

A NEW DIRECTION? FOREST SERVICE DECISIONMAKING AND MANAGEMENT OF NATIONAL FOREST ROADLESS AREAS

WILLIAM J. WAILAND*

Making natural resource management decisions in roadless areas of our national forests has long been a contentious issue. The Forest Service, under President Bush, recently passed a rule allowing states to petition the administration regarding how they wish these roadless areas to be managed. The rule envisions that states will collaborate with all concerned parties in formulating these petitions, but sets no standards ensuring such a process. Given the difficulty of achieving collaboration, the lack of standards makes this purported goal less likely and suggests that the rule may have been an attempt to open roadless areas to development. Nonetheless, this Note urges states and stakeholders to undertake collaboration and argues that the administration should use its oversight to encourage this process rather than unwanted development. In this way, the new rule has the potential to facilitate broadly acceptable management policies and provide valuable experience in the field of collaborative environmental management.

INTRODUCTION

The United States Forest Service manages 193 million acres of national forests and grasslands.¹ The agency makes management decisions between different and often competing uses for these public lands, such as logging, recreation, preservation, and grazing. These decisions are supported in different combinations by various constituencies, including environmentalists, developers, adjacent landowners, and recreationalists. Historically, Congress has given the Forest Service little statutory guidance in directing the resolution of land use conflicts, initially believing that the agency could use science to make those decisions objectively. As conflicts between different forest users steadily increased, however, it became apparent that science can inform, but not make, decisions. Like science, economics can assist

* Copyright © 2006 by William J. Wailand. J.D. Candidate, 2006, New York University School of Law. B.A., 2002, Harvard University. I would like to thank Katrina Wyman for her consistently thoughtful comments throughout the writing process. I would also like to thank Professor Richard Stewart for taking the time to provide useful feedback. I am grateful for the hard work of my fellow *New York University Law Review* editors, especially Delci Winders, Alex Guerrero, and Monique Cofer. Finally, my deepest appreciation goes to my beautiful wife, Heidi Wailand, for her insightful critiques, unwavering support, and much more.

¹ Forest Serv., U.S. Dep't of Agric., About Us, <http://www.fs.fed.us/aboutus> (last visited Oct. 15, 2005).

decisionmaking, but cannot determine correct outcomes. Management decisions require value judgments.

Given the lack of a clear congressionally determined mission or an objective means of decisionmaking, the Forest Service must turn to its decisionmaking process to defend its decisions against critics. Indeed, Congress codified public participation as part of the decision-making process to lend legitimacy to the Forest Service's final decisions. However, the goal of achieving widely acceptable policies through broad public participation remains elusive. The decision-making process has been characterized by litigation rather than consensus, and participants' roles in the process are often reduced to commenting on preformulated, highly technical plans.

These concerns over process take on special significance in the context of roadless areas, where conflicts over management decisions are exacerbated. Roadless areas,² which constitute roughly one-third of the national forest system,³ possess significant recreational and ecological value⁴ and evoke strong emotions. Moreover, national interests in preservation and recreation areas may diverge from local interests in the economic benefits of development.

Under President Clinton, the Forest Service published a rule prohibiting all road construction and timber harvesting in roadless areas in order to address a perceived failure of local forest managers to recognize their national significance.⁵ The rule was considered by some to be "one of the most significant conservation efforts in United States history."⁶ The Forest Service sought to legitimize this substantive national rule through extensive public participation (both public meetings and comment), but serious concerns were raised about the lack of input by those most directly affected. This rule never went into effect.

² "Roadless areas" are those parts of the national forest where no major roads were ever built. For a brief history of roadless area management before the rules that I discuss in this Note, see Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1148-51 (2004).

³ Forest Serv., U.S. Dep't of Agric., Roadless Area Conservation, <http://roadless.fs.fed.us> (last visited Oct. 15, 2005).

⁴ See *infra* notes 78-79 and accompanying text (detailing exceptional qualities of roadless areas).

⁵ See Special Areas, Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (proposed Jan. 12, 2001) (to be codified at 36 C.F.R. § 294) [hereinafter Roadless Rule].

⁶ Open Letter from Mike Dombeck, Chief, U.S. Forest Serv., http://roadless.fs.fed.us/documents/letter_to_emp.htm (last visited Oct. 15, 2005); see also *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1220 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005) (noting that, according to Defendant-Intervenors, "the Roadless Rule was the 'most significant land conservation initiative in nearly a century'" (quoting Defendant-Intervenors' Resp. Br., at 1)).

When President Bush entered office, he immediately suspended President Clinton's roadless rule, and published a new rule⁷ that focuses exclusively on process. Under the new rule, governors can file a petition with the Secretary of Agriculture to establish management requirements⁸ on roadless areas within their state, in theory making decisions more sensitive to state and local concerns. However, the rule lacks procedural standards to guide states in formulating petitions or to guide the Secretary in evaluating petitions. Therefore, there is no assurance that the process and resulting decisions will be any more defensible than those decisions made outside the context of roadless areas.

I argue that, despite the lack of standards, states and concerned stakeholders should actively collaborate and the administration should use its oversight powers to encourage this process. Combined with collaborative decisionmaking, the new rule could steer natural resource decisionmaking in a new direction, helping produce broadly accepted policies and providing valuable lessons for environmental management in other contexts. In Part I, I explain how an agency such as the Forest Service can defend its decisions as legitimate and why this is important. I then consider the origins of the Forest Service's current decisionmaking problems—vague laws, lack of objective decisionmaking criteria, and inadequate public participation. In Part II, I assess President Clinton's roadless rule and President Bush's final rule, examining what each considers the proper locus of decisionmaking. In Part III, I describe how President Bush's final rule fails to transfer any meaningful decisionmaking authority to the states, instead leaving the Secretary free to selectively accept only those plans that match the administration's policies. The potential success of the Bush rule in achieving its stated goals relies on the actions of the governors in undertaking the petitioning process, which I examine, and the Secretary in reviewing the petitions. I argue that the rule is in fact a politically expedient way to remove roadless protections, as compared to President Clinton's substantive roadless rule. In Part IV, I describe how, through collaborative decisionmaking, the state can use the final rule to increase legitimacy in resolving difficult forest

⁷ Special Areas, State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (codified at 36 C.F.R. § 294 (2005)) [hereinafter Final Rule].

⁸ *Id.* at 25,654. By "management requirements," the final rule means different management techniques (e.g., fire suppression) and different uses (e.g., recreation) for roadless areas. See *infra* note 118 (listing some management strategies mentioned by administration and noting absence of any reference to development of forest resources as potential use).

management issues and suggest how the Secretary can assist in reaching such a result.

I

INDEFENSIBLE DECISIONS: THE FOREST SERVICE'S LACK OF LEGITIMACY

Every decision has two conceptually distinct components: the substance of the decision itself and the process by which it was made. A government agency decision can be defended as "legitimate" if (1) it is directed by a constitutionally enshrined, representative political entity such as Congress; (2) it is the objectively correct decision; or (3) it is made through a process that provides legitimacy (especially through public participation).⁹ For decisions that lack clear political guidance or an objective basis, only the process remains to defend the agency against its critics. While I make no assertions as to the comparative importance of political accountability, objective expertise, or procedural legitimacy, their complete absence leaves an agency unable to defend its decisions or even its existence.

Arguably, the Forest Service finds itself in this position today.¹⁰ Some academics see the Forest Service as essentially broken, perhaps beyond repair.¹¹ Even former chiefs of the Forest Service are joining in the call for changes to the agency's operations.¹² In this Part, I discuss how this crisis of legitimacy came to be. In Section A, I first

⁹ As Professor Stewart observes, broad delegations of authority to agencies create a "democracy deficit" to be filled by public participation ("interest representation") and administrative expertise ("[a]nalytic management"), which he views as complementary, despite the tensions between them. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 445-46 (2003).

¹⁰ As late as 1960, on the other hand, the Forest Service was hailed as a model agency. See, e.g., HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* 203-07 (1960) (speaking of agency in glowing terms); see also *Fabulous Bear, Famous Service Fight Annual Billion-Dollar Fire*, NEWSWEEK, June 2, 1952, at 50, 51-52 ("[T]he Forest Service is one of Uncle Sam's soundest and most businesslike investments. . . . The Forest Service owes much of its phenomenal efficiency to two policies: decentralization and cooperation with anyone who will cooperate.").

¹¹ See generally ROBERT H. NELSON, *A BURNING ISSUE: A CASE FOR ABOLISHING THE U.S. FOREST SERVICE* (2000) (arguing for abolition of Forest Service and devolution of national forests to states and private actors); Roger A. Sedjo, *Does the Forest Service Have a Future?*, 23 REG. 51 (2000) (questioning continued vitality of Forest Service as it stands, lacking well-defined mission and supporting constituency).

¹² See, e.g., R. Max Peterson, *Discussion: Does the Forest Service Have a Future?*, in *A VISION FOR THE U.S. FOREST SERVICE: GOALS FOR ITS NEXT CENTURY* 191, 191 [hereinafter *A VISION FOR THE U.S. FOREST SERVICE*] (Roger A. Sedjo ed., 2000) ("[T]he Forest Service is in transition, change is everywhere, and the Forest Service knows where it has been but has a less clear vision of where it is going."); Jack Ward Thomas, *What Now?: From a Former Chief of the Forest Service*, in *A VISION FOR THE U.S. FOREST SERVICE*, *supra*, at 10, 11 ("It is time—past time—to take a careful look at the laws that influence the

describe how vague and ambiguous laws afford the Forest Service substantial discretion in decisionmaking, while failing to establish clear values or provide political accountability. I then contend that science and economics are unable to provide objective decisionmaking criteria, leaving the Forest Service unable to use expertise to arrive at or defend its decisions.¹³ In Section B, I explain why the Forest Service's prior system of public participation did not legitimize agency decisions. Decisions emerged from the process slowly, often only after litigation, and rarely reflected consensus. I then describe recent changes to the process and their likely impact.

A. Science and Economics Fall Short

In the early 1900s, as a new agency, the Forest Service embraced scientific management as its defining mandate.¹⁴ Using the expertise of scientific management, it was believed, a well-trained staff could make decisions that ensured the greatest good for the greatest number.¹⁵ Objectively correct answers to difficult societal problems were thought to exist.¹⁶ For the first half of the twentieth century, few conflicts arose between competing uses,¹⁷ and thus the ability of scientific management to resolve difficult social questions was never tested

management of the national forests . . . and to develop legislation that will clarify missions, reconcile conflicts, and define authorities.”).

¹³ To the extent that science and economics can assist in making decisions, evidence of the poor ecological condition of national forests and the fiscal losses of the agency might indicate they are not heeded. See U.S. DEP'T OF AGRIC., FOREST SERV., *THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT* 38 (June 2002), <http://www.fs.fed.us/projects/documents/Process-Predicament.pdf> (“Large portions of the National Forest System are in poor or declining health.”); Randal O'Toole, *Discussion: State Trust Lands Management, in A VISION FOR THE U.S. FOREST SERVICE*, *supra* note 12, at 142, 142 (stating that Forest Service loses two billion dollars annually managing national forests). While substantive problems of Forest Service decisions merit their own extensive discussion, they are beyond the scope of this Note, which focuses instead on the decisionmaking process.

¹⁴ See ROBERT H. NELSON, *PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT* 48–50 (1995) (describing incorporation of scientific management principles into Forest Service).

¹⁵ See GIFFORD PINCHOT, *BREAKING NEW GROUND* 261 (1947) (quoting letter articulating Forest Service mission (drafted by Pinchot but signed by Secretary of Agriculture James Wilson) as stating, “where conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run”).

¹⁶ This belief was part of a larger progressive movement that saw science as answering many societal problems. NELSON, *supra* note 14, at 49.

