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## At a Dead End: The Need for Congressional Direction in the Roadless Area Management Debate

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*In California v. U.S. Department of Agriculture, the Ninth Circuit held that the Bush administration improperly promulgated the 2005 State Petitions Rule in violation of the National Environmental Policy Act and the Endangered Species Act, and reinstated the Clinton administration's 2001 Roadless Rule. The August 2009 ruling is only the latest decision in a nearly decade-long litigation battle over the fate of roadless areas. This battle began shortly after the Clinton administration promulgated the Roadless Rule, which sought to protect administratively 58.5 million acres of roadless lands from development. These roadless lands were initially identified as a result of the 1964 Wilderness Act, which directed the Forest Service to study such areas for potential inclusion into the wilderness system.*

*This Note goes back to the root of the roadless area debate—the Wilderness Act itself—for insight into the issues surrounding roadless-area management. Roadless areas share many of the characteristics of wilderness, and often serve as precursors to wilderness designation. The value of roadless areas and their connection to wilderness have animated much of the modern struggle over roadless area management, including the Forest Service's roadless area reviews, the administrative rules promulgated by the Clinton and Bush administrations, and the ensuing litigation. California v. U.S. Department of Agriculture, the most recent decision concerning the Roadless Rule, signals a need for change. This Note argues that managing roadless areas through administrative rulemaking is not viable because it lacks the permanence necessary for lasting resource*

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conservation. Additionally, it might conflict with the Wilderness Act and appears to be creating “*de facto* wilderness.” In keeping with the Wilderness Act, Congress should provide more legislative guidance. It could codify the Roadless Rule into law, amend the Wilderness Act to provide for different levels of protection, or amend the National Forest Management Act to require the Forest Service to take roadless values into account.

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## INTRODUCTION

Roadless areas are ecologically, economically, and scientifically significant. They afford dispersed recreation, clean drinking water, and large undisturbed landscapes. They provide open space and natural settings, serve as barriers against invasive plant and animal species, constitute important habitat for diverse native species, and allow for unusually valuable opportunities for monitoring and research.<sup>1</sup> They are particularly important because they often serve as precursors to wilderness areas: government inventories of potential wilderness areas have tended to focus on roadless areas of five thousand acres or more.<sup>2</sup> Road construction threatens this potential for wilderness designation by making the land less suitable for recreational use, destroying wildlife habitat, raising the chance of landslides, disrupting water flow, fragmenting ecosystems, and increasing air pollution.

Roadless areas within the National Forest System have received special treatment since the mid-1920s, when the Forest Service began administratively protecting lands as primitive, wild, and wilderness areas. In 1964, Congress passed the Wilderness Act, establishing the National Wilderness Preservation System with 9.1 million acres of administratively designated Forest Service wilderness and directing the Forest Service and other agencies to review the suitability of their lands for future inclusion in the wilderness system. Since 1964, the responsible agencies have inventoried their lands and recommended areas for wilderness designation.

Over the last forty-five years, Congress has greatly expanded the National Wilderness Preservation System, designating about 100 million of acres of new wilderness during the late 1970s and 1980s.<sup>3</sup> However, many of the roadless areas inventoried by the agencies remain in limbo, as Congress has not yet designated them. Moreover, by the mid-1990s,

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1. Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276, 30,277 (proposed May 10, 2000); *see also* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

2. ROSS W. GORTE, CONG. RESEARCH SERV., NATIONAL FOREST SYSTEM ROADLESS AREA INITIATIVES 4 (2009). Note that the 5,000 acre standard is merely a guideline—much smaller areas have been designated as wilderness. *Id.*

3. *Id.* Currently, the National Wilderness Preservation System encompasses nearly 110 million acres of wilderness. *See also id.* at 1.

congressional designation of wilderness areas had decreased dramatically due to opposition by key members of Congress.<sup>4</sup>

In the late 1990s, responding to growing concerns over the fate of roadless areas, President Clinton directed the Forest Service to issue a rule prohibiting most road construction and timber harvesting in the remaining Forest Service roadless areas.<sup>5</sup> The resulting "Roadless Rule" was to take effect in March 2001, but the new Bush administration delayed implementation as the rule became subject to numerous challenges in court.<sup>6</sup> The Bush administration tried to resolve the issue with its own brand of roadless area management, the State Petitions Rule.<sup>7</sup> This approach did not fare much better than the previous rule, generating lawsuits<sup>8</sup> and controversy from the very beginning.

In August 2009, the Ninth Circuit decided *California v. U.S. Department of Agriculture (USDA)*, holding that the Bush administration's State Petitions Rule violated the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).<sup>9</sup> The Ninth Circuit agreed with the Northern District of California's ruling that the State Petitions Rule constituted an unlawful revision of the Clinton administration's Roadless Rule and affirmed the reinstatement of the Roadless Rule as the remedy.<sup>10</sup> The Ninth Circuit's decision represents only the most recent volley in an almost decade-long legal ping-pong match regarding the management of roadless areas.

The last eight years of litigation demonstrate the huge amount of controversy surrounding this value-laden issue. The conflict essentially boils down to how strongly Americans feel about protecting quasi-wilderness pending congressional designation as wilderness. If such quasi-wilderness areas are not adequately protected until Congress determines their fate, the construction of roads can destroy the very characteristics amenable to future wilderness designation. The drastic changes in the Forest Service's roadless area policies with each new presidential

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4. H. Michael Anderson & Alik Moncrief, *America's Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 414 (1999).

5. Memorandum from William J. Clinton, President, to the Secretary of Agriculture (Oct. 13, 1999), available at <http://usgovinfo.about.com/blroadless.htm>.

6. The 2001 Roadless Rule has been the subject of nine lawsuits in Federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. See *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003); *Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248 (D. Idaho 2001); *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001).

7. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

8. See *infra* Part II.D.4.

9. *California v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009).

10. *Id.* at 1020; *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

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administration suggest that agency rulemaking is not a viable means of permanently managing roadless areas and indicates the need for congressional action with regard to roadless area management.

This Note looks to the root of the debate—the history of the Wilderness Act itself—for insight into the issues surrounding roadless-area management. Part I focuses on the interplay between roadlessness and wilderness, providing a historical background of the Forest Service’s treatment of roadless areas and chronicling the development, substance, and implementation of the Wilderness Act. A glimpse into the legislative history of the Wilderness Act illuminates the origins of the debate on roadless-area management. Part II addresses more modern struggles, including the Forest Service’s RARE reviews, the attempts of the Clinton and Bush administrations to settle the issue, and the ensuing litigation. Finally, Part III discusses *California v. USDA*, reading the case to signal a need for change.

The current approach of administrative protection is not viable because it lacks the permanence necessary for resource conservation and may violate the Wilderness Act. The Note argues that in lieu of leaving the agencies under the direction of conflicting agency mandates, Congress should provide additional legislative guidance. There are three primary means for Congress to proceed: Congress could codify the original Roadless Rule into law, amend the Wilderness Act to provide for different levels of protection (including opening up some areas to mountain biking), or amend the National Forest Management Act (NFMA) to require that Forest Service planning take into account the economic, ecological, and other values of roadless areas. The Note offers explanations why Congress may not act, and concludes with an evaluation of the current administration’s approach.

## I. FORESTS, ROADLESS AREAS, AND WILDERNESS

### A. *Historical Background*

Prior to the 1964 passage of the Wilderness Act, wilderness on federal lands had no formal congressional protection: roadless areas or areas possessing wilderness characteristics received only administrative protection. Beginning with the Organic Act of 1897, the Forest Service emphasized conservation of forest lands, focusing on protection and development.<sup>11</sup> The Organic Act provided that national forests could be

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11. Organic Act of 1897, 16 U.S.C. §§ 528–531 (2006).

administered to “protect the forest within the reservation.”<sup>12</sup> In practice, forests were used for multiple purposes without much conflict. Soon, however, Forest Service leaders came to see value in protecting the natural state of some forest lands. Largely due to the work of Aldo Leopold, in 1924 the Forest Service designated the first-ever wilderness area in the Gila National Forest in New Mexico by an administrative order pursuant to the Organic Act.<sup>13</sup> Although it “was only an administrative order by a regional official and made no promise of permanence,” the designation of wilderness at Gila is often seen as the beginning of “institutional wilderness.”<sup>14</sup> By 1927, the Chief of the Forest Service, William B. Greeley, had developed an interest in the wilderness idea, saying that it “[has] merit and deserves careful study.”<sup>15</sup> He saw importance in protecting these areas from “unnecessary road building” and maintaining their “wilderness character.”<sup>16</sup>

To this end, Greeley ordered an inventory of undeveloped national forestlands, a process that eventually culminated in the Forest Service’s 1929 “L-20” regulation,<sup>17</sup> which set formal guidelines for establishing and managing “primitive” areas.<sup>18</sup> Officially, these areas were to remain primarily in their natural state, with exceptions for minimal logging and low-impact roads and shelters.<sup>19</sup> But despite this apparently restrictive mandate, “nothing about the . . . regulation actually prohibited any form of development or use, including road building and logging.”<sup>20</sup> In the 1930s, the agency established seventy-three primitive areas, amounting to 13 million acres, and withdrew them from commercial use. During the same decade, unprecedented road building as well as the rise of car culture and industrial tourism led conservationists like Aldo Leopold and Bob Marshall to form the Wilderness Society in hopes of curbing such trends.<sup>21</sup> Partly due to the efforts of the Wilderness Society and other conservationist groups, the new “U Regulations” of 1939 directed the study and reclassification of the old Primitive Areas and created a system

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12. Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 296 (1966) (citing 30 Stat. 34 (1897); 16 U.S.C. § 475 (1985)).

13. BENJAMIN W. HAHN ET AL., STANFORD ENVTL. LAW SOC’Y, NATIONAL FOREST RESOURCE MANAGEMENT: A HANDBOOK FOR PUBLIC INPUT AND REVIEW 121 (1978).

14. *Id.*; DOUG SCOTT, CAMPAIGN FOR AMERICA’S WILDERNESS, THE ENDURING WILDERNESS: PROTECTING OUR NATURAL HERITAGE THROUGH THE WILDERNESS ACT 29 (2004).

