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Nos. 11-1378, 11-1384

STATE OF WYOMING,
Petitioner,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
Respondents.

COLORADO MINING ASSOCIATION,
Petitioner,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
Respondents.

AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 23rd day of August, 2012, send out from Omaha, NE 3 package(s) containing 3 copies of the BRIEF IN OPPOSITION OF CONSERVATION RESPONDENTS in the above entitled case. All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

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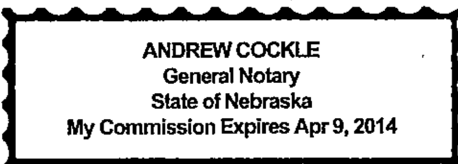

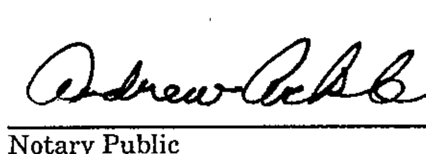
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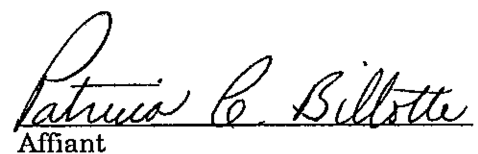
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Nos. 11-1378 and 11-1384

Supreme Court of the United States

STATE OF WYOMING,

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DEPARTMENT
OF AGRICULTURE, et al.,

Respondents.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF IN OPPOSITION OF CONSERVATION RESPONDENTS in the above-entitled petitions for writs of certiorari complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 8,938 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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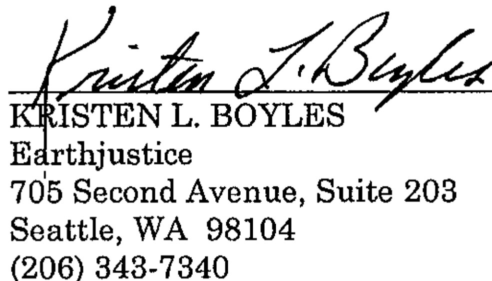

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STATE OF WYOMING,

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UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF CONSERVATION RESPONDENTS

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August 24, 2012

QUESTIONS PRESENTED

1. Whether the Tenth Circuit correctly held that the U.S. Forest Service has regulatory authority to restrict road-building and timber harvesting on national forest areas that are not designated Wilderness Areas under the Wilderness Act of 1964, 16 U.S.C. §§ 1131–36.

2. Whether the Tenth Circuit correctly held that the Forest Service's authority to adopt generally applicable regulations to manage its lands pursuant to the agency's Organic Act, 16 U.S.C. § 551, was not implicitly repealed by the National Forest Management Act, 16 U.S.C. § 1604, which sets forth procedures for promulgating management plans for individual national forests.

3. Whether the Tenth Circuit correctly held that the Forest Service's environmental impact statement for the Roadless Area Conservation Rule, 36 C.F.R. 294.12–.13 (2001), complied with the National Environmental Policy Act, 42 U.S.C. §§ 4321–70h.

PARTIES TO THE PROCEEDINGS

The petitions correctly identify the parties to the proceedings below. This brief is submitted on behalf of conservation respondents Biodiversity Conservation Alliance, Defenders of Wildlife, National Audubon Society, Natural Resources Defense Council, Pacific Rivers Council, Sierra Club, The Wilderness Society, and Wyoming Outdoor Council, who intervened as defendants in the district court and were appellees in the court of appeals.

RULE 29.6 STATEMENT

Conservation respondents Biodiversity Conservation Alliance, Defenders of Wildlife, National Audubon Society, Natural Resources Defense Council, Pacific Rivers Council, Sierra Club, The Wilderness Society, and Wyoming Outdoor Council are nonprofit organizations that have no parent corporations, and no publicly-held company has any ownership interest in them.

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INTRODUCTION

The State of Wyoming and Colorado Mining Association seek review of the decision of the United States Court of Appeals for the Tenth Circuit upholding the U.S. Forest Service's Roadless Area Conservation Rule (Roadless Rule), a rule that limits road-building and logging on federal property within the National Forest System. Petitioners offer no genuine reason for intervention by this Court. The Tenth Circuit's unanimous decision does not conflict with any decision of any other Circuit or of this Court. The only other decision of a court of appeals that has addressed the same rulemaking fully accords with the challenged decision. *See Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002). A separate challenge to the Roadless Rule also remains active in the United States District Court for the District of Columbia, presenting a later opportunity for this Court's review in the unlikely event that it ultimately results in a conflicting decision. *Alaska v. U.S. Dep't of Agric.*, No. 11-1122-RJL (D.D.C.).

Petitioners request nothing more than review of the Tenth Circuit's application of settled legal principles to the particular rulemaking at issue. Yet petitioners fail to identify any aspect of the Tenth Circuit's careful, methodical, 120-page opinion that warrants correction. Judge Holmes's opinion addressed each of petitioners' claims in detail and properly rejected them all. Not a single Tenth Circuit judge voted to grant petitioners' request for en banc review.

Although petitioners characterize the Tenth Circuit's decision as an assault on "the carefully constructed balance of power between the Executive and Legislative Branches," Wyoming Pet. at 2, there is no

constitutional issue here beyond that implicitly arising in any case where a plaintiff claims an agency acted contrary to statute. The only issues are ones of statutory construction and application on which petitioners simply disagree with the Tenth Circuit's decision. And the issues petitioners raise—claimed violations of the Wilderness Act, National Forest Management Act (NFMA), and National Environmental Policy Act (NEPA)—are not close calls.

First, as the Tenth Circuit explained, the Roadless Rule does not create Wilderness Areas without the congressional approval required by the Wilderness Act. Prohibiting road construction and logging is not the same as designating a Wilderness Area. Substantive, on-the-ground differences in management requirements distinguish the roadless areas covered by the Roadless Rule from true Wilderness Areas.

Second, although petitioners allege that NFMA repealed the Forest Service's authority under its 1897 Organic Act to regulate the occupancy and use of national forests for many and varied purposes, they cite no indication of legislative intent to curtail that authority, nor can they surmount the years of consistent precedent upholding the Forest Service's reliance on that authority to promulgate rules of general applicability to govern the national forests.

Third, the NEPA arguments advanced by petitioners and their associated amici fail to grapple with and overcome the Forest Service's detailed analysis and conclusions in the environmental impact statement for the Roadless Rule. The Forest Service adopted the Roadless Rule after holding hundreds of public meetings, accepting over a million public comments, and issuing thousands of pages of envi-

ronmental analysis. Far from being a predetermined rule where the environmental analysis was merely a sham, the final Roadless Rule appropriately reflected agency consideration of alternatives and public input precisely as envisioned by the NEPA process. That the final Rule rejected petitioners' position does not raise a significant issue requiring this Court's review. Moreover, the scale and extent of the environmental analysis was more than adequate to satisfy NEPA's requirements.

