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Removing the Roadblock to Intervention of Right: *Wilderness Society v. U.S. Forest Service* and the Ninth Circuit's Decision to Abandon Its Federal Defendant Rule

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REMOVING THE ROADBLOCK TO INTERVENTION OF RIGHT: *WILDERNESS SOCIETY v. U.S. FOREST SERVICE* AND THE NINTH CIRCUIT'S DECISION TO ABANDON ITS FEDERAL DEFENDANT RULE

Abstract: In 2011, in *Wilderness Society v. U.S. Forest Service*, the U.S. Court of Appeals for the Ninth Circuit abandoned its unique federal defendant rule, which prohibited any non-federal entity from intervening of right to defend the federal government's decisions under the National Environmental Policy Act of 1969. In doing so, the Ninth Circuit ensured that its typical, liberal intervention of right standard applied equally to all proposed intervenors. This Comment argues that the Ninth Circuit rightfully recognized that the practical realities of NEPA litigation and its own intervention policies require a broad and flexible approach to intervention of right, rather than the federal defendant rule's categorical prohibition.

INTRODUCTION

The injuries and consequences of a lawsuit often extend beyond the plaintiff and defendant of that suit.¹ Those consequences can be especially far-reaching in environmental litigation, because environmental suits can affect many stakeholders and can have broad effects on legal entitlements.² Typically, therefore, to join a suit impacting their interests, third parties can make a motion to intervene of right.³

¹ See Jean L. Doyle, Note, *Federal Rule 24: Defining Interest for Purposes of Intervention of Right by an Environmental Organization*, 22 VAL. U. L. REV. 109, 109 (1987); Stephanie D. Matheny, Note, *Who Can Defend a Federal Regulation? The Ninth Circuit Misapplied Rule 24 by Denying Intervention of Right in Kootenai Tribe of Idaho v. Veneman*, 78 WASH. L. REV. 1067, 1073-74 (2003).

² See Stuart Spencer, Note, *Sierra Club v. U.S. Environmental Protection Agency: Intervention of Right and the Victories That Come Back to Haunt*, 7 TUL. ENVTL. L.J. 271, 274 (1993); see, e.g., *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1104 (9th Cir. 2002) (determining the validity of the U.S. Forest Service's "Roadless Rule" that limited road construction on over fifty-eight million acres of national forests), *abrogated by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Sierra Club v. EPA*, 995 F.2d 1478, 1480 (9th Cir. 1993) (determining whether the EPA's permits to the City of Phoenix waste water treatment plants, which allowed the plants to discharge toxic pollutants into nearby rivers, violated the Clean Water Act), *abrogated by Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011); *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 303 (9th Cir. 1989) (determining the claims of various environmental groups seeking to enjoin the Oregon Bureau of Land

Until recently, however, the Ninth Circuit's unique federal defendant rule prohibited those with private interests from intervening of right as defendants in any claims arising out of the National Environmental Policy Act of 1969 (NEPA).⁴ Under this rule, only the federal government could defend a NEPA challenge, because only the federal government is liable under NEPA.⁵ Thus, private groups and local governments could not intervene of right in any NEPA suit in the Ninth Circuit to make their interests and arguments heard.⁶

In 2011, in *Wilderness Society v. U.S. Forest Service*, the en banc U.S. Court of Appeals for the Ninth Circuit revisited the federal defendant rule and concluded that rather than retaining the rule's categorical bar against intervention of right, it would permit private parties to intervene in NEPA suits.⁷ It did so by reasoning that the federal defendant rule was irreconcilable with its own intervention of right standard and the intervention law of most circuits.⁸ Accordingly, the Ninth Circuit reversed its precedent and abandoned the federal defendant rule.⁹

Although the federal defendant rule was unique to the Ninth Circuit, the *Wilderness Society* decision was particularly important because the Ninth Circuit adjudicates the majority of the country's environmental litigation.¹⁰ The Ninth Circuit encompasses nine Western states and many of the country's natural parks and resources.¹¹ Consequently,

Management from harvesting and selling timber within the habitat of the northern spotted owl, *abrogated by Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011).

