A Decade of Litigation Over the Roadless Rule Finally Nearing the End

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After more than a decade of litigation over the management of roadless areas in national forests, several developments over the past months have brought this long and drawn-out fight nearly to a close. All but three states will be governed by the terms of the 2001 Roadless Rule, while state-specific rules in Idaho and Colorado will govern roadless areas in those two states. Alaska, with the nation's two largest national forests, the Tongass and Chugach National Forests, as well as the most roadless acreage of any state, is the only state in which litigation continues. Alaska has strong arguments that national forests in the state should not be subject to the restrictions of the Roadless Rule.

In the 1970s, the U.S. Forest Service (USFS) developed an "inventory" of roadless areas larger than 5,000 acres, to be considered by the U.S. Congress for inclusion in the National Wilderness Preservation System.[1] However, most of these inventoried roadless areas (IRAs) were never formally designated as "wilderness." Instead, they remained governed by individual forest plans, which generally allowed for at least some extractive uses, including logging, mining, oil and gas development, and construction of off-road vehicle routes.[2]

In the late 1990s, USFS began developing the Roadless Area Conservation Rule (Roadless Rule), which it issued during the final days of the William Clinton Administration.[3] Subject to limited exceptions, the Roadless Rule prohibited road construction, reconstruction, and timber harvest in the 58.5 million acres of the IRAs within the national forests.[4] While other extractive activities, such as hard-rock mining, were not explicitly proscribed in IRAs, the road-building prohibition provides a practical impediment to most such activities.

I. The First Wave of Roadless Rule Challenges

Shortly after it was published in 2001, the Roadless Rule was challenged by several states, including Alaska, Idaho, and Wyoming.[5] Before turning to recent developments, the following two sections summarize this earlier history.

A. *Idaho*

Idaho and the Kootenai Tribe of Idaho brought suit in 2000—before the final Rule was published—to enjoin USFS from releasing a draft environmental impact statement (EIS) for the proposed Rule until it released maps of roadless areas. A federal district court dismissed the claims as not ripe for adjudication because the draft EIS and proposed Rule had not been published.[6]

The Kootenai Tribe and Boise Cascade Corporation subsequently filed suit in January 2001, after the final Rule was published, seeking to enjoin its implementation on the grounds that the Rule violated the National Environmental Policy Act (NEPA)[7] and the Administrative Procedures Act (APA)[8] because of inadequate public participation. The court found a decision on injunctive relief to be premature.[9] Eventually, Idaho prevailed on a later challenge, similar to the Kootenai Tribe's challenge, resulting in the district court of Idaho issuing a preliminary injunction blocking implementation of the Roadless Rule nationwide.[10] However, this was reversed by the U.S. Court of Appeals for the

1. California ex rel. Lockyer v. U.S. Dept. of Agric., 575 F.3d 999, 1005 (9th Cir. 2009).
2. *Id.*
3. 66 Fed. Reg. 3244 (Jan. 12, 2001).
4. *Id.*
5. Wyoming v. U.S. Dept. of Agric., 277 F. Supp. 2d 1197, 1204 (D. Wyo. 2003), *vacated and remanded*, 414 F.3d 1207 (10th Cir. 2005); Kootenai Tribe of Idaho v. Veneman, 142 F. Supp. 2d 1231, 31 ELR 20617 (D. Idaho 2001), *rev'd*, 313 F.3d 1094, 33 ELR 20130 (9th Cir. 2002); Alaska v. USDA, No. 3:01-cv-00039 (JKS) (cited in Organized Village of Kake v. U.S. Dept. of Agric., 776 F. Supp. 2d 960, 964-66, 41 ELR 20196 (D. Alaska 2011). Similar lawsuits were filed in Utah and North Dakota.
6. Idaho v. U.S. Forest Service, CV99-611-N-EJL (D. Idaho Feb. 18, 2000).
7. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
8. 5 U.S.C. §§551-559.
9. *Kootenai Tribe of Idaho*, 142 F. Supp. 2d at 1236.
10. *Kootenai Tribe of Idaho*, 142 F. Supp. 2d 1231, *rev'd*, 313 F.3d 1094, 33 ELR 20130 (9th Cir. 2002).

Ninth Circuit in December 2002, which reinstituted the Roadless Rule.[11]

B. Alaska

Alaska settled its initial lawsuit after USFS agreed to amend the Roadless Rule to exempt the Tongass and Chugach National Forests from the Rule's restrictions.[12] This Tongass Exemption was then promulgated by rule in December 2003.[13] In issuing the Rule, USFS recognized that while roadless areas are generally rare in the national forests of the lower 48 states, the Tongass was "approximately 90 percent roadless and undeveloped."[14] Further, since timber harvesting and road construction were already prohibited in the "vast majority" of the 9.34 million acres of Tongass IRAs, USFS found that "[a]pplication of the roadless rule to the Tongass is unnecessary to maintain the roadless values of these areas."[15] Thus, the Tongass Exemption was promulgated to relieve the Tongass and Chugach National Forests from the strictures of the Roadless Rule.

