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The National Forest System Roadless Areas Initiative

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The National Forest System Roadless Areas Initiative

Summary

The roadless areas of the National Forest System have received special management attention for decades. In part to recognize the importance of national forest roadless areas for many purposes and in part because making project decisions involving roadless areas on a forest-by-forest basis was resulting in controversy and litigation that consumed considerable time and money, the Clinton Administration established a new nationwide approach to the management of the roadless areas in the National Forest System. A record of decision (ROD) and a final rule were published on January 12, 2001, that prohibited most road construction and reconstruction in 58.5 million acres of inventoried forest roadless areas, with significant exceptions. Most timber cutting in roadless areas also was prohibited, with some exceptions, including improving habitat for threatened, endangered, proposed, or sensitive species, or reducing the risk of wildfire and disease. With some exceptions, the new prohibitions would have applied immediately to the Tongass National Forest in Alaska.

The Bush Administration initially postponed the effective date of the roadless area rule, then decided to allow it to be implemented while proposing amendments. However, the Federal District Court for Idaho preliminarily enjoined its implementation. The Ninth Circuit reversed the Idaho district court, but on July 14, 2003, the Federal District Court for Wyoming again permanently enjoined implementation of the Rule. This holding is still on appeal to the 10th Circuit, but now may be moot. A final rule "temporarily" exempting the Tongass National Forest (Alaska) from the roadless rule was published December 30, 2003. On July 16, 2004, a new general roadless rule was proposed and a new final rule was published on May 13, 2005. The new rule eliminates the need for a separate Tongass rule, and replaces the Clinton roadless rule with a procedure whereby the governor of a state may petition the Secretary of Agriculture to promulgate a special rule for the management of roadless areas in that state, and make recommendations for that management. The new rule contains no standards by which the Secretary is to review a state's recommendations, and does not address the weight to be given to the views of local residents versus those of out-of-state residents with an interest in the public lands.

A new final forest planning rule was also published on January 5, 2005. The rule does not address roadless areas at all, but does require review of areas that might be suitable for wilderness designation when plans are revised.

This report traces the development and content of the roadless area rules and directives, describes the statutory background, reviews recent events, and analyzes some of the legal issues. The report will be updated as circumstances warrant.

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The Roadless Areas and Related Initiatives — Background

The Clinton Administration undertook a series of actions affecting the roadless areas of the National Forest System (NFS).[1] More particularly, new rules were finalized with respect to: (1) the roadless areas as such; (2) the NFS roads that make up the Forest Development Transportation System, and (3) the planning process of the Forest Service (FS). The provisions of these three new rules were intertwined and each part affected the others. The new roadless area rules were issued in light of the importance of the roadless areas for many forest management purposes and to the American public, and because addressing projects in roadless areas on a forest-by-forest basis as part of the usual planning process was resulting in controversy, conflict, and the expenditure of time and money on appeals and litigation, such that national-level guidance regarding projects in roadless areas was deemed advisable.

The Clinton Administration roadless area proposals were praised by some, criticized by some for not being far-reaching enough, and criticized by others as being too restrictive, creating "de facto wilderness," and being procedurally flawed. Several lawsuits were filed challenging the adequacy of the information provided the public, the opportunity to comment, and other aspects of the rulemaking. The Bush Administration initially postponed the effective date of the roadless area rule, but then decided to implement it while considering changes. Implementation of the rule was enjoined on May 10, 2001, but this district court decision was reversed and remanded by the 9th Circuit. However, the rule was again enjoined by the Wyoming District Court on July 14, 2003, on NEPA grounds and because the court concluded it created de facto wilderness. This decision was appealed by intervenors to the 10th Circuit, but may now be moot.

The Bush Administration put into effect an initial set of interim directives regarding roadless area management, solicited comments retroactively on the interim directives and on the management of roadless areas in general, and finalized a directive altering the requirements for preparation of NEPA documents in some

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[1] The NFS includes the national forests and national grasslands and is administered by the Forest Service in the Department of Agriculture. Roadless areas within the NFS have long received special management. Beginning even before enactment of the 1964 Wilderness Act, larger (generally 5,000 acres or more) roadless areas were "inventoried" to consider their wilderness characteristics, and later their suitability for inclusion in the National Wilderness Preservation System. These are the "inventoried" areas referred to in the Administration's initiative and in this report. A discussion of the roadless area initiative and many of the related documents are available on the Forest Service website at [http://www.roadless.fs.fed.us/].

instances. A to exempt the Tongass National Forest was then published, pending other possible rules to address the application of the roadless rule in Alaska. On July 16, 2004, new roadless rules were proposed that would eliminate the previous rule and provide a new procedure for the governor of a state to petition the Secretary of Agriculture for a state-wide rule on the management of roadless areas. In the meantime, roadless areas would be managed under the interim direction, with some modifications. New final forest planning rules were published on January 5, 2005, and a new round of interim directives was published. A new final roadless area rule was published on May 13, 2005.[2]

This report focuses on the roadless areas initiative, describes the statutory background, summarizes and provides citations for the various rules and subsequent actions, and analyzes some of the legal issues in connection with the roadless areas.

Roadless Areas. On October 13, 1999, President Clinton directed the Secretary of Agriculture, acting through the Forest Service, to develop regulations to provide "appropriate long-term protection for most or all of the currently inventoried 'roadless' areas, and to determine whether such protection is warranted for any smaller roadless areas not yet inventoried."[3] A Notice of Intent to complete an environmental impact statement (EIS) on alternatives for protection of NFS roadless areas was published on October 19, 1999;[4] a draft EIS (DEIS) was issued in May, 2000, and accompanying regulations were proposed on May 10, 2000;[5] and a final environmental impact statement (FEIS) was issued on November 13, 2000. A record of decision (ROD) and final rules were issued on January 12, 2001, to be effective on March 13, 2001.[6] The rules were issued in light of the importance of the roadless areas for various forest management purposes and to the American public, and because addressing projects in roadless areas on a forest-by-forest basis as part of the planning process was resulting in controversy, conflict, and the expenditure of a great deal of time and expense on appeals and litigation, such that national-level guidance was deemed advisable.[7]

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

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[2] 70 Fed. Reg. 25,654.

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

[4] 64 Fed. Reg. 56,306.

[5] 65 Fed. Reg. 30,276.

[6] 66 Fed Reg. 3,244 (January 12, 2001), adding 36 C.F.R. § 294, Subpart B..

[7] *Id.*, at 3,246.

Roads. In related actions, the Forest Service on January 28, 1998, issued an Advance Notice of Proposed Rulemaking to revise its Forest Development Transportation System regulations related to roads in the NFS,[8] and also proposed an interim rule to temporarily suspend road construction and reconstruction in certain NFS unroaded areas.[9] On February 12, 1999, the agency published a final interim rule that temporarily suspended road construction and reconstruction in unroaded areas, and provided certain procedures related to such areas.[10] A proposed rule[11] and proposed administrative policy[12] regarding the Forest Development Transportation System were published on March 3, 2000. Final Roads rules (36 C.F.R. §212) and a transportation policy were published on January 12, 2001, both effective on that date.[13] (Note that the final roadless area management rule also was published on that date.) Certain terms were changed in the final rule,[14] and the policy provided new direction to be contained in the Forest Service Manual that emphasizes the maintenance and decommissioning of existing roads rather than the construction of new roads. The policy addressed when and how to conduct roads analyses, required that a compelling need for a new road be demonstrated, and also required an economic analysis that addressed both initial and long-term costs, a scientific analysis, and a full EIS before a road could be built in roadless areas. The new final policy was to supersede the interim policy except with respect to roads in the Tongass National Forest, in which forest the interim policy would continue to govern the activities that are permitted to go forward. These policies and interim direction have now been changed under the Bush Administration.

Under 36 C.F.R. § 212.5(b),[15] the focus is on providing and maintaining the minimum forest transportation system needed for safe and efficient travel and for the administration, utilization, and protection of NFS lands. This is to be determined by science-based roads analysis at the appropriate scale and is to minimize adverse environmental impacts. Unneeded roads would be decommissioned and the roadbeds restored. The economic and ecological effects of roads would be analyzed as part of an interdisciplinary, "science-based" process in which the public would be engaged. Until the new road inventories and analyses are completed, interim requirements would pertain and a compelling need for new roads would have to be demonstrated. These rules are still in effect, though new rules have been proposed.