³ See Gene R. Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 Nw. U. L. Rev. 894, 895–96 (1980); Doyle, *supra* note 1, at 111–12. Because intervention of right allows an individual or group to become an actual party to case without undertaking the expense of filing a separate suit, one commentator has argued that “intervention is certainly the best choice for an environmental group that wants to take an active part in ongoing litigation.” Doyle, *supra* note 1, at 111–12.

⁴ *Wilderness Soc'y*, 630 F.3d at 1176.

⁵ *Id.* at 1177; see, e.g., *Kootenai Tribe*, 313 F.3d at 1108; *Wetlands Action Network v. U.S. Army Corps of Eng's*, 222 F.3d 1105, 1114 (9th Cir. 2000), *abrogated by Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011); *Churchill Cnty. v. Babbitt*, 150 F.3d 1072, 1082–83 (9th Cir.), *amended by* 158 F.3d 491 (9th Cir. 1998); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 n.11 (9th Cir. 1995), *abrogated by Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011); *Sierra Club*, 995 F.2d at 1485; *Portland Audubon Soc'y*, 866 F.2d at 303.

⁶ See *Kootenai Tribe*, 313 F.3d at 1108; *Wetlands Action Network*, 222 F.3d at 1113–14; *Churchill Cnty.*, 150 F.3d at 1082–83; *Forest Conservation Council*, 66 F.3d at 1499 n.11; *Sierra Club*, 995 F.2d at 1485.

⁷ 630 F.3d at 1177.

⁸ *Id.* at 1178–80.

⁹ *Id.* at 1180.

¹⁰ Lawrence Hurley, *Ruling Opens Door for Intervenors in Western NEPA Disputes*, E&E PUBL'G LLC (Jan. 14, 2011), <http://www.eenews.net/eenewspm/2011/01/14/1>.

¹¹ *Id.*

many environmental disputes, including NEPA suits, arise within the Ninth Circuit's jurisdiction.¹² Thus, *Wilderness Society* marks an important turning point for private groups affected by the government's decisions under NEPA.¹³

Part I of this Comment contextualizes *Wilderness Society's* holding within the broader circuit court debate on the proper interpretation of intervention of right.¹⁴ Then, Part II outlines the Ninth Circuit's reasoning for ultimately discarding the federal defendant rule and applying its broad intervention standard to NEPA cases.¹⁵ Finally, Part III argues that by abandoning the federal defendant rule the Ninth Circuit corrected an inconsistency in its intervention law and ensured that its typical, liberal intervention standard applied equally to all proposed intervenors.¹⁶

I. WILDERNESS SOCIETY AND CONFLICTING INTERPRETATIONS OF INTERVENTION OF RIGHT

The NEPA requires all federal agencies contemplating legislation to assess the environmental impact of that legislation and to review available alternatives in an environmental impact statement.¹⁷ If the agency produces an inadequate environmental impact statement, or fails to produce one, then a party may challenge the legislation to enjoin the government from executing it.¹⁸ Yet, government decisions that implicate NEPA also affect private groups or local governments that benefit from the governmental action.¹⁹ Consequently, private groups and local governments often seek to defend a federal agency's

¹² *Id.*

¹³ See *id.*; Julie Weis, *Intervention as of Right in NEPA Cases—Ninth Circuit Returns to the Fold*, TRENDS: ABA SECTION OF ENV'T, ENERGY, & RESOURCES, May-June 2011, at 12, 12–13.

¹⁴ See *infra* notes 17–52 and accompanying text.

¹⁵ See *infra* notes 53–72 and accompanying text.

¹⁶ See *infra* notes 73–94 and accompanying text.

¹⁷ 42 U.S.C. § 4332(2) (C) (2006); Jesse H. Alderman, Note, *Crying Wolf: The Unlawful Delisting of Northern Rocky Mountain Gray Wolves from the Endangered Species Act Protections*, 50 B.C. L. REV. 1195, 1198 n.23, 1205 n.96 (2009).

¹⁸ See 42 U.S.C. § 4332(2) (C); Matheny, *supra* note 1, at 1072. NEPA, however, does not create a private cause of action. *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1135 (9th Cir. 1998); Matheny, *supra* note 1, at 1072. Thus, to challenge the adequacy of an agency's environmental impact statement, a party must claim the statement violates the Administrative Procedure Act (APA). *ONRC Action*, 150 F.3d at 1135; Matheny, *supra* note 1, at 1072. The APA will invalidate an agency's environmental impact statement if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2006); Matheny, *supra* note 1, at 1072.

