

No. 09-35200

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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The Wilderness Society and Prairie Falcon Audubon, Inc.,

Plaintiffs-Appellees,

vs.

United States Forest Service; Jane P. Kollmeyer, Supervisor, Sawtooth National  
Forest; Scott C. Nannenga, District Ranger, Minidoka Ranger District,

Defendants,

and

Magic Valley Trail Machine Assoc., Idaho Recreation Council, and  
The BlueRibbon Coalition, Inc.,

Intervenor-Applicants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

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**BRIEF FOR AMICI CURIAE C.L. "BUTCH" OTTER  
GOVERNOR OF IDAHO, and  
IDAHO GOVERNOR'S OFFICE OF SPECIES CONSERVATION  
IN SUPPORT OF INTERVENOR-APPLICANTS-APPELLANTS**

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## TABLE OF CONTENTS

|   |    |
|---|----|
| STATEMENT OF CONSENT .....  | 1  |
| IDENTITY AND INTEREST OF AMICI CURIAE .....   | 1  |
| ARGUMENT .....  | 3  |
| I. Introduction.....  | 3  |
| II. This Court Should Modify the “Federal Defendant” Rule.....  | 6  |
| A. The “Federal Defendant” Rule overlooks and undermines special participatory roles created by Federal statutes and regulations .....                                    | 6  |
| B. The “Federal Defendant” Rule cannot be reconciled with the reality of the NEPA process .....   | 9  |
| C. Amici’s experience with Roadless area management and conservation provides <i>prima facie</i> evidence for eliminating or modifying the “Federal Defendant” Rule ..... | 16 |
| III. The “Federal Defendant” Rule Needs to be Modified to Prevent Inconsistent Application .....  | 21 |
| IV. The “Federal Defendant” Rule Tramples on Idaho’s State Sovereignty .....  | 23 |
| CONCLUSION .....  | 27 |

## TABLE OF AUTHORITIES

### Cases

|   |          |
|---|----------|
| <i>Defenders of Wildlife, et al. v. Hall, et al.</i> ,<br>No. 08-56-M-DWM (May 8, 2008).....                          | 22       |
| <i>Defenders of Wildlife, et al. v. Salazar, et al.</i> . No. 09-cv-077, Dkt. No. 62 (D.<br>Mont. Aug. 23, 2009)..... | 22       |
| <i>Douglas Cnty. v. Babbitt</i> ,<br>48 F.3d 1495 (9th Cir. 1995) .....   | 24       |
| <i>Florida Power &amp; Light Co. v. Lorion</i> , 470 U.S. 729 (1985).....   | 8        |
| <i>Forest Conservation Council v. U.S. Forest Serv.</i> ,<br>66 F.3d 1489 (9th Cir. 1995) .....                       | 2, 5, 24 |
| <i>Gonzales v. Oregon</i> ,<br>546 U.S. 243 (2006).....   | 26       |
| <i>Hillsborough Cnty. v. Automated Med. Labs., Inc.</i> , 471 U.S. 707, 719 (1985) .....                              | 26       |
| <i>Jayne, et al. v. Rey, et al.</i> ,<br>No. 09-cv-00015-BLW .....  | 18, 19   |
| <i>Jayne, et al.</i> , No. 09-cv-015-BLW, Docket Entry Order No. 27 (D. Idaho Apr. 16,<br>2009).....                  | 20       |
| <i>Jayne, et al.</i> , No. 09-cv-015-BLW, Docket Entry Order No. 74 (D. Idaho June 30,<br>2010) .....                 | 20       |
| <i>Kootenai Tribe of Idaho v. Veneman</i> ,<br>313 F.3d 1094 (9th Cir. 2002) .....                                    | 6, 9     |
| <i>Kootenai Tribe of Idaho v. Veneman</i> ,<br>No. CV01-10-N-EJL, 2001 WL 1141275 (D. Idaho May 10, 2001) .....       | 16, 17   |
| <i>Massachusetts v. EPA</i> ,<br>127 S. Ct. 1438 (2007).....  | 23, 24   |
| <i>Monsanto Co. v. Geertson Seed Farms</i> ,<br>130 S.Ct. 2743 (2010).....  | passim   |
| <i>Rapanos v. United States</i> ,<br>547 U.S. 715 (2006).....   | 25       |
| <i>Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers</i> ,<br>531 U.S. 159 (2001).....              | 26       |
| <i>Western Watersheds Project v. Servheen</i> ,<br>No. 07-cv-243-EJL, Dkt. No. 34 (Oct. 31, 2007).....                | 21       |

|   |        |
|---|--------|
| <i>Western Watersheds Project v. U.S. Fish and Wildlife Serv.</i> ,<br>No. 06-cv-00277-BLW, Dkt. No. 58 (Mar. 9, 2007)..... | 21     |
| <i>Western Watersheds Project v. U.S. Fish and Wildlife Serv.</i> ,<br>No. 07-35267 (9th Cir. Mar. 26, 2007).....           | 22     |
| <i>Western Watersheds Project</i> ,<br>No. 06-cv-00277-BLW, Dkt. No. 85 (Apr. 16, 2007).....                                | 22     |
| <i>Wetlands Action Network v. United States Army Corps. of Engr's</i> ,<br>222 F.3d 1105 (9th Cir. 2000).....               | 6      |
| <i>Winter v. Natural Resources Defense Council</i> ,<br>129 S. Ct. 365 (2008).....  | 5      |
| <i>Winter v. Natural Resources Defense Council</i> , 129 S. Ct. 365, 381 (2008) .....                                       | 5, 16  |
| <i>Wyoming v. U.S. Dep't of Agric.</i> , 277 F. Supp. 2d 1197 (D. Wyo. 2003).....   | 17     |
| <i>Yniguez v. Arizona</i> , 939 F.2d 727 (9th Cir. 1991) .....  | 20, 24 |

