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The Long and Winding "Road": How NEPA Noncompliance for Preservation Actions Protects the Environment

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NOTES

The Long and Winding “Road”

HOW NEPA NONCOMPLIANCE FOR PRESERVATION ACTIONS PROTECTS THE ENVIRONMENT*

I. INTRODUCTION

The first commercial enterprise in North America was a sawmill.¹ Established in the Virginia territory in 1607, it set the tone for what the European colonizers eventually did to many of the forests in their new home – cut them down.² Today, the national forests and their dependents – the people, plants, and animals that rely on them for recreation, livelihood, and habitat – are increasingly threatened by logging and related activities. The rate of land development and urbanization between 1992 and 1997 was more than twice that of the previous decade, as 3.2 million acres of forest, wetland, and farmland were developed within those five years.³ Through the government, the American public currently owns 191 million acres of national forest in forty-five states, Puerto Rico, and the

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¹ Earthjustice, *Forests*, at <http://www.earthjustice.org/program/forests/> (last visited Nov. 29, 2003).

² *Id.*

³ Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (discussing regulation codified as final rule at 36 C.F.R. pt. 294).

Virgin Islands.⁴ More than fifty percent of this land is already open to logging, mining, and other extractive industries.⁵ The resulting environmental harm from road construction and timber harvest is immediate and long term.⁶ In other words, once these extractive industries make use of formerly unspoiled lands, they can never truly be repaired.

In order to curtail the effects of roadbuilding and logging, the Clinton administration promulgated the Roadless Area Conservation Rule (Roadless Rule)⁷ in January 2001. This Rule seeks to protect the remaining 58.5 million acres of forestland that has not been severely damaged or altered by human hands.⁸ As soon as the final Rule was implemented, several pro-logging interest groups challenged its validity in two Ninth Circuit cases: *Kempthorne v. United States Forest Service*⁹ and *Kootenai Tribe v. Veneman*.¹⁰ The plaintiffs in these cases claim that the Roadless Rule does not comply with the procedural mandates of the National Environmental Policy Act (NEPA).¹¹ Created in 1970, NEPA mandates that all federal agencies must file an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."¹² An EIS is a detailed statement discussing the adverse environmental impacts caused by a federal action.¹³ Although by and large NEPA is the fundamental procedural vehicle for environmental protection because it forces agencies to consider environmental impacts before they act, certain federal actions that seek to protect

⁴ Earthjustice, *supra* note 1.

This is twice the size of the national park system or the national wildlife refuge system. Three times as many people visit national forests as national parks, and the forests provide habitat for more rare species than refuges do. Hundreds of communities get their drinking water from national forest streams . . . [T]he few remaining stands of virgin forest are virtually all on public lands.

Id.

⁵ *Id.*

⁶ Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3245.

⁷ *Id.* at 3244.

⁸ 36 C.F.R. pt. 294.14 (2003).

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

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

¹¹ The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321-4375 (2000)) [hereinafter NEPA].

¹² NEPA, 42 U.S.C. § 4332 (2000).

¹³ *Id.*

pristine lands from being developed often fall within NEPA's mandates. The Roadless Rule is such an action.

This Note argues that federal actions that expressly preserve natural resources and ban human modification of the environment should be exempted from NEPA. Within the environmental context, where permanent change can rapidly occur, time matters a great deal. The EIS process can be quite expensive and can significantly delay proposed federal protections. Most of these delays stem from the processes of consultation, public comment, and litigation challenging the adequacy of the EIS.¹⁴ The typical EIS runs hundreds of pages in length and can cost millions of dollars to produce.¹⁵ A recent study for the Federal Highway Administration found that on average an EIS required 3.6 years to complete,¹⁶ while some could take up to twelve years.¹⁷ Generally, because an EIS is an integral tool for agencies to consider environmental impacts, its benefits outweigh the costs of delaying federal action.¹⁸ However, where a rule seeks to conserve a natural resource by preserving instead of altering its physical environment, the need for an EIS is redundant and the temporal costs of the preparation outweigh the benefits.

¹⁴ Jonathan M. Cosco, Note, *NEPA for the Gander: NEPA's Application to Critical Habitat Designations and Other "Benevolent" Federal Action*, 8 DUKE ENVTL. L. & POL'Y F. 345, 352 (1998).

¹⁵ As of Fiscal Year 2000, the Roadless Rule Initiative has cost the Forest Service \$9.4 million. U.S. DEPT OF AGRICULTURE, FOREST SERVICE ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT 6 (Nov. 2000), available at <http://roadless.fs.fed.us/documents/feis/documents/vol3/volume3nb.pdf>.

¹⁶ Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 919 (2002) (citing FED. HIGHWAY ADMIN., EVALUATING THE PERFORMANCE OF ENVIRONMENTAL STREAMLINING: DEVELOPMENT OF A NEPA BASELINE FOR MEASURING CONTINUOUS PERFORMANCE § 4.1.1 (May 2001), available at <http://environment.fhwa.dot.gov/strmlng/baseline/section4.htm>).

¹⁷ In 1973, the Connecticut Department of Transportation (CDOT) began an exhaustive 12-year NEPA process to prepare an EIS for a new expressway. When its permit was denied, it began the NEPA process over again. COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (Jan. 1997), available at <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf>.

¹⁸ Cosco, *supra* note 14, at 353. For example, the Nuclear Regulatory Commission issued a license to resume operation of one of the reactors at Three Mile Island just four years after the plant was seriously damaged in one of the worst nuclear accident Americans have yet experienced. In this case, the burdens and the time it took to prepare the EIS and litigate this matter were severely outweighed by the potential psychological and environmental problems that could have resulted without preparing an EIS. See *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

Part II discusses the purposes and policies behind both NEPA and the Roadless Rule. Part III analyzes the case law and theories that justify the proposed exemption from NEPA's procedural requirements. Using the Roadless Rule as a prime example, Part IV argues that NEPA should not apply to federal actions that prohibit human modification of a naturally existing environment for the express purpose of preserving that environment.

II. THE VEHICLES: NEPA AND THE ROADLESS RULE

NEPA is a procedural statute intended to make an agency think about the environment before it acts, and thus mitigate any unnecessary environmental harm. However, in some cases it is possible that the procedure mandated by NEPA, the EIS process, could subvert its own purposes. The Roadless Rule is such a case. Currently, there are several ongoing lawsuits challenging the Forest Service's compliance with NEPA in implementing this rule, thus further delaying the much needed forest protection that the Rule provides.

A. *National Environmental Policy Act*

In 1969, Congress finally acted on the escalating environmental problems plaguing the United States by enacting NEPA, "the environment's Magna Carta."¹⁹ This "grandfather" of all environmental laws was established to create a national policy to "encourage productive and enjoyable harmony between man and his environment, . . . promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."²⁰ The optimistic tone of NEPA speaks in terms of having man and nature coexist in "productive harmony" and refers to the federal government as the new environmental trustee for present and future generations.²¹ The Act's legislative history indicates that Congress created NEPA to counteract the inadequacy of governmental policies in protecting and preserving for future generations the

¹⁹ Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447 (1990).