15. SCOTT, *supra* note 14, at 29.

16. *Id.*

17. *Id.*

18. *Id.*

19. McCloskey, *supra* note 12, at 296.

20. SCOTT, *supra* note 14, at 29.

21. Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service’s Roadless Rule*, 44 NAT. RESOURCES J. 687, 696 (2004).

of “Wilderness Areas” and “Wild Areas” where logging and road building were excluded.<sup>22</sup> By the passage of the Wilderness Act in 1964, thirty-one of the seventy-three primitive areas had been reclassified and given greater protection.<sup>23</sup>

This administrative protection was easily modified by administrative order, however, and as a result many areas did not survive the reclassification process.<sup>24</sup> Pressures for increased logging and development led to the release of administratively protected wilderness lands.<sup>25</sup> In addition, when the old primitive areas were reclassified as wilderness, boundaries were revised to accommodate logging interests.<sup>26</sup> The postwar economic boom intensified the pressure to log the national forests.<sup>27</sup> Conservationists soon realized that a more permanent form of wilderness protection was necessary to protect the diminishing wilderness.

### B. *The Idea of Wilderness and the Wilderness Act*

In his 1951 address to the Sierra Club’s Second Biennial Wilderness Conference in San Francisco, Executive Director of the Wilderness Society Howard Zahniser urged attendees to “make a concerted effort for a positive program that will establish an enduring system of areas that can be at peace and not forever feel that the wilderness is a battleground.”<sup>28</sup> Zahniser emphasized the necessity of statutory protection for wilderness. Statutory protection, Zahniser explained, would prevent future administrative actions from shrinking protected areas and would help stabilize the wilderness system. Wilderness Society founder Bob Marshall had noted years before that wilderness should be designated by Congress, as “[t]his would give them as close an approximation to permanence as could be realized in a world of shifting desires.”<sup>29</sup> Otherwise, said John Barnard of the Sierra Club in 1956, “America’s wilderness areas could be wiped out by the stroke of the

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22. SCOTT, *supra* note 14, at 35.

23. HAHN, *supra* note 13, at 121.

24. For example, “[a] road was allowed to split the original Gila Wilderness in two; the lushly timbered French Pete valley was taken out of the Three Sisters Wilderness; [and] 446 thousand acres of timberland along the Magruder Corridor in Idaho were excised from the Selway-Bitterroot Wilderness.” *Id.*

25. SCOTT, *supra* note 14, at 15–16.

26. *Id.* at 38.

27. *Id.* at 40.

28. Howard Zahniser, *How Much Wilderness Can We Afford To Lose?*, in WILDLANDS IN OUR CIVILIZATION 51 (1964).

29. SCOTT, *supra* note 14, at 31.

Secretary of Agriculture's pen even though public sentiment did not favor it."<sup>30</sup>

In 1956, Zahniser and a number of conservation groups collaborated to draft the first wilderness bill.<sup>31</sup> Senator Hubert Humphrey and eight other senators introduced the bill, S. 4013, on June 7, 1956.<sup>32</sup> S. 4013 was a "strong preservationist document" that would have created national wilderness in areas across the federal land system, including within Indian reservations, and would have banned the construction of roads and structures and any commercial activity within these areas.<sup>33</sup> Under S. 4013, areas under the jurisdiction of federal land management agencies would continue to be so governed, in accordance with wilderness preservation. The bill also would have immediately incorporated "wilderness," "wild," and "roadless" areas into the wilderness system, while "primitive areas" would first be reviewed by the Secretary of Agriculture.<sup>34</sup> Finally, the proposed statute contained a provision establishing a National Wilderness Preservation Council, whose function was to be largely advisory.<sup>35</sup>

But S. 4013 was only the first of a series of bills proposing a national wilderness system. Humphrey's second bill, S. 1176, was the first wilderness bill to be given hearings.<sup>36</sup> These hearings, the first of eighteen on the matter, showcased the arguments on both sides of the issue. The proponents of a wilderness act believed in the idea of wilderness as a resource in itself, "a setting for a human experience," rather than a resource to be exploited or utilized.<sup>37</sup> This "wilderness idea" was seen as shaping both American character and history.<sup>38</sup> Leopold and other wilderness advocates believed in a new "land ethic" that eschewed the anthropocentric view for a biocentric view of nature.<sup>39</sup> They sought statutory protection, rather than administrative, so that the wilderness

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30. *Id.* at 39.

31. "The Wilderness Society, the National Parks Association, the Izaak Walton League, the Council of Conservationists, the Wildlife Management Institute, the Citizens Committee on Natural Resources, and the Federation of Western Outdoor Clubs had all been consulted on draft legislation, and had given formal or informal backing to the effort." CRAIG W. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* 106 (1982).

32. McCloskey, *supra* note 12, at 298.

33. ALLIN, *supra* note 31, at 106.

34. *Id.* at 106-07.

35. *Id.* at 107. The council would be made up of federal administrators and citizen conservationists, and would gather information and make recommendations about wilderness. RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* 221 (4th ed. 2001).

36. *Id.* at 108.

37. McCloskey, *supra* note 12, at 295.

38. Wallace Steger, Letter to the Outdoor Recreation Resources Review Commission (December 3, 1960), available at <http://wilderness.org/content/wilderness-letter>.

39. McCloskey, *supra* note 12, at 294.

resource could be protected permanently.<sup>40</sup> The sponsors were driven by a desire to both preserve lands for recreation and scale back agency discretion to create or eliminate administrative wilderness.<sup>41</sup>

Opposition to the bill was extensive. According to Professor Roderick F. Nash, many critics of the wilderness system were not opposed to the principle of wilderness preservation, they just disagreed on “where and how much.”<sup>42</sup> They noted that the nation’s wilderness areas were already well-protected by the administrative agencies, obviating the need for additional legislation.<sup>43</sup> Initially, the agencies were also opposed to a wilderness bill. The Forest Service testified against permanent wilderness protection, stating that it “would strike at the heart of the multiple-use policy of national forest administration.”<sup>44</sup> The Forest Service was not opposed to statutory recognition of wilderness protection as a legitimate use, but it was unwilling to give up decision-making power in that regard.<sup>45</sup> Finally, opponents of the bill called it “class legislation,” benefiting only those with the time and money to enjoy wild areas at the expense of mining, ranching, and timber interests.<sup>46</sup> Wilderness users were seen as a privileged minority “determined to ‘lock up’ the nation’s resources for their own limited use.”<sup>47</sup>

Powerful interests on both sides of the debate made the road to passing a wilderness act a long one. Ultimately, the wilderness bill went through at least sixty-five iterations (passed into twenty different versions), eighteen hearings, and nine years of deliberation before taking its final shape as the Wilderness Act of 1964.<sup>48</sup> The difficulty in reaching a consensus on the wilderness issue foreshadowed the debate on roadless area management that would arise decades later.

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40. In supporting Saylor’s wilderness bill, H.R. 9070, one Representative vocalized the sentiment felt by the proponents of the Wilderness Act: “The time has come to save wilderness areas, not temporarily by administrative decision, but permanently by law.” *Wilderness Preservation System: Hearings Before the Subcomm. on Public Lands of the H. Comm. on Interior and Insular Affairs*, 88th Cong. 1091 (1964) (statement of Hon. John V. Lindsay, A Representative in Congress from the State of New York).

41. Sandra B. Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 ENVTL. L. 1015, 1040 (2004).

42. NASH, *supra* note 35, at 223.

43. ALLIN, *supra* note 31, at 110.

44. *Id.*

45. *Id.* at 111.

46. MARK W. T. HARVEY, *WILDERNESS FOREVER: HOWARD ZAHNISER AND THE PATH TO THE WILDERNESS ACT 188* (2005).

47. ALLIN, *supra* note 31, at 111.

48. McCloskey, *supra* note 12, at 298.

*C. Provisions of the Wilderness Act.*

The final version of the wilderness bill, signed into law on September 4, 1964, represented a compromise between conservationist and commodity interests and the culmination of a decade of deliberation. The Act set out a policy “to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”<sup>49</sup> It established the National Wilderness Preservation System, which was made up of areas of congressionally designated federal lands to “be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness.”<sup>50</sup>

The Act further specified that “wilderness areas” be designated only by an act of Congress.<sup>51</sup> Under the Act, a tract of undeveloped federal land is eligible for designation as wilderness if it (1) is substantially natural in appearance; (2) has outstanding opportunities for solitude or primitive recreation; (3) is either greater than 5000 acres or otherwise large enough to be practicable for wilderness management; and (4) has or may have ecological, geological, scientific, educational, scenic, or historical value.<sup>52</sup> While reserving the right to designate wilderness, Congress gave the Departments of Agriculture and Interior the roles of studying and reporting on the suitability of lands for inclusion into the system.<sup>53</sup> The Act specifies a ten year period for these studies, but does not provide for ongoing review of potential wilderness beyond the ten year period.<sup>54</sup>

Congressionally designated wilderness areas are subject to a number of prohibitions. The Act generally prohibits commercial activities (such as timber harvesting), motorized access, roads, structures, and facilities in wilderness areas. Section 4(c) states:

Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of

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49. 16 U.S.C. § 1131(a) (2006).

50. *Id.*

51. *Id.* § 1131.

52. *Id.* § 1131(c). A Wilderness Study Area (WSA) is an area of land meeting the general wilderness qualifications and thus eligible for congressional designation as a Wilderness Area. States survey their public lands and identify WSAs for potential inclusion into the National Wilderness Preservation System.

53. *Id.* § 1132(b)–(c).

54. *Id.*

persons in the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.<sup>55</sup>

Section 4(d) provides numerous exceptions to these prohibitions, including possible continued use of motorboats and aircraft; fire, insect, and disease control measures; mineral prospecting conducted “in a manner compatible with the preservation of the wilderness environment”; water projects; continued livestock grazing; and commercial recreation activities.<sup>56</sup>

#### D. Implementation

The Wilderness Act affected the Forest Service from the outset because all of the 9.1 million acres placed directly into the wilderness system by the Act were national forest lands that had been previously designated as “wild” or “wilderness.”<sup>57</sup> Consequently, by 1966 the Forest Service had established regulations for wilderness management.<sup>58</sup> In addition, the Wilderness Act tasked both the Interior and Agriculture Departments with performing reviews. The Secretary of Interior was required to review “every roadless area five thousand contiguous acres or more” in the units of the National Park System and National Wildlife Refuge.<sup>59</sup> The Secretary of Agriculture was required to review and recommend for wilderness preservation the “primitive” areas that had never been reclassified as “wilderness” or “wild.”<sup>60</sup> It is unclear why the Act did not require the Secretary of Agriculture to review Forest Service roadless areas, and although the unequal treatment of similarly situated Forest Service lands was “perhaps politically necessary in order to secure passage of the Act . . . . [I]t set the stage for a controversy between the Forest Service and conservationists which continues today.”<sup>61</sup> Despite the lack of direction to do so, the Forest Service proceeded to review roadless areas.<sup>62</sup>

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55. *Id.* § 1133(c).

