Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations

Robert L. Glicksman

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TRAVELING IN OPPOSITE DIRECTIONS:
ROADLESS AREA MANAGEMENT UNDER THE
CLINTON AND BUSH ADMINISTRATIONS

BY
ROBERT L. GLICKSMAN

Shortly before the end of the Clinton Administration, the Forest Service issued its Roadless Area Conservation Rule (Roadless Rule) to govern the management of the 58.5 million acres of inventoried roadless areas located within the national forests. Described by the Chief of the Forest Service as “one of the most significant conservation efforts in United States history,” the Roadless Rule prohibited most road construction and timber harvesting activities in roadless areas as a means of sustaining the values of those areas “now and for future generations.” Within a day of the new President’s inauguration, however, the Bush Administration postponed the effective date of the Roadless Rule so that the new Administration would have the opportunity to review it. Six months later, the Forest Service published an advance notice of proposed rulemaking in which it asserted that long-term resource management decisions are more appropriately made through local forest planning decisions than through implementation of a uniform, nationally applicable rule. In mid-2004, the Forest Service followed up that notice by publishing a proposed rule that would replace the Clinton-era Roadless Rule with an approach that would allow development within roadless areas, to the extent permitted by current land-use plans, unless a state governor petitions the Secretary of Agriculture for protective regulations and the Secretary decides to approve such a petition.

This Article compares the Clinton and Bush Administrations’ approaches to the management of roadless areas within the national forests as reflected in the Roadless Rule, its proposed replacement, and related initiatives. The Clinton Administration’s approach reflected a consistent effort to balance the desire to afford access for multiple uses of the national forests and the goal of ensuring long-term protection for valuable resources such as clean water and adequate wildlife habitat. That approach sought to shift the agency’s emphasis from building roads to facilitate timber harvesting and other resource extraction to

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providing environmentally sound access and improved stewardship. The Bush Administration’s developing approach, by contrast, emphasizes the protection of forest resources from natural disasters, but not from human activities such as road construction and timber harvesting. It also places a stronger emphasis on the protection of private property rights in and near the national forests than it does on the protection of ecologically valuable resources. This Article criticizes this shift in focus, along with the Bush Administration’s apparent willingness to sacrifice long-term ecological sustainability and to endorse a reduction in environmental evaluation under the National Environmental Policy Act (NEPA) of road-building and related activities in roadless areas, as an ill-advised and short-sighted weakening of the Roadless Rule’s resource protections for those areas. Finally, the Article reviews a series of lawsuits in which litigants have challenged the validity of the Roadless Rule, concluding that promulgation of the Rule violated neither NEPA nor the Wilderness Act of 1964. The Article concludes that the direction in which the Bush Administration is pushing roadless area management is aligned more with resource extraction and development and less with natural resource preservation, which will likely result in fewer roadless areas remaining roadless.

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A. The Legality of the Clinton Roadless Rule
I. INTRODUCTION

It is obvious to anyone paying attention (and perhaps even to some of those who are not) that the Clinton and Bush Administrations have taken widely different approaches on a variety of important environmental issues. One of the most prominent areas in which the two Administrations have staked out different policy initiatives relates to the management of roadless areas contained in the national forests. Roadless area management by the United States Forest Service (Forest Service) has long been and continues to be a source of controversy, especially when the issue is whether those areas are suitable for intrusive activities such as road building and timber harvesting.2

One reason for the controversy over this issue is the amount of valuable land and the importance of the natural resources affected by its resolution. The Forest Service has jurisdiction over more than 190 million acres of land located in more than 150 national forests and grasslands.3 These lands contain about half of the nation’s softwood timber inventory.4 The value of these forests as a source of harvested timber is reflected in the fact that timber receipts in fiscal year 1991 alone amounted to about three quarters of a billion dollars.5 This probably understates the value of the affected timber because many Forest Service timber sales are priced below cost.6 But the

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1 Throughout this article, the Bush Administration discussed is that of President George W. Bush, 43rd President of the United States.
4 Id. § 1:4.
6 See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 724 (5th
value of the national forests obviously is not limited to the harvestable timber resources they contain. The lands under the jurisdiction of the Forest Service, for example, provide habitat for nearly one third of all species listed as endangered or threatened\textsuperscript{7} under the Endangered Species Act.\textsuperscript{8} The national forests also provide valuable opportunities for outdoor recreation.

The presence of roads within the national forests facilitates access not only for the purpose of extracting some of the forests’ resources, such as timber and minerals, but also for certain forms of motorized recreation. Road construction has the potential, however, to impair the suitability of land for other kinds of recreational use, and it can destroy or fragment the habitat of wildlife within the forests. The National Forest System contains an extensive system of roads. It includes approximately 373,000 miles of roads, which carry about 9,000 Forest Service administrative vehicles daily for purposes such as wildlife habitat improvement projects, maintenance of recreation activities, fire suppression, law enforcement, and search and rescue activities, and about 15,000 vehicles daily for timber harvesting and resource development.\textsuperscript{9}

Despite this extensive system of roads, the National Forest System contains approximately 58.5 million acres of inventoried roadless areas,\textsuperscript{10} about one third of all National Forest System lands. Forest Service land and resource management plans prohibit road building in 20.5 million acres of this total. Road building is barred in an additional 42.4 million acres of congressionally designated areas that include wilderness areas and wild and scenic river corridors.\textsuperscript{11} The question facing both the Clinton and Bush Administrations was whether to restrict activities such as road construction and timber harvesting in these roadless areas. The stakes were high. Former Forest Service Chief Mike Dombeck described the Clinton Administration’s efforts to protect roadless areas as “one of the most significant conservation efforts in United States history.”\textsuperscript{12} Professor Charles Wilkinson called it “an
epic initiative.” Opponents of the Clinton approach would undoubtedly describe it in less charitable terms.

This Article describes the approaches to roadless area management taken by the two most recent Administrations. Part II provides a brief overview of the manner in which the Forest Service managed roadless areas before the Clinton Administration as well as a summary of the statutory framework that currently governs roadless area management within the national forests. Part III describes the Clinton Administration’s pursuit of three initiatives related to the management of roadless areas: the Roadless Area Conservation Rule, new rules governing management of transportation within the national forests, and changes to the Forest Service’s land-use planning process. Part III then explains how the Bush Administration has already changed, or proposed to change, the direction of each of these initiatives.

Part IV assesses the legality and policy merit of the Clinton and Bush initiatives, focusing in the case of the Clinton rules on a pair of lawsuits that challenged the validity of those rules, and concluding that the Clinton initiatives do not appear to have violated either the National Environmental Policy Act (NEPA) or the Wilderness Act. Part IV also concludes that, in finalizing its approach to the management of roadless areas, the Bush Administration will have the burden of justifying any dramatic about-face in policy direction it decides to pursue. Ultimately, however, the Forest Service has sufficient discretion under its governing statutes that it can probably justify the pursuit of a different direction in roadless area management policy. Finally, Part IV asserts that, even if the approach to which the Bush Administration seems committed is within the agency’s discretion, elements of that approach are ill-advised as a matter of federal land management policy. In particular, the roadless area management documents issued by the Forest Service under the Bush Administration thus far emphasize the protection of private property rights and the protection of national forest resources from the adverse consequences of natural events, such as forest fires, but not from resource extraction and development. At the same time, the Forest Service seems intent on deemphasizing the pursuit of ecological sustainability. These elements of the developing Bush policy have the potential to facilitate the degradation of some of the most valuable resources contained within the national forests, especially for uses such as primitive recreation, wildlife preservation, and watershed protection.

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II. A SHORT HISTORY OF FOREST SERVICE MANAGEMENT OF ROADLESS AREAS

The statutes delegating the authority to manage the national forests to the Forest Service vest broad discretion in the agency to determine what kinds of activities to allow in different areas of the forests. Although the Forest Service has restricted activities in roadless areas of the national forests for at least eighty years, the process of systematically assessing these areas to determine whether they should be preserved as wilderness began in earnest after the adoption of the Wilderness Act in 1964. For roadless areas not selected for such preservation, the agency decided whether to allow road construction, timber harvesting, and other activities through implementation of the land-use planning process created by the National Forest Management Act of 1976 (NFMA). This Part briefly surveys the history of the Forest Service’s management of roadless areas prior to the Clinton Administration and summarizes the relevant statutory provisions governing Forest Service management of these areas.

A. Forest Service Management of Primitive and Roadless Areas Before the Roadless Rule

The roadless areas of the national forests serve a variety of functions. According to the Forest Service,

[w]hile National Forest System inventoried roadless areas represent only about two percent of the United States’ land base, they provide significant opportunities for dispersed recreation, sources of public drinking water, and large undisturbed landscapes that provide privacy and seclusion. In addition, these areas serve as bulwarks against the spread of invasive species and often provide important habitat for rare plant and animal species, support the diversity of native species, and provide opportunities for monitoring and research.

Roadless areas also provide other invaluable resources, including clean air and uncontaminated soil. The installation of roads in these areas can cause serious damage to these resources by increasing erosion and the possibility

of landslides, disrupting water flow, fragmenting ecosystems, destroying wildlife habitat, and increasing air pollution.\(^\text{19}\)

The Forest Service has afforded special management attention to roadless areas for decades. As early as 1924, the agency managed some forest areas as natural, primitive, or wilderness areas.\(^\text{20}\) Forest Service regulations adopted in 1929 afforded high priority to the maintenance of “primitive conditions . . . with a view to conserving the values of [primitive areas] for purposes of public education and recreation.”\(^\text{21}\) By 1939, the Forest Service had classified 14 million acres as primitive areas. In that year, the agency adopted new regulations that prohibited commercial timber cuts, roads, and recreational camps within primitive areas.\(^\text{22}\)

The allowable cut in the national forests increased dramatically during the 1950s in response to pressure from timber companies, among other factors.\(^\text{23}\) At the end of that decade, Congress enacted the Multiple-Use Sustained-Yield Act of 1960 (MUSYA),\(^\text{24}\) which vested in the Secretary of Agriculture broad discretion to administer the renewable surface resources of the national forests for multiple use and sustained yield.\(^\text{25}\) The statute provided that the establishment and maintenance of wilderness areas are consistent with statutory purposes.\(^\text{26}\)

Congress began to provide more formal direction to the federal land management agencies in their administration of these areas when it adopted the Wilderness Act, which established the National Wilderness Preservation System. The Act designated 9.1 million acres of national forest lands as wilderness.\(^\text{27}\) It banned commercial enterprises and permanent roads within designated wilderness areas and permitted temporary roads only to a limited extent.\(^\text{28}\) The Wilderness Act also established a procedure by which Congress could designate additional roadless wilderness areas in the national forests. It required that the Secretary of Agriculture, by 1974, review each area in the national forests previously classified by the Secretary or the Chief of the Forest Service as primitive to determine whether those areas were suitable for preservation as wilderness. Areas recommended for

\(^{19}\) Baldwin, supra note 11, at 26.


\(^{22}\) Id. (citing ROTH, supra note 21); Brandon Dalling, Comment, Administrative Wilderness: Protecting Our National Forestlands in Contravention of Congressional Intent and Public Policy, 42 NAT. RESOURCES J. 385, 389 (2002).

\(^{23}\) DiPeso & Pelikan, supra note 21, at 353–54 (citing MICHAEL FROME, BATTLE FOR THE WILDERNESS (1997)).


\(^{25}\) Id. § 529.

\(^{26}\) Id.

\(^{27}\) Robert L. Glicksman & George Cameron Coggins, Wilderness in Context, 76 DENN. U. L. REV. 383, 385 (1999); DiPeso & Pelikan, supra note 21, at 357.

wilderness designation could attain that status only by further act of Congress.29

In 1967, the Forest Service began the process of compiling a nationwide inventory of the National Forest System to identify areas suitable for designation as wilderness under the Wilderness Act.30 That process, called the Roadless Area Review and Evaluation (RARE I), encompassed even more areas than the study areas mandated by the Wilderness Act,31 and culminated in 1972 with the agency's finding that approximately 56 million acres of the national forests were suitable for wilderness designation.32 The Forest Service decided to abandon RARE I after the courts held that the evaluation procedure used by the agency failed to comply with NEPA's environmental assessment procedures.33

The agency began another inventory—RARE II—under the Carter Administration in 1977. The final environmental impact statement (EIS) for RARE II, released in 1979, recommended wilderness designation for 15 million acres of national forest lands and further study of an additional 10.8 million acres.34 In a suit challenging the Forest Service's decision to designate 47 RARE II areas in California as nonwilderness, the Ninth Circuit Court of Appeals ruled that the RARE II process also violated NEPA because it was insufficiently site-specific and failed to consider an adequate range of alternatives.35 The court affirmed an injunction against the release of tracts eligible for wilderness designation back into multiple-use, sustained-yield management.36

Although the Reagan Administration later announced plans to initiate a RARE III process, Congress obviated the need for the process in many states by adopting a series of state wilderness bills that designated as wilderness millions of acres of national forest lands covered by the RARE inventories.37

29 Id. § 1132(b).
31 Dalling, supra note 22, at 391; Klein, supra note 20, at 1375.
32 Wyoming, 277 F. Supp. 2d at 1205; Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276, 30,276 (proposed May 10, 2000) (to be codified at 36 C.F.R. pt. 294). The final environmental impact statement (EIS) for RARE I, however, eliminated most roadless areas from the inventory and selected 12.3 million acres for further consideration of suitability for wilderness designation. COGGINS ET AL., supra note 6, at 1133.
33 Wyoming, 277 F. Supp. 2d at 1205 (citing Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972)); see also California v. Block, 690 F.2d 753, 758 (9th Cir. 1982) (“[The RARE I] effort ended when a federal court enjoined development pursuant to the plan until the Forest Service completed an EIS.”).
34 COGGINS ET AL., supra note 6, at 1133. The RARE II EIS recommended that the remaining 36 million acres be released for use as nonwilderness. Id.
35 Block, 690 F.2d at 767–68, 773; see also National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 66 Fed. Reg. 35,918, 35,919 (July 10, 2001) (citing Block); COGGINS ET AL., supra note 6, at 1133–35. The holding in Block applied only to the national forests in California, but its rationale seemed to apply to the entire RARE II inventory. Id. at 1135; see also Dalling, supra note 22, at 393 (comparing NEPA violations recognized in Block to similar problems in the Clinton roadless initiative).
36 Glicksman & Coggins, supra note 27, at 301.
37 COGGINS ET AL., supra note 6, at 1135–36; see also DiPeso & Pelikan, supra note 21, at 363 (noting state wilderness bills were enacted pursuant to a 1984 compromise that precluded the
The Forest Service conducted additional reviews through the land management planning process dictated by NFMA, which is described below.

B. The Current Legal Framework for Managing Roadless Areas in the National Forests

For areas of the national forests that do not constitute wilderness or hold some other special designation, the Forest Service retains broad discretion to determine appropriate management policies. NFMA established a policy of maintaining the national forests “in appropriate forest cover” in order to “secure the maximum benefits of multiple use sustained yield management in accordance with land management plans.” In developing these land and resource management plans (LRMPs), the Forest Service must provide for multiple use and sustained yield of the products and services obtained from the forest in accordance with MUSYA, including “coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” In addition, the LRMPs must determine forest management systems and harvesting levels based not only on multiple-use, sustained-yield principles, but also on “the availability of lands and their suitability for resource management.”

NFMA requires the Secretary of Agriculture to adopt guidelines for LRMPs considering the economic and environmental aspects of systems of renewable resource management and providing for, among other things, outdoor recreation (including wilderness recreation), timber, watershed, wildlife, and fish. The guidelines must insure that timber will be harvested from the national forests only if certain conditions are met. For example, the agency may permit timber harvests only if soil, slope, and other watershed conditions will not be irreversibly damaged, and if protection is provided for streams and other bodies of water where harvests are likely to seriously and adversely affect water conditions or fish habitat. In developing the LRMPs, the Secretary must identify lands not suited for timber production and

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38 Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294); see also DiPeso & Pelikan, supra note 21, at 363 (noting that the release of roadless lands from wilderness study status was only for one national forest management planning cycle).
40 Id. § 1604(e)(1); see also id. § 1607 (requiring the Secretary of Agriculture to “assure that the development and administration of the renewable resources of the National Forest System are in full accord with the concepts for multiple use and sustained yield of products and services as set forth in [MUSYA]”).
41 Id. § 1604(e)(2); see also id. § 1604(g)(2)(A) (requiring the Secretary of Agriculture to promulgate regulations pursuant to MUSYA to govern development and revision of LRMPs, including guidelines that “require the identification of the suitability of lands for resource management”).
42 Id. § 1604(g)(3)(A).
43 Id. § 1604(g)(3)(E)(i), (iii).
ensure that no timber harvesting occurs on those lands for ten years. 44 The unsuitability classification must be reviewed at least every ten years. 45 Individual projects such as the issuance of timber contracts or permits must be consistent with the applicable LRMP. 46 NFMA also addresses transportation within the national forests. It declares that the installation of “a proper system of transportation to service the National Forest System” should “meet anticipated needs on an economical and environmentally sound basis.” 47

These statutory directives have done relatively little to cabin the discretion of the Forest Service. 48 According to a former Chief of the Forest Service, the Forest Service’s enabling statutes “are so broad and esoteric that for practical purposes they are rather meaningless to anyone who seriously tries to relate them to a specific area of land.” 49 MUSYA certainly fits that description. One court described it as a statute that “breathes discretion at every pore.” 50 Although NFMA is not as standardless as MUSYA, 51 the courts have interpreted it as a statute that vests in the Forest Service “considerable discretion.” 52

The Forest Service’s broad discretion under the Forest Service Organic Administration Act of 1897, 53 MUSYA, and NFMA has traditionally extended to the determination of whether to allow roads in particular areas of the National Forest System. Before the adoption of the Roadless Rule and associated Clinton Administration initiatives discussed below, “the question of whether to build a road through a national forest was largely left to individual forest supervisors” within the Forest Service, whose decisions had to conform to the LRMPs developed for individual units of the National

44 Id. § 1604(k).
45 Id.
46 Id. § 1604(i).
47 Id. § 1608(a).
49 Id. at 947 (quoting R. Max Peterson, former Chief of the Forest Service).
50 Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979) (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975)); see also Mortimer, supra note 48, at 949 (asserting that MUSYA grants the Forest Service “a free hand in establishing what may be the ‘best’ combination of outputs the national forests are able to provide”); id. at 955 (characterizing MUSYA as “a markedly discretionary statute”).
51 See, e.g., House v. United States Forest Serv., 974 F. Supp. 1022, 1033 (E.D. Ky. 1997) (stating that NFMA’s land-use planning process was designed to curtail agency discretion and ensure forest preservation and productivity).
52 Ind. Forest Alliance, Inc. v. United States Forest Serv., 325 F.3d 851, 863 (7th Cir. 2003) (citing Sierra Club v. Marita, 46 F.3d 606, 620 (7th Cir. 1995)); see also Native Ecosystems Council v. Dombeck, 304 F.3d 886, 900 (9th Cir. 2002) (discussing the Forest Service’s discretion in the land-use planning process); Rocky Mountain Oil & Gas Ass’n v. United States Forest Serv., 12 Fed. Appx. 498, 500 (9th Cir. 2001) (discussing in connection with standing issue the Forest Service’s discretion to decide whether to authorize leasing of Forest Service lands for mineral exploitation); Forest Guardians v. Dombeck, 131 F.3d 1309, 1312 (9th Cir. 1997) (discussing agency’s discretion to amend LRMPs).
Apart from consistency with land management plans, Congress furnished little else in the way of guiding principles for road-building decisions. A series of interrelated actions taken by the Clinton Administration provided significantly more guidance to agencies and limited their discretion.

