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Kootenai Tribe of Idaho v. Veneman: The Roadless Rule: Dead End or Never Ending Road

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KOOTENAI TRIBE OF IDAHO v. VENEMAN: THE ROADLESS RULE: DEAD END OR NEVER ENDING ROAD?

I. INTRODUCTION

"Today, we launch one of the largest preservation efforts in America's history to protect these priceless, back-country lands."[1] In 1999, President William Clinton directed the United States Forest Service to promulgate a rule with the intent to conserve and protect inventoried and uninventoried roadless forest land.[2] This directive, termed the Roadless Rule (Rule), purported to protect between forty and sixty million acres of National Forest land.[3] Due to the halt in road construction, reconstruction and a decrease of timber harvesting associated with the Rule, concerned parties filed suit to enjoin the Rule.[4]

The District Court of Idaho, in *Kootenai Tribe of Idaho v. Veneman*,[5] became one of the first courts to examine the Rule's compliance with the National Environmental Protection Act (NEPA) regulations.[6] The court included the Environmental Impact Statement (EIS) requirement and the ripeness doctrine in its analysis of NEPA.[7] The EIS requirement lies at the heart of NEPA's procedu-

1. Allison S. Hoyt, Comment, *Roadless Area Conservation: How the "Roadless Rule" Affects America's Forestland*, 14 TUL. ENVTL. L.J. 525, 525-26 (2001) (quoting President Clinton's announcement of Roadless Rule initiative in 1999).

2. *See id.* at 526 (discussing President Clinton's announcement and resulting Roadless Rule). The Roadless Rule [hereinafter Rule] was published in the Federal Register on January 12, 2001. *See id.*

3. *See id.* at 525 n.1 (discussing components of Rule).

4. *See* Kootenai Tribe of Idaho v. Veneman, 142 F. Supp. 2d 1231, 1231 (D. Idaho 2001) (addressing and ruling on compliance of Rule with statutory standards). The variety of parties involved in the suit include: the Kootenai Tribe of Idaho, Boise County of Idaho, various Boards of Commissioners in Idaho, Snowmobile Associations and Clubs, Livestock groups and Ann Veneman, the then Secretary of Agriculture. *See id.*

5. *See id.* (discussing claims regarding compliance of Rule with various agency standards and requirements).

6. *See id.* (deciding on injunction sought against Roadless Rule). The District Court of Idaho was not the only court dealing with the validity of the Rule; six other districts, in seven states, faced similar suits. *See* 66 Fed. Reg. 44,111, 44112 (Aug. 22, 2001). The District Court of Idaho, however, was the first court to rule on the issue. *See Kootenai*, 124 F. Supp. 2d at 1231.

7. *See Kootenai*, 142 F. Supp. 2d at 1239-42 (requiring Environmental Impact Statement [hereinafter EIS] for extra Rule and holding that issue was ripe for judicial review).

ral regulations and has been the source of increased litigation attempting to define the specific terms of the requirement.[8] The court analyzed the ripeness doctrine to determine if judicial jurisdiction had been established.[9]

This Note explores the Idaho District Court's decision and interpretation of both NEPA requirements and the ripeness doctrine in the context of President Clinton's directive and resulting Rule.[10] Section II summarizes the factual context of *Kootenai.*[11] Section III provides a background of the Rule, NEPA requirements and the ripeness doctrine.[12] Section IV discusses the district court's holding in the case and provides a critical analysis of its consistency with established case law.[13] Finally, Section V examines the impact of the district court's decision on future jurisprudence and its potential repercussions upon the Rule's environmental goals.[14]

II. FACTS

In 1999, President Clinton directed the Forest Service to devise a regulation to prevent further construction of roads in the forest system.[15] The goal of the Rule was to protect inventoried as well as uninventoried roadless areas.[16] Thereafter, the Forest Service issued a Notice of Intent to Prepare an EIS in order to begin the

8. *See* Michael E. Lackey, Jr., *Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants*, 60 GEO. WASH. L. REV. 1232, 1235 n.22 (1992) (citing cases examining issue of EIS requirement).

9. *See* Eacata Desiree Gregory, Comment, *No Time is the Right Time: The Supreme Court's Use of Ripeness to Block Judicial Review of Forest Plans for Environmental Plaintiffs in* Ohio Forestry Ass'n v. Sierra Club, 75 CHI.-KENT L. REV. 613, 614 (2000) (discussing background and importance of ripeness doctrine as tool to determine judicial review).

10. *See Kootenai*, 142 F. Supp. 2d 1231, 1239-42 (using EIS requirement and ripeness as decisional criteria regarding Rule).

11. For a discussion of the facts of *Kootenai*, see *infra* notes 15-30 and accompanying text.

12. For a discussion of National Environmental Protection Act [hereinafter NEPA] requirements and the ripeness doctrine, see *infra* notes 65-93 and accompanying text.

13. For narrative and critical analyses of *Kootenai*, see *infra* notes 94-184 and accompanying text.

14. For a discussion of the impact of *Kootenai* on other jurisdictions, see *infra* notes 185-200 and accompanying text.

15. *See Kootenai*, 142 F. Supp. 2d at 1235 (explaining background and history of Rule).

16. *See id.* The term "inventoried" stems from the Forest Service's second attempt to programmatically study the roadless areas in RARE II. California v. Block, 690 F.2d 753, 758 (9th Cir. 1982). For a more detailed discussion of RARE II, see *infra* notes 37 - 44 and accompanying text.

necessary public comment period.[17] The State of Idaho filed suit in December 1999, arguing that the Forest Service did not sufficiently comply with the public comment provisions of NEPA.[18] While the court dismissed Idaho's action as premature, the Forest Service continued to work on the Rule, releasing a draft EIS with the proposed rule in May 2000.[19] On January 5, 2001, the Forest Service completed an EIS and released the Final Rule, scheduled to be implemented in May 2001.[20]

The Kootenai Tribe of Idaho and interest groups concerned about commercial and recreational use of forest areas brought suit against Ann Veneman, the Secretary of Agriculture, and other government officials.[21] The suit contested the adoption and validity of the Rule promulgated by the Forest Service under President Clinton's direction.[22] On January 8, 2001, the Kootenai Tribe and adjoining parties sought an injunction and withdrawal of the Rule for violations of several environmental acts in the District of Idaho.[23] On January 20, 2001, prior to the court's decision, then recently elected President George W. Bush ordered the Rule's postponement for sixty days, redirecting the Rule's effective date to May 12, 2001.[24]

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17. *See id.* (explaining that Forest Service allowed public comment filing for sixty day period and rejected requests for extension of this period).

18. *Id.* (noting grant of Forest Service's request for Motion to Dismiss). The court in this hearing stated that there was no "final agency action" on this matter to date. *See id.* Therefore, the challenge was not ripe for judicial review. *See id.* The court continued by pointing out that it was unable to find caselaw supporting review of an agency action during the comment scoping period and this is why the motion to dismiss had to be granted. *See id.*

19. *See id.* (noting Forest Service allowed sixty-nine day comment period regarding draft EIS and proposed rule while again denying time extension requests).

20. *See Kootenai*, 142 F. Supp. 2d at 1235-36 (distinguishing draft from final EIS). The final EIS differed in its expansion of regulated areas not included in the draft version as well as applying the Rule immediately to the Tongass National Forest, which was given a five-year review plan under the draft EIS. *See id.* The final EIS applied the Rule to all inventoried roadless areas, prohibited road construction, reconstruction, and timber harvesting making exceptions for stewardship. *See id.* The final EIS also removed the procedural rule analysis by placing it in the final Forest Planning Regulations. *See id.* Further, the final EIS also increased the total land encompassed by the Rule from 54.3 million acres stated in the draft version to 58.5 million. *See id.*

21. *See id.* at 1231 (noting different parties involved in suit).

22. *See id.* at 1235 (stating rule intended to preserve roadless areas in national forest).

23. *See id.* at 1236 (recognizing that plaintiffs' claims lie on violations of Administrative Procedure Act, NEPA, National Forest Management Act [hereinafter NFMA], Organic Administration Act, Multiple-Use Sustained Yield Act, Section 108, Wilderness Act, and National Historic Preservation Act).

24. *See id.* at 1236 (explaining President Bush postponed all of Clinton's last minute regulations and rules not yet implemented).

