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The Road to Nowhere: The Ninth Circuit Upholds Nation-Wide Protection of Inventoried Roadless Areas in National Forests. California ex rel. Lockyer v. USDA

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California ex rel. Lockyer v. USDA[1]

I. INTRODUCTION

California ex rel. Lockyer v. USDA (hereinafter "*Lockyer*") focuses diverging responses to constructing new roads in inventoried roadless areas in the National Forest System. Continuous litigation centered around the protection of the environment, and whether roadless areas should be governed by one overriding national rule that could create consistency, or several local rules that could take local differences into consideration in the management of roadless areas. In *Lockyer*, the Ninth Circuit held that the local management policy implemented in the State Petitions Rule was invalid, and that the national management policy implemented in the Roadless Rule should be executed. This note focuses on the continued litigation that has created this controversy and the effects of the Ninth Circuit's ruling on the future of land management in inventoried roadless areas.

II. FACTS AND HOLDING

The United States Forest Service (hereinafter "Forest Service") is an agency of the United State Department of Agriculture (hereinafter "USDA"), which was established in 1905 and is responsible for managing national forests.[2] In 1999, the Forest Service began working on the Roadless Rule: a nationwide plan that would protect national forests by prohibiting activities such as road construction, reconstruction, and timber harvesting in national forests that were identified as inventoried roadless areas.[3] The Roadless Rule took nationwide effect in April 2003.[4]

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[1] 575 F.3d 999 (9th Cir. 2009).
[2] U.S. Forest Service, Homepage, http://www.fs.fed.us (last visited Feb. 21, 2010).
[3] *Lockyer v. Dep't of Agric.*, 575 F.3d at 1006.
[4] *Id.* at 1007.

In response to federal litigation challenging the Roadless Rule, the Forest Service implemented the State Petitions Rule in 2005, which would in effect repeal the Roadless Rule and allow individual states to petition for state specific roadless area management and protection.[5] In promulgating the State Petitions Rule, the Forest Service included a severability clause which stated that "should all or any part of this regulation be set aside, the Department does not intend that the prior rule be reinstated, in whole or in part."[6] The Forest Service also explained that because the State Petitions Rule was "merely procedural in nature and in scope" and thus it would have "no direct, indirect, or cumulative effect on the environment," it had designated the State Petitions Rule for categorical exclusion under the National Environmental Policy Act (hereinafter "NEPA").[7] Under a categorical exclusion, the Forest Service would be able to implement the State Petitions Rule without documenting an Environmental Impact Statement (hereinafter "EIS").[8]

Almost immediately after announcing the State Petitions Rule, the Forest Service was met with litigation, alleging that the procedures used in the State Petitions Rule implementation were invalid, and thus the State Petitions Rule should be invalidated altogether.[9] It was the procedural implementation of the State Petitions Rule that led to this case.[10] Several states, including California, New Mexico, Oregon, and Washington[11] along with The Wilderness Society and other environmental advocacy groups brought suit against the USDA and the Forest Service[12] alleging

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[5] *Id.* at 1007-08.

[6] *Id.* at 1008 (internal quotation marks omitted) (quoting Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654, 25,655-56 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

[7] *Id.* (internal quotation marks omitted) (quoting Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. at 25,660).

[8] *Id.* at 1008-09.

[9] *Id.* at 1009.

[10] *Id.*

[11] The State of Washington intervened as a plaintiff. *Id.*

[12] The Silver Creek Timber Company intervened on behalf of the Forest service, and the American Council of Snowmobile Associations, the Blue Ribbon Coalition, California Association of 4 Wheel Drive Clubs, and the United Four Wheel Drive Association intervened on behalf of the Forest Service as to the remedy phase of the litigation. *Id.*

violations of the NEPA, the Endangered Species Act (hereinafter "ESA"), and the rationality requirement of the Administrative Procedure Act (hereinafter "APA").[13]