²⁰ NEPA, 42 U.S.C. § 4321 (2000).

²¹ Blumm, *supra* note 19, at 449 (citing NEPA, 42 U.S.C. § 4331(a), (b)(1)).

environment in which we live.²² The loss of valuable open space, urban and suburban growth, critical air and water pollution problems, needless deforestation, continuing soil erosion, and countless other environmental quality problems demonstrated the inadequacies of environmental policies.²³

Recognizing in the 1960s that the nation could not continue making the environment pay for its material well-being, Congress implemented NEPA as a procedural guide for federal agencies to make the environment a paramount concern.²⁴ To the fullest extent possible, a federal agency proposing "major federal actions"²⁵ significantly affecting the quality of the human environment²⁶ must comply with NEPA and prepare an EIS. An impact statement details the unavoidable adverse environmental effects, long-term and short-term environmental impacts, alternatives to the action, and the irretrievable and irreversible commitments of resources should the action be implemented.²⁷ The preparation of an EIS thus serves a dual purpose – to inject environmental considerations into the federal decision-making process and to inform the public of those considerations.²⁸ Generally, an

²² H. REP. NO. 91-378 (1969), reprinted in 1969 U.S.C.C.A.N. 2751, 2753.

²³ *Id.*

²⁴ Maria C. Holland, Comment, *Judicial Review of Compliance with the National Environmental Policy Act: An Opportunity for the Rule of Reason*, 12 B.C. ENVTL. AFF. L. REV. 743, 743 (1985).

²⁵ An action is considered "federal" if some federal agency has the power to control the action and considered "major" if there is any substantial commitment of resources, whether monetary or otherwise. ROGER W. FINDLEY & DANIEL A. FARBER, *ENVIRONMENTAL LAW IN A NUTSHELL* 27 (5th ed. 2000). For example, building a nuclear reactor involves a major federal action because a federal license is required and there will be a substantial commitment of resources used to license an entire power plant. *Id.*

²⁶ NEPA, 42 U.S.C. § 4332 (2000).

[A]ll agencies of the Federal government shall . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 4332(C).

²⁷ *Id.*

²⁸ *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981).

agency should comply with NEPA to its fullest extent. However, as with any broad procedural statute, certain factual situations can distort its function, making exceptions necessary.

B. *The Roadless Rule*

In the 1960s, Congress was concerned with extreme population growth and loss of valuable open space and natural resources. Today, in 2002, as populations continue to grow in size, this problem has increased significantly. Between 1992 and 1997, the rate of land development and urbanization doubled that of the previous decade, while the rate of population growth remained constant.²⁹ Additionally, roads were constructed in 2.8 million acres of the 34.3 million inventoried roadless areas that have prescriptions for road building.³⁰ Reacting to these disconcerting developments, the Forest Service promulgated the Roadless Rule as an attempt to preserve the decreasing amount of open space.³¹ In a speech celebrating the creation of the Roadless Rule, President Clinton proclaimed:

[T]hese areas represent some of the last, best, unprotected wildlands anywhere in our nation. . . . Today we launch one of the largest land preservation efforts in America's history to protect these priceless, backcountry lands We will ensure that [generations to come] will be able to look out on valleys like this, just as beautiful then as they are now. . . . We will live up to the challenge Theodore Roosevelt laid down a century ago to leave this land even a better land for our descendants than it is for us.³²

²⁹ Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001). "An average of 3.2 million acres per year of forest, wetland, farmland, and open space were converted to more urban uses between 1992 and 1997. In comparison, 1.4 million acres per year were developed between 1982 and 1992." *Id.*

³⁰ *Id.* at 3246 (covering a 20-year period).

³¹ "Roads have long been recognized as one of the primary human-caused sources of soil and water disturbances in forested environments." *Id.* It has also been proven that roads are a primary contributor to forest fires. WORLD WILDLIFE FUND, SCIENTIFIC BASIS FOR ROADLESS AREA CONSERVATION (June 2002) (citing W.J. Hann et al., *Landscape Dynamics of the Basin*, in 2 AN ASSESSMENT OF ECOSYSTEM COMPONENTS IN THE INTERIOR COLUMBIA BASIN AND PORTIONS OF THE KLAMATH AND GREAT BASINS 337 (T.M. Quigley & S.J. Arbelbide, eds. 1997)), available at <http://www.worldwildlife.org/forests/forestssection.cfm?sectionid=208&newspaperid=17&contentid=925>. Therefore, along with the preservation of open space, preserving roadless areas maintains a healthy ecosystem.

³² President William Jefferson Clinton, *Remarks at "Roadless" Lands Event* (October 13, 1999), available at http://roadless.fs.fed.us/documents/clinton_remarks.htm.

The Roadless Rule was adopted into the Federal Register on January 12, 2001 as one of the most sweeping public lands conservation measures in one hundred years. It set out to protect and conserve the environment by prohibiting the activities most likely to alter and fragment ecosystems – road construction, reconstruction, and timber harvest – on 58.5 million acres of inventoried roadless areas on National Forest System lands.³³

Following the spirit of NEPA, the Roadless Rule was created to provide lasting protection to the social and ecological values and characteristics of roadless areas.³⁴ Roads create dangerous conditions for ecosystems because roads and associated logging cause soil erosion, watershed damage, reduced water and air quality, and increased fire risks.³⁵ For these reasons, proponents of the Roadless Rule feared that “[w]ithout immediate action, . . . development activities may adversely affect watershed values and ecosystem health in the short and long term, expand the road maintenance backlog which would increase the financial burden associated with road maintenance, and perpetuate public controversy and debate over the management of these areas.”³⁶

To enable local officials to build roads to protect the public health and safety in cases of fire and flood, and to harvest small diameter timber to maintain a healthy forest, the Roadless Rule does not ban road construction and timber harvesting when it is absolutely necessary.³⁷ Any forest management action would still, however, be subject to an environmental assessment in order to ensure that logging will not occur solely because an agency claims it is good for the

³³ Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3245.

³⁴ Roadless areas are invaluable in their contribution to the quality of water and air, soil stabilization and erosion control, climate regulation, biodiversity, recreation and tourism, non-timber products, and cultural values. DOUGLAS J. KRIEGER, THE WILDERNESS SOCIETY, ECONOMIC VALUE OF FOREST ECOSYSTEM SERVICES: A REVIEW (Mar. 2001), available at <http://www.wilderness.org/Library/Roadless.cfm>.

³⁵ U.S. DEPT OF AGRICULTURE, FOREST SERVICE ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT 3-44 (Nov. 2000), available at <http://roadless.fs.fed.us/documents/feis/documents/vol1/volume1nb.pdf>.

³⁶ Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3247.

