Nos. 11-1378, 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.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Respondents.

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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, WYOMING STOCK GROWERS ASSOCIATION, PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AMERICAN SHEEP INDUSTRY ASSOCIATION, INTERMOUNTAIN FOREST ASSOCIATION, AND WYOMING FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In January 2001, the United States Forest Service promulgated the Roadless Area Conservation Rule ("2001 Roadless Rule") to govern the management of 58.5 million acres of national forest lands located in thirty-eight states. The 2001 Roadless Rule generally prohibits all road construction, road reconstruction, and timber extraction on national forest lands subject to the rule. The 2001 Roadless Rule has an unprecedented impact on the nation's forests and this case raises important questions about the relationship between the Legislative and Executive Branches of the federal government, including:

1. Whether the Forest Service violated the National Forest Management Act ("NFMA") by promulgating the 2001 Roadless Rule without following the forest planning process set forth in the NFMA.

2. Whether the Forest Service usurped Congress's exclusive authority to designate wilderness areas pursuant to the Wilderness Act of 1964 by designating 58.5 million acres of federal lands as de facto wilderness.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37(3), Mountain States Legal Foundation, Wyoming Stock Growers Association, Public Lands Council, National Cattlemen's Beef Association, American Sheep Industry Association, Intermountain Forest Association, and Wyoming Farm Bureau Federation respectfully submit this amicus curiae brief, on behalf of themselves and their members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to the defense and preservation of individual liberty, the right to own and use property, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has been active in

[1] Pursuant to Supreme Court Rule 37(2), letters indicating the intent to file this amicus curiae brief were received by counsel of record for all parties at least ten days prior to the due date of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37(6), counsel for amici curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than amici, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

litigation aimed at ensuring the proper interpretation and application of the Wilderness Act of 1964 and subsequent acts creating wilderness areas. *United States v. Unser*, 165 F.2d 755 (10th Cir. 1999) (MSLF attorneys represented defendant); *Northwest Motorcycle Ass'n v. U.S. Dept. of Agric.*, 18 F.3d 1468 (9th Cir. 1994) (MSLF attorneys represented plaintiff); *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997) (MSLF attorneys represented plaintiff). MSLF has also fought executive branch efforts to lock-up federal lands through the creation of de facto wilderness areas and abuse of its limited withdrawal authority. *Wyoming v. United States Dep't of Agric.*, 661 F.3d 1209 (10th Cir. 2011) (amicus curiae); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745 (D.C. Cir. 2007) (MSLF attorneys represented plaintiffs); *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980) (plaintiff).

Wyoming Stock Growers Association ("WSGA") was organized in 1872 to advance and protect the interest of the State's livestock producers. It was the second state cattlemen's organization created in the United States. It is the only organization based in Wyoming focused entirely on serving the needs of the cattle industry, which is the largest segment of Wyoming's agricultural production. WSGA advocates on issues affecting the cattle industry, agriculture, and rural community living. It also provides members with timely information regarding events in the cattle industry and promotes the role of the Wyoming cattle industry in resource stewardship, animal care, and

the production of high-quality, safe, and nutritious beef.

Public Lands Council ("PLC") has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land, accounting for critical wildlife habitat and the nation's natural resources. PLC works to maintain a stable business environment in which livestock producers can conserve the West and feed the nation and world.

National Cattlemen's Beef Association ("NCBA") is the national trade association representing U.S. cattle producers, with more than 28,000 individual members and sixty-four state affiliate, breed, and industry organization members. Altogether, NCBA represents more than 230,000 cattle breeders, producers, and feeders. NCBA works to advance the economic, political, and social interests of the American cattle business and to be an advocate for the cattle industry.

American Sheep Industry Association ("ASI") represents the interests of more than 82,000 sheep producers located throughout the United States. ASI is a producer-powered federation of forty-five state sheep associations, as well as individual members, dedicated to the common goal of promoting the American sheep industry. The predecessor to ASI, the National Wool Growers Association, was founded

in 1865. Land, water, predator, and other environmental issues are extremely important to the sheep industry. ASI works with other industry organizations, state and federal agencies, and state sheep producer organizations to see that the interests of sheep producers are considered in land-use regulations and wildlife management.