The original claim was brought in the United States District Court for the Northern District of California.[14] The district court granted summary judgment in favor of the plaintiffs, holding that the implementation of the State Petitions Rule violated both the NEPA and the ESA, and that the proper remedy was to reinstate the Roadless Rule pending the USDA's compliance with the procedural requirements under both Acts.[15] The defendants appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit arguing that the State Petitions Rule was merely procedural in nature, thus making it an administrative action for which there was a categorical exclusion to the requirements of the NEPA and the ESA.[16]

After reviewing the Forest Service's procedures in implementing the State Petitions Rule, the Court of Appeals for the Ninth Circuit held that the USDA and the Forest Service violated the NEPA by failing to comply with the environmental analysis requirement, violated the ESA by failing to engage in the proper consultation before implementing the State Petitions Rule, and that the district court did not abuse its discretion by enjoining the State Petitions Rule and reinstating the Roadless Rule.[17]

III. LEGAL BACKGROUND

A. *National Environmental Policy Act*

The NEPA[18] was signed into law on January 1, 1970 and establishes national policies and goals for the protection, maintenance, and

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[13] *Id.*
[14] *Id.*
[15] *Id.* (citing California *ex rel.* Lockyer v. USDA, 459 F. Supp. 2d 874, 909, 912 (N.D. Cal. 2006)).
[16] *Id.* at 1010.
[17] *Id.* at 1005.
[18] 42 U.S.C. §§ 4321-4370h (2006).

enhancement of the environment, and also provides a process for implementing these goals within federal agencies.[19] The NEPA requires federal agencies to consider the environmental impacts of its proposed actions and consider reasonable alternatives to those actions.[20] To meet the NEPA requirements, federal agencies must prepare a detailed EIS for actions that significantly affect the environment.[21] In 1978, the Council for Environmental Quality promulgated 40 C.F.R. §§ 1500-15081 which are binding on all federal agencies.[22]

The NEPA process consists of an evaluation of the environmental effects of a federal agency's proposed action, including its alternatives, and includes three levels of analysis depending on whether the proposed action could significantly affect the environment.[23] The first level is a categorical exclusion determination, and if a federal agency had previously determined the action as having no significant environmental impact, then the agency need not prepare a detailed environmental analysis.[24] The second level requires a federal agency to prepare an environmental assessment to determine if the action would significantly affect the environment.[25] This can lead to a determination of no significant impact or can address steps that an agency can take to reduce potentially significant impacts.[26] The third level comes into play when the environmental agency determines that the environmental impact of an action may be significant, and then a more detailed EIS must be created to evaluate the proposed action and its alternatives.[27] The public and other federal agencies may provide input into the statement and comment on the

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[19] U.S. EPA, National Environmental Policy Act (NEPA): Basic Information, http://www.epa.gov/Compliance/basics/nepa.html (last visited Mar. 11, 2010).
[20] U.S. EPA, National Environmental Policy Act (NEPA): Homepage, http://www.epa.gov/Compliance/basics/nepa.html (last visited Mar. 11, 2010).
[21] U.S. EPA, National Environmental Policy Act (NEPA): Basic Information, *supra* note 19.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

draft when it is completed.[28] The agency must identify how the findings of the EIS, including the alternatives, were incorporated into the agency's decision.[29] It is the responsibility of the federal agency that is undertaking the action to comply with the requirements of the NEPA.[30]

B. *The Roadless Rule*

The Roadless Rule was adopted and became effective on March 13, 2001 as a method to provide lasting protection for inventoried roadless areas in the National Forest System.[31] The Roadless Rule established prohibitions on road construction, reconstruction, and timber harvesting in designated areas, stating that these activities had the most potential for altering and fragmenting landscapes which would lead to immediate and long term loss of the value and characteristics of roadless areas.[32] It was determined that the health of the environment needed to be considered at a nationwide level, where the Forest Service could look at the "whole picture" of land management for roadless areas.[33] It was believed that local land management plans were not always able to recognize the national significance of land development, and that nationwide results of land reduction on local levels could lead to a substantial loss of quality and quantity of roadless areas over time.[34] In response to these concerns, the Roadless Rule implemented a nationwide system for inventoried roadless area management.[35]

