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# America's Unprotected Wilderness

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# AMERICA'S UNPROTECTED WILDERNESS

H. MICHAEL ANDERSON*

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## INTRODUCTION

Since Congress adopted the Wilderness Act of 1964,[1] the National Wilderness Preservation System has grown dramatically. As of 1998, Congress had designated more than 103 million acres of federal public land as wilderness.[2] Numerous bills are pending in Congress that would create millions of acres of new wilderness areas within the national forests, national parks, national wildlife refuges, and lands administered by the Bureau of Land Management (BLM).[3] Since 1994, however, there has been very little new wilderness established, largely due to opposition by key congressional leaders.

In the absence of congressional action to designate additional wilderness, there has been mounting concern about the loss of roadless areas—or "undesignated" wilderness areas—due to logging road construction, mineral development, and other management activities. The Forest Service's road-building program in particular has become the focus of much criticism and political debate. The Chief of the Forest Service addressed the controversy in February 1999 by imposing an eighteen-month moratorium on new road construction in most roadless areas within the national forests.[4]

This article examines the legal framework for future wilderness designations and for administrative study and protection of roadless areas. It begins with a brief summary of lands that are currently in the wilderness system and that could be added to the system. Second, it reviews the processes established by the Wilderness Act and other statutes for designation, administrative review, and management of potential wilderness areas. Third, it discusses legal authorities and requirements for federal agencies to protect roadless areas pending congressional action, using the Forest Service's roadless area moratorium as a case study. Finally, it analyzes legal options for expanding the wilderness system and maintaining options for future designations. The article focuses on the

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1. Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131–1136 (1994)).

2. *See* THE WILDERNESS SOCIETY, THE WILDERNESS ACT HANDBOOK 3 (Jay Watson ed., 3d ed. 1998) [hereinafter HANDBOOK].

3. *Cf., e.g.*, Red Rock Wilderness Act of 1997, H.R. 1500 & S. 773, 105th Cong. (designating 5.7 million acres of BLM lands in Utah); Northern Rockies Ecosystem Protection Act of 1997, H.R. 1425, 105th Cong. (designating more than 13.5 million acres of wilderness in Idaho, Montana, Oregon, Washington, and Wyoming); Morris K. Udall Wilderness Act of 1997, H.R. 900 & S. 531, 105th Cong. (designating as wilderness 1.56 million acres of the Arctic National Wildlife Refuge in Alaska); Rocky Mountain National Park Wilderness Act of 1997, H.R. 302, 105th Cong. (designating certain lands in Rocky Mountain National Park as components of the National Wilderness Preservation System).

4. *See* infra Part III.B. The moratorium is intended to "retain resource management options in those unroaded areas subject to suspension from the potentially adverse effects associated with road construction, while the Forest Service develops a revised road management policy." 64 Fed. Reg. 7289, 7290 (1999).

Forest Service and BLM, as national forest and BLM lands are more controversial and contain most of the nation's potential wilderness outside of Alaska.[5]

Thirty-five years after passage of the Wilderness Act, there remains tremendous potential, as well as strong public support, for additional wilderness designations. At the same time, there is much concern for preserving the natural character and values of undesignated wilderness areas. Ideally, Congress should establish comprehensive procedures and standards for periodic, on-going review and recommendations of potential wilderness, coupled with interim protection. Absent such congressional action, however, existing laws still obligate the land management agencies, at a minimum, to consider potential wilderness additions as part of their regular planning processes and to use the utmost care to avoid degradation of roadless areas. Further, we recommend adoption of a protective, status quo management policy for all roadless areas on federal land in order to maintain their wilderness character and important environmental values.

## I. CURRENT AND FUTURE WILDERNESS SYSTEM

### A. *The Current System*

The Wilderness Act of 1964 initially designated as wilderness 9.1 million acres of national forest land that the Forest Service had administratively classified as wilderness, wild, or canoe areas.[6] Since then, the wilderness system has expanded eleven-fold to 103.6 million acres, which represents 4.5 percent of all land in the United States.[7]

The wilderness system has been built through enactment of dozens of wilderness bills, typically establishing wilderness areas in a particular state. The largest single increment occurred in 1980 with passage of the Alaska National Interest Lands Conservation Act (ANILCA),[8] which designated more than 56 million acres as wilderness.[9] More recently, the California Desert Protection Act of 1994[10] designated 7.5 million acres as wilderness, including 3.5 million acres of BLM land.[11]

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5. For information about wilderness classification in national parks and wildlife refuges, see J. HENDEE ET AL., WILDERNESS MANAGEMENT 142–47 (2d ed. 1990). For a narrative account of the history and protection of the National Park System under the Wilderness Act, see Michael McCloskey, *What the Wilderness Act Accomplished in Protection of Roadless Areas Within the National Park System*, 10 J. ENVTL. L. & LITIG. 455 (1995).

6. *See* Wilderness Act § 3(a), 16 U.S.C. § 1132(a).

7. *See* HANDBOOK, *supra* note 2, at 3.

8. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101–3233 (1994)).

9. *Cf.* ANILCA §§ 701–704, 16 U.S.C. § 1132 note.

10. Pub. L. No. 103-433, 108 Stat. 4471 (codified as amended at 16 U.S.C. § 1132 note).

11. ANILCA § 102, 16 U.S.C. § 1132 note.

While the vast majority of the wilderness system is located in the western states, many wilderness areas have been established in the East. The Eastern Wilderness Act of 1975[12] established the precedent of extending wilderness status to areas that were smaller and less pristine than the western wilderness areas.[13]

Management responsibility for wilderness areas is spread among the four federal public land agencies. The National Park Service administers 43 million acres of national park wilderness; the Forest Service manages 34.6 million wilderness acres in the national forests; the Fish and Wildlife Service controls 20.7 million acres in national wildlife refuges; and the BLM is responsible for another 5.2 million acres of wilderness.[14] About 16 percent of all federal public lands is designated wilderness.[15]

B. *The Future System*

Remarkably, there is no reliable government estimate of how much undesignated wilderness remains on federal lands. However, the potential amount of additional wilderness likely far exceeds the size of the current wilderness system.

The Wilderness Act defines a wilderness area as a tract of undeveloped federal land that (1) is substantially natural in appearance; (2) provides outstanding opportunities for solitude or primitive recreation; (3) is generally at least five thousand acres in size or large enough to be manageable as wilderness; and (4) may have ecological, geological, scientific, educational, scenic, or historical value.[16] Past government inventories of potential wilderness have usually begun by identifying roadless areas of five thousand acres or more.[17]

Using five thousand acre roadless areas on federal land as a definition, The Wilderness Society estimates there are about 220 million acres of undesignated wilderness in the United States.[18] Table 1 displays esti-

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12. Pub. L. No. 93-622, 88 Stat. 2096 (codified as amended at 16 U.S.C. § 1132 note).

13. Less than five percent of the total wilderness acres lies east of the 100th Meridian, and almost half of that is in just two areas: Everglades National Park in Florida and the Boundary Waters Canoe Area in Minnesota. *See* HANDBOOK, *supra* note 2, at 3.

14. *See id.*

15. The proportion of land within each of the four public land systems which is designated wilderness is as follows: National Parks (48.3%), National Forests (18.0%), National Wildlife Refuges (22.6%), BLM lands (2.2%). *Cf. id.*; DYAN ZASLOWSKY & TOM H. WATKINS, THESE AMERICAN LANDS 11, 58, 105, 151 (1994).

16. *See* Wilderness Act § 2(c), 16 U.S.C. § 1131(c).

17. The Wilderness Act directed the Secretary of Interior to review the wilderness suitability of "every roadless area of five thousand contiguous acres or more" within the national parks and wildlife refuges. Wilderness Act § 3(c), 16 U.S.C. § 1132(c). The Forest Service and BLM have also used the five thousand acre size criterion in their wilderness inventories. *See infra* notes 33, 88 and accompanying text.

18. *See* Memorandum from Bill Meadows, President, The Wilderness Society, to Executive Committee (June 25, 1998) (on file with author). Acreage estimates were developed by Wilderness

mated acreages of potential wilderness under the jurisdiction of each land management agency. More than half the potential wilderness is in Alaska.

Relatively little of the undesignated wilderness has been formally recommended by the land management agencies for addition to the wilderness system. A total of about 26 million acres of wilderness recommendations are currently pending before Congress, including 7.4 million acres of BLM land, 7.1 million acres of national parks, 6.1 million acres of national forests, and 5.4 million acres of national wildlife refuges.[19] Thus, only about 12 percent of the unprotected wilderness on federal lands has been recommended for designation.

TABLE 1: ESTIMATED ACREAGE OF UNPROTECTED WILDERNESS ON FEDERAL LANDS IN THE UNITED STATES[20]

(millions of acres)

| | National Forests | BLM | National Parks | National Wildlife Refuges | Total |
|---|---|---|---|---|---|
| Lower 48 | 45 | 37 | 5 | 10 | 97 |
| Alaska | 15 | 35 | 20 | 55 | 125 |
| Total | 60 | 72 | 25 | 65 | 222 |

Combining protected and unprotected wilderness, we estimate that the wilderness resource on federal lands totals approximately 325 million acres. This represents about 14 percent of all land in the United States and half of all federal public land.[21]

## II. EXISTING LEGAL AUTHORITIES AND REQUIREMENTS

This Part analyzes the current legal framework for the designation, administrative review, and management of potential wilderness areas. While the Wilderness Act established the original framework, several subsequent laws—principally the national forest "RARE II" bills enacted in the early 1980s, the Federal Land Policy and Management Act of 1976 (FLPMA), and ANILCA—have added important elements.

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Society staff based on a variety of sources, including acreage figures supplied by the Forest Service, Park Service, and Fish and Wildlife Service. *See id.*

19. *See* HANDBOOK, *supra* note 2, at 41, 43; *see also infra* notes 59, 98–99 and accompanying text.

20. *See supra* note 18 (describing the derivation of the acreage estimates).

21. *See* Memorandum from Bill Meadows, *supra* note 18 (providing an estimate for unprotected wilderness).

A. *The Wilderness Act*

Under the Wilderness Act, areas can only be added to the National Wilderness Preservation System through congressional designation.[22] Congress thereby elected not to authorize executive designation of wilderness areas, as originally advocated by conservationists.[23] Instead, the Act set up a process by which the land management agencies would review potential wilderness areas and the President would present recommendations to Congress for additions to the system.[24]

Regarding the national forests, the Wilderness Act directed the Forest Service to complete, within ten years, a wilderness suitability review of 5.5 million acres that the agency had previously classified as "primitive areas."[25] The Forest Service completed the primitive area reviews on schedule and, in most cases, without major controversy.[26] A notable exception involved the East Meadow Creek roadless area, which was adjacent to the Gore Range-Eagles Nest Primitive Area in Colorado.[27] In upholding a district court decision enjoining a timber sale in the roadless area, the Tenth Circuit Court of Appeals established a precedent of requiring land management agencies to "proceed slowly" before foreclosing wilderness designation options.[28]

The Wilderness Act established a similar ten-year suitability review process for national parks and national wildlife refuges. The major difference was that, instead of limiting the review to previously classified lands like the national forest primitive areas, Congress directed the Secretary of Interior to examine "every roadless area of five thousand contiguous acres or more" in the parks and refuges.[29] The Department of

22. The Act states that "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act." Wilderness Act § 2(a), 16 U.S.C § 1131(a). Similarly, "[e]ach recommendation of the President for designation as 'wilderness' shall become effective only if so provided by an Act of Congress." Wilderness Act § 3(b), 16 U.S.C. § 1132(b).

