KRISTEN L. BOYLES (CSB #158450)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340
(206) 343-1526 *[FAX]*
kboyles@earthjustice.org

TIMOTHY J. PRESO (MSB #5255)
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
(406) 586-9699
(406) 586-9695 *[FAX]*
tpreso@earthjustice.org

THOMAS S. WALDO (ASB #9007047)
Earthjustice
325 Fourth Street
Juneau, AK 99801-1145
(907) 586-2751
(907) 463-5891*[FAX]*
twaldo@earthjustice.org

Attorneys for Plaintiffs
(complete list of parties on signature page)

GREGORY C. LOARIE (CSB #215859)
Earthjustice
426 Seventeenth Street, 5th Floor
Oakland, CA 94612
(510) 550-6725
(510) 550-6749 *[FAX]*
gloarie@earthjustice.org

Local Counsel for Plaintiffs

THE HONORABLE ELIZABETH D. LAPORTE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al., 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 ENVIRONMENTAL PLAINTIFFS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

TABLE OF CONTENTS

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

TABLE OF AUTHORITIES

CASES

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

STATUTES

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

REGULATIONS

MISCELLANEOUS

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

INTRODUCTION

In these consolidated cases, the state and environmental plaintiffs challenge the Forest Service's repeal of the 2001 Roadless Area Conservation Rule and its replacement with a discretionary state petition process. See Final Rule, Special Areas; State Petitions for Inventoried Roadless Area Management ("Roadless Repeal), 70 Fed. Reg. 25,654 (May 13, 2005). In response to the legal challenges raised under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., the Forest Service essentially sounds a single note: because the Roadless Rule had been enjoined by a lone district court, the Roadless Repeal had no impacts, and, in fact, was not a repeal at all.

The agency's repeated assertion that the challenged rule "did not constitute a repeal of the Roadless Rule," FS Opp. at 20, is untenable. As an initial matter, the Roadless Repeal removed the Roadless Rule from the Code of Federal Regulations. See 70 Fed. Reg. at 25,654 ("The Department of Agriculture is revising Subpart B of Title 36, Code of Federal Regulations, Protection of Inventoried Roadless Areas.") (emphasis added); see also id. at 25,655, 25,661 (same). This is a repeal in every practical sense of the word. Indeed, when the Forest Service urged the Tenth Circuit to dismiss an appeal of the injunction against the Roadless Rule, the agency repeatedly stressed that it was replacing, repealing, and superseding the Roadless Rule, depriving the appellate court of jurisdiction. See Brief of United States, Wyoming v. USDA, No. 03-8058 (May 25, 2005) at 1-4 (attached as Exh. 1). The court agreed with this position and dismissed the case as moot. Wyoming v. USDA, 414 F.3d 1207, 1211-13 (10th Cir. 2005).

Having successfully argued that the replacement of the Roadless Rule rendered moot the Wyoming litigation, the Forest Service now argues exactly the opposite: that the Wyoming judgment obviated any need to repeal the rule. FS Opp. at 20, 24-25. The agency cannot sustain these contradictory positions in different courts. There are only two ways that a regulation can be repealed: (1) an agency can do so by complying with all legal requirements to repeal a valid rule,

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

including those prescribed in NEPA, the ESA, and the APA;[1] or (2) a regulation can be struck down by the courts, in a final judgment once all rights of appeal have been exhausted.[2] The Forest Service is attempting to make the Roadless Rule disappear without following either of these routes.[3]

That the Forest Service's defense of the Roadless Repeal boils down to a simplistic "the court made us do it" is deeply troubling. This litigation focuses on how the Forest Service manages some of the last unprotected remnants of our nation's once-vast forested wildlands. Protection of roadless areas generated millions of public comments in favor of the Roadless Rule. For grizzly bears, wolves, clean water, wild salmon, hiking, and other recreation, roadless areas are essential, irreplaceable, and rapidly disappearing. Protection of these areas deserves more than a cavalier excuse to avoid responsibility.

It is also an excuse that does not hold up to scrutiny. The Roadless Repeal itself notes that "[r]egardless of these lawsuits," the Forest Service wished to revise or replace the Roadless Rule. 70 Fed. Reg. at 25,656. Instead of taking responsibility and candidly pursuing this agenda, defendants sought to employ adverse court rulings as "cover" for their effort to repeal the rule. Administrative Record ("AR") Exh. I to Bundick Decl., Senate Governmental Affairs Committee Report, "Rewriting the Rules" (Oct. 24, 2002) at 40-41. Here, once again, the Forest Service hides behind a court order, this time to justify its legal failings. This tactic should not long detain this Court. For the Roadless Repeal, the Forest Service engaged in no environmental analysis under NEPA, nor did the agency comply with the consultation requirements of the ESA. And while a federal agency has the discretion to change its mind about regulations, it must engage in reasoned decisionmaking that is missing here. A disputed district court judgment, pending on appeal and

---

[1] See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-41 (1983) (agency required to comply with APA rulemaking standards in replacing rule adopted by prior administration); Nat'l Wildlife Fed'n v. Clark, 630 F. Supp. 412, 417 (D.D.C. 1985) (agency required to comply with NEPA in replacing rules adopted by prior administration).

[2] See Didrickson v. U.S. Dep't of Interior, 982 F.2d 1332, 1337-39 (9th Cir. 1992) (holding intervenor-defendants entitled to pursue appeal of district court judgment striking down agency rule after agency acquiesced in the district court judgment).

[3] TWS joins the argument of the States (Reply Br. at 13-15) that judicial estoppel precludes the federal defendants from arguing here that they did not actually repeal the Roadless Rule.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

contradicting another federal appellate court decision, does not immunize the agency from compliance with these laws.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE ROADLESS REPEAL.

Ignoring the Ninth Circuit's decision in Kootenai Tribe v. Veneman, 313 F.3d 1094 (9th Cir. 2002), that many of these same plaintiffs had standing to challenge a federal court injunction against the Roadless Rule, id. at 1109-10, the Forest Service contends that plaintiffs lack standing to challenge the Roadless Repeal. The Court should reject this argument.

A. Injury in Fact

Defendants err at the outset by failing to recognize that plaintiffs' NEPA and ESA claims center on defendants' failure to comply with required procedures in repealing and replacing the Roadless Rule – not substantive claims. The distinction is significant. While defendants urge that plaintiffs have failed to demonstrate an injury that is "'actual and imminent,'" FS Opp. at 12, plaintiffs asserting procedural injury "need not show that the substantive environmental harm is imminent." Cantrell v. City of Long Beach, 241 F.3d 674, 679 n.3 (9th Cir. 2001); see Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). Plaintiffs asserting procedural injury must establish that "(1) the [defendants] violated certain procedural rules; (2) these rules protect [plaintiffs'] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." Citizens for Better Forestry v. USDA, 341 F.3d 961, 969-70 (9th Cir. 2003).

Plaintiffs satisfy this standard. Plaintiffs allege that defendants violated procedural rules requiring (1) environmental analysis under NEPA and (2) consultation with federal wildlife experts under the ESA.[4] These procedures protect plaintiffs' concrete interests in national forest roadless

[4] Plaintiffs' APA claim challenges defendants' compliance with rulemaking requirements, but focuses on the substance of their rationale. Whether classified as substantive or procedural, plaintiffs satisfy Article III standing requirements under Kootenai Tribe, where the Ninth Circuit was not examining a claim of procedural injury. 313 F.3d at 1109 (demanding "an invasion of a legally-protected interest that is concrete and particularized, and actual or imminent").

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

areas. Under the concrete interest test, "environmental plaintiffs must allege that they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected" by the challenged agency action. Citizens for Better Forestry, 341 F.3d at 971. Here plaintiffs satisfy that test with numerous affidavits documenting their members' use and enjoyment of national forest roadless areas around the country that were protected under the Roadless Rule but are left unprotected as a result of defendants' Roadless Repeal.[5] See Ullian Decl. ¶¶ 2-3; Siechert Decl. ¶¶ 3-9; Bayles Decl. ¶¶ 11-13; Beebe Decl. ¶¶ 4-13; Heiken Decl. ¶¶ 10-12; Molvar Decl. ¶¶ 8-12; Alexakos Decl. ¶¶ 3-11; Oppenheimer Decl. ¶¶ 18-20; LaPerriere Decl. ¶¶ 10-14; Hoyt Decl. ¶¶ 8-13; Anderson Decl. ¶¶ 8-12; Henson Decl. ¶¶ 10-15, 20; Stone Decl. ¶¶ 5-7; Werntz Decl. ¶¶ 8-10; see also Kootenai Tribe, 313 F.3d at 1109 (conservationists had standing where plaintiffs' "staff and members hunt, hike, fish and camp in roadless areas"); Citizens for Better Forestry, 341 F.3d at 971 (finding concrete interest where plaintiffs proffered "numerous affidavits covering a vast range of national forests around the country" establishing "that their members use and enjoy national forests, where they observe nature and wildlife").

