The Roadless Area Controversy: Past, Present, and Future

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Chapter 21
THE ROADLESS AREA CONTROVERSY:
PAST, PRESENT, AND FUTURE

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§ 21.01 Introduction

On January 5, 2001, after more than a year of public deliberations but only a few days before leaving office, the Clinton Administration issued the Roadless Area Conservation Rule (Roadless Rule), placing one-third of all national forest lands off-limits to road construction. Opponents argue that this prohibition creates “de facto” wilderness preserves, locking up the affected lands—nearly 60 million acres lying almost entirely within 12 western states—to mineral development, timber harvest, and other extractive industries.

The Roadless Rule is the subject of both ongoing litigation and reconsideration by the Bush Administration. Regardless of the outcome of these efforts, roadless area management will continue to pose compelling and contentious issues, just as it has throughout the past century. Roadless area conservation raises important policy issues about executive versus legislative power to manage federal public lands and resources, top-down, centralized decisionmaking rather than site-specific planning, and the legitimacy of broad-sweeping preservation initiatives on lands designated for multiple use and sustained yield. This chapter will explore the historic and legal frame-
work governing roadless areas and wilderness in the national forests, along with the Roadless Rule's implications for public land management and national preservation objectives.

§ 21.02 Roads and Roadless Areas in the National Forests

[1] History of the Forest Reserves: Conservation and Sustainable Use

[a] Reservation and Early Management of Forested Areas

Nineteenth century federal law encouraged rapid settlement and exploitation of western public lands and natural resources.¹ Unsustainable practices were the result of both federal law governing the disposition of the public lands and a lack of oversight for the management of those lands.² Concern that excessive logging would cause irreparable damage to watersheds and timber supplies³ eventually prompted the President and Congress to reserve forested lands from the public domain.

The power to conserve public lands and resources flows from the Property Clause, which provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁴ The Supreme Court has described the Property Clause as providing “complete power” over public property.⁵ The extent to which Congress may go in exercising this power has not been well defined, but it entails at least

³ See id.
⁴ U.S. Const. art. IV, § 3.
those powers of an ordinary proprietor as well as sovereign police powers.  

Delegations of Property Clause power to the executive branch have been routinely upheld. In United States v. Midwest Oil Co., the Supreme Court recognized the President's power to withdraw public lands from extractive activities as "the exigencies of the public service require[]." The Court also upheld the Secretary of Agriculture's authority to protect forest reserves from destruction through regulation of their use and occupation in United States v. Grimaud.  

The General Revision Act of 1891 and the Organic Administration Act of 1897 provided explicit statutory authorization to the executive branch to create and administer forest reserves. Culminating with Teddy Roosevelt's "midnight reserves," the President reserved over 200 million acres of forested lands from the public domain in a span of less than 20 years. The forest reserves were not off-limits to public use, however; under the leadership of Gifford Pinchot, forest resources were to be used, but in a sustainable manner. To rein in executive discretion, Congress inserted a provision in the 1907 agricultural appropriations bill barring further executive additions to forest reserves, effectively requiring congressional creation of national forests.

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6 Camfield v. United States, 167 U.S. 518, 525 (1897). See also Light v. United States, 220 U.S. 523, 536-37 (1911) (affirming injunction against unpermitted grazing in the Holy Cross Forest Reserve, and upholding the government's broad Property Clause powers: "The United States can prohibit absolutely or fix the terms on which its property may be used.").

7 236 U.S. 459, 471 (1915) (citing Grisar v. McDowell, 73 U.S. 363 (1867)).


11 See Wilkinson & Anderson, supra note 2, at 22-23.

12 See Dana & Fairfax, supra note 10, at 91-92.
[b] Conservation of Primitive Areas in Forest Reserves

The Forest Service has limited timber harvest and economic activities in roadless areas since the 1920s, pursuant to its general powers under the 1872 Organic Act. The Act, much of which remains in place today, directs the Secretary of Agriculture to:

make provisions for the protection against destruction by fire and depredations . . . and . . . make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.

The first official wilderness-like reserve in the national forest system was established in 1924 with the adoption of assistant forester Aldo Leopold’s proposal to set aside an area within the Gila National Forest. Leopold recognized that his proposal would be “rank heresy to some minds,” but believed that wilderness preservation provided recreational opportunities and could be reconciled with utilitarian goals.

Subsequently, Regulation L-20, issued in 1929, provided formal guidance for establishing and managing “primitive areas.” It established broad management guidelines to maintain relatively natural conditions “for purposes of public education and recreation,” leaving the details for individual area plans. L-20 was fairly limited, from a preservation standpoint, as it allowed timber harvesting, grazing, and mining to continue.

15 McCloskey, supra note 13, at 296-97. At about the same time, portions of the Superior National Forest, now known as the Boundary Waters Canoe Area Wilderness, were given administrative protection, and road-building was prohibited in the White River National Forest to preserve the primeval “mood” of Trappers Lake basin. See id.
16 Wilkinson & Anderson, supra note 2, at 336 (citing Aldo Leopold, “The Wilderness and its Place in Forest Recreational Policy,” 19 J. Forestry 718, 719 (1921)).
17 Id. at 338.
18 Id. at 339.
19 Id.
During the 1930s, wilderness policies were strengthened under the leadership of Bob Marshall, head of the Forest Service Division of Recreation and Lands. Regulation L-20 was replaced with the “U Regulations,” which provided for classification of undeveloped primitive areas as wilderness, wild, or primitive and prohibited roads, motorized vehicles, and logging in wilderness and wild areas. The U Regulations became the basis for the Wilderness Act of 1964.


