Nos. 11-1378 and 11-1384

In The Supreme Court of the United States

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

COLORADO MINING ASSOCIATION,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS BRIEF OF THE WYOMING COUNTY COMMISSIONERS ASSOCIATION, THE NEVADA ASSOCIATION OF COUNTIES, THE UTAH ASSOCIATION OF COUNTIES, AND THE ASSOCIATION OF OREGON COUNTIES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

RULES & REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI CURIAE[1]

Pursuant to the Supreme Court Rule 37, the Wyoming County Commissioners' Association, the Nevada Association of Counties, the Utah Association of Counties, and the Oregon Association of Counties respectfully submit this brief amicus curiae in support of the State of Wyoming's and the Colorado Mining Association's Petitions for a Writ of Certiorari.[2]

The Wyoming County Commissioners' Association ("WCCA") is an organization consisting of the Boards of County Commissioners of 23 Wyoming counties. The WCCA exists to strengthen Wyoming's Counties and the people who lead them through a program of networking, education, and unified action. The goals

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of this Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The State of Wyoming and the Colorado Mining Association have both filed Petitions for Writ of Certiorari with the Court on the same issue. The docket number for the State of Wyoming's Petition is 11-1378; and the docket number for the Colorado Mining Association Petition is 11-1384. The Amici Curiae intend for this brief to support both the State of Wyoming's and the Colorado Mining Association's Petitions.

of the WCCA are to strengthen the role and communicating the needs of county government, developing the leadership potential of county commissioners and to assisting members in the performance of their duties by providing information and education. Additionally the WCCA seeks to form a strong network of county commissioners to enhance its ability to resolve common issues as well as maintain a vital and useful commissioner's organization.

The Nevada Association of Counties ("NACO") was formed in Reno in 1924 under the name of Nevada County Commissioners' Association. NACO is comprised of representatives from all 17 of Nevada's counties, several statewide county associations called Affiliate Members, private industry representatives called Associate Members and Government Partners, statewide associations related to county government. NACO's mission is to encourage county government to adopt and maintain local, regional, state and national cooperation which will result in a positive influence on public policy and provide valuable education and support services that will maximize efficiency and foster public trust in county government.

The Utah Association of Counties ("UAC") is a voluntary, state-wide organization operated by the 29 counties of Utah. UAC was formed in 1924 to help counties provide effective county governance to the people of Utah. UAC offers a broad range of management and intergovernmental relations services to county commissioners and other county officials. UAC's purpose is to improve the operation of Utah's

county governments and thereby, the services counties provide to their residents.

The Association of Oregon Counties ("AOC") is an intergovernmental entity under Oregon Revised Statutes Chapter 190, originally founded in 1906. Its mission is: "Uniting counties to advocate, communicate, and educate." It fulfills that mission through advocacy for county government at the state and national levels and by providing information, technical assistance, training, conferences and workshops to county officials and the citizens of Oregon. Among the purposes of AOC is "to do any and all other things necessary and proper for the benefit of the residents of the counties of this state."

The combined interests of the aforementioned county associations, collectively herein known as the "Associations," respectfully submit their brief in support of the Petition for Writ of Certiorari by the State of Wyoming requesting that this Court grant review of the case and ultimately utilize its supervisory power to reverse the decision of the U.S. Circuit Court of Appeals for the Tenth Circuit ("Tenth Circuit") regarding its decision in *Wyoming v. U.S. Dep't. of Agric.*, 661 F.3d 1209 (10th Cir. 2011).

After a mad dash to complete the Roadless Area Conservation Final Rule ("Roadless Rule"), 66 Fed. Reg. 3244-72 (Jan. 12, 2011), at the twilight of President Bill Clinton's administration, the Forest Service released the Roadless Rule with just six days left in the administration's final term in office. *See Wyoming*

v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309, 1332 (D. Wyo. 2008). In setting aside 58.5 million acres of roadless areas the Forest Service delivered a significant blow to local communities near National Forest System lands. The ill-effects of the Forest Service's fatally flawed Roadless Rule are most significantly felt at the local level by the citizens who the members of the Associations represent.

As a result of the Forest Service's promulgation of the Roadless Rule, and the effective halt to productive and preventative timber management and road construction within roadless areas, there exists a real and substantial threat of forest disease, insect infestation, and wildfire as well as devastating economic impacts. *See id*. at 1329-30, 1353.

