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National Forest System Roadless Area Initiative

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National Forest System Roadless Area Initiative

Summary

Roadless areas in the National Forest System have received special attention for decades. Many want to protect their relatively pristine condition, to provide habitat for certain 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 sites.

Because of the costly controversy and litigation over decisions for projects in roadless areas, and to protect their pristine conditions, the Clinton Administration established a nationwide approach to managing roadless areas in the National Forest System. On January 12, 2001, a record of decision (ROD) and a final rule generally prohibited road construction and reconstruction in 58.5 million acres of inventoried roadless areas, with significant exceptions. Timber cutting in those areas also was prohibited, with exceptions, including to improve habitat for certain types of species and to reduce the risk of wildfire and disease. The Forest Service also issued management directives to implement the rule.

The Bush Administration initially postponed the effective date of the roadless area rule, then decided to allow it to be implemented while proposing amendments. It also asked for public comment on key questions for managing roadless areas, and issued new interim directives for managing roadless areas. These efforts eventually led, on May 13, 2005, to a new rule for managing the roadless areas, replacing the Clinton roadless rule with a procedure for governors to petition the Secretary for a special rule for managing the inventoried roadless areas in that state, and to make recommendations for that management. Several states have filed petitions so far; those of Virginia, North Carolina, and South Carolina have been approved, while those of New Mexico and California are still pending. The filing deadline under the special procedure has expired, but states can still seek a rule under 7 C.F.R. §1.28.

On May 10, 2001, the Federal District Court for Idaho preliminarily enjoined implementation of the Clinton rule. The Ninth Circuit reversed the Idaho district court, but on July 14, 2003, the Federal District Court for Wyoming again permanently enjoined implementation of the Clinton rule. This holding was appealed, but dismissed as moot by the 10th Circuit in light of the 2005 Bush rule. On September 20, 2006, the Federal District Court for Northern California enjoined the 2005 Bush 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 Clinton rule until it had complied with these requirements. The Administration has stated that states can still petition for a roadless area management rule under the Administrative Procedures Act (APA). Idaho filed such a petition, and the agency has agreed to develop a Memorandum of Understanding to implement the petition.

The 110th Congress may examine the two Administrations roadless rules and related litigation. It could decide on a course of action for managing the inventoried roadless areas, or it could let the rules and litigation run their course.

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National Forest System Roadless Area Initiative

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 has 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 Bush rule, and reinstated the Clinton rule, until the Bush Administration had met certain legal requirements. Bills have been introduced to implement the Clinton rule, and various provisions relating to roadless area protection have been debated in the context of Interior appropriations (which includes FS funding).[3]

The management of the roadless areas of the NFS is of great interest to both wilderness proponents and to opponents of additional natural or wilderness area protection. 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 natural areas and the remaining areas should be available for timber harvesting, mining, developed recreation, and other uses.

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[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 (FS) 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 *Roadless Area Review and Evaluation* (RARE) studies completed in the 1970s, excluding areas that have since been designated as part of the National Wilderness Preservation System by Congress.

[3] For more on current legislative activity, see CRS Report RL33596, *Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service*, by Ross W. Gorte, Carol Hardy Vincent, Marc Humphries, and Pamela Baldwin, and CRS Report RL33399, *Interior, Environment, and Related Agencies: FY2007 Appropriations*, coordinated by Carol Hardy Vincent and Susan Boren.

This report focuses on the roadless areas initiative. It discusses the regulatory and statutory background, describes the Clinton initiative, 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.

Regulatory and Statutory Background

The Clinton Regulations

The Clinton Administration undertook a series of actions affecting the NFS roadless areas. New rules were finalized with respect to: (1) the roadless areas, as such; (2) the NFS roads that make up the Forest Development Transportation System, and (3) the FS planning process. The provisions of these three rules were intertwined, with each part affecting the others.

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."[4] In response, the FS prepared an environmental impact statement (EIS) on alternatives to protect NFS roadless areas, leading to a record of decision (ROD) and final rule, issued on January 12, 2001, to be effective on March 13, 2001.[5] National-level guidance was deemed advisable, because of the importance of the roadless areas 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 controversy, conflict, and a great deal of time and money spent on appeals and litigation.[6]

The ROD and final rule would have (1) prohibited, with significant exceptions, new roads in inventoried roadless areas; (2) prohibited most timber harvests in the roadless areas, but allow cutting under specified circumstances; and (3) applied the same prohibitions to the Tongass National Forest in Alaska, but allowed certain road and harvest activities already in the pipeline to go forward. The details of the final rule are discussed below.

Transportation System. On January 28, 1998, the FS issued an Advance Notice of Proposed Rulemaking to revise its Forest Development Transportation System regulations for roads in the NFS.[7] A year later, the FS finalized an interim rule that temporarily suspended road construction and reconstruction in unroaded

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[4] Memorandum from President William J. Clinton to the Secretary of Agriculture on Protection of Forest 'Roadless' Areas, Oct. 13, 1999.

[5] 66 *Fed Reg.* 3244 (Jan. 12, 2001), adding 36 C.F.R. § 294, Subpart B.

[6] Id., at 3246.

[7] 63 *Fed. Reg.* 4350, regarding regulations at 36 C.F.R. § 212.

areas, and provided certain procedures related to such areas.[8] Final roads rules (36 C.F.R. §212) and a transportation policy were published on January 12, 2001.[9] (Note that the final roadless area rule also was published on that date.) The policy provided new direction, to be contained in the FS Manual, to emphasize maintaining and decommissioning existing roads rather than building new roads. The policy addressed when and how to conduct roads analyses, required that a compelling need for a new road be demonstrated, and required an economic analysis that addressed both initial and long-term costs, a scientific analysis, and a full EIS before a road could be built in roadless areas.

Under 36 C.F.R. §212.5(b),[10] the focus is on providing and maintaining the minimum transportation system needed for safe and efficient travel to administer, use, and protect NFS lands. This is to be determined by science-based roads analysis at the appropriate scale and is to minimize adverse environmental impacts. Unneeded roads would be decommissioned and the roadbeds restored. The economic and ecological effects of roads would be analyzed as part of an interdisciplinary, "science-based" process, with public participation. Until the new road inventories and analyses are completed, interim requirements would pertain and a compelling need for new roads would have to be demonstrated. These rules are still in effect, though new rules have been proposed.

FS Planning. On November 9, 2000, the FS issued final new planning regulations, effective on that date, but with a delay in implementation.[11] However, the Bush Administration proposed new planning regulations on December 6, 2002, and extended the date for compliance with the 2000 planning regulations.[12] New planning regulations were published on January 5, 2005.[13] These new regulations are discussed in more detail below.

