THE ROADLESS RULE THAT NEVER WAS: WHY ROADLESS AREAS SHOULD BE PROTECTED THROUGH NATIONAL FOREST PLANNING INSTEAD OF AGENCY RULEMAKING

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The 2001 Roadless Rule would have barred construction of new roads on 58.5 million acres of national forest land. Within months of its inception, however, a barrage of legal challenges and reversal of policy under the Bush Administration precluded its implementation. Regardless of its ecological merits, the backlash against the Roadless Rule suggests that agency rulemaking may not be the best way to achieve roadless area protection. This comment argues that the traditional process, forest planning under the National Forest Management Act of 1976 ("NFMA"), offers a preferable alternative to agency rulemaking in this context. It also offers recommended changes to the NFMA planning regulations to facilitate effective roadless area protection.

INTRODUCTION

Upon its inception in January 2001, the Roadless Area Conservation Rule ("Roadless Rule")[1] was touted as one of the most significant conservation initiatives of the past century.[2] Enacted under the general

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1. Protection of Inventoried Roadless Areas, 36 C.F.R. § 294 (2004), *amended by* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,653 (May 13, 2005) (codified at 36 C.F.R. pt. 294).

2. *See* Kevin Galvin, *Energy Woes Aid Case for Forest Roads*, SEATTLE TIMES, Apr. 24, 2001, at A1, *available at* 2001 WLNR 1335012 (noting that "Clinton's roadless rule was hailed by environmentalists as the greatest victory for land protection in a generation"); Theo Stine & Mark Soraghan, *Colorado Opposes the Roadless Initiative*, DENVER POST, Apr. 5, 2001, at A1 (calling the Roadless Rule "the most sweeping conservation measure of the past century"). These statements are especially noteworthy given the other significant conservation

rulemaking authority of the Secretary of Agriculture,[3] the Roadless Rule barred construction of new roads on 58.5 million acres of the last remaining undeveloped land in the United States, protecting nearly one-third of the national forest system from further development.[4] The Roadless Rule prohibited the construction or reconstruction of roads within inventoried roadless areas[5] except under certain narrow exceptions.[6] Within months of its inception, however, a barrage of legal challenges[7] and a reversal of Forest Service policy under the Bush Administration precluded its implementation. Then, on May 13, 2005, the Bush Administration replaced the Roadless Rule with a new rule giving governors the power to make the initial roadless area management decisions in their respective states ("State Petitioning Rule").[8]

Extensive scientific research and widespread popular support confirm the merits of the roadless area protection the Roadless Rule would have provided.[9] However, the backlash against it resulting in its suspen-

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measures in the century leading up to the Roadless Rule, including creation of the national forest system under Theodore Roosevelt and the Wilderness Act of 1964.

3. The U.S. Department of Agriculture promulgated the Roadless Rule through its general rulemaking authority under the Forest Service Organic Act of 1897, 16 U.S.C. § 551 (2000), to regulate the "occupancy and use" of the national forest system. 36 C.F.R. § 294.10 (2004). The Secretary of Agriculture's authority to regulate "occupancy and use" is very broad. *See, e.g.*, United States v. Grimaud, 220 U.S. 506 (1911) (upholding the Secretary of Agriculture's authority under the 1897 Organic Act to establish criminal penalties for violating its grazing regulations); United States v. Weiss, 642 F.2d 296 (9th Cir. 1981) (upholding the Secretary of Agriculture's authority under the 1897 Organic Act to regulate hardrock mining operations within the national forests).

4. U.S. FOREST SERVICE, FINAL ENVIRONMENTAL IMPACT STATEMENT, ROADLESS AREA CONSERVATION RULE, at S-1 (2000) [hereinafter ROADLESS RULE FEIS].

5. Inventoried roadless areas are those areas within the national forest system of at least 5,000 acres that contain no roads. *Id.* at 1-5.

6. 36 C.F.R. § 294.12 (2004); *see also* ROADLESS RULE FEIS, *supra* note 4, at S-6 (exceptions where road construction would be permitted: where a road "is needed to protect public health and safety"; "to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or to conduct a natural resource restoration action under CERCLA, section 311 of the Clean Water Act, or the Oil Pollution Act"; "pursuant to outstanding rights"; or where "[r]ealignment is needed to prevent irreparable resource damage by a classified road" that is "essential for public or private access, natural resource management, or public health and safety").

7. *See infra* note 55 and accompanying discussion.

8. State Petitions for Inventoried Roadless Area Management, 36 C.F.R. § 294 (2005). Under this provision, governors recommend to the Department of Agriculture which roadless areas, if any, should be protected from development.

9. *See* Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1144 (2004); *cf.* Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 ECOLOGY L.Q. 249, 253–54 (2005) (doubting whether "science" can be the deciding factor in natural resources policy decisions because scientific uncertainty means that "sharply contrasting decisions can be justified by the claim that they are grounded in science").

sion and revocation suggests that agency rulemaking may not have been the best way to achieve effective protection. The backlash also suggests that not all interested parties felt that they were able to participate adequately in the decision making process.[10] Furthermore, the uncertainty created by management policy that is stripped down and then reinvented with every change in the presidency is alarming, especially considering the vast size and importance of the federal public land resource at stake. Even though fundamental differences divide those seeking permanent roadless protection from those opposed to it, both sides share frustration with the politically charged agency rulemaking process that has resulted in a full pendulum swing in the past five years.[11]

This comment explores a preferable alternate route to roadless area protection: forest planning under the National Forest Management Act of 1976 ("NFMA").[12] In a sense, this recommended alternative represents a return to our roadless area protection roots, as NFMA forest planning offered the only protection of roadless areas prior to the Roadless Rule. It is not merely a return to the status quo, however, that is recommended; improvements to the forest planning process are needed to facilitate effective roadless area protection.

In general, national forest planning under the NFMA is preferable to agency rulemaking for three reasons. First, the forest planning process gives forest plans more credibility than agency rulemakings. The NFMA planning regulations ensure credibility by requiring that plans be based in science and that resource management decisions be made at the local or regional level, allowing for adequately detailed analysis. Second, public participation and consultation requirements ensure that all interested parties have an adequate opportunity to participate in forest planning. Furthermore, because much of the planning under the NFMA occurs at the individual national forest unit level instead of the national level, there is more opportunity for meaningful participation in local decision making. Third, national forest plans are more resistant to judicial review and presidential interference and, therefore, are more stable than agency rulemaking.[13]

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10. Meredith Goad, *Baldacci Joins Fight Over Roadless Forests: Nine Governors Urge the Bush Administration Not to Make it Easier to Build and Log on Wild Public Lands*, PORTLAND PRESS HERALD, Nov. 13, 2004, *available at* 2004 WLNR 17021036 ("In the [Clinton] version of the roadless rule, I think governors felt oftentimes left out of that process, and in some cases communities felt that way, too, so [the Bush Administration's proposal] is a way to try to address that.") (quoting Dan Jiron, Spokesman, U.S. Forest Serv.).

11. *See* Editorial, *Surrender in the Forests*, N.Y. TIMES, July 18, 2004, § 4, at 12 (criticizing the reversal in Forest Service policy).

12. 16 U.S.C. §§ 1600–1614 (2000).

13. Historically, rulemaking was far more stable than it has been under the Clinton and

Unlike the ephemeral administrative agency rulemaking employed to create the Roadless Rule, NFMA forest planning has the potential to offer more permanent solutions to the complex problems surrounding management of the national forest resource. Between 1983 and 2001, when NFMA forest planning offered the only protection of roadless areas, only 2.8 million acres of the total 58.5 million acres of total inventoried roadless areas were developed.[14] As of 2001, however, 34.3 million acres of inventoried roadless areas were under management prescriptions allowing road construction,[15] making lasting protection unlikely without added safeguards to the forest planning process. Thus, in addition to explaining why forest planning is preferable to agency rulemaking, this comment recommends revisions to the forest planning regulations to facilitate roadless area protection.

Part I explains the need for roadless area protection and gives a brief overview of the history of the Forest Service's role in roadless area management and conservation. Part II explains the legislative framework of the NFMA and the forest planning process, discussing why forest planning under the NFMA is a better way to achieve roadless area protection than agency rulemaking. Finally, Part III illustrates that the Forest Service has the authority to preserve roadless areas through NFMA forest planning and explains how this process works. Part III also recommends revisions to the forest planning regulations to facilitate roadless area protection.

I. THE SIGNIFICANCE OF ROADLESS AREAS

Roadless areas are a unique natural resource, providing valuable services that would otherwise be unavailable. For example, there is no substitute for large tracts of undeveloped land for providing dispersed recreation opportunities, clean water, and superior habitat for fish and wildlife. As increasing development eliminates roadless areas from private land, federal protection of roadless areas on public land has become crucial.

The Forest Service, recognizing the unique values inherent to roadless areas, began to inventory and plan for their protection more than forty years ago. Today, seventy-two percent of inventoried roadless ar-

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Bush administrations. *See* discussion *infra* Part II.B. Only time will tell whether the tendency of recent presidents to intrude into agency rulemaking will continue.

14. U.S. Forest Service, Roadless Area Conservation Final Rule: Questions and Answers, http://roadless.fs.fed.us/documents/rule/qa/rule_qa.PDF (last visited Dec. 19, 2005).

15. U.S. Forest Service, Background Paper (May 2005), http://roadless.fs.fed.us/documents/m-05/04_28_05_background.html.

eas are located in the eleven western states, not including Alaska.[16] When Alaska is included in this calculation, ninety-eight percent of inventoried roadless areas are in the West.[17]

From 1983[18] to 2001, inventoried roadless areas were protected through the NFMA forest planning process. Then in 2001, the Roadless Rule removed management of roadless areas from the discretion of the Forest Service, establishing a nationwide rule prohibiting road building. The 2005 State Petitioning Rule, on the other hand, leaves the initial decision of whether to protect roadless areas up to the governors of each western state.