23. *See* ZASLOWSKY & WATKINS, *supra* note 15, at 208, 211.

24. *See* Wilderness Act § 3, 16 U.S.C. § 1132.

25. Wilderness Act § 3(b), 16 U.S.C. § 1132(b).

26. *See* D.M. ROTH, FOREST SERV., U.S. DEP'T OF AGRIC., THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1964–1980, at 11 (Forest Service History Series 1984).

27. *See id.* at 19–22.

28. Parker v. United States, 448 F.2d 793,795 (10th Cir. 1971). The court stated:

> We have no difficulty in recognizing the general purpose of the Wilderness Act. It is simply a congressional acknowledgment of the necessity of preserving one factor of our natural environment from the progressive, destructive and hasty inroads of man, usually commercial in nature, and the enactment of a "proceed slowly" order until it can be determined wherein the balance between proper multiple uses of the wilderness lies and the most desirable and highest use established for the present and future.

*Id.*

29. Wilderness Act § 3(c), 16 U.S.C. § 1132(c). For national wildlife refuges, the Act required the Secretary to review "every roadless island" in addition to roadless areas. *Id.*

Interior completed the required reviews and submitted wilderness recommendations to Congress.[30]

The Act's wilderness review process provided for extensive public involvement. Before submitting recommendations to the President, the agencies were required to publish notice of each proposal in the Federal Register and local newspapers, hold a hearing in the local area, and notify and invite comment from state and local officials and other concerned federal agencies.[31]

While the Wilderness Act set the stage for securing "an enduring resource of wilderness,"[32] it did not specify a long-term role for the land management agencies in constructing the wilderness system. In particular, the Act did not mandate or specify a process for ongoing administrative or public review of potential wilderness, beyond the ten-year studies of national forest primitive areas and of national park and wildlife refuge roadless areas. The Act, however, provided the purposes, definitions, and a basic public involvement model for future legislation and administrative reviews.

The Act entirely omitted two major types of potential wilderness from the review process: (1) national forest roadless areas that were not classified as primitive areas and (2) all roadless areas administered by the BLM. In addition, Congress understandably did not foresee the events that led in 1980 to creation of vast new parks and wildlife refuges in Alaska. However, as discussed below, subsequent legislative, administrative, and judicial actions have partially filled in those gaps.

### B. *National Forest RARE II Legislation*

#### 1. Background

In 1967, the Forest Service went beyond the requirements of the Wilderness Act and initiated a nationwide study of the wilderness potential of all previously unclassified national forest roadless areas larger than five thousand acres.[33] The Roadless Area Review and Evaluation (RARE) was criticized for omitting many suitable areas from the inventory. Conservationists successfully argued in court that the National Environmental Policy Act of 1969 (NEPA)[34] required the Forest Service to prepare an environmental impact statement (EIS) before authorizing timber sales in roadless areas.[35] Affirming a decision to enjoin logging in a

30. *See* HANDBOOK, *supra* note 2, at 41, 43.

31. *See* Wilderness Act § 3(d), 16 U.S.C. § 1132(d).

32. Wilderness Act § 2(a), 16 U.S.C. § 1131(a).

33. *See* Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 345 (1985).

34. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4331–4370d (1994 & Supp. II 1996)).

35. *See* Wilkinson & Anderson, *supra* note 33, at 347.

roadless area, the Tenth Circuit Court of Appeals in 1973 found that "there is an overriding public interest in preservation of the undeveloped character of the area."[36] The Forest Service responded by deferring development activities in roadless areas pending compliance with NEPA.

In the 1970s, Congress became increasingly willing to go beyond the designation of primitive areas in national forests. Rejecting Forest Service arguments that national forests in the East contained few areas suitable for wilderness, Congress designated thirty-two wilderness and wilderness study areas in the Eastern Wilderness Act of 1975.[37] The National Forest Management Act of 1976 (NFMA)[38] directed the Forest Service to consider wilderness in developing land management plans.[39]

In 1977, the Forest Service began a new nationwide roadless area study called "RARE II." The RARE II inventory identified 2919 roadless areas encompassing 62 million acres.[40] The roadless areas were allocated to three categories—recommended wilderness, further planning, and nonwilderness. In an effort to comply with NEPA, the agency prepared an EIS with alternatives that allocated different amounts of roadless areas to the three categories. The preferred alternative allocated 15 million acres to wilderness, 10.8 million acres to further planning, and 36.2 million acres to nonwilderness.[41] However, the Ninth Circuit Court of Appeals in 1982 ruled that the EIS was inadequate,[42] again halting management activities in roadless areas.

In 1984, the roadless area controversy culminated in the passage of nineteen separate wilderness bills that added 8.6 million acres to the wilderness system.[43] The wilderness bills accepted many of the RARE II allocations, but sometimes designated substantially more wilderness than recommended in RARE II.[44]

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36. Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1250 (10th Cir. 1973).

37. Pub. L. No. 93-622, §§ 3–4, 88 Stat. 2096, 2097–2100 (codified as amended at 16 U.S.C. § 1132 note).

38. Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1600–1614 (1994)).

39. *See* NFMA § 6, 16 U.S.C. § 1604(e)(1), (g)(3)(A); 36 C.F.R. § 219.17(a) (1997); *see also* Idaho Conservation League v. Mumma, 956 F.2d 1508, 1511 (9th Cir. 1992); California v. Berglund, 483 F. Supp. 465, 478 (E.D. Cal. 1980).

40. *See* FOREST SERV., U.S. DEP'T OF AGRIC., ROADLESS AREA REVIEW AND EVALUATION, FINAL ENVIRONMENTAL IMPACT STATEMENT at iii (1979) [hereinafter RARE II]. The first RARE inventory identified 56 million acres in 1449 roadless areas. *See id.* at 6.

41. *See id.* at iv.

42. *See* California v. Block, 690 F.2d 753, 765–69 (9th Cir. 1982). The Forest Service subsequently amended its forest planning regulations to require wilderness review of all roadless areas, including those evaluated in RARE II, unless directed otherwise by Congress. *See* 36 C.F.R. 219.17(a) (1997); 48 Fed. Reg. 40,383 (1983).

43. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 1053 (3d ed. 1993).

44. In Oregon, for example, RARE II recommended 370,000 acres for wilderness, but the Oregon Wilderness Act designated nearly one million acres. *See* ROTH, *supra* note 26, at 27.

2. Release Language

A key issue in the RARE II bills concerned the statutory direction for management of roadless areas that were not designated as wilderness in the legislation.[45] The Forest Service and timber industry wanted language that would permanently insulate development activities in roadless areas from further legal challenges and eliminate any obligation to conduct additional wilderness reviews. Environmentalists, on the other hand, wanted to maintain legal options to protect roadless areas for future designation.

Congress eventually agreed upon standard "soft release" language and included virtually identical language in all the RARE II bills. First, each act declared that, with regard to the RARE II inventoried roadless areas in that state, the RARE II EIS was legally sufficient and not subject to judicial review.[46] Second, each act excused the Forest Service from reviewing roadless areas in the state during the first round of planning required by the NFMA. However, the acts required the Forest Service to "review the wilderness option when the plans are revised," roughly every ten to fifteen years.[47] Third, prior to or during revision of the NFMA plans, all RARE II areas that were not designated as wilderness or for special management in the legislation were to be managed in accordance with the plans and not necessarily to protect their wilderness suitability.[48]

In a series of decisions involving management of national forest roadless areas, the Ninth Circuit Court of Appeals narrowly interpreted the soft release language in RARE II legislation. The decisions have made clear that the release language in RARE II bills did not exempt all subsequent Forest Service roadless area development decisions from judicial review. First, in *City of Tenakee Springs v. Block*[49] the court held that RARE II release language in ANILCA did not immunize from judicial review the roadless area allocations in the Tongass National Forest management plan.[50] Second, in *National Audubon Society v. United States Forest Service*,[51] the court concluded that "the prohibition on judicial review found in [the Oregon Wilderness Act] applies not to

45. *See id.* at 2–7.

46. *See e.g.*, Washington State Wilderness Act of 1984, Pub. L. No. 98-339, § 5(b)(1), 98 Stat. 299, 303.

47. *E.g.*, *id.* § 5(b)(2), 98 Stat. at 303.

48. *See id.* § 5(b)(3), 98 Stat. at 303. Furthermore, the undesignated roadless areas "need not be managed for the purpose of protecting their suitability for wilderness designation prior to or during revision of the initial land management plans." *Id.*

49. 778 F.2d 1402 (9th Cir. 1985).

50. *See Tenakee Springs*, 778 F.2d at 1405. The court stated that the sufficiency language "immunizes from judicial review only the wilderness/nonwilderness allocations made by RARE II and not the detailed Tongass Plan allocations of nonwilderness areas as suitable for primitive, environmentally compatible, or intensive development." *Id.*

51. 4 F.3d 832 (9th Cir. 1993).

*roadless or roaded* determinations, but to the Act's *wilderness or non-wilderness* designations."[52]

Most recently, in *Smith v. Forest Service*[53] the Ninth Circuit blocked a timber sale located within a RARE II area in Washington State because the agency had not adequately disclosed the sale's impact on the area's roadless values.[54] Regarding the RARE II legislation, the court stated:

> Judicial review of the wilderness option is not foreclosed forever by the [Washington State Wilderness Act]. Under that Act, the wilderness option for inventoried lands may be revisited in second-generation Forest Plans. Accordingly, when the agency is considering the development of a 5,000 acre roadless area, selection of a no-action alternative, which the agency is required to consider, . . . would preserve the possibility that the area might some day be designated as wilderness. . . . [T]he possibility of future wilderness classification triggers, at the very least, an obligation on the part of the agency to disclose the fact that development will affect a 5,000 acre roadless area.[55]

### 3. Wilderness Review and Forest Planning

The RARE II Acts and the NFMA require the Forest Service to review all roadless areas for wilderness suitability during the revision of NFMA land and resource management plans.[56] During the first round of NFMA planning, the Forest Service developed 123 separate plans. Some of the first-generation plans—for national forests in Idaho, Montana, Nevada, and other states for which Congress did not enact RARE II wilderness bills—included wilderness reviews and made wilderness recommendations. The plans typically recommended wilderness for only a small fraction of the inventoried roadless areas.[57] For national forests covered by RARE II legislation, the forest plans did not make wilderness recommendations; however, some plans did include roadless area reviews in response to strong public interest and concern about roadless areas that were legislatively "released" to the forest planning process.[58]

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52. *National Audubon Soc'y*, 4 F.3d at 837 (emphasis added). The court explained, "The desire of Congress to preclude further review of wilderness designations made by the [Oregon Wilderness Act] and RARE II does not persuade us that Congress also intended to preclude judicial review of Forest Service compliance with NEPA in these four contested timber sales." *Id.*

53. 33 F.3d 1072 (9th Cir. 1994).

54. *See Smith*, 33 F.3d at 1073.

55. *Id.* at 1078 (citations omitted).

56. *See supra* notes 39, 47 and accompanying text.

57. For example, the Idaho Panhandle National Forest plan recommended only 4 of the 47 inventoried roadless areas, amounting to 18 percent of total roadless acreage. *See* Idaho Conservation League v. Mumma, 956 F.2d 1508, 1512 (9th Cir. 1992).

