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MARTIN NIE*

Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule

ABSTRACT

Many of the most controversial issues in public land policy and management are addressed by natural resource agencies using the administrative rulemaking process. This is partly due to the design of public land laws, many of which are ambiguous, vague, and/or contradictory in part. This article examines the historic roadless rule promulgated by the U.S. Forest Service from a process and decision-making standpoint. The roadless rule is important to learn from because it has been one of the most controversial rules ever written and has raised serious questions about the limitations and legitimacy of large-scale rulemakings. The article finishes by exploring various options and alternatives to the rulemaking status quo. Alternatives in public participation, transparency, electronic rulemaking, scoping, collaboration, and others are discussed. The article argues for more congressional responsibility in resolving the roadless issue but also defends the rule in terms of what is legal and legitimate in today's political context and administrative state.

I. INTRODUCTION

Many environmental laws have a degree of statutory ambiguity, vagueness, and/or contradiction, giving public land agencies a good deal of administrative discretion. This means that several controversial environmental issues end up being managed through the administrative rulemaking process. Should the U.S. Forest Service (FS), for example, ban road building on nearly 59 million acres of national forest land? This article asks whether or not our public land agencies should be making

* Associate Professor of Natural Resource Policy, University of Montana, College of Forestry and Conservation. I would like to thank Jack Ward Thomas, Michael Dombeck, Michael Francis, David New, Jim Burchfield, Alan McQuillan, Rebecca Roose, the staff and editors at NRJ, and a number of people interviewed for their time and assistance; and the McIntire-Stennis Cooperative Forestry Research Program for its generous grant support. The observations and conclusions presented here are not necessarily representative of the views of any of the above.
these types of decisions through the rulemaking process and how effective they can be in doing so.

The article proceeds in four parts following the Introduction. Part II provides an overview of national forest policy. This body of law is analyzed in terms of what it says and fails to say and why this matters from a conflict management standpoint. The vagueness, ambiguity, contradiction, and over-extended commitments found in these laws are major reasons why administrative rulemaking has become the dominant venue for conflict management. Part III develops the case study. The roadless rule is important to learn from because it has been one of the most controversial rules ever promulgated and has raised serious questions about the limitations and legitimacy of rulemakings of this scale. The rapidly changing political, administrative, and legal history of the roadless rule is provided in this section. Part IV is a primer on administrative rulemaking as it applies to political conflict. A general outline of the Administrative Procedures Act (APA) and its notice-and-comment provision is provided. Tension between a rule's precision and flexibility, the contested role of public participation, and the "ossification" of rulemaking are discussed.

In part V, I argue that Congress ought to intervene and resolve what are essentially value- and interest-based political conflicts over public land management. Often times, failing to do so is an abrogation of its responsibility. This is especially the case with relatively clear-cut political choices, such as yes or no to roadless area protection or yes or no to snowmobiles in Yellowstone National Park. It becomes complicated, however, when Congress is asked to resolve terribly complex and often site-specific and localized disputes. There is not one right answer, and we must continue to carefully balance these tensions. Despite the argument for more congressional responsibility, the original roadless rule, as promulgated during the Clinton administration, is defended in terms of what is legal and legitimate in today's political context. In other words, Congress chose to delegate discretion to the FS, and this discretion could be used to either build 386,000 miles of roads in the national forest system or to stop building anymore. If Congress disagrees with such broad discretion, it should respond with new legislation.

Assuming that Congress will not rewrite public land law anytime soon, and that rulemaking as the dominant approach to conflict management is here to stay, part V goes on to make a number of

recommendations on how we might proceed in the future to bring rulemaking closer to the democratic ideal. These recommendations are relatively incremental, feasible, and experimental in nature. For example, the move toward "online rulemaking" could possibly bring about increased transparency, facilitate information exchange, and use more interactive and deliberative models of communication and decision making. New and more inclusive ways of "scoping" the public could also be explored so the public can play a more proactive role in deciding what is to be decided upon. Embedding stakeholder-based collaborative groups into the rulemaking process is another promising alternative that could be tried and carefully evaluated. Perhaps most controversial is the possibility of using public comment in rulemaking as a type of straw vote and preference indicator. This is seen as a fall back alternative if other changes to the rulemaking process are not forthcoming.

II. FOREST MANAGEMENT: STATUTORY GUIDANCE AND THE LACK THEREOF

In making controversial decisions, agencies look to their statutory mission and mandate for guiding principles or explicit instructions provided to them by Congress. The 1897 Forest Service Organic Act, for example, states in part that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." This broad mandate provides little resolution because some interest groups emphasize the "protect" and "water flows" provisions while others highlight the "supply of timber" component.

Superimposed on top of the Organic Act is the Multiple Use Sustained Yield Act of 1960 (MUSYA). Through MUSYA, Congress formally articulated the multiple use mission of the FS: "[I]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." The Act defines multiple use:

3. Alan G. McQuillan, Is National Forest Planning Incompatible with a Land Ethic?, 88 J. Forestry 31, 33 (May 1990) (discussing the contested purposes of the forest reserves and how preservationist John Muir would have emphasized the "improve and protect the forest" provision, while FS Chief Gifford Pinchot would more likely have stressed the "furnish a continuous supply of timber" provision).
5. Id.
The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.6

This statutory language shows that there is relatively little in MUSYA directing or constraining forest managers. They are to manage for multiple use and sustained yield, the latter meaning "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land."8

The contested language in MUSYA is easy to find. For instance, what are the needs of the American people and what constitutes the most judicious use of the land? What does providing "due consideration" of "the relative values of the various resources in particular areas" really mean?9 More problematic is the Act's failure to specify the spatial scale for implementing multiple use on either a forest-by-forest level or a national forest system level.10 This is not to say that MUSYA says nothing of importance, for the multiple use mission later proved to be a major

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7. See generally Michael C. Blumm, Public Choice Theory and Public Lands: Why "Multiple Use" Failed, 18 HARV. ENVTL. L. REV. 405, 407 (1994) ("Since multiple use is founded upon a standardless delegation of authority to managers of public lands and waters, congressional endorsement of multiple use has created the archetypal 'special interest' legislation.").
10. A Society of American Foresters review, for example, recommends that "Congress should clearly articulate in new legislation that the concept of multiple use is not necessarily appropriate on every management unit, but may be better applied in the aggregate across the national forests and public lands." In FOREST OF DISCORD: OPTIONS FOR GOVERNING OUR NATIONAL FORESTS AND FEDERAL PUBLIC LANDS 54-55 (Donald W. Floyd ed., 2002) [hereinafter FOREST OF DISCORD].
challenge for an agency that became focused primarily on dominant-use timber production.\textsuperscript{11} But its abstractness has been used by the FS over the years to defend everything from designating 58.5 million acres as protected roadless areas to proposing an 8.7 billion board-foot timber sale in the Tongass National Forest in southeast Alaska.\textsuperscript{12} Multiple uses could be complimentary and not contradictory according to the FS. For example, it could embrace clearcutting as a way to provide beneficial openings for browsing game species and simultaneously achieve its timber, wildlife, and recreation (hunting) purposes.\textsuperscript{13}

The multiple use mandate was also used to justify the extensive clearcutting and terracing of hillsides in the Bitterroot National Forest in western Montana, though many saw it as more akin to "timber mining."\textsuperscript{14} This case provided one spark in what would eventually become the National Forest Management Act of 1976 (NFMA), which is primarily a planning-based statute calling for new interdisciplinary forest planning processes and expanded opportunities for public participation.\textsuperscript{15} Some important prescriptions are also found in the Act, including limits on the size of clearcuts and a mandate to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives."\textsuperscript{16}

The forestry, policy, and academic literature surrounding NFMA's impact on forest management has spurred significant debate. Some critics contend that NFMA is a "solution to a nonexistent problem."\textsuperscript{17} The Bitterroot and Monongahela\textsuperscript{18} cases had nothing to do

\begin{itemize}
  \item \textsuperscript{11} David A. Clary, \textit{Timber and the Forest Service} xii (1986) (providing a critical history of the FS and its unique bureaucratic timber-oriented culture as "a case of public service wherein the servant believed firmly that it knew better than the public what the public really wanted").
  \item \textsuperscript{13} See generally Paul W. Hirt, \textit{A Conspiracy of Optimism: Management of the National Forests Since World War II} (1994).
  \item \textsuperscript{14} The "Bolle Report," a major milestone in FS history and requested by Senator Lee Metcalf of Montana, aptly summarized the situation: "Multiple use management, in fact, does not exist as the governing principle on the Bitterroot National Forest." See \textit{A University View of the Forest Service, A Select Committee of the University of Montana Presents Its Report on the Bitterroot National Forest}, CONG. REC. 1 (daily ed. Nov. 18, 1970) (on file with author).
  \item \textsuperscript{16} 16 U.S.C. § 1604(g)(3)(b) (1976).
  \item \textsuperscript{17} R.W. Behan, \textit{The RPA/NFMA: Solution to a Nonexistent Problem}, 88 J. FORESTRY 20, 22 (1990).
\end{itemize}
with planning says Richard Behan, so why "solve" these local site-specific problems with elaborate planning requirements? Federico Cheever also argues that the forest management standards outlined in NFMA have failed to provide a significant check on FS timber management practices "because they have failed to communicate an intelligible message to the lawyers, Forest Service officials and federal judges who initiate, defend, and resolve claims asserted under them." This failure to communicate generally intelligible content, says Cheever, is a "result of Congress's commitment to Forest Service discretion in the legislative process that gave us NFMA." In a similar vein, Michael Mortimer argues that the problems currently afflicting the FS result from Congress avoiding responsibility for difficult resource management decisions. Mortimer places the blame on the goal-based statutes governing the FS:

Congressional direction to the Forest Service has been less than specific, affording little in the way of a concrete agency mission. Consequently, the Forest Service's attempts at resource management have been plagued by controversy and litigation, ultimately imbuing the agency with a sort of administrative schizophrenia, unable to identify or even recognize its mission.

On the other hand, those like Jack Tuholske and Beth Brennan argued a decade ago that this substantive environmental statute was beginning to fulfill its mandate. They claim that it provides the direction the agency needs to adopt a more holistic and ecosystem-based approach to forest management. But for this to happen, courts must be

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21. Id. at 606.


23. Id. at 910.

willing to see it as having substance, enforce its underlying purpose, and "read and interpret the statute as a whole rather than analyze statutory sections in isolation from each other." Others, like Charles Wilkinson, believe that while NFMA struggles to find a balance between statutory directives and agency discretion, it has had a substantive and procedural impact on forest management and is broad-textured and elastic enough to respond to future needs. Another view, argued by those such as the late Arnold Bolle, who played an important role in the Act's creation, is that NFMA is a good law, but its intent has not been faithfully implemented by the FS. In short, NFMA added a planning element to the forest management policies and multiple use mandates of the Organic Act and MUSYA. NFMA did not take away much management authority from the FS and continues to be subject to a range of interpretations.

The tension between congressional prescription and agency discretion was very apparent in the drafting of NFMA and the ensuing debate in Congress. The FS favored the planning-based NFMA bill sponsored by Senator Hubert Humphrey of Minnesota and fought against the more prescriptive NFMA bill proposed by Senator Jennings Randolph of West Virginia. Unlike Humphrey's version, the Randolph bill provided for comprehensive reform that prescribed numerous specific standards for forest management, with a particular focus on fish

25. Id. at 134.
29. See generally WILKINSON & ANDERSON, supra note 18.
and wildlife habitat and even-aged management. While the two sponsors agreed that timber production had taken priority over other forest values, and that this needed to be fixed, they differed in how much discretion to give the FS. In the end, some compromises were made and Humphrey included the NFMA "diversity requirement" in his bill, which would eventually become law. Diversity, however, was not defined in the Act and it was up to the FS to give this term meaning in their regulations.

The point of this statutory review is to illustrate the lack of explicit guidance in how the FS should answer management questions that are value- and interest-based and political to the core. The political might and leadership of Gifford Pinchot helps explain the broad mandate expressed in the 1897 Organic Act. According to Federico Cheever, Gifford Pinchot sought congressional support without congressional supervision and won this support in the carte blanche given him in the "paradoxical" FS Organic Act. It is in this statutory vacuum that Pinchot left his indelible signature on the FS. MUSYA and NFMA also failed to answer the central philosophical questions regarding forest management. This vacuum was instead filled by an opportunistic type of politics wherein the agency could promise everything to everyone in the name of "intensive management" and multiple use. Unrealistic promises made to multiple use constituencies and an overextended commitment to intensive management would become the agency’s Achilles’ heel according to historian Paul Hirt, who views FS history as a "conspiracy of optimism."