³⁷ *Id.* at 3258. In addition to the maintenance and “emergency” exceptions to the Roadless Rule listed above, a road also may be constructed pursuant to a natural resource restoration action under specific Congressional acts for road safety improvement projects. *Id.*

environment.³⁸ For example, harvesting trees damaged from wildfires, or “salvage logging,” actually disrupts ecological processes and harms the environment.³⁹ Therefore, any act that will physically change the environment via human hands is and should be subject to the rigors of NEPA. Also, the Rule does not revoke, suspend, or modify any permits or contracts issued prior to the Rule’s final adoption, therefore leaving intact processes already set in motion.⁴⁰

Six days before the Rule was adopted, the Idaho state government and several groups including logging associations, Indian tribes, and snowmobile associations, brought two suits⁴¹ seeking a preliminary injunction against implementation of the Roadless Rule as violative of NEPA, the National Forest Management Act (NFMA)⁴² and the Administrative Procedure Act (APA).⁴³ The defendant-intervenors⁴⁴ argued that the court

³⁸ Wilderness Society, *Bush’s Forest Plan: Salvage Rider Resurrected* (Aug. 30, 2002), available at <http://www.wilderness.org/Library/Roadless.cfm>.

³⁹ *Id.* Salvage logging can be defined as the logging of trees that are dead or dying as a result of fire or insect infestation. The term does not, by itself, indicate whether logging those trees will improve the overall health and long-term sustainability of the forest ecosystem. Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and its Legacy*, 27 ENVTL. L. 1035, 1048 (1997). Not only does the logging of dead trees harm the environment, this Salvage Logging Rider actually gave loggers an excuse to harvest healthy trees. *Id.* at 1049. In Missouri’s Mark Twain National Forest, a small brush fire that only damaged mature trees on about two acres, was used to justify the 240-acre Eleven Point Salvage Sale and in eastern Washington’s Colville National Forest, the 4,000-acre Addy Salvage Sale consisted almost entirely of green, healthy forests. Wilderness Society, *supra* note 38.

⁴⁰ 36 C.F.R. § 294.14 (2003).

⁴¹ *Kemphorne v. United States Forest Serv.*, 142 F. Supp. 2d 1248 (D. Idaho 2001); *Kootenai Tribe v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001).

⁴² 16 U.S.C. §§ 1600–1676 (2000). The NFMA should not be applicable on appeal because the Forest Service has broad rulemaking authority that is independent of the NFMA, and it therefore “had the right to proceed via rulemaking in lieu of forest plan modification.” H. Michael Anderson, *National Forest Roadless Rule Goes to Ninth Circuit*, CAL. ENVTL. L. REP., July 2001, at 169 (citing *Wyoming Timber Industry Ass’n v. United States Forest Serv.*, 80 F. Supp. 2d 1245, 1260 (D. Wyo. 2000)), available at <http://www.wilderness.org/Library/Roadless.cfm>.

⁴³ 5 U.S.C. §§ 551–559, 701–706 (2000).

⁴⁴ The federal defendants in this case took no position on the merits of the case but did argue that agency rulemaking is entitled to judicial discretion. *Kootenai Tribe*, 142 F. Supp. 2d at 1231. As this rule was promulgated in the “eleventh hour” by the Clinton administration, the new Bush administration was unwilling to zealously defend this conservationist measure. Therefore, several environmental groups intervened to defend this rule in light of the government’s unwillingness to do so. *Id.* The defendant-intervenors include the following groups: Idaho Conservation League, Idaho Rivers United, Sierra Club, The Wilderness Society, Oregon Natural Resources Council, Pacific Rivers Council, Natural Resources Defense Council, Defenders of Wildlife, and Earthjustice Legal Defense Fund. *Id.*

lacked jurisdiction,⁴⁵ that the plaintiffs' challenges were meritless, and that enjoining the Roadless Rule would cause irreparable harm to the environment.⁴⁶

At the district court level, the intervenors argued that the Roadless Rule is not subject to NEPA, pursuant to the Ninth Circuit's decision in *Douglas County v. Babbitt*.⁴⁷ The court in *Douglas County* held that the Secretary of the Interior does not have to file an EIS when designating critical habitat for endangered or threatened species because NEPA requirements are displaced by the Endangered Species Act (ESA); NEPA does not require an EIS for actions that preserve the physical environment; and the goals of NEPA are furthered without an EIS.⁴⁸

The intervenors reasoned that the Roadless Rule did not require an EIS because banning road building in National Forests does not commit resources to affirmative human development of the environment, and thus maintains existing environmental conditions and the status quo.⁴⁹ The district court distinguished *Douglas County* by stating that limiting active forest management in the national forest does change the status quo and therefore requires an EIS.⁵⁰

On appeal, the defendant-intervenors argued to the Ninth Circuit that the Roadless Rule is a perfect example of the type of federal action that should be exempt from NEPA.⁵¹ After hearing the arguments, the Ninth Circuit recently stated that

⁴⁵ The Court found that the plaintiffs had standing pursuant to *Friends of the Earth v. Laidlaw Evtl. Servs., Inc.*, 528 U.S. 167 (2000), and that the issue was ripe for review even though the Bush administration stayed the Final Rule's effective date until May 12, 2001. See *Acquisition of Title to Land in Trust: Delay of Effective Date*, 66 Fed. Reg. 8899 (Feb. 5, 2001).

⁴⁶ *Kemphorne*, 142 F. Supp. 2d at 1254; *Kootenai Tribe*, 142 F. Supp. 2d at 1237.

⁴⁷ 48 F.3d 1495 (9th Cir. 1995).

⁴⁸ *Id.* at 1497-1507. An EIS is defined as a detailed statement that discusses the environmental impact, adverse environmental effects, alternatives, the relationship between long-term productivity and short-term uses of man's environment, and irreversible and irretrievable commitments of resources if this proposed federal action is implemented. NEPA, 42 U.S.C. § 4332(C) (2000).

⁴⁹ *Kemphorne*, 142 F. Supp. 2d at 1258; *Kootenai Tribe*, 142 F. Supp. 2d at 1239.

⁵⁰ See *Kemphorne*, 142 F. Supp. 2d at 1258. After ruling on this threshold issue, the Court found that the EIS prepared by the Forest Service was "grossly inadequate" and therefore issued the preliminary injunction that became effective on May 12, 2001 pending the government's issuance report on the status of the Rule in the new administration. *Id.* at 1261.

⁵¹ *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2002).

[b]ecause human intervention, in the form of forest management, has been part of the fabric of our national forests for so long, [the Court] conclude[s] that, in the context of this unusual case, the reduction in human intervention that would result from the Roadless Rule actually does alter the environmental status quo.⁵² From this reasoning the Court held that the Roadless Rule did require an EIS, but reversed the preliminary injunction because it found the EIS to be adequate.⁵³

However, as this paper will show, the Ninth Circuit may have been mistaken in its holding that the Roadless Rule should not be exempt from NEPA because the roadless areas are the least “managed” areas in the National Forest System,⁵⁴ and NEPA’s purposes can be fulfilled without an EIS.

III. THE DETOURS: EXEMPTIONS FROM NEPA

In proclaiming that an agency charged with protecting the environment should be exempt from NEPA, Senator Muskie⁵⁵ declared that in such a case, an exemption actually best serves the objective of protecting the environment.⁵⁶ Congress has in fact explicitly exempted certain actions from NEPA. For example, Congress excused the Environmental Protection Agency (EPA) from preparing an EIS for all actions taken pursuant to the Clean Air Act and for some actions taken under the Clean Water Act.⁵⁷ Aside from the explicit

⁵² *Id.* at 1115.

