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Blazing a Path to Wilderness: A Case Study of Impact Litigation Through the Lens of Legislative History

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BLAZING A PATH TO WILDERNESS:
A CASE STUDY OF IMPACT LITIGATION THROUGH THE LENS OF LEGISLATIVE HISTORY

Neil Kagan*

Litigation can be a catalyst for legislation. Legislative history can reveal just how influential litigation is. The legislative history of the laws to designate wilderness in the 1980s provides an object lesson. It demonstrates that litigation both pushed Congress to act and shaped the legislation Congress enacted. This is especially true of the watershed year of 1984. That year, Congress enacted more wilderness laws and added more wilderness areas to the National Wilderness Preservation System in more states than in any other year. The legislative history of the 1984 wilderness laws embedded in bills, hearings, committee meetings, committee reports, and floor proceedings, in conjunction with the legislative history of the various wilderness bills and laws considered, rejected, and passed from 1979 through 1983, reveal the significant impact a particular lawsuit had on Congress in 1984 and beyond. Specifically, a lawsuit grounded in the National Environmental Policy Act, taking advantage of a powerful precedent, prompted the preservation of the wilderness character of millions of acres of public land. To be precise: The lawsuit impelled Congress to designate more than 9.171 million acres in twenty-three states as wilderness from 1984 through 1989. Of that number, more than 7.335 million acres are managed by the U.S. Department of Agriculture through the Forest Service; more than 1.835 million acres are managed by the U.S. Department of the Interior through the Bureau of Land Management and the National Park Service. This article uses legislative history to demonstrate how a strategic lawsuit sparked congressional action. It traces the litigation engendered by the Forest Service’s decision regarding roadless areas in national forests and the evolution of Congress’s response to that litigation, from the first lawsuit filed in 1979 to the last filed in 1983. In the process, it shows how legislative history can illuminate the underlying causes and policy choices that lead to legislation.

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INTRODUCTION

One year more than any other witnessed an explosion of laws preserving wilderness in the United States. In most years, Congress enacts one or two laws designating wilderness; that year, Congress enacted twenty-one. In most years, Congress adds ten or fewer wilderness areas to the National Wilderness Preservation System; that year, Congress added 175. In most years, Congress adds 1 million or fewer acres to the system; that year, Congress added more than 8.2 million.

The year was 1984. What made it so extraordinary was something that began towards the end of 1983. A tiny nonprofit group, bucking the national conservation establishment, initiated a daring strategy. The Oregon Natural Resources Council (ONRC) launched a federal lawsuit challenging the U.S. Forest Service’s allocation of 2.24 million acres in the national forests in Oregon to non-wilderness, even though those acres were suitable for wilderness designation.

ONRC’s was not the first federal lawsuit challenging the Forest Service’s allocation of roadless areas to non-wilderness following the agency’s second review and evaluation of such areas, called RARE II. RARE II evaluated sixty-two million acres of national forest lands nationwide that could meet the statutory definition of wilderness, leading the Forest Service to recommend that Congress designate approximately fifteen million acres as wilderness, while the agency allocated approximately thirty-six million acres to non-wilderness and approximately eleven million acres to further study.

Three earlier federal RARE II lawsuits had successfully challenged the Forest Service’s allocations of roadless areas to non-wilderness in national forests in California, Oregon, and Washington. The courts held that the environmental impact statement (EIS) the Forest Service prepared to inform its allocations failed to comply with the requirements of the National Environmental Policy Act (NEPA). Congress took notice of the California case after the filing of the lawsuit in 1979, after the district court issued its decision in 1980, and after the court of appeals affirmed that decision in 1982. Congress responded by enacting a handful of wilderness laws in 1980, 1982, and 1983.


2. In 1980, the year with the next highest number, Congress added seventy wilderness areas.


Congress may have been aware when federal courts in Oregon and Washington, relying on the California decision, stopped the development of one roadless area in Oregon and four roadless areas in Washington; together, these areas comprised less than 200,000 acres. But these decisions, issued in July and October 1983, respectively, did not generate an expeditious legislative response.

ONRC’s Oregon RARE II lawsuit did. A month after the filing of the statewide lawsuit, implicitly conceding its validity, the Forest Service effectively surrendered without a fight. It unilaterally stopped the sale of timber and, incidentally, logging, road building, and other activities destructive of wilderness in more than two million acres allocated to non-wilderness in Oregon’s national forests. The lawsuit made real what had formerly been only the specter of statewide stoppages of development in roadless areas released from wilderness consideration. And it soon induced an Oregon senator holding a key position to wield his considerable influence to force a compromise on a hotly contested issue—an issue that until then had bottled up most wilderness legislation since the Forest Service completed RARE II in 1979.

In an earlier article showing that the Oregon RARE II lawsuit had played this crucial role in the enactment of the 1984 wilderness laws, I barely scratched the surface of their legislative history. I decided to mine that history to discover whether it contains further proof of the game-changing impact the lawsuit had on Congress. I struck gold.

The legislative history confirms that the Oregon RARE II lawsuit precipitated legislation ensuring that millions of acres of public land remain wild. Portending copycat lawsuits likely to freeze activity in the national forests of other states, the Oregon RARE II lawsuit generated tremendous pressure to preclude judicial review by legislatively releasing roadless areas for development. This pressure broke the impasse over the fate of roadless areas that had blocked most wilderness legislation. It motivated Congress to reach a compromise balancing the designation of more roadless areas as wilderness against the provisional release of the rest.

The compromise opened the way to eighteen wilderness laws in 1984 and five more from 1985 through 1989. These laws designated 9.171 million acres in twenty-three states as wilderness, including 7.335 million acres in national forests in twenty-three of the thirty-eight states surveyed in RARE II. This is nearly twice the acreage the Forest Service had recommended for wilderness designation in those states.

In this article, I will use legislative history and other sources to demonstrate how ONRC’s strategic use of litigation sparked congressional action. I will trace the litigation RARE II engendered and the evolution of Congress’s response to it, from the first lawsuit filed in 1979 to the last filed in 1983. In the process, I will show how

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DISCUSSION

In the Wilderness Act of 1964, Congress described a 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."\(^6\) In 1960, prize-winning author and conservationist Wallace Stegner coined the expression the "wilderness idea" in a letter later presented in support of the Wilderness Act.\(^7\) He acknowledged the recreational and aesthetic value of wilderness, as well its function as a genetic reserve.\(^8\) But his main purpose was "to speak for the wilderness idea as something that has helped form our character and that has certainly shaped our history as a people."\(^9\) He wrote, "We simply need that wild country available to us, even if we never do more than drive to its edge and look in. For it can be a means of reassuring ourselves of our sanity as creatures, a part of the geography of hope."\(^10\)

I. WILDERNESS LITIGATION AND LEGISLATION, 1979-1983

A. 1979

In 1977, the Forest Service undertook a review and evaluation of 62 million acres of roadless, undeveloped federal forest lands "to select appropriate roadless areas to help round out the National Forest System's share of a quality National Wilderness Preservation System and, at the same time, maintain opportunities to get the fullest possible environmentally sound use from other multiple use resources and values."\(^11\) As the second of two such evaluations, the project was called "RARE II."

