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Who Can Defend a Federal Regulation? The Ninth Circuit Misapplied Rule 24 by Denying Intervention of Right in *Kootenai Tribe of Idaho v. Veneman*

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WHO CAN DEFEND A FEDERAL REGULATION? THE NINTH CIRCUIT MISAPPLIED RULE 24 BY DENYING INTERVENTION OF RIGHT IN *KOOTENAI TRIBE OF IDAHO V. VENEMAN*

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Abstract: In *Kootenai Tribe of Idaho v. Veneman*, the United States Court of Appeals for the Ninth Circuit misapplied Rule 24 of the Federal Rules of Civil Procedure by denying intervention of right to organizations that had protectable interests in the adoption and implementation of the Roadless Rule. The court based its decision to deny intervention of right on its federal defendant rule, which bars intervention of right by parties other than the federal government to defend a challenge brought under the National Environmental Policy Act (NEPA). The *Kootenai* decision extended the reach of the federal defendant rule to include environmental organizations that had actively participated in the challenged NEPA administrative rulemaking process. This extension contradicts Rule 24's focus on the practical effects of litigation and the Ninth Circuit's precedent of liberally granting intervention in public law cases. This Note argues that the Ninth Circuit should abandon the federal defendant rule and instead apply Rule 24 by individually evaluating whether absentees have a protectable interest within NEPA's zone of concern for the environment or have actively participated in the process of adopting the challenged regulation.

In January 2001, the United States Forest Service issued its final Roadless Rule,[1] a landmark conservation regulation that would prohibit nearly all logging and roadbuilding in 58.5 million acres of National Forest lands.[2] The Roadless Rule was the culmination of a lengthy administrative rulemaking process[3] undertaken pursuant to the National Environmental Policy Act of 1969 (NEPA).[4] The Forest Service received over one million public comments on the Roadless Rule, ninety-six percent of which called for strong conservation measures.[5] The Clinton administration adopted the Roadless Rule just two weeks before the inauguration of President George W. Bush.[6] When opponents filed a NEPA challenge in the District Court of Idaho seeking to

1. Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

2. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1105–06 (9th Cir. 2002) [hereinafter *Kootenai II*].

3. *Id.* at 1104–05.

4. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4375 (2000)).

5. *Kootenai II*, 313 F.3d at 1116 n.19, 1119.

6. *Id.* at 1105–06.

overturn the Roadless Rule, the new administration announced that it had its own concerns about the Roadless Rule and declined to defend it in court.[7] In response, several environmental organizations sought to intervene under Rule 24 of the Federal Rules of Civil Procedure to defend the NEPA challenge.[8] The District Court of Idaho alternatively granted both intervention of right and permissive intervention,[9] but later rejected the arguments of the environmental intervenors by concluding that the Forest Service had likely violated NEPA[10] and temporarily enjoined implementation of the Roadless Rule.[11]

In *Kootenai Tribe of Idaho v. Veneman*,[12] the U.S. Court of Appeals for the Ninth Circuit concluded that the environmental organizations could not intervene of right under Rule 24(a)(2) to defend a federal regulation even though they had helped to promulgate it.[13] The court applied its federal defendant rule, reasoning that because the federal government is the only party capable of violating NEPA, no other entities have the right to intervene to defend a NEPA challenge.[14] Instead, the court held that district courts have discretion to grant defendant-side intervention in NEPA cases under Rule 24(b)(2)'s standards for permissive intervention.[15] The Ninth Circuit then affirmed the district court's grant of permissive intervention and reached the merits of the intervenors' defense of the Roadless Rule.[16] Ultimately, the Ninth Circuit agreed with the arguments presented by the environmental intervenors and lifted the injunction that had blocked implementation of the Roadless Rule.[17] Although the *Kootenai* case was at least a

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7. *Id.* at 1106, 1111.

8. *Id.* at 1106.

9. Kootenai Tribe of Idaho v. Veneman, No. CV01-10-N-EJL (D. Idaho Mar. 14, 2001) (order granting intervention).

10. Kootenai Tribe of Idaho v. Veneman, 142 F. Supp. 2d 1231, 1246–47 (D. Idaho 2001) [hereinafter *Kootenai I*].

11. *Kootenai II*, 313 F.3d at 1106–07.

12. 313 F.3d 1094 (9th Cir. 2002).

13. *See id.* at 1104–05.

14. *Id.* at 1108. This Note will use the term "federal defendant rule" to denote the Ninth Circuit's rule barring defendant-side intervention in NEPA cases by parties other than the federal government. See *Portland Audubon Society v. Hodel*, 866 F.2d 302, 308–09 (9th Cir. 1989), for a detailed discussion of the federal defendant rule.

15. *Kootenai II*, 313 F.3d at 1111.

16. *See id.* at 1104.

17. *Id.*

temporary victory for the Roadless Rule,[18] this win might have come at a high cost: leaving defendant-side intervention in NEPA cases to the discretion of district courts may limit the ability of absentees to protect their interests in future government decisions.[19]

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[20] and other federal environmental statutes[21] to challenge these programs in court. This reverse form of conservation litigation, which seeks to achieve primarily economic goals using environmental statutes to provide the cause of action,[22] can be a particularly effective method to overturn regulations that were adopted by a previous administration but are at odds with the policies of a new administration.[23] The new administration might decline to defend a regulation promulgated by its predecessor, and may find it politically expedient to accede to an "adverse" court judgment or settle a case rather than independently undertake a public rulemaking process to change the regulation.[24]

Intervention under Rule 24 provides an opportunity for public interest organizations to protect regulations that the federal government adopts

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18. Despite the Ninth Circuit's decision, the future of the Roadless Rule remains uncertain because another federal court issued a contradictory opinion holding that the Forest Service had violated NEPA and enjoining the rule nationwide. *See* State of Wyo. v. United States Dep't of Agric., No. 01-CV-86-B, 2003 U.S. Dist. LEXIS 15514, *112–14 (July 14, 2003). Agriculture Secretary Ann Veneman announced that the Forest Service will retain the Roadless Rule, but with likely modifications to give more control to states and to exempt large tracts in Alaska. Press Release, USDA Retains National Forest Roadless Area Conservation Rule, USDA News Release No. 0200.03 (June 9, 2003), *available at* http://www.usda.gov/news/releases/2003/06/0200.htm (last visited Oct. 23, 2003).

19. The Ninth Circuit has already applied the *Kootenai* rule to deny intervention of right to conservation groups seeking to defend a NEPA challenge to forest rules in Alaska. Alaska Forest Ass'n v. United States Dep't of Agric., No. 01-35549, 2003 U.S. App. LEXIS 10880, at *3 (9th Cir. May 29, 2003).

20. *See, e.g., id.* at *2–3 (applying the *Kootenai* rule to deny intervention of right to conservation groups seeking to appeal a district court decision finding that the government had violated NEPA when the government elected not to appeal); Wyoming v. United States Dep't of Agric., 201 F. Supp. 2d 1151, 1153 (D. Wyo. 2002) (challenging the Roadless Rule for NEPA and other procedural violations).

21. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 157 (1997) (challenging a biological opinion issued pursuant to the Endangered Species Act).

22. *See, e.g., id.*

23. *See, e.g.*, W. Council of Indus. Workers v. Sec'y of the Interior, Civ. No. 02-6100-AA (D. Or. Apr. 22, 2003) (settling of industry lawsuit challenging the status and critical habitat designation of the northern spotted owl).

24. *See id.*

but later chooses not to defend in court.[25] Intervenors become parties to the litigation.[26] They can submit briefs, examine witnesses at trial, and appeal adverse decisions.[27] Absentees[28] may intervene of right under Rule 24(a)(2) when they have a protectable interest in the subject matter of the suit that may be adversely affected by the outcome of the case and that is not adequately represented by the existing parties.[29] Alternatively, courts may grant permissive intervention under Rule 24(b)(2) if absentees assert an independent basis for federal court jurisdiction and raise claims that share common questions of law or fact with issues in the litigation.[30] Rule 24 is a flexible and practical rule[31] intended to protect absentees whose interests might be affected by the outcome of pending litigation.[32]

This Note argues that the Ninth Circuit misapplied Rule 24 in *Kootenai* by denying intervention of right to groups with protectable interests in defending the Roadless Rule. The Ninth Circuit's federal defendant rule contravenes Rule 24(a)(2)'s requirement that courts assess the practical effects of litigation on the protectable interests of absentees,[33] including the stare decisis effect of overturning a federal regulation.[34] This Note proposes that absentees satisfy the protectable interest requirement of Rule 24(a)(2) by asserting injuries within NEPA's zone of interest for the environment and by actively participating in the rulemaking process. If they satisfy the other requirements of the rule, they have a right to intervene. Part I briefly reviews the function and environmental purpose of NEPA and introduces the zone of interest test under the Administrative Procedure

25. *See id.* (noting that the court had granted intervention to environmental groups to defend endangered species status and critical habitat designations for spotted owls and marbled murrelets).

26. *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375 (1987).