III. MANAGEMENT OF ROADLESS AREAS UNDER THE CLINTON AND BUSH ADMINISTRATIONS

Given the amount of discretion that statutes such as MUSYA and NFMA vest in the Forest Service to determine the appropriate uses of particular areas of the national forests, it is not surprising that at different times, the agency has pursued different policies in managing uses of the national forests in general and of roadless areas in particular. During the second term of the Clinton Administration, the Forest Service adopted three sets of rules designed to minimize road construction, particularly in roadless areas of the national forests. In adopting one of those rules, the agency went even further, stating its intention to “aggressively” decommission existing unneeded roads. The Forest Service’s approach during the Clinton Administration was based on a desire to prevent damage to ecologically valuable resources—including clean water and adequate habitat for wildlife and plants—that would be put at risk through the construction of roads and the pursuit of activities facilitated by enhanced access to undeveloped areas of the national forests.

During the Bush Administration, the Forest Service remained responsible for striking a balance between the need for public access and the adverse consequences to forest resources from affording that access. It soon became clear that the change of administration would entail a recalculation of the balance. Even before he took office, President-elect Bush expressed his opposition to the Clinton approach to roadless area management. On its very first day, the Bush Administration postponed the effective date of one of the prime components of the Clinton approach to roadless area management. In 2004, the Forest Service issued a proposed rule that would replace the nationwide prohibitions reflected in the Roadless Rule with a process that would permit state governors to petition the Secretary of Agriculture for the imposition of management requirements for inventoried roadless areas. If a state governor did not submit such a petition within 18 months of adoption of the rule, or if the Secretary rejected such a

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55 *Id.* at 621.
57 *See infra* note 132 and accompanying text.
58 *See infra* notes 129–34 and accompanying text.
petition, decisions concerning the activities to be permitted in roadless areas would be resolved through the land use planning process. Although the Forest Service has not yet fully fleshed out its approach to roadless area management under President Bush, the agency’s priorities and the means it intends to use to implement them clearly differ from those of the previous administration. For example, the protection of private property seems to be a higher priority than it had been, and the protection of national forest resources from the consequences of natural resource extraction and development has seemingly become less important to Forest Service policy makers. This Part contrasts these divergent approaches to the management of roadless areas in the national forests.

A. The Clinton Administration’s Initiatives

The Clinton Administration’s Forest Service undertook three initiatives that affected the management of roadless areas in the national forests. First, the agency considered what kinds of activities to permit in roadless areas. Second, it assessed its approach to the construction and management of roads throughout the National Forest System. Third, it revised the Forest Service land and resource management planning process. The Forest Service pursued these three related endeavors more or less simultaneously.

1. The Roadless Area Conservation Rule

In October 1999, President Clinton ordered the Forest Service to initiate a nationwide plan to protect roadless areas within the national forests, which contained “some of the last, best unprotected wildlands in America.” The Forest Service quickly published a notice of intent to prepare an EIS under NEPA for a nationwide roadless rule. This notice indicated the agency's intention to protect roadless areas by restricting road construction in unroaded portions of inventoried roadless areas previously identified in RARE II and existing forest plan inventories.

In May 2000, the Forest Service proposed new regulations prohibiting road construction and reconstruction in most inventoried roadless areas of


60 Mendelson, supra note 54, at 622 (citing Memorandum from William J. Clinton, President, to the Secretary of Agriculture (Oct. 13, 1999), 1999 WL 8202046).

61 Kootenai Tribe of Idaho v. Veneman (Kootenai Tribe), 313 F.3d 1094, 1105 (9th Cir. 2002). This notice indicated the agency’s intention to protect roadless areas by restricting road construction in unroaded portions of inventoried roadless areas previously identified in RARE II and existing forest plan inventories. National Forest System Roadless Areas, 64 Fed. Reg. 56,306, 56,307 (Oct. 19, 1999).

62 The Forest Service uses the term “inventoried roadless areas” to refer to areas described in the final EIS on the Roadless Rule discussed in this section. These are areas the agency considered for inclusion as wilderness during the RARE processes. See supra notes 30–37 and accompanying text. Although most of these areas were not recommended for designation as wilderness, most still retain their natural characteristics and are suitable for uses such as primitive recreation and have value as a result of pristine scenery, fish and wildlife habitats, contributions to biological diversity, and watershed protection. National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 66 Fed. Reg. 35,918, 35,919 (July 10, 2001); see also Sullivan, supra note 12, at 142 n.95 (detailing the effects of Clinton’s Roadless Lands Directive). Despite the name, some inventoried roadless areas
the National Forest System and requiring evaluation of roadless area characteristics in the context of multiple-use objectives during land and resource management plan revisions. The Forest Service formulated its proposal “in response to strong public sentiment for protecting roadless areas and the clean water, biological diversity, wildlife habitat, forest health, dispersed recreational opportunities, and other public benefits provided by these areas.” The agency explained that its management policies allowed local agency officials to make decisions about road construction on a case-by-case basis either through the forest planning process or through site-specific, project-level decisions. The agency’s proposal was designed to put an immediate stop to activities likely to degrade desirable characteristics of inventoried roadless areas. Those local decisions were to be consistent with decisions made at the national level through a publicly conducted rulemaking process. The proposal would also ensure that the significant characteristics of roadless areas be identified and considered through local planning efforts. Local officials would no longer be able to authorize road construction or reconstruction in inventoried roadless areas, but would retain the authority to adopt additional management protection for these areas. The Forest Service indicated it was postponing a decision on how to protect roadless areas of the Tongass National Forest in Alaska until 2004. According to the Forest Service, the proposal did not represent an effort to expand the National Wilderness Preservation System. The agency recognized “that only Congress may designate wilderness” and committed to continue managing inventoried roadless areas pursuant to multiple-use mandates.

\[\text{contain roads. “Since 1982, the Forest Service has permitted road construction, industrial logging and other development in the inventoried roadless areas on a local, site-specific basis.” Kootenai Tribe, 313 F.3d at 1105.}\]


\[\text{64 Id. at 30,276. The proposal was also prompted by “budgetary concerns and the need to balance forest management objectives with funding priorities. The intent of this rulemaking is to provide lasting protection in the context of multiple-use management for inventoried roadless areas and other unroaded areas within the National Forest System.” Id.}\]

\[\text{65 Id. at 30,277.}\]

\[\text{66 Id.}\]

\[\text{67 Id. The Forest Service is due to review the Tongass Land and Resource Management Plan in 2004. The agency indicated in the preamble to the proposed rule that in determining whether the prohibition on road construction in roadless areas should apply to the Tongass National Forest, it would have to take into account the provisions of the Tongass Timber Reform Act, 16 U.S.C. §§ 472a, 539d, 539e (2000), which requires it to seek to provide a supply of timber that meets market demand, consistent with providing for the multiple use and sustained yield of all renewable resources. See 65 Fed. Reg. at 30,288 (incorporating an evaluation of unroaded areas in the Tongass National Forest as part of the five year review cycle to determine whether the road construction prohibition or exceptions should be applied).}\]

\[\text{68 65 Fed. Reg. at 30,278.}\]
The Forest Service issued its final Roadless Area Conservation Rule (Roadless Rule)\(^69\) eight days before the end of the Clinton Administration in January 2001. The stated goal was “to provide lasting protection for inventoried roadless areas within the National Forest System in the context of multiple-use management.”\(^70\) Like the proposed rule, the final rule prohibited road construction and reconstruction in inventoried roadless areas,\(^71\) but it also prohibited timber harvesting in these areas, except for purposes of vegetative management.\(^72\) The Forest Service asserted that these activities “have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics.”\(^73\) The Roadless Rule would help protect watershed health and prevent fragmentation of important habitat for wildlife and plants (including threatened, endangered, and sensitive species), and, by doing so, sustain the values of roadless areas “now and for future generations.”\(^74\)

The Forest Service decided to apply the final rule to activities in the Tongass National Forest, except where a notice of availability of a draft EIS for road construction or timber harvesting in inventoried roadless areas had been published in the Federal Register before the publication of the final rule.\(^75\) On the one hand, the Forest Service recognized “the unique and sensitive ecological character of the Tongass National Forest, the abundance of roadless areas . . . , and the high degree of ecological health.”\(^76\) On the other hand, immediate application of the Roadless Rule to the Tongass would eliminate about 95 percent of timber harvests in roadless areas, which would adversely affect the local economy. The proposed rule would have

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\(^{70}\) Id. at 3244.

\(^{71}\) The Roadless Rule “created a new presumption that roadless areas would remain roadless, except in a narrowly limited set of circumstances.” Mendelson, supra note 54, at 624. The Rule contained limited exceptions to the ban on construction. See 66 Fed. Reg. at 3272–73 (outlining circumstances under which roads may be built or repaired despite the general prohibition against road construction in inventoried roadless areas).

\(^{72}\) 36 C.F.R. § 294.13(a) (2003). The final rule provided limited exceptions to the prohibition on timber harvesting, including harvesting of small diameter timber to improve endangered species habitat or to maintain or restore characteristics of ecosystem composition. The rule also contained an exception for harvesting that is incidental to the implementation of a management activity not otherwise prohibited by the Roadless Rule (such as trail construction or maintenance, construction of fire lines for fire suppression, survey and maintenance of property boundaries, ski runs, and utility corridors). Id. § 294.13(b); 66 Fed. Reg. at 3258.

\(^{73}\) Id. at 3244. Although other activities also compromise roadless area values, the Forest Service concluded that “they resist analysis at the national level and [therefore were] best reviewed through local land management planning.” Id.

\(^{74}\) Id. at 3247.


\(^{76}\) 66 Fed. Reg. at 3254. The Tongass “is part of the northern Pacific coast ecoregion, an ecoregion that contains one fourth of the world’s coastal temperate rainforests . . . . [T]he forest’s high degree of overall ecosystem health is due to its largely undeveloped nature including the quantity and quality of inventoried roadless areas and other special designated values.” Id.; see also Sullivan, supra note 12, at 128 (“[T]he Tongass is home to the nation’s largest remaining old growth stands, hundreds of species of fish and wildlife, and 9.4 million acres of roadless area, more roadless acres than any other national forest.”).
deferred application of the Roadless Rule to the Tongass to allow local communities to adjust to the new legal regime. The Forest Service concluded, however, that a deferment would have jeopardized long-term protection of the Forest’s unique ecological values. Accordingly, the agency decided to make the final rule applicable immediately to the Tongass, but to adopt “a mitigation measure that both assures long-term protection and a smooth transition for forest dependent communities.”

Responding to comments that the Roadless Rule would not provide for multiple use of inventoried roadless areas, the Forest Service indicated the rule would allow many activities that do not require new roads (including off-highway vehicle use, livestock grazing, oil and gas development, development of locatable mineral claims, and timber harvesting for limited purposes) to continue in roadless areas. Indeed, the agency specifically refused to expand the prohibitions of the rule to include mining and other activities that might harm the undeveloped characteristics of inventoried roadless areas. The Forest Service asserted,

[C]ourts have recognized that the MUSYA does not envision that every acre of National Forest System land be managed for every multiple use, and does envision some lands being used for less than all of the resources. As a consequence, the agency has wide discretion to weigh and decide the proper uses within any area.

By adopting MUSYA, “Congress also affirmed the application of sustainability to the broad range of resources the Forest Service manages, and did so without limiting the agency’s broad discretion in determining the appropriate resource emphasis and mix of uses.”

The Forest Service also addressed the criticism that the adoption of a national prohibition on the construction of roads in inventoried roadless areas would improperly eliminate the ability to make decisions on a local level based on public input. The Forest Service refuted the criticism by claiming that local land management planning efforts do not always

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77 66 Fed. Reg. at 3254. The Forest Service declared the final rule consistent with the Tongass Timber Reform Act (TTRA) because, although the TTRA “urges the Forest Service to ‘seek to meet market demand’ for timber from the Tongass National Forest, the TTRA does not envision an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation.” Id. at 3255 (citing Alaska Wilderness and Tourism Ass’n v. Morrison, 67 F.3d 723, 731 (9th Cir. 1995)); see Sullivan, supra note 12, at 133–34 (describing the TTRA).

78 66 Fed. Reg. at 3249–50; see also 36 C.F.R. § 294.10 (2003) (stating that the purpose of the Roadless Rule “is to provide, within the context of multiple-use management, lasting protection for inventoried roadless areas within the National Forest System”).


80 Id. at 3252 (citing Wind River Multiple-Use Advocates v. Espy, 835 F. Supp. 1362, 1375 (D. Wyo. 1993)).

81 Id. The Forest Service also stated the final Roadless Rule would “complement the key sustainability, science, and spatial decision making issues raised by the planning rule.” Id. at 3254. This subject is discussed in Part III.A.4, infra. The Forest Service refused to adopt an exception to allow road construction where needed to carry out a multiple use because such an exception would allow road construction in roadless areas for any multiple-use purpose, which would conflict with the objective of protecting roadless areas. 66 Fed. Reg. at 3256.
recognize the national significance of inventoried roadless areas and the values they represent. Case-by-case decision making at the individual forest or regional level could result in the incremental reduction of roadless areas through road construction and timber harvesting.\textsuperscript{82} According to the Forest Service, a nationwide prohibition was the best way to resolve the long-running controversy over the proper management of roadless areas within the national forests.\textsuperscript{83}

2. The National Forest Transportation System

At the same time it was developing its approach to the management of roadless areas in the national forests, the Forest Service during the Clinton Administration considered a series of related changes to transportation in the National Forest System. In January 1998, the Forest Service published an advance notice of proposed rulemaking, indicating it was proposing to revise its regulations concerning the management of the National Forest System transportation system.\textsuperscript{84} The agency stated that the existing road system in the National Forest System "was largely funded and constructed to develop areas for timber harvesting and the development of other resources."\textsuperscript{85} Because resource uses in the national forests had shifted over the previous two decades toward recreation, and because better scientific information about the benefits and environmental impacts of roads had become available, the Forest Service decided it needed to consider adjustments in the management of the forest road system to respond to these changes.\textsuperscript{86}

In particular, it had become clear that ecological impacts from existing roads—including increased frequency of flooding and landslides, increased stream sedimentation, adverse effects on fish habitat, fragmentation and degradation of wildlife habitat, and accelerated presence of invasive species—were more extensive than previously thought. Furthermore, increased levels of human activities in previously inaccessible areas had adverse impacts on forest resources. In addition, available funding was inadequate to maintain roads so as to minimize ecological impacts and ensure safe and efficient use. The Forest Service therefore sought to figure out ways to "better manage roads with limited resources."\textsuperscript{87} The agency announced it expected to "aggressively decommission[] unneeded roads to reduce adverse environmental impacts," update heavily used roads to reduce environmental impacts, and design new roads more carefully to minimize ecological damage.\textsuperscript{88}

\textsuperscript{82} Id. at 3252–53.
\textsuperscript{83} Id. at 3253.
\textsuperscript{85} Id. at 4350.
\textsuperscript{86} Id. The Forest Service found that recreation usage had increased from less than 250 million recreation visitor days to almost 350 million such days in the previous ten years. Id. at 4351.
\textsuperscript{87} Id. at 4350.
\textsuperscript{88} Id. at 4350–51.
On the same day it issued the advance notice of proposed rulemaking, the Forest Service proposed to temporarily suspend road construction and reconstruction in most roadless areas of the National Forest System. The agency’s goal was “to safeguard the significant ecological values of roadless areas from potentially adverse effects associated with road construction, while new and improved analytical tools are developed to evaluate the impact of locating and constructing roads.” The suspension would remain in effect for at most 18 months from the effective date of the interim rule.

A little more than a year later, the Forest Service imposed the interim suspension as a means not only of retaining resource management options in ecologically important unroaded areas from the potentially adverse effects of road construction, but also of refocusing attention on “the larger issues of public use, demand, expectations, and funding surrounding the National Forest Transportation System.” The Forest Service denied that the temporary suspension altered or violated the agency’s multiple-use mandate under MUSYA or NFMA because the suspension was temporary, did not apply to all unroaded areas, and did not restrict multiple uses (although some activities dependent on road construction would be affected). The agency also responded to concerns that the temporary suspension amounted to a “massive land grab” that would create de facto wilderness in areas subject to multiple-use management. The temporary suspension was not a policy to expand the Wilderness Preservation System because it did not limit activities other than road construction or reconstruction, including timber harvesting, which may be accomplished without road construction. The Forest Service maintained that recommendations for wilderness area designation and management would continue to be made pursuant to the Forest Service planning process and in accordance with the Wilderness Act.

By early 2000, the Forest Service had decided to conduct a thorough review of its forest road system policy. In order to improve its road management, the Forest Service proposed “to shift the emphasis from

90 Id. at 4352.
91 Id. at 4351. The Forest Service later referred to the temporary suspension as a “timeout”… while the Forest Service developed a revised road management policy and analytical tools to provide a more ecological approach to existing and future road needs.” National Forest System Road Management, 65 Fed. Reg. 11,676, 11,676–77 (Mar. 3, 2000); see also Administration of the Forest Development Transportation System; Prohibitions; Use of Motor Vehicles Off Forest Service Roads, 66 Fed. Reg. 3206, 3206 (Jan. 12, 2001) (to be codified at 36 C.F.R. pts. 212, 261, 295) (stating the agency’s goal to take a more ecological approach to the management of Forest Service roads).
93 Id. at 7291; see also id. at 7292 (denying that the interim rule made decisions or recommendations regarding wilderness potential). The interim suspension expired upon issuance of the final road management rule. See 66 Fed. Reg. at 3214.
transportation development to managing environmentally sound access,” a shift it deemed consistent with changes in public opinion and demand concerning use of national forest resources as well as increased understanding about the adverse environmental effects of road construction and lack of maintenance.\textsuperscript{95} The Forest Service proposed to require the use of “a science-based transportation analysis to identify the minimum Forest Service road system needed for administration, utilization, and protection of National Forest System lands and resources, while providing safe and efficient travel and minimizing adverse environmental effects.”\textsuperscript{96} Among other things, the proposal would require the Forest Service to identify the minimum transportation system needed to administer and protect the national forests using a science-based transportation analysis and realistic funding estimates.\textsuperscript{97} The agency proposed to make it a priority to decommission the roads that posed the greatest risk of environmental damage.\textsuperscript{98}

On the same day it issued the final Roadless Rule, the Forest Service issued final rules governing road management.\textsuperscript{99} The aim of these rules was to ensure that new roads be essential for resource management and use, that construction and maintenance minimize adverse environmental impacts, and that unneeded roads be decommissioned so ecological restoration initiatives could begin.\textsuperscript{100} As it had proposed, the Forest Service modified its approach to management of transportation in the national forests by shifting away from the development and construction of new roads towards the maintenance of needed roads and the removal of unneeded roads, especially those that pose the greatest threats to public safety or environmental degradation.\textsuperscript{101} Among other things, the Forest Service committed itself to

\textsuperscript{95} Id. at 11,677.

