

No. 14-5259

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**THE ARK INITIATIVE, et al.,**

*Plaintiffs-Appellants,*

v.

**THOMAS TIDWELL, Chief, United States  
Forest Service, et al.,**

*Defendants-Appellees,*

and

**ASPEN SKIING COMPANY,**

*Intervenor-Appellee.*

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On Appeal from the United States District Court

For the District of Columbia

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**FINAL BRIEF OF *AMICUS CURIAE*, THE STATE OF COLORADO,  
IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE OF THE DECISION OF  
THE UNITED STATES DISTRICT COURT**

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**CERTIFICATE AS TO PARTIES, RULINGS  
AND RELATED CASES**

**A. Parties and Amici.**

Except for *amici* appearing before this court, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants.

**B. Rulings Under Review.**

References to the rulings at issue appear in the Brief for Appellants.

**C. Related cases.**

References to related cases appear in the Brief for Appellee Aspen Skiing Company.

**PERTINENT STATUTES AND REGULATIONS**

All statutes and regulations relevant to this appeal appear in the addenda to the Appellants' Brief and Brief for Appellee Aspen Skiing Company.

# TABLE OF CONTENTS

## PAGE

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES	
PERTINENT STATUES AND REGULATIONS .....	i
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
I. The Colorado Rule represents the state-by-state approach to forest management that federal law prescribes.....	4
II. Appellants, like all affected parties, were repeatedly invited to participate in the decision making process that led to promulgation of the Rule, and the Rule reflects the “impressive” public outreach during the comment period. .	7
III. Whether lands excluded from the Colorado Roadless Rule were “empirically roadless” has no bearing on this matter.....	10
CONCLUSION .....	13
CERTIFICATE OF COMPLIANCE.....	14
CERTIFICATE OF SERVICE .....	15

## **IDENTITY AND INTEREST OF AMICUS CURIAE**

The State of Colorado is home to some 4.2 million acres of roadless areas, public lands that are a nationally significant resource and an irreplaceable social and economic asset to the State. CRR-009554 (JA-264). Colorado's roadless backcountry provides critical wildlife habitat, clean drinking water, and unmatched scenery. CRR-009554 (JA-264); CRR-008895 (JA-258). Those roadless areas also provide myriad recreational opportunities, which are cherished by Colorado's citizens and the hundreds of thousands of visitors who visit the State annually. CRR-008883 (JA-252); CRR-008895 (JA-258). In short, Colorado's roadless areas are a treasure of immense value. CRR-009554 (JA-264). And few things are more important to Coloradans than the responsible stewardship of that treasure. CRR-008883 (JA-252).

Amid fears that the 2001 Roadless Area Conservation Rule would be overturned, on the one hand, and concerns that it did not adequately reflect the State's knowledge of and priority regarding its roadless areas on the other hand, three Colorado Governors—both Republican and Democrat—petitioned the Forest Service to adopt the Colorado Roadless Rule (or "Rule"). CRR-008895 (JA-258); CRR-008883 (JA-252); CRR-009654 (JA-266). In 2005, Governor Owens signed legislation creating a task force within Colorado to solicit tens of thousands of

public comments and conduct a comprehensive review of Colorado's four million acres of roadless areas. CRR-008883-84 (JA-252-253).

The Colorado Roadless Rule resulted from the findings and recommendations of this task force. CRR-159486 (JA-481). The Rule represents cooperative federalism at its best. Importantly, the Rule protects pristine roadless areas and provides heightened protection for over a million acres of land; it does so for the benefit of the lands themselves, as well as for the benefit of the citizens of Colorado and the nation who utilize and enjoy them. CRR-159486-87 (JA-481-482). At the same time, the Rule respects previously-approved ski area development plans and permits, protects water supply infrastructure, and allows the State to mitigate the risk of catastrophic wildfires in mountain communities. CRR-159482-85 (JA-477-478).

Appellants ask this Court to cast aside the cooperative efforts of the State, the Forest Service, and the public. They seek to dismantle the Colorado Roadless Rule, potentially removing the Rule's protections and prudent land management policies. That result is unacceptable to the State of Colorado. Under Fed. R. App. P. 29(a), Colorado files this brief as *amicus curiae* to urge the Court to uphold the Colorado Roadless Rule.

