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ISSUE BRIEF

State Attorneys General Win Fight to Enforce Roadless Rule

By Damien M. Schiff

In *California ex rel. Lockyer v. United States Department of Agriculture*,[1] the Ninth Circuit Court of Appeals weighed in again on a decade-long controversy regarding land use in the national forests. The case pitted the attorneys general of California, New Mexico, Oregon, and Washington, along with several environmental groups, against the federal government and various industry and recreational groups. Although turning on abstruse points of administrative law, the case practically may determine whether and to what extent the national forests can be used commercially (or recreationally), rather than be left in their natural state. *Lockyer*, as explained in greater detail below, endorsed the enforcement of a Clinton-era rule—known as the Roadless Rule—that removes large segments of the nation's federal lands from use.

I. A Factual Background

The National Forest System comprises nearly 200 million acres[2] which are administered by the United States Forest Service pursuant to a number of laws, chief among them the National Forest Management Act (NFMA).[3] Under NFMA, each national forest must have a forest plan which guides that forest's management and uses.[4] Since the 1970s, the Forest Service has been inventorying "roadless" areas within the national forests to assist Congress in the designation of "wild and scenic areas"[5] under the Wilderness Act.[6] To date, the Forest Service has identified over 58 million acres of roadless areas.[7] Because nothing in NFMA necessarily requires these roadless areas to be protected, and because many environmental groups believed that these areas should be protected from productive use, President Clinton directed the Forest Service, in October, 1999, to draft what ultimately became known are the Roadless Area Conservation Rule—or, more popularly, the Roadless Rule[8] Under that Rule, road construction, reconstruction, and timber harvesting would generally be prohibited in designated roadless areas.[9] Even without the Roadless Rule, roadless areas can be protected under NFMA's forest plan process. Nevertheless, the Forest Service feared that leaving roadless area protection to forest-specific management would inadequately protect roadless areas, whose value, the agency argued, can often only be appreciated when considered in conjunction with other roadless areas in other forests.[10]

In May, 2001, shortly before the Roadless Rule was to go into effect, a district court in Idaho enjoined the Rule.[11] That injunction was reversed on appeal by *Kootenai Tribe of Idaho v. Veneman*.[12] There, the Ninth Circuit held that the Forest Service had adequately assessed the potential environmental impact of the Roadless Rule, as well as alternatives to the Rule, under the National Environmental Policy Act (NEPA).[13] Thus, in April, 2003, shortly after the Ninth Circuit's decision, the Roadless Rule went into effect nationwide.[14]

Yet, just a few months later, in July, 2003, a district court in Wyoming (which lies within the Tenth Circuit Court of Appeals) again enjoined the Roadless Rule's implementation.[15] That decision was appealed to the Tenth Circuit, but shortly before the court was to hear oral argument, the government announced that

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it would be issuing a new rule to replace the Roadless Rule.[16] Accordingly, the Tenth Circuit dismissed the appeal as moot and vacated the Wyoming district court's injunction.[17]

In May, 2005, the Forest Service issued the superseding rule, known as the State Petitions Rule.[18] The State Petitions Rule effected two changes: (1) it rescinded the Roadless Rule; and (2) it established a petition process under which a state governor could petition the federal government to declare national forest lands within the state as roadless areas.[19] Under this Rule, governors had 18 months during which to submit these petitions.[20] In promulgating the Rule, the Forest Service concluded that it did not have to complete any extended environmental impact analysis under NEPA because the Rule was subject to a regulatory "categorical exclusion."[21] For similar reasons, the Forest Service concluded that its environmental assessment obligations under the Endangered Species Act (ESA) were also excused.[22]

These determinations were then challenged in consolidated actions in federal court in San Francisco. The district court subsequently overturned the State Petitions Rule and reinstated the Roadless Rule.[23] The court ruled that the Forest Service's conclusion that the State Petitions Rule was subject to categorical exclusion under NEPA was unreasonable. The court reached the same conclusion with respect to the Forest Service's lack of analysis under the ESA. As a remedy, the court then enjoined the State Petitions Rule and reinstated the Roadless Rule. Appeals were taken to the Ninth Circuit.

II. A Legal Background

Under NEPA, a federal agency is generally required to conduct some form of environmental impact analysis if a federal project may have a significant impact on the environment. Specifically, the agency must either: (1) prepare an "environmental impact statement"; (2) prepare a less ambitious "environmental assessment" with a corresponding "finding of no significant impact"; or (3) prepare a finding that the project is categorically exempt from NEPA pursuant to regulation.[24]

Under the ESA, a federal agency has the duty to consult with either the Fish and Wildlife Service or the National Marine Fisheries Service (depending on the species involved) if its proposed project may affect a listed species or its critical habitat.[25] The agency has no duty to consult if the project will have no effect on any listed species or critical habitat.

III. The Ninth Circuit's *Lockyer* Decision Explained

After dispensing with a contention that the appeal was not ripe for review,[26] the Ninth Circuit addressed the merits of the appellants' NEPA and ESA claims.