56. *Id.* § 1133(d).

57. HAHN, *supra* note 13, at 122.

58. ALLIN, *supra* note 31, at 144.

59. 16 U.S.C. § 1132(c).

60. *Id.* § 1132(b); ALLIN, *supra* note 31, at 151.

61. HAHN, *supra* note 13, at 122.

62. Brandon Dalling, *Administrative Wilderness: Protecting Our National Forestlands in Contravention of Congressional Intent and Public Policy*, 42 NAT. RESOURCES J. 385, 391–92 (2002).

*E. The Value of Roadlessness and Its Connection to Wilderness*

Roadless areas, including those reviewed by the Forest Service, are inherently valuable. Opponents of roadless-area protection often point to economic prosperity and job creation as justifying road building, which enables logging and mining to take place. But Earthjustice Senior Editor Tom Turner has argued that roadless areas, while valuable for commodity uses, are actually more valuable intact, because they offer what economists call “ecosystem services.”<sup>63</sup> These services include providing clean drinking water, producing food, sequestering carbon, and preserving biological diversity, as well as soil formation, pest control, and opportunities for recreation.<sup>64</sup> Further, the tourism and retirement sectors may actually outweigh commodity interests as sources of economic growth.<sup>65</sup> Beyond this economic value, roadless areas have spiritual value as well. Many people of faith feel that these areas “reflect God’s majesty, power and beauty in a unique way, as do all of the amazing variety of creatures they shelter.”<sup>66</sup> In fact, religious organizations have lobbied the government for protection of roadless areas.<sup>67</sup>

Roadless areas serving as precursors to wilderness designation has generated criticism that roadless areas are really “de facto wilderness.”<sup>68</sup> But while these areas may share many of the characteristics of congressionally designated wilderness, they often allow for a broader range of activities, such as mountain biking and other mechanized travel.<sup>69</sup> Additionally, “[roadless] areas can also take pressure off heavily used wilderness areas by providing solitude and quiet, and dispersed recreation opportunities.”<sup>70</sup> Indeed, the Roadless Rule allows multiple uses forbidden in wilderness areas, such as motorized use, grazing, and oil and gas development. It cannot be denied, however, that roadless areas do share many wilderness characteristics, most importantly the absence of roads. These characteristics have animated much of the modern struggle over roadless lands. And as the remainder of this Note will

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63. TOM TURNER, ROADLESS RULES: THE STRUGGLE FOR THE LAST WILD FORESTS 63 (2009). In fact, the national timber sale program’s net value to the government is negative, costing taxpayers more than \$2 billion from 1992 to 1997 and averaging a net loss of approximately \$400 million a year. *Id.*

64. *Id.* at 63–64.

65. *Id.* at 64–65.

66. *Id.* at 68–69.

67. *Id.* at 68–70. These organizations include Restoring Eden and the Coalition on the Environment and Jewish Life. *Id.*

68. Wyoming v. U.S. Dep’t of Agric., 277 F. Supp. 2d 1197, 1232–37 (D. Wyo. 2003).

69. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. § 294).

70. *Id.*

detail, the ambiguous and often conflicting laws governing forest lands have only complicated the issue.

## II. THE MODERN ROADLESS STRUGGLE

### A. *The RARE Saga*

As a result of the Wilderness Act's passage in 1964, the Forest Service had less administrative control over the forests, diminishing its ability to fulfill the mandate of providing timber and other commodities.<sup>71</sup> In response, the agency sought to limit the impact of wilderness preservation on commodity production by adopting the "purity principle."<sup>72</sup> Relying on the language of section 4 of the Wilderness Act, the agency "insisted on using the management criteria [of wilderness areas] . . . as a minimum standard of admission to the wilderness system, . . . a result Congress did not intend."<sup>73</sup> The effect of the purity principle was to disqualify many potential wilderness areas from serious consideration.<sup>74</sup>

Though the purity principle satisfied forest managers and commodity interests by limiting land withdrawals for wilderness preservation, the principle had many opponents in the general public, in Congress, and most notably in the White House.<sup>75</sup> In the spring of 1971, the Forest Service was spurred into action by pressure from the White House.<sup>76</sup> The Council on Environmental Quality circulated a draft executive order that threatened Forest Service operations by requiring the Forest Service to identify all areas "that appear to have the character of wilderness as defined in [s]ection 2(c) of the Wilderness Act" and to protect the status of those areas until Congress and the president acted on them.<sup>77</sup> This proposed order threatened the Forest Service status quo by requiring it to use the standard of section 2(c) rather than its own purity principle.<sup>78</sup> Possibly due to a bargain with the Forest Service, the draft order was never issued and the Forest Service "found it prudent to study its roadless

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71. ALLIN, *supra* note 31, at 158.

72. *Id.* The Forest Service devised the "purity principle" as a means of limiting the Wilderness Act's impact. The agency argued that only land in its pristine or "primeval" state was eligible for inclusion into the Wilderness system. *Id.*

73. *Id.*

74. CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 346 (1987).

75. *Id.* at 159.

76. *Id.* at 159-60.

77. *Id.*

78. *Id.*

domain, isolate wilderness study areas, and thus free the remainder of its management areas for multiple-use forestry.”<sup>79</sup>

The Forest Service completed the ensuing Roadless Area Review and Evaluation (RARE I) in 1973. Immediately, the scope and methodology of RARE I engendered controversy and litigation.<sup>80</sup> The entire review—a study of 56 million acres of roadless areas across the country—was conducted in a ten-month period. New wilderness recommendations as a result of the study amounted to only 6.3 million acres. Weaknesses included “deficiencies in the completeness of the inventory, the feasibility of public participation, and the methodology used to select study areas.”<sup>81</sup> One highly criticized aspect of the inventory was the Forest Service’s use of the purity principle in its evaluation of roadless areas. Environmental litigants worried that timber harvesting would destroy the wilderness characteristics of roadless areas, rendering them ineligible for wilderness study area designation.<sup>82</sup> These deficiencies, a new presidential administration, and the procedural requirements of the Forest and Rangeland Renewable Resources Planning Act, NFMA, and newly enacted NEPA, led the Forest Service to conduct a second Roadless Area Review and Evaluation (RARE II) in 1977.

Conducted under the direction of the new Carter administration, RARE II turned out to be a much more comprehensive survey than RARE I, reviewing 62 million acres of roadless land.<sup>83</sup> RARE II was completed in 1979, and the Forest Service recommended that 15 million acres (or 24 percent) be classified for wilderness designation, 36 million acres (or 58 percent) be classified as nonwilderness, and 10.8 million acres (or 17 percent) be allocated for further planning under NFMA before decisions were made on their future management.<sup>84</sup>

The 36 million acres to be classified as nonwilderness led to litigation about the adequacy of RARE II. Although the Forest Service had prepared an environmental impact statement (EIS) for the RARE II process, the State of California challenged the adequacy of that EIS with regard to the nonwilderness designation of forty-seven roadless areas in

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79. *Id.*

80. *See, e.g.,* Wyo. Outdoor Coordinating Comm. v. Butz, 484 F.2d 1244 (10th Cir. 1973).

81. ALLIN, *supra* note 31, at 161.

82. David Stewart, *Creating the New American Wilderness in America’s “Untrammelled” Backcountry: The Roadless Area Conservation Rule and the Ninth Circuit*, 28 OKLA. CITY U. L. REV. 829, 834–35 (2003).

83. WILKINSON & ANDERSON, *supra* note 74, at 350.

84. *Id.*; GEORGE H. SIEHL, FOREST SERVICE’S ROADLESS AREA REVIEW AND EVALUATION (RARE II) ISSUE BRIEF NO. IB79059 (1980).

the state in *California v. Bergland*.<sup>85</sup> The district court granted an injunction stopping any further development in those areas based on the agency's failure to conduct adequate site-specific analysis and failure to consider an adequate range of alternatives.<sup>86</sup> The Ninth Circuit affirmed the injunction in *California v. Block*, holding that site-specific EISs would be required before any of the inventoried roadless areas could be developed.<sup>87</sup> While RARE II failed to lead to additional permanent protection, these inventoried roadless areas would later serve as the basis for the Clinton administration's 2001 Roadless Rule, as discussed in Part II.D, *infra*.

### B. State Wilderness Bills

One result of the RARE II litigation was pressure from industry interests for Congress to "release" roadless areas from the requirement of comprehensive area-by-area wilderness review.<sup>88</sup> Wilderness proponents leveraged this industry pressure to demand significant amounts of wilderness designation, resulting in a series of state-by-state compromise wilderness bills in which Congress reviewed the RARE II allocations for each state.<sup>89</sup> Statewide wilderness bills were eventually passed for all of the RARE II states except Idaho and Montana.<sup>90</sup> In 1984, Congress enacted twenty-one wilderness laws designating 8.5 million acres of wilderness in twenty-one states.<sup>91</sup> The state wilderness acts all contained similar "release" provisions whereby Congress could ratify the legal adequacy of the RARE EIS as it applied to lands in that state and release the Forest Service both from managing and having to consider those RARE II nonwilderness areas for wilderness designation until revision of the relevant forest plan.<sup>92</sup>

Also as a result of its loss in *California v. Block*, the Forest Service revised its NFMA regulations on planning in roadless areas.<sup>93</sup> The revised regulations gave the Forest Service discretion to manage roadless areas in

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85. *California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980), *aff'd sub nom. California v. Block*, 690 F.2d 753 (9th Cir. 1982).

86. *Id.*

87. *Id.*

88. DOUGLAS W. SCOTT, CAMPAIGN FOR AMERICA'S WILDERNESS, A WILDERNESS-FOREVER FUTURE: A SHORT HISTORY OF THE NATIONAL WILDERNESS PRESERVATION SYSTEM 22 (2006), available at [http://www.wilderness.net/toolboxes/documents/awareness/Doug%20Scott-A\\_Wilderness-Forever\\_Future-history.pdf](http://www.wilderness.net/toolboxes/documents/awareness/Doug%20Scott-A_Wilderness-Forever_Future-history.pdf).

