



National Forest System Roadless Area Initiatives

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Summary

Roadless areas in the National Forest System (NFS) have received special attention for decades. Many want to protect their relatively pristine condition—to provide habitat for wildlife, to protect water quality and aesthetics, and to retain their value for dispersed recreation. Others want to use the areas in more developed ways—to explore for and develop minerals (including oil and gas), to harvest timber, and to provide opportunities for motorized recreation or developed recreation.

Two different roadless area policies have been offered in the last decade. On January 12, 2001, the Clinton Administration's roadless area policy established a nationwide approach to managing roadless areas in the National Forest System to protect their pristine conditions. The Nationwide Rule, as it will be called in this report, generally prohibited road construction and reconstruction and timber harvesting in 58.5 million acres of inventoried roadless areas, with significant exceptions.

The Bush Administration initially postponed the effective date of the Nationwide Rule, then issued its own rule. It asked for public comment on key questions for managing roadless areas, and issued new interim directives for managing roadless areas. These efforts led to a new rule on May 13, 2005. The State Petition Rule allowed governors to petition the Secretary of Agriculture for a special rule for managing the inventoried roadless areas in their state and to make recommendations for that management. Several states filed petitions; those of Virginia, North Carolina, South Carolina, Idaho, and Colorado were approved. The petitions of New Mexico and California were halted when the State Petition Rule was enjoined.

In 2001, the federal District Court for Idaho preliminarily enjoined implementation of the Nationwide Rule, but was reversed by the Ninth Circuit. In 2003, the federal District Court for Wyoming permanently enjoined implementation of the Nationwide Rule. This holding was dismissed as moot by the Tenth Circuit in light of the 2005 State Petition Rule. In 2006, the federal District Court for Northern California enjoined the State Petition Rule until the Administration had complied with the requirements of the National Environmental Policy Act (NEPA) and the Endangered Species Act. The court directed the Administration to apply the Nationwide Rule until it had complied with these requirements. Instead, the Administration allowed governors to petition for a roadless area management rule for their state under the Administrative Procedure Act (APA). The Idaho and Colorado petitions were filed under this procedure. The Idaho petition was approved in October 2008. In the meantime, a new lawsuit in Wyoming led to a second injunction of the Nationwide Rule by that district court. To avoid conflicting rulings, the California district court limited its holding (that the Nationwide Rule applied) to the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, New Mexico, Nevada, Oregon, and Washington. In August 2009, the Ninth Circuit upheld the lower court finding that the State Petition Rule was invalid and that the Nationwide Rule should be in place. An appeal is still pending in the Tenth Circuit, although that court's decision could contradict the Ninth Circuit, leading to a conflict between the circuits and potentially creating an issue that can be resolved only by the U.S. Supreme Court or Congress unless the Forest Service (FS) initiates a new rule.

Legislation was introduced in the 111th Congress to codify the Nationwide Rule by prohibiting building roads in or harvesting timber from areas designated on maps as roadless, with certain exceptions. (S. 1738/H.R. 3692 (111th).)

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Introduction

Roadless areas within the National Forest System (NFS)¹ have long received special management. Beginning in 1924, the Forest Service (FS) began protecting areas administratively as wilderness, wild, and primitive areas. In 1964, Congress enacted the Wilderness Act, creating the National Wilderness Preservation System with the administratively designated FS wilderness areas and directing the FS (and the National Park Service and Fish and Wildlife Service) to review the wilderness suitability of certain of their lands. Since 1964, the agencies have made numerous wilderness recommendations, and Congress acted on many of them, but some recommendations remain pending. President Clinton proposed a new rule to prohibit most road construction and timber harvesting in the remaining FS roadless areas.² Implementation was delayed, then enjoined; the injunction was overturned and another injunction was set in place. President Bush then offered a new roadless area rule, but on September 20, 2006, a court set aside the State Petition Rule, and reinstated the Nationwide Rule until the Bush Administration had met certain legal requirements. The FS announced it was accepting petitions from states to choose their roadless areas under the Administrative Procedure Act (APA). In August 2008 a different federal court ruled that the Nationwide Rule was contrary to law.

In August 2009, the Ninth Circuit affirmed that the State Petition Rule was passed contrary to law and that the Nationwide Rule should be in place. The Tenth Circuit, however, has pending before it a case of whether the Nationwide Rule was legally adopted. There is potential for a conflict between the two circuits of the appropriateness of the Nationwide Rule, leaving an issue that could be resolved by the U.S. Supreme Court, congressional action, or a new rulemaking by the FS. Legislation was introduced in both the House and the Senate in October 2009 (S. 1738/H.R. 3692) to establish a nationwide policy of protecting inventoried roadless areas.³

The management of the roadless areas of the NFS is of great interest to wilderness proponents and to those who favor development of natural resources in national forests. Proponents of additional protection point to the many purposes and values the roadless areas serve, including water quality protection, backcountry recreation, and habitat for wildlife. Opponents assert that the formal congressional wilderness review and designation process sets aside adequate areas for preservation and the remaining areas should be available for timber harvesting, mining, developed recreation, and other uses.

This report focuses on the two roadless areas initiatives. It discusses the regulatory and statutory background, summarizes and provides citations for the various rules and subsequent actions, and analyzes some of the legal and policy issues in connection with the roadless areas, including the litigation related to the issue.

¹ The NFS includes 155 national forests (188.0 million acres), 20 national grasslands (3.8 million acres), and 125 other units (0.9 million acres), and is administered by the Forest Service in the U.S. Department of Agriculture.

² The *inventoried roadless areas*, identified in the Clinton Rule and most other documents, generally refer to areas identified in the FS's second *Roadless Area Review and Evaluation* (RARE II) completed in January 1979, excluding areas that have since been designated as part of the National Wilderness Preservation System by Congress.

³ S. 1738/ H.R. 3692 (111th Congress). For more on current legislative activity, see CRS Report R40237, *Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service (FS): Issues for the 111th Congress*, coordinated by Ross W. Gorte and Carol Hardy Vincent.

Regulatory and Statutory Background

Roadless Areas: Statutory Background

The principal forest management statutes relevant to analysis of the roadless rules are the “Organic Act of 1897,”⁴ the Multiple-Use Sustained-Yield Act of 1960,⁵ and the National Forest Management Act of 1976.⁶ The 1897 Act directs that the national forests be managed to improve and protect the forests 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.”⁷ The 1897 Act also authorizes the Secretary of Agriculture (Secretary) to issue regulations to “regulate their [the forest reservations’] occupancy and use and to preserve the forests thereon from destruction.”⁸

Over the years many uses of the national forests in addition to timber and watershed management have been allowed administratively. What constitutes the most desirable combination of uses for a forest has been hotly debated for decades. Statutorily, the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) expressly recognizes and authorizes the *multiple use* of the forests, 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 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.”⁹ MUSYA states that the national forests are established and shall be administered for their original purposes and also “for outdoor recreation, range, timber, watershed, and wildlife and fish purposes”¹⁰ and that “the establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of” this act.¹¹ This latter language, which preceded enactment of the 1964 Wilderness Act,¹² recognized that the FS managed some forest areas as administrative wilderness or natural areas.