The District Court of Idaho in *Kootenai* addressed and made findings on issues necessary for a final ruling.[25] The district court held that it had jurisdiction over the plaintiffs' claims after analyzing issues of standing, requirement of the EIS and ripeness of the claim.[26] More specifically, the district court found that the plaintiffs had standing in the case; it was likely they suffered irreparable injury; the Forest Service did not adequately follow procedural guidelines in preparing an EIS; and the plaintiffs would likely succeed on the merits of their claims.[27]

Despite its findings, the district court recognized that the discussion of irreparable injury was slightly premature in light of President Bush's postponement of implementation of the Rule.[28] The district court then withheld ruling on the injunction sought by the plaintiffs until the government issued its expected status report.[29] After receiving the status report, the district court granted the plaintiffs' request for an injunction, thereby preventing the Forest Service's implementation of the Rule scheduled for May 2001.[30]

III. BACKGROUND

A. Roadless Directive

In October 1999, President Clinton announced an initiative to develop a forest management plan to ban construction and reconstruction of roadless areas within the National Forest System.[31] Subsequently termed the Roadless Rule, it is considered "the most

25. *See Kootenai*, F. Supp. 2d at 1248 (granting injunction until governmental status report in May 2001). The district court based its finding on issues such as standing, procedural requirements, and ripeness. *See id.*

26. *See id.* at 1237-48 (examining all issues necessary in formulating judgment on preliminary injunction: standing, ripeness, and irreparable injury).

27. *See id.* (summarizing district court's holding and findings throughout case).

28. *See id.* at 1248 (stating government status report of ongoing review by new administration would allow district court to review issue of injury).

29. *See id.* (ordering reversal of ruling on plaintiffs' Motion for Preliminary Injunction pending issuance of government's status report).

30. *See Kootenai v. Veneman*, 2001 WL 1141275, at *2 (D. Idaho May 10, 2001) [hereinafter *Kootenai I*] (holding all aspects of Rule as published in Federal Register under 66 Fed. Reg. 3244 as well as 65 Fed. Reg. 67, 514 shall be enjoined from implementation). The district court also ordered a Litigation Plan to be submitted by June 11, 2001 in order to hold a telephone scheduling conference on June 21, 2001 to confirm deadlines proposed by the parties and to set the matter for trial. *Id.*

31. *See* Jennifer L. Sullivan, *The Sprit of 76: Does President Clinton's Roadless Lands Directive Violate the Spirit of the National Forest Management Act of 1976?*, 17 ALASKA L. REV. 127, 128 (2000) (discussing Rule's directive and its impact in forest management).

significant land preservation undertaking since Teddy Roosevelt built the national forest system."[32] Shifts in public concern, evidenced by opinion and demand over the protection of resources located in the Forest System prompted the creation of the Rule.[33] A further motivating factor stemmed from worry over the economic impact of the significant backlog of existing construction within the forests.[34] Ultimately, the desire to preserve important social and ecological resources in forest areas at risk of destruction from watershed damage and road construction led to the Rule's proposal.[35] During his final months in office, President Clinton directed the Forest Service to use these goals to create a proposal of long-term environmental conservation of forest areas that fit under inventoried and later uninventoried areas recorded through past land reviews.[36]

1. RARE I & RARE II

The first Roadless Area Review Evaluation (RARE I), sparked in the 1960s, attempted to record and evaluate national forest lands, especially areas dubbed "primitive."[37] Critics viewed RARE I as a failure because it missed many areas for designation, did not value areas in terms of ecological importance, did not recognize areas planned for timber sales and only recommended a small area for further study.[38] RARE I was quickly abandoned due to ensuing litigation concerning its inadequacies, and later, in 1977, a new

32. *Id.* at 128 (quoting President of Wilderness Society, William H. Meadows).

33. *See id.* at 138 (stating reasons given for proposal of Rule).

34. *See id.* (commenting road maintenance and reconstruction accounted for over $8.4 billion in backlog).

35. *See* Hoyt, *supra* note 1, at 528 (discussing goals and purposes behind President Clinton's Roadless Rule).

36. *See id.* at 527-29 (setting forth background of Rule and previous attempts at environmental protection of roadless areas).

37. *See* Susan Jane M. Brown, Comment, *"Green Gold:" Securing Protection for Roadless Areas on the Gifford Pinchot National Forest*, 8 U. BALT. J. ENVTL. L. 1, 7-9 (2000) (stating Roadless Area Review Evaluation I [hereinafter RARE I] intended to inventory more "primitive" lands being excluded from Wilderness Act of 1964 and was to be completed within one year). Rare I set out to inventory roadless areas of at least 5,000 acres and adjacent existing wilderness areas. *See id.* In addition, RARE I intended to increase the Forest Service's knowledge in areas where it had insufficient prior knowledge. *See id.*

38. *See id.* at 8-9 (discussing that due to its rushed nature RARE I was considered failure). Many analysts claim that the pressure placed upon the completion of RARE I caused an inadequate, rushed evaluation. *See id.* In 1977, the Forest Service fully abandoned RARE I and immediately began work on the second Roadless Area Review Evaluation [hereinafter RARE II]. *See id.* at 9.

evaluation plan was promulgated, known as the second Roadless Area Review Evaluation (RARE II).[39]

While RARE II incorporated all the areas recorded by RARE I, it allowed time to complete a more thorough inventory of roadless areas.[40] RARE II established categories for the designation of land and expanded the amount of land included in the inventory to over sixty-two million acres, an increase from RARE I's fifty-six million acres.[41] Facing similar litigation as its predecessor, the government eventually abandoned RARE II for failing to comply with environmental regulations.[42] Contrary to President Clinton's intent, critics feared that his directive would only result in a third Roadless Area Review Evaluation (RARE III) process.[43] The Rule rather, expressed Clinton's goals concerning the inventoried lands brought forth through the RARE projects.[44]

2. *Evolution and Purpose of the Roadless Rule*

Understanding the background leading up to President Clinton's proposal of the Rule is useful in examining the Rule itself and its purpose. The Rule sought to protect benefits derived from roadless areas in national forests.[45] These benefits included: high air, water and soil quality, protection of clean drinking water, undisturbed expanses and other values such as recreation.[46] Roadless areas play a significant role because they protect various species from disturbance while maintaining interior habitats from activities such as logging.[47]

Maintaining roadless land prevents exploitation by the timber industry, which often receives blame for the negative effects of log-

39. *See id.* (stating RARE II was designed to learn from RARE I and be more effective inventory tool).

40. *See id.* (commenting RARE II was to be in effect from 1977 through 1979).

41. *See* Brown, *supra* note 37 at 8-9 (providing that categories of RARE II included recommended wilderness, multiple use, and further study).

42. *See id.* at 10 (concluding RARE II was scrapped after court decisions resulting in injunctions on evaluation). The third Roadless Area Review Evaluation [hereinafter RARE III] was expected to commence in the future; however, Congress thereafter passed various legislation protecting lands found under RARE I and II. *See id.*

43. *See id.* at 12.

44. *See id.* (stating goal of Rule was not to inventory roadless areas, rather to, "restrict certain activities such as road construction and reconstruction in inventoried roadless areas.").

45. *See* Hoyt, *supra* note 1 at 528-29 (discussing social and ecological benefits provided by protection of roadless areas through Rule).

46. *See id.* (enumerating benefits found in forest roadless areas).

47. *See* Brown, *supra* note 37, at 5 (explaining roadless areas are "training grounds" for future wilderness in that wilderness is land that is roadless).

ging on the overall health of forests.[48] For example, timber production can lead to poorly maintained existing roads, resulting in degradation of forestland by flooding, landslides, stream sedimentation and reduction in species' productivity.[49] The Rule sought to combat these hazards by promoting the overall health and stability of the forest systems.[50]

In order to prevent future degradation and to reverse current degradation, the Rule contained a number of protections for roadless areas.[51] The Rule called for protection of over fifty-eight million acres of forestland- accounting for approximately thirty-one percent of all National Forest Service lands.[52] Two significant aspects of the Rule included: (1) prohibition of road construction and reconstruction in protected areas, and (2) prohibition of timber removal.[53] Though not open-ended, the Rule provided for prevention mechanisms of road construction and reconstruction.[54] In actuality, the Rule provided some exceptions, including: (1) construction that will prevent or limit a "catastrophic event," (2) responsibility for CERCLA reaction, (3) exercising of rights statutorily granted, (4) realignment of existing, essential roads, (5) reconstruction of hazardous existing roads, and (6) roads included in a Federal Aid Highway Project.[55] The Rule provided similar excep-

48. *See* Sullivan, *supra* note 37, at 139 (discussing hazards of road building for timber industry).