89. *Id.*

90. Mary Katherine Ishee, *Roadless Lands and Wilderness Planning: A History and Overview*, in THE NATURAL RESOURCES LAW MANUAL 385, 387 (Richard J. Fink ed., 1995).

91. GORTE, *supra* note 3.

92. Ishee, *supra* note 90, at 387.

93. 36 C.F.R. pt. 219 (1983).

the category of nonwilderness for preservation of their roadless characteristics.<sup>94</sup> The regulations also demanded that all roadless areas identified in RARE II be evaluated and considered for wilderness recommendation during the forest planning process unless otherwise required by law.<sup>95</sup> This affected second-generation plans of most forests in states covered by RARE II sufficiency and release language, as well as some first-generation plans.

Although there were many state wilderness bills passed in the 1980s, opposition from key members of Congress has resulted in very little new wilderness established since 1994.<sup>96</sup> As a result, in the late 1990s conservationists grew increasingly concerned about the possible loss of roadless areas, or “undesignated wilderness areas,” to timber, mineral, and other commodity interests.<sup>97</sup>

### C. *A Dysfunctional Framework: The Law Governing Forests*

When faced with controversial decisions, agencies often look to their statutory mandate for guiding principles.<sup>98</sup> Unfortunately, in the case of the Forest Service, the Organic Act does not offer much help. It states in part that “[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”<sup>99</sup> This mandate is so malleable that various interest groups can and often do emphasize different provisions (such as protection of water flows and timber supply) to support their conflicting agendas.<sup>100</sup>

The Forest Service is also governed by the Multiple Use Sustained Yield Act of 1960 (MUSYA).<sup>101</sup> Through MUSYA, Congress directed the Forest Service to manage national forests for multiple use and sustained yield without impairment of the productivity of the land. Multiple use is defined as the management of all the various renewable surface resources of the national forests “in the combination that will best meet the needs of the American people” and recognizes that

some land will be used for less than all of the resources . . . without impairment of the productivity of the land, with consideration being

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94. Ishee, *supra* note 90, at 387.

95. *Id.*; see also 36 C.F.R. pt. 219.

96. Anderson & Moncrief, *supra* note 4, at 414.

97. *Id.*

98. Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223, 225 (2004).

99. Organic Act of 1897, 16 U.S.C. § 475 (2006).

100. Nie, *supra* note 98, at 225–26.

101. 16 U.S.C. §§ 528–531.

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given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.<sup>102</sup>

The Act also states that “[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes”<sup>103</sup> and explicitly notes that “the establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of” MUSYA.<sup>104</sup>

By failing to prioritize the different potential uses of forest lands, this broad language does little to guide forest managers in decision making. In fact, “its abstractness has been used by the USFS over the years to defend everything from designating 58.5 million acres as protected roadless areas to proposing an 8.7 billion board foot timber sale in the Tongass National Forest in Southeast Alaska.”<sup>105</sup> A lack of clear, uniform standards governing land decision making tends to lead federal agencies to submit to the persistent pressures of local commodity interests.<sup>106</sup> MUSYA’s “standardless delegation of authority to managers of public lands,” when endorsed by Congress, leads to such capitulation.<sup>107</sup> For example, due to pressure from the timber industry and communities dependent on it, “multiple use in the national forests has produced below-cost timber sales.”<sup>108</sup> Consistent with public choice theory,<sup>109</sup> small, well-organized special interest groups end up playing a disproportionate role in public lands policy, “where the interests of disorganized, distant public owners are regularly overshadowed by the opposing interests of locally concentrated commodity interests.”<sup>110</sup> Thus, while the idea of multiple use was promising early on, it has not led to balanced results due to its inherent bias toward commodity users.<sup>111</sup>

Most recently, the National Forest Management Act of 1976 (NFMA) was enacted to govern the administration of national forests by

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102. *Id.* § 531.

103. *Id.* § 528.

104. *Id.* § 529.

105. Nie, *supra* note 98, at 227.

106. Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405, 407 (1994).

107. *Id.*

108. *Id.*

109. Applying the lessons of economics to political science, public choice analysis takes a critical view of the making of public policy in a democracy. One branch of public choice theory, “interest group theory,” sees legislators not as promoters of the public interest but as primarily interested in reelection. Interest group theory views the legislature “as either a playground of special interests or a passive mirror of self-interested constituents.” *Id.* at 415–16.

110. *Id.*

111. *Id.* at 415.

establishing multiple-use standards for national forest planning and setting up a legislative framework for the planning process.<sup>112</sup> NFMA created the land-use planning processes that governed roadless areas not selected for preservation under the Wilderness Act before 2001. NFMA requires the Forest Service to review all roadless areas for potential inclusion in the wilderness system during the revision of NFMA land and resource management plans.<sup>113</sup> During the 1990s, the Forest Service sought to address inadequacies of the NFMA plans and to generate scientific information for plan revisions by focusing on “ecoregional” plans and assessments.<sup>114</sup> Though these actions did not lead to the designation of more wilderness, they did bring to light the ecological and economic significance of roadless areas.<sup>115</sup> The statute also directed the Forest Service to consider wilderness values among the range of multiple-use considerations when developing land management plans.<sup>116</sup>

The statutory provisions that guide the Forest Service illustrate the lack of direction given to the agency for solving what are essentially value-laden political questions.<sup>117</sup> Roadless areas represent different things to different groups: some view them as economic resources to be exploited, some emphasize their recreational value, others recognize their ecological significance, and still others focus on the spiritual values associated with these lands. These values animate the two main viewpoints on roadlessness, which Professor Federico Cheever articulates as the “roadless issue” view and the “roadless resource” view.<sup>118</sup> The “roadless issue” group sees roadlessness as a “designation which should cease to exist,” arguing that land should either be designated as wilderness or opened up to multiple use, while the “roadless resource” group wishes to protect the valuable roadless resource for its own sake.<sup>119</sup>

Unfortunately, the laws governing the Forest Service do not prioritize between these values, leaving the agency without a consistent or coherent mission. As a result, “the Forest Service’s attempts at resource management have been plagued by controversy and litigation, ultimately imbuing the agency with a sort of administrative

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112. National Forest Management Act, 16 U.S.C. §§ 1600–1614 (2006).

113. *Id.* §§ 1604(e)(1), (g)(3)(A); Anderson & Moncrief, *supra* note 4, at 422.

114. Anderson & Moncrief, *supra* note 4, at 422.

115. *Id.*

116. 16 U.S.C. § 1600.

117. Nie, *supra* note 98, at 230–31.

118. Federico Cheever, *Not Quite Wilderness: The Development of Roadless Area Protection on Forest Service and BLM Land 1* (Univ. of Denver Sturm College of L., Working Paper No. 07-37), available at <http://ssrn.com/abstract=1020387>.

119. *Id.*

schizophrenia, unable to identify or even recognize its mission.”<sup>120</sup> This “administrative schizophrenia” is reflected in the Forest Service’s treatment of roadless areas. With the Organic Act, MUSYA, and NFMA providing little guidance and conflicting goals, the same agency has been able to justify a nationwide rule prohibiting road-building and timber harvesting, as well as a policy eliminating that same national standard and setting up an opt-in system for state-specific roadless area protections.

*D. Modern Roadless Area Management: Two Attempts*

Until the promulgation of the Roadless Rule in 2001, inventoried roadless areas were protected through the NFMA forest planning process.<sup>121</sup> Predominantly a planning statute, the NFMA requires “land and resource management plans” (LRMPs or Forest Plans) for each unit of the National Forest System. These LRMPs must comply with MUSYA by providing for multiple use and sustained yield and by coordinating various interests, including recreation, range, timber, wildlife, and wilderness.<sup>122</sup> The NFMA tasks the Secretary of Agriculture with adopting guidelines for LRMPs that consider the economic and environmental aspects of systems of renewable resource management and that provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish.<sup>123</sup> The guidelines must ensure that certain conditions are met before timber is harvested from National Forest System lands. For example, the Forest Service must work to prevent soil, slope, or other watershed conditions from being irreversibly damaged.<sup>124</sup> In developing LRMPs, the Secretary is required to identify lands not suited for timber production and to ensure that subject to certain exceptions, no timber harvesting will occur on such lands for a period of ten years.<sup>125</sup> The Secretary must review these lands at least every ten years and return them to timber production when they become suitable.<sup>126</sup>

Although some of the plans governing roadless areas dictated that those areas were to remain roadless, “many apparently contemplated the

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120. Michael J. Mortimer, *The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management*, 54 ADMIN. L. REV. 907, 910 (2002).

121. Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1149 (2004).

122. 16 U.S.C. § 1604(e)(1) (2006).

123. *Id.* § 1604(g)(3)(A).

124. *Id.* § 1604(g)(3)(E)(i).

125. *Id.* § 1604(k).

126. *Id.*

building of roads at some point.”<sup>127</sup> In practice, NFMA gave the Forest Service wide discretion, often leaving decisions (such as whether to build a road) to individual forest supervisors.<sup>128</sup> While the decisions of the forest supervisors had to comply with the LRMPs, the applicable laws—NFMA, MUSYA, and the Organic Act—offered little in the way of guidance.<sup>129</sup> This lack of clarity resulted in decentralized and unprincipled decision making regarding the management of roadless areas.

By 2000, there were approximately 386,000 miles of roads on Forest Service lands.<sup>130</sup> Between the completion of RARE II in 1979 and 2000, prescriptions allowing for road construction and reconstruction were developed on approximately 34.3 million acres<sup>131</sup> and roads had been built in an estimated 2.8 million acres of inventoried “roadless lands.”<sup>132</sup> Without a national policy in place to protect roadless areas, road construction and reconstruction were estimated to occur at the rate of 232 miles annually.<sup>133</sup> These statistics prompted the Forest Service to enact a rule that would administratively protect roadless areas from future road construction.

