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THE UNDERAPPRECIATED ROLE OF THE NATIONAL
ENVIRONMENTAL POLICY ACT IN WILDERNESS
DESIGNATION AND MANAGEMENT

BY

MICHAEL C. BLUMM* & LORENA M. WISEHART**

On its 50th anniversary, the Wilderness Act owes much to the effect of the National Environmental Policy Act (NEPA), both in terms of the number of acres in the national wilderness system and in the management of designated wilderness areas. Courts have closely scrutinized federal land management agency actions that threaten wilderness qualities, and this Article maintains that the usual vehicle has been NEPA. Enacted a little over a half-decade after the Wilderness Act, NEPA was instrumental in the doubling of wilderness acres in the 1980s, as Congress added wilderness areas and released other areas to multiple uses in response to a NEPA injunction imposed on U.S. Forest Service management. NEPA has also had a considerable effect on wilderness area management, curbing timber cutting and recreational activities and, in combination with the Federal Land Policy and Management Act, requiring the Bureau of Land Management (BLM) to pursue the least damaging environmental alternative to rerouting a road bisecting wilderness study areas.

NEPA's influence on potential wilderness remains large a half-century after the passage of the Wilderness Act, as NEPA has ratified the Forest Service's "Roadless Rule," which will protect potential wilderness areas from most developments, making them eligible for future wilderness designation. Additionally, NEPA has required BLM to identify and publicly disclose lands with wilderness characteristics when revising its land plans. Thus, NEPA has fulfilled its mission of improving environmental decision making by encouraging the designation of new wilderness areas, insisting on careful management of existing wilderness, and approving both the protection of large roadless areas in national forests and the identification of roadless areas in BLM land plans. Without NEPA, there would be considerably less to celebrate on the Wilderness Act's 50th anniversary.

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I. INTRODUCTION

The National Environmental Policy Act (NEPA),¹ the nation's basic environmental charter, has often been criticized for its lack of substance.² However, NEPA has in fact played a substantial, if overlooked, role in fostering improved federal environmental decision making.³ A particularly

¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

² See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (“[I]t would not have violated NEPA if the Forest Service, after complying with the Act’s procedural prerequisites, had decided that the benefits to be derived from downhill skiing [justified continuing the project] notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd [living at the possible ski site.]”); see also *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) (explaining that NEPA’s purpose is to ensure a “fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decision-making unit of the agency.”); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (“Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’” (citations omitted)).

³ For example, the Ninth Circuit’s NEPA jurisprudence on standing, protection of the existing environment, the environmental significance threshold, and the scope of agency alternatives all favor environmental outcomes. See Michael C. Blumm & Keith Mosman, *The Overlooked Role of the National Environmental Policy Act in Protecting the Western Environment: NEPA in the Ninth Circuit*, 2 WASH. J. ENVTL. L. & POL’Y 193, 197, 199 (2012) (claiming that the Ninth Circuit has adopted four distinct lines of cases that help to fulfill the environmental protection purpose that Congress envisioned for NEPA). One way in which

noteworthy contribution of NEPA largely escaping widespread recognition has been the critical role NEPA has played both in encouraging the congressional designation of wilderness areas and in helping to ensure their sound management. In combination with the standards and procedures of the Wilderness Act⁴ and the Federal Land Policy and Management Act (FLPMA),⁵ NEPA has functioned to provide protection to de facto wilderness lands prior to official wilderness designation and to guard against unwise developments in designated wilderness areas.

NEPA's role in encouraging the designation of wilderness areas is particularly noteworthy. After the Wilderness Act created some nine million acres of "instant" wilderness in 1964,⁶ wilderness designations stalled amid the statute's cumbersome study procedures.⁷ However, after the Tenth Circuit ruled in 1971 that the Wilderness Act required the Forest Service to study unroaded lands adjacent to so-called "primitive" areas for their wilderness potential before allowing timber harvests of those areas, NEPA assumed a prominent role in studying the wilderness potential of these areas.⁸ And after the Forest Service decided to conduct a nationwide study of potential wilderness area through two "Roadless Area Review and Evaluations" (RARE I and II), the Ninth Circuit stopped the agency from allowing development on lands that it had decided not to recommend for wilderness designation on NEPA grounds.⁹ This NEPA injunction effectively ended the RARE program and induced Congress to enact a series of state wilderness statutes that in the 1980s and early 1990s more than doubled the

NEPA has produced improved environmental decisionmaking has been through the courts' use of comments by agencies with environmental expertise. *See* Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5, 7 (2012) (maintaining that comments of agencies with environmental expertise remain quite influential in reviewing courts' interpretations of NEPA compliance).

⁴ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2006 & Supp. II 2008), *amended by* Omnibus Public Land Management Act of 2009 Pub. L. No. 111-11 123 Stat. 991.

⁵ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2006).

⁶ 16 U.S.C. § 1132(a) (2006) ("All areas within the national forests classified at least 30 days before September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as 'wilderness', 'wild', or 'canoe' are hereby designated as wilderness areas."). This provision instantly created approximately 9.1 million acres of designated wilderness. CRAIG W. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* 136 (1982).

⁷ *See infra* notes 60–67 and accompanying text (discussing the district court's decision in *Parker v. United States*, 309 F. Supp. 593, 594–95 (D. Colo. 1970) and the Tenth Circuit's decision in *Parker v. United States*, 448 F.2d 793, 797–98 (10th Cir. 1971), affirming the district court).

⁸ *See infra* notes 92–98 and accompanying text (discussing *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1250 (10th Cir. 1973)); H. Michael Anderson & Alike Moncrief, *America's Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 420 (1999) ("The Forest Service responded [to *Wyoming Outdoor Coordinating Council*] by deferring development activities in roadless areas pending compliance with NEPA.").

⁹ *See infra* notes 105–16 and accompanying text (discussing *California v. Block*, 690 F.2d 753, 758, 760, 765, 769 (9th Cir. 1982) (affirming that the Forest Service's EIS did not adequately discuss the range of alternatives at the agency's disposal or address site-specific environmental consequences of agency action)).

number of wilderness areas and added more than eight percent of the current wilderness acreage.¹⁰

With the maturing of the wilderness system in the late 1980s, attention shifted from wilderness designation to wilderness management. In several decisions, courts interpreted NEPA as significantly constraining the discretion of federal agencies in their management of wilderness areas. For example, the D.C. District Court decided that the Forest Service could not, consistent with NEPA, sanction wholesale timber harvesting of insect-damaged timber inside a wilderness area for the benefit of commercial timberlands outside the wilderness.¹¹ And the Ninth Circuit determined that NEPA required the Forest Service to evaluate the effect of reissuing a permit for pack-mule trips in a wilderness area on the Wilderness Act's essential goal of preserving wilderness character, while pursuing ancillary recreational goals.¹²

Courts have also invoked NEPA to protect areas with wilderness potential that have not attained wilderness status. For example, the Ninth Circuit interpreted NEPA as requiring the Forest Service to evaluate the effect of logging roadless lands not selected for wilderness designation and to protect the congressional prerogative to designate wilderness in the future.¹³ And the Tenth Circuit ruled that when approving a road

¹⁰ See *infra* notes 117–24 and accompanying text; see also ROSS W. GORTE, CONG. RESEARCH SERV., RL 31447, WILDERNESS: OVERVIEW AND STATISTICS 2 (2010), available at <http://polis.house.gov/uploadedfiles/wildernessoverviewcrs.pdf> (tabulating additions to the National Wilderness Preservation System); Wilderness.net, *Wilderness Statistics Reports*, <http://www.wilderness.net/NWPS/chart> (last visited Apr. 12, 2014) (summarizing amount of wilderness designated by legislative session); Michael C. Blumm & Andrew B. Erickson, *Federal Wild Lands Policy in the Twenty-First Century: What a Long, Strange Trip It's Been*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. (forthcoming 2014) (discussing the results of the state wilderness bills in terms of acreage protected).

¹¹ See *infra* notes 155–66 and accompanying text (discussing *Sierra Club v. Block*, 614 F. Supp. 488, 490–94 (D.C. Cir. 1985)); *Sierra Club v. Lyng (Lyng I)*, 662 F. Supp. 40, 42–44 (D.C. Cir. 1987) (holding that the Secretary lacked:

“the same [Wilderness Act] Section 4(d)(1) broad management discretion [to manage Wilderness Areas] . . . when he takes actions within the Wilderness Areas for the benefit of outside commercial and other private interests, . . . because in a situation like this the Secretary is not managing the wilderness but acting contrary to wilderness policy for the benefit of outsiders[.]”

and continuing a preliminary injunction against Secretary's actions until the publication of an EIS); *Sierra Club v. Lyng (Lyng II)*, 663 F. Supp. 556, 558, 560 (D.C. Cir. 1987) (addressing the extent to which a Forest Service program to combat beetle infestation in wilderness areas may benefit privately owned commercial lands adjacent to the wilderness area).

¹² See *infra* notes 178–87 and accompanying text (discussing *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (holding that renewals of existing special use permits were not permissible categorical exclusions under NEPA, requiring instead an EA or EIS)).

¹³ See *infra* notes 207–53 and accompanying text (discussing *National Audubon Society v. U.S. Forest Service*, 4 F.3d 832, 836–37 (9th Cir. 1993) (holding that Congress did not intend to “preclude judicial review of Forest Service compliance with NEPA” in four contested timber sales on roadless areas)); *Smith v. U.S. Forest Service* 33 F.3d 1072, 1079 (9th Cir. 1994) (holding the Forest Service violated NEPA by failing to consider the effect of a timber sale on a

improvement bisecting two wilderness study areas,¹⁴ NEPA demanded that the Bureau of Land Management (BLM) not only had to examine less damaging alternatives but also had to select the least damaging alternative it studied.¹⁵ In these cases NEPA imposed important curbs on agency discretion in managing both wilderness areas and lands with wilderness potential.

NEPA has also played an important role upholding Forest Service protection for roadless areas by ratifying the so-called “Roadless Rule” against attacks of NEPA noncompliance by those opposed to protecting roadless areas, demonstrating that courts interpret NEPA’s requirements flexibly to achieve the statute’s overarching purpose of promoting environmental protection.¹⁶ NEPA continues to promote designation of future wilderness areas by requiring BLM to identify and publicly disclose lands with wilderness characteristics when revising its land plan plans.¹⁷

Professor Peter Appel has shown that courts give close scrutiny to agency actions affecting wilderness areas,¹⁸ but we think that NEPA has been the usual vehicle for ensuring that wilderness values are not short-changed in the administrative process. In this Article, we examine the significant but often overlooked role NEPA has played in wilderness protection. Part I examines the background of the Wilderness Act, relevant

5,000-acre roadless area that the agency partially inventoried and released for nonwilderness use, but declining to require an EIS and leaving to the Forest Service the decision of “how best to comply with NEPA and its implementing regulations”); *Lands Council v. Martin*, 529 F.3d 1219, 1231 (9th Cir. 2008) (clarifying that the *Smith* ruling “applies to roadless areas that are either greater than 5,000 acres or of a ‘sufficient size’ within the meaning of 16 U.S.C. § 1131(c)”).

¹⁴ For an explanation of wilderness study areas under FLPMA § 603, see *infra* notes 282–83 and accompanying text.

¹⁵ See *infra* notes 284–303 and accompanying text (discussing *Sierra Club v. Hodel*, 848 F.2d 1068, 1073, 1075 (10th Cir. 1988), *overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (concerning the State of Utah’s attempt to widen a state highway adjacent to two wilderness study areas (WSAs), and BLM’s duty to oversee such expansion in accordance with § 603(c) of FLPMA, which mandated a nonimpairment and nondegradation standard for all third party rightholders operating on WSAs)).

¹⁶ See *infra* notes 260–80 and accompanying text (discussing *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002) and *Wyoming v. U.S. Department of Agriculture*, 661 F.3d 1209, 1243 (10th Cir. 2011) (both holding that the Forest Service complied with NEPA by analyzing a reasonable range of alternatives in the 2001 Roadless Rule’s EIS)).

¹⁷ See *infra* notes 304–12 and accompanying text (discussing *Oregon Natural Desert Ass’n v. BLM*, 531 F.3d 1114, 1132–33 (9th Cir. 2008), *opinion amended and superseded on denial of reh’g*, 625 F.3d 1092 (9th Cir. 2010) (holding BLM violated NEPA by failing to address wilderness characteristics when developing a land use plan in Oregon)).

¹⁸ Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 110, 129 (2010) (suggesting that courts are unusually skeptical of agency plans to develop public lands in Wilderness Act cases, and maintaining that “courts do not act as they do in other areas of law”); see also Peter A. Appel, *Wilderness, the Courts, and the Effect of Politics on Judicial Decisionmaking*, 35 HARV. ENVTL. L. REV. 275, 277–78, 311 (2011) (arguing that courts’ pro-wilderness decision making is not due to any discernible political ideology, “lend[ing] support to the hypothesis that wilderness protection taps into a deep-seated cultural love of wilderness that transcends party politics and simple ideology”).

provisions of the Act, and the procedures the statute established to designate additional wilderness areas. Part II discusses the way in which NEPA contributed to the political momentum that led to substantial expansion of the National Wilderness Preservation System in the 1980s. Part III turns to NEPA's role in authorizing federal courts to scrutinize closely the management of designated wilderness areas. Part IV shows how NEPA challenges have successfully protected potential wilderness against both BLM and Forest Service development plans. We conclude that NEPA has played a significant, if underappreciated, role in encouraging wilderness designation and in ensuring that both wilderness areas and lands with wilderness characteristics are preserved as the "untrammelled areas" that Congress envisioned in the Wilderness Act a half-century ago.¹⁹

II. BACKGROUND

The Wilderness Act is a legacy of conservation policies of key U.S. Forest Service administrators during the early twentieth century. Legendary figures like Aldo Leopold and Bob Marshall forged policies preserving natural areas as alternatives to the utilitarianism advocated by the first chief of the Forest Service, Gifford Pinchot.²⁰ By World War II, the Forest Service had an established system of protecting roadless lands from development.²¹ But in the 1950s, a nascent environmental community began to lobby Congress for more permanent, statutory protection for these areas.²² After nearly a decade of consideration, Congress finally passed the Wilderness Act in 1964 giving statutory protection for "primitive areas" that the Forest Service had managed as wilderness since the 1920s.²³ The 1964 Act required the Forest Service to study these primitive areas and pass on recommendations to the President, who in turn would recommend which areas were suitable for wilderness designation by Congress.²⁴ This statutory study requirement would lead to the first Wilderness Act lawsuits, the results of which constrained the agency's ability to manage the national forests and set the stage for future litigation involving not only the Wilderness Act but NEPA as well.²⁵

¹⁹ See Wilderness Act, 16 U.S.C. § 1131(c) (2006) ("A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized 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.").

²⁰ See *infra* notes 26–31 and accompanying text; see also Aldo Leopold, *The Wilderness and Its Place in Forest Recreational Policy*, 19 J. FORESTRY 718, 719 (1921) (explaining that wilderness should be "kept devoid of roads, artificial trails, cottages, or other works of man"); Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 357–58 (1994) (noting that Pinchot advocated multiple-use and utilitarian policies while strongly opposing "the preservation view").

²¹ ALLIN, *supra* note 6, at 81–83, 85, 94.

²² *Id.* at 104–05.

²³ 16 U.S.C. § 1132(b) (2006); ALLIN, *supra* note 6, at 105, 135–36.

²⁴ 16 U.S.C. § 1132(b) (2006).

²⁵ See *infra* notes 75–116 and accompanying text.

A. Wilderness Preservation Before the Wilderness Act

Support for wilderness preservation rose as an antidote to the utilitarian land management policies Gifford Pinchot and his successors advocated.²⁶ Forest Service ranger Aldo Leopold spent the 1920s advancing a national forest model that included lands reserved from economic development.²⁷ The post-Pinchot Forest Service eventually agreed: By 1929, the agency had designated some five million acres of roadless national forests as “primitive areas” that would be managed for recreational and educational benefits.²⁸ Leopold’s associate Bob Marshall,²⁹ chief of the Forest

²⁶ Pinchot headed the Department of Agriculture’s Division of Forestry beginning in 1898. See Hardt, *supra* note 20, at 355. His influence as architect of modern forestry practices on federal lands grew when he convinced his close friend President Theodore Roosevelt to transfer control of the national forest system, which began under the authority of the General Revision Act of 1891, from the Department of the Interior to the Department of Agriculture. See General Revision Act of 1891, 16 U.S.C. § 471 (1925) (authorizing the President to “set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests”); see also M. NELSON MCGEARY, GIFFORD PINCHOT: FORESTER-POLITICIAN 45, 54–61 (1960) (recounting the history of the Roosevelt-Pinchot friendship and Pinchot’s political struggle to obtain management authority over the nation’s forests); HAROLD K. STEEN, THE U.S. FOREST SERVICE: A HISTORY 70, 74 (1976) (describing the friendship between Roosevelt and Pinchot and the transfer of the forest reserves to the Department of Agriculture). After the 1905 transfer, which gave Pinchot the opportunity to manage vast lands and practice the silvicultural theories he had developed, he established the principle of “sustained yield management,” which meant that the forest reserves would be managed for the benefit of agricultural, livestock, lumbering, and mining interests. See Hardt, *supra* note 20, at 355–56. This policy initially left out recreation and wilderness preservation as agency goals, although Pinchot encouraged preservation “only as will insure the permanence of the [forest] resources.” *Id.* at 356; Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 165 (1999) (explaining that the BLM and Forest Service moved slowly in incorporating preservation and recreation into their management philosophies, stating: “Gifford Pinchot . . . gave scarce recognition to recreation, and for many years, the Forest Service deemed its primary responsibility to be the harvesting of the timber.”).

²⁷ See, e.g., Aldo Leopold, *The Wilderness and Its Place in Forest Recreational Policy*, 19 J. FORESTRY 718, 719 (1921) (“[Such tracts should be] kept devoid of roads, artificial trails, cottages, or other works of man.”).

²⁸ U.S. FOREST SERV., U.S. DEPT OF AGRIC. L-20 REGULATIONS (1929) (internal document) (“The Chief of the Forest Service shall determine, define, and permanently record . . . a series of areas to be known as primitive areas, and within which shall be maintained primitive conditions of environment, transportation, habitation, and subsistence, with a view to conserving the value of such areas for purposes of public education, and recreation.”); JOHN B. LOOMIS, INTEGRATED PUBLIC LAND MANAGEMENT: PRINCIPLES AND APPLICATIONS TO NATIONAL FORESTS, PARKS, WILDLIFE REFUGES, AND BLM LANDS 37 (2d ed. 2002) (illustrating that Regulation L-20 was problematic because foresters had the authority to make “primitive” designations at the regional level, devoid of formal oversight, leading local and regional foresters to develop idiosyncratic notions of what “primitive” entailed, in both its geographic and temporal scope); Michael P. McClaran, *Livestock in Wilderness: A Review and Forecast*, 20 ENVTL. L. 857, 861–62 (1990) (noting that “primitive areas” remained open to certain economic activities, particularly grazing, mining, and some timber harvesting); Amy Rashkin et al., *The Wilderness Act of 1964: A Practitioner’s Guide*, 21 J. LAND RESOURCES & ENVTL. L. 219, 226 (2001) (beginning in 1924, the Forest Service designated areas for preservation management as wild (roadless area less than 100,000 acres), wilderness (roadless area greater than 100,000 acres), canoe (Boundary Waters Canoe Area in

Service's Division of Recreation, instituted the U-Regulations of 1939,³⁰ authorizing the Forest Service to designate all primitive areas as either "wilderness," "wild," or "recreation" areas, to greater insulate them from development.³¹ For wilderness advocates, however, these initiatives shared a common flaw: The agency's administrative designations could not permanently insulate such areas from economic exploitation because such areas could always be administratively redesignated for development.³²

In the 1940s and 1950s, Forest Service actions illustrated the impermanence of these administrative wilderness designations, as the agency reopened large tracts of administrative wilderness across the West to economic activity, including the Gila Wilderness that Aldo Leopold had

Minnesota), or primitive (area that may be classified as wild or wilderness pending a Forest Service inventory to determine boundaries and defining characteristics)).

²⁹ Leopold and Marshall, along with Robert Sterling Yard, Benton MacKaye, Ernest Oberholtzer, Bernard Frank, Harvey Broome, and Harold Clinton Anderson, founded The Wilderness Society in 1935. THE WILDERNESS SOCIETY, THE WILDERNESS ACT HANDBOOK: 40TH ANNIVERSARY EDITION 1-2 (Ben Beach et al. eds. 2004), available at <http://wilderness.org/sites/default/files/Wilderness-Act-Handbook-2004-complete.pdf>; see also PAUL S. SUTTER, DRIVEN WILD 3-6 (2002) (discussing the history behind the formation of the Wilderness Society).