Intermountain Forest Association ("IFA") develops and implements solution-oriented policies intended to provide a positive climate for forest management as well as a stable and sustainable supply of timber from public and private forestlands. IFA also works to assure that regulations affecting its members remain reasonable. IFA has members in Wyoming, Colorado, Montana, and South Dakota. IFA has a firm commitment to environmental responsibility and accountability, advancements in manufacturing technology and forestry science, and the business principles that have helped forest products businesses survive and prosper in the intermountain west for a century.

Wyoming Farm Bureau Federation ("WFBF") has more than 2,600 member families working in production agriculture. WFBF is the voice of Wyoming agriculture. WFBF members work together to develop agricultural resources, policy, programs, and services to enhance the rural lifestyle of Wyoming. Its purpose is to protect, promote, and represent the economic, social, and educational interests of Wyoming agriculture. WFBF is dedicated to the values upon which our nation was built: the right of citizens to organize and speak through one voice and the

principle of uniting to get things done on the basis of majority decision after discussion and debate. WFBF believes in constitutional government, the competitive enterprise system, property rights, and individual freedom.

In the instant case, the de facto wilderness created by the 2001 Roadless Rule would negatively affect the livelihoods and recreational interests of these organizations and their members. Many of these organizations' members use, and seek to continue to use, these areas for motorized recreation, camping, hiking, and other recreation. Many of these organizations' members also live, own property, and work in the areas designated as de facto wilderness areas by the 2001 Roadless Rule. Many of these members depend on the continued access to the timber, oil and gas, locatable minerals, and forage within the National Forest areas made inaccessible by the 2001 Roadless Rule. Many of these members will be adversely affected by deteriorating forest health and increased potential for catastrophic fires in the national forests, including inventoried roadless areas. The 2001 Roadless Rule also curtails these members' ability to make and maintain improvements, including fences and water developments, which hampers their ability to manage public lands that are entrusted to their care through grazing leases, mineral leases, or other arraignments. Their ability to manage livestock, including the placement of supplements and the doctoring of sick animals in a timely manner, is also diminished. Almost all aspects

of grazing and livestock management become more expensive when roads are unavailable; management practices must revert to bygone standards, which are time-consuming and labor intensive: supplies must be hauled by horseback instead of truck; primitive temporary camps must suffice where modern travel trailers would normally be used. The 2001 Roadless Rule also creates a public expectation that roadless areas will be managed as wilderness, inevitably leading to greater pressure on public officials to inhibit other uses.

Accordingly, Mountain States Legal Foundation, Wyoming Stock Growers Association, Public Lands Council, National Cattlemen's Beef Association, American Sheep Industry Association, Intermountain Forest Association, and Wyoming Farm Bureau Federation respectfully submit this amicus curiae brief in support of Petitioners.

STATEMENT OF THE CASE

I. WILDERNESS LANDS, 1924-1964.

In 1924, the Forest Service established the first de facto wilderness area, the Gila Wilderness in New Mexico. H.R. Rep. No. 1538 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3615, 3616. By 1964, the Forest Service had created eighty-eight de facto wilderness areas consisting of 14,598,681 acres. *Id.* These areas were classified administratively as wilderness (6,898,143 acres), wild (1,336,254 acres),

canoe (886,673 acres), and primitive (5,477,740 acres). *Id.*

In passing the Wilderness Act of 1964 ("Wilderness Act"), 16 U.S.C. §§ 1131-1136, Congress repealed any administrative authority that may have existed to classify federal lands as "wilderness." 16 U.S.C. § 1131(a). Instead, Congress retained sole authority to establish new "wilderness areas." 16 U.S.C. § 1132(b). Thus, Congress explicitly revoked any implied authority the Forest Service may have had to create de facto wilderness areas. *Id.*; 1964 U.S.C.C.A.N. 3615, 3616. Congress exercised this authority to designate more than 9 million acres of federal land as part of the National Wilderness Preservation System. 16 U.S.C. § 1131(a). Congress further directed the Forest Service to study, by September 3, 1974, all areas classified as primitive as of the date of the Wilderness Act for suitability for designation as wilderness. 16 U.S.C. § 1132(b).

