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## Administrative Wilderness: Protecting Our National Forestlands in Contravention of Congressional Intent and Public Policy

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# Administrative Wilderness: Protecting Our National Forestlands in Contravention of Congressional Intent and Public Policy

*Conservation is paved with good intentions which prove to be futile, or even dangerous, because they are devoid of critical understanding either of the land, or of economic land-use.<sup>1</sup>*

*Our first task is not to understand the law to see if it is working and if it ought to be changed. Instead, we should first understand these lands themselves and, after having done that, see if and how the law ought to be revised.<sup>2</sup>*

## ABSTRACT

*Preservation of our forestlands has been a hotly contested issue over the last half century. Congress passed the Wilderness Act of 1964, granting it the exclusive power and authority to protect public lands as wilderness. At the behest of President Clinton, however, the Forest Service instituted an administrative rule-making process to protect roadless public forestlands in a wilderness-like state. While laudable in its aims, the Forest Service's "roadless" rule usurped the power and authority reserved in Congress under the Wilderness Act to create and set aside public lands as wilderness. As a result, the "administrative" wilderness created under the Forest Service's roadless rule lacks permanence, adequate research, public input and participation, congressional oversight, and authority. Several Western states have challenged the Forest Service's authority to create the roadless rule in federal district court. Because of these shortfalls in the Forest Service's roadless rule, the rule should be invalidated and the Forest Service should be admonished not to create wilderness protections for public lands, as Congress is the sole governmental body with power and authority to create wilderness.*

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1. ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 225 (Oxford Univ. Press 1987) (1949).

2. Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 659 (1997).

## I. INTRODUCTION

Setting aside wilderness in the West has become an increasingly hot topic of debate involving both local and national interests.<sup>3</sup> Preservationists argue that the highest form of land management is preservation, but extractive industries<sup>4</sup> counter that preservation intrudes on legitimate extractive activities to which Western lands have been devoted for more than a century. Congress attempted to balance preservation of public lands with extractive and other competing interests in the Wilderness Act of 1964.<sup>5</sup> In the Wilderness Act, Congress expressly reserved to itself the power to create and set aside wilderness areas. Under the Clinton administration, however, the Executive branch created administrative wilderness in violation of congressionally reserved powers. In so doing, the administration usurped proper congressional authority and avoided public participation in its efforts to preserve federal land before a new administration took office. Most notable is the Clinton administration's roadless initiative, which calls for wilderness-like protection of all roadless Forest Service lands.<sup>6</sup> Unfortunately, administrative wilderness tactics, like those used by the Clinton administration, do not withstand scrutiny; additionally, the administrative actions are not permanent because the administrative "protections" come and go with later presidential administrations that may have different political agendas.<sup>7</sup>

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3. See e.g., *Wyo. Timber Indus. Ass'n v. United States Forest Serv.*, 80 F. Supp. 2d 1245 (D. Wyo. 2000). The court commented on the stigma felt by those parties involved in Western extractive industries that are similarly dissatisfied with the Forest Service's Roadless Conservation Final Rule. The court, relying on S. Rep. No. 98-54, observed that [e]conomic users of the National Forests were concerned that endless debate and study surrounding the wilderness issue was obstructing appropriate economic utilization of National Forest lands. They feared that even lands not designated as wilderness would be managed in a perpetual *de facto* wilderness state pending additional studies and potential future wilderness designation.

*Id.* at 1248 (citations omitted) (emphasis added).

4. Natural resource extractive industries, for purposes of this article, include traditional hard rock mining, oil and gas exploration and development, coal extraction and development, power plants, hydroelectric projects, power lines and pipelines, timber harvesting, and livestock grazing.

5. 16 U.S.C. § 1131 (1994).

6. See *infra* part II.B.

7. The current political situation underscores the need to keep agencies from creating administrative wilderness. The Clinton administration sought to create wilderness protections while the Bush administration is looking for politically correct ways to reverse the roadless initiative's effects. Had the decision properly remained with Congress, none of the current "ruckus" would be occurring. See *infra* part III.A.

The roadless initiative culminated the Clinton administration's efforts through the Forest Service and the Antiquities Act<sup>8</sup> to preserve millions of acres of federally owned land, particularly in the West. The President's aim to preserve untrammled land in its pristine state was laudable, but the method simply does not justify the means. Clinton's roadless initiative was a concerted effort on the part of the administration to bypass expressly reserved congressional powers and to create de facto wilderness areas by Forest Service agency action and by numerous presidential monument designations<sup>9</sup> through the Antiquities Act. Congress is the only governmental body with the power to designate and set aside wilderness areas,<sup>10</sup> but the Forest Service, as directed by President Clinton in his October 13, 1999, Memorandum to the Secretary of Agriculture,<sup>11</sup> completed a rule-making process that, on a national level, effectively designates Forest Service roadless areas mapped in Roadless Area Review

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8. 16 U.S.C. § 433 (1994).

9. President Clinton set aside 21 new monuments or expansions during his tenure. Those monuments are the following: Agua Fria, Ariz. (Jan. 11, 2000); Anderson Cottage, Washington, D.C. (July 7, 2000); California Coastal (Jan. 11, 2000); Canyons of the Ancients, adjacent to Mesa Verde National Park, Colo. (June 9, 2000); Cascade-Siskiyou, Or. (June 9, 2000); Craters of the Moon, Idaho (expansion Nov. 9, 2000); Giant Sequoia National Monument, Cal. (Apr. 15, 2000); Grand Canyon-Parashant National Monument, Ariz. (Jan. 11, 2000); Grand Staircase-Escalante National Monument, Utah (1996); Hanford Reach, southeast Wash. (June 9, 2000); Ironwood Forest, near Tucson, Ariz. (June 9, 2000); Pinnacles National Monument, Calif. (expansion Jan. 11, 2000); Vermilion Cliffs, Ariz. (Nov. 9, 2000); Sonoran Desert National Monument, Ariz. (Jan. 17, 2001); Carrizo Plain National Monument, Calif. (Jan. 17, 2001); Minidoka Internment National Monument, Idaho (Jan. 17, 2001); Upper Missouri Breaks National Monument, Mont. (Jan. 17, 2001); Pompeys Pillar National Monument, Mont. (Jan. 17, 2001); Kasha-Katuwe Tent Rocks National Monument, N.M. (Jan. 17, 2001); U.S. Virgin Islands Coral Reef National Monument (Jan. 17, 2001); Buck Island National Monument, U.S. V.I. (expansion Jan. 17, 2001). Wilderness Soc'y, *America's Outback: The National Monuments of the Bureau of Land Management*, at [http://www.wilderness.org/standbylands/monument\\_list.htm](http://www.wilderness.org/standbylands/monument_list.htm) (last visited May 15, 2002). For an analysis and criticism of the Clinton administration's tactics involving its setting aside the largest monument of its tenure, the Grand Staircase-Escalante National Monument, see James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483 (1999). Rasband criticizes the administration's actions to the extent the actions seemingly circumvented the legislative process for setting aside wilderness areas. He notes that the effort to establish the monument was a top-down directive aimed more at obtaining political allies than proposing a unified effort that would mutually benefit all parties intimately involved. See *id.* at 484 n.3, 509 n.126.

10. See 16 U.S.C. §§ 1131-1132 (1994). The statute provides that "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act." *Id.* § 1131.

11. See William J. Clinton, Memorandum for the Secretary of Agriculture, Subject: Protection of "Roadless" Areas (Oct. 13, 1999), at [http://roadless.fs.fed.us/documents/chief\\_memorandum.htm](http://roadless.fs.fed.us/documents/chief_memorandum.htm) (last visited June 11, 2002).

Evaluation (RARE) II and subsequent surveys as de facto wilderness areas.<sup>12</sup> The proposed action would place wilderness-like protections on 58.5 million acres, roughly thirty-one percent of all lands under the Forest Service's jurisdiction.<sup>13</sup> Idaho will be particularly affected; the administrative wilderness action will protect approximately forty-six percent of its remaining Forest Service lands.<sup>14</sup>

The administration's actions have been criticized by Western interests and Western Congressmen, but lauded by many environmental groups<sup>15</sup> and others who do not have a direct economic stake<sup>16</sup> in the lands affected by the administration's preservationist actions.<sup>17</sup> Certain Western lawmakers, whose constituents adamantly opposed Clinton's action, have

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12. See Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,246 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) (setting forth the final rules initially called for by Clinton, *supra* note 11).

13. See U.S. DEP'T OF AGRIC., FOREST SERVICE ROADLESS AREA CONSERVATION, FINAL ENVIRONMENTAL IMPACT STATEMENT 1-1 (2000).

