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Public Land Law - Looking into the Future: The Need for a Final Judgment on the Validity of the Roadless Rule, Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207 (10th Cir. 2005)

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CASE NOTE

PUBLIC LAND LAW—Looking into the Future: The Need for a Final Judgment on the Validity of the Roadless Rule, *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207 (10th Cir. 2005).

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INTRODUCTION

The future of national forest roadless areas is uncertain.¹ Since 2001, litigation has surrounded national forest roadless area management.² Courts render a judgment on the issue, only to have an opposite judgment issued by another court.³ Although one may know today what the management plan for national forest roadless areas is, courts have continually quashed hopes for a long-term plan and the ability to predict the future of roadless areas.⁴ Also, two presidential administrations with different views on roadless area management increased the

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¹ See generally *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1214 (10th Cir. 2005) [hereinafter *Wyoming II*] (holding the Roadless Rule case to be moot); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1123 (9th Cir. 2002) [hereinafter *Kootenai II*] (holding the district court erroneously granted a preliminary injunction of the Roadless Rule); *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006) (holding the State Petitions Rule is to be set aside, reinstating the Roadless Rule); *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) [hereinafter *Wyoming I*] (holding the Roadless Rule invalid, thus granting a permanent nationwide injunction of the rule); *Kootenai Tribe v. Veneman*, 142 F. Supp. 2d 1231, 1248 (D. Idaho 2001) [hereinafter *Kootenai I*] (holding a likelihood of success on claims, thus granting a preliminary injunction of the Roadless Rule).

² See *Wyoming II*, 414 F.3d 1207; *Kootenai II*, 313 F.3d 1094; *Lockyer*, 459 F. Supp. 2d 874; *Wyoming I*, 277 F. Supp. 2d 1197; *Kootenai I*, 142 F. Supp. 2d 1231.

³ Compare *Wyoming I*, 277 F. Supp. 2d at 1239 (holding the roadless rule violated NEPA, thus granting a permanent nationwide injunction on the rule) and *Kootenai I*, 142 F. Supp. 2d at 1248 (granting a preliminary injunction on the Roadless Rule because court found a likelihood of success on NEPA claims and of irreparable harm), with *Kootenai II*, 313 F.3d at 1123 (finding *Kootenai I* erroneously granted a preliminary injunction based on the faulty assumption of likelihood of success of NEPA claim and finding of irreparable harm), and *Lockyer*, 459 F. Supp. 2d at 919 (repealing the State Petitions Rule and reinstating nationwide the Roadless Rule); see also Felicity Barringer, *Judge Voids Bush Policy on National Forest Roads*, N.Y. TIMES, Sept. 21, 2006 at A21 (describing the national forest management litigation as “legal Ping-Pong”).

⁴ See generally *Wyoming II*, 414 F.3d 1207 (mooting the Roadless Rule case); *Kootenai II*, 313 F.3d at 1123 (reversing *Kootenai I*'s preliminary injunction of the Roadless Rule); *Lockyer*, 459 F. Supp. 2d at 919 (repealing the State Petitions Rule and reinstating the Roadless Rule nationwide); *Wyoming I*, 277 F. Supp. 2d at 1239 (granting a nationwide injunction of the Roadless Rule); *Kootenai I*, 142 F. Supp. 2d at 1248 (holding the Roadless Rule likely violated NEPA, granting a preliminary injunction of the rule); see also Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1185 (2004) (“While the Ninth Circuit held that the Forest Service fully complied with NEPA [National Environmental Policy Act] in its promulgation of the Roadless Rule, the Wyoming district court found several deficiencies in the agency’s efforts to comply with NEPA.”); see *infra* note 199.

uncertainty surrounding these areas.⁵ One administration assured national, long-term protection of roadless areas, while the next sought state-by-state protection, which would allow for varying degrees of protection.⁶ Without a long-term plan, the U.S. Forest Service (Forest Service) and states lack the ability to assure preservation of this finite resource.⁷

The decisions sparking litigation over national forest roadless area management began almost ten years ago.⁸ In March 1999, after years of forest-by-forest management plans, the Forest Service placed a moratorium on road construction in inventoried national forest roadless areas.⁹ During the moratorium, President Clinton directed the Forest Service to develop a new management policy for roadless areas.¹⁰ The Forest Service commenced the public process to establish new Forest Service regulations.¹¹ This process, in compliance with the National Environmental Policy Act (NEPA), included a Draft Environmental Impact Statement (DEIS) and a proposed rule, both of which were published in May 2000.¹² After the public comment period, the Forest Service published a Final Environmental Impact Statement (FEIS) in November 2000.¹³ In January 2001,

⁵ Glicksman, *supra* note 4, at 1208 (“[T]he direction in which the Bush Administration is steering roadless area management policy is very different from the direction reflected in the Roadless Rule and associated Clinton Administration initiatives: [President Bush’s] direction is aligned less with natural resource preservation and more with resource extraction and development.”).

⁶ See, e.g., Glicksman, *supra* note 4, at 1143-44; compare Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) [hereinafter Roadless Area Conservation] (mandating a nationwide conservation of national forest roadless areas), with Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25654, 25661 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294) [hereinafter State Petitions] (mandating a state-by-state approach to national forest roadless areas, which would allow for varied levels of protection between states and even within a state).

⁷ The Forest Service through “[t]he Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests.” Protection of National Forests; Rules and Regulations, 16 U.S.C. § 551 (2006). The courts’ indecisiveness greatly affects Wyoming, a state with an abundance of national forest land. *Wyoming II*, 414 F.3d at 1211. Approximately 3.25 million acres (35%) of the national forest land in Wyoming is roadless as defined by Roadless Area Review Evaluation II. *Id.*

⁸ See Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7,290 (Feb. 12, 1999) (to be codified at 36 C.F.R. pt. 212).

⁹ *Id.* (“This final interim rule temporarily suspends decisionmaking regarding road construction and reconstruction in many unroaded areas within the National Forest System.”); see also *Wyoming I*, 277 F. Supp. 2d at 1205-06 (granting a moratorium allowed “time to assess the ecological, economic, and social value of roadless areas and to evaluate the long-term management options for inventoried roadless areas.”).

¹⁰ *Wyoming I*, 277 F. Supp. at 1205-06.

¹¹ *Wyoming II*, 414 F.3d at 1210.

¹² National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006); *Wyoming II*, 414 F.3d at 1210.

¹³ *Wyoming II*, 414 F.3d at 1210.

the Forest Service adopted the Roadless Rule.¹⁴ The Roadless Rule prohibited road construction activities and timber harvesting in inventoried national forest roadless areas, unless the activity fell into one of the enumerated exceptions.¹⁵

Criticism of the Roadless Rule and the Forest Service quickly developed.¹⁶ Four months after the Forest Service adopted the Roadless Rule, the State of Wyoming filed suit against the United States Department of Agriculture (USDA) for procedural and substantive deficiencies.¹⁷ Wyoming asked the U.S. District Court for the District of Wyoming (district court) for declaratory and injunctive relief from the Roadless Rule.¹⁸ Wyoming claimed the Forest Service violated NEPA, the Wilderness Act, and other acts when promulgating the Roadless Rule.¹⁹ The district court found for Wyoming on five of its NEPA claims and its Wilderness Act claim.²⁰ The court ordered a nationwide injunction of the Roadless Rule.²¹

¹⁴ *Id.*; see Roadless Area Conservation, 66 Fed. Reg. 3244-01 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

¹⁵ See Roadless Area Conservation, 66 Fed. Reg. at 3272 (“A road may not be constructed or reconstructed in inventoried roadless areas of the National Forest System . . . Timber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System.”); see also *Wyoming II*, 414 F.3d at 1210; see *infra* note 53 and accompanying text (listing the exceptions).

¹⁶ *Wyoming II*, 414 F.3d at 1211.

¹⁷ *Id.* (alleging the Roadless Rule violated NEPA and the Wilderness Act); see *infra* notes 153-58 and accompanying text. The USDA oversees the Forest Service. See Charles L. Kaiser & Scott W. Hardt, *Fitting Oil and Gas Development Into the Multiple-Use Framework: A New Role for the Forest?*, 62 U. COLO. L. REV. 827, 832 (1991).

¹⁸ *Wyoming II*, 414 F.3d at 1211.

¹⁹ See *id.*; see also National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006); National Wilderness Preservation System Act, 16 U.S.C. §§ 1131-1136 (2006). Although the court recognized the *Kootenai II* decision, which held the Roadless Rule was unlikely to violate NEPA, the court gave no deference to the decision. *Wyoming II*, 414 F.3d at 1210 n.1. The court found the *Kootenai II* decision “to be of limited persuasive value” for three reasons: (1) the decision may have overruled other Ninth Circuit opinions concerning NEPA, (2) the opinion departed from U.S. Supreme Court NEPA precedent by discussing substantive components of NEPA, and (3) the opinion failed to clarify what it overruled. *Id.* In contrast, *Lockyer* asserted the Ninth Circuit’s *Kootenai II* opinion “explained in considerable detail its conclusion” that the promulgation of the Roadless Rule likely did not violate NEPA. Cal. *ex rel.* Lockyer v. U.S. Dep’t of Agric., 459 F. Supp. 2d 874, 880-81 (N.D. Cal. 2006).

²⁰ *Wyoming I*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003).

