No. _____

In The
Supreme Court of the United States

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 15, 2012

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QUESTIONS PRESENTED

At President Clinton's direction, the United States Forest Service promulgated the Roadless Area Conservation Rule ("Roadless Rule") in January 2001 to govern the management of 58.5 million acres of national forest lands located in thirty-eight states. The Roadless Rule generally prohibits all road construction, road reconstruction, and timber extraction on national forest lands subject to the rule. The Roadless Rule has an unprecedented impact on the nation's forests and this case raises the following important questions about the relationship between the Legislative and Executive Branches of the federal government:

1. The Wilderness Act of 1964 provides that only Congress may designate wilderness areas. Did the Forest Service usurp Congress's authority to designate wilderness areas?

2. Congress enacted the National Forest Management Act ("NFMA") to govern forest planning and management. Did the Forest Service exceed its authority by promulgating the Roadless Rule without following the forest planning process set forth in NFMA?

3. Congress enacted the National Environmental Policy Act ("NEPA") to foster informed agency decision-making. Did the Forest Service violate NEPA by predetermining the outcome of the environmental analysis, not conducting any site-specific analysis, and not preparing a supplemental environmental analysis?

PARTIES TO THE PROCEEDINGS

Petitioner, the State of Wyoming, and the Colorado Mining Association, were the Appellees in the court below.

Respondents, and the Appellants in the court below, are the United States Department of Agriculture; the United States Forest Service; Tom Vilsack, Secretary of the Department of Agriculture; Tom Tidwell, Chief Forester for the United States Forest Service; Biodiversity Conservation Alliance; Defenders of Wildlife; National Audubon Society; Natural Resources Defense Council; Pacific Rivers Council; Sierra Club; Wilderness Society; and Wyoming Outdoor Council.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Wyoming, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 661 F.3d 1209 and reproduced in the appendix hereto ("App.") at 1. The opinion of the District Court for the District of Wyoming is reported at 570 F. Supp. 2d 1309 and reproduced at App. 131.

JURISDICTION

The judgment of the Tenth Circuit was entered on October 21, 2011. (App. 128). The Petitioners filed a timely Joint Petition for Rehearing *En Banc* on December 5, 2011, which was denied on February 16, 2012. (App. 224). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 3, Clause 2 of the United States Constitution, commonly known as the Property Clause, provides in relevant part: "The Congress shall

have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]"

The relevant provisions of the National Forest Service Organic Act, 16 U.S.C. §§ 475 and 551, the Multiple Use and Sustained Yield Act, 16 U.S.C. §§ 528, 529, and 531, the Wilderness Act of 1964, 16 U.S.C. §§ 1131 through 1133, the National Forest Management Act, 16 U.S.C. § 1604, and the National Environmental Policy Act, 42 U.S.C. § 4332, are reproduced beginning at App. 234.

INTRODUCTION

The agencies of the Executive Branch have only those powers conferred by Congress, and they must faithfully execute the laws they have been entrusted to administer. In this case, the Forest Service exceeded the limit of its authority by usurping a power explicitly reserved to Congress and by refusing to follow the statutes enacted specifically to govern the Forest Service's actions. These violations were exacerbated by the Forest Service's persistent refusal to engage in a meaningful environmental review. The Forest Service's acts in direct contravention of the clearly expressed will of Congress upset the carefully constructed balance of power between the Executive and Legislative Branches. This Court should restore that balance.

The Forest Service, at the President's direction, promulgated the Roadless Rule with the specific intent to circumvent Congress. For decades environmental advocates had been dissatisfied with Congress's failure to designate all inventoried roadless areas in the national forests as wilderness. While Congress enacted a number of state specific wilderness acts in the years after the passage of the Wilderness Act of 1964, many roadless areas remained available for multiple use and development. During the administration of President Clinton, however, the idea was formulated to preserve the wilderness characteristics of these roadless areas administratively. Using this procedure, the administration believed it could bypass what it perceived to be a dilatory Congress and ensure that inventoried roadless areas would not be subject to piecemeal wilderness designation or development. Accordingly, on October 13, 1999, President Clinton directed the Forest Service to promulgate the Roadless Rule before the end of his term in January 2001.

The Forest Service complied with the President's order by violating the clear congressional mandates contained in the Wilderness Act, NFMA, and NEPA. As to the Wilderness Act, the Forest Service sought to evade Congress's explicit statutory reservation of authority by denying that it was designating wilderness areas. To facilitate its denial, the Forest Service articulated technical but illusory distinctions between wilderness and roadless areas. Thus, the Forest Service achieved the functional equivalent of wilderness

while maintaining the appearance that it was not exercising a power reserved by Congress.