#### Statutes

|   |       |
|---|-------|
| 16 U.S.C. § 1604(a) .....   | 8     |
| 42 U.S.C. § 4321-4375 (2000).....   | 2     |
| 42 U.S.C. § 4331(a) .....   | 7     |
| 42 U.S.C. § 4332(c) .....   | 7, 11 |
| 42 U.S.C. § 4332(d) .....   | 9     |
| 42 U.S.C. § 4332(e) .....   | 9     |
| 5 U.S.C. § 553(e) .....   | 2     |
| Endangered Species Act, 16 U.S.C. § 1531, <i>et seq.</i> .....                              | 1     |
| National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852<br>(1970) ..... | 2     |

#### Other Authorities

|  |    |
|--|----|
| Bradley C. Karkkainen, <i>Whither NEPA?</i> , 12 N.Y.U. Env't'l. L.J. 333 (2004).....  | 12 |
| Council on Environmental Quality, <i>Collaboration in NEPA, A Handbook for<br/>NEPA Practitioners</i> (Oct. 2007) .....      | 11 |
| NEPA Task Force Report to the Council on Environmental Quality, <i>Modernizing<br/>NEPA Implementation</i> (Sept. 2003)..... | 10 |

#### Regulations

|                          |   |
|--------------------------|---|
| 40 C.F.R. § 1501.6 ..... | 7 |
|--------------------------|---|

|   |        |
|---|--------|
| 40 C.F.R. § 1501.7(a)(1) .....          | 7      |
| 40 C.F.R. § 1502.14 .....               | 9      |
| 40 C.F.R. § 1503.1(a)(2), (3) .....     | 7      |
| 40 C.F.R. § 1506.5(c).....              | 9      |
| 40 C.F.R. § 1506.6(d) .....             | 26     |
| 40 C.F.R. § 1508.5 .....                | 7      |
| 70 Fed. Reg. 25654 (May 13, 2005) ..... | 17     |
| 72 Fed. Reg. 13469 (Mar. 22, 2007)..... | 18     |
| 73 Fed. Reg. 61456 (Oct. 16, 2008)..... | 18, 19 |
| FED. R. CIV. P. 24(a)(2) .....          | 6      |

## STATEMENT OF CONSENT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-2(a), Amici Curiae Governor C.L. “Butch” Otter and the Governor’s Office of Species Conservation respectfully submit this brief with the consent of the appellant and appellee.

### IDENTITY AND INTEREST OF AMICI CURIAE

Amici Governor C.L. “Butch” Otter is the Governor of the State of Idaho and under Art. IV, sec. 5 of the Idaho Constitution, the Governor is the Chief Executive of the State and must ensure that the laws of the State of Idaho are faithfully executed. He files this brief in his official capacity as the Governor of the State of Idaho.

Amici Idaho Governor’s Office of Species Conservation (“OSC”) is an agency within the Executive Office of the Governor and is responsible for implementing programs furthering the Governor’s obligation to faithfully execute the laws of the State of Idaho. Under title 67, section 818(2) of the Idaho Code, OSC has the authority *inter alia* to coordinate all Federal and state agencies with duties and responsibilities affecting petitioned and listed species under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (“ESA”).

At the direction of the Governor, Amicus OSC works with many citizens of the State who need to access and utilize federal lands. These federally permitted

activities can occur in areas that serve as habitat for listed or candidate species thus implicating OSC's mission to develop cooperative strategies with federal, state and private stakeholders to conserve species and their habitat while maintaining predictable levels of appropriate land use. Amici have developed land use strategies running the gamut from ESA section 7 biological opinions to macro-scale petitions to the federal government seeking changes to or refinement of a specific Federal regulation under the Administrative Procedure Act. *See* 5 U.S.C. § 553(e) (stating “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

Given the contentious nature of public land management, the underlying National Environmental Policy Act (NEPA)<sup>1</sup> compliance associated with states' land use strategies frequently come under scrutiny by opposing parties in federal court. Although, Amici often move to intervene to protect their sovereign interests, the “Federal Defendant” Rule now reviewed in this Court typically relegates Amici to the remedial phase of the litigation. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 & n.11 (9th Cir. 1995) (holding the State of Arizona's and Apache County's interests could be fully ventilated and vindicated through participating in the portion of the proceedings addressing injunctive relief).

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1. The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321 - 4375 (2000)).