58. All national forest plans in the Pacific Northwest Region (Oregon and Washington), for example, included detailed roadless area reviews. The forest plan EISs in that region included a separate appendix describing each roadless area, the area's management allocation under each alter-

Of the 60 million acres of inventoried roadless areas, the Forest Service has recommended wilderness for 6.1 million acres.[59] The remaining 53.9 million acres have been allocated to various nonwilderness management classifications in local forest plans. Only 9 million acres of inventoried roadless land are considered to be suitable for timber production;[60] however, many other roadless areas are vulnerable to development activities such as salvage logging, oil and gas drilling, and associated road construction. The Forest Service estimates that, under current forest plans, new roads could be built into 33 million acres of inventoried roadless areas.[61] Before the Forest Service can authorize activities that substantially alter the undeveloped character of a roadless area, it must evaluate the impacts in an EIS.[62]

Current NFMA regulations specify the types of areas subject to wilderness review and issues to consider in the review, such as the area's wilderness values and feasibility of management as wilderness.[63] Proposed Forest Service amendments to the NFMA regulations would still require plan revisions to review roadless areas for wilderness designation.[64] A few national forests have already completed plan revisions, and several others—mostly in the Southeast and Rocky Mountains—are in the midst of revising their plans.

During the 1990s, the Forest Service has increasingly focused on "ecoregional" plans and assessments to cure inadequacies of the NFMA plans and lay the scientific groundwork for plan revisions. While the ecoregional plans have not included wilderness reviews or recommendations, they have generated new information about the ecological and economic importance of roadless areas. For example, the Interior Columbia Basin Ecosystem Management Project (ICBEMP) is a mammoth interagency effort to devise an ecosystem-based management strategy for all 75 million acres of national forests and BLM lands in the Columbia

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native, and the environmental consequences of those allocations. *See, e.g.*, FOREST SERV., U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT, LAND AND RESOURCE MANAGEMENT PLAN WILLAMETTE NATIONAL FOREST app. at C-1 (1990).

59. *See* FOREST SERV., U.S. DEP'T OF AGRIC., WILDERNESS AND ROADLESS AREA DATA (attachment to Letter from Gerald T. Coghlan, Acting Director of Engineering, Forest Service, to author (June 29, 1998)) (on file with author).

60. *See id.*

61. *See* FOREST SERV., U.S. DEP'T OF AGRIC., FACTS ABOUT THE NATIONAL FOREST ROAD SYSTEM (attachment to Letter from Chief Michael Dombeck, Forest Service, to Colleagues (Jan. 22, 1998)) (on file with author).

62. *See* National Environmental Policy Act; Revised Policy and Procedures, 57 Fed. Reg. 43180, 43,200 (1992). *But cf.* Smith v. United States Forest Serv., 33 F.3d 1072, 1079 (9th Cir. 1994) (stating that site-specific EIS for roadless area timber sale "may not be *per se* required"); National Audubon Soc'y v. Forest Serv., 4 F.3d 832, 838 & n.6 (9th Cir. 1993) (remanding decision to enjoin roadless area timber sale with instructions to review under arbitrary and capricious standard).

63. *See* 36 C.F.R. § 219.17 (1997).

64. *See* 60 Fed. Reg. 18886, 18931 (1995).

River Basin.[65] Notably, the economic assessment for the ICBEMP found that the existence value of roadless areas in the Columbia Basin far exceeds the value of timber and livestock forage on federal lands.[66] The ICBEMP's ecological assessment also highlighted the importance of roadless areas as habitat strongholds for endangered salmon and trout species in the Basin.[67]

Despite growing scientific support for roadless area protection, NFMA plan revisions to date have recommended remarkably little additional wilderness. In the Rocky Mountain Region, where the plan revision process is farther along than the rest of the country, the four plan revisions completed to date recommend wilderness designation for less than one percent of the inventoried roadless areas.[68]

On the other hand, Forest Service Chief Mike Dombeck has urged greater protection of wilderness and roadless areas.[69] As discussed later in this article, Dombeck in February 1999 instituted a controversial interim suspension of new road construction in most national forest roadless areas.[70]

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65. *See generally* FOREST SERV., U.S. DEP'T OF AGRIC. & BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, EASTSIDE DRAFT ENVIRONMENTAL IMPACT STATEMENT (1997).

66. *See* THOMAS M. QUIGLEY & SYLVIA ARBELBIDE, U.S. DEP'T OF AGRIC., AN ASSESSMENT OF ECOSYSTEM COMPONENTS IN THE INTERIOR COLUMBIA BASIN 1824 (1997) ("[T]he existence of unroaded areas is by far the most valuable output from FS- and BLM-administered lands in the Basin today, and will continue to be so in the year 2045.").

67. *See id.* at 1348 ("Unroaded areas have the potential to maintain natural processes unaltered by land management activities and may be important refugia for strongholds of salmonid.... Designated wilderness and areas predicted to be unroaded are important anchors for strongholds throughout the Basin.").

68. *See* Letter from The Wilderness Society et al. to Lyle Laverty, Regional Forester, Rocky Mountain Region (July 7, 1998) (on file with author). The letter states:

> Region 2's record on recommending additional wilderness during the forest planning process is abysmal. The Forest Service identified as roadless a total of 1,387,835 acres on the Black Hills, Rio Grande, Arapaho-Roosevelt, and Routt National Forests. Of this, conservationists recommended 806,430 acres for wilderness, and the agency itself found hundreds of thousands of acresl [sic] to be "eligible" for wilderness. Yet, the Forest Service recommended only a paltry 8,551 acres for wilderness designation.

*Id.* (citation omitted).

69. *See* Letter from Chief Mike Dombeck, Forest Service, to all Forest Service Employees (July 1, 1998) (concerning conservation leadership) (on file with author). Chief Dombeck stated:

> Values such as wilderness and roadless areas, clean water, protection of rare species, old growth forests, naturalness—these are the reasons most Americans cherish their public land. . . . [T]wenty percent of the National Forest System is wilderness, and in the [minds] of many, more should be. Our wilderness portfolio must embody a broader array of lands—from prairie to old growth. As world leaders in wilderness management, we should be looking to the future to better manage existing, and identify potential new, wilderness and other wild lands.

*Id.*

70. *See* discussion *infra* Part III.B.

## C. *Federal Land Policy and Management Act*

### 1. Background

The Bureau of Land Management (BLM) has exclusive jurisdiction over about 48 percent, or 264 million acres, of federally owned lands, most of which are located in eleven western states and Alaska.[71] During the first thirty years of its existence, the BLM operated under various mining, homestead, and other land laws inherited from its predecessors, the General Land Office and the U.S. Grazing Service.[72] When these two agencies merged to create the BLM in 1946,[73] Congress did not establish a comprehensive statutory framework for management of BLM lands, as it had for the national park, forest, and wildlife refuge systems.[74] From the beginning, BLM lands were regarded primarily as a source of livestock forage, timber, and mineral resources. Policy makers generally viewed the BLM as an agency with two main functions: transferring lands from federal to state or private ownership, and managing grazing and mining on the public lands.

The Wilderness Act did not direct the BLM to consider wilderness values when administering its lands, in part because of the traditional view mentioned above, but also because the question of whether BLM lands were to remain in public ownership had not been settled.[75] It was not until twelve years later, with the passage of the Federal Land Policy and Management Act of 1976 (FLPMA),[76] that Congress fundamentally modified the BLM's mission and provided a comprehensive system of management for public lands under its jurisdiction.[77]

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71. *See* Bureau of Land Management, U.S. Dep't of the Interior, *Public Land Statistics: 1997* (last modified Mar. 21, 1998) <http://www.blm.gov/natacq/pls97/part1.html> [hereinafter *1997 BLM Statistics*]. Throughout this section "public lands" refers to those lands under the BLM's jurisdiction. BLM lands are also referred to as "National Resource Lands." *See* ZASLOWSKY & WATKINS, *supra* note 15, at 131. Alaska contains over one-third of all BLM lands. *See 1997 BLM Statistics*, *supra*. For a discussion of ANILCA and its impact on wilderness review in Alaska, see *infra* Part II.D.

72. *See* ZASLOWSKY & WATKINS, *supra* note 15, at 105–48 (detailing the extensive history of the BLM and natural resource lands, including the enactment of FLPMA).

73. *See* Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1100.

74. *See* John D. Leshy, *Wilderness and Its Discontents: Wilderness Review Comes to the Public Lands*, ARIZ. ST. L.J. 361, 363 (1981).

75. *See* HANDBOOK, *supra* note 2, at 37; Leshy, *supra* note 74, at 362–64 (1981). Frequently, BLM lands have been "dismissed as the 'leftover lands,'" or "the land that no one wanted." ZASLOWSKY & WATKINS, *supra* note 15, at 105, 135. William P. Clarke, who served as Secretary of Interior under Reagan, thought of BLM lands in this way and professed to be surprised to find even 24 million acres containing wilderness characteristics. *See id.* at 135.

76. Pub. L. No. 94-579, 90 Stat. 2744 (codified as amended at 43 U.S.C. §§ 1701–1785 (1994 & Supp. III 1997)).

77. Many have referred to FLPMA as the BLM's "organic" act, and with respect to outlining land management guidelines, it is more precise than most other organic acts for public land agencies. *See* HENDEE ET AL., *supra* note 5, at 148. As a historical note, immediately after passage of the Wilderness Act, Congress established the Public Land Law Review Commission (PLLRC) to review and recommend revisions of the public land laws, "most of which were administered by the Bureau

As for establishing a legal framework for future wilderness designations, FLPMA may be no more effective than the Wilderness Act. It does, however, go one step further by requiring protection of lands as they await final congressional action.[78] FLPMA reflects Congress's concern with "defining the concept of wilderness and prescribing how statutorily designated wilderness areas were to be managed, [rather than] directing how new areas were to be included in the [National Wilderness Preservation System]."[79]

Regardless, FLPMA did change the direction of public land management in two significant ways. First, it established the policy that public lands should be retained in federal ownership and managed for the national interest.[80] Second, it recognized wilderness as fully consistent with the multiple-use mandate for BLM lands and as deserving of the same consideration as other possible uses of the land.[81]

2. BLM Wilderness Review

Under the general land use planning provisions of FLPMA, the BLM must maintain an ongoing inventory of "all public lands and their resource and other values."[82] Section 603 further required the Secretary of Interior to review all "roadless areas" identified during this inventory for their suitability as wilderness, and to make recommendations to the President within fifteen years.[83] For speed and convenience, the Secretary of Interior decided to conduct a one-time, nationwide wilderness review for BLM lands and divided the process into three stages: inventory, study, and reporting.[84] State directors were given the responsibility for making inventory decisions and recommendations consistent with the guidelines issued in the BLM's Wilderness Inventory Handbook (WIH).[85]

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of Land Management." Leshy, *supra* note 74, at 368; *see also* Public Land Law Review Commission, Pub. L. No. 88-606, §§ 1–3, 78 Stat. 982, 982 (1964) (originally codified at 43 U.S.C. §§ 1391–1393 (1964) and subsequently omitted with the termination of the Commission, 43 U.S.C. § 1391 note (Codification) (1994)) [hereinafter PLLRC]. In many respects, the work of the commission was Congress's first step towards FLPMA's enactment. *Cf.* PLLRC, *supra*, §§ 1–3; *see also* Leshy, *supra* note 74, at 368–71.

78. *See* FLPMA § 603(c), 43 U.S.C. § 1782(c).

79. Leshy, *supra* note 74, at 365–66.

80. *See* FLPMA § 102(a)(1), 43 U.S.C. § 1701(a)(1).