II. ROADLESS AREA REVIEW AND EVALUATION I.

Pursuant to the Wilderness Act, the Forest Service completed the Roadless Area Review and Evaluation I ("RARE I") in 1973. 16 U.S.C. § 1132(b). RARE I was not intended to recommend expansions to the National Wilderness Preservation System or roadless areas. David Stewart, *Creating the New American Wilderness in America's Untrammeled Backcountry: The Roadless Area Conservation Rule*

and the Ninth Circuit, 28 Okla. City U. L. Rev. 829, 834 (2003). Instead, RARE I was a preliminary examination and identification of existing roadless areas for further study as "New Study Areas," which might then in the future be classified as wilderness areas by Congress. *Id*.

RARE I proposed approximately 56 million acres of undeveloped National Forest lands as wilderness. *Wyoming v. United States Dep't of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003) ("*Wyoming I*"), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005). RARE I was completed in less than one year, causing a number of problems addressed in later court challenges. William D. Doron, *Legislating for the Wilderness: RARE II and the California National Forests* 30-37 (1986). "The Forest Service decided to abandon RARE I after the courts held that the evaluation procedure used by the agency failed to comply with [the National Environmental Policy Act's ("NEPA")] environmental assessment procedures." Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 Envtl. L. 1143, 1150 (2004). Specifically, the Tenth Circuit enjoined development of lands surveyed under RARE I pending completion of an environmental impact statement ("EIS") in compliance with NEPA. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1250 (10th Cir. 1973), *overruled in part on other grounds by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992).

III. ROADLESS AREA REVIEW AND EVALUATION II.

After the failure of RARE I, the Forest Service began a new Roadless Area Review and Evaluation ("RARE II") in 1977. "RARE II, like its predecessor, was administratively initiated for the purpose of identifying those roadless and undeveloped areas which could be designated as 'wilderness areas' pursuant to the Wilderness Act." *Wyoming I*, 277 F. Supp. 2d at 1205 (citing *Mountain States Legal Found.*, 499 F. Supp. at 387).

"RARE II was an attempt by the Forest Service to identify and consider for wilderness designation the remaining roadless national forest lands. . . . RARE II was intended to be a rational allocation of roadless areas to wilderness or nonwilderness uses." Paul Mohai, *Rational Decision Making in the Planning Process: Some Empirical Evidence From RARE II*, 17 Envtl. L. 507, 529 (1987). RARE II was designed to consider the entire National Forest System in order to minimize local variations in inventory and allocation of roadless areas. RARE II did not replace the land and resource management effort, but merely assisted that effort by resolving roadless area allocation questions. *See* United States Dept. of Agric., *Final Environmental Statement, Roadless Area Review and Evaluation (RARE II)* at 6 (1979).

As with RARE I, courts held that RARE II was unlawful because the Forest Service failed to comply with NEPA. *California v. Bergland*, 483 F. Supp. 465,

501 (D.C. Cal. 1980), *aff'd in part*, *rev'd in part sub nom*. *California v. Block*, 690 F.2d 753, 762 (9th Cir. 1982). For example, the State of California challenged the adequacy of the RARE II EIS as the basis for the Forest Service's decision to manage areas in California for purposes other than wilderness. *Block*, 690 F.2d at 759. The Ninth Circuit affirmed the district court's conclusion that the RARE II process violated NEPA because it was not site-specific and because the Forest Service had failed to consider an adequate range of alternatives. *Id*. at 762. As a result, a statewide injunction on further designation or recommendation of wilderness lands was instituted and lands eligible for wilderness designation continued to be managed under multiple-use practices. *Id*. at 759; *Bergland*, 483 F. Supp. at 476, 501.

