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The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands

by Michael C. Blumm

The George W. Bush Administration's approach to federal public land management was suspect from the outset. With its Secretary of the Interior a former James Watt disciple and its Secretary of Agriculture from agribusiness,[1] the new Administration signaled a sharp break from the conservationist policies of the Clinton Administration.[2] That such a sea change should occur as a consequence of an election in which many still doubt the results provide clear evidence that the claim of the Green Party candidate (who no doubt swung the election)[3]—that there was no practical difference between the Republican and Democratic alternatives—was a bald-faced lie. In retrospect, never has so much public land policy changed on such a small margin of the electorate.[4]

The means of effectuating this revolution in public land policy are the subject of this Article, for the Bush Administration hardly accomplished its policy reversals in a straightforward manner. Instead, the Administration changed the course of public land law by responding (or not responding) to a series of lawsuits brought by commodity interest groups against Clinton Administration policies. Instead of defending its predecessor's policy initiatives, the Bush Administration often settled the lawsuits, promising to adopt reforms advocated by the commodity interest litigators. This "get sued and supply a sweetheart settlement" policy was complemented in one case, discussed below, by a closely related strategy of virtually failing to litigate at all.[5] Indeed, it seemed as if the Administration was pursuing a "Trojan Horse" approach to changing public land policy: first inviting litigation from industry[6]; then, once a case was filed, avoiding a court decision on the merits through settlement agreements that gave the industry everything it could have hoped for through litigation, while undermining environmental controls in the process. This sweetheart settlement process was accomplished behind closed doors without public participation or any change in legislation. This use of litigation without judicial decision would surprise those who, in an earlier generation, advocated litigation to advance environmental and civil rights issues in order to overcome legislative inertia.[7] A generation later, the use of public law litigation in the service of rolling back environmental protection, in large measure through governmental acquiescence, must be viewed by its early advocates as a cruel irony.

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1. Gail Norton was an attorney for the Mountain States Legal Foundation when its director was future Secretary of the Interior James Watt. Ann Veneman, a former agribusiness lawyer, was also a board member of Calgene (later bought out by Monsanto), the company that launched the first genetically engineered food in 1994. *See* Center for Responsive Politics, *President Bush's Cabinet, at* http://www.familyfarmer.org/updates/11801.html (last visited Jan. 21, 2004); Katharine Q. Seelye, *Bush Is Choosing Industry Insiders to Fill Several Environmental Positions*, N.Y. Times, May 12, 2001, at 10.

2. *See, e.g.*, John H. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 Envtl. L. 199, 211, 216-18 (2001) (article by the former Interior Solicitor); U.S. Department of the Interior (DOI), A History of the U.S. Department of the Interior During the Clinton Administration xxvi-xxxi, 62-66 (2000) [hereinafter U.S. DOI History].

3. In Florida, the official margin of the George W. Bush victory was 930 votes, about 0.016% of Florida votes cast. Ralph Nader captured 97,419 Florida votes, about 2%. In New Hampshire, the Bush margin was 7,282 votes, about 1.3%. Nader captured 22,156 New Hampshire votes, about 4%. Federal Election Commission, *Federal Elections 2000*, *at* http://www.fec.gov/pubrec/fe2000/tcontents.htm (last visited Jan. 21, 2004).

4. Of course, the majority of votes favored the Al Gore-Joe Lieberman ticket—by over a one-half million-vote margin: 50,996,116 votes to 50,456,169, about 0.5%. Nader gathered 2,882,955 votes, about 2.7%. *Id*. But the electoral vote of 271-266 made the second President Bush the first president to lose the popular vote yet win the electoral college since Benjamin Harrison in 1888. William C. Kimberling, *The Electoral College*, *at* http://www.fec.gov/pdf/eleccoll.pdf (last visited Feb. 24, 2004).

5. *See infra* notes 10-81 and accompanying text (section on roadless rule litigation).

6. *See* Les Blumenthal, *In Northwest Forest, Feds Would Rather Settle Than Fight*, Tacoma News-Trib., Feb. 2, 2003, at A1 (quoting Jim Lyons, the Clinton Administration's Assistant Secretary of Agriculture, to the effect that his successor, Mark Rey, a former timber industry lobbyist, has adopted a "sue-to-settle" strategy that encourages industry lawsuits, then fighting environmental group participation in settlements that give the industry the logging it seeks; also claiming that the Bush Administration has become "masters of the friendly lawsuit").

7. The classic article is Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

This Article examines the Bush Administration's ongoing public land revolution, accomplished largely through sweetheart settlements with extractive industries. Section I discusses the litigation over the Clinton Administration's policy to maintain roadless areas in national forests, which the Bush Administration by and large failed to defend in court, although it did reach a settlement with the state of Alaska exempting that state from the operation of the rule. Section II considers a settlement agreement and a memorandum of agreement (MOA) with the state of Utah that led to the termination of nearly three million acres of wilderness study areas and also established a process for approving roads that would apparently ensure that no future wilderness areas would ever be designated. Similar agreements are likely to be reached with other western states. Section III explains a number of settlements that collectively undermine the Northwest Forest Plan, the Clinton Administration's effort to bring ecosystem management principles to public timber harvesting. Section IV examines the settlement reached with the snowmobile industry to rescind the Clinton Administration's phaseout of snowmobiles in Yellowstone Park, a settlement that seemed to receive more publicity than the other sweetheart deals.[8] The Bush Administration's ensuing rule change was rejected by a federal court, only to have another federal court enjoin the snowmobile ban.[9] The Article concludes that although the sweetheart settlement policy could be explained as the Bush Administration's attachment to a state's rights, it really reflects an overriding determination to advance commodity interests on public lands.

I. The Roadless Rule: Failing to Litigate

The Clinton Administration received widespread notoriety for the more than 5 million acres it protected in 19 national monuments in the waning days of the Administration,[10] but in reality its administrative rule prohibiting most road building and logging in roadless areas of national forests—covering some 58.5 million roadless acres, about 30% of the 192 million-acre national forest system[11]—was the greater conservation achievement. Or so it seemed on January 12, 2001, when the U.S. Forest Service promulgated its final rule.[12] By protecting 58.5 million acres, subject to various exceptions,[13] that rule would have—when combined with existing wilderness areas—protected nearly one-half of the acres in national forests from most road building and logging.[14] It also would save some $8.4 billion in deferred maintenance and reconstruction of 386,000 miles of Forest Service roads.[15] However, the rule did not ban all logging in roadless areas, only logging requiring road building; it expressly allowed logging of "generally small diameter" trees to reduce risk of wildfires or to improve imperiled species habitat.[16] The rule also provided a temporal exemption for Alaska's Tongass National Forest, home to North America's largest remaining intact temperate rain forest and containing more roadless acres (9.3 million) than any other national forest, allowing most logging to continue until April 2004.[17] Moreover, the Clinton Administration rule did not close any existing roads or restrict existing access to roadless areas by off-road vehicles.[18]

8. In one of the debates among the Democratic presidential contenders before the 2004 Iowa caucuses, all present responded to a question on the subject by rejecting the Bush Administration's effort to continue snowmobiling in Yellowstone, and most used the opportunity to criticize the Administration's approach to the environment.

9. *See infra* notes 259-88 and accompanying text (sections on various court decisions on snowmobiling in Yellowstone National Park).

10. *See* James Ridgeway, *Interior Secretary Treads Lightly on Clinton's Monuments*, Village Voice, Feb. 21-27, 2001, *available at* http://www.villagevoice.com/issues/0108/ridgeway1.php. *See also* Leshy, *supra* note 2, at 216-19; John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. Colo. L. Rev. 287, 300 (2001); Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 Cornell L. Rev. 1333, 1343-44 (2002); Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473 (2003); Sanja Rachod, *The Clinton National Monuments: Protecting Ecosystems With the Antiquities Act*, 25 Harv. Envtl. L. Rev. 535 (2001); Jana Prewitt & Victoria Voytko, A History of the U.S. Department of the Interior Under the Clinton Administration 1993-2001, at 62-64 (2002), *available at* http://library.doi.gov/master0105.pdf (last visited Jan. 22, 2004) (discussing each monument individually). The Clinton Administration also created the 1.7 million-acre Grand Staircase-Escalante National Monument in 1996.

11. *See* H. Michael Anderson, *National Forest Roadless Rule Goes to Ninth Circuit*, 2001 Cal. Envtl. L. Rep. 169, 169. On roadless areas generally, see H. Michael Anderson & Aliki Moncrief, *America's Unprotected Wilderness*, 76 Denv. U. L. Rev. 413 (1999).

12. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). The final rule was the culmination of an extensive process, begun three years before in January 1998 when Forest Service Chief Mike Dombeck announced consideration of a new transportation policy for the national forests. While that policy was under development, he proposed an 18-month road building moratorium in the forests. Although both the Wyoming Timber Industry Association and the state of Idaho challenged the moratorium, their suits were dismissed as premature in early 2000. By that time, President William J. Clinton had already announced, in October 1999, that the Administration would develop a comprehensive policy to protect unroaded areas in national forests. On November 13, 2000, following the issuance of a draft environmental impact statement (EIS) in May 2000 and the receipt of some 1.1 million comments (over 95% in favor of the ban) and 600 pubic meetings, the Forest Service release a near-final plan that would have banned road building and commercial logging on 49 million acres immediately and would add the Tongass National Forest to the ban in 2004, bringing the total acres subject to the ban to 58.5 million. The final plan was promulgated two months later. *See* Earthjustice, *Background: Timeline of the Roadless Rule* (updated Dec. 12, 2002), *at* http://www.earthjustice.org/backgrounder/display.html?ID=22 (last visited Jan. 10, 2004); Anderson, *supra* note 11, at 171 (on the number of public comments and meetings).

13. Exempted from the road building ban were roads necessary to access nonfederal inholdings and mining claims, roads needed for public safety and environmental cleanup, and federal highway projects. 66 Fed. Reg. at 3253, 3264. Roads could also be built in areas currently under lease for oil and gas development and within the existing boundaries of ski areas with special use permits. *Id.* at 3249, 3260.

14. According to Michael Anderson, 18% of the acres in national forests are in designated wilderness areas; the roadless road would give protection to 30% more, for a total of around 48%. About 52% of the national forest acreage is roaded, containing some 380,000 miles of roads, built mostly to allow logging. Anderson, *supra* note 11, at 169.

15. 66 Fed. Reg. at 3245. The rule aimed to protect not only areas that were roadless, but areas with characteristics "often present in . . . inventoried roadless areas," including high quality air, soil, and water, sources of public drinking water, and habitat with species diversity, including imperiled species. *Id.* at 3251. Thus, some "inventoried roadless areas" contained roads either because they were inventoried as roadless but were subsequently roaded for logging or other purposes, or because they had roads when inventoried but nonetheless retained specific roadless area characteristics. The rule defines "road" as a "motor vehicle travelway over 50 inches unless designated and managed as a trail"; a "trail" is an authorized route designated and managed "for travel by foot, stock, or trail vehicle, and can be over, or under, 50 inches wide." The rule explicitly does not prohibit maintenance or construction of trails. *Id.* at 3272.

16. *Id*. at 3257.

17. *Id*. at 3262-63. *See infra* note 58 (discussing the final rule exempting the Tongass from the roadless rule).

18. *Id.* at 3249-51.

A. The Idaho Suit

Challenges to the rule did not even await its final promulgation: days after President William J. Clinton signed the rule but prior to its promulgation, the state of Idaho, Boise Cascade, the Kootenai Tribe of Idaho, several snowmobile and off-road vehicle organizations, two livestock companies, and two counties filed suit, seeking an injunction barring implementation of the rule.[19] In what would prove to be a significant development, environmental groups intervened on the side of the government.[20] Six other suits followed, including suits by the states of Alaska, Utah, and Wyoming.

The incoming Bush Administration wasted little time in addressing the roadless rule, which was scheduled to take effect on March 12, 2001: it suspended the rule's application for 60 days on its first day in office.[21] Although U.S. Attorney General John Ashcroft claimed at his confirmation hearing that he would defend and enforce the rule,[22] the U.S. Department of Justice failed to defend the rule on its merits in the Idaho case, claiming that the Administration had the rule under review and would not complete the review until just before the end of the suspension of the rule, or around May 4.[23]

Judge Edward Lodge of the U.S. District Court for the District of Idaho, an appointee of President George H.W. Bush, then proceeded to issue an opinion, in which he upheld the state and the extractive users' standing, concluded that the government's environmental documentation was inadequate, and ruled that the plaintiffs had a high likelihood of success on the merits of their claims.[24] The court initially refused to enjoin the rule, however, awaiting the Bush Administration's promised review of the rule.[25] On July 10, 2001, shortly after the court's initial decision and no doubt influenced by widespread public support for roadless protection,[26] the Bush Administration announced that it would not discard the rule but instead would amend it.[27] A week later, Judge Lodge enjoined implementation of the rule, citing the government's own characterization of the rule that without the amendments it contemplated, there would be "a potential for long-term irreparable harm."[28] The court concluded that implementation of the rule would "pose serious risks to the National Forests and adjoining lands by restricting active [ongoing] management activities . . . ."[29] Judge Lodge made no mention of the environmental benefits the rule would produce.

The Bush Administration chose not to appeal the Lodge decision, but the intervening environmental groups did. On December 12, 2001, a divided panel of the U.S. Court of Appeals for the Ninth Circuit, in an opinion by Judge Ronald Gould, a President Clinton appointee, reversed the district court, rejecting claims that the roadless rule was promulgated without proper process.[30] The majority first upheld, over the dissent's objections, the district court's decision to allow the intervention of the environmental groups.[31] The court then rejected the environmentalists' claims that the National Environmental Policy Act (NEPA) did not apply to the roadless rule because the rule did nothing more than pre-

19. Idaho filed suit on January 9, 2001, four days after President Clinton and the Agriculture Secretary signed the final rule but three days prior to publication; the others filed suit a day earlier, on January 8, 2001. Anderson, *supra* note 11, at 172.

20. The intervenors were the Forest Service Employees for Environmental Ethics, the Idaho Conservation League, Idaho Rivers United, the Sierra Club, the Wilderness Society, the Oregon Natural Resources Council, Pacific Rivers Council, and the Natural Resources Defense Council, Inc.

21. The rule was suspended by Memorandum from Andrew H. Card, White House, to Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001), along with numerous other rules that had yet to take effect; Special Areas; Roadless Area; Conservation: Delay of Effective Date, 66 Fed. Reg. 8899 (Feb. 5, 2001).

22. *See Confirmation Hearings on the Nomination of John Ashcroft to Be Attorney General of the United States: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. 184, 216-17 (2002) (statement of Sen. Cantwell).

23. Anderson, *supra* note 11, at 172 (noting that the U.S. Department of Justice used only four minutes of its allotted one-half hour at a hearing on a requested preliminary injunction).

24. The court faulted the government for failing to have adequate descriptions and maps available at the scoping stage of the EIS and for not allowing sufficient time for public comment, Kootenai Tribe v. Veneman, 142 F. Supp. 2d 1231, 1244-46, 31 ELR 20617 (D. Idaho 2001), but the draft EIS contained an entire volume of maps of each affected national forest, and the Forest Service provided 24 more days of public comment on the draft EIS than the 45 days required by National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209, and included an entire volume of responses to public comments in the final EIS. *See* Anderson, *supra* note 11, at 173. The court also concluded that the EIS failed to analyze a reasonable range of alternatives because it did not consider options allowing for more road building, failed to adequately disclose the rule's cumulative impacts, and failed to adequately discuss mitigation of wildlife, insect, and disease threats to roadless areas. *Kootenai Tribe*, 142 F. Supp. 2d at 1241, 1243, 1247.

25. *Kootenai Tribe*, 142 F. Supp. 2d at 1248.

26. *See supra* note 12 (95% of public comments on the draft EIS supported the rule); *infra* note 79 (over 90% of public in favor of the rule).

27. National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 66 Fed. Reg. 35918 (July 10, 2001).

28. Kootenai Tribe v. Veneman, No. 01-010-N-EJL, 2001 WL 1141275, at *2 (D. Idaho May 10, 2001) (citing the government's status report, which stated that the government "share[d] many of the[ ] concerns" of the plaintiffs concerning the process of approving the roadless rule. Federal Defendants Status Report at 2, *Kootenai Tribe* (No. 01-010-N-EJL). *See also id.* at 4 ("the [government] shares plaintiffs' concerns about the potential for irreparable harm in the long-term under the current Rule").

29. *Kootenai Tribe*, 2001 WL 1141275, at *2.

30. Kootenai Tribe v. Veneman, 313 F.3d 1094, 31 ELR 20130 (9th Cir. 2001). Judge Warren Ferguson, a President Jimmy Carter appointee, joined Judge Gould's opinion. Judge Andrew Kleinfield, a President George H.W. Bush appointee, dissented in significant part.

31. Initially, the court upheld the environmentalists' standing to pursue the appeal in the absence of the government. *See id.* at 1109. The court also upheld the standing of the plaintiffs to bring the suit. *Id.* at 1112-13. Then, the majority ruled that the district court had the discretion to allow the intervention of the environmental groups since they could assist the court in resolving the "large and varied" issues raised in the case; for even though they did not have a "direct interest" in the rulemaking, they asserted an interest in the use and enjoyment of roadless areas and raised "defenses" responsive to the challenges raised by the plaintiffs. *Id.* at 1110-11.

Judge Kleinfeld dissented, complaining that because NEPA requires action only by the federal government, and because only the federal government can violate NEPA, the intervenors could not be defendants in a NEPA compliance action. Therefore, he claimed to be "mystified" as to how the environmental groups, without a "protectable interest," could have a "question of law or fact in common" with government necessary to justify intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure. He maintained that the government's interest in the case was compliance with NEPA—a defense that the environmentalists "cannot possibly assert." The fact that the environmentalists used and enjoyed national forests was irrelevant, according to Judge Kleinfeld. *Id.* at 1126-27 (Kleinfeld, J., dissenting in part).

serve the environmental status quo.[32] Judge Gould concluded that because historically human intervention characterized forest management, the proposed reduction in human intervention would alter the status quo, thus triggering NEPA's procedural requirements.[33]

But on the merits of the NEPA claim, the court reversed the district court's preliminary injunction, finding that the Forest Service gave the public "extensive, relevant information" on the roadless rule and provided adequate time for meaningful public debate and comment, citing the Montana Attorney General who termed the public participation in the environmental impact statement (EIS) process "exemplary."[34] The court also upheld the 69-day public comment period on the Forest Service's draft EIS as adequate.[35]

In what may be the most significant aspect of its decision, the Ninth Circuit dismissed the plaintiffs' argument that the EIS was defective because it failed to consider any alternatives that would permit more road construction. The district court felt that by considering only alternatives that involved prohibiting road construction, plus the "no action" alternative,[36] the Forest Service failed to consider the NEPA-required "reasonable range" of alternatives.[37] Judge Gould disagreed, ruling that "[t]he NEPA alternatives requirement must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment, rather than to harm it."[38] This is an interpretation of NEPA that seems consistent with congressional intent,[39] but one which the U.S. Supreme Court has consistently ignored.[40] In concluding that its elastic approach to NEPA alternatives was consistent with congressional intent, the Ninth Circuit reasoned: "Certainly, it was not the original purpose of Congress in NEPA that government agencies in advancing conservation of the environment must consider alternatives less restrictive of developmental interests."[41] Therefore, NEPA did not require the Forest Service to consider alternatives that were inconsistent with its policy objective of preventing the degradation of the values of roadless areas, like undisturbed landscapes, watershed protection, species habitat, and educational opportunities.[42] The court concluded that "it would turn NEPA on its head" if the Forest Service had to analyze in detail environmentally damaging alternatives inconsistent with the agency's conservation policy objectives.[43] In reaching this conclusion, Judge Gould construed the policy of NEPA to be "first and foremost to protect the natural environment."[44]

32. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209. In the Ninth Circuit, "an EIS is not required to leave nature alone." Douglas County v. Babbitt, 48 F.3d 1495, 1505, 25 ELR 20631 (9th Cir. 1995) (rejecting arguments that an EIS was necessary for the designation of critical habitat under the Endangered Species Act (ESA), 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18).

33. *Kootenai Tribe*, 313 F.3d at 1115.

34. *Id*. at 1116 & n.19 (the Montana Attorney General also characterized the roadless rule as "the product of public rulemaking at its most effective"). The court rejected the plaintiffs' contentions that the Forest Service's maps and descriptions of roadless areas were inadequate, ruling that maps were not required during the scoping period and that the maps provided in the draft EIS were adequate even though the Forest Service identified some 4.2 million acres of additional roadless areas between the publication of the draft EIS and the final EIS. *Id*. at 1116-18 (observing that a supplemental EIS is not required for every change in a proposal between the draft EIS and the final and noting that the public had an opportunity to comment on the final EIS).

