

WHERE THE WILD THINGS WERE: A CHANCE TO KEEP ALASKA'S CHALLENGE OF THE ROADLESS RULE OUT OF THE SUPREME COURT

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INTRODUCTION

In a 2010 decision out of the Tenth Circuit, an injunction against the Roadless Area Conservation regulations, known as the “Roadless Rule,”¹ was reversed, representing an important step in finally solidifying federal protection of the inventoried “roadless areas.” The Roadless Rule prohibits road construction, reconstruction, and timber harvesting in designated areas.² Between the Ninth and Tenth Circuits, there are now two major circuit decisions recognizing the validity of the Roadless Rule. These decisions are significant partly because they were decided by the two circuits most deeply impacted by the Roadless Rule, and are thus the most crucial in its survival. The Ninth and Tenth Circuits contain, respectively, the first and second largest National Forest lands areas subject to the Roadless Rule among judicial circuits.³

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1. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (codified at 36 C.F.R. § 294 (2012)) [hereinafter Roadless Rule].

2. *Id.*

3. See 2001 *Roadless Rule Maps*, U.S. FOREST SERV., <http://www.fs.fed.us/maps/> (follow “Roadless Area Conservation Maps” hyperlink) (last visited Sept. 8, 2012) (The U.S. Forest Service manages more than 190 million acres, of which nearly 58 million are inventoried roadless areas. Almost sixty percent of these managed areas, or 122,092,000 acres to be specific, are located within the Ninth Circuit, 43,274,000 of which are inventoried roadless areas; 41,758,000 acres of National Forest lands are located within the Tenth Circuit’s jurisdiction, 13,313,000 of which are inventoried roadless areas. Thus, between them, the

Prior to the recent Tenth Circuit decision, the Roadless Rule endured many political and legal challenges.⁴ Although the unanimous circuit decisions staved off the Roadless Rule's permanent injunction, the State of Alaska is currently attempting to essentially re-try the case in a new forum.⁵ This Article focuses on the Roadless Rule's history⁶ and ongoing litigation⁷, discussing the decisions upholding the Roadless Rule in the Ninth and Tenth Circuits. Finally, it analyzes Alaska's pending challenge in the District Court for the District of Columbia and the Roadless Rule's likely treatment should it reach the Supreme Court.⁸

I. HISTORY AND EVOLUTION OF THE ROADLESS RULE

The Organic Administration Act of 1897⁹ established the national forest system, and articulated a directive of the Forest Service: "No national forest shall be established, except to improve and protect the forest within . . . or for the purpose of . . . furnish[ing] a continuous supply of timber for the use and necessities of citizens . . ." ¹⁰ From this auspicious beginning, with two apparently competing interests to balance, the Forest Service is mandated to provide the public with access to and use of its forest lands, while simultaneously working to preserve, improve, and protect them.

Subsequently, the Wilderness Act of 1964¹¹ ("Wilderness Act")

Ninth and Tenth Circuit jurisdictions contain the vast majority of National Forests and Roadless lands, rendering the decisions by these circuits especially relevant in terms of the Roadless Rule's future).

4. See *Timeline of the Roadless Rule*, EARTH JUSTICE, <http://earthjustice.org/features/timeline-of-the-roadless-rule> (last visited Nov. 6, 2012) (containing a timeline showing various executive efforts to either suspend or bolster the Roadless Rule).

5. See *Alaska v. U.S. Dep't of Agric.*, No. 1:11-cv-01122 (D.D.C. filed June 17, 2011) (State of Alaska claiming that the Roadless Rule violates multiple National Acts); see also discussion *infra* Part II.

6. See generally *Timeline of the Roadless Rule*, *supra* note 4.

7. See generally TOM TURNER, *ROADLESS RULES: THE STRUGGLE FOR THE LAST WILD FORESTS* (2009) (reviewing the history of the Roadless Rule and related litigation).

8. It merits noting that the Supreme Court very recently refused to grant certiorari for a Tenth Circuit decision on the Roadless Rule. *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1210 (10th Cir. 2005), *cert. denied*, No. 11-1378, 568 U.S. ____ (Oct. 1, 2012); see *U.S. Supreme Court Leaves Roadless Rule Standing*, ENVIRONMENTAL NEWS SERVICE (Oct. 2, 2012, 11:57 AM), <http://enr.com/news/2012/10/02/u-s-supreme-court-leaves-roadless-rule-standing/> (describing Roadless Rule and the appellate history of the case). Nevertheless, the threat of future review by the Supreme Court remains.

9. Organic Administration Act of 1897, ch. 2, § 1, 16 U.S.C. § 475 (2012).

10. *Id.*

11. 16 U.S.C. §§ 1131-36 (2006).

established a procedure by which Congress can designate roadless areas as “wilderness,”¹² which had the effect of keeping them in a primitive state in perpetuity.¹³ Looking to preserve and protect forest lands, the Forest Service began the Roadless Areas Review and Evaluation (“RARE I”) in 1967 – the first attempt to inventory the roadless areas within the national forest system with the goal of ultimately recommending certain lands to Congress as appropriate for wilderness designation.¹⁴ Almost ten years later, in 1976, after a district court outlawed clear-cutting nationwide,¹⁵ Congress passed the National Forestry Management Act¹⁶ (“NFMA”), “allow[ing] the Forest Service to resume clear-cutting with certain restrictions” and accomplish its other interest.¹⁷ NFMA required the Forest Service to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System”¹⁸

In 1977, the Forest Service began RARE II, its second attempt to inventory the roadless areas within its jurisdiction.¹⁹ This effort, however, was short-lived; a successful court challenge, brought under the National Environmental Protection Act (“NEPA”)²⁰ against the Forest Service’s wilderness designation procedure, halted any further action by the Forest Service.²¹ When it became clear that there would be no RARE III, Congress took control of roadless area policy by enacting numerous bills to establish wilderness designations on a state-by-state

12. *Id.* § 1132(c).

13. *Id.* § 1131(a)–(c); *see also* TURNER, *supra* note 7, at 22 (noting that the Wilderness Act immediately set aside 9.1 million acres of national forest land and gave Congress the power to set aside more unspoiled areas).

14. *See* 16 U.S.C. § 1132(b) (describing the process of review).

15. *See generally* W. Va. Div. of Izaak Walton League of Am., Inc. v. Butz, 367 F. Supp. 422 (N.D. W. Va. 1973) *aff’d*, 522 F.2d 945 (4th Cir. 1975).

16. National Forest Management Act of 1976, 16 U.S.C. §§ 1600–14 (2012).

17. TURNER, *supra* note 7, at 23 (citing *Butz*, 367 F. Supp. at 422).

18. 16 U.S.C. § 1604(a).

19. *See* Christopher Cumings, *Judicial Iron Triangles: The Roadless Rule to Nowhere – And What Can be Done to Free the Forest Service’s Rulemaking Process*, 61 OKLA. L. REV. 801, 805–06 (2008) (RARE II was completed in 1979; the inventory identified 62 million acres as roadless areas within the national forest system and recommended to Congress 15.1 million acres as appropriate for wilderness designation).