IV. THE 2001 ROADLESS AREA CONSERVATION RULE.

In the twilight of the Clinton administration, the Forest Service locked-up inventoried roadless areas identified during the failed RARE I and RARE II processes by issuing the 2001 Roadless Area Conservation Rule ("2001 Roadless Rule"). 66 Fed. Reg. 3,244 (January 12, 2001). In promulgating the 2001 Roadless Rule, the Forest Service relied on the 25-year-old maps identifying potential wilderness areas that were prepared for RARE II, which were, in part, based on the maps completed for RARE I. *Id*. Through use of these outdated maps, the Forest

Service purportedly identified 58.5 million acres of inventoried roadless areas. *Id*.

Not surprisingly, the 2001 Roadless Rule was the subject of nine lawsuits in federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. On July 14, 2003, in litigation involving the State of Wyoming, the U.S. District Court for the District of Wyoming issued a permanent nationwide injunction and set aside the 2001 Roadless Rule. *Wyoming I*, 277 F. Supp. 2d at 1197. The *Wyoming I* court held that the Forest Service, having failed to succeed in using RARE I and RARE II to designate more wilderness, simply issued the 2001 Roadless Rule to sidestep congressional authority over designation of wilderness areas. *Wyoming I*, 277 F. Supp. 2d at 1236. This ruling was appealed; however, the Tenth Circuit ruled that adoption of the State Petition Rule, *infra* Part I.E., rendered the litigation moot and therefore the decision in *Wyoming I* was vacated. *Wyoming v. United States Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir 2005) ("*Wyoming II*").

V. STATE PETITION RULE.

After the Forest Service's failures with RARE I and II and its unlawful attempt to create de facto wilderness with the 2001 Roadless Rule, the Forest Service published the State Petition Rule for Inventoried Roadless Area Management in 2005. 70 Fed. Reg. 1055 (March 14, 2005). In October 2006, a

magistrate judge held that the State Petition Rule was promulgated in violation of NEPA and the Endangered Species Act. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006) ("*Lockyer I*"). Ignoring the decision in *Wyoming I*, and without independently assessing the validity of the 2001 Roadless Rule under the Wilderness Act, the magistrate judge reinstated the 2001 Roadless Rule. *Id*. at 918 ("[C]ourts should reinstate the prior rule upon invalidation of its replacement.") This ruling was affirmed by a panel of the Ninth Circuit. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009) ("*Lockyer III*").[2]

VI. THE INSTANT LITIGATION.

Following the magistrate judge's decision in *Lockyer I*, the State of Wyoming filed the instant case, renewing its challenge to the 2001 Roadless Rule. The Colorado Mining Association sought and was granted intervenor status. After thorough briefing and argument, the Wyoming District Court again struck down the 2001 Roadless Rule. *Wyoming v. U.S. Dep't of*

[2] In December 2008, the magistrate judge limited the scope of her ruling in *Lockyer I* to the States within the Ninth Circuit and the plaintiff State of New Mexico. *California ex rel. Lockyer v. U.S. Dep't of Agric.* ("*Lockyer II*"), 710 F. Supp. 2d 916 (N.D. Cal. 2008) (order partially staying injunctive relief in the interests of comity pursuant to Fed. R. Civ. P. 62(c)).

Agric., 570 F. Supp. 2d 1309 (D. Wyo. 2008) ("*Wyoming III*").

A panel of the Tenth Circuit reversed. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209 (10th Cir. 2011) ("*Wyoming IV*"). Focusing on hyper-technical distinctions between roadless areas and wilderness, and ignoring the on-the-ground realities, the panel turned a blind eye to the fact that the 2001 Roadless Rule creates de facto wilderness. The panel also erroneously dismissed Wyoming's and Colorado Mining Association's other meritorious claims, including the claim that promulgation of the 2001 Roadless Rule violated the requirements of the National Forest Management Act ("NFMA"). Both Wyoming and the Colorado Mining Association have petitioned this Court for writs of certiorari.

