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### Federal Wild Lands Policy in the Twenty-First Century: What a Long, Strange Trip It's Been

Michael Blumm

*Lewis & Clark Law School*, [blumm@lclark.edu](mailto:blumm@lclark.edu)

Andrew B. Erickson

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## Articles

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# Federal Wild Lands Policy in the Twenty-First Century: What a Long, Strange Trip It's Been

Michael C. Blumm\*

Andrew B. Erickson<sup>+</sup>

### ABSTRACT

The protection of federally owned wild lands, including, designated wilderness areas, has long been a cardinal element of the American character. For a variety of reasons, designating wild lands for protection under the Wilderness Act has proved difficult, increasingly so in recent years. Thus, attention has focused on undesignated wild lands, that is, unroaded areas managed by the principal federal land managers, the U.S. Forest Service and the Bureau of Land Management (“BLM”). These areas can benefit from a kind of de facto protected status if they are Forest Service areas that have been inventoried for wilderness suitability and not released to multiple-use or are wilderness study areas managed by BLM. In the last two decades, considerable controversy has surrounded roadless areas in both national forests and BLM lands because protecting their wild land characteristics may foreclose development, such as oil and gas leasing or timber harvesting. Recently, the courts have settled longstanding litigation by upholding roadless rule protection in the national forests. But BLM wild land protection has remained more unsettled, as Congress recently rejected a Wild Lands

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\* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. With apologies to Jerry Garcia, Bob Weir, Phil Lesh, Robert Hunter, and the Grateful Dead.

<sup>+</sup> Clerk to Alaska Supreme Court; J.D. *magna cum laude* 2013, Lewis and Clark Law School.

Policy adopted by the Obama Administration. Despite this political setback, current policy is to survey and consider wild lands in all BLM land plans and project approvals. This promised consideration, however, leaves the fate of such lands in the hands of local BLM officials and to the political vicissitudes of future administrations.

This Article traces the evolution of federal wild lands policy from its beginnings in the 1920s, through the enactment of the Wilderness Act in 1964 and the Federal Land Management and Policy Act in 1976, to the longstanding dispute over the Forest Service's roadless rule, and to the present controversy over BLM wild lands policy. We maintain that, pending congressional decisions on wilderness status, the best way to protect wild lands in the twenty-first century is through administrative rule, as in the case of national forest lands. Such protection, however, will require at least acquiescence from Congress, which has not been evident in the case of BLM lands in recent years.

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## I. INTRODUCTION

Wild lands are a distinctive aspect of the American character. During colonial America, religious heretics like Roger Williams were banished to wild lands.<sup>1</sup> Then, in the nineteenth century, the American dream was to conquer the wild lands, and displace native populations, in order to settle the continent and fulfill the nation's "manifest destiny."<sup>2</sup> In the twentieth century, wild lands became a scarce natural resource that first the U.S. Forest Service and then Congress sought to preserve and protect.<sup>3</sup> In 1964, the United States became the first country in the world to designate wilderness, "untrammelled" areas "where man himself is a visitor who does not remain."<sup>4</sup> Some six decades later, the nation has over 109 million acres of federal land designated as wilderness, most of them in the West.<sup>5</sup>

But designating wilderness areas requires political consensus that is uncommon in an era of divided government, Senate filibusters, and party-line voting.<sup>6</sup> Consequently, in the twenty-first century only 5.1 million acres have been added to the country's wilderness inventory, just 4.6 percent of total wilderness acres.<sup>7</sup> Although the two largest federal land managers, the Forest Service and the Bureau of Land Management ("BLM"), have many unroaded lands that are eligible for wilderness designation, Congress has designated only 8.7 million acres of BLM lands as wilderness, less than three percent of the agency's total land

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1. See RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 262 (3d ed. 1982).

2. See PHILLIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 11–12 (2003); KIM HEACOX, *AN AMERICAN IDEA: THE MAKING OF THE NATIONAL PARKS* 60 (2009).

3. See *infra* Part II; see also SHABECOFF, *supra* note 2, at 151–53.

4. Wilderness Act, 16 U.S.C. § 1131(c) (2006).

5. See Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 65 (2010); Gary Bryner, *Designating Wilderness Areas: A Framework for Examining Lessons From the States*, USDA Forest Service Proceedings RMRS-P-049, 274 (2007).

6. See Daniel Viehland, *The Battle for New Wilderness: A Closer Look at Montana's Sleeping Giant*, HIGH COUNTRY NEWS (Feb. 27, 2012) <http://www.hcn.org/blogs/range/the-battle-for-new-wilderness-a-closer-look-at-montanas-sleeping-giant>; Richard H. Plides, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 277 n.7, 326, 331 (2011).

7. Wilderness Data Search Results, Wilderness.net, <http://www.wilderness.net/nwps/advSearch> (accessed by searching "After" Year: "2000"). Most recently, Congress enacted the Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009), which designated about 2 million acres of wilderness in eight western states and West Virginia.

holdings.<sup>8</sup> Moreover, some 58 million acres of unroaded lands in national forests qualify as wilderness, but so far Congress has not been able to pass legislation designating many of those areas as wilderness.<sup>9</sup> Controversy over the fate of these roadless wild lands has raged for roughly two decades.<sup>10</sup>

In recent years, wild lands preservation has become a partisan political issue, as the two major political parties have become bitterly divided over whether to restrict the development of these federal lands.<sup>11</sup> Many states in the intermountain West favor exploiting wild lands for energy, transportation, and other extractive resource uses. In the 1990s, the Clinton Administration pursued initiatives aimed at preserving unroaded areas in both national forests and BLM lands, which prompted litigation by some states and extractive industries.<sup>12</sup> Before that litigation produced conclusive results, the Bush Administration attempted to rescind the protections,<sup>13</sup> inducing another round of litigation by environmental groups. Some of that litigation is still ongoing,<sup>14</sup> but protection for roadless national forest lands has recently been upheld by both the Ninth and Tenth Circuits,<sup>15</sup> and the Supreme Court refused to

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8. *Wilderness Areas*, BLM, [http://www.blm.gov/wo/st/en/prog/blm\\_special\\_areas/NLCS/Wilderness.html](http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/Wilderness.html) (last visited Dec. 9, 2012).

9. *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294) [hereinafter 2001 Roadless Rule]; Laurie Yung et al., *Wilderness Politics in the American West*, INT. J. OF WILDERNESS 14 (2008).

10. *See* TOM TURNER, ROADLESS RULES: THE STRUGGLE FOR THE LAST WILD FORESTS 27–30 (2009).

11. *See, e.g.*, Clifford Kraus & Ashley Parker, *Romney Energy Plan Would Expand Oil Drilling on U.S. Land and Offshore*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/us/politics/romney-tries-to-refocus-campaign-on-economy-and-obama-turns-to-education.html> (noting the political differences between Democrats and Republicans over energy production on federal lands).

12. *See* TURNER, *supra* note 10, at 27–31. *See, e.g.*, 2001 Roadless Rule, *supra* note 9 (providing roadless protections to about 58.5 million acres of national forest lands); BLM, WILDERNESS INVENTORY AND STUDY PROCEDURES (2001), *available at* [pbadupws.nrc.gov/docs/ML0306/ML030630534.pdf](http://pbadupws.nrc.gov/docs/ML0306/ML030630534.pdf) (giving the BLM new guidance for recommending wilderness).

13. *See* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (codified at 36 C.F.R. pt. 294) (allowing states to petition the Forest Service for a state-specific roadless rule) [hereinafter State Petitions Rule].

14. *See infra* Parts III and IV.

15. *See* California *ex rel.* Lockyer v. USDA, 575 F.3d 999, 1004–05 (9th Cir. 2009) (reinstating the 2001 Roadless Rule after the district court enjoined implementation of the State Petitions Rule); Wyoming v. USDA, 661 F.3d 1209, 1220 (10th Cir. 2011) (upholding the 2001 Roadless Rule).

review the issue.<sup>16</sup> Protection of most roadless national forest lands seems now to be national policy.

On BLM lands, the Clinton Administration's attempt to add to wilderness study areas, an interim status that is still quite protective,<sup>17</sup> was stymied by litigation brought by the State of Utah,<sup>18</sup> the state with the most potential new wilderness study areas. This stalemate was seemingly broken when the Obama Administration implemented a "wild lands policy" in 2010, which promised many of the same protections that the earlier Clinton Administration initiated.<sup>19</sup> However, in 2011, the new Republican majority in the House of Representatives insisted upon an appropriations rider that denied funding to implement the wild lands policy,<sup>20</sup> leaving the policy still-born, at least in the near-term.

Thus, American wild lands policy is now at crossroads. Most roadless areas in national forests that do not enjoy wilderness status are now protected from development by administrative rule,<sup>21</sup> not unlike the way in which national forest wild lands were protected in the 1930s and 1940s.<sup>22</sup> But many BLM roadless areas remain in legal limbo, awaiting further action by Congress, although the BLM is apparently not approving developments that would threaten the areas' roadless status.<sup>23</sup>

This Article examines wild lands policy in the early twenty-first century, focusing on the Forest Service's roadless rule and the BLM's wild lands policy. Part II explains early administrative protections for wilderness and the structure of the Wilderness Act, emphasizing the Act's cumbersome procedure for adding wild lands in the national

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16. *Colo. Mining Ass'n v. USDA*, 661 F.3d 1209 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 144 (2012).

17. *See* Appel, *supra* note 5, at 109.

18. *See* *Utah v. Babbitt*, 137 F.3d 1193, 1199–1200 (10th Cir. 1998) (Utah challenged the BLM's classification of wilderness study areas in the state)

19. *See* Phil Taylor, "Wild Lands" Policy Would Allow Limited Development, *BLM Chief Says*, N.Y. TIMES (Mar. 2, 2011), [www.nytimes.com/gwire/2011/03/02/02greenwire-wild-lands-policy-would-allow-limited-developm-20171.html](http://www.nytimes.com/gwire/2011/03/02/02greenwire-wild-lands-policy-would-allow-limited-developm-20171.html); SEC'Y OF INTERIOR, ORDER NO. 3310, PROTECTING WILDERNESS CHARACTERISTICS ON LANDS MANAGED BY THE BUREAU OF LAND MANAGEMENT (2010), *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications\\_Directorate/public\\_affairs/news\\_release\\_attachments.Par.26564.File.dat/sec\\_order\\_3310.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf) [hereinafter WILD LANDS POLICY].

20. *See* Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 125 Stat. 552 (2012).

21. *See infra* Part III.A.

22. *See infra* Part II.

23. *See* BLM, BLM MANUAL, MANAGEMENT OF WILDERNESS STUDY AREAS 1–6 (2012), *available at* [www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_manual.Par.22269.File.dat/6340.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.22269.File.dat/6340.pdf).

forests, parks, and wildlife refuges to the wilderness system. Part III explores the national forest roadless rule and how the courts' affirmation of that rule resulted in significant administrative protections for undesignated national forest wild lands. Part IV turns to BLM lands, considering how the Federal Land Policy and Management Act ("FLPMA") added BLM lands to those eligible for wilderness designation. Part IV discusses the controversy over FLPMA's inventory of roadless lands, the ensuing litigation, and the current legislative stalemate over protections for undesignated BLM lands with wilderness characteristics.

Federal protection for wilderness began over ninety years ago, and since then efforts to preserve America's remaining wild lands have followed a long and controversial road.<sup>24</sup> We conclude by examining the current state of protections for national forest and BLM wild lands. Going forward, it seems unlikely that Congress will be able to exercise leadership concerning the remaining unprotected BLM wild lands. Therefore, we see wild lands policy in the twenty-first century as primarily in the hands of the executive branch, where FLPMA's land and resource planning process and NEPA's procedural mandate require the BLM to at least consider preserving wilderness characteristics.

## II. THE DEVELOPMENT OF FEDERAL WILD LANDS PROTECTIONS

The American impulse to preserve large tracts of public land from human development has its origins in nineteenth century transcendentalist writers like Ralph Waldo Emerson and Henry David Thoreau.<sup>25</sup> Building on this literary and philosophical tradition, foresters working for the federal government during the 1920s and 1930s became the first to put the idea of wilderness into practice.<sup>26</sup> In 1964, the Wilderness Act shifted the power to designate wilderness areas to

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24. In the words of the Grateful Dead, "what a long, strange trip it's been." GRATEFUL DEAD, *Truckin'*, on AMERICAN BEAUTY (Warner Bros. 1970).

25. See NASH, *supra* note 1, at 86–87; see generally RALPH WALDO EMERSON, *Nature*, in NATURE, ADDRESSES AND LECTURES, THE WORKS OF RALPH WALDO EMERSON, I, 14, 15 (1883) ("In wilderness, I find something more dear and connate than in the streets or villages . . . in the woods we return to reason and faith."); THE JOURNAL OF HENRY DAVID THOREAU, VOL. II, 144 (Bradford Torrey & Francis H. Allen eds., 1906) ("I believe that Adam in paradise was not so favorably situated on the whole as is the backwoodsman in America.").

26. See Appel, *supra* note 5, at 71–72; NASH, *supra* note 1, at 182–87.



Congress, creating a slow, contentious, and cumbersome process for adding new lands to the national wilderness system.<sup>27</sup>

*A. Initial Administrative Protection for Wild Lands (1920–1964)*

Systematic protection of wild lands in the United States began as an attempt by the Forest Service to preserve select areas of the national forests from human development.<sup>28</sup> Since the earliest days of the Forest Service, policymakers like Gifford Pinchot viewed the national forests as a resource to be exploited, and utilitarian policies predominated.<sup>29</sup> Eventually, many foresters and conservationists became concerned that increased use and development of the national forests would eliminate the remaining wild areas.<sup>30</sup>

In 1920, Arthur Carhart, a Forest Service “recreation engineer,” successfully convinced his supervisors to preserve a small area around Trappers Lake, Colorado, and parts of Superior National Forest in Minnesota as wild areas managed exclusively for primitive recreation and aesthetic value.<sup>31</sup> After learning of Carhart’s success at preserving small-scale wild areas, Aldo Leopold, then a Forest Service land manager, began a campaign to set aside more land within the national forests for wilderness. In 1922, Leopold suggested that an area within the Gila National Forest in New Mexico should be protected from permanent human development and industrial resource extraction—a proposal that eventually led to the Forest Service’s creation of the Gila Wilderness, the nation’s first wilderness area.<sup>32</sup>

Over the next forty years, the Forest Service developed regulations and policies to increase the number of administrative wilderness areas in

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27. Wilderness Act, 16 U.S.C. §§ 1131–36 (2006 & Supp. II 2008).

28. See NASH, *supra* note 1, at 185–87.

29. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 128–31 (1993).

30. See, e.g., Robert Marshall, *The Problem of the Wilderness*, in *THE GREAT NEW WILDERNESS DEBATE* 85, 87, 95 (J. Baird Callicott & Michael P. Nelson eds., 1998) (“Within the next few years the fate of the wilderness must be decided. . . . [T]he preservation of a few samples of undeveloped territory is one of the most clamant issues before us today. Just a few more years of hesitation and the only trace of that wilderness which has exerted such a fundamental influence in molding American character will lie in the musty pages of pioneer books and the mumbled memories of tottering antiquarians. To avoid this catastrophe demands immediate action.”).

31. See Appel, *supra* note 5, at 72; NASH, *supra* note 1, at 185–86.

32. Appel, *supra* note 5, at 71–72.

the national forest system.<sup>33</sup> In 1929, the Forest Service implemented Regulation L-20, which authorized the Chief of the Forest Service to classify national forests as “primitive areas” based upon the recommendations of regional land managers.<sup>34</sup> Primitive areas limited resource extraction, permanent improvements, and transportation within these areas, and they also prohibited road building, except in special cases where roads were essential for forest management.<sup>35</sup> In Regulation L-20, the Forest Service acknowledged wilderness values, including recreation and public education, as beneficial uses of the national forest system.<sup>36</sup>

A decade later, in 1939, the Forest Service promulgated a new regulatory system that superseded Regulation L-20.<sup>37</sup> The resulting U-Regulations created four different types of preserved land within the national forests: wilderness areas (Regulation U-1), wild areas (Regulation U-2), recreation areas (Regulation U-3), and experiment and natural areas (Regulation U-4).<sup>38</sup> The main difference between the newly classified wilderness and other wild areas was their size: Regulation U-1 defined wilderness as a primitive area consisting of more than 100,000 acres.<sup>39</sup> Regulation U-2 required wild areas to be between 5,000 and 100,000 acres.<sup>40</sup> All four U-Regulations incorporated most of the same limitations on forest use as the 1929 Regulation L-20, including a prohibition on permanent improvements, most resource extraction, and non-primitive transportation.<sup>41</sup> Significantly, the U-Regulations elevated the decision-making authority for classifying U-1 wilderness areas to the

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33. See Brandon Dalling, *Administrative Wilderness: Protecting Our National Forestlands in Contravention of Congressional Intent and Public Policy*, 42 NAT. RESOURCES J. 385, 389 (2002).

34. See Appel, *supra* note 5, at 72.

35. See *id.*

36. See *id.*

37. See Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service’s Roadless Rule*, 44 NAT. RESOURCES J. 687, 697 (2004) (explaining the 1939 U-Regulations).

38. See 36 C.F.R. §§ 251.20–23 (1939); Appel, *supra* note 5, at 73.

39. 36 C.F.R. § 251.20 (1939) (“Upon recommendation of the Chief, Forest Service, national forest lands in single tracts of not less than 100,000 acres may be designated by the Secretary as ‘wilderness areas.’”).

40. 36 C.F.R. § 251.22 (1939).

41. See Appel, *supra* note 5, at 73–74; Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 ENVTL. L. 1015, 1067 (2004); *McMichael v. United States*, 355 F.2d 283, 286 (9th Cir. 1965) (upholding a federal conviction under the U-Regulations).

Secretary of the Agriculture—authority to classify U-2 wild areas remained with the Chief of the Forest Service and district rangers.<sup>42</sup>

Under both the L- and U-Regulations, the Forest Service drastically increased both the number and size of preserved areas within the national forests.<sup>43</sup> From 1931 to 1939, the agency classified seventy-three new primitive areas, totaling approximately fourteen million acres.<sup>44</sup> But the discretionary nature of Forest Service land classifications concerned conservationists, who feared that extractive industry lobbyists would convince future administrators to decrease the size of protected areas.<sup>45</sup> As early as 1937, Bob Marshall, founder of the Wilderness Society, began a campaign for statutory protections for the nation's remaining wild lands.<sup>46</sup>

### *B. The Wilderness Act of 1964*

By the 1950s, conservationists, led by Howard Zahniser, organized an influential campaign to pass a wilderness bill in Congress.<sup>47</sup> Zahniser argued that congressional action on wilderness was needed because the Forest Service lacked clear statutory authority to create wilderness areas and had no power to prohibit future mining or dam-building in wilderness or wild areas.<sup>48</sup> Moreover, only Congress had the power to designate such areas in the national parks.<sup>49</sup> Yet the primary motivation for a wilderness bill was to permanently protect existing Forest Service

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42. 36 C.F.R. § 251.21 (1939); see Appel, *supra* note 5, at 73–74. Authority to designate U-3 recreation areas and U-4 experiment and natural areas remained with the Chief of the Forest Service and local land managers, except for designations larger than 100,000, which required the Secretary's approval. 36 C.F.R. §§ 251.22–.23.