³⁰ 36 C.F.R. §§ 251.20-251.22 (1960) (superseded); Robert Marshall, *The Problem of the Wilderness*, 30 SCI. MONTHLY, 141, 141 (1930), available at <http://www.uvm.edu/rsenr/rm240/marshall.pdf> (discussing Leopold's idea of government-owned undeveloped lands, Marshall wrote, "I shall use the word *wilderness* to denote a region which contains no permanent inhabitants, possesses no possibility of conveyance by any mechanical means and is sufficiently spacious that person in crossing it must have the experience of sleeping out. The dominant attributes of such an area are: first, that it requires anyone who exists in it to depend exclusively on his own effort for survival; and second, that it preserves as nearly as possible the primitive environment. This means that all roads, power transportation and settlements are barred. But trails and temporary shelters, which were common long before the advent of the white race, are entirely permissible.").

³¹ 36 C.F.R. §§ 251.20-251.22 (1960) (superseded) ("Upon recommendation of the Chief, Forest Service national lands in single tracts of not less than 100,000 acres may be designated by the Secretary as 'wilderness areas' within which there shall be no roads or other provisions for motorized transportation, no commercial timber cutting, and no occupancy under special use permit for hotels, stores, resorts, summer homes, or organized camps, hunting or fishing lodges, or similar uses . . . Suitable areas of national forest land in single tracts of less than 100,000 acres but not less than 5,000 acres may be designated by the chief of the Forest Service as 'wild areas,' which shall be administered in the same manner as wilderness areas, with the same restrictions upon their use."); Thomas M. Rickart, *Wilderness Land Preservation: The Uneasy Reconciliation of Multiple and Single Use Land Management Policies*, 8 B.C. ENVTL. AFF. L. REV. 873, 878 (1980) (explaining that "[t]here was no statutory basis for the Forest Service's designation of 'primitive' areas, and thus the agency could at its discretion modify or even retract a protective designation by simple administrative order").

³² McClaran, *supra* note 28, at 863 n.31 ("[B]y 1952, 13 years after the enactment of the U-Regulations, only 26% of all possible reclassifications had occurred; only six of 28 L-20 primitive areas exceeding 100,000 acres were reclassified to U-1 wilderness status, and only 13 of 46 L-20 primitive areas less than 100,000 acres were reclassified to U-2 wild areas."). The L-20 "primitive area" designation provided limited protection, allowing timber harvesting, grazing, and mining to continue. Sandra Zellmer, *The Roadless Area Controversy: Past, Present, and Future*, in PROCEEDINGS OF THE ROCKY MOUNTAIN MINERAL LAW FORTY-EIGHTH ANNUAL INSTITUTE 21-1, 21-5 (2002); Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 339 n.1825 (1985).

fought to preserve.³³ Uncertainties about the security of administrative wilderness set the tone for wilderness advocacy following World War II. Howard Zahniser of the Wilderness Society spearheaded this movement, arguing for permanent wilderness designated by Congress that the Forest Service could not revoke.³⁴

Zahniser's efforts gained political traction by the late 1950s,³⁵ but the Forest Service pushback was equally intense,³⁶ forcing a congressional compromise that produced the Multiple-Use Sustained-Yield Act of 1960 (MUSYA).³⁷ MUSYA broadened the statutory authority of the Forest Service beyond its Organic Act,³⁸ authorizing not only sustained yield management

³³ GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LANDS AND RESOURCES LAW* 1010–11 (6th ed. 2007) (mentioning three incidents where the federal government revoked administrative wilderness status: the Gila Wilderness, Oregon's French Pete Valley, and the Echo Park Dam along the Utah-Colorado border, all of which involved logging concessions to timber companies).

³⁴ *Id.* Zahniser's proposed bill described wilderness as "untrammelled by man," or "not subject to human controls and manipulations that hamper the free play of natural forces." See Gordon Steinhoff, *Interpreting the Wilderness Act of 1964*, 17 MO. ENVTL. L. & POL'Y REV. 492, 498–99 (2010) (discussing Zahniser's part in the statutory definition of "wilderness"). For Zahniser's general philosophy, see Howard Zahniser, *How Much Wilderness Can We Afford to Lose?*, SIERRA CLUB BULL. 7–8 (Apr. 1951) (explaining Zahniser's motivation for seeking congressional action).

³⁵ Senator Hubert Humphrey introduced the first wilderness bill into Congress in 1956, although it languished in committee. COGGINS ET AL., *supra* note 33, at 1011.

³⁶ ALLIN, *supra* note 6, at 111 ("The general view of the Forest Service, as enunciated by its chief, Richard E. McArdle, was that 'the bill would strike at the heart of the multiple-use policy of National Forest administration.'). Concerned about loss of agency discretion as well as timber, power, and mining interests, the Service initially opposed the bill that would become the Wilderness Act. Zellmer, *supra* note 32, at 21–6; see also Rickart, *supra* note 31, at 879 (explaining that the Forest Service viewed wilderness legislation as a threat to founding principles of national forest management and that the agency feared wilderness would be given priority where nonwilderness uses of forest resources might better serve the public need).

The fight over wilderness was only one of the postwar disputes that the Forest Service faced. The timber industry exerted equally strong pressure to increase the yield from national forests as a response to the postwar housing boom. See Wilkinson & Anderson, *supra* note 32, at 28 (explaining that forest planning became more controversial as the demand for timber and other resources increased in the 1950s). The burgeoning American middle class also sought unprecedented recreational access to federal lands. *Id.* at 28–29 (stating that during the same time timber demand increased, annual recreational visits to national forests increased from 26 to 81.5 million). The Forest Service had to confront these challenges guided by nothing but its own Organic Act, which identified watershed protection and timber production as the agency's principal duties in managing the national forest system. See Organic Administration Act of 1897, 16 U.S.C. §§ 473–78, 479–82, 551, (2006); *United States v. New Mexico*, 438 U.S. 696, 707 (1978) (interpreting the legislative intent behind the Organic Act to reserve the national forests for the primary purposes of "conserv[ing] water flows" and providing a "continuous supply of timber for the people"). These stakeholders sought to advance the kind of single-use doctrine that the Forest Service had long tried to avoid. See Hardt, *supra* note 20, at 355–56 (describing the multiple use and sustained yield management theories implemented by Pinchot).

³⁷ 16 U.S.C. §§ 528–531 (2006).

³⁸ *Id.* § 475 (the pertinent language reads, "[national forests shall be established] for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . ."). The Forest Service in fact had been practicing multiple use for years before this statutory codification. DENNIS ROTH &

and watershed preservation, but also fostering recreation, grazing, and wildlife as coequal resources.³⁹ Timber interests believed MUSYA protected sustained yield of commodity production; environmentalists cautiously approved the attention to wildlife; and the general public ostensibly benefited from increased recreation opportunities.⁴⁰ However, MUSYA was only a half-measure for wilderness, since the statute announced that the agency could construe wilderness as a permissible use of the national forests, but did not make it a mandatory one.⁴¹

In 1964, after nine years of debate, Congress enacted the Wilderness Act, originally drafted by Zahniser.⁴² Like MUSYA, it was a legislative compromise. The Senate passed a wilderness bill in 1961, but the House bill was blocked by the Chairman of Interior and Insular Affairs Committee, Wayne Aspinall of Colorado.⁴³ Aspinall, who saw the wilderness movement as a direct threat to natural resource industries, refused to release the bill from his committee until his concerns were addressed.⁴⁴

Wilderness supporters ultimately persuaded Aspinall by agreeing to support a number of his own legislative projects, most notably the Public Land Law Review Commission Act (PLLRC Act).⁴⁵ Aspinall designed the

FRANK HARMON, U.S. FOREST SERV., FS-574, FOREST SERVICE HISTORY SERIES: THE FOREST SERVICE IN THE ENVIRONMENTAL ERA 1 (1995). For example, in the Oregon and California Lands Act of 1937, 43 U.S.C. § 1181a (2006), Congress authorized the sustained yield management of forest lands that had been the subject of a failed railroad grant. See Michael C. Blumm & Tim Wigington, *The Oregon and California Railroad Grant Lands' Sordid Past, Contentious Present, and Uncertain Future: A Century of Conflict*, 40 B.C. ENVTL. AFF. L. REV. 1, 1–8, 20–21 (2013).

³⁹ 16 U.S.C. § 528 (2006).

⁴⁰ Hardt, *supra* note 20, at 365.

⁴¹ 16 U.S.C. § 529 (2006) (stating that “[t]he establishment and maintenance of areas of wilderness are consistent with the purposes [of MUSYA]”).

⁴² THE WILDERNESS SOCIETY, *supra* note 29, at 2.

⁴³ Aspinall authored an alternative version of the wilderness bill that wilderness advocates described as “perversion of the wilderness preservation legislation.” The Speaker of the House refused to schedule Aspinall’s bill to enter the House floor for debate; Aspinall retaliated by refusing to let the Senate bill leave his committee. DOUG SCOTT, *THE ENDURING WILDERNESS: PROTECTING OUR NATURAL HERITAGE THROUGH THE WILDERNESS ACT* 54 (2004); see, e.g., COGGINS ET AL., *supra* note 33, at 1011; 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 25:9 (2d ed. 2013).

⁴⁴ See Dennis Roth, *The National Forests and the Campaign for Wilderness Legislation*, 28 J. FOREST HIST. 112, 124 (1984) (explaining that the wilderness bill was stalled for three years in the House Committee on Interior and Insular Affairs as Chairman Aspinall “maneuvered to incorporate congressional affirmative action and the continuation of mining”); James Morton Turner, *“The Specter of Environmentalism”: Wilderness, Environmental Politics, and the Evolution of the New Right*, 96 J. AM. HIST. 123, 127 (2009) (describing Aspinall as “the legislation’s most dogged opponent” and explaining that “Aspinall carefully guarded the West’s ability to develop its natural resources; as chair of the House Interior Committee with oversight of the public lands, he was in a powerful position to do so.”); see also CRAIG W. ALLIN, *WILDERNESS POLICY, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS* 176 (Charles Davis ed., 1997) (describing Aspinall’s “antiwilderness agenda”).

⁴⁵ The Public Land Law Review Commission Act of 1964, 43 U.S.C. §§ 1391–1400 (1964). Aspinall was also instrumental in the enactment of the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411–1418 (1964) (authorizing the development of multiple-use plans for lands managed by the Bureau of Land Management); and the Public Land Sale Act of 1964, 43 U.S.C. §§ 1421–1427 (1964) (authorizing sales of public lands in tracts not exceeding 5,120 acres,

commission as a means to secure industry access to federal lands through the conduct of “a complete review of all the laws and regulations affecting Federal public land ownership and the natural resources thereof.”⁴⁶ Before it disbanded in 1970, the PLLRC Act completed a massive report to Congress,⁴⁷ but its chief recommendation—replacing multiple use doctrine with dominant use doctrine—was never implemented.⁴⁸ Still, the PLLRC Act had two lasting effects: 1) its land planning prescriptions for the BLM formed the

that have been classified for sale in accordance with a “determination that (a) the lands are required for the orderly growth and development of a community or (b) the lands are chiefly valuable for residential, commercial, agricultural (exclusive of lands chiefly valuable for grazing or raising forage crops), industrial, or public uses or development.”). See Perry R. Hagenstein, *Commissions and Public Land Policies: Setting the Stage for Change*, 54 DENV. L. J., 619, 630 (1977) (describing Aspinall’s reaction to the rising wilderness sentiment in administrative agencies as follows: “Responding to a growing national interest in recreation and preservation of natural values on public lands, the administrative agencies . . . were increasingly restricting economic uses of these lands. These uses . . . had strong local constituencies from which western members of Congress derived much of their support and which provided grist for the legislative mills of the Interior and Insular Affairs Committees. At least some members of the Interior Committees realized that they were unable to slow the administrative agencies against which they were arrayed and which had the discretionary authority ultimately to bring economic uses of the public lands to a halt. As Chairman of the House Interior and Insular Affairs Committee, Aspinall was looking for a way to place some of the control over public land decisions back in the Congress and especially in his Committee.”).

⁴⁶ H. COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 2D SESS., PUBLIC LAND LAW REVIEW COMMISSION: BACKGROUND AND NEED 39, 41 (1964) (prepared by Wayne Aspinall). The structure of the PLLRC heavily favored congressional control: Its members included six senators, six congressmen, six presidential appointees, and a chairman selected by the Commission, who turned out to be Aspinall. See Jerome C. Muys, *The Public Land Law Review Commission’s Impact on the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 301, 302 (1979).

⁴⁷ The PLLRC study produced 33 separate reports on public land issues, based on over 900 witness testimonies, nationwide public land tours for PLLRC members, and extensive advice from employees of state and federal government. See, e.g., Jerome C. Muys, *The Unfinished Agenda of the Public Land Law Review Commission*, in PUBLIC LAND LAW 315 (1992); Muys, *supra* note 46, at 302.

⁴⁸ PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION’S LAND 3 (1970) (doubting the practicality of “multiple-use” doctrine, the PLLRC’s final report advocated a “dominant use” policy for public lands: “[W]here a unit, within an area managed for many uses, can contribute maximum benefit through one particular use, that use should be recognized as the dominant use, and the land should be managed to avoid interference with fulfillment of such dominant use.”); see also SAMUEL TRASK DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES 235 (2d ed. 1980) (commenting on the effect of the final PLLRC report: “[T]here was a brief cry of horror from most conservationists and preservationists, and then silence. It was unnecessary to criticize the report or to elaborate its themes because the recommendations were being ignored by almost everyone.”). The size and scope of the PLLRC also proved alienating to potential stakeholders, all of whom had something to lose from the prescription of dominant use. As Jerry Muys, former counsel to the PLLRC, stated, “The PLLRC report . . . covered the full range of uses of the public lands Consequently, no single interest group, including the affected federal land management agencies, would be completely pleased with the report. . . . In short, too many oxen were gored to be able to muster something like a Citizens Committee for the PLLRC Report.” Muys, *supra* note 46, at 302–03.

basis of FLPMA, enacted six years later,⁴⁹ and 2) the commission's creation persuaded Aspinall to support the Wilderness Act, which paved the way for its enactment.

B. Examining the Wilderness Act

Signed into law by President Lyndon Johnson fifty years ago, on September 3, 1964,⁵⁰ the Wilderness Act contains unusually poetic language in its description of wilderness:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized 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.⁵¹

The Act defines wilderness areas as undeveloped tracts of federal land that 1) generally appear to have been affected by the forces of nature (as opposed to human development); 2) possess outstanding opportunities for solitude or primitive and unconfined types of recreation; 3) have at least 5,000 acres of land or can otherwise be practically sustained in an unimpaired condition; and 4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.⁵² Congress stipulated that wilderness areas would be “devoted [only] to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use,”⁵³ in contrast to the discretionary public land laws that preceded wilderness designation.⁵⁴

The Act created 9.1 million acres of so-called “instant wilderness” from lands that were previously classified as “wild” or “wilderness” under the agency's U-Regulations of 1939.⁵⁵ Congress also ordered the Forest Service to study the remaining 5.5 million acres of primitive areas designated by its L-Regulations of 1929, but which had not been designated under the U-regulations, and to assess their suitability for inclusion in the National Wilderness System (NWS).⁵⁶ The Act likewise directed the Secretary of the

⁴⁹ See Muys, *supra* note 46, at 306; *infra* notes 56–58 and accompanying text (regarding FLPMA and BLM's mandate to conduct a study of public lands for either inclusion in or exclusion from the NWS).

⁵⁰ Wilderness Act of 1964, 16 U.S.C. § 1131–1136 (2006).

⁵¹ *Id.* § 1131(c).

⁵² *Id.*

⁵³ *Id.* § 1133(b).

⁵⁴ See *supra* note 32 and accompanying text.

⁵⁵ 16 U.S.C. § 1132(a) (2006) (“All areas within the national forests classified at least 30 days before September 3, 1964 by the Secretary of Agriculture of the Chief of the Forest Service as ‘wilderness’, ‘wild’, or ‘canoe’ are hereby designated as wilderness areas.”). This administrative wilderness was comprised of 54 separate areas. See COGGINS ET AL., *supra* note 33, at 1011; H.R. REP. NO. 88-1538, at 8 (1964) (giving an itemized list of the total size of all areas included as “instant wilderness”).

⁵⁶ 16 U.S.C. § 1132(b) (2006); see also Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288–89 (1966).

Interior to conduct a wilderness suitability study of all roadless areas over 5,000 acres in size within the National Wildlife Refuge and the National Park Systems.⁵⁷ The agencies had ten years to complete these studies and present their findings to the President, who would then pass on his recommendations to Congress for inclusion in or exclusion from the National Wilderness System.⁵⁸ The Forest Service was expressly obligated to manage the primitive areas under study as wilderness, free of development, until the studies were complete and Congress took action.⁵⁹

In 1970, in the first major court suit under the Wilderness Act, conservation organizations and neighboring landowners sought to enjoin the Forest Service from selling timber from the East Meadow Creek area of White River National Forest in Colorado.⁶⁰ The plaintiffs in *Parker v. United States* alleged the area was “of such character as to qualify as wilderness,” and claimed that selling timber on such land would violate both the Wilderness Act and Forest Service regulations.⁶¹

The East Meadow Creek area was contiguous to a designated “primitive area” and had not been studied by the Forest Service during the RARE I analysis.⁶² The *Parker* plaintiffs alleged the Forest Service was obligated to study the area and make a recommendation as to its wilderness potential prior to authorizing any activities that would irreparably harm the area’s wilderness character.⁶³

The Tenth Circuit, affirming the district court, concluded that timber harvesting would destroy the presidential and congressional options to designate the area as wilderness.⁶⁴ The court therefore upheld the lower court’s injunction preventing the Secretary of Agriculture from authorizing timber harvesting on undeveloped land contiguous to a designated “primitive area,” because the President and Congress had yet to consider whether to designate the land as wilderness.⁶⁵ The *Parker* result established a practice of strict judicial scrutiny of agency decisions that could affect wilderness values and limited the discretion of the Forest Service to approve developments like timber harvesting or road building affecting potential wilderness areas.⁶⁶ Following *Parker*, the Forest Service had to study

⁵⁷ 16 U.S.C. § 1132(c) (2006).

⁵⁸ *Id.* § 1132(b) (establishing the primacy of Congress in creating wilderness, specifying: “Each recommendation of the President for designation as ‘wilderness’ shall become effective only if so provided by an Act of Congress.”).

⁵⁹ *Id.* (“[A]reas classified as ‘primitive’ on September 3, 1964 shall continue to be administered under the rules and regulations affecting such areas on September 3, 1964 until Congress has determined otherwise.”).

⁶⁰ *Parker v. United States*, 309 F. Supp. 593, 594 (D. Colo. 1970), *aff’d*, 448 F.2d 793 (10th Cir. 1971).

⁶¹ 309 F. Supp. at 594.

⁶² *Id.*

⁶³ *Id.* at 594–95.

⁶⁴ *See Parker*, 448 F.2d at 797–98; COGGINS & GLICKSMAN, *supra* note 43, § 25:9.

⁶⁵ *See Parker*, 448 F.2d at 797–98.

⁶⁶ COGGINS ET AL., *supra* note 33, at 1049; *see also* H. Anthony Ruckel, *The Wilderness Act and the Courts*, 76 DENV. U. L. REV. 611, 614 (1999) (viewing the directive in section 3(b) of the Act as an order to federal land agencies to “proceed slowly”).

primitive areas and areas contiguous to primitive areas, make recommendations to the President about their wilderness suitability, and preserve the wilderness character of the areas pending final determination on wilderness status by Congress.⁶⁷ The latter requirement gave substantial interim protection to wilderness-like areas of national forests.

At the time of the *Parker* litigation, the Forest Service was undertaking a massive inventory and study of potential wilderness areas. And it would be NEPA, not the Wilderness Act, which wilderness preservationists would look to in order to safeguard the nation's untrammeled areas.