Roadless Areas: Statutory Background

The principal forest management statutes relevant to analysis of the Roadless Area Initiative are the "Organic Act of 1897,"[14] the Multiple-Use Sustained-Yield

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[8] 64 *Fed. Reg.* 7290 (Feb. 12, 1999).

[9] 66 *Fed. Reg.* 3206 and 3219, respectively.

[10] 66 *Fed. Reg.* 3230.

[11] 65 *Fed. Reg.* 67514.

[12] The compliance date was extended in an interim final rule (66 *Fed. Reg.* 27552, May 17, 2001). Compliance with the 2000 regulations was later postponed until new planning regulations are finalized (67 *Fed. Reg.* 35431, May 20, 2002). See also regulations extending compliance for projects implementing plans (68 *Fed. Reg.* 53294, Sept. 10, 2003).

[13] 70 *Fed. Reg.* 1023.

[14] 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, et al.

Act of 1960,[15] and the National Forest Management Act of 1976.[16] 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...."[17] The 1897 Act also authorizes the Secretary to issue regulations to "regulate their [the forest reservations] occupancy and use and to preserve the forests thereon from destruction...."[18]

Over the years, many uses of the national forests in addition to timber and watershed management have been allowed administratively. 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."[19] 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"[20] and that "the establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of" this act.[21] This latter language, which preceded enactment of the 1964 Wilderness Act,[22] recognized that the FS had been managing some forest areas as administrative wilderness or natural areas. What constitutes the most desirable combination of uses for a forest has been hotly debated for decades.

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."[23] 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.

The National Forest Management Act of 1976 (NFMA) set out additional provisions on the management of the national forests that include direction for

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[15] P.L. 86-517 (74 Stat. 215), 16 U.S.C. §§528-531.

[16] 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, et al.

[17] 16 U.S.C. §475.

[18] 16 U.S.C. §551.

[19] 16 U.S.C. §531.

[20] 16 U.S.C. §528.

[21] 16 U.S.C. §529.

[22] P.L. 88-577 (78 Stat. 890), 16 U.S.C. §§1131-1136.

[23] 16 U.S.C. §531.

developing 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 ...."[24]

Can "De Facto" Wilderness Be Created Administratively?

Some have asserted that the management changes involved in the roadless area initiative would amount to "de facto" wilderness areas, and that only Congress can designate wilderness areas. Thus, they argue that the roadless area initiative violates statutory requirements for wilderness protection and management.

The explanatory material with the final Clinton roadless area regulation stated (1) that the regulation preserves multiple use management, (2) that a wide range of uses were permitted in inventoried roadless areas, subject to the management direction in forest plans, prior to the roadless rule, and (3) that a wide range of uses would still be allowable under the new rule.

> Under this final rule, management actions that do not require the construction of new roads will still be allowed, including activities such as timber harvesting for clearly defined, limited purposes, development of valid claims of locatable minerals, grazing of livestock, and off-highway vehicle use where specifically permitted. Existing classified roads in inventoried roadless areas may be maintained and used for these and other activities as well. Forest health treatments for the purposes of improving threatened, endangered, proposed, or sensitive species habitat or maintaining or restoring the characteristics of ecosystem composition and structure, such as reducing the risk of uncharacteristic wildfire effects, will be allowed where access can be gained through existing roads or by equipment not requiring roads ...
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> The Roadless Area Conservation rule, unlike the establishment of wilderness areas, will allow a multitude of activities including motorized uses, grazing, and oil and gas development that does not require new roads to continue in inventoried roadless areas ...[25]

Certainly, only Congress can designate areas for inclusion in the National Wilderness Preservation System. However, the MUSYA — enacted before the 1964 Wilderness Act — expressly provides for the administrative management of national forest lands for fish and wildlife, outdoor recreation, and watershed purposes, as well as for timber, 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,

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[24] 16 U.S.C. §1604(g). Note that FS wilderness management is again mentioned in law, 12 years after enactment of the Wilderness Act.

[25] 66 *Fed. Reg.* 3249 (Jan. 12, 2001).

timber, watershed, wildlife and fish, and *wilderness* ..." (emphasis added). Therefore, it appears that, as a general matter, prohibitions on activities in roadless areas could lawfully be imposed administratively and 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, game and other wildlife habitat), yielding benefits without permanent impairment of the lands. However, it also is possible that, as applied, severe and extensive restrictions might be challenged as violating sustained yield under MUSYA.

Some of these issues have been raised in suits challenging the roadless area rule. (The litigation is discussed below.) On July 14, 2003, Judge Brimmer of the Federal District Court for Wyoming permanently enjoined the roadless rule, in part on NEPA grounds and in part on the ground that it was a "thinly veiled attempt to designate 'wilderness areas' in violation of the clear and unambiguous process established by the Wilderness Act for such designation."[26] The court equated the roadless areas with de facto wilderness, noted the severity of the restrictions under the roadless rule, which the court characterized as being as restrictive, or more so, than for congressionally designated wilderness areas,[27] and that the argument that the roadless rule permits multiple uses (such as motorized uses, grazing, and oil and gas development) to proceed so long as roads were not constructed "fails because all of those uses would, in fact, require the construction or use of a road."[28] Because it felt that the roadless areas under the new rule were tantamount to wilderness areas, the court concluded that the rule was "in violation of the clear and unambiguous process established by the Wilderness Act for such Designation."[29] The court did not reach Wyoming's assertions that the roadless rule also violated NFMA and MUSYA, but did mention that the Wilderness Act "provides protection for a use of the National Forests that was not contemplated by either the Organic Act or the MUSYA ...,"[30] and repeatedly equated roadless areas generally with congressionally designated wilderness.

As discussed above, both MUSYA and NFMA mention wilderness as a use of the national forests, a point the Brimmer opinion did not discuss. Furthermore, in the compromise *release language* in wilderness acts from the mid-1980s through the mid-1990s, Congress repeatedly declined to direct that roadless areas not designated as part of the National Wilderness Preservation System be managed for only non-

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

[27] The court reviewed the exceptions by which roads could be allowed in roadless areas under the rule, 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 "such measures ... as may be necessary in the control of 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." (Comparing 16 U.S.C. §1133(d)(1) with 36 C.F.R. §294.12(b)(1).)

[28] Id.

[29] Id., at 1239.

[30] Id., at 1234.

wilderness uses, but instead permitted their management for uses that might retain their wilderness attributes. The court noted part of the legislative history of the Wilderness Act, that "the statutory framework of the Wilderness Act would ... assure that no further administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited."[31] The validity of the assertion that the roadless rule was "in violation of the clear and unambiguous process established by the Wilderness Act for such [Wilderness] Designation,"[32] 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 that maintains wilderness characteristics on national forest lands.