27. *See id.*

28. As used in this paper, absentees are entities or individuals who are not original parties to litigation.

29. FED. R. CIV. P. 24(a)(2).

30. *Id.* 24(b)(2).

31. *See, e.g.*, Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 837 (9th Cir. 1996) (noting that Rule 24's interest requirement is a "practical, threshold inquiry" and that "no specific legal or equitable interest need be established").

32. Kleissler v. United States Forest Serv., 157 F.3d 964, 971 (3d Cir. 1998).

33. FED. R. CIV. P. 24(a)(2).

34. *See, e.g.*, Oneida Indian Nation of Wis. v. New York, 732 F.2d 261, 265 (2d Cir. 1985) (granting intervention of right to an absentee tribe whose aboriginal land rights could be affected by the stare decisis effect of a judgment in the case).

Act (APA).[35] Part II describes intervention under Rule 24, focusing on the protectable interest requirement for intervention of right as interpreted by the U.S. Supreme Court, its application to public law cases, and its relationship to the requirements for Article III standing.[36] Part III describes the federal defendant rule for NEPA cases and reviews Ninth Circuit public law intervention cases in non-NEPA contexts. Part IV reviews the *Kootenai* decision. Finally, Part V argues that the Ninth Circuit should have allowed the environmental groups to intervene of right under Rule 24(a)(2), and that the court should abandon the federal defendant rule in NEPA challenges in favor of a practical and flexible inquiry into the asserted interests of the proposed intervenors as mandated by Rule 24.

I. NEPA: A PROCEDURAL STATUTE ENACTED TO PROTECT THE ENVIRONMENT

Congress enacted NEPA with the goal of protecting the environment[37] by requiring federal agencies to evaluate significant environmental impacts prior to undertaking major actions.[38] NEPA established a national environmental policy directing the federal government to use "all practicable means" to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations" and to "attain the widest range of beneficial uses of the environment without degradation."[39] NEPA has profoundly influenced decisionmaking by federal agencies[40] and has made administrators more accessible and accountable to the public.[41] The centerpiece of NEPA is its requirement that federal agencies prepare an environmental impact statement (EIS) prior to undertaking "major Federal actions significantly affecting the quality of the human environment."[42] A federal agency must follow NEPA's procedural requirements when it proposes legislation or

35. 5 U.S.C. §§ 551–559, 701–706 (2000).

36. *See* U.S. CONST. art. III, § 2 (requiring a case or controversy for federal court jurisdiction).

37. *See* 42 U.S.C. § 4321 (2000) (declaring the goal of promoting efforts that "will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man").

38. *Id.* § 4332(2).

39. *Id.* § 4331.

40. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 1:1 (1992 & Supp. 2002).

41. Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 453 (1990).

42. 42 U.S.C. § 4332(2)(c).

undertakes an administrative rulemaking process to adopt a new regulation, such as a forest management plan or a pollution control rule, that might have a significant effect on the environment.[43] Although NEPA establishes procedural rather than substantive requirements,[44] these procedural requirements can lead federal agencies to abandon environmentally damaging proposals[45] by requiring administrators to consider the environmental effects of their actions and engage in a public process that exposes these effects.

Because NEPA does not create a private cause of action, parties seeking to challenge a NEPA decision in court must allege violations of the Administrative Procedure Act (APA).[46] Under the APA, citizens may file suit alleging that a final agency decision was arbitrary and capricious or otherwise not in accordance with law.[47] A NEPA challenge brought pursuant to the APA may include charges that the federal government should have prepared a full EIS, or did prepare an EIS but failed to consider an adequate range of alternatives.[48] A typical result of a successful NEPA challenge is an injunction against the federal action pending NEPA compliance.[49] On remand, the agency may either modify its proposed action or correct analytical deficiencies.[50]

The APA requires plaintiffs to assert injuries "arguably within the zone of interests" of the underlying statute to establish prudential standing.[51] In applying the APA's zone of interest test, federal courts interpret NEPA as protecting environmental, but not economic, interests.[52] Thus, only parties who assert an injury within NEPA's

43. *See id.*

44. *See* Tillamook County v. United States Army Corps of Eng'rs, 288 F.3d 1140, 1143 (9th Cir. 2002).

45. Blumm, *supra* note 41, at 452.

46. 5 U.S.C. §§ 551, 553–558, 701–706 (2000); Or. Natural Res. Council v. Bureau of Land Mgmt., 150 F.3d 1132, 1135 (9th Cir. 1998).

47. *See* 5 U.S.C. § 706.

48. *See* 42 U.S.C. § 4332(2)(c).

49. *See* MANDELKER, *supra* note 40, § 4:54.

50. *See id.* § 4:61.

51. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970); *see* 5 U.S.C. § 702 (granting a right of review to persons suffering legal wrong as a result of agency action "within the meaning of the underlying statute").

52. *See* Taubman Realty Group v. Mineta, 320 F.3d 475, 481 (4th Cir. 2003) (noting that NEPA does not require preparation of an environmental impact statement for economic or social effects alone); Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1037–38 (8th Cir. 2002); ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n, 205 F.3d 403, 408 (D.C. Cir. 2000); Nev. Land Action v. United States Forest Serv., 8 F.3d 713, 715–17 (9th Cir. 1993); MANDELKER, *supra* note 40, § 4:22.

environmental zone of interest have standing to bring a NEPA challenge.[53]

II. RULE 24 ALLOWS ABSENTEES TO INTERVENE TO DEFEND THEIR INTERESTS THAT MAY BE AFFECTED BY PENDING LITIGATION

Intervention under Rule 24 allows an absentee with an interest in a pending lawsuit to join the litigation as a party on its own motion.[54] The rule distinguishes between intervention of right under Rule 24(a)(2)[55] and permissive intervention under Rule 24(b)(2).[56] Although both forms of intervention grant party status, there are significant practical differences between the two in criteria, degree of participation, and scope of review on appeal. The U.S. Supreme Court has established a flexible and practical approach to evaluating intervention requests.[57] As a result, many federal courts have become "more receptive" to granting intervention in the context of public law litigation.[58] In spite of this acceptance, Article III standing requirements[59] may limit the ability of absentees to intervene in some situations.

A. Rule 24 Allows Absentees To Intervene To Protect Their Interests in Existing Litigation

Intervention allows absentees with an interest in pending litigation to enter the lawsuit on their own motion.[60] A primary purpose of intervention is to protect the rights of people who may potentially be affected by litigation to which they are not parties.[61] This policy is consistent with the nature of the adversary process, which requires the

53. *See Nevada Land Action*, 8 F.3d at 715–17.

54. 7C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1901 (2d ed. 1986).

55. FED. R. CIV. P. 24(a)(2).

56. *Id.* 24(b)(2).

57. *See infra* Part II.B.

58. *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 217 (2000). Public law litigation is litigation used by multiple parties to resolve grievances over public policy. *See id.* at 219–22.

59. *See* U.S. CONST. art. III, § 2.

60. WRIGHT ET AL., *supra* note 54, § 1901.

61. Kleissler v. United States Forest Serv., 157 F.3d 964, 971 (3d Cir. 1998).

court to "hear from both sides before the interests of one side are impaired by a judgment."[62]

Federal Rule of Civil Procedure 24 governs intervention in federal district courts.[63] Rule 24(a)(2) requires a federal district court to allow an absentee to intervene in an action when (1) the absentee makes a timely motion to intervene, (2) the absentee has a significantly protectable interest relating to the property or transaction that is the subject of the action, (3) the applicant is so situated that the disposition of the litigation may as a practical matter impair its ability to protect this interest, and (4) none of the current parties adequately represents the absentee's interest.[64] The protectable interest requirement is often the critical factor upon which courts decide whether or not an absentee can intervene of right.[65]

Alternatively, a court may grant permissive intervention under Rule 24(b)(2). This Rule provides that a court "may" permit absentees to intervene when their "claim or defense and the main action have a question of law or fact in common."[66] The district court has discretion to grant or deny intervention when an applicant meets these requirements and establishes independent grounds on which the court can assert jurisdiction.[67]

There are several significant practical differences between intervention of right and permissive intervention. Most importantly, intervention of right is not subject to district court discretion: if absentees meet the requirements for intervention of right, the district court must allow them to join the litigation.[68] In addition, although both permissive intervenors and intervenors of right become parties to a

62. Sierra Club v. Envtl. Prot. Agency, 995 F.2d 1478, 1483 (9th Cir. 1993).

63. FED. R. CIV. P. 24.

64. Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1113 (9th Cir. 2000). In relevant part, Rule 24(a) provides: "Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." FED. R. CIV. P. 24(a)(2).

65. *See, e.g.*, Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 837 (9th Cir. 1996) (holding that an absentee was not entitled to intervene of right because it lacked a significantly protectable interest).

66. FED. R. CIV. P. 24(b)(2).

67. *Northwest Forest Res. Council*, 82 F.3d at 839.