¹⁷ This lack of conflict can be explained by the Forest Service's largely custodial role during this period, during which there was minimal logging and recreational interests in national forests were only nascent. See Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY* L.Q. 140, 152–53 (1999) (noting that Forest Service timber cuts remained low until after Great Depression).

or challenged. During this period, the Forest Service operated under the 1897 Organic Administration Act, which provided that national forests should be managed for three purposes: (1) to preserve and protect the forest within the reserved area; (2) to secure favorable conditions of water flows; and (3) to furnish a continuous supply of timber for the use and necessities of the citizens of the country.¹⁸

After World War II, the Forest Service began to harvest timber aggressively.¹⁹ At the same time, recreational use of national forests increased dramatically.²⁰ Conflicts began to arise between different forest users, most notably recreationalists and timber interests.²¹ In order to resolve these conflicts using scientific "expertise," the Forest Service needed a more expansive legislative mandate that would afford it significant discretion.²² Congress's faith in the Forest Service's ability to utilize such a mandate is embodied in the Multiple-Use Sustained-Yield Act (MUSYA) of 1960.²³ The MUSYA established that national forests were to be "administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."²⁴ Thus, Congress announced a realm of potential uses, but gave no assistance in deciding what mix of uses the Forest Service should select. Instead, the Act stated that the uses were to be provided "in the combination that will best meet the needs of the American people."²⁵ But by giving the Forest Service such extensive discretion to resolve inevitable value conflicts, Congress left the agency unable to formulate a single unifying mission.²⁶

¹⁸ 16 U.S.C. § 475 (2000).

¹⁹ Laitos & Carr, *supra* note 17, at 152–53 (noting sixfold increase in logging by mid-1960s, which was sustained into early 1980s).

²⁰ *Id.* at 161 (noting 1161% increase in recreational visits to national forests between 1950 and 1995).

²¹ While recreation and timber harvesting do not always conflict (for example, timber harvesting can be used to improve game populations), they often do. See RANDAL O'TOOLE, *REFORMING THE FOREST SERVICE* 92 (1988) (concluding that timber management conflicts with recreation "[i]n most cases").

²² During the New Deal era, Congress repeatedly followed this model of granting agencies broad discretion and relying on their "expertise" to legitimize decisions. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1677–78 (1975) (describing delegation of "sweeping powers" to agencies under broad legislative mandates during New Deal era).

²³ Pub. L. No. 86-517, 74 Stat. 215 (1976) (codified at 16 U.S.C. §§ 528–531 (2000)); see also NELSON, *supra* note 14, at 67–69 (characterizing Multiple-Use Sustained-Yield Act as codifying Forest Service's preexisting practice of accommodating different uses, without providing agency specific guidance on how to implement).

²⁴ 16 U.S.C. § 528 (2000).

²⁵ *Id.* § 531(a).

²⁶ See Michael J. Mortimer, *The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management*, 54

In the face of competing constituencies, the Forest Service's legitimacy, premised on claims of scientific objectivity, began to erode. In any management context, including forest management, there is a distinction between setting policy goals and putting those policies into effect. Science can partially inform the setting of policy goals and help implement decisions once made (for example, by determining which uses are compatible and what levels of use are sustainable), but science cannot dictate which goals to pursue, or by itself determine which uses are "correct."²⁷

While this became increasingly clear to its constituents, the Forest Service continued to define fundamental political problems as technical problems best addressed by professional experts.²⁸ By couching value debates in technical terms, the Forest Service attempted to promote the objectivity of its choices, and to insulate itself from criticism.²⁹ Not surprisingly, conflict continued to increase as the Forest Service cited its "expertise" in justifying its choices regarding competing uses, without reference to public input.

In 1976, Congress passed the National Forest Management Act (NFMA).³⁰ Recognizing that the Forest Service could no longer rely on science to defend its decisions, Congress established a forest planning process that included public participation.³¹ It remains evident today that "the Forest Service can no longer turn to science to trump

ADMIN. L. REV. 907, 910 (2002) (attributing agency's "administrative schizophrenia" to lack of concrete congressional direction).

²⁷ See Daniel B. Botkin, *Discussion: Rethinking Scientific Management, in A VISION FOR THE U.S. FOREST SERVICE*, *supra* note 12, at 75, 80 (arguing that proper role of science in democracy is to "tell society what goals are possible and present various choices for achieving those goals," but not to choose goals); Alvin M. Weinberg, *Science and Trans-Science*, 10 MINERVA 209, 222 (1972) ("Scientists have no monopoly on wisdom where this kind of trans-science is involved: they will have to accommodate to the will of the public and its representatives.").

²⁸ Hanna J. Cortner, *Discussion: What Now?*, in *A VISION FOR THE U.S. FOREST SERVICE*, *supra* note 12, at 44, 45.

²⁹ George Hoberg, *Science, Politics, and U.S. Forest Service Law: The Battle Over the Forest Service Planning Rule*, 44 NAT. RESOURCES J. 1, 6 (2004).

³⁰ Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified at 16 U.S.C. §§ 472a, 521b, 1600, 1611-1614 (2000)).

³¹ 16 U.S.C. § 1612 (2000) (requiring "procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs"). See *infra* Section I.B for further discussion of the National Forest Management Act (NFMA). This legislative response reflects a broader shift in the administrative state towards assuring "fair representation for all affected interests in the exercise of the legislative power delegated to agencies." Stewart, *supra* note 22, at 1712.

its critics or define credible technical solutions to complex social problems.”³²

Some assert that economics can provide an objective decision-making criterion by offering a value-free means of deciding between competing uses, thereby shielding the Forest Service from attacks on its decisions.³³ A decision to log, for example, could be based on whether the public benefits of jobs and timber are outweighed by the costs of preparing the sale and the loss of recreational and preservation value. This greater economic rationality would help insulate forest managers from politically contentious decisions and would allow the agency to produce the most value from the resources it manages.

Such a framework is based on two assumptions: one, that economic analysis can provide the objectivity it seems to promise; and two, that given the possibility of objective economic analysis, forest managers will apply it appropriately. Both assumptions are problematic. It is unclear that economics can offer an objectively “correct” way to manage natural resources.³⁴ First, the decision to consider economic efficiency in policymaking is itself a value judgment and must be defensible.³⁵ While Congress could require management decisions that maximize overall economic welfare, legislators have not yet deemed economic efficiency to be the appropriate principle for making these natural resource policy decisions. There is reason to doubt that economic analysis will win broad support. Economic analysis often focuses on overall societal welfare rather than equity concerns, meaning that there will be winners and losers.³⁶ Unless the former compensates the latter—and there are significant obstacles to such transfers—certain interests will oppose such change.

³² Sally K. Fairfax, *State Trust Lands Management: A Promising New Application for the Forest Service?*, in *A VISION for the U.S. FOREST SERVICE*, *supra* note 12, at 105, 113.

³³ See generally O’Toole, *supra* note 21, at 197–99 (encouraging use of market principles to create sensible and practicable framework for making natural resource decisions).

³⁴ The question of what role economics should play in environmental and natural resource policymaking has been thoroughly examined, as has its potential for objectivity. I do not intend to engage or resolve this broader debate, but instead limit my discussion to several relevant points. For a thorough treatment of the debate, see R. Scott Farrow et al., *Economic Valuation of the Environment: A Special Issue*, 34 ENVTL. SCI. & TECH. 1381 (2000), available at <http://pubs3.acs.org/acs/journals/toc.page?incoden=esthag&indecade=0&involume=34&inissue=8> (introducing special issue offering different perspectives on debate about economic valuation of environment).

³⁵ See, e.g., Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REGULATION, Jan.–Feb. 1981, at 33, 36–40 (considering practical and ethical problems with valuing non-monetary benefits).

³⁶ See Stewart, *supra* note 9, at 452–53 (noting that in using economic incentive systems “there are likely to be problems in ensuring regulatory equity”).

Second, there are practical difficulties with applying this approach that may compromise the objectivity of decisions made using it. Applied economics requires discretionary judgments, and can generally be used to support various policy solutions.³⁷ This feature is especially significant in the natural resource and environmental field, where many values have no market analogues. Indeed, some suggest that “[t]he very process of quantification may import systematic bias” against nonmonetary variables, such as the value of preservation.³⁸ This concern has led some people who might favor the economic framework in principle to dispute whether economic analysis can truly provide the objectivity it promises.³⁹ While economic analysis may point the way to sensible policy outcomes, it is unlikely to offer conclusions except in cases where there is a clear discrepancy between the respective values of conflicting uses.

Even if economic analysis provided an objective framework, it would still need to be applied appropriately by the agency. Political pressure and financial incentives faced by Forest Service officials cut against a straightforward application of economic analysis.⁴⁰ Unless and until these structures are changed, the Forest Service will be unable to use an economic framework to make economically efficient decisions.⁴¹ However, if proper structural reform is undertaken, eco-

³⁷ Stewart, *supra* note 22, at 1703.

³⁸ *Id.* at 1704. But see David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343, 367–72 (2004) (arguing that contingent valuation is promising means of determining nonmonetary values).

³⁹ See Robert H. Nelson, *Rethinking Scientific Management: Brand-New Alternatives for a Century-Old Agency*, in A VISION FOR THE U.S. FOREST SERVICE, *supra* note 12, at 57, 66–67 (considering current economic efficiency arguments as just another iteration of progressive philosophy, still unable to resolve value conflicts through objectivity).

⁴⁰ In fact, these structures encourage economically *inefficient* decisions. For example, twenty-five percent of timber receipts go to local counties for education and transportation, Twenty-Five Percent Fund Act, 16 U.S.C. § 500 (2000), generating political pressure to log in resource-based communities from both the communities and their legislators. Financially, managing for recreation and preservation provides little direct funding and solicits only limited appropriations, while timber management generates income (in both direct revenue and congressional appropriations), regardless of the net value of sales. This framework gives Forest Service officials an incentive to discount the value of recreation, wildlife habitat, and environmental amenities, even when their benefits exceed that of timber harvesting. See John A. Baden, Editorial, *Pork-Barrel Economics Thwart Forest Service Reform*, SEATTLE TIMES, Jan. 26, 1993, at A11 (describing this skewed incentive system and below-cost timber sales that result from it).

⁴¹ John A. Baden, *Faulty Incentives Prevent Forest Service Reform*, SEATTLE TIMES, Jan. 19, 1993, at A11 (“[W]ith bad incentives, good intentions will not suffice.”); see also O’Toole, *supra* note 13, at 147–48 (“Changing the agency’s name, the department to which it reports, or the people who are at the top will do nothing for the forests. Instead, we need to change its financial and governance structures.”).

conomic analysis can work in concert with public participation to lead to sensible and defensible policy outcomes.⁴²

B. Legitimacy of Planning under the National Forest Management Act

Even if Congress has not provided guidance to the Forest Service and no objective decisionmaking criteria are available, the Forest Service could still defend its decisions and decisionmaking authority if the process were seen as legitimate. In this Section, I first examine the success of the public participation process under NFMA. I then consider recent changes to that process, before turning to roadless area management in the following Part.

NFMA calls for the creation of forest plans to guide forest management and set priorities among competing constituencies.⁴³ Most significantly, NFMA instructs the Forest Service to develop a process to include public participation so that all uses receive a fair hearing.⁴⁴ Involving all interested parties could allow for resolution of value conflicts among competing constituents through the development of consensus on a broadly acceptable mix of uses seen as legitimate by all parties. In the face of this lofty goal, many critics question whether the ideals of democratic participation and consensus planning have been realized;⁴⁵ some go so far as to call the planning process a failure.⁴⁶ Others are less skeptical, finding that "for all its faults . . . most decisions emerging from [the current legal system], however slowly, are consistent with law and public preference."⁴⁷

A clear tension exists between meaningful and effective participation, which can be time-consuming and site-specific, and efficient decisionmaking.⁴⁸ Inefficiencies may be justified if NFMA provides a

⁴² See *supra* note 9 (noting that administrative expertise and public participation can be complementary).

⁴³ See 16 U.S.C. § 1601(a) (2000) (noting necessity of "long term perspective in planning and undertaking related national renewable resource programs administered by the Forest Service" and requiring preparation of "Renewable Resource Assessment").

⁴⁴ See *supra* note 31 (describing notice and comment requirement of NFMA).

⁴⁵ See, e.g., Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 673-74 (1997) (noting that Forest Service has not achieved "goal of full democratization," but neither is it "antidemocratic" as it once was).

⁴⁶ Roger A. Sedjo, *Does the Forest Service Have a Future? A Thought-Provoking View*, in *A VISION FOR THE U.S. FOREST SERVICE*, *supra* note 12, at 176, 180 ("In the more than two decades since the NFMA, little of what was envisioned has become reality.").

⁴⁷ George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 *ECOLOGY L.Q.* 602, 610 (1999).

