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The Real World Roadless Rules Challenges

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NOTE

THE REAL WORLD ROADLESS RULES CHALLENGES

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The legal status of America's 58.5 million acres of Inventoried Roadless Areas has been unsettled for nearly a decade. These wild areas were given strict protection in the final days of the Clinton Administration, but President Clinton's Roadless Rule was suspended and later overturned by the Bush Administration when it promulgated its State Petitions Rule. Both rules were challenged in various courts, with conflicting results. As it stands, the United States Forest Service is simultaneously compelled to follow the Roadless Rule by the Ninth Circuit and barred from following the rule by the Tenth. This Note argues that both rules are invalid and that a new rule is needed for long-term stability. This new rule should initially require strict protection by the federal government but should allow for some local input to prevent another reversal when the Republican Party eventually retakes the White House.

TABLE OF CONTENTS

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> "American Democracy, in its myriad personalities, in factories, workshops, stores, offices—through the dense streets and houses of cities, and all their manifold sophisticated life—must either be fibred, vitalized, by regular contact with out-door light and air and growths, farm-scenes, animals, fields, trees, birds, sun-warmth and free skies, or it will certainly dwindle and pale. . . . I conceive of no flourishing and heroic elements of Democracy in the United States . . . without the Nature-element forming a main part—to be its health-element and beauty-element—to really underlie the whole politics, sanity, religion and art of the New World."
>
> —Walt Whitman[1]

INTRODUCTION

Many historians agree that wilderness is a critical facet of the American experience.[2] It seems beyond dispute that we should maintain some amount of land in pristine condition, but questions about how much should be preserved, and through which processes, remain. In contemplating these issues, Whitman unwittingly points to an intriguing problem: What if the only way to protect these democracy-supporting natural landscapes is to do so by an undemocratic process?[3] Is wilderness so critical to democracy that it should be protected by executive decree if necessary, or does a top-down approach cut too strongly against our political ideals?

Undeveloped land has a variety of cultural, biological, educational, historical, recreational, and economic benefits—benefits that the government has sometimes recognized, despite opposition, through increased wilderness protection.[4] The value of protected federal land is recognized by the public. As illustrated by a nationwide survey conducted in 2000, the public appreciates a variety of the values of protecting pristine areas: almost 55 percent noted that protecting undeveloped federal land is "extremely important" to

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1. WALT WHITMAN, *Specimen Days: Nature and Democracy—Morality*, *in* COMPLETE PROSE WORKS 200, 200 (Philadelphia, David McKay 1892).

2. *See, e.g.*, RICHARD N.L. ANDREWS, MANAGING THE ENVIRONMENT, MANAGING OURSELVES 136–37, 144–46 (2d ed. 2006) (describing the shift toward government protection of wild lands at the turn of the twentieth century); DOUG SCOTT, CAMPAIGN FOR AM.'S WILDERNESS, THE ENDURING WILDERNESS: PROTECTING OUR NATURAL HERITAGE THROUGH THE WILDERNESS ACT (2004); TOM TURNER, ROADLESS RULES: THE STRUGGLE FOR THE LAST WILD FORESTS 63–70 (2009) (describing both economic and faith-based reasons for protecting wild areas).

3. *See supra* note 1 and accompanying text.

4. TURNER, *supra* note 2 at 63–68 (economic value), 68–70 (religious value), 89–93 (biological value), 99–101 (recreational value); *see also infra* Section III.A.

protecting water quality, and 85 percent felt that it is "extremely important" or "very important" to preserve wild lands for future generations.[5] Keeping developers and timber companies out of wild land is critical to the mission of several major environmental groups, including The Wilderness Society,[6] The Nature Conservancy,[7] and the Natural Resources Defense Council ("NRDC").[8]

In contrast, timber companies and off-road vehicle enthusiasts believe Americans are entitled to free and full access to public lands.[9] Also in opposition to preservation efforts, the American Forest Resource Council has gone so far as to state that increased logging will *help* the environment by reducing intensity of forest fires as well as the amount of climate-change-causing greenhouse gases in the atmosphere.[10] Yet in spite of such opposing forces, the turn of the twenty-first century witnessed increased protection for undeveloped regions.[11] Public land conservation policy has generally followed the same trend as environmental protection as a whole, which enjoyed a steady rise from the 1960s through the 1990s.[12]

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5. U.S.D.A. FOREST SERV. & N.O.A.A., *Uses and Values of Wildlife and Wilderness in the United States*, *in* NATIONAL SURVEY ON RECREATION AND THE ENVIRONMENT (NSRE 2000), 6 tbls. WILD283 & WILD284 (2002), *available at* http://www.srs.fs.usda.gov/trends/Nsre/summary2.pdf.

6. *About Us*, THE WILDERNESS SOC'Y, http://wilderness.org/about-us (last visited Feb. 13, 2011).

7. *About Us*, THE NATURE CONSERVANCY, http://www.nature.org/aboutus/ (last visited Feb. 13, 2011).

8. *Issues: Wildlands*, NAT. RESOURCES DEF. COUNCIL, http://www.nrdc.org/land/ (last visited Feb. 13, 2011).

9. *About AFRC*, AM. FOREST RESOURCE COUNCIL, http://www.amforest.org/about/ (last visited Feb. 13, 2011); *About ORBA*, OFF-ROAD BUS. ASS'N, http://www.orba.biz/index.php?option=com_content&view=article&id=1&Itemid=2 (last visited Feb. 13, 2011).

10. *Timber Industry: Cutting Down Trees Helps Environment* (National Public Radio broadcast Nov. 27, 2007) (transcript and audio recording available at http://www.npr.org/templates/story/story.php?storyId=16655740). Selective logging can be beneficial to forest health due to the prevalence of overly dense forests caused by active fire suppression strategies. 149 CONG. REC. H7087 (daily ed. July 17, 2003); Joshua Nathaniel, Survey, *Forests on Fire: The Role of Judicial Oversight, Forest Service Discretion, and Environmental Regulations in a Time of Extraordinary Wildfire Danger*, 84 DENV. U. L. REV. 923, 946 (2007); *see also* Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy In an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 314–15 (2006) (noting that aggressive fire suppression efforts have left forests more prone to catastrophic fires and pest infestation). *But see Public Lands Advocacy*, WILDEARTH GUARDIANS, http://www.wildearthguardians.org/site/PageServer?pagename=programs_wild_places_publiclands (last visited Feb. 13, 2011) (arguing that fire management should not be an excuse for logging).

11. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, tit. I, II, V, VII, VIII, 123 Stat. 991, 999–1126, 1147–65, 1224–95 (protecting a significant amount of federal land as National Park, National Wild and Scenic Rivers, National Heritage Area, and Wilderness). Land preservation certainly has its critics, including those who believe America's natural resources should be further exploited for commodity development, such as oil production in Arctic National Wildlife Refuge. Sheryl Gay Stolberg, *Bush Calls for End to Ban on Offshore Drilling*, N.Y. TIMES, June 19, 2008, at A1.

12. Prior to 1960 the only federal environmental laws were weak and narrow, but several major environmental statutes were passed in subsequent decades, including the Clean Air Act in 1963; the Resource Conservation and Recovery Act in 1976; the Comprehensive Environmental Response, Compensation, and Liability Act in 1980; and the significant tightening of air quality standards in 1990. ANDREWS, *supra* note 2, at 227–54. Environmental progress stalled during the

The federal government's growing commitment to conservation was halted during the presidency of George W. Bush, whose environmental policy reversals have led to some frustrating legal ambiguities.[13] One such policy reversal involves President Bush's elimination of the Roadless Area Conservation Rule ("Roadless Rule"), the status of which has been unsettled for nearly a decade.[14] At the end of the Clinton Administration, the United States Forest Service ("Forest Service"),[15] at President Clinton's urging, issued a massive agency directive called the Roadless Rule. This rule prohibited almost all road building and timber harvesting on tens of millions of United States National Forest ("National Forest") acres known as Inventoried Roadless Areas ("IRA").[16] Once in office, President Bush immediately suspended the Roadless Rule, and later issued the State Petitions for Inventoried Roadless Area Management Rule ("State Petitions Rule"), overturning the Roadless Rule entirely and opening IRAs to logging and other commercial interests, subject to laws in place prior to the Roadless Rule.[17] The State Petitions Rule favors more localized control over IRAs and allows for states to petition the Forest Service to set state-specific levels of IRA preservation.[18] During the Bush Administration both rules were challenged, and conflicting holdings in the Ninth and Tenth Circuits led to uncertainty regarding which rule, if either, is valid.[19] President Obama inherited this uncertainty and has not yet taken definitive action regarding the protection of the federal land in question.[20]

This Note argues that the National Forest Service under President Obama should institute a new rule for the management of the land at the center of this conflict. The new rule should blend the Clinton and Bush rules, mirroring an early draft version of the State Petitions Rule that set the default at strict protection but allowed for state-instituted changes under extraordinary circumstances. Part I traces the history of roadless area management, including the promulgation of the Roadless Rule, the State

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Reagan Administration as the Environmental Protection Agency faced significant budget cuts, but the general trend from the postwar period to today is undeniable. *Id.* at 255–62.

13. Robert B. Keiter, *Breaking Faith with Nature: The Bush Administration and Public Land Policy*, 27 J. LAND RESOURCES & ENVTL. L. 195 (2007).

14. *Infra* Section I.A.

15. The Forest Service, established in 1905, is a division of the United States Department of Agriculture and currently manages 193 million acres of public land withdrawn as National Forests or National Grasslands. U.S. DEP'T OF AGRIC., FOREST SERV., THE U.S. FOREST SERVICE—AN OVERVIEW 1, *available at* http://www.fs.fed.us/documents/USFS_An_Overview_0106MJS.pdf.

16. *Id.*; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

17. *See* State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at C.F.R. pt. 294); *infra* Section I.B.

18. *See* State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,654.

19. *See infra* Section I.C. The Roadless Rule was primarily litigated in the Ninth and Tenth Circuits because over 96 percent of IRAs are within these jurisdictions. *See* U.S. DEP'T OF AGRIC., FOREST SERV., 1 ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT app. A at A-3 to A-4 (2000) [hereinafter ROADLESS RULE FEIS].

20. *See infra* Section I.C.

Petitions Rule, and the current situation facing the Obama Administration. Part II argues that neither the Roadless Rule nor the State Petitions Rule is legally valid due to violations of the National Environmental Policy Act ("NEPA"). As such, the current rules are likely to be struck down, and management of roadless areas will revert to an uncoordinated, localized planning process led by the Forest Service. Part III contends that a new national rule is in the public interest and suggests that, rather than copy the staunchly conservationist Roadless Rule that is likely be undone by the next Republican president, President Obama should institute a rule that provides both roadless area protection and long-term stability. This new national rule would mandate strict protection as a default but would allow for state-instituted alterations, such as those developing in Idaho and Colorado, under certain circumstances.