[a] Legislative History and Key Provisions

By September 3, 1964, when the Wilderness Act was signed into law, a nation still reeling from the assassination of President Kennedy and alarmed by Rachel Carson’s report of environmental calamity embraced the lofty preservationist goals of the Wilderness Act as an expression of something uplifting, virtuous, and uniquely American. Efforts to pass wilderness legislation began almost a decade earlier. The first wilderness bill, S. 4013, was introduced by Hubert H. Humphrey and eight other senators in 1956. The purposes of S. 4013 were to remove administrative authority to diminish or declassify wilderness areas, to provide clear authority for the maintenance of wilderness areas, to designate wilderness areas within other categories of public lands, and to protect wilderness areas from mining and the construction of water projects. The Forest Service, concerned about timber, power, and mining interests as well as a loss of discretion, initially opposed the bill.

20 See id. at 340; Roderick Nash, Wilderness and the American Mind 205 (3d ed. 1982).
21 36 C.F.R. § 216.20 (1939). The prohibition against motorized vehicles was subsequently extended to primitive areas. See McMichael v. United States, 355 F.2d 283, 286 (9th Cir. 1965) (upholding conviction for operating motorized vehicle in primitive area in violation of U Regulations, 36 C.F.R. § 251.21(a) (1963)).
24 McCloskey, supra note 13, at 298.
25 Id. The Forest Service advanced a bill of its own to ensure the authority to manage forest lands for multiple use purposes. That bill was ultimately enacted as the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C.A. §§ 528-531 (2000).
Congressional members were motivated by the opportunity to curtail the Forest Service's discretion to set aside administrative preserves.\textsuperscript{26} The House Report indicated that, in fact, abolishing the agency's "absolute discretion" was a primary purpose of the Wilderness Act: "A statutory framework for the preservation of wilderness would permit long-range planning and assure that no future 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."\textsuperscript{27} The few dissenters were appeased by the inclusion of Representative Wayne Aspinall's pet project, the Public Land Law Review Commission, in the legislative package.\textsuperscript{28} The Commission conducted a review of executive-legislative relations in decisionmaking on public lands management and suggested reforms that were later adopted in the Federal Land Policy and Management Act (FLPMA).\textsuperscript{29}

The Wilderness Act of 1964 authorizes "a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas.'"\textsuperscript{30} It provides that only Congress may designate official wilderness: "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act."\textsuperscript{31}

The Act defines wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."\textsuperscript{32} The statutory definition turns on both naturalness and size:

\begin{quote}
[W]ilderness is further defined to mean . . . undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) gen-
\end{quote}

\textsuperscript{28} See Glicksman & Coggins, supra note 23, at 386.
\textsuperscript{31} Id.
\textsuperscript{32} 16 U.S.C.A. § 1131(c) (2000).
eraly appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

Once designated, wilderness areas are to be managed to preserve their wilderness character. Permanent roads and commercial enterprises are generally prohibited in wilderness areas, as are most motorized and mechanized vehicles. The Act also restricts grazing, water projects, and transmission lines. Subject to valid existing rights, the Act withdraws wilderness areas from mining and mineral leasing as of January 1, 1984. Mining and mineral leasing that do occur are subject to reasonable regulation for the protection of the land’s wilderness character; access to mining claims is also subject to reasonable regulation and is to be allowed "by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." State or privately owned inholdings must be provided with "adequate access" or exchanged for federal land of equal value.

There are special provisions for certain activities, including "commercial services . . . to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas." The use of motorboats and air-

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33 Id.
38 Id.
craft, where already established, “may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable.”42 In addition, measures may be taken as “necessary in the control of fire, insects, and diseases . . . ”43

All nine million acres classified as wilderness or wild under the U Regulations were designated as official wilderness areas upon passage of the Act.44 The Act directs the Secretary of Agriculture to study and report on the suitability of the remaining 5.4 million acres of primitive areas to the President.45 The President is directed to advise Congress with respect to these areas; the President’s recommendation for designation becomes effective only by Act of Congress.46 The Act also provides for review and recommendations regarding “roadless areas” of five thousand acres or more within national parks and national wildlife refuges.47 The Secretaries are required to give notice and hold public hearings with regard to their recommendations, and to submit their views to the President and Congress.48

[b] Roadless Area Review and Evaluation (RARE) Studies

After passage of the Wilderness Act, the Forest Service embarked on two successive wilderness suitability studies, known as RARE I and RARE II. RARE I, conducted in 1971, identified 56 million acres of roadless areas in the national forests that might qualify for inclusion in the wilderness system.49 Over 12 million acres were recommended for wilderness designation, while other inventoried roadless areas were classified as wil-

44 16 U.S.C.A. § 1132(a) (2000). The Act also designated “canoe” areas, a reference to the Boundary Waters in northern Minnesota. Id.
45 16 U.S.C.A. § 1132(b) (2000). This study was to be completed within ten years. Id.
46 Id.
derness study areas (WSA) to be withheld from final disposition pending further review, and still others were to be “re­leased” and made available for multiple uses such as timber harvesting and mineral extraction.53 However, the Forest Service was enjoined from releasing the latter category until it prepared an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA).51

In 1977, the Forest Service initiated RARE II to accelerate additions to the wilderness system and to clarify the role of commercial interests in national forests.52 When the RARE II surveys were done in 1979, over 15 million acres in nearly 3,000 roadless areas were recommended as wilderness, 11 million acres were slated for further study, and 36 million acres were recommended for uses other than wilderness.53 In California v. Block, the Ninth Circuit determined that the EIS for RARE II was inadequate due to a lack of site-specific analysis, failure to address public comments, and an inadequate range of alternatives.54 Once again, the release of wilderness-eligible tracts for multiple use management was enjoined, effectively precluding road building and logging in 36 million acres of national forests and prompting Congress to enact a series of statewide wilderness bills in the 1980s.55

The Forest Service continues to review land allocations during its regular planning processes and, under the Act, Congress may consider wilderness proposals for national forest lands at any time.56 The process for identifying and evaluating potential wilderness areas is set forth in the Forest Service Handbook,
which provides a checklist of criteria for wilderness review.\footnote{57} Foremost in the evaluation of wilderness potential is the identification and inventory of all roadless areas.\footnote{58} Areas that have “improved roads maintained for travel by standard passenger-type vehicles” are not considered roadless, but airstrips, electronic installations, structural improvements such as fences and water troughs, and evidence of mining and timber harvest do not necessarily disqualify areas from consideration.\footnote{59}