\textsuperscript{96} Id.; see also Administration of the Forest Development Transportation System; Prohibitions; Use of Motor Vehicles Off Forest Service Roads, 65 Fed. Reg. 11,680, 11,680 (proposed Mar. 3, 2000) (to be codified at 36 C.F.R. pts. 212, 261, 295) (proposing “to shift the emphasis from transportation development to managing access within the capability of the land” and to place emphasis “on providing administrative and public access and safety within a context of maintaining and restoring healthy ecosystems”). The shift in emphasis was reflected in the removal of the word “development” from the term “forest development transportation” throughout the regulations. Id.; see also 66 Fed. Reg. at 3212 (stating that removal of the word “development” reflected a shift toward improved stewardship).

\textsuperscript{97} 66 Fed. Reg. at 3207.

\textsuperscript{98} 65 Fed. Reg. at 11,681. At the same time, the Forest Service proposed changes to the Forest Service Manual to guide Forest Service planning teams on how to integrate consideration of the forest transportation system into the planning process. The agency remarked that it considered “the National Forest road system, at approximately 380,000 miles of road, to be largely complete. As a result, the previous emphasis on road development has evolved into the present focus on managing access within the capability of the land.” Forest Transportation System, 65 Fed. Reg. 11,684, 11,684 (Mar. 3, 2000).


\textsuperscript{100} 66 Fed. Reg. at 3206.

\textsuperscript{101} Id. at 3207.
minimizing adverse environmental effects associated with road construction, reconstruction, and maintenance. In defending its new approach, the agency reported that scientific evidence suggests that the erosion and sedimentation associated with roads were partially responsible for a decline in the quality of fish and wildlife habitat. It interpreted legislative mandates as making it responsible for striking a balance between the need for public access and the environmental costs associated with providing that access. The rules required the Forest Service to identify the minimum road system needed for use and protection of the National Forest System, taking into account forest health, emergency access, and public access needs.

In seeking to describe the relationship between the transportation system rules and two other initiatives, the Roadless Rule and changes to the Forest Service planning process, the Forest Service explained that the three sets of rules “are three separate and distinct Forest Service initiatives that together form a coherent strategy for dealing with vital conservation issues.” The Roadless Rule addressed the need to protect roadless areas in the context of multiple-use management. The planning rules would “incorporate the principles of ecological, economic, and social sustainability into forest planning.” The road management rules would be implemented through the planning process and would have to adhere to the sustainability, collaboration, and science provisions of the planning rules. In short, all three rules sought “to provide for long-term sustainability, to promote collaboration, and to integrate science into National Forest System land management decisions.” The Forest Service insisted that the road management rules did not conflict with its obligation to comply with statutory multiple-use principles.

3. Forest Service Planning Rules

The third component of the Clinton Administration’s attempt to protect roadless areas in the national forests involved revision of the National Forest System planning process. In October 1999, the Forest Service solicited comments on proposed rules governing land and resource management planning in the National Forest System. The preamble to the proposal characterized sustainability as “the foundation for National Forest System planning and management.” The proposal provided that during

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102 Id.
103 Id. at 3208.
104 See infra Part III.A.4 for a discussion of the changes made during the Clinton Administration.
106 Id.
107 Id.
108 Id. at 3210.
110 Id. at 54,074.
amendment or revision of an LRMP the Forest Service would determine the suitability of specific areas for particular uses. The Forest Service proposed to add several new special designations to the existing list of two (wilderness and research natural areas). One of these new designations was for roadless areas. This change was designed to integrate direction for all specially designated areas into LRMPs. The Forest Service also proposed to make amendment or revision of an LRMP the mechanism by which it established management direction for areas such as roadless areas. It stressed that nothing in the proposal would preclude consideration of roadless areas “for the full range of management options. Although wilderness designation must be one of the options considered, roadless areas are also subject to consideration for various uses or other degrees of protection.”

The Forest Service issued its final revisions to the planning process in November 2000. The agency repeated that sustainability is the overall goal for national forest management, but emphasized three additional “key concepts”: cooperation and collaboration with the public and other private and public entities, more effective integration of science into forest planning and management, and elimination of burdensome analytical requirements. In response to comments on the proposed rule, the Forest Service sought to clarify the relationship between the new planning rules, the proposed Roadless Rule, and road management policy:

The proposed road management policy describes analysis methods and procedures that would complement the planning-related activities of national forests and grasslands. The proposed rule regarding roadless areas would prohibit road construction and reconstruction in inventoried roadless areas. It would also require land managers to consider certain roadless area characteristics during plan revision and to then decide in the context of overall multiple-use objectives whether additional protections should be afforded inventoried roadless areas or other unroaded areas. Similarly, the proposed planning rule would require the responsible official to consider designating roadless areas during plan revision along with any needed plan decisions related to such areas. The final planning rule clarifies that analyses and decisions regarding inventoried roadless areas . . . , other than the national prohibitions that may be established in the final Roadless Area Conservation Rule, will be made through the planning process . . . . Under this final rule, the responsible official is required to evaluate inventoried roadless areas and unroaded areas and identify areas that warrant protection and the level of protection to be afforded.

111 Id. at 54,090; see also id. at 54,107 (discussing the land and resource management plan revision process).
113 Id.
114 Id. at 67,529–30. The planning rule defined inventoried roadless areas as “[a]reas . . . identified in a set of inventoried roadless maps, contained in Forest Service Roadless Area Conservation, Draft Environmental Impact Statement, Volume 2, dated May 2000, which are
The agency concluded that the review of roadless characteristics is an explicit function of land management planning and therefore should be addressed through the planning rule. Accordingly, it made the requirements for identifying roadless areas and additional roadless area protections a part of the plan revision process.\textsuperscript{115}

The final planning rule authorized the Forest Service to recommend special designations to higher authorities or, to the extent permitted by law, adopt them through plan revision.\textsuperscript{116} The regulations distinguished between congressionally designated areas, including wilderness, and administratively designated areas, including roadless areas.\textsuperscript{117} Some comments urged the Forest Service to protect all remaining roadless areas to preserve ecologically significant areas. The Forest Service responded that the proposed Roadless Rule would protect inventoried roadless areas by prohibiting certain activities within them. Furthermore, the planning rule required the evaluation of roadless areas for ecological sustainability (including ecosystem and species diversity) and the consideration of additional protection during the LRMP revision process.\textsuperscript{118}

The Forest Service emphasized that the final planning rule “did not withdraw roadless areas from active management or prohibit access to public lands.”\textsuperscript{119} Nor did the then-proposed Roadless Rule propose closing existing trails or roads or changing current forest access. Under that rule, “decisions about recreational activities (other than those dependent on road construction and reconstruction) . . . would continue to be made through the planning process.”\textsuperscript{120} The Forest Service continued to receive comments expressing concern that the proposed Roadless Rule clashed with Congress’s authority to designate wilderness areas, but the Forest Service replied that the Roadless Rule’s prohibition on certain activities in roadless areas and the planning rule’s mandate to evaluate roadless areas during the planning process were consistent with applicable statutes, including the Wilderness Act.\textsuperscript{121}

4. Summary of the Clinton Administration’s Approach

The three Clinton Administration initiatives that affected the management of roadless areas within the national forests—the Roadless Rule, the forest transportation system rule, and the revisions to the planning held at the National headquarters office of the Forest Service, or any subsequent update or revision of those maps.” \textit{Id.} at 67,580. It defined unroaded areas as “[a]ny area, without the presence of a classified road, of a size and configuration sufficient to protect the inherent characteristics associated with its roadless condition. Unroaded areas do not overlap with inventoried roadless areas.” \textit{Id.} at 67,581.

\textsuperscript{115} \textit{Id.} at 67,590.
\textsuperscript{116} \textit{Id.} at 67,577.
\textsuperscript{117} \textit{Id.}.
\textsuperscript{118} \textit{Id.} at 67,558.
\textsuperscript{119} \textit{Id.}.
\textsuperscript{120} \textit{Id.}.
\textsuperscript{121} \textit{Id.}.
process—reflect a consistent approach to the task of balancing the desire to afford access for multiple uses of the national forests with the goal of preventing damage to ecologically important natural resources caused by road building, the pursuit of resource extraction, and other activities to which roads provide access. All three initiatives were based on the desire to provide long-term protection for valuable resources such as clean water and adequate habitat for wildlife and plants in the national forests while abiding by applicable multiple-use mandates.

The Roadless Rule was designed to protect watershed health and to prevent fragmentation of habitat important to wildlife and plants through a nationwide prohibition on road construction and most timber harvesting in roadless areas. The forest transportation system rule was a response to the discovery that the adverse ecological effects of roads on the national forests were more extensive than previously believed. The Forest Service under the Clinton Administration therefore committed itself to an “aggressive” effort to eliminate unneeded roads, to manage existing roads to reduce adverse environmental effects, and to design new roads in a manner that would minimize ecological damage. The agency’s objective was to shift the emphasis from a policy of road building for the purpose of developing areas for timber harvesting and other resource extraction to one of providing environmentally sound access and improved stewardship. Under the Clinton Administration, the Forest Service considered the national forest road system to be “largely complete.” Finally, in developing its planning system revisions, the Forest Service characterized long-term sustainability as “the foundation for National Forest System planning and management.” The objective of ecological and economic sustainability provided a prominent justification for the Roadless Rule, the forest transportation rule, and the planning process revisions.


125 Id.


B. The Bush Administration’s Initiatives

The Clinton Administration completed its endeavors to protect roadless areas in the national forests immediately before turning over the reins of power to the incoming Bush Administration. Thus, the ink was barely dry on the final Roadless Rule when the new Administration put an immediate halt to its implementation. The Forest Service subsequently announced plans to revisit the Roadless Rule, proposed changes to the planning rules adopted in late 2000, and issued directives that altered some aspects of the previous Administration’s approach to forest transportation system management. Many of these regulatory endeavors are still in mid-stream, so it is difficult to provide a definitive comparison of the Clinton and Bush approaches to management of roadless areas. But, the Forest Service has taken sufficient action since early 2001 to provide evidence supporting the conclusion that a significant change of direction is in the works.

1. The Roadless Area Conservation Rule

a. In General

Less than a week after George W. Bush took office as President, his Chief of Staff, Andrew H. Card, Jr., issued a memorandum to the heads of executive departments and agencies. This memorandum appeared in the Federal Register. On behalf of the President, the memorandum directed its recipients to postpone for 60 days the effective date of all regulations that had been published in the Federal Register but had not yet taken effect. Because the Roadless Rule issued at the end of the Clinton Administration was published in the Federal Register on January 12, 2001, but not scheduled to go into effect until March 13, 2001, its effective date was stayed by the Card memorandum. Two weeks later, the Forest Service confirmed that the effective date of the Roadless Rule (which then-President-elect Bush had opposed before taking office) had been delayed until May 12, 2001. The


\[130\] 66 Fed. Reg. at 7702. The memorandum vested authority in the Director of the Office of Management and Budget to make exceptions “for emergency or other urgent situations relating to health and safety.” Id.

\[131\] Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). The revisions to the Forest Development Transportation System rules went into effect on January 12, 2001, Administration of the Forest Development Transportation System; Prohibitions; Use of Motor Vehicles Off Forest Service Roads, 66 Fed. Reg. 3206, 3206 (Jan. 12, 2001) (to be codified at 36 C.F.R. pts. 212, 261, 295), and therefore were not affected by the Card memorandum. Similarly, the Clinton Administration revisions to the Forest System planning regulations went into effect on November 9, 2000, 65 Fed. Reg. at 67,514, and therefore were not affected.

\[132\] See Mendelson, supra note 54, at 624, 627 (noting that the Forest Service issued the ruling despite lack of support from the incoming President).
agency asserted that the delay was exempt from notice-and-comment rulemaking because it constituted a rule of procedure and because the delay was based on “good cause.”\textsuperscript{133} The stated purpose of the delay was to give the agency the opportunity to review the Roadless Rule.\textsuperscript{134} At the end of the 60-day period, however, the Roadless Rule was scheduled to go into effect.\textsuperscript{135}

In July 2001, the Forest Service published an advance notice of proposed rulemaking and a request for comments.\textsuperscript{136} The agency reported that a number of states, Indian tribes, organizations, and citizens had raised concerns about the Roadless Rule. The Forest Service asserted that the comments and concerns indicated a predisposition toward long-term resource management decisions through the local forest planning process based on local information and “the best available science,” rather than through the implementation of a uniform standard applicable to all roadless areas.\textsuperscript{137} The agency recognized that “inventoried roadless areas contain important environmental values that warrant protection,” but indicated that appropriate protection and management should be provided through “an open and fair process” addressing the concerns referred to above.\textsuperscript{138}

The agency reported that, about a week before the delay on the effective date of the Roadless Rule was scheduled to expire, the Secretary of Agriculture had presented five principles to be used in the management of roadless areas. These five principles included the following: informed decision making drawing on local expertise and experience through the local forest planning process; collaboration with affected entities through a “fair and open process that is responsive to local input and information”; protection of forests from the negative effects of wildfire and insect disease outbreaks; protection of communities, homes, and property from the risk of fire and other problems on adjacent federal lands; and protection of access to property by ensuring states, tribes, and private property owners access to property within inventoried roadless areas.\textsuperscript{139} Noticeably absent from the five principles was any mention of sustainability or the degree to which road construction and the uses for which it could provide access had the

\textsuperscript{133} Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8899, 8899 (Feb. 5, 2001) (to be codified at 36 C.F.R. pt. 294). The Forest Service claimed that “[s]eeking public comment is impracticable, unnecessary and contrary to the public interest.”\textsuperscript{Id.}

\textsuperscript{134} Id.

\textsuperscript{135} See Baldwin, supra note 11, at 33. By then, however, a federal district court in Idaho had already issued a preliminary injunction prohibiting the Forest Service from implementing the Roadless Rule. See ROADLESS AREA CONSERVATION RULE TIMELINE, at http://roadless.fs.fed.us/documents/id_07/07_09_04_roadless_rule_timeline.html (last visited Nov. 14, 2004); infra notes 140, 218–22 and accompanying text.

\textsuperscript{136} National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 66 Fed. Reg. 35,918 (July 10, 2001). Of the 726,000 responses received by the Forest Service, 52,432 were original responses (as opposed to form letters). The overwhelming number favored the Clinton Roadless Rule. According to the Attorney General of Montana, 90\% of commenters favored even stronger protections. Baldwin, supra note 11, at 39–40 (citing Kootenai Tribe, 313 F.3d 1094, 1116 n.19 (9th Cir. 2002)).

\textsuperscript{137} 66 Fed. Reg. at 35,918.

\textsuperscript{138} Id.

\textsuperscript{139} Id. at 35,919.
potential to impose harm to vulnerable natural resources in roadless areas. The advance notice of proposed rulemaking therefore seemed to signal a shift from natural resource protection (aside from protection against natural events such as wildfires) to the protection of private property.

The Forest Service also reported in the advance notice of proposed rulemaking that eight lawsuits challenging the validity of the Roadless Rule had been filed. The plaintiffs in all eight lawsuits raised the common allegation that the Forest Service had provided inadequate opportunity for public review and comment on the rule. Indeed, a federal district court in Idaho had already issued a preliminary injunction preventing the Forest Service from implementing the Roadless Rule or the aspects of the planning revisions that dealt with the inventory and evaluation of roadless areas. In addition, the agency indicated that the Chief of the Forest Service had issued a letter committing the Forest Service to protection and management of roadless areas until they could be considered through the forest planning process.

After stating that it was studying whether to amend the Roadless Rule, the Forest Service solicited public input on several questions. The agency expressed interest on issues such as what the appropriate role of local forest planning should be in the protection and management of roadless area; how roadless areas should be managed to provide for healthy forests, including protection from fires and the buildup of hazardous fuels and from insect and disease outbreaks; how communities and private property owners near roadless areas should be protected from the risks associated with natural events such as wildfires on federal lands; how best to assure reasonable access to states, tribes, and citizens owning property within roadless areas; what characteristics, environmental values, and social and economic factors the Forest Service should consider as it evaluates roadless areas; whether to prohibit or allow particular activities in roadless areas through LRMP revisions; whether roadless areas selected for future protection through LRMP revisions should be proposed to Congress for wilderness designation or maintained under a specific designation for roadless areas management under the LRMP; and how the Forest Service can work effectively with groups with competing views and values in managing the public lands.

The month after it published the advance notice of proposed rulemaking concerning the Roadless Rule, the Forest Service published notice of the Forest Service Chief’s issuance of interim directives to agency personnel in response to the “legal controversy and uncertainty” surrounding the Roadless Rule as a result of the pending litigation challenging its validity. The directives reserved to the Chief the authority to approve road construction, reconstruction, and timber harvesting in

140 Id.
141 Id.
142 Id. at 35,919–20.
inventoried roadless areas until a revision of an LRMP considers the protection or other management of these areas. In addition, the directives required that Regional Foresters screen proposed timber sales in roadless areas to determine whether to recommend that they be approved by the Chief.  

b. As Applied to the National Forests in Alaska

The Forest Service published a second advance notice of proposed rulemaking concerning revisions to the Roadless Rule in July 2003. The 2001 interim directives had expired as a result of the April 2003 decision of the Ninth Circuit reversing the preliminary injunction issued by the federal district court in Idaho. The agency explained that its review of the Roadless Rule was motivated by a desire to “move forward with a responsible and balanced approach” to addressing the concerns of states, local governments, and tribes affected by the Roadless Rule. In response to the first advance notice, the Forest Service had received more than 726,000 responses, which the agency characterized as falling into one of two camps: “(1) Emphasis on environmental protection and preservation, and support for making national decisions; and (2) emphasis on responsible active management, and support for local decisions made through the forest planning process.” The purpose of the second notice was to solicit comment on whether to exempt permanently the Tongass and Chugach National Forests from the Roadless Rule.