⁴⁸ See Stewart, *supra* note 22, at 1775 ("So long as formal participation rights remain at the heart of the pluralist solution to the problem of agency discretion, the possibilities for

forum for all voices to be heard and lends legitimacy to the final decisions. Whether one supports the NFMA planning process or not, it is clear that it entails serious inefficiencies—it is slow, expensive, and highly litigious.⁴⁹ Most initial plans, which must be revised at least once every fifteen years,⁵⁰ take five or six years to develop, even before additional public comment, appeals, and litigation.⁵¹ Today, NFMA planning constitutes an estimated forty percent of the direct work of the Forest Service and twenty percent of its budget.⁵² The ultimate question, then, is whether this time has been well-spent in terms of gains to legitimacy.

Unfortunately, the goal of meaningful input, especially local input, seems to have gone largely unrecognized. Instead of being afforded an opportunity to craft solutions from the beginning, constituents are asked to comment on 100-plus-page highly technical documents.⁵³ The “bureaucratic model of ‘decide, announce, and defend’ often seems to dominate” agency decisionmaking.⁵⁴ Frequently, only die-hards and professionals stay genuinely involved in the process.⁵⁵ The agency itself “all too often . . . see[s] public participation as more

streamlining multi-party adjudicatory proceedings on complex issues are distinctly limited.”).

⁴⁹ Roger A. Sedjo, *Streamlining Forest Service Planning*, in *NEW APPROACHES ON ENERGY AND THE ENVIRONMENT: POLICY ADVICE FOR THE PRESIDENT* 101, 102–03 (Richard D. Morgenstern & Paul R. Portney eds., 2004), available at http://www.rff.org/rff/RFF_Press/CustomBookPages/NewApproachesonEnergyandtheEnvironment/18_Streamlining-Forest-Service-Planning.cfm (follow “Download this Policy Recommendation” hyperlink).

⁵⁰ 16 U.S.C. § 1604(f)(5)(A) (2000).

⁵¹ See Robert Breazeale, *Is Something Wrong with the National Forest Management Act?*, 21 J. LAND RESOURCES & ENVTL. L. 317, 321 (2001) (describing initial plan development, followed by public comment and final environmental impact statements, followed by exhaustion of administrative remedies, followed by formal legal challenges). For example, the public process of revising the Tongass National Forest management plan, arguably the most controversial in the nation, began in 1987, was finally completed in 1997, and is still being litigated. See Brief for the Federal Appellees at 10, *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797 (9th Cir. 2005) (No. 04-35858).

⁵² Sedjo, *supra* note 49, at 101.

⁵³ See O’TOOLE, *supra* note 21, at 178 (“In practice, forest plans are so complex that real public participation is all but impossible. . . . As a result, public participation in most plans devolves into a contest to see which interest group can generate the most form letters.”).

⁵⁴ Martin Nie, *Administrative Rulemaking and Public Lands Conflicts: The Forest Service’s Roadless Rule*, 44 NAT. RESOURCES J. 687, 718 (2004).

⁵⁵ See Thomas, *supra* note 12, at 19 (“As time marched on, all but the zealots and the hired guns dropped out of the [planning] process.”). This feature in particular tends to emphasize the role of organized interest groups (including environmentalists and timber and energy lobbyists) in the decisionmaking process, while diminishing the voice of local constituents. See Stewart, *supra* note 22, at 1775 (“[T]he content of rulemaking decisions is often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence.”).

of an obstacle to be overcome than a vital part of their decision-making.”⁵⁶

This lack of effective channels of participation can be particularly acute for residents living near national forests. Local forest users are frustrated and disillusioned that their input is treated as “‘little more than chits on a tally sheet.’”⁵⁷ Detailed understanding of the local ecology is lost.⁵⁸ Complaints must wind their way through an unwieldy system of appeals that is difficult to navigate for those unfamiliar with the NFMA process.⁵⁹ The focus on centralized decision-making has placed little emphasis on local forest managers’ attempts to involve local constituencies. And even when local communities accept a forest plan, it can be altered after an agreement has been reached.⁶⁰

Ideally, widespread participation rights would generate broadly acceptable policy.⁶¹ Given that the first 125 plans saw about 1200 appeals and over 100 lawsuits,⁶² this appears not to be the case.

⁵⁶ Nie, *supra* note 54, at 718.

⁵⁷ Sarah F. Bates, *Discussion Paper: The Changing Management Philosophies of the Public Lands*, in W. LANDS REP. NO. 3 (1993)); see also Sedjo, *supra* note 46, at 181 (attributing frustration and disillusionment to fact that even when plans emerged that reflected local interests, they were often “‘tied up in appeals and litigation” or “‘never implemented for lack of budget or because of an overriding executive decision”); Roger A. Sedjo, *The National Forests: For Whom and For What?*, POLITICAL ECONOMY RESEARCH CENTER POLICY SERIES [hereinafter PERC POLICY SERIES] PS-23, at 22 (Aug. 2001) (“Although the local population can be involved in the planning process, . . . these preferences are often ignored.”).

⁵⁸ See Botkin, *supra* note 27, at 80–81 (describing value of local knowledge and tendency of scientists to dismiss it).

⁵⁹ See Sedjo, *supra* note 57, at 22 (“[D]issatisfaction with [Forest Service] decisions must be registered through an unwieldy chain of command that stretches through a multitude of bureaucratic levels.”).

⁶⁰ See, e.g., Editorial, *Public Ignored in Forest-Plan Changes*, DENVER POST, Feb. 15, 2005, at B6 (describing management plan five years in making that was altered at last stage of appeal by Deputy Undersecretary for Natural Resources). Even when a political appointee does not change a finalized plan, such plans can be undermined in other ways. First, because planning is such a lengthy process, on-the-ground changes can render a plan obsolete before it is created. Second, when a plan is finalized, and has survived the gauntlet of appeals and litigation, it still may not be implemented for lack of funding. Forest Service appropriations are distributed not by forest, but rather by program (such as timber, fire prevention, or recreation). See Sedjo, *supra* note 57, at 6 (describing individual planning process and congressional appropriations as essentially independent, leading to funding that often bears little relation to forest plans). Thus, many plans will not have sufficient funding to be fully implemented. See Sedjo, *supra* note 49, at 103 (“[F]unding for their full implementation is rarely available.”).

⁶¹ Professor Stewart first notes that the process by which all affected interests participate can be a determinant of just results. See Stewart, *supra* note 22, at 1750. He goes on to say, however, that “the impact of such representation on agency decision[s] is at best problematic.” *Id.* at 1776.

⁶² Sedjo, *supra* note 11, at 52.

Indeed, because forest plans must comply with not only NFMA and its implementing regulations,⁶³ but also with the National Environmental Policy Act,⁶⁴ the Endangered Species Act,⁶⁵ and other federal statutes, NFMA seems to have been more effective at creating litigation avenues than at generating meaningful public involvement. The extent of these procedural lawsuits⁶⁶ suggests that the goal of legitimacy is still far from reach.⁶⁷

In sum, while the goals of NFMA to democratize the forest planning process and help legitimize agency decisions were laudable, they have gone largely unrealized. Recently, the Forest Service under President Bush published a rule that significantly changed NFMA's implementing regulations.⁶⁸ The new rule is intended "to streamline and improve the planning process," improving the collaborative process.⁶⁹ This process would ideally result in flexible and broadly accepted plans that allow local forest managers to adapt to dynamic

⁶³ The viability regulation in particular has been the basis for many environmental lawsuits challenging forest plans but it has since been removed by the Bush administration. *See, e.g.,* Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996) (challenging Forest Service Record of Decision for failure to comply with viability regulation). *Compare* 36 C.F.R. § 219.10(b) (2005) ("The overall goal of the ecological element of sustainability is to provide a framework to contribute to sustaining native ecological systems by providing ecological conditions to support diversity of native plant and animal species in the plan area."), *with* 36 C.F.R. § 219.19 (2000) (requiring that plans provide habitat "to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area").

⁶⁴ 42 U.S.C. §§ 4321–4370 (2000).

⁶⁵ 16 U.S.C. §§ 1531–1544 (2000).

⁶⁶ *See, e.g.,* Buckeye Forest Council v. U.S. Forest Serv., 337 F. Supp. 2d 1030, 1031 (S.D. Ohio 2004) (challenging Forest Service logging decision under Endangered Species Act (ESA), NFMA, National Environmental Policy Act (NEPA), and Administrative Procedure Act (APA)); Wyoming Sawmills, Inc. v. U.S. Forest Serv., 179 F. Supp. 2d 1279, 1290 (D. Wyo. 2001) (challenging Forest Service preservation decision under Establishment Clause, NFMA, NEPA, and Federal Advisory Committee Act); House v. U.S. Forest Serv., 974 F. Supp. 1022, 1024 (E.D. Ky. 1997) (challenging Forest Service logging decision under ESA, NFMA, NEPA, and APA).

⁶⁷ One could alternatively take the view that these lawsuits are an indication that legitimacy is being achieved or at least monitored through the use of the courts. *See supra* note 47 and accompanying text (noting view that current framework yields results that accord with law and public preference). However, the sheer volume of lawsuits, *see supra* note 62 and accompanying text, suggests that they are not being used to monitor the legitimacy of the process, in which case some limited number of lawsuits would bring the Forest Service into line. Instead, it seems likely that these lawsuits are concerned with the substance of decisions (for example, too much or too little logging) and use procedural defects merely as a basis for taking legal action. *See infra* note 93 (suggesting that procedural legitimacy has value even if distinction between substance and process can often be muddled in practice).

⁶⁸ National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005) (codified at 36 C.F.R. § 219 (2005)) [hereinafter Planning Rule].

⁶⁹ *See id.* at 1023.

on-the-ground conditions.⁷⁰ These plans will be supplemented by continual monitoring and external audits of agency performance.⁷¹

The changes will likely remove forest plans as a basis for environmental (or even development) lawsuits challenging agency action. While NFMA's regulations still require agency action to be consistent with the forest plan for the area,⁷² the plans will now be too vague to provide for successful challenges on the basis that individual projects are inconsistent.⁷³ This change will require environmentalists to shift away from litigation in pursuit of their goals.

The rule takes a more comprehensive view of collaboration, extending beyond commenting on predetermined options to the entire planning process.⁷⁴ However, it is unclear whether the guidelines established by the new rule are sufficiently well-designed to achieve effective collaborative governance, engaging stakeholders from the start in setting goals and priorities. It merely requires "a collaborative and participatory approach to land management planning," leaving it to the discretion of local forest officials to determine "the methods and timing of public involvement."⁷⁵ This vague language and the lack of minimum standards may undermine the potential of such a change. I further discuss collaborative decisionmaking in Part IV in the context of President Bush's final rule concerning roadless areas.

There are clear deficiencies in the way the Forest Service decides between competing uses and values. The current statutory framework for resolving these tensions has been unable to provide the sought-after legitimacy. Today the Forest Service seems unable to defend its decisions adequately to any of its constituencies.⁷⁶ I will now turn to the recent presidential proposals for decisionmaking in roadless areas, where management conflicts are particularly severe.

⁷⁰ *Id.* (suggesting rule will make plans more adaptable not only to changing environmental conditions, but also to economic and social conditions).

⁷¹ 36 C.F.R. § 219.6(b) (2005).

⁷² *Id.* § 219.8(e).

⁷³ See Planning Rule, *supra* note 68, at 1025 (emphasizing that plans will now contain "detailed descriptions of desired conditions, rather than long lists of prohibitive standards or guidelines or absolute suitability determinations").

⁷⁴ *Id.* at 1024.

⁷⁵ 36 C.F.R. § 219.9 (2005).

⁷⁶ See, e.g., Sedjo, *supra* note 46, at 182 ("Today, few would view the Forest Service as an elite agency. Local users of National Forest lands are highly disenchanting and discouraged. Recreationists, environmentalists, range users, and timber users also voice major complaints.").

II

PRESIDENTIAL SOLUTIONS TO ROADLESS AREA MANAGEMENT

Roadless areas are a unique part of the Forest Service system. Comprising 58.5 million acres, or about thirty-one percent of the Forest Service land base, these areas remain largely or entirely undeveloped.⁷⁷ Because of this pristine state, they possess exceptional qualities, as described in President Clinton's roadless rule.⁷⁸ They provide public drinking water for millions of people; protect the diversity of plant and wildlife communities; harbor numerous threatened, endangered, and sensitive species that depend on large tracts of undisturbed forest; and provide abundant recreational opportunities, scenic beauty, and respite from urban life.⁷⁹ As the United States landscape continues to be developed, the value of these unfragmented lands will grow.