MUSYA also requires *sustained yield*, defined as the “achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.”¹³ How much is a “high-level annual or regular periodic output” of forest resources that does not impair the productivity of the land has also been the subject of much debate.

⁴ The 3rd through 17th unnumbered paragraphs under “Surveying the Public Lands,” in the Sundry Civil Expenses Appropriations Act for FY1898; Act of June 4, 1897 (ch. 2, 30 Stat. 34), 16 U.S.C. §§ 473-475.

⁵ P.L. 86-517, 74 Stat. 215; 16 U.S.C. §§ 528-531.

⁶ P.L. 94-588, 90 Stat. 2949, primarily amending P.L. 93-378, the Forest and Rangeland Renewable Resources Planning Act of 1973 (RPA); 16 U.S.C. §§ 1600-1614.

⁷ 16 U.S.C. § 475.

⁸ 16 U.S.C. § 551.

⁹ 16 U.S.C. § 531.

¹⁰ 16 U.S.C. § 528.

¹¹ 16 U.S.C. § 529.

¹² P.L. 88-577, 78 Stat. 890; 16 U.S.C. §§ 1131-1136.

¹³ 16 U.S.C. § 531.

The National Forest Management Act of 1976 (NFMA) set out additional provisions on the management of the national forests that include direction for developing, amending, and periodically revising land and resource management plans. NFMA directs that regulations be adopted to guide forest planning and accomplish specific goals set by the Congress “under the principles of” MUSYA. This included insuring “consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish; ... [and] provide for diversity of plant and animal communities.”¹⁴

The Clinton Administration Roadless Area Rule

The Nationwide Rule

The Clinton Administration undertook a series of actions affecting the NFS roadless areas. On October 13, 1999, President Clinton 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.”¹⁵ In response, the FS prepared an environmental impact statement (EIS) on alternatives to protect NFS roadless areas. The final rule, issued on January 12, 2001, was to take effect on March 13, 2001.¹⁶ The Nationwide Rule established a nationwide policy for roadless areas. National-level guidance was deemed advisable because of roadless areas’ importance for various forest management purposes and to the American public, and because addressing projects in roadless areas on a forest-by-forest basis as part of the planning process had resulted in a great deal of time and money spent on appeals and litigation.¹⁷

The Nationwide Rule (1) prohibited, with significant exceptions, new roads in inventoried roadless areas; (2) prohibited most timber harvests in the roadless areas, but allowed cutting under specified circumstances; and (3) applied those same prohibitions to the Tongass National Forest in Alaska but allowed certain road and harvest activities already under way to be completed.

The FS identified approximately 58.5 million acres of inventoried roadless areas, 30% of all NFS lands. Roads are also currently prohibited in an additional 34.9 million acres of congressionally designated wilderness areas (18% of NFS lands), and are restricted in another 9.2 million acres (5% of NFS lands) of other congressionally designated areas, such as national recreation areas and wild and scenic river corridors. The roughly 47% of NFS lands with roads contain about 300,000 miles of FS and other roads.¹⁸

¹⁴ 16 U.S.C. § 1604(g). Note that FS wilderness management is again mentioned in law, 12 years after enactment of the Wilderness Act.

¹⁵ Memorandum from President William J. Clinton to the Secretary of Agriculture, *Protection of Forest ‘Roadless’ Areas* (October 13, 1999).

¹⁶ 66 Fed. Reg. 3244 (January 12, 2001), adding 36 C.F.R. § 294, Subpart B.

¹⁷ 66 Fed. Reg. at 3246.

¹⁸ The FS does not report its inventory of roads, but identified that the 64,866 miles of road maintained to standard was 22% of all roads. U.S. Dept. of Agriculture, *Forest Service Performance and Accountability Report—Fiscal Year 2004* (continued...)

The explanatory material in the final rulemaking states that roadless areas provide significant opportunities for dispersed recreation, are sources of public drinking water, and are large undisturbed landscapes that provide open space and natural settings, serve as a barrier against invasive plant and animal species, are important habitat, support the diversity of native species, and provide opportunities for monitoring and research.¹⁹ In contrast, the explanatory material continues, installing roads can increase erosion and sediment yields, disrupt normal water flow processes, increase the likelihood of landslides and slope failure, fragment ecosystems, introduce non-native species, compromise habitat, and increase air pollution.²⁰

The final roadless area rule was more restrictive in several respects than either the proposed rule or the preferred alternative in the final EIS. With some exceptions, the rule imposed immediate, national-level, Service-wide limitations on new road construction and reconstruction in the inventoried roadless areas throughout the NFS, and imposed nationwide prohibitions on timber harvesting in those areas. The regulations were to apply immediately to the Tongass National Forest in Alaska, although certain activities already in the planning stages in that forest were allowed to go forward.

The final rule prohibited new road construction and reconstruction, with exceptions for health, safety, resource protection, or other issues related to the public interest.²¹ Any classified roads (those in the NFS transportation system or otherwise authorized by the FS) could be maintained in inventoried roadless areas.

Harvesting timber was expected to be infrequent under the rule. Cutting, selling, or removing timber from inventoried roadless areas was prohibited unless one of specified circumstances existed. Cutting small-diameter trees was permissible to maintain or improve one or more of the roadless area characteristics and “to improve threatened, endangered, or sensitive species habitat; or to maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects.”²²

Other cutting could be permitted if incidental to implementing a management activity that was not otherwise prohibited; if needed and appropriate for personal or administrative use in accordance with 36 C.F.R. § 223 (the regulations on sale and disposal of timber); or if roadless characteristics had been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest before January 12, 2001. In this last instance, timber could only be cut in the substantially altered portion of the roadless area.²³

The Nationwide Rule expressly did not affect any permit, contract, or other legal instrument authorizing the occupancy and use of NFS lands issued before January 12, 2001; nor did it alter any project or activity decision made prior to that date.²⁴ The rule did not apply to roads or

(...continued)

(April 2005).

¹⁹ 66 Fed. Reg. 3245 (January 12, 2001).

²⁰ 66 Fed. Reg. at 3246.

²¹ See 66 *Fed. Reg.* 3272; 36 C.F.R. § 294.12(b)

²² 36 C.F.R. § 294.13(b)(1).

²³ 36 C.F.R. § 294.13(b)(2)-(4).

²⁴ 36 C.F.R. § 294.14(a) and (c).

harvest in the Tongass National Forest if a notice of availability of a draft EIS for the activities had been published in the *Federal Register* before January 12, 2001.²⁵ Otherwise the new rule applied to the Tongass National Forest immediately.

