Nos. 11-1378 and 11-1384

In the Supreme Court of the United States

STATE OF WYOMING, PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

COLORADO MINING ASSOCIATION, PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
JOHN L. SMELTZER
BARCLAY T. SAMFORD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

In 2001, after a multi-year public review of options for managing inventoried roadless areas (IRAs) within the National Forest System, the United States Department of Agriculture (USDA) promulgated the Roadless Area Conservation Rule (Roadless Rule), which restricts road building and timber harvests in IRAs. The questions presented are:

1. Whether USDA violated the Wilderness Act, 16 U.S.C. 1131 *et seq.*, by promulgating the Roadless Rule pursuant to its authority under the Organic Administration Act of 1897, 16 U.S.C. 551, and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.*

2. Whether USDA violated the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, by promulgating the Roadless Rule.

3. Whether, prior to promulgating the final Roadless Rule, USDA complied with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes—Continued: Page

In the Supreme Court of the United States

No. 11-1378

STATE OF WYOMING, PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

No. 11-1384

COLORADO MINING ASSOCIATION, PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-127) is reported at 661 F.3d 1209. The opinion of the district court (Pet. App. 131-223) is reported at 570 F. Supp. 2d 1309.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2011. A petition for rehearing was denied on February 16, 2012 (Pet. App. 224-225). Petitioner State of Wyoming filed a petition for a writ of certiorari

on May 15, 2012. Petitioner Colorado Mining Association filed a petition for a writ of certiorari on May 16, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Forest System (NFS) includes more than 190 million acres of land throughout the county, including 155 national forests, 20 national grasslands, and more than 60 other administrative units. 76 Fed. Reg. 8480 (Feb. 14, 2011); Pet. App. 5. "Inventoried roadless areas" (IRAs) comprise approximately 30% of that land (approximately 58.5 million acres). 66 Fed. Reg. 3245 (Jan. 12, 2001). This case arises out of a challenge to the United States Department of Agriculture's (USDA's) 2001 promulgation of the "Roadless Area Conservation Rule" (Roadless Rule), which prohibits most road construction and commercial timber harvests in IRAs. *Id.* at 3244.

1. Since its promulgation, the Roadless Rule has been the subject of numerous legal challenges, including in this case. Petitioners' arguments implicate a number of statutes governing the NFS, including the Organic Administration Act of 1897 (Organic Act), 16 U.S.C. 551, the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. 528-531, the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*, the Wilderness Act, 16 U.S.C. 1131 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

a. The Organic Act, MUSYA, and NFMA (among other statutes) authorize USDA to administer the NFS. The Organic Act grants USDA broad authority to "make such rules and regulations * * * as will insure the objects of [national forest] reservations, namely, to regu-

late their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. 551.

MUSYA declares that national forests "are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. 528, 529. MUSYA authorizes USDA to "develop and administer the renewable surface resources of national forests for multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. 529. The statute defines "multiple use" to include "making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions." 16 U.S.C. 531(a). That definition also contemplates that "some land will be used for less than all of the resources[]" and directs that "consideration be[] given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." *Ibid.* Congress also specified that "[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions" of MUSYA. 16 U.S.C. 529.

The substantive goals of the Organic Act and MUSYA are implemented in part through the planning framework established in NFMA. See Pet. App. 8. Under NFMA, USDA must develop for each administrative unit a land and resource management plan (LRMP) that "include[s] coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness" uses. 16 U.S.C. 1604(a) and (e)(1). All site-specific "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest

System lands [must] be consistent with [LRMPs]." 16 U.S.C. 1604(i).

b. Congress enacted the Wilderness Act in 1964 in order to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness." 16 U.S.C. 1131(a). The Act designated for permanent wilderness preservation all national forest lands then administratively classified as "wilderness," "wild," or "canoe," 16 U.S.C. 1132(a), and directed the Secretary of Agriculture to study 34 areas administratively classified as "primitive" for potential inclusion within the "National Wilderness Preservation System," 16 U.S.C. 1132(b). Congress instructed the Secretary to report his findings to the President and instructed the President to submit recommendations on wilderness designations to Congress by September 3, 1974. 16 U.S.C. 1132(b) and (c). The Wilderness Act defines the term "wilderness" as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S.C. 1131(c). The definition specifies, *inter alia*, that each area recommended for designation as a wilderness should comprise "at least five thousand acres of land" or be "of sufficient size as to make practicable its preservation and use in an unimpaired condition," should "retain[] its primeval character and influence," and should lack any "substantially []noticeable" "imprint of man's work." *Ibid.*

The Wilderness Act provides that the President's wilderness-area recommendations become "effective only if so provided by an Act of Congress." 16 U.S.C. 1132(b); see also 16 U.S.C. 1131(a). Once designated, wilderness areas must be managed in accordance with strict prescriptions designed to "preserv[e] the wilder-

ness character" of the lands. 16 U.S.C. 1133(b). Subject to existing private rights and other limited exceptions, the Wilderness Act provides that within congressionally-designated wilderness areas, "there shall be no commercial enterprise and no permanent road * * * , there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation." 16 U.S.C. 1133(c); see 16 U.S.C. 1133(d) (special provisions applicable to, *inter alia*, aircraft or motorboats; fire, insects, and diseases; mineral activities and surveys; mining and mineral leasing; water resources and reservoirs; grazing; and commercial services).

c. Congress enacted NEPA in order to foster better decisionmaking by agencies and more informed public participation with respect to agency actions that affect humans and the human environment. See 42 U.S.C. 4321; 40 C.F.R. 1501.1(c). NEPA requires that, whenever a federal agency proposes a "major Federal action[] significantly affecting the quality of the human environment," the agency must examine the reasonably foreseeable environmental effects of the proposed action and inform the public about those effects. 42 U.S.C. 4332(2)(C); 40 C.F.R. Pt. 1508; see *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983). In so doing, the agency must prepare a "detailed statement" of the environmental impact of the proposed action—an "environmental impact statement" (EIS)—the requirements for which are set out in regulations issued by the Council on Environmental Quality (CEQ). 42 U.S.C. 4332(2)(C); 40 C.F.R. Pts. 1502, 1508.

NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson* v.

Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). NEPA's "mandate to the agencies is essentially procedural" and is designed "to insure a fully informed and well-considered decision" on the part of the federal agency. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

2. a. In 1972, the Forest Service completed a "Roadless Area Review and Evaluation" (RARE I) identifying 1499 roadless areas within 56 million acres of land in the NFS for further evaluation as to suitability for wilderness designation. See 66 Fed. Reg. 35,918-35,919 (July 10, 2001); Pet. App. 7. The United States Forest Service (Forest Service) completed a more extensive review of roadless areas (RARE II) in 1979. 66 Fed. Reg. at 35,919; Pet. App. 8. As a result of those reviews and subsequent Presidential recommendations, Congress designated several NFS areas as "wilderness." Pet. App. 8. Combined with the lands so designated in the Wilderness Act itself, a total of 34.7 million acres of land were designated as wilderness areas. *Ibid.*

In the course of completing the RARE studies, the Forest Service compiled a nationwide inventory of nonwilderness roadless areas (known as inventoried roadless areas or IRAs). Pet. App. 9. As USDA has noted, such areas often remain roadless because they contain steep and rugged terrain that either is not well suited for timber harvests, makes it difficult and costly to develop roads, and/or includes land with exceptionally high ecological value or sensitivity. 65 Fed. Reg. 30,276-30,277 (May 10, 2000). Those areas are potentially subject to future designation as wilderness areas and are currently valuable in their own right. C.A. App. 540, 846-858. The Forest Service's effort to regulate such areas is the subject of this litigation.

In the late 1990s, USDA initiated rulemaking proceedings to change its road-management policies in the NFS. Pet. App. 9. The rulemaking was prompted by a variety of factors, including changes in public attitudes about resource uses in national forests, advances in scientific knowledge about the environmental effects of roads within the forests, and changes in resource demands and budget constraints. *Ibid.*; 63 Fed. Reg. 4350 (Jan. 28, 1998). In 1998, USDA published an advance notice of proposed rulemaking (ANPRM) inviting public comment on potential regulations to respond to "these changes and * * * better serve present and future management objectives in a more efficient manner." 63 Fed. Reg. at 4350.

At the same time, USDA published a proposed interim rule that would "suspend" "new road construction projects[] and road reconstruction projects" in most roadless areas of the NFS. 63 Fed. Reg. at 4354. The preamble to the proposed interim rule explained that its purpose was to "safeguard the significant ecological values of roadless areas * * * while new and improved analytical tools are developed to evaluate the impact of locating and constructing roads." *Id.* at 4352. USDA received more than 80,000 comments on the ANPRM and proposed interim rule. 64 Fed. Reg. 56,306 (Oct. 19, 1999). After considering the comments, USDA adopted a final interim rule "suspend[ing] road construction and reconstruction" in specified "unroaded areas," for a period of 18 months, beginning on March 1, 1999. *Id.* at 7290, 7303 (Feb. 12, 1999).

b. On October 19, 1999, USDA published a notice of intent (NOI) to "initiat[e] a public rulemaking process to propose the protection of remaining roadless areas within the National Forest System" and to prepare an EIS

"[t]o assist in determining the scope and content of a proposed rule." 64 Fed. Reg. at 56,306. USDA published the NOI in response to both a Presidential directive that the agency initiate such rulemaking, see 65 Fed. at Reg. at 30,278, and "strong public sentiment for protecting roadless areas," including by making permanent the "temporary suspension of road construction/reconstruction," as reflected in public comments on the ANPRM and proposed interim rule, 64 Fed. Reg. at 56,306. Pet. App. 10-11. The NOI initiated the "scoping" process under NEPA, which included a 60-day period during which the Forest Service "solicit[ed] public comment on the nature and scope of the environmental, social, and economic issues related to the proposed rulemaking that should be analyzed in depth in the Draft [EIS]." 64 Fed. Reg. at 56,307; Pet. App. 11. During the scoping period, the Forest Service held 187 meetings throughout the country, including throughout Wyoming. 66 Fed. Reg. at 3248; 64 Fed. Reg. 67,825-67,829 (Dec. 3, 1999); Pet. App. 11. In January and February 2000, USDA posted maps of IRAs on a website (roadless.fs.fed.us) dedicated to the rulemaking. Gov't C.A. Br. 14-15; C.A. App. 1451; see *id.* at 519d-519m.

On May 10, 2000, USDA released for public comment a proposed Roadless Rule and draft EIS (DEIS). Pet. App. 12; 65 Fed. Reg. at 30,276-30,308; C.A. App. 425-519. The proposed rule would prohibit road construction and reconstruction on the "unroaded portions of inventoried roadless areas of the National Forest System." 65 Fed. Reg. at 30,288. In the preamble to the proposed rule, USDA explained that the rule would apply to the 51.5 million acres of IRAs that had remained unroaded since the RARE I and RARE II inventories,

id. at 30,276, and noted that "map adjustments" might be made prior to a final rule to account for any new information acquired in ongoing assessments and LRMP revisions, *id.* at 30,279.

In the DEIS, USDA evaluated the environmental effects of four alternative courses of action. The alternatives were: (1) taking no action to regulate IRAs as a class; (2) prohibiting road building only, as in the proposed rule; (3) prohibiting road building and commodity-purpose timber harvests, but allowing timber cutting for "stewardship" purposes such as to reduce risk of catastrophic fire, to respond to insect infestation or disease, or to improve wildlife habitat; and (4) prohibiting road building and all timber harvests. C.A. App. 456-459; Pet. App. 12-13. The DEIS also noted that USDA had considered a host of other alternatives—including proposals to allow more road building—but had not conducted a detailed environmental analysis of those options after determining that they were inconsistent with the stated purpose of protecting IRAs or for other reasons. C.A. App. 468-473, 572-592; Pet. App. 13.