A. Why We Should Conserve Roadless Areas

Roadless areas are a natural resource with no substitute. They provide valuable amenities, including a unique opportunity for dispersed recreation, privacy, and seclusion that can be found only on large, undisturbed landscapes.[19] They provide sources of clean water,[20] with federally inventoried roadless areas containing at least portions of watersheds that provide drinking water to 354 municipalities.[21] They act as buffers against the spread of invasive plants.[22] They conserve biological diversity, providing habitat for over 220 threatened, endangered, and proposed species and 1,930 sensitive species.[23]

Building roads in these areas compromises their unique values. Roads provide easy access for motorized vehicles that introduce noise into the last quiet places. Roads compromise water quality by increasing erosion and disrupting the hydrological function of watersheds.[24] Motorized vehicles also carry noxious weeds, which are then able to proliferate on roadsides because of the ecosystem disturbance caused by roads.[25]

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16. *See id.* at app. A-3 to A-4. The eleven western states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, & JOHN D. LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 8 (5th ed. 2002).

17. *See* ROADLESS RULE FEIS, *supra* note 4, at app. A-3 to A-4.

18. The Forest Service promulgated regulations requiring consideration of roadless areas in forest plans in 1983. 36 C.F.R. § 219.17 (1983).

19. ROADLESS RULE FEIS, *supra* note 4, at 1-4.

20. *Id.* at 1-1.

21. MICHAEL P. DOMBECK ET AL., FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 99 (2003).

22. ROADLESS RULE FEIS, *supra* note 4, at 1-4.

23. *Id.* at 1-1.

24. *See* DOMBECK ET AL., *supra* note 21, at 102.

25. *See id.* at 103.

Habitat for fish and wildlife is degraded, both by fragmentation from roads[26] and by increased deaths from impacts with motorized vehicles.[27]

Conservation of roadless areas on federal public land is especially important because roadless areas are rapidly disappearing from private lands as they become more intensely developed.[28] From 1992 to 1997, an average of 3.2 million acres of private land per year was converted from undeveloped to urban uses, a development rate equal to twice that of the previous decade.[29] Thus, the future of roadless area protection is clearly in the hands of the federal government.

B. A Brief History of Roadless Area Protection

Recognizing the unique values of the roadless area resource, the Forest Service began to inventory and protect roadless areas as a class of their own in 1973 with its roadless area review and evaluation, later dubbed "RARE I."[30] Notably, the Forest Service took the initiative to enlarge the scope of the RARE I inventory beyond what was statutorily required.[31] After considerable controversy and litigation,[32] the Forest Service undertook a second roadless area review, known as "RARE II," in an effort to remedy the technical and legal inadequacies of RARE I found by the courts.[33]

Another purpose of RARE II was to standardize the forest planning process for roadless areas, as the Forest Service believed that the process would be slow and subject to substantial local variation if conducted

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26. *See* RICHARD T. T. FORMAN, LAND MOSAICS: THE ECOLOGY OF LANDSCAPES AND REGIONS 163–64 (1997) (discussing the filter effect roads have on species movement, such that roads effectively separate the habitat of many species into distinct subpopulations with differential gene flows). Besides (and partially because of) genetic isolation of subpopulations, habitat fragmentation also causes higher extinction rates, even in species that do not require a large home range. *See id.* at 414–15.

27. DOMBECK ET AL., *supra* note 21, at 102.

28. ROADLESS RULE FEIS, *supra* note 4, at 1-4.

29. DOMBECK ET AL., *supra* note 21, at 96 (citing USDA Natural Resource Conservation Service, *NRI Inventory*, 1982–1997).

30. Mary Katherine Ishee, *Roadless Lands and Wilderness Planning: A History and Overview*, *in* THE NATURAL RESOURCES LAW MANUAL 385 (Richard J. Fink ed., 1995).

31. *Id.* The Wilderness Act of 1964, 16 U.S.C. § 1132(b) (2000), only required the Secretary of Agriculture to review "primitive areas," a designation protecting national forest land from commercial use, for potential wilderness area designation. *Id.* at 383.

32. *See, e.g.*, Wyo. Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973) (enjoining development of roadless areas pursuant to RARE I until an EIS is prepared), *overruled on other grounds by* Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

33. Ishee, *supra* note 30, at 385.

solely through individual forest plans under the NFMA.[34] Using the RARE II analysis, the Forest Service issued a final environmental impact statement ("FEIS") in 1979 in which inventoried roadless areas were divided into three categories: (1) those areas recommended for addition to the wilderness area system, (2) those areas in which further planning was needed, and (3) those areas recommended for non-wilderness status.[35] Areas in the third category were open to multiple uses, including commercial development, to be determined specifically through individual NFMA forest plans.[36]

Soon thereafter, California challenged the adequacy of RARE II regarding the areas recommended for non-wilderness status, arguing that the FEIS violated the provisions of the National Environmental Policy Act ("NEPA") requiring site-specific analysis of environmental impacts and consideration of a range of alternatives.[37] In *California v. Block*, the Ninth Circuit overturned the FEIS on the grounds that the non-wilderness designation foreclosed future consideration of these areas for wilderness designation, finding that the non-wilderness designation constituted an "irreversible and irretrievable" commitment of resources triggering the site-specific impact analysis requirement.[38] The court also ruled that the Forest Service's alternatives analysis was inadequate because it lacked an alternative designating a larger percentage of roadless areas to the wilderness classification.[39] The Ninth Circuit upheld the injunction barring the Forest Service from taking any action that would change the status of the roadless areas until it filed an environmental impact statement that complied with NEPA.[40]

California v. Block triggered a great deal of controversy among industry, environmentalists, and the affected states.[41] As a work-around to the ruling, Congress passed a series of state-by-state wilderness bills based on the RARE II allocations for each state.[42] Also in reaction to *California v. Block*, the Forest Service revised its NFMA regulations in 1983 to establish its discretion to manage areas designated under RARE II as non-wilderness for preservation of their roadless area qualities.[43] From 1983 to 2001, most roadless area planning occurred at the individ-

34. *Id.*
35. *Id.* at 385–86.
36. *Id.* at 386.
37. California v. Block, 690 F.2d 753, 756 (9th Cir. 1982).
38. *Id.* at 762–63.
39. *Id.* at 767–68.
40. *Id.* at 760, 763.
41. Ishee, *supra* note 30, at 387.
42. *Id.*
43. 36 C.F.R. § 219.17 (1983).

ual forest level.[44] Thus, the Roadless Rule marked the first national-level effort to plan for roadless area protection since RARE II was released in 1979.

The Roadless Rule became politically viable in the late 1990s, when rising public and congressional distrust of the Forest Service[45] and a multi-billion dollar maintenance backlog on roads within national forests[46] converged under environmentally conscious (and some would say activist) President Bill Clinton and his like-minded appointees in the Forest Service. Distrust of the Forest Service resulted from a shift in its policy goals away from conservation of natural resources and towards commodity production from 1970 to 1990.[47] Public criticism of the substantial federal subsidies for timber and energy interests in the nature of road construction and maintenance was another impetus behind the Roadless Rule.[48] In 2000, the budget backlog on maintenance of the existing national forest road system alone was more than $8.4 billion.[49] Given the size of the federal subsidy and the budget and management problems it created, the Forest Service administration "question[ed] the wisdom of building new roads in inventoried roadless areas."[50]

Against this backdrop, President Clinton directed the Forest Service "to develop, and propose for public comment, regulations to provide appropriate long-term protection for most or all of these currently inventoried 'roadless' areas."[51] The Forest Service complied, undertaking the intensive scientific studies and public involvement process[52] that ultimately resulted in the enactment of the Roadless Rule on January 12, 2001.[53]

Shortly thereafter, the Bush Administration suspended implementation of the Roadless Rule and other recently enacted Clinton-era regulations with the infamous "Card memorandum," purportedly to study the soundness of their policy bases.[54] A barrage of legal challenges resulting

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44. *See* Ishee, *supra* note 30, at 388.

45. *See* DOMBECK ET AL., *supra* note 21, at 104–05.

46. ROADLESS RULE FEIS, *supra* note 4, at S-2.

47. DOMBECK ET AL., *supra* note 21, at 105.

48. ROADLESS RULE FEIS, *supra* note 4, at S-2.

49. *Id.*

50. *Id.*

51. DOMBECK ET AL., *supra* note 21, at 110 (quoting Memorandum from President William J. Clinton to the Secretary of Agriculture, Oct. 13, 1999).

52. *Id.* at 110–14.

53. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3243 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294), *amended by* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,653 (May 13, 2005) (codified at 36 C.F.R. pt. 294).

54. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001). This memorandum was issued by President Bush's

in a nationwide injunction against implementation of the Roadless Rule followed.[55] With the injunction awaiting appeal in the Tenth Circuit, the legal status of the Roadless Rule remained uncertain until July 2004, when the Forest Service proposed a substantially different version of the Roadless Rule.[56] On May 13, 2005, the Bush Administration officially revoked and replaced the Roadless Rule.[57]

The Forest Service under the Bush regime was easily able to replace the Roadless Rule with a vastly different rule[58] because the Department of Agriculture promulgated the original Roadless Rule using its general rulemaking authority.[59] Instead of establishing permanent protection for roadless areas, the State Petitioning Rule sets the default at no protection beyond the NFMA forest planning process.[60] While this aspect of the State Petitioning Rule is not inherently problematic, the real threat to effective roadless area conservation under the new rule is that governors may seek to alter the management direction of applicable forest plans by

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Chief of Staff, Andrew H. Card, Jr. *Id.* Several commentators criticized this maneuver. *See, e.g.*, Glicksman, *supra* note 9, at 1197–98 (arguing that the delay of the effective date of the Roadless Rule without notice and comment was of "dubious legality"); Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 732 n.255 (2004) (suggesting that the Card memorandum violated the Administrative Procedure Act).