¹⁹ See *Wilderness Soc'y*, 630 F.3d at 1179–80 (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3d Cir. 1998)).

actions in a NEPA claim.²⁰ To have their interest and arguments heard, these private parties usually move to intervene of right under Federal Rule of Civil Procedure 24(a)(2).²¹

Rule 24(a)(2) permits a party to intervene on the merits of its motion if the party meets certain requirements.²² One of these requirements is that a proposed intervenor must demonstrate a protectable interest, that is, an “interest relating to the property or transaction that is the subject of the action.”²³ Nonetheless, circuits are split on the extent to which intervention as a matter of right is permitted under 24(a)(2).²⁴

The majority of courts take a liberal view of “protectable interest,” allowing a party to intervene if that party demonstrates that some related interest would be harmed by the suit.²⁵ Under this liberal view, intervention is constructed broadly to protect the interests of third parties and promote judicial economy.²⁶ Because under this approach an intervenor is not required to prove a particular legal interest, the intervention standard is highly context specific.²⁷

In contrast, a minority of courts more formalistic approach to 24(a)(2) intervention, and require parties to show a direct cognizable legal interest.²⁸ Under this approach, intervention is construed more narrowly to prevent unfairly burdening the named parties.²⁹ Similar to

²⁰ See *Portland Audubon Soc’y*, 866 F.2d at 303–04.

²¹ See Shreve, *supra* note 3, at 895–96; Doyle, *supra* note 1, at 111–12.

²² FED. R. CIV. P. 24(a)(2); Spencer, *supra* note 2, at 272.

²³ FED. R. CIV. P. 24(a)(2).

²⁴ Doyle, *supra* note 1, at 126–27; Spencer, *supra* note 2, at 273; Note, *Federal Civil Procedure: Intervention of Right Granted Private Party in Government Antitrust Suit Under New Rule 24(a)(2)*, 1968 DUKE L.J. 117, 124.

²⁵ Doyle, *supra* note 1, at 131.

²⁶ *Id.*; Spencer, *supra* note 2, at 273–74; see, e.g., *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U.S. 129, 133–36 (1967); *Forest Conservation Council*, 66 F.3d at 1499 n.11.

²⁷ Doyle, *supra* note 1, at 128; see, e.g., *United States v. Hooker Chems. & Plastics Co.*, 749 F.2d 968, 983 (2d Cir. 1984); *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *Blake v. Pallan*, 554 F.2d 947, 952 (9th Cir. 1977); *Nuess v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

²⁸ See Doyle, *supra* note 1, at 133; Spencer, *supra* note 2, at 275; see, e.g., *Donaldson v. United States*, 400 U.S. 517, 528–31 (1970), *superseded by statute*, I.R.C. §§ 7609(a), 7609(b) (2006), *as recognized in* *Tiffany Fine Arts v. United States*, 469 U.S. 310 (1985); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 858 (7th Cir. 1985); *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 869 (8th Cir. 1977).

²⁹ Doyle, *supra* note 1, at 133; Spencer, *supra* note 2, at 274; see, e.g., *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984); *Wilderness Soc’y v. Morton*, 463 F.2d 1261, 1263 (D.C. Cir. 1972).

the standard in the more liberal approach, the standard in the conservative approach is highly fact specific.³⁰

When evaluating a 24(a)(2) motion, the Ninth Circuit requires a “‘significantly protectable’ interest relating to the property or transaction which is the subject of the action.”³¹ In nearly all cases, the Ninth Circuit adopts a broad and flexible interpretation of this requirement in favor of intervention.³² Thus, a party may typically intervene if its related interests would be harmed by the pending action.³³

Although in most cases the Ninth Circuit applied a liberal intervention of right standard, the Ninth Circuit had one unique exception: its federal defendant rule.³⁴ The federal defendant rule prohibited non-federal entities from intervening of right under Rule 24(a)(2) as defendants in claims arising out of NEPA.³⁵ Defenders of the rule rea-

³⁰ Doyle, *supra* note 1, at 133–34 (noting that although conservative courts have similar standards for intervention of right, they can reach different results even under the same facts).