There is a "reasonable probability" that repeal of the Roadless Rule will threaten plaintiffs' interest in roadless areas. Citizens for Better Forestry, 341 F.3d at 972 (quotations and citation omitted). The Roadless Repeal withdrew regulatory protections that prohibited road construction and logging in roadless areas. In place of the Roadless Rule's substantive protections, the Roadless Repeal established a voluntary state petitions process. To paraphrase Kootenai Tribe, the roadless areas used by plaintiffs "were to be protected by the Roadless Rule but will have less protection from development if [the repeal] is sustained. This is sufficient to establish an injury in fact." 313 F.3d at 1109 (emphasis added); see also Citizens for Better Forestry, 341 F.3d at 972-75 (finding "cognizable injury in fact" where changes to planning regulations "decrease[d] substantive environmental requirements").

Nevertheless, the Forest Service contends that "generalized allegations of increased

[5] Defendants single out five of plaintiffs' standing affidavits that they claim are "deficient," FS Opp. at 12 n.2, but as long as one plaintiff has standing, the Court need not consider the standing of other plaintiffs. Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

likelihood of future injury" do not suffice, and that this Court must apply "even more exacting scrutiny" to plaintiffs' standing allegations given the nationwide rulemaking at issue. FS Opp. at 10, 12 (quotations and citation omitted). Defendants are wrong.

First, defendants' argument (at 10-11) rests heavily on an out-of-Circuit authority, Florida Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996) (en banc), that has been explicitly rejected by the Ninth Circuit. In Citizens for Better Forestry, the Ninth Circuit observed that Florida Audubon conflicted with Ninth Circuit standing law, rejected its demand for "heightened standing scrutiny" in cases not involving site-specific project challenges, and concluded that the "rule of the Ninth Circuit is correct." 341 F.3d at 974.

Second, defendants' argument that plaintiffs' challenge is too far removed from the purported "real cause" of injury, which they define as a "roadbuilding or timber harvesting decision," FS Opp. at 13, defies governing case law holding 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." Citizens for Better Forestry, 341 F.3d at 975. Plaintiffs "need not assert that any specific injury will occur in any specific national forest that their members visit." Id. at 971. Instead, "[t]he asserted injury is that environmental consequences might be overlooked as a result of deficiencies in the government's analysis under environmental statutes." Id. at 971-72 (internal quotations and citation omitted). Repeal of the Roadless Rule removed substantive prohibitions on site-specific projects in roadless areas. Defendants failed to comply with statutory procedures designed to ensure that their decision was fully informed by environmental considerations. This creates a "'reasonable probability' that the challenged procedural violation will harm the plaintiffs' concrete interests." Id. at 975 (citation omitted).

Third, defendants contend that plaintiffs' injury is mitigated because any future roadless area development made possible by the Roadless Repeal "would be subject to administrative and judicial challenge before it had any on-the-ground impact." FS Opp. at 13. This same argument was made – and rejected – in Kootenai Tribe, where the Ninth Circuit held that "[w]hatever protections of the involved environmental interests remain in the absence of the Roadless Rule, there can be no doubt that the 58.5 million acres subject to the Roadless Rule, if implemented, would have greater

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

protection if the Roadless Rule stands." 313 F.3d at 1110.

Fourth, even if proof of a threatened site-specific injury were required under Ninth Circuit case law – which it is not – plaintiffs have provided such proof. Defendants selectively pluck allegations from plaintiffs' standing affidavits concerning projects such as the Biscuit timber sale in Oregon, the Simplot Exploration Project in Idaho, and the Threemile timber sale in Alaska[6] and claim they are "not the result" of the Roadless Repeal because they were approved before the repeal, when the Wyoming injunction was in place, or in the case of the Threemile sale, while the temporary Tongass exemption was in effect.[7] FS Opp. at 13-14. However, defendants promulgated the repeal before implementation of these projects. The Roadless Repeal was an agency decision, superseding the injunction and the temporary Tongass exemption, to let these projects proceed. Plaintiffs have requested relief that would stop these actual and imminent threats to their interests.

Moreover, defendants simply ignore other affidavit testimony documenting roadless area threats that defendants have created since they promulgated the Roadless Repeal. Plaintiffs submitted the Hoyt declaration documenting the further threat posed to Idaho's Sage Creek and Meade Peak roadless areas by the proposed expansion of Simplot's Smoky Canyon phosphate mine. See Hoyt Decl. ¶ 13. The Simplot Exploration Project was merely a prelude to this mine expansion. The expansion would disturb approximately 1,040 acres of the Sage Creek inventoried roadless area and 60 acres of the Meade Peak inventoried roadless area. See id.; Second Hoyt Decl. ¶ 2. As acknowledged by the Forest Service itself, the expansion is permissible only because "[o]n May 13, 2005, a Notice of Final Rule was published [i.e., the Roadless Repeal], which released the current roadless area management regulations for inventoried National Forest System Lands." Second Hoyt

---

[6] The Forest Service argues that the Threemile project affects a relatively small portion of a vast roadless area. FS Opp. at 14-15 n.7. This fact merely highlights the size of the roadless area, not the significance of the harm. The sale will build 7.8 miles of roads and clearcut 621 acres of old growth in two adjacent roadless areas. See FS Opp. Exh. 8 at 6. Two of plaintiffs' members use and enjoy the area that will be logged, and the timber sale will impair their uses. See Alexakos Decl. ¶¶ 3-7; Beebe Decl. ¶¶ 3-8.

[7] The agency repealed the temporary Tongass exemption at the same time it repealed the rest of the Roadless Rule. See TWS SJ Mem. at 38-39. As with the Biscuit project, the Threemile timber sale has not yet been implemented.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Decl. at ¶ 3 & Exh. A.[8] As approval of this mine expansion will come long after the vacatur of the Wyoming injunction, this project's threat to plaintiffs' interests results from the Roadless Repeal.[9]

Similarly, in August 2005 the defendants authorized oil and gas leasing encompassing nearly 20,000 acres in four roadless areas in Utah's Uinta National Forest. See Catlin Decl. ¶ 5; Watterson Decl. Exh. A. These new leases do not prohibit surface road construction for oil and gas development, in contravention of the Roadless Rule's prohibition on road development in connection with any such leases issued after January 12, 2001. See Oil and Gas Lease Sale List (Aug. 2005), at http://www.ut.blm.gov/fluidminerals/2005/august2005/aug05finalsalelist.rtf (visited May 4, 2006); 36 C.F.R. §§ 294.12(a), 294.12(b)(7) (66 Fed. Reg. at 3,272-73). This leasing presents a substantial threat to plaintiffs' interest in the Uinta roadless areas, because the sale of such leases "entailed an irrevocable commitment of land to significant surface-disturbing activities, including drilling and roadbuilding." Conner v. Burford, 848 F.2d 1441, 1449 (9th Cir. 1988); see also Catlin Decl. ¶ 5. The Uinta leasing occurred three months after the Roadless Repeal. Plaintiffs have amply demonstrated injury in fact even under the heightened standard that defendants wrongly urge the Court to apply.

B. Causation and Redressability

The Forest Service fares no better in contending that plaintiffs cannot satisfy the causation and redressability prongs of the standing inquiry. Again defendants fail to mention the governing

---

[8] The proponent of the mine expansion has also linked the project directly to the Roadless Repeal. See Second Hoyt Decl. ¶ 4 & Exh. B.

[9] *Amici* Off-Road Vehicle Groups suggest (at 9-10) that the Smoky Canyon mine expansion would be permissible under the Roadless Rule's exception for road construction "in conjunction with the continuation, extension, or renewal of a mineral lease." 36 C.F.R. § 294.12(b)(7) (2001) (repealed) (66 Fed. Reg. at 3,272-73). They are wrong. This exception applied only to the continuation or renewal of leasing "on lands that are under lease by the Secretary of the Interior as of January 12, 2001." 36 C.F.R. § 294.12(b)(7) (66 Fed. Reg. at 3,273); see also 66 Fed. Reg. at 3,266 (explaining that exception "limit[s] the area potentially affected to only those areas currently under lease"). The Smoky Canyon mine would disturb roadless lands that are not yet leased, requiring lease expansions that would be subject to the Roadless Rule but for defendants' repeal. See U.S. Forest Serv., Draft EIS, Smoky Canyon Mine Panels F&G, Fig. 3.11-1 (Dec. 2005), at http://www.id.blm.gov/planning/scmdeis/CHAPTER%2003/Figure%203.11-1.pdf (visited May 4, 2006).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

standard, which the Ninth Circuit describes as follows:

> Reliance on procedural harms alters a plaintiff's burden on the last two prongs of the Article III standing test. To establish standing by alleging procedural harm, the members must show only that they have a procedural right that, if exercised, could protect their concrete interests and that those interests fall within the zone of interests protected by the statute at issue.

Defenders of Wildlife v. U.S. EPA, 420 F.3d 946, 957 (9th Cir. 2005) (citations omitted); accord Citizens for Better Forestry, 341 F.3d at 975-76. "[V]iolating the procedural requirements for forestry decisions meets that bar, as the violation lessens the likelihood that environmental considerations will be attended to in making those decisions." Defenders of Wildlife, 420 F.3d at 958. Here compliance with the environmental analysis obligations of NEPA and the ESA could have influenced defendants' decision to scrap the Roadless Rule, and plaintiffs' effort to protect roadless areas plainly falls within the zone of interests protected by the relevant statutes. See id. (plaintiffs challenging improper ESA consultation satisfied causation and redressability requirements); Citizens for Better Forestry, 341 F.3d at 976 (same as to NEPA and ESA).