35. *Id*. at 1118-19 (noting that the NEPA regulations establish only a minimum 45-day comment period, 40 C.F.R. §1506.10(c), and allow the public comment period to be shortened for "compelling reasons of national policy," *id*. §1506.10(d)). The court had this to say about the time for public comment: "[T]he periods for public comment exceeded the regulatory minimums, and the entire process spanned over a year. NEPA requires that agencies give a hard look to [the] environmental impact of proposed major actions, but not necessarily an interminably long look." *Kootenai Tribe*, 313 F.3d at 1119. The dissent seemed to adopt the district court's opinion that the maps had to be made available during the scoping period. *Id.* at 1129-30 (Kleinfeld, J., dissenting).

36. The no-action alternative is required by 40 C.F.R. §1502.14(d). The three alternatives evaluated by the Forest Service were: (1) prohibiting road construction in roadless areas but allowing timber harvest; (2) prohibiting road construction and timber harvest except for disease, insect, and fire prevention; and (3) prohibiting road construction and all timber harvest in roadless areas. *See Kootenai Tribe*, 313 F.3d at 1120.

37. 40 C.F.R. §1502.14 (NEPA regulation requiring that an agency "rigorously explore[ ] and objectively evaluate[ ] all reasonable alternatives").

38. *Kootenai Tribe*, 313 F.3d at 1120. Judge Kleinfeld, in dissent, did not agree, asserting that there were numerous other unexamined alternatives that would have met the Forest Service's objective of preventing the degradation of roadless areas such as limiting the density of roads, restrictions on road construction materials, or restricting the use of road to low emission vehicles. He claimed that the existence of such viable but unexamined alternatives made the EIS inadequate. He also maintained that the majority's willingness to interpret NEPA's alternatives requirement less stringently when a proposal is to protect the environment made "no sense" in light of the purposes of national forests—to provide timber and protect water flows—and the fact that they have not been managed as natural areas. *Id*. at 1128-29 (Kleinfeld, J., dissenting).

39. *See, e.g.*, 42 U.S.C. §§4331(a) ("policy of the federal government to use all practicable means to create and maintain conditions in which man and nature can exist in productive harmony"); 4331(b) (federal government has the responsibility to fulfill the responsibilities of each generation as a "trustee of the environment for the succeeding generation" and to ensure "attain[ment] of the widest beneficial uses of the environment without degradation . . ."); 4331(c) ("each person should enjoy a healthful environment and . . . has the responsibility to contribute to the preservation and enhancement of the environment"); 4332 (federal "policies, regulations, and public laws . . . shall be interpreted and administered in accordance with the [above] policies . . .).

40. The Court has invariably ruled that judicial review of agency compliance with NEPA is limited to its procedural requirements, disregarding any substantive directives in the provisions cited *supra* note 39. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353, 19 ELR 20743 (1989) ("it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act"); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 548, 8 ELR 20288 (1978); Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28, 10 ELR 20079 (1976).

41. *Kootenai Tribe*, 313 F.3d at 1112 (citing 42 U.S.C. §§4231 et seq. but no supporting legislative history). The court characterized the plaintiffs' request for a broader alternatives analysis as being based on a worry "that an excess of conservation will be harmful to the environment by precluding appropriate actions in developing roads useful for fighting fires, or insects, or other hazards." *Id*.

42. *Id*. at 1121. The court cautioned that the Forest Service could not define its policy objectives "in unreasonably narrow terms," but it concluded that protecting roadless areas from degradation "can hardly be termed unreasonably narrow." *Id*. at 1122 (citing City of Carmel-by-the-Sea v. Department of Transp., 123 F.3d 1142, 1155, 27 ELR 21428 (9th Cir. 1997)).

43. *Id*. (citing Oregon Envtl. Council v. Kunzman, 614 F. Supp. 657, 659-60, 15 ELR 20499 (D. Or. 1985); and Forelaws on Bd. v. Johnson, 743 F.2d 677, 685, 15 ELR 20186 (9th Cir. 1984)).

44. *Id*. The court refused to construe NEPA as an impediment to environmentally benign initiatives:

> NEPA may not be used to preclude lawful conservation measures by the Forest Service and to force federal agencies, in contravention of their own policy objective, to develop and

Judge Gould thought that Idaho and the extractive users failed to show a strong likelihood of success on the merits; nor did the balance of hardships tip "decidedly" in their favor, justifying the district court's preliminary injunction.[45] The majority observed that in the status report submitted to the district court by the Forest Service—now under control of a "presidential administration which is perhaps less sympathetic to the [r]oadless rule"—the government "expressed concern 'about the potential for irreparable harm in the long-term'" due to the rule.[46] But Judge Gould framed the issue as "whether the incidental harms that *may* result from such restrictions outweigh [the] benefits . . . [that will] result in immeasurable benefits from a conservationist standpoint."[47] The Ninth Circuit majority concluded that the lower court "failed adequately to weigh the public interest in preserving our national forests in their natural state," that restrictions on human intervention do not usually produce irreparable injury, and that given the uncertainty of the plaintiffs' claims, the district court "should have engaged in a more in-depth assessment of the balance of hardships, giving more weight to the public's interest in conservation of natural resources."[48] The court therefore reversed the district court's preliminary injunction, effectively reinstating the roadless rule.[49] At least for a time.

B. The Alaska Settlement

The roadless road had particular effect in Alaska, protecting over nine million acres of the Tongass National Forest in Southeast Alaska and some five million acres of the Chugach National Forest in the south central part of the state.[50] These are the nation's two largest national forests, and together they account for around one-quarter of the roadless acreage affected by the roadless rule.[51] The Tongass is home of the largest remaining temperate rain forest in North America and has the country's largest old growth trees scheduled for timber harvest, with some 663,000 acres of low-elevation, old growth slated for timber harvest in 49 timber sales under the Forest Service's current plan.[52] In an effort to ensure that this old growth is in fact harvested, the state of Alaska filed a challenge to the roadless rule in the Alaska district court, claiming that the roadless rule violated numerous federal statutes, including the Alaska National Interest Lands Conservation Act, which the state claimed forbids establishing new reserves in Alaska without congressional consent.[53]

As in the appeal of the Idaho case, the Bush Administration decided not to defend the roadless rule, choosing instead to settle the case. On June 9, 2003, the Administration announced that it had reached an agreement with the state, promising that it would amend the roadless rule to exempt the Tongass from its application.[54] The Administration also announced that it would allow any governor to apply for an exemption from the roadless rule on several grounds, including fire protection and wildlife habitat restoration.[55]

> degrade scarce environmental resources. The Forest Service, as steward of our priceless national forests, is in the best position, after hearing from the public, to assess whether current roads adequately aid forest management practices and whether a general ban on new roads in roadless areas of national forests serves appropriate conservation and budgetary interests.

Id. at 1123.

45. *Id*. at 1124 (citing Idaho Sporting Congress v. Alexander, 222 F.3d 562, 565, 31 ELR 20038 (9th Cir. 2000).
46. *Id*. The Ninth Circuit observed that the district court's findings of irreparable harm were based on a U.S. General Accounting Office (GAO) report that concluded that the roadless rule would prevent pine forest restoration in one forest, rebuilding of fire prevention trails in another, and undertaking fire prevention measures in a third. *Id*.
47. *Id*. at 1124-25 (emphasis in the original).
48. *Id*. at 1125. The court cited American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966, 15 ELR 20735 (9th Cir. 1983), for the proposition that a preliminary injunction is proper despite the plaintiff's strong likelihood of success on the merits because of the overriding public interest in preserving the fragile desert environment.
49. The Ninth Circuit did not issue an order directing the district court to dissolve its injunction until April 14, 2003. Kootenai Tribe v. Veneman, Nos. 01-35472 et al. (9th Cir. Apr. 14, 2003).
50. *See* Alaska Rainforest Campaign, *Alaska's Tongass Rainforest: #1 Location for Logging in Roadless Areas*, *at* www.akrain.org (last visited Jan. 22, 2004).
51. The Wilderness Society, *New Administration Proposal Would Gut Roadless Rule*, *at* http://www.wilderness.org/OurIssues/Roadless/news-20030610.cfm (last visited Jan. 22, 2004).
52. Alaska Rainforest Campaign, *supra* note 50 (also noting that the designated wilderness within the Tongass and areas not scheduled for timber harvest under the forest plan omit most of the largest, ancient trees coveted by the timber industry and also provide the most valuable wildlife habitat; only 16% of the areas zoned for nondevelopment in the Tongass plan are even suitable for timber production).

    The Tongass has some 4,500 miles of existing roads, many of which are in poor condition. In fact, over one-half of all anadromous stream crossings in the Tongass block fish passage through poorly designed or maintained culverts. In these roaded areas, there is approximately 15 billion board-feet of timber available for harvest over the next century, but that is only about one-half the timber scheduled for harvest under the Tongass Land Management Plan. Moreover, timber in roadless areas already sold to commercial harvests at the time of the effective date of the roadless rule remain unaffected by the rule, providing federal timber harvests for about seven years. *See* InfoRain, *Timber Sales in Roadless Areas of the Tongass National Forest*, *at* http://www.inforain.org/maparchive/tongass_timber_sales.htm (last visited Feb. 24, 2004) (providing a map of scheduled timber sales in the Tongass).
53. Alaska claimed that provisions in the 1980 Alaska National Interest Lands Conservation Act barred further wilderness reviews, additional withdrawals, or new conservation areas and cited a policy statement in the statute indicating that the 1980 law provided sufficient protection for federal lands in Alaska. *See* 16 U.S.C. §3101(d):

    > This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska . . . . Congress believes that the need for future legislation designating new conservation system units and new national conservation areas, or new national recreation areas, has been obviated thereby.

    See also id. §3213 ("No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by . . . Act of Congress.") Environmentalists maintained that the roadless rule established no wilderness areas, withdrawals, or conservation areas, and the policy statement didn't limit the Forest Service's regulatory authority. *See Murkowski Says FS Should Exempt Alaska From Roadless Rule*, PUBLIC LANDS NEWS, Sept. 5, 2003, at 3.
54. *See Forest Service Will Make Exception to Roadless Policy*, PUBLIC LANDS NEWS, June 13, 2003, at 1.
55. U.S. Department of Agriculture (USDA) News Release, USDA Retains National Forests Roadless Area Conservation Rule, June 9, 2003, *available at* http://www.usda.gov/news/releases/2003/06/0200.htm (last visited Feb. 24, 2004) (the grounds for gubernatorial exemption included protection of people, reduction of fire hazards, restoration of wildlife habitat, maintenance of facilities like dams, provision of access to private property, and correction of technical mistakes; no exemptions would apply to areas with other statutory or regulatory protection).

The ensuing settlement agreement also promised to consider exempting the Chugach from the roadless rule.[56] On July 18, 2003, the Forest Service proposed rules carrying out the settlement.[57] The Tongass exemption went into effect on January 24, 2004.[58]

C. The Wyoming Injunction

A month after the Bush Administration announced its settlement with the state of Alaska, a Wyoming district court issued a nationwide injunction against the roadless rule, ruling that it not only violated NEPA (as Judge Lodge held in the Idaho decision) but also the Wilderness Act.[59]

Judge Clarence Brimmer, a Ford appointee,[60] made his views about the wisdom of the roadless rule quite transparent, accusing the Forest Service of "rush[ing the roadless rule through the administrative process] to give President Clinton lasting notoriety in the annals of environmentalism."[61] He would have none of it.

Judge Brimmer found numerous faults in the Forest Service's NEPA compliance in its "mad dash to complete the Roadless Initiative before President Clinton left office."[62] The maps were not available during the scoping period, and the Forest Service refused requests to extend the scoping period[63]; the Forest Service denied state requests for cooperating agency status without "one good reason in the administrative record"[64]; the Forest Service considered an inadequate range of alternatives and provided an inadequate discussion of the alternatives it did consider[65]; the agency conducted an inadequate cumulative impact analysis of the effect of the roadless road along with other contemporaneous activities[66]; and the agency failed to prepare a supplemental EIS on what the court considered to be substantial changes in the roadless rule, such as the addition of 4.2 million acres subject to the rule.[67] For all of these reasons, the court concluded that the Forest Service violated NEPA, and in the process did "lasting damage to our very law designed to protect the environment" by giving the "once-over lightly" to evaluating the roadless rule in order to advance "the political capital of the Clinton Administration without taking the 'hard look' that NEPA requires."[68]

Judge Brimmer also ruled that the roadless rule violated the Wilderness Act by usurping the U.S. Congress' exclusive power to designate wilderness areas. The court considered the roadless rule to designate "de facto wilderness" because a roadless forest is synonymous with the Wilderness Act's definition, the permitted uses in each were "essentially the same," and "most, if not all" roadless areas were at one time considered for wilderness designation but rejected by Congress.[69]

Thus, Judge Brimmer thought the roadless rule was "a thinly veiled attempt to designate 'wilderness areas' in violation of the clear and unambiguous process established by the Wilderness Act . . . ."[70] This Wilderness Act ruling was more damaging to roadless area protection than the NEPA ruling because by requiring congressional approval, it would foreclose even the Bush Administration's half-

56. Alaska v. Department of Agric., No. A01-039-CV (JKS) (June 10, 2003) (settlement in which the federal government admitted that it was "concerned about the application of the [r]oadless [r]ule to the national forests in Alaska").

57. National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 68 Fed. Reg. 41864 (July 15, 2003). Final rules were delayed due to the injunction levied by the U.S. District Court for the District of Wyoming, as discussed in the next section. *See Administration May Rethink Changes to FS Roadless Rule*, PUBLIC LANDS NEWS, Nov. 14, 2003, at 6-7.

58. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, 68 Fed. Reg. 75136, 75138 (Dec. 30, 2004) (stating that due to "great uncertainty about implementation of the roadless rule due to the various lawsuits, the Department has decided to adopt this final rule, initiated pursuant to the settlement agreement with the State of Alaska . . ."). This rule also serves as a temporary management plan for the Tongass until a permanent exemption from the roadless rule can be promulgated. The Forest Service claimed that no further environmental analysis was necessary, relying on the roadless rule EIS now enjoined by the Wyoming district court. *See infra* text accompanying notes 59-81 (section on the Wyoming injunction).

59. 16 U.S.C. §§1131-1136. Wyoming v. Department of Agric., 277 F. Supp. 2d 1197, 33 ELR 20250 (D. Wyo. 2003).

60. President Gerald Ford's Chief of Staff, former Rep. Dick Cheney (R-Wyo.), now of course Vice President, would likely have had a role to play in Judge Brimmer's appointment.

61. *Wyoming*, 277 F. Supp. 2d at 1232.

62. *Id*. at 1218, 1222 (twice quoting from the state's opening brief).

63. *Id.* at 1207. In this respect—and several others—the court departed from the Ninth Circuit's *Kootenai Tribe* decision, which it considered to be "of limited persuasive value" because, according to the Wyoming district court, interpreting the scope of alternatives less stringently for proposals aimed at protecting the natural environment and giving weight to the environmental values supporting the roadless rule conflicted with Supreme Court NEPA precedent. *Id*. at 1203 n.1 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 19 ELR 20743 (1989)).

64. *Id*. at 1231. Cooperating agency status, an effort to increase intergovernmental coordination in the NEPA process, is reserved for agencies with jurisdiction by law or special expertise over any environmental impacts involved in the proposed action triggering NEPA. 40 C.F.R. §§1501.6, 1508.5. The director of the roadless project stated that the states were denied cooperating agency status "because states would want to work at too great a 'level of detail.'" *Wyoming*, 277 F. Supp. 2d at 1221.

65. *Id*. at 1222-26 (emphasizing the Forest Service's failure to "rigorously explore and objectively evaluate all reasonable alternatives," as required by 40 C.F.R. §1502.14(a), (b)). The court complained about "[t]he Forest Service's cavalier dismissal of . . . forest management activities [like fire- and insect-related harvests], which have been the environmental status quo for decades . . . ." *Id*. at 1226. Judge Brimmer thought that the Forest Service's inadequate analysis of alternatives "was the result of the agency narrowly defining the scope of the project to satisfy a predetermined directive by Chief Dombeck, which eliminated competing alternatives . . . ." *Id.* The court also made its view of the merits quite clear: "[T]here is nothing unreasonable about studying in detail an alternative that would permit the construction of a road into a roadless area to protect the forest through active forest management." *Id*.

66. *Id*. at 1227-29 (discussing the Forest Service's failure to satisfy 40 C.F.R. §1508.25(a)(2) of the NEPA regulations).

67. *Id*. at 1229-31 (also complaining about the Forest Service eliminating procedural aspects of the roadless rule by folding them into its planning regulations, broadening the scope of the rule by including inventoried roadless areas with classified roads, and limiting the "stewardship exception" for timber harvesting to "small diameter timber").

68. *Id.* at 1232. Judge Brimmer's rhetoric might have been influenced by the fact that he had some $1 million in oil and gas stocks at the time he was deciding the fate of the roadless rule. However, the Judicial Council of the Tenth Circuit dismissed a complaint by two citizen groups that his oil interests constituted a conflict of interest. Bill Luckett, *Council Dismisses Brimmer Complaint*, CASPER STAR-TRIB., Feb. 2, 2004, *available at* http://www.casperstartribune.net/articles/2004/02/02/news/e1cc8b3e1e2d256696c9b9b8d33df068.txt (last visited Feb. 24, 2004).

69. *Wyoming*, 277 F. Supp. 2d at 1236.

70. *Id*. at 1239.

hearted attempts to amend or re-promulgate some form of the roadless rule.[71]

Due to these Wilderness Act and NEPA violations the court issued a permanent, nationwide injunction against the roadless rule.[72] The Bush Administration wasted little time in citing the Wyoming decision as a reason for Congress not to approve a rider in the 2004 U.S. Department of the Interior (DOI) Appropriations bill that would have kept the roadless rule in place. According to its statement on the bill, the Administration opposed the rider because "[i]n view of [the Wyoming] decision, a legislative prohibition at this time would likely lead to serious unintended adverse effects, including the absence of any rule protecting roadless areas."[73] The Administration's alleged concern for protecting roadless areas helped convince the U.S. House of Representatives to reject the rider[74]; however, just two days earlier, the Forest Service formally proposed to exempt the Tongass from the roadless rule and requested public comment on the Chugach exemption.[75] Later, the Administration delayed promulgating final rules on the exemptions, stating that it was unwise to promulgate exemptions to a rule subject to judicial injunction,[76] raising questions about whether the Bush Administration would fulfill its pledge that it would amend but not rescind the roadless rule.[77] Doubts about the Administration's intentions grew when it employed the Wyoming injunction to justify salvage timber logging in roadless areas in Oregon.[78]

As in the case of the Idaho decision, the Bush Administration chose not to appeal the Wyoming decision, although intervening environmental groups did.[79] After the environmentalists appealed, the state of Wyoming moved to dismiss, arguing, among other things, that the environmentalists no longer had standing after the government chose not to appeal.[80] Somewhat shockingly—and a vivid demonstration of how the Bush Administration uses litigation to advance its policies—the Administration then chose to file for amicus status and submitted a brief supporting the state, arguing that allowing the appeal would violate its executive branch prerogatives.[81]

71. Also, the remedy for a NEPA violation would presumably be a remand to the agency to supplement the record, not a declaration that the roadless rule was contrary to the Wilderness Act.

72. *Id.* at 1238 ("harm to the environment throughout the country can be presumed when an agency fails to comply with NEPA." *Id.* (citing Davis v. Mineta, 302 F.3d 1104, 1114, 32 ELR 20727 (10th Cir. 2002))). The court did not reach the issue of whether the rule violated the National Forest Management Act (NFMA), 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16, or the Multiple-Use Sustained Yield Act, 16 U.S.C. §§528-531. *Wyoming*, 277 F. Supp. 2d at 1237.

73. *See Judge Blocks FS Roadless Rule; Appeals Court Differs*, PUBLIC LANDS NEWS, July 25, 2003, at 3 (quoting from the Statement of Administration Policy on H.R. 2691).

74. *Id*. (noting that the House rejected the rider 234-185 on July 17, 2003). The roadless protection the administration worried about losing was likely the interim directives issued by the Chief of the Forest Service reserving to the Chief the authority to make road construction and timber harvest decisions in roadless areas until the applicable forest management plan is revised or amended. 66 Fed. Reg. 65795 (Dec. 20, 2001).