Interim Management Before the Nationwide Rule Took Effect

The Nationwide Rule did not take effect immediately, except for the Tongass National Forest. Interim guidance in the FS Manual on the management of roadless areas and the construction of roads in roadless areas would have applied until a roads analysis was completed and incorporated into the relevant forest plans.²⁶ The FS Manual contained considerable detail that would have permitted new roads only if the regional forester determined there was a compelling need for the road, and both an EIS and a science-based roads analysis had been completed. The management direction was to apply both to inventoried roadless areas and to areas of more than 1,000 acres that were contiguous to inventoried roadless areas (or certain other areas) and met stated criteria. Exceptions were provided to the applicability of the interim guidelines.

Administrative Delay in Implementation

Immediately after President Bush took office, his Chief of Staff, Andrew Card, issued a memorandum that postponed for 60 days the effective date of regulations that were not yet in effect.²⁷ The roadless area regulation was covered by this language.

On February 5, 2001, notice was published in the *Federal Register* postponing the effective date of the Nationwide Rule from March 13, 2001, to May 12, 2001.²⁸ The Administration would then decide whether or not to implement the rule. The Nationwide Rule was enjoined by the District Court of Idaho on May 10, 2001 (see below, “Roadless Rule Litigation”).

Proposed Rulemaking for a New Roadless Policy

On July 10, 2001, the FS published an Advance Notice of Proposed Rulemaking, asking for public comment on 10 questions relating to “key principles” involving management of the roadless areas. Comments were due in September. The questions asked about the role of local forest planning, collaboration, wildfire prevention, access to roadless areas, and appropriate activities.

On June 26, 2002, the FS released its summary report (dated May 31, 2002) on the public comments received in response to the Advance Notice of Proposed Rulemaking. The FS received about 726,000 responses, mostly form letters but including 52,432 original responses. The report urged caution in relying on the gist of the comments received, in that “respondents are self-selected; therefore their comments do not necessarily represent the sentiments of the entire

²⁵ 36 C.F.R. § 294.14(d).

²⁶ 66 *Fed. Reg.* 3219.

²⁷ Andrew H. Card, Jr., *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies* (January 20, 2001).

²⁸ 66 *Fed. Reg.* 8899. The postponement notice stated that the action was exempt from notice and comment because it was a procedural rule and for good cause shown.

population. The analysis attempts to provide fair representation of the wide range of views submitted, but makes no attempt to treat input as if it were a vote.” Appendix E indicated that the overwhelming number of “organized” responses were in favor of the roadless rule.²⁹

Nationwide Rule Enjoined but then Reinstated

In 2001 the federal District Court for Idaho stopped implementation of the Nationwide Roadless Rule under a preliminary injunction.³⁰ The court found it likely that the FS had not complied with NEPA when preparing the rule, pointing to the alternatives analysis and public comments sections of the environmental impact statement (EIS) as probably flawed.³¹ At this point, the Bush Administration had stopped defending the rule, planning to withdraw it. The defense was mounted by environmental groups that intervened as defendants. They brought an appeal. The Ninth Circuit reversed the Idaho District Court reversing the application of the injunction.³² The Circuit Court held that the FS had complied with NEPA by analyzing a reasonable range of alternatives and providing “the public with extensive, relevant information on the Roadless Rule.”³³ The Nationwide Rule was back in effect.

Nationwide Rule Enjoined for Violating the Wilderness Act and NEPA

On July 14, 2003, the federal District Court for Wyoming permanently enjoined the Nationwide Rule for violating NEPA by failing to provide adequate public notice and on the grounds that it was a “thinly veiled attempt to designate ‘wilderness areas’ in violation of the clear and unambiguous process established by the Wilderness Act.”³⁴ The court equated the roadless areas with de facto wilderness, characterizing the severity of the restrictions under the roadless rule as restrictive as for congressionally designated wilderness areas.³⁵ The court concluded that the rule was “in violation of the clear and unambiguous process established by the Wilderness Act for such Designation.”³⁶

Only Congress can designate areas for inclusion in the National Wilderness Preservation System.³⁷ However, MUSYA—enacted before the 1964 Wilderness Act—expressly provides for

²⁹ The Report on the Public Comments is available at <http://www.roadless.fs.fed.us>. The Ninth Circuit pointed out that the Attorney General of Montana had asserted that nationally, “96% of commenters favored stronger protections.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2003).

³⁰ *Kootenai Tribe of Idaho v. Veneman*, 2001 WL 1141275 (D. Idaho, May 10, 2001).

³¹ *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001).

³² *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

³³ *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1116 (9th Cir. 2002).

³⁴ *Wyoming v. U.S. Department of Agriculture*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003).

³⁵ The court reviewed the rule’s exceptions allowing roads in roadless areas, but failed to mention that Federal Aid Highways could be permitted in some instances (p. 1236). On the other hand, the court noted that the roadless rule was more restrictive for constructing roads in roadless areas to combat problem conditions than was the Wilderness Act, which allows necessary measures to control fire, insects, and diseases, while the roadless rule only allows roads in the case of an “imminent flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property.”

³⁶ *Wyoming v. U.S. Department of Agriculture*, 277 F. Supp. 2d at 1239.

³⁷ 16 U.S.C. § 1131.

the administrative management of national forest lands for many purposes, and states that “the establishment and maintenance of wilderness areas is consistent with” the purposes of the act. NFMA—enacted after the Wilderness Act—directs that forest plans “assure ... coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and *wilderness*” (emphasis added). Therefore, it appears that as a general matter, the roadless rule might be defended as appropriate management of non-timber resources for multiple use purposes (such as outdoor recreation, water quality protection, mineral development, and game and other wildlife habitat). However, it also is possible that severe and extensive restrictions might be seen as violating sustained yield under MUSYA.

The Nationwide Rule included explanatory material that distinguished roadless areas from wilderness areas, stating that other management is still allowed—such as development of mineral claims, livestock grazing, off-highway vehicle use, and fire management efforts.³⁸

The Wyoming court did not address the provisions for using NFS as wilderness under either the MUSYA or NFMA. Congress repeatedly declined to direct that roadless areas not designated as part of the National Wilderness Preservation System be managed for only non-wilderness uses, but instead permitted their management for uses that might retain their wilderness attributes.³⁹ The validity of the court’s assertion, that the roadless rule was “in violation of the clear and unambiguous process established by the Wilderness Act for such [Wilderness] Designation,”⁴⁰ would seem to depend on whether one agrees that management of the roadless areas under the roadless rule would be as restrictive as that under the Wilderness Act, and on how one views the references to wilderness in MUSYA and NFMA and the actions of Congress in continuing to allow management of the roadless areas to maintain wilderness characteristics on national forest lands.

Management of Roadless Areas after Nationwide Rule Was Enjoined

After the Nationwide Rule was enjoined, the Bush Administration issued a series of interim directives governing roadless area protection and management until it could formulate its own rule. However, the interim directives were only to be in effect for 18 months and were apparently to cease to apply once a forest plan was revised or amended.