Not only do these NEPA challenges delay important activities, but the “Federal Defendant” Rule exacerbates the problem by circumscribing Amici’s sovereign interests to total dependence on the Federal government’s ability to fully articulate and defend the genesis, evolution and completion of important conservation and management projects. Respectfully, only the Amici and other similarly-situated applicants are in the best and most authoritative position to articulate these important contributions to the Federal courts. Thus, Amici are seriously disadvantaged by the “Federal Defendant” Rule and should be permitted to fully participate in all aspects of NEPA and other public lands litigation in the Ninth Circuit.

## **ARGUMENT**

### **I. Introduction.**

As the Chief Executive of Idaho, Governor C.L. “Butch” Otter is responsible for conserving, developing and managing his State’s public natural resources in a jurisdiction that is virtually a federal enclave. Over two-thirds of Idaho’s land mass is managed by the federal government, and the “Federal Defendant” Rule in the Ninth Circuit has foreclosed the Amici from full participation in land management decisions within the State of Idaho and unfairly diminished the interests of Idaho citizens in judicial review of federal NEPA and other public lands challenges.

The federalism implications cannot be overstated—Supreme Court precedent requires that states receive special solicitude and recognizes their traditional primary authority over land, water and the other environmental resources within their borders. The consequences of the “Federal Defendant” Rule resonate not just for Idaho, but affect long-term state and local planning and land use management in Alaska, Arizona, California, Hawaii, Montana, Nevada, Oregon, and Washington.

The infirmities of the “Federal Defendant” Rule are manifestly unfair to Idaho, and other state and local governments who actively participate in the planning and use of land within their borders. NEPA and the Council on Environmental Quality’s (“CEQ”) implementing regulations encourage elevated roles for States, local governments, and Tribes, yet these active NEPA participants are left on the courthouse steps once the inevitable NEPA challenge is commenced. The time and cost associated with NEPA compliance—whether it results in an Environmental Assessment or an Environmental Impact Statement—are enormous. Moreover, this Court’s inconsistent application of the “Federal Defendant” Rule, and its extension of the Rule outside of NEPA, creates further confusion.

Lastly, the Supreme Court recently debunked the idea that an injunction is the “default” or “normal” remedy in a NEPA case. *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2757 (2010) (specifically rejecting pre-*Winter v. Natural*

*Resources Defense Council*, 129 S. Ct. 365 (2008) Ninth Circuit precedent). The Court emphasized that “[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course,” and that injunctions do not automatically issue in NEPA cases. *Id.* at 2761; *see also Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 381 (2008) (“An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.”). *Monsanto* and *Winter* require consideration of all four of the factors in the traditional balancing test, changing the landscape of NEPA injunctions and explicitly overruling Ninth Circuit jurisprudence on this issue.

In the past, many NEPA cases were effectively decided at the preliminary injunction phase (which, at least temporarily, stops projects before they start), where this Court routinely permitted intervenor participation. *See, e.g., Forest Conservation Council*, 66 F.3d at 1499; *see generally Winter*, 129 S. Ct. 365. However, given the new precedent, fewer injunctions are likely to be granted and more NEPA cases will be decided on the merits—leaving Rule 24 intervenors without judicial recourse. Thus, the harm and unfairness associated with the “Federal Defendant” Rule will be much more poignant, as more non-Federal intervenors are barred from the merits portion of the litigation and settlement negotiations.

## **II. This Court Should Modify the “Federal Defendant” Rule.**

Amici recognize that this Court has regularly denied intervention as a matter of right to applicants seeking participation in the merits phase of a NEPA compliance action. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) (stating that “[a]s a general rule, the Federal government is the only proper defendant in an action to compel compliance with NEPA”) (quoting *Wetlands Action Network v. United States Army Corps. of Engr’s*, 222 F.3d 1105, 1114 (9th Cir. 2000)) (internal citations omitted). This general presumption against full participation is based on the premise that private parties do not have a ‘significant protectable interest’ as required under FED. R. CIV. P. 24(a)(2) in NEPA compliance actions. *Id.* Amici join in and adopt Appellants’ points and authorities in support of modification to this Court’s “Federal Defendant” Rule as if set forth in full. *See* Opening Brief of Appellant Recreation Groups, Dkt. No.13 (“Appellants’ Brief”).

### **A. The “Federal Defendant” Rule overlooks and undermines special participatory roles created by Federal statutes and regulations.**

The current mechanistic application of the “Federal Defendant” Rule undermines and overlooks the critical roles states, local governments and project applicants can legally have in these Federal decision making processes. Put simply, there are instances where Federal law and regulations carve out special

participatory roles for applicants like Amici only to hope that the Federal government will fully defend the project or plan at issue. Thus, these instances warrant a closer inspection of and suggest a modification to the “Federal Defendant” Rule.

