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## Judicial Iron Triangles: The Roadless Rule to Nowhere--And What Can Be Done to Free the Forest Service's Rulemaking Process

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## COMMENT

### Judicial Iron Triangles: The Roadless Rule to Nowhere—And What Can be Done to Free the Forest Service’s Rulemaking Process

#### *Introduction*

The United States Forest Service has a long history of seeking to manage the nation’s publicly held forests in accordance with broad, and sometimes contradictory, congressional goals. When the Organic Act of 1897 was passed, which established the national forest system, it included the following directive that has served as the Forest Service’s mission statement for the last century: “No public forest reservation shall be established, except to improve and protect the forest within . . . or for the purpose of . . . furnish[ing] a continuous supply of timber for the use and necessities of citizens . . . .”<sup>1</sup> Thus, most of the agency’s history has been marked by the struggle to balance these two competing directives, providing the public access to and use of its forest lands, while also working to preserve, improve, and protect them.

Beginning in the 1970s with the emergence of the environmental movement and the passage of several important pieces of legislation that inaugurated a slow shift away from resource production and towards conservation on federal lands, the Forest Service faced increasing difficulty in moderating between these competing interests.<sup>2</sup> The situation has been such a challenge in large part because of the massive increase in public participation, which is dominated by stakeholders on both extremes of the environmental spectrum who find little motivation to compromise, instead choosing to hold the Forest Service hostage by invoking the threat of litigation. Consequently, “analysis paralysis”<sup>3</sup> has set in within the Forest Service, resulting in constant litigation that requires the Forest Service to devote massive resources to defend its rules and projects in court.<sup>4</sup> Furthermore, since its active participation in

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1. Organic Administration Act of 1897 § 1, 16 U.S.C. § 475 (1897) (current version at 16 U.S.C. § 475 (2006)).

2. GEN. ACCOUNTING OFFICE, FOREST SERVICE DECISION MAKING: A FRAMEWORK FOR IMPROVING PERFORMANCE 62-67 (1997) [hereinafter GAO FOREST SERVICE DECISION MAKING FRAMEWORK].

3. FOREST SERV., U.S. DEP’T OF AGRIC., THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT 21 (2002), available at <http://www.fs.fed.us/projects/documents/Process-Predicament.pdf> [hereinafter THE PROCESS PREDICAMENT].

4. GAO FOREST SERVICE DECISION MAKING FRAMEWORK, *supra* note 2, at 28-30.

environmental policymaking in the 1970s, Congress has all but withdrawn itself from the process, especially more recently with the “Republican Revolution” of 1994, which was avowedly anti-regulation. Because Congress was uninterested in doing so, groups began to turn to the courts and the Forest Service, with whom they began to work together, to create environmental policy.

This cooperative effort illustrates how so-called “judicial iron triangles”—that is, federal judges, administrative agencies, and interest groups—developed within environmental law.<sup>5</sup> Essentially, two factors must be present for a judicial iron triangle to develop and persist. First, all the parties to the group must be able to satisfy the needs of the others involved, which requires each party to the subgovernment to “do their part” for the others involved. Once this subgovernment begins to shape policy, it is important for the other political actors acquiesce to its governance. If the policy produced by the judicial iron triangle becomes of interest to outsiders, the nonplayers (i.e., Congress or the President) may see incentives developing that would encourage their intervention in the subgovernment. Yet, so long as others do not involve themselves, the members of a judicial iron triangle are able to shape environmental policy according to their own beliefs because there are few effective review and control mechanisms overseeing the bureaucrats, judges, and interest groups that are making policy. In many ways, the judicial iron triangle varies little (from a theoretical perspective, at least) from the concept of the traditional iron triangle,<sup>6</sup> except that the role of congressional committees has been replaced with the federal judiciary.<sup>7</sup>

The result of governance by judicial iron triangles is that the very reforms intended by Congress to make environmental policymaking an informed, open, and collaborative process, instead produced the opposite effect. Agencies are

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5. For discussion of judicial iron triangles in greater detail see *infra* Part V. The term “judicial iron triangle” appears to have first been used in Jeanne Nienaber Clarke & Kurt Angersbach, *The Federal Four: Change and Continuity in the Bureau of Land Management, Fish and Wildlife Service, Forest Service, and National Park Service, 1970-2000*, in *WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS* 35, 47 (Charles Davis ed., 2001). This comment will sometimes use the term “subgovernment” in place of “judicial iron triangle” in part for the sake of space, but it is also used to reinforce the idea that judicial iron triangles make policy outside the traditional, elected policy-making bodies.

6. That is, the collusion of administrative agencies, congressional committees, and the organized interests they regulate. One of the first formulations of this concept can be found in GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (Random House 1970) (1966).

7. Clarke & Angersbach, *supra* note 5, at 47; Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223, 259-60 (2004).

faced with ambiguous and sometimes conflicting mandates from Congress, which create a battleground in the bureaucracy and the courts where organized environmental interests<sup>8</sup> uncompromisingly advocate single-minded policies, while leaving the general public with no one to hold accountable for the policy that results from this process.<sup>9</sup>

To illustrate the crisis now facing the nation's environmental policy, this comment will take a case study approach to examine "one of the largest land preservation efforts in America's history,"<sup>10</sup> President Bill Clinton's Roadless Area Conservation Rule (the roadless rule),<sup>11</sup> and also President George W. Bush's subsequent (albeit ultimately unsuccessful) attempt to revise it (the state petitions rule).<sup>12</sup> The process by which the rule was promulgated, and its history following publication of the final rule, illustrates the problems affecting American environmental policymaking today—inefficiency, paralysis, polarization, and a general lack of accountability.

Part I of this comment will provide a brief history of the Forest Service's management of roadless areas, focusing on the promulgation of the roadless rule and the state petitions rule. In keeping with the theme of judicial iron triangles, the majority of the analysis throughout this comment focuses on the relationships in this tripartite arrangement during the rulemaking process, and the consequences of these relationships. Part II will look at the interaction of organized interests and the courts. Part III will turn toward the interaction between organized interests and the Forest Service. Part IV will focus on the courts and the Forest Service. Part V will address the origins of the judicial iron triangle phenomenon in environmental law. Part VI will then explore reforms that could produce a more efficient, cooperative, and accountable rulemaking process. This comment concludes in Part VII.

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8. The phrase "organized environmental interests" is not meant to refer only to those groups espousing an environmentalist approach to regulation. It is meant to include all groups, including pro-development ones, involved in the debate over environmental policymaking.

9. See BERNARD ROSEN, *HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE* (3d ed. 1998) (discussing the challenges to bureaucratic accountability and methods of holding the bureaucracy to account for their actions in much greater detail than is possible here).

10. Bill Clinton, President of the U.S., Remarks by the President at "Roadless" Lands Event (Oct. 13, 1999) (on file with author). Author's note: many of the roadless rule documents cited in this comment and noted as "on file with author" are available at the Forest Service's special roadless rule website available at <http://www.roadless.fs.fed.us>. However, by the time of publication, the links to these documents were changed at least twice. For this reason, no direct links are provided, because of the difficulty in keeping the links accurate.

11. Special Areas, Roadless Area Conservation, Final Rule, 66 Fed. Reg. 3244, 3272 (Jan. 12, 2001).

12. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005).

*I. A Brief History of Forest Service Protection of Roadless Areas*

*A. Initial Attempts*

As the environmental movement began hitting its stride in the 1960s and 1970s, the federal government was pressured to provide some kind of protection to the untouched lands under its control.<sup>13</sup> This pressure culminated in the passage of the Wilderness Act of 1964 (Wilderness Act).<sup>14</sup> The Wilderness Act established a procedure by which Congress could designate roadless areas as “wilderness,”<sup>15</sup> which had the effect of keeping them in a primitive state in perpetuity.<sup>16</sup> In 1967, the Forest Service began its first attempt to inventory (known as the Roadless Areas Review and Evaluation or RARE I) all of the roadless areas within the national forest system with the goal of ultimately recommending some of the land to Congress as appropriate for wilderness designation.<sup>17</sup> In 1973, the process ended with a finding that approximately 56 million acres of roadless areas existed within the national forest system.<sup>18</sup> Of these acres, approximately 12.3 million were designated as suitable to be categorized wilderness.<sup>19</sup> In 1972, while the RARE I process was still underway, the courts considered several successful challenges, brought under the National Environmental Policy Act of 1969 (NEPA), to the wilderness designation process used by the Forest Service.<sup>20</sup> The issues raised in these challenges, which primarily complained that the NEPA process was

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13. See Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288 (1966).

14. 16 U.S.C. §§ 1131-1136 (2006).

15. *Id.* § 1132. In essence, the Secretary of Agriculture reviews potential wilderness areas and then gives a report to the President on which lands are appropriate for wilderness designation. *Id.* The President then reviews the recommendations and passes them along to Congress. *Id.*

16. *Id.* § 1131(a), (c).

17. See *id.* § 1132(b) (requiring the Forest Service to take this action). For a thorough overview of the RARE I & II processes, see Charles F. Wilkinson & Michael H. Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 334-70 (1985).

18. Roadless and Undeveloped Areas within National Forests; Selection of New Study Areas, Availability of Final Environmental Statement, 38 Fed. Reg. 28894-95 (Oct. 15, 1973); see also FOREST SERV., U.S. DEP'T OF AGRIC., ROADLESS AND UNDEVELOPED AREAS: FINAL ENVIRONMENTAL STATEMENT: SELECTION OF FINAL NEW STUDY AREAS FROM ROADLESS AND UNDEVELOPED AREAS WITHIN THE NATIONAL FORESTS (1973) [hereinafter ROADLESS AND UNDEVELOPED AREAS: FINAL ENVIRONMENTAL STATEMENT].

19. ROADLESS AND UNDEVELOPED AREAS: FINAL ENVIRONMENTAL STATEMENT, *supra* note 18.

20. Wyo. Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); see also Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972).

rushed and the analysis produced was deficient, are strikingly similar to those that would be brought against the roadless rule nearly 30 years later.<sup>21</sup>

After the RARE I decisions, the Forest Service made various attempts to fix the problems with the RARE I process and analysis. The major fix was supposed to be the publication of the final environmental impact statement for the inventory of roadless areas in 1973, as discussed above.<sup>22</sup> However, conservationist groups and Congress remained displeased, claiming that the Forest Service was being too picky in recommending lands for wilderness designation through its policy of requiring potential wilderness lands to be in pristine condition and untrammelled by man.<sup>23</sup> As a result, Congress passed two laws that created wilderness in the eastern and western United States,<sup>24</sup> some of which the Forest Service claimed was inappropriate for such designation.<sup>25</sup> With time, however, Forest Service officials came to the realization that RARE I was the product of a flawed NEPA analysis, as it did not fully meet the Act's requirements.<sup>26</sup> With the inauguration of the Carter administration and the appointment of new officials within the United States Department of Agriculture (USDA), the catalyst was in place for a second attempt at a roadless area review.<sup>27</sup>

In 1977, the Forest Service began its second attempt at inventorying the roadless areas within its jurisdiction (RARE II).<sup>28</sup> RARE II was completed in 1979, and the inventory identified 62 million acres as roadless areas within the national forest system.<sup>29</sup> Because the Forest Service used a more liberal standard than that used previously in RARE I, it recommended to Congress

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21. See Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 698 n.62 (2004). As Nie notes, in the RARE I and II cases, it was conservation, not development interests, complaining about the NEPA process. *Id.*

22. See ROADLESS AND UNDEVELOPED AREAS: FINAL ENVIRONMENTAL STATEMENT, *supra* note 18.

23. JOHN FEDKIW, MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905-1995, at 114-15 (1996).

24. Wilkinson & Anderson, *supra* note 17, at 348. The two acts were the Eastern Wilderness Act of 1975, Pub. L. No. 93-622, 88 Stat. 2096 (1975), and the Endangered American Wilderness Act of 1978, Pub. L. No. 95-200, 91 Stat. 1425 (1978).

25. Wilkinson & Anderson, *supra* note 17, at 348.

26. FEDKIW, *supra* note 23, at 114.

27. *Id.* at 115.

28. *Id.*; see also Wilkinson & Anderson, *supra* note 17, at 349-50.