14. See *id.* at 3-4, A-3. The 9.3 million acres in Idaho comprise only 15 percent of the proposed administrative wilderness; however, proportionally, Idaho is the most adversely affected state with 46 percent of its remaining Forest Service lands being protected as administrative wilderness. *Id.*

15. Interestingly, environmentalists, looking for financial backing in their effort to support the initiative, have persuaded a "dozen of the nation's wealthiest foundations [to give] \$9.7 million to more than three dozen environmental groups seeking to influence the proposal." Michael Milstein, *Clinton Locks Up Third of U.S. Forests*, OREGONIAN, Jan. 5, 2001, at A1. See also *Funding of Environmental Initiatives and Their Impact on Rural Communities: Oversight Hearing Before the Subcomm. on Forests and Forest Health of the House Comm. on Res.*, 106th Cong. 87 (2000) (outlining that the basis of the hearing was to investigate the influx of money to environmental groups, namely the Pew Charitable Trusts, who were attempting to influence Clinton to protect national forests and pursue the roadless initiative through the Heritage Forest Campaign). This fact becomes relevant when considering that one of the objectives of Michael Dombeck, then Chief of the Forest Service, was to manage the national forests with citizen cooperation. The Forest Service has made a push to "turning more of its attention to foundations, special-interest groups, even corporations, for help in caring for the national forests." Brent Israelsen, *Forest Service Recruiting "Partners" in Environment; Forest Service Seeks to Expand Private Partners*, SALT LAKE TRIB., Jan. 22, 1999, at C1. A distinct conflict of interest arises when the Forest Service seeks funding from special interest groups, which may, in part, sway the Forest Service's decision-making process.

16. The counter argument is that preservation will infuse money into local communities through tourism and recreation; however, the land set aside is not a park of significant interest. The rule affects millions of acres (one-third of all Forest Service lands) spread across the United States. The tourism argument is certainly tenuous in light of the lack of tourist concentration and the number of attractions that these lands cover. These areas are already roadless, yet the current level of tourism can hardly be said to be significant enough to replace current extractive industries.

17. See Rocky Barker, *New Idaho Timber Sale Sparks Roadless Debate; Ban on Logging Would Limit Options for Forest Managers*, IDAHO STATESMAN, Jan. 24, 2000, at 1A (outlining both proponents' and opponents' views on Clinton's roadless initiative).

threatened to use both the court system and legislation to thwart the administration's actions with respect to the Forest Service's roadless policy Final Rule.<sup>18</sup> In the West, President Clinton's roadless initiative adds more tinder to the already blazing federalism fire.

This article discusses legitimate power to preserve wilderness on one hand and unacceptable methods to circumvent public participation and congressionally outlined mandates for wilderness protection on the other hand. Part II of this article recounts the background of the debate including prior Forest Service attempts to designate lands suitable for congressional wilderness protection. Part III analyzes how the roadless rule circumvents Congress's power to create wilderness areas and how the administration circumvented public participation in the rulemaking process. This part also compares administrative wilderness protections granted by the rule to wilderness protections granted by the Wilderness Act. This article concludes by suggesting that only Congress has the authority to create wilderness areas and such power should remain in Congress. Congress, much more than the executive branch or an administrative agency, has the resources to research the relevant issues, properly engage the public, and protect minority interests that may be adversely affected by wilderness designations.

## II. BACKGROUND

Attempts at preserving national forestlands have taken many forms over the last three-quarters of a century. As a result of Aldo Leopold's work, the Forest Service set aside the first federal forestlands as administratively designated "wilderness areas" in 1924 in the Gila National Forest in New Mexico.<sup>19</sup> Subsequently, the Forest Service administratively created "primitive areas" that restricted use by allowing limited woodcutting and minor roads and trails but prohibiting motorized vehicles and commercial timber harvesting; these administrative efforts at wilderness preservation ended with the beginning of the Second World War.<sup>20</sup> After World War II, efforts to create public and federal support for protection of "wild" wilderness areas culminated in the passage of the 1964 Wilderness Act, a piece of legislation nine years in the making and

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18. See *id.*; Press Release, Jim Hansen, Clinton and Gore Make Final Push to Close National Forest (Nov. 14, 2000), 2000 WL 7980917; Press Release, John E. Peterson, Congressman Peterson Asks President-Elect to Seek Reversal of Roadless Policy (Jan. 12, 2001), 2001 WL 5419109; Press Release, Pete V. Domenici, Domenici Foresees Changes to Clinton's "Roadless Forests" Rule (Jan. 5, 2001), 2001 WL 5418997.

19. See H. REP. NO. 88-1538, at 7 (1964); Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 296 (1966).

20. See McCloskey, *supra* note 19, at 296-97.

vigorously debated by conflicting interests including opposing extractive industries and supporting protectionist groups.<sup>21</sup> The Wilderness Act declared that Congress intended "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."<sup>22</sup> As part of the process, the Act called for the immediate designation of certain areas already outlined as "wilderness" that were, as of the time of the act, essentially treated as wilderness areas. This action resulted in immediate wilderness designation of more than 9.1 million acres.<sup>23</sup> The Act required that within ten years both the Secretary of the Interior and the Secretary of Agriculture were to study certain areas under their respective jurisdictions and recommend portions of those lands for wilderness designation by Congress.<sup>24</sup> The Wilderness Act also designated Congress as the sole governmental entity with the power to preserve public lands as wilderness.<sup>25</sup>

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21. *See id.* at 297-301.

22. 16 U.S.C. § 1131(a) (1994). The Act defines wilderness in more of an aesthetic manner than a technical manner:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c) (1994).

23. *See* Michael McCloskey & Jeffery Desautels, *A Primer on Wilderness Law and Policy*, 13 ENVTL L. REP., ENVTL. L. INST. 10278, 10279 (1983) (noting that nine million acres were placed under wilderness designation with the enactment of the Wilderness Act); 16 U.S.C. § 1132(a) (1994) ("All areas within the national forests classified at least 30 days before September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as 'wilderness,' 'wild,' or 'canoe' are hereby designated as wilderness areas"). *See also* H. REP. NO. 88-1538, at 8 (calculating the total acreage to be designated by the 1964 Wilderness Act, including wilderness, wild, and canoe areas, to be 9,120,941 acres).

24. *See* 16 U.S.C. § 1132(b), (c).

25. *See id.*

The Act instructed the Secretary of Agriculture to review only those areas in the National Forest system that were designated as "primitive."<sup>26</sup> The Act similarly instructed the Secretary of the Interior to review all roadless lands contained in parks and wildlife refuges under his jurisdiction for possible wilderness designation. In both cases, Congress determined that the respective secretaries should only consider acreages that composed five thousand contiguous acres or more.<sup>27</sup> While the Act seemed only to require the Forest Service to review primitive areas, the Tenth Circuit Court in *Parker v. United States*<sup>28</sup> held that the Wilderness Act required that *all* areas suitable for wilderness designation be left unimpaired pending wilderness review so as not to prevent their eventual inclusion in congressionally designated wilderness areas.<sup>29</sup> The court noted that altering the public land in question could impair the President's ability to recommend those public lands for later congressional wilderness designation.<sup>30</sup> The Forest Service, not knowing what to do after the *Parker* decision, started to inventory all Forest Service lands to determine which lands should be considered for wilderness designation.

#### A. Prior Attempts at Determining Wilderness Suitability: RARE I and RARE II

In 1967, the Forest Service voluntarily embarked on a nationwide inventory of national forest system lands to determine which lands were suitable for wilderness designation under the Wilderness Act.<sup>31</sup> The Forest Service contemplated a study and inventory process that went far beyond the requirements of the Act, which merely obligated the Forest Service to review the suitability of the Forest Service's administratively designated "primitive" areas to determine whether such lands should be included in

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26. The Act states,  
The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President.

§ 1132(b).

27. See §§ 1131(c), 1132(c).

28. 448 F.2d 793 (10th Cir. 1971).

29. See *id.* at 797-98. The Court's holding was restricted to areas with "contiguous lands which seem to have significant wilderness resources." *Id.* (quoting Forest Service Manual § 2321(1)).

30. See *id.* at 796.

31. See GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCE LAW 1040-41 (3d ed. 1992).



the wilderness program.<sup>32</sup> The "primitive" areas reviewed by the Forest Service would become wilderness areas after presidential recommendation to Congress only upon *affirmative* congressional action.<sup>33</sup> In response to the congressional mandate to review "primitive" areas, the Forest Service began what it called the "Roadless Area Review Evaluation" (RARE I) as an effort to single out wilderness areas for wilderness designation and concurrently make an inventory of areas that the Forest Service could continue to manage for multiple-use purposes.<sup>34</sup> The initial RARE I inventory process ended in 1972,<sup>35</sup> culminating five years of work to classify and identify 56 million acres of land that the Forest Service deemed suitable for wilderness protection. Due in part to the District Court for the Northern District of California's decision in *Sierra Club v. Butz*,<sup>36</sup> the five-year initial RARE I inventory was scrapped after much criticism and litigation over the Forest Service's evaluation and allocation of forestland to wilderness and non-wilderness areas and the failure to prepare environmental impact statements (EIS) to accompany RARE I wilderness and non-wilderness study areas.<sup>37</sup> *Parker* required the Forest Service to refrain from impairing lands contiguous to "primitive" areas and *Sierra Club* required that if the Forest Service was to make management plans respecting a parcel of Forest Service land, the agency needed to prepare a National Environmental Policy

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32. See 16 U.S.C. § 1332(b) (1994). The Act requires the Forest Service to review only "primitive" areas; however, nothing in the Act restricts the President from suggesting additional lands to Congress for wilderness designation. The President may extend "existing boundaries of primitive areas or recommend the addition of any contiguous area of national forest lands predominantly of wilderness value." *Id.*

33. See *id.*

34. See *California v. Block*, 690 F.2d 753, 757-58 (9th Cir. 1982). The chance that any litigation arising over the Forest Service's affirmative action to inventory and classify lands suitable for wilderness designation would have been very low had the Forest Service only tried to accomplish what Congress had asked it to do. Instead, the Forest Service embarked on a long, costly process that was rendered moot twice.

