

COMMENTS

Roadless Area Conservation: How the “Roadless Rule” Affects America’s Forestland

Alison S. Hoyt*

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I. INTRODUCTION

“Today, we launch one of the largest preservation efforts in America’s history to protect these priceless, back-country lands.”¹ In January 2001, sixteen days before leaving office, President Clinton,

* J.D. candidate 2002, Tulane University School of Law; B.A. Environmental Studies and Anthropology, University of California at Santa Cruz.

1. *President Announces Process to Protect 40-60 Million Acres of Roadless National Forest*, at <http://www.americanlands.org/forestweb/timber.htm> (last visited Jan. 11, 2001) (quoting President William Jefferson Clinton).

through the Forest Service, reserved nearly sixty million acres of federal land under the Special Areas; Roadless Area Conservation Rule (Roadless Rule).² Not since Teddy Roosevelt has a President implemented such an extensive land withdrawal policy.³ After more than a year of hearings and public comments, Clinton approved the final version of the rule on January 5, 2001, thereby preserving millions of acres of pristine National Forest System (NFS) land for future generations.⁴

The new protections encompass an area larger than all of the nation's National Parks put together,⁵ and lie almost entirely in the twelve western states.⁶ While environmentalists praise the rule for protecting the biodiversity and ecosystem health of these pristine lands, others, including some governors of western states traditionally dependent upon the resources found there, hotly contest it.⁷ Because the rule is a maneuver of such massive scale, questions of authority have been raised. Many feel that the former President and the Forest Service (the Service) acted outside the scope of their power.⁸ However, in analyzing various sources of presidential and agency authority, it becomes apparent that the Roadless Rule does indeed fall within the bounds of this power. Some of these sources are discussed in this comment, including the Organic Administration Act of 1897 (Organic

2. Special Areas; Roadless Area Conservation; Final Rule, 36 C.F.R. pt. 294 (2001), WL 36 CFR § 294. The final rule was approved by the President on January 5, 2001, and published in the Federal Register on January 12, 2001.

3. U.S. GOV'T INFO/RESOURCES, CLINTON HALTS ROAD WORK IN U.S. FORESTS, PART 2: FACT SHEET ON THE ROADLESS RULE, at <http://usgovinfo.about.com/newsissues/usgovinfo/library/weekly/aa010501e.htm> (last visited Jan. 11, 2001) [hereinafter *Clinton: Part 2*].

4. See U.S. FOREST SERV., ROADLESS AREA CONSERVATION: TIMELINE, at <http://roadless.fs.fed.us/timeline/textver.shtml> (last visited Jan. 11, 2001).

5. *Clinton: Part 2*, *supra* note 3.

6. The states are Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 12 (3d ed. 1993).

7. U.S. GOV'T INFO/RESOURCES, CLINTON HALTS ROAD WORK IN U.S. FORESTS, PART 1: WESTERN GOVERNORS VOW TO GET RULE OVERTURNED, at <http://usgovinfo.about.com/newsissues/usgovinfo/library/weekly/aa010501d.htm> (last visited Jan. 11, 2001) [hereinafter *Clinton: Part 1*].

8. See, e.g., MSNBC, *Alaska Will Sue Over Forest Plan* (Jan. 6, 2001), at <http://forests.org/archive/america/alwills.htm> (last visited Apr. 8, 2001) (quoting Alaska Governor Tony Knowles' pledge to file suit against "this illegal . . . executive fiat") [hereinafter *Alaska Suit*]; The Associated Press, *Coalition Returns to Court to Ax Roadless Policy* (Jan. 9, 2001), at <http://www.idahostatesman.com/news/daily/20010109/LocalNews/70447.shtml> (reporting that an Idaho coalition feels that the Forest Service "bypassed the forest planning process"); Timothy P. Carney, *Clinton Rushing to Lock Up 54 Million Acres of National Forest*, NAT'L CONSERVATIVE WKLY. (Oct. 27, 2000), at <http://www.humaneventsonline.com/articles/10-27-00/roadless.html> (attributing to Senator Larry Craig (R.-Idaho) the idea that the Forest Service "usurp[ed] congressional authority and disregard[ed] the federal laws that govern bureaucratic rulemaking").

Act), the Property Clause of the Constitution and case law, all of which grant the President and the Service the ability to implement regulations protecting public land. The basics of the Roadless Rule will also be discussed: what it does specifically, what are its benefits and costs and how it is being attacked.

Despite the arguments, relying on usurped power and negative economic impact, against the rule, the benefits of protecting roadless areas are plentiful. Indeed, the Service and the former President determined that there is a need for national attention because of the importance of roadless areas and the controversy surrounding their management.⁹ According to the Service, the “intent of this final rule is to provide lasting protection for inventoried roadless areas within the [NFS] in the context of multiple-use management.”¹⁰ Due to the recent nature of the rulemaking and the fact that the rule is still in its sixty-day implementation hold, it is unclear at this time whether it will withstand the pressure from its opponents.¹¹ It is clear, however, that given the rule’s judicial and statutory support, it will take quite a fight to conquer it.

II. BACKGROUND

In January 1998, Forest Service Chief Mike Dombeck proposed a temporary halt to all road construction in the nation’s inventoried roadless areas.¹² The Interim Roads Rule, issued on February 12, 1999, suspended road construction and reconstruction in certain roadless areas for eighteen months, during which time a long-term road policy for the forests was to be developed.¹³ In October 1999, President Clinton asked

9. See U.S. FOREST SERV., ROADLESS AREA CONSERVATION FINAL ENVIRONMENTAL IMPACT STATEMENT: BIOLOGICAL EVALUATION FOR THREATENED, ENDANGERED AND PROPOSED SPECIES AND SENSITIVE SPECIES (amended Nov. 2000) Vol. 1, ch. 3, pp. 16-20 [hereinafter FEIS], http://roadless.fs.fed.us/documents/feis/documents/vol1/chap3_0.pdf.

