

Nos. 09-8075 & 08-8061 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING,

Plaintiff-Appellee,

and COLORADO MINING ASSOCIATION,

Intervenor-Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST
SERVICE; TOM VILSACK, SECRETARY, DEPARTMENT OF AGRICULTURE; TOM
TIDWELL, CHIEF FORESTER, UNITED STATES FOREST SERVICE

Defendants-Appellants,

BIODIVERSITY CONSERVATION ALLIANCE; DEFENDERS OF WILDLIFE; NATIONAL
AUDUBON SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; PACIFIC RIVERS
COUNCIL; SIERRA CLUB; WILDERNESS SOCIETY; and, WYOMING OUTDOOR
COUNCIL

Defendants-Intervenors-Appellants,

On Appeal from the United States District Court for the District of Wyoming
United States District Judge Clarence A. Brimmer (No. 2:07-cv-00017)

**BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, MONTANA, OREGON, AND
WASHINGTON IN SUPPORT OF APPELLANTS**

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INTRODUCTION

Among the hundreds of millions of acres of National Forest lands in the Western United States, the Forest Service designated 14.7 million acres in California, Montana, Oregon and Washington as off-limits to roadbuilding and logging under the 2001 Roadless Rule, preserving these acres as some of the country's last remnants of pristine, wild land. In 2008, a Wyoming district court enjoined the Roadless Rule that protects those acres and every other designated roadless area throughout the United States. Ignoring the Forest Service's Organic Act of 1897 and the Multiple-Use and Sustained Yield Act of 1960, and the significant distinctions between congressionally-designated wilderness areas and roadless areas managed by the Forest Service, the district court has made a sweeping attempt to wipe Forest Service roadless area protections off of the maps of the the United States.

The Wyoming district court also invalidated the 2001 Roadless Rule under the National Environmental Policy Act ("NEPA"), despite the most extensive public process in the history of the Forest Service, despite the fact that the Rule is the most protective environmental alternative, and despite a Ninth Circuit determination on nearly identical issues that the Forest Service had complied with the statute.

Amici States seek to protect the roadless areas within their borders, in order to safeguard the vital natural resource values that these pristine public lands support. We support the Forest Service’s view (1) that the Wilderness Act does not divest the Forest Service of its long-standing authority to protect roadless areas within its jurisdiction, (2) that the public process leading to the adoption of the rule fully complied with NEPA, and (3) that – even if the Roadless Rule is somehow determined to be invalid – a nationwide injunction prohibiting application of the Rule is overbroad and therefore not an appropriate remedy.

INTEREST OF AMICI^{1/}

Areas protected by the Roadless Rule include 14.7 million acres of unspoiled forests in the *amici* States of California, Montana, New Mexico, Oregon and Washington. Appellants’ Appendix (“AA”) at 1038-39. Without the protections of the Roadless Rule, over one-half of these acres – 8.2 million – would be vulnerable to road construction and logging under currently existing forest plans. *Id.* In their unspoiled state, these millions of acres provide critical freshwater supplies in the arid West, and essential habitat for imperiled species such as the California Condor, the Gray Wolf, the Northern Spotted Owl, and numerous species of salmon. AA at 439-42, 769-78, 788-93, 1057-72; *see also* 66 Fed. Reg. 3245 (Jan. 12, 2001). The

^{1/}*Amici* appear pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, which provides that “a State . . . may file an amicus-curiae brief without the consent of the parties or leave of court.”

value of these areas as plant and wildlife habitat and as vital fresh water sources will, in *amici's* view, be best preserved under the Roadless Rule's resource-protective regulatory regime.

The citizens of *amici* States voiced strong support for the policies embodied in the Roadless Rule through public comment on the draft Rule. Thousands of citizens of the four states participated in the public comment process. AA at 1593; *see also* AA at 1721-1961. Of those citizens that provided input, the vast majority expressed support for adoption of the Roadless Rule, including for example, ninety-six percent of the 80,000 commenters from Washington State. AA at 1593.

In California, the Roadless Rule will protect 1.1 million acres of pristine forest land in the Sierra Nevada Mountains, an area within a few hours' drive of two-thirds of the state's population. The Sierra Nevada Range contains such national treasures as Lake Tahoe and the ancient trees of the Giant Sequoia forest, the largest and oldest living things in the world.² Multiple roadless areas in California are considered "globally outstanding" ecoregions on the basis of their biodiversity, supporting 58 federally listed endangered and threatened species. AA at 738.

² In an editorial supporting efforts to protect the unique ecosystem of the Sierra, the Los Angeles Times noted: "As California becomes increasingly crowded and developed, the [Sierra Nevada] range becomes ever more vital as a place for recreation, solace, renewal and rejoicing in life." *Los Angeles Times*, May 15, 1999.