The Clinton Administration Roadless Area Conservation Rule

The FS identified approximately 58.5 million acres of inventoried roadless areas, 30% of all NFS lands. Under current plans, road building is not allowed in 20.5 million acres (35% of inventoried roadless areas, 11% 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 is 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.[33]

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.[34] 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.[35]

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[31] Id., at 1233, quoting from H.Rept. 88-1538.

[32] Id., at 1239.

[33] 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* (Washington, DC: April 2005).

[34] 66 *Fed. Reg.* 3245 (Jan. 12, 2001).

[35] Id., at 3246.

The Roadless Area Rule

The final roadless area rule put in place by the Clinton Administration was more restrictive, in several respects, than was either the proposed rule or the preferred alternative in the final EIS. With some exceptions, the rule imposed immediately-effective, 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, with some exceptions. 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, but with exceptions, if:[36]

> (1) A road is needed to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property;
>
> (2) A road is needed to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or to conduct a natural resource restoration action under CERCLA, Section 311 of the Clean Water Act, or the Oil Pollution Act;
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> (3) A road is needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty;
>
> (4) Road realignment is needed to prevent irreparable resource damage that arises from the design, location, use, or deterioration of a classified road and that cannot be mitigated by road maintenance. Road realignment may occur under this paragraph only if the road is deemed essential for public or private access, natural resource management, or public health and safety;
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> (5) Road reconstruction is needed to implement a road safety improvement project on a classified road determined to be hazardous on the basis of accident experience or accident potential on that road;
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> (6) The Secretary of Agriculture determines that a Federal Aid Highway project, authorized pursuant to Title 23 of the United States Code, is in the public interest or is consistent with the purposes for which the land was reserved or acquired and no other reasonable and prudent alternative exists; or
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> (7) A road is needed in conjunction with the continuation, extension, or renewal of a mineral lease on lands that are under lease by the Secretary of the Interior as of January 12, 2001 or for a new lease issued immediately upon expiration of an existing lease. Such road construction or reconstruction must be conducted in a manner that minimizes effects on surface resources, prevents unnecessary or unreasonable surface disturbance, and complies with all applicable lease requirements, land and resource management plan direction, regulations, and

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[36] New 36 C.F.R. §294.12(b), 66 *Fed. Reg.* 3272.

> laws. Roads constructed or reconstructed pursuant to this paragraph must be obliterated when no longer needed for the purposes of the lease or upon termination or expiration of the lease, whichever is sooner.

Maintaining classified roads (those in the NFS transportation system or otherwise authorized by the FS), if any, was permitted in inventoried roadless areas.

The cutting, sale, or removal of timber from inventoried roadless areas also was prohibited unless one of specified circumstances exists, and the expectation was expressed that cutting would be infrequent. The proposed regulations had allowed timber to be cut for "stewardship" purposes, but the final regulation eliminated the use of that ambiguous term in favor of specifying the purposes for which cutting could be allowed. Cutting of small diameter trees was permissible to maintain or improve one or more of the roadless area characteristics and:[37]

> (i) To improve threatened, endangered, or sensitive species habitat; or
>
> (ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects....

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.[38]

The Clinton roadless rule expressly would not have revoked, suspended, or modified any permit, contract, or other legal instrument authorizing the occupancy and use of NFS lands that was issued before January 12, 2001, nor would it have revoked, suspended, or modified any project or activity decision made prior to January 12, 2001.[39] The rule would not have applied to roads or 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.[40] These provisions would have grandfathered the activities addressed, but otherwise the new rule would have applied to the Tongass immediately.[41]

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[37] Id., §294.13(b)(1).

[38] Id., §294.13(b)(2)-(4).

[39] Id., §294.14(a) and (c).

[40] Id., §294.14(d).

[41] The *proposed* rule would not have applied the prohibitions on new road construction to the Tongass National Forest. Rather, decisions on whether the prohibitions should apply to any or all of the inventoried roadless areas in the Tongass would have been considered at the time of the five-year review of the April 1999 revised Tongass Plan (i.e. in 2004). The preferred alternative in the final EIS would have applied the road and timber prohibitions to the Tongass in April 2004, rather than immediately.

The explanatory material accompanying the Clinton Administration's forest planning rule of November 9, 2000, indicated that it was very similar to the proposed roadless area rule and also stated that the "final planning rule clarifies that analyses and decisions regarding inventoried roadless areas and other unroaded areas, other than the national prohibitions that may be established in the final Roadless Area Conservation Rule, will be made through the planning process articulated in this final rule. Under this final rule, the responsible official is required to evaluate inventoried roadless areas and unroaded areas and identify areas that warrant additional protection and the level of protection to be afforded."[42]

Therefore, possible *additional* restrictions on use of the roadless areas beyond those provided by the national rule would be developed as part of the planning process. The materials also compared particular parts of the proposed roadless areas rule with the final planning rule. It appears that the final planning regulations are less specific with respect to roadless area reviews than were the proposed regulations. As noted, the final rule eliminated the separate treatment of roadless area reviews within that rule.

Interim Management of Inventoried Roadless Areas

The final Clinton administrative policy on NFS roads published on January 12, 2001,[43] provided interim direction on the management of roadless areas and the construction of roads in roadless areas that was to apply until a roads analysis was completed and incorporated into the relevant forest plans. This direction was in the FS Manual and 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. Examples of instances that constituted compelling need were provided. 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.

Subsequent Administrative Actions

Administrative Delay in Implementation

Immediately after President Bush took office, his Chief of Staff, Andrew Card, issued a memorandum that, among other things, postponed for 60 days the effective date of regulations published in the *Federal Register*, but not yet in effect.[44] The

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[42] 65 *Fed. Reg.* 67529.

[43] 66 *Fed. Reg.* 3219.

[44] Andrew H. Card, Jr., *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies*, (Jan. 20, 2001). Exceptions were made for rules reviewed and approved by a Bush-appointed department head; rules subject to statutory or judicial (continued...)

roadless area regulation was covered by this language, since it was published on January 12, 2001, but was not to be effective until March 13, 2001. The original delay was because the roadless rule was determined to be a "major rule" under the Congressional Review Act, which gives Congress time to consider action to disapprove the rule.[45] If Congress had disapproved the roadless area rule and the President had signed the resulting act, that new legislated direction would have been binding, but Congress did not act.