To date, Congress has designated more than 600 areas totaling over 100 million acres within the national forest system, national park system, and other public lands as official wilderness.\footnote{60} There are 34 million acres of designated wilderness in the national forest system.\footnote{61}

§ 21.03 Public Land Law Governing Forest Land and Resources

[1] Multiple-Use Sustained-Yield Act (MUSYA) and National Forest Management Act (NFMA)

[a] Wilderness as a Multiple-Use Resource

The Multiple-Use Sustained-Yield Act of 1960 (MUSYA), debated in Congress at the same time as some of the early wilderness bills, defines “multiple use” as “[t]he management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people.”\footnote{62} “Sustained yield” calls for an annual or periodic output of renewable forest re-


\footnote{58} Handbook, supra note 57, at 7.1.

\footnote{59} Id. at 7.11(3), 7.11a(1)-(11).

\footnote{60} Wilderness Facts, http://www.tws.org/wild/facts/facts_general.htm (last visited May 28, 2002). See National Wilderness Preservation System Map, at http://www.wilderness.net/nwps/map.cfm (depicting wilderness areas). The most significant recent addition to the System was in 1994, when Congress designated eight million acres through the California Desert Protection Act. Bills to protect the Coastal Plain of the Arctic National Wildlife Refuge and Utah’s Redrock Canyonlands have failed. See Wilderness Facts, supra.

\footnote{61} See Wilderness Facts, supra note 60.

sources “in perpetuity . . . without impairment of the productivity of the land.”\textsuperscript{63} MUSYA states that “some land will be used for less than all of the resources . . . 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.”\textsuperscript{64} It expressly provides that “[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions . . . [of this Act].”\textsuperscript{65}

Although MUSYA explicitly adopted the multiple-use and sustained-yield (MUSY) concept that had long been applied on national forest lands, it provides little guidance regarding management prerogatives or procedures, and in \textit{Perkins v. Bergland}, the Ninth Circuit concluded that the statute “breathes discretion at every pore.”\textsuperscript{66} The National Forest Management Act of 1976 (NFMA) constrains agency discretion with detailed provisions on the suitability of lands for timber harvest, protection of watersheds and soils, and diversity of plant and animal communities.\textsuperscript{67} NFMA incorporates MUSY principles, including “coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.”\textsuperscript{68} It requires long-term planning for land and resource management, and encourages public participation through the planning process.\textsuperscript{69}

\textbf{[b] Resource Development}

MUSYA provides that “[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands . . . .”\textsuperscript{70} Persons may enter the forests for all lawful purposes, including mineral development.\textsuperscript{71} Under

\begin{itemize}
\item \textsuperscript{63} 16 U.S.C.A. § 531(b) (2000).
\item \textsuperscript{64} Id.
\item \textsuperscript{65} 16 U.S.C.A. § 529 (2000).
\item \textsuperscript{66} 608 F.2d 803, 806 (9th Cir. 1979) (citing Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975)).
\item \textsuperscript{67} 16 U.S.C.A. § 1604(g),(k) (2000).
\item \textsuperscript{69} See 16 U.S.C.A. § 1604(d),(i) (2000).
\item \textsuperscript{70} 16 U.S.C.A. § 528 (2000).
\item \textsuperscript{71} 16 U.S.C.A. § 478 (2000).
\end{itemize}
MUSYA and the Organic Act, however, the Forest Service is directed to regulate the occupation and use of national forest lands and to preserve them from destruction.\(^\text{72}\)

Congress recognized that a "proper system of transportation" is necessary for access and resource development in the national forest system, and directed that funding for transportation construction and maintenance should "enhance local, regional, and national benefits."\(^\text{73}\) Roads must be "designed to standards appropriate for the intended uses, considering safety, cost of transportation, and impacts on land and resources."\(^\text{74}\) Temporary roads for timber harvest and other permitted uses must foster reestablishment of vegetative cover.\(^\text{75}\)

The agency's authority to declare primitive areas "off-limits" to roads and motorized access was tested in *McMichael v. United States*.\(^\text{76}\) There, defendants were convicted of operating motorized vehicles within a primitive area of the Boise National Forest. The Ninth Circuit upheld the Forest Service's regulations governing primitive areas, citing MUSYA and the Organic Act and remarking that the Wilderness Act provided "further indication that the Congressional policy supports the regulations in question."\(^\text{77}\) In response to defendants' arguments that the area was not unique or otherwise suitable for preservation, the court stated that the choice of lands to be preserved is an administrative choice not subject to judicial review.\(^\text{78}\)

[c] **Planning Requirements**

NFMA requires the Secretary to develop, maintain, and revise land and resource management plans for units of the na-
national forest system, and ensure that the plans provide for MUSY in light of “the availability of lands and their suitability for resource management.” The use of national forest lands must be consistent with these plans. Plans may be amended “in any manner whatsoever,” and must be revised at least every 15 years. The Secretary must provide for notice and public participation in the planning process.

The Secretary is specifically directed to make suitability determinations for timber production on national forest lands and identify lands that are not suited for production, “considering physical, economic, and other pertinent factors to the extent feasible. . . .” No harvesting may occur on unsuitable lands for a period of ten years, with exceptions for salvage and sales necessary to protect other multiple-use values.

