

# Roadless Rule Retains Respect

In the fall of 1999, President Bill Clinton announced his intention to create a plan that would halt road construction on federal land.<sup>1</sup> When the Forest Service promulgated regulations in an effort to implement the administration's goals, they banned road construction on 58.5 million acres of Forest Service land.<sup>2</sup> Several groups brought suit in federal court claiming that these regulations, known collectively as the Roadless Rule, violated the National Environmental Policy Act (NEPA).<sup>3</sup> Although the district court agreed with the challengers, the Ninth Circuit did not.

In the consolidated cases of *Kootenai Tribe of Idaho v. Veneman*<sup>4</sup> and *Kempthorpe v. U.S. Forest Service*, (hereinafter jointly "*Kootenai*"), the court upheld the permissive intervention and standing of environmental defendants seeking to oppose challenges to environmental regulations promulgated by the Clinton administration and reluctantly defended by the Bush administration. In examining the Forest Service's obligations under NEPA, the Ninth Circuit found that the Forest Service properly followed rule-making procedures, and properly evaluated alternatives to the Roadless Rule as required by NEPA.

In 1967, the U.S. Forest Service voluntarily began to evaluate roadless areas under its jurisdiction.<sup>5</sup> Today, 58.5 million acres of roadless areas have been inventoried, 2.8 million acres of which have been developed and are classified as "roaded" roadless areas.<sup>6</sup> On October 13, 1999, President Clinton ordered the Forest Service to initiate a plan to protect all roadless areas of the national forests.<sup>7</sup> One week later, in order

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1. GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 1129 (5th ed. 2002).

2. Preamble and Final Roadless Area Rule, 66 Fed. Reg. 3244 (January 12, 2001).

3. 42 U.S.C. §§ 4321-4370d (2003). The plaintiffs also brought challenges under National Forest Management Act, 16 U.S.C. §§ 1600-1687 (2003), and the Administrative Procedure Act, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.), this piece focuses on the issues that arose in relation to NEPA.

4. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

5. *Id.* at 1104; See COGGINS, WILKINSON & LESHY, *supra* note 1, at 1129. The goal of this evaluation was to determine which forest service lands should be eligible for wilderness designation. *Id.*

6. *Kootenai*, 313 F.3d at 1105. Because of the evaluative criteria that the Forest Service used, some of the areas classified as roadless actually included roads. In other areas, the roads were built after the Forest Service completed their inventories. *Id.* at 1105 n.4

7. *Id.* at 1105.

to comply with both the President's order and NEPA, the Forest Service published a notice of intent to produce an Environmental Impact Statement (EIS) for a National Roadless Plan.<sup>8</sup>

On May 10, 2000, the Forest Service published both a draft EIS (DEIS) and a proposed Roadless Rule.<sup>9</sup> This proposed rule identified 54.3 million acres of roadless areas, including 2.8 million "roaded" roadless areas.<sup>10</sup> The proposed rule would have prohibited development 51.5 million acres of forest, exempting any roaded roadless areas from the ban.<sup>11</sup> On November 13, 2000, the Forest Service released a Final EIS (FEIS), which identified a total of 58.5 million acres of roadless land to be covered by the Roadless Rule's ban.<sup>12</sup> The FEIS contained 4.2 million acres of land that had not been earlier identified in the DEIS.<sup>13</sup> The Forest Service altered the proposed rule to ban development on all identified roadless areas including the 2.8 million acres of roaded land that were previously exempt, though these areas had less stringent standards on timber harvest.<sup>14</sup> The final rule was published on January 5, 2001. It prohibited all road-building on the 58.5 million acres identified in the FEIS with few exceptions.<sup>15</sup> Thus, the rule preserves the land in a more pristine and natural form, prohibiting some of the ordinary uses usually permitted by the forest service. This victory for the forest received a short delay however. On January 20, 2001, newly inaugurated President George W. Bush postponed any regulations not yet implemented by sixty days, thereby postponing the date of the Roadless Rule's implementation until May 12, 2001.<sup>16</sup>

On January 8, 2001, the Kootenai tribe of Idaho and fellow plaintiffs<sup>17</sup> filed suit in the United States District Court for the District of Idaho against the Secretary of Agriculture and the Chief of the Forest Service for promulgation of the Roadless Rule in violation of NEPA.<sup>18</sup>

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8. *Id.* (citing Notice of Intent to Prepare an Environmental Impact Statement, 64 Fed.Reg. 56,306 (Oct 19, 1999)).