On February 5, 2001, notice was published in the *Federal Register* postponing the effective date of the roadless area rule from its previous effective date of March 13, 2001, to May 12, 2001.[46] The Administration would then decide whether or not to implement the rule. As discussed below (see "Litigation Over the Roadless Rule"), the Clinton rule was enjoined on May 10, 2001.

Advance Notice of Proposed Rulemaking

On July 10, 2001, the FS published an Advance Notice of Proposed Rulemaking, asking for public comment on ten questions relating to "key principles" involving management of the roadless areas. Comments were due by September 10, 2001. The questions were:

- What is the appropriate role of local forest planning ... in evaluating protection and management of inventories roadless areas?
- What is the best way ... to work with the variety of ... organizations and individuals in a collaborative manner ...?
- How should inventoried roadless areas be managed to provide for healthy forests, including protection from severe wildfires...?
- How should communities and private property near inventoried roadless areas be protected from the risks associated with natural events ... that may occur on adjacent federal lands?
- What is the best way to implement ... reasonable access to [non-federal] property ... within inventoried roadless areas?
- What are the characteristics, environmental values, social and economic considerations, and other factors the Forest Service should consider as it evaluates inventoried roadless areas?

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[44] (...continued)
deadlines; and rules the director of the Office of Management and Budget deemed excepted because of an emergency or other urgent situation relating to health and safety.

[45] The roadless rule involved several delays in implementation: (1) the usual 30-day delay under the Administrative Procedure Act (APA; 5 U.S.C. §§501, et seq.), although this delay is often not applicable to FS rules; (2) the 60-day delay under the Congressional Review Act (CRA; Subtitle E of the Small Business Regulatory Enforcement Act of 1996, P.L. 104-121; 5 U.S.C. §§801, et seq.), to give Congress time to debate major rules; and (3) the 60-day delay resulting from the President's directive. Normally, the 30-day APA delay and the 60-day CRA delay run concurrently.

[46] 66 *Fed. Reg.* 8899. The postponement notice stated that the action was exempt from notice and comment because it is a procedural rule and for good cause shown.

- Are there specific activities that should be expressly prohibited or expressly allowed for inventoried roadless areas through Forest Plan revisions or amendments?
- Should inventoried roadless areas selected for ... protection through the local forest plan revision process be proposed to Congress for wilderness designation, or should they be maintained under a specific designation for roadless area management ...?
- How can the Forest Service work effectively with individuals and groups with strongly competing views, values, and beliefs ...?
- What other concerns, comments, or interests relating to the protection and management of inventoried roadless areas are important?

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 includes appendices that describe the system used to analyze the comments, and urges 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 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 indicates that the overwhelming number of "organized" responses were in favor of the roadless rule.[47]

Interim Management of Roadless Areas — Bush I

Pending expected publication of proposed new roadless area rules, the Bush Administration issued a series of interim directives governing roadless area protection and management. The first was effective May 31, 2001, but was not published until August.[48] On June 7, 2001, additional new interim roadless area management direction was provided. On that date, the FS Chief Dale Bosworth issued a memorandum addressing protection of roadless areas and requiring his approval for some proposed roads or timber harvests in inventoried roadless areas pending completion of forest plan revisions or amendments.

Additional directives issued in December 2001 were difficult to interpret. As with earlier directives, the December directives were already in effect when

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[47] The Report on the Public Comments was 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).

[48] The first of these (I.D. No. 7710-2001-1) was actually published on August 24, two days after the second of these directives (I.D. No. 7710-2001-2 and I.D. No. 2400-2001-3, both issued July 27, 2001), even though the first one had been in effect since May 31. See 66 *Fed. Reg.* 44590 (Aug. 24, 2001) and 66 *Fed. Reg.* 44111 (Aug. 22, 2001).

published,[49] but retroactive comment was invited, to be considered if final directives were developed. However, the interim directives were only to be in effect for 18 months (unless extended), and were apparently to cease to apply once a forest plan was revised or amended. (The ambiguities of the December directives are relevant because some of these directives were later reinstated, as discussed below.)

I.D. 1920-2001-1 appeared to substantially replace much of the previous interim directives (both Clinton and Bush directives). However, the *Federal Register* notice did not clearly indicate which provisions were being replaced or the precise extent of revisions. The published explanatory material stated that affected material was set out and unaffected material was not. Yet some of the earlier provisions were neither shown nor discussed and, therefore, might still have been in effect. However, 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 many specific details on permissible road construction) was expressly revised in the December directives — notably the former requirements for protecting contiguous areas and for preparing an EIS for projects in roadless areas — and the explanatory materials stated that the revised provisions were then moved to appear in the planning part of the FS 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 directives took effect.

Decision-Making on Timber Harvesting in Roadless Areas. The December directives reserved authority to the Chief to approve or disapprove certain proposed timber harvests in inventoried roadless areas until a forest plan revision or amendment was completed "that has considered the protection and management of inventoried roadless areas pursuant to FSM 1920." It 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. (Note that these exceptions conform to the timber harvest exceptions in the Clinton 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

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[49] I.D. No. 1920-2001-1 and I.D. No. 7710-2001-3, both effective December 14, 2001, were published on December 20, 2001 (66 *Fed. Reg.* 65796).

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, at which point it terminated.[50] 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.

Note that the December Directive apparently eliminated the requirement that there be a *compelling* need for a road and a science-based analysis and full EIS in all cases. The applicability of the interim direction to certain contiguous areas also was eliminated. Although the responsible official could still do an EIS and could protect contiguous areas, and a compelling need for a road might exist, less protection to roadless areas could result because, although the directives *permitted* protection, they did not contain the higher thresholds for approval of activities and more formalized documentation requirements of the previous direction.

Regulatory Changes to Categorical Exclusions

Changes to agency NEPA documentation requirements could significantly affect roadless areas. Under NEPA, agencies must prepare an EIS for proposed actions that might have a significant effect on the human environment. If it is not clear whether if an action might have such an effect, the agency is to prepare an environmental assessment (EA) to determine if an EIS is necessary. Depending on what the EA finds, preparation of an EIS may then follow, or the agency may issue a Finding of No Significant Impact (FONSI), in which case no further analysis is required. However, some actions have been shown to have so little effect on the environment that not even an EA is necessary. An agency may indicate what these clearly non-harmful actions are by specifying *categorical exclusions* — actions that are excluded from preparation of even an EA.[51]

New Categorical Exclusions. Several actions have expanded the activities that may be conducted as categorical exclusions. The FS and BLM issued joint regulations allowing for hazardous fuels reduction projects, including up to 1,000 acres of mechanical treatment and 4,200 acres of prescribed burning.[52] The FS also established a categorical exclusion for relatively small timber sales, replacing a previous small-timber-sale exclusion whose use had been enjoined.[53] In addition, certain silvicultural treatments may proceed as categorical exclusions under §404 of

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[50] 66 *Fed. Reg.* 65801.