81. *See* Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,014, 72,015 (1979) [hereinafter IMP]. The BLM recognized that "[u]nder FLPMA, wilderness preservation is part of BLM's multiple-use mandate, and wilderness values are recognized as part of the spectrum of resource values and uses to be considered in the inventory and in the land-use planning process." *Id.* Section 603 of FLPMA "directs the BLM, for the first time, to carry out a wilderness review of the public lands." *Id.*; *see also* FLPMA § 603(a), 43 U.S.C. § 1782(a).

82. FLPMA § 201(a), 43 U.S.C. § 1711(a).

83. FLPMA § 603(a), 43 U.S.C. § 1782(a).

84. *See* HENDEE ET AL., *supra* note 5, at 148.

85. *See generally* BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, WILDERNESS INVENTORY HANDBOOK (1978) [hereinafter WILDERNESS INVENTORY]. The inventory

The WIH guidelines divided the inventory into two phases.[86] State directors first identified "roadless areas" of at least five thousand acres which may have contained wilderness characteristics.[87] The initial inventory reduced the lands under consideration to about 50 million acres.[88] A more intensive inventory of these "wilderness inventory units" followed, and roadless areas that met the definition of wilderness as provided in the Wilderness Act were designated "Wilderness Study Areas" (WSAs).[89]

In 1980, the BLM announced that it had identified 24 million acres as having wilderness characteristics warranting further wilderness study—only 13 percent of its lands in the lower forty-eight states (in contrast, the Forest Service had found 32 percent of its lands in those same states to be "roadless").[90] Perhaps the most heated and nationally recognized controversy erupted in Utah, where the BLM eliminated more than 2 million acres from further review because of their potential for mining, grazing, or industrial development.[91]

During the wilderness study, or "suitability" review, the BLM must weigh the benefits of preserving a WSA's wilderness values against the benefits of managing the area for other purposes, such as mineral leasing or grazing.[92] In balancing these values, the BLM must consider factors such as the area's ecological, educational and historical value, the extent to which designation would diversify the wilderness system, and whether the area can be "effectively managed to preserve its wilderness character."[93]

Before recommendations as to the suitability of an area are submitted to the Secretary, they are subject to extensive public participation, as required by the Wilderness Act for parks and refuges.[94] The Secretary reports his decision to the President, who then submits the final recom-

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began in September 1978 and covered 174 million acres in the lower 48 states. *See* HENDEE ET AL., *supra* note 5, at 147. Because of the uncertainty concerning the future of Alaska's public lands, BLM land in Alaska was not reviewed. *See* WILDERNESS INVENTORY, *supra*, at 4.

86. *See* HENDEE ET AL., *supra* note 5, at 148.

87. *See* Wilderness Inventory Results for Public Lands Under Administration of the Bureau of Land Management in the Contiguous Western States, 45 Fed. Reg. 75,574, 75,574 (1980).

88. *See* HENDEE ET AL., *supra* note 5, at 148.

89. 45 Fed. Reg. at 75,576.

90. *See id.* at 75,574–75; *see also supra* note 39 and accompanying text.

91. *See* Utah; Final Wilderness Inventory Decision, 45 Fed. Reg. 75,602, 75,604 (1980).

92. *See* Wilderness Study Policy, 47 Fed. Reg. 5098, 5103 (1982); HENDEE ET AL., *supra* note 5, at 151.

93. Wilderness Study Policy, 47 Fed. Reg. 5098, 5103 (1982). The BLM does not provide any guidance as to how "manageability" is to be determined. *Cf. id.* The decision is essentially based on whether it would be practical to manage a particular area as wilderness—a highly subjective determination—given such factors as the degree to which private or state inholdings would disrupt federal management. *See* HENDEE ET AL., *supra* note 5, at 151.

94. *See* FLPMA § 603(a), 43 U.S.C. § 1782(a) (1994 & Supp. II (1996)). Section 603 of FLPMA extends the public participation requirements of section 3(d) of the Wilderness Act to the BLM wilderness review. *See id.*; *see also* Wilderness Act § 3(d), 16 U.S.C. § 1132(d) (1994).

mendations to Congress.[95] Even WSAs that are deemed "unsuitable" must be reported.[96] As with the Wilderness Act, Congress reserved the final authority to make wilderness designations for itself.[97]

As of September 30, 1997, the BLM made recommendations on 561 WSAs throughout the nation, covering over 16 million acres.[98] It recommended 7.4 million acres as suitable for wilderness, and 8.9 million as nonsuitable.[99]

The controversy surrounding the wilderness review in Utah gave rise to direct legislative involvement that had not occurred in other states. Throughout Utah, the BLM conducted its wilderness inventory in great haste. It allocated only two years to evaluate 22 million acres of land even though FLPMA had allowed fifteen years for completion of the review.[100] A lack of adequate staff conducting the review compounded the problem. The Utah BLM determined that 14.5 million acres "clearly and obviously" did not contain wilderness characteristics.[101] Only 2.5 million acres were actually designated WSAs.[102] Conservationists, and even BLM employees who had participated in the inventory, accused the BLM of violating its own wilderness inventory policy in several ways and excluding lands that should have been designated WSAs.[103]

In 1988, Representative Wayne Owens introduced a bill to protect 5.7 million acres, as advocated by conservationists.[104] Secretary of Inte-

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95. *See* FLPMA § 603(a), 43 U.S.C. § 1782(a).

96. HENDEE ET AL., *supra* note 5, at 152.

97. *See* Leshy, *supra* note 74, at 374. Although the House version of FLPMA would have made the President's wilderness recommendations automatically effective if Congress failed to take action within 120 days, the Conference Committee jealously guarded Congress's right to have the final say and dropped the provision. *See id.*

98. *See 1997 BLM Statistics*, *supra* note 71.

99. *See id.*

100. *See* FLPMA § 603(a), 43 U.S.C. § 1782(a); Utah; Final Wilderness Inventory Decision, 45 Fed. Reg. 75,602, 75,605 (1980).

101. Utah v. Babbitt, 137 F.3d 1193, 1198 (10th Cir. 1998) (summarizing the history of Utah's wilderness debate).

102. *See id.* Another 0.7 million acres were subsequently added as a result of administrative appeals, bringing the total amount of WSAs to 3.2 million acres. *See* Telephone Interview with Ken Rait, Issues Director, Southern Utah Wilderness Alliance (Sept. 2, 1998).

103. *See* Ray Wheeler, *The BLM Wilderness Review* (visited Oct. 27, 1998) <http://www.suwa.org/WATE/review.html>. In 1983, House Public Lands Subcommittee Chairman John Seiberling went to Utah to investigate charges of mismanagement in the Utah BLM wilderness inventory. Seiberling returned to Washington convinced that the BLM had indeed mismanaged the inventory, and told reporters: "They've left out areas that obviously qualify for wilderness—and I've seen a lot of them." *Id.*

104. *See* Daniel Glick, *A Wilderness Shell Game*, WILDERNESS, Winter 1995, at 14, 16–17. When Rep. Owens left Congress in 1993, Rep. Hinchey reintroduced H.R. 1500, with 5.7 million acres of proposed wilderness. In response, Utah Representative James Hansen offered H.R. 1745 in 1995—a bill that would designate only 1.2 million acres and which would have allowed unprecedented development of dams, roads, pipelines, and other facilities even *within* designated wilderness. *Id.* at 16. A companion bill to H.R. 1500 has been introduced in the Senate. *See* S. 773, 105th Cong. § 2(b)(1) (1997).

rior Bruce Babbitt ordered the BLM to re-inventory the lands included in H.R.1500—a move challenged by wilderness opponents in *Utah v. Babbitt.*[105] The Tenth Circuit Court of Appeals denied the plaintiffs' request for a preliminary injunction against the reinventory on the basis of standing and, therefore, never reached the question of whether FLPMA actually authorized such an undertaking.[106]

Utah's wilderness designations are still locked in a stalemate. Currently, Utah contains ninety-five WSAs, which cover 3.2 million acres, and only 2 million of those were recommended as suitable for wilderness.[107] In response to the creation of the Grand Staircase-Escalante National Monument in 1996, several Utah counties began to blade roads in the monument and in other potential wilderness areas, asserting that they held valid R.S. 2477 rights-of-way.[108] R.S. 2477 claims have become an important tool for wilderness opponents and have sparked many of the cases involving interim protection of potential wilderness areas.[109]

3. Interim Protection of WSAs

Unlike previous wilderness legislation, FLPMA requires the BLM to protect the wilderness values of both areas under inventory and WSAs.[110] All activities, except for those specifically exempted by FLPMA, must be regulated so as to prevent impairment of wilderness

105. *Babbitt*, 137 F.3d at 1199–1200.

106. *See id.* at 1216. The court did note that section 603 "envisions a much more comprehensive process . . . than that implemented by the [reinventory]," which did not address the suitability of the lands for management as wilderness. *See id.* at 1206 n.17. Therefore, authority for the Secretary's decision flowed from FLPMA's general land use planning provisions. *See id*; *see also* FLPMA §§ 201, 202, 43 U.S.C. §§ 1711, 1712 (1994). For the most part, the BLM has justified wilderness inventory work after 1991 (the deadline imposed by section 603) on the basis of these provisions. *See Babbitt*, 137 F.3d at 1206 n.17.

107. *See 1997 BLM Statistics*, *supra* note 71.

108. *See* Alexander H. Southwell, Comment, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZ. L. REV. 417, 435 (1996–97). Although R.S. 2477 was repealed, FLPMA expressly grandfathered rights-of-way established before 1976. *See* FLPMA §§ 701(a), (h), 43 U.S.C. § 1701 note (1994).

109. *See, e.g.*, Sierra Club v. Hodel, 848 F.2d 1068, 1077–79 (10th Cir. 1988).

110. Section 603(c) provides that during the inventory and study phase of the review, the Secretary:

> shall continue to manage such lands according to his authority under this Act and other applicable law in a *manner so as not to impair the suitability of such areas for preservation as wilderness*, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976; *Provided*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required *to prevent unnecessary or undue degradation* of the lands and their resources or to afford environmental protection.

FLPMA § 603(c), 43 U.S.C. § 1782(c) (emphasis added). The BLM has promulgated guidelines for management of land under wilderness review. *See* IMP, *supra* note 81, at 72,014. The Reagan administration limited the extent to which the BLM may restrict "valid existing rights" by amending the IMP in 1983. *See* Interim Management Policy and Guidelines, 48 Fed. Reg. 31,854, 31,854 (1983) [hereinafter Revised IMP].

suitability.[111] Management under the "nonimpairment" mandate essentially protects Congress's "right to make the designation decision by preventing actions that would pre-empt that decision"[112]—a concept which mirrors the *Parker* "proceed slowly" rationale.[113]

Implementing interim protections has proven to be a contentious issue, because FLPMA requires both interim protection and recognition of valid existing uses.[114] The BLM has recognized two standards for interim management in order to accommodate valid existing uses.[115] For lands that are not subject to existing uses, the "nonimpairment" standard applies and the agency must manage those lands so as to prevent impairment of their wilderness characteristics.[116] If a valid existing right exists, and if it can only be exercised through activities that will diminish an area's wilderness suitability, that use will be permitted to continue under the less stringent "nondegradation" standard.[117]

The BLM's Interim Management Policy was first upheld in *Utah v. Andrus*.[118] The court reiterated the principle established in *Parker*, noting that Congress did not want "future uses to be foreclosed by the impact of present activity."[119] It further acknowledged that for activities in potential wilderness areas, which are not subject to existing uses, the more stringent nonimpairment standard applies.[120] Although the opinion was not appealed, the Tenth Circuit adopted the district court's view of section 603 in *Sierra Club v. Hodel*.[121]

Section 603 does provide the BLM with a tool that could be used to protect potential wilderness, but the agency rarely applies the nonimpairment standard so as to prevent damaging activities. Neither court mentioned above attempted to clearly distinguish between the two standards; in fact, in *Utah v. Andrus*, the court weakened the nonimpairment standard by limiting the BLM's duty to preventing *permanent* impairment of wilderness suitability.[122] If the BLM determines that reclamation

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111. FLPMA § 603(c), 43 U.S.C. § 1782(c).