43. See Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 296 (1966).

44. *Id.*; NASH, *supra* note 1, at 206.

45. See McCloskey, *supra* note 43, at 297. Some Forest Service designations of primitive and wilderness areas under the L and U-Regulations had been revoked. Before 1964, the French Pete Valley in Oregon and parts of the Gila Wilderness in New Mexico were reopened to logging. See GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 1010–11 (6th ed. 2007).

46. See John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 ENVTL. L. 955, 963 (2005).

47. See McCloskey, *supra* note 43, at 297–98.

48. See *id.*; General Mining Act of 1872, ch. 152, 17 Stat. 91, (codified as amended at 30 U.S.C. §§ 22–24, 26–30, 33–35, 37, 39–43, 47 (2006)) (allowing mining claims on federal lands, including national forests); Federal Power Act of 1920, ch. 285, 41 Stat. 1063, (codified as amended at 16 U.S.C. §§ 792–819, 820–23 (2006)) (authorizing dam construction on federal lands, including national forests).

49. See McCloskey, *supra* note 43, at 298.

wilderness, removing the agency's discretion to declassify or change the size of wilderness areas.<sup>50</sup>

After nine years of debate, in September 1964, Congress passed the Wilderness Act, which established a national policy of preserving wilderness areas for future generations.<sup>51</sup> The Act defined wilderness as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation."<sup>52</sup> The Act designated as wilderness all 9.1 million acres of existing Forest Service U-1 wilderness areas and U-2 wild areas<sup>53</sup> and called for the Secretary of Agriculture to study other existing "primitive areas" to determine which were suitable for designation.<sup>54</sup> Congress required the Secretaries of Agriculture and the Interior to conduct reviews of all primitive areas larger than 5,000 acres in national forests, national parks, and national wildlife refuges and ranges; and to submit recommendations for wilderness designations to the president and Congress within ten years.<sup>55</sup> After enactment of the Wilderness Act, only a public law could designate federal land as wilderness.<sup>56</sup>

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50. "[Zhaniser] and other wilderness supporters feared, that under pressure from commodity interests, too much land might be removed from primitive areas as they were reclassified as [U-1] wilderness areas." *Id.* at 297.

51. Senator Hubert Humphrey was instrumental in guiding the Wilderness Act through the legislative process, working with the Forest Service and National Park Service throughout the nine-year process. Congress held some 30 congressional hearings, and a total of 65 different wilderness bills were proposed before the final passage. *See id.* at 298–300.

52. The Act defined wilderness areas according to four characteristics, including 1) being primarily affected by nature, 2) possessing outstanding opportunities for solitude or primitive recreation, 3) being over 5,000 acres, and 4) containing significant ecological, geological, or other features. Wilderness Act, 16 U.S.C. § 1131(c) (2012).

53. *See Appel, supra* note 5, at 73; COGGINS ET AL., *supra* note 45, at 1011. The Wilderness Act also automatically designated Forest Service "canoe" areas, which meant the Boundary Waters Canoe Area, the only area ever designated by the Forest Service as a U-3 recreation area or canoe area. 16 U.S.C. § 1132(a) (2012); 36 C.F.R. § 293 (2012); *see* LES JOSLIN, THE WILDERNESS CONCEPT AND THE THREE SISTERS WILDERNESS: DESCHUTES AND WILLAMETTE NATIONAL FORESTS, OREGON 14 (2005).

54. Wilderness Act, 16 U.S.C. § 1132(a); *see generally Appel, supra* note 5, at 73 (discussing the Forest Service's classifications of "primitive areas," some of which were roadless).

55. Wilderness Act, 16 U.S.C. § 1132(a).

56. *See id.* § 1131(a).

### C. Wilderness Designations by Congress (1964–2009)

Although Congress provided leadership in passing a national wilderness policy, implementation of the Wilderness Act over the last half-century has produced endless political conflict.<sup>57</sup> At the agency-level, the Forest Service's attempts to identify areas of the national forests suitable for wilderness were stopped by litigation in the 1970s and 1980s.<sup>58</sup> Congress eventually added about 100 million additional acres to the National Wilderness Preservation System, but the political gridlock over wilderness proposals has increased, while in recent years enthusiasm in Congress for designating new wilderness has waned.<sup>59</sup>

In 1967, the Forest Service began a voluntary process of reviewing all national forest lands for their wilderness potential.<sup>60</sup> The agency's first Roadless Area Review and Evaluation ("RARE I") in 1972 identified 1,449 areas, comprised of over 56 million acres of national forests, as suitable wilderness.<sup>61</sup> From these areas, the Forest Service identified 274 areas—totaling 12.3 million acres, or six percent of the total land in national forests—that the agency recommended for congressional designation.<sup>62</sup> But lawsuits filed by environmental groups challenged the procedures that the Forest Service used in reviewing the suitability of roadless areas, casting doubt on the 1972 RARE I findings.<sup>63</sup> The environmentalists eventually successfully argued that the

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57. See, e.g., Julie Cart, *Salazar Backpedals: Politics Stalls Wilderness Designation, Again*, L.A. TIMES (Jun. 1, 2011), <http://latimesblogs.latimes.com/greenspace/2011/06/politics-placed-wilderness-designation-placed-in-limbo.html> (describing a recent example of the political conflict over wilderness designation in the West).

58. See *California v. Block*, 690 F.2d 753, 756 (9th Cir. 1982); *Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1251 (10th Cir. 1973); *Sierra Club v. Butz*, [1973] 3 Envtl. L. Rep. (Envtl. Law Inst.) 20,071, 20,074 (N.D. Cal. Aug. 19, 1972).

59. See John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RESOURCES & ENVTL. L. 1, 5 (2005).

60. See Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1150 (2004). The Forest Service's review of all national forests went beyond the Wilderness Act's mandate to study existing primitive areas. See COGGINS ET AL., *supra* note 45, at 1049.

61. COGGINS ET AL., *supra* note 45, at 1049.

62. In RARE I, the Forest Service recommended only 19% of national forest roadless areas for wilderness designation. *Background Information on Wilderness and Roadless Area Evaluation*, W. FOREST LEADERSHIP COALITION, [www.wflcenter.org/news\\_pdf/138\\_pdf.pdf](http://www.wflcenter.org/news_pdf/138_pdf.pdf), (last visited Dec. 10, 2012).

63. See Glicksman, *supra* note 60, at 1150 n.33. For example, in *Parker v. United States*, 448 F.2d 793, 797–98 (10th Cir. 1971), the Tenth Circuit enjoined a Forest Service timber sale because the Forest Service failed to give adequate consideration to the wilderness characteristics of a roadless area adjacent to a "primitive" area. In *Utah v.*

Forest Service failed to comply with the National Environmental Policy Act (“NEPA”) when it opened some inventoried roadless areas to development.<sup>64</sup>

At the beginning of the Carter Administration in 1977, the Secretary of Agriculture responded to the court injunctions by ordering the Forest Service to conduct a second review of the national forests in order to comply with NEPA’s mandate.<sup>65</sup> Two years later, in 1979, the Forest Service concluded RARE II, reviewing a total of 62 million acres in 2,919 roadless areas.<sup>66</sup> In its report to the President, the agency recommended that 15 million acres—about 7.5 percent of national forest lands—receive congressional designation as wilderness, and that 10.8 million acres receive further consideration by the agency as potential wilderness.<sup>67</sup> The Forest Service proposed that areas RARE II identified as not suitable for wilderness—over 37 million acres, about sixty percent of the inventoried areas—be released to multiple-use decision-making.<sup>68</sup>

The RARE II process attempted to provide finality for wilderness planning on the national forests, but the results were short-lived. Soon after the Forest Service completed RARE II, the State of California and several environmental groups challenged the Forest Service’s decisions to exclude numerous areas from further consideration as wilderness.<sup>69</sup> By excluding over seventy-six percent of roadless areas from its

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*Andrus*, 486 F. Supp. 995, 1007 (D. Utah 1979), the court reiterated the reasoning of *Parker*, explaining that Congress did not want proposed activities on potential wilderness areas to foreclose future designation as wilderness.

64. See *Sierra Club v. Butz*, [1973] 3 *Envtl. L. Rep.* (Envtl. Law Inst.) 20,071, 20,074 (N.D. Cal. Aug. 19, 1972) (prohibiting the Forest Service from taking action that would change the wilderness character of inventoried roadless areas without conducting a NEPA analysis); *Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973) (enjoining a timber sale in an inventoried roadless area until the Forest Service conducted a NEPA analysis).

65. See MICHAEL McCLOSKEY, *IN THE THICK OF IT: MY LIFE IN THE SIERRA CLUB* 174 (2005); Monica Voicu, *At a Dead End: The Need for Congressional Direction in the Roadless Area Management Debate*, 37 *ECOLOGY L.Q.* 487, 500 (2010) (also noting that Congress passed FLPMA, NFMA, and NEPA in the time since the Forest Service began RARE I).

66. See CHARLES F. WILKINSON & H. MICHAEL ANDERSON, *LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS* 350 (1987); *Wilderness Act*, 16 U.S.C. § 1131(c) (2012).

67. See *W. FOREST LEADERSHIP COALITION*, *supra* note 62.

68. See Voicu, *supra* note 65, at 500–01.

69. See *California v. Bergland*, 483 F. Supp. 465, 470 (E.D. Cal. 1980), *aff’d sub nom. California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982) (describing the Forest Service’s decision to classify 36 million acres, or 58%, of national forest roadless areas as “nonwilderness”).

recommendations for wilderness designation and opening those areas to multiple-use without site-specific analyses, California and the environmentalists claimed that the Forest Service violated NEPA.<sup>70</sup> The Ninth Circuit agreed, affirming an injunction against the Forest Service and prohibiting the use of the RARE II planning documents in future forest management.<sup>71</sup>

Consequently, the Forest Service's attempt to recommend wilderness designations produced only uncertainty and confusion concerning the future of national forest wild lands. Faced with the prospect of beginning a lengthy and expensive third review process, the Reagan Administration struck a compromise with congressional leaders.<sup>72</sup> Instead of waiting for the Forest Service to conduct a new environmental review of suitable wilderness and release of non-wilderness to multiple-use, Congress would address wilderness designations on a state-by-state basis.<sup>73</sup> Therefore, as in 1964, Congress took responsibility for determining which areas of national forests received wilderness designations, and which areas would be released to multiple-use.<sup>74</sup>

Throughout the 1980s and 1990s, this state-by-state process of congressional wilderness designation produced significant results.<sup>75</sup> In 1984, Congress passed wilderness bills for eighteen states, designating over 8.1 million acres—seven percent of the current wilderness system.<sup>76</sup>

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70. See *Block*, 690 F.2d at 759–60.

71. See *id.* at 765 (concluding that the Forest Service violated NEPA by 1) providing an inadequate analysis of site-specific environmental effects, 2) failing to consider a sufficient range of alternatives, and 3) failing to provide sufficient opportunity for public comment and 4) failing to meaningfully respond to public comments).

72. In the 1980s, the Reagan Administration briefly began a third inventory, RARE III, but abandoned the effort when Congress began passing statewide wilderness legislation. See GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, 3 PUBLIC NATURAL RESOURCES LAW § 25:9 (2d ed. 2009); Jim DiPeso & Tom Pelikan, *The Republican Divide on Wilderness Policy*, 33 GOLDEN GATE U. L. REV. 339, 363 (2003).

73. See Glicksman, *supra* note 60, at 1150.

74. See COGGINS ET AL., *supra* note 45, at 1052.

75. See Voicu, *supra* note 65, at 501.

76. See *id.* (stating that a total of 21 wilderness laws were passed in 1984, pursuant to the compromise); see also Wilderness.net, *Wilderness Law Library Search*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/pubLawLib> (accessed by searching “Year: 1984”) (last visited Oct. 9, 2013). State wilderness bills passed by Congress in 1984 added millions of acres of wilderness throughout the West. See Arizona Wilderness Act of 1984, Pub. L. 98-406, 98 Stat. 1485 (1984) (1 million acres); California Wilderness Act of 1984, Pub. L. 98-425, 98 Stat. 1619 (1984) (3.1 million acres); Oregon Wilderness Act of 1984, Pub. L. 98-328, 98 Stat. 272 (1984) (800,000 acres); Utah Wilderness Act of 1984, Pub. L. 98-428, 98 Stat. 1657 (1984) (700,000 acres); Washington State Wilderness Act of 1984, Pub. L. 98-339, 98 Stat. 299 (1984) (one

From 1984 to 1993, Congress passed a total of twenty-eight statewide wilderness bills, designating 9.8 million acres of wild lands in those areas that were politically popular and consensus wilderness selections.<sup>77</sup>

But the state-by-state designation process led to bitter political disagreements over the future of wild lands. In 1988, President Reagan pocket-vetoed a statewide wilderness bill for Montana, which would have designated over 1.4 million acres of wilderness—the veto was widely seen as an effort to give political support to a Republican Senate candidate.<sup>78</sup> After the incumbent Democratic senator, John Melcher, lost the 1988 election to Republican Conrad Burns, Congress failed to act on the remaining wilderness recommendations for Montana’s 5.4 million acres of roadless lands.<sup>79</sup>

In addition to the conundrum over Montana’s national forest wild lands, Congress’s selection of the consensus areas in the twenty-eight states that did receive wilderness bills left many other suitable wild lands in limbo—roadless areas not designated as wilderness, but not released for multiple-use.<sup>80</sup> Because the Forest Service had identified these areas as suitable for wilderness designation in RARE II, the agency could not release so-called “inventoried” lands to multiple-use management without an adequate environmental review to satisfy NEPA.<sup>81</sup> Congress’s failure to designate or release over 58 million acres of roadless areas left a gap in national forest wild lands policy, frustrating the Forest Service for over twenty years.

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million acres); Wyoming Wilderness Act of 1984, Pub. L. 98-550, 98 Stat. 2807 (1984) (800,000 acres). In 1989, Congress added 700,000 acres of wilderness in Nevada, *see* Nevada Wilderness Protection Act of 1989, Pub. L. 101-195, 103 Stat. 1784 (1989), and, in 1993, over 670,000 acres in Colorado, *see* Colorado Wilderness Act of 1993, Pub. L. 103-77, 107 Stat. 756 (1993).

77. *See Wilderness Law Library Search*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/pubLawLib> (accessed by searching “After Year: 1984”) (last visited Oct. 9, 2013) (showing that between 1984 and 1993 Congress designated over 8% of the current wilderness acreage).

78. *See* Philip Shabecoff, *Reagan Vetoes Bill to Protect 1.4 Million Acres in Montana*, N.Y. TIMES (Nov. 4, 1988), <http://www.nytimes.com/1988/11/04/us/reagan-vetoes-bill-to-protect-1.4-million-acres-in-montana.html>.

79. *See id.*; *see also* George Wuerthner, *Montana’s Statewide Wilderness Bill Long Overdue*, NEWWEST (March 23, 2009), [http://www.newwest.net/topic/article/montanas\\_statewide\\_wilderness\\_bill\\_long\\_overdue/C41/L41/](http://www.newwest.net/topic/article/montanas_statewide_wilderness_bill_long_overdue/C41/L41/) (stating that as of 2013, Congress has yet to pass a state wilderness bill for Montana).

80. *See* Voicu, *supra* note 65, at 489–90.

81. *See id.* at 501 (describing the Forest Service’s regulations that “demanded that all roadless areas identified in RARE II be evaluated and considered for wilderness recommendation during the forest planning process unless otherwise required by law.”).



### III. THE ROADLESS RULES: ADMINISTRATIVE PROTECTION FOR NATIONAL FOREST ROADLESS AREAS

Near the end of the Clinton Administration, the Forest Service stopped waiting for Congress and provided its own long-term management strategy for roadless areas. In 2001, the Forest Service adopted an administrative rule to prohibit most road building and resource extraction in the remaining inventoried roadless areas<sup>82</sup>—much like the L- and U-Regulations’ protection of administrative wilderness areas in the early twentieth century.<sup>83</sup> After surviving an attempt by the Bush Administration to undo the administrative protections and legal challenges in two circuits, the 2001 Roadless Rule now provides significant protection to roughly one-quarter of the land in national forests.<sup>84</sup>

#### *A. The 2001 Roadless Rule: Development and Provisions*

When the Reagan Administration abandoned the RARE inventory process in 1984, Congress proceeded to designate wilderness areas in a series of state-specific wilderness bills.<sup>85</sup> Although Congress designated millions of acres of wilderness in twenty-eight states, the state-specific legislation did not provide a management regime for other inventoried roadless areas that were left undesignated and not released for multiple-use.<sup>86</sup> Congress designated 36.7 million acres of wilderness in the national forests, roughly twenty percent of the total area managed by the Forest Service.<sup>87</sup> Another 58.5 million acres remained roadless and qualified for wilderness designation, but Congress failed to designate or

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82. See Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,244 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

83. See *supra* notes 33–42 and accompanying text.

84. See Heather S. Fredricksen, *The Roadless Rule that Never Was: Why Roadless Areas Should be Protected through National Forest Planning Instead of Agency Rulemaking*, 77 U. COLO. L. REV. 457, 458 (2006).

85. See *supra* notes 72–77 and accompanying text.

86. See *supra* notes 75–95 and accompanying text.

87. See *Wilderness Data Search*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/advResults> (accessed by searching “Agency: Forest Service”) (last visited Oct. 9, 2013).

release these inventoried roadless areas for multiple-use in the state-specific wilderness bills.<sup>88</sup> Consequently, responsibility for setting management policies on the remaining roadless areas passed to regional foresters and forest supervisors.<sup>89</sup>

From 1984 to 2001, the Forest Service managed roadless areas under the National Forest Management Act planning process on a forest-by-forest basis.<sup>90</sup> Controversies over roadless areas erupted continuously over decisions to permit road building and logging in roadless areas.<sup>91</sup> Other Forest Service managers shied away from the issue altogether, avoiding the controversial decision to open roadless areas for development by leaving the roadless areas in a legal limbo.<sup>92</sup>

The nationwide controversy over the fate of more than 58 million acres of roadless areas concerned officials in the Forest Service and Clinton Administration, but the most important catalyst that prompted the development of a long-term solution was the Forest Service budget.<sup>93</sup> From 1992 to 1997, the Forest Service's timber program cost taxpayers over \$2 billion.<sup>94</sup> The Forest Service's system of forest roads operated as a major subsidy for the timber industry—on average, timber sale revenues totaled only eighty-three cents for each dollar spent because of road construction and maintenance costs, which the Forest Service shouldered.<sup>95</sup>

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88. See Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,246 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

89. See Fredricksen, *supra* note 84, at 458.

90. See *id.* at 461.

91. See TURNER, *supra* note 10, at 24–25.

92. See *id.* at 27–28. By 1996, Chief of the Forest Service Jack Ward Thomas recognized that the problem of roadless areas had grown contentious and was in need of a solution. Thomas directed forest supervisors to address the management of each roadless area through the forest plan amendment process. Forest supervisors would either decide to permanently protect a roadless area from development, or open the area to logging and road building. Thomas hoped that the forest plan amendment process would resolve the roadless conflict by providing a forum for wilderness advocates and proponents of resource extraction to negotiate over the future of each roadless area and, ultimately, the forest supervisor's decision would provide a permanent end to the controversies. Unfortunately, Thomas' directive to the forest supervisors was ignored, and Thomas resigned out of frustration. See *id.* at 24–30.