I. THE HISTORY OF ROADLESS AREA MANAGEMENT IN THE NATIONAL FOREST SYSTEM

The Forest Service has a long history of conserving pristine land from development—a history that reached its apex, in both breadth and degree of protection, with the Roadless Rule.[21] Decades after the Forest Service first administratively set aside land for strictly conservationist purposes, Congress took a substantial legislative step by enacting the Wilderness Act of 1964 ("Wilderness Act").[22] The Wilderness Act constitutes the strictest protection of America's wild lands; it created a nine-million-acre National Wilderness Preservation System ("Wilderness") upon which commercial enterprises and permanent roads are banned.[23] In addition to directly preserving Wilderness land, the Wilderness Act requires the Forest Service to survey National Forests to identify other areas appropriate for legislative protection.[24] Suitable surveyed lands that do not yet have legislative protection are now known as Inventoried Roadless Areas.[25] Many former IRAs have been formally designated as "Wilderness" by Congress and are therefore protected

21. Wild areas first enjoyed administrative protection by the Forest Service in 1924. *See* Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1375 (2002) (describing setting aside portions of the Gila National Forest as wilderness in 1924). In 1939 the agency began prohibiting commercial timber harvesting, roads, and recreational camps in the 14 million acres of designated primitive areas. DENNIS M. ROTH, THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS 4 (rev. 2d ed. 1995).

22. Wilderness Act of 1964, Pub. L. 88–577, 78 Stat. 890; *see also infra* Section II.B.

23. *See* National Wilderness Preservation System, 16 U.S.C. §§ 1131–1136 (2006). Wilderness can be designated in any classification of federal land and continues to be managed by the agency that was responsible prior to designation. 16 U.S.C. § 1131(b). See *infra* Section II.B for a more extensive discussion of the Wilderness Act.

24. 16 U.S.C. § 1132(b). Congress directed the Forest Service to identify large tracts of land generally untouched by civilization to preserve. 16 U.S.C. §§ 1131(c), 1132(a). Management of all National Forest land has legislative limits, but in general local officials are given broad discretion to develop land as they see fit. *See infra* Section II.D.

25. Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1154 n.62 (2004); *see* 36 C.F.R. § 294.11 (2009).

by the Wilderness Act, but many others remained unprotected as of 2000.[26] This Note focuses on the management of the millions of acres of these IRAs, and this Part deals specifically with the lands' status over the past decade.

This Part traces the factual history of IRA management, including Forest Service rulemaking procedures under the Clinton and Bush Administrations and lengthy legal battles in the Ninth and Tenth Circuits. Section I.A discusses the promulgation of the Roadless Rule and the subsequent legal challenges. Though the Roadless Rule has been upheld by the Ninth Circuit, a district court in the Tenth Circuit has since issued a nationwide injunction, putting in question the rule's legal validity. Section I.B explores the development of the State Petitions Rule, which effectively overturned the Roadless Rule, as well as a successful legal challenge in the Ninth Circuit. Section I.C summarizes the current status of IRA management, including state-instituted rules proposed in Colorado and in place in Idaho. Due to the complexity of recent IRA management history, this Part sets the stage by outlining the facts; legal analyses of the two rules and the major legal battles are contained in Part II.

A. *The Development of, and Injunction Against, the Roadless Rule*

Despite having a mixed environmental record overall,[27] President Clinton had a strong record of land conservation,[28] as exemplified by the Roadless Rule. Concerned that "[a]n average of 3.2 million acres per year of forest, wetland, farmland, and open space were converted to more urban uses between 1992 and 1997,"[29] and dissatisfied with the amount of Wilderness set aside, President Clinton ordered the Forest Service in 1999 to promulgate a rule protecting remaining wild areas from encroachment.[30] The Forest Service quickly set out to analyze the consequences of a complete ban on road building in IRAs.[31] The protection of additional wild land

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26. ROADLESS RULE FEIS, *supra* note 19, app. A at A-3 to A-4. Most IRAs are found in the West and in Alaska. *Id.* at 3-11 tbl. 3-3. They range from large wild areas (for example, White Cloud–Boulder Roadless Area, over 300,000 acres in Idaho, *White Cloud–Boulder Inventoried Roadless Area*, ROADLESSLAND.ORG, http://roadlessland.org/map.php?id=2199 (last visited Feb. 13, 2011)) to small parcels adjacent to other types of federal land (for example, Ken Mountain Roadless Area, 527 acres within the Chattahoochee National Forest, *Ken Mountain Inventoried Roadless* Area, ROADLESSLAND.ORG, http://roadlessland.org/map.php?id=889 (last visited Feb. 13, 2011)).

27. *See* John H. Cushman Jr. & Timothy Egan, *Battles on Conservation Are Reaping Dividends*, N.Y. TIMES, July 31, 1996, at A1.

28. Timothy Egan, *The Nation: Land Rush; Putting Some Space Between His Presidency and History*, N.Y. TIMES, Jan. 16, 2000, § 4, at 3.

29. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

30. National Forest System Roadless Areas, 64 Fed. Reg. 56,306 (Oct. 19, 1999).

31. The Forest Service set out to analyze:

> (1) The effects of eliminating road construction activities in the remaining unroaded portions of inventoried roadless areas on the National Forest System; and (2) the effects of establishing criteria and procedures to ensure that the social and ecological values, that make both invento-

seemed to match public sentiment at the time: almost half of survey respondents believed that Congress had not protected enough wilderness, and only 6 percent believed Congress had protected too much.[32]

After more than a year of development by the Forest Service, the Roadless Rule was issued at the end of President Clinton's final term in early 2001 and was scheduled to go into effect on March 13 of that year.[33] The rule "prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics."[34] It encompassed "roughly one-third of all National Forest System lands, or approximately 58.5 million acres."[35] The Roadless Rule was lauded by environmental groups as a seminal event in the conservation of America's natural resources.[36]

Unfortunately for environmentalists, the Roadless Rule was suspended by the Bush Administration within two weeks of its promulgation,[37] in part because of legal challenges to the rule brought in the Ninth and Tenth Circuits.[38] The first court challenge to the Roadless Rule came in Idaho in 2001, which resulted in the Ninth Circuit eventually upholding the rule in *Kootenai Tribe v. Veneman*.[39] The Roadless Rule did not fare as well within

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ried roadless areas and other uninventoried roadless lands important, are considered and protected through the forest planning process.

Id.

The stated purpose of the rule is to "protect the social and ecological values and characteristics of inventoried roadless areas from road construction and reconstruction and certain timber harvesting activities." Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3247.

32. U.S.D.A. FOREST SERV. & N.O.A.A., *supra* note 5, at WILD282.

33. Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3244. For text of rule, see 36 C.F.R. §§ 294.10–.14 (2009) or Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3272–73. See *infra* Section II.A for additional details of the rulemaking process.

34. Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3244.

35. *Id.* at 3245. By comparison, the area of Minnesota is 55.6 million acres. See State of Minn., *About Minnesota*, MINN. N. STAR, http://www.state.mn.us/portal/mn/jsp/content.do?id=-8542&subchannel=null&sc2=null&sc3=null&contentid=536879402&contenttype=EDITORIAL&programid=536888179&agency=NorthStar (last visited Feb. 13, 2011).

36. Douglas Jehl, *Road Ban Set For One-Third Of U.S. Forests*, N.Y. TIMES, Jan. 5, 2001, at A2 ("'This is a great moment in history, and it is something for which our children will express gratitude,' said Ken Rait, who as director of the Heritage Forests Campaign was a leader among those lobbying the administration for the move."); *see also* Alison S. Hoyt, Comment, *Roadless Area Conservation: How the "Roadless Rule" Affects America's Forestland*, 14 TUL. ENVTL. L.J. 525, 526 (2001) ("Not since Teddy Roosevelt has a president implemented such an extensive land withdrawal policy.").

37. *See* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001). See *infra* Section I.B for additional discussion of the Roadless Rule's suspension under the Bush administration.

38. Wyoming v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309 (D. Wyo. 2008); Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005); Kootenai Tribe v. Veneman, 142 F. Supp. 2d 1231 (D. Idaho 2001), *rev'd*, 313 F.3d 1094 (9th Cir. 2002). Further discussion of these cases can be found in Sections II.A and II.B.

39. 313 F.3d 1094 (9th Cir. 2002); *see also* Mazen Basrawi, Comment, *Roadless Rule Retains Respect*, 30 ECOLOGY L.Q. 769 (2003); Kristine Meindl, Case Note, Kootenai Tribe of Idaho v. Veneman*: The Roadless Rule: Dead End or Never Ending Road?*, 14 VILL. ENVTL. L.J. 151 (2003).

the Tenth Circuit, where its implementation was enjoined nationwide by a Wyoming federal district court in *Wyoming v. U.S. Department of Agriculture*.[40] The *Wyoming* court found that the Forest Service had failed to comply with NEPA in several respects.[41] NEPA requires federal agencies to adhere to specific, time-intensive procedures whenever a proposed action will likely have an effect on the environment in order to promote reasoned decisions and public engagement.[42] In addition to finding the rulemaking procedure inadequate under NEPA, the court found the content of the Roadless Rule to violate the Wilderness Act.[43] Intervening environmental groups appealed the ruling, but the case was vacated as moot since the Bush Administration had promulgated a replacement for the Roadless Rule.[44]

B. *The State Petitions Rule*

Soon after entering the White House, the Bush Administration suspended the start dates of all pending executive policies, including the Roadless Rule.[45] It opposed the top-down nature of the Roadless Rule and favored a more localized approach.[46] Accordingly, President Bush's secretary of agriculture sought to manage roadless areas according to five principles centered on localized interests—interests that, notably, included no mention of conservation or sustainability.[47] This preference for local control of IRAs eventually yielded the State Petitions Rule.

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40. 277 F. Supp. 2d 1197 (D. Wyo. 2003).

41. *Id.* at 1231–32. The court pointed to an inadequate scoping process, *id.* at 1220, a failure to cooperate with impacted states, *id.* at 1221, and a failure to adequately discuss required alternatives, *id.* at 1224–26. See *infra* Part II for further analysis.

42. *See infra* Section II.A.

43. 277 F. Supp. 2d at 1237.

44. Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207 (10th Cir. 2005); *see also* Cortney Hill Kitchen, Case Note, *Looking into the Future: The Need for a Final Judgment on the Validity of the Roadless Rule,* Wyoming v. U.S. Dep't of Agric., *414 F.3d 1207 (10th Cir. 2005)*, 8 WYO. L. REV. 511 (2008).

45. Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8899, 8899 (Feb. 5, 2001) (to be codified at 36 C.F.R. pt. 294).

46. Glicksman, *supra* note 25, at 1166.

47. Glicksman describes the principles as follows:

> [1.] [I]nformed decision making drawing on local expertise and experience through the local forest planning process;
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> [2.] [C]ollaboration with affected entities though a "fair and open process that is responsive to local input and information";
>
> [3.] [P]rotection of forests from the negative effects of wildfire and insect [sic] disease outbreaks;
>
> [4.] [P]rotection of communities, homes, and property from the risk of fire and other problems on adjacent federal lands; and
>
> [5.] [P]rotection of access to property by ensuring states, tribes, and private property owners access to property within inventoried roadless areas.

In 2005 the Bush Administration replaced the Roadless Rule with the State Petitions Rule, which allowed states to petition the secretary of agriculture regarding the management of roadless areas within their borders.[48] The secretary was given discretion to approve or deny these petitions.[49] Until petitions were approved or interim measures were negotiated between a state and the Forest Service, IRAs were to be managed in accordance with the directives in place prior to the Roadless Rule.[50] In practice, the State Petitions Rule did not always result in deference to state choice. The governors of California and New Mexico petitioned for protection of all roadless areas in each state; neither petition was accepted.[51]

The Forest Service did not attempt to follow NEPA when developing the State Petitions Rule, claiming that the new rule was merely a procedural change and that each state-specific plan would have to comply with NEPA before being promulgated.[52] The State Petitions Rule eventually suffered a similar fate as the Roadless Rule: it was enjoined nationwide by the Ninth Circuit for failing to comply with NEPA.[53] The court reasoned that the State Petitions Rule was more than procedural; instead, it constituted a federal action that should have triggered a NEPA analysis because it substantively overturned the Roadless Rule and immediately opened up millions of acres of national forest land to development and timber harvesting.[54] The Ninth Circuit thus effectively reinstated the Roadless Rule by prohibiting the Forest Service from disobeying the Roadless Rule without completing a NEPA analysis of the State Petitions Rule,[55] an endeavor on which the Forest Service never embarked.