From Pinchot through NFMA, the FS has fought for maximum levels of administrative discretion and Congress has largely obliged. As

33. WILKINSON & ANDERSON, supra note 18, at 292-93.
34. The provision requires the FS to “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” 16 U.S.C. § 1604(g)(3)(b) (2000).
38. HIRT, supra note 13, at xxi.
a result, the venue of conflict has shifted from Congress to the administrative arena. And while discretion once gave the FS unencumbered authority to manage the public lands under the guise of scientific management, it now plagues the agency in unending lawsuits and administrative appeals because many interest groups believe that the actions of the FS are inconsistent with congressional direction. While professional foresters once fought to preserve their discretion, many forest policy leaders are now calling for management priorities to be set through a political and legislative process.\textsuperscript{39} A review by the Society of American Foresters, for example, contends that "[t]he purposes of the national forests and public lands are no longer clear" and that the complex and serious problems of national forest management "cannot be resolved through regulatory reform or through the appropriations process" and that "new legislation is warranted."\textsuperscript{40}

What about the hundreds of other laws, regulations, and court decisions constraining agency behavior?\textsuperscript{41} The FS has recently made "analysis paralysis" and "the process predicament" central to its case that the agency is forced to do more paperwork than on-the-ground forest management these days.\textsuperscript{42} The argument goes that, while in theory MUSYA and NFMA might give the FS some discretion, it is lost upon the thick layering of other laws and regulations.\textsuperscript{43} There is some truth to this claim, for both Congress and the agency's own implementing regulations have added enormous procedural and analytical obligations. But that does not change the basic argument made here. Congress has passed additional substantive and mostly procedural laws while failing to confront the tough questions regarding forest management. The agency still has discretion, but it must now take numerous procedural steps to exercise it. It is a case study in inefficient discretion. Until Congress clarifies the central purpose of our national forest lands and the core mission of the FS, procedural and decision-making inefficiencies will be a fact of life.\textsuperscript{44}

\begin{footnotesize}
\begin{enumerate}
\item See FOREST OF DISCORD, supra note 10, at xxi.
\item Id. at 50–51.
\item In an often-cited report, the General Accounting Office summarizes the decision-making problem facing the FS:
\end{enumerate}
\end{footnotesize}
III. THE FOREST SERVICE ROADLESS RULE

A. History of Roads and Conflict

Conflict over road building in our national forests is not new. As historian Paul Sutter explains, the interwar period's road building frenzy is essential to understanding the roots of the contemporary wilderness movement. During this time period, the FS and National Park Service were engaged in unprecedented road building. The construction of these roads, and the car culture, consumerism, and industrial-style tourism that came along with them, was seen as a major threat to wilderness. Sutter documents how the building of roads and the commercialization of the backcountry—not some naive romanticized notion of untouched and pristine wilderness—was a chief concern of wilderness leaders like Aldo Leopold, Bob Marshall, and Benton MacKaye and a dominant reason why they formed The Wilderness Society to do something about it.

Roads continue to be a central concern of the conservation community. There are more than 500,000 miles of roads on our public lands—enough to drive to the moon and back and 13 times the length of the interstate highway system. The FS is responsible for 386,000 miles of these roads, not including the 60,000 miles of unplanned or illegal roads created by off-road vehicles and other forest users. These

Strengthening accountability for performance within the Forest Service and improving the efficiency and effectiveness of its decision-making is contingent on establishing long-term strategic goals that are based on clearly defined mission priorities. However, agreement does not exist on the agency's long-term strategic goals. This lack of agreement is the result of a more fundamental disagreement, both inside and outside the Forest Service, over which uses the agency is to emphasize under its broad multiple-use and sustained yield mandate and how best to ensure the long-term sustainability of these uses.


46. Id.

47. Id. at 3-7. The Wilderness Society was formed in 1934 and the group remains active on the roads issue. See THE WILDERNESS SOC'Y, NATIONAL FOREST ROADLESS AREAS, at http://www.wilderness.org/OurIssues/Roadless/ (last visited June 5, 2004).


numbers have led some interest groups to call for an end to road building in roadless areas and the closure and/or obliteration of some existing roads, two separate policy issues.\textsuperscript{50} This, in turn, has created controversy and conflict because several interests, including timber, mining, motorized recreators, and others, want to access these roadless areas for economic or recreational purposes.\textsuperscript{51} The issue of roads in our national forests—from the auto-camping and motor-touring craze of the interwar period to the "Shovel Brigade" and threats of violence over road closures in Elko County, Nevada—has been controversial and acrimonious.\textsuperscript{52}

**B. Roads and the Forest Service**

The Forest Service has a long history of administratively protecting areas defined as primitive and roadless.\textsuperscript{53} Following its first roadless area review in the mid-1920s, and nudged by those such as Arthur Carhart and Aldo Leopold, the FS promulgated administrative regulation L-20 as its first act of primitive area protection in 1929.\textsuperscript{54} By today's standards, L-20 was not particularly protective, but it was used as a way to prevent haphazard road building and unnecessary commercial development until detailed management plans might be written.\textsuperscript{55} Unsatisfied with the number of incompatible uses allowed within these "primitive areas," Bob Marshall played a significant role in the promulgation of the FS's U Regulations in 1939.\textsuperscript{56} These administratively designated "wilderness or wild areas" received a much greater degree of more permanent protection and would generally be safeguarded from road building, motorized transportation, timber cutting, and commercial and private development.\textsuperscript{57}

\begin{footnotesize}
\textsuperscript{50} See id., 3 ROADLESS FEIS, AGENCY RESPONSES TO PUBLIC COMMENTS.
\textsuperscript{51} Id.
\textsuperscript{52} The "Shovel Brigade" stemmed from closure of the South Canyon Road in Elko County, Nevada, an access route to the Jarbridge Wilderness Area and a popular campground. The FS decided not to repair the road in order to protect a threatened bull trout population, and this led to very symbolic protests in Elko County and northwestern Montana, and eventually to the resignation of Humboldt-Toiyabe National Forest Supervisor Gloria Flora. See Jon Christensen, Nevadans Drive Out Forest Supervisor, HIGH COUNTRY NEWS, Nov. 22, 1999, at 3.
\textsuperscript{54} JOHN C. HENDEE & CHAD P. DAWSON, WILDERNESS MANAGEMENT: STEWARDSHIP AND PROTECTION OF RESOURCES AND VALUES 40 (3d ed. 2002).
\textsuperscript{55} Id. at 102–04.
\textsuperscript{56} See id. at 41; see also SUTTER, supra note 45, at 252–55.
\textsuperscript{57} See HENDEE & DAWSON, supra note 54, at 102–04.
\end{footnotesize}
The L-20 and U Regulations were administrative regulations implemented at the discretion of the Chief of the FS and the Secretary of Agriculture. Similar to today's debate, conservationists quickly learned how agency discretion can cut both ways, and it was often cutting into administratively protected wilderness areas. They thus fought for new wilderness legislation and their efforts paid off with enactment of The Wilderness Act in 1964. Unlike the administrative regulations, this Act made it clear that only by an act of Congress could an area be designated as wilderness.

The Wilderness Act included a congressional mandate that the FS inventory its land for possible wilderness designation. This led to the FS conducting its Roadless Area Review and Evaluation (RARE I) in the early 1970s. This evaluation was criticized on both substantive and procedural grounds and eventually gave way to another study. RARE II, as it was called, was completed in 1979 and its recommendations fall into three categories: (1) FS roadless lands for wilderness designation by Congress; (2) areas that were to be further studied by the agency; and (3) areas that should be released to nonwilderness, multiple use management. RARE II was also quite controversial. Conservationists complained that not enough roadless areas were recommended by the agency for wilderness designation.

California sued the FS over the adequacy of the RARE II process, successfully arguing that before an inventoried area could be released for development an Environmental Impact Statement (EIS) for each area would have to be prepared. There was also some question over how to legislatively proceed with the FS's wilderness recommendations: should wilderness be designated in a piecemeal and state-by-state fashion like it

60. 16 U.S.C. § 1132(b) (2000).
61. Id.
62. Similar to the pace of the roadless rulemaking process, some interest groups complained of the quick speed of the RARE process and argued that it was being unnecessarily rushed—but in this case conservationists were doing the complaining.
63. The final RARE II EIS (1979) called for wilderness designation of 624 areas totaling 15,008,838 acres (five million of these acres were on Alaska's Tongass National Forest), allocation to nonwilderness of 1981 areas totaling 36,151,558 acres, and further planning for 314 areas totaling 10,796,508 acres. HENDEE & DAWSON, supra note 54, at 136.
64. See H. Michael Anderson & Alliki Moncrief, America's Unprotected Wilderness, 76 DENV. U. L. REV. 413, 419–22 (1999); see also HENDEE & DAWSON, supra note 54, at 134–38.
had in the past or should these multiple areas be combined and voted on in one big omnibus bill? In retrospect, California's EIS challenge made certain that there would be no tidy ending to the RARE II process: conservationists wanted more wilderness and industry wanted more multiple use management, and no one seemed too excited about a RARE III. Compromise language in individual state wilderness bills proved to be the most popular route taken given this stalemate.

C. The Roadless Rule

1. Formation

Roadless lands, including those identified during RARE II, continued to cause controversy throughout the 1980s and 90s. Since RARE II was completed in 1979, roads had been constructed in an estimated 2.8 million acres of inventoried “roadless lands,” and approximately 34.3 million acres (out of 58.5 million acres of inventoried roadless areas considered in the Final EIS) had prescriptions allowing for road construction and reconstruction. Like the old growth issue, road building and various timber sales planned in roadless areas seemed to automatically trigger action from environmental groups and their attorneys. And, as discussed below, maintaining these roads by the

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66. HENDEE & DAWSON, supra note 54, at 138.
67. ALLIN, supra note 53, at 160–66. A RARE III has not been conducted.
70. The contradiction was not lost by the Ninth Circuit, which noted the “odd semantic twist” of including in “inventoried roadless areas” some areas with roads and found it “perhaps reminiscent of George Orwell’s ‘Newspeak,’ the name of the artificial language used for official communications in George Orwell’s novel Nineteen Eighty-Four, which is now often applied to corrupt English.” Kootenai Tribe of Idaho v. Veneman, 313 F. 3d 1094, 1105 (9th Cir. 2002).
72. A number of issues, such as old growth, road building, clearcutting, and below-cost timber sales, have continually mired the FS in conflict. One way to deal with these issues is to remove them from the debate. Similar to Dombeck’s pro-active move on road building, for example, he and former Chief Jack Ward Thomas support the idea of declaring old-growth off limits to logging in national forests, partially because it is a way to deal with the divisive conflicts surrounding this practice. See Mike Dombeck & Jack Ward Thomas, P-I Focus: Declare Harvest of Old-Growth Forests Off-Limits and Move On, SEATTLE POST-INTELLIGENCER, Aug. 24, 2004, available at http://seattlepi.nwsource.com/opinion/135891_oldgrowth24.html (last visited June 5, 2004).
agency was also incredibly expensive.\textsuperscript{73} For these and other reasons, in February of 1999, FS Chief Michael Dombeck issued a temporary suspension of new road construction.\textsuperscript{74} The moratorium prohibited new road construction in inventoried roadless areas for 18 months with exceptions for forests with recently revised forest management plans like the Northwest Forest Plan and Alaska's Tongass National Forest.\textsuperscript{75}

Perhaps intent on securing his place in conservation history, President Clinton made it clear that he wanted the moratorium made permanent. On October 13, 1999 (13 months before the Roadless FEIS was published by the FS), President Clinton remarked at the Reddish Knob Overlook in Virginia,

\begin{quote}
Today, we launch one of the largest land preservation efforts in America's history to protect these priceless, back-country lands. The Forest Service will prepare a detailed analysis of how best to preserve our forests' large roadless areas, and then present a formal proposal to do just that... Through this action, we will protect more than 40 million acres, 20 percent of the total forest land in America in the national forests—from activities, such as new road construction which would degrade the land.\textsuperscript{76}
\end{quote}

That same day, the President sent a memorandum to the Secretary of Agriculture prioritizing this issue. In it, the President states,

\begin{quote}
I have determined that it is in the best interest of our Nation, and of future generations, to provide strong and lasting protection for these forests, and I am directing you to initiate administrative proceedings to that end. Specifically, I direct the Forest Service to develop, and propose for public comment, regulations to provide
\end{quote}

\textsuperscript{73} See infra notes 101-103 and accompanying text.

\textsuperscript{74} Administration of the Forest Development Transportation System, Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, Interim Rule, 36 C.F.R. § 212; 64 Fed. Reg. 7290 (Feb. 12, 1999).

\textsuperscript{75} "As a result of the considerable science and public involvement in formulating these plans and considering the disruption to management that could result by applying suspensions to these forests, the Department has decided to retain the exemption[s]." \textit{Id.} at 7300. See Northwest Forest Plan Accomplishments, at http://www.fs.fed.us/r6/nwfp.htm (last visited June 5, 2004); see also Tongass Plan Documents, at http://www.fs.fed.us/r10/tongass/management\%20news/tlmp/tlmp.shtml (last visited June 5, 2004).

appropriate long-term protection for most or all of these currently inventoried "roadless" areas, and to determine whether such protection is warranted for any smaller "roadless" areas not yet inventoried.\(^7\)

2. The Roadless Area Conservation EIS Process

Following this lead, a notice of intent to begin the rulemaking process and prepare an EIS was published October 19, 1999.\(^7\) The "scoping" phase of the rule followed, with more than 517,000 responses and 16,000 people attending 187 scoping meetings. This input helped the agency determine what issues needed to be analyzed in the draft EIS (DEIS).\(^7\) The process was expedited by setting up the EIS and analysis team under the "Incident Command System," a system used by the agency to manage large wildfires.\(^8\) This design allowed policy language and decisions to be quickly reviewed up the agency hierarchy.