20. National Environmental Protection Act, 42 U.S.C. §§ 4321–47 (2012) (NEPA establishes a national environmental policy and goals for the protection, maintenance, and enhancement of the environment. It also provides a process for implementing these goals and a series of procedural requirements that safeguard the constitutionality and legitimacy of any major federal environmental action.).

21. *See generally* California v. Block, 690 F.2d 753 (9th Cir. 1982) (holding that the Forest Service was not properly complying with NEPA).

basis.²²

In 1998, a survey revealed that the Forest Service faced an \$8.4 billion backlog of road maintenance and construction.²³ A year later, the Forest Service Chief published the “Interim Roadless Rule,” placing an eighteen-month moratorium on road building in national roadless areas.²⁴ In a move met with wide public support,²⁵ the Clinton administration promulgated the “Roadless Area Conservation” regulations, known as the “Roadless Rule.” The Roadless Rule, eventually adopted and made effective on March 13, 2001, established lasting protection for inventoried roadless areas in the National Forest System.²⁶ It set limits on road construction, reconstruction, and timber harvesting in designated areas, stating that these activities have the greatest potential for altering and fragmenting landscapes, which, in turn, would lead to immediate and long-term decline in the value and characteristics of roadless areas.²⁷ The environment’s health was in need of serious consideration on a national level, and, to that end, the Forest Service was granted authority to examine the “whole picture” of land management for roadless areas by implementing a nationwide management system.²⁸

In essence, the Roadless Rule forbids road construction and logging

22. See, e.g., Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (codified in scattered sections of 16 U.S.C. and 43 U.S.C.); California Wilderness Act of 1984, 16 U.S.C. § 543; Oregon Wilderness Act of 1984, 16 U.S.C. § 4600 (2012); Washington State Wilderness Act of 1984, 16 U.S.C. § 460pp (2012).

23. FOREST SERV., U.S. DEP’T OF AGRIC., ROADLESS AREA CONSERVATION FINAL ENVIRONMENTAL IMPACT STATEMENT VOLUME 1, at 1-5 (2000) (“Agency has an \$8.4 billion backlog in deferred maintenance, road reconstruction, and bridge and culvert maintenance and replacement on the more than 386,000 miles in the Forest Transportation System.”).

24. Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 36 C.F.R. § 212 (2012); see also *Wyo. Timber Indus. Ass’n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245 (D. Wyo. 2000) (challenging the interim rule).

25. See TURNER, *supra* note 7, at 35. Over one hundred members of Congress wrote to the president urging protection for roadless areas, and over a quarter-million emails supporting the moratorium crashed White House servers in a single weekend in June 1999. *Id.*

26. *Roadless Rule*, *supra* note 1, at 3244.

27. *Id.* at 3245 (The Roadless Rule discusses concerns for high quality or undisturbed soil, water, and air; sources of public drinking water; diversity of plant and animal communities; habitats for threatened and endangered species or those dependent on large areas of land; motorized and semi-primitive motorized classes of dispersed recreation; reference landscapes; natural landscapes with scenic quality; cultural properties and sacred sites; and other locally identified unique characteristics.).

28. *Id.* at 3246.

in inventoried roadless areas, which comprise about one third (58.5 million acres) of the National Forest System.²⁹ The rule had two elements: a “Prohibition Rule,” which banned road construction and reconstruction in inventoried roadless areas, and a “Procedural Rule,” which required forest managers to identify additional roadless areas and determine whether they warranted elevated protection.³⁰

The Roadless Rule does not restrict access to inventoried roadless areas, but instead prevents the construction of new roads and reconstruction of existing roads.³¹ It does not, as some assume, prohibit any sort of activity or development in an area, eliminating all economic use the land could provide.

Furthermore, the Roadless Rule includes several exceptions to the general prohibition against roadbuilding and timber harvesting in inventoried roadless areas. It allows for forest management activities that do not require the construction of new roads,³² construction or reconstruction of roads when necessary for public safety, response actions, and other events,³³ and even allows for certain exceptions to the general prohibition against timber harvesting in roadless areas.³⁴ Moreover, the Roadless Rule was intended to have a negligible real impact on timber sales nationwide, as the industry had already experienced sharp declines in the previous decade. To that end, the availability of timbered lands would not be affected.³⁵

A. The First Challenges to the Roadless Rule in Court

The State of Idaho was the first to challenge the proposed rule, claiming that the Forest Service’s scoping process violated NEPA,³⁶ but

29. *Id.* at 3244–45.

30. Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276, 30,288 (May 10, 2000).

31. *See Roadless Rule*, *supra* note 1, at 3249–50 (“[T]he final rule merely prohibits the construction of new roads and the reconstruction of existing roads in inventoried roadless areas.”).

32. *Id.* at 3250 (“[M]anagement actions that do not require the construction of new roads will still be allowed . . .”).

33. *Id.* at 3272–73 (listing circumstances under which a road may be constructed).

34. *Id.* at 3273 (listing circumstances under which timber can be cut, sold, and removed in roadless areas).

35. TURNER, *supra* note 7, at 36.

36. Scoping is required by NEPA regulations. 40 C.F.R. § 1501.7 (2012) (“There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.”).

the suit was dismissed.³⁷ On January 8, 2001, only three days after the Roadless Rule took effect, the Kootenai Tribe and others filed suit in the District of Idaho, alleging that the Roadless Rule was illegal and violated both NEPA and the Administrative Procedure Act.³⁸ Before the District Court published its opinion, President Bush postponed the Roadless Rule's effective date to May 12, 2001.³⁹

The State of Alaska also challenged the Roadless Rule. Specifically, Alaska sought to prevent its application to the Tongass National Forest, and, ultimately, the state reached a separate settlement with the Forest Service promulgating a new rule exempting the Tongass from the Roadless Rule.⁴⁰ This was a huge setback for the Roadless Rule, given that the Tongass National Forest is the country's largest tract of national forest land; under the Tongass exemption Alaska was essentially removed from the Roadless Rule's reach.⁴¹ However, this out of court settlement did not affect other states, and Idaho's challenge continued.

Despite postponement of the effective date, the Idaho District Court issued a nationwide injunction.⁴² The Ninth Circuit subsequently vacated the injunction, holding that the district court had abused its discretion in enjoining the rule.⁴³ The Court of Appeals determined that beyond providing adequate notice, the affirmative duties NEPA imposes are actually rather limited, so that the plaintiff's allegations of procedural invalidity⁴⁴ were insufficient to support an injunction.⁴⁵ The

37. *Idaho v. U.S. Forest Serv.*, No. CV99-611-N-EJL, 2000 WL 33417326, at *1 (D. Idaho Feb. 18, 2000).

38. *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1236 (D. Idaho 2001) [hereinafter *Kootenai I*].

39. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1106 (9th Cir. 2002), *abrogated in part on other grounds by* *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011) [hereinafter *Kootenai II*].

