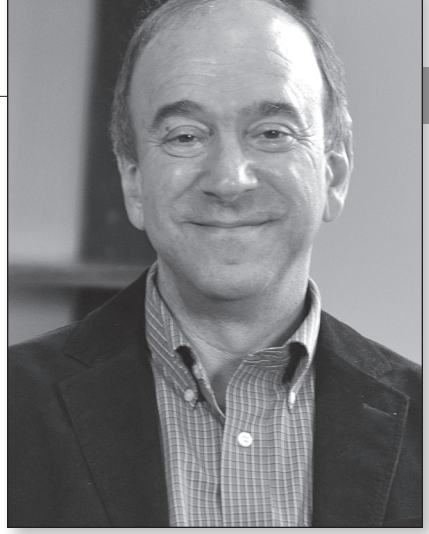

By Richard Lazarus

The Nine Lives of the Roadless Rule

Few areas of law are so regularly whipsawed by presidential elections as environmental law. Almost like clockwork, the final weeks (if not days) of an outgoing administration are marked by efforts to enact so-called "midnight" environmental regulations, which are then greeted by no less aggressive efforts by the incoming administration to find a way to undo the predecessor's handiwork.

Whatever the political party coming in or out of the White House, the pattern is the same. Immediately after the inauguration, the new president issues an executive order to stop, if possible, midnight rules from becoming effective. The relevant client agency, supported by the Justice Department, next declines to defend the rule's legality in litigation. Finally, a stakeholder group supportive of the rule subsequently steps in to defend the rule in the federal government's stead.

A recent Ninth Circuit en banc decision, *Organized Village of Kake v. U.S. Department of Agriculture,* underscores the prolonged chaos that can then result in litigation. The issue in *Village of Kake* — whether the Tongass National Forest should be subject to or exempt from the Forest Service's Roadless Rule — has been debated for almost fifteen years by three different presidents, five different federal district courts, and three different federal circuits. Two presidents have declined to defend the legality of their predecessors' decisions.

What's all the fuss about? On January 5, 2001, two weeks before the inauguration of George W. Bush, the Clinton administration's Department of Agriculture (parent of the Forest Service) promulgated a rule limiting construction and timber harvesting in millions of acres of national forests in order to protect the ecological values of those areas. As part of that rule, the department declined with minor exceptions to exempt the Tongass National Forest in Alaska, notwithstanding that state's claim that the adverse socioeconomic impacts of the rule warranted such an exemption.

Federal court litigation has been seemingly nonstop ever since. First, in 2001 a federal district court in Idaho enjoined the Clinton rule's implementation, which the Bush administration declined to defend on appeal, but then the Ninth Circuit in 2002 reversed, reinstating the rule. A few months later, however, a federal district court in Wyoming struck the Roadless Rule down yet again, but that ruling was subsequently mooted in part once the Department of Agriculture exempted in 2003 the Tongass from the Roadless Rule and then mooted completely in 2005 when Agriculture replaced the Roadless Rule with a new State Petitions Rule that states, including Alaska, liked.

Three different presidents, five different district courts, and three different circuit courts

Done in 2005, right? Not even close. Environmentalists quickly challenged the legality of the Bush administration's State Petitions Rule, which a federal district court in California ruled in 2006 was invalid, reinstating the 2001 Roadless Rule; the Ninth Circuit in 2009 affirmed. The Wyoming federal district court in 2008 responded to the California federal trial court's ruling reviving the Roadless Rule by striking down that rule for a second time. But this time the Tenth Circuit on appeal reached the merits and reversed in 2011. The Roadless Rule was back.

Done then in 2011? Nope! Now that the 2001 Roadless Rule had been effectively revived, the environmentalists and some Alaskan communities next challenged in *Village of Kake* the Bush administration's 2005 exemption for the Tongass from that rule. The Obama administration declined to defend the Bush exemption, but the state of Alaska championed the defense. An Alaskan federal district court struck the exemption down in 2011 and, although the Ninth Circuit initially reversed in favor of the state, the Ninth Circuit ruled en banc this past July that the Tongass exemption was unlawful. Six judges joined the majority opinion, five dissented on the merits, although one of the dissenters concurred in the judgment on the ground that Alaska had suffered no monetary injury and therefore lacked standing.

Alaska will likely file a petition for Supreme Court review this fall, but further review is highly unlikely. The actual basis of the Ninth Circuit ruling — that the Bush administration failed adequately to explain its reasons for the exemption — is not airtight. But that ruling is far too fact-bound to present an important legal issue warranting High Court review. The concurrence based on lack of standing will also give the more conservative justices pause before voting for review. Ironically, moreover, what in fact makes the case so extraordinary — the absurd length of this litigation — is also the very reason why the justices are likely to decide to put the case to bed.

But keep your scorecards handy. Because the D.C. Circuit ruled last December that Alaska was not time-barred from challenging the 2001 Roadless Rule's legality, even cert denied won't supply the last nail to this litigation's coffin.

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