## **SUMMARY OF ARGUMENT**

The Colorado Roadless Rule is a model of cooperative federalism. Through a six-year public decision-making process, the Forest Service and the State of Colorado carefully crafted a Rule that prioritizes protection of the most pristine backcountry lands and provides heightened protection to a significant portion of those lands. The Rule protects state decreed water rights and water supply infrastructure and ensures that citizens of Colorado will continue to receive high-quality water from the National Forests. It also allows mountain communities to protect themselves from catastrophic forest fires. In addition—and most relevant here—the Colorado Roadless Rule respects existing ski-area permits and development plans and avoids conflicting land management decisions. In short, the Colorado Roadless Rule is better for Colorado, its roadless areas, and the nation than any previous rule or management plan.

Appellants ask this Court to disrupt the careful balance struck by the Rule and potentially eliminate the Rule's protections. They are entitled to this relief, they claim, because the ski-area lands excluded from the Rule were “empirically roadless” at the time the Colorado Roadless Rule was adopted. That term, however, is based on no law or regulation. It is Appellants' own creation. The Court should decline Appellants' invitation to adopt a new rule of decision—one

that Appellants themselves invented to support their theory of this case—to govern roadless decisions by the United States Forest Service.

## ARGUMENT

### **I. The Colorado Rule represents the state-by-state approach to forest management that federal law prescribes.**

The Secretary of Agriculture manages the National Forest System lands to best meet the needs of the American people. CRR-008900 (JA-261). To do so, the Secretary must develop *and periodically revise* land and resource management plans for units of the National Forest System. 16 U.S.C. § 1604. Moreover, the Secretary must coordinate such development and revisions “with the land and resource management planning processes of State and local governments and other Federal agencies.” *Id*; *see also* 16 USCS § 530 (“[T]he Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.”). Notably, no law requires the Secretary to promulgate roadless rules. CRR-008899-900 (JA-260-261). These rules are promulgated “solely at the discretion of the Secretary in an effort to meet public needs.” CRR-008900 (JA-261).

The Colorado Roadless Rule resulted from just the type of cooperative planning required by 16 USCS § 1604. *Op.* at 35. The Rule is the culmination of a six-year rule making process. *Op.* at 6. Throughout that process, Colorado and the Forest Service identified those lands within Colorado that were, *at that time*, most

suitable for inclusion in the roadless inventory, while ensuring that including those lands was compatible with other state interests. Op. at 32; CRR-159486 (JA-481) (The Rule “balances Colorado specific concerns with roadless conservation, which is also important to the State.”).

That cooperative approach had significant tangible benefits. It allowed the State and the Forest Service to identify lands best suited for roadless designation and to provide greater protection for those lands than did the 2001 Roadless Rule.<sup>1</sup> For example, the Rule included 409,500 acres that were not covered in the 2001 Roadless Rule. CRR-159482 (JA-477). And it designated 1,219,200 acres of “upper tier” lands where road construction and tree cutting are more restricted and limited than in the 2001 Roadless Rule. CRR-159483 (JA-478). The Colorado Roadless Rule also added significant restrictions to a provision of the 2001 Roadless Rule that would have otherwise allowed unfettered “linear construction zones.” CRR-009514 (JA-263); 159485 (JA-480) (“[T]he 2001 Roadless Rule does not restrict [linear construction zones] and the potential adverse impacts to roadless characteristics.”). This tiered approach to roadless land management addressed Colorado-specific concerns, making the Rule more responsive to the needs of the public and, on balance, more protective than the 2001 Roadless Rule. CRR-159483 (JA-478).

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<sup>1</sup> 66 Fed. Reg. 3,244 (Jan 12, 2001).

Moreover, these additional, heightened protections offset the decision by the Forest Service and the State to exclude from the Rule other lands less suitable for roadless designation—in particular, lands that no longer met the roadless criteria or were already subject to conflicting permits or plan allocations. *Op.* at 31-32; *also* CRR-159482-83, 88 (JA-477-478; JA-483). For example, the Forest Service excluded from the Colorado Roadless Rule 459,100 acres that were included in the 2001 Rule, but were “determined to be substantially altered.” CRR-159482-83 (JA-477-478). Appellant does not challenge the exclusion of those lands from the Colorado Roadless Area. Instead, Appellant challenges the exclusion of approximately 8,300 acres of land within permitted ski area boundaries or ski area management allocations. *Br.* at 37-38.

