

US Forest Service Update

August 25, 2008

SUBJECT: Status of Roadless Rules



Litigation History and Status

The Roadless Area Conservation Rule (RACR) prohibiting road construction and timber harvesting with exceptions on 58.5 million acres of National Forest System lands was published in the Federal Register on January 12, 2001 (66 FR 3244).^{*} Ten lawsuits were filed against the rule. In May 2001, Judge Lodge in the District of Idaho issued a preliminary injunction barring implementation of the rule in the two cases filed in Idaho. The 9th Circuit Court of Appeals reversed Judge Lodge's decision, and the RACR went into effective in April 2003. In June 2003, the government settled its case with the State of Alaska which led to a December 30, 2003 decision to exempt the 9.3 million roadless acres of the Tongass National Forest from the RACR (68 FR 75136). In March 2007, the government settled the two cases filed in North Dakota. The State of Utah, Communities for a Great Northwest, and the American Forest and Paper Association lawsuits were dismissed.

In July 2003, Judge Brimmer in the District of Wyoming upheld the State of Wyoming's challenge and declared promulgation of the RACR procedurally flawed under NEPA and substantively illegal under the Wilderness Act. He permanently enjoined its application. The Brimmer decision was appealed, but after the State Petitions Rule was issued on May 13, 2005 (70 FR 25654), the 10th Circuit Court of Appeals declared the appeal moot and vacated Brimmer decision.

Two lawsuits were filed in the Northern District of California challenging the 2005 State Petitions for Inventoried Roadless Area Management Rule. One suit was filed by the States of California, New Mexico, and Oregon with the State of Washington intervening; and the other by a coalition of environmental groups. On September 20, 2006, Magistrate Judge Laporte set aside the State Petitions Rule, and reinstated the RACR including the Tongass amendment. This decision on appeal to the 9th Circuit Court with oral argument scheduled on October 20, 2008.

On January 12, 2007, in response to the reinstatement of the RACR, the State of Wyoming filed a second lawsuit (*Wyoming II*) against the RACR. The State also asked Judge Brimmer to reopen its initial challenge and again enjoin the rule. On June 7, 2007, Judge Brimmer denied the request to reopen because of the 10th Circuit Court's mandate to vacate and dismiss the case. Judge Brimmer then proceeded with the second case. Judge Brimmer again enjoined the RACR in his August 12, 2008 *Wyoming II* decision. This decision placed the Forest Service in a position of having to comply with the northern California district court's injunction *to follow* the RACR and the Wyoming district court's injunction *not to follow* the RACR. In an effort to ensure the agency would not be in contempt with either court order, the Department of Justice submitted motions on August 20, 2008 to both courts requesting a stay or minimally limiting the scope of their injunctions to the plaintiff states. Court decisions are pending on these motions

^{*} 66 FR 3244 – Federal Register references indicate volume and page number.

State Petitions Status

The States of California, Idaho, New Mexico, North Carolina, South Carolina, and Virginia filed petitions under the State Petitions Rule. The North Carolina, South Carolina, and Virginia petitions were essentially the same as the RACR. California sought a “no net loss” policy for inventoried roadless lands. New Mexico requested the RACR plus the inclusion of the 101,000 acres of the Valle Vidal. Since the New Mexico petition, the area is now being conserved by the 2006 Valle Vidal Protection Act. Other States announcing they intended to final a petition under the State Petitions Rule included Arizona, Colorado, Illinois, Oregon, Washington, and Wisconsin.

After Magistrate Laporte’s decision, petitioning States were encouraged file their petition under the Administrative Procedure Act (APA). Idaho Governor James Risch submitted a petition under the APA for the management of 9.3 million inventoried roadless acres. Based on the Idaho petition, a proposed state-specific Idaho roadless area conservation rule was published on January 7, 2008 (73 FR 1135). The notice of availability for the supporting draft environmental impact statement (DEIS) was published on December 21, 2007 (72 FR 72985). The comment period for both closed on April 7. The State is a cooperating agency. A final environmental impact statement (FEIS) is expected in early September, and publication of a final rule in October 2008.