A December 2001 directive, ID 1920-2001-1, appeared to replace many of the previous interim directives (both Clinton and Bush). However, the *Federal Register* notice did not clearly indicate which provisions were being replaced or the precise extent of the revisions. The published explanatory material stated that affected material was shown and unaffected material was not. Yet some of the earlier provisions were neither shown nor discussed and, therefore, might still have been in effect. The final text of new FS Manual § 1925 did not show these undiscussed earlier provisions—as though they were superseded. Thus, it was not clear which of the previous materials were still in effect. For example, some of former FS Manual § 7712.16 (that contained specific details on permissible road construction) was expressly revised in the December directives, and the explanatory materials stated that the revised provisions were moved to the FS

³⁸ 66 Fed. Reg. 3249 (January 12, 2001).

³⁹ See compromise release language in wilderness acts from the mid-1980s through the mid-1990s.

⁴⁰ *Wyoming v. U.S. Department of Agriculture*, 277 F. Supp. 2d at 1239.

Manual as a new § 1925. Yet other provisions that were in § 7712.16 were neither discussed as superseded or modified, nor set out in the new § 1925. Thus, it was not clear exactly which of the previous interim directives were still in effect after the December directive took effect.

Decision-Making on Timber Harvesting in Roadless Areas

The December directive reserved authority to the Chief of the Forest Service to approve certain proposed timber harvests in inventoried roadless areas until a forest plan was completed “that has considered the protection and management of inventoried roadless areas pursuant to FSM 1920.” They also provided that the Chief could designate an Associate Chief, Deputy Chief, or Associate Deputy Chief, on a case-by-case basis, to be the responsible official.

Regional foresters were to screen timber harvest projects in inventoried roadless areas for possible referral to the Chief. The Chief was to make decisions regarding harvests *except* for those that were: (1) generally of small-diameter material, the removal of which is needed for habitat or ecosystem reasons (including reducing fire risk); (2) incidental to a management activity not prohibited under the plan; (3) needed for personal or administrative use; or (4) in a portion of an inventoried roadless area where harvests had previously taken place and the roadless characteristics had been substantially altered. (These exceptions conform to the timber harvest exceptions in the Nationwide Rule.) Decisions as to these harvests were to be made by forest officers normally delegated such authority.

The December 2001 directive stated that the Chief’s authority with respect to timber harvests did not apply if a Record of Decision for a forest plan revision was issued as of July 27, 2001—as was true of the Tongass National Forest—and would otherwise terminate when a plan revision or amendment that has considered the protection and management of inventoried roadless areas was completed.

Decision-Making on Road Construction in Roadless Areas

The Chief’s authority for road construction in inventoried roadless areas was to remain in effect until a forest-scale roads analysis was completed and incorporated into each forest plan.⁴¹ Regional foresters were to make many decisions on road construction projects under the new FS Manual § 1925.04b. There was no express provision for terminating the authority of regional foresters, but the general policy, § 1925.03, keyed termination of the special provisions to completion of a roads analysis and its incorporation into the relevant forest plan.

The December Directives apparently eliminated the Clinton-era requirement that there be a *compelling* need for a road, a science-based analysis, and full EIS in all cases. The applicability of the interim directive to certain contiguous areas also was eliminated. The responsible official could still do an EIS and could protect contiguous areas, and could find a compelling need for a road. However, roadless areas could have reduced protections because the directives did not contain the higher thresholds for approval of activities and more formalized documentation requirements previously required.

⁴¹ 66 *Fed. Reg.* 65801.

On July 16, 2004, the FS reinstated the December 2001 directive ID 1920-2001-1 (which had expired on June 14, 2003) simultaneously with a proposed new roadless rule.⁴² It was renumbered as ID 1920-2004-1, and modified. It reestablished the provisions allowing the Chief to make decisions affecting inventoried roadless areas involving: 1) road construction, until a forest-scale roads analysis was completed and incorporated into a forest plan or a determination was made that a plan amendment was not needed; and 2) timber harvests, until a forest plan had “considered” protecting and managing roadless areas.

ID 1920-2004-1 differs from the 2001 version by allowing the Chief to grant project-specific exceptions to allow a regional forester or forest supervisor to exercise the authority to conduct projects in roadless areas. Adding forest supervisors to those who can decide to conduct projects in roadless areas expanded the 2001 directive, and arguably made it easier to approve projects in those areas. FS Manual § 1925.04b also was changed to allow regional foresters to make decisions on road construction and reconstruction in inventoried roadless areas for lands associated with any mineral lease, license, permit, or approval for mineral leasing operations.

Dispute over Tongass National Forest Roadless Areas

The Nationwide Rule was scheduled to apply immediately to the Tongass National Forest in Alaska. The State of Alaska sued, arguing that the Nationwide Rule abrogated the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), which provided there would be no additional administrative withdrawals of federal lands in the state. To settle the lawsuit, the Bush Administration agreed it would publish a proposed roadless rule that would exclude the Tongass National Forest.⁴³ A proposed rule to exclude the Tongass from the Nationwide Rule and an Advance Notice of Proposed Rulemaking to exclude both the Tongass and Chugach National Forests (also in Alaska) were published on July 15, 2003.⁴⁴ A final rule “temporarily” exempting the Tongass from the roadless rule was published on December 30, 2003.⁴⁵ Specifically, the roadless area restrictions on road construction and reconstruction and on the cutting, sale, or removal of timber in inventoried roadless areas did not apply to the Tongass National Forest. The explanatory material indicated that the exemption was in place only until an Alaska-wide roadless rule was finalized. The exemption meant that areas protected under the Revised Tongass Land Management Plan would remain protected, but an additional 300,000 acres of inventoried roadless areas would be available for logging under that plan.

The Forest Service has taken the position that the State Petition Rule, published on May 13, 2005 (discussed in “2005 Roadless Area Policy: The State Petition Rule,” below), eliminated the need for further Tongass-specific rulemaking and that timber harvest decisions that include an inventoried roadless area component will be made in accordance with the forest plan unless changed through state-specific rulemaking.⁴⁶ A new Tongass Forest plan amendment that would make some roadless areas available for logging was completed in January 2008; the Record of Decision was appealed, but the plan was upheld by Chief Gale Kimball on August 22, 2008.

⁴² 69 *Fed. Reg.* 42648.

⁴³ *Alaska v. U.S. Department of Agriculture*, No. A01-039 CV (D. Alaska June 10, 2001).

⁴⁴ 68 *Fed. Reg.* 41865 and 68 *Fed. Reg.* 41864 (July 15, 2003), respectively.

⁴⁵ 68 *Fed. Reg.* 75136 (December 30, 2003).

⁴⁶ See http://www.fs.fed.us/r10/tongass/forest_facts/faqs/roadless.shtml.

2005 Roadless Area Policy: The State Petition Rule

New final roadless area rules were published on May 13, 2005, giving power to the states to request which roadless areas would remain unchanged.⁴⁷ The changes to 36 C.F.R. § 394 permitted the governor of a state to recommend management of roadless areas in the state in a petition to the Secretary. Petitions were required to provide specified information, including (1) a description of the particular lands for which the petition is made; (2) particular management recommendations; (3) identification of the needs and circumstances intended to be addressed by the petition, including conserving roadless value, protecting health and safety, reducing fuels, maintaining dams, and providing access; (4) information on how the recommendations differ from the relevant federal plans and policies; (5) a comparison of the recommendations with state land management policies and direction; (6) impact of the recommendations on fish and wildlife and habitat; (7) a description of any public involvement efforts undertaken by the state in developing the petition; and (8) a commitment by the state to participate as a cooperating agency in any environmental analysis for the rule-making.

