

ARTICLES

SHAUN A. GOHO*

The Unlamented Demise of the Federal Defendant Rule

Abstract	468
Introduction	468
I. Intervention Under the Federal Rules of Civil Procedure	470
II. The Federal Defendant Rule.....	472
A. Origins: <i>Portland Audubon v. Hodel</i>	472
1. First Interpretation: Adopting the <i>Wade</i> Rule	473
2. Second Interpretation: Prudential Standing for Intervenors.....	474
3. Third Interpretation: Insufficiently Concrete Interests	475
4. Fourth Interpretation: A NEPA-Specific Rule	476
5. Fifth Interpretation: All of the Above	476
B. The Official History	477
1. <i>Sierra Club v. U.S. Environmental Protection Agency</i>	477
2. <i>Forest Conservation Council v. U.S. Forest Service</i>	479
3. <i>Churchill County v. Babbitt</i>	480
4. <i>Wetlands Action Network v. U.S. Army Corps of Engineers</i>	481
5. <i>Kootenai Tribe of Idaho v. Veneman: The Federal Defendant Rule for the Gander</i>	482

* Senior Clinical Instructor, Emmett Environmental Law & Policy Clinic, and Lecturer on Law, Harvard Law School. I thank Kate Konschnik for valuable comments on an earlier draft and JELL staff for their careful review and thoughtful edits.

6.	The Lay of the Land: 2002–2011	484
C.	The Secret History.....	485
1.	Expansion of the Rule to Non-NEPA Cases.	485
2.	Grounds for Distinguishing FDR from non-FDR Cases.....	487
3.	All or Nothing?.....	490
4.	Ninth Circuit Origins.....	491
III.	The Federal Defendant Rule’s Unlamented Demise	493
IV.	Lessons Learned	496
A.	The Ninth Circuit Got It Right.....	496
B.	An Irony of Timing	498
C.	Even Judicial Doctrines Will Die Without Advocates... ..	499
D.	The Paths of Common Law Doctrines	503
	Conclusion.....	509

ABSTRACT

For two decades, courts in the Ninth Circuit enforced the so-called Federal Defendant Rule, under which intervention as of right was prohibited in cases brought under the National Environmental Policy Act (NEPA). The Ninth Circuit eventually abandoned this rule in its 2011 *en banc* decision in *Wilderness Society v. U.S. Forest Service*. This Article traces the history of the Federal Defendant Rule, showing how it evolved through a common law-like process from a fact-specific decision in one case to a bright-line rule. It also explains how, despite the Rule’s apparent clarity, it produced confusion in the district courts of the Ninth Circuit, leading to a series of inconsistent decisions. The Article concludes that the Ninth Circuit was right to reject the Rule and uses the history of the Rule to draw more general lessons about the processes through which judicial doctrines emerge, evolve, and are abandoned.

INTRODUCTION

The Ninth Circuit’s 2011 decision in *Wilderness Society v. U.S. Forest Service*¹ brought an end to that court’s 20-year experiment with the Federal Defendant Rule (FDR or Rule), under which intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure (FRCP) was categorically prohibited at the merits stage of

¹ 630 F.3d 1173 (9th Cir. 2011).

cases brought under the National Environmental Policy Act (NEPA).² The court's rationale for the Rule was that intervenors could not have a significantly protectable interest in a NEPA case because that statute imposes only procedural duties on the government. As the court put it in one decision: "[B]ecause NEPA requires action only by the government, only the government can be liable under NEPA. A private party cannot 'comply' with NEPA, and, therefore, a private party cannot be a defendant in a NEPA compliance action."³

In *Wilderness Society*, the *en banc* court unanimously rejected the FDR, holding that "courts need no longer apply a categorical prohibition on intervention on the merits, or liability phase, of NEPA actions."⁴ Instead, the court held that judges in the Ninth Circuit should, in NEPA cases, apply a "contextual, fact-specific inquiry as to whether private parties meet the requirements for intervention [as] of right on the merits, just as they do in all other cases."⁵ Now, in the Ninth Circuit, as in most others, "[a] putative intervenor will generally demonstrate a sufficient interest for intervention [as] of right in a NEPA action, as in all cases, if 'it will suffer a practical impairment of its interests as a result of the pending litigation.'"⁶

The Federal Defendant Rule was an anomaly in the jurisprudence of intervention and the Ninth Circuit was correct to reject it. To understand both how the Rule lasted as long as it did, and the reasons for its eventual demise, this Article recaps the birth, growth, and death of the Rule.

Part I of this Article sets out the basic rules governing intervention in the federal courts. Part II then describes the history of the FDR, covering both the official history of the Ninth Circuit cases that clarified the scope of the Rule over time, and the secret history of the district court cases that exposed the Rule's tensions and

² 42 U.S.C. § 4321 (2006).

³ *Churchill Cnty. v. Babbitt*, 150 F.3d 1072, 1082 (9th Cir. 1998).

⁴ 630 F.3d at 1176.

⁵ *Id.* at 1180.

⁶ *Id.* The only other circuit to have adopted an approach akin to the FDR is the Seventh Circuit, which has held that in all cases "brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants." *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982) (per curiam). All other circuits that have addressed intervention in suits against government agencies do not apply this categorical approach. *See WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992 (10th Cir. 2009); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964 (3d Cir. 1998); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994); *Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (per curiam).

inconsistencies. Part III chronicles the Ninth Circuit's eventual abandonment of the Rule in *Wilderness Society*. Finally, Part IV identifies some lessons that can be gleaned from this history: the correctness of the Ninth Circuit's decision to abandon the Rule; the irony that it did so just when changes in another doctrinal area reduced the significance of the Rule; the idea that judicial doctrines need advocates as much as public policy positions do if they are to survive; and the Rule's history as a textbook demonstration of some of the main models of the development of common law doctrines.

I

INTERVENTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Under the Federal Rules of Civil Procedure, there are two forms of intervention: intervention as of right and permissive intervention. A court *must* grant a motion for intervention as of right if the motion is "timely" and the applicant "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."⁷ Courts generally rephrase the rule into the following four-part test:

- (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.⁸

If a court finds that the movant satisfies all four parts of the test, then it must allow the movant to intervene.

By contrast, under permissive intervention, a court *may* grant a motion to intervene if the motion is timely and the applicant "has a claim or defense that shares with the main action a common question of law or fact."⁹ The test for permissive intervention is considerably less stringent than that for intervention as of right, but the district

⁷ Fed. R. Civ. P. 24(a).

⁸ *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993), *abrogated by* *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

⁹ Fed. R. Civ. P. 24(b)(1).

court judge also retains significant discretion in deciding whether to allow a movant to intervene, even if the test is satisfied.¹⁰ A party

¹⁰ Appellate review of permissive intervention decisions is highly deferential, generally being carried out pursuant to an “abuse of discretion” or “clear abuse of discretion” standard. As the First Circuit put it in one decision, “the district court enjoys broad discretion in making determinations regarding permissive intervention under Rule 24(b)(2). Reversal of a district court’s denial of permissive intervention on grounds of abuse of discretion is ‘so unusual as to be almost unique.’” *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989); *see also* *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare of Pa.*, 701 F.3d 938, 947 (3d Cir. 2012); *McHenry v. Comm’r.*, 677 F.3d 214, 219 (4th Cir. 2012); *Blount-Hill v. Zelman*, 636 F.3d 278, 287 (6th Cir. 2011); *City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1078 (10th Cir. 2009); *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008); *AT & T Corp. v. Sprint Corp.*, 407 F.3d 560, 561 (2d Cir. 2005); *Canatella v. California*, 404 F.3d 1106, 1117 (9th Cir. 2005); *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 573 (8th Cir. 1998); *In re Vitreous Steel Products Co.*, 911 F.2d 1223, 1231 (7th Cir. 1990); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 471 (5th Cir. 1984). Review of trial court decisions on motions to intervene as of right is usually less deferential. Several circuit courts review timeliness determinations for abuse of discretion, but subject other aspects of the district court’s decision to *de novo* review. *See, e.g., In re Uponsor, Inc.*, F1807 Plumbing Fittings Products Liab. Litig., 716 F.3d 1057, 1065 (8th Cir. 2013) (“[O]ur court generally reviews *de novo* whether or not a person is entitled to intervention as a matter of right. When a district court denies a motion to intervene based on untimeliness, however, we review that decision for abuse of discretion.”) (citations and internal quotation marks omitted); *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1322 (D.C. Cir. 2013) (“We review the denial of a motion to intervene *de novo* for issues of law, for clear error as to findings of fact and for abuse of discretion on issues that involve a measure of judicial discretion.”) (citation and internal quotation marks omitted); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (“We review a district court’s decision allowing intervention as of right pursuant to Rule 24(a) *de novo*, except for the element of timeliness, which we review for an abuse of discretion.”); *Coal. of Ariz./N.M. Cnty. for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 840 (10th Cir. 1996) (“We review for an abuse of discretion a district court’s rulings on the timeliness of an application for intervention as of right, but we review *de novo* a district court’s rulings on the three remaining requirements under Rule 24(a)(2).”); *United States v. Tex. E. Transmission Corp.*, 923 F.2d 410, 413 (5th Cir. 1991) (“The *de novo* standard governs review of district court rulings on all Rule 24(a) requirements except for timing.”); *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989) (adopting abuse of discretion review for timeliness and *de novo* review for other Rule 24(a)(2) factors). The Eleventh Circuit and D.C. Circuit adopt variations upon this approach. *See Fox*, 519 F.3d at 1301 (“We review the denial of a motion to intervene of right *de novo*. We review subsidiary findings of fact for clear error.”) (citation omitted). Some other circuits use an abuse of discretion standard for all aspects of Rule 24(a) decisions, but usually specify that they grant additional deference to permissive intervention decisions. *See, e.g., Yock*, 701 F.3d at 947 (“This Court reviews a district court’s denial of permissive intervention and intervention of right for abuse of discretion but applies a more stringent standard to denials of intervention of right.”) (citation and internal quotation marks omitted); *AT & T Corp.*, 407 F.3d 560, 561 (2d Cir. 2005) (“We review a denial of intervention for abuse of discretion. When a district court denies permissive intervention, our review is particularly deferential.”) (citations and internal quotation marks omitted); *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998) (“Although we review the district court’s

seeking to intervene will usually move for both intervention as of right and permissive intervention.

Under the generally trans-substantive approach of the FRCP,¹¹ these standards are supposed to apply to all federal civil litigation. In other words, the same rules governing intervention apply regardless of the nature of the substantive issues at stake in the litigation or the identity of the parties.

II

THE FEDERAL DEFENDANT RULE

A. *Origins: Portland Audubon v. Hodel*

The Federal Defendant Rule had its roots in the Ninth Circuit's 1989 decision in *Portland Audubon Society v. Hodel*.¹² This case was part of the lengthy and multifaceted dispute that played out in the late 1980s and early 1990s relating to the protection of the northern spotted owl and the management of old growth forests in the Pacific Northwest. In this case, a coalition of environmental organizations sued the Bureau of Land Management (BLM) to halt timber sales in old growth forests near spotted owl nesting sites. They brought claims under several statutes, including NEPA. In particular, the plaintiffs argued that the BLM should have prepared a supplemental environmental impact statement (EIS) for seven timber management plans because of significant new information about the status of the northern spotted owl.¹³

The Northwest Forest Resource Council (NFRC), a timber industry group, moved to intervene as of right as a defendant in the litigation. The district court granted the NFRC's motion as to some of the plaintiffs' claims, but denied it as to the NEPA claim. Citing a Seventh Circuit decision, *Wade v. Goldschmidt*,¹⁴ the district court

intervention decisions for abuse of discretion, that discretion is more circumscribed when Rule 24(a) is in play.") (citations omitted); cf. *Sierra Club v. S.C.*, 945 F.2d 776, 779 (4th Cir. 1991) ("We review the denial of a motion for intervention on abuse of discretion grounds.").

¹¹ See generally David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371 (2010); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377 (2010).

¹² 866 F.2d 302 (9th Cir. 1989).

¹³ *Portland Audubon Soc'y v. Hodel*, 19 Env'tl. L. Rep. 20366 (D. Or. Jan. 29, 1988).