USDA then held approximately 430 public meetings about the proposed rule. 66 Fed. Reg. at 3248. As a result of that outreach, USDA received more than one million postcards and form letters, 60,000 original letters, 90,000 emails, and several thousand faxes, including numerous comments from public officials at the federal, Tribal, state, and local levels. *Ibid.*

In November 2000, USDA issued a final EIS (FEIS), 65 Fed. Reg. 69,513 (Nov. 17, 2000), which included updated analyses to respond to public comments and other changed circumstances. Pet. App. 14; see C.A. App. 536-539 (summary of changes); see also *id.* at 1417-1450 (comments and responses). Among the changes were

revisions to the IRA maps that USDA explained were intended both to correct "cartographic" and classification errors and to add newly inventoried areas pursuant to ongoing land-management plan revisions. *Id.* at 594; see also *id.* at 1185-1194 (FEIS Wyoming maps). Those adjustments increased the total amount of IRAs to approximately 58.5 million acres. *Ibid.*; Pet. App. 14. In order to eliminate confusion and administrative difficulties, USDA also eliminated the blanket exemption in the proposed rule for the 2.8 million acres of "roaded" areas within the IRAs but retained an exemption for the maintenance of existing roads. C.A. App. 576 n.3; Pet. App. 14. Like the DEIS, the FEIS evaluated a variety of potential effects of each proposed alternative—including effects on water quality, wildlife, recreation, forest health (relating to wild fires, insects, and disease), and social and economic conditions (relating to timber harvests and commodity uses). C.A. App. 610-1016.

c. In January 2001, USDA adopted the final Roadless Rule, see 66 Fed. Reg. at 3244-3273, which prohibits most road building and harvesting within IRAs, see *id.* at 3272-3273. In the preamble to the final rule, USDA explained that the risks to watersheds, wildlife habitat, and other unique roadless area characteristics posed by "road construction and reconstruction and certain timber harvesting activities" required immediate action limiting those activities. *Id.* at 3244-3247. The benefits of the limitations imposed by final rule, USDA explained, outweighed any costs associated with factors such as lost jobs in the timber industry and increased costs of certain types of fuel treatment. *Id.* at 3267-3268.

The Roadless Rule prohibits road "construction" and "reconstruction" (*i.e.*, the realignment of an existing

road or a road improvement that enhances service level, capacity, or design function) within IRAs. 66 Fed. Reg. at 3272 (§§ 294.11, 294.12(a)). The rule expressly allows the "maintenance" of classified roads in IRAs. *Id.* at 3273 (§ 294.12(c)). The rule also permits construction or reconstruction in certain enumerated circumstances, including: when a road is "needed to protect public health and safety in cases of an imminent threat of flood, fire or other catastrophic event that, without intervention, would cause the loss of life or property"; when a road is "needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty"; when the Secretary determines, under specified circumstances, to permit a Federal Aid Highway project; or when a road is needed "in conjunction with the continuation, extension, or renewal of a mineral lease" on lands under lease as of January 12, 2001. *Id.* at 3272-3273 (§§ 294.12(b)(1), (3), (6), and (7)).

The Roadless Rule also prohibits the cutting, sale, or removal of timber from IRAs, subject to four exceptions. First, the stewardship exemption permits the Forest Service to allow cutting, sale, and removal of "generally small diameter timber" if the responsible official determines that such activities will "maintain or improve" one or more "roadless area characteristics" and the activities are undertaken either to "improve threatened, endangered, proposed or sensitive species habitat" or to "maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects." 66 Fed. Reg. at 3273 (§ 294.13(b)(1)). The second, third, and fourth exceptions permit the Forest Service to allow cutting, sale, or removal of timber where "incidental to the implementation of [an allowed] management activity"; where "need-

ed and appropriate for personal or administrative use"; or in specific areas where "[r]oadless characteristics have been substantially altered" by road construction and timber harvests that occurred before the date of the rule (January 12, 2001) but after the area was designated an IRA. *Ibid.* (§§ 294.13(b)(2), (3), and (4)).

3. a. Within months of its publication, the Roadless Rule was separately challenged in several different district court actions, two of which are particularly relevant here.

A federal district court in Idaho preliminarily enjoined implementation of the Roadless Rule in April 2001, but the injunction was vacated on appeal in December 2002. See *Kootenai Tribe* v. *Veneman*, 313 F.3d 1094 (9th Cir. 2002).

Meanwhile, in May 2001, the State of Wyoming filed suit in the United States District Court for the District of Wyoming, alleging that the Roadless Rule was promulgated in violation of NEPA, NFMA, and the Wilderness Act. In 2003, that district court granted summary judgment in favor of Wyoming on its Wilderness Act and NEPA claims and ordered that the rule be "permanently enjoined." *Wyoming* v. *USDA*, 277 F. Supp. 2d 1197, 1239. A coalition of environmental groups that had intervened in defense of the Roadless Rule appealed the district court's decision. See *Wyoming* v. *USDA*, 414 F.3d 1207 (10th Cir. 2005). USDA did not appeal, instead issuing a new rule known as the State Petitions Rule in May 2005 that established procedures for States to petition USDA for State-specific regulations governing IRAs within that State. 70 Fed. Reg. 25,654 (May 13, 2005). Citing the new agency action, the Tenth Circuit dismissed the appeal as moot and vacated the district

court's 2003 opinion and injunction. *Wyoming*, 414 F.3d at 1214.

In 2006, however, a California district court held that USDA had violated NEPA and the Endangered Species Act of 1973 by promulgating the State Petitions Rule, and it ordered the Roadless Rule reinstated. *State of California ex rel. Lockyer* v. *USDA*, 459 F. Supp. 2d 874 (N.D. Cal.). The Ninth Circuit affirmed. *State of California ex rel. Lockyer* v. *USDA*, 575 F.3d 999 (2009).[1]

b. Wyoming then filed a new complaint challenging the Roadless Rule on the same grounds it had asserted in the previous action that had been dismissed as moot.

---

[1] In 2001, the State of Alaska filed suit in federal district court in Alaska challenging the validity of the Roadless Rule. That suit was settled in 2003 when the Forest Service agreed to propose a rule that would exempt IRAs in the Tongass National Forest from the Roadless Rule. See 68 Fed. Reg. 41,864 (July 15, 2003). The resulting exemption for the Tongass National Forest was later set aside—and the Roadless Rule reinstated in the Tongass—in a separate suit filed in the District of Alaska. See *Organized Vill. of Kake* v. *USDA*, 776 F. Supp. 2d 960 (2011). Alaska appealed that decision, see *Organized Vill. of Kake* v. *USDA*, No. 11-35517 (9th Cir. filed June 17, 2011), and filed a separate suit in district court in the District of Columbia, see *Alaska* v. *USDA*, No. 1:11-cv-01122 (filed June 17, 2011). Both the appeal and separate action remain pending.