Moreover, plaintiffs here are in the same position as defendant-intervenors in Kootenai Tribe. To paraphrase the Ninth Circuit's ruling in that case, "an increased risk of road development affecting conservation and environmental interests of applicants and their members, is 'traceable' to the [Roadless Repeal]. This 'injury' would be redressed by a decision of this Court [invalidating the repeal] and allowing the Roadless Rule to have force." 313 F.3d at 1110. Like defendant-intervenors in Kootenai Tribe, plaintiffs here have standing.

Defendants argue against this conclusion by suggesting that plaintiffs offer "a tenuous and speculative chain of causation" that assumes that defendants' state petitions process will not protect roadless areas and that development projects will be proposed in those areas to the detriment of plaintiffs' interest. FS Opp. at 15. Defendants simply ignore the direct causal link between their repeal of the Roadless Rule and their own push now to implement roadless area projects that the rule would prohibit. Moreover, "[t]he 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, not how many steps must occur before such

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

harm occurs." Citizens for Better Forestry, 341 F.3d at 975. In any event, the causal link between the Roadless Repeal state petitions process and site-specific development projects is more direct than the link between forest planning regulations and individual forest plans and ultimately site-specific projects that the Ninth Circuit deemed sufficient in Citizens for Better Forestry.

Finally, defendants assert that plaintiffs' injury is not redressable because the Court should agree with their arguments that the Roadless Rule should not be reinstated. See FS Opp. at 16. However, "[w]hen deciding whether the plaintiff has standing to maintain the action, the court ordinarily will assume that it has the ability to grant the relief that the plaintiff seeks." Nat'l Wildlife Fed'n v. FEMA, 345 F. Supp.2d 1151, 1166 (W.D. Wash. 2004) (quotation and citation omitted); accord Bonnichsen v. U.S. Dep't of Army, 969 F. Supp. 628, 633 (D. Or. 1997). Defendants' remedial arguments are irrelevant, and plaintiffs have Article III standing.[10]

II. THE WYOMING DISTRICT COURT INJUNCTION DID NOT RELIEVE THE AGENCY OF ITS DUTY TO COMPLY WITH NEPA, THE ESA, AND THE APA.

The provisions of NEPA and the ESA themselves required the Forest Service to assess and analyze the environmental impacts of, and alternatives to, the Roadless Repeal. In removing the Roadless Rule from the Code of Federal Regulations, the agency did a great deal more than merely comply with a district court injunction. It ended the Wyoming appeal and all other litigation pending at that time, preventing any other parties in those cases from continuing to defend the rule and preventing a final adjudication of the validity of the rule. This critical policy choice had a potentially enormous impact on the 58.5 million acres of roadless areas protected by the rule.

---

[10] Defendants suggest, and *amici* argue, that plaintiffs' claims are not ripe. See FS Opp. at 15 n.8. They are wrong. Where, as here, plaintiffs challenge an agency's failure to comply with required procedures, they "may complain of that failure at the time the failure takes place, for the claim can never get riper." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1998) (discussing NEPA claim); Citizens for Better Forestry, 341 F.3d at 977 (same); Sierra Club v. U.S. Dep't of Energy, 287 F.3d 1256, 1263-64 (10th Cir. 2002) (same as to ESA procedural claim). Moreover, while *amici* point out that subsequent environmental analysis will presumably occur if any state petition is adopted by defendants, such analysis will not consider whether to repeal the Roadless Rule; future consideration of that issue was foreclosed by the Roadless Repeal. See Laub v. Dep't of Interior, 342 F.3d 1080, 1090-91 (9th Cir. 2003) (finding procedural claim ripe where later procedural compliance would not address plaintiffs' concern).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

NEPA and the ESA do not allow the agency to escape accountability for this critical policy decision, even where, as here, the pendency of litigation made the impact of its decision uncertain. NEPA requires that an agency must prepare an EIS if the action may have a significant impact on the environment. Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998). Similarly, the ESA's "may affect" threshold for consultation is triggered by "[a]ny possible effect" of agency action, "whether beneficial, benign, adverse, or of an undetermined character." Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphasis added). Under both NEPA and the ESA, agency actions subject to the statutes include the adoption of regulations. 40 C.F.R. § 1508.18(a); 50 C.F.R. § 402.02.

Requiring compliance with these statutory duties despite the Wyoming injunction makes perfect sense given the way finality works in our judicial system. While the district court's injunction was its final word, the case was not final as it worked its way through appellate review. See 28 U.S.C. § 1291 (statutory right of appeal of district court rulings). As the Supreme Court explained as to why vacatur is appropriate when an appeal is mooted, "[w]hen that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." United States v. Munsingwear, 340 U.S. 36, 40 (1950) (emphasis added).

The issue before this Court under NEPA is whether it was reasonable for the Forest Service to conclude that the Roadless Repeal was merely procedural and therefore categorically exempt from NEPA. See Northcoast Envt'l Ctr. v. Glickman, 136 F. 3d 660, 667 (9th Cir. 1998) (applying reasonableness standard to agency's determination not to prepare an EIS where it was primarily a legal issue based on undisputed facts). For the ESA, the question is whether the Forest Service was justified in its "no effect" determination. A critical link in the agency's argument under both statutes is that the Wyoming injunction dissolved the rule, so that the "state petition" rule was merely procedural and in fact did not even repeal the Roadless Rule. FS Opp. at 20, 24-25.

These determinations are not reasonable because of the significant possibility that the Tenth Circuit would reverse the Wyoming injunction or that courts in other circuits would come to a different conclusion. By precluding these outcomes, the Roadless Repeal has a potentially

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

significant impact on 58.5 million acres of public lands, as the Forest Service admits. FS Opp. at 25 ("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."); id. at 31 (outcome of litigation was "uncertain").

This possibility precluded the agency's reliance on a categorical exclusion and required preparation of an EIS:

> An EIS must be prepared if "substantial questions are raised as to whether a project … may cause significant degradation of some human environmental factor." Idaho Sporting Cong., 137 F.3d at 1149 (internal quotation omitted). Thus, to prevail on a claim that the Forest Service violated its statutory duty to prepare an EIS, a "plaintiff need not show that significant effects will in fact occur." Id. at 1150. It is enough for the plaintiff to raise "substantial questions whether a project may have a significant effect" on the environment. Id.

Blue Mts. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (text alterations by Blue Mts. court).

The same is true of the ESA, where consultation is required on any agency action that "may affect" a listed species or its habitat, including any possible effect. 50 C.F.R. § 402.14; see Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1055 (9th Cir. 1994) (forest plans are actions that "may affect" protected salmon because the plans "set[] guidelines for logging, grazing and road-building activities within its boundaries"); Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992) (forest plan "is action that 'may affect' the spotted owl, since it sets forth criteria for harvesting owl habitat"); Romero-Barcelo v. Brown, 643 F.2d 835, 857 (1st Cir. 1981) (agencies required to consult on whether actions "possibly affect endangered and threatened species or their habitats"), rev'd on other grounds, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); Florida Key Deer v. Stickney, 864 F. Supp. 1222, 1235 (S.D. Fla. 1994) (consultation on impact of flood insurance program required because of "potential" that insurance would encourage development that "could" affect endangered species habitat).

To this argument, the Forest Service offers two responses, neither of which withstands scrutiny. First, the Forest Service observes that, "on the day the State Petitions Rule was issued, the injunction was valid and in place." FS Opp. at 39; see also id. at 24. This point ignores the

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

uncertainty about the outcome of the appeal.

Second, the Forest Service asserts, without citation, that "speculation concerning the outcome of legal challenges to the ongoing viability of the injunction could not be relied upon by the Forest Service when it issued the State Petitions Rule." FS Opp. at 39. Under both NEPA and the ESA, no speculation was necessary. It was not unduly speculative to foresee that the injunction might be reversed. The Ninth Circuit had done just that in Kootenai Tribe, and a Tenth Circuit affirmance of the Wyoming judgment would have created a split in the circuits.[11] The agency's task under NEPA and the ESA was not to speculate on the outcome of the litigation, but to assess the potential impacts of and alternatives to its proposed action in light of this uncertainty.

In this case, the replacement of the Roadless Rule and the mooting of all pending litigation about it had an enormous potential impact on 58.5 million acres of national forest roadless areas. Reasonable alternatives to this action would have addressed the concerns raised in the lawsuits and accomplished the agency's stated objectives with much less adverse impact to the environment, yet the agency refused to consider any alternative other than its preferred course of action. See TWS SJ Mem. at 11-14; see also infra Argument.III.B. It was precisely to prevent such uninformed decisionmaking that Congress required agencies to prepare EISs. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (purposes of NEPA are to inform decisionmaker and public); NRDC v. U.S. Forest Serv., 421 F.3d 797, 813 (9th Cir. 2005) (consideration of alternatives is "the heart" of an EIS). By the same token, the repeal "may affect" the numerous imperiled wildlife species that depend on national forest roadless areas for their survival, and this possible effect required consultation under the ESA to ensure against jeopardy. 16 U.S.C. § 1536(a)(2).[12]

---

[11] Contrary to the Forest Service's suggestion, FS Opp. at 24 n.14, it is of no significance that the appellants in the Wyoming case did not seek a stay pending appeal. Since no imminent actions in roadless areas were pending, there would have been no point seeking a stay.