The Forest Service's action was also due in part to *Parker v. United States*, 448 F.2d 793, 797 (10th Cir. 1971) (noting that allowing a timber sale to go through would prevent "preserv[ation] [of wilderness value] for consideration at the executive and congressional level"). In other words, the Forest Service was taking away the possibility that executive and legislative branches could designate the area as wilderness.

35. *Id.*

36. 3 ENVTL. L. REP. 20,071 (N.D. Cal. 1972).

37. See *Block*, 690 F.2d at 758 (noting that "this effort ended when a federal court enjoined development pursuant to the plan until the Forest Service completed an EIS"). See also *California v. Bergland*, 483 F. Supp. 465, 471 (E.D. Cal. 1980) (noting that the "RARE I program was not supported by an environmental impact statement and its methodology was severely criticized"); *Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973) (holding that the Forest Service could not proceed with a timber sale without the requisite National Environmental Policy Act EIS).

Act<sup>38</sup> (NEPA) compliant EIS. In the *Sierra Club* court's view, RARE I did not comply with NEPA.<sup>39</sup>

Subsequently, the Forest Service began a post-RARE I survey of the Forest Service lands, this time filling in administrative holes and attempting to comply with NEPA in the study and scoping process. In 1977, the Forest Service reassessed Forest Service lands for wilderness designation, calling the second inventory process RARE II.<sup>40</sup> The RARE II inventory process ended with a final EIS in 1979 that identified approximately 56.4 million acres as potential wilderness areas but recommended only 15.6 million acres as wilderness.<sup>41</sup> The RARE II study classified the remaining 40.8 million acres as "potential wilderness" and "non-wilderness," with 10.8 million acres reserved for further wilderness study and 36 million acres reserved for uses other than wilderness.<sup>42</sup>

While the Forest Service made a serious attempt to comply with NEPA in the RARE II process, the Ninth Circuit held in *California v. Block*<sup>43</sup> that the RARE II process violated NEPA because the RARE II EIS failed to adequately analyze specific sites, consider a sufficient range of alternatives, and give the public an adequate opportunity to comment on the process.<sup>44</sup> These NEPA violations are similar to the problems present in the Clinton roadless initiative. The holding by the Ninth Circuit in *Block* was restricted to federal forestlands within California,<sup>45</sup> no other decisions by courts outside of California have been as far reaching. Because of the *Block* decision, the Forest Service contemplated doing a third evaluation, RARE III, to be completed by September 30, 1985,<sup>46</sup> but the Forest Service finally backed away from the proposal. Since RARE II, Congress has not acted in a concerted manner to designate the large, contiguous tracts of RARE II wilderness-recommended land as wilderness areas but has instead chosen to tackle the wilderness issue on a state-by-state basis. In place of the courts restricting activities on federal lands due to wilderness concerns, Congress enacted several state wilderness bills aimed at designating wilderness areas

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38. 42 U.S.C. §§ 4321-4361 (1994). NEPA is a planning statute that forces federal agencies to consider public and environmental concerns before proceeding with "major" agency actions.

39. See *Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d at 1250-51.

40. See COGGINS & WILKINSON, *supra* note 31, at 791.

41. See McCloskey & Desautels, *supra* note 23, at 10,279.

42. See *id.* The Forest Service created three classifications in which to place land: Wilderness, Further Planning, and Nonwilderness. See *California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982).

43. 690 F.2d at 758.

44. See *id.* at 760-62, 765, 772.

45. *Id.* at 760 (noting that "California specifically challenged the Forest Service decision to designate forty-seven RARE II areas in California as Nonwilderness").

46. McCloskey & Desautels, *supra* note 23, at 10,285.

on a state-by-state basis and "freeing-up" remaining federal forestlands for other non-wilderness uses including utilization by extractive industries.<sup>47</sup>

## B. Clinton's Roadless Area Proposal

On October 13, 1999, President Clinton directed the Secretary of Agriculture to solicit public comments and develop and implement regulations that would protect currently inventoried roadless areas and smaller uninventoried areas as the Forest Service determined necessary.<sup>48</sup> The President unilaterally declared his intent to preserve the land for "future generations" not by using the traditional methods of the Wilderness Act and congressional consent but by instructing the Forest Service to preserve inventoried roadless areas in a semi-wilderness state using agency action.<sup>49</sup> Initial estimates predicted the roadless areas set aside by the President's initiative would be 40 million acres,<sup>50</sup> however, the actual amount of acreage to be protected under the rule is about 58.5 million acres,

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47. See George Cameron Coggins & Robert L. Glicksman, *Wilderness Act of 1964: Reflections, Applications, and Predictions: Content: I. Reflection and Prediction: Wilderness in Context*, 76 DENV. U. L. REV. 383, 391, 392 (1999). See, e.g., Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, § 102(b), 98 Stat. 2807 (1984). Part of the purpose of the Wyoming Wilderness Act was to "insure that certain National Forest System lands in the State of Wyoming be made available for uses other than wilderness in accordance with applicable national forest laws and planning procedures." *Id.*

48. See Clinton, *supra* note 11.

49. See *id.*

Specifically, I direct the Forest Service to develop, and propose for public comment, regulations to provide appropriate long-term protection for most or all of these currently inventoried "roadless" areas, and to determine whether such protection is warranted for any smaller "roadless" areas not yet inventoried. The public, and all interested parties, should have the opportunity to review and comment on the proposed regulations.

*Id.* Public reactions to the proposal varied from full support by environmental groups to absolute dissatisfaction by other interests, especially extractive industries and their representatives. See Anne Gearan, *Clinton Soothes Timber Industry*, AP ONLINE, Oct. 13, 1999, available at 1999 WL 28128127 (noting congressional opposition by Rep. Robert Goodlatte (R-Va.) stating, "Issuing decrees from a mountaintop is not the way democracy is supposed to work," and, "With the stroke of a pen, Clinton will circumvent the people's representatives in Congress, who he knows would never support such a proposal in the legislative process."); Lee Davidson, *Clinton's New Utah Shock*, DESERET NEWS, Oct. 13, 1999, at A1 (noting that 35 Republicans, including Utah's and Idaho's congressional delegations, joined in a letter to the Clinton administration vowing to fight the proposed initiative).

50. See Gearan, *supra* note 49; Catherine Lazaroff, *Clinton Safeguards 40 Million Roadless Acres*, ENVT'L. NEWS SERV. (Valentine Holdings Ltd.), Oct. 13, 1999, available at 1999 WL 29705260.

more than thirty percent of all Forest Service lands.<sup>51</sup> Subsequently the Forest Service issued a notice of intent to prepare an environmental impact statement considering four proposals: no action, prohibiting new road construction and reconstruction in roadless areas, prohibiting new road construction and reconstruction in roadless areas and prohibiting commercial timber harvesting, and the prohibition of all activities subject to existing rights.<sup>52</sup> In spite of the enormous amount of acreage involved and the number of interested parties, the Forest Service limited the initial NEPA solicitation and scoping process to a sixty-day period from the notice of intent published in the Federal Register.<sup>53</sup> The subsequent comment period on the draft EIS and the proposed rule was also only about a sixty-day period.<sup>54</sup> The Forest Service, without specifically publishing the areas considered for roadless protection, proceeded with the deadlines even though many Western states requested an extension of the comment period and more information, such as maps showing the areas to be considered for roadless protection.<sup>55</sup> Interested parties and government agencies and states were given just over two months to respond to an action that could potentially affect 30 percent of all Federal lands. The speed at which the Forest Service pushed the rule through the NEPA process indicates that the

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51. See Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. § 294) (noting that the final rule will provide roadless protections for some 58.5 million acres); U.S. DEP'T OF AGRIC., *supra* note 13, at ES-1 (indicating the final acreage estimated to be protected under the rule to be 58.5 million acres).

52. National Forest Systems Roadless Areas, 64 Fed. Reg. 56306, 56307 (Oct. 19, 1999).

53. *Id.* The Forest Service asked for comments on the "nature and scope of the environmental, social, and economic issues related to the proposed rulemaking that should be analyzed"; however, as alleged by the State of Idaho in its December 30, 1999, complaint, the scoping period was too short and did not grant the State of Idaho and related plaintiffs sufficient time to make meaningful comments and suggestions to the Forest Service's proposed rulemaking. See Complaint for Idaho at 6, 17, *Idaho v. United States Forest Serv.*, No. CV 99-611-N-EJL, slip op. (D. Idaho Feb. 18, 2000).

54. See Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276 (May 10, 2000). The notice in the Federal Register, published on May 10, 2000, indicated that the time period for receiving comments on the draft EIS and the proposed roadless rule would end on July 17, 2000.