With respect to the NEPA claim, the appellants argued that the State Petitions Rule was not eligible for the categorical exclusion normally afforded procedural and administrative actions or other "paper" transactions because the Rule had the substantive effect of opening up roadless areas to development and timber harvesting. In opposition, the Forest Service contended that the State Petitions Rule just codified a paper transaction because it was rescinding a rule that had already been enjoined by the Wyoming district court and which had been in effect for only three months.[27]

The Ninth Circuit accepted the appellants' argument and ruled that the Forest Service could not avail itself of the categorical exclusion for routine or administrative actions. The court reasoned that the State Petitions Rule could not be merely procedural as it had the immediate and direct effect of rescinding the Roadless Rule, under which roadless areas were essentially free from any and all development. In contrast, under the State Petitions Rule, these same areas would be subject to road construction and timber harvesting.[28] The Ninth Circuit also noted that it had already determined in *Kootenai Tribe* that the Roadless Rule had real and significant environmental effects, which now, the court observed, would be removed by the State Petitions Rule.[29]

The court arrived at the same conclusion on the ESA claim. Given that the Roadless Rule's rescission by the State Petition Rule would create clear environmental effects, the court could not credit the Forest Service's assertion that no ESA-protected species or habitat would be affected at all.[30]

The Ninth Circuit also rejected the Forest Service's contention that the State Petitions Rule was merely a paper transaction because it just acknowledged the new status quo created by the Wyoming district court's injunction. First, the court noted that the status quo *had* changed, because the Roadless Rule had been in effect for three months before it was enjoined. Second, and more importantly, the court pointed out that the Forest Service had on its own issued the State Petitions Rule, knowing full well that the Rule's issuance would moot the pending appeal of the Wyoming district court's injunction in the Tenth Circuit. The Ninth Circuit therefore concluded that the Forest Service could not have its cake and eat it too: it could not gain the benefit of having got out of the Tenth Circuit appeal, *and* the benefit of having the

Wyoming district court's injunction change the status quo for NEPA and ESA purposes.[31] And in part because of the Forest Service's litigation tactics, the Ninth Circuit concluded that an appropriate remedy for the NEPA and ESA violations was the reinstatement of the Roadless Rule.[32]

IV. Going Forward

Although the legal battle is likely over in the Ninth Circuit, litigation continues in the Tenth Circuit. Shortly after the California district court overturned the State Petitions Rule and reinstated the Roadless Rule, another suit was filed in the Wyoming district court, with the result that the reinstated Roadless Rule was again enjoined.[33] That decision is now on appeal to the Tenth Circuit.[34] Thus, as matters now stand, the Forest Service must apply the Roadless Rule within the Ninth Circuit, and likely throughout the rest of the country, with the proviso that it may not have to apply it within the Tenth Circuit. Should the Tenth Circuit affirm the Wyoming district court and create a conflict with the Ninth Circuit, it is likely that the Supreme Court would take up the case to resolve the conflicting judgments to which the Forest Service would then be subject.

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Endnotes

[1] 2009 WL 2386403 (9th Cir. Aug. 5, 2009).

[2] *See id.* at *1.

[3] 16 U.S.C. §§ 1600-14.

[4] *See id.* § 1604(a), (f).

[5] *See Lockyer* at *2.

[6] 16 U.S.C. §§ 1131-36.

[7] *Lockyer* at *2.

[8] *See id.*

[9] *See* 66 Fed. Reg. 3,244 (Jan. 12, 2001).

[10] *See Lockyer* at *3 (citing 66 Fed. Reg. at 3,246).

[11] Kootenai Tribe of Idaho v. Veneman, 2001 WL 1141275 (D. Idaho May 10, 2001).

[12] 313 F.3d 1094 (9th Cir. 2006).

[13] *See id.* at 1123-26.

[14] *See Lockyer* at *3.

[15] Wyoming v. U.S. Dep't of Agriculture, 277 F. Supp. 2d 1197 (D. Wyo. 2003).

[16] *See Lockyer* at *4.

[17] Wyoming v. U.S. Dep't of Agriculture, 414 F.3d 1207 (10th Cir. 2005).

[18] 70 Fed. Reg. 25,654 (May 13, 2005).

[19] *See Lockyer* at *4.

[20] *See id.* (citing 70 Fed. Reg. at 25,661).

[21] 70 Fed. Reg. at 25,660.

[22] *See Lockyer* at *15.

[23] California ex rel. Lockyer v. U.S. Dep't of Agriculture, 459 F. Supp. 2d 974 (N.D. Cal. 2006).

[24] 40 C.F.R. § 1501.4.

[25] 50 C.F.R. § 402.14(a). *See* 16 U.S.C. § 1536(a)(2).

[26] *See Lockyer* at *7.

[27] *See id.* at *10.

[28] *See id.*

[29] *See id.* at *10-*11.

[30] *See id.* at *15.

[31] *See id.* at *12-*14.

[32] *See id.* at *16.

[33] Wyoming v. U.S. Dep't of Agriculture, 570 F. Supp. 2d 1309 (D. Wyo. 2008).

[34] Wyoming v. U.S. Dep't of Agriculture, 08-8061 (10th Cir. notice of appeal filed Aug. 13, 2009).