C. *The Current Status of Inventoried Roadless Area Management*

Conflicting holdings between the Ninth and Tenth Circuits have resulted in an unsettled and somewhat paradoxical situation. The simultaneous

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Id. (quoting National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 66 Fed. Reg. 35,918, 35,918–19 (July 10, 2001) (to be codified at 36 C.F.R. pts. 219, 294)).

48. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654, 25,654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

49. *Id.* at 25,661.

50. *See infra* Section II.D.

51. KRISTINA ALEXANDER & ROSS W. GORTE, CONG. RESEARCH SERV., RL 30647, NATIONAL FOREST SYSTEM ROADLESS AREA INITIATIVES 12 (2009), *available at* http://www.fsx.org/pdf/CRS%20Roadless%20Report%2010-09-09.pdf.

52. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,660 (explaining NEPA analysis is unnecessary since the State Petitions Rule only includes procedural changes to land management that are subject to a categorical exclusion from NEPA requirements); Jacob C. Schipaanboord, Note, *America's Troubled Roads*, 26 J. LAND RESOURCES & ENVTL. L. 153, 167 (2005).

53. California *ex rel.* Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1005, 1007 (9th Cir. 2009).

54. *Id.* at 1014–15, 1018. See *infra* Section II.C for a complete discussion of *Lockyer*.

55. *Lockyer*, 575 F.3d at 1020; *see also* Kitchen, *supra* note 44, at 521–22 (discussing the District of Northern California Court holding that the Ninth Circuit affirmed).

existence of a nationwide injunction against the Roadless Rule issued by the Wyoming district court and a nationwide injunction against the State Petitions Rule in the Ninth Circuit puts the Forest Service in an untenable position. After the nationwide reinstatement of the Roadless Rule by the Ninth Circuit, the rule went into effect even in the Tenth Circuit despite the injunction issued by the *Wyoming* court.[56] This occurred because the Tenth Circuit vacated the *Wyoming* court's injunction after the passage of the State Petitions Rule.[57] The plaintiffs in *Wyoming* petitioned the Tenth Circuit to reconsider its vacatur of the district court decision, but the court declined to hear their case.[58] Instead, the Tenth Circuit ordered the Wyoming district court to determine if the Ninth Circuit's *Lockyer* decision should be followed out of comity.[59] The Wyoming district court held that the Ninth Circuit ruling did not need to be followed and again issued a nationwide injunction against the Roadless Rule.[60]

With these conflicting injunctions, the long-term management of roadless areas within national forests is currently unsettled, making it difficult for the Forest Service to do its job.[61] While the court battles continue,

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56. Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207 (10th Cir. 2005). Christopher Cumings, Comment, *Judicial Iron Triangles: The Roadless Rule to Nowhere—And What Can Be Done to Free the Forest Service's Rulemaking Process*, 61 OKLA. L. REV. 801, 809–10 (2008).

57. Cumings, *supra* note 56, at 809–10.

58. *Id.* at 810.

59. *Id.* at 810 n.70.

60. Wyoming v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309, 1354–55 (D. Wyo. 2008). The full history is slightly more complicated, further indicating that litigation may not be the best path for the Obama Administration to protect IRAs. The process that resulted in Judge Brimmer's reinstatement of the nationwide injunction in *Wyoming v. United States Department of Agriculture*, 570 F. Supp. 2d at 1354–55, began with the Northern District of California's nationwide reinstatement of the Roadless Rule issued by Judge Laporte in *California ex rel. Lockyer v. United States Department of Agriculture*, 459 F. Supp. 2d 874, 915–16 (N.D. Cal. 2006). In light of that decision, Judge Laporte stayed her injunction against the State Petitions Rule in all National Forests outside of the Ninth Circuit. California *ex rel.* Lockyer v. U.S. Dep't of Agric., 710 F. Supp. 2d 916 (N.D. Cal. 2008). In August 2009, however, the Ninth Circuit affirmed Judge Laporte's earlier decision, again enjoining the State Petitions Rule and reinstating the Roadless Rule nationwide. California *ex rel.* Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1020–21 (9th Cir. 2009). Judge Brimmer refused to reconsider his injunction of the Roadless Rule in light of the developments in the Ninth Circuit and the Forest Service's 2009 interim directive to allow road building contingent on the secretary of agriculture's approval, noting that the Roadless Rule puts the nation's forests, not just Wyoming's forests, in danger. Order Denying Motion for Reconsideration and Rule 62(c) Motion for Suspension of Injunction Pending Appeal, Wyoming v. U.S. Dep't of Agric., No. 07-CV-017-B (D. Wyo. June 15, 2009). The USDA also sought reconsideration of the injunctions issued in both circuits. Defendant's Motion for Indicative Ruling on Rule 60(b) Motion to Modify Injunction or for Stay Pending Approval, California *ex rel.* Lockyer v. U.S. Dep't of Agric., No. 05-03508-EDL consolidated with No. 05-04038-EDL (N.D. Cal. Aug. 20, 2008); Federal Defendants' Motion for Reconsideration and Motion for Stay Pending Reconsideration, Wyoming v. U.S. Dep't of Agric., No. 07-CV-017B (D. Wyo. Aug. 20, 2008). These reconsiderations were denied. Cumings, *supra* note 56, at 810–11 n.70. A plain-language timeline can be found at *Roadless Area Conservation Policy Timeline*, WILDERNESS SOC'Y, http://wilderness.org/campaigns/roadless-forests/roadless-area-conservation-timeline (last visited Feb. 13, 2011).

61. Federal Defendants' Motion for Reconsideration and Motion for Stay Pending Reconsideration at 2, Wyoming v. U.S. Dep't of Agric., No. 07-CV-017B (D. Wyo. Aug. 20, 2008) ("[T]he United States Forest Service [is] in the untenable position of having to comply with one district court's injunction *to follow* the 2001 Roadless Rule and another district court's injunction *not to*

President Obama's Secretary of Agriculture, Tom Vilsack, who oversees the Forest Service, has issued an interim directive stating that all decisions regarding management of IRAs must go through him.[62] This means the Forest Service is technically following neither of the disputed rules. According to Secretary Vilsack, "This interim directive will provide consistency and clarity that will help protect our national forests until a long-term roadless policy reflecting President Obama's commitment is developed."[63] Though Secretary Vilsack has discretion to allow road building or timber harvesting within roadless areas, he has indicated that he will lean heavily toward conservation.[64] The directive excludes roadless areas within Idaho, which has developed its own roadless rule.[65]

While the State Petitions Rule was in force nationwide, the governors of Colorado (within the Tenth Circuit) and Idaho (within the Ninth Circuit) filed petitions to create their own statewide roadless rules.[66] Idaho's petition to divide IRAs into several categories and prescribe varying levels of protection in each was filed in October 2006, at which point the state began working with the U.S. Department of Agriculture ("USDA") to craft a plan.[67] Pursuant to NEPA, the proposed rule was published and opened up for public comment in January 2008,[68] and entered into force in October

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follow the 2001 Roadless Rule, and [faces] the spectre of contempt allegations in one Court or the other."); *see also* Noelle Straub & Eric Bontrager, *Obama admin takes first leap into roadless brawl*, N.Y. TIMES, May 28, 2009, http://www.nytimes.com/gwire/2009/05/28/28greenwire-obama-admin-takes-first-leap-into-roadless-bra-16635.html.

62. Memorandum 1042-154 from Tom Vilsack, Sec'y, U.S. Dep't of Agric. (May 28, 2009), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5065998.pdf. This directive was renewed in June 2010. Memorandum from Joel D. Holtrop, Deputy Chief, Nat'l Forest Sys. to Regional Foresters (June 8, 2010), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5176101.pdf.

63. News Release, U.S. Dep't of Agric., Agriculture Secretary Vilsack Announces Interim Directive Covering Roadless Areas in National Forests (May 28, 2009), *available at* http://fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5065995.pdf.

64. *See* Cornelia Dean, *Directive Limits Activity in Roadless Areas of Forests*, N.Y. TIMES, May 28, 2009, at A13.

65. *See* Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61,456 (Oct. 16, 2008) (to be codified at 36 C.F.R. pt. 294). The situation of IRAs in Idaho is taken up in Section II.D. There is also considerable conflict regarding the management of roadless areas in the Tongass National Forest, *see* Natural Res. Def. Council, *Tongass National Forest*, SAVE BIOGEMS, http://www.savebiogems.org/tongass/ (last visited Feb. 13, 2011), but this issue is beyond the scope of this Note.

66. Although the State Petitions Rule was enjoined prior to the fruition of either petition, the Forest Service continued to pursue them. The injunction had the effect of returning IRAs in Colorado and Idaho to Roadless Rule protections prior to the 2008 *Wyoming* decision and the 2009 Vilsack memorandum.

67. Petition from James E. Risch, Governor, State of Idaho, to U.S. Sec'y of Agric., Roadless Area Management in Idaho (Oct. 5, 2006); Letter from Mark Rey, Under Sec'y, Natural Res. & Env't, to James E. Risch, Governor, State of Idaho (Dec. 22, 2006), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5052654.pdf. See *infra* notes 211–215 and accompanying text for additional information on the Idaho rule.

68. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 1135 (proposed Jan. 7, 2008) (to be codified at 36 C.F.R. pt. 294).

2008.[69] Environmental groups oppose Idaho's rule, claiming that it triples road construction and doubles logging compared to the Roadless Rule.[70] Accordingly, several groups have challenged the Idaho rule in federal court, alleging violations of the Endangered Species Act ("ESA"), the National Forest Management Act ("NFMA"), and NEPA.[71]

The situation in Colorado is less certain. Though Colorado submitted its petition in August 2007, Colorado's proposed rule has not yet been approved by the USDA.[72] The Forest Service developed an extensive cost-benefit analysis of the proposed rule, followed NEPA requirements, and made the rule available for public comment in July 2008.[73] The proposed rule, which would remove certain areas from roadless status while strictly protecting the remainder,[74] is currently in limbo while Secretary Vilsack weighs the options. As of November 2010, the USDA has yet to approve Colorado's proposal, and Secretary Vilsack has indicated that the proposal does not adequately protect Colorado's IRAs.[75] Since Colorado is within the jurisdiction of the Tenth Circuit, it technically is subject to no nationwide rule regarding IRA management.[76] Although Vilsack has said his first priority is to fully protect IRAs nationwide, some Coloradans are optimistic that he will approve a Colorado-specific rule due to its unique battles with wildfires and tree parasites.[77]

The Obama Administration has chosen to fight to uphold the Roadless Rule in the Tenth Circuit, but even a favorable ruling will not settle the situation.[78] Many conservative lawmakers oppose the Roadless Rule, indi-

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69. 36 C.F.R. §§ 294.20–.29 (2009). For more information about the Idaho Roadless Rule, see *infra* Section II.D.

70. Tashia Tucker, *Idaho Roadless Rule Challenged in Federal Court*, THE WILDERNESS SOC'Y (Jan. 16, 2009), http://wilderness.org/print/1098.