49. *See id.* (mentioning additional environmental harms linked to road building in forests such as, "fragmentation and degradation of habitat for some wildlife species."). Human impact may result in environmental hazards due to increased human visits to areas traditionally limited in access. *See id.*

50. *See id.* (explaining that although roads are important for timber industry and human enjoyment, they lead to decreased health of forests).

51. *See* Final Rule, 36 C.F.R. § 294.12 (2000) (presenting codified version of Rule).

52. *See* Hoyt, *supra* note 1, at 529 (forwarding that Rule protects fifty-eight and one-half million acres of forest, thirty-one percent of National Forest Service land and about two percent of land of United States). The Forest Service states that its lands include about 386,000 miles of roads and that the Rule deals with three categories of protection: (1) prohibition of construction and reconstruction, (2) prohibition of timber removal on protected lands, and (3) application to the Tongass National Forest in Alaska. *See id.*

53. *See id.* For a discussion of the denial of an extension of time, see *supra* note 18 and accompanying text.

54. *See* Final Rule, 36 C.F.R. § 294.12 (2000) (presenting codified version of Rule).

55. *See* Hoyt, *supra* note 1, at 530 (discussing Rule's general prohibition of road construction or reconstruction). Included in the exceptions to the Rule's prohibition is the allowance of road construction or reconstruction "'in conjunction with the continuation, extension, or renewal of a mineral lease on lands that are under lease or for new leases issued immediately upon expiration of an existing lease.'" *Id.*

tions for prohibited activities termed "timber harvesting."[56] Although exceptions to the Rule are limited, they illustrate its inherent flexibility.[57]

The National Forest Service prepared President Clinton's proposed Rule as a regulation to achieve these specified goals.[58] In October 1999, the Forest Service issued a Notice of Intent to prepare an EIS that provided scoping comments within a sixty-day period.[59] In May 2000, the Forest Service released a draft EIS and a proposed version of the Rule.[60] In early November 2000, the Forest Service published a final EIS and by January 2001, released the final Rule with a Record of Decision to implement the Rule by May 12, 2001.[61]

3. New Administrative Action to Roadless Rule

With the Rule's implementation scheduled for May 2001, recently elected President George W. Bush ordered the Rule's postponement.[62] President Bush exhibited some apprehension toward the Rule, leaving its future uncertain.[63] In light of postponement,

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56. *See id.* (explaining exceptions to timber removal prohibition). The Rule allows for exceptions such as timber harvesting that: improves endangered or threatened species' habitat, avoids forest disaster by "maintaining ecosystem composition," relates to management activity not prohibited by the Rule, serves administrative or personal use, occurs post-inventory but prior to the Rule in areas so drastically altered that they no longer comport with the definition of a roadless area. *See id.*

57. *See id.* at 530-31 (discussing exceptions and requirement that harvesting comply with exception analysis under § 294.13(b)(1) of Rule).

58. *See Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1235 (providing factual background of Rule and Clinton's directive). Clinton directed the Forest Service to develop and prepare for public comment a plan to protect roadless areas by ending construction and reconstruction of roads and also to protect inventoried as well as uninventoried areas across forest system. *Id.*

59. *See id.* (explaining requirement of filing with Forest Service and that sixty day period was not extended despite requests from different parties).

60. *See id.* at 1235-36 (stating draft EIS was 700 pages and sixty-nine day comment period followed release of draft EIS and Rule proposal).

61. *See id.* at 1236 (discussing that final Rule expanded regulated areas from draft EIS and encompassed several other changes from draft version).

62. *See* Idaho v. United States Forest Service, 142 F. Supp. 2d 1248, 1253 (D. Idaho 2001) (discussing present administrative action on Rule and sixty-day postponement of effective date).

63. *See* Hoyt, *supra* note 1 at 546 (discussing current standing of Rule and possible future action). It is acknowledged that although President Bush disfavors the Rule, to defeat it would require the Bush Administration to repeat the same efforts taken to enact the Rule. *See id.* Therefore, the Bush Administration will be forced to closely examine the Rule and consider gains of timber industry in light of the Rule's environmental protections. *See id.* at 547.

the government has decided to review the Rule and provide periodic status reports.[64]

B. National Environmental Policy Act

Funneled through the Forest Service, the Rule was controlled by regulatory standards purported under NEPA.[65] NEPA's enactment arose during a movement to leave traditional common law for a more publicly concentrated law focused on growing concerns of environmental protection.[66] NEPA aimed to create "a comprehensive national policy for the environment modeled around ideals of sustainability and ecosystem balance" and to ensure agency compliance with environmental policy through the introduction of the EIS.[67]

NEPA requires federal agencies engaging in "major federal actions that significantly affect the quality of the human environment" to prepare an EIS for public review, participation and comment.[68] A critical question concerning NEPA arises in the context of what actions trigger the EIS requirement.[69] Some courts view the requirement as precipitated by affirmative environmental alteration, while other courts hold that the EIS requirement is not automatically triggered by actions that do not alter the environment.[70] An EIS must examine potential environmental impacts of a proposed action and possible alternatives.[71] The EIS process invites

64. *See Kootenai*, 142 F. Supp. 2d at 1248 (delaying court's decision until receipt of governmental status report regarding review of Rule in light of Bush's postponement).

65. *See* Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 245 (2000) (discussing purpose of NEPA and its application to federal agencies in considering environmental impacts of their policies).

66. *See id.* at 245 (examining passage of NEPA and its importance in representing new time for "environmental governance").

67. *See id.* at 246 (exploring three accomplishments of passage of NEPA).

68. *See* Idaho Conservation League v. Mumma, 956 F.2d 1508, 1511 (9th Cir. 1992) (relying on authority of 16 U.S.C. § 1604(g)(1) (1994)); *see also* 42 U.S.C. § 4332 (1994) (establishing policies and goals of NEPA).

69. *See* Douglas County v. Babbitt, 48 F.3d 1495, 1497-98 (9th Cir. 1995) (describing EIS requirements); *see also* Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772-73 (1983) (indicating physical environment must be protected). For a futher discussion of what actions trigger the EIS requirement, see notes 68-85 and accompanying text.

70. For a further discussion of actions that trigger the EIS requirement, see *infra* notes 142-46 and accompanying text.

71. *See* Matthew Porterfield, Public Citizen v. United States Trade Representative: *The (Con)Fusion of APA Standing and the Merits Under NEPA*, 19 HARV. ENVTL. L. REV. 157, 165 (1995) (introducing purpose and requirements of EIS). The purpose of an EIS is to ensure that the public knows of governmental actions that may

public participation that enables affected parties to participate in governmental decision-making that may have an environmental impact on the community.[72] The EIS must also be made available for public comment and circulation.[73] Two main purposes are served by an EIS: (1) to take an adequate look at every reasonable alternative and provide enough detail to provide a "thorough discussion of significant aspects of probable environmental consequences;" and (2) to be prepared with actions that commit resources to affirmative human development of the environment, change existing environmental conditions or alter the environmental status quo.[74]

Triggering the EIS requirement requires particular examination of the type of action taken.[75] The Supreme Court, in *Metropolitan Edison Co. v. People Against Nuclear Energy (Metro)*,[76] clarified that NEPA regulations were only for assessment of future actions "where an agency . . . significantly affects the quality of the human environment."[77] The *Metro* Court stated that the resulting environmental impact must be evaluated along with any adverse environmental effects of an agency proposal.[78] According to the *Metro* Court, the key to the EIS requirement rests in the relationship between the envi-

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have an environmental impact and that decisions are not made without regard to any significant environmental impacts. *See id.* at 166. Once an EIS is completed, an agency can continue with the proposed plan unless through the EIS process, an alternative is identified as posing less of a negative environmental impact. *See id.* The EIS process is not intended to eliminate environmental harm, rather it is meant to address possible negative environmental consequences of an action in hopes of making more environmentally conscious decisions. *See id.* at 166-67.