As to NFMA, the Forest Service admittedly did not follow the forest planning process, even though the quintessential function of forest planning is the allocation of specific lands to particular purposes. The Forest Service claimed that it did not have to comply with NFMA because the nationwide rule was promulgated under the agency's general rulemaking authority set forth in the National Forest Service Organic Act ("Organic Act"). The Forest Service's assertion that it can change existing forest plans promulgated under NFMA without following the process set forth in NFMA is wholly without merit and directly contrary to the purposes of NFMA. If allowed to stand, the precedent set by the process used to develop the Roadless Rule would allow the Forest Service, and other federal agencies, to circumvent whole statutory regimes under the guise of national rulemaking.

Finally, the rulemaking was completed in a mere fourteen months and left little opportunity for meaningful public participation or informed agency decision making, and thus subverted both the letter and spirit of NEPA. For example, the Forest Service is required by NEPA to evaluate the site-specific impacts of its actions where those actions have site-specific consequences. The Forest Service, however, treated all roadless areas in all parts of the country as if they were identical, and refused to consider how the rule would affect particular areas. Additionally, as the Clinton Administration drew to a close the Forest

Service restructured the Roadless Rule to include millions of acres that contained roads as well as additional lands larger than the State of Connecticut without supplementing the environmental impact statement. Of course, any serious attempt to remedy these defects in the NEPA process would have made it impossible to complete the rule during President Clinton's term.

This case raises important questions about the limits of federal agency authority, the faithful execution of the laws, and the relationship between the Legislative and Executive Branches. This Court's review is necessary to stop the Forest Service from exceeding the scope of its congressionally delegated authority and to enforce the Forest Service's obligation to follow NFMA and NEPA.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. The Forest Service's Authority Under the Organic Act and MUSYA

Congress enacted the Organic Act in 1897. *See* 16 U.S.C. §§ 473 through 482 and 551. It provided that the national forests were to be set aside "to improve and protect the forest within its boundaries, or for the purpose of securing favorable water flows, and to furnish a continuous supply of timber for use and necessities of citizens of the United States[.]" 16 U.S.C. § 475. In furtherance of these purposes, Congress

authorized the Secretary of Agriculture to "make provisions for the protection against destruction by fire and depredations" and to "make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction[.]" 16 U.S.C. § 551.

Over time Congress recognized that the forests had value beyond the limited purposes articulated in the Organic Act. In furtherance of that recognition, Congress enacted the Multiple Use and Sustained Yield Act ("MUSYA") in 1960 which established a broad multiple use mandate for the forests. *See* 16 U.S.C. §§ 528 through 531. In addition to their original purposes, the forests were now to be administered "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. Congress directed the Secretary to manage the "renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. § 529. It further directed the Secretary to give due consideration "to the relative values of the various resources in particular areas." *Id.* Finally, Congress advised the Secretary that the "establishment and maintenance of areas of wilderness are consistent with the [MUSYA]." 16 U.S.C. § 529.

Even before the passage of MUSYA, however, the Forest Service had been designating wilderness areas administratively. In 1924, the Forest Service designated a portion of the Gila National Forest in New

Mexico as a wilderness preserve, and by 1964 Congress observed that the Forest Service had administratively designated eighty-eight wilderness-type areas. H.R. Rep. No. 88-1538 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3615, 3616. These areas were variously classified by the Forest Service as "wilderness," "wild," "canoe," and "primitive." *Id*.

B. The Wilderness Act

In response to these administrative designations of wilderness by the Forest Service, Congress enacted the Wilderness Act in 1964, which established a procedure for Congress to designate wilderness areas in the national forest system. *See* 16 U.S.C. §§ 1131 through 1136. One of the "major purposes" of the Wilderness Act was to place "ultimate responsibility for wilderness classification in Congress," and to create a "'statutory framework for the preservation of wilderness that would permit long-range planning and assure that no future administrator could arbitrarily or capriciously . . . make wholesale designations of additional areas in which use would be limited.'" *Parker v. United States,* 309 F. Supp. 593, 597 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971) (quoting H.R. Rep. No. 88-1538, 1964 U.S.C.C.A.N. at 3616).

The Wilderness Act creates "a National Wilderness Preservation System composed of federally owned areas designated by Congress as 'wilderness areas,'" to be left "unimpaired for future use and enjoyment as wilderness." 16 U.S.C. § 1131(a). Congress

immediately designated all areas that had been administratively designated as "wilderness," "wild," or "canoe" as wilderness areas. 16 U.S.C. § 1132(a). Congress then created a process by which the Secretary would review areas administratively classified as "primitive" and recommend those areas found to be suitable for wilderness designation to Congress. 16 U.S.C. § 1132(b). Finally, Congress removed the Secretary's authority to designate wilderness areas. The Wilderness Act provides "no Federal lands shall be designated as 'wilderness areas' except as provided in this chapter or by subsequent Act." 16 U.S.C. § 1132(a).