Congress’ environmental policy mandate for NEPA envisioned the Federal government’s active cooperation with states and local governments. 42 U.S.C. § 4331(a). As such, CEQ’s implementing regulations for NEPA support this “hard look” at project applicants’ interest by providing opportunities for amplified participation throughout the environmental analysis. 40 C.F.R. § 1501.6; *see also id.* § 1508.5 (stating “[a] State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe may by agreement with the lead agency become a cooperating agency.”). The regulations further emphasize that during the scoping process, the lead agency must “invite the participation of affected Federal, State, and local agencies, any affected Indian Tribe, [and] the proponent of the action....” 40 C.F.R. § 1501.7(a)(1). Once the draft environmental impact statement is prepared, but before a final statement is issued, the agency shall request the comments of “[a]ppropriate State and local agencies...Indian Tribes,...and the applicant, if any....” 40 C.F.R. § 1503.1(a)(2), (3); 42 U.S.C. § 4332(c) (same). Thus, for state and local governments, tribes, and third-party project proponents, NEPA provides an enhanced opportunity for these

participants to actively help the lead agency shape and mold the underlying Federal action.<sup>2</sup>

Notwithstanding the invitation for cooperative project development, the “Federal Defendant” Rule seemingly turns these affirmative declarations of amplified participation on their head. On the one hand, NEPA invites “cradle to the grave” participation in developing the project—often at great cost and investment to the proponent (see discussion, *infra*)—only to have this Court’s precedent foreclose all but a slight crack in the courthouse door for the opportunity to defend the fruits of the applicant’s labor.

Furthermore, the “Federal Defendant” Rule misapprehends the applicant’s unique contribution to the development of the administrative record that generally forms the basis of judicial review for these types of public lands litigation. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985). Applicants that accept the Federal government’s cooperative invitation usually commit to lending their particular expertise, time and resources to ensure the lead agency has the necessary information to properly understand the contours of the proposed action

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2. Other Federal land use statutes also provide equal or greater avenues for participation by Amici and other similarly situated parties. For example, the National Forest Management Act (“NFMA”) controls the Forest Service’s management and planning for the national forests. NFMA requires the Forest Service to develop a land and resource management plan for every forest it manages and that the plans be “coordinated with the land and resource management planning of State...governments....” 16 U.S.C. § 1604(a).

to provide the public with the requisite clarity in alternatives. 42 U.S.C. § 4332(e); *see also* 40 C.F.R. § 1502.14 (stating “[t]his section is the heart of the environmental impact statement...it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issue and providing a clear basis of choice...”). In fact, NEPA allows cooperating states to prepare an Environmental Impact Statement (unlike private project applicants). 42 U.S.C. § 4332(d); 40 C.F.R. § 1506.5(c). Thus, by barring these unique insights to the development of the rule and record, the “Federal Defendant” Rule does little to foster public confidence that the court is fairly and equitably resolving these issues.

B. The “Federal Defendant” Rule cannot be reconciled with the reality of the NEPA process.

The “Federal Defendant” Rule is justified in this Circuit on the premise that private parties do not have a “significant protectable interest” under Rule 24 in NEPA compliance actions. *Kootenai Tribe v. Veneman*, 313 F.3d at 1108. This misguided rationale has, for decades, discriminated against States such as Idaho and fails to account for the functional reality of NEPA. Navigating through NEPA’s exacting procedural environmental review requirements, as detailed below in the Roadless context, requires a considerable investment of time and financial

resources before non-Federal parties such as Idaho may pursue their policy choices and individual projects.

According to CEQ, “brief” environmental assessments (EAs) typically range from 10 to 30 pages in length, require from two weeks to two months to complete, and cost between \$5,000 and \$20,000. Larger environmental assessments associated with controversial or high profile projects, typically range from 50 to more than 200 pages in length, require from nine to 18 months to complete, and cost between \$50,000 and \$200,000. NEPA Task Force Report to the Council on Environmental Quality, *Modernizing NEPA Implementation* (Sept. 2003) at 65-66, *available at* [http://ceq.hss.doe.gov/publications/modernizing\\_nepa\\_implementation.html](http://ceq.hss.doe.gov/publications/modernizing_nepa_implementation.html).

If there may be significant environmental impacts as a result of the proposed action, a longer EIS must be prepared. In comparison, EISs typically range from 200 to more than 2,000 pages, require from one to more than **six years** to complete, and cost between \$250,000 and \$2 million. *Id.* at 66. For illustrative purposes only, assuming an EIS median cost of \$1.125 million based on CEQ data, this has resulted in a staggering estimated total cost of **\$4.2 billion**<sup>3</sup> for NEPA compliance since 2004—and just for EIS development absent accounting for other obligations related to fulfilling environmental analysis earlier in the NEPA process.

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3. Since 2004, approximately 3,773 EISs have been published by Federal agencies. *See* <http://yosemite.epa.gov/oeca/webeis.nsf/viEISO1?OpenView>.

These NEPA document development costs, either as a human resource (as clearly illuminated in discussion of Idaho’s participation in the Roadless Rule) or financial, are not solely borne by the federal government. It has long been the standard operating procedure that project proponents seeking activity with a nexus to Federal public lands assume significant financial support of developing NEPA documentation. Of course, the lead Federal agency is “responsible” for the environmental impact statement under NEPA, 42 U.S.C. § 4332(c), but for most non-Federal projects, the agency shifts the responsibility and financial obligations for the EA to the private project sponsor. But simple financial investment is not the complete picture. The other dimension is, as touched upon earlier, what should be inspirational good government.