[12] The Wyoming injunction did not obviate defendants' responsibility to rationally explain their abandonment of the Roadless Rule pursuant to the APA. See Int'l Union, UMW v. U.S. Dep't of Labor, 358 F.3d 40, 44 (D.C. Cir. 2004). See Argument.V, infra and States' Reply at 22-24.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

III. AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED TO EVALUATE REASONABLE ALTERNATIVES TO THE ROADLESS REPEAL.

As explained in the opening brief, the Forest Service was required to prepare an EIS in connection with the Roadless Repeal for the purpose of considering reasonable alternatives to the proposed rule in light of the agency's changed "purpose and need" for the action. TWS SJ Mem. at 4-15. The Forest Service's principal defense to this claim is that the agency did not actually repeal the rule and that the "state petitions" rule was therefore merely procedural and categorically excluded from NEPA. FS Opp. at 20-27. Plaintiffs have responded to this argument above. The Forest Service also argues that, even if an EIS were required to repeal the rule, the 2000 Roadless Rule EIS was sufficient, because the purpose and need remained the same and any other alternatives were infeasible. FS Opp. at 28-32. In reality, the record demonstrates that the purpose and need changed substantially, with a corresponding change in the reasonable, feasible alternatives.[13]

A. The Purpose and Need for the 2005 Rule Was Much Broader Than for the Original Roadless Rule.

Contrary to the Forest Service's assertion, the "purpose and need" for the action changed substantially from the 2000 FEIS to the 2005 Roadless Repeal. "Purpose and need" is a term of art under NEPA. The CEQ regulations provide that "[t]he [environmental impact] statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. The purpose and need expressed in the EIS is highly significant because it defines the scope of reasonable alternatives to the agency's proposed action. See Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997); TWS SJ Mem. at 7-8. The purpose of the 2000 FEIS was to adopt a national rule prohibiting the actions that would cause the greatest harm to roadless areas, while the purposes of the 2005 Roadless Repeal were multi-faceted. Because the latter rule's purposes were broader, many more alternatives could serve its purposes. NEPA requires the agency to consider these alternatives in an EIS.

---

[13] Contrary to the defendants' argument, the possible future preparation of EISs for states that submit petitions cannot compensate for the lack of an adequate EIS now for the nationwide repeal of the Roadless Rule. See States' Reply Br. at 4 n.5, 7-9.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

The first sentence under the heading "Purpose and Need" in the 2000 FEIS states, "The purpose of this action is to conserve and protect the increasingly important values and benefits of roadless areas by: 1) prohibiting activities that have the greatest likelihood of degrading desirable characteristics of inventoried roadless areas …." AR RACR-4609, Roadless Rule FEIS (Nov. 2000) at 1-14 (emphasis added).[14] The purpose and need statement also emphasizes the need for a national rule because local decisionmaking often does not adequately take into account the cumulative, national effect of losing roadless areas. Id. at 1-15. The Ninth Circuit quoted this purpose and held that "any inclusion of alternatives that allowed road construction outside of the few exceptions allowed in the Roadless Rule would be inconsistent with the Forest Service's policy objective in promulgating the Rule." Kootenai Tribe, 313 F.3d at 1120-21. Opponents of the rule attacked this purpose as unreasonably narrow, but the court rejected this argument. Id. at 1121-22.

The 2005 Roadless Repeal does not serve the principal purpose of the 2000 FEIS because it does not prohibit anything. It repeals all the prohibitions and, in their place, merely establishes a procedure that might or might not lead to future rules for states that submit petitions. Such an action would not serve the purposes of the 2000 FEIS. Id. at 1120-21.

Because the 2005 rule does not serve the core purpose stated in the 2000 FEIS, the purposes for the 2005 action must be, and are, different. While the explanation of the 2005 Roadless Repeal recites continuing recognition of the values of roadless areas, it no longer requires a national prohibitory rule. See TWS SJ Mem. at 9-11. It identifies a large number of additional concerns. See id. While a national prohibitory rule in some form is one option that could meet the broad purposes expressed for the 2005 rule, a much broader range of alternatives is also available, and NEPA requires the agency to consider them. See TWS SJ Mem. at 8-14.

The Forest Service errs by ignoring the purpose and need stated in the 2000 FEIS. Instead, it quotes general background statements about the rule contained in the January 2001 Federal Register preamble. FS Opp. at 29. The Federal Register preamble incorporated by reference the 2000 FEIS, including – explicitly – its statement of purpose and need. 66 Fed. Reg. at 3,244. The

[14] There was also a purpose number two in this sentence, to address roadless areas through planning, that was resolved separately in new planning regulations. FEIS at 1-14 & n.6.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

2000 FEIS's statement of purpose and need, not the Federal Register preamble, provided the relevant legal touchstone.[15] Kootenai Tribe, 313 F.3d at 1121; see 40 C.F.R. § 1502.13.

The contrast between the purposes underlying the 2001 and 2005 rules, and between the alternatives the agency considered, highlights the NEPA violation in this case. In adopting the original Roadless Rule, the Forest Service stated a relatively narrow purpose – prohibiting the most damaging actions through a national rule – but considered in detail multiple alternatives and variations in a draft and final EIS before adopting a final rule. See FEIS at 2-3 to 2-12; Kootenai Tribe, 313 F.3d at 1120-22. By contrast, in adopting the 2005 rule, the agency stated much broader purposes, yet refused to evaluate in detail any alternatives other than its preferred course of action.

B. The Alternatives Proposed by TWS and Members of the Public Are Feasible.

The Forest Service argues that all of the alternatives suggested by plaintiffs and other members of the public are infeasible because the outcome of several cases challenging the Roadless Rule was uncertain. FS Opp. at 31. This argument fails for several reasons, but most obviously because one purpose of a new EIS process would be to consider alternatives responsive to any adverse court decisions or serious challenges.

As a threshold matter, the government mischaracterizes the proposed alternatives by asserting that they "are all dependent upon the 2001 Roadless Rule being in place." Id. Just the opposite is true: all of the alternatives identified in plaintiffs' motion would change the 2001 Roadless Rule in response to the agency's stated objectives, by expanding the exceptions, making it more flexible, refining the coverage, providing for a state petition process, or some combination of these amendments.[16] TWS SJ Mem. at 11-14.

---

[15] Because there was no EIS for the 2005 Roadless Repeal, there is no formal statement of purpose and need, and the purposes must be determined from the Federal Register notice, which cites multiple reasons for the new rule. See TWS SJ Mem. at 9-10.

[16] The supplemental administrative record produced by defendants following plaintiffs' opening briefs provides further evidence that the agency internally developed proposals of this nature and considered them feasible. In 2002, the agency developed a detailed proposal, including specific rule language that went through numerous drafts and edits, for a rule that would retain roadless area protections until individual national forests revised their forest plans. These plan revisions would contain expanded analyses of roadless area values and new administrative provisions for "Primitive" and "Backcountry" designations. See AR SPR-015b, SPR-017b, SPR-027b,

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

The lawsuits do not render these proposed alternatives infeasible because a new EIS with new alternatives could address any perceived deficiencies with the 2001 rule. Indeed, a new EIS would be a more responsive way to address complaints about the process than replacing the entire rule. See TWS SJ Mem. at 14. The agency could use a new EIS process to address not only concerns about the adequacy of the original process, but also allegations of substantive problems. The Wyoming district court held that the Roadless Rule unlawfully created de facto wilderness because, in the court's opinion, the prohibition against most roads would prevent any cattle grazing or oil drilling. Wyoming v. USDA, 277 F. Supp.2d 1197, 1236 (D. Wyo. 2003), vacated, 414 F.3d 1207 (10th Cir. 2005). Plaintiffs disagreed strongly, see McMichael v. United States, 355 F.2d 283, 285-85 (9th Cir. 1965) (finding protective regulation for undeveloped national forest area consistent with Wilderness Act), and the issue was pending before the Tenth Circuit at the time of the repeal. However, if the Forest Service believed this holding might be upheld on appeal, the agency could consider alternatives that provided expanded exceptions to the road building prohibition, as proposed by the Forest Service itself in 2001 and by the Forest Roads Working Group in 2003. See TWS SJ Mem. at 11-13. Such alternatives were within the agency's authority to adopt rules regulating uses of the national forests. See 16 U.S.C. § 551; Kootenai Tribe, 313 F.3d at 1117 n.20.