²¹ *Id.* The Northern District of California explained an injunction is generally the remedy for NEPA violations. *Lockyer*, 468 F. Supp. 2d at 913. Additionally, the injunction should be “tailored to the violation of the law that the [c]ourt already found—an injunction that is no broader but also no narrower than necessary to remedy violations of NEPA.” Cal. *ex rel.* Lockyer v. U.S. Dep’t of Agric., 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006). The court further elaborated that the injunction must “prevent such injury from occurring again by the operation of the invalidated regulations, be it in the Eastern District of California . . . or anywhere else in the nation.” *Id.* (emphasis added). Thus, the court explained the proper remedy for a national rule that violates NEPA can be a nationwide injunction. See *id.*

The USDA did not appeal the district court's decision, but environmental organizations, intervenors in the suit, appealed to the Tenth Circuit Court of Appeals.²² Concurrently, however, the new administration was taking steps to replace the Roadless Rule.²³ Under the direction of President Bush, the Forest Service announced an interim rule for national forest roadless area management, while it developed a new management plan.²⁴ In May 2005, the Forest Service replaced the Roadless Rule with the State Petitions Rule.²⁵ The State Petitions Rule allows state governors to petition the Secretary of Agriculture to establish state management practices for national forest roadless areas within the state's boundaries.²⁶

Because the Tenth Circuit Court of Appeals found the Roadless Rule no longer existed, it held the case was moot.²⁷ To preserve the petitioners' rights the Tenth Circuit vacated the lower court's decision.²⁸

²² See *Wyoming II*, 414 F.3d at 1211. Intervenors included the Wyoming Outdoor Council; the Wilderness Society; Sierra Club; Biodiversity Associates; Pacific Rivers Council; Natural Resources Defense Council; Defenders of Wildlife; National Audubon Society. *Id.* at 1207. There were also twenty amici curiae, which included environmental groups, mining associations, petroleum associations, states, and counties. *Id.*

²³ *Id.* at 1211 ("While the appeal [*Wyoming II*] was pending, the Forest Service announced a proposal to replace the Roadless Rule.").

²⁴ *Id.*; see also Roadless Area Protection, 69 Fed. Reg. 42648-02 (July 16, 2004) ("The reinstated [interim directive] . . . is intended to provide guidance for addressing road and timber management activities in inventoried roadless areas until land and resource management plans are amended or revised.").

²⁵ *Wyoming II*, 414 F.3d at 1211.

²⁶ *Id.*

²⁷ *Id.* at 1211-13. The court stated that the "portions of the Roadless Rule that were substantively challenged by Wyoming no longer exist . . . Moreover, the alleged procedural deficiencies of the Roadless Rule are now irrelevant because the replacement rule was promulgated in a new and separate rulemaking process." *Id.* at 1212. The court determined the announcement of the State Petitions Rule removed both the substantive and procedural challenges to the Roadless Rule, making the case on appeal moot. *See id.*

²⁸ *Id.* at 1213-14. Following Tenth Circuit and Supreme Court precedent, once the court determined the case to be moot, it vacated the lower court's decision. *Id.* at 1213. Vacating a judgment "is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). The U.S. Supreme Court further explained how parties' rights are protected through vacatur by stating "that those who have been prevented from obtaining the review to which they are entitled should not be treated as if there had been a review." *Id.* at 39. When an appeals court moots a case and then vacates the lower court's decision "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40. The court in *Wyoming II* stated that "the rights of the *defendant-intervenors*, the nonprevailing parties seeking appellate relief, are preserved" by vacating the lower court's judgment. *Wyoming II*, 414 F.3d at 1213 n.6 (emphasis added).

This case note argues the Tenth Circuit in *Wyoming II* erroneously decided the case to be moot.²⁹ This note analyzes the Tenth Circuit Court of Appeals' decision, arguing the court should have employed a recognized exception to the mootness doctrine, public interest, and judicial economy to rule on the merits of the case.³⁰ Furthermore, this note reviews the two opposing national forest roadless area management rules and recent cases, which challenged roadless area management plans, to defend its position.³¹

BACKGROUND

In 1897, the Forest Service Organic Act (Organic Act) instituted the first management plan for national forest land.³² Recently, however, national forests, especially roadless areas, have lacked a steady management plan because of administrative and judicial flip-flopping.³³ The Tenth Circuit added to the inconsistent management by failing to rule on the merits of the Roadless Rule.³⁴

Reviewing the history of national forest roadless area management, relevant cases, and the mootness doctrine helps to understand why the Tenth Circuit should have ruled on the merits of the Roadless Rule.³⁵ The recent vacillation of national forest roadless area management demonstrates the controversial nature of the issue and also the need for a long-term management plan.³⁶ A Ninth Circuit Court of Appeals decision and a U.S. District Court for the Northern District of California decision illustrate the same vacillation, but in the judicial context.³⁷ Finally, an examination of the mootness doctrine reveals an exception applicable to *Wyoming II*.³⁸

²⁹ See *infra* notes 145-94 and accompanying text.

³⁰ See *infra* notes 145-94 and accompanying text.

³¹ See *infra* notes 39-99 and accompanying text.

³² Kaiser & Hardt, *supra* note 17, at 830-31; see Forest Service Organic Act, 16 U.S.C. §§ 473-478, 489-482, 551 (2006).

³³ Compare *Wyoming I*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) (holding the roadless rule violated NEPA, thus granting a permanent nationwide injunction on the rule) and *Kootenai I*, 142 F. Supp. 2d 1231, 1248 (D. Idaho 2001) (granting a preliminary injunction on the Roadless Rule because court found a likelihood of success on NEPA claims and of irreparable harm), with *Kootenai II*, 313 F.3d 1094, 1123 (9th Cir. 2002) (finding *Kootenai I* erroneously granted a preliminary injunction based on the faulty assumption of likelihood of success of NEPA claim and finding of irreparable harm), and *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006) (repealing the State Petitions Rule and reinstating nationwide the Roadless Rule); see also *Barringer*, *supra* note 3, at A21 (describing the national forest management litigation as "legal Ping-Pong").

³⁴ See *Wyoming II*, 414 F.3d 1207, 1214 (10th Cir. 2005).

³⁵ See *infra* notes 39-120 and accompanying text.

³⁶ See *infra* notes 39-68 and accompanying text.

³⁷ See *infra* notes 69-99 and accompanying text.

³⁸ See *infra* notes 100-120 and accompanying text.

A. Management Plans for National Forest Roadless Areas

Until the promulgation of the Roadless Rule, the Forest Service offered no uniform plan for national forest roadless area management.³⁹ Instead, “individual forest plans governed the use of roadless areas . . . [and there was] forest-by-forest decision making.”⁴⁰ Often the Forest Service bowed to industrial interests in forest plans, allowing industrial logging in roadless areas and the infrastructure needed to support such operations.⁴¹ As concern for the degradation of roadless areas rose, a national mandate to protect this finite resource was inevitable.⁴²

Recognizing the importance of roadless areas, the Forest Service issued an interim national forest management rule in 1999.⁴³ The interim rule mandated an eighteen-month moratorium on road construction in roadless areas identified by the second Roadless Area Review and Evaluation.⁴⁴ The Forest Service used this eighteen-month period to analyze the “benefits and impacts of roads.”⁴⁵ During this period, Congress required the Forest Service to prepare an Environmental Impact Statement (EIS).⁴⁶ The Forest Service used the EIS as a guide to create a

³⁹ See *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459 F. Supp. 2d 874, 880 (N.D. Cal. 2006).

⁴⁰ *Id.*

⁴¹ *Cf. Kootenai II*, 313 F.3d 1094, 1105 (9th Cir. 2002) (noting that in twenty years the Forest Service developed (built roads, logged, etc.) 2.8 million acres of national forest roadless areas).

⁴² See Heather S. Fredrikson, *The Roadless Rule that Never Was: Why Roadless Areas Should be Protected Through National Forest Planning Instead of Agency Rulemaking*, 77 U. COLO. L. REV. 457, 464 (2006). From 1970 to 1990 the Forest Service adopted a “commodity production” policy, thus, timber and energy companies became keenly interested in road construction in national forests. *Id.* Conservationists and the Clinton administration voiced their concern over such practices in national forest inventoried roadless areas. *Id.*

⁴³ See *Wyo. Timber Indus. Ass’n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245, 1249 (D. Wyo. 2000) (“In particular, the Forest Service was concerned with funding shortfalls, erosion and other environmental damage, substandard roads, and the value of unroaded areas”); see also Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7,290 (Feb. 12, 1999) (to be codified at 36 C.F.R. pt. 212) (“This final interim rule temporarily suspends decisionmaking regarding road construction and reconstruction in many unroaded areas within the National Forest System.”).

⁴⁴ See Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. at 7,290 (“The temporary suspension of road construction and reconstruction will expire upon the adoption of a revised road management policy or 18 months from the effective date of this final interim rule, whichever is sooner.”); see, e.g., *Wyo. Timber Indus.*, 80 F. Supp. 2d at 1249. In 1979, the second Roadless Area Review and Evaluation (RARE II) identified 2,919 national forest roadless areas and recommended the appropriate future management for each. *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383, 387 (D. Wyo. 1980) (estimating the roadless areas included more than sixty-two million acres).

⁴⁵ *Wyo. Timber Indus.*, 80 F. Supp. 2d at 1249.

⁴⁶ See H. Micheal Anderson & Alike Moncrief, *America’s Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 436 (1999).

new rule for national forest roadless area management.⁴⁷ In May 2000, the Forest Service published the DEIS and the proposed rule, allowing public comment until July 2000.⁴⁸ The Forest Service then issued the FEIS in November of 2000.⁴⁹ The FEIS subjected 58.5 million acres to the Roadless Rule, including 4.2 million acres of roadless area previously not included in the DEIS.⁵⁰ Finally, on January 5, 2001, the Forest Service announced the final Roadless Rule, which would be implemented in March of the same year.⁵¹

The Roadless Rule prohibited all forms of road construction in inventoried national forest roadless areas unless the construction fell into one of four enumerated exceptions.⁵² Road construction was allowed under the Roadless Rule if it was (1) for the protection of public health and safety, (2) needed for statutory environmental cleanup, (3) a right reserved in a statute or treaty, or (4) necessary for established mineral leases.⁵³ The Roadless Rule's extensive ban on road construction and its national scope "were necessary to protect the diminishing areas of relatively unspoiled national forest from further fragmentation by the steady accretion of local decisions allowing encroachment."⁵⁴

⁴⁷ *See id.*

⁴⁸ Wyoming II, 414 F.3d 1207, 1210 (10th Cir. 2005); *see also* Special Areas; Roadless Area Conservation; Proposed Rules, 65 Fed. Reg. 30275 (May 10, 2000) (to be codified at 36 C.F.R. 294).

