Sierra Club v. U.S. Environmental Protection Agency: INTERVENTION OF RIGHT AND THE VICTORIES THAT COME BACK TO HAUNT

The Sierra Club sued the Environmental Protection Agency (EPA) under the citizen's suit provision of the Clean Water Act[1] (CWA) in the United States District Court, District of Arizona. The complaint alleged that two waste water treatment plants operated by the City of Phoenix discharged toxic pollutants, pursuant to permits, into the Salt and Gila Rivers. These rivers were impaired by pollution. Thus, argued Sierra Club, the EPA had a duty to list the waste water treatment plants as sources, and to formulate control strategies to reduce the pollution. The prayer for relief sought a declaratory judgment and an injunction requiring the EPA to do the following: (1) promulgate water quality standards for toxic pollutants for Arizona waters, and (2) list impaired waters, point sources, and control strategies under the CWA, and implement the strategies. In practical terms, the Sierra Club wanted the court to order the EPA to reduce the amount of pollutant discharge from the two waste water treatment plants operated by the City of Phoenix.

The city moved to intervene, both as a matter of right and permissively under Federal Rule of Civil Procedure 24. The district court judge denied the applications to intervene for lack of a protectable interest. Specifically, the district court reasoned that since the Sierra Club was seeking EPA compliance regarding procedural requirements and statutory duties, such consequences did not affect the content or the substance of the source list at issue. The court noted that the intervenors would have ample opportunity to contest any proposed changes to the substance or content of the regulation during the administrative process, which adequately protected their stated interest.[2]

The city appealed the decision. The Ninth Circuit Court of Appeals reversed, and held that the city had a right to intervene since permits and real property owned by the City would be affected by changing permit levels. *Sierra Club v. U.S. Environmental Protection Agency*, 995 F.2d 1478 (9th Cir. 1993).

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1. 33 U.S.C. § 1365(a) (2) (1988).

2. Sierra Club v. U.S. Environmental Protection Agency, No. 90-1764, slip op. at 7 (D. Ariz. July 14, 1991) (denying motion to intervene).

Federal Rule of Civil Procedure 24 (Rule 24) provides for intervention as of right in an ongoing case when certain criteria are met.[3] Courts generally construe the rule broadly, in favor of the applicant for intervention.[4] The language of Rule 24(a) creates a threefold test for intervention of right. On timely application, an absentee will be permitted to intervene if: "(1) the absentee claims an interest relating to the property or transaction which is the subject of the action; (2) the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede the ability to protect that interest"; and (3) the applicant's interest is inadequately represented by existing parties.[5]

Courts disagree, however, as to what will qualify as an interest for purposes of this test.[6] Many courts give a liberal reading to the

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[3]. Fed. R. Civ. P. 24(a) provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The rule was amended in 1966 in an effort, according to the advisory committee note, to permit courts to look at practical considerations in determining whether an absentee seeking intervention is adequately represented. Moreover, "the deletion of the 'bound' language . . . frees the rule from undue preoccupation with strict considerations of res judicata." Fed. R. Civ. P. 24 advisory committee's note (1966).

[4]. *See, e.g.*, Ceres Gulf v. Cooper, 957 F.2d 1199, 1202 (5th Cir. 1992). The inquiry on intervention is a flexible one focusing on particular facts: "intervention of right must be measured in practical rather than technical yardstick." *Id.* (quoting United States v. Texas East Transmission Corp., 923 F.2d 410, 413 (5th Cir. 1991)). The rule permitting intervention as of right is construed broadly, in favor of those applying for intervention. Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States, 921 F.2d 924, 926 (9th Cir. 1990). *See generally* Ellyn J. Bullock, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right*, 1990 U. ILL. L. REV. 605, 626 (1990).

[5]. Yniguez v. State of Arizona, 939 F.2d 727, 731 (9th Cir. 1991) (citing Fed. R. Civ. P. 24(a)). *See*, *e.g.*, Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir. 1992); Americans United for Separation of Church and State v. City of Grand Rapids, 922 F.2d 303 (6th Cir. 1990).