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).
[32] *Id.* The Final Rule discussed concerns for high quality or undisturbed soil, water and air, sources of public drinking water, diversity of plant and animal communities, habitats for threatened and endangered species or those dependent on large areas of land, motorized and semi-primitive motorized classes of dispersed recreation, reference landscapes, natural landscapes with scenic quality, cultural properties and sacred sites, and other locally identified unique characteristics. *Id.* at 3245.
[33] *Id.* at 3246.
[34] *Id.*
[35] *Id.*

The Roadless Rule would not close off or block access to inventoried roadless areas rather it would just prevent the construction of new roads and reconstruction of existing roads.[36] While the Roadless Rule includes a general prohibition, it also includes several exceptions.[37] Management actions that did not require the construction of new roads would still be allowed, including timber harvesting for defined, limited purposes, and the development of valid claims of locatable minerals, grazing of livestock, and off-highway vehicle use where specifically permitted.[38] The Roadless Rule would also allow for the construction or reconstruction of roads when needed for public safety, for response actions, to prevent irreparable resource damage, road safety improvement, for maintenance of classified roads, or pursuant to the renewal of a mineral release, reserved rights or as provided statute or treaty.[39] Similarly, while the Roadless Rule contained a general prohibition against timber harvesting in roadless areas, exceptions were written.[40] Exceptions included improvement to threatened, endangered, proposed or sensitive species habitats, if it were incidental to an activity not prohibited by the Roadless Rule, or if done under 36 C.F.R. § 223, or in a substantially altered portion of roadless areas.[41] The exceptions were expected to be infrequent.[42]

C. *The State Petitions Rule*

The State Petitions Rule was adopted on May 13, 2005 as a replacement to the Roadless Rule.[43] After the Roadless Rule was put into effect, concerns were raised by those who were most affected by the Act; specifically the Act's application of one set of standards uniformly to all

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[36] *Id.* at 3249-50.
[37] *Id.* at 3250.
[38] *Id.*
[39] *Id.* at 3272-73.
[40] *Id.* at 3273.
[41] *Id.*
[42] *Id.*
[43] Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

inventoried roadless areas. In 2001, the year it was implemented, the Roadless Rule was the subject of nine Federal lawsuits.[44] The Forest Service decided that a better approach to the management of inventoried roadless areas in the National Forest System would be one that involved strong state and federal cooperation in order to facilitate long term, community oriented solutions.[45]

The State Petitions Rule would address the concerns of the Roadless Rule by allowing state specific considerations of roadless areas within each state.[46] Within eighteen months after the implementation of the rule, Governors of individual states that contain National Forests could petition the Secretary of Agriculture to promulgate regulations for their specific areas of inventoried roadless areas.[47] The petition would need to provide information on the location of the particular lands being referred to, the recommended management requirements, how those management requirements compare and differ from the management process currently in place, how the plan would affect fish and wildlife that utilize the lands in question, and the public involvement in the process.[48] The Secretary of Agriculture would review the petition, request additional information if needed, and respond within 180 days accepting or declining the petition to initiate state specific rule making.[49] If the Secretary of Agriculture accepts the petition, the Forest Service would then initiate the comment and notice period to address the petition and would coordinate development of the proposed rule with the Governor who petitioned for it.[50]

D. Kootenai Tribe of Idaho v. Veneman[51]

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[44] *Id.* at 25,654-55.
[45] *Id.* at 25,654.
[46] *Id.* at 25,655.
[47] *See* 30 C.F.R. § 294.12 (2009), *invalidated by* Wyoming v. USDA, 570 F. Supp. 2d 1309 (D. Wyo. 2008).
[48] *Id.* § 294.14(a), *invalidated by* Wyoming, 570 F. Supp. 2d 1309.
[49] *Id.* § 294.13, *invalidated by* Wyoming, 570 F. Supp. 2d 1309.
[50] *Id.* § 294.16.
[51] 313 F.3d 1094 (9th Cir. 2002).