In November 2006, Colorado Governor Bill Owen submitted a petition for the management of 4 million roadless acres. Colorado Governor Bill Ritter amended the petition in April 2007. Based on the petition, a proposed rule was published on July 25, 2008 (73 FR 43544) and notice of availability of the supporting DEIS on August 1 (73 FR 44991). The comment period on both closes on October 23. The State is a cooperating agency. The FEIS is expected to be available at the end of November, and publication of a final rule in mid-January 2009.

Pending Legislation

On April 20, 2007, the Northern Rockies Ecosystem Protection Act (H.R. 1975) was introduced to designate certain National Forest System lands and public lands under the jurisdiction of the Secretary of the Interior in the States of Idaho, Montana, Oregon, Washington, and Wyoming as wilderness, wild and scenic rivers, wildland recovery areas, and biological connecting corridors, and for other purposes. Under section 503 of this bill, there is a proposal for a prohibition on road construction, timber harvesting, and mineral development in roadless areas 1,000 acres or larger until Congress states otherwise.

On May 24, 2007, House Bill H.R. 2516 and Senate Bill S.1478 were introduced with bipartisan support to protect inventoried roadless areas in the National Forest System. They would make the RACR law. These bills are available at the Library of Congress website:

<http://thomas.loc.gov/>. Since 2001, three previous House and three previous Senate bills to legislate the RACR have failed.

Additional information

The Forest Service maintains a roadless website at <http://roadless.fs.fed.us/>. Copies of the proposed state-specific rules, supporting documents, and other information are available.

Contact: Bill Supulski, U.S. Forest Service, Roadless Coordinator, 202-205-0948.

LEGAL STATUS OF THE ROADLESS AREA CONSERVATION RULE

September 8, 2008

SUMMARY: The Roadless Area Conservation Rule was adopted by the U.S. Forest Service on January 12, 2001, after the most extensive public involvement in the history of federal rulemaking. The Roadless Rule generally prohibited road construction and timber cutting in 58.5 million acres of inventoried roadless areas, covering about 30 percent of the National Forest System. The Ninth Circuit Court of Appeals upheld the Rule's legality in 2002, but a Wyoming district ruled otherwise a year later. In December 2003, the Bush Administration amended the Rule by temporarily exempting Alaska's Tongass National Forests pursuant to a settlement with the State of Alaska. In May 2005, the Administration repealed the Roadless Rule and replaced it with a State petition process. However, in September 2006, a federal district court in California invalidated the Bush Administration's action and reinstated the 2001 Roadless Rule nationwide, except in the Tongass. In August 2008, the Wyoming district court again invalidated the Roadless Rule and issued a nationwide injunction.

Currently, the California and Wyoming court rulings and injunctions are both in effect and have been appealed within their respective circuits. Thus, until the courts of appeals resolve the conflicting district court decisions: (1) the Forest Service may not undertake activities that violate the Roadless Rule on 49.2 million acres of inventoried roadless areas, but is not required to abide by the Rule on the 9.3 million acres of the Tongass National Forest; and (2) the Forest Service may not rely on the Roadless Rule as a legal justification for its management decisions.

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

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

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

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

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

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

On September 20, 2006, Judge Laporte issued a landmark decision invalidating and enjoining the State Petitions Rule and reinstating the 2001 Roadless Rule. Judge Laporte held that the State Petitions Rule amounted to a repeal of the Roadless Rule and had been promulgated without complying with the requirements of the National Environmental Policy Act and Endangered Species Act. The Bush Administration has appealed that ruling to the Ninth Circuit. A hearing on that appeal is scheduled for October 20, 2008.

Undeterred by the California court's invalidation of the State Petitions Rule, the Administration has relied on general authorities of the Administrative Procedure Act to continue pursuing state-specific amendments to the Roadless Rule. Federal rulemaking processes are underway that could weaken the Roadless Rule's protection for roadless areas in Idaho and Colorado. A final EIS on the Idaho rule was released on August 29, while the draft Colorado was open for public comment until October 23.