40. *See* Forest Serv., U.S. Dep't of Agric., Release No. 0200.03, USDA Retains National Forests Roadless Area Conservation Rule (June 9, 2003); *see also* Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75, 136 (Dec. 30, 2003) (to be codified at 36 C.F.R. § 294) (temporarily exempting the Tongass National Forest from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas).

41. Until last year, Alaska found itself removed from the litigation surrounding the Roadless Rule. A District Court decision reinstating the Roadless Rule in the Tongass, discussed *infra* Part II.3, and a renewed challenge to the Rule in the District of Columbia have brought Alaska back into the ongoing litigation of the Rule.

42. *See* *Kootenai Tribe of Idaho v. Veneman*, No. CV01-10-N-EJL, 2001 WL 1141275, at *2 (D. Idaho May 10, 2001) ("The Forest Service is HEREBY ENJOINED from implementing all aspects of the Roadless Area Conservation Rule.") (emphasis in original).

43. *Kootenai II*, 313 F.3d at 1104.

44. *See id.* at 1117 (The plaintiffs complained that the Forest Service violated

Court of Appeals also held that the Forest Service was not required to issue a supplemental Environmental Impact Statement (“EIS”) for the addition of 4.2 million acres of previously unidentified roadless areas to the final EIS.⁴⁶

Most importantly, the Court of Appeals held that the Forest Service impact statements analyzed an adequate range of alternatives as required by NEPA,⁴⁷ and held that the Forest Service was not required under NEPA to consider alternatives in its EIS that were inconsistent with its basic policy objectives.⁴⁸ Since the decision was published, the greatest criticisms have focused on the Ninth Circuit’s discussion of the Roadless Rule’s purpose, particularly the panel’s unsupported claims that “the policy of NEPA is first and foremost to protect the natural environment.”⁴⁹ Although critics claim that this is an overbroad and liberal reading of NEPA’s language that offers unfounded support for a bad rule, the Ninth Circuit’s decision granted the Forest Service the same presumption of lawful rulemaking that many agencies enjoy in court.⁵⁰ The Ninth Circuit also held that the Forest Service’s promulgation of the Roadless Rule complied with Congress’s intent in drafting NEPA.⁵¹ This was the first clear affirmation of the Roadless Rule’s constitutionality, a good indicator of its long-term legitimacy and survival (at least within the Ninth Circuit), and a major victory for its supporters.

The State of Wyoming filed its own suit challenging the rule, and a federal district court enjoined the rule’s nationwide application in July 2003, reaching its own finding that the Forest Service had violated NEPA and the Wilderness Act.⁵² However, after the Bush administration

NEPA’s “hard look” requirement by not providing maps of the potential affected areas at the scoping period. The Court disagreed, noting that the Forest Service had provided maps of the affected areas prior to issuing the draft EIS and had been engaged in ongoing studies and discussions with the plaintiffs for several years.)

45. *Id.* at 1104.

46. *Id.* at 1118.

47. *Id.* at 1120 (citing 40 C.F.R. § 1502.14).

48. *Id.* at 1121–22.

49. *See id.* at 1123 (“NEPA may not be used to preclude lawful conservation measures by the Forest Service and to force federal agencies, in contravention of their own policy objectives, to develop and degrade scarce environmental resources.”).

50. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”).

51. *Kootenai II*, 313 F.3d at 1120.

52. *Wyoming v. U.S. Dep’t of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo.

passed the State Petition Rule⁵³ in 2005, all pending legal challenges to the Roadless Rule were rendered moot, and the Tenth Circuit Court of Appeals vacated the Wyoming district court's 2003 injunction.⁵⁴

B. The Effective Repeal of the Roadless Rule by the State Petition Act

The new State Petition Act, dramatically different from the Roadless Rule, allowed governors from each state with roadless areas to petition the Secretary of Agriculture to establish their own management plans for roadless areas.⁵⁵ Individual state action allowed for greater flexibility, but also for far greater exceptions in terms of destruction of forested lands.⁵⁶

The Forest Service explained that the state petitioning process established by the new rule would "allow State-specific consideration of the needs of these areas,"⁵⁷ with the purpose of "[setting] forth a process for State-specific rulemaking to address the management of inventoried roadless areas . . ."⁵⁸ The Forest Service also explained that because the State Petition Rule was "merely procedural in nature and in scope" and thus would have "no direct, indirect, or cumulative effect on the environment," it could be categorically excluded from the procedural requirements of NEPA.⁵⁹ Under this exclusion, the Forest Service could implement the rule without complying with even the most basic requirements of NEPA, including the crucial EIS.⁶⁰

2003), *vacated* 414 F.3d 1207 (10th Cir. 2005).

53. *See generally* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (codified at 36 C.F.R. § 294).

54. *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1210 (10th Cir. 2005), *cert. denied*, No. 11-1378, 568 U.S. ____ (Oct. 1, 2012).

55. Notably, the regulations provided no standards or criteria to guide the Secretary of Agriculture in responding to a petition. *See* William J. Wailand, *A New Direction? Forest Service Decisionmaking and Management of National Forest Roadless Areas*, 81 N.Y.U. L. REV. 418, 418 (2006) (suggesting that the absence of standards may reflect an attempt to open roadless areas to development).

56. *See* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,654. One concern regarding the Roadless Rule was "the need for flexibility and exceptions to allow for needed resource management activities," because the "inflexible 'one-size-fits-all' nationwide rulemaking approach is flawed and there are better means to achieve protection of roadless area values." *Id.* at 25,656.

57. *Id.* at 25,655.

58. *Id.* at 25,661 (codified at 36 C.F.R. § 294.10).

59. *Id.* at 25,660.

60. *Id.* ("[T]he Department's assessment is that this final rule falls within FSH 1909.15, Section 31.1b and no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement.").

The Forest Service had clearly anticipated challenges to the 2005 rule, and therefore included a severability provision in the Roadless Rule to keep in effect any portions not invalidated pursuant to judicial review, and to block reinstatement of the old Roadless Rule.⁶¹ Several states, including California, New Mexico, Oregon, and Washington, almost immediately brought suit against the United States Department of Agriculture (“USDA”) and the Forest Service alleging violations of NEPA, the Endangered Species Act, and the rationality requirement of the Administrative Procedure Act.⁶²

C. Reinstatement of the Roadless Rule in the Ninth Circuit and Injunction in the Tenth Circuit

The Northern District of California invalidated the State Petition Act and reinstated the Roadless Rule in 2006.⁶³ The Ninth Circuit affirmed, holding that the Forest Service had violated both NEPA and the Endangered Species Act by adopting an approach to roadless area management in 2005 that was less protective of the environment than the approach reflected in the 2001 Roadless Rule, without considering the effects of the change on the environment as required under either statute.⁶⁴

Wyoming brought suit in response to the California District Court decision, and successfully enjoined the revitalization of the Rule.⁶⁵ A District Court in Washington issued a decision presuming that the 2001 Roadless Rule nevertheless remained in force, and went unchallenged.⁶⁶ In response, the California District Court modified the scope of its nationwide injunction, as a matter of judicial comity, so that the

61. *Id.* at 25,656 (“The Department wishes to make its intent clear that should all or any part of this regulation be set aside, the Department does not intend that the prior rule be reinstated, in whole or in part.”); *see also* 36 C.F.R. § 294.18 (2005) (“In the event that any provision . . . is determined . . . to be invalid . . . the remaining provisions . . . shall remain in full force and effect.”).