On the same day it issued the second advance notice of proposed rulemaking, the Forest Service issued a proposed rule to exempt the Tongass and Chugach National Forests from prohibitions against timber

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146 See infra Part IV.A.1.a.
147 68 Fed. Reg. at 41,864. The district court’s decision is discussed infra notes 221-22 and accompanying text. The Ninth Circuit’s decision “actually made the Roadless Rule effective for the first time.” ROADLESS AREA CONSERVATION RULE TIMELINE, supra note 135.
148 68 Fed. Reg. at 41,864. The second advance notice also was prompted by a settlement that the Forest Service entered into during a suit brought by Alaska and six other parties challenging the legality of the Roadless Rule. The plaintiffs in that lawsuit alleged that the Roadless Rule violated the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. §§ 3101-3233 (2000), by applying the requirements of the Roadless Rule to the national forests in Alaska. The settlement required the Forest Service to exempt the Tongass National Forest temporarily from the Roadless Rule and to publish a separate advance notice of proposed rulemaking to solicit comment on whether to make the exemption permanent. See Tom Turner, Unsettling Development, 21 ENVT. F. 32, 30 (2004) (describing the chronology and context of the Tongass settlement); see also News Release, USDA, USDA Retains National Forests Roadless Area Conservation Rule (June 9, 2003) (announcing Agriculture Secretary Ann M. Veneman’s position that USDA will retain the Roadless Rule but will propose an amendment authorizing exception upon request of a state governor), http://www.usda.gov/news/releases/2003/06/0200.htm.
149 68 Fed. Reg. at 41,865.
150 Id.
harvesting and road construction and reconstruction in inventoried roadless areas until a final rule was announced in response to the advance notice.\textsuperscript{151} The agency explained that exempting the Tongass from the Roadless Rule would make approximately 300,000 roadless acres (about three percent of the 9.3 million roadless acres in the Tongass) available for forest management, and exempting the Chugach would permit roaded access on approximately 150,000 roadless acres (about three percent of that forest’s 5.4 million roadless acres) in the Chugach. The application of the Roadless Rule to the 43.7 million roadless acres in national forests outside Alaska would not be affected.\textsuperscript{152}

In the preamble to the proposed rule, the Forest Service characterized the Roadless Rule as having “fundamentally changed the Forest Service’s longstanding approach to management of inventoried roadless areas by establishing nationwide prohibitions” on timber harvesting and road construction in inventoried roadless areas.\textsuperscript{153} According to the agency, even though the final EIS for the Roadless Rule predicted that “substantial social and economic hardship in communities throughout Southeast Alaska” would result, the final Roadless Rule nevertheless applied its prohibitions to the Tongass.\textsuperscript{154} The Forest Service explained that Congress, when it adopted the Alaska National Interest Lands Conservation Act of 1980 (ANILCA),\textsuperscript{155} concluded that the statute provides “sufficient protection” for the scenic, natural, cultural, and environmental values on the federal lands in Alaska while affording “adequate opportunity” to satisfy the economic and social needs of Alaskans.\textsuperscript{156} In addition, the Tongass Timber Reform Act (TTRA)\textsuperscript{157} amended ANILCA by directing the Forest Service to seek to provide a supply of timber from the Tongass that meets market demand.\textsuperscript{158}

The Forest Service described the adverse effects the Roadless Rule would have if applied to the Tongass: The Roadless Rule would significantly limit the ability of the 32 communities located within the boundaries of the Tongass to develop road and utility connections, and could result in the loss of 900 jobs. At the same time, the Forest Service seemed to view the protections afforded by the Roadless Rule as unnecessary. It asserted that most of the roadless areas in the Tongass were already protected through designation as wilderness, national monument, or other special designation prohibiting commercial timber harvesting and road construction, and an additional 39 percent was managed under the LRMP to maintain natural

\textsuperscript{152} Id at 41,866.
\textsuperscript{153} Id; see also Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294) (applying Roadless Rule prohibitions to Tongass National Forest despite the long-standing practice of multiple-use management in affected areas).
\textsuperscript{154} 68 Fed. Reg. at 41,866.
\textsuperscript{156} Id § 3101(d).
\textsuperscript{157} 16 U.S.C. §§ 472a, 539d, 539e (2000).
\textsuperscript{158} Id § 539d(a).
settings where these activities are not allowed. The agency committed itself
to considering whether the proposed rule would better implement the
national interests proclaimed by Congress for the Tongass.\footnote{68 Fed. Reg. at 41,867.}

In December 2003, the Forest Service issued a final rule temporarily
exempting the Tongass from the prohibitions on timber harvesting and road
construction and reconstruction in inventoried roadless areas until the
agency has a chance to issue a final rule concerning the application of the
harvesting would continue to be prohibited on more than 78 percent of the
Tongass, and that the exemption exposed only three percent of the
Tongass’s roadless areas to forest management.\footnote{Id. at 75,137.} The exemption responded
to “serious concerns about the previously disclosed economic and social
hardships that application of the [Roadless Rule’s] prohibitions would cause
in communities throughout Southeast Alaska.”\footnote{Id. at 75,138.} The effect of the
exemption was to allow the Tongass to be managed pursuant to the 1997
Tongass Forest Plan, which was readopted in 2003.\footnote{Id.} The Forest Service
stated that it developed the plan “through balanced and open planning
processes, based on years of extensive public involvement and thorough
scientific review.”\footnote{Id. at 75,139.} Because the plan sufficiently protects roadless areas,
the Forest Service deemed unnecessary the additional restrictions imposed
by the Roadless Rule.\footnote{Id.} Some who commented on the proposed exemption
argued that the Roadless Rule was “a landmark national standard that is
essential to ensure the long-term protection of roadless values” and that
exempting the Tongass—the largest national forest in the country and the
site of nearly 16 percent of the acreage protected by the Roadless Rule—
would seriously undermine that standard.\footnote{Id. at 75,139.} The Forest Service responded,

\begin{quote}
[C]onsidered together, the abundance of roadless values on the Tongass, the
protection of roadless values included in the Tongass Forest Plan, and the
socioeconomic costs to local communities of applying the roadless rule’s
prohibitions to the Tongass, all warrant treating the Tongass differently from
the national forests outside of Alaska.\footnote{Id. at 75,139.}
\end{quote}

Put slightly differently, the agency concluded that the social and
economic hardships attributable to the Roadless Rule outweighed the long-
term ecological benefits supplied by the Rule.\footnote{Id. at 75,141.} By one account, the Tongass is “one of the only places in the country that
retains every species of plant and animal found in pre-Columbian times, a biological time
capsule that includes grizzly bears, wolves, bald eagles and salmon.” Osha Gray Davidson, \textit{The
 deemed the exemption to be consistent with the congressional direction provided by ANILCA and the TTRA.169

c. The Proposed Roadless Area Management Rule

In July 2004, the Forest Service published a proposed rule to govern the management of inventoried roadless areas.170 If adopted, the proposed rule would replace the Roadless Rule issued during the Clinton Administration with a process pursuant to which a state governor could file a petition with the Secretary of Agriculture to establish management requirements for inventoried roadless areas in the national forests located within the state.171 A governor would have 18 months from the effective date of the final rule to file a petition.172 The petition would have to describe the lands for which management requirements were being sought, the particular management requirements recommended by the state, the circumstances and needs to be addressed by the petition, and the manner in which the management requirements recommended by the governor would differ from existing LRMPs or policies related to inventoried roadless areas.173

The Secretary would retain the ultimate authority to determine what requirements, if any, to impose on the roadless areas covered by the petition.174 The proposal contains no standards, however, to guide the Secretary in accepting or rejecting a state governor’s petition, stating only that the Secretary’s “response shall accept or decline the petition to initiate a State-specific rulemaking.”175 If the Secretary accepts a petition, the Forest Service must initiate notice and comment rulemaking to address the petition. After the expiration of the 18-month window of opportunity for state governors to file petitions, those seeking the imposition of restrictions on roadless areas would still be able to resort to the Department of Agriculture’s “general petitioning process.”176 Absent a successful petition of either type, decisions about the range of activities to be permitted in roadless areas would be governed by the land use planning process for each national forest.177

169 68 Fed. Reg. at 75,142.
171 Id. at 42,637.
172 Id. at 42,637, 42,641.
173 Id. at 42,641.
174 See id. at 42,640 (providing that the purpose of the proposal is to establish a process in which “the Secretary determines that regulatory direction is appropriate based on a petition from the affected Governor”).
175 Id. at 42,641; see also id. (“The Secretary or the Secretary’s designee shall make the final decision for any State-specific inventoried roadless area management rule.”).
176 Id. at 42,638 (citing 7 C.F.R. § 1.28).
177 On the same day it published the proposed rule, the Forest Service published a notice that it was reinstating an interim directive for the management of inventoried roadless areas initially issued on December 14, 2001 that had expired on June 14, 2003. The directive stated “the administrative policy that, until a land management plan is revised or an amendment
2. The National Forest Transportation System

The Bush Administration took aim not only at the Roadless Rule, but also at the Clinton Administration’s policy governing management of the national forest transportation system. The Clinton policy required an analysis of the road system within each national forest and the creation of a transportation atlas to document the forest transportation system. By the end of 2001, however, the Forest Service reported that many agency transportation managers had characterized elements of the Clinton policy as unworkable. In addition, the Forest Service had begun a review of the Roadless Rule. Accordingly, the Forest Service issued interim administrative directives that were meant, among other things, to afford line officers more flexibility in determining the application of the roads analysis process. Under the Clinton approach to management of the transportation system in the national forests, road construction or reconstruction in inventoried roadless areas and contiguous unroaded areas could not be authorized unless there was a “compelling need” for the activity and the agency had conducted a “science-based roads analysis” and prepared an EIS. The new interim directive eliminated all of these requirements for unroaded areas and relieved the Forest Service from the blanket responsibility of preparing an EIS for road management activities proposed in inventoried roadless areas. The Forest Service finalized the interim directives in 2003.

3. Forest Service Planning Rules

The third component of the Clinton Administration’s approach to management of roadless areas took the form of revisions to the land and resource management planning process. In December 2002, the Forest Service announced that it had reviewed those revisions and found them ripe for change. According to the agency, the review “affirmed much of the
2000 rule and the underlying concepts of sustainability, monitoring, evaluation, collaboration, and use of science.”

But the review also convinced the agency that the Clinton rules were neither straightforward nor easy to implement, that they did not clarify the programmatic nature of the planning process, that they lacked flexibility, and that they failed to recognize the limits of agency personnel and budgets. The review raised doubts as to whether the Forest Service could achieve the ecological, social, and economic sustainability standards established in the planning rule.

In explaining its 2002 proposal, the Forest Service characterized as “fundamental to programmatic planning” the premise that LRMPs are “permissive; that is, they allow, but do not mandate, certain activities to take place within the plan area.” As a result, the Forest Service took the position that “plans themselves generally are not actions that significantly affect the quality of the human environment, nor do they dictate site-specific actions.”

Henceforth, most detailed environmental analysis under NEPA would be conducted at the site-specific project level because analysis at the planning stage is “generally too speculative to be useful for project analysis.” Indeed, under the proposed rules, LRMPs can be excluded altogether from NEPA analysis if a categorical exclusion is applicable and no extraordinary circumstances exist. The agency also explained that it crafted the 2002 proposal with a different approach to sustainability than the approach reflected in the 2000 rules. The Forest Service proposed to view sustainability “as a single objective with interdependent social, economic, and ecological components. In contrast to the 2000 rule, this concept of sustainability is linked more closely to the MUSYA in that economic and social components are treated as interdependent with ecological aspects of sustainability, rather than as secondary considerations.”

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185 Id. at 72,770; see also id. at 72,771 (stating that “[t]he general goals of the 2000 rule are laudable” and that the emphasis on sustainability was “[a] major improvement . . . which assists the Forest Service in providing for multiple uses over time”); id. at 72,774–75 (affirming that “the health of the land and sustaining its resources within the authority granted by MUSYA [is] the overall goal for managing the National Forest system”).

186 Id. at 72,770–71.

187 Id. at 72,772.

188 Id. at 72,774.

189 Id.

190 Id. at 72,775. The Federal Register notice states,

The proposed rule requires plans to provide substantial baseline data and trend analysis, which can include the description of direct, indirect, and cumulative effects information at a broad scale appropriate to planning, while requiring more detailed fine-scale NEPA analysis, including the description of direct, indirect, and cumulative effects, to be conducted when a site-specific action at the project level is proposed to implement the plan. Experience has shown that site-specific NEPA analysis, based upon more general plan-level analysis, provides a more timely and accurate assessment of the effects of Forest Service management actions than could otherwise be projected under more hypothetical reasoning in more detailed NEPA analysis at the plan level.

191 Id. at 72,778.

192 Id. at 72,783. The Forest Service insisted that “[t]his change in emphasis is not intended to
The 2002 proposal specifically addresses roadless areas. It provides that, unless otherwise provided by law, the Forest Service must evaluate inventoried roadless areas and consider recommending them as potential wilderness areas during LRMP development or revision. The evaluation includes validation of the maps of inventoried roadless areas or adjustments as necessary and appropriate. The proposal also allows the Forest Service to evaluate these areas at other times “as determined appropriate.”

According to one observer, the proposed planning regulations “may obviate the need for a separate Roadless Rule by . . . returning roadless area management to the forest-by-forest planning process.” The proposed regulations presume that all National Forest System lands—including roadless areas—are “potentially suitable for a variety of uses—including commercial timber harvest—unless a plan excludes them as not suited for one or more uses.”

4. Summary of the Bush Administration’s Approach

It is too early to assess the full impact of the Bush Administration’s approach to the management of roadless areas in the national forests. Most of the Administration’s initiatives have not yet reached fruition. The Forest Service has issued a proposed rule that would establish a process for determining management requirements for inventoried roadless areas. While the proposal provides a clear indication of the direction in which the Bush Administration intends to take roadless area management, it is nevertheless still just in the proposal stage. The agency also has proposed amendments to the Forest Service planning process, but they are not yet final either. At the same time, the likely direction of these initiatives is not a complete mystery. The “principles” enunciated by the Secretary of Agriculture for the management of roadless areas emphasize local decision making through the forest planning process rather than resolution of the roadless area controversy through promulgation of a single, uniform, national standard.

Likewise, the proposed roadless area management rule is designed to “allow for the recognition of local situations and resolution of unique resource

downplay the importance of ecological sustainability or of maintaining the health and productivity of the land.” *Id.*

193 The proposal would change the definition of inventoried roadless areas by removing the reference to the maps contained in the May 2000 draft EIS prepared by the Forest Service. The new definition would provide that inventoried roadless areas are those “identified in a set of inventoried roadless area maps, contained in Forest Service records, or any subsequent update or revision of those maps.” *Id.* at 72,805. *Compare id. with 36 C.F.R. § 219.36 (2003) (providing that inventoried roadless area maps were those contained in the May 2000 draft EIS proposed by the Forest Service).*


195 *Id.* at 72,802.

196 *Id.*

197 Baldwin, *supra* note 11, at 42.

198 *Id.*

management challenges within a specific State." The same principles appear to place a priority on the protection of forest resources from natural disasters instead of from human activities such as road construction and timber harvesting. They also arguably stress protection of private property more than they do protection of valuable ecological resources.

The proposed planning rules trumpet sustainability as the overall goal for managing the National Forest System, but that goal does not appear to be a featured component of the Bush Administration’s efforts to develop an approach to roadless area management. Moreover, even when the Forest Service committed itself to promoting sustainability, it placed more emphasis on the economic and social components of that concept than did the Service during the Clinton Administration. The Clinton planning rules defined sustainability as “composed of interdependent ecological, social, and economic elements [ embodying] the principles of multiple-use and sustained-yield without impairment to the productivity of the land.” Those rules, however, explicitly declared long-term ecological sustainability as the first priority of planning and management of the national forests, because “it is essential that uses of today do not impair the functioning of ecological processes and the ability of these natural resources to contribute to sustainability in the future.” The proposed Bush planning rules elevate the economic and social components of sustainability from their former “secondary” status to co-equal status with ecological sustainability.

In contrast to the Forest Service under the Clinton Administration, the Bush Administration’s Forest Service also seems committed to reducing reliance on environmental assessments under NEPA. The interim directive on management of the national forest transportation system, for example, relieved the Forest Service of the responsibility of preparing an EIS for some road management activities proposed in inventoried roadless areas. In addition, the proposed planning rules appear to downplay the need for environmental evaluation at the plan development stage.

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202 See id.
205 Id. § 219.2. One court has characterized this statement as reflecting a change in the mission of the Forest Service from “multiple use” management to “ecological sustainability” management. Wyoming, 277 F. Supp. 2d 1197, 1211 (D. Wyo. 2003).
206 See 67 Fed. Reg. at 72,783; see also Carter et al., supra note 18, at 10,967 (indicating that the Bush proposal rejects the principle that ecological sustainability should be made “the cornerstone of forest management by eliminating the priority given to ecological sustainability in the 2000 regulations”).
208 See 67 Fed. Reg. at 72,775, 72,778; see also supra notes 174–77 and accompanying text. More generally, the planning rules proposed by the Bush administration “significantly scale back on substantive and procedural forest planning requirements.” Richard J. Lazarus, A Different
Indeed, the Forest Service concluded that it need not comply with NEPA procedures in connection with its issuance of the July 2004 proposed rule on roadless area management. The replacement of the Clinton Roadless Rule with the proposed state petition process obviously has the potential to result in significantly more road construction and timber harvesting in roadless areas. Yet the Forest Service has asserted that the proposed rule is “merely procedural” in nature and scope and thus has no direct, indirect, or cumulative effect on the environment.\textsuperscript{209} In addition, the agency invoked a categorical exclusion contained in the Forest Service Handbook for rules establishing Service-wide administrative procedures.\textsuperscript{210} The agency noted that it would fully consider under NEPA the environmental effects of any rulemaking initiated in response to a state petition.\textsuperscript{211} That promise, however, is far from reassuring, because it does not address the need for evaluation of the environmental impacts of the adoption of the proposed rule itself. The agency has committed to undertaking a NEPA evaluation before considering whether to impose further restrictions on the development of roadless areas, but it has not made a similar commitment to analyzing the proposed rule’s removal of restrictions on road construction and timber harvesting. If a state does not file a petition within the 18-month time frame allowed by the proposal, the protections afforded by the Roadless Rule for roadless areas within the state will have been removed without any NEPA analysis.

Finally, in one of the relatively few “final”\textsuperscript{212} decisions concerning roadless area management taken by the Forest Service since the Bush Administration took office, the agency reversed the Clinton Forest Service’s decision to subject the Tongass National Forest to the Roadless Rule, albeit on a deferred basis.\textsuperscript{213} The agency deemed the Roadless Rule’s protective provisions unnecessary with respect to the Tongass and placed a higher priority on avoiding socio-economic loss to local communities than on protecting the long-term ecological benefits that the Roadless Rule would have provided.\textsuperscript{214}

\textsuperscript{210} Id.
\textsuperscript{211} Id. It is not clear whether the Forest Service has committed to undertaking a NEPA evaluation if the Secretary decides to deny a state’s petition, or only if the Secretary decides to grant a petition and initiate rulemaking to impose management restrictions recommended by the state. If the agency does not undertake an evaluation of the environmental impacts of denial of a state’s petition, it would again avoid considering the potential adverse environmental consequences of removing the restrictions on road construction and timber harvesting contained in the Roadless Rule.
\textsuperscript{212} The Forest Service issued a final rule in December 2003 that temporarily exempted the Tongass National Forest from the prohibitions on road construction and timber harvesting in inventoried roadless areas. See supra notes 160–67 and accompanying text.
\textsuperscript{213} See supra Part III.B.1.b.
\textsuperscript{214} See supra notes 159–60 and accompanying text.
IV. LEGAL CONSTRAINTS ON MANAGEMENT OF ROADLESS AREAS IN THE NATIONAL FORESTS

The Clinton approach and the Bush approach to the management of roadless areas (to the extent the Bush Administration has formulated one) differ in significant respects. Until the Forest Service completes its efforts to amend the Roadless Rule and the planning regulations, aspects of the Clinton approach remain in effect. But the Clinton initiatives concerning roadless area management may be halted not only by regulatory amendments, but also by court decree. This Part discusses the legality of the Roadless Rule in light of the judicial challenges brought against it. It next addresses the legality of the Forest Service’s efforts to change the direction of these initiatives under the Bush Administration. Finally, it assesses the relative merits of the two approaches as a matter of federal land management policy.

A. The Legality of the Clinton Roadless Rule

The statutes that govern the Forest Service’s administration of the National Forest System, including MUSYA and NFMA, afford the agency considerable discretion to authorize one or more designated multiple uses when and where the agency decides they are appropriate. But, the agency’s discretion is not unconstrained. In pursuing initiatives that have the potential to cause significant adverse environmental effects, the Forest Service must engage in environmental assessment in accordance with NEPA. Shortly after adoption of the Roadless Rule, plaintiffs filed a series of lawsuits against the Forest Service, charging the agency with violating its NEPA obligations. In addition, in at least one lawsuit the plaintiffs alleged that the Roadless Rule’s prohibition on road construction and timber harvesting amounted to the designation of “de facto” wilderness areas, in violation of the Wilderness Act’s reservation to Congress of exclusive authority to designate wilderness areas. The two courts that published decisions in these lawsuits came to partially conflicting conclusions. One held that the Forest Service conformed to NEPA in promulgating the Roadless Rule, while another concluded that the agency violated not only NEPA, but also the Wilderness Act.