The Wilderness Act defines a "Wilderness" as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain[;]" or "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions[.]" 16 U.S.C. § 1131(c). The Wilderness Act outlines the following additional characteristics of a wilderness area:

> (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land . . . ; and (4) may also contain ecological, geological, or other features

> of scientific, educational, scenic, or historical value.

Id. To maintain their pristine quality, the Wilderness Act prohibits commercial enterprise, permanent and temporary roads, aircraft and other forms of mechanical transportation, and structures or installations within any wilderness area. 16 U.S.C. § 1133(c).

C. NFMA

In the 1970s, Congress again became concerned about the Forest Service's management of the national forests under the Organic Act and the MUSYA. In 1976, Congress enacted NFMA which established a statutory framework for management of the National Forest System. *See* 16 U.S.C. § 1604.

> The National Forest Management Act was enacted as a direct result of congressional concern for Forest Service clearcutting practices and the dominant role timber production has historically played in Forest Service policies. Congress was concerned that, if left to its own essentially unbridled devices, the Forest Service would manage the national forests as mere monocultural "tree farms." Procedurally, the Act requires the Forest Service to develop Land and Resource Management Plans for the national forests. This formal planning process was designed to

> curtail agency discretion and to ensure forest preservation and productivity.

Sierra Club v. Thomas, 105 F.3d 248, 249-50 (6th Cir. 1997) reversed on ripeness grounds in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998).

NFMA requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning process of State and local governments and other Federal agencies." 16 U.S.C. § 1604(a). Forest plans, and amendments to those plans, must be prepared using procedures that allow local public input. 16 U.S.C. § 1604(d), (f)(4)-(5); 16 U.S.C. § 1612(a). Once adopted for an individual national forest, a forest plan controls the management of that forest. 16 U.S.C. § 1604(i). An inconsistent use requires formal amendment of a forest plan using procedures that again allow local public input. 16 U.S.C. § 1604(d), (f)(4). In addition, NFMA requires that lands suitable for timber production be designated while "developing land management plans." 16 U.S.C. § 1604(e) and (k).

NFMA specifically requires a separate plan for "each unit" or forest in the National Forest System. 16 U.S.C. § 1604(f)(1). In fact, Congress expressly intended that there was "not to be a national land management prescription" in NFMA or Forest Service rules, due to the widely varying biological and socio-economic conditions across national forests. S. Rep.

No. 94-893, at 26; 35, *reprinted in* 1976 U.S.C.C.A.N. 6662, 6694. Instead, NFMA was structured so that management direction for the forests, including multiple use coordination, would be developed in individual forest plans. *Id*.

D. The RARE Inventories

In 1967, the Forest Service began a nationwide inventory known as the Roadless Area Review Evaluation ("RARE I") to identify areas that could be designated as "wilderness" under the Wilderness Act. During this inventory, the Forest Service found that approximately 56 million acres within the forests could be designated as wilderness under the Wilderness Act. (App. 138-39). The RARE I inventory ended in 1972 after a successful judicial challenge under NEPA. *See Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

In 1977, the Forest Service began a second Roadless Area Review and Evaluation ("RARE II") to evaluate roadless areas within the national forests for designation as wilderness areas. *California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982). In the RARE II inventory the Forest Service identified 62 million acres of the national forests as potential wilderness. (App. 139). Like RARE I, RARE II was successfully challenged in federal court for failing to comply with NEPA. *Block,* 690 F.2d at 756-57. While the RARE II inventory was never implemented, the Forest Service continued to describe those lands identified in the

inventory as inventoried roadless areas. However, over time roads were built in some of these areas.

II. The Roadless Rule

On October 13, 1999, President Clinton directed the Forest Service to develop regulations to provide appropriate long-term protection for most or all of the currently inventoried roadless areas. The President instructed the agency to complete the process of issuing final regulations by the fall of 2000. The Forest Service internal communications to the EIS team reiterated the timeframe for completing the rulemaking with the deadline, "get done during the Clinton Administration (Dec. 2000)." Forest Service Chief Dombeck also stressed the importance of the expedited schedule: "This task is big, it is important, and it is urgent. We cannot afford to waste a single day."