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[8] 63 Fed. Reg. 4,350, regarding regulations at 36 C.F.R. § 212.

[9] 63 Fed. Reg. 4,354.

[10] 64 Fed. Reg. 7,290 (Feb. 12, 1999).

[11] 65 Fed. Reg 11,680 (Mar. 3, 2000).

[12] 65 Fed. Reg. 11,684.

[13] 66 Fed. Reg 3,206 and 3,219 respectively.

[14] "Forest development roads" is changed to "National Forest System roads" and "forest transportation plan" is changed to "forest transportation atlas." Other new definitions also are added, e.g. to clarify "road construction" and "road reconstruction." 66 Fed. Reg. 3,216-3,217.

[15] 66 Fed. Reg. 3,230.

Planning. On a third track, the Forest Service on November 9, 2000, issued final new planning regulations, effective on that date.[16] However, new planning regulations were again proposed on December 6, 2002, and the date for compliance with the 2000 planning regulations was extended,[17] — which had the effect of restoring the 1982 planning regulations until new planning regulations were finalized. New regulations were published on January 5, 2005.[18]

Roadless Areas — Statutory Background

In considering the roadless area initiatives, a review of the most relevant portions of the statutes that govern the management of the NFS may be helpful.

The principal forest management statutes relevant to analysis of the Roadless Area Initiative are the Organic Act of 1897,[19] the Multiple-Use Sustained-Yield Act of 1960,[20] and the National Forest Management Act of 1976.[21] The 1897 Act directs that the national forests be managed to improve and protect the forests or "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States ...."[22] The 1897 Act also authorizes the Secretary to issue regulations to "regulate the occupancy and use of the forests and to preserve them from destruction ...."[23]

Over the years, many uses of the national forests in addition to timber and watershed management have been allowed administratively. Statutorily, the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) expressly recognizes and authorizes the "multiple use" of the forests, a term MUSYA defines as the management of all the various renewable surface resources of the national forests "in the combination that will best meet the needs of the American people" and recognizes that "some land will be used for less than all of the resources ... without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."[24] MUSYA states that the national forests are established and shall be administered for their original

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[16] 65 Fed. Reg. 67,514. Revising the planning regulations has been a contentious issue for the Forest Service for quite some time.

[17] The compliance date was extended in an interim final rule, 66 Fed. Reg. 27,552 (May 17, 2001). Compliance with the 2000 regulations was later postponed until new planning regulations are finalized. 67 Fed. Reg. 35,431 (May 20, 2002). See also extension of compliance for projects implementing plans, 68 Fed. Reg. 53,294 (September 10, 2003).

[18] 70 Fed. Reg. 1,023.

[19] Act of June 4, 1897, ch. 2, 30 Stat. 34.

[20] P.L. 86-517, 74 Stat. 215.

[21] P.L. 94-588, 90 Stat. 2949, primarily amending P.L. 93-378.

[22] 16 U.S.C. § 475.

[23] 16 U.S.C. § 551.

[24] 16 U.S.C. § 531.

purposes and also for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes"[25] and that "[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of [the act.]"[26] This latter language, which preceded enactment of the 1964 Wilderness Act ,[27] recognized that the FS had been managing some forest areas as administrative wilderness or natural areas. What constitutes the most desirable combination of uses for a forest has been hotly debated for decades.

MUSYA also requires "sustained yield," which is defined as the "achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land."[28] How much is a "high-level annual or regular periodic output" of forest resources that does not impair the productivity of the land has also been the subject of much debate.

The National Forest Management Act of 1976 (NFMA) set out additional provisions on the management of the national forests that include direction for developing land and resource management plans. NFMA directs that regulations be adopted to guide forest planning and accomplish specific goals set by the Congress, including insuring consideration of the economic and environmental aspects of various systems of renewable resource management including "silviculture and protection of forest resources; to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish; and providing for diversity of plant and animal communities."[29]

The roadless areas in the National Forest System have long received special management attention. Beginning in 1924, long before the enactment of MUSYA, the FS managed many forest areas as natural, primitive, or wilderness areas — a practice expressly approved in MUSYA. More permanent, congressionally approved statutory wilderness areas were provided for in the 1964 Wilderness Act,[30] which established the National Wilderness Preservation System. The Wilderness Act directed review of FS-designated primitive areas and other larger roadless areas to consider their suitability for inclusion in the national wilderness system. This review was carried out and expanded (with respect to the national forests) in the Roadless Area Review and Evaluation or "RARE" studies, which expanded on studies begun before enactment of the 1964 Wilderness Act. Roadless areas inventoried either as part of the RARE studies or as part of subsequent reviews during the NFMA planning process are the "inventoried" roadless areas referred to in the October 19, 1999 Notice. Congress has designated many additional wilderness areas since 1964,

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[25] 16 U.S.C. § 528.

[26] 16 U.S.C. § 529.

[27] P.L. 88-577, 78 Stat. 890.

[28] 16 U.S.C. § 531.

[29] 16 U.S.C. § 1604(g). Note that "wilderness" management is again mentioned, twelve years after enactment of the Wilderness Act.

[30] P.L. 88-577, *supra*.

but, under the statutes summarized above, especially the MUSYA, the FS may still manage parts of the national forests as natural, primitive, or wildlife areas, which might be characterized as "administrative wilderness" areas.

The management of the roadless areas of the NFS is of great interest to both wilderness proponents and to opponents of additional natural or wilderness area protection. Proponents of additional protection point to the many purposes the roadless areas serve, including water quality protection, backcountry recreation, and habitat for wildlife; opponents assert that the formal congressional wilderness review and designation process sets aside adequate natural areas and the remaining areas should be available for timber harvesting, mining, developed recreation, and other uses.

The FS identified approximately 58.5 million acres of inventoried roadless areas, roughly one-third of all NFS lands. Road building is not allowed in 20.5 million acres of this total under current plans. Roads are also currently prohibited in an additional 42.4 million acres of Congressionally-designated areas such as Wilderness or Wild and Scenic River corridors. There are approximately 386,000 miles of FS and other roads in the NFS. The explanatory material in the final rulemaking states that roadless areas provide significant opportunities for dispersed recreation, are sources of public drinking water, and are large undisturbed landscapes that provide open space and natural settings, serve as a barrier against invasive plant and animal species, are important habitat, support the diversity of native species, and provide opportunities for monitoring and research.[31] In contrast, the explanatory material continues, installing roads can increase erosion and sediment yields, disrupt normal water flow processes, increase the likelihood of landslides and slope failure, fragment ecosystems, introduce non-native species, compromise habitat, and increase air pollution.[32]

The Final Clinton Administration Roadless Area Rule

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

The final rule prohibited new road construction and reconstruction, but with some significant exceptions. The exceptions were if:

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[31] 66 Fed. Reg. 3,245 (Jan. 12, 2001).

[32] *Id.*, at 3,246.

(1) A road is needed to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property;

(2) A road is needed to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or to conduct a natural resource restoration action under CERCLA, Section 311 of the Clean Water Act, or the Oil Pollution Act;

(3) A road is needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty;

(4) Road realignment is needed to prevent irreparable resource damage that arises from the design, location, use, or deterioration of a classified road and that cannot be mitigated by road maintenance. Road realignment may occur under this paragraph only if the road is deemed essential for public or private access, natural resource management, or public health and safety;

(5) Road reconstruction is needed to implement a road safety improvement project on a classified road determined to be hazardous on the basis of accident experience or accident potential on that road;

(6) The Secretary of Agriculture determines that a Federal Aid Highway project, authorized pursuant to Title 23 of the United States Code, is in the public interest or is consistent with the purposes for which the land was reserved or acquired and no other reasonable and prudent alternative exists; or

(7) A road is needed in conjunction with the continuation, extension, or renewal of a mineral lease on lands that are under lease by the Secretary of the Interior as of January 12, 2001 or for a new lease issued immediately upon expiration of an existing lease. Such road construction or reconstruction must be conducted in a manner that minimizes effects on surface resources, prevents unnecessary or unreasonable surface disturbance, and complies with all applicable lease requirements, land and resource management plan direction, regulations, and laws. Roads constructed or reconstructed pursuant to this paragraph must be obliterated when no longer needed for the purposes of the lease or upon termination or expiration of the lease, whichever is sooner.