With nearly 6.4 million acres of inventoried roadless areas alone, Montana has the third largest total roadless area among the States affected by the Roadless Rule (AA at 1038), including key tracts in the Greater Yellowstone and Northern Continental Divide ecosystems that constitute important pieces of the State's outdoor recreational experience. For example, the Pioneer Mountains in southwestern Montana offer the longest general elk and deer hunting seasons in the West. In addition, roadless areas in Montana serve critical ecological functions in the preservation of native species, including helping to maintain viable populations of the endangered grizzly bear, gray wolf, Canada lynx and bull trout; contributing to the recovery of the arctic grayling, a candidate for federal listing; and providing important habitat to ensure that sensitive species such as westslope cutthroat trout and Yellowstone cutthroat trout do not meet the criteria for listing under the federal Endangered Species Act ("ESA"). *See, e.g.*, AA at 732-95.

Over two million acres of national forest land in Washington is currently roadless, including land in the prized forests of the Olympic, Mount-Baker Snoqualmie, Wenatchee, and Umatilla National Forests that provide key habitat for numerous rare or endangered species including the Canada lynx, the bald eagle, and several native species of wild salmon. AA at 1038; *see also* AA at 732-95; 66 Fed. Reg. 3245 (Jan. 12, 2001). Throughout the West, existing roads within Forest Service lands have become an increasing source of sediment affecting the quality of

state waters and, in Washington State, poorly maintained Forest Service roads are frequently washed out during the rainy season, resulting in deposition of sediments into State waters, including waters providing habitat to sensitive species. AA at 658-67. The States are concerned that their water resources will be further impacted if new roads are allowed in the remaining roadless areas within their borders.

Amici also have a concrete interest in protecting specific lands and resources that are affected by roadless-area policies, including a number of state parks adjacent to inventoried roadless areas. For example, Oregon owns the Jessie M. Honeyman Memorial State Park, which is adjacent to a roadless area in the Oregon Dunes National Recreation Area. Further, the States all have responsibilities to protect and conserve the wildlife and water quality and water resources found in roadless areas. *See California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 459 F. Supp. 2d 874, 887-89 (N.D. Cal. 2006) (describing potentially affected state interests). Accordingly, *amici* States have an enormous stake in the outcome of this Court's decision.

Absent the protections of the Roadless Rule, *amici* may suffer irreversible harm to their lands, resources, and wildlife. For example, in June 2006, *amicus* State of Oregon sustained irreparable harm during an interval without Roadless Rule protections, when a logging project was conducted in an inventoried roadless

area over the State's objections. *See id.*, 459 F. Supp. 2d at 887 (describing auction of Mike's Gulch timber sale during pendency of Northern District litigation).

Amici urge reversal of the Wyoming district court's ruling in order to preserve the Roadless Rule's protections and the environmental *status quo*.

BACKGROUND

Protection of roadless areas has resulted in litigation battles across the Ninth and Tenth Circuits for almost a decade. After the Forest Service adopted the Roadless Rule in 2001, the Rule was challenged in a number of district courts, including in both Idaho and Wyoming. In 2005, the Forest Service repealed the Roadless Rule, mooted the challenges to the 2001 Rule, which were in various stages of litigation. *See, e.g., Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212-13 (10th Cir. 2005). Prior to the Rule's repeal, one challenge progressed to a federal appeals court, with the Ninth Circuit concluding (on a preliminary injunction ruling) that the Rule was likely to withstand a NEPA challenge. *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

California, New Mexico, Oregon, and Washington, along with twenty national and regional conservation groups, successfully challenged the 2005 repeal in district court in the Northern District of California and won nationwide reinstatement of the 2001 Roadless Rule. *California ex rel. Lockyer, v. U.S. Department of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006). The Ninth

Circuit affirmed the Northern District's determinations in August 2009. *California ex rel. Lockyer v. U.S. Department of Agriculture*, 575 F.3d 999 (9th Cir. 2009).

After the Northern District reinstated the Roadless Rule, the State of Wyoming challenged it (for the second time) in Wyoming district court. The Wyoming district court, in the decision on appeal here, made NEPA findings directly at odds with the findings of the Ninth Circuit's 2002 preliminary injunction ruling, and enjoined implementation of the Rule nationwide. *Wyoming v. U.S. Department of Agriculture*, 570 F.Supp.2d 1309 (D. Wyo. 2008). This appeal followed.

Amici participate in this proceeding to urge an outcome that preserves the pristine character of the remaining roadless area Forest Service lands within their borders so that the States' natural resources are protected. *Amici* feel strongly about presenting our perspective to the Court because of our responsibility to protect our lands, waters and sensitive species, and also because the vast majority of our citizens support protecting the natural resource values of the remaining roadless forest land.

Should this Court find some infirmity in the process whereby the Forest Service adopted the Roadless Rule, *amici* request that this Court reverse the Wyoming District Court's nationwide injunction against implementation of the Rule as overbroad. A narrower injunction, tailored to remedying Wyoming's

alleged harm would respect the 2002 and 2009 decisions of the Ninth Circuit, and protect the interests of the *amici* States and their citizens.