C. Wyoming

Like Idaho, Wyoming brought a challenge to the Rule. It was successful in the district court of Wyoming, where Judge Clarence Brimmer ruled in 2003 that USFS violated NEPA by failing to perform an adequate cumulative impact analysis and by failing to prepare a supplemental EIS that addressed new information.[16] Finding that the Roadless Rule permitted USFS to establish its own "de facto administrative wilderness," Judge Brimmer also held that the Roadless Rule violated the Wilderness Act and issued a nationwide injunction against implementation of the Roadless Rule.[17] On appeal, however, the U.S. Court of Appeals for the Tenth Circuit held that the petitioners' claims were moot because USFS had already replaced the 2001 Roadless Rule with a new rule—the State Petitions Rule—before the appellate decision was rendered.[18]

II. The State Petitions Rule

Recognizing that because of the "one-size-fits-all" approach of the nationwide Roadless Rule, "some states and communities felt disenfranchised by the process,"[19] the Roadless Rule was repealed by the George W. Bush Administration and replaced by the State Petitions for Inventories Roadless Areas Rule (State Petitions Rule).[20] The State Petitions Rule set up an 18-month window in which states could petition the U.S. Department of Agriculture (USDA) for state-specific modifications of the stringent requirements of the Roadless Rule. But before any such petitions could be filed, the State Petitions Rule was already under attack.

A. The Second Wave of Challenges

The issuance of the State Petitions Rule in 2005 was met by two new lawsuits filed in the Northern District of California on behalf of several western states and various environmental groups.[21] In a consolidated decision, U.S. Magistrate Judge Evelyn Laporte held in *California ex rel. Lockyer v. U.S. Dep't of Agriculture* (*Lockyer I*) that promulgation of the State Petitions Rule violated both NEPA and the Endangered Species Act (ESA)[22] because USFS had not performed a programmatic EIS to assess the impacts of repealing the Roadless Rule and replacing it with the State Petitions Rule.[23] This decision reinstated the Roadless Rule nationally.[24]

In response, Wyoming filed a motion requesting that the district court in Wyoming reinstate its 2003 injunction, which was denied by the court, which found "no dramatic change in controlling authority, no significant new evidence previously unavailable, and no blatant error" justifying reopening the case.[25] But Judge Brimmer advised the state to "inform the Tenth Circuit of the California ruling and ask that the circuit court recall its mandate," which the state did by motion to the Tenth Circuit.[26]

The Tenth Circuit, however, denied Wyoming's motion, and directed Judge Brimmer to evaluate possible comity issues created by the *Lockyer I* decision. On remand, Judge Brimmer, in a fiery opinion, took aim at both the California district court and USFS, expressing "shock" at the court's actions and accusing USFS of "flagrantly and cavalierly railroad[ing] this country's present environmental laws in an attempt to build an outgoing President's enduring fame."[27] Judge Brimmer then once again issued a permanent, nationwide injunction against the 2001 Roadless Rule.

11. *Kootenai Tribe of Idaho*, 313 F.3d at 1105.
12. Alaska v. USDA, No. 3:01-cv-00039 (JKS) (cited in Organized Village of Kake v. U.S. Dept. of Agric., 776 F. Supp. 2d 960, 964-66, 41 ELR 20196 (D. Alaska 2011).
13. 68 Fed. Reg. 75136 (Dec. 30, 2003).
14. 68 Fed. Reg. at 75137.
15. *Id.*
16. Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1231-32 (D. Wyo. 2003).
17. *Id.* at 1236.
18. 414 F.3d at 1214.
19. 73 Fed. Reg. 1457 (Oct. 16, 2008).
20. *See* State Petition Rule Record of Decision, 70 Fed. Reg. 25653 (May 13, 2005).
21. California ex rel. Lockyer v. U.S. Dep't of Agric. (*Lockyer I*), 459 F. Supp. 2d 874 (N.D. Cal. 2006); Wilderness Society v. United States Forest Service, Civ. No. 05-04038 (N.D. Cal. 2005).
22. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
23. *Lockyer I*, 459 F. Supp. 2d at 908-09.
24. *Id.* at 918.
25. Wyoming v. U.S. Dep't of Agric., Civ. No. 01-0086, Dkt. No. 185 (D. Wyo. June 6, 2007).
26. *Id.* at 7.
27. Wyoming v. U.S. Dept. of Agric., 570 F. Supp. 2d 1309, 1352 (D. Wyo. 2008), *rev'd*, 661 F.3d 1209 (10th Cir. 2011).