C. The Roadless Area Review Evaluation (RARE) and Its Challenges

Although this fact is often overlooked, the Wilderness Act did not address roadless areas in the National Forest System not already classified as wilderness or primitive areas or areas adjacent to such lands.⁶⁸ However, in 1967, Forest Service Chief Edward Cliff decided to undertake what became known as the Roadless Area Review and Evaluation (RARE, later called RARE I), a process of inventorying and studying all roadless areas

⁶⁷ ALLIN, *supra* note 6, at 154–55. Courts have ruled that section 1782 of FLPMA “essentially codifies and extends the Parker rule for WSAs on BLM public lands.” COGGINS & GLICKSMAN, *supra* note 43, § 25:16. Although *Parker* indicated that section 3(b) of the Wilderness Act restricted the Secretary’s discretion to approve development of wilderness land contiguous to a designated area, in *Wilson v. Block* the Tenth Circuit Court of Appeals declined to extend that restriction to roadless lands not contiguous to a primitive area. *See Wilson v. Block*, 708 F.2d 735, 752–53 (10th Cir. 1983). In *Wilson*, environmental groups challenged the Forest Service’s decision to authorize expansion of a ski area in Arizona’s Coconino National Forest. *Id.* at 738–39. The plaintiffs alleged that the Secretary impermissibly approved the development of “pristine land” adjacent to lands the President recommended be designated as wilderness, because this infringed Congress’s prerogative to designate wilderness areas and determine their boundaries. *Id.* at 751. However, the D.C. Circuit affirmed the district court’s determination that the Forest Service did not violate the Wilderness Act, even though the proposed ski area expansion abutted lands that the Forest Service and the President had recommended for preservation as wilderness. *Id.* at 739, 751, 753. The court distinguished *Parker*, explaining that section 3(b) of the Wilderness Act only restricted the Secretary’s discretion to develop wilderness land contiguous to a designated primitive area; it did not apply to lands that are “neither contained in nor contiguous to a primitive area,” and none of the lands at issue in *Wilson* were designated “primitive.” *Id.* at 752–53.

⁶⁸ *Wilson*, 708 F.2d at 752–53; *see also* DOUGLAS SCOTT, A WILDERNESS-FOREVER FUTURE: A SHORT HISTORY OF THE NATIONAL WILDERNESS PRESERVATION SYSTEM ILC17 (2001), available at http://wilderness.nps.gov/celebrate/Section_Two/NWPS%20History.pdf (mentioning that “[t]he 5,000,000 acres of 1930s-era national forest primitive areas for which the Wilderness Act required study were certainly not the only wilderness-quality lands on the national forests. . . . [T]here were many other undeveloped areas—what came to be called the *de facto* wilderness and, later, *roadless areas*—meriting preservation . . .”); H. Michael Anderson & Alike Moncrief, *America’s Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 419 (1999) (explaining that the Wilderness Act did not “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. . . . [and t]he 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.”).

greater than 5,000 acres, not just designated primitive areas.⁶⁹ Based on the recommendations of regional foresters,⁷⁰ RARE I proceeded to study some fifty-six million acres of roadless areas in the National Forest System and to assess their suitability for wilderness designation.⁷¹

When concluded in 1972, the RARE I study 1) recommended twelve million acres—about 20% of the inventoried lands—for wilderness designation; 2) set aside an additional eleven million acres for further review; and 3) proposed “releasing” the remaining thirty-three million acres—roughly 60% of inventoried lands—for multiple-use management.⁷² The agency preserved both the twelve million acres of recommended wilderness and the eleven million acres of designated “study areas” until Congress made a final decision as to their wilderness suitability.⁷³ However, the Forest Service would make the remaining thirty-three million roadless acres available for developments like timber harvesting and road building. The results of RARE I and its successor studies would haunt the Forest Service for decades, largely due to the effects of NEPA.⁷⁴

III. NEPA’S ROLE IN EXPANDING THE WILDERNESS SYSTEM

Although Congress did not enact NEPA until a half-decade after the passage of the Wilderness Act,⁷⁵ the nation’s basic environmental charter

⁶⁹ See COGGINS & GLICKSMAN, *supra* note 43, § 25:9; Wilkinson & Anderson, *supra* note 32, at 345 n.1857 (“The roadless area study was originally recommended by a 4-person team appointed to draft policy guidelines to implement the Wilderness Act.”). In late 1964, the team advised forest supervisors to “review each National Forest and identify, but not formally designate in any way, all potential new wilderness.” JOHN C. HENDEE ET AL., U.S. FOREST SERV., MISC. PUBL’N NO. 1365, WILDERNESS MANAGEMENT 99 (1978); see also ALLIN, *supra* note 6, at 159–60 (suggesting that the roadless area inventory may have been the result of a compromise with the White House which was pressuring the Forest Service to adopt the wilderness character standard of section 2(c) of the Act in favor of the “purity principle,” a stricter approach advocated by the agency).

⁷⁰ See Rickart, *supra* note 31, at 886 (stating “[t]he first step in the RARE process required a determination by Regional Foresters of which roadless, undeveloped areas within their regions should be studied for possible wilderness designation.”); U.S. FOREST SERV., ROADLESS AND UNDEVELOPED AREAS DRAFT ENVIRONMENTAL STATEMENT 11–12 (1973) (calling for “[selecting] high-quality areas for additional study and to continue to protect their wilderness resource characteristics until a final determination can be made.”).

⁷¹ U.S. FOREST SERV., *supra* note 70, at a-iii; COGGINS & GLICKSMAN, *supra* note 43, § 25:9 (noting that the RARE I inventory identified more than 56 million acres of national forest land that “technically qualified as wilderness”); Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 ENVTL. L. 1015, 1044 (2004); see also ALLIN, *supra* note 6, at 160 (characterizing RARE I as “more quick than comprehensive” because the entire review was conducted in just a year); see generally Richard Bury & Gary Lapotka, *The Making of Wilderness: Land Use and the National Forest System*, ENV’T, Dec. 1979, at 12, 14–15 (discussing RARE I’s assessment process).

⁷² See Bury & Lapotka, *supra* note 71, at 12.

⁷³ *Id.*

⁷⁴ See *infra* Part III.A–B.

⁷⁵ See Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

played a critical role in expanding the wilderness system.⁷⁶ Most of the wilderness areas initially designated by the Wilderness Act consisted of “rock and ice” areas, leaving large tracts of lower elevation lands with timber and mineral resources vulnerable to development.⁷⁷ As advocates of wilderness preservation pushed for expanding the Wilderness Preservation System to include areas beyond the rocks and ice, NEPA proved to be an essential mechanism, by involving both the public and the courts in these efforts.⁷⁸ NEPA in fact became the primary vehicle for challenges to Forest Service wilderness recommendations and attempted releases of wilderness-eligible lands to multiple use management.⁷⁹ The ability to obtain judicial review of the Forest Service’s wilderness decisions under NEPA was essential, since the RARE study was not required by, and therefore could not be challenged under the Wilderness Act.⁸⁰ As the Forest Service had great difficulty in complying with NEPA in the RARE process, the statute proved indispensable in preserving roadless areas until Congress intervened in the 1980s by enacting a series of state-specific wilderness bills.⁸¹

A. Early NEPA Cases Affecting the Wilderness Designation Process

RARE I was the Forest Service’s first attempt to develop a procedure for allocating roadless areas to wilderness preservation. The study aimed to facilitate resource planning and provide certainty as to which lands should be designated as wilderness, and which could be released for other uses.⁸² Wilderness preservation advocates criticized RARE I for recommending for wilderness only a fraction of roadless areas it studied,⁸³ and environmental groups seized upon NEPA to challenge the RARE I allocations.⁸⁴ The first of these suits, *Sierra Club v. Butz*,⁸⁵ ended Forest Service hopes that RARE I

⁷⁶ See *infra* notes 83–116 and accompanying text.

⁷⁷ See GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 1128–29 (5th ed. 2002) (describing the “wilderness areas designated in the Wilderness Act or shortly thereafter [as] so-called ‘rocks and ice’ areas—high altitude, remote, relatively inaccessible and with few known resources of demand in the marketplace like timber and minerals”).

⁷⁸ See *infra* notes 83–116 and accompanying text.

⁷⁹ See *infra* Part III.A–B; COGGINS ET AL., *supra* note 33, at 1049.

⁸⁰ See COGGINS ET AL., *supra* note 33, at 1049.

⁸¹ See *infra* Part III.C.

⁸² ALLIN, *supra* note 6, at 160; Wilkinson & Anderson, *supra* note 32, at 346.

⁸³ See *infra* text accompanying notes 85–86.

⁸⁴ JOHN C. HENDIE & CHAD P. DAWSON, WILDERNESS MANAGEMENT: STEWARDSHIP AND PROTECTION OF RESOURCES AND VALUES 132 (3d ed. 2002) (explaining that critics of RARE I alleged the review was intentionally fast, so as to thwart “[o]pportunities for careful review by . . . agency personnel and concerned citizens,” and the methodology utilized by the Forest Service was inadequate). *Id.* See discussion of NEPA, *infra* Part IV; see also ALLIN, *supra* note 6, at 160 (explaining that “RARE I proved to be more quick than comprehensive”). Congress passed NEPA in 1969 and RARE I was completed in 1972, meaning that NEPA was available to support challenges to RARE I allocation decisions.

⁸⁵ *Sierra Club v. Butz*, 349 F.Supp. 934, N.D. Cal. (1972). 3 *Envtl. L. Rep.* (Envtl. Law Inst.) 20,071 (N.D. Cal. Aug. 29, 1972).

would justify the development of those areas that it recommended be dropped from wilderness consideration.⁸⁶

In *Butz*, the Sierra Club successfully argued that NEPA required the Forest Service to prepare an environmental impact statement (EIS) prior to authorizing timber sales in roadless areas that the RARE study inventoried but designated as nonwilderness.⁸⁷ The Sierra Club sued, claiming that the proposed timber sales violated NEPA.⁸⁸ The Forest Service responded by arguing that NEPA did not apply because RARE I was a voluntary study not required by the Wilderness Act, and consequently authorizing development in the inventoried roadless areas was a “nondecision,” not an agency “action” subject to NEPA.⁸⁹ The district court agreed with the conservation groups and ruled that NEPA required preparation of an EIS before the Forest Service could authorize timber sales threatening the wilderness character of lands meeting the qualifications for wilderness.⁹⁰

The *Sierra Club* injunction made clear that each new development proposal on inventoried national forest lands—representing unique natural resources—required preparation of an EIS that would consider and publicly disclose the wilderness values of the lands under consideration.⁹¹ This case was NEPA’s first, but certainly not the final blow to Forest Service attempts to permanently free up roadless areas for development.

Shortly after *Sierra Club v. Butz*, environmental groups again succeeded in using NEPA to stop development of RARE I inventoried lands.⁹² In *Wyoming Outdoor Coordinating Council v. Butz*, environmentalists sued the Forest Service for failing to prepare EISs on timber sales planned prior to completion of RARE I.⁹³ The Forest Service claimed that NEPA did not

⁸⁶ Rickart, *supra* note 31, at 890; *see infra* notes 87–91 and accompanying text.

⁸⁷ Wilkinson & Anderson, *supra* note 32, at 347; *Butz*, 3 *Envl. L. Rep.* (Envtl. Law Inst.) at 20,072.

⁸⁸ *Butz*, 3 *Envl. L. Rep.* (Envtl. Law Inst.) at 20,072.

⁸⁹ Wilkinson & Anderson, *supra* note 32, at 347 n.1868

⁹⁰ *Butz*, 3 *Envl. L. Rep.* (Envtl. Law Inst.) at 20,072. The court’s injunction prevented the Forest Service from authorizing any development on RARE I lands absent NEPA compliance. *Id.*

⁹¹ *See id.*; Rickart, *supra* note 31, at 890 (“NEPA was judged applicable to all phases of the RARE process and even initial determinations of suitability required environmental impact statements.”); ALLIN, *supra* note 6, at 161.

⁹² *See* *Wyo. Outdoor Coordinating Council v. Butz (Wyo. Outdoor Council)*, 484 F.2d 1244 (10th Cir. 1973), *overruled on other grounds by* *Los Ranchos De Albuquerque v. Marsh (Los Ranchos)*, 956 F.2d 970 (10th Cir. 1992) (holding that the appropriate standard for reviewing the U.S. Army Corps of Engineers’ determination that bridge construction project did not require an EIS was arbitrary and capricious under the Administration Procedure Act). In *Los Ranchos*, the Tenth Circuit overruled *Wyo. Outdoor Council* with respect to the standard of review that should apply in NEPA cases. *Los Ranchos*, 956 F.2d at 973. In *Wyo. Outdoor Council* and others, the Tenth Circuit applied a “reasonableness standard;” but in *Los Ranchos*, the court determined this standard was inconsistent with the Supreme Court’s decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989), and consequently ruled that the “arbitrary and capricious” standard was the proper standard to apply when reviewing an agency decision whether to prepare an EIS. *Id.*

⁹³ *Wyo. Outdoor Council*, 484 F.2d at 1246. *See also id.* at 1247 (explaining that Forest Service prepared “Environmental Impact Reviews” for the timber sales, but that the agency

require the preparation of an EIS on any of the sales because they were not “major federal actions significantly affecting the quality of the human environment,” the statutory trigger for an EIS.⁹⁴

The district court agreed with the Forest Service, but the Tenth Circuit reversed, determining that NEPA required preparation of an EIS on the timber sales.⁹⁵ Adopting the reasoning of *Sierra Club v. Butz*, the court ruled that NEPA procedures applied because authorizing a change to the wilderness character of a roadless area was the kind of action that required preparation of an EIS.⁹⁶ The court observed that “there is an overriding public interest in preservation of the undeveloped character of the area,” and consequently enjoined the contested timber sales pending the Forest Service’s preparation of an EIS.⁹⁷ Although the injunction applied only to a few existing timber sale contracts in roadless areas, the effect of the court’s order was to halt timber sales in all areas identified by RARE I until the Forest Service prepared an EIS that complied with NEPA.⁹⁸

The NEPA challenges to RARE I prompted the Forest Service to abandon that study,⁹⁹ NEPA’s first large-scale effect on wilderness policy. As a result of NEPA, RARE I would not give the Forest Service justification for releasing roadless national forest lands to logging, mining, and other uses incompatible with wilderness.

In 1977, in an effort to resolve the problems with RARE I, speed the process of wilderness designation, and open other roadless areas to nonwilderness uses, the Forest Service initiated a new nationwide wilderness study: RARE II.¹⁰⁰ Although RARE II inventoried more lands than RARE I—sixty-two million acres as opposed to fifty-six million acres—it too acquired its share of critics, who also invoked NEPA to challenge the results of that study.¹⁰¹

“concluded that in view of the lack of significant effect on the human environment and consideration given to wilderness management, [EISs] were not needed for the sales in question.”)

⁹⁴ *Id.* at 1246 (citing 42 U.S.C. § 4332). NEPA requires agencies to prepare a “detailed statement” for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2006).

⁹⁵ *Wyo. Outdoor Council*, 484 F.2d. at 1246.

⁹⁶ *Id.* at 1250; see Wilkinson & Anderson, *supra* note 32, at 347.

⁹⁷ *Wyo. Outdoor Council*, 484 F.2d. at 1250 (“We are convinced that a major federal action significantly affecting the human environment is involved, within the meaning of the statute.”).

⁹⁸ COGGINS & GLICKSMAN, *supra* note 43, § 25-11.

⁹⁹ See Rickart, *supra* note 31, at 890–91.

¹⁰⁰ See Wilkinson & Anderson, *supra* note 32, at 349–50; California v. Bergland, 483 F. Supp. 465, 471 (E.D. Cal. 1980) (“The asserted purpose of RARE II was to speed the process of wilderness allocation and to open remaining roadless areas to development.”). The Forest Service recognized the deficiencies in RARE I, and intended for RARE II to speed up the planning process. ALLIN, *supra* note 6, at 161. The RARE II inventory included 2,919 roadless areas spanning 62 million acres. Anderson & Moncrief, *supra* note 68, at 420.

¹⁰¹ See Susan Jane M. Brown, “Green Gold: Securing Protection for Roadless Areas on the Gifford Pinchot National Forest,” 8 U. BALT. J. ENVTL. L. 1, 9 (2000) (“RARE II was designed to incorporate the lessons from RARE I by allocating more time to complete the process (commencing in 1977 and completed in 1979) and including . . . missed RARE I areas, areas adjacent to existing wilderness areas, and congressionally designated wilderness study areas.”).

B. Enjoining RARE II

The Forest Service released the RARE II report and accompanying EIS in 1979, with the agency's preferred alternative recommending that Congress designate fifteen million acres of RARE II lands as wilderness and calling for further study of 10.8 million acres.¹⁰² Even though all RARE II areas met the minimal statutory requirements for wilderness designation, the Forest Service recommended that the majority of lands it inventoried in the RARE II study, some thirty-six million acres—nearly 60%—be classified as “nonwilderness” and released to multiple use management.¹⁰³ Almost immediately upon RARE II's release, critics of the study filed suit, alleging the RARE II EIS violated NEPA.¹⁰⁴

The State of California and environmentalists challenged the RARE II recommendations, seeking to enjoin development of roadless areas within the state.¹⁰⁵ California claimed that the RARE II EIS failed to give serious consideration to the effect of the “nonwilderness” designation on the wilderness qualities of lands classified of those lands.¹⁰⁶ The district court ruled that the RARE II EIS failed to support the nonwilderness designations in violation of NEPA.¹⁰⁷

The Ninth Circuit affirmed the district court because the decision to harvest timber on an undeveloped tract of land is “an irreversible and

Areas overlooked during RARE I included areas that did not meet the Forest Service's “purist” interpretation of wilderness. But by the time the agency initiated RARE II, the Department of Agriculture had directed the Forest Service to revise its definition of wilderness, thus increasing the amount of wilderness available to inventory. See Wilkinson & Anderson, *supra* note 32, at 349–50; see also DOUG SCOTT, A WILDERNESS FOREVER FUTURE-HISTORY 17 (2001), available at http://wilderness.net/toolboxes/documents/awareness/Doug%20Scott_-_WildernessForever_Future-history.pdf (explaining that the Forest Service's “purity doctrine” excluded millions of acres of “wildlands” that the Forest Service deemed “not wild enough”).

¹⁰² John Klein-Robberharr, Comment, *Judicial Review of Forest Service Timber Sales: Environmental Plaintiffs Gain New Options Under the Oregon Wilderness Act*, 35 NAT. RESOURCES J. 201, 206 (1995) (citing Receipt of Environmental Impact Statements, 44 Fed. Reg. 3087 (Jan. 15, 1979)); COGGINS & GLICKSMAN, *supra* note 43, at 25-11. See *California v. Bergland*, 483 F. Supp. 465, 471 E.D. Cal 1980, *aff'd sub nom* *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (explaining that “[f]urther planning” was “a decision not to decide and to leave land use issues to the ordinary forest planning process.”).

¹⁰³ COGGINS & GLICKSMAN, *supra* note 43, at 25-11; ALLIN, *supra* note 6, at 164; see *Bergland* 483 F. Supp. at 471 (noting that areas released to nonwilderness could be developed without further consideration of wilderness issues).

¹⁰⁴ Brown, *supra* note 101, at 10.

¹⁰⁵ *Bergland*, 483 F. Supp. at 469–70. The Natural Resources Defense Council, Trinity County, and the Clear Creek Legal Defense Fund intervened as plaintiffs. *Bergland*, 483 F. Supp. at 472. Webco Lumber Company, the National Forest Products Association and Del Norte, Shasta, and Siskiyou counties intervened as defendants. *Id.*

¹⁰⁶ *Id.* at 470. California alleged violations of the Multiple-Use Sustained-Yield Act and National Forest Management Act in addition to the NEPA claims, but the court did not reach those claims. *Id.* at 472.

¹⁰⁷ *Id.* at 470 (concluding that the Forest Service “either never seriously considered the impact of its decision on the wilderness qualities of the RARE II areas, or that the Forest Service has simply failed to disclose the data, assumptions, and conclusions employed by it in such consideration”).

irretrievable decision” which could have “serious environmental consequences.”¹⁰⁸ The court identified three distinct NEPA violations: 1) the RARE II EIS did not adequately discuss site-specific environmental consequences;¹⁰⁹ 2) the EIS did not consider an adequate range of alternatives; and 3) the Forest Service failed to provide the public an adequate opportunity to comment on its proposal.¹¹⁰

Concerning the requirement that the EIS provide detailed site-specific analysis for millions of acres of lands, the court recognized the logistical difficulties, but concluded that the scope of the proposal was the agency’s choice, and that the scope did not relieve the Forest Service from its NEPA-imposed duty of publicly disclosing the site-specific consequences of its decisions to release millions of acres to nonwilderness.¹¹¹ In its alternative ruling, the court suggested that a reasoned decision required the Forest Service to consider at least one alternative that allocated to wilderness greater than one-third of the inventoried lands.¹¹² The court’s decision on public involvement faulted the agency for failing to circulate a draft supplemental EIS, even though it changed the criteria for making wilderness allocations, and for failing to provide a meaningful response to public comment on the draft EIS it did circulate.¹¹³

¹⁰⁸ *Block*, 690 F.2d at 763.

