

## **Court Battles Looming Over the Protection of Roadless Areas**

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The fate of almost 60 million acres of roadless national forest remains unsettled due to increasing litigation over the legality of a final rule protecting roadless areas on National Forest lands published in the Federal Register earlier this year by the Clinton Administration.[1] There have been four lawsuits filed against the Roadless Area Protection Rule, and the end result of the current controversy is anyone's guess. Recently, the roller coaster ride of roadless area protection jumped the tracks with the recent disclosure by the Bush Administration that it will not defend the roadless policy as promulgated by the Clinton Administration.[2] As the debate over the government's authority to protect this nation's last remaining unprotected roadless areas moves to court, interested parties are preparing for what could be a long and contentious environmental legal battle.

### **The Roadless Area Conservation Final Rule**

The purpose of the Roadless Area Conservation final rule is "to provide, within the context of multiple-use management, lasting protection for inventoried roadless areas within the National Forest System." [3] The rule primarily bans the construction of roads and the harvest of timber in inventoried roadless areas of the National Forest System, except under certain circumstances.[4] The circumstances are quite broad, though, allowing for the construction of roads to protect public health and safety in cases of an imminent threat such as flood or fire.[5] Alternatively, roads will be allowed for the removal of generally small diameter timber to improve threatened, endangered, or sensitive species habitat, and to maintain or restore characteristics of ecosystem composition and structure.[6] In practice, however, the rule would prohibit road building and most timber cutting in inventoried roadless area, and would effectively bar most off road vehicles and new oil, gas, and mining operations.[7] It is the breadth of this roadless area protection that has spurred lawsuits by several states and various interest groups challenging the procedural process of the rule and the authority of the government to implement such a policy.

### **Legal Challenges to the Roadless Area Protection Rule**

The Roadless Area Final Rule was originally supposed to go in effect on March 13, 2001,[8] but on February 5, 2001 the United States Department of Agriculture (USDA) postponed the implementation of the rule due to a directive from White House Chief of Staff Andrew Card ordering the postponement of pending regulations from the Clinton Administration for 60 days.[9] In the absence of further delay, the current effective date of the Roadless Rule is May 12, 2001. However, there are four separate lawsuits challenging the implementation of the Roadless Area final rule.

On February 20, 2001 a coalition of plaintiffs including the Kootenai Tribe of Idaho, the Blue Ribbon Coalition, Boise Cascade Corporation, Boise and Valley Counties, and various snowmobile and ranching companies filed suit in the U.S. District Court, District of Idaho against the USDA and the Forest Service over the implementation of the Roadless Rule.[10] The brunt of the plaintiffs challenge is that the Forest Service failed to adequately involve the public as required by the Administrative Procedure Act (APA), and failed to consider environmental impacts and reasonable alternatives for the recommended course of action in the Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA).[11] Arguing that the Forest Service violated its procedural obligations, the plaintiffs have requested that the court issue a preliminary injunction preventing the Forest Service from implementing the Final Rule until the case is heard and adjudicated.[12]

In an unusual twist, the federal government, represented by the Bush Administration, filed a response

that failed to defend the Roadless Rule.[13] Instead, the response invited the court to order a stay of the effective date of the regulation until the case is resolved on the merits.[14] The government also declared that "the USDA clearly retains the discretion and authority to promulgate, amend, revise, or rescind rules such as the Roadless Rule here at issue." [15] Furthermore, Justice Department attorneys went so far as to say that the intervening defendant environmental organizations would not be harmed by a delay in the implementation of the rule because any timber sales that might move forward as a result of a delay could be challenged on a site specific basis where the sales would be occurring.[16]

Various environmental organizations intervened in the case as defendants to support the adequacy of the EIS conducted by the Forest Service. However, one intervenor, Forest Service Employees for Environmental Ethics (FSEEE), entered the suit not to defend the government's compliance with NEPA, but rather to argue that NEPA does not even apply to the Roadless Rule.[17] FSEEE believes that an EIS is not necessary because the Roadless Rule does not cause a change in the physical environment, which is part of the test for conducting an EIS.[18] Rather, the Roadless Rule requires the government to refrain from affecting the physical environment; in essence it requires the government to conserve and maintain roadless area characteristics on the forest.[19] Should FSEEE prevail on this theory, an EIS would not have been required in the first place, and the court would be without subject matter jurisdiction to hear the plaintiff's NEPA claims.[20]

In a separate lawsuit, the State of Idaho filed suit against the Forest Service in the same federal district court in Idaho on grounds that the Forest Service violated NEPA, the National Forest Management Act, and the APA in promulgating the Roadless Rule.[21] Furthermore, the State of Alaska filed its own suit over the Roadless Rule, and the Mountain States Legal Foundation filed a separate suit in the U.S. District Court for the District of Columbia representing Communities for a Great Northwest, a rural grassroots group located in Libby, Montana.[22] Communities for a Great Northwest believes that "because the Property Clause places responsibility for federal lands in Congress and because Congress set forth in the Federal Land Policy and Management Act (FLPMA) and the Wilderness Act how lands are to be withdrawn from activity, studied for, and designated as wilderness," the Forest Service's order is unconstitutional and illegal.[23] The premise of the Communities for a Great Northwest's argument is that by preserving roadless areas, the Forest Service has created de facto wilderness areas, a power specifically reserved to Congress.