55. The Roadless Rule was challenged in nine lawsuits in federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,655. The District Court for the District of Idaho issued a preliminary injunction against implementing the Roadless Rule in 2001, which was reversed by the Ninth Circuit Court of Appeals the following year. Koonenai Tribe v. Veneman, 142 F. Supp. 2d 1231 (D. Idaho 2001), *rev'd*, 313 F.3d 1094 (9th Cir. 2002). In 2003, the State of Alaska and the Department of Agriculture reached a settlement agreement temporarily withdrawing the Tongass National Forest from the Roadless Rule's mandate. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,655. Later in 2003, the District Court for the District of Wyoming issued a nationwide permanent injunction on the Roadless Rule. Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003). The Tenth Circuit vacated the District Court's decision on appeal, holding that the May 13, 2005 State Petitioning Rule rendered the appeal moot. Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1210 (10th Cir. 2005).

56. Special Areas; State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636 (proposed July 16, 2004) (codified at 36 C.F.R. pt. 294).

57. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,653.

58. *Id.*; *cf.* Nina A Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 627 (2003) (commenting that issuing administrative regulations is a "relatively durable form" of policy-making when compared to placing its policy in a Forest Service Handbook or the Forest Service Manual because a legislative rule "[can] be changed only through another process of notice-and-comment rulemaking").

59. 36 C.F.R. § 294.10 (2004).

60. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,654.

submitting a rulemaking petition to the Secretary of Agriculture by November 13, 2006.[61] The danger is that successful rulemaking petitions will foreclose future conservation and management efforts that would have been possible under the forest planning process. The State Petitioning Rule represents a nearly complete policy reversal affecting the management of 58.5 million acres of federal land. This dramatic pendulum swing has created confusion and controversy over public land management.[62] The result of forest planning through agency rulemaking is a volatile political battle that leaves national forest resource management in limbo.[63]

The State Petitioning Rule has stirred up significant controversy.[64] While the Roadless Rule promised permanent protection of all inventoried roadless areas, the State Petitioning Rule sets the default at no protection.[65] Instead of setting a nationwide policy, the State Petitioning Rule leaves the initial decision of whether to preserve roadless areas in each state up to its governor.[66] While the original Roadless Rule was intended to provide "lasting protection" for roadless areas, the stated purpose of the State Petitioning Rule is "to set forth a process for State-specific rulemaking to address the management of inventoried roadless areas in areas where the Secretary determines that regulatory direction is appropriate based on a petition from the affected Governor."[67] Thus, the goal of "protection" is replaced by one of active "management," which presumably includes the continued construction of new roads.

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61. *Id.* at 25,661; 36 C.F.R. § 294.12 (2005).

62. *See* Nie, *supra* note 54.

63. *See* Michael J. Mortimer, *The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management*, 54 ADMIN. L. REV. 907, 967 (2002) (noting that "[i]t is inconceivable that drastic management decisions can be slipped on and off like a pair of shoes").

64. *See* Nie, *supra* note 54, at 711.

65. *See* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,654 ("Under this final rule, submission of a petition is strictly voluntary, and management requirements for inventoried roadless areas would be guided by individual land management plans until and unless these management requirements are changed through a State-specific rulemaking."). In response to public comments expressing concern that roadless areas lack adequate protection under the State Petitioning Rule, the Bush Administration responded that over 24 million acres "were already 'off limits' to road construction under existing forest plan management direction." *Id.* at 25,659. Even so, the real danger of the State Petitioning Rule is that a state's failure to recommend protection for certain inventoried roadless areas (or a state's failure to submit a petition at all) will be interpreted as permission, or even as a mandate, to change the currently protective management designations to allow road building.

66. 36 C.F.R. § 294.12 (2005).

67. *Id.* § 294.10.

While some western governors are in favor of the rule, others "see it as an outright abdication of federal responsibility."[68] In fact, California, Oregon, and New Mexico have filed a federal lawsuit challenging the replacement of the Roadless Rule with the State Petitioning Rule, alleging that the Bush Administration failed to undertake adequate environmental impact analysis in promulgating its rule.[69] Environmental groups have rallied against the State Petitioning Rule, with twenty of them joining forces to bring a lawsuit against the Bush Administration in October 2005.[70] By leaving the ultimate preservation decision in the hands of western governors, the State Petitioning Rule lacks sufficient procedural safeguards to ensure the appropriate amount of protection for roadless areas. Given that the Property Clause vests control of federal lands with the federal government,[71] resulting in a long history of federal public land management, it is both inappropriate and unwise to give such authority to states.[72]

II. WHY FOREST PLANNING UNDER THE NFMA IS PREFERABLE TO AGENCY RULEMAKING

The uncertain future of meaningful roadless area protection resulting from the politically charged rulemaking process that drove both the Roadless Rule and the State Petitioning Rule demonstrates that agency rulemaking is not the optimal way to manage the roadless area resource. Instead, the Forest Service should restore, with some improvements,[73] the pre-2001 mechanism: forest planning under the NFMA. Part II.A explains how the forest planning process works, while Part II.B discusses the advantages of forest planning over agency rulemaking in this context.

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68. Nie, *supra* note 54, at 711.

69. Terence Chea, *3 States File Suit Over National Forests*, SEATTLE TIMES, Aug. 31, 2005, at B5.

70. Bob Egelko, *Groups Sue to Preserve Roadless Areas in National Forests: Claimants Support Clinton-era Rules Overturned by Bush*, S. F. CHRON., Oct. 7, 2005, at A11.

71. U.S. CONST. art. IV, § 3, cl. 2.

72. *See* Nie, *supra* note 54, at 712 (noting that environmentalists oppose the State Petitioning Rule because it sets a precedent for state control of federal lands).

73. Flaws in the 2005 forest planning regulations leave roadless areas vulnerable to overdevelopment. Thus, revisions to the forest planning regulations are necessary to ensure meaningful roadless area conservation. *See* discussion *infra* Part III.C.

A. Forest Planning Under the NFMA

Congress enacted the NFMA[74] to establish multiple-use standards for national forest planning and to set up a legislative framework to guide the planning process.[75] The NFMA requires national forests to be managed for the five major resources recognized by the Multiple Use and Sustained Yield Act of 1960:[76] outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.[77] The NFMA represents a compromise between the timber industry and environmentalists because it allows some areas within national forests to be managed for intensive logging, including clear-cutting where appropriate, while allowing other areas to be managed for recreational and wilderness uses.[78]

Unlike prior federal land management statutes, the NFMA and its implementing regulations set out specific procedural and substantive planning requirements.[79] Under the NFMA, the Forest Service must establish a set of tiered planning documents: an overarching national plan and more detailed site-specific plans for each national forest or group of forests.[80] Each forest plan must be revised at least every fifteen years, or when the Secretary of Agriculture finds conditions have significantly changed.[81] The NFMA also includes stringent procedural requirements for public notice, comment, and appeal of forest plans.[82] Furthermore, the NFMA requires compliance with NEPA.[83]

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74. 16 U.S.C. §§ 1600–1614 (2000).

75. *See* S. REP. NO. 94-893 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6662.

76. 16 U.S.C. § 528 (2000).

77. *Id.* § 1604(e)(1).

78. *See* CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING 42–43 (1987) (explaining how the Senate and House compromised to agree on a bill that allowed clear-cutting where appropriate but also imposed limitations on timber harvesting).

79. *See id.* at 74; George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307, 339–40 (1990) (noting that "[t]he NFMA . . . assumes a rigorously hierarchical scheme of administration for the national forests" in that "[t]he regulations must conform to the legislative criteria; the plans must conform to standards set by the regulations; and actual management decisions must conform to plan provisions").

80. 16 U.S.C. § 1602 (requiring the Secretary of Agriculture to prepare a national Renewable Resources Program every ten years to "provide in appropriate detail for protection, management, and development of the National Forest System, including forest development roads and trails; for cooperative Forest Service programs; and for research"); *id.* § 1604(f)(1) (requiring "one integrated plan for each unit of the National Forest System").

81. *Id.* § 1604(f)(5).

82. *Id.* § 1604(d); 36 C.F.R. §§ 219.9, 219.13 (2005).

83. 16 U.S.C. § 1602. Until January 2005, NEPA compliance meant the preparation of an environmental impact statement. *See* 36 C.F.R. § 219.8(b) (2004); *see also Colo. Off-Highway Vehicle Coal. v. U.S. Forest Serv.*, 357 F.3d 1130, 1132 (10th Cir. 2004). If the Forest Service Handbook amendments proposed in January 2005 are adopted, no EIS will be re-

The NFMA requires planning at the national, regional, and individual forest level, depending on the scope and scale of the issues at hand.[84] For most resources, some planning takes place on all three levels.[85] Planning at the national level consists of broad policy directives, while planning at the local level consists of site-specific analysis.[86] The scale of regional planning falls somewhere in between national and local planning.[87] Most NFMA planning occurs at the local level with the development of "forest plans," also known as "land and resource management plans" or "land management plans."[88] A forest plan must be established for each "unit" within the national forest system, which may be a single national forest or several forests grouped together.[89] Forest plans divide each forest unit into "management areas."[90] The forest plan then analyzes the resources present within each management area and determines which uses are most appropriate in each area.[91]

B. Advantages of NFMA Forest Planning Over Agency Rulemaking

Historically, administrative rules have been a stable form of policy because the same procedural safeguards apply equally to the promulgation and revocation of agency rules.[92] Many commentators have argued that these procedural safeguards and the subsequent "hard look" judicial review of rulemaking[93] has lead to agency "ossification" because agencies are unwilling to invest their efforts in new rulemaking that is likely

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quired because the proposed amendment would create a categorical exclusion from the EIS process for NFMA forest plans. National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 70 Fed. Reg. 1062, 1064 (proposed Jan. 5, 2005); *see also* discussion *infra* Part II.B.1.

84. 36 C.F.R. § 219.2 (2005).

85. WILKINSON & ANDERSON, *supra* note 78, at 79–81.

86. *Id.* at 80.

87. *Id.* at 81.

88. 16 U.S.C. § 1604; 36 C.F.R. § 219.1.

89. 36 C.F.R. § 219.2(b).