On May 10, 2000, the Forest Service issued its proposed Roadless Rule and supporting Draft Environmental Impact Statement ("EIS"). The proposed rule contained two parts: a "prohibition component" and a "procedural component." The prohibition component prohibited road construction and reconstruction within the unroaded portions of inventoried roadless areas. The procedural component required local forest managers to identify additional unroaded areas that may warrant roadless protection during forest plan revisions. The Forest Service considered four alternatives in detail for the prohibition component of the rule in the Draft EIS – a no action

alternative and three alternatives prohibiting road construction and reconstruction, but allowing differing levels of timber harvest.

In its Draft EIS, the Forest Service identified 54.3 million acres of the 192 million acres in the National Forest System as inventoried roadless areas. It defined inventoried roadless areas as "[u]ndeveloped areas typically exceeding 5,000 acres that met the minimum criteria for wilderness consideration under the Wilderness Act and that were inventoried during the Forest Service's [RARE II process.]" The Draft EIS disclosed that 2.8 million acres of the roadless areas inventoried during the 1970s in fact contain roads. As a result, the Forest Service provided in the Draft EIS that "[p]ortions of inventoried roadless areas containing classified roads built since the areas were inventoried would not be subject to [the rule's] prohibitions."

The Forest Service issued its Final EIS on November 13, 2000. While all of the action alternatives in the Final EIS continued the complete ban on road construction and reconstruction, the Final EIS departed from the Draft EIS and proposed Roadless Rule in several respects. First, the Forest Service broadened the scope of the Roadless Rule's prohibition component, applying it to all inventoried roadless areas, not just the "unroaded portions." Second, the Forest Service adopted a more restrictive timber harvest alternative than the Draft EIS in all inventoried roadless areas. Third, between the preparation of the Draft and Final EIS, the Forest Service identified an

additional 4.2 million acres of roadless areas that would be subject to the rule's prohibitions.

On January 12, 2001, a mere fourteen months after the President's order, the Forest Service issued the final Roadless Rule. (App. 226-33; 66 Fed. Reg. 3244 (Jan. 12, 2001)). The final Roadless Rule applies to 58.5 million acres, including all 2.8 million acres of inventoried roadless areas that contain roads and restricts timber harvest even more than was proposed in the Final EIS. The rule's prohibitions cover approximately one-third of all national forest lands, or an area roughly the same size as the states of New York and Pennsylvania combined. In Wyoming alone the Roadless Rule "affects 3.25 million acres (or 35%) of the 9.2 million acres of National Forest System land in the [the state]." (App. 153). "Under the Roadless Rule, as promulgated, 'this vast national forest acreage, for better or worse, was more committed to pristine wilderness, and less amenable to road development for purposes permitted by the Forest Service.'" (App. 16 quoting *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1106 (9th Cir. 2002)).

III. Proceedings Below

A. Initial Roadless Rule Litigation

The Roadless Rule spawned a number of lawsuits across the country. Two of the first cases were brought in Idaho by the Kootenai Tribe of Idaho and the State of Idaho. *See Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001); *Idaho*

ex rel. Kempthorne v. U.S. Forest Serv., 142 F. Supp. 2d 1248 (D. Idaho 2001).[1] In both cases, the plaintiffs asked the District Court in Idaho to enter a preliminary injunction halting implementation of the Roadless Rule.

Proponents of the Roadless Rule argued that neither NEPA nor NFMA applied to the rule because the rule does not alter the environmental status quo and the Forest Service promulgated the rule pursuant to its regulatory authority under the Organic Act. *Kootenai Tribe*, 142 F. Supp. 2d at 1239-40; *Idaho*, 142 F. Supp. 2d at 1257. The court rejected both arguments. First, the court found that the Roadless Rule was subject to NEPA and NFMA because it "will add to, modify and remove decisions embodied in forest plans governing the management of the national forests." *Kootenai Tribe* at 1240; *Idaho* at 1259. In fact, the court pointed out that the rule acknowledged that it will "supercede existing forest plan management direction[,]" and "the Roadless Rule, in changing or limiting existing active management in the national forest, drastically alters the current status quo." *Kootenai Tribe* at 1240-41; *Idaho* at 1259.

The court then found that the Forest Service likely violated NEPA because it failed to analyze a reasonable range of alternatives and the comment

[1] These decisions were issued on the same day and are identical in many respects. Citations to relevant points in both cases are provided.

period was grossly inadequate. *Kootenai Tribe* at 1244, 1247; *Idaho* at 1261-63. In reaching these conclusions, the court noted that there was "strong evidence that because of the hurried nature of this process the Forest Service was not well informed enough to present a coherent proposal or meaningful dialogue and that the end result was predetermined. Justice hurried on a proposal of this magnitude is justice denied." *Kootenai Tribe* at 1247; *Idaho* at 1261.