Maintenance of classified roads was permissible in inventoried roadless areas.

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

improve habitat for species that are listed as threatened or endangered under the Endangered Species Act or are proposed for listing under that Act, or which are sensitive species; or

> maintain or restore ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects.[33]

Other cutting could be permitted if incidental to the implementation of a management activity that was not otherwise prohibited; if needed and appropriate for personal or administrative use in accordance with 36 C.F.R. § 223 (the regulations on sale and disposal of timber); or if roadless characteristics had been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest before January 12, 2001. In this last instance, timber could only be cut in the substantially altered portion of the roadless area.[34]

The new roadless area rule expressly would not have revoked, suspended, or modified any permit, contract, or other legal instrument authorizing the occupancy and use of NFS lands that was issued before January 12, 2001, nor would it have revoked, suspended, or modified any project or activity decision made prior to January 12, 2001.[35] The rule would not have applied to roads or harvest in the Tongass National Forest if a notice of availability of a draft environmental impact statement for the activities had been published in the Federal Register before January 12, 2001.[36] These provisions would have grandfathered the activities addressed, but otherwise the new rule would have applied to the Tongass immediately.[37]

The explanatory material accompanying the Clinton Administration's planning rule of November 9, 2000, indicated that it was very similar to the proposed roadless area rule and also stated that the "final planning rule clarifies that analyses and decisions regarding inventoried roadless areas and other unroaded areas, other than the national prohibitions that may be established in the final Roadless Area Conservation Rule, will be made through the planning process articulated in this final rule. Under this final rule, the responsible official is required to evaluate inventoried roadless areas and unroaded areas and identify areas that warrant additional protection and the level of protection to be afforded."[38]

Therefore, possible *additional* restrictions on use of the roadless areas beyond those provided by the national rule would be developed as part of the planning process. The materials also compared particular parts of the proposed roadless areas rule with the final planning rule. It appears that the final planning regulations are less

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[33] New 36 C.F.R. § 294.13(b)(1), 66 Fed. Reg. 3,273.

[34] *Id.*, § 294.13(b)(2)-(4).

[35] *Id.*, § 294.14(a) and (c).

[36] *Id.*, § 294.14(d).

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

[38] 65 Fed. Reg. 67,529.

specific with respect to roadless area reviews than were the proposed regulations. As noted, the final rule eliminated the separate treatment of roadless area reviews within that rule.

Can "De Facto" Wilderness Areas Be Created Administratively?

Some have asserted that the management changes involved in the roadless area initiative would amount to "de facto" wilderness, and that only Congress can designate wilderness areas.

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

> Under this final rule, management actions that do not require the construction of new roads will still be allowed, including activities such as timber harvesting for clearly defined, limited purposes, development of valid claims of locatable minerals, grazing of livestock, and off-highway vehicle use where specifically permitted. Existing classified roads in inventoried roadless areas may be maintained and used for these and other activities as well. Forest health treatments for the purposes of improving threatened, endangered, proposed, or sensitive species habitat or maintaining or restoring the characteristics of ecosystem composition and structure, such as reducing the risk of uncharacteristic wildfire effects, will be allowed where access can be gained through existing roads or by equipment not requiring roads ....
>
> The Roadless Area Conservation rule, unlike the establishment of wilderness areas, will allow a multitude of activities including motorized uses, grazing, and oil and gas development that does not require new roads to continue in inventoried roadless areas ....[39]

Certainly, only Congress can designate areas for inclusion in the National Wilderness Preservation System.[40] However, the MUSYA (enacted before the 1964 Wilderness Act), expressly provides for the administrative management of national forest lands for fish and wildlife, outdoor recreation, and watershed purposes, as well as for timber, and states that "the establishment and maintenance of wilderness areas is consistent with [MUSYA's] purposes."[41] The NFMA (enacted after the Wilderness Act), directs that forest plans "assure ... coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and *wilderness* ...."[42] Therefore, it appears that, as a general matter, some new prohibitions on activities in roadless areas could lawfully be imposed administratively and the roadless rule might

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[39] 66 Fed. Reg. 3,249.

[40] P.L. 88-577, 78 Stat. 890.

[41] P.L. 86-517, 74 Stat. 215, 16 U.S.C. § 529.

[42] 16 U.S.C. § 1604(e).

be defended as appropriate management of non-timber resources for multiple use purposes (such as outdoor recreation, mineral development, game and other wildlife), yielding those benefits without permanent impairment of the lands. However, it also is possible that, as applied, restrictions that were severe and extensive might be challenged as violating the "sustained yield" aspects of the MUSYA.

Some of these issues have been raised in suits challenging the roadless area rule, and on July 14, 2003, Judge Brimmer of the Federal District Court for Wyoming permanently enjoined the roadless rule, in part on NEPA grounds and in part on the ground that it was a "thinly veiled attempt to designate 'wilderness areas' in violation of the clear and unambiguous process established by the Wilderness Act for such designation."[43] The court equated the roadless areas with de facto wilderness, noted the severity of the restrictions under the roadless rule, which the court characterized as restrictive, or more so, than that of congressionally designated wilderness areas,[44] and that the argument that the roadless rule permits multiple uses (such as motorized uses, grazing, and oil and gas development) to proceed so long as roads were not constructed "fails because all of those uses would, in fact, require the construction or use of a road."[45] Because it felt that the roadless areas under the new rule were tantamount to wilderness areas, the court concluded that the rule was "in violation of the clear and unambiguous process established by the Wilderness Act for such Designation."[46] The court did not reach Wyoming's assertions that the roadless rule also violated NFMA and MUSYA, but did mention that the Wilderness Act "provides protection for a use of the National Forests that was not contemplated by either the Organic Act or the MUSYA ...,"[47] and repeatedly equated roadless areas generally with congressionally designated wilderness.

As discussed above, both MUSYA and NFMA mention wilderness as a use of the national forests, a point the Brimmer opinion did not discuss. Furthermore, in the compromise "release" language in state-by-state wilderness acts since the mid-1980s, Congress repeatedly declined to direct that roadless areas that were not designated as part of the National Wilderness Preservation System when forest management plans were revised be managed for only non-wilderness uses, but instead permitted their management for uses that might maintain their wilderness attributes. The court noted part of the legislative history of the Wilderness Act to the effect that "the statutory framework of the Wilderness Act would ... assure that no further

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

[44] The court reviewed the exceptions by which roads could be allowed in roadless areas under the rule, but did not mention that Federal Aid Highways could be permitted in some instances (p. 1236). On the other hand, the court noted that the roadless rule was more constrained with respect to constructing roads in roadless areas in order to combat problem conditions than was the Wilderness Act, in that the Wilderness Act allows roads "to control fire, insects, and diseases," while the roadless rule only allows roads in the case of an "imminent flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property." (Comparing 16 U.S.C. 1133(d)(1) with 36 C.F.R. § 294.12(b)(1).

[45] *Id.* .

[46] *Id.* at 1239.

[47] *Id.*, at 1234.

administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited."[48] The validity of the assertion that the roadless rule was "in violation of the clear and unambiguous process established by the Wilderness Act for such [Wilderness] Designation,"[49] would seem to depend on whether one agrees that management of the roadless areas under the roadless rule would be as restrictive as that under the Wilderness Act, and on how one views the references to wilderness in MUSYA and NFMA and the actions of Congress in continuing to allow management of the roadless areas that maintains wilderness characteristics on national forest lands.

Administrative Actions and Litigation Since January 20, 2001

The "Card" Memorandum. Immediately after President Bush took office, his Chief of Staff, Andrew Card, issued a memo that directed, among other things, that the effective date of regulations that had been published in the Federal Register, but had not yet taken effect, be postponed for 60 days, unless a department head appointed by President Bush had reviewed and approved the regulatory action.[50] The roadless area regulation was covered by this language, since although it was published as a final rule on January 12, 2001, it was not to be effective until March 13, 2001.[51] The delay was because the roadless rule was determined to be a "major" rule under the Congressional Review Act, under which Congress is given a certain amount of time to possibly take action to disapprove the rule.[52] If Congress had

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

[49] *Id.*, at 1239.

[50] Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, Andrew H. Card, Jr. January 20, 2001. Exceptions are also made for rules that are subject to statutory or judicial deadlines, or rules the Office of Management and Budget Director deems are excepted because they are needed for an emergency or other urgent situation relating to health and safety.