¹⁰⁹ The district court had found EIS was deficient on several grounds, including failures to 1) include comprehensive descriptions of the RARE II areas, 2) assess the wilderness value of each area, 3) discuss the effect of nonwilderness designations on wilderness characteristics and values, 4) consider the effect of development on potential for future wilderness designation, and 5) balance the economic benefits of nonwilderness classification with the resulting environmental consequences. *See id.* at 760. The Ninth Circuit agreed that NEPA required correction of these deficiencies in order to fulfill its objective of disclosing to the public the environmental consequences of proposed federal actions. *Id.* at 763 (interpreting NEPA and the then-applicable Council on Environmental Quality’s NEPA guidelines).

¹¹⁰ *Id.* at 762, 765, 769–70.

¹¹¹ *Id.* at 765.

¹¹² Although the Forest Service considered eight alternatives, the court concluded that the alternatives analysis was inadequate, reasoning that the EIS should have included an alternative that involved increasing production on federal land already open to development and “[a]llocating to Wilderness a share of the RARE II acreage at an intermediate percentage between 34% and 100%.” *Id.* at 765, 766–67. By failing to consider an alternative that allocated more than a third of the RARE II acreage to wilderness, the agency could not, according to the Ninth Circuit, make the reasoned choice that NEPA required. *Id.* at 765. Since all of the RARE II inventoried acreage met the minimum criteria for wilderness designation, the Forest Service was not justified in considering only those alternatives that allocated considerably more total acres to nonwilderness than to wilderness. *Id.* at 769. The Ninth Circuit did not agree with the district court that the EIS should also have included an alternative “[e]xpanding the number of classifications beyond the broad categories Wilderness, Nonwilderness, and Future Planning.” *Id.* at 766.

¹¹³ *Id.* at 770, 772. Most of the public comments submitted to the Forest Service discussed specific areas, but the Forest Service’s EIS failed to identify or discuss any of the site-specific comments; instead, the Forest Service merely tallied the number of comments received and listed the number of responses recommending wilderness, nonwilderness or further planning. *Id.* at 773. The court recognized that the “agency’s obligation to respond to public comment is limited” but explained that the agency must provide a “‘meaningful reference’ to all responsible opposing viewpoints concerning the agency’s proposed decision.” *Id.* (citing 40 C.F.R. § 1510(a) (1977); 38 Fed. Reg. 20,550, 20,555 (1973) (superseded 1978)). The court concluded “that the

California v. Block enjoined the Forest Service from authorizing activities that would impair the wilderness character of inventoried lands until it prepared an EIS that complied with NEPA by adequately analyzing and publicly disclosing the effect of releasing lands to nonwilderness status.¹¹⁴ Although the case concerned only roadless areas in California, the Forest Service's RARE II EIS was nationwide in scope,¹¹⁵ and the court's order thus precluded road building and logging in all RARE II lands classified as nonwilderness.¹¹⁶ The upshot was that the agency could not release to multiple use management some thirty-six million acres until it satisfied NEPA.

C. Congressional Intervention

Following the challenge to RARE II in *California v. Block*, the Forest Service was poised to initiate RARE III, a third attempt at inventorying and studying roadless areas, by preparing EISs on wilderness allocations in individual national forests.¹¹⁷ However, Congress preempted RARE III in

Forest Service was obliged to identify and discuss responsible opposing viewpoints concerning individual site allocations," and that the EIS did not satisfy this obligation. *Id.*

¹¹⁴ *Id.*

¹¹⁵ COGGINS & GLICKSMAN, *supra* note 43, § 25:09. For example, in *Earth First v. Block*, an action to enjoin the Forest Service from changing the wilderness character of the North Kalmiopsis Roadless Area in southern Oregon, the district court held the EIS was inadequate because it lacked the site-specific analysis required by *California v. Block*. 569 F. Supp. 415, 417 (D. Or. 1983) (citing *Block*, 690 F.2d 753 (9th Cir. 1982)). The court explained that the primary issue in the case was, as in *California v. Block*, "whether the Forest Service may designate an area as Nonwilderness without a site-specific EIS addressed to that issue, relying instead upon the RARE II EIS which the Ninth Circuit determined was faulty, and a subsequent EIS which cannot consider the wilderness question but only analyzes the value of various nonwilderness alternatives." *Id.* at 419. The court explained that the Ninth Circuit had already resolved the issue in *California v. Block*, and that it was irrelevant whether the lands were in California or Oregon because the RARE II EIS had nationwide scope. *Id.* The court therefore concluded that because the Forest Service failed to prepare an EIS that included site-specific information, NEPA required it to enjoin road construction, logging, and other nonwilderness uses until the agency prepared a valid EIS. *Id.* at 420.

¹¹⁶ COGGINS & GLICKSMAN, *supra* note 43, § 25:9 ("[A]ll parties understood that any activities which threatened wilderness values on all RARE II lands would be subject to automatic injunction," and recognizing that the court's interpretation of the Wilderness Act effectively halted logging and other commercial development on over one-third of national forest lands); see also Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of A Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 101 (1994) (asserting that *Block* "had profound implications for the Forest Service" because it "essentially prevented [timber harvest] on roadless lands where a site-specific EIS was not in place, and even when an EIS was prepared, injunctions were still issued."); Friends of the Bitterroot v. U.S. Forest Serv., 900 F. Supp. 1368, 1374 (D. Mont. 1991) (granting a preliminary injunction against timber sales in inventoried roadless areas because the Forest Service failed to consider an alternative to the proposed sale that preserved the inventoried lands but allowed cutting on other lands within the sale area).

¹¹⁷ See Brown, *supra* note 101, at 10 (explaining that the "Forest Service failed to recommend any lands for inclusion in the NWPS, and instead decided to scrap the entire RARE II process."). Following the decision to terminate RARE II, the Forest Service announced it

most western states by passing a series of state-specific wilderness bills that designated wilderness amounting to over 8% of the total wilderness system today.¹¹⁸

Congress took action in response to the repeated failures of the Forest Service to comply with NEPA in inventorying and studying its roadless areas, which effectively halted timber harvests in national forest roadless areas. The timber industry and its Republican allies in the Senate pushed for national legislation that would designate wilderness areas and release other roadless areas to development.¹¹⁹ Eventually, the industry and its allies gave up trying to pass national release legislation and instead focused on passing state bills that achieved a compromise with wilderness advocates on the fate of the lands released from initial wilderness consideration.¹²⁰

From 1984 to 1993, Congress passed twenty-eight state wilderness bills, adding 9.8 million acres of wilderness, more than 8% of the current acreage comprising the National Wilderness System.¹²¹ In 1984 alone, Congress passed twenty-one state wilderness laws designating 8.2 million acres of wilderness and increasing the National Wilderness System by 10%.¹²² Many of

planned to initiate a RARE III, which would focus on specific national forests, thereby resolving the “site-specific analysis problems plaguing the agency’s first two attempts.” *Id.*

¹¹⁸ COGGINS ET AL., *supra* note 33, at 1052 (asserting that Congress short-circuited the RARE III process in many states by passing 19 wilderness bills in 1984 alone); Univ. of Montana, *Wilderness Statistics Reports*, <http://www.wilderness.net/NWPS/Chart> (last visited Apr. 12, 2014); Blumm & Erickson, *supra* note 10, at 13–16

¹¹⁹ See ROTH & HARMON, *supra* note 38, at 2 (examining the political maneuvering behind the state wilderness bills); SCOTT, *supra* note 101, at 22 (stating the order in *California v. Block* “generated great pressure from logging and other development interests for Congress to find some way to get national forest roadless areas ‘released’ from the requirement for intensive area-by-area review of wilderness”); see generally Dennis Roth, *The Wilderness Movement and the National Forests: 1980-1984* (1988), available at http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/9309/The_Wil_Mov_Nat_For_1980_1984.pdf?sequence=11957/9309/The_Wil_Mov_Nat_For_1980_1984.pdf?sequence=1 (discussing the legislative history behind the state wilderness bills).

¹²⁰ See JAMES MORTON TURNER, *THE PROMISE OF WILDERNESS: AMERICAN ENVIRONMENTAL POLITICS SINCE 1964*, 66–69 (2012) (discussing national release legislation proposed in Congress and the ensuing political compromises involving wilderness designation and release); see also COGGINS ET AL., *supra* note 33, at 1,053 (explaining the distinction between “hard” and “soft” release language; the latter prevailed, meaning the nonwilderness roadless areas would be released from wilderness consideration until the revision of the pertinent Forest Service land plan).

¹²¹ *Wilderness Statistics Reports*, *supra* note 118 (estimates include acreage added through passage of ANILCA); Blumm & Erickson, *supra* note 10, at 15.

¹²² *Wilderness Statistics Reports*, *supra* note 118 (select “Public Laws Enacted by Year” and “Acreage Legislated by Year”) (estimates include acreage added through passage of ANILCA). More new wilderness areas—175—were added to the system in 1984 than in any other year. *Id.* (select “Wilderness Areas Designated by Year”). Thirty statewide national forest wilderness bills with release language were enacted between 1980 and 1990. ROSS W. GORTE, CONG. RESEARCH SERV., R41649, *WILDERNESS LAWS: STATUTORY PROVISIONS AND PROHIBITED AND PERMITTED USES 7* (2011). In 1984 alone, Congress passed state wilderness bills for Arizona, Arkansas, California, Florida, Georgia, Mississippi, New Hampshire, New Mexico, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. COGGINS ET AL., *supra* note 33, at 1136. Congress failed to pass bills for Colorado,

these state wilderness bills adopted the RARE II allocations, although in some states the amount of land allocated to wilderness far exceeded that recommended in RARE II.¹²³ The bills designated new wilderness areas while “releasing” roadless areas not designated as wilderness for development.¹²⁴

The fate of the roadless areas “released” from wilderness consideration was the subject of much congressional debate.¹²⁵ The timber industry and other development interests favored “hard release” of such areas, meaning that the Forest Service would conduct no future wilderness reviews of roadless areas not initially recommended for wilderness in the state bills and the areas would be made permanently available for nonwilderness uses.¹²⁶ Wilderness advocates, in contrast, wanted the Forest Service to consider wilderness issues during project planning so long as the released areas remained roadless; in other words, no release.¹²⁷ However, as a result of legislative compromise in 1984, the state wilderness bills included “soft release” language that released nondesignated areas to multiple use management until the Forest Service revised forest plans required by the National Forest Management Act (NFMA), generally ten to fifteen years later.¹²⁸

The compromise achieved by timber interests and wilderness advocates on the fate of released lands meant the Forest Service was not required to consider the wilderness designation option when drafting its first generation of forest plans.¹²⁹ However, during the forest plan revision process, the

Idaho, Montana, and several other states in 1984, although it eventually enacted bills for Nevada in 1989 and Colorado in 1993. *Id.*

¹²³ Anderson & Moncrief, *supra* note 68, at 420 n.44 (noting that the Oregon Wilderness Act designated nearly one million acres as wilderness lands, although RARE II recommended only 370,000 acres for wilderness designation).

¹²⁴ See Dennis Baird et al., *Mediating the Idaho Wilderness Controversy*, in *MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE* 229, 231 (J. Walton Blackburn & Willa Marie Bruce eds., 1995); see, e.g., Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, § 102(b)(2), 98 Stat. 2807, 2807 (1984). Part of the purpose of the Wyoming Wilderness Act was to “insure that certain National Forest System lands in the State of Wyoming be made available for uses other than wilderness in accordance with applicable national forest laws and planning procedures” *Id.*

¹²⁵ See COGGINS ET AL., *supra* note 33, at 1052–53 (explaining that the “release” issue was a “major point of contention in Forest Service (and BLM) wilderness legislation” and that it “stymied legislative action for some time[]”).

¹²⁶ *Id.* at 1053; see also JAMES MORTON TURNER, *THE PROMISE OF WILDERNESS: AMERICAN ENVIRONMENTAL POLITICS SINCE 1964*, at 199 (2012) (explaining that wilderness advocates favored a so-called “soft release,” in contrast to the so-called “hard release” advocated by the timber industry which would bar future consideration of wilderness); FOREST SERV., FS 391, *THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1964–1980*, at 65–67 (1984) (describing the legislative history behind the release and sufficiency language in the state bills); Brown, *supra* note 101, at 10–11 (describing the difference between “hard release” and “soft release”).

¹²⁷ COGGINS ET AL., *supra* note 33, at 1053.

¹²⁸ *Id.*; COGGINS & GLICKSMAN, *supra* note 43, § 25-10; see, e.g., Washington State Wilderness Act of 1984, Pub. L. No. 98-339, 98 Stat. 299 (1984) (including soft release language typical of the state wilderness bills). Because the initial NFMA plans have all been completed, release language is no longer relevant for national forest wilderness legislation. GORTE, *supra* note 122, at 7.

¹²⁹ COGGINS ET AL., *supra* note 33, at 1,053.

agency would again be required to consider the wilderness designation option for previously released areas that remained undeveloped.¹³⁰ The Forest Service need not preserve the released roadless areas; instead, the areas were to be managed for multiple use.¹³¹ The release language also typically immunized the Forest Service from judicial review involving the released areas by declaring the RARE II study to be adequate consideration of wilderness suitability for inventoried lands.¹³² Implications of the soft release language are further explored below in Part V.A.¹³³

While Congress was acting to designate wilderness through state bills, the Forest Service, which had abandoned RARE III, was in the process of developing forest plans required by NFMA.¹³⁴ In states where Congress was unsuccessful in passing a wilderness bill,¹³⁵ NFMA forest plans reviewed roadless areas and made wilderness allocations that largely mirrored the RARE II allocations.¹³⁶ The plans typically recommended wilderness for only a small portion of the inventoried roadless areas,¹³⁷ while releasing lands not recommended for wilderness to multiple use management.¹³⁸ The environmental effects of those plans were subject to evaluation and public disclosure in individual plan EISs.¹³⁹ Environmental groups challenged the

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (identifying relevant language in the Washington State Wilderness Act of 1984, and explaining that the “net effect” of the WSWA release language was to provide general immunity from wilderness-based review except for areas that were not inventoried as part of RARE II).

¹³³ Discussing *Nat'l Audubon Soc'y v. U.S. Forest Serv.*, 4 F.3d 832 (9th Cir. 1993); *Smith v. U.S. Forest Serv.*, 33 F.3d 1072 (9th Cir. 1994); *City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985).

¹³⁴ See Baird et al., *supra* note 124, at 231; see also Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 101–02 (1994) (explaining that “[t]he RARE III analysis was incorporated into each forest plan EIS, and contained much more site-specific information about each roadless area . . . including its wilderness suitability, resource trade-offs from development versus preservation, and the consequences of implementing the forest plan’s management prescription for the area.”).

¹³⁵ States with national forest wilderness areas but not statewide wilderness bills with release language include Idaho, Illinois, Louisiana, Minnesota, Montana, South Carolina, and South Dakota. GORTE, *supra* note 122, at 7 n.17. Forest plans for National Forest lands addressed by the state wilderness bills did not include wilderness recommendations, but to address public concern about roadless areas that were released by the state wilderness bills, some plans did include roadless area reviews. Anderson & Moncrief, *supra* note 68, at 422.

¹³⁶ Baird et al., *supra* note 124, at 231; see also 36 C.F.R. § 219.7(c)(v) (2012) (requiring forest plans to “[i]dentify and evaluate lands that may be suitable for inclusion in the National Wilderness Preservation System and determine whether to recommend any such lands for wilderness designation.”); Wilkinson & Anderson, *supra* note 32, at 352 (explaining that “forest plans evaluate[d] roadless areas for potential wilderness recommendations to Congress and establish[ed] general management direction for congressionally designated wilderness areas.”).

¹³⁷ Anderson & Moncrief, *supra* note 68, at 422 (noting that the Idaho Panhandle National Forest plan recommended only four of the 47 inventoried roadless areas, just 18% of total roadless acreage in the forest).

¹³⁸ Baird et al., *supra* note 124, at 231.

¹³⁹ *Id.*; see also Wilkinson & Anderson, *supra* note 32, at 347 (noting that *California v. Block* meant courts would “closely scrutinize” forest plan EISs for roadless areas allocated to nonwilderness management and suggesting that “the single most important feature of the forest

wilderness recommendations in at least one of these “first generation” Land and Resource Management Plans (LRMPs).¹⁴⁰

D. NEPA and Wilderness Expansion in National Forests

The wilderness wars of the 1980s left long lasting effects. Of course, following the legislative compromises achieved in 1984, state wilderness bills increased wilderness acreage by more than 12%.¹⁴¹ Many other roadless acres were removed from timber harvesting and road building, at least temporarily, in the form of the “further study” category.¹⁴² Most of these acres would later be preserved by the Forest Service’s “roadless rule,” discussed below in Part V.A.

Other after-effects linger. The effort to “release” wilderness-inventoried land not recommended for wilderness designation for multiple use management seemed to encourage a political movement in favor of multiple use. Extractive industries—represented by the mining, timber, and grazing lobbies—seemed to embrace multiple use as a synonym for public lands development.¹⁴³ Multiple use has become a symbol for extractive development on public lands in the twenty-first century West.¹⁴⁴

plan’s EIS for a roadless area is a detailed, site-specific analysis of the environmental consequences of nonwilderness management.”).

¹⁴⁰ In *Idaho Conservation League v. Mumma*, environmental groups challenged the Forest Service’s decision to recommend against wilderness designation for 43 of 47 roadless areas in the Idaho Panhandle Land and Resource Management Plan. 956 F.2d 1508, 1510 (9th Cir. 1992). The plaintiffs alleged the EIS for the plan violated NEPA and the Wilderness Act. *Id.* The environmental groups alleged: 1) that the EIS violated NEPA because it did not consider the alternative of logging timber from already developed lands and recommending the roadless areas for wilderness, and 2) that the Service failed to disclose the value of the timber proposed for harvest on the roadless areas. *Id.* at 1519. The district court determined the plaintiffs lacked standing to sue and granted summary judgment to the defendants. *Id.* at 1510. The Ninth Circuit reversed on the standing issue but affirmed the district court’s decision on the merits, concluding that: 1) the Forest Service complied with NEPA by considering and then rejecting an alternative based on timber production in already developed areas, and 2) “NEPA does not require a particularized assessment of non-environmental impact,” such as the value of timber harvest on roadless areas. *Id.* at 1522–23.

¹⁴¹ See *supra* notes 121–22 and accompanying text (81,250,019 acres of wilderness prior to 1984, 9.8 million acres added through state wilderness bills passed from 1984–1993); *Wilderness Statistics Reports*, *supra* note 118.

¹⁴² See *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383, 388 (D. Wyo. 1980) (noting the “further study” designation preserved 10.8 million acres of national forest); see also *infra* note 256 and accompanying text (noting there were over 58 million roadless acres preserved by the Forest Service’s roadless rule).

¹⁴³ See *Hardt*, *supra* note 20, at 348 (“In recent years, however, many environmental groups have criticized the multiple use doctrine for failing to protect environmental values, while development interests have embraced it as a mandate that the federal lands remain open to commodity uses.”).