⁴⁹ Wyoming I, 277 F. Supp. 2d 1197, 1206-10 (D. Wyo. 2003).

⁵⁰ Kootenai II, 313 F.3d 1094, 1105 (9th Cir. 2002).

⁵¹ *Id.*; *see also* Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

⁵² Wyoming I, 277 F. Supp. 2d at 1210.

⁵³ *Id.*

⁵⁴ Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 880 (N.D. Cal. 2006). In December 2003, the Department of Agriculture amended the Roadless Rule to include the Tongass Amendment. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75136-01 (Dec. 30, 2003) (to be codified at 36 C.F.R. 294). The Tongass Amendment "temporarily exempt[ed] the Tongass National Forest . . . from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas . . . until the Department promulgate[d] a subsequent final rule concerning the application of the roadless rule within the State of Alaska." *Id.* at 75136. The amendment spurs from the settlement of a lawsuit between the State of Alaska and the USDA. *Id.* at 75137. Impetus for the rule comes from the two facts: (1) many communities in southeast Alaska are surrounded by Tongass roadless areas, thus prohibiting roads would limit the access to these communities; and (2) the majority of people in these communities rely on timber harvesting in the Tongass for work, losing this would cause a huge detriment to the economy of southeast Alaska. *Id.* "The November 2000 [F]EIS for the roadless rule estimated that a total of approximately 900 jobs could be lost in the long run in Southeast Alaska due to the application of the roadless rule, including direct job losses in the timber industry as well as indirect job losses in other sectors." *Id.*

The Roadless Rule, however, did not go into effect in March 2001 as planned.⁵⁵ When President Bush took office, he suspended the Roadless Rule and other actions not yet implemented by the previous administration.⁵⁶ The suspension allowed the Bush administration “the opportunity to review any new or pending regulations.”⁵⁷ In May 2001, when the suspension was almost over, the U.S. District Court for the District of Idaho preliminarily enjoined implementation of the Roadless Rule.⁵⁸ The Roadless Rule finally went into effect in April 2003 when the Ninth Circuit Court of Appeals reversed the preliminary injunction.⁵⁹ The Roadless Rule, however, was in effect only three months before the U.S. District Court for the District of Wyoming declared a national, permanent injunction on the rule.⁶⁰ Subsequently, the Forest Service replaced the Roadless Rule with the State Petitions Rule in May 2005.⁶¹

The State Petitions Rule revoked the national management plan for national forest roadless areas and installed a system for state-by-state management of these lands.⁶² The State Petitions Rule allows a governor to petition the Secretary of Agriculture to establish management plans for all or portions of national forest roadless areas within the state’s borders.⁶³ The petition “must include specific information and recommendations on the management requirements for individual inventoried roadless areas within that particular State.”⁶⁴ The State Petitions Rule

⁵⁵ *Lockyer*, 459 F. Supp. 2d at 880; *see also* Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001).

⁵⁶ *Lockyer*, 459 F. Supp. 2d at 880; *see* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies [hereinafter Memorandum], 66 Fed. Reg. 7702 (Jan. 24, 2001) (“With respect to regulations that have been published in the [Federal Register] but have not taken effect, temporarily postpone the effective date of the regulations for 60 days.”).

⁵⁷ Memorandum, 66 Fed. Reg. 7702; *see also* Fredrikson, *supra* note 42, at 464.

⁵⁸ *See* *Kootenai I*, 142 F. Supp. 2d 1231, 1248 (D. Idaho 2001) (holding a likelihood of success on claims, thus granting a preliminary injunction of the Roadless Rule); *see infra* notes 72-74 and accompanying text; *see also* *Lockyer*, 459 F. Supp. 2d at 880.

⁵⁹ *See* *Kootenai II*, 313 F.3d 1094, 1126 (9th Cir. 2002) (concluding the preliminary injunction was incorrectly issued); *see infra* notes 80-84 and accompanying text; *see also* *Lockyer*, 459 F. Supp. 2d at 918.

⁶⁰ *See* *Wyoming I*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) (granting a nationwide injunction of the Roadless Rule).

⁶¹ *See* *Wyoming II*, 414 F.3d 1207, 1211 (10th Cir. 2005); State Petitions, 70 Fed. Reg. 25654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

⁶² *See* State Petitions, 70 Fed. Reg. 25654 (“[M]anagement requirements for inventoried roadless areas [will] be guided by individual land management plans until and unless these management requirements are changed through a State-specific rulemaking.”); *see also* *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459 F. Supp. 2d 874, 881 (N.D. Cal. 2006).

⁶³ State Petitions, 70 Fed. Reg. at 25661.

⁶⁴ *Id.* at 25655. The State Petitions Rule continued by stating if a state submits a petition for a national forest roadless area and the area extends into another state, the petitioning governor “should coordinate with the Governor of the adjacent State.” *Id.*

allows governors to file petitions within eighteen months of the Rule's inception.⁶⁵ The Secretary and an advisory committee then evaluate the petition.⁶⁶ The life of the State Petitions Rule, like the Roadless Rule, was short.⁶⁷ On October 11, 2006, the U.S. District Court for the Northern District of California set aside the State Petitions Rule and reinstated the Roadless Rule nationwide.⁶⁸

B. Recent Cases Addressing National Forest Roadless Area Management Plans

Just three days after the Forest Service issued the Roadless Rule, the Kootenai Tribe filed a claim challenging the Roadless Rule.⁶⁹ The Tribe claimed the Roadless Rule violated NEPA and the Administrative Procedure Act (APA).⁷⁰ Just one day later, the State of Idaho filed a similar complaint in the same court.⁷¹ The U.S. District Court for the District of Idaho granted both plaintiffs' request for a preliminary injunction of the Roadless Rule.⁷² The court found the plaintiffs presented "a strong likelihood of success on the merits" of their NEPA claims.⁷³ The court also found the plaintiffs presented sufficient information to show the Roadless Rule was likely to cause irreversible harm to national forests.⁷⁴ Although the Forest Service did not appeal the injunction, intervening environmental organizations did.⁷⁵

⁶⁵ *Id.*

⁶⁶ *Id.* The advisory committee was a national committee established to address the concerns that management of roadless areas have national implications. *Id.* The committee was composed of people concerned with the conservation and management of national forest roadless areas. *Id.*

⁶⁷ *Lockyer*, 459 F. Supp. 2d at 919.

⁶⁸ *Id.* Prior to its repeal, eleven States submitted petitions pursuant to the State Petitions Rule. Red Lodge Clearinghouse, *National Forest Management*, available at <http://www.redlodgclearinghouse.org/legislation/nationalforestmanagement2.html> (last visited Sept. 30, 2007). States submitting petitions were CA, CO, ID, ME, MI, NC, NM, OR, SC, VA, WA. *Id.*

⁶⁹ *Kootenai I*, 142 F. Supp. 2d 1231, 1231 (D. Idaho 2001).

⁷⁰ *Id.* at 1236; see also National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006); Scope of Review, 5 U.S.C. § 706(2)(A) (2006). Plaintiffs claimed the Forest Service failed to take a "hard look" when preparing the EIS and that this would cause potential irreparable harm to national forests. *Kootenai I*, 142 F. Supp. 2d at 1243. Specifically, plaintiffs contended the Forest Service (1) failed to analyze reasonable alternative to the Roadless Rule, (2) the public comment period was inadequate, and (3) failed to analyze adequately the cumulative impacts of the Roadless Rule. *Id.* at 1243-47.

⁷¹ See *Kootenai II*, 313 F.3d 1094, 1104 (9th Cir. 2002).

⁷² See *Kootenai I*, 142 F. Supp. 2d at 1248.

⁷³ *Kootenai II*, 313 F.3d at 1107.

⁷⁴ *Id.* at 1106-07. The harm would result from the lack of accessibility to prevent "unnaturally severe wildfires, insect infestation and disease." *Id.* at 1112.

⁷⁵ *Id.* at 1104. The Ninth Circuit Court of Appeals consolidated the appeals. *Id.*

The Ninth Circuit Court of Appeals examined whether the plaintiffs demonstrated a likelihood of success on their NEPA claims.⁷⁶ The court reviewed NEPA's procedural requirements to determine if a preliminary injunction of the Roadless Rule was appropriate.⁷⁷ First, the court found the Forest Service most likely complied with NEPA's notice and comment procedures.⁷⁸ Second, the court found the Forest Service most likely considered a reasonable range of alternatives in the EIS.⁷⁹ Therefore, the court found the plaintiffs failed to meet the preliminary injunction burden; they failed to show probable success on their NEPA claims.⁸⁰

In conclusion, the court of appeals rejected the lower court's holding that irreparable harm would occur if the Forest Service implemented the Roadless Rule.⁸¹ The court of appeals opined that "restrictions on human intervention are not usually irreparable in the sense required for injunctive relief."⁸² The court held that promulgation of the Roadless Rule was not likely to violate NEPA and the lower court "incorrectly applied the 'possibility of irreparable harm' standard to justify an injunction."⁸³ Therefore, the Ninth Circuit reversed and remanded the lower court's decision.⁸⁴

⁷⁶ *Id.* at 1115. First, the court found that an EIS is required in accordance with NEPA when a federal action significantly affects *the human environment*, but not when an action "maintain[s] the environmental status quo." *Id.* at 1114; see 40 C.F.R. § 1508.14 (2005) (defining human environment). The environmental organizations argued that the Roadless Rule did not affect the human environment, but the Rule "simply amounts to a decision to leave nature alone." *Kootenai II*, 313 F.3d at 1115. The court, however, decided the Roadless Rule did trigger an EIS, as human intervention, or in this case, the lack of intervention would change the environmental status quo. *Id.*

⁷⁷ *Kootenai II*, 313 F.3d at 1115.

