Nos. 09-8075 & 08–8061 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
STATE OF WYOMING,

Plaintiff-Appellee,

and COLORADO MINING ASSOCIATION,

Intervenor-Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*

Defendants-Appellants,

BIODIVERSITY CONSERVATION ALLIANCE, *et al.*

Defendants-Intervenors-Appellants,

On Appeal from the United States District Court for the District of Wyoming
United States District Judge Clarence A. Brimmer (No. 2:07-cv-00017)

(PROPOSED) BRIEF AS AMICI CURIAE OF RECREATION GROUPS

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Applicants the BlueRibbon Coalition, California Association of 4 Wheel Drive Clubs, United Four Wheel Drive Associations, American Council of Snowmobile Associations and (collectively, the "Recreation Groups") are nonprofit corporations, which have no publicly-traded parents or subsidiaries, and are not publicly-traded corporations or entities within the meaning of Fed.R.App.P. 26.1.

Respectfully submitted this 30th day of December, 2009.

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INTEREST OF AMICI

Amicus BlueRibbon Coalition ("BlueRibbon") is an Idaho nonprofit corporation representing over 1,100 businesses and organizations with approximately 600,000 members nationwide. BlueRibbon members use motorized and nonmotorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access United States Forest Service (USFS) lands throughout the United States, including inventoried and uninventoried "roadless areas" in Wyoming and elsewhere affected by the 2001 Roadless Rule at issue herein.

Amicus United Four Wheel Drive Associations ("UFWDA") is a nonprofit organization which consists of more than 10,000 individuals, clubs, and associations who share a common interest in recreational off-road activities, including the use of four-wheel-drive vehicles. UFWDA has members in each of the 50 states who have been affected by the 2001 Roadless Rule as implemented throughout the nation, including Wyoming.

Amicus California Association of Four-Wheel-Drive Clubs ("Cal 4") is a California mutual benefit corporation which consists of 8,000 members and 160 member clubs. Cal 4 members regularly engage in four-wheel-drive oriented recreation throughout the country and intend to continue doing so. These interests in off-road access involve public lands throughout the National Forest System,

including inventoried and uninventoried "roadless areas" throughout the nation, including Wyoming.

Amicus American Council of Snowmobile Associations ("ACSA") is a nationwide association of clubs and individuals representing the interests of snowmobilers nationwide, including those in Wyoming. ACSA members have a concrete stake in the implementation of the Roadless Rule in Wyoming and throughout the national Forest System.

These groups represent an interest not represented by the State or any other party. The Recreation Groups represent the interests of a significant portion of the recreating public which will be impacted by this Court's decision, and members of these groups have long worked with the Forest Service at the various administrative levels to assist the agency in developing recreation plans. This involvement has occurred in virtually all aspects of litigation challenging Forest Service "roadless" policies, as well as past, present, and continuing administrative processes addressing "roadless" areas.

SUMMARY OF THE ARGUMENT

Our Nation's treasured forest lands must be actively and effectively managed. Such management necessitates detailed, site-by-site analysis; not politically convenient templates. That improper procedural means advance an agenda of less rather than more active human presence is of little legal import.

This Court should seize the opportunity to place the 2001 Roadless Rule alongside the 2005 State Petitions Rule and similar misplaced efforts to manage our National Forests via election cycle emanations from the DC beltway, and to begin a return to professionally-driven and project-focused management that our forests and citizens deserve.

ARGUMENT

Amici will not unnecessarily repeat the State of Wyoming's arguments, but wish instead to amplify the State's position and clarify the proper context of the merits analysis. In the first round of this litigation, the district court correctly determined that the 2001 Roadless Rule was promulgated in violation of the National Environmental Policy Act ("NEPA") and the Wilderness Act. *See Wyoming v. Dep't of Agric.*, 277 F.Supp.2d 1197 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005). As noted in its opinion, the district court is the sole judicial body which has considered the validity of the 2001 Roadless Rule. *Wyoming v. Dep't of Agric.*, 570 F.Supp.2d 1309, 1351-1352 (D. Wyo. 2008). The 2001 Roadless Rule reflects a policy-driven effort at legislating a cookie-cutter approach to managing over 58 million acres of federal land. It fares no better under proper scrutiny than have similar efforts to shortcut procedural environmental laws.

I. No Court has Affirmed the Validity of the 2001 Roadless Rule.

Aside from the district court, no court has squarely addressed the legality of the 2001 Roadless Rule. One must take careful note of the proper context interpreting the myriad related decisions in order to avoid the figurative and legal effect attributed by appellants to those cases. Contrary to those implications, this appeal is not a *pro forma* exercise toward a foregone conclusion, but rather presents the legality of the 2001 Roadless Rule as a question of first impression that plaintiffs have waited nearly a decade to have answered.

That appellants consider *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) dispositive here is evidenced by the littering of references to that Ninth Circuit decision throughout their briefs. This reliance is misplaced -- *Kootenai Tribe* was not presented with the question of whether the 2001 Rule was legal and therefore cannot serve as precedent in answering the question before this Court.