1. NEPA Issues

a. The Ninth Circuit Litigation

The legality of the Roadless Rule was at issue even before it was published in the Federal Register. A few days before publication, the

216 Kootenai Tribe, 313 F.3d 1094, 1116 (9th Cir. 2002).
218 The Forest Service issued its Record of Decision on the Roadless Rule on January 5, 2001,
Kootenai Tribe of Idaho, a timber company, motorized recreation groups, livestock companies, and two Idaho counties filed suit in federal district court in Idaho\(^{219}\) alleging that the Roadless Rule violated NEPA, NFMA, and the Administrative Procedure Act (APA)\(^{220}\). After several environmental groups intervened as defendants,\(^{221}\) the district court granted the plaintiffs’ motion for preliminary injunction against implementation of the Roadless Rule.\(^{222}\) Although the government did not appeal, the environmental intervenors did.\(^{223}\)

The Court of Appeals inquired whether the district court abused its discretion in concluding that the plaintiffs showed probable success on the merits of their NEPA claim. By a 2–1 vote, the court concluded that the district court did abuse its discretion. The first ground for the district court’s preliminary injunction was its finding that the Forest Service did not allow sufficient public participation in the environmental assessment process. The Ninth Circuit disagreed, concluding that the agency provided the public with extensive relevant information. The district court faulted the Forest Service for failing to provide detailed maps or descriptions of potentially affected areas during the scoping and draft EIS comment period, thereby denying the public appropriate access to information necessary for meaningful even though the Rule itself was not published in the Federal Register until a week later. Kootenai Tribe, 313 F.3d at 1105; Wyoming, 277 F. Supp. 2d at 1210.

\(^{219}\) Kootenai Tribe, 313 F.3d at 1104.


\(^{221}\) Kootenai Tribe, 313 F.3d at 1106 & n.5. When Idaho sued to enjoin implementation of the Roadless Rule, the Bush Administration did not defend the Rule. Instead, it asked the court to postpone ruling on a motion for a preliminary injunction until it had an opportunity to complete a full review of the Rule. Indeed, the Department of Agriculture told the district court that it “shares plaintiff’s concerns about the potential for irreparable harm in the long-term under the current rule.” Carter et al., supra note 18, at 10,972 (quoting Idaho v. United States Forest Serv., No. 01-CV-11, 2001 U.S. Dist. LEXIS 21990, at *1 (D. Idaho Apr. 5, 2001)). Cf. Mendelson, supra note 54, at 625 (stating that the government “was less than enthusiastic in defending the rule before the district court”). When the district court issued a preliminary injunction to prevent implementation of the Roadless Rule and the portions of the planning rule related to management of roadless areas, 36 C.F.R. § 219.9(b)(8) (2003), the United States chose not to appeal. The intervenors did appeal. Baldwin, supra note 11, at 33–34. The Forest Service’s failure to defend the Roadless Rule in court after the 2000 election “reportedly prompted the resignation of both the Chief and Deputy Chief of the Forest Service.” Lazarus, supra note 208, at 1099. For a discussion of how the Bush Administration “changed the course of public land law by responding (or not responding) to a series of lawsuits brought by commodity interest groups against Clinton Administration policy initiatives,” see Michael C. Blumm, The Bush Administration’s Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Land,” 34 Envtl. L. Rep. (Envtl. L. Inst.) 10,397 (2004). The Roadless Rule litigation is discussed id at 10,398–10,403.

\(^{222}\) Kootenai Tribe; 313 F.3d at 1104.

\(^{223}\) Id at 1107. The Ninth Circuit held that the intervenors had standing to appeal the preliminary injunction, id at 1110, and that the district court did not abuse its discretion in granting permissive intervention, id at 1111. The court also held that the plaintiffs had standing to bring the suit in the district court. Id. at 1114. In another threshold ruling, the Court of Appeals held that NEPA applied to the promulgation of the Roadless Rule because the reduction in human intervention that would result from the Roadless Rule would alter the environmental status quo and the Roadless Rule therefore would have a demonstrable impact on the physical environment. Id. at 1115.
participation in the NEPA process. According to the Court of Appeals, however, the Forest Service provided maps of the affected areas before issuing the draft EIS, and the location of the affected areas was reasonably known to the plaintiffs as a result of years of discussions between the plaintiffs and the Forest Service concerning roadless areas. The failure to provide maps during the scoping period therefore was not determinative.

The district court also found problematic the Forest Service’s identification of an additional 4.2 million acres of previously unidentified inventoried roadless areas between publication of the draft EIS and release of the final EIS. The Ninth Circuit pointed out, however, that the public had a right to comment between publication of the final EIS and promulgation of the final Roadless Rule. Moreover, this defect at most justified enjoining application of the Roadless Rule to the 4.2 million acres, whereas the district court enjoined implementation of the entire Rule.

The district court found it unreasonable for the Forest Service to allow only 69 days for submission of comments on the draft EIS, and characterized this action as “an obvious violation of NEPA.” The appellate court concluded, however, that the Forest Service complied with NEPA regulations, which require a minimum of 45 days for public comment. The district court provided no judicially manageable standard for determining how many days beyond the minimum would be sufficient, and its conclusion that the public was deprived of “meaningful dialogue or input” was contradicted by a record showing that the Forest Service held more than 400 public meetings and received more than a million written comments on the Roadless Rule. The district court’s invalidation of the Roadless Rule on the ground of lack of meaningful participation in the NEPA process, when the Forest Service had provided substantially more time for comment than the regulations require, was “unprecedented.”

The second basis for the district court’s preliminary injunction was its conclusion that the Forest Service failed to consider a reasonable range of alternatives to the Roadless Rule. The district court took issue with the agency’s decision to limit itself to considering three alternatives, all of which included a total ban on road construction within roadless areas. The Ninth

\[224\] Id. at 1116.
\[225\] Id. at 1117.
\[226\] Id. at 1118.
\[227\] Id.; see also Dalling, supra note 22, at 407–08 (arguing that two 60-day comment and scoping periods for a rulemaking “that severely restricts traditional multiple use on more than a third of Forest Service lands [is] an inadequate time period to allow serious and effective public consideration of the proposed rule”).
\[228\] Kootenai Tribe, 313 F.3d at 1118 (citing 40 C.F.R. § 1506.10(c) (2003)).
\[229\] In addition, the agency distributed 50,000 copies of the draft EIS and 43,000 copies of the final EIS to the public, sent these documents to more than 10,000 public libraries, and posted copies on its website. Id. at 1119.
\[230\] Id.
\[231\] These alternatives included prohibiting road construction and reconstruction and allowing timber harvesting; prohibiting road construction and reconstruction and timber harvesting, except for “stewardship purposes” such as disease, insect, and fire prevention; and prohibiting road construction and reconstruction and all timber harvesting. Id. at 1120.
Circuit, however, held that the Forest Service satisfied its statutory obligation to consider alternatives to the proposed action. The court asserted that “[t]he NEPA alternatives requirement must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment, rather than to harm it.” The Forest Service was nevertheless bound to consider an appropriate range of alternatives because, according to the plaintiffs, the Roadless Rule could harm the environment by barring the development of roads useful for fighting fires, insects, or other hazards. The district court concluded that the Forest Service should have analyzed alternatives that did not entail a near-total prohibition on road construction in inventoried roadless areas.

The Court of Appeals accepted the intervenors’ argument that consideration of any alternatives that allowed road construction other than for “stewardship” purposes would have been inconsistent with the agency’s objective in promulgating the Roadless Rule. That objective was to prohibit activities likely to degrade the desirable characteristics of roadless areas, including undisturbed landscapes, clean water, biological diversity, and protection against invasive species. In addition to these “compelling environmental, conservation and wilderness values,” the Forest Service issued the Roadless Rule as a means of ensuring that adequate funds would be available to keep existing roads safe. Road construction would be inimical to these goals, and NEPA did not require the Forest Service to consider alternatives inconsistent with the agency’s basic policy objectives. According to the Ninth Circuit, “it would turn NEPA on its head to interpret the statute to require that the Forest Service conduct in-depth analyses of environmentally damaging alternatives that are inconsistent with the Forest Service’s conservation policy objectives.” In short, the Forest Service’s

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233 Kootenai Tribe, 313 F.3d at 1120. A federal district court in Wyoming, whose decisions concerning the Roadless Rule are discussed infra Part IV.A.1.b, seemed to regard this point as “a significant departure from Supreme Court NEPA precedent.” Wyoming, 277 F. Supp. 2d 1197, 1203 n.1 (D. Wyo. 2003). But the only case the district court cited was Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–51 (1989), which, according to the district court, stands for the proposition that NEPA lacks substantive components. Wyoming, 277 F. Supp. 2d at 1203 n.1. The Ninth Circuit’s decision does not inject substantive content into NEPA. Instead, it represents the view that NEPA’s procedural obligations may differ depending upon whether compliance with the statutory procedures would promote or thwart NEPA’s goals. It is hard to dispute that NEPA has substantive goals, even if it seeks to achieve them through purely procedural means. See 42 U.S.C. § 4321 (2000) (stating that the purposes of NEPA include the promotion of efforts to prevent or eliminate damage to the environment); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 538 (1978) (stating that NEPA “established significant substantive goals for the Nation”).

234 ibid.
235 Kootenai Tribe, 313 F.3d at 1120.
236 ibid.
conclusion that only a near-total ban on road construction in roadless areas would promote its goals was reasonable.\textsuperscript{238}

Finally, the Court of Appeals overturned the district court’s conclusion that the Forest Service did not sufficiently evaluate the cumulative effects of the Roadless Rule and the potential mitigating measures. The cumulative effects were too speculative to be susceptible to in-depth analysis, and the Forest Service adequately considered the potential ills of the adoption of the Roadless Rule. The district court therefore erred in holding that there was a strong likelihood that the plaintiffs would prevail on their NEPA claims.\textsuperscript{239}

One judge dissented from the majority’s reversal of the preliminary injunction. Among the “more egregious deficiencies” cited by that judge was the Forest Service’s failure to consider the alternative of not banning road construction and repair.\textsuperscript{240} Despite the majority’s conclusion to the contrary, there were many alternatives to the ban that still would have met the agency’s objectives, including allowing road construction with limits on density or limiting the kinds of vehicles allowed on the roads.\textsuperscript{241} The dissenting judge took particular issue with the majority’s assertion that NEPA applies less stringently when the primary purpose of the proposed action is to protect the environment: “No citation of authority for this proposition is provided. It makes no sense.”\textsuperscript{242} Congress established the national forests to supply timber and protect water, not to preserve natural environments. Moreover, the Roadless Rule would not necessarily protect the forests because, according to the plaintiffs, “roadlessness may promote forest fires, insect infestation, and disease.”\textsuperscript{243} In addition, the dissenting judge concluded that the majority should have deferred to the district court’s finding that the Forest Service provided an inadequate opportunity for comment. Instead, the majority put its stamp of approval on the Forest Service’s attempt to make a “massive management change . . . on the eve of an election, and [to] shove[ ] it through without the ‘hard look’ NEPA required.”\textsuperscript{244}

\textsuperscript{238} Id. at 1123.
\textsuperscript{239} Id. The court also took issue with the district court’s assessment of irreparable injury and the balance of hardships. Id. at 1124–26.
\textsuperscript{240} Id. at 1128 (Kleinfeld, J., concurring in part and dissenting in part).
\textsuperscript{241} Id. at 1128–29 (Kleinfeld, J., concurring in part and dissenting in part).
\textsuperscript{242} Id. at 1129 (Kleinfeld, J., concurring in part and dissenting in part).
\textsuperscript{243} Id.
\textsuperscript{244} Id. at 1130 (Kleinfeld, J., concurring in part and dissenting in part). That characterization is hard to square with the facts. President Clinton ordered the Forest Service to initiate efforts to protect roadless areas in October 1999, more than a year before the 2000 presidential elections. The Forest Service issued the proposed Roadless Rule in May 2000, about six months before the election. See Mendelson, supra note 54, at 628 (discussing the “long lead time” of the Roadless Rule). Professor Mendelson contends that policy making at the end of a presidential term may be beneficial if it increases the democratic and participatory quality of agency decision making, contributes to an internal agency dialogue, or increases agency accountability. Id. at 629–35, 641–57.
b. The Tenth Circuit Litigation

A second challenge to the Roadless Rule was litigated in federal district court in Wyoming v. United States Department of Agriculture.\footnote{245} The suit was brought by Wyoming against the Secretary of Agriculture and the Chief of the Forest Service.\footnote{246} As in the Ninth Circuit litigation, environmental groups intervened on the side of the federal government.\footnote{247} Wyoming argued that the Roadless Rule violated both NEPA and the Wilderness Act.\footnote{248}

Wyoming alleged six different violations of NEPA.\footnote{249} First, the state claimed that the Forest Service’s rush to finish the Roadless Rule before the end of the Clinton Administration resulted in violations of various NEPA procedures. For example, Wyoming argued that the information the Forest Service provided to the public during scoping and development of the EIS was inadequate. In particular, Wyoming professed ignorance of the location of the alleged roadless areas because the Forest Service did not provide any maps until the end of the scoping period. The district court agreed that the affected states could not meaningfully participate in the EIS development process without knowing which roadless areas the Rule covered. For this reason, it deemed the Forest Service’s refusal to extend the scoping period arbitrary and capricious.\footnote{250}

Second, Wyoming asserted that the Forest Service acted improperly by denying the state cooperating-agency status.\footnote{251} The court agreed that the Forest Service, as the lead agency,\footnote{252} had the discretion to grant or deny cooperating-agency status to a state. However, it found that the agency acted arbitrarily by refusing that status to Wyoming and nine other states affected

\footnote{245} 277 F. Supp. 2d 1197 (D. Wyo. 2003). The court found Wyoming’s challenge to the 2000 planning regulations not to be ripe for review because those regulations were “not currently in effect,” id. at 1211, and were in the process of being revised, id. at 1213. Similarly, the court found challenges to the Clinton Forest Service’s road management rule and transportation policy not to be ripe. Id. at 1213–14.

\footnote{246} The district court found that Wyoming had standing to sue. Id. at 1214–17.

\footnote{247} Id. at 1203.

\footnote{248} Wyoming also argued that the Roadless Rule violated NFMA; MUSYA; the Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, 98 Stat. 2807; the National Historic Preservation Act, 16 U.S.C. §§ 470–470x-6 (2000); and the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2000). The court found that the state waived its claims under the last three of these statutes because it failed to cite any authority in support of those claims in its opening brief. Wyoming did not waive its NFMA or MUSYA claims, but the court found it unnecessary to decide whether the Roadless Rule violated those statutes in light of its holdings that the Rule violated NEPA and the Wilderness Act. Wyoming, 277 F. Supp. 2d at 1237. This Article does not explore the validity of the Roadless Rule under any of the above statutes other than NEPA and the Wilderness Act. The application of the Wilderness Act to the Roadless Rule is discussed infra Part IV.A.2.a–b.

\footnote{249} The court ruled against the state on one of these allegations, finding that the Forest Service did not fail to conduct a detailed site-specific analysis of every forest affected by the Roadless Rule, despite characterizing the state’s claim as “compelling.” Wyoming, 277 F. Supp. 2d at 1227.

\footnote{250} Id. at 1219–20.

\footnote{251} NEPA regulations emphasize agency cooperation early in the NEPA process. 40 C.F.R. § 1501.6 (2003). States may become cooperating agencies with the agreement of the lead agency. Id. § 1508.5.

\footnote{252} The lead agency is the one with primary responsibility for preparing the EIS. Id. § 1508.16.
by the Roadless Rule. According to the court, the Forest Service never explained why it denied cooperating-agency status to states containing 92 percent of the inventoried roadless areas. In addition, the court found that the difficulties of coordinating with ten states would not have been insurmountable.253

Third, like the plaintiffs in the Ninth Circuit litigation, Wyoming charged that the Forest Service failed to consider a reasonable range of alternatives.254 The agency explained that it would consider only alternatives that eliminated road construction and timber harvesting in roadless areas because those activities occur on a national scale, are likely to alter landscapes, often cause landscape fragmentation, and often result in irreversible, long-term loss of roadless characteristics. It eliminated all other alternatives because they did not meet the objective of immediately stopping activities that result in the degradation of roadless areas. The three action alternatives the Forest Service considered differed only with respect to the degree of restrictions placed on timber harvesting.255 The court found the agency’s approach insufficient for several reasons. The court regarded the alternatives considered by the Forest Service as boiling down to two: prohibiting road construction and timber harvesting altogether and prohibiting those activities except for harvesting for “stewardship purposes.”256 Two options were not enough because “[t]he number of alternatives an agency must consider . . . [is] directly proportional to the scope and nature of the proposed action,”257 and the Roadless Rule was “the most significant land conservation initiative in nearly a century.”258

In addition, the court found that the Forest Service did not include appropriate mitigation measures in the alternatives it did consider.259 The court also found fault with the Forest Service’s elimination of some alternatives on the basis that they were covered by the Roadless Rule’s procedural aspects—procedures that the Forest Service subsequently eliminated without reconsidering the “covered” alternatives.260 The court premised its holding that the Forest Service failed to consider a reasonable

253 Wyoming, 277 F. Supp. 2d at 1221.
254 Id. at 1222–26.
255 Id. at 1223–24. The Forest Service also considered the “no action” alternative, as required by the Council on Environmental Quality (CEQ) regulations, 40 C.F.R. § 1502.14(d) (2003), but the court said it did not consider it as a “viable alternative.” Wyoming, 277 F. Supp. 2d at 1224.
256 Wyoming, 277 F. Supp. 2d at 1224. For a description of these stewardship purposes, see supra notes 71–72.
257 Wyoming, 277 F. Supp. 2d at 1224.
258 Id.
259 Id. at 1224–25. The CEQ regulations require agencies to “[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives.” 40 C.F.R. § 1502.14(d) (2003); see also id. § 1502.16(h) (requiring inclusion of a “means to mitigate environmental impacts”).
260 The procedural aspect eliminated was the goal of ensuring identification and evaluation of ecological and social characteristics of roadless areas through local forest planning. The court found that the Forest Service improperly eliminated alternatives (like mineral withdrawal exemptions) that could have been evaluated through the planning process. Wyoming, 277 F. Supp. 2d at 1225.
range of alternatives on the agency’s reliance on the “conclusory premise” that any road construction would degrade the desirable characteristics of inventoried roadless areas, in violation of the purpose of the Roadless Rule.\textsuperscript{261} According to the court, the Forest Service narrowly defined the scope of the Roadless Rule “to satisfy a predetermined directive by [Forest Service] Chief Dombeck, which eliminated competing alternatives out of consideration and existence.”\textsuperscript{262} The Forest Service had eliminated road construction by the day after President Clinton issued his October 1999 directive, thereby failing to consider reasonable alternatives that entailed road construction.\textsuperscript{263}

Fourth, the court held that the Forest Service failed to engage in adequate consideration of the cumulative effects of the Roadless Rule, the road management rule, and the transportation policy. The agency found that the combined effects of these actions would create additional acres of unroaded areas, but the court regarded this finding as unhelpful. Although the agency sought to issue these rules in an integrated manner and in close proximity, “it never informed the American public of the cumulative effects of these rules, or even how the rules operated together.”\textsuperscript{264}

Finally, the court found that the Forest Service violated NEPA by failing to issue a supplemental EIS despite having made four substantial changes between the draft and final EIS: the elimination of the “procedural aspects” of the Roadless Rule by moving them into the planning regulations; a broadening of the scope of the Roadless Rule to include areas with classified roads within inventoried roadless areas; the identification of an additional 4.2 million acres of roadless areas subject to the Roadless Rule; and a substantial change in the type of timber harvesting allowed by the Roadless Rule (by limiting the “stewardship exception” to the prohibition on harvesting to small diameter timber).\textsuperscript{265} Each of these changes was substantial because each directly affected the scope and purpose of the Roadless Rule. The agency should have prepared a supplemental EIS but chose not to do so.\textsuperscript{266} Based on these violations of NEPA, as well as other Wilderness Act violations,\textsuperscript{267} the court permanently enjoined implementation of the Roadless Rule.\textsuperscript{268}

\textsuperscript{261} Id.
\textsuperscript{262} Id. at 1226.
\textsuperscript{263} Id.
\textsuperscript{264} Id. at 1229.
\textsuperscript{265} Id. at 1230.
\textsuperscript{266} The CEQ regulations require supplementation if the agency makes substantial changes in the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1) (2003).
\textsuperscript{267} See infra Part IV.A.2.a.
\textsuperscript{268} Wyoming, 277 F. Supp. 2d at 1237–39. The government decided not to appeal the district court’s decision. Environmental intervenors appealed to the Tenth Circuit, but the United States filed an amicus brief arguing that the intervenors lacked standing to appeal an adverse district court judgment invalidating a discretionary decision and that the Court of Appeals lacked jurisdiction under 28 U.S.C. § 1291 because the intervenors were not aggrieved by the district court’s decision. Brief of the United States as Amicus Curiae in Support of Appellee’s Motion to

c. NEPA and the Roadless Rule

While the Ninth Circuit held that the Forest Service fully complied with NEPA in its promulgation of the Roadless Rule, the Wyoming district court found several deficiencies in the agency’s efforts to comply with NEPA. Neither the facts contained in the administrative record nor the law support the conclusion that the Forest Service violated NEPA.