According to CEQ, although lead agencies retain decision making authority and responsibility throughout the NEPA process, “[b]y engaging relevant expertise, including scientific and technical expertise, and knowledge of a local resource, a collaborative body [which includes non-Federal parties] can reach a more informed agreement and advise decision-makers accordingly.” *See* Council on Environmental Quality, *Collaboration in NEPA, A Handbook for NEPA Practitioners* (Oct. 2007), at 4, *available at* [http://ceq.hss.doe.gov/publications/collaboration\\_handbook.html](http://ceq.hss.doe.gov/publications/collaboration_handbook.html) (*NEPA Collaboration Handbook*). Thus, those who know the most about the proposed

action under NEPA—states, private project proponents or permit applicants—are theoretically essential to developing competent Federal government environmental decisions.

Data collected on NEPA litigation provide another illustration of the important interests at stake in this Court’s review of the “Federal Defendant” Rule. Again according to CEQ, out of 132 NEPA cases filed in 2008, 77 cases can be described as “public lands” cases, for an approximate total of 58 percent of all the outstanding NEPA litigation. *See*

<http://ceq.hss.doe.gov/nepa/NEPA2008LitigationSurvey.pdf>. Certainly, not all of these NEPA cases were brought in Ninth Circuit jurisdictions, but the data are instructive of a practical reality of NEPA litigation. NEPA plaintiffs “place[] a high value on NEPA because it affords extraordinary opportunities to throw up procedural roadblocks that may delay or kill projects” that they oppose. Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. *Env’tl. L.J.* 333, 339 (2004).<sup>4</sup> As further evidence of this premise, the 2008 NEPA litigation data reveal that of 374 total plaintiffs, 210 were characterized as “Public Interest Groups,” with State Government NEPA plaintiffs numbering only 13 in 2008. *Id.* Without ascribing

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4. The author also understates the obvious that “NEPA litigation--either to decide whether an EIS is required or to determine its adequacy once it is produced--adds further costs and delays. Fear of judicial review pushes agencies toward ever-lengthier and more elaborate EISs, responding to all major comments received in the public notice and comment period.” *Id.* at 340.

too much to the statistics set forth above, these data can reasonably be distilled to reinforce the notion that the playing field in NEPA litigation is uneven for non-Federal parties from the opening moments, and the “Federal Defendant” Rule in the Ninth Circuit completes the self-fulfilling prophesy.

The CEQ clarion call is that “the full potential for more actively identifying and engaging other federal, tribal, state and local agencies, affected and interested parties, and the public at large in collaborative environmental analysis and federal decision-making is rarely realized.” *NEPA Collaboration Handbook* at 1.

However, when it comes time to account for the same expertise that has invested and informed NEPA decisions on the front end, that expertise is routinely and summarily banished from a merits-based defense of those same decisions through application of the “Federal Defendant” Rule. The Ninth Circuit has artificially minimized the appropriate “protectable interest” that guarantees fair entry through the front door of the Federal court house (and not the back door during the remedial phase), and recently, even the front doors of the United States Supreme Court.

The dysfunction of this Circuit’s “Federal Defendant” Rule reached its zenith this past term in the United States Supreme Court in *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010). In *Monsanto*, a NEPA case, the District Court held that the Animal Plant Health Inspection Service (“APHIS”) had

violated NEPA by issuing a determination to deregulate a certain variety of genetically engineered alfalfa under the Plant Protection Act without preparing an environmental impact statement.

The Supreme Court took considerable time to address Article III standing because petitioner Monsanto Company was only afforded permissive intervention to take part in the remedial phase of the proceeding. By the time the case progressed to the remedy for extraordinary relief, Monsanto's Roundup Ready Alfalfa (RRA), was well into the slipstream of interstate commerce. More than 3,000 farmers in 48 states had planted an estimated 220,000 acres of RRA. *Monsanto*, 130 S. Ct at 2751. All of this real-time activity impacting Monsanto's interests had taken place before the first appropriate moment arrived for the company to be heard on any aspect of the litigation.

At the Supreme Court, the United States, Monsanto and the developer of RRA, Forage Genetics International, appealed the scope of the nationwide, permanent injunction. While the case was pending before the Supreme Court, the respondents alleged that the failure of Monsanto to perfect its appeal of the district court's vacatur of the agency's deregulation decision robbed the petitioners of any justiciable injury to be addressed by the Supreme Court.

Upon investing significant argument time to resolve the Article III standing issue, the Supreme Court determined that Monsanto was presently injured by its

inability to engage in commercial activity related to Roundup Ready Alfalfa until APHIS had completed its NEPA obligations. “Because that injury is caused by the very remedial order that petitioners challenge on appeal, it would be redressed by a favorable ruling from this Court.” *Monsanto*, 130 S. Ct. at 2752

The *Monsanto* case is a conspicuous example of the unfairness of the “Federal Defendant” Rule in the Ninth Circuit. Left solely to the dregs of the remedial phase of the NEPA challenge, the Monsanto Company was left to justify its appropriate seat at counsel table before the Supreme Court at the latest possible hour. If Monsanto had been accorded full party status in the merits phase of the proceedings – with their commercial interests at stake unquestioned – it is likely that the procedural sand bagging which developed around whether the Supreme Court was hearing a live dispute would have been avoided. The exposure by Monsanto to a late-hour standing challenge in the Supreme Court is an unfortunate byproduct of the “Federal Defendant” Rule.