STATEMENT OF THE CASE

I. Development of the 2001 Roadless Rule

In January 1998, the Chief of the Forest Service initiated what became a lengthy process to evaluate how best to manage the 58.5 million acres of roadless areas within the 192-million-acre National Forest System. With an estimated 446,000 miles of roads already lacing the national forests and over half of all national forest acres devoted to commercial activities such as logging, mining, and oil and gas development, the remaining undeveloped lands assumed a new importance to the agency's mission of balancing national forest uses. Roadless areas provide numerous critical resources. When Americans turn on the tap in hundreds of communities, the clean water they receive originates in roadless areas. Roadless areas also provide abundant opportunities for hunting, camping, off-road vehicle use, fishing, snowmobiling, skiing, mountain biking, horseback riding, and many other recreational activities. And roadless areas offer a last refuge to many imperiled wildlife species. California condors, the grizzly bears and wolves of the Yellowstone area, native salmon and trout in the Pacific Northwest, migratory songbirds of the Appala-

chian hardwoods, and myriad others rely on roadless areas to survive.

Before the Roadless Rule, decisions regarding whether to develop roadless areas were left to local agency managers. But, as the Forest Service determined:

> Forest Service officials have the responsibility to consider the "whole picture" regarding the management of the National Forest System ... . Local land management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape. If management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced through road construction and certain forms of timber harvest.

Roadless Area Conservation; Final Rule, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001). Accordingly, in 1998, the Forest Service Chief suspended new road construction temporarily within most roadless areas, pending revision of regulations governing the national forest transportation system. *Id.* at 3247. This process generated considerable public interest in greater permanent protection for roadless areas, and, on October 13, 1999, President Clinton directed the Forest Service to develop and propose appropriate regulations. *See id.*

Under NEPA's established procedures, the agency conducted a preliminary "scoping" process to identify the relevant issues, prepared a two-volume draft en-

vironmental impact statement, accepted extensive public comments on it, and completed a four-volume final environmental impact statement. *Id.* at 3248. These documents considered in detail the impacts of and alternatives to the proposed rule. To provide further information and facilitate public participation, the agency conducted more than 600 public meetings attended by 39,000 people in communities around the country. *Id.*

Following the completion of this extensive process, the Forest Service published its final rule on January 12, 2001. 66 Fed. Reg. 3244. The Roadless Rule generally prohibits road construction and logging within roadless areas, subject to specific exceptions. *See* 36 C.F.R. §§ 294.12–.13. The Rule:

- Addresses only road-building and logging, leaving untouched other commercial activities such as pipeline construction and maintenance, ski areas, and livestock grazing. 66 Fed. Reg. at 3249;
- Allows use of off-road vehicles and non-motorized vehicles (such as mountain bikes) and the construction and maintenance of trails for them. 66 Fed. Reg. at 3251;
- Closes no existing roads or trails. 66 Fed. Reg. at 3251;
- Preserves state and private landowners' rights of access to their lands across roadless areas, and provides for the construction and reconstruction of roads in such areas "pursuant to reserved or outstanding rights, or as provided for by statute or treaty." 36 C.F.R. § 294.12(b)(3);

- Preserves local Forest Service officials' discretion to authorize road construction needed for public health and safety, environmental cleanups, prevention of irreparable resource damage from an existing road, remediation of traffic hazards, implementation of the Federal Aid Highway system, and extension or renewal of a pre-existing mineral lease. 36 C.F.R. § 294.12(b);
- Allows logging or tree-cutting incidental to other activities, or for personal use (e.g., firewood or Christmas trees) or administrative purposes, or in areas still inventoried as roadless but substantially altered by past road-building and logging. 36 C.F.R. § 294.13(b); and
- Allows cutting and removal of "small diameter timber" to reduce the risk of uncharacteristically intense fires. 36 C.F.R. § 294.13(b)(1)(ii).

II. Relevant Roadless Rule Litigation

A. *Kootenai Tribe v. Veneman*

After the Forest Service promulgated the Roadless Rule, it was challenged in federal courts. The first of these challenges to be adjudicated was a consolidated case in the District of Idaho in which the district court preliminarily enjoined the Rule. *Kootenai Tribe v. Veneman,* 142 F. Supp. 2d 1231 (D. Idaho 2001). On December 12, 2002, the Ninth Circuit reversed the Idaho court's ruling, rejecting several claims raised under NEPA. *Kootenai Tribe v. Veneman,* 313 F.3d 1094 (9th Cir. 2002).

B. *Wyoming v. U.S. Department of Agriculture* (2003)

Shortly after the Ninth Circuit reversed the Idaho district court's preliminary injunction, the District

Court for the District of Wyoming issued its decision in a challenge to the Roadless Rule brought by the State of Wyoming. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003). The Wyoming district court held that the Roadless Rule violated NEPA and the Wilderness Act, *id.* at 1239, and enjoined the implementation of the Roadless Rule nationwide. *Id.* at 1238–39. Although conservation groups that had intervened as defendants appealed, on the day after oral argument before the Tenth Circuit, the Forest Service announced its adoption of the "State Petitions Rule," which replaced the Roadless Rule. Shortly thereafter, the Tenth Circuit dismissed the appeal as moot and vacated the district court's decision. *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212–13 (10th Cir. 2005).

C. The State Petitions Rule and Roadless Rule Repeal

The 2005 State Petitions Rule repealed the Roadless Rule, opening up roadless areas to road-building and commercial logging. In its place, the Forest Service promulgated regulations providing a specific process for individual states to petition for state-specific roadless area protections. State Petitions for Inventoried Roadless Area Management; Final Rule, 70 Fed. Reg. 25,654 (May 13, 2005). The States of California, Oregon, New Mexico, and Washington, as well as twenty conservation organizations, challenged the repeal in the Northern District of California on NEPA and Endangered Species Act grounds. They prevailed, and on September 20, 2006, the California district court invalidated the State Petitions Rule and reinstated the Roadless Rule. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006). The Ninth Circuit affirmed

the district court's decision and injunction in August 2009. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009).

III. The Present Litigation

Following the Roadless Rule's reinstatement by the California district court, the State of Wyoming filed this case, which is essentially identical to its earlier action. As in the earlier lawsuit, conservation groups intervened as defendants. On August 12, 2008, the district court again set aside the Roadless Rule and enjoined its enforcement. *Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309 (D. Wyo. 2008). Appeals to the Tenth Circuit by the Forest Service and conservation groups followed. The States of California, Montana, Oregon, and Washington weighed in as amici curiae in support of the Rule. On October 21, 2011, the Tenth Circuit reversed the district court, upholding and reinstating the Roadless Rule. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209 (10th Cir. 2011) (Pet. App. 1–127).[1] The Tenth Circuit's opinion unanimously rejected all of petitioners' claims, and the appellate court subsequently denied petitioners' request for rehearing en banc with no judge voting for rehearing.