93. See Christopher Cumings, *Judicial Iron Triangles: The Roadless Rule to Nowhere—And What Can Be Done to Free the Forest Service's Rulemaking Process*, 61 OKLA. L. REV. 801, 806 (2008).

94. Editorial, *Subsidized Roads Lead Nowhere*, CHI. TRIB. (Aug. 12, 2003), [http://articles.chicagotribune.com/2003-08-12/news/0308120210\\_1\\_national-forests-tongass-roadless-rule](http://articles.chicagotribune.com/2003-08-12/news/0308120210_1_national-forests-tongass-roadless-rule).

95. See TURNER, *supra* note 10, at 24–25.

In the 1990s, the Forest Service became known as the largest road-building entity in the world, maintaining over 380,000 miles of forest roads.<sup>96</sup> Despite its efforts to reduce the mileage of forest roads—the Forest Service decommissioned 2,700 miles per year between 1991 and 1997<sup>97</sup>—the demand for new road construction continued.<sup>98</sup> Constant efforts by western congressmen to authorize new logging bills put pressure on the Forest Service to build new roads to access the new timber sales.<sup>99</sup>

But the costs of constructing and maintaining so many forest roads took its toll on the Forest Service budget.<sup>100</sup> With an annual road maintenance budget of about \$90 million, the Forest Service's backlog for road projects ballooned to over \$8.4 billion by 1996.<sup>101</sup> New road construction became unsustainable from an economic perspective, and officials in the Clinton Administration began to examine ways to stop new road construction completely in roadless areas across the country.<sup>102</sup>

In 1999, the Forest Service announced an administrative rule that prohibited almost all new road construction or re-construction in

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96. See Catherine Walters, *Wildlands CPR Issues New Report on Forest Service Road Management*, WILDLANDS CPR (Sept. 23, 2009), <http://www.wildlandscpr.org/road-riporter/wildlands-cpr-issues-new-report-forest-service-road-management>. The Forest Service manages more than twice as many road miles as the United States Numbered Highways system. The total distance of forest roads is almost the same distance as traveling to the moon and back. See *Roads to Nowhere: Failing Forest Roads Threaten Wildlands*, OR. WILD, [http://www.oregonwild.org/oregon\\_forests/oregon\\_roadless\\_wild\\_land/roadless-reports/Roads%20Factsheet.pdf](http://www.oregonwild.org/oregon_forests/oregon_roadless_wild_land/roadless-reports/Roads%20Factsheet.pdf) (last visited Dec. 29, 2013).

97. *National Forest System Facts*, U.S. FOREST SERV., [http://www.fs.fed.us/eng/road\\_mgt/factsheet.shtml](http://www.fs.fed.us/eng/road_mgt/factsheet.shtml) (last visited Apr. 10, 2013).

98. See TURNER, *supra* note 10, at 30.

99. See Todd Wilkinson, *Forest Service Seeks a New (Roadless) Road to the Future*, HIGH COUNTRY NEWS, Apr. 27, 1998.

100. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

101. *Id.* at 3245–46; William J. Wailand, *A New Direction? Forest Service Decisionmaking and Management of National Forest Roadless Areas*, 18 N.Y.U. L. REV. 418, 433 (2006).

102. *Id.* at 432. In 1998, Forest Service Chief Dombeck became the first to conceive of a strategy for a nationwide prohibition on new forest road construction. Dombeck wondered whether he could “simply declare a moratorium on road building,” and ordered an 18-month “temporary suspension” of new road building in roadless areas while the Forest Service and White House contemplated an administrative rule to prohibit new roads in roadless areas. President Clinton formally announced the initiation of a Forest Service rulemaking process that would provide permanent protection to all roadless areas, marking the first time since 1939 that the Forest Service took the lead in making wild lands policy on national level. See TURNER, *supra* note 10, at 30–32.

inventoried roadless areas across the country—an area of 58.5 million acres, or one-third of the national forests.<sup>103</sup> The rule also prohibited new timber sales in roadless areas, with limited exceptions, such as cutting small-diameter trees to improve forest health.<sup>104</sup> Initially, the Forest Service debated whether to include roadless areas in the Tongass National Forest of southeastern Alaska, an area of highly productive and valuable timber.<sup>105</sup> Ultimately, the Roadless Rule applied to roadless areas in the Tongass, except for road and timber projects for which the Forest Service had already issued public notices prior to 2001.<sup>106</sup>

After receiving more than 1.6 million comments on the Roadless Rule's environmental impact statement ("EIS"), President Clinton announced the final adoption of the rule on January 5, 2001.<sup>107</sup> Although the implementation of the 2001 Roadless Rule was delayed during the first sixty days of the Bush Administration,<sup>108</sup> the rule went into effect in March 2001.<sup>109</sup> Lawsuits challenging the rule's procedure and substantive protections for roadless areas followed immediately.

### *B. Legal Challenges to the 2001 Roadless Rule and the State Petitions Rule*

Opponents to the 2001 Roadless Rule included resource extraction interests and local governments that feared the closure of roadless areas to future timber sales and motorized recreation.<sup>110</sup> The Kootenai Tribe of Idaho, timber companies, and the State of Idaho filed the first challenge

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103. See Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3272–73.

104. *Id.* at 3273.

105. *Id.* at 3254–55.

106. *Id.*

107. *2001 Roadless Area Conservation Rule*, EARTHJUSTICE, <http://wilderness.org/sites/default/files/EarthJustice-Roadless-Rule-Factsheet.pdf> (last visited Apr. 10, 2013) (noting that 95% of commenters supported protections for national forest roadless areas); Letter from Michael Dombeck, Chief of U.S. Forest Serv., to all employees on release of the Roadless Area Conservation Final Rule (Jan. 5, 2001), available at [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5137372.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5137372.pdf).

108. Fredricksen, *supra* note 84, at 464–65.

109. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (memorandum from President Bush's chief of staff, Andrew Card—also known as the Card Memorandum); Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 732 n.255 (2004) (questioning the legality of the Card Memorandum).

110. See *Kootenai Tribe v. Veneman*, 142 F. Supp. 2d 1231, 1239 (D. Idaho 2001) (consolidated with *Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248 (D. Idaho 2001)).

to the 2001 Roadless Rule, alleging that the Forest Service violated NEPA.<sup>111</sup> The District Court for the District of Idaho agreed with the tribe that the Forest Service failed to analyze a reasonable range of alternatives to the rule by only considering alternatives that included a prohibition on new road construction in roadless areas.<sup>112</sup> Consequently, the court issued an injunction preventing implementation of the 2001 Roadless Rule.<sup>113</sup>

On appeal, the Ninth Circuit reversed the district court in *Kootenai Tribe v. Veneman*, reinstating the 2001 Roadless Rule, and vindicating the rule's EIS.<sup>114</sup> A divided panel of the Ninth Circuit reasoned that the Forest Service had considered a reasonable range of alternatives in the EIS, given that the purpose of the 2001 Roadless Rule was to protect the ecological and social characteristics of roadless areas.<sup>115</sup> The court recognized that NEPA's mandate to analyze alternative actions must be applied "less stringently" when the proposed action is aimed at environmental protection.<sup>116</sup> Thus, the Forest Service did not need to analyze alternatives, such as road building, that undermined the policy objective of the rule.<sup>117</sup> Therefore, the Ninth Circuit reversed the district

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111. *Id.* at 1235.

112. *Id.* at 1243–47 (“It appears to the Court that . . . the [draft environmental impact statement] only examined three action alternatives. Each of three alternatives banned road construction and reconstruction in inventoried roadless areas and only differed as to the level of restriction imposed on timber harvesting.”). The court also agreed with the tribe on two other NEPA claims. The court decided that the Forest Service provided an inadequate time for public comment, only 69 days, for a rule with such a broad national scope, and the Forest Service failed to analyze reasonably foreseeable cumulative effects in the rule's EIS. *Id.* at 1247 (“[T]he Forest Service was required to include a useful analysis of these projects. A cursory and general discussion of the potential impacts will not do.”).

113. *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002).

114. *Id.* at 1126.

115. *Id.* at 1120. The Ninth Circuit also concluded that the Forest Service's cumulative impacts analysis satisfied NEPA by giving a “hard look” to the complex problem of roadless areas on a national scale. *Id.* at 1123. Similarly, the court decided that the Forest Service provided adequate time and opportunity for public comment because the draft EIS was available for more than the minimum 45-day period required by NEPA regulations and changes to the draft EIS were available for comment in the final EIS before final adoption of the rule. *See id.* at 1119.

116. *Id.* at 1120 (“The NEPA alternatives requirement must be interpreted less stringently when the proposed action has a primary and central purpose to conserve and protect the natural environment, rather than to harm it.”).

117. *Id.* at 1121 (The objective of the Roadless Rule was to “prohibit activities that have the greatest likelihood of degrading desirable characteristics of inventoried roadless areas and [to] ensure that ecological and social characteristics of inventoried roadless areas are identified and evaluated through local land management planning efforts. . . .

court's injunction against implementation of the 2001 Roadless Rule, clearing the way for the Forest Service to implement the national rule for the protection of 58.5 million acres.<sup>118</sup>

The Ninth Circuit's decision to uphold the 2001 Roadless Rule, however, did not end the legal challenges to the rule.<sup>119</sup> In 2003, the State of Alaska led a group of plaintiffs challenging the application of the rule to the Tongass National Forest.<sup>120</sup> Alaska claimed the rule violated a host of federal statutes, including the APA, the Alaska National Interest Lands Conservation Act,<sup>121</sup> the Tongass Timber Reform Act,<sup>122</sup> NFMA, and NEPA.<sup>123</sup> In an effort to avoid defending the 2001 Roadless Rule, the Bush Administration agreed to a settlement with Alaska in which the Forest Service would publish a new rule to exempt the Tongass and Chugach National Forests from the prohibitions on road building and timber cutting in roadless areas.<sup>124</sup> The Tongass and Chugach exemption rule went into effect in December 2003, removing the 2001 Roadless Rule's protections for national forests in southeast Alaska.<sup>125</sup>

Another front in the legal battle over the 2001 Roadless Rule emerged in the Tenth Circuit, where Wyoming brought its own legal challenge to the rule.<sup>126</sup> In addition to the NEPA claims that had already been litigated in the Ninth Circuit, Wyoming claimed that the rule violated the Wilderness Act by designating wilderness without

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The Forest Service was not required under NEPA to consider alternatives in the DEIS and FEIS that were inconsistent with its basic policy objectives.”); *see also* 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, 229 (2012).

118. *Kootenai Tribe*, 313 F.3d at 1126. Judge Kleinfeld dissented, declining to reach the merits of the NEPA claims because the United States did not appeal the district court's ruling, and the intervenor appellants lacked standing. *See id.* at 1128.

119. Kristen Ronholt, *Where the Wild Things Were: A Chance to Keep Alaska's Challenge of the Roadless Rule Out of the Supreme Court*, 29 ALASKA L. REV. 237, 242 (2012).

120. *See Alaska v. USDA*, No. 1:11-cv-01122-RJL (D.C. Cir. Mar. 25, 2013).

121. 16 U.S.C. §§ 3101–33 (2006).

122. Pub. L. No. 101-626, 104 Stat. 4426 (1990) (amending 16 U.S.C. § 539d(d)).

123. *See Alaska*, No. 1:11-cv-01122-RJL, at 1; Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, [2004] 34 Env'tl. L. Rep. (Env'tl. Law Inst.) 10,397, 10,401 (May 2004).

124. *See Ronholt*, *supra* note 119, at 242.

125. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (Dec. 30, 2003) (codified at 36 C.F.R. pt. 294).

126. *See Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1203 (D. Wyo. 2003).

congressional approval.<sup>127</sup> The District Court for the District of Wyoming agreed with Wyoming, and it approved a new nationwide injunction against the 2001 Roadless Rule.<sup>128</sup>

As *Wyoming v. USDA (Wyoming I)* awaited appeal in the Tenth Circuit,<sup>129</sup> the Bush Administration attempted to undo the restrictive 2001 rule through the administrative process.<sup>130</sup> In 2005, the Forest Service issued a new rule that replaced the previous 2001 Roadless Rule.<sup>131</sup> The new rule established a procedure for state governors to petition the Forest Service for a state-specific roadless rule to address the individual roadless areas in each particular state.<sup>132</sup> This State Petitions Rule allowed governors to submit petitions for a state-specific rulemaking to the Department of Agriculture by November 13, 2006, at which point the Secretary of Agriculture and a review committee would decide whether to begin a rulemaking process.<sup>133</sup> In the interim, the 58.5 million acres of roadless areas reverted to the management policies under each individual forest plan, as they had been managed prior to the 2001 rule's adoption.<sup>134</sup>

The preamble to the State Petitions Rule cited the ongoing legal controversy over whether the 2001 Roadless Rule satisfied NEPA's requirements, emphasizing the ability of state-specific rules to provide more creativity and flexibility than the 2001 rule's national prohibition on roadless area development.<sup>135</sup> But in promulgating the State Petitions Rule, the Bush Administration made a fateful decision under NEPA and

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127. *See id.* at 1232 (“Wyoming argues that the Roadless Rule constitutes a de facto designation of “wilderness” in contravention of the process established by the Wilderness Act of 1964.”).

128. *Id.* at 1239 (“[T]he Court ORDERS that the Roadless Rule, 36 C.F.R. §§ 294.10–14, be permanently enjoined.”).

129. In 2005, after promulgation of the state petitions rule, the Tenth Circuit vacated the district court's injunction, and dismissed the appeal as moot. *Wyoming v. USDA*, 414 F.3d 1207, 1210 (10th Cir. 2005).

130. *See id.* at 1211. The day after the Tenth Circuit heard oral arguments in the appeal of *Wyoming v. USDA*, the Forest Service issued the State Petitions Rule. *Id.* The Tenth Circuit then requested supplemental briefing and ultimately concluded that Wyoming's claims were moot, vacating the injunction. *Id.* at 1214.

131. State Petitions for Inventoried Roadless Area Management Rule, 70 Fed. Reg. 25,654 (May 13, 2005) (codified at 36 C.F.R. pt. 294).

132. *Id.* at 25,661 (codified at 36 C.F.R. pt. 294.13).

133. *Id.*

134. *Id.* at 25,654 (“Under this final rule, submission of a petition is strictly voluntary, and management requirements for inventoried roadless areas would be guided by individual land management plans until and unless these management requirements are changed through a state-specific rulemaking.”).

135. *Id.*

the Administrative Procedure Act.<sup>136</sup> Instead of preparing a new EIS, the Administration justified the State Petitions Rule by stating that the rule “neither prohibits nor requires any action” and thus, “the final regulation, in and of itself, is environmentally neutral and constitutes ‘no effect’ to the environment.”<sup>137</sup> The rule cited the no action alternative evaluated in the 2001 Roadless Rule EIS as sufficient to satisfy the requirements of NEPA, stressing that any proposed state-specific rule would undergo a new NEPA process.<sup>138</sup>

Once the Forest Service promulgated the State Petitions Rule, seven governors filed petitions to the Secretary of Agriculture for state-specific roadless rules.<sup>139</sup> The governors of North Carolina, South Carolina, New Mexico, and California submitted petitions to protect all of the roadless areas in their states;<sup>140</sup> Virginia also submitted a petition for a modified rule—each of these petitions was denied by the Bush Administration.<sup>141</sup> The Administration did accept petitions from Idaho and Colorado to create state-specific roadless rules in those states.<sup>142</sup> In Idaho, the Forest Service created a four-tiered system of roadless areas, each with different levels of protection and permissible road building and logging.<sup>143</sup>

The State Petitions Rule unleashed a new round of litigation, this time from environmental groups and pro-wilderness states.<sup>144</sup> The denial of California’s petition to adopt a statewide roadless rule identical to the 2001 Roadless Rule prompted the state and environmental groups to initiate litigation challenging the validity of the State Petitions Rule and

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136. See TURNER, *supra* note 10, at 110–11.

137. State Petitions for Inventoried Roadless Area Management Rule, 70 Fed. Reg. at 25,660. The Forest Service claimed that the rule was procedural in nature. Therefore, under NEPA regulations, the rule was categorically excluded from requiring a separate environmental analysis. See *id.*

138. *Id.*

139. See *Timeline of Roadless Rule*, EARTHJUSTICE, <http://earthjustice.org/features/timeline-of-the-roadless-rule> (last visited Apr. 10, 2013).

140. See *id.*

141. See THE WILDERNESS SOC’Y, ROADLESS FOREST PROTECTION 40 (2009), available at <http://wilderness.org/sites/default/files/legacy/roadless-forest-protection-CBB-09.pdf>.

142. See USDA, STATUS OF ROADLESS RULES (2013), available at [www.fs.fed.us/biology/resources/pubs/issuepapers/IssueUpdate\\_RoadlessRules\\_Sept2013.pdf](http://www.fs.fed.us/biology/resources/pubs/issuepapers/IssueUpdate_RoadlessRules_Sept2013.pdf).

143. See Special Areas; Roadless Area Conservation; Applicability to National Forests in Idaho, 73 Fed. Reg. 1135, 1137 (Jan. 7, 2008) (codified at 36 C.F.R. pt. 294). The four categories ranged from “Wild Land Recreation,” the most protective, to “General Forest,” which allowed timber production and mining. See Kyle J. Aarons, *The Real World Roadless Rules Challenges*, 109 MICH. L. REV. 1293, 1323 (2011).