The proposed roadless rule and DEIS were released for public review and comment on May 10, 2000. Four alternatives were considered by the agency.\(^8\) Alternative 1, the no action and no prohibitions alternative, would essentially handle future proposals for road (re)construction on a case-by-case basis at the project level going through the National Environmental Policy Act (NEPA) process.\(^8\) Alternative 2 would have prohibited road (re)construction in inventoried roadless areas, but without restrictions on timber harvesting.\(^8\) Alternative 3 prohibited road (re)construction in inventoried areas and prohibited timber harvesting except for stewardship purposes, like improving threatened and endangered species habitat and reducing the risk of uncharacteristically intense fire.\(^8\) Finally, Alternative 4 would have prohibited road (re)construction and all commodity and stewardship timber cutting in inventoried areas, except when necessary to protect threatened or endangered species.\(^8\) The public was asked to comment on these alternatives and other issues. More than 430 meetings were held

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79. See 1 ROADLESS FEIS, supra note 49.
80. DOMBECK ET AL., supra note 69, at 111.
81. See National Environmental Protection Act (NEPA), 42 U.S.C. § 4332(C)(3) (2000) (requiring "alternatives to the proposed action").
82. 1 ROADLESS FEIS, supra note 49, at 2-6.
83. Id.
84. Id. at 2-7.
85. Id. at 2-8.
by the agency, 230 of them to share information on the DEIS and proposed rule, and more than 200 additional meetings to hear public comment.\textsuperscript{86} These meetings drew more than 23,000 people nationwide.\textsuperscript{87} Written comments on the proposed rule were also substantial. By the end of the comment period on July 17, about 1,155,000 comments were sent to the agency, including around one million postcards and form letters, 60,000 original letters, 90,000 email messages, and several thousand faxes.\textsuperscript{88}

Alternative 3, with selected social and economic mitigations, was chosen by the agency as its preferred alternative. It did so noting that NEPA requires an agency to choose an environmentally preferred alternative, interpreted "to mean the alternative that would cause the least damage to the biological and physical components of the environment, and, which best protects, preserves, and enhances historic, cultural, and natural resources."\textsuperscript{89} This alternative prohibits road (re)construction and timber harvesting in inventoried roadless areas, except for stewardship purposes. Various exceptions and mitigations include when a road is needed (1) to protect public health and safety (in cases of an imminent threat of flood, fire, or other catastrophic event), (2) to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and (3) to access a reserved or outstanding right as provided by statute or treaty.\textsuperscript{90} This decision would protect 58.5 million acres—31 percent of FS land, and 2 percent of the total U.S. land base—from road building and most timber cutting.\textsuperscript{91}

The FS partially framed the original roadless rule with talk of administrative leadership and the proper scale of decision making.\textsuperscript{92} It argued in its record of decision (ROD) defending the roadless rule that a national rule was needed to address a prolonged national conflict.\textsuperscript{93} First, it cast the roadless rule as a national issue, arguing that FS officials "have the responsibility to consider the 'whole picture' regarding the management of the National Forest System" and that "[l]ocal land

\textsuperscript{86} Id. at 1-7.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Roadless Rule, supra note 71, at 3263 (referring to Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981)).
\textsuperscript{90} 1 ROADLESS FEIS, supra note 49, at ES-9.
\textsuperscript{91} Id. at ES-1.
\textsuperscript{92} Roadless Rule, supra note 71, at 3246.
\textsuperscript{93} Id. The Record of Decision, required by Council on Environmental Quality regulations (40 C.F.R. § 1505.2 (2002)), provides the reasons and logic for adopting rules.
management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape."94 It also portrayed the rule as the best way to resolve or manage this intractable conflict given the large number of administrative appeals and lawsuits filed over the issue and the extensive amount of congressional debate it has generated over the years.95 This, the agency said,

illustrates the need for national direction and resolution and the importance many Americans attach to the remaining inventoried roadless areas....These disputes are costly in terms of both fiscal resources and agency relationships with communities of place and communities of interest. Based on these factors, the agency decided that the best means to reduce this conflict is through a national level rule.96

In speaking about the partially roadless Yaak Valley in northwest Montana, and about the future of our national forests in general, former FS Chief Dombeck believes that they boil down to values and vision.97 While discussions over wild places, old growth, and the like are typically cloaked in thick EISs "that read as though a biologist were mimicking a patent lawyer," at their core, these issues are over values.98 As Dombeck sees it, the leadership challenge is "to get beyond the controversy du jour and ask, "What is it society will need from—value most about—the national forests in fifty years?"99 The Yaak, and other places like it, he says, "are filled with important value-laden issues that I hope we can respond to with vision."100

It is particularly useful to understand the roadless rule from a fiscal standpoint as well. At the time of the rule's publication, the FS faced a backlog of about $8.4 billion in deferred maintenance and reconstruction of roads in its transportation system.101 The FS also receives less than 20 percent of the funds needed annually to maintain the existing road infrastructure.102 Furthermore, due to factors such as

94. Roadless Rule, supra note 71, at 3246.
95. Id.
96. Id.
98. Id.
99. Id.
100. Id. at 1-2.
101. Roadless Rule, supra note 71, at 3245.
102. Id. at 3246.
location, terrain, planning requirements, appeals, lawsuits, and other factors, development activities in roadless areas often cost more to plan and implement than on other FS lands.\footnote{103} These fiscal considerations were cited by the FS in its defense of the roadless rule. The "fiscal frame" is an important one because it shifts responsibility to the FS in order to manage its "own house" or puts the onus on Congress to provide appropriate funding. In other words, the FS is providing leadership by responsibly managing its budget and priorities. Seen in this light, the FS was simply doing what other agencies do when legislatures fail to give them the appropriations they need: they make priorities and choices and look for places to save money.

3. Political and Legal Challenges

The rule caused a great deal of controversy and ended up in litigation.\footnote{104} In \textit{Kootenai Tribe of Idaho v. Veneman}, the Idaho District Court found that the FS provided inadequate information during the scoping process and failed to provide the public with a meaningful opportunity to comment on the rule because of inadequate identification of the inventoried roadless areas (and statewide maps were not made available until after the comment period closed).\footnote{105} The court found fault with the public comment period in general, concluding that "the comment period was grossly inadequate and thus deprived the public of any meaningful dialogue or input into the process—an obvious violation of NEPA."\footnote{106} The court also found that the FS did not consider an adequate range of alternatives in its DEIS and failed to analyze possible cumulative impacts of the alternatives it did study.\footnote{107} Roughly a month later, in \textit{State of Idaho v. United States Forest Service}, the Idaho District Court granted a preliminary injunction to prevent implementation of the rule (and a

\begin{itemize}
  \item 103. \textit{Id.}
  \item 106. \textit{Id. at 1247.}
  \item 107. \textit{Id. at 1244, 1247.}
\end{itemize}
portion of a related agency planning rule), finding that the FS failed to take the sort of "hard look"\textsuperscript{108} required by NEPA.\textsuperscript{109}

Many opponents of the rule also argued that road-related decisions should be made through the regular forest planning process. This way, FS professionals could make these important and often site-specific decisions. The Society of American Foresters, for example, urged Secretary Veneman to require FS line officers to make decisions about roadless areas at the local level: "We believe modifying the rule and addressing its flaws through a localized planning process is preferable to endless litigation, and allowing courts to make decisions that natural resource professionals ought to make."\textsuperscript{110}

The Bush administration's initial approach to the roadless rule and this legal challenge was threefold. First, upon taking office, the President's Chief of Staff, Andrew Card, issued a memo that essentially postponed for 60 days most regulations that had been published in the \textit{Federal Register} but had not yet taken effect, unless a department head in the administration had reviewed and approved them.\textsuperscript{111} The "Card Memorandum" was a way in which the Bush administration could review the flurry of environmental and other rules and regulations promulgated at the end of President Clinton's term (late-term activity that is common in other presidential administrations as well).

Second, while the \textit{Kootenai} case was pending before the Ninth Circuit, the FS went back into rulemaking mode by having another round of public comment in order to study whether or not to amend the published roadless rule.\textsuperscript{112} This time, the FS asked the public in an advanced notice of proposed rulemaking (ANPR) to comment on ten questions related to "key principles" of roadless area management.\textsuperscript{113} Regarding "informed decision making," for example, the public was asked, "what is the appropriate role of local forest planning as required

\textsuperscript{108} See \textit{Muckleshoot Indian Tribe v. U.S. Forest Serv.}, 177 F.3d 800, 814 (9th Cir. 1999); \textit{Robertson v. Methow Valley Citizens Council}, 490 U.S. 332, 350 (1989).

\textsuperscript{109} \textit{Idaho v. U.S. Forest Serv.}, No. CV01-11-N-EJL, 2001 U.S. Dist. LEXIS 21990, 5 (D. Idaho 2001). Judge Edward C. Lodge found that "there is a substantial possibility that the Roadless Rule will result in irreparable harm to the National Forests," and that "[a] band-aid approach to something this controversial may mask or obscure the symptoms for political purposes but does not address the 'hard look' analysis for a cure as required by NEPA...." \textit{Id.} at 7.

\textsuperscript{110} Letter from William H. Banzhaf, Executive Vice President, Society of American Foresters, to The Honorable Ann Veneman, Secretary of Agriculture (Apr. 27, 2001) (on file with author). This is a curious argument, for projects implementing forest plans have been especially susceptible to endless litigation and judicial management.

\textsuperscript{111} \textit{BALDWIN}, supra note 104, at 12.


\textsuperscript{113} 66 Fed. Reg. 35,918 (July 10, 2001).
by NFMA in evaluating protection and management of inventoried roadless areas?" The public was also asked to comment on the "best way for the Forest Service to work with the variety of States, tribes, local communities, other organizations, and individuals in a collaborative manner to ensure that concerns about roadless values are heard and addressed through a fair and open process." Third, following the appeal of the Idaho case to the Ninth Circuit, and foreshadowing what would become a dominant environmental strategy of the Bush White House, the new administration chose not to defend the rule in court. Despite the administration's refusal to defend the rule, the Ninth Circuit granted intervenor status to several environmental groups and reversed the district court, stating that the roadless rulemaking and EIS processes were not inadequate. Among other findings, the court ruled that the FS's scoping and public comment phases were adequate, noting the rather limited legal duties imposed on an agency during the scoping period and the extensive public participation that took place throughout the process. The court stated that "NEPA requires that agencies give a hard look to environmental impact of proposed major actions, but not necessarily an interminably long look." The court paid particular attention to the NEPA claims made by plaintiffs. For one, it ruled that the DEIS and FEIS analyzed an adequate range of alternatives, and that this range must be understood in light of the purposes for which NEPA was written by Congress. The court ruled that since the roadless rule is entirely consistent with the policy objectives of NEPA, as well as with the Forest Service's own mission, "it would turn NEPA on its head to interpret the statute to require that the Forest Service conduct in-depth analyses of

114. Id. at 35,919.
115. Id. Other questions related to how best to protect forests, communities, and access to property and how best to designate inventoried roadless areas, including possible wilderness designation. Value-centered questions were also asked, such as, "How can the Forest Service work effectively with individuals and groups with strongly competing views, values, and beliefs in evaluating and managing public lands and resources, recognizing that the agency cannot meet all of the desires of all of the parties?" Id. at 35,920.
117. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1095 (9th Cir. 2002).
118. Id. at 1116. See 40 C.F.R. § 1501.7 (2002).
119. Kootenai Tribe, 313 F.3d at 1119.
120. Id. at 1120.
environmentally damaging alternatives that are inconsistent with the Forest Service's conservation policy objectives."\textsuperscript{121}

4. The Forest Roads Working Group

While the \textit{Idaho} case and other litigation was going on, a collection of conservationists, hunters, and fishers and those representing the forest products and outdoor recreation industries came together to form the Forest Roads Working Group (FRWG). While not exactly the broadest based of coalitions,\textsuperscript{122} the ad hoc group responded to the stated principles and proposed questions asked in the FS's ANPR and submitted comments focused on how the agency might move forward with the rule.\textsuperscript{122} As a result, and in consultation with FS Chief Dale Bosworth, the FRWG "pledged to initiate a good-faith dialogue among interested stakeholders in an effort to resolve the highly polarized debate over the [roadless rule]."\textsuperscript{124} The FRWG asked the Meridian Institute, a mediation group, to conduct the dialogue. They did so using various strategies, including a two-day multi-stakeholder dialogue, which was attended by over 40 people representing different perspectives. The result, according to the group, was "develop[ing] a deeper understanding of the underlying interests and concerns of key stakeholder groups, and identif[ying] key issues...that require additional data gathering and further in-depth discussion to resolve, [and finding] some overarching areas of common ground."\textsuperscript{125}

The FRWG made three important recommendations. First, it expressed support for the original roadless rule "because of its nationwide applicability, suitable management structure, and solid legal foundation."\textsuperscript{126} Second, they recommended the consideration of "future measures that might strengthen the rule to address important issues such as forest health maintenance and management of recreational vehicle impacts."\textsuperscript{127} Finally, the group emphasized "the need for a formal, ongoing deliberative consultation process during implementation of the rule over the next several years to consider whether and, if

\begin{itemize}
\item \textsuperscript{121} \textit{Id.} at 1122.
\item \textsuperscript{123} \textsc{Forest Roads Working Group, Recommendations for Protection of Roadless Areas} (Mar. 26, 2003), \textit{at} http://www2.merid.org/roadless/ (last visited June 1, 2004).
\item \textsuperscript{124} \textit{Id.} at 3.
\item \textsuperscript{125} \textit{Id.} at 1.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 2.
\end{itemize}
so, what improvements should be made to the rule." While proposing to leave the original rule intact, the group also recommended that a multi-stakeholder advisory committee be established for the purpose of guiding future implementation and possible improvements to the rule.