On January 4, 1979, the Forest Service announced the outcome of RARE II. It recommended designating 15,088,838 acres in 624 roadless areas in 38 states and Puerto Rico as wilderness.\(^12\) It also allocated 36,151,558 acres in 1,981 roadless areas to non-wilderness, and 10,796,508 acres in 314 roadless areas for further planning.\(^13\) Wilderness advocates in Washington, Oregon, and California were

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8. Id.
9. Id.
10. Id.
12. Id. at iii-iv.
13. Id. at iv.
incensed that the Forest Service allocated most of the roadless areas that qualified as wilderness to non-wilderness.14 Huey Johnson, the head of the California Resources Agency, considered the recommendations for wilderness designation inadequate.15

The State of California soon commenced litigation against the Forest Service. On July 25, 1979, in California v. Bergland, the State of California and others sued the Forest Service in federal district court.16 The plaintiffs claimed that the Forest Service based its decision to allocate forty-seven roadless areas in national forests in California to non-wilderness on an environmental impact statement (EIS) that failed to comply with the National Environmental Policy Act (NEPA).17 NEPA requires a federal agency to prepare an EIS when it proposes major federal action that may significantly impact the quality of the environment.18

The Sierra Club and The Wilderness Society "had urged . . . California not to sue because they feared a legislative 'backlash' which might result in the Forest Service being forever forbidden to study released land for wilderness designation [in the future] (permanent release) or forbidden to study it for several decades (long-term release)."19 The issue of "release" thus concerned whether roadless areas not designated as wilderness could be considered for wilderness designation later and, relatedly, whether they could be managed as non-wilderness in the interim. Also known as "hard release," permanent release and long-term release not only prohibited or postponed further reviews of wilderness potential. It made roadless areas available for timber harvesting, road building, and other development activities.20 Such development would destroy the wilderness qualities of these areas, eliminating their suitability for wilderness designation in the future.

The fears of a legislative backlash to litigation were soon justified. Within months of the filing of Bergland, Senator Mark Hatfield of Oregon introduced a bill with hard release language. Senate Bill 2031, titled the "Oregon Wilderness Act of 1979," would have established 451,300 acres of wilderness in national forests in Oregon; provided that the remaining RARE II roadless areas would be permanently available for uses other than wilderness; prohibited the further study of these lands...

15. Id. at 59.
16. The lawsuit named Secretary of Agriculture Bob Bergland as the lead defendant because the Forest Service is an agency within the Department of Agriculture.
for wilderness suitability; and precluded judicial review of the legal sufficiency of the RARE II EIS with respect to national forests in Oregon.21

Hatfield rammed the bill through the Senate in a week. On November 20, 1979, the very day he introduced the bill, the Senate Committee on Energy and Natural Resources issued a report recommending the passage of the bill.22 Hatfield was the committee’s ranking minority member.23 The committee report notes that, prior to RARE II, "lawsuits have helped perpetuate ‘defacto’ [sic] wilderness status’ for non-wilderness areas, causing the committee . . . concern[] about the availability of [areas allocated to non-wilderness by RARE II] . . . for multiple use management for uses other than wilderness.”24 Then, mentioning the Bergland lawsuit by name, the report observes that the same kind of lawsuit could be filed in Oregon.25 "Therefore, the committee bill includes language preventing the courts from overturning land allocation decisions in the State of Oregon based on the alleged inadequacy of the final RARE II EIS.”26

The committee report further states, “The principal objective of the bill's language is to lessen the uncertainty over the amount and location of lands available for nonwilderness uses.”27 "The committee believes this added predictability is important to allow those who depend on the national forests to better estimate the availability of timber supply and other resources in the future.”28 Six days after Hatfield introduced the bill, he reiterated this belief on the floor of the Senate. He said, "What my proposed release language does . . . is to lessen uncertainty over [sic] amount of land available for nonwilderness multiple use. As a result, future timber supply can be estimated."29 On the same day, November 26, 1979, the Senate passed S. 2031.30

The Speaker referred the bill to the House Committees on Interior and Insular Affairs and Agriculture on November 27, 1979, and it died there.31 One reason

22. Id. at 1, reprinted in 13247 U.S. Cong. Serial Set, at 1330.
25. Id.
26. Id.
27. Id.
28. Id.
30. Id. at 33,441.
was that Oregon Congressmen Jim Weaver and Al Ullman could not agree on the amount of wilderness to designate. Weaver wanted to designate more acres as wilderness than Ullman did. Perhaps as important as their disagreement was the bill's hard release language, which the Sierra Club and The Wilderness Society found unacceptable.

B. 1980

On January 8, 1980, U.S. District Judge Lawrence Karlton issued his decision in *Bergland*. Based on his examination of the RARE II EIS, he held that the Forest Service violated NEPA because, among other things, the agency "either never seriously considered the impact of its decision on the wilderness qualities of the RARE II [roadless] areas, or . . . simply failed to disclose the data, assumptions, and conclusions [it] employed . . . in such a consideration." In addition, the judge held that the RARE II EIS failed to describe the wilderness values of the roadless areas; failed to describe the effect of unspecified development on the roadless areas; and failed to consider a broad range of alternative actions, instead skewing all the alternatives it considered towards development, not wilderness. Finally, the judge held that the Forest Service "undercut the possibility of serious public participation in its decision making process."

Legislation to designate wilderness in national forests in six states (Alaska, Colorado, South Dakota, Missouri, Louisiana, and South Carolina) was pending in Congress when Judge Karlton issued his decision. The Senate Committee on Energy and Natural Resources noted the *Bergland* RARE II lawsuit specifically in its report on the House bill designating wilderness in Colorado and South Dakota, observing "there has been considerable concern that similar suits might be filed in other states which would seriously disrupt the management of the national forest system."

32. *Roth II*, supra note 19, at 27.
35. *Id.*
36. *Id.*
The committee had good reason for concern. Judge Karlton had granted California and its co-plaintiffs’ motions for summary judgment. Summary judgment is only appropriate where material facts are undisputed and "the movant is entitled to judgment as a matter of law." In other words, the judge determined that the Forest Service violated NEPA based on the flaws evident from the RARE II EIS itself. These flaws led him to find "that the RARE II non-wilderness designations are legally insufficient to support any administrative action that changes the wilderness characteristics" of the roadless areas in California. Because the RARE II EIS was nationwide in scope, the same flaws rendered illegal the non-wilderness allocations in every state. Therefore, a plaintiff who brought a RARE II lawsuit would likely be able to win summary judgment by establishing that the allocation of a roadless area to non-wilderness relied on the RARE II EIS, citing Bergland as precedent.

To forestall such a lawsuit, the committee recommended establishing the sufficiency of the RARE II EIS's compliance with NEPA. "Sufficiency" was an aspect of release. Specifically, the committee proposed amending the bill to provide that the RARE II EIS "is not subject to judicial review with respect to national forest system lands in Colorado." The committee stated it "considers this language to be a general model for dealing with the . . . 'sufficiency' issue." The committee also established what it considered a model to deal with release per se. Instead of hard release, the committee proposed a form of "soft release." This proposal derived from negotiations that proceeded under the auspices of Congressmen John Seiberling of Ohio, Chairman of the House Public Lands Subcommittee, and two Congressmen from California, Harold Johnson and Phillip Burton. Johnson and Burton were sponsoring California wilderness bills.