On January 8, 2001, three days after the Final Rule was issued which put the Roadless Rule into effect, the Kootenai Tribe, joined by private and county groups, filed suit alleging that the Roadless Rule was illegal and violated both the NEPA and the APA.[52] The plaintiffs argued that the Roadless Rule would cause irreparable harm by preventing access to forests that would be necessary to counter issues like wildlife fires and threats from insects and diseases.[53] On January 20, 2001, President George Bush postponed, by sixty days, the effective date of all of the prior administration's rules and regulations that had not yet been implemented, making the new effective date for the Roadless Rule May 12, 2001.[54] Despite the postponement, on May 10, 2001 the district court found that the plaintiffs had shown a strong likelihood of success on the merits and since there existed a substantial possibility that the Roadless Rule would result in irreparable harm to the National Forests, an injunction should be issued.[55]

The federal defendants did not appeal, but an interlocutory appeal was brought by the environmental groups that had been granted status as defendant-intervenors by the district court.[56] The Court of Appeals for the Ninth Circuit held that the intervenors had Article III standing to bring the appeal because they were able to adequately allege an injury in fact, a causal connection to the alleged NEPA violation, and that their alleged injuries fall within the zone of interests that the NEPA aims to protect.[57]

The court of appeals held that the district court erred in granting a preliminary injunction against the implementation of the Roadless Rule.[58] Under the NEPA's notice and comment requirement, and in order to

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[52] *Id.* at 1106.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 1107.
[56] *Id.*
[57] *Id.* at 1112-14.
[58] *Id.* at 1115-26. ("To be entitled to preliminary injunctive relief, the plaintiffs must demonstrate either: (1) a combination of success on the merits combined with a possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips in the plaintiffs' favor." (citing Idaho Sporting Cong., Inc. v. Alexander, 222 F.3d 562, 565 (9th Cir. 2000))).

ensure that the Forest Service took a hard look at the Roadless Rule initiative, the Forest Service was required to involve the public in preparing and implementing the NEPA procedures.[59] The plaintiffs complained that the Forest Service violated this requirement by not providing maps of the potential affected areas at the scoping period. However, the court of appeals determined that the primary purpose of the scoping period is to notify those who may be affected by a government action governed by the NEPA, that the relevant entity is beginning the EIS process.[60] Beyond providing adequate notice, the affirmative duties the NEPA imposes are limited.[61] The court of appeals held that because the Forest Service provided maps of the affected area prior to issuing the draft EIS and that the affected area was reasonably known to the plaintiffs prior to the receipt of the maps because the plaintiffs had been engaged in ongoing studies and discussions with the Forest Service concerning the roadless areas for several years.[62]

The court of appeals also held that while the Forest Service identified an additional 4.2 million acres of previously unidentified roadless areas and subjected the additional acres to the Roadless Rule between the publication of the draft impact statement in May of 2000 and the final impact statement in November of 2000, the Forest Service was not required to issue a supplemental EIS.[63] The plaintiffs also argued that the Forest Service's failure to grant an extension of time for the comment period deprived the public of providing meaningful input. The court of appeals, however, noted that regulations under the NEPA require a minimum of forty-five days for public comment, and that the Forest Service extended that time by providing sixty-nine days of public

[59] *Id.* at 1116 (citing 40 C.F.R. § 1506.6(a) (2001)).
[60] *Id.* at 1116 (citing 40 C.F.R. § 1501.7).
[61] *Id.*
[62] *Id.* at 1117.
[63] *Id.* at 1118 ("It is true that a supplemental EIS must be published when an agency makes substantial changes to an EIS. However, a supplemental EIS is not required for *every* change; it is not uncommon for changes to be made in a FEIS after receipt of comments on a DIS and further concurrent study." (citation omitted) (citing 40 C.F.R. § 1502.9(c)(1)(i))).

