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[NINTH CIRCUIT ABANDONS FEDERAL DEFENDANT RULE PROHIBITING INTERVENTION OF RIGHT IN NEPA CASES](#)

[*The Wilderness Society; Prairie Falcon Audubon, Inc. v. U.S. Forest Service, et al.*, No. 09-35200 \(9th Cir. Jan. 14, 2011\)](#)

By [Jessica Johnson](#)

On January 14, 2011, the United States Court of Appeals for the Ninth Circuit filed its opinion upon review of a decision by the Idaho District Court to deny a motion to intervene in a case under the National Environmental Policy Act ("NEPA"). In *The Wilderness Society; Prairie Falcon Audubon, Inc. v. U.S. Forest Service, et al.*, No. 09-35200 (9th Cir. Jan. 14, 2011) ("Wilderness Society"), the Ninth Circuit abandoned the "federal defendant rule," which categorically prohibited intervention on the merits, or liability phase, of NEPA actions.

Federal Rule of Civil Procedure 24(a)(2) requires the court, upon timely motion, to permit anyone to intervene who:

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 the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In all intervention of right cases other than those brought under NEPA, the court applies a four-part test when analyzing a motion to intervene of right, as follows:

- (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.

The court applies this test liberally in favor of intervention where intervention would serve efficiency and due process, and considers practical and equitable factors. The second prong does not require the interest to be protected by the statute under which the litigation is brought, but is sufficient if "the interest is protectable under some law" and "there is a relationship between the legally protected interest and the claims at issue."

The federal defendant rule, however, "categorically precludes private parties and state and local governments from intervening of right as defendants on the merits of NEPA actions." (It does not bar, though, "limited intervention of right in the remedial phase" or intervention as a plaintiff.)

In *Wilderness Society*, the plaintiffs alleged that the Forest Service violated NEPA by failing to prepare an Environmental Impact Statement and consider reasonable alternatives when it adopted a travel plan designating roads and trails in a National Forest for motorized vehicle use. Three groups representing recreation interests moved to intervene but were opposed by the conservationist plaintiffs. The district court applied the "federal defendant" rule and denied intervention of right and permissive intervention.

Reviewing the case en banc, the Ninth Circuit explained that the rationale for the federal defendant rule was that "NEPA is a procedural statute that binds only the federal government," and the only defendants can be "the governmental bodies charged with compliance." On that basis, an intervenor on the government defendant's side would not have a "significantly protectable" interest. The court found that such rationale "mistakenly focuses on the underlying legal claim instead of the property or transaction that is the subject of the lawsuit." There are possible circumstances where private parties seeking to intervene in NEPA cases can "demonstrate an interest 'protectable under some law,' and a relationship between that interest and the claims at issue."

The court declared that the federal defendant rule "eschews practical and equitable considerations and ignores our traditionally liberal policy in favor of intervention." The court further found that the rule is inconsistent with its "approval of intervention of right on the side of the federal defendant in cases asserting violations of environmental statutes other than NEPA," such as the Federal Land Policy and Management Act, the Endangered Species Act, and the Administrative Procedure Act.

The Ninth Circuit abandoned the bright-line rule against intervention as defendants in a NEPA action, holding that courts should be permitted to analyze a motion to intervene on a case-by-case basis and examine the factual context under the same standards applicable to all other intervention cases. This ruling brings the Ninth Circuit into conformity with the majority of the other circuit courts. Only the Seventh Circuit maintains a rule prohibiting intervention of right, but that circuit's rule also extends to any action against a government body charged with compliance with a federal statute, not just NEPA.

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