⁷⁸ *Id.* at 1115-20. Contrary to the lower court's finding, the court found the Forest Service did provide adequate information and public notice concerning the Roadless Rule. *Id.* at 1116. Specifically, the Court found there was actual notice of the areas to be affected, despite an initial lack of maps of the area. *Id.* at 1117. The court also found the additional 4.2 million acres of affected land in the FEIS did not require a supplemental EIS. *Id.* at 1118. The court also noted the public had time to comment on the additions. *Id.* Finally, the court found the Forest Service provided substantially more time for public comment than required by NEPA. *Id.* at 1119. The Forest Service accepted public comments for sixty-nine days, whereas, NEPA only requires a forty-five day comment period. *Id.* at 1118.

⁷⁹ *Id.* at 1120-24. In support, the court determined NEPA does not require the Forest Service to consider alternatives that directly conflict with NEPA's policy objectives. *Id.* at 1121. The court explained by stating that NEPA's objective "is first and foremost to protect the natural environment." *Id.* at 1123.

⁸⁰ *Id.*

⁸¹ *Id.* at 1126.

⁸² *Kootenai II*, 313 F.3d at 1125.

⁸³ *Id.* at 1126. "[T]he process [of implementing the Roadless Rule] abided the general statutory requirements of NEPA." *Id.*

⁸⁴ *Id.*

Recently, the U.S. District Court for the Northern District of California, in *California ex rel. Lockyer v. USDA*, once again changed the management of national forest roadless areas.⁸⁵ In *Lockyer*, the plaintiffs consisted of four states and a host of environmental organizations.⁸⁶ The plaintiffs claimed the USDA violated NEPA, the Endangered Species Act (ESA), and the APA when it promulgated the State Petitions Rule.⁸⁷

To determine whether the promulgation of the State Petitions Rule required a NEPA analysis, the court addressed whether the Rule constituted a procedural change or a substantive repeal of the Roadless Rule.⁸⁸ The court asserted that a substantive repeal, but not a procedural change, would require a NEPA analysis.⁸⁹ The court found the State Petitions Rule did substantively repeal the Roadless Rule because it “eliminated the uniform nationwide protections for roadless areas.”⁹⁰ Therefore, NEPA required an EIS for the State Petitions Rule.⁹¹

⁸⁵ See Cal. *ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

⁸⁶ *Id.* at 879. The four states were California, Washington, New Mexico, and Oregon. *Id.* The environmental groups were the Wilderness Society, California Wilderness Coalition, Forests Forever Foundation, Northcoast Environmental Center, Oregon Natural Resources Council Fund, Sitka Conservation Society, Siskiyou Regional Education Project, Biodiversity Conservation Alliance, Sierra Club, National Audubon Society, Greater Yellowstone Coalition, Center for Biological Diversity, Environmental Protection Information Center, Klamath-Siskiyou Wildlands Center, Defenders of Wildlife, Pacific Rivers Council, Idaho Conservation League, Humane Society of the United States, Conservation NW and Greenpeace. *Id.*

⁸⁷ *Id.* at 884; see also National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006); Endangered Species Act, 16 U.S.C. §§ 1531-1539 (2006); Scope of Review, 5 U.S.C. § 706(2)(A) (2006). The plaintiffs claimed the USDA violated NEPA because the Forest Service adopted the State Petitions Rule “without environmental analysis under NEPA,” the Forest Service did not prepare an EIS when promulgating the State Petitions Rule. *Lockyer*, 459 F. Supp. 2d at 881. The plaintiffs claimed the USDA also failed to engage in the consultation process required by ESA. *Id.* The ESA requires the agency to engage in a consultation to insure the agency action “is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2).

⁸⁸ *Lockyer*, 459 F. Supp. 2d at 883. The court began its discussion by recognizing the “threshold that triggers the requirement for NEPA analysis is relatively low.” *Id.* at 894. To show an analysis is needed one only needs to prove there are “substantial questions whether a project may have a significant effect’ on the environment.” *Id.* (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

⁸⁹ *Lockyer*, 459 F. Supp. 2d at 883.

⁹⁰ *Id.* at 898. The court relied on *Andrus v. Sierra Club*, a U.S. Supreme Court opinion, to support the finding that an EIS was required when the Roadless Rule was repealed. *Id.* at 899. *Andrus* stated if a program is terminated and the termination “would significantly affect the quality of the human environment,” then an EIS is required. *Id.* (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 393 n.22 (1979)).

⁹¹ *Lockyer*, 459 F. Supp. 2d at 894. A substantive repeal signified that the Forest Service implemented a new management plan for roadless areas. *Id.* When the Forest Service implements a new management plan, NEPA requires an EIS. *Id.* “An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive.” *Id.*

The court also found the State Petitions Rule itself, not just the repealing of the Roadless Rule, required an EIS.⁹² The State Petitions Rule required an EIS because it was a new management plan for national forest roadless areas.⁹³ “To characterize this shift from uniform national protections for roadless areas to protections that vary by state as well as by forest as merely procedural would elevate form over substance and eliminate environmental assessment of this substantial change.”⁹⁴ Thus, the court found the State Petitions Rule “substantively effects the environment” by both repealing the existing rule and by implementing a new rule.⁹⁵

In conclusion, the court enjoined the State Petitions Rule and reinstated the Roadless Rule.⁹⁶ When discussing this remedy the court stated that “[t]he Ninth Circuit has explained that ‘the effect of invalidating an agency rule is to reinstate the rule previously in force.’”⁹⁷ The court prohibited the USDA from taking any actions that would violate the Roadless Rule without first preparing an EIS.⁹⁸

⁹² *Id.*

⁹³ *Id.* at 899. Before the Roadless Rule, national forest roadless areas were managed on a forest-by-forest level, whereas with the State Petitions Rule the forest may be managed on a state-by-state level. *Id.*

For example, a number of national forests and the roadless areas within them cross state lines . . . Previously, those areas were managed uniformly on both sides of the state border under the forest plan. At oral argument, Defendants’ counsel conceded that the Forest Service had not taken a hard look at what would happen if neighboring states submitted petitions seeking differing treatment of roadless areas that crossed state borders.

Id. “Similarly, the Forest Service failed to consider what would happen if one state petitioned for more protection of those roadless areas and the neighboring state did not.” *Id.*

[T]he Palisades and Winegar Hole roadless areas in the Targhee National Forest straddle the Idaho-Wyoming border and contain areas in both states where road construction and reconstruction are not prohibited under the current forest plan. The State of Idaho, which filed an amicus brief in support of Defendants in this case and opposed reinstatement of the Roadless Rule, has announced that it will submit a petition that apparently will not seek to reinstate all the protections it had under the Roadless Rule . . . while the State of Wyoming has announced that it will not file a petition.

Id. at 900 n.5.

⁹⁴ *Id.* at 901.

⁹⁵ *Id.* at 904. The court also found for the petitioners that the “Forest Service violated ESA by failing to engage in the consultation process before issuing the State Petitions Rule.” *Id.* at 912. The court decided not to address the APA claim, as it already found the State Petitions Rule to violate NEPA and ESA. *Id.* at 913.

⁹⁶ *Lockyer*, 459 F. Supp. 2d at 919.

⁹⁷ *Id.* It is well recognized that when a court invalidates an agency rule, the court has authority to reinstate the previous rule. *See, e.g.*, *Paulson v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“The effect of invalidating an agency rule is to reinstate the rule previously in force.”).

⁹⁸ *Lockyer*, 459 F. Supp. 2d at 919.

As these cases demonstrate, the Roadless Rule is controversial and continues to be a prominent issue in the judicial context.⁹⁹

C. *The Mootness Doctrine*

Federal courts are limited to deciding actual cases and controversies.¹⁰⁰ The mootness doctrine is applicable if a case or controversy once existed, but subsequently was resolved prior to the federal court's judgment.¹⁰¹ If the court finds that no case or controversy exists, it may dismiss the case as moot.¹⁰² The Supreme Court, however, has emphasized the mootness doctrine's flexibility.¹⁰³ This flexibility is seen in the exceptions to the doctrine.¹⁰⁴ Two exceptions are relevant here—cases capable of repetition, yet evading review and voluntary cessation.¹⁰⁵

A case is not moot when a case or controversy is capable of repetition, yet evades review.¹⁰⁶ A case is not moot, thus reviewable by a federal court, if two factors are satisfied: (1) the challenged issue terminates before full litigation occurs, and (2) a reasonable expectation exists that the same party will be exposed to the

⁹⁹ Compare *Kootenai I*, 142 F. Supp. 2d 1231, 1248 (D. Idaho 2001) (granting a preliminary injunction of the Roadless Rule because the court found a likelihood of success on NEPA claims and irreparable harm), with *Kootenai II*, 313 F.3d 1094, 1123 (9th Cir. 2002) (finding *Kootenai I* erroneously granted a preliminary injunction based on the faulty assumption of likelihood of success on NEPA claims and finding irreparable harm), and *Lockyer*, 459 F. Supp. 2d at 919 (repealing the State Petitions Rule and reinstating the Roadless Rule nationwide); see also Barringer, *supra* note 3, at A21 (describing the national forest management litigation as “legal Ping-Pong”).

¹⁰⁰ Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 277 (1990); see also U.S. CONST. art. III, § 2. The mootness doctrine is based on Article III of the U.S. Constitution, although this assumption has been debated. Bandes, *supra* note 100, at 277 (“The Court currently views the mootness doctrine as grounded, at least in part, in article III concerns. A number of commentators, recently joined by Chief Justice Rehnquist, have questioned this assumption.”).