The 1979 NFMA regulations require consideration of regional and ecosystem-based concerns through the planning process, for example, by providing for viable populations of species, and by requiring regional guides. The Senate Report, however, reveals a legislative preference for local planning: “[i]t is unwise to legislate national prescriptions for all forests, given the wide range of climatic conditions, topography, geologic and soil types,” as well as the diversity of local perspectives. Yet NFMA does not preclude the Forest Service from protecting natural features and habitat via rulemaking rather than forest plan amendments. NFMA itself requires coordination and interdisciplinary planning, which at times will necessitate re-

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84 Id.
86 Id. (codified at 36 C.F.R. § 219.4(b)(2) (1981)).
gional and even national decisionmaking. In *Seattle Audubon Society v. Lyons*, the court interpreted NFMA's provisions to allow, and in some cases require, landscape-level planning.


Just as NFMA declares that units of the national forest system are "united . . . into one integral system," FLPMA unifies existing public land laws through comprehensive legislation governing mining and other activities on public lands. FLPMA deals with an array of subjects, including withdrawals and land exchanges, rights-of-way, and planning processes for Bureau of Land Management (BLM) lands. In contrast to NFMA, FLPMA's multiple-use mandate specifically includes minerals.

FLPMA proclaims that the public lands should be retained and managed for MUSY purposes "in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 . . . ." It adds that the public lands should be managed for environmental and cultural values as well, including preservation of certain lands "in their natural condition."

One of Congress' primary objectives in enacting FLPMA was to curtail executive branch authority to withdraw public lands by enabling "Congress to exercise its constitutional authority to

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90 871 F. Supp. 1291, 1317 (W.D. Wash. 1994), aff'd, 80 F.3d 1401 (9th Cir. 1996). The court upheld the Northwest Forest Plan, allowing amendments to plans in 19 forests to satisfy provisions of NFMA and to provide viable populations of old-growth dependent species. Id.
93 Compare FLPMA, 43 U.S.C.A. § 1702(c) (1986) (defining "multiple use" to include renewable and non-renewable resources such as "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values") with NFMA, 16 U.S.C.A. §§ 1600 (focusing on renewable resources), 1604(e) (2000) (listing multiple uses, with no reference to minerals).
withdraw or otherwise designate or dedicate Federal lands for specified purposes and . . . delineate the extent to which the Executive may withdraw lands without legislative action.\textsuperscript{96} The term “withdrawal” is defined as “withholding . . . Federal land from settlement, sale, location, or entry, under some or all of the general land laws, . . . in order to maintain other public values in the area or reserving the area for a particular public purpose or program.”\textsuperscript{97} FLPMA authorizes the Secretary of the Interior to make only those withdrawals that do not require an act of Congress, and limits the Secretary’s power to delegate withdrawal power to political appointees within the Office of the Secretary.\textsuperscript{98} The Secretary must notify Congress of any withdrawals over 5,000 acres and may only make such withdrawals for a 20-year period; Congress may terminate the withdrawal by concurrent resolution.\textsuperscript{99}

Regulations that effectively remove large swaths of inventoried roadless areas from mineral entry to maintain the area’s natural values could violate FLPMA’s withdrawal provisions.\textsuperscript{100}


\textsuperscript{97} 43 U.S.C.A. § 1702(j) (1986).


\textsuperscript{99} 43 U.S.C.A. § 1714(c)(1),j) (1986 & Supp. 2002). The Secretary may withdraw areas smaller than 5,000 acres upon request by a department or agency head or on his or her own initiative, \textit{id.} § 1714(d), but must provide an opportunity for public hearing. \textit{Id.} § 1714(b)(1), (h). The statute allows emergency withdrawals to become effective immediately. \textit{Id.} § 1714(e).

The Roadless Rule expressly disclaims any intent to withdraw land from mineral entry and development: “Withdrawals are not proposed as part of the Roadless Area Conservation Rule... mineral withdrawal for specific inventoried roadless areas could be proposed through the forest planning process or specific project proposals.”

§ 21.04 The Roadless Area Conservation Rule

[1] What's all the Fuss About Roads?

There are nearly 390,000 miles of National Forest Transportation System roads, placing the Forest Service in charge of one of the longest road systems in the world. This figure represents 10% of total road length in the United States, a nation well known for its love of automobiles and interstate highways.

Roads, whether paved or unpaved, can have a dramatic effect on natural ecosystems, in particular, wildlife, vegetation, and water, soil, and air quality. The abundance and diversity of native species is diminished near roads, while exotic species tend to thrive in and near the clearings created by roads. “Edge effects” extending beyond the road corridor vary by ecosystem type, volume of traffic, proximity to water, and other factors.

2002), gives the Secretary of the Interior discretion to determine which lands are to be leased.


103 See Glicksman & Coggins, supra note 23, at 397.


106 Saunders, supra note 105, at 210 (stating that habitat degradation, or depth of edge influence (DEI), extends, on average, 50 meters from the road, given a road width of 10 meters).
By some estimates, over 20% of the United States is affected by roads, although only 1% of the total land base is physically covered by roads.\textsuperscript{107}


[a] The Roadless Area Conservation Rule

In 1998, Forest Service Chief Mike Dombeck proposed a temporary halt to all road construction in inventoried roadless areas in the national forest system.\textsuperscript{108} The Interim Roads Rule, issued in February 1999, suspended road construction for 18 months, during which time a long-term road policy for the forests was to be developed.\textsuperscript{109}

In October 1999, President Clinton directed the agency to develop regulations to provide long-term protection of roadless areas, and the Forest Service issued a Notice of Intent to begin rulemaking.\textsuperscript{110} The agency then issued its proposed rule and draft EIS in May 2000, and final EIS in November 2000.\textsuperscript{111} During the development of the Roadless Rule, over 600 public meetings were held and 1.6 million comments were received.\textsuperscript{112} The Forest Service ultimately selected EIS Alternative 3, the environmentally preferred alternative, in its final Roadless Rule in January 2001.\textsuperscript{113}

The Roadless Rule covers 58.5 million acres, amounting to 31% of all national forest system land and approximately 2% of the entire land base of the continental United States.\textsuperscript{114}

\textsuperscript{107} See id. at 209; Watkins, supra note 104, at 3.
\textsuperscript{109} Interim Rule, 64 Fed. Reg. 7290 (Feb. 12, 1999).
\textsuperscript{114} Id. at 3245.
though the proposed rule covered certain “unroaded” areas and portions of “inventoried roadless areas,” the final Roadless Rule extends to all “inventoried roadless areas,” defined as areas “identified in a set of inventoried roadless area maps, contained in Forest Service Roadless Area Conservation, Draft Environmental Impact Statement . . . or any subsequent update or revision of those maps.” The reference to “inventoried roadless areas” obviates the need for determining what is or is not a road, but the Rule nonetheless defines “road” as “a motor vehicle travelway over 50 inches wide, unless designated and managed as a trail.”