REASONS FOR GRANTING THE PETITIONS

I. THE 2001 ROADLESS RULE VIOLATES THE NATIONAL FOREST MANAGEMENT ACT.

The Tenth Circuit essentially concluded that the NFMA's requirement that the Forest Service prepare and follow individual forest plans is irrelevant if the Forest Service finds it is politically convenient to ignore the NFMA. *Wyoming IV*, 661 F.3d at 1271. The Tenth Circuit's reading of the NFMA turns that legislation into a nullity: In short, the Forest Service would be required to "develop, maintain, and, as

appropriate, revise land and resource management plans for units of the National Forest System," 16 U.S.C. § 1604(a), and then it would be free to ignore those forest-specific planning decisions when they conflict with the political agenda of a particular administration. That result is absurd, yet it describes exactly what happened here. The Forest Service ignored the forest plans that had been developed for 58.5 million acres of National Forests at a considerable taxpayer expense and then simply replaced them with the 2001 Roadless Rule.[3]

The NFMA requires the Forest Service to develop and maintain "forest plans," i.e., "land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). These plans are meant to be a comprehensive description of management policy that "form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents . . . all of the features required by this section." 16 U.S.C. § 1604(f)(1).

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[3] The 2001 Roadless Rule wiped out the forest plans for 30 percent of the 191 million acres subject to the NFMA. *Wyoming IV*, 661 F.3d at 1221. The sheer scope of the 2001 Roadless Rule makes these petitions worthy of this Court's attention. *See Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 870 (1999) ("We are advised that over 20 million acres of land were patented under the 1909 and 1910 Acts. . . ."); *Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari, 439 U.S. 817, 99 S.Ct. 78, 58 L.Ed.2d 108, and now reverse.").

"Land management plans guide sustainable, integrated resource management of the resources within the plan area in the context of the broader landscape." 36 C.F.R. § 219.1. After a forest plan is developed, "all subsequent agency action . . . must comply with the NFMA and the governing forest plan." *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009); *Idaho Sporting Cong., Inc. v. Rittenhouse,* 305 F.3d 957, 962 (9th Cir. 2002). The Forest Service only has the authority to "change the legal consequences of completed acts . . . if Congress conveys such authority in an express statutory grant." *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1070 (9th Cir. 1998) (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)). The NFMA does not authorize the Forest Service to retroactively amend its forest plans to comply with a subsequent action, such as the 2001 Roadless Rule. *See id*.; *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1189 (9th Cir. 2011) (Opinion of Judge Reinhardt); 16 U.S.C. § 1604(f)(4) ("Plans developed in accordance with this section shall . . . be amended . . . in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section. . . ."). By enacting the NFMA, Congress directed the Forest Service to determine land management prescriptions for "each unit of the National Forest System" rather than creating a one-size-fits-all nationwide rule. *See* 16 U.S.C. § 1604(f)(1). By failing to follow the process required by the NFMA, and instead dictating a national land

management prescription through the 2001 Roadless Rule, the Forest Service ignored its obligation to prepare *and follow* forest plans as required by the NFMA.

That Congress intended the NFMA to govern management of non-wilderness is illustrated by Congress's actions following the passage of the Wilderness Act in 1964. For example, the Wyoming Wilderness Act of 1984, which designated 1.1 million acres of wilderness in Wyoming pursuant to Congress's reserved authority under the Wilderness Act, makes clear that areas considered for, but not designated as, wilderness "shall be managed for multiple use in accordance with land management plans pursuant to section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 as amended by the National Forest Management Act of 1976. . . ." Wyoming Wilderness Act of 1984 § 401(b)(3), Pub. L. No. 98-550, 98 Stat. 2807, 2812 (1984). Congress's explicit intent was therefore to designate some areas as wilderness and release non-wilderness areas for multiple use in accordance with the NFMA. *Id*. The language Congress used to reinforce the primacy of the NFMA could not have been more specific. The 2001 Roadless Rule eviscerates the various forest plans and severely constrains the Forest Service's decision space about the range and mix of multiple uses in roadless areas. The drafters of the NFMA and the Wyoming Wilderness Act plainly intended to prohibit the outcome the Forest Service

preordained when it cobbled together the 2001 Roadless Rule.[4]