B. Appellate Decisions Reinstate the Roadless Rule

In 2009, the Ninth Circuit affirmed Judge Laporte's *Lockyer I* decision, holding in *Lockyer II* that the State Petition Rule effectively repealed the Roadless Rule and should have undergone NEPA and ESA review, and that Judge Laporte did not abuse her discretion in weighing the equities and reinstating the Roadless Rule.[28] Similarly, the Tenth Circuit held that Wyoming had failed to demonstrate that USFS' promulgation of the Roadless Rule violated any environmental laws, and the court overturned Judge Brimmer's injunction against the Roadless Rule.[29]

Wyoming petitioned the U.S. Supreme Court for a writ of certiorari, but the Supreme Court denied the state's petition in October 2012.[30] Thus, after a long and winding road, the Roadless Rule was upheld once again as the law of the land—or at least most of it.

III. The Idaho Rule

Before the State Petitions Rule was overturned by the *Lockyer* decision, Idaho had already begun work on its own plans for management of the roadless national forest lands in the state. Despite judicial rejection of the State Petitions Rule, Idaho proceeded with its plans to opt out of the Roadless Rule. But instead of following the specific petition authority conferred by the since-invalidated State Petitions Rule, Idaho relied on the general authority granted by the APA that allows anyone to petition for agency rulemaking.[31] In 2006, Idaho submitted a petition for a state-specific rule and after an extensive series of public meetings, as well as review by both the Roadless Area Conservation National Advisory Committee (RACNAC) and USDA, Idaho's petition for a state-specific roadless rule was approved on December 22, 2006.[32]

Developed through a collaborative process that included conservation groups Idaho Conservation League and Trout Unlimited, along with county commissioners, timber companies, hunters, and recreation groups, the Idaho Rule was envisioned by then-Gov. Jim Risch as "a plan written by Idahoans, for Idahoans."[33] Instead of blanket limitations on road-building and timber harvesting in all IRAs, as provided by the national Roadless Rule, the Idaho Rule creates several different categories of lands within Idaho's 9.3 million acres of IRAs and applies different management "themes" to each category. Under three of the themes covering over three million acres, the Idaho Rule provides more protection than the national Roadless Rule, banning all road-building, with a single exception for roads required by "statute, treaty, reserved or outstanding rights, or other legal duty of the United States."[34]

On the other hand, the Idaho Rule permits more temporary road-building and logging in lands covered by the Backcountry/Restoration (BCR) theme, while providing certain restrictions to ensure that the roadless characteristics of the lands are maintained or improved over the long term.[35] Road construction is also authorized to provide access to specifically identified phosphate deposits in the Caribou-Targhee National Forest managed under the General Forest, Rangeland, Grassland (GFRG) theme.[36]

A. Challenges to the Idaho Rule

Plaintiff environmental groups, including the Wilderness Society, Sierra Club, and Natural Resources Defense Council, brought suit in the federal district court of Idaho, challenging the Idaho Rule under both NEPA and the ESA.

1. The ESA Claim

Two ESA-listed species—the threatened grizzly bear and the endangered caribou—are present in Idaho roadless areas. Since the Idaho Rule had the potential to impact the habitat of these listed species, USFS engaged in consultation with the U.S. Fish and Wildlife Service (FWS) under §7 of the ESA, which requires assessment of potential impacts of federal actions on listed species. After considering the potential impacts to the grizzly bear and the caribou, FWS issued a Biological Opinion (BiOp) that concluded that the Idaho Rule was not likely to jeopardize the two species. Specifically, the BiOp found that existing protections afforded wildlife in the national forests' Long Range Management Plans (LRMPs) were sufficient to protect the caribou,[37] while a proposed Access Amendment setting standards for wheeled, motorized use within grizzly bear habitat was sufficient to protect that species.[38]

The plaintiffs argued to the district court that the BiOp was inadequate and that FWS could not rely on such "promises" of future actions, such as the new Access Amendment, to ensure the protection of listed species as required by the ESA.[39] But the court rebuffed these arguments, distinguishing the Ninth Circuit's decision in *National Wildlife Federation v. National Marine Fisheries Service (NMFS)*,[40] where the court had rejected a BiOp

