A REPLY TO PROFESSOR TOBIAS

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In his response to my article, *Intervention in Public Law Litigation: The Environmental Paradigm*, [1] Professor Carl Tobias finds much to commend and much to criticize, and he offers a "friendly critique" of my article.[2] I thank Professor Tobias for taking the time to respond to my article, and I hope that this response furthers the dialogue on this important subject.

Professor Tobias finds four primary faults with my account. First, he believes that I rely too heavily on impressionistic and anecdotal data in formulating my conclusions, although he recognizes that all analyses of intervention—his own included—suffer from the same fault.[3] Second, he argues that my article and other considerations of this area would benefit from "a more refined understanding of modern environmental litigation."[4] Third, Professor Tobias expresses doubt about the wisdom of my prescriptions for improving intervention, particularly with my argument that courts of appeals should review intervention denials under an abuse of discretion standard rather than de novo.[5] Fourth, and finally, he argues that my article "clings too substantially to a private law view of environmental litigation and participation in it."[6] I will deal with each of these criticisms in turn.

I agree with Professor Tobias that everyone's analysis of problems concerning intervention would benefit from hard statistical data regarding rates of participation, and I share his concerns that such data would prove difficult to gather and analyze. Although one can postulate in a quantitative model demonstrating the point at which additional intervenors would prove counterproductive,[7] simply determining the units with which to measure the burden that additional intervenors create would defy even the most patient data collector. I agree with Professor Tobias that any such study, to be useful,

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1. *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U.L.Q. 215 (2000).

2. *See* Carl Tobias, *Rethinking Intervention in Environmental Litigation*, 78 WASH. U.L.Q. 313 (2000) [hereinafter, Tobias, *Rethinking Intervention*]. My article criticized earlier works of Professor Tobias. *See* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415 [hereinafter Tobias, *Standing to Intervene*].

3. *See* Tobias, *Rethinking Intervention*, *supra* note 2, at 314-15.

4. *Id.* at 315.

5. *See id.* at 316-17.

6. *Id.* at 318.

7. *See* Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978).

would have to compare data from circuits that review district court intervention decisions de novo and those that review it for abuses of discretion. For reasons I suggested in my article, however, the incentive structure of intervention decisionmaking tilts in favor of granting intervention regardless of the standard of review applied.[8] A proper study would have to comb through not only all of the instances in which a district court denied intervention and the decision was appealed, but all instances in which someone applied for intervention and the district court simply granted it. There are undoubtedly many instances in which a district court judge hastily scribbles "Granted" on the cover page of an intervention motion or asks a law clerk to draft a terse order granting a motion. Moreover, the most useful data to inform the debate between Professor Tobias and me would consist of results from cases involving public law litigation, particularly environmental public law litigation. Ideally, this data set would divide out the different types of environmental public law litigation that I describe in my article[9] and show how intervention plays out in each. Needless to say, it will be a long time before someone takes the time to assemble such quality data.

Even if someone were to complete such a study, Professor Tobias and I must face the real possibility that the study will be inconclusive. For example, a recent study of amicus curiae participation in the Supreme Court—one that analyzes every argued Supreme Court case over the last fifty years, tabulates the instances of amicus participation, and identifies certain institutional participants and monitors their success rates—reaches only cautious conclusions.[10] If that were the result from empirical analysis of intervention in district courts, Professor Tobias and I would still face the debate we face now, namely, the extent to which district courts should allow intervention and the extent to which courts of appeals should force district courts to allow intervention. That debate must, at some level, be informed by impressions.

In his second criticism, Professor Tobias argues that my article lacks a sufficiently refined understanding of modern environmental litigation. As I

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8. *See* Appel, *supra* note 1, at 292-95.

9. *See id.* at 224-39.

10. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 750 (2000). To the extent that lessons learned in the amicus context inform the debate over intervention between Professor Tobias and I, Kearney and Merrill tend to support Professor Tobias's view—stated most prominently in Tobias, *Standing to Intervene*, *supra* note 2, at 447-48—that institutional intervenors tend to assist litigation more than other intervenors. Kearney and Merrill find that these amicus participants show a higher success rate than other amicus participants. *See* Kearney & Merrill, *supra*, at 801-11. However, this success rate also supports my argument that amicus participation can often effectively replace participation as an intervenor. *See* Appel, *supra* note 1, at 308-09.

recognized in my article, however, "not all environmental cases are alike."[11] I agree with Professor Tobias that many differences separate the challenge to a rulemaking under the Clean Air Act and a challenge to a specific timber sale in a national forest.[12] Courts ought to treat motions to intervene in different cases differently. As I have argued, however, they presently tend not to do so. Instead, courts tend to treat applications for intervention similarly regardless of the underlying substance of the case. They not only do this regardless of the underlying purposes of a statute—which Professor Tobias regards as the "touchstone of analysis" in most situations[13]—but also without regard to the unique attributes of the litigation before them. Further, as I argued in my article, courts tend to treat intervention motions in environmental cases much as they would treat intervention motions in civil rights cases.[14] Thus, Professor Tobias and I agree that courts must develop a more nuanced appreciation for the underlying legal problems in the particular cases before them.