71. Complaint for Declaratory and Injunctive Relief, Jayne v. Rey, No. 4:09-cv-00015-BLW (D. Idaho Jan. 16, 2009).

72. Letter from Mark Rey, Under Sec'y, Natural Res. & Env't, to Bill Ritter, Jr., Governor, State of Colo. (Aug. 24, 2007), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5053067.pdf.

73. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 73 Fed. Reg. 43,544 (July 25, 2008) (to be codified at 36 C.F.R. pt. 294); U.S. DEP'T OF AGRIC., FOREST SERV., ROADLESS AREA CONSERVATION: NATIONAL FOREST SYSTEM LANDS IN COLORADO, PROPOSED RULE, REGULATORY IMPACT ANALYSIS AND COST-BENEFIT ANALYSIS (2008), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm8_036212.pdf.

74. See *infra* notes 216–220 and accompanying text for additional information on the Colorado rule.

75. *See* Press Release, Tom Vilsack, Sec'y, U.S. Dep't of Agric., Statement from Agriculture Secretary Vilsack on Colorado Roadless Petition (Apr. 6, 2010), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5145340.pdf.

76. *See supra* notes 56–60 and accompanying text.

77. John Tomasic, *Vilsack appreciates 'unique situation' driving Colorado on roadless rule wildfire mitigation*, COLO. INDEP. (Sep. 29, 2009, 12:17 PM), http://coloradoindependent.com/38898/vilsack-appreciates-'unique-situation'-driving-colorado-on-roadless-rule-wildfire-mitigation.

78. *See* Bettina Boxall, *Obama administration defends 2001 roadless rule*, L.A. TIMES GREENSPACE BLOG (Aug. 13, 2009, 6:59 PM), http://latimesblogs.latimes.com/greenspace/2009/08/roadless-rule-national-forests-.html.

cating that it would not likely survive the next change in the party of the president.[79] A compromise rule that takes into account the concerns of both conservationists and state governments interested in development is much more likely to last beyond the Democratic Party's current tenure in the White House. A stable compromise rule would also benefit the Forest Service: it is tasked with operating on a fifteen-year planning cycle, which it cannot do in and around roadless areas due to the recent unpredictability of their management.[80]

II. A NEW RULE IS REQUIRED FOR STABLE AND EFFECTIVE ROADLESS AREA MANAGEMENT

The Obama Administration can best ensure consistent protection for roadless areas by developing a new rule rather than continuing to fight for the Roadless Rule in the Tenth Circuit and possibly in the Supreme Court. Even if the Obama Administration had positive prospects for its case—which it does not—a victory for the Roadless Rule in court might prove ephemeral, lasting only until a more politically conservative president reverses course. If the Roadless Rule is indeed overturned by the Tenth Circuit, the State Petitions Rule is unlikely to last long, since it is similarly invalid in light of NEPA violations. Thus, the long-term management directive of IRAs is unlikely to be resolved in court.

This Part focuses on why neither the Roadless Rule nor the State Petitions Rule is valid under NEPA. A new IRA management policy must be issued under Obama's Forest Service if a stable and sustainable solution is to be attained. Section II.A analyzes the procedures followed by President Clinton's Forest Service in developing the Roadless Rule, and the court battles that followed, to show that the rule will likely be enjoined by the Tenth Circuit. Section II.B moderates this likely ruling against the Roadless Rule by arguing that it does not violate the Wilderness Act, indicating that a replacement rule would be viable. Section II.C confirms that the State Petitions Rule is likewise invalid and thus also not viable as a long-term IRA policy. Accordingly, IRA policy could be set by a new Forest Service directive, congressional action to direct management, or reversion to the pre-2001 planning requirements from NFMA. Section II.D argues that congressional action is unlikely due to current priorities and localized opposition to strict conservation measures, and that NFMA alone

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79. Several Republican representatives voiced strong opposition to a rider that would have attached the Roadless Rule to the 2003 Department of the Interior appropriations bill (H.R. 108-2691), including current Representatives Bob Goodlatte (R-VA) and Mike Simpson (R-ID). 149 Cong. Rec. H7087–92 (daily ed. July 17, 2003); *see also* Jim DiPeso & Tom Pelikan, *The Republican Divide on Wilderness Policy*, 33 GOLDEN GATE U. L. REV. 339 (2003) (describing opposition of western Republicans to strict federal land management); Ray Ring, *Roadless-less*, MISSOULA INDEP., Nov. 12, 2009, at 14–18 (noting opposition to the Roadless Rule by Idaho's Republican representatives).

80. 16 U.S.C. § 1604(f)(5) (2006); Monica Voicu, Note, *At a Dead End: The Need for Congressional Direction in the Roadless Area Management Debate*, 37 ECOLOGY L.Q. 487, 502–04, 516 (2010).

will leave roadless areas vulnerable to encroachment and development. Therefore, the Obama Administration should take the initiative to institute a new rule, detailed in Part III.

A. *The Roadless Rule and NEPA*

The key to the fate of the Roadless Rule is whether the Forest Service fully complied with NEPA during the rulemaking process. Although the Ninth Circuit upheld the rule, its holding largely depended on an unsupported finding that agency actions with conservationist purposes should be allowed some leniency.[81] Based on previous NEPA decisions, it appears that the Tenth Circuit likely will affirm the Wyoming district court's ruling that the Forest Service violated NEPA when developing the Roadless Rule.[82]

Since NEPA is central to the analysis of the court battles of both the Roadless Rule and the State Petitions Rule, some background information may be useful.[83] Before an agency begins any "major Federal action[]" that "significantly affect[s] the quality of the human environment," it must comply with the requirements set out in NEPA and in the accompanying regulations promulgated by the Council on Environmental Quality ("CEQ").[84] The purpose of NEPA is not necessarily to promote a particular outcome but rather to ensure that the decision-making agency, in this case the Forest Service, considers complete information, contemplates alternative actions, and responds to public comments.[85]

The NEPA process begins with "scoping," which is "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action."[86] Also early in the process, the agency is encouraged, but not required, to cooperate with governmental stakeholders such as municipalities or state agencies that could be affected by the action.[87] During the analysis, the agency must prepare an Environmental Impact Statement ("EIS") unless it finds that the proposed

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81. Kootenai Tribe v. Veneman, 313 F.3d 1094, 1120 (9th Cir. 2002); Shems Baker-Jud, Chapter, *The Ninth Circuit's Differential Approach to Alternatives Analysis in NEPA Cases:* Westlands Water District v. United States Department of Interior, 35 ENVTL. L. 583, 597 (2005) ("*Kootenai* is the only case in which the Ninth Circuit has expressly employed a different analysis for the required range of alternatives under NEPA, depending on whether the agency has proposed a conservation or non-conservation action.").

82. *See supra* notes 117–122 and accompanying text.

83. See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 244–71 (6th ed. 2007) for a more detailed briefing on NEPA's requirements.

84. 42 U.S.C. § 4332(2)(C) (2006). Full requirements are set out in 42 U.S.C. §§ 4321–4370 (2006) and 40 C.F.R. §§ 1501.1–1518.4 (2009).

85. 40 C.F.R. § 1501.1; *see also* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756–58 (2004).

86. 40 C.F.R. § 1501.7.

87. *Id.* §§ 1501.6, 1508.5; Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1220 (D. Wyo. 2003).

action will not have a significant impact.[88] The EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[89] The EIS is to be used during the decision-making process, and not simply to justify or explain decisions that have already been made.[90] It must also address concerns brought up during the required public comment period.[91] The exploration of alternatives, including a no-action alternative, is central to an EIS.[92] The agency must genuinely consider the net benefits of each alternative to ensure the initial agency preference is not a foregone conclusion.

The development of the Roadless Rule was relatively brief, considering the magnitude of the undertaking. In October 1999, President Clinton ordered the Forest Service to begin the public process to " 'provide appropriate long-term protection for most or all of these currently inventoried 'roadless' areas.' "[93] Soon after, the Forest Service announced the alternatives it would explore, which brought 16,000 people to 187 meetings and elicited more than 517,000 responses.[94] In this initial announcement, the Forest Service

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88. *Pub. Citizen*, 541 U.S. at 757.

89. 40 C.F.R. § 1502.1.

90. 40 C.F.R. § 1502.5 ("The [EIS] shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made . . . .").

91. *Id.* §§ 1503.1–1503.4.

92. *Id.* § 1502.14 (Every EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives[.]"); New Mexico *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 708 (10th Cir. 2009) ("Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded.").

93. ROADLESS RULE FEIS, *supra* note 19, at 1-6. As a comparison, the planning period discussed in *Richardson*, in which the Bureau of Land Management's decision to open a portion of the 427,275 acre Otero Mesa for development was challenged, lasted six years. 565 F.3d at 688.

94. ROADLESS RULE FEIS, *supra* note 19, at ES-1 to ES-3, 1-7. Alternatives explored were:

[1.] "No Action; No Prohibitions," wherein no new rule would be issued;

[2.] "Prohibit Road Construction and Reconstruction Within Inventoried Roadless Areas," wherein all road construction would be barred, but timber harvesting would be fully allowed;

[3.] "Prohibit Road Construction, Reconstruction, and Timber Harvest Except for Stewardship Purposes Within Inventoried Roadless Areas," which is similar to alternative 2 except timber harvesting would only be allowed for limited purposes, such as benefiting endangered species, preventing large wildfires, or restoring ecological composition; and

[4.] "Prohibit Road Construction, Reconstruction and All Timber Cutting Within Inventoried Roadless Areas," which is similar to alternative 3 but timber cutting would also be allowed for personal use, such as firewood, as well as when incidental to other activities, such as trail maintenance.

ROADLESS RULE FEIS, *supra* note 19, at 2-5 to 2-7; *see also* National Forest System Roadless Areas, 64 Fed. Reg. 56,306 (proposed Oct. 19, 1999).

Alternative 3 is closest to the final rule. See ROADLESS RULE FEIS, *supra* note 19, at S-5 to S-6 for a list of alternatives and 36 C.F.R §§ 294.10–.14 (2001) for the final rule.

said it would assess an elimination of road building on IRAs and procedures to protect other wilderness values.[95] A proposed rule and draft EIS were released in May 2000, followed by more than 400 public meetings in which the Forest Service explained the EIS and received comments.[96] Between the draft and final versions of the rule, an additional 4.2 million acres of IRAs were added to the Roadless Rule.[97] The Roadless Rule was finalized on January 12, 2001 and was scheduled to go into force on March 13, 2001.[98]

Though the *Wyoming* opinion was too aggressive in overturning the Roadless Rule,[99] it contained the well-grounded finding that the Roadless Rule rulemaking process presented too few alternatives in its EIS.[100] A thorough discussion of alternative actions is a critical piece of the NEPA process.[101] The CEQ goes so far as to call the alternatives section "the heart" of an EIS.[102] Analysis of alternatives is necessary to ensure the agency is not simply going through the motions toward a predetermined conclusion, and the purpose of the proposed action must be defined broadly enough to capture a range of alternatives.[103] As the *Wyoming* court noted, the president's initial purpose of providing long-term protection for IRAs was certainly broad enough for a variety of reasonable alternatives, but the Forest Service immediately narrowed this directive into an analysis of the elimination of road construction and timber harvesting within IRAs.[104] By defining the purpose of the analysis in such limited terms, the only variable assessed by the Forest Service was the degree of restrictions on

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95. The Forest Service stated:

> [T]he agency will prepare an environmental impact statement to analyze: (1) The effects of eliminating road construction activities in the remaining unroaded portions of inventoried roadless areas on the National Forest System; and (2) the effects of establishing criteria and procedures to ensure that the social and ecological values, that make both inventoried roadless areas and other uninventoried roadless lands important, are considered and protected through the forest planning process.