28. California ex rel. Lockyer v. U.S. Dept. of Agric. *(Lockyer II)*, 575 F.3d 999, 1021 (9th Cir. 2009).
29. Wyoming v. U.S. Dept. of Agric., 661 F.3d 1209, 1272 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 144, 184 L. Ed. 2d 233 (U.S. 2012), *and cert. denied*, 133 S. Ct. 417, 184 L. Ed. 2d 233 (U.S. 2012).
30. *Available at* http://www.supremecourt.gov/orders/courtorders/100112zor.pdf.
31. *See* 73 Fed. Reg. 61456 (Oct. 16, 2008).
32. 72 Fed. Reg. 17816, 17817 (Apr. 10, 2007). This history was outlined in the district court's decision. *See* Jayne v. Rey *(District Court Decision)*, 780 F. Supp. 2d 1099, 1103, 41 ELR 20076 (D. Idaho 2011), *aff'd sub nom.* Jayne v. Sherman, No. 11-35269, 2013 WL 64357 (9th Cir. Jan. 7, 2013).
33. Idaho Roadless Rule Upheld in Court, Spokesman-Rev. (Jan. 7, 2013).
34. *District Court Decision*, 780 F. Supp. 2d at 1103. The more-restrictive themes are known as the "Wild Land Recreation" theme, "Primitive" theme, and "Special Areas of Historic or Tribal Significance" theme. 36 C.F.R. §294.23(a).
35. 73 Fed. Reg. 61465 (Oct. 16, 2008).
36. *District Court Decision*, 780 F. Supp. 2d at 1104 (citing 36 C.F.R. §294.25(e)(1)).
37. *Id.* at 1106-07 (citing FWS Biological Opinion at 107).
38. *Id.* at 1108 (citing Appendix C of FWS Biological Opinion).
39. *Id.* at 1109.
40. 524 F.3d 917 (9th Cir. 2008).

from NMFS that relied on the agency's promise to install certain structural improvements to Columbia River dams for its no-jeopardy decision. In contrast, the district court in *Jayne v. Rey*[41] found that the FWS' reliance on USFS commitments was proper because the "Access Amendment was not some vague aspiration but a detailed proposal" and that USFS "has made a firm commitment to protect the grizzly bear in other areas, and it is reasonable to assume they would follow the same course."[42]

2. The NEPA Claim

Plaintiffs also challenged USFS' final EIS (FEIS) as based on incorrect data and assumptions. In particular, plaintiffs challenged USFS' reliance on "the realities of budgets and the balancing of priorities" for its projections that neither logging nor road-building would be greatly increased from the amounts authorized under the national Roadless Rule.[43] While the court recognized that the Idaho Rule technically allows more road-building and logging than under the national rule, it found the Forest Service's projections of only modest increases based in part on agency budgetary constraints to be "entitled to deference given the expertise the agency has in matters of its own budget and how it affects project priorities."[44]

3. The Rule's Phosphate Mining Provision

The environmental plaintiffs also claimed that USFS violated NEPA by failing to conduct a site-specific analysis of future mining operations in the area opened to future phosphate mining. But the court rejected these arguments, finding it preferable under NEPA "to defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project's probable environmental consequences."[45] Here, the FEIS concluded that the only known proposal for mining phosphate in an IRA was a planned expansion of the Smoky Canyon Mine, but that the proposed expansion of that particular mine had already been studied in a site-specific EIS, which had concluded that mitigation measures were sufficient to protect water quality and contain selenium contamination.[46] Further, the Smoky Canyon Mine EIS and the decision to proceed with the mine expansion had previously been upheld by the Ninth Circuit as meeting NEPA requirements in *Greater Yellowstone Coalition v. Lewis*.[47]

B. The Ninth Circuit Appeal

Environmental plaintiffs appealed the district court's decision to the Ninth Circuit. But "[a]fter scouring both the administrative and district court records," the Ninth Circuit "conclude[d] that the district court's grant of summary judgment was warranted."[48] In its brief January 2013 opinion upholding the Idaho Rule, the Ninth Circuit noted that the "inclusive, thorough, and transparent process resulting in the challenged rule conformed to the demands of the law and is free of legal error," and adopted the district court's "comprehensive opinion" as its own.[49]

