

**In The
Supreme Court of the United States**

SCOTT TIMBER CO. and
CARPENTERS INDUSTRIAL COUNCIL,

Petitioners,

v.

OREGON WILD and CASCADIA WILDLANDS,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF AMICI CURIAE THE PUBLIC LANDS
COUNCIL, AMERICAN SHEEP INDUSTRY
ASSOCIATION, INTERNATIONAL ASSOCIATION
OF GEOPHYSICAL CONTRACTORS, AMERICAN
PETROLEUM INSTITUTE, AND AMERICAN
EXPLORATION & MINING ASSOCIATION
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
INTERESTS OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. Remand Decisions are Final and Appealable Under 28 U.S.C. § 1291	7
II. Intervenors Have a Statutory Right to Appeal Final Orders	10
III. The Ninth Circuit Has Unfairly Eliminated Appeal Rights.....	12
IV. Eviscerating Statutory Appeal Rights Violates Fundamental Fairness.....	14
V. The Ninth Circuit Has Abolished the “Federal Defendant” Requirement in Other Contexts	16
VI. The Decision Creates Asymmetry, Fundamental Unfairness, and Gives Mere <i>Prospective</i> Intervenors Greater Appeal Rights.....	17
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page
CASES	
<i>Alsea Valley Alliance v. Dep't of Commerce</i> , 358 F.3d 1181 (9th Cir. 2004).....	7
<i>South Dakota ex rel. Barnett v. U.S. Dep't of Interior</i> , 317 F.3d 783 (8th Cir. 2003).....	17
<i>Blossom v. Milwaukee & Chicago R. Co.</i> , 1 Wall. 655, 17 L.Ed. 673 (1864)	18
<i>Bullard v. Blue Hills Bank</i> , 135 S.Ct. 1686 (2015).....	11
<i>Citizens for Balanced Use v. Montana Wilderness Ass'n</i> , 647 F.3d 893 (9th Cir. 2011)	11
<i>Devlin v. Scardelletti</i> , 536 U.S. 1 (2002).....	18
<i>Gelboim v. Bank of America Corp.</i> , 135 S.Ct. 897 (2015).....	9
<i>Godfrey L. Cabot, Inc. v. Binney & Smith Co.</i> , 46 F. Supp. 346 (D.N.J. 1942).....	15
<i>Hinckley v. Gilman, C. & S.R. Co.</i> , 94 U.S. 467, 24 L.Ed. 166 (1877)	19
<i>Jones v. Prince George's County</i> , 348 F.3d 1014 (D.C. Cir. 2003)	17
<i>Karcher v. May</i> , 484 U.S. 72 (1987)	12
<i>Leonard E. Warner, Inc. v. Nissan Motor Corp. in U.S.A.</i> , 66 N.C. App. 73, 311 S.E.2d 1 (N.C. Ct. App. 1984).....	15
<i>California ex rel. Lockyer v. United States</i> , 450 F.3d 436 (9th Cir. 2006).....	11, 12

TABLE OF AUTHORITIES – Continued

	Page
<i>Moore v. New York Cotton Exchange</i> , 270 U.S. 593 (1926)	13
<i>In re Oceana Int’l, Inc.</i> , 49 F.R.D. 329 (S.D.N.Y. 1969)	15
<i>Oregon Wild v. BLM</i> , No. 6:14-CV-0110-AA, 2015 WL 1190131 (D. Or. Mar. 14, 2015).....	5
<i>Park & Tilford, Inc. v. Schulte</i> , 160 F.2d 984 (2d Cir. 1947)	15
<i>Pit River Tribe v. U.S. Forest Serv.</i> , 615 F.3d 1069 (9th Cir. 2010).....	7
<i>Portland Audubon Society v. Hodel</i> , 866 F.2d 302 (9th Cir. 1989), <i>abrogated by Wilderness Soc.</i> , 630 F.3d 1173 (9th Cir. 2011).....	16
<i>In re Raabe & Glissman, Inc.</i> , 71 F. Supp. 678 (S.D.N.Y. 1947)	15
<i>Ringsby Truck Lines, Inc. v. United States</i> , 490 F.2d 620 (10th Cir. 1973), <i>cert. denied</i> , 419 U.S. 833 (1974)	8
<i>Smartt v. Coca-Cola Bottling Corp.</i> , 337 F.2d 950 (6th Cir. 1964), <i>cert. denied</i> , 380 U.S. 934 (1965).....	14
<i>Stringfellow v. Concerned Neighbors in Action</i> , 480 U.S. 370 (1987)	11, 12, 13
<i>Sullivan v. Finkelstein</i> , 496 U.S. 617 (1990)	9
<i>Swint v. Chambers County Comm’n</i> , 514 U.S. 35 (1995).....	9, 11