¹⁴ 673 F.2d 182 (7th Cir. 1982).

held that “when the focus of a proceeding is whether governmental bodies charged with compliance with a statute have satisfied the federal statutory procedural requirements in making administrative decisions, the government bodies charged with compliance can be the only defendants.”¹⁵

The NFRC appealed the denial of its motion to intervene and the Ninth Circuit affirmed. The court began by citing the four-part test for deciding motions for intervention as of right, quoted above.¹⁶ The key issue in this case, the court held, was whether the proposed intervenors satisfied the second prong of the test: that they “asserted an interest relating to the property or transaction which is the subject of the action.” As explained by the Supreme Court, this “interest” must be a “significantly protectable interest,”¹⁷ although in the Ninth Circuit it need not be any “specific legal or equitable interest.”¹⁸

The court went on to conclude that the NFRC did not have the requisite “significantly protectable interest” in this case—a holding for which *Portland Audubon* is traditionally cited as the first FDR case. Yet a close reading of the case shows that it did not state this rule clearly. Instead, the court’s decision in *Portland Audubon* was open to multiple interpretations, and these competing visions of the decision would play out over the next twenty years of FDR cases in the Ninth Circuit, culminating in *Wilderness Society*. Generally, there are five possible interpretations of the decision.

1. First Interpretation: Adopting the Wade Rule

The first possible reading of *Portland Audubon* is that it adopted wholesale the *Wade* rule from the Seventh Circuit. Much of the opinion, which quotes *Wade* at length, lends itself to this interpretation. Under the *Wade* approach, any time a suit seeks only to require that a federal agency comply with its procedural duties under a statute, a party other than the agency defendant cannot have a “significantly protectable interest.” Because such a suit cannot compel any particular substantive outcome of the agency’s decision-making process, but merely requires the agency to follow the appropriate procedures, the interests of other actors are simply not implicated. Thus, in *Portland Audubon*, the timber industry group

¹⁵ *Portland Audubon Soc’y*, 19 *Env’tl. L. Rep.* at 20366.

¹⁶ *Portland Audubon Soc’y*, 866 F.2d at 308; *see supra* text accompanying note 8.

¹⁷ *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

¹⁸ *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

could have no cognizable interest in the plaintiffs' NEPA claim. The court could not order the agency to adopt any specific approach to timber sales on BLM lands. Instead, a victory for the plaintiffs would mean only that the BLM had to prepare a supplemental EIS.

2. *Second Interpretation: Prudential Standing for Intervenors*

Under a second interpretation of the decision in *Portland Audubon*, potential intervenors must show that their interests are related to the statute that is the basis for the lawsuit, in a manner akin to the zone of interests test for prudential standing.¹⁹ After quoting *Ward*, the court noted two earlier Ninth Circuit decisions in which the court had granted motions to intervene.²⁰ The difference, according to the court, was that in those cases, the intervenors' interests related "to the interests intended to be protected by the statute at issue."²¹ In *Portland Audubon*, by contrast, the timber industry organization asserted only economic interests: "NEPA provides no protection for the purely economic interests that they assert. Although the intervenors have a significant economic stake in the outcome of the plaintiffs' case, they have pointed to no 'protectable' interest justifying intervention as of right."²²

Despite the obvious similarities between this test and the zone of interests test, the court denied that it was imposing a requirement that

¹⁹ Under this test, the Ninth Circuit had held at the time of *Portland Audubon*, and continues to hold, that a plaintiff asserting purely economic interests does not have standing to bring a case under NEPA. *See, e.g.,* *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dept. of Agric.*, 415 F.3d 1078, 1103 (9th Cir. 2005); *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993); *Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979). Because NEPA is intended to protect environmental interests, a plaintiff asserting only economic interests is not within the zone of interests protected by the statute.

The Supreme Court recently departed from its practice of referring to the zone of interests test as an aspect of prudential standing. Instead, the Court now instructs, "[w]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). This Article nevertheless continues to refer to the zone of interests as one for prudential standing because that was the terminology used by the courts during the time the Ninth Circuit developed and then rejected the Federal Defendant Rule.

²⁰ *Portland Audubon Soc'y*, 866 F.2d at 309 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526–28 (9th Cir. 1983) and *Cnty. of Fresno*, 622 F.2d at 437–38).

²¹ *Id.*

²² *Id.*

“a party seeking to intervene must have standing.”²³ Thus, the court did not require the proposed intervenor to meet the tripartite constitutional test of injury in fact, causation, and redressability. By equating a protectable interest with an interest protected by NEPA, however, the court arguably imported—its protestations to the contrary notwithstanding—the zone of interests aspect of prudential standing into the test for intervention as of right. Indeed, the Ninth Circuit cited *Portland Audubon* for precisely that proposition in an unpublished decision in 1992.²⁴

3. *Third Interpretation: Insufficiently Concrete Interests*

A third possible interpretation of *Portland Audubon* focuses not upon the nature of the proposed intervenors’ interests but on whether they were sufficiently concrete to justify intervention. This interpretation admittedly does not receive much support from the

²³ *Id.* at 308 n.1. The Supreme Court in a 1986 case declined to rule on whether intervenors must demonstrate standing, *see* *Diamond v. Charles*, 476 U.S. 54, 68–69 (1986), and there is currently a circuit split on the issue. Along with the Ninth Circuit, the Second, Fifth, Sixth, Tenth, and Eleventh Circuits have held that an intervenor need not establish standing. *See* *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc); *United States v. Tennessee*, 260 F.3d 587, 595 (6th Cir. 2001); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978). By contrast, the Eighth and D.C. Circuits have held that that an intervenor must independently satisfy both the requirements of Rule 24 and standing. *See In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 976 (D.C. Cir. 2013); *Perry v. Schwarzenegger*, 630 F.3d 898 (9th Cir. 2011); *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009). The Seventh Circuit has avoided ruling on the question by determining that “[a]ny interest of such magnitude [as to support Rule 24(a) intervention of right] is sufficient to satisfy the Article III standing requirement as well.” *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) (quoting *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997)). On the question of whether standing should be required to intervene, *see generally* Elizabeth Zwickert Timmermans, Note, *Has the Bowsher Doctrine Solved the Debate?: The Relationship Between Standing and Intervention as of Right*, 84 NOTRE DAME L. REV. 1411 (2009); Eric S. Oelrich, Note, *The Relationship Between Standing and Intervention: The Tenth Circuit Answers by “Standing” Down*, 14 MO. ENVTL. L. & POL’Y REV. 209 (2006); Kerry C. White, Note, *Rule 24(a) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene*, 36 LOY. L.A. L. REV. 527 (2002); Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 268–72 (2000); Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415.

²⁴ *See* *Salmon River Concerned Citizens v. Robertson*, No. 91-16369, 1992 WL 354225, at *1 (9th Cir. Nov. 30, 1992) (holding that “‘purely economic interests’ are not sufficient for intervention in a NEPA action under *Portland Audubon*”); *cf.* *Or. Envtl. Council v. Or. Dep’t of Envtl. Quality*, 775 F. Supp. 353, 358 (D. Or. 1991) (citing *Portland Audubon* to deny intervention in a Clean Air Act case because “[t]he Act does not provide direct protection for the economic interests of industries that emit pollutants”).

language of the opinion itself. Yet it would not have been an implausible basis for denying intervention on the facts of the case. The only interest that the NFRC identified, according to the district court, was that the companies who made up its constituent industry groups “bid on and purchase timber from lands managed by the BLM.”²⁵ In other words, it is not clear that the NFRC identified any particular timber sale in which its members had a specific property interest such as a permit or contract. As discussed below, some later Ninth Circuit decisions denied intervention on the basis of such “bare expectations.”²⁶

4. Fourth Interpretation: A NEPA-Specific Rule

Fourth, the decision might be understood as standing for a NEPA-specific rule—the eventual form of the FDR. Again, the *Portland Audubon* court itself does not explain its decision in these terms. From the perspective of the interests that regulated parties can assert, there is no logical basis upon which to distinguish NEPA from other statutes that create similar procedural duties for federal agencies. The *Portland Audubon* court went to great trouble to distinguish the facts before it from those in two earlier decisions, *Sagebrush Rebellion, Inc. v. Watt*,²⁷ and *County of Fresno v. Andrus*.²⁸ There would have been no need for the *Portland Audubon* court to distinguish those cases if the fact that the case had been brought under NEPA was of decisive significance. And yet *Portland Audubon* would come to stand for precisely this NEPA-specific rule.

5. Fifth Interpretation: All of the Above

Finally, there is the “all of the above” option. As mentioned earlier, decisions on motions to intervene as of right are highly fact-specific. Given this characteristic of intervention rulings, there is no reason that *Portland Audubon* had to stand for any broader rule at all. Instead, the decision could mean simply that intervention as of right is inappropriate when *all* of the factors implicated by the four rules described above are present: the case involves a government agency’s procedural duties under NEPA and the proposed intervenors represent overly attenuated and non-germane interests. Indeed, it is quite

²⁵ *Portland Audubon Soc’y v. Hodel*, 19 Env’tl. L. Rep. 20366 (D. Or. 1988).

²⁶ See *infra* note 70.

²⁷ 713 F.2d 525 (9th Cir. 1983).

²⁸ 622 F.2d 436 (9th Cir. 1980).

possible that today, even after the FDR has been overturned by *Wilderness Society*, a court in the Ninth Circuit would still decide *Portland Audubon* the same way.

B. The Official History

Over the next twenty years, the history of the Federal Defendant Rule in the Ninth Circuit can be traced in two ways. The first, examined in this section, is the official history of the Rule. The official history is a series of cases that solidified the Rule's status as a *per se* rule—applicable only to NEPA cases, only at the merits stage, and equally to environmental and economic interests. At the same time, however, there was a secret history of the Rule, consisting mostly of district court decisions, which threatened to undermine the Ninth Circuit's attempts to build clarity.

I. Sierra Club v. U.S. Environmental Protection Agency

The first, and most important, step from the ambiguity of *Portland Audubon* toward a NEPA-specific FDR came four years later in *Sierra Club v. U.S. Environmental Protection Agency*,²⁹ a Clean Water Act (CWA) case. In this case, the Sierra Club and an individual alleged that two wastewater treatment plants operated by the City of Phoenix discharged toxic pollutants into the Gila and Salt Rivers and that the EPA should list those rivers as impaired and impose new permit requirements on the plants.³⁰ The City of Phoenix sought to intervene in the litigation. The district court denied the City's motion, citing *Portland Audubon*.

The Ninth Circuit reversed. The court held that this case differed from *Portland Audubon* in three relevant ways. First, the City held existing National Pollutant Discharge Elimination System permits for the plants—"rights protected by law relating to the property which is the subject of the action."³¹ By contrast, the interests asserted by the proposed intervenors in *Portland Audubon* amounted to "a bare expectation, not anything in the nature of real or personal property, contracts, or permits."³² So far, the court's analysis was consistent with the third interpretation of *Portland Audubon* identified above—whether the intervenor's interests were sufficiently concrete.

²⁹ 995 F.2d 1478 (9th Cir. 1993).

³⁰ *Id.* at 1480.

³¹ *Id.* at 1482.

³² *Id.*

Second, the court rejected the plaintiffs' argument that the City should be denied intervention because its interests had no relation to those protected by the CWA. In doing so, the court disavowed the second interpretation of *Portland Audubon*—the zone of interests test. Instead, the *Sierra Club* court held, it is “generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.”³³

Finally, the court announced a new characterization of *Portland Audubon*. For the first time it described that case as announcing a NEPA-specific rule (the fourth possible interpretation as identified above). *Portland Audubon*, the court held, was:

[M]ost plainly distinguished from and reconciled with [other Ninth Circuit] cases by understanding it as a NEPA case. Since NEPA requires only action by the government, no private party can comply with NEPA. It is for that reason that in a lawsuit to compel compliance with NEPA, no one but the federal government can be a defendant.³⁴

The CWA, by contrast, does not primarily regulate the EPA, but instead regulates the behavior of polluters—private individuals, companies, and, of particular relevance in *Sierra Club*, local governments.³⁵

In sum, this decision strengthened two interpretations of *Portland Audubon*: the bare expectation interpretation and the NEPA-only interpretation. Indeed, since *Portland Audubon* itself makes no reference to a NEPA-specific rule, *Sierra Club* arguably marks the true origin of the FDR as subsequently understood. Simultaneously, the decision also undermined another plausible reading of *Portland Audubon*, one requiring a zone of interests showing by intervenors.