Indeed, it is extremely common for an agency to prepare an EIS, and even multiple EISs, to remedy defects found by a court. See, e.g., Neighbors of Cuddy Mt. v. Alexander, 303 F.3d 1059, 1063-64 (9th Cir. 2002) (agency prepared a timber sale EIS, then a supplemental EIS in response to administrative appeal, and then a second supplemental EIS in response to court decision); Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1301-02 (W.D. Wash. 1994) (Forest Service and BLM jointly prepared supplemental EIS for 24 million acres of spotted owl habitat after previous EISs prepared separately by the agencies were held inadequate), aff'd sub nom. Seattle Audubon

---

SPR-038b. Further, in connection with the June 2003 press release announcing a proposed new "opt-out" state petition process, see TWS SJ Mem. at 13, the Forest Service explained that it was developed in part after considering the recommendations of the Forest Roads Working Group. AR SPR-103d at 8. "This proposal would allow for addressing more localized situations and problems should the governor of the state request that a waiver from the blanket provisions of the rule warrant consideration." Id. These are precisely the types of alternatives an agency must disclose and evaluate in an EIS.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Soc'y v. Moseley, 80 F.3d 1401 (9th Cir. 1996).

These and countless other cases disprove defendants' assertion that the only feasible response to the Wyoming district court judgment was to repeal the rule entirely and replace it with a state petition process. There was nothing in that judgment, even if it had been upheld on appeal, that prevented the Forest Service from considering a range of additional alternatives in a supplemental EIS to address defects found by the court and other issues the agency considered relevant.

The Forest Service also asserts that other pending, unresolved lawsuits challenging the Roadless Rule rendered any alternative variations of the rule infeasible, see FS Opp. at 31, but this claim is even less supportable. Were it true, opponents of any government action could always render the action "infeasible" simply by filing multiple lawsuits. It is not uncommon for a controversial government action to face multiple court challenges, but normally the government defends them, even in the face of some losses. See States' Reply at 15-17. The Forest Service has not cited, and plaintiffs are unaware of, a single case in which the mere existence of lawsuits challenging an agency action rendered the action so infeasible that no alternative variations of it could be considered in an EIS.

IV. THE FOREST SERVICE VIOLATED ESA § 7(A)(2) BY FAILING TO CONSULT ON THE POSSIBLE HARMFUL IMPACTS FROM THE ROADLESS REPEAL.

As with the Forest Service's NEPA argument, the agency's defense to its failure to comply with the consultation requirements of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), rests on its post-hoc position that it did not repeal the Roadless Rule when it replaced the Rule with the state petition process in May 2005. See Argument.II, supra. The Forest Service does not contest that its repeal of the Roadless Rule was an agency action within the meaning of ESA § 7. See Conner, 848 F.2d at 1453 (discussing "agency action"). The only way for the Forest Service to avoid its ESA § 7(a)(2) consultation duties is to claim, as the agency does, that its repeal of the Roadless Rule has no effect at all. To the contrary, when the Forest Service replaced the Rule, its action had an easily identifiable possible effect – that of preventing reinstatement of roadless area protections for 58.5 million acres of federal public land. The Forest Service repeal, coming in the

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

midst of adjudication, did not eliminate its ESA duties to analyze this potential impact.

The Forest Service's "no effect" determination is arbitrary and capricious. The Forest Service contends that formal consultation is not required here "because the rule has not resulted in – and cannot on its own result in – any changes to the physical environment that would impact species protected by the ESA." FS Opp. at 35. On its face, this explanation fails. The question the Forest Service should have asked is whether its repeal of the Roadless Rule has any possible effects, regardless of "results" to date, including any indirect effects – that is, effects that are caused by the repeal later in time, not "on its own." See 50 C.F.R. § 402.02; Pacific Rivers Council, 30 F.3d at 1054 n.8 (consultation triggered by "may affect" determination).

Here, the Forest Service's "no effect" determination is supported only by conclusory statements that the Repeal is "merely procedural." 70 Fed. Reg. at 25,660; AR SPR-084, ESA Determination (repeal "will not directly result in changes in the management of any particular National Forest"). The ESA Determination mentions neither possible impacts nor indirect effects – a failing that dooms the Forest Service's defense.

The cases cited by the Forest Service where courts have upheld "no effect" determinations illustrate how untenable the Forest Service's "no effect" finding is here. In Defenders of Wildlife v. Flowers, 414 F.3d 1066, 1070 (9th Cir. 2005), the appellate court affirmed a "no effect" determination where no pygmy owls (the listed species at issue) lived within the project area. Here, the Forest Service admits that "hundreds of endangered species … are present in the National Forest System across the country." FS Opp. at 40. Similarly, in Southwest Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443 (9th Cir. 1996), the court affirmed a "no effect" determination because the "burned over salvage area provide[d] neither foraging nor nesting habitat" for the Mexican spotted owl and because the 1995 Rescissions Act had temporarily eliminated the normal application of the ESA and other environmental laws. Id. at 1446, 1449. Finally, Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy, 383 F.3d 1082 (9th Cir. 2004), did not involve a "no effect" determination at all. The Navy apparently did not address the initial presidential decision to site the Trident II missile backfit program at the Bangor base when it informally consulted with NMFS because presidential actions are not subject to the ESA. See id. at 1092; see

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

also 16 U.S.C. § 1532(7) (term "federal agency" does not include President). No presidential action is at issue here.

The Forest Service does not contest that removal of protections from national forest roadless areas will adversely affect threatened and endangered species and their critical habitat, nor could it, given the record before the Court. See TWS SJ Mem. at 20-21. Aside from repeating its position that the Roadless Repeal "only establishes an administrative procedure for the submission of petitions for future rulemaking," FS Opp. at 38, the agency briefly raises three other arguments that should not long detain the Court. First, the Forest Service misstates plaintiffs' challenge, claiming that it would be impractical to consult on the Roadless Repeal and "to require Forests to speculate on the effects of hypothetical rulemakings flowing from hypothetical State petitions." FS Opp. at 39-40. Of course, plaintiffs do not seek to have the Forest Service engage in a guessing game consultation about future state petitions; the Forest Service must consult on the impacts of its May 2005 decision – the decision to remove protections from 58.5 million acres of federal public land.

Second, the Forest Service argues without citation that "consultation at this level of generality" would be "overwhelming." FS Opp. at 40. As an initial matter, this argument is belied by the fact that the Forest Service consulted under the ESA on the original Roadless Rule. 66 Fed. Reg. at 3,271. Although the agency advances this argument in the same misleading context of consultation on future rulemaking, it is also important to note that the Forest Service regularly engages in "programmatic" ESA consultations on broad agency actions as well as site-specific consultations for actions authorized under those actions. See Pacific Rivers Council, 30 F.3d at 1056 ("little doubt" that forest plans are ongoing agency actions subject to ESA § 7 consultation); PCFFA v. NMFS, 265 F.3d 1028, 1032 (9th Cir. 2001) (programmatic and site-specific salmon consultation on timber sales under the Northwest Forest Plan); Gifford-Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1064 (9th Cir. 2004) (broad consultation on Northwest Forest Plan for spotted owls, with future biological opinions to consider specific impacts). Finally, the Forest Service's contention that it will comply with the ESA during subsequent, state-specific rulemakings (if any), FS Opp. at 41, does not relieve it of its duty to "insure" that this action – the repeal of the Roadless Rule's protections – "is not likely to jeopardize" threatened and endangered

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

species. 16 U.S.C. § 1536(a)(2). Consultations on later, entirely uncertain rulemakings cannot replace consultation now, for they would miss the impacts of the repeal and allow it to escape consideration in the consultation process.

V. THE ROADLESS REPEAL IS ARBITRARY AND CAPRICIOUS.

When the Forest Service promulgated the 2001 Roadless Rule, the agency explained why the Roadless Rule was needed to fulfill its statutory mandates. See TWS SJ Mem. at 28-30. When the Forest Service reversed course and repealed the Rule, the agency failed to explain how its repeal would meet the agency's substantive obligations or how it would address the concerns that led to the initial adoption of the rule. The Court should invalidate the repeal as arbitrary and capricious.

A. Plaintiffs' Claim Is Justiciable.

The Forest Service contends that the Court cannot review TWS's second claim for relief as a "stand-alone" APA claim. FS Opp. at 42. This argument collides with the APA's broad presumption of reviewability. Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967). Given the Forest Service's authorizing statutes, this argument is wrong.

TWS specifically cited to the National Forest Management Act ("NFMA"), the Multiple-Use Sustained-Yield Act ("MUSYA"), and the Organic Administration Act in its complaint (¶ 51) and has discussed the requirements of those three statutes in detail. TWS SJ Mem. at 26-27. The Organic Administration Act, 16 U.S.C. § 551, authorizes the Forest Service "to preserve the forests thereon from destruction." MUSYA set forth multiple-use goals for national forests; the forests "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Id. § 528. NFMA gives the Forest Service its most detailed requirements: providing for the diversity of plant and animal communities, id. § 1604(g)(3)(B), and insuring that timber is cut only where watershed conditions are protected. Id. § 1604(g)(3)(E)(i) and (iii).

It was these requirements that drove the Forest Service's initial adoption of the Roadless Rule. "Watershed protection is one of the primary reasons Congress reserved or authorized the purchase of National Forest System lands." 66 Fed. Reg. at 3,246. "Without immediate action, these development activities may adversely affect watershed values and ecosystem health in the

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

short and long term…." Id. at 3,247. See id. at 3,272 (Rule promulgated under Organic Administration Act, MUSYA, and NFMA).