55. *Id.* at 30,276. See also Matt Kelly, *Leavitt Leads Governors in Asking Clinton for More Input on Roadless Forest Tracts*, SALT LAKE TRIB., Feb. 29, 2000, at A3 (reporting that Western governors wanted more input on the roadless initiative as the Western states felt they were "left out of the loop on the roadless initiative and other federal land-use plans").

Another reason for the delay may have been, in part, an attempt to delay implementation of the roadless rule until a new "friendlier" administration took office. Unfortunately, however, the fact remains that a sixty-day comment period was hardly sufficient considering the amount of land under consideration. Regardless of the chess moves, this argument is precisely why agencies and administrations should not be in the business of setting aside wilderness. Much less subsequent change and in-fighting would result if Congress continued to make the decisions regarding wilderness.

agency was more interested in creating a final rule than seeking input from interested parties.

### C. The Roadless Rule (Roadless Area Conservation Final Rule)

The Roadless Area Conservation Final Rule (RACR), to be effective May 12, 2001,<sup>56</sup> places a national-level moratorium on two controversial "landscape altering" activities by prohibiting road building and commercial timber harvesting in inventoried roadless areas.<sup>57</sup> Roads already in existence that are necessary for the long-term transportation purposes of the Forest Service plan will continue, but additional construction of roads in inventoried roadless areas will be prohibited except for a small number of exceptions outlined in the final rule.<sup>58</sup> RACR also prohibits all forms of commercial timber harvesting, while allowing non-commercial harvesting for limited purposes.<sup>59</sup> The areas considered for roadless treatment include

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56. See Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8,899 (Feb. 5, 2001). In contrast to the RARE I and RARE II evaluations aimed at determining whether certain roadless areas are suitable for wilderness protection, the roadless initiative seeks to perpetually preserve all roadless areas as administrative wilderness. RARE I and RARE II did not attempt to set aside all roadless areas for wilderness protection. The RARE II evaluation attempted to merely set aside a portion of roadless areas for congressional wilderness preservation. See McCloskey & Desautels, *supra* note 23, at 10,279.

57. See Special Areas, Roadless Area Conservation, 66 Fed. Reg. 3244, 3272-74 (Jan. 12, 2001) (to be codified at 36 C.F.R. § 294). See also U.S. DEP'T OF AGRIC., *supra* note 13 at 1-15 (stating that the "Agency determined that only those uses and activities likely to significantly alter landscapes, including habitat fragmentation and changes in native plant and animal communities on a national scale, would be considered for prohibition in this proposal").

58. See Special Areas, Roadless Area Conservation, 66 Fed. Reg. at 3,272-73 (Jan. 12, 2001). According to the Final Rule, roads will be permissible in cases where "a road is needed to protect public health and safety in cases of [a]...catastrophic event that...would cause the loss of life or property," to perform clean-up events under CERCLA, "pursuant to reserved or outstanding rights, or as provided for by statute or treaty," where "[r]oad realignment is needed to prevent irreparable resource damage that...cannot be mitigated by road maintenance," where "[r]oad reconstruction is needed to implement a road safety improvement project," as necessary for a Federal Aid Highway project, and where "a road is needed in conjunction with the continuation, extension, or renewal of a mineral lease." *Id.*

59. See *id.* at 3,273. The Final Rule restricts timber harvesting to "infrequent" circumstances where the "cutting, sale, or removal of generally small diameter timber is needed" in only the following circumstances: "[1] to improve threatened, endangered, proposed, or sensitive species habitat; or [2] [t]o maintain or restore the characteristics of ecosystem," or [3] as necessary to the "implementation of a management activity not otherwise prohibited," or [4] where the "cutting, sale, or removal of timber is needed and appropriate for personal or administrative use," or [5] where the "roadless characteristics have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest" where "both the road construction and subsequent timber harvest must have occurred after the area was designated an inventoried roadless area and prior to January 12, 2001." *Id.*

areas inventoried under RARE II and other inventories completed through land-management and other large-scale assessments.<sup>60</sup>

The rule further notes that "[t]he intent of this final rule is to provide lasting protection for inventoried roadless areas within the National Forest System in the context of multiple-use management,"<sup>61</sup>—protections strikingly similar to wilderness protection, an area of public lands law that Congress expressly reserved to itself. RACR places a national-level moratorium on all road construction and timber harvesting in the national forests effective May 12, 2001,<sup>62</sup> but the Final Rule does not place further restrictions on other activities at the national level.<sup>63</sup> Managers at the regional and local level will still be able to create and implement further restrictions on other activities as the regional and local-level managers see fit.<sup>64</sup>

The implementation date of the final rule, initially set for March 13, 2001, 60 days from its initial publication in the Federal Register,<sup>65</sup> was delayed by President Bush's "Regulatory Review Plan" until after the new President's staff had a chance to review the proposed actions and rule makings.<sup>66</sup> RACR was then to become effective on May 12, 2001.<sup>67</sup> In addition to the Bush administration's attempt to delay the plan, several states filed suit to permanently enjoin the rule from becoming effective.<sup>68</sup>

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60. See U.S. DEP'T OF AGRIC., *supra* note 13 at 1-5.

61. *Id.*

62. See *infra* part III.B.

63. See *infra* part III.B.3.

64. See Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3,259 (Jan. 12, 2001) (noting that "Local responsible officials' discretion to initiate land and resource management plan amendments, as deemed necessary, would not be limited by [the Final Rule]").

65. See *id.* at 3,244. Initially, publication of the Final Rule on January 12, 2001, would have allowed the Rule to become effective 60 days later on March 13, 2001.

66. See Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7,702 (Jan. 24, 2001). The President's memorandum effectively delayed any "regulations that have been published in the [Federal Register] but have not taken effect" by "temporarily postpon[ing] the effective date of the regulations for 60 days." *Id.*

67. See Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8,899 (Feb. 5, 2001) (to be codified at 36 C.F.R. pt. 294).

68. See, e.g., Complaint for Idaho, Idaho v. United States Forest Serv., No. CV 99-611-N-EJL, slip op. (D. Idaho Feb. 18, 2000). Several other Western States have filed motions for leave to file amicus curiae briefs in the Idaho case including Colorado (State of Colorado's Motion to Participate as Amicus Curiae in Support of Idaho's Motion for Preliminary Injunction and Statement of Position as Amicus Curiae, CIV01-011-N-EJL, (Mar. 27, 2001)); Wyoming (State of Wyoming's Motion for Leave to Appear as Amicus Curiae and to Join in State of Colorado's Statement of Position, CIV01-011-N-EJL, (May 3, 2001)); North Dakota (State of North Dakota's Motion to Appear as Amicus Curiae and to Join in State of Colorado's Statement of Position, CIV01-011-N-EJL, (May 10, 2001)); and Montana (Motion of the Governor of the State of Montana for Leave to Appear as Amicus Curiae in Support of the State of Colorado's Statement of Position, CIV01-011-N-EJL, (May 1, 2001)). In response to

The District Court for the State of Idaho granted a preliminary injunction enjoining implementation of RACR and plaintiffs appealed the decision to the Ninth Circuit Court of Appeals where the appeal is currently awaiting action.<sup>69</sup>

#### **D. The Administration's Broader Approach to Protecting Forest Service Lands as Administrative Wilderness**

In combination with RACR, the Forest Service has been working on a broader multi-faceted process and means of creating administrative wilderness and regulating roads. At nearly the same time as the publication of RACR, the Forest Service published two other closely related rules, the Planning Rule and the proposed Transportation Rule. RACR sets aside roadless areas in an administrative wilderness state, the new Planning Rule places greater emphasis on preserving those roadless areas not set aside by RACR as additional administrative wilderness, and the Transportation Rule outlines the process by which the Forest Service will begin to emphasize decommissioning current roads and inhibiting the construction of new roads, potentially creating more roadless areas for later administrative wilderness protection.<sup>70</sup> Even though the three rules have slightly different purposes, together they promote wilderness-like treatments of national forest land by regulating and prohibiting road construction on Forest Service lands—actions that should be addressed cumulatively because they are part of an overall plan to bypass Congress and promote the creation of administrative wilderness.

##### *1. The Planning Rule (National Forest System Land and Resource Management Planning)*

The current planning rule,<sup>71</sup> published in the Federal Register on November 9, 2000, replaces the old rule adopted in 1982 and now emphasizes administrative wilderness protection for unroaded,

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Idaho's motion for a preliminary injunction enjoining the implementation of RACR, the court made its findings, see *Idaho ex. rel. Kempthorne v. United States Forest Serv.*, 142 F. Supp. 2d 1248 (D. Idaho 2001), and subsequently entered the injunction enjoining RACR. See *Idaho v. United States Forest Serv.*, CIV01-011-N-EJL, Slip op. at 4 (D. Idaho May 10, 2001). The preliminary injunction has been appealed to the Ninth Circuit. Preliminary Injunction Appeal, *Idaho v. United States Forest Serv.*, CIV01-011-N-EJL (D. Idaho May 11, 2001).