The remaining challenges to the Roadless Rule were resolved without judicial decision. Two consolidated cases in district court in the District of Columbia were dismissed. See *Communities for a Great Nw.* v. *Veneman*, No. 1:00-cv-01394; *American Forest & Paper Ass'n* v. *Veneman*, No. 1:01-cv-00871. Two consolidated cases in district court in North Dakota were settled and dismissed. *Billings Cnty.* v. *Veneman*, No. 1:01-cv-00045; *North Dakota* v. *Veneman*, No. 1:01-cv-00087. And a suit filed by the State of Utah was stayed and then administratively closed. *Utah* v. *United States Forest Serv.*, No. 2:01-cv-00277B (D. Utah).

The Colorado Mining Association (CMA) was permitted to intervene as plaintiff. On August 12, 2008, the district court issued an opinion and order, again granting summary judgment for petitioners on the Wilderness Act and NEPA claims and ordering the Roadless Rule "permanently enjoined." *Wyoming* v. *USDA*, 570 F. Supp.2d 1309, 1354 (D. Wyo.); Pet. App. 131-223.

The district court held that USDA's promulgation of the Roadless Rule had usurped Congress's power, in violation of the Wilderness Act, by "designat[ing] 58.5 million acres of National Forest land as a de facto wilderness area." Pet. App. 210. The court offered three justifications for its conclusion. First, the court viewed a roadless forest as "synonymous with the Wilderness Act's definition of 'wilderness.'" *Ibid.* Second, the court explained that "a comparison of the uses permitted in wilderness areas and those permitted in inventoried roadless areas leads inescapably to the conclusion that the two types of areas are essentially the same. " *Ibid.* And third, the court reasoned that "the fact that most, if not all, of the inventoried roadless areas were based on the RARE II inventories, which were designed to recommend wilderness areas to Congress, further evidences that the Forest Service usurped congressional authority." *Id.* at 211. The district court rejected the government's argument that IRAs and wilderness areas are not the same because grazing, mineral development, and other activities that are prohibited in wilderness areas are allowed in IRAs. *Ibid.* Such opportunities, the court stated, are meaningless without road construction. *Ibid.*

The district court also concluded that USDA had violated NEPA in five different ways: (1) by acting arbitrarily in failing to extend the 60-day NEPA "scoping" comment period after releasing maps of IRAs, Pet. App.

167-171; (2) by acting arbitrarily in denying Wyoming and other States "cooperating agency" status when preparing the draft EIS and FEIS, *id.* at 171-175; (3) by failing to consider an adequate range of alternatives in the FEIS, *id.* at 175-186; (4) by failing to adequately analyze cumulative effects in relation to other rulemaking initiatives, *id.* at 189-194; and (5) by acting arbitrarily and capriciously in not preparing a supplemental EIS with respect to changes made between the draft and final rules, *id.* at 194-199. The court rejected Wyoming's argument, however, that NEPA required USDA to conduct a site-specific analysis of every land area affected by the Roadless Rule. *Id.* at 187-188.

In light of its conclusions that USDA violated NEPA and the Wilderness Act in promulgating the Roadless Rule, the district court declined to reach petitioners' claims under NFMA and MUSYA. Pet. App. 212-213.

4. The court of appeals reversed. Pet. App. 1-127. The court first held that the district court had erred in concluding that the Roadless Rule established "de facto" wilderness areas. *Id.* at 27. The court assumed without deciding that the Wilderness Act limits USDA's authority to establish wilderness by regulation. *Id.* at 26. But the court agreed with USDA that the Organic Act and MUSYA give the agency broad authority to manage NFS lands for an array of uses or combinations of use, including conservation uses that fall short of statutory wilderness designations. *Id.* at 37-41. The court "close-[ly] examin[ed]" the "precise differences" between the prescriptions for IRAs and wilderness areas, concluding that the two types of areas are distinct from each other and that "the Wilderness Act is more restrictive and prohibitive than the Roadless Rule." *Id.* at 27-29.

The court explained that, "[a]s a general matter, the Roadless Rule restricts only two activities—road construction and commercial timber harvesting, unless an exception applies." Pet. App. 28 (citing 66 Fed. Reg. at 3272-3273). In comparison, the court explained, the Wilderness Act prohibits those activities *and* "all 'commercial enterprise,' 'motor vehicles, motorized equipment or motorboats,' all 'form[s] of mechanical transport,' and any 'structure or installation,' unless an exception applies." *Ibid.* (quoting 16 U.S.C. 1133(c)). Overall, the court concluded, the Wilderness Act is significantly more restrictive than the Roadless Rule with respect to, *inter alia*, construction of installations and structures, recreational activities, road construction and maintenance, mineral development, and grazing. *Id.* at 28-35. The court therefore determined that "IRAs governed by the Roadless Rule are not de facto administrative wilderness areas." *Id.* at 35.

The court of appeals also rejected petitioners' arguments that the Roadless Rule violates MUSYA because it applies generally to more than 30% of the national forest land, precludes administration of renewable resources for multiple use, and "gives no consideration to 'various resources' in 'particular areas.'" Pet. App. 114 (quoting Pet. Wyo. C.A. Br. 44)). The court relied on record evidence demonstrating that USDA gave due consideration to competing resource values, in accordance with MUSYA's "multiple-use mandate," *id.* at 118-119, and observed that "the ultimate mix of uses chosen by [USDA] after consideration of the competing resources values is largely left to agency discretion," *id.* at 119.

The court of appeals similarly rejected petitioners' NFMA claim. Pet. App. 120-126. The court acknowl-

edged that NFMA "established a localized planning process for individual units of the national forest," but found "no expression of [congressional] intent to repeal or limit [USDA's] broad rulemaking authority under the Organic Act," including the authority to issue "broad nationwide conservation rule[s]." *Id.* at 123.