Third, Professor Tobias expresses some caution about my suggestions for how to improve intervention. He disagrees with my suggestion that courts of appeals that now review intervention decisions de novo review intervention denials under an abuse of discretion standard. Professor Tobias believes that this would vest too much authority in an individual (namely the district court judge), who in many instances will be overworked and will face intervention applications from an unpopular organization or one that will protract the proceedings.[15] Although this is the predictable criticism voiced against the abuse of discretion standard, it avoids the question of why district courts should enjoy discretion in other more important areas. Two examples mentioned in my article come to mind. First, district courts enjoy discretion on whether to enter injunctive relief and the scope of that relief.[16] Second, district courts enjoy discretion in deciding whether to dismiss an action altogether for the failure of the parties to join an indispensible party.[17] It seems odd to trust a single decisionmaker to formulate the ultimate decree and to decide whether the action should proceed at all, but not to trust that same decisionmaker to decide whether to admit another party to litigation,

11. Appel, *supra* note 1, at 238.
12. *See* Tobias, *Rethinking Intervention*, *supra* note 2, at 315.
13. *Id.* at 316.
14. *See* Appel, *supra* note 1, at 234-39.
15. *See* Tobias, *Rethinking Intervention*, *supra* note 2, at 316-17.
16. *See* Appel, *supra* note 1, at 305.
17. *See id.* at 305-06. The relevant rule of civil procedure is FED. R. CIV. P. 19. Professor Tobias has written about this aspect of Rule 19. *See* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745 (1987).

especially when the value of adding that additional party is indeterminate.

Fourth and finally, Professor Tobias believes that "it is simply too late in the day to consider environmental cases as bipolar disputes between two private parties."[18] I agree. I recognize that much of modern environmental litigation cannot be viewed as consisting of bipolar disputes; my lengthy discussion of the salmon litigation in the Pacific Northwest demonstrates that understanding.[19] Professor Tobias and I also agree that complex environmental litigation fits within Chayes's theoretical construct of what constitutes public law litigation.[20] Our disagreement, then, turns on who should have the power to insert themselves into the litigation. Chayes himself argued that one of the central features of public law litigation was its potential to have wide-reaching effects on nonparties.[21] Contrary to Professor Tobias, I do not believe that intervenors in many cases make additions that warrant their participation. Courts have other ways of accomplishing the same ends that intervenors promise to bring—courts can, for example, call their own expert witnesses or appoint special masters if the facts are complex—without the attendant problems of delay or bias that having an intervenor can bring. Although public participation is undoubtedly important in modern environmental decisionmaking, public participation frequently takes place at the administrative level and need not necessarily take the form of formally admitting an intervenor as a party.

In sum, if Professor Tobias and I were appointed to the bench and were faced with similar cases, we would likely decide some of them the same way. There would undoubtedly be cases in which we would both grant motions for intervention and cases in which we would both deny motions. There would likely be a large number of public law cases in which Judge Tobias would grant intervention motions but limit the extent of the participation, and Judge Appel would deny intervention motions but entertain briefs from amici curiae. In many instances the difference between these two approaches would be negligible. In my view, the flexibility that would allow Judge

18. Tobias, *Rethinking Intervention*, *supra* note 2, at 318.

19. *See* Appel, *supra* note 1, at 227-38.

20. Thus, Professor Tobias and I are not engaging in a debate similar to the one over whether mass tort litigation constitutes public law litigation. *Compare* Linda S. Mullenix, *Mass Tort Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 580-82 (1994), *and* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Paradigm*, 33 VAL. U. L. REV. 413 (1999) (arguing that mass tort litigation is not within public law litigation paradigm), *with* David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984), *and* Jack B Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 472-75 (arguing that mass tort cases fit within public law litigation paradigm).

21. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

Tobias and Judge Appel to reach these different decisions is an important part of the vision underlying public law litigation. I come to this enterprise no enemy of public law litigation or of intervenors. I believe, however, that the practice of intervention in public law litigation can be improved over its present state.