The district court correctly characterized the precedential value of *Kootenai Tribe* in the first round of this litigation as "limited." *State of Wyoming v. U.S. Dep't of Agric.*, 277 F.Supp.2d at 1202 n.1 ("this Court finds the *Kootenai Tribe* opinion to be of limited persuasive value. Moreover, because this Court is unable to discern what opinions *Kootenai Tribe* overruled, this Court will refrain from relying on any Ninth Circuit NEPA opinions as persuasive authority.") Additionally, *Kootenai Tribe* includes a strongly-worded dissenting opinion, which

this Court might find more persuasive than the majority opinion. *See, e.g., Kootenai Tribe*, 313 F.3d at 1130 (Kleinfeld, J., dissenting) (agreeing with Idaho district court's analysis and noting "[t]he District Court's factual findings are extensive and damning...."). More importantly, *Kootenai Tribe* involved an appeal from a district court decision granting a preliminary injunction. The *Kootenai Tribe* panel was therefore not tasked with a definitive evaluation of the merits or a review of the administrative record, for "it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Applicable Ninth Circuit precedent acknowledges "our review of a district court order granting a preliminary injunction is 'subject to limited review.'" *Demery v. Arpaio*, 378 F.3d 1020, 1027 (9th Cir. 2004) (quoting *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 839 (9th Cir. 2002)). Under such review the appellate court will reverse only where the district court abuses its discretion. *Id.* In fact, "[a]n appellate court upon an appeal from an order granting or denying a temporary injunction will ordinarily not consider the merits of a case further than is necessary to determine whether the trial court abused its discretion." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1186 (8th Cir. 2000). Properly understood, the *Kootenai Tribe* majority opinion should not be viewed as a final assessment of the legality of the Roadless Rule, by the Ninth Circuit or otherwise.

Finally, the *Kootenai Tribe* majority reversed the district court's order preliminarily enjoining implementation of the Roadless Rule because it concluded the district court, in applying the Ninth Circuit's "sliding scale" test for evaluating the propriety of preliminary injunctive relief, erroneously found a "strong likelihood of success on the merits" coupled with a "possibility of irreparable harm" while the majority felt that "Plaintiffs have demonstrated at best a serious question of liability on the merits of their NEPA claim...." *Kootenai Tribe*, 313 F.3d at 1126. The final outcome of *Kootenai Tribe* therefore turns on a subtle nuance in applying the Ninth Circuit's preliminary injunction standard.[1] The decision entered in this case, in contrast, arises from a final judgment of the District Court following the complete and thorough development of the administrative record and presentation of the merits, which involve additional challenges to the Roadless Rule not considered in *Kootenai Tribe*.

Nor does more recent activity involving the 2005 State Petitions Rule provide guidance as to the legality of the 2001 Roadless Rule. In *Lockyer v. U.S. Dep't of Agric.*, 459 F.Supp.2d 874 (N.D. Cal. 2006), the District Court for the Northern District of California determined that the 2005 State Petitions Rule was

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[1] This nuance is even less relevant following the Supreme Court's decision in *Winter v. NRDC*, 129 S.Ct. 365, 3756-376 (2008), which arguably recasts the Ninth Circuit's "sliding scale" test so as to eliminate any formulation which would justify entry of preliminary injunctive relief based on the mere likelihood of irreparable injury.

promulgated without the necessary NEPA analysis and accordingly invalidated the Rule. *Lockyer*, 459 F.Supp.2d at 912; *aff'd*, 575 F.3d 999 (9th Cir. 2009). However, the district court explicitly denied any insinuation that the legality of the 2001 Roadlesss Rule (or the Wyoming district court's analysis) was before it. Wyoming (and the Recreation Groups) argued unsuccessfully that a remedy in the California case should not impose the result deemed illegal by the Wyoming court, and the California court freely acknowledged this result in concluding that "renewed litigation is not necessarily undesirable" compared to what the court considered the alternate harm of the State Petitions Rule being illegally implemented. *Lockyer*, 459 F.Supp.2d at 917. The California court determined the 2001 Rule should be reinstated through a mechanical application of what it considered controlling precedent in *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), not through some independent evaluation of the wisdom or even legality of the 2001 Rule. *Lockyer*, 459 F.Supp.2d at 916.

This Court should squarely confront the legality of the 2001 Roadless Rule unimpeded by the veil of prior judicial analysis. The prior decisions of other courts in different procedural contexts[2] are neither binding nor particularly

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[2] Notwithstanding the valiant ends-driven efforts of preservationists and those of the agency refocused by new leadership, there are gaping procedural holes in the process culminating in the 2001 Rule. These are understandable, since its architects knew their vision necessitated they "take whatever executive actions are necessary" and could not "afford to waste a single day." *Kootenai Tribe*, 142

informative except in setting the background and generally outlining applicable areas of the law. The district court here conducted an intense review which is seemingly consistent with a basic thesis that preservationist appellants should support -- that a mad dash to enact nationwide land management rules driven by political deadlines runs afoul of both the letter and spirit of public participation requirements rather than be driven by political deadlines. This Court should affirm.