Finally, the court of appeals rejected all seven of the NEPA arguments petitioners advanced on appeal. Pet. App. 42-113. First, the court held that USDA did not act arbitrarily in declining to extend the initial 60-day scoping period following the release of IRA maps, given the absence of any rule requiring an extension or even requiring the provision of detailed site maps during the initial comment period (which is designed to develop issues for subsequent NEPA review). *Id.* at 46-55. Second, the court held that USDA's decision not to grant cooperating agency status to petitioner Wyoming was committed to the agency's discretion and therefore not subject to judicial review. *Id.* at 55-58. Third, the court held that USDA complied with NEPA by reasonably limiting its consideration of available alternatives to those alternatives that furthered the purpose of the rulemaking. *Id.* at 58-75. Fourth, the court held that USDA sufficiently disclosed and evaluated the potential cumulative effects of the Roadless Rule and three other coordinated rulemaking proceedings. *Id.* at 75-83. Fifth, the court of appeals agreed with the district court that USDA was not required to conduct a detailed site-specific analysis of every IRA in order to effectively evaluate the potential effects of the Roadless Rule. *Id.* at 84-91. Sixth, the court held that USDA reasonably declined to prepare a supplemental EIS after making changes to the rule in the final FEIS and final rule. *Id.* at 91-104. In so holding, the court concluded that the

elimination of the exemption for "roaded" areas was not a "substantial" change for purposes of NEPA analysis because the draft EIS had already considered the effects of the rule in those areas. *Id.* at 96-97. Finally, the court rejected petitioners' claim that USDA's NEPA analysis was "predetermined," finding no evidence that USDA had "irreversibly and irretrievably" committed itself to a particular outcome before it completed the NEPA analysis of the Roadless Rule. *Id.* at 105-113.

ARGUMENT

Petitioners reassert their arguments that, in promulgating the Roadless Rule, USDA violated the Wilderness Act, NFMA, and NEPA. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners argue (Wyo. Pet. 23-24; CMA Pet. 20-25) that by promulgating the Roadless Rule USDA designated 58.5 million acres as "de facto wilderness" without statutory authorization to do so. The court of appeals correctly rejected that argument. Petitioners do not identify any decision of this Court or of any other court of appeals that conflicts with the decision here and the government is not aware of any. That is a sufficient reason to deny further review of this question.

a. The court of appeals assumed without deciding that the Wilderness Act reserves to Congress alone the authority to designate an area as "wilderness," Pet. App. 26, and concluded that the Roadless Rule does not in fact designate any areas as wilderness, *id.* at 27-37. That conclusion was correct—and aside from conclusory assertions to the contrary, petitioners do not identify any flaw in the court's reasoning. Because the RARE

inventories that identified most of the IRAs were designed to identify areas meeting minimum criteria for wilderness designation, 66 Fed. Reg. at 3250; 65 Fed. Reg. at 30,287, particular IRAs may have the inherent character of lands described by the Wilderness Act's broad definition of "wilderness." 16 U.S.C. 1131(c). But that does not mean that USDA's imposition of certain management prescriptions on those areas is the equivalent of making a formal wilderness designation. Although the Roadless Rule does impose significant restrictions on IRAs, its prohibitions are significantly less stringent than wilderness prohibitions in several important ways.

First, the Roadless Rule permits more roads in the affected area than would a wilderness designation. The Wilderness Act prohibits any "permanent road" and, subject to limited exceptions, any "temporary road." 16 U.S.C. 1133(c). In contrast, the Roadless Rule allows existing permanent roads to be maintained, and provides broader exceptions for the construction of new roads, whether temporary or permanent, including when "provided for by statute or treaty," 66 Fed. Reg. at 3272 (§ 294.12(b)(3)), and when the Secretary of Agriculture determines a Federal Aid Highway project is "in the public interest," *ibid.* (§ 294.12(b)(6)).

Second, although the ban on road building will likely curtail mineral exploration and development in IRAs, the Roadless Rule still allows greater mineral development in IRAs than is allowed in wilderness areas. As a general rule, NFS lands are open to mineral location under the General Mining Law of 1872, 30 U.S.C. 21 *et seq.*, and mineral leasing under the Mineral Leasing Act, 30 U.S.C. 181, 226(h). See 36 C.F.R. 228.1 *et seq.*, 228.100 *et seq.* Under the Wilderness Act, however, are-

as within the NFS that are designated as wilderness are now closed to any "commercial enterprise" and withdrawn from mineral activities. 16 U.S.C. 1133(c) and (d). In contrast, the Roadless Rule imposes no limitation on "commercial enterprise[s]" generally or on mining activities in particular, beyond the practical limitations imposed by the prohibition on road building. 66 Fed. Reg. at 3250.

Petitioner CMA protests (Pet. 20-21) that "without roads activities specifically prohibited in wilderness areas are effectively prohibited in roadless areas even though the activity may technically be authorized." That assertion is misplaced. In fact, the practical limitations imposed by the Roadless Rule do not eliminate all meaningful opportunity for mineral development or other commercial uses within IRAs. For example, the General Mining Law provides a right of "reasonable access" to locate and develop locateable mineral claims, a right that "may include" the right to "road construction or reconstruction" where access without roads (*e.g.*, by helicopter or non-motorized transport) is not adequate. 66 Fed. Reg. at 3253, 3264; see generally 36 C.F.R. 228 Subpt. A. The Roadless Rule does not alter those statutory rights. *Id.* at 3272 (§ 294.12(b)(3)). With respect to minerals subject to discretionary leasing (*i.e.*, oil, gas, and coal), the Roadless Rule allows existing roads to be maintained for leasing activities, *id.* at 3250, allows directional (slant) drilling and underground development, *id.* at 3256, and allows new roads to be constructed where needed for the "continuation, extension, or renewal" of existing leases, or for any new lease issued immediately upon expiration of an existing lease, *id.* at 3272-3273 (§ 294.12(b)(7)). USDA has, moreover, allowed the installation of a section of natural gas pipeline

within an IRA based on the determination that construction within the pipeline right-of-way was not road construction. *Wilderness Workshop* v. *United States Bureau of Land Mgmt.*, 531 F.3d 1220, 1224-1228 (10th Cir. 2008).

Third, the Roadless Rule allows greater grazing opportunities than is allowed in wilderness areas. The Wilderness Act's prohibition on any "commercial enterprise" precludes livestock grazing within NFS wilderness areas, except to the extent allowed under an exception for "established" grazing. 16 U.S.C. 1133(c) and (d)(4); see also 36 C.F.R. 293.7. In contrast, the Roadless Rule contains no prohibition on grazing or on the erection of structures or installations that can be accomplished without road building and permits the maintenance of existing roads for grazing uses. 66 Fed. Reg. at 3250.

Fourth, the Roadless Rule permits a broader array of recreational activities than are permitted in wilderness areas. The Wilderness Act prohibits within wilderness areas any "use of motor vehicles, motorized equipment or motorboats, * * * landing of aircraft, * * * [or] other form of mechanical transport." 16 U.S.C. 1133(c). As a result, wilderness areas are closed to, *inter alia*, off-road motor vehicle use, snowmobiling, helicopter landings (including heli-skiing), and bicycling. See 36 C.F.R. 261.18, 293.6. In contrast, the Roadless Rule contains no restrictions on such uses. See 66 Fed. Reg. at 3245, 3247, 3272-3273.