The Wyoming district court held that the information the Forest Service provided to the public during the scoping period and development of the Roadless Rule EIS was inadequate to comply with NEPA. But, two observers have characterized the hearings conducted by the Forest Service in promulgating the Roadless Rule as “exhaustive.”269 According to the Wyoming district court, at least one of the states that the court perceived as shut out of the NEPA process officially agrees with this characterization: The Montana Attorney General, in contesting the district court’s finding that the process the Forest Service followed in issuing the Roadless Rule was inadequate, took the position that the Forest Service “went well beyond its statutory duty to involve the public in development of roadless area protections.”270

The Forest Service went to great lengths to solicit public input throughout the development of the Roadless Rule, beginning at the scoping stage. The Forest Service held ten public scoping meetings in Montana—one for each national forest in the state—thereby encouraging public participation at the earliest stage of the NEPA process.271 Similarly, the agency convened seven public scoping meetings in Wyoming at locations throughout the state.272 The Forest Service held more than 400 public meetings nationwide after issuing the draft EIS—including 34 in Montana273 and 19 in Wyoming.274 The agency held at least one meeting in every national forest in Montana and two in each forest containing affected roadless areas.275 Nationwide, the agency received about 1.2 million written public comments on the draft Roadless Rule and the draft EIS, 96 percent of which

269 DiPeso & Pelikan, supra note 21, at 372.
275 Brief of Appellants at 11, Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002) (Nos. 01-35072, 01-35476), 2001 WL 34005160.
either supported the Roadless Rule or supported an even more protective approach. 276

The two district courts found troubling three particular defects in the NEPA process for the Roadless Rule. First, the Idaho district court, whose decision was later overturned by the Ninth Circuit, based its conclusion that the NEPA process for the Roadless Rule was inadequate on the Forest Service’s failure to make maps of the affected roadless areas available to the public. 277 The Wyoming district court took the same approach. 278 In fact, the Forest Service displayed maps of the affected roadless areas during scoping meetings. 279 It also released detailed maps of inventoried roadless areas before issuing the draft EIS, as a separate volume of the EIS, and on its Roadless Rule website. Finally, the states involved had actual notice as a result of previous contacts with the Forest Service. 280

Second, the Idaho district court regarded the 69-day period for submission of comments on the draft EIS to be inadequate. 281 The Ninth Circuit, however, came to a contrary conclusion, noting that the Forest Service provided more than 50 percent more time for comments than required by NEPA regulations. 282 The Ninth Circuit also observed that courts lack the authority to impose on agencies procedural obligations exceeding those contained in applicable laws. 283

Third, the Wyoming district court characterized the Forest Service’s failure to grant the states containing most of the inventoried roadless areas

276 Id. at 11–12.
277 See Kootenai Tribe, 313 F.3d 1094, 1116 (9th Cir. 2002) (noting the Forest Service obligation “to afford ‘interested persons an opportunity to participate in the rule making’”).
280 Kootenai Tribe, 313 F.3d at 1117; see also Brief of Appellants at 35, Kootenai Tribe (Nos. 01-35072, 01-35476) (explaining compliance steps the Forest Service took during the EIS process).
281 Kootenai Tribe, 313 F.3d at 1118.
282 Id.; see 40 C.F.R. § 1506.10(c) (2003) (requiring not less than 45 days for comments on a draft EIS). The Forest Service also afforded the public 60 days for the submission of comments during the scoping period. Federal Defendants’ Brief in Response to the State of Wyoming’s Brief for Declaratory and Injunctive Relief at 48, Wyoming (No. 01-CV-8608).
283 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 548 (1978) (concerning procedural obligations derived from the Administrative Procedure Act); see also Alabama ex rel. Siegelman v. United States Envtl. Prot. Agency, 911 F.2d 489, 506 (11th Cir. 1990) (holding that the agency provided more time for public comment than required by regulation, and therefore provided meaningful opportunity for public participation); County of Del Norte v. United States, 732 F.2d 1462, 1465 (9th Cir. 1984) (rejecting allegations of NEPA noncompliance where agency allowed more time for public comment on draft EIS than CEQ regulations required); Conn. Light & Power Co. v. Nuclear Regulatory Comm’n, 673 F.2d 525, 534 (D.C. Cir. 1982) (refusing to require longer public comment period than the APA required, even though a longer period might have been helpful due to technical complexity of regulations).
cooperating-agency status as arbitrary. NEPA does not refer to cooperating agencies. It simply requires that the “responsible” federal official “consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.” Assuming states such as Wyoming had “jurisdiction by law or special expertise” concerning the subject matter of the Roadless Rule, the issue is whether the Forest Service complied with its statutory obligation to consult with and obtain the comments of the states. The statute does not address whether a lead agency must designate another agency with jurisdiction or expertise as a cooperating agency or can instead resort to some other, less formal consultation process.

In concluding that the Forest Service’s failure to designate Wyoming as a cooperating agency was arbitrary and capricious, the district court cited the NEPA regulations dealing with cooperating agencies. As the court acknowledged, those regulations vest in the lead agency the discretion to designate or refrain from designating cooperating agencies. The court found that the Forest Service abused that discretion by failing to respond to the state’s request that it be afforded cooperating-agency status. But the Forest Service did invite the participation of the affected states, albeit not as cooperating agencies. The record indicates that the Forest Service consulted with the states. The district court made reference, in a footnote, to the Forest Service’s invitation to Wyoming and other members of the Western Governors Association to solicit and synthesize information and act as a liaison between the states and the Forest Service—an invitation the court deemed inadequate. The court did not mention other measures the Forest Service took to facilitate state input, including the appointment of a Forest Service liaison with the states, the provision of an opportunity for the states to help the Forest Service identify fora for public participation, and the decision to volunteer to provide technical staff to help the states develop input on the draft EIS. Wyoming apparently never responded to these opportunities. The Wyoming district court did not cite a single case in which another court has second-guessed a lead agency’s refusal to afford cooperating-agency status to another agency.

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286 Wyoming, 277 F. Supp. 2d at 1221.
287 40 C.F.R. § 1501.6 (2003) (stating agencies shall become cooperating agencies "[u]pon request of the lead agency"). CEQ has indicated that “[w]here appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications." Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,030 (Mar. 23, 1981). CEQ did not indicate who is to determine whether designation of a cooperating agency is “appropriate,” and it did not require that the “cooperation” take the form of a designation of a state as a cooperating agency. See id.
288 Wyoming, 277 F. Supp. 2d at 1221.
289 Id. at 1221 n.25.
Forest Service abused its discretion in not designating Wyoming as a cooperating agency appears to be unprecedented. The district court accepted Wyoming’s characterization that the only possible reason for the Forest Service’s decision not to afford cooperating-agency status to Wyoming was the agency’s desire not to let state participation slow down its “mad dash to complete the Roadless Initiative before President Clinton left office.” Such speculation does not provide a solid basis for overturning an agency’s choice of procedures under a statute and regulations vesting in the lead agency the discretion to choose applicable procedures.

The Ninth Circuit and the Wyoming district court disagreed not only about the procedural propriety of the Forest Service’s NEPA compliance efforts, but also about the substantive validity of the Roadless Rule’s EIS. Unlike the Ninth Circuit, the Wyoming district court found the Forest Service’s discussion of alternatives to the Roadless Rule to be inadequate in that the agency only considered two alternatives—the one chosen and another authorizing limited timber cutting for “stewardship purposes.” It is well settled, however, that an agency need not consider alternatives inconsistent with the purpose of the proposal. As one court put it, the range of alternatives that must be considered derives from the EIS’s statement of purpose and need; “all that is required is that the agency consider all alternatives reasonably related to the purposes of the project.”

Any alternative that would have allowed significant road construction would have been inconsistent with the purpose of the Roadless Rule, which was to prevent activities most likely to degrade the desirable characteristics of inventoried roadless areas. Further, the alternatives considered by the

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292 Id. at 1221.
293 See Kootenai Tribe, 313 F.3d 1094, 1122–23 (9th Cir. 2002) (concluding that the Forest Service adequately considered alternatives consistent with NEPA’s purpose to protect and conserve natural areas).
294 Wyoming, 277 F. Supp. 2d at 1224.
295 See, e.g., Seattle Audubon Soc’y v. Moseley, 80 F.3d 1401, 1404–05 (9th Cir. 1996) (finding that the defendants fully evaluated a range of alternatives because “[a]n agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives”); Sokol v. Kennedy, 48 F. Supp. 2d 911, 918–19 (D. Neb. 1999) (concluding that the National Park Service did not have to consider alternative boundary designation for national scenic river that would have failed to provide the protection level demanded by the statute), rev’d on other grounds, 210 F.3d 876 (8th Cir. 2000).
296 City of Sausalito v. O’Neill, 211 F. Supp. 2d 1175, 1193 (N.D. Cal. 2002) (citing Laguna Greenbelt, Inc. v. United States Dept of Transp, 42 F.3d 517, 524 (9th Cir. 1994)), aff’d in relevant part, 2004 WL 2348385 (9th Cir. Oct. 20, 2004); see also Citizens’ Comm. to Save Our Canyon v. United States Forest Serv., 297 F.3d 1012, 1030 (10th Cir. 2002) (stating that an agency is only required to consider reasonable alternatives in light of identified objectives).
297 Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276, 30,277 (proposed May 10, 2000) (to be codified at 36 C.F.R. pt. 294); see also Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3290 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) (“The purpose and need for this proposed action is based on the premise that inventoried roadless areas have characteristics that should be conserved and maintained. Road construction, reconstruction, and timber harvesting are the activities most likely to harm the characteristics that the agency is seeking to protect.”); id. at 3263 (“First and foremost, the Department wants to ensure that inventoried roadless areas sustain their values for this and future generations.”); id. at 3266
agency were not limited to options that prohibited road building or timber harvesting. Instead, the draft EIS considered permitting roads in a variety of situations, including where roads were necessary to protect public health and safety, to respond to pollution, and to protect existing rights. The final EIS, in response to public comments on the draft, provided for additional exceptions from the ban on road construction, including an exception for roads providing access for mineral leasing. Similarly, the Forest Service considered alternatives that would not have restricted timber harvesting or that would only have prohibited harvesting for commodity purposes. The agency also explained why it rejected an alternative that would have allowed future discretionary mineral leasing in areas not already under mineral lease as of the date of adoption of the Roadless Rule.

The Forest Service did not fail to comply with its NEPA obligation to consider cumulative impacts. Despite the possibility of considering the effects of the Roadless Rule, proposed revisions to the NFMA planning process, and proposed changes to the agency’s transportation policy in separate documents based on the independent utility of each possible change, the Roadless Rule’s EIS discussed the cumulative impacts of all of these actions. More comprehensive discussion of the cumulative effects of these proposals was precluded by the inability to foresee exactly what impacts these broad-based policy initiatives would have. Contrary to the Wyoming district court’s conclusion that the Forest Service failed to inform the public of the manner in which the various proposals operated together, the Forest Service explained when it issued the final Roadless Rule that the Rule was consistent with other Forest Service rulemaking and policy efforts, including the planning rule, the road management policy, and

(stating that the agency’s goal was to “maintain[] the health and contributions of existing inventoried roadless areas by preserving the relatively undisturbed characteristics of those areas, thereby protecting watershed health and ecosystem integrity”).

299 See id. at 3266 (describing modifications to the environmentally preferred alternative to allow road construction for mineral leasing in areas under mineral lease as of the adoption of the Roadless Rule, timber harvesting where previous construction and harvesting have substantially altered roadless characteristics, and application of the prohibitions to the Tongass National Forest). Moreover, the Forest Service considered other options—including making inventoried roadless areas available for development at an earlier screening stage. Federal Defendants’ Brief in Response to the State of Wyoming’s Brief for Declaratory and Injunctive Relief at 55, Wyoming v. United States Dep’t of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003) (No. 01-CV-860B).
301 66 Fed. Reg. at 3265 (explaining that such an option would have “potentially significant environmental impacts that road construction could cause to inventoried roadless areas”).
302 See Utahns for Better Transp. v. United States Dep’t of Transp., 305 F.3d 1152, 1173, 1183 (10th Cir. 2002) (considering the interdependence of actions and whether those actions should be treated together).
303 Brief of Appellants at 46, Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002) (Nos. 01-35472, 01-35476), 2001 WL 34005160.
304 Kootenai Tribe, 313 F.3d 1094, 1124–26 (9th Cir. 2002). NEPA regulations define cumulative impacts as incremental impacts resulting from “past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7 (2003).
ongoing efforts to manage wildfires. The preamble to the final Roadless Rule referred to the draft and final EISs on the Roadless Rule for a further discussion of the combined, complementary effects of the Roadless Rule, the planning rule, and the road management transportation initiatives.

The Wyoming district court held that the Forest Service did not include appropriate mitigation measures in the alternatives it did consider. The Forest Service, however, developed exceptions to the prohibitions in the Roadless Rule that had the effect of mitigating the effects of those prohibitions. In response to comments on the proposed rule and the draft EIS, the Forest Service developed and considered additional means of mitigating the effects of each of the alternatives it considered. For example, the final EIS discussed the possibility of mitigating adverse effects, such as impairment of fire suppression and insect and disease control, resulting from the limited road building and timber harvesting permitted by the Roadless Rule and the alternatives considered by the Forest Service.

In the portion of the preamble to the final Roadless Rule devoted to a discussion of compliance with NEPA, the Forest Service also described an “economic transition program” it planned to implement in communities most affected by the Rule’s prohibitions, including providing financial assistance to community-led transition programs.

The issue of whether the Forest Service should have published a supplemental EIS was discussed in a relatively cursory manner by both the Ninth Circuit and the Wyoming district court. NEPA regulations require issuance of an EIS to supplement either a draft or a final EIS if the agency “makes substantial changes in the proposed action that are relevant to [the] environmental concerns” or if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” The Forest Service’s final Roadless Rule differed in several respects from the preferred alternative discussed in the draft EIS. The changes included an expansion of the scope of the rule to encompass areas with classified roads within inventoried roadless areas and the designation of an additional 4.2 million acres of roadless areas. The Supreme Court has cautioned that “an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision making intractable, always
awaiting updated information only to find the new information outdated by the time a decision is made.”

The Court has held that an agency decision on whether to prepare a supplemental EIS is subject to a “rule of reason.” Under that approach, a supplement is required if the new information shows that the action which remains to be taken will affect the quality of the environment in a significant manner or to a significant extent not already considered. Because the determination of whether to supplement an EIS is primarily a factual question, judicial review of the agency’s decision on whether to prepare a supplemental EIS is deferential.

Although the final version of the Roadless Rule differed from the preferred alternative described in the draft EIS, the drafters anticipated and discussed some of the changes reflected in the final rule. As one court has explained, “not all changes to an EIS warrant a supplement. Rather, some changes may in fact logically stem from the initial public comment period and do not warrant a supplemental EIS and additional public comment.” Other changes in the final Roadless Rule, such as the inclusion of additional roadless area acreage, arguably would reduce rather than exacerbate adverse environmental effects. There is some authority for the proposition that project changes that reduce anticipated adverse environmental effects should not trigger the obligation to prepare a supplemental EIS. Even if the inclusion of the additional acreage would exacerbate adverse impacts (because of increased risk of fire or insect infestation, for example), a supplement was not required unless the change was “substantial” in a manner relevant to environmental concerns. Applicable forest plans already protected almost 90 percent of the added acreage from road construction and reconstruction. It is thus not clear why the addition of the acreage should be regarded as a substantial change or that any change was relevant to the environmental concerns discussed in the EIS.

317 Id.
318 Id. at 374. The definition of significance for these purposes is the one that appears in the CEQ regulations. See 40 C.F.R. § 1508.27 (2003).
319 Marsh, 490 U.S. at 377.
322 See Sierra Club v. United States Army Corps of Eng’rs, 295 F.3d 1209, 1221–22 & n.17 (11th Cir. 2002) (questioning continuing validity of view to the contrary expressed in National Wildlife Fed’n v. Marsh, 721 F.2d 767 (11th Cir. 1983)).
2. Wilderness Act Issues

a. The Tenth Circuit Litigation

In the Tenth Circuit litigation over the validity of the Roadless Rule, Wyoming claimed not only that the Rule violated NEPA, but also that it violated the Wilderness Act because it amounted to a "de facto designation of 'wilderness'" in violation of Wilderness Act procedures. The agency responded that the "Roadless Rule [did] not constitute a de facto designation of wilderness" because it allows multiple uses that "do not require the construction of new roads—uses such as motorized travel, grazing, and oil and gas development"—to continue in inventoried roadless areas. The issue before the court was whether the Forest Service "usurped Congress's power regarding access to, and management of, public lands by a de facto designation of 'wilderness' in violation of the Wilderness Act of 1964."

The district court began with the premise that "Congress has the sole power to create and set aside federally designated wilderness areas pursuant to the Wilderness Act." That exclusive power derives from the provision of the Wilderness Act prohibiting the designation of any federal lands as wilderness "except as provided for" in the Wilderness Act or by subsequent statute. According to the court, the Wilderness Act removed the discretion of the Forest Service to establish de facto administrative wilderness areas.