ARGUMENT

I. THE WILDERNESS ACT DOES NOT DIVEST THE FOREST SERVICE OF AUTHORITY TO PROTECT NATIONAL FOREST LANDS WITHIN ITS JURISDICTION

The Wilderness Act of 1964 established a formal process for land to be managed as federally-protected “wilderness.” The Wyoming district court found that land can be set aside for preservation only under and pursuant to the Wilderness Act, and therefore, that the Forest Service’s Roadless Rule “constitutes a de facto designation of ‘wilderness’ in contravention of the process established by the Wilderness Act of 1964.” *Wyoming v. U.S. Department of Agriculture*, 570 F.Supp.2d 1309, 1345-50 (D. Wyo. 2008). The district court fundamentally misapprehends the Forest Service’s authority under its Organic Act of 1897 and the Multiple-Use and Sustained Yield Act of 1960 (MUSYA).

The Organic Act is an expansive charter that confers the Forest Service’s basic grant of authority to regulate occupancy and use of National Forest land, including to “preserve the forests . . . from destruction” 16 U.S.C. § 551. This

bedrock charter has never been amended, either expressly or by implication.³

Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests* 65-66 (1987). Indeed, the Forest Service's authority to protect undeveloped National Forest lands was confirmed in a case decided after passage of the Wilderness Act. *McMichael v. United States*, 355 F.2d 283, 285-86 (9th Cir. 1965) (long-established administrative practice and clear congressional intent make clear that section 551 grants the Forest Service discretion to establish limitations on the use of primitive, wilderness and wild areas).

In addition to the powers conferred by the Organic Act, the Forest Service has authority, under the MUSYA, to foster "multiple use" of all the resources of the national forest so they are utilized in the combination that best meets the needs of the American people. *California v. Block*, 690 F.2d 753, 757 (9th Cir. 1982) (citing 16 U.S.C. § 531(a)). The MUSYA states expressly that the "establishment and maintenance of areas of wilderness" is consistent with the Forest Service's multiple use mandate. 16 U.S.C. § 529. Thus, in addition to the authority to recommend to Congress that specific primitive lands in the National Forest System be added to the Wilderness System under the Wilderness Act, the Forest Service *also has separate and independent authority* under its Organic Act and the MUSYA

³ The district court does not attempt to meet the high burden required to establish a repeal of the Organic Act by implication. *See Am. Hospital Ass'n v. NLRB*, 499 U.S. 606, 613 (1991); *Amerada Hess Corp. v. Dept. of Interior*, 170 F.3d 1032, 1034 (10th Cir. 1999).

to preserve and set aside National Forest land for protection. *Block*, 690 F.2d at 757 (citing 16 U.S.C. § 475).

Amici do not dispute that, under the Wilderness Act, Congress has the sole power to create and set aside federally designated “wilderness areas” governed and managed as required in that Act. The requirements of the Wilderness Act, however, do not – and cannot – govern other federal lands, including National Forest lands that have not been designated by Congress as wilderness. Nothing in the language of the Wilderness Act precludes a roadless determination nor supports the concept of “de facto wilderness” for lands identified for preservation outside of the Wilderness System. *See* 16 U.S.C. § 1133(a)(1) (stating that the Wilderness Act does not interfere with the purposes for which the National Forests are established). While the lands may share wilderness characteristics, their legal designation, use, and management regimes result from different statutory requirements. Although the district court merely glosses over them (*Wyoming*, 570 F.Supp.2d at 1349-50), the differences in the management restrictions attached to designated wilderness as opposed to roadless areas are significant. The Wilderness Act generally prohibits all commercial enterprises, as well as all roads regardless of purpose, all motorized vehicles, equipment and mechanized transport, and the cutting of trees for non-wilderness purposes. 16 U.S.C. § 1133(c)&(d)(30); 36 C.F.R. § 293.6. The Roadless Rule, in contrast, restricts only roadbuilding, with some exceptions, and

commercial logging. 36 C.F.R. §§ 294.12-13 (2001). So, as one example among many, both motorized off-road vehicle use and non-motorized mechanized recreation (such as mountain bikes) are allowed in roadless areas, but not in officially designated “wilderness.” AA 817-23, 847. Not only does the district court’s decision ignore the obvious factual differences between wilderness lands and roadless areas, it fails to cite any case law that supports its concept of “de facto wilderness.”⁴

If affirmed, the district court’s “de facto” wilderness ruling could have profound implications. The ruling would divest federal land managers of authority to preserve and protect land that their agencies are entrusted to manage on behalf of the citizens of this country. In the case of the Forest Service, the district court’s ruling would preclude roadless area determinations, and therefore preservation, for the 190 million acres of land in the National Forest System, leaving those lands available only for Forest Service-approved development. That result would be in clear contravention the agency’s express statutory mandate to manage land for preservation purposes.

⁴ The only case law cited by the district court in support of its conclusion is *Parker v. United States*, 309 F.Supp. 593, 597 (D.Colo. 1970), *aff’d* 448 F.2d 793, 795-97 (10th Cir. 1971). In *Parker*, the Forest Service was prohibited from selling timber on lands adjacent to primitive areas prior to completing a congressionally-mandated review to determine whether the areas were suitable for wilderness designation. *Id.* at 794-95. The Tenth Circuit’s decision did not address the issue of the Forest Service’s retained authority under the MUSYA and the Organic Act to manage lands for preservation and does not adopt the trial court’s dicta relied on by the Wyoming district court. *Id.* at 795-97.