29. FOREST SERV., U.S. DEP'T OF AGRIC., RARE II: FINAL ENVIRONMENTAL IMPACT STATEMENT, ROADLESS AREA REVIEW AND EVALUATION iii (1979) [hereinafter RARE II: FINAL EIS]. For a thorough discussion of the RARE II processes and subsequent litigation, see Douglas E. Booth, *Timber Dependency and Wilderness Selection: The U.S. Forest Service, Congress, and the RARE II Decisions*, 31 NAT. RESOURCES J. 715 (1991).

15.1 million acres as appropriate for wilderness designation.<sup>30</sup> Again, in 1982, a successful NEPA challenge to the Forest Service's wilderness designation procedure, *California v. Block*, put a halt to any action being taken on the inventory.<sup>31</sup> *Block* had the effect of halting any attempts to develop roadless areas identified in RARE II without additional analysis. This was the last attempt by the Forest Service to recommend any additions to the wilderness system, at least on a nationwide scale.<sup>32</sup> In response to *Block*, the Forest Service initially contemplated doing a RARE III analysis, but eventually scrapped the proposal.<sup>33</sup> By the mid 1980s, as it became clear that RARE III would not be conducted, Congress had effectively taken control of roadless area policy by enacting numerous bills that created wilderness areas on a state-by-state basis.<sup>34</sup>

#### *B. President Clinton Acts—The Roadless Area Conservation Rule*

The next major step toward a nationwide rule protecting roadless areas within the national forest system began in early 1998. At that time, a survey revealed that the Forest Service faced an \$8.4 billion backlog of road maintenance and construction.<sup>35</sup> Acting on a promise made during his confirmation hearings to improve the agency's fiscal responsibility, Mike Dombeck, Forest Service Chief, initiated the rulemaking process, and in February 1999 published what was known as the "Interim Roadless Rule,"<sup>36</sup>

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30. RARE II: FINAL EIS, *supra* note 29, at iii-viii.

31. *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

32. As a part of the process of creating land management plans for each national forest, the Forest Service considers recommendations of wilderness, but only on a forest-by-forest basis, as required by the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600-1614 (2006).

33. Brandon Dalling, *Administrative Wilderness: Protecting Our National Forestlands in Contravention of Congressional Intent and Public Policy*, 42 NAT. RESOURCES J. 385, 393 (2002).

34. *E.g.*, Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980); California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (1984); Oregon Wilderness Act of 1984, Pub. L. No. 98-328, 98 Stat. 272 (1984); Washington State Wilderness Act of 1984, Pub. L. No. 98-339, 98 Stat. 299 (1984).

35. 1 FOREST SERV., U. S. DEP'T OF AGRIC., ROADLESS AREA CONSERVATION FINAL ENVIRONMENTAL IMPACT STATEMENT 1-5 (2000).

36. Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7290, 7303 (Feb. 12, 1999). It is important to note that the Tongass National Forest was exempt from the interim rule, as it had recently completed its Forest Plan, and as a result of the plan the local economy was in a state of massive transition due to drastically reduced timber harvest levels. *Id.* at 7300. It was feared that including the Tongass would result in an economic catastrophe for the 80,000 people living in and around the Tongass National Forest, who to that point had

which placed an eighteen month moratorium on road building in national forest roadless areas.<sup>37</sup> In the meantime, agency officials began to work on a permanent rule.<sup>38</sup> President Clinton, in a memorandum to the Secretary of Agriculture, directed the Forest Service to “provide appropriate long-term protection for most or all” roadless areas.<sup>39</sup>

The Forest Service’s rulemaking process, as set forth by the Administrative Procedures Act<sup>40</sup> and NEPA,<sup>41</sup> required a number of periods of public participation. Four hundred thirty public meetings were held and over 1.6 million public comments were received, though 95 percent of the public comments came in the form of letters or postcards.<sup>42</sup> The final rule prohibited all road construction within “inventoried roadless areas,” with a few exceptions, most importantly “to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property.”<sup>43</sup> The final rule applied to 58.5 million acres of national forest land, which is equal to two percent of the United States’ land mass (including the Tongass National Forest, which had been excluded from the interim rule).<sup>44</sup>

### C. The Roadless Rule Goes To Court

Shortly after coming to office, President George W. Bush issued what is now known as the “Card Memo,” which postponed all rules promulgated by the previous administration, but not yet in effect, for sixty days.<sup>45</sup> The roadless

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largely depended on timber for economic stability in their communities. *Id.*

37. *Id.* Challenges to the interim rule were unsuccessful. See *Wyo. Timber Indus. Ass’n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245 (D. Wyo. 2000).

38. See National Forest System Roadless Areas, Notice of Intent to Prepare an Environmental Impact Statement, 64 Fed. Reg. 56,306 (Oct. 19, 1999).

39. Memorandum from Bill Clinton, President of the U.S., to the Sec’y of Agric., Protection of Forest “Roadless” Areas (Oct. 13, 1999) (on file with author).

40. 5 U.S.C. §§ 551-553 (2006).

41. National Environmental Policy Act § 102, 42 U.S.C. § 4331 (2006).

42. Special Areas; Roadless Area Conservation; Final Rule, 66 Fed. Reg. 3244, 3248 (Jan. 12, 2001).

43. *Id.* at 3272.

44. For a discussion of the roadless rule’s relation to the Tongass National Forest and the various legal issues raised, see generally Jennifer L. Sullivan, *The Spirit of 76: Does President Clinton’s Roadless Lands Directive Violate the Spirit of the National Forest Management Act of 1976?*, 17 ALASKA L. REV. 127 (2000).

45. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001). For a general discussion of the different approaches towards roadless area management taken by Clinton and Bush, see Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143 (2004).

rule was to take effect on March 13, 2001, and thus, was one of the regulations directly affected by the memo. Despite the Bush administration's postponement, parties upset by the roadless rule filed legal challenges to it before the final rule was even published in the *Federal Register*.<sup>46</sup> The State of Idaho brought suit in 1999, claiming that the Forest Service's scoping process was in violation of NEPA, but the suit was dismissed as not ripe for judicial review because no final agency action had been taken at that time.<sup>47</sup> By early 2006, nine cases had been filed challenging the roadless rule in six different federal district courts.<sup>48</sup> On May 10, 2001, a district court judge in Idaho granted injunctions against the roadless rule in two separate cases, *Idaho v. United States Forest Service* and *Kootenai Tribe of Idaho v. Veneman*.<sup>49</sup> A three judge panel of the United States Court of Appeals for the Ninth Circuit subsequently vacated the injunctions, holding that the district court had abused its discretion in enjoining the rule.<sup>50</sup> In July 2003 in *Wyoming v. USDA*, a district court judge enjoined the application of the rule nationwide, finding that the Forest Service had violated NEPA on several counts during the rulemaking process and, additionally, violated the Wilderness Act.<sup>51</sup> Concurrently, a separate settlement was reached with the State of Alaska which resolved that state's legal challenge to the rule.<sup>52</sup> The terms of the settlement required the Forest Service to propose, and ultimately promulgate, a new rule temporarily exempting the Tongass National Forest from the roadless rule.<sup>53</sup>

#### *D. President Bush Reacts—The State Petitions Rule*

Meanwhile, the Bush administration, along with the Forest Service, was actively working toward addressing the issues raised in criticism of the

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46. *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1235 (D. Idaho 2001).

47. *Idaho v. U.S. Forest Serv.*, No. CV99-611-N-EJL, 2000 WL 33417326 (D. Idaho Feb. 18, 2000).

48. For an up-to-date chronology of the roadless rule, see Forest Serv., U.S. Dep't of Agric., Roadless-Home, <http://roadless.fs.fed.us/> (last visited May 20, 2009).

49. *Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248 (D. Idaho 2001); *Kootenai*, 142 F. Supp. 2d 1231.

50. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002). The Ninth Circuit combined the two district court cases into a single case, as they were both addressing identical issues.

51. *Wyoming v. USDA*, 277 F. Supp. 2d 1197 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

52. FOREST SERV., RELEASE NO. 0200.03, U.S. DEP'T. OF AGRIC., USDA RETAINS NATIONAL FORESTS ROADLESS AREA CONSERVATION RULE, (June 9, 2003) (on file with author).

53. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (Dec. 30, 2003).

original roadless rule. This process eventually spawned a new rule, the state petitions rule, in May 2005.<sup>54</sup> The new rule created a process by which state governors could petition the Secretary of Agriculture to initiate the rulemaking process for the purpose of managing roadless areas within their state.<sup>55</sup> This state-specific process came in response to the most widespread criticism of the original roadless rule—that it imposed an inflexible national standard unable to accommodate the issues that necessarily arise in managing disparate national forests.<sup>56</sup> The new rule had the effect of rendering all pending legal challenges to the roadless rule moot.<sup>57</sup> Thus, because the objectionable portions of the original rule were removed, the United States Court of Appeals for the Tenth Circuit vacated the Wyoming district court’s 2003 injunction.<sup>58</sup>

#### *E. The Roadless Rule Revived*

The story of the roadless rule and state petitions rule, however, did not end with the Tenth Circuit’s decision. In 2005, in *California ex rel. Lockyer v. USDA*, the State of California alleged that the state petitions rule violated several environmental laws, most notably NEPA.<sup>59</sup> When the case was decided in October 2006, the district court found that the Forest Service violated NEPA, determining that the state petitions rule fell within the categorical exclusion<sup>60</sup> to NEPA’s environmental impact requirement.<sup>61</sup> The Forest Service had applied the categorical exclusion to the state petitions rule and, thus, did not prepare an environmental impact statement because the agency felt that the rule was “purely procedural.”<sup>62</sup> The court held that, in fact, the state petitions rule was a major federal action significantly affecting the environment because it replaced nationwide protection for roadless areas with a different system.<sup>63</sup> As a result, the court issued an injunction against implementation of the state petitions rule.<sup>64</sup> However, the court went a step

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54. Forest Serv., U.S. Dep’t of Agric., Special Areas; State Petitions for Inventoried Roadless Area Management; Final Rule, 70 Fed. Reg. 25654-62 (May 13, 2005).

55. *Id.*

56. *Id.*

57. *Wyoming v. USDA*, 414 F.3d 1207, 1212 (10th Cir. 2005).

58. *Id.* at 1213-14.

59. *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874 (N.D. Cal 2006).

60. Categorical Exclusion, 40 C.F.R. §§ 1500.4(p), 1500.5(k), 1508.4 (2007).

61. *Lockyer*, 459 F. Supp. 2d at 894-909.

62. *Id.* at 894; *see also* Special Areas; State Petitions for Inventoried Roadless Area Management; Final Rule, 70 Fed. Reg. 25,653, at 25,660 (May 13, 2005).

63. *Lockyer*, 459 F. Supp. 2d at 915-16.

64. *Id.* at 913-19.

further and found that because the 2003 injunction against the roadless rule had been vacated, the roadless rule was, in effect, reinstated.<sup>65</sup>

*F. The Never Ending Road?*

Just as it appeared that a point of time had been reached in which the roadless rule was revived and was afforded an opportunity to permanently become a part of the law, the rule found itself back in court. This was foreshadowed to some degree in *Lockyer*, where the defendants counseled the magistrate judge against reinstating the rule because to do so would lead to massive litigation.<sup>66</sup> Accordingly, just days after *Lockyer* was decided, the State of Wyoming filed a motion for relief from the *Lockyer* decision in the district court in Wyoming.<sup>67</sup> Initially, Judge Brimmer denied the request and instead advised the State to ask the Tenth Circuit to reconsider its 2005 decision vacating Brimmer's 2003 decision enjoining the rule.<sup>68</sup> After the Tenth Circuit refused to do so, Wyoming filed suit in Brimmer's court, once more challenging the roadless rule.<sup>69</sup> In August 2008, Judge Brimmer again enjoined the roadless rule.<sup>70</sup>

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65. *Id.*

66. *Id.* at 919.

67. Plaintiff's Motion for Relief from Judgment, Wyoming v. USDA, Civ. No. 01-CV-086B, (D. Wyo. Sept. 22, 2006).

68. Order Denying State of Wyoming's Motion for Relief from Judgment or Order Pursuant to Federal Rule of Civil Procedure 60(b), Wyoming v. USDA, Civ. No. 01-CV-086B (D. Wyo. June 7, 2007).