[6]. *See* United States v. Texas Eastern Transmission Corp., 923 F.2d 410, 412 (5th Cir. 1991) (stating that the facts and procedural situations of each case are important, and generally rules and past decisions cannot provide uniformly dependable guidelines).

interest requirement with an emphasis on the practical aspects of intervention in a particular factual situation.[7] The leading liberal interpretation of the interest requirement stems from *Cascade Natural Gas Corporation v. El Paso Natural Gas Company.*[8] The Supreme Court in *Cascade* permitted intervention of right in order to allow a third party affected by a settlement agreement to protest that agreement.[9] Courts have followed *Cascade*'s broad reading of Rule 24(a) and have held that the interest requirement is flexible, practical and protective of outsiders.[10]

Environmental cases illustrate how an intervenor's interest in ongoing litigation may need protection. In *Sagebrush Rebellion, Inc. v. Watt*, the court allowed the Audubon Society to intervene as of right in a lawsuit between the Mountain State Legal Foundation and

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7. Jean L. Doyle, *Federal Rule 24: Defining Interest for Purposes of Intervention of Right by an Environmental Organization*, 22 VAL. U.L. REV. 109, 127 (1987) (discussing a thorough and useful analysis of conflicting Rule 24 interpretations from "conservative" versus "liberal" courts); *see*, *e.g.*, Ceres Gulf v. Cooper, 957 F.2d 1199, 1202 (5th Cir. 1992) (quoting United States v. Texas Eastern Transmission Corp., 923 F.2d 410, 413 (5th Cir. 1991) (noting intervention must be measured by practical rather than technical yardstick); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (noting the purpose in amending Rule 24 was to allow courts to look at practical considerations); Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978) (the impairment requirement of Rule 24 should be viewed in a practical, not strictly legal, sense); *see also* Fed. R. Civ. P. 24 advisory committee's note (1966). The committee noted that "[i]ntervention of right is . . . so that [the applicant] may protect his interests which as a practical matter may be substantially impaired by disposition of the action . . . ." *Id.*

8. 386 U.S. 129 (1967). While the value of *Cascade* as precedent has been questioned, the Court's interpretation on intervention has not been criticized. Doyle, *supra* note 7, at 128.

9. *Cascade*, 386 U.S. at 133. The Court allowed Cascade Natural Gas to intervene in the settlement of a divestiture plan for El Paso Natural Gas due to Clayton Act violations. Cascade had an interest, primarily economic, not otherwise represented, that justified intervention of right. *Id.*

10. *See*, *e.g.*, United States v. Hooker Chemicals & Plastics Corps., 749 F.2d 968 (2d Cir. 1984). The court concluded that "formalistic restrictions" should be abandoned in favor of the "flexibility necessary 'to cover the multitude of possible intervention situations.'" *Id.* at 983 (quoting Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Prod., Inc., 725 F.2d 871, 875 (2d Cir. 1984)). *See also* Natural Resources Defense Council v. Costle, 561 F.2d 904, 909 (D.C. Cir. 1977) (allowing industries to intervene in an action over promulgation of EPA regulations).

the Secretary of the Interior, James Watt.[11] The Foundation, representing conservative land interests, challenged a federal decision to set aside a large tract of public land in Idaho as a bird refuge.[12] Watt, coincidentally, was a previous head of the Foundation. "Understandably, the Audubon Society referred to the case as *Watt v. Watt* and asserted that the Secretary of Interior was not representing their environmental interests."[13] The court agreed, allowing the group to intervene based on an interest in the protection of birds and other animals.[14]

In contrast to the liberal interpretation of interest in *Cascade* and *Sagebrush*, some courts attempt to restrict broad interpretations of what is a protectable interest. These courts perceive intervention of right as a delay and burden to ongoing litigation, taking control of litigation out of the hands of the original parties.[15] The Supreme Court in *Donaldson v. United States*[16] adopted this narrow approach. Donaldson worked for a circus. When the Internal Revenue Service (IRS) subpoenaed the circus and its accountants for records relating to Donaldson's personal income taxes, Donaldson sought to intervene.[17] The Court denied intervention, reasoning that such a move went well beyond Rule 24(a)(2).[18] Instead, intervention of right claimants required a "significantly protectable interest" before the court would

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11. 713 F.2d 525, 527 (9th Cir. 1983).

12. *Id.* at 526.