II. THE FOREST SERVICE FULLY COMPLIED WITH NEPA IN ADOPTING THE ROADLESS RULE

In finding that the Forest Service violated NEPA in adopting the Roadless Rule, the district court erred, first, by improperly analyzing the administrative record and, second, by incorrectly applying NEPA case law and standards of review. In 2002, the Ninth Circuit conducted a detailed review of applicable legal precedent and a thorough analysis of the factual record (on a preliminary injunction ruling) and reached a different result, rejecting nearly identical NEPA challenges as those brought by the State of Wyoming here.⁵ *Kootenai Tribe*, 313 F.3d 1094. For all of the reasons discussed below, *Kootenai Tribe* is correctly decided.⁶

A. The Forest Service's NEPA Process was Rigorous

As an initial matter, the *amici* States do not agree with the district court's conclusion that the Roadless Rule was "given only a once-over lightly" in the

⁵ Because *Kootenai Tribe* involved the appeal of a preliminary injunction, the Ninth Circuit made the determination that the Rule's challengers had not shown a substantial likelihood of success on the merits of their NEPA claims. *Kootenai Tribe*, 313 F.3d at 1123. Nevertheless, the court's review was substantively comprehensive. As the Ninth Circuit stated just this August in affirming the Northern District's injunction reinstating the Roadless Rule, the court in *Kootenai Tribe* "evaluated in considerable detail the procedural challenges made against the Roadless Rule and concluded, on the record before it, that 'it is plain that the Forest Service gave a 'hard look' at the complex problem presented" (*California ex rel. Lockyer*, 575 F.3d at 1007, internal citations omitted) and, therefore, the Ninth Circuit considered itself "bound by the findings of *Kootenai Tribe* " that the Roadless Rule is "legally valid" (*id.* at 1014).

⁶ The district court's 2003 invalidating the Roadless Rule expressly declines to follow the Ninth Circuit's rulings in *Kootenai Tribe*. *Wyoming v. U.S. Dept. of Agriculture*, 277 F.Supp.2d 1197, 1202 n.1. (D.Wyo. 2003).

NEPA process. *Wyoming*, 570 F.Supp.2d at 1345. The States have not hesitated to complain in the past when they believe that the Forest Service’s public participation efforts have been less thorough than required by NEPA. *See, e.g., California ex. rel Lockyer*, 575 F.3d 999 (challenging the 2005 repeal of the Roadless Rule under NEPA); *see also Block*, 690 F.2d at 757 (California’s challenge to the RARE II project under NEPA), *California v. U.S. Forest Service*, 465 F.Supp.2d 942 (N.D. Cal. 2006) (challenge to NEPA compliance of the FEIS for the Giant Sequoia National Monument Plan); *People of the State of California v. U.S. Dept. of Agriculture*, 2008 WL 3863479 (E.D.2008) (NEPA challenge against 2004 Sierra Nevada Framework Plan).

In contrast, the public process leading up to the promulgation of the Roadless Rule stands out as an example of how compliance with NEPA results in “informed decision-making and informed public participation.” *Block*, 690 F.2d at 761, 767. Before adopting the Roadless Rule, the Forest Service held hundreds of public meetings throughout the country, and garnered comments from thousands of citizens. Over 180 public meetings were held in geographically dispersed regions all across the *amici* States, including at least 32 in Montana, 61 in California, 16 in New Mexico, 46 in Oregon, and 26 in Washington. 65 Fed. Reg. 30,288-308 (May 10, 2000). This high level of public participation confirms that the public comment process met the goals of NEPA – it facilitated input from a large segment of the

population of the states with large tracts of National Forest lands. Thus, in the experience of *amici*, the Forest Service went well beyond its statutory duty to involve the citizens of our States in development of Roadless Rule protections.

B. Appellants Have Demonstrated That the Forest Service Complied with NEPA

The defendant federal agencies and the environmental group appellants have provided this Court with a ten-volume Appellants' Appendix compiling the relevant portions of the voluminous administrative record. That record includes a four-volume FEIS and its appendices; the agency's detailed analysis of, and formal and informal responses to, over 1.5 million public and government agency comments; at least six published federal register notices announcing the intent and justification for the rule and/or soliciting public comment; and multiple maps outlining the location of roadless areas in each state. *See* Opening Brief of Federal Defendants-Appellants at 40- 61; Appellants' Opening Brief at 18-43. The appellants' opening briefs amply demonstrate that the Forest Service's FEIS for the Roadless Rule adequately "notifie[d] the public and relevant government officials of the proposed action and its environmental consequences and inform[ed] the public that the acting agency had considered those consequences," as required by NEPA. *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1437 (10th Cir. 1996).

C. *Kootenai Tribe* Was Correctly Decided

The Ninth Circuit in *Kootenai Tribe* held that the challengers of the 2001 Roadless Rule had not shown that the Forest Service failed to provide sufficient information or to adequately consider impacts and alternatives. *Kootenai Tribe*, 313 F.3d 1094. In doing so, the Ninth Circuit properly considered the portions of the administrative record that were overlooked or given short shrift by the Wyoming district court.