TABLE OF AUTHORITIES – Continued

	Page
<i>Town of Chester v. Laroe Estates, Inc.</i> , No. 16-605, ___ U.S. ___, 137 S.Ct. 1645 (June 5, 2017).....	12
<i>U.S., to Use & for Benefit of Foster Wheeler Corp., v. Am. Sur. Co. of New York</i> , 142 F.2d 726 (2d Cir. 1944)	13
<i>United States Catholic Conference v. Abortion Rights Mobilization, Inc.</i> , 487 U.S. 72, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988)	19
<i>United States v. City of Los Angeles, Cal.</i> , 288 F.3d 391 (9th Cir. 2002).....	13
<i>Wilderness Soc. v. U.S. Forest Serv.</i> , 630 F.3d 1173 (9th Cir. 2011) (<i>en banc</i>).....	13, 16, 17

STATUTES AND RULES

5 U.S.C. § 706(2).....	4
28 U.S.C. § 1291	<i>passim</i>
28 U.S.C. § 1292	<i>passim</i>
Fed. R. Civ. P. 24.....	<i>passim</i>

OTHER AUTHORITIES

Intervention of Private Parties Under Federal Rule 24, 52 Colum. L. Rev. 922 (1952)	15
James Wm. Moore, <i>Federal Intervention – The Right to Intervene and Reorganization</i> , 45 YALE L.J. 565 (Feb. 1936).....	14

TABLE OF AUTHORITIES – Continued

	Page
6-24 Moore’s Federal Practice – Civil § 24 App. 100 (2017)	14, 15
REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (Apr. 1937).....	14
Wright & Miller, Appellate Review, 7C FED. PRAC. & PROC. CIV. § 1923 (3d ed.)	14

INTERESTS OF *AMICI CURIAE*¹

Amici Curiae are national and global trade associations that represent companies and families that grow and produce the nation’s food, fiber, and energy from forests, farms, grasslands, and oil and natural gas fields. The Public Lands Council (“PLC”), American Sheep Industry Association (“ASI”), International Association of Geophysical Contractors (“IAGC”), American Petroleum Institute (“API”), and American Exploration & Mining Association (“AEMA”), collectively “*amici*,” submit this brief in support of Scott Timber Co.’s and Carpenters Industrial Council’s Petition for a Writ of Certiorari.

Ensuring that intervenors retain the right to independently appeal adverse district court decisions, regardless of whether a federal defendant also chooses to appeal, is of immense importance to all prospective intervenors throughout the United States, including natural-resource-dependent industries and the individuals, businesses, and communities that depend on resource production for their long-term viability and

¹ Pursuant to Court Rule 37.2(a), counsel of record for petitioners and respondents received timely notice of the intent to file the *amici curiae* brief. On December 21, 2017, the petitioners filed a letter of blanket consent with the Clerk of Court to the filing of amicus briefs. *Amici* obtained the consent of respondents’ counsel to file an *amici curiae* brief via a telephone call and email. Pursuant to this Court’s Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

livelihoods. *Amici* are most often defendant-intervenors in cases which frequently affect their federal contract rights (including leases), operations on federal lands through specific projects, complex regulatory rules, and related interests.