The court also found that the Organic Act did not give the Forest Service carte blanche to ignore the provisions of NFMA in the promulgation of the Roadless Rule. *Idaho* at 1257. In fact, the court said it found "no merit" in the argument that the Roadless Rule could be undertaken pursuant to the Organic Act without complying with NFMA. *Id.* It specifically stated that "while it is true that NFMA did not supercede § 551 of the Organic Act, the evidence suggests that the two are supposed to complement one another." *Id.* at 1258. Ultimately, the court found that the plaintiffs would likely succeed on the merits of their claims and entered the requested injunction. *See Kootenai Tribe of Idaho v. Veneman*, 2001 WL 1141275 (D. Idaho 2001).

The wilderness advocates who had intervened in support of the Roadless Rule appealed the preliminary injunction issued by the district court in Idaho to the Ninth Circuit Court of Appeals. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002). While the federal defendants did not appeal, the Ninth Circuit found that the intervenors had

standing to appeal on their own. *Id.* at 1110. Unlike the district court, the Ninth Circuit found that the plaintiffs had not shown a likelihood of success on their claims that the Forest Service did not comply with NEPA's notice and comment procedures and failed to consider a reasonable range of alternatives. *Id.* at 1115-24. Accordingly, the Ninth Circuit found that preliminary injunctive relief was not warranted and reversed and remanded the case to the district court. *Id.* at 1126. Judge Kleinfeld vigorously dissented, and succinctly stated the plain fact that, "[w]hat we have here is a case where the agency attempted a massive management change for two percent of the nation's land on the eve of an election, and shoved it through without the 'hard look' NEPA required, as the district court so found and the agency itself now acknowledges." *Id.* at 1130-31.

While the issue of preliminary injunctive relief was being litigated in Idaho and the Ninth Circuit, the State of Wyoming filed its own case challenging the Roadless Rule in the District of Wyoming on May 18, 2001. Wyoming's Complaint alleged that the Roadless Rule was promulgated in violation of NEPA, the Wilderness Act, NFMA, and MUSYA among other statutes. *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1217 (D. Wyo. 2003). Unlike the preliminary injunctive proceedings in Idaho and the Ninth Circuit, however, the case in Wyoming proceeded to a determination on the merits. On July 14, 2003, the United States District Court for the District of Wyoming ruled that the Roadless Rule was promulgated in violation of NEPA

and the Wilderness Act, and consequently, that the Roadless Rule must be set aside pursuant to the provisions of the Administrative Procedure Act.[2] *Id.* at 1239.

After an exhaustive review of the administrative record, the Wyoming district court came to the firm conclusion that the Forest Service "drove through the administrative process in a vehicle smelling of political prestidigitation." *Id.* at 1203. In particular, the court found that the Forest Service violated NEPA by refusing to extend the scoping period, denying Wyoming and other affected states' requests to serve as cooperating agencies, failing to consider a reasonable range of alternatives, and failing to prepare a supplemental EIS. *Id.* at 1220, 1221-22, 1226, 1231. Ultimately, the district court concluded:

> In its rush to give President Clinton lasting notoriety in the annals of environmentalism, the Forest Service's shortcuts and bypassing of the procedural requirements of NEPA has done lasting damage to our very laws designed to protect the environment. What was meant to be a rigorous and objective evaluation of alternatives to the proposed action was given only a once-over lightly. In sum, there is no gainsaying the fact that the Roadless Rule was driven through the

[2] As a result of the Wyoming district court's ruling the Idaho district court never considered the merits of the challenges to the Roadless Rule brought by the Kootenai Tribe of Idaho and the State of Idaho on remand from the Ninth Circuit.

> administrative process and adopted by the Forest Service for the political capital of the Clinton administration without taking the "hard look" that NEPA required.

Id. at 1232.

The district court went on to consider Wyoming's Wilderness Act claim, and found that the Roadless Rule created de facto wilderness areas in violation of the Wilderness Act. *Id.* at 1236. The court's ruling was based on the plain fact and the Forest Service's apparent acknowledgement that "a roadless forest is synonymous with the Wilderness Act's definition of wilderness." *Id.* The court explained: "The ultimate test for whether an area is 'wilderness' is the absence of human disturbance or activity. As one scholar has explained, roads, which necessarily facilitate human disturbance and activities, 'are the coarse filter in identifying and defining wilderness.'" *Id.* at 1234 quoting 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, 959 (2002). "In fact, the Forest Service's procedures for identifying wilderness areas, and its rules for protecting wilderness areas in National Forests, emphasize the importance of the 'roadless' nature of 'wilderness areas.'" *Id.* at 1234.