75. The federal government fast-tracked its proposal to exempt the Tongass after the settlement agreement with Alaska. 68 Fed. Reg. at 41865. The same day, the Administration sought public comment on the Chugach exemption. *Id*. at 41864.

76. *See Administration May Rethink Changes to FS Roadless Rule*, PUBLIC LANDS NEWS, Nov. 14, 2003, at 6-7. On June 9, 2003, the Forest Service announced that it would propose an exemption allowing governors to seek an exemption from the roadless rule under "exceptional" circumstances, but it does not yet appear to have proposed such a rule. *See* USDA, *supra* note 55.

77. *See*, *e.g.*, Matthew Daly, *Supreme Court Could Get Roadless Road*, CASPER STAR-TRIB., July 31, 2003, *available at* http://www.casperstartribune.net/articles/2003/07/28/news/wyoming/998cf261ae710a5baaf6ebc2bc42f694.txt (last visited Feb. 24, 2004) (quoting Mark Rey, Bush Administration Agriculture Undersecretary, to the effect: "We wanted to amend [the roadless rule], not end it." Also stating that the administration wants to protect roadless values while ensuring that the rule will not be subject to continuous litigation.).

78. *See Largest Forest Service Logging Project in Modern History*, PORTLAND INDEPENDENT MEDIA CENTER, Dec. 7, 2003, *available at* http://portland.indymedia.org/en/2003/12/276087.shtml (last visited Feb. 24, 2004). The Biscuit Fire, the largest wildlife in the nation in 2002, burned some 500,000 mostly roadless acres in the Siskiyou National Forest and the Kalmiopsis Wilderness Area in southwestern Oregon. The preferred alternative in the Forest Service's draft EIS on its Biscuit Fire salvage plan would log around 518 million board-feet of timber on 30,000 acres, more logging than was done on all the national forests in the Northwest in 2002 and enough trees to fill log trucks lined up for 900 miles. *See* the Biscuit Fire Recovery, *at* http://biscuitfire.com; Cascadia Forest Alliance, *Unprecedented Logging Proposed for the Siskiyou* (Oct. 21, 2003), *at* http://www.cascadiaforestalliance.org/biscuit.htm. Up to 60,000 acres would be disqualified from possible wilderness designation. *Id.* One economist claimed that the Biscuit Fire Salvage Recovery Plan would cost taxpayers more than it would the revenue it would generate. Associated Press, *Biscuit Fire Salvage Deemed Too Costly*, SEATTLE POST-INTELLIGENCER, Oct. 21, 2003, *available at* http://seattlepi.nwsource.com/local/144759_salvage21.html (Ernie Niemi of ECONorthwest; also pointing out that since 1992 the Siskiyou National Forest lost money on timber sales every year but one). And a leading expert on forest ecology, Dr. Jerry Franklin, professor of forest ecology at the University of Washington and an architect of the Northwest Forest Plan, claimed that the proposed salvage sale was unnecessary to reduce fire danger, stating: "The consensus in the ecological community at this point is that salvage logging rarely contributes anything positive to the recovery processes." Associated Press, *Old Growth Forest Expert Questions Biscuit Fire Salvage Logging*, DAILY NEWS (Longview, Wash.), Jan. 27, 2004, *available at* http://www.tdn.com/articles/2004/01/27/oregon/news02.txt. *See also* CONSERVATION BIOLOGY INSTITUTE, ECOLOGICAL ISSUE UNDERLYING PROPOSALS TO CONDUCT SALVAGE LOGGING IN AREAS BURNED BY THE BISCUIT FIRE (2004), *available at* http://consbio.org/ (pointing out that the Biscuit Fire took place in an area of "extraordinary natural richness, diversity and beauty that was shaped in part by fire," and claiming that aggressive restoration actions in most of the fire action area are largely unnecessary). In February 2004, the U.S. Environmental Protection Agency (EPA) severely criticized the Biscuit Fire sale for increasing erosion and sediment delivery to already impaired waters. *See* Craig Welch, *EPA Blasts Plan to Log Burned Oregon Forest*, SEATTLE TIMES, Feb. 21, 2004, *available at* http://seattletimes.nwsource.com/html/localnews/2001862314_biscuitfire 21m.html.

The Biscuit Fire was not the only timber salvage operation the Bush Administration pushed in roadless areas in the wake of the *Wyoming* injunction. A timber salvage plan in the wake of what was called the B&B Fire in the central Oregon Cascades south of Mount Jefferson, which burned around 90,000 acres in the summer of 2003, would build a network of roads in a roadless area immediately adjacent to the Mount Jefferson Wilderness, effectively preempting a proposed Santiam Wilderness Area. *See* Oregon Natural Resources Council, *Controversial Post-Fire Logging Plan in the Works* (Nov. 13, 2003), *at* http://www.onrc.org/alerts/164.B&B.html.

79. *See* Press Release, Earthjustice, Bush Administration Fails to Defend National Forest Roadless Areas (Sept. 15, 2003), *available at* http:www.earthjustice.org/ news/display.html?ID+ 674 (noting that the time for the federal government to file an appeal had passed and claiming that of the more than two million people who commented on the roadless rule, over 90% were in favor of it).

80. Wyoming Outdoor Council v. Wyoming, No. 03-8058, Appellee's Motion to Dismiss, at 4 (10th Cir. Sept. 29, 2003).

81. Wyoming Outdoor Council v. Wyoming, No. 03-8058, Brief of the United States as Amicus Curiae in Support of Appellee's Motion to Dismiss, at 11 (10th Cir. Nov. 13, 2003).

II. The Wilderness Settlements: Terminating Wilderness Study Areas, Ending Wilderness Studies, and Recognizing Roads

Wilderness may be one of the seven wonders of American environmental law,[82] but it continues to spawn considerable legal controversy. Only Congress makes wilderness designations, meaning that inclusions in the now over 100 million-acre system are the product of statutes in which Congress decides which lands to include in wilderness, and which lands to release to multiple use management.[83] Designation decisions are controversial politically, but they are beyond the scope of litigation. However, there are numerous legal questions concerning the status of wilderness study areas (WSAs), which are roadless areas of at least 5,000 acres that land managers have identified as possessing wilderness characteristics, and which Congress may add to the wilderness system.[84]

The roadless rule, described in the previous section, is limited to national forest lands; roadless areas on Bureau of Land Management (BLM) lands are unaffected. However, about 15.5 million acres of lands that BLM identified as having wilderness characteristics under the directives of the Federal Land Policy and Management Act (FLPMA) are subject to interim protection in order to ensure that Congress will have the opportunity to designate wilderness areas when it decides to take action.[85] To date, Congress has enacted only two broad-based wilderness statutes designating BLM lands, the Arizona Desert Wilderness Act of 1990 and the California Desert Conservation Act of 1994,[86] which together designated a total of 6.5 million acres of wilderness on BLM lands, while releasing other lands from WSA status.[87] Although there are now around 15.5 million acres in WSA status,[88] many observers think that this acreage is suspiciously small, due to the fact that the BLM's 1991 inventory omitted many roadless areas having wilderness characteristics that should have qualified for WSA status.[89] The BLM seemed to agree: in the 1990s, the agency began to identify additional WSAs beyond the initial acres identified as part of its ongoing FLPMA obligations to inventory public lands for their resource and amenity values and to prepare land use management plans.[90] The identification of these additional WSAs was controversial, opposed by extractive industries, off-road vehicle enthusiasts, and several western states.

WSAs are particularly controversial in Utah, where environmentalists have long claimed that the BLM's initial wilderness inventory short-changed WSAs. The BLM inventoried 5.2 million acres in Utah, recommending wilderness designation of approximately 2.0 million acres in 1980, a figure reduced to 1.9 million acres in 1991 following lengthy administrative appeals.[91] After environmentalists identified tens of millions of acres overlooked by the BLM, including 5.9 million acres in Utah,[92] they eventually convinced the Clinton Administration in 1996 to reevaluate the wilderness characteristics lands omitted from the initial Utah wilderness review.[93] This decision to reinventory

82. William H. Rodgers Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 Loy. L.A. L. Rev. 1009, 1009-10 (1994) (referring specifically to §2 of the Wilderness Act of 1964, 16 U.S.C. §1132, which created the National Wilderness Preservation System).

83. Wilderness areas and their enabling statutes are listed at 16 U.S.C. §1132 note.

84. The Wilderness Act of 1964 required the Forest Service to study undeveloped areas the agency had classified as "primitive" and contiguous areas for wilderness suitability and make recommendations to the president, who in turn would make recommendations to Congress. 16 U.S.C. §1132(b). The statute also required the DOI to make wilderness recommendations to the president concerning "roadless" areas of at least 5,000 acres within national parks and wildlife refuges. *Id.* §1132(c). A dozen years later, in 1976, the Federal Land Management and Policy Act (FLPMA), 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603, directed the DOI to study roadless areas of at least 5,000 acres on Bureau of Land Management (BLM) lands, identify those areas having "wilderness characteristics," and make wilderness recommendations to the president by 1991. 43 U.S.C. §1782(a). The president then had two more years to make recommendations to Congress. *Id.* §1782(b).

85. 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603. *See supra* note 84 on the FLPMA directive to study wilderness. The concept of a WSA was first articulated by the Tenth Circuit in Parker v. United States, 448 F.2d 793, 1 ELR 20489 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), which ruled that the Forest Service could not authorize logging in roadless areas adjacent to areas under consideration for wilderness designation because doing so would impair the president's and Congress' ability to add to areas the agency studied under the procedure established by §3(d) of the Wilderness Act. 16 U.S.C. §1132(d). FLPMA codified the WSA concept by requiring the BLM to manage those areas it identified as having wilderness characteristics "so as not to impair [their suitability] as wilderness, subject, however, to the continuation of existing [pre-1976] mining and grazing uses and mineral leasing." 42 U.S.C. §1782(c). Pre-1976 uses that are grandfathered from the non-impairment standard are still subject to the directive that the BLM "take any action . . . to prevent unnecessary and undue degradation" of WSAs. *Id.*

86. Arizona Desert Wilderness Act of 1990, 101 Pub. L. No. 628, 104 Stat. 4469; *see* 16 U.S.C. §1132 note; California Desert Protection Act of 1994, 103 Pub. L. No. 433, 108 Stat. 4471; *see* 16 U.S.C. §410aa note.

87. Letter from Secretary Gale A. Norton, DOI, to Sen. Robert Bennett (R-Utah) 1 (Apr. 11, 2003), *available at* http://www.nevadawilderness.org/lawsuit/norton_let.htm (last visited Jan. 18, 2004).

88. *Id.*

89. For example, the authors of the leading public land law treatise consider the fact that the BLM identified only about 23 million acres as having wilderness characteristics of the 174 million BLM acres outside of Alaska (around 13%) to be "inordinately low." George Cameron Coggins & Robert L. Glicksman, 2 Public Natural Resources Law §14B:12, at 14B-16 (2001 release). The BLM subsequently recommended that Congress designate only 9.6 million acres of the nearly 23 million inventoried acres as wilderness (*see* Norton letter, *supra* note 87, at 1), but all of the inventoried land was subject to WSA protection in order to protect the ability of Congress to add to the lands recommended for wilderness designation. There are now fewer than 23 million WSA acres due largely to the two statutes mentioned *supra* note 86 and accompanying text.

90. 43 U.S.C. §§1711(a) (inventory), 1712 (land use plans).

91. Utah; Final Wilderness Inventory Decision, 45 Fed. Reg. 75602, 75604 (Nov. 14, 1980) (5.2 million acres inventoried, 3.2 million acres dropped from further consideration due to a lack of wilderness characteristics); BLM, U.S. DOI, Utah State Wilderness Study Report 3 (1991) (1.9 million acres recommended) (discussed in Utah v. Babbitt, 137 F.3d 1193, 1198-99, 28 ELR 20561 (10th Cir. 1998)).

92. *See* Press Release, Campaign for America's Wilderness, Jekyll and Hyde? Administration Announces Initiative to Involve Public in Preserving Public Lands 2 (Apr. 16, 2003), *available at* http://www.leaveitwild.org/news/release_04_16_03.htm (last visited Jan. 18, 2004) (also noting that environmentalists identified 2.5 million overlooked acres in Oregon).

93. *See* Utah v. Babbitt, 137 F.3d at 1199, 1209 (10th Cir. 1998) (noting that the government claimed that the new inventory only would assess wilderness characteristics and not make recommendations about the suitability of the lands for designation as wilderness; those recommendations would not be made until after the inventory was made public). The government maintained that it had the authority to conduct the reinventory under §201(a) of FLPMA, 43 U.S.C.

prompted numerous responses, including efforts by several southern Utah counties to bulldoze roads and a suit by the state of Utah.

The state's suit succeeded in convincing the Utah district court to enjoin the DOI from proceeding with the reinventory on the ground that there was no statutory authority for such a reconsideration and, if there was, the agency violated FLPMA's public participation requirements.[94] The U.S. Court of Appeals for the Tenth Circuit, however, dissolved the injunction in 1998, dismissing most of the state's case.[95] The court ruled that the state lacked standing to challenge the reinventory because it could show no injury from it, since by itself the reinventory changed no management directives.[96] Such changes could occur only through subsequent amendments to the BLM's resource management plans.[97] Although the court dismissed the lion's share of the state's case, it did uphold the state's standing to challenge the BLM's alleged de facto wilderness management of reinventoried lands, although the Tenth Circuit cast considerable doubt on the merits of the state's remaining claim.[98] The latter ruling resulted in a remand to the district court, keeping the case alive, a fact that would later prove to be quite significant.

The BLM proceeded with the reinventory and, in 1999, identified some 2.6 million additional acres in the state with wilderness characteristics.[99] Then, at midnight of the Clinton Administration, in January 2001, the BLM issued a new *Wilderness Handbook*, which called for its land use management plans to reflect the reinventoried lands.[100] The 2001 *Wilderness Handbook* also allowed citizen nominations of new WSAs.[101]

Meanwhile, the Clinton Administration was also attempting to take steps to preserve Congress' opportunity to designate wilderness areas on BLM lands. Since by definition BLM wilderness areas must be "roadless,"[102] the existence of a road disqualifies an area from wilderness consideration. Under an obscure 19th century law aimed at facilitating settlement of the West, known as R.S. 2477, the federal government granted a general "right-of-way for construction of highways" across unreserved public lands.[103] But the law established neither criteria nor procedures to establishing such rights-of-way, creating years of uncertainty and conflict.[104] Although FLPMA repealed R.S. 2477 over one-quarter century ago, it did not extinguish preexisting rights-of-way nor indicate how to identify them.

In an attempt to clarify some of the R.S. 2477 uncertainties, the Clinton Administration proposed regulations to implement the statute in 1994.[105] These regulations would have defined key terms like "construction" and "highways," set time deadlines for the filing of R.S. 2477 claims, established an appeal process, and clarified the relationship between federal and state law.[106] However, the Republican

§1711(a) (directing the Secretary to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern").

94. Utah v. Babbitt, No. 96-870 (D. Utah Nov. 15, 1996) (ruling that FLPMA did not authorize the inventory and that the government violated §201 of the statute by failing to provide for public participation in the inventory process).

95. *Utah*, 137 F.3d at 1217.

96. *Id*. at 1211-12.

97. *See id*. at 1208-10 (distinguishing §201 of FLPMA, which authorized the inventory, from the §202 directive to develop and implement land use plans; also concluding that only the latter required public participation).

98. *Id*. at 1215-16 (describing Utah's evidence as "nebulous" and immaterial to the de facto wilderness claim).

99. *See* U.S. DOI, Utah Wilderness Settlement Fact Sheet: Historical Context Behind the Utah Wilderness Settlement 1 (2003), *available at* www.doi.gov/wilderness. factsheet.html (also noting that the Utah reinventory identified some 440,000 acres of state trust lands as possessing wilderness characteristics).

100. *See* BLM, Final Wilderness Inventory and Study Procedures Handbook, BLM Manual H-6310-1 (2001) [hereinafter Wilderness Handbook]. Public Land Resources: Planning, Programming, and Budgeting, 66 Fed. Reg. 1694 (Jan. 9, 2001) (public notice of availability of the *Final Wilderness Inventory and Study Procedures Handbook*). The BLM issued the original *Wilderness Handbook* in 1978. On December 12, 1979, the BLM issued an Interim Management Policy to guide the use of the *Wilderness Handbook* in selecting the §603 WSAs. The *Wilderness Handbook* expired on September 30, 1984, but an internal memorandum reinstated it on November 8, 1984, noting that it was designed only for short-term use (though it has been in use since that time). The BLM stated that it would employ the 2001 *Wilderness Handbook* to catalogue areas with wilderness characteristics under the BLM's inventory authority under §201 of FLPMA and then use its §202 land use planning authority to designate inventoried areas as WSAs, which would be managed under the nonimpairment standard called for by the Interim Management Policy. Wilderness Handbook at 1, 5, 6. Thus, the 2001 *Wilderness Handbook* in effect memorialized in policy what the BLM had been doing in its "reinventory" during the late 1990s. *See* U.S. DOI, Summary of Department of the Interior's Wilderness Settlement Proposal (2003), *available at* http://www.doi.gov/wilderness/summary.html (last visited Feb. 24, 2004) [hereinafter DOI Wilderness Settlement Summary].

101. Wilderness Handbook, *supra* note 100, at 5. The 2001 *Wilderness Handbook* required citizen proposals to be accompanied by a map, a description of proposed boundaries, and a "detailed narrative that describes the wilderness characteristics of the area and documents that information significantly differs from the information in prior inventories . . . ." *Id.* If the BLM agreed that a proposed area had wilderness character, and a proposed action would degrade that character, the BLM would "as soon as practicable, initiate a new land use plan or plan amendment to address the wilderness values." *Id.* But since the 2001 *Wilderness Handbook* was issued without an opportunity for public comment, just 10 days before President Clinton left office, Utah claimed that it was a circumvention of public process and eventually added this allegation to its complaint in its suit against the DOI, which was renamed *Utah v. Norton*. *See supra* notes 94-98 and accompanying text.

102. 43 U.S.C. §1782(a). *See supra* note 15, noting that some inventoried roadless areas can in fact have roads.

103. R.S. 2477, 43 U.S.C. §932 (repealed): "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." R.S. 2477 was originally enacted as §8 of the Mining Act of 1866, then reenacted and codified as part of the Revised Statutes in 1873. Congressional Research Service, Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest 1 (2003) [hereinafter CRS Study]. *See also* U.S. DOI, The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands (1993) (draft report to Congress; this report was never made final). In many respects, R.S. 2477 is the quintessential "lord of yesterday," to use Charles Wilkinson's memorable phrase describing 19th century laws that still govern natural resource allocation more than a century later. *See generally* Charles F. Wilkinson, Crossing the Next Meridian: Land, Water, and the Future of the West 1-27 (1992).

104. Coggins & Glicksman, *supra* note 89, §10E:19 at 10E-41.

105. Revised Statute R.S. 2477 Rights-of-Way, 59 Fed. Reg. 39216 (Aug. 1, 1994). In 1992, Congress asked the DOI to study the history of R.S. 2477 claims and suggest how to resolve them in the conference report on the Fiscal Year 1993 Appropriations Bill for [the] Interior and Related Departments. Pub. L. No. 102-381, 105 Stat. 1374 (Oct. 5, 1992). *See* H.R. Rep. No. 102-901, at 71 (1992). The DOI drafted a report in March of 1993, *see* U.S. DOI, *supra* note 103, and then proposed the regulations in August 1994.