144. See *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874, 879 (N.D. Cal. 2006).



seeking to reinstate the original 2001 Roadless Rule.<sup>145</sup> In *California ex rel. Lockyer v. USDA*, the district court ruled in favor of California, concluding that the State Petitions Rule violated both NEPA and the Endangered Species Act (“ESA”).<sup>146</sup> First, the court determined that the State Petitions Rule required an analysis under NEPA, rejecting the government’s argument that the State Petitions Rule did not repeal the 2001 Roadless Rule.<sup>147</sup> The court ruled that the government did not comply with the *Wyoming* court’s injunction against the 2001 rule and noted that, in fact, the government had appealed that ruling.<sup>148</sup> Therefore, the State Petitions Rule effectively repealed the prior rule and consequently required an environmental analysis.<sup>149</sup> Second, the court determined that the State Petitions Rule was not a purely procedural rule, and it was thus not exempt from NEPA analysis.<sup>150</sup> The State Petitions Rule returned roadless area management to individual forest plans, which amounted to a substantial change in management from the 2001 rule.<sup>151</sup> According to the court, the government could not rely on the environmental analysis in the 2001 rule because that EIS rejected the no action alternative that the State Petitions Rule claimed to adopt.<sup>152</sup> The court reasoned that the government could not use an environmental

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145. *See id.* (“Plaintiffs seek an Order vacating and setting aside the State Petitions Rule, reinstating the Roadless Rule and enjoining Defendants from taking any action in violation of the Roadless Rule until they undertake appropriate environmental analysis.”). California, a coalition of environmental groups, and other western states argued that the State Petitions Rule violated NEPA because the Bush Administration failed to conduct a new EIS, violated the Endangered Species Act (ESA) because the Forest Service did not consult with the wildlife agencies on potential effects to listed species, and violated the APA by acting arbitrarily and capriciously. *See id.* at 910–13.

146. *Id.* at 913 (“Defendants failed to engage in the reasoned environmental analysis and consultation mandated by NEPA and ESA.”).

147. *Id.* at 909 (“The Forest Service had to comply with NEPA when it issued the State Petitions Rule.”).

148. *Id.* at 896 (“[T]his ‘on paper only’ argument strains against the basic rule of law whereby published changes in regulations constitute binding changes in governing law.”).

149. *See id.* at 899 (“[E]ven if the revocation of the Roadless Rule’s protections did not by itself trigger NEPA, the State Petitions Rule did more than merely reinstate the prior regime of management by individual forest plans. . . . This new approach raises a substantial question about the rule’s potential to affect the environment.”).

150. *Id.* at 901–02 (“The State Petitions Rule is not the type of relatively mundane action illustrated by the examples” of categorically exempt “routine administrative, maintenance, and other actions.”).

151. *See id.* at 899.

152. *Id.* at 906–07 (The Roadless Rule EIS could not be used because the “no action alternative did not contain a state petitioning process overlay and so cannot substitute for consideration of the State Petitions Rule.”).

analysis that concluded a prohibition on road building and timber cutting was necessary in roadless areas in order to justify the elimination of that same prohibition.<sup>153</sup>

Although the district court took no position on California's claims under the APA, the concern over the government's complete reversal of roadless area policy factored into the district court's analysis under NEPA.<sup>154</sup> Judge Elizabeth Laporte incorporated the Supreme Court's decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*<sup>155</sup> into her analysis of California's NEPA claims.<sup>156</sup> Under *State Farm*, an agency must offer a reasoned explanation for rescinding an existing rule because of changes in policy direction.<sup>157</sup> Judge Laporte explained that the government failed to offer new evidence or environmental analysis that could justify the State Petitions Rule.<sup>158</sup> Consequently, the district court reinstated the 2001 Roadless Rule, reasoning that the balance of equities favored the more protective 2001 rule, rather than a regulatory void that would result from leaving the State Petitions Rule in place.<sup>159</sup>

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153. *See id.* "In rescinding the Roadless Rule, the Forest Service makes the startling claim that even if an EIS is required, the Roadless EIS suffices: the agency is merely adopting the document's "no action" alternative. However, the "Purpose and Need" in the Roadless Rule FEIS, which explained and justified both a prohibition on development of roadless areas and the achievement of this objective through a nationwide rule, cannot, as a matter of logic or law, explain and justify a Roadless repeal rule that implicitly reaches the opposite policy conclusion. Likewise, where the entire supporting Roadless Rule FEIS explains why the no-action alternative does not achieve the agency's "Purpose and Need," the Forest Service cannot rationally conclude, absent a new analysis, that this alternative should be adopted." Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 32, *Lockyer*, 459 F. Supp. 2d 874 (No. C05-03508).

154. *See Lockyer*, 459 F. Supp. 2d at 913 ("The Court need not decide whether Plaintiffs have adequately alleged a separate violation of the APA . . . . Compliance with [NEPA and ESA] incorporates the requirements set forth in *Motor Vehicle*.").

155. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

156. *See Lockyer*, 459 F. Supp. 2d at 913 ("Plaintiffs argue nonetheless that *Motor Vehicle* establishes a duty to provide a reasoned explanation for the repeal [of the Roadless Rule].").

157. *State Farm*, 463 U.S. at 57 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.") (internal quotations and citations omitted).

158. *Lockyer*, 459 F. Supp. 2d at 913.

159. *Id.* at 919 ("The State Petitions Rule is set aside and the Roadless Rule, including the Tongass Amendment, is reinstated."). The court also concluded that the State Petitions Rule violated the ESA because the Forest Service did not consult with federal wildlife agencies prior to adopting a rule that directly affected habitat of listed species in roadless areas, specifically grizzly bear critical habitat. *See id.* at 912.

With the nationwide injunction against the State Petitions Rule in effect, the 2001 Roadless Rule once again controlled roadless area management throughout the country.<sup>160</sup> As a result, the State of Wyoming renewed its own NEPA challenges to the 2001 rule in district court in Wyoming.<sup>161</sup> In 2008, *Wyoming v. USDA (Wyoming II)* concerned many of the same issues as the first case, *Wyoming I*,<sup>162</sup> which the Tenth Circuit had vacated as moot after the promulgation of the State Petitions Rule in 2005.<sup>163</sup>

In *Wyoming II*, the same district judge as in *Wyoming I*, Judge Clarence Brimmer, once again concluded that the 2001 Roadless Rule violated both NEPA and the Wilderness Act.<sup>164</sup> First, the judge agreed with the state that the 2001 EIS provided an inadequate time period for public comment and used inaccurate information, including incomplete maps in data presented to the public.<sup>165</sup> Second, the court concluded that the Forest Service acted arbitrarily by denying cooperating agency status to the State of Wyoming and the nine other affected states.<sup>166</sup> Third, the EIS failed to examine a reasonable range of alternatives, in particular, alternatives that allowed some road building and timber cutting.<sup>167</sup> Fourth, the Forest Service failed to analyze the cumulative impacts on the environment of the 2001 Roadless Rule and failed to write a supplemental EIS when an additional 4.2 million acres were included under the rule.<sup>168</sup> On the Wilderness Act claims, Judge Brimmer

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160. See Aarons, *supra* note 143, at 1301. In 2009, the Ninth Circuit affirmed the district court's reinstatement of the Roadless Rule. See *California ex rel. Lockyer v. USDA*, 575 F.3d 999 (9th Cir. 2009).

161. See *Wyoming v. USDA*, 570 F. Supp. 2d 1309, 1318 (D. Wyo. 2008).

162. Compare *id.* at 1320, with *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1206–11 (D. Wyo. 2003).

163. See *supra* note 130; *Wyoming v. USDA*, 414 F.3d 1207, 1211 (10th Cir. 2005).

164. See *Wyoming*, 570 F. Supp. 2d at 1354–55.

165. See *id.* at 1335 (“[T]he Court must again conclude that Wyoming was right in characterizing the Forest Service’s process as a ‘mad dash to complete the Roadless Initiative before President Clinton left office.’”).

166. See *id.* (“There is not one good reason in the administrative record before the Court explaining why cooperating agency status was denied to the ten most affected states, including Wyoming”).

167. See *id.* at 1340 (“The alternatives section of the Roadless Rule EIS was implemented to justify the Forest Service’s predetermined decision to prohibit all road construction and timber harvest in roadless areas”).

168. See *id.* at 1343 (“It was irrational for the Forest Service to develop a comprehensive strategy for implementing interrelated rules and policies, carry out that strategy, and never consider the cumulative effects of its actions or explain them to the public.”); *id.* at 1345 (“[T]he Court concludes that the Forest Service failed to take a

determined that the 2001 Roadless Rule created “de facto” wilderness by prohibiting road construction, and all other uses that “would, in fact, require the construction or use of a road.”<sup>169</sup> Thus, according to Judge Brimmer, the 2001 Roadless Rule undermined Congress’s authority to designate wilderness and circumvented the procedures of wilderness designation created by Congress in the Wilderness Act.<sup>170</sup>

As a result of the findings that the 2001 Roadless Rule violated both NEPA and the Wilderness Act, Judge Brimmer issued his second nationwide injunction against implementation of the Roadless Rule.<sup>171</sup> Both the Forest Service and intervening environmental groups promptly appealed to the Tenth Circuit.<sup>172</sup> This time, with both the State Petitions Rule under an injunction in the Ninth Circuit and the 2001 Roadless Rule enjoined by the district court in Wyoming, the Tenth Circuit reached the merits.<sup>173</sup>

A unanimous panel of the Tenth Circuit, however, reversed the district court, concluding that the 2001 Roadless Rule complied with NEPA and did not violate the Wilderness Act.<sup>174</sup> On Wyoming’s NEPA claims, the Tenth Circuit found no merit in the district court’s rejection of the Forest Service’s alternatives and cumulative impacts analysis.<sup>175</sup> According to the panel, the Forest Service permissibly designed a narrow purpose for the Roadless Rule and considered a reasonable range of

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“hard look” at the new information that it had gathered and substantially changed the final Roadless Rule . . .”).

169. *Id.* at 1350; *see id.* at 1349 (“[A]s the Forest Service itself seems to acknowledge, a roadless forest is synonymous with the Wilderness Act’s definition of ‘wilderness.’”).

170. *Id.* at 1350 (“[T]he Roadless Rule was promulgated in violation of the Wilderness Act of 1964.”).

171. *Id.* at 1355 (“[T]he Court ORDERS that the Roadless Rule, 36 C.F.R. §§ 294.10 to 294.14, be permanently enjoined, for the second time.”).

172. *See Wyoming v. USDA*, 661 F.3d 1209, 1236 (10th Cir. 2011).

173. *See id.* at 1220.

174. *Id.* at 1272.

175. *See id.* at 1243–69. The Tenth Circuit also determined that the Forest Service provided adequate time and opportunity for public comment, even if detailed maps and information were not available from the outset of the scoping process. *See id.* at 1239 (“[W]e conclude that it was not unreasonable—that is, not arbitrary, capricious, or an abuse of discretion—to limit the period to sixty days and to decline to extend it any further.”); *id.* at 1240 (“[E]ven without the maps, Wyoming was aware of the [roadless areas] that would be impacted”). The court also rejected Wyoming’s claim that it was denied cooperating agency status under NEPA because that claim was unreviewable under the APA. *Id.* at 1242 (“Under the applicable legal framework, therefore, the decision to grant or deny Wyoming’s request [for cooperating agency status] was committed to the Forest Service’s discretion and is not judicially reviewable under the APA.”).

alternatives to serve the purpose of the rule.<sup>176</sup> The Forest Service's consideration and rejection of six alternatives to the road-building prohibition, including exemptions for fire, insects, and forest management, satisfied the court that the agency considered adequate alternatives.<sup>177</sup> Similarly, the court concluded that the Forest Service considered the cumulative impacts of other regulatory programs and analyzed their environmental effects in the EIS, obviating the need for a supplemental EIS.<sup>178</sup>

The Tenth Circuit also reversed the district court's decision that the 2001 rule undermined the Wilderness Act.<sup>179</sup> The court looked to the application of the 2001 rule, which allowed some motorized uses and development, compared with the highly restrictive Wilderness Act provisions:<sup>180</sup> according to the court, "wilderness areas governed by the Wilderness Act and [roadless areas] governed by the Roadless Rule are not only distinct, but that the Wilderness Act is more restrictive and prohibitive than the Roadless Rule."<sup>181</sup> Therefore, the Tenth Circuit reversed the district court's conclusion on all grounds and reinstated the 2001 Roadless Rule.<sup>182</sup>

### *C. Current Administrative Protections for Roadless Areas*

In the aftermath of *Wyoming II*, the 2001 Roadless Rule became the default rule for national forest roadless areas throughout the country.<sup>183</sup> In 2011, the District Court for the District of Alaska overturned the Tongass and Chugach exemptions, reinstating the 2001 Roadless Rule on national forests in southeast Alaska.<sup>184</sup> When the Supreme Court denied

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176. *Id.* at 1250 ("[W]e conclude that the Forest Service considered a reasonable range of alternatives in detail in the EIS, and reasonably rejected those alternatives that did not further the defined purpose of the Roadless Rule.").

177. *See id.* at 1247.

178. *Id.* at 1262 ("[T]he changes made to the proposed action did not trigger a duty to prepare a supplemental EIS . . .").

179. *See id.* at 1234.

180. *See id.* at 1229–30 ("[A] comparison of the provisions of the Wilderness Act and the Roadless Rule demonstrates that [roadless areas] and wilderness areas are not functionally equivalent or 'essentially the same.'").

181. *Id.* at 1233.

182. *Id.* at 1272.

183. *See* Daniel L. Timmons, *Roadless Rule Litigation Reaching End of the Road*, MARTEN LAW (Feb. 11, 2013), <http://www.martenlaw.com/newsletter/20130211-roadless-rule-litigation>.

184. *See* Organized Vill. of Kake v. USDA, 776 F. Supp. 2d 960, 972 (D. Alaska 2011) (determining that the Tongass Exemption was arbitrary and capricious). An appeal

certiorari in *Wyoming II* in 2012, the Ninth and Tenth Circuits' decisions upholding the validity of the 2001 rule remained undisturbed.<sup>185</sup> Recently, in March 2013, the D.C. Circuit rejected a new challenge to the 2001 rule filed by the State of Alaska, finding the suit barred by the six-year statute of limitations for challenging federal regulations.<sup>186</sup> Thus, the twelve-year saga of litigation over national forests roadless areas seems to have come to a close.

The 2001 Roadless Rule currently applies to national forest roadless areas in all but two states, Idaho and Colorado. The Idaho Roadless Rule, promulgated at the end of the Bush Administration, covers 9.3 million acres of roadless areas in Idaho national forests.<sup>187</sup> The Idaho Rule provides more stringent protections than the 2001 Roadless Rule for 3.25 million acres of roadless areas in so-called "wild land recreation" and "primitive" areas.<sup>188</sup> But the Idaho Rule loosened restrictions on road building and timber harvesting for 5.3 million acres in newly classified "backcountry restoration" areas.<sup>189</sup> The rule also returned 400,000 roadless acres to multiple-use decision-making, suggesting that those areas will no longer be considered potential wilderness.<sup>190</sup> Although environmental groups challenged the rule under NEPA and the ESA, the Ninth Circuit recently upheld the rule, validating the Forest Service's environmental impact statement and the ESA consultation.<sup>191</sup>

In July 2012, the Obama Administration promulgated a state-specific rule governing 4.2 million acres of national forests in Colorado.<sup>192</sup> Like the Idaho Rule, the Colorado Rule resulted from significant compromise between environmental groups and industries

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to the Ninth Circuit has been stayed pending an attempt at mediation. *See* Timmons, *supra* note 183.

185. *Wyoming v. USDA*, 661 F.3d 1209 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 417 (2012).

186. *Alaska v. USDA*, No. 1:11-cv-01122-RJL (D.D.C. Mar. 25, 2013); *see* Kim Murphy, *Judge Upholds Roadless Protections on U.S. Forests*, L.A. TIMES (Mar. 25, 2013), <http://www.latimes.com/news/nation/nationnow/la-na-nn-roadless-rule-20130325,0,785399.story>.

187. Special Areas; Roadless Area Conservation; Applicability to National Forests in Idaho, 73 Fed. Reg. 1135, 1137 (Jan. 7, 2008) (codified at 36 C.F.R. pt. 294).

188. *See id.*; *Jayne v. Sherman*, 706 F.3d 994, 996 (9th Cir. 2013) (upholding the Idaho Roadless Rule).

189. Special Areas; Roadless Area Conservation; Applicability to National Forests in Idaho, 73 Fed. Reg. at 1137.

190. *Jayne*, 706 F.3d at 998.

191. *See id.* at 996.

192. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 77 Fed. Reg. 39,576 (Jul. 3, 2012) (codified at 36 C.F.R. pt. 294).

within the state.<sup>193</sup> The Colorado Rule loosened restrictions on road building and development in 3 million acres of roadless areas, leaving only 1 million acres protected by more stringent protections than the 2001 rule.<sup>194</sup> A legal challenge to the Colorado Rule is unlikely, but environmental groups have already begun challenging individual projects authorized under the rule.<sup>195</sup>

Thus, the Forest Service's administrative rules currently protect about 50 million acres of roadless areas in national forests.<sup>196</sup> The administrative protections are actually quite strong—road building, resource extraction, and development are largely prohibited in those areas.<sup>197</sup> These administrative protections will also be difficult for future administrations to reverse. The decisions in *California* and *Wyoming II* demonstrate that to change the current roadless rules, the administration must conduct new environmental impact statements that analyze the potential environmental effects of loosening roadless protections.<sup>198</sup> Downgrading protections to current roadless areas would also require future administrations to offer a reasoned explanation for the change in policy directions.<sup>199</sup>

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193. See Lauren Swain, *Roadless . . . Is More: A Brief History of Colorado's Roadless Rule Dilemma*, SIERRA CLUB (March 2012), [http://action.sierraclub.org/site/PageNavigator/E-Newsletters/Misc\\_CHP\\_CO\\_March2012RoadlessRule.html](http://action.sierraclub.org/site/PageNavigator/E-Newsletters/Misc_CHP_CO_March2012RoadlessRule.html).

194. See Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 77 Fed. Reg. at 39,583; Catherine Tsai, *Some Colorado Roadless Areas Get Stiffer Protections*, DENVER POST (May 2, 2012), [http://www.denverpost.com/breakingnews/ci\\_20529100/colorado-roadless-rule-still-includes-exceptions](http://www.denverpost.com/breakingnews/ci_20529100/colorado-roadless-rule-still-includes-exceptions).

195. See *Coal Mine Expansion in Colorado Roadless Forests Likely to Face Challenge*, EARTHJUSTICE (Dec. 31, 2012), <http://earthjustice.org/news/press/2012/coal-mine-expansion-in-colorado-roadless-forest-likely-to-face-challenge>.

196. See *Major Victory Secures Roadless Rule*, EARTHJUSTICE, <http://earthjustice.org/features/campaigns/major-victory-secures-roadless-rule> (last visited May 11, 2013). In 2009, President Obama's Secretary of Agriculture, Tom Vilsack ordered all decisions about roadless area management be approved by the Secretary's office—thus, elevating decision making for roadless areas to the highest level. See Noelle Straub & Eric Bontrager, *Obama Administration Takes First Leap Into Roadless Brawl*, N.Y. TIMES (May 28, 2009), <http://www.nytimes.com/gwire/2009/05/28/28greenwire-obama-admin-takes-first-leap-into-roadless-bra-16635.html>. This order removed local forest managers' discretion to build roads or cut timber for forest health maintenance, a decision reminiscent of the U-regulations, which elevated decision making for classifying U-1 wilderness and U-2 wild areas to the secretary's office. See *supra* note 42 and accompanying text.