It is too early in the litigation process to understand the validity of any of these challenges to the Roadless Rule, but the argument that the Forest Service failed to adequately involve the public in the process may be a difficult one to prove. After all, in his resignation letter to the Bush Administration, former Chief of the Forest Service Michael Dombeck outlined that the Roadless Rule was "the most extensive multi year environmental analysis in history, a process that included over 600 public meetings and generated 1.6 million comments, the overwhelming majority of which supported protecting roadless areas." [24] The more substantive arguments that the Roadless Area Rule's EIS violates NEPA are more serious threats. Yet the most disturbing challenge to the implementation of the Final Rule is the Bush Administration's reluctance to even defend the Forest Service in federal court.

The Roadless Area Rule may become the greatest land-use battle of the year because it strikes at the heart of the raging debate over the proper way in which to manage our last remaining parcels of undeveloped, unprotected forests. Those who believe in the active management of our forest resources will continue to fight the application of the rule, while those who support the concept of letting roadless areas manage themselves, will continue to defend it. Regardless of the philosophical differences of these two management perspectives, there are valid scientific and economic reasons for preserving roadless areas on the national forests, and separate from the legal arguments that will be waged, the public has come out in strong support of the concept of keeping roadless areas free from development.

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[1] On January 12, 2001 the Department of Agriculture published a final rule to establish prohibitions on road construction, road reconstruction, and timber harvesting in inventoried roadless areas on National Forest System Lands. *See* Special Areas; Roadless Area Conservation; Final Rule, 66, No. 9, Fed. Reg. 3,244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) [hereinafter Final Rule].

[2]See John Heilprin, *USDA To Finish Forest Rules Review*, WASHINGTON POST, Mar. 21, 2001, available at <[http://www.washingtonpost.com/wp-srv/aponline/20010321/aponline205245\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/20010321/aponline205245_000.htm)>.

[3]Final Rule, *supra* note 1, at 3,272 (to be codified at 36 C.F.R. § 294.10).

[4]See *id.* at 3272-3273 (to be codified at 36 C.F.R. §§ 294.12 and 294.13).

[5]*Id.* at 3272 (to be codified at 36 C.F.R. § 294.12).

[6]*Id.* at 3273 (to be codified at 36 C.F.R. § 294.13).

[7]Douglas Jehl, *Urging Bush to Resist Pressure, Forest Chief Resigns*, N.Y. TIMES ON THE WEB, Mar. 28, 2001, available at <<http://www.nytimes.com/2001/03/28/politics/23FORE.html?searchpv=site04&pagewanted=print>>.

[8]Final Rule, *supra* note 1, at 3,244.

[9]Federal Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction at 2, *Kootenai Tribe v. Forest Service* (No. CIV 01-010-N-EJL).

[10]Memorandum in Support of Motion for Preliminary Injunction, *Kootenai Tribe v. Forest Service* (No. CIV 01-010-N-EJL).

[11]See *id.* at 1,9.

[12]*Id.* at 1.

[13]Federal Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, *supra* note 9, at 4-5.

[14]*Id.* at 5.

[15]*Id.* at 3.

[16]*Id.* at 5.

[17]Defendant-Intervenor FSEEE's Memorandum in Opposition to Plaintiff's Motion to Strike Opposition Pleadings at 2, *Kootenai Tribe v. Forest Service* (No. CIV 01-010-N-EJL).

[18]See generally Defendant-Intervenor FSEEE's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, *Kootenai Tribe v. Forest Service* (No. CIV 01-010-N-EJL).

[19]See *id.*

[20]See *id.* at 1.

[21]See generally Complaint, *State of Idaho v. Forest Service* (No. CIV 01-011-N-EJL).

[22]Mountain State Legal Foundation, *Legal Cases: Communities for a Great Northwest, et al. v. Clinton, et al. (II)*, at <[http://www.mountainstateslegal.org/legal\\_cases.cfm?legalcaseid=61](http://www.mountainstateslegal.org/legal_cases.cfm?legalcaseid=61)>.

[23]*Id.*

[24]Jehl, *supra* note 7.