IV. The Colorado Rule

Originally proposed in 2006 and modified in 2007, the Colorado Rule was finally formalized and issued as a final rule modifying the Roadless Rule in July 2012.[50] Similar to the Idaho Rule, the Colorado Rule generally prohibits road-building and timber cutting in the state's IRAs, "with narrowly focused exceptions."[51] As with the Idaho Rule, the Colorado Rule provides more stringent protections for some lands than the 2001 Roadless Rule, while relaxing some requirements on other lands. The Colorado Rule establishes a two-tiered system, such that on the 1.2 million acres of "upper tier" lands, "exceptions to road construction and tree cutting are more restrictive and limiting than the 2001 Roadless Rule."[52] Further, the Colorado Rule provides additional restrictions on the development of linear construction zones (LCZs), such as electric power or telecommunications lines, and adds 409,500 acres that were not covered by the 2001 Roadless Rule.[53] On the other hand, the Colorado Rule removes roadless protections from 8,300 acres of ski areas and 459,100 acres of lands identified under the 2001 Roadless Rule, but substantially altered from a truly roadless condition since being inventoried in the 1970s.[54]

Like the Idaho Rule, the Colorado Rule was drafted to provide the state with additional flexibility to manage wildfire risk, and to address specific local economic and job growth concerns. In particular, the Colorado Rule addresses state-specific concerns including:

> (1) Reducing the risk of wildfire to at-risk communities and municipal water supply systems; (2) facilitating exploration and development of coal resources in the North Fork coal mining area on the Grand Mesa, Uncompahgre, and Gunnison National Forests; (3) permitting the construction and maintenance of water conveyance structures; (4) restricting linear construction zones, while permitting access to current and future electrical power lines

41. 780 F. Supp. 2d 1099, 41 ELR 20076 (D. Idaho 2011).
42. 780 F. Supp. 2d at 1111.
43. *Id.* at 1112.
44. *Id.*
45. *Id.* at 1113 (quoting Friends of Yosemite Valley v. Norton, 348 F.3d 789, 800 (9th Cir. 2003)).
46. *Id.* at 1114.
47. 628 F.3d 1143, 1153, 41 ELR 20059 (9th Cir. 2010).
48. Jayne v. Sherman, No. 11-35269, 2013 WL 64357 at *7 (9th Cir. Jan. 7, 2013).
49. *Id.*
50. 77 Fed. Reg. 39576-612 (July 3, 2012) (codified at 36 C.F.R. §§294.40-49).
51. 36 C.F.R. §294.40.
52. 77 Fed. Reg. at 39578.
53. *Id.* at 39577.
54. *Id.* at 39577-78.

and telecommunication lines; and (5) accommodating existing permitted or allocated ski areas.[55]

As Democratic Gov. John Hickenlooper emphasized upon the Rule's promulgation, "[t]he Colorado Roadless Rule reflects the diverse, creative and passionate suggestions contributed by thousands of Coloradans . . . . The rule adds new protections to millions of acres of our state's cherished national forests while providing sufficient, targeted flexibility crucial to local economies and communities."[56]

Unlike the Idaho Rule, the Colorado Rule has managed to avoid facial legal challenges since its promulgation in July 2012.[57] However, individual projects proposed for Colorado's roadless areas face ongoing challenges. In mid-December 2012, environmental groups filed a notice of intent to sue USFS, alleging ESA violations related to the agency's approval of a coal lease expansion in the North Fork coal mining area identified by the Colorado Rule.[58] On January 28, 2013, these environmental groups also filed an administrative appeal of a Bureau of Land Management decision authorizing that same mine expansion.[59]

With environmental groups likely to look closely at future projects proposed for IRAs in both Idaho and Colorado, project proponents should be prepared to run the gamut of environmental litigation, including challenges under the ESA, NEPA, and the National Forest Management Act (NFMA).[60] USFS could also face as-applied challenges to the agency's approval of the state rules under NEPA and the APA.[61] Specifically, to the extent that the state rules authorize environmentally destructive extractive activities in otherwise roadless areas, environmental groups may argue that approval of the rules was "arbitrary and capricious" in violation of the APA. NEPA and APA challenges to coal mining leases in Colorado's North Fork coal mining area could also focus on greenhouse gas (GHG) emissions and cumulative climate change impacts due to expanded coal mining activities throughout the North Fork area.

V. The Alaskan Saga Continues

As mentioned above, Alaska initially challenged the promulgation of the 2001 Roadless Rule, but withdrew its challenge after USFS agreed to exempt the Tongass National Forest from the Rule's restrictions. In December 2003, USFS amended the Roadless Rule to temporarily exempt the Tongass from its prohibitions against timber harvest, road construction, and reconstruction in IRAs (the Tongass Exemption), until USFS could adopt a rule to address the specific situation of the Tongass.[62] The State Petitions Rule, however, stated that management of IRAs on the Tongass would continue to be governed by the existing forest plan, thus, "negat[ing] the need for further Tongass-specific rulemaking as contemplated in the 2003 Tongass Exemption."[63]

A. *The Challenge to the Tongass Exemption*

On December 22, 2009, plaintiffs, including an Alaskan native village and various environmental groups, filed a complaint against USFS challenging the Tongass Exemption as violating the APA and NEPA.[64] In promulgating the Tongass Exemption, USFS had argued that such exemption was needed to prevent significant job losses and to allow for roads and utilities to be constructed to connect isolated southeast Alaska communities. The federal district court of Alaska dismissed these arguments as contrary to the evidence, and on March 4, 2011, the court granted summary judgment for the plaintiffs, holding that the Tongass Exemption was "arbitrary and capricious" in violation of the APA.[65] In its decision, the court reinstated the 2001 Roadless Rule on the Tongass.

