E – OUTLOOK

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

Year 2011 Environmental & Natural Resources Law Section
Issue 1 OREGON STATE BAR

Editor's Note: In this issue, Julie Weis of Haglund Kelly Jones & Wilder LLP analyzes the Ninth Circuit Court of Appeal's decision in *The Wilderness Society v. U.S. Forest Service*, addressing intervention in NEPA lawsuits.

We have reproduced the entire article below. Any opinions expressed in this article are those of the author alone. For those who prefer to view this article in PDF format, a copy will be posted on the Section's website: http://www.osbenviro.homestead.com/.

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Reversing Course: Ninth Circuit Abandons the "Federal Defendant Rule" for Intervention in National Environmental Policy Act Cases

By Julie Weis, Haglund Kelley Jones & Wilder LLP

Introduction. On January 14, 2011, in a case that began as a garden variety public lands dispute, an en banc panel of the Ninth Circuit Court of Appeals jettisoned more than twenty years of case law by abandoning the federal defendant rule, which had barred all non-federal entities from intervening as of right (and sometimes permissively) as defendants on the merits of cases brought under the National Environmental Policy Act (NEPA). The court, which had veered down the "none but the federal defendant" path more than twenty years ago in a line of cases starting with Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989), wisely concluded that "courts need no longer apply a categorical prohibition on intervention on the merits, or liability phase, of NEPA actions." The Wilderness Society v. U.S. Forest Service, No. 09-35200, 2011 WL 117627, at *1 (9th Cir. Jan. 11, 2011). Instead, courts tasked with adjudicating motions to intervene should do what many practitioners have long been advocating – decide motions to intervene based on the plain language of Rule 24 of the Federal Rules of Civil Procedure.

District Court Case. The Wilderness Society case originated as an Administrative Procedures Act (APA) challenge brought by environmental advocacy plaintiffs to the U.S. Forest Service's travel management plan for the Sawtooth National Forest in Idaho. The lawsuit alleged claims under various environmental statutes, including the Clean Water Act and the National Forest Management Act (NFMA), in addition to NEPA. A coalition of recreational interests moved to intervene in the case either as of right under Rule 24(a) or as permissive intervenors pursuant to Rule 24(b). The plaintiffs opposed the motion, and the U.S. Forest Service

defendants took no position on the intervention request. Ultimately, the district court denied the motion to intervene as of right on the grounds that the Ninth Circuit's federal defendant rule – which the court stated was not limited to NEPA actions – precluded private parties from intervening in cases like the one before it. The district court also denied the alternative request for permissive intervention, a holding not central to the en banc decision (and hence not discussed further).

Ninth Circuit Appeal. The recreational interests appealed the denial of intervention to the Ninth Circuit. In their briefing, appellants discussed at length the Ninth Circuit's unique and convoluted approach to intervention in the environmental and natural resources law context, and they also compared the Ninth Circuit's approach with that of other Circuit Courts of Appeal throughout the U.S. Appellants described the origin of the federal defendant rule in Portland Audubon Society, supra, 866 F.2d 302, the Court's analysis and extension of the rule to NFMA in Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489 (9th Cir. 1995), and the Court's revisitation of the rule in Kootenai Tribe v. Veneman, 313 F.3d 1094 (9th Cir. 2002), where the Court admitted its intervention case law "is not perhaps crystal clear." Id. at 1108. Appellants also pointed out that the Ninth Circuit's federal defendant rule represented a minority position in a Circuit split. After the federal defendants informed the Court they would not be participating in the appeal, an invitation to abandon the rule had been extended to the Court.

Oral Argument Before Three-Judge Panel.[1] A Ninth Circuit panel consisting of Judges Fisher, Tashima and Berzon heard oral argument on March 9, 2010. Ironically, as soon as appellants' counsel began to frame the case as one involving the Ninth Circuit's "unique restrictions on intervention that are applied against any non-federal parties in suits involving federal lands issues," Judge Fisher interjected – within the first minute of argument – that appellants' counsel should not "waste . . . time" on the federal defendant rule argument because the panel was "bound by our caselaw . . . so we're not going to try to overrule prior case law." During the subsequent course of oral argument, which dealt both with the specific posture of the case and the more general status of Ninth Circuit intervention law, Judge Berzon identified a particularly troublesome aspect of Ninth Circuit intervention law, namely the notion that an entity might possess standing to bring an APA lawsuit yet simultaneously lack a sufficient interest to intervene in a similar APA case. Judge Berzon stated she did not "understand that. It seems very weird that you can bring the lawsuit but that you don't have a good enough interest to intervene." Judge Tashima similarly questioned why an entity advocating on behalf of environmental interests would be treated inherently differently than an entity advocating on behalf of recreational interests in the intervention context, telling appellees' counsel that he failed "to see why, if you have a protectable interest . . . he doesn't have one? It just doesn't make any sense to me." Ultimately, after more than thirty minutes of argument, Judge Berzon asked the question which had been danced around deftly to that point: whether counsel for appellants was asking the panel "to call for an en banc vote on the federal defendant rule."