90. *See id.* § 219.7(a)(2)(iv) (requiring that "[a]reas of each National Forest System unit are identified as generally suitable for various uses").

91. *Id.*

92. Nie, *supra* note 54, at 721–24; Mendelson, *supra* note 58, at 627 (commenting that issuing administrative regulations is a "relatively durable form" of policy-making, when compared to placing its policy in a Forest Service Handbook or the Forest Service Manual because a legislative rule "[can] be changed only through another process of notice-and-comment rulemaking").

93. "Hard look" review is a version of the "arbitrary and capricious" standard, employed by courts when reviewing informal agency rulemaking and rulemaking rescissions. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (holding that the rescission of a Department of Transportation regulation requiring passive restraint seatbelts is subject to reversal if arbitrary and capricious).

to be overturned by the courts.[94] The ossification theory, however, also applies to prevent revocation. Because courts may also overturn revocations of agency rules on arbitrary and capricious grounds, existing rules have traditionally been safe from revocation.[95] The flurry of rulemaking activity under the Clinton and Bush administrations challenges traditional notions of stability and ossification. In recent years, rulemaking has become more of an ephemeral process in which each new presidential administration revokes the old regulatory regime and establishes its own.[96]

Within this new rulemaking paradigm, forest planning under the NFMA offers three significant benefits over agency rulemaking. First, the extensive forest planning process gives plans more credibility than agency rules. While agency rulemaking generally has a broad scope because it allows an agency to establish policies applicable nationwide, forest planning allows plans to be tailored to local conditions. Scientific analysis of natural resources and environmental impacts is more meaningful at the regional or local scale than at the national scale.[97] Second, the notice and comment requirements for forest planning ensure that all of the affected parties are included in the process so that they are more likely to be satisfied with the result.[98] The public participation advantage over rulemaking may be improved even more under the 2005 planning regulation amendments, which purport to require even more public participation than the old regulations.[99] Third, forest plans are more resistant to judicial review than agency rulemaking. NFMA forest plans

94. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 393–94 (2000).

95. Harold H. Bruff, *Executive Power and the Public Lands*, 76 U. COLO. L. REV. 503, 517 (2005).

96. For example, in the first major revision to the NFMA forest planning regulations in almost twenty years, the Clinton Administration revised the NFMA forest planning regulations in 2000. National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,513 (Nov. 9, 2000) (codified at 36 C.F.R. pts. 217, 219). Then in 2005, the Bush Administration substantially revised the forest planning regulations. National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005) (codified at 36 C.F.R. pt. 219).

97. Ishee, *supra* note 30, at 383 (discussing the importance of local forest plans for individual forests or groups of forests).

98. Coggins, *supra* note 79, at 351 ("Planning forces most of the competitors and processes into one arena .... In short, planning should reduce the impact of transient political preference on federal land management—although it will never be eliminated altogether.").

99. National Forest System Land Management Planning, 70 Fed. Reg. at 1023 (stating that one of the "intended effects" of the planning regulation amendments is to "strengthen collaborative relationships with the public and other governmental entities"); *id.* at 1033 ("This final rule provides extensive opportunity for public participation that exceeds requirements for public participation under NEPA and improves the clarity of the process for public notification.").

are binding law such that they are "controlling and judicially enforceable until properly revised."[100] Because forest plan revision is a lengthy and involved process, once a forest plan is complete it is relatively secure.[101]

1. The Forest Planning Process Provides Scientific Credibility

The NFMA forest planning process gives the resulting forest plans inherent credibility because forest plans must be based in science and, as a result, most of the planning happens at a scale that allows plans to be tailored to local conditions. The forest planning regulations require that the Forest Service official responsible for developing forest plans "take into account the best available science."[102] As a result, planning necessarily takes place on a smaller scale. It would be utterly impossible to develop a detailed forest plan covering the entire nation because of the vast and varied area involved and level of scientific analysis required.

Rulemaking, on the other hand, is not specifically constrained by scientific principles.[103] Even though courts will overturn a rule that is "arbitrary and capricious,"[104] the deferential nature of arbitrary and capricious review[105] means that agencies can get away with less scientific analysis when exercising their rulemaking authority than they can when developing forest plans under the NFMA. In general, agency rulemaking must comply with NEPA if it constitutes a "major Federal action[] significantly affecting the quality of the human environment."[106] Although there is some uncertainty as to whether conservation measures such as the Roadless Rule trigger NEPA's procedural requirements,[107] the Forest

100. WILKINSON & ANDERSON, *supra* note 78, at 74 (citing 16 U.S.C. § 1604(i) (1982)).

101. *But see* 36 C.F.R. § 219.8(e)(3) (2005) (authorizing the Responsible Forest Service Official to "[a]mend the plan contemporaneously with the approval of the [nonconforming] project or activity so that it will be consistent with the plan as amended"). A similar provision was included in the previous version of the regulations. 36 C.F.R. § 219.10 (2004).

102. 36 C.F.R. § 219.11(a) (2005).

103. *See* Administrative Procedure Act, 5 U.S.C. § 553 (2000).

104. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (finding a rulemaking arbitrary and capricious where not supported by the substantial evidence on the record).

105. *Id.* at 43 ("The scope of [judicial] review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

106. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000).

107. *See, e.g.*, Katie Kendall, Note, *The Long and Winding "Road": How NEPA Noncompliance for Preservation Actions Protects the Environment*, 69 BROOK. L. REV. 663 (2004) (arguing that federal conservation actions should be exempt from NEPA). *But see* Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1224–26 (D. Wyo. 2003) (holding that not only were NEPA requirements triggered by the Roadless Rule, but also that they were not satisfied), *vacated as moot by* 414 F.3d 1207 (10th Cir. 2005).

Service undertook full NEPA analysis and completed an environmental impact statement ("EIS") for the Roadless Rule.[108]

An EIS is both a public disclosure document and a decision making tool. As a public disclosure document, an EIS must "inform decision-makers and the public of the reasonable alternatives [to the proposed federal action] which would avoid or minimize adverse impacts or enhance the quality of the human environment."[109] As a decision making tool, an EIS must be used "by Federal officials in conjunction with other relevant material to plan actions and make decisions."[110]

Although extensive scientific research informed the Roadless Rule,[111] the State Petitioning Rule underwent far less scientific analysis.[112] While the Forest Service completed an EIS for the Roadless Rule, no additional environmental impact analysis was completed for the State Petitioning Rule.[113] Whether the State Petitioning Rule will stand up in court remains to be seen,[114] but this severe policy reversal on questionable scientific grounds demonstrates the problem with rulemaking credibility.[115]

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108. *See* ROADLESS RULE FEIS, *supra* note 4.

109. 40 C.F.R. § 1502.1 (2005).

110. *Id.*

111. ROADLESS RULE FEIS, *supra* note 4; Mark Udall, Editorial, *Roadless "Victory" is Really Abdication*, ROCKY MTN. NEWS, July 23, 2004, at 52A (asserting that the Clinton Roadless Rule "reflect[ed] the highest standards of science-based public policy").

112. The Roadless Rule's revocation on less than convincing scientific grounds is part of a broader pattern within the Bush Administration. *See* Doremus, *supra* note 9, at 251 ("Over the past two years, the Administration has ignored, manipulated, challenged, suppressed and dictated scientific analysis in order to implement an agenda harmful to the environment and roll back Clinton-era protections.") (citation omitted).

113. The Bush Administration's justification for not completing an EIS for its state petitioning rule is that the rule will have essentially the same environmental impact as the "no action alternative" in the 2001 Roadless Rule FEIS. Special Areas; State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636, 42,639 (proposed July 16, 2004) (codified at 36 C.F.R. pt. 294). Scientific analysis of the impact of the State Petitioning Rule is apparently delayed until submitted state plans are considered, and would then occur on a case-by-case basis. *See id.* at 42,638 ("The State petitions under this proposed rule would have to include specific information and recommendations for the management requirements for individual inventoried roadless areas within a particular State.").

114. To date, two lawsuits have been filed against the Bush Administration challenging the State Petitioning Rule, one brought by several states and the other by environmental groups. Chea, *supra* note 69; Egelko, *supra* note 70.

115. Professor Holly Doremus aptly points out that the uncertainty inherent in science allows politicians to justify a broad range of policy outcomes, such that science "is typically not the decisive element in regulatory decisions." Doremus, *supra* note 9, at 253. The inherent limitations of science, however, shouldn't preclude thorough scientific analysis of policy proposals, which serve to (1) make the political process more transparent, and (2) allow incremental improvement of scientific analysis over time by facilitating the updating process. *Id.* at 298.

By contrast, forest plans must comply with NEPA.[116] Historically, an EIS has been required for each forest plan or forest plan amendment.[117] If the proposed Forest Service Handbook provisions are adopted, instead of an EIS, NEPA compliance for forest plans will consist of a categorical exclusion from the EIS requirement, except under "extraordinary circumstances" where the plan approves a specific action on the ground.[118] Undoubtedly, such a categorical exclusion would compromise the scientific credibility that an EIS provides.

Independent of NEPA, however, the NFMA planning process requires a scientific basis for decision making. Under the NFMA, "taking into account the best available science" means that Forest Service officials must document how the scientific principles apply to the issues being considered, and "[e]valuate and disclose" both "substantial uncertainties" in the science and "substantial risks associated with plan components."[119] To meet these requirements, the Forest Service official "may use independent peer review, a science advisory board, or other . . . methods" as appropriate.[120]

Because the NFMA requires detailed scientific analysis of on-the-ground impacts of plan implementation, most of the planning occurs at the regional, local, or forest unit level. Smaller-scale planning allows Forest Service officials to effectively evaluate regional and local issues.[121] The Roadless Rule, on the other hand, created a nationwide policy prohibiting road construction in all roadless areas. Critics have argued that the "blanket prohibition on all roadless forest areas is fundamentally wrong" in certain areas where special conditions merit a modified approach.[122] The one-size-fits-all approach of the Roadless Rule undermined its credibility, especially in areas with uniquely timber-dependent economies such as the Tongass National Forest in Alaska.[123]

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116. 16 U.S.C. § 1604(g)(1) (2000); *see also* Coggins, *supra* note 79, at 340.