¹⁰¹ See, e.g., Bandes, *supra* note 100, at 245; 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.1 (2007).

¹⁰² See, e.g., ERWIN CHERMERINSKY, FEDERAL JURISDICTION 135, 129-30 (Vicki Been et al. eds., Aspen Publisher 5th ed. 2007) (“Essentially, any change in the facts that ends the controversy renders the case moot”). The U.S. Supreme Court has stated “a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Parties to the suit or the court are capable of raising the issue of mootness. WRIGHT, MILLER & COOPER, *supra* note 101, at § 3533.1.

¹⁰³ *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 400 (1980) (noting the “flexible character of the Art. III mootness doctrine”).

¹⁰⁴ There are four exceptions to the mootness doctrine: “collateral” injuries, “capable of repetition yet evading review,” voluntary cessation, and “certified class action suit[s].” CHERMERINSKY, *supra* note 102, at 131.

¹⁰⁵ See *infra* notes 106-20 and accompanying text.

¹⁰⁶ See, e.g., 5 AM. JUR. 2D *Appellate Review* § 602 (2007).

same action in the future.¹⁰⁷ This exception allows courts to rule on short duration issues, which are likely to reoccur, but terminate before or during litigation.¹⁰⁸

The other relevant exception to the mootness doctrine is when a party voluntarily ceases the disputed action, but could resume the action in the future.¹⁰⁹ The U.S. Supreme Court, in *Friends of the Earth v. Laidlaw Environmental Services*, recently stated when a party voluntarily terminates a disputed act the case is moot only “if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”¹¹⁰ The Court stressed the party claiming mootness carries a “heavy burden” and must show the contested actions would not reoccur.¹¹¹ The case should not be moot if the party fails to carry this burden.¹¹²

The Supreme Court’s decision in *City of Mesquite v. Aladdin’s Castle, Inc.*, demonstrates when a statutory repeal satisfies the voluntary cessation exception to mootness.¹¹³ In that case, Aladdin’s Castle sought declaratory and injunctive relief

¹⁰⁷ See, e.g., Lewis J. Heisman, *Federal Administrative Orders as Subject to Judicial Review Where Such Orders are “Capable of Repetition, yet Evading Review”*, 66 A.L.R. FED 285 (1984).

¹⁰⁸ Heisman, *supra* note 107, at § 1(a). Cases dealing with pregnancy issues are good examples of how this exception can apply— pregnancy is a temporary condition that usually lasts around nine to ten months, whereas litigation of a pregnancy issue may require more time. See 5 AM. JUR. 2D *Appellate Review* § 602; see also *Roe v. Wade*, 410 U.S. 113, 125 (1973) (“Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be ‘capable of repetition, yet evading review.’”).

¹⁰⁹ See, e.g., CHEMERINSKY, *supra* note 102, at 139; 5 AM. JUR. 2D *Appellate Review* § 606 (2007); *Walling v. Helmerich & Payne*, 323 U.S. 37, 43 (1944) (“Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.”); see also *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (“[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.”). The court does not appear to have discretionary power to avoid applying this exception. See CHEMERINSKY, *supra* note 102, at 139 (“A case is not to be dismissed as moot if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time.”) (emphasis added).

¹¹⁰ *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citing *U.S. v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968)) (emphasis added). In *Laidlaw*, environmental groups brought suit seeking declaratory and injunctive relief and civil penalties against the defendant for violation of the Clean Water Act permit regulations. *Laidlaw*, 528 U.S. at 167. The Supreme Court found the case not moot even though the defendant had closed one facility and also changed its behavior to be in compliance with the regulations. *Id.* at 193. In *Laidlaw* the Supreme Court found the burden was not met; it was not absolutely clear the actions would not reoccur, thus, the case was not moot even though the acts had been amended. *Id.* at 193.

¹¹¹ *Laidlaw*, 528 U.S. at 189 (“[The] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.”).

¹¹² *Id.* at 189; accord CHEMERINSKY, *supra* note 102, at 139-40.

¹¹³ *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283 (1982). A statutory change or repeal, however, does not always fulfill the exception to mootness. See *infra* note 120.

against a city ordinance because of a vague phrase in a licensing provision.¹¹⁴ The district court found the challenged phrase was unconstitutionally vague.¹¹⁵ While the case was pending on appeal, the City eliminated the challenged phrase from the ordinance.¹¹⁶ The Supreme Court found “the city’s repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court’s judgment were vacated.”¹¹⁷ The Court found the City failed to carry its burden; it failed to prove there was no reasonable expectation of reinstatement of the statute.¹¹⁸ Therefore, the Supreme Court held the case was not moot, but rather the court could proceed to the merits of the case.¹¹⁹ Whether a statutory repeal makes a case moot appears to hinge on the likelihood of reinstatement of the statute.¹²⁰

PRINCIPAL CASE

In 2003, the State of Wyoming filed suit against the USDA in the U.S. District Court for the District of Wyoming.¹²¹ Numerous environmental organizations intervened as defendants.¹²² Wyoming claimed the USDA violated NEPA, the Wilderness Act, and other acts when promulgating the Roadless Rule.¹²³ The court found for Wyoming on five of its six NEPA claims and its Wilderness Act claim.¹²⁴

¹¹⁴ *Aladdin’s Castle*, 455 U.S. at 283.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 289. The court stated that the City changed the provision in response to the lower court’s decision. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Aladdin’s Castle*, 455 U.S. at 289.

¹²⁰ See CHEMERINSKY, *supra* note 102, at 141-43; compare *Massachusetts v. Oakes*, 491 U.S. 576 (1989) (holding the case was moot when the challenged statute was amended), with *Aladdin’s Castle*, 455 U.S. 283 (holding a change in the challenged statute while the case was on appeal does not moot the case).

¹²¹ *Wyoming I*, 277 F. Supp. 2d 1197, 1203 (D. Wyo. 2003).

¹²² *Id.* at 1204. Intervenors included Wyoming Outdoor Council, Wilderness Society, Sierra Club, Biodiversity Associates, Pacific Rivers Council, Natural Resource Defense Council, Defenders of Wildlife, and National Audubon Society. *Id.*

¹²³ *Id.* at 1217. Specifically, Wyoming claimed the Forest Service violated NEPA for the following six reasons: (1) failure to provide the public with adequate information during the scoping period and development of the EIS; (2) denial of cooperating agency status for Wyoming; (3) failure to consider a reasonable range of alternatives; (4) failure to conduct site specific analysis; (5) failure to conduct an adequate cumulative impact analysis; and (6) failure to provide a supplemental EIS. *Id.* at 1219-32. In addition, Wyoming claimed the Roadless Rule constituted “a de facto designation of ‘wilderness’ in contravention of the process established by the Wilderness Act.” *Id.* at 1232. Wyoming contended the Roadless Rule created wilderness areas, thus bypassed Congress’s sole authority to designate wilderness areas. *Id.* at 1232; see also National Wilderness Preservation System Act, 16 U.S.C. §§ 1131-1136 (2006).

¹²⁴ *Wyoming I*, 277 F. Supp. 2d at 1231-32, 1235-37. The court agreed with Wyoming on all of its NEPA claims, except that NEPA required a site specific analysis. *Id.* at 1227. Also the

Since the court found the Roadless Rule violated NEPA and the Wilderness Act, it decided not to address Wyoming's remaining claims.¹²⁵ The U.S. District Court concluded by ordering a nationwide injunction of the Roadless Rule.¹²⁶

Although the USDA decided not to appeal the district court's decision, environmental organizations—the defendant-intervenors—filed an appeal with the Tenth Circuit Court of Appeals.¹²⁷ Because the Forest Service repealed the Roadless Rule during appellate oral arguments, the court dismissed the case as moot and vacated the lower court's decision.¹²⁸

The court began its discussion of mootness by determining the Roadless Rule was nonexistent.¹²⁹ The court stated the Forest Service's adoption of the State Petitions Rule rendered the Roadless Rule irrelevant.¹³⁰ The court stated that in determining whether an issue is moot, “[t]he crucial question is whether granting a present determination of the issues offered will have some effect in the real world.”¹³¹ Since the court found the Roadless Rule no longer existed, there was no need to address the case.¹³²

The court then discussed one exception to the mootness doctrine—a wrong capable of repetition, yet evading review.¹³³ The court explained this exception has two prongs.¹³⁴ An exception exists if the “challenged conduct” is short

court determined that the Roadless Rule violated the Wilderness Act because (1) a roadless area “is synonymous with the Wilderness Act's definition of ‘wilderness,’” (2) the permitted uses of the two areas were the same, and (3) most of the roadless areas covered by the Roadless Rule were identified in a study intended to identify areas to recommend as wilderness. *Id.* at 1236.

¹²⁵ *Id.* at 1237. Although Wyoming properly raised National Forest Management Act and Multiple-Use and Sustained-Yield Act claims, the court found it was not required to address these claims after holding the Roadless Rule violated NEPA and the Wilderness Act. *Id.* The court then dismissed Wyoming's other claims under federal statutes because of lack of authoritative support. *Id.* at 1237.

¹²⁶ *Id.* at 1239. The U.S. District Court for the District of Wyoming found “the Roadless Rule was promulgated in violation of the National Environmental Policy Act and the Wilderness Act [and thus was] set aside.” *Id.* at 1239. The court concluded by ordering a nationwide injunction of the Roadless Rule. *Id.*

¹²⁷ *Wyoming II*, 414 F.3d 1207, 1211 (10th Cir. 2005).

¹²⁸ *Id.* at 1214.

¹²⁹ *Id.* at 1212.

¹³⁰ *Id.*

¹³¹ *Id.* (quoting *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000)).

¹³² *Wyoming II*, 414 F.3d at 1212. The court reasoned the “alleged procedural deficiencies of the Roadless Rule [were] now irrelevant because the replacement rule was promulgated in a new and separate rulemaking process.” *Id.*

¹³³ *Id.*; see also *CHEMERINSKY*, *supra* note 102, at 135 (explaining the exception to the mootness doctrine).