³¹ *Wilderness Soc’y*, 630 F.3d at 1177. The significantly protectable interest requirement is one prong of the Ninth Circuit’s four part test for intervention. *Id.* To successfully intervene a party must comply with the following 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.

Id. (quoting *Sierra Club*, 995 F.2d at 1481).

³² *Id.* at 1179; *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996); *Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982); *Nuess*, 385 F.2d at 700.

³³ *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (“[W]e have taken the view that a party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.”); *Andrus*, 622 F.2d at 438; see Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 289 (1990).

³⁴ *Wilderness Soc’y*, 630 F.3d at 1179 (“The ‘federal defendant’ rule’s limitation on intervention of right in NEPA actions also runs counter to the standards we apply in all other intervention of right cases.”); Ruth Schimmel, Comment, *Recent Developments in Environmental Law: National Environmental Policy Act*, 24 TUL. ENVTL. L.J. 429, 429 (2011).

³⁵ *Wilderness Soc’y*, 630 F.3d at 1176; *Portland Audubon Soc’y*, 866 F.2d at 303. The federal defendant rule first originated in the Ninth Circuit’s 1989 case, *Portland Audubon Society v. Hodel*. *Wilderness Soc’y*, 630 F.3d at 1177; see *Portland Audubon Soc’y*, 866 F.2d at 303. In *Portland Audubon Society*, various environmental groups sought to enjoin the Oregon Bureau of Land Management from harvesting and selling timber in the northern spotted owl’s habitat. 866 F.2d at 303. One issue was whether two timber interests, the Northeast Forest Resources Council and a group of individual timber contractors, could intervene as defendants in the NEPA claim. *Id.* at 308. The court held that although the timber interest groups had a substantial economic interest in the claim, this interest was insufficient to

soned that because only the federal government can violate NEPA, only federal entities have the requisite protectable interest.³⁶ Therefore, although the Ninth Circuit often permits liberal intervention in other cases, in NEPA cases it applies a more conservative standard.³⁷ In *Wilderness Society*, the Ninth Circuit resolved this inconsistency by abandoning the federal defendant rule.³⁸

The dispute in *Wilderness Society* arose after the U.S. Forest Service approved 1196 miles of trails for motorized vehicles in the Minidoka Ranger District of the Sawtooth National Forest in Idaho.³⁹ As a result of this proposed legislation, the Wilderness Society and Prairie Falcon Audubon, Inc. filed suit against the Forest Service.⁴⁰ These groups argued that the Forest Service violated NEPA, and other environmental statutes, because it did not fully consider the adverse environmental effects that expanded motor vehicle access could have on the area.⁴¹

In response, three recreational groups—the Magic Valley Trail Machine Association, Blue Ribbon Coalition, Inc., and Idaho Recreation Council—sought to intervene of right as defendants in support of the Forest Service’s plan.⁴² The recreational groups represented the interests of individuals who used motor vehicles to access and enjoy Sawtooth National Forest.⁴³ The groups argued that although they supported the Forest Service’s plan to allow expanded motor vehicle access in the area, the Forest Service, as a federal organization, could not adequately represent their private interests.⁴⁴

The U.S. District Court for the District of Idaho, however, denied the recreational groups’ Rule 24(a)(2) motion, reasoning that the federal defendant rule barred private parties from intervening of right in

allow intervention of right because “NEPA provides no protection for purely economic interests.” *Id.* at 309. In subsequent years, the *Portland Audubon Society* decision became the basis for the Ninth Circuit’s strict federal defendant rule. *Wilderness Soc’y*, 630 F.3d at 1178.

³⁶ See, e.g., *Kootenai Tribe of Idaho*, 313 F.3d at 1108; *Wetlands Action Network*, 222 F.3d at 113–14; *Churchill Cnty.*, 150 F.3d at 1082–83; *Forest Conservation Council*, 66 F.3d at 1499 n.11; *Sierra Club*, 995 F.2d at 1485.

³⁷ See *Wilderness Soc’y*, 630 F.3d at 1178–79; Spencer, *supra* note 2, at 275–76.