Petitions were allowed until November 13, 2006, with provisions for late petitions under 7 C.F.R. § 1.28. If the Secretary approved a petition, the FS must coordinate development of the proposed rule with the state, but the Secretary would make the final decision on any rule. 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. The rule does not indicate what happens when there is a change in governors. This ambiguity became focused when the new Governor of Colorado disagreed with the designations made in the petition submitted by his predecessor shortly after the prior governor lost re-election. See "State Petition Submissions and Responses," below.

The rule does not include any standards on the scope or balance required for public participation in developing a state's recommendations, or for how a state is to gather its information about an area's resources and values. There also are no requirements or standards for the Secretary's review and approval of a petition, and no statement as to the relative weight to be given to a state's recommendations versus the preferences of non-state residents who may express an opinion on the desired management of these national lands.

The background materials accompanying the proposed and final rule refer to the importance of collaborating with partners, including state governments: "strong State and Federal cooperation regarding management of inventoried roadless areas can facilitate long-term, community-oriented solutions."⁴⁸ The materials review the promulgation of the Nationwide Rule and note that the new rule was proposed in response to "concerns [that] were immediately expressed by those most impacted by the roadless rule's prohibitions."⁴⁹ This latter comment raises questions about the role of public input in the rulemaking in that only 4% of the comments received on the original roadless rule opposed or expressed concerns about its protections. Similarly, the responses to the new roadless rule overwhelmingly favored continuing protection. The explanatory materials justify taking a different approach by stating that "the public comment process is not intended to serve as a scientifically valid survey process to determine public opinion."⁵⁰

⁴⁷ 70 Fed. Reg. 25654.

⁴⁸ 70 Fed. Reg. 25654.

⁴⁹ *Id.*

⁵⁰ 70 Fed. Reg. 25656.

Advisory Committee Established

In accordance with the new roadless rule, a Roadless Area Conservation National Advisory Committee was established by the Secretary under the Federal Advisory Committee Act to provide advice and recommendations on implementing the state-petition-based roadless area rules.⁵¹ According to the notice, the Committee consists of up to 15 members “representing a balanced group of representatives of diverse national organizations who can provide insights into the major contemporary issues associated with the conservation and management of inventoried roadless areas.” The Committee operates “in a manner designed to establish a consensus of opinion.”⁵²

State Responses to the State Petition Rule

Response to the State Petition Rule by governors has been mixed. Most states that filed petitions sought to preserve all of their roadless areas, providing the same protection as under the Nationwide Rule.⁵³ On January 12, 2004, nine governors wrote in opposition to the rule.⁵⁴ Other governors have expressed concern that the new roadless area rule petition process is too vague to provide states proper guidance in proposing state-based rules, and places undue burdens on state resources. North Carolina Governor Michael Easley raised the vagueness issue in a letter to the Secretary of Agriculture, asserting that the rule provides “insufficient clarity” on how the Department will respond to state petitions or the criteria the Department will use to consider them.⁵⁵ The Governor also noted that the rule does not clarify how the Department will coordinate state-specific rule development among individual states or how it will approach management of roadless areas that cross state boundaries.⁵⁶

Other governors also have expressed concern over the rule’s burden on states. On October 14, 2004, Oregon Governor Theodore Kulongoski filed a petition with Secretary Johanns to permit states to adopt the 2001 roadless area rule through an expedited process. The Governor argued that the 2005 roadless area rule will require states to expend significant financial and personnel resources to ensure adequate public participation and technical analysis on its provisions and implementation.⁵⁷ North Carolina Governor Easley stated in his August 2004 letter to Secretary Veneman that the administrative and financial investment in the petitioning process could be “onerous” to state agencies. Tennessee Governor Bredesen similarly stated in a September 8, 2004, letter to Secretary Veneman that the rule may place an “undue financial burden on our state

⁵¹ 70 Fed. Reg. 25663.

⁵² *Id.*

⁵³ States that filed to protect all of their roadless areas are: California, New Mexico, North Carolina, South Carolina, and Virginia. Petitions from Colorado and Idaho recommended development in some of the inventoried roadless areas.

⁵⁴ The governors were from the following states: Arizona, Iowa, Kansas, Maine, Missouri, New Mexico, Pennsylvania, Virginia, and Washington.

⁵⁵ Letter to Ann Veneman, U.S. Secretary of Agriculture (August 16, 2004).

⁵⁶ Governor Easley stated, “The proposal’s state-specific rulemaking could result in inconsistent management plans due to conflicting state priorities. Actions on one side of the border will undoubtedly impact and could potentially undermine management strategies on the other side.”

⁵⁷ Letter from Theodore Kulongoski, Governor of Oregon, to Mike Johanns, U.S. Secretary of Agriculture (October 14, 2005). On October 27, 2005, the Department denied the petition for an expedited process scheme, expressing doubt that the Governor’s proposed rule would substantially decrease states’ burdens. Letter from Mark Rey, Under Secretary of Natural Resources and Environment, U.S. Dept. of Agriculture, to Theodore Kulongoski, Governor of Oregon.

agencies without providing some assurances of any concurrence or approval from the Department of Agriculture.”⁵⁸ Virginia Governor Mark Warner expressed concern in a July 30, 2004, letter to the Secretary that, although the 2005 rule confirms that the FS has final authority for managing roadless areas, the rule places on individual states the burden of seeking protection of the areas.⁵⁹

State Petition Submissions and Responses

Governors of five states filed petitions with the Secretary of Agriculture under the State Petition Rule. On December 22, 2005, the Virginia Governor filed a petition requesting protection for all roadless areas in the state. Subsequently, the Governors of North Carolina, South Carolina, New Mexico, and California submitted similar petitions requesting comprehensive protection of all roadless areas in their respective states. The Governor of Idaho filed a petition for managing Idaho’s inventoried roadless areas on October 5, 2006.⁶⁰ The lame-duck Governor of Colorado filed a petition on November 13, 2006, to keep a significant portion of the areas roadless. An amended petition was filed by his successor in April 2007, recommending preservation of even more acreage.⁶¹ Both the Idaho and the Colorado petitions were made after the State Petition Rule was enjoined (see “Implementation of the State Petition Rule Enjoined,” below).

The advisory committee recommended that the petitions of North Carolina, South Carolina, and Virginia be approved, and on June 21, 2006, the Secretary of Agriculture approved them.⁶² Letters from the Department to the governors outlined the process for moving forward with proposed state-specific roadless area rules and that the Department and the respective state should take the following steps: develop a memorandum of understanding regarding the “appropriate level of environmental analysis” required under NEPA and the Endangered Species Act; ensure that the rule provides for public involvement and “active solicitation” of the views of interested parties; coordinate the development of the rule; and consider how the rule will amend any existing state land management plans.⁶³ The letters reiterated that the proposed state-based rules would be subject to federal notice and comment rulemaking requirements and that the Secretary has sole authority to formally adopt any such rules after issues emerging from the notice and comment period have been resolved. The advisory committee did not make recommendations on the petitions of New Mexico and California, as the deadlines for responding to these petitions were interrupted by the injunction halting application of the State Petition Rule (see below).

