Three's (No Longer) a Crowd: The Abandonment of the Federal Defendant Rule by the Ninth Circuit in the Context of NEPA Claims

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The National Environmental Policy Act (NEPA) requires every agency in the executive branch of the federal government to assess environmental consequences prior to taking actions which significantly affect the quality of the human environment. The procedural requirements of NEPA have generated an enormous amount of litigation, largely over the question of whether a project's impacts are sufficiently "significant" to require a detailed environmental impact statement, and particularly in the western United States. Until 14 January 2011, it was well-settled in the United States Ninth Circuit that when a claim was brought under NEPA and a private party, state government, or local government sought to intervene as a matter of right, the "none but a federal defendant rule" ("federal defendant rule") categorically precluded such groups from doing so. On 14 January 2011, after considering history, precedent, and the jurisprudence of sister circuits, the Ninth Circuit Court of Appeals abandoned the federal defendant rule in the Wilderness Society v United States Forest Service. While the court provided several justifications for its decision, it never once acknowledged the uniqueness of the Ninth Circuit, of NEPA litigation, or of NEPA's critical role as a tool for environmentalists. The true failure here is the manner in which federal agencies are fulfilling their responsibilities under NEPA. Abandoning the rule did not address that failure, and may actually exacerbate it. This case comment highlights the implications of the abandonment of the federal defendants rule from the perspectives of the NEPA plaintiff, the NEPA federal defendant, and the proposed NEPA intervenor. Although the Ninth Circuit's holding was sound and accurately interpreted the law, it failed to discuss significant consequences for environmentalists, and several other issues that will still have to be considered by future courts.

Le National Environmental Policy Act (NEPA) requiert que toutes les agences de la branche exécutive du gouvernement fédéral évaluent les conséquences environnementales affectant de manière significative la qualité de l'environnement humain avant d'agir. Les exigences procédurales du NEPA ont généré une quantité énorme de litiges, principalement sur la question de savoir si les impacts d'un projet sont suffisamment « significatifs » pour exiger un énoncé détaillé des conséquences environnementales, et particulièrement dans l'Ouest des États-Unis. Jusqu'au 14 janvier 2011, il était bien établi dans le 9e Circuit des États-Unis que lorsqu'une réclamation avait été introduite sous le NEPA et qu'une partie privée, un gouvernement d'État, ou un gouvernement local cherchait à intervenir sur une question de droit, la règle d'"aucun défendeur sauf le fédéral" ("règle du défendeur fédéral") interdisait catégoriquement à ces groupes de le faire. Le 14 janvier 2011, après avoir considéré l'histoire, les précédents et la jurisprudence des circuits variés, le Cour d'Appel du 9ème Circuit a abandonné la règle du défendeur fédéral dans le Wilderness Society v United States Forest Service. Alors que la Cour a donné plusieurs justifications pour sa décision, elle n'a jamais reconnu le caractère unique du Neuvième Circuit, du litige concernant le NEPA, ou du rôle critique du NEPA comme outil pour les écologistes. Le véritable échec ici est dans la manière avec laquelle les agences fédérales acquièrent de leurs responsabilités sous le NEPA. Abandonner la règle n'a pas rendu à cet échec, et peut en réalité l'exacerber. Ce commentaire d'articles met en relief les implications de l'abandon de la règle du défendeur fédéral du point de vue du demandeur NEPA, du défendeur fédéral NEPA, et de l'intervenant NEPA proposé. Bien que la décision du Neuvième Circuit soit claire et interprétée précisément la loi, elle n'a pas discuté des conséquences importantes pour les écologistes, et plusieurs autres questions doivent encore être examinées par les tribunaux dans l'avenir.

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Often referred to as the Magna Carta of environmental laws, *NEPA* was enacted by Congress in 1969 and was signed into law by President Richard Nixon on 1 January 1970.\(^1\) As the first major environmental law in the United States, *NEPA* was promulgated in light of "the decades of environmental neglect that had significantly degraded the nation's landscape and damaged the human environment".\(^2\) Its purpose is to:

- [d]eclare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.\(^3\)

*NEPA* is a procedural statute. A broad range of federal actions can trigger *NEPA*'s requirements, including "issuing regulations, providing permits for private actions, funding private actions, making federal land management decisions, [and] constructing publicly-owned facilities".\(^4\) Congress has outlined a procedure, commonly referred to as "the *NEPA* process,"

\(^1\) *National Environmental Policy Act of 1969, 42 USC §§ 4321-75 (2012) [NEPA].*


\(^3\) *NEPA*, supra note 1, § 4331.

or the "environmental impact assessment process" for NEPA compliance. NEPA does not require agencies to elevate environmental concerns above others, but does require them to identify significant environmental consequences, and to consider any related social and economic effects of their proposed actions. As long as the negative environmental effects of the proposed action are adequately identified and analyzed, NEPA permits the agency to conclude that other considerations outweigh the environmental costs and to proceed with the action.

Once a federal lawsuit is filed, an outside party may intervene by way of one of two avenues: by right, in which a four-part test must be met, or by permission of the court. For decades, the Ninth Circuit applied the federal defendant rule, which categorically barred nonfederal parties from intervening by right in NEPA suits. This categorical exclusion was based on the premise that private parties, state governments, and local governments lack significantly protectable interests to make intervention of right appropriate, due to NEPA’s procedural nature, its burdens and its compliance requirements, which run only to the federal government.