Amici are concerned that the Ninth Circuit's erroneous construction of 28 U.S.C. §§ 1291 and 1292, disallowing defendant intervenors from appealing adverse remand decisions, severely limits and in some cases precludes the ability of individuals and businesses to protect their interests by eliminating judicial review, and will hinder the projects on which their livelihoods depend. *Amici* agree with petitioners that 28 U.S.C. §§ 1291 and 1292 plainly state the bases of appellate jurisdiction and do not differentiate between appeal rights of an agency versus a right of appeal by any other party.

Amici represent the interests of the industries, individuals, and businesses that depend on federal agencies to manage our nation's renewable resources on federal lands. Domestic livestock producers, timber and forest products companies, and the oil and natural gas industry depend on permits and contracts from federal agencies to conduct their operations. However, litigation challenging the use and extraction of natural resources managed by federal agencies such as the U.S. Forest Service ("USFS"), Bureau of Land Management ("BLM"), U.S. Fish and Wildlife Service, and other land management agencies is rarely filed directly against the private entity with contract rights to use federally-managed natural resources. Rather, lawsuits

that threaten the interests of *amici* and their individual members are virtually always filed against the federal agencies that issue the authorizations, and the contract holders or permit applicants, in turn, intervene as defendant parties under Rule 24.

As examples, challenges to domestic livestock grazing on public range is managed by BLM and the USFS and typically involves in-depth environmental review prepared by the agency when it issues or renews a grazing permit or revises the applicable land and resource management plan which authorizes grazing as a multiple-use objective. Similarly, challenges to timber sales and forest health treatment projects typically arise out of USFS or BLM approval of a particular project, the associated environmental review, and whether the authorization is consistent with the land and resource management plan allowing future timber harvest activities as consistent with plan objectives. Finally, challenges to oil and natural gas production typically involve challenges to the environmental analysis and related approvals for the project's exploration and development.

Because *amici* and their members are rarely – if ever – named as defendants in these types of lawsuits, the only way for *amici* to ensure that their interests are adequately represented is to move to intervene as defendant-intervenors to help defend the challenged decision and litigate the specific issues affecting their operations. Many of the challenges involve the validity of a federal agency's environmental review of a project or other decision under the National Environmental

Policy Act, 42 U.S.C. § 4321 *et seq.*, (“NEPA”). NEPA, and the other major legislation regarding planning and management of federal lands, set forth the procedures and substantive law agencies must follow when making management decisions.

However, NEPA, and substantive planning Acts such as the Federal Land Policy and Management Act, the National Forest Management Act, the Taylor Grazing Act, and other acts do not contain an independent private right of action. Therefore, most often, the Administrative Procedure Act (“APA”) serves as the jurisdictional basis for lawsuits in these environmental and natural resource-based contexts. The standard of review for challenges under the APA requires the reviewing court to “hold unlawful and *set aside* agency action, findings, and conclusions found to be,” *inter alia*, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2) (emphasis added). The requirement that reviewing courts must *set aside* agency action found unlawful means, as here, that successful challenges to natural resource projects usually result in an order vacating the agency’s decision and remanding it to the agency for additional environmental review.

An order vacating an agency decision and remanding it to the agency can effectively *terminate* the project from the perspective of *amici* and their members because the resource use contemplated by the vacated decision cannot proceed. Here, the district court’s

Opinion and Order held that BLM violated NEPA and APA and “set aside” the White Castle Project’s authorization. *Oregon Wild v. BLM*, No. 6:14-CV-0110-AA, 2015 WL 1190131 at *13 (D. Or. Mar. 14, 2015). The practical effect of the order is that Petitioner Scott Timber Co. is enjoined from harvesting timber in the project area. *Oregon Wild*, 2015 WL 1190131 at *13 (vacatur of BLM’s authorization of the White Castle Project means that “by law, BLM cannot proceed with the project”). Scott Timber paid \$1.3 million for those contract rights and made a substantial investment to secure those rights, but the company is unable even to attempt to protect its financial interest in obtaining a favorable ruling in the underlying litigation because the Ninth Circuit applies an incorrect “general rule” that bars any intervenor-defendants from independently appealing the remand order. This Court should accept certiorari and clarify the proper scope of appeal rights under Title 28 for intervenors who have joined as parties under Rule 24.