These Congressmen had convened meetings attended by representatives of the forest industry, environmental groups, and the Forest Service. The attendees compromised "on statutory language which would ensure sufficiency (protection against RARE II lawsuits) and which would release land examined but not designated

40. FED. R. CIV. P. 56(a).
42. Id. at 502.
43. GORTE & BALDWIN, supra note 20, at CRS-5.
45. Id. at 23, reprinted in 13329 U.S. Cong. Serial Set, at 32.
46. Id. at 5 (§ 5(b)(2)), reprinted in 13329 U.S. Cong. Serial Set, at 14.
47. ROTH II, supra note 19, at 3.
48. Id.
49. Id.
as wilderness for one cycle (10 to 15 years) of the planning process required by the National Forest Management Act of 1976. This was labeled "California release." This was labeled "California release."Because, in accordance with the compromise, the committee recommended amending the Colorado wilderness bill to provide that the Forest Service "shall not be required to review the wilderness option until it revises the initial forest plans [mandated by the National Forest Management Act] and in no case prior to the date established by law for completion of the initial planning cycle, September 30, 1985." "Since the plans must be revised within fifteen years, this was expected to allow 10 to 15 years of management for such [released] lands without further wilderness review." Until the Forest Service revised the plans, "[roadless] areas not designated as wilderness, wilderness study, or remaining in further planning need not be managed for the purpose of protecting their suitability for wilderness designation pending revision of the initial plans." In other words, these areas could be logged, roaded, and otherwise developed.

The Conference Committee on the bill agreed to the Senate committee's release/sufficiency formula, with the caveat that its application be limited to national forest lands in Colorado. The House and Senate then agreed to the conference report, and the President signed the bill, designating wilderness in Colorado, Louisiana, Missouri, South Carolina, and South Dakota on December 22, 1980. As enacted, in addition to establishing sufficiency, the law allowed the Forest Service in future planning to consider whether lands released to non-wilderness might be designated as wilderness. Yet, it did not expressly require such consideration. The actual language in this regard read:

[RARE II] shall be deemed for the purposes of the initial land management plans required for . . . lands [reviewed in RARE II] by the Forest and Rangeland Renewable Resources Planning Act of 1974 as amended by the National Forest Management Act of 1976 to be an adequate consideration of the suitability of such lands for inclusion in the National Wilderness Preservation

50. Id.
51. Id. at 4. The House's 1980 California wilderness bill did not survive in the Senate. Id.
52. Id.
54. GORTE & BALDWIN, supra note 20, at CRS-6.
58. Id. at § 107(b), 94 Stat. 3270-71.
59. Id.
System and the Department of Agriculture shall not be required to review the wilderness option prior to the revision of the initial plans and in no case prior to the date established by law for completion of the initial planning cycle.60

Congress included the same language in wilderness bills enacted as the Alaska National Interest Lands Conservation Act (ANILCA)61 and the New Mexico Wilderness Act of 1980.62

C. 1982

In 1980, the Forest Service had appealed Judge Karlton’s decision in Bergland to the U.S. Court of Appeals for the Ninth Circuit.63 On October 22, 1982, in California v. Block, the Ninth Circuit upheld the district court’s decision;64 the court of appeals enjoined activities that would impair the wilderness character of forty-seven roadless areas in California until the Forest Service prepared an EIS that complied with NEPA.65

Across the country, RARE II resulted in the allocation of most of the roadless areas to non-wilderness. For instance, of the 2,976,465 acres of roadless areas in Oregon, the Forest Service allocated 2,208,444 acres to non-wilderness, slated 399,901 acres for further study, and recommended that just 368,120 acres be designated as wilderness.66 Of the 2,520,068 acres of roadless areas in Washington, the Forest Service allocated 2,032,169 acres to non-wilderness, slated 219,012 acres for further study, and recommended that 268,887 acres be designated as wilderness.67

The conservation community had been intensely disappointed with these allocations when the Forest Service announced them in 1979.68 As discussed earlier, Congress had a legitimate concern that this disappointment might fuel a rash of litigation in Bergland’s mold.69 The Ninth Circuit’s affirmance exacerbated this

60. Id. at § 107(b)(2), 94 Stat. 3271.
63. California v. Block, 690 F.2d 753 (9th Cir. 1982).
64. Id.
65. Id.
66. RARE II EIS, supra note 11, at App. O-1.
67. Id. at App. S-1.
69. See supra text accompanying notes 39–42.
concern because the appellate court's ruling bound all the states in the circuit and served as persuasive authority in those outside the circuit.

Activists in Oregon had spoken of challenging the allocations of roadless areas to non-wilderness in court immediately upon the issuance of RARE II in 1979. However, despite the roadmap the California RARE II lawsuit provided, no one from the conservation community in Oregon or elsewhere filed a RARE II lawsuit in 1980. Or 1981. Or 1982.

The reason is that the Sierra Club and The Wilderness Society managed to dissuade everyone from filing a RARE II lawsuit. They feared such a lawsuit might unleash a political backlash against wilderness or generate a legislative drive toward hard release. The Sierra Club was so fearful of the fallout that might follow a RARE II lawsuit that it chose not to rely on Bergland when the Club filed a federal lawsuit in 1982 to stop the construction of the Bald Mountain Road and logging in the 113,000-acre North Kalmiopsis roadless area in the Siskiyou National Forest in Oregon. The Forest Service had allocated the North Kalmiopsis to non-wilderness based on the RARE II EIS invalidated in Bergland. The Sierra Club lost the case to stop the Bald Mountain Road.

Although no one filed a RARE II lawsuit through 1982, the potential for one still existed. Even so, Congress enacted just one wilderness bill in 1982: a law to establish a single wilderness area of 12,953 acres in the Hoosier National Forest in Indiana. The law included the same form of soft release and sufficiency language found in the Colorado, Alaska, and New Mexico wilderness laws of 1980. Senator James McClure of Idaho, who chaired the Senate Committee on Energy and Natural Resources, did not oppose the Indiana bill, even though he favored hard release "because he considered . . . [it] to be in a different category from the big western


71. MARSH, supra note 68, at 127.

72. Id. at 127-28.


77. Id. at § 4, 96 Stat. 1942-43.
bills. California, Oregon, and Washington produced most of the timber in the West. The obstacle to more wilderness laws was, in fact, the issue of release. Congressman Seiberling had believed the compromise reflected in the 1980 wilderness laws would hold. Yet, it did not. When Republicans took control of the Senate in 1981, the timber industry decided to push more aggressively for permanent [hard] release.

The stalemate continued. The timber industry and the advocates for wilderness pushed their own bills, but for the most part, neither side could overcome the opposition of the other.

D. 1983

Congress enacted two wilderness bills in January 1983 containing Colorado release language. One designated the 6,888-acre Paddy Creek Wilderness in the Mark Twain National Forest in Missouri. The other designated three wilderness areas totaling 47,800 acres in the Monongahela National Forest in West Virginia.

On February 1, 1983, Oregon Congressman Weaver introduced H.R. 1149 to designate certain national forest lands and other lands in Oregon as wilderness. As amended by the House Committee on Interior and Insular Affairs, the proposed Oregon Wilderness Act of 1983 would have designated 1.128 million acres as wilderness, three times more than the Forest Service had recommended in RARE II. The bill provided for Colorado release and precluded judicial review of the RARE II EIS. It did not specify that the Forest Service had to consider released lands for wilderness designation when the time came to revise the forest plans.