³⁸ See *Wilderness Soc’y*, 630 F.3d at 1176.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² *Id.* at 1176–77.

⁴³ *Wilderness Soc’y v. U.S. Forest Serv.*, No. CV08-363-E-EJL, 2009 WL 453764, at *1 (D. Idaho Feb. 20, 2009), *rev’d en banc*, 630 F.3d 1173 (9th Cir. 2011).

⁴⁴ *Id.*

NEPA cases.⁴⁵ Following the rationale of the federal defendant rule, the court held that because the recreational groups were private parties, they could not violate NEPA.⁴⁶ Thus, they did not have a “significant protectable interest” in the action.⁴⁷

On appeal, the Ninth Circuit reversed, eliminating the federal defendant rule.⁴⁸ The court concluded that the federal defendant rule’s strict categorical prohibition on intervention of right conflicted with Rule 24(a)(2), the Ninth Circuit’s traditionally liberal policies toward intervention, and the intervention law of nearly all other circuits.⁴⁹ Accordingly, the Ninth Circuit remanded the case to the district court to reconsider the recreational groups’ motion to intervene.⁵⁰ The Ninth Circuit instructed that, rather than applying the federal defendant rule to NEPA actions, the district court should apply the Ninth Circuit’s typical, case-specific intervention of right standard.⁵¹ Thus, in subsequent NEPA actions, the court should permit intervention when a party suffers harm to a legally protected and related interest.⁵²

II. THE COURT’S RATIONALE FOR ABANDONING THE FEDERAL DEFENDANT RULE

Ultimately, the *Wilderness Society* court abandoned the federal defendant rule for three reasons.⁵³ First, it concluded that the rule was inconsistent with Federal Rule of Civil Procedure 24(a)(2) because the federal defendant rule requires a proposed intervenor to demonstrate liability identical to the named defendant, rather than merely a related interest.⁵⁴ Second, the court reasoned that the rule’s categorical bar against intervention of right for private interests was irreconcilable with the Ninth Circuit’s typical intervention standard, and the practical reali-

⁴⁵ *Id.* at *2. The district court also denied permissive intervention under 24(b) because the Recreational Groups did not “add any further clarity or insight into the claims in this action.” *Id.* at *4.

⁴⁶ *Id.* at *2.

⁴⁷ *Id.*

⁴⁸ *Wilderness Soc’y*, 630 F.3d at 1177.

⁴⁹ *Id.* at 1178–80.

⁵⁰ *Id.* at 1180–81.

⁵¹ *Id.* at 1180.

⁵² *Id.* On remand the U.S. District Court for the District of Idaho granted the Recreational Groups’ motion to intervene. *Wilderness Soc’y v. U.S. Forest Serv.*, No. CV08-363-E-EJL, 2011 WL 1743781, at *2 (D. Idaho May 5, 2011).

⁵³ See *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178–80 (9th Cir. 2011); Benjamin E. Becker, Case Note, *Wilderness Soc’y v. United States Forest Serv.*, 43 *URB. LAW.* 910, 910 (2011).

⁵⁴ See *Wilderness Soc’y*, 630 F.3d at 1178; *infra* notes 57–60 and accompanying text.

ties of NEPA cases.⁵⁵ Finally, the court recognized that the rationale for the federal defendant rule lacked support in nearly all other circuits.⁵⁶

A. *The Federal Defendant Rule and Rule 24(a)(2)*

By abandoning the federal defendant rule and liberalizing its intervention standard in NEPA actions, the *Wilderness Society* court sought to reconcile its intervention law with the plain language of Rule 24(a)(2).⁵⁷ The *Wilderness Society* court concluded that the federal defendant rule conflicted with Rule 24(a)(2) because the federal defendant rule required that a proposed intervenor of right face the same liability as the named defendant.⁵⁸ In contrast, Rule 24(a)(2) requires only that an intervenor demonstrate “an interest relating to the property or transaction that is the subject of the action.”⁵⁹ Thus, as the *Wilderness Society* court noted, the federal defendant rule impermissibly focused on the underlying merits of the intervenor’s claim by requiring NEPA liability, rather than the intervenor’s interest in the subject matter of the case.⁶⁰