The Rule’s stated purpose is to “protect the social and ecological values and characteristics of inventoried roadless areas from road construction and reconstruction and [from] certain timber harvest activities.” It identifies roadless area characteristics as including high quality air, water, and soils, undisturbed habitat for resident and migratory species, scenic values, and exceptional opportunities for recreation. As for economic effects, the regulatory impact analysis concluded that roadless area conservation will result in lost revenues and lost jobs, but at the same time generate tourism dollars and increase the value of nearby properties. Preventing road construction in remote areas also provides financial savings to the federal treasury by alleviating the backlog of construction

117 66 Fed. Reg. at 3272. Trails “established for travel by foot, stock, or trail vehicle” continue to be allowed in roadless areas. Id. at 3251.
118 Id. at 3247 (to be codified at 36 C.F.R. pt. 294).
119 Id. at 3245, 3272.
needs elsewhere. The regulatory impact analysis concluded that, on balance, economic benefits would outweigh costs.

The Rule’s provisions can be broken down into three categories: prohibitions on road construction; restrictions on timber harvest; and special provisions for the Tongass National Forest in Alaska. New construction and reconstruction of roads in inventoried roadless areas is generally prohibited except when necessary to: (1) limit the threat of a catastrophic event; (2) allow environmental clean-up; (3) allow the exercise of rights previously granted by statute or treaty; (4) realign an “essential” existing road; (5) rectify hazardous conditions; or (6) complete a Federal Aid Highway Project, but only if no other prudent alternative exists. Construction may also be allowed “in conjunction with the continuation, extension, or renewal of a mineral lease on lands that were under lease . . . as of the date of publication of th[e] rule.”

The Rule prohibits timber harvest, with exceptions for the removal of small trees: (1) to improve habitat for endangered species; (2) to avoid forest disasters by maintaining ecosystem composition; (3) when harvesting is incidental to a management activity that the rule does not otherwise prohibit; (4) for administrative or personal use; or (5) when roadless characteristics have been so drastically altered by road construction and subsequent timber harvest that the area no longer fits the description of a roadless area.

The Tongass National Forest, the Forest Service’s largest administrative unit with vast unroaded areas, received special consideration in the Roadless Rule, in large part because a.

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121 Id. The Forest Service estimates that it requires $8.4 billion to address the backlog of transportation needs in the national forest system, but “receives less than twenty percent of the funds needed annually to maintain existing road infrastructure.” Id.

122 See id. at 8-10.


124 Id. at 3256. In addition, “road construction needed in conjunction with a new lease may be allowed . . . if the lease is issued immediately upon expiration of the existing lease.” Id.

125 Id. at 3257 (to be codified at 36 C.F.R. § 294.13(b)). See also U.S. Forest Serv., Changes from Proposed Rule, at http://roadless.fs.fed.us/documents/rule/zRULE_Changes_from_prop_2_final_1_4_01.htm (last visited May 30, 2002).
comprehensive forest plan revision had recently been completed for the Tongass.\footnote{66 Fed. Reg. at 3254.} Although the proposed rule would have deferred the prohibition on road construction, the final Roadless Rule applies the construction ban to the Tongass, effective immediately.\footnote{65 Fed. Reg. at 30,288; 66 Fed. Reg. at 3254.} However, the Rule allows the continuation of projects for which a notice of availability of a draft EIS had been published by January 12, 2001.\footnote{66 Fed. Reg. at 3255.}

To protect existing expectations, the Rule provides that “any permit, contract, or other legal instrument authorizing the occupancy and use of National Forest System land issued prior to January 12, 2001” will not be revoked, suspended, or modified.\footnote{Id. at 3259, 3273 (to be codified at 36 C.F.R. § 294.14(a)).} As a result, activities already under Forest Service review, including mineral leases and timber contracts, will continue to be permitted.

[b] Related Planning and Transportation Revisions

The Roadless Rule does not require Forest Service units to initiate plan amendments or revisions. Instead, it cross-references newly revised planning regulations, issued on November 9, 2000,\footnote{See id. at 3259-60 (to be codified at 36 C.F.R. § 294.14(e)) (citing Final Planning Rule, 65 Fed. Reg. 67,514 (codified at 36 C.F.R. pt. 219)).} which specify planning processes for roadless areas.\footnote{See id. at 3258.} The revised regulations emphasize sustainability as the overall goal of forest planning by strengthening the role of science and requiring collaboration with other governmental entities and the public.\footnote{Final Planning Rule, 65 Fed. Reg. at 67,514 (codified at 36 C.F.R. pt. 219).} The revised regulations do away with regional guides, but they continue to address regional considerations through various provisions requiring consistency among planning areas and authorizing joint planning on multiple units.\footnote{Id. at 67,526, 67,576 (codified at 36 C.F.R. § 219.3). See id. at 67,579 (requiring withdrawal of regional guides and incorporation of regional direction into plan decisions) (codified at 36 C.F.R. § 219.35).}
Regulations and policy governing the national forest transportation system were also amended in January 2001. The amended regulations de-emphasize transportation development while promoting science-based transportation analysis. The new transportation policy amends the Forest Service Manual "to ensure that National Forest System roads provide for public uses of National Forest System lands . . . [and] to the extent practicable, begin to reverse adverse ecological impacts associated with roads."