117. 36 C.F.R. § 219.8(b) (2004); *see also* Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 ENVTL. LAW. 149, 177 (1996) ("If an amendment is 'significant,' it must undergo public involvement comparable to that required for the initial development of a plan, including the preparation of an EIS.").

118. National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 70 Fed. Reg. 1062, 1064–65 (proposed Jan. 5, 2005).

119. 36 C.F.R. § 219.11(a)(1)–(3) (2005).

120. *Id.* § 219.11(b).

121. Jennifer L. Sullivan, *The Spirit of 76: Does President Clinton's Roadless Lands Directive Violate the Spirit of the National Forest Management Act of 1976?*, 17 ALASKA L. REV. 127, 148 (2000).

122. *Id.* at 149 (discussing the problems the Roadless Rule created in the Tongass National Forest in Alaska).

123. *Id.* at 148.

This heightened credibility of forest planning, however, comes at a price. A drawback of forest planning when compared to agency rulemaking is that it takes a long time[124] and can be very expensive.[125] In fact, one commentator has gone so far as to say that the NFMA should be repealed because the solution it affords is worse than the problem it was created to fix, predicting in 1981 that the extensive planning required by the NFMA would exhaust the Forest Service budget and displace its management, production, and protection functions.[126] As of 1996, the Forest Service had spent over $250 million to prepare 123 forest plans.[127]

The 2005 revisions to the NFMA planning regulations address these concerns, as the revisions are intended to "streamline and improve the planning process."[128] The new planning regulations emphasize "adaptive management" with the intent of "making plans more adaptable to changes in social, economic, and environmental conditions."[129] Even without these procedural revisions, however, the benefits of the NFMA forest planning process outweigh its costs. An agency rule that takes a year or two to promulgate, but then can be easily reversed upon a change in the presidency, has little lasting value. A forest plan that takes five years to complete, but then governs the natural resource decisions in a national forest until revised, is a far more valuable tool.

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124. Gippert & DeWitte, *supra* note 117, at 160 (noting that implementation of NFMA is "difficult given the complex legal framework that Congress has enacted"); Jack Ward Thomas, *What Now?: From a Former Chief of the Forest Service, in* A VISION FOR THE U.S. FOREST SERVICE 10, 19 (Roger A. Sedjo ed., 2000) ("Any revision at all [to Forest Plans] has proven impossible to achieve over twenty-three years.").

125. Gippert & DeWitte, *supra* note 117, at 153 ("Planning is not a free exercise; state of the art Forest Plans cost millions of dollars."); Coggins, *supra* note 79, at 348 ("Present planning processes are characterized by excessive expense, needless confusion, and, often, futility.").

126. *See generally* Richard W. Behan, *RPA/NFMA—Time to Punt*, 79 J. FORESTRY 802 (1981).

127. Stephen P. Quarles, Counsel, Am. Forest & Paper Ass'n, Testimony Before the Subcomm. on National Parks, Forests and Lands of the H. Comm. on Resources: The Failure of Federal Land Planning (Mar. 26, 1996), *in* NATIONAL FOREST MANAGEMENT ACT IN A CHANGING SOCIETY, at Quarles (Natural Resources Law Center ed., 1996).

128. National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1023 (Jan. 5, 2005) (codified at 36 C.F.R. pt. 219).

129. *Id.* at 1023–1024.

2. The NFMA's Public Participation Requirements Ensure that Affected Parties Have Adequate Opportunity to Participate in Decision Making

There are two possible sources of statutory public involvement mandates for informal agency rulemaking: § 553 of the Administrative Procedure Act ("APA")[130] and NEPA. Informal agency rulemaking regarding management of public lands does not trigger the notice and comment requirements of the APA.[131] However, the procedural requirements of NEPA are triggered by "major Federal action[] significantly affecting the quality of the human environment,"[132] which arguably includes agency rulemaking under the Organic Act of 1897,[133] such as the Roadless Rule and the State Petitioning Rule. The extent of the public participation required by NEPA, however, remains an open question. The promulgation of the Roadless Rule, for example, included a massive public participation campaign, while the State Petitioning Rule was passed with less fanfare.

In enacting the Roadless Rule, the Forest Service arguably exceeded the public participation requirements of the APA and NEPA.[134] The proposed Roadless Rule and Draft EIS were published in the Federal Register for public notice and comment on May 10, 2000.[135] Even though not required by statute,[136] during the next several months the Forest Service held over 430 public meetings around the country at-

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130. Administrative Procedure Act, 5 U.S.C. § 553 (2000). The notice and comment requirements of § 553 are as follows: § 553(b) of the APA requires publication of notice of the proposed rulemaking in the Federal Register; § 553(c) requires the agency to give interested parties an opportunity to participate in the rulemaking through submission of written testimony or through public hearing, if required by statute; once public comments have been considered; § 553(c)–(d) requires the agency to incorporate them into the adopted rule and publish the final rule in the Federal Register. *Id.*

131. *See id.* § 553(a)(2) (exempting "matter[s] relating to... public property" from the notice and comment requirement).

132. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000).

133. *See* Idaho v. U.S. Forest Serv., 142 F. Supp. 2d 1248, 1257 (D. Idaho 2001) (finding "no merit" to the argument that rulemaking promulgated under the Organic Act does not require compliance with NEPA).

134. Glicksman, *supra* note 9, at 1185–91 (arguing that the Forest Service more than complied with NEPA during the Roadless Rule promulgation).

135. Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276 (proposed May 10, 2000) (codified at 36 C.F.R. pt. 294), *amended by* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,653 (May 13, 2005) (codified at 36 C.F.R. pt. 294).

136. *See* Administrative Procedure Act, 5 U.S.C. § 553(c) (2000) (requiring for rulemakings that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments *with or without* opportunity for oral presentation") (emphasis added).

tended by more than 23,000 people.[137] When the comment period ended on July 17, 2000, the Forest Service had received over 1.1 million written comments, the vast majority of which were in favor of the Roadless Rule.[138]

Despite the Forest Service's commendable effort to garner public input during the promulgation of the Roadless Rule, some felt excluded from the process. Industry groups, especially timber, were among its loudest critics.[139] States and tribal governments also expressed dissatisfaction with their level of participation in the Roadless Rule decision making process. Some western states and Republican lawmakers called the Roadless Rule "hasty and irresponsible."[140] Idaho Governor Dick Kempthorne lamented the "absolutely flawed public policy that has stiffed the states."[141] A number of western states brought legal challenges to the Roadless Rule on the grounds that they had been denied cooperating agency status for NEPA purposes in the rulemaking process.[142] Achieving cooperating agency status would have allowed the affected states to formally enter the NEPA process early on and to have more input in the decision making process.[143] The Wyoming District Court agreed with the states, holding that the Department of Agriculture acted arbitrarily and capriciously in denying cooperating agency status to Wyoming and the nine other western states most affected by the Roadless Rule.[144]

The Bush Administration did not fare any better in ensuring adequate public participation in its rulemaking process. For example, the Forest Service did not post notice or provide opportunity for comment regarding the decision to delay the effective date of the Roadless Rule in

137. ROADLESS RULE FEIS, *supra* note 4, at 1-7.

138. *Id.*; Glicksman, *supra* note 9, at 1185–86 (citation omitted) (noting that 96 percent of the written public comments received were favorable to the Roadless Rule).

139. *See, e.g.*, Sullivan, *supra* note 121, at 149 (explaining dissatisfaction among the Alaskan timber industry with the adoption of the Roadless Rule).

140. Douglas Jehl, *Road Ban Set for One-Third of U.S. Forests*, N.Y. TIMES, Jan. 5, 2001, at A1.

141. *Id.*

142. *See, e.g.*, Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1221 (D. Wyo. 2003), *vacated as moot by* 414 F.3d 1207 (10th Cir. 2005).

143. Memorandum for Heads of Federal Agencies on Designation of Non-Federal Agencies as "Cooperating Agencies" from the Executive Office of the President, Council on Envtl. Quality (July 8, 1999), *reprinted in* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION app. at P-2 (Paulette Simonetta & Claudia A. Thompson eds., Thompson/West 2d ed. 2004) (1984). The purpose of granting cooperating agency status to states and local governments is to allow their special expertise regarding the impacts associated with each of the proposed alternatives to inform the decision making process, as well as to establish a mechanism for addressing intergovernmental issues. *Id.*

144. *Wyoming*, 277 F. Supp. 2d at 1221.

the Card memorandum.[145] The public comment period for the State Petitioning Rule was extended from 60 to 120 days,[146] but the extra two months were inadequate to appease all interested parties.[147] Unlike the Clinton Administration, the Bush Administration held no public meetings to discuss its proposed rule.[148] As a result, some people felt shut out of the process.[149] The Forest Service received 1.8 million comments on its proposed rule.[150] The Bush Administration, however, did not disclose how many of these comments were in favor of the State Petitioning Rule.[151]

In contrast to agency rulemaking, the NFMA forest planning process explicitly requires participation by all affected parties, including industry groups, other governmental agencies, and interested citizens.[152] The NFMA planning regulations require the responsible Forest Service official to "use a collaborative and participatory approach to land management planning," providing opportunities for participation in the development, amendment, and revision stages.[153] Forest Service officials must consult with other departments and agencies during the creation of each forest plan,[154] including collaboration with state and tribal governments early in the planning process.[155] Officials are encouraged to "seek assistance" from state and local governments as appropriate "to help address management issues or opportunities."[156]

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145. Glicksman, *supra* note 9, at 1165–66 (describing that the Forest Service asserted that it was exempt from the notice and comment requirement of the Administrative Procedure Act because the Card memorandum was a rule of procedure and because the delay was based on "good cause"). *See supra* note 54 and accompanying discussion.