B. *Creating a Consistent 24(a)(2) Intervention Standard*

In addition, the *Wilderness Society* court also rejected the federal defendant rule because the rule conflicted with the Ninth Circuit’s historically favorable policies toward intervention of right.⁶¹ Typically, the Ninth Circuit did not require a party to demonstrate a specific legal interest to intervene, but rather weighed “practical and equitable considerations,” in favor of intervention.⁶² The federal defendant rule, however, did not allow for this flexible analysis in NEPA actions; the rule automatically barred any private interest from intervening of right.⁶³ Thus, by abandoning the federal defendant rule and consistently applying the same liberal Rule 24(a)(2) intervention standard to all cases, the court sought to right this discrepancy within its own intervention law.⁶⁴

⁵⁵ See *Wilderness Soc’y*, 630 F.3d at 1179; *infra* notes 61–67 and accompanying text.

⁵⁶ See *Wilderness Soc’y*, 630 F.3d at 1180; *infra* notes 68–72 and accompanying text.

⁵⁷ See 630 F.3d at 1178–79.

⁵⁸ *Id.*

⁵⁹ FED. R. CIV. P. 24(a)(2).

⁶⁰ *Wilderness Soc’y*, 630 F.3d at 1178.

⁶¹ *Id.* at 1179.

⁶² *Id.* (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)).

⁶³ *Id.*

⁶⁴ See *id.*

Furthermore, the *Wilderness Society* court held that the federal defendant rule's strict prohibition on Rule 24(a)(2) intervention for private parties ignores the practical ramifications of NEPA cases, which frequently involve and affect private interests.⁶⁵ The court reasoned that although NEPA only binds the federal government, the environmental implications of NEPA actions affect private parties and local governments.⁶⁶ Thus, in contrast to the Ninth Circuit's typical Rule 24(a)(2) intervention standard, which weighs "practical and equitable considerations," the federal defendant rule did not permit intervention based on such considerations, and instead ignored the practical realities of NEPA actions.⁶⁷

C. Conforming with the Majority Approach to 24(a)(2) Intervention

Finally, by abandoning the federal defendant rule in *Wilderness Society*, the Ninth Circuit sought to align its NEPA intervention of right standard with the more liberal approach to Rule 24(a)(2) intervention, followed by the majority of the circuits.⁶⁸ Before *Wilderness Society*, the Ninth Circuit was the only circuit to adopt such a categorical prohibition on Rule 24(a)(2) intervention exclusively in NEPA actions.⁶⁹ Although the Seventh Circuit prohibits private parties from intervening of right in certain cases, this exclusion is not limited to NEPA actions.⁷⁰ Instead, the Seventh Circuit applies this prohibition in all cases in which only the federal government can be charged with compliance.⁷¹ In contrast, other circuits have refused to adopt such a strict rule against Rule 24(a)(2) intervention in NEPA cases.⁷²

⁶⁵ *Id.* at 1180 (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3d Cir. 1998)).

⁶⁶ *Wilderness Soc'y*, 630 F.3d at 1179.

⁶⁷ *Id.* at 1179–80 ("Given the many different scenarios in which NEPA claims arise, courts should be permitted 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.").

⁶⁸ See *Wilderness Soc'y*, 630 F.3d at 1180; Matheny, *supra* note 1, at 1086.

⁶⁹ *Wilderness Soc'y*, 630 F.3d at 1180; see, e.g., *WildEarth Guardian v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009); *Kleissler*, 157 F.3d at 971.

⁷⁰ *Wilderness Soc'y*, 630 F.3d at 1180; see *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982).

⁷¹ See, e.g., *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985).

⁷² *Wilderness Soc'y*, 630 F.3d at 1180; see, e.g., *WildEarth Guardian*, 573 F.3d at 995; *Kleissler*, 157 F.3d at 971. The Sixth and Second Circuits have explicitly declined to consider the issue. See *Friends of Tims Ford v. Tenn. Valley Auth.*, 585 F.3d 955, 963 n.1 (6th Cir. 2009); *Pogliani v. U.S. Army Corps of Eng'rs*, 146 F. App'x 528, 529–30 (2d Cir. 2005).