68. *See* FED. R. CIV. P. 24(a)(2) ("anyone shall" be granted intervention).

litigation,[69] the district court has broad discretion to impose even "highly restrictive" conditions on the involvement of permissive intervenors.[70] For example, the court can preclude a permissive intervenor from raising new claims for relief, prevent the intervenor from participating in some of the existing claims, and limit the intervenor's participation in discovery.[71] By contrast, the district court has less discretion to limit the scope of participation under Rule 24(a)(2) because an intervenor of right has an interest in the litigation that cannot be adequately protected without joining the litigation.[72] Finally, the scope of review on appeal depends on whether intervention is of right or permissive. An appellate court reviews a decision to grant or deny intervention of right de novo[73] but reviews a decision of permissive intervention only for abuse of discretion.[74]

B. The U.S. Supreme Court Has Adopted a Flexible, Practical Approach To the Protectable Interest Requirement for Intervention of Right Under Rule 24(a)(2) in Public Law Litigation

The U.S. Supreme Court has established a pragmatic approach to granting intervention of right under Rule 24(a)(2).[75] This approach requires courts to focus on the practical effects of the litigation when determining whether an absentee's protectable interest will be affected by the ongoing litigation.[76] The liberalized interest requirement has led to increased flexibility for intervention in public law litigation[77] by directing courts to consider the practical effect of the outcome of litigation.[78] Based on this pragmatic approach, courts in public law cases often consider the stare decisis effect of a judgment, which, while not

69. *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 377 (1987).

70. *Id.* at 382 n.1 (Brennan, J., concurring).

71. *See id.* at 373.

72. *Id.* at 381–82.

73. Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1113 (9th Cir. 2000).

74. Greene v. United States, 996 F.2d 973, 978 (9th Cir. 1993).

75. *See* Appel, *supra* note 58, at 215–16.

76. *See* FED. R. CIV. P. 24 advisory committee's notes to 1966 Amendments (noting that the prior rule 24 was unduly restrictive and that this amendment reflects a more practical focus of liberalized joinder requirements).

77. *See* Appel, *supra* note 58, at 215–16.

78. *See* Kleissler v. United States Forest Serv., 157 F.3d 964, 971 (3d Cir. 1998).

directly binding non-parties, constitutes a significant practical impairment in later litigation of the same issue.[79]

For example, in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,[80] the U.S. Supreme Court established that some public concerns constitute protectable interests sufficient to intervene of right under Rule 24(a)(2),[81] particularly when these concerns are protected by the statutes under consideration in the case.[82] The Court allowed the State of California to intervene in an antitrust suit involving the regional natural gas market,[83] holding that the state's public interest in a competitive natural gas market was the same interest that the antitrust laws at issue in the case sought to protect.[84] In reaching this conclusion, the Court reasoned that Rule 24(a)(2) focuses on the practical effects of litigation,[85] and stated that if "an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."[86]

Thus, the Court implied that the purpose of the underlying statute is relevant to determining whether absentees have a protectable interest sufficient to intervene of right.[87] Several circuits have applied a comparable analysis to hold that the citizen suit provisions of the Endangered Species Act (ESA)[88] establish a legally protected interest sufficient for a private citizen to intervene of right to defend a federal agency's decision to list a species under the act.[89] This inquiry is also

79. *See infra* notes 91–95 and accompanying text.

80. 386 U.S. 129 (1967).

81. *See* Diamond v. Charles, 476 U.S. 54, 68 (1986). The Court has provided little guidance on what public concerns are sufficient for intervention of right. *See* Appel, *supra* note 58, at 256, 266.

82. *See Diamond*, 476 U.S. at 66 n.17.

83. *Cascade Natural Gas Corp.*, 386 U.S. at 132.

84. *Id.* at 135–36.

85. *Id.* at 134 n.3.

86. *Id.* (emphasis omitted).

87. *See id.* at 135–36.

88. 16 U.S.C. §§ 1531–1544 (2000).

89. *See, e.g.*, Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. United States Dep't of the Interior, 100 F.3d 837, 841–42 (10th Cir. 1996) (granting intervention of right to a private party who had successfully petitioned and litigated for the listing of the Mexican Spotted Owl); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1395–98 (9th Cir. 1995) (granting intervention to organizations that had successfully sued to secure listing of the Bruneau Hot Springs Snail); *see also* Carl Tobias, *Rethinking Intervention in Environmental Litigation*, 78 WASH. U. L.Q. 313, 316 (2000) (noting that the "touchstone of analysis will be the purpose of the environmental statute which underlies the litigation, and how this purpose relates to the interest requirement for intervention").

closely analogous to the APA's zone of interest test for prudential standing, which considers whether the underlying statute arguably protects the plaintiff's interest.[90]

Courts often base the grant of intervention to absentees in public law cases on the potential stare decisis effect of a court's judgment determining the legality of an agency decision.[91] Such a determination can create a significant practical barrier to future litigation of the issue.[92] The U.S. Supreme Court has noted that although persons who were not parties to a particular adjudication are not bound by strict rules of res judicata, "subsequent litigation serves little practical value to the potential intervenor" because later courts would likely invoke the doctrine of stare decisis and defer to the original decision.[93] For example, the precedential effect of a decision that a particular forest management statute bars even-age logging could impair the ability of absentees to protect their interests in future lawsuits challenging the application of that statute to other timber sales.[94] Similarly, the stare decisis effect of a judgment regarding disputed aboriginal land rights constitutes a sufficient practical impairment to justify intervention of right by absentee tribes claiming rights to the same land.[95] Granting intervention in such situations avoids the problem of a court effectively binding parties without first giving them an opportunity to be heard.[96]

As a result of Rule 24's liberalized interest requirements and the effect of stare decisis, most federal courts have been generally receptive to intervenors in public law cases.[97] Granting intervention in these cases ensures that all sides are represented in litigation that implicates issues of broad social concern.[98] It can also reduce future litigation of the same issues while broadening access to the courts.[99]

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90. *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970); *see also supra* notes 52–53 and accompanying text.

91. *See, e.g.*, Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (concluding that the potential stare decisis effect of the judgment in the case would impair the interests of the absentees).

92. *See id.*

93. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield, 382 U.S. 205, 213 (1965).

94. *Espy*, 18 F.3d at 1207.

95. Oneida Indian Nation of Wis. v. New York, 732 F.2d 261, 265 (2d Cir. 1984).

96. Appel, *supra* note 58, at 299.

97. *See id.* at 282.

98. *See* Cindy Vreeland, Note, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 279 (1990).

99. Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1496 n.8 (9th Cir.

C. *Article III Standing May Limit the Ability of Absentees To Intervene*

The federal circuits disagree about whether a party seeking to intervene of right at the district court level must satisfy Article III standing requirements.[100] Although the concepts of intervention of right and standing have different origins and purposes,[101] they have similar requirements.[102] An applicant for intervention of right must demonstrate a protectable interest that may be affected by the outcome of the lawsuit.[103] To establish standing, a plaintiff must allege an "invasion of a legally protected interest" that might be redressed by the litigation.[104] The similarity between these two standards has led some federal courts to conflate the tests. For example, the Tenth Circuit has concluded that meeting the requirements of standing is one way to demonstrate that an absentee has a protectable interest sufficient to intervene of right.[105] In some circuits, however, requirements for standing pose a significant barrier to intervention.[106]

Although the federal circuits differ on whether standing is required to intervene at the district court level, the U.S. Supreme Court has established that an intervenor must demonstrate independent Article III standing in order to appeal a judgment without the party on whose side

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1995).

100. *See* U.S. CONST. art. III, § 2; Diamond v. Charles, 476 U.S. 54, 68–69 (1986); Tyler R. Stradling & Doyle S. Byers, Comment, *Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 BYU L. REV. 419, 424–35 (noting that of the eight circuits to consider the issue, three require standing and five do not). *Compare* Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 308 n.1 (9th Cir. 1989) (noting that the Ninth Circuit resolves intervention questions without reference to standing doctrine), *with* United States v. 36.96 Acres of Land, 754 F.2d 855, 859–60 (7th Cir. 1985) (holding that an organization's aesthetic and environmental interests were not sufficient under Rule 24(a)(2), which requires a "direct and substantial" legally-protectable interest).

101. Carl Tobias, *Standing To Intervene*, 1991 WIS. L. REV. 415, 416–17 (noting that standing entails whether a plaintiff can initiate a lawsuit in order to meet Article III's case or controversy requirement, while intervention entails whether an absentee may participate in ongoing litigation in which the plaintiff already has standing). This Note will not address standing in intervention cases. For more information about the application of standing requirements to intervention analysis, see generally *id.*

102. *See Portland Audubon Soc'y*, 866 F.2d at 308 n.1.

103. *See id.* at 308.

104. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

105. *See* Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. United States Dep't of the Interior, 100 F.3d 837, 842 (10th Cir. 1996).