National Forest System Roadless Areas, 64 Fed. Reg. at 56,306.

96. ROADLESS RULE FEIS, *supra* note 19, at 4-3 to 4-4.

97. Kootenai Tribe v. Veneman, 313 F.3d 1094, 1105 (9th Cir. 2002).

98. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

99. *See infra* Section II.B.

100. Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1222–26 (D. Wyo. 2003). See *supra* note 94 for the list of alternatives explored.

101. 42 U.S.C. § 4332(2)(E) (2006) ("[A]ll agencies of the Federal Government shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348–52 (1989).

102. Citizens' Comm. To Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1030 (10th Cir. 2002).

103. Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002).

104. 277 F. Supp. 2d at 1223.

timber harvesting.[105] Even an alternative that allowed for harvesting or road building was extremely limited, permitting such activities only if they "(1) maintained or improved roadless area characteristics; *and* (2) improved threatened, endangered, proposed or sensitive species habitat; or, reduced the risk of 'uncharacteristically intense' fire; or, restored ecological structure, function, processes, or composition to roadless areas."[106] Notably absent from this list were more standard stewardship activities that would have complied with the original purpose, such as permitting road construction for " 'hazardous fuel reduction treatments, insect and disease treatments, and forest health management.' "[107]

The failure of the Forest Service to consider valid alternatives in good faith, as required by NEPA, is further demonstrated by the Ninth Circuit's faulty analysis of this issue. The Ninth Circuit did not scrutinize the alternatives analysis nearly as closely as the *Wyoming* court did.[108] Although the Ninth Circuit found that the Roadless Rule alters the environmental status quo to the point that the Forest Service was required to follow NEPA,[109] it used, without precedent, the conservationist purpose of the Roadless Rule to dilute NEPA's requirements:

> The NEPA alternatives requirement must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment, rather than to harm it. Certainly, it was not the original purpose of Congress in NEPA that government agencies in advancing conservation of the environment must consider alternatives less restrictive of developmental interests.[110]

The court reached this conclusion despite the district court's prior acknowledgement that stewardship efforts such as fuel clearing and disease protection would be seriously hindered by a ban on road construction.[111]

It is true that an agency should not be forced to consider alternatives that run counter to the purpose of the proposed action,[112] but the purpose of the action cannot be defined so narrowly as to preclude meaningful alternatives.[113] The Ninth Circuit noted, again without precedential support, that "the policy of NEPA is first and foremost to protect the natural environment. NEPA may not be used to preclude lawful conservation measures by the

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105. *Id.* at 1224; *see also* U.S. DEP'T OF AGRIC., FOREST SERV., ROADLESS AREA CONSERVATION: DRAFT ENVIRONMENTAL IMPACT STATEMENT 1, S-3 to S-6 (2000) [hereinafter ROADLESS RULE DEIS].

106. *Wyoming*, 277 F. Supp. 2d at 1224 (citation omitted).

107. *Id.* at 1226.

108. *Compare id.* at 1222–26, *with* Kootenai Tribe v. Veneman, 313 F.3d 1094, 1120–24 (9th Cir. 2002).

109. *Kootenai*, 313 F.3d at 1115.

110. *Id.* at 1120; *see also supra* note 81.

111. *Kootenai*, 313 F.3d at 1114–15.

112. *See, e.g., id.* at 1122.

113. *See supra* notes 101–103 and accompanying text.

Forest Service and to force federal agencies, in contravention of their own policy objectives, to develop and degrade scarce environmental resources."[114] While this justification holds for an exclusion of alternatives that would allow for commercial road development or timber harvesting, it does not explain the absence of an alternative that would allow for active management of IRAs, such as road building for disease and fire control.[115]

The Tenth Circuit has not yet ruled on the validity of the Roadless Rule.[116] Should the Tenth Circuit eventually adjudge the Roadless Rule's merits, precedent suggests it will affirm the district court opinion. The Tenth Circuit uses a "rule of reason" to evaluate the sufficiency of a NEPA alternatives analysis and judges reasonableness "with reference to an agency's objectives for a particular project."[117] In an earlier decision, the Tenth Circuit noted that "defendants could reject alternatives that did not meet the purpose and need of the project, [but] they could not define the project so narrowly that it foreclosed a reasonable consideration of alternatives."[118] NEPA analyses overturned by the Tenth Circuit for failure to adequately explore alternatives include the Utah Department of Transportation's exploration of a new bridge as the only means to expand traffic flow across the Jordan River despite the possibility of expanding existing bridges,[119] and the Bureau of Land Management's exploration of the allowance of mining in the majority of an undeveloped region despite many public comments that suggested alternatives to limit resource exploitation.[120]

Similar to these cases, the Forest Service only analyzed alternatives that included a ban on road construction despite the possibility of protecting IRAs in other ways.[121] While the Tenth Circuit would likely approve of the Forest Service limiting alternatives to those that aggressively protect IRAs, confining the analysis to a ban on road building seems unreasonably narrow,

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114. *Kootenai*, 313 F.3d at 1123.

115. From the environmentalist's perspective, it is important to note that this interpretation of NEPA is not necessarily advantageous to conservation efforts. The stated purpose of a federal action should not be enough to exempt it from NEPA requirements. For example, granting a permit for a wind farm on federal land is certainly a conservationist effort, yet the footprint of the turbines and accompanying roads and power lines have the potential to unnecessarily impact wildlife and other environmental values if exempt from NEPA. *But see* Katie Kendall, Note, *The Long and Winding "Road": How NEPA Noncompliance for Preservation Actions Protects the Environment*, 69 BROOK. L. REV. 663, 665 (2004) (arguing "that federal actions that expressly preserve natural resources and ban human modification of the environment should be exempted from NEPA" to adhere to the spirit of NEPA and avoid costly delays in enacting conservation-based policies).

116. *See supra* notes 56–60 and accompanying text.

117. New Mexico *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 709 (10th Cir. 2009).

118. Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002) (citation omitted).

119. *Id.* at 1118–22.

120. *Richardson*, 565 F.3d at 708–13; *cf.* Colo. Env't Coal. v. Dombeck, 185 F.3d 1162, 1174–76 (10th Cir. 1999) (finding that when the purpose of a project is to expand skiable area of a resort, it is acceptable to include expansion in all alternatives, provided various levels of expansion are analyzed in good faith).

121. Wyoming v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309, 1335–40 (D. Wyo. 2008).

especially considering that President Clinton's broad direction to the Forest Service—to "provide appropriate long-term protection of most or all of these [IRAs]"—did not mention a ban on construction.[122]

Based on the relative strength of the Ninth Circuit's arguments in *Kootenai* and the *Wyoming* court's NEPA arguments, it seems unlikely that the Tenth Circuit would overturn *Wyoming* on appeal. The resulting circuit split could eventually lead to a decision by the Supreme Court, whose disposition is more difficult to predict. However, given the amount of time required to reach the Court, and considering the Court's current conservative character,[123] the Obama Administration would be better served by devoting resources to the creation of a new rule than continuing to fight for the Roadless Rule in court.

B. *The Roadless Rule and the Wilderness Act*

In addition to its NEPA holding, the *Wyoming* court found that the Roadless Rule violated the Wilderness Act and thus held the rule to be substantively as well as procedurally invalid. Procedural deficiencies under NEPA alone would enable the Forest Service under President Obama to promulgate an identical rule by restarting the process and fully complying with NEPA. However, the substantive faults at issue would compel a different rule. The Roadless Rule does not violate the Wilderness Act for two reasons. First, IRAs under the rule are subject to different restrictions than is Wilderness. Second, the Wilderness Act does not bar executive agencies from selecting federal land for conservation. The Wyoming district court's analysis of both of these issues does not appreciate the significant differences between designated Wilderness and IRAs.

The Wilderness Act represents a landmark piece of legislation in the shift of federal land management away from disposition and development, toward a mixture of uses, including preservation.[124] Wilderness is defined in the act "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."[125] Once designated as Wilderness, land cannot be used by any commercial enterprise, and no permanent roads can be built except as necessary to "meet minimum requirements for the administration of the area for the purpose of [the act]."[126] Also generally barred are temporary roads, the use of motor vehicles, and the construction of any structure or installation.[127] There are

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122. ROADLESS RULE DEIS, *supra* note 105, at S-1.

123. Erwin Chemerinsky, *Supreme Court's conservative majority is making its mark*, L.A. TIMES, Oct. 4, 2010, at A17; Adam Liptak, *Environment Groups Find Less Support on Court*, N.Y. TIMES, July 3, 2009, at A10.

124. Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 288–89 (1966).

125. 16 U.S.C. § 1131(c) (2006).

126. *Id.* § 1133(c).

127. *Id.*

some exceptions for existing private rights, previously established grazing, and road building necessary to prevent wildfires and disease outbreaks.[128]

In overturning the Roadless Rule, the *Wyoming* court found that the rule was an overreach of executive authority.[129] The court reasoned that IRAs became de facto Wilderness under the rule and that "Congress unambiguously provided that 'no Federal lands shall be designated as "wilderness areas" except as provided for [in the Wilderness Act] or by a subsequent Act.'"[130] The court defined the primary purpose of the Wilderness Act as "[a] statutory framework for the preservation of wilderness [that] would permit long-range planning and assure that no further administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited."[131] It went on to compare Wilderness Areas to IRAs under the Roadless Rule, finding the restrictions to be "essentially the same."[132]

The *Wyoming* court's analysis was fallacious. The court reasoned that since a necessary feature of Wilderness Areas is roadlessness, IRAs defined by roadlessness must also be Wilderness.[133] This ignores the many activities that are legal in IRAs under the Roadless Rule but are not allowed in Wilderness, such as off-highway vehicle use; mineral, oil, and gas development; and new grazing.[134] Additionally, the rule allows the Forest Service to permit permanent roads in IRAs under limited circumstances, whereas only temporary roads are ever allowed in Wilderness Areas.[135] Since Wilderness Areas are functionally different from IRAs under the Roadless Rule, it cannot reasonably be said that designated roadless areas constitute de facto Wilderness.

In addition to ignoring the differences between IRAs and Wilderness, the *Wyoming* court failed to recognize that Congress never intended to preclude the Forest Service from managing certain areas for strictly conservationist purposes.[136] The Multiple Use and Sustained Yield Act ("MUSYA") requires that the national forests be managed for a number of uses, including conservation, and it is within the authority of the Forest Service to designate certain areas to certain uses.[137] Acknowledging that this

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128. *Id.* § 1133(c)–(d). Grazing is only allowed if it was established prior to the designation of the land as Wilderness. *Id.*

129. Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1237 (D. Wyo. 2003). The Wilderness Act provides that "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act." 16 U.S.C. § 1131(a).

130. *Wyoming*, 277 F. Supp. 2d at 1233.

131. *Id.* (quoting Parker v. United States, 309 F. Supp. 593, 597 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971)).

132. *Id.* at 1236.

133. *Id.*

134. Glicksman, *supra* note 25, at 1194; *Wyoming*, 277 F. Supp. 2d at 1236.

135. Glicksman, *supra* note 25, at 1195.

136. *See id.*

137. 16 U.S.C. §§ 528–531 (2006).

type of management should continue, Congress noted in the Wilderness Act that "nothing in [the Act] shall be deemed to [interfere] with the purpose for which national forests are established"[138] and that "[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions" of MUSYA.[139] It is more likely that Congress merely sought to prevent the executive branch from attaching the label "wilderness area" to any reserve of land outside the congressionally defined Wilderness Preservation System.[140] Congress specifically barred land outside of the system from being "designate[d]" as Wilderness, but did not address land "reserved" or "administered."[141] Thus, through the Wilderness Act, Congress precluded the Forest Service from designating Wilderness under the Act but did not curtail the agency's ability to manage certain parcels of forest for strictly conservationist purposes.