¹⁴⁴ See Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY* L.Q. 140, 152 (1999) (arguing that by “[o]perating under the mandate of multiple use, the Forest Service and the BLM historically have permitted commodity uses to dominate the public lands.”); Zellmer, *supra* note 32, at 32 (recognizing the “long-standing multiple-use paradigm based on commodity production”). Multiple use was once opposed by the timber industry

Another after-effect of the 1980s wilderness wars concerns the controversy over the “release” language in the 1980s wilderness bills.¹⁴⁵ Congress resolved the issue of when roadless areas in national forest could or would again receive wilderness consideration in the 1980s.¹⁴⁶ In the case of BLM wilderness lands, this issue remains unresolved and highly controversial. We discuss the controversy in Part V.B. below.¹⁴⁷

IV. NEPA’S ROLE IN WILDERNESS MANAGEMENT

After the 1980s expansion of the wilderness system, wilderness advocates shifted some of their focus from wilderness designation to wilderness management. As in the case of wilderness expansion, NEPA played an underappreciated role in ensuring that wilderness is managed not for commercial uses, but to protect wilderness characteristics.¹⁴⁸ The Wilderness Act forbids roads, commercial development, structures, and motorized vehicles in wilderness areas, but permits federal agencies to authorize some wilderness-incompatible activities if “necessary.”¹⁴⁹ Courts have interpreted NEPA to significantly constrain the discretion of federal agencies in managing wilderness areas, providing conservationists an important vehicle to ensure that managing agencies provide adequate justification before authorizing activities likely to harm wilderness resources.¹⁵⁰

A. Enjoining Management for Nonwilderness Purposes

The Wilderness Act authorizes the Forest Service to take “measures . . . as may be necessary in the control of fire, insects, and diseases, subject to

because it authorized the preservationist policies of Leopold and Marshall. *See supra* notes 20, 27–31 and accompanying text. However, by the late 20th century, multiple use became a rallying cry for commodity users. *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

¹⁴⁵ *See supra* notes 125–32 and accompanying text.

¹⁴⁶ *Id.*

¹⁴⁷ One legacy of the 1980s wilderness wars that did not have substantial effect on efforts to protect wild lands was the *California v. Block* court’s expansive ruling on the scope of permissible NEPA alternatives, which the Ninth Circuit did not apply in the context of the Forest Service’s roadless rule. *See infra* notes 258–81 and accompanying text.

¹⁴⁸ *See* COGGINS & GLICKSMAN, *supra* note 43, at § 25:44 (“Once Congress declares an area wilderness, very few commercial or commodity uses are allowed” and federal land agencies have a duty to preserve wilderness as wilderness.).

¹⁴⁹ Wilderness Act of 1964, 16 U.S.C. § 1133(d)(1) (2006) (“Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable. In addition, such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.”). *See* COGGINS & GLICKSMAN, *supra* note 43, § 25:44 to § 25:45.

¹⁵⁰ *See infra* notes 164–66 and accompanying text; *see also* Appel, *supra* note 18, at 89 (explaining that where courts have considered agency authorizations of activities with potential to harm wilderness characteristics, they have required the agencies to provide “somewhat careful reasoning”).

such conditions as the Secretary [of Agriculture] deems desirable.”¹⁵¹ In the 1980s, environmental groups filed several suits seeking to enjoin Forest Service attempts to control outbreaks of the southern pine beetle in wilderness areas.¹⁵² Beetle infestations were killing large swaths of pine forests in Texas and the Southeast, forests that provided important habitat for the endangered red-cockaded woodpecker.¹⁵³ In 1982, the Forest Service initiated a control program that sought to curb the spread of beetle infestations by cutting both infested trees and healthy trees surrounding infestations in order to create “buffer zones.”¹⁵⁴

In *Sierra Club v. Block*, the Sierra Club sought to enjoin the Forest Service from cutting trees as part of the beetle control program in several wilderness areas,¹⁵⁵ alleging that the program violated the Wilderness Act, NEPA, and the Endangered Species Act (ESA).¹⁵⁶ The Forest Service maintained the control program was necessary to prevent the beetle from destroying the commercial value of privately owned pine forests adjacent to wilderness areas and to protect woodpecker colonies from habitat loss caused by the beetle.¹⁵⁷

The Forest Service had prepared Environmental Assessments (EAs) for the control program in each of the three involved national forests; all three EAs concluded the control program would not result in any significant effect on the environment.¹⁵⁸ The district court identified “significant defects” in the EAs, ruling that they failed to adequately address the adverse effects of

¹⁵¹ 16 U.S.C. § 1133(d)(1) (2006).

¹⁵² See *Sierra Club v. Block (Block I)*, 614 F. Supp. 488, 490 (D.D.C. 1985); *Sierra Club v. Lyng (Lyng I)*, 662 F. Supp. 40, 41 (D.D.C. 1987), *Sierra Club v. Lyng (Lyng II)*, 663 F. Supp. 556, 557 (D.D.C. 1987); *Sierra Club v. Block (Block II)*, 614 F. Supp. 134, 135 (E.D. Tex. 1985).

¹⁵³ See generally John Shurts, *Wilderness Management and the Southern Pine Beetle*, 17 ENVTL. L. 671, 671–74 (1987) (describing the southern pine beetle problem and Forest Service control measures); Daniel Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 ECOLOGY L.Q. 152, 266–67 (1988) (describing southern pine beetle ecology and management).

¹⁵⁴ See *Block I*, 614 F. Supp. at 490–91 (explaining that between 1982 and 1985 the Forest Service issued three EAs, one covering the southern pine beetle control program for each of three separate national forests). The Forest Service justified the control program by rationalizing that absent the program, “the southern pine beetle infestations may destroy commercial and environmental value of the pine forests.” *Id.*; see also Rohlf & Honnold, *supra* note 153, at 266–67 (suggesting that the Forest Service’s claim that tree cutting was “essential to preventing wide scale and irreparable destruction by the voracious southern pine beetle” meant the agency “either misunderstood or disregarded the congressional mandate to preserve the wilderness character of southeastern forests”).

¹⁵⁵ *Block I*, 614 F. Supp. at 490 (challenging the southern pine beetle control program in the Black Creek and Leaf Wilderness Area in DeSoto National Forest, Mississippi; the Caney Creek Wilderness Area in Ouchita National Forest, Arkansas; and the Kisatchie Hills Wilderness Area in Kistchie Hills National Forest, Louisiana); see also *Block II*, 614 F. Supp. at 135 (considering similar issues in federal wilderness areas in Texas but denying a request for a preliminary injunction).

¹⁵⁶ *Block I*, 614 F. Supp. at 490.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* at 490–91.

cutting trees in wilderness areas.¹⁵⁹ Recognizing NEPA requires preparation of an EIS, not an EA, where a proposal is likely to have major effects,¹⁶⁰ the court explained “[o]ne could not rationally conclude that cutting thousands of acres of pine trees in a wilderness forest will not have any major effects.”¹⁶¹ The court observed that the Forest Service failed to discuss the efficacy of the cutting program, explaining that “[i]f the cutting has a limited or no effect on the number of pine trees lost to beetle infestations, wilderness area policy might be better served by no control.”¹⁶² Consequently, the court granted the Sierra Club’s request for an injunction on its NEPA claim.¹⁶³

The injunction prevented the Forest Service from cutting trees in the wilderness areas.¹⁶⁴ The court decided that without an EIS, the Forest Service could not authorize timber harvesting of insect-damaged timber inside a wilderness area for the benefit of commercial timberlands outside the wilderness area.¹⁶⁵ The case suggested that courts will employ NEPA to give close scrutiny to management actions in wilderness areas that threaten wilderness values, even though after preparing an EIS the Forest Service ultimately was able to proceed with a pared down beetle harvest program.¹⁶⁶

¹⁵⁹ *Id.* (noting that an earlier EIS on commercial timber harvests in forest lands did not address wilderness values, and observing that the EAs the Forest Service did prepare contained only a “cursory and perfunctory” discussion of wilderness issues).

¹⁶⁰ *Id.* at 491. Although regulations from the Council on Environmental Quality (“CEQ”) are not binding on courts, they provide that “major” effects are actually “significant” effects. *See* 40 C.F.R. § 1508.18 (2013) (stating that “[m]ajor reinforces but does not have a meaning independent of “significantly” as found in 40 C.F.R. § 1508.27).

¹⁶¹ *Block I*, 614 F. Supp. at 491 (citing 40 C.F.R. §§ 1508.18, 1508.25) (recognizing that “under CEQ’s definitions, any action ‘with effects that may be major’ in light of its context and intensity requires a EIS.”).

¹⁶² *Id.* at 491–92.

¹⁶³ *Id.* at 492, 494 (concluding that plaintiffs showed a likelihood of prevailing on the merits of the NEPA claim and issuing a limited preliminary injunction allowing for cutting as needed to protect the red-cockaded woodpecker).

¹⁶⁴ *Id.* at 494. The court limited the injunction on tree cutting to allow spot cutting where necessary to serve the public interest in preserving specific red-cockaded woodpecker colonies. *Id.* at 493–94.

¹⁶⁵ *Id.* (explaining that the injunction did not apply to timber harvests aimed at controlling beetle infestations in or near active red-cockaded woodpecker colony sites where the cutting was “undertaken for the sole purpose of preventing harm to the red-cockaded woodpeckers”).

¹⁶⁶ After *Sierra Club v. Block*, the Forest Service prepared an EIS that emphasized that timber harvests as part of a beetle control program must not interfere with natural ecological processes, recommending a substantial reduction in the amount of tree cutting within the wilderness areas. *See* Rohlfs & Honnold, *supra* note 153, at 267. In a later case concerning the same project, *Sierra Club v. Lyng (Lyng I)*, the Sierra Club argued the Secretary could not authorize the beetle control program in wilderness areas without demonstrating the program was necessary. 662 F. Supp. 40, 41 (D.D.C. 1987). The court concluded that the beetle control program was directed at furthering adjacent property interests, not wilderness interests or national wilderness policy, and therefore ruled the Secretary did not have the same broad management discretion normally afforded him under the Wilderness Act and held the program was an abuse of the Secretary’s discretion. *Id.* at 42–43. Following release of the EIS on March 6, 1987, the parties returned to court in *Sierra Club v. Lyng (Lyng II)*. 663 F. Supp. 556, 557 (D.D.C. 1987). The NEPA claim was settled following completion of the EIS, the ESA claim was declared moot, and the only issue left for consideration was the Wilderness Act claim. *Id.* at 557.

Outside of the beetle control context, courts have enjoined other nonwilderness activities in wilderness areas for failure to comply with NEPA. For example, in *Wilderness Watch v. Iwamoto*, the district court for the Western District of Washington ruled that the Forest Service violated NEPA and the Wilderness Act when it repaired and then relocated a fire lookout in a designated wilderness area.¹⁶⁷ The Forest Service claimed that NEPA did not apply because the project fell within a categorical exclusion for repair and maintenance of recreation sites and facilities,¹⁶⁸ but the court ruled that the Forest Service “abused its discretion by not conducting an EIS or EA” before embarking on the repair project.¹⁶⁹ The court reasoned the project did not involve the type of minor projects associated with ordinary maintenance that would normally be categorically excluded, and recognized that the project involved a specially protected area.¹⁷⁰ Ruling that the Forest Service violated both NEPA and the Wilderness Act, the court ordered the agency to remove the structure.¹⁷¹

In other cases, environmental groups have effectively invoked NEPA on nonwilderness lands to enjoin Forest Service activities with the potential to significantly affect wilderness resources.¹⁷² In one such case, *Izaak Walton*

The court granted the defendant’s motion for summary judgment on the Wilderness Act claim because the Secretary had provided sufficient evidence the cutting was necessary, and the Secretary’s decision to implement the control program was not arbitrary or capricious. *Id.* at 560–61.

¹⁶⁷ *Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063, 1077 (W.D. Wash. 2012). In September 1998, the Forest Service issued a memo regarding its decision to repair a fire lookout that was built in the 1930s. *Id.* at 1067. The agency authorized contractors and volunteers to use rock drills and helicopters to repair the lookout’s foundation. *Id.* However, in 2002, the Forest Service went beyond the plan outlined in the decision memo and disassembled the lookout, transported pieces of the lookout offsite by helicopter, constructed a new foundation, flew new and restored pieces of the lookout back to the site, and reassembled lookout structure onsite. *Id.* at 1067–68.

¹⁶⁸ *Id.* at 1067.

¹⁶⁹ *Id.* at 1077.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1079.

¹⁷² Courts have also invoked NEPA to enjoin activities on nonwilderness lands providing habitat connectivity between designated wilderness areas, where the environmental impacts of such activities were not adequately assessed. For example, in *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179 (9th Cir. 1990), the Ninth Circuit enjoined postfire salvage logging in the Klamath National Forest because the Forest Service did not adequately assess the adverse effects on a biological corridor connecting two wilderness areas. 914 F.2d at 180, 182. The Forest Service adopted an intensive timber management strategy, planning to maximize the harvest of standing timber, likely through clearcutting. *Id.* at 180. The agency released an accompanying EIS that examined the adverse environmental effects anticipated to result from the timber harvest, but the court concluded that the EIS gave fish and wildlife concerns “only cursory attention” and failed to discuss the biological corridor or consider the unique value of area as the only significant biological corridor connecting two wilderness areas. *Id.*; see also *Env’tl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1197 (N.D. Cal. 2004) (enjoining timber sale after concluding that the Forest Service violated NEPA because, even though it did recognize that the project area provided important habitat connectivity between a wilderness area and a late successional reserve, its determination that there would be no significant effect to the area was conclusory).

League of America v. Kimbell,¹⁷³ environmental organizations sued the Forest Service, challenging the agency's decision to construct a snowmobile trail connecting lakes adjacent to the Boundary Waters Canoe Area Wilderness (BWCAW).¹⁷⁴ The federal district court of Minnesota ruled that the Forest Service failed to provide adequate analysis supporting its conclusion that the snowmobile trail did not significantly affect the noise environment of the BWCAW.¹⁷⁵ The court explained "the sounds of snowmobiles and ATVs from a snowmobile trail on the perimeter of the BWCAW, high above a wilderness lake will surely impact the solitude of the wilderness."¹⁷⁶ The court consequently ordered the Forest Service to prepare an EIS that more thoroughly considered the sound effects in the BWCAW, enjoining activity on the snowmobile trail pending completion of an EIS that complied with NEPA.¹⁷⁷

B. Permits and Cumulative Impact Analyses

In another controversy over wilderness management, *High Sierra Backpackers Ass'n v. Blackwell*,¹⁷⁸ conservation groups sued the Forest Service, seeking to enjoin the agency's issuance of special-use permits to commercial packstock operators in two designated wilderness areas.¹⁷⁹ The conservationists claimed the permits violated both NEPA and the Wilderness Act.¹⁸⁰ The district court granted the Forest Service summary judgment on High Sierra's claim that the Forest Service was violating the Wilderness Act by allowing commercial services that degraded the wilderness areas.¹⁸¹ The court explained that the Forest Service had broad discretion under the Wilderness Act to determine how much commercial pack-use to allow and how to deal with the impacts, but nevertheless granted High Sierra's motion for summary judgment on the NEPA claim.¹⁸² The court concluded the Forest Service violated NEPA by issuing multi-year special-use permits and granting

¹⁷³ 516 F. Supp. 2d 982, 997 (D. Minn. 2007).

¹⁷⁴ *Id.* at 997.

¹⁷⁵ *Id.* at 995–96.

¹⁷⁶ *Id.* at 997.

¹⁷⁷ *Id.* at 996–97 (citing *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 927 (D. Minn. 2005)). In *Bosworth*, the court, assessing whether the timber harvest in a narrow strip of land between two parts of the BWCAW would significantly affect the wilderness, determined the affected wilderness was "used heavily year-round by recreational visitors," and that the Forest Service had failed to include analysis of potential illegal motorized use in the wilderness area caused by new road construction. 352 F. Supp. 2d at 924–25. The *Bosworth* court ruled that the Forest Service failed to adequately analyze environmental impacts, including cumulative impacts, resulting from the timber sale and enjoined the sale pending completion of an EIS. *Id.* at 927.

¹⁷⁸ 390 F.3d 630 (9th Cir. 2003).

¹⁷⁹ *Id.* at 635–36. The conservation groups challenged the Forest Service's actions in issuing multiyear special-use permits and granting one-year renewals of special-use permits. *Id.* at 636.

¹⁸⁰ *Id.* at 637.

¹⁸¹ *Id.*

¹⁸² *Id.* at 638.

one-year renewals of special-use permits to commercial packers without first completing an EIS.¹⁸³

The Ninth Circuit upheld the district court's ruling that the Forest Service violated NEPA by failing to assess the individual and cumulative impacts of the issuance of multi-year special-use permits and renewals of special-use permits to commercial pack-stock operators.¹⁸⁴ The Forest Service asserted the special-use permits and one-year renewals were categorically excluded from NEPA, but the court noted that the Forest Service's own regulations do not permit the categorical exclusion of activities in wilderness areas.¹⁸⁵ Because the categorical exclusion does not apply to "congressionally designated areas, such as *wilderness*, wilderness study areas, or National Recreational Areas," NEPA required the Forest Service to prepare an EA or EIS on its one-year renewals of the special-use permits.¹⁸⁶ Since the agency did no NEPA analysis, the court ruled the permit issuance "lacked the formality it was legally required to have," and therefore violated both NEPA and the Wilderness Act.¹⁸⁷

In *Minnesota Public Interest Research Group v. Butz*,¹⁸⁸ the plaintiffs sought declaratory and injunctive relief to prevent logging in the Boundary Waters Canoe Area (BWCA)¹⁸⁹ in northern Minnesota until the agency complied with NEPA by completing an EIS.¹⁹⁰ The district court concluded that the cumulative effect of the Forest Service's actions regarding timber sales in the BWCA constituted major federal actions significantly affecting the human environment and ruled that NEPA therefore required the Forest

¹⁸³ *Id.* The district court ordered the Forest Service to complete a NEPA analysis of cumulative impacts and a site-specific analysis for each permittee and, in the interim, ordered a reduction in the allocation of special-use permits and limited access to areas of environmental concern. *Id.*

¹⁸⁴ *Id.* at 648–49 (also reversing the district court's grant of summary judgment to the Forest Service on the Wilderness claim and holding that there were "triable issues of fact regarding whether the Forest Service damaged the wilderness areas.").

¹⁸⁵ *Id.* at 641 (citing Forest Service Handbook 1909.15, 30.3(1)(a)—(b)).

¹⁸⁶ *Id.* (emphasis in original).

¹⁸⁷ *Id.* at 648. Even though some of the permits were simply renewals of existing permits, the court explained that maintaining status quo use levels did not comply with the Wilderness Act because "[a]t best, when the Forest Service simply continued preexisting permit levels, it failed to balance the impact that that level of commercial activity was having on the wilderness character of the land. At worst, the Forest Service elevated recreational activity over the long-term preservation of the wilderness character of the land." *Id.* at 647.

¹⁸⁸ *Butz I*, 358 F. Supp. 584 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974).

¹⁸⁹ The BWCA is a federally designated wilderness in Superior National Forest created by the Boundary Waters Canoe Area Wilderness Act of 1978. *See* Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649 (1978).

¹⁹⁰ *Butz I*, 358 F. Supp. at 587. The plaintiffs challenged private logging operations under Forest Service timber sales that took place prior to the effective date of NEPA. *See* 498 F.2d at 1317. The plaintiffs also claimed that logging in the Boundary Waters Canoe Area (BWCA) should be prohibited because it was "incompatible with the wilderness values protected by the Wilderness Act." *Id.* The government countered that NEPA did not apply because there was no major federal action after the effective date of NEPA. *Id.*

Service to prepare an EIS.¹⁹¹ The court enjoined logging on land contiguous with undeveloped areas of the BWCA until the Forest Service prepared an EIS complying with NEPA, and the Eighth Circuit, sitting en banc, affirmed.¹⁹² The Eighth Circuit held that the Forest Service's modification or extension of some of the contracts and its supervision of defendant's daily logging activities constitute a major federal action significantly affecting the quality of the human environment within the purview of NEPA.¹⁹³

In *Friends of Boundary Waters Wilderness v. Dombeck*,¹⁹⁴ a coalition of counties, outfitters, and other citizens (the outfitters) alleged that the Forest Service violated NEPA in its EIS for a plan amending the Superior National Forest LRMP.¹⁹⁵ The outfitters claimed that the EIS did not adequately consider all available alternatives, available data, economic effects of the plan on local communities, and the effects of restricting visitor use on their own use of the area.¹⁹⁶ The district court dismissed the NEPA claim, but the Eighth Circuit ruled that the outfitters had standing to bring the NEPA claims. Ultimately though, it concluded that the EIS complied with NEPA, and therefore affirmed the lower court's judgment in favor of the government.¹⁹⁷ The court recognized that federal agencies are not required to consider alternatives contrary to NEPA's goal to "attain the widest range of beneficial uses of the environment without degradation."¹⁹⁸ The Forest

¹⁹¹ *Butz I*, 358 F. Supp. at 622, 630. The activities of the Forest Service concerning these 11 pre-NEPA timber sales fell roughly into three categories: contract extensions, contract modifications, and the administrative actions required by the contracts. 498 F.2d at 1318.