69. Bob Moen, *Wyoming's Roadless Rule Challenge Back in Court*, CASPER STAR TRIB., Oct. 20, 2007, at A3.

70. Wyoming v. USDA, 570 F. Supp. 2d 1309 (D. Wyo. 2008). As this comment was being prepared for publication, not surprisingly, major developments took place. First, in light of Judge Brimmer's August 2008 decision, Judge Laporte reconsidered her decision in *Lockyer* and issued a stay of her earlier injunction against the state petitions rule. See Order Partially Staying Injunctive Relief in the Interests of Comity Pursuant to Federal Rule of Civil Procedure 62(c), California *ex rel.* Lockyer v. USDA, Civ. No. C05-03508, (N.D. Cal. Dec. 12, 2008) (lifting the injunction as to all National Forests outside of the Ninth Circuit). Next, the new Obama administration, in an effort to rectify some of the confusion arising from all the litigation, issued an interim directive allowing limited road building upon the Secretary of Agriculture's approval. See Memorandum from Tom Vilsack, Sec'y of Agric., Authority to Approve Road Construction and Timber Harvesting in Certain Lands Administered by the Forest Service (May 28, 2009) (on file with author). Not surprisingly, Judge Brimmer on June 15, 2009, refused to reconsider his August 2008 injunction, in light of the Obama administration's new directive. See Order Denying Motion for Reconsideration and Rule 62(c) Motion for Suspension of Injunction Pending Appeal, Wyoming v. USDA, Civ. No. 07-CV-017B (D. Wyo. June 15, 2009). Finally, in August 2009, the Ninth Circuit issued its decision on the *Lockyer* appeal, upholding Judge Laporte's decision to enjoin the state petitions rule and reinstate the roadless rule. See California *ex rel.* Lockyer v. USDA, No. 07-15613, 2009 WL

In yet another twist on the roadless rule saga, the State of Idaho, and later the State of Colorado, took a slightly different approach to that considered by the state petitions rule. Because that rule had been invalidated by *Lockyer*, these states petitioned the Secretary of Agriculture to initiate state specific rulemaking under the Administrative Procedures Act section 553(e), which allows any “interested person the right to petition [an agency] for the issuance, amendment, or repeal of a rule.”<sup>71</sup> Idaho’s petition was published as a proposed rule in the *Federal Register* in January 2008.<sup>72</sup> Because the petition was not issued under the state petition rule, it has escaped the litigation that has plagued the other rules.

## II. Courts, Interest Groups, and the Roadless Rule

The development of the roadless rule and state petitions rule provide ample evidence of the existence of a new kind of iron triangle present in American environmental policymaking. This section will examine the use of courts by those feeling wronged by the Forest Service decision-making process and how suits seeking to enforce environmental statutes have become just another tool in the repertoire of interest groups on both sides of the environmental policy debate. In addition, this section will discuss the role of judges as policymakers and the potential for politics to affect judicial decision making in the roadless rule cases.

Over the last forty years or so, federal judges and interest groups have developed a mutually beneficial relationship in the realm of environmental policymaking. The federal judiciary has developed into a forum for groups who feel ignored or trivialized in the more traditional policymaking processes.<sup>73</sup> In particular, federal judges have expanded the concept of standing to allow groups greater access to the courts,<sup>74</sup> NEPA violations have been recognized as presenting viable causes of action,<sup>75</sup> and intervention has been liberally granted in environmental cases.<sup>76</sup> In return, interest groups have

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2386403 (9th Cir. Aug. 5, 2009).

71. 5 U.S.C. § 553(e)(2006); *see also* 7 C.F.R. § 1.28 (2007).

72. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 1135 (Jan. 7, 2008).

73. JULIANA S. GONEN, LITIGATION AS LOBBYING: REPRODUCTIVE HAZARDS AND INTEREST AGGREGATION (2003).

74. This reached a high point, perhaps, with the decision in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184-85 (2000).

75. *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971).

76. Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215 (2000) (discussing the frequency with which intervention is granted in

provided the judiciary two easily identifiable benefits—they provide information and legal analysis (both as parties and as amici), and they bring cases to the courts that require judges to decide between competing policy preferences and to justify their decisions, which then creates the opportunity for judges to express their political preferences.

*A. Benefits Provided to Courts by Interest Groups—Opportunity and Information*

Judges have been traditionally thought of as impartial, apolitical decisionmakers who “base their decisions on precedent and will adhere to the doctrine of stare decisis.”<sup>77</sup> Under this view, often referred to as the *legal model* of judicial decision making, organized interest groups would have little influence on judicial decision making because decisions would be highly constrained by precedent and judicial iron triangles could not develop.<sup>78</sup> An opposing view, known as the *attitudinal model*, holds that judges do make decisions on the basis of something other than precedent.<sup>79</sup> In an oft-quoted passage from Cardozo’s classic work, *The Nature of the Judicial Process*, he noted that “[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”<sup>80</sup> Those holding this view believe that each judge’s personal policy preferences predominate, with disagreement arising over whether those policy positions are ever modified in light of the likely response of other policymakers.<sup>81</sup>

According to some, judges are strategic actors who render decisions with the goal of seeing their positions becoming policy.<sup>82</sup> Thus, judges have an incentive to decide cases in accordance with the position of the most powerful or influential party or group—if their decisions are challenged later in other political arenas, it is likely that the more powerful group will prevail.<sup>83</sup> Deciding in this manner, then, supports the idea of judicial iron triangles—judges decide cases according to their own policy preference, with a view towards seeing their decisions becoming effective policy. Judges, however, depend on interest groups to bring the appropriate cases before their

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environmental cases).

77. STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 210 (1988).

78. Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324 (1992).

79. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 779-82 (2000).

80. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

81. Kearney & Merrill, *supra* note 79, at 781-85.

82. *Id.* at 783-84.

83. *Id.*

courts and also rely, to some degree, on these groups to provide the information and rationale necessary to reach a defensible decision.<sup>84</sup> To some extent, by bringing cases, the groups also implicitly promise to support a favorable decision elsewhere in the policymaking process. Interest groups, on the other hand, receive from the courts an open forum they might not find anywhere else.

The primary benefit provided to courts (and thus, judges) by interest groups is the opportunity to consider an issue, which then, according to the attitudinal model, would create the opportunity for judges to carry out their political preferences.<sup>85</sup> Because federal courts lack any power to actively solicit cases on their own, courts would be nonentities in environmental policy without interest groups, or at least, their role would be dramatically reduced. While individual citizens could still bring suit on their own, they often lack the resources (time and money) to do so.<sup>86</sup> In this way, interest groups function like a kind of environmental insurance; like-minded people pool their resources together with the goal of distributing the burdens of litigation among themselves, which enables the members of the groups to collectively challenge or defend a greater number of projects than they could individually.<sup>87</sup> However, since groups exist on both sides of the environmental debate, environmental cases require judges to decide between two positions that are seemingly consistent with the law. This, then, provides judges with the opportunity to decide cases according to political preference.

In the roadless rule cases, the fundamental issue presented to the courts was whether the roadless rule was promulgated in violation of the procedural requirements established under NEPA and the Administrative Procedures Act of 1946 (APA).<sup>88</sup> Suits alleging NEPA violations must be brought under the APA because NEPA does not have any provision for judicial review of agency decisions in violation of its provisions.<sup>89</sup> Section 702 of the APA entitles any

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84. KENNETH J. MEIER, *POLITICS AND THE BUREAUCRACY* 140-43 (4th ed. 2000) (discussing the impact of lack of expertise among federal judges).

85. Kearney & Merrill, *supra* note 79, at 781-85.

86. Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS AM. ACAD. POL. & SOC. SCI. 20, 22-23 (1958) (discussing the NAACP's use of litigation to affect policy change).

87. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 34 (1982) (suggesting that collective action is likely where a small number of "zealots" together value a certain collective good at a level equal to or greater than a larger group of individuals (in the case of the environment, the larger group would be the public in general)).

88. Administrative Procedures Act of 1946, 5 U.S.C. §§ 501-559, 701-706 (2006).

89. MATTHEW J. LINDSTROM & ZACHARY A. SMITH, *THE NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL MISCONSTRUCTION, LEGISLATIVE INDIFFERENCE, & EXECUTIVE*

“person suffering legal wrong because of agency” to judicial review of such action.<sup>90</sup> Under the APA, agency actions must be set aside if they are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”<sup>91</sup> and also where agency actions are found to be “without observance of procedure required by law.”<sup>92</sup>

To briefly summarize, the plaintiffs in the roadless rule cases argued that the Forest Service violated the requirements of NEPA on several counts: the agency did not allow enough time for the public to meaningfully participate,<sup>93</sup> it failed to consider a full range of alternatives in the Environmental Impact Statement (EIS) process,<sup>94</sup> and inexplicably failed to grant the most affected states participation in the process by granting cooperating agency status.<sup>95</sup> The plaintiffs also alleged that the Forest Service violated several other laws, most importantly the Wilderness Act.<sup>96</sup> The Wilderness Act violations consisted mainly of accusations that the Forest Service, through the roadless rule, created de facto wilderness areas, a power that Congress specifically reserved for itself in the Wilderness Act.<sup>97</sup> In *Wyoming v. USDA*,<sup>98</sup> the Forest Service was also accused of violating the National Forest Management Act and the Multiple Use Sustained Yield Act among others, but the district judge did not consider it necessary to consider these in light of the violations of NEPA and the Wilderness Act.<sup>99</sup> It should be noted that the plaintiffs in *Kootenai Tribe of Idaho v. Veneman*<sup>100</sup> and *Idaho ex rel. Kempthorne v. U.S. Forest Service*<sup>101</sup> (the other roadless rule cases in which decisions have been reached) made similar arguments.<sup>102</sup>

Considering that the substance of the arguments presented at both the trial and appellate levels were generally the same (the rule was/was not rushed through, the alternatives considered in the EIS were/were not sufficient), why did the district judges in *Kootenai* and *Wyoming* enjoin the roadless rule (as

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NEGLECT 100 (2001).

90. 5 U.S.C. § 702.

91. *Id.* § 706(2)(A).

92. *Id.* § 706(2)(D).

93. *See* 40 C.F.R. § 1506.6 (2007).

94. *See* 42 U.S.C. § 4332(E)(2000); 40 C.F.R. § 1501.2 (c).

95. *See* 40 C.F.R. §§ 1501.6, 1501.7(a)(1).

96. *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1232 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

97. *See Parker v. United States*, 448 F.2d 793 (10th Cir. 1971).

98. *Wyoming v. USDA*, 277 F. Supp. 2d at 1197.

99. *Id.* at 1237.

100. 142 F. Supp. 2d 1231 (D. Idaho 2001).

101. 142 F. Supp. 2d 1248 (D. Idaho 2001).

102. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1106 (9th Cir. 2002).

the dissenting judge in the Ninth Circuit panel would have done as well<sup>103</sup>) while the Ninth Circuit supported the rule? The answer to this question is apparent by looking for evidence of a judicial iron triangle. The judges at each level were voting with their own political preferences in mind, and the interest groups bringing and defending the rule provided them the rationale and opportunity to do so, while receiving in return an open forum from the court.

Although the sample is not large enough to make sweeping generalizations about environmental policy, the most common and accurate indicator of how a judge would rule in a roadless rule case was the political party of the president who nominated him or her. Judges nominated by Republican presidents ruled against the roadless rule, whereas the two Ninth Circuit judges voting to uphold it were both appointed by President Clinton.<sup>104</sup> Additional support for finding politically motivated decision making comes from the language in the judges' opinions, which becomes particularly evident when comparing the *Kootenai* decision with the decision in *Wyoming*.<sup>105</sup>

Analysis of the *Kootenai* decision reveals the majority's view of the roadless rule and the environmental philosophy underlying it. The most telling example is found in footnote 30 of the majority opinion in which the judges asserted that the court had to consider the fact that endangered wildlife found refuge in roadless areas.<sup>106</sup> The judges' demand for consideration of endangered wildlife illustrates that political philosophy, and not precedent, guided their decision. NEPA makes no express mention of wildlife anywhere within the text of the Act, though there is one regulation that states that "[the] degree to which the action may adversely affect an endangered or threatened species or its habitat"<sup>107</sup> is one factor that should be considered when determining if the action is "significant[]." <sup>108</sup> If an action is deemed to have a significant effect on the environment, an environmental impact statement is then required.<sup>109</sup> Instead, NEPA's policy goals are expressed in terms of humans' relationship with the environment; for example, Congress intended that NEPA would protect the environment for the "overall welfare and development of man" and to "fulfill the social, economic, and other

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103. *Id.* at 1129-31.

104. This information was compiled from the Federal Judicial Center website which has biographical information for every federal judge going back to 1789. See Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/history/home.nsf> (last visited May 20, 2009).