9. *Id.* at 1105.

10. 64 Fed. Reg 56,306 (Oct. 19, 1999)

11. *Kootenai*, 313 F.3d at 1105.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1106 (citing 36 C.F.R. § 294.12(B)(1,3)). Exceptions include things such as preservation of reserved rights and some discretion to FS officials to construct roads necessary for public health and safety. 36 C.F.R. § 294.12 (b) (2003).

16. *Kootenai*, 313 F.3d at 1106.

17. The Kootenai tribes were joined by the Boise Cascade Corporation, motorized vehicle recreational groups, livestock companies, and two Idaho counties. *Id.* at 1104.

18. *Id.* at 1106.

The next day, the state of Idaho led by Governor Kempthorne filed a similar complaint in the same court.<sup>19</sup>

In early 2001, the plaintiffs in *Kootenai* and *Kempthorne*, both moved for preliminary injunctions.<sup>20</sup> The public official and forest manager plaintiffs claimed irreparable harm because they were prevented from accessing the roadless areas to prevent fire, insect infestation and disease.<sup>21</sup> The tribes claimed irreparable cultural, social and economic harm.<sup>22</sup> On March 14, 2001, the district court granted a motion by the Idaho Conservation League along with several other environmental organizations (collectively ICL) to intervene as defendants in both cases, and a similar motion by the Forest Service Employees for Environmental Ethics (FSEEE) to intervene in *Kootenai*.<sup>23</sup>

On April 5, 2001, the district court issued orders in both cases holding that the plaintiffs were likely to prevail on their motions for a preliminary injunction.<sup>24</sup> However, it would not rule on the motions until the new administration updated the court on its review of the Roadless Rule. On May 4, 2001, the Forest Service communicated to the district court that it planned to initiate a new public process that would, examine possible modifications to the rule, including amendments that would allow “limited activities to prevent the negative effects of unnaturally severe wildfires, insect infestation and disease,” though it would “[develop] amendments to the rule that would seek to maintain the protections embodied in the current rule.”<sup>25</sup>

The district court granted a preliminary injunction on May 10, 2001 preventing the implementation of the Roadless Rule, holding that the plaintiffs had “a strong likelihood of success on the merits” absent any amendments by the Bush administration.<sup>26</sup> The district court stated that there is a “substantial possibility that the Roadless Rule will result in irreparable harm to the National Forests.”<sup>27</sup> The court was further influenced by the lack of a specific date set for creating new amendments and the absence of a guarantee that the amendments would “cure the defects identified by the Court and acknowledged to exist by the Federal Government.”<sup>28</sup> Finally, the district court found that the plaintiffs had

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19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* (internal quotations omitted).

26. *Id.* at 1107. *Kootenai Tribe of Idaho v. Veneman*, 142 F.Supp.2d 1231, 1247 (2003).

27. *Kootenai*, 313 F.3d at 1107.

28. *Id.*

made a showing of irreparable harm.<sup>29</sup> Though the federal government did not contest this ruling, the ICL and FSEEE intervening defendants appealed and the cases were consolidated by the Ninth Circuit.<sup>30</sup> Perhaps due to the political controversies behind this case, the court took nearly fourteen months after oral argument to issue an opinion.