106. *See, e.g.*, United States v. 36.96 Acres of Land, 754 F.2d 855, 859–60 (7th Cir. 1985).

they intervened.[107] In *Diamond v. Charles*,[108] the Court held that a private individual whose conduct is not directly implicated by a state abortion law could not appeal a decision finding the law unconstitutional because the state did not appeal.[109] The intervenor lacked a judicially cognizable interest in the state's prosecution of another person under this criminal statute.[110] The Court reasoned that because only the state could adopt a legal code, only the state has standing to defend the code against a constitutional attack.[111] However, the Court left open the possibility that a private party could establish standing to defend the constitutionality of a statute that creates a protectable private interest.[112]

In sum, the U.S. Supreme Court has established a pragmatic test for granting intervention under Rule 24. Courts must grant intervention of right when absentees meet the requirements of Rule 24(a)(2), guaranteeing the opportunity to defend interests at stake in pending litigation. By contrast, courts have broad discretion to grant, deny, or limit the scope of intervention under Rule 24(b)(2). Federal courts are generally receptive to intervenors in public law cases, particularly when the absentees seek to vindicate interests consistent with the purpose of the underlying statute. However, Article III standing requirements may limit the ability of public interest organizations to intervene in some circumstances.

III. THE NINTH CIRCUIT LIBERALLY GRANTS INTERVENTION OF RIGHT IN PUBLIC LAW CASES EXCEPT TO THOSE DEFENDING NEPA CHALLENGES

The Ninth Circuit liberally approves intervention requests in most public law cases.[113] The court broadly grants intervention of right to private groups to defend procedural or constitutional challenges to laws or regulations other than NEPA,[114] but it applies the federal defendant rule to deny intervention of right by parties other than the federal

107. Diamond v. Charles, 476 U.S. 54, 68–69 (1986).

108. 476 U.S. 54 (1986).

109. *Id.* at 56.

110. *Id.* at 64–65, 71.

111. *Id.* at 65.

112. *Id.* at 65–66, 65 n.17.

113. *See* Vreeland, *supra* note 98, at 289.

114. *See infra* Part III.A.

government to defend NEPA challenges.[115] In reaching these contradictory results, the court has not explained how NEPA differs from other procedural or constitutional rules that a private party cannot violate.[116]

A. The Ninth Circuit Interprets Rule 24(a)(2) in Favor of Granting Intervention, and Generally Allows Public Interest Groups To Defend Government Decisions

The Ninth Circuit generally interprets Rule 24(a)(2)'s protectable interest requirement broadly.[117] The court views Rule 24(a)(2)'s protectable interest test as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[118] Applying these principles to non-NEPA cases, the Ninth Circuit implicitly rejects the federal defendant rule by granting intervention of right to groups "directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose" to defend even procedural and constitutional challenges to government actions.[119]

When private groups have sought to intervene to defend non-NEPA challenges to laws for which they had advocated, the Ninth Circuit has demonstrated broad flexibility in granting intervention of right.[120] The

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115. *See infra* Part III.B.

116. *Compare* Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 526–27 (9th Cir. 1983) (granting intervention of right to organizations that had participated in the administration designation of a conservation area), Wash. State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982) (granting intervention of right to an initiative sponsor to defend a constitutional challenge), *and* Idaho v. Freeman, 625 F.2d 886, 887 (9th Cir. 1980) (granting intervention of right to the National Organization for Women to defend a constitutional challenge), *with Kootenai II*, 313 F.3d 1094, 1108 (9th Cir. 2002) (denying intervention of right to organizations that had promoted adoption of the Roadless Rule).

117. *See Spellman*, 684 F.2d at 630.

118. Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1496 (9th Cir. 1995) (quoting Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)).

119. Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 837 (9th Cir. 1996).

120. *See id.* Several other federal courts have followed the Ninth Circuit's lead in granting intervention of right to private groups to defend the constitutionality of laws for which they had advocated. *See* Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1256 (10th Cir. 2001) (granting intervention of right to environmental groups to defend a monument designation); Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1245–47 (6th Cir. 1997) (citing Ninth Circuit cases in granting intervention to the Chamber of Commerce to defend a constitutional challenge to a campaign finance reform law that the Chamber had previously advocated for at the state legislature); Mausolf v. Babbitt, 85 F.3d 1295, 1296, 1303–04 (8th Cir. 1996) (granting intervention of right to conservation groups that had been involved in prior litigation and administrative proceedings to

court has granted intervention in non-NEPA cases even when the private groups could not themselves have enacted, enforced, or violated the law at issue in the case.[121] For example, the Ninth Circuit granted intervention of right to the National Organization for Women to defend a constitutional challenge to the ratification procedures of the proposed Equal Rights Amendment because it had a continuing interest in the amendment that would be impaired by an adverse decision.[122] The court has also allowed the private sponsor of a ballot initiative to intervene of right to defend a Commerce Clause[123] challenge because of the sponsor's direct involvement in the adoption of the law.[124] Similarly, the court recently allowed the private sponsors of an anti-trapping initiative to intervene to defend a constitutional challenge involving claims of federal preemption under the Supremacy Clause[125] as well as due process and Commerce Clause claims.[126]

The Ninth Circuit has also granted intervention of right to defend procedural challenges to administrative decisions in environmental litigation involving statutes other than NEPA. In *Sagebrush Rebellion, Inc. v. Watt*,[127] the court granted intervention of right to environmental organizations to defend a procedural challenge[128] to the Interior Secretary's decision to withdraw nearly a half million acres under the a federal land management statute in order to create a bird conservation area.[129] The court concluded that the environmental organizations that participated in the rulemaking process had a significantly protectable interest in the conservation of birds and their habitats that would, as a practical matter, be impaired by an adverse judgment in the case.[130]

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defend a challenge to snowmobile restrictions at Voyageurs National Park); A & P v. Town of E. Hampton, 178 F.R.D. 39, 41–42 (E.D.N.Y. 1998) (granting intervention of right to a group that had actively advocated for adoption of a Superstore Law to defend a constitutional challenge).

121. *See, e.g.*, *Freeman*, 625 F.2d at 887 (granting intervention of right to a private organization to defend a challenge to procedures for adopting a constitutional amendment).

122. *Id.*

123. Wash. State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 629–30 (9th Cir. 1982).

124. *Id.*

125. *See* Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 841–42 (9th Cir.), *as amended on denial of reh'g en banc*, 312 F.3d 416 (9th Cir. 2002).

126. *See id.*

127. 713 F.2d 525 (9th Cir. 1983).

128. *Id.* at 526, 529.

129. *Id.* at 526.

130. *Id.* at 526–28.

Similarly, absentees who petition to list a species under the ESA can intervene of right to defend litigation seeking to eliminate or reduce protections for that species because of the government's alleged procedural violations.[131] For example, in *Idaho Farm Bureau Federation v. Babbitt*,[132] plaintiffs challenged the procedures that led to the listing of the Bruneau Hot Springs Snail under the ESA, including the alleged failure by the federal government to comply with time limits and notice requirements.[133] The intervening environmental groups had actively participated in the administrative process leading to the decision, including filing the original petition for listing and suing the agency to force it to act.[134] In determining that the conservation groups had a protectable interest sufficient to intervene of right under Rule 24(a)(2), the Ninth Circuit stated that "a public interest group is entitled *as a matter of right* to intervene in an action challenging the legality of a measure it has supported."[135]

In *Didrickson v. United States Department of the Interior*,[136] the Ninth Circuit allowed permissive intervenors to appeal a district court decision that overturned a wildlife regulation when the original federal government defendant declined to appeal.[137] Although this case involved permissive intervention, the court's reasoning is relevant to determining whether intervenors have a right to appeal a district court decision invalidating a government action.[138] The *Didrickson* court considered the practical effects of denying the request, noting that by acquiescing to the district court's judgment overturning the regulation, the government had effectively promulgated a new regulation adverse to the intervenors' position.[139] Moreover, the intervenors participated in the rulemaking proceedings leading to the regulation,[140] and could have challenged the government's new position under the APA had this been the agency's original decision.[141] Thus, the lower court judgment created a sufficient

131. *See* Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995).

132. 58 F.3d 1392 (9th Cir. 1995).

133. *Id.* at 1395.

134. *Id.* at 1398.

135. *Id.* at 1397 (emphasis added).

136. 982 F.2d 1332 (9th Cir. 1992).

137. *Id.* at 1337–39.

138. *See id.*

139. *Id.* at 1339.

140. *Id.* at 1338–39.

141. *See* 5 U.S.C. § 706 (2000).

interest to justify permissive intervention.[142] In addition, the court expressly rejected the government's argument that, based on the Supreme Court's decision in *Diamond*, it was the only party that could have standing to defend its own regulation in court.[143]

In granting intervention to private groups to defend these diverse government actions, the Ninth Circuit has repeatedly noted the importance of the intervenors' participation in the process of adopting the challenged law.[144] By contrast, the Ninth Circuit has held that a group's generalized environmental interests were not sufficient to intervene of right in defense of legislation that the group had not promoted.[145] This participation interest continues to be a basis for granting intervention of right under Rule 24(a)(2) to non-governmental organizations to defend non-NEPA challenges.[146]

B. The Ninth Circuit Has Severely Restricted Intervention of Right by Groups Other Than the Federal Government To Defend NEPA Challenges

In contrast to its decisions in non-NEPA cases, the Ninth Circuit has strictly limited the ability of private groups to intervene to defend NEPA challenges. In a series of NEPA cases beginning with *Portland Audubon Society v. Hodel*,[147] the Ninth Circuit has stated two discrete rationales for denying defendant-side intervention. First, the court has adopted a blanket federal defendant rule, holding that because only the federal government can violate NEPA, it is the only proper defendant in a NEPA challenge.[148] Second, in many of the same cases, the court also denied intervention because the applicants asserted purely economic

142. *Didrickson*, 982 F.2d at 1338–39.