105. Compare *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1203, 1226-27 (D. Wyo. 2002), vacated as moot, 414 F.3d 1207 (10th Cir. 2005), with *Kootenai*, 313 F.3d at 1120-27.

106. *Kootenai*, 313 F.3d at 1125 n.30.

107. 40 C.F.R. § 1508.27(b)(9) (2007).

108. *Id.* § 1508.27.

109. 42 U.S.C. § 4332(C) (2006).

requirements of present and future . . . Americans.”<sup>110</sup> That is not to say that animals do not form part of the “environment”; rather, there is no language in NEPA *requiring* a consideration of such factors in arriving at a decision to act. The *Kootenai* majority overturned the district court’s injunction based on what they alleged were NEPA’s policy goals,<sup>111</sup> finding that the roadless rule furthered the substantive goals of the Act. This position is also inconsistent with precedent holding that NEPA’s substantive policy is not legally enforceable. In 1978, the United States Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* held that while “NEPA does set forth significant substantive goals for the Nation . . . its mandate to the agencies is essentially procedural.”<sup>112</sup> This position has been consistently reinforced by courts in later decisions.<sup>113</sup>

Additionally, the majority asserted in defense of its ruling that the “NEPA alternatives requirement [part of the EIS process] must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment.”<sup>114</sup> This amounts to a holding that it is acceptable for an agency to violate the procedural requirements of the NEPA so long as the substance of the action is pro-environment. In response to the majority’s ruling, the dissenting judge noted that there is no precedent for this interpretation of NEPA.<sup>115</sup> Along similar lines, the majority also chastised the lower court for “[not] giving due weight to the public’s interest in conservation of natural resources”<sup>116</sup> in issuing the injunction—which could be interpreted as arguing that because the decision was not environmentally friendly, it is invalid. In doing so, the majority essentially rejected the explicit findings by the district court that the roadless rule would prevent irreparable harm to the plaintiffs by preventing Forest Service officials from actively managing national forests to prevent fires.<sup>117</sup> Instead, the majority claims this argument is “overstated” and notes that there could be “no serious argument” that the roadless rule would not provide “immeasurable benefits from a

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110. *Id.* § 4331 (a).

111. Some argue that Congress intended the NEPA to have a substantive aspect that was to be binding on agencies and that it is the courts who have eroded it by refusing to hold agencies to these substantive goals. See LINDSTROM & SMITH, *supra* note 89, at 53-64, 100-24.

112. 435 U.S. 519, 558 (1978).

113. *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980); *Nevada v. Dep’t of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep’t of Navy*, 383 F.3d 1082, 1087 (9th Cir. 2004).

114. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002).

115. *Id.* at 1126.

116. *Id.*

117. See *Kootenai Tribe of Idaho v. Veneman*, No. CV01-10-N-EJL, 2001 WL 1141275 at \*2 (D. Idaho May 10, 2001), *rev’d*, 313 F.3d 1094 (9th Cir. 2002).

conservationist standpoint.”<sup>118</sup> The majority cites no authority for balancing the hardships for the purpose of granting a preliminary injunction from a “conservationist standpoint.” In fact, the majority seems to assume that because the roadless rule would prevent trees from being cut down and roads from being constructed, it will necessarily conserve and protect the environment.<sup>119</sup>

Separating NEPA’s procedural requirements from any substantive goals it may have plays an important role in the relationship between courts and the other branches of government.<sup>120</sup> If courts were required to consider how well a proposed rule fits NEPA’s substantive goals, judges would be forced to make value-laden, politically motivated decisions. For instance, how is a judge to determine whether or not an agency action “fulfill[s] the responsibilities of each generation as trustee of the environment,”<sup>121</sup> or whether a rule “encourage[s] productive and enjoyable harmony between man and his environment?”<sup>122</sup> These are the kind of substantive goals found in NEPA, and, as is apparent, it would be impossible for them to be uniformly interpreted and enforced across the country because these goals are understood differently by different individuals. Divorcing the procedure from the substance plays an important role in ensuring NEPA will be interpreted similarly throughout the country.

Judge Brimmer’s district court opinion in *Wyoming* differs in more than its conclusion. The first thing that strikes the reader about the opinion is the greater amount of documentary evidence that was available to and utilized by Brimmer in issuing his ruling.<sup>123</sup> The administrative record of the case was full of internal documents that suggested that the Forest Service intentionally and arbitrarily rushed the rulemaking process in order to keep to the timeline imposed by President Clinton and Forest Service Chief Mike Dombeck.<sup>124</sup> The result is that Brimmer’s conclusions appear more defensible than some of those reached by the *Kootenai* majority; but, that is not to say that he was free from politically motivated decision making.

Judge Brimmer makes no attempt to hide his disdain for the Ninth Circuit’s *Kootenai* decision. In a lengthy footnote, he calls the decision “judicial gloss” and, therefore, “refrain[s] from relying on any Ninth Circuit NEPA opinions

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118. *Kootenai*, 313 F.3d at 1124-25.

119. *Id.* at 1129.

120. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, 421 (1976).

121. 42 U.S.C. § 4331(b)(1) (2000).

122. *Id.* § 4321.

123. *Wyoming v. USDA*, 277 F. Supp. 2d 1197 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

124. *Id.* at 1218-20.

as persuasive authority.”<sup>125</sup> Similarly, in his opinion’s first sentence, Brimmer states that the issue before the court is the legality of the roadless rule, which the Forest Service “drove through the administrative process in a vehicle smelling of political prestidigitation.”<sup>126</sup> Brimmer further accuses the agency of losing sight of its mission while attempting to “create a ‘legacy’ for itself and the Clinton administration through the Roadless Rule.”<sup>127</sup>

Brimmer’s display of political disgust with the Forest Service’s actions was not necessary to the resolution of the case. His colleagues in the District of Idaho did not need to resort to political bickering to resolve essentially the same arguments.<sup>128</sup> However, it does suggest that federal judges can and will use their opinions to shape the public debate on controversial issues. It is doubtful that the judges involved were oblivious to the fact that a decision like *Kootenai* or *Wyoming* would receive substantial press coverage or that their words would form the basis of news reports on the decisions.<sup>129</sup> Furthermore, newspapers reporting on the roadless rule cases did not always rely on the legally operative portions of the decisions but instead chose quotes from dicta in the opinions. For example, in reporting on the Ninth Circuit’s decision in *Kootenai*, *The Oregonian* quoted some of the troubling language in the majority’s opinion—that there could be “no serious argument” on the roadless rule’s “benefits from a conservationist standpoint.”<sup>130</sup> This illustrates one of the less recognized benefits interest groups receive in going to court, as issues that might otherwise be ignored and groups that might remain unknown are brought to the spotlight, regardless of their success. This publicity then can be translated into influence on the other branches of government.<sup>131</sup>

As mentioned above, judges also rely, to some degree, on interest groups to provide them with highly technical information and to present legal arguments. The most traditional manner in which groups do so (other than by bringing cases) is to submit amicus curiae briefs.<sup>132</sup> This form of participation

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125. *Id.* at 1203 n.1.

126. *Id.* at 1203.

127. *Id.* at 1238.

128. The Idaho district court only noted that strong evidence was presented that “the end result was pre-determined.” *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1247 (D. Idaho 2001).

129. In some newspapers, the decisions were front page news, in such unlikely places as Akron, Ohio. *E.g.*, *Court Ruling a Blow to Bush Forest Plan*, AKRON BEACON J., Dec. 14, 2002, at A1 (referring to the Ninth Circuit’s *Kootenai* ruling specifically).

130. Michael Milstein, *Decision Revives Clinton’s Roadless Rule*, OREGONIAN, Dec. 13, 2002, at A1.

131. Lynn Mather, *The Fired Football Coach (Or, How Trial Courts Make Policy)*, in CONTEMPLATING COURTS 170, 179, 183-84 (Lee Epstein ed., 1995).

132. Kearney & Merrill, *supra* note 79, at 744.

has grown exponentially in the past fifty years.<sup>133</sup> At the United States Supreme Court level, the number of filings by amici has risen by more than 800 percent, while the caseload has remained relatively static.<sup>134</sup> This trend is reflected in the roadless rule cases. For example, by the time the *Wyoming* decision reached the Tenth Circuit, twelve amicus curiae briefs had been submitted on behalf of twenty-one different groups.<sup>135</sup> Despite the prevalence of this form of participation, most attempts to quantitatively gauge the influence of amici briefs on judicial decision making generally have produced inconclusive results.<sup>136</sup> However, as the roadless rule cases suggest, they do seem to be used by judges as sources of information and reasoning to support their decisions. For example, the Ninth Circuit majority in *Kootenai* used the reasoning found in the amicus brief of Montana's Attorney General to support its argument that the roadless rule's public participation process was sufficient—or in the Attorney General's words, “exemplary.”<sup>137</sup>

*B. Benefits Provided to Interest Groups by the Courts—The Keys to the Courthouse Door*

While judges obviously play a central role in environmental policymaking, without interest groups, courts would be almost irrelevant because they lack any power to bring suits on their own. Perhaps the greatest benefit judges confer on environmental interest groups is permitting them to bring suit, which judges do by applying standing requirements more or less stringently (depending on the issues in the case), recognizing valid causes of action for violations of environmental statutes that do not contain express citizen suit provisions (especially NEPA), and liberally granting environmental interest groups status as interveners.<sup>138</sup>

Standing is the basis for all cases brought in the federal court system.<sup>139</sup> It is generally derived from Article III of the Constitution, which limits the jurisdiction of federal courts to cases and controversies; it is considered one element of this limit.<sup>140</sup> The case or controversy limitation is meant to ensure

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133. *Id.* at 749.

134. *Id.*

135. *Wyoming v. USDA*, 414 F.3d 1207 (10th Cir. 2005).

136. *Kearney & Merrill*, *supra* note 79, at 829 (finding that certain groups do enjoy a higher degree of success than others). For example, “the Solicitor General [of the United States] enjoys a unique degree of success,” as do other groups with long histories of participation in the judicial process (such as the ACLU and the AFL-CIO). *Id.*

137. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1116 n.19 (9th Cir. 2002).

138. *See supra* notes 73-75 and accompanying text.

139. CHARLES H. ECCLESTON, *THE NEPA PLANNING PROCESS: A COMPREHENSIVE GUIDE WITH EMPHASIS ON EFFICIENCY* 314 (1999).

140. U.S. CONST. art. III, § 2; *see also* *Lance v. Coffman*, 549 U.S. 437 (2007) (summarizing

that the federal courts only hear true disputes—not hypothetical situations or cases where all matters in question have already been resolved (e.g., moot cases).<sup>141</sup> In modern times, the law of standing has developed greatly in the realm of environmental litigation, as courts utilize standing rules to either open or close the door to environmental interest groups.<sup>142</sup> The first step towards expanding the concept of standing in environmental cases (particularly in the context of a private citizen seeking to enforce federal statutes) came with the 1966 United States Court of Appeals case *Scenic Hudson Preservation Conference v. Federal Power Commission*.<sup>143</sup> In *Scenic Hudson*, the Second Circuit recognized that to have standing the harm a party must suffer can be more than a personal economic interest.<sup>144</sup> There, the court recognized that the plaintiffs had standing to bring suit based on the aesthetic harms they allegedly suffered.<sup>145</sup>

The first United States Supreme Court case to address a similar issue was *Sierra Club v. Morton*,<sup>146</sup> decided in 1972. *Morton* was decided along similar lines as *Scenic Hudson* in that the Supreme Court rejected the position that only economic harm was sufficient to bring suit under the APA, noting that injury to “aesthetic, conservational, and recreational” values can also amount to legally cognizable damage, sufficient to find an actual case or controversy.<sup>147</sup> The United States Supreme Court expanded citizen standing even further in *United States v. Students Challenging Regulatory Agency Procedures* (commonly known as *SCRAP*).<sup>148</sup> In *SCRAP*, the Court maintained the requirement that a plaintiff must allege harm, but the decision seemed to allow an indirect link between that harm and the agency action.<sup>149</sup>

Standing law was further refined with the appointment to the United States Supreme Court of Justice Scalia, a long time critic of expansive grants of

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the Supreme Court’s jurisprudence on standing).

141. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

142. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 402-13 (3d ed. 2004). One could argue that this has nothing to do with judicial iron triangles, and instead it is just evidence of the evolution of standing doctrine. This paper takes the position that the evolution of standing has largely been driven by judges deciding whether or not they want to decide a given issue. When an issue seems to compel a decision contrary to a judge’s policy preferences, he or she will use standing as a way to dispose of the case without getting involved in deciding the merits. *Id.*

143. 354 F.2d 608 (2d Cir. 1965).