[51] Several dates surround the roadless rule: the 60-day delayed effectiveness date in the rule itself — which derives from the Congressional Review Act (CRA)(Subtitle E of the Small Business Regulatory Enforcement Act of 1996, Pub. L. No 104-121, 110 Stat. 857-874, 5 U.S.C. §§801 *et seq.*); the 60-day delay resulting from the President's directive; and the usual 30-day delay that might otherwise apply under the Administrative Procedure Act (APA)(5 U.S.C. 501 *et seq.*). Normally, the 30-day APA delay period and the 60-day CRA delay period run concurrently.

[52] Under 5 U.S.C. § 804(2), a major rule is one that "has resulted in or is likely to result in — (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets" other than rules under the Telecommunications Act of 1996. Under the Review Act, a rule that has been determined to be a major rule cannot become effective for at least 60 days after publication. This delay period is to give the Congress time to consider the rule and to address legislatively issues raised by it. A major rule will take effect the later of the date

(continued...)

disapproved the roadless area rule and the President had signed the resulting act, that new legislated direction, of course, would have been binding, but Congress did not take action.

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[52] (...continued)
occurring 60 days after the date on which — (1) Congress receives the report submitted pursuant to § 801(a)(1); or after the rule is published in the Federal Register, if it is; (2) if the Congress passes a joint resolution of disapproval which is subsequently vetoed by the President, then the earlier of when one House votes and fails to override the veto, or 30 session days after Congress receives the veto message from the President; or (3) the date the rule would otherwise have taken effect if not for the review requirement. 5 U.S.C. § 801(a)(3). Other provisions allow a major rule to become effective earlier under certain circumstances, such as those involving an imminent threat to health or safety or other emergency circumstances, national security, etc., or if either House votes to reject a joint resolution of disapproval. When, as in this instance, a rule is published and/or reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House through the date on which the same or succeeding Congress first convenes its next session, that Congress may consider and pass a joint resolution of disapproval during a period of 60 session or legislative days after receiving the reported rule. A held-over rule takes effect as otherwise provided; but the opportunity for Congress to consider and disapprove it is extended.

The *usual* effective date of a regulation under the APA is 30 days after publication, during which time affected persons may prepare for and adjust to the impending effects of the rule. The 30-day period is intended as a minimum, and an agency may set a longer interval if that appears advisable, and longer times have been afforded in circumstances when it is anticipated that economic adjustments must be made in response to the new regulatory requirements. However, there are exceptions to the applicability of the APA, one of which is that the usual rulemaking procedures do not apply to rules relating to agency management or public property.

However, in 1971, Secretary of Agriculture Hardin partially waived the APA exemption for rules related to public property (36 Fed. Reg. 13804 (July 24, 1971). The Hardin Order subjects Department of Agriculture rulemaking to the public notice and comment requirements prescribed by 5 U.S.C. 553(b) and (c), subject to exceptions for good cause. However, the Order does not appear to subject Department rules to the 30-day delay requirement of § 553(d), or to other APA provisions beyond § 553(b) and (c), a fact which may be relevant to options available to change the rule. Many Forest Service rules, including the new Planning rule and the Roads rule, are effective immediately upon being finalized.

Under the APA, interested persons have the right to petition for issuance, amendment, or repeal of a rule, even during the 30-day delay period, although by what procedures an agency may accomplish changes in response to such a petition during the delay period is not totally clear. As noted above, however, the roadless rule does not appear subject to these provisions. Even if it were, the roadless rule is a final published rule, even though it is not yet in effect, and at least one court has held that an agency cannot simply "repeal" such a regulation, but rather may need to modify or revoke the final regulation through commensurate procedures (Consumer Energy Council of America v. Federal Energy Regulatory commission, 673 F. 2d 425 (D.C. Cir. 1982)) — here those that may be required by the NFMA and other agency regulations.

Effective Date Postponed. On February 5, 2001, notice was published in the Federal Register[53] postponing for 60 days the effective date of the roadless area rule from its previous effective date of March 13, 2001, to May 12, 2001.[54] The Administration then decided to implement the rule, but to consider amending it.

Implementation Enjoined — Part 1. The state of Idaho sued for a declaratory judgment and to enjoin implementation of the roadless rule for violation of NEPA, NFMA and the APA, and other suits in other states also were filed.[55] The court in the Idaho case found that plaintiffs were likely to succeed on their assertion that the FS had not provided the public an opportunity to comment meaningfully on the rule in that there was inadequate identification of the inventoried roadless areas (the court noting that statewide maps were not made available until after the public comment period had ended), inadequate information was presented during the scoping process (FS employees were alleged to be ill-prepared), and the period for public comment was not adequate (all of the public meetings in Idaho occurred within 12 business days of the end of the first 60-day comment period and many of the public comments were received within the last week of the time given and no responses were provided). The court characterized the comment period as "grossly inadequate" and an "obvious violation" of NEPA. The court further found that the FEIS did not consider an adequate range of alternatives, since all but the "no action" alternative included "a total prohibition" on road construction and the EIS did not analyze whether other alternatives might have accomplished protection of the environmental integrity of the roadless areas. In addition, the court concluded that FS did not analyze possible mitigation of negative impacts of the alternatives it did study.

The Bush Administration did not defend the rule, but did ask the court to postpone ruling on the motion for preliminary injunction until it had had an opportunity to complete a full review of the rule, arguing that an injunction was not necessary because the rule was not to be implemented until at least May 12, 2001.

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[53] 66 Fed. Reg. 8,899.

[54] The postponement notice stated that the action was exempt from notice and comment either because it is a procedural rule or for good cause shown: "[t]o the extent that 5 U.S.C. section 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. section 553(b)(A). Alternatively, the Department's implementation of this rule without opportunity for public comment, effective immediately upon publication today in the Federal Register, is based on the good cause exceptions in 5 U.S.C. section 553(b)(B) and 553(d)(3). Seeking public comment is impracticable, unnecessary and contrary to the public interest. The temporary 60-day delay in effective date is necessary to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President's memorandum of Jan. 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. The imminence of the effective date is also good cause for making this rule effective immediately upon publication."

[55] Idaho v. Dombeck, CV01-11-N-EJL (D.C. Id. 2001); Kootenai Tribe of Idaho et al v. Dombeck, CV01-10-N-EJL. (D.C. Id. 2001) Colorado and Alaska have joined Idaho in the suit and Utah also has filed suit.

The court reserved its ruling until on or after May 4th, the day that the Administration was to submit a status report on its review and findings. On May 4th, the Administration filed its status report with the court and announced that it would implement the Roadless Rule, but would take additional actions to address "reasonable concerns raised about the rule" and ensure implementation in a "responsible common sense manner," including providing greater input at the local planning level.[56]

However, on May 10th, Judge Lodge granted a preliminary injunction to prevent implementation both of the Roadless Rule and of the portion of the Planning Rule that relates to prescriptions for the roadless areas (36 C.F.R. § 219.9(b)(8)). The court found the Government's "vague commitment" to propose amendments to the Rule indicative of a failure to take the requisite "hard look" that an EIS is expected to perform, leaving the court with the "firm impression" that implementation of the Roadless Rule would result in irreparable harm to the National Forests. The court concluded that the government's response was a "band-aid approach" and enjoined implementation of the Rule while the agency goes forward with its new study and development of proposed amendments.

The United States did not appeal this decision, but environmental groups who had been granted intervenor status did appeal. Several other lawsuits raising various issues have been filed, including suits in North Dakota, Idaho, Alaska and the District of Columbia. The Ninth Circuit reversed the district court and remanded the case to the district court, as will be discussed further below.

Advance Notice of Proposed Rulemaking on Roadless Area Management. On July 10, 2001, the Forest Service published an Advance Notice of Proposed Rulemaking and asked for public comment on ten questions relating to "key principles" involving management of the roadless areas. Comments were due by September 10, 2001, on such questions as: what is the appropriate role of local forest planning in evaluating roadless management; what are the best ways to work collaboratively; how to protect the forests, including protection from severe wildfires; how to protect communities and homes from wildfires on federal lands; how to provide access to nonfederal properties; what factors the FS should consider in evaluating roadless area management; what activities should be expressly prohibited or allowed in roadless areas through the planning process; should roadless areas protected under a forest plan be proposed to Congress for wilderness designation or should they be maintained under a specific roadless management regime; how should the FS work with individuals and groups with strongly competing views; and what other concerns relate to the roadless areas.