In appealing to fellow Congresspersons for support, Weaver and his cosponsors wrote that passage of the bill was “essential” to avert the “real and
imminent threat” of a RARE II lawsuit, prophesying that “[s]uch a lawsuit would lock up the entire three million acres of Oregon roadless lands evaluated by the Forest Service during RARE II.”90 The House passed the bill on March 21, 1983.91 The roadless areas designated for wilderness by the bill were temporarily protected from development while Congress considered whether to designate them as wilderness.92

Senator Hatfield held three hearings on Weaver’s bill in 1983: (1) in Bend, Oregon; (2) in Salem, Oregon; and (3) in Washington, D.C.93 He held these hearings to help him develop a Senate bill.94 He chided both wilderness advocates and opponents for their hardline positions.95 He believed "that the recommendation of the Forest Service and the administration fall far short of what is necessary for a diverse and balanced wilderness system in Oregon."96

James Monteith, the Executive Director of the Oregon Natural Resources Council (ONRC), testified at Hatfield’s hearing in Bend.97 ONRC was then a small group operating on a shoestring budget with a handful of employees.98 Monteith lamented that "the Forest Service has relentlessly roaded and cut [the last remaining forest wildlands since the completion of RARE II] . . . [r]egardless of their value as critical fish and wildlife habitat, key watersheds, back-country recreation areas, or


92. ROTH II, supra note 19, at 34.


95. Part I Hearing on H.R. 1149, supra note 93, at 535-36.

96. Id. at 536.


98. ROTH II, supra note 19, at 25.
rare ecosystems."99 He said "we are prepared to sue the Forest Service again,"100
until they obey the law and provide these areas an adequate and fair wilderness review. This attempt to legislate by chainsaw, thereby precluding the options of Congress, cannot be tolerated."101

By the end of 1983, ONRC had exhausted its patience with the continuing impasse over release. 'In Oregon, timber harvesting was occurring so fast that to these activists the difference between ten years or thirty years or forever in the competing release bills was meaningless. . . . The time was now or never for these activists, and they did not want to give up their local forests for the national cause[.]"102

One roadless area ONRC refused to give up was Oregon’s North Kalmiopsis, which was in imminent peril.103 In 1982, when it was known as the Oregon Wilderness Coalition, ONRC had joined the unsuccessful federal lawsuit the Sierra Club filed to stop the construction of the Bald Mountain Road, which the Forest Service was building to access the roadless area’s virgin forest for timber harvesting. Disdaining the Sierra Club’s timidity, ONRC organized its own federal lawsuit in 1983, Earth First v. Block. ONRC and its co-plaintiffs authorized me to argue that the RARE II EIS allocating the North Kalmiopsis to non-wilderness was inadequate. Accordingly, I expressly relied on the Ninth Circuit’s reasoning and decision in California v. Block in trying the case.104

On July 15, 1983, U.S. District Judge James Redden ruled in ONRC’s favor, holding that the Forest Service violated NEPA.105 He found the local EIS prepared by the Siskiyou National Forest inadequate because it lacked the site-specific analysis required to designate a roadless area as non-wilderness, relying instead upon the invalid RARE II EIS.106 Accordingly, the judge enjoined road construction, logging, and other non-wilderness uses until the Forest Service prepared a valid EIS.107 His

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100. Monteith was presumably alluding to the Sierra Club lawsuit in 1982 and the Earth First v. Block lawsuit earlier in 1983. See supra notes 73-75, infra notes 103-08. Both lawsuits concerned the North Kalmiopsis roadless area in the Siskiyou National Forest in Oregon. Id. Whether Hatfield knew what Monteith was talking about is not documented. But given the senator’s concern about the legal vulnerability of RARE II and the potential impact of its invalidation on the timber industry, he seems unlikely not to have been monitoring the roadless area litigation in Oregon.


102. MARSH, supra note 68, at 135.

103. For a detailed description of the North Kalmiopsis roadless area and the history, development, filing, and prosecution of ONRC’s lawsuit to stop its development, see Kagan, supra note 5, at 327-39.


105. Id. at 419.

106. Id. at 419-20.

107. Id. at 417.
preliminary injunction prohibited "any . . . actions inconsistent with the wilderness character of the North Kalmiopsis unless or until the requirements of California v. Block and NEPA have been met." 108

Less than three months later, on October 6, 1983, in Kettle Range Conservation Group v. Block, U.S. District Judge Justin Quackenbush enjoined any action that would change the wilderness characteristics of four roadless areas in the Colville National Forest in Washington. 109 The four roadless areas that were the subject of the lawsuit together totaled approximately 85,000 acres. 110

If Congress was aware of these two narrow RARE II lawsuits in Oregon and Washington, none of its members reacted to them legislatively with any urgency. When Senator Hatfield failed to introduce an Oregon wilderness bill before the end of the 1983 session of Congress, Congressman Weaver’s wilderness bill appeared dead, or at least dormant. 111 Like the words of many prophets, Weaver’s warning of an impending apocalyptic RARE II lawsuit had fallen on deaf ears; the mere threat of such a lawsuit was not enough to spur the Senate to pass the bill. Because the viability of the bill seemed to be at an end, the agreement that had protected the roadless areas slated for designation while the bill was pending expired. 112 Now these areas were vulnerable to activities that would destroy their wilderness character.

So were all but one of the roadless areas in national forests in Oregon allocated to non-wilderness. In Earth First, ONRC succeeded in protecting the North Kalmiopsis, but the Department of Agriculture’s policy was to allow timber sales and other activities in other roadless areas to proceed absent litigation, despite the Ninth Circuit’s California v. Block decision. 113 On September 9, 1983, the Assistant Secretary

108. Id. at 422. On December 15, 1983, Judge Redden made the preliminary injunction permanent. Judge Halts Road Work on Wilderness Edge, PORTLAND OREGONIAN, Dec. 16, 1983, at Cl. The judge confirmed his earlier ruling, saying that the RARE II EIS was “legally inadequate” to support the Forest Service’s decision to allocate the North Kalmiopsis roadless area to non-wilderness. Id.


111. ROTH II, supra note 19, at 34.

112. Id.

of Agriculture for Natural Resources and Environment directed the Chief of the Forest Service to "put those who wish to halt development activities in the position of actually having taken the necessary steps to do."\textsuperscript{114}

ONRC concluded it had no choice but to take those steps. It decided to replicate the strategy that had worked so well for it in \textit{Earth First}, but on a grand scale. Specifically, it would seek a statewide injunction on the ground that the Forest Service's release of all the roadless areas in Oregon's national forests suffered from the flaws identified in \textit{California v. Block}. Of course, ONRC first had to acquire a resource indispensable to the execution of its plan, a resource that was scarce in those days: a private lawyer who would undertake an environmental case, a case targeting the raw material fueling the timber industry, an industry central to the Oregon economy. Pro bono.\textsuperscript{115}

In October, three months after Monteith delivered ONRC's threat to litigate at the hearing Senator Hatfield held in Bend, ONRC's Associate Director Andy Kerr approached me.\textsuperscript{116} He asked me to take the statewide lawsuit the group had in mind. Lucky to be able to accept,\textsuperscript{117} I immediately got to work. Two months later, on December 13, 1983, I filed a 40-page complaint against the Forest Service in federal district court, \textit{Oregon Natural Resources Council v. Block} (ONRC v. Block or the Oregon RARE II lawsuit).\textsuperscript{118}