[c] Idaho v. U.S. Forest Service

The State of Idaho, the Kootenai Indian Tribe, and others challenged the Roadless Rule, alleging violations of NEPA, NFMA, and the Administrative Procedure Act (APA). At least eight lawsuits were brought in a number of jurisdictions. Previously, a challenge to the Interim Roadless Rule had been brought in the district of Wyoming, but the court dismissed the case on jurisdictional grounds.

In ruling on motions for preliminary injunction in the Idaho cases, the district court determined that the plaintiffs were likely to succeed on their NEPA arguments. The court noted several deficiencies in the rulemaking process for the Roadless Rule. First, it found that the Forest Service had failed to provide the public with a meaningful opportunity to comment both by pro-

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135 66 Fed. Reg. at 3206. The revised regulations are intended "to help ensure that additions to the National Forest System network of roads are those deemed essential for resource management and use; that, construction, reconstruction, and maintenance of roads minimize adverse environmental impacts; and, finally, that unneeded roads are decommissioned and restoration of ecological processes are [sic] initiated." Id.
140 Idaho, 142 F. Supp. 2d at 1260-61; Kootenai Tribe, 142 F. Supp. 2d at 1247.
viding too little time for comment and by failing to properly identify the roadless areas under consideration in a readily accessible manner and timely fashion.\footnote{Idaho, 142 F. Supp. 2d at 1260-61. The court also found that the record indicated a lack of meaningful consultation with the Tribe. \textit{Kootenai Tribe}, 142 F. Supp. 2d at 1245 and n.23.} According to the court, the EIS also failed to consider an adequate range of alternatives, as all but the “no action” alternative included “a total prohibition” on road construction, and failed to identify measures that could minimize the negative impacts of alternatives studied.\footnote{Idaho, 142 F. Supp. 2d at 1262-63. \textit{See also Kootenai Tribe}, 142 F. Supp. 2d at 1247 (stating that the EIS’ assessment of the Rule’s cumulative effects was inadequate).}

The Bush Administration did not defend the Roadless Rule in court, leaving environmental groups as intervenors to slug it out with Idaho and other plaintiffs.\footnote{Intervenors include Defenders of Wildlife, Natural Resources Defense Council, The Wilderness Society, Sierra Club, and a number of local groups. \textit{See id.}} The Administration represented that it would implement the Rule but would take additional actions to address the concerns raised by the Rule’s opponents. Even so, the court issued a preliminary injunction, preventing implementation of the Rule as well as the portion of the Planning Rule that relates to roadless area prescriptions.\footnote{\textit{Kootenai Tribe} of Idaho v. Veneman, No. CV01-10-N-EJL, 2001 WL 1141275 (D. Idaho 2001). The court described the government’s response as a “band-aid approach,” leaving it with the “firm impression” that the Roadless Rule would irreparably harm the national forests. \textit{Id.}}

The intervenors appealed to the Ninth Circuit Court of Appeals, and arguments were heard in October 2001.\footnote{See “Earthjustice Argues in Defense of Roadless Forests” (Oct. 15, 2001), \textit{available at} \url{http://www.earthjustice.org/news} (last visited May 28, 2002).} Their leading argument on appeal was that NEPA did not apply to the Roadless Rule, making the adequacy of the EIS irrelevant. Although the district court rejected this argument,\footnote{\textit{Kootenai Tribe}, 142 F. Supp. 2d at 1240-41 (concluding that an EIS was required for the Roadless Rule, as it modifies forest plan decisions and restricts treatment and restoration projects).} under \textit{Douglas County v. Babbitt}, actions that do not change existing environmental conditions or commit resources to affirmative
human action affecting the environment do not require NEPA analysis.  


On January 20, 2001, immediately after President Bush took office, Chief of Staff Andrew Card issued a memorandum directing a 60-day postponement of the effective date of regulations that had been published in the Federal Register but had not yet taken effect.  

As the Roadless Rule’s effective date was March 13, 2001, it was covered by the Card memorandum.  

Subsequently, a notice was published in the Federal Register pushing the effective date of the Roadless Rule back to May 12, 2001, “to give Department officials the opportunity for further review and consideration.”  

The Forest Service has since sought public comment on management of roadless areas through various advanced notices of proposed rulemaking, stating that, among other things “continuing controversy over the rule” and “legal uncertainties” made offering a proposed rule “impractical . . . at this time.”

[Acknowledging concerns raised by local communities, tribes, and States impacted by the roadless area conservation rule . . . USDA [is moving] forward with a responsible and balanced approach to re-examining the rule . . . . This advance notice is intended to give the public the opportunity to comment on key issues that have been raised regarding the protection of roadless areas. These comments will help the Department determine the next steps in addressing the long-term protection and management of roadless values within the National Forest System.

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147 49 F.3d 1495, 1505 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996). The court held that an EIS is not required for the designation of critical habitat under the Endangered Species Act. Id.


149 The Rule was published on January 12, 2001, but Congress has 60 days to review major rules before they become effective. 5 U.S.C.A. § 801(a)(3) (Supp. 2002).


Meanwhile, the Chief has issued interim directives “to stabilize the management situation while the roadless rule is being litigated.” The interim directives reserve the Chief’s authority to approve timber harvest and road construction in inventoried roadless areas.

The Department of Agriculture has also extended the initial compliance deadline for the new planning rule, citing concerns for “implementability.” A final revised planning rule is not expected until October 2002.

§ 21.05 The Power to Preserve Through Rulemaking

[1] Does the Roadless Rule Create “Wilderness”?