³³ *Id.* at 1484. The court also added, however, that the City's interests were in fact protected by the Clean Water Act, “[b]ecause the Act protects the interest of a person who discharges pollutants pursuant to a permit, and the City of Phoenix owns such permits.” *Id.* at 1485-86. The court thus overruled decisions like *Oregon Environmental Council v. Oregon Department of Environmental Quality*, 775 F. Supp. 353 (D. Or. 1991), which—citing *Portland Audubon*—had denied intervention as of right to several companies under the Clean Air Act (CAA) because the CAA “does not provide direct protection for the economic interests of industries that emit pollutants.” *Id.* at 358.

³⁴ 995 F.2d at 1485.

³⁵ *Id.*

2. Forest Conservation Council v. U.S. Forest Service

The next FDR case was *Forest Conservation Council v. U.S. Forest Service*.³⁶ This case emphasized the Rule's focus on an agency's procedural duties by adding the refinement that the Rule prohibited intervention only at the merits stage of a case. Under *Forest Conservation Council*, third parties were free to intervene in NEPA cases with respect to the remedial portion of the case.

The case involved a challenge by several environmental groups to the Forest Service's failure to complete an EIS for its "guidelines for the management of Northern Goshawk habitat on national forest lands."³⁷ The State of Arizona and an Arizona county sought to intervene as defendants. The district court denied their motion to intervene, relying on *Sierra Club's* characterization of *Portland Audubon* as barring intervention in NEPA cases.

Most of the Ninth Circuit's decision on appeal reads as a renunciation of the FDR. The court emphasized that, like the City of Phoenix in *Sierra Club* and in contrast to the timber industry group in *Portland Audubon*, "the State and County have asserted tangible, concrete rights protected by various federal and state laws, as well as contracts with the federal government."³⁸ The injunction sought by the plaintiffs implicated those rights and contracts. As a result, the court held that "when, as here, the injunctive relief sought by plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests, that party satisfies the 'interest' test of [FRCP] 24(a)(2)."³⁹ As a result, the court allowed the State and County to intervene "in the portion of the proceedings addressing the injunctive relief sought by plaintiffs."⁴⁰

Almost as an afterthought—in a footnote at the very end of the opinion—the court denied intervention at the merits stage. After devoting six pages to explaining in great detail how much the outcome of the lawsuit would affect the concrete interests of the intervenors, the court's entire discussion of intervention at the merits stage was:

"Appellants cannot claim any interest that relates to the issue of the Forest Service's liability under NEPA and [the National Forest

³⁶ 66 F.3d 1489 (9th Cir. 1995).

³⁷ *Id.* at 1491.

³⁸ *Id.* at 1495.

³⁹ *Id.* at 1494.

⁴⁰ *Id.* at 1499.

Management Act]. In that respect, we agree with *Sierra Club's* statement that 'in a lawsuit [only] to compel compliance with NEPA, no one but the federal government can be a defendant.'"⁴¹

Three key points emerged from *Forest Conservation Council*. First, it indicated that the FDR did not apply at the remedial stage of a case. Second, it reaffirmed the vitality of the Rule at the merits stage, even applying it to a claim implicating procedural duties under the National Forest Management Act (NFMA). Both of these changes emphasized the Rule's focus on an agency's purely procedural duties. Third, it demonstrated that even at the remedial stage, a proposed intervenor must show that the remedy implicated its concrete rights or contracts. Thus the concreteness interpretation of *Portland Audubon* lived on. However, at the merits stage, such an interest was not sufficient to allow intervention.

3. Churchill County v. Babbitt

The next Ninth Circuit decision to address the Rule, *Churchill County v. Babbitt*,⁴² emphasized its NEPA-specific nature and held that it had become a bright-line rule rather than a multi-factor test. This case involved a challenge by several Nevada municipalities to a Department of the Interior water rights acquisition program. The plaintiffs argued that the Department should have prepared a programmatic EIS before starting the program.⁴³ A local power utility, the Sierra Pacific Power Company, moved to intervene as a defendant. The district court granted the motion in part, limiting Sierra Pacific's intervention to the remedial phase.⁴⁴

On appeal, the Ninth Circuit affirmed. The result followed as a pure matter of precedent:

The district court relied on our rule that the federal government is the only proper defendant in an action to compel compliance with NEPA. The rationale for our rule is that, because NEPA requires action only by the government, only the government can be liable under NEPA. A private party cannot "comply" with NEPA, and, therefore, a private party cannot be a defendant in a NEPA compliance action.⁴⁵

⁴¹ *Id.* at 1499 n.11 (quoting *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1485 (9th Cir. 1993)).

⁴² 150 F.3d 1072 (9th Cir. 1998).

⁴³ *Id.* at 1076.

⁴⁴ *Id.* at 1077.

⁴⁵ *Id.* at 1082 (citations omitted).

And that was that.

4. Wetlands Action Network v. U.S. Army Corps of Engineers

One issue that *Churchill County* left unaddressed was whether the nature of the intervenor's interest mattered at all. The court did not describe this interest. The parties' briefs, however, make it clear that what was at stake was not a direct interference with any existing permit or contractual right, but rather the potential impact of the decision on the utility's future plans for "restructuring the present upstream storage and water allocation regime now in place" on the Truckee River.⁴⁶ *Churchill County* thus potentially left open the question whether a more direct interest in the case would suffice for intervention on the merits. Furthermore, even though *Forest Conservation Council* had involved intervenors with more direct interests, the court's cursory treatment of intervention as to the merits must have left some potential intervenors with the hope that if a contractual right or permit was implicated with sufficient directness then the outcome would be different.

*Wetlands Action Network v. U.S. Army Corps of Engineers*⁴⁷ put to rest any such hopes. In that case, two environmental organizations challenged the Army Corps of Engineers' decision to issue an Environmental Assessment and Finding of No Significant Impact, rather than an EIS, in connection with the issuance of a dredge-and-fill permit under section 404 of the CWA.⁴⁸ The recipient of the permit moved to intervene.⁴⁹ Citing the FDR, the district court limited the permit holder's intervention to the remedial phase with respect to the plaintiffs' NEPA claims.⁵⁰

The Ninth Circuit affirmed. The permit holder argued that the FDR did "not apply to NEPA actions involving an attack upon a permit issued to a private party."⁵¹ The court found no such exception in its precedents and, citing *Churchill County*, upheld the district court's denial of intervention at the merits stage of the NEPA claim.⁵² Therefore, by the time of *Churchill County* and *Wetlands Action*

⁴⁶ Brief for Plaintiffs-Appellees at 19, *Churchill v. Babbitt*, 150 F.3d 1072 (9th Cir. 1998) (No. 97-15813), 1997 WL 33550630 at *19.

⁴⁷ 222 F.3d 1105 (9th Cir. 2000).

⁴⁸ *Id.* at 1109.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1113.

⁵¹ *Id.* at 1114.

⁵² *Id.*

Network, the FDR had been clearly established as a rule that applied regardless of the concreteness of the interests represented by the intervenors.

5. *Kootenai Tribe of Idaho v. Veneman: The Federal Defendant Rule for the Gander*

In the vast majority of NEPA cases, the plaintiffs are environmental organizations and the proposed defendant-intervenors are entities with economic interests that might be harmed by the outcome of the plaintiffs' suit. All of the Ninth Circuit's FDR cases before 2002 followed this pattern.⁵³ One reason the cases are skewed in this direction is that plaintiffs asserting only economic interests fail the zone of interests test for prudential standing under NEPA.⁵⁴ Over time, however, anti-environmental plaintiffs have grown more successful at bringing cases under the federal environmental laws, including NEPA.⁵⁵ One successful strategy is to assert, for standing purposes, environmental interests in conjunction with economic ones in order to challenge federal agencies' compliance with NEPA in carrying out environmentally protective actions.⁵⁶ Thus, for example, plaintiffs who want to challenge a Forest Service decision that restricts timber harvesting can argue that the action will result in more insect infestations and forest fires.⁵⁷

⁵³ As a result, one commentator criticized the Ninth Circuit's FDR cases as creating a "substantial disadvantage" for business interests, arguing that it left them "virtually powerless to defend their interests." Erik Figlio, Note, *Stacking the Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation*, 35 GA. L. REV. 1219, 1243 (2001).

⁵⁴ See, e.g., *Am. Independence Mines & Minerals Co. v. U.S. Dep't of Agric.*, 494 F. App'x 724, 727 (9th Cir. 2012), cert. denied, 133 S. Ct. 2766 (2013).

⁵⁵ See Stephanie D. Matheny, *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, 1069 (2003) ("The *Kootenai* case is a prominent example of a recent litigation trend in which parties opposed to conservation-oriented plans and endangered species protections have used NEPA and other federal environmental statutes to challenge these programs in court.").

⁵⁶ See Shaun A. Goho, *NEPA and the "Beneficial Impact" EIS*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 367, 395-96 (2012) (citing cases).

⁵⁷ See, e.g., *Cal. Forestry Ass'n v. Bosworth*, No. 2:05-cv-00905-MCE-GGH, 2008 WL 4370074, at *12 (E.D. Cal. Sept. 24, 2008) (finding that timber industry groups had prudential standing to bring a NEPA challenge to a forest plan amendment because they identified potential harms to privately-owned forests adjacent to federal land as a result of allegedly inadequate thinning of overly dense national forests).

One example of such a “NEPA for the Gander”⁵⁸ suit was *Kootenai Tribe of Idaho v. Veneman*,⁵⁹ in which an Indian tribe, a pulp-and-paper company, off-road vehicle users, livestock companies, and two Idaho counties challenged the Clinton administration’s “Roadless Rule,” which had restricted development in 58.5 million acres of National Forest land.⁶⁰ Several environmental organizations, among them the Sierra Club, Natural Resources Defense Council (NRDC), Wilderness Society, and Defenders of Wildlife, moved to intervene to defend the rule.⁶¹

The district court granted the motion, relying on *Sagebrush Rebellion, Inc. v. Watt*,⁶² a pre-*Portland Audubon* case in which environmental groups had been granted intervention as of right to defend the Secretary of the Interior’s decision to remove certain public lands from entry. As indicated above, *Portland Audubon* had distinguished *Sagebrush Rebellion* on the ground that “[t]he intervenors’ claim here, unlike those made in *Sagebrush Rebellion* . . . , has no relation to the interests intended to be protected by the statute at issue.”⁶³ The district court in *Kootenai Tribe* noted that *Sagebrush Rebellion* had not been overruled, and that “[t]he environmental, conservation and wildlife interests asserted by [the intervenors] are necessarily related to the interests intended to be protected by the NEPA.”⁶⁴

On appeal, the Ninth Circuit reversed as to intervention as of right under FRCP 24(a). In one paragraph, it rejected intervention as of right as a straight matter of precedent: “We read our precedent to hold that the private intervenors in this NEPA action may not intervene as of right.”⁶⁵ That the intervenors asserted environmental interests rather than economic ones—which the Ninth Circuit had found

⁵⁸ Jonathan M. Cosco, Note, *NEPA for the Gander: NEPA’s Application to Critical Habitat Designations and Other “Benevolent” Federal Action*, 8 DUKE ENVTL. L. & POL’Y F. 345 (1998).

⁵⁹ 313 F.3d 1094 (9th Cir. 2002) (*abrogated by* *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)).

⁶⁰ *Id.* at 1104. The plaintiffs satisfied the zone of interests test because they asserted that land they owned adjacent to national forests would be at greater risk of wildfires and insect infestations as a result of the Roadless Rule. *Id.* at 1112–14.

⁶¹ *Id.* at 1106 & n.5.

⁶² 713 F.2d 525 (9th Cir. 1983).

⁶³ *Portland Audubon Soc’y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 2011).

⁶⁴ *Kootenai Tribe of Idaho v. Veneman*, No. CV01-10-N-EJL, slip op. at 6 (D. Idaho Mar. 14, 2001).