I designed the lawsuit to win an injunction preserving the wilderness character of the roadless areas allocated to non-wilderness throughout the national forests in Oregon. The complaint alleged that the RARE II EIS failed to comply with NEPA in allocating 2.24 million acres of roadless areas in eleven of the twelve national forests in Oregon to non-wilderness.\textsuperscript{119} Among other things, the complaint sought a judgment enjoining the Forest Service "from taking or permitting any action . . . changing the wilderness character of the Oregon RARE II roadless areas allocated to non-wilderness, until an adequate environmental impact statement or statements are prepared, circulated, and considered, pursuant to NEPA, specifically addressing the areas."\textsuperscript{120} ONRC hoped such an injunction would motivate the timber industry to pressure Congress to designate more wilderness than the Forest Service had

\begin{itemize}
  \item at 40, Exhibit 8 at 1 (Memorandum from John B. Crowell, Jr., Assistant Sec’y for Nat. Res. & Env’t, Dep’t of Agric., to R. Max Peterson, Chief, Forest Serv. (Sept. 9, 1983)).
  \item Id. at 40, Exhibit 8 at 1.
  \item "Competent, and \textit{pro bono}, legal counsel was hard to find back then." Email from Andy Kerr to Neil Kagan (Apr. 10, 2017) (on file with author).
  \item "[Professor John] Bonine [recommended] you to us. You’d work \textit{pro bono}, even though you were living in the logging capital of the world at the time [Roseburg, Oregon]. . . . Though history prove[d] our choice right, we were desperate. If you had said no, no Plan B was in mind." \textit{Id}.
  \item See Kagan, supra note 5, at 349.
  \item Id. at 14.
\end{itemize}
recommended as a way to “unlock” the rest for timber harvesting. Ever since the issuance of the injunction in Bergland, at least some in the timber industry had sought to pressure Congress to make such a bargain.

The Oregon RARE II lawsuit was front-page news in Oregon cities: Salem, Eugene, and Grants Pass, for example. The Eugene Register-Guard’s leading editorial on December 18, 1983, said the lawsuit would compel Senator Hatfield to resolve the Oregon RARE II controversy legislatively once the new session of Congress began in January. It noted that Senator Hatfield had allowed the controversy “to languish since March,” when Congressman Weaver introduced H.R. 1149, and that he failed to introduce a competing bill in the Senate. He had taken no action after the courts decided the Earth First and Kettle Range lawsuits in July and October 1983, respectively. In fact, nothing had been heard from him since the hearing he held on H.R. 1149 on October 20, 1983. Now, said the editorial, “Hatfield must . . . initiate legislation in the Senate. The ONRC suit has virtually assured that he’ll be hustling to do so, mindful that he otherwise could be held culpable by Oregon’s lumbermen, wilderness advocates, or both.”

II. WILDERNESS LITIGATION AND LEGISLATION, 1984-1989

A. 1984

Nine months before I filed the Oregon RARE II lawsuit, the Forest Service acknowledged internally that it would probably lose such a lawsuit. In a March 9, 1983, letter, the Chief of the Forest Service informed its Regional Foresters that California v. Block “will be controlling precedent in States within . . . the Ninth Circuit . . . in any future lawsuits over the sufficiency of the RARE II process. The case would also likely be heavily relied upon in any litigation in the rest of the country. Thus, the government is likely to lose any future court challenges to decisions

121. ROTH II, supra note 19, at 35; see MARSH, supra note 68, at 137.
122. DOUG SCOTT, THE ENDURING WILDERNESS 82-83 (2004); see also MARSH, supra note 68, at 133-34.
124. RARE II Pressures Mount, EUGENE REG.-GUARD, Dec. 18, 1983, at 22A.
126. RARE II Pressures Mount, EUGENE REG.-GUARD, Dec. 18, 1983, at 22A.
regarding roadless areas for which reliance is placed on the RARE II EIS for NEPA compliance.”

Plainly, the Forest Service had seen the writing on the wall. That probably explains its next move. A bit more than a month after I filed the Oregon RARE II lawsuit, on January 25, 1984, Jeff Sirmon, the Regional Forester of the Pacific Northwest Region, “said . . . that all national forests in Oregon except the . . . Willamette National Forest" have stopped selling timber from the roadless areas studied in . . . RARE II.” The halt . . . [came] in response to a lawsuit filed last month in federal court . . . by the Oregon Natural Resources Council. "Unless this lawsuit gets resolved, we won’t be selling any of this timber," [Sirmon] said.

Thus, before the court had heard the merits, before I was even ready to move for summary judgment, the Forest Service reacted to the lawsuit by suspending the sale of timber in millions of acres in Oregon’s national forests. This stopped logging and related activities in the roadless areas until the court issued a ruling — at the earliest, longer should the court rule in ONRC’s favor. A ruling might be many, many months away.

Re-enter Senator Hatfield.

As a member of Oregon’s congressional delegation, Hatfield had been informed of the Oregon RARE II lawsuit a day or two before its filing. In 1979, the mere potential for the filing of a RARE II lawsuit was enough for him to jam an Oregon wilderness bill through the Senate in only one week. In December 1983, a RARE II lawsuit had actually been filed. Even worse for the timber industry from Hatfield’s perspective, the Forest Service quickly issued a moratorium on development activities in response to the lawsuit.

Hatfield believed the lawsuit would likely succeed. He considered the situation it had created urgent. Sensitive as always to the health of Oregon’s timber-based economy, he wanted to pass a bill that would resolve the lawsuit. He deemed a bill necessary both to lift the moratorium on the logging of 700 million board feet


129. Suit Halts Harvesting of Timber, EUGENE REG.-GUARD, Jan. 26, 1984, at 3B.

130. Id.

131. Id.

132. ROTH II, supra note 19, at 35.


of timber that had already been sold and to eliminate the likelihood that another 1.7 billion board feet would not be sold and harvested as planned.\textsuperscript{136}

Hatfield did not want to lose any time. In February, he reversed his former position in favor of hard release. He made known his intention to enact the House bill, modified to designate something less than a million acres as wilderness, but with California – that is to say, soft release language.\textsuperscript{137} He expressed confidence that Senator McClure would go along with soft release, notwithstanding McClure’s intransigent support for hard release.\textsuperscript{138}

Hatfield had good reason for his confidence. He chaired the Senate Appropriations Committee, which gave him powerful influence over other senators.\textsuperscript{139} They wanted to fund projects back in their home states. As chairman, Hatfield exercised a large degree of control over discretionary spending on those projects.

Indeed, when the issue of release came to a head on April 11, 1984, Hatfield was not shy about pointing out his chairmanship of the Appropriations Committee, with all its implications, to his fellow senators on the Energy and Natural Resources Committee, especially its chairman, Senator McClure.\textsuperscript{140} He demanded their help in enacting wilderness legislation to resolve the Oregon RARE II lawsuit.\textsuperscript{141} He told them that he was “impatient [for action] . . . because I’ve been ready to move on this [Oregon wilderness] bill for quite some time.”\textsuperscript{142} Fellow Energy and Natural Resources Committee member Senator Dan Evans of Washington added his weight to Hatfield’s, calling for rapid passage of the Washington wilderness bill. Like the Oregon wilderness bill, it provided for soft release.\textsuperscript{143} Knowledge of the lawsuit thus extended beyond the Oregon congressional delegation to the senators on the Energy and Natural Resources Committee.\textsuperscript{144}

ONRC’s “intent . . . to put more pressure on the timber industry and the legislative process . . . was successful.”\textsuperscript{145} The filing of the lawsuit was just the beginning.\textsuperscript{146} I maintained the pressure continuously by actively prosecuting the case. Early on, I fired off requests for discovery and, on February 7, U.S. District Court

\textsuperscript{136} Id.