144. *Id.* at 615.

145. *Id.* at 616.

146. 405 U.S. 727 (1972).

147. *Id.* at 737-40 (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970)).

148. 412 U.S. 669 (1973).

149. *Id.* at 687-90.

standing in citizen enforcement cases.<sup>150</sup> His influence over standing law reached its apex in *Lujan v. Defenders of Wildlife*.<sup>151</sup> In *Lujan*, the three-part test for standing that had developed over the previous years was reaffirmed: (1) the plaintiff must suffer a legally cognizable “‘injury in fact’ . . . which is (a) concrete and particularized . . . and (b) ‘actual or imminent’, not conjectural or hypothetical”; (2) there must be a “causal connection between the injury and the conduct complained of”; and (3) it must be “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”<sup>152</sup> What was remarkable about *Lujan* is that it held that the violation of the public interest by the federal government itself was not a sufficient harm to support standing, even where, as in *Lujan*, Congress had specifically provided a citizen suit provision in the relevant statute (the Endangered Species Act).<sup>153</sup>

Finally, conservationists received a favorable standing decision in 2000 when the United States Supreme Court decided *Friends of the Earth v. Laidlaw Environmental Services, Inc.*<sup>154</sup> The majority opinion, written by Justice Ginsburg (over the fervent dissent by Justice Scalia) explained that the harm necessary for standing (in environmental cases) is not solely harm to the environment, but rather, harm to the plaintiff.<sup>155</sup> Furthermore, Justice Ginsburg’s opinion reiterated that aesthetic harm is sufficient for standing’s sake.<sup>156</sup> The decision also held that, under the particular facts of the case, citizen attempts to require that civil penalties be paid by the defendant were sufficient to support the redressability requirement of standing, despite the fact that such fines are paid to directly to the government and not the plaintiff.<sup>157</sup> Ginsburg reasoned that civil penalties would have a deterrent effect on the questioned behavior and tend to assure that the wrongful activities will not be

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150. See his oft-quoted article, published before he became a Justice of the Supreme Court, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

151. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because the interveners in the roadless rule cases could have no legally cognizable injury according to the holdings of *Diamond v. Charles*, 476 U.S. 54, 64-65 (1986), and *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th Cir. 2000), they did not satisfy part one of the *Lujan* test, and it is unimportant to consider the other two, as all three elements must be met for a plaintiff to have standing.

152. *Lujan*, 504 U.S. at 560-61 (citations omitted) (internal quotation marks omitted).

153. *Id.* at 571-74.

154. 528 U.S. 167 (2000).

155. *Id.* at 182-83.

156. *Id.*

157. *Id.* at 186-87.

continued. In this way, citizens can receive redressability from civil penalties.<sup>158</sup>

In the roadless rule cases, the plaintiffs' standing to bring suit was not a significant issue, though it was contested. The courts mechanically applied the *Lujan* test and easily found its requirements to be satisfied.<sup>159</sup> In the NEPA context, a plaintiff must show that the "procedures in question are designed to protect some threatened concrete interest,"<sup>160</sup> which is accomplished by demonstrating a "geographic nexus between their NEPA claims and the land allegedly suffering an environmental impact."<sup>161</sup> For example, the harm the Kootenai tribe suffered could not have come from a NEPA violation alone to support a claim of standing.<sup>162</sup> Rather, the tribe owned land adjacent to national forests and they alleged the roadless rule would lead to wildfires and insect infestations.<sup>163</sup> The State of Wyoming made similar claims in its suit.<sup>164</sup> In contrast, and perhaps more troubling, however, is the liberal granting of status as defendant-interveners to several interest groups (nine in *Kootenai*<sup>165</sup> and eight in *Wyoming*<sup>166</sup>) in the roadless rule cases under Federal Rule of Civil Procedure 24, which, to some extent, is tied to the concept of standing.<sup>167</sup>

Intervention by interest groups is not necessarily troublesome, particularly when groups intervene on behalf of a plaintiff presenting, for example, a NEPA challenge to an agency rule. Intervention is thought to assist the administration of justice by allowing individuals, not a party to the original case, to intervene where the outcome of the case may affect their rights or where their participation may assist in the resolution of the case.<sup>168</sup> Courts

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158. *Id.*

159. *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1214-17 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005); *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1238-39 (D. Idaho 2001).

160. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992).

161. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1112 (9th Cir. 2002) (internal quotation marks omitted).

162. *Id.*

163. *Id.*

164. *Wyoming v. USDA*, 277 F. Supp. 2d at 1215-16.

165. *Kootenai*, 313 F.3d at 1095.

166. *Wyoming v. USDA*, 414 F.3d 1207, 1210 n.2 (10th Cir. 2005).

167. To summarize, Federal Rule of Civil Procedure 24(a) allows for intervention of right where (1) a statute confers an unconditional right to intervene; (2) when the applicant claims an interest relating to the transaction which is the subject of the action and is so situated that the decision may impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties. Federal Rule of Civil Procedure 24(b) allows permissive intervention when (1) a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

168. Appel, *supra* note 76 (generally discussing the historical development of intervention

tend to disagree on the status of intervenors, whether they are full parties with all the rights and obligations that come with such status, or whether they are something less.<sup>169</sup> This question is particularly troubling when the original party, with whom the intervenor is aligned, declines to appeal an unfavorable ruling.<sup>170</sup>

The trouble arises when, as in the roadless rule cases, groups are granted status as defendant-intervenor in a NEPA challenge, and the original defendant is the federal government. After an unfavorable ruling, the government then chooses not to appeal. As the Ninth Circuit noted, this is an “unusual procedural setting.”<sup>171</sup> From a constitutional perspective, this raises a separation of powers question under the Constitution’s Article II, which requires the Executive to “take Care that the Laws be faithfully executed.”<sup>172</sup> In this example, the courts are forcing a rule upon the executive branch that the administrative agency responsible for it admits is problematic and is actively working to change. However, if the roadless rule was required to be implemented either by statute or through the Constitution, and the federal government refused to defend it, then the intervenors could legally appeal the case.<sup>173</sup>

Furthermore, the roadless rule cases were inappropriate for intervention because the statute that had been violated, NEPA, is binding only on the federal government,<sup>174</sup> except in cases where nonfederal action has been federalized by a partnership between local and federal governments.<sup>175</sup> This was not the situation here, and accordingly, the Ninth Circuit in *Kootenai* held that “because NEPA requires action only by the government, only the government can be liable under NEPA. Because a private party cannot violate NEPA, it cannot be a defendant in a NEPA compliance action,”<sup>176</sup> and it is denied intervention of right under Federal Rule of Civil Procedure 24(a).

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and its use in environmental cases).

169. *Id.* at 277-79.

170. Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 GA. L. REV. 411, 440-52 (2005).

171. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002).

172. U.S. CONST. art. II, § 3.

173. This argument is more completely and forcefully argued in Brief for the United States as Amicus Curiae Supporting Appellee’s Motion to Dismiss at 15-16, *Wyoming v. USDA*, 414 F.3d 1207 (10th Cir. 2005) (No. 03-858), available at [http://www.ourforests.org/documents/feds\\_amicus.pdf](http://www.ourforests.org/documents/feds_amicus.pdf).

174. *See Biderman v. Morton*, 497 F.2d 1141, 1146-47 (2d Cir. 1974).

175. *Monarch Chem. Works, Inc. v. Exon*, 452 F. Supp. 493, 501-02 (D. Neb. 1978).

176. *Kootenai*, 313 F.3d at 1108 (quoting *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1114 (9th Cir. 2000) (citation omitted)).

Despite the fact that the government conceded that there were problems with the roadless rule and it was taking steps to remedy them, the Ninth Circuit nonetheless allowed the defendant-intervenors to pursue their appeal under Federal Rule of Civil Procedure 24(b).<sup>177</sup> This decision is in stark contradiction with United States Supreme Court precedent established in *Diamond v. Charles*, which held that “[b]ecause the State alone is entitled to create a legal code, only the State has the kind of ‘direct stake’ . . . in defending the standards embodied in that code.”<sup>178</sup> Not only that, but it appears that whatever standards the Federal Rules of Civil Procedure attempt to place on permissive intervention under Rule 24(b), in the environmental context, all that is required to meet Rule 24(b)(2)’s guideline that an intervenor’s “claim or defense . . . share [] with the main action a common question of law or fact”<sup>179</sup> is that defendant-intervenors assert “defenses . . . directly responsive to the claim[]” of the other party.<sup>180</sup>

The importance of this benefit provided by courts to interest groups cannot be overstated. If the roadless rule cases are indicators of any trends in environmental interest group behavior, it is that intervention might become one of the primary forms of group participation in the policy-making process. For example, by the time *Kootenai* reached the Ninth Circuit, nine groups had been granted status as defendant-intervenors.<sup>181</sup> The major benefit that these groups reap from the courts through intervenor status is the ability to act as a “real” party; yet, because so many of the groups intervene at the same time, they are able to spread the costs of litigation. The phenomenon is still present when environmental interest groups are in the plaintiff’s chair. In *California ex rel. Lockyer v. USDA*, 20 conservationist interest groups joined together in bringing suit.<sup>182</sup> This practice is not merely a tool of conservationist groups—in *Kootenai*, nine different groups (which could be generally classified as pro-development) intervened as plaintiffs.<sup>183</sup> This type of involvement begs the question whether the purpose and rationale for joinder and intervention<sup>184</sup> are being realized in environmental cases, or instead

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177. *Id.* at 1110. *Contra* Stephanie D. Matheny, Note, *Who Can Defend a Federal Regulation? The Ninth Circuit Misapplied Rule 24 by Denying Intervention of Right in Kootenai Tribe of Idaho v. Veneman*, 78 WASH. L. REV. 1067 (2003) (arguing that intervention of right should have been granted to the defendant-intervenors).

178. *Diamond v. Charles*, 476 U.S. 54, 65 (1986).

179. FED. R. CIV. P. 24(1)(B).

180. *Kootenai*, 313 F.3d at 1110.

181. *Id.* at 1095.

182. 459 F. Supp. 2d 874, 879 (N.D. Cal. 2006).

183. *Kootenai*, 313 F.3d at 1094.

184. FED. R. CIV. P. 20, 24.

whether interest groups are permitted to use these techniques to overwhelm their opponents by showing strength in numbers?

### *III. The Bureaucracy, Interest Groups, and the Roadless Rule*

Since the days of Woodrow Wilson, it has long been thought that there is,<sup>185</sup> or ought to be, a “politics/administration dichotomy.”<sup>186</sup> In other words, the elected branches of government (specifically Congress) should make political decisions while bureaucrats only make decisions on how to implement (or administer) those choices.<sup>187</sup> Bureaucrats, in this view, are to be impartial as they administer Congress’ decisions, or in Wilson’s words, “politics sets the tasks for administration” but should not “manipulate its offices.”<sup>188</sup> The consequence, however, is an inflexible adherence to the rules.<sup>189</sup> Although this conception of bureaucracy has largely been rejected by political scientists, most of whom acknowledge that administrators often must make highly political choices,<sup>190</sup> questions remain, principally: How much discretion should unelected bureaucrats have? Furthermore, can agencies be hijacked by (or in the case of judicial iron triangles, collude with) other political actors in an effort to achieve policy goals that could not be realized elsewhere in the political process? The former question will be addressed in the following section, but the latter will be addressed here, as the roadless rule’s history suggests that agencies, in this case the Forest Service, are excellent forums for frustrated policymakers and stakeholders to pursue their goals when success is unlikely or impossible elsewhere.

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185. For his thoughts on what the relationship between politics and administration should be, see the classic article by Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 209-10 (1887).

186. KENNETH J. MEIER, *POLITICS AND THE BUREAUCRACY* 41 (4th ed., Harcourt College Publishers 2000). One example of an attempt to maintain the division between administration and politics is the Council of Environmental Quality, which was made a part of the Executive Office of the President (an administrative office) instead of within the politically-oriented White House staff. This was done in an attempt to lessen the President’s control or influence over it. See Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENVTL. L. 275, 282-83 (1997).

187. Wilson, *supra* note 185, at 210-11.

188. *Id.* at 210.

189. See MEIER, *supra* note 186, at 41.

190. *Id.* at 40-42 (arguing that political questions differ from administrative questions only by who decides them).