¹⁹² *Butz I*, 358 F. Supp. at 630; 498 F.2d at 1322, 1325. In subsequent litigation, the district court reconciled the Wilderness Act's contemplation of some logging within BWCA with the general constraint against development not "necessary" for wilderness administration by enjoining logging within or adjacent to large tracts of previously unlogged forest. *MPIRG v. Butz (Butz II)*, 401 F. Supp. 1276, 1276 (D. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976).

¹⁹³ 498 F. 2d at 1316. Following the Forest Service's publication of the EIS and an associated management plan for the BWCA, MPIRG and the Sierra Club sued the Forest Service and others, claiming the EIS and management plan were procedurally and substantively inadequate under NEPA, and the Wilderness Act prohibited commercial logging in the virgin forest areas of the BWCA. *Butz II*, 401 F. Supp. at 1282 (D. Minn. 1975). The district court, agreeing with the plaintiffs, held the EIS did not comply with NEPA and the Wilderness Act and prohibited logging in areas contiguous to the remaining large blocks of virgin forest in the BWCA. *Id.* at 1333. The court permanently enjoined existing and future timber sales in the areas contiguous to the remaining virgin forest areas of the BWCA. *Id.* at 1334. The Eighth Circuit, again sitting en banc, reversed the district court, holding that the Forest Service complied with NEPA by preparing an EIS that was procedurally and substantively adequate under NEPA. *Butz II*, 541 F.2d 1292, 1295, 1299 (8th Cir. 1976) (explaining "the district court's review of the EIS was infected with an impermissibly broad view of its power to review the Forest Service's substantive decision to permit logging as a vegetation management tool in the BWCA").

¹⁹⁴ 164 F.3d 1115 (8th Cir. 1999).

¹⁹⁵ *Id.* at 1120. Friends of Boundary Waters challenged the Forest Service's BWCA Wilderness Management Plan and Implementation Schedule of 1993, which the court referred to as a "wilderness plan." *Id.* at 1119. The wilderness plan amended the 1986 Land and Resource Management Plan for the Superior National Forest, which directed management actions in the BWCA. *Id.* at 1120.

¹⁹⁶ *Id.* at 1127.

¹⁹⁷ *Id.* at 1131.

¹⁹⁸ *Id.* at 1129 (citing 42 U.S.C. § 4331(b)(3) (2006)).

Service sought to limit recreation in the BWCA Wilderness because visitor use levels were already “beginning to strain the viability and solitude of the wilderness area and to degrade the intended primitive recreational experience.”¹⁹⁹ Consequently, the court concluded that the agency’s EIS adequately addressed the “environmental, recreational, social, and economic impacts of the . . . Plan.”²⁰⁰

V. NEPA’S ROLE IN PRESERVING POTENTIAL WILDERNESS

NEPA has played an important role in protecting areas with wilderness quality that have not been formally designated as wilderness. For example, in a decision involving Forest Service management of roadless areas, the Ninth Circuit required the agency to evaluate the effect of logging in order to protect the congressional prerogative of designating wilderness in the future.²⁰¹ The Tenth Circuit ruled that when approving a road improvement bisecting two wilderness study areas, the BLM not only had the duty to examine less damaging alternatives, but also to select the least damaging alternative it studied.²⁰² In these decisions, NEPA imposed important curbs on agency discretion in managing lands with wilderness potential.

A. NEPA and Roadless Areas in National Forests

NEPA has been essential to maintaining roadless areas for future wilderness consideration. In a series of cases involving roadless areas on Forest Service lands, the Ninth Circuit distinguished roadlessness, an environmental condition, from wilderness, a legal concept. The Forest Service argued that release and sufficiency language in state wilderness acts of the 1980s precluded courts from reviewing projects involving roadless areas.²⁰³ The Ninth Circuit confirmed the acts did not release individual projects from judicial review,²⁰⁴ clarifying that although the statutes may not have described all undeveloped roadless-in-fact areas in the relevant states as roadless for purposes of further evaluation, that fact did not exempt the

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1131.

²⁰¹ See *Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1078 (9th Cir. 1994); see also *Friends of the Bitterroot v. U.S. Forest Serv.*, CV 90-76-BU (D. Mont. July 30, 1991) (granting a preliminary injunction against timber sales in inventoried roadless areas because the Forest Service failed to consider an alternative to the proposed sale that preserved the inventoried lands but allowed cutting on other lands within the sale area).

²⁰² See *Sierra Club v. Hodel*, 848 F.2d 1068, 1090–91 (10th Cir. 1988) (concerning expansion of the Burr Trail); see *infra* notes 284–301 and accompanying text.

²⁰³ See *infra* notes 209, 228 and accompanying text.

²⁰⁴ See Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 ENVTL. L. 149, 198–99 (1996) (citing *Smith*, 33 F.3d at 1077–78; *Nat’l Audubon Soc’y v. U.S. Forest Serv.*, 4 F.3d 832, 836–37 (9th Cir. 1993); *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1405–06 (9th Cir. 1985)).

Forest Service from considering the roadless value of these lands during NEPA review.²⁰⁵

The first of these cases involved the Oregon Wilderness Act, which created several wilderness areas and released other roadless areas to multiple use management.²⁰⁶ In *National Audubon Society v. U.S. Forest Service*,²⁰⁷ environmentalists objected to timber sales in released areas and abutting roadless areas of Rogue River National Forest.²⁰⁸ The Forest Service argued that by not specifically describing the sale areas as “roadless,” Congress intended to preclude judicial review, and therefore NEPA did not apply.²⁰⁹ The district court rejected this interpretation, holding that roadlessness is a question of fact, not of law, reasoning that “[t]he designation of an area as ‘roadless’ for the purpose of determining the broad category of future development possibilities is not synonymous with an assessment of whether . . . significant environmental consequences will result from development of the area.”²¹⁰ The court enjoined timber sales until the agency completed an EIS describing the timber sales’ consequences on the roadless and undeveloped nature of the sale tracts.²¹¹

On appeal, the Ninth Circuit agreed that the release language did not immunize the timber sales from judicial review of NEPA compliance.²¹² The

²⁰⁵ See *Nat’l Audubon Soc’y*, 4 F.3d at 837; see also John Klein-Robbehaar, Comment, *Judicial Review of Forest Service Timber Sales: Environmental Plaintiffs Gain New Options Under the Oregon Wilderness Act*, 35 NAT. RESOURCES J. 201, 218 (1995) (arguing that *Audubon Society* “provides new options to environmental groups who wish to challenge old growth timber sales. . . . an environmental group can challenge a timber sale on the basis of the roadlessness of the land”).

²⁰⁶ See Oregon Wilderness Act of 1984, 16 U.S.C.A. § 4600o (West 2010).

²⁰⁷ 4 F.3d 832 (9th Cir. 1993), *opinion amended and superseded on denial of reh’g*, 46 F.3d 1437 (9th Cir. 1993).

²⁰⁸ *Id.* at 834.

²⁰⁹ *Id.* at 836.

²¹⁰ *Nat’l. Audubon Soc’y v. U.S. Forest Serv.*, 21 *Env’tl. L. Rep.* (Env’tl. Law Inst.) 20,828, 20,829 (D. Or. Nov. 21, 1990).

²¹¹ *Id.* at 20,830.

²¹² *Nat’l Audubon Soc’y*, 4 F.3d at 837. The court reasoned that release language in the Oregon Wilderness Act prohibiting judicial review applied to *wilderness* designations, not roadless or roaded determinations. *Id.* The Oregon Wilderness Act specified that the agency did not need to review the wilderness option for individual project reviews, but it did not exempt the Forest Service from considering the roadless option. *Id.* The court noted it had previously held that “[t]he RARE II EIS addresses only the environmental impact of allocating certain lands to *wilderness* status.” *Id.* (citing *Tenakee Springs v. Block*, 778 F.2d 1402, 1405 (9th Cir. 1985)). In *Tenakee Springs*, the City of Tenakee Springs and the Southeast Alaska Conservation Council challenged the Forest Service’s decision to build a road in area of the Tongass National Forest classified as “nonwilderness” under RARE II. 778 F.2d at 1403. The plaintiffs alleged the Forest Service violated NEPA by failing to adequately consider environmental effects of the road construction on an undeveloped area of the forest. *Id.* ANILCA provided that the “legal and factual sufficiency” of the RARE II EIS for Alaska National Forests was not subject to judicial review, but the Ninth Circuit, reversing the district court, held that ANILCA did not preclude judicial review of the Tongass Forest Plan EIS. *Id.* at 1405. The court explained that the RARE II allocations were recommendations, not mandates for development; the Forest Service still retained the option of considering an alternative that would not result in developing the areas classified as “nonwilderness.” *Id.* at 1406. The court concluded the Forest Service violated NEPA and enjoined further construction of the road project. *Id.* at 1407; see also COGGINS ET AL.,

court determined the Oregon Wilderness Act aimed to immunize only Forest Service wilderness reviews from judicial scrutiny, and not subsequent project decisions.²¹³

In a similar case involving the 1984 Washington Wilderness Act,²¹⁴ the Ninth Circuit, relying on the reasoning in *National Audubon*, enjoined timber sales on a roadless area pending completion of an EIS pursuant to NEPA.²¹⁵ In *Smith v. U.S. Forest Service*, a recreational user challenged the Forest Service's assessment of the environmental impacts of a proposed timber sale in a roadless area of the Colville National Forest in Washington.²¹⁶ The timber sale area included both inventoried and uninventoried roadless lands in the Gatorson Planning Area.²¹⁷

In 1988, the Forest Service issued a plan for the Colville National Forest that called for logging the area.²¹⁸ The EIS for the plan analyzed the effects of timber sales on inventoried roadless areas, including the Twin Sisters RARE II area, but it failed to include a discussion of any roadless areas not inventoried as part of RARE II.²¹⁹ The Forest Service issued an EA for the Gatorson timber sale in 1992, concluding the sale would have no significant environmental effects beyond what the agency disclosed in its 1988 Forest Plan EIS.²²⁰

supra note 33, at 1055 (noting that agency development plans “against wilderness will presumably be subject to NEPA obligations”).

²¹³ *Nat'l Audubon Soc'y*, 4 F.3d at 837; Gippert & DeWitte, *supra* note 204. *But see* Klein-Robbehaar, *supra* note 205, at 202 (arguing that “[b]y relying on NEPA, the Ninth Circuit surmounted provisions in the OWA which preclude judicial review of Forest Service decisions”).

²¹⁴ *See Smith v. U.S. Forest Serv.*, 33 F.3d 1072 (9th Cir. 1994).

²¹⁵ *See id.* at 1078–79.

²¹⁶ *Id.* at 1073. The Forest Service issued a forest plan for the Colville National Forest in 1988. *Id.* at 1075. The accompanying EIS analyzed the effects of timber sales proposed in the plan on inventoried roadless areas, including the Twin Sisters RARE II area. *Id.* The EIS did not describe the Conn Merkel Area other than to identify it as “roaded.” *Id.* The timber sales were located in the Gatorson Planning Area of the forest. *Id.* at 1074. The western half of the planning area comprised part of the Twin Sisters RARE II area, while the eastern half occupied part of the Conn Merkel Area, a large parcel of uninventoried land. *Id.*

²¹⁷ *Id.* at 1074. The timber sales were located in the Gatorson Planning Area of the forest, the western half of which comprised part of the inventoried Twin Sisters RARE II area while the eastern half occupied part of the Conn Merkel Area, a 6,737-acre tract of uninventoried land bisected by an unpaved jeep trail. *Id.* With the passage of the Washington State Wilderness Act (WSWA), Congress released the Twin Sisters Area for nonwilderness use. *Id.* at 1074; Washington State Wilderness Act of 1984, Pub. L. No. 98-339, 98 Stat. 299 (1984). While the Forest Service authorized road building and logging in some parts of the Twin Sisters Area, at the time the complaint was filed, roughly 2,000 acres bordering the Conn Merkel Area remained roadless. *See Smith*, 33 F.3d 1072, 1076–77.

²¹⁸ *See Smith*, 33 F.3d 1072, 1075. The accompanying EIS analyzed the effects of timber sales proposed in the plan on inventoried roadless areas, including the Twin Sisters RARE II area, but the EIS did not describe the Conn Merkel Area other than to identify it as “roaded.” *Id.*

²¹⁹ *Id.* at 1074–75.

²²⁰ *Id.* at 1075.

Smith argued the Forest Service violated NEPA by failing to adequately address the effect of the timber sale on 6,000 acres of roadless lands,²²¹ maintaining that the agency's assessment was flawed for two primary reasons.²²² First, the area affected by the timber sale contained a roadless 5,000 acre parcel of uninventoried land, and Smith claimed the Forest Service may not authorize development in such areas without considering and publicly disclosing their wilderness values.²²³ The Forest Service contended the area was not roadless because it was bisected by a jeep road, which split the area into two parcels of less than 5,000 acres each, and therefore NEPA did not require wilderness consideration before authorizing logging of the area.²²⁴ The district court upheld the Forest Service's position that it did not need to consider the wilderness option prior to approving the sale.²²⁵ The Ninth Circuit affirmed on this ground, refusing to second-guess the Forest Service on the question of whether the jeep trail was a "road."²²⁶

Smith's second NEPA allegation, concerning the Forest Service's failure to consider the effects of the logging on a separate, partially inventoried, roadless area exceeding 5,000 acres in size, met with success.²²⁷ The Forest Service claimed that because part of the 5,000 acre parcel already had been inventoried and released to nonwilderness uses, the Washington State Wilderness Act of 1984 (WSWA) precluded judicial review.²²⁸ The Ninth Circuit explained that it rejected similar arguments made by the Forest Service in *National Audubon*, reversed the district court, and held that NEPA required the agency to consider the effect of the proposed logging on the roadless area even though it included some uninventoried land.²²⁹ The court

²²¹ *Id.* Smith also argued that because the uninventoried Conn Merkel Area was a roadless area of more than 5,000 acres, the WSWA required the Forest Service to consider designating the area as wilderness before authorizing logging or other development. *Id.*

²²² *Id.* at 1073, 1077.

²²³ *Id.* at 1073–74 “Under the WSWA, the Forest Service is required to consider the wilderness option prior to authorizing development in a roadless area only if 1) the area was not inventoried pursuant to RARE II; and 2) the area is larger than 5,000 acres in size.”)

²²⁴ *Id.* at 1073, 1077. The Forest Service defined “roadless areas” as any areas “within which there are no improved roads maintained for travel by means of motorized vehicles intended for highway use.” *Id.* at 1076.

²²⁵ *Id.* at 1075.

²²⁶ *Id.* at 1077. Refusing to substitute its own judgment for the Forest Service's determination that the unpaved jeep road was a road “maintained for vehicles intended for highway use,” the court ruled that it was not arbitrary and capricious for the Forest Service to determine the jeep trail was a road, and the area was therefore not “roadless.” *Id.* at 1073, 1077. The court also held that it lacked jurisdiction to consider Smith's challenge to the Forest Service's decision not to consider the wilderness option for the Conn Merkel Area in the EIS because the area was not roadless. *Id.*

²²⁷ *Id.* at 1073, 1077.

²²⁸ *Id.* at 1077–78. Smith argued the WSWA did not excuse the agency from considering the effect of a logging project on the roadless character of inventoried lands and did not preclude a court from reviewing the agency's failure to do so. *Id.* at 1077.

²²⁹ *Id.* at 1073. The district court, denying Smith's request for an injunction, held the WSWA precluded judicial review of the Forest Service's actions involving partially inventoried land that Congress previously released for nonwilderness use. *Id.*; see *supra* notes 206–13 and accompanying text (discussing *National Audubon*).

acknowledged that the WSWA barred review of the wilderness option, but agreed with Smith that the statute did not excuse the agency from considering the effect of logging on the roadless character of the land, which had separate environmental significance.²³⁰ Even though Congress may release lands for nonwilderness uses, NEPA still requires agencies to address adverse effects that may “irreversibly and irretrievably” alter the roadless character of the landscape.²³¹

The Forest Service argued that it complied with NEPA by addressing specific environmental resources in the Gatorson plan area, even if it did not specifically refer to the area’s roadless character.²³² The court nevertheless ruled that the NEPA documents were inadequate because they failed to take into account the roadless areas surrounding the Gatorson plan area, reasoning that NEPA required the Forest Service to address adverse effects on the entire roadless expanse.²³³ The court ruled the timber sales could not proceed until the Forest Service first complied with NEPA by considering the effects of the proposed logging on roadless areas, confirming that roadlessness is an environmental condition an agency must consider during NEPA analysis, regardless of whether Congress made a determination as to the wilderness status of the land.

Following *Smith*, the Ninth Circuit continued to recognize that NEPA required the Forest Service to analyze impacts of logging on all roadless areas, even if the roadless areas did not meet the statutory requirement for wilderness, because roadlessness itself is a unique environmental condition. For example, in *Sierra Club, Inc. v. Austin*,²³⁴ environmental groups sued the Forest Service, alleging the EIS for a postburn project did not adequately analyze the effects of logging on roadless-in-fact areas.²³⁵ The district court granted summary judgment in favor of the Forest Service, but the Ninth Circuit reversed,²³⁶ concluding that the agency violated NEPA by not taking a “hard look” at the environmental impact of logging on unroaded areas.²³⁷ The court explained that although the EIS thoroughly analyzed the project’s

²³⁰ *Smith*, 33 F.3d 1072, 1077–78.

²³¹ *See id.* at 1078. The court then provided an additional justification for requiring the Forest Service to address the environmental consequences of logging roadless areas: the potential for future wilderness designation of the roadless area. *Id.* The court explained that the WSWA did not permanently foreclose judicial review of the wilderness option and, in fact, the wilderness option for inventoried lands could be revisited in second-generation forest plans. *Id.* at 1078–79.

²³² *Id.*

²³³ *Id.* The court also ruled that NEPA required the Forest Service to disclose the fact that the inventoried and uninventoried roadless lands in the sale area comprised a 5,000 acre roadless expanse, thus meeting the statutory requirement for wilderness designation. *Id.* The court noted, however, that “an EIS may not be *per se* required” for a timber sale “proposed on inventoried land,” but it left to the agency “the decision of how best to comply with NEPA and its implementing regulations.” *Id.* at 1079.

²³⁴ 82 Fed. App’x 570 (9th Cir. 2003).

²³⁵ *Id.* at 572–73.

²³⁶ *Id.* at 573.

²³⁷ *Id.* (“The Forest Service failed to address the effects of logging in the unroaded areas on their characteristics vis-à-vis potential for future wilderness or IRA designation.”).

potential effect on inventoried roadless areas, the discussion of the impact on other roadless areas was “superficial and largely conclusory.”²³⁸ The court also faulted the agency for not considering the project’s impact on the potential for roadless areas to be designated as “inventoried roadless areas” or wilderness in the future.²³⁹ The court ruled that NEPA required the Forest Service to consider the effects of logging unroaded areas, even those not previously included in the Forest Service inventory, because such areas contain unique values that would be irreversibly and irretrievably affected by logging.²⁴⁰

In *Lands Council v. Martin*,²⁴¹ the Ninth Circuit seemingly expanded the scope of *Smith* by requiring NEPA analyses to include effects on roadless areas less than 5,000 acres in size.²⁴² After thousands of acres of forest burned in a 2005 fire, the Forest Service proposed to log portions of two uninventoried roadless areas.²⁴³ *Lands Council*, citing *Smith*, argued that the Forest Service’s EIS on the salvage logging project violated NEPA by failing to include an adequate discussion of the effects of the proposed logging on the roadless areas, primarily the potential wilderness designation of the area that the project would foreclose.²⁴⁴ The Forest Service attempted to distinguish the situation from *Smith*, claiming that the case did not apply because the lands at issue in *Lands Council* consisted of uninventoried parcels less than 5,000 acres in size and therefore did not meet the criteria for wilderness.²⁴⁵ The district court granted summary judgment to the Forest Service,²⁴⁶ but the Ninth Circuit reversed, holding that NEPA required the Forest Service to consider the effects of proposed logging on the roadless areas.²⁴⁷

Declining to accept the Forest Service’s argument, the Ninth Circuit concluded the Upper Cummins Creek roadless area was “indistinguishable from the roadless area at issue in *Smith*.”²⁴⁸ The court determined the Upper Cummins Creek roadless area, combined with the adjacent Willow Springs

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ 529 F.3d 1219 (9th Cir. 2008).

²⁴² See *infra* notes 251–252 and accompanying text.