In addition, the court found that "a comparison of the uses permitted in wilderness areas and those permitted in inventoried roadless areas leads inescapably to the conclusion that the two types of areas are

essentially the same." *Id.* The Forest Service argued that it did not create de facto wilderness because many uses expressly prohibited in wilderness areas were still technically permitted in roadless areas. However, the court looked at the practical effects of the Roadless Rule and rejected this argument because the uses identified by the Forest Service, "in fact, require the construction or use of a road." *Id.* The court also found that wholesale adoption of the RARE II inventories, which were designed to recommend wilderness areas to Congress, was further evidence that the Forest Service had usurped congressional authority. *Id.* For these reasons, the court permanently enjoined the Roadless Rule without reviewing Wyoming's remaining claims. *Id.* at 1237-39.

As in the Ninth Circuit, the intervening wilderness advocates, but not the federal defendants, appealed the decision of the district court to the Tenth Circuit Court of Appeals. While the appeal was pending, the Forest Service promulgated a new rule superseding the Roadless Rule, known as the State Petitions for Inventoried Roadless Area Management Rule ("State Petitions Rule"). *See* 70 Fed. Reg. 25654 (May 13, 2005). Unlike the Roadless Rule which mandated blanket protections for all inventoried roadless areas across the country, the State Petitions Rule authorized state governors to petition the Secretary of Agriculture to approve state-specific roadless area protections developed by the individual states. *Id.* In light of the promulgation of the State Petitions Rule, the Tenth Circuit determined that issues related to

the Roadless Rule were moot and vacated the district court's judgment and related rulings. *Wyoming v. USDA*, 414 F.3d 1207 (10th Cir. 2005).

After the Forest Service adopted the State Petitions Rule, several states and environmental groups challenged its propriety in the United States District Court for the Northern District of California. *See California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874 (N.D. Cal. 2006). That court found that the Forest Service had not promulgated the State Petitions Rule in compliance with NEPA and set it aside. *Id.* at 919. In addition, because the Tenth Circuit had vacated the judgment of the Wyoming district court setting aside the Roadless Rule, the California district court reinstated the Roadless Rule. *Id.* The Forest Service appealed the decision of the California court setting aside the State Petitions Rule to the United States Circuit Court of Appeals for the Ninth Circuit, but that court affirmed the decision of the district court on August 5, 2009. *See California ex rel. Lockyer v. USDA*, 575 F.3d 999 (9th Cir. 2009).

B. The Current Case

As a result of the California district court decision reinstating the Roadless Rule, Wyoming renewed its challenges to the Roadless Rule in the Wyoming district court on January 12, 2007, and the Colorado Mining Association Intervened in support of the challenge. Various groups who advocate for the creation of more wilderness areas intervened in support of

the Roadless Rule. On August 12, 2008, in an opinion that substantially reiterates the findings in the original opinion, the court again held that the Forest Service promulgated the Roadless Rule in violation of NEPA and the Wilderness Act and the court permanently enjoined the rule for a second time. (App. 222-23).[3]

The Forest Service and intervening wilderness advocates appealed the second decision of the Wyoming district court to the Tenth Circuit Court of Appeals which rendered its decision on October 21, 2011. (App. 1). The Tenth Circuit reversed the decision of the district court on both the NEPA and Wilderness Act claims and rejected Wyoming's NFMA and MUSYA claims as well. *Id.* The Tenth Circuit found that the Roadless Rule did not create de facto wilderness areas, because the provisions of the Wilderness Act and the rule are technically different. (App. 27). Despite this finding, at various points in the decision, even the Tenth Circuit conceded that the Roadless Rule generally prohibits "nonwilderness" uses, and recognized that the areas subject to the Roadless Rule were "pristine wilderness." (App. 88-89; 16).

The court further held that the Forest Service was not required to comply with NFMA when it promulgated the Roadless Rule, because the rule could be promulgated under the general rulemaking

[3] The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

authority derived from the Organic Act. (App. 122-23). In addition, the court found that the Forest Service had complied with NEPA even though it acknowledged that: (1) every action alternative the Forest Service considered completely banned road construction; (2) a thorough site-specific analysis of the rule's effects was not performed and will never be performed; (3) a supplemental EIS was not prepared after the Forest Service decided to add millions of acres with roads to the Roadless Rule; and (4) even though the President had ordered the Forest Service to achieve a particular result before the NEPA process even began. (App. 75, 89, 104, 113). In accord with these findings, the Tenth Circuit remanded the case to the district court with instructions to vacate the permanent injunction. (App. 127).

REASONS FOR GRANTING THE PETITION

I. By Promulgating the Roadless Rule, the Forest Service Usurped Congress's Exclusive Authority to Designate Wilderness Areas.