13. *Id.* at 528; *see also* Bullock, *supra* note 4, at 631. Bullock uses *Sagebrush* to strengthen his argument that environmental intervenors need protection and that such interests represent the public interests as a whole. *Id.*

14. *Sagebrush*, 713 F.2d at 529.

15. *See* New Orleans Public Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984), *cert. denied*, 469 U.S. 1019 (1984); Wilderness Soc'y v. Morton, 463 F.2d 1261, 1263 (D.C. Cir. 1972) (Tamm, J., concurring). *But see In re* Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991) (stating concerns over judicial economy are entitled to no weight on motion to intervene as of right).

16. 400 U.S. 517 (1970).

17. *Id.* at 521.

18. *Id.* at 528.

allow intervention.[19] The Court failed to define what such an interest might be.[20]

Some lower courts have used *Donaldson*'s "significantly protectable interest" language to restrict non-party access to the courts. Lower courts with such a restrictive view on intervention interpret "significant" to mean "direct rather than contingent."[21] This test, requiring that a proposed intervenor's interest rise to particular, but unspecified level, places significant discretion in the hands of the court.[22] Consequently, these interpretations may block intervention of right.[23]

In *Portland Audubon Society v. Hodel*,[24] for example, environmental groups sued the Bureau of Land Management to enjoin sales of old growth fir timber, claiming that the sales were a violation of the National Environmental Policy Act (NEPA).[25] The court refused to allow a logging advocacy group and some logging contractors to intervene as defendants on the NEPA claim.[26] The intervenors were not entitled to intervene as of right on the NEPA claim because they lacked "an interest relating to the property or transaction which is the subject of the action."[27] Although the intervenors certainly had a significant economic stake in the outcome

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19. *Id.* at 531.

20. "The *Donaldson* decision . . . provides little guidance for subsequent intervention decisions, leaving open the split between conservative and liberal interpretations of the interest requirement. Doyle, *supra* note 7, at 132.

21. Heyman v. Exchange Nat'l Bank of Chicago, 615 F.2d 1190, 1193 (7th Cir. 1980); *see, e.g.*, Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989), *cert. denied*, 492 U.S. 911 (1989); Wade v. Goldschmidt, 673 F.2d 182, 185 (7th Cir. 1982).

22. Doyle, *supra* note 7, at 133-34. Doyle argues that the disparate results of court decisions "demonstrate the need for guidelines that courts can follow when making decisions on questions of intervention." *Id.* at 135.

23. *See, e.g.*, United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986).

24. 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 492 U.S. 911 (1989).

25. *Id.* at 303. 42 U.S.C. §§ 4321-4347 (1988). NEPA requires federal agencies to include an environmental impact statement in every recommendation or report on proposals for legislation, or other major federal actions significantly affecting the environment. *Id.* § 4332(2) (C).

26. *Portland Audubon*, 866 F.2d at 309. Specifically, the logging advocates asserted an economic interest in ensuring a continued supply of timber from the Bureau of Land Management. *Id.* at 308.

27. *Id.* at 308.

of the plaintiff's case, the court found that they "had no 'protectable' interest justifying intervention as of right" under *Donaldson*.[28] The court attempted to distinguish *Sagebrush* by emphasizing that the environmental groups in *Sagebrush*, who had asserted environmental and wildlife interests, had adequate interests in the litigation.[29] The *Portland* intervenors, unlike those in *Sagebrush*, had "no relation to the interests intended to be protected by the statute at issue."[30] NEPA, the court reasoned, does not in this situation provide protection for purely economic interests.[31] The *Portland* court further restricted intervention of right in NEPA cases by suggesting that since NEPA regulated government projects, the government bodies charged with compliance could be the only defendants.[32] In response to the intervenors claim that such a test was unduly restrictive, the *Portland Audubon* court fell back on *Donaldson*, calling for a "significantly protectable interest" for intervention.[33]

In the noted case, the court used the Rule 24(a) test to determine whether the City of Phoenix was entitled to intervention as of right.[34] Having satisfied the criteria for timeliness and inadequacy of representation, the court turned to the issue of whether the city's

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28. *Id.* at 309.