IV. Other Relevant Proceedings

During the litigation of these cases, the States of Idaho and Colorado sought exemption from the Roadless Rule through promulgation of state-specific rules under the general rulemaking authority of the Ad-

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[1] In this opposition, Conservation Respondents cite to the Tenth Circuit's decision as reproduced in Wyoming's Petition Appendix.

ministrative Procedure Act, 5 U.S.C. § 553. In response, the Forest Service promulgated the Idaho Roadless Rule on October 16, 2008. Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61,456 (Oct. 16, 2008). The Idaho Rule supersedes the Roadless Rule on national forest roadless lands in Idaho. *See Jayne v. Rey*, 780 F. Supp. 2d 1099 (D. Idaho 2011) (rejecting challenge to Idaho Roadless Rule), *appeal docketed,* No. 11-35269 (9th Cir. Mar. 29, 2011).

On July 3, 2012, the Colorado Roadless Rule became effective with the publication of the final rule in the Federal Register. Roadless Area Conservation; Applicability to the National Forests in Colorado, 77 Fed. Reg. 39,576 (July 3, 2012). As in Idaho, the Colorado Roadless Rule replaces the nationwide Roadless Rule throughout that state.

One challenge to the nationwide Roadless Rule remains active in the D.C. district court. On June 17, 2011, the State of Alaska filed an action challenging the validity of the Roadless Rule as to lands within its borders and beyond. *Alaska v. U.S. Dep't of Agric.,* No. 11-1122-RJL (D.D.C.). The Forest Service and conservation group intervenors have filed motions to dismiss, which are pending.

REASONS FOR DENYING THE WRIT

The Tenth Circuit's ruling reveals no need for guidance from this Court. There is no disagreement among the courts of appeals over any of the issues presented. Petitioners do not assert—nor could they—that the Tenth Circuit departed from the "accepted and usual course of judicial proceedings," and they identify no important question of federal law that the Tenth Circuit decided in conflict with a deci-

sion of this Court or that this Court has not yet decided and should address. Sup. Ct. R. 10(a), (c). Instead, the petitions primarily rely on the reasoning of district court decisions in the *Wyoming*[2] and *Kootenai Tribe* litigation that were reversed by appellate courts and on the views of a dissenting Ninth Circuit judge in *Kootenai Tribe.* However, conflicts between district courts and their supervising appellate tribunals, or between a dissenting judge and his or her colleagues, in themselves offer no basis for granting a writ of certiorari. Were it otherwise, this Court's docket would require considerable expansion. In sum, although petitioners and their supporting amici are dissatisfied with the appellate court's ruling, they fail to advance a single legal issue warranting this Court's review or even a credible argument that the appellate court's decision was erroneous in any respect.

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[2] Throughout the petitions, Wyoming and CMA extol the Wyoming district court's ruling as a reliable guide to proper resolution of the issues in this case. *See* Wyoming Pet. at 18–20, 31; CMA Pet. at 8, 15, 26. Yet in addition to correcting the district court's misapplications of law, the Tenth Circuit corrected its numerous factual errors. *See, e.g.,* Pet. App. 51–53 (district court inaccurately found that maps were not displayed at scoping meetings), at 65–66 (district court finding that record evidence did not support road construction ban was "clearly erroneous"), at 67–68 (district court erroneously equated two environmental impact statement alternatives), at 69–70 n.27 (district court mischaracterized Forest Service rationale), at 73–74 (district court disregarded mineral leasing exception), at 104–05 n.39 (district court overlooked final environmental impact statement comment opportunity).

I. The Tenth Circuit Correctly Found That the Roadless Rule Does Not Violate the Wilderness Act.

Petitioners first argue that the Roadless Rule unlawfully created Wilderness Areas in violation of the 1964 Wilderness Act. Petitioners press this argument despite explanation from the Forest Service that the Roadless Rule was "not an effort to expand the [Wilderness system]," because "only Congress may designate wilderness." Roadless Area Conservation, Proposed Rule, 65 Fed. Reg. 30,276, 30,278 (May 10, 2000). The Roadless Rule itself states that its purpose is to protect inventoried roadless areas "within the context of multiple-use management." 36 C.F.R. § 294.10. Yet Wyoming contends that the Roadless Rule "effectively" designated Wilderness Areas. Wyoming Pet. at 24. CMA similarly describes the Roadless Rule as creating *de facto* Wilderness Areas. *See* CMA Pet. at 23–24.

Petitioners identify no appellate authority accepting their novel argument that the Wilderness Act displaces the Forest Service's authority to restrict road-building and timber harvest on the federal lands managed by the agency, nor do they point to any respect in which the Tenth Circuit's analysis of this issue conflicts with decisions of other circuits or of this Court. Moreover, their argument overlooks not only the power the Forest Service retains to manage its lands for multiple uses (including uses that do not involve roads), but also the substantial and dispositive differences between the terms of the Roadless Rule and the restrictions on forest use that accompany actual designation of an area as Wilderness under the Wilderness Act.

A. The Wilderness Act Does Not Supplant the Forest Service's Authority and Duty to Manage Its Lands for Multiple Uses, Including Conservation.

Petitioners' attack on the Roadless Rule ignores the broad authority Congress gave the Forest Service to regulate the occupancy and use of national forests under the agency's 1897 Organic Act. 16 U.S.C. § 551. That authority included a specific delegation of rulemaking power "to preserve the forests [of the National Forest System] from destruction." *Id.*

Over sixty years later, in the 1960 Multiple-Use Sustained-Yield Act, Congress explicitly directed the Forest Service to manage for multiple uses that include conservation. 16 U.S.C. § 529. Although petitioners insist that the Roadless Rule "effectively prohibits meaningful multiple use," Wyoming Pet. at 31—a concept which they seem to confine to road construction and logging—the statute declares that "multiple uses" also include "outdoor recreation, ... watershed, and wildlife and fish purposes," 16 U.S.C. § 528, specifies "that some land will be used for less than all of the resources," and does not prioritize "the greatest dollar return or the greatest unit output," 16 U.S.C. § 531(a). Simply put, Congress authorized the Forest Service to protect appropriate areas of the national forests from development activities pursuant to the agency's multiple-use mandate.