[1] Many who practice before the Ninth Circuit take a certain interest in the nuances of oral argument, recordings of which are available on the Ninth Circuit's website. For those who do not share such an interest, skip to the last section describing the implications of the Wilderness Society decision.

Ninth Circuit Takes Case En Banc. Four months later, the panel issued an Order asking the parties to brief the en banc question. The panel specifically instructed the parties to brief whether the case "should be heard en banc to decide if this court should abandon the 'federal defendant rule,' which prohibits private parties from intervening of right as defendants under Federal Rule of Civil Procedure 24(a) on the merits of claims arising under the National Environmental Policy Act." Order at 1-2. On September 30, 2010, Chief Judge Kozinski announced the Court had voted to hear the case en banc.

Oral Argument Before En Banc Panel. The en banc panel convened in Pasadena, California on December 13, 2010 (consisting of Chief Judge Kozinski joined by Judges Schroeder, Pregerson, Reinhardt, Rymer, Silverman, Graber, McKeown, Wardlaw, Rawlinson and Bybee). By that time, 37 amici curiae had weighed in on the issue before the Court, with no one advocating for retention of the federal defendant rule. Judge Pregerson, who had been on the Portland Audubon Society panel from which the federal defendant rule had emanated (along with fellow en banc panel member Judge Schroeder), suggested that the rule served an important case management purpose, observing that the long-running Portland Audubon Society line of cases had not been "easy to manage even from an appellate level." It was not lost on the panel, however, that none of the parties or amici were advocating for retention of the rule. The federal defendants were not parties to the appeal, and the appellees expressly declined to take a position on whether the Court should abandon the rule. On that note, Chief Judge Kozinski suggested the appellees' position was a wise one, observing that "environmental groups" periodically find themselves "on the other side of the issue." Counsel for appellees responded that the federal defendant rule "cuts both ways . . . it keeps everyone out . . . regardless of which side they're on." And in a short colloquy with counsel for amici curiae the Motorcyle Industry Council and Specialty Vehicle Institute of America, who had been ceded five minutes of argument time, the Court commented on the number and diversity of amici curiae – ranging from counties, states, Indian tribes, industry groups and recreation interests – many of whom who are "not always friends," yet all of whom were united in advocating for abandonment of the federal defendant rule.

Impact of Decision. The en banc opinion abandoning the federal defendant rule issued on January 14, 2011. The mandate has not yet issued, see Federal Rule of Appellate Procedure 41, but for practical purposes the federal defendant rule is a thing of the past. This does not mean that the floodgates to multi-party litigation have been opened; it simply means that the plain language of Rule 24(a), and hopefully Rule 24(b), will govern requests for intervention in the environmental and natural resources law context. (Although the holding in Wilderness Society speaks to intervention as of right in NEPA cases, the federal defendant rule's tentacles have extended far beyond that statute – now that the rule has been abandoned, its myriad progeny should be abandoned as well.) From a practice perspective, abandonment of the federal defendant rule should bring clarity to the courtroom and, in some cases, a reduction in unnecessary motion practice with its attendant costs. This is because it often is easier to assess a stakeholder's ability to satisfy the Rule 24 intervention requirements than it is to assess the likelihood that existing parties will oppose intervention based on the federal defendant rule and its permutations, and to predict a court's ultimate decision on such a motion. Ultimately, abandonment of the federal defendant rule should benefit entities from all ends of the interest spectrum who desire to participate in environmental and natural resources litigation affecting

their interests, without unduly burdening already-taxed federal judges, who have long demonstrated the ability to manage case dockets in the multi-party litigation setting.

If you would like to contribute or have comments, please contact the E-Outlook Editor, Patrick Rowe, at prowe@sussmanshank.com or (503) 243-1651.