⁶⁵ *Kootenai Tribe of Idaho*, 313 F.3d at 1108.

dispositive in *Sagebrush Rebellion*—was no longer of any consequence. The court did, however, uphold the district court’s alternative ruling in which it granted permissive intervention under FRCP 24(b).⁶⁶

6. *The Lay of the Land: 2002–2011*

After *Kootenai Tribe*, the development of the FDR was complete. Out of the five possible interpretations of *Portland Audubon*, only one was left standing: a rule that prohibited intervention as of right by any and all proposed intervenors in NEPA—and only NEPA—cases.⁶⁷ The court’s repeated descriptions of the FDR as a NEPA-specific rule were inconsistent with the *Wade* rule.⁶⁸ The zone of interests interpretation died in *Kootenai Tribe*, in which environmental organizations that would clearly have had prudential standing to bring a NEPA claim were denied intervention as of right.⁶⁹ Similarly, the court rejected the concrete interests interpretation in *Wetlands Action Network*, in which a section 404 permit holder was denied intervention as of right in a case challenging the Corps’ compliance with NEPA in issuing the permit.⁷⁰ The “all of the above” approach

⁶⁶ *Id.* at 1110–11.

⁶⁷ At the same time, *Kootenai Tribe* softened the impact of the Rule. By upholding the district court’s grant of permissive intervention, the court left open a path for intervention even in cases in which the Federal Defendant Rule applied. Yet, because appellate review of permissive intervention decisions is so deferential, *see supra* note 10, this approach left potential intervenors’ fates entirely to the discretion of the trial court judge.

⁶⁸ *See, e.g., Sierra Club v. U.S. EPA*, 995 F.2d at 1485; *Kootenai Tribe of Idaho*, 313 F.3d at 1108.

⁶⁹ In an unpublished decision a year after *Kootenai Tribe*, the Ninth Circuit reversed a district court’s grant of intervention as of right to the Sierra Club in a NEPA case. *Alaska Forest Ass’n v. U.S. Dep’t of Agric.*, 66 Fed. App’x. 716, 717 (9th Cir. 2003) (unpublished decision).

⁷⁰ Independently of the Federal Defendant Rule, however, the Ninth Circuit continued to distinguish between “bare expectations,” which do not support intervention as of right, and property rights such as contracts or permits, which do. *See, e.g., United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) *modified*, 307 F.3d 943 (9th Cir. 2002) and *certified question answered sub nom.* *S. Cal. Edison Co. v. Peevey*, 31 Cal. 4th 781, 74 P.3d 795 (2003); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agric.*, 143 Fed. App’x 751, 753 (9th Cir. 2005) (“[P]ure economic expectancy is not a legally protected interest for purposes of intervention.”) (unpublished opinion); *see also* *Med. Protective Co. v. Pang*, No. CV 05-2924-PHX-SMM, 2006 WL 1544192, at *4 (D. Ariz. June 1, 2006). Similarly, in an unpublished 1995 decision, the Ninth Circuit denied a motion to intervene at the remedial stage of an ESA case, distinguishing *Forest Conservation Council* because “the interim injunctive relief in this case, if granted, is not

was also incompatible with the Ninth Circuit's application of the FDR as a *per se* rule that it applied as a pure matter of precedent.⁷¹

C. *The Secret History*

Even as the Ninth Circuit appeared to move inexorably toward this understanding of the Federal Defendant Rule, a large number of district court decisions, and even some decisions of the Ninth Circuit itself, tugged the doctrine in different directions. In so doing, these decisions revealed the tensions underlying the Rule.

In particular, three kinds of inconsistencies arose in these cases. First, some cases extended the FDR to non-NEPA cases, while others did not. Second, some cases looked beyond the NEPA/non-NEPA distinction and divided applicable claims from non-applicable based on other tests, such as whether the claims were procedural or substantive. Third, some cases treated application of the Rule as an all-or-nothing decision under which proposed intervenors could either join a case as to all claims or as to none of them, while other cases applied the Rule to deny intervention as to only some of the plaintiffs' claims.

1. *Expansion of the Rule to Non-NEPA Cases.*

As for the first issue, throughout the 1990s and 2000s, district courts in the Ninth Circuit citing the FDR regularly denied motions to intervene in cases brought under a variety of other environmental statutes, including the Endangered Species Act (ESA),⁷² Clean Air

likely to impose direct, substantial burdens on appellants' asserted interests." *Silver v. Babbitt*, No. 95-15401, 1995 WL 597667, at *2 (9th Cir. Oct. 10, 1995).

⁷¹ The only potential remaining confusion was between a NEPA-only rule and one prohibiting intervention in all cases involving a federal agency's procedural duties. Although *Sierra Club* had distinguished *Portland Audubon* on the ground that the latter was "a NEPA case," *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1485 (9th Cir. 1993), the court had later made a fleeting reference to the plaintiffs' NFMA claim in *Forest Conservation Council*. Yet, this passing remark aside, every one of the Ninth Circuit's Federal Defendant Rule cases had involved a NEPA claim.

⁷² See, e.g., *Ctr. for Biological Diversity v. Lubchenco*, No. 09-04087 EDL, 2010 WL 1038398, at *3-*5 (N.D. Cal. Mar. 19, 2010); *WildEarth Guardians v. Salazar*, No. CV-09-00574-PHX-FJM, 2009 WL 4270039, at *2 (D. Ariz. Nov. 25, 2009) (denying intervention in ESA case); *Or. Nat. Desert Ass'n v. Lohn*, Civil No. 06-946-KI, 2006 WL 3762119, at *2 (D. Or. Dec. 20, 2006) ("I find that because the federal agencies are the only entities charged with compliance under Section 7 of the ESA, only NMFS and the FWS are the proper defendants for purposes of Rule 24(a) intervention as of right."); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 82 F. Supp. 2d 1070, 1074 (D. Ariz. 2000) (denying intervention as of right by private parties in ESA case); *Silver v. Babbitt*,

Act,⁷³ Plant Protection Act,⁷⁴ NFMA,⁷⁵ and other statutes governing federal land management.⁷⁶ During the same period, however, district courts also granted motions to intervene as of right in other cases brought against federal defendants under many of the same statutes.⁷⁷ Indeed, some of these cases even involved NEPA claims.⁷⁸

166 F.R.D. 418, 428 (D. Ariz. 1994) (“FWS’s duty under the ESA to identify critical habitat for the Mexican Spotted Owl is analogous to the government’s duty to prepare an environmental impact statement under the NEPA The applicants’ economic interests are not entitled to legal protection in a suit, such as this one, to force a federal agency to comply with governmental duties under an environmental law.”).

⁷³ See *Protect Lake Pleasant, LLC v. Johnson*, No. CIV 07-454 PHX RCB, 2007 WL 1108916, at *2 (D. Ariz. Apr. 13, 2007) (finding the Federal Defendant Rule “to be equally applicable to Plaintiffs’ [Federal Property and Administrative Services Act] and [Clean Air Act] claims”); cf. *Our Children’s Earth Foundation v. U.S. EPA*, No. C 05-05184, 2006 WL 1305223, at *3–*4 (N.D. Cal. May 11, 2006) (denying motion to intervene of the American Petroleum Institute and the National Petrochemical and Refiners Association in a suit challenging EPA’s failure to revise New Source Performance Standards within eight-year deadline because they had no protectable interest in “whether the Administrator will review the rules and by when he will act on the findings of his review”).

⁷⁴ See *Ctr. for Food Safety v. Vilsack*, No. C10-04038 JSW, 2010 WL 3835699, at *2, *6 (N.D. Cal. Sept. 28, 2010) (denying intervention of right in a case involving NEPA claims as well as claims under the Plant Protection Act and the 2008 Farm Bill); *Ctr. for Food Safety v. Connor*, No. C 08-00484 JSW, 2008 WL 3842889, at *3 (N.D. Cal. Aug. 15, 2008) (“The Court finds that the rationale underlying the denial of intervention as of right with respect to Plaintiffs’ NEPA claim applies equally to Plaintiffs’ PPA claim. Because only the government can comply with the PPA, the Proposed Intervenors do not have a significant protectable interest in the merits phase of this environmental compliance claim.”).

⁷⁵ See *Ctr. for Tribal Water Advocacy v. Gutierrez*, No. 06-CV-708-SU, 2007 WL 527932, at *2 (D. Or. Feb. 12, 2007) (holding that the FDR “applies to plaintiff’s claims under ESA and NFMA”); *Sequoia Forestkeeper v. U.S. Forest Serv.*, No. 1:07cv1690 LJO DLB, 2008 WL 324013, at *3–*4 (E.D. Cal. Feb. 5, 2008); *Sierra Nevada Forest Prot. Campaign v. Tippin*, No. CIV.S-06-00351FCDDAD, 2006 WL 1319397, at *4 (E.D. Cal. May 15, 2006) (“Like NEPA, NFMA requires only action by the government As such, under the Ninth Circuit’s rationale, only the government can be a defendant in a NFMA compliance action.”). The Ninth Circuit itself, in *Forest Conservation Council*, had in passing applied the Federal Defendant Rule to a NFMA claim. See 66 F.3d 1489, 1499 n.11 (9th Cir. 1995).

⁷⁶ See *Or. Natural Desert Ass’n v. Shuford*, No. CIV 06-242-AA, 2006 WL 2601073, at *3–*4, *6–*7 (D. Or. Sept. 8, 2006) (denying motions to intervene as to claims brought under NEPA, the Federal Land Policy and Management Act (FLPMA), the Public Rangelands Improvement Act (PRIA), the Taylor Grazing Act of 1934, and the Steens Mountain Cooperative Management and Protection Act of 2000 because “the statutory provisions that form the basis of plaintiff’s claims . . . regulate only the actions of the federal government”).

⁷⁷ See *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 266 F.R.D. 369 (D. Ariz. 2010) (ESA and NEPA); *Greater Yellowstone Coal. v. Timchak*, No. CV–08–388–E–MHW, 2008 WL 4911410 (D. Idaho Nov. 13, 2008) (CWA, NFMA, Mineral Leasing Act, and NEPA); *Ctr. for Biological Diversity v. Kempthorne*, No. C 08-1339 CW, 2008

As an initial matter, these decisions reveal that the Ninth Circuit's presentation of the FDR as a NEPA-specific doctrine breaks down as soon as you look at the district court cases. It is understandable, however, that many district courts extended the Rule to non-NEPA cases, given the justifications the Ninth Circuit had provided for the Rule. For example, in one case, a district court denied a motion to intervene at the merits stage filed by the Arizona Cattle Growers' Association in a case involving the Forest Service's alleged violation of the ESA in issuing grazing permits. The court held that:

The heart of this legal battle is whether the Forest Service has performed its duty to consult in connection with the issuance of certain grazing permits. Because only the Forest Service can "comply" with this duty, only the Forest Service can and should be a defendant for the liability phase of the litigation.⁷⁹

As a matter of logic, the court's position seems unassailable. The Ninth Circuit's stated rationale for the Rule applied equally to cases brought to enforce federal agencies' procedural duties under other environmental laws. Nevertheless, as indicated above, in many other cases, courts refused to apply the Rule and allowed defendant-intervenors into environmental cases. Whether courts were able to arrive at a principled basis for making this distinction is the next issue raised by these cases.

2. *Grounds for Distinguishing FDR from non-FDR Cases.*

Those district court decisions that applied the FDR to non-NEPA claims distinguished—either explicitly or implicitly—between cases

WL 3822948 (N.D. Cal. Aug. 13, 2008) (NEPA and APA); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. CIV. S-06-2845 LKK/JFM, 2007 WL 3034887 (E.D. Cal. Oct. 16, 2007) (ESA); *Modesto Irrigation Dist. v. Gutierrez*, No. CIV-F-06-00453 OWW DLB, 2007 WL 164953, at *1 (E.D. Cal. Jan. 18, 2007) (ESA); *Cal. State Grange v. Nat'l Marine Fisheries Serv.*, No. 1:06-CV-00308 OWW DLB, 2006 WL 3147681 (E.D. Cal. Nov. 1, 2006) (ESA); *Home Builders Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-629 LKK/GGH, 2006 WL 1455430 (E.D. Cal. May 24, 2006) (ESA); *Med. Advocates for Healthy Air v. Johnson*, No. C 06-0093 SBA, 2006 WL 581089 (N.D. Cal. Mar. 6, 2006) (CAA); *Natural Res. Def. Council v. Norton*, No. 1:05CV01207 OWW TAG, 2006 WL 39094 (E.D. Cal. Jan. 5, 2006) (ESA); *Cal. State Grange v. Evans*, No. 02-6044-HO, 2002 U.S. Dist. LEXIS 27696 (D. Or. May 9, 2002) (ESA); *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110 (D. Haw. 2000) (ESA and NEPA); *Forest Guardians v. Thomas*, 967 F. Supp. 1536 (D. Ariz. 1997) (NFMA).