In enacting the Wilderness Act four years later, Congress did not alter these authorities. To the contrary, Congress stated that the Wilderness Act's purposes were "within and supplemental to the purposes for which national forests ... are established and administered," and that "nothing" within the Act "shall

be deemed to ... interfere[] with" national forest management under the Organic Act and Multiple-Use Sustained-Yield Act. 16 U.S.C. § 1133(a). Far from prohibiting the Forest Service from administratively protecting national forest lands, the Wilderness Act explicitly preserved this authority. *See McMichael v. United States,* 355 F.2d 283, 284–85 (9th Cir. 1965) (Wilderness Act supported Forest Service regulations protecting undeveloped National Forest lands labeled "primitive, wilderness or wild areas"). Petitioners simply ignore these provisions.

B. Substantially Different Protections and Prohibitions Apply in Roadless Areas and Wilderness Areas.

The Tenth Circuit did not address the legal authority discussed above because it found that petitioners failed at the outset to establish that roadless areas under the Roadless Rule amount to *de facto* Wilderness Areas under the Wilderness Act. *See* Pet. App. 26. The Tenth Circuit was correct: substantially different protections and prohibitions apply in roadless areas and Wilderness Areas.

Under the Roadless Rule, only road-building and logging are prohibited in inventoried roadless areas. *See* 36 C.F.R. §§ 294.12–.13. Even these prohibitions are not absolute: the Roadless Rule contains specific exemptions that allow both activities in certain circumstances. *Id.* In contrast, the Wilderness Act applies to Wilderness Areas designated by Congress, and prohibits a much broader set of uses and activities, including motorized and mechanical vehicles, any commercial enterprise, structures and installations, and aircraft landings, as well as road-building and commercial logging. 16 U.S.C. § 1133(c). As the

Tenth Circuit held, these fundamental differences between the Roadless Rule and the Wilderness Act are neither technical nor illusory, and the Roadless Rule does not provide *"de facto"* Wilderness protection. Pet. App. 27–37; Wyoming Pet. at 3; CMA Pet. at 4.[3]

First, the Wilderness Act prohibits motorized and non-motorized vehicles in Wilderness Areas. The Roadless Rule, in sharp contrast, *allows* motorized and non-motorized vehicles in roadless areas. As noted by the Tenth Circuit, "*off-road* vehicle use, biking, [and] snowmobiling" are permitted under the Roadless Rule but prohibited under the Wilderness Act. Pet. App. 29–30 (emphasis added); *compare* Roadless Rule, 66 Fed. Reg. at 3250 ("[M]anagement actions that do not require the construction of new roads will still be allowed, including activities such as ... off-highway vehicle use"), *and* 66 Fed. Reg. at 3267 ("Inventoried roadless areas provide a remote recreation experience without the activity restrictions of Wilderness (for example, off-highway vehicle use and mountain biking).") *with* 16 U.S.C. § 1133(c) (prohibiting "use of motor vehicles" and "mechanical transport" in Wilderness Areas). Contrary to petitioners' argument, *see* CMA Pet. at 13, these *off-road* activities by definition do not require roads. Moreover, the Roadless Rule permits construction and maintenance of off-road vehicle *trails* that allow vehicle use. *See* 66 Fed. Reg. at 3251; *Biodiversity Con-*

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[3] Contrary to CMA's assertion (at 12), the Roadless Rule does not prohibit "the permanent or temporary construction of structures." *See* Pet. App. 29. The Rule prohibits only "road construction, reconstruction, and timber harvest in inventoried roadless areas." 66 Fed. Reg. at 3244.

servation Alliance v. U.S. Forest Serv., No. 11-226-SWS (D. Wyo. July 27, 2012) (affirming Forest Service decision to authorize motor vehicle use in an inventoried roadless area).

Second, in distinguishing roadless areas from Wilderness Areas, the Tenth Circuit correctly looked to the Roadless Rule's exception for road construction as provided for by statute or treaty, such as the General Mining Law of 1872, under which reasonable access to mineral deposits in inventoried roadless areas, "'depending on the stage of exploration or development, could range from helicopters, temporary or unimproved roads, [to] more permanent, improved roads.'" Pet. App. 35 (quoting 66 Fed. Reg. at 3268). By contrast, the Wilderness Act closes Wilderness Areas to non-grandfathered mining uses. *See* 16 U.S.C. § 1133(d)(3).

Third, the Roadless Rule contains other explicit exceptions to its management standards that are not allowed under the Wilderness Act: the Roadless Rule's exception for roads needed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), *see* Forest Service, Monte Cristo Mining Area, CERCLA Clean-Up Quick Facts (*available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5331196.pdf (last visited Aug. 15, 2012)) (discussing CERCLA road project in Washington roadless area), or for a Federal Aid Highway project (66 Fed. Reg. at 3264 (5.5 mile highway relocation in Alaska)). CERCLA and Federal Aid Highway road projects are prohibited in Wilderness Areas. *See* 16 U.S.C. § 1133(c) (prohibiting roads except in narrow circumstances). Moreover, under the Roadless Rule, many existing roads on the affected lands may be maintained and used, 36

C.F.R. § 294.12(c), and rights of access to valid mineral claims are not affected, 66 Fed. Reg. at 3255.

Fourth, unlike the Wilderness Act, *see* 16 U.S.C. § 1133(c), the Roadless Rule does not prohibit commercial enterprise. *See Hogback Basin Pres. Ass'n v. U.S. Forest Serv.*, 577 F. Supp. 2d 1139, 1146–55 (W.D. Wash. 2008) (Roadless Rule allowed commercial ski area development). For example, as the Tenth Circuit noted, the Roadless Rule allows road construction in connection with development of roadless lands that were under mineral lease as of the Rule's effective date of January 12, 2001. *See* Pet. App. 34. This exception "extends indefinitely the timeframe for which roads can be constructed on areas currently under lease." *Id.* at 34–35 (quoting 66 Fed. Reg. at 3265–66). The Tenth Circuit's opinion concerning the Roadless Rule's allowance for commercial activity also was well grounded in its own jurisprudence interpreting the Rule to allow construction zones necessary for oil and gas development in roadless areas. *See* Pet. App. 34 (discussing *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1224–28 (10th Cir. 2008), which held that the Roadless Rule did not prohibit installation of a natural-gas pipeline across a roadless area).

As the foregoing makes clear, merely to assert that "the plain fact is a roadless forest is a wilderness," Wyoming Pet. at 24, does not make it so as a matter of fact or law. Petitioners confuse a term of art—congressionally designated Wilderness with a capital W—with a word that can describe relatively undeveloped areas such as roadless areas—wilderness with a lowercase w. As the Tenth Circuit correctly found, although roadless areas subject to the Roadless Rule may be undeveloped, the Roadless

Rule does not impose restrictions comparable to those imposed on "capital W" Wilderness under the law, and there is no "ultra vires act" for the Tenth Circuit—or this Court—to restrain.[4]

II. The Tenth Circuit Rightly Held That the National Forest Management Act Did Not Repeal the Forest Service's Longstanding Authority Under Other Statutes.