### 1. *The 2001 Roadless Rule*

Near the end of his second term, President Clinton took action to protect roadless areas from future road-building.<sup>134</sup> On October 13, 1999, he directed the Secretary of Agriculture to develop regulations to provide “appropriate long-term protection for most or all of the currently inventoried ‘roadless’ areas, and to determine whether such protection is warranted for any smaller roadless areas not yet inventoried.”<sup>135</sup> In response to the President’s directive, the Forest Service issued the final Roadless Rule on January 12, 2001, eight days before President Clinton left office.<sup>136</sup> The Forest Service resolved to protect roadless areas from

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127. Nina A. Mendelson, *Agency Burrowing Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 621 (2003).

128. Glicksman, *supra* note 121, at 1152–53.

129. *Id.* at 1153.

130. JOEL A. KRAUSE, FOREST SERVICE ROADLESS AREA CONSERVATION, FINAL ENVIRONMENTAL IMPACT STATEMENT, NATIONAL FOREST SYSTEM ROADS SPECIALIST REPORT 1 (2000).

131. This total represents 59 percent of the 58.5 million acres of inventoried roadless areas considered in the Final EIS to the Roadless Rule. 66 Fed. Reg. at 3246 (to be codified at 36 C.F.R. part 294 (2008)).

132. *Id.*

133. Stewart, *supra* note 82, at 831.

134. Nie, *supra* note 21, at 700.

135. Memorandum from William J. Clinton, President, to the Secretary of Agriculture (Oct. 13, 1999), available at <http://usgovinfo.about.com/blroadless.htm>.

136. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (January 12, 2001), adding 36 C.F.R. § 294, Subpart B. Note that the final rule was issued just days before the end of

future road-building by enacting a national rule that would “ensure[] that [these areas] will be managed in a manner that sustains their values now and for future generations”<sup>137</sup>; the Service justified such a nationwide approach by pointing to “[t]he large number of appeals and lawsuits, and the extensive amount of congressional debate over the last 20 years, [which] illustrate[] the need for national direction and resolution and the importance many Americans attach to the remaining inventories roadless areas on NFS lands.”<sup>138</sup>

The Roadless Rule sought to protect 58.5 million acres of inventoried roadless areas in national forests by forcing Forest Service officials to consider the “whole picture” of forest management.<sup>139</sup> The inventoried roadless areas that served as the basis for the Roadless Rule were identified primarily from the RARE II review, LMRPs, and other large-scale assessments.<sup>140</sup> With its nationwide prohibition on road construction and timber harvest in roadless areas, the Roadless Rule reflected a mistrust of the ability of individual forest plans to recognize the true value of these areas.<sup>141</sup> Additionally, by prescribing a dominant use for roadless areas, the Roadless Rule effectively reduced the land area subject to multiple use, thus combating special-interest capture.<sup>142</sup>

In summary, the Roadless Rule: (1) prohibited new roads in inventoried roadless areas (with significant exceptions); (2) prohibited most timber harvests in the roadless areas, allowing cutting only under specified circumstances; and (3) applied those prohibitions to the Tongass National Forest in Alaska while allowing completion of certain road and harvest activities already underway.<sup>143</sup> Rather than displacing the forest plans previously used for forest management, the Rule superseded any less stringent restrictions on inventoried roadless areas, making the baseline rule one of heightened environmental protection.<sup>144</sup>

## 2. *Challenges to the Roadless Rule*

From the very beginning, the Roadless Rule faced challenges. On President Bush’s first day in office, his new Chief of Staff issued a

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Clinton’s second term, eliciting criticism that “the Forest Service drove through the administrative process in a vehicle smelling of political prestidigitation.” *Wyoming v. U.S. Dep’t of Agric.*, 277 F. Supp. 2d 1197, 1203 (2003).

137. 66 Fed. Reg. at 3247 (to be codified at 36 C.F.R. § 294).

138. *Id.* at 3246.

139. *Id.* at 3245.

140. *Id.* at 3246.

141. *Id.* at 3244.

142. See Blumm, *supra* note 106, at 422–23.

143. KRISTINA ALEXANDER & ROSS W. GORTE, CONG. RESEARCH SERV., NATIONAL FOREST SYSTEM ROADLESS AREA INITIATIVES (2009).

144. 36 C.F.R. § 294 (2008).

memorandum postponing the effective date of regulations not yet in effect for sixty days; this postponement included the Roadless Rule.<sup>145</sup> On February 5, 2001, a notice in the Federal Register stated that the effective date of the Roadless Rule would be delayed from March 13, 2001 to May 12, 2001, at which time the administration would decide whether to implement the rule.<sup>146</sup>

In addition to the challenges coming from the new administration, the Roadless Rule also faced litigation in the courts. In May 2001, the District Court of Idaho preliminarily enjoined implementation of the rule, finding it likely that the Forest Service had not complied with NEPA when preparing the rule due to inadequate alternatives analysis and public comment period.<sup>147</sup> The Bush administration declined to defend the rule, but environmental intervenors appealed the district court ruling. On December 12, 2002, the Ninth Circuit reversed, holding that the Forest Service complied with NEPA by analyzing a reasonable range of alternatives and providing the public with adequate information and time for comment.<sup>148</sup> The Ninth Circuit thus reinstated the Roadless Rule.<sup>149</sup>

Less than a year later, however, the District Court of Wyoming enjoined the Roadless Rule, finding that it violated NEPA as well as the Wilderness Act because it created “de-facto wilderness.”<sup>150</sup> The court viewed the Roadless Rule as a “thinly veiled attempt to designate ‘wilderness areas’ in violation of the clear and unambiguous process established by the Wilderness Act” and set aside the Roadless Rule.<sup>151</sup> Before the Tenth Circuit could rule on the appeal, the Forest Service under the new Bush administration issued the State Petitions Rule, which eliminated the challenged portions of the old rule and rendered the appeal moot.<sup>152</sup>

### 3. *The 2005 State Petitions Rule*

The new administration justified its revision of the Roadless Rule by citing public concerns about the validity and adequacy of the Roadless Rule and emphasizing the need for a state role in addressing the

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145. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

146. Special Areas; Roadless Area Conservation: Delay of Effective Date, 36 C.F.R. § 294 (2001).

147. *Kootenai Tribe of Idaho v. Veneman*, No. 01-10, 2001 WL 1141275, at \*2 (D. Idaho 2001), *rev'd*, 313 F.3d 1094, 1126 (9th Cir. 2002).

148. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1116 (9th Cir. 2002).

149. *Id.*

150. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003).

151. *Id.*

152. *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1211 (10th Cir. 2005).

challenges of inventoried roadless area management.<sup>153</sup> The new State Petitions Rule, published on May 13, 2005, eliminated the national management standard of the Roadless Rule, set the default at nonprotection, and reinstated the prior localized forest management under the NFMA forest planning process.<sup>154</sup> The new rule also set up a system where states could voluntarily petition for state-specific roadless area protections by the deadline of November 13, 2006.<sup>155</sup> This part of the rule was problematic because it posed the “danger . . . that successful rulemaking petitions will foreclose future conservation and management efforts that would have been possible under the forest planning process.”<sup>156</sup> As part of the application for roadless area protection, states were required to provide detailed descriptions of the lands for which they sought protection, the basis for protection, and the impacts of protection on private property.<sup>157</sup>

In practice, the rule made it difficult for states to file petitions by requiring detailed information about *federal* lands. In fact, nine governors wrote in opposition to the rule, and others expressed concern that the petition process was too vague and placed undue burdens on state resources.<sup>158</sup> Further, the rule contained a “severability clause,” which stated the Forest Service’s intent that the Roadless Rule not be reinstated.<sup>159</sup> In effect, the State Petitions Rule undid the work of the Clinton administration, returning forest management practices to the days before the Roadless Rule. Unlike the 2001 Roadless Rule, the State Petitions Rule was promulgated without the preparation of an EIS or environmental assessment under NEPA.

Five states (California, New Mexico, North Carolina, South Carolina, and Virginia) filed petitions seeking to protect all of their roadless areas, and two states (Colorado and Idaho) filed petitions to protect some of their roadless areas.<sup>160</sup> The Roadless Area Conservation National Advisory Committee (RACNAC) recommended that the petitions of North Carolina, South Carolina, and Virginia be approved,

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153. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654, 25,655–56 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

154. *See id.*

155. ALEXANDER & GORTE, *supra* note 143, at 10. (“The rationale for imposing a deadline on the roadless area petition process, and the consequences of a state’s failure to meet the deadline, are unclear.”).

156. Heather S. Fredriksen, *The Roadless Rule That Never Was: Why Roadless Areas Should Be Protected Through National Forest Planning Instead of Agency Rulemaking*, 77 U. COLO. L. REV. 457, 466 (2006).

157. 36 C.F.R. § 294.14 (2007).

158. ALEXANDER & GORTE, *supra* note 143, at 10.

159. 30 C.F.R. § 294 (2008).

160. ALEXANDER & GORTE, *supra* note 143, at 11.

and the Secretary of Agriculture approved them on June 21, 2006.<sup>161</sup> This approval was still subject to federal notice and comment rulemaking requirements, and the Secretary retained power to adopt formally such rules after the resolution of issues revealed in the notice and comment period.<sup>162</sup> RACNAC never made recommendations on the petitions of California or New Mexico, as the State Petitions Rule was enjoined before the deadline for responding to these petitions.

#### 4. *Challenges to the State Petitions Rule*

Like the Roadless Rule before it, the State Petitions Rule faced litigation from its very inception. In August 2005, several environmental advocacy organizations along with California, New Mexico, and Oregon challenged the USDA and Forest Service's promulgation of the State Petitions Rule, arguing that it violated NEPA, the ESA, and the Administrative Procedure Act (APA).<sup>163</sup> The district court granted summary judgment for the plaintiffs, holding that the USDA violated NEPA and the ESA.<sup>164</sup> It set aside the State Petitions Rule and reinstated the Roadless Rule until the Forest Service complied.<sup>165</sup>

Two days after the Northern District of California enjoined the State Petitions Rule, the State of Wyoming sought to reinstate the 2003 decision that the Roadless Rule violated NEPA and the Wilderness Act. The District Court of Wyoming declined to hear the state's action to revive the hearing, holding that it lacked authority to do so because of the Tenth Circuit's mandate to vacate and dismiss the case.<sup>166</sup> Consequently, the State of Wyoming filed a new suit in district court, alleging that the Roadless Rule violated NEPA and the Wilderness Act. The district court agreed and once again enjoined the Roadless Rule.<sup>167</sup>

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161. U.S. Dept. of Agric., News Release No. 0212.06 (June 21, 2006), [http://www.usda.gov/wps/portal/tut/pl\\_s.7\\_0\\_A/7\\_0\\_1OB?contentidonly=true&contentid=2006/06/0212.xml](http://www.usda.gov/wps/portal/tut/pl_s.7_0_A/7_0_1OB?contentidonly=true&contentid=2006/06/0212.xml).