Interim Management of Inventoried Roadless Areas I. The final Clinton administrative policy on National Forest System roads published on January 12, 2001,[57] provided interim direction on the management of roadless areas and the construction of roads in roadless areas that was to apply until a roads analysis was completed and incorporated into the relevant forest plans. This direction was in the

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[56] USDA News Release No. 0075.01.

[57] 66 Fed. Reg. 3,219.

Forest Service Manual (FSM) and contained considerable detail that would have permitted new roads only if the Regional Forester determined there was a compelling need for the road and both an EIS and a science-based roads analysis had been completed. Examples of instances that constituted compelling need were provided. The management direction was to apply to both inventoried roadless areas and to areas of more than 1,000 acres that were contiguous to inventoried roadless areas (or certain other areas) and met stated criteria. Exceptions were provided to the applicability of the interim guidelines.

Interim Management of Inventoried Roadless Areas II. Pending expected publication of proposed new roadless area rules, the Bush Administration issued a series of Interim Directives affecting roadless area protection and management. The first Directive was effective May 31, 2001, but was not published until August.[58] On June 7, 2001, additional new interim roadless area management direction was provided. On that date, the new Chief of the Forest Service issued a memorandum addressing protection of roadless areas and requiring his approval for some proposed roads or timber harvests in inventoried roadless areas pending completion of forest plan revisions or amendments.

Interim Directive 1920-2001-1 issued December 14, 2001, was published on December 20, 2001.[59] This December directive appears to substantially replace much of the previous directives. However, the Notice did not clearly indicate which provisions were being replaced or the precise extent of revisions. The published explanatory material states that affected material is set out and unaffected material is not. Yet some of the earlier provisions are neither shown nor discussed and therefore, might still have been in effect. However, the final text of new FSM §1925 did not show these undiscussed earlier provisions — as though they were superseded. Therefore, it is not clear which of the previous materials were still in effect. For example, some of former FSM §7712.16 (that contained many specific details on permissible road construction) is expressly revised in the December Directives (notably the former requirements for protection of contiguous areas and the requirement for preparation of an EIS for projects in roadless areas are eliminated) and the explanatory materials state that the revised provisions are then moved to appear in the Planning part of the Manual as new §1925. Yet other provisions that were in §7712.16 were neither discussed as superseded or modified, nor set out in new §1925. One example is that the previous requirement for a "compelling need" for the road project has disappeared without comment.[60] These ambiguities make

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[58] The first of these (I.D. No. 7710-2001-1) was actually published on August 24, two days after the second of these directives (I.D. No. 7710-2001-2 and I.D. No. 2400-2001-3, both issued July 27, 2001), even though the first one had been in effect since May 31. See 66 Fed. Reg. 44,590 (August 24, 2001) and 66 Fed. Reg. 44,111 (August 22, 2001).

[59] I.D. No. 7710-2001-3 and I.D. No. 1920-2001-1, both effective December 14, 2001. 66 Fed. Reg. 65,796.

[60] Another example is §7712.16b, paragraph 3, which distinguished between classified and unclassified forest roads and stated that environmental mitigation and environmental restoration of unclassified roads are appropriate in inventoried roadless and contiguous unroaded areas and must follow NEPA-based decisionmaking processes. However, (continued...)

analysis of and comment on the December Directives difficult. These ambiguities are relevant because this December directive has now been reinstated, as will be discussed below.

As with earlier directives, the December directive was already in effect (as of December 14, 2001) when published, but retroactive comment was invited — to be considered if final directives are developed. However, the interim directive was only to be in effect for 18 months, unless this time is extended to 36 months, and also apparently was to cease to apply once a forest plan was revised or amended.

As noted, the December directive moved some provisions that more directly address roadless area management into the planning part of the Manual. Only inventoried roadless areas were subject to the interim requirements. The December Directive reserved, as did the earlier ones, authority to the Chief to approve or disapprove certain proposed timber harvests in inventoried roadless areas until a plan revision or amendment is completed "that has considered the protection and management of inventoried roadless areas pursuant to FSM 1920." It also provided that the Chief could designate an Associate Chief, Deputy Chief, or Associate Deputy Chief on a case-by-case basis to be the responsible official. This delegation authority was changed to also include Forest Supervisors in the reinstated and amended directive.

The Regional Forester was to screen timber harvest projects in inventoried roadless areas for possible referral to the Chief. The Chief was to make decisions regarding harvests *except* for those that were: (1) generally of small diameter material, the removal of which is needed for habitat or ecosystem reasons (including reducing fire risk), (2) incidental to a management activity not prohibited under the plan; (3) needed for personal or administrative use; or (4) in a portion of an inventoried roadless area where harvests had previously taken place and the roadless characteristics had been substantially altered. Decisions as to these harvests were to be made by forest officers normally delegated such authority under existing FSM §2404.2. (These delegations included Forest Service line officers.)

The December 2001 directive stated that the Chief's authority with respect to timber harvests did not apply if a Record of Decision for a forest plan revision was issued as of July 27, 2001 — as was true of the Tongass National Forest — and would otherwise terminate when a plan revision or amendment that has considered the protection and management of inventoried roadless areas was completed.[61]

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[60] (...continued)
reconstruction or maintenance of unclassified roads in inventoried roadless and contiguous unroaded areas is inappropriate, other than to prevent or correct resource damage, as such activity would lead to de facto road development.

[61] FSM §1925.04a. 66 Fed. Reg. 65,801-65,802. Therefore, if the interim direction did not apply to Tongass, and the new roadless area rule were enjoined, arguably the usual forest line officers could approve timber harvests in that forest under the procedures and provisions in place before a the new final roadless area management rule and in accordance with the plan for that forest.

The Chief's authority with respect to road construction was to remain in effect until a forest-scale roads analysis was completed and incorporated into each forest plan, at which point it terminated.[62] The Regional Forester was to make many decisions on road construction projects under new §1925.04b. There was no express provision in that section for termination of the authority of the Regional forester. However, the general policy section, 1925.03, keyed termination of the special provisions to completion of a roads analysis and its incorporation into the relevant forest plan:

> Inventoried roadless areas contain important environmental values that warrant protection. Accordingly, until a forest-scale roads analysis (FSM7712.13b) is completed and incorporated into a forest plan, inventoried roadless areas shall, as a general rule, be managed to preserve their roadless characteristics. However, where a line officer determines that an exception may be warranted, the decision to approve a road management activity or timber harvest in these areas is reserved to the Chief or the Regional Forester as provided in FSM 1925.04a and 1925.04b.[63]

Under FSM 1925.04a, the Chief had approval authority over all road construction and reconstruction except those decisions delegated to the Regional Forester. Under FSM 1925.04b, the Regional Forester was to screen proposed road projects, forward certain of them to the Chief for approval, but be the deciding officer for many decisions on road projects in inventoried roadless areas, such as when a road is needed:

> to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention would cause the loss of life or property
>
> to conduct a Superfund response or to conduct a natural resources restoration action under Superfund, §311 of the Clean Water Act, or Oil Pollution Act
>
> in conjunction with the continuation extension, or renewal of a mineral lease on lands under lease as of January 12, 2001
>
> pursuant to reserved or outstanding rights or as provided by statute or treaty
>
> for critical resource restoration and protection
>
> to prevent resource damage by an existing road that is deemed essential for public or private access, management, or public health or safety, and where such damage cannot be corrected by maintenance; or
>
> to restore wildlife habitat.

Note that the December Directive apparently eliminated the requirement that there be a *compelling* need for a road and also eliminated the requirements for a

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[62] *Id.*, at 65,801.

[63] 66 Fed. Reg. 65,801.

science-based analysis and a full EIS in all cases. In addition, the applicability of the interim direction to certain important contiguous areas also was eliminated. Although the responsible official could still do an EIS and could protect contiguous areas, and a compelling need for a road might exist in some instances, less protection to roadless areas could result because while the new directive *permitted* protection, it did not contain the higher thresholds for approval of activities and more formalized documentation requirements of the previous direction.

This interim directive expired on June 14, 2003. However, as discussed under the heading "2005 Roadless Areas Regulations" below, the directive, renumbered and with certain changes, was later reinstated.