comment on the Roadless Rule.[64] When the comment period lasts over the minimum forty-five days, the impact statement ordinarily may not be challenged based on an allegedly inadequate comment period.[65] The Forest Service also held over 400 public meetings, received over 1,150,000 written comments, and sent copies of the draft impact statement and official impact statement to over 10,000 libraries and posted the statements online.[66] Because the comment period exceeded the regulatory minimums, and the entire process lasted more than a year, the Forest Service did not deprive the public of information necessary for meaningful participation in the NEPA process.[67]

The court of appeals next looked at the reasonable range of alternatives the Forest Service came up with before deciding on the Roadless Rule. The plaintiffs charged that the alternatives were unreasonably narrow under the NEPA because the Forest Service failed to consider a full range of alternatives.[68] The NEPA regulations required the agency to produce an impact statement that rigorously explores and objectively evaluates reasonable alternatives so that the agency can provide a clear basis for the choice it made.[69] The court held that the Forest Service impact statements analyzed an adequate range of alternatives.[70] The district court focused on the fact that the impact statements did not consider alternatives that did not include near total, nationwide prohibition of road construction in inventoried roadless areas, but the court of appeals stated that the Forest Service was not required

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[64] *Id.* (citing 40 C.F.R. § 1506.10(c)).

[65] *Id.* at 1118-19 (citing County of Del Norte v. United States, 732 F.2d 1462, 1465 (9th Cir. 1984) and Alabama *ex rel.* Seigelman v. EPA, 911 F.2d 499, 506 (11th Cir. 1990)).

[66] *Id.* at 1119.

[67] *Id.*

[68] *Id.* at 1120.

[69] *Id.* (citing 40 C.F.R. § 1502.14).

[70] *Id.* "In this case, the DEIS and FEIS considered three action alternatives for the inventoried roadless areas: (1) prohibit road construction and reconstruction and allow timber harvest (2) prohibit road construction, reconstruction and timber harvest except for stewardship purposes (e.g., disease, insect and fire prevention) and (3) prohibit road construction, reconstruction, and all timber harvest within inventoried roadless areas." *Id.* (footnote call numbers omitted).

under the NEPA to consider alternatives in its EIS that were inconsistent with its basic policy objectives.[71]

The court of appeals also held that the balance of hardships did not warrant a preliminary injunction, and that the plaintiffs would not suffer irreparable harm from the promulgation of the Roadless Rule.[72]

> [R]estrictions on human intervention are not usually irreparable in the sense required for injunctive relief. Unlike the resource destruction that attends development, and that is bound to have permanent repercussions, restrictions on forest development and human intervention can be removed if later proved to be more harmful than helpful.[73]

The main purpose of the Roadless Rule was to benefit the environment and conserve the national forests, and the court stated that "where the purpose of the challenged action is to benefit the environment, the public's interest in preserving precious, unreplenishable resources must be taken into account in the balancing of hardships."[74]

Because it was held that the district court erred in determining that the plaintiffs had a strong likelihood of success on the merits, and thus applied the wrong standard to justify an injunction, the court of appeals determined that the process used to promulgate the Roadless Rule did not violate the NEPA, and therefore the injunction should be reversed, and the Roadless Rule should be implemented in full.[75]

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[71] *Id.* at 1121-22 ("[I]t would turn NEPA on its head to interpret the statute to require that the Forest Service conduct in-depth analysis of environmentally damaging alternatives that are inconsistent with the Forest Service's conservation policy objectives" (citing Or. Envtl. Council v. Kunzman, 614 F. Supp. 657, 659-60 (D. Or. 1985))).
[72] *Id.* at 1124-26.
[73] *Id.* at 1125.
[74] *Id.*
[75] *Id.* at 1126.

