

Appendix N – Review of Roadless Rules, Legislation, and Policy

US Forest Service Update

November 8, 2011

SUBJECT: Status of Roadless Rules

Litigation History of Roadless Area Conservation Rule (RACR)

The RACR prohibits, with some exceptions, road construction and timber harvesting across 58.5 million acres of the National Forest System. The rule was published in the Federal Register on January 12, 2001 (66 FR 3244).^{*} Ten lawsuits were filed challenging the rule. In May 2001, a preliminary injunction barring implementation of the rule was issued by a federal district court in Idaho. The Ninth Circuit Court of Appeals reversed that ruling, and the RACR became effective in April 2003. In June 2003, the State of Alaska settled its claims regarding the RACR and after further rulemaking the Tongass National Forest was exempted from the RACR (68 FR 75136). Two cases in North Dakota that involved the RACR were eventually settled in March 2007 and three others were dismissed.

However, in July 2003, a federal district court in Wyoming upheld the State of Wyoming's challenge to the RACR holding that promulgation of the RACR was procedurally flawed under NEPA and substantively illegal under the Wilderness Act. The court set aside the rule and permanently enjoined the rule. The decision was appealed to the Tenth Circuit Court of Appeals, but the court declared the case moot and vacated the Wyoming order after the 2005 State Petitions Rule was promulgated.

The 2005 State Petitions Rule triggered two additional lawsuits in a district court of California. One lawsuit was filed by the States of California, New Mexico, and Oregon; and the other was filed by a coalition of environmental groups. On September 20, 2006, the California court set aside the State Petitions Rule, and reinstated the RACR (including the Tongass amendment). The decision was appealed and on August 5, 2009, the appellate court affirmed the district court's ruling.

In response to the reinstatement of the RACR, the State of Wyoming filed a second lawsuit (*Wyoming II*) challenging the RACR. On August 12, 2008, the Wyoming court again set aside and enjoined the RACR. The government filed an appeal on August 13, 2009 to the Tenth Circuit Court.

The Wyoming decision placed the Forest Service in a conundrum of trying to comply with the California court's order *to follow* the RACR and the Wyoming court's order *to not follow* the RACR. The Department of Justice submitted motions on August 20, 2008

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

to both courts requesting a stay or limiting the scope of both injunctions. On December 2, 2008, the California court changed its injunction to affect only the Ninth Circuit and the plaintiff State of New Mexico. On June 16, 2009, the Wyoming court denied the government's motion for reconsideration and suspension of its injunction. On October 21, 2011, the Tenth Circuit Court of Appeals overturned the Wyoming District Court decision (*WY v. USDA*).

On December 22, 2009, a coalition of Alaska Natives, recreation groups and environmentalists filed a lawsuit seeking to set aside the Tongass exemption of 2003 and all projects not fully consistent with the RACR. Briefs have been filed and the case is pending.

All alternatives in this programmatic environmental impact statement require that plans developed or revised under a final planning rule would comply with applicable law and regulation. None of the alternatives would affect the ability to comply with constraints of any existing or future roadless rule or statute.

State Petitions Status

The States of California, Idaho, New Mexico, North Carolina, South Carolina, and Virginia filed petitions under the State Petitions Rule. Other States announcing they intended to file a petition under the State Petitions Rule included Arizona, Colorado, Illinois, Oregon, Washington, and Wisconsin.

After the California district court ruling, Idaho Governor James Risch re-submitted Idaho's petition under the Administrative Procedure Act (APA) for the management of 9.3 million inventoried roadless acres within that state. A final Idaho Roadless rule was published in October 2008 (73 FR 61456). The final Idaho roadless rule supersedes the RACR in Idaho. Several environmental groups filed a lawsuit challenging the Idaho rule on January 16, 2009 claiming violations of the Endangered Species Act, National Forest Management Act, and the National Environmental Policy Act. Briefs were filed and a hearing was held October 22, 2010. Judge Windmill issued a ruling January 29, 2011. The Court found the Fish and Wildlife Service did not violate the ESA in preparing the Biological Opinion and the Court also found that the Forest Service did not violate NEPA in relying on the Biological Opinion or in preparing the FEIS and ROD approving the Idaho Roadless Rule.

In November 2006, then Colorado Governor Bill Owen submitted a petition for the management of 4 million roadless acres of IRAs within that state. Governor Bill Ritter amended the petition in April 2007 and submitted it under the APA. With the State as a cooperating agency, a proposed rule was published on July 25, 2008 (73 FR 43544) and notice of availability of the supporting DEIS on August 1. On August 3, 2009, the State released a revised version of the rule with a 60-day comment period. Governor Ritter submitted a revised petition to the Secretary of Agriculture on April 6, 2010. A new proposed rule and a revised DEIS are expected early in 2011.

Action by the Secretary of Agriculture

On May 28, 2009, Secretary of Agriculture Tom Vilsack issued Memorandum 1042-154 which reserves “to the Secretary the authority to approve or disapprove road construction or reconstruction and the cutting, sale, or removal of timber in those areas identified in the set of inventoried roadless area maps contained in Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume 2, dated November 2000.” The Memorandum did not affect lands covered by the Idaho rule (9.3 million acres), but includes the Tongass National Forest (9.3 million acres) in Alaska. Approximately, 49.2 million acres are affected. The Secretary has since re-delegated some authorities back to the Forest Service.

On May 29, 2010, the Secretary issued a new Memorandum 1042-155. It is essentially the same as the previous memorandum with the re-delegations, but includes the re-delegation to the Under Secretary Natural Resources and Environment for decisions covered by the 1872 Mining Laws. The new memorandum expires within one year, but can be re-issued.

Pending Legislation

Since 2001 four House and four Senate bills to legislate the RACR have been submitted but none were enacted. On October 1, 2009 Representative Jay Inslee (WA) and 154 cosponsors introduced HR 3692 and Senator Maria Cantwell (WA) and 24 cosponsors introduced S 1738 for the protection of roadless areas based on the 2001 rule. A related bill reintroduced on February 11, 2009, by Representative Carolyn Maloney and 95 cosponsors is the Northern Rockies Ecosystem Protection Act to designate certain National Forest System lands and public lands under the jurisdiction of the Secretary of the Interior in the States of Idaho, Montana, Oregon, Washington, and Wyoming as wilderness, wild and scenic rivers, wildland recovery areas, and biological connecting corridors, and for other purposes. Copies of these bills can be found at <http://thomas.loc.gov/>.

Additional information

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

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