C. *The State Petitions Rule and NEPA*

Seeking to free protected roadless areas for resource development and increase both flexibility and local control over IRAs, the Forest Service under President George W. Bush instituted the State Petitions Rule in May 2005.[142] Avoiding the appearance of moving too quickly to appreciate localized public sentiment that accompanied the Roadless Rule, the Forest Service let three years pass between the announcement that changes to the rule were being considered and the development of a proposed rule.[143] Another year went by before the final rule was issued.[144] Under the State Petitions Rule, a procedure was laid out for governors to petition the secretary of agriculture regarding the management of IRAs within each state.[145] The secretary was given complete discretion in approving or denying these

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138. *Id.* § 1133(a)(1).

139. *Id.* § 529.

140. McCloskey, *supra* note 124, at 306; *see also* Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 ENVTL. L. 1015, 1079 (2004) (discussing power of the executive branch to "recognize, manage or preserve" wild areas).

141. McCloskey, *supra* note 124, at 306.

142. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294); *see also* Cumings, *supra* note 56, at 808–09.

143. Possible changes announced in National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 66 Fed. Reg. 35,918 (July 10, 2001) (to be codified at 36 C.F.R. pts. 219, 294). Proposed rule published in Special Areas; State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636 (July 16, 2004) (to be codified at 36 C.F.R. pt. 294); *see also* William J. Wailand, Note, *A New Direction? Forest Service Decisionmaking and Management of National Forest Roadless Areas*, 81 N.Y.U. L. REV. 418, 436 (2006). Although the majority of comments received for the Roadless Rule were favorable, the Forest Service was criticized for ignoring the concerns of agencies and citizens directly impacted by the rule. *E.g.*, Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1218–22 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

144. State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,654.

145. *Id.* at 25,661–62.

petitions, but the process was skewed toward increasing development.[146] The State Petitions Rule ordered the Forest Service to comply with NEPA procedures in the implementation of each approved petition.[147]

The Forest Service blatantly disregarded the requirements and purpose of NEPA when developing the State Petitions Rule. Maintaining that the State Petitions Rule did not substantively alter the management of IRAs, the Forest Service argued that it did not need to comply with NEPA.[148] Instead, the Forest Service claimed the State Petitions Rule would fall under a categorical exclusion from NEPA, since it was strictly procedural and "neither prohibit[ed] nor require[ed] any action that would fund, authorize, or carry out activities on National Forest System (NFS) lands."[149] In the alternative, the Forest Service relied on the analysis of the no-action alternative produced for the final EIS of the Roadless Rule.[150] Since a NEPA analysis would be required before any final agency action regarding an IRA could take place, the Forest Service reasoned that the promulgation of the State Petitions Rule itself was not subject to NEPA.[151]

In addition to opening up millions of federal acres to development compared to the Roadless Rule that it replaced, the State Petitions Rule also altered the large-scale management of IRAs compared to the policy in place prior to the Roadless Rule. When California, along with other western states and environmental groups, challenged the State Petitions Rule in the Northern District of California, Judge Laporte disagreed with the Forest Service's justifications and overturned the rule.[152] This decision was affirmed by the Ninth Circuit in August 2009.[153] The district court relied heavily on the *Kootenai* decision, which found that the Roadless Rule was much more protective of natural resources than the NFMA planning process it replaced, indicating that a return to NFMA would be a substantive as well as a procedural change.[154] With the passage of the State Petitions Rule, NFMA was effectively reinstituted in IRAs for which state-proposed rules were not yet put in place.[155] The USDA under President Bush argued that the Roadless Rule was not being replaced since it had been enjoined nationwide by the

146. Wailand, *supra* note 143, at 438–47.

147. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,660.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. California *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006). The district court held that the State Petitions Rule violated both NEPA and ESA. Because this Note focuses on NEPA, and because the NEPA claim is sufficient to enjoin the State Petitions Rule, this Note does not address the ESA violation of the State Petitions Rule.

153. California *ex rel.* Lockyer v. U.S. Dep't of Agric., 575 F.3d 999 (9th Cir. 2009).

154. *Lockyer*, 459 F. Supp. 2d at 895–96. See *infra* Section II.D for a discussion of NFMA.

155. *Lockyer*, 459 F. Supp. 2d at 895–96.

2003 *Wyoming* district court decision.[156] However, this argument ignores the fact that the *Wyoming* injunction was vacated by the Tenth Circuit.[157] Judge Laporte thus ruled that the State Petitions Rule did not qualify for a categorical exclusion because it substantively changed the management of IRAs and, further, because the Forest Service offered no justification for its complete reversal on the issue.[158]

The defendants' alternative argument, that the no-action alternative analysis prepared for the Roadless Rule satisfies the NEPA requirements for the State Petitions Rule, also failed.[159] The court ruled that alternatives analyzed for an EIS must be centered on the purpose of the agency action, which differed greatly between the two management rules, as did the circumstances due to the intervening five years.[160]

D. *Inventoried Roadless Area Management Without a Federal Forest Service Rule*

If the Roadless Rule is indeed invalidated by the Tenth Circuit as this Note predicts, there are three paths for the future of IRA management: 1) Congress could pass legislation; 2) President Obama could allow management to revert to the planning process laid out in NFMA; or 3) President Obama could order the Forest Service to develop a new nationwide policy.

Congressional action would be the best option from a conservationist standpoint, since it could provide both stability and the maximum level of protection for IRAs. However, such action is extremely unlikely due to the current political environment.[161] Indeed, a bill has been proposed in each chamber of Congress that would codify the Roadless Rule directly, but neither version of the bill has advanced out of its assigned committee.[162]

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156. *Id.* at 896.

157. *Id.*

158. *Id.* at 897–904.

159. *Id.* at 905–09.

160. *Id.* at 905–07; *see also id.* at 905 ("[T]he no action alternative generally does not satisfy the proposed action's purpose and need; its inclusion in the Environmental Impact Statement is required by NEPA as a basis for comparison." (quoting RONALD E. BASS, ALBERT I. HERSON, & KENNETH M. BOGDAN, THE NEPA BOOK: A STEP-BY-STEP GUIDE ON HOW TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT 95 (2d ed. 2001))).

161. As of publication of this Note, Congress is focused on extending tax cuts, cutting spending, and repealing healthcare. It is also unlikely that small-government Republicans would vote for such an increase of federal power. Jackie Calmes, *For G.O.P., Big Ambitions Face Daunting Obstacles*, N.Y. TIMES, Nov. 4, 2010, at A1. The 111th Congress may have been the best chance to pass this type of legislation due to the significant majority of Democrats in both houses. *See supra* note 79.

162. Both bills were introduced on October 1, 2009. H.R. 3692, 111th Cong. (2009); S. 1738, 111th Cong. (2009). The House bill has 158 cosponsors, three of which are Republicans. *H.R. 3692: National Forest Roadless Act Conservation Act*, GOVTRACK, http://www.govtrack.us/congress/bill.xpd?bill=h111-3692 (follow "show cosponsors" hyperlink) (last visited Feb. 11, 2011). The Senate bill has 24 cosponsors, none of which are Republicans. *S. 1738: Roadless Area Conservation Act of 2009*, GOVTRACK, http://www.govtrack.us/congress/bill.xpd?bill=s111-1738 (follow "show cosponsors" hyperlink) (last visited Feb. 13, 2011). The bills' sponsors have not been

Congress became involved indirectly with the passage of the Roadless Rule through hearings on forest management, and the committee members made clear that their position was for all management of National Forests to remain in the hands of the Forest Service.[163] The lack of congressional action could be interpreted as evidence of a lack of public concern, but it likely has more to do with the power of local interests over national concerns in Congress due to the concentrated support for development relative to the diffuse support for conservation.[164]

In the absence of action, IRA management will revert to the forest planning structure dictated by NFMA that was in place prior to the Clinton Administration's promulgation of the Roadless Rule. The structure of NFMA directs the secretary of agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies."[165] The development of these land management plans must incorporate an interdisciplinary approach that includes the biological sciences,[166] is open to public participation,[167] and conforms with NEPA.[168] Forest plans are developed at multiple levels, including a national strategic plan, forest-level plans, and eventually project and activity plans.[169] The responsible official, who varies with the level of planning, has broad discretion to reserve land for Wilderness-like purposes, including wildlife protection and recreation.[170] NFMA contains several soft requirements to guide forest management but lacks specific requirements to significantly rein in official discretion.[171]

Leaving the management of IRAs to the NFMA planning process will leave these wild areas vulnerable to development and commercial interests. Localized decision makers are more sensitive to the possible financial gains of IRA development and therefore undervalue the national interest in wild area preservation.[172] Additionally, the Forest Service is culturally prone to

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successful in legislating the Roadless Rule despite repeated attempts since 2002. Voicu, *supra* note 80 at 517.

163. Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 729–30 (2004) (noting that the Congressional debate was over whether forest management should be determined by agency rulemaking or the NFMA planning process, with most agreeing that the issue was not appropriate for legislative action).

164. *See* Zellmer, *supra* note 140, at 1019 (arguing that local, economically leaning concerns can outweigh national majorities in the legislative process).

165. 16 U.S.C § 1604(a) (2006).

166. *Id.* § 1604(b).

167. *Id.* § 1612.

168. 36 C.F.R § 219.4 (2009).

169. *Id.* § 219.3.

170. *Id.* §§ 219.1–219.4, 219.26.

171. 16 U.S.C. § 1604 (2006).

172. David Stewart, *Creating the New American Wilderness in America's "Untrammeled" Backcountry: The Roadless Area Conservation Rule and the Ninth Circuit*, 28 OKLA. CITY U. L. REV. 829, 846 (2003) (discussing national interest in IRA preservation). Of course, local interests

emphasize timber production over other values.[173] The record of decision developed for the Idaho Roadless Rule and the proposed Colorado Roadless Rule illustrate the effect a repeal of the Roadless Rule would have on their respective IRAs. In Idaho, a return to NFMA would result in an increase of road building from 15 to 180 miles over the next 15 years and an increase in land available for logging from 9,000 to 40,500 acres.[174] In Colorado, an elimination of the Roadless Rule would lead to an increase in road building from 6 to 21 miles per year and an increase in land available for logging from 12,000 to 114,000 acres over the next 15 years.[175]

Since NFMA is unacceptably anticonservation and Congress is unlikely to act, the Obama Administration should develop a new federal policy to regulate the management of IRAs.[176] This Note suggests several aspects of a successful policy in Part III.

III. A NEW ROADLESS AREA MANAGEMENT RULE

The Obama Administration should craft a new rule in light of the lack of a long-term solution in place for the management of IRAs, the low potential for congressional action, and the drawbacks of using NFMA to manage these areas. Since IRA preservation is in the national public interest, state control over these areas must be somewhat restricted. Otherwise, America's wild lands will continue to disappear at an unacceptable pace due to the overvaluation of local development in state land-management decisions.[177] However, the new rule must allow more flexibility than did the Roadless Rule to prevent legal and political challenges.