It is the agency's burden – one that it does not carry – to show that the Roadless Repeal falls into the narrow exception to judicial review, for the existence of substantial discretion does not deprive the court of jurisdiction. This case does not present the rare circumstance where an action is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That exception applies only in circumstances where courts have no basis on which to review an agency action. It is typically limited to decisions that are classically committed to Executive Branch discretion, such as prosecutorial discretion, protection of national security, and allocation of an unrestricted lump sum budget. See Heckler v. Chaney, 470 U.S. 821 (1985); Webster v. Doe, 486 U.S. 592 (1988); Lincoln v. Vigil, 508 U.S. 182 (1993). It does not apply to agency determinations, such as this one, that are well-suited to judicial review. See, e.g., Beno v. Shalala, 30 F.3d 1057, 1066-67 (9th Cir. 1994) (Secretary of Health and Human Service's waiver of federal requirements for experimental welfare work incentive program subject to judicial review). Federal courts frequently review Forest Service decisions ranging from timber sales to Forest Plans to overarching policies, like the Northwest Forest Plan and the Roadless Rule itself.

While the Forest Service relies on ONRC v. Thomas, 92 F.3d 792, 798 (9th Cir. 1996) to support its argument, ONRC actually illustrates why the Court has jurisdiction in this instance. In that case, environmental plaintiffs challenged several Forest Service timber sales that were proceeding pursuant to the 1995 Rescissions Act, 1995 U.S.C.C.A.N. (109 Stat.) 240. The Rescissions Act contained broad sufficiency language that exempted the timber sales from the National Forest Management Act ("NFMA") and "all other applicable Federal environmental and natural resource laws." § 2001(i)(5), (8). "The effect of subsection 2001(i), therefore, is to render sufficient under the environmental laws whatever documents and procedures, if any, the agency elects to use…." ONRC, 92 F.3d at 795.

This factual setting is crucial to the appellate court's holding. Because the Rescissions Act had eliminated the application of NFMA and all other environmental laws, there was no law to apply. Id. at 798. As cited by the ONRC court itself, see id., APA "review is not to be had in those

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Lincoln v. Vigil, 508 U.S. at 191 (quotations omitted) (emphasis added). The Rescissions Act eliminated any "relevant statute" for the court to apply. Here, no statute has removed the Forest Service's statutory obligations.

The courts frequently review agency action adopted under statutes granting substantial discretion. In Motor Vehicle, the Supreme Court reviewed an agency's repeal of a passive restraint regulation under the APA. The substantive statute at issue directed the Secretary of Transportation to issue automobile safety standards and gave the agency great discretion over the content and subject of these regulations. 463 U.S. at 33. This discretion did not preclude APA review, nor did it prevent the Court from finding the repeal arbitrary and capricious. See, e.g., American Tunaboat Ass'n v. Baldrige, 738 F.2d 1013, 1014 (9th Cir. 1984) (holding regulations concerning impacts of tuna fishing on porpoises arbitrary and capricious where statute authorized Secretary to prescribe regulations "as he deems necessary and appropriate"). Agency decisions under NFMA, MUSYA, and the Organic Act are not so broadly committed to agency discretion as to be beyond review.

To withstand arbitrary and capricious review, the agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" and show that the decision was based on "consideration of the relevant factors." Motor Vehicle, 463 U.S. at 43 (citations and quotations omitted).[17] In language fully applicable here, the Supreme Court noted "[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the agency exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such … practice…." Id. at 48 (quotation omitted); id. at 49 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner, and we affirm this principle again today.").

---

[17] The standard of review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Motor Vehicle, 463 U.S. at 41 (quotations and citation omitted). As defendants note (at 45), the Supreme Court rejected the petitioners' argument that rescission of an agency rule should be judged by the same standard a court would use to judge an agency's refusal to issue a rule in the first place. Id. In this context, the Court held that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Id. at 42.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

B. The 2005 Roadless Repeal Is a Failure of Rational Agency Decisionmaking.

Simply put, the Forest Service had an obligation to explain how repeal of the Roadless Rule could serve the watershed protection, wildlife diversity, and ecosystem health purposes of the Organic Administration Act, MUSYA, and NFMA, given that the agency had, only four and a half years earlier, explained in detail why enactment of the Roadless Rule served these same statutory purposes. It did not meet this obligation. And while the Forest Service has discretion as to how it meets its statutory mandates, that discretion does not allow it to engage in arbitrary and capricious decisionmaking. Motor Vehicle, 463 U.S. at 41-43.

The Forest Service contends that the 2001 Roadless Rule never represented a "settled course of behavior" that deserves respect. FS Opp. at 46. This argument ignores the facts of Motor Vehicle. The safety regulation at issue there was promulgated, stayed, suspended, repromulgated, stayed again, and ultimately rescinded – all without ever being implemented. See 463 U.S. at 35-38. Nevertheless, the Supreme Court required the responsible agency to supply a reasoned analysis to justify its reversal of position. See id. at 41-42. Here, although only three months may have passed between the issuance of the mandate in Kootenai Tribe and the Wyoming injunction, the strictures of the Roadless Rule guided the Forest Service since the first interim roadbuilding moratorium in 1998. See States' Reply at 24-25.

With respect to the details of the Forest Service's decision in the areas of forest health and watersheds, see TWS SJ Memo. at 28-29, the agency's "reasoned analysis" is sorely lacking. The Forest Service repeats its contention that it has not abandoned concern for "roadless values." While it is clear that the Forest Service says that it is "committed to conserving and managing" roadless areas, the agency cites no evidence to back up this position. FS Opp. at 49. The agency pays lip service to "roadless values," but has no support for how it is protecting them by repealing their protection. See AR SPR-068c (noting EPA's concern with impacts to water quality).

On the issue of road maintenance, the Forest Service contends that there is no evidence that roads will be constructed that cannot be maintained. FS Opp. at 50-51. First, this rationale is unsupported by any record statements from the agency itself and should be rejected. See Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962) (court may not accept counsel's "post hoc

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

rationalizations for agency action"). Second, it is difficult, if not impossible, to square this contention with the evidence from the agency that it has a maintenance backlog. 66 Fed. Reg. at 3,245-46. It is not an "impermissible assumption that the Forest Service will act in contravention of its agency guidance and build roads without regard to its ability to fund the maintenance of those roads," FS Opp. at 51, when that is exactly what the Forest Service has been doing for decades.[18]

Finally, with respect to the need for a national rule, the Forest Service cites to lawsuits filed by five states that expressed a concern "that applying one set of standards nationwide failed to recognize the unique situations in individual states and regions." FS Opp. at 52.[19] This explanation passes like a ship in the night the Forest Service's prior position that local decisionmaking – national forest by national forest – was a fundamental problem with roadless area management. FEIS at I-15. Nor does the agency explain away its prior reasoning that the Forest Service had "the responsibility to consider the 'whole picture'" regarding national forest management, 66 Fed. Reg. at 3,246, and that management decisions for roadless areas made on a case-by-case basis at the forest or regional level would not fulfill the agency's responsibilities. Id. While the Forest Service touts its need to involve state governments, FS Opp. at 47, nothing in the record supports a decision to repeal the Roadless Rule in order to "partner" with states, and vague statements about state programs and policies do not provide a rational explanation for the elimination of federal land protections. See AR SPR-068c ("Most of the selected responses from county commissioners, state

---

[18] Nor does the Road Management Rule, 66 Fed. Reg. 3,205 (Jan. 12, 2001), FS Opp. at 51-52, relieve the Forest Service of its need for rational action with respect to roadless area protection. First, the Roadless Repeal does not mention the Road Management Rule, and the Court should disregard this argument. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (court "must judge the propriety of [agency] action solely by the grounds invoked by the agency"). Second, the Road Management Rule shifted Forest Service funding away from new road building and toward maintenance and decommissioning, see 66 Fed. Reg. at 3,207. These two rules together provided comprehensive reform of the Forest Service road system; however, the repeal of the Roadless Rule has left a large hole in this system.

[19] Simply adding the number of states willing to sue over a rule is not a compelling reason for change. While five states filed lawsuits over the Roadless Rule, four states have challenged its repeal, yet the Forest Service is not contemplating changing course again. In February 2005, a survey found six states supported the proposed repeal, eleven states supported the original Roadless Rule, and several other states expressed concerns. AR SPR-067c.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

legislators, or other non-federal officials opposed the proposed rule and supported the roadless rule."). Finally, the Forest Service contends that the national advisory committee assures that a "broad national perspective is considered" when reviewing state petitions. FS Opp. at 53. Of course, this committee insures no "national perspective" at all, for any opportunity for this committee to give its opinion is entirely dependent on the preceding decision of each individual governor to submit a petition. Given that in February 2005 only six states surveyed supported the proposed rule and two affirmatively stated that they would not file a petition, AR SPR-067c, defendants were well aware that no national perspective would be applied.

The Forest Service concluded that adoption of the Roadless Rule "ensures that inventoried roadless areas will be managed in a manner that sustains their values now and for future generations." 66 Fed. Reg. at 3,247. Nothing in the current record explains why this conclusion has changed. Because the 2005 Roadless Repeal is an irrational and unsupported reversal of agency action in light of the Forest Service's statutory obligations, it should be vacated.