The Property Clause of the United States Constitution provides Congress with plenary power to enact all necessary rules and regulations respecting the federal government's property. U.S. Const. art. IV, Section 3. Through its passage of the Wilderness Act, Congress retained for itself sole authority to designate wilderness areas. 16 U.S.C. § 1131(a); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55,

58-59 (2004). The Forest Service usurped this power by effectively designating wilderness areas under the cover of semantic distinctions. As the Wyoming district court recognized, the plain fact is a roadless forest is a wilderness and the Forest Service promulgated the roadless rule to create wilderness where Congress had chosen not to do so.

"No matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, [ ] an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Where Congress specifically retains power to take certain action, the agencies of the Executive branch have no authority to do so on their own no matter how artfully the action is branded. The Court should review this matter to restrain and invalidate the Forest Service's ultra vires act.

II. When Promulgating the Roadless Rule, the Forest Service Circumvented the Federal Statute Congress Enacted to Govern the Management of Forest Lands.

The Organic Act's general grant of authority cannot be read to eviscerate the more specific and later-enacted provisions of NFMA. While the Organic Act gave the Forest Service broad discretion to regulate the national forests, *see United States v.*

Grimaud, 220 U.S. 506 (1911), that discretion has been cabined by the later enacted and more specific provisions of NFMA. *See e.g., United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) ("a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended."). Thus, as aptly described by the United States District Court for the District of Idaho the Organic Act and NFMA "complement each other," *Idaho v. U.S. Forest Serv.*, 142 F. Supp. 2d at 1258, and if possible, their provisions should be harmonized into a coherent regulatory scheme. *Brown & Williamson*, 529 U.S. at 133 (citations omitted).

When the Forest Service engages in forest planning, it must follow the comprehensive regulatory scheme established by Congress in NFMA. The imposition of specific management prescriptions on inventoried roadless areas in the national forests *is* forest planning. *See, e.g., California ex rel. Lockyer*, 575 F.3d at 1005 (noting that forest plans typically divide a forest unit into different management areas that are subject to different goals, objectives and management prescriptions). In fact, for nearly thirty years the Forest Service used forest plans to guide the management of the 58.5 million acres of inventoried roadless areas. *See, e.g.*, 66 Fed. Reg. 35918, 35919 (July 10, 2001). The Roadless Rule changed the management of many of those acres by generally barring roads and timber harvest where individual forest plans had allowed them. For example, the

Roadless Rule re-designated as unsuitable 9 million acres of land that individual forest plans had found suitable for commercial timber production. *Id.* The Forest Service made these changes without regard to the provisions of individual forest plans and without amending a single forest plan in plain violation of NFMA.

There is no dispute that the Forest Service did not follow the forest planning process outlined in NFMA when it promulgated the Roadless Rule, because it believed it could choose between the Organic Act and NFMA. The Forest Service is incorrect, and the general rulemaking authority provided in the Organic Act is not a blank check that can be used to justify noncompliance with NFMA. The Court should review this matter to re-establish the proper relationship between the Organic Act and NFMA.

III. When Promulgating the Roadless Rule, the Forest Service Failed to Follow the Federal Statute Congress Enacted to Foster Informed Agency Decision-making.

A. The Forest Service Must Conduct a Meaningful NEPA Process.

NEPA is designed "to insure a fully informed and well-considered decision" through the preparation of an EIS for any "major Federal action[ ] significantly affecting the quality of the human environment." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); 42 U.S.C.

§ 4332(2)(C). The EIS "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g). Three federal judges have independently determined that the outcome in this case was determined the moment President Clinton ordered the Forest Service to develop what would become the Roadless Rule. Harkening to this command from the President, the Forest Service developed a set of action alternatives with no meaningful differences. All of the action alternatives prohibited road construction and reconstruction in order to effectively create new wilderness areas. The NEPA process was never intended to inform the agency's decision, but rather it was intended to justify the decision that had already been made.

An agency cannot adhere with fidelity to the process Congress required in NEPA if the agency has been ordered to reach a certain result by the President. The Court should review this matter to ensure that the Executive does not override the processes established by Congress for the protection of the environment, public participation in government action, and informed agency decision-making.