162. ALEXANDER & GORTE, *supra* note 143, at 12.

163. California *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006).

164. *Id.* at 909, 912. The Court found that the FS violated NEPA by failing to conduct a programmatic analysis as required by statute. *Id.* at 908–09. It also violated the ESA by failing to engage in the consultation process before issuing the State Petitions Rule. *Id.* at 912.

165. *Id.* at 919.

166. Wyoming v. U.S. Dep't of Agric., No. 01-CV-86-B (D. Wyo. June 7, 2007).

167. Wyoming v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309, 1354–55 (D. Wyo. 2008).

## III. CONFLICT AND CONTROVERSY: THE NEED FOR CHANGE

## A. California v. USDA

In *California v. USDA*, the most recent case in the roadless area management saga, the Ninth Circuit affirmed the Northern District of California, which had set aside the State Petitions Rule for violating NEPA and ESA.<sup>168</sup> The circuit court reinstated the Clinton administration's Roadless Rule, holding the Bush administration's revision unlawful.<sup>169</sup>

The USDA argued that it was not legally obligated to prepare an EIS under NEPA because the rule fell within a categorical exclusion of administrative rules without direct, indirect, or cumulative effects on the environment. The district court rejected this argument, holding that because the State Petitions Rule removed the Roadless Rule from the Code of Federal Regulations and reinstated the prior localized forest management under individual forest plans, it was not merely "procedural."<sup>170</sup> Such a drastic measure, the court reasoned, qualified as "substantive" action and triggered environmental analysis under NEPA.<sup>171</sup> In affirming the district court, the Ninth Circuit wrote:

The Forest Service's use of a categorical exemption to repeal the nationwide protections of the Roadless Rule and to invite States to pursue varying rules for roadless area management was unreasonable. It was likewise unreasonable for the Forest Service to assert that the environment, listed species, and their critical habitats would be unaffected by this regulatory change.<sup>172</sup>

The court cited to its opinion in *Kootenai Tribe v. Veneman*,<sup>173</sup> which found that the Roadless Rule had a demonstrable impact on the environment and provided greater substantive protections to roadless areas than the individual forest plans it superseded.<sup>174</sup> Bound by this precedent, the Ninth Circuit rejected the USDA's arguments that the Roadless Rule was never meaningfully in effect and could not have altered the status quo. The court also characterized the State Petitions Rule as amounting to a "repeal" of the Roadless Rule, finding that "[t]he USDA plainly intended to free itself of any future constraints imposed by

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168. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

169. *California v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009).

170. *Lockyer*, 459 F. Supp. 2d at 894-96.

171. *Id.*

172. *California v. U.S. Dep't of Agric.*, 575 F.3d at 1004-05.

173. *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

174. *Id.* at 1115, 1124-25.

the Roadless Rule.”<sup>175</sup> As the State Petitions Rule “revised” subpart B of 36 C.F.R. § 294 (which contained the Roadless Rule) in its entirety, the court found the repeal to be obvious.<sup>176</sup> Further, the severability clause made the agency’s intent to repeal the Roadless Rule clear, as did the agency’s internal correspondence, notice of proposed rulemaking, and decision memorandum.<sup>177</sup>

The Ninth Circuit also rejected the USDA’s reliance on the Wyoming District Court’s permanent injunction to argue that the replacement of the Roadless Rule was simply procedural.<sup>178</sup> The biggest flaw in this argument, reasoned the court, was that the injunction was in the process of being appealed to the Tenth Circuit. The USDA was unreasonable to ignore the possibility that the Tenth Circuit would reverse the district court and reinstate the Roadless Rule.<sup>179</sup> The court dismissed the USDA’s claim that the Wyoming injunction nullified the Roadless Rule in all jurisdictions, as well as its characterization of the State Petition Rule’s elimination of the Roadless Rule as a “paper exercise.”<sup>180</sup>

Last, defendants argued that the district court abused its discretion by enjoining the State Petitions Rule and reinstating the Roadless Rule as a remedy. The court rejected this argument as well, holding that it was reasonable and not an abuse of discretion for the district court to reinstate the protections of the Roadless Rule in order to avoid further degradation of roadless areas.<sup>181</sup> The court stated that “[t]he effect of invalidating an agency rule is to reinstate the rule previously in force.”<sup>182</sup> Despite the Roadless Rule’s limited time in effect and the Forest Service’s severability clause, the district court did not abuse its discretion to rule that the Roadless Rule be reinstated.<sup>183</sup> The Forest Service is not without recourse in changing its approach to roadless area management; however, it must comply with the dictates of NEPA and ESA in doing so.<sup>184</sup>

This last observation by the court—that the Forest Service may change its approach to roadless area management—highlights the issue at hand. Administrative rulemaking is not effectively protecting roadless areas pending wilderness designation.

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175. *California v. U.S. Dep’t of Agric.*, 575 F.3d at 1015.

176. *Id.*

177. *Id.*; see also 36 C.F.R. § 294.18 (2008) (severability clause).

178. *California v. U.S. Dep’t of Agric.*, 575 F.3d at 1015.

179. *Id.* at 1016.

180. *Id.*

181. *Id.* at 1020.

182. *Id.* (citing *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005)).

183. *Id.* at 1020–21.

184. *Id.*

### B. Analysis

The maelstrom of litigation resulting from both the Clinton Roadless Rule and the Bush State Petitions Rule and culminating in *California v. USDA*, reflects the ongoing controversy surrounding roadless area management. The policy whiplash that results from the administrations' differing approaches to roadless areas shows that managing roadless areas using administrative rulemaking is not a viable means for long-term protection of roadless resources. A new solution is needed: one that will have more legitimacy and durability across administrations. Looking back to the Wilderness Act provides useful guidance in assessing the purpose of roadless areas. In keeping with the purpose of the Wilderness Act, Congress should step in and provide direction in order to resolve the debate over roadless area management.

#### 1. The Current Approach is Not Viable

##### a. Administrative Rulemaking Lacks the Permanence Necessary for Resource Conservation

Roadless areas are valuable in many ways. As discussed above, they have economic, ecological, and spiritual value. They are further significant because the Forest Service has identified and inventoried them for potential inclusion into the wilderness system. Road construction can make this land unsuitable for recreational use, destroy wildlife habitat, increase the possibility of landslides, disrupt water flow, fragment ecosystems, and increase air pollution. As a result, the "wilderness characteristics" of roadless areas can be lost, along with the chance for permanent protection under the Wilderness Act.

Managing and protecting roadless areas through administrative rulemaking is ineffective due to the relative ease of changing policy with each new administration. Although this is a common feature of administrative rulemaking generally, it is particularly problematic with regard to the protection of public lands. The history of wilderness preservation shows that "however sincere the promises of protection in administrative orders and plans may be, anything less than statutory protection is temporary at best and illusory to boot."<sup>185</sup> The goal of roadless area management should be "to provide lasting protection for inventoried roadless areas within the National Forest System." While this echoes the goal of the 2001 Roadless Rule, the controversy resulting from the Roadless Rule implementation indicates that administrative

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185. SCOTT, *supra* note 14, at 107.

rulemaking is not the place to achieve that goal. Proponents of the Wilderness Act, also seeking lasting protection for the nation's wilderness areas, specifically curbed administrative discretion to expand or eliminate wilderness areas. Congress retained the right to designate wilderness areas proposed by the administrative agencies. The roadless areas that have been at issue in the past decade of litigation are the result of the reviews begun by the Wilderness Act.<sup>186</sup> Perhaps due to methodological or legal inadequacies in the reviews, or perhaps due to political pressure, Congress has not acted with regard to some 58 million inventoried roadless areas.<sup>187</sup>

The failure of the Forest Service to manage these areas consistently is particularly problematic from the viewpoint of conservation. It only takes one road to end an area's roadlessness.<sup>188</sup> Once roads are built, logging and development can follow; as a result, the areas are no longer "untrammelled by man . . . with the imprint of man's work substantially unnoticeable," and the qualities that might qualify them for future inclusion in the National Wilderness Preservation System are destroyed.<sup>189</sup> As Professor Martin Nie notes, the problem with agency management is the one-way street: "Those advocating conservation are at a perpetual disadvantage because development is often permanent. . . . Roads . . . cannot be built and then removed after every four-year election cycle."<sup>190</sup>

Both the Roadless Rule and the State Petitions Rule contain language justifying rules on the basis that litigation over roadless areas has indicated the need for agency direction and that the purpose of the rules is to put an end to all that litigation. But these conflicting administrative rules, followed by almost a decade of back-and-forth litigation over the management of roadless areas, show that agency decision making cannot settle the debate and signal the need for Congress to act. The need for congressional direction is also highlighted by that fact that "most of the substantive debate thus far has taken place in the administrative and judicial arenas, not within Congress."<sup>191</sup> There are a number of ways in which Congress can act to direct the Forest Service to protect roadless areas more permanently.

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186. See Anderson & Moncrief, *supra* note 4, at 434.

187. See Jan G. Laitos & Rachael B. Gamble, *The Problem with Wilderness*, 32 HARV. ENVTL. L. REV. 503, 534-37 (2008).

188. As stated by George Fell of the Nature Conservancy, "[t]he next generation and the generations following will always have the choice of exploiting the areas we have preserved, but they will not be able to preserve the areas we have exploited." *Hearings on S. 1176 before the S. Interior Comm.*, 85th Cong. 313 (1957) (statement of George Fell, The Nature Conservancy).

189. 16 U.S.C. § 1131(c) (2006).