Those ski-area lands, however, were highly appropriate for exclusion from the Rule. Some of the numerous reasons the Forest Service cited for excluding those lands included: (1) facilitating recreational use of National Forest lands; (2) assisting Colorado’s economically significant ski industry; (3) addressing the state-specific concerns expressed by the State of Colorado; (4) making only a minor impact on the total roadless area in Colorado; and (5) reducing management conflicts and confusion that would result from including ski area lands that were already within conflicting permit areas or plan allocations. *Op.* at 31-32. The potential for conflict was imminent; under the 2001 Rule, the Forest Service had

already approved slope expansions on nearly 3,000 of the 8,300 ultimately excluded acres. CRR-009559 (JA-265).

This cooperative decision-making process benefitted the national forests, the State, and the people who utilize and enjoy the forests. The Colorado Roadless Rule “attains the widest range of beneficial uses of the environment and achieves a balance between population and resource use while conserving roadless area characteristics.” CRR-159487 (JA-482). The Forest Service benefits because it preserves as “roadless” those lands best suited for inclusion. And the forests themselves benefit because the Forest Service is able to provide heightened protection to over a million acres of land. The State of Colorado receives the same benefits of preserving forests within its borders without restricting existing permitted uses of the national forests or impairing the economic viability of industries within the State that depend on the national forests.

**II. Appellants, like all affected parties, were repeatedly invited to participate in the decision making process that led to promulgation of the Rule, and the Rule reflects the “impressive” public outreach during the comment period.**

Appellants argue the Forest Service violated NEPA because it failed to personally invite them to participate in the Colorado Roadless Rule decision-making process. Br. at 61. The trial court correctly rejected that argument, finding that “[t]he Service’s impressive efforts to reach out to the public...were sufficient to satisfy its notice obligations to Plaintiffs.” Op. at 44. The Forest Service went

to great lengths to involve the public and the State of Colorado in the decision making process of the Rule. Op. at 43-44 (finding that the decision-making process included five formal public involvement processes, generating 312,000 public comments; creation of a bipartisan task force in Colorado, which held nine public meetings and six deliberative meetings that were open to public and received over 40,000 public comments; numerous notices published in the Federal Register; and three Roadless Area Conservation National Advisory Committee meetings, in which both the Forest Service and the State of Colorado participated); *also Id.* at 43 (finding that Appellant RMW commented on the Rule). The record easily supports the court's finding on this point.

The effects of this "impressive" public outreach are evident in the Colorado Roadless Rule, which provides greater protection for roadless lands as well as the citizens and communities of Colorado. Throughout the six-year decision-making process, the Forest Service revised the proposed Rule to address the comments it received from individuals, industry, interest groups, and local and state government. Op. at 6. Public involvement in the decision-making process led to a number of important elements in the Colorado Roadless Rule. As noted in section I above, the Colorado Roadless Rule provides heightened protection for approximately 1.2 million acres of upper-tier roadless lands and restricts linear construction zones through those upper-tier lands. The Colorado Roadless Rule

carefully balances that heightened protection with benefits to the citizens and communities of Colorado and all those who enjoy the National Forests.

Dismantling the Colorado Roadless Rule, piece by piece, would disrupt that balance and could jeopardize heightened protection for roadless lands in Colorado.

In addition to protecting the forests, the Colorado Roadless Rule protects the health and safety of those who live near the forest and those who depend upon the forests for a clean and dependable water supply. The Colorado Roadless Rule allows access to inventoried roadless areas for the construction, reconstruction, or maintenance of authorized water conveyance structures operated pursuant to state-decreed water rights. CRR-159484 (JA-479). More than two-thirds of the water yield in Colorado originates on national forest lands. *Id.* Water projects are necessary to transport high quality water from high-functioning watersheds to where it is needed in downstream cities, towns, and farms. *Id.* Access for the operation and maintenance of those projects is important to ensure reliable delivery of water and to prevent or mitigate project failures that could cause greater environmental impacts. *Id.* Protecting water projects and decreed water rights is another important element in balancing heightened protection for roadless areas with protection for Colorado's citizens and its communities. Taking apart the Colorado Roadless Rule would disrupt that careful balance and could jeopardize these projects and deprive citizens of the water on which they depend.

The Colorado Roadless Rule also provides additional community protection against wildfires by permitting temporary road construction and removal of combustible materials from roadless areas near at-risk communities. CRR-159485 JA-480). These communities are subject to increased risk of high-intensity wildfires because of the large number of dead trees on roadless lands. *Id.* By allowing the State and local communities to remove these trees, the Rule improves safety for the communities, firefighters, watersheds, and infrastructure. *Id.* Selectively eliminating portions of the Colorado Roadless Rule would disrupt the balance struck by the Forest Service and the State of Colorado and could subject Colorado's communities to increased risks of catastrophic wildfires.