29. *Id.*

30. *Id.* Note that the environmental interests that NEPA attempts to protect are broad. NEPA's overall objective is to restore and maintain environmental quality and "to create and maintain conditions under which man and nature can exist in productive harmony . . . ." 42 U.S.C. § 4331(a).

31. *See Portland Audubon*, 866 F.2d at 309.

32. *Id.* at 309 (citing Wade v. Goldschmidt, 673 F.2d 182, 185 (7th Cir. 1982)). In *Wade*, the court rejected the attempt of a corporation, four families and city officials to intervene as defendants where the plaintiffs had challenged a proposed bridge and expressway project as violating, among other statutes, NEPA. It found that the proposed intervenors did not possess the "direct, significant legally protectable interest in the property or transaction" required for intervention under Fed. R. Civ. P. 24(a) (2). *Wade*, 673 F.2d at 185.

33. *Portland Audubon*, 866 F.2d at 309.

34. Sierra Club v. U.S. Environmental Protection Agency, 995 F.2d 1478, 1481 (9th Cir. 1993). Specifically, the court set out to determine that: (1) the motion was timely; (2) the applicant claimed a significantly protectable interest relating to the property or transaction which was the subject of the action; (3) the applicant must be so situated that the disposition may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest was inadequately represented by the parties to the action. *Id.*

interests were "protectable."[35] The fact that the city owned waste water treatment plants that would be subject to the permit limit determination established prima facie satisfaction of the second element, the need for a "significantly protectable interest."[36]

The court then turned to the more strict criteria for intervention, citing *Donaldson* and *Portland Audubon* for their standard of review.[37] The city prevailed nonetheless. The court reasoned that *Portland* and *Donaldson* were distinguishable because the City of Phoenix owned the treatment plants and permits.[38] The loggers interest in *Portland Audubon* had been an "economic interest based upon bare expectation, not anything in the nature of real or personal property, contracts or permits."[39] Such property rights, the court reasoned, were among those "traditionally protected by law, unlike the interest of the former circus employee in *Donaldson* in preventing financial disclosures by his former employer to the IRS."[40] Furthermore, these property rights were sufficient to preclude deciding whether a lesser interest would suffice for intervention purposes.[41]

The court rejected the Sierra Club's argument that an intervenor requires some relationship to the interest protected by the statute.[42] *Portland Audubon* stated that loggers' interests had no relation to the interests which NEPA intended to protect.[43] Following this reasoning, the Sierra Club argued for an application of the relationship requirement, with the CWA rather than NEPA.[44] The

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35. *Id.*

36. *Id.* Specifically, the use of real property owned by the intervenor which would be regulated by the permit was an interest traditionally protected by law. *Id.*

37. *Id.* at 1482. The court never actually applied the standard set out in *Donaldson* and *Portland Audubon*, despite their extensive review of both cases. The court noted that because the property rights and permits owned by the city stemmed from protected traditional legal doctrines "[w]e need not decide in this case whether a lesser interest would suffice." *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1483 (citing Portland Audubon Soc'y v. Hodel, 866 F.2d 302 (9th Cir. 1989)).

43. *Id.* at 1483.

44. *Id.* The Clean Water Act was intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act

city's interest in discharging pollutants was contrary to the purpose of the CWA; the CWA "does not protect the economic or proprietary interests of polluters."[45] Intervention under the CWA, the Sierra Club contended, was "limited to environmental interests, not economic interests."[46]

The court balked, describing this reading of *Portland Audubon* as "more than a little surprising."[47] The objection by the Sierra Club to the city's participation, it noted, seemed to be that it was on the wrong side, the polluter's side.[48] The adversary process, the court continued, functioned only when both sides were heard.[49]

The court turned to *Sagebrush* and *Rebellion* to illustrate its point that prospective intervenors need not show that the interest they assert is the one that is protected by the statute under which the litigation is brought. In *Sagebrush*, Watt's proposal to sell 500,000 acres of Federal land stemmed from the Desert Land Act[50] and the Carey Act,[51] both intended to facilitate reclamation and settlement of desert lands. The Audubon Society's interests were adverse to these statutes, but the court held that their interests were protectable nevertheless. The court in *Sierra Club v. EPA* went on to hold that it was generally sufficient that the interest asserted was protected under statutory law, "and that there [was] a relationship between the legally protected interest and the claims at issue."[52]

"prohibits the discharge from any point source into protected national waters of any pollutant unless that discharge complies with specific requirements of the CWA." Westvaco Corp. v. U.S. EPA, 899 F.2d 1383, 1384 (4th Cir. 1990) (citing 33 U.S.C. § 1311(a) (1988)).