²⁴³ *Lands Council*, 529 F.3d at 1222. The two areas were the West Tucannon roadless area (4,284 acres) and the Upper Cummins Creek roadless area (966 acres), both of which were situated adjacent to the Willow Springs inventoried roadless area (containing more than 12,000 acres). Although a road separated the West Tucannon and Willow Springs areas, the Upper Cummins Creek and Willow Springs comprised a contiguous “roadless expanse of more than 13,000 acres.” *Id.* at 1222, 1230 (“referring to a contiguous area comprised of an uninventoried roadless area and an inventoried roadless area as a ‘roadless expanse’” (citing *Smith*, 33 F.3d 1072, 1078–79 (9th Cir. 1994))).

²⁴⁴ *Id.* at 1230 (citing *Smith*, 33 F.3d at 1078–79).

²⁴⁵ *Id.* at 1230–31 (noting that *Smith* involved roadless areas larger than 5,000 acres in size).

²⁴⁶ *Id.* at 1224.

²⁴⁷ *Id.* at 1232. *But see* League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Martin, No. 2:10-CV-1346-BR, 2011 WL 2493765, at *5, *7 (D. Or. June 23, 2011) (considering *Smith*, but deferring to Forest Service decision to prepare an EA instead of an EIS).

²⁴⁸ *Lands Council*, 529 F.3d. at 1231.

inventoried roadless area, formed a “roadless expanse” exceeding 5,000 acres in size.²⁴⁹ Following *Smith*, the court concluded that logging the Upper Cummins Creek area, in combination with the contiguous Willow Springs inventoried roadless area, required NEPA analysis.²⁵⁰

The Ninth Circuit also ruled that *Smith* applied to “roadless areas that are *either* greater than 5,000 acres *or* of a ‘sufficient size’ within the meaning of” the Wilderness Act.²⁵¹ The court explained:

“[The] Wilderness Act does not limit the potential for wilderness designation to roadless areas 5,000 acres or larger. . . . [A]n area is suitable for wilderness designation if it meets several requirements, including the area ‘has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition.’”²⁵²

Because the area was of sufficient size to be preserved as wilderness, the court concluded that NEPA required the Forest Service to discuss the effects of the logging on the roadless character of the uninventoried 4,284 acre West Tucannon roadless area.²⁵³

B. The Forest Service’s Roadless Rule

Between the completion of RARE II in 1979 and 2000, the Forest Service built roads on an estimated 2.8 million acres of inventoried roadless lands released for nonwilderness use.²⁵⁴ In October 1999, President Clinton sought to protect remaining roadless areas from additional road building and ordered the Forest Service to prepare an administrative rule addressing road building in roadless areas.²⁵⁵ The agency responded by issuing a nationwide rule protecting 58.5 million acres of inventoried roadless areas, nearly one-third of national forest lands, from future road building and directing that such areas be “managed in a manner that sustains their values now and for

²⁴⁹ *Id.* at 1230.

²⁵⁰ *Id.* at 1231.

²⁵¹ *Id.*

²⁵² *Id.* (citing Wilderness Act, 16 U.S.C. § 1131(c) (2006)).

²⁵³ *Id.*

²⁵⁴ Monica Voicu, *At a Dead End: The Need for Congressional Direction in the Roadless Area Management Debate*, 37 *ECOLOGY L.Q.* 487, 505–06 (2010).

²⁵⁵ President Clinton directed the Secretary of Agriculture to promulgate regulations providing “appropriate long-term protection for most or all of the currently inventoried ‘roadless’ areas, and to determine whether such protection is warranted for any smaller roadless areas not yet inventoried.” Memorandum from President Clinton to the Secretary of Agriculture, (Oct. 13, 1999), *available at* <http://usgovinfo.about.com/broadless.htm>; Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service’s Roadless Rule*, 44 *NAT. RESOURCES J.* 687, 700–01 (2004); Voicu, *supra* note 254, at 506. Even before President Clinton issued his directive, Forest Service Chief Michael Dombeck temporarily suspended new road construction in inventoried roadless areas, largely because roadless area issues were being frequently litigated and road maintenance on Forest Service lands was becoming increasingly expensive. Nie, *supra* note 255, at 699–700.

future generations.”²⁵⁶ The Roadless Rule also limited timber harvest in roadless areas and effectively prescribed a dominant preservation use.²⁵⁷

The Roadless Rule was controversial from the start, with many critics arguing that decisions involving road building be made during forest planning under NFMA.²⁵⁸ Opponents, including resource extraction interests and local governments, sued to enjoin implementation of the rule.²⁵⁹ In the first of these suits, *Kootenai Tribe of Idaho v. Veneman*,²⁶⁰ the Kootenai Tribe of Idaho, along with timber companies, local and state governments, and recreational groups, challenged the rule, claiming it violated NEPA.²⁶¹ They alleged the EIS did not comply with NEPA because the Forest Service considered an impermissibly narrow range of alternatives to the Roadless Rule and failed to address the cumulative effects of the alternatives.²⁶²

The federal court for the District of Idaho agreed that the range of alternatives was too narrow and enjoined the Forest Service from implementing the 2001 Roadless Rule, but the Ninth Circuit Court of Appeals

²⁵⁶ Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244–45, 3,247 (Jan. 12, 2001) (codified at 36 C.F.R. § 294) [hereinafter Roadless Rule]; Voicu, *supra* note 254, at 506–07; MICHAEL P. DOMBECK ET AL., FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 93 (2003). Dan Glickman, then Secretary of Agriculture, signed the Roadless Rule on January 12, 2001. *Id.*; see also PAMELA BALDWIN, CONG. RES. SERV., NO. 30647, THE NATIONAL FOREST SYSTEM ROADLESS AREAS INITIATIVE 2 (2002), available at http://azstateparks.com/ohv/downloads/OHV_2006_Roadless_Report.pdf (explaining that the Roadless Rule was “issued in light of the importance of the roadless areas for various forest management purposes and to the American public, and because addressing projects in roadless areas on a forest-by-forest basis as part of the planning process was resulting in controversy, conflict, and the expenditure of a great deal of time and expense on appeals and litigation”).

²⁵⁷ Roadless Rule, 66 Fed. Reg. at 3,249; see BALDWIN, *supra* note 256, at 6 (identifying the limited exceptions to the Roadless Rule). The Roadless Rule allowed timber harvest and other activities so long as they did not require the construction of new roads. Roadless Rule, 66 Fed. Reg. at 3,244; Voicu, *supra* note 254, at 507.

²⁵⁸ See Nie, *supra* note 255, at 704–05. Almost immediately after President Bush took office, his Chief of Staff postponed for 60 days most regulations that the Clinton Administration had published but which had not taken effect. *Id.* at 705; Voicu, *supra* note 254, at 507–08 (discussing the Bush Administration’s actions implementing the Roadless Rule). While litigation over the Roadless Rule was pending, the Bush administration reopened public comment on the rule and later issued the State Petitions for Inventoried Roadless Area Management Rule (“State Petitions Rule”), effectively overturning the Roadless Rule by opening inventoried roadless areas to road development. See Nie, *supra* note 255, at 705; Kyle J. Aarons, Note, *The Real World Roadless Rules Challenges*, 109 MICH. L. REV. 1293, 1296 (2011) (citing State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (codified at C.F.R. pt. 294)); see also Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1153–54 (2004) (describing the State Petitions Rule).

²⁵⁹ See Earthjustice, *Timeline of the Roadless Rule*, <http://earthjustice.org/features/timeline-of-the-roadless-rule> (last visited Apr. 12, 2014) (presenting a timeline of significant events in the evolution of the Roadless Rule and subsequent litigation).

²⁶⁰ 313 F.3d 1094, 1104 (9th Cir. 2002).

²⁶¹ *Id.* (The plaintiffs also alleged Administrative Procedure Act violations not discussed here). Because the appeal took place after the Clinton Administration left office, and the Roadless Rule was not supported by the Bush Administration, environmental groups provided the only defense of the rule. See Zellmer, *supra* note 71, at 1077–78.

²⁶² See 313 F.3d at 1120, 1123.

reversed.²⁶³ The EIS considered three alternatives, each of which would ban road construction within roadless areas.²⁶⁴ The Ninth Circuit explained that it was reasonable for the Forest Service to limit its consideration to alternatives that banned roads in roadless areas because the purpose of the Roadless Rule was to protect the ecological and social characteristics of such areas.²⁶⁵ The court also suggested that NEPA's mandate to analyze alternative actions applied "less stringently" when a proposed action promotes environmental protection, and so the Forest Service did not need to analyze alternatives that undermined the objective of the rule.²⁶⁶ The court recognized NEPA's policy—to protect the natural environment—and opined that the statute "may not be used to preclude lawful conservation measures by the Forest Service . . . in contravention of their own policy objectives, to develop and degrade scarce environmental resources"²⁶⁷ because it would "turn NEPA on its head to interpret the statute to require that the Forest Service conduct in-depth analyses of environmentally damaging alternatives that are inconsistent with the Forest Service's conservation policy objectives."²⁶⁸

After determining that the Forest Service considered an adequate range of alternatives, the court lifted the district court's injunction prohibiting

²⁶³ *Id.* at 1104, 1120. The district court also ruled that the Forest Service failed to provide the public with a meaningful opportunity to comment on the rule by not adequately identifying the roadless areas and by not allowing sufficient time for the comment period. *Id.* at 1116–19; *see* Nie, *supra* note 255, at 704.

²⁶⁴ 313 F.3d at 1120.

²⁶⁵ *Id.* at 1120–21. The court noted that the Forest Service may not define the objectives underlying the NEPA analysis in "unreasonably narrow terms," but concluded that there was no indication the Forest Service did so in the case of the roadless rule; instead, the court explained that "protecting the roadless areas . . . from further degradation can hardly be termed unreasonably narrow." *Id.* at 1122.

²⁶⁶ *Id.* at 1120 (reasoning that the "NEPA alternatives requirement must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment, rather than to harm it.").

The Ninth Circuit concluded:

[T]he conservation and preventative goals of the Forest Service in promulgating the Roadless Rule are entirely consistent with the policy objectives of NEPA, as well as with the Forest Service's own mission. . . . 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. The Forest Service, as steward of our priceless national forests, is in the best position, after hearing from the public, to assess whether current roads adequately aid forest management practices and whether a general ban on new roads in roadless areas of national forest serves appropriate conservation and budgetary interests.

Id. at 1122–23.

²⁶⁷ *Id.* at 1123.

²⁶⁸ *Id.* at 1122; *see also* Zellmer, *supra* note 71, at 1078 (noting the court's decision meant "an injunction was not warranted, and in fact flew in the face of the strong public interest 'in preserving precious, unreplaceable resources . . . and in preserving our national forests in their natural state.'").

implementation of the roadless rule.²⁶⁹ The court's decision in *Kootenai Tribe* reinstated the Roadless Rule, but an additional legal challenge was pending in the Tenth Circuit.

In 2001, the State of Wyoming filed its own suit challenging the Roadless Rule and, in 2003, a Wyoming federal district court, concluding that the Forest Service violated both NEPA and the Wilderness Act, enjoined the rule.²⁷⁰ Environmental interveners appealed, but the case was mooted by the Forest Service's adoption of the State Petitions Rule.²⁷¹ Then, in 2006, a federal district court in California struck down the State Petitions Rule for violating NEPA and the ESA, effectively reinstating the Roadless Rule.²⁷² At this point, Wyoming renewed its challenge to the Roadless Rule in 2007, and on August 12, 2008, the Wyoming district court again ruled that the Forest Service violated the Wilderness Act and NEPA in promulgating the rule.²⁷³ The district court issued a permanent nationwide injunction, and the Forest Service and environmental groups appealed.²⁷⁴ However, in 2011, the Tenth Circuit reversed the district court and upheld the validity of the Roadless Rule.²⁷⁵ The court concluded that the Forest Service acted within its authority pursuant to NEPA, the Wilderness Act, and other statutes.²⁷⁶

Although the Tenth Circuit did not expressly adopt the Ninth Circuit's reasoning concerning the reduced scope of alternatives required by NEPA for conservation actions,²⁷⁷ it reached the same result. The court concluded the three alternatives that the Forest Service examined in promulgating the Roadless Rule was a reasonable range of alternatives,²⁷⁸ and the Forest Service could ignore alternatives which did not further the agency's declared

²⁶⁹ *Kootenai Tribe of Idaho*, 313 F.3d at 1123. The court also reversed the district court on the issue of cumulative effects, agreeing with the environmental groups that the potential cumulative effects of the Roadless Rule were "too speculative to be amenable to in-depth analysis in the EIS." *Id.*

²⁷⁰ *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1231–32, 1239 (D. Wyo. 2003), *vacated*, 414 F.3d 1207 (10th Cir. 2005) (ruling that the Forest Service violated NEPA by failing to consider all reasonable alternatives, conducting an inadequate cumulative impacts analysis, and by failing to prepare a supplemental EIS to address new information).

²⁷¹ *See Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309, 1318 (D. Wyo. 2008), *rev'd*, 661 F.3d 1209 (10th Cir. 2011) (describing the history of Roadless Rule litigation in Wyoming).

²⁷² *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 908–09, 918–19 (N.D. Cal. 2006) (ruling that NEPA required preparation of a programmatic EIS because the State Petitions Rule fundamentally changed the manner in which roadless areas were protected and used).

²⁷³ *Wyoming*, 570 F. Supp. 2d at 1318.

²⁷⁴ *Id.* at 1345, 1354; *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1220 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 144 (2012) (petition by intervenor Colorado Mining Association), and *cert. denied*, 133 S. Ct. 417 (2012) (petition by Wyoming).

²⁷⁵ *Wyoming*, 661 F.3d at 1272.

²⁷⁶ *Id.* at 1266, 1272 (alleging violations of the Organic Act, MUSYA, and NFMA in promulgating the rule); *see Talasi Brooks, Wyoming v. U.S. Department of Agriculture*, 661 F.3d 1209 (10th Cir. 2011), 33 PUB. LAND & RESOURCES L. REV. 181, 184–85 (2012) (discussing the court's opinion in *Wyoming v. U.S. Dep't of Agric.*).

²⁷⁷ *See supra* notes 263–68 and accompanying text.

²⁷⁸ *See supra* note 265 and accompanying text.

purpose and need for the rule.²⁷⁹ The Tenth Circuit also upheld the rule against several other NEPA challenges.²⁸⁰

NEPA played a significant role in upholding the 2001 Roadless Rule, permitting the Forest Service to implement nationwide protection for nearly sixty million acres of roadless lands, providing significant administrative protection for potential wilderness areas and areas with wilderness characteristics that were ignored by Congress.²⁸¹

C. NEPA and BLM Wilderness Study Areas

Wilderness study areas (WSAs) on federal lands managed by the BLM are a particularly controversial part of public land law. The Federal Land Policy and Management Act (FLPMA) requires BLM to manage these potential wilderness lands so as not to impair their suitability for wilderness designation,²⁸² a stringent management standard. FLPMA also requires BLM

²⁷⁹ *Wyoming*, 661 F.3d at 1245–46 (concluding that “the Forest Service’s decision to limit the alternatives considered in detail to those that focused on restrictions on road construction and timber harvest . . . was reasonable in light of its conclusion, based on ample evidence presented in the EIS, that these activities posed the greatest risk of destroying the characteristics of IRAs, which the proposed rule was intended to protect and preserve”).

²⁸⁰ The court also concluded that: 1) the scoping period complied with NEPA; 2) the Forest Service’s decision not to provide detailed maps of the affected areas did not deny Wyoming the opportunity to meaningfully participate in the scoping process; 3) the Forest Service acted within its discretion in refusing to grant cooperating status to Wyoming; 4) the Forest Service adequately considered the cumulative effects of the Roadless Rule; 5) NEPA did not require the agency to prepare a supplemental EIS based on changes it made between the draft and final EISs; 6) NEPA did not require a site-specific analysis for each forest affected by the Rule; and 7) the Forest Service did not impermissibly avoid taking a hard look at its actions by predetermining the outcome of the rulemaking. *Id.* at 1238–66.

²⁸¹ On March 25, 2013, the U.S. District Court for the District of Columbia dismissed the final legal challenge to the Roadless Rule after concluding the suit was barred by the six-year statute of limitations for challenges to federal regulations. *Alaska v. U.S. Dep’t of Agric.*, 932 F. Supp. 2d 30, 31 (D.C. Cir. 2013); see Earthjustice, *Roadless Rule Survives Final Legal Challenge*, <http://earthjustice.org/news/press/2013/roadless-rule-survives-final-legal-challenge> (last visited Apr. 12, 2014). The Roadless Rule now applies in all states except Idaho and Colorado, where separate roadless rules apply. See Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 1,135, 1,137 (Jan. 7, 2008) (codified at 36 C.F.R. part 294); *Jayne v. Sherman*, 706 F.3d 994, 1009 (9th Cir. 2013) (upholding the Idaho Roadless Rule); Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 77 Fed. Reg. 39,576 (July 3, 2012).

²⁸² Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (2006). FLPMA directed the Secretary of the Interior to review BLM lands, identify areas meeting wilderness criteria, and make wilderness designation recommendations to the President by October 1991, 15 years after its enactment. *Id.* § 1782(a); COGGINS ET AL., *supra* note 33, at 1056. FLPMA also directed the President to make his recommendations to Congress within two years of receiving wilderness recommendations from the Secretary and provided that Congress may then act to designate as wilderness the lands it deems appropriate. 43 U.S.C. § 1782(b) (2006). In the interim between the BLM’s review of lands identified as having wilderness characteristics and Congress’s final decision regarding wilderness designation, the BLM must generally manage all reviewed lands “so as not to impair the suitability of such areas for preservation as wilderness,” whether or not it believes them to be suitable for such preservation. *Id.* § 1782(c). The BLM refers to the lands managed under this “nonimpairment” standard as “wilderness study areas”

to “take any action necessary to prevent unnecessary or undue degradation” of BLM lands, including WSAs.²⁸³

*Sierra Club v. Hodel (Hodel I)*²⁸⁴ involved a challenge by several environmental organizations to a proposed county road improvement project passing through federal lands in Garfield County in southern Utah.²⁸⁵ Garfield County proposed to improve twenty-eight miles of the so-called Burr Trail from a one-lane dirt road into a two-lane gravel road.²⁸⁶ Portions of the stretch of the Burr Trail bisected the Steep Creek and North Escalante Canyons WSAs.²⁸⁷ The Sierra Club, concerned that changes to the road and the resulting increase in traffic would “impair the naturalness and the solitude” of the affected area,²⁸⁸ sued federal officials and Garfield County, hoping to permanently enjoin the proposed construction.²⁸⁹ The Sierra Club alleged that the road improvement would “unnecessarily and unduly degrade” the WSAs adjacent to the road and would impair the WSAs’

(“WSAs”). *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 59 (2004). BLM’s initial public lands inventory reviewed close to 174 million acres and identified 919 WSAs encompassing nearly 24 million acres. COGGINS ET AL., *supra* note 33, at 1057.

²⁸³ 43 U.S.C. § 1732(b) (2006).

²⁸⁴ 675 F. Supp. 594 (D. Utah 1987), *aff’d in part, rev’d in part*, 848 F.2d 1068 (10th Cir. 1988), *overruled on other grounds by Los Ranchos*, 956 F.2d 970 (10th Cir. 1992).

²⁸⁵ *Hodel II*, 848 F.2d at 1073.

²⁸⁶ *Id.* Public use of the Burr trail included driving livestock to market in the late 1800s and early 1900s as well as oil exploration around 1918. *Id.* Beginning in the 1930s the road supported various uses, including transportation, tourism, agriculture, and economic development, all facilitated by County maintenance of the road beginning in the early 1940s. *Id.* According to the Tenth Circuit, “[t]he combination of public uses and county maintenance has created a right-of-way in favor of Garfield County, pursuant to Congress’ grant of public land in R.S. 2477.” *Id.* (citing An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, 14 Stat. 251 (1866)) (granting rights of way for highways over public lands). Congress passed Revised Statute 2477 as part of the mining laws of 1866 to encourage settlement and economic development. *Hodel I*, 675 F. Supp. at 601–02; see Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 PACE ENVTL. L. REV. 485, 486 (1994).