62. *See generally* California *ex rel.* Lockyer v. U.S. Dep’t of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006).

63. *Id.* at 916.

64. California *ex rel.* Lockyer v. U.S. Dep’t of Agric., 575 F.3d 999, 1005 (9th Cir. 2009) [hereinafter *Lockyer*] (holding that the USDA and the Forest Service violated NEPA by failing to comply with the environmental analysis requirement, violated the Endangered Species Act by failing to engage in the proper consultation before implementing the State Petitions Rule, and that the district court did not abuse its discretion by enjoining the State Petitions Rule and reinstating the Roadless Rule); *see also* discussion *infra* Part II.1.

65. Wyoming v. U.S. Dep’t of Agric., 570 F. Supp. 2d 1309, 1350–55 (D. Wyo. 2008).

66. Hogback Basin Pres. Ass’n v. U.S. Forest Serv., 577 F. Supp. 2d 1139, 1146 (W.D. Wash. 2008).

injunction of the State Petition Act was narrowly applied only within the Ninth Circuit and in New Mexico.⁶⁷ States outside the Ninth Circuit began the process of requesting the Secretary of Agriculture to issue individual state determinations.⁶⁸

II. LOCKYER AND WYOMING: HOW THE NINTH AND TENTH CIRCUIT COURTS OF APPEALS FINALLY GOT IT RIGHT

A. The *Lockyer* Court Enjoins the State Petition Act

In *Lockyer*, the Ninth Circuit considered how the State Petitions Rule promulgated by the USDA affected the Roadless Rule.⁶⁹ Although courts must generally defer to administrative agencies unless their actions are “arbitrary and capricious,”⁷⁰ the Ninth Circuit noted that the State Petitions Rule effectively repealed the Roadless Rule, and thus should be subject to review under NEPA⁷¹ because its implementation *could not* be considered “procedural only.”⁷² Consequently, since a drastic change in regulation, such as effectively repealing the Roadless Rule, was certainly enough to trigger NEPA public notice and comment, the court found that the USDA did not properly assert a valid reason for its classification of the State Petitions Rule as a categorical exemption under NEPA.⁷³ The court further found that the USDA had violated NEPA by arbitrarily determining that the State Petitions Rule would have no effect on listed species or habitats.⁷⁴

Finally, the Ninth Circuit held that the District Court of the Northern District of California did not abuse its discretion by reinstating the Roadless Rule,⁷⁵ stating that “[e]nvironmental injury, by its nature,

67. California *ex rel.* *Lockyer v. U.S. Dep’t of Agric.*, 710 F. Supp. 2d 916, 924 (N.D. Cal. 2008).

68. See, e.g., Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 1135 (Jan. 7, 2008) (codified at 36 C.F.R. § 294); Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 73 Fed. Reg. 43,544 (July 25, 2008) (codified at 36 C.F.R. § 294).

69. See *Lockyer*, 575 F.3d at 1011 (describing “arbitrary and capricious” standard for review).

70. *Id.*

71. See *id.* at 1014–17 (stating “the promulgation of the State Petitions Rule necessarily encompassed the permanent repeal of the Roadless Rule’s substantive protections” yet “the USDA could cite no occasion when [NEPA’s] categorical exclusion was used to repeal a rule with substantive effects on land management”).

72. *Id.* at 1016–17.

73. *Id.*

74. *Id.* at 1019.

75. *Id.* at 1020.

can seldom be adequately remedied by money damages and . . . , therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”⁷⁶ Alone among the Circuit Courts of Appeal, the Ninth Circuit considers the invalidation of an agency rule to cause the agency’s prior rule to be reinstated.⁷⁷ Under this precedent, the court concluded that the District Court rightfully reinstated the Roadless Rule in order to prevent further harm to roadless areas, gave meaningful consideration to the balancing of harm, and as such there was no abuse of discretion.⁷⁸

B. The Tenth Circuit Reverses the Permanent Injunction of the Roadless Rule

Contrary to expectations,⁷⁹ the Tenth Circuit reversed the District Court of Wyoming’s injunction of the Roadless Rule. The Appeals Court reviewed *de novo* the State of Wyoming’s challenge to the Roadless Rule, and held that the Roadless Rule did not contravene the Wilderness Act,⁸⁰ the Forest Service had acted within its authority under the Organic Act and the Multiple Use Sustained Yield Act (“MUSYA”)⁸¹ to regulate National Forest lands,⁸² and the Forest Service fully complied with the requirements of NEPA.⁸³

Although the Tenth Circuit tracked the opinion of the lower court, evaluating the same arguments with the same evidence, it emerged with vastly divergent results.⁸⁴ Comparing the aims of the Wilderness Act with those of the Roadless Act, the court determined that the two acts are not functionally equivalent and the Roadless Rule does not violate the Wilderness Act by creating *de facto* wilderness.⁸⁵ The Tenth Circuit echoed the Ninth Circuit in holding that the Forest Service possesses

76. *Id.* (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987)).

77. *Id.* (quoting *Paulson v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005)).

76. *Id.*

79. See Kyle J. Aarons, Note, *The Real World Roadless Rules Challenges*, 109 MICH. L. REV. 1293, 1311 (2011) (providing a lively defense of the merits of the District Court of Wyoming’s opinion enjoining the Roadless Rule and predictions that the 10th Circuit would affirm District Judge Brimmer’s opinion).

80. *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1234 (10th Cir. 2011).

81. 16 U.S.C. §§ 528–31.

82. *Wyoming*, 661 F.3d at 1235.

83. *Id.* at 1253–54.

84. *Id.* at 1228–42.

85. *Id.* at 1229–30. The Court also pointed out that the Roadless Rule, which provides broader exceptions for when new road construction or reconstruction can occur, is less restrictive in terms of “grazing,” and allows for mineral development to a greater extent than the Wilderness Act. *Id.* at 1232–33.

broad discretion to regulate national forests, including for conservation purposes.⁸⁶

1. *The Roadless Rule did not violate the Wilderness Act because it did not establish de facto wilderness areas*

In its analysis, the Tenth Circuit evaluated Wyoming's claim that the Roadless Rule constituted a *de facto* designation of "wilderness" in contravention of the Wilderness Act.⁸⁷ The court analyzed the language of both regulations, noting that the Wilderness Act defined "wilderness" as "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain," as well as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation."⁸⁸

As previously discussed, the Wilderness Act prohibits any "permanent" or "temporary road," and road maintenance activities, subject to limited exceptions, and prohibits any use of motor vehicles.⁸⁹ On the other hand, the Roadless Rule restricts *only* road construction and commercial timber harvesting, while allowing existing classified roads⁹⁰ to be maintained.