45. *Sierra Club*, 995 F.2d at 1483.

46. *Id.*

47. *Id.* The court chided the Sierra Club further, pointing out that "even admitted tort-feasors may be heard in tort cases, breakers of promises in contract cases, and trespassers in property cases." *Id.*

48. *Id.*

49. *Id.*

50. 43 U.S.C. §§ 321-39 (1986). The Desert Land Act offered desert land at $1.25 per acre to the person who could "conduct" water on the land within a period of three years for the purpose of irrigation and reclamation. *Id.* at § 321.

51. 43 U.S.C. § 641. The Carey Act authorized the Secretary of the Interior to allow states to reclaim public land situated in a desert free of charge to resale for settlement and cultivation. *Id.*

52. *Sierra Club*, 995 F.2d at 1484.

More muddled, however, was the court's attempt in the noted case to distinguish *Portland Audubon* based on it being a NEPA case rather than a CWA case. In NEPA cases, the court reasoned, interests "protectable in other litigation contexts [would] not suffice for intervention as defendant under *Portland Audubon*."[53] NEPA regulates only the Federal government, not the conduct of private parties. Since no private party could comply with NEPA, only the federal government could be a defendant.[54] The CWA, on the other hand, principally regulates private parties and local governments, such as the City of Phoenix.[55] The CWA protects the legitimate interests of parties discharging permissible quantities of pollutants pursuant to National Pollutant Discharge Elimination System (NPDES) permits.[56] Thus, the court reasoned, the city had a protectable interest.[57] Citing no authority, the court concluded that "in a NEPA case, someone who will be economically worse off if an environmental impact statement preceded a major government action, nevertheless, ha[d] no interest protected by law in defending against issuance of an environmental impact statement [EIS]."[58] With real property interests at stake, though, the court held that the city should have been allowed to intervene as a matter of right.

In its analysis of the noted case, the Ninth Circuit combined elements of both liberal and restrictive approaches to intervention.[59] Calling for a "significant protectable interest" to intervene, and citing *Donaldson*, the court indicated a preference for a restrictive interpretation of Rule 24(a).[60] The court's reliance on the restrictive analysis in *Portland Audubon* and *Wade* suggests that the Ninth Circuit would focus on protecting the original parties, rather than protecting third parties. Instead, the city's interests prevailed. While

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53. *Id.* at 1485.

54. *Id.* The court cited Wade v. Goldschmidt, 673 F.2d 182 (7th Cir. 1982), as authority for its assertion that only government bodies can be NEPA defendants. *Id.* at 185. *Wade* cites no authority for this proposition. Indeed, none seems to exist.

55. *Sierra Club*, 995 F.2d at 1485.

56. *Id.*

57. *Id.* at 1485-86.

58. *Id.* at 1485.

59. *See supra* notes 7 through 21 and accompanying text for discussion concerning liberal versus restrictive approaches to intervention.

60. *See Sierra Club*, 995 F.2d at 1482.

it is tempting to interpret such an outcome as a liberalization of interest requirements, the court's reasoning suggests otherwise. Conservative courts have been most receptive to traditionally recognized interests, especially interests in property.[61] By labeling waste water treatment plants as property of the city, the court spared itself more abstract analysis into what might constitute a protectable public interest.