The Tenth Circuit concluded that the NFMA was irrelevant because the Organic Act and the Multiple Use and Sustained Yield Act give the Forest Service general rulemaking authority. *Wyoming IV*, 661 F.3d at 1271. But this general authority is not the sort of express statutory grant that can override the specific requirements of the later-enacted NFMA. *See Friends of Southeast's Future,* 153 F.3d at 1059. Accordingly, this Court should grant the Petitions.

II. THE 2001 ROADLESS RULE USURPS CONGRESSIONAL AUTHORITY UNDER THE WILDERNESS ACT.

A. The Wilderness Act Explicitly Revoked Any Implied Authority The Forest Service Had To Designate De Facto Wilderness Areas And Reserved That Authority To Congress.

In passing the Wilderness Act, Congress determined that "[a] statutory framework for the preservation of wilderness would permit long-range planning

[4] The NFMA in no way requires that the Forest Service authorize road building in all of the areas covered by the 2001 Roadless Rule. However, agency decisionmaking regarding road building must comport with the planning requirements of NFMA, as well as the procedural requirements of NEPA and the APA. *See* 16 U.S.C. § 1604(f)(4).

and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or *make wholesale designations of additional areas in which use would be limited*." 1964 U.S.C.C.A.N. 3616 (emphasis added). To accomplish that goal, Congress explicitly revoked any implied authority that the Forest Service may have had to create de facto wilderness areas and reserved that power to itself. 16 U.S.C. §§ 1131(a), 1132(b). "This exclusive power derives from the provision of the Wilderness Act prohibiting the designation of any federal lands as wilderness 'except as provided for' in the Wilderness Act." Glicksman, 34 Envtl. L. at 1192 (quoting 16 U.S.C. § 1131(a) ("[N]o Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act.")).

The Wilderness Act essentially created two categories of federal lands: wilderness and non-wilderness. 16 U.S.C. § 1132. The Wilderness Act also designated as "wilderness" the lands previously classified by the Forest Service as wilderness, wild, and canoe. *Id.* Furthermore, the Wilderness Act provided long-term certainty through federal statutory protection for the congressionally designated wilderness and non-wilderness lands. *Id.*

Given this statutory background, any administrative effort to designate de facto wilderness areas, including the 2001 Roadless Rule, is in direct contravention of congressional intent in passing the Wilderness Act. No "subsequent Act" of Congress gives either the Secretary of Agriculture or the Forest

Service the authority to designate wilderness, as required by 16 U.S.C. §§ 1131(a) and 1132(b). Without an express delegation of authority, the Forest Service acted unlawfully. *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

B. The National Forest Management Act Does Not Grant The Forest Service The Authority To Create De Facto Wilderness Areas.

Although the Wilderness Act explicitly revoked any implied authority the Forest Service may have had to create de facto wilderness areas, the Forest Service has nevertheless argued that the NFMA provides such authority. This argument ignores the plain text of both the Wilderness Act and NFMA.

The NFMA only allows the Forest Service to "include coordination" of wilderness uses when developing forest management plans. 16 U.S.C. § 1604(e)(1). No separate authority to *designate* wilderness is granted by the NFMA. *See id.* In order to find this authority, the NFMA would have to be interpreted as repealing the Wilderness Act's express declaration that "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act." 16 U.S.C. § 1131(a). Repeals by implication are disfavored, unless the "earlier and later statutes are irreconcilable." *J.E.M. Ag Supply,*

Inc. v. Pioneer Hi-Bred Intern., Inc., 534 U.S. 124, 141-42 (2001); *Elephant Butte Irrigation Dist. of New Mexico v. U.S. Dept. of Interior*, 269 F.3d 1158, 1164 (10th Cir. 2001). Notwithstanding the Forest Service's creative reading of NFMA, the Wilderness Act is easily reconcilable with NFMA.