Section 1131(a) of the Wilderness Act states that “no Federal lands shall be designated as ‘wilderness areas’ except as provided for in this Act or by a subsequent Act,” reserving the power to designate wilderness areas for inclusion in the national wilderness preservation system to Congress. Con­strued narrowly, this provision merely denies other entities, including the executive branch, authority to bestow a particular area with the official “wilderness” label. By speaking only to the power to designate, rather than the power to manage or preserve, section 1131(a) suggests that this restriction is only a matter of labeling for inclusion within the National Wilderness System. The use of apostrophes to set apart the phrase “wilderness areas” also appears to create a legislative term of art—a special label—leaving the executive branch free to adopt other conservation-oriented management measures, such as the Roadless Rule.

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154 Id. at 44,112-13.
Other statutory provisions are consistent with this interpretation. Section 1133(a) indicates that the Wilderness Act did not diminish the Forest Service's power to conserve undeveloped areas: "The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests . . . are established and administered." It further provides that "[n]othing in this chapter shall be deemed to be in interference with the purpose for which national forests are established as set forth in [the Organic Act of 1897 and MUSYA]." MUSYA, passed just a few years before the enactment of the Wilderness Act, declares that "the establishment and maintenance of areas of wilderness are consistent" with its purposes and provisions, and NFMA explicitly lists wilderness as one of the uses for which forests must be managed.

Section 1132 of the Wilderness Act, however, weighs against this narrow interpretation. This section, which delineates the role of the executive branch in the creation of wilderness areas, provides that "[n]othing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system." By emphasizing that Interior can continue to manage national parks for predominantly preservation-oriented purposes while saying nothing about Agriculture, section 1132 cuts against lodging a general preservation authority in the Forest Service. The House report provides further evidence of a congressional desire to curtail Forest Service discretion.

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164 Id. In comparison, section 1132(b) describes the review process to be conducted by the Secretary of Agriculture without providing a similar savings clause.
165 See supra § 21.02[2][a] (discussing legislative history). But see McCloskey, supra note 13, at 306 (noting "strong arguments" for an interpretation that maintains administrative preservation authority, based on the plain language of the Wilderness Act).
Yet if the Roadless Rule addresses something other than “wilderness areas,” it does not offend the Wilderness Act. The Act defines this term by reference to size and natural attributes, specifying both wilderness designation criteria and wilderness management criteria.166 The Roadless Rule’s designation criteria, or scope of coverage, is similar to that found in the Wilderness Act, but its management prescriptions for covered areas are quite different.

Both the Roadless Rule and the Wilderness Act focus on conserving areas of 5,000 acres or more.167 The Rule covers “inventoried roadless areas,” defined as “a group of roadless areas that were evaluated for wilderness consideration beginning in the 1970’s and through subsequent planning efforts.”168 The final EIS describes “inventoried roadless areas” in more detail:

Undeveloped areas typically exceeding 5,000 acres that met the minimum criteria for wilderness consideration under the Wilderness Act and that were inventoried during the Forest Service’s Roadless Area Review and Evaluation (RARE II) process, subsequent assessments, or forest planning.169

The Roadless Rule states that the identification of other, non-inventoried roadless areas will be accomplished through the planning process.170 The new Planning Rule directs Forest Service officials to “identify and evaluate inventoried roadless areas and unroded areas” during plan revision or other appropriate times,171 and to recommend them for “special designations to higher authorities or, to the extent permitted by law, adopt special designations through plan amendment or revision.”172 Special designations include: (1) “congressionally designated areas”

169 Final EIS, supra note 101, Vol. I at G-5. See California v. Block, 690 F.2d 753, 768 (9th Cir. 1982) (noting that “all of the RARE II acreage, by definition, met the minimum criteria for inclusion in the [national wilderness system]”).
172 Id. at 67,577 (codified at 36 C.F.R. § 219.27).
such as wilderness and wild and scenic rivers; (2) “wilderness area review” areas, described as “undeveloped areas” of sufficient size “to make practicable their preservation and use in an unimpaired condition” for purposes of wilderness recommendation; and (3) “administratively designated areas,” like roadless areas, research natural areas, and other unique areas. 173

While the Roadless Rule turns on the presence or absence of roads, nowhere are roads mentioned in the Wilderness Act’s list of criteria for official wilderness designation. 174 The qualifications for “wilderness areas” under the Wilderness Act are two-fold: an area must be of a sufficient size for preservation purposes (generally 5,000 acres or more) and it must be untrammeled, i.e., “without permanent improvements or human habitation ... where man himself is a visitor who does not remain.” 175 All of the operative terms in this definition convey the notion that a wilderness area is a place without evidence of long-term human residence or permanent occupation. The transient use of a trail, a dirt track, or even a more substantial passageway does not necessarily disqualify the area in question from wilderness consideration. 176 Undeniably, “road density is a convenient measure of human presence on a landscape,” 177 but roads are not the sine qua non of wilderness.

This difference in scope is relatively minor and may not be definitive. The management prescriptions for activities in roadless areas, however, vary greatly from those governing wilderness areas. The Roadless Rule allows construction of some

173 Id.
176 See Parker v. United States, 309 F. Supp. 593, 601 (D. Colo. 1970) (concluding that the presence of a road, substantially unnoticeable due to dense forest conditions, did not preclude wilderness consideration), aff’d, 448 F.2d 793 (10th Cir. 1971), cert. denied, 405 U.S. 989 (1972); Wyoming Outdoor Council, 484 F.2d at 1249 (finding that the presence of numerous jeep trails did not disqualify area from wilderness consideration).
177 Saunders, supra note 105, at 223. Roads may “in some cases be appropriately used as a proxy for the suite of changes that are associated with human fragmentation of a landscape. However, suites of variables do not always vary in a predictable manner as a function of road density and changes in landscape metrics do not always parallel the areas of highest road density.” Id. (citations omitted).
state highways, maintenance of existing roads, motorized and mechanized means of travel, grazing, oil and gas development that does not require new roads, and utility access. The Forest Service has a long history of limiting activities in areas subject to protective, non-wilderness classifications. Research natural areas (RNAs), for example, are "retained in a virgin or unmodified condition" for conducting research, maintaining biodiversity, and promoting education. Within RNAs, the construction of permanent improvements is generally prohibited, as is mineral entry. The agency's authority to create and manage RNAs for preservation purposes has been upheld. Similarly, the authority to manage and conserve primitive areas was upheld in the McMichael case as a matter of administrative discretion.