IV. INSTANT DECISION

The Ninth Circuit noted that the USDA's compliance with the NEPA and the ESA is reviewed under the "arbitrary and capricious" standard of the APA.[76] The court stated that "an agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms of the regulation,"[77] and that "an agency's 'no effect' determination under the ESA must be upheld unless arbitrary and capricious."[78] In the Ninth Circuit, "[a]n agency's threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness,"[79] however, the "difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence."[80]

The Ninth Circuit first held that the USDA's failure to conduct an EIS under the NEPA because of its own characterization of the State Petitions Rule as "procedural only" was unreasonable.[81] Looking at the holding in *Kootenai Tribe v. Veneman*, the court noted that it had been determined that the Roadless Rule provided immeasurable benefits to roadless areas and that it provided greater substantive protections than individual forest plans.[82] Because the State Petitions Rule had the effect

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[76] California *ex rel.* Lockyer v. USDA, 575 F.3d 999, 1011 (9th Cir. 2009) (citing ACLU of Nev. v. Lomax, 471 F.3d 1010, 1018 (9th Cir. 2006)).

[77] *Id.* (internal quotation marks omitted) (quoting Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 857 (9th Cir. 1999)).

[78] *Id.* at 1101 (citing Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1448 (9th Cir. 1996)).

[79] *Id.* at 1101-12 (alteration in original) (internal quotation marks omitted) (quoting Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1070 (9th Cir. 2002)).

[80] *Id.* at 1012 (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377 n.23 (1989)).

[81] *Id.* at 1014 (citing Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654, 25,660 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294)).

[82] *Id.* ("[T]here can be no doubt that the 58.5 million acres subject to the Roadless Rule, if implemented, would have greater protections if the Roadless Rule stands. . . . There can be no serious argument that restrictions of human intervention in these wilderness areas

of repealing the Roadless Rule and its substantive protections, the court concluded that the implementation of the State Petitions Rule could not be considered "procedural only."[83] The court also found that the long term nature of the State Petitions Rule was more than merely procedural; "[the State Petitions Rule] purported to ensure that future land management decisions would never again be considered by the Roadless Rule and its enhanced protections for inventoried roadless areas."[84]

In addition to determining that the State Petitions Rule was more than procedural, the Ninth Circuit also stated that the USDA did not properly assert a valid reason for its classification of the State Petitions Rule as a categorical exemption under the NEPA.[85] The Forest Service Handbook describes factors that are to be taken into consideration when determining if something qualifies as a categorical exclusion,[86] which the court said the USDA did not adequately acknowledge.[87] The Final EIS that was originally developed for the Roadless Rule included considerable discussion of the unique and valuable qualities of the roadless areas and the species that live there,[88] yet when the USDA in effect repealed the Roadless Rule, it only stated that the State Petitions Rule would have no "discernable effect on the various classes of resources listed in the agency's NEPA Policy and Procedures that can constitute extraordinary circumstances."[89] The court held that this "cursory statement" was an

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will not result in immeasurable benefits from a conservationist standpoint." (quoting Kootenai Tribe v. Veneman, 313 F.3d 1110, 1124-25 (9th Cir. 2002))).

[83] *Id.* at 1016-17.

[84] *Id.* at 1018.

[85] *Id.* at 1017-18.

[86] "Relevant to the use of the categorical exclusion in this case are the condition of: 'Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, . . . Forest service sensitive species' and '[i]nventoried roadless areas.'" *Id.* at 1017 (alterations in original).

[87] *Id.* at 1017-18.

[88] *Id.* at 1017.