The Wilderness Act reserves to Congress the sole authority to designate wilderness areas. 16 U.S.C. § 1131(a). The NFMA, on the other hand, simply directs the Forest Service to coordinate and manage these congressionally designated wilderness areas when developing forest management plans. 16 U.S.C. § 1604(e)(1). This direction in the NFMA is consistent with the Wilderness Act's management scheme that wilderness "shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its [designation as wilderness]. . . ." 16 U.S.C. § 1131(b).

Thus, the Wilderness Act and the NFMA work in conjunction to create a coherent management scheme for National Forests. Nothing in the NFMA allows the Forest Service to designate wilderness areas in contravention of the Wilderness Act, as the Forest Service did with the 2001 Roadless Rule.

C. The 2001 Roadless Rule Created De Facto Wilderness.

As demonstrated above, the Wilderness Act, in no uncertain terms, repealed any implied authority that federal agencies may have had to create administrative

wilderness areas. 16 U.S.C. § 1131(a) ("[N]o Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act."); 1964 U.S.C.C.A.N. 3615, 3616. Several courts, including the District Court below, have reached the conclusion that, because the 2001 Roadless Rule generally banned road building subject to very limited exceptions, the 58 million acres affected by the Rule were "committed to pristine wilderness." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1105-06 (9th Cir. 2002); *see also Lockyer III*, 575 F.3d at 1020; *Wyoming III*, 570 F. Supp. 2d at 1349 ("[A]s the Forest Service itself seems to acknowledge, a roadless forest is synonymous with the Wilderness Act's definition of 'wilderness.'").

Given the statutory framework for the congressional designation of wilderness, managing roadless areas in a manner in which new road construction is so restricted so as to be practically prohibited constitutes the creation of de facto wilderness in violation of the Wilderness Act. In setting aside and permanently enjoining the 2001 Roadless Rule, the District Court here reasoned that "[t]he ultimate test for whether an area is 'wilderness' is the absence of human disturbance or activity. . . . In short, it is 'reasonable and supportable to equate roadless areas with the concept of wilderness.'" *Wyoming III*, 570 F. Supp. 2d at 1347-48 (citing Michael Mortimer, *The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management*, 54 Admin. L. Rev. 907,

958 (2002)). The District Court correctly concluded that, "[t]he Wilderness Act functions as a 'proceed slowly order' until Congress – through the democratic process rather than by administrative fiat – can strike the proper balance between multiple uses and preservation." *Wyoming III*, 570 F. Supp. 2d at 1347 (citing *Parker v. United States*, 309 F. Supp. 593, 795 (D. Colo. 1970)).

These conclusions are sound because the areas covered by the 2001 Roadless Rule would be managed in ways significantly similar to wilderness areas. Simply labeling these areas as "roadless," instead of "wilderness," is not sufficient to escape the requirements of the Wilderness Act. "A roadless forest is synonymous with the Wilderness Act's definition of 'wilderness.' The reason is that roads facilitate human disturbance and activity in degradation of wilderness characteristics." *Wyoming III*, 570 F. Supp. 2d at 1349. Similarly, if the uses permitted in wilderness areas and the uses permitted in roadless areas are virtually identical, the public will not be able to distinguish the roadless areas from wilderness areas. *Id.*

The uses allowed within the roadless areas are nearly the same as those uses allowed within wilderness areas. As in wilderness areas, the 2001 Roadless Rule generally disallows cutting of trees, temporary and permanent roads, commercial development, mechanical transportation, and structures. *Compare* 16 U.S.C. § 1133 *with* 66 Fed. Reg. at 3272-73 (to be codified at 36 C.F.R. §§ 294.12-.13). Yet, as in

wilderness areas, the 2001 Roadless Rule allows exceptions for mineral development, water resource development, and public health and safety. *Compare* 16 U.S.C. § 1133 *with* 66 Fed. Reg. at 3272-73. Because the 2001 Roadless Rule management scheme would largely mirror the management scheme for wilderness areas, the 2001 rule creates de facto wilderness and is in violation of the Wilderness Act.