¹³⁴ *Wyoming II*, 414 F.3d at 1212.

lived, making litigation during its existence difficult, and if reoccurrence of the challenged conduct is reasonably expected.¹³⁵ The court declared neither prong was met.¹³⁶ First, the court decided that if the Roadless Rule was reinstated there would be ample time to litigate the issue.¹³⁷ Second, the court stated that it would not speculate as to whether the issue would be relitigated.¹³⁸ Since the court found the case failed to satisfy either prong, the court held the case was moot.¹³⁹

Because the court found the case was moot, it also vacated the judgment of the lower court.¹⁴⁰ The court reasoned that vacating the lower court's decision was appropriate because the party bringing the appeal and the party that made the case moot were not the same.¹⁴¹ The court vacated the lower court's decision because mootness was a result of "circumstances unattributable to any of the parties."¹⁴² The court also found there was an absence of manipulation in the case, which would forbid a vacatur.¹⁴³ Thus, the court dismissed the case as moot and vacated the lower court's judgment.¹⁴⁴

ANALYSIS

The Tenth Circuit Court of Appeals erroneously determined *Wyoming II* to be moot. First, the court should have applied the "voluntary cessation" exception, allowing the court to rule on the merits of the case.¹⁴⁵ Second, public interest in

¹³⁵ *Id.* (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990) (for exceptions)).

¹³⁶ *Wyoming II*, 414 F.3d at 1212.

¹³⁷ *Id.* ("[T]here would be ample opportunity to challenge the rule before it ceased to exist."). The court, however, did not cite to any authority for this conclusion. *Id.*

¹³⁸ *Id.* The court asserted it would be speculative to conclude Wyoming would be faced with the Roadless Rule in the future. *Id.* The court cited to *Murphy v. Hunt*, a Supreme Court case, to assert "the possibility of recurrence must be more than theoretical." *Wyoming II*, 414 F.3d at 1212; see *Murphy v. Hunt*, 455 U.S. 478, 482-83 (1982).

¹³⁹ *Wyoming II*, 414 F.3d at 1212-13. The court did not discuss this exception in detail. See *id.* at 1212 (concluding the mootness exceptions did not apply in three sentences).

¹⁴⁰ *Id.* at 1213; see also *supra* notes 128-39 and accompanying text (discussing why the case was moot); see *supra* note 30 (explaining when a vacatur is proper).

¹⁴¹ *Wyoming II*, 414 F.3d at 1213. The Forest Service was responsible for mooting the case, and it was not seeking relief from the lower court's judgment. *Id.*

¹⁴² *Id.* (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994)).

¹⁴³ *Wyoming II*, 414 F.3d at 1213. Vacating is not an option if a party uses it to obtain relief not afforded through the judicial system. *Id.* The "instant case [does] not suggest that the Forest Service was motivated by a desire to avoid or undermine the district court's ruling." *Id.*

¹⁴⁴ *Id.* at 1214.

¹⁴⁵ CHEMERINSKY, *supra* note 102, at 139 (defining the voluntary cessation exception to the mootness doctrine and citing to relevant cases); see also *supra* notes 100-20 and accompanying text.

national forest roadless area management militated against mootness.¹⁴⁶ Third, judicial economy supported ruling on the merits instead of dismissing the case.¹⁴⁷

A. Exception to the Mootness Doctrine: Voluntary Cessation

Although the Tenth Circuit examined one exception to the mootness doctrine, it overlooked another applicable exception—voluntary cessation.¹⁴⁸ A court should not dismiss a case “as moot if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time.”¹⁴⁹ As found in *City of Mesquite v. Aladdin’s Castle, Inc.*, this exception can apply to statutory repeals.¹⁵⁰ The voluntary cessation exception can apply to statutory repeals if there is a reasonable likelihood that the statute will be reinstated.¹⁵¹

The Tenth Circuit in *Wyoming II* should have examined the voluntary cessation exception, focusing its analysis on the possible reinstatement of the Roadless Rule.¹⁵² Although the Forest Service did not repeal the Roadless Rule in response to litigation, the repeal occurred during oral arguments of *Wyoming II*.¹⁵³ Also, but for the Forest Service’s voluntary repeal, the Tenth Circuit would have ruled on the merits of the Roadless Rule.¹⁵⁴ Once a court establishes the party terminated

¹⁴⁶ See *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (“[P]ublic interest in having the legality of the practices settled, militates against a mootness conclusion,” when there is the possibility of reoccurrence.); see *infra* notes 177-83 and accompany text.

¹⁴⁷ See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000) (finding when litigation is in an advanced stage, it may be more efficient to decide a case, not moot it); see *infra* notes 184-94 and accompany text.

¹⁴⁸ See, e.g., CHEMERINSKY, *supra* note 102, at 139 (explaining the exception to the mootness doctrine); 5 AM. JUR. 2D *Appellate Review* § 606 (2007) (reviewing the effects of “voluntary acquiescence” of challenged conduct upon mootness).

¹⁴⁹ CHEMERINSKY, *supra* note 102, at 139; *W.T. Grant*, 345 U.S. at 632 (“[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.”); see, e.g., *Walling v. Helmerich & Payne*, 323 U.S. 37, 43 (1944) (“Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.”). In order for this exception to apply there must be a “reasonable expectation that the wrong will be repeated.” *W.T. Grant*, 345 U.S. at 633 (citing *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945)).

¹⁵⁰ *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982). The Supreme Court found “the city’s repeal of the objectionable language [in the statute] would not preclude it from reenacting precisely the same provision if the District Court’s judgment were vacated.” *Id.*; see also 16 C.J.S. *Constitutional Law* § 169 (2007) (stating that amending or repealing a challenged statute requires an analysis to determine if the voluntary cessation exception to the mootness doctrine applies).

¹⁵¹ See CHEMERINSKY, *supra* note 102, at 141-43.

¹⁵² See *Wyoming II*, 414 F.3d 1207, 1211 (10th Cir. 2005).

¹⁵³ See *id.*

¹⁵⁴ See *id.*; see also CHEMERINSKY, *supra* note 102, at 141-43.

the challenged conduct voluntarily, next it must determine the likelihood of the action reoccurring.¹⁵⁵ The Supreme Court's standard to determine if challenged conduct is likely to reoccur is whether "events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."¹⁵⁶ Because of the Ninth Circuit's holding in *Kootenai II*, the assured challenge to the State Petitions Rule, and precedent establishing a court's remedial authority to reinstate a prior rule a reasonable likelihood that the Roadless Rule would be reinstated existed.¹⁵⁷

The *Kootenai II* opinion indicates the Ninth Circuit thought the Roadless Rule was valid.¹⁵⁸ Although the Ninth Circuit in *Kootenai II* only addressed whether the plaintiffs presented enough evidence to warrant a preliminary injunction, the court discussed the petitioners' NEPA claims in great depth.¹⁵⁹ After discussing the merits of each alleged NEPA violation, the Ninth Circuit opined "it cannot be said that there is a strong likelihood of success on the merits."¹⁶⁰ The Ninth Circuit further emphasized its point by stating "it is *plain* that the Forest Service gave a 'hard look' at the complex problem presented."¹⁶¹ These statements and the depth of analysis undertaken by the court reveal that the Ninth Circuit considered the Roadless Rule valid.¹⁶²

Although the Ninth Circuit indicated the Roadless Rule was valid, the adoption of the State Petitions Rule repealed the Roadless Rule.¹⁶³ The repeal of the Roadless Rule and implementation of the State Petitions Rule was certain to spark litigation.¹⁶⁴ One newspaper article lucidly stated the State Petitions Rule would

¹⁵⁵ See 32A AM. JUR. 2D *Federal Courts* § 599 (2007) ("Defendants who seek to establish mootness because of their voluntary discontinuance of allegedly illegal activity must establish that there is *no reasonable likelihood that the wrong will be repeated.*") (emphasis added); 1A C.J.S. *Actions* § 83 (2008) (stating a case is not moot if the termination of the challenged act is "not expected to be permanent").

¹⁵⁶ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 203 (2000) (quoting *U.S. v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

¹⁵⁷ See, e.g., *Laidlaw*, 528 U.S. at 203; 1A C.J.S. *Actions* § 83; 32A AM. JUR. 2D *Federal Courts* § 599.

¹⁵⁸ See *Kootenai II*, 313 F.3d 1094, 1115-23 (9th Cir. 2002).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1123.

¹⁶¹ *Id.* (emphasis added).