⁵⁸ Letter to U.S. Secretary of Agriculture Ann Veneman (September 8, 2004).

⁵⁹ Letter to U.S. Secretary of Agriculture Ann Veneman (July 30, 2004). The FS has provided financial assistance to several states for costs incurred relating to petition development. On December 20, 2005, the FS announced a \$150,000 grant to the State of Idaho, and on June 28, 2006, it announced a \$200,000 grant to the State of Arizona. The grants were in response to formal requests by the states for financial support for the petitioning process. U.S. Dept. of Agriculture Press Releases Nos. 0560.05 and 0225.06.

⁶⁰ Petition of Governor James E. Risch for Roadless Area Management in Idaho, available at http://www.fs.fed.us/emc/roadless/061005_gov_risch_petition.pdf.

⁶¹ The Roadless Area National Advisory Committee recommended approving the April 2007 petition. Daily Env’t Rep. (BNA), p. A-7 (August 13, 2007). On August 3, 2009, Colorado revised its roadless application. See <http://www.dnr.state.co.us/roadlessrule>.

⁶² USDA News Release No. 0212.06.

⁶³ Letter from Mark Rey, Under Secretary of Natural Resources and Environment, U.S. Dept. of Agriculture, to Timothy Kaine, Governor of Virginia (June 21, 2006); Letter from Rey to Michael Easley, Governor of North Carolina (June 21, 2006); Letter from Rey to Mark Sanford, Governor of South Carolina (June 21, 2006).

In response to the September 20, 2006 injunction (see below), the Bush Administration announced it would process state petitions to manage roadless areas under the APA. On October 4, 2006, the charter for the advisory committee was formally amended to direct the committee's review of state petitions under the APA (5 U.S.C. § 553(e)) and under 7 C.F.R. § 1.28.⁶⁴ Both Idaho and Colorado submitted petitions under this procedure. The committee has recommended approval of the Idaho and Colorado petitions. The Idaho roadless rule became final October 16, 2008.⁶⁵ A proposed rule was issued for the Colorado areas in July 2008,⁶⁶ but it is unclear what effect that will have as Colorado announced in August 2009 that it is modifying its roadless petition.⁶⁷

Roadless Rule Litigation

Implementation of the Nationwide Rule Enjoined: Part 1

The Kootenai Tribe of Idaho, a forestry corporation, livestock concerns, motorized recreation groups, and others sued to stop the Nationwide Rule for violating NEPA, NFMA, and the APA.⁶⁸ The State of Idaho sued the next day, seeking similar relief.⁶⁹ The federal district court deciding both Idaho cases found that plaintiffs were likely to succeed on their assertion that the FS had not provided the public an opportunity to comment meaningfully on the rule because of inadequacies in (1) identification of the inventoried roadless areas (noting that statewide maps were not made available until after the public comment period had ended); (2) information presented during the scoping process (FS employees were alleged to be ill-prepared); and (3) the period for public comment. The court characterized the comment period as “grossly inadequate” and an “obvious violation” of NEPA.⁷⁰ The court further found that the final EIS did not consider an adequate range of alternatives, since all but the “no action” alternative included “a total prohibition” on road construction and the EIS did not analyze whether other alternatives might have accomplished protection of the environmental integrity of the roadless areas. In addition, the court concluded that FS did not analyze possible mitigation of negative impacts of the alternatives it did study.⁷¹

The Bush Administration asked the court to postpone putting the preliminary injunction into effect until the FS had reviewed the Nationwide Rule, arguing that an injunction was not necessary because the rule was not to be implemented until May 12, 2001. On May 10, 2001, the court granted a preliminary injunction preventing implementation of the roadless rule and the portion of the planning rule related to prescriptions for roadless areas (36 C.F.R. § 219.9(b)(8)).⁷²

⁶⁴ 71 Fed. Reg. 58577 (October 4, 2006).

⁶⁵ 73 Fed. Reg. 61455 (October 16, 2008). 36 C.F.R. part 294. The Idaho final rule created five different management areas within its 9.3 million acres that would prohibit some forms of development, depending on the classification, except in the 405,900 acres designated as general forest.

⁶⁶ 73 Fed. Reg. 43543 (July 25, 2008).

⁶⁷ See Colorado Department of Natural Resources website at <http://www.dnr.state.co.us/roadlessrule>.

⁶⁸ *Kootenai Tribe of Idaho v. Dombeck*, 142 F. Supp. 2d 1231 (D. Id. 2001), *rev'd*, 313 F. 3d 1094 (9th Cir. 2003).

⁶⁹ *Idaho v. Dombeck*, 142 F. Supp. 2d 1248 (D. Id. 2001), *rev'd*, 313 F. 3d 1094 (9th Cir. 2003).

⁷⁰ *Kootenai Tribe of Idaho v. Dombeck*, 142 F. Supp. 2d at 1244-1247.

⁷¹ *Id.* at 1247.

⁷² *Kootenai Tribe of Idaho v. Veneman*, CV01-10-N-EJL, 2001 WL 1141275 (D. Id. May 10, 2001).

The court found that the government’s “vague commitment” to propose amendments to the rule indicated a failure to take the requisite “hard look” that an EIS is expected to perform, leaving the court with the “firm impression” that implementation of the roadless rule would result in irreparable harm to the national forests. The court concluded that the government’s response was a “band-aid approach” and enjoined implementation of the rule while the agency proceeded with its new study and developed amendments.

While United States did not appeal this decision, environmental groups who had intervened did.

Ninth Circuit Decision Reinstates Nationwide Rule after First Injunction

The Ninth Circuit combined the two Idaho cases on appeal, and on December 12, 2002, reversed the Idaho district court stating:

Because of its incorrect legal conclusion on prospects of success, the district court proceeded on an incorrect legal premise, applied the wrong standard for injunction, and abused its discretion in issuing a preliminary injunction.⁷³

In reaching its conclusion, the Ninth Circuit reviewed the substantive grounds considered by the district court and disagreed that plaintiffs had demonstrated a likelihood of success on the merits. It found that the FS adequately complied with the NEPA public comment provision because the maps provided did not suffer from the grave inadequacies alleged by the plaintiffs. According to the Ninth Circuit, the plaintiffs had actual notice as to the roadless areas that would be affected. The court also found that the FS had provided adequate time for comment,⁷⁴ and that the EIS considered an adequate range of alternatives.⁷⁵ The Ninth Circuit denied Idaho’s petition for rehearing, and the case was remanded to the district court to reconsider its previous reasoning and injunction in light of the opinion of the appellate court.