Because of their value, the debate surrounding development of roadless areas is especially divisive. Each side tends to see the resolution of these matters as a struggle over forest management philosophy.⁸⁰ The proper locus of decisionmaking is particularly important in this debate. Some see national action as the only means to protect valuable ecological resources from piecemeal attrition by myopic local land managers. Others see restrictive federal policy as intrusive, inconsistent with existing and sufficient management strategies, and depriving local communities of valuable resources. The solutions of President Clinton and President Bush, respectively, speak to concerns raised by these perspectives. In the following two Sections, I provide a description and analysis of each rule, focusing on issues of legitimacy.

A. *President Clinton's Roadless Area Conservation Rule*

On January 12, 2001, under President Clinton's administration, the Forest Service issued the Roadless Area Conservation Rule (roadless rule).⁸¹ With limited exceptions, the roadless rule prohibited road construction and reconstruction and timber harvesting in

⁷⁷ See Forest Serv., U.S. DEP'T OF AGRIC., Roadless Area Conservation, <http://roadless.fs.fed.us> (last visited July 16, 2005). Because the roadless identification process occurred almost two decades ago, there are roads on roughly 2.8 million acres of "roadless" areas. Roadless Rule, *supra* note 5, at 3246.

⁷⁸ Roadless Rule, *supra* note 5, at 3245.

⁷⁹ *Id.*

⁸⁰ See NELSON, *supra* note 14, at 73–75 (describing 1970s Forest Service review of roadless area planning as having been "elevated to a grand contest of ideology").

⁸¹ Roadless Rule, *supra* note 5, at 3244.

inventoried roadless areas in the National Forest System.⁸² The agency framed the issue as one of the proper scope of decisionmaking, arguing that local forest management efforts “may not always recognize the national significance of inventoried roadless areas and the values they represent” and that if decisions continued to be “made on a case-by-case basis,” those lands and values would continue to be “incrementally reduced.”⁸³ The nationwide result would be a substantial loss of the quantity and quality of these roadless areas.

The agency also portrayed the rule as addressing fiscal considerations concerning national forest roads and roadless areas.⁸⁴ At over 386,000 miles, the Forest Service road system is immense and in disrepair.⁸⁵ The Forest Service estimated that there was an \$8.4 billion backlog of maintenance and that the agency received less than twenty percent of the funds it needed annually to maintain roads.⁸⁶ In addition, the rule asserted that development into roadless areas is often more expensive due to costly road construction, extensive environmental analysis requirements, and inevitable controversy, appeals, and litigation.⁸⁷ The agency suggested halting road building in roadless areas as a sensible economic solution.

President Clinton’s roadless rule clearly favored some values over others, choosing preservation and biodiversity over resource use and local control. It advanced this decision as correct, both scientifically and economically. Furthermore, such an explicit and visible decision might be defended as promoting electoral accountability for executive policy decisions. This defense, however, is undermined by the fact

⁸² *Id.* at 3272–73. Road building was still permitted when necessary (i) to protect against the loss of life or property; (ii) for a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Clean Water Act, or the Oil Pollution Act; or (iii) to access a continuing or extended mineral lease. *Id.* Timber harvest of generally small diameter trees was permitted in roadless areas (i) to improve threatened, endangered, proposed, or sensitive species habitat; (ii) for ecosystem maintenance and restorative work, including wildfire fuel reduction; or (iii) when a road has already been constructed and a timber harvest completed prior to passage of the rule. *Id.* at 3273.

⁸³ *Id.* at 3246.

⁸⁴ *Id.* at 3245–46.

⁸⁵ *Id.* at 3245.

⁸⁶ *Id.* at 3245–46.

⁸⁷ *Id.* at 3246. A U.S. General Accounting Office Report confirms this point, finding that most roadless areas would remain roadless with or without the roadless rule because of low timber values, controversy, and shifting public norms. See U.S. GEN. ACCOUNTING OFFICE, FOREST SERVICE ROADLESS AREAS: POTENTIAL IMPACT OF PROPOSED REGULATIONS ON ECOLOGICAL SUSTAINABILITY, GAO-01-47, at 23–25 (2000), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-01-47>. By taking an extremely divisive issue off the table, the roadless rule had the potential to reduce controversy and litigation, even if it increased resentment.

that the rule was promulgated only days before President Clinton finished his second term, knowing that President Bush was about to take office with a very different environmental agenda.

More convincingly, the rulemaking process by which the decision was made can be seen as lending it legitimacy. The rulemaking process, which officially began fifteen months earlier in October 1999,⁸⁸ was extensive. The Forest Service hosted over 600 meetings, with at least two meetings for each national forest and grassland.⁸⁹ In total, over 1.6 million comments were submitted.⁹⁰ Proponents of the rule point to a "tremendous outpouring of public support."⁹¹ Nonetheless, opponents successfully challenged the inclusiveness and sufficiency of the participatory process.⁹² Critics contend that the administration had predetermined their choice, making public input irrelevant.⁹³

Apart from challenges to the rulemaking process, critics also challenged the roadless rule on fairness grounds. Making a decision for all roadless areas at the national level prevents local forest managers and residents from influencing activities and uses on those lands.⁹⁴ Certainly, local residents stood to lose much from this rule—

⁸⁸ On October 19, 1999, the agency announced the initiation of the public rulemaking process to propose the protection of certain roadless areas within the National Forest System. National Forest System Roadless Areas, 64 Fed. Reg. 56,306 (Oct. 19, 1999).

⁸⁹ See Roadless Rule, *supra* note 5, at 3248.

⁹⁰ *Id.* (noting 187 meetings and 517,000 responses for notice of intent, and 430 meetings and 1,150,000 responses for proposed rule and draft environmental impact statement). For a detailed analysis of these comments, see CONTENT ANALYSIS ENTERPRISE TEAM, U.S. DEP'T OF AGRIC. FOREST SERV., SUMMARY OF PUBLIC COMMENT: ROADLESS AREA CONSERVATION PROPOSED RULE AND DEIS (Oct. 6, 2000), <http://roadless.fs.fed.us/documents/csum/index.shtml>.

⁹¹ Earthjustice, Background: Timeline of the Roadless Rule, <http://www.earthjustice.org/background/display.html?ID=22> (last visited July 16, 2005).

⁹² See *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1219 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005) (challenging rule on public participation grounds under NEPA); *Kootenai Tribe v. Veneman*, 142 F. Supp. 2d 1231, 1244–47 (D. Idaho 2001), *rev'd*, 313 F.3d 1094 (9th Cir. 2002) (same). For general discussions of these legal challenges to the roadless rule, see David Stewart, *Creating the New American Wilderness in America's "Untrammeled" Backcountry: The Roadless Area Conservation Rule and the Ninth Circuit*, 28 OKLA. CITY U. L. REV. 829, 837–46 (2003); Mazen Basrawi, In Brief: *Roadless Rule Retains Respect*, 30 ECOLOGY L.Q. 769 (2003); Kristine Meindl, Case-note: *Kootenai Tribe of Idaho v. Veneman: The Roadless Rule: A Dead End or Never Ending Road?*, 14 VILL. ENVTL. L.J. 151 (2003).

⁹³ See Nie, *supra* note 54, at 720 (describing public participation arguments used in litigation against roadless rule). Procedural challenges to such an extensive process give some weight to the argument that procedural legitimacy may never be enough so long as there is disagreement as to the substance of the decision. Despite the difficulty in neatly separating process and substance in practice, there is nonetheless clear value in improving process—the more legitimate and inclusive the process, the less likely is resentment (and litigation) by those who are unhappy with the substance of a decision.

⁹⁴ See Katherine Pfleger, *Folks Near Forests Should Have Greater Say, Agency's Chief Says*, SEATTLE TIMES, May 29, 2001, at B2.

economic development, access to motorized recreation, rural school funding through timber receipts,⁹⁵ and their use of local resources—and to risk much, such as potential property damage from wildfires and other management problems.⁹⁶ It is therefore not surprising that the roadless rule met resistance, and possibly might have met enforcement problems in local communities had it gone into effect.⁹⁷

The question at the center of the debate over the roadless rule is whether roadless management should occur at the forest or state level, allowing for at least some local input, or at the national level, where national preservation interests can prevail.⁹⁸ President Clinton's roadless rule reflects a belief that roadless areas and the values they represent are a matter of national importance and that such issues are best resolved at the national level. Under this view, the best way to protect the ecological and other values of roadless areas is a national prohibition on road building and timber harvesting. The substance of that decision is deemed more important than the process. Critics counter that active resource management can maintain healthy forests while yielding natural resources, and that local residents who are most affected by roadless area management decisions should be given a larger say.⁹⁹ For them, process remains essential. I turn now to President Bush's rule, which purports to give state governments a larger role in deciding how to manage roadless areas in their state.

B. President Bush's Proposed Roadless Rule

Within a week of entering office, President Bush's Chief of Staff issued a memorandum directing the heads of agencies to postpone for sixty days the effective date of all regulations published in the Federal Register that had not yet taken effect,¹⁰⁰ including the roadless rule.¹⁰¹

⁹⁵ See Twenty-Five Percent Fund Act, 16 U.S.C. § 500 (2000); see also *supra* note 40 (describing functioning and implications of funding program).

⁹⁶ But see *infra* notes 114–117 and accompanying text (describing argument that national forests belong to all Americans and local interests should not dominate).

⁹⁷ See Nelson, *supra* note 39, at 70 (noting that if local communities view decisionmakers as forcing incompatible national values on them, then national decisions may not hold). Suspicious westerners might categorize the rule as “a naked taking from western resource users for the benefit of eastern preservationists.” Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487, 591 (2003).

⁹⁸ Stewart, *supra* note 92, at 846.

⁹⁹ See, e.g., Adena Cook, Editorial, *Roadless Rule May Aid Innovation*, IDAHO STATESMAN (Boise), June 25, 2005, at 6 (suggesting that active management of roadless areas is essential); Jim Sims, *Roadless Rule a Win for Westerners*, ROCKY MOUNTAIN NEWS, May 23, 2005, at 40A (suggesting that Bush's new rule appropriately “empowers citizens at the state and local level”).

¹⁰⁰ Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

Several months later, in July 2001, the Forest Service published an Advance Notice of Proposed Rulemaking to solicit comments on possible changes to the roadless rule, citing concerns raised by local communities, tribes, and states.¹⁰² The agency expressed its belief that “appropriate [roadless area] protection and management should be crafted through an open and fair process and address the[se] concerns.”¹⁰³ After receiving more than 700,000 comments,¹⁰⁴ the Forest Service published a proposed rule for management of inventoried roadless areas in July 2004.¹⁰⁵ Roughly one year later, after receiving approximately 1.8 million additional comments,¹⁰⁶ the Forest Service published a final rule¹⁰⁷ that was virtually identical to the proposed rule.¹⁰⁸

The rule did not attempt to offer any economic or scientific rationale. Nor could it generate any political accountability, despite being ordered by the President, as it made no immediate land-use decisions.

¹⁰¹ The roadless rule was published in the Federal Register on January 12, 2001, but was not scheduled to go into effect until March 13, 2001. Roadless Rule, *supra* note 5, at 3244.

¹⁰² Special Areas, Roadless Area Conservation, 66 Fed. Reg. 35,918 (July 10, 2001).

¹⁰³ *Id.*

¹⁰⁴ CONTENT ANALYSIS TEAM, U.S. DEP’T OF AGRIC. FOREST SERV., ADVANCE NOTICE OF PROPOSED RULEMAKING: SUMMARY OF PUBLIC COMMENT, at i (May 31, 2002), <http://roadless.fs.fed.us/documents/xcsomm/index.shtml>. For a survey of comments received, see generally *id.* Noticeably absent from this document is any count of comments for or against keeping President Clinton’s roadless rule. See *id.* at i (“The analysis . . . makes no attempt to treat input as if it were a vote.”). However, analysis of these comments found that ninety-seven percent supported keeping the roadless rule. HERITAGE FORESTS CAMPAIGN, THE PUBLIC VS. POWERFUL CORPORATE SPECIAL INTERESTS: SUMMARY OF PUBLIC COMMENT ON THE BUSH ADMINISTRATION’S PLAN TO CHANGE THE ROADLESS AREA CONSERVATION RULE 1 (last visited Jan. 10, 2006), <http://www.ourforests.org/hfccommentreport.pdf>. Further, no public meetings were held, nor was supplemental environmental analysis conducted as the administration was developing its rule.