This Part justifies and outlines key provisions for a new Roadless Area Management Rule. Section III.A argues that a conservation-themed national rule is in the public interest due to the many benefits of wild lands. Section III.B recommends changes needed in the new rule compared to the Roadless Rule to prevent a successful legal challenge or political repeal. Specifically, limited road building should be allowed for fire and pest control to prevent another Wilderness Act challenge, and some state-instituted flexibility should be included to acknowledge localized expertise. Finally, Section III.C

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should not be ignored during the planning process to account for nuances such as wildfire and disease vulnerability. *Id.* at 846–49.

173. Nie, *supra* note 163, at 728 (citing DAVID A. CLARY, TIMBER AND THE FOREST SERVICE (1986)).

174. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61,456, 61,481 (Oct. 16, 2008) (to be codified at 36 C.F.R. pt. 294).

175. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 73 Fed. Reg. 43,544, 43,550 (July 25, 2008) (to be codified at 36 C.F.R. pt. 294).

176. *But see* Heather S. Fredriksen, Comment, *The Roadless Rule That Never Was: Why Roadless Areas Should Be Protected Through National Forest Planning Instead of Agency Rulemaking*, 77 U. COLO. L. REV. 457, 468–80 (2006) (arguing that IRAs would be better protected by NFMA due to scientific credibility, public participation, and resistance to judicial review).

177. *See* Wailand, *supra* note 143, at 437–38.

explores recent state-initiated roadless area management rule changes in Colorado and Idaho to show the potential of this proposed new rule.

A. *A National Roadless Rule Serves the Public Interest*

National Forest land that is inaccessible due to a lack of roads provides a number of public benefits. Roadless areas provide recreational opportunities, sources of clean public water, habitats for plant and animal diversity, clean air, and uncontaminated soil.[178] Science and public sentiment alike support protecting roadless areas.[179] Almost 98 percent of public comments received by the Forest Service related to the Roadless Rule were supportive,[180] and opinion polls have shown majority approval of national forest conservation, even among Republicans.[181] The uniqueness of roadless land is a primary contributor to its value: there is no substitute for many of the benefits of roadless land, including dispersed recreation, seclusion, and superior wildlife habitats.[182] For example, IRAs provide habitats for more than 220 threatened, endangered, or proposed-endangered species, as well as 1,930 sensitive species.[183] Public roadless land is even more critical in light of the increasing rate of development on privately held wild lands.[184]

Road construction would certainly take place in IRAs in the absence of a nationwide rule, significantly compromising the wild values of these areas.[185] Roads themselves are detrimental because they degrade water quality by increasing erosion[186] and fragment wildlife habitats.[187] Further damage, of course, is done as vehicles facilitate the spread of invasive species and nox-

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178. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

179. *Id.* at 3245–47; Gloria Flora, *Roadless Reflections*, 14 DUKE ENVTL. L. & POL'Y F. 407 (2003); Fredriksen, *supra* note 176, at 458; *see supra* text accompanying note 5.

180. *Roadless Rule Comments from the Public—over 4.2 Million!*, HERITAGE FORESTS CAMPAIGN, http://www.ourforests.org/risk/comment_numbers.html (last visited Feb. 13, 2011).

181. *Public Opinion*, HERITAGE FORESTS CAMPAIGN, http://www.ourforests.org/public_support/index.html (last visited Feb. 13, 2011) (relating poll data that 67 percent of voters nationally favor the Roadless Rule, including 58 percent of Republicans. Other data reported show majority support even in Colorado and Idaho, both of which have crafted their own state roadless rules).

182. ROADLESS RULE FEIS, *supra* note 19, at 1-4; Fredriksen, *supra* note 176, at 461.

183. ROADLESS RULE FEIS, *supra* note 19, at 1-1. This equates to 25 percent of listed or proposed animal species and 13 percent of plant species as likely to have habitat within IRAs. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

184. 66 Fed. Reg. at 3245. Between 1982 and 1992, 1.4 million acres per year of forest, wetland, farmland, and open space were converted to more open uses. This rate increased to 3.2 million acres per year between 1992 and 1997. *Id.*

185. When developing the Roadless Rule, the Forest Service determined that 232 miles of roads would have been constructed annually in IRAs between 2000 and 2004 without national protection. ROADLESS RULE FEIS, *supra* note 19, at ES-5.

186. MICHAEL P. DOMBECK ET AL., FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 99, 102 (2003).

187. RICHARD T.T. FORMAN, LAND MOSAICS: THE ECOLOGY OF LANDSCAPES AND REGIONS 163–64 (1995).

ious weeds and kill wildlife through impact.[188] One commenter has gone so far as to note that "[p]robably no single feature of human-dominated landscapes is more threatening to biodiversity (aquatic and terrestrial) than roads."[189] Additionally, the Forest Service already has an $8.4 billion backlog of road maintenance, which will only increase if road development is allowed in IRAs.[190]

Many public comments received during the development of the Roadless Rule acknowledged the values of roadless land but asserted that its primary value is resource extraction, such as logging, so the areas should be developed accordingly.[191] However, focusing on the exploitation of roadless areas for timber production ignores national interests. Although timber is a valuable natural resource, the use of National Forest land for timber production, though beneficial for local economies, does not provide national benefits. Timber from National Forests is sold below cost, resulting in a loss to taxpayers of around $835 million per year.[192] Additionally, the importance of timber production in National Forests has dwindled while recreation use has soared.[193] This has resulted in western public lands becoming far more valuable for their recreation values than for their commodity values.[194]

B. *Proposed Changes to a New Roadless Rule*

Due to the level of support for full protection of IRAs as well as their national benefits, the new policy for these areas should put roadlessness in place as the default, as does the Roadless Rule. This would allow those states likely to prefer complete IRA protection to achieve their goal without

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188. DOMBECK, *supra* note 186, at 102–03.

189. Reed F. Noss, *Wilderness Recovery: Thinking Big in Restoration Ecology*, *in* THE GREAT NEW WILDERNESS DEBATE 521, 523 (J. Baird Callicott & Michael P. Nelson eds., 1998).

190. ROADLESS RULE FEIS, *supra* note 19, at 1-5. The Forest Service currently manages 386,000 miles of road, *id.*, which is about eight times the mileage of the Interstate Highway System. *Eisenhower Interstate Highway System—Frequently Asked Questions*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/interstate/faq.htm#question3 (last visited Feb. 13, 2011).

191. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3248–49 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

192. *See* RENÉ VOSS, TAXPAYER LOSSES FROM LOGGING OUR NATIONAL FORESTS 12 (2005), *available at* http://www.johnmuirproject.org/pdf/JMP-NFTaxLoss.pdf. Logging expenditures are justified by commodity production and job creation, *id.* at 2, but the Forest Service does not recover its investment. *Taxpayers Losing Money to Loggers on U.S. Land, Forest Service Admits*, L.A. TIMES, Nov. 22, 1997, at 22.

Additionally, most logging receipts go back to the Forest Service for logging mitigation and access, meaning public benefit from publicly owned forests is minimal. VOSS, *supra*, at i.

193. Zellmer, *supra* note 140, at 1026 (stating that National Forest timber production has decreased 75% from the 1960s to the 1990s, whereas visitor-use days are up 1,100% since 1950); *see also* Flora, *supra* note 179, at 414 ("[N]ational forests provide only 4% of the country's wood fiber production.").

194. Zellmer, *supra* note 140, at 1026; *see also* KARYN MOSKOWITZ, ECONOMIC CONTRIBUTIONS AND EXPENDITURES IN THE NATIONAL FORESTS 4, 6 (1999), *available at* http://www.johnmuirproject.org/pdf/NF-Contributions-Economic-Report.pdf (contrasting $1.1 billion contribution of National Forest timber with $7.5 billion contribution from recreation).

having to dedicate time and resources toward a state-specific petition. However, the drive to protect IRAs as much as possible in the near term should be tempered by the need for a policy that can withstand a change in the party of the president. As seen during the development of the State Petitions Rule, the conservative President Bush chose to abandon national IRA protection completely despite public support for conservation.[195] Long-term stability could be achieved, in part, in a new policy that would allow the Forest Service increased latitude to engage in some stewardship activities such as combating wildfire and parasites including the mountain pine beetle.[196] A new policy should also allow for a limited amount of state-instituted changes to ensure the proper balance between national interests in conservation and local interests in development. Using the Roadless Rule as a starting point, the following two subsections describe these proposed changes.

1. *Rulemaking and Substance of a Federal Rule*

To ensure viability, the primary concern during the rulemaking process for a renewed roadless area management rule should be NEPA compliance. One important element in this regard would be the allowance of sufficient time between draft and final rules, due to the required comment period, public meetings, and information distribution.[197] Improved engagement of local stakeholders would also be crucial, since inadequacy in this respect was one of the major complaints about the promulgation of the Roadless Rule in 2001.[198] Most importantly, the Forest Service should explore a broader array of alternatives to protect IRAs in the EIS than it did when developing the Roadless Rule.[199] For example, one alternative could allow road building and limited development solely for recreational purposes to encourage access to America's wild lands, matching the increased demand.[200] When engaging in a NEPA analysis, it should not be considered sufficient for the Forest Service to consider merely whether the analysis would ultimately be upheld by an appellate court. As with the original Roadless Rule, a successful challenge at the district level, or even just a lengthy court battle, could be enough to derail the policy by passing the controversy to the next administration.

Although the main lesson from *Wyoming* is how to comply with NEPA when developing a conservationist policy, the case also shows the benefits

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195. *See* U.S.D.A. FOREST SERV. & N.O.A.A., *supra* note 5 and accompanying text.

196. *See, e.g.*, Howard Pankratz, *Beetle-kill rate in Colorado "catastrophic"*, THE DENVER POST, Jan. 14, 2008, http://www.denverpost.com/ci_7967666 (reporting that the mountain pine beetle has destroyed 1.5 million acres of trees since 1996).

197. *See supra* notes 83–92 and accompanying text.

198. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3248 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

199. *See supra* note 94.

200. ROADLESS RULE FEIS, *supra* note 19, at 3-15 to 3-18.

of expanding road building and timber-harvesting provisions for fighting fire, pests, and disease. At a minimum, a new policy should allow more road building than the Wilderness Act, in order to ensure the power to designate the strictest level of protection remains exclusively vested in Congress. This sets the bar quite low, since the Wilderness Act permits the construction of temporary roads only in cases of "emergencies involving the health and safety of persons within the area" and never allows the construction of permanent roads.[201]

The new rule should allow roads for the purposes of halting the spread of large fires near developed areas or particularly damaging diseases or pests.[202] This will prove especially crucial in the coming decades because wildfire intensity and pest outbreaks likely will increase due to climate change.[203] By contrast, the Roadless Rule allows roads only if "needed to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property."[204] In order to protect the many values outlined in Section III.A, protection of IRA characteristics should be sufficient to allow for active forest management; a threat to life or property should not be required.

Stewardship-oriented timber harvesting[205] should similarly be allowed to protect IRA characteristics from disease, pests, and wildfire. The Roadless Rule is relatively vague regarding timber harvesting, allowing it "to maintain or restore the characteristics of ecosystem composition and structure."[206] The rule lists only fire control as an example reason, omitting pest disease control.[207] Although these harvesting provisions would dilute the strict protections of the Roadless Rule, it is necessary to balance conservationist

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201. The provision in context reads:

> Except as specifically provided for in this [Act], and subject to existing private rights, there shall be . . . no permanent road within any wilderness area designated by this [Act] and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this [Act] (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road . . . within any such area.

16 U.S.C. § 1134(c) (2006). Additionally, "such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable." *Id.* § 1134(d)(1). Development is strictly limited aside from this provision. Zellmer, *supra* note 140, at 1042–43.