197. See *supra* notes 103–06 and accompanying text.

198. See *supra* notes 144–59, 174–82 and accompanying text.

199. See *supra* notes 154–59 and accompanying text.

#### IV. FLPMA: EXTENDING WILDERNESS PROTECTIONS TO BLM LANDS

Although national forest wilderness areas have received the most public attention, BLM lands are also eligible for wilderness designation.<sup>200</sup> In FLPMA, enacted in 1976, Congress extended the Wilderness Act's provisions to the BLM, requiring the agency to conduct inventories of land and make recommendations for wilderness designations.<sup>201</sup> Importantly, FLPMA directed the BLM to maintain the wilderness characteristics of land that the agency identified as suitable for possible congressional designation in the future.<sup>202</sup>

##### *A. Enacting a New Charter for Federal Lands*

In 1946, Congress reorganized public lands management to reflect the new priorities of a closing frontier.<sup>203</sup> The chief role for public land

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200. See Kevin Hayes, *History and Future of the Conflict Over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 204 (2001).

201. See Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–87 (2006).

202. *Id.* at § 1782 (“[T]he Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness”); Leshy, *supra* note 59, at 11.

203. See James R. Skillen, *Closing the Public Lands Frontier: The Bureau of Land Management 1961–1969*, 20 J. POL’Y HIST. 419, 419–22 (2008). As the United States expanded west in the early 1800s, the federal government became the owner of millions of acres. See Albert Bushnell Hart, *The Disposition of Our Public Lands*, 1 Q. J. ECON. 169, 170 (1887). The initial policy of the federal government was that most of these public lands would be transferred to private ownership as settlement proceeded from the middle of the continent to the Pacific Coast. See Joseph Ross, *FLPMA Turns 30: The Bureau of Land Management also Celebrates its 60th Birthday*, SOC’Y FOR RANGE MGMT. 16 (Oct. 2006) (discussing the government’s policy of increasing settlement through the Homestead Act of 1862 and the Mining Act of 1872); *but see* James L. Huffman, *Managing the Northern Forests: Lessons From the West*, 19 VT. L. REV. 477, 478 (noting the fact that federally-owned forests in the West were not subject to the same disposition as other public lands); COGGINS ET AL., *supra* note 45, at 124–25 (discussing the reservation of national forests by the federal government). The orderly dispossession of the lands was one of the paramount issues facing the early federal government. Because land sales constituted a significant source of revenues for the federal government, in 1790, Secretary of the Treasury Alexander Hamilton originally proposed creating a federal agency to oversee land transfers and the delineation of public lands. In 1812, Congress finally created the General Land Office, eventually putting the agency in charge of disposing of all federally owned lands that were not held as reserved lands (national parks, forests, wildlife refuges, military installations) or for the use of other federal agencies. See Ross, *supra*, at 16. During the era of disposition, from the founding to about 1934, the government transferred 816 million acres of public land to private



management through the mid-twentieth century included granting private rights-of-way and facilitating private grazing on public lands.<sup>204</sup> To help resolve these issues, Congress merged the U.S. Grazing Service and General Land Office into the BLM, which became responsible for continuing the disposition of some federal lands, authorizing rights-of-way, and managing grazing.<sup>205</sup> But this reorganization failed to address two underlying problems of public lands management.<sup>206</sup> First, the BLM lacked a clear statutory grant of authority from Congress to comprehensively manage public lands; there was no “organic act” for the agency that expressly authorized BLM control.<sup>207</sup> Second, confusion persisted over the authority for the BLM to withdraw land from public entry.<sup>208</sup> Prior to 1976, there were over 2,000 different laws and policies governing various public lands<sup>209</sup>—a situation that the Supreme Court aptly described as “chaotic.”<sup>210</sup>

In an effort to address these problems, in 1964, Congress created an advisory group, the Public Land Law Review Commission, to study public lands issues and make policy recommendations to Congress.<sup>211</sup> In 1970, the Commission produced a report that spotlighted the need for new legislation to provide the BLM with statutory authority to administer public lands.<sup>212</sup> Although it took six years, in 1976, Congress used the Commission’s report as a foundation for FLPMA, which repealed many

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ownership. See Hayes, *supra* note 200, at 206. In 1934, the Taylor Grazing Act and two ensuing executive orders in 1934 and 1935, classifying all remaining public lands into grazing districts, effectively ended the disposition era. See COGGINS ET AL., *supra* note 45, at 142–43.

204. See Hayes, *supra* note 200, at 206.

205. See *id.* at 207.

206. *Id.* at 210.

207. See Robert Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 VT. L. REV. 815, 817 (2005); Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 502–03 (2002) (describing five hallmarks of organic legislation for federal agencies: purpose statements, designated uses, comprehensive planning, substantive management criteria, and public participation).

208. See Flynn, *supra* note 207, at 817.

209. See Ross, *supra* note 203, at 17.

210. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 876 (1990).

211. See Flynn, *supra* note 207, at 817.

212. See Ross, *supra* note 203, at 17. For scholarship discussing the development and implications of the Public Land Law Review Commission, see Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 353 (1994); Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1141–42 (2005).

of the existing land management laws and replaced the policy of dispossessing public lands with a comprehensive management scheme that included both the goals of multiple-use and wilderness protection on BLM lands.<sup>213</sup>

### *B. Overview of FLPMA*

FLPMA signaled a major shift in public lands management.<sup>214</sup> Prior to 1976, the federal government gave little attention and put few resources into BLM land management and conservation programs, apparently assuming that these lands would soon be privatized.<sup>215</sup> FLPMA marked the official end of the long-standing era of disposition.<sup>216</sup> The new era forced Congress to confront new problems of land management, such as how to provide the benefits of public lands to as many interests as possible.<sup>217</sup> FLPMA's primary policy was to implement comprehensive land use planning for over 260 million acres of BLM lands.<sup>218</sup> Section 102 directed the BLM to provide a sustained yield of resources, including environmental protection, for perpetuity.<sup>219</sup> Congress expressly declared that its multiple-use mandate included protecting ecological, environmental, and historical aspects of the lands, as well as providing for sustainable resource use (both commodity and non-commodity), rights-of-way, recreation, and human occupancy.<sup>220</sup>

FLPMA included two key provisions to implement this new direction for public lands management.<sup>221</sup> First, section 201 established

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213. See Flynn, *supra* note 207, at 817–19.

214. See *id.* at 218.

215. See Hayes, *supra* note 200, at 210.

216. FLPMA, 43 U.S.C. § 1701(a)(1) (2012) (“The Congress declares that it is the policy of the United States that – the public lands be retained in Federal ownership”). As a practical matter, the disposition era ended in 1934 with the Taylor Act and subsequent executive orders. See *supra* note 203.

217. See Hayes, *supra* note 200, at 210.

218. See FLPMA, 43 U.S.C. § 1701(a)(7) (mandating that “management be on the basis of multiple use and sustained yield unless otherwise specified by law”); Ross, *supra* note 203, at 16.

219. FLPMA, 43 U.S.C. § 1701.

220. *Id.* at § 1701(a)(8) (“[T]he public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values . . . .”); see Hayes, *supra* note 200, at 210. Sixteen years earlier, in 1960, Congress had already declared that wilderness was consistent with multiple-use. See Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 529 (2006) (“The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of [the act].”).

221. See Flynn, *supra* note 207, at 819–20.

an inventory requirement to identify the resource values of all current BLM lands.<sup>222</sup> Section 201 required the BLM to inventory all present and future uses of each area of BLM land, as well as the associated environmental and natural resource values.<sup>223</sup> In conducting the inventory, the BLM must identify areas of critical environmental concern, defined as areas containing important environmental, historical, or cultural values that require special management attention.<sup>224</sup>

Second, section 202 required BLM to develop and implement land use plans for each area of BLM land.<sup>225</sup> These resource management plans (“RMPs”) govern the area’s present and future uses, protect identified resource values, and provide management guidance to govern those resources and uses.<sup>226</sup> Section 202 required the BLM to continually update the inventory of public lands for each area in order to provide an accurate description of the area’s characteristics,<sup>227</sup> and to establish procedures for public participation in land planning.<sup>228</sup> The RMP process forced the BLM to weigh the short-term benefits of resource use against the long-term benefits of conserving the lands and natural resources for the public in a politically accountable way.<sup>229</sup>

In addition to the inventory and planning requirements, FLPMA established specific resource management standards for all public lands managed by the BLM.<sup>230</sup> In particular, FLPMA directed the BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands.”<sup>231</sup> Thus, on all BLM lands, the unnecessary or undue degradation (“UUD”) mandate established a baseline standard of conservation that the agency may not ignore.<sup>232</sup> The courts have

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222. FLPMA, 43 U.S.C. § 1711(a).

223. *See id.*

224. *Id.* at § 1702(a).

225. *Id.* at § 1712.

226. *Id.* at 1732(a) (“The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 . . . .”); *see Flynn, supra* note 207, at 820.

227. *See Flynn, supra* note 207, at 820; FLPMA, 43 U.S.C. § 1711(a) (“The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values . . . . This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.”).

228. FLPMA, 43 U.S.C. § 1712(f).

229. *See Rachel E. Otto, The Continuing Battle Over Wilderness in the West: What Happens Next in Utah v. Norton?*, 27 J. LAND RESOURCES & ENVTL. L. 431, 433 (2007).

230. *See Hayes, supra* note 200, at 213–14.

231. FLPMA, 43 U.S.C. § 1732(b).

232. *See Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 35–36, 40 (D.D.C. 2007) (upholding DOI regulations defining unnecessary or undue degradation to include

interpreted the UUD standard to require the BLM to “disapprove of an otherwise permissible” resource use if that use would cause undue harm or needless degradation to the land.<sup>233</sup>

*C. Wilderness Study Areas (“WSAs”) and FLPMA’s  
Non-impairment Standard*

Although FLPMA established a multiple-use policy for the majority of BLM lands, Congress anticipated that the agency would designate some lands as wilderness in the future.<sup>234</sup> Section 603 required the BLM to identify areas in its inventories that meet the Wilderness Act’s statutory criteria for wilderness.<sup>235</sup> Section 603 also gave the BLM fifteen years to conduct a review of suitable wild lands and transmit those recommendations to the President and Congress for possible wilderness designation.<sup>236</sup>

Once the BLM identified lands meeting the Wilderness Act’s criteria, section 603 required the agency to implement a higher standard of protection for those lands, which the BLM’s 1978 Wilderness Inventory Handbook called Wilderness Study Areas (WSAs).<sup>237</sup> Importantly, Congress wanted to provide interim protection to WSAs so the possibility of future designation would not be foreclosed. Section 603 required the BLM to manage WSAs “in a manner so as not to impair the

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failure to comply with a mining plan of operations or other actions not “reasonably incident” to mining activities).

233. *Id.* at 42 (“FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.”).

234. FLPMA’s application of the Wilderness Act to BLM lands was notable because prior to 1976, Congress considered BLM lands temporary public lands—soon to be sold or granted to private owners. Thus, designating wilderness on BLM lands made little sense until the federal land policy of disposition changed. *See supra* note 203; Hayes, *supra* note 200, at 210.

235. FLPMA, 43 U.S.C. § 1782.

236. *Id.*

237. FLPMA, 43 U.S.C. § 1782(c) (“During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness...”); *see* BLM, DOI, WILDERNESS INVENTORY HANDBOOK 3 (1978) [hereinafter WILDERNESS INVENTORY HANDBOOK]; Sarah Krakoff, *Constitutional Conflicts on Public Lands: Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1161 (2004) (discussing BLM’s inventory process and WSAs).

suitability of such areas for preservation as wilderness . . . .”<sup>238</sup> This non-impairment standard prohibited road building, development, and resource extraction other than existing mining and grazing uses within WSAs, thus protecting WSAs in a manner similar to designated wilderness.<sup>239</sup>

In 1979, the BLM completed the first inventory of its land holdings and began to prepare individual RMPs to comply with FLPMA.<sup>240</sup> That same year, the BLM adopted an interim management policy (“IMP”) that clarified the agency’s responsibilities under section 603 concerning WSAs.<sup>241</sup> The BLM interpreted the non-impairment standard to apply to WSAs only if there were no existing grazing, mining, or mineral uses in the area.<sup>242</sup> If there were such “grandfathered uses” occurring in the area prior to 1976, the BLM would apply the UUD standard.<sup>243</sup> After a change in political administrations, the BLM reinterpreted the scope of the grandfather clause in section 603 to include new developments under valid existing rights, and the Tenth Circuit upheld this reinterpretation, meaning that the BLM would employ the non-impairment standard only for those new uses without pre-existing rights and the UUD for uses with pre-1976 rights, whether or not the use was in existence on the date of FLPMA.<sup>244</sup> The following Part of this Article discusses how the BLM’s management of WSAs and Congress’s failure to designate or release millions of acres of WSAs, particularly in Utah, produced, in the BLM’s

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238. FLPMA, 43 U.S.C. § 1782(c).

239. *Id.* (“[T]he Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted [on October 21, 1976].”).

240. *See* Ross, *supra* note 203, at 17.

241. *See* BLM, DOI, INTERIM MANAGEMENT POLICY AND GUIDELINES FOR LANDS UNDER WILDERNESS REVIEW 5 (1979), *available at* 44 Fed. Reg. 72,014 (Dec. 12, 1979) [hereinafter 1979 IMP]; *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979) (upholding the legality of the IMP under FLPMA). The Wilderness Act specifically allows for grazing to occur within designated wilderness areas. Wilderness Act, 16 U.S.C. § 1133(d)(4)(2) (2006).

242. *See* *Sierra Club v. Hodel*, 848 F.2d 1068, 1086 (10th Cir. 1988). Under the IMP, BLM permitted new development in WSAs according to valid existing rights, but these new uses would be subject to the non-impairment standard. *See* Interim Management Policy and Guidelines, 48 Fed. Reg. 31,854-02, 31,855 (Jul. 12, 1983) (codified in scattered parts of 43 C.F.R.).

243. *See* H. Michael Anderson & Aliko Moncrief, *America’s Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 429 n.110 (1999); Interim Management Policy and Guidelines, 48 Fed. Reg. at 31,854.

244. *See* *Sierra Club*, 848 F.2d at 1085–96. COGGINS, ET AL., *supra* note 45, at 1068–69 (discussing the BLM’s reinterpretation of section 603 by the new Reagan Administration in 1981 (citing an opinion by the Solicitor, 88 I.D. 909 (1981))).

words, “the most intractable controversy over any resource inventory since the passage of FLPMA.”<sup>245</sup>

## V. THE BLM WILD LANDS CONTROVERSY: INVENTORIES, ROADS, AND RULEMAKING

Congress designated the first BLM wilderness area, 35,000 acres along the Rogue River in Oregon, in 1978, two years after FLPMA extended Wilderness Act protections to BLM lands.<sup>246</sup> Since then, with the exception of a handful of significant BLM wilderness designations,<sup>247</sup> Congress has largely ignored potential wilderness areas on BLM lands. Of 253 million acres that the BLM manages, only 8.7 million acres have received congressional designation as wilderness—less than three percent of the agency’s land area.<sup>248</sup> The BLM currently manages 24 million acres as WSAs, but millions more acres have wilderness characteristics that qualify.<sup>249</sup> Thus, FLPMA’s legacy in the West includes large controversies over which lands deserve protection as wilderness, and how the BLM should protect those areas while waiting for Congress to make the ultimate decisions on wilderness designations.<sup>250</sup>

### A. *BLM Wild Lands Inventories and the Utah Settlement*

In 1978, the BLM created the Wilderness Inventory Handbook to guide field staff in inventorying and identifying wilderness characteristics on BLM lands.<sup>251</sup> The next year, in 1979, the BLM

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245. BLM, UTAH WILDERNESS INVENTORY REPORT vii (1999), available at <http://www.gpo.gov/fdsys/pkg/GPO-DOI-BLM-UTAH99/pdf/GPO-DOI-BLM-UTAH99.pdf>.

246. Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, 92 Stat. 40 (1978).

247. See, e.g., Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469 (1990); California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471 (1994); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009).

248. *Wilderness Data Search Results*, WILDERNESS.NET, <http://www.wilderness.net/nwps/advSearch> (accessed by searching Agency: “BLM”). In contrast, almost 20% of national forest lands are wilderness. See *supra* note 87 and accompanying text.

249. See BLM, DOI, MANAGING THE NATION’S PUBLIC LANDS: A PROGRAM REPORT PREPARED PURSUANT TO REQUIREMENTS OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, at 21 (1985); Anderson & Moncrief, *supra* note 243, at 428.

250. See Hayes, *supra* note 200.

251. See WILDERNESS INVENTORY HANDBOOK, *supra* note 237, at 3.

completed its first inventory of potential wild lands, identifying 24 million acres that immediately became WSAs, protected by FLPMA section 603's non-impairment standard.<sup>252</sup> The inventoried WSAs included 3.2 million acres in Utah, 2.5 million acres in Washington and Oregon, 2.2 million acres in Montana and the Dakotas, and 800,000 acres in Idaho.<sup>253</sup>

Between 1990 and 1993, President George H.W. Bush offered his recommendations to Congress for future wilderness designations based on the BLM's inventory of suitable wilderness. Like the statewide national forest wilderness bills, some of the lands identified by the BLM as suitable wilderness received broad political support for designation in Congress.<sup>254</sup> In 1990, Congress passed the Arizona Desert Wilderness Act, designating 1.1 million acres of BLM wilderness in Arizona.<sup>255</sup> Then, in 1994, the California Desert Protection Act added 3.5 million acres of BLM wilderness to the National Wilderness Preservation System.<sup>256</sup> In Utah, however, the initial 1979 wild lands inventory was only the beginning of a long and bitter political controversy over wilderness.

### *1. The 1996 Re-inventory of Utah Wild Lands*

The BLM's initial inventory in 1979 identified 3.2 million acres in Utah with wilderness characteristics.<sup>257</sup> These lands automatically became WSAs under the IMP, protected by the non-impairment standard

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252. See BLM, *supra* note 249, at 5; Utah v. Babbitt, 137 F.3d 1193 (10th Cir. 1998); Final Wilderness Inventory Decision, 45 Fed. Reg. 75602-01 (Nov. 14, 1980).

253. See *id.*; BLM, DOI, MONTANA INITIAL WILDERNESS INVENTORY 1 (1979), available at <https://ia600601.us.archive.org/1/items/montanainitialwi14unit/montanainitialwi14unit.pdf>.

254. See DiPeso & Pelikan, *supra* note 72, at 366. The wilderness designation process generally involves three steps: 1) public land inventory by the land management agency, 2) recommendation by the president for wilderness designation transmitted to Congress, 3) Congress passes and the president signs a public law designating wilderness. See generally *About the UWC: History of America's Redrock Wilderness Act*, UTAH WILDERNESS COALITION, <http://www.protectwildutah.org/about/history.html> (last visited Oct. 13, 2013) (describing the wilderness designation process for BLM wilderness); *Designating Wilderness*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/designation> (last visited Oct. 13, 2013) (describing the wilderness designation process for the USFS, BLM, and NPS).

255. Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469 (1990).