◆

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an issue of national importance to individuals and businesses throughout the United States who intervene as parties under Fed. R. Civ. P. 24. Disregarding prior Supreme Court precedent and the plain language of 28 U.S.C. §§ 1291 and 1292(a)(1), the Ninth Circuit has rewritten Rule 24 by eliminating intervenors’ statutory rights to appeal. The Ninth

Circuit has done this here and in many other cases by holding that, despite their status as full parties to an action, intervenors cannot appeal district court decisions on remand unless the United States government independently appeals. The right to appeal under 28 U.S.C. § 1291 contains no such limitation, and imposing one literally destroys an intervenor's ability to appeal, reducing an intervenor to no more than *amicus curiae* and hollowing out the core of Rule 24. Plain statutory language and this Court's jurisprudence make clear that an order is appealable under 28 U.S.C. § 1291 if it is "final," or has the effect of an injunction under 28 U.S.C. § 1292(a)(1). The Ninth Circuit's creation of a new requirement – that the government independently file an appeal – is inconsistent with fundamental due process and the intent of Rule 24, and will have far reaching consequences to an entire class of litigants whose only ability to protect their interests is through intervention.

The right of intervention under Rule 24 has long been a carefully guarded right ever since the Rule was codified nearly a century ago. In the real world, individuals and business seek intervention under Rule 24 because it is the only mechanism to prevent federal litigation that directly affects their interests from proceeding and adjudicating their interests without them. Under the doctrines of *res judicata* and *stare decisis*, intervenors are bound by any district court decision due to their status as parties. For that reason, it is fundamental that intervenors are on equal footing with the original parties. As parties, intervenors may assert

new claims and defenses, provide necessary factual clarity, and otherwise fully litigate their interests. Rule 24 was adopted to codify this very principle. Yet, the Ninth Circuit’s interpretation is inconsistent with Rule 24 and is irrational. The Supreme Court must confirm that intervention includes the statutory right to appeal.

ARGUMENT

I. Remand Decisions are Final and Appealable Under 28 U.S.C. § 1291.

The Ninth Circuit’s “general rule” that a defendant-intervenor has no independent right to appeal an adverse judicial remand order is contrary to public policy and the statutory rights protected by Title 28 because it deprives such entities fundamental due process of law, which inherently includes the right to appeal a final adverse decision. The Ninth Circuit bases its “general rule” largely on one of its own decisions in *Alsea Valley Alliance v. Dep’t of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004). In *Alsea*, the intervenor joined the case after the district court’s remand decision, and the case should not apply under the facts here. In *Alsea*, the agency had begun acting under an explicit remand order, had prepared an action plan to comply with the district court’s order, and started additional regulatory work. The court, without explanation, expansively held that it could “conceive of [no] . . . circumstances that would afford a non-agency litigant the ability to appeal a remand order.” *See also Pit River*

Tribe v. U.S. Forest Serv., 615 F.3d 1069, 1075 (9th Cir. 2010) (“generally, a remand order may be deemed a final order only where the *agency* appeals the remand”).

The Ninth Circuit’s “general rule” conflicts with the precedent established by this Court and raises important issues related to appellate jurisdiction and whether all parties to a case are on equal footing with a right to appeal. The Court should grant *certiorari* to resolve the now conflicting treatment of intervenor-defendants’ appeal rights among the federal courts of appeals. *See, e.g., Ringsby Truck Lines, Inc. v. United States*, 490 F.2d 620, 624 (10th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974) (“To deny jurisdiction . . . would effectively signal the end of appellants’ cause of action without any judicial review.”). This Court must confirm that the plain language of 28 U.S.C. §§ 1291 and 1292(a)(1) does not discriminate between private litigants and federal agencies.