¹⁰⁵ Special Areas, State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636 (proposed July 16, 2004) (codified at 36 C.F.R. § 294 (2005)) [hereinafter Proposed Rule].

¹⁰⁶ For a survey of comments received, see CONTENT ANALYSIS TEAM, U.S. DEP’T OF AGRIC. FOREST SERV., NOTICE OF PROPOSED RULEMAKING: STATE PETITIONS FOR INVENTORIED ROADLESS AREAS MANAGEMENT: ISSUES NARRATIVE (Apr. 8, 2005), <http://roadless.fs.fed.us/documents/m-05/Issues-Narrative-040805.pdf>. Again, the document “makes no attempt to treat input as if it were a vote or a statistical sample,” failing to quantify support for or opposition to the new rule in even the broadest terms. *Id.* at 1-1. In responding to its failure to tally comments, the Final Rule does not deny that the majority of comments supported Clinton’s roadless rule, but instead argues that “[t]he public comment process is not intended to serve as a scientifically valid survey process to determine public opinion.” Final Rule, *supra* note 7, at 25,656. While this assertion is true, the administration does not meaningfully respond to the criticism that its new rule is opposed by the majority of those interested in the matter.

¹⁰⁷ Final Rule, *supra* note 7.

¹⁰⁸ But cf. Proposed Rule, *supra* note 105. One notable difference is the creation of an advisory committee to make recommendations to the Secretary of Agriculture. *Id.* at 25,655.

Even the procedural legitimacy of the rule is somewhat undermined by the limitation of participation to notice and comment, and by the failure to quantify support for and opposition to the proposed rule.¹⁰⁹ Instead, the agency portrayed the rule as “merely procedural in nature and scope,”¹¹⁰ shifting the locus of decisionmaking to states. This shift leaves it to states, which may assist in substantive decisionmaking, to defend their choices, as President Bush’s rule does not lend them legitimacy. I devote the remainder of this Section to analyzing the structure of the rule, before considering its implementation.

While recognizing that “management of inventoried roadless areas must address those activities having the greatest likelihood of altering, fragmenting, or otherwise degrading roadless area values and characteristics,”¹¹¹ the Forest Service maintained that “[s]tate-specific consideration of the needs of these areas is an appropriate solution to address the[se] challenges.”¹¹² Furthermore, the agency asserted, “[s]trong State and Federal cooperation regarding management of inventoried roadless areas can facilitate long-term, community-oriented solutions.”¹¹³ Thus, the agency portrayed its rule as allowing states to resolve natural resource value judgments, suggesting that decisions made at the state level would be optimal.

Critics of the rule question the reduced role of national interests,¹¹⁴ arguing that national forests belong to all United States citizens,¹¹⁵ not just the citizens of a single state. Local or state control could thwart achievement of national environmental goals in roadless

¹⁰⁹ See *supra* notes 104 and 106.

¹¹⁰ Final Rule, *supra* note 7, at 25,660.

¹¹¹ *Id.* at 25,654.

¹¹² Proposed Rule, *supra* note 105, at 42,638; see also Final Rule, *supra* note 7, at 25,655 (“Collaborating and cooperating with States on the long-term strategy for the conservation and management of inventoried roadless areas on NFS lands allows for the recognition of local situations and resolutions of unique resource management challenges within a specific State.”).

¹¹³ Final Rule, *supra* note 7, at 25,654.

¹¹⁴ See, e.g., Coggins, *supra* note 47, at 609–10 (arguing that decisions concerning national lands should reflect national interests); Michael McCloskey, *Local Communities and the Management of Public Forests*, 25 *ECOLOGY L.Q.* 624, 627 (1999) (noting tension between interests of local “communities of place” and national “communities of interest”).

¹¹⁵ Apart from theoretical ownership of public lands, national ownership is further supported so long as the Forest Service loses money and United States taxpayers bear the burden of funding the agency and its local timber and management activities. See *supra* note 13 (noting fiscal losses of Forest Service). On the other hand, some contest even the theoretical ownership of national forests, arguing that “nationalization” of national forests was a strategy by environmentalists in the 1970s to reduce logging levels. See NELSON, *supra* note 11, at 121–22, 146–51 (describing nationalization of local proposals by environmental organizations as greatest obstacle to local efforts to guide forest management decisions, and suggesting that counties where forests are located, and perhaps even Forest Service employees, are true owners of national forests); see also Hoberg, *supra* note 29, at

areas,¹¹⁶ as states and local officials are perceived as being more closely aligned with economic development interests.¹¹⁷ Thus, the decisionmaking process, at the very least, must incorporate national views. While President Clinton's roadless rule reflected this view, President Bush's final rule clearly considers localized input more important.

Under the final rule, governors can file a petition with the Secretary of Agriculture to establish management requirements on inventoried roadless areas within their state different from those under the existing forest management plan.¹¹⁸ The petition must be filed within eighteen months of the publication of the rule, by November 13,

10–11 (describing nationalization and judicialization as two essential strategies of environmentalists).

¹¹⁶ Some argue that this result is in fact the goal of devolution advocates. See, e.g., Gary C. Bryner, *Policy Devolution and Environmental Law: Exploring the Transition to Sustainable Development*, 26 ENVIRONS ENVTL. L. & POL'Y J. 1, 7 (2002) ("Proponents of less environmental regulation, of unbridled economic growth and consumption may use devolution arguments to pursue their anti-government agenda."). This view is reinforced by strong industry support for steps toward devolution and only qualified support from the most conservative environmental organizations. See Douglas J. Amy, *Environmental Dispute Resolution: The Promise and the Pitfalls*, in ENVIRONMENTAL POLICY IN THE 1990S: TOWARD A NEW AGENDA 211, 224–25 (Norman J. Vig & Michael E. Kraft eds., 1990) (describing support for environmental dispute resolution as coming from questionable quarters). At the least, devolution will move the locus of decisionmaking away from Washington, D.C., where environmental groups are arguably the strongest. See DOUGLAS S. KENNEY, ARGUING ABOUT CONSENSUS: EXAMINING THE CASE AGAINST WESTERN WATERSHED INITIATIVES AND OTHER COLLABORATIVE GROUPS ACTIVE IN NATURAL RESOURCES MANAGEMENT 45 (2000), <http://www.colorado.edu/law/centers/nrlc/publications/RR23.pdf> (suggesting that "greater involvement of 'local' interests" may cause "reduced presence of national environmental interests"). However, Professor Richard Revesz challenges the common notion that environmental interests are systematically underrepresented at the state and local levels and more successful at the federal level. Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 563 (2001).

¹¹⁷ See TOMAS M. KOONTZ, FEDERALISM IN THE FOREST: NATIONAL VERSUS STATE NATURAL RESOURCE POLICY 9–10 (2002) (noting both this perception and competing view that state agencies may do better job of protecting land). Revesz argues that this business tilt is not supported by historical evidence, attributing differences in stringency of state environmental regulations to differences in preferences, not any public choice pathology making industry more effective and environmentalists less effective at the state level. See Revesz, *supra* note 116, at 637.

¹¹⁸ Forest Service Special Areas Rule, 36 C.F.R. § 294.12 (2005). The news release accompanying the final rule suggests that petitions may include "[w]ays to protect public health and safety, reduce wildfire risks to communities and critical wildlife habitat, maintain critical infrastructure (such as dams and utilities), and ensure that citizens have access to private property." Press Release, U.S. Dep't of Agric., USDA Forest Service Acts to Conserve Roadless Areas in National Forests: Announces National Advisory Committee to Help Implement New Rule (May 5, 2005), available at <http://roadless.fs.fed.us/xdocuments.shtml>. The rule itself, as well as statements by the administration, carefully avoids making any mention of logging or energy development.

2006.¹¹⁹ The petition must describe (among other things): the land for which such requirements are intended; the particular management requirements; circumstances and needs intended to be addressed by the petition; how the requirements differ from the applicable forest plan, while still complying with federal laws and regulations; and any public involvement efforts undertaken by the state.¹²⁰ The Secretary of Agriculture retains ultimate authority to accept or reject these petitions, or otherwise to regulate roadless areas.¹²¹

The final rule thus adds two new layers of decisionmaking—creating a state petition and accepting or rejecting the petition—but provides no guidance on how to make those decisions. There are no procedural or substantive requirements for the creation of a state petition, only several disclosure requirements. While it may be unpopular, a governor could unilaterally draw up an aggressive logging plan or an absolute roadless protection plan without violating the rule. The final rule likewise contains no standards to guide the Secretary of Agriculture in evaluating a petition,¹²² leaving her free to accept or reject a petition based purely on its adherence to the administration's policies¹²³ or even on her personal whims.¹²⁴

¹¹⁹ 36 C.F.R. § 294.12.

¹²⁰ *Id.* § 294.14.

¹²¹ *Id.* § 294.16 (“The Secretary or the Secretary’s designee shall make the final decision for any State-specific inventoried roadless area management rule.”). Indeed, the Secretary must maintain this authority for the rule to be constitutional. *See* U.S. CONST. art. IV, § 3, cl. 2 (granting federal government control over public lands management as long as lands are federally owned).

¹²² *See* 36 C.F.R. § 294.13 (providing only that Secretary “shall accept or decline the petition to initiate a State-specific rulemaking”); *see also* Nie, *supra* note 54, at 712, 733 (noting that proposed rule authorizes executive branch discretion over petitions while allowing it to blame politically risky decisions on state governors). There will arguably be institutional pressure to accept the petition, or else the petitioning process will have been wasted. *See* McCloskey, *supra* note 114, at 627 (noting “[s]trong pressures . . . to ratify the results of heavily negotiated issues”).

¹²³ Despite the administration’s protestations to the contrary, environmental groups have no difficulty believing that the administration might use its discretion to pursue aggressive development policies in roadless areas. For a skeptical look at President Bush’s policies toward national forest protection, *see generally* John M. Carter et al., *Cutting Science, Ecology, and Transparency Out of National Forest Management: How the Bush Administration Uses the Judicial System to Weaken Environmental Laws*, 33 ENVTL. L. REP. 10,959 (2003). Further supporting this suspicion, none of the five “conservation” principles that the agency claims the final rule incorporates involve protecting the forest from human development and ecological fragmentation. *See* Press Release, U.S. Dep’t of Agric., *supra* note 118.

¹²⁴ While the Secretary’s discretion would be very broad, it might not be complete. An organization with standing could challenge the decision under the Administrative Procedure Act (APA). 5 U.S.C. §§ 551–59, 701–06 (2000 & Supp. II 2002). However, it is unlikely that such a challenge would be successful. First, while there is a strong presumption of judicial reviewability, it may be rebutted if the challenged action was committed entirely to agency discretion. *Id.* § 701(a)(2); *Martin v. District of Columbia Courts*, 753

If the Secretary accepts the petition, then the Forest Service, in coordination with the state, will initiate state-specific rulemaking¹²⁵ subject to further notice and comment and environmental review.¹²⁶ However, as described in Part I.B, there are flaws in the notice and comment framework that temper the legitimacy that such a process can provide, especially when it is essentially a review of key judgments that have already been made in drafting the petition.¹²⁷

If the Secretary rejects the petition, or no petition is filed, then management of the roadless areas will revert to the existing forest management plan, which may have been developed decades ago.¹²⁸

A.2d 987, 991 (D.C. 2000). This exception to judicial review has been interpreted narrowly by courts, and applied only where there are no standards by which to measure lawfulness. *See, e.g., City of Santa Clara v. Andrus*, 572 F.2d 660, 666, 668, 669 (9th Cir. 1978) (refusing to review one decision by Secretary of Interior because there was “no law to apply,” but finding another decision reviewable). In this case, the rule gives absolutely no guidance as to how the Secretary should make his decision. The court would be limited to determining whether the Secretary acted within his or her statutory authority. *See Heckler v. Campbell*, 461 U.S. 458, 466 (1983) (stating that “review is limited to determining whether the regulations promulgated exceed the Secretary’s statutory authority and whether they are arbitrary and capricious”). The broad statutory mandate of the Forest Service, *see supra* Part I.A, makes it unlikely to preclude any decision (except perhaps approval of petitions based purely on the political affiliation of the governor). Second, even if the decision were reviewable, it is unlikely a court would overturn the decision. A reviewing court would probably examine it as an informal adjudication without APA procedures. In this case, the court will review the decision based on the administrative record under an “arbitrary and capricious” standard. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414, 420 (1971) (describing review of agency action based on administrative record under “arbitrary and capricious” standard). Although the rule does not require any justification of the decision, the reviewing court may ask the Secretary to develop his or her reasoning further. That review will be largely deferential, looking only at the reasoning’s cogency and consistency with the record. It is unlikely that the Secretary would be unable to justify any decision he or she may make.