The court ultimately held that "[t]hese distinctions clearly demonstrate that wilderness areas governed by the Wilderness Act and [inventoried roadless areas] governed by the Roadless Rule are not only distinct, but that the Wilderness Act is more restrictive and prohibitive than the Roadless Rule."⁹¹ Since "the [inventoried roadless areas] governed by the Roadless Rule are not *de facto* administrative wilderness areas," the court determined the district court erred by holding otherwise.⁹²

2. *The Roadless Rule Was Promulgated Pursuant to Broad Authority Granted by Congress in the Organic Act*

The court next addressed "whether the Forest Service otherwise acted within its statutory authority in promulgating the Roadless Rule."⁹³ The court found that "[t]he Organic Act gives the Forest Service broad discretion to regulate the national forests, including for

86. *Id.* at 1270.

87. *Id.* at 1229.

88. *Id.* at 1228.

89. Wilderness Act of 1964, 16 U.S.C. § 1133(c) (2012); 36 C.F.R. § 293.6.

90. Protection of Inventoried Roadless Areas, 66 Fed. Reg. 3244, 3250-51 (Jan. 12, 2001) (to be codified at 36 C.F.R. § 294.12(c)).

91. *Wyoming*, 661 F.3d at 1233.

92. *Id.*

93. *Id.* at 1234.

conservation purposes[.]”⁹⁴ and this broad rulemaking authority granted to the Forest Service under the Organic Act “is alone sufficient to support the Forest Service’s promulgation of the Roadless Rule.”⁹⁵

The court continued its analysis, further finding support in MUSYA, which grants the Forest Service broad discretion in its authority to manage NFS lands,⁹⁶ and states that “establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of [the Act],”⁹⁷ “to be supplemental to, but not in derogation of,” the Organic Act.⁹⁸ The Court of Appeals finally concluded that “the Forest Service had the authority . . . to promulgate a rule protecting NFS lands through restrictions on commercial logging and road construction” under both the Organic Act and MUSYA.⁹⁹

Wyoming reasserted its MUSYA claim as an alternate ground for affirming the district court’s injunction of the Roadless Rule, arguing that the Roadless Rule was inconsistent with MUSYA purposes because it applied a “one size fits all approach.”¹⁰⁰ The court, however, noted that “contrary to Wyoming’s argument, the [Roadless Rule] conforms to the multiple-use mandate of MUSYA, including management of NFS lands for ‘outdoor recreation,’ ‘watershed,’ and ‘wildlife and fish purposes.’”¹⁰¹ The Court admitted that “the Roadless Rule does not permit all uses specifically identified in MUSYA—namely, ‘timber’ purposes” but correctly pointed out that *this is not required under MUSYA*.¹⁰² The Forest Service has acted properly under the limitations of both the Organic Act and MUSYA in promulgating the Roadless Rule.

3. *The Forest Service Complied with the Mandates of NEPA and Did Not Act Arbitrarily and Capriciously in Conducting Its NEPA Analysis.*

The court then reviewed NEPA. Wyoming asserted that in promulgating the Roadless Rule, the Forest Service violated the NEPA by failing to: conduct adequate scoping, grant Wyoming cooperating-agency status, consider a reasonable range of alternatives, consider the cumulative impacts of the proposed action, prepare a supplemental EIS and take a “hard look” at the environmental consequences of the

94. *Id.*

95. *Id.* at 1235 (internal citations omitted).

96. *Id.*

97. Multiple Use Sustained Yield Act of 1960, 16 U.S.C. § 529 (2012).

98. *Id.* § 528.

99. *Wyoming*, 661 F.3d at 1235.

100. *Id.* at 1266–67.

101. *Id.* at 1267–68.

102. *Id.* at 1268.

action.¹⁰³ Several of these arguments were summarily struck down, so only the most crucial to the Rule's legitimacy and to its future defensibility will be discussed.

a. The Forest Service reasonably limited the range of alternatives to those that furthered the defined purpose of the Roadless Rule

The district court's opinion contains a noticeable thread of bias, resulting in a flawed opinion that erroneously found every Forest Service decision arbitrary and capricious regardless of the record. The district court had held that the Forest Service violated NEPA by "'fail[ing] to rigorously explore and objectively evaluate all reasonable alternatives'" to the proposed action.¹⁰⁴ The Tenth Circuit, however, found that the Forest Service "satisfied NEPA's requirements by analyzing a full range of reasonable alternatives that would satisfy" the purpose of the Roadless Rule.¹⁰⁵ As the court stated, "[u]nder NEPA, our role in reviewing the Forest Service's EIS 'is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions.'"¹⁰⁶ The court concluded that the Forest Service considered a reasonable range of alternatives in detail in the EIS, reasonably limited those alternatives for consideration to the ones that furthered the defined purpose of the Roadless Rule, and gathered sufficient information to "take a hard look at the environmental impacts of the proposed [rule] and its alternatives."¹⁰⁷

b. The Forest Service did not impermissibly predetermine the outcome of the Roadless Rule proceeding

The last section of the appellate court's NEPA analysis is noteworthy, because it begins by stating that even if the district court were correct that "the end-product of the Roadless Rule NEPA process was 'predetermined' and 'preordained,' it never decisively concluded that 'predetermination' or 'bias' constituted a separate ground for relief under NEPA."¹⁰⁸ In fact, "[i]n analyzing the environmental impacts of a proposed action under NEPA, *agency officials are not required to be 'subjectively impartial.'*"¹⁰⁹

The regulations promulgated by the Center for Environmental Quality, the reviewing body for the Environmental Protection Agency

103. *Id.* at 1237.

104. *Id.* at 1243.

105. *Id.* at 1243, 1247.

106. *Id.* at 1256-57.

107. *Id.* at 1250.

108. *Id.* at 1263.

109. *Id.* (emphasis added).

and other environmental agencies, *expressly indicate* that an “agency can have a preferred alternative in mind when it conducts a NEPA analysis[.]”¹¹⁰ so long as the agency takes the requisite “hard look” under NEPA.¹¹¹ The court, defining “predetermination” as occurring *only* when an agency “irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome,”¹¹² makes it clear that “predetermination is different in kind from mere ‘subjective impartiality[.]’” which “does not undermine an agency’s ability to engage in the requisite hard look at environmental consequences”¹¹³

After reviewing the record, the court concluded that “the Forest Service did not irreversibly and irretrievably commit itself to a certain outcome before it had completed its NEPA analysis.”¹¹⁴ Wyoming “simply [did] not satisfy the stringent standard applicable to claims of predetermination under NEPA.”¹¹⁵ The Forest Service did *not* act arbitrarily and capriciously in conducting its NEPA analysis in promulgating the Roadless Rule.¹¹⁶

In its final order, the Tenth Circuit held that the district court abused its discretion in permanently enjoining the Roadless Rule on a nationwide basis.¹¹⁷ Accordingly, the Tenth Circuit reversed,¹¹⁸ bringing the Tenth Circuit in line with the Ninth Circuit and effectively reestablishing the Roadless Rule nationwide.