The Wilderness Act, in contrast to the Roadless Rule and other administrative designations, completely bans permanent roads, subject only to existing private rights. The Act also restricts motorized and mechanized transport, including motorboats and aircraft, as well as commercial enterprises, structures, and grazing. Most importantly for purposes of this discussion, the Act withdraws wilderness areas from mining and mineral leasing as of 1984, subject to valid existing rights. Finally, although the Wilderness Act and the Roadless Rule both provide for continued access to privately-owned holdings, the Act contains a special provision for acquisition of

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178 Roadless Rule, 66 Fed. Reg. at 3245-50, 3256. The Rule acknowledges that mineral exploration and development may be more difficult and more costly without roads. See id. at 3268.
180 See Park Lake Resources, LLC, 197 F.3d at 451 n.2 (citing Forest Service Manual § 4.3.2: "[m]ineral and oil entry uses and prospecting ideally should be excluded").
181 See Park Lake Resources, LLC, 979 F. Supp. at 1315.
182 See McMichael v. United States, 355 F.2d 283, 286 (9th Cir. 1965) (upholding Forest Service "U" regulations as consistent with MUSYA and the Organic Act, and supported by the Wilderness Act); section 21.03(1)[b] (discussing McMichael).
inholdings within wilderness areas, while the Roadless Rule does not.186


Assuming the Wilderness Act does not prevent the executive branch from conserving roadless areas, the question remains whether national conservation initiatives through rulemaking are appropriate. Opponents argue that Congress, as a body of elected officials, is more qualified to make a decision that affects 60 million acres of public lands, along with the mineral and timber resources found on those lands. At the opposite end of the spectrum, they assert that local decisionmakers are better equipped to make decisions affecting land and resources, as well as human communities and their economic and cultural interests, in and around individual units of the national forest system.

The Forest Service decided that rulemaking was the appropriate decisionmaking path for roadless conservation because “[a]t the national level, Forest Service officials have the responsibility to consider the ‘whole picture’ regarding the management of the National Forest System, including inventoried roadless areas . . . .”187 The agency also cited the extreme controversy over management of roadless areas as justification for nationwide rulemaking, noting in particular the “extensive amount of congressional debate” and the need to act in a timely fashion to conserve roadless area values.188

Congress is sometimes seen as more sensitive to local needs and the demands of constituents than members of the executive branch. The consideration of legislation in Congress, from committee review and recommendation to floor debate to conference consideration and bicameral adoption, fosters accountability by providing numerous opportunities for public involvement. But the congressional process is by no means

186 Compare 16 U.S.C.A. § 1134 (2000) (providing for the purchase of private inholdings) with 66 Fed. Reg. at 3253 (stating that the Rule “does not affect a State’s or private landowner’s right of access to their land”).
188 Id.
immune from criticism. Congress’ efforts can be criticized as piecemeal and uncoordinated, as well as static and unresponsive to the general public interest.\textsuperscript{189} Dispersed authority and regional and party alliances can impede cooperative efforts and strategic leadership, particularly when it comes to environmental issues.\textsuperscript{190} Further, Congress is virtually unfettered by procedural safeguards; each house is free to adopt procedural rules and to enforce them (or not).\textsuperscript{191} Agency decisionmaking, in contrast, is governed by the requirements of the APA.\textsuperscript{192} As a result, the rulemaking process can facilitate access to the decisionmaker and provide more meaningful opportunities for public participation by all concerned parties than does the legislative process.

Nationwide rulemaking has advantages over local planning processes as well, at least in some contexts. Decisionmaking at the national level can minimize the influence of local biases and favoritism by elevating the ultimate decision to a higher level. Local planning efforts, on the other hand, “may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape.”\textsuperscript{193} Although local decisionmakers often have a better understanding of the cultural and economic effects of preservation on affected communities, the Forest Service Chief is in a superior position to consider the cumulative effects of roads on ecosystem integrity throughout the national forest system.


\textsuperscript{193} 66 Fed. Reg. at 3246.
There is no general legal impediment to executive decision-making at the national level, so long as local interests maintain their ability to participate in a meaningful way through rule-making and the NEPA process. The NFMA planning requirements provide the Secretary with authority to make decisions of nationwide import, and specifically require the Secretary to make suitability determinations for timber harvest and other uses on individual forest units. The Forest Service’s ability to adopt nationwide rules to manage undeveloped areas was upheld in *McMichael*. The *Seattle Audubon Society* cases lend judicial support to administrative efforts to conserve ecosystems through a regional or national approach. Of course, the policy implications of preserving vast areas of public lands through nationwide rulemaking will continue to stimulate vigorous debate.

§ 21.06 Conclusion

The Roadless Rule goes to the heart of the raging controversy over the destiny of our public lands. Is it time for a departure from the long-standing multiple-use paradigm based on commodity production? If so, should elected officials in Congress be the ones to make that call through legislative amendments, or should it be left to executive decisionmaking at either the national or local level? A system-wide effort to settle the roadless area controversy through a comprehensive ecosystem approach could lead to improvements in resource management throughout the national forest system. Yet communities dependent on resource development may not be prepared to cope with a dramatic shift in forest policy.

Whether the Roadless Rule will ultimately be upheld by the courts or embraced, even in part, by the current Administra-
tion remains to be seen. Regardless, the underlying dispute over the conservation and use of the public lands is unlikely to dissipate any time soon. In the end, striking an appropriate balance between the public's demands for outdoor recreational opportunities and open space and the countervailing pressure to provide timber and mineral products from the national forests will in all likelihood require a combination of legislative effort, administrative rulemaking, and local planning.