The court asserted that "[[t]he ultimate test for whether an area is 'wilderness' is the absence of human disturbance or activity." Forest Service regulations "emphasize the importance of the 'roadless' nature of 'wilderness areas'" and prohibit any "'temporary or permanent roads' in congressionally designated roadless areas." The court therefore endorsed the conclusion that "it is reasonable and supportable to equate roadless areas with the concept of wilderness." President Clinton's directive to the Forest Service to develop regulations for protection of inventoried roadless areas applied to roadless areas identified in the RARE I and II inventories, which were initiated for the purpose of identifying roadless and underdeveloped areas within the national forests that might be suitable for wilderness designation.

The court viewed the rulemaking that culminated in the Roadless Rule as a "significant departure from the statutory framework established by the
Wilderness Act” because it removed Congress, the sole repository of the power to designate wilderness, from the process.335 The court held that the Forest Service, by issuing the Roadless Rule, designated 58.5 million acres of de facto wilderness. It based this holding in part on its conclusion that a roadless forest is synonymous with the Wilderness Act’s definition of “wilderness” in that “roads facilitate human disturbance and activity in degradation of wilderness characteristics.”336 The court also found that the uses permitted in wilderness areas were essentially the same as those permitted in inventoried roadless areas.337 If anything, uses in inventoried roadless areas were more restricted.338 Finally, “the fact that most, if not all, of the inventoried roadless areas were based on the RARE II inventories” provided further evidence of the Forest Service’s unlawful exercise of congressional authority because the RARE II inventory was designed to recommend wilderness areas to Congress.339 The Forest Service’s Roadless Rule conflicted with a fundamental purpose of the Wilderness Act because the Rule made designations of additional wilderness areas despite Congress’s intention to reserve that power to itself.340 The court rejected the argument that the Roadless Rule did not create de facto wilderness areas due to the potential for multiple uses such as motorized uses, grazing, and oil and gas development. According to the court, all of these uses require construction or use of a road.341

b. The Wilderness Act and the Roadless Rule

The Wyoming district court’s conclusion that the Roadless Rule violates the Wilderness Act is erroneous. The Roadless Rule is consistent with the Forest Service’s authorizing statutes. The agency has broad discretion to decide among conflicting multiple uses in the lands under its jurisdiction. MUSYA requires that the national forests be administered for purposes that include outdoor recreation, watershed, and wildlife and fish purposes.342 Prohibiting many, but not all, timber harvesting and road construction activities in roadless areas is consistent with the protection of these values. It is also consistent with the provision of a sustained yield of these resources. NFMA also requires that the Forest Service assure that LRMPs “provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with [MUSYA],” but it specifically

335 Id.
336 Id. at 1236.
338 For example, the court noted that “a road could be constructed in a wilderness area to control fire, insects, or diseases,” whereas a road could only be constructed in a roadless area in the “case of an imminent flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property.” Id. (quoting 16 U.S.C. § 1133(d)(1) (2000); 36 C.F.R. § 294.12(b)(1) (2003)).
339 Id.
340 Id.
341 Id.
authorizes the agency to coordinate various multiple uses, including wilderness.\textsuperscript{343} The courts have held that the statutes vesting in the Forest Service the authority to manage the national forests for multiple use and sustained yield do not require “that every acre of National Forest be managed for every multiple use. Congress recognized ‘that some land will be used for less than all of the resources.’”\textsuperscript{344} Thus, MUSYA states that the Forest Service should consider “the relative values of the various resources in particular areas.”\textsuperscript{345} The agency need only give “due consideration” to competing uses.\textsuperscript{346} One court recognized decades ago that due to Congress’s failure to indicate in MUSYA the weight to be assigned to each potentially competing value, “it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service.”\textsuperscript{347}

The Forest Service did not abuse that discretion in issuing the Roadless Rule. The Rule permits a variety of uses, in addition to resource preservation and protection against loss of roadless values. These uses include oil and gas development, development of valid claims of locatable minerals, grazing of livestock, off-highway motorized vehicle use, and even timber harvesting for limited purposes, provided those activities can be engaged in without the construction of new roads. Existing roads may be maintained and used for all of these purposes.\textsuperscript{348} The agency specifically rejected the option of prohibiting all mining activities, choosing instead to rely on the land-use planning process to determine whether to allow specific mining activities.\textsuperscript{349} The Forest Service therefore considered a variety of permissible uses in inventoried roadless areas and reached the reasonable conclusion that these areas are less suitable for certain developmental uses than other areas of the national forests.\textsuperscript{350}

The Wilderness Act does not impose additional constraints on the designation of roadless areas. At least one observer has argued that the

\begin{itemize}
  \item \textsuperscript{343} 16 U.S.C. § 1604(e)(1) (2000).
  \item \textsuperscript{345} 16 U.S.C. § 529 (2000).
  \item \textsuperscript{346} Wind River Multiple-Use Advocates, 835 F. Supp. at 1372 (citing Sierra Club v. Hardin, 325 F. Supp. 99, 123 (D. Alaska 1971)); see also 16 U.S.C. § 529 (2000) (requiring that “due consideration . . . be given to the relative values of the various resources in particular areas”).
  \item \textsuperscript{347} Sierra Club, 325 F. Supp. at 123.
  \item \textsuperscript{349} 66 Fed. Reg. at 3247.
  \item \textsuperscript{350} See Baldwin, supra note 11, at 30 (arguing the Roadless Rule “might be defended as appropriate management of non-timber resources for multiple use purposes (such as outdoor recreation, game and other wildlife), yielding those benefits without permanent impairment of the lands”). Cf United States v. Perko, 108 F. Supp. 315, 322–23 (D. Minn. 1952) (upholding the designation of roadless areas under the Forest Service Organic Administration Act of 1897), aff’d, 204 F.2d 446 (8th Cir. 1953).  
\end{itemize}
Wilderness Act does not prohibit federal land management agencies from reserving areas for wilderness purposes, as long as these areas are not characterized as “wilderness areas.”351 For example, the Act declares it is “supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established . . . and nothing in [the Act] shall be deemed to [interfere] with the purpose for which national forests are established” pursuant to the Forest Service Organic Administration Act of 1897 and MUSYA.352 The latter provides that “[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions” of MUSYA.353 Thus, the enactment of the Wilderness Act may not divest the Forest Service of any pre-existing authority to protect areas within the national forests as wilderness.354

Even if the Wilderness Act does prohibit the creation of the administrative equivalent of a congressionally designated wilderness area, the Roadless Rule does not create such an equivalent. The Forest Service, in issuing the Roadless Rule, committed itself to continued management of inventoried roadless areas pursuant to applicable multiple-use mandates.355 The range of uses permitted in roadless areas under the Roadless Rule is broader than the range of uses permitted in wilderness areas. The Wilderness Act imposes a prohibition on all commercial enterprises in wilderness areas, except as specifically provided for in the statute.356 Mining and mineral leasing activities may be conducted only to the extent they were being conducted before the adoption of the Wilderness Act in 1964, and even then, those activities are subject to “reasonable regulations governing ingress and egress.”357 In contrast, the Roadless Rule’s authorization of oil and gas development and mineral location is not restricted to pre-1964 activities.358

The Wilderness Act also bars permanent roads within wilderness areas, except as specifically provided and subject to existing private rights.359 The Roadless Rule, on the other hand, does not completely ban road construction and reconstruction in inventoried roadless areas. The Forest Service may authorize road construction for a variety of reasons, such as to

354 See McCloskey, supra note 351, at 306–07 (arguing the Wilderness Act’s language does not “actually preclude” the Forest Service from reserving wilderness areas from protection).
357 Id. § 1133(d)(3).
358 See Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3249 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) (noting unlike the Wilderness Act, the Roadless Rule will allow “a multitude of activities including . . . oil and gas development”).
359 16 U.S.C. § 1133(c) (2000). The Wilderness Act even prohibits temporary roads “except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area).” Id.
protect public health and safety in case of an imminent natural catastrophe such as a fire; to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);\textsuperscript{360} to allow access pursuant to reserved or outstanding rights; to prevent irreparable resource damage that cannot be mitigated by road maintenance; to implement a road safety improvement project; or to allow access where a road is needed in conjunction with the continuation, extension, or renewal of a pre-existing mineral lease or for a new lease issued immediately upon expiration of an existing lease.\textsuperscript{361} Furthermore, the Roadless Rule specifically authorizes the maintenance of existing roads.\textsuperscript{362}

Other uses also are allowed more broadly within roadless areas than in wilderness areas. The Wilderness Act prohibits the use of motor vehicles, with limited exceptions.\textsuperscript{363} The Roadless Rule allows motorized uses, including off-road vehicle use where it is already permitted, as long as such use does not require the construction of new roads.\textsuperscript{364} Similarly, the Wilderness Act permits grazing only where it was established before September 3, 1964, subject to reasonable regulation by the Department of Agriculture.\textsuperscript{365} Grazing is allowed in inventoried roadless areas under the Roadless Rule regardless of when it commenced, as long as it does not require new road construction.\textsuperscript{366} The Wyoming district court concluded the Roadless Rule created de facto wilderness areas because all of the permitted multiple uses, including grazing and oil and gas development, require construction or use of a road, which the court seemed to think the Roadless Rule prohibits.\textsuperscript{367} While the Roadless Rule does bar most new road

\textsuperscript{361} See 66 Fed. Reg. at 3272–73 (discussing exceptions to the prohibition on road construction and reconstruction in roadless areas).
\textsuperscript{362} Id at 3273.
\textsuperscript{363} 16 U.S.C. § 1133(c) (2000). Motorized vehicles may be authorized “as necessary to meet the requirements for the administration of the area for purposes of this chapter (including measures required in emergencies involving the health and safety of persons within the area).” Id.
\textsuperscript{367} Wyoming, 277 F. Supp. 2d 1197, 1236 (D. Wyo. 2003). In another case, the court rejected the contention that an agency had established “de facto” wilderness areas in violation of the Wilderness Act. In Utah Ass’n of Counties v. Bush, 316 F. Supp. 2d 1172 (D. Utah 2004), an association of counties challenged the establishment by President Clinton of the Grand Staircase-Escalante National Monument pursuant to his authority under the Antiquities Act of 1906, 16 U.S.C. § 431 (2000). One of the arguments raised by the counties was that the President’s withdrawal of land to create the Monument amounted to the creation of de facto wilderness areas, in derogation of Congress’s exclusive right to establish wilderness areas under the Wilderness Act, 316 F. Supp. at 1192. The court found the argument to be without merit because the Antiquities Act vested in the President the power to establish the Monument, even though some of the land included in it had been designated by BLM as wilderness study areas but never by Congress as official wilderness. The court distinguished Wyoming on the ground that the Roadless Rule was promulgated by an executive branch department, whereas the President established the national monument in Utah Ass’n of Counties. Id. at 1193. In dictum, the court opined that if the case had involved BLM efforts to protect through
construction, the Forest Service specifically provided that the Rule will not close or block access to any existing roads within the National Forest System and that existing roads in inventoried roadless areas may be maintained and used for various multiple use activities.368

In short, the Forest Service acted within its broad discretion under MUSYA and NFMA in promulgating the Roadless Rule. Because the array of uses allowed within inventoried roadless areas is much broader than the permissible uses of wilderness areas under the Wilderness Act, the Roadless Rule does not violate the decree that only Congress may designate “wilderness areas.”

B. The Legality and Merits of the Developing Bush Approach to Managing Roadless Areas

1. Potential Legal Weaknesses in the Bush Administration’s Approach

The fate of roadless areas within the national forests turns not only on resolution of the conflicts between the courts in the Ninth and Tenth Circuits concerning the legality of the Clinton Administration’s Roadless Rule, but also on the initiatives the Bush Administration chooses to pursue in directing the Forest Service’s management of those areas. Because some of these initiatives have yet to take final form, it is impossible to fully assess the legality, merits, or impact of the Bush approach to management of roadless areas within national forests.

Some of the actions taken by the Bush Administration to date, however, lend themselves to preliminary analysis. The delay of the effective date of the Roadless Rule pursuant to the Card memorandum,369 subsequently implemented by the Forest Service,370 was of dubious legality. The Forest Service justified its failure to follow the APA’s notice-and-comment rulemaking procedures in delaying the effective date of the Rule by claiming that the delay was a rule of procedure exempt from notice-and-comment rulemaking371 and that the delay was based on “good cause.”372 In Natural Resources Defense Council v. Abraham,373 the Court of Appeals for the Second Circuit found another agency’s delay of the effective date of the Clinton Administration rules in reliance on the Card memo to constitute a rulemaking public lands that had been identified as candidates for wilderness designation but that had failed to achieve that status, “the outcome here might be the same as in Wyoming. But those are not the facts of this case and that is not the issue before this Court.” Id. at 1194. Given the court’s disclaimers, Utah Ass’n of Counties does not represent an endorsement of the Wilderness Act holding in Wyoming.

369 See supra notes 127–29 and accompanying text.
370 See supra notes 130–32 and accompanying text.
372 See id. § 553(b)(3)(B) (exempting a rule from notice-and-comment rulemaking requirements in situations in which the agency, for good cause, finds such procedures to be impracticable, unnecessary, or contrary to the public interest).
373 355 F.3d 179 (2d Cir. 2004).
violation of the APA, the agency’s invocations of the procedural rules and good cause exceptions to the contrary notwithstanding. As in Abraham, the Forest Service cited the “imminence” of the effective date of the Roadless Rule and the need to give the agency time to review and consider the new regulations as good cause justifications for the delay. The Abraham court found these justifications unpersuasive, explaining that an emergency of the agency’s own making did not excuse it from the need to comply with the APA. In addition, the court disagreed that the situation amounted to an emergency because “[t]he only thing that was imminent was the impending operation of a statute intended to limit the agency’s discretion . . . , which cannot constitute a threat to the public interest.” The Forest Service’s explanation for delaying the Roadless Rule was virtually identical to the one the court found inadequate in Abraham.

To the extent the Bush Administration pursues approaches to roadless area management that differ from those reflected in the Roadless Rule, it will have the burden of justifying its deviations from that Rule. The Supreme Court has rejected the argument that judicial review of a decision to rescind a rule should be more deferential than review of promulgation of a rule. In particular, “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” The Forest Service has already reversed one component of the Roadless Rule—its application to the Tongass National Forest. If that reversal of position is challenged, the agency would have to demonstrate not only that the decision to exempt the Tongass from the Roadless Rule is supportable, but also that there was a justifiable reason for the agency reaching a different conclusion than the previous Administration after balancing the social and economic hardship of applying the Roadless Rule to the Tongass against the ecological benefit of doing so.

The potential for judicial reversal of a shift in policy on roadless area management following a change in presidential administration is well

374 Id. at 204–06.
377 Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co. (State Farm), 463 U.S. 29, 41 (1983). The Court even referred to the application of a presumption “against changes in current policy that are not justified by the rulemaking record.” Id. at 42.
379 See Beermann, supra note 376, at 984 (indicating that in State Farm, “the Court took the regulatory status quo as the baseline and reviewed whether the new administration had articulated a sufficient justification for making a change”).
illustrated by challenges to the validity of the decision by the Bush-era National Park Service to reverse a Clinton-era ban on the use of snowmobiles in Yellowstone and Grand Teton National Parks. The Park Service issued final regulations at the very end of the Clinton Administration phasing out snowmobile use in the two parks.\(^{380}\) The Bush Administration stayed the regulations,\(^{381}\) which then went into effect after 60 days. When the International Snowmobile Manufacturers sued to invalidate the ban, the Park Service agreed to prepare a supplemental EIS and consider data on new snowmobile technologies.\(^{382}\) In December 2003, the Park Service issued final regulations allowing snowmobiling in the two parks, provided that most snowmobiles “meet certain air and sound emissions requirements, be accompanied by a trained guide, and comply with established daily entry limits on the numbers of snowmobiles that may enter the parks.”\(^{383}\) Two environmental groups sued in federal district court in the District of Columbia, arguing that the Park Service’s decision to allow continued snowmobiling represented arbitrary and capricious decision making in light of the threats to wildlife, endangered species, and the health of park visitors and employees posed by snowmobiling.\(^{384}\)

The court characterized the Park Service’s 2003 decision as “a 180 degree reversal from a decision on the same issue made by a previous administration.”\(^{385}\) This characterization affected the agency’s burden of justifying the 2003 snowmobile rule. According to the court, “[t]his dramatic change in course, in a relatively short period of time and conspicuously timed with the change in administrations, represents precisely the ‘reversal of the agency’s views’ that triggers an agency’s responsibility to supply a reasoned explanation for the change.”\(^{386}\) Because of the “presumption . . . that policies will be carried out best if the settled rule is adhered to,” the Park Service was responsible for “fully explaining the need for, and identifying the record evidence supporting, this change in course.”\(^{387}\) The court found unconvincing the Park Service’s reliance on the availability of new, cleaner, and quieter technology in light of the agency’s previous determination during the Clinton Administration that the new technology would do little, if anything, to prevent adverse impacts to wildlife. It also found the mitigation measures built into the 2003 rule to be significantly flawed.\(^{388}\)


\(^{382}\) Fund for Animals, 294 F. Supp. 2d at 99.


\(^{384}\) Fund for Animals, 294 F. Supp. 2d at 97.

\(^{385}\) Id. at 105.

\(^{386}\) Id. (citing State Farm, 463 U.S. 29, 41 (1983)).

\(^{387}\) Id. (quoting State Farm, 463 U.S. at 41–43).

\(^{388}\) Id. at 106–07.
Ultimately, the court found a “stark” gap between the 2001 and 2003 decisions. The Park Service switched from the position that all snowmobile use had to be halted to prevent adverse impacts to wildlife and resources in the parks to the position that nearly 1,000 snowmobiles per day would be allowed to use the parks. Having adopted its environmentally preferred alternative in 2001, it rejected that alternative in 2003, choosing instead an alternative whose primary beneficiaries would be snowmobilers and snowmobile manufacturers. The Park Service’s previous conclusion that snowmobile use amounted to unlawful impairment of park resources obliged it to explain its about-face. The court held that it did not do so, and thus engaged in “quintessentially arbitrary and capricious” action.391

The Forest Service runs the risk of similar judicial reversal to the extent it abandons components of the Clinton Administration’s policies for the management of roadless areas in the national forests, including the decision to exempt the Tongass National Forest from the Roadless Rule. The agency bears the burden of explaining why its change of position is not only consistent with the applicable land management statutes, but also consistent with the administrative record, including the record compiled in the rulemakings conducted during the Clinton Administration. The difficulty of predicting the outcome of any litigation that challenges any reversals of position undertaken by the Bush Administration is reflected in the fact that, subsequent to the district court’s decision invalidating the 2003 snowmobile regulations, another federal district court in Wyoming issued a preliminary injunction precluding the Park Service from enforcing the 2001 regulations. The court found a substantial likelihood that the plaintiffs, an organization of snowmobile manufacturers, could show that the Park Service, in issuing the 2001 regulations, failed to adequately consider the environmental impacts of various alternatives, reached “a prejudged political conclusion to ban snowmobiles in the Parks,” and failed to explain “its sudden determination that snowmobiles should be banned from the Parks.”