III. ALASKA IN THE FEDERAL COURTS AND ITS POSSIBLE EFFECT ON CIRCUIT SPLIT

In June 2011, the State of Alaska filed the most recent challenge to the Roadless Rule in the District of Columbia District Court.¹¹⁹ This suit was brought both in response to a decision in the District of Alaska striking the Tongass exemption and reinstating the Roadless Rule,¹²⁰ and as a means of relitigating in a new forum to avoid the Ninth Circuit’s

110. *Id.*

111. *Id.*

112. *Id.* at 1264.

113. *Id.*

114. *Id.*

115. *Id.* at 1265.

116. *Id.* at 1266.

117. *Id.*

118. *Id.*

119. Plaintiff’s Complaint at ¶ 1, *Alaska v. U.S. Dep’t of Agric.*, No. 1:11-cv-01122 (D.D.C. filed June 17, 2011).

120. *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 776 F. Supp. 2d 960, 976–77 (D. Alaska 2011).

Lockyer precedent.¹²¹ The challenge focuses on the Tongass and Chugach national forests in Alaska, but also seeks to strike down the rule nationwide.¹²² While the case raises many of the same claims as previous challenges to the Rule,¹²³ claims which have been rejected both by the Ninth and Tenth Circuits, it also includes claims specific to Alaska: it is alleged that the Roadless Rule violates the Alaska National Interest Lands Conservation Act (“ANILCA”)¹²⁴ and the Tongass Land Management Plan of 2008.¹²⁵

Alaska has filed pursuant to the Administrative Procedure Act¹²⁶ and the Declaratory Judgment Act,¹²⁷ alleging violations of ANILCA, the Tongass Timber Reform Act, the Wilderness Act, NFMA, NEPA, MUSYA, the Organic Administration Act, and the Administrative Procedure Act.¹²⁸ Alaska recites nearly verbatim the argument presented in the District of Wyoming’s now overruled opinion.¹²⁹ Alaska alleged that the USDA arbitrarily and capriciously denied multiple requests to extend the comment period, denied adequate information and maps to interested parties, denied requests from ten states to participate in the rulemaking as cooperating agencies, failed to consider adequate alternatives to “roadlessness,” and refused to provide an exception for access to new leasable minerals.¹³⁰ Alaska further alleged that the ANILCA should never have been extended to the Tongass National Forest.¹³¹

121. See *Kootenai II*, 313 F.3d 1094, 1104 (9th Cir. 2002) (“This case involves procedural challenges to a United States Forest Service rule, known commonly as the ‘Roadless Rule,’ with a potential environmental impact restricting development in national forest lands representing about two percent of the United States land mass.”).

122. Plaintiff’s Complaint at ¶ 1, *Alaska v. U.S. Dep’t of Agric.*, No. 1:11-cv-01122 (D.D.C. filed June 17, 2011).

123. *Wyoming*, 661 F.3d at 1209; *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999 (9th Cir. 2009).

124. 16 U.S.C. § 3101 (1980).

125. Plaintiff’s Complaint, *supra* note 119, at ¶ 1.

126. 5 U.S.C. §§ 701-706 (2012).

127. 28 U.S.C. §§ 2201-2202 (2012).

128. Plaintiff’s Complaint, *supra* note 119, at ¶ 1.

129. *Wyoming v. U.S. Dep’t of Agric.*, 570 F. Supp. 2d 1309, 1319-20 (D. Wyo. 2008). The State of Alaska apparently never contemplated that the Tenth Circuit would so soundly reject the reasoning of its lower court, and therefore assumed that the arguments it made in accordance with the opinion of the District of Wyoming would have a foregone conclusion in Alaska’s favor. Alaska will likely benefit from extensive briefing to downplay the significance of the Tenth Circuit decision overruling the District of Wyoming, as well as the Supreme Court’s subsequent decision to deny certiorari.

130. Plaintiff’s Complaint, *supra* note 120, at ¶¶ 10-36.

131. *Id.*

A. Alaska's Challenge Properly Belongs in the Ninth Circuit

The State of Alaska is re-opening litigation on a new front, in what appears to be blatant forum shopping. There is a significant risk that by filing a second case in a different circuit, the State is attempting to circumvent *stare decisis* in the Ninth Circuit.

While the operative facts and impact of this case are linked to the District of Columbia, they are more properly linked to the District of Alaska.¹³² It is undisputed law in the District of Columbia that “[w]hen the events occur in more than one district, a court can consider which jurisdiction has the stronger factual nexus to the claims.”¹³³ The State of Alaska can claim that venue in the District of Columbia is proper because the subject matter of the suit, the application of the Roadless Rule and the enjoinder of the Tongass Exemption, arises out of and is connected with transactions that occurred in, and regulations promulgated by agencies headquartered in, the District of Columbia. This assertion, however, is not enough to overcome the more substantial nexus the State of Alaska has with the District of Alaska, in the Ninth Circuit.

Courts in the District of Columbia, in particular amongst federal courts, examine venue challenges carefully in order “to guard against the danger that a plaintiff might manufacture venue in the District of Columbia.”¹³⁴ The problem with Alaska filing in the District of Columbia is not only that it avoids *stare decisis* in the Ninth Circuit, but it forces defendants and intervenor-defendants in the controversy to relitigate claims previously tried and determined in the Ninth Circuit. In fact, several of the plaintiff’s claims have already been litigated in the Ninth Circuit *Kootenai* case, a decision supported by the Tenth Circuit *Wyoming* case.¹³⁵

Transferring this case to the District of Alaska serves the interests of justice in that it will discourage forum shopping by the plaintiff. The District of Columbia “cannot find that it is in the interest of justice to encourage, or even allow, a plaintiff to select one district exclusively or

132. See *Wilderness Soc’y v. Babbitt*, 104 F. Supp. 2d 10, 14 (D.D.C. 2000). In prior litigation of a similar challenge to an agency rule, the extensive involvement of the Secretary of the Interior in the conduct of various environmental studies relating to the conduct of oil and gas resources in Alaska supported venue in D.C. because of “the national scope of the environmental issue.” *Id.*

133. *Miller v. Insulation Contractors, Inc.*, 608 F. Supp. 2d 97, 102 (D.D.C. 2009).

134. *Cameron v. Thornburgh*, 983 F.2d 253, 256 (D.C. Cir. 1993).

135. Discussed *supra*, Section II.

primarily to obtain or avoid specific precedents, particularly in circumstances such as these where the relevant law is unsettled and the choice of forum may well dictate the outcome of the case.”¹³⁶ “[M]ere involvement . . . on the part of federal agencies, or some federal officials who are located in Washington, D.C. is not determinative” of whether the plaintiff’s choice of forum receives deference.¹³⁷

Because the focus of Alaska’s litigation in the District of Columbia is the Roadless Rule’s application in the State of Alaska, and this litigation is inextricably intertwined with the appeal in the Ninth Circuit requesting reinstatement of the Tongass Exemption, the District Court for the District of Columbia is an inappropriate venue. Alaska’s case should be transferred to a court in the Ninth Circuit for adjudication.