Changes to "Categorical Exclusions." Changes to agency NEPA documentation requirements also could significantly affect the roadless areas. Under NEPA, agencies must prepare an EIS for proposed actions that might have a significant effect on the human environment. If it is not clear whether if an action might have such an effect, the agency is to prepare an environmental assessment (EA) to determine if an EIS is necessary. Depending on what the EA finds, preparation of an EIS may then follow, or the agency may issue a Finding of No Significant Impact (FONSI), in which case no further analysis is required. However, some actions have been shown to have so little effect on the environment that not even an EA is necessary. An agency may indicate what these clearly non-harmful actions are through its articulation of "categorical exclusions" — actions that are excluded from preparation of even an EA.[64]

Several agency actions have expanded the activities that may be conducted as categorical exclusions, and have replaced previous categorical exclusions on timber sales. Joint Forest Service/Bureau of Land Management categorical exclusions were finalized for hazardous fuels reduction projects that can include mechanical treatments on up to 1,000 acres.[65] A categorical exclusion was also finalized for smaller FS timber sales.[66] In addition, certain silvicultural treatments may proceed as categorical exclusions under Title IV of the Healthy Forests Restoration Act.[67]

Previously, the categorical exclusions portion of the FS Handbook set out types of activities that normally would be excluded from NEPA documents — unless extraordinary circumstances are present. One of the listed extraordinary circumstances was the presence of inventoried roadless areas. Extraordinary circumstances were defined as "conditions associated with a normally excluded action that are identified during scoping as *potentially* having effects which *may* significantly affect the environment." (Emphasis added.) The presence of an extraordinary circumstance arguably removed the proposed action from qualifying as a categorical exclusion and required the preparation of an EA in order to probe

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[64] 40 C.F.R. 1508.4.

[65] 68 Fed. Reg. 33,814 (June 5, 2003).

[66] 68 Fed. Reg. 44,598 (July 29, 2003).

[67] P.L. 108-148, 117 Stat. 1887.

further the possible environmental effects. This is the interpretation of the Handbook section and its legislative history in a Seventh Circuit case.[68]

New interim guidance was proposed[69] and finalized,[70] such that the presence of circumstances previously considered "extraordinary" do not necessarily preclude an action from being a categorical exclusion if the responsible official, based on scoping, determines there would be no significant environmental effects. Indeed, under the new directive, a circumstance *is* "extraordinary" only if the responsible official determines it is because the proposed action may have a significant effect on the environment, in which case an EIS is to be prepared. Or, if the responsible official is uncertain whether the proposed action may have a significant effect on the environment, an EA is to be prepared. Under this approach, the presence of circumstances that previously were per se "extraordinary" now are merely "resource conditions" that must specifically be considered in determining whether an action may have a significant effect. "It is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist."[71] This is a significant change from the previous text.

In defense of the proposed changes on explanatory circumstances, the explanatory material asserted that there is a split in the decisions of the circuits on the effects of the presence of extraordinary circumstances, and that the Ninth Circuit has held that an agency may issue a categorical exclusion even where a certain resource condition, such as the presence of threatened or endangered species, is found.[72] However, the cited case involved a salvage sale under §2001 of the Rescissions Act,[73] a statute that sets out a very narrow scope of judicial review of environmental decisions and a very broad range of discretion in the Secretary to determine the adequacy of any environmental reviews. In contrast, the Seventh Circuit opinion, which analyzed the wording and derivation of the current categorical exclusion provisions was not so contextually limited, and hence is arguably more on point.[74] Under the final directive, some timber sales could be conducted as categorical exclusions in roadless areas (and possibly in a roadless area with endangered or threatened species) if the official determines, without the necessity of written documentation of the underlying analysis relied upon, that there would be no significant environmental effects.

Comments on Possible Roadless Changes. On June 26, 2002, the Forest Service released its summary report dated May 31, 2002, on the public comments received in response to the Advance Notice of Proposed Rulemaking. The

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

[69] 66 Fed. Reg. 48412 (September 20, 2001).

[70] 67 Fed. Reg. 54622 (August 23, 2002).

[71] FSH 19909.15 — Environmental Policy and Procedures Handbook, § 30.3b.2.

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

[73] P.L. 104-19, 109 Stat. 194, 240-247.

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

Forest Service received approximately 726,000 responses, said to be mostly form letters to the 10 questions, but which included 52,432 original responses. The report includes appendices that describe the system used to analyze the comments, and urges caution in relying on the gist of the comments received, in that "respondents are self-selected; therefore their comments do not necessarily represent the sentiments of the entire population. The analysis attempts to provide fair representation of the wide range of views submitted, but makes no attempt to treat input as if it were a vote." Appendix E indicates that the overwhelming number of "organized" responses were in favor of the Roadless Rule.[75]

Ninth Circuit Decision on 1st Injunction. On December 12, 2002,[76] the Ninth Circuit reversed the Idaho district court stating:

> We hold that the district court had discretion to permit intervention, under Fed. R. Civ. P. 24(b), and intervenors now can bring this appeal under Fed. R. Civ. P. 24(b); that plaintiffs have standing to challenge the Roadless Rule; and, assessing the merits, that the district court abused its discretion in granting [sic] preliminary injunction against implementation of the Roadless Rule.[77]
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> . . . .
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> Because of its incorrect legal conclusion on prospects of success, the district court proceeded on an incorrect legal premise, applied the wrong standard for injunction, and abused its discretion in issuing a preliminary injunction.[78]

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

In reaching its conclusions, the Ninth Circuit reviewed the substantive grounds considered by the district court and disagreed that plaintiffs had demonstrated a likelihood of success on the merits, finding instead that the Forest Service did adequately comply with NEPA in its provision for public comment on the Roadless Rule because the maps provided did not suffer from the grave inadequacies alleged by plaintiffs, plaintiffs had actual notice as to the roadless areas that would be affected, and at most possibly inadequate maps would only affect the propriety of the Rule on the 4.2 million acres added during the EIS process. The court also found that the Forest Service had provided more than the minimum required amount of time for comment, the time allowed was adequate,[79] and that the EIS considered an adequate range of alternatives.[80] Because it felt that the district court wrongfully found that plaintiffs were likely to succeed on the merits, the appellate court concluded that the

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[75] The Report on the Public Comments can be reached via the June 26, 2002 News Release at [http://www.roadless.fs.fed.us]. The Ninth Circuit pointed out that the Attorney General of Montana had asserted that nationally "96% of commenters favored stronger protections." Kootenai Tribe of Idaho v. Veneman, 313 F. 3d 1094 (9th Cir. 2003).

[76] 313 F. 3d 1094 (9th Cir. 2003).

[77] *Id.* at 1104.

[78] *Id.* at 1126.

[79] *Id*. at 1118-1119.

[80] *Id.* at 1120-1121.

district court accepted only a minimal showing of irreparable harm and incorrectly issued the injunction.

Most of the unfavorable response to the decision has focused on whether it was proper for the intervenors to bring the appeal when the government did not. It will be recalled that the case came forward in an unusual context: although several statutes were initially involved in the lawsuits, the district court decision focused on the inadequacy of the federal defendants' NEPA compliance, a decision the federal defendants did not appeal. Certain environmental groups had been granted intervenor status and appealed the district court's ruling. The decision of the Ninth Circuit raises significant issues relating to whether the intervenor groups could appeal NEPA-compliance rulings when the federal defendants — the only ones who could comply with NEPA — did not.