[51] 40 C.F.R. §1508.4.

[52] 68 *Fed. Reg.* 33814 (June 5, 2003).

[53] 68 *Fed. Reg.* 44598 (July 29, 2003).

the Healthy Forests Restoration Act of 2003.[54] On December 15, 2006, the FS also finalized rules allowing categorical exclusions for forest plans, arguing that plans do not include decisions about activities that could have on-the-ground effects, and therefore need not include an environmental analysis of possible effects.[55]

Extraordinary Circumstances. Previously, the categorical exclusions portion of the FS Handbook set out types of activities that normally would be excluded from NEPA documents, *unless extraordinary circumstances are present*. One of the listed extraordinary circumstances was the presence of inventoried roadless areas. Extraordinary circumstances were defined as "conditions associated with a normally excluded action that are identified during scoping as *potentially* having effects which *may* significantly affect the environment" (emphasis added). The presence of an extraordinary circumstance arguably removed the proposed action from qualifying as a categorical exclusion, and required preparing an EA to probe further the possible environmental effects. This is the interpretation of the Handbook section and its legislative history in a Seventh Circuit case.[56]

New interim guidance modified possible use of categorical exclusions in the presence of circumstances previously identified as extraordinary.[57] Under the new guidance, actions can still be categorically excluded from NEPA documentation in the presence of extraordinary circumstances, if the responsible official, based on scoping, determines there would be no significant environmental effects. Indeed, under the new directive, a circumstance is "extraordinary" only if the responsible official determines that the proposed action may have a significant effect on the environment, in which case an EIS is to be prepared. If the responsible official is uncertain about the significance of the effects, an EA is to be prepared. Under this approach, circumstances previously identified as "extraordinary" now are merely "resource conditions" that must specifically be considered in determining whether an action may have a significant effect. "It is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist."[58]

In defending its proposal to change its use of extraordinary circumstances, the FS asserted that there is a split in the decisions of the circuit courts on the effects of the presence of extraordinary circumstances, and that the Ninth Circuit has held that an agency may issue a categorical exclusion even where a certain resource condition, such as the presence of an inventoried roadless area, is found.[59] However, the cited case involved a salvage sale under the Emergency Salvage Timber Sale Program, which allowed only a very narrow scope of judicial review of environmental

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[54] P.L. 108-148 (117 Stat. 1887), 16 U.S.C. §§6501-6518, et al.

[55] 71 *Fed. Reg.* 75481.

[56] Rhodes v. Johnson, 153 F. 3d 785 (7th Cir. 1998).

[57] 67 *Fed. Reg.* 54622 (Aug. 23, 2002).

[58] FS Handbook 19909.15 — *Environmental Policy and Procedures Handbook*, §30.3b.2.

[59] Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F. 3d 1443, 1450 (9th Cir. 1996).

decisions and a very broad range of discretion for the Secretary to determine the adequacy of any environmental reviews.[60] In contrast, the Seventh Circuit opinion,[61] which analyzed the wording and derivation of the current categorical exclusion provisions was not so contextually limited, and hence is arguably more on point. Under the new directive, a timber sale could be conducted as a categorical exclusion in an inventoried roadless area if the official finds that there would be no significant environmental effects, without any documentation of the underlying analysis.

Interim Management of Roadless Areas — Tongass NF

On June 9, 2003, the Bush Administration indicated that it would retain the roadless rule and would not renew the interim management directives. However, the roadless rule would be modified to exclude the Tongass National Forest, as part of a settlement of the lawsuit filed by the State of Alaska. A proposed rule to exclude the Tongass from the broader roadless 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.[62] A final rule "temporarily" exempting the Tongass from the roadless rule was published on December 30, 2003.[63] Specifically, the roadless area restrictions on road construction and reconstruction and on the cutting, sale, or removal of timber in inventoried roadless areas would not apply on the Tongass National Forest. The explanatory material indicated that the exemption was temporary — 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 new roadless rule, published on May 13, 2005 (discussed below), has 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.[64]

Interim Management of Roadless Areas — Bush II

On July 16, 2004, simultaneously with a proposed new roadless rule, the FS reinstated the December 2001 directive 1920-2001-1 (which officially expired on June 14, 2003).[65] It was renumbered as ID 1920-2004-1 and modified it in two respects. This reestablished the provisions (described above) allowing the Chief to make decisions affecting inventoried roadless areas involving: 1) road construction

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[60] The program was created in §2001 of P.L. 104-19 (109 Stat. 194), the 1995 Emergency Supplemental Appropriations and Rescissions Act, and codified at 16 U.S.C. §1611 note.

[61] Rhodes v. Johnson, 153 F. 3d 785 (7th Cir. 1998).

[62] 68 *Fed. Reg.* 41865 and 68 *Fed. Reg.* 41864 (July 15, 2003), respectively.

[63] 68 *Fed. Reg.* 75136 (Dec. 30, 2003).

[64] See [http://www.fs.fed.us/r10/tongass/forest_facts/faqs/roadless.shtml].

[65] 69 *Fed. Reg.* 42648.

— until a forest-scale roads analysis is completed and incorporated into a forest plan or a determination is made that a plan amendment is not needed; and 2) timber harvests until a forest plan has "considered" protecting and managing roadless areas.

ID 1920-2004-1 differs from its predecessor by allowing the Chief to grant project-specific exceptions to allow a regional forester or forest supervisor, for good cause, to exercise the authority to conduct projects in roadless areas. Adding forest supervisors to those who can decide to conduct projects in roadless areas expands the previous 2001 ID, arguably making it easier to approve projects in those areas. Secondly, FS Manual §1925.04b 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.

New Forest Planning Regulations

New regulations on NFS land management planning were published on January 5, 2005.[66] A separate rule repealed the 2000 planning regulations (at 36 C.F.R. §219, Subpart A), but did not repeal the roadless area management rule (at 36 C.F.R. §294, Subpart B).

The new §219.7(a)(5)(ii) basically retains a provision from the 2000 planning rules, providing that:

> Unless otherwise provided by law, all National Forest System lands possessing wilderness characteristics must be considered for recommendation as potential wilderness areas during plan development or revision.