¹²⁵ Forest Service Special Areas Rule, 36 C.F.R. § 294.16 (2005).

¹²⁶ Final Rule, *supra* note 7, at 25,658 (“[A]ny State-specific rulemaking envisioned by the final rule will include public notice and comment procedures and appropriate National Environmental Policy Act (NEPA) environmental analysis procedures.”).

¹²⁷ In seeming contradiction, the preamble to the final rule both compliments NFMA as granting legitimacy to petitions, *id.* at 25,656, noting that NFMA plans “are developed with extensive public involvement and collaboration, using the best available local information about resource conditions, trends, and issues,” and criticizes it as not being legitimate enough to warrant keeping current management plans intact, *id.* at 25,657, observing that although NFMA’s process is usually the best approach, “in some cases it is appropriate to allow other approaches”.

¹²⁸ However, simultaneously with publication of the proposed rule, the Forest Service reinstated an Interim Directive establishing the “administrative policy that, until a land management plan is revised or an amendment is adopted that considers their protection and management, inventoried roadless areas shall, as a general rule, be managed to preserve their roadless characteristics.” Roadless Area Protection, 69 Fed. Reg. 42,648, 42,648 (July 16, 2004). While this policy is encouraging for environmentalists, legal recourse would be difficult should the agency go against this “policy” or define preservation of roadless characteristics very loosely. Indeed, a road has been built into at least one

There will not be a supplemental NFMA process or an opportunity for public participation.¹²⁹ Nonetheless, such reversions could result in up to 34.3 million acres of undeveloped roadless areas losing protection they would have had under President Clinton's roadless rule.¹³⁰ The fact that the default position would remove protections on nearly sixty percent of roadless acres seems to undercut the claim that the final rule seeks only community-oriented solutions and not substantive outcomes.

Finally, after the state petition is incorporated into, or management reverts back to, the forest management plan, local managers will be left with discretion to approve logging and other development projects in unprotected roadless areas. This is not to suggest that commercial timber harvesters are waiting on the borders of roadless areas with saw in hand and local managers are ready to oblige. These roadless areas have remained roadless for 150 years for a reason, and even where timber harvesting is feasible, the virtual certainty of appeals and lawsuits may make such projects unappealing. Nonetheless, the final rule, as compared to Clinton's roadless rule, leaves open the possibility of future timber and energy development.

I have reviewed the most salient features of President Clinton's roadless rule and President Bush's new rule, which approach the management of roadless areas very differently. President Clinton's rule sought to protect roadless areas permanently, while trying to legitimize the decision through extensive public input. President Bush's rule makes no substantive management decisions, but instead appears to shift decisionmaking to states.

III

THE LIKELY ROLE OF THE STATE UNDER THE FINAL RULE

In this Part, I argue that President Bush's rule fails to shift any meaningful authority to the states. Rather, I contend, the rule was an attempt to remove permanent protections on roadless areas without risking the fallout from openly overturning President Clinton's pop-

roadless area since the new rule was passed. Pete Zimowsky, *Make Some Noise to Protect Cherished Roadless Areas*, IDAHO STATESMAN (Boise), Oct. 16, 2005, at 10 (lamenting construction of road into Sage Creek Roadless Area, Idaho).

¹²⁹ In addition, there is no environmental analysis requirement for such a reversion and no analysis was prepared for the proposed rule itself.

¹³⁰ This figure is the number of acres without protection under existing forest management plans. Special Areas, Roadless Area Conservation, 66 Fed. Reg. 35,918, 35,919 (July 10, 2001). While it may be unlikely that *no* petitions would be accepted, these numbers seriously undercut the claims of the proposed rule that it is merely procedural.

ular roadless rule. The success of this strategy in turn depends on the actions of governors in filing (or not filing) petitions and the actions of the Secretary in approving or rejecting these petitions.

Before passage of President Bush's final rule, states had a consultative role under NFMA and the National Environmental Policy Act that was not, at least by law, entitled to any more weight than comments by other citizens.¹³¹ They had neither codified responsibility, nor the ability to exert influence on the Forest Service's management of national forests within their state. Allowing states a greater role in reconciling value conflicts over their roadless areas was a fundamental justification for President Bush's final rule.¹³²

Supporters point to many perceived advantages of devolving¹³³ management to lower levels of government. Decisionmaking may be more efficient and flexible. Because substantive decisions will be made in multiple forums, outcomes may be more diverse and perhaps innovative.¹³⁴ Smaller units of government can be held more accountable for their decisions, resulting in greater responsiveness to local concerns and increased citizen participation.¹³⁵ The final rule notes some of these benefits, stating that "[s]tate governments are important partners in management of the Nation's land and natural resources. . . . [They] have frequently pioneered innovative land management programs and policies."¹³⁶ To reap these benefits, however, there must be some meaningful transfer of management authority to the state.¹³⁷

¹³¹ See Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Public Lands?*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 193, 196 (1996) (referring to current system as "dominant federal" model," wherein there is "no statutorily mandated management role for the states").

¹³² See Final Rule, *supra* note 7, at 25,654 ("State governments are important partners in management of the Nation's land and natural resources."); *id.* at 25,655 ("Collaborating and cooperating with States on the long-term strategy for the conservation and management of inventoried roadless areas . . . allows for the recognition of local situations and resolutions of unique resource management challenges.").

¹³³ Devolution is "[t]he act or an instance of transferring one's rights, duties, or powers to another." BLACK'S LAW DICTIONARY 484 (8th ed. 2004).

¹³⁴ See O'TOOLE, *supra* note 21, at 192; see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

¹³⁵ See Bryner, *supra* note 116, at 4 (reviewing major arguments for devolution, notably political accountability and increased public involvement).

¹³⁶ Final Rule, *supra* note 7, at 25,654.

¹³⁷ This transfer could take either of two forms. First, the state could be charged with managing the national forests in their state in compliance with federal law, with funding from the federal government and oversight by a much reduced Forest Service. See

Closer inspection of President Bush's final rule reveals that it has little real effect on state power.¹³⁸ In fact, the petitioning process was already available to governors, a fact recognized in the rule.¹³⁹ It has little relationship to genuine devolution proposals. No management duties are transferred;¹⁴⁰ decisionmaking authority is not turned over, but rather is retained by the Secretary;¹⁴¹ and possible benefits from state experimentation are largely undermined by the Forest Service's control over the process.

Considering that the role of the states is barely changed by the final rule, why did President Bush choose to emphasize a petitioning process that was already available? Under the new rule, many roadless areas will lose protections as compared to President Clinton's roadless rule if few petitions are filed or accepted.¹⁴² By couching the

Babcock, *supra* note 131, at 199–202 (describing this approach and its limitations). Second, the Forest Service could transfer its lands to states, possibly reserving those of unique national value. See NELSON, *supra* note 11, at 161 (describing three-part suggestion, wherein commercially valuable lands are transferred to private sector, nationally significant lands are retained by federal government, and all other forest lands are transferred to states).

¹³⁸ The Forest Service itself concedes that the rule “would not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government.” Final Rule, *supra* note 7, at 25,660. This section responds to Executive Order No. 13,132, which requires an analysis of rules' impacts on federalism principles. 64 Fed. Reg. 43,255, 43,256 (Aug. 4, 1999). While arguably this language is merely boilerplate, it is nonetheless revealing that they use it for this rule, rather than meaningfully addressing its impact on federal-state relations, if any.

¹³⁹ Governors can petition under 7 C.F.R. § 1.28 (2005). See Final Rule, *supra* note 7, at 25,657 (“[T]he Department's general petitioning process . . . would remain available after expiration of the 18-month petitioning period.”); see also Letter from Dave Freudenthal, Governor of Wyoming, to Dale Bosworth, U.S. Forest Serv. Chief (Nov. 15, 2004), http://wyoming.gov/governor/press_releases/2004/November2004/roadless_bosworth.asp (“[I]t appears to me that the current forest-planning process affords some deference to state and local interests in providing comments and preferences on roadless management direction.”).

¹⁴⁰ Forest Service Special Areas Rule, 36 C.F.R. § 294.17(b) (2005) (“Nothing in this subpart shall be construed to provide for the transfer to, or administration by, a State or local authority of any Federally owned lands.”).

¹⁴¹ Oregon Governor Ted Kulongoski pointed out this inconsistency in his comments on the proposed rule. See Letter from Theodore R. Kulongoski, Governor of Oregon, to U.S. Forest Serv. (Nov. 12, 2004), http://governor.oregon.gov/Gov/pdf/Roadless_rule.pdf (“It is inconsistent to shift the difficult work of roadless area designation from the Forest Service to states when the states do not have the authority to see that decisions are implemented. . . . [I]t is simply an unproductive use of the state's time, energy and resources.”).

¹⁴² See *supra* note 130 and accompanying text. Certainly, environmentalists see President Bush's record as suggesting that this outcome is intended. See Carter, *supra* note 123, at 10,973 (“The Bush Administration's pattern and practice of working against forest laws and protection in the courts, through administrative changes and practices, and with recommendations to Congress, clearly show a carefully thought-out, well-organized attempt to undo forest protections in the United States.”). However, the changes to

rule in terms of local participation and state collaboration, President Bush was able to claim that the rule was “environmentally neutral,” having “no direct, indirect, or cumulative effect on the environment.”¹⁴³ This both avoided the necessity of a supplemental environmental analysis for the rule itself and shifted political heat to the states for overturning President Clinton’s roadless rule.¹⁴⁴

The effectiveness of the strategy in actually spurring roadless area development depends on the substantive and procedural choices of governors in filing (or not filing) their petitions and in how the Secretary of Agriculture evaluates the petitions. Governors must decide whether to file a petition, how detailed the petition should be, how intricate the public participation process should be, and whether to start with the 2001 roadless rule or existing management plans as the default level of roadless protection. The governors of Washington, Oregon, California, and New Mexico have all stated their intentions to protect most, if not all of the roadless areas within their state.¹⁴⁵ However, Governor Richardson of New Mexico is not optimistic that the administration will accept such a petition, charging them with “playing ‘a shell game with governors.’”¹⁴⁶

NFMA similarly stressed collaboration, *see supra* note 74 and accompanying text, and environmentalists similarly charged that this emphasis was covering up the administration’s true intentions, *see* WILDLAW, WHITE PAPER: REVIEW OF THE NEW NFMA PLANNING REGULATIONS 7 (Jan. 20, 2005), available at http://www.wildlaw.org/Wildlaw_NFMA_Regs_White_Paper.doc (“[T]hese new regulations are less about good management and more about getting around the law.”).

¹⁴³ Final Rule, *supra* note 7, at 25,660.

¹⁴⁴ However, newspaper editorials largely disregarded the Forest Service’s assertions that the rule was neutral, railing against President Bush for failing our forests. *See, e.g., Repeal of Clinton-Era Roadless Rule—How’s It Playing?*, GREENWIRE, May 11, 2005, <http://www.eenews.net/Greenwire/Backissues/051105/051105gw.htm#20> (compiling series of editorials on rule change from newspapers around country that were all, save one, critical of new rule).

¹⁴⁵ Editorial, *Don’t Scrap Roadless Rule*, OLYMPIAN (Olympia, Wash.), May 12, 2005, at 5A (noting Washington governor’s stated intention to protect state’s roadless areas); Editorial, *Now It’s Up to Oregon to Safeguard Our Forestland*, STATESMAN J. (Salem, Or.), May 11, 2005, at 6C (noting Oregon governor’s commitment to protect state’s roadless areas); Dan Berman, *Roadless Rule’s Repeal Spurs a New Round of Battles*, GREENWIRE, May 6, 2005, <http://www.eenews.net/Greenwire/Backissues/050605/050605gw.htm#1> [hereinafter Berman, *Roadless Rule’s Repeal*] (reporting New Mexico governor’s promise to petition to maintain all of state’s roadless areas). Lisa Friedman, *Arnold Pledges to Save Trees*, LOS ANGELES DAILY NEWS, May 6, 2005, at N4 (noting California governor’s intention to protect state’s roadless areas). In addition, the Attorneys General from New Mexico, California, and Oregon have filed a lawsuit challenging the new rule as violating the National Environmental Protection Act and seeking reinstatement of President Clinton’s roadless rule. *See generally* Dan Berman, *Calif., N.M., Ore. Challenge New Roadless Rule*, GREENWIRE, Sept. 6, 2005.