III. THE IMPLICATIONS OF *WILDERNESS SOCIETY*

By eliminating the federal defendant rule and eliminating the distinction between intervention in NEPA actions and intervention in other environmental actions, the Ninth Circuit recognized that NEPA litigation requires a broad and flexible approach to intervention of right.⁷³ Previously, the Ninth Circuit's standard for intervention in NEPA actions was inconsistent with its standard under all other environmental statutes.⁷⁴ In NEPA actions, the federal defendant rule barred intervention by private actors; under the other statutes, however, the intervention standard permitted private parties to intervene of right.⁷⁵ For example, the Ninth Circuit allowed non-federal entities to intervene as defendants in claims challenging federal compliance with the Federal Land Policy and Management Act of 1976,⁷⁶ the Federal Endangered Species Act of 1973,⁷⁷ and the Clean Water Act.⁷⁸

⁷³ See *infra* notes 74–94 and accompanying text.

⁷⁴ See *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011); see, e.g., *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397–98 (9th Cir. 1995); *Sierra Club v. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993), *abrogated by Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526–28 (9th Cir. 1983).

⁷⁵ See *Wilderness Soc'y*, 630 F.3d at 1179; see, e.g., *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397–98; *Sierra Club*, 995 F.2d at 1486; *Sagebrush Rebellion, Inc.*, 713 F.2d at 526–28.

⁷⁶ *Sagebrush Rebellion, Inc.*, 713 F.2d at 526–28. In 1983, in *Sagebrush Rebellion, Inc. v. Watt*, the Ninth Circuit held that a conservation group could intervene of right to defend the Secretary of the Interior's decision to create a bird sanctuary against plaintiff's claims that such a project violated the Federal Land and Policy Act of 1976. 713 F.2d at 526, 527–28; see *Wilderness Soc'y*, 630 F.3d at 1179. In granting intervention the court noted that “there can be no serious dispute” that the conservation groups demonstrated a significantly protectable interest because “[a]n adverse decision in this suit would impair [the conservation group's] interest in the preservation of birds and their habitat.” *Sagebrush Rebellion, Inc.*, 713 F.2d at 528.

⁷⁷ *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397–98 (upholding intervention of right to environmental groups who sought to defend the Fish and Wildlife Service's decision to list a species of snail as an endangered species).

⁷⁸ *Sierra Club*, 995 F.2d at 1486. In 1993, in *Sierra Club v. EPA* the Ninth Circuit held that the City of Phoenix should be allowed to intervene of right to defend the Environmental Protection Agency (EPA) against allegations that the EPA's permits to the city's waste water treatment plants violated the Clean Water Act (CWA). 995 F.2d at 1480, 1483. The *Sierra Club* court attempted to reconcile its grant of intervention with the federal defendant rule by reasoning that unlike NEPA regulations, CWA regulations can apply to private parties. *Id.* at 1485. Yet, as the *Wilderness Society* court noted, this attempt was unfounded. See 630 F.3d at 1180. Whether a party faces liability under the statute in dispute is not a requirement for Rule 24(a)(2) intervention. *Id.* at 1179 (“[A] prospective intervenor's asserted interest need not be protected by the statute under which the litigation is brought to qualify as ‘significantly protectable’ under Rule 24(a)(2).”).

Thus, in abandoning the federal defendant rule, *Wilderness Society* rightfully corrected an inconsistency in its intervention law.⁷⁹

Furthermore, the Ninth Circuit's categorical bar against intervention by private interests in NEPA claims was fundamentally inconsistent with its intervention standard under other environmental statutes addressing the same policies and issues.⁸⁰ Moreover, because NEPA and many environmental statutes share similar policy goals, environmental litigation frequently overlaps.⁸¹ As a consequence, prior to *Wilderness Society*, a private party's right to intervene was based on the statute under which the claim was brought, rather than the extent of that party's interests in the litigation.⁸²