R.S. 2477 was self-executing: An R.S. 2477 right of way would come into existence automatically if a highway was constructed across unreserved public lands. *Hodel II*, 848 F.2d at 1078. (“[A] right-of-way could be obtained without application to, or approval by, the federal government. Instead, the grant referred to in R.S. 2477 became effective upon the construction or establishing of highways, in accordance with the state laws”). *But see* Tova Wolking, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements over Federal Public Lands*, 34 ECOLOGY L. Q. 1067, 1067 (2007) (“[R]esolution of [R.S. 2477] claims has become a complex issue, rife with uncertainty about which access routes are valid and which areas of land are affected”). More than 100 years after passing the 1866 mining laws, Congress repealed R.S. 2477 in FLPMA. See 43 U.S.C. § 1701 (2006); see also Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 529–30 (2005) (discussing the effects of FLPMA’s passage on R.S. 2477 rights of way); Alexander H. Southwell, Comment, *The County Supremacy Movement: The Federalism Implications of a 1990s States’ Rights Battle*, 32 GONZ. L. REV. 417, 435 (1996) (explaining that R.S. 2477 rights-of-way claims have become an important tool for wilderness opponents and have sparked many of the cases involving interim protection of potential wilderness areas).

²⁸⁷ *Hodel II*, 848 F.2d at 1073.

²⁸⁸ *Hodel I*, 675 F. Supp. at 596.

²⁸⁹ *Hodel II*, 848 F.2d at 1073–74.

suitability for future designation as wilderness and that the BLM violated NEPA by failing to study the environmental impact of the road project.²⁹⁰

A Utah district court, concluding that the project was within the County's right-of-way, authorized the road construction but ordered the BLM to ensure that the project did not unnecessarily degrade adjacent WSAs.²⁹¹ The court, reasoning that road work in the riparian area known as "The Gulch" would "unreasonably or unduly degrade" the adjacent WSA,²⁹² determined that the road needed to be relocated to an area outside the County's right-of-way and ordered the County to apply for a FLPMA permit from BLM.²⁹³

The Tenth Circuit agreed with the district court, first determining that the BLM's refusal to act was reviewable,²⁹⁴ and then concluding that NEPA applied and that the BLM had a duty to ensure the road project did not unduly or unnecessarily degrade areas adjacent to the WSAs.²⁹⁵ Although declining to adopt the district court's reasoning, the Tenth Circuit upheld the district court's determination that the road construction proposal triggered NEPA's requirements.²⁹⁶ The court recognized that relocation of the road from the existing right-of-way would trigger NEPA because of BLM's

²⁹⁰ *Id.* The Sierra Club also alleged that the proposed road improvements would extend beyond the county's right-of-way and encroach on federal land, and that the county needed to obtain a permit from the BLM as a result of the encroachment. *Id.*; *see also* 43 U.S.C. § 1782(c) (2006) ("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.") (emphasis added).

²⁹¹ *Hodel II*, 848 F.2d at 1074.

²⁹² According to the record, effects of the work proposed in The Gulch extended for nearly a mile and were likely to affect 3,430 acres of the North Escalante Canyons WSA. *Id.* at 1088. The court determined that the proposed project would not unduly or unnecessarily degrade the WSAs except for work in The Gulch. *See, id.* (explaining that the district court, based on BLM testimony, concluded "there would be less degradation of the WSA if the road were moved on to the adjacent bench located on BLM land").

²⁹³ *Hodel I*, 675 F. Supp. at 611 ("[W]ork in the riparian area of The Gulch will have an impact on the WSA sufficient to invoke the FLPMA requirement that all work done be the least degrading alternative . . . [m]oving the road out of the [existing right-of-way in The Gulch onto BLM land outside of the right-of-way] will result in less disturbance to [the WSAs]"). Although no permit was needed for the work in the existing County right-of-way, the court concluded that the County needed a BLM FLPMA permit to relocate the road on BLM land. *See id.* (holding "FLPMA requires the county to apply for . . . a permit and to work with the BLM to develop the least degrading alternative for The Gulch").

²⁹⁴ *Hodel II*, 848 F.2d at 1075. BLM asserted that its decision not to regulate the County's proposal was exempt from judicial review because it fell under the category of investigative or enforcement actions committed to agency discretion by law. *Id.* at 1074. The court disagreed, determining that BLM's actions were reviewable because FLPMA provided a legal standard that the court could apply. *Id.* at 1075. The court determined that unlike other discretionary enforcement actions, FLPMA imposed a duty on BLM to "take any action required to prevent unnecessary or undue degradation" and to "define and protect 'roadless' areas," and guided by those standards, the court determined it was capable of judging whether a WSA remains roadless or public lands and rights-of-way boundaries are breached. *Id.*

²⁹⁵ *Id.* at 1090.

²⁹⁶ *Id.* (explaining that the district court erred in ruling that BLM's actions in monitoring the project to ensure the proposal did not exceed the scope of the R.S. 2477 right-of-way constituted a "major federal action").

authority under FLPMA to regulate rights-of-way on public lands,²⁹⁷ while also holding that BLM's duty to prevent undue and unnecessary degradation of the WSAs triggered NEPA.²⁹⁸ The court, reasoning that "[t]he touchstone of major federal action . . . is an agency's authority to influence significant nonfederal activity," concluded that the BLM's "responsibility to impose an alternative it deems less degrading upon the nonfederal actor" was sufficient to invoke NEPA.²⁹⁹

Reading NEPA and FLPMA's undue degradation standard together, the Tenth Circuit reasoned that the road improvement's effect on the WSAs not only triggered NEPA's requirement to evaluate alternatives, but imposed a duty to select the alternative that would produce the least adverse environmental effects, reasoning that "[w]hen a proposed road improvement will impact a WSA the agency has the duty . . . to determine whether there are less degrading alternatives."³⁰⁰ The result seemed to endorse a kind of substantive NEPA, which environmentalists have long sought.³⁰¹

²⁹⁷ See *id.*

²⁹⁸ *Id.* at 1090–91 (“BLM’s duty under FLPMA . . . to prevent unnecessary degradation of WSAs from . . . changes in the right-of-way, injects an element of federal control for required action that elevates this situation to one of major federal action [triggering NEPA]”).

²⁹⁹ *Id.* at 1089–91.

³⁰⁰ *Id.* at 1090 (“[W]hile BLM may not deny improvements because they impair WSAs, it retains a duty to see that they do not unduly degrade.”). Citing a BLM interim management policy for lands under wilderness review, the court explained that “when a proposed road improvement will impact a WSA the agency has the duty under FLPMA § 603(c) and the regulation to determine whether there are less degrading alternatives, and it has the responsibility to impose an alternative it deems less degrading upon the nonfederal actor.” *Id.* at 1090–91 (citing Interim Management Policy and Guidelines, 48 Fed. Reg. 31,854, 31,855 (1983)) (quoting BLM policy regulation as stating “[w]hen it is determined that the rights conveyed can be exercised only through activities that will impair wilderness suitability, the activities will be regulated to prevent unnecessary and undue degradation.”).

³⁰¹ See Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735, 748–49 (1975) (proposing that “[s]o long as environmentally preferable alternatives to a proposed project are available . . . [NEPA] requires that the least adverse alternative be selected.”); David B. Lawrenz, *Judicial Review Under the National Environmental Policy Act: What Remains After Robertson v. Methow Valley Citizens Council?*, 62 U. COLO. L. REV. 899, 931 (1991) (arguing that in order “[t]o restore the vigor” of NEPA, Congress should modify the statute to clarify that “NEPA’s concern for protecting the environment is mandatory, not precatory”); Marion D. Miller, *The National Environmental Policy Act and Judicial Review After Robertson v. Methow Valley Citizens Council and Marsh v. Oregon Natural Resources Council*, 18 ECOLOGY L.Q. 223, 255 (1991) (suggesting that the addition of “substantive provisions to NEPA is an obvious first step towards heightened protection of the environment”).

The Supreme Court’s ensuing decision in *Norton v. Southern Utah Wilderness Ass’n (SUWA)*, 542 U.S. 55 (2004), may raise some questions about the continuing vitality of the Tenth Circuit’s *Hodel* decision. In *SUWA*, a unanimous Supreme Court ruled that neither NEPA nor FLPMA required BLM to regulate off-road vehicle use in WSAs in Utah. See *id.* at 67, 72. Holding that the Administrative Procedure Act (APA) authorizes a court to “compel agency action unlawfully withheld or unreasonably delayed” only where there is a “discrete” agency action, such as a permit issuance or rulemaking, that is legally required, the court concluded that general noncompliance with FLPMA’s nonimpairment mandate “lack[s] the specificity requisite for agency action.” *Id.* at 62–63, 65–67. The Court decided that BLM had discretion to determine

Reversing the district court, the Tenth Circuit also ruled that BLM violated NEPA by authorizing the county's proposed improvements without giving proper consideration to how the project might affect WSAs.³⁰² The court decided that NEPA required the BLM to analyze the environmental effects of the proposed project before allowing construction to proceed, and that the district court erred when determining the record supported a finding of no significant impact.³⁰³

D. NEPA, Land Plans, and Wilderness Characteristics

Many acres of public lands with wilderness characteristics are not within wilderness areas or even within WSAs. NEPA has an important role in identifying the wilderness qualities of these lands and encouraging their protection. Some of these possibilities were evident in *Oregon Natural Desert Association (ONDA) v. BLM*,³⁰⁴ in which environmental groups sued BLM for failing to comply with NEPA in revising a BLM land plan for 4.5 million acres of public lands in Southeastern Oregon.³⁰⁵ ONDA alleged BLM

how best to comply with FLPMA's requirement that it prevent "impairment" of WSAs, and therefore the agency could not be compelled to ban ORV use. *Id.* at 72.

The outcome and reasoning of the Tenth Circuit's opinion in *Hodel* is distinguishable from the Supreme Court's determination in *SUWA*. While *SUWA* considered whether to compel the BLM to regulate ORV use in WSAs, *Hodel* involved right-of-way work requiring a FLPMA permit from BLM, a discrete action under the Court's reasoning in *SUWA*. See *SUWA*, 542 U.S. at 62–63; *Hodel I*, 675 F. Supp. 594, 611 (D. Utah 1987). Although the *Hodel* court determined BLM's actions were reviewable because FLPMA's unnecessary degradation mandate imposed a definite standard on the agency, rights-of-way on public lands are subject to section 505 of FLPMA, and the issuance of a section 505 permit is a discrete action, reviewable for compliance with federal statutes and regulations consistent with *SUWA*. See *Hodel I*, 675 F. Supp. at 611.; *Hodel II*, 848 F.2d 1068, 1090 (10th Cir. 1988); Federal Land Policy and Management Act, 43 U.S.C. § 1765 (2006) (requiring right-of-way permits to "include (a) terms and conditions which will (i) carry out the purposes of [FLPMA]; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards . . . and (iv) require compliance with State standards for public health and safety, environmental protections . . . and (b) such terms and conditions as the Secretary concerned deems necessary to . . . require location of the right-of-way along a route that will cause least damage to the environment"). The discretionary action reviewable in *Hodel* was considerably different from the facts of *SUWA*, which involved an attempt to make BLM carry out a "monitoring and take action" promise in a FLPMA land plan by claiming that the agency's inaction violated FLPMA's nonimpairment mandate. See *SUWA* 542 U.S. at 60–61.

³⁰² *Hodel II*, 848 F.2d. at 1096 (remanding to the district court with instructions that BLM prepare an EA followed by either a finding of no significant impact or an EIS on the environmental effects of the proposed road project on the WSAs). The district court ruled that although BLM failed to prepare an EA, the agency nevertheless complied with NEPA because the evidence in the record was sufficient to support a finding of no significant impact. *Hodel I*, 675 F. Supp. at 615 ("BLM's finding of no significant impact was well within the bounds of reasoned decision-making and is supported by persuasive evidence.").

³⁰³ *Hodel II*, 848 F.2d. at 1096.

³⁰⁴ No. 03-1017, 2005 WL 711663 (D. Or. Mar. 29, 2005), *rev'd sub nom.* *ONDA v. BLM*, 531 F.3d 1114 (9th Cir. 2008), *opinion amended and superseded on denial of reh'g*, 625 F.3d 1092 (9th Cir. 2010).

³⁰⁵ See 625 F.3d at 1094–95.

violated NEPA by failing to adequately analyze the effects of the Southeast Oregon Resource Management Plan on wilderness characteristics or consider alternatives for managing wilderness characteristics on non-WSA land.³⁰⁶ BLM responded that it did not need to address wilderness characteristics in its land plan or accompanying EIS because it completed its obligation to consider wilderness characteristics under section 603 of FLPMA over a decade earlier.³⁰⁷

The district court, agreeing with BLM, held the agency was not “legally required to perform a wilderness inventory,” and so could not be faulted for failing in its EIS on the land plan to analyze non-WSA land that might now have wilderness characteristics, or to discuss management options for such lands.³⁰⁸ The Ninth Circuit, however, reversed, concluding that BLM violated NEPA by failing to address the existing wilderness characteristics of the affected lands, regardless of the outcome of wilderness review mandated by FLPMA.³⁰⁹ The Ninth Circuit largely held that NEPA documents for land use plans generally must consider the landscape’s wilderness characteristics, “regardless of whether permanent wilderness preservation is an option,” and regardless of the requirements of other statutes, including the Wilderness Act, FLPMA, or individual state wilderness acts concerning potential

³⁰⁶ *Id.* at 1108. ONDA also claimed that BLM violated NEPA because it failed to adequately analyze cumulative impacts and alternatives for grazing and vehicle use. *Id.* ONDA claimed violations of the Wilderness Act and the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315a–315r, but the court focused on the NEPA issues and did not address the Wilderness Act or Taylor Grazing Act claims. *Id.* Reasoning that because the EIS and land plan were intended to provide the BLM with a “comprehensive framework for managing public land,” and because wilderness values and characteristics—not just the legal definition of wilderness—are part of the resources BLM must consider in the land use planning process, ONDA argued that NEPA required consideration of wilderness values and characteristics in the EIS. *Id.* at 1110. ONDA suggested that the BLM violated NEPA by not providing a “full and fair discussion” of the plan’s environmental impacts when it failed to discuss non-WSA lands possessing wilderness values. *Id.*

³⁰⁷ *Id.* at 1110–11; *see* FLPMA, 43 U.S.C. § 1782(a) (2006) (requiring BLM to review wilderness resources on BLM lands and directing the Secretary of the Interior to report to the President, “from time to time,” his recommendation as to the suitability or nonsuitability of the inventoried areas for preservation as wilderness). Because BLM completed its FLPMA-mandated evaluation and assessment of wilderness values on public lands in 1989 and submitted recommendations to the Secretary of Interior in October 1991, the agency determined it no longer needed to consider wilderness issues during routine project planning pending congressional action. *ONDA v. BLM*, 625 F.3d at 1101. BLM also asserted that *SUWA* barred the court’s review of the EIS, but the Ninth Circuit disagreed, reasoning that completion of an EIS as part of NEPA analysis constitutes a discrete agency action as required by the Supreme Court in *SUWA*. *Id.* at 1111, 1118.

³⁰⁸ *ONDA v. BLM*, 625 F.3d at 1108. The district court also concluded that the BLM sufficiently analyzed cumulative impacts and considered an adequate range of grazing and ORV alternatives. *Id.*

³⁰⁹ *Id.* at 1124. The court’s analysis seemed to suggest that NEPA also required Forest Service land plans to include consideration of wilderness characteristics. *See id.* at 1117 (citing *Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1078 (9th Cir. 1994); *Lands Council v. Martin*, 479 F.3d 636, 640 (9th Cir. 2007); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1121 (9th Cir. 2002)) (“[T]here is no reason to suppose that [wilderness] characteristics, when they appear on BLM land, rather than on Forest Service land, do not implicate the planning process.”).

wilderness.³¹⁰ The court consequently enjoined implementation of BLM's Southeast Oregon plan until the agency complied with NEPA by addressing wilderness characteristics in the EIS and considering a range of alternatives, including closing some areas to all off-road vehicle use.³¹¹

ONDA v. BLM marked the first time the Ninth Circuit concluded that NEPA required a federal land management agency to take wilderness characteristics into account when revising land plans.³¹² The decision is significant because it requires public disclosure of existing wilderness qualities of public lands periodically at the time of all land plan revisions, and may prompt the public to demand protection of these lands with wilderness characteristics.

VI. CONCLUSION

NEPA's role in wilderness preservation has been largely underappreciated. In fact, NEPA played a significant role in designating and protecting the nation's wilderness and in maintaining the wilderness qualities of lands that Congress may one day designate as wilderness.

NEPA first imposed its procedures on the Forest Service's RARE planning, enjoining release of roadless areas to multiple use management until the agency publicly disclosed the value of the resources at stake and considered all reasonable alternatives.³¹³ That effectively remanded the issue of roadless release versus preservation to Congress, which responded by passing numerous state wilderness acts for Forest Service lands in the 1980s and 1990s, more than doubling designated wilderness acres.³¹⁴ NEPA proceeded to affect management of wilderness areas in cases involving timber cutting and recreational uses.³¹⁵ NEPA also provided some protection for undesignated lands with wilderness qualities by requiring the Forest Service to evaluate and publicly disclose large roadless areas it proposed to log,³¹⁶ requiring BLM to implement the least damaging alternative to a road improvement bisecting wilderness study areas,³¹⁷ and insisting that BLM

³¹⁰ *Id.* at 1121 ("BLM misunderstood the role of wilderness characteristics in its land use planning decisions. . . . [and] wilderness characteristics are a value which, under the FLPMA, the Bureau has the continuing authority to manage, even after it has fulfilled its . . . duties to recommend some lands with wilderness characteristics for permanent congressional protection."). Even though BLM completed the survey of wilderness characteristics required pursuant to FLPMA, 43 U.S.C. § 1782, the survey did not satisfy NEPA's requirement that the agency consider impacts to wilderness characteristics. *Id.* at 1111–12.

³¹¹ *Id.* at 1124. Regarding ORV use, the court explained that NEPA required BLM to consider alternatives that closed significant portions of land to all ORV use, not merely reducing ORV use. *Id.* at 1123–24.

³¹² *See supra* note 309.

³¹³ *See supra* notes 82–116 and accompanying text.

³¹⁴ *See supra* notes 117–24 and accompanying text.

³¹⁵ *See supra* notes 155–66, 188–93 (discussing timber cutting), 178–87 (discussing recreational pack trips) and accompanying text.

³¹⁶ *See supra* Part V.A.

³¹⁷ *See supra* notes 284–303 and accompanying text.

identify and consider protecting roadless areas with wilderness characteristics when revising its land plans.³¹⁸

NEPA case law concerning wilderness reflects Professor Appel's sense that courts give careful scrutiny to agency actions affecting wilderness.³¹⁹ But the results of this study suggest something more: NEPA and its procedures and judicial flexibility in interpreting the statute's requirements have been the usual vehicles for protecting both designated wilderness areas and lands with wilderness potential. NEPA has overcome agency claims of land management expertise; all the cases in this study involve the imposition of unwanted procedures upon unwilling agencies. In this capacity, NEPA has functioned as a "common law for the environment," enabling courts to flexibly apply NEPA's procedures to fit the context of the proposed actions.³²⁰

Nowhere is this flexibility better illustrated than in contrasting the Ninth Circuit's view of alternatives in reviewing the Forest Service's proposed release of lands to multiple use—in which the court thought that consideration of eight alternatives was insufficient to satisfy NEPA³²¹—with that same court's acceptance of a considerably narrower range of alternatives in upholding the same agency's Roadless Rule.³²² In the latter case the court was clearly unwilling to have NEPA serve as a barrier to protecting lands with wilderness qualities, whereas in the former case it interpreted NEPA procedures to require careful consideration and public disclosure of costs releasing protected lands to multiple use management. This contextual approach to NEPA is fully in keeping with its congressional drafters' intent that the goal of the statute was to protect and preserve the quality of the human environment, including wilderness.³²³ Recognition of NEPA's essential role in designating wilderness areas and in protecting lands with wilderness qualities will serve wilderness well in the next fifty years—just as it has in the last half-century.

³¹⁸ See *supra* Part V.D.

³¹⁹ See Appel, *supra* note 18, at 110.

³²⁰ See *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) ("[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA. To date, the courts have responded in just that manner and have created such a 'common law.'"); see also Blumm & Mosman, *supra* note 3, at 196 (explaining that because NEPA provides for public participation in decision making, it gives the public the opportunity to challenge government action, and often reveals other statutory violations. NEPA proponents have argued that the statute "created a kind of common law of the environment.").

³²¹ See *supra* note 112 and accompanying text.

³²² See *supra* notes 263–69 and accompanying text.

³²³ See National Environmental Policy Act of 1969, 42 U.S.C. § 4331(a) (2006) ("The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.").