When a civil action is filed in federal district court, the Federal Rules of Civil Procedure (FRCP) govern. Pursuant to the Rules Enabling Act, the FRCP are promulgated by the Supreme Court of the United States, and must be approved by the United States Congress. In 2011, the Ninth Circuit abandoned the federal defendant rule in favor of FRCP § 24(a)(2)’s less stringent requirement, which it viewed as a more liberalized, case-by-case inquiry, better aligned with the Ninth Circuit’s treatment of proposed intervenors in suits under other

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5 NEPA, supra note 1 § 4332; “National Environmental Policy Act”, online: United States Environmental Protection Agency <http://www.epa.gov/region1/nepa/> (“Environmental assessments (EAs) and Environmental Impact Statements (EIS’s), which are assessments of the likelihood of impacts from alternative courses of action, are required from all federal agencies and are the most visible NEPA requirements.”)
6 CEQ, supra note 4 at 5.
9 “The United States district courts are the trial courts of the federal court system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico ... The 94 judicial districts are organized into 12 regional courts, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies.” “Federal Courts’ Structure”, online: United States Courts <http://www.uscourts.gov>. The United States Ninth Circuit is made up of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington. “Court Locator”, online: United States Courts <http://www.uscourts.gov>.
10 Federal Rules of Civil Procedure [FRCP].
12 FRCP, supra note 10.
environmental statutes, such as the *Federal Land Policy and Management Act (FLPMA)*\(^3\) and the *Endangered Species Act (ESA)*.\(^4\)

Part I of this case comment will provide a detailed discussion of the facts and holding of *The Wilderness Society v United States Forest Service* in which the federal defendant rule was abolished in the Ninth Circuit.\(^5\) Part II will briefly discuss the implications of the abandonment of the rule in the context of *NEPA* claims from the perspectives of the *NEPA* plaintiff, the *NEPA* federal defendant, and the proposed *NEPA* intervenor. Part III will, looking to *NEPA* policy, purpose, and procedure, provide reasons why it is appropriate to single out *NEPA* actions, and will highlight considerations that the court did not acknowledge or address, but that future courts should keep in mind.

1. **THE WILDERNESS SOCIETY V UNITED STATES FOREST SERVICE**

When the United States Forest Service ("Forest Service")\(^6\) designated 1,196 miles of roads and trails for recreational motor vehicle use in the Minidoka Ranger District of Idaho's Sawtooth National Forest\(^7\) in 2008, the Wilderness Society\(^8\) and Prairie Falcon Audubon, Inc\(^9\) (collectively referred to in this article as the "Environmental Groups") sued, alleging noncompliance

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\(^6\) The US Forest Service is a federal agency of the United States Department of Agriculture, entrusted with 192 million acres of public forests and grasslands and charged with sustaining "the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations." "About Us—Mission", online: US Forest Service <http://www.fs.fed.us>.

\(^7\) The Sawtooth National Forest is "based in the city of Twin Falls in south central Idaho. Southern Idaho is comprised mostly of arid high desert sage and grasslands ... Terrain is flat to rolling with mountains bordering the north and south. Most of the suitable land has been developed for agriculture and that industry is the basis for the local economy ... Recreational opportunities abound in southern Idaho for the sportsman, hiker, cyclist, boater, golfer and many others. The Minidoka District of the Sawtooth National Forest provides excellent hiking, cycling and equestrian trails." "Sawtooth National Forest—About the Area", online: United States Department of Agriculture Forest Service <http://www.fs.usda.gov>.

\(^8\) Founded in 1935, The Wilderness Society identifies itself as "the leading American conservation organization working to protect" American public lands "collectively owned by the American people and managed by [the] government." The Wilderness Society has "led the effort to permanently protect as designated Wilderness nearly 110 million acres in 44 states ... [and] has been at the forefront of nearly every major public lands victory over the past 75 years." "About Us", online: The Wilderness Society <http://wilderness.org>.

\(^9\) The Prairie Falcon Audubon Society identifies itself as the south-central Idaho chapter of the National Audubon Society, "formed for exclusively educational, scientific, and charitable purposes." "Who We Are & What We Do", online: Prairie Falcon Audubon <http://prairiefalconaudubon.org>.
with NEPA. Subsequently, the Magic Valley Trail Machine Association,20 Idaho Recreation Council,21 and Blue Ribbon Coalition22 (collectively, the “Recreational Groups”), groups representing motor vehicle recreationists,23 sought to intervene. The Ninth Circuit District Court denied the Recreational Groups’ motion to intervene based on the federal defendant rule,24 and they timely appealed.

The Ninth Circuit Court of Appeals overturned twenty years of precedent and abandoned the federal defendant rule in favor of a relaxed inquiry, focusing instead on whether the proposed intervenor has an interest in the subject property or transaction rather than on the legal claim itself, whether the interest is significantly protectable under law, and whether a relationship exists “between the legally protected interest and the claims at issue.”25 Since Wilderness Society, private parties, state governments, and local governments are no longer categorically prohibited from intervening by right in NEPA actions during the liability phase of the suit. The Wilderness Society holding is statutorily sound—FRCP § 24 is unambiguous as to what it requires of proposed intervenors, and the rule was inconsistent therewith. The court applied the law correctly, but failed to discuss several issues that existed before and remain after the federal defendant rule’s abandonment.