VI. THE FOREST SERVICE FAILS TO JUSTIFY ITS EXTRAORDINARY REQUEST TO DENY PLAINTIFFS ANY REMEDY.

Defendants suggest that the appropriate remedy for their illegal rescission of an extraordinarily popular and landmark conservation rule is no remedy at all. They ask this Court to leave the repeal in place and deprive plaintiffs of any remedy for their illegal conduct even as they propose an increasing number of development projects in this nation's remaining national forest roadless areas. Defendants fail to justify such an inequitable and extraordinary result.

A. The Roadless Repeal Should Be Vacated to Prevent Irreparable Harms.

Defendants claim the Court should not issue any injunctive relief with respect to their Roadless Repeal. FS Opp. at 54-57. In so doing, they seek to squeeze this case into a narrow category of unusual circumstances justifying a departure from the rule that "vacatur of an unlawful rule normally accompanies a remand." Alsea Valley Alliance v. Dep't of Commerce, 358 F.3d 1181, 1185 (9th Cir. 2004); accord Defenders of Wildlife, 420 F.3d at 978; Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005); NRDC v. U.S. EPA, 966 F.2d 1292, 1305 (9th Cir. 1992) (vacating agency rule); see also American Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

2001) (holding that where plaintiff "prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order").

Defendants cannot justify such extraordinary treatment. While the Ninth Circuit has on rare occasions permitted agency rules to stand during a remand, such circumstances most often have arisen in cases challenging environmentally protective regulations, where vacatur threatened "irreversible consequences of environmental damage." NRDC v. U.S. Dep't of Interior, 275 F. Supp.2d 1136, 1143-44 (C.D. Cal. 2002) (discussing Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995), and Western Oil and Gas Ass'n v. U.S. EPA, 633 F.2d 803 (9th Cir. 1980)). It would distort these precedents to deny vacatur here, where defendants' Roadless Repeal opened the door to environmental harms that would have been precluded under the Roadless Rule.[20]

Contrary to the Forest Service's argument (at 56), plaintiffs have amply demonstrated irreparable harm from defendants' Roadless Repeal. The Roadless Repeal paves the way for implementation of the Biscuit and Threemile logging projects in Oregon and Alaska roadless areas. The repeal also has cleared the regulatory landscape to allow expansion of the Smoky Canyon phosphate mine into 1,100 acres of inventoried roadless lands on Idaho's Caribou-Targhee National Forest, see Hoyt Decl. ¶ 13, and oil and gas development with associated road construction pursuant to leases encompassing nearly 20,000 acres of roadless lands in the Uinta National Forest, see Catlin Decl.; Watterson Decl. Exh. A. These threatened environmental harms warrant injunctive relief. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least

[20] Defendants assert that Congress in the ESA has not "foreclosed a balancing of harms," FS Opp. at 56. To the contrary, "Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species." Washington Toxics Coalition v. EPA, 413 F.3d 1024, 1035 (9th Cir. 2005); see also Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities … ."). Defendants also seek to rely on case law holding that "'non-jeopardizing agency actions'" may sometimes proceed during ESA consultation, FS Opp. at 56 (quoting Washington Toxics, 413 F.3d at 1035), but the burden of demonstrating that any proposed action is non-jeopardizing falls upon the agency, see Washington Toxics, 413 F.3d at 1035, and defendants have not even attempted to carry that burden, nor could they, given the importance of roadless areas for imperiled species.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").

Nor does the public interest counsel against awarding injunctive relief. See FS Opp. at 56-57. Defendants' suggested harm to an asserted public interest in "federal and state cooperation," id. at 57, is illusory. As *amicus curiae* American Forest Resource Council points out, the ongoing state petitions process "essentially does nothing more than the APA petition authority already provides." AFRC *Amici* Br. at 2; see 5 U.S.C. § 553(e) (conferring right to petition for rule). Even if the Court vacates the Roadless Repeal, states still could petition for regulatory changes. On the other hand, the defendants' repeal of the extraordinarily popular Roadless Rule frustrated the established "public interest in preserving our national forests in their natural state." Kootenai Tribe, 313 F.3d at 1125. Vacating that repeal would advance this same overwhelmingly expressed public interest.

B. This Court Should Reinstate the Roadless Rule.

Upon vacating the Roadless Repeal, this Court should order reinstatement of the Roadless Rule pursuant to controlling Ninth Circuit precedent holding that "[t]he effect of invalidating an agency rule is to reinstate the rule previously in force." Paulsen, 413 F.3d at 1008. Reinstatement of the rule will protect plaintiffs' interest in national forest roadless areas from the threat posed by defendants' pending development projects.

Despite the Paulsen holding, defendants ask this Court to apply what they describe as "the general rule … to vacate the new rule without reinstating the old." FS Opp. at 57. Defendants base this so-called "general rule" not on Paulsen, which contradicts their argument, but on a decision of the D.C. Circuit in Small Refiner Lead Phase-Down Task Force v. U.S. EPA, 705 F.2d 506 (D.C. Cir. 1983). FS Opp. at 57. Defendants' reliance on Small Refiner is unavailing.

Small Refiner cannot establish any "general rule" for this case because the parties and the Court are bound by the contrary Paulsen precedent from this Circuit. See Yong v. INS, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it … ."); Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir. 1987) ("District courts are, of course, bound by the law of their own circuit, and are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

be.") (quotations and citation omitted).

Moreover, even if it were not contrary to controlling Circuit precedent, Small Refiner provides a particularly inappropriate blueprint for this Court's remedial order because its holding has not been followed even within the D.C. Circuit. Only a month after the D.C. Circuit issued its opinion in Small Refiner, that same Circuit issued its opinion in Action on Smoking and Health v. Civil Aeronautics Bd., 713 F.2d 795, 797 (D.C. Cir. 1983) ("Action II"), holding – contrary to Small Refiner – that vacatur of an agency's regulation "had the effect of reinstating the rules previously in force." The D.C. Circuit expressly followed Action II's holding four years later in Georgetown University Hosp. v. Bowen, 821 F.2d 750, 757-58 (D.C. Cir. 1987), without mentioning Small Refiner. This Court should not base its remedial ruling on an out-of-Circuit decision that is not only contrary to controlling Ninth Circuit authority, but has not even proven persuasive within its own Circuit.[21]

Defendants further err in arguing that "special circumstances" preclude reinstatement of the Roadless Rule. Defendants first contend that vacatur of the Roadless Repeal leaves no "regulatory void" to fill because the Roadless Rule was "wholly discretionary" and they were under no "statutory mandate" to promulgate it. FS Opp. at 58. However, they offer no reason why the invalidation of a rescission should not effectively reinstate the pre-existing regulatory scheme, whether statutorily mandated or not. Indeed, in Action II, the case upon which the Ninth Circuit based its Paulsen holding, see 413 F.3d at 1008, the D.C. Circuit had ordered reinstatement of a wholly discretionary regulation promulgated by the Civil Aeronautics Board pursuant to that agency's statutory authority to establish "just and reasonable classifications, rules, regulations and

[21] Moreover, defendants' purported "general rule" flies in the face of a host of contrary precedent from other Circuits (including some cases cited by defendants themselves) all holding that the general rule in such circumstances is to reinstate the rule previously in force. See Cumberland Med. Ctr. v. Sec'y of Health & Human Serv., 781 F.2d 536, 538 (6th Cir. 1986) (cited in FS Opp. at 57); Abington Mem. Hosp. v. Heckler, 750 F.2d 242, 244 (3d Cir. 1985); Bedford County Mem. Hosp. v. Health & Human Servs., 769 F.2d 1017, 1024 (4th Cir. 1985); Desoto Gen. Hosp. v. Heckler, 766 F.2d 182, 186 (5th Cir. 1985); Menorah Med. Ctr. v. Heckler, 768 F.2d 292, 297 (8th Cir. 1985) (cited in FS Opp. at 58); Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1569 (11th Cir. 1985).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

practices." Action on Smoking and Health v. Civil Aeronautics Bd., 699 F.2d 1209, 1215 (D.C. Cir. 1983) ("Action I"); see also id. at 1212-15 (discussing statutory authority for regulations); Action II, 713 F.2d at 797 (discussing reinstatement of prior rule). In so doing, the court reasoned that vacating the rescission of a prior rule had the effect of reinstating the prior rule. See id. at 797. The same is true here.[22]

Further, no "principles of comity" weigh against reinstatement of the Roadless Rule. FS Opp. at 59. Although their argument is unclear, defendants apparently rely on the fact that the Roadless Rule previously was enjoined by the Wyoming district court. See id. However, this case does not implicate any concern that "an injunction sought in one federal proceeding would interfere with another federal proceeding." Bergh v. Washington, 535 F.2d 505, 507 (9th Cir. 1976). The Tenth Circuit vacated the Wyoming district court's injunction of the Roadless Rule precisely to prevent that injunction from continuing to prejudice the parties who sought review of the Wyoming ruling, including many of the plaintiffs here. See Wyoming, 414 F.3d at 1213. Defendants' argument that this Court should nevertheless forbear from reinstating the Roadless Rule because of the vacated Wyoming injunction defies the Supreme Court's direction that the purpose of such a vacatur is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." Munsingwear, 340 U.S. at 41 (emphasis added).