*A. Benefits Provided to Interest Groups by Agencies—An Accessible, Efficient Forum*

The major objection raised by critics of the roadless rule was that the Forest Service, while engaged in grudging, *pro forma* compliance with NEPA's procedural requirements, violated the spirit, if not the letter, of the law in its timeline for promulgating the rule.<sup>191</sup> The mad rush to complete the rule, according to critics, was an attempt by the Forest Service to grant a political favor to an outgoing president, while building a strong environmental legacy for itself and President Clinton.<sup>192</sup> The dissenting judge in the *Kootenai* decision went so far as to suggest that the roadless rule was promulgated in an attempt to help Vice President Gore's chances in the presidential election.<sup>193</sup> This link was also noted by many of the rule's opponents.<sup>194</sup> Interestingly, President Clinton's own words offer some evidence for this position, though it is by no means damning. In his October 1999 speech announcing the beginning of the rulemaking process, Clinton made an interesting choice of words, calling the roadless rule the "latest step taken under the administration of Vice President Gore and me," which could be interpreted as an attempt to link Gore to the rule<sup>195</sup> with the hope that it would help him in the 2000 presidential elections.<sup>196</sup> Also, in most correspondence and speeches about the rule, there is an attempt to link this action with the past actions of President Theodore Roosevelt, widely remembered for, among other things, establishing the first national parks.<sup>197</sup> This attempt appears to have been successful to some degree with newspapers often remarking on the Roosevelt link in some fashion. The *Anchorage Daily News*, for example, quoted the president of the

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191. See, e.g., the arguments presented by the plaintiffs in *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1217-31 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

192. Even Judge Brimmer seemed to agree with critics. *Id.* at 1238.

193. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1130-31 (9th Cir. 2002) (Kleinfeld, J., dissenting).

194. See Alexander Cockburn, *Clinton Hugs Not Trees but Gore Campaign*, L.A. TIMES, Oct. 21, 1999, at B11.

195. Clinton, *supra* note 10.

196. Documents from the Forest Service dating to the infancy of the rule suggest that late 2000 was the expected completion date. See Letter from Mike Dombeck, Forest Service Chief, to Forest Service Employees (Oct. 14, 1999) (on file with author).

197. Clinton, *supra* note 10. In this speech of 2,178 words, President Clinton devoted 584 words (26.8 percent) to a discussion of Roosevelt and his importance to the conservation movement. *Id.* Additionally, Clinton used the name "Roosevelt" 13 times. *Id.*

Wilderness Society who called the rule “the most significant land preservation undertaking since Teddy Roosevelt built the national forest system.”<sup>198</sup>

Yet did President Clinton, various environmental interests, and the Forest Service collude to promulgate the roadless rule by the end of his term, and in the process violate the NEPA either in spirit or by the letter of the law? The evidence presented in the *Wyoming* decision (which among all of the roadless rule decisions most heavily relied on the rule’s administrative record) suggests that, at best, the Forest Service complied with NEPA *pro forma*, and at worst, purposefully disregarded an act designed to encourage meaningful, open, and public participation in the planning process and ensure that decisions are made on an informed basis.

The information provided in the rulemaking process was altogether unacceptable, according to most actors.<sup>199</sup> For instance, the Forest Service never provided detailed maps of the areas to be covered by the rule—the maps were of a continental scale and, thus, “lack[ed] sufficient detail to be of help in determining what specific roads and areas [we]re affected,” as the Wyoming State Engineer’s Office noted.<sup>200</sup> The information provided in hundreds of meetings held at a local level also seems to have been inadequate. In *Kootenai*, a member of the Kootenai tribal council noted in an affidavit that the “Forest Service District Ranger could not tell tribal representatives any specific information regarding the impacts the President’s Roadless Initiative would have on the rights of tribal members.”<sup>201</sup>

Besides inadequate information, the timeframe followed by the Forest Service in promulgating the rule also appears arbitrary and capricious and suggests an agency headed toward a predetermined result. In a letter to employees dated October 14, 1999, Forest Service Chief Mike Dombeck explained that the rule was expected to be completed by late 2000.<sup>202</sup> In keeping to this time frame, the comment period for the draft EIS was a mere sixty-nine days, despite the final statement being 700 pages.<sup>203</sup> While the regulations of NEPA require only a forty-five day comment period, this time

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198. Paula Dobbyn, *Clinton Plans Forest Shield, Tongass Areas May Become Protected*, ANCHORAGE DAILY NEWS, Oct. 14 1999, at F1 (quoting William H. Meadows, president of the Wilderness Society).

199. See *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1244-45 (D. Idaho 2001).

200. *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1209 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005) (quoting Roadless Rule Admin. Record, Doc. 4580, at 30) (internal brackets omitted).

201. *Kootenai*, 142 F. Supp. 2d at 1245 n.23.

202. Dombeck, *supra* note 196.

203. 1 FOREST SERV., *supra* note 35, at 7.

period is strictly a minimum.<sup>204</sup> Several requests for extensions were received and the Forest Service turned them down, despite a tradition of liberally granting extensions.<sup>205</sup> The Forest Service also turned down Wyoming's (and all other states') request to participate in the process with "cooperating agency status" because the state "would want to work at too great of a 'level of detail.'"<sup>206</sup>

Finally, the EIS requirement of NEPA compels agencies to consider a range of alternatives (including a "no-action alternative").<sup>207</sup> In the roadless rule EIS, three action alternatives were considered, all of which banned road construction and reconstruction, the difference being in the amount of other activities to be allowed in the affected areas.<sup>208</sup> Even the no-action alternative, if it were accepted, would still ban road building, as the interim roadless rule would still be in effect.<sup>209</sup> No alternatives were considered that allowed for any degree of road building beyond that to prevent imminent catastrophe because it would create an "unmanageably large number of alternatives."<sup>210</sup> This was the case despite the fact that several other possible alternatives could have been considered that would have prevented degradation to roadless areas without an outright ban on road building.<sup>211</sup> Prior Ninth Circuit precedent had held "[t]he existence of a viable but unexamined alternative renders an [EIS] inadequate. An agency's consideration of alternatives is adequate if it considers an appropriate range of alternatives, even if it does not consider every available alternative."<sup>212</sup> The dissenting opinion in *Kootenai* suggests a few reasonable alternatives to describe the range considered by precedent, such as limiting road density, limiting road construction materials, or limiting use to low-emission vehicles.<sup>213</sup> Thus, according to one court's opinion, by defining the scope of the project so narrowly, the Forest Service essentially defined the rule into existence.<sup>214</sup>

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204. *Kootenai*, 142 F. Supp. 2d at 1246.

205. See Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7290, 7295 (Feb 12, 1999).

206. *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1221 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

207. 40 C.F.R. § 1502.14(d) (2007).

208. 1 FOREST SERV., *supra* note 35, at 2-5.

209. *Wyoming v. USDA*, 277 F. Supp. 2d at 1207.

210. *Id.* at 1224-25 (quoting Roadless Rule Admin. Record, Doc. 4609, at 2-15).

211. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1128-29 (9th Cir. 2002) (Kleinfeld, J., dissenting).

212. *Id.* at 1129 (quoting *Res. Ltd. V. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1994)).

213. *Id.* at 1128-29.

214. *Wyoming v. USDA*, 277 F. Supp. 2d at 1226.

Given the scope of the rule, which affected two percent of the United States' land mass and more than a quarter of Forest Service land base, the length of time for the entire process—about fifteen months—seems insufficient, given that many other Forest Service projects of a much smaller scale took years to complete. For example, the 1997 revision of the Tongass Land Management and Resource Plan, which was as controversial as the roadless rule on a local level, took more than ten years to complete.<sup>215</sup> The rushed rulemaking process suggests an active partnership between certain interest groups and the Forest Service to see the roadless rule completed, and further, to see it completed at a politically relevant date.

*B. Benefits Provided to Agencies by Interest Groups—Information and Public Support*

Though the executive branch exercises the greatest degree of control over the administrative rulemaking process, interest groups also regularly attempt to exert influence in a variety of ways. In one study, 80 percent of the groups surveyed said they participated in the rulemaking process.<sup>216</sup> Furthermore, these groups rated it as one of their most important activities; more than 75 percent felt it was equal to or more important than lobbying Congress.<sup>217</sup> The roadless rule experience provides a powerful example of this. One investigation found that, from 1998 through 2000, environmental groups spent more than \$10 million campaigning for the roadless rule.<sup>218</sup> Additionally, they spent almost \$2 million of that amount in an effort to convince the Forest Service to apply the rule to the Tongass National Forest.<sup>219</sup> This is striking when one considers that the timber industry gave only \$6.5 million to congressional candidates in the 2000 elections.<sup>220</sup> Thus, environmental groups spent more money campaigning for the adoption of an administrative rule than an entire industry gave to candidates during a hotly contested national election cycle.<sup>221</sup>

Another form of interest group participation in rulemaking is for a group to rally its rank-and-file members to support the cause. This method was taken

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215. To appreciate how contentious (and expensive) the process of revising the Tongass Forest Plan was, see GEN. ACCOUNTING OFFICE, TONGASS NATIONAL FOREST: PROCESS USED TO MODIFY THE FOREST PLAN (2000).

216. CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 180 (CQ Press, 3d ed. 2003).

217. *Id.* at 181.

218. Michelle Cole, *Wealthy Foundations Help Crusade to Protect Forests*, OREGONIAN, Jan. 2, 2001.

219. *Id.*

220. *Id.*

221. *Id.*

to record-setting proportions during promulgation of the roadless rule, as the Forest Service received more than one million comments.<sup>222</sup> Yet, to some extent this is evidence of nothing more than an attempt to turn the comment process into a national referendum on the rule.<sup>223</sup> In the draft EIS comment period, 1,155,000 comments were received in some form.<sup>224</sup> Of these, about one million were postcards or form letters, while only 60,000 were original letters.<sup>225</sup> Of all the comments, the content analysis team was able to find only 2,450 unique comments.<sup>226</sup>

Despite this, some claimed that the public comments did have an impact on the final rule. One Forest Service official called the roadless rule public participation process “the best of democracy in action.”<sup>227</sup> Forest Service Chief Dombeck asserted that public comment was directly responsible for inclusion of the Tongass National Forest in the final rule, as it had been exempt from the interim rule.<sup>228</sup> If true, this would suggest that public comment is indeed seen as a type of vote. A director at the Wilderness Society claimed that the rule was not predetermined, but rather that “President Clinton [and Vice President Gore?] got the ball moving with the roadless rule” and would have backed off if not for the magnitude of the public comments in favor of the rule.<sup>229</sup>

Using the public comment period as a kind of national referendum on environmental policy is particularly inappropriate for a democratic society. Most of those who comment on proposed rules find themselves at one extreme or the other in terms of their attitudes toward the rule.<sup>230</sup> This can be seen simply by looking to the origin of the comments—most were received from members of environmental conservation groups, in the form of postcards and

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222. 1 FOREST SERV., *supra* note 35, at 1-7.

223. Some scholars even suggest that public comments should be considered by the agency as a type of straw vote, and they suggest methods to follow that would make this a feasible option. *See* Nie, *supra* note 21, at 740-42.

224. 3 FOREST SERV., *supra* note 35, at 1.

225. 1 FOREST SERV., *supra* note 35, at 1-7.

226. 3 FOREST SERV., *supra* note 35, at 1.

227. Nie, *supra* note 21, at 718-19.

228. *Id.* at 719. There might be some truth to this claim. All the evidence points to the unfair burden this rule would place on Alaska, and it further suggests that the rule amounts to little more than an attempt to shut down the Tongass National Forest to development. Because 25 percent of all roadless land is in the Tongass, the rule would have reduced timber harvest in roadless areas by 126.3 million board feet, 61 percent of which is in the Tongass. It would also result in the loss of 730 direct timber-related jobs, 383 of which are in the Tongass, more than every other state combined. *See* 1 FOREST SERV., *supra* note 35, at B-5.