From a process standpoint, the FRWG is noteworthy for several reasons. First, note the beliefs on which the group formed: "it is possible to protect inventoried roadless areas in a manner acceptable to a diverse array of interested stakeholders and that the best way to work toward that solution is to engage the parties in discussion." The group also points to the various litigation and unresolved nature of the conflict, despite it being managed through one of the most extensive federal rulemaking processes in history:

The FRWG is convinced—especially after conducting its stakeholder dialogue—that traditional rulemaking processes, even with the benefit of exhaustive hearings and NEPA documentation, are not always best suited to resolving these issues. While they are an important way to demonstrate leadership on nationally vexing issues, rulemakings sometimes lack the indispensable ingredient of informed dialogue and debate among stakeholders.

In this spirit, the FRWG also recommended that the FS refrain from making adjustments to the original rule without more dialogue and stakeholder participation.

The working group offers a positive example of how to move forward, though it is not without its risks and weaknesses. David New, an FRWG participant representing Boise Cascade, sees these collaborative-type approaches as a promising way to get down to fundamental issues of values and trade-offs and believes it can be more productive than dealing with conflicts through the "American sport of litigation." Others are more critical, however, in how they believe the working group was used as a way to provide political cover. They question why the pro-roadless recommendations made by the group are not being implemented and contend that, if these recommendations were more critical and unsupportive of the rule, they would have been

128. Id.
129. Id. at 1.
130. Id. at 14.
131. Id. at 11.
132. See discussion infra Part V.B.4.
133. Telephone interview with David New, Vice President, Timberland Resources, Boise Cascade (June 13, 2003).
embraced by the Bush administration and Chief Bosworth. This fear of collaborative groups being exploited and selectively used by more powerful political interests is not uncommon.

5. Post-Rule Congressional, Executive, and Judicial Responses

The rule also put the machinery of all three branches of government into gear. In June 2003, bills were introduced into the Senate and House that would provide lasting protection for inventoried roadless areas. Both would essentially codify in statute the roadless rule of January 12, 2001.

The Bush team was also busy in June of 2001. The administration first announced that it would not renew a temporary rule allowing road construction. But the following week the administration changed its tone by proposing to exempt Alaska’s Tongass and Chugach National Forests (containing one-quarter of inventoried roadless land) from the roadless rule while also allowing for a number of exemptions to the rule if requested by state governors. Whether or not to include the


135. Undersecretary of Agriculture Mark Rey told reporters on June 4, 2003, that a temporary rule allowing some exceptions to the roadless rule would not be renewed when it expired on June 14, 2003, effectively reinstating the original roadless rule. See Mathew Daly, Bush Seeks Roadless Revisions, MISSOULIAN, June 10, 2003, at A1, A2.


137. In an arguably misleading news release—“USDA Retains National Forests Roadless Area Conservation Rule”—Agriculture Secretary Ann Veneman explained how the proposed changes are consistent with the five principles announced in the ANPR and the types of exemptions that can be requested by governors, including protecting human health and safety, reducing hazardous fuels, restoring essential wildlife habitats, and providing reasonable access to private property. News Release No. 0200.03, supra note 136. Undersecretary of Agriculture Mark Rey characterized the proposal as “an opportunity to engage the states as partners to find where improvements to the rule can be made.” Tom Kenworthy, Administration to Waive Forest Development Limit, USA TODAY, June 10, 2003, at 8A. Others saw it quite differently, arguing that these exemptions are already provided in the 2001 rule, and that the state-based approach allows unsympathetic governors to basically gut the protections exemption by exemption. Recall that a number of states challenged the rule in court and could be expected to take full advantage of the exemptions option. Furthermore, the hazardous fuels exemption, as we have seen in the debate over fire and forest health in the West, could easily be used to defend large-scale exemptions.
Tongass in the roadless rule's provisions has proven to be one of the most controversial and complex parts of the process. The Alaska decision stemmed from the administration's settlement of a lawsuit brought by the state of Alaska challenging the rule, what conservationists refer to as the Bush "sue and settle" strategy.

The Bush administration then took the state-based exemption proposal a step further. As this article goes to press, the Department of Agriculture has proposed replacing the original roadless rule with a "petitioning process" providing governors an opportunity to seek establishment of management requirements for roadless areas within their states. The proposed change would be available to governors for 18 months following the final rule, a timeframe seen as "sufficient for States to collaborate effectively with local governments, stakeholders and other interested parties to develop proposals that consider a full range of public input." The petition would then be evaluated, and if accepted by the Secretary of Agriculture, the FS "would initiate subsequent State-specific rulemaking for the management of inventoried roadless areas in cooperation with the State involved in the petitioning process, and in consultation with stakeholders and experts." It is also at this stage where the FS would comply with NEPA and consider the environmental effects of these state-based rulemakings.


Letter from Mike Anderson, The Wilderness Society, to Interested Persons (June 11, 2003) (on file with author). According to Anderson, "the Administration is simply using the State of Alaska settlement as legal cover for what is a patently political deal to benefit the timber industry...." Id. The Bush administration, says Anderson, "schemed to defeat the Rule by failing to defend it in court." Id.


Id. at 42,637.

Id.

Id. at 42,639.
a national advisory committee to provide expert consultation on the implementation of the proposed rule is also being examined. Comprised of state and local governmental representatives and experts in fish and wildlife biology and management, forest management, outdoor recreation, and other disciplines, this advisory committee would provide input on such things as the Secretary’s response to a petition, information needs, and NEPA documentation.\footnote{144}

This significant departure from the original roadless rule (and public lands management in general) is being advocated as a way to partner with (primarily Western) state governments and deal with "the continued controversy, policy concerns, and legal uncertainty" surrounding its implementation.\footnote{145} As stated by Agriculture Secretary Ann Veneman, "The prognosis for the 2001 rule is continuing litigation lasting perhaps many years in several judicial districts and in at least four separate circuit courts of appeal."\footnote{146} "The prospect of endless lawsuits represents neither progress, nor certainty for communities," she says.\footnote{147} While the 2001 rule emphasized the need to look at the national-level picture regarding roadless area management, the proposed change accentuates the importance of the local level: "Collaborating and cooperating with States on the long-term strategy for the management of [roadless areas] would allow for the recognition of local situations and resolution of unique resource management challenges within a specific State."\footnote{148}

This proposal has been met with a predictable amount of conflict and controversy. Some western governors have embraced it, while others see it as an outright abdication of federal responsibility.\footnote{149}

\begin{itemize}
\item \footnote{144} Id. at 42,638.
\item \footnote{145} Id. at 42,637.
\item \footnote{146} USDA Transcript No. 0287.04, Transcript of Remarks by Agriculture Secretary Ann M. Veneman at the announcement of the National Forests Proposed Roadless Rule with Governor Dirk Kempthorne and Senator Larry Craig (July 12, 2004), available at http://www.usda.gov/Newsroom/0287.04.html (last visited Aug. 8, 2004).
\item \footnote{148} 69 Fed. Reg. 42,638 (July 16, 2004).
\item \footnote{149} The proposal was hailed as a welcome message by Idaho Governor Dirk Kempthorne (R) and Montana Governor Judy Martz (R). See Sherry Devlin, \textit{State-by-State Roadless Plans Unveiled}, MISSOULIAN, July 13, 2004, at A1. But New Mexico Governor Bill Richardson (D) called the plan "an abdication of federal responsibility" and said he will petition to protect "every single inch" of roadless areas in his state. See Juliet Eilperin, \textit{Roadless Rules for Forests Set Aside}, WASH. POST, July 13, 2004, at A1. Oregon Governor Ted Kulongoski (D) also called the proposal an "abdication of...responsibility" and a way for the FS and Congress to "circumvent what I think is their responsibility [to] manage these
Environmentalists have also railed against the proposal, of course, for not only does it potentially open up millions of acres to possible development, but it also sets a precedent for state control over public lands management. The proposal is also an excellent example of how the executive branch can use rulemaking to its political advantage. If implemented, it provides the executive significant powers to judge the acceptability of state petitions while also giving it a potential way out of making politically risky decisions.

At the time of this publication, the rule is in a state of legal limbo and a district court decision on the rule sits before the Tenth Circuit. Unlike the Ninth Circuit's interpretation, the Wyoming District Court ruled that the original roadless rule was illegal on procedural and substantive grounds. The Wyoming Court was quite critical of the FS's rulemaking process that culminated in the 2001 final rule. Judge Brimmer's opinion focused on its inadequate scoping and rushed and predetermined schedule and the agency's poor job of assessing a narrow range of alternatives in its EIS. Judge Brimmer was also critical of the role President Clinton played in moving the rule forward, saying,

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 administrative process and adopted by the...
Forest Service for the political capital of the Clinton administration without taking the "hard look" that NEPA required.\footnote{154}

The court ruled that the roadless rule amounted to a de facto designation of wilderness and a usurpation of congressional power and is thus in violation of the Wilderness Act.\footnote{155} First, the court argued that the rule "would remove Congress—the only body with the sole power to designate wilderness areas—from the process."\footnote{156} It saw no difference between a roadless forest and the definition of wilderness as provided in the Wilderness Act, nor did it see any meaningful differences in the types of permitted uses allowed in each.\footnote{157} The court reasoned that most, if not all, of the recommended roadless areas were based on the RARE II inventories, which were designed to recommend wilderness areas to Congress, and that this is further evidence of the FS usurping congressional authority.\footnote{158} In short, Judge Brimmer ruled that "[t]o allow the Secretary of Agriculture and the Forest Service to establish their own system of de facto administrative wilderness through administrative rulemaking negates the system of wilderness designation established by Congress."\footnote{159}

To summarize, the question of whether or not to develop or protect roadless areas managed by the FS has lingered since the mid-1920s. The FS administratively protected some areas from road construction; Congress added formal wilderness designation to others. In the meantime, nearly 59 million acres not designated as wilderness nor fully developed caused the FS a great deal of grief in terms of finances, appeals, and litigation. President Clinton and Chief Dombeck wanted to protect these areas for various reasons and they did so using the rulemaking and NEPA process. Those supporting the rule cite the record-breaking amount of public comment that went into the rulemaking process and that most of this comment supported the rule or wanted it strengthened. Critics, however, charge that the decision was predetermined and in contravention of NEPA, NFMA, and the Wilderness Act, among other statutes. Subsequently, the Bush administration re-examined the roadless rule by putting it through additional rulemaking processes. A number of serious changes to the original rule have been proposed. Also important to note is that most of

\footnote{154. \textit{id.} at 1232.}
\footnote{155. \textit{id.} at 1236.}
\footnote{156. \textit{id.} at 1235.}
\footnote{157. \textit{id.} at 1236.}
\footnote{158. \textit{id.}}
\footnote{159. \textit{id.}}
the substantive debate thus far has taken place in the administrative and judicial arenas, not within Congress.

From a political standpoint, it is difficult to distinguish between support for the substance of the rule and the process used to promulgate it. That is, we must ask whether or not those in favor of the rule are placing its pro-roadless outcome above the process by which it was crafted, and whether or not opponents of the rule are complaining of process when it is really the substance of the rule they do not like.

IV. POLITICAL CONFLICT AND ADMINISTRATIVE RULEMAKING: A PRIMER

The vagueness, ambiguity, and sometimes contradictory or paradoxical nature of environmental statutes leads to many important policy and management decisions made at the administrative level through the rulemaking process. Rulemaking can be seen as a type of compromise or bridge between legislative and administrative control. In theory, unelected bureaucrats can be held accountable through the rulemaking process. How strong a compromise and how well it performs this role of bridge is of great importance to public land policy and the conflict it generates.

A. Reasons for and Elements of Rulemaking

The political importance of the rulemaking process should not be underestimated. One study finds that a large majority of interest groups responding to a survey participate in the rulemaking process (roughly 80 percent) and rate their participation as important or more important than lobbying Congress (75.6 percent), grassroots work (65.8 percent), political contributions (63.5 percent), and litigation (74.7 percent).\textsuperscript{160} The importance of rulemaking to natural resource policy is unmistakable.\textsuperscript{161} By design or default, rulemaking has become an

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\textsuperscript{161} See generally George Cameron Coggins et al., Federal Public Land and Resources Law (5th ed. 2002). The authors note, Federal land management agencies are frequently caught in the middle of modern federal land use controversies. Historical missions and practices have been severely eroded by new statutes, and new missions have been charted, but congressional directives often have held out little concrete guidance in concrete situations, and procedural requisites have proliferated. Interests over a wide spectrum forcibly argue that their conception of the public interest should prevail in the circumstances, and
increasingly important venue for managing a number of high profile conflicts over public lands and wildlife management.

Administrative rules play a fundamental role in modern democracies.\textsuperscript{162} Rulemaking, says public administration professor Cornelius Kerwin, is a "mechanism for refining law and policy" and "is a direct, if not always desired, consequence of legislation."\textsuperscript{163} A "rule," according to the Administrative Procedures Act of 1946, "means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."\textsuperscript{164} Rules are law; they carry the same force as congressional legislation, presidential executive orders, and judicial decisions.\textsuperscript{165} The vacuum left by Congress in writing vague or ambiguous statutes is filled by an agency's rulemaking responsibility to "implement, interpret or prescribe law or policy."\textsuperscript{166} Implementation is rather non-controversial and happens when a law or policy has already been fully developed with substantive detail provided by Congress or the executive.\textsuperscript{167} Interpretive rules refer to agency explanations for how they interpret existing law.\textsuperscript{168} Agencies prescribe law when they write "legislative" or "substantive" rules that essentially amount to new law.\textsuperscript{169}

Information, participation, and accountability are three important elements of rulemaking as defined in the Administrative Procedures Act.\textsuperscript{170} First, information must be provided to the public in the form of a notice that is published in the \textit{Federal Register}.\textsuperscript{171} Generally, the agency tells the public what it is proposing to do, under what authority and statute it is acting, and the duration of the rulemaking period. Second, the participation requirement mandates that agencies give the public "an opportunity to participate in the rule making through all sides are willing to resort to litigation or political processes if dissatisfied with decisional results.