The economic impacts to local communities from the implementation of the Roadless Rule have been significant. Using Wyoming as an example, the impact on the timber industry has been nearly catastrophic with labor earnings alone dropping nearly 90-percent in the five most-affected counties within Wyoming. *Wilderness and Roadless Area Release Act of 2011: Hearing on H.R. 1581 Before the House Subcommittee on National Parks, Forests, and Public Lands*, 112th Cong. (2011) (testimony of Kent Connelly, Chairman of the Board of Lincoln County Commissioners, Lincoln County Wyoming). Revenue impacts from the implementation of the Roadless Rule have been negatively felt throughout the west. These impacts include: foregone energy development, yielding less sales and tax revenues and fewer local jobs; except for a few

limited exceptions, a complete lack of timber management and logging activities within roadless areas, again yielding fewer sales and lost tax revenues, the closure of numerous timber mills, and fewer local jobs; decreased tourism and its attendant decrease in local economic activity, due to reduced access and decreased secondary-spending in local businesses; a significant economic impact from wildfires. *Id*.

Impacts of this nature are particularly hard felt by local governments because local governments across the west were denied an opportunity to participate in the development of the Roadless Rule as a cooperating agency under the National Environmental Policy Act of 1969 ("NEPA") nor were local governments given the opportunity to coordinate their local and state land use plans with the Forest Service as is required under the National Forest Management Act of 1976 ("NFMA"). As the government entity directly responsible for economic sustainability, healthy, safety and welfare, local county governments are particularly impacted by the Forest Service's Roadless Rule and should have been afforded a meaningful opportunity to have a seat at the table during the development of the Rule in accordance with NFMA.

This is a case of national significance. Management of roadless areas have been in contention since 1999 when the "Interim Roadless Rule," which placed an eighteen month moratorium on road construction in roadless areas was put into place. Interim Roadless Rule, 64 Fed. Reg. 7290 (Feb. 12, 1999). Since 2001, the Roadless Rule has been the subject of at least

nine lawsuits, including suits filed in federal district court in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1226 n.9 (10th Cir. 2011). Both the Idaho Federal District Court and the Wyoming Federal District Court, courts that see a high volume of NEPA and public land cases, found that the Forest Service violated NEPA in promulgating the Roadless Rule. *Id*.

We respectfully ask this Court to grant the State of Wyoming's and the Colorado Mining Association's Petitions for Writ of Certiorari because as stated by the Wyoming District Court "the Forest Service violated the public interest when it flagrantly and cavalierly railroaded this country's present environmental laws in an attempt to build an outgoing President's enduring fame" and it is "in the best interest of the public to make sure the federal agencies comply with NEPA and the Wilderness Act when promulgating environmental regulations." *Wyoming*, 570 F. Supp. 2d at 1354.

SUMMARY OF THE REASONS FOR GRANTING THE PETITION

The Amici Curiae urges the grant of the State of Wyoming's and the Colorado Mining Association's Petitions for Writ of Certiorari, and the reversal of the decision of the Tenth Circuit Court of Appeals.

In a rush to complete the Roadless Rule at the twilight of the Clinton administration, the Forest

Service took shortcuts around the Wilderness Act, NEPA and NFMA. In so doing, the Forest Service denied state, local, and tribal governments the ability to be meaningfully involved in a decision that impacts local and regional economies, and the health, safety and welfare of local residents.

The Roadless Rule is a nationwide, one-size-fits all, land management prescription that designated 58.5 million acres as *de facto* wilderness. In promulgating the Roadless Rule, the Forest Service usurped Congress's sole power to designate wilderness areas, unlawfully expanded its regulatory authority, failed to take a hard look at the site-specific environmental and socio-economic impacts of the Roadless Rule, failed to follow required local forest planning process, and failed to meaningfully involve state, local, and tribal governments.

We respectfully ask this Court to grant the State of Wyoming's and the Colorado Mining Association's Petitions and to reverse the Tenth Circuit because if this case is allowed to stand, it will set a precedent under which federal agencies will be allowed to disregard Congress and violate this country's well established environmental laws.

REASONS FOR GRANTING THE PETITION

I. THE FOREST SERVICE PURPOSELY AVOIDED THE STRICT REQUIREMENTS FOR CREATING ADDITIONAL WILDERNESS AREAS THAT CONGRESS SET FORTH IN THE WILDERNESS ACT

The Tenth Circuit erred in overturning the Wyoming District Court's determination that the Forest Service, in promulgating the Roadless Rule, usurped Congress's power regarding access to, and management of, public lands by a *de facto* designation of "wilderness" in violation of the Wilderness Act of 1964.