106. 59 Fed. Reg. at 39219.

takeover of Congress in the 1994 election encouraged Sens. Ted Stevens (R-Alaska) and Orrin Hatch (R-Utah) to attach a rider to the highway funding bill that prohibited the use of appropriated funds for fiscal year (FY) 1996 to implement R.S. 2477 regulations.[107] The next year, the Republican Congress approved two more appropriation riders that first extended the ban on R.S. 2477 regulations,[108] and then made it permanent.[109] Thus, the identification of R.S. 2477 highways, and their concomitant effect on WSAs, was apparently to be left to administrative and judicial adjudication without any formal administrative interpretation.[110]

The wilderness situation changed dramatically after the Court decided the 2000 election, inaugurating an Administration more hostile to wilderness than any since the Wilderness Act passed in 1964. The Bush Administration moved to settle the still pending litigation with the state of Utah over the reinventory of wilderness study areas by effectively conceding all issues to the state, even though the Tenth Circuit had rejected nearly all the state's challenges and cast doubt on the remaining one,[111] and even though the BLM had always interpreted its FLPMA land use planning authority to include consideration of all uses, including wilderness.[112] The Administration also established a process for recognizing R.S. 2477 claims through "disclaimer of interest" regulations and promised to apply that process to Utah claims in a memorandum of understanding (MOU) with the state.[113]

A third avenue of attack on wilderness—successfully convincing the Court to review a Tenth Circuit decision that held that the BLM's failure to protect wilderness study areas from off-road vehicle use was judicially reviewable[114]—is beyond the scope of this Article. However, this aggressive challenge to an attempt to protect the wilderness characteristics of WSAs does serve as a nice contrast to the Administration's passivity in its failure to defend the roadless rule.[115]

A. The Wilderness Study Settlement

On April 11, 2003, the DOI agreed to settle the Utah WSA litigation in an agreement that was breathtaking in its scope and effect.[116] First, the BLM agreed that its authority to conduct wilderness reviews and establish WSAs expired in 1993 when President George H.W. Bush transmitted his wilderness recommendations to Congress; consequently, the agency would not "establish, manage, or otherwise treat" lands as WSAs that were not identified in the 1993 inventory.[117] The settlement thus not only rescinded the 2.6 million acres of WSAs identified in the 1999 reinventory, it also renounced FLPMA authority to establish any WSAs in the future.[118] These concessions effectively eliminated WSA status for roadless lands both inside and outside Utah that the BLM had identified as possessing wilderness after 1993, including 61,000 acres in Oregon, a total of 2.87 million acres in all.[119] Second, the DOI also agreed to revoke the *Wilderness Handbook* and related policies that directed the BLM to identify lands with wilderness characteristics through its land use planning process and to manage these areas to preserve their wilderness character.[120] Although no new additional WSAs will be identified on BLM lands, the DOI maintained it could protect lands with remote and primitive characteristics by designating

107. National Highway System Designation Act, §349(a)(1), Pub. L. No. 104-59, 109 Stat. 568, 617-18 (1995) (prohibiting any fiscal year (FY) 1996 funds from being used to implement R.S. 2477). Earlier, the two senators unsuccessfully attempted to add language to the 1995 National Highways System Designation Act that would have allowed state law to govern the validity of R.S. 2477 claims. *See* Wilderness Society, *R.S. 2477 Fact Sheet* (updated Mar. 20, 2003), *at* http://www.wilderness.org/OurIssues/RS2477/factsheet.cfm (last visited Feb. 5, 2004); *see also* CRS STUDY, *supra* note 103, at 6.

108. Department of [the] Interior and Related Agencies Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-134, §110, 110 Stat. 1321-177 (1996).

109. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-208, §108, 110 Stat. 3009, 3009-209 (1996) ("No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. §932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.").

110. See *infra* note 135 for an example of a result of such adjudication. Secretary Bruce Babbitt did revoke a Reagan-era policy issued by then-Secretary of the Interior Don Hodel on the recognition of R.S. 2477 claims that was quite generous in its interpretation of the statutory language of "construction of a highway" to include "[r]emoving high vegetation [or] moving large rocks out of the way." U.S. DOI, INTERNAL DEPARTMENTAL POLICY ON REVISED STATUTE 2477 GRANT OF RIGHT-OF-WAY FOR PUBLIC HIGHWAYS; REVOCATION OF DECEMBER 7, 1988 POLICY (1997) (applicability modified by R.S. 2477 MOU, *infra* note 128, §7), as quoted in U.S. DOI, DEPARTMENTAL POLICY STATEMENT, R.S. 2477, at 2 (1988). Under the Hodel policy of 1988, repeated passage of vehicles could qualify as "construction," and pedestrian and pack-animal trails could be "highways." *Id*. The Hodel policy encouraged the number of R.S. 2477 claims to skyrocket. *See* CRS STUDY, *supra* note 103, at 6.

111. *See supra* notes 95-98 and accompanying text (on the Tenth Circuit decision); *see also infra* notes 116-27 and accompanying text (on the settlement).

112. *See* John D. Leshy, The Bush (II) Administration and Federal Lands and Resources: An Outsider's View at Mid-Term, Speech at the Rocky Mountain Mining Law Foundation, Public Land Law, Regulation, and Management (May 15-16, 2003) (noting that for 27 years the BLM had interpreted its land use planning to authorize management of lands to preserve wilderness values).

113. *See infra* note 129 and accompanying text.

114. Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 33 ELR 20025 (10th Cir. 2002), *cert. granted*, 124 S. Ct. 462 (Nov. 3, 2003) (environmentalist challenge to the BLM's failure to "prevent impairment" of WSAs under §603(a) of FLPMA, 43 U.S.C. §1782(a), was reviewable as inaction unlawfully withheld under the Administrative Procedure Act (APA), 5 U.S.C. §§500-706, §702, *available in* ELR STAT. ADMIN. PROC.).

115. *See supra* notes 19-49 and accompanying text. However, the Administration's aggressive challenge to WSA protection is consistent with its determination to keep environmentalists from appealing the roadless rule injunction. *See supra* note 81 and accompanying text.

116. The fact that this settlement was announced the same day that Utah amended its complaint to challenge the implementation of the 2001 *Wilderness Handbook*, *supra* note 100, the vehicle by which resource management plans would recognize WSAs identified by the reinventory, reinforced the impression that the settlement was a sweetheart deal reached behind closed doors without public involvement.

117. Settlement Agreement at 14, Utah v. Norton (D. Utah Apr. 11, 2003) (No. 96-870) [hereinafter Utah Settlement Agreement].

118. *Id.* at 12. In a summary of the settlement, the DOI explained that it "agree[d] with Utah's position that [FLPMA] does not allow BLM to use [§]202 [authority to prepare and implement land use management plans] areas to create de facto wilderness." DOI WILDERNESS SETTLEMENT SUMMARY, *supra* note 100, at 1.

119. Bill Marlett, *Secretary Norton's Assault on America's Wilderness Heritage*, DESERT RAMBLINGS, Summer 2003, at 3.

120. Utah Settlement Agreement, *supra* note 117, at 13 (promising to rescind the 2001 *Wilderness Handbook*, *see supra* note 100); *see also id.* at 15 (restricting the Interim Management Policy, describing in detail how WSAs will be managed to pre-1993 WSAs, and modifying the *Land Use Planning Handbook,* BLM Handbook H-1601-1, to eliminate identifying WSAs as part of the land use planning process).

them as "areas of critical environmental concern" in its land planning process.[121]

The oil and gas industry hailed the settlement, believing that it would free up millions of acres for oil and gas leasing, and its optimism was rewarded when the Bush Administration promised to lease some 46,000 acres of former WSA lands adjacent to Dinosaur National Monument in eastern Utah for oil and gas exploration by mid-2004.[122] Environmentalists challenged the agreement, maintaining that FLPMA authorized identification of WSAs through land use planning and in its directive in §201 "to prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values) . . . ."[123] The DOI's sudden shift in its interpretation of FLPMA created a stark contrast with the Forest Service and National Park Service (NPS), which routinely evaluate roadless areas for WSA status through their land use planning authority.[124] The Bush Administration tried to characterize the Clinton Administration as changing FLPMA's interpretation,[125] but even the respective Administrations under President Ronald Reagan and President George H.W. Bush interpreted the statute to authorize land use plans to identify WSAs.[126] The environmentalists will take these arguments to the Tenth Circuit, as they ask the appellate court to vacate the district court's acceptance of the settlement, thereby reinstating the WSA status of the nearly three million acres that the settlement rescinded.[127] Ironically, the Utah governor who signed the settlement with the DOI's Secretary Gale Norton, Mike Leavitt, is now head of the Bush Administration's U.S. Environmental Protection Agency (EPA).

B. The R.S. 2477 MOU

Three days before the WSA settlement, then-Governor Leavitt and Secretary Norton signed an MOU that established an "acknowledgment process" for recognizing R.S. 2477 claims in Utah.[128] The MOU promised to apply new DOI "recordable disclaimer" rules to process thousands of R.S. 2477 claims,[129] although there is no indication that the authorizing provision, FLPMA §315, concerning removing "cloud[s] on . . . title,"[130] was intended to be the mechanism to settle R.S. 2477 claims.[131] In fact, the effect of the issuance of a recordable disclaimer for a R.S. 2477 claim would seem to create—not remove—a cloud on public land title by

121. U.S. DOI Fact Sheet, *supra* note 99, at 2. *See* 43 U.S.C. §1701(a)(11) (FLPMA policy of protecting areas of critical environmental concern); *see also id.* §1712(c)(3) (directive to give priority to areas of critical environmental concern in land use plans). Secretary Norton, in a letter to Senator Bennett on the day that the settlement was announced, seemed to contradict the settlement's renunciation of authority to manage lands for wilderness characteristics, stating that "consistent with FLPMA, the department will continue to consider wilderness characteristics as part of its land use planning process. We believe the discussion of wilderness characteristics is an integral part of responsible land use planning." Letter from Gale Norton, *supra* note 87, at 3.

122. *See* Juliet Eilperin, *Utah Oil and Gas Leases Stir Criticism: Sensitive Wildlife Habitats Auctioned to Bush Contributors, Environmentalists Say*, Wash. Post, Mar. 1, 2004, at A2. *See also Norton Says No New BLM WSAs; Enviros Will Take Her to Court,* Public Lands News, Apr. 18, 2003, at 3-4 (quoting Claire Moseley, executive director of Public Lands Advocacy, a coalition of oil and gas companies: "In Utah BLM has been holding off on leasing of three million acres for several years. Most of that is in southern Utah, where people are interested in leasing. And we're looking at another several hundred thousand acres of wilderness inventory in Colorado.").

123. *See id. See also* 43 U.S.C. §§1711(a) (inventory), 1712 (land use plans).

124. *See Norton Says No New BLM WSAs, supra* note 122, at 9-10 (noting that in the statewide forest wilderness laws of the 1980s, Congress generally authorized the Forest Service to consider the suitability of roadless areas for wilderness designation when revising its land and resource management plans).

125. DOI Wilderness Settlement Summary, *supra* note 100, at 2:

> The case arose because the statutory time period for wilderness recommendations under [§]603 expired in 1991. However, in the late 1990s, the Clinton [A]dministration began relying on [§§]201 and 202 of the Act to identify additional BLM lands not on the 1991 list. (The prior [A]dministration's approach to [§]202 areas was memorialized in a BLM handbook that was issued January 10, 2001.)

126. *See Environmentalists Will Argue FLPMA Allows WSA Studies*, Public Lands News, June 27, 2003, at 9 (quoting Jim Angell, attorney with Earthjustice: "They can't simply announce they never had discretion. It's an interpretation of every administration, including the Reagan [A]dministration, that there is room for creating WSAs in [§]202.").

127. *See Environmentalists Will Argue FLPMA Allows WSA Studies*, Public Lands News, June 27, 2003, at 9; Utah v. Norton, No. 96-0870 (D. Utah Apr. 14, 2003) (Order Approving Stipulation and Granting Joint Motion to Dismiss Third Amended and Supplemented Complaint).

128. Memorandum of Understanding Between the State of Utah and the Department of the Interior on State and County Road Acknowledgment (Apr. 9, 2003) [hereinafter cited as R.S. 2477 MOU]. The MOU is not a settlement of litigation, since although the state of Utah sent the Secretary of the Interior a notice of intention to file suit to quiet title to numerous R.S. 2477 claims in 2000, it never filed suit under the Quiet Title Act, 28 U.S.C. §2409a(m). *See* R.S. 2477 MOU, *supra*, finding 7. The BLM indicated that it did not intend to publish a notice of the MOU in the *Federal Register* or elsewhere. CRS Study, *supra* note 103, at 20.

129. R.S. 2477 MOU, §4. The new §315 rules were promulgated on January 6, 2003, 68 Fed. Reg. 494 (2003) (to be codified at 43 C.F.R. pt. 1864). These rules amended earlier regulations by: (1) largely removing a 12-year regulatory filing deadline for state and local governments; (2) eliminating the requirement that an applicant for a disclaimer be "a present owner of record"; and (3) clarifying that the BLM will not issue a disclaimer over the valid objection of another land management agency with jurisdiction over the lands. *See* Paul B. Smyth, *Report From Interior: Recent Developments*, *in* Public Land Law, Regulation, and Management, Paper No. 13, at 13–3 (Rocky Mtn. Min. L. Inst. 2003). The first change was designed to coincide with 1986 Amendments to the Quiet Title Act, 24 U.S.C. §2409a(g), which exempted state and local governments from the otherwise applicable 12-year statute of limitations. The second change was due to the fact that there are no records, and thus no record owners, concerning R.S. 2477 roads (or state ownership of navigable riverbeds). The third change is a reminder that the §315 authority is not limited to BLM or even DOI lands. 68 Fed. Reg. at 495.

130. 43 U.S.C. §1745 (authorizing disclaimer of interest in lands where, inter alia, the Secretary determines that the federal interest "has terminated by operation of law or is otherwise invalid"). The purpose of §315 was to provide an administrative process to clear title to lands in which the federal government had no legal interest. As discussed *infra* note 132, the effect of recognizing an R.S. 2477 claim does not terminate the federal interest in lands or leave the government with no residual property interest.

131. *See, e.g.*, Letter of Sen. Jeff Bingaman (D-N.M.) to David M. Walker, Comptroller General of the United States 1 (Apr. 15, 2003):

> Although nothing in [§]315, its legislative history, the prior rule implementing the section (43 C.F.R. §1864 (2002)), or even the statement accompanying the proposed rule (67 Fed. Reg. 8216, Feb. 22, 2002) suggested that [§]315 could be used to recognize R.S. 2477 claims, the statement accompanying the final rule reveal, for the first time, the Department's intention to use its disclaimer authority for this purpose. 68 Fed. Reg. at 496-98.

See also Leshy, *supra* note 112 (the former Interior Solicitor noting that §315 had never been interpreted to apply to R.S. 2477 claims).

recognizing a nonfederal road easement. Nor does the effect of recognizing an R.S. 2477 road terminate "a 'record interest of the United States' in land," as required by FLPMA §315.[132] Further, the use of such rules may conflict with a congressional directive against any "final rule or regulation . . . pertaining to the recognition, management, or validity of a right-of-way pursuant to R.S. 2477 unless expressly authorized by an Act of Congress."[133]

Unlike the 1994 proposed regulations,[134] the MOU made no express attempt to define key statutory terms like "construction" and "highway," but it did seem to adopt the state position—a position rejected recently by the federal district court of Utah[135]—that a valid R.S. 2477 highway requires only use, not purposeful, physical construction.[136] Although it is hardly clear that the MOU can change R.S. 2477 standards,[137] it equated "highway" with "road,"[138] which might indicate that it meant to abandon the BLM's previous positions, also adopted by the Utah court, that the state had to show that an R.S. 2477 claim was a highway connecting the public with identifiable destinations.[139] Further evidence that the MOU meant to change the evaluation standards for R.S. 2477 claims lies in its declaration that the BLM's 1997 revocation of what was called the "Hodel policy" of interpreting R.S. 2477 claims will not apply to MOU acknowledgment requests.[140] Since the Hodel policy liberally construed statutory terms like "construction" and "highways," the MOU apparently intended to reinstate its interpretations, even though the courts have approved the BLM's interpretations under the 1997 revocation.[141]

The MOU excluded reserved lands from its operation, including lands in wilderness areas, WSAs, the National Park System, and the National Wildlife Refuge System (but apparently not the Grand Staircase-Escalante National Monument).[142] However, the state and the counties did not disavow R.S. 2477 claims across these conservation lands,[143] so such claims could still be subject to a recordable disclaimer under the 2003 regulations or a quiet title action.[144] Nor is the state or its counties bound by determinations made under the MOU.[145] Moreover, the MOU only excluded WSAs designated by 1993, so it does in fact apply to the 2.6 million of WSAs that would be renounced three days later in the WSA settlement.[146] "Acknowledging" R.S. 2477 claims in these former WSAs would preclude those areas from ever being designated wilderness, which seems to be an unmistakable goal of the MOU.

Although by its terms the R.S. 2477 MOU was confined to the state of Utah, the states of Colorado and Alaska were quick to seek their own MOUs.[147] Colorado even sought to

132. The "record interest of the United States" in the right-of-way was effectively conveyed by the highway construction prior to 1976, not by issuance of the recordable disclaimer. Moreover, R.S. 2477 grants nonfederal rights-of-way easements on federal lands. Easements do not terminate the underlying federal land ownership. Recognizing an easement across federal lands is not the same as a quitclaim deed from the United States, and §315 specifies that a recordable disclaimer is the equivalent of a quitclaim. *Id.* §1745(c). A quitclaim deed is defined as a "deed that conveys a grantor's complete interest or claim in certain real property but neither warrants nor professes that the title is valid." Black's Law Dictionary 424 (Bryan A. Garner ed., 7th ed. 1999). Recognizing a road easement is not equivalent to renouncing federal ownership in the underlying land as it would be, for example, in a recordable disclaimer concerning the bed of a navigable water.

133. Omnibus Consolidated Appropriation Act of 1997, Pub. L. No. 104-208, §108, 110 Stat. 3009, 3009-3209 (1996); *see supra* note 109. The DOI considered the argument that the regulations were inconsistent with the congressional prohibition against promulgating regulations "pertaining to" R.S. 2477 but rejected it. According to the DOI, the prohibition was aimed only at the 1994 regulations, *supra* notes 105-06 and accompanying text, and the legislative history of the congressional prohibition indicated that Congress did not intend to "limit the ability of the Department to acknowledge or deny the validity of claims under R.S. 2477 or limit the right of grantees to litigate their claims in any court." 68 Fed. Reg. 494, 497 (citing H.R. Rep. No. 104-625, at 58 (1996)).

134. *See supra* note 106 and accompanying text.

135. Southern Utah Wilderness Alliance v. BLM, No. 2:96-CV-836 TC (Feb. 23, 2004) (haphazard driving is not "highway construction" for purposes of R.S. 2477), *reaff'g*, 147 F. Supp. 2d 1130, 1139-40 (D. Utah 2001) (adopting the BLM's view and rejecting Utah counties' view that "construction" required only use; the court also ruled that valid R.S. 2477 claims cannot be established on lands that were withdrawn from mining under the Pickett Act (*id.* at 1141-45)).

136. R.S. 2477 MOU, *supra* note 128, §3(a) (requiring only that "roads" be in existence in 1976 and "in use at the present time").

137. Although the congressional prohibition against promulgating regulations "pertaining to" R.S. 2477, *supra* note 106, obviously singles out regulations, not MOUs, its larger purpose was to reserve changes in R.S. 2477 policy to Congress. The MOU appears to recognize that it may not change R.S. 2477 standards in its provision recognizing that expansions in the width of rights-of-way are not within the R.S. 2477 grant but instead require FLPMA permits. R.S. 2477 MOU, *supra* note 128, §6.

138. *Id.* at n.1 ("For purposes of this MOU, the terms "road" and "highway" shall be deemed synonomous [sic]."). For illuminating sets of photos of alleged R.S. 2477 "highways," see Southern Utah Wilderness Alliance, *at* http://www.suwa.org; Earthjustice, *Photos*, *at* http://www.earthjustice.org/news/display.html?ID=522#photos; Highway-Robbery, *How a Loophole in an Outdated and Repealed Road Law Threatens Our National Parks, Monuments, and Other Special Places*, *at* http://www.highway-robbery.org; and R.S. 2477 Photo Gallery, *at* http://members.aol.com/gshiker999/index.html.

139. *Southern Utah*, 147 F. Supp. 2d at 1143-44. The MOU also required the "road" to be "public and capable of accommodating automobiles or trucks with four wheels and subject of some type of periodic maintenance." R.S. 2477 MOU, *supra* note 128, §3(d). This would appear to allow jeep trial or off-road vehicle tracks to qualify for R.S. 2477 rights-of-way.

140. R.S. 2477 MOU, *supra* note 128, §7. On the Hodel policy, *see supra* note 110.

141. The leading case is *Southern Utah*, 147 F. Supp. 2d at 1130. *See also* Fairhurst Family Ass'n, Ltd. Liab. Corp. v. U.S. Forest Serv., 172 F. Supp. 2d 1328, 1331 (D. Colo. 2001); Western Aggregates, Inc. v. County of Yuba, 101 Cal. App. 4th 278 (Cal. App. 3d Dist. 2002).

142. R.S. 2477 MOU, *supra* note 128, §2 (also excluding roads administered by other federal agencies, like the Forest Service, "unless that federal agency consents to the inclusion of the road in the Acknowledgment Process").