Wyoming next claims the Tenth Circuit erred in determining that the forest-planning mandates of the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600–14, did not repeal the Forest Service's Organic Act authority to enact forest-preservation regulations.[5] Wyoming cites no appellate authority accepting the view that NFMA precludes the Forest Service from using its Organic Act authority to promulgate regulations governing the use of National Forests on a nationwide or regional level. Even the Wyoming district court upon which petitioners so extensively rely did not accept this argument. Although that court did not reach petitioners' NFMA claim in

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[4] Wyoming's invocation (at 24) of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), is misplaced. *Brown & Williamson* addressed a situation where it was uncertain whether Congress gave the Food and Drug Administration jurisdiction to regulate tobacco products. Here, there is no dispute that the Forest Service has jurisdiction to regulate national forest lands—the question instead is the propriety of the specific regulation. This Court has also noted the "unique political history" surrounding tobacco regulation that formed the basis for the *Brown & Williamson* decision. *Massachusetts v. EPA*, 549 U.S. 497, 512 (2007).

[5] Petitioner Colorado Mining Association does not raise NFMA issues in its petition.

the proceedings below, *see* 570 F. Supp. 2d at 1350, in an earlier decision addressing a precursor to the Roadless Rule, it rejected the same NFMA argument petitioners now advance. *See Wyoming Timber Indus. Ass'n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245, 1259 (D. Wyo. 2000) (Brimmer, J.) ("[T]he Forest Service could use its rulemaking authority to resolve issues of broad applicability even though it had a concurrent duty to engage in more localized decision making through NFMA's forest planning process.").

Petitioners offer no justification for a different conclusion. Petitioners argue that the Forest Service had to comply with NFMA because "the imposition of specific management prescriptions on inventoried roadless areas in the national forests *is* forest planning." Wyoming Pet. at 25 (emphasis in original). However, under this view of federal forest management, any measure promulgated pursuant to the agency's Organic Act authority to regulate the "occupancy and use" of the National Forest System and to "preserve the forests thereon from destruction," 16 U.S.C. § 551, would be prohibited "forest planning" because such measures necessarily impact individual forests. Taken to its logical conclusion, petitioners' argument would effectively nullify the Forest Service's rulemaking authority under the Organic Act.

Yet NFMA did not repeal, amend, or otherwise address this longstanding source of Forest Service rulemaking authority. *See* Pet. App. 122–24. Nor did NFMA prohibit the Forest Service from establishing nationwide policies. Petitioners are left to argue for an implied repeal of the Organic Act. To overcome the presumption against repeals by implication, the intent of Congress must be "clear and manifest." *Watt v. Alaska,* 451 U.S. 259, 267 (1981) (quotation

omitted). Petitioners identify no such "clear and manifest" intent to repeal the 1897 Organic Act. Accordingly, the Tenth Circuit correctly rejected petitioners' argument based on precedent from this Court, stating that "[i]f Congress had intended to curtail the Forest Service's broad rulemaking authority under § 551, it is assumed that it would have at least referenced that provision in some manner." Pet. App. 123 (citing *Am. Hosp. Ass'n v. NLRB,* 499 U.S. 606, 613 (1991)).

Nevertheless, petitioners contend that according continuing vitality to the Forest Service's 1897 Organic Act authority would "eviscerate the more specific and later-enacted provisions of NFMA." Wyoming Pet. at 24. Petitioners misunderstand the statutory scheme: NFMA established procedures and required content for individual forest plans but did not limit the Forest Service's ability to resolve overarching policy questions through generally applicable rules governing the national forests, with which individual forest plans must comply. *See* Pet. App. 121–23. No courts share petitioners' contrary view, as numerous rulings from this Court and others—issued both before and after Congress passed NFMA in 1976—affirm the Forest Service's continuing Organic Act authority to enact generally applicable rules governing the use of National Forest land for a variety of purposes, including conservation. *See, e.g., United States v. Grimaud,* 220 U.S. 506, 521–23 (1911) (Organic Act authority to fix fees to prevent excess grazing); *Clouser v. Espy,* 42 F.3d 1522, 1538 (9th Cir. 1994) (authority to regulate roads to protect forests from "depredations"); *Wilson v. Block,* 708 F.2d 735, 756–60 (D.C. Cir. 1983) (authority to permit private recreational development on national

forest land); *Denver v. Bergland,* 695 F.2d 465, 476 (10th Cir. 1982) (authority to issue stop orders for unauthorized construction on Forest Service lands); *United States v. Weiss,* 642 F.2d 296, 298 (9th Cir. 1981) (authority to mitigate damage from mining operations); *Mountain States Tel. & Tel. Co. v. United States,* 499 F.2d 611, 613–18 (Ct. Cl. 1974) (authority to require permits and fees for forest land use); *United States v. Hymans,* 463 F.2d 615, 617–18 (10th Cir. 1972) (authority to prohibit nudity in national forests); *Jones v. Freeman,* 400 F.2d 383, 388–89 (8th Cir. 1968) (authority to impound and sell trespassing livestock to protect forest land). The Tenth Circuit was only the most recent to sustain the agency's exercise of such authority, correctly holding that "[t]he Forest Service is permitted to rely on its rulemaking authority under the Organic Act ... to resolve issues of broad, even nationwide applicability—such as protection of [roadless areas]—even though it is nevertheless required to engage in localized forest planning under the NFMA." Pet. App. 122–23 (citing *Am. Hosp. Ass'n,* 499 U.S. at 612).

III. The Tenth Circuit Did Not Err When It Found That the Forest Service Complied with NEPA.

A. The Roadless Rule Was Not Predetermined.

Wyoming argues that the Forest Service used the National Environmental Policy Act's environmental analysis process to justify, instead of inform, the agency's ultimate decision. Wyoming Pet. at 27.[6] The

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[6] Petitioner Colorado Mining Association does not raise NEPA issues in its petition.

courts of appeals have subjected such predetermination claims to a "stringent standard" that finds a NEPA violation only where the "agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714–15 (10th Cir. 2010) (emphasis in original) (discussed in Pet. App. 107–08; *accord Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). Courts have demanded "concrete evidence" of such an impermissible commitment, such as evidence that an agency entered into "a contractual obligation or other binding agreement" to take specified action. Pet. App. 110–11 (citing cases). Wyoming does not challenge the propriety of this standard, which was applied by the Tenth Circuit, but merely takes issue with the Tenth Circuit's application of this standard to the particular facts at issue. This is the very definition of an argument that does not justify review by this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

In any case, even as a claim of mere error, Wyoming's argument is misguided. Wyoming offers no "concrete evidence" of prejudgment and instead relies on the statement that "[t]hree federal judges have independently determined that the outcome in this case was determined the moment President Clinton ordered the Forest Service to develop what would become the Roadless Rule." Wyoming Pet. at 27. Of course, if simple addition counted as argument, respondents could counter that five federal judges, all

of them appellate judges (three on the court below and two on the *Kootenai Tribe* panel), found no such predetermination. More importantly, while President Clinton directed the Forest Service to develop and propose a rule that would "provide appropriate long-term protection" to roadless areas, 66 Fed. Reg. at 3247, he declared that "[t]he public, and all interested parties, should have the opportunity to review and comment on the proposed regulations," and that, "[i]n the final regulations, the nature and degree of protections afforded should reflect the best available science and a careful consideration of the full range of ecological, economic, and social values inherent in these lands." Memorandum for the Secretary of Agriculture, Re: Protection of Forest "Roadless" Areas, President William J. Clinton (Oct. 13, 1999).