\textsuperscript{137} ROTH II, supra note 19, at 17.

\textsuperscript{138} Id.

\textsuperscript{139} Mark O. Hatfield: A Featured Biography, U.S. SENATE, senate.gov/senators/FeaturedBios/Featured_Bio_HatfieldMark.htm (last visited Oct. 8, 2021).


\textsuperscript{141} Id.

\textsuperscript{142} Id.

\textsuperscript{143} Id. at 19.

\textsuperscript{144} See id.

\textsuperscript{145} MARSH, supra note 68, at 137.

\textsuperscript{146} For a discussion of the development of ONRC v. Block, see Kagan, supra note 5, at 339-42.
Judge Owen Panner issued an order compelling the production of the information I sought. From January through February, while opposing motions to dismiss, to strike, and to compel discovery, I sought certification of a defendant class comprised of the companies that had contracted with the Forest Service to harvest timber, build roads, and engage in other destructive activities in the roadless areas in the national forests in Oregon. On April 16, Judge Panner refused to certify a class but allowed me to amend the complaint to name the companies as individual defendants. So, on May 4, I filed an amended complaint naming ninety more companies as additional defendants, expanding the lawsuit by nearly an order of magnitude to include every one of the companies that had contracted with the Forest Service. Going global ratcheted up the pressure. We got Congress’s attention.

Congressman Weaver dubbed the Oregon RARE II lawsuit a "jewel." ONRC v. Block enhanced the leverage he and other Democrats in the House already had over the industry arising from its fear of a sweeping injunction, because the lawsuit made a statewide de facto injunction a realized rather than a merely hypothetical threat. These Democrats took advantage of the industry’s fear, as well as its desire for the release of roadless areas for logging, to insist on a compromise making soft release and the designation of more wilderness the price of sufficiency — that is to say, the preclusion of judicial review of the RARE II EIS.

As late as April 25, 1984, Senator McClure was reportedly maintaining steadfast resistance to soft release. But his resistance crumbled soon afterward under continuous pressure exerted by Senator Hatfield, who had enough votes on the Energy and Natural Resources Committee to overrule its chairman. In May, McClure acceded to a compromise with the House on soft release language. The key compromise language (1) ensured that the national forests would be expressly required — rather than just allowed, per California or Colorado release — to consider roadless areas allocated to non-wilderness for wilderness designation in the future (as opposed to never), and in the next cycle of forest planning (as opposed to sometime further in the future); and (2) empowered the Forest Service to manage roadless

151. Personal communication from Andy Kerr, who heard it from Congressman Weaver at the time, when Kerr was ONRC’s Associate Director.
152. See SCOTT, supra note 122, at 82-83.
153. Id.
155. Id.
156. MARSH, supra note 68, at 138; GORTE & BALDWIN, supra note 20, at CRS-7.
areas allocated to non-wilderness without regard to the effect of such management on their future suitability for wilderness designation:

(2) . . . [RARE II] shall be deemed for the purpose of the initial land management plans required for . . . lands [reviewed in RARE II] by the Forest and Rangeland Renewable Resources Planning Act of 1974 as amended by the National Forest Management Act of 1976, to be an adequate consideration of the suitability of such lands for inclusion in the National Wilderness Preservation System and the Department of Agriculture shall not be required to review the wilderness option prior to the revision of the plans, but shall review the wilderness options when the plans are revised, which revisions will ordinarily occur on a ten-year cycle, or at least every fifteen years, unless, prior to such time the Secretary of Agriculture finds that conditions in a unit have significantly changed;

(3) areas in the State of Oregon reviewed in [the RARE II EIS] . . . not designated as wilderness . . . shall be managed for multiple use in accordance with land management plans . . . Provided, That such areas need not be managed for the purpose of protecting their suitability for wilderness designation prior to or during revision of the land management plans . . . .157

The compromise language "opened the floodgates for wilderness legislation in the 98th Congress," and was added to eighteen wilderness laws enacted by Congress in 1984.158, 159 Hatfield regarded the "release language as the primary legacy of the 1984 bills."160 Wilderness advocates might disagree with Hatfield’s opinion, but there is no denying that release was the linchpin of the bills, including the


158. See MARSH, supra note 68, at 138; GORTE & BALDWIN, supra note 20, at CRS-7; 130 CONG. REC. 23,408 (1984) (statement of Sen. Bumpers) ("I was . . . very pleased that the leadership of both the Senate Energy and Natual [sic] Resources Committee [sic] and the House Committee on Interior and Insular Affairs was [sic] able to reach an agreement on release language for statewide wilderness bills."); id. at 23,440 (statement of Sen. DeConcini) ("I am grateful to my colleagues, Mr. McClure and Mr. Wallop and their House counterparts, Mr. Udall and Mr. Seiberling, for their efforts in negotiating this final compromise [on release language].")


160. MARSH, supra note 68, at 141.
“sufficiency” aspect of release. The sufficiency language was as follows: "Congress hereby determines and directs that . . . [the RARE II EIS] shall not be subject to judicial review with respect to National Forest System lands in the State of Oregon.”

Congressman Seiberling was one of those principally responsible for negotiating the release/sufficiency compromise with the Senate. In explaining the purpose and effect of the compromise on the California wilderness bill that had been introduced in 1983, he stated, "The release of this acreage [in national forests in California] is especially significant for the timber industry as it would remove the threat of wilderness related appeals and lawsuits that currently casts [sic] a cloud of uncertainty over roadless areas allocated to non-wilderness.

On May 18, 1984, the Senate Committee on Energy and Natural Resources reported out the version of the Oregon wilderness bill that, with adjustments to some wilderness boundaries and technical amendments, became law. The committee report acknowledges Bergland and California v. Block. Of course, neither decision had precipitated the enactment of an Oregon wilderness bill in all the time that had passed since the district and appellate courts had issued those decisions in January 1980 and October 1982, respectively. Then the report states that ONRC had recently filed a new lawsuit challenging the RARE II EIS: "A complaint was filed in the U.S. District Court for the State of Oregon on December 13, 1983, by the Oregon Natural Resources Council. The council seeks to stop ongoing or planned activities which might eventually change the wilderness characteristics of approximately 2.2 million acres of Oregon roadless areas in the national forests allocated to non-wilderness by RARE II."