112. IMP, *supra* note 81, at 72,016.

113. Parker v. United States, 498 F.2d 793, 795 (10th Cir. 1971).

114. Section 603 recognizes grandfathered uses such as mining, grazing, and mineral leasing. *See* FLPMA § 603(c), 43 U.S.C. § 1782(c). Section 701(h) protects "valid existing rights." FLPMA § 701(h), 43 U.S.C. § 1701 note.

115. *See* Revised IMP, *supra* note 110, at 31,854–55.

116. *See id.*

117. *See id.*

118. 486 F. Supp. 995, 1007 (D. Utah 1979); *see also* Colorado Envtl. Coalition v. Bureau of Land Management, 932 F. Supp. 1247, 1251 (D. Colo. 1996) (noting that existing mineral leases are exempt from the nonimpairment standard).

119. *Andrus*, 486 F. Supp. at 1007.

120. *See id.* at 1004.

121. 848 F.2d 1068, 1085–87 (10th Cir. 1988) (characterizing the tension between interim protection and recognition of valid existing rights as a "latent ambiguity," the court deferred to the BLM's interpretation of section 603).

122. *See Andrus*, 486 F. Supp. at 1007–08.

or time will restore an area's suitability before recommendations are made—a factual matter left to the agency's expertise—it may permit temporary impacts.[123] Essentially, interim management has been left almost entirely to the discretion of the agency.[124]

### D. *Alaska National Interest Lands Conservation Act*

#### 1. Background

While public lands were being reviewed for wilderness throughout the United States, Congress had just begun to decide the future of Alaska's public lands. After Alaska became a state in 1959, Congress was primarily concerned with settling the distribution of land among the state, Native Alaskans, and the federal government.[125] Because of the uncertainty of future ownership, the reviews mandated by the Wilderness Act and FLPMA were not conducted in Alaska. Congress took a major step towards establishing additional conservation lands in Alaska with the Alaska Native Claims Settlement Act of 1971 (ANCSA),[126] which directed the Secretary of Interior to set aside up to 80 million acres for consideration as national parks, wildlife refuges, forests, and other conservation areas.[127] In 1977, only one year after FLPMA was enacted, the first legislation creating wilderness in Alaska was proposed.

In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA),[128] which placed more than 104 million acres of Alaska's federal lands into new or expanded national parks, refuges, forests, and other conservation areas.[129] Of these, 56.4 million acres were added to the National Wilderness Preservation System. Before ANILCA was enacted, only 116,320 acres of public lands in Alaska were desig-

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123. *See id.* at 1008–09.

124. *See* FLPMA § 603(b), 43 U.S.C. § 1732(b) (1994). FLPMA requires the BLM to manage *all* public lands, even those not under wilderness review, so as to "prevent unnecessary or undue degradation." *Id.* Given the BLM's application of section 603, and its treatment in the courts, management standards for WSAs do not differ much in effect from any other public lands under its jurisdiction.

125. *See* Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958) (codified at 48 U.S.C. § 21 note (Alaska Statehood) (1994)). Before Alaska became a state, all of its lands were federally owned. The Alaska Enabling Act granted Alaska the right to select for state ownership 104 million acres of land—approximately one-third of the state. *See* COGGINS ET AL., *supra* note 43, at 143; HENDEE ET AL., *supra* note 5, at 148.

126. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended in scattered sections of 16 U.S.C.); *see also* ANCSA Amendments, Pub. L. No. 94-204, 89 Stat. 1149 (1976) (codified as amended in scattered sections of 43 U.S.C.). 43 U.S.C. § 1616(d)(2) (1994)).

127. *See* 43 U.S.C. § 1616(d)(2) (codifying ANCSA § 17(a)(7), 85 Stat. at 707, *as amended by* ANCSA Amendments § 7, 89 Stat. at 1149); *see also* Leshy, *supra* note 74, at 377.

128. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C. and 43 U.S.C.).

129. *See* ANILCA §§ 701–704, 16 U.S.C. § 1132 note (1994). ANILCA is also commonly referred to as the "Alaska Lands Act."

nated wilderness.[130] Signing the Act on December 2, 1980, President Carter remarked: "Never before have we seized the opportunity to preserve so much of America's natural and cultural heritage on so grand a scale."[131]

2. Wilderness Review

Although wilderness opponents have argued that Congress did not intend to allow wilderness designations beyond those specifically provided by ANILCA, several sections of the Act clearly anticipate, in fact require, additional wilderness review of parks, refuges, and forests. For parks and refuges not designated as wilderness by ANILCA, the Act directed the Secretary of Interior to review all lands within those areas in accordance with the park and refuge provisions of the Wilderness Act.[132] It required the Secretary to submit his findings and recommendations to the President within five years, and directed the President to submit the final recommendation to Congress within the following two years.[133] The Act further required the Secretary of Agriculture to review forest lands within "wilderness study" boundaries, as established by ANILCA, and to report his recommendations to the President and Congress within three years.[134] The same procedures outlined for parks and refuges by the Wilderness Act applied.[135]

As of December 1990, the Department of Interior had reviewed 77 million acres of park and refuge lands in Alaska, finding that 67.8 million acres would be suitable for wilderness designation.[136] Although the Secretary had planned to recommend 8.1 million acres—only 11.9 percent of suitable lands—the recommendation process has been stalled.[137] To date, no recommendations have been made for Alaska's national parks and refuges.

BLM lands are in an even worse state of affairs. Except for BLM lands on Alaska's North Slope, ANILCA did not require the BLM to conduct a wilderness review for lands under its jurisdiction—it left that

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130. *See* ZASLOWSKY & WATKINS, *supra* note 15, at 345–46. The only pre-ANILCA wilderness areas in Alaska were managed as part of the National Wildlife Refuge System. *See id.*

131. THE WILDERNESS SOC'Y, THE ALASKA LANDS ACT: A BROKEN PROMISE 1 (1990) [hereinafter A BROKEN PROMISE].

132. *See* ANILCA § 1317(a), 16 U.S.C. § 3205(a).

133. *See* ANILCA § 1317(a), (b), 16 U.S.C. § 3205(a), (b).

134. *See* ANILCA § 704, 16 U.S.C. § 1132 note. ANILCA only created one such area—the Nellie Juan-College Fjord Study Area in the Chugach National Forest. *See id.* All of Alaska's national forest roadless areas were included in the Forest Service's nationwide RARE II study. Out of about 16 million roadless acres reviewed in Alaska, the Forest Service recommended wilderness for 5.6 million acres. *See* RARE II, *supra* note 40, at A-1.

135. *See* ANILCA § 704, 16 U.S.C. § 1132 note.

136. *See* A BROKEN PROMISE, *supra* note 131, at 6.

137. *See id.*

decision entirely up to the discretion of the Secretary of Interior.[138] In 1981, Secretary James Watt, a long-time wilderness opponent, issued a memorandum prohibiting any wilderness review of BLM lands in Alaska, and his decision has not been revoked by subsequent Secretaries.[139]

For the North Slope BLM lands, the Secretary of Interior was required to conduct a wilderness review along with an assessment of the area's potential for oil and gas development.[140] Unlike the other provisions discussed above, section 1004 of ANILCA established an interim management mandate similar to that imposed by FLPMA.[141] It required the Secretary to administer the BLM lands "so as to maintain presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System," subject to valid existing rights, "until Congress determines otherwise."[142] As with FLPMA, "established uses may be permitted to continue, subject to such restrictions as the Secretary deems desirable, in the manner and degree in which the same were being conducted on [the date of ANILCA's enactment]."[143]

ANILCA addressed management of the controversial Arctic National Wildlife Refuge coastal plain somewhat differently. While authorizing limited oil exploration in the coastal plain, ANILCA prohibited leasing or production activities unless directed otherwise by a subsequent act of Congress.[144] The Interior Department in 1987 recommended leasing the entire coastal plain for full-scale oil development, but Congress has not agreed to authorize production activities.[145]

## III. NATIONAL FOREST ROADLESS AREA PROTECTION—A CASE STUDY

This Part discusses the background and legal context of the Forest Service's roadless area moratorium. National forest roadless areas have long been at the center of debate over wilderness and public land management. Likewise, the Forest Service has pioneered ways to protect wilderness, utilizing its broad statutory grant of administrative authority. Chief Dombeck's moratorium on road construction in roadless areas could mark a historic turning point in federal land conservation policy. However, some have questioned whether the Chief's moratorium is on solid legal ground.

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138. *See* ANILCA § 1320, 43 U.S.C. § 1784.

139. *See* HANDBOOK, *supra* note 2, at 37.

140. *See* ANILCA § 1004, 16 U.S.C. § 3144.

141. *See* ANILCA § 1004(c), 16 U.S.C. § 3144(c). For a detailed discussion of FLPMA's interim management provisions, see *supra* Part II.C.3.

142. ANILCA § 1004(c), 16 U.S.C. § 3144(c).

143. *Id.*

144. *See* ANILCA § 1003, 16 U.S.C. § 3143. ANILCA also withdrew the coastal plain from all mineral entry. *See* ANILCA § 1002(i), 16 U.S.C. § 3142(i).

145. *See* ZASLOWSKY & WATKINS, *supra* note 15, at 309–12.

A. *Background*

The Forest Service administers the 192 million-acre National Forest System pursuant to a broad multiple-use legal mandate.[146] The agency has often been criticized for giving undue preference to timber production at the expense of recreation, wildlife, water quality, and other non-commodity uses and values of the forest. Yet, the Forest Service also has a long tradition of conservation advocacy, including development of wilderness designation and management policies that became the starting point of the current wilderness preservation system.

Inspired by the advocacy of conservationists Aldo Leopold and Arthur Carhart, the Forest Service broke new ground in the 1920s by designating the first of many wilderness preserves, including the Gila Primitive Area in New Mexico and the Boundary Waters Canoe Area Wilderness in Minnesota.[147] In 1929, Forest Service Chief William Greeley issued Regulation L-20, "providing formal guidelines for establishing and managing 'primitive' areas."[148] In 1939, at the urging of Director of Recreation Robert Marshall, the agency promulgated the "U Regulations," which provided for reclassification of primitive areas and gave more specific management direction.[149] A quarter century later, the Forest Service's system of wilderness/primitive areas and management guidelines were essentially written into law in the Wilderness Act.[150]

In the 1960s and 1970s, as discussed above, the Forest Service initiated the RARE process to inventory and recommend roadless areas for potential wilderness designation.[151] The political process of determining which areas would be designated as wilderness greatly increased public awareness and concern about roadless areas and their future. The heightened public interest in roadless areas coincided with an effort by the Forest Service during the 1980s to expand its system of logging roads into roadless areas that had been legislatively "released" from the RARE II court injunctions. Meanwhile, Congress continued to appropriate millions of dollars annually to fund logging road construction.