256. California Desert Protection Act of 1994, Pub. L. No. 103-433 (1994).

257. See BLM, UTAH BLM STATEWIDE WILDERNESS ENVIRONMENTAL IMPACT STATEMENT: FINAL, 2:38 (1990).

under FLPMA's section 603.<sup>258</sup> But as a result of political objections over the scale of potential wilderness designations in the state, in 1992, President Bush recommended to Congress only 1.9 million acres for designation, only fifty-nine percent of the identified Utah acres.<sup>259</sup> As it turned out, this recommendation was actually the middle ground between Utah Republicans who wanted no wilderness, and many Democrats who thought that 1.9 million acres was not enough.<sup>260</sup>

Even before the President's recommendation, members of Congress introduced several proposals for wilderness designation on BLM lands in Utah.<sup>261</sup> Wilderness advocates in Congress, relying on environmental groups' estimates of potential wilderness in Utah, introduced bills calling for 5.7 million acres of designated wilderness.<sup>262</sup> Among these, the America's Red Rock Wilderness Act, initially proposed in 1988,<sup>263</sup> was reintroduced in 1993 as H.R. 1500.<sup>264</sup> In 1995, in response to the environmentalists' bills, Republican Representative James Hansen of Utah introduced H.R. 1745, which would have designated only 1.8 million acres and provided specific authorization for some development within those wilderness areas.<sup>265</sup> Although some of the Utah wilderness bills attracted widespread political attention on Capitol Hill, none gained enough traction to pass both houses, ensuring that Congress would not quickly resolve the stalemate.<sup>266</sup>

The failure of all proposed Utah wilderness bills reflected a fundamental disagreement over Utah BLM lands; hardly anyone in Congress, the state, or the conservation community could agree on how much land in Utah was suitable wilderness.<sup>267</sup> In 1996, Secretary Babbitt

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258. See 1979 IMP, *supra* note 241, at 5; WILDERNESS INVENTORY HANDBOOK, *supra* note 237, at 3; FLPMA, 43 U.S.C. § 1782(c) (2012).

259. See Jason Hardin, *Tenth Circuit Rejects Bid to Stop 1996 "Re-inventory" of Public Lands in Utah for Wilderness Characteristics*, 19 J. LAND RESOURCES & ENVTL. L. 156, 159 (1999).

260. See *id.*

261. See Hayes, *supra* note 200, at 219.

262. See Anderson & Moncrief, *supra* note 243, at 428.

263. See Krakoff, *supra* note 237, at 1168 n.57.

264. See Anderson & Moncrief, *supra* note 243, at 428 n.104.

265. See *id.* Representative Hansen's bill, H.R. 1745, would have allowed the construction of dams, pipelines, and roads throughout BLM lands in Utah, including in WSAs and even designated wilderness areas. *Id.* (citing Daniel Glick, *A Wilderness Shell Game*, WILDERNESS, Winter 1995, at 14, 16–17); see also Elizabeth Manning, *To Save a Utah Canyon, a BLM Ranger Quits and Turns Activist*, HIGH COUNTRY NEWS (Oct. 18, 1995), <http://www.hcn.org/issues/45/1397>.

266. See Anderson & Moncrief, *supra* note 243, at 429.

267. See Hayes, *supra* note 200, at 220. This disagreement came to a climax in a hearing of the House Natural Resources Committee where Representative Hansen



directed the BLM to conduct a second inventory of the 5.7 million acres of BLM lands in Utah described in H.R. 1500.<sup>268</sup> The Department of the Interior (“DOI”) promptly supplemented the 1978 Wilderness Inventory Handbook with a revised set of wilderness review procedures,<sup>269</sup> although these procedures applied the same legal criteria for determining wilderness suitability as the original inventory.<sup>270</sup> In 1996, the BLM proceeded to re-inventory 5.7 million acres of BLM lands in Utah, seeking to determine how many acres possessed wilderness characteristics and should be managed as WSAs.<sup>271</sup>

This re-inventory infuriated many Utahns, in particular state and county officials, who objected to preserving wilderness on public lands.<sup>272</sup> In a lawsuit filed in federal district court, the state, joined by several of its counties, sought to stop the re-inventory on the grounds that the BLM’s actions violated FLPMA’s inventory requirements and failed to comply with NEPA’s directives for public participation and environmental review.<sup>273</sup> Specifically, Utah claimed that the re-inventory contradicted the deadline established by section 603 of FLPMA, which required a review of wilderness lands within fifteen years, or by 1991.<sup>274</sup> The BLM countered that the re-inventory was authorized by section 202 of FLPMA, which requires the agency to consider wilderness values even after it completed the initial inventory.<sup>275</sup> After the District Court

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questioned Secretary of the Interior Bruce Babbitt about whether there were more than 5 million acres in Utah that qualified as wilderness. During the hearing, Secretary Babbitt suggested that the BLM should re-inventory BLM lands in the state, to which Hansen signaled his approval. *See id.*

268. *See Utah v. Babbitt*, 137 F.3d 1193, 1199 (10th Cir. 1998) (quoting a letter from Secretary of the Interior Bruce Babbitt to Representative James V. Hansen, July 24, 1996).

269. WILDERNESS INVENTORY HANDBOOK, *supra* note 237, at 3; *see also Babbitt*, 137 F.3d at 1198.

270. *See Babbitt*, 137 F.3d at 1198 (“According to the [DOI], the sole purpose of the 1996 inventory is to identify the presence or absence of wilderness characteristics . . .”).

271. *See id.*

272. *See* William G. Myers III & Jennifer D. Hill, *Along the Trammeled Road to Wilderness Policy on Federal Lands*, 56 ROCKY MTN. MIN. L. INST. 15-1, § 15.04[1] (2010).

273. *See Babbitt*, 137 F.3d at 1200.

274. *See id.* Utah also alleged that the re-inventory did not provide for public participation and that BLM failed to prepare an environmental impact statement analyzing the consequences of the re-inventory. *Id.*

275. *See id.* at 1206, n.17. BLM pointed out that FLPMA section 202 creates an ongoing duty for the agency to consider wilderness values on public lands. *Id.*; *see* FLPMA, 43 U.S.C. § 1712 (2012) (“In development and revision of land use plans, the

for the District of Utah enjoined the re-inventory for violating FLPMA's section 603 deadline, the Tenth Circuit reversed, ordering the injunction lifted.<sup>276</sup> The Tenth Circuit concluded that Utah and the other plaintiffs lacked standing to challenge the BLM's wilderness inventory because the re-inventory caused no concrete and imminent injury-in-fact.<sup>277</sup> However, the Tenth Circuit remanded to the district court for further consideration as to whether the wilderness inventory violated FLPMA by attempting to designate de facto wilderness.<sup>278</sup>

In 1999, after the district court lifted the injunction and thereby allowed the BLM to complete its re-inventory,<sup>279</sup> the BLM concluded that another 2.6 million acres had wilderness characteristics warranting further study.<sup>280</sup> Citing its general planning authority under section 202 of FLPMA, the BLM classified these 2.6 million acres as WSAs and applied the non-impairment standard, managing the new WSAs according to the same standard as the WSAs identified in the 1979 inventory.<sup>281</sup> To many environmentalists, however, the BLM's 1996 re-inventory represented a severe underestimate of wild lands in Utah.<sup>282</sup>

With BLM WSAs in Utah now totaling over 5.8 million acres, the lame-duck Clinton Administration put new measures in place that contemplated an ongoing process by the BLM to identify and protect more acres of suitable wilderness.<sup>283</sup> In 2001, the DOI published a

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Secretary shall . . . (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law . . .”).

276. See *Babbitt*, 137 F.3d at 1210, 1213.

277. See *id.* at 1216. “Plaintiffs have failed to identify a concrete, actual or imminent injury-in-fact which is fairly traceable to the 1996 inventory and likely to be redressed by a favorable decision.” *Id.* at 1214 (concluding that the plaintiff's alleged injury, the imposition of a heightened standard for BLM WSAs actually resulted from a letter written by the Secretary of the Interior in 1993, three years before the 1996 inventory).

278. See *id.*

279. See *id.*

280. See BLM, DOI, 1999 WILDERNESS REPORT xv (1999) (noting that the 2.6 million acres were in addition to the 3.2 million acres classified as WSAs in the 1979 inventory).

281. See *Utah v. Norton*, No. 2:96-CV-0870, 2006 WL 2711798, at \*8 (D. Utah Sept. 20, 1996).

282. For example, a 1998 citizen inventory conducted by the Utah Wilderness Coalition and the Southern Utah Wilderness Alliance (SUWA) found 8.5 million acres of wilderness-suitable lands managed by the BLM in the state. See Dustin Solberg, *Utah Finds 3 Million More Wild Acres*, HIGH COUNTRY NEWS (Aug. 3, 1998), <http://www.hcn.org/issues/135/4332>.

283. See Tova Wolking, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements Over Federal Public Lands*, 34 ECOLOGY L.Q. 1067, 1082 (2007).

revised Wilderness Inventory Handbook, which directed the BLM to continue identifying lands with wilderness characteristics as part of its duty to maintain an up-to-date inventory for land use planning purposes.<sup>284</sup> Like the lands identified in the 1996 re-inventory, the BLM would classify any newly identified lands as section 202 WSAs.<sup>285</sup> Importantly, the 2001 Handbook upgraded the protections that these section 202 WSAs would receive, directing the BLM to treat all wilderness-suitable lands with the non-impairment standard imposed by section 603 of FLPMA.<sup>286</sup>

From 2001 to 2003, the BLM complied with the terms of the 2001 Handbook, carrying out additional surveys of BLM lands throughout the West.<sup>287</sup> In Utah, the BLM identified an additional one million acres of land with wilderness potential, but the agency withheld a final decision on whether those one million acres were in fact wilderness suitable, citing a need for further study to determine whether the lands complied with the wilderness criteria.<sup>288</sup> Nevertheless, the 2001 Handbook seemed to set the BLM on a path to identify and recommend more areas for congressional designation as wilderness and protect those areas in the interim as WSAs.<sup>289</sup>

## 2. *The 2003 Utah Settlement*

At the outset of the George W. Bush presidency, opponents to wilderness preservation saw an opportunity to reverse what many viewed as President Clinton's attempts to preclude commercial development on

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284. See Maureen O'Dea Brill, *Making the Case for Wilderness: The Bureau of Land Management's Wild Lands Policy and Its Role in the Storied History of Wilderness Protection*, 4 LEG. & POL'Y BRIEF 7, 17 (2012); BLM, DOI, WILDERNESS INVENTORY AND STUDY PROCEDURES 6–7 (2001) [hereinafter 2001 HANDBOOK].

285. See Brill, *supra* note 284, at 17.

286. See 2001 HANDBOOK, *supra* note 284, at 6. Since 1980, the BLM had identified areas with wilderness characteristics that were smaller than 5,000 acres. The BLM called these areas section 202 WSAs because FLPMA required section 603 WSAs be over 5,000 acres. Section 202 areas identified before 1992 were recommended as wilderness and received the non-impairment standard. Section 202 WSAs identified after 1993 received the UUD standard, until 2001, when the 2001 Handbook upgraded protections by requiring the BLM to apply the non-impairment standard. See *id.*; see also *Sierra Club v. Watt*, 608 F. Supp. 305, 339 (E.D. Cal. 1985) (upholding BLM authority to manage areas less than 5,000 acres as section 202 WSAs).

287. See 2001 HANDBOOK, *supra* note 284, at 5–6.

288. See Stephen H.M. Bloch & Heidi J. McIntosh, *A View From the Front Lines: The Fate of Utah's Redrock Wilderness Under the George W. Bush Administration*, 33 GOLDEN GATE U. L. REV. 473, 477–78 (2003).

289. See Brill, *supra* note 284, at 17.

land with wilderness characteristics.<sup>290</sup> In 2003, Utah revived its legal challenges over the validity of the BLM's re-inventories of public lands in Utah, amending its complaint in the ongoing *Utah v. Babbitt* case<sup>291</sup> to address the 2001 Handbook's application of the non-impairment standard to all inventoried wilderness suitable lands. Utah argued that the "BLM's authority under FLPMA [section] 603, and by extension [section] 202, to establish WSAs and to manage such areas under the non-impairment standard, expired in 1993 when the President made his wilderness recommendations to Congress."<sup>292</sup> The state once again argued that any identification of section 202 WSAs violated the 15-year limit established by FLPMA, and that the statute authorized no re-inventories to extend the non-impairment standard beyond the initial section 603 WSAs.<sup>293</sup>

Despite the state's rather tenuous legal arguments,<sup>294</sup> the Bush Administration faced enormous political pressure to bow to Utah's position and release millions of acres of public lands to commercial development and motorized recreation.<sup>295</sup> Two weeks after Utah filed its amended complaint, the Administration, led by Secretary of the Interior Gale Norton, reached a settlement with Utah's Governor, Mike Leavitt.<sup>296</sup> Although the settlement was made out of court without public participation, the Tenth Circuit in *Utah v. Norton* upheld the agreement over the objections of citizens groups, including the Southern Utah Wilderness Alliance.<sup>297</sup>

The Utah Settlement represented a major victory for wilderness opponents.<sup>298</sup> First, the DOI agreed that the BLM's authority to designate WSAs under section 603 expired in 1993, the end of the 15-year review period specified in FLPMA.<sup>299</sup> Second, the federal government conceded

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290. See Bloch & McIntosh, *supra* note 288, at 475.

291. See Brill, *supra* note 284, at 17; *supra* notes 272–77 and accompanying text.

292. See Brill, *supra* note 284, at 17; *Utah v. Norton*, No. 2:96–CV–0870, 2006 WL 2711798, at \*4 (D. Utah Sept. 20, 1996).

293. See *Utah v. USDA*, 535 F.3d 1184, 1190 (10th Cir. 2008), *aff'g* *Utah v. Norton*, No. 2:96–CV–0870, 2006 WL 2711798 (D. Utah Sept. 20, 2006).

294. Four years later, in *Utah v. Kempthorne*, the Bush Administration defended the authority of BLM to designate section 202 WSAs. See Brief of the Federal Appellees at 41, *Utah v. Kempthorne*, 535 F.3d 1184 (10th Cir. 2008) (No. 06-4240); See Brill, *supra* note 284, at 19.

295. See Brill, *supra* note 284, at 18.

296. See Bloch & McIntosh, *supra* note 288, at 500. The BLM and Utah submitted the settlement to the district court, which approved the settlement in 2003. See *Norton*, 2006 WL 2711798, at \*5.

297. See *Norton*, 2006 WL 2711798, at \*5.

298. See Bloch & McIntosh, *supra* note 288, at 500.

299. See Myers & Hill, *supra* note 272, at § 15.04.

that, outside the established section 603 WSAs, the BLM had no authority to manage additional WSAs according to the non-impairment standard,<sup>300</sup> rejecting the Clinton Administration's attempt to apply the non-impairment standard to all WSAs.<sup>301</sup> Most importantly, the settlement ended the BLM's use of the 2001 Handbook.<sup>302</sup> The BLM now agreed not to designate new WSAs under section 202, or to manage any additional lands after 1993 under the non-impairment standard.<sup>303</sup> From 2003 until the early years of the Obama Administration, WSA acreage and management remained stagnant under the terms of the settlement.<sup>304</sup>

The BLM's scheme for wilderness, post-settlement, includes three types of inventoried land and two different management standards. First, WSAs identified in the 1980 inventory that had no grandfathered uses as of 1976 are subject to the non-impairment standard until Congress directs the area to be opened to multiple-use.<sup>305</sup> Second, the UUD standard governs WSAs with grandfathered uses and valid existing rights that cannot be developed in a manner that leaves the wilderness characteristics unimpaired.<sup>306</sup> Thus, some WSAs allow existing resource uses even if the activity can only be accomplished by diminishing the area's wilderness character.<sup>307</sup> The WSAs identified in the original 1980 inventory are de facto wilderness areas—WSAs until Congress either designates the area as wilderness or releases the area to multiple-use decision-making.<sup>308</sup>

The third type of WSA consists of small areas that the BLM recognized as possessing wilderness characteristics, but which did not

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300. SEC'Y OF INTERIOR, INSTRUCTION MEMORANDUM NO. 2003-274, BLM IMPLEMENTATION OF THE SETTLEMENT OF *UTAH V. NORTON* REGARDING WILDERNESS STUDY 2 (2003) [hereinafter NORTON MEMO I] (“[T]here is no general legal authority for the BLM to designate lands as WSAs for management pursuant to the non-impairment standard.”).

301. See Brill, *supra* note 284, at 18.

302. See Phil Taylor, *Surprise Move Leaves Interior's Wilderness Policy on Cutting-room Floor*, N.Y. TIMES (Apr. 13, 2011), <http://www.nytimes.com/gwire/2011/04/13/13greenwire-surprise-move-leaves-interiors-wilderness-poli-78397.html>.

303. See NORTON MEMO I, *supra* note 300, at 2.

304. See Myers & Hill, *supra* note 272, at § 15.04.

305. See BLM, DOI, BLM MANUAL 6330, MANAGEMENT OF WILDERNESS STUDY AREAS, 1–12 (2012) [hereinafter 2012 BLM WSA MANUAL]; Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 740 (10th Cir. 1982); BLM, DOI, INTERIM MANAGEMENT POLICY FOR LANDS UNDER WILDERNESS REVIEW, H-8550-1 (1995), available at <http://www.blm.gov/ca/pa/wilderness/wsa/guidancewsa.html> [hereinafter 1995 IMP].

306. See 2012 BLM WSA MANUAL, *supra* note 305, at 1–18.

307. See *Sierra Club v. Hodel*, 848 F.2d 1068, 1085–96 (10th Cir. 1988).

308. See *COGGINS & GLICKSMAN*, *supra* note 72, § 25:12.

qualify as WSAs under section 603 because the areas were less than 5,000 acres.<sup>309</sup> From 1980 to 1992, the BLM classified nine areas in Utah as section 202 WSAs and, in 1992, recommended that Congress designate those areas as wilderness.<sup>310</sup> After the Utah Settlement, the BLM conceded that it had no authority to designate additional section 202 WSAs, but the settlement did not affect the pre-1993 section 202 WSAs already in existence.<sup>311</sup> Consequently, the BLM manages those nine section 202 WSAs according to the same standards as section 603 WSAs—areas with grandfathered uses and some valid existing rights that receive the lesser UUD standard.<sup>312</sup> But section 202 WSAs may be changed by the BLM through the RMP process—in the future, the BLM may decide to release some section 202 WSAs to multiple-use decision-making without waiting for congressional approval.<sup>313</sup>

### *B. Ongoing Conflicts over Wilderness Impairment*

The hard-fought political battles over WSA classification and standards on BLM lands represent only part of the problem in a much wider controversy over wilderness. Even after the BLM identified WSAs, conflicts continually arose over what uses would be allowed in those areas, and how to enforce the FLPMA's non-impairment and UUD standards.<sup>314</sup> Wilderness opponents made significant gains in undermining the wilderness potential of thousands of acres by using a hundred-year-old statute, R.S. 2477,<sup>315</sup> as an authority to blade roads throughout pristine public lands.<sup>316</sup> For much of the past two decades, road building and energy development projects have threatened existing

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309. See *Sierra Club v. Watt*, 608 F. Supp. 305, 339 (E.D. Cal. 1985); Taylor, *supra* note 302.