Thus, although both the Roadless Rule and a wilderness designation pursuant to the Wilderness Act have the effect of imposing significant restrictions on the use of affected areas, the restrictions are not coextensive and the result is not the same. The Roadless Rule's twin

prohibitions on road building and timber harvests are not as comprehensive or restrictive as the Wilderness Act's prohibitions on any "commercial enterprise" and any "motorized equipment" or "mechanical transport." 16 U.S.C. 1133(c). And, contrary to the petitioners' perfunctory assertions, the differences are not mere "semantic distinctions" (Wyo. Pet. 24) or "technical differences" (CMA Pet. 23). The court of appeals systematically compared the provisions of the Wilderness Act and Roadless Rule and associated record evidence, Pet. App. 27-36, and found that the Wilderness Act was "clearly" "more restrictive and prohibitive," *id.* at 35. Petitioners have not engaged the court of appeals' analysis in any detail, let alone identified any aspect of the decision that warrants this Court's review.

b. In addition, the Roadless Rule is consistent with USDA's broad statutory authority pursuant to the Organic Act and MUSYA to "preserve the forests thereon from destruction," 16 U.S.C. 551, for "multiple use[s]," 16 U.S.C. 529, which are defined to include both "outdoor recreation," "watershed," and "wildlife and fish purposes," as well as "timber" and "range" purposes, 16 U.S.C. 528. That authority specifies both that USDA may manage "some land * * * for less than all of the resources," 16 U.S.C. 531(a), and that the "establishment and maintenance of areas of wilderness" is "consistent with" this multiple-use mandate, 16 U.S.C. 529. It is true that Congress, in enacting the Wilderness Act, reserved to itself the authority to designate statutory "wilderness areas" for purposes of that Act. 16 U.S.C. 1131(a), 1132(b). But the Organic Act and MUSYA leave no doubt both that USDA has the discretion to manage sensitive lands for some uses (*e.g.*, "outdoor recreation," "watersheds," and "wildlife") to the exclusion of others

(*e.g.*, "timber" harvests and road building) and that USDA has authority to manage lands in furtherance of "wilderness" values. 16 U.S.C. 528, 529, 531.[2]

The restrictions and prohibitions contained in the Roadless Rule are valid means of implementing USDA's regulatory authority under the Organic Act and MUYSA to "preserve" IRAs for conservation uses (*i.e.*, for protection of "wildlife and fish," "watershed[s]," and "outdoor recreation") without designating affected land as wilderness areas. See 16 U.S.C. 528, 551. The Wilderness Act did not repeal or abrogate that preexisting authority of USDA. Moreover, petitioners' unsupported assertions that the rule has the effect of designating IRAs as wilderness areas fail to rebut the court of appeals' careful analysis and conclusion to the contrary. Nor do petitioners argue that, if the Roadless Rule does not have the effect of designating IRAs as wilderness areas in conflict with the Wilderness Act, the rule is oth-

---

[2] When Congress enacted the Wilderness Act, it did not expressly repeal USDA's preexisting administrative authority to "establish[] and maint[ain] areas of wilderness." 16 U.S.C. 529. "[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-142 (2001) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). There is no such conflict here. In the Wilderness Act, Congress declared that the purposes of the Act were "within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered," and that "[n]othing" within the Wilderness Act "shall be deemed to * * * interfere[] with" national-forest management under the Organic Act and MUSYA or modify the statutory authority governing national parks and wildlife refuges. 16 U.S.C. 1133(a). Because the court of appeals correctly concluded that the Roadless Rule does not de facto designate IRAs as wilderness areas, it had no occasion to consider the scope of USDA's authority to establish and maintain wilderness areas.

erwise not authorized under the Organic Act or MUSYA. This Court's review is therefore not warranted.

2. Petitioners also argue (Wyo. Pet. 24-26, CMA Pet. 24-25) that USDA violated the NFMA's forest-planning requirements when it promulgated the Roadless Rule. Petitioners essentially argue that any time USDA takes action that affects a national forest, it must follow the procedures in NFMA even if it acts pursuant to a different grant of statutory authority. With respect to this case, petitioners contend (*ibid.*) that NFMA's requirement that USDA develop a LRMP to govern each unit of the NFS, 16 U.S.C. 1604, "supplant[s]" USDA's authority under the Organic Act and MUSYA to issue system-wide rules governing land areas in multiple units. The court of appeals correctly rejected that argument, as have the other federal courts to consider it. Further review is therefore not warranted.

Petitioners offer no reasoning to support their assertions that USDA cannot reasonably exercise its authority under either NFMA on the one hand or MUSYA and the Organic Act on the other, depending on the scope of the action at issue. And the court of appeals correctly concluded that, "although NFMA established a localized planning process for individual units of national forest, it did not take away from the Forest Service's authority * * * to issue a broad nationwide conservation rule, such as the Roadless Rule." Pet. App. 123. Petitioners fail to identify any provision of NFMA that effects such a repeal of authority or even arguably expresses an intent to effect such a repeal. See Wyo. Pet. 24-26, CMA Pet. 24-25.

In promulgating the Roadless Rule, USDA relied on its broad authority under the Organic Act to "regu-

lat[e] * * * occupancy and use" of NFS lands. See 66 Fed. Reg. at 3272 (citing 16 U.S.C. 551). It is true that, in enacting NFMA, Congress imposed a series of new requirements applicable to forest-level planning. But Congress did not eliminate USDA's authority to regulate the use of NFS lands through nationwide rules promulgated pursuant to its authority under NFMA or other applicable laws. See 16 U.S.C. 1613 ("The Secretary of Agriculture shall prescribe such regulations as [the Secretary] determines necessary and desirable to carry out the provisions of [NMFA]."); see also 16 U.S.C. 1612(a) (recognizing USDA's authority to "formulat[e] * * * standards, criteria, and guidelines" for "Forest Service programs" outside of the forest-planning process). And the promulgation of a nationwide conservation rule such as the Roadless Rule is fully compatible with the implementation of unit-specific forest plans. The rule's prohibitions apply in addition to any prohibitions within LRMPs, but the rule neither requires LRMP amendments nor compels any action that conflicts with the requirements of any LRMP. See 66 Fed. Reg. at 3273 (§ 294.14). Rather, the rule reflects USDA's discretionary decision not to undertake road-construction or timber-cutting projects that are (or might be) permitted under individual plans, but are not compelled by such plans. As the court of appeals explained, the Roadless Rule "leaves in place pre-existing forest plans governing individual IRAs * * * to the extent that they do not conflict with the Roadless Rule" and "does not prohibit the development of new rules specific to individual IRAs through the NFMA forest-planning process." Pet. App. 115-116.