190. Nie, *supra* note 98, at 281.

191. Nie, *supra* note 21, at 713-14.

*b. Protecting Roadless Areas through Administrative Rulemaking May Violate the Wilderness Act*

In addition to lacking the permanence necessary for effective resource conservation, the use of administrative rulemaking to manage roadless areas is also problematic because it may violate the Wilderness Act by usurping Congress' power over wilderness creation. In 2003, the District Court of Wyoming held that the 2001 Roadless Rule created "de facto wilderness" in direct contravention of the Wilderness Act's policy that only Congress may designate wilderness.<sup>192</sup> The court found support for its holding in the fact that the inventoried roadless areas to be protected by 2001 Roadless Rule were the same as those evaluated for wilderness consideration during the RARE I and II review process.<sup>193</sup> Even the Ninth Circuit in *California v. USDA* admitted that "[w]ith the passage of the Roadless Rule, inventoried roadless areas, 'for better or worse, [were] more committed to pristine wilderness, and less amenable to road development for purposes permitted by the Forest Service.'"<sup>194</sup>

The argument that the Roadless Rule violates the Wilderness Act is debatable, however, considering that the Organic Act, MUSYA, and NFMA provide the agency with broad discretion to decide among conflicting multiple uses in the lands under its jurisdiction.<sup>195</sup> The Organic Act sets watershed protection as one of the goals of national forests, and the Roadless Rule serves this end by preventing soil and water disturbances and environmental degradation. MUSYA defines multiple use broadly, and "does not envision that every acre of the National Forest System land be managed for every multiple use, and does envision some lands being used for less than all of the resources."<sup>196</sup> In fact, NFMA may affirmatively allow rulemaking prohibiting road construction, as it authorizes the Secretary of Agriculture to issue regulations governing the administration and management of all the roads in the national forests under the National Forest Transportation System.<sup>197</sup> Further, as one commentator noted, the Wilderness Act does not necessarily prohibit agencies from managing or reserving areas for wilderness uses, as long as those areas are not *designated* as "wilderness areas."<sup>198</sup>

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192. Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003)

193. 36 C.F.R. § 294 (2008).

194. California v. U.S. Dep't of Agric., 575 F.3d 999, 1020 (9th Cir. 2009) (quoting Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1106 (9th Cir. 2002)).

195. Glicksman, *supra* note 121, at 1193.

196. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3252 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

197. *Id.* Congress established the National Forest Transportation System as a system of transportation to service the needs of the National Forest System in an environmentally and economically sound way. See 16 U.S.C. § 1608 (2006).

198. Michael McCloskey, *supra* note 12, at 306.

Even if the Wilderness Act prohibits the creation of de facto wilderness by administrative agencies, the 2001 Roadless Rule did not create such areas. Roadless areas allow broader uses than the range of uses permitted in wilderness areas.<sup>199</sup> However, administratively protecting roadless areas as a blanket national policy remains problematic. As noted above, such protection does not withstand changes in administration, so it is not effective in protecting roadless resources in the long run. In fact, by enacting the will of the current administration with regard to what is essentially a value-laden issue,<sup>200</sup> it may even make roadless areas a special target for the next administration (as evidenced by the State Petitions Rule).<sup>201</sup>

Finally, even if the 2001 Roadless Rule did not conflict with the Wilderness Act, it still appears to be creating “de facto wilderness,” and congressional direction would give the policy more legitimacy. Critics of the 2001 Roadless Rule contend that “the ‘administrative’ wilderness created under the Forest Service’s roadless rule lacks permanence, adequate research, public input and participation, congressional oversight, and authority.”<sup>202</sup> Critics point to the speed with which the 2001 Roadless Rule was enacted as undermining its legitimacy “because of the rule’s failing to properly analyze and account for environmental impacts and interested parties’ concerns.”<sup>203</sup> Critics further suggest that the timing of the rule’s passage at the end of President Clinton’s second term indicates the administration’s disregard for the administrative process and intent to secure a place in conservation history.<sup>204</sup>

The Roadless Rule is not an effective mechanism for protecting the nation’s roadless areas. As an administrative rule, it lacks the permanence necessary for lasting resource conservation. Additionally, the rule’s potential conflict with the Wilderness Act, its nature as an administrative rule creating “de facto wilderness,” and the circumstances under which it was passed are all problematic. These factors, as well as the last decade of litigation, indicate a need for change.

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199. See *supra* Part I.E.

200. See Nie, *supra* note 21, at 694.

201. See Mendelson, *supra* note 127, at 627. Mendelson notes that, “had the Clinton administration taken no such action, the question of roads in national forests might never have reached the Bush administration’s policy agenda at all.” *Id.*

202. Dalling, *supra* note 62, at 385.

203. *Id.*

204. Nie, *supra* note 21, at 700.

### C. Possible Solutions

#### 1. Congress Needs to Provide More Direction on the Roadless Debate

In the Organic Act, MUSYA, and NFMA, Congress left the Forest Service with a lot of discretion but no clear central purpose, resulting in “a sort of administrative schizophrenia.”<sup>205</sup> Consequently, the Forest Service will continue to be plagued by procedural and decision-making inefficiencies, unless and until Congress “clarifies the central purpose of our national forest lands and the core mission of the [Forest Service].”<sup>206</sup> Congress is the right forum in which to address these issues because roadless area management, like other public lands issues, is “not [a] hyper-technical question[] that will challenge a busy Congress, but rather [a] value and interest-laden political question[] that [is] most appropriate for legislative debate and resolution.”<sup>207</sup> Underlying the roadless area management debate is the question of whether there is an “ideal wilderness system” or an amount of wilderness that is “enough.”<sup>208</sup> Perhaps, as Doug Scott notes, “[t]hese questions have no answers—and can have none.”<sup>209</sup> It should be Congress, elected by and representing the will of the American people, making these decisions.<sup>210</sup>

##### a. Congress Could Codify the Original Roadless Rule into Law

An initial means for Congress to permanently protect roadless areas and to remove the ambiguity surrounding their management would be codification of the 2001 Roadless Rule into federal law.<sup>211</sup> Indeed, on October 1, 2009, legislation was introduced in both houses of Congress to codify the 2001 Roadless Rule.<sup>212</sup> The legislation would direct the Secretary of Agriculture to manage roadless areas to maintain their roadless characteristics.<sup>213</sup>

Such legislation would have several benefits. Codification of the Roadless Rule would ensure lasting protection for roadless areas, preserving these wild areas for future generations.<sup>214</sup> It would provide the

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205. Mortimer, *supra* note 120, at 910.

206. Nie, *supra* note 98, at 232.

207. *Id.* at 275.

208. SCOTT, *supra* note 14, at 122.

209. *Id.* Scott poses these questions in the context of the wilderness debate.

210. *Id.* at 124.

211. Anderson & Moncrief, *supra* note 4, at 445.

212. See Roadless Area Conservation Act of 2009, S. 1738, 111th Cong. (2009); see also National Forest Roadless Area Conservation Act, H.R. 3692, 111th Cong. (2009).

213. Roadless Area Conservation Act of 2009, S. 1738, 111th Cong. (2009); National Forest Roadless Area Conservation Act, H.R. 3692, 111th Cong. (2009).

214. Anderson & Moncrief, *supra* note 4, at 445.

agency with more direction in its decision making, resulting in more certainty for communities near roadless areas. It could “defuse much of the controversy and polarization that has beset federal land management, such as the annual debate over congressional appropriations for Forest Service road construction.”<sup>215</sup> It would also provide a fiscal benefit by preventing the government from wasting taxpayer dollars on new logging roads, timber sales, and the preparation of site-specific EISs and allowing the Forest Service to focus on its maintenance backlog.<sup>216</sup> Passing the Roadless Rule through the legislative process, with all the checks and safeguards that process entails, would help legitimate the rule. And finally, revocation of laws is as difficult as passage. Thus, if such legislation were passed, it would not only lend legitimacy and accountability to the process but would also provide lasting protection to roadless areas, protection that could withstand bureaucratic whim and changing political pressures.<sup>217</sup>

Codification of the rule would face some serious obstacles, however. As a preliminary matter, the legislation would be difficult to pass. Identical legislation has been introduced by the recent bills’ sponsors, Rep. Jay Inslee and Sen. Maria Cantwell, in each session of Congress since 2002 without much success.<sup>218</sup> In an interview, Rep. Inslee admitted that part of the reason for the proposed legislation’s lack of success might be the fact that the administrative rule is in place and has provided some protection for roadless areas. But he still maintains that “it is important to do on a legislative basis, so we don’t have to worry about what the President will do every four years.”<sup>219</sup> The codification’s lack of success might also be explained by the fact that a nationwide solution is not sensitive to the needs of local communities and is not flexible. If such legislation were to be passed, Congress would likely draw strong criticism from local communities for taking such a “top-down” approach, instead of resolving land use issues through local LRMPs. Local communities who felt disenfranchised by the legislation could react by disregarding prohibitions on off-road vehicle (ORV) use or road building, destroying the characteristics that led to protection of those areas in the first place.<sup>220</sup> ORV use can produce roads or otherwise impair the wilderness

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215. *Id.* at 444.

216. Bill Schneider, *Roadless Rule Bill: the Timing is Right, so Just Pass It*, NEW WEST, Oct. 22, 2009, available at [http://www.newwest.net/topic/article/roadless\\_rule\\_bill\\_the\\_timing\\_is\\_right\\_so\\_just\\_pass\\_it/C41/L41/](http://www.newwest.net/topic/article/roadless_rule_bill_the_timing_is_right_so_just_pass_it/C41/L41/); Anderson & Moncrief, *supra* note 4, at 444–45.

217. Nie, *supra* note 21, at 730.

218. Roadless Area Conservation Act of 2002, S. 2790, 107th Cong. (2002); National Forest Roadless Area Conservation Act, H.R. 2865, 107th Cong. (2002).

219. Bill Schneider, *supra* note 216, at 1.

220. Laitos & Gamble, *supra* note 187, at 535.

characteristics of these lands, thus disqualifying them from eventual congressional protection under the Wilderness Act.<sup>221</sup>

*b. Congress Could Amend Wilderness Act*

The Wilderness Act has never been amended, except for a minor modification in 1978.<sup>222</sup> Congress could and should amend the Wilderness Act if it wishes to expand protection for roadless areas. The original Wilderness Act provided for the review of roadless and primitive areas, but that review seems to have been intended as a one-time process. Congress should amend the Act to provide for an ongoing wilderness review process that “would periodically update roadless area inventories and wilderness recommendations on all federal lands.”<sup>223</sup> Ideally, this would be a united, interagency process.<sup>224</sup> Part of the problem with RARE I and II was that the agency was ill-equipped to inventory the nation’s roadless areas and was squeezed between the conflicting statutory mandates of the Organic Act, MUSYA, and later, NFMA. These problems could be remedied by a commission dedicated to reviewing roadless areas and deciding what lands are suitable for inclusion into the wilderness system; Congress would then vote yes or no, without amendments.