Id. at 6.

162. Professor Kenneth Culp Davis has called rulemaking "one of the greatest inventions of modern government." \textsc{Kenneth Culp Davis, Administrative Law Treatise} 283 (1970).

163. \textsc{Cornelius M. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy} 22 (2d ed. 1999) [hereinafter Kerwin 2d ed.].


166. 5 U.S.C. § 551(4).


168. Id.

169. Id. at 23.

170. For a discussion of these core elements of rulemaking, how they have changed since 1946, and how they differ in informal and formal rulemaking, see id. ch. 2.

submission of written data, views, or arguments with or without opportunity for oral presentation."  

This provision can be seen as a minimum standard for public participation in rulemaking, for there is nothing in the Act forbidding agencies from doing more. Finally, accountability is an important element of rulemaking and is most explicit in the availability of judicial review. The reviewing court can hold unlawful and set aside an agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative rules, according to such a view, control agencies and thus promote accountability. Much has changed in rulemaking since 1946, and most rulemaking goes beyond the "minimalist model of the APA." But the three core elements of rulemaking contained in the APA "have remained dominant themes throughout the past thirty years of virtually constant change."

Rulemaking happens for a number of reasons. In the natural resources arena, it is simply impossible for Congress, when drafting legislation, to answer every possible management question that may arise, so agencies fill in the gaps with rules. Institutional self-interest provides another explanation for the popularity of rulemaking. Congress, the executive, judiciary, and interest groups, among other actors, all have something to gain from the rulemaking process. For example, congressional members can avoid making time-consuming controversial decisions, so they can engage in other activities. The White House has also learned how to influence the process and use rulemaking to its benefit, sometimes avoiding negotiations with Congress. Judges are

172. See id. § 553(c). Ironically enough, it appears as though Congress intentionally omitted an explanation for the public participation requirement.
174. Kerwin summarizes as follows:
Rules set limits on the authority of public officials in all areas of their work, identifying what they can know, how they can learn it, when they must act, what they must do, when they must do it, and actions they can take against those who fail to comply. A violation of rules puts the bureaucrat no less at risk than the private scofflaw. Fears of unfettered discretion in the hands of willful or ignorant bureaucrats are largely unfounded in a system in which citizens can trust that rulemaking will occur subsequent to any legislative enactment and set effective and reasonable limits on the use of otherwise discretionary power.
175. Id. at 56.
176. Id. at 57.
177. It is important to note that the APA exempts federal lands decision making from rulemaking procedures, but public land management agencies still regularly invoke the process. See 5 U.S.C. § 553(a)(2) (2000).
able to evaluate rules from a substantive and procedural standpoint and are thus able to influence policy when they choose to do so. And finally, it gives interest groups access and leverage in agency decision making, and these decisions are often more specific than those found in legislation. Rules are also information-intensive. This appeals to interest groups who have an opportunity to provide information during the process.

Politics and venue shopping provide another explanation for the role of rulemaking in government. Sometimes political actors try to move an issue to the rulemaking venue when other venues prove less favorable. Take rangeland reform as an example. In 1994 President Clinton and Secretary of the Interior Bruce Babbitt moved it to the administrative arena after failing to get legislation passed on numerous occasions. "Rangeland Reform '94" thus consisted of a package of promulgated regulations creating resource advisory councils (RACs) while also aiming to give BLM managers more strength in implementing FLPMA, among other things. The Clinton administration took this approach to circumvent vehement congressional-committee opposition.

B. Questions and Challenges Posed by Rulemaking

1. Tension between Rule Precision and Flexibility

The fundamental challenge of designing rules, be they legislative or administrative, is the tension between precision and flexibility. There are advantages and disadvantages of each. As political scientist Deborah Stone deftly illustrates, "The failings of precision are claimed as the virtues of vagueness." She goes on to show, for example, that precise rules may ensure fairness by treating likes alike, while flexible rules may ensure fairness by allowing sensitivity to contextual and individual differences. Precise rules, moreover, may eliminate arbitrariness and discrimination in agency behavior, but flexible rules allow agencies to respond creatively to new and particular situations. Ambiguity, says Stone, is a "wonderful refuge," for "[n]othing lubricates difficult

180. See generally Charles Davis, Politics and Public Rangeland Policy, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 74 (Charles Davis ed., 1997).
183. Id. at 289.
bargaining and hides real conflicts so well.”\textsuperscript{184} But this does not mean that all ambiguity is bad. It does mean, however, that we might as well give up searching for unattainable ideals like writing the perfectly precise or flexible rule or a formulaic optimum balance between the two. The challenge of all rulemaking is to continually work our way through these tensions and tradeoffs.\textsuperscript{185}

2. The Role of the Public in Rulemaking

There are some serious challenges posed by rulemaking as well. The “informal” rulemaking of the APA is referred to as “notice-and-comment rulemaking” due to its public comment requirements. But all too often agencies see public participation as more of an obstacle to be overcome than a vital part of their decision-making processes. A bureaucratic model of “decide, announce, and defend” often seems to dominate as agencies make the important decision internally, announce it to the public in the language of a proposal, and then defend the decision against criticism.\textsuperscript{186} This narrow type of participation often leads to problems because the public essentially reacts to agency-defined problems and solutions and does not get a chance to craft and define them at the outset.

The role of public participation in writing the roadless rule is a central theme in the debate surrounding the rule. Proponents of the rule are quick to point out the record-breaking number of comments generated by the proposal. Chris Wood, former senior policy and communication advisor to FS Chief Michael Dombeck, accentuates the democratic nature of the rule:

I believe the roadless rule, a bureaucratic endeavor, as all federal rule makings are, represented the best of democracy in action. A record-breaking six hundred local meetings and 2.2 million postcards, letters, e-mails, and faxes—an astonishing 95 percent supporting stronger protection of roadless areas—serve as testament. Instead of preparing canned and trite responses that neatly fitted a preordained conclusion, the Forest Service allowed public sentiment to shape the outcome and content of the rule—affirming the

\textsuperscript{184} Id. at 295.
\textsuperscript{185} See generally CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996) (theorizing rules and the legal context in which they are made).
\textsuperscript{186} John S. Applegate, Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking, 73 IND. L.J. 903, 908 (1998) (reviewing the use of citizen advisory boards in agency rulemaking and contrasting their use to interest group pluralism and regulatory negotiation).
value of public involvement in management of public lands. Never before, and likely never again, will a federal proposal receive such widespread public support.\textsuperscript{187}

Chief Dombeck echoes this claim and offers further evidence that public comment in rulemaking matters. The 18-month road building moratorium issued by Dombeck in 1999 did not include the Tongass National Forest (nor those Pacific Northwest forests amended by the Northwest Forest Plan). But he says that the Tongass was included in the 2001 rule because of the amount of public comment supporting its inclusion. While public comment was not the only factor, Dombeck contends that the rule was strengthened as a result of the agency listening to the public at the scoping stage.\textsuperscript{188} Mike Francis of the Wilderness Society makes a similar argument and contends that the rule was not predetermined as critics charge.\textsuperscript{189} President Clinton got the ball moving with the roadless rule, Francis says, but would have backed off if public comment were not so strongly in favor of roadless protection.\textsuperscript{190}

Other proponents of the rule are also quick to reference this precedent participation. Earthjustice, like dozens of other environmental groups, claims that “[t]he rule was the direct result of a tremendous outpouring of public support” and emphasizes the record-breaking number of comments made through the process.\textsuperscript{191} Congressional supporters of the rule and the process used to write it also made similar claims. Perhaps the most unlikely defense came from Montana’s Attorney General, Mike McGrath, who saw the roadless rule as “the product of public rulemaking at its most effective.”\textsuperscript{192} Going against the position of Governor Judy Martz, McGrath filed documents in the Ninth Circuit case stressing the “exemplary” participation in the EIS process. He noted that 24 public meetings were held in Montana, including in the smallest rural communities, and that more than 17,000 Montana citizens made comments, 67 percent of which “favored even stronger protections for roadless areas than those proposed in the Draft EIS” and that “[n]ationally 96 percent of commenters favored stronger


\textsuperscript{188}. Telephone Interview with Michael Dombeck, former U.S. FS Chief, currently Pioneer Professor of Global Environmental Management at the University of Wisconsin at Stevens Point (June 25, 2003).

\textsuperscript{189}. Telephone Interview with Mike Francis, National Forest Program Director, The Wilderness Society (June 26, 2003).

\textsuperscript{190}. \textit{Id.}


\textsuperscript{192}. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1116 n.19 (9th Cir. 2002).
protections."\textsuperscript{193} Of course, the FS (under Dombeck) also emphasized this extensive public involvement in its defense of the rule.\textsuperscript{194} A case can be made that the roadless rulemaking process is modern democracy at work: an elected president (who once pledged to make government "the greenest in history")\textsuperscript{195} set in motion a participatory rulemaking process and the responsible agency chose an alternative and a rule that falls within its congressionally-written mission and mandate. Furthermore, even though rulemaking is not a plebiscite, the vast majority of those choosing to participate in the process preferred the rule.

But opponents make the argument—one that is often made by the environmental community with other issues—that the rule was predetermined and an example of the "decide, announce, defend" model of decision making. This critique runs throughout the opposition's case. Senator Mark Dayton (D-MN), for example, defends the "democratic ideal" found in the NFMA planning process and contends that "the 'roadless ban' destroys this democratic process."\textsuperscript{196} He says, "It arbitrarily imposes an extreme, one-sided measure. The end-of-administration Executive Order imposing it was political grandstanding and federal land grabbing at their worst. I consider it bad public policy and even worse public process."\textsuperscript{197} Idaho Attorney General Alan Lance makes a similar case: "Throughout the process, Idahoans have felt 'stiffed' by the federal government. What should have been an open process with meaningful information and dialogue was fairly perceived as a sham process designed to reach a pre-determined outcome before a political deadline."\textsuperscript{198}

From a conflict standpoint, the ambiguous role of public participation in rulemaking further compounds the conflict resulting from ambiguous and/or contradictory natural resource law. The "content analysis team," responsible for analyzing the public comment regarding the roadless rule, makes this point perfectly clear.\textsuperscript{199} They note

\begin{itemize}
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} Roadless Rule, supra note 71, at 3248.
  \item \textsuperscript{195} Martin Nie, "It's the Environment, Stupid!": Clinton and the Environment, 27 PRESIDENTIAL STUD. Q. 39, 44 (1997).
  \item \textsuperscript{196} Letter from Mark Dayton, U.S. Senator (Minn.), to Martin Nie (Oct. 16, 2001) (on file with author).
  \item \textsuperscript{197} Id.
  \item \textsuperscript{198} Energy Impacts of the Roadless Rule: Joint Oversight Hearing Before the Subcomm. on Energy and Mineral Resources and the Subcomm. on Forests and Forest Health of the Comm. on Resources, 107th Cong. 11 (2001) [hereinafter Energy Impacts Hearing].
\end{itemize}
that many respondents on both sides of the issue believe that the FS should take the majority opinion into account—but they differ on what they believe constitutes such majority opinion. A number of the comments express that some voices should count more than others because varying sectors of the public are disproportionately impacted by the rule. Some believe that the public has spoken loud and clear and that the rule should be implemented accordingly. Others contend that the rule was fixed from the outset and question the integrity of the whole public comment process in general. Some point to the non-scientific sampling of the public comment process and its lack of validity. And a number of writers recommend that a nationwide vote should be held.

Furthermore, in the roadless and other debates as well, the use of interest group-written pre-printed postcards to make a comment has been an issue. Critics contend that the ease by which these postcard campaigns are organized artificially inflates public support or opposition and is not substantive in nature. Checking a yes/no box does not constitute authentic participation they say. But supporters counter that it is an important way for the public to participate in their democracy and that providing a signature and checking a box is democracy in action. In fact, it is also how we vote for our elected political representatives.

The FS procedure for reporting and analyzing public comment does not instill the overall process with clarity. The technique is basically non-committal, with the content analysis team making the usual qualifications: respondents are “self-selected” and therefore might not represent the sentiments of the entire population, public input is not treated as a vote, and the analysis simply ensures “that every comment is considered at some point in the decision process.”