Under Rule 24 of the Federal Rules of Civil Procedure, a potential intervenor must meet certain criteria to intervene, either as of right under Rule 24(a) or with the permission of the court under Rule 24(b). Earlier cases, including two in the Ninth Circuit, have held that only the federal government can defend the adequacy of its NEPA compliance,[81] and the dissenting opinion questions whether the majority adequately established that the appealing intervenors fit within even permissive intervention under Rule 24(b). The majority held that the district court erred to the extent it permitted intervention under Rule 24(a), but found intervention proper under Rule 24(b). In reaching this conclusion, the court quoted from a leading treatise which seems to postulate generous grounds for allowing intervention.[82] In a search for "independent jurisdictional grounds"sufficient to support intervention to pursue an appeal abandoned by the other parties, the court looked to the standing of the intervenor applicants. The court determined that the applicants need not show that they independently could have sued the party who prevailed in district court, but need allege only a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal.[83] The court stated that "intervenors

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[81] An earlier Ninth Circuit case, Churchill v. Babbitt, 150 F. 3d 1072, as amended by 158 F. 3d 491 (9th Cir. 1998) held that the district court in that instance did not err in allowing intervenors under Rule 24(a) to intervene only as to the remedial part of the case. In Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989) the court held that environmental intervenors did not qualify under Rule 24(a) to intervene as of right to defend a NEPA challenge although they evidently were allowed intervenor status on other claims. This latter case referred to an earlier Seventh Circuit case (Wade v. Goldschmidt, 673 F. 2d 182 (7th Cir. 1982)) in which the court denied intervenor status to an applicant because it failed to assert an interest sufficient to warrant intervention as of right under Rule 24(a) in the context of a NEPA challenge, stating: "In a suit such as this, brought to require compliance with federal statues regulating governmental projects, the governmental bodies charged with compliance can be the only defendants." (Wade, at 185.) Furthermore, the court found that "as it should be clear from our discussion of intervention of right," the applicants did not have "a question of law or fact in common" to satisfy the requirement for permissive intervention under Rule 24(b).

[82] Kootenai, at 1109.

[83] *Id.*

asserted their interests related to the Roadless Rule in moving to intervene,"[84] but did not clearly set out what those interests were. Possibly, they are the "interest in the use and enjoyment of roadless lands and in the conservation of roadless lands in the national forest lands subject to the roadless Rule" the court mentioned previously. The court also discussed the fact that the district court expressly noted the magnitude of the case and that "the applicants' intervention will contribute to the equitable resolution of this case," to which opinion the appellate court added that the presence of intervenors would "assist the court in its orderly procedures leading to the resolution of this case, which impacted large and varied interests."[85] This approach echoes another Ninth Circuit opinion that had applied a generous approach to intervention saying: "[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time we allow an additional interested party to express its views before the court."[86] This same court approached the 'interest' test of Rule 24(b) generously as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[87] The Ninth Circuit denied Idaho's petition for rehearing, and the case was remanded to the district court to reconsider its previous reasoning and injunction in light of the opinion of the appellate court. Several of the other lawsuits challenging the Roadless Rule were stayed pending the decision by the Ninth Circuit.

Interim implementation; Tongass. It will be recalled that the Clinton Administration on January 12, 2001, had issued interim direction for the management of roadless areas until a roads analysis had been completed and incorporated into relevant forest plans. This interim direction was followed by other interim directives issued by the Bush Administration in light of the injunction. This interim direction on management of roadless areas expired on June 14, 2003, but was later reinstated with modifications, as will be discussed.

On June 9, 2003, the Bush Administration indicated that it would "retain" the roadless rule and would not renew the interim management directives. However, the roadless rule would be modified to exclude the Tongass National Forest as part of a settlement of the lawsuit filed by the State of Alaska. A proposed rule to exclude the Tongass from the broader protection of the roadless rule was published on July 15[88] and an Advance Notice of Proposed Rulemaking to exclude both the Tongass and the Chugach National Forest (also in Alaska) was also published on the same day.[89] A final rule "temporarily" exempting the Tongass from the roadless rule was published

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[84] *Id.* at 1111.

[85] *Id.*

[86] Forest Conservation Council v. Forest Service, 66 F. 3d 1489, 1496 n.8 (9th Cir. 1995)(citation omitted).

[87] *Id.* at 1497.

[88] 68 Fed. Reg. 41865 (July 15, 2003).

[89] 68 Fed. Reg. 41864 (July 15, 2003).

on December 30, 2003.[90] Specifically, the roadless area restrictions on road construction, road reconstruction, or the cutting, sale, or removal of timber in inventoried roadless areas do not apply on the Tongass National Forest. The explanatory material indicates that the exemption is temporary — until an Alaska-wide roadless rule is finalized. The exemption means that roadless areas protected under the Revised Land Management Plan for the Tongass would remain protected, but an additional 300,000 acres of currently roadless area will be available for logging under that plan.

Implementation Enjoined — Part 2. On July 14, 2003, Judge Brimmer of the Federal District Court for Wyoming permanently enjoined the Roadless Rule, in part because of NEPA defects, and in part because he concluded it created de facto wilderness in violation of the Wilderness Act.[91] (See discussion of the wilderness issues, *supra*.) The court concluded that 1) the FS's decision not to extend the scoping comment period was arbitrary and capricious; 2) the FS's denial of cooperating agency status to Wyoming and other states was arbitrary and capricious; 3) the FS's failure to rigorously explore and objectively evaluate reasonable alternatives to the Roadless Rule was contrary to law; 4) the FS's failure to adequately analyze cumulative effects was a clear error in judgment; and 5) the FS's decision not to issue a supplemental EIS in light of new information on updated roadless area inventories was arbitrary and capricious, and contrary to law.[92] The court stated that the agency drove the rule "through the administrative process in a vehicle smelling of political prestidigitation"[93]in its "rush to give President Clinton lasting notoriety in the annals of environmentalism"[94] — and concluded that the agency must "start over."[95] This decision is on appeal to the 10th Circuit Court of Appeals.

New Proposed Roadless Regulations. On July 16, 2004, a new proposed roadless rule was published.[96] Under the proposed changes to 36 C.F.R. §394, no protections of roadless areas would be prescribed in the rule. Instead, a new procedure would be put in place under which there would be a window of time within which the governor of a state could petition the Secretary of Agriculture to promulgate a state-specific rule on the management of roadless areas. The comment period on the proposed rule was extended to November 15, 2004.[97]

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[90] 68 Fed. Reg. 75136 (Dec. 30, 2003).

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

[92] *Id.* at 1231 - 1232.

[93] *Id.* at 1203.

[94] *Id.* at 1232.

[95] *Id.* at 1239.

[96] 69 Fed. Reg. 42,636 (July 16, 2004).

[97] 69 Fed. Reg. 54,600 (September 9, 2004).

Interim Management of Inventoried Roadless Areas III. Effective upon publication of the proposed rules in the Federal Register, and for the duration of the time allowed for the state petition process, the FS reinstated the December 2001 directive 1920-2001-1, renumbered as ID 1920-2004-1 and modified it in two respects.[98] This reinstatement put in place again the provisions described above that allow the Chief of the FS to make decisions affecting inventoried roadless areas involving 1) road construction — until a forest-scale roads analysis is completed and incorporated into a forest plan or a determination is made that a plan amendment is not needed; and 2) the cutting of timber until a forest plan is in place that "considers" the protection and management of roadless areas.

ID 1920-2004-1 differs from the previous one in that it allows the Chief to grant project-specific exceptions to allow a Regional Forester or a Forest Supervisor, for good cause, to exercise the authority to conduct projects in roadless areas. The addition of forest supervisors to those who can conduct projects in roadless areas is an expansion of the previous ID that arguably could make it easier to approve projects in those areas. Secondly, FSM 1925.04b is changed to allow the Regional Forester to make decisions on road construction and reconstruction in an inventoried roadless area for lands associated with any mineral lease, license, permit or approval for mineral leasing operations.

Publication of the final roadless area rules states that the July 16, 2004 interim directive will remain in place until January 16, 2006, but may be renewed for an additional 18 months.[99]

New Forest Planning Regulations

New regulations on National Forest System land management planning were published on January 5, 2005.[100] A separate rule repealed the 2000 planning regulations at 36 C.F.R. § 219, Subpart A, but did not repeal the roadless area management rule at 36 C.F.R. § 294, Subpart B, which remained on the books, but enjoined.

New § 219.7(a)(5)(ii) of the new rules basically retains a provision from the 2000 rules[101] and provides that:

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

Depending on how 'wilderness' characteristics and evaluation criteria might be defined, this provision could require many roadless areas to be reviewed for possible wilderness designation as part of the cyclical plan revision process. However, no

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[98] 69 Fed. Reg. 42,648.

[99] 70 Fed. Reg. 25,658.

[100] 70 Fed. Reg. 1,023.