72. *See* Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 571 (1997) (discussing how NEPA sparks environmental justice by inviting public participation which empowers communication that may educate government regarding environmental effects of its decisions).

73. *See* Mass. v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) (quoting Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1073-74 (1st Cir. 1980)); *see also* Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985) (distinguishing need for EIS to look at every reasonable alternative rather than every possible alternative).

74. *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1239-40 (D. Idaho 2001) (quoting test under *Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995)).

75. *See generally, Douglas County v. Babbit*, 48 F.3d 1495 (9th Cir. 1995); *see generally Metro*, 460 U.S. 766 (1983). For a further discussion of actions triggering EIS requirement see *infra* notes 142-46 and accompanying text.

76. 460 U.S. 766 (1983).

77. *See Metro*, 460 U.S. at 771, 772 (paraphrasing statutory language of NEPA in light of specific facts present in *Metro* case and discussing that NEPA requirements are triggered when there is close relationship between environmental change and effect at issue).

78. *See id.* (concluding NEPA does not require agency to look at every impact or effect of given proposal, just impact or effect on environment).

ronmental effect and the change of any major federal action.[79] The Court noted that if such a relationship were too attenuated, it would not require an EIS, and therefore, a direct effect needs to be realized rather than a present "risk" of effect.[80] The *Metro* Court warned of using NEPA requirements as a policy tool and clarified that its purpose was to protect against future environmental harms as opposed to past harms or those with a potential environmental impact.[81]

Douglas County v. Babbitt[82] established that NEPA covers federal actions that alter the natural physical environment.[83] In *Babbitt*, the Ninth Circuit clarified the purpose of NEPA as "provid[ing] a mechanism to enhance or improve the environment and prevent further irreparable damage."[84] While there may be disagreement as to the triggering of the EIS requirement under NEPA, both the Ninth Circuit and the United States Supreme Court have held that EIS requirements are not prompted if a federal action does not alter the physical environment.[85]

C. Ripeness

Ripeness is a procedural question regarding parties and the claims they bring before a court that aids in determining subject matter jurisdiction.[86] If a court considers a claim to be unripe for review, then that court lacks subject matter jurisdiction and the complaint will be dismissed.[87] The purpose of the ripeness doc-

79. *See id.* at 773 (determining EIS requirement is triggered with consideration of relationship existing between effect and given change on physical environment of federal action).

80. *See id.* at 775 (recognizing burden on federal agency to create EIS for action that has effects too remote to be realized).

81. *See id.* at 777-79 (concluding NEPA should not be forum to mesh out policy disagreements or to remedy past accidents).

82. 48 F.3d 1495 (9th Cir. 1995).

83. *Douglas County v. Babbit*, 48 F.3d at 1505 (stating court holding that NEPA does not require EIS for actions that preserve physical environment).

84. *Id.* (quoting Pac. Legal Found. v. Andrus, 657 F.2d 829 (6th Cir. 1981)). The *Babbit* court continued that an EIS reporting on the "environmental impact" of federal actions is mandated by NEPA under the statute. *See id.* The *Babbitt* court also cited to *Metro's* holding, supporting that NEPA does not require an EIS for every action. *See id.* The court's support of *Metro* lends proof that reliance on the physical environment allows the court to hold that the EIS requirement is not triggered by actions that preserve the physical environment. *See id.*

85. For further discussion of the Ninth Circuit and Supreme Court holdings regarding the triggering of the EIS requirement, see *supra* notes 75-85 and accompanying text.

86. *See Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1242 (D. Idaho 2001) (introducing court's review of ripeness in this case).

87. *See id.* (laying out foundational basis of ripeness doctrine).

trine is to prevent judicial intervention in abstract disagreements regarding administrative matters by preventing premature court review.[88] The United States Supreme Court has ruled that a regulation is not typically considered to be ripe for review until "its factual components have been fleshed out by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm them."[89]

The traditional ripeness test evaluates whether the issue is fit for judicial review and if extreme hardship to the parties will result by a delay in court consideration.[90] Failure to comply with any of NEPA's procedural requirements allows for immediate injury to satisfy traditional ripeness tests.[91] The ripeness doctrine is often used as a tool to preclude judicial review of agency actions confusing with standing analysis.[92] Finally, some court decisions have facially inferred ripeness into NEPA claims.[93]

IV. NARRATIVE ANALYSIS

In *Kootenai*, the District Court of Idaho began its examination of the Rule by outlining the factual and procedural background of the case.[94] Throughout the background, the court concentrated on the Rule's implementation timeline, the EIS processes, and the foundations for litigation.[95] Further, the court recognized that the

88. *See* Amanda C. Cohen, *Ripeness Revisited: The Implications of* Ohio Forestry Association, Inc. v. Sierra Club for Environmental Litigation, 23 HARV. ENVTL. L. REV. 547, 550 (1999) (discussing proposition of ripeness rule and safeguards).

89. Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990) (examining ripeness in regard to EIS requirement).

90. Cohen, *supra* note 88, at 550 (quoting Ohio Forestry Association v. Sierra Club, 523 U.S. 726, 738 (1998), which likens ripeness test to that of standing under Constitution). Under the United States Constitution, Article III, § 2, cl. 1, the ripeness inquiry balances the party's interests with the judiciary's interest. *See id.*

91. *See id.* at 560 (citing *Ohio Forestry*, 523 U.S. at 737 and *Lujan*, 497 U.S. at 882). The *Lujan* Court maintains that immediate injury can be shown solely by failure to comply with NEPA requirements. *See id.*

92. *See* Gregory, *supra* note 9, at 615 (describing ripeness beginning as "judicially created prudential concern" to block review).

93. *See id.* at 637 (stating that ripeness may be differentiated between procedural and substantive matters as suggested by *Ohio Forestry*, 523 U.S. at 737).

94. *See Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1235 (D. Idaho 2001) (discussing progression of Rule from Clinton's 1999 directive to present action).

95. *See id.* at 1235-36. The court discussed the Forest Service's release of EIS (draft and final versions) and the manner in which the Forest Service solicited public comment. *See id.* Due to the timeliness of the Rule, the Forest Service did not grant increases in the public comment period, instead allowing sixty days after the publication of the Notice of Intent to Prepare an Environmental Impact Statement and another sixty-nine days after the draft EIS. *See id.*

Rule's final EIS expanded areas of forest land originally within the Rule.[96] The court ended its background discussion with an outline of the litigation and the plaintiffs' claims.[97]

A. Standard of Review

The Administrative Procedure Act (APA) controlled litigation because the Forest Service governed the Rule.[98] The court applied the appropriate standard of review by balancing the plaintiffs' likelihood of success against the relative hardship to the parties.[99]

The primary concern of the court focused on whether it had jurisdiction over the plaintiffs' claims.[100] In particular, the court addressed three questions regarding jurisdictional issues: (1) whether the court had jurisdiction because the Rule requires an EIS; (2) whether subject matter jurisdiction was supported by a concrete injury to the Plaintiffs; and (3) whether the court had an obligation to raise a ripeness argument sua sponte, if not first raised by the parties.[101]

B. Jurisdictional Claims

In beginning a jurisdictional examination, the court must establish that the plaintiffs have standing for the claim.[102] In determining the plaintiffs' standing, the court restated some commonly held constitutional requirements: finding injury in fact, traceability

96. *See id.* (examining differences between Rule and draft EIS including broadening scope of Rule to include all inventoried roadless areas, not just unroaded areas included in draft EIS adding over four million acres to covered area).

97. *See id.* at 1236 (explaining plaintiffs' actions resting on claimed violations of Administrative Procedure Act, NEPA, NFMA and other acts with sought remedy being preliminary injunction).

98. *See id.* (reiterating that Administrative Procedure Act control was founded under premise of limited judicial review of agency action to assure that action is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."). The court also pointed out that under the Administrative Procedure Act there is a presumption that agencies act in accordance with the law. *See id.*

99. *See Kootenai*, 142 F. Supp. 2d at 1237 (citing Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999)). The specific standard relies on a plaintiff's demonstration of either a combination of success on the merits of the claim and possibility of irreparable injury or a showing of serious questions raised with a balancing of hardships in favor of the plaintiff. *See id.* (citing Idaho Sporting Cong. v. Alexander, 222 F.3d 562, 565 (9th Cir. 2000)).