143. *Id.* at 1339–40.

144. *See, e.g.*, *id.* at 1339 (noting that the proposed intervenors had participated in the relevant rulemaking process as a basis for granting permissive intervention); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 526–27 (9th Cir. 1983) (citing the fact that "[b]oth groups participated actively in the administrative process . . . to establish the Birds of Prey Conservation Area").

145. Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 837–38 (9th Cir. 1996).

146. *See, e.g.*, Nat'l Audubon Soc'y v. Davis, 307 F.3d 835, 842 (9th Cir. 2002) (allowing the sponsor of an anti-trapping initiative to intervene to defend a constitutional challenge).

147. 866 F.2d 302 (9th Cir. 1989).

148. Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1114 (9th Cir. 2000); Churchill County v. Babbitt, 150 F.3d 1072, 1082 (9th Cir. 1998); Sierra Club v. Envtl. Prot. Agency, 995 F.2d 1478, 1485 (9th Cir. 1993); *see* Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989) (citing Wade v. Goldschmidt, 673 F.2d 182, 185 (7th Cir. 1982)).

injuries that fall outside of NEPA's zone of interest for the environment.[149] These two competing rationales have led to ambiguity in the Ninth Circuit's application of Rule 24,[150] particularly when absentees assert environmental injuries. Several other federal courts have rejected the Ninth Circuit's federal defendant rule as being inconsistent with the purposes of Rule 24 and its emphasis on practical considerations.[151]

The Ninth Circuit bases its federal defendant rule on the rationale that because NEPA establishes procedural requirements for the federal government, only the federal government can be liable for failing to comply with NEPA.[152] For example, the court applied the federal defendant rule in *Wetlands Action Network v. United States Army Corps of Engineers*[153] to deny intervention of right to a developer who sought to defend a NEPA challenge to a federal permit that allowed it to fill wetlands on its property.[154] Because a private party cannot violate NEPA, the court ruled that the developer could not defend the NEPA challenge.[155] Similarly, the court in *Sierra Club v. Environmental Protection Agency*[156] stated that interests that might be significantly protectable in other circumstances may not suffice for intervention of right to defend a NEPA challenge.[157]

The Ninth Circuit has also applied the APA's zone of interest test to determine whether prospective intervenors satisfy the protectable interest requirement for intervention of right in a NEPA case.[158] In applying this test to determine whether a private party has standing to

149. *Wetlands*, 222 F.3d at 1109; *Sierra Club*, 995 F.2d at 1485; *Portland Audubon Soc'y*, 866 F.2d at 309.

150. *Kootenai II*, 313 F.3d 1094, 1108 (9th Cir. 2002).

151. Kleissler v. United States Forest Serv., 157 F.3d 964, 971 (3d Cir. 1998) (noting that the Ninth Circuit's rigid rule in NEPA cases contravenes the major purpose of intervention, which is to protect third parties affected by pending litigation); Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (concluding that the stare decisis effect of a decision in a NEPA challenge could impair the intervenors' property interests); Wilderness Soc'y v. Babbitt, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (concluding that the purposes of Rule 24 are best served by allowing interested parties to participate in all aspects of the litigation).

152. *See, e.g.*, *Wetlands*, 222 F.3d at 1114.

153. *Id.* at 1105.

154. *Id.* at 1109.

155. *Id.* at 1114.

156. 995 F.2d 1478 (9th Cir. 1993).

157. *Id.* at 1485.

158. *See* Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1497 (9th Cir. 1995) (noting that the intervenors asserted non-economic interests "within NEPA's zone of concern for the environment") (quoting Douglas County v. Babbitt, 48 F.3d 1495, 1497 (9th Cir. 1995)).

bring a NEPA challenge, the court has concluded that "the purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions."[159] Applying this reasoning to questions of intervention of right, the court has denied intervention to absentees who assert purely economic injuries because they do not have a protectable interest under NEPA.[160] For example, in *Portland Audubon Society*, the court denied intervention to logging companies seeking to defend a NEPA challenge that would enjoin a group of timber sales.[161] The court distinguished *Sagebrush Rebellion*, noting that the logging companies seeking to intervene in *Portland Audubon Society* asserted purely economic claims that were not protected by NEPA whereas the *Sagebrush Rebellion* intervenors asserted interests that were protected by the federal law at issue in the case.[162]

However, other statutes can create an interest sufficient to intervene of right to defend a NEPA challenge even when the absentees do not assert environmental interests. For example, in *Sierra Club v. Environmental Protection Agency*, the court concluded that the holder of a Clean Water Act discharge permit had a protectable interest sufficient to intervene of right to defend a NEPA challenge to that permit.[163] Although NEPA did not protect the intervenor's economic interest, the Clean Water Act did.[164]

The Ninth Circuit has granted a limited form of intervention to absentees asserting purely economic interests.[165] The court denied intervention of right to defend the government's compliance with NEPA in the liability phase of the trial.[166] However, it granted permissive intervention under Rule 24(b)(2) to allow intervenors to participate in the remedial phase of the trial when the court decides whether to impose an injunction.[167]

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159. Nev. Land Action Ass'n v. United States Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993) (noting that a plaintiff who asserts purely economic injuries falls outside NEPA's zone of interest).

160. Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989).

161. *Id.*

162. *Id.*

163. Sierra Club v. United States Envtl. Prot. Agency, 995 F.2d 1478, 1485–86 (9th Cir. 1993).

164. *Id.*

165. Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1109, 1114 (9th Cir. 2000); Churchill County v. Babbitt, 150 F.3d 1072, 1083 (9th Cir. 1998).

166. *Wetlands*, 222 F.3d at 1109, 1114; *Churchill County*, 150 F.3d at 1083.

167. *See Wetlands*, 222 F.3d at 1109, 1114; *Churchill County*, 150 F.3d at 1083.

The Ninth Circuit combined its use of the federal defendant rule and NEPA's zone of interest test in *Forest Conservation Council v. United States Forest Service*.[168] The court held that entities asserting environmental injuries have a protectable interest sufficient to intervene of right in a NEPA challenge, but could only participate in the remedial phase of the trial.[169] The court concluded that the State of Arizona's interests in preventing forest fires and pest infestations on state land adjacent to the National Forests affected by the litigation constituted a concrete, plausible conservation concern within NEPA's zone of concern for the environment.[170] However, under the federal defendant rule, the state lacked a protectable interest in the government's compliance with NEPA, and thus could participate only in the remedial phase of the trial.[171]

Several other federal courts have considered and rejected the Ninth Circuit's federal defendant rule for NEPA cases as unduly formalistic given the flexible and practical approach of Rule 24.[172] In *Kleissler v. United States Forest Service*,[173] a NEPA challenge involving timber sales that would provide revenue to local communities, the Third Circuit expressly rejected the "narrow approach" of the Ninth Circuit's federal defendant rule.[174] The court stated that the Ninth Circuit's approach "minimizes the flexibility and spirit of Rule 24 as interpreted in *Cascade Natural Gas*."[175] The *Kleissler* court granted intervention of right to local school districts and municipalities to participate in both the liability and the remedial phases of the trial, noting the practical effects of a potential injunction on the intervenors' interests.[176] Similarly, the Fifth Circuit granted intervention of right to defend both the liability and remedial phases of a NEPA challenge in *Sierra Club v. Espy*[177] because

168. 66 F.3d 1489 (9th Cir. 1995).

169. *Id.* at 1496, 1499.

170. *Id.* at 1497.

171. *Id.* at 1499 & n.11.

172. Kleissler v. United States Forest Serv., 157 F.3d 964, 971 (3d Cir. 1998); Sierra Club v. Espy, 18 F.3d 1202, 1207–08 (5th Cir. 1994); Wilderness Soc'y v. Babbitt, 104 F. Supp. 2d 10, 18 (D.D.C. 2000). However, at least one other federal court follows the federal defendant rule, applying reasoning very similar to the Ninth Circuit's. *See* Wade v. Goldschmidt, 673 F.2d 182, 185 (7th Cir. 1982).

173. 157 F.3d 964 (3d Cir. 1998).

174. *Id.* at 971.

175. *Id.*

176. *Id.* at 972–73.

177. 18 F.3d 1202 (5th Cir. 1994).

the stare decisis effect of the decision would impair the intervenor's protectable interests.[178] Finally, the District Court for the District of Columbia noted that its circuit had not adopted the federal defendant rule and concluded that the purposes of Rule 24 would best be served by full participation by affected parties in a NEPA challenge.[179]

In sum, the Ninth Circuit's federal defendant rule in NEPA cases contrasts with its liberal grant of intervention when other statutes or regulations are at issue. Outside of the NEPA context, the Ninth Circuit has granted intervention to defend even constitutional and procedural violations that only the government could commit. The Ninth Circuit's more restrictive rule for intervention in NEPA cases is also at odds with several other circuits' NEPA cases.