Indeed, every court to consider a NFMA challenge to the Roadless Rule—two courts of appeals and one dis-

trict court—has rejected it. The Ninth Circuit, like the Tenth Circuit in this case, held that "nothing in [NFMA] * * * precludes national action on a conservation issue within the power of the Forest Service." *Kootenai Tribe* v. *Veneman*, 313 F.3d 1094, 1117 n.20 (2002). And, in rejecting a challenge to the 18-month moratorium on road-building in IRAs that preceded the Roadless Rule, the Wyoming district court determined that USDA had the authority "to proceed via [system-wide] rulemaking in lieu of forest plan modification." *Wyoming Timber Indus. Ass'n* v. *United States Forest Serv.*, 80 F. Supp. 2d 1245, 1258-1260 (D. Wyo. 2000). The unanimity of federal courts' view of this issue is a sufficient reason to deny review.

3. Wyoming also reasserts (Pet. 26-30) three of its NEPA challenges, urging the Court to review the court of appeals' fact-intensive conclusion that USDA complied with the procedural requirements of NEPA in promulgating the Roadless Rule. Review is not warranted, however, because the court of appeals' decision was correct and does not conflict with any decision of this Court or of any other court of appeals.

Whether an agency's action complied with NEPA and CEQ regulations is reviewed under the deferential review standard of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and the action must be upheld unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 375-376 (1989). This Court held in *Marsh*—a challenge to an agency's decision not to prepare a supplemental EIS—that such deferential review is appropriate in a case such as this because it is "a classic example of a factual dispute the resolution of which impli-

cates substantial agency expertise." 490 U.S. at 376. Applying that standard of review, both the court of appeals here and the only other court of appeals to consider the question have extensively reviewed the Roadless Rule's FEIS and associated NEPA evaluation and held that USDA complied with NEPA in promulgating the final Roadless Rule. Pet. App. 42-113; *Kootenai Tribe*, 313 F.3d at 1115-1126 (reversing preliminary injunction). Wyoming does not identify any issue of statutory or regulatory interpretation that is implicated in its request for further review of the court of appeals' fact-bound NEPA decision.

a. Wyoming first argues (Pet. 26-27) that, in preparing the EIS, USDA considered too narrow a range of alternatives in order to reach a predetermined outcome, *i.e.*, adoption of what would become the Roadless Rule. The court of appeals correctly rejected that argument. See Pet. App. 58-75. The court explained that USDA reasonably and permissibly limited its detailed review to four alternative rulemaking actions that would meet the objective of preserving the roadless character of IRAs after opting not to conduct a detailed review of six other categories of alternatives. *Id.* at 67-69. As the court of appeals noted, see *id.* at 68-72, moreover, the four alternatives USDA considered in detail were different from each other in meaningful ways, including with respect to allowable timber production and active-management practices (*e.g.*, tree cutting to reduce fuel loads and fire risk or to combat disease or insect infestations).

The court of appeals correctly concluded that USDA took the required "hard look" at the potential effects of a reasonable range of alternative rulemaking proposals and was therefore free to choose its preferred policy option. Pet. App. 75. That is all that NEPA requires. See

Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA generally contemplates that an agency will prepare an EIS (when one is required) before making "any irreversible and irretrievable commitments of resources." See 42 U.S.C. 4332(2)(C)(v). And the court of appeals correctly concluded that USDA made no such commitments prior to completing the FEIS in this case. Pet. App. 107-113. Wyoming does not even acknowledge the court of appeals' careful analysis, let alone identify any error therein.

b. Wyoming also argues (Pet. 27-29) that USDA acted arbitrarily in declining to provide a site-specific analysis for each IRA subject to the Roadless Rule. This argument was correctly rejected by both the district court, see Pet. App. 187-188, and the court of appeals, see *id.* at 84-91. CEQ regulations governing the requirements for an EIS provide that, when an agency is preparing an EIS for a "broad Federal action[]" such as the "adoption of * * * regulations," an agency may evaluate the proposal "[g]enerically" with reference to "common * * * impacts." See 40 C.F.R. 1502.4(b) and (c)(2). Wyoming does not acknowledge those regulations, which are "entitled to substantial deference." *Robertson*, 490 U.S. at 355.

Instead, Wyoming asserts (Pet. 28-29 (citing Pet. App. 88-89)) that the court of appeals announced a rule that site-specific analysis is unnecessary when a proposed action is designed to be "environmentally friendly." But that is not so. Rather, in distinguishing its holding from the Ninth Circuit's holding in *California* v. *Block*, 690 F.2d 753, 763-764 (1982), the court of appeals explained that a site-specific analysis was not required here in part because the rule would not lead to "substantial environmental degradation." Pet. App. 89 n.34. In

contrast, the Ninth Circuit viewed the action at issue in *Block* as "irreversibl[y] and irretrievabl[y]" committing certain land to nonwilderness uses that for at least 10 to 15 years without preserving the agency's discretion to "consider wilderness preservation as an alternative to development" in those areas. 690 F.2d at 763. The Roadless Rule does not irretrievably commit to any action that would cause environmental degradation[3] and it was appropriate for the court of appeals to take that into account in determining the degree of site-specific review reasonably required in order to take a "hard look" at the effects of the rule.