⁵³ *Id.* at 1104, 1115.

⁵⁴ See WORLD WILDLIFE FUND, *supra* note 31. Roadless areas are exactly that – places where no roads have been built and where, as a result, no logging or other development has occurred. Unspoiled by large-scale human activity, roadless areas are among the last strongholds of the primeval American landscape.

⁵⁵ Senator Edmund Muskie was one of a few legislators who spearheaded the congressional environmental movement that shaped the way the country thinks about pollution and the environment. He was a Senator for Maine from 1958-1980. In 1980, he left the Senate to become U.S. Secretary of State under President Jimmy Carter. Edmund S. Muskie Foundation, *Notable Members of Congress: Senator Edmund S. Muskie*, at <http://www.muskiefoundation.org/centeroncongress.html> (last visited Jan. 17, 2004); Biographical Directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M001121> (last visited Feb. 22, 2004).

⁵⁶ *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 382-83 (D.C. Cir. 1973) (citing 118 CONG. REC. 16,878 (1972)).

⁵⁷ A provision in the Energy Supply and Environmental Coordination Act exempts the Environmental Protection Agency (EPA) from preparing an EIS when it acts pursuant to the Clean Air Act. See 15 U.S.C. § 793(c)(1) (2000). (“No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].”). See also Federal Water Pollution Control Act, 33 U.S.C. § 1371(c)(1) (2000) (stating that an EIS does not need to be prepared for actions pursuant to this statute except in connection

congressional exemptions, the courts have traditionally recognized three narrowly-construed exemptions from NEPA.

A. *Irreconcilable Conflict Exception*

The most obvious, the irreconcilable conflict exception to NEPA compliance, arises when the mandates of a particular federal statute explicitly conflict with NEPA's requirements.⁵⁸ Under Section 102 of NEPA, where a clear and unavoidable statutory conflict exists, NEPA must give way because it "was not intended to repeal by implication any other statute."⁵⁹

In *Flint Ridge Development Co. v. Scenic Rivers Associations*,⁶⁰ the Supreme Court addressed whether NEPA required the Department of Housing and Urban Development (HUD) to prepare an EIS before a disclosure statement becomes effective pursuant to the Interstate Land Sales Full Disclosure Act.⁶¹ The Disclosure Act provides that a statement of record, which contains information concerning title, the terms and conditions for disposing of lots, conditions of the subdivision, and various other specified data, becomes effective thirty days after filing unless it is suspended by the Secretary for inadequate disclosure.⁶² As an EIS cannot possibly be drafted, circulated, commented upon and reviewed within this thirty-day period, an irreconcilable conflict existed.⁶³ Accordingly, the Court held that NEPA does not apply.⁶⁴ However, the Court noted that the irreconcilable conflict exemption is to be construed narrowly, emphasizing that under the Disclosure Act itself environmental concerns must be considered.⁶⁵

with grants for construction of public waste treatment plants, issuance of permits, and discharge from new sources).

⁵⁸ Lori H. Patterson, Comment, *NEPA's Stronghold: A Noose for the Endangered Species Act?*, 27 CUMB. L. REV. 753, 760 (1996).

⁵⁹ *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 694 (1973)).

⁶⁰ 426 U.S. 776 (1976).

⁶¹ *Id.* at 778.

⁶² *Id.* at 788.

⁶³ *Id.* at 788-89.

⁶⁴ *Id.* at 778.

⁶⁵ *Flint Ridge*, 426 U.S. at 789.

B. *The Functional Equivalence Doctrine*

The functional equivalence doctrine also exempts federal agencies from NEPA when compliance would be duplicative of or superfluous to agency action required by another federal statute.⁶⁶ In *Portland Cement Association v. Ruckelshaus*, the D.C. Circuit held that the EPA was not required to prepare an impact statement before adopting a New Source Performance Standard pursuant to the Clean Air Act.⁶⁷ On its own, the proposed standard in this case took into account the environment, the pros and cons of achieving emission reduction, and public comment; therefore, it created the channel for informed decision making that NEPA desires.

There is significant case law on the doctrine of functional equivalence, but its boundaries are still uncertain. The Ninth Circuit altered the functional equivalence doctrine by holding it was not Congress's intention that the EPA should comply with NEPA in registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁶⁸ While the court hesitated to adopt the "functional equivalence" rationale, it held that FIFRA displaces the NEPA requirements because Congress did not intend for NEPA to apply to FIFRA registrations.⁶⁹ The court also stated that Congress charged the EPA with balancing agricultural and environmental concerns, and that although FIFRA's process is not equivalent to NEPA, FIFRA does require public comment and the consideration of environmental as well as agricultural concerns.⁷⁰ Thus, FIFRA can be considered as an entirely new set of procedures that "displace" the public notice and comment procedures of NEPA. As Congress intentionally lightened the regulatory burden on pesticide registration in 1978, applying NEPA to this process "would sabotage the delicate machinery that Congress designed."⁷¹

⁶⁶ *Portland Cement*, 486 F.2d at 384.

⁶⁷ *Id.* at 385. Another court stated that *Portland Cement* no longer applies as subsequent legislation has exempted the EPA from making an impact statement in all actions pursuant to the Clean Air Act. *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1042 (D.C. Cir. 1999). Although it is possible that *Portland Cement* no longer applies, it provides the best example of the "functional equivalence" doctrine and the reasons against giving EPA a blanket exemption from NEPA.

⁶⁸ *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986).

⁶⁹ *Id.* at 781.

⁷⁰ *Id.* at 780-81.

⁷¹ *Id.* at 779.

NEPA's legislative history tends to support exemptions for the EPA because Congress created the EPA to best serve the Act's objectives.⁷² Because NEPA is a broad procedural measure and its goal of environmental preservation requires more work than one agency can provide, Congress assigned various duties to several protection agencies.⁷³ Requiring specific compliance with the impact statement mandate in each and every case would thwart the agencies' ability to effectuate expeditious decisions, an ability that could be further slowed by litigation and delay tactics by opponents of environmental protection.⁷⁴

But even granting that protective agencies should sometimes be exempt from NEPA's requirements, the question persists: "Who shall police the police?"⁷⁵ In discussing NEPA exemptions, Senator Henry M. Jackson stated that "[i]t cannot be assumed that EPA will always be the good guy."⁷⁶ "[I]t cannot be forgotten that [the] EPA is a regulatory agency and in the past in Washington all regulatory agencies have eventually come under the control of those that they are charged with regulating."⁷⁷ The fear that the EPA or any conservation-minded agency will not protect the environment as the agency should poses an ever-present concern; although some exemptions to NEPA are desirable, the Court must be wary of their ability to swallow the rule.

C. *The Inaction Doctrine*

Because exceptions to NEPA are narrowly construed, actions that do not alter the natural, physical environment do not squarely fit within those discussed above. However, special exemptions have been created where the purposes of NEPA are achieved by the federal action itself. This Note argues that under this line of cases federal actions that prohibit human

⁷² *Portland Cement*, 486 F.2d at 383-84 (citing 118 CONG. REC. 16,878 (1972)).