146. Department of Agriculture (USDA) Statement of Regulatory Priorities, 69 Fed. Reg. 72,663, 72,666 (Dec. 13, 2004).

147. Kim McGuire, *Groups Protest 'Roadless Rule,'* DENVER POST, Nov. 16, 2004, at 3B.

148. Deborah Frazier, *Unhappy Campers Protest Bush Plans: Wilderness Advocates Angry Over Plans to Open Roadless Areas*, ROCKY MTN. NEWS, Sept. 1, 2004, at 24A.

149. *E.g.*, Op-Ed., *Forest Service Didn't Listen*, DESERET MORNING NEWS, Nov. 18, 2004 (claiming that the Forest Service refused to accept comments collected by several organizations); Jessica Ruehrwein, Letter to the Editor, IDAHO STATESMAN, May 24, 2005, at 6 ("Will the Bush administration ever listen to the overwhelming majority of Americans rather than to big logging corporations?").

150. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,653, 25,654 (May 13, 2005) (codified at 36 C.F.R. pt. 294).

151. *See id.*

152. 36 C.F.R. § 219.9 (2005). *But see* MICHAEL FROME, THE FOREST SERVICE 96 (2d ed. 1984) (noting that the degree of public participation under the NFMA has varied widely and giving examples).

153. 36 C.F.R. § 219.9.

154. *Id.* § 219.9(a)(2)–(3) (engaging state and local governments and tribal governments).

155. *Id.* § 219.9(a)(2).

156. *Id.*

The NFMA and its planning regulations also contain extensive public notice requirements.[157] For example, the Forest Service must provide public notice and opportunity for comment at least three months before approving any forest plan or making any forest plan revision.[158] Public meetings or "comparable processes" are a required part of this comment period, intended to "foster public participation."[159] The NFMA also expressly provides an opportunity for citizen and interest groups to appeal forest plan and project decisions to the Forest Service or Department of Agriculture officials.[160] Between 1983 and 1996, the Forest Service received over 1200 forest planning appeals,[161] an indicator that the planning process has engaged affected parties.

In theory, the end result of NFMA forest planning is one that everyone can live with because everyone was at the table during the planning process. For example, one Roadless Rule critic recalls that the forest planning process "worked to achieve a balance between competing interests" in the Tongass National Forest.[162] The "collaborative efforts" under the NFMA regime resulted in "management goals designed to achieve protection of forest resources while also providing a sustainable yield of timber."[163] In fact, the Alaska Region of the Forest Service initiated an innovative "Collaborative Stewardship" program in 1997 "to build working relationships between the Forest Service and the affected communities."[164] As a direct result of this program, the Alaska timber industry voluntarily adjusted its scheduled timber harvests downward.[165] By contrast, effective public participation under the Roadless Rule was harder to achieve in this region.[166]

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157. *Id.* § 219.9(b). Forest Service officials take the public participation requirements of the NFMA seriously. Rick Cables, Regional Forester for the Rocky Mountain Region, notes that the forest planning process provides opportunity for the honest, specific thoughts that are the essence of public involvement. Interview with Rick Cables, Reg'l Forester for the Rocky Mountain Region, U.S. Forest Serv., in Boulder, Colo. (Apr. 1, 2005). Prior to becoming the Regional Forester for the Rocky Mountain Region, Rick Cables was the Regional Forester for the Alaska Region, covering the Tongass and Chugach National Forests, Forest Supervisor of the Pike and San Isabel National Forests and Comanche and Cimarron National Grasslands, and Forest Supervisor for the White Mountain National Forest.

158. 16 U.S.C. § 1604(d) (2000).

159. *Id.*

160. 36 C.F.R. §§ 215, 251.80 (2005).

161. Gippert & DeWitte, *supra* note 117, at 180.

162. Sullivan, *supra* note 121, at 149.

163. *Id.* at 138.

164. *Id.* at 151.

165. *Id.*

166. Rick Cables, the Regional Forester for the Tongass Region during the Roadless Rule era, notes that he lacked adequate maps to provide at public meetings because of the large scale of the Roadless Rule proposal. Interview with Rick Cables, *supra* note 157.

Of course, broader participation in the planning process cannot solve the "underlying value conflicts" surrounding the allocation of natural resources between the public, industry groups, environmentalists, states, and the federal government.[167] Even so, a plan endorsed by members of all of these groups is surely stronger than a rule promulgated by the federal government, which is inherently more top-down regardless of how many public comments were received during the rulemaking process.

3. Forest Plans Are More Resistant to Judicial Review

In the past several years, the Supreme Court has shown increasing hesitancy to review programmatic planning documents such as forest plans. Historically, courts had authority to use the NFMA's substantive and procedural planning requirements to strike down inadequate forest plans.[168] Some commentators worried that the courts, and not the Forest Service, would ultimately be the stewards of our national forests.[169] Such dire predictions did not come to pass, as courts have generally deferred to agency discretion in the forest planning arena.[170] A forest plan would be upheld unless a court found it to be "arbitrary and capricious."[171] Although agency rulemaking is also subject to arbitrary and capricious review,[172] courts have been more willing to strike down rulemakings than forest plans.[173] Thus, forest plans are historically more resistant to judicial review.

Two recent Supreme Court cases have made programmatic planning documents even more resistant to review. In *Ohio Forestry v. Sierra Club*, the Supreme Court held that a forest plan is only ripe for judicial

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167. Coggins, *supra* note 79, at 352–53.

168. WILKINSON & ANDERSON, *supra* note 78, at 74 ("The NFMA will require courts to scrutinize forest plans, and activities based on those plans, on both procedural and substantive grounds .... The Forest Service has correctly stated the controlling law in advising its planners that reviewing courts are likely to conduct a 'searching inquiry' into the procedural adequacy of forest plans and to require 'full, fair and bona fide compliance' with the NFMA."); Behan, *supra* note 126 (noting that "[a]n imperfect plan is an illegal plan").

169. Behan, *supra* note 126.

170. *See* 2 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW §§ 10F:36, 10F:51 (2005).

171. *See id.*; *cf.* Or. Natural Res. Council v. Lowe, 836 F. Supp. 727 (D. Or. 1993) (applying an even more deferential standard of review in requiring the plaintiff to demonstrate "that there is virtually no evidence in the record to support the agency's methodology").

172. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (2000).

173. *See* Gippert & DeWitte, *supra* note 117, at 182–83 (noting that "Congress' broad delegation of authority to the Secretary of Agriculture to plan, manage and administer uses of the National Forests has generally led to very limited judicial review of Forest Service decisions").

review once specific project approvals have been made pursuant to it.[174] In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court refused to enforce another type of programmatic planning document, a Bureau of Land Management ("BLM") Resource Management Plan establishing a duty to monitor off-road vehicle use in Wilderness Study Areas.[175] The Court noted that the Resource Management Plan established no discrete, enforceable duty in the BLM because it compelled no particular agency action.[176] The Court further noted that the Federal Land Policy & Management Act "describes land use plans as tools by which 'present and future use is *projected*.'"[177] Like BLM Resource Management Plans, NFMA forest plans are programmatic documents. If there were any doubt about this, the public notice accompanying the planning regulations adopted in January 2005 clarifies that forest plans "will be strategic rather than prescriptive in nature."[178] Thus, under the new planning regulations, courts will be even more hesitant to review forest plans and they will thus remain in force until properly revised.

III. ACHIEVING ROADLESS AREA PROTECTION THROUGH THE NFMA

Instead of pursuing roadless area management through rulemaking, the Forest Service should employ its forest planning authority under the NFMA to protect roadless areas. Part III.A establishes that the Forest Service may use its NFMA forest planning authority to achieve roadless area protection. Part III.B discusses how national, local, and regional planning should be used together to achieve the best result. Moreover, to facilitate meaningful roadless area protection through forest planning, the Forest Service should revise its NFMA forest planning regulations to expressly prescribe treatment of roadless areas, as discussed in Part III.C.

A. The Forest Service Has the Authority to Protect Roadless Areas Through NFMA Forest Planning

Regardless of the mechanism employed to protect roadless areas, the Forest Service faces a challenge to its authority from the "de facto

174. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998).

175. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 71–72 (2004).

176. *Id.* at 69–70.

177. *Id.* at 69 (quoting 43 U.S.C. § 1701(a)(2) (2000)).

178. National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1031 (Jan. 5, 2005) (codified at 36 C.F.R. pt. 219). While it may help to shield forest plans from judicial review, the characterization of forest plans as "strategic" in the 2005 planning regulations creates other problems. *See* discussion *infra* Part III.C.

wilderness" argument. Under this theory, roadless areas are the functional equivalent of wilderness areas, which can only be created through congressional designation.[179] The de facto wilderness argument was one of the grounds on which the Wyoming District Court invalidated the Roadless Rule.[180] The court held that roadless areas are functionally equivalent to wilderness, and that the Wilderness Act of 1964 vested the power to create wilderness solely in Congress.[181]

Roadless areas, however, are not synonymous with wilderness areas. Although many roadless areas have been formally designated as wilderness areas under the Wilderness Act of 1964, many others have not.[182] Until the 2005 planning regulation amendments, inventoried roadless areas could clearly be designated as "special areas" to ensure their preservation without a formal wilderness designation.[183] Under these regulations, the Forest Service retained administrative discretion to manage non-wilderness roadless areas for the preservation of their roadless characteristics.[184] Although the 2005 planning regulations no longer explicitly mention "inventoried roadless areas" as eligible for "special area" designation,[185] they arguably still fit within this category. Thus, the Forest Service has the authority to preserve roadless areas using the NFMA forest planning process.

B. The Potential for Roadless Area Protection Through National, Local, and Regional Forest Planning

Within the legal framework discussed *supra* Part II.A, the NFMA contains multiple tools for roadless area conservation planning. First, the NFMA authorizes national-level forest planning and policy directives. The second tool is individual forest planning at the local level. The third is regional forest planning. These variable scale strategies are most effective where implemented together, rather than alternatively.