The court, however, elaborated on its decision by citing to more liberal interpretations of Rule 24(a). Specifically, the court cited extensively to *Sagebrush*, by any measure a victory for environmentalists over restrictive intervention requirements,[62] to refute most arguments put forward by the Sierra Club for a more restrictive criteria for intervention.[63] Indeed, the court chided the Sierra Club for offering such restrictive arguments, noting dryly that *Portland Audubon* did not create an exception to hearing both sides of the argument.[64]

The irony of the situation in which Sierra Club found itself should not be lost to environmental litigants. Having successfully battled for over two decades to loosen restrictions on intervention,[65] environmental groups find themselves battling for tighter restrictions

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61. Planned Parenthood of Minn., Inc. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977). Planned Parenthood challenged the validity of zoning restrictions against abortion clinics. Nearby homeowners were allowed to intervene to represent their interest in property values. *Id.* at 869; *see also* Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir. 1970) ("Interests in property are the most elementary type of right that Rule 24(a) is designed to protect.") (citing Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 122, 129 (1967)); Doyle, *supra* note 7, at 133 n.145. Because of a strict interpretation of interest, conservative courts focus on protecting the interests of original parties, whose interests usually prevail. *Id.*

62. Commentators such as Bullock cite *Sagebrush* as an example of how the litigation of public concerns has evolved into a very real part of our judicial system. Bullock, *supra* note 4, at 630-31.

63. *Sierra Club*, 995 F.2d at 1484.

64. *Id.* at 1483.

65. *See*, *e.g.*, United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986) (citizens group allowed to intervene in government suit against hazardous waste site); Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (allowing intervention by public interest environmental group which had sponsored legislation to prevent low-level radioactive disposal from other states entering state of Washington); *see generally* Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983); *see supra* notes 11-14 and accompanying text.

to keep groups hostile to their claims out of the courtroom. The fact that *Sagebrush* became grounds for allowing the City of Phoenix to intervene against a suit brought by the Sierra Club in the noted case illustrates such a paradox.

Nevertheless, such a holding does not spell disaster for environmental groups for a variety of reasons. First, the court in the noted case explicitly pointed out that property interests were not the only means by which parties could obtain intervention of right.[66] Interests "less plainly protectable by traditional legal doctrines suffice[s] for intervention of right."[67] The court stated that anti-nuclear groups[68] and women's rights organizations,[69] as well as environmental groups, have benefited from less restrictive intervention standards.[70] Second, courts, when deciding if environmental plaintiffs have standing, have recognized that environmental interests are unique.[71] As with *Sagebrush*, environmental plaintiffs have been allowed to represent the public interest in the protection and enhancement of the environment. Multiple environmental groups successfully claimed to represent the public interest in the protection and the enhancement of the environment in a motion to intervene in a government action against a

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66. *Sierra Club*, 995 F.2d at 1482.

67. *Id.*

68. *Id.* (citing Washington State Bldg. & Const. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), *cert. denied,* 461 U.S. 913 (1983)) (intervention of right by environmental group which had sponsored anti-nuclear waste statute in suit challenging that statute).

69. *Id.* at 1482 (citing Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980) (intervention of right by National Organization for Women in suit challenging the procedures for ratification of the proposed Equal Rights Amendment).

70. *Sierra Club*, 995 F.2d at 1482.

71. *See* Gonzales v. Gorsuch, 688 F.2d 1263, 1266 (9th Cir. 1982). While the issue in *Gonzales* was standing, not intervention, the court noted how "liberal" personal stake requirements were applicable to environmental plaintiffs. *Id. See also* Sierra Club v. Morton, 405 U.S. 727 (1972). The Court held that environmental and aesthetic injury are sufficient to satisfy injury in fact. *Id.* at 749-52. *See also* United States v. Students Against Regulatory Agency Procedures, 412 U.S. 669, 685 (1973). The Court granted environmental groups standing on a claim of economic, recreational, and aesthetic harm. *Id. But see* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888-89 (1990) (denying standing to environmentalists with recreational and aesthetic attachment to federal lands). *See generally* Bullock, *supra* note 4, at 620.

polluter of Lake Superior.[72] The court held that the group's interest in the lake for drinking water, recreation, and natural beauty were "substantial interests."[73] While the court did not cite *Donaldson*, the "substantial interests" designation by the Court suggests that the group's interests qualified them for intervention of right under *Donaldson*.

Finally, even under a restrictive, "significantly protectable interest" test for intervention, environmental interests should readily pass "because it is not necessarily as restrictive as some courts believe it to be."[74] *Donaldson* was unique, involving a narrow issue of tax liability. This is vastly different from civil lawsuits involving public interest intervention.[75] Courts have noted the narrowness of *Donaldson*'s summons proceedings and seem to warn against drawing broad conclusions applicable to other proceedings.[76] The "significantly protectable interest" language need hardly be unduly restrictive, as some courts interpret it.