⁷⁸ See *Ctr. for Biological Diversity*, 266 F.R.D. at 369; *Ctr. for Biological Diversity*, 2008 WL 3822948; *Greenpeace*, 122 F. Supp. 2d at 1110.

⁷⁹ *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 82 F. Supp. 2d 1070, 1074 (D. Ariz. 2000).

to which the Rule did or did not apply in at least three different ways. First, some cases applied the Rule to claims regarding an agency's procedural duties, while refusing to apply it to claims involving an agency's substantive duties. Second, some cases drew the line between claims involving statutory provisions that regulate only federal agencies and those involving statutory provisions that also regulate private conduct. Third, some cases refused to apply the Rule when the plaintiffs had sued a state or local agency in addition to a federal agency. To further confuse matters, some cases involved two or more of these considerations.

First, some cases granting intervention specifically drew a distinction between substantive and procedural claims, granting motions to intervene as to substantive claims. For example, in one case in which the plaintiffs claimed that the National Marine Fisheries Service's (NMFS) decision to list a species under the ESA was arbitrary and capricious, the court noted that the "applicants seek to intervene not only with respect to a challenge to agency procedures, but also to the substantive listing decision. As such the applicants have a significantly protectable interest that warrants intervention."⁸⁰ In another case, the court distinguished the Ninth Circuit's FDR cases, explaining that: "The Ninth Circuit's special approach to intervention in NEPA cases does not extend to claims alleging violations of other environmental laws, at least where the claims challenge the substance of a decision made under the laws rather than the government's failure to take an action mandated by the laws."⁸¹ A number of other cases arrived at this result, but without explicitly invoking the dichotomy between substance and procedure or even citing the Rule.⁸²

Other cases, however, cannot be explained by a distinction between substance and procedure. Either they granted intervention to contest procedural claims or they denied intervention to contest substantive

⁸⁰ *Cal. State Grange*, 2002 U.S. Dist. LEXIS 27696, at *6.

⁸¹ *Ctr. for Biological Diversity*, 2008 WL 3822948, at *3.

⁸² *See, e.g., Ctr. for Biological Diversity*, 266 F.R.D. at 373, 375; *Modesto Irrigation Dist.*, 2007 WL 164953, at *1-*2; *Cal. State Grange*, 2006 WL 3147681, at *3-*4; *Greenpeace Foundation*, 122 F. Supp. 2d at 1114-15 (granting intervention as to substantive ESA and NEPA claims); *see also* *Our Children's Earth Foundation, v. U.S. EPA*, No. C 05-05184 WHA, 2006 WL 1305223, at *2-*3 (N.D. Cal. May 11, 2006), (denying intervention as of right in case alleging that EPA had failed to perform its nondiscretionary duty to review emissions standards for existing petroleum refineries because "[t]he substantive content of any new regulations is not . . . a subject of this lawsuit;" "[i]t concerns instead a process: the agency review of the regulations").

claims. In particular, these cases defined the class of cases to which the FDR applied more broadly to include any claim that could be brought only against a federal agency.

A 2010 decision, for example, denied a motion to intervene as of right by the State of Alaska in a case challenging NMFS's failure to list the ribbon seal as threatened or endangered under the ESA.⁸³ The plaintiffs in that case challenged the substantive adequacy of NMFS's listing decision.⁸⁴ The court nevertheless relied upon the Rule as one reason to deny intervention, highlighting that the "[p]laintiffs' sole claim is that [the d]efendants acted unlawfully in making their listing determination under Section 4 of [the] ESA, a provision that does not even apply to the activities of private parties."⁸⁵ In another case, which challenged the adequacy of three biological opinions, the court denied a motion to intervene, finding "that because the federal agencies are the only entities charged with compliance under Section 7 of the ESA, only NMFS and the [Fish and Wildlife Service] are the proper defendants for purposes of [FRCP] 24(a) intervention as of right."⁸⁶

This approach could lead to results inconsistent with those in the cases that relied on the substance/procedure dichotomy. For example, consider a case challenging an ESA listing decision. In several such cases, district courts granted motions to intervene, relying on the characterization of plaintiffs' claims as substantive.⁸⁷ Under an approach that focused on whether a claim could be brought only against a federal agency, however, these intervention motions would have been denied—as occurred in the ribbon seal case mentioned in the previous paragraph.

⁸³ *Ctr. for Biological Diversity v. Lubchenco*, No. 09-04087 EDL, 2010 WL 1038398, at *1 (N.D. Cal. Mar. 19, 2010). The court granted permissive intervention, but only as to remedy. *Id.* at *11.

⁸⁴ *See Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945 (N.D. Cal. 2010).

⁸⁵ *Ctr. for Biological Diversity*, 2010 WL 1038398, at *3.

⁸⁶ *Or. Natural Desert Ass'n v. Lohn*, Civil No. 06-946-KI, 2006 WL 3762119, at *2 (D. Or. Dec 20, 2006); *see also Or. Natural Desert Ass'n v. Shuford*, No. CIV 06-242-AA, 2006 WL 2601073, at *3-*4 (D. Or. Sept. 8, 2006) (denying intervention because "the statutory provisions that form the basis of plaintiff's claims—NEPA, FLPMA, PRIA, the Taylor Grazing Act, and the Steens Act—regulate only the actions of the federal government.").

⁸⁷ *See, e.g., Cal. State Grange v. Evans*, No. 02-6044-HO, 2002 U.S. Dist. LEXIS 27696, at *6 (D. Or. May 9, 2002).

Finally, some cases concluded that the Rule did not apply when the original defendants in the case included entities other than federal agencies. For example, two district court decisions, in denying intervention based on the FDR, distinguished the cases before them (in which the only defendants were federal agencies) from a case in which “[a] non-federal defendant’s compliance with the ESA was . . . directly at issue,”⁸⁸ or “the case . . . was not limited to the compliance of the federal government.”⁸⁹

3. *All or Nothing?*

Cases such as these, which distinguished between claims to which the FDR applied and those to which it did not, raised a third issue: whether the Rule applied claim-by-claim. Should intervention be denied under the FDR as to certain claims even if the applicant was granted intervention as to other claims, to which the Rule did not apply? On this issue, too, the district court cases were divided.

Some analyzed motions to intervene on a claim-by-claim basis. In a particularly clear example of this approach, a 2008 decision out of the Northern District of California granted motions to intervene as to the plaintiffs’ substantive ESA and Marine Mammal Protection Act claims, but denied them as to a NEPA claim and an Administrative Procedure Act (APA) claim, alleging that the defendants had improperly promulgated a rule without following notice-and-comment procedures.⁹⁰ This was, of course, the approach that the district court had followed in *Portland Audubon*.⁹¹

Others, however, allowed intervention as to all claims as long as there were at least some claims to which the Rule did not apply. Thus, one district court decision observed that, “[i]n an action brought *solely under NEPA*, private parties may not intervene as of right in the

⁸⁸ *Or. Natural Desert Ass’n*, 2006 WL 3762119, at *3.

⁸⁹ *Ctr. for Food Safety v. Connor*, No. C 08-00484 JSW, 2008 WL 3842889, at *2 (N.D. Cal. Aug. 15, 2008).

⁹⁰ *Ctr. for Biological Diversity v. Kempthorne*, No. C 08-1339 CW, 2008 WL 3822948, at *4 (N.D. Cal. Aug. 13, 2008); *see also* *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1109 (9th Cir. 2000) *abrogated by* *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011) (reviewing district court decision that had granted intervention as of right as to Clean Water Act claims but denied it as to NEPA claims).

⁹¹ *Portland Audubon Soc’y v. Hodel*, 866 F.2d 302 (9th Cir. 1989) (affirming district court decision that had denied intervention as to NEPA claim while granting intervention as to other claims).

merits phase of a proceeding.”⁹² The court went on to conclude that “[h]ere, however, Plaintiffs’ claims *also involve* substantive violations under the [CWA] and [NFMA] in addition to the NEPA procedural violations” and therefore granted the motion to intervene as a whole.⁹³ Most cases arriving at this result were not so explicit in their reasoning; instead, these decisions simply granted motions to intervene in cases involving substantive claims and/or additional, non-federal defendants while citing non-FDR Ninth Circuit precedents.⁹⁴

4. *Ninth Circuit Origins*

Despite the apparent clarity of the Ninth Circuit case law, as described above, at least some of the confusion reflected in these district court cases can be traced back to decisions of the Ninth Circuit from this period. Take the first issue—whether the FDR applies only to NEPA claims. On the one hand, the court repeatedly described the Rule as applying specifically to NEPA.⁹⁵ On the other, the court extended the Rule to a NFMA claim in a footnote in *Forest Conservation Council*.⁹⁶

On the second issue—how to distinguish between claims to which the Rule applied or did not apply—the Ninth Circuit again sent conflicting signals. A number of its FDR precedents highlighted the fact that only government agencies can be sued under NEPA.⁹⁷ This

⁹² *Greater Yellowstone Coal., v. Timchak*, No. CV-08-388-E-MHW, 2008 WL 4911410, at *3 n.1 (D. Idaho Nov. 13, 2008) (emphasis added).

⁹³ *Id.* (emphasis added).

⁹⁴ *See, e.g., S. Yuba River Citizens League, v. Nat’l Marine Fisheries Serv.*, No. CIV. S-06-2845 LKK/JFM, 2007 WL 3034887, at *13–*14 (E.D. Cal. Oct. 16, 2007); *Cal. State Grange v. Nat’l Marine Fisheries Serv.*, No. 1:06-CV-00308 OWW DLB, 2006 WL 3147681, at *2 (E.D. Cal. Nov. 1, 2006); *Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-629 LKK/GGH, 2006 WL 1455430, at *3, *4 (E.D. Cal. May 24, 2006).

⁹⁵ *See, e.g., Wetlands Action Network*, 222 F.3d at 1114 (9th Cir. 2000) (“As a general rule, ‘the federal government is the only proper defendant in an action to compel compliance with NEPA.’”) (quoting *Churchill Cnty. v. Babbitt*, 150 F.3d 1072, 1082 (9th Cir. 1998); *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1485 (9th Cir. 1993) (“*Portland Audubon* is most plainly distinguished from and reconciled with these cases by understanding it as a NEPA case.”).

⁹⁶ 66 F.3d 1489, 1499 n.11 (9th Cir. 1995).

⁹⁷ *See Churchill Cnty.*, 150 F.3d at 1082 (“The rationale for our rule is that, because NEPA requires action only by the government, only the government can be liable under NEPA. A private party cannot ‘comply’ with NEPA and, therefore, a private party cannot be a defendant in a NEPA compliance action.”); *accord Kootenai Tribe of Idaho v.*

rationale does not appear to distinguish between procedural and substantive claims. And if one looks at the specific claims raised in these cases, at least some of them appear to be better characterized as substantive than procedural. In *Churchill County and Forest Conservation Council*, the plaintiffs challenged the defendants' failure to prepare an EIS or programmatic EIS,⁹⁸ a claim that seems procedural in nature. *Kootenai Tribe*, however, involved both procedural claims (whether the agency had complied with the APA's notice and comment requirements) and substantive ones (whether the conclusions in the agency's EIS were arbitrary and capricious).⁹⁹

In a 1995 case, by contrast, the Ninth Circuit emphasized the distinction between substantive and procedural claims, concluding that it was appropriate to allow intervention as of right for substantive claims. The case, *Idaho Farm Bureau Federation v. Babbitt*,¹⁰⁰ involved a challenge to the Fish and Wildlife Service's (FWS) decision to list the Bruneau Hot Springs Snail as endangered under the ESA. Two environmental organizations, Idaho Conservation League and Committee for Idaho's High Desert, moved to intervene as of right. The district court granted the motion and the Ninth Circuit affirmed.¹⁰¹ In doing so, the court emphasized that, although the plaintiff had appealed only the district court's decision on its procedural claim, it had originally brought both procedural and substantive claims. Thus, the court concluded, the intervenors "were not seeking intervention in a case challenging only agency procedure."¹⁰²

Idaho Farm Bureau is also relevant to the final issue—whether a court should deny intervention only when the FDR would bar intervention as to all of the plaintiffs' claims, or whether a court should use the Rule to deny intervention only as to the subset of claims to which it was applicable. As indicated above, *Idaho Farm Bureau* allowed intervention as to all claims, as long as some of them were substantive.

