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## THE WILDERNESS SOCIETY

### LEGAL STATUS OF THE ROADLESS AREA CONSERVATION RULE

August 10, 2009

**SUMMARY:** The Roadless Area Conservation Rule was adopted by the U.S. Forest Service on January 12, 2001, after the most extensive public involvement in the history of federal rulemaking. The Roadless Rule generally prohibited road construction and timber cutting in 58.5 million acres of inventoried roadless areas, covering about 30 percent of the National Forest System. The Ninth Circuit Court of Appeals upheld the Rule's legality in 2002, but a Wyoming district ruled otherwise a year later. In December 2003, the Bush Administration amended the Rule by temporarily exempting Alaska's Tongass National Forest pursuant to a settlement with the State of Alaska. In May 2005, the Administration repealed the Roadless Rule and replaced it with a State petition process. However, in September 2006, a federal district court in California invalidated the Bush Administration's action and reinstated the 2001 Roadless Rule nationwide, except in the Tongass. In August 2008, the Wyoming district court again invalidated the Roadless Rule and issued a nationwide injunction, which has been appealed to the Tenth Circuit. In October 2008, the Administration adopted a separate roadless rule for the state of Idaho. On May 28, 2009, the Obama Administration issued a one-year interim directive prohibiting the Forest Service from authorizing any road-building or logging projects in roadless areas without approval of the Secretary of Agriculture, except in Idaho. On August 5, 2009, the Ninth Circuit Court of Appeals affirmed the California district court decision invalidating the Bush Administration's rule and reinstating the 2001 Roadless Rule.

Currently, the 2001 Roadless Rule is in effect nationwide except in Idaho and in Alaska's Tongass National Forest. Thus, the Forest Service may not undertake activities that violate the Roadless Rule on 40 million out of the 58.5 million total acres of inventoried roadless areas. Roadless area projects in the Tongass National Forest are subject to approval by the Secretary of Agriculture.

Key unresolved issues:

- Will the 10<sup>th</sup> circuit reverse or affirm the Wyoming court decision?
- Will the Obama Administration continue the temporary exemption of the Tongass?
- Will the Administration finalize a Colorado rule?
- Will the Idaho rule stand up in court?

**BACKGROUND:** The Roadless Area Conservation Rule came under a coordinated and sustained attack by the timber industry and its allies immediately after it was adopted in January 2001. In May 2001, U.S. District Court Judge Edward Lodge in Idaho issued a preliminary injunction blocking implementation of the Roadless Rule on the grounds that the Forest Service had violated the National Environmental Policy Act (NEPA) by failing to provide adequate information to the public. The Bush Administration elected not to appeal Judge Lodge's decision, but several environmental groups that had intervened in the Idaho lawsuits did appeal, represented by Earthjustice.

In December 2002, the Ninth Circuit Court of Appeals reversed Judge Lodge, rejecting the District Court's assertions that the Rule was illegally adopted. In April 2003, the full court of appeals denied a request by the State of Idaho to reconsider its decision. The decision by the Ninth Circuit court – which covers most of the western United States -- remains the controlling case law on the Rule's legality in that circuit.

However, in July 2003, U.S. District Court Judge Clarence Brimmer in Wyoming (part of the Tenth Circuit) issued an opinion that directly contradicted the Ninth Circuit in a decision invalidating the Rule and enjoining its implementation. Judge Brimmer ruled that the Roadless Rule violated both NEPA due to inadequate public involvement and the Wilderness Act by creating "de facto wilderness areas." As in the Idaho case, the Bush Administration opted not to appeal, but once again environmental intervenors, represented by Earthjustice, appealed.

In December 2003, the Bush Administration promulgated a regulation temporarily exempting the Tongass National Forest's 9.3 million acres of inventoried roadless areas from the Roadless Rule. The exemption, which was adopted pursuant to a settlement of litigation brought by the state of Alaska, was supposed to remain in effect only until the Administration adopted a permanent rule for Alaska. However, no further rulemaking has occurred in Alaska, leaving the legally-viable duration of the Tongass exemption in doubt.

In May 2005, the Bush Administration repealed the Roadless Rule and replaced it with a State petition process. The State Petitions Rule allowed road building and logging to resume in accordance with local forest management plans, and established a cumbersome process for individual State governors to request different management rules for roadless areas within their respective States. However, there was no certainty that the petition process would result in any protection for roadless areas.