The rule’s application to NEPA cases originated in Portland Audubon Society v Hodel.26 Hodel involved a highly publicized, heated dispute between spotted owl advocates and timber industry groups.27 Environmental groups filed a NEPA suit, seeking to halt the Bureau of Land

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20 Chartered in 1864 “when action by Congress threatened the availability of motorized/mechanized access to existing Forest Service trails,” the Magic Valley Trail Machine Association identifies itself as an Idaho, statewide organization that represents the interests of recreational motorcycle riders and riding activities, and focuses on “working with land managers, elected officials and others who seek responsible land management policy … preserv[ing] motorized access to a diverse mix of trails in scenic Idaho.” “Home”, online: Magic Valley Trail Association <http://www.mvtma.com/>.

21 The Idaho Recreation Council identifies itself as “a recognized, statewide, collaboration of Idaho recreation enthusiasts and others that will identify and work together on recreation issues in cooperation with land managers, legislators, and the public to ensure a positive future for responsible outdoor recreation access for everyone now and into the future.” “Home”, online: Idaho Recreation Council <http://www.id-rc.org/>.

22 The Blue Ribbon Coalition identifies itself as a national nonprofit organization “dedicated to protecting responsible recreational access to public lands and waters … and encourages individual environmental stewardship … [and] is focused on building enthusiast involvement with organizational efforts through membership, outreach, education, and collaboration among recreationists.” “Home”, online: The Blue Ribbon Coalition <http://www.sharetrails.org/>.


25 Sierra Club v United States Environmental Protection Agency 995 F 2d 1478 at 1484 (9th Cir 1993) [Sierra Club].

26 Portland Audubon Society v Hodel, 866 F 2d 302 (9th Cir 1989) [Hodel].

Management's approval of timber sales in close proximity to spotted owl habitat in Oregon forests. A logging group, contractors, and Oregon localities sought to intervene. These entities were prohibited from intervening in the NEPA action, and the decision set a strong precedent that shaped Ninth Circuit environmental policy for over twenty years.

Nearly two decades after Hodel, in 2008, the Forest Service designated over one thousand miles of roads and trails for recreational motor vehicle in Idaho. The Environmental Groups filed suit against the Forest Service in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief under NEPA and other environmental statutes. The Environmental Groups alleged the Forest Service violated NEPA by, "among other things, failing to prepare an Environmental Impact Statement (EIS) and failing to consider reasonable alternatives to the travel plan that would protect certain ecologically sensitive watersheds and wildlife habitats within the District." The Environmental Groups alleged the plan was too recreational vehicle-friendly and sought to invalidate it, to limit motorized vehicle access to previously authorized routes, and to prohibit off-road vehicles from leaving designated routes, subject to compliance with NEPA and other environmental statutes.

Once a federal lawsuit has been filed, an outside party may intervene by way of one of two avenues: by right, in which a four-part test must be met; or by permission of the court. With intervenor status come the same procedural rights as those afforded to a full party to the lawsuit. The federal defendant rule only applied to intervention of right, and only prohibited intervention during the liability phase of a NEPA action.

"Intervention as of Right", under FRCP § 24(a), entitles an applicant to intervene if the latter "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede

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28 The Bureau of Land Management (BLM) is a federal agency charged with sustaining "the health, diversity, and productivity of America's public lands for the use and enjoyment of present and future generations. It administers more public land—over 245 million surface acres—than any other federal agency in the United States. Most of this land is located in the 12 Western states, including Alaska." "The Bureau of Land Management: Who We Are, What We Do", online: US Department of the Interior, Bureau of Land Management <http://www.blm.gov>.

29 Hodel, supra note 26 at 303-304; Weis, supra note 27 at 12.

30 Weis, supra note 27 at 12. The district court did, however, allow the parties to intervene in the FLPMA, Oregon and California Lands Act, and Migratory Bird Treaty Act portions of the overall suit; Oregon and California Revested Lands Sustained Yield Management Act of 1937, 43 USC §§ 1181(2012); Migratory Bird Treaty Act of 1918, 16 USC §§ 703-712 (2012).

31 Wilderness Society 2011, supra note 15; NEPA, supra note 1, § 4332(C) (NEPA requires federal agencies to "include in every recommendation or report on proposals for ... major Federal actions significantly affecting the quality of the human environment, a detailed statement" containing, among other things, "alternatives to the proposed action").