Alaska appealed that decision to the Ninth Circuit, but after hearing oral arguments, the court referred the parties to mediation proceedings on December 13, 2012, and the appeal was stayed pending the outcome of mediation.[66]

B. *A New Challenge to the 2001 Roadless Rule*

In addition to appealing the district court's decision reinstating the Roadless Rule, in June 2011, Alaska filed a new suit in the District Court for the District of Columbia, once again directly challenging the 2001 Roadless Rule itself.[67] As well as now-familiar challenges that the Roadless Rule violates the Wilderness Act, NEPA, and the APA, the complaint also included several Alaska-specific claims, including violations of the Alaska National Interest Lands Conservation Act (ANILCA)[68] and the Tongass Timber Reform Act (TTRA).[69]

Given that both the Ninth Circuit and the Tenth Circuit have upheld the Roadless Rule against challenges based on NEPA, the APA, and the Wilderness Act, Alaska faces an uphill challenge to prevail on those claims. No court has yet addressed its state-specific claims based on the Alaskan land management statutes, specifically ANILCA and TTRA. In particular, the state appears to

55. *Id.* at 39577.
56. USFS, Colorado Roadless Rule, http://www.fs.usda.gov/detail/r2/home/?cid=stelprdb5200050 (last visited May 17, 2013).
57. 77 Fed. Reg. at 39576.
58. Press Release, Earthjustice, Coal Mine Expansion in Colorado Roadless Forest Likely to Face Challenge (Dec. 31, 2012), http://earthjustice.org/news/press/2012/coal-mine-expansion-in-colorado-roadless-forest-likely-to-face-challenge (last visited May 17, 2013).
59. Environmental Groups Appeal BLM Decision to Allow Coal Mine to Expand in Colorado, 44 Env't Rep. 292 (BNA) (Feb. 1, 2013).
60. 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16.
61. 5 U.S.C. §706.
62. 68 Fed. Reg. 75136 (Dec. 30, 2003).
63. Organized Village of Kake v. U.S. Dept. of Agric., 776 F. Supp. 2d 960, 966, 41 ELR 20196 (D. Alaska 2011).
64. *Id.*
65. *Id.* at 976.
66. Organized Village of Kake v. U.S. Dep't of Agric., No. 11-35517, Dkt. 41 (D. Alaska Dec. 13, 2012).
67. Alaska v. U.S. Dep't of Agric. (*Alaska v. USDA*), No. 1:11-cv-01122-RJL (D.D.C. June 17, 2011).
68. 16 U.S.C. §§410hh-3233; 43 U.S.C. §§1602-1784.
69. 16 U.S.C. §559(d).

have a strong substantive case that the application of the Roadless Rule to national forests in the state is a violation of ANILCA. But before getting to the merits of Alaska's case, the state must first overcome statute-of-limitations challenges to its case.

1. The Statute-of-Limitations Challenge

The federal defendants filed a motion to dismiss in May 2012 based on the general six-year statute of limitations applicable to claims against the federal government.[70] While the federal defendants argued that the cause of action accrued with the promulgation of the Roadless Rule in 2001, Alaska argued that "[d]uring its convoluted history, the Roadless Rule has either been under injunction or superseded for most of the time since it was enacted,"[71] and that

> [a]s a consequence . . . the State did not have standing to sue, and thus the State's cause of action against the 2001 Roadless Rule did not begin to "accrue," with respect to the Tongass until the 2003 Tongass Exemption was set aside by the District Court for the District of Alaska on March 4, 2011.[72]

For the Chugach, Alaska argued that the issuance of the State Petitions Rule in 2005 obviated the need to challenge the Roadless Rule, so that any cause of action only accrued when the State Petitions Rule was overturned by the *Lockyer* decision and the Roadless Rule was reinstated.[73]

Given the unique facts of the case, Alaska appears to have strong arguments that its claims did not accrue until the Roadless Rule's provisions were in fact applied to Alaskan IRAs. However, in a March 2013 opinion, long on background and short on analysis, Judge Richard Leon dismissed Alaska's complaint, holding, quite simply, that:

> Alaska's cause of action accrued in January 2001, when the Roadless Rule was adopted and published. The six-year limitations period established by §2401(a) expired well before Alaska instituted the present action in 2011. Because "§2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed," this Court lacks jurisdiction over Alaska's claims.[74]

In its opinion, the court stated perfunctorily that "Alaska's argument that §2401(a) is not jurisdictional is contrary to longstanding precedent in our Circuit,"[75] but failed to address the heart of Alaska's argument, namely that no cause of action could accrue with respect to the individual forests until those forests were actually subject to the Rule being challenged.