II. A Nationwide Injunction is the Appropriate Remedy for an Illegal Nationwide Rule.

The district court acted within its discretion and in accordance with the weight of relevant authority by enjoining any implementation of the nationwide Roadless Rule.

The Forest Service's opposition to a nationwide remedy hangs from the premise that any injunction should be only as broad as is necessary to accomplish "complete relief to the plaintiffs." *See*, Federal Appellants' Brief at 62. However,

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F.Supp.2d at 1235 n.2 (quoting then-Forest Service Chief Mike Dombeck in October 28, 1999 letter to Forest Service staff). Among the numerous obvious consequences of this rush was the fact that over 4 million acres of "inventoried roadless areas" were omitted from disclosure in the Draft EIS, but later revealed as being covered by the Rule only in the Final EIS, and therefore after the close of public comment. *See*, *Wyoming II*, 570 F.Supp.2d at 1344; Federal Appellants' Brief at 15, 17 (noting various "adjustments increased the total amount of IRAs to approximately 58.5 million acres" from 54.3 million acres in the Draft EIS). For comparison, 4.2 million acres is 6.562.5 square miles, which is larger than the land mass of three states (Rhode Island- 1,045; Delaware- 1,954; Connecticut- 4,845 square miles, respectively).

the cited authority addresses the proposition in only a general context, which ignores important factors here. This is not a typical case of discrete "final agency action" with effects limited to a particular party or geographic area, but a quasi-legislative enactment affecting the entire National Forest System. This is a distinction with a huge difference, and in similar circumstances illegally-promulgated Forest Service rules have been stricken throughout the system, not just in the venue of a concrete challenge to the rule. *See, e.g., Heartwood, Inc. v. U.S. Forest Service*, 73 F.Supp.2d 962, 980 (S.D.Ill. 1999). While the Recreation Groups appreciate the steadfastness with which agency counsel adheres to its position, the Forest Service routinely makes the same arguments, and they are consistently rejected.

Preservationist appellants are in an even more precarious position to attack a nationwide injunction. They must explain why the California and Ninth Circuit courts (at their urging) determined an illegal nationwide rule should be rectified by a nationwide injunction, but that "narrowly tailored" relief is necessary in Wyoming or the Tenth Circuit. Of course such an effort is futile. The result advanced by preservationist interests and embodied in decisions like *Paulsen* applies with equal force here as in *Lockyer*, *Heartwood* and similar cases.

At some point one must address the obvious - a federal agency enacted a rule affecting more than 50 million acres of public land scattered throughout the

National Forest System. That legislative act should be universally applicable or inapplicable, not subject to piecemeal application based on the existence or outcome of different lawsuits within individual federal judicial districts.

The law supports this common sense interpretation. For example, the D.C. Circuit Court of Appeals has "made [it] clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated--not that their application to the individual petitioners is proscribed.'" *National Mining Ass'n. v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C.Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C.Cir. 1989)). Similarly, the *Heartwood* court reasoned:

> Because the Court finds the timber harvest CE unlawful under NEPA, the Court may not enjoin its application in just a narrow, geographic area. The [Forest Service] intended the challenged CE to be applied nationwide on all [Forest Service] lands, so in finding the CE unlawful, the Court sees no option but to enjoin its application nationwide. To do otherwise would invite further needless litigation on this particular CE, and the Court chooses to avoid that consequence.

Heartwood, 73 F.Supp.2d at 980.

This district court acted well within its discretion in fashioning its remedy. The district court's analysis reflects recognition of controlling law and reasoned findings of fact. *Wyoming II*, 570 F.Supp.2d at 1353. Under an abuse of discretion standard, this Court should labor no more vigorously than the *Lockyer* panel in affirming the sufficiently-articulated conclusion of the district court on remedy

CONCLUSION

This Court should affirm in all respects the well-reasoned opinion of the district court.

Respectfully submitted this 30th day of December, 2009.

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RULE 32 CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 2,409 words. I relied on Microsoft Word to obtain the count. I certify that the information on this page is true and correct to the best of my knowledge and believe formed after a reasonable inquiry.

/s/ Paul A. Turcke
Paul A. Turcke, Esq.

CERTIFICATE OF ELECTRONIC FILING

Pursuant to the 10th Circuit General Order dated March 18, 2009, I hereby certify that:

(1) all required privacy redactions have been made;

(2) the electronic submission is an exact copy of the hard copies filed with the Clerk;

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/s/ Paul A. Turcke
Paul A. Turcke, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2009, the foregoing document was filed using the appellate ECF system and that all parties of record were served through that system. Additionally, I certify that seven copies of the foregoing document will be delivered to the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit within two business days.

/s/ Paul A. Turcke
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