Depending on how wilderness characteristics and evaluation criteria might be defined, this provision could require many roadless areas to be reviewed for possible wilderness designation as part of the cyclical plan revision process. No management guidance is provided for inventoried roadless areas that are not recommended for inclusion in the National Wilderness Preservation System. Another section indicates that, initially at least, all forest lands generally are to be considered available for multiple uses going into the planning process. *Roadless area* and *inventoried roadless area* were removed from the definitions, because the terms are not used in the rule. Comments on the proposed planning regulations raised concerns about protection for roadless areas; the agency response was that the "Responsible Official considers these values during the planning process for the plan's desired conditions and objectives, which will involve local, regional, and national interests, and use the best available local information." This seems to indicate that roadless values will be only one factor among many to be considered in managing the forests.

The new planning regulations stress that plans generally do not make decisions, but rather are "aspirational," setting out goals for the management of forest units. Nor do they contain much detail on how to manage forests, leaving that to the FS Manual, Handbooks, and directives. In particular, the explanatory material states that

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[66] 70 *Fed. Reg.* 1023.

guidance about special area concerns, such as roadless areas, are more properly included in FS directives.[67] In response to a comment that special protection for roadless areas was missing in the new regulations, the materials point only to the provision on wilderness evaluations quoted above, and state that additional guidance on roadless *wilderness evaluations* will be forthcoming in directives.[68]

Several interim directives, asking for comments, have been published since the of the final planning rules were promulgated, principally the 12 IDs published on March 23, 2005.[69] However, as has been true of previous directives, it is difficult to find the texts in question[70] and to ascertain the current status of a particular management issue — in this case, the management of inventoried roadless areas. In addition, the relationship of the March 23 IDs to the previous interim directives on roadless area management is not clear. ID 1920-2001-1 (December 2001) was reinstated and renumbered as ID 1920-2004-1 "to provide guidance for addressing road and timber management activities in inventoried roadless areas until land and resource management plans are amended or revised."[71] The March 23 IDs include ID 1920-2005-1, which states that it does not supersede any previous IDs. The new 1920 series directive does not address the previous directive bearing that number, nor address roadless area management at all, except to indicate that part 1925 of the FS Manual is "reserved" for IDs and field guidance on the Management of Inventoried Roadless Areas — with no indication or reference to the directive that already exists and is in effect. Therefore, the direction in effect for managing roadless such areas, pending revision of plans under the new planning regulations, is not clear.

The final 2005 roadless area rule, discussed below, originally stated that the July 16, 2004 ID would expire on January 16, 2006. However, the ID was renewed on January 16, and now is scheduled to remain in effect until July 16, 2007, or until a statewide rule is finalized under the new roadless area regulations or a forest plan "considers" roadless areas.[72]

2005 Roadless Area Regulations

New final roadless area rules, similar to the proposed regulations, were published on May 13, 2005.[73] Under the proposed changes to 36 C.F.R. §394, no protection of roadless areas is prescribed in the rule. Instead, the new regulations

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[67] Id., at 1044.

[68] Id.

[69] 70 *Fed. Reg.* 14637.

[70] Although directives purportedly are available at [http://www.fs.fed.us/im/directives/], the new directives were unavailable at that site as of Dec. 8, 2006. If a citizen visits the directives site mentioned in the *Federal Register* [http://www.fs.fed.us/emc/nfma/], the text of all planning directives is available, but changes in the relevant IDs is not evident and the relationship between previous and current IDs is not clear.

[71] 69 *Fed. Reg.* 42648 (July 16, 2004).

[72] I.D. 1920-2006-1, effective Jan. 16, 2006.

[73] 70 *Fed. Reg.* 25654.

establish a procedure to permit the governor of a state to submit a petition to the Secretary with recommendations on management of roadless areas in the state. Petitions must 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 hazardous fuels, maintaining dams, providing access, etc.; (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 could have been submitted until November 13, 2006, but the explanatory material notes that petitions for rulemaking or amendment after that time could be filed under 7 C.F.R. §1.28. If the Secretary approves a petition, the FS must coordinate development of the proposed rule with the state, but the Secretary (or designee) is to 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 process will pertain for a newly-seated governor of a state that previously failed to submit a state-specific roadless rule petition. Section 1.28 states only that petitions filed under the section "will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions." Concerns relating to this ambiguity are relevant, as it has been reported that the governors of Minnesota, New Hampshire, Utah, and Wyoming have decided not to submit petitions for state-specific roadless rules in accordance with the deadline.[74]

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.[75]

The background materials accompanying the proposed and final rule refer to the importance of collaborating with partners, including state governments, stating: "strong State and Federal cooperation regarding management of inventoried roadless

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[74] Don Thompson, "Schwarzenegger Seeks to Maintain Roadless Areas in Forests," *S.F. Gate* (July 11, 2006).

[75] See CRS Report RL32436, *Public Participation in the Management of Forest Service and Bureau of Land Management Lands: Overview and Recent Changes*, by Pamela Baldwin.

areas can facilitate long-term, community-oriented solutions."[76] The materials review the promulgation of the original roadless rule and note that "concerns were immediately expressed by those most impacted by the roadless rule's prohibitions" and that the new rule is proposed in response to those concerns.[77] This latter comment raises interesting questions about the role of public input in the rulemaking in that (as noted above) only 4% of the comments received on the original roadless rule opposed or expressed concerns about its protections. Similarly, the relative number of responses to the new roadless rule favored continuing protection. The explanatory materials justify taking a different approach by stating that "every comment received is considered for its substance and contribution to informed decisionmaking, whether it is one comment repeated by tens of thousands of people or a comment submitted by only one person. The public comment process is not intended to serve as a scientifically valid survey process to determine public opinion."[78]

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.[79] The Committee is to consist 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."[80] The Committee is to operate "in a manner designed to establish a consensus of opinion."

State Responses to 2005 Roadless Area Rule

Several 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 Secretary of Agriculture Ann Veneman, 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.[81] The Governor also noted that the rule does not clarify how the

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[76] 70 *Fed. Reg.* 25654.

[77] Id.

[78] 70 *Fed. Reg.* 25656.

[79] 70 *Fed. Reg.* 25663.

[80] Biographical information on the 13 individuals serving on the Committee, as of July 6, 2006, can be accessed at [http://www.roadless.fs.fed.us/documents/adv-comm/RACNAC-Bios.pdf].

[81] Letter to Ann Venemen, U.S. Secretary of Agriculture (August 16, 2004).

Department will coordinate state-specific rule development among individual states or how it will approach management of roadless areas that cross state boundaries.[82]

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.[83] North Carolina Governor Easley stated in his August 2004 letter to Secretary Venemen 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 agencies without providing some assurances of any concurrence or approval from the Department of Agriculture."[84] 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.[85]

State Petition Submissions and Responses

To date, governors of six states have filed petitions with the Secretary of Agriculture under the 2005 roadless area rule. On December 22, 2005, Virginia Governor Warner 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

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[82] In expressing concern over the use of a state-based rule scheme to manage interstate roadless areas, 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."