32 Wilderness Society 2011, supra note 15 at 1176.

33 Carswell, supra note 8.


35 Carswell, supra note 8.

36 Williams, supra note 34 at 19.
the movant’s ability to protect its interest, unless existing parties adequately represent that interest.\textsuperscript{37} To intervene by right, a proposed intervenor must meet four requirements:

(1) the motion must be timely; (2) the applicant must claim a ‘significantly protectable’ interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the parties to the action.\textsuperscript{38}

“Permissive Intervention”, under FRCP § 24(b), does not require a significantly protectable interest, but instead requires “a claim or defense that shares with the main action a common question of law or fact”.\textsuperscript{39} If this is shown, the court has discretion to grant permissive intervention.\textsuperscript{40} The Recreational Groups sought to intervene both by right and by permission, arguing that the Environmental Groups inadequately represented the “private, recreation, aesthetic and procedural interests of the Recreational Groups.”\textsuperscript{41} The Environmental Groups opposed intervention, and the Forest Service took no position. The district court denied intervention of right based on the federal defendant rule. The Recreational Groups were also denied permissive intervention based on the district court’s finding that, although the Recreational Groups showed an interest in the outcome of the suit, they had inadequately participated in the administrative process, they would not “add any further clarity or insight to the litigation,”\textsuperscript{42} and the gravamen of the NEPA action challenges whether or not the federal government complied with certain environmental statutes and executive orders.\textsuperscript{43} Because NEPA imposes duties on federal defendants, reasoned the court, the defense of the action was for the federal government only.

The Recreational Groups filed a motion to reconsider or to stay, which the district court denied.\textsuperscript{44} The Recreational Groups appealed to the Ninth Circuit Court of Appeals, which granted \textit{en banc} review. Because the court was determining whether or not to overturn one of its precedents, the case was heard by an \textit{en banc} panel of eleven judges rather than the usual three-judge panel.\textsuperscript{45} On appeal, the Recreational Groups argued that the federal defendant rule should be abandoned, and that the district court abused its discretion in denying permissive intervention. The Environmental Groups took no position on the federal defendant rule.

The \textit{en banc} panel examined its historical treatment of motions to intervene in suits under FLPMA, the ESA, and the Administrative Procedure Act. The court acknowledged that it had

\begin{itemize}
  \item \textsuperscript{37} FRCP, supra note 10, § 24(a)(2).
  \item \textsuperscript{38} FRCP, supra note 10, § 24(a).
  \item \textsuperscript{39} Ibid, 24(b)(1)(B); Kootenai, supra note 24 at 1108.
  \item \textsuperscript{40} Ibid at 1110.
  \item \textsuperscript{41} Wilderness Society 2009, supra note 15.
  \item \textsuperscript{42} Wilderness Society 2011, supra note 15 at 1177.
  \item \textsuperscript{43} Wilderness Society 2009, supra note 15 at 4.
  \item \textsuperscript{44} Ibid.
\end{itemize}
previously distinguished these suits from NEPA actions, but no longer saw a need for the distinction or the federal defendant rule. It authorized future courts to “engage in the contextual, fact-specific inquiry as to whether private parties meet the requirements for intervention of right on the merits, just as they do in all other cases.” The court also looked to sister circuits, including the Seventh Circuit, which prohibits intervention of right in NEPA cases, but extends that prohibition beyond NEPA cases.

The court of appeals reversed the district court’s denial of the Recreational Groups’ motion to intervene based on the federal defendant rule and remanded the case for reconsideration of the motion in light of the rule’s abandonment. On 5 May 2011, without oral argument, the district court reconsidered and granted the motion to intervene by right. On 21 February 2012, also without oral argument, the district court ruled on renewed cross-motions for summary judgment filed by the federal defendants and the Environmental Groups. The Recreational Groups joined in the federal defendants’ summary judgment motion. After commenting on the “lengthy delay” caused by the Recreational Groups’ appeal, the district court ruled, among other things, that due to inadequate analyses and generalized assumptions regarding certain aspects of the proposed project’s effects on the environment, the federal defendants had not fully complied with NEPA and, on or before 1 May 2012, the federal defendants must determine and inform the court whether a supplemental environmental assessment will allow them to satisfy NEPA, or whether a full EIS will be necessary.

2. THE IMPLICATIONS OF THE FEDERAL DEFENDANT RULE’S ABANDONMENT

The Ninth Circuit, according to one journalist, “oversees hundreds of millions of acres of public land in the West [and] routinely handles high-stakes legal wrangling” over environmental issues. In 2010 alone, thirty-four of the fifty-three total NEPA-related appellate decisions issued emanated from the Ninth Circuit. Pending the appellate court decision, a diverse group of thirty-seven amici argued in favor of abandoning the rule. Although Wilderness Society has been described as an ordinary, “garden-variety public lands lawsuit,” it created significant consequences for the Ninth Circuit. NEPA decisions can have significant,

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46 Wilderness Society 2011, supra note 15 at 1180.
47 Ibid.
50 Carswell, supra note 8.
52 Wilderness Society 2011, supra note 15 at 1178; an “amicus curiae” (pl. amici curiae), or “friend of the court” is “[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter … Often shortened to amicus.” Black’s Law Dictionary, 9th ed, sub verbo “amicus curiae”.
53 Weis, supra note 27 at 12.
far-reaching effects on environmental policy, and "intervenors have played decisive roles in many lawsuits."