Moreover, this Court should not defer to the USDA's expressed wish to avoid reinstatement of the Roadless Rule. See FS Opp. at 59-60, citing 70 Fed. Reg. at 25,656. Courts reinstating previous regulations upon finding an unlawful rescission have disregarded such agency wishes. See Menorah Med. Ctr., 768 F.2d at 297 (reinstating prior regulation and rejecting agency's request that court solely order remand); accord Abington Mem. Hosp., 750 F.2d at 244; Lloyd Noland Hosp., 762 F.2d at 1569; Bedford County Mem. Hosp., 769 F.2d at 1024; Cumberland Med. Ctr., 781 F.2d

---

[22] Nor is this case parallel to the situation in Motor Vehicle, 463 U.S. at 57 n.21, where the Supreme Court permitted an agency to continue to suspend a prior regulation while it reconsidered that regulation's rescission on remand. See FS Opp. at 58-59. The regulation in that case never became effective before it was rescinded. See 463 U.S. at 38. Here, by contrast, the Roadless Rule became effective, and invalidation of its repeal should restore its effect.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

at 538-39. These results are consistent with the principle that the prior regulation remains valid until it is lawfully rescinded. Plaintiffs' requested relief would not "force the Department to adopt the 2001 Roadless Rule," FS Opp. at 59; the defendants voluntarily adopted the rule and now must act lawfully if they wish to rescind it. To hold otherwise would permit the defendants to effectively rescind the Roadless Rule merely by expressing their wishes, rather than by following the legally required procedures under NEPA, the ESA, and the APA. Indeed, the defendants' expressed wish to avoid any reinstatement of the Roadless Rule arose from the same inadequate decisionmaking process that gave rise to the unlawful Roadless Repeal, and it may be rejected on that basis alone. See Cumberland Med. Ctr., 781 F.2d at 539 (rejecting assertion "that the prior regulation cannot be reinstated" where agency's position was based "on the same inadequate procedures upon which the current rule was passed").

Even if this Court were to consider "special circumstances" as advocated by defendants, a critical circumstance not mentioned by defendants should control – the irreparable harm that projects such as the Smoky Canyon mine expansion, Biscuit and Threemile logging, and other roadless area projects threaten to plaintiffs and "the public's interest in preserving precious, unreplenishable resources," Kootenai Tribe, 313 F.3d at 1125, if the Roadless Rule is not reinstated. See Bedford County Mem. Hosp., 769 F.2d at 1024 (holding that court receiving agency request to forego reinstatement of prior rule must consider "harm to private interests").

This Court should also enjoin defendants from taking any action in violation of the reinstated Roadless Rule. Given the defendants' past evasion of the Roadless Rule's requirements without following the procedures required by law to rescind the rule, such relief will ensure that irreplaceable national forest roadless areas remain protected on remand. See Northwest Ecosystem Alliance v. Rey, No. 04-844P, 2006 WL 44361 at *7 (W.D. Wash. Jan. 9, 2006) (reinstating prior national forest requirements and enjoining projects that do not comply with them: "It would be incongruous for the Court to set aside the 2004 ROD and to reinstate the 2001 ROD, while at the same time allowing timber projects that do not comply with the 2001 ROD to proceed.").[23]

[23] Intervenors and *amici* fail to offer any legitimate reason for this Court to reject reinstatement of the Roadless Rule. AFRC asserts that the rule should not be reinstated because it is "illegal."

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

C. The Court Should Not Apply the Tongass Exemption.

The reinstated Roadless Rule should apply to the Tongass National Forest as well. The Forest Service and the State of Alaska argue that, if the Roadless Rule is reinstated, the Court should also reinstate an exemption for the Tongass National Forest. The Court should not take this path for four reasons. First, in adopting the rule, the Forest Service emphasized that the Tongass exemption was intended to be only "temporary" and "short term." 68 Fed. Reg. 75,136, 75,138 (Dec. 30, 2003).

Second, the Tongass exemption was justified by a land management plan the Ninth Circuit subsequently held arbitrary and in violation of NEPA. See NRDC v. U.S. Forest Serv., 421 F.3d at 816 n.29. In response, the best the defendants can muster is that "the Circuit did not vacate the plan." FS Opp. at 61 n.31. Plaintiffs there did not request vacatur because it would have caused management to revert to an older, less protective plan. Instead, at their request, the court remanded to determine appropriate relief. NRDC v. U.S. Forest Serv., 421 F.3d at 816 n.29. For purposes of relief in the present case, the relevant fact is that a major Forest Service error "fatally infected [the plan's] balance of economic and environmental considerations…." Id. at 816. This fact undermines a critical justification for the temporary rule exempting the Tongass. Nor is Northwest Ecosystem Alliance v. Rey of any help to the Forest Service because that case did not involve a temporary, short-term rule relying on a plan subsequently declared arbitrary. This Court has equitable discretion to consider these facts in fashioning appropriate relief.

Third, contrary to the claims of the Forest Service and State of Alaska, application of the Roadless Rule in the Tongass would not cause any adverse economic or social effects. Subsequent to the 2000 Roadless Rule FEIS, which provides the basis for those predictions, logging levels and

---

AFRC *Amici* Br. at 14. However, the Ninth Circuit has held that the Roadless Rule was not illegal, see Kootenai Tribe, 313 F.3d at 1094, and the rule's fate in other Circuits was undetermined when defendants preempted the litigation process through their unlawful repeal. Similarly, the State of Wyoming suggests "judicial economy" forecloses reinstatement of the rule because Wyoming will simply seek to reinstate an injunction against the rule. See Wyoming's *Amicus* Br. at 6-8. However, even if Wyoming proceeds in this manner, there is no waste of judicial resources in allowing the 10th Circuit appellate process to reach its conclusion, instead of being untimely preempted by unlawful agency action.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

the economic demand for timber have declined substantially and can now be met without logging in any roadless areas. See Exh. 2 at 32-33 and Table 3 (draft Forest Service study projecting most likely market demand scenarios at 33-34 MMBF annually for 2003-2012); 2000 FEIS at 3-378 (finding that Tongass could cut about 50 MMBF annually under Roadless Rule).[24]

Finally, reinstatement of the original Roadless Rule will not jeopardize the out-of-court settlement agreement between the Forest Service and the State of Alaska. Alaska's assertion that the state "agreed to withdraw its suit in exchange for the USDA's agreement to promulgate a rule to temporarily exempt [the Tongass]" is false. Alaska *Amicus* Br. at 1. The federal defendants agreed only to publish a "proposed temporary regulation…." See AR TRS-0401_wo_t112 at 8 (emphasis added). The Forest Service made "no representation regarding the content or substance of any final rule…." Id. The federal defendants have fully discharged their obligations under this agreement, and a decision from this Court reinstating the original rule will not change that.[25]

CONCLUSION

For the reasons discussed above, in TWS's opening memorandum, and the States' opening and reply memoranda, TWS respectfully asks the Court to grant its motion for summary judgment and injunctive relief.

[24] The Forest Service also claims that the Roadless Rule would significantly limit new road and utility connections for communities in the Tongass, but cites no example. FS Opp. at 61 n.33. There are none. Were a situation to arise that presented a strong need for relief from the Roadless Rule to construct a needed road or utility connection for Tongass communities before the agency could complete its obligations under NEPA, the ESA, and the APA, the agency could move for relief from the requested injunction. The hypothetical possibility of such a circumstance is insufficient reason to deny the injunction.

[25] Plaintiffs did not challenge the Tongass exemption in this case because the Roadless Repeal also repealed that exemption.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Respectfully submitted this 5th day of May, 2006.

/s/ Kristen L. Boyles
KRISTEN L. BOYLES (CSB #158450)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340
(206) 343-1526 *[FAX]*
kboyles@earthjustice.org

TIMOTHY J. PRESO (MSB #5255)
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
(406) 586-9699
(406) 586-9695 *[FAX]*
tpreso@earthjustice.org

THOMAS S. WALDO (ASB #9007047)
Earthjustice
325 Fourth Street
Juneau, AK 99801-1145
(907) 586-2751
(907) 463-5891*[FAX]*
twaldo@earthjustice.org

Attorneys for Plaintiffs The Wilderness Society, California Wilderness Coalition, Forests Forever Foundation, Northcoast Environmental Center, Oregon Natural Resources Council Fund, Sitka Conservation Society, Siskiyou Regional Education Project, Biodiversity Conservation Alliance, Sierra Club, National Audubon Society, Greater Yellowstone Coalition, Center for Biological Diversity, Environmental Protection Information Center, Klamath-Siskiyou Wildlands Center, Defenders of Wildlife, Pacific Rivers Council, Idaho Conservation League, Humane Society of the United States, Conservation NW, and Greenpeace

GREGORY C. LOARIE (CSB #215859)
Earthjustice
426 Seventeenth Street, 5th Floor
Oakland, CA 94612
(510) 550-6725
(510) 550-6749 *[FAX]*
gloarie@earthjustice.org

Local Counsel for Plaintiffs