¹⁶² See generally *id.*

¹⁶³ See *Kootenai II*, 313 F.3d at 1115-23; State Petitions, 70 Fed. Reg. 25654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

¹⁶⁴ Note the plethora of newspaper articles devoted to the national forest roadless area management. See, e.g., Felicity Barringer, *Logging and Politics Collide in Idaho*, N.Y. TIMES, Aug. 9, 2004, at A10 (discussing the "polarizing and fierce" debate between "those who want to make a profit from federal timberlands and those who want to lock business out"); Editorial, *T.R.? He's No T.R.*, N.Y. TIMES, Feb. 11, 2007, at Section 4 (noting President Bush thwarted "one of the

“spur a new round of suits by environmentalists.”¹⁶⁵ In *Wyoming II*, the Tenth Circuit recognized the zealous nature in which roadless area management plans are litigated.¹⁶⁶ When describing the background of the Roadless Rule the court stated: “Almost *immediately*, the Roadless Rule was embroiled in litigation.”¹⁶⁷ The Tenth Circuit must have foreseen that the adoption of the State Petitions Rule would cause further litigation of roadless area management plans.¹⁶⁸

Since litigation of the State Petitions Rule was inevitable, the Tenth Circuit should have considered the remedy involved in such litigation and the possible reinstatement of the Roadless Rule.¹⁶⁹ Many circuits have precedent declaring that when a court invalidates an agency rule, the court has authority to reinstate the previous rule.¹⁷⁰ Although the Tenth Circuit lacks binding precedent for

most important acts of environmental stewardship in many years, Mr. Clinton’s roadless rule.”); Editorial, *The Roadless Rule Takes a New Turn*, N.Y. TIMES, Sept. 25, 2006 at A24 (discussing the U.S. District Court for the Northern District of California’s ruling to reinstate the Roadless Rule); see Juliet Eilperin, *Roadless Rules for Forests Set Aside: USDA Plans to Reverse Clinton Prohibitions*, WASH. POST, July 13, 2004 at A1 (writing about the Bush Administration’s proposal to replace the Roadless Rule); Jeff Gearino, *Roadless Rule Affects State*, CASPER STAR TRIBUNE, May 5, 2005 (noting there are many different opinions about national forest roadless area management); Bill Marsh, *The Nation; Where the Human Footprint is the Lightest*, N.Y. TIMES, July 31, 2005, at Section 4 (noting where the “last of the truly wild” places are located and the dispute surrounding management of these roadless areas); Karl Puckett, *Roadless Rule: State of Montana Backs Clinton-era Protection*, GREAT FALLS TRIBUNE, Oct. 8, 2007 (discussing the debate surrounding national forest roadless area management); Whitney Royster, *Roadless Rule Puzzles Governor*, CASPER STAR TRIBUNE, Aug. 6, 2004 (discussing the implications of the State Petitions Rule); Garren Stauffer, *Still No Resolution on Roadless Rule*, LARAMIE BOOMERANG, Oct. 20, 2007 (discussing the “hot-button issue” of national forest roadless areas).

¹⁶⁵ See, e.g., Eilperin, *supra* note 164, at A1.

¹⁶⁶ *Wyoming II*, 414 F.3d 1207, 1211 (10th Cir. 2005) (mentioning *Kootenai II* and *Wyoming I*, which reached different conclusions about the merits of the Roadless Rule).

¹⁶⁷ *Id.* (emphasis added).

¹⁶⁸ It is fair to say the court knew litigation was inevitable because even newspapers foresaw it. See, e.g., Eilperin, *supra* note 164, at A1. Petitioners filed a complaint for declaratory and injunctive relief from the State Petitions Rule on August 30, 2005, about seven weeks after the Tenth Circuit decided *Wyoming II*. See Complaint for Declaratory and Injunctive Relief at 17, *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006) (No. 05-cv-04038-EDL).

¹⁶⁹ See *Lockyer*, 459 F. Supp. 2d at 919.

¹⁷⁰ See, e.g., *id.*; Paulson v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) (“The effect of invalidating an agency rule is to reinstate the rule previously in force.”); Int’l Snowmobile Mfrs. Ass’n v. Norton, 340 F. Supp. 2d 1249, 1257 (D. Wyo. 2004) (finding that a judgment on the validity of a rule must be made when there exists potential for reinstatement); Bedford County Mem’l Hosp. v. Health & Human Servs., 769 F.2d 1017, 1024 (4th Cir. 1985) (“Hence we find that the appropriate relief . . . is to remand for entry of decrees directing payment forthwith under the old overhead formula.”); Menorah Med. Ctr. v. Heckler, 768 F.2d 292, 297 (8th Cir. 1985) (“Unless special circumstances are present, which we do not find here, prior regulations remain valid until replaced by a valid regulation or invalidated by a court.”); Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1569 (11th Cir. 1985) (“The effect [of invalidating the malpractice rule] was to reinstate the prior method of reimbursement.”); Abington Mem’l Hosp. v. Heckler, 750

such authority, the court should have considered the practice in other circuits.¹⁷¹ Furthermore, the Tenth Circuit could have predicted that when selecting a forum to challenge the State Petitions Rule, supporters of the Roadless Rule would select a forum likely to give a judgment in their favor.¹⁷² Specifically, future petitioners were likely to file suit in a forum where invalidation of the current rule allowed the court to reinstate the prior rule—the Roadless Rule.¹⁷³ Thus, at the time of the Tenth Circuit’s ruling, there existed a reasonable probability that the Roadless Rule would be reinstated through State Petitions Rule litigation.¹⁷⁴

When looked at together the Ninth Circuit’s approval of the Roadless Rule, the certain challenge to the State Petitions Rule, and precedent allowing courts to reinstate a prior rule, it appears the burden on the Forest Service—to show there was no reasonable expectation of reinstatement—was not met.¹⁷⁵ Thus, because the Forest Service voluntarily repealed the Roadless Rule and a reasonable likelihood of a court reinstating the Rule existed, *Wyoming II* satisfies the voluntary cessations exception to the mootness doctrine.¹⁷⁶

F.2d 242, 244 (3d Cir. 1984) (“Thus, until rendered invalid by a court decision or replaced by a valid new regulation, the prior method of reimbursement remains operative.”); *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“Thus, by vacating or rescinding the rescissions proposed by ER-1245, the judgment of this court had the effect of reinstating the rules previously in force.”).

¹⁷¹ Although not binding precedent, in *International Snowmobile Manufacturers Association v. Norton* the U.S. District Court for the District of Wyoming recognized the authority to reinstate a prior rule. *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 340 F. Supp. 2d at 1257 (“[N]ew rules and regulations implemented by the [National Park Service] could be found invalid and as a default, the [previous rule] would be reimplemented.”).

¹⁷² Undeniably the Tenth Circuit is aware of forum shopping. See, e.g., JAMES R. PRATT, III & BRUCE J. MCKEE, *ATLA’S LITIGATING TORT CASES* § 3:2 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2007) (“[T]he plaintiff’s attorney must give the utmost attention to all the possible forum selection factors in order to pick the forum that will probably best favor the plaintiff.”).

¹⁷³ See *Lockyer*, 459 F. Supp. 2d at 874. The *Lockyer* complaint requested relief in the form of “enjoin[ing] defendants from approving any actions inconsistent with the Roadless Rule.” Complaint for Declaratory and Injunctive Relief at 16, *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006) (No. 05-cv-04038-EDL).

¹⁷⁴ See *supra* notes 157-73 and accompanying text.

¹⁷⁵ *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (“[The] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.”); see 1A C.J.S. *Actions* § 83 (2008) (“In actions which challenge a government practice, mootness is obviated where a probability of the recurrence of the practice is coupled with a certainty that the impact of the recurrence will fall on the litigants before the court.”); Daniel Steuer, *Another Brick in the Wall: Attorneys’ Fees for the Civil Rights Litigant After Buckhannon*, 11 GEO. J. ON POVERTY L. & POL’Y 53, 63 (2004) (“[A] case would not be declared moot if some indication existed that the defendant might reinstate the challenged practice”). Although a factor in the court’s decision, a party’s stated intent not to reinstate a rule is not sufficient evidence to prove the challenged conduct will not be repeated. Steuer, *supra* note 175, at 64.

¹⁷⁶ See *supra* notes 148-75 and accompanying text.

B. Public Interest

In addition to the voluntary cessation exception to the mootness doctrine, public interest in the adjudication of the Roadless Rule's validity supported a conclusion to not moot the case.¹⁷⁷ Courts can decide issues of great public interest if it is likely the controversy will occur again in the future.¹⁷⁸ The U.S. Supreme Court has stated "public interest in having the legality of the practices settled, militates against a mootness conclusion."¹⁷⁹ National forest roadless area management has proven itself an issue of great public interest.¹⁸⁰ The *Kootenai II* court identified the public interest when it stated, "in a case such as this one where the purpose of the challenged action is to benefit the environment, the public's interest in preserving precious, unreplaceable resources must be taken into

¹⁷⁷ See, e.g., Foster V. Carson, *The Ninth Circuit Misapplies the Capable-of-Repetition-Yet-Evading-Review Exception to the Mootness Doctrine and Lends a Free Hand to Budget-Cutting State Officials*, 79 WASH. L. REV. 665, 668 (2004) ("Federal courts do not recognize an exception to mootness for cases involving a strong public interest. However, both the U.S. Supreme Court and the Ninth Circuit have held that a strong public interest in settling the legality of an action may weigh against a holding of mootness."); Steuer, *supra* note 175, at 64 (stating strong public interest in having an issue decided adds to the consideration of mootness). Additional support that the court should not have mooted the case because of public interest comes from its own citations. Wyoming II, 414 F.3d 1207, 1212 (10th Cir. 2005). The U.S. District Court for the District of Wyoming cites to *Camfield v. Oklahoma City*, to support its conclusion of mootness, by paraphrasing *Camfield* to conclude "that, without more, the possibility that a legislature may reenact the challenged statute does not preclude a mootness determination." *Id.*; *Camfield v. Okla. City*, 248 F.3d 1214, 1223-24 (10th Cir. 2001). Public interest, however, can be the "more" needed to "preclude a mootness determination." See *Wyoming II*, 414 F.3d at 1212; see also Carson, *supra* note 177, at 668 (stating, although not dispositive, public interest can mitigate a mootness conclusion).

¹⁷⁸ Public interest is distinct from the "capable of repetition, yet evading review" exception to mootness, because public interest does not require the litigation to involve the same parties. See 5 AM. JUR. 2D *Appellate Review* § 604 (2007); see also *supra* notes 105-08 and accompanying text; see, e.g., U.S. v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (citing U.S. v. Trans-Mo. Freight Ass'n, 166 U.S. 309, 309, 310 (1897) (stating "[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion."); *Alton & S. Ry. Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 463 F.2d 872, 878 (D.C. Cir. 1972) ("[T]he court continues an appeal in existence . . . when the court discerns a likelihood of recurrence of the same issue, generally in the framework of a 'continuing' or 'recurring' controversy, and 'public interest' in maintaining the appeal.") (emphasis added); *Boise City Irrigation & Land Co. v. Clark*, 131 F. 415, 419 (9th Cir. 1904) ("[T]he courts have entertained and decided such cases heretofore . . . partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.").