¹⁴⁶ Berman, *Roadless Rule’s Repeal*, *supra* note 145 (quoting New Mexico Governor Richardson). Governor Freudenthal of Wyoming feels similarly. *See* Dan Berman, *Western Govs Question Roadless Rule’s Petition Process*, GREENWIRE, June 15, 2005, <http://www.eenews.net/Greenwire/Backissues/050605/050605gw.htm#1>.

At the other end of the spectrum is Governor Kempthorne of Idaho, a principal proponent of the final rule. He is seeking input from county commissioners and local officials in an attempt to put together a "broad-based" plan.¹⁴⁷ The default position for the petition will be existing land management plans, which only protect 3.8 million acres of the 9.3 million acres of roadless areas in the state and which are as many as seventeen years old.¹⁴⁸ Environmentalists insist that the governor is dedicating few resources to his supposedly "broad-based" process and is instead relying on local officials to convince him to protect more roadless areas.¹⁴⁹ The likely result will be a petition that closely resembles the existing management plan, and that does not necessarily ensure public input.¹⁵⁰

In contrast, Colorado is taking Clinton's roadless rule as its default position¹⁵¹ and is establishing a thirteen-member task force to make recommendations to Governor Owens after holding a series of public hearings in the capitol and communities around national forests.¹⁵² It is therefore likely that the final petition will be considerably

www.eenews.net/Greenwire/Backissues/061505/061505gw.htm#1 [hereinafter Berman, *Western Govs*] ("What they're saying is, 'You get to go do all this work and send us a letter or petition and then we start it back through our planning process' . . . And they can still say 'No.'" (quoting Wyoming Governor Dave Freudenthal) (internal quotations omitted)). In fact, the Governor of Oregon already formally requested the USDA to revive the popular roadless rule protections in his state, hoping to avoid the petitioning process, but his request was quickly rejected. Warren Cornwall, *Governor Seeks To Restore "Roadless Rule" Protections*, SEATTLE TIMES, Nov. 3, 2005, at B2. The Governor of Washington has done similarly and expects the same response. *Id.*

¹⁴⁷ Rocky Barker, *Kempthorne Wants Input for Idaho Roadless Plan*, IDAHO STATESMAN (Boise), June 24, 2005, at 1 [hereinafter Barker, *Kempthorne Wants Input*]. Each county is to devise its own process for seeking input from local residents before passing this information on to the Governor. Rocky Barker, *Counties Weigh In on Roadless Areas*, IDAHO STATESMAN (Boise), Aug. 31, 2005, at 1. One question will be the extent to which county commissioners weigh the views of those outside the county, even if within the state.

¹⁴⁸ *Id.*

¹⁴⁹ Press Release, Heritage Forests Campaign, Kempthorne Balks on Roadless Protections (June 23, 2005), available at <http://www.ourforests.org/press/pr06-23-05.html>.

¹⁵⁰ In Utah, Governor Huntsman is also supportive of the existing land management plans, four of six of which are currently being revised. Joe Baird, *Utah Roadless Areas in Danger?*, SALT LAKE TRIB., June 12, 2005, at B1. However, unlike Governor Kempthorne, he has no plans to submit a petition. *Id.* Environmental groups argue that this arrangement will encourage development in state roadless areas, while the governor contends that he has not "'given any consideration to the mining or logging aspect.'" *Id.*

¹⁵¹ An Act Concerning the Creation of a Roadless Areas Review Task Force, 2005 Colo. Sess. Laws 1487, 1488 (June 8, 2005), available at http://www.state.co.us/gov_dir/leg_dir/oills/HTML/session_laws_of_Colorado.htm (last visited Oct. 20, 2005). The first meeting on November 2, 2005 drew a crowd of nearly 500 citizens, representing varied interests. Nancy Lofholm, *Tempers Flare at Crowded Meeting on Forests*, DENVER POST, Nov. 3, 2005 at B5.

¹⁵² 2005 Colo. Sess. Laws 1488-89.

more protective of roadless areas and more reflective of public wishes. As of yet, states have not expressed a monolithic desire to develop roadless areas, as environmentalists feared.¹⁵³ It remains to be seen whether more preservation-minded governors will continue to resist pressure from development interests and produce protective petitions.

Governors have also expressed concern that they may lack the resources necessary to do an adequate job of creating petitions, both to gather information and to enable public participation. Although roadless issues have yet to be resolved, the administration now contends that states can definitively settle them in an eighteen month period.¹⁵⁴ Moreover, when the Forest Service issued its proposed rule, it predicted that the eighteen month statewide process would require only 1000 hours¹⁵⁵ and \$25,000 to \$100,000.¹⁵⁶ Governor Schweitzer of Montana estimates that it will cost nine million dollars just to analyze his state's roadless areas before submitting a petition.¹⁵⁷ He has requested Forest Service aid, to which the Forest Service has offered "modest assistance," but for which it has not yet set parameters.¹⁵⁸ The advantages of the collaborative process in lending legitimacy to the petitions will require significant state resources, all without any assurance that the Secretary will approve any petition.¹⁵⁹ Some states, especially those whose populations overwhelmingly supported President Clinton's roadless rule, might understandably be reluctant to expend these resources.

While the Forest Service has couched the final rule in terms of devolution, a closer inspection reveals this description to be mis-

¹⁵³ A perhaps more pressing concern for preservationists will be the extent to which local residents demand access to roadless areas for high-impact recreation, such as all-terrain vehicles.

¹⁵⁴ See *supra* note 119 and accompanying text.

¹⁵⁵ Proposed Rule, *supra* note 105, at 42,640. One governor found the "notion that Wyoming can review every Forest Service Plan and develop petitions in less than 1,000 man hours [to be] absurd." Letter from Freudenthal, *supra* note 139. This time estimate was removed in the final rule.

¹⁵⁶ Proposed Rule, *supra* note 105, at 42,639. This monetary estimate was maintained in the final rule. Final Rule, *supra* note 7, at 25,660.

¹⁵⁷ Baird, *supra* note 150, at B1.

¹⁵⁸ Dan Berman, *Bush Admin Tries to Reassure States on Roadless Petitions*, GREENWIRE, June 16, 2005, <http://www.eenews.net/Greenwire/Backissues/061605/061605gw.htm#19>. Other states, including New Mexico and Colorado, have requested federal assistance and in September 2005, the USDA issued its first grant of \$115,000 to Colorado to aid in the petitioning process. *Agency Expects More Petitions on Roadless Rule*, PLATTS COAL TRADER, Sept. 13, 2005, at 4.

¹⁵⁹ As Governor Schweitzer of Montana has stated, "[t]he final rule stipulates that [the USDA] retains final approval authority over any state roadless rule petition, providing no assurances that state efforts and investments would bear fruit." Berman, *Western Govs*, *supra* note 146.

leading. Instead, the rule raises the specter of development of roadless areas, depending on how proactive governors are in protecting these areas in their states and whether the Secretary will accept such protective petitions. Contrary to conventional environmentalist expectations, governors do not appear to inexorably support development in their state. The final rule will likely lead to development at the margins that would not have occurred under President Clinton's roadless rule but not to widespread logging and energy extraction in roadless areas.¹⁶⁰ Accepting that President Bush's final rule will not lead to rampant development, I now turn to whether it could have a positive effect in terms of legitimacy.

IV

TAKING ADVANTAGE OF THE FINAL RULE

In this Part, I suggest steps to enhance the legitimacy of decisions emerging from President Bush's final rule. Specifically, I recommend that states and stakeholders engage in a collaborative process in developing their petitions and that the Secretary focus on the process underlying a petition rather than its substance in deciding whether to approve it.

President Bush's final rule envisions a process whereby states will collaborate with "local governments, Tribes, stakeholders, and other interested parties."¹⁶¹ If properly conducted, such collaborative decisionmaking (CDM)¹⁶² can greatly enhance the legitimacy of value judgments by empowering citizens to take ownership of the process, "make tradeoffs, set priorities, and determine the public interest."¹⁶³

¹⁶⁰ Low timber values, controversy, and shifting public norms will also continue to discourage development in roadless areas, both in petitions and in the discretionary actions of the Forest Service after the petitioning process is completed. *See supra* note 87 and accompanying text. Nonetheless, any development in roadless areas will be seen as a defeat for environmentalists, who came tantalizingly close to complete protection under President Clinton's roadless rule.

¹⁶¹ Final Rule, *supra* note 7, at 25,656.

¹⁶² By collaborative decisionmaking (CDM), I refer to a process aimed at reaching consensus among diverse stakeholders, or at least an outcome everyone can accept. *See generally* KENNEY, *supra* note 116 (giving background on collaborative process and reviewing arguments for and against its utilization).

¹⁶³ Bryner, *supra* note 116, at 30. *But cf.* Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 96-97 (Eric W. Orts & Kurt Deketelaere eds., 2001) (questioning whether current ways in which regulatory agencies incorporate public participation into decisionmaking processes are indeed insufficient, as supporters of CDM claim). This push for collaborative decisionmaking has also been advocated on the grounds that it can open up politics to historically disenfranchised groups. *See* Michael H. Shuman, *Going Local: Devolution for Progressives*, NATION, Oct. 12, 1998, at 11, 15.

In doing so, the process can genuinely engage the public and attain agreement among those most affected.¹⁶⁴ If poorly conducted, however, CDM can aggravate power imbalances and lead to biased decisions, which has made the environmental community suspicious about its value.¹⁶⁵

Despite the administration's seeming intention that states undertake collaborative processes, the final rule only requires that petitions include a "description of any public involvement efforts."¹⁶⁶ It fails to affirmatively mandate a collaborative process for creating the petition that engages citizens from the beginning.¹⁶⁷ Moreover, the Forest Service's low estimates about necessary time and money¹⁶⁸ suggest that a thorough collaborative process may not be precisely what it had in mind.¹⁶⁹ Because the legitimacy of the final decision under CDM depends so heavily on the details of implementation, lack of any clear standards and funding to support these processes is highly problematic, and gives weight to claims that the rule was merely a politically expedient way to reverse President Clinton's roadless rule.

There are three major obstacles to recognizing the potential benefits of the rule. First, in filing the petition, a state may implement the collaborative process poorly and fail to obtain meaningful consensus. Second, despite a well-conducted collaborative process, the Secretary might nonetheless reject a petition. Finally, even if the Secretary accepts a consensus petition, litigation could still undermine its implementation.

This Note does not attempt to describe in detail what an ideal CDM process would look like, as it will depend on the specific sensibilities and needs of each state. Indeed, there is no single formula for

¹⁶⁴ At its most basic, CDM reflects a competing system of democracy. Often called Jeffersonian, or participatory, democracy, this form of governance is based on direct citizen involvement and deliberation in public policy decisionmaking; it lost out to Madisonian, or representative, democracy, which favors decisionmaking by elected officials. See KENNEY, *supra* note 116, at 49–56 (placing debate over CDM in context of centuries-old debate over merits of democratic institutions).

¹⁶⁵ See *supra* note 116 and accompanying text (discussing uncertainty about devolution advocates' ultimate goals); see also Sydney F. Cook, *Revival of Jeffersonian Democracy or Resurgence of Western Anger? The Emergence of Collaborative Decision Making*, 2000 UTAH L. REV. 575, 577 ("Critics, however, fear that this movement is another ploy by pro-development forces to capture the decisionmaking process . . .").

¹⁶⁶ 36 C.F.R. § 294.14(a)(7) (2005).

¹⁶⁷ A governor could theoretically come up with the petition by himself or herself, or behind closed doors. The state might then solicit comments from the public on the predetermined plan (much as NFMA public participation has been conducted in the past). See *supra* notes 53–56 and accompanying text (noting problems with this model of public participation).

¹⁶⁸ See *supra* notes 155–156 and accompanying text.

¹⁶⁹ See Berman, *supra* note 158 (noting challenges states confront under rule).

engaging stakeholders or for obtaining meaningful consensus, as already demonstrated by the different directions in which states seem to be heading.¹⁷⁰ While it is unfortunate that the final rule failed to codify even minimum standards for this process, strict guidelines for public participation and CDM would constrain states from trying different options, and lessen the benefits to be obtained from state experimentation. So long as states are transparent in their efforts,¹⁷¹ this experimentation could provide important lessons for the future of collaborative natural resource planning.