IV. IN *KOOTENAI TRIBE OF IDAHO V. VENEMAN*, THE NINTH CIRCUIT APPLIED THE FEDERAL DEFENDANT RULE TO DENY INTERVENTION OF RIGHT

In *Kootenai Tribe of Idaho v. Veneman*, the Ninth Circuit substantially limited the ability of environmental groups to intervene to defend NEPA challenges. Although the *Kootenai* court upheld a far-reaching conservation law that would protect nearly sixty million acres of National Forests from logging and roadbuilding, it extended the federal defendant rule beyond its prior application by denying intervention of right to organizations that both asserted environmental injuries[180] and participated actively in the rulemaking process.[181] Instead, the court granted only permissive intervention.[182] By so holding, the court left the environmental groups' ability to intervene to defend future NEPA challenges to the discretion of the district court under Rule 24(b)(2).[183]

The Forest Service adopted the Roadless Rule after numerous environmental groups worked for years to secure strong protections for

178. *Id.* at 1207.

179. Wilderness Soc'y v. Babbitt, 104 F. Supp. 2d 10, 18 (D.D.C. 2000).

180. *Kootenai II*, 313 F.3d 1094, 1104, 1109–10 (9th Cir. 2002).

181. *See* Wyoming v. United States Dep't of Agric., 201 F. Supp. 2d 1151, 1153–54 (D. Wyo. 2002) (hearing a parallel challenge to the Roadless Rule in which plaintiffs alleged that the federal government had violated the Federal Advisory Committee Act by working too closely with environmental groups to formulate the Roadless Rule).

182. *Kootenai II*, 313 F.3d at 1110.

183. *See* Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 839 (9th Cir. 1996).

these remote wildlands in the National Forests.[184] The Forest Service began to study and inventory roadless areas larger than five thousand acres in the 1970s.[185] In response to active persuasion by environmental groups during the Clinton administration,[186] the Forest Service initiated a NEPA rulemaking process in October 1999 to develop a nationwide plan to protect these roadless areas.[187] The Forest Service issued a comprehensive EIS in May 2000 examining the potential impacts of implementing the Rule.[188] Just days before leaving office, the Clinton administration issued a final rule that would ban most new roadbuilding and logging in 58.5 million acres of inventoried roadless areas in National Forests throughout the United States.[189]

Environmental organizations participated extensively throughout the NEPA rulemaking process, actively seeking adoption of the Roadless Rule.[190] As a result of a broad campaign by these and other organizations, the Forest Service received more than 1.15 million comments on the Roadless Rule EIS, ninety-six percent of which favored strong protections.[191] In response to this public support, the Forest Service issued its final rule in January 2001, prohibiting most roadbuilding and increasing the area to be "committed to pristine wilderness" by seven million acres.[192]

Three days later, the Kootenai Tribe of Idaho, the State of Idaho, and snowmobile, timber, and livestock groups filed suit in the District Court of Idaho to challenge the Roadless Rule.[193] They alleged procedural violations of NEPA, including failure to consider an adequate range of alternatives.[194] The newly-inaugurated President George W. Bush temporarily suspended implementation of the Roadless Rule.[195] The Forest Service then announced that it would initiate a new rulemaking

184. *See Wyoming*, 201 F. Supp. 2d at 1153.
185. *Kootenai II*, 313 F.3d at 1104.
186. *See Wyoming*, 201 F. Supp. 2d at 1153.
187. *Kootenai II*, 313 F.3d at 1105.
188. *Id.*
189. *Id.*
190. *Wyoming*, 201 F. Supp. 2d at 1153.
191. *See Kootenai II*, 313 F.3d at 1116 n.19, 1119.
192. *Id.* at 1105–06.
193. *Id.* at 1104.
194. *Id.* at 1120.
195. *Id.* at 1106.

process because of the administration's concerns over how the rule had been promulgated.[196]

Anticipating that the Bush administration might not vigorously defend the Roadless Rule, several environmental groups sought to intervene to defend the NEPA challenge.[197] The district court granted intervention of right under Rule 24(a)(2) and concluded that the groups satisfied the requirements of having a protectable interest that could be impaired by an adverse judgment and that was not adequately represented by the existing parties.[198] The court reasoned that the environmental groups asserted conservation interests protected by NEPA and fell within the *Sagebrush Rebellion* rule allowing groups that actively supported a federal regulation during the administrative rulemaking process to intervene of right to defend the regulation.[199] The court further reasoned that the federal defendants may not adequately represent these conservation interests because the federal defendants must represent the broad public interest rather than the specific environmental concerns of the intervenors.[200] In addition, the court alternatively granted permissive intervention under Rule 24(b)(2).[201] However, after allowing the groups to intervene, the court rejected their NEPA arguments and held that the Forest Service had considered an inadequate range of alternatives and provided an inadequate comment period.[202] The court later issued a temporary injunction blocking implementation of the Roadless Rule.[203] The Forest Service declined to appeal this decision, and the environmental intervenors appealed without the original defendant.[204]

On appeal, the Ninth Circuit invoked the federal defendant rule to reject the district court's grant of intervention of right under Rule 24(a)(2).[205] The court first considered whether intervenors asserting environmental interests could defend the federal government's alleged violations of NEPA's procedural requirements without the government's

196. *Id.*

197. *Id.*

198. Kootenai Tribe of Idaho v. Veneman, No. CV01-10-N-EJL (D. Idaho Mar. 14, 2001) (order granting intervention).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Kootenai I*, 142 F. Supp. 2d 1231, 1244, 1246–47 (D. Idaho 2001).

203. *Kootenai II*, 313 F.3d 1094, 1106–07 (9th Cir. 2002).

204. *Id.* at 1107.

205. *Id.* at 1108.

participation.[206] While admitting that its precedent on this issue was perhaps not "crystal clear,"[207] the court determined that under the federal defendant rule, these groups lacked the significantly protectable interest in the rulemaking process required to intervene of right.[208] In so holding, the court did not distinguish[209] either its application of NEPA's zone of interest test to grant intervention of right to groups asserting environmental injuries in *Forest Conservation Council*[210] or the *Sagebrush Rebellion* rule that groups can intervene of right to defend a federal regulation they supported.[211]

Although the Ninth Circuit denied intervention of right, it held that the district court had not abused its discretion by granting permissive intervention under Rule 24(b)(2).[212] The court reasoned that the environmental groups raised common issues of law or fact with the primary claims in the case by asserting defenses directly responsive to the claim for an injunction and, while lacking a direct interest in the rulemaking process, had interests in the use and enjoyment of roadless areas that would be protected by the Roadless Rule.[213] The Ninth Circuit noted that the federal government had declined from the beginning to defend the Roadless Rule and cited with approval the district court's reasoning that participation by the intervenors would "contribute to the equitable resolution of this case."[214]

The Ninth Circuit also held that the intervenors had standing to appeal the decision without the federal government based on their environmental interests in the implementation of the rule.[215] Under the U.S. Supreme Court's holding in *Diamond*, the intervenors were required to establish independent Article III standing because the government did not appeal.[216] In holding that the intervenors had standing, the Ninth Circuit reasoned that they had suffered an imminent

206. *Id.* at 1107.

207. *Id.* at 1108.

208. *Id.*

209. *See id.* at 1107–08.

210. Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1497 (9th Cir. 1995).

211. Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527–28 (9th Cir. 1983).

212. *Kootenai II*, 313 F.3d at 1111.

213. *Id.* at 1110–11.

214. *Id.* at 1111.

215. *Id.* at 1109–10.

216. *Id.* at 1109; *see supra* Part II.C.

invasion of a "legally-protected interest" in their use of the public lands that would receive less protection if the Roadless Rule were not implemented.[217] This injury was caused by the injunction and could be redressed by a decision to reinstate the Roadless Rule.[218]

After deciding these procedural issues, the Ninth Circuit held that the government had complied with NEPA and lifted the injunction.[219] The court agreed with the intervenors' arguments that the government had followed the correct procedures and considered an adequate range of alternatives.[220] Noting that the agency was "now governed by a new presidential administration which is perhaps less sympathetic to the Roadless Rule," the court expressly rejected the Forest Service's argument that the court should leave the injunction in place because implementing the rule would cause irreparable harm.[221] The court's decision to reinstate the Roadless Rule thus depended solely on the participation of the intervenors, who presented the only defense to the NEPA challenge while the government argued against implementing its own regulation.[222]

In summary, the *Kootenai* court extended the federal defendant rule to disallow intervention of right by environmental groups that had actively participated in the NEPA process. These groups are limited to permissive intervention under Rule 24(b)(2). Thus, the *Kootenai* court limited future defendant-side intervention by environmental groups in NEPA cases to the discretion of district courts.