⁷³ Some agencies charged with environmental protection are the Environmental Protection Agency, the Department of the Interior, and the Forest Service, to name a few.

⁷⁴ *Portland Cement*, 486 F.2d at 383-84 (citing 118 CONG. REC. 16,878 (1972)).

⁷⁵ *Id.* at 384.

⁷⁶ *Id.* at 384 (citing 118 CONG. REC. 16878 (1972)).

⁷⁷ *Id.* at 384 n.39 (quoting National Wildlife Federal Conservation Report (Sept. 22, 1972)).

modification of a natural environment, such as the Roadless Rule, should be excused from NEPA compliance.⁷⁸

In *Pacific Legal Foundation v. Andrus*, the Sixth Circuit considered whether to exempt the United States Fish and Wildlife Service (FWS) from filing an EIS before listing a species as endangered pursuant to the Endangered Species Act (ESA).⁷⁹ Although this factual situation does not fit into either the functional equivalence⁸⁰ or irreconcilable conflict⁸¹ doctrines, the court nevertheless excused the Secretary of the Interior from NEPA's procedural requirements.⁸² The court reasoned that because the ESA prevented the Secretary from considering the environmental impact when listing species as endangered or threatened, filing an impact statement would not have served NEPA's purposes.⁸³ Most importantly, the Secretary's action in listing species as endangered or threatened furthered NEPA's purposes⁸⁴ and rendered an EIS superfluous. By listing species as endangered, the Secretary was in fact working to preserve the natural environment and prevent the irretrievable loss of natural resources.⁸⁵

In *Douglas County v. Babbitt*, the Ninth Circuit extended the decision in *Pacific Legal* by holding that the Secretary of Interior's designation of critical habitat for an endangered species under the ESA did not require an EIS filing.⁸⁶ Under the ESA, critical habitat must be designated for a species when one is listed as endangered. The designation in turn prohibits federal actions that could likely destroy or disrupt the habitat.⁸⁷ In this case, the Secretary designated critical habitat at the earliest possible time for the Northern

⁷⁸ For example, the Roadless Rule bans all road construction in designated Roadless Areas. 36 C.F.R. § 294.12 (2003).

⁷⁹ *Pacific Legal Found. v. Andrus*, 657 F.2d 829 (6th Cir. 1981).

⁸⁰ At the time the seven species of mussels involved in this case were listed, the ESA was not "functionally" equivalent to NEPA because the ESA did not provide for consideration of environmental, economic, or other consequences of the listing. *See id.* at 835.

⁸¹ The ESA did not provide for an express exemption from NEPA or contain any time constraints that would make the ESA irreconcilably conflict with NEPA. *See id.* at 834.

⁸² *Id.*

⁸³ *Id.* at 835. The Secretary is limited to using the best scientific and commercial data on the five factors listed in the ESA. 16 U.S.C. § 1533(b)(1)(A) (2000).

⁸⁴ *Pacific Legal*, 657 F.2d at 837. *See also* discussion of NEPA's purposes *infra* Part IA.

⁸⁵ *Pacific Legal*, 657 F.2d at 837.

⁸⁶ *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

⁸⁷ 16 U.S.C. § 1536(a)(2) (2000).

Spotted Owl, as it was already listed as a threatened species.⁸⁸ After proposing the critical habitat, the Secretary concluded that an EIS need not be prepared under *Pacific Legal*, and granted the Council on Environmental Quality's (CEQ) request for the FWS to stop preparing the statement.⁸⁹

The court held the Secretary's actions proper and laid out three reasons for its decision: (1) by virtue of *Merrell v. Thomas*,⁹⁰ the applicable procedural requirements provision of the ESA displaced NEPA requirements; (2) even if the displacement was not clear, NEPA still did not require an EIS for actions that do nothing to alter the natural physical environment; and (3) the ESA furthered the goals of NEPA without requiring an EIS.⁹¹

Accordingly, the crucial principle is that an EIS is unnecessary when a federal action seeks to preserve the natural, untouched physical environment, as an impact statement is a report detailing the environmental impact of an invasive action in order to enhance the environment and prevent further irreparable damage⁹² – precisely the goal of the initial action. The Supreme Court articulated this point by stating that “although NEPA states its goals in sweeping terms of human health and welfare, these goals are the *ends* that Congress has chosen to pursue by *means* of protecting the physical environment.”⁹³ Echoing this idea, the Fifth Circuit held in *Sabine River Authority v. United States Department of Interior*⁹⁴ that the federal government's acquisition of a negative easement prohibiting commercial development of certain wetlands in Texas did not change the physical environment, and thus no EIS was needed.⁹⁵ Given the above precedent, an EIS should not be required “in order to leave nature alone.”⁹⁶

⁸⁸ *Douglas County*, 48 F.3d at 1498.

⁸⁹ *Id.*

⁹⁰ 807 F.2d 776 (9th Cir. 1986).

⁹¹ *Douglas County*, 48 F.3d at 1502-06.

⁹² See *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981).

⁹³ *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) (emphasis in original).

⁹⁴ 951 F.2d 669 (5th Cir. 1992), *cert denied*, 506 U.S. 823 (1992).

⁹⁵ *Id.*

⁹⁶ *Nat'l Ass'n of Prop. Owners v. United States*, 499 F. Supp. 1223, 1265 (D. Minn. 1980), *aff'd*, *State of Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981).

The Ninth Circuit reaffirmed the inaction doctrine in *Douglas County v. Lujan*.⁹⁷ There, the district court held that leaving nature alone changes the physical environment and the status quo; therefore, an EIS is required to account for the environmental impact of this "action."⁹⁸ This holding was based on the assumption that critical habitat for the Spotted Owl may not be the best habitat for other species.⁹⁹ Reversing the district court's decision, the Ninth Circuit responded, "[o]f course a forest, free of human interference, changes all the time – saplings grow, mature trees die, dead trees decay. The touchstone is not *any* change in the status quo, but change effected by humans."¹⁰⁰ Logic would dictate that an EIS is not required to explain natural evolution of the environment; species have survived in the natural element long before humans "managed" the environment. Thus, by designating critical habitat and leaving nature alone, the government is allowing natural processes to occur and species to again adapt to the elements. Often, time is of the essence when designating critical habitat or preserving the natural environment because plans for development or timber harvesting are continually developing. The time it takes to defend NEPA challenges or comply with its requirements could result in the permanent loss of an endangered or threatened species or the destruction of critical habitat.¹⁰¹ Therefore, requiring an EIS in these types of preservation actions appears to subvert the true purposes of NEPA.

However, not every circuit agrees with the reasoning laid out in *Douglas County*; in fact, the Tenth Circuit has held exactly the opposite in requiring an impact statement for the Secretary's designation of critical habitat for endangered or threatened species under the ESA. In *Catron County Board of Commissioners v. United States Fish and Wildlife Service*,¹⁰² the court found that the ESA directive takes into account only economic impacts and does not displace NEPA; that an impact does flow from the critical habitat designation; and that

⁹⁷ *Douglas County v. Lujan*, 810 F. Supp. 1470 (D. Or. 1992), *rev'd sub nom.* *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

⁹⁸ *Lujan*, 810 F. Supp. at 1484.