The Ninth Circuit also correctly considered the nature and scope of the Roadless Rule in finding no NEPA violation. The level of detail that NEPA requires in an EIS “depends upon the nature and scope of the proposed action.” *California v. Block*, 690 F.2d at 761 (citing *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 322 (1975)). In addition to all the reasons set forth in the appellants’ briefing, the Wyoming district court’s NEPA analysis is also incorrect because it fails to properly take into account the nature and scope of the Roadless Rule.⁷

The Roadless Rule serves to protect and preserve roadless areas from new road-building and logging, and therefore, maintains the environmental *status quo* in

⁷ Although the Wyoming district court expressly acknowledged that “[t]he requisite level of detail and the number of alternatives an agency must consider depends on the nature and scope of the agency’s proposed action” (*Wyoming*, 570 F.Supp.2d at 1335-36), the court nevertheless wrongly applied this principle in finding the Forest Service’s NEPA analysis deficient.

a way that does not constrain future decisions or limit future options with respect to the use of roadless areas. “[T]he Roadless Rule is benign in that it can be undone so that any development that has been forestalled under the rule may be resumed, or limited development may proceed under the exceptions it contemplates.” *Kootenai Tribe*, 313 F.3d at 1121. Although in this case the Forest Service did employ a rigorous process of detailed environmental review, this level of detail may have been greater than required because the Forest Service’s action did not irretrievably commit resources to new or altered uses. As a decision of a benign nature, a less-searching judicial review under NEPA may have been justified. *See Block*, 690 F.2d at 758. Authority in the Tenth Circuit is in accord. In the context of reviewing a claim that an agency failed to evaluate an adequate range of alternatives under NEPA, this Court found that “[w]hen an agency makes an informed decision that the environmental impact [of a project] will be small” . . . “a less extensive search for reasonable alternatives is required.” *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1278-79 (10th Cir. 2004) (citing *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 960) (internal quotations omitted).⁸ Consistent with the

⁸ This Court’s finding in *Catron County*, 75 F.3d at 1436, that a decision to designate critical habitat for a listed species under the ESA was not exempt from NEPA compliance does not contradict this authority. Rather than claiming a NEPA exemption, the Forest Service here undertook a rigorous and detailed review of its proposed action, and fully considered the environmental consequences.

Ninth Circuit’s findings and the extensive explanations of the NEPA process summarized in appellants’ briefing, the scope of the Roadless Rule FEIS survives judicial review under either the usual or this less-searching standard of review.

1. The Forest Service Considered a Reasonable Range of Alternatives to Adoption of the Roadless Rule.

In *Kootenai Tribe*, the Ninth Circuit considered an identical NEPA challenge to that made by the State of Wyoming here –that the Forest Service failed to evaluate alternatives that did not include a ban on road construction for roadless areas – but reached the opposite conclusion. *Kootenai Tribe*, 313 F.3d at 1120. Given the Forest Service’s preservation purposes and the environmental protection purposes of NEPA, and given that the Rule does not foreclose future options for use of roadless areas, limiting the scope of alternatives to those that ban roads is not unreasonable under NEPA. *Id.* at 1121. Instead, the “inclusion of alternatives that allowed road construction . . . would be inconsistent with the Forest Service’s policy objective in promulgating the Rule.” *Id.* at 1120-21. Requiring in-depth analysis of environmentally damaging alternatives in this context “would turn NEPA on its head.” *Id.* at 1122-23.

Although a federal agency may not limit alternatives by defining its policy objective in unreasonably narrow terms (*see City of Carmel-by-the-Sea v. United States Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)), the *Kootenai* court

found that “there is no indication that [the Forest Service] did so” in adopting the Roadless Rule. *Kootenai Tribe*, 313 F.3d at 1121. Rather, “[p]rotecting the roadless areas of our national forests from further degradation can hardly be termed unreasonably narrow,” “[g]iven the importance of roadless lands as a resource and the ease with which they may be irretrievably damaged.” *Id.*; accord, *AWARE v. Colorado Dept. of Transp.*, 153 F.3d 1122, 1130 (10th Cir. 1998) (“it is clear an agency need not independently evaluate alternatives it determines in good faith to be ineffective as a means to achieving the desired ends”).

The Roadless Rule EIS amply supports the Forest Service’s conclusion that roadless areas could not be protected absent a broad prohibition on road construction. *Kootenai Tribe*, 313 F.3d at 1121; see also AA at 565, 654, 744, 657, 740, 759, 783, 790-91. The Ninth Circuit reversed the district court on its NEPA alternatives finding because, like the Wyoming district court here, the lower court gave “inadequate weight to analysis of the conservation and environmental values supporting the Rule.” *Id.* at 1121. This Court has approved similarly-scoped alternatives analyses, when consistent with NEPA and the agency’s legitimate purpose. See, e.g., *Greater Yellowstone*, 359 F.3d at 1278 (at the time the environmental documents were prepared, the proposed project was the only alternative that would satisfy the local land use requirements and the project’s purpose); *AWARE v. Colorado Dept. of Transp.*, 153 F.3d 1122, 113 (10th Cir.