[83] Letter from Theodore Kulongoski, Governor of Oregon, to Mike Johanns, U.S. Secretary of Agriculture (October 14, 2005). On Oct. 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.

[84] Letter to U.S. Secretary of Agriculture Ann Venemen, Sept. 8, 2004.

[85] Letter to U.S. Secretary of Agriculture Ann Venemen, July 30, 2004. The FS has provided financial assistance to several states for costs incurred relating to petition development. On Dec. 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.

roadless areas in their respective states. The Governor of Idaho filed a petition for managing Idaho's inventoried roadless areas on October 5, 2006.[86] (See below.)

The advisory committee recommended that the petitions of North Carolina, South Carolina, and Virginia be approved, and on June 21, 2006, the Department of Agriculture approved them.[87] Letters from the Department to the governors outlined the process for moving forward with proposed state-specific roadless area rules — 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.[88] 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 has not made recommendations on the petitions of New Mexico and California.

In response to the September 20, 2006 Court decision (see "Implementation Enjoined — Part 3," below), the Bush Administration announced it would process state petitions to manage roadless areas under the Administrative Procedures Act (APA). On October 4, 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.[89] This was cited in the State of Idaho's petition as the authority for considering the state's petition. The Administration has agreed to develop a Memorandum of Understanding with the State, based on the petition, for managing the roadless NFS lands in Idaho.

Litigation Over the Roadless Rule

Implementation Enjoined — Part 1

The State of Idaho sued asking for a declaratory judgment and an injunction on implementing the roadless rule for violating NEPA, NFMA, and the APA, and other suits in other states also were filed.[90] The court in the Idaho case found that plaintiffs

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[86] *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].

[87] USDA News Release No. 0212.06.

[88] 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).

[89] 71 *Fed. Reg*. 58577.

[90] Idaho v. Dombeck, CV01-11-N-EJL (D.C. Id. 2001); Kootenai Tribe of Idaho et al v. (continued...)

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 (all of the public meetings in Idaho occurred within 12 business days of the end of the first 60-day comment period and many of the public comments were received within the last week of the time given and no responses were provided). The court characterized the comment period as "grossly inadequate" and an "obvious violation" of NEPA. 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.

The Bush Administration did not defend the rule, but did ask the court to postpone ruling on the motion for a preliminary injunction until it had reviewed the rule, arguing that an injunction was not necessary because the rule was not to be implemented until May 12, 2001. The court reserved its ruling until May 4, the day that the Administration was to submit a status report on its review and findings. On May 4, the Administration filed its status report with the court and announced that it would implement the roadless rule, but would take additional actions to address "reasonable concerns raised about the rule" and ensure implementation in a "responsible common sense manner," including providing greater input at the local planning level.[91]

On May 10, 2001, Judge Lodge granted a preliminary injunction to prevent implementation both 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)). 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.

The United States did not appeal this decision, but environmental groups who had been granted intervenor status did appeal. Several other lawsuits raising various issues were filed, including suits in North Dakota, Idaho, Alaska and the District of Columbia.

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[90] (...continued)
Dombeck, CV01-10-N-EJL. (D.C. Id. 2001). Colorado and Alaska joined Idaho in the suit and Utah also filed suit.

[91] USDA News Release No. 0075.01.

Ninth Circuit Decision on First Injunction

On December 12, 2002, the Ninth Circuit reversed the Idaho district court stating:[92]

> We hold that the district court had discretion to permit intervention, under Fed. R. Civ. P. 24(b), and intervenors now can bring this appeal under Fed. R. Civ. P. 24(b); that plaintiffs have standing to challenge the Roadless Rule; and, assessing the merits, that the district court abused its discretion in granting preliminary injunction against implementation of the Roadless Rule.[93]
> . . . .
> 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.[94]

Idaho's petitions for panel rehearing was denied on April 4, 2003.

In reaching its conclusions, 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 did adequately comply with NEPA in its provision for public comment on the roadless rule, because the maps provided did not suffer from the grave inadequacies alleged by the plaintiffs, the plaintiffs had actual notice as to the roadless areas that would be affected, and the possibly inadequate maps would at most affect only the propriety of the rule on the 4.2 million acres added during the EIS process. The court also found that the FS had provided more than the minimum required amount of time for comment, the time allowed was adequate,[95] and that the EIS considered an adequate range of alternatives.[96] Because it felt that the district court wrongfully found that plaintiffs were likely to succeed on the merits, the appellate court concluded that the district court accepted only a minimal showing of irreparable harm and incorrectly issued the injunction. 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. Several other lawsuits challenging the roadless rule were stayed, pending the decision by the Ninth Circuit. Because litigation in the 10th Circuit was dismissed as moot, the opinion of the Ninth Circuit is the only precedent on these issues.

Most of the unfavorable reaction to the Ninth Circuit decision has focused on whether it was proper to allow the intervenors to bring an appeal when the government did not. The case came forward in an unusual context. Although several statutes were initially cited in the lawsuits, the district court decision focused on the inadequacy of the federal defendants' NEPA compliance, which the defendants did

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[92] 313 F. 3d 1094 (9th Cir. 2003).

[93] Id. at 1104.

[94] Id. at 1126.

[95] Id. at 1118-1119.

[96] Id. at 1120-1121.

not appeal. Certain environmental groups had been granted intervenor status and appealed the district court's ruling. The decision of the Ninth Circuit raised significant issues relating to whether the intervenor groups could appeal NEPA-compliance rulings when the federal defendants — the only ones who could comply with NEPA — did not.[97]

Implementation Enjoined — Part 2

On July 14, 2003, Judge Brimmer of the Federal District Court for Wyoming permanently enjoined the roadless rule, in part because of NEPA defects, and in part because he concluded it created de facto wilderness in violation of the Wilderness Act.[98] (See "Can 'De Facto' Wilderness Be Created Administratively?" above.) The court concluded that:[99]

