



Ninth Circuit Abandons "Federal Defendant" Rule Precluding Non-Federal Parties from Intervening as of Right in National Environmental Policy Act Cases

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In a decision issued January 14, 2011, in *Wilderness Society v. U.S. Forest Service*, an *en banc* panel of the United States Court of Appeals for the Ninth Circuit overturned a rule it instituted more than two decades ago precluding non-federal parties from intervening as of right in National Environmental Policy Act (NEPA) cases. The decision has substantial implications for parties that may have an interest in intervening in NEPA cases to defend the conduct and decisions of the federal government.

Federal Rule of Civil Procedure 24 allows any party to seek to intervene in an ongoing civil action. A party can seek to intervene as of right provided its motion to intervene is timely, it claims an interest relating to the property or transaction that is the subject of the action, disposing of the action may as a practical matter impair or impede its ability to protect its interest, and no existing parties adequately represent that interest. In its prior precedent, the Ninth Circuit held that this rule does not provide a basis for would-be intervenors to defend the merits of a federal agency action under NEPA because NEPA is a procedural statute that binds only the federal government.

Without dissent, the Ninth Circuit overruled its prior precedent concluding that the so-called Federal Defendant rule is inconsistent with the text of Rule 24 and that the application of the Federal Defendant rule in NEPA cases runs counter to the standards it applies in all other cases. At the same time it abandoned the Federal Defendant rule, the Ninth Circuit clarified that it would apply the body of precedent it developed respecting intervention as of right in non-NEPA cases to NEPA cases going forward. The Court stated:

To determine whether putative intervenors demonstrate the "significantly protectable" interest necessary for intervention of right in a NEPA case, the operative inquiry should be whether the "interest is protectable under some law" and whether "there is a relationship between the legally protected interest and the claims at issue."

Slip Op. at 804 (citation omitted). This ruling will allow parties with a cognizable interest in an agency decision under NEPA, such as an Environmental Impact Statement and Record of Decision, to seek to intervene in both the merits and remedy stages of a lawsuit challenging that decision. Public and private parties alike that undertake projects that trigger the NEPA process (e.g., due to the need for a federal permit or the use of federal funding), such as construction of a new highway interchange or development of a piece of commercial real estate, now have the capability to defend such projects during NEPA litigation whereas before they were relegated to the sidelines.

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