A. The Forest Service Failed to Comply with Congress's Wilderness Designation Requirements and Unlawfully Expanded Its Regulatory Authority

In passing the Wilderness Act, the United States Congress sent a firm message to the Executive Branch that Congress, and only Congress, has the authority to designate wilderness areas. *See* 16 U.S.C. § 1131(a) (2011). The Wilderness Act leaves no room for discretion in determining how and by whom additional wilderness areas can be added. *See id*. The Act states that "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act." *Id*. The Act further states that "[e]ach recommendation of the President for designation as 'wilderness' shall become effective *only* if so

provided by an Act of Congress." *Id.* § 1132(b) (emphasis added).

With the Wilderness Act, Congress put a stop to the former practice of allowing the executive branch to designate wilderness areas. *Parker v. United States*, 309 F. Supp. 593, 597 (D. Colo. 1970), *aff'd*, 488 F.2d 793 (10th Cir. 1971). Instead, Congress set forth a process which requires the Forest Service and other land management agencies to present wilderness recommendations to Congress for its consideration, but specifically reserved the authority to create wilderness areas to the Congress. *See* 16 U.S.C. § 1132.

In promulgating the Roadless Rule through an agency rule making process, the Forest Service purposely removed Congress, the only body with the authority to designate wilderness areas, from the equation. *Wyoming*, 570 F. Supp at 1349. In doing so, the Forest Service ignored the Congressional mandate that all wilderness designations require an act of Congress, thereby usurping Congress's authority. *Id.* at 1350.

It is not hard to guess why the Forest Service excluded Congress from its decision to manage 58.5 million acres as *de facto* wilderness. After the passage of the Wilderness Act in 1964, the Forest Service embarked on two nationwide studies of potential wilderness areas called the Roadless Area Review and Evaluations ("RARE"). *See Wyoming*, 570 F. Supp. 2d at 1320-21. The two inventories, called RARE I and RARE II, were used by the Forest Service to evaluate

wilderness recommendations to Congress. *Id.* In 1984, after evaluating the Forest Service's recommendations contained in the RARE inventories, Congress took an unprecedented step and passed nineteen separate wilderness bills that added 8.6 million acres to the wilderness system. H. Michael Anderson & Aliki Moncreif, *America's Unprotected Wilderness* 76 DEN. U. L. REV. 413, 420 (1999) (citing GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LANDS AND RESOURCE LAW, 1053 (3d ed. 1993)).

The Forest Service, notwithstanding Congress's much more limited action to designate 8.6 million acres from the RARE Inventories, set out to provide administrative "wilderness" protection for the remainder of the inventoried roadless areas. In doing so, the Forest Service violated the Wilderness Act and unlawfully expanded its authority over the land within the National Forest System.

B. Roadless Areas and Wilderness Areas Are Synonymous, Despite Precise or Nuanced Differences

The Tenth Circuit erred in finding that the nuanced "precise differences" between roadless areas and wilderness areas meant that roadless areas are not *de facto* wilderness areas. The similarities between the two are too great to ignore because of "precise differences." Both wilderness areas and roadless areas must be: 1.) At least 5,000 acres in size (unless the roadless area is connected to a wilderness area);

2.) Both prohibit road construction and commercial logging; and 3.) Both restrict multiple use management. *See Wyoming*, 570 F. Supp. 2d at 1349.

While the Roadless Rule contains limited exceptions that allow for road building and timber harvest – which the Tenth Circuit placed extreme emphasis on – the practical reality is that the exceptions are rarely, if ever used and the prohibitions contained in the Roadless Rule are so significant that roadless areas are synonymous with wilderness areas. Even the United States Court of Appeals for the Ninth Circuit recognized that under the Roadless Rule huge sections of this "vast national forest acreage, for better or for worse, was more committed to pristine wilderness, and less amenable to road development for purposes permitted by the Forest Service." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1106 (9th Cir. 2002).

The Tenth Circuit also scrutinized the minute differences in allowed activities such as the use of mechanized equipment like bicycles which are allowed in roadless areas, but not in wilderness areas. *Id.* at 1231. Despite the Tenth Circuit's emphasis, the differences merely indicate the Forest Service's cleverness in side-stepping the requirements of the Wilderness Act by creating a *de facto* wilderness area. Except for minute and subtle differences, the roadless areas and wilderness areas are synonymous for all practical purposes.

We respectfully ask this Court to grant the State of Wyoming's and the Colorado Mining Associations' Petitions because the Forest Service usurped Congress's sole power to designate wilderness areas and therefore violated the Wilderness Act and in so doing self-expanded its regulatory authority.