V. THE NINTH CIRCUIT ERRED IN DENYING INTERVENTION OF RIGHT TO ENVIRONMENTAL GROUPS SEEKING TO DEFEND THE ROADLESS RULE

The *Kootenai* court misapplied Rule 24 and contradicted the environmental purpose of NEPA by denying intervention of right to conservation groups that had actively participated in the adoption of the Roadless Rule. This case demonstrates that the Ninth Circuit's federal

217. *Kootenai II*, 313 F.3d at 1109.

218. *Id.* at 1110. This standing analysis differs from the more typical case where the plaintiff must demonstrate Article III standing. Here, because the intervenors are defendants, their injury cannot be caused directly by the defendants as is typically required.

219. *Id.* at 1126.

220. *Id.* at 1121–22.

221. *Id.* at 1124.

222. *See id.* at 1111.

defendant rule contravenes Rule 24(a)(2) by failing to account for the practical impairment of the protectable interests of absentees. The Ninth Circuit should abandon its blanket rule denying defendant-side intervention of right in NEPA cases.[223] Instead, the court should apply Rule 24(a)(2) by focusing on whether the interests asserted by absentees are protected by NEPA,[224] whether the absentees established a protectable interest by actively participating in the administrative rulemaking process,[225] and whether the outcome of litigation might impair these interests.[226] Under this approach, the *Kootenai* intervenors satisfied the requirements for intervention of right because they asserted protectable conservation interests under NEPA[227] and had actively supported the Roadless Rule throughout the NEPA administrative rulemaking process.[228]

A. The Ninth Circuit's Federal Defendant Rule Misapplies Rule 24

The Ninth Circuit's federal defendant rule misapplies Rule 24. The primary purpose of Rule 24 is to allow absentees to protect their interests by permitting them to participate in existing litigation that might impair these interests.[229] By applying the federal defendant rule to deny intervention of right to environmental organizations, the Ninth Circuit has prevented these groups from joining litigation that might have a profound practical effect on their protectable interests unless the district court exercises its discretion to grant permissive intervention. This application of the federal defendant rule is inconsistent with the environmental purpose of NEPA because it renders participation by organizations asserting conservation interests less likely. In addition, the

223. The Ninth Circuit does not currently apply the federal defendant rule to statutes other than NEPA. *See supra* Part III.A. However, for the same reasons discussed *infra* Part V.A, the Ninth Circuit should likewise decline to extend the federal defendant rule to bar intervention to defend procedural challenges under other statutes.

224. *See* Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1497 (9th Cir. 1995).

225. *See, e.g.*, Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983).

226. *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 134 n.3 (1967).

227. *See* Coalition of Ariz./N.M. Counties v. United States Dep't of the Interior, 100 F.3d 837, 841–42 (10th Cir. 1996) (concluding that the ESA creates a protectable interest for a proposed intervenor who had petitioned for listing an endangered species).

228. *See Sagebrush Rebellion*, 713 F.2d at 527.

229. *See* Kleissler v. United States Forest Serv., 157 F.3d 964, 971 (3d Cir. 1998).

federal defendant rule contradicts the Ninth Circuit's more liberal grant of intervention of right to defend laws other than NEPA cases.[230]

1. The Ninth Circuit's Federal Defendant Rule Misapplies Rule 24(a)(2) by Failing To Assess the Practical Effects of Pending Litigation on Protectable Environmental Interests

The federal defendant rule undermines the purpose of Rule 24 because district courts must deny intervention of right to groups that assert protectable interests in the environment even when the outcome of the litigation is likely to directly and profoundly affect these interests.[231] The U.S. Supreme Court has specifically rejected this type of rigid interpretation of the protectable interest requirement, instead directing courts to adopt a pragmatic approach.[232] As noted by the Third Circuit in *Kleissler*, the federal defendant rule is an unusually narrow and formalistic reading of Rule 24 that ignores the U.S. Supreme Court's focus on practical effects in evaluating intervention requests.[233]

The *Kootenai* court demonstrated this narrow reasoning by drawing an imperceptibly fine distinction between satisfying the injury-in-fact requirement for Article III standing and the protectable interest requirement for Rule 24(a)(2), concluding that the intervenors satisfied the former but not the latter.[234] Although the purposes of standing and intervention of right differ, the requirements for both are similar.[235] In its analysis of standing, the *Kootenai* court concluded that the intervenors had suffered an injury in fact, or an invasion of a "legally-protected interest," to their use and appreciation of the areas to be protected by the Roadless Rule.[236] This injury was caused by the injunction that blocked implementation of the Roadless Rule, and could be redressed by lifting the injunction.[237] When the court applied Rule 24(a)(2)'s test for intervention of right, however, it invoked the federal defendant rule to conclude that the intervenors lacked a "significantly protectable

230. *See supra* Part III.A.

231. *See Kootenai II*, 313 F.3d 1094, 1108 (9th Cir. 2002).

232. *See* FED. R. CIV. P. 24 advisory committee's notes to 1966 Amendments.

233. *See Kleissler*, 157 F.3d at 971.

234. *Kootenai II*, 313 F.3d at 1108–10.

235. *See supra* notes 102–04 and accompanying text.

236. *Kootenai II*, 313 F.3d at 1109.

237. *Id.* at 1110.

interest"[238] in the litigation and were not so situated that "disposition of the action may as a practical matter impair or impede" their ability to protect this interest.[239] In reaching these apparently contradictory conclusions, the court narrowly distinguished the intervenors' protectable interest in the implementation of the Roadless Rule from their interest in the rulemaking process itself.[240]

This distinction fails to account for the practical effect of a court's conclusion that the government violated NEPA: a significantly increased likelihood that it will enjoin the regulation that absentees seek to defend.[241] Although the environmental organizations would not be directly bound by such a judgment, they would face significant practical barriers in future litigation based on principles of stare decisis.[242] The Ninth Circuit's approach in *Forest Conservation Council* of granting limited intervention of right to an absentee asserting environmental interests, but excluding the intervenor from the liability phase of the trial,[243] likewise fails to consider the practical effect of a decision on the merits. A court is not likely to issue an injunction in the remedial phase of a NEPA challenge unless it has already concluded that the federal government violated NEPA in the liability phase.[244] In *Kleissler*, the Third Circuit recognized this concern and rejected the Ninth Circuit's bifurcated approach of denying intervention in the liability phase of a NEPA trial while allowing intervention in the remedial phase. The court concluded that it could not pragmatically apply the Ninth Circuit's approach without "unduly attenuating" the absentees' protectable interests.[245]

Finally, the Ninth Circuit's federal defendant rule overlooks the effect on the rulemaking process when the government chooses not to appeal an adverse judgment. The Ninth Circuit in *Didrickson* recognized that the government's acquiescence to an adverse judgment is effectively equivalent to the promulgation of a regulation reversing the agency's

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

239. *See* FED. R. CIV. P. 24(a)(2).

240. *Kootenai II*, 313 F.3d at 1108.

241. *See* Kleissler v. United States Forest Serv., 157 F.3d 964, 972 (3d Cir. 1998).

242. *See supra* notes 91–96 and accompanying text.

243. Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995).

244. *See supra* notes 91–96 and accompanying text.

245. *See supra* notes 91–96 and accompanying text.

original decision.[246] Had the agency directly issued such a regulation, advocates of the original regulation could have brought suit under the APA to challenge its decision.[247] Yet, under the *Kootenai* rule, the party that prevailed in the agency's rulemaking process could be denied the opportunity to join litigation to defend the challenged regulation.[248] Because the *Kootenai* decision allows only permissive intervention under Rule 24(b)(2), the district court could exercise its discretion to deny intervention to environmental groups seeking to defend the agency's original decision,[249] regardless of the extent of their participation in the NEPA rulemaking process or the subject of the litigation. If the district court denies permissive intervention, an appellate court is likely to uphold the decision because it reviews such a denial under the deferential abuse of discretion standard.[250] This effectively means that the parties that originally prevailed in the rulemaking process can be shut out of litigation despite their interests in the implementation of the regulation.

2. *The Ninth Circuit's Use of the Federal Defendant Rule To Deny Intervention by Conservation Groups Is Inconsistent with the Environmental Purpose of NEPA*

The *Kootenai* court's application of the federal defendant rule to deny intervention of right to groups asserting conservation interests conflicts with NEPA's stated purpose of protecting the environment.[251] The *Kootenai* rule places environmental groups at a distinct practical disadvantage in future NEPA challenges seeking to overturn conservation-oriented regulations. Under the Ninth Circuit's federal defendant rule, once the agency makes a decision, only the side that opposed that decision is entitled to participate in the liability phase of NEPA litigation.[252] As a result, the side that successfully persuades an agency to adopt its preferred regulation does not have an equal opportunity to participate in future litigation of the matter. The practical effect of denying intervention to environmental groups is potentially

246. Didrickson v. United States Dep't of the Interior, 982 F.2d 1332, 1339 (9th Cir. 1992).

247. *See* 5 U.S.C. § 706 (2000).

248. *See Kootenai II*, 313 F.3d 1094, 1108 (9th Cir. 2002).

249. *See* FED. R. CIV. P. 24(b)(2) (providing that a court "may" grant intervention).