[89] *Id.* at 1017-18 (internal quotation marks omitted) (quoting Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed.Reg. 25,654, 25,661 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294)).

insufficient explanation of why the State Petitions Rule would qualify as a categorical exclusion.[90]

The threshold that triggers the requirement for an EIS is very low; all a plaintiff must do is raise substantial questions as to whether a project may have a significant effect on the environment, and the court concluded that the plaintiffs in the instant case met that burden.[91]

The Ninth Circuit next determined that the USDA violated the Environmental Protection Act by arbitrarily determining that the State Petitions Rule would have no effect on listed species or habitats, and by failing to conduct a consultation with the appropriate expert wildlife agency to determine the effects the USDA's actions could have on listed species and their designated critical habitats.[92]

"The threshold for triggering the ESA is relatively low; a consultation is required whenever a federal action *may affect* listed species or critical habitats, and in rejecting the argument that the State Petitions Rule was merely procedural, the court held that the threshold was met."[93] The court noted that not only was the USDA repealing the substantive protections that the Roadless Rule afforded to roadless areas, but that the USDA had themselves previously stated that inventoried roadless areas were "biological strongholds for populations of threatened and endangered species."[94] The USDA had also stated that the continued building in roadless areas would result in a greater likelihood of "measurable losses of habitat quality and quantity in inventoried roadless areas, with the increased potential for adverse effects to some [threatened, endangered and proposed] species."[95]

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[90] *Id.* at 1018.

[91] *Id.* at 1012, 1018 (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)).

[92] *Id.* at 1018-19.

[93] *Id.* at 1018 (quoting 50 C.F.R. § 402.14(a) (2002)).

[94] *Id.* at 1019 (internal quotation marks omitted) (quoting Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294)).

[95] *Id.* (alteration in original) (internal quotation marks omitted) (quoting U.S. Forest Service, Roadless Area Conservation Final Impact Statement 3-182 (2000)).

Because the Roadless Rule may affect listed species and their critical habitats, the court held that the threshold for the ESA had been met and that the Forest Service was required to have a consultation before repealing the Roadless Rule through the promulgation of the State Petitions Rule.[96]

The Ninth Circuit also determined that the district court did not abuse its discretion by reinstating the Roadless Rule.[97] The court stated that the traditional balancing of harms applies in the environmental context, and that in determining the scope of an injunction, a district court has broad latitude in balancing the equities between the parties and giving due regard to the public interest.[98] In addition, the court noted that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."[99] The Ninth Circuit also previously held that the "effect of invalidating an agency rule is to reinstate the rule previously in force."[100] The court concluded that because the district court reinstated the prior Roadless Rule in order to prevent further harm to roadless areas, it gave meaningful consideration to the balancing of harm and as such there was no abuse of discretion.[101]

V. COMMENT

While the Ninth Circuit's ruling in *Lockyer* seems to have put an end to the years of litigation in California, it has not put an end to litigation surrounding the Roadless Rule elsewhere. Nevertheless, the

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[96] *Id.*
[97] *Id.* at 1020.
[98] *Id.* at 1019-20 (citing Geertson Seed Farms v. Johanns, 570 F.3d 1130, 1136 (9th Cir. 2009)).
[99] *Id.* at 1020 (internal quotation marks omitted) (quoting Amoco Prod. Co. v. Vill. of Gamble, 480 U.S. 531, 545 (1987)).
[100] *Id.* (internal quotation marks omitted) (quoting Paulson v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005)).
[101] *Id.*

effects of the *Lockyer* decision have the ability to resonate in other decisions nationwide.

Part of the reason this decision is so significant is because the Ninth Judicial Circuit encompasses more National Forest land area than any other judicial circuit,[102] so in effect the ruling in *Lockyer* had a greater impact on the National Forest system than a potential ruling in any other circuit. Because the Ninth Circuit encompasses the most acreage of National Forest land, as well as the most acreage that is subject to the Roadless Rule, it seems that its ruling will hold a very high level of persuasion over other courts dealing with controversies surrounding the implementation of the Roadless Rule.

With over sixty-three percent of National Forest lands contained in the Ninth Circuit,[103] one could say that the greatest effects of a national rule will be felt in the Ninth Circuit. This also serves to highlight the influence that *Lockyer* will have on other jurisdictions. The Ninth Circuit took into account the effects the Roadless Rule would have on adverse parties as well as the arguments put forth that everyone will benefit from its implementation, and determined that any hardship will be outweighed by the potential benefits. With fewer National Forests in other jurisdictions, it could easily be argued that those adverse parties will face less of a burden by the Roadless Rule, and that the smaller areas of National Forests warrant greater protection.