In July 2005, Tenth Circuit Court of Appeals dismissed environmentalists' appeal of the Wyoming district court decision and vacated the decision, solely on the grounds that the case was made moot by the Administration's May 2005 repeal of the Roadless Rule. The Tenth Circuit's decision temporarily ended the litigation over the Roadless Rule and cleared the way for litigation over the Administration's State Petitions Rule. It also meant that the Ninth Circuit Court's decision strongly upholding the Roadless Rule remained the controlling case law on the issue of the Rule's legality.

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In August 2005, the states of California, Oregon, and New Mexico (later joined by Washington) sued over the State Petitions Rule, and environmental groups (represented by Earthjustice) filed a similar lawsuit a month later. The cases were filed in Northern California federal district court and both assigned to U.S. Magistrate Judge Elizabeth Laporte.

On September 20, 2006, Judge Laporte issued a landmark decision invalidating and enjoining the State Petitions Rule and reinstating the 2001 Roadless Rule. Judge Laporte held that the State Petitions Rule amounted to a repeal of the Roadless Rule and had been promulgated without complying with the requirements of the National Environmental Policy Act and Endangered Species Act. The Bush Administration appealed that ruling to the Ninth Circuit.

Undeterred by the California court's invalidation of the State Petitions Rule, the Bush Administration relied on general authorities of the Administrative Procedure Act to continue pursuing state-specific amendments to the Roadless Rule. Federal rulemaking processes were initiated for roadless areas in Idaho and Colorado. The final Idaho rule was promulgated on October 16, 2008. In Colorado, a draft rule was published in 2008 but not finalized prior to the end of the Bush Administration in January 2009.

The California decision required the Forest Service to comply with the Roadless Rule in all national forests except the Tongass National Forest, since the Bush Administration had previously exempted the Tongass from the Rule. In April 2007 the Forest Service agreed to temporarily defer timber sales in the Tongass roadless areas through settlement of a lawsuit over the Tongass land management plan. The Tongass logging moratorium continued until the Forest Service completed a revision of its management plan, which occurred in February 2008.

In response to the California court decision reinstating the Roadless Rule, the State of Wyoming sought to revive the injunction on the Roadless Rule that was issued by Judge Brimmer in 2003 and vacated by the Tenth Circuit in 2005. However, in July 2007 the Tenth Circuit denied on procedural grounds Wyoming's request to immediately reinstate the 2003 injunction. The Tenth Circuit also cautioned the Wyoming district court of the potential for conflict with the California district court decision.

On August 13, 2008, Judge Brimmer released his second decision, once again ruling that the Roadless Rule violated NEPA and the Wilderness Act and enjoining the Forest Service's use of the Rule nationwide. Environmental intervenors have once again appealed Judge Brimmer's decision to the Tenth Circuit.

The federal government's initial response to Judge Brimmer's decision was to file motions with both the Wyoming and California district courts requesting that they at least temporarily suspend their injunctions in order to relieve the Forest Service of the potential to be held in contempt of court for complying or not complying with the Roadless Rule. Environmental and state plaintiffs opposed the motion to lift or amend Judge Laporte's injunction. The Tenth Circuit suspended action on the environmental intervenors' appeal of Judge Brimmer's decision pending Brimmer's ruling on the government's motion.

In October 2008, the Bush Administration promulgated a final roadless rule for the state of Idaho, supplanting the 2001 Roadless Rule on Idaho's 9.3 million acres of inventoried roadless land. Conservationists have challenged the Idaho rule in federal district court. A draft rule covering Colorado's 4.4 million acres was proposed in July 2008 but has not yet been finalized.

On December 2, 2008, in response to the federal government's motion and for the sake of judicial comity, Judge Laporte issued a partial stay of her injunction, temporarily reducing the geographic scope of her 2006 injunction to states located within the Ninth Circuit, plus New Mexico (since it is one of the state co-plaintiffs). The effect of the partial stay was to temporarily remove Roadless Rule protection from 13.6 million acres of roadless areas in 29 states and Puerto Rico.

On May 28, 2009, the Obama Administration issued a one-year interim directive prohibiting the Forest Service from authorizing any road-building or logging projects in roadless areas without approval by the Secretary of Agriculture. The directive does not apply to roadless areas in Idaho, but does apply to those in the Tongass National Forest.

On June 15, 2009, Judge Brimmer denied the Forest Service's request to stay or modify his nationwide injunction barring implementation of the 2001 Roadless Rule. Judge Brimmer's decision cleared the way for the Tenth Circuit to begin considering environmentalists' appeal.

On August 5, 2009, the Ninth Circuit Court of Appeals affirmed Judge Laporte's 2006 landmark decision invalidating the Bush State Petitions Rule and reinstating the 2001 Roadless Rule. The court of appeals' decision effectively reinstated the 2001 Rule nationwide except in Idaho and the Tongass National Forest.

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