Wyoming asserts that three courts of appeals have held that NEPA always requires a site-specific analysis of any proposed action. Pet. 28 (citing *Conservation Law Found.* v. *General Servs. Admin.*, 707 F.2d 626, 630-631 (1st Cir. 1983); *Sierra Club* v. *Peterson*, 717 F.2d 1409, 1414-1415 (D.C. Cir. 1983); *Block*, 690 F.2d at 763-764). Wyoming is incorrect. It is true that the decisions on which Wyoming relies held that NEPA required the relevant federal agency to consider site-specific effects of the particular action under consideration in those cases. But in at least two of the decisions, the courts made

---

[3] There is no record support for the CMA's assertion (Pet. 4-5) that the Roadless Rule "will have potentially devastating consequences" in terms of "insect infestations and forest fires" or lost opportunities for mineral development. Nor is there any support for Wyoming's claim (Pet. 31-32) that USDA failed to analyze the rule's effect on such considerations. As the court of appeals explained (Pet. App. 70-72 & nn.28-29), the FEIS systematically considered the rule's potential effects on, *inter alia*, fires, fire suppression, forest health, and mineral development, as well as potential socioeconomic effects related to mineral development—and did not identify any potentially devastating consequences. See C.A. App. 628-29, 681-732. Petitioners disregard the record and the court of appeals' analysis.

clear that the holdings were based on the particular "context" or "situation" presented in the particular case. *Conservation Law Found.*, 707 F.2d at 634; *Sierra Club*, 717 F.2d at 1415; see also *Block*, 690 F.2d at 761 ("The detail that NEPA requires in an EIS depends upon the nature and scope of the proposed action."). And none of those cases purported to announce a one-size-fits-all rule that NEPA requires a site-specific analysis in every EIS. See *New Mexico ex rel. Richardson* v. *Bureau of Land Mgmt.*, 565 F.3d 683, 717-718 (10th Cir. 2009) ("there is no bright line rule" regarding analysis of site-specific effects, but "[i]nstead, the inquiry is necessarily contextual").

Although the Ninth Circuit's decision in *Block* includes language that could be interpreted broadly as requiring site-specific analyses for all areas covered by a nationwide rule, it is doubtful that that court would apply such a broad rule today for two reasons. First, the relevant CEQ regulations permitting agencies to generically evaluate broad federal actions, see 40 C.F.R. 1502.4(b) and (c)(2), did not apply to the federal action at issue in *Block*. See 690 F.2d at 763 n.5. Second, the Ninth Circuit's more recent decision in *Kootenai Tribe* rejected the same site-specific challenge petitioners make to the FEIS associated with the Roadless Rule. The court stated in that case that an agency may adopt "regulations of general applicability" such as the nationwide Roadless Rule without "an evaluation of the costs and benefits of the law at each location where it may apply." 313 F.3d at 1117 n.20. Petitioners have failed to demonstrate, therefore, that their challenge to the Roadless Rule would have a different outcome if brought in any other court of appeals. This Court's intervention is therefore not warranted.

c. Wyoming further argues (Pet. 29-30) that NEPA required USDA to prepare a supplemental EIS (SEIS) when it decided to apply the final rule to IRAs generally (including 2.8 million acres of already roaded areas) rather than only to unroaded areas within IRAs. Wyoming argues that this regulatory change was not within the "spectrum of alternatives" evaluated in the draft EIS and thus constituted "substantial changes" requiring an SEIS. The court of appeals correctly rejected that argument. See Pet. App. 96-97.

As explained in the FEIS, USDA eliminated the distinction in the draft rule between roaded and unroaded areas within IRAs because the distinction was confusing to the public and would be difficult to administer in a consistent manner. C.A. App. 576, n.3, 1204. The agency also explained that eliminating that distinction was not a substantive change because the analysis in the DEIS covered both roaded and unroaded areas of IRAs without differentiation. *Ibid.* As the court of appeals noted, a supplemental EIS is not required on account of a change in a proposed rule if the potential environmental effects of the change have already been considered. Pet. App. 97. Moreover, the extension of the rule to roaded areas in IRAs was without substantive effect because the use and maintenance of existing roads is not prohibited by the Roadless Rule, C.A. App. 590, and because the timber-harvest prohibition contains an exemption for areas whose roadless characteristics have already been substantially altered, 66 Fed. Reg. at 3273 (§ 294.13(b)(4)).

Wyoming neither disputes any aspect of USDA's explanation for the change and its non-substantive nature nor identifies any aspect of the court of appeals' decision

that is erroneous. Review of Wyoming's NEPA claims is therefore unwarranted.

4. Finally, Wyoming and CMA both argue (Wyo. Pet. 31-32, CMA Pet. 26-27) that review by this Court is appropriate based only on the amount of land at issue. But in the absence of any important legal question about which the courts of appeals are divided—or as to which the court of appeals here erred—the amount of land in question does not provide a basis for certiorari review, particularly in light of the absence of record support for petitioners' assertions (see Wyo. Pet. 32; CMA Pet. 26) about the ill effects of the Roadless Rule.

IRAs remain roadless largely because they are in remote areas of rugged terrain that are difficult to access for commercial or other uses. 65 Fed. Reg. at 30,277. When promulgating the Roadless Rule, USDA determined that the rule would provide significant benefits to, *inter alia*, watersheds, wildlife, and ecosystem health, 66 Fed. Reg. at 3245-3247, at the cost of only "minor" adverse national socioeconomic effects, *id.* at 3264. USDA noted, for example, that "the reduction in timber harvest from National Forest System lands [as a result of the rule] is less than 3%, which is less than 0.5 percent of total United States timber production." *Ibid.* USDA similarly noted that "oil and gas production from all National Forest System lands is about 0.4 percent of the current national production, and the oil and gas resources located inside inventoried roadless areas are an insignificant portion of total resources." *Ibid.* Petitioners do not challenge those findings, relying instead on opaque comparisons between the combined acreage of IRAs and the combined acreage of different combinations of eastern States. Wyo. Pet. 31-32; CMA Pet. 26. But petitioners do not attempt to assess the amount of

acreage that would be suitable for the purposes they allege are adversely affected by the Roadless Rule.

Petitioners also ignore the regulatory flexibility built into USDA's administration of the rule. To date, the agency has promulgated two State-specific rules governing IRAs in national forest land located in Idaho and Colorado. See 73 Fed. Reg. 61,456 (Oct. 16, 2008) (Idaho); 77 Fed. Reg. 39,576 (July 3, 2012) (Colorado). Those rules address concerns specific to the States they govern. For example, in Colorado the need for a State-specific rule was attributed to special concerns regarding wildfires and municipal water supplies as well as accommodating existing permitted ski areas. 77 Fed. Reg. at 39,577. The availability of these more localized rules also counsels against this Court's review of the court of appeals' conclusion that the Roadless Rule in general was validly promulgated.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
JOHN L. SMELTZER
BARCLAY T. SAMFORD
Attorneys

AUGUST 2012