While this case raises serious legal questions regarding the rights of private litigants in challenges to decisions of federal agencies, it also has significant importance to natural-resource-dependent entities, who routinely intervene to defend litigation against federal agencies. Although federal agencies are responsible for developing and implementing projects to carry out the duties set forth in their enabling legislation, private entities like *amici* and their members cannot directly defend those decisions, particularly where federal courts eliminate appellate jurisdiction to challenge district court decisions invalidating agency projects or regulations. Because the interests of *amici*, their

members, and other similarly-situated individuals and associations are so closely tied to management decisions made by federal agencies, they routinely intervene to defend litigation challenging those decisions.

District court remand orders are final, appealable orders within the meaning of 28 U.S.C. § 1291. *Gelboim v. Bank of America Corp.*, 135 S.Ct. 897, 901 (2015). A “final decision” is one “by which a district court dissociates itself from a case.” *Id.* (citing *Swint v. Chambers County Comm’n*, 514 U.S. 35, 42 (1995) (emphasis added)). Finality for appeal is thus determined by whether the court retains an ongoing role in the litigation. *See id.* (citing *Catlin v. United States*, 324 U.S. 229, 233 (1945) (final decision is “one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”)). They are final from the perspective of the individuals and organizations *amici* represent, who are almost always precluded from proceeding with a project authorized by a challenged agency decision following a remand order. *Amici* and their members absolutely depend on intervention under Rule 24 to protect their interests, as intervention is often the *sole* means for *amici* to become parties to litigation to protect their interests and contract rights.

This Court has been careful to avoid “categorical” rules defining the appealability of remand orders and recognizes the “*great variety in remands*, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges.” *Sullivan v. Finkelstein*, 496

U.S. 617, 623 (1990) (emphasis added). Rather, the Court considers the precise holding and order entered by the district court. *Id.* Here, the district court’s Opinion and Order “SET ASIDE” the White Castle Project’s authorization and did not require any further NEPA analysis and documentation. Instead, the order of vacatur simply set aside the project decision. Pet. App. at 39, *Oregon Wild v. BLM*, No. 6:14-CV-0110-AA, 2015 WL 1190131 at *13 (D. Or. Mar. 14, 2015).

II. Intervenor’s Have a Statutory Right to Appeal Final Orders.

The Ninth Circuit’s “general rule” eliminating an intervenor’s appeal rights in administrative remand cases ignores the plain language of 28 U.S.C. §§ 1291 and 1292(a)(1). The statute in pertinent part provides:

The courts of appeals * * * shall have jurisdiction of appeals from *all final decisions* of the district courts of the United States * * * .

28 U.S.C. § 1291 (emphasis added).

(a) * * * [T]he courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, *granting*, continuing, modifying, refusing or dissolving *injunctions*, or refusing to dissolve or modify *injunctions* * * * .

28 U.S.C. § 1292(a)(1) (emphases added).

By conditioning an intervenor’s right to appeal a remand order upon whether the government defendants

separately elect to appeal, the Ninth Circuit has imposed an unlawful, insurmountable roadblock not found in Title 28. And the reason it is not found in Title 28 is abundantly clear. Parties to litigation, including intervenors, are entitled to appeal *as of right* any “final decision” of a federal district court. See *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686, 1691 (2015) (“In ordinary civil litigation, a case in federal district court culminates in a ‘final decisio[n.]’ . . . A party can typically appeal as of right only from that final decision.”) (citing 28 U.S.C. § 1291; *Swint*, 514 U.S. at 42); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987) (“We conclude that because [intervenor] is now a party to the suit by virtue of its permissive intervention, it can obtain effective review of its claims on appeal from the final judgment. An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court.”).