Some disagreed with the Ninth Circuit decision by disputing whether it was proper to allow the intervenors to bring an appeal when the government chose not to. The case came forward in an unusual context. The district court decision focused on the inadequacy of the federal defendants’ NEPA compliance, but the defendants did not appeal that issue. Instead, certain environmental groups that had intervened on the government’s side appealed the district court’s ruling. The Ninth Circuit decision raised significant issues about whether intervenors could appeal NEPA-compliance rulings when the federal defendants—the only ones who could comply with NEPA—did not.

Implementation of the Nationwide Rule Enjoined: Part 2

On July 14, 2003, the federal District Court for Wyoming permanently enjoined the Nationwide Rule, in part because of NEPA defects, and in part because the court concluded it created *de facto* wilderness in violation of the Wilderness Act.⁷⁶ (See “Nationwide Rule Enjoined for Violating the

⁷³ 313 F. 3d 1094, 1126 (9th Cir. 2003).

⁷⁴ *Id.* at 1118-1119.

⁷⁵ *Id.* at 1120-1121.

⁷⁶ *Wyoming v. U.S. Department of Agriculture*, 277 F. Supp. 2d 1197 (D. Wyo. 2003).

Wilderness Act and NEPA,” above.) In addition to the Wilderness Act conflict, the court found the FS had committed the following NEPA defects in the rulemaking:

- not extending the scoping comment period;
- denial of cooperating agency status to Wyoming and other states;
- failure to rigorously explore and objectively evaluate reasonable alternatives to the Roadless Rule;
- failure to adequately analyze cumulative effects; and
- not issuing a supplemental EIS in light of new information on updated roadless area inventories.⁷⁷

The court stated that the agency drove the rule “through the administrative process in a vehicle smelling of political prestidigitation”⁷⁸ in its “rush to give President Clinton lasting notoriety in the annals of environmentalism”⁷⁹—and concluded that the agency must “start over.”⁸⁰

On July 11, 2005, the Tenth Circuit dismissed the appeal in this case and vacated the district court’s decision. It held that the case was made moot by the new roadless regulations published by the Bush Administration on May 13, 2005.⁸¹ Because the Tenth Circuit dismissed the litigation as moot, and the Tongass case was settled, as a principle of legal precedence, the opinion of the Ninth Circuit was the only precedent on the Nationwide Rule. Another lawsuit changed that.

Implementation of the State Petition Rule Enjoined

On August 28, 2005, the states of California, Oregon, and New Mexico filed a lawsuit in the federal District Court for Northern California challenging the State Petition Rule.⁸² Environmental groups also filed suit to challenge the rule, and the cases were consolidated. The State of Washington joined the states’ suit as a plaintiff intervenor, and other states filed amicus briefs on both sides.⁸³ The plaintiffs alleged that the State Petition Rule offered less protection and a more localized approach than the Nationwide Rule, and thus required environmental analysis under NEPA and consultation under the Endangered Species Act. They argued that the Department had violated the APA when it finalized the regulations without conducting requisite NEPA analysis, allowing meaningful public involvement, or explaining the rationale for the Department’s change in roadless area policy.⁸⁴

In a summary judgment effective September 20, 2006, the federal District Court for Northern California set aside the State Petition Rule and reinstated the Nationwide Rule until the FS

⁷⁷ Id. at 1231-1232.

⁷⁸ Id. at 1203.

⁷⁹ Id. at 1232.

⁸⁰ Id. at 1239.

⁸¹ Wyoming v. U.S. Department of Agriculture, 414 F.3d 1207 (10th Cir. 2005).

⁸² California v. U.S. Department of Agriculture, C05-03508, 2006 WL 2711469 (N.D. Cal. September 20, 2006).

⁸³ Montana and Maine filed an amicus brief on behalf of plaintiffs; Alaska and Wyoming filed an amicus brief on behalf of defendants.

⁸⁴ California v. U.S. Department of Agriculture, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

complied with NEPA and ESA.⁸⁵ The FS appealed the decision. On November 29, 2006, the judge clarified its injunction, prohibiting the FS from taking any management activities that would have been banned under the Nationwide Rule.⁸⁶ This had the effect of nullifying oil and gas leases that had been issued under the State Petition Rule, among other things. The decision sparked a dispute between circuits as to which roadless rule had passed muster.

Wyoming Redux: The Nationwide Rule Enjoined: Part 3

After the California suit had been filed in 2005, the State of Wyoming attempted to revive the 2003 Wyoming District Court holding that the Nationwide Rule was invalid.⁸⁷ The Tenth Circuit issued a mandate directing the District Court of Wyoming to dismiss the 2005 challenge, which it did. Two days after the district court in California enjoined the State Petition Rule, the State of Wyoming again moved to reinstate the 2003 decision that the Nationwide Rule was contrary to NEPA and the Wilderness Act. While that 2003 case had been appealed, the Tenth Circuit had not ruled on its merits but instead found the State Petition Rule rendered it moot. Wyoming argued that the 2003 decision was still good law. The federal District Court of Wyoming refused to consider Wyoming's action to revive the holding, holding it lacked the authority.⁸⁸ However, the court stated it was "extremely perplexed" at how the California court could effectively overturn its 2003 ruling: "This court is troubled and questions the authority of the California court to raise this rule back to life and force."⁸⁹

The State of Wyoming filed a new suit in district court, claiming the Nationwide Rule violated NEPA and the Wilderness Act. The District Court of Wyoming agreed.⁹⁰ The court considered that the Nationwide Rule would allow certain uses of the roadless areas, such as grazing, oil and gas development, and motorized vehicles, that were not traditionally allowed in wilderness. However, the court distinguished those uses, saying that to be effective, those uses all would require roads and the Nationwide Rule prevented that. The court acknowledged the California decision, saying that "the Court is disturbed, and frankly shocked at the fact that a Magistrate Judge essentially re-instituted a policy that was not properly before that Court, and especially in light of the fact that an Article III judge had already ruled that the re-instituted policy was promulgated in violation of law."⁹¹ Because the California court had not considered the merits of the Nationwide Rule when acting (but according to the Wyoming court had instead followed a general rule that invalidating one rule reinstates its precedent), the Wyoming court said its actions were consistent with that order. The Nationwide Rule was enjoined, again.

Following the Wyoming decision, it appeared that the Forest Service was required to follow the Nationwide Rule by the California order, and forbidden to follow it by the Wyoming order. The Forest Service filed motions in both courts to suspend the injunctions so it would not be held in contempt. However, some noted that the Forest Service had not been following the Nationwide

⁸⁵ *California v. U.S. Department of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006). This order was issued in October, superseding the September decision. The injunction dates from September 20, 2006, however.

⁸⁶ *California v. U.S. Department of Agriculture*, 468 F. Supp. 2d 1140 (N.D. Cal. 2006).

⁸⁷ *Wyoming v. U.S. Department of Agriculture*, 277 F. Supp. 2d 1197 (D. Wyo. 2003).

⁸⁸ *Wyoming v. U.S. Dept. of Agriculture*, No. 01-CV-86 (D. Wyo. June 7, 2007).