In addition to amending the Wilderness Act to provide for periodic reviews, Congress could amend the Act to include different levels of protection for different kinds of wilderness. Currently, the Wilderness Act’s rigid division of the wilderness world into “designated users” and “excluded would-be users” only exacerbates resource popularity conflicts, resulting in the would-be users lobbying against increased wilderness designation.<sup>225</sup> To combat this problem and make wilderness designation more palatable, Congress could create two other categories in addition to “Wilderness” as currently defined in the Act. This zoning approach would add the categories of “Quasi-Wilderness,” that is, wilderness areas with fewer use restrictions, and “No Use Zones,” areas with even stronger limitations on use that could rehabilitate overused areas with wilderness characteristics to their prior state.<sup>226</sup>

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221. John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RESOURCES & ENVTL. L. 1, 7 (2005).

222. Act of Oct. 21, 1978, Pub. L. No. 95-495, § 4(b), 92 Stat. 1650 (1978) (deleting former paragraph 5 in 16 U.S.C. 1133(d), relating to management of the Superior National Forest in Minnesota).

223. Anderson, *supra* note 96, at 441.

224. *Id.*

225. Laitos & Gamble, *supra* note 187, at 544.

226. *Id.* at 553.

Within the Quasi-Wilderness areas, low-impact mechanized use, such as mountain biking, should be allowed. Attorney Theodore Stroll argues that Congress did not intend to ban the use of human-powered transport in Wilderness to begin with, and that allowing such uses would not be inconsistent with the Wilderness Act.<sup>227</sup> Relying on the legislative history of the act, Stroll contends that the Act did not mean to prohibit mechanically aided human-powered transport generally, but only transport that requires an artificial infrastructure or permanently damages the physical environment.<sup>228</sup> He concludes that there is tension resulting from advances in recreational technology and the public's desire to expand Wilderness areas.<sup>229</sup> Allowing such uses in the Quasi-Wilderness areas would appease the mountain-biking interests that currently stand in the way of more wilderness designation, while at the same time allowing for more wild areas to be protected from more damaging forms of use.

Amending the Wilderness Act would bring numerous advantages. Congress could reaffirm the importance of wilderness protection as well as reflect the shifting baseline of the wilderness idea. By adding a category of Quasi-Wilderness allowing for mountain-bike use, Congress could gain more support and thus protect more wilderness areas. And finally, because wilderness areas are effectively whatever Congress designates as wilderness, delineating different categories with differing protection levels would bring logic and transparency to the process.

*c. Congress Could Amend NFMA to Require That Forest Service Planning Takes Roadless Values into Account*

An alternate course of action would involve Congress amending NFMA to require that Forest Service plans take roadless values into account, and making this provision judicially enforceable. Prior to the 2001 Roadless Rule, roadless areas were managed according to the NFMA planning process. The 2005 State Petitions Rule sought to reinstate management under the forest planning process, and several commentators have suggested a return to the planning process as the solution to roadless area management debate.<sup>230</sup> One might question, however, returning the fate of roadless areas to the planning process when "it was the forest planning process that led to 386,000 miles of roads

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227. Theodore Stroll, *Congress's Intent in Banning Mechanical Transport in the Wilderness Act of 1964*, 12 PENN. ST. ENVTL. L. REV. 459, 459 (2004).

228. *Id.* at 474.

229. *Id.* at 459.

230. See, e.g., Fredriksen, *supra* note 156, at 457 (suggesting a return to NFMA forest planning and recommending revisions to the forest planning regulations to facilitate roadless area protection).

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being built in the system, and 58.7 percent of inventoried roadless areas being ‘allocated to a prescription that allows road construction and reconstruction.’”<sup>231</sup>

If forest planning is indeed a potential solution to this problem, then perhaps a congressional amendment to the NFMA planning regulations would help guide the Forest Service by requiring it to take roadless values into account. Such an amendment could create a strong presumption that roadless areas remain roadless, and require specific findings to overcome that presumption, subject to judicial review. This type of amendment to NFMA would still allow for flexibility in roadless area decision making, but it would set the baseline to protection. It would require the Forest Service to consider roadless characteristics in its decision making and would likely result in the protection of more roadless areas, especially when compared to the pre-2001 NFMA planning process. It would be more responsive to local needs than would a national rule, but it would still be guided by the baseline of roadless area protection. Amending NFMA to create a presumption for roadless protection would also help counter the “special interest capture” so prevalent in public lands law by providing clearer statutory guidance and allowing for less wiggle room.<sup>232</sup> The drawbacks to this solution include the likely difficulty in getting Congress to agree on this kind of amendment, as well as issues surrounding the judicial review provision. What findings would be required to overcome the presumption of roadlessness? How could courts ensure that the Forest Service truly takes roadless values into account? These are all issues that would need to be resolved, and that could impact the effectiveness of such an amendment.

## 2. *Why Congress May Not Act*

Congress may be disinclined to act for a number of reasons. First, Congress is deterred by the impact of the ORV and mountain biking industries, which have strong lobbies.<sup>233</sup> These groups tend to reject wilderness proposals, instead advocating for their own type of “backcountry” designation that would permit and promote recreation in the context of multiple use.<sup>234</sup> ORV lobbyists focus on “access” as the centerpiece of the backcountry designation, portraying wilderness areas as uninviting and unavailable.<sup>235</sup> They seek to convince the media and

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231. Nie, *supra* note 21, at 728.

232. See Blumm, *supra* note 106, at 407.

233. See Laitos & Gamble, *supra* note 187, at 534–37.

234. SCOTT, *supra* note 14, at 102.

235. *Id.* at 109. In fact, the BlueRibbon Coalition (an ORV advocacy group) says that it is dedicated to “preserving our natural resources for the public instead of from the public.” *Id.*

Congress that wilderness areas allow for just one kind of outdoor recreation—hiking, an activity only for the young and the fit—at the expense of family recreation, which is made possible by ORVs.<sup>236</sup>

Additionally, traditional commodity users' fiscal resources and lobbies make congressional protection of wildlands difficult.<sup>237</sup> Such groups want to engage in timber harvesting, grazing, and oil and gas development on wilderness lands.<sup>238</sup> Remote areas that were inaccessible in the past are now accessible due to modern technology, and some of these areas have potential for oil and gas extraction.<sup>239</sup> To commodity developers, enlargement of the wilderness system is inconsistent with economic growth.<sup>240</sup>

Last, the internal composition of Congress may have an impact on the success of proposed congressional action.<sup>241</sup> Until very recently, Congress has been more conservative, more antiregulation and more pro-property rights.<sup>242</sup> Today's Congress lacks the "champions of wilderness designation, including members from affected western states" that were so instrumental to the passage of the Wilderness Act in 1964.<sup>243</sup> Further, turnover has led to a loss of wilderness experience among this generation of congressional members.<sup>244</sup>

It is possible, therefore, that even though Congress is the right forum in which the roadless area management debate should be addressed, it will not be able to reach the consensus necessary to pass roadless legislation. The tremendous sway of commodity and recreational interests, combined with the makeup of today's Congress, serve as serious barriers to congressional action. In that case, administrative rulemaking might win the day.

### 3. *Where We Are Now: The Obama Administration's Approach*

President Obama campaigned in support of the Roadless Rule, but the Forest Service's approach under the Obama administration seems to suggest that it is not continuing either the State Petitions Rule or the Roadless Rule.<sup>245</sup> Instead, the Secretary of Agriculture reserved decision-making authority over all projects in roadless areas while long-term

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236. *Id.* at 108–09.

237. Laitos & Gamble, *supra* note 187, at 534–35.

238. *Id.* at 535–36.

239. *Id.*

240. *Id.*

241. *Id.* at 535.

242. Leshy, *supra* note 221, at 5.

243. *Id.*

244. *Id.*

245. ALEXANDER & GORTE, *supra* note 143, at 19.

roadless policy is developed and current litigation is resolved.<sup>246</sup> This interim directive will last until May 28, 2010, “or until such earlier time as published delegations of authority have been revised to incorporate its provisions or until revoked.”<sup>247</sup> Additionally, on August 14, 2009, the Obama administration appealed the District of Wyoming’s latest decision enjoining the Roadless Rule in the Tenth Circuit Court of Appeals.<sup>248</sup> In its November 2, 2009 brief, the USDA argued that longstanding National Forest Service management practices that set aside land for conservation to the exclusion of other uses do not violate the Wilderness Act.<sup>249</sup> The USDA also defended the environmental analyses it issued with the rule.<sup>250</sup>

#### CONCLUSION

Roadless areas are ecologically, economically, and spiritually important, containing many of the same characteristics as wilderness areas. As such, many of these areas have been identified and inventoried for possible designation as wilderness under the Wilderness Act. Because the construction of roads threatens to destroy the very characteristics that make roadless areas so special, roadless areas should be protected pending congressional designation or release. Roadless area management is inherently a value-laden political question, and thus such questions should be left to Congress, the appropriate forum in which to deliberate and resolve political questions. Agency rulemaking is too easily subject to special-interest capture and administrative whim. The weaknesses of agency rulemaking are especially relevant in the context of roadless areas, for once a road is built and development follows, the land may not be eligible for wilderness designation for years to come. The past decade’s back-and-forth on roadless area management, culminating in *California v. USDA*, shows that a new approach is needed. Congress should look to the 1964 Wilderness Act to create legislation that gives roadless areas adequate and lasting protection, while setting up periodic reviews to facilitate the study and inclusion of these areas into the National Wilderness Preservation System.

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246. Memorandum of Secretary of Agriculture Tom Vilsack, No. 1042-154 (May 28, 2009), <http://www.ocio.usda.gov/directives/doc/SM1042-154.pdf>.

247. *Id.*

248. *Wyoming v. U.S. Dep’t of Agric.*, 570 F. Supp. 2d 1309 (D. Wyo. 2008), *appeal docketed*, No. 09-8075 (10th Cir. Aug. 14, 2009).

249. *Clinton-Era Forest Service ‘Roadless Rule’ Defended in Appeal by USDA, Activist Groups*, 40 *Env’t Rep.* (BNA) 2580 (2009).

250. *Id.*

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