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[97] Under Rule 24 of the Federal Rules of Civil Procedure, a potential intervenor must meet certain criteria to intervene. Earlier cases, including two in the Ninth Circuit, had held that only the federal government can defend the adequacy of its NEPA compliance. Churchill v. Babbitt, 150 F. 3d 1072, as amended by 158 F. 3d 491 (9th Cir. 1998) held that the district court in that instance did not err in allowing intervenors only as to the remedial part of the case. In Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989), the court held that environmental intervenors did not qualify to intervene to defend a NEPA challenge although they evidently were allowed intervenor status on other claims. The dissenting opinion in the roadless rule case questioned whether the appealing intervenors fit within even permissive intervention under Rule 24(b). The majority held that the district court erred in permitting intervention under Rule 24(a), but found intervention proper under Rule 24(b). In reaching this conclusion, the court quoted from a treatise which seems to postulate generous grounds for allowing intervention (Kootenai, at 1109.) In a search for "independent jurisdictional grounds"sufficient to support intervenors pursuing an appeal abandoned by the other parties, the court looked to the standing of the intervenor applicants, and determined that the applicants need not show that they independently could have sued the party who prevailed in district court, but need allege only a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal (Id.). The court also discussed the fact that the district court expressly noted the magnitude of the case and that "the applicants' intervention will contribute to the equitable resolution of this case," to which opinion the appellate court added that the presence of intervenors would "assist the court in its orderly procedures leading to the resolution of this case, which impacted large and varied interests." This echoes another Ninth Circuit opinion that had applied a generous approach to intervention, saying: "a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time we allow an additional interested party to express its views before the court" (Forest Conservation Council v. Forest Service, 66 F. 3d 1489, 1496 n.8 (9th Cir. 1995) (citation omitted)). This same court approached the 'interest' test of Rule 24(b) generously as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."

[98] Wyoming v. United States Department of Agriculture, 277 F. Supp. 2d 1197 (D. Wyo. (2003).

[99] Id. at 1231-1232.

- (1) the FS's decision not to extend the scoping comment period was arbitrary and capricious;
- (2) the FS's denial of cooperating agency status to Wyoming and other states was arbitrary and capricious;
- (3) the FS's failure to rigorously explore and objectively evaluate reasonable alternatives to the Roadless Rule was contrary to law;
- (4) the FS's failure to adequately analyze cumulative effects was a clear error in judgment; and
- (5) the FS's decision not to issue a supplemental EIS in light of new information on updated roadless area inventories was arbitrary and capricious, and contrary to law.

The court stated that the agency drove the rule "through the administrative process in a vehicle smelling of political prestidigitation"[100] in its "rush to give President Clinton lasting notoriety in the annals of environmentalism"[101] — and concluded that the agency must "start over."[102]

On July 11, 2005, the Tenth Circuit dismissed the appeal in this case and vacated the district court's decision. It held that new roadless regulations published on May 13, 2005, discussed below, made the case moot.[103]

Implementation Enjoined — Part 3

On August 28, 2005, the States of California, Oregon, and New Mexico filed a lawsuit in the Federal District Court for Northern California to challenge the 2005 roadless area rule.[104] The Earthjustice Legal Defense Fund and other environmental groups also filed suit to challenge the rule, and the case has been consolidated with *California v. U.S. Department of Agriculture*. The State of Washington joined the states' suit as a plaintiff intervenor, and others have filed amicus briefs.[105] The plaintiffs alleged that the 2005 roadless rule offered less protection and a more localized approach than the Clinton roadless rule, and thus required environmental analysis under NEPA and consultation under the Endangered Species Act (ESA; 16 U.S.C. §§1531-1540). They argued that the Department had violated the Administrative Procedure Act (APA; 5 U.S.C. §§701, et seq.) when it finalized the regulations without conducting requisite NEPA analysis, allowing meaningful public

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[100] Id. at 1203.

[101] Id. at 1232.

[102] Id. at 1239.

[103] Wyoming v. United States Department of Agriculture, 414 F.3d 1207 (10th Cir. 2005).

[104] State of California v. U.S. Department of Agriculture, C05-03508 (N.D.Ca. Sept. 20, 2006).

[105] Montana and Maine have filed an amicus brief on behalf of plaintiffs; Alaska and Wyoming have filed an amicus brief on behalf of defendants.

involvement, or explaining the rationale for the Department's change in roadless areas policy.[106]

In a summary judgment on September 20, 2006, the U.S. District Court for Northern California set aside the 2005 roadless rule and reinstated the Clinton rule until the 2005 rule complied with NEPA and ESA. The decision has been appealed by the Silver Creek Timber Company, and further judicial challenges on the rules over roadless area protection seem likely. On November 29, 2006, the judge further enjoined the FS from "taking any further action contrary to the [Clinton] Roadless Rule without first remedying the legal violations identified in the Court's opinion of September 20, 2006."[107]

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. Other 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.

Roadless area management has been addressed by recent Administrations through a complex series of interrelated actions on roads, roadless areas, and forest planning. In an effort to standardize management of such areas and avoid persistent litigation, the Clinton Administration promulgated a new nationwide rule protecting and restricting uses in inventoried roadless areas on January 12, 2001.

In response to litigation, the Bush Administration took several steps. The public was asked for comments on concerns about roadless area management. Numerous interim directives for administering roadless areas were issued, allowing the Chief of the FS to make decisions on roads and timber cutting in roadless areas, but to delegate that responsibility in some circumstances, including to authorize forest supervisors to conduct projects in roadless areas. Administrative changes on NEPA categorical exclusions appear to allow certain actions in roadless areas without written environmental analyses. In addition, planning regulations published on January 5, 2005, appear to presume that roadless areas are basically available for a variety of uses, including timber harvests, subject to unit-by-unit planning processes. Finally, on May 13, 2005, the Administration issued a new roadless area rule, replacing the Clinton rule with a new process by which the governor of a state may petition the Secretary to promulgate a state-specific rule for managing roadless areas. The interim directives are to remain in effect until July 16, 2007, a statewide rule is finalized, or a forest plan revision or amendment "considers" roadless areas.

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[106] State of California v. U.S. Department of Agriculture.

[107] State of California v. U.S. Department of Agriculture, C05-03508 ((N.D.Ca. Nov. 29, 2006), order granting injunctive relief.

In May 2001, a federal court enjoined implementation of the Clinton roadless rule. This decision was later reversed on appeal, but another federal district court permanently enjoined implementation of the rule. The second injunction was also appealed, but was made moot by the new 2005 Bush rule. Implementation of the Bush rule was enjoined on September 20, 2006, reinstating the Clinton rule until the Administration had complied with the requirements of NEPA and ESA. The Bush Administration has responded by noting that governors could still file petitions for a state-specific rule for managing roadless areas under the Administrative Procedures Act (APA).

In summary, the regulatory direction for managing the remaining National Forest System inventoried roadless areas arguably has fluctuated between a special recognized status with nationwide protections and having no special status or even separate mention in the new forest planning regulations. Also, the new petition process allows a governor to seek a special statewide rule for the roadless areas in that state. Litigation has led to injunctions preventing implementation of both the Clinton and Bush rules, exacerbating uncertainty over roadless area management. What management standards, if any, may apply to roadless areas in the future is not clear.