10. Special Areas; Roadless Rule Conservation, 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

11. The sixty-day hold was extended by an order from President Bush. The order, published in the Federal Register on February 5, pushes the effective date of the rule back from March 13, 2000, to May 12, 2001. Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8899, 8899 (Feb. 5, 2001). According to the publication, “[t]he temporary 60-day delay . . . is necessary to give Department officials the opportunity for further review and consideration of new regulations.” (emphasis added). *Id.*

12. U.S. FOREST SERV., ROADLESS AREA CONSERVATION: QUICK ANSWERS, at <http://www.roadless.fs.fed.us/qanswers/qa2.shtml> (last visited Feb. 4, 2001) [hereinafter QUICK ANSWERS]. In 1972, the Forest Service began the Roadless Area Review and Evaluation program (RARE I). U.S. FOREST SERV., ROADLESS AREA CONSERVATION: QUESTION & ANSWER: THE FINAL RULE, at <http://roadless.fs.fed.us/documents/rule/qa/fr.shtml> (last visited Jan. 11, 2001) [hereinafter QUESTION & ANSWER]. A more extensive inventory of the nation’s roadless areas, RARE II, was completed in 1979. It is the data from these two programs that serve as the basis for establishing inventoried roadless areas in most of the national forests and grasslands. *Id.*

13. QUICK ANSWERS, *supra* note 12.

the Service to develop regulations allowing for long-term protection of these areas.¹⁴ Throughout the development process, more than 180 American Indian and Alaska Native groups were consulted, eight federal agencies were involved, 600 public meetings were held, almost 2 million comments were received and seven separate hearings were held before U.S. House and Senate committees and subcommittees.¹⁵ The Service's proposed rule was published in the *Federal Register* in May 2000 and the Final Rule in January 2001.¹⁶

A. Goals and Purposes of the Roadless Rule

The Service promulgated the Roadless Rule to "protect the social and ecological values and characteristics of inventoried roadless areas from road construction and reconstruction and [from] certain timber harvest activities."¹⁷ Without such a rule, the Service feared a number of adverse effects, including watershed damage and an increase in maintenance backlog.¹⁸ These and other effects will be discussed individually.

1. Values of Roadless Areas

National forest roadless areas are highly valued for the many social and ecological benefits they provide. These benefits include: (1) high quality air, soil and water;¹⁹ (2) clean drinking water;²⁰ (3) habitat for endangered and threatened species;²¹ (4) large, undisturbed expanses;²²

14. *Id.*; see also William J. Clinton, *President's Roadless Memorandum: Memorandum for the Secretary of Agriculture* (Oct. 13, 1999), at <http://usgovinfo.about.com/newsissues/usgovinfo/blroadless.htm> (last visited Jan. 11, 2001) [hereinafter *Clinton Memorandum*].

15. U.S. FOREST SERV., ROADLESS AREA CONSERVATION RULEMAKING FACTS, at http://roadless.fs.fed.us/documents/rule/zRULE_Facts_1-5-01.htm (last visited Jan. 11, 2001) [hereinafter RULEMAKING FACTS].

16. QUICK ANSWERS, *supra* note 12.

17. U.S. FOREST SERV., ROADLESS AREA CONSERVATION: QUICK ANSWERS, at <http://www.roadless.fs.fed.us/qanswers/qa5.shtml> (last visited Apr. 8, 2001).

18. See Special Areas; Roadless Rule Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

19. Clean air, soil and water create the foundation for other resources and values. Healthy watersheds protect downstream communities from flooding, while providing clean water for industrial, agricultural and domestic uses. They also help maintain healthy fish and wildlife populations, and allow for a variety of outdoor recreation. *Id.*

20. NFS roadless areas contain all or portions of 354 municipal watersheds, providing drinking water for millions of people. Protecting such areas saves these communities a substantial amount of money in filtration costs and helps to maintain an efficient and clean flow of water to many growing populations. *Id.*

21. It is estimated that more than 200 threatened, endangered or proposed to be listed wildlife species are likely to take advantage of the open space afforded by roadless areas. RULEMAKING FACTS, *supra* note 15 (reporting the number to be approximately 220); Special Areas; Roadless Rule Conservation, 66 Fed. Reg. at 3245 (reporting the number to be

and (5) other values, such as dispersed recreation, reference landscapes and “locally identified unique characteristics.”²³ The Roadless Rule has the distinct ability to protect and maintain all of these important characteristics of America’s National Forests by protecting those special areas in which they are found. Preserving these values for future generations was one of the primary reasons for implementing the rule.²⁴

2. What the Rule Specifically Does

The Roadless Rule protects 58.5 million acres of forests, amounting to 31% of all NFS land and approximately 2% of the entire land base of the continental United States.²⁵ The Service reports that about 386,000 miles of roads are currently administered on NFS lands.²⁶ The provisions of the rule can be broken down into three categories of activity: (1) prohibition of construction and reconstruction of roads; (2) prohibition of timber removal; and (3) immediate application to the Tongass National Forest in Alaska.²⁷

approximately 280). This accounts for approximately 25% of all animal species and 13% of all plant species. RULEMAKING FACTS, *supra* note 15; Special Areas; Roadless Rule Conservation, 66 Fed. Reg. at 3245. In addition, forty-four species have critical habitat designated within inventoried roadless areas. FEIS, *supra* note 9, at 3.

22. In addition to providing habitat for endangered and threatened species, the relatively undisturbed nature of roadless areas allows native habitat for more than 1400 Forest Service-listed sensitive species of terrestrial and aquatic plants. RULEMAKING FACTS, *supra* note 15. In all, more than 65% of all Forest Service sensitive species “are directly or indirectly affected by inventoried roadless areas.” Special Areas; Roadless Rule Conservation, 66 Fed. Reg. at 3245.

23. While allowing certain wilderness-type activities, such as hiking, cross-country skiing and canoeing, roadless areas allow activities not currently allowed in Wilderness areas, such as mountain bike riding. Special Areas; Roadless Rule Conservation, 66 Fed. Reg. at 3245. Allowing these activities in roadless areas, while protecting the natural beauty, eases pressure off of heavily used wilderness areas by providing a space for solitude and recreation at the same time. Roadless areas are also thought to provide reference landscapes to measure the effects of development. By monitoring these large, relatively undisturbed areas, researchers are able to study the effects of development on other parts of the landscape. These areas have a high scenic quality that many people seek for recreation and which contribute to property values of nearby areas. In addition, roadless areas are often sites for traditional cultural resources, including many sacred sites eligible for protection under the National Historic Preservation Act. Lastly, roadless areas may contain “locally identified unique characteristics,” such as uncommon geological formations or important wetland complexes. *Id.*

24. See generally *Clinton Memorandum*, *supra* note 14 (describing generally such values as worthy of protection).

25. RULEMAKING FACTS, *supra* note 15.

26. *Id.*

27. See U.S. FOREST SERV., CHANGES FROM PROPOSED TO FINAL RULE, at http://roadless.fs.fed.us/documents/rule/zRule_Changes_from_prop_2_final_1_4_01.htm (last visited Jan. 11, 2001) [hereinafter CHANGES].