3. The “Ossification” of the Rulemaking Process

Another problem with rulemaking is that it has become increasingly rigid, burdensome, inflexible, and ossified. Such inflexibility not only robs agencies of efficiency, but it can also frustrate statutory goals and be a disincentive for agencies to experiment with flexible or temporary rules. It can lead to agencies engaging in more “non-rule rulemaking,” like those issued in “policy statements, interpretive rules, manuals, and other informal devices” that do not have

200. Id. at xx.
201. Id. at vii; see generally 3 ROADLESS FEIS, supra note 49 (analyzing and responding to public comments received in DEIS).
203. Id. at 1392.
the same degree of accountability as provided in notice-and-comment rulemaking.\footnote{Id. at 1393.}

Law professor Thomas McGarity cites a number of reasons why rulemaking has become so ossified in recent years. First, rulemaking has become "a victim of its own success" in that the political battleground has shifted from Congress to the bureaucracy.\footnote{Id. at 1397.} As the following discussion illustrates, there is also intense institutional competition between Congress and the executive branch over the rulemaking process. Especially relevant to environmental issues, rulemaking must also "resolve extremely complex scientific and economic issues in the midst of daunting uncertainties."\footnote{Id. at 1398.} Ossification also stems from a number of requirements that have been imposed on the process. First, there are judicially imposed analytical requirements that force agencies to provide a "reasoned explanation" for rules and rationally respond to outside comments. This is a rather modest requirement, but it has also led the regulated community to hire lawyers and consultants "to pick apart the agencies' preambles and background documents and launch blunderbuss attacks on every detail of the legal and technical bases for the agencies' rules."\footnote{Id. at 1400.} As a result, says McGarity, "[t]he key to successful rulemaking is therefore to make every effort to render the rule capable of withstanding the most strenuous possible judicial scrutiny the first time around."\footnote{Id. at 1401.} This is a criticism often heard in forest policy, as decision makers complain about having to make their plans and rules "bullet proof" in order to withstand judicial challenge, and they contend that this has led to "the process predicament."\footnote{USDA FOREST SERV., THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT 36 (June 2002), available at http://www.fs.fed.us (last visited June 9, 2004).}

Congress has also imposed analytical requirements, like having agencies go through the EIS process and prepare analyses required by the Regulatory Flexibility Act, all in an effort to exercise control over agency decision making.\footnote{McGarity, supra note 202, at 1403.} This is further compounded by a number of analytical requirements imposed by the White House. These are often issued in the form of executive orders mandating that agencies undertake such actions as regulatory impact analyses and evaluate rules in terms of private property rights, trade, and federalism, among other
things. Another layer consists of scientific review requirements used by agencies to solicit outside expertise and provide peer review of scientific and technical rules. Once these analytical requirements are met, rules are then subject to congressional, judicial, and executive review, thus leading to further ossification.

Resolution of such challenges to rulemaking depends on political philosophy. Perhaps this ossification is a natural result of asking our bureaucracies to do too much while letting our elected representatives do too little. Another argument is that these requirements and review procedures ensure accountability and thoughtful analysis and are worth the loss of efficiency. McGarity's recommendation is that all three branches "back off" and let rulemaking "function with greater freedom and flexibility." He says a change in attitude about what can be expected of government bureaucracies is needed. The point is well taken, for if society is trying to do too much through rulemaking, the answer might be to change venues instead of leaving agencies to implement vague and contradictory laws.

The ossification of rulemaking is also important from a conflict management standpoint. First, it is one reason why so many controversies play themselves out in what seems like slow motion. The process simply takes a long time to run its administrative and legal course. It also illustrates how unfair it is for Congress and the White House to complain of the excessive analysis done by agencies when they are the ones forcing agencies to do it with various analytical

211. President Reagan's Executive Order 12,291, for example, requires that agencies submit all rules to the Office of Management and Budget for review so that they are in compliance with the order's cost-benefit analytical requirements. 46 Fed. Reg. 13,193 (Feb. 19, 1981).
212. McGarity, supra note 202, at 1408. The scientific review process is often used by the Environmental Protection Agency, for example.
213. According to McGarity's analysis, ossification results from these requirements and reviews:

The net result of all of the aforementioned procedural, analytical, and substantive requirements is a rulemaking process that creeps along, even when under the pressure of statutory deadlines. In the absence of deadlines, the process barely moves at all. Given all of the barriers to writing a rule in the first place, few agencies are anxious to revisit the process in light of changed conditions or new information. Knowing that mistakes or miscalculations in rules will be very difficult to remedy, agencies are also reluctant to write innovative or flexible rules in the first instance. Consequently, an important policymaking tool has become extraordinarily cumbersome.

Id. at 1436.
214. Id. at 1462.
215. Id.
requirements. Such inflexibility also makes policy experimentation increasingly difficult. In forest policy, for example, a number of interest groups are advocating a more experimental approach, including the use of pilot projects and a move toward adaptive management. The problem, however, is that without apriori congressional exemption such experimentation and adaptation can slow the process and create problematic uncertainties. The likelihood of litigation following a final rule, moreover, is also a disincentive for agencies to experiment in the first place.

V. DISCUSSION, ANALYSIS, AND RECOMMENDATIONS

A. The Roadless Rule

This section defends the roadless rule as promulgated by the FS during the Clinton administration. It argues that Congress is the most appropriate body for resolving issues like this, but when Congress does not make a decision or cannot muster a working majority, or simply abrogates its responsibilities, the decision making is left with the FS. The roadless rulemaking process, though far from perfect, is thus legal and legitimate in today’s political context and administrative state. The following section then outlines some steps that could be taken to improve the rulemaking status quo.

1. Constitutionality and Legality

The roadless rule is clearly within the constitutional and legal discretionary authority of the FS. Article IV, section 3 of the U.S. Constitution, the Property Clause, states, “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” The federal government has proprietary and sovereign powers over its property (including public lands) and may regulate activity on private lands that affect its public lands. The scope of the Property Clause has been

216. See generally A VISION FOR THE U.S. FOREST SERVICE: GOALS FOR ITS NEXT CENTURY (Roger A. Sedjo ed., 2000); FOREST OF DISCORD, supra note 10; BEAVER ET AL., supra note 28;
217. U.S. CONST. art IV, § 3.
debated, but the courts have been rather consistent in their reading of its scope and importance, going so far as to say that this congressional power over public lands is "without limitations." Congress has power over national forest management and has chosen to exercise that power in this case by giving it to the FS.

The scope of the Property Clause changes things for some critics of congressional delegation. While it might be unconstitutional for Congress to delegate too much responsibility to a federal agency regulating private behavior, Congress has much more latitude when it does so concerning federal public lands. The executive branch acts as both proprietor and sovereign when executing delegated Property Clause powers. As noted by Sandra Zellmer, this means that "property management is not necessarily analogous to other types of lawmaking, and more leeway might be afforded executive agencies, acting not only as instruments of a tripartite government but also as proprietors, when public property is implicated." She also notes that courts have regularly cited this executive role as proprietor in ratifying sweeping exercises of power, and that the broadly phrased National Forest Organic Act of 1897 was upheld by the Supreme Court against a nondelegation challenge.

This argument is especially pertinent to the roadless rule. The FS noted in its record of decision (ROD) that many public comments questioned whether it had the authority to prohibit road construction through the rulemaking process and whether the proposed rule was in conflict with existing environmental laws and policies. In its response, the FS emphasizes the Property Clause and the broad powers given to it by Congress in the Organic Act, MUSYA, and NFMA. The FS defends itself using the language and intent of these broadly written statutes. First, the Organic Act emphasizes watershed protection, and the roadless


222. Id. at 1025, 1026. See United States v. Grimaud, 220 U.S. 506, 521-22 (1911).

223. Roadless Rule, supra note 71, at 3252.

224. Id.
rule does just that by preventing soil and water disturbances and environmental degradation. 225 Second, the FS reminds critics that MUSYA "does not envision that every acre of [FS] land be managed for every multiple use, and does envision some lands being used for less than all of the resources." 226 The ROD also points out that several multiple uses, as long as they do not require new roads being built, will be allowed in these roadless areas. 227 And third, it reiterates the preamble to the recent NFMA planning regulations stating that "[p]lanning will be conducted at the appropriate level depending on the scope and scale of the issues," meaning that the national-level roadless issue should be addressed at "the appropriate scale and level of organization." 228 The rule, therefore, is consistent with the mission, mandate, and responsibilities of the FS as expressed in its Organic Act, MUSYA, and NFMA. Once again, discretion cuts both ways: these broadly written laws have allowed the FS to build more than 380,000 miles of roads in the forest system—and they also allow the FS to stop building any more.

What about the de facto wilderness claim that the rule amounts to an administrative usurpation of congressional power? This claim, along with the scoping critique, is at the heart of the opposition's case. 229 This line of reasoning is important to consider, but there is nothing in the Wilderness Act saying that the FS must develop all of those lands not included in the wilderness preservation system. And the Wilderness Act clearly provides a much greater degree of protection and is more restrictive in nature than the roadless rule. The Forest Service Organic Act, moreover, authorizes the FS to "make such rules and regulations and establish such service as will insure the objects of [the national forests], namely, to regulate their occupancy and use and to preserve the

225. Id. at 3246.
226. Id. at 3252.
227. Id. at 3249–50.
228. Id. at 3250. Still, some critics contend that the rule violates the spirit, if not the letter, of NFMA because forest management decisions are to be made regionally. See, e.g., Jennifer L. Sullivan, The Spirit of 76: Does President Clinton's Roadless Lands Directive Violate the Spirit of the National Forest Management Act of 1976?, 17 ALASKA L. REV. 127, 158–59 (2000) (arguing that the Tongass National Forest requires a more flexible approach to road building than prescribed in the roadless rule and that the issue should be dealt with through the forest planning process).
229. See, e.g., Brandon Dalling, Administrative Wilderness: Protecting Our National Forestlands in Contravention of Congressional Intent and Public Policy, 42 NAT. RESOURCES J. 385 (2002) (arguing that the roadless rule usurps the congressional power and authority to set aside public lands as wilderness); see also Mortimer, supra note 22, at 961 (arguing that the rule is a "thinly disguised attempt to create wilderness").
forests thereon from destruction." 230 Furthermore, MUSYA declares that "[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act." 231 The Endangered Species Act (ESA) is another reason why the rule is both legal and necessary. 232 Protecting roadless areas from further development would help the FS achieve the conservation goals made explicit by Congress in the ESA. 233 NEPA is the basis for another counter argument. While its procedural requirements seem to matter most to courts, 234 it is important to not lose sight of the Act's original purpose to protect the environment. 235 As the Ninth Circuit made clear in defending the FS's use of NEPA with the roadless rule, "it would turn NEPA on its head to interpret the statute to require that the Forest Service conduct in-depth analysis of environmentally damaging alternatives that are inconsistent with the Forest Service's conservation policy objectives." 236 The important interplay of all these fundamental statutes is critical and well addressed by the roadless rule.

2. Forest Planning Process

But would it be better to resolve these roadless issues through the traditional forest planning process? As outlined above, this claim has been made by several critics of the original roadless rule, in part because of President Clinton's controversial role in its initiation. Critics charge

232. Two-hundred-twenty species are listed as threatened, endangered, or proposed for listing; 1930 sensitive species rely on habitat within inventoried roadless areas. See 1 ROADLESS FEIS, supra note 49, at 3-180.
233. As Congress made clear, one of the primary purposes of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...." 16 U.S.C. § 1531(b) (2000).
234. Tillamook County v. U.S. Army Corps of Eng'rs, 288 F.3d 1140, 1143-44 (9th Cir. 2002).
236. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1122 (9th Cir. 2002). According to the court, "it was not the original purpose of Congress in NEPA that government agencies in advancing conservation of the environment must consider alternatives less restrictive of developmental interests." Id. at 1120. See also 42 U.S.C. §§ 4231-4233 (2000).
that the "directive pushes the USFS in a direction predetermined by the
president, and circumvents policy and planning processes defined by
Congress." According to this logic, the fate of roadless areas should be
determined by Congress through wilderness designation or by the FS
through planning processes. For some reason, the latter is assumed to be
value- and decision-neutral, but it is clearly not. After all, the planning
process is managed by an agency with a well-recognized and often-
studied organizational culture that has historically emphasized intensive
management and timber production over other values. Furthermore, it
was the forest planning process that led to 386,000 miles of roads being
built in the system, and 58.7 percent of inventoried roadless areas being
"allocated to a prescription that allows road construction and
reconstruction." Of course, what the FS has planned on paper can be
much different than what might happen on the ground because plans are
essentially zoning documents that often are not implemented as
written. But still, for critics, those defending the forest planning
process as a way to deal with the roadless issue are really defending
more road building and not the planning process. For them, there is not
much difference between policy substance and process: the rule means
no more roads and the forest planning process means more. Finally, as
discussed earlier, NFMA planning regulations (in place during the rule's
promulgation) call for decision making at the appropriate scale, and the
FS saw the roadless issue as one that should be addressed nationally.

237. Jay O'Laughlin & John C. Freemuth, Roadless Area Policy, Politics, and Wilderness
Potential: Toward Understanding President Clinton's Directive to the U.S. Forest Service, 6 INT'L
J. WILDERNESS 9, 10 (2000) (arguing that "Clinton's directive distorts the mandated NFMA
process of identifying and recommending additions to the [National Wildlife Preservation
System] through a forest-by-forest land-use planning process"). But see infra note 241 for
2000 planning regulations on this matter.

238. See generally DAVID A. CLARY, TIMBER AND THE FOREST SERVICE (1986). Clary asserts
that the agency's culture is more like a religion: its sacred mission was to provide wood to
the world and avert a "timber famine." Id. at xii. This religious conviction, says Clary,
explains much of the controversy surrounding national forest management in that the
servant (FS) "believed firmly that it knew better than the public what the public really
wanted." Id.

239. The Future of the United States Forest Service: Oversight Hearing before the House Comm.
on Resources, 107th Cong. 107-10 (2002) [hereinafter Oversight Hearing].

240. This point raises a whole set of new questions that are beyond the scope of this
article. See generally Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998); 36 C.F.R. §
219.7 (2002).

241. See supra notes 92-96 and accompanying text; Roadless Rule, supra note 71, at 3252.

The 2000 planning regulations are quite clear on this matter:
Fundamental to this rule is the notion that there is a hierarchy of scale to
be considered when addressing resource management issues, and that it is
the nature of the issue that guides the selection of the appropriate scale
and level of the organization to address it....The rule should not be
Certainly, provided trends in habitat fragmentation and administrative priorities like ecosystem management, some issues go beyond the purview of individual national forest units. We must sometimes step back and make decisions on a more regional or national basis.