Finally, the attention by this Court to the “Federal Defendant” Rule is particularly appropriate given the guidance to the Ninth Circuit by United States Supreme Court on NEPA cases in two consecutive terms. In *Monsanto*, the Court was clear that with respect to injunctive relief in NEPA cases, it is not the law to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. Wrote Justice Alito:

No such thumb on the scales is warranted. Nor, contrary to the reasoning of the Court of Appeals, could any such error be cured by a court’s perfunctory recognition that “an injunction does not automatically issue” in NEPA cases. [Citation omitted.] It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue... .

*Monsanto*, 130 U.S. at 2757 (emphasis in original). Accordingly, after unprecedented review of NEPA cases by the Supreme Court in *Monsanto* and *Winter v. Natural Resources Defense Counsel, Inc.*, 129 S. Ct. 365 (2008), abandonment of the “Federal Defendant” Rule will likely prevent the errors highlighted in the Supreme Court’s recent review of Ninth Circuit injunction jurisprudence.

C. Amici’s experience with Roadless area management and conservation provides *prima facie* evidence for eliminating or modifying the “Federal Defendant” Rule.

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Nowhere is the validity of the “Federal Defendant” Rule more questionable than the ongoing roadless area dispute. In 2001, the Kootenai Tribe of Idaho and the State of Idaho brought a NEPA compliance action against the Department of Agriculture and successfully obtained a preliminary injunction halting the implementation of the 2001 Roadless Rule and its uniform application to the 58.5 million acres of inventoried roadless areas within its purview. *Kootenai Tribe of Idaho v. Veneman*, No. CV01-10-N-EJL, 2001 WL 1141275 (D. Idaho May 10, 2001). On appeal, this Court revisited the “Federal Defendant” Rule in the context

of reversing the District of Idaho's grant of a preliminary injunction. *Kootenai Tribe of Idaho*, 313 F.3d 1094 (9th Cir. 2002).

Notwithstanding the strictures of this Court's "Federal Defendant" Rule, when the federal government chose not to appeal, intervenor-preservationist special interest groups were permitted to permissively intervene and step in the shoes of the "Federal Defendant"s to appeal the District of Idaho's injunction. *Id.* at 1105-1107. The majority concluded that the preservationist-intervenors had demonstrated Article III standing sufficient to fill the void left by the federal government. *Id.*

Prior to the District Court of Idaho resuming the pending litigation, the District Court of Wyoming issued an order permanently enjoining the nationwide implementation of the 2001 Roadless Rule. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003). While the Wyoming Court's injunction was pending an appellate decision from the Tenth Circuit Court of Appeals, the "Federal Defendant"s replaced the 2001 Rule with the State Petitions Rule. 70 Fed. Reg. 25654 (May 13, 2005).

On June 23, 2005, Amici accepted the federal government's invitation to submit a roadless petition and embark on a three-year resource intensive collaborative effort culminating in a unique achievement and milestone in environmental policy—the Idaho Roadless Rule. *See* 73 Fed. Reg. 61456 (Oct. 16,

2008). The Idaho Roadless Rule is unique in that it successfully integrated a local effort attuned to each individual roadless area's characteristics with the 2001 Rule's national policy of conserving roadless areas. *Id.*

This three-year process first involved local communities holding a total of 60 public meetings across the State to develop management recommendations for the Governor's review. *See Jayne, et al. v. Rey, et al.*, No. 09-cv-00015-BLW, Governor' Otter Memo. in Support of Motion to Intervene, Dkt. No. 7, at 5 (D. Idaho Mar. 24, 2009) ("Gov. Otter's Intervention Brief"). The Governor reviewed these and other numerous individual recommendations from a variety of diverse stakeholders and submitted his final petition to the Secretary of Agriculture under the APA. *Id.* at 6.

Second, prior to accepting the State's petition and initiating the rulemaking process with the U.S. Forest Service, the Department of Agriculture required each state to undergo review by the Roadless Area Conservation National Advisory Committee ("RACNAC"). 72 Fed. Reg. 13469 (Mar. 22, 2007).<sup>5</sup> Conforming to this protocol, former-Governor James E. Risch presented Idaho's Roadless Petition to RACNAC. *See* 73 Fed. Reg. at 61457, 61460. After extensive open debate,

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5. RACNAC consisted of representatives from diverse organizations—e.g., Blue Ribbon Coalition; Idaho Lemhi County; Izaak Walton League of America; Montana Wilderness Ass'n; Intermountain Forest Ass'n; Nat'l Mining Ass'n; Center for Biological Diversity; WildLaw; and Trout Unlimited.

RACNAC unanimously recommended that the Secretary accept the State's petition and proceed to rulemaking. *Id.*

Third, the Forest Service and Governor Otter on behalf of the State entered into a memorandum of understanding ("MOU") formalizing the Governor's commitment to work with the agency as a cooperating agent pursuant to NEPA. *Id.* at 8. The State's cooperative effort directly influenced the proposed regulatory language and shaped the draft environmental impact statement ("EIS") pursuant to NEPA. Following the release of the draft EIS, former-Governor Risch committed to collaboratively refining, through seventeen public meetings and six open RACNAC meetings, the proposed rule by using RACNAC as a mediator between the Forest Service, State, Tribes and public. 73 Fed. Reg. at 61468.