The court also rejected what it characterized as "Alaska's back-up argument that standing to sue is a prerequisite to the running of the limitations period established by §2401(a)," noting that "[i]f a litigant has a question as to ripeness or standing, 'the appropriate time for a judicial determination . . . is within the prescribed statutory period for review.'"[76] But again, while the Tongass Exemption was in effect, Alaska did not have a question regarding its standing to challenge the Roadless Rule because it simply had no controversy with the Rule at all.

In May 2013, Alaska filed notice appealing the district court's dismissal of the case to the D.C. Circuit,[77] but for now, the 2001 Roadless Rule is back in effect on all Alaskan national forests. However, if Alaska is able to successfully appeal the motion to dismiss, then the substantive merits of its case could finally be addressed.

2. The ANILCA Claim

After nearly a decade of debate and legislative attempts, ANILCA was passed in 1980 and signed by President Jimmy Carter. The law designated over 100 million acres of federal lands in Alaska for specific conservation purposes, creating or expanding numerous national parks, monuments, wildlife refuges, and wilderness areas. The congressional purposes in §101 of ANILCA outline a compromise between preservation of scenic, wilderness, habitat, and recreational values, protection of a subsistence way of life for rural Alaskans, and economic development:

> This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.[78]

Section 1326 of ANILCA, known as the "no more clause," explicitly limits the ability of agencies to alter this "proper balance" struck by Congress by denying agencies the ability to permanently "withdraw" additional public lands without congressional approval:

70. Motion to Dismiss at 4, Alaska v. USDA, No. 1:11-cv-01122-RJL (D.D.C. May 14, 2012) (citing 28 U.S.C. §2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").
71. Joint Opposition to Defendant's and Defendant-Intervenors' Motions to Dismiss at 5, Alaska v. USDA, No. 1:11-cv-01122-RJL (D.D.C. June 25, 2012).
72. *Id.* at 13-14.
73. *Lockyer I*, 459 F. Supp. 2d at 908-09 (6 (reinstating the Roadless Rule with the Tongass Exemption intact).
74. *Alaska v. USDA*, No. 1:11-cv-01122-RJL, at 6 (D.D.C. Mar. 21, 2013) (citing Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987)).
75. *Id.*
76. *Id.* at 7 (citing Eagle-Picher Indus., Inc. v. U.S. EPA, 759 F.2d 905, 909, 15 ELR 20467 (D.C. Cir. 1985)).
77. Notice of Appeal and Representation Statement, *Alaska v. USDA*, No. 1:11-cv-01122-RJL (May 16, 2013).
78. ANILCA §101(d), 16 U.S.C. §3101(d).

> No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress.[79]

Alaska argues that the Roadless Rule cannot apply in Alaska because ANILCA explicitly determined the appropriate balance between protection and development and requires that "Congress itself had to approve, by joint resolution, any further designation of public land in excess of 5,000 acres that would no longer be available for 'more intensive use and disposition.'"[80]

ANILCA does not provide a definition of the critical term "withdrawal," but in general, "withdrawal" in the context of public lands "is understood as a generic term referring to a statute, an executive order, or an administrative order that changes the designation of a described parcel from 'available' to 'unavailable' for homesteading or resource exploitation."[81] Alaska argues that by limiting road-building and timber harvesting on the large Alaskan IRAs, USFS withdrew these lands in violation of ANILCA §§101 and 1326. The federal defendants have yet to respond substantively to these claims, but Alaska appears to have a strong statutory argument that the Roadless Rule effectively "withdrew" lands without required congressional approval.