When using these strategies in a coordinated approach, an important consideration is the appropriate relationship between each level of planning. Several theories explain the interaction between national, local,

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179. Wilderness Act of 1964, 16 U.S.C. § 1131(a) (2000).

180. Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003), *vacated as moot by* 414 F.3d 1207 (10th Cir. 2005).

181. *Id.* at 1233–35.

182. ROADLESS RULE FEIS, *supra* note 4.

183. 36 C.F.R. § 219.27(c) (2004); Ishee, *supra* note 30, at 387.

184. 36 C.F.R. § 219.27(c); Ishee, *supra* note 30, at 387.

185. 36 C.F.R. § 219.7(a)(2)(v) (2005) ("Special areas are . . . designated because of their unique or special characteristics. Special areas such as botanical areas or significant caves may be designated . . . .").

and regional planning: the bottom-up theory, the top-down theory, and the iterative exchange theory.[186] Under the top-down theory, local forest planners get their direction from above, thus preventing local needs from frustrating national policy.[187] By contrast, under the bottom-up theory, planning originates at the individual forest level and national-level planning and policy respond to local needs.[188] Under the iterative exchange theory, local and national planners continually exchange information such that influence runs both ways.[189] The iterative exchange approach is the most effective, allowing for discussion and compromise between the federal and local levels.[190] By contrast, agency rulemaking that mandates a nationwide rule, such as the Roadless Rule, is inherently top-down. This top-down effect explains much of the criticism that the Roadless Rule did not respond to local needs. The 2005 planning regulation amendments represent a rejection of top-down planning and embrace both the bottom-up and iterative theories.[191]

1. Forest Planning at the National Level

National planning is crucial for setting polices that are applicable nationwide, especially where there is a need for uniformity and coordination among the national forests. The scope of national-level planning is necessarily broad because of the difficulty of addressing site-specific conditions on a large scale. Even so, national planning can set policies that inform local and regional planning.[192]

National planning, however, has been underutilized in the NFMA forest planning regime, possibly because the Forest Service has traditionally rejected top-down planning, instead relying on individual forest plans to make most of the important decisions regarding land use.[193] Even so, the statutory framework for national-level forest planning is in place and ready to be employed should a progressive administration wish to do so.[194]

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186. *See* WILKINSON & ANDERSON, *supra* note 78, at 77–78.

187. *Id.* at 77.

188. *Id.* at 77–78.

189. *Id.* at 78.

190. *Id.* At least one current Forest Service official agrees that the iterative exchange theory best explains the interaction between national and local decision making. Interview with Rick Cables, *supra* note 157.

191. *See* 36 C.F.R. § 219 (2005).

192. Interview with Rick Cables, *supra* note 157 (noting that the national framework creates a "policy skeleton" to guide regional and local decision making).

193. *See* WILKINSON & ANDERSON, *supra* note 78, at 90.

194. Congress left the Forest Service with discretion to determine how strong a role national planning should take. COGGINS & GLICKSMAN, *supra* note 175, § 10F:32 (2005).

On the national level, NFMA forest planning consists of the Forest Service Strategic Plan.[195] The NFMA also grants to the Secretary of Agriculture the authority to undertake rulemaking to establish forest planning regulations.[196] The Secretary of Agriculture could use its rulemaking authority under the NFMA to promulgate regulations to facilitate protection of roadless areas through the forest planning process.[197] For example, a "roadless" management area could be established to allow individual forest plans to include roadless designations.[198]

Outside of the NFMA regime, the Secretary of Agriculture's Renewable Resources Program ("RPA Program")[199] and the President's Statement of Policy[200] supplement the Forest Service's national resource planning role. Together, the Forest Service Strategic Plan, RPA Program, Statement of Policy, and NFMA rulemaking authority can guide the resource allocations in the more detailed regional and local plans. In concert, all four could be implemented by a progressive administration to establish a policy framework for the preservation of roadless areas.

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195. 36 C.F.R. § 219.2(a). The Forest Service Strategic Plan "establishes goals, objectives, performance measures, and strategies for management of the National Forest System." *Id.*

196. 16 U.S.C. § 1613 (2000).

197. Interview with Rick Cables, *supra* note 157 (noting that this may be the most effective way to achieve roadless area protection at the national level); *see* discussion *infra* Part III.C.

198. Interview with Rick Cables, *supra* note 157.

199. The RPA Program, prepared by the Secretary of Agriculture, provides a "45-year plan for protection, management, and development of the National Forest System." *1985 Recommended Renewable Resources Program and the President's Statement of Policy: Hearing Before the Subcomm. on Forests, Family Farms, and Energy of the H. Comm. on Agriculture*, 100th Cong. 1 (1987) (statement of Hon. Harold L. Volkmer, Chairman, H. Subcomm. on Forests, Family Farms, and Energy). The RPA Program is a strategic planning document, setting out initiatives that guide local planning efforts. Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1601–87; *1985 Recommended Renewable Resources Program and the President's Statement of Policy: Hearing Before the Subcomm. on Forests, Family Farms, and Energy of the H. Comm. on Agriculture*, 100th Cong. 27 (1987) (statement of Mark Rey, Vice President, Pub. Timber Council, Nat'l Forest Products Ass'n). The RPA Program could establish a policy of no new road building in inventoried roadless areas. However, the RPA Program has not been used in recent years. Even though it is currently dormant, the law authorizing the RPA Program remains intact, thus making it a potentially valuable tool for national-level forest planning.

200. The President must issue a Statement of Policy every five years for framing budget requests. 16 U.S.C. § 1606(a). The Statement of Policy establishes broad policy goals for funding and managing the national forests. WILKINSON & ANDERSON, *supra* note 78, at 79–80. A conservation-minded president could emphasize roadless area protection in a Statement of Policy and make funding recommendations accordingly.

2. Forest Planning at the Individual Forest Level

While national-level policy and standards provide the framework for forest planning, Forest Service discretion in applying these policies to local needs is a necessary component of the planning process.[201] At the heart of the NFMA are provisions that set up a framework for establishing forest plans, also known as "land and resource management plans" or simply "land management plans."[202] A forest plan must be established for each "unit" within the national forest system, which may be a single national forest or several grouped together.[203]

Forest plans divide each forest unit into "management areas."[204] Management areas are similar to zoning districts in that they are organized into categories by permitted uses.[205] A forest plan must identify the suitable uses in each "management area," considering the resources present therein.[206] In addition, forest plans may stipulate how the Forest Service should administer the resources in each management area.[207] Potential uses in a given resource management area include recreation, livestock grazing, timber harvest, watershed management, and fish and wildlife purposes.[208] Roadless areas, although not explicitly mentioned in the 2005 planning regulations, are another potential designated use, most likely under the "special area" category.[209] The Forest Service has the authority to adopt "special area" designations through forest plan amendments or revisions.[210]

Forest plans are like zoning plans in that incompatible uses are separated geographically. For example, a management area designated for roadless preservation is incompatible with traditional timber harvesting because roads must be constructed to remove the timber. Thus, even though the NFMA mandates that each national forest unit be managed

201. Interview with Rick Cables, *supra* note 157.

202. *See* 16 U.S.C. § 1604; 36 C.F.R. § 219.1 (2005); 36 C.F.R. § 219.1 (2004).

203. *See* 36 C.F.R. § 219.2(b) (2005) (describing land management plans for "forest, grassland, prairie, or other comparable administrative unit[s]").

204. *See id.* § 219.12(a)(1).

205. COGGINS & GLICKSMAN, *supra* note 175, § 10F:50.

206. 36 C.F.R. § 219.12(a)(1) (2005).

207. *Id.*; *see also* Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995) (interpreting a previous version of the NFMA planning regulations).

208. 36 C.F.R. § 219.12(a)(1).

209. *See id.* § 219.7(a)(2)(v) ("Special areas are areas within the National Forest System designated because of their unique or special characteristics."). Roadless areas were explicitly mentioned in the previous version of the planning regulations. 36 C.F.R. § 219.27(c) (2004).

210. 36 C.F.R. § 219.7(a)(2)(v) (2005).

under multiple use principles, some areas within each unit may properly be managed for a single use if others are incompatible.[211]

Since the adoption of the 1983 planning regulations, the Forest Service has conducted most of its roadless area planning at the individual forest plan level.[212] Under the 1983 planning regulations, which remained in effect until 2000, Forest Service officials were required to evaluate impacts on roadless areas during project-level decision making.[213] Under this planning regime, an estimated 2.8 million acres of the total 34.3 million acres of unprotected inventoried roadless areas were developed.[214]

Although only a small percentage of inventoried roadless areas was actually developed under the 1983 planning regulation regime, the absence of a national policy to guide the treatment of roadless areas in forest plans meant that continued protection of these areas was not guaranteed. Without a national policy, piecemeal decisions to develop roadless areas may lead to over-development because case-by-case decision making otherwise provides no mechanism for considering cumulative impacts.[215] Without consideration of cumulative impacts, inventoried roadless areas could be incrementally reduced, resulting in a substantial nationwide loss of roadless area values and characteristics over time.[216] Thus, although local forest planning is an essential tool for roadless area management, it must be guided by a national policy to achieve meaningful protection.

3. Forest Planning at the Regional Level

The Forest Service should use regional planning in conjunction with national and local planning to achieve the best results. In cases where special conditions exist, such as habitat ranges for endangered species spanning more than one national forest, regional planning should actually supplant local planning. Regional planning works better than local plan-

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211. *See, e.g.*, Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468 (9th Cir. 1994) (upholding a forest plan that precluded off-road vehicle use in certain areas because of conflicts with other uses); Wind River Multiple-Use Advocates v. Espy, 835 F. Supp. 1362 (D. Wyo. 1993) (upholding designation of areas primarily for grizzly bear habitat), *aff'd*, 85 F.3d 641 (9th Cir. 1996).

212. Ishee, *supra* note 30, at 389.

213. Gippert & DeWitte, *supra* note 117, at 197.

214. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294), *amended by* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,653 (May 13, 2005) (codified at 36 C.F.R. pt. 294).