229. Nie, *supra* note 21, at 719.

230. FOREST SERV., U.S. DEP'T OF AGRIC., SUMMARY OF PUBLIC COMMENT ON ROADLESS AREA CONSERVATION, at vii-xii (2000).

form letters.<sup>231</sup> This approach presents two major problems for an agency attempting to discern the concerns and opinions of the public. First, it creates a skewed view of public opinion, one that is probably not in accord with the positions of society at large. Second, it defeats the purpose behind requiring agencies to solicit public comments. Comments were intended to be a means of identifying issues and concerns that the agency failed to address or addressed inadequately in its preliminary analysis of the proposed action. Furthermore, it suggests that nationwide, “popular” comments are given far greater weight than even those of local policymakers in affected areas. This once again is problematic in that many of the areas most affected by the rule are sparsely populated rural areas. For example, the governor of Alaska, the state legislature, several state legislators, and eight local governments all submitted letters and/or resolutions in support of exempting the Tongass from the rule;<sup>232</sup> yet, even if everyone living in Alaska were to have submitted a comment in favor of exemption for the Tongass, those comments would only equal a little more than half of those submitted by postcard or form letter.<sup>233</sup> Thus, the roadless rule example lends strong support for the existence of the judicial iron triangle in environmental policy—by rallying their members, interest groups were able to grant the Forest Service and its rule the appearance of strong public support.

#### *IV. The Courts, the Bureaucracy, and the Roadless Rule*

The relationship between the courts and administrative agencies is perhaps the most tenuous among the three sides of a judicial iron triangle. While courts are often highly deferential to agency decisions, there is still a feeling in many agencies that judicial review of their decisions only promotes delay and inefficiency. There may be more to this claim than just agency bitterness towards the “new way” of doing things. Several studies have revealed that agencies are unusually difficult to defeat in litigation—generally finding that agencies are successful in 70 to 75 percent of their cases before the United States Supreme Court.<sup>234</sup> One Forest Service study found that in a five year period, the agency was successful in 62 out of 80 NEPA lawsuits brought against it.<sup>235</sup> Yet because of the constant fear of litigation, the Forest Service

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231. *Id.* at F1-F9.

232. 4 FOREST SERV., *supra* note 35, 28-58.

233. In the 2000 Census, Alaska’s population was determined to be 626,932. *See* U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/> (last visited May 20, 2009).

234. MEIER, *supra* note 186, at 141.

235. THE PROCESS PREDICAMENT, *supra* note 3, at A-14.

and other agencies spend vast resources “bullet proofing” their projects. A 1999 report found that planning and assessment consumed about 40 percent of the work at the Forest Service’s national level,<sup>236</sup> which equaled approximately \$250 million, or 20 percent of the Forest Service’s annual budget at the time.<sup>237</sup> One telling example cited by the Forest Service is that of a fire recovery project in the Bitterroot National Forest, which covered approximately 80,000 acres.<sup>238</sup> Forest Service employees spent 15,000 person-days planning the project, with costs exceeding \$1 million—\$100,000 of which was spent on printing and mailing costs.<sup>239</sup> Despite this, courts and agencies do have significant benefits to offer each other, and as the roadless rule cases illustrate, the relationship persists in environmental policymaking.

*A. Benefits the Courts Provide Agencies—Discretion and Deference*

The chief benefit courts have to offer administrative agencies is deference. Deference comes in two forms, the first being deference to an agency’s interpretation of its mission. In *Chevron v. Natural Resources Defense Council*,<sup>240</sup> the United States Supreme Court ruled that “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on permissible construction of the statute.”<sup>241</sup> Furthermore, the standard of review imposed by courts in statutory interpretation cases is the highly deferential arbitrary and capricious standard. This standard is taken from the APA section 706, and is perhaps one of the most deferential standards in administrative law.<sup>242</sup> One widespread example of judicial deference in environmental law is the generally consistent refusal of federal courts to recognize any substantive requirements in NEPA’s declaration of policy, found in section 101 of the Act. This reached its apex in *Robertson v. Methow Valley Citizens Council*,<sup>243</sup> which held that agencies are “not constrained by NEPA from deciding that other values outweigh the environmental costs . . . NEPA merely prohibits uninformed—rather than unwise—agency action.”<sup>244</sup>

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236. *Id.* at 35-36. The term “national level” here refers to work concerning the National Forest System as a whole, in contrast to the forest-by-forest, or regional level.

237. *Id.*

238. *Id.*

239. *Id.*

240. 467 U.S. 837 (1984).

241. *Id.* at 843.

242. 5 U.S.C. § 706 (2000).

243. 490 U.S. 332 (1989).

244. *Id.* at 350-51.

The second type of deference granted to administrative agencies by the courts is deference to the expertise of agencies in complex, technical decisions. The approach of the federal courts, and specifically the United States Supreme Court, to NEPA is again instructive. In the 1975 decision *Kleppe v. Sierra Club*, the Court noted that “[n]either [NEPA] nor its legislative history contemplates that a Court should substitute its judgment for that of the agency as to the environmental consequences of its actions.”<sup>245</sup> The Court went on to note that if NEPA’s procedural requirements are met, “[t]he only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences.”<sup>246</sup>

The roadless rule cases suggest that judicial deference to the substantive aspects of agency decisions remains alive and well today. In *Kootenai*, for example, the majority was willing to interpret NEPA less stringently where the underlying goal of the project was to protect the environment.<sup>247</sup> Despite the fact that this assertion was based on nothing more than the majority’s political preferences (there is certainly no precedent even hinting at this), it has been established as precedent in the Ninth Circuit and was cited by the Northern District of California as one of the primary rationales for reinstating the roadless rule, after enjoining the state petitions rule.<sup>248</sup> Even Judge Brimmer’s scathing opinion in the *Wyoming* decision represented a nod to the Forest Service. In that opinion, despite being critical of the Forest Service’s conduct during the rulemaking process, he was still to some degree deferring to the policy of the new Bush administration Forest Service that had refused to appeal the other injunctions against the rule and had lightly defended the rule before Brimmer’s court.<sup>249</sup>

#### *B. Benefits Agencies Offer Courts—The Power of the Sword*

In contrast, perhaps the main benefit agencies can confer on the courts is the willingness to implement the courts’ unfavorable decisions. As was noted by Hamilton in the Federalist papers, courts lack “influence over either the sword or the purse . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>250</sup> Despite the inherent weaknesses the Founders saw in the judiciary, it has enjoyed unusual success in seeing its decisions implemented by the administrative branch of government. One

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245. 427 U.S. 390, 410 n.21 (1976).

246. *Id.* at 410.

247. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002).

248. *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874, 895, 919 (N.D. Cal. 2006).

249. *Wyoming v. USDA*, 277 F. Supp. 2d 1197 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

250. THE FEDERALIST NO. 78 (Alexander Hamilton).

study of United States Supreme Court decisions from 1953 to 1990 found that agencies implemented policies in 92.7 percent of the cases in which they lost.<sup>251</sup>

The Forest Service's response to the Ninth Circuit's *Kootenai* decision illustrates the effectiveness of the courts. After the *Kootenai* decision was released, the Forest Service proceeded with implementing the decision, despite the fact that the agency, then under the direction of Bush administration officials, had already disavowed the rule and was actively seeking to replace it. Until the fate of the rule had been settled, the Forest Service issued an interim directive which essentially halted all logging in roadless areas for eighteen months unless consent to harvest was granted by the Forest Service Chief.<sup>252</sup>

#### V. Origins of Judicial Iron Triangles

Article IV, section three of the United States Constitution grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>253</sup> While the nation was confined to the land east of the Appalachian Mountains, this task was not difficult for Congress to manage. However, as the nation grew geographically and as the federal government took on more responsibilities, this task simply became impossible to manage. Thus, Congress began to delegate some responsibility to administrative agencies, like the Forest Service.<sup>254</sup> Furthermore, judges sought to "fill the void left" as a result of congressional delegation.<sup>255</sup> This served the practical purpose of shifting some of the burden of governance to others, who were better able to write policy and possessed expert knowledge Congress could never have. However, many have seen this as also serving the more troubling purpose of allowing Congress to escape tough policy decisions by forcing them upon unelected bureaucrats and judges.<sup>256</sup>

Thus, one can see the seeds of the development of judicial iron triangles being sown. Iron triangles of any type, also known in the literature as "subgovernments" and "tripartite coalitions,"<sup>257</sup> depend on two things for their

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251. MEIER, *supra* note 186, at 141.

252. Roadless Area Protection; Interim Direction, 66 Fed. Reg. 44,111 (Aug. 22, 2001).

253. U.S. CONST. art. IV, § 3.

254. See MEIER, *supra* note 186, at 41.

255. See EUGENE W. HICKOK & GARY L. MCDOWELL, JUSTICE VS. LAW: COURTS AND POLITICS IN AMERICAN SOCIETY 212-15 (1993).

256. See GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY xiv-xv, 252-53 (2003).

257. Andrew S. McFarland, *Public Interest Lobbies Versus Minority Faction*, in INTEREST

development and survival.<sup>258</sup> The first is that the parties involved must be able to satisfy the needs of the other players.<sup>259</sup> The second, and perhaps most important, is that other political actors must acquiesce in governance by a subgovernment.<sup>260</sup> If the activities of such an iron triangle become important to outsiders, then the nonplayers (i.e., Congress or the President), have incentives to intervene in the subsystem and possibly break it up.<sup>261</sup>

One could argue that in the environmental policy-making arena traditional, not judicial, iron triangles are really the governing subsystem. One scholar, for example, suggested such a system existed in environmental policy between the Army Corps of Engineers, congressional committees and development interests with regard to dam building.<sup>262</sup> The same scholar suggested the Forest Service, from an early time in its existence, engaged in a similar type of system by seeking to serve the local elites<sup>263</sup> instead of following the motto of Gifford Pinchot, perhaps the father of the national forest system, that the end goal of the Forest Service was to deliver “the greatest good [to] the greatest number in the long run.”<sup>264</sup>

It may indeed be true that traditional iron triangles dominated much of the nation’s early environmental law. However, with the rise of the modern environmental movement in the 1970s, the incentives arose for policymakers to interject themselves into whatever subsystems might have then existed. This movement and the congressional response to it probably disrupted the subsystem as it then existed. Yet, as conservationist groups became “insiders” and as industry formed groups to counter the power the conservationist groups had amassed, the incentive for Congress to intervene dissipated.<sup>265</sup> The environment lost political prominence, especially with the 1981 inauguration of Ronald Reagan, who undoubtedly disdained the goals of the environmental movement.<sup>266</sup> Additionally, the role individual members of Congress had in environmental policymaking decreased dramatically. The roadless rule illustrates the lack of any real power the legislative branch of the traditional iron triangle had over the rule. During the time the roadless rule was being

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GROUP POLITICS 324, 334 (Allan J. Cigler & Burdett A. Loomis eds., 1983).

258. MEIER, *supra* note 186, at 44.

259. *Id.*

260. *Id.*

261. *See generally* FRANK R. BAUMAGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993).

262. MCCONNELL, *supra* note 6, 211-30.

263. *Id.* at 200.

264. *Id.* at 45.

265. *See* Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 99-108 (2001).

266. *Id.* at 102-05

developed, the three most influential congressional committees for natural resources issues<sup>267</sup> were chaired by three Republican congressmen from Alaska,<sup>268</sup> all of whom fiercely opposed the rule<sup>269</sup> and possessed great power within Congress. None of the three participated in the rulemaking process other than submitting official comments and making a few public statements.<sup>270</sup> With the departure of Congress from most environmental policymaking, a power vacuum was created, which was filled by the federal judiciary.

This shift of responsibility from Congress to elsewhere was hardly unintentional. By writing statutes that are broad and vague, legislators are able to appear responsive to the public's demands. Additionally, because the laws are vague, most legislators are able to support them and thus escape casting a potentially politically damaging "no" vote.<sup>271</sup> Environmental policy is home to some of the most vague laws ever written. NEPA, for example, while prescribing some procedural requirements, also contains a "Declaration of National Environmental Policy," which is merely a resolution on the environment that provides no practical mandate for agencies.<sup>272</sup> For instance, one of the substantive goals of the NEPA is that agencies should "create and maintain conditions under which man and nature can exist in productive harmony."<sup>273</sup> One could easily interpret this "harmony" as either careful, environmentally conscious development, or as keeping nature as it is with a minimum of human intrusion. Both interpretations are consistent with NEPA.

This vagueness is not a unique characteristic of NEPA. Two of the other most important forest management laws to come out of the environmental movement of the 1970s, the Multiple Use Sustained Yield Act of 1960 (MUSYA)<sup>274</sup> and the National Forest Management Act of 1976 (NFMA),<sup>275</sup> are

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267. These are the Senate Committee on Energy and Natural Resources, the House Committee on Natural Resources, and the Senate Appropriations Committee.