Once a party’s motion to intervene is granted, they are placed on equal footing as the original parties as to the rights they may exercise during litigation. *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 895, 901 (9th Cir. 2011) (citing *California ex rel. Lockyer v. United States*, 450 F.3d 436, 445 (9th Cir. 2006)). This is a function of Fed. R. Civ. P. 24(a), which provides for intervention of right and requires “proposed intervenors [to] have a ‘significant protectable interest’ at stake in [the] case that could be impaired by the outcome.” *Lockyer*, 450 F.3d at 445. Additionally, proposed intervenors must demonstrate that “[t]hey

have no other means to protect [their] interest, and no current party adequately represents it.” *Id.*

Intervention necessarily encompasses the right to appeal an adverse judgment.² *See, e.g., Karcher v. May*, 484 U.S. 72, 77 (1987) (while “[o]ne who is not an original party to a lawsuit may of course become a party by intervention, substitution or third-party practice . . . we have consistently applied the rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal”); *Stringfellow*, 514 U.S. at 375-76. As explained above and more fully in the Petition for a Writ of Certiorari, administrative remand orders are final, appealable decisions within the meaning of 28 U.S.C. § 1291. Thus, *parties* to the case challenging a decision of a federal administrative agency are entitled to appeal adverse remand orders *as of right*. Holding otherwise reduces an intervenor to an *amicus* and renders Rule 24 a dead letter.

III. The Ninth Circuit Has Unfairly Eliminated Appeal Rights.

The Ninth Circuit has explicitly held that when a non-party has a protectable interest that may be impaired by the outcome of a lawsuit, becoming an intervenor is the only sufficient means for that non-party to

² The appellant must have Article III standing to appeal. *Town of Chester v. Laroe Estates, Inc.*, No. 16-605, ___ U.S. ___, 137 S.Ct. 1645 (June 5, 2017). However, standing is not an issue here. Defendant-intervenor Scott Timber has contract rights to harvest timber under its federal timber sale contract and is directly affected by the outcome of the case. Pet. App. at 10.

defend its rights. *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 400 (9th Cir. 2002) (“However, amicus status is insufficient to protect [a prospective intervenor’s] rights because such status does not allow the [prospective intervenor] to raise issues or arguments formally and gives it no right of appeal.”) (citing *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995), *abrogated by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)) (*en banc*).

Relying on Supreme Court precedent, the Second Circuit has held that where a non-party will be bound by a judgment, the party is entitled to intervene to defend the challenged action. *U.S., to Use & for Benefit of Foster Wheeler Corp., v. Am. Sur. Co. of New York*, 142 F.2d 726, 728 (2d Cir. 1944) (citing *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316, 329, 330 (1896); *Kramer v. Morgan*, 85 F.2d 96 (2d Cir. 1936)). Further, this Court has held that once a non-party successfully intervenes in an action, it becomes a party to the suit, with the *same rights as existing parties*, such as the right to file counterclaims. *Moore v. New York Cotton Exchange*, 270 U.S. 593, 607-10 (1926) (*emphasis added*); *Stringfellow*, 514 U.S. at 375-76.

Neither the appeal statutes in Title 28 nor the Supreme Court’s interpretation of the scope of those statutes impose the additional hurdle manufactured by the Ninth Circuit – that a defendant-intervenor can only appeal a remand order if an originally-named federal defendant appeals. In so holding, the Ninth Circuit has deprived private litigants, such as *amici*, and

other entities throughout the nation who intervene in federal litigation of any meaningful ability to protect their interests. Under such a holding, intervenors have no independent right to appeal an adverse ruling, despite their status as parties under Rule 24.