The Forest Service responded to this presidential direction by undertaking an extensive public outreach effort, distributing more than 50,000 copies of the two-volume draft environmental impact statement and holding more than 600 public meetings nationwide. 66 Fed. Reg. at 3248. The agency received approximately 1.2 million public comments on the draft Roadless Rule and draft environmental impact statement, 97 percent of which supported the draft rule or favored even stronger protections. Contrary to Wyoming's assertion that this extraordinary process "was never intended to inform the agency's decision," Wyoming Pet. at 27, the agency's final environmental impact statement responded to the public's strong preference for *greater* roadless area protection. The Forest Service broadened the "preferred alternative" to prohibit commercial logging as well as road-building in inventoried roadless areas and to apply its prohibitions to Alaska's Tongass National Forest.

66 Fed. Reg. at 3257 (logging prohibition); *id.* at 3254 (application to Tongass). The agency also eliminated alternatives offering a process to guide forest-specific decisions regarding whether to further protect roadless areas—a process the public found confusing. *Id.* at 3258–59.[7]

As the Tenth Circuit observed, "the Roadless Rule in fact evolved throughout the NEPA process, which suggests that the agency had not irretrievably and irreversibly committed itself to a predetermined outcome prior to conducting its NEPA analysis." Pet. App. 111–12 n.42. The lack of evidence provided by Wyoming "simply does not satisfy the stringent standard applicable to claims of predetermination under NEPA." *Id.* at 110.

B. The Roadless Rule Environmental Impact Statement Was Sufficiently Site-Specific.

Wyoming contends that the Tenth Circuit's rejection of its demand for a site-specific environmental analysis of the Roadless Rule conflicts with decisions of other circuits requiring that an environmental impact statement must separately analyze impacts on all specific areas affected by a major federal action and that an agency may not evaluate impacts only "generically." Wyoming Pet. at 28. Yet no circuit has

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[7] Wyoming does not rely on these modifications to support its claim that the Forest Service should have evaluated the Roadless Rule in a supplemental environmental impact statement, as the agency fully considered the impact of such changes during its environmental analysis. *See, e.g.,* Final Environmental Impact Statement at 2-24 to 2-32 (tables comparing key characteristics and effects of alternatives).

adopted a per se rule that NEPA analysis must be site-specific, and the Tenth Circuit's affirmance of the district court on this claim reflects the application of legal principles on which there is judicial consensus. *See* Pet. App. 84 ("The district court rejected this argument and held that the Forest Service was not required under NEPA to conduct a site-specific analysis for every affected [roadless area].").

The circuits, including the three whose decisions Wyoming cites, are in broad agreement that "whether an EIS is sufficiently detailed to meet the mandates of NEPA" is governed by a "rule of reason." *Conservation Law Found. of New England v. Gen. Servs. Admin.*, 707 F.2d 626, 632 (1st Cir. 1983). Application of the rule of reason entails a fact-specific inquiry into whether the analysis provides "sufficient detail to foster informed decision-making." *N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886, 890–91 (9th Cir. 1992). Where a federal action, like the roadless rule, is one of broad applicability, the regulations governing the NEPA process counsel that agencies may examine environmental impacts "[g]enerically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter," as well as "[g]eographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area." 40 C.F.R. § 1502.4(c). Courts—including courts in circuits that Wyoming wrongly claims follow a per se rule requiring site-specific analysis—hold that environmental analyses for "programmatic" actions need not analyze "site-specific impacts." *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800–01 (9th Cir. 2003); *see also Nevada v. Dep't of Energy*, 457 F.3d 78, 92 (D.C. Cir. 2006).

Conversely, the NEPA regulations provide that an environmental impact statement must analyze "any irreversible or irretrievable commitments of resources which would be involved in [a] proposal should it be implemented," 40 C.F.R. § 1502.16, effectively requiring site-specific analysis when an action would irrevocably alter the environment at a particular location. *See also* 42 U.S.C. § 4332(2)(C)(v) (requiring "detailed statement" on "any irreversible and irretrievable commitments of resources which would be involved in the proposed action"). The three decisions Wyoming cites (at 28) merely reflect unremarkable applications of the principle that environmental analysis must be done at the appropriate scale given the particular proposed action, including site-specific analysis when an action would entail irreversible or irretrievable commitments of resources at particular sites. *See Conservation Law Found.*, 707 F.2d 626 (environmental impact statement invalidated for failing to examine environmental consequences of new uses of property committed for sale); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (because lease decision "sanctioned activities which have the potential for disturbing the environment," environmental analysis needed to be done on the agency's irrevocable commitment to certain surface disturbing activities); *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (site-specific analysis required for irretrievable commitment of roadless lands to development). The Tenth Circuit is in full agreement with the requirement of site-specific analysis when a federal action involves an irrevocable commitment of resources at a particular location. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 717–18 (10th Cir. 2009).

Importantly, consistent with the principle of appropriate-scale analysis—and in keeping with NEPA's purpose to ensure study of "the effect of ... proposed actions on the physical environment," *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983)—the decisions Wyoming cites have *not* insisted upon a detailed, site-specific analysis of actions that make no irretrievable commitment of physical environmental resources. *See Block,* 690 F.2d at 776 (requiring no "intensive review" of wilderness recommendations); *Conservation Law Found.,* 707 F.2d at 634 ("site-specific supplementation of the [final environmental impact statement] ... may be minimal once GSA establishes that probable reuse ... will be for parks and recreation or other ecologically non-intensive purposes"). The Roadless Rule makes no such irretrievable commitments. *See* Final Environmental Impact Statement at 3-406.[8] Instead, the Rule preserves all options for the future, as its "restrictions on forest development and human intervention can be removed if later proved to be more harmful than helpful," *Kootenai Tribe,* 313 F.3d at 1125. This has already been done in two states through the Forest Service's Idaho- and Colorado-specific roadless area management rules. Under the principles applied by the very decisions Wyoming cites, no site-specific analysis was required.

