

Since the end of the Clinton era, there has been much confusion over the status of roadless areas in the national forests. Yesterday the Ninth Circuit weighed in, ruling in [California v. USDA](#) that the Bush administration had unlawfully revised the Clinton administration's Roadless Rule, and reinstating that rule. The decision, which has been [welcomed by environmental groups](#), adds another complication to an already confusing situation. A challenge to the Roadless Rule is still pending in the Tenth Circuit. In May, the Obama Administration administratively [elevated decisions about](#) roadless areas to the cabinet level. Although the media billed that decision as a "time out," it proved a short-lived one — in July, Secretary of Agriculture Vilsack [approved a roadless area timber harvest](#) in the Tongass National forest in Alaska. This decision provides a true time out, prohibiting road construction and timber harvest in inventoried roadless areas except in a few narrow circumstances. But that time out won't affect the Tongass, which was never included within the Roadless Rule's coverage.

The genesis of the Roadless Rule dispute lies in the 1964 Wilderness Act, in which Congress designated about 9 million acres of national forest land as wilderness, and directed the Forest Service to review the suitability of other lands for wilderness. The Wilderness Act defines wilderness as areas

where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter 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 and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable . . .

16 U.S.C. § 1132(c). Permanent roads are prohibited in wilderness areas. 16 U.S.C. § 1133(c).

The Forest Service undertook two reviews of its roadless lands in the 1970s to identify areas suitable for wilderness designation, but in each case the courts ruled that the environmental review under NEPA had been inadequate. Congress went ahead with a series of state-specific wilderness bills, which formally designated some of the inventoried lands as wilderness but left some 58.5 million acres of in a kind of limbo. They were managed under the National Forest Management Act's forest-by-forest planning process through the 1990s, which gives the local forest supervisor broad discretion to determine where roads, and the

logging they make possible, should go.

On January 5, 2001, just 8 days before George W. Bush moved in to the White House, the Forest Service finalized the Roadless Rule, categorically prohibiting road construction and timber harvest in roadless areas nationwide. The new rule was justified on the grounds that individual forest plans could not be trusted to recognize the true value of roadless areas:

At the national level, Forest Service officials have the responsibility to consider the “whole picture” regarding the management of the National Forest System, including inventoried roadless areas. Local land management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape. If management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced through road construction and certain forms of timber harvest. Added together, the nationwide results of these reductions could be a substantial loss of quality and quantity of roadless area values and characteristics over time.

Litigation quickly followed. The gist of the challenges was that the Roadless Rule was adopted without adequate environmental review and that it amounted to an unlawful administrative wilderness designation. A district court in Idaho enjoined implementation of the rule, but the Ninth Circuit overturned that decision. Another district court, in Wyoming, also enjoined the rule, but before the Tenth Circuit decided that appeal the Forest Service issued a new rule eliminating the controversial portions of the Roadless Rule.

This new rule, known as the State Petitions Rule, renounced the national management standard of the Roadless Rule. It allowed state governors to petition the Forest Service to establish a plan for management of some or all of the roadless areas within that state, and to recommend the parameters of such a plan. In the absence of a statewide plan, the State Petitions Rule leaves roadless area management where it was before the Roadless Rule, in the hands of the local forest supervisor through the ordinary forest planning process.

Like the Roadless Rule, the State Petitions Rule was immediately challenged. Three years ago, a district court in California struck it down, holding that it could not be adopted without NEPA analysis and Endangered Species Act consultation. That court ordered the Forest Service to reinstate the Clinton administration Roadless Rule which the State

Petitions Rule had replaced.

Yesterday, the Ninth Circuit affirmed that decision. It ruled:

- (1) That the claims were ripe for judicial review, without waiting for a specific decision to put a road in a roadless area.
- (2) That the Forest Service could not rely on a NEPA “categorical exclusion” to avoid environmental analysis of the Rule’s effects, because the State Petitions Rule took “substantive environmental protections off the books” and amounted to “a marked change in roadless area management.”

By permanently removing the Roadless Rule from the Code of Federal Regulations, the State Petitions Rule did much more than establish a new procedure for the consideration of state-specific land management rules: it purported to ensure that future land management decisions would never again be constrained by the Roadless Rule and its enhanced protections for inventoried roadless areas. It was unreasonable for the USDA to characterize the permanent repeal of these substantive protections as “merely procedural” and within the scope of the cited categorical exclusion.

- (3) For the same reason, because the rule would make a difference to the level of protection afforded roadless areas, that the ESA required consultation with the Fish and Wildlife Service and National Marine Fisheries Service on its potential effects on listed species.
- (4) That the district court properly required the Forest Service to reinstate the Roadless Rule.

In one sense, this decision takes some pressure off Secretary Vilsack, who no longer has the power to approve invasions of roadless areas. In another sense, it puts pressure on the Forest Service to decide whether to endorse the Roadless Rule or take another approach that would give it more discretion. It is irrelevant to the ongoing Tongass dispute. Road-building and timber harvest in the Tongass were already such a political hot potato in 2001 that even an administration on the verge of leaving office was unwilling to touch them. The Roadless Rule specifically exempts the Tongass National Forest from its coverage.