2.1 NEPA Plaintiffs

NEPA compliance suits are primarily filed by environmental groups. Ironically, industry and recreational groups advocated for the federal defendant rule's abandonment, while environmentalists largely stayed out of the fight. The rule was viewed by many as a gift and a curse for environmentalists. Erik Schlenker-Goodrich, the plaintiffs' lead attorney with the Western Environmental Law Center commented, "[w]e used it to try to keep motorized groups out of our litigation." However, the rule was also used to exclude environmentalists. Schlenker-Goodrich's statement is based on the premise that if an industrial party were the plaintiff in a NEPA action, which is rare, the rule would preclude an environmental party from intervening. Megan Anderson O'Reilly, another Western Environmental Law Center attorney, agreed, adding that "[t]hat was the main reason environmental groups have not advocated a particular position on the rule." Robin Conrad, who heads the US Chamber of Commerce's legal team and filed an amicus brief in opposition to the rule, admitted that "it would be devastating to the environmental groups" if the court abandoned the rule.

2.2 NEPA Federal Defendants

Although the federal defendants notified the court that they would be taking no position on the Recreational Groups' appeal, they later filed a brief in opposition to the Recreational Groups' efforts to persuade the Ninth Circuit to revisit the federal defendant rule. In that brief, the federal defendants argued that the case "does not properly present the issue," partly because the "recreational groups only want to intervene concerning the possible remedy the plaintiffs are seeking," which, even with the rule in place, was allowed in the Ninth Circuit.

2.3 NEPA Intervenors

The federal defendant rule was a roadblock for commercial and recreational entities in particular. These groups argued that their voices often went unheard in NEPA suits between envi-

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54 Carswell, supra note 8.
55 Ibid.
56 Hurley, "Intervenors", supra note 51.
57 Ibid; Carswell, supra note 8.
58 Ibid.
59 Ibid.
60 "Ninth Circuit Broadens Intervenion in NEPA Cases: Environmental Update" (18 January 2011), online: Sidley Austin LLP <http://www.sidley.com>; this would be rare given that most NEPA challenges are originated by environmental advocacy groups.
61 Hurley, "Private Interests", supra note 45.
62 Ibid.
63 Weis, supra note 27 at 13.
64 Hurley, "Private Interests", supra note 45; See e.g. Forest Conservation Council v United States Forest Service, 66 F 3d 1489 (9th Cir 1995) at 1493-99.
ronmental groups and the government. These entities often find themselves as federal permit applicants seeking access to federally managed natural resources. They argue that abandoning the rule permits “uniquely equipped real parties in interest to litigate complex environmental issues,” and expands the court’s access to invaluable perspectives.

Paul Turcke, an attorney for the Recreational Groups, doubts that the litigation floodgates will open post-*Wilderness Society*. Turcke stated that “[i]t’s not black and white—(it’s not) ‘you’re in or you’re out.’” Ironically, Turcke also stated that the impact of *Wilderness Society* will vary among Ninth Circuit districts, depending on individual judges’ treatments of proposed intervenors. Montana, Turcke said, was “generally liberal about allowing intervention, while courts in the Northwest more frequently limited or denied it.”

The Public Lands Council Executive Director and National Cattleman’s Beef Association Director of Federal Lands, Dustin Van Liew, views the rule’s abandonment as “a major victory for livestock ranchers and other public land users.” He went on to say that ranchers “now have a seat at the table when unfounded lawsuits are brought before the courts alleging violations under *NEPA* and other environmental laws.”

3. **THE DISTINCTIVENESS OF NEPA AND ITS INTERACTION WITH THE FEDERAL DEFENDANT RULE**

Although the Ninth Circuit’s holding was sound and accurately interpreted the law, the court failed to acknowledge and address certain important considerations and significant consequences of its decision, which are discussed below.

3.1 Other Avenues Exist For Proposed Intervenors to Participate In NEPA Litigation

First, the federal defendant rule only applied to intervention by right and only prohibited intervention during the liability phase of a *NEPA* action. A proposed nonfederal intervenor has been and remains eligible to intervene by right during the remedies phase of a *NEPA* case.

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68 Carswell, supra note 8.
70 Carswell, supra note 8.
72 Ibid.
73 Ibid.
74 Williams, supra note 34 at 19.
75 Ibid.
Permissive intervention was also not prohibited by the federal defendant rule.\textsuperscript{76} Because proposed intervenors had other options for intervention in \textit{NEPA} suits, revisitation of the federal defendant rule was not necessary.

### 3.2 \textit{NEPA} Itself is Unique and Has Unique Implications for the Ninth Circuit

Second, \textit{NEPA} is a distinctive environmental statute. The Act establishes the framework for incorporating environmental considerations into federal decision-making\textsuperscript{77} and showing compliance with any “studies, reviews, or consultations required by any other environmental laws.”\textsuperscript{78} Unlike other environmental statutes, \textit{NEPA} only binds federal agencies—no individual agency has enforcement authority over \textit{NEPA}.\textsuperscript{79} \textit{NEPA} affirms every person’s responsibility to protect and improve the environment, but emphasizes the federal government’s leading role in that effort. Therefore, “the heart of \textit{NEPA} is helping \textit{federal agencies} act as responsible stewards of America’s vast natural resources.”\textsuperscript{80}

\textit{NEPA} demands that a balance be struck between competing interests, and the federal government is the one and only entity required to weigh relevant factors and alternatives before taking action. If a party believes this has been improperly or insufficiently done, \textit{NEPA} provides the only remedy. This forms the basis of all \textit{NEPA} litigation. By abandoning the federal defendant rule and allowing intervention at the liability phase of the litigation, the courts have created a distraction which takes away from the issue of whether the federal government satisfied \textit{NEPA}.