Although the Ninth Circuit's liberalization of its NEPA intervention standard will make intervention of right easier for private parties, it will not open the floodgates to third party intervention.⁸³ To intervene of right a party must still prove harm to a legally protected and related interest.⁸⁴ Therefore, private parties are not automatically granted intervention under the new standard.⁸⁵ Instead, the abandonment of the federal defendant rule means that third-party motions are not automatically dismissed.⁸⁶ Thus, unlike the prior standard which required that the court dismiss a private party's Rule 24(a)(2) motion no matter how great the potential harm to that party's interest, the new standard permits the Ninth Circuit to consider the impact of a NEPA action on a particular defendant.⁸⁷

Furthermore, although the new standard allows greater flexibility, it also helps to limit judicial discretion.⁸⁸ The federal defendant rule categorically precluded private parties from intervening of right under Rule 24(a)(2) in NEPA actions.⁸⁹ Yet, private parties could still seek

⁷⁹ See *Wilderness Soc'y*, 630 F.3d at 1179; Doyle, *supra* note 1, at 1079–80. The Ninth Circuit also applied a liberal intervention standard in non-environmental cases, when the proposed intervenor could not face liability under the statute at issue. Matheny, *supra* note 1, at 1080–81; see, e.g., Wash. State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 629–30 (9th Cir. 1982); Idaho v. Freedman, 625 F.2d 886, 887 (9th Cir. 1980).

⁸⁰ *Wilderness Soc'y*, 630 F.3d at 1179–80.

⁸¹ See Spencer, *supra* note 2, at 284.

⁸² See *id.*

⁸³ See Weis, *supra* note 13, at 13.

⁸⁴ *Wilderness Soc'y*, 630 F.3d at 1180.

⁸⁵ See *id.*; Weis, *supra* note 13, at 13; Hurley, *supra* note 10.

⁸⁶ See *Wilderness Soc'y*, 630 F.3d at 1179.

⁸⁷ See *id.*; Schimmel, *supra* note 35, at 432.

⁸⁸ See Matheny, *supra* note 1, at 1074–75, 1092.

⁸⁹ *Id.* at 1092; see, e.g., Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1108, 1110–11 (9th Cir. 2002), *abrogated by Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011); Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1114 (9th Cir. 2000), *abrogated*

permissive intervention under Federal Rule of Civil Procedure 24(b).⁹⁰ Unlike Rule 24(a)(2), which mandates intervention if a party meets the rule's requirements, under 24(b) intervention is completely discretionary.⁹¹ Consequently, the federal defendant rule left intervention for private parties and local governments in NEPA cases completely at the discretion of a specific judge.⁹²

Moreover, the *Wilderness Society* court's decision to abandon the federal defendant rule is particularly important because the Ninth Circuit encompasses nine Western States, and thus, many of the country's national parks.⁹³ Consequently, many environmental disputes and especially NEPA actions arise within the Ninth Circuit's jurisdiction; therefore, *Wilderness Society* rightfully allows many private parties and local governments the chance to have their interests represented in a Circuit that decides much of the nation's NEPA litigation.⁹⁴

CONCLUSION

In *Wilderness Society*, the Ninth Circuit abandoned its unique federal defendant rule that categorically precluded private parties from intervening of right in NEPA actions. In its place, the court applied its typical, liberal intervention of right standard, which permits intervention when the ongoing suit would harm a party's legally protected and related interest. This broad and flexible approach to Rule 24(a)(2) intervention more appropriately accounts for the practical realities of NEPA litigation, the text of Rule 24(a)(2), and the Circuit's own intervention policies. Furthermore, this change will help prevent the Ninth Circuit from arbitrarily distinguishing between NEPA actions and other environmental actions in permitting intervention.

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by *Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011); *Churchill Cnty. v. Babbitt*, 150 F.3d 1072, 1082–83 (9th Cir. 1998), *amended by* 158 F.3d 491 (9th Cir. 1998).

⁹⁰ See Matheny, *supra* note 1, at 1092; see *Kootenai Tribe of Idaho*, 313 F.3d at 1108, 1110–11.

⁹¹ Compare FED. R. CIV. P. 24(a) (providing that if certain conditions are met “the court *must* permit anyone to intervene” (emphasis added)), with FED. R. CIV. P. 24(b) (providing that if certain conditions are met “the court *may* permit anyone to intervene” (emphasis added)).

⁹² See Matheny, *supra* note 1, at 1092.

⁹³ Hurley, *supra* note 10.

⁹⁴ *Id.*