The Tenth Circuit focused on narrow, technical differences between roadless areas and wilderness, but never confronted the practical similarity between the two. Accordingly, the Tenth Circuit erred in determining that the 2001 Roadless Rule did not create de facto wilderness. For example, the Tenth Circuit concluded that the 2001 Roadless Rule's allowance for some commercial activities, motor vehicles, and some construction of roads and structures distinguished roadless areas from wilderness. *Wyoming IV*, 661 F.3d 1230-32. But the court failed to acknowledge that the Wilderness Act also allows commercial enterprise, permanent and temporary road construction, use of motor vehicles, motorized equipment or motorboats, landing of aircraft, other forms of mechanical transport, and erection of structures when necessary for administration of wilderness areas, for emergency purposes, or to honor valid existing rights. 16 U.S.C. § 1133(c). While the details of the various exceptions differ, the end result of both the 2001 Roadless Rule and the Wilderness Act was that the covered federal lands "for better or worse,

[were] more committed to pristine wilderness." *Kootenai Tribe of Idaho*, 313 F.3d at 1105-06.

Under the Wilderness Act there can only be "wilderness" or non-wilderness, and the Act reserves to Congress the authority to make this designation. 16 U.S.C. § 1132. The Wilderness Act's explicit reservation of authority indicates that Congress did not intend for the Forest Service to designate wilderness areas administratively or manage them as such. Therefore, management of roadless areas as wilderness is in direct contravention of Congress's intent in passing the Wilderness Act. 16 U.S.C. § 1131(a); 1964 U.S.C.C.A.N. 3616. These areas, having not been legislatively designated by Congress to be "wilderness," must continue to be designated non-wilderness and managed as non-wilderness.

D. Congress Intended To Maintain Extensive Public Access To Non-Wilderness Lands.

The 2001 Roadless Rule also contradicts one of the policy goals of the Wilderness Act: to "spread the pressures upon our recreational resources which will become increasingly overburdened as the years go by." 1964 U.S.C.C.A.N. 3615, 3622. The policy of the Wilderness Act and the intent of Congress in passing the Wilderness Act have been fulfilled by a long-term statutory management scheme that protects 105 million acres of wilderness, yet reserves the bulk of federal lands for more accessible uses. *See* The

National Wilderness Preservation System, http://nationalatlas.gov/articles/boundaries/a_nwps.html (last visited Jun. 14, 2012). If administrative designations such as the 2001 Roadless Rule continue to lock up additional federal lands, more people will be forced to use non-wilderness areas. This results in more people using a smaller amount of federal land. Only a select few, physically capable people are able to enjoy the 105 million acres of wilderness already in existence. Creating more wilderness areas would result in less access to federal public lands and would place an undue burden on already overburdened federal public lands.

Congressional intent to maintain extensive access to federal lands is supported by the statutory definition of wilderness, which prevents new wilderness from being created in developed areas. 16 U.S.C. § 1131. New wilderness may not be created because areas already affected by the imprint of human activity are statutorily ineligible for wilderness designation. The Wilderness Act defines "wilderness" as:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or

> human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c). Since 1964, Congress has designated 105,695,176 acres of wilderness as part of the National Wilderness Preservation System. The National Wilderness Preservation System, http://nationalatlas.gov/articles/boundaries/a_nwps.html (last visited Jun. 14, 2012). Because RARE I and RARE II failed to provide a legal justification for additional congressionally designated wilderness, the 2001 Roadless Rule is without legal justification. The 2001 Roadless Rule directs the Forest Service to manage non-wilderness lands as wilderness, in violation of the Wilderness Act's definition of wilderness and congressional intent to "spread the pressures upon our recreational resources. . . ." 1964 U.S.C.C.A.N. 3615, 3622. Accordingly, this Court should grant the Petitions.

CONCLUSION

For the foregoing reasons, this Court should grant the Petitions.

Respectfully submitted,

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