268. The three Alaskan congressmen were Ted Stevens (Senate Appropriations Chair), Frank Murkowski (Senate Resources Chair), and Don Young (House Resources Chair). See Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 445-49 (2006) (discussing the strength of the Alaska congressional delegation in Forest Service policy).

269. See David E. Sanger & Sam Howe Verhovek, *Clinton Proposes Wider Protections for U.S. Forests*, N.Y. TIMES, Oct. 14, 1999, at A1.

270. 4 FOREST SERV., *supra* note 35, at States, Alaska, 27.

271. See LOVELL, *supra* note 256, at xvii, 260.

272. 42 U.S.C. § 4331 (2000).

273. *Id.* § 4331(a).

274. Pub. L. No. 86-517, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528-531(2000)).

275. Pub. L. No. 94-588, 90 Stat 2949 (codified as amended in scattered sections of 16 U.S.C.).

also plagued with ambiguity.<sup>276</sup> This trend has several important consequences. First, an agency turns to these acts for guidance in making tough decisions and instead develops “a sort of administrative schizophrenia, unable to identify or even recognize its mission.”<sup>277</sup> Additionally, this ambiguity has “allow[ed] interest groups to project *their* visions onto the congressional mandates.”<sup>278</sup> One scholar has asserted that “ambiguity which once provided agencies necessary latitude before Congress . . . now inspire[s] sophisticated western interest groups to challenge agency policy.”<sup>279</sup>

The most apparent effect of this delegation through ambiguity is that it has drastically increased litigation. Because environmental legislation is so vague, an agency can simultaneously be complying with an act and violating it, depending on who is interpreting the law’s text. Consequently, groups only need to find a judge (or a panel of judges) sympathetic with their position in order to cause policy change. One telling statistic is that from the time NEPA was enacted in 1969 over 1,000 court cases have been brought under the Act.<sup>280</sup> Thus, the very ambiguity that was meant to provide agencies the flexibility needed to enact highly technical and complex environmental rules has now ensured that almost every action by a resource agency—like the Forest Service—will be challenged by some kind of organized interest.

Additionally, delegation through ambiguity has forced judges to take the lead role in holding the bureaucracy accountable. Congress can now rely on the judiciary to overturn unpopular agency decisions, without the political risk of doing so itself. The Executive can do likewise, and the roadless rule provides a good example. The Bush administration could have immediately suspended implementation of the roadless rule and either done nothing further or proceeded to develop a new rule (each of which would have required going through the rulemaking process again, however). Instead, the Bush administration allowed the courts to overturn it, and only then, once it was politically safe to reformulate the rule, was the state petitions rule promulgated. The revision was, in essence, court ordered. The courts, then, provided the Bush administration with a convenient excuse to use in response

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276. For an extended discussion of the problems of ambiguity, see Nie, *supra* note 7, at 225-33.

277. Michael J. 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, 910 (2002).

278. Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 640 (1997).

279. *Id.* at 630.

280. LINDSTROM & SMITH, *supra* note 89, at 100.

to criticism—the state petitions rule was not an attempt to undo the policies of the previous administration; rather, it was a proactive step to protect areas that were not protected after the 2003 injunction against the roadless rule.

What this leads to is unaccountable environmental decision making. While the President and Congress possess numerous methods of holding bureaucrats accountable,<sup>281</sup> there are fewer means to hold judges accountable, particularly in a Congress like the current one, even though one party holds a healthy majority in both houses and the presidency.<sup>282</sup> The main weapon Congress possesses vis-à-vis the judiciary in regulatory law is to codify the disputed action into statute.<sup>283</sup> Yet, given the makeup of the current Congress, it is unlikely that any legislation, either in favor of or opposed to the roadless rule, could be enacted. While the current Congress and President Obama seem to view environmental issues as pressing, the law governing the National Forest System appears to be a much less pressing view than, for example, global warming and renewable energy. It is further unlikely that much will be done to reconsider the Forest Service's decision-making process until the economic concerns that dominate much of the political discourse of today are resolved. In fact, when Congress finally acted in response to public outcry, neither of the proposed bills made it out of committee; thus, once again, Congress was able to escape accountability by refusing to give the bill a roll call vote.<sup>284</sup> This was despite the fact that the bill had a rather broad base of support, as the House version had 150 cosponsors.<sup>285</sup>

What is most troubling is not that Congress is ineffective in controlling the courts or the bureaucracy; rather, it is that the public cannot hold anyone accountable electorally. For instance, all of the judges involved in the roadless rule cases were appointed by past presidents (though, it is doubtful that any president ever will be held accountable for the judges he puts on the bench, except during the nomination process). Likewise, the environment was not an important factor for voters in the last two presidential elections,<sup>286</sup> despite the

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281. See ROSEN, *supra* note 9.

282. For member list of the current Congress, visit each chamber's website. United States House of Representatives, <http://www.house.gov> (last visited May 20, 2009). United States Senate, <http://www.senate.gov> (last visited May 20, 2009).

283. See HICKOK & MCDOWELL, *supra* note 255, at 213.

284. For the current status of congressional efforts to codify the roadless rule, see The Library of Congress, Thomas, Bills and Resolutions, <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.2516>: (last visited May 20, 2009).

285. *Id.* The bill introduced in the House was entitled the National Forest Roadless Area Conservation Act of 2007 (H.R. 2516). A few other attempts have been made to codify the roadless rule as a statute since 2002, but all have died in committee.

286. See Gerald M. Pomper, *The Presidential Election: The Ills of American Politics After 9/11*, in THE ELECTIONS OF 2004 42, 54 (Michael Nelson ed., 2005).

fact that in 2000, presidential candidate Al Gore had long been a champion of environmental causes.<sup>287</sup> The disinterest of the electorate allows the parties of a judicial iron triangle to pursue their visions of environmental policy without fearing recourse at the polls. Similarly, the roadless rule and other examples suggest that near the end of their presidencies, lame-duck presidents will resort to last ditch efforts (i.e., executive orders and expedited rulemaking) to realize otherwise impossible environmental policy goals,<sup>288</sup> once again leaving the public with no one to hold accountable.

#### *VI. What Is to Be Done?*

What, then, is to be done about this crisis of accountability in environmental policy? First, and most important, Congress needs to take back some of the discretion that has been delegated to agencies. Of course, not every issue is a matter for congressional action, but the roadless rule is a prime example of an issue that should have been settled legislatively, given the enormity of the project. Congress is more than capable of legislating in this area, as it has passed laws regulating use of federal lands that are of a much greater level of specificity than a potential roadless rule would be. For example, in Alaska, where the federal government owns approximately 60 percent of the land,<sup>289</sup> Congress has passed two major pieces of legislation that directly addressed agency management of federal lands.<sup>290</sup> The Tongass Timber Reform Act<sup>291</sup> is especially notable as it sets a clear policy for Forest Service management of the largest national forest in the system, such as defining where the Forest Service may build roads,<sup>292</sup> providing strict management guidelines for specific parcels of land,<sup>293</sup> and enacting measures for protecting fisheries.<sup>294</sup>

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287. For an extended discussion of Al Gore's abandonment of the environment during the 2000 presidential campaign, see DICK MORRIS, *POWER PLAYS: WIN OR LOSE—HOW HISTORY'S GREAT POLITICAL LEADERS PLAY THE GAME* 75-87 (2002).

288. For a discussion of presidential use of executive orders to protect the environment, see William H. Rogers, *Executive Orders and Presidential Commands: Presidents Riding to the Rescue of the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 13 (2001).

289. Alaska Department of Natural Resources, Division of Mining, Land, & Water, Land Ownership in Alaska, [http://www.dnr.state.ak.us/mlw/factsht/land\\_own.pdf](http://www.dnr.state.ak.us/mlw/factsht/land_own.pdf) (last visited May 20, 2009).

290. Those two pieces of legislation are the Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2374 (codified as amended in scattered sections of 16 & 43 U.S.C.) and the Tongass Timber Reform Act of 1990, Pub. L. No. 101-626, 104 Stat. 4426 (codified in scattered sections of 16 U.S.C.).

291. 16 U.S.C. §§ 472(a), 539(d)-(e), 1132 (2000).

292. 104 Stat. 4426, § 106.

293. *Id.* §§ 201-02.

294. 16 U.S.C. § 539.

Likewise, environmental laws need to be written in a clearer and more precise manner. If agencies have a clear mandate, they will be in a better position to resist political pressure from both the executive branch and interest groups.<sup>295</sup> Unambiguous statutes will also have the effect of reducing litigation, and thus remove (or at least lessen) the role judges play in the policy process. If NEPA were to be amended so that it clearly explains when an environmental impact statement is required and what is required to be in it, the two leading grounds for NEPA suits would be resolved.<sup>296</sup> For example, the requirement that an agency “explore and objectively evaluate all reasonable alternatives,” found in NEPA’s implementing regulations,<sup>297</sup> would be much more meaningful if “reasonable alternatives” was adequately defined and explained. Currently, this represents one of the most contentious provisions of the statute because it is simply too easy for groups to find an unexamined but plausible alternative, thereby rendering the entire NEPA process insufficient.<sup>298</sup>

An additional step Congress could take would be to remove or limit the ability of groups to pursue a cause of action for a NEPA violation. Instead of relying on the APA as a ground for bringing suit, NEPA could be amended to specifically provide for citizen suits, but it should clearly identify and define which violations constitute legally cognizable injuries. As NEPA exists in its current form, it is simply too vague to provide effective direction, which in turn creates incentives for those who do not agree with agency decision making to allege a NEPA violation over what amounts to little more than trivial errors that had little, if any, effect on the actual decision made. Despite an implementing regulation that states “any trivial violation of these regulations [should] not give rise to any independent cause of action,”<sup>299</sup> two examples of trivial violations are found in a great number of cases that essentially assert the agency’s analysis was imperfect (in 1994 one study found 92 percent of NEPA challenges essentially concerned the sufficiency of the NEPA documents prepared for the project).<sup>300</sup> The first common example, found in 70 percent of challenges to NEPA EISs, is that the analysis of significant effects is deficient.<sup>301</sup> The other common claim is that the range of alternatives is inadequate, which is present in 45 percent of claims against

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295. Nie, *supra* note 7, at 262-73.

296. See ECCLESTON, *supra* note 139, at 381-82.

297. 40 C.F.R. § 1502.14 (2007).

298. See Dubois v. USDA, 102 F.3d 1273, 1289 (1st Cir. 1996).

299. 40 C.F.R. § 1500.3.

300. See ECCLESTON, *supra* note 139, at 382.

301. *Id.* at 383.

NEPA documents.<sup>302</sup> Commonly, after losing a suit for one of these two reasons, the agency issues a supplemental EIS and then proceeds to reach the same decision it did before, producing no tangible result except the expenditure time and taxpayer money in defending a decision that would have been inevitably reached anyway.

In the end, though, the onus lies with the public to bring change to environmental policy. Much of the gains in environmental policy seen in the 1970s were initiated by grassroots campaigns of concerned citizens. For the current judicial iron triangle dominating environmental policy to be disrupted or eliminated, another grassroots-level movement must develop so that Congress has a clear mandate for action. However, as long as the public continues to be largely apathetic to environmental issues, elected (and unelected) officials will continue to act accordingly. The public also must take advantage of the opportunities it is provided to meaningfully participate in the policy-making process. While the level of participation in the creation of the roadless rule is promising, signing one's name on a form letter is little more than the "fast food" version of political participation. In the end, the solution to the nation's environmental problems lies in the solution to most problems found in a democracy—a more informed and active citizenry.

#### *VII. Conclusion*

Despite traditional notions that judges and bureaucrats are impartial, apolitical decisionmakers, numerous scholars have found instances of both engaged in political decision making. Perhaps nowhere is this more evident than in environmental policy, as the case of the roadless rule suggests that judges and bureaucrats, along with interest groups, work together to shape policy, resulting in a new phenomenon: the judicial iron triangle. This phenomenon has developed largely because Congress has refused to make tough policy decisions, choosing instead to enact ambiguous statutes that give the public the impression that Congress is active in environmental regulation, but in effect the statutes do little. In practice, Congress' actions amount to a delegation of the tough decisions to those in the unelected spheres of government. The situation is not hopeless, however, a proactive Congress and, especially, a general public more interested in environmental issues, would help foster the development of a movement seeking to demand restoration of accountability in environmental policy.

*Christopher Cumings*

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302. *Id.* at 383-84.