100. *See id.* at 1237 (discussing issues of jurisdiction to ensure proper judicial review).

101. *See id.* (recognizing that jurisdiction of court over claims arose as threshold matter).

102. *See id.* (determining jurisdiction where party must have standing to be appropriately before court).

of the injury to the challenged action and the redressability of the injury with a favorable decision.[103] It identified case law granting plaintiffs standing based on an injury resulting from violations of procedural requirements of acts such as NEPA.[104] In regard to finding an injury in fact, the court set forth a requirement that the plaintiffs must show procedural violations to be immediate rather than speculative and that those individual members, rather than a collective group, felt the injury.[105] In this case, the court found that the Kootenai Tribe (Tribe) sufficiently demonstrated a personalized, geographical nexus demonstrated such that they would suffer from environmental impacts imposed on the area by the Rule.[106] The Tribe illustrated that declined forest management under the Rule would harm their interest in the area for recreational, aesthetic, spiritual and other uses.[107] The court also found that the plaintiffs illustrated that injuries such as wildfires and disease outbreaks would result from management planning changes and would not occur but-for the Forest Service's rapid implementation of the Rule.[108] Based on these findings, the court determined that the plaintiffs had met the injury threshold for standing.[109]

Through an analysis of the traceability and redressability of the plaintiffs' claim, the court found that the Tribe had satisfied the requirements, and thus had standing under Article III of the Con-

103. *See id.* at 1238 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 180-81 (2000)). The Court stated that in addition to the constitutional requirements of standing, the plaintiff must show that the injury alleged is within the "zone of interests" of the protections of NEPA. *See Babbitt*, 48 F.3d 1495, 1499 (9th Cir. 1995).

104. *See Kootenai*, 142 F. Supp. 2d at 1238 (recognizing *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1508 (9th Cir. 1992), where Ninth Circuit held this harm to be recognized by Congress and distinct in nature rather than conjectural or hypothetical).

105. *See id.* at 1238-39 (discussing previous court holdings requiring individualized injury in connection with challenged action).

106. *See id.* at 1239 (finding concrete interest of Kootenai Tribe in recreational, aesthetic, spiritual and other uses of roadless areas). The resulting environmental harm from the Rule would cause a decrease in active forest management, thus showing a personalized link to affected areas. *See id.*

107. *See id.* (stating that local regulation of areas to protect environmental features would reduce harm to tribal members and other parties such as livestock companies).

108. *See id.* at 1239 (stating fact that injury may not occur is irrelevant and that fact of possible overlooking of such injuries or ignoring reasonable alternatives through inadequate following of rules under NEPA is sufficient for traceability and redress of injury).

109. *See Kootenai*, 142 F. Supp. 2d at 1239 (holding plaintiffs' conferred standing).

stitution.[110] The court found direct causation between the rapid implementation of the Rule and the alleged injury.[111] Causation, along with the type of alleged injury would not occur if the Rule was not implemented, thus, the court concluded that the parties would be redressed by an injunction halting a change in forest management.[112]

C. EIS Requirement

The court subsequently examined the argument surrounding the EIS requirement of the Roadless Rule.[113] The defendants claimed that the Rule did not require the preparation of an EIS because the Rule did not "commit resources to some affirmative human development of the environment, did not change existing environmental conditions, and did not alter the environmental status quo."[114] NEPA mandates that federal government agencies comply with EIS requirements to the "fullest extent possible" when they take actions that will significantly affect the human environmental quality.[115] The court rejected the Forest Service's argument that NEPA's EIS requirement did not apply because the Rule left forest land untouched and there were no affirmative actions.[116] The court instead recognized that removing decision-making from forest plans that govern management of national forests was enough of an affirmative action to require reliance on NEPA's EIS

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110. *See id.* (holding that along with precedent from other Ninth Circuit decisions, plaintiffs met their burden to confer standing by satisfying all three constitutional prongs).

111. *See id.* (discussing that traceability can be established). The showing of traceability requires that:

> the alleged injury — wildfires, disease outbreaks, and insect infestation, resulting from national changes in active local management plans prohibiting road construction, reconstruction and/or timber harvesting, purportedly as result of statutory violations – would not have occurred but for the decision of the Forest Service in pushing the implementation of the Roadless Rule on a fast track.

Id.

112. *See id.* (holding possible non-occurrence of alleged injury irrelevant because real injury is that environmental consequences may be ignored or overlooked through procedural failures).

113. *See Kootenai*, 142 F. Supp. 2d at 1239.

114. *Id.* at 1239-40 (recognizing plaintiffs' asserted requirement of EIS may hold under NFMA).

115. *See Kootenai*, 142 F. Supp. 2d at 1240 (restating goals and expectations of EIS requirement).

116. *Id.*

mandates.[117] The court concluded the plaintiffs had jurisdiction based on the merits of the case.[118]

D. Ripeness

The court next examined issues of ripeness raised sua sponte.[119] Since the litigation had been instigated prior to the commencement of the Rule, the court felt it necessary to address the impact of this timing issue on the legitimacy of the plaintiffs' claim.[120] A primary concern of the court was the timing of a governmental status report and the plaintiffs' request for injunctive relief.[121] In order to avoid a premature decision, the court wanted to allow the government the opportunity to make changes that would be accounted for when examining the Rule.[122] The court also focused on the previous publication of the Rule in the Federal Register – illustrating its treatment as a complete process.[123] The court in *Kootenai* found that waiting for a governmental position would be an inadequate ripeness requirement.[124] The court, therefore, found the plaintiffs' claim ripe for review.[125]

E. Likelihood of Success on the Merits

Further, the court addressed the claim's likelihood of success on the merits.[126] Specifically, it examined the plaintiffs' procedural

117. *See id.* (holding prohibition of activities such as road construction alters status quo by departing from established local forest plans). The court explained that changing or limiting active forest management changes the status quo in preventing enactment of land management that will impact the environment in a manner that NEPA intended to protect. *See id.*

118. *See id.* at 1241 (setting forth holding regarding jurisdiction).

119. *See id.* at 1241-42.

120. *See Kootenai*, 142 F. Supp. 2d at 1242 (stating Rule was to be implemented on Jan. 5, 2001). President Bush's postponement scheduled the Rule to begin on May 12, 2001 and there was supposed to be a government status report in early May 2001. *See id.* The court discussed the possible impact of ruling on a preliminary injunction prior to the government report. *See id.* at 1242.

121. *Id.* (acknowledging pending governmental status report and discussing its impact on reaching decision in this case).

122. *See Kootenai*, 142 F. Supp. 2d at 1242 (recognizing importance of allowing ample time for review by new Bush administration).

123. *See id.* (realizing that although government withdrew opinion regarding Rule, publication in Federal Register shows that for exception of Bush's postponement, Rule would have been in effect).

124. *See id.* (stating publication of Rule in Federal Register and Record of Decision shows that implementation of rule would be in effect if not for governmental stay).

125. *See id.* (holding that finding issue not ripe for review is not adequate remedy).

126. *See Kootenai*, 142 F. Supp. 2d at 1242-43.

challenges against the Forest Service.[127] The court began by addressing the range of alternatives available to the Forest Service.[128] Realizing that the requirement to investigate alternatives was the crux of NEPA's EIS requirement, and failing to adequately do so equated to an inappropriate EIS, the court addressed the Forest Service's "hard look" at reasonable alternatives in creating the Rule's EIS.[129]

The court found that the Forest Service's alternatives to the banned road construction and reconstruction areas differed only in the level of restriction cast on timber harvesting.[130] The court recognized that alternatives outside the agency's objectives were not required; however, the court reasoned that other alternatives were available to the Forest Service that fell within the policy objectives of reducing risk to inventoried roadless areas; thus, the plaintiffs could pose a challenge to the alternatives addressed by the Forest Service.[131]

In light of the public comment period allowed under the Rule, the court examined the Forest Service's compliance with NEPA re-

127. *See id.* at 1242-43 (discussing claims for procedural challenge resting in NEPA). The court identified the Ninth Circuit's rule that looks at a challenge to see if there is a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Id.* at 1242 (quoting Or. Envtl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987)). The court furthered that this reasoning employs a reviewing court to adjudge whether an agency took a "hard look" at the possible environmental consequences of their actions in compliance with NEPA's informed decision-making and public participation goals. *See id.* at 1242-43.