1998) (approving analysis that rejected transit alternatives to highway construction project).

The understanding that NEPA requires consideration only of alternatives that advance an agency's reasonable objectives is supported by the analysis used by the Ninth Circuit in *California v. Block*, although that case had a very different factual setting. In *Block*, the State of California challenged the Forest Service's evaluation of the environmental impacts of the RARE II project, a decision to designate some inventoried roadless as "nonwilderness" and therefore open for development. *Block*, 690 F.2d at 758. None of the alternatives considered by the Forest Service designated less than 37% as nonwilderness, more than the acreage proposed to be protected as wilderness. *Id.* at 765.

Given the RARE II project objectives, the court found this range of alternatives to be unreasonably narrow under NEPA. *Id.* Because the Forest Service's purpose was to make "a trade-off between wilderness use and development" in a way that foreclosed future options for use of the "nonwilderness" land, the agency failed to foster informed decision-making about this trade-off by only considering alternatives that resulted in one outcome – allocating more RARE II acreage to developable nonwilderness than was protected as wilderness. *Id.* at 767-68.

In contrast, the Forest Service’s purpose in adopting the Roadless Rule was limited to maintaining the *status quo* – conserving primitive areas in their natural condition, free from roads. It was not further directed at designating areas for development or taking action that would alter existing uses, change settled expectations, or foreclose other options. Therefore, the agency was entitled to limit its consideration to a range of alternatives that achieved its narrower environmental goals. *Kootenai Tribe*, 313 F.3d at 1121. Like the district court in *Kootenai Tribe*, the Wyoming district court failed to recognize and take into account that the Roadless Rule does not foreclose future options.⁹

2. The Forest Service Complied with NEPA’s Scoping Requirements

Wyoming contends, and the district court found, that the Forest Service violated NEPA during the “scoping phase” by not providing certain information (including maps identifying the geographic scope of the roadless areas to be covered), by not providing more time for scoping (even though a time period is not

⁹ In acknowledging the contrary outcomes of *Block* and *Kootenai Tribe*, the district court misconstrued the Ninth Circuit’s rulings to find a conflict in the cases. *Wyoming*, 570 F.Supp.2d at 1340. Rather than an “implied[] overruling of *Block*,” as the district court suggests, the Ninth Circuit’s ruling in *Kootenai* was entirely consistent with its ruling in *Block*. The court simply applied the same principle – a decision that makes a decisive, irreversible commitment of resources that forecloses preservation options is subject to a more searching analysis under NEPA – to a set of opposite facts and logically reached the opposite conclusion. *Kootenai Tribe*, 313 F.2d at 1121.

specified in the statute or regulations), and by rejecting Wyoming's request for "cooperating agency" status. *Wyoming*, 570 F.Supp.2d at 1333-34.

In *Kootenai Tribe*, however, the Ninth Circuit reversed similar district court conclusions, noting that the challengers of the Roadless Rule have "overstate[d] NEPA's requirements" for scoping. *Kootenai Tribe*, 313 F.3d at 1116. Rather than imposing specific, affirmative duties on a federal agency, the scoping period instead serves only the limited purpose of "providing adequate notice and beginning a meaningful dialogue with . . . the public about a proposed action" and was not violated in the Roadless Rule process. *Id.* at 1117.

The Ninth Circuit "disagreed with the district court and the plaintiffs that the Forest Service's failure to provide maps of the affected areas during [the scoping] period violated NEPA." *Id.* The *amici* States similarly disagree with the State of Wyoming here that meaningful participation was constrained because the Forest Service purportedly did not provide certain information about the specific roadless areas that were to be affected by the proposed action. *Wyoming*, 570 F.Supp.2d at 1333. As the Ninth Circuit observed, "the location of the affected [roadless] areas was reasonably known" to the States, including Wyoming, prior to the preparation of any specific maps, because the States "have been engaged in ongoing studies and discussions with the Forest Service about roadless areas for several years," including during both the RARE I and RARE II processes. *Kootenai Tribe*, 313

F.3d at 1117. *See also Block*, 690 F.2d at 758-59 (noting the history of the States’ and the public’s participation in roadless area identification and mapping starting with RARE I in 1972).

Further, *amici* States agree with the Ninth Circuit that the claim that a federal agency violates NEPA if it does not provide more time for comment than is specified in NEPA regulations is a “novel allegation” that is unsupported by any authority. *Id.* at 1119. Nothing in the scoping regulation requiring federal agencies to “[i]nvite the participation” of affected parties and “[d]etermine the scope” of the upcoming environmental analysis (*see* 40 C.F.R. § 1501.7) specifies a requirement for scoping meetings or time periods for review. To the contrary, this Court has held that the formulation of procedure for public comment is “basically left within the discretion of the agencies to which Congress has confined the responsibility for substantive judgments.” *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986).

Finally, *amici* States believe the Court should reject Wyoming’s claim that the Forest Service’s refusal to grant Wyoming “cooperating agency” status gave rise to a NEPA violation in this case. Neither Wyoming nor the district court provides legal authority or support in the record for the conclusion that the Forest Service’s denial of Wyoming’s request here was arbitrary or contrary to law. NEPA permits, but does not mandate, granting formal cooperating agency status for

State agencies. 42 U.S.C. § 4332(2)(C). As the Forest Service determined here, NEPA allows a federal agency to reasonably conclude that such status is unnecessary given the host of other opportunities for State agency participation in the decision-making process.