The report then explains that the bill aimed to settle "[t]he 'sufficiency' aspect of [the release] question,” that is to say, to remove the "cloud of uncertainty over the development of some roadless areas' created by the RARE II lawsuits filed after California v. Block. The only such lawsuit the report identified was ONRC v. Block. Accordingly, the bill precluded judicial review of the RARE II EIS "with respect to national forest system lands in Oregon.” The inclusion of this provision

163. Id.
164. H.R. 1149, 98th Cong. (reported to Senate, May 18, 1984; amended to adjust boundaries and make technical changes, May 24, 1984), https://www.congress.gov/bill/98th-congress/house-bill/1149/all-actions?q=%7B%22search%22%3A%5B%22oregon+wilderness%22%5D%7D&s=2&r=1; 130 CONG. REC. 14,053-54 (1984).
166. Id. at 9, reprinted in 13558 U.S. Cong. Serial Set at 1336.
167. Id. at 27, reprinted in 13558 U.S. Cong. Serial Set at 1354.
168. Id.
was of utmost importance to Hatfield and the timber industry because it would nullify the Oregon RARE II lawsuit.\footnote{Marsh, supra note 68, at 138.} As Hatfield explained on the Senate floor:

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\text{[T]his legislation . . . resolves the issue raised in . . . a . . . [law]suit which has been filed in Oregon pertaining to the adequacy of the RARE II study. This bill declares that the environmental impact statement is sufficient . . . . Resolution of the issue itself is a major step forward for Oregon’s uncertain lumber economy.}\footnote{130 Cong. Rec. 14,058-59 (1984) (statement of Sen. Hatfield).}
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On June 4, the House took up the bill as amended by the Senate. Congressman Les AuCoin of Oregon shared Hatfield’s deep concern about the dire necessity of ending the de facto injunction the Forest Service had imposed on the development of roadless areas on national forest lands in Oregon in response to \textit{ONRC v. Block}.\footnote{See 130 Cong. Rec. 14,804-05 (1984) (statement of Rep. AuCoin).} He vigorously rebutted Oregon Congressman Denny Smith’s contention that the bill “is not a great compromise,”\footnote{130 Cong. Rec. 14,804 (1984) (statement of Rep. Smith).} calling that contention “a bunch of bunk.”\footnote{130 Cong. Rec. 14,804 (1984) (statement of Rep. AuCoin).} AuCoin continued, “The fact of the matter is that we have a court suit that has been imposed on all of the roadless areas of Oregon in which all 3 million acres are frozen from any developmental activity unless Congress passes a bill that releases some and preserves the rest for wilderness.”\footnote{Id. at 14,805.} He reiterated this point, saying, “We cannot solve . . . the problem of the court case, without preserving some in wilderness and releasing the rest for commercial use.”\footnote{Id. at 14,805.} In the end, the House agreed to the Senate amendments by a vote of 281 to 99 on June 6, 1984.\footnote{H.R. 1149, 98th Cong. (as passed by House, Jun. 6, 1984), https://www.congress.gov/bill/98th-congress/house-bill/1149/all-actions?q=%7B%22search%22%3A%22oregon+wilderness%22%5D%7D&s=2&r=1.}

The Senate Committee on Energy and Natural Resources reported out three more wilderness bills in May 1984 (Washington, Arizona, and Arkansas) and three more in August (California, Utah, and Florida). Progress on five of these bills had stopped completely or showed no sense of urgency in 1983; the Arizona bill was introduced in 1984. All became law as reported by the committee, complete with the compromise release/sufficiency language, as well as some amendments unrelated to release or sufficiency.


of uncertainty” caused by the RARE II lawsuits that had been filed after *California v. Block*. The only RARE II lawsuits known to have been filed after the California RARE II lawsuit were *Earth First*, *Kettle Range*, and *ONRC v. Block*.

The reports do not mention any of these lawsuits specifically, but the senators on the committee knew all about the Oregon RARE II lawsuit from Senator Hatfield and from the committee’s very own report on the Oregon wilderness bill. Other senators were also aware of the lawsuit. For instance, Senator Slade Gorton of Washington referred to "pending [RARE II] lawsuits in the West hav[ing] created considerable uncertainty regarding . . . manage[ment] . . . and havoc for Washington State timber companies”; *ONRC v. Block* was the only RARE II lawsuit pending at the time, and apparently it was the last ever filed. The committee issued no report on the Wyoming wilderness bill, but it contained the same sufficiency and soft release language as the wilderness bills enacted in 1984 for seventeen other states.

The Senate Committee on Agriculture, Nutrition, and Forestry reported out four wilderness bills in April (Wisconsin, Vermont, New Hampshire, and North

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185. *See supra* note 166; 130 CONG. REC. at 14,058; *see also* 130 CONG. REC. 14,172 (statement of Sen. Melcher) (Senator John Melcher of Montana, who served on both the Committee on Agriculture, Nutrition, and Forestry and the Committee on Energy and Natural Resources, described his participation in the crafting of sufficiency/release language and supported its inclusion in wilderness bills to enable the Forest Service "to manage lands . . . without the cloud of uncertainty, appeals and lawsuits they have been faced with.")


Carolina)\textsuperscript{188} and six more in September (Georgia, Mississippi, Texas, Tennessee, Pennsylvania, and Virginia).\textsuperscript{189} Six of these bills had little or no more momentum of note in 1983 (Wisconsin, Vermont, New Hampshire, North Carolina, Texas, and Tennessee)\textsuperscript{190}; four were introduced in 1984 (Georgia, Mississippi, Pennsylvania, and Virginia).\textsuperscript{191}

Using the same language, word for word, the committee report on each of the ten bills expressly states that litigation challenging the RARE II

\begin{itemize}
  \item \textsuperscript{190} For the last significant congressional action in 1983, and the gap between that and the next significant congressional action, see H.R. 3578, 98th Cong. (passed House, Nov. 16, 1983; comm. rep. to full Senate ordered to be printed, Apr. 26, 1984) (Wisconsin), https://www.congress.gov/bill/98th-congress/house-bill/3578/actions?q=%7B%22search%22%3A%5B%22wisconsin+wilderness%22%5D%7D&s=4&r=1; H.R. 4198, 98th Cong. (passed House, Nov. 15, 1983; comm. rep. to full Senate ordered to be printed, Apr. 26, 1984) (Vermont), https://www.congress.gov/bill/98th-congress/house-bill/4198/actions?q=%7B%22search%22%3A%5B%22vermont+wilderness%22%5D%7D&s=4&r=1; H.R. 3921, 98th Cong. (passed House, Nov. 15, 1983; comm. rep. to full Senate ordered to be printed, Apr. 26, 1984) (New Hampshire), https://www.congress.gov/bill/98th-congress/house-bill/3921/actions?q=%7B%22search%22%3A%5B%22new+hampshire+wilderness%22%5D%7D&s=4&r=1; H.R. 3960, 98th Cong. (passed House, Nov. 16, 1983; comm. rep. to full Senate ordered to be printed, Apr. 26, 1984) (North Carolina), https://www.congress.gov/bill/98th-congress/house-bill/3960/actions?q=%7B%22search%22%3A%5B%22north+carolina+wilderness%22%5D%7D&s=6&r=1; H.R. 3788, 98th Cong. (hearings held, Nov. 7, 1983; comm. rep. to full House ordered to be printed, May 2, 1984) (Texas), https://www.congress.gov/bill/98th-congress/house-bill/3788/actions?q=%7B%22search%22%3A%5B%22texas+wilderness%22%5D%7D&s=2&r=1; H.R. 4263, 98th Cong. (referred to Subcomm. on Pub. Lands and Nat’l Parks, Nov. 14, 1983; comm. rep. to full House ordered to be printed, Apr. 26, 1984) (Tennessee), https://www.congress.gov/bill/98th-congress/house-bill/4263/actions?q=%7B%22search%22%3A%5B%22tennessee+wilderness%22%5D%7D&s=4&r=1.
\end{itemize}
recommendations "has had a direct bearing on congressional consideration of wilderness legislation." All ten reports point out that the reasoning of *California v. Block* created "uncertainty regarding the RARE II study," making "[m]anagement of roadless areas not designated as wilderness . . . subject to challenge through appeals and lawsuits." Of course, the California lawsuit on its own had not driven the enactment of many wilderness bills, and none since two laws were enacted in January 1983 designating as wilderness only 54,688 acres in two national forests.