215. *Id.*

216. *Id.*

ning for managing habitat for widely dispersed species, such as grizzly bear and salmon, whose habitat crosses national forest boundaries.[217] Similarly, regional planning allows for consideration of cumulative environmental impacts of management activities such as road construction.[218] Another benefit of regional planning is that socioeconomic analysis is more meaningful on the regional than on the individual or national forest scale.[219] Additionally, regional planning would be less expensive than revising current forest plans on an individual basis.[220]

Until the promulgation of the 2000 planning regulations, regional planning was a required step in the NFMA planning hierarchy.[221] Called "Regional Guides," these plans served as an intermediary step to connect the broad policy goals in the national strategic plan with the individual forest plans.[222] In the 2000 revisions of the planning regulations, however, the Forest Service deleted the Regional Guide requirement to simplify the planning process,[223] which many critics argued had become too cumbersome.[224]

Even though Regional Guides are no longer required, Forest Service officials may still plan at the regional level if appropriate to address the scope and scale of the issues at hand, because the Regional Forester is empowered to act as the responsible planning official as needed.[225] Thus, regional planning is still an option under the current forest planning regulatory regime.

C. Recommended Planning Regulation Revisions to Facilitate Roadless Area Protection Through NFMA Forest Planning

The 2005 planning regulations have several shortcomings. Thus, to ensure effective and meaningful roadless area protection through NFMA

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217. Michael Anderson, Senior Res. Analyst, Wilderness Soc'y, Statement Before the Subcomm. on Forests and Public Lands Management of the S. Comm. on Energy and Natural Resources Re: Forest Service Land Management Planning Process (April 5, 1995), *in* NATIONAL FOREST MANAGEMENT ACT IN A CHANGING SOCIETY, *supra* note 127, at Fox.

218. Interview with Rick Cables, *supra* note 157.

219. Anderson, *supra* note 217.

220. *Id.*

221. *See* Gippert & DeWitte, *supra* note 117, at 162 ("The 1979 NFMA planning regulations established 'Regional Plans' as a non-statutory level of planning to serve as a link between national land planning and local project efforts, to disaggregate national goals and targets, and to provide a means to deal with issues that transcend unit boundaries.").

222. *Id.*

223. National Forest System Land Resource Management Planning, 65 Fed. Reg. 67,514, 67,527 (Nov. 9, 2000) (codified at 36 C.F.R. pts. 217, 219).

224. Gippert & DeWitte, *supra* note 117, at 162; Quarles, *supra* note 127, at 22–23.

225. 36 C.F.R. § 219.2(b)(2) (2005).

forest planning, the planning regulations should be revised. The biggest hurdle to effective roadless area preservation in the 2005 regulations is the notion that forest plans are "aspirational" in nature and that decisions made therein are not binding on subsequent permitting decisions.[226] Not only is this provision unwise, it may also be illegal. It appears to conflict with the NFMA, which requires that "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans."[227] The notion that forest plans are merely aspirational represents a major departure from traditional forest planning, in which all permitting decisions, such as timber sales and road building, were required to comply with the governing forest plan.[228] Under the 2005 planning regulations, by contrast, even if a forest plan sets aside an inventoried roadless area for preservation, the Forest Service has discretion to later issue a timber sale within the area. Thus, whether forest planning under the NFMA could effectively achieve roadless area protection depends only upon the willingness of Forest Service administrators to follow their own forest plans.

To remedy this legal and practical problem, the 2005 planning regulations should be revised to make clear that forest plans are binding on future permitting decisions. An aspirational plan is an oxymoron; what is the purpose of a plan if not to determine future action? Aspirational plans would be a waste of the time and money required to prepare them. Returning to the historical understanding that forest plans are binding legal documents would ensure that the planning decisions made therein are binding on future management decisions, including decisions to make certain areas off-limits to road construction.

A second shortcoming of the 2005 planning regulations is the failure to specifically address treatment of roadless areas in forest planning. The absence of provisions requiring consideration of roadless area values means that the roadless area resource may be undervalued, resulting in more than the appropriate level of development. Thus, the forest planning regulations should be revised to expressly address treatment of roadless areas, as did the short-lived 2000 planning regulations.[229] Under the 2000 planning regulations, the Forest Service was required to "[i]dentify and evaluate inventoried roadless areas and unroaded areas" during the forest plan revision process and to "determine which inventoried roadless areas and unroaded areas warrant additional protection

226. *See id.* § 219.7(a)(2).
227. 16 U.S.C. § 1604(i) (2000).
228. WILKINSON & ANDERSON, *supra* note 78, at 74 (citing 16 U.S.C. § 1604(i) (1982)).
229. 36 C.F.R. § 219.27(c) (2004).

[over and above that provided by the Roadless Rule] and the level of protection to be afforded."[230] These provisions were intended to complement the national prohibition of road construction in inventoried roadless areas provided by the Roadless Rule by giving the Forest Service discretion to impose additional protection above that required by the Roadless Rule in particularly sensitive areas.[231]

Even without a national "roadless rule" in place, requiring the Forest Service to take roadless area values into consideration when revising forest plans is sound policy. Safeguards are necessary to ensure that unique qualities of roadless areas are accounted for when undertaking forest plan revisions. To ensure such consideration, the planning regulations should establish a management prescription specifically for roadless areas. Under such a management prescription, activities harmful to roadless area values could be prohibited to ensure preservation.

Finally, the forest planning regulations should be revised to reinstate explicit procedures for regional planning, because the regional scale presents a significant opportunity for meaningful roadless area conservation. Although regional planning is not foreclosed by the 2005 planning regulations,[232] the regulations contain no specific procedure for undertaking a regional planning effort. The planning regulations should be revised to specify which parties must be involved and the general procedure that must be followed in the regional planning process. Given the expense and problems encountered under the 1983 regulations requiring regional planning,[233] it should not necessarily be required in all cases. The Forest Service, however, should be authorized to undertake regional planning where the conditions make it desirable, such as where endangered species habitat spans several national forest units.

The forest planning regulations should specify procedures for defining a "region." How a planning region is defined should depend upon the characteristics of the region and its management goals. For example, where there are significant socio-economic impacts to be considered, defining planning regions by social units may be desirable. The advantage of defining regions by social boundaries is that public participation

230. National Forest System Land Resource Management Planning, 65 Fed. Reg. 67,514, 67,571 (Nov. 9, 2000) (codified at 36 C.F.R. pt. 219), *amended by* National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1023 (Jan. 5, 2005) (codified at 36 C.F.R. pt. 219).

231. Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276, 30,277 (proposed May 10, 2000) (codified at 36 C.F.R. pt. 294), *amended by* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,653 (May 13, 2005) (codified at 36 C.F.R. pt. 294).

232. *See supra* text accompanying note 225.

233. *See supra* text accompanying notes 223–24.

would be maximized because meaningful public participation is easier to achieve when the planning unit encompasses only one socio-cultural unit.[234] For example, Rick Cables, then the forest supervisor for the White Mountain National Forest, developed watershed-based planning units around social units just before the enactment of the NFMA.[235] Under this planning regime, there was a high level of public participation in forest management decisions.[236] When the NFMA was passed in 1976, however, the entire White Mountain National Forest was combined into one planning unit, resulting in a noticeable drop in public interest and input.[237]

By contrast, if endangered species habitat or other environmental impacts are a primary concern in a given area, planning regions should be defined along ecological boundaries. For example, the 1993 Northwest Forest Plan was developed to ensure the viability of the spotted owl in the Pacific Northwest.[238] Covering nineteen million acres of Forest Service land in the Pacific Northwest, including portions of nineteen national forests, the plan established a maximum timber harvest that would preserve spotted owl habitat viability and also set aside habitat reserves.[239] The ultimate goal was to develop a management plan that would preserve the spotted owl while allowing harvest of valuable old-growth timber.[240] Although the Northwest Forest Plan was somewhat controversial, it has been touted as a model for national forest planning.[241] The Northwest Forest Plan is a prime example of why the Forest Service should take advantage of its regional forest planning authority to achieve roadless area protection where regional conditions facilitate regional planning, making it more effective than local planning.

Where there are no special unifying regional characteristics but the Forest Service nevertheless wants to undertake regional planning, regions could simply be created along state lines for ease of administration. The main advantage of forest planning at the state level is efficiency.[242] Forest Service officials would only have to deal with the agencies of a

234. Interview with Rick Cables, *supra* note 157.

235. *Id.*

236. *Id.*

237. *Id.*

238. *See* George Hoberg, *Science, Politics, and U.S. Forest Service Law: The Battle Over the Forest Service Planning Rule*, 44 NAT. RESOURCES J. 1, 7–9 (2004).

239. Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 ENVTL. L. 1015, 1073 & n.416 (2004).

240. Hoberg, *supra* note 238, at 9.

241. Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 463 (1997).

242. Interview with Rick Cables, *supra* note 157.

single state for each forest plan, including departments of wildlife and environmental quality.[243] Furthermore, only one state implementation plan under the Clean Water and Clean Air Acts would apply to each forest plan, further simplifying the planning process.

CONCLUSION

While the Roadless Rule would have provided lasting protection for roadless areas, it was too controversial to be viable. The State Petitioning Rule, on the other hand, creates a danger that inadequate state roadless area petitions will foreclose future conservation efforts that would have been available under the forest planning regime. The controversy surrounding both rules, as well as the policy reversal within just four years, underscores the problems inherent in establishing roadless area policy through agency rulemaking.

The Forest Service should instead pursue roadless area protection in the national forests through its forest planning authority under the NFMA. Although the NFMA has more procedural safeguards that limit agency discretion and increase the time frame for making policy, NFMA forest plans are less vulnerable to reversal than agency rulemaking. In addition, the forest planning process ensures that all affected parties have adequate opportunity to participate in the decision making process and gives forest plans inherent credibility that rulemaking lacks. Forest plans are thus our best option for providing lasting and meaningful protection for roadless areas.

243. *Id.*