3. Role of Congress

Perhaps most important is the role that Congress could play in the roadless rule. It could review and revoke the rule, codify the rule into law, or write a new roadless law at any time. While Congress failed to take the initiative with roadless designation, it certainly involved itself throughout the process. It held seven hearings on the roadless rule. Many of them focused on the NEPA process and the rule's contested impacts on timber and energy development. There was also some talk, or threat, of repealing the rule using the Congressional Review Act. But during this time, Congress was often focusing on the process itself interpreted as excluding higher-level officials from decisions made at the forest and grassland level. If an issue warrants higher-level study and decisionmaking, such tasks can be undertaken.

65 Fed. Reg. 67,514, 67,523 (Nov. 9, 2000). Though uncertain at the time of publication, it is also important to note that forest planning regulations proposed under the Bush administration may significantly alter this decision-making framework and roadless area management in general. See 67 Fed. Reg. 72,770 (Dec. 6, 2002).

242. Congress could do so by using the Congressional Review Act, which gives Congress a certain amount of time to review and possibly disapprove a rule that is defined as “major.” Under this Act, a major rule cannot become effective for at least 60 days after its publication so that Congress can consider the rule and possibly deal with it legislatively. 5 U.S.C. §§ 801, 804(2) (2000).

243. In response to temporary suspension of new road construction, for example, “Senators Frank Murkowski (R-Alaska) and Larry Craig (R-Idaho) and Representatives Don Young (R-Alaska) and Helen Chenoweth (R-Idaho) threatened to cut the [FS] budget to a 'custodial' level because the Forest Service...seemed 'bent on producing fewer and fewer results from the national forests at rapidly increasing costs.'” DOMBECK ET AL., supra note 69, at 106 (referring to the letter known to FS employees as “the salvo of the Four Horsemen of the Apocalypse”).

244. See, e.g., SUMMARY OF PUBLIC COMMENT & DEIS, supra note 199.

245. One hearing was originally planned by Senator Larry Craig (R-Idaho) to evaluate the Congressional Review Act (CRA) as applied to the roadless rule. This failed to happen because Craig was “no longer convinced that this rulemaking [would] survive the U.S. court system long enough for Congress to act one way or another.” Forest Service's Roadless Area Rulemaking: Hearing before the Subcomm. on Forests and Public Land Management of the Senate Comm. on Energy and Natural Resources, 107th Cong. 107-66 (2001) [hereinafter Roadless Area Rulemaking Hearing]. The CRA was included as part of the Small Business Regulatory Enforcement Act of 1996, Pub. L. No. 104-121, 110 Stat. 857, 868 (codified at 5 U.S.C. §§ 801-808 (2000)). The CRA provides Congress with a mechanism to review and disapprove federal agency rules. Also interesting to note is that the law was supported by Republicans who were concerned about burdensome regulations and wanted a way to review and possibly repeal them.
and not on the issue of whether or not an agency should be making a decision of this magnitude through rulemaking. Much of the debate, moreover, was not over legislative versus administrative control of forest management (though there was some of that too), but over what type of administrative control should be used in this case: a national level rule or the forest planning process. Either way, it seems as though many members of Congress, both for and against the substance of the rule, agreed that this is not an appropriate issue to be reconciled by the legislative branch. Congressman John Porter (R-Illinois), for example, expressed his pleasure that the FS "is presently working on a forest road reform effort that I hope will obviate the need for future such debates in Congress." For some, it even appears that the self-appointed Forest Roads Working Group is better situated to deal with this issue than Congress. When asked whether she supports efforts to codify the roadless rule in statute, Secretary of Agriculture Ann Veneman responded negatively and testified that she thinks it would "undermine the work of the working group" and that it is better to make these decisions by consensus. With this in mind, one might well argue that not only is Congress taking a back seat to bureaucrats, but now bureaucrats are placing self-appointed stakeholders in the driver's seat.

If a majority of Congress feels so strongly about the roadless rule, it could do something about it, as it has with other controversial rules. Complaints of a runaway agency fail to make sense when it is Congress that has chosen to not leash this bureaucracy in the first place. Nevertheless, Congress should codify the original roadless rule into law. This would add an important layer of legitimacy and accountability to the process, much more so than by rulemaking alone.

246. See hearings cited supra notes 198, Energy Impacts Hearing; 239, Oversight Hearing; 245, Roadless Area Rulemaking Hearing.
248. Oversight Hearing, supra note 239.
249. A good example of this is provided by the congressional response to the Federal Communication Commission's (FCC) very controversial rules, making it easier for media conglomerates to add new markets. 68 Fed. Reg. 46,283, 46,285 (Aug. 5, 2003). The rules were very controversial and led to a rare type of congressional repudiation. The congressional response took different forms, including attaching amendments to other bills that would weaken the rules and also by using the Congressional Review Act. The Senate approved a resolution, made possible by the CRA, to repeal the FCC's new (de)regulations. Stephen Labaton, F.C.C. Plan to Ease Curbs on Big Media Hits Senate Snag, N.Y. TIMES, Sept. 17, 2003, available at http://www.nytimes.com/2003/09/17/business/media/17FCC.html (last visited June 25, 2004).
250. See generally Anderson & Moncrief, supra note 64 (recommending a legally binding long-term roadless area protection policy, whether by codification, executive order, or rulemaking).
4. Fiscal Responsibility

The budgetary backdrop of this rule is worth reiterating. Remember that at the time of the rule's publication the FS faced a backlog of about $8.4 billion in deferred maintenance and reconstruction costs, that the agency receives less than 20 percent of the funds needed annually to maintain the existing road infrastructure, and new development activities in roadless areas often cost more to plan and implement than on other FS lands. Seen in this light, the rule demonstrates administrative leadership and fiscal responsibility by the FS. Like complaints over other unfunded mandates, it is simply unfair for Congress to demand more road access, maintenance, and construction without providing adequate funding. Congress has every right to demand more roads, and with this right comes the responsibility to fund their maintenance and (re)construction. But without funding, the FS has the obligation to keep its budgetary house in good working order.

5. Public Values and Opinion

Assessments of the rule might also be different if it were out of step with prevailing public values, beliefs, and attitudes about forest management, but it is not. While the American public has the same penchant as their political representatives for not accepting the trade-offs that come with making choices, the public polls nevertheless reflect the same values rooted in the roadless rule. Even the FS's own social science research shows this (though it also shows serious disagreement on a few issues as well). Americans find it "very important, important, or somewhat important" to preserve natural resources through policies such as no timbering and no mining, restricting development of minerals, protecting ecosystems and wildlife habitat, protecting watersheds, preserving the wilderness experience, and "develop[ing] a national policy for natural resource development." Furthermore, all groups, according to the report, see the expansion of motorized access

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251. Roadless Rule, supra note 71, at 3245-46.
252. DEBORAH J. SHEILDS ET AL., GEN. TECH. REP. RMRS-GTR-95, SURVEY RESULTS OF THE AMERICAN PUBLIC'S VALUES, OBJECTIVES, BELIEFS, AND ATTITUDES REGARDING FORESTS AND GRASSLANDS (2002) (a technical document supporting the 2000 USDA Forest Service RPA Assessment), available at http://www.fs.fed.us/rm/pubs/rmrs_gtr095.pdf (last visited June 6, 2004). Like most comprehensive social surveys, there is enough data in this report to provide at least some ammunition for roadless rule opponents as well. For example, "[w]hile respondents feel that it is an important objective to keep management decisions local, they also feel that it is important to develop a national policy for natural resource development." Id. at 14.
253. Id.
and the development of new paved roads as an either somewhat or slightly unimportant objective of forest management. At the very least, one can make an argument that the values on which the roadless rule is founded have a broad base of public support.

6. The Road Ahead

What is perhaps most troubling is what has happened since publication of the original roadless rule. Given the changes in congressional and executive leadership and ideology, attacks on the original rule should be expected. Congress has every right to review and abolish the rule, but it should do so out in the open, not by using questionable legislative strategies like rider provisions or committee and appropriation games. The White House also has every right to lead in the writing of a new rule—but only after going through another formal rulemaking process and environmental analysis. Both would result in a massive pendulum swing from roadless area protection to continued road building, but that is modern democracy (and ideological division) at work. Unfortunately, this is not how the rule has played itself out. Instead of Congress making the tough choices, or a professional resource agency utilizing an extensive public comment process making the decision, the judicial system has largely determined the fate of these 58.5 million acres. At the time of this publication, uncertainty about the rule abounds—a state of affairs that is becoming the norm in natural resource politics. The question, then, is whether the courts are the proper place to make a political decision like this.

The proposed change allowing governors to petition the Department of Agriculture for state-based roadless area management is especially troublesome. From a process standpoint, this proposal is fundamentally flawed. First, it is important to remember that article IV of the U.S. Constitution gives Congress—not state governors—power over public lands management. Of course, the administration argues that ultimate decision-making authority will rest with the Secretary of Agriculture, as it must to be legal. Instead of outright delegation to governors, their petitions will be “considered.” But as anyone familiar with writing a letter during an administrative rulemaking process knows well, the term “considered” can be as hollow as it sounds. For example, will gubernatorial petitions that advocate opening up more roadless

254. Id. at 15.
255. Administrative and environmental law professor Tom McGarity has testified that the Card Memo used to postpone the original rule was in fact a violation of the APA, see Roadless Area Rulemaking Hearing, supra note 245, at 69.
areas be "considered" differently than roadless-friendly ones? Second, what happens when there is a change in gubernatorial administrations? Will the status of a state's roadless lands swing widely on a four-year election cycle? If so, it places those advocating increased road building at an advantage because they only have to win once.

Also curious is the argument that the new proposed rule will take care of the litigation surrounding the 2001 rule. This is poorly reasoned on numerous counts. First, it is inaccurate to suggest that the courts have forced the Administration to rewrite the original roadless rule. That rule is currently in an indeterminate state, as the Ninth Circuit Court of Appeals upheld it on substantive and procedural grounds, while an unfavorable Wyoming District Court decision has been appealed to the Tenth Circuit. It is quite possible, then, that two western courts of appeals may uphold the original roadless rule promulgated under Clinton; or we may have another circuit split and may have to wait for the Supreme Court to sort things out. Also specious is the claim that the new proposed rule will reduce future litigation surrounding roadless areas. Instead, it will certainly proliferate, as some states go forward with crafting petitions—petitions that are then subject to further NEPA analysis and more litigation. Instead of litigation over one national-level rule, it will be over several state-based ones. And third, it is insincere to lament the amount of litigation surrounding the 2001 rule and use it as a reason to write a new one, when the administration has not defended the 2001 version from the beginning. This is brilliant politics, but it also illustrates the limitations of relying too heavily upon the courts and bureaucracy in resolving conflicts over public lands management.

The proposed rule is particularly egregious from an accountability standpoint. It may prove to be nothing more than an artful dodge of responsibility and a shrewd way of avoiding blame for a risky political decision. Instead of making the tough choice of either defending or scrapping the rule, the buck gets passed to state governors. If the petitions are made without authentic broad-based public input and participation, they will be a mockery to the original rulemaking process and the unprecedented public comment that went into it.

The proposed rule’s billing to the public has also been disingenuous, for while it is offered as proof of “President Bush’s commitment to cooperatively conserving roadless areas on national forests,” it does no such thing as the proposed rule is merely procedural
in nature: maybe it will, maybe it won’t. What is does do, however, is put an enormous responsibility on Western governors and gives the executive branch a sharpened rulemaking tool. If implemented, the executive will be able to stand for the principle of roadless area conservation in the abstract while placing responsibility at the feet of Western state governors when these lands are proposed for development. But by retaining final decision making authority, the executive can also play the rulemaking “consideration” game when it suits itself. From an accountability standpoint, the proposed rule perfectly illustrates the democratic limitations of using rulemaking as a primary means of conflict resolution.

B. Improving the Rulemaking Process in Public Land and Resources Policy

1. The Need for Transparency, Participation, and Experimentation

Rulemaking in public land and resources policy, whether one likes it or not, is likely here to stay. Therefore, it is worthwhile to consider politically feasible ways in which it might be improved. A number of experimental changes to the rulemaking process could be tested through pilot projects that fall within the legal parameters of administrative and resources law. The APA, after all, is a minimalist model of administrative rulemaking and there is no reason why agencies cannot experiment with new ideas. Of course, these proposals will not satisfy those convinced that Congress must resolve all of these issues. For them, such tinkering with rulemaking is like putting lipstick on a pig. But Congress, it seems, cannot agree on the day of the week, so the call for more congressional action is easier said than done. Congress, moreover, will never be able to answer all of the questions that resource agencies struggle with, so it behooves us to explore ways to improve the rulemaking process.

These experiments should be as transparent as possible and utilize multiple methods of public input and democratic debate. As used here, transparency “means deliberately revealing one’s actions so that...}

outsiders can scrutinize them." While this principle will not always ensure that the best decisions are made, it remains "the most effective error correction system humanity has yet devised." Transparency and providing multiple inputs into the decision-making process will force natural resource agencies to constantly check their internal cultures, values, and biases against that of the public.

If Congress chooses to not settle these political issues legislatively, then we should not leave the decision making to "objective" resource professionals, but rather combine agency expertise with multiple methods of public input and democratic participation. The rulemaking process can be seen as a type of black box, with public comment going in and agency rules coming out. Despite the substantial rulemaking record, what happens inside this black box remains a mystery to many concerned with but not involved in the final decision. Natural resource agencies should try to turn these black boxes into windows through which the public can better understand the logic and complexity of agency rulemaking.