The California decision requires the Forest Service to comply with the Roadless Rule in all national forests except the Tongass National Forest, since the Bush Administration had previously exempted the Tongass from the Rule. In April 2007 the Forest Service agreed to temporarily defer timber sales in the Tongass roadless areas through settlement of a lawsuit over the Tongass land management plan. The Tongass logging moratorium continued until the Forest Service completed a revision of its management plan, which occurred in February 2008. Since then the Forest Service has resumed preparing timber sales in roadless areas, but no logging has begun.

In response to the California court decision reinstating the Roadless Rule, the State of Wyoming sought to revive the injunction on the Roadless Rule that was issued by Judge Brimmer in 2003 and vacated by the Tenth Circuit in 2005. However, in July 2007 the Tenth Circuit denied on

procedural grounds Wyoming's request to immediately reinstate the 2003 injunction. The Tenth Circuit also cautioned the Wyoming district court of the potential for conflict with the California district court decision. In October 2007, Judge Brimmer held a hearing in the State's re-filed case against the Roadless Rule in which he expressed frustration with the California court's ruling.

On August 13, 2008, Judge Brimmer released his decision, once again ruling that the Roadless Rule violated NEPA and the Wilderness Act and enjoining the Forest Service's use of the Rule nationwide. Environmental intervenors have once again appealed Judge Brimmer's decision to the Tenth Circuit and have requested a stay of his injunction pending resolution of the appeal. The federal government's initial response to Judge Brimmer's decision was to file motions with both the Wyoming and California district courts requesting that they at least temporarily suspend their injunctions in order to relieve the Forest Service of the potential to be held in contempt of court for complying or not complying with the Roadless Rule. Environmental and state plaintiffs will oppose the motion to lift or amend Judge Laporte's injunction.

Prepared 9/8/08 by Michael Anderson, Senior Resource Analyst, The Wilderness Society, (206) 624-6430 ext. 227.

###

2001-2008 ROADLESS AREA CONSERVATION POLICY CHRONOLOGY

(as of September 8, 2008)

2001

- January 12 Roadless Area Conservation Rule is published in Federal Register.
- February 5 USDA Secretary Veneman suspends implementation of Roadless Rule until May 12.
- May 10 Idaho federal district court issues preliminary injunction blocking implementation of Roadless Rule. Environmental intervenors appealed to Ninth Circuit Court of Appeals.
- June 7 Forest Service issues interim directive requiring approval by Chief of all road building and logging projects in roadless areas until forest plans are amended.
- July 10 Bush administration requests public comment on 10 questions regarding protection of roadless areas. More than 800,000 comments were submitted by the end of the public comment period.

2002

- June 5 Legislation is introduced in the House of Representatives to enact the Roadless Rule, with more than 170 original cosponsors. A companion bill was introduced in the Senate on July 25.
- December 12 Ninth Circuit Court of Appeals reverses the Idaho district court decision and strongly upholds the legality of the Roadless Rule.

2003

- June 12 Bush Administration announces that it will propose changes to the Roadless Rule to exempt Alaska's National Forests and grant waivers upon request of individual State governors.
- July 14 Wyoming federal district court decides that the Roadless Rule violated NEPA and the Wilderness Act and issues injunction. Environmental intervenors appealed to the 10th Circuit Court of Appeals.
- December 23 Forest Service exempts Tongass National Forest from Roadless Rule.

2004

- July 12 USDA Secretary Veneman announces the Administration will propose replacing the Roadless Rule with a voluntary Governor petition process. By the end of the comment period, more than 1.7 million comments opposed the Administration's proposal and supported retaining the Roadless Rule.