Nevertheless, despite such reasons for qualified optimism concerning future intervention claims by environmental groups, a disturbing conclusion emerges in reasoning from the noted case. The court asserts that *Portland Audubon* was "most plainly" distinguished from the noted case since it involved NEPA rather than CWA.[77] The court reasoned that since NEPA requires only action from the government, only the government, not a private party, can be a defendant.[78] Such a bar to intervention in NEPA cases has scant authority.[79] While NEPA requires agencies rather than private parties

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72. United States v. Reserve Mining Co., 56 F.R.D. 408, 417 (D. Minn. 1972).

73. *Id.* at 418; *see also* Bullock, *supra* note 4, at 631-33, for general discussion of how *Reserve Mining* represents a "liberal" approach to Rule 24(a) that satisfies the requirements for intervention set out in Donaldson v. United States, 400 U.S. 517 (1971).

74. Bullock, *supra* note 4, at 633 n.282. As the commentator notes, there is sufficient room for disagreement as to what "significantly protectable" means. *See, e.g.*, Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 578 F.2d 1341, 1344 (10th Cir. 1978) ("Strictly to require that a movement in intervention have a *direct* interest . . . strikes us as being too narrow a construction of Rule 24(a) (2).") (emphasis in original).

75. Bullock, *supra* note 4, at 633.

76. *See*, *e.g.*, Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 578 F.2d 1341, 1344 (10th Cir. 1978).

77. Sierra Club v. U.S. EPA, 995 F.2d 1478, 1485 (9th Cir. 1993).

78. *See id.*

79. *See supra* note 52.

to issue EIS statements, the reality is that NEPA cases frequently involve private, state and federal parties all vying for consideration in a courtroom.[80] Furthermore, such a technical distinction may act as bar to intervention directly contradicts a major policy concern of intervention of right: protecting third parties affected by ongoing litigation.[81] Analyzed from this point of view, intervention of right involves fairness—"is it fair to deny a non-party the opportunity to influence ongoing litigation if that party will be required to live with the result?"[82]

Finally, such a technical distinction between NEPA and CWA claims contradicts the spirit of the court's own holding in the noted case: that a prospective intervenor need not show that the interest asserted is "protected by the statute under which litigation is brought."[83] "It is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue."[84] Both NEPA and CWA were enacted in an effort to restore and maintain the biological integrity of the nation's natural resources. NEPA and CWA litigation frequently overlap. To bar intervention in one type of claim ignores fundamental realities in modern environmental litigation.

The City of Phoenix clearly had an interest in what new discharge limits might result from Sierra Club's legal action, regardless of whether they could represent their interest at a later date in the administrative process. But, the fact that the court felt compelled to speculate on restrictions to intervention in future NEPA intervention claims, suggests an attempt to bar future NEPA

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80. *See generally* Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983) (Galveston utility company and private developer successfully intervened); *see* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 224 (1980). The New York City Planning Commissioner, the United States Department of Housing, local agencies, Trinity Episcopal School Corp., and a host of environmental and neighborhood coalitions eventually became parties to a NEPA suit involving a proposed low-income housing plan. *Id.*

81. Doyle, *supra* note 7, at 121. "[I]ntervention is a protective device designed to prevent injury to third parties whose interests are closely connected to the matter being litigated." *Id.*

82. *Id.* Moreover, Doyle points out that "with the modern trend toward expanding civil litigation beyond purely private concerns, this protective function has become increasingly important." *Id.*

83. Sierra Club v. U.S. EPA, 995 F.2d at 1478, 1484.

84. *Id.*

litigation. At the very least, it suggests an attempt to protect government agencies from third parties hostile to their NEPA assessments.

The Supreme Court may indeed offer future restrictions to environmental intervenors, just as they did to environmental plaintiffs in *Lujan v. National Wildlife Federation*[85] with regard to standing issues. While longing for a simpler day when intervention involves less complicated parties and issues, the Court should maintain its focus on the practical consequences of such a denial, as directed in Rule 24.

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[85]. 497 U.S. 871 (1990). *See supra* note 68 for examples of conflicting interpretations of environmental interests for standing purposes.