143. *Id.* §§7, 10 (noting that the revocation of the Hodel policy, *supra* note 110, will still apply to "other requests" for R.S. 2477 acknowledgment outside the MOU; noting that use of the MOU will not prejudice any claims to valid existing rights to the road under existing law). Although the state could renounce claims in conservation lands and the federal government could refuse to administratively acknowledge them in the absence of judicial recognition, it is quite doubtful that the government can retroactively rescind the statutory offer made in the Mining Act of 1866. Under R.S. 2477, there was a standing offer to establish "highways" over nonreserved public lands between 1866 and 1976. *See supra* note 105. Much of the lands now in conservation units—and indeed much land now in private ownership—was nonreserved land during at least part of this 110-year period. If established prior to the establishment of the conservation units or the privatization, the R.S. 2477 claims presumably would still be valid.

144. *See supra* notes 128 (Quiet Title Act) and 131 and accompanying text (2003 regulations).

145. R.S. 2477 MOU, *supra* note 128, §10.

146. *Id.* §2(a).

147. *See Alaska Seeks Riverbeds as "Disclaimers,"* Public Lands News, May 16, 2003, at 8 (noting that environmentalists fear that Alaska will claim every section line in the state, which would amount to over one million miles of R.S. 2477 rights-of-way); *Colo-*

include national conservation system lands, such as parks, refuges, monuments, and WSAs, in the acknowledgment process contained in its proposed MOU.[148] The House responded by passing a rider to the FY 2004 DOI Appropriations bill that would have forbade the use of recordable disclaimers to settle R.S. 2477 claims within conservation lands,[149] but the provision was deleted in conference.[150] The Bush Administration thus seems free to expand the use of recordable disclaimers to recognize roads and disqualify WSAs throughout the West, although a recent opinion of the U.S. General Accounting Office has called into question the legality of the Utah MOU.[151]

III. Scuttling the Northwest Forest Plan

The origins of the Northwest Forest Plan lie in the unsustainable timber harvesting that characterized Northwest public forests in the 1970s and 1980s, when it appeared that the federal government aimed to liquidate the last of the region's remaining old growth forests.[152] Environmentalists became aware of the precarious state of the northern spotted owl, and they challenged the small islands of habitat protection the Forest Service provided for the spotted owl that biological studies increasingly showed were inadequate.[153]

Litigation over Northwest public timber harvests began in the mid-1980s, when environmentalists obtained an injunction halting logging in the Suislaw National Forest for violating NEPA by failing to consider the risk of landslides and their effects on water quality and fish populations.[154] Sen. Mark Hatfield (R-Or.) responded to the injunction in 1985 by introducing the first of what became a series of appropriation riders to overturn court injunctions.[155] A complicated interplay between the courts ensued, with courts enjoining federal timber harvests for violating environmental laws while the riders attempted to withdraw the courts' jurisdiction or suspend the underlying laws.[156] Although the Court ratified Congress' ability to change the underlying laws via appropriation riders,[157] Congress allowed the riders to expire after 1990,[158] and the lower courts reinstated the injunctions even before the Court handed down its ruling, largely because the Forest Service and the BLM failed to consider and publicly disclose the latest scientific information concerning the northern spotted owl and its habitat requirements.[159] Then, after the court-ordered listing of the owl in 1990, the Endangered Species Act (ESA) took center stage.[160]

rado Asks DOI for R.S. 2477 Deal, Including Parks, Public Lands News, June 13, 2003, at 5.

148. *See Colorado Asks DOI for R.S. 2477 Deal*, *supra* note 147, at 5 (quoting a May 15, 2003, letter from the Executive Director of the Colorado Department of Natural Resources that excluding conservation lands will "create conflicts where the same road crosses from BLM land onto wildlife refuges, WSAs, or national monuments").

149. *See Enviros Ponder Senate Rider to Curb R.S. 2477 Assertions*, Public Lands News, Aug. 8, 2003, at 8-9 (noting that the House vote on the provision was 226 to 194; the amendment itself was aimed at heading off a complete ban on the use of recordable disclaimers to settle R.S. 2477 claims, sponsored by Rep. Mark Udall (D-Colo.)). While Congress could prevent the federal government from acknowledging R.S. 2477 claims within conservation units, it could probably not affect judicial recognition of such claims. *See supra* note 144.

150. *See Money Bill Conference Doesn't Look Overly Formidable*, Public Lands News, Oct. 17, 2003, at 6-7.

151. U.S. GAO, Recognition of R.S. 2477 Rights-of-Way Under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding With the State of Utah 2 (2004) (concluding that the Utah MOU is inconsistent with the congressional proscription against regulations pertaining to the recognition of R.S. 2477 rights-of-way, *supra* note 133, but also noting that §315 of FLPMA did in fact authorize disclaimers of interest for rights-of-way).

152. *See generally* Steven L. Yaffee, The Wisdom of the Spotted Owl: Policy Lessons for a New Century (1994).

153. George Cameron Coggins et al., Federal Public Land and Resources Law 828 (3d ed. 1993) (noting that the new biological information induced environmentalists to petition to list the owl, to challenge the denial of the listing in court, and subsequently to seek to use the listing to block public timber harvests).

154. National Wildlife Fed'n v. U.S. Forest Serv., 592 F. Supp. 931, 14 ELR 20755 (D. Or. 1984), *appeal dismissed*, 803 F.2d 724 (9th Cir. 1986).

155. Supplemental Appropriations Act, Pub. L. No. 99-88, ch. VII, 99 Stat. 293, 340 (1985). Senator Hatfield, who was then the Chairman of the Senate Appropriations Committee, was ideally positioned to include riders in appropriation bills. *See* Linda M. Bolduan, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decisionmaking*, 20 Envtl. L. 329 (1990).

156. *See* Victor Sher & Carol Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions From Judicial Review of Environmental Laws*, 15 Harv. Envtl. L. Rev. 435, 444-47, 452-76 (1991); Alyson Flournoy, *Beyond the Spotted Owl Problem: Learning From the Old Growth Controversy*, 17 Harv. Envtl. L. Rev. 261, 284-94 (1993). The most famous (or infamous) of the riders of the 1980s was §318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, §318, 103 Stat. 701, 745-50 (1989), which set the annual harvest level from federal public forests in the Northwest and directed the Forest Service and the BLM to "minimize fragmentation" of "ecologically significant old growth forests," and limited judicial review. After the Ninth Circuit ruled that Congress, through §318, could not prescribe results in pending federal court cases, the Court subsequently reversed, ruling that Congress had the constitutional authority to change the laws underlying ongoing cases. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 22 ELR 20663 (1992), *rev'g*, Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 21 ELR 20019 (9th Cir. 1990).

157. *Robertson*, 503 U.S. at 429. *See* Michael C. Blumm, *Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders*, 43 Wash. U. J. Urban & Contemp. L. 35 (1993).

158. The Ninth Circuit ruled in Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303-04, 22 ELR 20372 (9th Cir. 1991), that Congress did not intend the timber riders to be effective beyond the fiscal year of the appropriation.

159. Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1096, 21 ELR 21505 (W.D. Wash. 1991) (Forest Service violated both NEPA and the NFMA), *aff'd*, 952 F.2d 297, 22 ELR 20372 (9th Cir. 1991); Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1502 (D. Or. 1991) (NEPA violation due to failure to consider and disclose the latest scientific information concerning the effects of the BLM's planned logging of owl habitat and the imperiled status of the species), *aff'd*, 998 F.2d 705 (9th Cir. 1993). Judge William L. Dwyer, the district court judge in *Seattle Audubon*, made extensive findings concerning the statutory violations and the political pressure that led to them. *See*, *e.g.*, 777 F. Supp. at 1090:

> More is involved here than the simple failure by an agency to comply with its governing statute. The most recent violation of the NFMA exemplifies a deliberate and systematic refusal by the Forest Service and the [U.S. Fish and Wildlife Service (FWS)] to comply with the laws protecting wildlife. This is not the doing of the scientists, foresters, rangers, and others at the working levels of these agencies. It reflects decisions made by higher authorities in the executive branch of government.

160. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26114 (June 26, 1990) (listing the spotted owl as a threatened species after the court in Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 19 ELR 20277 (W.D. Wash. 1988), ruled that the FWS' refusal to list the owl was arbitrary and capricious, since it was contrary to all reputable scientific opinion).

The listing, combined with NEPA and National Forest Management Act (NFMA) injunctions, led to the formation of an interagency task force that recommended that the Forest Service and the BLM set aside roughly eight million acres in spotted owl habitat reserves in which logging would be prohibited and road building discouraged.[161] The Forest Service accepted this approach, but the BLM resisted, eventually seeking and obtaining a rare and controversial ESA exemption in 1992 that allowed limited logging in some spotted owl habitat areas that was later withdrawn by the Clinton Administration.[162] But broad-based court injunctions were affirmed by the Ninth Circuit in early 1993 on non-ESA grounds,[163] and the listing of the northern spotted owl promised additional logging restrictions.

Faced with the prospect that the ESA would add to an already stalemated timber supply situation, the Clinton Administration attempted to fashion a compromise. After convening a widely publicized "Forest Summit" in Portland, Oregon, in 1993, the Administration considered a variety of alternatives in developing what became known as the Northwest Forest Plan, covering over 20 million acres of federal forests west of the Cascades, stretching from northern California to the Canadian border.[164] The alternative selected was the most timber productive of those studied, establishing a goal of an annual harvest of 1.1 billion board-feet of timber,[165] a target that was subsequently reduced to 805 million annual board-feet of timber.[166] This 1994 plan, which amended 19 Forest Service and 7 BLM land management plans, also promised to protect and restore large tracts of public forest to provide for the viability of mobile species like the northern spotted owl.[167] The plan was the first large-scale ecosystem management plan and consequently sought watershed restoration on a unprecedented scale; among the species it sought to protect were Pacific salmon, which themselves were the subject of ESA listings.[168]

Under the plan, the timber harvests would come from approximately 30% of the remaining old growth in Northwest public forests available for logging on some 4.6 million acres between reserves. But before logging those areas, the plan required the Forest Service and the BLM to undertake watershed analysis aimed at protecting streams via buffers or other mitigation measures[169] and to conduct surveys for rare and relatively less mobile forest-dependent species[170] such as red tree voles, which are an important prey for owls.[171] These "aquatic conservation" and "survey and manage" requirements were crucial to the plan's legality. According to the reviewing court: "If the plan as implemented is to remain lawful, the monitoring, watershed analysis, and mitigation steps called for by [it] will have to be faithfully carried out."[172] The court ruled that the plan provided only the minimum amount of protection demanded by the ESA and other federal laws, stating that "any more logging sales than the plan contemplates would probably violate the laws."[173]

But the ink was barely dry on the Northwest Forest Plan when Congress once again resorted to authorizing timber harvests by appropriation rider.[174] After the Republican

161. Interagency Scientific Committee, A Conservation Strategy for the Northern Spotted Owl (1990). The report also recommended logging restrictions between the spotted owl reserves that would restrict logging on 50% of the lands such that the remaining trees would average 11 inches in diameter with a 40% canopy closure (the so-called 50-40-11 rule). *See* Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Laws*, 18 B.C. Envtl. Aff. L. Rev. 605, 613 & n.59 (1991).

162. Notice of Decision, 57 Fed. Reg. 23405 (June 26, 1992); *see* Flournoy, *supra* note 156, at 297-98. Before the exemption was withdrawn, environmentalists succeeded in obtaining a court order requiring the Endangered Species Committee to disclose all ex parte communications with the George H.W. Bush Administration. Portland Audubon Soc'y v. Endangered Species Committee, 984 F.2d 1534, 23 ELR 20560 (9th Cir. 1993).

163. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 709, 23 ELR 21142 (9th Cir. 1993) (timber production requirements of the O&C Lands Act did not constrain the court's authority to enjoin the BLM's violation of NEPA when it approved timber sales in spotted owl habitat without preparing an EIS); Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 23 ELR 21148 (9th Cir. 1993) (EIS that rested on stale scientific evidence violated NEPA).

164. Management for Habitat for Late-Successional and Old Growth Forest-Related Species Within the Range of the Northern Spotted Owl; National Forests in Washington, Oregon, and California, 59 Fed. Reg. 18788 (Apr. 20, 1994); *see* U.S. Forest Serv. & BLM, Standards and Guidelines for Management of Habitat for Late-Successional and Old Growth Forest-Related Species With the Range of the Northern Spotted Owl (1994) [hereinafter Northwest Forest Plan].

165. U.S. Forest Serv. & BLM, Record of Decision for Planning Documents Within the Range of the Northern Spotted Owl 24 (1994).

166. U.S. Forest Serv. & BLM, Final Supplemental Environmental Impact Statement for Amendment to the Survey and Manage, Protection Buffer, and Other Mitigation Measures Standards and Guidelines and Manage Fact Sheet iii (2000).

167. Northwest Forest Plan, *supra* note 164, at 29. The plan also promised to provide job assistance to rural communities affected by decreasing harvest levels within the range of the owl. *Id*. at 3.

168. *See* U.S. DOI History, *supra* note 2, at xv, noting:

> Babbitt said he was surprised to discover that the forest plan was equally a fish plan and a watershed restoration, and that rivers are our most neglected and degraded ecosystems, with roughly one-third of all fish, two-thirds of all crayfish, and three-quarters of the bivalve freshwater mussels in America rare or threatened with extinction.

On the fate of the salmon in the Northwest, see Michael C. Blumm, Sacrificing the Salmon: A Legal and Policy History of the Decline of Columbia Basin Salmon (2002), *available at* http://www.salmonlaw.net (last visited Feb. 25, 2004).

169. Northwest Forest Plan, *supra* note 164, at 11.

170. *Id*. at 9.

171. The survey and management provisions of the Northwest Forest Plan were designed to protect old growth-dependent species that have more difficulty in dispersing than the northern spotted owl. In areas subject to the plan that are open to logging (so-called matrix lands), these species could become isolated, with resulting genetic damage. The plan provided a variety of protections for these less mobile species; for example, the red tree vole required pre-logging surveys and a 10-acre buffer around nest sites. The Bush Administration downgraded the protection for the red tree vole in 2002, eliminating the pre-logging surveys in the central part of the species' range. Then, in 2003, the administration eliminated buffer zone protection for voles in their central range. The elimination of these protections has been challenged in Klamath Siskiyou Wildlands Ctr. v. Boody, No. 03-3124-CO (D. Or. filed Dec. 31, 2003).

172. Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1322, 25 ELR 20711 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

173. *Id*. at 1300.

174. *See* Patti A. Goldman & Kristin L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Law Rider and Its Legacy*, 27 Envtl. L. 1035 (1997); Michael Axline, *Forest Health and the Politics of Expediency*, 26 Envtl. L. 613 (1996). President Clinton originally vetoed the appropriations bill containing the rider, in part because of the timber rider, but he later signed it after being assured by Senator Hatfield that the Administration would have "complete discretion" in implementing the law "according to [its] best judgement." Goldman & Boyles, *supra* at 1047. Despite its popular name

takeover of Congress in the 1994 elections, a 1995 supplemental appropriation bill contained a provision that became known as the Timber Salvage Rider, which contained a series of exemptions from environmental law for public timber harvests, two of which were focused on the harvests within the range of the Northwest Forest Plan.[175] The 1995 rider was but a temporary victory for the timber industry, as public outcry prevented its renewal when it expired in 1996. Even with the 1995 rider, the annual timber production target in the Northwest Forest Plan never materialized, largely due to the inability of the Forest Service to carry out its aquatic conservation and survey duties and still find suitable areas to harvest.[176] Ironically, the timber industry, which fought the Northwest Forest Plan, began to embrace the plan, at least in terms of its projected annual timber harvest.

But there were many other parts of the Northwest Forest Plan to which the industry objected, especially after the courts declared that the provisions of the plan were enforceable. First, in 1999, Judge William L. Dwyer of the U.S. District Court for the Western District of Washington ruled that the federal land management agencies' failure to complete surveys for over 70 species, especially the red tree vole, violated the plan.[177] Later that year, Judge Barbara J. Rothstein of the same court again enforced the requirements of the Northwest Forest Plan, this time its aquatic conservation requirements, despite the National Marine Fisheries Service's determination that proposed logging would not violate the ESA.[178] In each case, the result was to stop public timber harvests.[179]

Thus, when the Bush Administration assumed office in early 2001, the timber industry viewed the Northwest Forest Plan as a broken promise, largely (but not exclusively) due to its survey and manage and aquatic conservation requirements that had resulted in decreased timber harvest. The industry decided to pursue a multifaceted, comprehensive approach to transform the Northwest Forest Plan into a plan for achieving a prescribed level of timber harvest, much like in the 1980s, when harvest levels were set in appropriation riders. The vehicle to accomplish this transformation was a series of lawsuits in which the industry challenged various aspects of the Northwest Forest Plan under the watch of a sympathetic Administration.[180] The result was several set-

as a "salvage rider," the provision in fact authorized logging of healthy trees, below-cost sales, and sales inconsistent with applicable land management plans. *Id.* at 1056-59. And the discretion that the administration thought it possessed was not recognized by the courts, which interpreted the scope of the rider largely in accord with the timber industry's interpretation. *See id.* at 1069-84.

175. Pub. L. No. 104-19, §2001, 109 Stat. 194, 240 (1995) (codified at 16 U.S.C. §1611 note). Section 2001(b) authorized harvesting diseased or burned trees, those "imminently susceptible" to disease or fire, and "associated trees" for the purpose of ecosystem improvement or restoration, subject to minimal environmental review. *See* Inland Empire Public Lands Council v. Glickman, 88 F.3d 687, 701, 26 ELR 21149 (9th Cir. 1996) (Forest Service could ignore effects on grizzly bears, an ESA-listed species). Section 2001(d) directed "expeditious[ ]" sales of federal timber described in interagency planning documents (so-called Option 9 sales), notwithstanding prior court orders. *See* Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 26 ELR 21638 (9th Cir. 1996) (rejecting challenges to §2001(d) sales). This provision led to harvests of more than 600 million board-feet of timber in 1995, more than double the amount in the 3 previous years. COGGINS & GLICKSMAN, *supra* note 89, §20:10 at 20-22 to 20-23. Section 2001(k) ordered the sale of previous authorized but uncompleted sales under an expired appropriation rider, notwithstanding any other provision of law (§318, the 1990 appropriation rider; *see supra* note 151). *See* Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 26 ELR 20983 (9th Cir. 1996) (upholding the timber industry's interpretation that this provision applied to all sales between 1991 and 1995, not merely sales pending when the earlier rider expired in 1991). For detailed overviews of the Timber Salvage Rider and its judicial interpretation, see COGGINS & GLICKSMAN, *supra* note 89, §20:10, at 20-19 to 20-26; Goldman & Boyles, *supra* note 174, at 1048-87.

176. U.S. FOREST SERV. & BLM, QUESTIONS & ANSWERS: SURVEY AND MANAGE DRAFT SUPPLEMENTAL EIS 4 (2003), *available at* www.or.blm.gov/nwfpnepa (noting that since 1994 the average annual timber sale offerings under the Northwest Forest Plan were "60% of the amount predicted" in the plan) [hereinafter Questions & Answers: Survey and Manage].

177. Oregon Natural Resources Council v. U.S. Forest Serv., 59 F. Supp. 2d 1085 (W.D. Wash. 1999) (requiring the Forest Service and the BLM to adhere to the Northwest Forest Plan's schedule for completing surveys for over 70 wildlife species and specifically requiring surveys of red tree voles prior to any logging). According to one of the plaintiffs' attorneys in the case:

> [E]ven after Judge Dwyer agreed with us that the Forest Service and BLM violated the Northwest Forest Plan by not doing promised surveys and not providing promised protection, the Justice Department made us seek (and obtain) an injunction halting specific sales, because the Administration didn't want to take the heat for pulling the sales. Even after Judge Dwyer gave us the injunction, the Administration refused to voluntarily pull other sales that met all of the criteria of the first sales, and made us seek a second injunction. Only after we obtained that second injunction did the did the Administration was reluctantly settle the case. So the Clinton Administration was hardly as "pro-environment" as the Bush Administration is "pro-industry."

E-mail from Mike Axline, Partner, Miller, Axline & Sawyer (formerly Professor of Law, University of Oregon), to Michael Blumm (Jan. 13, 2004) (on file with author).

178. Pacific Coast Fed'n of Fishermen's Ass'n v. National Marine Fisheries Serv., 71 F. Supp. 2d 1063, 1069 (W.D. Wash. 1999), *aff'd*, 265 F.3d 1028, 1036-37 (9th Cir. 2001) (rejecting the National Marine Fisheries Service's attempt to evaluate the aquatic conservation strategy only on a watershed scale, which discounted site-specific aquatic degradation and failed to adequately consider cumulative impacts, as arbitrary). *See* Lauren M. Rule, *Enforcing Ecosystem Management Under the Northwest Forest Plan: The Judicial Role*, 12 FORDHAM ENVTL. L.J. 211 (2000).