Veneman, 313 F.3d 1094, 1198 (9th Cir. 2002); *Wetlands Action Network*, 222 F.3d at 1114.

⁹⁸ *Churchill Cnty.*, 150 F.3d at 1076; *Forest Conservation Council*, 66 F.3d at 1491.

⁹⁹ *Kootenai Tribe of Idaho*, 313 F.3d at 1115–24.

¹⁰⁰ 58 F.3d 1392 (9th Cir. 1995).

¹⁰¹ *Id.* at 1395, 1397–98.

¹⁰² *Id.* at 1398 n.3.

In a similar vein was a 2001 decision, *Southwest Center for Biological Diversity v. Berg*.¹⁰³ The case involved several procedural and substantive ESA claims brought against the FWS, the Department of the Interior, the U.S. Army Corps of Engineers, and the City of San Diego.¹⁰⁴ The court focused on the directness of the proposed intervenors' contractual interests and did not even mention the FDR or its significance to intervention in the context of the plaintiffs' procedural ESA claims.¹⁰⁵ Instead, it granted intervention as to all claims.

In other cases, however, the Ninth Circuit either adopted, or implicitly approved of, district court decisions granting intervention as to some claims but not as to others. For example, in *Portland Audubon*, the district court granted intervention as to the plaintiffs' non-NEPA claims.¹⁰⁶

These cases reveal that, before *Wilderness Society*, the apparent clarity of the Ninth Circuit's Federal Defendant Rule masked significant ambiguities and conflicts. Did it apply only to procedural NEPA challenges, or to all NEPA challenges? Did it apply to all procedural claims against federal agencies, or only to procedural claims under NEPA? If the Rule applied to some of the plaintiffs' claims but not to others, should the proposed intervenor be allowed into the case as to some issues but not as to others? Or was it sufficient to allow the intervenor into the case that it could show that the Rule did not apply to at least one of the plaintiffs' claims? District court cases reached contradictory outcomes on all of these issues.

III

THE FEDERAL DEFENDANT RULE'S UNLAMENTED DEMISE

The life of the Federal Defendant Rule came to an abrupt end with the *en banc* decision in *Wilderness Society*. This case started out as an unlikely candidate for abandoning the FDR. The plaintiffs, the Wilderness Society and Prairie Falcon Audubon, Inc., challenged a Forest Service decision designating trails for off-road vehicle (ORV) use in the Sawtooth National Forest in Idaho, raising NEPA, NFMA,

¹⁰³ 268 F.3d 810 (9th Cir. 2001).

¹⁰⁴ *Id.* at 816–17. In an amended complaint, the plaintiffs had dropped claims under the CWA and NEPA. *Id.* at 817.

¹⁰⁵ *Id.* at 820–21.

¹⁰⁶ *Portland Audubon Soc'y v. Hodel*, 19 *Env'tl. L. Rep.* 20366 (D. Or. Jan. 29, 1988).

CWA, and APA claims.¹⁰⁷ Their underlying concern was that the Forest Service allowed too much ORV use in the forest.

Several groups of recreational ORV users moved to intervene. They did not defend the substance of the agency's NEPA decision, however. Instead, they filed cross-claims, arguing that the Forest Service was allowing too little ORV use. As to the plaintiffs' claims, the recreational groups did not seek to defend the agency's decision on the merits; instead, they merely wanted to be heard as to the remedy if the plaintiffs prevailed. Their motion to intervene, however, was not explicitly limited to the remedy phase of the plaintiffs' NEPA claim.

The plaintiffs opposed the recreational groups' motion, arguing that the FDR applied both to their NEPA claim and to their non-NEPA claims because the alleged NFMA, CWA, and APA violations arose under statutory provisions that applied only to the federal government.¹⁰⁸ The district court denied the motion to intervene.¹⁰⁹

After the district court denied a motion for reconsideration, the recreational groups appealed. On appeal, the recreational groups, supported by a number of amici, challenged not only the district court's application of Ninth Circuit precedent, but also asked the court to overrule the FDR.¹¹⁰ In response, the plaintiffs defended the district court's application of the Rule, but took "no position regarding the propriety of the [FDR]."¹¹¹

After oral argument, the panel instructed the parties to file supplemental briefs on the question "whether this case should be heard *en banc* to decide if this court should abandon the [FDR], which prohibits private parties from intervening [as] of right as defendants under [FRCP] 24(a) on the merits of claims arising under

¹⁰⁷ *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176 (9th Cir. 2011).

¹⁰⁸ See *Plaintiffs' Response to Recreational Groups' Motion to Intervene* at 2–3, *Wilderness Soc'y v. U.S. Forest Serv.* (D. Idaho Dec. 23, 2008) (No. 408CV00363), 2008 WL 5650749.

¹⁰⁹ *Wilderness Soc'y v. U.S. Forest Serv.*, No. CV08-363-E-EJL, 2009 WL 453764 (D. Idaho Feb. 20, 2009) *rev'd*, 630 F.3d 1173 (9th Cir. 2011).

¹¹⁰ See *Opening Brief of Appellants Recreation Groups* at 8, *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (D.C.No.4:08-cv-00363-EJL), 2009 WL 6504121.

¹¹¹ *Answering Brief of Plaintiffs-Appellees the Wilderness Soc'y and Prairie Falcon Audubon, Inc.* at 3, *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (No. 09-35200), 2009 WL 6504122 at *3.

[NEPA].”¹¹² The recreational groups argued that the case should be heard *en banc*.¹¹³ The plaintiffs again took no position on the correctness of the FDR, but argued that this case presented “a poor set of facts” for reviewing the Rule, because the recreational groups’ motion to intervene should be denied even under conventional intervention principles.¹¹⁴ The court then granted *en banc* review. Industry groups, tribes, and states filed amicus briefs urging the court to overturn the Rule.¹¹⁵ The United States filed an amicus brief arguing, like the plaintiffs, that this case did not present a good set of facts for abandoning the Rule, but also agreeing with the proposed intervenors that there should be no *per se* rule governing intervention in such cases.¹¹⁶

The *en banc* court rejected the Rule. The court observed that, “[i]n applying a technical prohibition on intervention of right on the merits of all NEPA cases, it eschews practical and equitable considerations and ignores our traditionally liberal policy in favor of intervention.”¹¹⁷ It also contrasted the FDR cases with its “consistent approval of intervention of right on the side of the federal defendant in cases asserting violations of environmental statutes other than NEPA.”¹¹⁸ Finally, it noted that the Rule was inconsistent with decisions in the Third, Fifth, and D.C. Circuits.¹¹⁹ In the end, nobody spoke up for the Rule: not the plaintiffs, not the amici, not even Judges Mary Schroeder and Harry Pregerson, who had been on the panel that decided *Portland Audubon* twenty-two years earlier and who now joined the other judges of the *en banc* panel in a unanimous decision to overrule that case.¹²⁰

¹¹² Order, *Wilderness Soc’y. v. U.S. Forest Serv.*, No. 09–35200 (9th Cir. July 13, 2010).

¹¹³ See Supplemental Brief of Appellants Recreation Groups at 4, *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (No. 09-35200), 2010 WL 3390278.

¹¹⁴ Supplemental Brief Regarding En Banc Review at 1, *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (No. 09-35200), 2010 WL 3390279 at *2.

¹¹⁵ See *Wilderness Soc’y*, 630 F.3d at 1175–76 (listing parties and counsel).

¹¹⁶ Brief Amicus Curiae for the United States in Support of Appellees, *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (No. 09-35200), 2010 WL 5780041.

¹¹⁷ *Wilderness Soc’y*, 630 F.3d at 1179.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1180.

¹²⁰ Judge Kim McLane Wardlaw, who had been on the panel in *Wetlands Action Network*, was also on the *Wilderness Society en banc* panel.

IV LESSONS LEARNED

A. *The Ninth Circuit Got It Right*

Several observations about this saga are possible. First, the Ninth Circuit was undoubtedly correct to abandon the Federal Defendant Rule. As explained by the *Wilderness Society* court, a *per se* rule against intervention as of right in NEPA cases was inconsistent with the Ninth Circuit's approach to intervention in other cases and with other circuits' approaches to intervention in NEPA cases. Given the generally lenient and flexible interpretation that the Ninth Circuit and other courts have given to FRCP 24(a), it did not make sense to single out this category of cases for such a bright-line rule against intervention.

Indeed, in public law cases, intervention should usually be liberally granted. As Judge Reinhardt explained in a dissent from a denial of intervention in another case, unlike most issues about access to the courts, intervention does not create a conflict "between efficiency and the individual's right of access to a federal judicial forum."¹²¹ Instead,

[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.¹²²

These joint benefits of liberal intervention are particularly likely to result in the policy-laden disputes that arise under the federal environmental laws, including NEPA.

None of which is to say that motions to intervene should always be granted in environmental cases. Potential intervenors must still demonstrate that they have a sufficiently direct and concrete interest in the case and that the government will not adequately represent their interests. In many cases, they will not be able to satisfy these requirements.

There are also certain categories of environmental cases in which liberal intervention makes less sense. Michael Harris, for example, argues that intervention should generally be denied in cases that

¹²¹ *Greene v. United States*, 996 F.2d 973, 979 (9th Cir. 1993) (Reinhardt, J., dissenting).

¹²² *Id.* at 980.

challenge federal agency rulemakings as arbitrary or capricious.¹²³ He notes that in these record-review cases, intervenors cannot offer any new factual information, which is traditionally one of the justifications for intervention.¹²⁴ Moreover, because remand for a new rulemaking is generally the only remedy available, intervenors do not need to be heard regarding the development of “expansive, judicially directed remedies.”¹²⁵ Instead, potential intervenors can effectively protect their interests, without interfering with the efficiency of the judicial process, by participating in the rulemaking proceeding itself.¹²⁶

An even stronger argument can be made that intervention should be disfavored in deadline suits, in which the plaintiffs allege that an agency has missed a statutory deadline. In the rulemaking cases that Harris discusses, potential intervenors may have a significant stake in the continued enforcement of the challenged rule. If a court vacates the rule and remands it for a new rulemaking, the result is a change from the legal status quo. In a deadline suit, by contrast, the legal situation remains the same until the agency carries out the required action. Moreover, the issues at stake in these cases are usually purely legal, and potential intervenors will have an opportunity to present their policy and factual arguments during the subsequent rulemaking. The argument against intervention is even stronger when the agency quickly reaches a settlement with the plaintiffs that imposes a rulemaking schedule, but leaves the ultimate outcome of the rulemaking to the agency—a regular occurrence in such cases. Courts frequently, and correctly, deny motions to intervene in these cases.¹²⁷ For example, the D.C. Circuit, which requires that intervenors have

¹²³ Michael Ray Harris, *Intervention of Right in Judicial Proceedings to Review Informal Federal Rulemakings*, 40 HOFSTRA L. REV. 879, 879–80 (2012).

¹²⁴ *Id.* at 908–09.

¹²⁵ *Id.* at 910. Courts do retain some discretion, however, to order remand without vacating the challenged rule. *See generally* Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599 (2004); Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

¹²⁶ Harris, *supra* note 123, at 919–20.