Third, the Ninth Circuit is distinctive in that it encompasses the majority (over sixteen million acres)\textsuperscript{81} of our nation’s federally protected lands. Consequently, challenges to energy and natural resource projects involving “timber, grazing, mining, and renewable energy development are frequently litigated” in Ninth Circuit courts using \textit{NEPA}.\textsuperscript{82} The abandonment of the federal defendant rule has effectively placed the majority of US public lands at unnecessary, increased risk by allowing proposed intervenors to join \textit{NEPA} suits during the liability phase and to put forth arguments based in self-interest. These arguments often conflict with the purposes of \textit{NEPA}. Rather than asking why the federal defendant rule should have been upheld before choosing to abandon it, the court of appeals should have asked itself how, if so purposeless, the federal defendant rule managed to remain a staple in Ninth Circuit \textit{NEPA} litigation.

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\textsuperscript{76} See e.g. Kern \textit{v United States Bureau of Land Management}, 284 F (3d) 1062 (9th Cir 2002) (timber companies granted permissive intervention to defend BLM’s environmental effects findings in NEPA EIS for land management plan).

\textsuperscript{77} Luther, \textit{supra} note 7 at 4 (“\textit{NEPA} is a declaration of policy with action-forcing provisions, not a regulatory statute comparable to other environmental laws intended to protect air, water, wetlands, or endangered species”)

\textsuperscript{78} \textit{Ibid} at 8.

\textsuperscript{79} \textit{Ibid} at 10.

\textsuperscript{80} “\textit{NEPA},” Executive Office of the President of the United States, \textit{supra} note 2 (emphasis added).

\textsuperscript{81} FY 2010 Federal Real Property Report, online: United States General Services Administration (GSA) <http://www.gsa.gov> at 11.

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for over two decades. Certainly this was no accident. It remained effective for so long due to the unique nature of NEPA and the lands encompassed by the Ninth Circuit.

3.3 A Diversity of Points of View Are Already Internalized within NEPA's EIS Process

Fourth, the intended role of public participation in the NEPA process also makes the statute unique. NEPA directs federal agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment.”

If an EIS, the “most rigorous level of NEPA compliance,” is required, the federal agency engages in a mandatory agency-public collaboration period, during which the range of issues to be addressed in the EIS are established. During this period, interested parties are encouraged to participate, and any information, including preexisting or required studies or reviews that may be useful during the EIS process are put forth. The federal agency must present a wealth of required information to the public, including the EIS, and must see the proposal through the existing agency review processes, as well as through a public review and comment period.

Those that favored the federal defendant rule's abandonment argued that private parties, state governments, and local governments pursuing projects often have “important and unique information, commonly in the form of technical expertise, from which a court could benefit.” The EIS process, with its multiple opportunities for public participation and interdisciplinary collaboration, is the appropriate stage of the overall NEPA process for those parties to present that type of information. Technical and expert information is most useful when presented during this stage.

In 2009, Nancy Sutley of the Council for Environmental Quality stated, in response to arguments raised by politicians that NEPA "slows projects and invites litigation," and "[o]
Officials have begun viewing NEPA as just another box that must be checked before projects can proceed,” that “it is time to take a more strategic view of how it [NEPA] can affect a new and daunting set of environmental challenges.”

Sutley went on to state that, when carried out properly, NEPA can lower the risk of litigation: “the process must be collaborative, address the hard issues up front and happen early in the decision flow.” Under NEPA, the federal government is required to collect and analyze this information to ensure decisions are made on informed bases. If there is a problem, it is with the federal government’s implementation of NEPA, not with the federal defendant rule. An overall failure of federal agencies to take NEPA requirements seriously was not remedied by the rule’s abandonment and is a policy issue much bigger than the rule itself.

3.4 Abandonment of the Rule May Open Litigation Floodgates and Complicate Case Management

Fifth, the abandonment of the federal defendant rule is seen by many as a leveling of the playing field. Although the field may be leveled, there are now too many teams playing. Without the federal defendant rule, a claim against the federal government for noncompliance with NEPA can quickly transform into a political tug-of-war in which issues unimportant to the determination of federal liability take the forefront, and interests often inconsistent with the policies behind NEPA dilute the litigation and distract the court.

Rather than adding clarity and insight to the litigation, allowing nonfederal defendants to intervene in NEPA suits adds confusion and conflict. During oral argument before the Ninth Circuit Court of Appeals in January 2011, some of the judges questioned the practical implications of abandoning the federal defendant rule.

According to Chief Judge Alex Kozinski, lawsuits with multiple litigants present logistical issues which complicate the litigation. Judge Harry Pregerson, who was part of both the en banc panel that abolished the federal defendant rule and the Portland Audubon panel that established it, spoke on the logistical benefits of the federal defendant rule, suggesting that the Portland Audubon line of cases had been “difficult to manage.” Judge Pregerson went on to say that “[w]hen you’re dealing with some of these complex matters, you’ve got a lot of lawyers there and they all want to be parties and file their cross-motions … It gets all tangled up and nothing gets done and lawsuits drag on.” In spite of their legitimacy, the reservations expressed by the judges described above did not make their way into the en banc opinion abolishing the federal defendant rule.