2005

- May 13 Bush Administration issues final regulation repealing the Roadless Rule and replacing it with a state petition process.
- July 11 Tenth Circuit Court of Appeals dismisses appeal of the Wyoming district court decision and vacates that court decision, on grounds that the case has been made moot by the May 13 repeal of the Roadless Rule.
- August 5 Ninth Circuit Court of Appeals invalidates the Tongass National Forest management plan and remands the case to the district court to determine appropriate relief. The court decision postpones roadless area logging in the Tongass until the plan is revised.
- August 28 States of California, Oregon, and New Mexico (later joined by Washington State) file a lawsuit challenging the Bush Administration's repeal of the Roadless Rule. The states' case, along with a similar lawsuit filed by 20 environmental groups, was assigned to Magistrate Judge Elizabeth Laporte in Northern California federal district court.
- December 22 Virginia submits the first state roadless petition, requesting protection for all of the state's 380,000 acres of roadless areas. Four other states (North Carolina, South Carolina, New Mexico, and California) also petitioned for full protection of their states' roadless areas.

2006

- September 20 Judge Laporte rules that the Administration illegally repealed the Roadless Rule, sets aside the State Petitions Rule, and reinstates the Roadless Rule nationwide except in the Tongass National Forest.
- September 20 Idaho submits petition allowing road building and logging in most of the state's 9.3 million acres of roadless areas.
- September 22 State of Wyoming asks Judge Brimmer for immediate reinstatement of his 2003 decision enjoining the Roadless Rule.
- September 22 Forest Service Chief issues national directive to stop roadless area activities unless consistent with the Roadless Rule (except in Tongass).
- October 4 Bush Administration revises regulations to allow continued review of state roadless area petitions by a Roadless Area Conservation National Advisory Committee (RACNAC).
- November 29 Judge Laporte issues injunction barring road construction in connection with more than 300 oil and gas leases sold since January 2001. The injunction was modified on December 28 to cover leasing activity since May 2005.

2007

- February 6 Judge Laporte issues final injunction, clarifying that the injunction extends to oil and gas drilling permits (as well as leases) issued since May 2005.
- April 9 Forest Service and timber industry appeal Judge Laporte's decision to the Ninth Circuit.

- April 9 Parties in Tongass National Forest litigation reach “global settlement” that protects all roadless areas pending revision of Tongass forest plan.
- April 10 Federal Register notice initiates 30-day scoping comment period on Idaho petition for state-specific rulemaking.
- April 11 Colorado Governor Ritter submits roadless petition including exemptions for ski areas, grazing, and coal mining.
- May 24 Bills to enact the Roadless Rule are introduced in the House and Senate.
- June 7 Judge Brimmer denies State of Wyoming’s request to reinstate his 2003 decision enjoining the Roadless Rule.
- July 5 Tenth Circuit Court of Appeals denies State of Wyoming’s request to reinstate intervenors’ appeal of Judge Brimmer’s 2003 case.
- October 19 Judge Brimmer holds oral arguments on State of Wyoming’s new lawsuit challenging the 2001 Roadless Rule.
- December 20 Idaho roadless rule draft EIS released.
- December 26 Colorado roadless rule scoping notice issued.

2008

- January 22 10-year anniversary of Forest Service proposed moratorium on road construction in Inventoried Roadless Areas.
- January 25 Tongass final forest plan released.
- February 25 Comment deadline for Colorado roadless rule scoping.
- February 28 State of California sues the Forest Service for failing to protect roadless areas in 4 southern California forest plans.
- April 7 Comment deadline for Idaho roadless rule draft EIS.
- July 25 Draft rule for Colorado roadless areas released for 90 days of public comment (until October 23).
- August 12 Wyoming federal district court issues a second decision (very similar to its 7/14/03 decision) invalidating and enjoining the Roadless Rule nationwide.
- August 20 Bush Administration asks Judge Brimmer and Judge Laporte to suspend their respective injunctions.

August 29

Final EIS released on Idaho roadless rule.

October 20

Ninth Circuit hearing on Administration's appeal of Judge Laporte's Sept. 2006 decision.

Prepared 9/8/08 by Michael Anderson, Senior Resource Analyst, The Wilderness Society, (206) 624-6430 ext. 227.

###