B. The District of Columbia should follow the Ninth and Tenth Circuits in upholding the Roadless Rule.

Because NEPA, NFMA, MUSYA, and the Wilderness Act do not provide a private right of action, the court must review the Forest Service’s promulgation of the Roadless Rule as a “final agency action” under the Administrative Procedure Act.¹³⁸ The Administrative Procedure Act provides for judicial review of final agency action, and requires the agency to have examined relevant data and to articulate a satisfactory explanation for its action.¹³⁹ “The determination whether the [agency] acted in an arbitrary and capricious manner rests on whether it ‘articulated a rational connection between the facts found and the choice made.’”¹⁴⁰

In its complaint to the District Court of the District of Columbia, the

136. *Schmidt Labs., Inc. v. Hartford Accident and Indem. Co.*, 654 F. Supp. 734, 737 (D.D.C. 1986); *see also* *Turner & Newall PLC v. Canadian Universal Ins. Co.*, 652 F. Supp. 1308, 1312 (D.D.C. 1987); *but see* *Cheeseman v. Carey*, 485 F. Supp. 203, 215 (S.D.N.Y. 1980), *remanded*, 623 F.2d 1387 (2d Cir. 1980) (opining that “[f]orum shopping is no more an evil than any other tactical determination a party makes in its behalf. Any competent lawyer chooses a forum with his or her client’s interest in mind.”).

137. *Stockbridge-Munsee Cmty. v. United States*, 593 F. Supp. 2d 44, 47 (D.D.C. 2009) (transferring case and refusing to defer to the plaintiffs’ choice of forum, despite the fact that “the administrative action at issue . . . arose in Washington”) (internal citations and quotations omitted); *see also* *Starnes v. McGuire*, 512 F.2d 918, 925 n.7 (D.C. Cir. 1974) (en banc).

138. 5 U.S.C. § 551 (2012).

139. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

140. *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003) (quoting *Pub. Citizen v. Dep’t. of Trans.*, 316 F.3d 1002, 1020 (9th Cir. 2003)).

State of Alaska alleges that the Roadless Rule violates ANILCA¹⁴¹ and the Tongass Timber Reform Act (“TTRA”)¹⁴² by setting aside nearly 15 million acres of roadless areas in the Tongass and Chugach forests without congressional authorization.¹⁴³ Even if these claims were appropriate for the District Court of the District of Columbia to review, rather than transferring them to the Ninth Circuit, where they are already being reviewed on appeal,¹⁴⁴ they face a difficult battle.

This appeal has weight, as the Tongass was initially regulated separately from the Roadless Rule and Alaska’s interests are directly injured by the application of the Rule to the Tongass National Forest. However, the Ninth and Tenth Circuits have both reviewed the authority of the Forest Service to promulgate the Roadless Rule, and its compliance with NEPA procedure in doing so.¹⁴⁵ While the State of Alaska claims that the Forest Service violated its mandate under the Organic Act and MUSYA,¹⁴⁶ the Tenth Circuit has clearly stated that “the Forest Service had the authority to promulgate a rule protecting NFS lands through restrictions on commercial logging and road construction” under both Acts.¹⁴⁷ The D.C. District Court is unlikely to reach a different conclusion than the Tenth Circuit on this issue, and Alaska faces an uphill battle in persuading the court of its position.

Alaska also demands remedy for the violation of the Wilderness Act, alleging that the Roadless Rule mandates management of inventoried roadless areas in the national forests as *de facto* wilderness.¹⁴⁸ However, as discussed *supra*, the Tenth Circuit has definitively addressed this argument, holding that “the [inventoried roadless areas] governed by the Roadless Rule are not *de facto* [sic] administrative wilderness areas.”¹⁴⁹ Almost anticipating Alaska’s argument, the court

141. 16 U.S.C. § 3101 (2012), *et seq.* Under ANILCA, Congress intended to preserve certain lands and waters in the State of Alaska “that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values. . . .” *Id.* § 3101(a).

142. 16 U.S.C. § 539d (2012). The TTRA represents another Congressional attempt to legislate specifically to Alaska, providing for separate management of the Tongass National Forest. *Id.*

143. Plaintiff’s Complaint, *supra* note 119, at ¶ 57.

144. *See* Order, Organized Vill. of Kake v. U.S. Dep’t of Agric., No. 11-35517 (9th Cir. filed June 17, 2011).

145. For discussion of the decisions in *Wyoming v. U.S. Dept. of Agric.*, 661 F.3d 1209 (10th Cir. 2011) and *Kootenai II*, 313 F.3d 1094, (9th Cir. 2011), which reviewed the Forest Service’s authority to promulgate the Roadless Rule and its compliance with NEPA procedure, see *supra* Section II.

146. Plaintiff’s Complaint, *supra* note 119, at ¶¶ 79–83.

147. *Wyoming*, 661 F.3d 1209, 1235 (10th Cir. 2011).

148. Plaintiff’s Complaint, *supra* note 119, at ¶ 66.

149. *Wyoming*, 661 F.3d at 1233.

specifically addressed the probable restrictions on mining interests, noting that “the Roadless Rule imposes no general prohibition on mining or mineral-development activities, other than the limitations imposed through the road-building prohibition[, and] the exceptions to the Roadless Rule’s road-building prohibition would also permit new road construction or reconstruction for mineral development in certain situations.”¹⁵⁰

In sum, the State of Alaska points to no language indicating the Tenth Circuit misread the statutes in question in its lengthy analysis of the legality of the Roadless Rule. Alaska alleges that the Forest Service violated its mandate under NFMA to manage each national forest in accordance with a comprehensive forest plan.¹⁵¹ However, the Tenth Circuit looked at Wyoming’s NFMA claim and held that it was not viable because the Roadless Rule was promulgated pursuant to the authority granted in the Organic Act and MUSYA, and therefore does not need to comply with the provisions of NFMA.¹⁵² The State of Alaska further alleges in its NEPA claims that the Forest Service repeatedly violated NEPA in promulgating the Roadless Conservation Areas regulation.¹⁵³ Despite Alaska’s assertions of wrongdoing, the Ninth and Tenth Circuits both found no procedural violations under NEPA in the promulgation of the Roadless Rule.¹⁵⁴ The D.C. District Court is again unlikely to stray from this holding in conflict with its sister courts.

The State of Alaska reiterates the old argument that the Roadless Rule should be struck down nationwide as violating the Administrative Procedure Act.¹⁵⁵ The Administrative Procedure Act requires an agency action to be held unlawful and set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” or in excess of statutory authority.¹⁵⁶ However, as the State of Alaska’s prior six claims will likely fail, the District of Columbia cannot set aside the Roadless Rule, under these criteria, as arbitrary or capricious, not in accordance with the law, nor as action taken by the Forest Service in excess of its statutory authority.¹⁵⁷

Alaska’s best approach, if the case is to be transferred home to the Ninth Circuit, would be to abandon the arguments already well settled by the Ninth and Tenth Circuits and attack the rationale of the *Kootenai*

150. *Id.* at 1232–33.

151. Plaintiff’s Complaint, *supra* note 119, at ¶¶ 67–70.

152. *Wyoming*, 661 F.3d at 1271–72.