**III. Whether lands excluded from the Colorado Roadless Rule were “empirically roadless” has no bearing on this matter.**

Appellants' brief creates a new class of National Forest lands, which it calls “empirically roadless,” and argues that the Forest Service was prohibited from excluding those lands from the Colorado Roadless Rule. Those arguments fail for two reasons. First, the term “empirically roadless” never appears in any statute, policy, or directive governing the Forest Service's management of National Forest lands and the term has no bearing on the appropriateness of the Colorado Roadless Rule. Second, even if the term is meant to describe lands that have been or could be included in a roadless inventory, the Forest Service acted within its discretion to exclude those lands from the Colorado Roadless Rule.

The phrase “empirically roadless” appears throughout Appellants’ brief. *See e.g.* Br. at 14 (“those same mandates did not permit the Service to categorically exclude all *empirically roadless* parcels from the roadless inventory merely because that result was desired by the ski industry (emphasis added)). Yet Appellants never define the phrase. It is not a term of art and it never appears in the Organic Act,<sup>2</sup> Wilderness Act,<sup>3</sup> 2001 Roadless Rule,<sup>4</sup> 2005 State Petitions Rule,<sup>5</sup> or the Colorado Roadless Rule. Those acts and rules likewise do not limit the Forest Service’s discretion to manage or classify “empirically roadless” lands. For this reason alone, Appellants’ argument should fail.

Notwithstanding the absence of the term in any relevant law or policy, Appellants argue that by excluding empirically roadless ski area lands, the Colorado Roadless Rule “reshaped the agency’s longstanding roadless management policy and practice, and discarded ... the Service’s own established procedures for inventorying and managing roadless areas.” Br. at 4. This argument ignores the history and purpose of roadless lands within the National Forest System.

The Forest Service promulgated the first national Roadless Rule in 2001. Op. at 4-5. The 58.5 million acres subject to the 2001 Roadless Rule were simply

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<sup>2</sup> 16 U.S.C. §§ 471-539.

<sup>3</sup> 16 U.S.C. §§ 1131-36.

<sup>4</sup> 66 Fed. Reg. 3,244 (Jan 12, 2001).

<sup>5</sup> 70 Fed. Reg. 25,654 (May 13, 2005).

“the leftover land that Congress had not designated as wilderness” and some regions that were subsequently designated roadless. *Id.* at 5. The 2001 Roadless Rule refers to those lands as nothing more than “[a]reas identified in a set of inventoried roadless area maps”. CRR-000057 (JA-159), *See also* State Petition Rule CRR-003068. And those areas were not intended to exclude uses or development. Instead, they were intended to “allow a multitude of uses, including motorized uses, grazing, and oil and gas development.” *Op.* at 5. Most importantly, the 2001 Roadless Rule acknowledged that inclusion of lands in the roadless inventory was not permanent, but rather was subject to change. CRR-000057 (JA-159) (describing roadless areas as those “identified in a set of inventoried roadless area maps, contained in Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume 2, dated November 2000, which are held at the National headquarters office of the Forest Service, or any *subsequent update or revision of those maps.*”).

The record is clear that Forest Service never created roadless management policy or practice that was intended to later prohibit it from reconsidering and changing its previous designations. Appellants appear to concede that the Forest Service acted within its discretion by excluding from the Colorado Roadless Rule 459,100 acres that were previously included in the 2001 Roadless Rule, since they have not challenged that decision. The Forest Service similarly acted within its

discretion when it excluded approximately 8,300 acres of ski-area lands. Labelling those lands “empirically roadless” now, in litigation, cannot be the difference between a lawful or unlawful designation. Moreover, if this Court were to overturn the district court’s decision based on a finding that the ski-area lands were “empirically roadless,” then it could create permanent de facto roadless areas across the United States that were never contemplated by law. The Court should reject this invitation to expand the scope of roadless regulation absent any statutory or regulatory basis.

### **CONCLUSION**

For the foregoing reasons, the State of Colorado respectfully requests that the Court affirm the judgment of the district court.

Dated: September 3, 2015.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,766 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

**CERTIFICATE OF SERVICE**

I hereby certify on this 3rd day of September, 2015, a true and correct copy of *Final Brief of Amicus Curiae, The State of Colorado, in support of defendant-appellee and affirmance of the decision of the United States District Court* was filed with the Clerk of the United State Court of Appeals for the D.C. Circuit via the Court’s CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated: September 3, 2015

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