II. THE TENTH CIRCUIT ERRED IN HOLDING THAT THE FOREST SERVICE DID NOT VIOLATE NEPA

The Petitioners have not stood alone in arguing that the Forest Service violated NEPA through its promulgation of the Roadless Rule. Within four days of the Forest Service issuing the Roadless Rule, the Kootenai Tribe and the State of Idaho filed challenges in the U.S. District Court of Idaho claiming the Forest Service violated NEPA and the Administrative Procedure Act ("APA"). *See Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001), rev'd 313 F.3d 1094 (9th Cir. 2002). The Kootenai Tribe and the State of Idaho both argued that the Forest Service violated NEPA by failing to take a "hard look" when preparing the Roadless Rule Environmental Impact Statement ("EIS") by not analyzing a reasonable range of alternatives, providing an inadequate public comment period, and by failing to adequately analyze the cumulative effects of the Roadless Rule. *See id*. The State of Wyoming filed a complaint with the District Court of Wyoming a few weeks after the Idaho Complaints, echoing the same concerns with the Forests Service's NEPA analysis.

Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1217 (D. Wyo. 2003).

This Court has held that NEPA requires federal agencies to consider the environmental and socio-economic impacts of its actions, to disclose those impacts to the public, and then explain how those actions will address those impacts. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97, (1983). The NEPA shortcuts taken by the Forest Service, in its rush to complete the Roadless Rule before the end of the Clinton administration, prevented the Forest Service from complying with the NEPA requirements. On this point, the Wyoming District Court found that:

> In its rush to give President Clinton lasting notoriety in the annals of environmentalism, the Forest Service's shortcuts and bypassing of the procedural requirements of NEPA has done lasting damage to our very laws designed to protect the environment. What was meant to be a rigorous and objective evaluation of the proposed action was given only a once-over lightly. In sum, there is no gainsaying the fact that the Roadless Rule was driven through the administrative process and adopted by the Forest Service for the political capital of the Clinton administration without taking the "hard look" that NEPA required.

Id.

The Tenth Circuit erred in upholding the Forest Service's NEPA shortcuts and the resulting arbitrary and capricious decisions that resulted from those shortcuts. The NEPA violations the Forest Service committed during the promulgation of the Roadless Rule are significant and must be corrected by this Court in order to ensure the Tenth Circuit's decision below does not stand as precedent under which future violations of NEPA will be justified.

A. The Forest Service Acted Arbitrarily and Capriciously in Denying Cooperating Agency Requests

From a local government perspective, all of the NEPA violations are significant, however, the Forest Service's decision to deny cooperating agency status, without any justification, to those entities who properly requested cooperating agency status afforded by NEPA is particularly troublesome. NEPA states that it is the policy of the Federal Government to work "in cooperation with State and local governments." 42 U.S.C. § 4331(a). Elaborating upon that policy, the Council of Environmental Quality ("CEQ") specifically provided for cooperating agency regulations in its NEPA regulations. 40 C.F.R. §§ 1501.6-1508.5.

Cooperating agency status provides local and state governments and affected Indian Tribes an opportunity to be a collaborative partner, directly involved in federal projects that will have an impact within their jurisdiction and upon the citizens they

represent. The Forest Service's failure to include cooperating agencies denied state and local governments and Indian Tribes impacted by the Roadless Rule the ability to be meaningfully involved in the development of an administrative rule that would significantly effect that management of National Forest System lands in their areas while also impacting the local and regional socio-economic climate.

While the CEQ regulations provide federal agencies with discretion regarding the grant of cooperating agency status, the Wyoming District Court found that the Forest Service acted arbitrarily and capriciously by failing to even acknowledge or respond (affirmatively or negatively) to properly submitted cooperating agency requests. *Wyoming*, 570 F.Supp. 2d at 1335.

The Tenth Circuit erred in finding that the CEQ cooperating agency regulations are not judicially reviewable under the APA because there is no meaningful standard upon which to judge the agency's exercise of discretion. A meaningful standard does exist. The CEQ regulations define an eligible state or local government and Indian Tribe cooperating agency as entity that has "jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal." 40 C.F.R. § 1508.5.

A determination as to whether a state or local government entity or Indian Tribe has fulfilled that eligibility requirement, in combination with consideration of the explanation provided in the record as to why cooperating agency status was granted or denied

by the agency, provides a meaningful standard upon which to judge the agency's exercise of discretion. Utilizing this meaningful standard further fulfills Congress's policy under NEPA that the Federal Government work "in cooperation with State and local governments" as well as fulfilling CEQ's direction to all federal agencies to "more actively solicit in the future the participation of state, tribal and local governments as 'cooperating agencies' in implementing the [EIS] process under [NEPA]." 42 U.S.C. § 4331; Memorandum from George T. Frampton, Council on Envt'l. Quality, to Heads of Federal Agencies, dated July 28, 1999.