202. For example, the spread of the mountain pine beetle in Colorado has been catastrophic, threatening millions of acres of mature lodgepole pine forest and the associated recreational and water-quality values. Todd Hartman, *Deaths of trees 'catastrophic'*, ROCKY MTN. NEWS, Jan. 15, 2008, http://www.rockymountainnews.com/news/2008/jan/15/beetle-infestation-get-much-worse/.

203. W.A. Kurz et al., *Mountain pine beetle and forest carbon feedback to climate change*, 452 NATURE 987, 987–90 (2008); *see also* UNION OF CONCERNED SCIENTISTS, GLOBAL WARMING AND CALIFORNIA WILDFIRES (2008), *available at* http://www.ucsusa.org/assets/documents/global_warming/ucs-ca-wildfires-1.pdf ("If global warming emissions are not substantially reduced, large wildfires in California are projected to increase 55 percent.").

204. 36 C.F.R § 294.12(b)(1) (2001).

205. For example, harvesting dead trees that are especially susceptible to fire.

206. 36 C.F.R. § 294.13(b)(1)(ii).

207. *Id.*

measures with a more pragmatic policy to avoid legal and political challenges. When harvesting does occur, the rule should also require that the Forest Service sell its timber at the prevailing market rate to reduce undue lobbying pressure from logging companies seeking to exploit artificially cheap public resources.

2. *State Petitions*

Besides increasing road building provisions slightly, the new policy to protect IRAs should allow for the creation of state-specific policies within certain limits. Allowing for increased state control would make it less likely that the new rule would be overturned by a conservative president.[208] Such a scheme would also help to keep those living near IRAs from becoming alienated and hostile toward the new rule.[209] As with the State Petitions Rule, the secretary of agriculture should have ultimate authority over the acceptability of a petition, and NEPA compliance should be required upon implementation of any proposed state-level plan.

To adequately protect the national interest in IRA conservation detailed in Section III.A, certain provisions must be off-limits for state-specific adjustments. Land within an IRA should never be open to commercial timber harvesting without a stewardship purpose, such as forest thinning to prevent the spread of parasites or to improve the habitat of an endangered species. Clearcutting should never be allowed due to its negative effects on soil, water, biodiversity, and recreation.[210] Additionally, since the purpose of IRAs is public enjoyment, road development to serve new mineral claims, including oil and gas, should be barred, adding a restriction not found in the Roadless Rule.

In addition to the absolute limitations proposed above, adjustments proposed by state petitions should be required to have an overarching stewardship purpose. First, several conservation-oriented criteria should be put in place to ensure that IRA development is permitted only when there is a pressing public need that cannot be met through alternative means. For example, the secretary might require states to show that active forest management strategies, such as controlled burns, are necessary in place of passive strategies wherever they are proposed. The secretary might also require that states work with the Forest Service to offset any proposed development in IRAs with long-term protec-

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208. Ironically, an early version of the State Petitions Rule may provide an excellent example for the Forest Service to follow. The Forest Service under President Bush initially considered keeping the Roadless Rule as it stood while opening a petition process for governors to alter the protection level within individual states. News Release, U.S. Dep't of Agric., USDA Retains National Forests Roadless Area Conservation Rule (June 9, 2003), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5050590.pdf.

209. It should be noted that several states petitioned for full protection under the State Petitions Rule, including Virginia, South Carolina, North Carolina, California, and New Mexico. Voicu, *supra* note 80, at 509. It can be assumed that additional states challenging the validity of the State Petitions Rule would also choose full protection, including Oregon and Washington.

210. ADELA BACKIEL & ROSS W. GORTE, CONG. RESEARCH SERV., 92-607 ENR, CLEARCUTTING IN THE NATIONAL FORESTS (1992), *available at* http://ncseonline.org/nle/crsreports/forests/for-2.cfm.

tion plans in other National Forest land. Second, where a tree-cutting or road-building scheme is proposed, petitioning states should have to show that there exist no reasonable alternatives using more passive stewardship strategies. Only temporary roads should be built when feasible. Finally, petitioning states should be required to demonstrate a preponderance of scientific evidence showing a net ecological benefit to any proposed stewardship activity not allowed under the federal policy.

C. *Lessons from Colorado and Idaho*

Under the State Petitions Rule, Idaho and Colorado developed statewide roadless rules to govern the IRAs within their borders. These examples show not only the potential of state-instituted roadless provisions but also why greater federal restrictions are necessary to protect IRAs. Both rules recognize the inherent value of IRAs and set many acres aside, but both also open significant tracts of land to commercial development.

The stated purpose of the Idaho Roadless Rule is vague, focusing on protecting wild areas from both development and natural damage.[211] The Idaho petition announces seven principles to be followed in IRA management, such as using current forest plans as baselines and maintaining consistency between intra- and interstate forests.[212] The proposed rule divides IRAs into five management themes with varying levels of restrictions.[213] At polar ends of the spectrum, "Wild Land Recreation" is to be managed to maintain wilderness quality whereas "General Forest" can be exploited for timber production or mining with minimal safeguards.[214] The most common designation is "Backcountry / Restoration," which allows road building and timber harvesting for broadly defined stewardship purposes.[215]

Whereas the Idaho Roadless Rule is currently in force, the Colorado proposal was not instituted during the Bush Administration and is currently under consideration by the USDA.[216] The stated purpose of the proposal indicates an increased emphasis on commodity development; the proposal is meant "to provide increased management flexibility of roadless areas in

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211. The purpose is to protect roadless characteristics while:

> Protecting communities, homes, and property from the risk of severe wildfire or other risks existing on adjacent Federal lands; [p]rotecting forests from the negative effects of severe wildfire and insect and disease outbreaks; or [p]rotecting access to property, by ensuring that States, Tribes, and citizens owning property within roadless areas have access to that property as required by existing laws.

U.S. DEP'T OF AGRIC., FOREST SERV., ROADLESS AREA CONSERVATION: NATIONAL FOREST SYSTEM LANDS IN IDAHO, FINAL ENVIRONMENTAL IMPACT STATEMENT S-2 (2008).

212. Petition from James E. Risch, Governor, State of Idaho, to U.S. Sec'y of Agric., Roadless Area Management in Idaho 18–19 (Oct. 5, 2006).

213. *See id.* at 22–58.

214. *Id.*

215. *See id.* at 33–52.

216. *See* Vilsack, *supra* note 75.

Colorado, primarily to reduce hazardous fuels and treat large-scale insect and disease outbreaks, allow access to coal reserves . . . , and allow access to future utility and water conveyances, while continuing to conserve roadless area values and characteristics."[217] The Colorado proposal takes a much different approach than the Idaho rule. Rather than categorizing parcels of IRAs and prescribing permissible activities for each category like Idaho, the Colorado proposal would remove certain areas from roadless status entirely and institutes uniform guidelines for the remaining land.[218] The proposal would allow road building for wildfire and disease protection,[219] and would allow extensive tree cutting compared to the Roadless Rule—up to 1.5 miles into forests that border communities at risk of fire damage.[220]

The Idaho Roadless Rule and the proposed Colorado Roadless Rule are not without their critics. Several environmental groups have criticized Idaho's rule for allowing too much development on IRAs, noting that leaving the old Roadless Rule in place would have been a better option.[221] The Idaho Roadless Rule opens over 400,000 acres to road construction and logging, and another 5.3 million acres to these activities where "there is significant risk that a wildland fire event could adversely affect an[] at-risk community."[222] These concerns have culminated in a lawsuit brought by several environmental groups, claiming the Idaho Roadless Rule violates NEPA, NFMA, and the ESA.[223] The suit states that the NEPA analysis was not thorough enough, that the Idaho Roadless Rule unlawfully displaces forest plan wilderness recommendations, and that the rule puts endangered species at risk.[224]

Whereas increased logging is the primary concern with the Idaho Roadless Rule, criticisms of the proposed Colorado rule focus on oil, gas, and coal production.[225] Critics also contend that the proposed Colorado rule contains thinning provisions for wildfire protection that go well beyond

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217. U.S. DEP'T OF AGRIC., FOREST SERV., RULEMAKING FOR COLORADO ROADLESS AREAS: DRAFT ENVIRONMENTAL IMPACT STATEMENT 3 (2008).

218. *See* Colorado Roadless Final Petition (Apr. 4, 2010), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5145339.pdf.

219. *Id.* § 294.33.

220. *Id.* § 294.32.

221. *E.g.*, *Idaho Roadless Rule Facts*, EARTH JUST., http://www.earthjustice.org/sites/default/files/library/factsheets/idaho-roadless-factsheet.pdf (last visited Feb. 13, 2011).

222. *Id.* (quoting Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61,456, 61,490–91 (Oct. 16, 2008) (to be codified at 36 C.F.R. pt. 294)) (internal quotation marks omitted).

223. Complaint for Declaratory and Injunctive Relief, *supra* note 71.

224. *Id.* at 11–17.

225. *See* Sharon Sullivan, *Coal mining, ski expansion allowed under propose[d] 'roadless' rule*, GRAND JUNCTION FREE PRESS, Aug. 5, 2009, http://www.gjfreepress.com/article/20090805/COMMUNITY_NEWS/908049994; *Pew Environmental Group Statement on Colorado's Roadless Rule*, PEW CHARITABLE TR. (Oct. 1, 2009), http://www.pewtrusts.org/news_room_detail.aspx?id=55268.

what research shows is required.[226] That is, fire protection is often used to justify forest thinning despite a lack of scientific support.[227]

Though the Idaho and proposed Colorado rules have flaws, these flaws do not indicate that state-specific roadless rules are fundamentally detrimental to America's remaining pristine areas. Instead, these examples indicate the sort of limitations that need to be incorporated into the petition process. The Idaho rule would not be viable under the policy laid out in Section III.C since logging would never be allowed absent a stewardship purpose, and the stewardship exception would require a strong scientific basis. The proposed Colorado rule would also need to be altered because road building would not be allowed for commodity production. Of course, the protections offered by NEPA, NFMA, and the ESA will continue to protect these areas.

CONCLUSION

The recent history of policies governing America's remaining roadless areas is rife with conflict. Two previous presidents attempted to stabilize the situation with opposing Forest Service rules, but both are currently enjoined nationwide due to court rulings in the Ninth and Tenth Circuits. There is more than one path to a new national policy with varying levels of public participation, but the most promising is a push by President Obama's Forest Service to craft a new rule. Though the Obama Administration may be pressed by conservationists to functionally copy the strict Roadless Rule of 2001, this would be politically unstable due to its one-size-fits-all approach. A rule that would start with strict protection as a national default but would allow for state-instituted adjustments under certain circumstances is much more likely to last beyond Obama's presidency. This Note's balanced proposal would protect the wild lands that are crucial to our democratic sustenance while maintaining some level of public accountability.

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226. *Colorado Roadless Rule Misses the Mark For Wildfire Protection*, COLO. WILD (June 9, 2009), http://www.coloradowild.org/index.php?option=com_content&task=view&id=67&Itemid=33; *see also* David O. Williams, *Wildfire fuels debate on state versus national roadless rules*, COLO. INDEP. (August 11, 2009, 12:49 AM), http://coloradoindependent.com/35245/wildfire-fuels-debate-on-state-versus-national-roadless-rules.

227. CHAD HANSON, THE MYTH OF "CATASTROPHIC" WILDFIRE: A NEW ECOLOGICAL PARADIGM OF FOREST HEALTH 1–2, 22 (2010), *available at* http://www.johnmuirproject.org/documents/Hanson%20White%20Paper%2029Jan10%20Final.pdf.