When the Ninth Circuit took up the case, the court noted that it presented an unusual situation as the intervening defendants were contesting a ruling against the government, which the government had chosen not to contest.<sup>31</sup> Therefore, the court first addressed whether the motions to intervene were properly adjudicated under Rule 24 of the Federal Rules of Civil Procedure (FRCP) governing intervention.<sup>32</sup>

The Ninth Circuit held that the district court had erred in granting intervention under FRCP 24(a), intervention as of right, because "as a general rule, 'the government is the only proper defendant in an action to compel compliance with NEPA.'" <sup>33</sup> However, the Ninth Circuit held that parties may intervene under FRCP 24(b), the permissive intervention provision, which explains that "all that is necessary . . . is that interveners' 'claim or defense and the main action have a question of law or fact in common.'" <sup>34</sup> Once a court finds such a commonality, and assuming the parties have proper standing, the court has discretion to grant intervention.<sup>35</sup> Using an abuse of discretion standard for reviewing the district court's ruling on permissive intervention, the Ninth Circuit held that the district court did not err in allowing ICL and FSEEE to intervene under FRCP 24(b).<sup>36</sup> Because the government did not fully defend their stance, the court felt that the presence of the interveners would help to assure that the issues were fully heard and litigated.<sup>37</sup>

In his dissent, Judge Kleinfeld disagreed with the majority's ruling on permissible intervention.<sup>38</sup> The dissent pointed to precedent holding that private parties have no protectable interest in NEPA compliance actions.<sup>39</sup> It further argued that parallel interests do not constitute

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29. *Id.*

30. *Id.* at 1104, 1107.

31. *Id.* at 1107.

32. *Id.*

33. *Id.* at 1108 (quoting *Wetlands Action Network v. Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th Cir. 2000)).

34. *Kootenai*, 313 F.3d at 1108 (quoting FED. R. CIV. P. 24(b)).

35. *Id.* (citing CHARLES ALAN WRIGHT ET AL., 7C FEDERAL PRACTICE AND PROCEDURE § 1911, 357-63 (2d. ed. 1986)).

36. *Id.* at 1111.

37. *Id.*

38. *Id.* (Kleinfeld, J., dissenting).

39. *Id.* at 1127 (citing *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989)).

common claims or defenses, as NEPA only applies to the government and cannot be applied to private parties.<sup>40</sup>

After determining that the Forest Service's Roadless Rule required completion of an Environmental Impact Statement in order to comply with NEPA, the Ninth Circuit next considered whether the district court "abused its discretion or based its decision on an erroneous legal standard or clearly erroneous findings of fact" in issuing a preliminary injunction.<sup>41</sup> Specifically, the court analyzed the lower court's determination of two issues on the merits as well as the lower court's assertion of likely irreparable harm.

One of the key issues in the case is whether the Forest Service complied with NEPA's notice and comment procedures. Specifically the plaintiffs challenged the Service's failure to provide maps of affected areas during the critical periods. In analyzing the plaintiffs' allegations, the Ninth Circuit rejected the district court's finding that maps of the affected areas were not properly provided during the scoping period, and that they were inadequately provided during the DEIS notice and comment period.<sup>42</sup> Specifically, the court held that there is no affirmative duty to provide maps during scoping periods.<sup>43</sup> The court also rejected the district court's finding that the public comment process and the length of the comment period were insufficient.<sup>44</sup> The Service had in fact provided maps prior to issuing the DEIS and in general the location of the affected areas was "reasonably known to the plaintiffs" even before they received the maps because they had been actively involved in the process including several years of participation in studies and discussions with the Forest Service.<sup>45</sup>

The court then evaluated whether the Forest Service properly considered a reasonable range of alternatives under NEPA.<sup>46</sup> The Forest Service considered three options for the inventoried roadless areas, all of which banned road construction and reconstruction, but which allowed varying degrees of timber harvesting.<sup>47</sup> The circuit court noted that the Service promulgated the Roadless Rule to conserve existing national forests for aesthetic and educational purposes, for environmental preservation and, ecosystem and watershed health, and so that existing limited funds can be properly used to maintain already established roads

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40. *Id.*

41. *Id.* at 1115.

42. *Id.* at 1116-17.

43. *Id.* at 1117.

44. *Id.* at 1118-19.

45. *Id.* at 1117.

46. *Id.* at 1120.