3. The TTRA Challenge

The TTRA was passed by Congress in 1990 and signed into law by President George H.W. Bush. The law amended ANILCA by repealing the $40 million annual appropriation for the Tongass and removing the 4.5 billion board feet decadal timber harvest target.[82] It also designated additional wilderness areas in the Tongass, and modified long-term contracts between USFS and two pulp and paper companies.[83]

In its complaint, Alaska argues that §101 of the TTRA directs USFS "to seek to provide a volume of timber sufficient to meet the annual and planning cycle market demand for Tongass timber," and that "Defendants' failure to maintain their discretion to analyze, determine and seek to meet the market demand for timber from the Tongass violates the TTRA."[84] Alaska claims that

> [b]y setting aside so much commercial forest land pursuant to the 2001 Roadless Rule that insufficient timber volume is available to meet industry needs, Defendants have violated TTRA sections 101 and 105 by eliminating the ability of the USFS to even consider an option of offering sufficient timber for sale to meet annual and planning cycle market demand.[85]

The federal defendants respond that the TTRA directs USFS "to pursue the market demand goal only 'to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources . . . .'"[86] Further, the federal defendants argue that "the statute's exhortation to 'seek' to meet market demand is also '[s]ubject to . . . other applicable law, and the requirements of the National Forest Management Act . . . .'"[87]

Unlike the specific "no more clause" in ANILCA, the language in the TTRA directing USFS to "seek" to meet market demand for timber is explicitly subject to the general multiple use directives governing USFS and to other statutory requirements. Thus, it appears unlikely that the court will find the statutory language in the TTRA specific enough to override the agency's discretion to manage the forest lands for multiple uses, including roadless values.

If Alaska successfully appeals the statute of limitations-based dismissal of its case, the state should ultimately prevail on its substantive ANILCA claims if it can establish that the Roadless Rule was effectively a "withdrawal" of lands in contradiction of the ANILCA "no more clause." Given the multiple-use considerations in the TTRA, Alaska is less likely to prevail on its claims under that statute. While the outcome of the case is unlikely to affect the management of national forest lands outside of Alaska, if Alaska ultimately overturns the Roadless Rule within the state, this could have a significant impact on road-building and timber harvesting on the expansive Alaskan national forest lands. However, international timber markets and shifting USFS priorities will also play a role in determining timber production levels from Alaskan forest lands.

VI. Conclusion

The 2001 Roadless Rule has now been upheld by both circuits that have heard challenges to the Rule. As for the state-specific rules, the Idaho Rule has now been upheld by the Ninth Circuit, while the Colorado Rule has to date avoided direct challenges. Developers of projects in the IRAs of both states, however, should continue to diligently comply with required site-specific NEPA and ESA

79. ANILCA §1326(a), 16 U.S.C. §3213(a).
80. Complaint at 22, Alaska v. USDA, No. 1:11-cv-01122-RJL (D.D.C. June 17, 2011) (citing ANILCA §101(d)).
81. George C. Coggins et al., Public Natural Resources Law 285 (3d ed. 1992).
82. Tongass Timber Reform Act (TTRA), Pub. L. No. 101-626, §101(a), 104 Stat. 4426 (1990), 16 U.S.C. §539d(a)).
83. TTRA §§202, 301.
84. Complaint, *supra* note 79, at 23.
85. *Id.* at 23.
86. Reply Brief in Support of Intervenor-Defendants' Motion to Dismiss at 14, Alaska v. USDA, No. 1:11-cv-01122-RJL (D.D.C. July 31, 2012) (citing TTRA §101(a), 16 U.S.C. §539d(a)).
87. *Id.* at 16 (citing TTRA §101(a); 16 U.S.C. §539d(a)).

analyses in anticipation of potential challenges from environmental groups.

Litigation over the application of the Roadless Rule to the expansive national forest lands in Alaska may not yet be over. If Alaska can successfully appeal the dismissal of its complaint on statute-of-limitations grounds, the state has a good chance of invalidating the Roadless Rule as applied to Alaskan IRAs, particularly in the Tongass. Alternatively, the state may refocus its attention on its still-pending appeal of the *Village of Kake* decision and seek to have the Tongass Exemption reinstated. However, the practical impact of a potential Alaskan victory remains somewhat uncertain. The timber industry in the Tongass and throughout Alaska has generally been in decline for decades, while healthy forest watersheds are increasingly being recognized as critical to salmon production and a burgeoning tourism-based economy.[88] With USFS now planning to transition logging in the Tongass away from large, old growth stands to sustainable harvesting of second-growth forests,[89] releasing Alaska's national forests from the restrictions of the Roadless Rule may not actually have a dramatic impact on Alaskan timber production.

88. *See* Paula Dobbyn, *Transition for Tongass*, American Forests, Summer 2012, http://www.americanforests.org/magazine/article/transition-for-tongass/ (last visited May 17, 2013).
89. *See, e.g.*, USFS, *Economic Analysis of Southeast Alaska: Envisioning a Sustainable Economy With Thriving Communities* (May 4, 2010), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev2_037960.pdf.