250. Greene v. United States, 996 F.2d 973, 978 (9th Cir. 1993).

251. *See* 42 U.S.C. § 4332(2) (2000); *see also supra* Part I.

252. *See Kootenai II*, 313 F.3d at 1108.

quite significant: if the federal government chooses not to defend the case, a court may invalidate a regulation regardless of whether the government complied with NEPA.

3. *The Ninth Circuit's Federal Defendant Rule Conflicts with Its Otherwise Liberal Grant of Intervention To Defend Challenges Brought Under Laws Other Than NEPA*

The Ninth Circuit's limited rationale for using the federal defendant rule in NEPA cases is further undermined by the court's refusal to apply the rule in comparable non-NEPA cases.[253] Notably, the court has not clearly articulated a distinction between NEPA litigation and other cases involving procedural or constitutional challenges.[254] In *Sagebrush Rebellion*, for example, the court granted intervention of right to conservation groups to defend the federal government's procedures in establishing a bird conservation area because the groups had participated in the administrative rulemaking process.[255] Likewise, in *Didrickson*, the Ninth Circuit permitted environmental groups to independently appeal a decision overturning a wildlife regulation adopted through an APA rulemaking process because they had actively advocated for the regulation.[256] In addition, the Ninth Circuit has repeatedly allowed private parties to intervene of right to defend a variety of constitutional challenges to government actions ranging from ratification procedures for a constitutional amendment[257] to voter initiatives to block the import of radioactive wastes.[258]

As nongovernmental organizations, the intervenors in these cases could not have violated either the constitutional provisions or the procedural requirements of the statutes at issue, but the Ninth Circuit

253. *See supra* Part III.A.

254. *Compare* Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 526–27 (9th Cir. 1983) (granting intervention of right to defend an administrative decision under the Federal Land Policy and Management Act), Wash. State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982) (granting intervention of right to defend a Commerce Clause challenge to a citizen initiative), *and* Idaho v. Freeman, 625 F.2d 886, 887 (9th Cir. 1980) (granting intervention of right to defend a challenge to the process of adopting a proposed constitutional amendment), *with Kootenai II*, 313 F.3d at 1108 (denying intervention of right because only the federal government can violate NEPA).

255. *Sagebrush Rebellion*, 713 F.2d at 526–29.

256. Didrickson v. United States Dep't of the Interior, 982 F.2d 1332, 1338–39 (9th Cir. 1992).

257. *Freeman*, 625 F.2d at 887.

258. *Spellman*, 684 F.2d at 630; *see supra* notes 121–26 and accompanying text.

granted them intervention of right to defend the federal government's actions.[259] These grants of intervention in comparable non-NEPA cases directly contradict the reasoning behind the Ninth Circuit's federal defendant rule that because only the government can violate the law, only the government can be a defendant.[260] Applying the federal defendant rule in NEPA cases directly conflicts with the Ninth Circuit's granting of intervention to defend procedural and constitutional challenges when other laws are at issue.[261]

In *Sagebrush Rebellion* and related cases, the Ninth Circuit correctly applied Rule 24 by focusing on the practical effects of the litigation on the interests of absentees.[262] In these cases, the court did not focus on whether the intervenors could violate the statutes in question, but instead applied Rule 24 to grant intervention based on the absentees' protectable interests that would be affected by the outcome of the litigation.

B. *The Environmental Intervenors Were Entitled To Intervene of Right Because They Asserted Injuries Within NEPA's Zone of Interest for the Environment and Participated Directly in the Rulemaking Process*

Under a proper application of Rule 24, the *Kootenai* intervenors satisfied the requirements for intervention of right. The court expressly recognized that the intervenors met three of the four requirements of Rule 24(a)(2): the application was timely, their interests could be impaired by a decision in the case, and the government did not provide adequate representation.[263] The court should have recognized that the environmental intervenors met the remaining requirement—that of having a significantly protectable interest—because they asserted conservation interests in the subject of the litigation that are protected by NEPA.[264] In addition, the intervenors had a protectable interest in defending the rulemaking process under the court's holding in *Sagebrush Rebellion* because they had participated directly in the adoption of the Roadless Rule.

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259. *See supra* Part III.A.

260. *See Kootenai II*, 313 F.3d 1094, 1108 (9th Cir. 2002).

261. *See supra* notes 121–26 and accompanying text.

262. *See supra* Part III.A.

263. *See Kootenai II*, 313 F.3d at 1108–11.

264. *See supra* notes 87–89 and accompanying text.

The *Kootenai* intervenors asserted interests in the Roadless Rule that fell within NEPA's zone of concern for the environment and thus established a protectable interest sufficient to intervene of right under Rule 24(a)(2).[265] When evaluating intervention motions, the court should consider the purpose of the underlying statute to determine whether it creates a protectable interest.[266] This is particularly appropriate in NEPA litigation because the APA, which provides the cause of action,[267] requires plaintiffs to assert an injury within the zone of interest of the underlying statute.[268] The Ninth Circuit has acknowledged that NEPA's environmental purpose is relevant to evaluating intervention requests.[269] In *Forest Conservation Council*, the court granted intervention of right to the State of Arizona to defend the remedial phase of a NEPA challenge because the state asserted interests in the environmental health of its adjacent forests that were "concrete, plausible interests within NEPA's zone of concern for the environment."[270]

The Ninth Circuit should have recognized that the potential environmental injuries asserted by the *Kootenai* intervenors were likewise within the zone of interest protected by NEPA.[271] Instead, without distinguishing its grant of intervention of right in *Forest Conservation Council*, the *Kootenai* court rejected the proposition that groups asserting environmental interests can intervene of right to defend NEPA cases.[272] The practical effect of denying intervention in this case would have been the invalidation of a conservation rule protecting vast tracts of ecologically significant forestland.[273] Although environmental groups would not have been directly bound by res judicata in future litigation of the issue, stare decisis would pose a significant practical barrier to relief.[274] This change in the regulation would result not from

265. *See supra* notes 87–89 and accompanying text.

266. *See* Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989); Stevenson v. Rominger, 905 F. Supp. 836, 840 (E.D. Wash. 1995); Tobias, *supra* note 89, at 316.

267. Or. Natural Res. Council Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1135 (9th Cir. 1998).

268. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

269. Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1497 (9th Cir. 1995).

270. *Id.*

271. *See Kootenai II*, 313 F.3d 1094, 1108 (9th Cir. 2002).

272. *Id.*

273. *See id.* at 1111 (noting that the federal government declined to defend the Roadless Rule).

274. *See supra* notes 91–96 and accompanying text.

the environmentally-informed, public decisionmaking process mandated by NEPA,[275] but instead from a court's decision in a case that was not defended. Such an outcome would contravene the fundamental purpose of NEPA.

In addition to having a protectable interest under NEPA, the environmental intervenors had a separate protectable interest in the rulemaking process under *Sagebrush Rebellion* because they directly and actively promoted the adoption of the Roadless Rule.[276] The Ninth Circuit has repeatedly granted intervention of right to groups to defend procedural or constitutional challenges to laws they helped to adopt.[277] For example, in *Sagebrush Rebellion*, the court granted intervention of right to environmental groups that had actively supported the federal government's establishment of a national conservation area during the rulemaking process.[278] Similarly, in *Kootenai*, the environmental intervenors actively participated in the NEPA rulemaking process,[279] encouraging participation by the public that led to submission of more than 1.15 million comments.[280] Both cases involved a change in presidential administration that resulted in a dramatically different approach to conservation policy after the rules were adopted.[281] The only significant distinction is that *Kootenai* is a NEPA case and *Sagebrush Rebellion* is not.[282]

VI. CONCLUSION

The *Kootenai* decision illustrates that the Ninth Circuit's federal defendant rule for NEPA cases misapplies Rule 24 by failing to account for the practical effects of litigation on the protectable interests of absentees. These interests include environmental concerns protected by NEPA and participation interests in the administrative rulemaking process. The Ninth Circuit should abandon its blanket federal defendant

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275. *See* Tillamook County v. United States Army Corps of Eng'rs, 288 F.3d 1140, 1142 (9th Cir. 2002).

276. *See supra* Part III.A.

277. *See* Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 837 (9th Cir. 1996).

278. Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 526 (9th Cir. 1983).

279. *See* Wyoming v. United States Dep't of Agric., 201 F. Supp. 2d 1151, 1153–54 (D. Wyo. 2002).

280. *See Kootenai II*, 313 F.3d 1094, 1119 (9th Cir. 2002).

281. *Id.*; *Sagebrush Rebellion*, 713 F.2d at 528.

282. *Kootenai II*, 313 F.3d at 1104; *Sagebrush Rebellion*, 713 F.2d at 526.

rule and instead determine whether the absentee asserts a significantly protectable interest in the subject matter of the litigation that may, as a practical matter, be impaired by the outcome of the litigation. Applying this test, the *Kootenai* intervenors met the requirements to intervene of right under Rule 24(a)(2) because they asserted environmental interests protected by NEPA, these interests would be practically impaired by the outcome of the litigation, and the interests were not adequately represented by the existing parties.