In making decisions regarding the validity of both the Roadless Rule and the State Petitions Rule, courts have based final decisions on the accuracy of the procedural steps taken to implement each rule. It seems to be a straightforward analysis of procedure. However, when looking into the reasoning behind such holdings, it does not take long to see that what

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[102] *See* U.S. Forest Service, 2001 Roadless Rule State Maps, http://fs.usda.gov (last visited Feb. 21, 2010) (follow "Roadless Website" hyperlink; then follow "Roadless Area by State" hyperlink; then follow "State Maps" hyperlink). The Ninth Circuit encompasses 122,182,000 acres of National Forests, 43,254,000 of which are inventoried roadless areas. *See id.*

[103] *See* U.S. Forest Service, Homepage, *supra* note 2 ("The Forest Service manages public lands in nation forests and grasslands, which encompass 193 million acres.") The Ninth Circuit contains 122,182,000 acres of the 193 million total acres of National Forest Lands, roughly sixty-three percent.

looks like straight procedure is actually muddled with concerns for the effects of these rules on the environment and fluid interpretations of what actually satisfies the proper procedure. What is actually being done in this determination of procedural accuracy is a balancing test that pits the economic hardship of mining and timber companies against environmental preservation. Fortunately, the Ninth Circuit was very clear that the future of the environment prevails.

The impact of the ruling in *Lockyer* also has potential to impact other circuit's decisions. The court in *Wyoming v. USDA* held that the Roadless Rule violated both the NEPA and the Wilderness Act, and was permanently enjoined.[104] This ruling has been appealed and will be heard in the Tenth Circuit.[105] This appeal could be the final say on the Roadless Rule. If the court holds in line with *Lockyer*, it will solidify the importance of the protection of the environment. The Tenth Circuit holds the second largest amount of National Forest land that is subject to the Roadless Rule,[106] so if the Tenth Circuit also finds the Roadless Rule to have been properly implemented, it would be hard to imagine the national plan of the Roadless Rule to be permanently enjoined elsewhere.

These rulings could have an impact on the management of Mark Twain National Forest in Missouri, which consists of 1,493,000 acres.[107] However, only 25,000 of those acres are inventoried roadless areas and thus are subject to the Roadless Rule.[108] This means that if the Roadless Rule is upheld on a national level, only two percent of Missouri's national forests would be under the stricter protections of the Roadless Rule; the remaining ninety-eight percent would remain under the management policies and procedures of the NEPA.

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[104] 570 F. Supp. 2d 1309, 1355 (D. Wyo. 2008).

[105] Earth Justice, Timeline of the Roadless Rule (2009), http://www.earthjustice.org/library/background/timeline_of_the_roadless_rule.html (last visited Feb. 15, 2010).

[106] *See* U.S. Forest Service, 2001 Roadless Rule State Maps, *supra* note 102 (follow "Roadless Website" hyperlink; then follow "Roadless Areas by State" hyperlink; then follow "State Maps" hyperlink). The Tenth Circuit encompasses 41,758,000 acres of National Forest lands, 13,313,000 of which are inventoried roadless areas. *See id.*

[107] *See id.* (follow "Missouri" hyperlink).

[108] *See id.*

VI. CONCLUSION

The *Lockyer* decision solidified the importance of national protection of roadless areas. The court relied heavily on the text of the Roadless Rule that stressed the numerous ways a national rule would protect the future of the environment and the severe negative impacts that relying on individual local rules would produce. The court was unconvinced that the sidestepped procedures used in the implementation of the State Petitions Rule adequately acknowledged the seemingly detrimental effects that were laid out in the Roadless Rule. While this case has not put an end to the litigation surrounding the issue, it would not be surprising to see other courts rely on *Lockyer* in future decisions.

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