⁹⁹ *Id.*

¹⁰⁰ *Babbitt*, 48 F.3d at 1506.

¹⁰¹ *Patterson*, *supra* note 58, at 784.

¹⁰² *Catron County Bd. of Comm'rs v. United States Fish and Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996). In this case, the Secretary was designating habitats for the spikedance and loach minnows, two species of threatened fish. *Id.* at 1432.

compliance with NEPA actually furthers the goals of the ESA rather than hinders them.¹⁰³ Relying on ambiguous legislative history, the court recognized that designating critical habitat might serve NEPA's purposes, but nonetheless reasoned that NEPA requires a particular process and not a certain result.

Although it is true that NEPA is a procedural and not substantive statute, NEPA should give way when its process would subvert the very goal of environmental protection. Moreover, the plaintiffs in *Catron County* may have been using NEPA in another manner at odds with its purpose. The plaintiffs asserted several injuries, including those that were solely economic.¹⁰⁴ Economic injuries, however, should not be redressed through NEPA litigation, as the purpose of NEPA was to ensure that federal agencies would protect and consider the natural environment – not private economic injury.¹⁰⁵ Despite the seeming coherence of both the purpose of the designation and the purpose of NEPA's requirements, and the contradiction between the claimed economic harms and NEPA's environmental focus, the Tenth Circuit neither addressed nor criticized the inaction doctrine.¹⁰⁶

Although the Tenth Circuit's reasoning is problematic, it is true that the inaction doctrine has its limits. Exempting all federal "inactions" from NEPA compliance could harm the environment. In *National Wildlife Federation v. Espy*,¹⁰⁷ the plaintiffs brought suit to force the Farmers Home Administration (FHA), a subdivision of the Department of Agriculture, to comply with NEPA by conducting an EIS when the agency transferred title to the Farm Credit Bank of a wetland used for grazing without a provision for wetland conservation.¹⁰⁸ The Ninth Circuit held that a title transfer, which did nothing to alter the existing environment, did not require an EIS because the status quo remained.¹⁰⁹ In this situation, environmental degradation was already in process because cattle were grazing on the wetland, and FHA transferred the title with the knowledge that grazing would

¹⁰³ *Id.* at 1436.

¹⁰⁴ *Id.* at 1433.

¹⁰⁵ Patterson, *supra* note 58, at 784.

¹⁰⁶ *Id.*

¹⁰⁷ 45 F.3d 1337 (9th Cir. 1995).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1343.

continue.¹¹⁰ By allowing grazing to continue without considering further environmental impacts because the status quo was maintained,¹¹¹ the court subverted the protective purpose of NEPA.¹¹² Because NEPA has proven to be "an effective tool in forcing government agencies to consider the environmental consequences of their actions," this potential dilution of NEPA under the status quo rationale is undesirable.¹¹³ As the next section demonstrates, however, there are other situations where the necessity of immediate environmental protection does outweigh the benefits of NEPA.

IV. THE DESTINATION

A. *The Charitable Trust Correlation to NEPA*

The broad statutory language of NEPA has provided courts "a catalyst for development of a 'common law' of NEPA,"¹¹⁴ which is evident from the above discussion of its judicially-recognized exemptions. For federal agencies to uniformly implement NEPA, a coherent standard of judicial review should be developed by analogizing NEPA with the common law concept of a charitable trust.¹¹⁵ By correlating these two concepts, courts will be better equipped to subject federal agencies to NEPA compliance, but will ultimately understand when exemptions are necessary in order to benefit the public and the "greater good." In general, a trust is a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person."¹¹⁶ A charitable trust is designed to provide a benefit to a community or class of individuals; this relationship allows the trust property to be administered for a purpose beneficial to the public.¹¹⁷ To be considered charitable, a trust's primary goal must be of such social value to justify the duration of property in perpetuity to this end.¹¹⁸ The conservation of natural

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 42 U.S.C §§ 4321, 4331(a) (2000).

¹¹³ Patterson, *supra* note 58, at 785.

¹¹⁴ Kleppe v. Sierra Club, 427 U.S. 390, 421 (1976).

¹¹⁵ Holland, *supra* note 27, at 747.

¹¹⁶ RESTATEMENT (SECOND) OF TRUSTS § 2 (1959) [hereinafter RESTATEMENT].

¹¹⁷ *Id.* §§ 348, 368 (purposes of a charitable trust).

¹¹⁸ See *id.* at §§ 368-376 (examples of charitable trusts).

resources for the benefit of the public and generations to come can fairly be considered a legitimate goal of a charitable trust.¹¹⁹ As Congress enacted NEPA to preserve the environment for future generations,¹²⁰ its purpose follows closely the purpose of a charitable trust. By analogy, federal agencies are the trustees charged with administering the environment for the greater good of our society.¹²¹

Trustees acquire certain duties, such as the duties of loyalty, due care, and accounting to the beneficiary.¹²² In order to be loyal to the beneficiaries' interests, a trustee may not allow self-interest to interfere with the ultimate goal of preservation for the beneficiaries;¹²³ all actions by the trustee must be performed to promote the beneficiaries', in this case the public's, greater good. To this end, the trustee has discretion to perform its administrative duties, but is obligated to exercise due and reasonable care with every decision.¹²⁴ In order to safeguard the beneficiaries' interests, the trustee has also been charged with the duty to keep account of the trust management and to disclose all relevant information regarding the trust.¹²⁵ If the trustee unreasonably abuses its discretion, any beneficiary may bring suit for such equitable remedies as specific performance of the trustee's duties, redress for its breach, an injunction against the breach of that trust, and removal of the trustee.¹²⁶

Several similarities exist between the duties of a common law trustee and federal agencies bound by NEPA. For example, under the duty of loyalty, the Forest Service cannot allow economic or regional self-interests to impede on preservation because in the long run, the conservation of public lands is the paramount concern and the ultimate purpose of this trust. The United States government, like any trustee, has the responsibility of administering the environment for this and succeeding generations.¹²⁷ Because protecting the

¹¹⁹ See *id.* See also NEPA, 42 U.S.C. § 4331(a) (2000).

¹²⁰ 42 U.S.C. § 4331(a).

¹²¹ Holland, *supra* note 24, at 789.

¹²² RESTATEMENT, *supra* note 116, § 186.

¹²³ AUSTIN W. SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 170 (1989).

¹²⁴ *Id.* § 174.

¹²⁵ *Id.* §§ 172-73 (accounting of the trust management, and disclosing relevant trust information, respectively).

¹²⁶ *Id.* § 199.