a. Prohibiting New Road Construction and Reconstruction

Generally, new road construction and reconstruction of existing roads in inventoried roadless areas on NFS lands is prohibited.²⁸ However, the rule does lay out very specific exceptions to this prohibition.²⁹ Prerequisites to such exceptions are met when road construction or reconstruction: (1) will limit the threat of a catastrophic event; (2) is necessary for a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) response effort; (3) is necessary for the exercise of rights previously granted by statute or treaty; (4) is needed to realign an existing road deemed “essential”; (5) will rectify conditions on an existing classified hazardous road; or (6) is part of a Federal Aid Highway Project, but only if no other prudent alternative exists.³⁰ In addition to these six exceptions, road construction may be allowed “in conjunction with the continuation, extension, or renewal of a mineral lease on lands that are under lease or for new leases issued immediately upon expiration of an existing lease.”³¹

b. Prohibiting Cutting, Sale, and Removal of Timber

As does the road construction prohibition, the restriction on cutting, sale, and removal of timber (collectively, timber harvesting) includes specific exceptions.³² Such exceptions are limited to the harvesting of small diameter trees for the maintenance or improvement of roadless characteristics *and* for one or more of the following purposes: (1) to improve habitat for endangered and threatened species; (2) to avoid uncharacteristic forest disasters by maintaining ecosystem composition; (3) when harvesting is incidental to a management activity that the rule does not otherwise prohibit; (4) for administrative or personal use (including such uses as Christmas tree and firewood cutting); or (5) when roadless area characteristics have been so drastically altered by the construction of a road and subsequent timber harvest occurring after the area was inventoried, but prior to the rule, that the area no longer fits the description of a roadless area.³³ The occurrence of these exceptions is

28. Special Areas; Roadless Area Conservation; Final Rule, 36 C.F.R. § 294.12 (2000); *see also* U.S. FOREST SERV., ROADLESS AREA CONSERVATION: FINAL RULE, at <http://roadless.fs.fed.us/documents/rule/rule.do.shtml> (last visited Jan. 11, 2001) (explaining the significance and workings of the Final Rule).

29. 36 C.F.R. § 294.12.

30. *Id.* § 294.12(b); *see also* CHANGES, *supra* note 27 (providing in table form the distinctions between the proposed rule, the preferred alternative and the final rule).

31. CHANGES, *supra* note 27.

32. *See* 36 C.F.R. § 294.13.

33. *Id.* § 294.13(b); *see also* CHANGES, *supra* note 27.

expected to be infrequent.³⁴ In addition, the provision requires that harvesting must “be clearly shown through project level analysis to contribute to the ecological objectives described in § 294.13(b)(1) or under the circumstances described in paragraphs (b)(2) through (b)(4).”³⁵

c. Applying Immediately to the Tongass National Forest

While the Proposed Roadless Rule delayed application to the Tongass until 2004, the Final Rule will apply immediately.³⁶ However, the rule does adopt a mitigation measure that allows the continuation of projects that had published a Notice of Availability for a draft environmental impact statement (DEIS) by January 12, 2001 (the date of publication of the rule in the Federal Register).³⁷ This mitigation measure attempts to ensure both long-term forest protection and a smooth transition for forest dependent communities.³⁸

The Service has made special attempts to balance the interests of the environment with those of communities and industry. The new rule “includes provisions to help ease potential economic impacts on local communities, preserve or enhance forest values, and guard against the risk of catastrophic wildfire.”³⁹ To protect existing expectations, the Service has implemented a “grandfathering” clause that allows logging of timber already sold or approved for sale.⁴⁰ In addition, this clause extends timber sales in the Tongass to those already the subject of a DEIS, providing an extra year of timber supply.⁴¹ As discussed previously, all activities already under Service review, including mining leases, will continue to be permitted.⁴²

While the Service has made certain concessions for the continuance of current leases and other projects, perhaps the most significant attempt to balance interests comes in the form of a six-year \$72 million assistance program designed to ease the economic transition for affected communities.⁴³ Of this, \$38.5 million will be directed to help

34. CHANGES, *supra* note 27.

35. Special Areas; Roadless Rule Conservation, 66 Fed. Reg. 3244, 3257 (to be codified at 36 C.F.R. pt. 294) [hereinafter Special Areas].

36. CHANGES, *supra* note 27.

37. 36 C.F.R. § 294.14(d); *see also* CHANGES, *supra* note 27.

38. Special Areas; Roadless Rule Conservation, 66 Fed. Reg. at 3254.

39. *Clinton: Part 2*, *supra* note 3.

40. *Id.*

41. *Id.*

42. 36 C.F.R. § 294.14(a) (providing that existing contracts, permits or other legal instruments authorizing the occupancy and use of NFS lands would not be suspended or modified by the rule); *see also* Special Areas, *supra* note 35, at 3259.

43. *Clinton: Part 2*, *supra* note 3.

communities around the Tongass, many of whom are dependent upon timber resources.⁴⁴

B. Federal Public Lands

1. National Forests vs. National Parks

One of the arguments against President Clinton's Roadless Rule is that the program treats areas of National Forests as if they were National Parks. Having been organized under two different government agencies and established for different reasons, the National Park System and the National Forest System have divergent interests and goals.⁴⁵ Therefore, it is thought that Clinton's reservation of these areas for protection in their natural state falls outside his power, and that of the United States Department of Agriculture (USDA).⁴⁶ This argument fails, however, in light of the evolution of both National Parks and National Forests.

National Parks are set aside primarily for preservation of natural features in their undisturbed state.⁴⁷ While the Park Service has traditionally focused on preservation, inclusion under its care of various recreational and cultural areas since its inception in 1916 has broadened the Park Service's objectives beyond managing the areas solely for the "enjoyment of future generations" to include the management of some areas for the recreational enjoyment of current generations.⁴⁸ Still, as a general rule, the most famous members of the system, the fifty National Parks, are managed under a more preservationist approach.⁴⁹

The National Forests, on the other hand, have a different history. In 1905, Gifford Pinchot became Chief Forester of the newly established United States Forest Service.⁵⁰ Because Pinchot believed strongly in utilitarianism, he consistently favored managed resource development over preservation.⁵¹ Indeed, when faced with the idea of prohibiting timber removal from the Adirondack Forest Preserve in New York,

44. *See id.*

45. The National Park System is run by the Department of the Interior while the National Forest System is run by the Department of Agriculture. *See* Harold W. Wood, Jr., *Pinchot and Mather: How the Forest Service and Park Service Got That Way*, in COGGINS ET AL., *supra* note 6, at 117.

46. *See supra* note 8.

47. COGGINS ET AL., *supra* note 6, at 117; *see also* National Parks Organic Act, 16 U.S.C. § 1 (1995) (directing the National Park Service to "conserve the scenery and the natural and historic objects and the wild life [in national parks] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations").

48. COGGINS ET AL., *supra* note 6, at 140.

49. *Id.*

50. *Id.* at 118.

51. *See id.* at 117.