Regardless of the method of public participation chosen, some common challenges can be identified. The first major challenge for states that undertake CDM will be identifying and engaging interested parties in the formulation of the petition.¹⁷² In this effort, the Forest Service could provide technical assistance to the states, drawing on its experience with NFMA.¹⁷³ Of particular concern is the exclusion of environmental interests, both local and national.¹⁷⁴ Fault for this exclusion may lie with the states or the environmentalists themselves—or both. States may exclude environmental interests because incorporating dissenting parties makes consensus more difficult and less likely.¹⁷⁵ Alternatively, states may exclude environmental or national interests because of difficulty identifying an adequate representative.¹⁷⁶ Finally, states may exclude any national interests because they feel that only their citizens should be able to participate in the petitioning process. However, if a state fails to include environmental or national interests in the petitioning process, it will seriously under-

¹⁷⁰ See *supra* Part III.

¹⁷¹ See Nie, *supra* note 54, at 734–35 (stressing importance of transparency in public lands decisions). Back-door dealings would undermine the legitimacy of the process and the ability to learn from this experience.

¹⁷² See McCloskey, *supra* note 114, at 627 (noting difficulty of consulting “the varied interests of all of the national co-owners of these forests”).

¹⁷³ Through its NFMA planning process, the Forest Service already has a network of local officials and interested parties throughout the National Forest System, which could prove invaluable in reaching out to forest users during the petitioning process.

¹⁷⁴ See, e.g., KENNEY, *supra* note 116, at 61 (noting preliminary study finding that about fifty percent of consensus-based watershed initiatives in interior West do not include any environmental representatives); NELSON, *supra* note 11, at 121 (“National environmental organizations in particular may be excluded from the new ‘consensus-based processes’ . . .”). A shift to CDM may therefore “weaken national environmental commitments.” Bryner, *supra* note 116, at 19.

¹⁷⁵ See DOUGLAS S. KENNEY, *RESOURCE MANAGEMENT AT THE WATERSHED LEVEL: AN ASSESSMENT OF THE CHANGING FEDERAL ROLE IN THE EMERGING ERA OF COMMUNITY-BASED WATERSHED MANAGEMENT* 58 (1997); Amy, *supra* note 116, at 222 (“Mediators usually play the pivotal role in deciding who is invited to participate, and they often opt to keep the number as small as possible to facilitate the process of coming to an agreement.”).

¹⁷⁶ See *supra* note 172 and accompanying text.

mine any claim to legitimacy that may come from a collaborative process.¹⁷⁷

Environmentalists, on the other hand, often view CDM with suspicion¹⁷⁸ and are reluctant to participate.¹⁷⁹ However, as the general population becomes more environmentally minded, it is no longer clear that collaboration, even at the local level, will result in environmentally harmful outcomes.¹⁸⁰ It may make more sense to accept CDM as an inevitable development, and insist on a well-designed and executed collaborative process.¹⁸¹ Indeed, the petitioning process could be viewed as an opportunity to build bridges, reduce antagonism, and expand the environmental activist network outside of Washington, D.C.

States can assist in this process by encouraging development interests to be reasonable in their requests, focusing their attention on only the highest valued lands, with the fewest competing uses. Developers have already suggested (in admittedly self-serving statements) that this process will not result in a significant increase in development.¹⁸² The consensus process is more likely to succeed if they abide by such claims. States can also push recreationalists to accept recrea-

¹⁷⁷ See KENNEY, *supra* note 116, at 46 (noting that excluding "extreme interests" for sake of consensus may have devastating impact on minority interests, including environmental and public interest activists).

¹⁷⁸ See *supra* note 165.

¹⁷⁹ In addition to substantive concerns, environmentalists also view the collaborative process as a threat to a well-settled environmental strategy, litigation, leading one author to observe that environmentalists' aversion may be "simple culture shock." Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WISC. L. REV. 555, 569.

¹⁸⁰ In fact, a General Accounting Office report found that projects including the community in project design sometimes resulted in a *higher* level of environmental protection, as well as greater public satisfaction with project plans. GEN. ACCOUNTING OFFICE, FEDERAL LAND MANAGEMENT: ADDITIONAL GUIDANCE ON COMMUNITY INVOLVEMENT COULD ENHANCE EFFECTIVENESS OF STEWARDSHIP CONTRACTING, GAO-04-652, at 39-40 (2004), available at <http://www.gao.gov/new.items/d04652.pdf>.

¹⁸¹ Two environmental groups operating in Idaho conceded this point reluctantly, stating that they will press for as much protection in the petitioning process as possible because, as one put it, "[i]t's the only game in town." Barker, *Kempthorne Wants Input*, *supra* note 147, at 1; see also Kevin Darst, *Forest Meetings Open to Public*, FORT COLLINS COLORADOAN, Sept. 13, 2005, at B1 (noting same for Colorado environmental group). Nonetheless, a coalition of twenty environmental groups have sued the USDA, alleging that the new rule violates the National Environmental Protection Act and the Endangered Species Act, and seeking the reinstatement of President Clinton's roadless rule. Dan Berman, *20 Enviro Groups Ask Court to Restore Clinton Roadless Rule*, GREENWIRE, Oct. 7, 2005.

¹⁸² See Baird, *supra* note 150, at B1 ("If people think the timber industry is going to go out and build all these new roads, they're being misled."); Rocky Barker, *Bush Erases Clinton's Ban on Development in Forests*, IDAHO STATESMAN (Boise), May 6, 2005, at 1 (asserting that not much new logging or roadbuilding will result and suggesting that "[r]oadless areas are roadless because they are in remote areas with the least-appealing

tional user fees¹⁸³ in order to secure more land by bringing financial resources to the table to compete against development interests.¹⁸⁴ In these ways, the CDM process can avoid being unfairly skewed towards development interests.

The second major challenge is actually reaching consensus even if all interested parties are adequately represented in negotiations. Some might believe that natural resource management, especially in a field as emotionally charged as national forest roadless areas, is a poor candidate for collaborative decisionmaking. The dispute over the management of roadless areas reflects deep, unresolved value differences.¹⁸⁵ Petitions will affect a large number of people with heterogeneous (if not diametrically opposed) interests.¹⁸⁶ Participating stakeholders are not ensured that any eventual consensus will actually be implemented on the ground.

However, the fact that challenges exist¹⁸⁷ does not mean that meaningful consensus is impossible. States that undertake the process will encounter different challenges and utilize different solutions. Given a desire to reach consensus and transparency, there is much to be learned from the creation of the initial petitions.

Under the current rule, creating a successful consensus petition is only part of the process. As described previously, the Secretary has

commercial timber stands"); Steve Lipsher, *Forest Roadless Rule Reversed*, DENVER POST, May 6, 2005, at A1 (same).

¹⁸³ Recreational user fees are fees that must be paid to enter or use national forests.

¹⁸⁴ See generally Holly Lippke Fretwell, *Paying to Play: The Fee Demonstration Program*, PERC POLICY SERIES ISSUE NO. PS-17 (Dec. 1999) (arguing that user fees are necessary for federal agencies to provide high quality recreation); John A. Baden, Editorial, *Recreation User Fees Would Level the Playing Field*, SEATTLE TIMES, Feb. 2, 1993, at A9 (suggesting that user fees can ensure consideration of nontimber values).

¹⁸⁵ See KENNEY, *supra* note 116, at 27, 35 (surveying literature concerning ideal settings for CDM, including observation that CDM works best when significant value conflicts have been previously resolved).

¹⁸⁶ See Coglianese, *supra* note 163, at 106 ("[E]ven though consensus may be suitable for the governance of small groups of individuals who have ongoing relationships and common interests, it is not suitable for governance of large nation-states or in highly conflictual settings.").

¹⁸⁷ A final challenge for states will be raising sufficient financial resources to undertake CDM. Compare *supra* notes 155–156 and accompanying text (noting Forest Service estimates that state petitioning process will cost \$25,000 to \$100,000 and take 1000 hours), with *supra* note 157 and accompanying text (citing Montana governor's estimate that analyzing state's roadless areas before even undertaking petitioning process will cost nine million dollars). Federal financial assistance can be sought from the Forest Service, especially in analyzing roadless areas. See *supra* note 158 and accompanying text. The cost of the actual CDM process will vary widely depending on the procedures followed by the state, and will reflect different commitments and abilities to undertake participatory efforts. Whether it is financially viable to conduct an inclusive CDM process such as that envisioned by this Note depends on the resources and decisions of the state.

full discretion to accept or reject a petition.¹⁸⁸ Despite the lack of formal standards, the Secretary could observe self-imposed constraints in order to ensure that states' efforts were not in vain.¹⁸⁹ If a consensus-based petition emerges from an inclusive process, the Secretary should look at it more favorably even if it is not aligned with the administration's policies. The method of producing acceptable petitions may vary, so long as the state has demonstrated that the petition reflects the will of the people. However, if a petition emerges that clearly does not reflect public opinion, then the Secretary should resist pressure from the participants, and reject it.¹⁹⁰ Such a procedural focus would dovetail with the administration's language about the purpose of the new rule and would quiet criticism that it was nothing more than a thinly veiled attempt to increase roadless development.

Even if all these suggestions are followed, there will still be room for litigation under the state-specific rulemaking process that could undermine petitions. The participants in the CDM process will hopefully stand by the outcome and not seek to secure more favorable outcomes in court unless they have serious and legitimate concerns about the collaborative process. This will be difficult for those who believe they can do better in court, and the state and Forest Service may very well end up defending their changes. Nonetheless, last-minute changes after a consensus petition has been reached—whether through litigation, politics, or economics—will weaken overall support for the final plan's on-the-ground implementation and damage the credibility of the process.

President Bush's final rule could thus be transformed into a unique opportunity to conduct a citizen-driven planning process that NFMA has failed to embody. Because different states will choose different techniques, there is much to be learned from attempting a collaborative process in this divisive field of natural resource management. CDM has the potential to generate meaningful public

¹⁸⁸ See *supra* notes 122–124 and accompanying text. In responding to requests “that the final rule include a specific standard or criteria that the Secretary will apply when reviewing petitions,” the Forest Service asserts that “this would not be a valuable addition. . . . The Department believes that the overall design of the regulation and the required elements of the petition adequately reflect what will be considered. . . . The authority vested by Congress is broad, as is the discretion in how such authority is applied.” Final Rule, *supra* note 7, at 25,658.

¹⁸⁹ Admittedly, these suggestions are optimistic. Without formal standards, there is no way to ensure they are implemented; they will succeed only to the extent they are persuasive.

¹⁹⁰ In fact, the Secretary could encourage states to conduct an inclusive CDM process before they reach this stage by using his ability to “request[] additional information from a petitioner.” Final Rule, *supra* note 7, at 25,661.

involvement in the petitioning process, and forge a new standard of legitimacy in Forest Service decisionmaking.

CONCLUSION

The Forest Service has long faced difficulty in defending both its substantive decisions and its decisionmaking process. Science is unable to provide definitive answers to natural resource management decisions, which at their heart require value judgments. Economic analysis, while promising as an aid to decisionmaking, also has its limitations, especially in the context of the Forest Service. Public participation is the most promising avenue for legitimizing decisions, but current implementation is inadequate.

Roadless area management, perhaps the most divisive issue facing the Forest Service, may seem an unlikely candidate for trying a new direction. Nonetheless, President Bush has tried to bring collaboration and "community-oriented solutions"¹⁹¹ to the forefront. It remains to be seen whether this vision will come to pass. The absence of standards makes meaningful collaboration less likely, and feeds criticism that the final rule merely provided political cover for catering to development interests.¹⁹²

Despite this lack of guidance, the petitioning process at the very least enables collaboration and could therefore be used to generate broadly acceptable policies in a way that NFMA has not been able to do. While there are obstacles to reaching consensus, I suggest that through collaboration, states, stakeholders, and the Secretary could help bring about a positive result. Even for environmentalists stung by their reversal of fortune, this may provide an opportunity. Green decisions made through this process will have a newfound legitimacy. When all the dust has settled, this rule could be to the benefit of both the environmental movement and participatory democracy.

¹⁹¹ Final Rule, *supra* note 7, at 25,654.

¹⁹² Nie, *supra* note 54, at 733 (suggesting final rule may have been "nothing more than an artful dodge of responsibility . . . for a risky political decision").