128. *See Kootenai*, 142 F. Supp. 2d at 1243 (examining contention that failure to address and seriously consider range of available alternatives was NEPA violation). The plaintiffs contend that the Forest Service did not consider a "broad range of alternatives," thus pre-determining the outcome. *See id.*

129. *See id.* (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)). NEPA's standards for addressing whether an EIS is adequate regarding proper analyzation of reasonable alternatives are "(1) whether the federal agency has sufficiently detailed information to make its decision in light of potential environmental consequences and (2) whether the federal agency has provided the public with information on the environmental impact of the proposed action and encouraged public participation in the development of that information." *Id.*; *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) (discussing Agency's responsibility to address all viable alternatives).

130. *See Kootenai*, 142 F. Supp. 2d at 1243-44 (finding Forest Service did consider alternatives consistent with goals behind reasonable alternatives requirement). Also, noting that although alternatives inconsistent with the Rule do not need to be examined, the Forest Service failed to address alternatives that were consistent with prohibiting activities posing a great risk to "social and ecological values of inventoried roadless areas." *See id.*

131. *See id.* at 1244 (reasoning that plaintiffs would succeed on merits of their reasonable alternative violation of NEPA claim).

quirements of public participation in the proposed Rule.[132] The court forcefully concluded that the Forest Service's public comment period was not adequate and denied the public a thorough opportunity to participate in the process of formulating the Roadless Rule.[133] Supporting this finding, the court relied on the confusing nature of the EIS provided by the Forest Service as well as the denial of additional public comment time.[134] Although recognizing that the Forest Service complied with statutory minimums under NEPA, the court chastised the Forest Service for the quality of information provided during that minimum time frame.[135] The court continued to emphasize full disclosure of information as necessary for a complete, thorough and meaningful public input period.[136] The Forest Service's lack of straightforward, complete and clear information strengthened the finding of a NEPA violation.[137]

F. Failure to Adequately Analyze Cumulative Impacts

The final aspect of the court's analysis regarding the Forest Service's EIS production concerned the duty to discuss cumulative impacts of an action.[138] Discussing precedent, the court recognized that an examination of impacts regarding an agency action is required and that in this case, the Forest Service failed to fully present

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132. *See id.* at 1244 (addressing Forest Service's use of public comment and whether it was sufficient and adequate under NEPA). NEPA requires that an agency must "involve the public in preparing and implementing their NEPA procedures" and this process invites participation from affected parties. *Id.* Public notification and an opportunity to comment on agency rulemaking is required and the agency should consider comments in its decision-making. *See id.*

133. *See id.* at 1247 (commenting Forest Service's comment period deprived public of meaningful participation, which violated NEPA).

134. *See id.* at 1244-45 (discussing public concern expressed over definitions of certain terms utilized in Rule, such as "unroaded areas" and how this along with inadequacy of information presented, staff conduct, meaningful consultation with Indian Tribes and failure to grant additional comment time contributed to Forest Service's failure to provide adequate comment period).

135. *See Kootenai*, 142 F. Supp. 2d at 1244-45 (concluding information provided by Forest Service was confusing in nature therefore inadequate for public comment purposes).

136. *See id.* at 1246 (continuing time cannot be of essence regarding issue of this magnitude and actions taken throughout this process suggest "pre-determined" political outcome).

137. *See id.* at 1246-47 (holding 700 page final Environmental Impact Statement generated 1.6 million comments, public meetings were held at end of comment periods and many comments were not given response).

138. *See id.* at 1247 (formulating NEPA requirement to discuss cumulative impacts in useful manner). The court recognized holdings where cursory discussions and general remarks regarding impacts of an action were insufficient. *See id.*

impacts in all areas presented in the EIS.[139] The court found the Forest Service failed to adequately discuss cumulative impacts and therefore violated NEPA.[140]

Despite finding that the Forest Service violated NEPA in several ways and that such violations allowed for a minimal showing by the plaintiffs of harm, the court withheld ruling on the requested injunction until the government presented a status report.[141] On May 4, 2001, however, the same court ordered the injunction after the status report insufficiently dealt with EIS flaws and failed to address identified problems.[142] The court, in granting the injunction, stated that allowing the Rule to take effect would ignore the possibility of repercussions.[143]

V. CRITICAL ANALYSIS

A. EIS Requirement Under NEPA

In *Kootenai*, the district court relied heavily on NEPA as the primary procedural guideline to determine whether the Forest Service adequately formulated the Rule.[144] The court attempted to ensure that the Forest Service complied with NEPA's procedures.[145] For example, the court substantially examined the requirement that an agency prepare an EIS for agency actions that affect the

139. *See id.* (dismissing suggestion by Forest Service that non-predictable or significant isolated aspects of EIS did not preclude discussion in broad scheme of cumulative impacts in proposed and finalized Rule and accompanying policy).

140. *See Kootenai*, 142 F. Supp. 2d at 1247 (holding likelihood of finding failure on behalf of Forest Service to fully discuss cumulative impacts of Rule).

141. *See id.* at 1248 (holding that although plaintiffs' claim has merit, legitimacy, and likelihood of success, court should postpone grant of injunction until such time as new governmental administration has had opportunity to address flaws of EIS and Rule).

142. *See Kootenai I*, 2001 WL 1141275, at *1-2 (D. Idaho May 10, 2001) (granting injunction on appeal after governmental status report failed to achieve court's desired results of Rule amendment and change).

143. *See id.* at *2 (stating Rule in current form and momentum would result in years of litigation due to shear magnitude of Forest Service's action).

144. *See Kootenai*, 142 F. Supp. 2d at 1235 (providing historical background that Forest Service staff was authorized to formulate Rule in compliance with NEPA standards).

145. *See id.* The district court, recognizing that other acts such as the NFMA are implicated in this litigation, chose to concentrate on the Forest Services compliance with NEPA standards. *See id.* The court further points out that the NFMA requires the Forest Service to be in compliance with NEPA including the preparation of an EIS if necessary. *See id.* at 1240. Therefore, the EIS requirement stems from NFMA's indirect mandate to comply with NEPA standards. *See id.*

environment.[146] The court correctly retained the foundational test under NEPA: that an agency must prepare an EIS in circumstances of a "major federal action" that significantly affects the quality of the human environment.[147] The court concentrated on the argument that the Forest Service must comply with the EIS standard under NEPA.[148] Thus, the court looked at actions under the Rule to see if they would incite EIS compliance.[149] The court cited findings that "leaving nature alone" does not absolve EIS compliance, and that the Forest Service's Rule precluded enough state action to constitute alteration of the status quo.[150]

The Ninth Circuit's decision in *Douglas County v. Babbit* conflicts with the *Kootenai* court's rationale.[151] In *Babbit*, the Ninth Circuit found that NEPA procedures do not apply to agency actions that do not alter the physical environment.[152] The *Babbit* court relied on Supreme Court decisions regarding the scope of NEPA's requirements.[153] The Ninth Circuit also found that conservation of

146. *See* Lindstrom, *supra* note 65 at 246 (stating EIS is tool that agencies must utilize in order to ensure they are in compliance with national environmental policy).

147. *See Kootenai*, 142 F. Supp. 2d at 1240 (citing 42 U.S.C. § 4332(c)(1994), which establishes situations in which EIS is required by federal agency action).

148. *See id.* at 1239-41 (addressing and holding that Rule in fact required EIS).

149. *See id.* at 1241 (recognizing that NEPA does not require EIS under all circumstances, while also admitting that EIS compliance may apply to all agency's non-affirmative actions).

150. *See id.* at 1241 (dismissing Forest Service's arguments that areas affected under Rule undergo no affirmative action and thus preclude NEPA EIS requirements). Instead the court found that preventing land management techniques qualifies as a demonstrable impact on the environment thus falling under NEPA guidelines. *See id.*

151. *Douglas County v. Babbit*, 48 F.3d 1495, 1497 (9th Cir. 1995) (holding that NEPA does not apply in situations that designate critical habitat).