Pinchot felt the prohibition was a waste, as “forestry had nothing to do with decoration of public places.”⁵² In another incident, Pinchot used his influence in Washington on behalf of San Francisco’s efforts to dam the Hetch Hetchy valley in Yosemite National Park.⁵³ His adamancy clearly revealed his focus on resource development over preservation: “I am fully persuaded that . . . the injury . . . by substituting a lake for the present swampy floor of the [Hetch Hetchy] valley . . . is altogether unimportant compared with the benefits to be derived from its use as a reservoir.”⁵⁴

Upon becoming Chief Forester, Pinchot received the following instructions: “All the resources of forest reserves are for *use* . . . where conflicting interests must be reconciled, the question will always be decided from the standpoint of the greatest good for the greatest number in the long run.”⁵⁵ It is this underlying utilitarianism that the Service adopted as its own through the Organic Act,⁵⁶ and later through the Multiple Use-Sustained Yield Act of 1960 (MUSY).⁵⁷ While the Organic Act favors protection of the forest and its resources and water flows, MUSY emphasizes the importance of five key uses: outdoor recreation, range, timber, watershed, and wildlife and fish purposes.⁵⁸ Importantly, MUSY is careful not to step on any toes: “The purposes of [this Act] are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in [the Organic Act].”⁵⁹

In 1976, the National Forest Management Act (NFMA),⁶⁰ combining elements of the Organic Act and MUSY, repealed the Organic Act.⁶¹ While most of its provisions set standards for creating individual management plans, it did provide certain requirements for such plans as a whole.⁶² Perhaps most importantly, NFMA requires that management plans insure that timber will be harvested from NFS land *only* where

52. *Id.*

53. *See id.*

54. *Id.*

55. The instructions, given to Pinchot by Agriculture Secretary James Wilson, were reportedly written by Pinchot himself. *Id.* at 118.

56. Organic Administration Act of 1897, 16 U.S.C. §§ 473-482, 551 (1994) (repealed in part 1976).

57. Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1994).

58. *Id.* § 528; *see generally* 16 U.S.C. §§ 473-482, 551.

59. 16 U.S.C. § 528.

60. National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949 (1978) (codified as amended in scattered sections of 16 U.S.C.).

61. COGGINS ET AL., *supra* note 6, at 641.

62. *See* Pub. L. 94-588 § 6(g), 90 Stat. 2949, 2953.

certain conditions are met.⁶³ These include where watershed conditions will not be irreversibly damaged and where protection is provided to avoid seriously damaging habitat.⁶⁴ Both of these objectives have been incorporated into the Roadless Rule.⁶⁵

2. Reservation and Withdrawal Authority

A “withdrawal” of land is generally a statute, executive order, or administrative rule changing the status of a parcel of land from available to unavailable for resource exploitation.⁶⁶ A “reservation” of land is quite similar to a withdrawal, but is usually made for a particular purpose.⁶⁷ In the case of the Roadless Rule, an administrative rule withdrew lands from the public domain and reserved them for future generations at the direction of a presidential memorandum. This type of power has grown out of a long and varied history of public land use policy.

Up until the middle of the nineteenth century, the United States promoted an expansion program commonly referred to as the public land disposal policy, by which federal land was given out to nearly anyone requesting it by way of mining and timber grants, homesteads, railroad grants, and numerous other means of disposition.⁶⁸ However, this program led to widespread abuses of public land laws giving rise to a new policy stressing retention and conservation.⁶⁹ Reservation of the Yellowstone area as a “pleasuring ground” in 1872 sparked a classification process, slow at first, but that soon evolved into an important method of countering the “excesses of land barons.”⁷⁰ From there, the practice of withdrawing land from entry took off.⁷¹

Perhaps more significant than the classification of Yellowstone as a National Park was the passage of the General Revision Act of 1891.⁷² The Act included a Forest Reservation provision, which while buried in an amendment, granted an enormously beneficial power to the

63. *See id.* § 6(g)(3).

64. *Id.* § 6(g)(3)(E).

65. *See generally* 36 C.F.R. pt. 294.

66. COGGINS ET AL., *supra* note 6, at 285.

67. *See id.*

68. *See generally* COGGINS ET AL., *supra* note 6, ch. 2 (discussing generally the disposition of the public domain).

69. *See id.* at 106-07.

70. Yellowstone was named a true National Park a number of years later when the U.S. Army reclaimed possession of the land from various squatters. *Id.* at 106.

71. Reactions to such excesses led to the formation of new organizations such as the Sierra Club, which promoted and contributed to the proliferation of executive withdrawal. *Id.*

72. *Id.* (citing General Revision Act, 16 U.S.C. § 471 (1995)).

executive.⁷³ The provision authorized the President to “set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations.”⁷⁴ The Act resulted in the reservation of millions of acres, later managed under the Organic Act, which authorized “protective management of the Forest Reserves.”⁷⁵ By 1901, 50 million acres of public domain had been set aside and by the end of President Theodore Roosevelt’s tenure, another 150 million had been added, bringing the total to more than 200 million acres in less than twenty years.⁷⁶ As today, controversies between preservationists and their foes raged.⁷⁷ While the Forest Reserve Amendment was repealed in part, other acts such as the Antiquities Act of 1906 serve to reinforce the power of the executive to withdraw and reserve lands as delegated to it by Congress.⁷⁸

The idea that the executive could withdraw lands from the public domain was nothing new. In fact, it was fairly common for the President to set aside land for specific purposes, such as military or Indian reservations.⁷⁹ However, Roosevelt’s era may have marked the first time land was withdrawn for the sake of the *land itself*.

3. Authority to Make Regulations Governing Use and Occupancy

Despite the controversy caused by widespread withdrawal of federal land, a number of courts approved the government’s right to make such reservations and, in turn, to establish rules governing use of those areas. Two cases in particular are *Light v. United States*⁸⁰ and *United States v. Grimaud*.⁸¹

In *Light*, the Supreme Court held that the United States could prohibit use of its property outright or fix the terms of use of such land.⁸² The Court held further that, while public land is held in trust for the people, it is not the domain of the courts to say how that trust shall be administered, thereby increasing the leverage of the government to establish guidelines for use of public land.⁸³

73. *Id.* at 107.

74. *Id.* (quoting General Revision Act, 16 U.S.C. § 471).

75. *Id.*

76. *See id.*

77. *Id.*

78. Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1995); *see also* COGGINS ET AL., *supra* note 6, at 287.

79. *See* COGGINS ET AL., *supra* note 6, at 287.

80. 220 U.S. 523 (1911).

81. 220 U.S. 506, 506 (1911).

82. *Light*, 220 U.S. at 536.

83. *See id.* at 537.