Despite the overwhelming public support for the final rule,<sup>6</sup> a portion of the same environmental groups who stepped in the shoes of the federal government to defend against Amici's challenge to the 2001 Rule, challenged the Idaho Rule. *See Jayne, et al. v. Rey, et al.*, No. 09-cv-00015-BLW (D. Idaho). Ironically, even though some of these very same plaintiffs did not oppose the Governor's full intervention in the Idaho Roadless Rule, the court nevertheless gave short-shrift to

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**6.** *See Jayne, et al.*, No. 09-cv-015-BLW, Governor Otter's Joinder and Consolidated Memo. in Support, Dkt. No. 91, at 2 n.2 (July 23, 2010) (stating that in addition to several conservation groups, including Trout Unlimited and Idaho Conservation League, the Obama Administration is also on record supporting the Idaho rule).

Amici's extensive and undeniable track record in this issue by confining their participation to the remedial portion of the litigation. *See Jayne, et al.*, No. 09-cv-015-BLW, Docket Entry Order No. 27 (D. Idaho Apr. 16, 2009).

What a bizarre result. Amici did successfully obtain leave to file a consolidated *amicus curiae* brief on the merits and an intervenor brief on any potential remedial issues; however, there is no legal, policy or otherwise legitimate reason to prevent Amici from fully participating in the proceedings given our extensive efforts throughout the rulemaking process. *See Jayne, et al.*, No. 09-cv-015-BLW, Docket Entry Order No. 74 (D. Idaho June 30, 2010).

Given this experience, Amici respectfully request attention to and have compelling argument for a blanket grant of full intervention to States as those interests more often than not also meet the requirements for Article III standing. In *Yniguez v. Arizona*, 939 F.2d 727, 735 (9th Cir. 1991) this Court held, "because the Article III standing requirements are more stringent than those for intervention under Rule 24(a), our determination that [applicants] have standing under Article III compels the conclusion that they have an adequate interest under the rule." Regardless, Amici should not have been relegated to friend of the court status for a rule they cooperatively engineered.

### **III. The “Federal Defendant” Rule Needs to be Modified to Prevent Inconsistent Application.**

Beyond the context of Roadless, Amici’s recent success in fully protecting its sovereign interests has been an uphill struggle. Amici provide the following examples in order to underscore the need for clarity from this Court on this issue.

In *Western Watersheds Project v. Servheen*, No. 07-cv-243-EJL, Dkt. No. 34 (Oct. 31, 2007), the District of Idaho granted full intervention as a matter of right to the States of Idaho and Wyoming to defend the U.S. Fish and Wildlife Service’s (“Service”) decision to delist the Yellowstone population of grizzly bears under the ESA. In granting the States’ full participation, the court interestingly cited this Court’s holding in *Forest Conservation Council* to stand for both the recognition of the applicant States’ unique and concrete interests in the litigation, but also to use and expand that rationale to get beyond the decision’s traditional remedial phase exception.

By contrast, when the States of Idaho, Wyoming and Colorado moved to intervene to defend their sovereign interests in continuing to manage the greater sage-grouse in the face of a listing determination under the ESA, the District of Idaho relegated these sovereign interests to the remedial phase of the litigation provided Plaintiff requested equitable relief. *Western Watersheds Project v. U.S. Fish and Wildlife Serv.*, No. 06-cv-00277-BLW, Dkt. No. 58 (Mar. 9, 2007). As a

result, the three states along with several private-party applicants filed notices of appeal with this Circuit. *Western Watersheds Project v. U.S. Fish and Wildlife Serv.*, No. 07-35267 (9th Cir. Mar. 26, 2007). This interlocutory appeal was subsequently withdrawn after extensive negotiations with the plaintiff resulted in a stipulation regarding the states' and private parties' respective participation in the litigation. *Western Watersheds Project*, No. 06-cv-00277-BLW, Dkt. No. 85 (Apr. 16, 2007).

Lastly, the District of Montana took an entirely different route to confer participation to Amici in the increasingly vitriolic litigation involving the gray wolf under the ESA. *Defenders of Wildlife, et al. v. Hall, et al.*, No. 08-56-M-DWM (May 8, 2008); *accord Defenders of Wildlife, et al. v. Salazar, et al.*, No. 09-cv-077, Dkt. No. 62 (D. Mont. Aug. 23, 2009). There, the court entirely denied intervention as of right even though environmental plaintiffs sought preliminary injunctions in both actions; however, the court did exercise its discretion and permitted Amici to permissively intervene in both cases.

In this handful of similar environmental actions, Amici's interests have encompassed the entire spectrum of participation. Clearly, this irrational assignment of participation does not promote or foster confidence among Idahoans that each interested party will be afforded the equality of opportunity to be heard by the federal courts within this district.

#### **IV. The “Federal Defendant” Rule Tramples on Idaho’s State Sovereignty.**

This Court’s adoption of the “Federal Defendant” Rule radically shifts authority from states to the federal government on matters that undeniably impact areas of local concern. There is no question that Idaho is the trustee of natural resources within its State, and that it has a duty to protect the health, safety, and economic well being of its citizens. In deciding to impose this limitation in NEPA lawsuits, the Court eviscerates the State of Idaho’s sovereignty.