152. *See id.* at 1505 (noting Secretary of Interior's act to designate natural habitat for endangered species was challenged on grounds of noncompliance with the NEPA standards). The court held that NEPA guidelines do not apply to critical habitat designation or action that intends to preserve existing physical environment. *See id.*

153. *See id.* (discussing Supreme Court decision in *Metro*, 460 U.S. 766, 772-73 (1983), in which Court reasoned that NEPA's goals evidenced through congressional intent, illustrate desire to protect environment). The Supreme Court asserted that NEPA does not require impact discussion on every federal action; and in seeking protection of social health and welfare; Congress chose to use NEPA as a means to an identified end. *See id.* The Court stated that the purpose of an EIS is to identify possible adverse environmental impacts in federal action that alter the land, sea, or air. *See id.* However, the *Metro* Court rationalized that leaving the physical environment alone and designating it as a protected area does not alter the environment in a manner consistent with actions requiring EIS compliance. *See id.*

the environment is not a federal action that would be guided under NEPA.[154]

The Ninth Circuit's rationalization for its holding rested on the belief that preservation of the existing environment helped to prevent human interference.[155] Consequently, this natural progression protects the environment and adheres to NEPA's goal of requiring an EIS.[156] The Ninth Circuit quoted case law suggesting that requiring an EIS for agency action that furthers the purpose of NEPA could actually hinder the attainment of those environmental protection goals.[157]

The Ninth Circuit also relied on the Supreme Court decision in *Metro.*[158] The *Metro* Court helped establish actions necessary under NEPA to trigger an EIS.[159] In evaluating environmental impacts and adverse effects from agency action, the Court determined that not every impact or effect mandates assessment.[160] The *Metro* Court held that such assessment is only required in situations that effect the environment itself.[161] In defining the context in which NEPA requirements apply to the environment, the *Metro* Court concluded that they only pertain to the physical environment.[162] Further, the Court rationalized that this contextual limitation allowed for human welfare to be promoted by educating agencies of the effects on the physical environment that their plans may incur.[163]

154. *See id.* at 1505-06 (concluding such rationale of not requiring EIS is shared by other courts, such as in Fifth and Eighth Circuits).

155. *See id.* at 1506 (stating environment will shift, change, and evolve in natural process when human interference is prohibited and this is cognizant of goals prompted by NEPA).

156. For a further discussion of the Rule's compliance with NEPA goals, see *supra* notes 140-46 and accompanying text.

157. *See Babbit*, 48 F.3d at 1506 (quoting *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981)).

158. *See Metro*, 460 U.S. 766, 771-73 (1983) (holding Nuclear Regulatory Commission was not required under NEPA to consider psychological issues regarding nuclear accident).

159. *See id.* (using legislative intent, statutory sponsor quotation, as well as court interpretation to formulate some working guidelines for NEPA requirements and procedures; specifically, in what situations NEPA requirements are sparked).

160. *See id.* at 772 (paraphrasing wording from statutory language of NEPA Section 102(c), 42 U.S.C. § 4332(c) (1994) and discussing importance of term "environmental" in determining NEPA requirements).

161. *See id.* (interpreting environment in contextual manner and limiting it to physical environment).

162. *See id.* at 772-73 (recognizing NEPA's goals are ends in which Congress intended to accomplish means of protecting physical environment).

163. *See Metro*, 460 U.S. at 772-73 (discussing statutory language of EIS requirement intending to take "hard look" at agency action that may significantly affect human environment).

Despite the *Metro* Court's clear limitation on NEPA's application, the district court in *Kootenai* utilized the Supreme Court's decision to create a bridge between preventing land management techniques and a change in the physical environment.[164]

In light of the district court's rationale in *Kootenai*, it becomes important to question the court's compliance with the judicial dicta of their own circuit, the Ninth Circuit, and that of the Supreme Court.[165] The district court did not provide reasoning for departing from the Supreme Court or the Ninth Circuit decisions; rather it rejected the Forest Service's reliance on case law purporting to negate EIS compliance, in one isolated comment.[166] The district court even cited *Metro*, by concluding that preventing land management techniques would equate to a demonstrable impact on the environment.[167] However, the district court's reasoning is inconsistent with Supreme Court precedent.[168] The district court creates a demonstrable impact through the Rule's plan of leaving forestland as is, thereby preventing or limiting acts such as road construction or timber harvesting.[169] The district court fails to clarify how the Rule distinguishes itself from the type of federal action discussed by the Supreme Court that preserves existing lands, thus allowing natural environmental processes to dictate impact.[170]

B. Ripeness

A critical turning point in the district court's analysis came during its discussion of ripeness.[171] The ripeness doctrine exists "to keep the judiciary from entangling itself in abstract disagreements over administrative policies by preventing premature adjudica-

164. *See Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1241 (D. Idaho 2001) (citing Supreme Court decision as support for connection of "leaving nature alone" and demonstrable impact on physical environment).

165. For a further discussion of applicable caselaw conflicting with Kootenai decision, see *supra* notes 147-60 and accompanying text.

166. *See Kootenai*, 142 F. Supp. 2d at 1240 (distinguishing cases from present case on basis that Rule will add to, modify, and remove decisions from other forest management plans).

167. *See id.* at 1241 (citing *Metro*, 460 U.S. at 722, where Supreme Court reiterated need for NEPA in situations where there would be demonstrable impact on physical environment around us).

168. *See id.*

169. *See id.* (stating that Rule's prohibitions have demonstrable impact on world around us and this is what Congress intended NEPA to remedy).

170. *See id.* The court does not distinguish *Metro*, 460 U.S. at 722, from its own findings; but rather it cites the case as support without articulating the specific connection. *See id.*

171. *See id.* (raising sua sponte issue of ripeness finding that claim is ripe for review in this case).

tion."[172] When determining ripeness, a court must evaluate its fitness for judicial review and the hardship of a delayed court decision on the parties involved.[173] The district court recognized that ripeness is a procedural question determinative of jurisdiction.[174] In order to be ripe under the Administrative Procedures Act (APA), a regulation's factual component of a concrete action linking the regulation to the claimed injury must be worked out.[175] A court cannot determine the legitimacy of a regulation unless it first determines the regulation's impact.[176] A final decision needs to be made regarding the regulation's application.[177] The district court in *Kootenai* supported a finding of ripeness through the publication of the Rule in the Federal Register and Record of Decision.[178] The court recognized the government's withdrawal of their position regarding the matter as well as the pending status report, yet found ripeness due to failure to remedy.[179]

Other courts have interpreted ripeness in a manner that blocks judicial review of actions similar to the one at issue in *Kootenai.*[180] Courts are reluctant to become involved and make decisions concerning actions that agencies may modify or even abandon.[181] Further, where judicial review places the court in a position to be a

172. Cohen, *supra* note 88 at 550 (quoting Sierra Club v. Marita, 46 F.3d 606, 614 (7th Cir. 1995)). Cohen also points out that the plaintiff does not need to put off litigation of specific project when claimed injury fits within overall plan. *Id.*

173. *See id.* (stating that to make this determination it has been found that three questions are necessary: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would interfere inappropriately with administrative action; and (3) whether there is any benefit from courts factually developing presented issues).

174. *See Kootenai*, 142 F. Supp. 2d at 1242 (distinguishing ripeness as jurisdictional question). If claim is not ripe, then the court lacks subject matter jurisdiction over claim and it should dismiss the action. *Id.*

175. *See id.* (discussing "fleshing out" of action applicable to plaintiffs' claimed harm).

176. *See* Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 929 (Tex. 1998) (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986), which purports necessity of "final decision" regarding regulation).

177. *See id.*

178. *See Kootenai*, 142 F. Supp. 2d at 1242. The Kootenai court stated that no dispute regarding publication arose, and therefore, notwithstanding President Bush's postponement the Rule would already be in effect. *Id.* The court continued that not finding the matter to be ripe would not provide a remedy for the plaintiffs in this case. *See id.* Therefore, the court found the matter ripe despite the government's contention of review of the Rule. *See id.*

179. *See id.* (holding that waiting until release of Government's status report, in regards to ripeness, is not adequate remedy).

180. *See* Gregory, *supra* note 9, at 614 (discussing how courts have utilized ripeness doctrine to block judicial review of forest plans).