IV. Eviscerating Statutory Appeal Rights Violates Fundamental Fairness.

The history of intervention shows the development of a way for the courts to keep their processes from *doing injury to third persons*. See 6-24 Moore’s Federal Practice – Civil § 24 App. 100 (2017).³ Modern

³ Fed. R. Civ. P. 24 codified the right to intervene at law and in equity, which had developed piecemeal through caselaw, from Equity Rule 37, and admiralty practice. REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (Apr. 1937) at 62. Rule 24 was codified to expansively create independent party status to individuals and businesses in order to protect their rights from being “substantially affected.” Rule 24 was intended to clarify prior decisions addressing intervention, which had produced inconsistent or limited rights. As codified, Rule 24 allowed intervenors to become parties for all purposes “of the claim or the defense.” James Wm. Moore, *Federal Intervention – The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 565 (Feb. 1936). The right of an intervenor to appeal dates back to Roman Law, where intervention commonly occurred at the appeal stage “on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the *petitioner’s interest thus be inadequately protected*.” *Id.* at 568 & n.12. “One who has been treated as a party by the district court . . . has standing to appeal subsequent actions in the case as if he had been formally made a party.” Wright & Miller, Appellate Review, 7C FED. PRAC. & PROC. CIV. § 1923 & n.29 (3d ed.) (citing *Smartt v. Coca-Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964), *cert. denied*, 380 U.S. 934 (1965)).

intervention practice is an expansion of a key principle underlying the development of intervention: the purpose of the courts to prevent their processes from being used to the prejudice of the rights of interested third persons. *Id.*

Prior to the adoption of Rule 24, an intervenor was forced to “take the case” as is, meaning the intervenor could not enlarge the issues. This is no longer true. “Once an intervenor becomes a party, they are a party for *all purposes*.” *Leonard E. Warner, Inc. v. Nissan Motor Corp. in U.S.A.*, 66 N.C. App. 73, 79, 311 S.E.2d 1, 5 (N.C. Ct. App. 1984) (construing North Carolina analogue to Rule 24) (emphasis added). Upon being allowed to intervene, the party assumes all rights and liabilities as if they had originally been joined. *See* 4 Moore, Federal Practice ¶ 24.16 (2d ed. 1950); *Intervention of Private Parties Under Federal Rule 24*, 52 Colum. L. Rev. 922, 931 (1952). Under Rule 24, “an intervenor [sic] in an action or proceeding is, for all intents and purposes, an original party.” *In re Raabe & Glissman, Inc.*, 71 F. Supp. 678 (S.D.N.Y. 1947); *see also* *Godfrey L. Cabot, Inc. v. Binney & Smith Co.*, 46 F. Supp. 346 (D.N.J. 1942). Once intervention has been granted, “an intervenor should be entitled to litigate fully on the merits.” *Park & Tilford, Inc. v. Schulte*, 160 F.2d 984 (2d Cir. 1947); *In re Oceana Int’l, Inc.*, 49 F.R.D. 329, 333-34 (S.D.N.Y. 1969).

V. The Ninth Circuit Has Abolished the “Federal Defendant” Requirement in Other Contexts.

An order remanding a decision to an agency may be appealed under 28 U.S.C. §§ 1291 or 1292(a)(1) if the order has either the hallmarks of finality, or the practical effect of an injunction. However, the Ninth Circuit has created a “general rule” out of whole cloth that a private intervenor-defendant may not appeal an order remanding to an agency unless the agency also chooses to appeal, despite the lack of such a formidable requirement in the plain language of the statutes.

The Ninth Circuit has expressly rejected similar rules regarding an intervenor’s right of appeal where the agency does not also appeal. For example, prior to 2011, the Ninth Circuit adhered to the “federal defendant” rule, which categorically precluded private parties and state and local governments from intervening as of right in actions arising under NEPA. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (*en banc*); see also *Portland Audubon Society v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989) (proposed intervenors’ “significant economic stake” in outcome of case not a “‘protectable’ interest justifying intervention as of right” under Fed. R. Civ. P. 24(a)(2)), *abrogated by Wilderness Soc.*, 630 F.3d at 1177. In *Wilderness Society*, an *en banc* panel of the Ninth Circuit rejected the “federal defendant” rule. The court held that “such a bright-line rule is inconsistent with the text of Rule 24(a)(2)” and “engrafts a limitation on intervention of right to parties liable to the plaintiffs *on the same*

grounds as the defendants.” Wilderness Soc., 630 F.3d at 1178-79 (emphasis added).