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96 Perkowski, *supra* note 92.
A liberal policy in favor of intervention does not necessarily resolve cases more efficiently and open more doors for litigants.\textsuperscript{97} A liberal policy in favor of intervention opens the field to too many players, unnecessarily delaying NEPA suits in the federal circuit responsible for resolving more public land management disputes than any other federal circuit in the United States. Now that the federal defendant rule has been abandoned, proposed intervenors may "intervene on the defendant's side and, in some cases, argue for particular points that the government would not push."\textsuperscript{98} The liability phase of NEPA litigation should focus on the federal government's responsibilities rather than provide another shot to an intervenor to put forth arguments based on self-interest. Irrespective of the language of FRCP § 24, the traditionally liberal attitude toward intervention\textsuperscript{99} should not be extended to NEPA suits at this phase of litigation where only the federal government faces liability.

According to the Ninth Circuit Court of Appeals, a case-by-case determination is better than the bright-line federal defendant rule. Is this necessarily true? In invalidating the rule and holding that simply some legally protectable interest in the subject property or transaction and a link between the interest and the underlying claim(s)\textsuperscript{100} are required for intervention of right, the court simply replaced a bright-line rule with a different, equally overbroad one. If all that is required is a practical impairment of a proposed intervenor's interests as a result of the pending litigation, how much discretion do courts actually have going forward?

Some believe the federal defendant rule's abandonment will not lead to an opening of the floodgates to multi-party environmental litigation because the "plain language of FRCP 24 should now govern requests for intervention."\textsuperscript{101} Paul Turcke, an attorney for the Recreational Groups, admitted that "[t]he impact of the ruling will vary from district to district ... depending on how strict judges had been in the past."\textsuperscript{102} A leading US law firm stated in a litigation publication discussing Wilderness Society that although the Ninth Circuit replaced the federal defendant rule with a case-by-case, fact-specific test, "the guidance given by the court regarding what must be shown suggests that most project proponents/investors will be able to make a strong case that they have a legally protectable interest giving rise to a right to intervene."\textsuperscript{103} Based on these statements, it is highly probable that a flood of litigation will result. With or without the federal defendant rule, an environmental plaintiff will use NEPA, whenever possible, to slow, stall, or completely derail a project it believes harms the environment. Without the federal defendant rule, what would be straightforward NEPA lawsuits to determine the federal government's compliance with the statute will likely transform into multiple lawsuits within one. Because of the high volume of NEPA lawsuits brought in the Ninth Circuit, the effects of the federal defendant rule's abandonment will be intense. If most nonfederal defendants will be able to make a sufficient showing for intervention of right absent the federal

\textsuperscript{97} Wilderness Society 2011, supra note 15 at 1178.

\textsuperscript{98} Hurley, "Intervenors", supra note 51.

\textsuperscript{99} Wilderness Society 2011, supra note 15 at 1179.

\textsuperscript{100} Sierra Club, supra note 25 at 1484.

\textsuperscript{101} Weis, supra note 27 at 13.

\textsuperscript{102} Hurley, "Intervenors", supra note 51.

defendant rule, then there will be little to stop them from expanding and complicating litigation, increasing the amount of work and resources required of the courts and the litigants.

3.5 NEPA Has Long Served as a Strategic Tool for Environmentalists

Sixth, although NEPA is procedural in nature, it is most often used as a vehicle for bringing projects involving the federal government and some aspect of the environment to a halt via litigation. In a December 2005 House of Representatives Resources Committee Task Force hearing, testimony was presented that “in an area devoid of endangered species, impacts to waterways and floodplains, or of federal funding, NEPA may be the only tool that grassroots groups have [to fight highway projects].”104 Another witness testified that NEPA has “become the tool of choice of public citizens groups to block the decisions of federal agencies”.105 The United States Chamber of Commerce reported that:

NEPA, with its costly and time-consuming environmental reviews and impact statements, historically has been used by environmental activists to stall or prevent many hundreds and perhaps thousands of federal projects since it was signed into law in 1970. Activists do this by obtaining injunctions against proposed projects until the controlling federal agency has prepared a “satisfactory” Environmental Impact Statement (EIS) under NEPA. The lawsuit and subsequent EIS have the effect of delaying a project—often indefinitely—thereby stymieing jobs and economic growth ... NEPA lawsuits are so prevalent, often the mere threat of a lawsuit (even where one is never filed) makes the EIS preparation process that much more costly and time-consuming for covered projects.106

In 2010, federal courts issued forty-three substantive NEPA-related decisions involving federal agency compliance.107 The nongovernmental plaintiff prevailed in fourteen of the forty-three cases (33%). In National Parks and Conservation Association v Bureau of Land Management,108 for example, a conservation association and two individuals successfully challenged the Bureau of Land Management’s (BLM) approval of a developer’s request to exchange private lands for several parcels of surrounding BLM-managed land to construct a 4,600 acre landfill on a former mining site near Joshua Tree National Park in California. The Ninth Circuit Court of Appeals held that the NEPA EIS was insufficient for not addressing the potential for eutrophication, “an increase in chemical nutrients in an ecosystem ... which causes alterations in plant or animal life” in negative ways.109


105 Ibid at 14.


108 606 F 3d 1058 (9th Cir 2010).