69. See *State of Idaho v. United States Forest Serv.*, No. 01-011, slip op. at 4 (D. Idaho May 10, 2001).

70. See *id.*

71. National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514 (Nov. 9, 2000) (codified at 36 C.F.R. pts. 217, 219).

uninventoried lands in addition to RARE II inventoried wilderness areas.<sup>72</sup> The planning requirement would create more administrative wilderness in addition to the roadless areas preserved under RACR.<sup>73</sup> The Forest Service first published the proposed planning rule at the same time as the proposal to create RACR<sup>74</sup> and subsequently published the Final Planning Rule at nearly the same time as the final RACR rule, a little more than a year after the prior proposal.<sup>75</sup> The timing of these two rules suggests that the rules were closely associated and part of a larger effort by the Forest Service to further preserve roadless areas and create administrative wilderness.

## 2. The Transportation Rule

The Forest Service proposed the Transportation Rule to "revise regulations concerning the development, use, maintenance, and management of the national forest transportation system."<sup>76</sup> The rule, however, also provides for decommissioning roads, which will potentially lead to an increase in unroaded areas that will then be evaluated under the Planning Rule for administrative wilderness protection. After implementation of the new regulations, the Forest Service will decommission any roads in excess of the required minimum and will begin reclamation efforts to restore the decommissioned areas to a natural state,<sup>77</sup>

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72. See *id.* at 67,571. The new planning rules place greater emphasis on creating management plans for the forests to first determine whether the particular "roadless" area is suitable for wilderness designation.

73. See *id.* Unroaded areas are "[a]ny area, without the presence of a classified road, of a size and configuration sufficient to protect the inherent characteristics associated with its roadless condition. Unroaded areas do not overlap with inventoried roadless areas." *Id.* at 67,581.

74. See National Forest System Land and Resource Management Planning, 64 Fed. Reg. 54,074 (Oct. 5, 1999) (codified at 36 C.F.R. pts. 217, 219).

75. See National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514 (Nov. 9, 2000) (codified at 36 C.F.R. pts. 217, 219).

76. Administration of the Forest Development Transportation System; Prohibitions; Use of Motor Vehicles Off Forest Service Roads, 65 Fed. Reg. 11,680 (Mar. 3, 2000) (codified at 36 C.F.R. pts. 212, 261, 295). The Forest Service initially published a notice of intent (NOI) in the Federal Register at 63 Fed. Reg. 4,351 (Jan. 28, 1998). The NOI proposed the interim suspension of all road building for the lesser of 18 months or the adoption of a final transportation policy while the Forest Service developed new, improved regulations for the creation and decommission of Forest Service roads. The interim rule, published at 64 Fed. Reg. 7,290 (Feb. 12, 1999), became effective on March 1, 1999, and effectively prohibited all new road construction in roadless areas inventoried under RARE II and roadless areas of 1000 acres or greater bordering congressionally designated wilderness areas or bordering RARE II inventoried roadless areas.

77. See Administration of the Forest Development Transportation System; Prohibitions; Use of Motor Vehicles Off Forest Service Roads, 65 Fed. Reg. 11,680. The Transportation Rule proposes the decommission of roads "that are not needed to meet forest resource management objectives and that, therefore, should be decommissioned. Decommissioning roads involves



a natural state that can now be preserved as administrative wilderness in conjunction with the Planning Rule.

### 3. *Cumulative Impacts of the Three Rules*

RACR administratively places 58.5 million acres of national forests off limits for any type of use incompatible with wilderness areas.<sup>78</sup> Managers are limited in planning to a RARE III-type wilderness evaluation and inventory through a planning process that requires managers to set aside unroaded and inventoried administrative wilderness areas for administrative wilderness protection. The Planning Rule calls for treating these "unroaded" areas as de facto wilderness areas, preventing Forest Service officials from any activities on these lands that may detract from potential wilderness designation.<sup>79</sup> The net effect of wilderness-related portions of the Planning Rule complement the effects of RACR and the proposed Transportation Rule in securing administratively created wilderness areas without Congress's pre-requisite approval.

## III. ANALYSIS

### A. Clinton's Actions Create a "De Facto" Administrative Wilderness Area

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.... For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas'...."<sup>80</sup> President Clinton's roadless rules create de facto wilderness areas even though the Wilderness Act reserves that power to Congress, not the executive branch.

#### 1. *Contravention of the Wilderness Act and Congressional Intent*

In so far as Clinton's roadless-initiative was a step in conserving millions of acres of public forestland under the Forest Service's jurisdiction, the plan, by directing the Forest Service to set aside roadless areas, used the Forest Service's discretionary power to create and manage roadless areas

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restoring them to a more natural state through activities such as reestablishing former drainage patterns, stabilizing slopes, and restoring vegetation." *Id.* at 11,683.

78. See *supra* note 51 and accompanying text.

79. See Administration of the Forest Development Transportation System, Prohibitions, Use of Motor Vehicles Off Forest Service Roads, 65 Fed. Reg. 11,680.

80. 16 U.S.C. § 1131(c) (1994).

in such a manner as to create a "defacto wilderness area."<sup>81</sup> Congress explicitly reserved to itself the sole authority to designate wilderness areas, as expressed in the statute and the accompanying legislative history.<sup>82</sup>

The House and Senate versions of the Wilderness Bill differed dramatically. The earlier versions of the Senate bill allowed the Secretary of Agriculture or the Secretary of the Interior to designate wilderness areas with Congress retaining the power to veto the secretaries' wilderness designations. The House counterpart reserved the power to set aside wilderness areas solely in Congress.<sup>83</sup> The House held up its version of the bill in the legislative process until a compromise could be drawn between the House and Senate versions; the final bills passed by the two houses agreed to vest the authority to designate wilderness areas solely in Congress.<sup>84</sup> No one person, secretary, or agency, including the chief executive officer, had the authority to reserve federal lands as wilderness areas.<sup>85</sup> The House Report further notes that "by establishing explicit legislative authority for wilderness preservation, Congress is fulfilling its responsibility under the U.S. Constitution to exercise jurisdiction over public lands."<sup>86</sup> The Wilderness Act and legislative history clearly show that only Congress has the power to create and set aside federally designated wilderness areas.

The Wilderness Act shows two purposes in preserving wilderness areas in their pristine states. The first reason for wilderness preservation is to conserve wilderness in its natural and unmodified condition without human settlement and mechanization.<sup>87</sup> Congress's second reason for

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81. See James Gerstenzang, *Clinton to Ban Building Roads in U.S. Forests*, L.A. TIMES, Oct. 13, 1999, at A1.

82. But see McCloskey, *supra* note 19, at 305-06. McCloskey argues that ambiguities in the Act create the uncertainty as to whether an executive order or agency action can create wilderness-like areas with only the wilderness "label" to be applied by affirmative congressional action. The House Report clearly articulates the concerns the House saw with respect to federal administrative agency actions. The House was concerned that executive or agency action would not take in to consideration local and regional interests. See H.R. REP. NO. 88-1538, at 8 (1964). Clearly, the top-down approach taken by the Forest Service and President Clinton with respect to the roadless initiative squarely contravenes the intent of the Wilderness Act.

83. Daniel Rohlf & Douglas L. Honnold, *Managing the Balance of Nature: The Legal Framework of Wilderness Management*, 15 ECOLOGY L.Q. 249, 251 n.14 (1998).

84. See *id.*

85. Presidents in office after the passage of the Wilderness Act have increasingly used congressionally designated power as ascribed in the Antiquities Act to set aside large acreages in the form of national monuments, partially circumscribing congressional intent of the Wilderness Act. See *supra* note 9 for a list of the monuments set aside by President Clinton during his presidential tenure.

86. H.R. REP. NO. 88-1538, at 8 (1964).

87. See 16 U.S.C. § 1131(a) (1994).

wilderness designation is for the enjoyment of future generations.<sup>88</sup> In either case, Congress reserved the power to designate wilderness because Congress would "act in the national interest with due regard to regional and local interests."<sup>89</sup> Clinton's roadless initiative purported to include input from regional and locally affected agencies, groups, and businesses; however, the final roadless initiative rulemaking not only precluded all road construction and reconstruction in roadless areas,<sup>90</sup> but also all forms of commercial timber harvesting<sup>91</sup> at the expense of local economies and businesses.

The Wilderness Act requires congressional action to prevent administrative attacks on or undue administrative creations of wilderness areas. The House worried that differences in administrative agendas and goals would adversely affect wilderness preservation.<sup>92</sup> Administratively designated wilderness poses two problems that may be exacerbated by changes from one president or Forest Service administration to the next. The first problem, and the one over which the original Congress most worried, might occur when a later administration abolishes a prior administration's "wilderness" area.<sup>93</sup> From one administration to the next, lobbying pressures and the President's personal values and agenda contribute to differing land management policies. In the extreme scenario, each new administration would undue the prior administration's wilderness activities and create wilderness areas of its own. In fact, current efforts by the Bush Administration to "undue" the Clinton administration's wilderness plans underscore Congress's concerns and the need for congressional action instead of agency rulemakings. The new administration has already delayed the implementation of RACR pending review under President Bush's "Regulatory Review Plan," adding to the confusion already induced by President Clinton's roadless initiative.<sup>94</sup> The wilderness fiasco, as administered by agencies, creates a continual state of flux with respect to land management plans.