179. *See* Oregon Natural Resources Council & Western Environmental Law Center, *Federal Court Declares Logging of Old Growth Forests Illegal* (Oct. 9, 2003), *at* http://rising.olynetwork.com/news/2003/10/19.php (last visited Mar. 2, 2004) (discussing a 2003 injunction issued by the U.S. District Court for the District of Oregon for violating NEPA by failing to comply with the survey and manage requirements, and noting that the Forest Service had halted roughly 100 old growth timber harvests pending the completion of the surveys). Oregon Natural Resources Council Action v. U.S. Forest Serv., No. 03-613-KI (D. Or. Oct. 9, 2003), *available at* http://www.onrc.org/press/ONRCv.USFS.pdf.

180. The Bush Administration did not confine its efforts to increase timber harvests from public lands to overhauling the Northwest Forest Plan, however. It undertook a full-scale revision of implementation of the NFMA, from revising forest planning rules to eliminating any mandatory requirements, particularly requirements of maintaining viable species populations (36 C.F.R. §219.19) and ensuring that agency actions are consistent with the governing forest plan (36 C.F.R. §219.10). *See* William J. Snape et al., *Cutting Science, Ecology, and Transparency Out of National Forest Management: How the Bush Administration Uses the Judicial System to Weaken Environmental Laws*, 33 ELR 10959, 10962-71 (Dec. 2003) (also explaining the Administration's use of the threat of wildfires to eliminate environmental protection, its undermining public participation in forest planning, and its elimination of some forest plan administrative appeals). *See* Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities; Final Rule, 68 Fed. Reg. 33582 (June 4, 2003).

The first Bush Administration proposed NFMA planning regulations weakening the regulatory definition of "viable population." National Forest System Land and Resource Management Planning, 56 Fed. Reg. 6508, 6525-26 (Feb. 15, 1991), but did not promulgate final regulations. The Clinton Administration then proposed to remove the word "viability" from the regulations altogether and re-

tlement agreements designed to make the Northwest Forest Plan much more user-friendly to the timber industry.[181]

A. The Survey and Manage Settlement

In its waning days, the Clinton Administration amended the survey and manage provisions of the Northwest Forest Plan to reflect on-the-ground experience. These changes aimed to overcome implementation difficulties by consolidating mitigation measures and redefining the application of various survey requirements to particular species while increasing probable logging by nearly 50%.[182] The amendments were not enough to satisfy the timber industry, for even though the amendments eliminated survey and manage requirements for some 72 species, they retained these requirements for 346 species.[183]

The timber industry filed suit against the amendments, alleging that the survey and management program "transferred more than 81,000 acres of timber-producing . . . forest land into permanent reserves" in violation of several statutes.[184] In March 2002, in an effort "to avoid further costly litigation," the Bush Administration agreed to a settlement of the suit in which it promised to consider "an alternative that replaces the [s]urvey and [m]anage mitigation requirements with existing Forest Service and BLM special status species programs to achieve the goals of the Northwest Forest Plan through a more streamlined process . . . ."[185] The agencies noted that the cost of implementing the survey and manage requirements was high, and they claimed their experience implementing the plan led them to believe that their special status programs would protect "species at high risk of extirpation," even though the special status protections are optional and not all species subject to survey and manage requirements would be protected by the special status programs.[186] Moreover, some species, like the red tree vole, would have special status protection only in limited locations.[187] The agencies maintained that dropping the survey and manage requirements would increase the probable sale quantities of timber harvest, reduce the cost of fire prevention, and produce around 500 jobs.[188] The Bush Administration announced the final revocation of the survey and manage requirements on January 23, 2004.[189]

B. The Aquatic Conservation Strategy Rollback

The government appealed the district court ruling arguing that in order to adequately consider both site-specific and

place it with more measurable biological criteria, such as species habitat needs and trends in species disease and predation. National Forest System Land and Resource Management Planning, Part II, 60 Fed. Reg. 18886, 18895-96 (Apr. 13, 1995). The final regulations, however, did not remove the word viability from the ecological sustainability provisions. *See* National Forest System Land and Resource Management Planning, Part III, 65 Fed. Reg. 67514, 67574 (Nov. 9, 2000) (to be codified at 36 C.F.R. §219.20(a)(2)(ii)). The Bush Administration suspended implementation of these regulations and proposed new planning regulations. National Forest System Land and Resource Management Planning, Part III, 67 Fed. Reg. 72770 (Dec. 6, 2002).

181. The details of the industry's strategy are set forth in several documents uncovered as a result of Freedom of Information Act lawsuit brought by environmentalists. Biodiversity Northwest v. Department of Justice, No. CV03-0530P (D.D.C. complaint filed Feb. 28, 2003). An unattributed memorandum, entitled *Administrative Tools to Fix the Northwest Forest Plan* (Dec. 2001), outlines all of the initiatives discussed in this section and also one apparently not yet the subject of a settlement agreement: streamlined ESA consultation regulations to eliminate "unneeded and burdensome consultations." *Id.* at 6. A subsequent memorandum, authored by the American Forest Resource Council, the Western Council of Industrial Workers, and the Association of Oregon and California Land Counties, entitled *A Global Framework for Settlement of Litigation Challenging the Federal Action Actions Relating to the Northwest Forest Plan* (Apr. 2002), discusses the rationales for the suits the industry filed, with the goal of achieving the 1.1 billion annual board-feet of timber the Northwest Forest Act promised. This document was submitted to government counsel for review, *id*. at 34, which prompted an August 1, 2002, response, *Confidential Settlement Document*, from Wells Burgess of the U.S. Justice Department, to Mark Rutzick, counsel for the coalition of groups that authored the *Global Framework*, in which the government proposed a settlement agreeing to eliminate the survey and management requirements, reverse the Ninth Circuit's interpretation of appropriate spatial and temporal scale of the aquatic conservation strategy, and streamline ESA consultation procedures.

The August 14 response from Rutzick suggested that the government's offer of settlement needed to expand to recognize the dominant timber use of O&C lands so that BLM land management plans could be revised accordingly, eliminating critical designations to expedite timber sales, and reviewing the species listings because new scientific data could justify reduced protection. Response to Federal Settlement Offer of August 1, 2002, by Coalition Counsel Mark Rutznick at 4-5 (Aug. 14, 2002). Rutzick was subsequently appointed senior advisor to the General Counsel of the National Oceanic and Atmospheric Administration, where he can influence the Bush Administration's implementation of the ESA concerning Pacific salmon. All of the documents cited in this footnote are available at http://www.earthjustice.org/new/display.html?ID=581 (last visited Mar. 2, 2004).

182. *See* U.S. Forest Serv. & BLM, Final Supplemental Environmental Impact Statement for Amendment to the Survey and Manage, Protection Buffer, and Other Mitigation Measures, Standards, and Guidelines iii, viii (2001) (noting that the preferred alternative would provide "approximately the same level of species protection" while increasing probable timber sales quantity by 49% and reducing costs by 76%).

183. Settlement Agreement at 1, Douglas County Timber Operators v. Secretaries of Agric. & Interior (D. Or. Sept. 30, 2002) (No. 01-CV-6378-AA) [hereinafter Survey and Manage Settlement]. Environmentalists also faulted the 2001 Amendments, filing suit charging that they violated the APA, the NFMA and its regulations, FLPMA and its regulations, and NEPA and its regulations, primarily because the amendments allegedly provide inadequate protection for 164 fungi, 14 lichen, 10 mollusks, and 4 bryophytes, and removed, without scientific support, 72 species from all survey and manage requirements. *See* Oregon Natural Resources Council v. Veneman, No. 02-0389 (W.D. Wash. filed Feb. 15, 2002).

184. Survey and Manage Settlement, *supra* note 183, at 1-2 (alleging violations of the O&C Lands Act, the NFMA, the Multiple-Use Sustained-Yield Act, and FLPMA).

185. *Id.* at 2.

186. Questions & Answers: Survey and Manage, *supra* note 176, at 1, 3-4. Special status programs, which differ between the Forest Service and the BLM, are guidance to the agencies aimed at avoiding ESA listings. *Id.* at 2. They are not mandatory prescriptions.

187. *Id.* at 4 (noting that the Forest Service and the BLM give the red tree vole special status protection only in the north Coast Range of Oregon).

188. Press Release, U.S. Forest Serv. & BLM, Bureau of Land Management and USDA Forest Service Release Draft Survey and Manage Supplemental Environmental Impact Statement (May 23, 2003) (on file with author) (claiming an increase in probable sale quantity from 675 to 765 annual board-feet of timber (still less than the 805 million board-feet target), a reduction in hazardous fire treatment cost from $134 to $39 per acre ($44 per acre with mitigation), and 529 jobs (451 with mitigation)).

189. To Remove or Modify the Survey and Manage Mitigation Measure Standards and Guidelines, 69 Fed. Reg. 3316 (Jan. 23, 2004). The Administration noted that because the Agriculture and Interior Secretaries were the responsible officials for removing the guidelines, no administrative appeals would be available under 36 C.F.R. pt. 217.

cumulative impacts from timber sales, the aquatic conservation strategy had to be applied at the individual project level as well as at the watershed level, but the Ninth Circuit upheld the decision.[190] In April 2003, however, the agencies proceeded to propose amendments to the Northwest Forest Plan designed to reverse the court's holding.[191] Considering only two alternatives in a draft supplemental EIS—reversing the court or not—they preferred to reverse, clarifying that aquatic conservation strategy was "intended to be met at the . . . watershed or larger scale, and not the project level scale."[192] The agencies also claimed that the court decisions could be interpreted to ban all projects, even forest restoration projects, having any short-term adverse aquatic effects.[193]

The "clarifying" amendments aimed to produce fewer court injunctions, increase timber harvests, and improve prospects for achieving the plan's target level of timber sales.[194] Also, as the district court had observed earlier, the amendments would virtually guarantee that no timber sale run afoul of the requirements, particularly if the agencies not only insist that the appropriate spatial level to apply to the aquatic conservation strategy objectives is the watershed level, but also maintain that the appropriate temporal level is long-term (10 years or more), since this position would effectively exempt adverse short-term effects from the aquatic conservation strategy.[195] By eviscerating the aquatic conservation strategy, these changes crippled the essential ecosystem management underpinnings of the Northwest Forest Plan.[196]

C. The Oregon and California (O&C) Lands Act Settlement

Included in the Northwest Forest Plan's systems of reserves—where timber harvesting is generally prohibited—was around one million acres of land managed under the 1937 O&C Act.[197] O&C lands are timber-rich, relatively low-elevation lands managed by the BLM under land management plans prepared under the procedures of FLPMA, although, according to legal opinions by the Interior Solicitor, FLPMA's multiple use mandate is trumped by the O&C Act's dominant use management for commercial forestry.[198] The Ninth Circuit initially agreed,[199] although the leading treatise considered the language of the O&C Act to be a "precursor of current multiple use legislation."[200] Later, after the government realized that it could not meet its obligations under the NFMA and the ESA to protect old growth-dependent species without imposing timber constraints on O&C lands, the same court ignored its earlier decision and ruled that the management of O&C lands was subject to all environmental laws.[201]

Despite the latter ruling, the timber industry filed suit, alleging that the Northwest Forest Plan violated the O&C Act

190. *See supra* note 178 and accompanying text.

191. Clarification of Language in the 1994 Record of Decision for the Northwest Forest Plan: National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl; Western Oregon and Washington, and Northwestern California, 68 Fed. Reg. 18253 (Apr. 15, 2003). These amendments do not appear to be the result of a formal settlement agreement, although the industry did include a claim about the aquatic conservation strategy in its complaint in Settlement Agreement at 1, American Forest Resource Council v. Secretary of the Interior (D. Or. Jan. 13, 2003) (No. 02-6087-AA). *See infra* note 214 and accompanying text. The Forest Service stated merely that "[p]lan goals have been delayed or stopped due to misapplication of certain passages in the ACS [aquatic conservation strategy]." *Id.* (referring to the ruling in Pacific Coast Fed'n of Fishermen's Ass'n v. National Marine Fisheries Serv., 71 F. Supp. 2d 1063, 1069 (W.D. Wash. 1999), *aff'd*, 265 F.3d 1028, 1036-37 (9th Cir. 2001)). *See supra* note 178 and accompanying text.

192. U.S. Forest Serv. & BLM, Key Points and Background: Aquatic Conservation Strategy Final Supplemental EIS (2003). Environmentalists asserted that this represented an inadequate range of alternatives. *See* Scoping Comments on Aquatic Conservation Strategy EIS by the Pacific Rivers Council, Pacific Coast Federation of Fishermen's Associations, and Oregon Natural Resources Council 6-8 (2003) (maintaining that the EIS had to discuss an alternative that implemented the aquatic conservation strategy through a "range of variability" approach that would evaluate whether proposed logging would maintain or foster conditions producing a natural range of variability at the watershed level).

193. U.S. Forest Serv. & BLM, News Release, Agencies Release Aquatic Conservation Strategy Draft Supplemental Environmental Impact Study for Public Review (Apr. 2, 2003). This claim seems quite disingenuous as, for example, a settlement between environmentalists and the Forest Service in April 2003 freed up some 60 million board-feet in 19 timber sales. *See* Northwest Ecosystem Alliance, *Environmentalists Agree to Release Some Timber Sales Held Up Over Salmon* (Apr. 2003), *at* http://www.ecosystem.org/nationalforests/timbersales_released_4_03.html (also on file with author) (describing a settlement approved by the district court judge in *Pacific Coast Fed'n*).

194. U.S. Forest Serv., Key Points and Background, Aquatic Conservation Strategy, Draft Environmental Supplemental EIS (1993).

195. *See Pacific Coast Fed'n*, 71 F. Supp. 2d at 1073. *See also id.* at 1070, 1073 (requiring the Forest Service to consider short-term, as well as long-term, adverse effects).

196. E-mail from Patti Goldman, Earthjustice, to Michael Blumm (Jan. 26, 2004) (on file with author) (explaining that the rollback of the aquatic conservation strategy is a "gutting" of the ecosystem management approach because the Forest Service and the BLM will no longer have to ask whether a timber sale "will move the watershed toward or away from properly functioning aquatic habitat").

197. 43 U.S.C. §1181a (calling classified as "timberlands" to be managed "for permanent forest production" under the principle of "sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities").

198. Memorandum from Gale A. Norton, Associate Solicitor, U.S. DOI, to James Cason, Deputy Assistant Secretary, U.S. DOI, Statutes Governing Management of the Northern Spotted Owl (Oct. 28. 1986). Memorandum from Solicitor, U.S. DOI, to Director, BLM, Applicability of Section 603 of the Federal Land Policy and Management Act of 1976 to O&C and Coos Bay Wagon Road Lands (June 1, 1977).

199. Headwaters, Inc. v. BLM Medford Dist., 914 F.2d 1174, 1183-84, 20 ELR 21378 (9th Cir. 1990).

200. Coggins & Glicksman, *supra* note 89, §20:47 at 20-107 to 20-108.

201. Portland Audubon Soc'y v. Lujan, 998 F.2d 705, 709 (9th Cir. 1993) ("plain language of the [O&C Act] supports the district court's conclusion that the Act has not deprived the BLM of all discretion with regard to either the volume requirements of the Act or the management of the lands entrusted to its care"), *aff'g*, 795 F. Supp. 1489 (D. Or. 1992) (ruling that the O&C Act did not exempt the BLM from the requirements of NEPA or the ESA); *see also* Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1314, 25 ELR 20711 (W.D. Wash. 1994) (rejecting the timber industry's argument that the O&C Act imposed constraints on the Northwest Forest Plan, stating: "Management under the [O&C Act] must look not only to annual timber production, but also to protecting watersheds, contributing to economic stability, and providing recreational facilities."). *See also* Michael C. Blumm & Jonathan Lovvorn, *The Proposed Transfer of BLM Lands to the State of Oregon: Environmental and Economic Questions*, 32 Land & Water L. Rev. 353, 377 (1997) (concluding that the "BLM must manage O&C lands for non-timber uses when required to do so by federal environmental laws like NEPA and the ESA. . . . [T]he operation of the Northwest Forest Plan has almost completely preempted the application of the [O&C Act].").

and other laws.[202] Fortunately for the industry, it never had to litigate its latest claims,[203] as the Bush Administration proved willing to settle on quite favorable terms "in order to avoid further costly litigation," by promising to prepare a supplemental EIS and "replac[ing] the current land management designations [with those] that are consistent with the O&C Act as interpreted [by the Interior Solicitor and the initial Ninth Circuit decision]."[204] In short, the settlement agreement promised to revise the BLM's resource management plans to conform to a dominant timber paradigm expressly rejected by the courts.[205] Moreover, in the agreement the BLM also agreed to offer a specified amount of timber each year,[206] something the timber industry never could have obtained under the Northwest Forest Plan.[207]

D. Reconsidering Species Listings and Critical Habitat Designations

One of the precursors to the Northwest Forest Plan was the listing of the northern spotted owl in 1990.[208] Two years later, the U.S. Fish and Wildlife Service (FWS) designated around 6.8 million acres in the western parts of California, Oregon, and Washington as critical habitat for the owl.[209] The FWS listed the marbled murrelet in 1992[210] and designated the bird's critical habitat—comprising some 3.8 million acres along the Pacific coasts of the same three states—in 1996.[211] These critical habitat designations included lands that the Northwest Forest Plan subsequently made available for timber harvest in 1994, making timber harvests on these lands more difficult.

As part of the timber industry's litigation offensive against the Northwest Forest Plan and related restrictions on timber harvesting,[212] the industry filed suit in the spring of 2002, challenging the government's failure to review the status of the two listed species under §4(c)(2) of the ESA.[213] In particular, the industry claimed that the critical habitat designations were unlawful.[214] The latter contention was based largely on a Tenth Circuit decision accepting industry arguments that had been partly rejected by the Ninth Circuit in earlier litigation over the designation of spotted owl critical habitat.[215] Despite this Ninth Circuit ruling,[216] the Bush

202. The industry claimed the Northwest Forest Plan violated NEPA, FLPMA, the Federal Advisory Committee Act, and the Federal Records Act. Settlement Agreement at 4, American Forest Resource Council v. Clarke (D.D.C. Oct. 17, 2003) (No. 94-1031-TPJ) [hereinafter American Forest Resource Council Settlement].

Part of the industry filed suit in the D.C. district court; and another part intervened in an ongoing environmentalist suit in the Western District of Washington. The ensuing jurisdictional conflict seemed to be resolved in favor of the latter court, as the Judge Thomas Penfield Jackson of the D.C. district court dismissed the case twice for reasons discussed *infra* note 203. Then, a week before oral argument in the D.C. Circuit, the government and industry reached the settlement agreement cited above, which resurrected the case from its deathbed and gave jurisdiction over the settlement to the D.C. district court. E-mail From Patti Goldman, Earthjustice, to Michael Blumm (Feb. 12, 2004).

203. Similar timber industry contentions were expressly rejected in *Seattle Audubon Soc'y*, 871 F. Supp. at 1314 (holding that the ESA applies to O&C lands), *aff'd on other grounds sub nom.*, Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 26 ELR 20980 (9th Cir. 1986) (per curiam). *See also* American Forest Resource Council v. Shea, 172 F. Supp. 2d 24 (D.C. 2001), in which the court held that the American Forest Resource Council, one of the original intervenors on behalf of the Forest Service in *Seattle Audubon Soc'y*, was barred by res judicata of that decision from reasserting its previously unsuccessful claim that environmental laws, such as the ESA and NEPA, did not apply to O&C lands. This decision, however, was expressly vacated by the American Forest Resource Council Settlement, thus enabling the Bush Administration to snatch defeat from the jaws of victory. American Forest Resource Council Settlement, *supra* note 202, at 7.

204. American Forest Resource Council Settlement, *supra* note 202, at 2-3.

205. *See supra* notes 201, 202. Note that the settlement adopted a position taken by a Solicitor's Opinion authored by current Secretary of the Interior Norton when she was an attorney with the DOI. Memorandum from Associate Solicitor, *supra* note 198.

206. American Forest Resource Council Settlement, *supra* note 202, at 5 (the BLM and the Forest Service jointly agreed to offer timber sales of 805 million board-feet per year, the amount estimated under the original Northwest Forest Plan, and "thinning sales" of approximately 300 million board-feet per year).

207. E-mail from Goldman, *supra* note 196.

208. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26114 (June 26, 1990) (designated as a threatened species) (following the decision in Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 19 ELR 20277 (W.D. Wash. 1988) (decision not to list the owl was arbitrary because all reputable scientific opinion supported the listing)).

209. Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796, 1809 (Jan. 15, 1992) (following the decision in Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 21 ELR 20914 (W.D. Wash. 1991) (rejecting the FWS' claim that critical habitat for the owl was not "prudent and determinable")).

210. Determination of Threatened Status for the Washington, Oregon, and California Population of the Marbled Murrelet, 57 Fed. Reg. 45328 (Oct. 1, 1992) (designated as a threatened species).

211. Final Designation of Critical Habitat for the Marbled Murrelet, 61 Fed. Reg. 26255, 26269 (May 24, 1996). It is worth noting that both the owl and murrelet listings were the consequence of citizen petitions. On the often overlooked role of the citizen petition process in implementing the ESA, see Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons From the Columbia Basin*, 74 WASH. L. REV. 519, 586-87 (1999).

212. *See supra* note 181.

213. 16 U.S.C. §1533(c)(2) (requiring a review every five years). The industry claims that the northern spotted owl's decline is due not to the destruction of old growth habitat, but due to competition from barred owls (*Strix varia*). Its claim concerning the marbled murrelet is that murrelets in the Northwest are not a separate population from those in Alaska, where murrelets are plentiful.

214. Settlement Agreement at 2, Western Council of Industrial Workers v. Secretary of the Interior (D. Or. Jan. 13, 2003) (No. 02-06100-AA); Settlement Agreement at 2, American Forest Resource Council v. Secretary of the Interior (D. Or. Jan. 14, 2003) (No. 02-6087-AA) (marbled murrelet).

215. In New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1285, 31 ELR 20614 (10th Cir. 2001), the court rejected the government's "baseline model" for evaluating the economic effects of critical habitat designation because it allowed most of the economic costs of habitat designation to escape review (since most of the costs were attributable to the listing decision in which, by statute, economic costs are irrelevant), inconsistent with the court's interpretation of §4(b)(2) of the ESA, 16 U.S.C. §1533(b)(2) (requiring critical habitat designations to be based on "best scientific data available . . . after taking into consideration the economic impact" of designation). This decision, requiring the government to "conduct a full analysis of all the economic impacts" of critical habitat designation, built on an earlier Tenth Circuit decision, which required an EIS on critical habitat designation. Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 26 ELR 20808 (10th Cir. 1996).

The timber industry argued that the owl and murrelet critical habitat designations were inconsistent with these Tenth Circuit decisions, but the Ninth Circuit had already rejected their argument that an EIS was required in Douglas County v. Babbitt, 48 F.3d 1495, 1507-08, 25 ELR 20631 (9th Cir. 1995) (concluding that an EIS is not required for actions that do not alter the physical environment and refusing to allow NEPA to become an "obstructionist tactic" to the ESA's protectionist goals).

216. The Ninth Circuit, in *Douglas County*, did not expressly consider the appropriateness of the government's "baseline model," which the

Administration proved pliable, signing settlements in which it agreed with the timber industry that the Tenth Circuit's approach was "the proper scope of the analysis of economic impacts . . . ."[217] The settlements promised to reconsider both the listings and the critical habitat designations, including a revised consideration of economic effects.[218] As a reward for the public service provided by the filing of the lawsuits, the government agreed to award the timber industry attorney fees.[219]

IV. Snowmobiling in Yellowstone

Yellowstone National Park, the crown jewel of the National Park System, has been the scene of considerable conflict over the use of snowmobiles. Winter use of Yellowstone, almost nonexistent in 1970, began in earnest after the NPS began grooming snow roads in 1971, the same year Old Faithful Snow Lodge opened.[220] Even in the 1970s, there were complaints about snowmobile noise and air pollution and adverse effects on wildlife, but the NPS took no action to restrict snowmobile use, in part because the agency viewed snowmobiles as less disruptive to the park than plowing roads for winter automobile use.[221] By 1980, winter visitors had grown to around 70,000 annually, as the park encouraged snowmobile use by designating all of the park's roads open for their use, expanding facilities for snowmobilers, and banning dogsleds from the park due to conflicts with snowmobiles.[222] As a result, snowmobile use continued to grow throughout the 1980s; by 1993, it had doubled to some 140,000 per year.[223] This rise of snowmobiling as the major winter use in Yellowstone occurred without any serious analysis of the effects of snowmobile use on park resources.[224]

In 1990, in response to this increased use, the NPS completed a winter use plan for Yellowstone and the nearby park units of Grand Teton National Park and the John D. Rockefeller Jr. Memorial Parkway.[225] But this plan did little to protect wildlife, erroneously predicted that there would be no air quality problems, and its estimate for increased use over the next decade was exceeded in just three years.[226] This mushrooming use triggered a new planning process that in 1997 produced a new draft study of the effects of snowmobiling on park resources, on which the public made over 200,000 comments.[227] Meanwhile, the harsh winter of

Tenth Circuit struck down in *New Mexico Cattle Growers*. But the *Douglas County* court did expressly reject a district court decision that the government had to consider the full range of NEPA factors, including socioeconomic factors in designating critical habitat. *Douglas County*, 48 F.3d at 1507. Therefore, it seems quite likely that the Ninth Circuit would also reject the Tenth Circuit's conclusion that the economic analysis required by the ESA for critical habitat designation was a full economic analysis, including costs attributable to the listing decision.

217. Settlement Agreement at 2, *Western Council of Industrial Workers* (No. 02-06100-AA) (northern spotted owl); Settlement Agreement at 2, *American Forest Resource Council* (No. 02-6087-AA) (marbled murrelet).

218. Settlement Agreement at 3, *Western Council of Industrial Workers* (No. 02-06100-AA) (promising proposed revisions to the critical habitat designations by the end of 2005). Settlement Agreement at 3, *American Forest Resource Council* (No. 02-6087-AA) (proposed critical habitat revisions by August 30, 2006, and final revisions by August 30, 2007). For the public notice of the listing review, see 5-Year Review of the Marbled Murrelet and the Northern Spotted Owl, 68 Fed. Reg. 19569 (Apr. 21, 2003). Rather than allow the Forest Service and the BLM to compile the population trend data on the birds, the Bush Administration has "outsourced" this responsibility to private contractors. *See, e.g.*, Ley Garnett, *Panel Considers Status of Spotted Owl*, OPB News, Dec. 19, 2003, *available at* http://www.publicbroadcasting.net/opb/news.newsmain?action=article&ARTICLE_ID=582135 (reporting that the owl data will be compiled by the private firm, Sustainable Ecosystems Institute, and noting that while the timber industry claims that the northern spotted owl is not old growth-dependent and should be considered to be the same species as the California spotted owl (thus obviating the need for ESA listing), the Forest Service's expert on the owl, Eric Forman, maintains that the owl continues to decline at monitoring stations on the Olympic peninsula and the east slopes of the Washington Cascades).

219. Settlement Agreement at 5, *Western Council of Industrial Workers* (No. 02-06100-AA). Settlement Agreement at 5, *American Forest Resource Council* (No. 02-6087-AA).

220. NPS, U.S. DOI, 1 Winter Use Plans, Final Environmental Impact Statement 14 (2000) [hereinafter 2000 EIS]. Oversnow vehicle travel in Yellowstone actually began in 1949 with snowplanes: two-person cabs on three large metal skis with an airplane propeller that traveled on roads without taking off. Snowcoaches, large vehicles capable of carrying 10 people or more, began in 1955. Snowmobiles were first introduced in 1963. In 1968, the NPS formalized its first winter use policy which: (1) encouraged oversnow rather than automobile use (and the associated road plowing that would be required); (2) promised to groom snow roads to provide more comfortable snowmobiling; and (3) promised to authorize the opening of overnight facilities at Old Faithful for winter use. Michael J. Yochim, *The Development of Snowmobile Policy in Yellowstone National Park*, Yellowstone Sci., Spring 1999, at 2-4.

221. 2000 EIS, *supra* note 220, at 14; Yochim, *supra* note 220, at 5, 8.

222. In contrast to Yellowstone, Glacier National Park banned snowmobile use in 1975 under President Richard M. Nixon's Off-Road Vehicle Executive Order of 1972, Exec. Order No. 11644 (allowing off-road vehicles in national parks only where they would not adversely affect natural, aesthetic, or scenic values). Yochim, *supra* note 220, at 6 (noting that Glacier banned snowmobiles on the ground that the 1,300 snowmobiles using the park disrupted the park's solitude). Other national parks, such as Yosemite, Sequoia/Kings Canyon, and Lassen, also banned snowmobiles around the same time, although Rocky Mountain National Park allowed their continuation on its west side. *Id*. There apparently was no written review of Yellowstone snowmobiling and its relationship to President Nixon's Executive Order. *See* John A. Sacklin et al., *Winter Visitor Use Planning in Yellowstone and Grand Teton National Parks*, 4 USDA Forest Service Proceedings 244 (No. RMRS-P-15 2000).

223. 2000 EIS, *supra* note 220, at 14; Yochim, *supra* note 220, at 7. In the mid- and late 1990s, however, visits declined to the 115,000-125,000 level due to a variety of reasons, including poor snow years, an increase in user fees, a government shutdown in 1995-1996, and publicly expressed misgivings from NPS personnel about increasing snowmobiling. Sacklin et al., *supra* note 222, at 244-45.

224. *See* Yochim, *supra* note 220, at 8; Sacklin et al., *supra* note 222, at 246 (noting the "limited information available on winter recreation and wildlife").

225. Yochim, *supra* note 220, at 7.

226. *Id*. The increased use was partly due to the fact that in the late 1980s business interests in Wyoming towns surrounding the park convinced federal land managers to develop a trail that would link the towns with trails in all Yellowstone area parks in order to boost the local economy. 2000 EIS, *supra* note 220, at 14-15. The result was that, by the 1990s, park managers confronted an established use with an economically dependent local interest group. Public land policy has long been quite responsive to organized local pressure. *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 Harv. Envtl. L. Rev. 405 (1994).

227. Yochim, *supra* note 220, at 8. The 1999 final version of this study, a multiagency effort that included both the park units and adjacent national forests, set goals of protecting areas of cultural and natural significance from adverse effects of winter use and reducing snowmobile sound and emission levels. However, the study admitted it was "unsure of the effects of winter use on wildlife and other resources" and simply identified the concern that current snowmobile exhaust and sound levels "may create health concerns for employees and visitors." Greater Yellowstone Coordinating Committee, Winter Visitor Use Management: Executive Summary 4 (1999). The study left any remedial measures, such as the new winter use plan and accompanying EIS for Yellowstone promised as a re-

1996-1997 produced a snowfall 150% above normal and ice that prevented the park's bison from reaching the grass beneath the snow. Consequently, numerous bison migrated out of the park in search of food, mostly into Montana, many on snowmobile roads. Since some park bison carry brucellosis that, if transmitted to cattle, can cause aborted calves, the state of Montana slaughtered most of the bison leaving the park—over 1,000 head in all. This slaughter amounted to roughly one-third of the park's herd, one of the largest mass killings of bison since they were eliminated from the Great Plains in the 1880s.[228] The bison slaughter prompted a suit from the Fund for Animals, objecting to the NPS' failure to write an EIS and to engage in ESA biological consultation on the park's winter use program. The suit was subsequently settled when the NPS agreed to write a new winter use plan that would consider at least one road closure and would be the subject of both an EIS and ESA consultation.[229]

A. The 2000 Winter Use Plan

In October 1997, the government settled the EIS/ESA case in an agreement that called for a new winter use plan by October 2000.[230] While the planning was ongoing, in early 1999, a coalition of environmental groups—the Bluewater Network—petitioned the NPS to ban snowmobiles in all 28 park units where they were allowed.[231] Also in 1999, EPA initiated a rulemaking to set emission limits for non-road, spark engines like snowmobiles.[232] The air quality issue would become a focus of the 2000 plan.

The EIS process included a scoping procedure that included 2,000 public comments and 3 public workshops, 1 draft EIS, 5 public hearings, and over 46,000 public comments on the draft EIS. The EIS considered seven alternatives.[233] The preferred alternative called for eliminating snowmobiling in Yellowstone, allowing access only by mass transit snowcoach.[234] However, due to a 2000 appropriations rider that forbade any changes in snowmobile use in any NPS unit before the end of the 2001-2002 season,[235] the NPS opted for a phase-in of the snowmobile ban; a complete ban would not go into effect until the 2003-2004 season.[236]

The basis of the ban lay in the NPS' interpretation of its responsibilities under the NPS Organic Act, which requires conservation of park resources and values and avoiding "impairment" to park resources.[237] According to the agency, park managers

> must always seek ways to avoid, or to minimize, to the greatest degree practicable, adverse impacts on park resources and values. . . . While [park] policies permit recreation and other activities . . . they may be allowed only when they will not cause an impairment or derogation of a park's resources, values[,] or purposes.[238]

Moreover, under NPS management policies in effect since 1988, the NPS must protect the highest possible air quality in the parks and err on the side of protecting air quality if there is any doubt about the effects on park resources from an existing or potential source of air pollution.[239] The NPS must also preserve the natural quiet of the parks and minimize unnatural sounds adversely affecting park resources or values or the visitors' enjoyment of them.[240]

The NPS acknowledged that public access to park resources was an important purpose of the park system, and that snowmobiling in Yellowstone evolved to make winter use experiences available to a wider range of people than the most physically fit.[241] But the agency maintained that the ongoing adverse affects of snowmobiling on wildlife, air quality, and natural soundscapes and odors made it impossible to fulfill its obligation to avoid impairment of Yellowstone's resources and values.[242] Although the NPS acknowledged that the mass transit snowcoaches also adversely effect wildlife, air quality, and natural soundscapes, the agency maintained that snowcoaches produce much less traffic, and the adverse effects that do result are "at least a

sult of the settlement agreement discussed *infra* note 229 and accompanying text, up to the managers of the individual park and forest units. Greater Yellowstone Coordinating Committee, *supra*, at 10-11.

228. Yochim, *supra* note 220, at 8.

229. *See* 2000 EIS, *supra* note 220, at 5. The NPS considered two possible road closures, but in early 1998 decided that it lacked sufficient information about the wildlife use of groomed trails and deferred any closures for at least three winter seasons while studying the issue. This decision was challenged by the Fund for Animals, but the D.C. district court upheld the NPS' finding of no significant impact on its road closure environmental impact assessment. Fund for Animals v. Babbitt, No. 97-1126, slip op. at 16 (D.D.C. Mar. 31, 1999). *See* Sacklin et al., *supra* note 222, at 247.

230. Sacklin et al., *supra* note 222, at 247.

231. *Id.* at 248.

232. Phase 2 Emission Standards for New Nonroad Spark-Ignition Handheld Engines at or Below 19 Kilowatts, 64 Fed. Reg. 40940 (July 29, 1999).

233. National Park Service, U.S. DOI, 1 Winter Use Plans, Final Environmental Impact Statement for the Yellowstone and Grand Teton National Parks and the John D. Rockefeller Jr. Memorial Parkway Record of Decision viii-xii (2000).

234. *Id.* at xii-xiii.

235. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, §128, 114 Stat. 2763, A239-40 (2000).

236. NPS, U.S. DOI, Winter Use Plans, Record of Decision 2 (2000) [hereinafter 2000 ROD]. The date for the complete ban was subsequently delayed by a year due to regulations described *infra* note 251.

237. *See* 16 U.S.C. §1 ("fundamental purpose of the [park system] is to conserve the scenery and the natural and historic objects and wild life therein and to provide enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations"). The agency noted that the conservation directive applied even when there is no risk of impairment. 2000 ROD, *supra* note 236, at 11.

238. 2000 ROD, *supra* note 236, at 11 ("The laws give the [NPS] the discretion to allow some impacts to park resources and values when appropriate and necessary to fulfill the purposes of a park as long as that impact does not constitute impairment."). *See also id.* at 12: "Impairment is an impact that, in the professional judgment of the responsible [NPS] manager, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. Impairment may occur from visitor use or park management activities" (citing NPS Director's Order No. 55, Sept. 6, 2000, as amended Nov. 17, 2000). The NPS defines "park resources and values" as the park's scenery, natural and historic objects, and wildlife, including, inter alia, ecological, biological, and physical processes; scenic features; natural visibility; natural landscapes, soundscapes, and smells; and air and water resources. 2000 ROD, *supra* note 236, at 12-13.

239. 2000 ROD, *supra* note 236, at 13 (citing 1988 NPS Management Policies, ch. 4).

240. *Id.*

241. *Id.* at 14.

242. *Id.* at 15 ("Reduction of numbers of snowmobiles is problematic because carrying capacity studies are left to the future, and adverse impacts would continue until capacities are determined and effectively implemented.").

magnitude lower than with snowmobile access."[243] Even before the agency implemented the plan through an administrative rule, the International Snowmobile Manufacturers Association and the state of Wyoming sued the NPS, alleging that the EIS violated NEPA and the Organic Act.[244]

Six weeks after the filing of the suit, on January 21, 2001, in one of the last acts of the Clinton Administration, the NPS promulgated a rule implementing a revised winter use plan by phasing in the snowmobile ban.[245] The rule would have prohibited snowmobiling in Yellowstone, effective for the 2004-2005 season, at which point the only motorized transport in the park would be mass transit snowcoach.[246] But the rule was immediately blocked by the incoming Bush Administration.

B. The 2001 Settlement Agreement and the 2003 Winter Use Plan

The Bush Administration wasted no time in suspending the snowmobile phaseout just a week after it was promulgated.[247] Then, in June 2001, the Administration reached a settlement with the snowmobile manufacturers in which the NPS promised to reconsider the snowmobile ban and to prepare a supplemental EIS, incorporating significant new information, including new snowmobile technology.[248] The ensuing draft supplemental EIS, published in March 2002, examined four alternatives to the snowmobile ban, including one that would allow snowmobiling to continue on the basis of cleaner and quieter technologies.[249] The NPS received over 350,000 comments on the draft supplemental EIS, over 80% of which supported maintaining the snowmobile ban.[250] Nevertheless, in November 2002, the Bush Administration proceeded to promulgate a rule that delayed the implementation of the ban, pending completion of the final supplemental EIS.[251]

The NPS issued the final supplemental EIS in February 2003, which included a preferred alternative not considered in the draft that would authorize 950 snowmobilers per day in the parks.[252] That was the alternative officially adopted by the agency one month later in its record of decision, which explained that the use limits were based on current average use, plus an allowance for "modest increases."[253] The basis of the agency's turnabout was reliance on what it defined to be "best available technology" requirements for snowmobiles entering the parks.[254] The NPS maintained that new snowmobiles, which became available in the three years between 2000 and 2003, and the new four-stroke engines are "substantially cleaner than standard two-stroke engines."[255] As a result, the agency claimed that both the air and noise pollution would be reduced below the impairment standard of the Organic Act.[256] As for the wildlife effects, the NPS claimed that it would avoid impairment of park resources and values by requiring all snowmobiles to be accompanied by a guide and imposing daily limits.[257] Interestingly, the agency acknowledged that the economic effect of any of the alternatives, including the snowmobile ban, would be negligible except in the town of West Yellowstone, where there might be decline of up to 8.5% in jobs and dollars.[258]

C. The 2003 District of Columbia District Court Decision

A coalition of environmental groups, led by the Fund for Animals and the Greater Yellowstone Coalition, filed suit against the Bush Administration's 2003 plan, charging that its willingness to continue snowmobiling and trail grooming in light of the NPS' earlier finding of impairment of park resources and values amounted to arbitrary decisionmaking in violation of the Administrative Procedure Act (APA).[259] In addition, they alleged that the government's failure to respond to the Bluewater Network's 1999 petition for a rulemaking banning all snowmobiling trail grooming in all national parks also violated the APA.[260]

243. *Id.*

244. International Snowmobile Mfrs. Ass'n v. Norton, No. 00CV-229B (D.D.C. filed Dec. 6, 2000). The state of Wyoming intervened on the side of the plaintiffs; environmentalists intervened on the side of the government.

245. Special Regulations, Areas of the National Park System, 66 Fed. Reg. 7259, 7265 (Jan. 22, 2001) (to be codified at 36 C.F.R. §7.13(l)(1)).

246. The rule also would have banned snowmobiling on the John D. Rockefeller Jr. Memorial Parkway and in most of the Grand Teton National Park. *Id*. at 7266-68 (to be codified at 36 C.F.R. §§7.21 (a)(1), 7.22(g)(1)).

247. Special Regulations, Areas of the National Park System: Delay of Effective Date, 66 Fed. Reg. 7260 (Jan. 31, 2001).

248. Settlement Agreement at 3, International Snowmobile Mfrs. Ass'n v. Norton (D.D.C. June 29, 2001) (No. 00-CV-22B).

249. NPS, U.S. DOI, 1 Winter Use Plans, Draft Supplemental Environmental Impact Statement (2002).

250. *See* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 101, 34 ELR 20010 (D.D.C. 2003).

