



## **The 10th Circuit Court of Appeals Issues Landmark Decision Regarding Roadless Land Designations by the U.S. Forest Service**

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On October 21, 2011, the U.S. Court of Appeals for the Tenth Circuit issued a significant decision upholding the 2001 Forest Service Roadless Rule issued near the end of President Clinton's administration. A copy of this 120 page decision is available [here](#).

This decision allows the Forest Service to designate approximately 50 million acres of public lands as roadless and prohibit road construction and commercial timber harvesting in these areas, unless an exception applies. In addition to restricting federal lands access, the decision also opens the door to the Forest Service and other federal agencies designating *de facto* wilderness areas, promulgated outside of the requirements and procedures of the Wilderness Act.

The conflict regarding designation of roadless areas within National Forest Lands managed by the U.S. Forest Service is entering its second decade. In 2003, and again in 2008, Judge Brimmer of the U.S. District Court of the District of Wyoming issued decisions finding that the Forest Service violated the Wilderness Act and National Environmental Policy Act (NEPA) in promulgating the 2001 Clinton Roadless Rule. Judge Brimmer also held that the Forest Service violated the Wilderness Act by designating 58.5 million of acres of lands as *de facto* wilderness. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (2003) (Wyoming I), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005) (finding the decision moot by issuance of the State Roadless Petition Rule, which allowed states to designate its own roadless areas); *Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309 (D. Wyo. 2008) (Wyoming II).

In these cases, the District Court explained that Congress has the sole power to include lands in the National Wilderness Preservation System and held that no Federal lands could be designated as “wilderness areas” except as provided for in the Wilderness Act.

In its decision, the Tenth Circuit acknowledged that the Wilderness Act and 2001 Roadless Rule overlap in coverage in many ways, but found that the Roadless Rule does not establish *de facto* wilderness, as defined in the Wilderness Act. The court found that the Inventoried Roadless Areas identified under the 2001 Roadless Rule are not precisely the same as lands designated as wilderness under the Wilderness Act.

The court identified the following distinguishing factors: unlike the Wilderness Act, the Roadless Rule did not prohibit construction of permanent or temporary structures; the Wilderness Act is more stringent on prohibiting recreation activities, and more restrictive regarding road maintenance, road construction, and use of existing roads; and, the Roadless Rule is less restrictive regarding grazing activities.

With respect to mineral development, the Court found that the Roadless Rule did not impose a general prohibition on mining or mineral development activities, except for prohibition on road construction. Relying on the text of the Roadless Rule, the Court stated that mineral leasing activities that could be carried out through use of existing roads were not expressly prohibited.

While the Court relied upon the plain language of the Roadless Rule to bolster its decision, from a practical standpoint, Forest Service’s management of roadless areas will likely result in extensive restrictions to mineral access and development, through imposition of restrictions through land use planning decisions, and its byzantine permitting system.

The Court also found that the Forest Service acted within the authority and broad discretion that Congress provided under its organic statute and also the Multiple-Use Sustained-Yield Act, and National Forest Management Act. The Court explained that Congress “clearly authorized the Forest Service to regulate [Forest Service] lands for multiple uses, including those protected by the Roadless Rule, such as outdoor recreation.” Slip Op. at 39.

This finding opens the door for future legal conflicts regarding similar *de facto* wilderness issues related to Bureau of Land Management (BLM) designation of wilderness characteristic areas through its land use planning process under the guise of its discretionary authority under the Federal Land Policy and

Management Act (FLPMA).

The potential ramifications of this decision are significant for oil and gas access, and other multiple uses of public lands. The stage is also set for similar issues to be litigated within the context of restrictive land use designations made, for example, by BLM under the FLPMA Act which result in the equivalent of *de facto* wilderness designations.

For more information, please contact [Bret Sumner](#) or [Bill Sparks](#).

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