III. THE FOREST SERVICE VIOLATED THE NATIONAL FOREST MANAGEMENT ACT ("NFMA") AND PURPOSELY AVOIDED ITS REQUIREMENTS

A. Roadless Land Management Prescriptions Must Be Addressed Under NFMA's Forest Planning Process, Not Under An Agency Rule

NFMA "requires the Forest Service to 'develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.'" *Citizens' Comm. To Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) (quoting 16 U.S.C. § 1604(a)). Land and resource management plans, or forest plans, "guide all natural resource management activities and establish management standards and guidelines for the National

Forest System. They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management." 36 C.F.R. § 219.1(b)(1982). Each forest plan must be revised at least every fifteen years, or when the Secretary of Agriculture finds that conditions on the forest or unit have significantly changed. 16 U.S.C. § 1604(f)(5)(A).

From 1982 to 2000, inventoried roadless areas were protected through the NFMA forest planning process. 36 C.F.R. § 219.17 (1982) (in 1982, the Forest Service promulgated regulations requiring consideration of roadless areas in forest plans). In 2001, the Roadless Rule, and its accompanying Forest Planning Regulations issued in 2000, removed the management discretion as to whether or not to protect roadless areas from individual local forest plans, and established a nationwide land management prescription through the agencies rule. *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001); National Forest System Land Resource Management Planning; Final Rule, 65 Fed. Reg. 67,514, 67,529-30, 67,571 (codified at 36 C.F.R. § 219.9(b)(8)(2000)) (requiring local forest plans to consider additional protections for roadless areas, but not allowing for use of discretion to remove unsuitable roadless areas from the inventory). In so doing, the Forest Service eliminated the local, site specific analysis under which previous roadless area management decisions were made. *See id*. By promulgating an agency rule establishing a national land management prescription for roadless

areas, and thus removing roadless management decisions from the local forest plans, the Forest Service violated NFMA.

Through NFMA, Congress established a process by which the Forest Service is to determine land management prescriptions for national forests. *See* 16 U.S.C. § 1604. Section 1604 of NFMA requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." *Id*. NFMA further requires that land use plans shall "form one integrated plan for each unit of the National Forest System," and such plans shall "provide for multiple use and sustained yield" including the "coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." *Id.* § 1604(f)(1), (e)(1).

By enacting NFMA, Congress directed the Forest Service to determine land management prescriptions for the National Forest System for "each unit of the National Forest System" rather than nationwide rule making efforts. *See id.* § 1604(f)(1). By failing to follow the process required by Congress, and instead dictating a national land management prescription through an agency rule, the Forest Service violated NFMA.

B. The Forest Service's Failure To Comply With NFMA Denied Local Governments The Ability To Coordinate Their Local Land Use Plans

NFMA requires that the Secretary of Agriculture develop, maintain, and revise land and resource management plans "coordinated with the land and resource management planning processes of State and local governments and other Federal agencies." 16 U.S.C. § 1604(a). By failing to analyze roadless area protection through the NFMA forest planning process, the Forest Service denied State and local governments the opportunity to coordinate their land and resource management plans and planning processes. As then Idaho Governor, and later Secretary of the U.S. Department of the Interior, Dick Kempthorne lamented, the Roadless Rule was an "absolutely flawed public policy that has stiffed the states." Douglas Jehl, *Road Ban Set for One-Third of U.S. Forests*, N.Y. TIMES, Jan. 5, 2001, at A1.

As Congress recognized through the inclusion of 16 U.S.C. § 1604(a) in NFMA, coordination of issues that cross the jurisdictional boundaries between the Forest Service, state, and local governments is critically important. Local communities adjacent to Forest System lands often depend upon Forest System lands for their drinking water supply, transportation network, and economic viability through the creation of jobs, harvesting of forest products, and livestock grazing. Local communities also rely upon the Forest Service for protection from wildfires, including

preventative management. Local land use plans address these issues and more, and provide for long term management direction specific to each county's identified needs.

By promulgating the Roadless Rule under agency rulemaking, rather than following the forest planning process required under NFMA, the Forest Service denied local governments the ability to engage the Forest Service in a discussion to coordinate issues affecting the health, safety and welfare of their citizens.

CONCLUSION

For the reasons set out above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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