During the 1990s, conservationists succeeded in reducing substantially the amount of logging and road construction in the national forests.[152] Congress became increasingly skeptical of funding additional forest roads, particularly in roadless areas. In 1997, proposals to slash

146. *See* COGGINS ET AL., *supra* note 43, at 622–23.

147. *See* Wilkinson & Anderson, *supra* note 33, at 336–37.

148. *See id.* at 337–39 (citing McMichael v. United States, 355 F.2d 283, 284 n.3 (9th Cir. 1965)).

149. *See id.* at 339–40.

150. *See id.* at 340–41.

151. *See* discussion *supra* Part II.B.1.

152. Between 1987 and 1995, for example the total timber sale volume declined from 11.3 billion board feet to 2.9 billion board feet, while total road construction fell from 2,593 miles to 468 miles. *Compare* 1987 REPORT OF THE FOREST SERVICE 18, 37 (1987), *with* 1995 REPORT OF THE FOREST SERVICE 17, 30 (1995).

appropriations for new road construction barely lost in both the Senate and House. Several senators from the Southeast urged the Clinton Administration to defer new roads and timber sales in roadless areas pending revision of forest plans in that region.[153] In signing the 1998 Interior appropriations bill, President Clinton signaled the Administration's intention to "develop[] a scientifically based policy for managing roadless areas in our national forests."[154] The President declared, "These last remaining wild areas are precious to millions of Americans and key to protecting clean water and abundant wildlife . . . ."[155]

## B. *U.S. Forest Service Road Policy & Roadless Area Moratorium*

In February 1999, Forest Service Chief Mike Dombeck adopted an interim regulation of potentially great significance for roadless area protection.[156] The rule temporarily suspended road construction activities, including construction of temporary roads, in most national forest roadless areas.[157] The policy generally applies to roadless areas inventoried in RARE II or in subsequent forest plans. The road-building moratorium will last until the Forest Service adopts a revised road management policy, or no longer than eighteen months.[158]

The interim rule contained several exceptions. First, it did not apply to any national forest with a revised forest plan, including four Rocky Mountain forests and Alaska's Tongass National Forest, which contains more than 9 million acres of roadless land. Second, it exempted the nineteen Pacific Northwest national forests covered by the 1994 Northwest Forest Plan. The combined effect was to exclude about 15 million acres of roadless land from the policy.

Second, the interim policy left out a large amount of "uninventoried" roadless areas. However, it did cover about 250 thousand acres of roadless land in the Southern Appalachians that were missed by RARE II but identified by a federal interagency study.[159] The moratorium also applied to unroaded tracts greater than one thousand acres that are adjacent to inventoried roadless areas.[160]

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153. *See, e.g.*, Letter from Max Cleland et al., U.S. Senators, to Dan Glickman, Secretary of Agriculture (Nov. 14, 1997) (on file with author).

154. President's Statement on Signing the Department of the Interior and Related Agencies Appropriations Act of 1998, 33 WKLY COMP. PRES. DOC. 1809, 1810 (Nov. 14, 1997).

155. *Id.*

156. *See* Temporary Suspension of Road Construction in Unroaded Areas, 64 Fed. Reg. 7289, 7290 (1999) (to be codified at 36 C.F.R. § 212).

157. *See id.* at 7290.

158. *Id.*

159. *Id.* at 7298. *See generally* SOUTHERN APPALACHIAN FOREST COALITION & THE WILDERNESS SOC'Y, THE SOUTHERN APPALACHIAN ASSESSMENT: HIGHLIGHTS AND PERSPECTIVES 22 (1997) [hereinafter SAA HIGHLIGHTS].

160. 64 Fed. Reg. at 7298. In the Northwest, conservationists have contested timber sales in several areas that they contend qualify as roadless. *See, e.g.*, Smith v. Forest Service, 33 F.3d 1072,

In addition, the policy did not prohibit helicopter logging, oil and gas leasing, or trail construction for off-road vehicles (ORVs) within the inventoried roadless areas. ORV use has become an increasingly serious environmental problem in roadless areas and other public lands.[161]

Once the Forest Service adopts a revised road management policy, the interim rule will expire.[162] The long-term opportunity to extend and broaden the roadless area moratorium.

### C. *Legal Issues*

Opponents of the roadless area protection may challenge the interim rule or the revised road management policy in court, arguing that the decision was not adopted in accordance with procedures required by various laws.[163] Following is a brief analysis of two legal issues that may arise in such litigation.

#### 1. Authority to Protect Roadless Areas

One potential legal argument is that the Forest Service lacks statutory authority to prohibit road construction.[164] However, Congress has delegated exceptionally broad regulatory power to the Forest Service to protect national forest resources. The Organic Act of 1897 authorizes the agency to "make such rules and regulations and establish such service as will insure the objects of [the national forests], namely, to regulate their occupancy and use and to preserve the forests thereon from

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1079 (9th Cir. 1994) (enjoining timber sale affecting an uninventoried roadless area adjacent to an inventoried area).

161. *See generally* FRIENDS OF THE EARTH & WILDLANDS CENTER FOR PREVENTING ROADS, TRAILS OF DESTRUCTION (1998).

162. *See* 64 Fed. Reg. at 7290. The revision of the Forest Service's overall road management policy began with an Advance Notice of Proposed Rulemaking issued in conjunction with the proposed interim rule to suspend road construction in roadless areas. *See* 63 Fed. Reg. 4349 (1998). The notice acknowledged the need to reexamine the condition and function of the 373 thousand mile forest road system and take steps to remove unneeded roads, reduce environmental impacts, and use available funds more wisely. *See id.* at 4350–51.

163. A lawsuit challenging the interim policy was filed *pro se* shortly after release of the draft rule. *See* Respondents' Memorandum in Support of Motion to Dismiss at 2, Martin v. Glickman, (W.D. Va. 1998) (No. 98-M-05-R). The government argued that the case was premature since the draft rule was not final agency action. *See id.* The suit, which sought to enjoin the policy pending local public involvement and preparation of an EIS, was dismissed for failure to respond to a show cause order. *See* Telephone Interview with Vincent DeWitt, U.S. Dep't Agric., Office of General Counsel (Sept. 16, 1998).

164. *Cf.* Memorandum from Karen Budd-Falen & Gus Redmond Michaels, III to Tom McDonnell, Am. Sheep Indus. Ass'n (Mar. 26, 1998) (arguing that the NFMA and FLPMA do not grant "discretion to enact moratoriums or . . . manage roadless areas administratively" and that instead the laws "evidence Congressional intent to build roads for adequate transportation within the National Forests in order to honor access rights to existing multiple use interests located in roadless areas") (on file with author).

destruction"[165] The courts have consistently upheld Forest Service regulations and conservation actions taken under the authority of the Organic Act.[166]

The Multiple-Use Sustained-Yield Act of 1960 (MUSYA)[167] confirmed the Forest Service's expansive management authority. The MUSYA broadened the purposes of the national forests and clarified that "[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of [this Act]."[168] In *McMichael v. United States*,[169] the Ninth Circuit Court of Appeals ruled that the Organic Act and MUSYA authorized the Forest Service to prohibit use of motorized vehicles in a designated primitive area.[170] Similarly, the Forest Service has ample authority to adopt regulations that prohibit road construction and logging in roadless areas in order to protect the watershed, wildlife, recreational, and wilderness values of the national forests. Of course, the Forest Service's management discretion under the Organic Act and MUSYA has been curbed by various laws. The Endangered Species Act of 1973 (ESA),[171] for example, prohibits federal agencies from authorizing management activities that destroy critical habitat for endangered species.[172] However, there is scant statutory limitation on Forest Service decision-making authority to protect the environment and maintain management options.

2. Compliance with Planning Requirements

A second potential legal objection to the moratorium is that it violates the procedural requirements of the NFMA and NEPA. The NFMA requires the Forest Service to give public notice whenever it amends a forest plan and to undertake extensive analysis and public involvement if the amendment "would result in a significant change" in the plan.[173] Opponents of the roadless area moratorium argue that the Chief's interim policy violates the NFMA by changing existing forest plans without observing the Act's plan amendment process.[174]

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165. Organic Act of 1897, ch. 2, 30 Stat. 11, 35 (codified as amended at 16 U.S.C. § 551 (1994)).

166. *See, e.g.*, United States v. Grimaud, 220 U.S. 506, 509–14, 521, 523 (1911) (upholding grazing regulations); *see also* Wilkinson & Anderson, *supra* note 33, at 55–59.

167. Pub. L. No. 86-517, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528–531 (1994)).

168. *See* MUSYA § 2, 16 U.S.C. § 529.

169. 355 F.2d 283 (9th Cir. 1965).

170. *See McMichael*, 355 F.2d at 285–86.

171. Pub. L. No. 93-205, 87 Stat 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (1994)).

172. *See* ESA § 7, 16 U.S.C. § 1536(a)(2).

173. NFMA § 6, 16 U.S.C § 1604(f)(4) (1994).

174. *See* Letter from Frank Murkowski et al., U.S. Senators & Representatives, to Dan Glickman, Secretary of Agriculture (Nov. 13, 1997) ("[T]he NFMA does not allow instantaneous changes to the plans based on new policy direction. . . . Congress expects the Secretary of Agriculture to amend or revise the plans with the same degree of analysis it took to prepare the plans in the first instance.") (on file with author).

The Forest Service adopted the roadless area moratorium through informal rulemaking procedures similar to those required by the Administrative Procedures Act (APA).[175] Potentially, the agency could have chosen, in addition to or instead of the rulemaking, to amend the NFMA plans for all the national forests affected by the moratorium.[176] However, amending most of the 123 forest plans would have been cumbersome and inefficient, especially since many of the plans are already in the process of being revised. Further, the APA procedures provide the public with notice and opportunity to comment on the proposed moratorium, thereby substantially fulfilling the NFMA's basic notice requirement for plan amendments.[177] In addition, the Forest Service held twenty-five public meetings on the draft policy in affected regions of the country.

During the rocky course of plan implementation, the Forest Service has prevailed twice and lost once in lawsuits that have raised NFMA plan amendment issues. In *Southern Timber Purchasers Council v. Alcock*,[178] the timber industry argued that a regional policy providing greater habitat protection for the endangered red-cockaded woodpecker could not be implemented without a significant plan amendment.[179] The court rejected the industry's claim, finding:

> [T]he policy is a temporary attempt to preserve the status quo in certain discrete locations while a later policy can be weighed, which seriously limits the policy's significance to the [forest plan]. Moreover, the . . . policy merely calls a time-out during which the current [plan] strategy for protecting the red cockaded woodpecker . . . can be reevaluated.[180]

On appeal, the Eleventh Circuit vacated the judgement of the district court with respect to the NFMA claim, finding that the industry plaintiffs lacked standing to pursue the claim.[181]

The timber industry unsuccessfully raised the same argument in *Prairie Wood Products v. Glickman*.[182] In that case, the Forest Service adopted two sets of regional interim policies designed to protect old-

175. *See* 5 U.S.C. § 553 (1994). The APA specifically exempts decisions concerning federal lands from rulemaking procedures. *See id.* § 553(a)(2); *see also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 776 n.1 (1969) (noting that the public property exemption applies to BLM lands). Land management agencies, however, commonly do not take advantage of the exemption.

176. *See* NFMA § 6, 16 U.S.C. 1604(f)(4).

177. *See* 5 U.S.C. 553(b).