¹²⁷ *See, e.g.*, *Am. Lung Ass’n v. Reilly*, 962 F.2d 258, 261–62 (2d Cir. 1992); *Ctr. for Biological Diversity v. U.S. EPA.*, No. C-11-06059 YGR, 2012 WL 909831 (N.D. Cal. Mar. 16, 2012); *Ctr. for Biological Diversity v. U.S. EPA.*, 274 F.R.D. 305, 311 (D.D.C. 2011); *In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. 1, 6 (D.D.C. 2010); *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 68 (D.D.C. 2004).

standing, recently denied intervention for lack of standing to an industry group in precisely these circumstances.¹²⁸

But NEPA cases do not fit this pattern. Indeed, given their nature, these cases are a particularly poor choice for a rule limiting intervention. For one thing, although NEPA cases are record-review cases brought pursuant to the APA, courts generally allow the record to be supplemented more frequently in NEPA cases than in other categories of cases.¹²⁹ Intervenors are therefore more likely to be able to add relevant factual information in a NEPA case than in an APA challenge to an agency rulemaking. For another, NEPA cases usually do not involve only a government action, but also some underlying private action that may be enjoined from going forward if the NEPA analysis is struck down. Therefore, the Ninth Circuit was correct to reject the FDR.

B. An Irony of Timing

As just noted, the potential impact of NEPA litigation on private projects is one reason to allow liberal intervention in these cases. Arguably, the Rule's limitation to the merits phase addressed this concern—even under the Rule, permit holders and others who would be harmed if the court imposed an injunction would have a chance to be heard at the remedial phase of the litigation. But that fact raises a second observation about the *Wilderness Society* decision. One irony of the timing of the decision is that the Ninth Circuit abandoned the FDR at almost precisely the moment when the consequences of the Rule were dramatically reduced.

Recall that under the Rule, intervention as of right was forbidden only on the merits of a NEPA claim, not as to remedy. Under contemporaneous case law, however, a defendant-intervenor's options at the remedial phase were limited, because courts put a strong thumb on the scale in favor of granting injunctions in NEPA cases.

¹²⁸ *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323–27 (D.C. Cir. 2013) (holding that the Utility Water Act Group, an industry trade association, did not have standing to intervene in a case in which environmentalists had challenged EPA's failure to revise effluent limitations and effluent limitation guidelines and in which the plaintiffs and EPA had submitted a proposed consent decree establishing a schedule for rulemaking).

¹²⁹ *See, e.g., Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1107 (9th Cir. 2010); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009); *Nat'l Audubon Soc'y. v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997); *see generally* Susannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929 (1993).

In fact, some courts even held that under NEPA, an injunction should be an automatic remedy.¹³⁰ Other courts did not go so far, but still presumed that the plaintiffs would suffer irreparable harm in NEPA cases for purposes of the four-part test governing the imposition of preliminary injunctions.¹³¹

As a result of these decisions, a potential intervenor's ability to get into the case at the merits phase under the Rule would frequently have been of little use. If the agency lost at the merits stage, there was little chance that an intervenor could prevent the imposition of a burdensome injunction at the remedial phase.

The Supreme Court's decisions in *Winter v. Natural Resources Defense Council, Inc.*¹³² and *Monsanto Co. v. Geertson Seed Farms*,¹³³ however, changed all of that. These cases held that the four-part test for both preliminary and permanent injunctions applied with full force in NEPA cases. The Court put no thumb on the scale in favor of the environment; instead, it held that the plaintiff bore the burden on all four elements. As a result, there is now much more to fight for at the remedial phase of a NEPA case than there was during the heyday of the FDR.

C. Even Judicial Doctrines Will Die Without Advocates

If the Rule was always wrongheaded and its consequences are now reduced, why did it get abandoned when it did? A potential explanation emerges if one focuses on what is perhaps the most striking aspect of the Rule's demise: its entirely unlamented nature. As indicated above, in *Wilderness Society*, the Rule found no defenders among the litigants or amici. One simple point to emerge from this fact is that in our adversarial system, a judicial doctrine, as much as a policy position, must have advocates if it is to survive. No advocates were to be found who would support the Rule, and thus it is no surprise that the Ninth Circuit abandoned it.

Why could the Rule find no supporters? To start with, industry groups, property rights activists, and local governments are the entities most likely to move to intervene in NEPA cases, which are

¹³⁰ *State of Cal. v. Bergland*, 483 F. Supp. 465, 498–99 (E.D. Cal. 1980), *aff'd in part, rev'd in part sub nom. Cal. v. Block*, 690 F.2d 753 (9th Cir. 1982).

¹³¹ *See, e.g., Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

¹³² 555 U.S. 7 (2008).

¹³³ 561 U.S. 139 (2010).

predominantly brought by environmentalists. As a result, it is no surprise that these groups opposed the FDR.

As for environmentalists, their lack of support appears to have two main reasons. First, over time the Rule had evolved from one that virtually always benefited environmentalists and harmed industry groups to one that could affect both groups, if not exactly evenly. Because most NEPA cases are brought by environmental groups, before *Kootenai Tribe* the primary effect of the Rule had been to deny motions to intervene by industry groups in cases brought by environmentalists. This asymmetrical effect was noted and criticized by commentators at the time.¹³⁴ But, in the late 1990s, industry groups and other “anti-environmentalist” plaintiffs started bringing more NEPA cases and, in the process, became more successful at overcoming the significant prudential standing barriers to such suits.¹³⁵

Until this time, the FDR had been applied only to such anti-environmentalist interests. Environmentalists may therefore have assumed that the Rule would not be applied to them in these “NEPA for the Gander” cases.¹³⁶ But *Kootenai Tribe* rejected this view, holding that the Rule applied to all defendant-intervenors in NEPA cases, whatever the basis for their interest in the case. After *Kootenai*, environmental groups, many of whom participate frequently in environmental litigation, realized that the Rule could be used against them, too. As a result, while they continued to cite the Rule as binding Ninth Circuit precedent when it favored them in particular cases, none of them were interested in defending the Rule when its continued validity was squarely presented by the *en banc* court in *Wilderness Society*.

A second reason for environmentalists’ lack of support for the FDR may have been some district courts’ expansion of the Rule beyond NEPA. In cases under other environmental statutes, such as the ESA, environmentalists are more likely to find themselves attempting to intervene as defendants than in NEPA cases. As a result, the risk that the Ninth Circuit might apply the Rule more broadly to deny

¹³⁴ See, e.g., Erik Figlio, *supra* note 53.

¹³⁵ See *supra* text accompanying notes 54–57. The Supreme Court recently denied certiorari in a case that would have squarely presented the issue whether purely economic interests suffice for prudential standing under NEPA. *Am. Independence Mines & Minerals Co. v. U.S. Dep’t of Agric.*, 494 F. App’x 724, 727 (9th Cir. 2012); *cert. denied*, 133 S. Ct. 2766 (2013).

¹³⁶ Cf. *Cosco*, *supra* note 58.

environmentalists' motions to intervene provided an independent reason for them to abandon their support for the Rule. This fear was certainly reasonable, in that the case law had failed to establish a consistent reason for applying the Rule only to NEPA cases and not to other environmental cases against federal agencies.

That left the federal government as the only possible supporter for the Rule. As noted above, the Department of Justice (DOJ) took the position in the *Wilderness Society* litigation that the FDR was inconsistent with FRCP 24(a), even though it believed that motions to intervene should rarely be granted. Looking beyond DOJ's stated position in this one case, it is possible to imagine some reasons that it might not oppose the presence of intervenors in environmental litigation. From the government's perspective, it can be useful to have someone covering your flank in litigation. For one thing, intervenors can present arguments that DOJ might want to make but cannot for political or other reasons. In addition, the presence of parties arguing both that the government has gone too far and that it has barely gone far enough can help the agency portray itself as representing a reasonable middle-ground—therefore making it more likely that a court will defer to it on matters of fact and law.

There are also reasons that DOJ might not want intervenors in the case. For example, the presence of intervenors might make it more difficult for the government to settle the litigation if it wants to, although intervenors do not have an actual veto over settlements negotiated between the original parties.¹³⁷ The freedom to settle, however, is arguably less important to the government in NEPA cases than in some other categories of cases, such as the deadline cases discussed above.

In sum, the FDR was doomed because no entity that regularly participates in this type of litigation saw any benefit from the Rule's survival. In an adversary system, a common law legal doctrine, such as the Rule, needs advocates if it is to survive. The Rule lost its environmentalist advocates after *Kootenai Tribe* and the district court decisions that expanded its application, and so its demise was inevitable.

The only reason it survived as long as it did (from 2002 to 2011) was that courts in the Ninth Circuit continued to apply it as a matter of precedent. While environmental advocates may have had no

¹³⁷ See Local No. 93, Int'l Assoc. of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 528–30 (1986).

interest in supporting the Rule, they also were not free to ignore binding circuit precedent. The specific timing of the Rule's overruling in the end depended on the court's willingness to review it *en banc*.

The observation that the FDR died in part because it had no advocates leads to a broader point about intervention doctrine in environmental cases. In NEPA actions, as in litigation against federal agencies involving many other environmental statutes, a large fraction of the litigants are repeat players. On the environmental side, nationwide organizations such as the Sierra Club, NRDC, Environmental Defense Fund, Center for Biological Diversity, and Earthjustice, along with many regional and local groups, regularly participate as both plaintiffs and defendant-intervenors in litigation involving federal agencies. On the other side, trade groups such as the National Mining Association, National Homebuilders Association, and Utility Air Regulatory Group, as well as property-rights and recreational groups such as the Pacific Legal Foundation and Blue Ribbon Coalition, also regularly litigate both for and against the government.

Both sets of groups can expect to participate as plaintiffs in some cases and as defendant-intervenors in others. Knowing that any limits on intervention for which they advocate as plaintiffs in one case might be applied to exclude them from another case in the future in which they will move to intervene, these groups may decide not to oppose motions to intervene, or to oppose them less vigorously than they otherwise would.

This outcome is made even more likely when one considers the costs and benefits of opposing a motion to intervene in these cases. Because most environmental cases against a federal agency are record-review cases,¹³⁸ the additional costs imposed on plaintiffs by defendant-intervenors are relatively small. The cases are usually resolved on summary judgment and do not involve discovery. Therefore, in most cases the only additional costs imposed on plaintiffs by intervenors come from arguments on a motion to dismiss and/or motion for summary judgment that are not presented by the federal defendant. Thus the costs of allowing intervention, while real,

¹³⁸ Even in NEPA cases, in which—as described above—courts are more likely to allow supplementation of the record than in many other record-review cases, it seems unlikely that defendant-intervenors would frequently seek to supplement the record. The plaintiffs are more likely to seek supplementation in these cases, because they are the parties who will want evidence that does not support the agency's decision to be before the court.

are much more manageable in these cases than in other types of civil litigation.

On the other side, there can be significant costs, especially in terms of delay, to opposing a motion to intervene. A denial of a motion to intervene is generally an appealable interlocutory order,¹³⁹ and district courts frequently stay the case or effectively stay it through protracted scheduling orders while the appeal of the intervention order is pending. As a result, even in the best-case scenario for a plaintiff—in which the district court denies the motion to intervene and that decision is upheld on appeal—the litigation can be delayed by a year or more. For many plaintiffs, the prospect of this sort of delay will be a much more significant consideration than the burden of briefing responses to an intervenor’s legal arguments.

The combined effect of these incentives could be that intervention doctrine will tend to move in a more liberal direction than would otherwise be the case. Such a result would be difficult to demonstrate empirically, because it is not clear what would constitute the baseline against which to compare the current state of the doctrine.¹⁴⁰ Nevertheless, it seems a plausible outcome of the litigants’ incentives and is reflected in anecdotal evidence of plaintiffs who decline to oppose motions to intervene for fear of creating bad law. The *Wilderness Society* decision is merely an extreme case of this general phenomenon.

D. The Paths of Common Law Doctrines

Another perspective on the FDR focuses not on its ultimate demise but on the entire process through which it arose, developed, and then died. This progression could serve as a textbook example of the evolution of common law rules. In particular, it illustrates three perspectives on the path of the common law: Edward Levi’s three-step description of the legal reasoning process; Carol Rose’s description of the alternation of rules and standards; and accounts of the path dependence of legal rules.

¹³⁹ See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) (“[W]hen an order prevents a putative intervenor from becoming a party in *any* respect, the order is subject to immediate review.”).

¹⁴⁰ One possibility might be to compare circuits in which environmental litigation tends to involve many repeat players, such as perhaps the Ninth and D.C. Circuits, against other circuits with a higher proportion of one-time or sporadic litigants in such cases.