109 Ibid at 1085.
Also, in *Te-Moak Tribe of Western Shoshone of Nevada v United States Department of the Interior*,110 a Native American tribe and several environmental organizations successfully challenged BLM’s amendment to a plan of operations for an existing mineral exploration project located in well-known, culturally sensitive areas of the Te-Moak Tribe under NEPA. The Ninth Circuit Court of Appeals held that BLM failed to sufficiently analyze the amendment’s cumulative impacts on Native American cultural resources, as required by NEPA.111

NEPA litigation is an environmentalist’s weapon as it allows opponents of a federal project to impede the project’s progress or halt it altogether.112 The court in *Wilderness Society* failed to acknowledge the obstacles environmentalists now face when challenging federal agencies in the Ninth Circuit absent the federal defendant rule. Abandoning the federal defendant rule significantly diminished the environmentalist’s arsenal.

4. CONCLUSION

The court followed the letter of the law in *Wilderness Society*, but failed to discuss many issues that continue to exist after the federal defendant rule’s elimination. These issues should be considered and discussed by future courts. The court in *Wilderness Society* stated that the federal defendant rule “eschews practical and equitable considerations and ignores [Ninth Circuit] traditionally liberal policy in favor of intervention.”113 The court ignored several countervailing considerations that should have created more hesitation before it dismissed the federal defendant rule as useless. The court emphasized the inutility of the rule, yet some federal district courts in the Ninth Circuit have “even started to apply it to cases outside of the NEPA context, including *Endangered Species Act* cases.”114 If the federal defendant rule prevented efficient resolution of disputes, clarity, and insight, Ninth Circuit trial courts would not be extending its use to other environmental statutes.

As the federal defendants argued, the pre-*Wilderness Society* proposed intervenor had options that eliminated the need for the court to revisit the federal defendant rule. The federal defendant rule did not prohibit a proposed nonfederal intervenor from seeking to intervene in the remedies phase of a NEPA case, nor did it prohibit permissive intervention. The remedies phase of the litigation is where the *Wilderness Society* intervenors could have appropriately intervened, and this alone should have persuaded the court to uphold the federal defendant rule. The court failed to acknowledge the Ninth Circuit’s distinctive role, in that it encompasses the majority of our federally managed lands, and therefore the majority of NEPA-based litigation. By failing to acknowledge this, the court’s comparison of the Ninth Circuit to sister circuits was inadequately informed. The court’s failure to acknowledge the distinctive nature of NEPA as an umbrella statute, providing a framework for compliance with other environmental laws, leaves it inaccurately grouped with statutes such as the ESA and FLPMA. The EIS process allows nonfederal defendants and the public ample opportunity for comment and

110 608 F 3d 592 (9th Cir 2010).
111 Ibid at 603-607; NEPA, supra note 1, § 4332(C)(ii).
112 Luther, supra note 7 at 10.
113 Wilderness Society 2011, supra note 15 at 1179.
114 Hurley, “Private Interests”, supra note 45; See e.g. Oregon Natural Desert Association v Lohn, 485 F Supp 2d 1190 (ND Or 2006); see also Friends of the Wild Swan Inc v United States Fish and Wildlife Service, 896 F Supp 1025 (ND Or 1995).
production of the unique information and technical expertise that proposed intervenors are argued to have, and from which the court derives significant value.

Perhaps had the environmental community taken less of a neutral stance on the federal defendant rule, the court would not have turned a blind eye to the unique interests and considerations that were at stake and would have upheld the federal defendant rule. The clarity and insight arguably offered by eliminating the federal defendant rule are not so clear, according to many, including one of the Recreational Groups' attorneys and one of the judges who sat on the en banc panel that voted to abandon the rule. Although it followed the letter of the law, the Wilderness Society court traded one overly broad rule for another.

Elimination of the federal defendant rule is a net loss for environmentalists. A leading Western United States law firm wrote that since the rule's abandonment, NEPA plaintiffs now have to go up against not only the "Department of Justice [DOJ] on behalf of the coordinating agency, but also ... private firms on behalf of the project proponents backing the projects with private investments." Drawing on its experience, the firm went on to say that DOJ NEPA attorneys "are typically very good ... [but] the investors have a much greater financial incentive to see the project come to fruition, and they will often fund a more vigorous and expensive defense, which in turn can increase the attention that the challengers must devote in order to mount a credible opposition to the project." Ultimately, the firm concluded that "we expect that fewer challenges will be successful now that proponents will be able to participate in the liability phase."

Future courts should acknowledge all of the above considerations, the fact that the federal government headlines NEPA compliance, and that NEPA's intention is to compel federal agencies alone to act responsibly and to make informed decisions involving the United States' precious natural resources. None of these factors invalidate the Wilderness Society decision, but are significant in seeing the big picture in which Ninth Circuit NEPA litigation takes place.

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115 Hutley, "Private Interests", supra note 45 ("Intriguingly, environmental groups appear somewhat conflicted about the matter. They have stayed neutral on the question of whether the rule should be kept and have downplayed the importance of the case. Legal observers say this is because while the rule might help them in some cases, in others, it does not.")

116 Lemaster & Hood, supra note 103.

117 Ibid.

118 Ibid.