3. The Forest Service Adequately Analyzed Cumulative Effects of the Roadless Rule

The district court also found fault with the Forest Service’s assessment of the cumulative impacts of the Roadless Rule in relation to three other sets of agency rules: the never-implemented 2000 Planning Rule, the Road Management Rule, and the now-suspended Transportation Policy.¹⁰ While it acknowledged that the agency did consider the impact of the policies taken together, and that the FEIS concluded that the Roadless Rule in conjunction with the other policies would “create additional acres of unroaded areas,” the district court nevertheless found that the analysis on which this was based lacked good faith and objectivity.¹¹ *Wyoming*,

¹⁰ The 2000 planning rules, which were never implemented and were replaced by rules that have been enjoined (*see Citizens for Better Forestry v. U.S. Department of Agriculture*, 632 F.Supp.2d 968 (N.D. Cal. 2009)), require the Forest Service to evaluate unroaded areas for additional protection when revising forest land management plans. 66 Fed.Reg. at 67,571. The Road Management Rule requires evaluation of road need and decommissioning in National Forests. 66 Fed.Reg. at 3,217. The Transportation policy establishes criteria for the addition of new roads, including consideration of long-term funding obligations. 66 Fed. Reg. at 3,230.

¹¹ The district court failed to note that the FEIS contained a more detailed explanation of how the Rule’s prohibition on roadbuilding would relate to the management guidance set forth in the other rules. *See* AA at 567-69, 643-48, 722, 1006-07.

570 F.Supp.2d at 1341-42. As with the district court's other NEPA findings, the Ninth Circuit reached the opposite conclusion when considering the same question: "We reject the district court's conclusion that the Forest Service failed adequately to evaluate the cumulative effects of the Roadless Rule. . . ." *Kootenai Tribe*, 313 F.3d at 1123. "[I]n-depth analysis" is not required where the potential cumulative effects of the Roadless Rule "are too speculative." *Id.* at 1124.¹²

Consistent with the Ninth Circuit's finding, the Forest Service adequately explained the speculative nature of the future application of the policies, concluding that it was "not possible to predict the outcome to [National Forest Service] roads on individual national forests and grasslands from decisions that will be made from the combined implementation of the Planning Regulations, the Roads Policy, and the alternatives considered in the FEIS." AA at 644. None of these other rules and policies outlined specific projects with specific known impacts. Rather, each of these planning provisions merely provided a framework to evaluate future, as of yet unframed, proposals to manage roads on a forest-specific basis. The level of detail contained in the FEIS comports with this Court's "rule of reason" applied to NEPA analysis. *Env't'l Def. Fund v. Andrus*, 619 F.2d 1368, 1375 (10th Cir. 1980); *Utahns*

¹² Again, *California v. Block* consistently applies this same legal principle, and logically reaches the opposite conclusion, based on the opposite set of facts. There, the court found that the Forest Service could not claim that the cumulative impacts of a nationwide rule were too speculative or difficult to analyze when the agency itself chose to enact a rule of national scope to irretrievably commit millions of acres to nonwilderness in one fell swoop. *Block* 690 F.2d at 765.

for Better Transp. V. United States Dept. of Transp., 305 F.3d 1152, 1176 (10th Cir. 2002) (duty to discuss only impacts that are “reasonably foreseeable”).

The speculative nature of the exercise sought by Wyoming is underscored now that both the 2000 Planning Regulations and the Transportation Policy have been abandoned by the Forest Service. See 68 Fed. Reg. 69,986 (Dec. 16, 2003) (suspension and elimination of Transportation Policy); *Citizens for Better Forestry v. U.S. Department of Agriculture*, 632 F.Supp.2d 968 (N.D. Cal. 2009) (discussing history of the 2000 Rule planning rule and enjoining its replacement rule). Even if more detailed analysis initially had been warranted, it would be futile to order the Forest Service to do so now.¹³ The courts do not require further impact assessments when they are likely to be unproductive. *Greater Yellowstone*, 359 F.2d at 1276; *Save Our Heritage v. Federal Aviation Admin.*, 269 F.3d 49, 61-62 (1st Cir. 2001).

4. The Forest Service Did Not Violate NEPA by Failing to Prepare a Supplemental EIS

NEPA does not require an agency to issue a supplemental environmental impact statement (“SEIS”) every time new information comes to light (*see Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989)), but only when the changes differ so dramatically as to “preclude ‘meaningful consideration’ by the

¹³ Because the Roadless Rule does not irretrievably commit natural resources to development, a less detailed analysis is appropriate under the standard of *California v. Block*, 690 F.2d at 761 (the detail required by NEPA depends on the the nature and scope of the proposed action). See also *Greater Yellowstone*, 359 F.3d at 1278-79.

public.” *Block*, 690 F.2d at 770. Nothing in the record suggests this threshold was met here.