Under the applicable rule of reason, the Forest Service's analysis of impacts was amply detailed to promote informed decision making. As the Tenth

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[8] The Roadless Rule Final Environmental Impact Statement can be found in Volumes Four–Seven of Appellants' Appendix filed in the Tenth Circuit.

Circuit pointed out, the Roadless Rule environmental impact statement "considered some regional distinctions and site-specific aspects of the proposed Roadless Rule, including the impact of the proposed alternatives on specific forest areas." Pet. App. 90 (citing region- and state-specific discussions in the final environmental impact statement of water quality and drinking water sources, soil loss, and landslides, and state-by-state summaries of key roadless area information); *see also, e.g.,* Final Environmental Impact Statement at 3-83 to 3-88 (regional and state-by-state analysis of wildfire risk), at 3-104 to 3-109 (regional fire occurrence analysis), at 3-130 to 3-135 (regional habitat fragmentation analysis), at 3-318 to 3-320 (regional- and county-specific analysis of impacts on mineral development), at 3-330 to 3-341 (community- and county-specific analysis of economic impacts on timber-dependent communities), at 3-342 to 3-346 (same for impacts on National Forest System employment). In short, the Forest Service analysis was far from "generic," and, despite Wyoming's criticism, the state fails to identify even one geographically specific impact of the Roadless Rule that escaped analysis. *See* Wyoming Pet. at 28.

As the Tenth Circuit has recognized in another decision that, on the particular facts, *required* a site-specific analysis, the inquiry into the appropriate level of analysis for an environmental impact statement "is necessarily contextual." *Richardson,* 565 F.3d at 718. The Tenth Circuit's resolution of that inherently fact-bound inquiry in this case reflects a correct application of legal principles on which the courts of appeals are in broad agreement and presents no issue worthy of review by this Court.

C. No Supplemental Environmental Impact Statement Was Required.

Wyoming's remaining NEPA argument—that the Tenth Circuit erred by not requiring the Forest Service to supplement its environmental impact statement—is similarly unworthy of this Court's review. A supplemental environmental impact statement is required where changes in an agency's proposed action "will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 361 (1989) (internal quotations, alteration and citation omitted); *accord* 40 C.F.R. § 1502.9(c)(1). The Tenth Circuit applied this firmly established standard, and Wyoming does not contend that the standard the court applied is incorrect or that there is any disagreement among the circuits over it. *See* Pet. App. 92–93. Instead, Wyoming merely asks this Court to review the Tenth Circuit's application of the accepted standard to the facts of this case. *But see* Sup. Ct. R. 10.

Wyoming targets the final Roadless Rule's expanded application to 2.8 million acres of "inventoried" roadless lands that were roaded since the Forest Service's last inventory. The state claims these areas "are in a fundamentally different condition than the roadless areas that were originally the subject of the rule." Wyoming Pet. at 30. However, as the Tenth Circuit pointed out, the Forest Service's draft environmental impact statement considered the Roadless Rule's impact on these lands even before they were swept within the scope of the Rule; "the effects analysis" in the draft impact statement "'was actually based on application of the prohibitions to entire [inventoried roadless areas], since data was

not specific to roaded or unroaded portions.'" Pet. App. 96 (quoting the final environmental impact statement) (alteration omitted). The roaded areas referenced by Wyoming were among the very lands considered in the draft environmental impact statement. In short, as the Tenth Circuit found, there was no "dramatic shift," Wyoming Pet. at 30, necessitating supplemental NEPA analysis.

IV. Petitioners' and Amici's Policy Arguments Do Not Justify Granting the Petitions.

From a policy perspective, petitioners and amici assert that this Court should review the Tenth Circuit's decision merely because the Roadless Rule encompasses a lot of land. Yet federal regulations often affect many people, implicate a large amount of money, or concern many acres of land. If mere acreage were sufficient to compel this Court's review, decisions regarding most federal environmental regulations would automatically receive review, yet this has not been the Court's practice. This Court has recently denied review to cases involving more than 150 million acres of federal public lands governed by challenged grazing regulations (*Public Lands Council v. W. Watersheds Project,* 632 F.3d 472 (9th Cir. 2011), *cert. denied,* 132 S. Ct. 366 (2011)), millions of acres of protected bird habitat (*Arizona Cattle Growers Ass'n v. Salazar,* 606 F.3d 1160 (9th Cir. 2010), *cert. denied,* 131 S. Ct. 1471 (2011)), and millions of miles of navigable waterways nationwide (*Nat'l Cotton Council of Am. v. U.S. Env'tl Prot. Agency,* 553 F.3d 927 (6th Cir. 2009), *cert. denied,* 130 S. Ct. 1505 (2010)). Moreover, the National Forest System comprises almost 200 million acres of land, within the 2.3 billion acres of the United States. At 58.5 million acres (actually less, given recent administrative

withdrawals of approximately 13 million acres in Idaho and Colorado from the Rule's requirements), the Roadless Rule's geography does not encompass an overwhelming portion of the nation's land, of federal lands generally, or even of the national forests.

Neither are Wyoming's and CMA's petitions salvaged by the arguments advanced by their various supporting amici curiae. Most of the amicus filings are devoted to a rehash of the flawed legal arguments discussed above. Where amici diverge from the petitioners, it is principally in advancing hyperbolic factual assaults on the Roadless Rule with few supporting citations and often in direct contradiction of the Forest Service's expert findings. Ultimately, like petitioners themselves, amici fail to offer any substantial argument warranting this Court's attention.

First, the claim by amici Western Energy Alliance (WEA) and American Petroleum Institute (API) that the Roadless Rule "will profoundly and negatively impact the nation's economy and efforts to make our country energy dependent," WEA Br. at 4; *see* API Br. at 12, rings hollow given the facts surrounding energy development on federal public lands. According to the most recent Interior Department report, there are approximately 38.5 million acres of federal lands under lease for oil and gas development in the United States, but only 12.3 million acres in production, leaving 26.2 million acres of already leased lands available for potential exploration and development. *See* U.S. Dep't of Interior, Summary of Onshore Oil & Gas Statistics (Nov. 9, 2011) (*available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/oil___gas_statistics/data_sets.Par.69959.File.dat/table-01.pdf (last visited Aug. 15, 2012)).

Given that leased lands within national forest roadless areas account for less than a million acres, 66 Fed. Reg. at 3266, more than 25 million acres of leased federal lands remain available for development unaffected by the Roadless Rule.