⁸⁹ *Wyoming v. U.S. Department of Agriculture*, 01-CV-86-B, at 5 (D. Wyo. June 7, 2007).

⁹⁰ *Wyoming v. U.S. Department of Agriculture*, 570 F. Supp. 2d 1309 (D. Wyo. 2008).

⁹¹ *Wyoming v. U.S. Department of Agriculture*, 570 F. Supp. 2d at 1352.

Rule as directed by the California court, but was allowing states to file state-by-state petitions (as was the goal of the State Petition Rule) under the APA instead.

Judicial Comity

As a result of the FS motion before the district court in California, the judge issued a rule limiting the scope of the injunction that reinstated the Nationwide Rule.⁹² That order put the Nationwide Rule in effect in all the states within the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, Nevada, and Washington) and in New Mexico. New Mexico was included because the state was a plaintiff in the case and had won the injunction. The judge stated that the notion of judicial comity, which is a concept under which courts will respect the decisions of other courts, did not *require* her to modify the injunction. She noted that her order was issued years before the Wyoming decision; the plaintiff in the Wyoming decision (the State of Wyoming) only alleged harm to the one state, but the decision was applied nationwide; and the Wyoming decision disregarded the Ninth Circuit's analysis in support of the Nationwide Rule in *Kootenai*.⁹³ However, she limited the injunction in the "spirit of comity."⁹⁴

Ninth Circuit Reinstates Nationwide Rule, Again

The Ninth Circuit affirmed the lower court's decision that the State Petition Rule did not comply with NEPA or the ESA and that the Nationwide Rule was in place.⁹⁵ This should have the effect of nullifying the State Petition Rule nationwide and returning the Nationwide Rule to effect at least for a while. However, the Tenth Circuit still has an appeal of the Wyoming decision pending before it. That court could exercise judicial comity and apply the reasoning of the Ninth Circuit. Even if the Tenth Circuit recognizes the sufficiency of the NEPA review of the Nationwide Rule as found by the Ninth Circuit, it could still find the Nationwide Rule invalid based on the different legal grounds presented by the wilderness argument, which the Ninth Circuit did not consider. This could lead to a conflict between the two circuits with one court saying the Nationwide Rule is valid nationwide, and another saying the contrary; this conflict between courts could be resolved only by the U.S. Supreme Court.

The conflict between rulemakings could be resolved statutorily by Congress or it could be resolved administratively by new rulemaking. The FS still has a role. It could create its own rule; after all, this entire dispute is over two rulemaking procedures. A new, different roadless rule would not be constrained by these court decisions. Additionally, rather than a new rulemaking that applies for every state, the FS could again use APA rulemaking on a state-by-state basis as its roadless policy, rather than follow the Nationwide Rule or the courts. In the meantime, the FS instituted a one-year policy in May 2009 that only the Secretary may approve projects in roadless areas.⁹⁶

⁹² California v. U.S. Department of Agriculture, No. C05-03508 EDL, 2008 WL 5102864 (N.D. Cal. December 2, 2008).

⁹³ Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2003) (holding that challenges to the NEPA review were not likely to succeed).

⁹⁴ California v. U.S. Department of Agriculture, No. C05-03508 EDL, 2008 WL 5102864 *7 (N.D. Cal. December 2, 2008).

⁹⁵ California v. U.S. Department of Agriculture, No. 07-15613 (9th Cir. Aug. 5, 2009).

⁹⁶ Secretary's Memorandum 1042-154, Authority to Approve Road Construction and Timber Harvesting in Certain (continued...)

The Ninth Circuit Decision and the Tongass

Reinstatement of the Nationwide Rule by the Ninth Circuit may have reignited the conflict regarding the Tongass National Forest in Alaska: the Ninth Circuit rule did not exempt the Tongass when it declared the Nationwide Rule was properly in place, and no Alaska rule has ever been finalized, as was required by the court settlement in 2003 (see “Dispute over Tongass National Forest Roadless Areas,” above). A plan has been adopted that would allow development in some of the areas of the Tongass that are roadless. There is a question whether allowing the development under the plan would place the Forest Service in contempt of the Ninth Circuit decision, or whether the agreement that the Tongass would be exempted from the Nationwide Rule *temporarily* still applies,⁹⁷ even though the Forest Service indicated it would not take the action necessary for a final rule.

Congressional Action

On October 1, 2009, two bills were introduced to make the Nationwide Rule federal law (S. 1738/H.R. 3692 (111th)). The House bill directs that the final rule of January 12, 2001, be put in place and that the roadless areas shown in the final environmental impact statement for that rule be preserved. The Senate bill describes the purpose of the proposed legislation, noting that road maintenance is extremely expensive and that oil and gas production on Forest Service lands accounts for 0.4% of domestic production. It defines an inventoried roadless area as any area identified as “roadless” on a map. Thus, the two bills could affect different areas. For example, the approximately 400,000 acres of lands that Idaho decided to develop for general forest purposes pursuant to their state petition, were shown as roadless when the final Nationwide Rule was published.⁹⁸ The House bill appears to have the potential effect of nullifying the Idaho state plan, whereas the Senate bill might not affect the Idaho rule.

Conclusion

Roadless areas of the National Forest System have received special attention for decades. Some argue that the areas should be available for appropriate development—mineral exploration and development, timber harvesting, motorized recreation, developed recreation sites, and more. Others believe that the areas should remain roadless to preserve the special values that their condition provides—clean water, undeveloped wildlife habitats, dispersed recreation, aesthetics, and more.

Both the Bush Administration and the Clinton Administration issued rules addressing inventoried roadless areas—one rule in which the states would take the lead in management decisions, and the other applying a uniform national policy. Both were rejected by courts, leading to conflicting

(...continued)

Lands Administered by the Forest Service (May 28, 2009), available online at http://fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5065998.pdf.

⁹⁷ See 68 Fed. Reg. 75136 (Dec. 30, 2003).

⁹⁸ Perhaps complicating the issue further, the regulation for the Idaho rule states that all of the states 9.3 million acres are “roadless,” despite having classifications that allow development of roads, mining, forestry, or other development on much of the property. See 36 C.F.R. § 294.22(a). If a map also indicates all of these areas as roadless, the Senate bill would seem to nullify any such development.

decisions in two different district courts—one reinstating the Nationwide Rule, and the other enjoining it—and a circuit court decision reinstating the Nationwide Rule and nullifying the State Petition Rule.

The FS under the Obama Administration has indicated that projects in roadless areas must be approved by the Secretary, suggesting it is not continuing the Bush-era policy of allowing governors to file petitions for a state-specific rule for managing roadless areas under the APA, nor does it appear to be following the Nationwide Rule which prohibits projects in roadless areas. Only one state—Colorado—has a pending roadless rule application under the APA policy, and that state is in the process of revising it.

The ultimate decision of which roadless rule applies may not be in the courts, unless it is brought before the Supreme Court, but by Congress. The contradictory court decisions may indicate a statutory fix is needed. Congress acted on October 1, 2009, with legislation introduced in both houses to make the Nationwide Rule federal law.

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