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88. *See id.*

89. H.R. REP. NO. 88-1538, at 8 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3615, 3617. The House Report further explains that "[a]reas designated as wilderness system should be so designated by an affirmative act of Congress." *Id.*

90. RACR excepts a limited number of categories for road construction and maintenance. *See infra* note 118.

91. *See* Special Areas, Roadless Area Conservation; Final Rule, 66 Fed. Reg. 3,244, 3,272-73 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) (prohibiting both road construction and commercial timber harvesting in certain inventoried roadless areas).

92. *See* H.R. REP. NO. 88-1538, at 8, *reprinted in* 1964 U.S.C.C.A.N. at 3616-17.

93. *See id.*

94. *See* Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8,899 (Feb. 5, 2001).

The second problem Congress foresaw bears on the current roadless situation. Congress determined that it was not for the Chief Executive to create "wholesale designations of additional areas in which use would be limited."<sup>95</sup> This second congressional concern goes to the heart of the current controversy. President Clinton has created administrative wilderness areas in a way that the House report acknowledged would likely not permit long-range planning.<sup>96</sup> President Clinton's roadless initiative, like any other administrative action, will be subject to the discretion of the new administration. Creating wilderness through the proper congressional channels as mandated by Congress would have alleviated the uncertainty with respect to RACR. Congressional hearings would have ensured adequate exploration of the pros and cons of wilderness designation. The Clinton administration's actions have unfortunately silenced opposing views. The administrative creation of the RACR de facto wilderness areas denied essential congressional oversight, support, and investigation.<sup>97</sup>

Congress has not designated much of the RARE II inventories' roadless areas as wilderness under the Wilderness Act, so Clinton's roadless proposal allowed him to bypass the slow-moving legislative body and insure that wilderness protections were created before he left office and before his efforts could be thwarted by a subsequent hostile administration, exactly the type of shifting political actions the Wilderness Act intended to prevent. It is likely that President Clinton knew he could not get support in Congress for creating wilderness areas on the proposed areas, as evidenced by the controversy over his national monument designations. RARE II ended in 1979, but, since that time, many of the inventoried roadless areas continued to remain multiple-use forestlands without wilderness protection.<sup>98</sup> Congress may not have created more wilderness from the RARE II inventoried areas because it did not want to.<sup>99</sup>

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95. H.R. REP. NO. 88-1538, at 8, *reprinted in* 1964 U.S.C.C.A.N. at 3616-17.

96. *See id.*

97. The administrative rule-making process along with the accompanying environmental impact statement could be a good substitute for congressional action; however, the process around the roadless initiative was fundamentally flawed in that President Clinton directed the Forest Service to protect roadless areas, not to take into serious consideration all of the alternatives or externalities. RACR was concerned mostly with preservation, an area of narrow focus considering the many interests involved.

98. *See* Special Areas, Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,246 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) (explaining that Congress had only designated some of the RARE II inventoried roadless areas as wilderness).

99. In 1984 Congress created wilderness areas in 21 states on a state-by-state basis, but Idaho and Montana did not receive an act. Congress placed language in the acts releasing all other non-wilderness from further wilderness review until the Forest Service revised its forest management plans. *See* U.S. DEP'T OF AGRIC., *supra* note 13, at 3-394; *see also supra* note 47 (noting that the act creating wilderness in Wyoming freed remaining non-wilderness lands for other non-wilderness uses).

## 2. NFMA and Lack of Regional and Local Participation

President Clinton's roadless initiative unfortunately analyzed only preservation alternatives, began with an end in mind that precluded adequate analysis of other less-protectionist alternatives, and precluded meaningful public and local participation in the planning process.<sup>100</sup> President Clinton directed the Forest Service "to develop, and propose for public comment, regulations to provide appropriate long-term protection for most or all of these currently inventoried 'roadless' areas, and to determine whether such protection is warranted for any smaller 'roadless' areas not yet inventoried."<sup>101</sup> The top-down directive fails to answer the initial threshold question of whether the Forest Service should be engaging in setting aside lands for long-term preservation, at least at the national instead of regional and local levels. The directive presumes that such decisions should be made at the highest level and passes on to questions of how much protection, where, and in what quantities. The directive and subsequent actions fail to ask whether President Clinton should be initiating this process with respect to Forest Service lands or whether the issue should be left to Congress and the Wilderness Act.<sup>102</sup>

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100. Special attention should be paid to a prior complaint filed by Idaho in which Idaho argued that the RACR rulemaking violated the NEPA participation process. The state basically alleged that the Forest Service was creating a pre-determined rule and the agency did not care for or pay attention to any public participation by the state and its agencies. See Complaint for Idaho, *Idaho v. United States Forest Serv.*, No. CV 99-611-N-EJL, slip op. (D. Idaho Feb. 18, 2000). The judge noted that participation was an integral part of the NEPA process and the court would give slight, if any, deference to the agency if the Forest Service did not allow for meaningful participation by interested parties:

[T]he Court would be remiss if it failed to emphasize to the Forest Service that ...the agency's final agency action will undoubtedly be subject to close judicial scrutiny.... A central purpose of the NEPA process is to provide full disclosure of relevant information to allow meaningful public debate and oversight....[O]ne does not have to be learned in the law to determine the public's participation will hardly be "meaningful" [if the public is not adequately informed of the action]. The State's concern over access to and management of its endowment and state forest lands that may be surrounded by national forest land are legitimate concerns of state and local governments and its citizens.

The public needs to be informed in order to meaningfully participate. An argument suggesting the Court is required to give due deference to agency action and expertise is likely to ring hollow unless the Forest Service does what it says it will do. . . .

*Id.* at 10-11.

101. See Clinton, *supra* note 11.

102. See 66 Fed. Reg. at 3,246 (explaining that Congress had only designated some of the RARE II inventoried roadless areas as wilderness).

The Forest Service, in the publication accompanying the final rule, explains why it has determined that a national-level rule is necessary in a section entitled "National Direction v. Local Decisionmaking."<sup>103</sup> In response to concerns that a national-level rule exceeds the National Forest Management Act's (NFMA)<sup>104</sup> authority, the Forest Service argues that the preamble to the regulations implementing NFMA allows for national level control because of language in the recent NFMA planning regulations that a state's "[p]lanning will be conducted at the appropriate level depending on the scope and scale of the issues."<sup>105</sup> The Forest Service fails to cite "statutory" authority but merely references the preamble to the regulations implementing NFMA. Title 16 of the U.S. Code seems to indicate that management plans should be created for individual units of the national forests,<sup>106</sup> not at the national level. But, at the same time, the statute does not explicitly preclude national-level planning.<sup>107</sup> The statute seemingly requires the Forest Service to create management plans for individual forests on a forest-by-forest level; however, the Forest Service utilizes *regulations created by the Forest Service*, not the actual statute, to grant the Forest Service authority to create a national-level rule. While full development of this issue is outside the scope of this article, realizing the tenuous nature of the Forest Service's authority to create a national-level rule aimed at preservation of administrative wilderness areas strengthens the argument that the overall reason for and effect of the roadless rule is to create administrative wilderness at the bequest of President Clinton before he left office and turned over the presidential reins to a new, less preservationist-minded administration.

The RACR administrative rule-making process failed to adequately consider local views when the Forest Service created RACR and administrative wilderness protections at President Clinton's direction. An

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103. *See id.*

104. 16 U.S.C. §§ 1600-1614 (1994). NFMA is a planning statute that directs the Forest Service how to plan and manage national forestlands.

105. *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,250 (Jan. 12, 2001) (to be codified at 36 CFR pt. 294).

106. *See* 16 U.S.C. § 1604(a) (1994).

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for *units* of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

*Id.* (emphasis added).

In addition, section 1604 provides for State and local government input, input that was arguably not given any type of deference as the Forest Service considered the merits of RACR.

107. *See id.*

interesting twist to the entire action relates to Michael Dombeck's<sup>108</sup> pro-collaboration policy including local level planning and participation in the national forest planning process.<sup>109</sup> Dombeck championed a collaborative approach to forest planning, but when the Forest Service needed to get RACR through the planning process, he absolutely failed to "come up with ways of working with the local communities and [to] utilize what works best in that area."<sup>110</sup> The speed of the Forest Service's conclusions with respect to administrative wilderness precluded interested parties from adequately representing their concerns regarding timber harvesting and road construction. In essence, the Forest Service did not give enough time for the NFMA and NEPA processes to properly apply to the Forest Service's actions. This failure necessarily eliminated the NFMA and NEPA processes as planning tools and as measures to bridle agency discretion.<sup>111</sup> The

108. Dombeck served as the Chief of the Forest Service during the creation of RACR.

109. Dombeck purported to create additional public participation; however, how RACR included participation still eludes local agencies and persons.

What I intend to do is provide direction to the regional foresters and forest supervisors to move toward a very strong collaborative stewardship approach. And I don't think we want to dictate by regulations how they should do it. I'd like to see them come up with ways of working with the local communities and utilize what works best in that area.

Charles Levendorsky, *New Theme for the Forest Service—Serve the Forest?*, DENVER POST (Rockies Edition), Apr. 6, 1997, at E3.

110. *Id.*

111. With respect to NEPA, the Forest Service may have violated the statute by segmenting rules cumulatively affecting administrative wilderness, failing to prepare an impact statement for portions of RACR later included in another rule, and limiting participation.