In *Grimaud*, the Supreme Court upheld the authority of the Secretary of Agriculture to make rules and regulations restricting the use of any reservation, citing the Organic Act's goal of improving and protecting the forest.⁸⁴ The issue in *Grimaud* was whether such an action was beyond the delegation power of the executive.⁸⁵ The Court admitted that it is difficult to distinguish between legislative power to make laws and administrative power to make regulations, but upheld the Secretary's attempt to restrict use of the reserved land as merely administrative in nature, and therefore not beyond the scope of his power.⁸⁶

As national sentiment progressed from wholesale disposition to retention and management to federal reacquisition, preserving wilderness became a principal goal of national policy.⁸⁷ These changes in public land law have developed some interesting patterns of land ownership over the last hundred years.⁸⁸ This patchwork of ownership, in turn, has given rise to a surprising number of lawsuits addressing access to and across federal lands.⁸⁹ For example, in *United States v. Perko*, the government brought suit against local citizens allegedly violating airspace reservations over roadless areas of the Superior National Forest.⁹⁰ The issue in the case was whether an executive order of the President restricting travel through airspace over roadless areas was valid.⁹¹ The court held that the order was valid, stating further that "the right of the public to have freedom of transit . . . must be subject to the paramount right of the Government to promulgate . . . regulations . . . under its exclusive sovereignty."⁹²

A second case discussing access to and through federal land is *Perko v. Northwest Paper Co.*⁹³ Plaintiffs argued that, because they had repeatedly made use of a logging road through a roadless area of Superior National Forest, they were entitled to a judgment declaring their rights to such use.⁹⁴ The court disagreed, holding that the road was never

84. *Grimaud*, 220 U.S. at 515 (holding that the 1897 act was intended "to improve and protect the forest and to secure favorable conditions of water flows"); see generally Organic Act, 16 U.S.C. § 551 (1994) (authorizing the Secretary to make provisions for the protection of the forest and to regulate the occupancy and use of forest reservations).

85. *Grimaud*, 220 U.S. at 516-17.

86. *Id.*

87. COGGINS ET AL., *supra* note 6, at 145.

88. *See id.*

89. "[F]or a long time litigation over access questions involving federal lands was rare, but no longer—it seems that there has been more such litigation in the past [twenty five] years than in the prior two hundred . . ." *Id.*

90. 108 F. Supp. 315, 315 (D. Minn. 1952).

91. *Id.* at 316.

92. *Id.* at 322.

93. 133 F. Supp. 560, 560 (D. Minn. 1955).

94. *See id.* at 561.

intended, nor authorized to be used, for public passage.⁹⁵ Because the land surrounding the road belonged to the United States, and not to Northwest Paper, it could not be assumed that the latter intended to dedicate the road to public use, and therefore the prohibition of access across the road was valid.⁹⁶

Finally, in *Mackie v. United States*, the plaintiff, who owned property near a roadless area, argued that he was entitled to an easement of necessity to get across the land.⁹⁷ The district court held that, because plaintiff had another mode of access that did not cross the roadless area, albeit an inconvenient one, no easement of necessity was warranted.⁹⁸ The court noted that a great deal of litigation regarding restrictive regulations in roadless areas has arisen, “determining beyond doubt the right of the Government thus to limit access to [such areas].”⁹⁹ The court held further that the limitations imposed upon plaintiff’s access did not constitute a taking under the Fifth Amendment to the Constitution.¹⁰⁰

In addition to case law addressing the implementation authority of the government, the Property Clause of the Fourth Amendment has emerged as an increasingly important tool in the governance of federal lands.¹⁰¹ The clause states that “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.”¹⁰² In 1881, the Supreme Court, in applying the Property Clause, held that the United States has full power “to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.”¹⁰³ Such application of the clause has been useful in delineating the scope of the Government’s power to limit use and occupancy of federal lands.¹⁰⁴

C. *Benefits and Costs: How the Rule Affects Industry and Environment*

While some of the potential effects can be counted, many of the benefits and costs associated with the Roadless Rule are qualitative,

95. *Id.* at 563.

96. *Id.*

97. 194 F. Supp. 306 (D. Minn. 1961).

98. *Id.* at 308.

99. *Id.* at 307.

100. *Id.* at 308.

101. See COGGINS ET AL., *supra* note 6, at 172.

102. U.S. CONST. art. IV, § 3, cl. 2.

103. COGGINS ET AL., *supra* note 6, at 185 (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917)).

104. See *id.* at 183-86 (discussing the applicability of the Property Clause to federal land use policy).

rather than quantitative. In its Regulatory Impact Analysis, the USDA compared these costs and benefits to likely effects in the absence of the rule.¹⁰⁵ The benefits are mostly associated with maintaining the areas in their current state, while most of the costs are associated with lost opportunity.¹⁰⁶ As discussed above, roadless areas and NFS lands in general, provide a variety of goods and services, ranging from pure aesthetics to resource supply. The following is a discussion of the potential benefits derived from protecting these goods and services.

The Service puts a great deal of emphasis on protecting watersheds in and around national forests.¹⁰⁷ Restricting access in roadless areas will help to maintain the water quality of these watersheds, thereby protecting drinking water sources, reducing treatment costs and preserving the value of water-based recreation activities.¹⁰⁸ In addition to high water quality, restricting occupancy and use of these pristine forest areas protects air quality, a benefit associated with better human and ecosystem health, higher adjacent property values, and better visibility.¹⁰⁹

Another potential benefit of the Roadless Rule is that it will limit negative impact on biological diversity and wildlife health. It allows better protection of endangered and threatened species, as well as healthy wildlife and fish populations.¹¹⁰ Restricting road access also reduces the risk of introducing nonnative species, thereby maintaining forage quality and quantity, which is essential to the existence of healthy species.¹¹¹ These populations, in turn, help to maintain populations of game species, allowing quality hunting and fishing both in roadless areas and beyond.¹¹² Preserving the quality of wildlife populations also maintains other recreation opportunities, such as wildlife viewing, hiking, and biking.¹¹³ This has an economic impact as well, in that the resources upon which outfitter and guide services depend would not be harmed.¹¹⁴ On a broader scale, preserving these opportunities in roadless areas may help to ease visitation pressure on wilderness areas.¹¹⁵

105. See generally U.S. DEP'T OF AGRIC., REGULATORY IMPACT ANALYSIS FOR THE ROADLESS AREA CONSERVATION RULE (2001), http://roadless.fs.fed.us/documents/feis/specprep/xira_spec_rpt.pdf [hereinafter IMPACT ANALYSIS].

106. *Id.* at 7.