251. Special Regulations, Areas of the National Park System, 67 Fed. Reg. 69473 (Nov. 18, 2002) (allowing snowmobiling to continue during the 2002-2003 season, the phaseout beginning during the 2003-2004 season, and not imposing a complete ban until the 2004-2005 season).

252. NPS, U.S. DOI, 3 Winter Use Plans, Final Supplemental Environmental Impact Statement S-10 (2003). The NPS identified the snowmobile ban as the environmentally preferable alternative. *Id*. at S-5.

253. NPS, U.S. DOI, Winter Use Plans, Record of Decision 11 (2003).

254. *Id*. at 14-16.

255. *Id*. at 21.

256. *Id.* at 21-22 (claiming that four-stroke engines are capable of reducing hydrocarbon emissions by 95% and carbon monoxide emissions by 85%, and that they were tested at a sound level of 73 decibels in the A scale (dB(A)) versus 79 dB(A) for two-stroke engines, a six-fold difference).

257. *Id*. at 22. *See also id.* at 24 (suggesting that a monitoring and adaptive management program would also avoid impairment).

258. *Id*. at 23. On the power of local economic interests to influence federal public land decisionmaking, see Blumm, *supra* note 226.

259. 5 U.S.C. §§500-706, *available in* ELR Stat. Admin. Proc. *See* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 97, 34 ELR 20010 (D.D.C. 2003). The Fund for Animals sought an end to trail grooming, while the Yellowstone Coalition sought reinstitution of the snowmobile phaseout. The International Snowmobile Manufacturers' Association and the BlueRibbon Coalition (representing over 1,000 businesses and organizations with economic and commercial interests in snowmobiling in the parks) intervened on the side of the federal government. *Id*. at 98.

260. *See id.* at 101-02 (describing a petition submitted by 60 environmental organizations seeking regulations banning snowmobiling and trail grooming in national parks). The court also noted an April 2000 NPS memorandum that seemed to agree with the environmentalists that "'most, if not all, of the recreational snowmobile use now occurring in the National Park System is not in conformity with applicable legal requirements.'" *Id*. at 102 (quoting Memorandum from Assistant Secretary for Fish and Wildlife and Parks 4 (Apr. 26, 2000)). A draft rule was prepared to bring the parks into compliance with governing regulations and to allow snowmobiling only under special

On December 16, 2003, Judge Emmet Sullivan of the D.C. District Court, a President Clinton appointee, agreed with the environmentalists and set aside the 2003 plan. Judge Sullivan acknowledged that although the standard of judicial review of agency action was highly deferential, there was "a slight wrinkle" when an agency reverses an earlier decision: it must supply "a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[261] In short, the court must be convinced that the agency has not "deliberately changed" or "casually ignored" prior precedents and standards.[262] Judge Sullivan was not persuaded that the Bush Administration had supplied such a reasonable explanation for the turnabout it promulgated.

The court observed that the reasons for the abrupt change had to be explained in light of the statutory mandate governing the agency, in this case by the Organic Act's overriding conservation directive as well as NPS interpretations requiring park managers to avoid or minimize adverse effects on park resources and values.[263] Thus, according to the court, once the agency determined that snowmobile use had "an adverse effect on the Park's resources, or disturbs wildlife, the snowmobile use must immediately cease."[264] Emphasizing that in 2000 the NPS concluded that snowmobile use unlawfully impaired Yellowstone's resources and values, Judge Sullivan observed that the justification for the Bush Administration's about-face was due largely due to the NPS' claim that the imposition of a "best available technology" requirement and a transition from two-stroke to four-stroke snowmobile engines would produce a new generation of "cleaner, quieter snowmobiles."[265] The court, however, noted that the 2000 plan explicitly considered the prospect of improved new technology and thought it was an inadequate solution, especially with respect to adverse effects on wildlife.[266] The 2003 plan never contradicted this conclusion and, in fact, adopted the findings in the 2000 EIS and the accompanying record of decision.[267]

Nor did the NPS' assurances about limiting snowmobile use at 950 per day and requiring guided tours supply a reasonable explanation, according to the court. For one thing, the snowmobile daily limits did not actually reduce snowmobile use, since they were based on current daily averages and allowed for a "modest increase."[268] For another, the new rule discontinued the previous requirement that snowmobilers travel in groups of 1 to 11 snowmobiles, thereby eliminating some of the benefits of the tour-guide requirement.[269]

The court concluded that the NPS' explanation of its administrative flip-flop was "weak, at best," lacking a "cogent, supported explanation," and therefore a "quintessentially arbitrary and capricious" decision, particularly in light of the agency's conservation mandate and its earlier impairment finding.[270] Consequently, Judge Sullivan vacated the 2003 plan and ordered the previous plan and its snowmobile phaseout to be put into effect.[271] He also ordered the NPS to respond to the 1999 petition seeking a ban on all snowmobile use in the national parks.[272] By enjoining the Bush Administration's proposal to resume snowmobiling in Yellowstone, the court reinstated the Clinton phaseout plan.[273] Then, eight weeks after Judge Sullivan's decision, the U.S. District Court for the District of Wyoming enjoined the Clinton plan.

D. The 2004 District of Wyoming Court Decision

After unsuccessfully seeking a stay of Judge Sullivan's decision from the D.C. Circuit,[274] Wyoming and the snowmobile manufacturers turned their attention to the Wyoming judge who had approved the 2001 settlement that allowed snowmobiling to continue.[275] Since Judge Brimmer had only stayed the litigation pending completion of the supplemental EIS process promised in the settlement, the case was technically still before him.[276] Judge Brimmer, who earlier

regulations in September 2000, but no proposed or final rules were issued, and the government never formally responded to the petition. *See Fund for Animals*, 294 F. Supp. 2d at 102.

261. *Fund for Animals*, 294 F. Supp. 2d at 104 (emphasis omitted) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42, 13 ELR 20672 (1983)).

262. *Id.* (quoting Bush-Quayle '92 Primary Comm. v. Federal Election Comm'n, 104 F.2d 448, 453 (D.C. Cir. 1997)).

263. *Id*. at 105.

264. *Id*. (citing 36 C.F.R. §2.18(c); Exec. Order No. 11644, §3(2); Exec. Order No. 11989, §2.)

265. *Id*. at 106.

266. *Id*. at 107 (quoting the 2001 rule: "Some newer snowmobiles have promised reducing some impacts, but not enough for the use of large numbers of those machines to be consistent with the applicable legal requirement. *Cleaner, Quieter Snowmobiles Would Do Little, if Anything, to Reduce the Most Serious Impacts on Wildlife*." (quoting 66 Fed. Reg. at 7260) (emphasis supplied by the court)).

267. *Id*. at 106-07 (also noting that EPA affirmed that the 2000 technological projections remained accurate and concluded that even with the new technology, a snowmobile phaseout was still required).

268. *Id*. at 107.

269. *Id.*

270. *Id.* at 108 (quoting Louisiana Pub. Serv. Comm'n v. Federal Energy Regulatory Comm'n, 184 F.3d 892, 897 (D.C. Cir. 1999). The court also addressed the plaintiffs' divergent NEPA claims. It agreed with Fund for Animals that the NPS' failure to consider an alternative that eliminated trail grooming violated NEPA's requirement to consider a full range of alternatives. *Id*. at 108-12. However, Judge Sullivan did not agree with the Yellowstone Coalition's claim that the agency's analysis of the health risks of snowmobile use on susceptible populations, e.g., NPS employees, pregnant women, children, and the elderly, violated NEPA, determining that this was a dispute over proper scientific methodology over which a court should not referee, and finding no "blatant use of an unscientific or discredited method of evaluation." *Id*. at 112.

271. *Id*. at 115. The court did not disturb the 2002 rule's amendment of the 2000 plan, delaying the snowmobile ban for a year. *Id.*

272. *Id*. at 114-15 (determining the agency's delay in responding to the petition to be unreasonable).

273. After Judge Sullivan's decision, the 2003-2004 winter use season in Yellowstone began under regulations issued on November 18, 2002. 67 Fed. Reg. at 69473. These regulations reduced snowmobiling by about one-half from historic levels, required all snowmobile users to be accompanied by an NPS-authorized guide, and limited groups to 10 visitors plus the guide. They did not require best available technology snowmobiles. The regulations anticipated that beginning in the 2004-2005 season, all motorized visitor travel in Yellowstone would be by park service-managed snowcoaches. 67 Fed. Reg. at 69477.

274. The merits of Judge Sullivan's opinion are currently on appeal before the D.C. Circuit.

275. *See supra* note 248 and accompanying text.

276. Although the government issued the record of decision implementing the supplemental EIS in March 2003, the NPS did not issue its final rule allowing 950 daily snowmobile trips in Yellowstone and 1,140 altogether in the 3 park units until December 11, 2003, Special Regulations; Areas of the Park Service, 68 Fed. Reg. 69268 (Dec. 11, 2003), only 5 days before the Sullivan injunction. *See* International Snowmobile Mfrs. Ass'n. v. Norton, No. 00-CV-229-B, preliminary injunction slip op. (D.D.C. Feb. 10, 2004) [hereinafter 2004 Injunction].

had issued the injunction against the roadless rule, and who once enjoined significant parts of former DOI Secretary Bruce Babbitt's rangeland reform regulations,[277] rewarded the industry's faith in him by issuing a preliminary injunction against the implementation of the Clinton snowmobile ban.[278]

Although Judge Brimmer recognized that the burden on Wyoming and the snowmobile manufacturers to obtain a preliminary injunction was a heavy one, he concluded that the burden had been met, citing harm to "a whole group of businesses which supply lodging, dining, gas, and other services to snowmobilers in the Parks."[279] He thought the balance of harms clearly favored the snowmobile industry, particularly since there was "no showing . . . of the current health risks" of the Bush rules[280]; there was great public interest in protecting "business owners and concessionaires who relied" on the implementation of the Bush rule from imposition of the Clinton rule, which "was sprung on [them] the night before the beginning of the 2003-2004 season"[281]; and the snowmobile manufacturers and Wyoming had, by raising serious questions about the validity of the Clinton rule, shown a likelihood of success on the merits.[282] On the latter issue, Judge Brimmer faulted the Clinton rule for: (1) being a "prejudged political decision" that did not adequately consider the environmental and safety aspects of snowcoaches in the parks; (2) not giving cooperating state agencies enough time to comment on the snowmobile ban and "essentially exclud[ing] them from the decision-making process, in violation of NEPA"; (3) failing to adequately consider public comments; and (4) failing to adequately explain why, within a year, the NPS "had gone from a history of unlimited snowmobile access to a complete ban."[283]

Although he had little difficulty in deciding to award a preliminary injunction against the Clinton rule, Judge Brimmer had more difficulty determining its proper form. Since reinstating the Bush rule "would be in direct contravention" of Judge Sullivan's decision, he refused to do so.[284] He also acknowledged that he could not grant relief of unrestricted snowmobile use if it would violate the NPS Organic Act's nonimpairment standard.[285] Instead, he remanded the issue to the NPS to promulgate "fair and equitable rules" that would include limiting snowmobile use to four-stroke engines.[286] The NPS immediately promulgated rules allowing up to 780 snowmobiles in Yellowstone and more in Teton National Park, not all of which had to meet best available technology standards, but all of which must be commercially guided.[287] At least for the remainder of the 2004 season, the Bush Administration had once again apparently won the day.[288]

V. Conclusion

The depth of the Bush Administration's assault on the public land legacy of the Clinton Administration is fairly stunning. While no one would think that a change in Administrations would not produce significant policy changes, there is a tradition of at least defending the policies of the previous Administration in court.[289] The second Bush Administration occasionally recognized this principle,[290] but the cases described in this Article suggest that the Bush Administration was mostly hostile to it. In fact, the Bush Administration seemed to aggressively employ litigation to advance its policy objectives at every turn. For example, in the roadless rule litigation, the government repeatedly failed to defend the Clinton Administration rule,[291] then claimed a lower court opinion was a sufficient reason for Congress to not

277. On the roadless rule injunction, see *supra* notes 59-81 and accompanying text; on Judge Brimmer's rangeland reform injunction, see Public Lands Council v. Babbitt, 929 F. Supp. 1436 (D. Wyo. 1996), *rev'd in part, aff'd in part*, 167 F.3d 1287 (10th Cir. 1999), *aff'd*, 529 U.S. 728 (2000); on Judge Brimmer's background, see *supra* notes 60, 68, and accompanying text.

278. Judge Brimmer decided he retained jurisdiction to enjoin the Clinton rule because such an injunction would not technically conflict with Judge Sullivan's injunction of the Bush rule, since Judge Brimmer had had jurisdiction over the Clinton rule since December 2000. 2004 Injunction, *supra* note 276, at 10-11. Further, Judge Brimmer held Judge Sullivan's opinion on the validity of the Clinton rule to be "separate and distinct" from the validity of the Bush rule, and the doctrine of federal comity accorded to other district court opinions "has no application" due to the discrete issues involved in the two cases. *Id*.

279. *Id*. at 13 (party seeking a disfavored injunction must show factors that "weigh heavily and compellingly in its favor"), 16 (noting that the businesses may already have suffered irreparable injury; "an injunction seems to be the only way to salvage even a part of the season;" and that loss of customers, goodwill, and threats to business viability can amount to irreparable harm).

280. *Id.* at 18-19:

> [T]his Court believes that the harm suffered by Wyoming and the [snowmobile manufacturers] is far greater than that suffered [by the environmental intervenors] in continuing the Winter Use Plan that has been in effect in the Park for decades, and that with the advent of four-stroke snowmobiles the public health issues will be very much diminished . . . as well as by better management . . . .

281. *Id.* at 19. *See also id.* at 20:

> A single Eastern district judge shouldn't have the unlimited power to impose the old 2001 rule on the public and the business community, any more that a single Western district judge should have the power to opt for a different rule. Rather, these issues should be left in the care of the [NPS] . . . .

282. *Id.* at 21.

283. *Id*. at 24-28.

284. *Id.* at 29.

285. *Id.* at 30.

286. *Id.* at 31.

287. Associated Press, *Yellowstone Snowmobile Ban Set Aside: Judge Rules Against Clinton-Era Rules*, Feb. 11, 2004, *available at* http://msnbc.msn.com (noting that 140 snowmobiles would be allowed on Grand Teton National Park and the John D. Rockefeller Jr. Memorial Parkway). Of the 780 snowmobiles, only 287 would be required to have "best available technology"; no best available technology snowmobiles would be required in Grand Teton. Yellowstone National Park Homepage, *Winter Use Status*, *at* http://nps.gov/yell/planvisit/todo/winter/index.htm (last visited Feb. 20, 2004).

288. On February 17, 2004, Judge Sullivan issued a show cause order asking the NPS to explain why it should not be held in contempt for allowing more snowmobiles into Yellowstone National Park than were allowed by its December 16, 2003, order. Greater Yellowstone Coalition v. Norton, No. 02-2367 (EGS) (D.D.C. Feb. 17, 2004), *available at* http://fund.org/uploads/YellowstoneShowCauseOrder.pdf.

289. *See, e.g.*, Del Norte County v. United States, 732 F.2d 1462, 14 ELR 20522 (9th Cir. 1984), where the Reagan Administration successfully defended the Carter Administration's designation of six California wild and scenic rivers against a claim that the designation violated NEPA's public participation requirements).

290. Tulare County v. Bush, 185 F. Supp. 2d 18 (D.D.C. 2001) (upholding the designation in the Giant Sequoia National Monument).

291. *See supra* text accompanying note 23, following note 29, and preceding note 54.

take action to preserve the rule it would not defend.[292] Although the Bush Administration claimed that it would only amend, not discard, the roadless rule,[293] it lobbied Congress not to codify it,[294] exempted the Tongass National Forest from its application,[295] took advantage of the Wyoming court's injunction to authorize large-scale timber salvage logging in roadless areas,[296] and not only failed to appeal the injunction, but argued that an environmentalist appeal to preserve the rule would tread on its executive prerogatives.[297] The only thing consistent about these positions was a determined effort to discard the roadless rule of the previous Administration.

Even more striking was the Bush Administration's legal strategy to undermine wilderness study areas, which involved both abandonment of positions long held by both Republican and Democratic administrations and novel interpretations never before advanced. For example, in revoking wilderness study status from nearly three million acres, it renounced its authority to identify WSAs that had been recognized as far back as the Reagan Administration.[298] On the other hand, the MOU with the state of Utah—promising to apply recordable disclaimer regulations to R.S. 2477 claims—was based on an unprecedented interpretation of FLPMA, one that seems inconsistent with congressional intent.[299] These legal maneuvers were accomplished through a sweetheart settlement with the state that not only conceded all the issues to the state but also largely avoided testing the validity of the government's positions in either a court of law or the court of public opinion. The Utah governor who signed the agreements soon became the Bush Administration's EPA Administrator.[300]

Sweetheart settlements also characterized the Bush Administration's undermining of the Northwest Forest Plan, eliminating the plan's survey and manage requirements,[301] proclaiming dominant timber use on O&C lands,[302] and promising to reconsider the listings and critical habitat designations for the northern spotted owl and the marbled murrelet.[303] The Bush Administration also subverted the plan's aquatic conservation strategy, thwarting a key component of the nation's first large-scale ecosystem management plan.[304] Most of these measures were the products of a strategy concocted by industry lawyers shortly after the Court ended the 2000 election; one of the principal architects was soon rewarded with a senior position in the Bush Administration's office implementing the ESA.[305]

Another sweetheart settlement led to the overturning of the Clinton Administration's plan to phase out snowmobiling in Yellowstone National Park.[306] However, the D.C. District Court overturned the Bush Administration's reinstitution of snowmobiling for failing to adequately explain the policy reversal.[307] Then, the same Wyoming district judge who enjoined the roadless rule also enjoined the snowmobiling phaseout for, among other reasons, being a "prejudged political decision."[308] The Bush Administration immediately responded by authorizing increased snowmobile use.[309]

The snowmobiling controversy epitomizes the Bush Administration's approach to public land issues. Its definition of the "public" in public land use is the local business industry using public lands for commercial purposes. Thus, the roadless rule, WSAs, the Northwest Forest Plan, and the snowmobile ban—all of which restricted local extractive users—are suspect, and all were subjected to wholesale legal assault by the Bush Administration. The comprehensive nature of this assault is unparalleled in modern public land history.[310] Although fueled by a sense of localism and state prerogatives, where states' rights conflict with economic development, the Bush Administration has favored the latter.[311] Thus, it is not quite accurate to attribute the Bush aggression against wildlife species, intact ecosystems, environmental quality, and solitude as federalism-motivated. Instead, it seems as if its polices favoring public land logging, mining, and off-road vehicle use are aimed at appeasing a business constituency that uses public lands for commercial purposes. That is likely to be the Bush Administration's chief public land legacy.

292. *See supra* note 73 and accompanying text.
293. *See supra* notes 27, 77 and accompanying text.
294. *See supra* note 74 and accompanying text.
295. *See supra* note 75 and accompanying text.
296. *See supra* note 78 and accompanying text.
297. *See supra* note 81 and accompanying text.
298. *See supra* notes 112, 126 and accompanying text.
299. *See supra* notes 132-33 and accompanying text.
300. *See supra* text following note 127.
301. *See supra* notes 185-89 and accompanying text.
302. *See supra* notes 204-07 and accompanying text.
303. *See supra* note 218 and accompanying text.
304. *See supra* notes 194-96 and accompanying text.
305. *See supra* note 181.
306. *See supra* notes 248-51 and accompanying text.
307. *See supra* notes 270-73 and accompanying text.
308. *See supra* notes 278-83 and accompanying text.
309. *See supra* note 287 and accompanying text.
310. The only modern parallel would be the early Reagan years when Watt was Secretary of the Interior. But the Watt Administration actually left very little legacy. *See* George Cameron Coggins, *Nothing Beside Remains: The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. Envtl. Aff. L. Rev. 473, 546 (1990) ("By any scoresheet, Mr. Watt was a personal, professional, political, and philosophical loser."). The legacy of Watt's protege, Secretary Norton, promises to be more enduring. Leshy, the Clinton Administration's Interior Solicitor, compared the second Bush Administration with the first Eisenhower Administration and the Harding Administration. Leshy, *supra* note 112.
311. Leshy, *supra* note 112 (discussing an attempt by the state of California to zone out a facility associated with a federal hard-rock mining claim located on nonfederal lands; the Bush Administration has intervened on the side of the miner against the state, claiming that the 1872 Mining Law preempts the state regulation).