In the traditional NEPA segmentation argument, the Forest Service violates NEPA by failing to adhere to the NEPA regulations set forth by the Council of Environmental Quality, which require proposed federal actions that may have "cumulatively significant impacts" to be discussed in the same environmental impact statement. *See* Complaint for Idaho at 15, *State of Idaho v. United States Forest Serv.*, CIV01-011-N-EJL, (D. Idaho Jan. 9, 2001) (quoting 40 C.F.R. § 1508.25(a)(2) (2001)). RACR and other rules, namely the Final Planning Rule and the proposed Transportation rule, each separately affect roadless areas, administrative wilderness, and road construction. *See infra* Part III.C. As a recent complaint alleged, the "Forest Service avoided its obligations under NEPA and NEPA regulations to fully analyze and disclose the combined and cumulative impacts of the Roadless Area Conservation Rule, the Planning Rule, and the Transportation rule." *See* Complaint for Idaho at 15, *State of Idaho v. U.S. Forest Serv.*, CIV01-011-N-EJL, (Jan. 9, 2001).

The Forest Service's failure to prepare an impact statement addressing the impacts of the proposed "procedural planning rule" outlined in the Roadless Area Conservation notice of intent (NOI) to prepare an impact statement violates NEPA. The "procedural planning rule" was withdrawn from the Roadless Area Conservation Final EIS and Final Rule, allowing the Forest Service to incorporate the procedural portion of the roadless rule into the planning rule without addressing public or environmental concerns. Both the Planning Rule and the Roadless Rule initially addressed what seemed to be related issues; however, the

agency's actions beg interested parties to ask, "How can we possibly address the issues of that magnitude, and achieve an acceptable mix of the many commodity and non-commodity values, without extensive planning?"<sup>112</sup>

The Forest Service provided just two 60-day comment and scoping periods for a rule-making effort that severely restricts traditional multiple use on more than a third of Forest Service lands,<sup>113</sup> an inadequate time

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Forest Service determined that the procedural planning portion fit better in the Planning Rule and left the Roadless Rule to create current prohibitions and not allow for future "wilderness" designations. See National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514, 67,529-31 (Nov. 9, 2000) (codified at 36 C.F.R. pts. 217, 219).

The Final Planning Rule prescribes a process for "procedural planning" treatment for roadless areas that was to be originally incorporated, not in the Final Planning rule, but as a "procedural planning" portion of the Roadless Area Conservation Final Rule. After publication in the roadless draft environmental impact statement (DEIS), however, the Forest Service removed the "procedural planning" rule from the Roadless Area Conservation Rule and added the roadless "procedural planning" rule to the Final Planning Rule just before publication of the Final Planning Rule in the Federal Register, creating a situation where the Forest Service did not have to address concerns or prepare an EIS regarding the procedural planning rule. See Complaint for Idaho at 10-11, *State of Idaho v. U.S. Forest Serv.*, CIV01-011-N-EJL (D. Idaho Jan. 9, 2001) (noting that the Forest Service issued a Finding of No Significant Impact (FONSI) with respect to the proposed planning rule). The final Roadless Area Conservation EIS acknowledged that the Roadless Area Conservation roadless "procedural planning" rule would be incorporated into the Final Planning Rule. See, U.S. DEP'T OF AGRIC., *supra* note 13, at xi. Through the Forest Service's quick handiwork and rule shuffling, the Forest Service did not have to address the impacts of the "procedural planning"-rule portion of RACR in an environmental impact statement as outlined/required in the initial roadless area NOI.

The Forest Service failed to realize that hiding the provisions in another less-controversial rule does not do away with the problem. Parties seriously interested in future "administrative wilderness" designations had plenty to comment on in the Roadless Rule; however, switching the procedural planning portion to the Planning Rule created a scenario where the Forest Service did not have to address the public or environmental concerns of those interested in the impacts of the procedural planning portion of the Roadless Rule outside of the concerns already addressed in the Planning Rule.

112. Wilkinson, *supra* note 2, at 682. Congress passed the Wilderness Act after nine years of lobbying and planning. RARE I and RARE II evaluations were multiple years in the making; however, the Forest Service, backed by the Clinton administration, planned and designated administrative wilderness in a little over a year. The process, which limited comments to just over 120 days, can hardly be said to be the product of extensive natural resource planning.

113. See National Forest System Roadless Areas, 64 Fed. Reg. 56,306, 56,307 (Oct. 19, 1999) (limiting the comment period on the scoping portion of the final rule comment period to 60 days); Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276 (proposed May 10, 2000) (codified at 36 C.F.R. pt. 294). This notice published in the Federal Register on May 10, 2000, limited the comment period on the draft rules to just over a 60-day period; comments were to be received by July 17, 2000. *Id.*

Not only did the Forest Service unilaterally go forward with its restrictive time



period to allow serious and effective public consideration of the proposed rule. The RARE I and RARE II processes had been years in the making, but, in each case, the programs were scrapped for major shortfalls. RACR created administrative wilderness, going much farther than the mere classification and inventory processes of RARE I and RARE II, in just over a year's time period. The total comment period allowed by the process restricted comments to 120 days, leaving some 240 days to prepare documents and respond to comments—a time period hardly lengthy enough to adequately consider necessary issues and provide meaningful responses to comments. The Forest Service had the end in mind before it began and intended to reach this end regardless of the means used to create the rule. The timing of the matter and the manner in which the process occurred indicate that the Forest Service intended to follow through with President Clinton's directive regardless of the cost (monetary, psychological, and/or administrative) and present to him a final rule setting aside administrative wilderness for his signature before he left office. The Forest Service knew it had strict deadlines to meet if it wanted to ramrod its rule through the administrative process before a possibly hostile President took office.

## B. The RACR Protections Create Administrative Wilderness

The Wilderness Act and RACR both contain strikingly similar prohibitions on road building and commercial activities. RACR explicitly prohibits all road building and commercial timber harvesting on a national level because these two activities affect the landscape but leaves managers at the regional and local level with the discretion to allow or prohibit activities other than road building and timber harvesting in roadless areas.<sup>114</sup> Similarly, the Wilderness Act denotes that preservation of wilderness areas is for the protection and preservation of lands in their natural condition, "untrammeled by man."<sup>115</sup> The Wilderness Act

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periods, denying requests for extensions on the comment periods, the Forest Service also failed to provide interested parties with maps of uninventoried unroaded areas that would be affected by the roadless rule. Eventually, the Forest Service disseminated maps to parties who requested the maps of affected areas; however, distributing maps of the affected areas in the post-initial comment period hardly facilitates the public collaboration and comment process. Complaint for Idaho at 17-18, *State of Idaho v. United States Forest Serv.*, No. CIV01-011-N-EJL (D. Idaho Jan. 9, 2001).

114. See Special Areas, Roadless Conservation, 66 Fed. Reg. 3,244, 3,272-73 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) (prohibiting both road construction and commercial timber harvesting). See also U.S. DEP'T OF AGRIC., *supra* note 13 at 1-15 & 1-16 (stating that road construction and commercial timber harvesting are the only activities prohibited at the national level because of their propensity to significantly alter the landscape).

115. 16 U.S.C § 1131(c) (1994).

specifically prohibits all types of motorized craft,<sup>116</sup> road construction, and commercial enterprise within wilderness boundaries. The Act, however, allows certain preexisting activities to continue at the same rate as prior to the Act's passage, including exemptions for mining, water and power development, grazing, and other preservation and administrative activities.<sup>117</sup> Both the Wilderness Act and RACR allow roads and motorized use as necessary to administer wilderness and roadless areas and for emergency needs.<sup>118</sup>

RACR guarantees wilderness preservation by removing any type of planning for roadless areas from the hands of local managers by creating a national-level preservation prescription.<sup>119</sup> Traditional Forest Service land management plans must be created within, and/or updated at least every fifteen years,<sup>120</sup> but, unlike the forest management plans, RACR provides no parallel requirement for review and revision, thus creating permanent wilderness designations, subject to future administrative action.

### 1. *The Final Rule and Road Prohibitions*

The purpose of the initial proposed rulemaking does not explain the reasons for the Forest Service's prohibition on roads.<sup>121</sup> Road construction and reconstruction prohibitions depend on the type of road with classified roads (permanent highways or roads necessary for Forest Service transportation) being the only roads that will continue to exist on Forest Service lands.<sup>122</sup> On one hand, the Forest Service loudly trumpets the cost

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116. The Act allows certain preexisting uses of motorized craft in the Boundary Waters Canoe Area. See 16 U.S.C. § 1133(d)(1) (1994).

117. See 16 U.S.C. § 1133(c) (prohibiting all subsequent commercial activity except as provided in the Act and subject to preexisting rights).

118. See *id.*; Special Areas, Roadless Conservation, 66 Fed. Reg. at 3272-73.

119. See *infra* notes 124 & 125.

120. 16 U.S.C. § 1604(f)(5) (1994).

121. See National Forest System Roadless Areas, 64 Fed. Reg. 56,306 (Oct. 19, 1999). The Forest Service attempts to give two justifications for the rule. The first is in the name of "public sentiment" for protection of roadless areas. The second justification is the Forest Service's large road maintenance and reconstruction backlog. The Forest Service is trying to appeal to the mind and heart of those persons and entities that would be interested in commenting on the Forest Services proposed rulemaking. These concerns over the road maintenance backlog are certainly valid but do not necessitate the creation of a national-level rule.