107. See, e.g., Organic Act, 16 U.S.C. §§ 473-482, 551 (1995) (repealed in part 1976) MUSY, 16 U.S.C. §§ 528-531 (1994).

108. IMPACT ANALYSIS, *supra* note 105, at 8.

109. *Id.*

110. See *id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See *id.*

Finally, many planned timber sales in roadless areas cost more to prepare and sell than they receive in revenues.¹¹⁶ To the extent that these sales would not take place, financial savings would be realized.¹¹⁷ It also would decrease agency costs, in avoiding litigation over management activities.¹¹⁸ More importantly, limiting the number of miles of new roads would avoid an increase in maintenance backlog.¹¹⁹ The USDA reports an estimated \$8.4 billion in deferred maintenance and reconstruction on the almost 400,000 miles of roads in the national forest system.¹²⁰ In addition, “[t]he agency receives less than [20%] of the funds needed annually to maintain the existing road infrastructure.”¹²¹ Halting construction of new roads, and reconstruction of current roads, would minimize increases in this backlog and perhaps save the agency upwards of \$219,000 per year in maintenance.¹²²

While the USDA feels that the benefits of the Roadless Rule outweigh the costs, many feel just the opposite.¹²³ Loss of jobs and inability to exploit resources exemplify the associated costs.¹²⁴ In addition, the negative effects of the rule are more easily quantifiable and therefore more visible and understandable than the positive effects.¹²⁵ On a basic level, prohibition of road construction would limit access to resources within roadless areas.¹²⁶ Currently, approximately nine million acres of land suitable for timber production lie within roadless areas.¹²⁷ While timber harvesting is possible without the use of roads, for example, through helicopter use, roads are necessary for most timber sales to be economically feasible.¹²⁸ In addition to lost revenue, hundreds of timber jobs will be lost and many more affected in the long

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Special Areas; Roadless Rule Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

121. *Id.* at 3246.

122. IMPACT ANALYSIS, *supra* note 105, at 8.

123. *See id.* at 7.

124. *See id.* at 9.

125. *See id.* at 11-12 (comparing potential costs and benefits of the rule).

126. *See id.* at 9. The rule severely limits expansion into roadless areas, making it difficult both physically and financially to remove such resources.

127. U.S. FOREST SERV., ROADLESS AREA CONSERVATION FINAL ENVIRONMENTAL IMPACT STATEMENT: FOREST MANAGEMENT SPECIALIST REPORT 3 (2000), available at http://roadless.fs.fed.us/documents/feis/specprep/xforveg_spec_rpt.pdf.

128. IMPACT ANALYSIS, *supra* note 105, at 9.

term.¹²⁹ Jobs in other industries would also be affected, including road construction and mineral exploration.¹³⁰

The impact on mineral resources is expected to vary depending on available substitutes.¹³¹ Access to conduct exploration and development for “locatable minerals” (metallic and nonmetallic minerals subject to appropriation under the General Mining Law of 1872) will still be allowed, but exploration and development of leasable minerals, such as oil, gas and coal, would be limited to the extent that roads would be required.¹³² Billions of tons of resources would be unavailable for exploitation and payments to states could be reduced by more than \$3 million per year.¹³³

Aside from economic impacts, the Roadless Rule may also have an effect on the risk of wildland fire or disease.¹³⁴ It is a minor concern, however, since treatment of forests in these areas already receives a low priority, although restricted road access may increase the cost of the treatment that does occur.¹³⁵ Finally, the rule will have negative impacts on resource-dependent communities surrounding roadless areas.¹³⁶ The multimillion dollar assistance program discussed above, however, will offset this effect.

D. Arguments Against the Rule

The newly established Roadless Rule has more than a few opponents. Among them are representatives and governors of a number of western states.¹³⁷ The arguments against the rule are varied, but generally rely on the notion that Clinton and the Service have acted beyond the scope of their power.¹³⁸ Senator Larry Craig (R.-Idaho) argues that the Service is “usurping congressional authority by

129. The USDA’s Impact Analysis estimates that 461 jobs would be affected immediately (841 total jobs), with an associated annual loss of \$36.2 million in income. This number does not include long term losses in the Tongass National Forest. *Id.*

130. The USDA estimates between eighty-eight and 104 road construction jobs will be lost and 3095 mineral exploration jobs, with total income effects of approximately \$128 million. These numbers do not include long term losses in the Tongass National Forest. *Id.*

131. *See id.*

132. *Id.*

133. These resources include between 300 and 1300 million tons of coal, almost 900 million tons of phosphate, 11.3 trillion cubic feet of natural gas and 550 million barrels of oil. *Id.*

134. *See id.* at 10.

135. *See id.*

136. *See id.* at 9, 11-12. The rule is expected to impact local economies through lost revenue and jobs. *Id.*

137. Among the most outspoken of these are Senator Larry Craig (R.-Idaho) and Alaska Governor Tony Knowles. *See Alaska Suit, supra* note 8; *see also* Carney, *supra* note 8.

138. *See supra* note 8.

disregarding the federal laws that govern bureaucratic rulemaking.¹³⁹ Senator Craig reportedly believes that the problems facing the roadless areas are not genuine, but rather a political agenda on the part of the former President.¹⁴⁰

Other state authorities have vowed to get the rule overturned.¹⁴¹ Senator Frank Murkowski (R.-Alaska), who heads the Senate Energy Committee, has repeatedly suggested that more federal lands be opened up to petroleum exploration in order to lessen America's dependence on imports.¹⁴² Alaska Governor Tony Knowles has said he will sue to get the rule overturned as it applies to two Alaska National Forests, the Tongass and the Chugach, because of the existence of other applicable management plans.¹⁴³ Knowles has stated: "I am directing my attorney general to file suit against this illegal and ill-advised executive fiat to preserve the integrity of the planning process."¹⁴⁴

A more impassioned argument comes from Frank Gladics, President of the Independent Forest Products Association (IFPA), which claims to represent more than 80% of the companies who purchase federal timber in the western United States.¹⁴⁵ Gladics has stated: "I believe the Forest Service is purposefully understating the impacts of their . . . [r]oadless policy to avoid having to show that it will devastate small family-owned forest products companies who depend on federal timber for their very survival."¹⁴⁶ The IFPA believes both that small businesses will be hardest hit by the rule because they rely on federal timber, and that the Service has ignored this dependence.¹⁴⁷

President Bush has not said whether he will try to reverse the new policy provisions but has said that the plan paid too little attention to the concerns of those most heavily affected and to the impact on industry.¹⁴⁸ Representative James Hansen (R.-Utah), the new chairman of the House

139. Carney, *supra* note 8.

140. *See id.*

141. These include Senator Frank Murkowski (R.-Alaska), Alaska Governor Tony Knowles, and Representative James Hanson (R.-Utah). *See Clinton: Part 1, supra* note 7; *Alaska suit, supra* note 8; H. Josef Hebert, *Clinton's Forest Protection Plan Runs into Heavy Criticism*, STAR TRIB. (Jan. 6, 2001), at <http://webserv3.startribune.com/stOnLine/cgi-bin/article?thisSlug=LOGG06&date=06-Jan-2001&word=roadless>.

142. *Clinton: Part 1, supra* note 7.

143. *Alaska Suit, supra* note 8.

144. *Id.*

145. House Committee on Small Business, *Hearing on the Effects of the Roadless Policy on Rural Small Business and Rural Communities: Opening Statement by Frank Gladics, Independent Forest Products Association* (July 11, 2000), available at <http://www.linder.house.gov/smbiz/hearings/106th/2000/000711/gladics.htm>.

146. *Id.*

147. *See id.*

148. Hebert, *supra* note 141.

Resources Committee, has promised a “vigorous congressional review” focusing on overturning the rule using the 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA), which allows Congress sixty days to overturn any rule that will have an impact of more than \$100 million on the U.S. economy.¹⁴⁹ It is still unclear whether the Act will apply to the Roadless Rule.¹⁵⁰ In any case, the Office of Management and Budget has determined that the rule is “major,” which means that the Service must wait sixty days after publication in the Federal Register to implement it.¹⁵¹

Notwithstanding the applicability of the SBREFA, President Bush must still follow certain procedures if he is to successfully rescind the rule. A leading case laying out the prerequisites for rescission is *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automotive Insurance Co.*¹⁵² In *State Farm*, the Supreme Court reviewed a decision by the National Highway Transportation Safety Administration (NHTSA) rescinding a rule promulgated by a previous administration.¹⁵³ Like the Roadless Rule, the rule in question in *State Farm* was implemented following numerous considerations.¹⁵⁴ On review, the Court found the agency’s action to be supported by substantial evidence and upheld.¹⁵⁵ After suspension, reinstatement and modification of the rule, the United States Court of Appeals for the D.C. Circuit in 1979 upheld the modified rule as a “rational, nonarbitrary regulation.”¹⁵⁶ Two years later, the new Secretary of Transportation rescinded the rule, citing changes in the economic circumstances of the automobile industry.¹⁵⁷

The Supreme Court in *State Farm* found that the agency’s promulgation of the rule may only be set aside if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in

149. Small Business Regulatory Enforcement Act of 1996, Pub. L. No. 104-121, § 804(2)(A), 110 Stat. 857, 873 (1997).

150. John Hughes, *More Roadless Forest Protection Urged*, BOULDER NEWS (Oct. 30, 2000), at <http://www.bouldernews.com/news/worldnation/301fore.html>.

151. QUESTION & ANSWER, *supra* note 12. What is now unclear is the consequence of President Bush’s recent order holding implementation of the Roadless Rule for another sixty days. Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8899, 8899 (Feb. 5, 2001).

152. 463 U.S. 29, 29 (1983).

153. See *generally id.* (addressing the validity of rescinding a rule that would have required automobile manufacturers to include airbags or automatic seatbelts in new cars).

154. The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (repealed 1994), followed approximately sixty notices and at the time this case arose, had been imposed, amended, rescinded, reimposed, and rescinded again. *Id.* at 34.

155. *Id.* at 36.

156. *Id.* at 37 (quoting *Pac. Legal Found. v. Dep’t of Transp.*, 593 F.2d 1338, 1338 (1979)).

157. *Id.* at 38.

accordance with law.”¹⁵⁸ The Court further held that “the rescission or modification of [a] . . . standard is subject to the same test.”¹⁵⁹ In explaining its decision, the Court noted the well-established notion that choosing a course of action requires an agency’s informed judgment and consideration of all factors, so that the agency may carry out the duties committed to it by Congress.¹⁶⁰ “Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change.”¹⁶¹ The Court therefore applies the same arbitrary and capricious standard to the rescission of a rule as it would to the promulgation of a rule.

State Farm is useful in analyzing the steps the new administration will have to take in rescinding the Roadless Rule. In that case, the agency’s explanation for rescission of the rule was insufficient for the Court to conclude that the rescission was a “product of reasoned decisionmaking.”¹⁶² In other words, a decision to rescind must take into consideration all reasonable factors and alternatives before the decision is made. It has long been established that an agency must provide a record of its reasoning in implementing a new rule. *State Farm* espouses the idea that this record must also be provided in rescinding a rule. The agency must explain the evidence that is available, offer an explanation that does not run counter to such evidence and demonstrate a “rational connection between the facts found and the choice made.”¹⁶³ President Bush will be required to satisfy the requirements laid out in *State Farm* before any attempt to rescind the Roadless Rule will be upheld.

III. ANALYSIS

At the turn of the twentieth century, President Roosevelt began a legacy of protection for the National Forests, and at the turn of the twenty-first, President Clinton followed his lead. While some feel that the Roadless Rule is a step in the right direction for federal land use policy, others feel it too strongly limits access to those resources upon which they have come to rely. Yet these arguments are two sides of the same environment-focused coin. The issue for many, however, is less environmental than it is political. For the latter group, the issue is whether the President’s action crossed a line and how that action will affect the nation’s economy.

158. *Id.* at 41 (quoting *Citizens of Overton Park v. Volpe*, 401 U.S. 402, 414 (1971)).

159. *Id.*

160. *See id.* at 41-42.

161. *Id.* at 42.

162. *Id.* at 52.

163. *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Yet even if the focus remains on politics, the rule arguably comes out ahead. The purposes of the rule are simply to minimize ecological damage and to enhance agency efficiency: it does not negate existing contracts or close existing roads. It does not infringe on local discretion and local authorities' ability to initiate forest plan amendments as necessary is not limited by the rule.¹⁶⁴ The rule was implemented to protect assets, such as clean water and healthy populations, both human and nonhuman and to eliminate wasteful practices in the Service.

The Service concedes that there are costs associated with closing off large portions of forestland. However, many feel that these costs are a small price to pay for preserving priceless ecological assets. In a time when open spaces are continually lost to urban sprawl, there is a need to conserve roadless areas to provide unfragmented habitat, reference areas for research and continued recreation opportunities. The Roadless Rule will ensure long-term sustainability of these resources while allowing the next generation of Americans to inherit forest areas unobstructed by roads. In addition, it is bad policy, as well as illogical, to continue building new roads when the Service cannot pay for the roads it has already built.¹⁶⁵

The Service further acknowledges that some communities with significant economic dependence on forestland could be impacted, but the effects on national systems are expected to be minor.¹⁶⁶ As George Lennon, spokesman for the Service, has stated: "[T]he rule would limit access only to places where loggers or harvesters have so far found no reason to harvest."¹⁶⁷ The total timber volume affected is estimated at 0.5% of total U.S. production,¹⁶⁸ and reserves of oil and gas in inventoried roadless areas are considered an insignificant portion of the 0.4% of the current national production found on all NFS lands.¹⁶⁹ Because the terrain in roadless areas is often unaccommodating,

164. See *Interrelationships of Rulemaking and Multiple Forest Plan Amendments: Hearing Before the House Comm. on Res., Subcomm. on Forest and Forest Health*, 106th Cong. (2000) (statement of Randle G. Phillips, Deputy Chief, Programs and Legislation, Forest Serv., U.S. Dep't of Agric.), available at <http://www.fs.fed.us/geology/rulemakings.htm>.

165. "For years the public and agency have questioned the logic of building new roads, especially in controversial roadless areas, when the agency simply cannot afford to maintain its existing road system." *Id.*

166. Special Areas; Roadless Rule Conservation, 66 Fed. Reg. 3244, 3261 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

167. Carney, *supra* note 8.

168. Special Areas, 66 Fed. Reg. at 3264; see also RULEMAKING FACTS, *supra* note 15 (finding that "[i]mplementation of the Roadless Rule would decrease the amount of timber harvested on NFS lands by 2%—from 3308 million board feet (MMBF) to 3234 MMBF, less than 0.5% of total U.S. production").

169. Special Areas, 66 Fed. Reg. at 3264.

expenditures required to remove these resources would likely outweigh the revenues derived from their sale.

In fact, a study conducted in association with the Wilderness Society found that protecting roadless areas could actually be *good* for a state's economy.¹⁷⁰ Looking at fourteen state-specific economic profiles, John B. Loomis, Ph.D. and Professor of Agriculture and Resource Economics at Colorado State University, found patterns in income and job growth that "make it clear that forests products manufacturing and other resource extractive jobs are a minor, and in most cases, declining part of the economy in states with national forest land."¹⁷¹ Added to this is the economic transition program proposed by the Service to limit the impact on those communities hardest hit, which seeks to provide financial assistance to communities, as well as work with such groups to implement local transition projects.¹⁷² It is true that the economic impact on these communities must be taken into consideration when weighing the rule's costs and benefits, but this impact is only part of the picture. More important is the presidential and administrative power to make the rule at all. As shown, numerous statutes and cases have granted just such authority.

The Constitution grants Congress the power to make regulations regarding federal land through application of the Property Clause.¹⁷³ Using such power, Congress entrusted the Secretary of Agriculture with broad powers to administer the NFS by passing laws, such as the Organic Act, MUSY and NFMA.¹⁷⁴ The Service, in promulgating the Roadless Rule, has abided by all the applicable laws restricting its power.

Although the Organic Act has been repealed, the Secretary of Agriculture still has clear authority to make provisions for the protection of the nation's forests.¹⁷⁵ Through MUSY, the Secretary must maintain the NFS for multiple-use and sustained yield of resources without impairment to the productivity of the land.¹⁷⁶ This multiple-use

170. *You Can't Save the Economy Without the Trees* (Oct. 9, 2000), at <http://www.americanlands.org/forestweb/timber.htm>.

171. The fourteen states were California, Colorado, Florida, Georgia, Michigan, Minnesota, North Carolina, New Hampshire, New Mexico, Pennsylvania, South Dakota, Tennessee, Washington, and Wisconsin. *Id.*

172. See U.S. FOREST SERV., ROADLESS AREA CONSERVATION: QUESTION & ANSWER: ECONOMIC AND SOCIAL EFFECTS, at <http://roadless.fs.fed.us/documents/rule/qa/es.shtml> (last visited Jan. 11, 2001).

173. See U.S. CONST. art. IV, § 3, cl. 2.

174. U.S. FOREST SERV., FINAL REGULATORY FLEXIBILITY ANALYSIS FOR THE ROADLESS AREA CONSERVATION RULE 7 (Jan. 5, 2001), available at http://roadless.fs.fed.us/documents/feis/specprep/xfrfa_clearance.pdf.

175. See Organic Act, 16 U.S.C. § 551 (1994).

176. See MUSY, 16 U.S.C. § 529 (1994).

requirement is interpreted broadly so that the Secretary may have discretion in determining the combination of uses best suited to the area.¹⁷⁷ Indeed, the United States Court of Appeals for the Ninth Circuit has noted that the agency's authority "breathes discretion at every pore."¹⁷⁸ Following MUSY, NFMA reinforces the principles of multiple-use and sustained yield.¹⁷⁹ It also authorizes the Secretary to create regulations to carry out the goals of the Act.¹⁸⁰

Case law has also provided the requisite authority for the executive's actions. In both *Light* and *Grimaud*, the Supreme Court reinforced the government's right to prohibit use of its property.¹⁸¹ As discussed, other courts have applied this right to roadless areas in particular.¹⁸² In addition to following the requirements set out by these laws and cases, the agency has acted in accordance with other regulatory requirements.¹⁸³ The rule was reviewed under USDA procedures, Executive Order 12866 on Regulatory Planning and Review, and the "major rule provisions" of the SBREFA.¹⁸⁴ In addition, a regulatory impact analysis was prepared that found that the benefits associated with the rule outweigh the costs.¹⁸⁵

Having addressed the impacts of the rule and the authority to make it there remains only one issue: whether President Bush will overturn it. The new President has expressed some disfavor for it, but to rescind the rule, the administration will have to go through the same steps as were required to promulgate it.¹⁸⁶ More than a century of land policy has lent itself to the implementation of the Roadless Rule. In that time, this country has gone from a land disposal policy to structured management to outright reservation. This evolution of federal land management will certainly play a role in determining the future of the Roadless Rule.

177. *See id.* § 531.

178. *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

179. National Forest Management Act of 1976, Pub. L. 94-588, § 6(e), 90 Stat. 2949, 2952 (1978).

180. *Id.* § 15.

181. *See Light v. United States*, 220 U.S. 523, 523 (1911); *United States v. Grimaud*, 220 U.S. 506, 506 (1911).

182. *See generally* *United States v. Perko*, 108 F. Supp. 315, 315 (D. Minn. 1952); *Perko v. Northwest Paper Co.*, 133 F. Supp. 560, 560 (D. Minn. 1955); *Mackie v. United States*, 194 F. Supp. 306, 306 (D. Minn. 1961).

183. *See* Special Areas; Roadless Rule Conservation, 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

184. *Id.*

185. *See* IMPACT ANALYSIS, *supra* note 105, at 7.

186. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 29 (1983).

IV. CONCLUSION

Timber harvesting has a significant impact on fragile forestlands and the values associated with them. It threatens habitat, contributes to the fragmentation of open spaces and dirties much-needed drinking water. The Roadless Rule was designed to limit the impacts of timber harvesting on these delicate ecosystems. Despite the adverse effects of the rule on resource production, the rule is important to the ultimate protection of those resources. Therefore it is crucial that the Bush administration considers both the economic gains derived from the potential timber industry in these areas and the environmental benefits protected by the Roadless Rule. It is important that these resources be preserved for future generations. The Roadless Area Conservation Rule is an integral tool in that effort, one that has been sanctioned by a hundred years of statutes and court cases authorizing just such an action.