47. *Id.*

in the national forests.<sup>48</sup> Under NEPA, the Forest Service did not need to contemplate alternatives that were inconsistent with the policy objectives of the Roadless Rule.<sup>49</sup> Furthermore, the court noted that NEPA mandates consideration of alternatives that, "avoid or minimize adverse environmental effects," and that the goal of the statute is "first and foremost to protect the natural environment."<sup>50</sup> Based on this reasoning, the court declared the district court's finding, that the Forest Service did not properly consider alternatives that included more active forest management, "clearly erroneous."<sup>51</sup>

Having decided that the plaintiffs did not show probable success on the merits, the court then turned to evaluating the strength of the claims of irreparable harm.<sup>52</sup> The plaintiffs claimed irreparable harm resulting from the Roadless Rule because it limits public officials' and forest managers' ability to prevent forest fires, insect infestation and disease, as well as possible irreparable cultural, social and economic harms to tribes.<sup>53</sup> The Ninth Circuit found that the district court erred in failing to take the public's interest in preserving "precious unreplaceable resources" into account when balancing the hardships for a preliminary injunction.<sup>54</sup> The court also held that restrictions on human intervention are not irreparable in the sense required for a preliminary injunction.<sup>55</sup> Citing a three-year moratorium that the Forest Service had placed on development in the inventoried roadless areas prior to the Roadless Rule, and the review and amendment of the Roadless Rule underway during the time of the litigation, the court found that no irreparable harm existed sufficient to warrant a preliminary injunction.<sup>56</sup>

The court held that from its determination of the low probability of success on the merits, the low probability of irreparable harm and the balance of hardships, a preliminary injunction should not have been issued.<sup>57</sup> The court further found that the district court proceeded on an erroneous legal premise and that it was a clear violation of discretion to

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48. *Id.* at 1121.

49. *Id.* (citing *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir.1999)).

50. *Id.* at 1122-23 (quoting *Or. Env'tl. Council v. Kunzman*, 614 F.Supp. 657, 659-660 (D.Or. 1985)).

51. *Id.* at 1123.

52. *Id.* at 1124.

53. *Id.*

54. *Id.* at 1125.

55. *Id.*

56. *Id.*

57. *Id.* at 1126.

issue the injunction.<sup>58</sup> The court reversed the judgment and remanded the cases for further proceedings.<sup>59</sup>

The dissent also disputed the majority's reversal of the preliminary injunction, because it found that the Forest Service failed to take account of alternatives that would allow some road construction and repair and still meet the goal of preventing degradation of the roadless areas.<sup>60</sup> The dissent further argued that the national forests, in contrast to wilderness areas, were established to "provide a source of timber and to protect the flow of water."<sup>61</sup> Thus, alternatives that allowed some road building would not be inconsistent with the purpose of the national forests and should have been considered.

Judge Kleinfeld would have upheld the district court's finding that the notice and comment period and procedure was insufficient,<sup>62</sup> because evidence from the record showed inadequate consultation with affected parties.<sup>63</sup> The dissent characterized the agency action as "a case where the agency attempted a massive management change for two percent of the nation's land on the eve of an election, and shoved it through without the 'hard look' NEPA required."<sup>64</sup> It criticized the majority for failing to apply appropriate precedent on intervention and NEPA, "in order to prevent the government from taking a harder look at a massive policy change."<sup>65</sup>

The Roadless Rule has survived the first hurdle in two legal challenges and a new and unfriendly administration. The Ninth Circuit's determination of likelihood of success on the merits does not bode well for the Rule's challengers. Despite the fact that this case does not open many doors for similar interventions by environmental litigants to stop the Bush administration from rolling back protectionist measures promulgated by the Clinton administration, the 58.5 million acres of roadless land remain protected by the Roadless Rule . . . for now.

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58. *Id.*

59. *Id.*

60. *Id.* at 1129.

61. *Id.*

62. *Id.*

63. *Id.* at 1130.

64. *Id.* at 1130-31.

65. *Id.* at 1131.