The same is true of the Ninth Circuit’s “general rule” regarding the appeal rights of intervenors. The Ninth Circuit’s “federal defendant” rule, which eliminates appellate jurisdiction for appeals by intervenors, is completely at odds with intervention under Rule 24 and Title 28. The decision below failed to properly analyze “finality,” ignores the practical effect of the order as an injunction, and fails to consider that the agency may well decide to forgo any further analysis with respect to the project and instead terminate the project permanently. This is why a blanket “federal defendant” rule leads to unjust results, because finality must often be determined on a case-by-case basis.

VI. The Decision Creates Asymmetry, Fundamental Unfairness, and Gives Mere *Prospective* Intervenors Greater Appeal Rights.

A federal district court’s denial of a motion to intervene is regarded as an immediately appealable, interlocutory decision if the motion was to intervene as of right and the movant was also denied permissive intervention. In that circumstance, the rejected intervenor – although a nonparty – is recognized to have standing to appeal the denial. *See, e.g., Jones v. Prince George’s County*, 348 F.3d 1014, 1020 (D.C. Cir. 2003) (asserting appellate jurisdiction over denial of motion to intervene as of right); *South Dakota ex rel. Barnett*

v. U.S. Dep't of Interior, 317 F.3d 783, 785 (8th Cir. 2003) (affirming denials of intervention of right and permissive intervention).

Simply put, intervenors are *bound* by a district court's administrative remand order, and should thus be entitled to appeal that decision if the requirements of 28 U.S.C. §§ 1291 and 1292(a)(1) are met. Here, Petitioner Scott Timber Co. purchased the White Castle timber sale at auction for a bid price of more than \$1.3 million and were granted intervention to participate as a party defendant. However, Scott Timber cannot proceed with its contract because of the district court's order vacating the project. Pet. App. at 39. ("the Court SETS ASIDE the White Castle Project's authorization, holding that BLM violated NEPA and APA").

Scott Timber had no opportunity to influence federal defendant's decision not to appeal. Unlike in class action cases, there is no "fairness hearing" at which Scott Timber can object to the agency's decision not to appeal.⁴ Scott Timber played an active role in the

⁴ The Court's interpretation of the right to appeal is not limited to named parties to the litigation. *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). In *Devlin*, the Court noted that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Devlin*, 536 U.S. at 7 (citing *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988)) (*per curiam*) (internal quotation omitted). The Court explained:

We have never, however, restricted the right to appeal to named parties to the litigation. In *Blossom v. Milwaukee & Chicago R. Co.*, 1 Wall. 655, 17 L.Ed. 673 (1864), for instance, we allowed a bidder for property at a foreclosure sale, who was not a named party in the foreclosure action, to appeal the refusal of a request he

underlying litigation, *Scott Timber* filed a separate motion for summary judgment, and the court entered judgment against *Scott Timber*. Pet. App. at 39. However, under the Ninth Circuit’s “general rule,” *Scott Timber* has no recourse. If the right to appeal is so broad that it can extend even to *non-parties*, it is remarkable that an intervenor could be denied an appeal right based solely on the status of the party the intervenor supports. This cannot be the law. The Petition for Certiorari should be granted.



made during that action to compel the sale. In *Hinckley v. Gilman, C. & S.R. Co.*, 94 U.S. 467, 24 L.Ed. 166 (1877), we allowed a receiver, who was an officer of the court rather than a named party to the case, to appeal from an order “relat[ing] to the settlement of his accounts,” reasoning that “[f]or this purpose he occupies the position of a party to the suit.” *Id.*, at 469. More recently, we have affirmed that “[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned,” *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988), given the binding nature of that adjudication upon the interested nonparty.

Id. at 7-8.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.

Respectfully submitted,

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