Again, in response to similar arguments raised by the plaintiffs in *Kootenai*, the Ninth Circuit expressly rejected a challenge to the Roadless Rule based on the Forest Service’s failure to prepare an SEIS. In *Kootenai*, the court found – contrary to the district court decision on appeal here – that adding 4.2 million acres of roadless areas, most of which were already protected under other management schemes, into the scope of the Rule was not a “substantial change in the proposed action that [was] relevant to environmental concerns,” but rather was the kind of change commonly made in an FEIS. *Kootenai*, 313 F.3d at 1118 (citing 40 C.F.R. § 1502.9(c)(1)).

The district court cites no authority for its findings that the three other changes it identified to the draft EIS were sufficient to trigger an SEIS. Instead, the court summarily concludes that the changes – elimination of the “procedural” part of the Rule, the limited inclusion of roaded areas within the inventoried tracts, and a modification of the stewardship logging exemption – were “substantial” because they “directly affected the purpose and scope” of the Rule. *Wyoming*, 570 F.Supp.2d at 1344. These changes, however, were made in response to public comment or to correct data and boundary errors – the very purpose of circulating a draft EIS – and were explained in the FEIS or Final Rule. AA at 1038, 1566-89.

These changes were modest and reasonable, and therefore pass muster under NEPA. *Cf. Block*, 690 F.2d at 769-70 (SEIS was required because the final alternative selected was “a radical departure” from those outlined in the draft EIS and could not have been reasonably anticipated).

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING OVERBROAD INJUNCTIVE RELIEF

Even if the NEPA process is somehow found deficient, this Court should reverse the Wyoming district court’s nationwide injunction against the Roadless Rule as substantially overbroad. “It is well settled an injunction must be narrowly tailored to remedy the harm shown.” *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 962 (10th Cir. 2002) (collecting cases). In this case, Wyoming presented to the district court limited, state-specific claims of harm to its state forests under the Roadless Rule, and no evidence whatsoever of harm beyond its borders. AA at 32-77, 248.

In contrast to the state-specific claims of potential harm to Wyoming if the Roadless Rule was implemented within Wyoming’s borders, the case that proceeded through the California district court and to the Ninth Circuit involved geographically-dispersed interests, including four state plaintiffs, and twenty regional and national organizations that represented interests in every state with a Forest Service roadless area. *California ex rel. Lockyer*, 459 F. Supp. 2d at 879.

These parties pointed to harms that would result from development in roadless areas across the nation.

Further, at the time the Wyoming District Court ruled, the Ninth Circuit had tentatively (but supported by extensive legal and factual analysis) opined that it believed the Roadless Rule to be lawful (*Kootenai Tribe*, 313 F.3d 1094), and the Northern District injunction reinstating the 2001 Rule was on appeal (*California ex rel. Lockyer*, 575 F.3d 999). Since that time, the Ninth Circuit has upheld the California district court's ruling, including the district court's injunction. The Ninth Circuit's recent decision includes statements again confirming the soundness of the NEPA review that informed the adoption of the Roadless Rule. *California ex rel. Lockyer*, 575 F.3d at 1007, 1014 (noting that the Ninth Circuit in *Kootenai Tribe* "evaluated in considerable detail the procedural challenges made against the Roadless Rule and concluded, on the record before it, that it is plain that the Forest Service gave a hard look at the complex problem presented" and therefore the court considered itself "bound by the findings of *Kootenai Tribe*" that the Roadless Rule is "legally valid") (internal quotations omitted).

In these circumstances, the Wyoming court's nationwide invalidation of the Roadless Rule fails to give appropriate consideration to two decisions of the Ninth Circuit that in their essence amount to determinations that the Roadless Rule should remain in effect. It is a court's equitable obligation to limit an injunction to a scope

no greater than necessary to remedy the plaintiff's alleged injury. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Accordingly, the district court's injunction below was overreaching and should be overturned.

CONCLUSION

For the foregoing reasons, *amici* States of New Mexico, California, Montana, Oregon, and Washington respectfully request that this court reverse the rulings of the Wyoming district court and find that the 2001 Roadless Rule was validly adopted in compliance with NEPA and the federal Wilderness Act. Alternatively, we request that the Court limit the scope of the district court's injunction.

Respectfully submitted November 9, 2009,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2009, the foregoing **Brief of Amici Curiae States of California, Montana, Oregon, and Washington in Support of Appellants** was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate ECF system and that all parties of record in this case were served through that system on November 9, 2009. Additionally, I certify that seven copies of the aforementioned brief will be delivered to the Clerk of the U.S. Court of Appeals within two business days.

/s/ Sally Magnani

CERTIFICATE OF DIGITAL SUBMISSIONS

Pursuant to the 10th Circuit General Order dated March 18, 2009, I hereby certify that:

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF is an exact copy of the written document filed with the Clerk, and

(2) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program Trend Micro, Version and, according to the program, is free of viruses.

 /s/ Sally Magnani

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,939 words (exclusive of table of contents, table of authorities, and certificates of counsel). I relied on my Microsoft Word word processing tool to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Respectfully submitted November 9, 2009.

 /s/ Sally Magnani