310. See BLM, NATIONAL LANDSCAPE CONSERVATION SYSTEM—WILDERNESS STUDY AREAS 20–24 (2009), available at [http://www.blm.gov/pgdata/etc/medialib/blm/ut/natural\\_resources/nlcs/wilderness\\_study\\_areas.Par.88202.File.dat/WSAs%20throughout%20the%20Country.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ut/natural_resources/nlcs/wilderness_study_areas.Par.88202.File.dat/WSAs%20throughout%20the%20Country.pdf).

311. See COGGINS & GLICKSMAN, *supra* note 72, § 25:12.

312. See 2012 BLM WSA MANUAL, *supra* note 305, at 1-1.

313. See *id.* at 1-5 to 1-6; COGGINS & GLICKSMAN, *supra* note 72, § 25:12.

314. See Wolking, *supra* note 283, at 1067.

315. Lode Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 C.F.R. § 932) (repealed 1976) (“[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted . . .”).

316. See 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, 524 (2005).

WSAs and un-inventoried BLM wild lands, jeopardizing those areas' future suitability for congressional wilderness designation.<sup>317</sup>

*1. R.S. 2477: From Sierra Club v. Hodel to SUWA v. BLM*

Throughout the controversy in Utah, road building and claims for rights-of-way on public lands have been the most prolific and damaging tools at the disposal of wilderness opponents.<sup>318</sup> The State of Utah and several county governments have claimed that an obscure provision of the Mining Act of 1866 authorized the construction of highways over any public lands, including national parks, wilderness areas, and WSAs, and even private lands.<sup>319</sup> Although R.S. 2477 is essentially a relic of the bygone frontier era of the nineteenth century, the effects of the statute remain a central obstacle for BLM wilderness.<sup>320</sup>

The Mining Act of 1866 effectuated Congress's nineteenth century goal of facilitating westward expansion and industrial progress.<sup>321</sup> Section 8 of the Mining Act, later codified as R.S. 2477, granted rights-of-way for highways across public and private lands<sup>322</sup>—Congress evidently wanted to provide access and routes to resources in the West.<sup>323</sup> One hundred and ten years later, long after the closing of the frontier, Congress repealed R.S. 2477 when it enacted FLPMA in 1976, although it included a savings clause that recognized as valid any right-of-way that had been perfected before October 21, 1976.<sup>324</sup> FLPMA, however, failed to answer questions as to what constituted a highway and the procedure required to perfect an R.S. 2477 right-of-way.<sup>325</sup> These questions found their way to court when Utah and county governments began to assert

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317. See Wolking, *supra* note 283, at 1069. See, e.g., Stephen Speckman, *Oil Drilling Possible in Wilderness Study Areas*, DESERT NEWS (Dec. 27, 2008), <http://www.deseretnews.com/article/705273336/Oil-drilling-possible-in-wilderness-study-areas.html> (describing an oil and gas lease on Utah land that is surrounded by BLM WSAs); *BLM Plans to Resurrect Expired Tar Sands Leases: Monument, National Recreation Area, and Wilderness Study Areas at Risk*, S. UTAH WILDERNESS ALLIANCE, <http://action.suwa.org/site/News2?page=NewsArticle&id=6187> (last visited Apr. 8, 2013).

318. See Wolking, *supra* note 283, at 1073.

319. See *S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 742 (10th Cir. 2005).

320. See Wolking, *supra* note 283, at 1107.

321. See *id.* at 1074.

322. Lode Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 C.F.R. § 932) (repealed 1976) (“[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted . . .”).

323. See Wolking, *supra* note 283, at 1074.

324. FLPMA § 706, 43 U.S.C. § 1701 (1976).

325. See Wolking, *supra* note 283, at 1076.

claims to R.S. 2477 rights-of-way through WSAs and other unroaded BLM lands.<sup>326</sup>

In 1986, Garfield County, Utah, announced plans to improve a twenty-eight mile stretch of single-lane road, called the Burr Trail, that bisected two WSAs near Capitol Reef National Park in the southern canyonlands.<sup>327</sup> The county planned to pave and widen the road to two lanes, relying both on Utah state law as well as R.S. 2477 to justify expanding the existing right-of-way through the WSAs.<sup>328</sup> When the BLM failed to take action to stop the construction, the Sierra Club filed a lawsuit, citing the increased traffic and future environmental effects as compelling BLM enforcement against the county.<sup>329</sup> The Sierra Club argued that the BLM's FLPMA duty to prevent impairment to WSAs made the agency's inaction unlawful.<sup>330</sup> Both the district court and the Tenth Circuit disagreed.<sup>331</sup>

In *Sierra Club v. Hodel*, the Tenth Circuit upheld the BLM's decision to allow improvements to the Burr Trail.<sup>332</sup> The court made clear that state law governs the scope of the right-of-way,<sup>333</sup> and Utah law authorized improvements that were reasonable and necessary to further the historical uses of the right-of-way.<sup>334</sup> The court decided that the proposed paving of the Burr Trail satisfied FLPMA's UUD standard and was reasonably necessary to further the historical uses of the trail—thus, paving the Burr Trail fell within the scope of the right-of-way.<sup>335</sup> Although the Tenth Circuit affirmed the BLM's inaction allowing the road improvements, the court required the BLM to conduct an environmental analysis under NEPA before allowing construction to begin.<sup>336</sup> And in conducting this NEPA analysis, BLM must, the court

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326. See *Sierra Club v. Hodel*, 675 F. Supp. 594, 596 (D. Utah 1987); *S. Utah Wilderness Alliance v. BLM*, 147 F. Supp. 2d 1130, 1133 (D. Utah 2001).

327. See *Sierra Club v. Hodel*, 848 F.2d 1068, 1073 (10th Cir. 1988).

328. See *id.*

329. See *id.* at 1080–83.

330. See *id.* at 1081–82.

331. See *id.* at 1083. The district court initially granted a preliminary injunction against the road construction. But after conducting a site inspection of the Burr Trail Road, the district court concluded that the right-of-way was valid and that paving a two-lane highway was within the scope of the right-of-way because the improvement was reasonable and necessary. *Sierra Club*, 675 F. Supp. at 596, 617–18.

332. See *Sierra Club*, 848 F.2d at 1097.

333. See *id.* at 1083.

334. See *id.* at 1083–85.

335. See *id.*

336. See *id.* at 1092–97.



ruled, choose the location of the road through the WSA that would be the least damaging to the wilderness characteristics.<sup>337</sup>

The *Hodel* ruling opened the possibility for Utah and its counties to argue for expanding road-building activities and to claim rights-of-way in other WSAs.<sup>338</sup> Utah law defined highways broadly: continuous use of a mere path prior to 1976 could be sufficient to establish a highway, even without actual construction activities or continual maintenance.<sup>339</sup> Applying Utah's definition of highways, county governments asserted R.S. 2477 claims along with the rights to conduct improvements to those "highways" in WSAs throughout the state that the BLM had previously considered roadless.<sup>340</sup>

After *Hodel*, the BLM recognized that improved highways traversing through WSAs would frustrate the agency's management policies and FLPMA's non-impairment standard for WSAs.<sup>341</sup> In 1993, the DOI reported that the BLM and courts had recognized 1,455 R.S. 2477 rights-of-way on BLM lands nationwide, with an additional 5,600 claimed rights-of-way, including 5,000 in Utah alone.<sup>342</sup> The following

337. See *id.* at 1088 ("[T]he effect of the order is to require BLM to specify where [in the WSA] the road should be located in order that it make the least degrading impact on the WSA"). Thus, the UUD mandate of FLPMA created a substantive requirement in the NEPA analysis for the agency to choose the best environmental alternative. See *id.*

338. See Wolking, *supra* note 283, at 1086–87.

339. See *id.* at 1080.

340. See, e.g., *S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 742 (10th Cir. 2005); *United States v. Garfield Co.*, 122 F. Supp. 2d 1201, 1233–34 (D. Utah 2000) (upholding a valid R.S. 2477 right-of-way and authorizing the county to begin road improvements); *Kane Cnty. v. United States*, No. 2:08-CV-00315, 2013 WL 1180764, at \*66 (D. Utah Mar. 20, 2013) (upholding several valid R.S. 2477 rights-of-way in and around Grand Staircase-Escalante National Monument). However, courts have denied other R.S. 2477 claims from Utah counties. See *San Juan Cnty. v. United States*, No. 2:04-CV-0552, 2011 WL 2144762, at \*36 (D. Utah May 27, 2011) (rejecting an R.S. 2477 claim in Canyonlands National Park). In 2012, Utah counties filed thousands of R.S. 2477 claims throughout the state. See Geoff Liesik, *Utah Counties File Lawsuits Against BLM Over R.S.2477 Roads*, DESERET NEWS (May 4, 2012), <http://www.deseretnews.com/article/865555277/Utah-counties-file-lawsuits-against-BLM-over-RS2477-roads.html>; Hillary Hoffmann & Sara Imperiale, *Recent Surge in "Ghost Roads" Litigation Threatens National Parks and Other Federally Protected Lands*, VT. LAW, <http://watchlist.vermontlaw.edu/recent-surge-in-%E2%80%9Cghost-roads%E2%80%9D-litigation-threatens-national-parks-and-other-federally-protected-lands/> (last visited Jun. 3, 2013) (suggesting that other states, such as Nevada, "are also ready and waiting to jump on the R.S. 2477 bandwagon if the federal courts validate even a small percentage of Utah's claims").

341. See Bloch & McIntosh, *supra* note 288, at 492 (describing Secretary Babbitt's attempts to stop R.S. 2477 road-building in protected landscapes).

342. See Wolking, *supra* note 283, at 1074, 1096.

year, the DOI proposed a rulemaking that would have required all R.S. 2477 claims to be filed with the BLM within two years of the final rule.<sup>343</sup> The proposed rule also sought to redefine what constituted a highway, instituting a uniform federal definition that required the right-of-way to be used as a thoroughfare by the public and supported by physical construction or maintenance activity.<sup>344</sup>

The effect of the proposed rule would have been to eliminate many of the 5,600 outstanding R.S. 2477 claims.<sup>345</sup> Unsurprisingly, wilderness opponents who favored road construction to prevent future wilderness areas rallied Republicans in Congress to oppose the DOI's rule.<sup>346</sup> In 1995, Republicans attached a budget rider to a transportation spending bill that imposed a one-year moratorium on the DOI's proposed regulations.<sup>347</sup> In the next Congress, Republicans successfully passed a provision to permanently prohibit the DOI from promulgating R.S. 2477 rules unless expressly authorized by Congress.<sup>348</sup>

Undaunted by this legislative backlash against wilderness protection, the Clinton Administration pressed on with new executive efforts to protect BLM wilderness.<sup>349</sup> In 1996, President Clinton used his executive authority to designate the Grand Staircase-Escalante National Monument in southern Utah.<sup>350</sup> Also, Secretary Babbitt issued a new policy for BLM managers to review R.S. 2477 claims, directing the BLM to use state law to decide the validity of claims, but only to the extent that the claims were consistent with federal law.<sup>351</sup>

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343. See Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216 (Aug. 1, 1994).

344. See *id.* at 39,220.

345. See Bloch & McIntosh, *supra* note 288, at 492–93.

346. See *id.* at 493.

347. See National Highway System Designation Act of 1995, § 349(a)(1), Pub. L. No. 104-59, 109 Stat. 568, 617–18 (1995).

348. See Wolking, *supra* note 283, at 1079; Department of the Interior and Related Agencies' Appropriations Act of 1997, § 108, Pub. L. No. 104-208, 110 Stat. 3009, 3009–200 (1996) (“No final [R.S. 2477] rule . . . shall take effect unless expressly authorized by an Act of Congress subsequent to the date of the enactment of this [1997 Interior Appropriations] act.”). The Clinton Administration interpreted this provision to be “permanent law.” See Cong. Requesters, B-277719, 1997 WL 475167 (Comp. Gen. Aug. 20, 1997).

349. See Hayes, *supra* note 200, at 220.

350. See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 476–78, 538 (2003) (describing the Antiquities Act of 1906 and President Clinton's designation of the Grand Staircase-Escalante National Monument in 1996).

351. See James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 ENVTL. L. 1005, 1032 (2005).

The Utah counties again went on the offensive.<sup>352</sup> Enraged by President Clinton's national monument designation of Grand Staircase; San Juan, Kane, and Garfield Counties began grading roads within the new national monument and nearby WSAs, claiming highway rights-of-way under R.S. 2477.<sup>353</sup> In response, environmental groups filed a lawsuit in federal court seeking an injunction to require the BLM to stop the counties' allegedly unlawful construction activities on the claimed rights-of-way.<sup>354</sup> This time, however, the BLM conducted its own review of the counties' claims, making administrative determinations that fifteen of the sixteen rights-of-way claims were invalid.<sup>355</sup> In *SUWA v. BLM*, the district court concluded that the existence of the rights-of-way was properly determined by the BLM in the first instance, and that the court should apply a deferential standard of review to the agency's determination.<sup>356</sup> Applying the BLM's interpretation of R.S. 2477, the district court affirmed the agency's conclusions that the counties' rights-of-way were invalid and granted the injunction.<sup>357</sup> On appeal, the Tenth Circuit reversed the decisions of both the district court and the BLM.<sup>358</sup> The primary issue before the court was the existence of the rights-of-way.<sup>359</sup> First, the Tenth Circuit concluded that long-established principles of state law would govern the determination of R.S. 2477 claims, with courts having primary jurisdiction to determine which rights-of-way claims to validate, not the BLM.<sup>360</sup> Second, although federal law governed the interpretation of R.S. 2477 because there was no substantive federal highway law, the Tenth Circuit determined that the statute borrowed the terms "highway" and "right-of-way" from state and common law.<sup>361</sup> Thus, the Tenth Circuit overruled the district court's deference to the BLM's initial determination, and remanded for a de

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352. See *Wolking*, *supra* note 283, at 1082–83.

353. See *S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 742–43 (10th Cir. 2005).

354. See *id.*

355. See *id.* at 743.

356. *S. Utah Wilderness Alliance v. BLM*, 147 F. Supp. 2d 1130, 1135, 1147 (D. Utah 2001).

357. *Id.*

358. *S. Utah Wilderness Alliance*, 425 F.3d at 788.

359. See *id.* at 742.

360. See *id.* at 757 (“In sum, nothing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder, and we decline to infer such authority from silence when the statute creates no executive role for the BLM.”).

361. See *id.* at 782; Matthew L. Squires, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. ANN. SURV. AM. L. 547, 562 (2008).

novo analysis of the existence of right-of-way.<sup>362</sup> Significantly, the court upheld the district court's ruling that state law reasonably limited the scope of the R.S. 2477 right-of-way to the historic usage of the route, endorsing the same approach for reviewing the scope of rights-of-way adopted by the *Hodel* court.<sup>363</sup>

In 2006, after the *SUWA* decision, Secretary Norton issued a press release and memorandum to announce that the BLM would conduct environmental reviews and a permitting process before approving any new road improvements on R.S. 2477 rights-of-way.<sup>364</sup> Therefore, following *SUWA*, right-of-way holders must inform the BLM prior to engaging in any road construction or maintenance of an R.S. 2477 highway.<sup>365</sup> And the BLM possesses the authority to regulate construction through regulations and permitting schemes.<sup>366</sup> Secretary Norton's guidelines for BLM land managers established a general policy of recognizing "reasonable and necessary" R.S. 2477 road improvements,<sup>367</sup> but directed the BLM to develop a permitting process and conduct an environmental analysis on all R.S. 2477 improvement requests.<sup>368</sup>

## 2. Bush Administration Policies

Unlike the Clinton Administration, which sought to rein in R.S. 2477 claims and prevent the impairment of existing WSAs, the George W. Bush Administration was hostile to wilderness and WSAs, resulting in a loosening of protections for WSAs and attempts to undermine future wilderness designations. In 2001, the DOI proposed a new rulemaking under the Quiet Title Act<sup>369</sup> that would allow the federal government to

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362. See *S. Utah Wilderness Alliance*, 425 F.3d at 758. But the Tenth Circuit did endorse a role for BLM in regulating some aspects of rights-of-way across public lands, specifically WSAs. According to the court, BLM retained some authority to make administrative determinations of the existence and scope of R.S. 2477 rights-of-way for its planning purposes. See *id.* at 757.

363. See *id.* at 747.

364. See SEC'Y OF INTERIOR, MEMORANDUM, DEPARTMENTAL IMPLEMENTATION OF *S. UTAH WILDERNESS ALLIANCE V. BUREAU LAND MGMT.* (2006) available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/im\\_attachments/2006.Par.30693.File.dat/im2006-159attach1.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2006.Par.30693.File.dat/im2006-159attach1.pdf) [hereinafter NORTON MEMO II].

365. See Wolking, *supra* note 283, at 1084–86.

366. See *id.*

367. See NORTON MEMO II, *supra* note 364.

368. See *id.*; Wolking, *supra* note 283, at 1097.

369. Quiet Title Act, 28 U.S.C. § 2409(a)(g) (2012); Revised Disclaimer Rule, 68 Fed. Reg. 494, 495 (Jan. 6, 2006) (codified at 43 C.F.R. pt. 1860).

disclaim interest in lands on which an R.S. 2477 claim existed.<sup>370</sup> This rulemaking came about in response to Utah's attempts to claim the lands underlying hundreds of miles of "highways" through WSAs.<sup>371</sup> In 2003, the DOI promulgated a revised disclaimer rule that made it easier for state or county governments to make claims to public lands.<sup>372</sup> The rule defined "county highways" to include almost all manner of transportation usages including cow paths, jeep trails, and hiking paths, so long as the route had been publicly used prior to 1976.<sup>373</sup>

Bush Administration officials also immediately and aggressively attempted to undo restrictions on energy development on BLM lands.<sup>374</sup> In 2002, Utah's BLM field office issued instructions that oil and gas leasing on public lands would be given a high priority by agency staff.<sup>375</sup> Any BLM decision not to approve an energy development project would require an explanation to justify the denial, and it would be subject to review by officials in Washington, D.C.<sup>376</sup> Although FLPMA established wilderness as a consideration for BLM land management, President Bush's priority of energy development almost always trumped wilderness values.<sup>377</sup> The Utah BLM field office granted all but one energy development projects that conflicted with citizens groups' inventories of potential wilderness, even though the BLM had a duty under FLPMA to consider the adverse effects of proposed activities on those lands.<sup>378</sup> Consequently, the Bush Administration allowed energy

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370. Revised Disclaimer Rule, 68 Fed. Reg. at 495.