B. The Forest Service Must Consider the Site-Specific Impacts of the Roadless Rule.

NEPA requires federal agencies to prepare "a detailed statement by the responsible official" on the

"environmental impacts" of the proposed action and the "adverse environmental effects which cannot be avoided[.]" 42 U.S.C. § 4332(C). Three different circuits have concluded that in order to fulfill this statutory mandate, federal agencies are required to conduct a site-specific analysis of the environmental consequences of the proposed action. (App. 187 citing *Conservation Law Found. of New England v. Gen. Servs. Admin.*, 707 F.2d 626, 630-31 (1st Cir. 1983); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); *Block,* 690 F.2d at 763-64). In contrast, the Tenth Circuit found that because the Roadless Rule was a broad nationwide rule, the Forest Service could evaluate the effects of the rule "generically." (App. 89 citing 40 C.F.R. § 1502.4(c)(2)). However, "NEPA contains no exemptions for projects of national scope." *Block*, 690 F.2d at 765. Absent an accurate and detailed analysis of the real environmental consequences of a proposed action on the specific sites where it will be implemented, it is impossible for an agency to take the hard look required by NEPA.

The Tenth Circuit found that because the Roadless Rule protects pristine wilderness it will not lead to environmental degradation, and therefore, a site-specific NEPA analysis is not required. (App. 88-89). NEPA applies to major federal actions that significantly affect the quality of the human environment for good or ill. 42 U.S.C. § 4332(2)(C). Accordingly, the quality of the agency's environmental analysis cannot vary depending on whether or not it perceives its actions to be environmentally friendly. Moreover, "the

Roadless Rule, in changing or limiting existing active management in the national forest, drastically alters the current status quo," and this change will have profound environmental consequences at specific sites that should have been evaluated. *Kootenai Tribe*, 142 F. Supp. 2d at 1241; *Idaho*, 142 F. Supp. 2d at 1259.

While it may be easier to promulgate a nationwide rule without taking a hard look at the environmental effects to various resources in particular areas, Congress has not authorized the Forest Service to do so. Instead, Congress has delegated the hard work of forest management to the Forest Service with the unambiguous command to look carefully at each site where it proposes to take action. The Court should review this action to ensure that the last NEPA process applicable to a given piece of land before permanent management prescriptions are imposed is both meaningful and informative.

C. The Forest Service Must Supplement Its Environmental Impact Statement.

Federal agencies must prepare supplements to either draft or final EISs if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns[.]" 40 C.F.R. § 1502.9(c)(1)(i); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1989). In this regard, an alternative not disseminated in a draft EIS may be adopted in a final EIS without further public comment only if it is "qualitatively within the spectrum of alternatives

that were discussed" in the draft EIS. *See* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18035 (March 23, 1981). Otherwise, a supplemental EIS is required. *Id.*

The Final EIS's broadening of the Roadless Rule's scope to include 2.8 million acres that contain roads was not qualitatively within the spectrum of any alternative discussed in the Draft EIS. The areas that contain roads are in a fundamentally different condition than the roadless areas that were originally the subject of the rule. In fact, it was the development of these 2.8 million acres over a twenty-year period that created the perceived need for the Roadless Rule in the first place. It is readily apparent from this dramatic shift between the Draft EIS and the Final EIS that in order to promulgate the Roadless Rule within the President's timeframe, the Forest Service had to take a shortcut at the expense of its obligation to take a hard look at the environmental impacts of its change in scope.

By not preparing a supplemental EIS, the Forest Service did just what Congress prohibited in NEPA – it made its decision without having the necessary environmental information available to it and the public. The Court should review this matter to make the Forest Service adhere to NEPA's requirements.

IV. The Large Amount of Public Land Involved Makes this a Case of Exceptional Public Importance.

This is a case of exceptional public importance because of the vast amount of public land subject to the prohibitions of the Roadless Rule. *See*, *e.g.*, *Andrus v. Utah*, 446 U.S. 500, 506 (1980). The Roadless Rule effectively prohibits meaningful multiple use of 58.5 million acres of land that was previously available for use by the public. Approximately one-third of all Forest Service land is now managed solely to maintain pristine wilderness conditions at the expense of every other potential use.

The Roadless Rule's ban on road construction will have significant consequences for current and future generations of forest users. Without road building, access to remove dead or diseased trees will end. As the Wyoming district court found, this will result in the spread of disease through beetle infestation and will increase the risk of catastrophic wildfires in the forests. (App. 219-20). Moreover, the ban prevents the development of mineral reserves and prevents the installation of necessary safety features to allow the continued operation of existing mines. For instance in Colorado alone, the Roadless Rule would withdraw more than 4.4 million acres of Forest Service land from managed mineral development. The ban adversely affects a host of different interests, including those associated with mineral extraction, timber production, grazing, water improvement, wildfire management, outdoor recreation, and sporting opportunities of all

types in an area roughly the size of New York and Pennsylvania combined.

The sheer amount of land subject to the prohibitions of the Roadless Rule and the rule's unprecedented impact on the National Forests, the states, and the public warrants the grant of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 15, 2012