The committee stated, "There have been three lawsuits filed in the Northwest that rely extensively on *California v. Block*." As mentioned, only three such lawsuits were ever known to have been filed: *Earth First, Kettle Range*, and *ONRC v. Block*. The reports proceed to name them.


194. See text at notes 83 and 84, supra.

First, they name *Earth First* and *Kettle Range*\(^{196-197}\), noting that the courts in those cases enjoined activities that would destroy the wilderness characteristics of five roadless areas in two states – the North Kalmiopsis in Oregon and four roadless areas in Washington, respectively. These lawsuits on their own had not prompted the passage of any wilderness bills.

Then came the kicker – acknowledgement of the vast scope of *ONRC v. Block*: "In December 1983, the Oregon Natural Resources Council brought suit against the Forest Service in an attempt to enjoin any activity which would impair the wilderness characteristics of approximately 2.25 million acres of roadless lands in Oregon until the requirements of NEPA have been net. That suit is pending. Oregon Natural Resources Council v. Block, Civil No. 83-1902, D. Oreg."\(^{198}\)

The committee reports then explain, "The desire . . . to preclude litigation directed at stopping the continuation of management activities on roadless areas led to a search for a legislative solution. Provisions . . . termed 'sufficiency' and 'release' language are the outcome of that search."\(^{199}\) To eliminate the potential for litigation

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fostered by the success of the California lawsuit, manifested in striking fashion by ONRC v. Block, the committee deemed the analysis of the roadless areas in the RARE II EIS "sufficient" for the National Forest System lands in each of the ten states within the committee's purview. Accordingly, the bills provided that the RARE II EIS "shall not be subject to judicial review with respect to national forest system lands" in the ten states.

Congress proceeded to pass all eighteen wilderness bills as reported or amended by the two Senate committees to include the compromise release and sufficiency language. That put an end to the threat of RARE II lawsuits like ONRC v. Block challenging all the allocations of roadless areas to non-wilderness in all the national forests in the eighteen states covered by the bills. The President signed the bills into law from June 19 to October 30, 1984.

Together, these laws designated as wilderness 6,475,062 acres of national forest lands in eighteen states. This is nearly twice the wilderness the Forest Service had recommended for all the states involved. The Oregon Wilderness Act of 1984 designated more than double the wilderness the Forest Service had recommended for Oregon. The Washington Wilderness Act of 1984 designated almost four times the wilderness the Forest Service had recommended for Washington.

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202. See supra note 187.
203. See Appendix, Table 1.
204. Id.
205. Id.
206. Id.
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Congress took the occasion of enacting the Arizona, California, Oregon, and Washington wilderness bills to add to the National Wilderness Preservation System another 1,835,690 acres under the jurisdiction of the U.S. Department of the Interior, Bureau of Land Management, and National Park Service in those states.207

B. 1985-1989

The compromise on release/sufficiency forged in response to ONRC v. Block opened the way for five more wilderness laws from 1985 through 1989: for Kentucky, Nebraska, Nevada, Michigan, and Oklahoma. These laws relied on the exact same language employed in 1984 to eliminate the possibility that RARE II lawsuits might be filed to stop the Forest Service from managing roadless areas allocated to non-wilderness for non-wilderness uses.208

The report of the House Committee on Interior and Insular Affairs on the Michigan wilderness bill most fully explained the necessity of preventing RARE II lawsuits. Closely echoing the committee reports on the 1984 wilderness bills, the report said, "[Appeals of development activities on roadless areas have] already happened in several instances, and [this has] thrown a cloud of uncertainty over the development of some roadless areas, whereas development has occurred in others."209

Similarly, the report of the Senate Committee on Energy and Natural Resources on the Nebraska wilderness bill explained that California v. Block led the Forest Service to "believe[] that activities on areas inventoried in RARE II could be subject to . . . judicial review. This causes uncertainty concerning the Forest Service's ability to plan for and manage . . . lands inventoried and studied in the RARE II process."210

The report of the House Committee on Interior and Insular Affairs on the Nebraska wilderness bill explains its release/sufficiency language obliquely by referring to the House committee report on the Arizona wilderness bill enacted in


That report explained that its "release/sufficiency" language was designed to eliminate the "cloud of uncertainty" hanging over the development of roadless areas created by lawsuits filed after *California v. Block*.

Rather than explain the purpose of the release/sufficiency language, the rest of the committee reports on wilderness bills enacted from 1985 through 1989 merely invoke Congress's institutional knowledge. They say the bills contain "the ['release/sufficiency'] language . . . developed by the Congress during the second session of the 98th Congress [to settle the 'problems' arising from the decision in *California v. Block*]"; the 'release/sufficiency' language incorporated by the Congress in virtually all national forest wilderness bills enacted over the past several years"; "the standard release/sufficiency language found in most wilderness bills"; "standard release and sufficiency language"; or simply "release and sufficiency language."

Regardless of the explanation or lack of one in these committee reports, the language of the wilderness laws enacted from 1985 through 1989 is the same as the wilderness laws enacted in 1984. This was the compromise language Congress negotiated in 1984 to address the 'problem' that continued to face the Forest Service in the national forests in Kentucky, Nebraska, Nevada, Michigan, and Oklahoma, the same problem that gave rise to the 1984 wilderness laws: namely, the potential for RARE II lawsuits like *ONRC v. Block*.

Congress designated as wilderness another 860,289 acres of national forest lands in the five additional states. This is one and a half times more wilderness than the Forest Service's recommendation of 567,759 acres for the states involved.

All told, the legislative history shows that *ONRC v. Block* spurred legislation preserving the wilderness character of millions of acres of the wild in Oregon and beyond. To be precise: The lawsuit impelled Congress to designate 9,171,041 acres in twenty-three of the thirty-eight states studied in RARE II as wilderness. Of that

218. See Appendix, Table 2.
219. Id.
number, 7,335,351 acres were national forest lands. This was almost twice the acreage the Forest Service had recommended for wilderness designation in those states.

CONCLUSION

This story operates on multiple levels. First, this is a story about how litigation can impact legislation and how legislative history can reveal the nature and extent of litigation’s impact. The language of bills, the transcripts of hearings and committee meetings, committee reports, and proceedings on the floor of the House and Senate can all be invaluable in discovering what happened, when, and – perhaps – why. The legislative history of the 1984 wilderness laws embedded in these sources, in conjunction with the legislative history of the various wilderness bills and laws considered, rejected, and passed from 1979 through 1983, reveal the significant impact the Oregon RARE II lawsuit had on Congress in 1984 and beyond.

Second, this is a story about the impact of one specific lawsuit on legislation. As the reports on the wilderness bills issued by both Senate committees in 1984 make plain, the committee members were concerned about judicial "interference" with the development of roadless areas allocated to non-wilderness. But members of Congress, especially Senator Hatfield, had begun to manifest this concern almost five years earlier, soon after California and wilderness advocates filed the Bergland lawsuit in 1979. