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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants.	Case No.: 05-03508-EDL consolidated with
THE WILDERNESS SOCIETY, et al., Plaintiffs, v. UNITED STATES FOREST SERVICE, et al., Defendants.	Civ. No.: 05-04038-EDL STATE PLAINTIFFS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

All parties agree that the Forest Service has statutory authority to make policy choices regarding America's scarce remaining roadless areas. But such affirmative decisions trigger the requirement to perform a NEPA analysis that describes the environmental consequences of the agency's proposed course of action. The analysis must also fairly evaluate alternative courses of action, and it must be subjected to public scrutiny. *See West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 930 n.14 (9th Cir. 2000) ("NEPA's object is to minimize . . . the risk of uninformed choice"). In promulgating the Roadless Repeal rule without NEPA analysis, defendants have flouted these legal obligations.

Defendants' sole defense to the merits of this case – "the Wyoming district court, not the Forest Service, repealed the Roadless Rule" – is squarely contradicted by the administrative record. Indeed, in internal draft documents that post-date the allegedly determinative 2003 Wyoming court injunction, the Forest Service stated frankly that an appeal of the Wyoming injunction was pending, and that: "*There is no aspect of this [rulemaking] action that is required by statute or court order*." SPR-60c (Memo from Dave Barone to Andria Weeks, dated Oct. 5, 2004); SPR-64c (Agenda Review Report 059-AC10, dated Feb. 8, 2005).[1/]

Defendants' defense of legal necessity is also inconsistent with their litigation conduct regarding the Roadless Rule. Federal defendants, not the Wyoming court, caused the demise of the Roadless Rule, by: (1) devising an internal strategy to replace the Rule well in advance of the Wyoming court injunction; (2) failing to mount a vigorous defense of the Roadless Rule in any forum; (3) failing to appeal the adverse Wyoming ruling; (4) failing to seek geographic limitation of the court's injunction to either Wyoming or 10th Circuit boundaries, especially in view of conflicting Ninth Circuit authority; and (5) racing to moot intervenors' appeal by issuing a final rule before the 10th Circuit could render a decision.

As a final matter, defendants' legal-necessity defense is at odds with the selective acquiescence practice of federal agencies in the same time period at issue here when Administration-supported

1. All record documents cited herein are contained in State and environmental plaintiffs' earlier-filed Joint Excerpts of Record or in the Joint Supplemental Excerpts of Record filed herewith.

policy was at stake. *See infra* at 15-16. Having made an affirmative policy choice to acquiesce in the Wyoming court's decision (even in jurisdictions where that decision was not controlling), the Forest Service must bear the legal consequences of that choice.

As the Forest Service must ultimately admit in both record documents and its brief, the legal status of the Roadless Rule was at most "uncertain" at the time the agency issued the 2005 Repeal final rule. *See* SPR-062 at 42637 (describing "legal uncertainty surrounding the implementation of the roadless rule"); Defs' MSJ at 31 (observing that "the ultimate legal viability of the Rule was uncertain" at the time the 2005 Rule was issued). If it was "uncertain" whether the Forest Service's action constituted repeal of the Roadless Rule, it was necessarily "uncertain" whether the Forest Service's Repeal rule would cause the environmental effects of a loss of roadless area protections. The mere *possibility* of such an effect required the agency to prepare a NEPA analysis. *See* Reply Brief of The Wilderness Society *et al.* ("TWS Reply") at 10-12.[2/]

Defendants' only additional defense to this action is a strenuous challenge to plaintiffs' standing to bring it. Defendants assert that States containing millions of inventoried roadless acres, possessing public trust responsibilities to protect wildlife and water quality therein, owning lands affected by federal policies thereon, and compelled to participate in an arduous and uncertain administrative process to regain protection therefor, lack any legally cognizable injury traceable to the Roadless Repeal. Defs' MSJ at 16-20. Defendants' argument both understates the threats facing plaintiff States and misconceives NEPA law on standing in this Circuit.

For the reasons below, the States of Oregon, Washington, California, and New Mexico each have standing to maintain this action. All that is required to maintain this suit, however, is that at least one of these States has an injury-in-fact, caused by defendants' noncompliance with NEPA, and redressable by this court. *See Village of Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252, 264 & n.9 (1977) (holding that where "at least one . . . plaintiff . . . has demonstrated standing," the court may conclude its inquiry and allow plaintiffs' case to proceed). That requirement is readily satisfied.

2. To minimize duplication, State plaintiffs incorporate by reference portions of the Reply brief of environmental plaintiffs in consolidated case no. 05-4038-EDL.

II. ARGUMENT

A. STATE PLAINTIFFS HAVE DEMONSTRATED STANDING

Plaintiff States of California, New Mexico, Oregon, and Washington have already detailed the procedural injuries that arise from defendants' failure to follow proper NEPA procedures in promulgating the Roadless Repeal final rule. States' MSJ at 17. State plaintiffs have also explicated their various injuries-in-fact from the Roadless Repeal, grounded in their legal responsibilities for State wildlife and water resources, and/or their proprietary interests in State lands that may be harmed by defendants' removal of protections for inventoried roadless areas. *Id*. at 16-17; Gregoire Decl. at ¶ 4 & Exh. A; Koenings Decl. at ¶¶ 4-11; Bernath Decl. at ¶¶ 4-7; Carrier Decl. at ¶¶ 3-8; Farris Decl. at ¶¶ 3-4; Simon Decl. at ¶¶ 2-9; Stevenson Decl. at ¶¶ 2-8; Polsky Decl. at ¶¶ 4-10.[3/] Defendants err in asserting that State plaintiffs have not satisfied Article III requirements. Further, defendants' standing argument rests in significant part on out-of-circuit precedent *expressly repudiated* by the Ninth Circuit. *See infra* at 10-11.

1. Injury in fact

a. Harm to States' interests in wildlife, fish, and water resources is reasonably probable

Defendants are incorrect that even if – as they reluctantly concede – States have a protectable interest in wildlife within their borders, the Roadless Repeal does not pose the required "reasonable probability of harm" to that interest. According to defendants, States seeking protection for their wildlife suffer no "reasonably probable" harm because they may either (a) eventually obtain full Roadless Rule protections via petition, or (b) participate in a future site-specific NEPA process. Defs' MSJ at 17-18.

The fallacy of this argument is best illustrated by reference to plaintiff State of Oregon, where – by federal defendants' own admission in a pending Ninth Circuit case – the Forest Service plans to contract almost immediately for logging in inventoried roadless areas as part of the "Biscuit" fire-salvage sale. *See* Plaintiffs' Exhibit ("Plfs. Exh.") 26, Declaration of John N. Fertig in *Siskiyou Regional Education Project v. Goodman,* No. 06-35266 (9th Cir.; pending).

3. Defendants' extensive argument that procedural injury is only cognizable when coupled with an injury in fact (Defs' MSJ at 16-17) is gratuitous; State plaintiffs alleged both "injury-in-fact" and procedural injury. *See* States' MSJ at 16-17.

The Forest Service has indicated that logging in the Biscuit project's "Mike's Gulch inventoried roadless area" must occur in 2006 to prevent timber decay – *i.e.*, before any State Petition from Oregon (due November 13, 2006) could possibly be acted upon. *Id.* at ¶¶ 5, 6, & 10.[4/]

The suggestion that Oregon will still have a full range of roadless protection options available through the Petition process even *after* Mike's Gulch logging occurs is tantamount to a suggestion that felled trees can be successfully reaffixed to their stumps as a NEPA remedy. *See* Plfs. Exh. 27, Letter from Governor Kulongoski to Linda Goodman, Regional Forester, dated March 9, 2006 (stating: "I continue to have grave concerns over the prospects of commercial harvest in the Biscuit IRAs. . . . I again ask the Forest Service to defer logging in the Biscuit roadless areas while I pursue my objective of permanently protecting the 1.9 million acres of roadless areas in Oregon.") The proposition that Oregon does not face a present, "reasonably probable" injury at Mike's Gulch IRA is simply not credible.[5/] Rather, the ineluctable conclusion is that the State of Oregon faces a concrete injury-in-fact that, when coupled with procedural injury sustained through defendants' unlawful avoidance of a NEPA process, is sufficient to confer standing. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995) (holding that a NEPA plaintiff must show "a 'concrete interest' that underlies its procedural interest").

As to the State of Washington, this court has already determined that plaintiff has a "significant protectable interest" sufficient to permit intervention as-of-right in this matter. *Order Granting Motion to Intervene by State of Washington* (dated Mar. 31, 2006) at 3.

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4. In October 2005, the Governor of Oregon requested that the Forest Service permit Oregon to protect its roadless areas on an expedited basis. Carrier Decl. at ¶ 7 & Exh. A. The Forest Service denied the request. Carrier Decl. at ¶ 8 & Exh. B.

5. The availability of a site-specific NEPA process, such as that on individual timber sales (Defs' MSJ at 18), does not negate States' injury-in-fact from defendants' failure to perform NEPA on their programmatic decision to repeal the Roadless Rule. *But for* the Roadless Repeal, no sale in Mike's Gulch could lawfully proceed at present. Although defendants correctly note that an Oregon district court upheld the Biscuit Project's 2004 authorization in the wake of the 2003 Wyoming court injunction (Defs' MSJ at 13), it is clear that had defendants made a different policy choice in their 2005 Roadless Repeal final rule, any development project at Mike's Gulch could be prevented from proceeding on the ground in 2006.

Specifically, the court noted that Washington has, through declaration evidence, demonstrated its concrete interests in protection of fish, wildlife, and water resources, as well as other natural resources that benefit outdoor recreation and tourism in the State. *Id.* The court further noted that the State of Washington's interests "may be impaired" if roadless areas are not protected from further roadbuilding activity, with the accompanying potential for water quality degradation, adverse impacts to salmon habitat, and impairment of the Washington Department of Fish and Wildlife's ability to fulfill its resource-protective mission. *Id*. at 4 (summarizing declarations).

The fact that Washington's injuries are not temporally immediate is irrelevant to the present inquiry, whether framed as an inquiry into standing or ripeness.[6/] The Supreme Court has made clear that a party injured by an agency's failure to comply with NEPA "may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n., Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). As the Ninth Circuit explained in allowing a similar programmatic challenge to Forest Service action to proceed in *Citizens for Better Forestry v. United States Dep't of Agriculture*, 341 F.3d 961 (9th Cir. 2003): "[T]he imminence or lack thereof of site-specific action is simply a factual coincidence, rather than a basis for legal distinction. [. . .] [T]he planning of a site-specific action *vel non* is irrelevant to the ripeness of an action raising a procedural injury." *Id*. at 977. Thus, in Washington as in Oregon, the State's interests are *presently* injured by defendants' having "ma[d]e up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment." *Id*. at 971 (internal quotations and citations omitted).

b. Harm to States' interests in State-owned properties is reasonably probable

Plaintiff Attorneys General of California and New Mexico have additionally demonstrated standing based on the reasonable probability that the Roadless Repeal will harm State-owned

6. At some point a claim that a plaintiff's harms are too speculative to demonstrate injury-in-fact shades into an argument that plaintiff's claims are unripe because the contours of that injury will be better known in the future. In the present case, defendants treat the issue as one of standing (*see* Defs' MSJ at 15 n.8), while amici American Forest Resource Council (AFRC) *et al*. treat it as an issue of ripeness. *See Memorandum of Amici Curiae AFRC, et al.* at 3-5.

lands (States' MSJ at 17 & declarations cited therein) – a harm that defendants acknowledge constitutes "a cognizable interest." Defs' MSJ at 18. Defendants argue, however, that California and New Mexico cannot describe the potential adverse effects with sufficient specificity to satisfy Article III requirements, because the Forest Service has neither proposed individual near-term projects in these States' roadless areas nor made "the final decision before on-the ground actions occur" that could impact State lands. Defs' MSJ at 19 & n.12. Again, defendants' demand for site-specificity and immediacy of impacts does not accord with controlling NEPA precedent.

The States' standing to protect their proprietary interest in lands affected by the Roadless Repeal, regardless of precisely where and how those impacts will be felt, follows from well established precedent in this Circuit. In *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), the Court held that a municipality had standing to sue a federal agency where it had a mere "geographic nexus" to the site of the challenged project. *Id.* at 671. In *State of California v. Block*, 690 F.2d 753 (9th Cir. 1982), the Court upheld California's standing to challenge the U.S. Forest Service's failure to comply with NEPA in preparing an EIS for a broad-brush land allocation decision governing federal forest lands in this State. The court rejected a defendant-intervenor's challenge to the State's standing, finding that California had satisfied the "injury-in-fact" requirement because the land allocations would necessarily "affect lands owned by California" that are "in geographical proximity to the Proposed Action's site," even though California had not identified specific affected land parcels. *Id.* at 776.

Similarly, in *Douglas County v. Babbitt*, the Ninth Circuit held that "[a] County's proprietary interest in its lands adjacent to [a challenged] critical habitat [designation]" represented a sufficiently "concrete interest," even where no parcel-specific effects were enumerated, and the only threats identified were the generic spillover threats that "failing to properly manage for insect and disease control and fire [on federal land]" could have on adjacent State lands. 48 F.3d at 1501.

In the *Kootenai Tribe* challenge to the Roadless Rule, the Ninth Circuit held that the State of Idaho had standing because of the mere proximity of State lands to federal lands affected by

the roadless rule. *Kootenai Tribe v. Veneman,* 313 F.3d 1094 (9th Cir. 2002). The Court stated that "[a]s adjacent landowners, the Idaho plaintiffs have a 'sufficient geographic nexus to the site of the challenged project that [they] may be expected to suffer whatever environmental consequences' may result from implementation of the Roadless Rule." *Id*. at 1112 (citing *City of Davis v. Coleman,* 521 F.2d 661, 671 (9th Cir. 1975)).

Trial court decisions further illustrate Circuit law regarding standing for States asserting property-based interests. Recently, for example, in *State of California v. United States Forest Service,* 2005 WL 1630020 (N.D. Cal. July 11, 2005) (Plfs' Exh. 25), the court held that the mere "geographic proximity" of State-owned lands to federal lands affected by a challenged Forest Service action was sufficient to demonstrate the State's interest in the action. Given that "[f]orest ecosystems and endangered species do not recognize property lines," the court held that it was "reasonably probable" that decisions affecting federal lands "that are immediately adjacent to the state's forest will harm plaintiff's concrete interests." *Id.* at *4.[7/]

Because plaintiff States' real property is reasonably likely to be adversely affected by defendants' noncompliance with NEPA, plaintiffs have standing to prosecute this action.

c. State plaintiffs have standing to challenge programmatic decisions

Defendants erroneously argue that plaintiff States' harms are too indirect to confer standing, because State Petition review and site-specific project proposals will provide opportunities for future NEPA process. Defs' MSJ at 18 & 19 n.12. In *Citizens for Better Forestry*, the Ninth Circuit explained that the availability of later, site-specific NEPA analysis does not obviate the need for up-front programmatic NEPA analysis where, as here, the Forest Service issues a nationwide substantive regulation with predictable aggregate effects. As the Court noted in rejecting the Forest Service's argument that site-specific NEPA processes sufficed to address any

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7. Further, defendants' suggestion that because the California Department of Forestry may not always manage State lands to maximize ecological values, the Attorney General cannot allege any injury to such values stemming from the Forest Service's policies on federal lands (Defs' MSJ at 18, n.11), is identical in form to an argument the court rejected in *State of California v. United States Forest Service*. In that case, the court dismissed as irrelevant to the standing inquiry the facts offered by defendants regarding particular state agencies' policies, noting that "the Attorney General would be free to take a different view in exercising his common-law authority to protect State interests by bringing a lawsuit." *Id.* at *3.

harms from changes to regulations governing forest plans: "site-specific plans will follow the requirements of national rules (as they must), such that decreased substantive national rules will likely result in less environmental protection at the regional and site-specific levels." *Id.* at 974-75.[8/] The Ninth Circuit considered, and dismissed, the precise argument defendants here advance: that plaintiffs lacked standing due to the "legal distance" between the promulgation of a nationwide final rule and any "on-the-ground impacts" that would injure plaintiffs' interests. *See* Defs' MSJ at 18.

Responding to the Forest Service's argument that plaintiffs have standing "to challenge LRMPs and other programmatic rules that are one step removed from site-specific plans . . . [but] should not have standing to challenge the . . . [national] Rule which is two steps removed from site-specific plans" – which the court characterized as a "direct/indirect injury argument" – the Ninth Circuit explained why it chose to "dispose of it":

> [S]uch line-drawing seems inherently arbitrary. The relevant inquiry for the immediacy requirement in the procedural context is whether there is a "reasonable probability" that the challenged procedural violation will harm the plaintiffs' concrete interests [citation omitted], not how many steps must occur before such harm occurs. [. . .] The USDA's argument to the contrary – that there is no reason to believe that lower environmental safeguards at the national programmatic level will result in lower environmental standards at the site-specific level – suggests that it conceives of plan development rules merely as exercises in paper-pushing. "[S]hort of assuming that Congress imposed useless procedural safeguards, and that [the plan development rule] is a superfluous step, we must conclude that [it] plays some, if not a critical, part in subsequent [lower-level] decisions." *Idaho Conservation League* [*v. Mumma*], 956 F.2d [1508] at 1516 [(9th Cir. 1992)].

Citizens for Better Forestry, 341 F.3d at 975. Here too, the promulgation of a rule containing "lower environmental safeguards" (*i.e.*, a return to roadless area management by forest plan) at the "national programmatic level" makes it "reasonably probable" that lower environmental standards at the site-specific level will "harm the plaintiffs' concrete interests."

In *State of California v. Block, supra*, the Ninth Circuit similarly held that the State of California had standing to challenge the Forest Service's broad allocation of national forest

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8. Although defendants attempt to distinguish *Citizens for Better Forestry* on the grounds that the nationwide planning rule there in play had "substantive" effects (Defs' MSJ at 18 n.10), in fact the Roadless Repeal final rule had marked substantive effects, *i.e.*, the removal of preexisting roadless protections. Therefore, *Citizens for Better Forestry* significantly informs both the standing and NEPA analyses here.

roadless lands among three categories (wilderness/ nonwilderness/ further study), because the Forest Service had not considered any alternative scenarios that would have made significantly more land eligible for wilderness designation. The court held that later site-specific NEPA review would be inadequate to remedy California's injuries, because in issuing their programmatic rule defendants had made a "decisive allocative decision," and "[f]uture decisions concerning these areas will be constrained by this choice." 690 F.2d. at 762-63. Thus, the court held, defendants' programmatic action "must therefore be carefully scrutinized now and not when specific development proposals are made." *Id*. at 763.

Just as the *Block* court found that "the promise of site-specific EIS's in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development," *id.* at 763, here, too, State Petition and site-specific EIS's are meaningless if they only address different options for achieving a purpose and need (*e.g.*, logging or phosphate extraction at particular locations) that is fundamentally incompatible with preserving the ecological values formerly protected by the Roadless Rule. Further, any State-specific, petition-driven NEPA processes can neither address the environmental impacts of projects occurring before petitions are acted upon, nor the impacts of projects in non-petitioning States. Because defendants' Roadless Repeal, and the incursions into roadless areas it authorizes even in advance of receipt of State Petitions, will constrain future options for roadless area management, defendants must perform a programmatic NEPA analysis of their action.

Lastly, here, as in *State of California v. United States Forest Service*, *supra,* for certain actions the Roadless Repeal is in fact the final decision before on-the-ground actions occur that could impact State lands or natural resources, such as where a State fails to submit a petition, and a roadless-area project proceeds pursuant to a NEPA categorical exclusion.[9/] Thus, even

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9. Under Forest Service regulations revised in 2001, the agency can exempt from site-specific NEPA analysis – *i.e.,* can categorically exclude – even those projects that impact listed "resource conditions" such as inventoried roadless areas, as long as the impacts thereto are not "significant." *See* Plfs. Exh. 28, *National Environmental Policy Act Documentation Needed for Certain Special Use Authorizations,* 66 Fed. Reg. 48412, 48414 (Sept. 20, 2001). The administrative record reveals that the Forest Service internally considered replacing the Roadless Rule with a rule that required an Environmental Impact Statement for all roadless-area incursions – not just those deemed "significant" by the agency. *See* SPR-1b ("Proposed Amendment of

defendants' suggestion that site-specific NEPA processes can cure the failure to prepare a programmatic EIS (Defs' MSJ at 19 n.12) is, as to certain projects, wrong as a matter of fact as well as law.

Because plaintiff States have concrete interests in resource protection and State-owned properties that are impaired by the programmatic decisions made in defendants' Roadless Repeal rule, plaintiffs have shown the injury-in-fact necessary to satisfy Article III requirements.

2. Causation and redressability

Plaintiff States' injury-in-fact is caused by defendants' failure to comply with NEPA in promulgating the Roadless Repeal final rule, and therefore can be redressed by defendants' conduct of an adequate NEPA process. A NEPA injury consists of deprivation of legally required process, rather than failure to obtain a specific outcome, and thus a NEPA plaintiff need not "establish with any certainty" that the conduct of a NEPA process will cause an agency to change its conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). All that is required is that an agency's decision "*could be influenced* by the environmental considerations that the relevant statute requires an agency to study." *Citizens for Better Forestry*, 341 F.3d at 976 (quotations and citations omitted; emphasis in original).

The Ninth Circuit has repeatedly stated that a NEPA injury is cognizable whenever it is "fairly traceable to the challenged action of the defendant" and it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004), quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). *See also Citizens for Better Forestry*, *supra*, at 975 ("Once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed.") (internal quotations and citations omitted).

In the face of this unbroken wall of precedent, defendants can only invoke *out-of-circuit*

Roadless Area Conservation Rule," dated Apr. 13, 2001); SPR-3b (memo by Frank Norbury, dated Apr. 17, 2001); SPR-37b (e-mail message from F. Pam Titus re: Roadless Policy Issues, dated June 7, 2002). The proposed and final Roadless Repeal rules make clear, however, that the agency rejected that option without subjecting it to any public comment. Thus, opportunities for site-specific challenge to roadless area projects are more limited than defendants suggest.

legal authority in their effort to import a more demanding "substantial probability" standard for causation. *See* Defs' MSJ at 11 (citing legal standards from *Florida Audubon Soc'y v. Bentsen,* 94 F.3d 658, 667 (D.C. Cir. 1996) and *Dellums v. United States Nuclear Regulatory Comm'n,* 863 F.2d 968, 980 (D.C. Cir. 1988)). Not only is nonbinding authority superfluous in a jurisdiction replete with controlling NEPA standing jurisprudence, but *Florida Audubon* has been expressly rejected in this Circuit. Responding to an identical invocation of that case in *Citizens for Better Forestry*, the Ninth Circuit wrote:

> Against th[e] weight of controlling authority, the USDA cites a conflicting subsequent decision from the D.C. Circuit. *See Fla. Audubon Soc'y v. Bentsen,* 94 F.3d 658, 667 (D.C. Cir.1996) (en banc). According to the USDA, *Florida Audubon* requires us to hold that in procedural injury cases involving "broad rulemaking" as opposed to "government action . . . located at a particular site," heightened standing scrutiny applies. With all due respect for our sister circuit, we are bound to follow the law of the Ninth Circuit. Moreover, in announcing this rule it was the D.C. Circuit that placed itself in conflict with our rule, as it recognized when it rendered *Florida Audubon. See id.* at 675 (Rogers, J., dissenting) ("[The majority's new rule] places this circuit in conflict with the Ninth Circuit, which has frequently found standing in cases similar to this one."); *see also id.* (citing *Idaho Conservation,* 956 F.2d at 1516).

341 F.3d at 974.

Ultimately, defendants' standing argument here is again that plaintiffs may not challenge a Forest Service action that indirectly, rather than directly, reduces roadless area protections – the distinction already rejected as legally irrelevant in *Citizens for Better Forestry*. State Plaintiffs' harms from the Roadless Repeal, although in some instances indirect, are not so attenuated or speculative as to obviate standing. Neither are they beyond redress. In *Citizens for Better Forestry*, the Ninth Circuit pointedly concluded its standing analysis:

> [W]e reaffirm, as we have repeatedly done in the face of USDA arguments to the contrary, that environmental plaintiffs have standing to challenge not only site-specific plans, but also higher-level, programmatic rules that impose or remove requirements on site-specific plans.

Id. at 975.

In the present case, notwithstanding additional "USDA arguments to the contrary," State Plaintiffs have met their constitutional burden of demonstrating that programmatic choices made in the Roadless Repeal final rule (including the critical choice not to protect roadless areas in the period pending submittal and resolution of State petitions) will constrain future decisionmaking at the State Petitions stage and the site-specific level. Defendants' demand for greater specificity

as to the nature, location, and timing of plaintiffs' injuries goes well beyond Article III requirements. As the *Kootenai Tribe* court explained:

> To require that plaintiffs prove particular environmental effects for standing purposes is overmuch and "would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." *City of Davis*, 521 F.2d at 670-671; *see also Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) ("requiring the plaintiff to show actual environmental harm as a condition for standing confuses the jurisdictional inquiry . . . with the merits inquiry").

313 F.3d at 1112.

If even one plaintiff State has standing on any basis, this suit may proceed. *See, e.g., Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981) ("Because we find that California has standing, we do not consider the standing of the other plaintiffs"); *Board of Natural Resources of the State of Washington v. Brown*, 992 F.2d 937, 943 (9th Cir. 1993) ("Because the Boards have standing . . . we need not consider whether . . .[other parties] also have standing . . . ."). Here, each of plaintiff States has established both a procedural injury and an injury to its concrete proprietary interests, that its injuries are caused by defendants, and that its injuries are redressable by this court. Plaintiff States therefore have standing to maintain this action.

B. THE ROADLESS REPEAL VIOLATED NEPA

In promulgating the Roadless Repeal final rule, the Forest Service took a two-fold action: (1) repealing the Roadless Rule, and thereby removing the specific protections it conferred on inventoried roadless areas, and (2) creating a petition process whereby State governors could express preferences regarding management of their States' roadless areas. Defendants' entire merits argument rests on the mistaken premise that defendants' final rule of May 2005 comprised only the latter action – creating a State Petition process that merely "establishes a process by which future decisions will be made." Defs' MSJ at 2. From this faulty premise, defendants' entire jurisdictional and merits argument flows: no harms are possible and no NEPA process is required because mere "procedures" do not have environmental effects.

If, however, the Forest Service volitionally repealed the Roadless Rule, the agency appears to concede that a NEPA process would have been required. *See* Defs' MSJ at 25

(acknowledging that "the 2001 Roadless Rule had substantive, site-specific impacts because it prohibited, subject to certain exceptions, road construction and timber harvest within IRAs of the National Forests.") Because the Forest Service did repeal the Roadless Rule, and unambiguously told the Tenth Circuit that it had made this choice, defendants cannot credibly maintain the contrary here.

1. The Forest Service told the Tenth Circuit that the agency had repealed the Roadless Rule; the agency should be judicially estopped from asserting the contrary here.

The Forest Service, not the Wyoming district court, made the choice to repeal the Roadless Rule in May 2005, by issuing a rule that "replaced" it with a different national rule. This is what the agency told the Tenth Circuit in urging dismissal of environmentalists' then-pending appeal as moot, thereby depriving those groups (and by extension, the more than one million members of the public who supported the Roadless Rule) of an opportunity to obtain a ruling on the Roadless Rule's legality. *See* Brief of the United States in *Wyoming v. USDA*, No. 03-8058 (May 25, 2005), attachment to TWS Reply, at 1-4 (stating that Forest Service was "replacing" and "superceding" the Roadless Rule). Having obtained the result it sought – dismissal as moot – by representing that the agency had replaced the Roadless Rule, the Forest Service should be judicially estopped from asserting the contrary proposition in this forum: that the Wyoming court definitively invalidated the Roadless Rule, leaving the agency no choice but to abandon it.

"Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). It is an equitable doctrine intended to protect the integrity of the judicial process by preventing a litigant from "playing fast and loose with the courts." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), quoting *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988). Judicial estoppel is applied to prevent parties from making inconsistent assertions as "a means of obtaining unfair advantage." *Arizona v. Shamrock Foods*, 729 F.2d 1208, 1215 (9th Cir 1984), quoting *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir. 1953).

Here, defendants represented to the Tenth Circuit that they were promulgating a new rule that obviated the need to address the merits of environmentalists' appeal of the Wyoming injunction. They must now be estopped from asserting the opposite in the present action: that the Wyoming court injunction left them no option but repeal of the Roadless Rule.

Whereas collateral estoppel is designed to prevent repetitive litigation of specific factual matters, judicial estoppel concerns the relationship between litigants and the courts. Thus, the Supreme Court's bar on the use of nonmutual collateral estoppel against the government does not prohibit application of judicial estoppel to a federal agency. Indeed, the Ninth Circuit has specifically authorized the use of judicial estoppel in a NEPA context where a federal agency fails to comply with assurances previously made to a court.

In *Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992), for example, the Court rejected plaintiffs' argument that the National Park Service should not be granted dissolution of an injunction requiring it to prepare environmental impact statements concerning mining in national parks in Alaska, where plaintiffs voiced fears that the agency might not comply with NEPA in the future. The Court held that because the agency had in court briefs and oral argument "represented that it will fully comply with NEPA in evaluating future applications for mining projects . . . [and] understands its duty to follow NEPA in reviewing future applications for permits," plaintiffs' concerns were unfounded insofar as "judicial estoppel precludes the Park Service from later arguing that it has no further duty to consider mitigation measures or the cumulative effects of mining in the three parks." *Id.* at 891.

As explained by the Third Circuit: "[The] use of inconsistent positions . . . is more than an affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano, supra*, 203 F.2d at 513 (citations omitted).[10/] Because the Forest Service not only courted, and capitulated

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10. The *Scarano* Court elaborated that "[a] plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later . . . to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier positions." *Id.* at 513. Although in this State-plaintiff case the Forest Service does not encounter "the same adversary" as it did in the Tenth Circuit, in the consolidated environmental-plaintiff case, the Forest Service does.

in, a district court defeat, but *affirmatively acted* to preempt an imminent Circuit Court ruling by telling the Court that the agency had repealed the Roadless Rule, the Forest Service must accept the legal consequences of its policy choice, and should be estopped from arguing here that it did not repeal the Roadless Rule.

2. The Forest Service made a policy choice to acquiesce in the Wyoming court's ruling.

The Forest Service's Roadless Repeal was not judicially compelled, but was, rather, an affirmative exercise of policy discretion. At the time the Roadless Repeal final rule was promulgated in May 2005, the sole Circuit Court decision addressing the legality of the Roadless Rule held that the rule likely *complied* with NEPA. *Kootenai Tribe,* 313 F.3d at 1123. A contrary Wyoming district court decision was on the brink of resolution by the Tenth Circuit, which had already heard oral arguments in the matter. *State of Wyoming v. United States Dep't of Agriculture,* 414 F.3d 1207, 1210 (10th Cir. 2005) (stating that "the new rule has mooted the issues in this case"). Against this chronology, the Forest Service's claim that it had no choice but to assume that the rule was *illegal,* and *immediately* to publish an alternative rule rather than await an appellate ruling, is patently unconvincing.[11/]

Federal defendants' internal strategy to replace the Roadless Rule, formulated well in advance of the Wyoming court's ruling, is detailed in the *Rewriting the Rules* congressional report already reviewed by this Court in granting plaintiffs' motion to compel. *See* Exh. I to Barone Decl. at 27-49. Documents newly released under the court's Order to Compel confirm that defendants intended to replace the Roadless Rule with or without an adverse court ruling. For example, an internal Forest Service memorandum titled "Roadless Area Rulemaking

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11. The Forest Service's failure to appeal the adverse district court ruling in Wyoming, its effort to prevent environmental intervenors from appealing, and its race to moot environmental intervenors' appeal to the Tenth Circuit is described in environmental plaintiffs' brief; State plaintiffs incorporate that discussion by reference. *See* TWS Reply at 1. State Plaintiffs further note that, as an alternative to abandoning the Roadless Rule nationwide, the Forest Service failed to seek geographic limitation of the remedy to the State of Wyoming, or at most, the Tenth Circuit – a remedy appropriate where Wyoming was the only State plaintiff before the Court. Such a limitation would have been particularly fitting given that the Ninth Circuit had indicated that it would likely reach a different legal conclusion, and where numerous other challenges were pending in other judicial fora.

Proposal," dated April 5, 2002 – *i.e.*, more than one year *before* the Wyoming district court issued an injunction against the Roadless Rule – maps out an agency strategy whereby "[i]f preliminary injunction is lifted by the Ninth Circuit Court," the Forest Service will implement the Roadless Rule but simultaneously "[p]ublish a proposed rule to revise the January 12, 2001 Rule as soon as possible." SPR-23b. The Roadless Rule would then be "replaced upon adoption of a new Final Rule." *Id.*

Defendants' suggestion that they had no choice but to acquiesce in a single adverse district court decision is also wholly inconsistent with the conduct of the present Department of Justice in relitigating issues in other policy contexts even after repeated losses in the *courts of appeals*. In perhaps the most striking example, the federal government has mounted an ongoing legal defense of the Partial-Birth Abortion Act of 2003 (18 U.S.C. §1531) in the face of an unbroken line of adverse rulings. *See, e.g., National Abortion Federation v. Ashcroft,* 287 F. Supp. 2d 525 (S.D.N.Y. 2003) (granting TRO to enjoin enforcement of Act); *Carhart v. Ashcroft,* 331 F. Supp. 2d 805 (D. Neb. 2004) (holding Act unconstitutional); *Carhart v. Gonzalez,* 413 F.3d 791 (8th Cir. 2005) (holding Act unconstitutional) (*cert. granted sub nom. Gonzales v. Carhart,* 126 S. Ct. 1314 (Feb. 21, 2006)); *National Abortion Federation v. Gonzales,* 437 F.3d 278 (2nd Cir. 2006) (holding Act unconstitutional); *Planned Parenthood Federation of America, Inc. v. Gonzales,* 435 F.3d 1163 (9th Cir. 2006) (holding Act unconstitutional). Similarly, when the Fifth Circuit held that a U.S. Fish and Wildlife Service regulation regarding "critical habitat" under the Endangered Species Act was facially invalid, *Sierra Club v. United States Fish & Wildlife Serv.,* 245 F.3d 434 (5th Cir. 2001), the agency did not abandon the regulation. Instead, it continued to employ it across the country, including in the Ninth Circuit, until the Ninth Circuit likewise held the regulation to be unlawful three years later. *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.,* 378 F.3d 1059 (9th Cir. 2004).

Agencies' nonacquiescence in court decisions is authorized by the Supreme Court's holding in *United States v. Mendoza,* 464 U.S. 154 (1984). In *Mendoza,* the Supreme Court announced a broad prohibition on the assertion of nonmutual collateral estoppel against the

government, reasoning that it would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." 464 U.S. at 160. The absence of nonmutual collateral estoppel makes possible an agency's decision whether to acquiesce in or resist an adverse ruling on an issue, by "[leaving] the Government . . . free to litigate . . . that issue in the future with some other party." *Id.* at 164.

As a policy matter, agency nonacquiescence has both adherents and detractors. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence By Federal Administrative Agencies*, 98 Yale L.J. 679 (1989).[12/] One need not take any position on the desirability of the practice, however, to observe that defendants' *the-Wyoming-court-made-us-do-it* argument regarding the Roadless Repeal is belied by their concurrent, nonacquiescing litigation conduct in another policy context.[13/]

3. The Forest Service must conduct the required environmental analysis of its Roadless Repeal rule.

Having made a choice to repeal an environmentally significant regulation, the Forest Service must employ required procedures, including conducting an environmental analysis under NEPA. The Forest Service has admitted to the public and to this court that it promulgated the Roadless Repeal rule against a backdrop of legal "uncertainty." *See* Plfs. Exh. 29, *Notice of Issuance of Agency Interim Directive,* 69 Fed. Reg. 42648 (July 16, 2004) (stating that "legal proceedings are ongoing and the ultimate outcome is far from certain"); Defs' MSJ at 31("the ultimate legal viability of the [Roadless] Rule was uncertain"). As described in environmental

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12. Nonacquiescence or selective acquiescence in judicial decisions can ensure full ventilation of difficult legal issues: "This ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of 'percolation' within the lower courts." *Hart v. Massanari,* 266 F.3d 1155, 1172-73 (9th Cir. 2001). On the other hand, pervasive nonacquiescence may "border on lawlessness" (Estreicher & Revesz, *supra,* at 681) and "exacerbate agency-court tensions." *Id*. at 686; *see also Murray v. Heckler,* 722 F.2d 499, 500-01 (9th Cir. 1983) (criticizing *intracircuit* nonacquiescence).

13. Further, as noted *supra,* the agency acknowledged in internal documents that its Roadless Repeal action was not legally compelled. *See* SPR-64c (Agenda Review Report 059-AC10, dated Feb. 8, 2005) and SPR-60c (Memo from Dave Barone to Andria Weeks, dated Oct. 5, 2004) (both stating: "There is no aspect of this [rulemaking] action that is required by statute or court order.").

plaintiffs' brief, the fact that the agency's action "may" have a significant effect on the environment triggers NEPA obligations. *See* TWS Reply at 10-12.

The requirement to conduct a NEPA analysis in the present circumstance becomes still clearer when compared to the alternative legal rule that defendants implicitly propose: that any time an agency regulation is successfully challenged in court – thereby creating "legal uncertainty" as to whether the agency will prevail on appeal – the agency may repeal that regulation without normally required procedures. Because federal regulatory action frequently spawns litigation by affected parties, and because agencies may easily obtain a district court loss where, as here, they mount a "lackadaisical and half-hearted" defense,[14/] defendants' proposition has no limiting principle.

Such a proposition is squarely at odds with *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual ("State Farm"),* 463 U.S. 29 (1983), and its progeny demanding a rational explanation of agency rule changes, and would prevent review of arbitrary-and-capricious NEPA decisionmaking. Indeed, defendants' proposed rule renders the APA's rationality requirement a legal nullity in a rule-repeal context. The necessary conclusion is that, instead, where the legal fate of a regulation is genuinely uncertain, an agency must use proper procedures to revise or repeal that regulation, must justify changes with reference to substantial evidence in the Administrative Record, and, where the agency's action "may" have a significant effect, must conduct a NEPA analysis of that action.

a. The agency's use of a categorical exclusion was unlawful

Defendants' argument that the Roadless Repeal final rule is categorically excluded from NEPA requirements rests on their erroneous characterization of the rule as establishing only a future process, not also repealing substantive roadless-area protections. As explained above, however, the Forest Service took a two-fold action in its May 2005 rulemaking, by (1) repealing the Roadless Rule, and (2) "replacing" it with a newly created petition process.

Even if the Forest Service's rulemaking could plausibly be categorically excluded,

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14. This was former Forest Service Chief Mike Dombeck's characterization of the agency's litigation conduct in the Idaho district court challenge to the Roadless Rule, in which he was a named defendant. See *Rewriting the Rules, supra,* at 39 & n.114.

however – a proposition that State plaintiffs vigorously dispute – the agency did not provide sufficient explanation of its exclusion rationale to support such a determination. The Ninth Circuit has held that where, as here, extraordinary circumstances are potentially implicated, an agency must provide some contemporaneous documentation of the rationale for a categorical exclusion, *regardless* of the agency's internal documentation requirements. *State of California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002). As described in State plaintiffs' opening brief, the only agency documents mentioning the categorical exclusion in the present case contain conclusory statements, not analyses. *See* States' at 23 & n.21. As such, they cannot support the agency's decision, because they do not permit the court to "determine if the application of the exclusion is arbitrary and capricious." *Norton, supra,* 311 F.3d at 1176.

To justify the Forest Service's conclusory statements regarding reliance on a categorical exclusion, defendants again invoke authority from the D.C. Circuit where the Ninth Circuit has adopted a *contrary* view. Specifically, Defendants cite *Backcountry Horsemen of America v. Johanns,* Civ. no. 05-0960 (Mem. Op., Mar. 19, 2006), Exh. 12 to Defs' MSJ, for the proposition that no categorical exclusion documentation is required for establishment of Forest Service procedural rules, because the action in question is one for which no "decision memorandum is required" under the Forest Service Handbook. *Backcountry Horsemen* at 16. In *State of California v. Norton,* however, federal defendants advanced an identical argument in stating that a "Categorical Exclusion Review" document need not be prepared "except for certain defined MMS [Marine Mammal Service] actions which the MMS has determined have the potential for causing environmental effects, and has specifically listed in . . . [the agency's NEPA] Guidelines." *See Reply Brief of the United States* (dated Mar. 11, 2002) in *State of California v. Norton,* 2002 WL 32103618, at *26 (9th Cir.). The Ninth Circuit necessarily *rejected* that argument in holding that the agency's reliance on a categorical exclusion was insufficiently documented to permit meaningful judicial review.

Thus, even if the Roadless Repeal could be fairly characterized as a "procedural" rule, the administrative record contains insufficient information to support the Forest Service's use of a categorical exclusion.

b. The Roadless EIS does not meet the agency's NEPA obligations[15/]

(i). *The Agency's "purpose and need" has changed, requiring a new EIS*

Defendants were required to prepare a new Environmental Impact Statement for their Roadless Repeal rule, because that rule does not have the same "purpose and need" as the Roadless Rule. It is axiomatic that "the no-action alternative generally does not satisfy the proposed action's purpose and need[;] its inclusion in the EIS is required by NEPA as a basis for comparison." Roland E. Bass, *et al.*, *The NEPA Book: A Step-by-Step Guide On How To Comply With The National Environmental Policy Act* (2nd ed., 2001), at 95. Thus, defendants' assertion that the Roadless Repeal may rely on the "no-action alternative" from the 2000 FEIS in lieu of a new EIS is wrong as a matter of hornbook law.

As described in the 2000 FEIS, the Roadless Rule was intended to protect ecological values and reduce road maintenance expenses by "immediately" prohibiting activities that posed "the greatest risk to the social and ecological values of inventoried roadless areas." *FEIS*, Vol. 1, at ES-1. The Roadless Rule was also intended to create a roadless policy that was predictable and nationally coherent. *See* State Plfs' MSJ at 24-25. The Repeal rule, in near-complete contrast, permits extractive use of roadless areas where allowed by individual forest plans; defers consideration of whether and where any such activities will be banned; does not establish any policy to reduce road construction; creates unpredictability by leaving roadless decisionmaking up to a combination of individual State governors, a federal advisory committee, and Forest Service decisionmakers; and rejects national coherence in favor of allegedly improved local responsiveness. Where a new environmental rule does not even colorably advance the same interests as the rule it replaces, an agency must prepare a new environmental analysis.

(ii). *The agency has failed to consider feasible alternatives to the Roadless Repeal.*

In violation of NEPA's mandate to consider alternative ways of achieving an agency's purpose and need, the Forest Service failed to make public, or to analyze the environmental impacts of, *any* alternatives to the Roadless Repeal. Recently produced record documents

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15. State Plaintiffs here emphasize selective points in discussing defendants' unlawful reliance on the 2000 FEIS in support of their Roadless Repeal, and incorporate by reference environmental plaintiffs' additional arguments on this topic. *See* TWS Reply at 13-17.

indicate that the agency considered internally a variety of ways to modify the original Roadless Rule, including, for example, eliminating blanket roadless-area protections but requiring EIS's for any future roadless area incursions (*see supra* n.9), or, alternatively, establishing a "backcountry" land classification system that would further subdivide roadless areas for purposes of determining the level of protection they would receive. *See, e.g.*, SPR-5b ("Proposed Rule for Roadless Backcountry Areas, dated June 8, 2001); SPR-13b (e-mail message and memo from Frederick Norbury, dated Mar. 27, 2002, at 4 (presenting "Other Thoughts")); SPR-38b (memo by David Barone re: Latest 'draft' of Revised 36 CFR 294, dated June 13, 2002). However, the agency neither analyzed the individual or comparative environmental impacts of such options, nor subjected them to public scrutiny and comment, as required by NEPA to insure informed agency decisionmaking.

In addition, the Forest Service has erroneously dismissed as "infeasible" all additional examples of available alternatives suggested by plaintiffs, stating that anything short of an immediate and total repeal of roadless protections, and a return to forest-plan-based management, would have contravened the Wyoming court's injunction. Defs' MSJ at 30-31. Thus, for example, plaintiff States' suggestion that the Forest Service should have analyzed the alternative of preventing roadless incursions pending action upon State petitions – *i.e.*, creating an *interim* condition of protection rather than nonprotection, so that options would not be foreclosed before a NEPA process could be conducted on State petitions – is dismissed as "infeasible."

But defendant Mark Rey has told the public just the opposite. Responding to a New York Times editorial praising the instant multi-State suit ("A Light in the Forest," Plfs' Exh. 30), defendant Rey stated that this litigation is both "unfortunate and unnecessary." ("Protection for Forests," Plfs' Exh. 31). This litigation is "unnecessary," in defendant Rey's words, because the Forest Service is "*providing interim protection to roadless areas, pending the development of state-specific rules provided for in our 2005 rulemaking*." *Id.* (emphasis added). As to the facts, the construction of phosphate roads in Idaho, imminent logging in Oregon, oil and gas leasing in Utah, and near-future logging in Minnesota all belie Mr. Rey's public assurance that the Forest

Service is "providing interim protection . . . pending the development of state-specific rules."[16/] As to the law, however, Mr. Rey's words make clear that the Forest Service believes that it *does* have the legal authority to prohibit roadless incursions until State Petitions are acted upon, notwithstanding the Wyoming injunction; it has merely chosen not to exercise that authority with respect to certain roadless-area projects.[17/] Defendants' failure to consider feasible programmatic alternatives to the Roadless Repeal violates NEPA.

C. THE ROADLESS RULE VIOLATED THE APA

The agency's Roadless Repeal violated the Administrative Procedure Act, because it was a substantively irrational response to the 2003 Wyoming court injunction.[18/] The Roadless Rule was promulgated after years of agency analysis and scientific study and the most participatory rulemaking in USDA history. It rested on a voluminous EIS that amply documented the inadequacy of forest-plan-based management to protect the ever scarcer resource values of

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16. Mr. Rey presumably refers to a series of Forest Service interim directives that require the Forest Service Chief, or in some instances his subordinates, to authorize roadless area incursions. *See* AR SPR-12 to SPR-15; SPR-19 to SPR-21; Plfs. Exh. 1. However, these directives largely adopt what the Forest Service elsewhere describes as "Reserved Decision Authority," namely, authority that "[does] not limit actions, but who makes the decision." SPR-37b (e-mail message re: "Roadless Policy Issues," dated June 7, 2002). The agency contrasts this with actual "Interim Protection measures," which would "mimic the roadless rule's approach until land management planning 'releases.'" *Id*.

17. As State and environmental plaintiffs have demonstrated, "interim protection" is not being conferred on, at minimum, Oregon, Idaho, Utah, and Minnesota roadless areas pending review and NEPA analysis of State petitions. State plaintiffs further note that defendants' Declaration of James W. Sanders does not even demonstrate the contrary as to Minnesota. *See id.* ¶ 3 (confirming that "the Echo Trail Project does include timber harvest and temporary road construction in areas inventoried as roadless areas during the [2004] Forest Plan revision process."). It is legally irrelevant that no logging or roading is planned "in areas that were identified as part of the 2001 Roadless Area Conservation Rule," *id*. at ¶ 2: by its plain terms, the Roadless Rule protected not only areas identified as roadless in 2001, but also, any areas meeting roadless criteria that would be identified in *future* forest plan revisions. *See* RACR-5796 (Roadless Rule), 66 Fed. Reg. 3244, 3272 at [former] § 294.11(defining "Inventoried Roadless Areas"). Thus, absent the Roadless Repeal, roadless areas newly identified in Superior National Forest through the 2004 land management plan process would have been protected from commercial logging in any project after that year – including, the present Echo Trail Project.

18. State plaintiffs incorporate by reference environmental plaintiffs' discussion of the viability of APA claims based on the substantive statutes and organic act that define the Forest Service's legal obligations. *See* TWS Reply at 20-22.

roadless areas, such as providing habitat for dwindling species and insuring a reliable freshwater supply in the arid West. *See* Plfs' MSJ at 2 & 37-38. In the face of such analysis, it was irrational for the Forest Service to throw out the baby with the bath water in response to the Wyoming court injunction, by reverting to *the very management scheme it had documented in its FEIS to be woefully eroding roadless area values*. *See* States' MSJ at 25.

The D.C. Circuit has explained that the existence of an adverse court decision does not make it *per se* rational for an agency to repeal a regulation in full, particularly where minor rule changes might satisfy a court's concern while fulfilling the rule's originally intended purpose. In *International Union, UMW v. United States Dep't of Labor,* 358 F.3d 40 (D.C. Cir., 2004), the court held that it was irrational for the present Department of Labor to withdraw a mine safety regulation that had been proposed, but never finalized, during a prior presidential administration. Among the justifications proffered by the agency for the rule withdrawal was that an 11th Circuit decision issued after the proposed rule was published cast doubt on the legality of the agency's intended course. The D.C. Circuit rejected this explanation as arbitrary and capricious, however, noting that the agency should have explored ways to "craft[] a rule that met the Eleventh Circuit's standard" while furthering the agency's original mine-safety goals. *Id.* at 44.

In the present case, similarly, the Forest Service erroneously raced to conclude that the Wyoming ruling was "fatal to its effort" to confer some form of roadless area protection nationwide, rather than attempting to craft a rule responsive to any alleged legal defects in the initial Roadless Rule. For example, while Roadless Rule challengers expressed concerns that Roadless Rule restrictions on timber harvest might compromise forest fire and insect control efforts – raising the specter of near-term conflagration and infestation if the Rule were not modified to remove such restrictions – it is difficult to discern the reason that it is essential to conduct *phosphate exploration* and *oil and gas leasing* during the pendency of the State petition process.[19/]

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19. Plaintiffs dispute that conflagration and pestilence were realistic threats under the Roadless Rule, in part because of the Rule's "emergency circumstances" exceptions. *See* States' MSJ at 8 n.7. Plaintiffs merely note that such arguments were at least raised in Roadless Rule litigation, whereas arguments about the need for minerals and fuel extraction from roadless areas

The Supreme Court has made clear that an agency must explain the substantive reasons for a rule rescission, and it is not sufficient "for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions." *State Farm,* 463 U.S. at 52. The Forest Service's lack of serious consideration of less draconian modifications of the Roadless Rule, so as to preserve that Rule's core function of ecosystem protection, makes the agency's response to any legitimate legal "uncertainty" wholly irrational.

D. REINSTATEMENT OF THE ROADLESS RULE IS THE PROPER REMEDY

Reinstatement of the Roadless Rule, until such time as defendants may propose its replacement with another rule that has been subjected to a proper NEPA process, is the appropriate remedy for defendants' NEPA violations. State Plaintiffs incorporate by reference environmental plaintiffs' discussion of the propriety of reinstating the Roadless Rule on the present facts. *See* TWS Reply at 25-30.[20/]

State plaintiffs further note that, contrary to defendants' suggestion that the Roadless Rule should only be deemed to have existed for the three months between the Ninth Circuit's ruling in *Kootenai Tribe* and the Wyoming district court's injunction, the roadless rule in fact guided Forest Service policy for at least six years, notwithstanding the pendency of multi-forum litigation. *See, e.g.,* RACR-1350 (Proposed Roadless Rule), 65 Fed. Reg. 30276, 30278 (describing "regulatory initiatives" as beginning with a January 1998 temporary suspension of road construction and reconstruction in certain areas); SPR-9b ("Background and Status of Roadless Area Mgt. and Rulemaking") (listing roadless protections implemented prior to Roadless Rule).[21/] Simply put, the Forest Service was largely refraining from roadless incursions

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were not. Rather, Forest Service policy changes in this area appear to reflect non-litigation concerns. *See, e.g.,* SPR-8b (e-mail from Bruce Ramsey, dated Oct. 12, 2001) (floating option of a "[roadless area] management scheme based on mineral resource potential" that would "allow development at Forest Supervisor discretion regardless of roadless status[,]" in light of the "billions of dollars worth of minerals" in known coal and phosphate deposits in roadless areas).

20. Because Plaintiff States asserted no claim regarding the Tongass National Forest in Alaska, they do not join in environmental plaintiffs' discussion of a Tongass remedy.

21. Indeed, the very reason that environmental plaintiffs did not seek a stay of the Wyoming district court ruling pending appeal (*see* Defs' MSJ at 24 n.14) was the lack of imminence of

for many years – presumably, out of fear for their legal vulnerability[22/] – even as it strategized as to how to rescind the Roadless Rule.

The facts supporting the State of Virginia's roadless petition are typical: "because of the process leading up to the 2001 adoption of the Roadless Conservation Rule, roadbuilding and commercial timber harvesting have not been occurring in roadless areas on the George Washington or Jefferson [National Forests in Virginia] over the last eight years." Plfs. Exh. 19, *Petition of the Governor of Virginia to the U.S. Secretary of Agriculture for Protection of National Forest System Inventoried Roadless Areas in the Commonwealth of Virginia* (dated Dec. 22, 2005), at 4. The Roadless Rule, not management-by-forest-plan, was the multi-year status quo before the Roadless Repeal. Thus, reinstatement of the Roadless Rule is the appropriate remedy for defendants' NEPA violations.

CONCLUSION

In its most recent NEPA ruling against the U.S. Forest Service, the Ninth Circuit noted a "disturbing trend," in which "the USFS appears to have been more interested in harvesting timber than in complying with our environmental laws." Plfs. Exh. 32, *Earth Island Institute v. United States Forest Service*, 2006 WL 767012 (9th Cir., Mar. 24, 2006) at *26-*27 (cataloguing NEPA cases invalidating Forest Service actions from 2001-04). In the present case, State plaintiffs submit that the Forest Service was likewise "more interested" in quick repeal of the Roadless Rule than in complying with the nation's bedrock environmental law.

For the reasons identified in State and environmental plaintiffs' briefs, the 2005 Roadless Repeal should be invalidated, and the 2001 Roadless Rule should be reinstated, until defendants meet their critical environmental analysis and disclosure obligations under NEPA.

Dated: May 5, 2006

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roadless area projects.

22. *See, e.g., Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1079-81 (E.D. Cal. 2004) (enjoining, as violative of the Roadless Rule, proposed Forest Service logging in a roadless portion of Tahoe National Forest).

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The e-filing attorney hereby attests to having on file holograph signatures for any signatures indicated by a "conformed" signature (/S/) within this e-filed document.