2. Electronic Rulemaking Possibilities

Electronic, or online, rulemaking might provide a promising and politically feasible way to bring about increased transparency. A number of governmental activities in the area of electronic rulemaking are now underway. As one study puts it, "e-rulemaking is being rolled out with an air of inexorable momentum." The use of electronic commenting has already been tried by federal agencies, including the


259. Id. at 16.

260. The same can also be said of the NEPA public participation process. See generally Jonathan Poisner, A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation, 26 ENV'TL. L. 53, 85 (1996) (analyzing NEPA's public participation requirements from a synoptic, pluralistic, and deliberative standpoint).


262. Shulman et al., supra note 261, at 165.
Environmental Protection Agency, the Department of Transportation, the National Oceanic and Atmospheric Administration, and the Social Security Administration. The FS also allowed email submissions and provided information about the rule on its roadless rule website. The U.S. Department of Agriculture also provided a more interactive format in conducting a fully electronic rulemaking that focused on the production and marketing of organic food (the National Organic Program).

As discussed earlier, the technical nature of rulemaking often limits the scope of participation to experts and interest groups that have the necessary knowledge, time, and resources to be fully engaged in the process. The average citizen (and policy professor) may feel a bit bewildered by the Byzantine nature of modern rulemaking. The standard approach to notice and comment rulemaking is problematic because it relies on one-way communication. There is essentially little or no two-way dialogue that takes place between the public and agency. While not a panacea, “e-rulemaking” holds the promise of making some improvements to the process. By moving toward internet-accessible dockets, for example, the public could have rapid access to important information. These electronic dockets, moreover, could increase transparency, facilitate the sharing of information, and increase managerial efficiency. “Electronic docket rooms” could also lead to an interactive discussion, as commentators could view and then respond to other comments accessible online. This online dialog could either be embedded within the formal rulemaking process or take place along side it.

263. Id.
265. Shulman et al., supra note 261, at 163.
266. Visit the Department of Transportation's Docket Management System at http://dms.dot.gov/ (last visited June 6, 2004), and the Environmental Protection Agency’s EDOCKET at http://cascade.epa.gov/RightSite/dk_public-home.htm (last visited June 6, 2004).
267. According to Carlitz & Gunn, supra note 261, at 391, efficiency considerations drove the adoption of the electronic docket at the Department of Transportation, partly because the new system was designed to replace the agency's old paper system.
269. Carlitz & Gunn, supra note 261, at 395. This is one reason why democratic theorists are so interested in the use of online dialogue: it provides a way to move from “preference aggregation” to a more deliberative and discursive design. See generally Shulman et al., supra note 261; David Schlosberg & John S. Dryzek, Digital Democracy: Authentic or Virtual?, 15 ORG. & ENV’T. 327 (2002).
Complaints by FS representatives that comments are not germane to the proposed rule are often heard. Therefore, in addition to the electronic docket and allowing comments to be submitted electronically, an agency could also use this space to educate the public about the rule and its scientific and legal context. This would likely increase the quality of comments received and help the public understand their place in this process. One of the aims of e-rulemaking, then, might be to find a way to better integrate scientific knowledge and public values in environmental decision making.270

3. Ambitious Scoping271

Dialogue between agencies and the public is of vital importance right now. The use of public input in agency decision making, whether it is through NEPA scoping or the use of notice-and-comment rulemaking, is usually very restricted and circumscribed. The public is asked to comment on specific and often very technical topics. This is certainly the case with the use of scoping by agencies at the beginning of the EIS process. But the problem, at least as some agencies see it, is that much of the comment received by the agency is not "guideline ready," that is, not solely focused on the decision at hand.272 This is an issue that many forest planners have dealt with in the past: what to do with comment that goes beyond decision X. As reported by Cheri Brooks, a Forest Service course handbook on forest plan implementation provides an example of how to do a successful translation. A public letter might say, for example:

I object to this project because you people are always messing up the environment. I have been fishing the South Fork for thirty years, and I have never had such bad fishing since those logging trucks started running up and down the Old Road. I just don't know why the taxpayers have to put up with it. And there's the logging. This area used to be a real wilderness. Now it looks like a tornado went through. No wonder the fishing is so bad anymore.273

270. Shulman et al., supra note 261, at 169.
271. The term "scoping" is used here in an inclusive way to refer to different types of agency-sponsored pre-decisional public involvement strategies, often used as a way to determine the significant issues to be addressed in an environmental impact statement and resource plans.
273. Id.
The handbook instructs the planner to translate this into the following issue statement:

The construction of Road 719 B, as proposed, crosses a 300 yard stretch of highly erosive soils on steep slopes in the NE ¼ of Section 5, T4S, R8E. A proposed clearcut adjacent to that road lies on the same soil type. Sediment from the proposed road construction and timber harvesting could become imbedded in rainbow trout spawning gravels in the South Fork, reducing reproductive success and, consequently, fishing success.274

Many agency personnel involved with the public comment process will attest that "substantive" comments, meaning technical and site-specific, usually matter most in agency decision making. This is not to say that an agency swarmed with one-sided public comment will not listen and act accordingly but that a lot of comment is deemed irrelevant to the decision. From a forest planning standpoint, such a translation is necessary, and from an organizational culture standpoint, well understood. At the same time, however, this non-germane and often value-laden and personal comment should have a place in the agency's decision-making process.275

One approach to this issue is to expand our understanding and use of the scoping process. Peter Mulvihill and colleagues suggest a number of different ways in which "ambitious scoping" has and can be tried in environmental assessment and review.276 One possibility, made increasingly feasible by the electronic docket system discussed above, is

274. Id.
275. See generally Toddi A. Steelman, The Public Comment Process, 97 J. FORESTRY 22 (1999). In her examination of public participation in forest planning on the Monongahela National Forest, Toddi Steelman found that technical and value-based feedback was important to decision makers in the planning process, saying that “[t]echnical information from the public helped shape some specific management decisions, and value-based information shaped the overall management direction.” Id. at 25. Steelman notes, however, that public land management agencies are more proficient with and responsive to technical input because this is the information with which they are most comfortable. Their institutional cultures and organizations are less adept at handling value-based input, which may help explain why conflict has plagued public involvement in Forest Service decisionmaking.

to provide a double or parallel scoping process in which one is of the traditional and limited sort and the other more open and communicative. The latter could be used to deal with future resource scenarios or to maintain a rolling dialog amongst stakeholders and the agency. Using scoping in this more inclusive way would encourage the public to make important and relevant comments that might go beyond a particular project, proposal, or rule. Ambitious scoping also holds the possibility of changing the types of rules that are proposed in the first place. Instead of the public always reacting to agency proposals, a rolling and ambitious scoping endeavor could give the public a greater say in what types of decisions ought to be decided upon. Rethinking the role of scoping in agency decision making should be prioritized. As the Wyoming and Idaho district courts emphasized, the use of scoping by the FS left a lot to be desired. Furthermore, it has usually been environmental groups complaining of biased scoping endeavors, so its broadened use should be embraced by a number of different interests.

4. Embedding Collaborative Groups into the Rulemaking Process

Another potential way of improving rulemaking is by embedding stakeholder-based collaborative groups within the process. Citizen advisory boards, working groups, or perhaps even newly formulated resource advisory committees (RACs) could be used as a way to utilize a more collaborative and deliberative approach to rulemaking. NFMA, in fact, already has a provision allowing for the use of advisory boards, though it has been largely ignored. The

277. Mulvihill, supra note 276, at 42.
278. Mulvihill & Baker, supra note 276.
279. See supra Part III.C.3.
280. For a discussion of how advisory boards could be used to improve agency decision making and how the model differs from regulatory negotiation and notice-and-comment participation, see Applegate, supra note 186. Applegate concludes that “[c]itizens advisory boards represent a useful new alternative to the one-way, often adversarial, communication of the review-and-comment models and to the narrow representation of regulatory negotiation.” Id. at 957.
282. 16 U.S.C. 1600 § 14(b) states,
responsibilities delegated to these groups could vary. For example, they could be delegated the responsibility of crafting a compromise recommendation regarding a controversial part of a rule. Another possibility includes using these groups to help formulate questions, like those asked in advanced notices of proposed rulemakings, that are then commented on by the public. The strength of this approach is that it encourages constructive dialog and the search for common ground among community and interest-based stakeholders and may result in decisions with a wider degree of public support. Its impact on resource management in the American West is unmistakable.\textsuperscript{283}

The danger, on the other hand, is that these groups can be exploited and used for political cover. Some of those closely involved in the roadless rule debate, for example, wonder why the pro-roadless rule recommendations coming out of the Forest Roads Working Group were not embraced by the Bush administration or the FS. These critics contend that the working group’s recommendations were ignored because they were not in line with the FS’s preferences, and, if they were, they would be promptly embraced as an example of successful collaboration in action.

5. Public Comment as Straw Vote

If Congress and agencies choose not to act and these and other types of more collaborative and authentic forms of public participation are not forthcoming, we might also consider making public comment on proposed rules a type of straw vote that is formally tabulated and made

\footnotesize{In providing for public participation in the planning for and management of the National Forest System, the Secretary, pursuant to the Federal Advisory Committee Act (FACA) (86 Stat. 770) and other applicable law, shall establish and consult such advisory boards as he deems necessary to secure full information and advice on the execution of his responsibilities. The membership of such boards shall be representative of a cross section of groups interested in the planning for and management of the National Forest System and the various types of use and enjoyment of the lands thereof. When asked, FS personnel often cite what they believe is the onerous nature of FACA as one reason advisory boards have not been used more often in the past. See generally Allyson Barker et al., \textit{The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis}, 23 J. LAND RESOURCES & ENVTL. L. 67 (2003) (placing collaborative groups in their larger legal context, including an analysis of FACA and APA).

283. \textit{See generally} ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST (Philip Brick et al. eds., 2000) (reviewing the growth of collaborative conservation in western environmental management).}
public. If this is attempted, the public should be reminded that this is not a ballot initiative and that existing natural resource law reigns supreme. That is, if public comment runs counter to law, law wins. Nevertheless, it would be relatively easy to make this option available to the public. Not only would qualitative input be considered by the agency, but it would also ask the public dichotomous questions about the rule or particular principles of the rule. For example, do you favor or not favor the proposed roadless rule as currently drafted? Does it go too far, not far enough, or is it just about right?

As currently set up, agencies and their content analysis teams know how this comment breaks down, but only sometimes do they make their internal counting available to the public. The political reasoning for such an omission is obvious when an agency decision clearly runs counter to the participating public’s preferences. This means that it is often up to interest groups to seek this information and do their own statistical analysis, analysis that is often not trusted by political adversaries or is questioned by the public as being subjectively interpreted. One way to interpret the traditional content analysis process is that it gives agencies whatever public support they need to make a decision. In other words, without a formal counting, there will always be enough public comment to justify whatever decision an agency wants to make. For example, the FS’s summary of public comment for the proposed roadless rule and DEIS is 752 pages long and the summary of public comment regarding the ANPR totals 1207 printed pages.

Given the record-breaking number of responses considered (1.2 million for the DEIS and 726,440 for the ANPR), the agency has ample supply of whatever public support is needed. Both do a remarkable job of covering

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284. It would also be interesting to allow agency personnel to express their views in a type of internal agency straw poll. Because agency expertise is such an important part of the administrative control argument, why not allow these professionals a way to convey their preferences about proposed agency rules? At times, it would uncover the common divide between agency personnel and political appointees.

285. See generally Greg Hanscom, Outsourced, HIGH COUNTRY NEWS, Apr. 26, 2004, at 7 (reporting on the executive-level pressure and politics surrounding the roadless rule’s (recently outsourced) content analysis team).


287. SUMMARY OF PUBLIC COMMENT & DEIS, supra note 199.

288. Id. at i (“The analysis attempts to provide fair representation of the wide range of views submitted, but makes no attempt to treat input as if it were a vote. The goal of the content analysis process is to ensure that every comment is considered.”).
the breadth of input provided while reminding readers that public comment is not a vote and that respondents are "self-selected." A possible straw vote would change this dynamic and render the "self-selected" critique moot, for all American "voters" are self-selected.

Quantifying the type and direction of public comment could also be quite useful to Congress. If public-comment results produced a nine-to-one ratio in favor of one decision and the agency chose the opposite, Congress would be provided an important cue that it should consider legislative action. Keep in mind, however, that, while providing important input that is often national in scope, this type of public participation is rather superficial and limited. The trade-offs and tough talk found in democratic debate is not required. In short, the rulemaking straw vote is more preference aggregation than deliberation, but the threat of its adoption might make the deliberative options discussed above more palatable to agencies.

VI. CONCLUSION

The suggestions discussed in part V certainly fail to address the core question in the roadless rule and other controversial decisions in natural resources policy: should a bureaucracy or Congress be making these important political decisions? There is a dominant sequence in natural resource politics: (1) vague, ambiguous, or contradictory natural resource laws leave many central policy questions unanswered; (2) natural resource agencies try to answer these questions using the less-than-perfect administrative rulemaking process; (3) the agencies are sued; (4) courts implicitly or explicitly answer the policy questions avoided by Congress; and (5) depending on the court's interpretation, they are either championed as guardians of democracy or vilified as judicial activists. The bottom line, then, is that something is not right. We need a productive debate on how to fix whatever is wrong in this sequence. Perhaps the answer lies in the halls of Congress; or, maybe changes in rulemaking or a more decentralist and collaborative approach would do the job. There are several possible payoffs and risks involved in each alternative. What remains clear is that the strange sojourn of the roadless rule is becoming the dysfunctional norm in natural resource politics and policy making.