371. See Wolking, *supra* note 283, at 1102–04.

372. Revised Disclaimer Rule, 68 Fed. Reg. at 495. The disclaimer rule allowed right-of-way claimants, including state or county governments, to file notice of R.S. 2477 claims with BLM. The rule also provided a simple application process and procedures for BLM to issue a disclaimer of interest in lands. *Id.*

373. See Bloch & McIntosh, *supra* note 288, at 489.

374. See *id.* at 483–85.

375. See *id.*

376. Exec. Order No. 13,212, 66 Fed. Reg. 28,357, 28,357 (May 18, 2001); BLM, INSTRUCTION MEMORANDUM NO. 2001-191, PROCESSING OF APPLICATIONS FOR PERMIT TO DRILL (APD), SITE-SPECIFIC PERMITS, SUNDRY NOTICES, AND RELATED AUTHORIZATIONS ON EXISTING LEASES AND ISSUING NEW LEASES DURING RESOURCE MANAGEMENT PLAN (RMP) DEVELOPMENT (2001), available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/directives\\_archives.Par.98926.File.dat/FY%202001%20IMs.zip](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/directives_archives.Par.98926.File.dat/FY%202001%20IMs.zip).

377. See Bloch & McIntosh, *supra* note 288, at 480 ("In May of 2001, the Bush Administration made clear that domestic energy production was one of its top priorities . . .").

378. See *Or. Natural Desert Ass'n v. Rasmussen*, 451 F. Supp. 2d 1202, 1213 (D. Or. 2006) (concluding that the BLM must analyze the effects of a proposed activity on any citizen-submitted wilderness proposals); *Or. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1132 (9th Cir. 2008) (determining that the Utah Settlement did not eliminate the

projects to occur on thousands of acres of potential WSAs throughout Utah and the West, effectively precluding those areas from classification as WSAs and eliminating the lands from further consideration by the agency as possible wilderness.<sup>379</sup>

### C. The Obama Wild Lands Policy (2009–2013)

The election of President Obama in 2008 gave hope to wilderness advocates seeking a “new dawn” in conservation and environmental policies.<sup>380</sup> The Obama Administration appointed Secretary of the Interior Ken Salazar, who initiated a 2009 review of BLM policies for inventorying lands with wilderness characteristics.<sup>381</sup> After testifying to a congressional committee, Secretary Salazar lamented the BLM’s lack of “comprehensive long-term national guidance on how to inventory and manage lands with wilderness characteristics.”<sup>382</sup> Salazar clearly intended to reverse the Bush Administration’s policies under the Utah Settlement and renew President Clinton’s policy of protecting wilderness characteristics on BLM lands.<sup>383</sup>

In 2010, Secretary Salazar issued Secretarial Order No. 3310, known as the Wild Lands Policy.<sup>384</sup> This order required the BLM to conduct new inventories of all BLM lands with wilderness characteristics that were not already classified as WSAs or designated as wilderness and

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BLM’s duties to consider wilderness values during the process of developing RMPs); *see also ONDA Sets Precedent for Wilderness and ORVs*, WILDLANDS CPR, <http://www.wildlandscpr.org/?q=road-riporter/onda-sets-precedent-wilderness-and-orvs> (last visited Oct. 10, 2013) (describing *ONDA v. BLM* and the effect of the Ninth Circuit’s ruling).

379. *See* Bloch & McIntosh, *supra* note 288, at 480 (“The Bush Administration has been creative in identifying ways to maximize opportunities for development—and minimize opportunities for preservation—on our nation’s public lands.”); *BLM Directive on Wilderness Protection: Implications for Arizona and the West*, ARIZ. WILDERNESS COALITION, [http://www.azwild.org/resources/factsheet\\_BLMdirective.php](http://www.azwild.org/resources/factsheet_BLMdirective.php) (last visited Oct. 13, 2013) (noting that the Bush Administration also authorized off-road vehicle recreation “in areas the BLM had already found to qualify for wilderness protection.”).

380. *See* David Adam, *U.S. Wilderness Conservation Law Hailed as “New Dawn for American Heritage”*, GUARDIAN (Mar. 26, 2009), <http://www.guardian.co.uk/environment/2009/mar26/us-conservation>.

381. *See* Myers & Hill, *supra* note 272, § 15.04.

382. *See BLM Restores Guidance for Managing Lands with Wilderness Characteristics as Part of Multiple-Use Mission*, BLM (Feb. 25, 2011), [http://www.blm.gov/wo/st/en/info/newsroom/2011/february/NR\\_02\\_25\\_2011.html](http://www.blm.gov/wo/st/en/info/newsroom/2011/february/NR_02_25_2011.html); Brill, *supra* note 284, at 20.

383. *See* Brill, *supra* note 284, at 20.

384. WILD LANDS POLICY, *supra* note 19.

establish a new database of those lands for consideration in RMP revisions.<sup>385</sup> The newly inventoried lands with wilderness characteristics outside of WSAs would be classified as “wild lands”—a new category of public lands.<sup>386</sup> For these “wild lands,” the order required the BLM to apply a new standard of protection: prohibiting any impairment unless an appropriate, documented reason justified the impairment and reasonable mitigation measures could minimize the harmful effects to the wilderness characteristics.<sup>387</sup>

Like the 1996 re-inventory ordered by Secretary Babbitt, Salazar’s Wild Lands Policy attempted to conduct a new inventory of the BLM’s lands that had wilderness characteristics.<sup>388</sup> The main difference between the two policies, however, was that the 2010 Wild Lands Policy did not order the BLM to classify the newly inventoried wild lands as WSAs and automatically apply the section 603 non-impairment standard to those areas.<sup>389</sup> Instead, Salazar ordered the BLM to manage “wild lands” under a new standard, protecting the wild lands from impairment unless the agency documented reasons to exempt the area and planned mitigation measures.<sup>390</sup>

After the sweeping Republican victory in the 2010 congressional elections, it was no surprise that many Republicans challenged Secretary Salazar’s new direction in natural resource policy.<sup>391</sup> On April 14, 2011, House Republicans attached a rider to one of the most important bills facing the government, the Defense Appropriations Act.<sup>392</sup> The rider

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385. See *id.* at 1; BLM, DOI, POLICY ON CONDUCTING WILDERNESS CHARACTERISTICS INVENTORY ON BLM LANDS (2011), [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/im\\_attachments/2011.Par.27443.File.dat/IM2011-154\\_att1.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2011.Par.27443.File.dat/IM2011-154_att1.pdf) [hereinafter 2011 WILDERNESS CHARACTERISTICS INVENTORY].

386. See COGGINS & GLICKSMAN, *supra* note 72, § 25:12.

387. See *id.*

388. See *supra* notes 268–86 and accompanying text.

389. Compare the 2011 WILDERNESS CHARACTERISTICS INVENTORY, *supra* note 385, with the 1996 re-inventory and the 2001 HANDBOOK, *supra* note 284. See *supra* notes 287–89 and accompanying text.

390. See COGGINS & GLICKSMAN, *supra* note 72, § 25:12, at 25-23 to 25-24.

391. See Jim Rutenberg & Jeff Zeleny, *Democrats Outrun by a 2-Year G.O.P. Comeback Plan*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/04/us/politics/04campaign.html>.

392. Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, § 1769, 125 Stat. 38 (2011). Despite the bill’s importance, the White House threatened to veto the bill because of the numerous riders and provisions that House Republicans had attached. See Daniel Strauss, *White House Threatens to Veto Defense Bill*, THE HILL (Jun. 23, 2011), <http://thehill.com/homenews/administration/>

prohibited the Department of the Interior from implementing Secretary Salazar's Order No. 3310, thus eliminating the new BLM wild lands inventory and stalling the process of wilderness protection across millions of acres of public lands.<sup>393</sup>

But in March 2012, Secretary Salazar revived his attempt to identify and protect additional BLM wild lands.<sup>394</sup> The BLM issued two new policies as part of the agency's field guidelines manual, adopting many of the substantive requirements of the Wild Lands Policy.<sup>395</sup> BLM Manual 6310 directed the agency to conduct new inventories to identify additional lands with wilderness characteristics,<sup>396</sup> and Manual 6320 required BLM field staff to consider wilderness characteristics in RMP and project-level planning.<sup>397</sup> Consequently, the BLM must now identify new areas that have wilderness characteristics and consider the effects to those wilderness characteristics before approving RMPs or site-specific projects.<sup>398</sup>

## VI. CONCLUSION

Wild lands policy in the United States is now at a crossroads. Systematic wild lands protection began in the 1920s and 1930s as an effort by the executive branch to protect certain areas of the national

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168139-white-house-threatens-2012-defense-appropriations-bill-veto (last visited Oct. 10, 2013).

393. See Brill, *supra* note 284, at 9; see also Rocky Barker, *Budget Deal Stops BLM Wild Lands Inventory*, IDAHO STATESMAN (Apr. 12, 2011), <http://www.garp.org/news-and-publications/overview/story.aspx?altTemplate=PrintYellowBrixStory&newsId=27102>.

394. See PUB. LANDS COUNCIL, 2011–2012 ANNUAL REPORT: A YEAR IN REVIEW 19–20 (2012), available at <http://publiclandscouncil.org/CMDocs/PublicLandsCouncil/Annual%20Meeting/ANNUAL%20REPORT%202012.pdf>.

395. See *id.*; BLM, BLM MANUAL, available at [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/blm\\_manual.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html) (last visited Dec. 29, 2013).

396. See BLM, DOI, MANUAL 6310, CONDUCTING WILDERNESS CHARACTERISTICS INVENTORY ON BLM LANDS 2–3 (2012).

397. See BLM, DOI, MANUAL 6320, CONSIDERING LANDS WITH WILDERNESS CHARACTERISTICS IN THE BLM'S LAND USE PLANNING PROCESS 2–3 (2012).

398. BLM Manuals 6310 and 6320 implemented the requirements under FLPMA and NEPA that were recognized by the Ninth Circuit in 2010. In *Oregon Natural Desert Ass'n. v. BLM*, the court invalidated an RMP because the BLM failed to consider wilderness characteristics in the planning area. 625 F.3d at 1121. The court concluded that wilderness was among the values that Congress intended the BLM to consider in the FLPMA planning process, and therefore, NEPA required consideration of wilderness characteristics in the environmental analysis. See *id.* at 1122.



forests from resource use and development.<sup>399</sup> Fearing the removal of those administrative protections, environmentalists convinced Congress to pass the Wilderness Act in 1964, placing wild lands policymaking under the prerogative of the legislature.<sup>400</sup> But the cumbersome wilderness designation procedures created by the Wilderness Act, and rampant congressional gridlock, led to stalemates and legal limbo for many national forest and BLM wild lands.<sup>401</sup> Although Congress enacted state-by-state wilderness designation for 9.8 million acres of national forests,<sup>402</sup> the legislative process left 58.5 million acres of roadless areas in the national forests undesignated as wilderness but not open to multiple uses, such as road building.<sup>403</sup>

Inventoried roadless areas within the national forests were the source of significant controversy from the 1980s to the beginning of the twenty-first century.<sup>404</sup> In 2001, the Clinton Administration promulgated an administrative rule which, after long and contentious litigation, has largely put the issue to rest by implementing long-term protections for the remaining roadless areas.<sup>405</sup> Despite President Bush's attempt to overturn the 2001 Roadless Rule through the State Petitions, Rule,<sup>406</sup> both the Ninth and Tenth Circuits have affirmed the Roadless Rule, which now applies in all states but Idaho and Colorado.<sup>407</sup> The 2001 Roadless Rule, and Idaho and Colorado Roadless Rules, proscribe most road building and timber harvests for 50 million acres in national forests, amounting to a significant administrative protection for wild lands that were ignored by Congress.<sup>408</sup>

When FLPMA extended the Wilderness Act to BLM lands in 1976, the identification and management of potential wilderness areas produced an intractable controversy not unlike the problem of roadless

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399. *See supra* notes 28–46 and accompanying text.

400. *See supra* notes 47–56 and accompanying text.

401. *See supra* notes 57–81 and accompanying text.

402. *See supra* notes 73–77 and accompanying text.

403. *See supra* notes 85–89 and accompanying text.

404. *See supra* notes 90–102 and accompanying text.

405. *See supra* notes 103–09 and accompanying text.

406. *See supra* notes 130–35 and accompanying text.

407. *See supra* notes 114–18 and accompanying text (Ninth Circuit upholding the 2001 Roadless Rule); *supra* notes 146–59 and accompanying text (*California ex rel. Lockyer* enjoining the State Petitions Rule and reinstating the 2001 Roadless Rule); *supra* notes 174–82 and accompanying text (Tenth Circuit upholding the 2001 Roadless Rule).

408. *See supra* notes 104–06 and accompanying text (2001 Roadless Rule); *supra* notes 187–91 and accompanying text (Idaho Roadless Rule); *supra* notes 192–95 and accompanying text (Colorado Roadless Rule).

areas in national forests.<sup>409</sup> In 1979, the BLM conducted its first inventory of wild lands, identifying over 24 million acres that qualified as wilderness.<sup>410</sup> Since then, Congress designated almost half of these WSAs as wilderness, but currently, 12.7 million acres of WSAs on BLM lands remain as de facto wilderness, and millions more acres qualify for wilderness protection because of their pristine and roadless characteristics.<sup>411</sup> With the notable exception of the Omnibus Public Land Management Act of 2009, which designated over 880,000 acres of BLM wilderness,<sup>412</sup> Congress has demonstrated little interest in designating additional BLM wilderness areas or providing legislation to guide the BLM's management of non-WSA wild lands.<sup>413</sup>

While awaiting congressional action, the Clinton Administration tried unsuccessfully to resolve the controversies over which BLM lands should receive protection from development and what standard of protection the BLM should afford those lands.<sup>414</sup> At the end of President Clinton's second term, in 2001, the BLM adopted a revised Wilderness Inventory Handbook, directing the agency to identify unprotected wild areas that qualify as wilderness and to protect against impairment of wilderness qualities.<sup>415</sup> But in 2003, the Bush Administration reversed this policy in the Utah settlement, leaving the number and size of WSAs unchanged since 1992 and reaffirming the two different standards of protection for WSAs.<sup>416</sup> The UUD standard governs WSAs with grandfathered uses or valid existing rights that cannot be undertaken without permanent impairment of wilderness characteristics.<sup>417</sup> All other WSAs receive the more protective non-impairment standard, which prohibits new developments that would permanently impair the area's suitability for wilderness designation.<sup>418</sup> Thus, after the 2003 Utah Settlement, the BLM may identify new lands with wilderness characteristics through the RMP process, but those lands cannot receive

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409. See *supra* notes 257–60 and accompanying text.

410. See *supra* notes 252–53 and accompanying text.

411. See *Wilderness Study Areas*, BLM, [http://www.blm.gov/wo/st/en/prog/blm\\_special\\_areas/NLCS/wilderness\\_study\\_areas.html](http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/wilderness_study_areas.html) (last visited May 12, 2013); *supra* notes 262–64 and accompanying text.

412. See Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009).

413. See *supra* notes 266–71 and accompanying text.

414. See *supra* notes 268–82 and accompanying text.

415. See *supra* notes 269–82 and accompanying text.

416. See *supra* notes 290–304 and accompanying text.

417. See *supra* notes 204–06 and accompanying text (UUD standard); *supra* note 306 and accompanying text.

418. See *supra* notes 305–13 and accompanying text.

permanent WSA status or protection under the non-impairment standard.<sup>419</sup>

In 2009, the Obama Administration implemented a new policy for identifying and preserving additional BLM wild lands.<sup>420</sup> The Wild Lands Policy required the BLM to conduct a new inventory of lands with wilderness characteristics and apply a new standard of protection for those wild lands, prohibiting unreasonable impairment of the wilderness characteristics.<sup>421</sup> But in 2011, Congress disapproved of the Wild Lands Policy, forbidding the BLM from implementing the new wild lands inventory.<sup>422</sup>

Currently, BLM wild lands outside of designated wilderness or WSAs receive some administrative protection in the form of consideration in FLPMA and NEPA processes.<sup>423</sup> In 2012, the BLM issued two policy manuals directing field staff to identify and consider lands with wilderness characteristics in RMP and project planning.<sup>424</sup> Unlike Secretary Salazar's Wild Lands Policy or President Clinton's pre-Utah Settlement policy, the 2012 manuals did not implement a new wilderness inventory or apply a specific standard of protection to newly identified lands with wilderness characteristics.<sup>425</sup> Instead, when the BLM conducts an RMP process as mandated by FLPMA, or undertakes specific project-level planning, the agency must survey the affected public lands for wilderness characteristics and consider those characteristics before it approves the RMP or the project.<sup>426</sup>

But requiring consideration of wilderness characteristics does not provide the same level of protection as a substantive standard, such as the non-impairment standard that applies to existing WSAs.<sup>427</sup> Therefore, the future of BLM wild lands protection is less certain than under previous policies that brought more wild lands under the non-impairment standard. Protection of wilderness characteristics through the RMP process depends on the willingness of the BLM, and future executive administrations, to consider each individual agency action and decide to

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419. See *supra* notes 307–13 and accompanying text.

420. See *supra* notes 380–90 and accompanying text.

421. See *supra* notes 384–87 and accompanying text.

422. See *supra* notes 391–93 and accompanying text.

423. See *supra* notes 394–98 and accompanying text.

424. See *supra* notes 396–97 and accompanying text.

425. See *supra* notes 285–86 and accompanying text (President Clinton's policy); *supra* notes 386–87 and accompanying text (Secretary Salazar's Wild Lands Policy); *supra* notes 396–97 and accompanying text (2012 BLM manuals).

426. See *supra* notes 396–98 and accompanying text.

427. See *supra* notes 237–39 and accompanying text.

preserve wilderness on a case-by-case basis. Without congressional leadership,<sup>428</sup> or at least congressional acquiescence to executive efforts like the ill-fated Wild Lands Policy, the remaining BLM wild lands will be left without substantive, permanent protection.

Absent the apparent hostility of Congress, the success of the 2001 Roadless Rule in protecting national forest roadless areas demonstrates a new way forward for wild lands protection through administrative rulemaking. As the court in *Wyoming II* explained, prohibiting certain activities through national rulemaking can offer wild lands significant protections, effectuating the same long-term preservation goals as the non-impairment standard or the provisions of the Wilderness Act.<sup>429</sup> Administrative rulemaking also offers relatively permanent protections for wild lands, making it difficult for future administrations to overturn protections without offering a reasonable explanation for the policy change and conducting a new environmental analysis.<sup>430</sup> Whether BLM wild lands continue to be protected through the RMP process or through administrative rulemaking, it appears that wild lands policy in the twenty-first century will be the product of executive hegemony, which is somewhat ironic since a half century ago environmentalists thought administrative protection was inadequate when they successfully fought for congressional protection of wilderness areas in the landmark 1964 Wilderness Act.

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428. See Mimi Smith, *Morris K. Udall*, 21 ENVTL. L. i (1991) (praising the leadership of Morris Udall and providing a list of the environmental legislation that Udall guided through Congress).

429. See *supra* notes 179–81 and accompanying text.

430. See *supra* notes 147–58 and accompanying text.