¹⁷⁹ *W.T. Grant*, 345 U.S. at 632.

¹⁸⁰ See generally Wyoming I, 277 F. Supp. 2d 1197 (D. Wyo. 2003); Wyoming II, 414 F.3d 1207; Kootenai I, 142 F. Supp. 2d 1231 (D. Idaho 2001); Kootenai II, 313 F.3d 1094 (9th Cir. 2002); Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006); see also *supra* note 164 (listing newspaper articles addressing national forest roadless area management).

account.”¹⁸¹ The extensive litigation demonstrates the overriding public interest “in preserving . . . national forests in their natural state.”¹⁸² Thus, combined with the voluntary cessation exception to the mootness doctrine, the strong public interest concerning national forest roadless area management should have persuaded the Tenth Circuit to rule on the issues presented in *Wyoming II*.¹⁸³

C. Judicial Economy

Finally, the theory of judicial economy also supported a decision not to moot *Wyoming II*.¹⁸⁴ A court’s inquiry “into the possibility of future recurrence of a dispute may conserve the judicial machinery by anticipating future litigation through the state and federal court systems. Under such circumstances, finding a case *not* moot may advance judicial economy.”¹⁸⁵ The reasonable probability of the Roadless Rule being reinstated supported ruling on *Wyoming II* to enhance judicial economy.¹⁸⁶

¹⁸¹ *Kootenai II*, 313 F.3d at 1125. The court continued by stating: “The district court in our view failed adequately to weigh the public interest in preserving our national forests in their natural state.” *Id.*

¹⁸² *Id.* “As evidenced by this litigation, a number of states and environmental organizations consider the environmental protections of roadless areas repealed by the State Petitions Rule *to be vital to the public interest.*” *Lockyer*, 459 F. Supp. 2d at 914; *see also Wyoming II*, 414 F.3d at 1214 (holding the Roadless Rule case to be moot); *Kootenai II*, 313 F.3d at 1123 (holding the district court erroneously granted a preliminary injunction of the Roadless Rule); *Lockyer*, 459 F. Supp. 2d at 919 (holding the State Petitions Rule is to be set aside, reinstating the Roadless Rule); *Wyoming I*, 277 F. Supp. 2d at 1239 (holding the Roadless Rule invalid, thus granting a permanent nationwide injunction of the rule); *Kootenai I*, 142 F. Supp. 2d at 1248 (holding a likelihood of success on claims, thus granting a preliminary injunction of the Roadless Rule); *see also* Ben Neary, *Wyoming Judge to Hold Hearing on Roadless Rule*, CASPER STAR TRIBUNE (May 24, 2007). The Roadless Rule hearing was scheduled for Oct. 19, 2007 in the U.S. District Court for the District of Wyoming in front of Judge Brimmer. *Id.*

¹⁸³ *See, e.g., Steuer, supra* note 175, at 64; *W.T. Grant*, 345 U.S. at 632 (citing *U.S. v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 309, 310 (1897) (stating “[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.”)).

¹⁸⁴ *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000) (“[B]y the time mootness is an issue, the case has been brought and litigated, often . . . for years. To abandon the case at an advanced stage may prove more wasteful than frugal.”); Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1675 (1970).

¹⁸⁵ *Mootness on Appeal in the Supreme Court, supra* note 184, at 1675 (emphasis in original); *accord Laidlaw*, 528 U.S. at 192 (“[B]y the time mootness is an issue, the case has been brought and litigated, often . . . for years. To abandon the case at an advanced stage may prove more wasteful than frugal.”).

¹⁸⁶ *See supra* notes 157-76 and accompanying text; *Mootness on Appeal in the Supreme Court, supra* note 184, at 1675. The State of Wyoming has filed new litigation, consisting of the same Roadless Rule claims as brought in *Wyoming I* in U.S. District Court for the District of Wyoming. *See Neary, supra* note 182.

The Tenth Circuit could have conserved judicial resources by deciding the validity of the Roadless Rule when it was first on appeal to the court.¹⁸⁷ If the Tenth Circuit had invalidated the Roadless Rule, then the *Lockyer* court might have adjusted its remedy, not reinstating the Roadless Rule.¹⁸⁸ If the Tenth Circuit had ruled the Roadless Rule was valid, the ruling would have added credibility to the *Lockyer* remedy of reinstating the Roadless Rule.¹⁸⁹ In both situations, a ruling by the Tenth Circuit would have barred the State of Wyoming from filing the current lawsuit challenging the Roadless Rule.¹⁹⁰ Instead, the Tenth Circuit's decision to moot the case necessitated repeat litigation of the same Roadless Rule claims in the U.S. District Court for the District of Wyoming.¹⁹¹ Because that court had ruled on the same claims in 2003, it is highly likely to again invalidate the Roadless Rule.¹⁹² In response to the court's likely ruling, proponents of the Roadless Rule will, for the second time, appeal to the Tenth Circuit.¹⁹³ A decision by the Tenth Circuit in *Wyoming II* would have avoided this second round of Roadless Rule litigation in the U.S. District Court for the District of Wyoming and the Tenth Circuit.¹⁹⁴

CONCLUSION

The Tenth Circuit Court of Appeals erroneously determined *Wyoming II* to be moot.¹⁹⁵ In its opinion the court ignored the voluntary cessation exception to mootness, which appears to be applicable.¹⁹⁶ Furthermore, both public interest and judicial economy militated against mooting the case.¹⁹⁷ A Tenth Circuit decision about the validity of the Roadless Rule would have added guidance and

¹⁸⁷ See, e.g., *Mootness on Appeal in the Supreme Court*, *supra* note 184, at 1675.

¹⁸⁸ See also *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006).

¹⁸⁹ See *id.*

¹⁹⁰ Hearing held on Oct. 19, 2007 in front of Judge Brimmer, U.S. District Court for the District of Wyoming. See Neary, *supra* note 182.

¹⁹¹ Stauffer, *supra* note 164 (stating: "[Judge] Brimmer already has ruled against the federal government regarding the [Roadless R]ule. Another judge, in a different jurisdiction, has since re-instated the rule.>").

¹⁹² See *Wyoming I*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) (holding the Roadless Rule invalid because of NEPA and Wilderness Act violations).

¹⁹³ See generally *Wyoming II*, 414 F.3d 1207 (10th Cir. 2005).

¹⁹⁴ *Mootness on Appeal in the Supreme Court*, *supra* note 184, at 1675 ("The inquiry into the possibility of future recurrence of a dispute may conserve the judicial machinery by anticipating future litigation through the state and federal court systems. Under such circumstances, finding a case *not* moot may advance judicial economy.>").

¹⁹⁵ See *supra* notes 145-91 and accompanying text.

¹⁹⁶ See *supra* notes 148-76 and accompanying text.

¹⁹⁷ See *supra* notes 177-94 and accompanying text.

boundaries to subsequent roadless area management plan litigation.¹⁹⁸ Deciding the issue to be moot, however, the Tenth Circuit avoided making a decision that would have national ramifications.¹⁹⁹

Because the mootness doctrine appears to be flexible, when a court is faced with the issue of mootness, the court must examine all relevant aspects of the case, including exceptions to mootness, public interest, and judicial economy.²⁰⁰ Only by reviewing all applicable aspects can a court make an informed, just decision. But, if a court dismisses a case as moot without a full analysis, the decision can subject the judicial system and the public to a continuing cycle of unresolved litigation. The Tenth Circuit Court of Appeals' *Wyoming II* opinion did just that; the court's brief and superficial analysis of the mootness doctrine and its failure to consider public interest and judicial economy has spurred unnecessary, repetitive litigation, contributing to the unpredictable future of national forest roadless areas.²⁰¹ Courts can avoid similar situations by using the flexibility of the mootness doctrine to rule on a case, instead of simply using the doctrine as a tool to dismiss a case.

¹⁹⁸ See *supra* notes 187-90. Hearing held on Oct. 19, 2007 in front of Judge Brimmer, U.S. District Court for the District of Wyoming. Neary, *supra* note 182; Boise City Irrigation & Land Co. v. Clark, 131 F. 415, 419 (9th Cir. 1904) ("[T]he courts have entertained and decided such cases heretofore . . . partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.") (emphasis added); see also Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006).

¹⁹⁹ The State of Wyoming and the nation appear to be split on how national forest roadless areas should be managed: Should management be a federal, state, or forest-by-forest plan? No matter which plan is adopted, having a long-term management plan will allow states, counties, citizens, and industry to distinguish what activities are and are not allowed in roadless areas. Currently, however, permissible activities in roadless areas are unpredictable. Although the *Lockyer* court reinstated the roadless rule, it is very probable that the U.S. District Court for the District of Wyoming will hold the Roadless Rule to be invalid. See *Lockyer*, 459 F. Supp. 2d at 919; see generally *Wyoming I*, 277 F. Supp. 2d 1197 (D. Wyo. 2003) (stating Judge Brimmer's conclusions about the Roadless Rule). The Forest Service will be stuck between a rock and a hard place, as one court prohibited it from doing anything contrary to the roadless rule, while the other will probably hold the Rule to be invalid. Compare *Lockyer*, 459 F. Supp. 2d at 919, with *Wyoming I*, 277 F. Supp. 2d at 1239. Thus it will be hard for the Forest Service to avoid contempt of court orders, as it will have two diametrically opposed orders.

²⁰⁰ U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400-01 (1980) (stating "the flexible character of the Art. III mootness doctrine").

²⁰¹ See *Wyoming II*, 414 F.3d 1207, 1211-13 (10th Cir. 2005). The Tenth Circuit only examined one exception to the mootness doctrine. *Id.* Additionally, the court failed to analyze public interest and judicial economy as each relates to the mootness doctrine. *Id.*; see also *supra* notes 127-44, 177-94, 199 and accompanying text.