¹²⁷ NEPA, 42 U.S.C. § 4331(a) (2000).

environment for the American public – the class of persons designated as the beneficiaries for the charitable trust – is beneficial to the nation, the government is afforded discretion in the means it chooses to use to achieve this end.¹²⁸

Requiring an EIS is NEPA's equivalent to the trustee's duty to account for its management – a check that ensures that the trustee does not abuse its discretion.¹²⁹ Crucially, however, when compliance with the terms of the trust conflicts with its ultimate purposes, the trustee is allowed to deviate from those terms.¹³⁰ Based on that premise, a federal agency may deviate from NEPA's "accounting procedures" if the EIS will hinder the goal of environmental preservation. For example, if a federal action will accomplish NEPA's purposes without an impact statement, creating an EIS will only slow down the process of protection, and irreparable harm could result.¹³¹ An EIS, or the duty to account, is generally desirable because it gives the beneficiaries (the American public) a chance to participate in the handling of its trust (the health of the environment). However, when situations arise in which compliance with the terms of the trust will subvert the ultimate purpose of the trust, an exemption to NEPA and its accounting procedures is justified, if not necessary.

B. Merging the Roads: Coupling Federal Inaction with Preservation

When it enacted NEPA, Congress recognized that the environment should become a priority in the nation's decision making. For approximately two hundred years, governmental policies were designed to enhance production and increase monetary gains. To that end, the United States has become one of the most prosperous nations in the world; however, this "material well-being" has come at the price of a swiftly declining natural environment.¹³² "Today it is clear that we cannot continue on this course. Our natural resources – our air, water, and land – are not unlimited. We no longer have the

¹²⁸ See Holland, *supra* note 24, at 789; See also *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

¹²⁹ See Holland, *supra* note 24, at 789.

¹³⁰ RESTATEMENT, *supra* note 116, § 381.

¹³¹ See discussion *supra* Part I.

¹³² S. REP. NO. 91-296, at 5 (1969).

margins for error that we once enjoyed.”¹³³ The legislative history of NEPA suggests that an attempt to slow down or stop environmental degradation in its tracks is NEPA’s ultimate purpose.

Unfortunately, the time it may take to file an EIS and later defend its soundness in court subverts environmental preservation. The conservation measures of the Roadless Rule were delayed from October 1999 until December 2002¹³⁴ because of the time it took to prepare an EIS and the numerous lawsuits regarding the quality of the EIS. In this case, the time constraints associated with an EIS actually hindered environmental protection, as human damage and modification to the ecosystem could continue. Accordingly, prohibiting human modification of the environment in many cases will preserve and protect the environment, which, under the trust analogy, will not trigger the accounting duties of a trustee. For certain projects, the EIS process could last up to twelve years.¹³⁵ The significant environmental damage that can occur during that twelve-year period may be irreparable. In such a case, the trustee should be able to deviate from its accounting requirements in order to preserve the land for the greater good for generations to come.¹³⁶

Additionally, the effect the Roadless Rule will have on wildland fire or disease is of minor concern since treatment in these areas already receives a low priority.¹³⁷ Overall, the scientific literature shows that roadless areas are less altered and present a lower fire hazard than forests in intensely managed areas; in fact, twelve percent of roaded national forests are highly susceptible to fire as compared to three percent of roadless areas.¹³⁸

¹³³ *Id.*

¹³⁴ The announcement that a Roadless Rule was to be created was given in a speech by President Clinton on October 13, 1999 at the George Washington and Jefferson National Forest in Virginia. See Clinton Remarks, *supra* note 32. The Ninth Circuit lifted the injunction on the implementation of the Roadless Rule on December 12, 2002. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

¹³⁵ COUNCIL ON ENVTL. QUALITY, *supra* note 17.

¹³⁶ See RESTATEMENT, *supra* note 116, § 164; See also discussion *infra* Part IIB.

¹³⁷ Alison S. Hoyt, Comment, *Roadless Area Conservation: How the “Roadless Rule” Affects America’s Forestland*, 14 TUL. ENVTL. L.J. 525, 540 (2001) (citing U.S. Dept’t of Agric., Regulatory Impact Analysis for the Roadless Area Conservation Rule (2001)).

¹³⁸ UNITED STATES DEPT OF AGRICULTURE, FOREST SERVICE ROADLESS AREA CONSERVATION: DRAFT ENVIRONMENTAL IMPACT STATEMENT (2000), cited in WORLD WILDLIFE FUND, *supra* note 31. In fact, several studies have shown that “[f]ires in the

Every day, more of the ecosystem is being demolished and developed in a way that cannot truly be repaired.¹³⁹ For example, the Roadless Rule carries a provision that the final rule will “not revoke, suspend, or modify any permit, contract or other legal instrument authorizing the occupancy and use of the National Forest System land issued prior to January 12, 2001.”¹⁴⁰ Because the intention to create a rule was announced on October 13, 1999, industries interested in logging, mining, or building roads in these areas of the national forests were able to make contracts before the final rule date. The Forest Service added to the rule that project decisions are only valid if created before the date of publication of the Roadless Rule, not sixty days later when the Rule would become effective.¹⁴¹ The necessity of this provision implies that the Forest Service recognizes the immediate need to protect forestland, and was fearful that the industries would rush to contract work in the national forests at the last minute. By delaying the environment’s protection to prepare a statement that reiterates the need for the Roadless Rule, valuable time is lost in the fight for environmental conservation.

roaded areas are more intense, due to drier conditions, wind zones . . . high surface-fuel loading, and dense stands.” See WORLD WILDLIFE FUND, *supra* note 31. See also W.J. Hann et al., *Landscape Dynamics of the Basin*, in 2 AN ASSESSMENT OF ECOSYSTEM COMPONENTS IN THE INTERIOR COLUMBIA BASIN AND PORTIONS OF THE KLAMATH AND GREAT BASINS 337 (T.M. Quigley & S.J. Arbelbide, eds. 1997), cited in WILDLIFE FUND, *supra* note 31; C.P. WEATHERSPOON & C.N. SKINNER, *An Assessment of Factors Associated with Damage to Tree Crowns from the 1987 Wildfire in Northern California*, in 41 FOREST SCIENCE 430-451 (1995) (finding that partial cut stands with fuels treatment burned more intensely and suffered higher levels of tree mortality than areas left uncut and untreated), cited in WILDLIFE FUND, *supra* note 31; UNITED STATES DRAFT ENVIRONMENTAL IMPACT STATEMENT (2000) (finding that roaded areas on the national forests are almost 4 times more likely as roadless forests to be at risk for insect infestation and disease), cited in WILDLIFE FUND, *supra* note 31.

¹³⁹ Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001). Roads have been constructed in 2.8 million of those 34.3 million acres of inventoried roadless areas that have prescriptions for road building, and without the Roadless Rule, this number will certainly increase. *Id.* Studies have shown that roads inflict numerous impacts on their immediate physical environment and fragment natural ecosystems. WORLD WILDLIFE FUND, *supra* note 31 (citing J.R. STRITHTOLT & D.A. DELLASALA, *Importance of Roadless Areas in Biodiversity Conservation in Forested Ecosystems: A Case Study – Klamath-Siskiyou Ecoregion*, in 15 CONSERVATION BIOLOGY 1742-1754 (2001)). In fact, although roads cover only 2% of the coterminous United States, almost 25% of the land area of the United States is impacted. WORLD WILDLIFE FUND, *supra* note 31 (citing R.T.T. FORMAN & A.M. HESPERGER, *Road Ecology and Road Density in Different Landscapes, with International Planning and Mitigation Solutions*, in PROCEEDINGS TRANSPORTATION AND WILDLIFE: REDUCING WILDLIFE MORTALITY AND IMPROVING WILDLIFE PASSAGEWAYS ACROSS TRANSPORTATION CORRIDORS 1-23 (G. Evink et al. eds., 1996)).