Further, the Ninth Circuit’s Rule creates an inequitable playing field, as the 40-plus states outside of its jurisdiction are able to vigorously protect and defend their land use projects but those within the Court’s jurisdiction cannot. As states compete with each other for both the economic use, recreational use, and protection of the lands within their borders, the states within the Ninth Circuit are at a competitive disadvantage because they are unable to vigorously defend their policy choices and their citizens’ rights.

In *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the Supreme Court considered whether a state had Article III constitutional standing to challenge the EPA’s decision not to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. Admittedly, that case was postured differently and was not a NEPA case, but nonetheless Justice Steven’s majority opinion is instructive given this Court’s holding that the Article III constitutional standing requirements

are more stringent than Rule 24(a)'s. *Yniguez*, 939 F.2d at 735. The Supreme Court emphasized that a State is not a normal private party litigant and that it has a “well-founded desire to preserve its sovereign territory.” *Id.* at 1454.

This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity, the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

*Id.* at 1454 (quoting *Georgia v. Tennessee Cooper Co.*, 206 U.S. 230, 237 (1907) approvingly). The Court held that Massachusetts had not just an interest in the land it owned within the “territory alleged to be affected” but that it also had a “quasi-sovereign interest” in threatened property within the state that it did not own. *Id.* The Court also concluded that Massachusetts’s “stake in protecting its quasi-sovereign interests” was entitled to “special solicitude” for standing purposes. *Id.* at 1454-55. Ninth Circuit NEPA case law regarding intervention and standing has also confirmed these unique state interests. *See e.g., Forest Conservation Council*, 66 F.3d at 1497 (acknowledging state and county non-economic interests “such as the environmental health of, and wildfire threats to, state lands adjacent to national forests, which appellants have a legal duty to maintain”); *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1500-01 (9th Cir. 1995) (acknowledging county’s proprietary environmental interest in lands adjacent to Federal land).

Also relevant are other Supreme Court cases emphasizing states' traditional "primary power over land and water use." *Rapanos v. United States*, 547 U.S. 715, 738 (2006). When the Ninth Circuit forecloses a state from full participation as an intervening party in public land use cases, it treads upon the state's sovereignty rights invoked in the Tenth Amendment and its procedural due process rights invoked in the Fourteenth Amendment.<sup>7</sup> Supreme Court decisions have respected states' traditional authority and protected states against unwarranted incursions by the federal government, noting the need to maintain the proper balance between state and federal governments unless Congress has legislated a specific change in that balance.

When the Supreme Court considered the reach of Federal Clean Water Act jurisdiction in *Rapanos v. United States*, 547 U.S. 715 (2006), it noted that regulation of land use "is a quintessential state and local power" and that statutes like the Clean Water Act preserve "primary state responsibility for ordinary land-use decisions." *Id.* at 738, 755-56. In that case, the Federal government's overbroad exercise of jurisdiction was an "unprecedented intrusion into traditional state authority" that turned the federal agency into a "*de facto* regulator of immense stretches of *intrastate* land." *Id.* at 737-38 (emphasis added)).

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7. The Amici do not (and could not) allege here that the "Federal Defendant" Rule rises to the level of a Constitutional violation. However, Amici believe, as a policy matter, the Rule is an incursion into state sovereignty and respectfully requests this Court's careful reconsideration.

In another Clean Water Act case, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001), the Supreme Court also considered the federal government’s interpretation of the Clean Water Act and found that the proposed regulations extending federal jurisdiction to intrastate waters that were or would be used as migratory bird habitat was a “significant impingement of the States’ traditional and primary power over land and water use.” *See also Gonzales v. Oregon*, 546 U.S. 243, 271 (2006) (“regulation of health and safety is primarily, and historically, a matter of local concern”) (quoting *Hillsborough Cnty. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) (internal quotations omitted)).

Like these Clean Water Act cases which limit the encroachment of the federal government on the states under the Clean Water Act, NEPA also defines an important role for states and localities, **requiring** the federal government to work closely **with** states and local governments, to achieve NEPA’s goals. *See* Section II.A *supra*; *see also* 40 C.F.R. § 1506.6(d) (requiring federal EISs to discuss inconsistencies with approved state or local plans and laws, and the extent to which the agency can reconcile its proposed action with a plan or law).

Here, it is not the federal government that is trying to overextend its reach. Instead, it is this Circuit’s “Federal Defendant” Rule, as applied in NEPA challenges (and in litigation involving other environmental and land use statutes),

that cabins a states' exercise of well-recognized sovereign rights. No matter the source, the effect is the same: the scales that must keep federalism in balance have been improperly weighted against the states that fall within the Ninth Circuit's jurisdiction.

### CONCLUSION

Based on the foregoing, Amici respectfully request this Court eliminate or modify the "Federal Defendant" Rule.

DATED this 21st day of October, 2010:

By: /s/ David F. Hensley

/s/ Thomas C. Perry

*Attorneys for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,706 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED this 21st day of October, 2010.

By: /s/ Thomas C. Perry

## CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case are registered CM/ECF users and that service will be served by the appellate CM/ECF service.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by first class U.S. Mail, postage prepaid, to the following non-CM/ECF participant: NONE

*/s/ Thomas C. Perry* \_\_\_\_\_