122. The Final Rule segments prohibited roads into three different classifications, temporary, unclassified, and classified roads. Temporary roads include "road[s] authorized by contract, permit, lease, other written authorization, or emergency operation, not intended to be part of the forest transportation system and not necessary for long-term resource management." Unclassified roads include temporary roads for which the purpose or permit has expired and "unplanned roads, abandoned travelways, and off-road vehicle tracks that have not been designated and managed as a trail." Classified roads are roads within the

of maintaining the agency's 380,000 miles of roads and the large \$8.4 billion maintenance and reconstruction backlog created by the extensive road system. On the other hand, the Forest Service also notes that strong generalized public sentiment exists in favor of preventing additional road construction and reconstruction in inventoried roadless areas.<sup>123</sup> With respect to national management, the Forest Service has determined, in the case of roadless areas, that local management will not effectuate the "higher goals" of the Forest Service because of failure of local management to see the big picture.<sup>124</sup> Because local managers manage Forest Service lands according to multiple use NFMA standards and not wilderness preservation, the Forest Service, at the direction of President Clinton, needed to implement a top-down directive aimed at wilderness preservation to accomplish the President's preservation goals. No competent rationalization is given for the national office's position other than noting that the national office has a better understanding of the long-term effects of forest management, a vision that local officials either would not see or would not implement.<sup>125</sup> Without a top-down directive, national

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Forest Service managed lands that are "determined to be needed for long-term motor vehicle access, including State roads, county roads, privately owned roads, and National Forest System roads." Special Areas, Roadless Conservation, 66 Fed. Reg. at 3,272.

123. See National Forest System Roadless Areas, 64 Fed. Reg. 56,306, 56,306. The Forest Service's decision will result in increased litigation. Ironically, the Forest Service's commentary on the final rule notes that "[f]inally, national concern over roadless area management continues to generate controversy, including costly and time-consuming appeals and litigation." Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). The Forest Service has yet to see the last of the litigation resulting from its rule intended to reduce litigation.

124. See *id.* at 3246. The Forest Service seems to discredit the management capabilities of local Forest Service officials where it noted:

At the national level, Forest Service officials have the responsibility to consider the "whole picture" regarding the management of the National Forest System, including inventoried roadless areas. Local land management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape. If management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced through road construction and certain forms of timber harvest.

*Id.*

125. The Forest Service further explains its reasoning as follows: The large number of appeals and lawsuits, and the extensive amount of congressional debate over the last 20 years, illustrates the need for national direction and resolution and the importance many Americans attach to the remaining inventoried roadless areas on National Forest System lands. These disputes are costly in terms of both fiscal resources and agency

officials claim that roadless areas will suffer due to the effects of local management.<sup>126</sup>

Critics of the Forest Service's classification system and road definitions adopted in the Final Rule claim that the Forest Service will be able to close any road within the Forest Service's discretion. Senator Enzi (R-Wyoming) claimed, "I've been through this rule with a fine-tooth comb and it enables the Forest Service to shut down roads that the agency has chosen not to call roads....Hunters, fishermen, campers, ranchers and timber harvesters will all suffer under this decree."<sup>127</sup> What Senator Enzi may not realize is that RACR does far more than allow road closures. The rule prohibits road building and any type of commercial timber harvesting in inventoried roadless areas, essentially locking the designated roadless area into a semi-wilderness state.<sup>128</sup>

Many proponents of RACR would argue that the mere creation of any type of road in a roadless area would compromise the area's special "roadless characteristics." A temporary road or skid trail constructed for legitimate purposes of timber harvesting, however, would have very little, if any, permanent impact on a roadless area other than "moral desecration."<sup>129</sup> In most instances, temporary trails could be adequately restored to original roadless conditions.

## 2. RACR's Prohibitions on Commercial Timber Harvesting

Similar to the timber harvesting prohibitions in congressionally designated Wilderness Areas, RACR effectively places an unnecessary

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relationships with communities of place and communities of interest. Based on these factors, the agency decided that the best means to reduce this conflict is through a national level rule.

*Id.* The last line quoted above fails to tell the real story. President Clinton directed the Secretary of Agriculture to institute a rule making process that would preserve roadless areas. The Forest Service did not decide unilaterally what was best for forestlands; President Clinton determined what was best for the Forest Service before the Forest Service even began its rulemaking process. Starting with an end in mind is hardly the best way to solve a problem that may have innumerable solutions. President Clinton knew what he wanted the agency to do, and the agency followed through with his plan in a little over a year's time with the final EIS being published in November of 2000.

126. *See id.*

127. Press Release, Mike Enzi, Forest Service Moving Forward with Access Restrictions (Jan. 5, 2001), available at 2001 WL 5418982.

128. "The Roadless Area Conservation rule, unlike the establishment of wilderness areas, will allow a multitude of activities including motorized uses, grazing, and oil and gas development that does not require new roads to continue in inventoried roadless areas." Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3,249.

129. By "moral desecration" I mean a use of a wilderness area that, while not harming the area in substance, may harm the wilderness area in principle. Herbs and woody plants will reclaim the disturbed area, restoring the area to its pre-disturbed condition; however, such reclamation will not obviate the cry that the area has been disturbed in the first place.

national-level moratorium on all commercial timber harvesting within inventoried roadless areas.<sup>130</sup> RACR singles out timber harvesting because as a general rule, according to the rule summary accompanying RACR in the Federal Register, the construction of additional roads and timber harvesting go hand in hand.<sup>131</sup> Preventing commercial timber interests from entering inventoried roadless areas would also give the Forest Service the increased discretion to prevent the construction of temporary roads<sup>132</sup> even though the temporary road would not necessarily detrimentally affect the roadless area.<sup>133</sup>

Together with the prohibitions on road construction, RACR's national restrictions on timber harvesting create a roadless, timbered area indistinguishable from a wilderness area. As with wilderness areas on Forest Service land, the agency primarily manages and cares for the de facto wilderness area created under RACR in much the same manner as the Forest Service would care for a congressionally designated wilderness area.

### 3. *The Final Rule and Other Activities*

Activities not specifically prohibited by the Final Rule will be allowed to continue as already outlined in forest management plans.<sup>134</sup> The Final Rule will not prohibit activities already in place on inventoried roadless areas such as grazing, oil exploration, or mining, unless prohibited in local or regional forest management plans.<sup>135</sup> The Final Rule only places

130. See *id.* at 3,273. See also 16 U.S.C. § 1133(c) (1994) (subject to existing rights, prohibiting all forms of commercial enterprise). RACR provides exceptions to the prohibitions on timber harvesting. See Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3,273.

131. See *id.* at 3,245 (summarizing that "[t]he Final Rule prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics"). Preventing timber harvesting, in addition to preventing the construction of new roads, will keep heavy machinery out of roadless areas, which would most likely result in the least amount of disturbance to the natural habitat, fauna, and soil. See *id.*

132. "Temporary road" is defined as a road authorized by contract, permit, lease, other written authorization, or emergency operation, not intended to be part of the forest transportation system and not necessary for long-term resource management. *Id.* at 3,272.

133. The Final EIS dismissed discussion about the creation and decommission of temporary roads as moot when the Forest Service said, "The use of temporary roads may have the same long lasting and significant ecological effects as permanent roads, such as the introduction of non-native vegetation and degradation of stream channels. Vegetation recovery after timber harvest can take decades to restore structure and composition." U.S. DEP'T OF AGRIC., *supra* note 13 at 2-18.

134. See *id.* at 1-15, 1-16.

135. See *id.* In contrast to the prohibitions outlined in the Wilderness Act, RACR seemingly allows off-road vehicles use and motorized winter recreation activities such as snowmobiling in roadless areas that do not require the construction of additional roads, subject, of course, to local forest management plans.

a moratorium on new road construction and timber harvesting, but, in spite of the minor differences between RACR and Wilderness Act protections (such as RACR continuing to allow certain limited commercial enterprise), the net effect of RACR is to create a "wilderness-like" preserve with respect to roadless areas under the Forest Service's jurisdiction.

#### IV. CONCLUSION

President Clinton's roadless initiative and Roadless Area Conservation Final Rule creates administrative wilderness areas in violation of the Wilderness Act. Congress has vested within itself the sole authority to create wilderness areas because legislators were concerned that overzealous administrations or agencies may wreak havoc by creating and decommissioning wilderness areas from one presidential administration to the next.

The Roadless Area Conservation Final Rule is the perfect example of congressional fears evident at the time of the Wilderness Act's passage. A pro-preservation administration has directed agency action to create wilderness areas in violation of reserved congressional powers and congressional intent. President Clinton directed the Forest Service to preserve roadless areas and instituted a rule-making process to that end, but the directive failed to consider in the first place whether the action was legitimate and assumed the Forest Service had the discretion to create administrative wilderness. The speed with which the action was undertaken and completed undermines the rule's legitimacy because of the rule's failing to properly analyze and account for environmental impacts and interested parties' concerns. The Executive Branch should take heed and leave the wilderness creation process to Congress.