Ninth Circuit Abandoning its 'Federal Defendant Rule'

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The Ninth Circuit announced today that it is abandoning its "federal defendant rule" for cases brought under the National Environmental Policy Act ("NEPA"). *See Wilderness Soc'y v. U.S. Forest Serv.*, No. 09-35200 (9th Cir. Jan. 14, 2011).

Since 1989, the Ninth Circuit's unique federal defendant rule has operated to "categorically preclude private parties and state and local governments from intervening of right as defendants on the merits of NEPA actions." Slip op. at 798. Under the rule, the Ninth Circuit used to hold that only the federal government was a proper defendant in a suit challenging NEPA compliance, such as challenges to the adequacy of an environmental assessment or environmental impact statement underlying a project approval or permit, whether for a grazing permit, mining or water project, or right-of-way on federal lands, or other activity requiring a NEPA review prior to proceeding. This rule practically made it difficult for natural resource and federal land project interests in the Ninth Circuit to intervene in such litigation to defend their projects and the federal approvals for them.

In its decision, the court noted the broad-based interest in overturning the rule. No fewer than thirty-seven amici,, or "friends of the court," including private groups, state and local government entities, and regional water authorities, had argued for abandonment of this categorical prohibition. *Id*. at 800. The en banc court ruled that going forward, courts within the Ninth Circuit "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." *Id*. at 803. Put another way, the court overturned its prior "federal defendant rule" and held that regardless of whether a NEPA or other environmental statutory claim was presented in a lawsuit, the right of a party to intervene in defense of the federal agency decision should be controlled by the normal intervention inquiry under Federal Rule of Civil Procedure 24(a)(2). The operative inquiry now to determine whether an intervenor applicant has the "significantly protectable" interest required for intervention as of right in a NEPA case is whether that party's "interest is protectable under some law" and whether "there is a relationship between the legally protected interest and the claims at issue." *Id.* at 804. An intervenor applicant "will generally show a sufficient interest for intervention of right in a NEPA case, as in any other case, if it will suffer a practical impairment of its interests as a result of the pending litigation." *Id.*

This is a ruling with significant implications for natural resource developers and those who operate on the public lands, and for others whose activities

may implicate NEPA review and compliance, including agricultural businesses, water providers, power developers, railroads, and others. These interests often may wish to, or need to, intervene in federal court litigation challenging permits or approvals for their projects. Now the obstacles to doing so in the Ninth Circuit have been significantly lowered. Parties with these interests will need only to meet the same standards as any other intervenor applicant in any other litigation context under the Federal Rules of Civil Procedure, making access to the federal courts within the Ninth Circuit more equitable for all stakeholders in NEPA cases.