153. Plaintiff’s Complaint, *supra* note 119, at ¶¶ 71–78.

154. *Kootenai II*, 313 F.3d 1094, 1126 (9th Cir. 2002); *Wyoming*, 661 F.3d at 1266.

155. Plaintiff’s Complaint, *supra* note 119, at ¶¶ 84–91.

156. 5 U.S.C. § 706 (2012).

157. Plaintiff’s Complaint, *supra* note 119, at ¶¶ 85–86.

II decision. The *Kootenai II* majority overturned the District of Idaho's injunction based on its finding that the Roadless Rule furthered the substantive goals of NEPA.¹⁵⁸ This position is inconsistent with precedent holding that NEPA is primarily a procedural act, with its substantive policy not legally enforceable.¹⁵⁹ The majority went further, asserting that the "NEPA alternatives requirement [part of the EIS process] must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment."¹⁶⁰ This holding essentially allows an agency to violate the procedural requirements of NEPA so long as the substance of the action is pro-environment.¹⁶¹ This is the great weakness of the Ninth Circuit precedent, and the only place Alaska has a chance of success on the merits. However, at the end of the day it may not be enough to force an injunction of the Rule in the Ninth Circuit.

Finally, the allegations that the Forest Service also violated the Regulatory Flexibility Act¹⁶² and the Administrative Procedure Act Section 706 are unique to Alaska. These allegations, as well as the ANILCA and TTRA claims, rightly belong in the Ninth Circuit with the appeal from the decision in *Village of Kake*.¹⁶³ Alaska's chance of prevailing in this manner is substantially higher, considering the lower threshold of proof of injury and a 2002 exemption from the Roadless Rule issued by the Forest Service itself.

Alaska's demand that this ruling be upheld despite the District of Alaska court's decision has merit, because Alaska has a true injury to its interests and because the Forest Service had its opportunity to evaluate inclusion of the Tongass National Forest under the broad Roadless Rule. Regardless of whether this was the most environmentally protective rule

158. *Kootenai II*, 313 F.3d at 1123.

159. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (holding that while "NEPA does set forth significant substantive goals for the Nation . . . its mandate to the agencies is essentially procedural"); see also *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) ("[W]e stated that NEPA, while establishing 'significant substantive goals for the Nation,' imposes upon agencies duties that are 'essentially procedural.'"); *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006) ("NEPA's mandate 'is essentially procedural . . .'"); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1087 (9th Cir. 2004) ("Because NEPA is an 'essentially procedural' statute . . .").

160. *Kootenai II*, 313 F.3d at 1120.

161. See *Cummings*, *supra* note 18, at 816 (noting that the majority chastised the lower court for "[not] giving due weight to the public's interest in conservation of natural resources' . . ." (citing *Kootenai II*, 313 F.3d at 1126)).

162. 5 U.S.C. § 601, *et seq.* (1980).

163. See *Organized Vill. of Kake v. U.S. Dep't Agric.*, 776 F. Supp. 2d 960 (D. Alaska 2011), *argued*, No. 11-35517 (9th Cir. Aug. 30, 2012)).

possible, it was the rule lawfully chosen and promulgated by the Forest Service and lawfully applied in the State of Alaska. Alaska's interest is best served in focusing on its individual state rule, rather than fighting an uphill battle in the District Court of the District of Columbia.

IV. RESTING EASIER, IF NOT EASY: THE FUTURE OF THE ROADLESS RULE

Regardless of whether the D.C. District Court transfers Alaska's challenge of the Roadless Rule to a more appropriate venue, the actual chance of a permanent injunction of the Roadless Rule is substantially lowered with the strong and reasonable voice of the Tenth Circuit joining that of the Ninth. Had Alaska's case been heard by the D.C. District Court before the Tenth Circuit reinstated the Roadless Rule, or had the Tenth Circuit affirmed the injunction issued by the Wyoming District Court, the D.C. Circuit would have been compelled to choose one side of a circuit split. It is entirely possible that the D.C. District Court would have erred on the side of caution by enjoining the Rule. This circuit split would most certainly have forced the Roadless Rule before the Supreme Court.¹⁶⁴ However, if the D.C. District Court and Court of Appeals now enjoin the Roadless Rule, they will be the minority voice in a circuit split, against the two circuits with the greatest interest in a valid Roadless regulation.

The Roadless Rule continues to face opposition in Congress,¹⁶⁵ in the Senate,¹⁶⁶ and in the courts.¹⁶⁷ The danger in the Roadless Rule getting to the Supreme Court is, of course, another permanent injunction, without an appellate court reversal. Under the leadership of Chief Justice Roberts, the Supreme Court is notoriously reticent to affirm the unruly Ninth Circuit judges.¹⁶⁸

However, with the affirmation of the Ninth Circuit's opinion by the Tenth Circuit, and the Supreme Court's subsequent refusal to grant

164. THE SUPREME COURT OF THE UNITED STATES, RULES OF THE SUPREME COURT OF THE UNITED STATES, 5-6 (2010) (explaining that a "court of appeals [] enter[ing] a decision in conflict with the decision of another United States court of appeals on the same important matter" is one of the main issues the Court considers in granting certiorari).

165. See Wilderness and Roadless Area Release Act of 2011, H.R. 1581, 112th Cong. (2011).

166. See Wilderness and Roadless Area Release Act of 2011, S. 1087, 112th Cong. (2011).

167. See Plaintiff's Complaint, *supra* note 119.

168. See Brian T. Fitzpatrick, *Disorder in the Court*, L.A. TIMES, July 11, 2007 ("The Supreme Court reviewed 22 cases from the 9th Circuit [during the 2006] term, and it reversed or vacated 19 times.").

certiorari for the appeal of the Tenth Circuit's decision, the burden is now on Alaska to convince judges from the District Court and Court of Appeals of the District of Columbia that the reasoning of two separate Appellate panels have been arbitrary and capricious. Even should the State of Alaska succeed in convincing the D.C. Circuit to rule differently than the Ninth and Tenth Circuits, convincing the Supreme Court to uphold a nationwide injunction or repeal of the Roadless Rule seems unlikely, especially given its refusal to hear the appeal of *Wyoming*.¹⁶⁹

CONCLUSION

The tumultuous history of the Roadless Rule in the courts of this nation continues, even after the Ninth and Tenth Circuits have issued decisions recognizing its validity. The potential circuit split that once seemed inevitable now seems more like a well-reasoned accord in the higher courts on the legality and enforceability of the Roadless Rule. Though the danger exists that the case will create a split and the Supreme Court will seize the opportunity to grant certiorari and take on the Ninth Circuit once again, it is unlikely to overrule the Tenth Circuit as well. It seems, at least for now, that the Roadless Rule is safe to continue protecting the pristine areas from exploitation and overdevelopment—to keep the wild places wild and the wild things as they are.

169. Greg Stohr, *High Court Rejects Appeal Over Forest "Roadless Rule"*, BLOOMBERG BUSINESS WEEK (Oct. 1, 2012), <http://www.businessweek.com/news/2012-10-01/high-court-rejects-appeal-over-forest-roadless-rule>.