¹⁴⁰ 36 C.F.R. § 294.14(a) (2003).

¹⁴¹ Special Areas; Roadless Area Conservation, 66 Fed. Reg. at 3260.

By combining the theory of charitable trust and the reasoning behind the case law that exempts the Secretary of the Interior from filing an EIS for certain actions under the ESA, the principle emerges that other federal agency actions that preserve a natural environment by prohibiting human development should also be exempt from NEPA. But still, actions that simply maintain the "status quo" are significantly different than actions that prohibit human development of a natural environment for conservation reasons. By only maintaining the "status quo," an action could be allowing environmental damage to continue.¹⁴² The cattle grazing example,¹⁴³ which used the inaction doctrine to relieve FHA from the rigors of NEPA, shows that not all "inactions" result in environmental protection. For this reason, the federal "action" must also further NEPA's purposes before an exemption should be allowed.

In *Douglas County*, the Ninth Circuit held that actions that do nothing to modify a naturally existing environment are exempt from the procedural requirements of NEPA.¹⁴⁴ Other courts have accepted the inaction doctrine, where a land or critical habitat designation usually does not result in any affirmative action per se, as a factor in determining an exemption from NEPA.¹⁴⁵ For fear of creating a broad exemption that could be manipulated by those whose actions would further damage the natural environment,¹⁴⁶ the inaction doctrine should not be considered by itself in deciding whether to exempt an action from NEPA.¹⁴⁷

Thus, an additional criterion to the inaction doctrine should be that when a federal "inaction" actually furthers the goals of NEPA, then the action should be exempt from preparing an EIS.¹⁴⁸ In explaining the rationale of the Roadless Rule, the Forest Service explicitly stated that it was attempting to prohibit federal action that could further damage the environment: "[a]s human caused fragmentation increases,

¹⁴² Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337 (9th Cir. 1995).

¹⁴³ See discussion *supra* Part IIIC.

¹⁴⁴ *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995).

¹⁴⁵ See *id.*; see also *Sabine River Auth. v. United States Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992).

¹⁴⁶ See *Espy*, 45 F.3d 1337.

¹⁴⁷ *Patterson*, *supra* note 58, 786.

¹⁴⁸ *Id.*

the amount of core wildlife habitat decreases."¹⁴⁹ Not only can the Rule's prohibition of road construction and timber harvest be considered "inaction" as no affirmative action is to be undertaken, but this "inaction" also advances NEPA goals because the Rule seeks to conserve national forestland for generations to come.

Some commentators argue that the main purpose of NEPA is to involve the public in government decision making and to provide information to the public.¹⁵⁰ The public involvement that NEPA mandates, such as public hearings and a forty-five day public comment period, is generally desirable. However, the legislative history suggests that environmental protection and conservation are NEPA's ultimate goals and that public participation is just a vehicle used to most effectively achieve this goal. By exempting actions such as the Roadless Rule from NEPA, any harm the public may suffer is significantly less than the potentially permanent environmental harm that the public would experience if the NEPA process was fully achieved.

Even exempting certain actions from NEPA compliance would not bar public comment. Although a public involvement process under NEPA is undesirable for rules or actions that prohibit human modification of a natural environment because of the necessary time commitments, interested parties may still comment on the Rule pursuant to the Administrative Procedure Act (APA). For those parties interested in commenting on a rule, the APA requires that a proposed rule be placed in the Federal Register, that interested parties be notified, and that any party be allowed to comment.¹⁵¹ Before an agency holds a meeting on a rule, the APA requires the agency to publicly announce the date, time, and place of the meeting, thus opening the door for public involvement.¹⁵² Accordingly, when a situation arises where a NEPA exemption is necessary, the public may nonetheless participate under the mandates of the APA.

¹⁴⁹ Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3247 (Jan. 12, 2001).

¹⁵⁰ Andrea L. Hungerford, *Changing the Management of Public Land Forests: The Role of the Spotted Owl Injunctions*, 24 ENVTL. L. 1395, 1396 (1994) (citing SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 251 (1984)).

¹⁵¹ APA, 5 U.S.C. § 552(a) (2000).

¹⁵² *Id.*

V. CONCLUSION

Gifford Pinchot, the first Chief of the Forest Service, summed up the mission of the Forest Service as one "to provide the greatest amount of good for the greatest amount of people in the long run."¹⁵³ NEPA was created upon the premise that inadequate government policies have caused continuing environmental decline, and that these inadequacies can be seen through the loss of valuable open space, critical air and water pollution, needless deforestation, and countless other environmental problems.¹⁵⁴

Although it is desirable for federal agencies to comply with NEPA to the "fullest extent possible,"¹⁵⁵ a federal agency may defeat NEPA's very purposes by complying with its procedure. In this Catch-22,¹⁵⁶ the procedural compliance must give way in order to accomplish a substantive goal consistent with the history and purpose of the relevant law.¹⁵⁷ Federal actions such as the Roadless Rule, which essentially prohibits road construction and timber harvesting on 58.5 million acres in the national forests, were promulgated to preserve the ecosystem for generations to come.¹⁵⁸

When federal action prohibits human modification of a naturally existing environment and furthers the purposes of NEPA, an EIS is neither needed nor even desirable. However, courts should be wary of creating broad exemptions from NEPA since federal actions that are touted as "benevolent" may not always be so.¹⁵⁹ Through a comparison of the histories of NEPA

¹⁵³ U.S. FOREST SERVICE, *Mission Statement*, available at <http://www.fs.fed.us/aboutus> (last visited Nov. 29, 2003).

¹⁵⁴ S. REP. NO. 91-296, at 4 (1969).

¹⁵⁵ NEPA, 42 U.S.C. § 4331(a) (2000).

¹⁵⁶ JOSEPH HELLER, CATCH-22 (1961).

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

Id. at 47.

¹⁵⁷ See discussion *infra* Part III.A.

¹⁵⁸ Banning road construction and timber harvesting allows for clean drinking water, the preservation of species, protection from forest fires, etc. See KRIEGER, *supra* note 34.

¹⁵⁹ See Cosco, *supra* note 14.

and the Roadless Rule, preserving the natural environment is the paramount concern of both, and therefore the Roadless Rule achieves NEPA's purposes without an impact statement. Along with NEPA's legislative history, the directives of the charitable trust doctrine further support exempting from NEPA federal actions that do nothing to alter the physical, natural environment. Additionally, as the state of the environment continues to decline, expeditious decisions to protect it are ultimately desirable, and well-considered exemptions would only aid in environmental protection.

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