[101] 36 C.F.R. § 219.27(b)(2004).

management guidance for inventoried roadless areas that are not recommended for inclusion in the National Wilderness Preservation System is provided.[102] Another section indicates that, initially at least, all forest lands generally will be considered to be available for multiple uses going into the planning process.[103] "Roadless area" and "inventoried roadless area" are removed from the definitions section because the terms are not used in the rule. Comments raising concerns about protection for roadless areas were submitted when the planning regulations were proposed and the response was that the "Responsible Official considers these values during the planning process for the plan's desired conditions and objectives, which will involve local, regional, and national interests, and use the best available local information." This response seems to indicate that roadless values will be only one factor among many to be considered in managing the forests.[104]

The new planning regulations stress that plans are not decisional in nature, but rather are aspirational only, setting out goals for the management of forest units. Nor do they contain much detail on how to manage the forests, leaving that to the Forest Service Manual, Handbooks, and directives. In particular, the explanatory material states that guidance about special area concerns, such as roadless areas are more properly included in Forest Service directives.[105] In response to another comment that special protection for roadless areas was lost in the new regulations, the materials point only to the provision on wilderness evaluations quoted above, and state that additional guidance on roadless *wilderness evaluations* will be forthcoming in directives.[106]

Several publications of interim directives with solicitation of comments occurred since the publication of the final planning rules, principally the 12 IDs published on March 23, 2005.[107] However, as has been true of previous directives, it is difficult to find the texts in question[108] and to ascertain the current status of a particular management issue — in this case the management of inventoried roadless areas. In addition, the relationship of the March 23rd ID to the previous interim directive on roadless area management is not clear. It may be recalled that ID 1920-2001-1 (issued December 14, 2001, and expired June 14, 2003) was reinstated and renumbered as ID 1920-2004-1 "to provide guidance for addressing road and timber management activities in inventoried roadless areas until land and resource

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[102] *Id.*, at 1,044.

[103] Section 219.12 at 1,059.

[104] Supplemental Response to Public Comments on the 2002 Proposed Planning Rule, at 31.

[105] *Id.*, at 1,044.

[106] *Id.*

[107] 70 Fed. Reg. 14,637.

[108] Although directives purportedly are available at [http://www.fs.fed.us/im/directives/], the actual text of the new directives is unavailable at that site as of April 19, 2005. If a citizen visits the directives site mentioned in the Federal Register [http://www.fs.fed.us/emc/nfma/], the text of the new interim directives is available, but the sequence of the relevant IDs is not evident and the relationship between previous and current IDs is not clear.

management plans are amended or revised."[109] (Again, although that July 16, 2004, publication indicates the ID is available at [http://www.fs.fed.us/im/directives], it in fact is not — but see the discussion of it in the preceding section of this report.) The March 23rd interim directives include ID 1920-2005-1, which states that it does not supersede any previous IDs. The new 1920 series directive does not address the previous directive bearing that number, nor address roadless area management at all, except to indicate that part 1925 of the Forest Service Manual is "reserved" for IDs and field management guidance on the Management of Inventoried Roadless Areas — with no indication that there is in fact already such a directive in effect that is not referenced. Therefore, it was not clear whether there was any direction in effect with regard to management of roadless such areas pending revision of plans under the new planning regulations. The new final roadless area rule states that the plans and the July 14, 2004 interim direction are to apply.

2005 Roadless Area Regulations. New final roadless area rules were published on May 13, 2005.[110] The final roadless area regulations are very similar to the proposed regulations. A procedure is established to permit a Governor of a state to submit a petition to the Secretary regarding roadless areas in a state, and to make recommendations as to management of such areas. Petitions are required to provide specified information, including 1) a description of the particular lands for which the petition is made; 2) particular management recommendations; 3) identification of the circumstances and needs intended to be addressed by the petition, including conserving roadless value, protecting health and safety, reducing hazardous fuels, maintaining dams, providing access, etc.; 4) information on how the recommendations differ from the relevant federal plans and policies; 5) how the recommendations compare to state land policies and management direction; 6) how the recommendations would affect fish and wildlife and habitat; 7) a description of any public involvement efforts undertaken by the state during development of the petition; and 8) a commitment by the state that it will participate as a cooperating agency in any environmental analysis for the rulemaking.

Petitions must be submitted not later than November 13, 2006, but the explanatory material mentions that petitions for rulemaking or amendment after that time could be filed under 7 C.F.R. § 1.28. If the Secretary approves a petition, the FS must coordinate development of the proposed rule with the state, but the Secretary or the Secretary's designee is to make the final decision on any rule.

The rule does not include any standards on the scope or balance required for public participation in the development of a state's recommendations, or for how a state is to gather its information about an area's resources and values. There also are no requirements or standards for the Secretary's review and approval of a petition, and, perhaps most importantly, no statement as to the relative weight to be given to

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[109] 69 Fed. Reg. 42,648 (July 16, 2004).

[110] 70 Fed. Reg. 25,654.

a state's recommendations versus the preferences of non-state residents who may express an opinion on the desired management of these national lands.[111]

The background materials accompanying both the proposed and final rule refer to the importance of collaborating with partners, including state governments, stating: "strong State and Federal cooperation regarding management of inventoried roadless areas can facilitate long-term, community-oriented solutions."[112] The materials review the promulgation of the original roadless rule and note that "concerns were immediately expressed by those most impacted by the roadless rule's prohibitions" and that the new rule is proposed in response to those concerns.[113] This latter comment raises interesting questions about the role of public input in the rulemaking in that only approximately 4% of the extraordinary number of comments received on the original roadless rule opposed or expressed concerns about its protections. Similarly, the overwhelming number of responses to the new roadless rule favored continuing protection. The explanatory materials justify taking a different approach by stating that "every comment received is considered for its substance and contribution to informed decisionmaking, whether it is one comment repeated by tens of thousands of people or a comment submitted by only one person. The public comment process is not intended to serve as a scientifically valid survey process to determine public opinion."[114]

Advisory Committee Established. Also on May 13, 2005, a Roadless Area Conservation National Advisory Committee was established by the Secretary under the Federal Advisory Committee Act, to provide advice and recommendations on the implementation of the state petitions for special roadless area management rules.[115] Nominations for this Committee must be received in writing by June 27, 2005. The Committee is to consist of 12 members representing a "balanced group of representatives of diverse national organizations who can provide insights into the major contemporary issues associated with the conservation and management of inventoried roadless areas." The Committee is to operate "in a manner designed to establish a consensus of opinion."

Conclusion

Roadless areas of the National Forest System have received special management for decades and more recently have been addressed by two administrations through a complex series of interrelated actions on roads, roadless areas, and forest planning. A new nationwide rule providing protections and use restrictions on inventoried roadless areas was promulgated in January 12, 2001, in an effort to standardize

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

[112] 70 Fed. Reg. 25,654.

[113] *Id.*

[114] 70 Fed. Reg. 25,656.

[115] 70 Fed. Reg. 25,663.

management of such areas and avoid persistent litigation. However, a federal court enjoined implementation of the Clinton Administration's roadless rule, and although this decision was later reversed, another federal district court has again permanently enjoined implementation of the rule. A new roadless area rule has been finalized that replaces previous protections with a new process by which a governor of a state may petition the Secretary to promulgate a state-specific rule for the management of roadless areas. A petition would also contain recommendations for the management of the areas. The proposed rule does not contain details on how the public is to be involved in the development of a state petition, or how the state's recommendations are to relate to the preferences expressed by non-state residents regarding the same public lands.

During the time allowed for the new process, previous interim direction for the management of the roadless areas was reinstated, with some modifications, to govern the management of these areas during the time allowed for the new process. This direction allows the Chief of the FS to make decisions as to roads and timber cutting, but to delegate that responsibility in some circumstances, including to authorize forest supervisors to conduct projects in roadless areas. The interim provisions would be in effect until January 16, 2006 (unless extended for 18 additional months), a statewide rule is finalized, or a forest unit plan "considers" roadless areas.

New final planning regulations published on January 5, 2005, appear to presume that roadless areas are basically available for a variety of uses, including timber harvests, subject to unit-by-unit planning processes. Other administrative changes regarding categorical exclusions and extraordinary circumstances now appear to allow certain actions to be taken in roadless areas without written environmental analyses.

In summary, the regulatory direction for the management of the remaining National Forest System inventoried roadless areas arguably has gone from embodying a special recognized status with nationwide protections to having no special status or even separate mention in the new forest-by-forest planning regulations. Also, a new petition process has been established under which a Governor of a state may seek a special statewide rule regarding roadless areas. What management protections, if any, may apply to roadless areas in the future is not clear.