In his classic exposition of the process of legal reasoning, Edward Levi identifies three stages in the history of a legal rule. “The first stage is the creation of the legal concept which is built up as cases are compared The second stage is the period when the concept is more or less fixed The third stage is the breakdown of the concept.”¹⁴¹ His primary example in explaining this sequence is the inherently dangerous rule in tort law, under which a seller of inherently dangerous goods could be held liable for injuries suffered by someone other than the buyer (in other words, the rule created an exception for inherently dangerous goods from the usual requirement that a plaintiff be in privity of contract with the defendant to recover). In Levi’s account, the first stage corresponded to a series of decisions between 1816 and 1851 in which courts struggled to develop a coherent approach to the issue, culminating in *Longmeid v. Holliday*, in which the English Court of Exchequer for the first time formulated a rule basing liability on whether the object was “an instrument in its nature dangerous.”¹⁴² The second stage, from 1851 to 1915, involved the consistent application of the *Longmeid* rule. Courts identified particular products as inherently dangerous or not, with liability to those not in privity turning on the answer to this question.¹⁴³ Finally, in the 1916 New York Court of Appeals decision in *MacPherson v. Buick*, the distinction was abandoned, as the court removed the requirement of privity of contract for all negligence actions.¹⁴⁴

The FDR followed much the same pattern, if on a considerably more compressed time scale. First, immediately after *Portland Audubon*, it was not clear that the case stood for any particular rule; it was open to multiple interpretations. The *Sierra Club* decision four years later first announced the NEPA-specific FDR, thus creating the relevant legal concept.¹⁴⁵ In the second stage, the rule announced in *Sierra Club* was applied consistently for close to two decades, with subsequent Ninth Circuit cases clarifying exactly which situations fell

¹⁴¹ Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 506 (1948).

¹⁴² *Id.* at 509–10 (quoting 155 Eng. Rep. 752, 755 (1851)).

¹⁴³ *Id.* at 510–14.

¹⁴⁴ *Id.* at 514–17 (citing 111 N.E. 1050 (N.Y. 1916)).

¹⁴⁵ This fact also recalls Karl Llewellyn’s observation about “the distinction between the ratio decidendi, the court’s own version of the rule of the case, and the true rule of the case, to wit, what it will be made to stand for by another later court.” KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 50 (Oxford University Press 2008) (1930).

on either side of the line that *Sierra Club* had drawn. Third, the Rule was abandoned in *Wilderness Society*.

In fact, the FDR might provide a better example of this process than the inherently dangerous rule. As Lawrence Cunningham has pointed out, *MacPherson* did not represent so much a breakdown of the *Longmeid* rule as it did a bifurcation, in which liability continued to attach to inherently dangerous products, but was also expanded to cover other products if the manufacturer was negligent.¹⁴⁶ *Wilderness Society*, by contrast, represented a genuine breakdown of the Rule. After this case, there was no *per se* rule excluding intervenors in NEPA cases or any other category of cases; instead, all motions to intervene as of right would be judged under the same multi-factor test.

This abandonment of the rule-like FDR for the standard-like approach announced in *Wilderness Society* calls to mind another account of the cycle of legal doctrine: Carol Rose's description of such doctrines are forever alternating between the bright-line clarity of rules (crystal) and the fuzziness of standards (mud).¹⁴⁷ Her focus is on private law—in particular, on property law. In her account, private parties, approaching their contractual relationships *ex ante*, prefer bright-line rules establishing clear entitlements. Courts, reviewing cases *ex post* in which these clear contractual entitlements produce apparently unjust results because of “ninnies, hard-luck cases, and the occasional scoundrels who take advantage of them,”¹⁴⁸ muddy up these rules with exceptions and limits. The result, as she puts it, is that “we see a back-and-forth pattern: crisp definition of entitlements, made fuzzy by accretions of judicial decisions, crisped up again by the parties’ contractual arrangements, and once again made fuzzy by the courts.”¹⁴⁹

Something similar happened with the FDR. As the history sketched out above demonstrates, *Portland Audubon* did not create the Rule. Instead, that decision relied on several factors, including not only the nature of the plaintiffs’ claims, but also the nature and concreteness of the proposed intervenors’ interests, in denying the motion to

¹⁴⁶ Lawrence A. Cunningham, *The Common Law as an Iterative Process: A Preliminary Inquiry*, 81 NOTRE DAME L. REV. 747, 767–68 (2006).

¹⁴⁷ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 593 (1988).

¹⁴⁸ *Id.* at 587.

¹⁴⁹ *Id.* at 585.

intervene.¹⁵⁰ It was only in subsequent cases, especially *Sierra Club*, that the FDR became a *per se* bright-line rule.¹⁵¹

Yet the very process of rendering the FDR more rule-like undermined its logical coherence. Why should it apply only to NEPA cases and not to others? Why was the nature and concreteness of the proposed intervenor's interest irrelevant here when it was of central importance in other cases? These tensions were exposed in a series of inconsistent district court opinions, some expanding the Rule beyond its NEPA home, others taking the Ninth Circuit at its word and limiting it to such cases. Thus the arc of the FDR, like the trespass doctrines discussed by Rose, shows an originally standard-like approach becoming ever more rule-like over time until, undermined by its internal conflicts and inconsistencies, it collapses into a return to a standard-like approach.

There are differences, of course, between Rose's story and what happened here. Most obviously, the setting is federal civil procedure rather than property law. One consequence of this difference is that the actors who create the crystals and mud are different. Whereas in Rose's account private parties establish rules that are then muddied by courts, here it is an appellate court that both creates the Rule from mud and then later rejects it, returning to the muddy standard. Arguably, the lower courts played a role in muddying the Rule before its final collapse. In any event, private parties played no direct role.¹⁵²

A third description of the common law process emphasizes its path dependence. Path dependence is the idea that "an outcome or decision is shaped in specific and systematic ways by the historical path leading to it."¹⁵³ This concept, or at least this terminology, derives from economics and sociology, where it has been used to explain such phenomena as the predominance of the QWERTY keyboard.¹⁵⁴ In the

¹⁵⁰ See *supra* text accompanying notes 12–28.

¹⁵¹ See *supra* text accompanying notes 29–71.

¹⁵² Private parties' interests regarding the rule also do not parallel those in the property law situation. When dealing with property law or other forms of private law, contracting parties should generally desire *ex ante* clarity, even if half of them may later want to benefit from fuzziness in court. When it comes to the rules governing intervention, however, there is no similar *ex ante/ex post* divide in the perceptions of private parties, at least regarding the form of the rule. They might have a preference for whether a rule is more or less favorable to intervention, but not for whether a rule is clear or vague.

¹⁵³ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001).

¹⁵⁴ See Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985).

analysis of legal doctrine, the concept of path dependence, if not the specific terminology, actually has a much longer history that goes back at least to Oliver Wendell Holmes, Jr. Holmes repeatedly commented upon, usually with some derision, the tendency of the common law to retain and adapt outdated doctrines.¹⁵⁵

More recently, Oona Hathaway has attempted to systematize the discussion of legal path dependence. In particular, she identifies three variants of path dependence: increasing-returns path dependence, which “occurs because once a court makes an initial decision, it is less costly to continue down that same path than it is to change to a different path”; evolutionary path dependence, which emphasizes that “[t]he possibilities for today and tomorrow are determined by the evolutionary changes of the past”; and sequencing path dependence, which is based on the insight of rational choice theory that “the sequence in which alternatives are considered can decisively influence the outcome.”¹⁵⁶

The history of the FDR exemplifies both the increasing-returns and sequencing forms of path dependence. The key point here is the role of the *Sierra Club* decision. As indicated above, the *Portland Audubon* decision could have been explained in several ways. When, several years later, the *Sierra Club* court was faced with a motion to intervene in a CWA case, it could have distinguished *Portland Audubon* on multiple grounds. Instead, it focused on one aspect of *Portland Audubon*: it was a NEPA case.

Once this Rule had been defined, it determined the path of subsequent cases. Courts in later FDR cases had alternative bases for denying intervention available to them, including the insufficient directness of the intervenors’ interests or a prudential standing-like disconnect between the intervenors’ interests and the interests

¹⁵⁵ See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35 (Dover Publications 1991) (1881) (“[J]ust as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten.”); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”). See generally Clayton P. Gillette, *The Path Dependence of the Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 245 (Steven J. Burton ed. 2000).

¹⁵⁶ Hathaway, *supra* note 3, at 607–08.

protected by the statute.¹⁵⁷ Instead, thanks to *Sierra Club's* formulation of a NEPA-specific rule, those later courts followed the FDR path rather than any of the other avenues open to them. These decisions can be regarded as a form of increasing-returns path dependence; it was easier for a court to apply an applicable bright-line rule than to work through a multi-factor test or to develop a rule in an unsettled area of the law.¹⁵⁸

The critical role played by *Sierra Club* also highlights that the history of the FDR represents a form of sequencing path dependence. As just noted, some of the FDR cases could have been decided on other grounds. If these cases had occurred before *Sierra Club*, the court might well have decided them on different grounds because it would not have had the cost-reducing option of relying on *Sierra Club's* bright-line rule available to it.

The particular timing of *Kootenai Tribe* may also have played a role. The doctrine already had a decade to get locked in before it was first applied to environmental groups. If environmental groups had been denied intervention on this basis earlier, the Rule may have faced more opposition earlier in its development.

Michael Gerhardt has criticized accounts of path dependence as impossible to prove.¹⁵⁹ It is always a risk in historical analysis that one will find causation where there was only correlation, making up "Just So Stories" to describe spurious relationships between phenomena.¹⁶⁰ One cannot restart the clock of history to run controlled experiments. So too here the idea that the formulation of

¹⁵⁷ For example, the briefing in *Churchill County* shows that the putative intervenors had only indirect and contingent interests in the outcome of the litigation. See *supra* text accompanying note 46.

¹⁵⁸ As Michael Gerhardt has noted, the more rule-like a doctrine, "the more strongly it imposes path dependency." MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 98 (2008). This form of path dependence emerges not only because it is easier for courts to apply the existing rule, but also because litigants will tailor their arguments to the new precedent. See Hathaway, *supra* note 153, at 628 ("[W]hen a new precedent emerges, litigants will react to the precedent in ways that further reinforce and contribute to the path indicated by that new precedent.").

¹⁵⁹ "The second prerequisite for path dependency is sequentialism. Sequentialism requires the order in which the Court decides cases to influence outcomes It is, however, impossible to prove sequentialism determines specific outcomes. It is pure speculation whether the Court would have ruled differently if it were to have decided some cases in a different sequence." Gerhardt, *supra* note 158, at 86.

¹⁶⁰ See, e.g., Stephen J. Gould, *Sociobiology: The Art of Storytelling*, 80 *NEW SCIENTIST* 530 (1978).

the Rule depended on the specific sequence of *Portland Audubon* followed by *Sierra Club* is only a hypothesis.

Nevertheless, there are some reasons to believe that the path followed by the FDR cases shaped the development of the doctrine. First, as noted above, courts had alternative grounds for decision making available to them. While the NEPA versus CWA distinction was the most straightforward distinction available to the *Sierra Club* court, if another case had come before the Ninth Circuit, another basis for analogizing or distinguishing *Portland Audubon* may well have been easier for the court to adopt. Second, two of the three judges on the *Portland Audubon* panel were among the judges who voted to reject the Rule in *Wilderness Society*, suggesting that the final form of the Rule was not envisioned by the *Portland Audubon* court.

As a final observation, it is worth noting that path dependence is particularly likely to occur among intermediate appellate courts such as the federal courts of appeal. Unlike the highest court in a jurisdiction, which is always free to overrule itself, circuit court panels cannot overrule a prior decision by another panel. Instead, as happened in *Wilderness Society*, the court must decide to convene *en banc* before it can reverse any precedent. This additional barrier for any litigant seeking reversal of a precedent makes it especially likely that the decision taken by an early panel, whose composition may not be representative of the court as a whole, will fix the path for subsequent doctrinal developments.

CONCLUSION

The Federal Defendant Rule was a mistaken attempt to limit intervention in NEPA litigation in the Ninth Circuit. That court was correct to ultimately abandon the Rule. Yet its saga carries lessons both for the role of intervention in environmental litigation and for the processes by which common law rules change through time.