181. *See id.* at 615 (supporting policy decisions have led to court's desire to stay away from agency review).

generalist in deciding matters, an agency is considered the best entity to make decisions about its own regulations.[182] As such, courts hold that where an agency action can raise new facts or where 'more minds' may change a plan's outlook, a court should defer to the agency.[183]

In *Kootenai,* the court postponed the Rule awaiting further government inquiry.[184] This left the Rule open to "more minds" and possible changes in order to move the Rule from the final stage and back into the planning, pre-implementation stage.[185] The district court recognized that finding an injury was premature in this case because the Rule had not produced any irreparable affects on the Plaintiffs.[186] With irreparable injury findings premature, the court arguably states that further governmental action is necessary to make a finding.[187] As such, it would appear that not all components of the Rule were sufficiently explored to warrant a judicial decision. Therefore, the district court contradicts its own findings. While the matter is ripe on its face, it was not sufficiently ripe to find injury.[188] The holding is inconsistent both internally and externally, with hesitation from other courts to find agency actions ripe for fear of unnecessary judicial review.[189]

VI. IMPACT

The impact of *Kootenai* weakens the fundamental goals of the Rule and possible future environmental conservation efforts.[190] The government could allot time under the new administration to review and possibly alter the Rule. Unfortunately, the decision

182. *See* Wilderness Soc'y v. Alcock, 867 F. Supp. 1026, 1043 (N.D.Ga. 1994) (discussing "generalist federal court" idea that some matters are too complex for judicial review and can be decided and meshed out better at agency level).

183. *See id.* (recognizing new agency cycles and possible new facts allow agency to be more appropriate body for review).

184. *See Kootenai,* 142 F. Supp. 2d at 1236 (discussing postponement of Rule until further government inquiry was completed in May 2001).

185. *See id.* (postponing Rule could lead to possible revisions, changing what is finally implemented).

186. *See id.* at 1247-48 (finding irreparable injury premature until governmental status report).

187. *See id.* (finding further government action necessary only insofar as status report expected by May 4, 2001).

188. For a further discussion of the district court's finding of ripeness in *Kootenai,* see *supra* notes 166-77 and accompanying text.

189. For a further discussion of the district court's finding of ripeness in *Kootenai,* see *supra* notes 178-83 and accompanying text.

190. *See Kootenai I,* 2001 WL 1141275, at *2 (D. Idaho May 10, 2001) (finding injunctive relief against implementation of all aspects of Rule).

granting an injunction could bar the Rule and negate the government's efforts or the implementation of the Rule altogether.[191]

Finding an EIS requirement for the Rule under NEPA may place an unnecessary burden on the Forest Service.[192] The Rule was intended to be an environmental protection measure to ensure the survival of roadless areas throughout much of the Western United States.[193] The Rule arguably fits within the specific scope of NEPA's goals, thus exempting it from the EIS requirement.[194] Despite burdening the agency and hindering the development of the Rule, such a requirement may have inappropriately placed the matter within judicial review.[195] Not only does this implicate a possible abuse of judicial review, but also demonstrates that the *Kootenai* court clearly abandoned Supreme Court precedent.[196] Despite any effects of *Kootenai* on the ability of the Forest Service to produce a land conservation measure like the Rule, the impact on future court findings and applications of NEPA requirements may be misapplied.[197] This could inappropriately place many environmental conservation measures within judicial review, halting or forever hindering such movements.

Holding the matter ripe for review while admitting a finding of irreparable injury is premature suggests the finding of injunctive relief may also be premature.[198] A matter cannot be ripe yet also be

191. *See id.* For a further discussion of the timing of the Rule and granting of an injuction, see *supra* notes 171-72.

192. *See* Johnson, *supra* note 72, at 577 (discussing NEPA's EIS requirements and what preparing an EIS entails). An EIS requires public comment, presentation of materials and research, conducting research of environmental impacts and the like. *See id.* This process could pose financial as well as time constraints on an agency; therefore, finding an EIS to be necessary for an action is important in distribution of these costs on an agency. *See id.*

193. *See Kootenai*, 142 F. Supp. 2d at 1235 (presenting historical background of Rule through President Clinton's directive in 1999).

194. *See id.* at 1239-40 (discussing Intervenor's argument that Rule is not subject to NEPA's guidelines and requirements).

195. For a further discussion of judicial review of the EIS requirement, see *supra* notes 140-46 and accompanying text.

196. *See Douglas County v. Babbit*, 48 F.3d 1495, 1505 (9th Cir. 1995) (holding that NEPA guidelines do not apply to critical habitat designation or action that intends to preserve existing physical environment); *see also Metro*, 460 U.S. 766, 772-72 (1983) (reasoning that NEPA's goals are evidenced through congressional intent and desire to protect environment). The *Metro* Court reasoned that leaving the physical environment alone and designating it as a protected area does not alter the environment in a manner consistent with actions requiring EIS compliance. *See Metro*, 460 U.S. at 772.

197. For a further discussion of the district court's findings, see *supra* notes 94-139 and accompanying text.

198. *See Kootenai*, 142 F. Supp. 2d at 1248. The court found at the closing of its opinion that a decision on injunctive relief was premature because of the pend-

premature due to pending governmental review. This leaves the district court tangled in its own wording. The court may have been apprehensive in finding the matter unripe for fear of barring future action; yet the court maintains its assertion later in the opinion that timing is inappropriate to find for an injunction against the Rule.[199] This leaves the district court vulnerable to consistency arguments on appeal, and an appellate court may find that the matter had not been ripe when the district court reviewed the claim.[200]

The EIS and ripeness requirements are two aspects of the *Kootenai* decision that are controversially outside the bounds of case law, leaving many questions open for the pending appeal.[201] Presently, the Rule, at least in Idaho, has been enjoined.[202] Future protection efforts for roadless areas are uncertain. Moreover, the district court's decision has uncertain impacts upon NEPA requirements and the ripeness doctrine. Public support of striking the Rule allows the court to bar environmental conservation efforts by utilizing judicial dicta. Many suggest that the injunction is a positive step to increase land protection through cooperation among local and state level governments.[203] Supporters of this viewpoint cite NEPA as a guarantee to ensure, "the public's right to participate in governmental decision making."[204] The decision has been praised as a step towards site-specific determinations rather than application of conservation efforts to large areas that could result in

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ing Government status report. *See id.* However, the court rests this specific finding on the fact that finding irreparable injury is premature in light of pending Government action. *See id.* However, by finding possible injury earlier in the opinion, why did the court utilize injury as a rationale for prematurity? Perhaps, because having already found the matter ripe, the court realized the conundrum it would be engaging in if it just stated that finding an injunction itself is premature – this may have insinuated a lack of ripeness due to timing of the Government status report. *See id.*

199. *See id.* (holding that finding irreparable injury is premature).

200. *See* 66 Fed. Reg. 44,111 (Aug. 22, 2001) (discussing pending nature of *Kootenai* case before Ninth Circuit Court of Appeals).

201. For a further discussion of EIS and ripeness requirement in Kootenai, see *supra* notes 140-83 and accompanying text.

202. *See Kootenai I*, 2001 WL 1141275, at *2 (D. Idaho May 10, 2001) (granting injunction against all aspects of Rule).

203. *See Gibbons Praises Bush Administration for Balanced Approach at Roadless Rule, available at* http://www.house.gov/gibbons/roadlessrule.htm (last visited Oct. 6, 2002) (praising Bush Administration for approaching Roadless Rule in balanced manner encompassing state and local governments in environmental conservation decision-making).

204. *See* Press Release, Alan G. Lance, Attorney General of State of Idaho, "Idaho Wins Injunction Blocking Roadless Rule," *available at* www2.state.id.us/ag/newsrel/2001/pr_may102001.htm (last visited Oct. 6, 2002) (noting that blocking Clinton's Roadless Rule is victory for public's right to participate in government decision-making).

large-scale devastating impacts.[205] As *Kootenai* suggests, how courts deal with NEPA requirements and ripeness remains open to interpretation. The decision may ironically leave a trail or "a road" for how future courts deal with similar issues as well as future efforts to protect roadless areas.

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205. *See Gibbons Praises Bush Administration for Balanced Approach at Roadless Rule, supra* note 198 (suggesting Rule restricts solving of nation-wide energy crisis and citizen enjoyment of public lands).