178. 779 F. Supp. 1353 (N.D. Ga. 1991), *vacated sub nom.*, Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 811 (11th Cir. 1993) (vacating for jurisdictional reasons).

179. *See Southern Timber*, 779 F. Supp. at 1360–61 (concluding that the district court lacked jurisdiction because the timber company and the Council lacked standing to bring claims under the Forest Management Act).

180. *Id.* at 1361.

181. *See Forest Service Timber*, 993 F.2d at 807–10.

182. 971 F. Supp. 457, 462, 472–74 (D. Or. 1997).

growth forests and salmon stream habitat in the Pacific Northwest.[183] The Forest Service implemented both policies through non-significant plan amendments for the nine affected national forests.[184] The court deferred to the Forest Service's determination of non-significance, ruling that "Congress has allowed the Forest Service substantial leeway in determining the significance of proposed forest plan amendments."[185] The court was not persuaded by evidence that the policies would reduce timber outputs by 58 million board feet, since "the Forest Service was obligated to consider its duty to meet other goals and objectives," such as wildlife and fish viability.[186]

The court in *Prairie Wood Products* also rejected the industry's claim that the Forest Service violated NEPA by failing to prepare an EIS on the regional interim policies. The court ruled that "[p]reparation of an EIS is . . . unnecessary when the agency's action merely prevents human interference with the physical environment rather than irretrievably committing resources."[187] Thus, no EIS was required for the interim policies, since they "are designed to arrest environmental degradation in order to preserve the environmental status quo."[188]

Both of the above cases involve the issue of whether a plan amendment is significant or non-significant, not whether a plan amendment is required in the first place. The only reported case addressing the latter issue is *House v. United States Forest Service*,[189] where a federal district court in Kentucky enjoined a Forest Service timber sale in potential habitat for the endangered Indiana bat, partly on the grounds that the agency had implemented bat habitat policies without adopting them as plan amendments.[190] In that case, however, the Forest Service provided no opportunity for public comment on the policies.[191] Thus, the decision provides little support for opponents of the moratorium, as the Forest Service provided extensive public involvement opportunities through the rulemaking process.

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183. *See Prarie Wood Prods.*, 971 F. Supp. at 460–61. Both policies were instituted pending completion of a longer-term regional strategy being developed through two EISs covering Forest Service and BLM lands in different parts of the Columbia River Basin. *See id.* at 461. One policy, called the "Eastside Screens," prohibited most logging in old-growth forests and near streams in eastern Oregon and Washington. *See id.* The second policy, called "PACFISH," expanded the riparian protection policy to anadromous fish habitats in Idaho and California. *See id.*

184. *See id.*

185. *Id.* at 465; *accord* Sierra Club v. Cargill, 11 F.3d 1545, 1548 (10th Cir. 1993) (The NFMA "expressly commends the significance of an amendment to the Forest Supervisor's judgment.").

186. *Prarie Wood Prods.*, 971 F. Supp. at 464, 465.

187. *Id.* at 467; *accord* Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995) ("NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment.").

188. *Prarie Wood Prods.*, 971 F. Supp. at 467.

189. 974 F. Supp. 1022 (E.D. Ky. 1997).

190. *See House*, 974 F. Supp. at 1024 n.1, 1028, 1034.

191. *See id.* at 1034.

## IV. LOOKING TO THE FUTURE: OPTIONS FOR WILDERNESS AND ROADLESS AREA PROTECTION

This Part examines opportunities to utilize existing legal authorities to expand the wilderness system and maintain options for future designations. It discusses models for future wilderness designation and review and proposes a new policy for managing the undesignated wilderness areas.

### A. *Wilderness Designation*

The ultimate goal for wilderness protection is to enact legislation that designates land as part of the National Wilderness Preservation System established by the Wilderness Act. Sooner or later, barring an unforeseen loss of public support for wilderness protection, Congress is likely to resume enacting legislation that adds new areas to the wilderness system. Legislation may "package" the wilderness additions in several different ways. None of these models will fit all situations.

Traditionally, most wilderness bills have designated several areas managed by a single federal agency in a single state. Examples include the numerous RARE II wilderness bills (national forests), the Arizona Desert Wilderness Act of 1990[192] (BLM), the Washington Park Wilderness Act of 1988[193] (national parks), and the pending America's Red Rock Wilderness Act[194] (Utah BLM). This model has the potential advantages of engaging a state's political representatives in the review and local debate over wilderness designation and of adding substantial amounts of wilderness in a single bill. However, it has the disadvantage of excluding political representation of interested citizens who do not reside in that state. Thus, some of the nation's finest wilderness remains undesignated and under serious threat in Alaska, Idaho, Montana, and Utah due to strong opposition by the states' congressional delegations.

A second commonly used approach is to designate single areas, such as in the Boundary Waters Canoe Area Wilderness Act of 1978[195] and the Alpine Lakes Area Management Act of 1976.[196] This model is especially appropriate where unique or complex management issues are involved that need to be specifically addressed in the legislation. It may also be easier to obtain political consensus on individual areas. The ma-

192. Pub. L. No. 101-628, 104 Stat. 4469 (codified as amended, in pertinent part, at 16 U.S.C. § 1132 note (1994 & Supp. II 1996)). The legislation also designated several national wildlife refuge wilderness areas.

193. Pub. L. No. 100-668, 102 Stat. 3961, 3961–63 (codified as amended, in pertinent part, at 16 U.S.C. § 1132 note).

194. H.R. 1500, 105th Cong. (1997).

195. Pub. L. No. 95-495, 92 Stat. 1649 (codified as amended, in pertinent part, at 16 U.S.C. § 1132 note).

196. Pub. L. No. 94-357, 90 Stat. 905 (codified as amended, in pertinent part, at 16 U.S.C. § 1132 note).

jor disadvantage is that it can be a time-consuming and inefficient use of the legislative process, especially where there are numerous, relatively small areas involved.

A third potential model is to take an "ecosystem" approach to wilderness designation. The outstanding example is ANILCA, in which Congress protected many wilderness areas managed by different agencies across a large landscape. Similarly, the pending Northern Rockies Ecosystem Protection Act covers a multi-state region and includes designation of biological corridors and recovery areas as well as wilderness areas.[197] This type of legislation has the potential advantage of providing greater benefits to fish and wildlife resources and attracting more scientific support. On the other hand, it can be very complex legislation in terms of drawing boundaries, defining management prescriptions, and explaining its objectives to the public.

Taking a step back from designation, Congress can require the federal agencies to study certain areas for potential addition to the wilderness system. Wilderness study was a prominent feature of the Wilderness Act, the Eastern Wilderness Act,[198] and other wilderness legislation. It can be an effective tool for providing interim protection, working out difficult boundary or management issues, or paving the way for eventual designation. However, wilderness study also can be a legislative copout—a means of trying to avoid or defer hard but necessary decisions.

### B. *Wilderness Inventory and Review*

Often a key step on the road to legislative designation is an administrative wilderness recommendation or at least verification that an area has wilderness qualities. About 26 million acres of undesignated wilderness areas have already been recommended for designation to Congress.[199] Yet, the currently recommended areas represent just 12 percent of the potential wilderness.

Ideally, Congress should establish a unified, inter-agency wilderness review process that would periodically update roadless area inventories and wilderness recommendations on all federal lands.[200] However, the agencies' general planning laws, like the NFMA, FLPMA, and NEPA,

197. H.R. 1425, 105th Cong. (1997).

198. H.R. 1567 § 4(a), 105th Cong. (1997).

199. *See supra* text accompanying note 19.

200. The Eastern Wilderness Act, a bill now pending, would require the federal land management agencies to inventory and review potential wilderness areas located east of the 100th Meridian. *See* H.R. 1567, 105th Cong. §§ 2(c)(3), 2(d), 3, 4(a). The proposed bill would also require the federal agencies to study the wilderness potential of state and private lands in the East. *See id.* § 3. The agencies would have to complete the reviews within 15 years. *See id.* § 4.

provide adequate legal authority and direction for on-going review of the undesignated wilderness.[201]

Both federal land managers and interested citizens can play important roles in gathering information and advising Congress on potential wilderness. Agencies have considerable discretion to design processes for conducting wilderness inventories and reviews, particularly since many of the procedures required by the Wilderness Act and FLPMA no longer apply. Several models are emerging in different parts of the country that engage citizens and agencies to varying extents.

In the Southeast, the Forest Service has re-inventoried its roadless areas as part of the Southern Appalachian Assessment—a wide-ranging, interagency study of the region's forests and surrounding environment.[202] The assessment also identified which roadless areas contain threatened and endangered species and possible old-growth forests.[203] In addition, the agencies conducted a public opinion survey which found, among other things, that 69 percent of Southern Appalachian residents thought there should be more designation of wilderness.[204] The new inventory included many areas that had been missed in RARE II; however, conservationists have criticized the agency for disqualifying areas on the basis of inadequate opportunities for solitude and backcountry recreation.[205] The Wilderness Society and other conservationists have prepared detailed maps of unprotected roadless areas in the region's six national forests.[206] The Forest Service intends to use the results of the assessment in the upcoming revision of forest plans, which will review the wilderness suitability of all national forest roadless areas in the region.[207]

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201. *See* NFMA § 6, 16 U.S.C. § 1604(e) (1994); FLPMA § 201(a), 43 U.S.C. § 1711(a) (1994); NEPA §§ 101-207, 42 U.S.C. §§ 4331-4370d (1994 & Supp. II 1996)). The National Park Service and U.S. Fish and Wildlife Service also have a policy of conducting wilderness reviews as part of their normal management planning. *See The Eastern Wilderness Act: Hearings on H.R. 1567 Before the Subcomm. on National Parks and Public Lands of the House Comm. on Resources*, 105th Cong. 39-41 (1997) (statement of Destry T. Jarvis, National Park Service).

202. *See* 4 SOUTHERN APPALACHIAN MAN AND BIOSPHERE, THE SOUTHERN APPALACHIAN ASSESSMENT (1996). For a useful summary of the assessment, see SAA HIGHLIGHTS, *supra* note 159.

203. *See* SAA HIGHLIGHTS, *supra* note 159, at 51.

204. *See id.* at 29.

205. *See id.* at 22.

206. *See, e.g.*, THE WILDERNESS SOC'Y, TENNESSEE'S MOUNTAIN TREASURES (1996); The Wilderness Society, *Conservation Coast to Coast: Center for Landscape Analysis: Mapping the Wild* (visited Nov. 6, 1998) <http://www.wilderness.org/ccc/cla/index.htm> (describing The Wilderness Society's mapping of the Sierra Nevada region, the Columbia River Basin, and the Southern Appalachians).

207. *See* Forest Service, U.S. Dep't of Agric., *Southern Appalachian Assessment Hits the Streets!* (visited Nov. 6, 1998) <http://www.fs.fed.us/news/080796.htm?southern+appalachian> (reporting on the release of the Southern Appalachian Assessment and stating "the USDA Forest Service plans to use the information in the assessment in the upcoming revision of several long term management plans for the National Forests in the Southern Appalachians").

California citizens and conservation organizations have taken the initiative to inventory all roadless areas in the state's national forests and BLM lands. Coordinated by the California Wilderness Coalition, the mostly volunteer effort is proceeding independently of the Forest Service and BLM.[208] The principal objective of the citizens' project is to develop legislative proposals for wilderness designation, rather than to change agency management plans or wilderness recommendations.