Even as to leased lands within roadless areas of the national forests, the Roadless Rule contains an exception "extend[ing] indefinitely the timeframe for which roads can be constructed on areas currently under lease" as of the Rule's effective date. 66 Fed. Reg. at 3265–66; *see* 36 C.F.R. § 294.12(b)(7). While WEA complains that a "federal oil and gas lease does not confer a right of access," WEA Br. at 2, this limitation on federal lease rights was already in place—and well known to lease holders—before the Forest Service promulgated the Roadless Rule, and the Rule did not modify it. *See Coquina Oil Corp. v. Harry Courlis Ranch,* 643 P.2d 519, 523 (Colo. 1982); *S. Utah Wilderness Alliance,* 127 IBLA 331, 368–71 (1993); 66 Fed. Reg. at 3265–66. As for API's unsupported speculation that Interior "will likely be disinclined to put additional Roadless Rule areas up for lease," API Br. at 10, there is a substantial Interior Department record to the contrary. For example, Interior issued 27 leases wholly or partially in national forest roadless areas in Colorado while the Roadless Rule was in effect after the Ninth Circuit's *Kootenai Tribe* decision. *See, e.g.,* Exhibit A to Decl. of Tracy Parker, *California ex rel. Lockyer v. U.S. Dep't of Agric.*, No. C05-03508 EDL (N.D. Cal. Nov. 1, 2006) (listing leases issued in Colorado roadless areas between May 19 and July 2, 2003).

Second, amici Wyoming County Commissioners Association *et al.* (WCCA) and the Coalition of Local Governments (CLG) offer a confused, contradictory,

and ultimately unpersuasive effort to demonstrate the Roadless Rule's impact on logging interests. While WCCA contends that the Roadless Rule's impact on Wyoming's timber industry "has been nearly catastrophic," WCCA Br. at 4, CLG clarifies that the "Wyoming forests have not seen significant commercial logging for more than 22 years," CLG Br. at 10—*i.e.*, for more than a decade before the Roadless Rule. Indeed, CLG takes pains to attribute this shift to a change in the logging program for western Wyoming's Bridger-Teton National Forest that occurred thirteen years before the Roadless Rule. *See* CLG Br. at 10. Whatever the merit of this contention, it says nothing about the impact of the Roadless Rule, much less about how invalidation of the Rule would address amici's concerns. In truth, annual logging levels in the national forests dropped from a high of nearly thirteen billion board feet in the late 1980s to the current range of approximately one to three billion board feet well before promulgation of the Roadless Rule. *See* U.S. Forest Serv., Number of Sales, Volume, Value & Price Per MBF of Convertible Timber Cut & Sold, Forest Service Wide, 1905-2011 (*available at* http://www.fs.fed.us/forestmanagement/documents/sold-harvest/documents/1905-2011_Natl_Summary_Graph.pdf (last visited Aug. 15, 2012)). Indeed, because timber harvest levels from national forests depend on many factors, including consumer demand, environmental issues unrelated to the Roadless Rule, and the Forest Service's own budget limitations, the ability to access timber in roadless areas is not a critical determining factor.

Third, CLG contends that the Roadless Rule's ban on logging of large-diameter, old-growth trees will lead to "catastrophic wildfire." CLG Br. at 2. Howev-

er, the Forest Service's expert analysis predicted that the Roadless Rule would make no difference in the acreage burned by wildfires. *See* Final Environmental Impact Statement at 3-91, 3-95 (projecting that approximately 160,000 acres will burn annually within national forest roadless areas with or without the Roadless Rule). This is because, regardless of the Rule, "the highest priorities for fuel management work will continue to be on [national forest] lands outside of roadless areas where natural resource values or potential threats to human communities are the highest." *Id.* at 3-78. Moreover, "building roads into inventoried roadless areas would likely *increase* the chance for human-caused fires," as "human-caused wildland fire is nearly five times more likely to occur on essentially roaded lands than on essentially unroaded lands." *Id.* at 3-115 to 3-116 (emphasis added). While CLG claims a need to remove large trees from the forest, *see* CLG Br. at 21–22, the expert agency found that "any logging that reduces average tree size, at either the stand or landscape scale ... will increase the risk of stand-replacement fires rather than decrease it" because larger trees are more "fire resistant." Final Environmental Impact Statement at 3-91, 3-92 (quotations and citation omitted).

Fourth, the amici mining and grazing associations assert that "[t]he practical effect of the Roadless Rule is that all commercial activities, including mining or grazing, are prohibited." Mining and Cattle Ass'ns Br. at 22. This is simply not so. Under the Roadless Rule, "[r]easonable access to conduct exploration and development of valid claims for locatable minerals (metallic and nonmetallic minerals subject to appropriation under the General Mining Law of 1872)

would continue," 66 Fed. Reg. at 3269, pursuant to the Rule's exception for roads "needed pursuant to reserved or outstanding rights, or as provided for by statute." 36 C.F.R. § 294.12(b)(3). As for livestock grazing, grazing allotments abound on national forest lands, both inside and outside of roadless areas, *see* Final Environmental Impact Statement at 3-288 to 3-289. As the Forest Service found, grazing "[a]llotments located in roadless areas are usually reached on horseback or by [off-highway vehicle]," not by road; "seldom are roads built on [National Forest] lands for the primary purpose of providing access to grazing allotments." *Id.* at 3-289.

Fifth, amici State of Utah and six others paint a picture of unified state displeasure with the Roadless Rule. Yet the Roadless Rule applies in 38 states, and opposition to the Rule is not even a majority position. The states of California (4.416 million acres of federal roadless land), Oregon (1.965 million acres), Washington (2.015 million acres), New Mexico (1.597 million acres), Montana (6.397 million acres), and Maine (6,000 acres)—which together account for more than a quarter of all the acreage covered by the Rule—all have actively engaged in federal court litigation to support the Roadless Rule.

Finally, amicus Safari Club raises a purported concern that the Roadless Rule may harm "wildlife species that depend on roadway corridors for habitat." Safari Club Br. at 5, 8, 16–18. However, the Forest Service's environmental analysis considered impacts on such species. *See* Final Environmental Impact Statement at 3-146 to 3-147. Moreover, the Safari Club fails to explain why such species are not amply provided with habitat by the approximately 446,000 miles of roads—enough to encircle the Earth

nearly 18 times—that have already been carved through the National Forest System, *see* 66 Fed. Reg. at 3245–46, not to mention the many additional roads on surrounding private, state, and other federal lands. By contrast, those wildlife species that depend on roadless areas for their survival (including more than 300 species listed or proposed for listing under the Endangered Species Act) have nowhere else to go "if the relatively undisturbed habitat provided by these areas is not maintained." Final Environmental Impact Statement at 3-179 to 3-180. The Safari Club provides no reason to question the Forest Service's conclusions about which policies best balance the interests of wildlife together with the other interests that the agency must consider in making decisions about the use of the national forests. Still less does it, or any of the other amici, explain how its disagreement with the balance struck by the Forest Service indicates the existence of legal issues in this case that require resolution by this Court.

CONCLUSION

For the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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