389 Id. at 107.
390 Id. at 108.
391 Id. (quoting La. Pub. Serv. Comm’n v. Fed. Energy Regulatory Comm’n, 184 F.3d 892, 897 (D.C. Cir. 1999)). The court found that the Park Service “swer[d] from prior precedents' without a cogent, supported explanation.” Id. (quoting Greater Boston Television Corp. v. Fed. Communications Comm’n, 444 F.2d 841, 844 (D.C. Cir. 1970)). The court also held that the Park Service violated NEPA by failing to consider the alternative of the cessation of trail grooming (a practice involving the packing of snow along trails to facilitate winter use). Id. at 97 n.2, 108–11.
393 Int’l Snowmobile Mfrs. Ass’n v. Norton, 304 F.3d at 1291; see also Int’l Snowmobile Mfrs. Ass’n v. Norton, 2004 WL 2337372, at *10 (finding that the NPS “reached a prejudged political conclusion”). Cf. Fund for Animals, 204 F. Supp. 2d at 108 n.11 (citing to evidence in the record to support the conclusion that the Park Service’s 2003 decision “was completely politically driven and result oriented”).
the decision invalidating the 2003 regulations was not before it, there is little question that the two district courts viewed the relative merits of the 2001 and 2003 regulations differently. The result reached by a court asked to review the validity of any revisions to roadless area management policies promulgated by the Bush Administration therefore might depend on that court’s reaction to the legitimacy of the Clinton-era policies.

A shift in policy approach resulting from a change in presidential administration is of course not necessarily illegitimate. As indicated above, the Forest Service has broad discretion to fashion management policies for the national forests. Historically, that discretion has extended to the management of the portions of the national forests that qualify as roadless areas. Statutes such as MUSYA and NFMA continue to mandate multiple-use management, a regime that has prompted the courts to afford considerable deference to the Forest Service when its land and resource management decisions have been challenged. In light of that deference, it is certainly not possible to predict with any confidence that any changes the Bush Administration adopts to the Forest Service’s authority to manage roadless areas will be struck down in court.

2. The Merits of the Bush Approach as a Matter of Policy

The advisability of the Bush Administration’s approach to the management of roadless areas raises different questions than the consistency of that approach with the agency’s enabling acts. Putting aside questions concerning the legality of any changes in the management of roadless areas that may be adopted by the Forest Service, the actions taken thus far by the Bush Administration raise serious questions about the merits of its approach to roadless area management as a matter of environmental and natural resource policy. One concrete step already taken by the Bush Administration is the exemption of the Tongass National Forest from the Roadless Rule’s prohibitions. Environmentalists claim that allowing roads in the Tongass for timber harvesting could destroy as many as 2.5 million acres. On the other hand, a prohibition on timber harvesting in roadless areas would eliminate access to only about four percent of timber in the national forests, and only a quarter of a percent of the nation’s domestic timber production. Moreover, as a result of global shifts in the timber

395 Id. at 1285.
396 Cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (stating that, in the context of statutory interpretation, "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policies to inform its judgments").
397 See supra Part II.B and notes 342–47 and accompanying text.
399 Davidson, supra note 168, at 37; see also Carter et al., supra note 18, at 10,973 (arguing that the exemption of the Tongass and Chugach National Forests from the Roadless Rule "severely undermines the protections of the rule").
market, there is considerable doubt that the exemption will be able to stave off the decline in the local timber industry.\textsuperscript{401} An additional concern is the possibility that the Tongass exemption will set a precedent for exempting other national forests from roadless area protections, in whole or in part, based on the potential impact of the Roadless Rule on local economies.

The Tongass exemption is not the only example of action by the Bush Administration that will reduce protection of roadless areas. The Bush Administration’s 2001 interim directives on forest transportation system policy (finalized in 2003) significantly reduced the level of protection afforded roadless areas by eliminating the requirement that the agency show a “compelling need” for a road before road construction or reconstruction may be commenced in inventoried roadless areas.\textsuperscript{402} The directives also afford Forest Service officials more discretion to determine whether NEPA requires an EIS for road management activities in inventoried roadless areas, thus enhancing the risk that road construction will occur without prior consideration of the potential adverse environmental consequences.\textsuperscript{403}

The creation of greater discretion for the Forest Service to avoid NEPA evaluation when authorizing road management activities in roadless areas is part of a larger pattern of efforts by the Bush Administration to free agencies like the Forest Service from the shackles of NEPA compliance responsibilities. Some of these efforts are directed specifically at activities in roadless areas, while others apply more generally but have the potential to facilitate resource-damaging activities in roadless areas. The Bush Administration has taken steps, for example, to broaden the ability of the Forest Service to invoke categorical exclusions from NEPA assessment responsibilities. NEPA regulations authorize federal agencies to define categories of actions that individually or cumulatively normally do not have environmental impacts significant enough to justify preparation of an EIS.\textsuperscript{404} If the Council on Environmental Quality approves of one of these categorical exclusions,\textsuperscript{405} the affected agency need not prepare an EIS for any project falling within the scope of the exclusion. NEPA regulations require that an agency’s categorical exclusion procedures provide for “extraordinary

\textsuperscript{401} See Felicity Barringer, In Alaska, Help for Logging Comes Late, N.Y. TIMES, Feb. 29, 2004, at 14 (showing timber harvest levels in the Tongass declined precipitously in the 1990s, long before the adoption of the Roadless Rule, from over 400 million board feet in 1990 to about 150 million board feet in 2000).

\textsuperscript{402} See Forest Transportation System Analysis; Roadless Area Protection, 66 Fed. Reg. 65,706, 65,707 (Dec. 20, 2001) (adopting a policy which “authorized road construction and reconstruction in inventories roadless areas and contiguous unroaded areas only if the Regional Forester determined that the project met a compelling need”); see also Special Areas; Roadless Area Conservation, 68 Fed. Reg. 75,136, 75,142 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294) (“The department believes it is prudent to proceed with a decision on temporarily exempting the Tongass from the prohibitions in the roadless rule.”).

\textsuperscript{403} See THE WILDERNESS SOCIETY, supra note 400 (providing a history of the roadless debate).

\textsuperscript{404} 40 C.F.R. §§ 1500.4(p), 1500.5(k) (2003).

\textsuperscript{405} NEPA regulations define a categorical exclusion as “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency . . . and for which, therefore, neither an environmental assessment nor an [EIS] is required.” Id. § 1508.4.
circumstances” in which an action normally covered by an exclusion may have a significant environmental effect.406

The Bush Administration has initiated at least two efforts to expand categorical exclusions in ways that may facilitate the Forest Service’s ability to authorize activities in roadless areas without a prior evaluation of the potential adverse environmental impacts of those activities. First, the Forest Service in 2002 issued an interim final directive in which it indicated that the mere presence of certain resource conditions—including the presence of inventoried roadless areas—that previously qualified as extraordinary circumstances precluding a categorical exclusion would now not automatically qualify as such.407 Under the new approach, the mere presence of one of these resource conditions no longer necessarily precludes the issuance of a categorical exclusion. Instead, it is the potential effect of the proposed action that determines whether extraordinary circumstances exist.408 As a result, it will be easier to exclude proposed actions within roadless areas from all NEPA review than was previously the case.409

Second, as indicated above,410 the Forest Service has invoked a categorical exclusion to justify not preparing an EIS for the proposed rule on roadless area management. The agency has indicated that it will initiate NEPA evaluation when the Secretary approves a state petition and undertakes to adopt management restrictions recommended by the state through rulemaking proceedings. If a state does not petition for the adoption of management restrictions, however, the Forest Service apparently will not undertake an evaluation of the environmental impacts of scrapping the Clinton Roadless Rule.

In the absence of a state petition, management of roadless areas will be governed by the applicable land use plan. The land use planning process provides another opportunity for the Forest Service to consider the environmental implications of the use of roadless areas. But the Forest

406 Id.
409 See PAMELA BALDWIN, CONG. RESEARCH SERV. REPORT NO. RL30647, THE NATIONAL FOREST SYSTEM ROADLESS AREA INITIATIVE 19–21 (2003) (describing categorical exclusions to the Roadless Rule), http://www.ncseonline.org/nle/crsreports/03Jul/RL30647.pdf. The Forest Service under the Bush Administration also has created a categorical exclusion from NEPA environmental evaluation responsibilities for hazardous fuels reduction activities. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814, 33,814 (June 5, 2003). The exclusion applies to “[h]azardous fuels reduction activities using prescribed fire not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres.” Id. at 33,824. The exclusion does not apply where there are extraordinary circumstances such as adverse effects on inventoried roadless areas. Id. at 33,814. The 2002 interim directive discussed above, however, makes it less likely that the mere fact that an activity will be conducted in inventoried roadless areas will qualify as an extraordinary circumstance that precludes a categorical exclusion.
410 See supra notes 209–11 and accompanying text.
Service proposed in 2002 to authorize categorical exclusions from the obligation to prepare either an environmental assessment or an EIS in connection with adoption or revision of an LRMP. This novel approach seems inconsistent with NFMA's mandate that the Forest Service issue regulations specifying "procedures to insure that land management plans are prepared in accordance with [NEPA]." Regardless of its legal merit, the proposal is clearly a bad idea. As some observers have pointed out, analysis of the impacts of decisions such as the levels and locations of activities authorized by an LRMP and the cumulative impacts of those decisions is typically conducted at the plan development stage. The Forest Service should be required to consider the potential environmental consequences of its planning decisions, "rather than relying solely on piecemeal assessments of individual projects implementing the plan. Exempting forest plans from NEPA would allow many of the most significant forest management decisions to forever escape environmental review." Moreover, the Bush Administration amended the Forest Service administrative appeal regulations in 2003 to exempt from the appeals process decisions for actions that have been categorically excluded from NEPA. The preclusion of public participation likely to result from the removal of the opportunity to appeal such decisions removes another opportunity to ensure that local Forest Service officials properly take into account the potential adverse environmental consequences of decisions to authorize potentially damaging activities in roadless areas.

The prospects of even further weakening of roadless area protections seem to be on the horizon through revisions to the Roadless Rule itself and to Forest Service planning rules. The Forest Service announced in 2003 that it would propose an amendment to the Roadless Rule allowing state

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411 See National Forest System Land and Resource Management Planning, 67 Fed. Reg. 72,770, 72,797 (Dec. 6, 2002) (to be codified at 36 C.F.R. pt. 219) ("A new plan, plan amendment, or plan revision may be categorically excluded from documentation in an Environmental Assessment or Environmental Impact Statement as provided in agency NEPA procedures.").

412 "All previous administrations and courts understood NEPA to clearly apply to forest plans and significant amendments." Carter et al., supra note 18, at 10,965.

413 16 U.S.C. § 1604(g)(1) (2000); see also Block, 690 F.2d 753, 757 n.2 (9th Cir. 1982) ("[NFMA] requires that the unit land management plans must be prepared in accordance with [NEPA].").

414 Carter et al., supra note 18, at 10,965.

415 Id.

416 36 C.F.R. § 215.12(f) (2003). Similarly, the new appeal regulations preclude appeals of a determination that a new decision is not needed following supplementation of an EIS or revision of an environmental assessment. Id. § 215.12(b).

governors to seek relief from the Rule in “exceptional circumstances” so as to “augment exceptions already present in the [Rule].” Exceptional circumstances would include protection of human health and safety, reducing hazardous fuels and restoring essential wildlife habitats, maintaining existing facilities such as dams, and providing reasonable access to private property. It is not clear how expansively the Forest Service would have applied these exceptions, but the exception for “reducing hazardous fuels” had the potential to result in the construction of a significant number of roads to facilitate timber harvesting projects justified as fuel reduction projects. Given that the Forest Service has already recently adopted a categorical exclusion from NEPA for hazardous fuel reduction activities, the exception to the Roadless Rule for these same activities had the potential to further shield these activities in roadless areas from meaningful environmental evaluation or control.

When the Forest Service actually issued its proposed rule on roadless area management in 2004, however, it differed dramatically from the proposal the agency had described in 2003. Instead of allowing state governors to seek relief from the Clinton Roadless Rule in a narrow range of “exceptional circumstances,” the agency proposed in 2004 to eliminate the protections provided by the Roadless Rule unless a state governor petitions for the imposition of management restrictions for roadless areas within the state and the Secretary decides to grant the petition. Thus, the Forest Service has completely reversed the default position. Under the approach the Forest Service said in 2003 that it would pursue, roadless areas would have been protected from most road construction and timber harvesting unless a state governor sought relief from the Rule. Under the 2004 proposal, none of the Roadless Rule’s protections would apply unless a state governor petitions for their adoption. Even if a state governor files such a petition, the Secretary retains the apparently unbridled discretion to grant or deny the petition; the proposed rule contains no standards whatsoever for the Secretary to apply in ruling on a state’s petition for the imposition of management restrictions.

Finally, the Forest Service has proposed amendments to its planning regulations that would make it more difficult for local officials to preclude activities such as timber harvesting and resource extraction from being conducted in roadless areas. In its 2002 proposal, the Forest Service set forth the following provision:

National Forest System lands are generally suitable for a variety of uses such as outdoor recreation, livestock grazing, timber harvest, energy resource development, mining activities, watershed restoration, cultural and heritage interpretation, and other uses. Rather than determine the suitability of all lands for all uses, a plan should assume that all lands are potentially suitable for a

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419 Id.
420 See supra note 409.
421 See supra notes 174–77 and accompanying text.
variety of uses except when specific areas are identified and determined not to be suited for one or more uses.422

This provision would create a presumption that all lands in the national forests—apparently including roadless areas—should be open to the full range of multiple uses and place the burden on planning officials to demonstrate that restrictions on certain kinds of uses are appropriate.423 This approach is antithetical to the Clinton Administration's Roadless Rule, which precludes timber harvesting and road construction absent an applicable exception to the Rule.424 It is consistent, however, with the approach reflected in the Forest Service's 2003 proposed rule for roadless area management, which, in effect, creates a similar presumption that management restrictions in roadless areas are not necessary and foists the burden of demonstrating the contrary upon the governors of states containing national forests with roadless areas.

Both the proposed roadless area protection rule and the proposed planning rule reflect the Bush Administration's view that the most appropriate method for protection of roadless areas is through localized decision making during the forest planning process, rather than through the imposition of nationally applicable prohibitions or restrictions.425 The Forest Service explained, for example, that its proposed rule for roadless area management “would allow for the recognition of local situations and resolution of unique resource management challenges within a specific State.”426 The Forest Service under the Clinton Administration reached precisely the opposite conclusion, taking the position that the best means to reduce the conflict over the appropriate use and management of roadless areas was through adoption of a national level rule. The agency asserted that only a national approach would provide adequate protection because of the possibility that officials responsible for planning would fail to “recognize the national significance of inventoried roadless areas and the values they

423 See Carter et al., supra note 18, at 10,967. The proposed rules, however, would require that inventoried roadless areas be considered for recommendation as wilderness in the plan revision process, unless otherwise provided by law. 67 Fed. Reg. at 72,790, 72,802.
425 But see Carter et al., supra note 18, at 10,973 (arguing that the Bush Administration has removed procedural opportunities for local affected citizens to participate in the planning and analysis of projects).
426 Special Areas; State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636, 42,638 (proposed July 16, 2004) (to be codified at 36 C.F.R. pt. 294); see also id. at 42,637 (stating that “Strong State and Federal cooperation regarding management of inventoried roadless areas can facilitate long-term, community-oriented solutions.”). The Forest Service indicated that it had received more than 726,000 comments in response to the advanced notice of proposed rulemaking published in 2001. The comments reflected two main points of view: 1) support for emphasizing environmental protection and preservation and for making national decisions, and 2) support for emphasizing “responsible active management” and for “local conservation decisions made through the land and resource management planning process.” Id. at 42,638. The agency did not explain what percentage of the comments reflected each of the two main points of view, but the agency’s approach obviously is based on the second position.
represent in an increasingly developed landscape." 427 The Bush proposals therefore not only begin with a different substantive premise from the Clinton approach. They also vest substantial authority to decide on the fate of roadless areas in the hands of government officials who may be less inclined to place a priority on the protection of these areas from the adverse effects of intensive use. State decision makers and Forest Service officials responsible for land use planning decisions may tend toward a less protective approach if they are more susceptible than national decision makers to the demands of local interest groups like timber producers or if they do not recognize the national significance of the roadless areas affected by their decisions. 428 Moreover, the deference to state interests reflected in the proposed management rule is one-sided. The Secretary has the authority, by rejecting a state petition, to overrule a governor who has decided to recommend the imposition of management restrictions on roadless areas. The proposed rule does not create a mechanism, however, for the Secretary to impose management restrictions if the state fails to petition for them. 429

Any predisposition of Forest Service decision makers to de-emphasize resource protection when making decisions bearing on roadless area management seems likely to be reinforced by other aspects of the Bush Administration’s proposed planning rules as well as by the “principles” of roadless area management enunciated by the Secretary of Agriculture. The Bush Administration’s approach to national forest planning moves away from the Clinton Administration’s commitment to long-term ecological sustainability as the first priority of national forest planning and management. The Bush Administration’s approach would require planners to pay greater heed to economic and social sustainability. 430 This shift in emphasis is almost certain to lead to planning and management decisions that provide lower levels of protection for the unique values represented by the preservation of largely undeveloped roadless areas through restrictions on resource extraction, development, and other forms of intensive use. The Bush Administration’s “principles” for roadless area management also seem designed to provide a basis for increased development of roadless areas. 431 Efforts to protect forest resources from natural disasters, such as fire, may translate into more salvage timber sales. Protection of access to private property seems certain to entail more road construction or reconstruction. In short, under the Bush Administration’s approach, fewer roadless areas are likely to remain roadless than under the Clinton Administration’s approach.

428 See supra note 82 and accompanying text.
429 The Forest Service presumably could impose management restrictions on a particular roadless area through the adoption of amendments to an LRMP. For the reasons suggested above, however, the land use planning process may be prone toward a less protective approach than that reflected in the Clinton Roadless Rule.
430 See supra note 206 and accompanying text.
431 The “principles” are described supra at note 139 and accompanying text.
V. CONCLUSION

By promulgating the Roadless Rule, the Clinton Administration committed the Forest Service to the long-term preservation of areas of the national forests that, among other things, provide valuable sources of relatively undisturbed recreation, public drinking water, and rare plant and animal habitat. But the long term may not last as long as the architects of the Roadless Rule anticipated. The Rule, which the Forest Service issued early in 2001, almost immediately came under attack in court. By mid-2003, two courts had reached conflicting conclusions concerning the validity of the Rule, casting doubt as to its future. At the same time, the Rule and the policies it sought to promote were subject to administrative second-guessing. The Bush Administration blocked the Roadless Rule even before it became operative by staying its effective date. Although the Rule eventually went into effect, the Forest Service has already revoked its application to the Tongass National Forest. Moreover, the Bush-era Forest Service is likely to appreciably reduce the level of protection afforded roadless areas against the adverse environmental effects of activities such as timber harvesting and road construction by taking steps to change the Roadless Rule, the policies governing management of the national forest transportation system, and the national forest planning process.

The fate of the Roadless Rule remains in doubt, as do the exact contours of Bush Administration initiatives for the management of roadless areas in the national forests. What is already clear is that the direction in which the Bush Administration is steering roadless area management policy is very different from the direction reflected in the Roadless Rule and associated Clinton Administration initiatives: the emerging direction is aligned less with natural resource preservation and more with resource extraction and development.