In Utah, the BLM and citizen wilderness advocates are conducting simultaneous but separate wilderness inventories. Founded in 1985, the Utah Wilderness Coalition has been the main force behind the legislative initiative to establish additional wilderness areas in Utah.[209] At the direction of Secretary of Interior Babbitt, the BLM is evaluating areas that are included in pending legislation but were omitted from the agency's earlier WSA inventory.[210] Meanwhile, citizens working with the Southern Utah Wilderness Alliance have completed their own inventory, identifying a total of 8.5 million acres of potential wilderness.[211]

Colorado citizen conservationists and BLM personnel are taking a more coordinated approach to address roadless areas.[212] The Colorado Environmental Coalition initially took the lead in re-inventorying BLM roadless areas, but the BLM made the next step by reviewing the Coalition's proposals and issuing its own recommended roadless area maps for public review and comment. Depending on public input, the BLM may adopt the updated roadless area inventory by amending its resource management plans.

These examples illustrate a trend toward greater participation by citizen groups in inventorying and mapping of unprotected wilderness areas. If land managers choose not to deal seriously with roadless area issues, citizens will likely bypass such agencies and go directly to members of Congress with new wilderness legislation and to the courts for interim protection of roadless areas. On the other hand, agency officials can take the initiative and seek out opportunities to collaborate with interested citizens—as well as other agencies and universities—to accom-

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208. *Cf.* California Wilderness Coalition, *California Wilderness Coalition* (last modified January 25, 1998) <http://www.calwild.org/f-mail.htm> (presenting information about the California Wilderness Coalition including its membership, mission, and projects).

209. *Cf.* Southern Utah Wilderness Alliance, *The BLM Wilderness Review* (visited Nov. 6, 1998) <http://www.suwa.org/WATE/review.html> (outlining the inventory of Utah's public lands for designation as wilderness by the Utah Wilderness Coalition, a private group of conservationists dedicated to maintaining the wilderness); *supra* notes 107–09 and accompanying text.

210. *See* Utah v. Babbitt, 137 F.3d 1193, 1207–08 (10th Cir. 1998).

211. *Cf.* Southern Utah Wilderness Alliance, *New Utah Wilderness Inventory: Fruition of the New Citizen's Inventory of Utah Wilderness* (visited Nov. 6, 1998) <http://www.suwa.org/new_inventory> (reporting on the Utah Wilderness Coalition's inventory of public lands in Utah).

212. *See* Memorandum from State Director, Colorado BLM Office, to District Managers, Area Managers, and Deputy State Director, Resource Services (May 19, 1997) (on file with authors) (setting forth policy for the management of lands described in the Colorado Environmental Coalition's wilderness proposal for BLM lands) [hereinafter Colorado BLM Directive].

plish wilderness reviews. Collaborative inventorying and mapping of roadless areas could save substantial amounts of agency time and resources.

### C. *Management of Unprotected Wilderness*

Roadless area management has been a long-standing battleground for conservationists, commodity development interests, and federal land managers. The debate traditionally has focused on whether roadless areas should be designated as wilderness or managed for commodity production.[213] For a variety of reasons, however, the terms of the debate have changed in recent years. Scientific documentation of widespread declines in fish and wildlife, water quality, and overall ecological integrity due to road construction, intensive logging, motorized recreation, and other human disturbances have underscored the increasingly important role of roadless areas in maintaining environmental quality.[214] Consequently, it has become more difficult for federal land managers to reconcile roadless area degradation with legal obligations imposed by NEPA, NFMA, the Clean Water Act, the Endangered Species Act, and other environmental laws. In general, federal land management priorities have shifted from producing commodity resources to protecting biological diversity and amenity values. Further, public opinion polls indicate widespread support for roadless area protection.[215]

Thus, a strong case can now be made for retaining the natural values and benefits of essentially all remaining roadless areas on federal land. Protecting roadless areas helps to maintain environmental quality and ensure compliance with existing environmental laws. A policy of maintaining the wild, undeveloped character of roadless areas would defuse much of the controversy and polarization that has beset federal land management, such as the annual debate over congressional appropriations for Forest Service road construction. It also would save millions of taxpayer dollars that are being spent on new logging roads, timber sales, and the

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213. *See, e.g.*, Forest Serv., U.S. Dep't of Agric., *Words to Action: Conservation Leadership for the 21st Century, Remarks of Mike Dombeck, National Leadership Conference, October 27, 1998* (visited Nov. 6, 1998) <http://www.fs.fed/us/intro/speech/19981027.html>.

214. *See, e.g.*, *supra* notes 65–67 and accompanying text (arguing that roadless areas should remain undeveloped based on studies of the potential effects on wildlife, water quality, and natural conditions if development were to take place in the roadless areas of the Columbia Basin); *see also* P.R. Ehrlich & E.O. Wilson, *Biodiversity Studies: Science and Policy*, 253 SCIENCE 758 (1991) (arguing that human action, specifically land development, is causing the extinction of wild species and ecosystems); Reed F. Noss, *Sustainability and Wilderness*, 5 CONSERVATION BIOLOGY 120, 120–21 (1991) (arguing for the necessity of roadless areas to provide habits for various species such as wolves, grizzly and black bears, and mountain lions).

215. *See* Ken A. Rait, *Forest Service Should Keep President Clinton's Promise*, OREGONIAN, Sept. 4, 1998, at 24, 26 (reporting on the nationwide opinion survey commissioned by The Wilderness Society finding that 65 percent of voters support a proposal to "stop all timber cutting in roadless wild forest areas").

preparation of site-specific EISs.[216] Moreover, it would preserve options for future generations by halting the irreversible loss of wild areas.

We recommend that the federal government adopt a legally-binding, long-term roadless area protection policy. Ideally, the policy should be enacted by Congress, as it did when it assumed responsibility for creating the Wilderness System. However, such a wildland policy could also be adopted administratively by the President through executive order or by the agencies through rulemaking, such as the Forest Service's moratorium on road construction in roadless areas.[217] Our recommended policy would include the following elements.

1. The policy should begin with a clear statement of intent to establish a national policy to protect in their natural condition the remaining wild, undeveloped public lands. In 1976, Congress settled a comparable, long-standing dispute over whether to dispose of BLM public lands or retain them in federal ownership by enacting FLPMA. Section 102 of FLPMA declared a national policy that "the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest."[218]
2. Consistent with scientific recommendations, the policy should define wildlands to include all roadless areas greater than one thousand acres in federal ownership and smaller tracts with significant wildland characteristics, such as old-growth forests.[219] The definition could also encompass additional, lightly-roaded public lands that are essentially in their natural state, as is current Forest Service practice for eastern national forests.[220]
3. The policy should at a minimum permanently protect federal wildlands from new road construction, logging, mineral development, and motorized vehicle use. Exceptions could be made on a case-by-case basis, either through land management planning (as FLPMA provides for disposal of public lands) or, perhaps in the case of large

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216. *See, e.g.*, 95 GEN. ACCT. OFF. REP. 237FS, at 2 (1995) (reporting that expenditures for timber sales exceeded receipts returned to the Treasury by a total of $995.4 million in three-year period); THE WILDERNESS SOC'Y, DOUBLE TROUBLE: THE LOSS OF TREES AND MONEY IN OUR NATIONAL FORESTS 1 (1998) (stating that the commercial timber sale program lost $204 million in 1996).

217. *See supra* Part III.C.

218. FLPMA § 102(a)(1), 43 U.S.C. § 1701(a)(1) (1994).

219. *See* Letter from Dominick Dellasala et al., Scientists, to President Clinton (Dec. 10, 1997) ("In our view, a scientifically-based policy for roadless areas on public lands should, at a minimum, protect from development all roadless areas larger than 1,000 acres and those smaller areas that have special ecological significance because of their contributions to regional landscapes.") (on file with author); *see also* H.R. REP. NO. 105-814 (1998) (proposing the Eastern Wilderness Act of 1997 which would provide interim protection for all roadless areas 500 acres or larger on federal lands east of the 100th Meridian).

220. *See* FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE LAND AND RESOURCE MANAGEMENT PLANNING HANDBOOK § 1909.12, § 7.11b (1992) (defining inventory criteria allowing for up to a half mile of improved road for each 1,000 acres).

areas, through an act of Congress (as ANILCA provides for drilling in the Arctic Coastal Plain). FLPMA's management direction for BLM Wilderness Study Areas, which preserves valid existing rights, is a potential model.[221] The overall management objective should be to maintain the status quo in order to preserve future options and the non-commodity values and uses of the areas. However, existing activities such as excessive grazing and fire suppression should be carefully scrutinized and curtailed where necessary to protect wildland values.

4. The policy should direct the federal land management agencies to inventory their wild lands on a regular basis. The inventory effort should focus on identifying uninventoried roadless areas larger than one thousand acres, as well as areas larger than five thousand acres that were missed by previous inventories. The agencies should collaborate with citizen groups like the California and Utah wilderness coalitions to conduct the inventories. National, regional, and local scientific panels should develop criteria and protocols and oversee the inventory process. All inventoried wildlands would be protected from development. While inventories are being completed, the NEPA process for any road-building, logging, and mining project would have to assess the affected area's wildland characteristics and make a determination that the project would not affect a de-facto wildland.[222]

## CONCLUSION

On the thirty-fifth anniversary of the Wilderness Act, a national consensus is emerging that our remaining wild public lands are valuable resources that should remain unspoiled. Yet, millions of acres of national forest and BLM roadless areas are subject to logging, mining, oil and gas drilling, and associated road construction, threatening irreversible losses of the nation's wilderness resource. In Idaho's national forests alone, one million acres of roadless land were lost to logging and road building during the past decade.[223]

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221. *See supra* Part II.C.3; *see also* H.R. REP. NO. 105-814 (1998) (proposing the Eastern Wilderness Act of 1997 which would apply FLPMA's interim protection requirement to potential wilderness areas on federal land east of the 100th Meridian); H.R. 1376, 105th Cong. (1997) (prohibiting road building and logging in public land roadless areas larger than five thousand acres in the West and 1500 acres in the East).

222. In Colorado, where the BLM is reviewing the wilderness characteristics of previously uninventoried areas, the agency has adopted a policy to "[i]nitiate an evaluation of an area or areas whenever discretionary actions that might have irreversible or irretrievable impacts are proposed in the areas recommended for wilderness by the [Colorado Environmental Council]" and "to hold discretionary actions that might have irreversible or irretrievable impacts temporarily in abeyance" pending resolution of wilderness issues through the BLM planning process. Colorado BLM Directive, *supra* note 212.

223. *See* THE WILDERNESS SOC'Y, IDAHO'S VANISHING WILDERNESS: A STATUS REPORT ON ROADLESS AREAS IN IDAHO'S NATIONAL FORESTS 1 (1997).

Due to public support for wilderness preservation, the success of the Wilderness Act has far exceeded the expectations of its original proponents. The land management agencies need to work collaboratively with citizens to review potential wilderness as part of normal planning processes. Congress, in turn, should resume the role it assigned to itself of evaluating agency and citizen-sponsored wilderness recommendations and making appropriate additions to the wilderness system.

In the meantime, though, the undesignated wilderness areas need greater protection to ensure that future generations have the option to preserve and enjoy ample wilderness resources. If we were to adopt a policy of protecting the remaining roadless areas, approximately 50 percent of America's federal lands would remain in a wild, natural condition.[224] This seems to be a reasonable balance between competing demands for federal lands. We owe it to ourselves and to future generations to let nature reign free over at least half of our public lands.

224. *See supra* Part I.B.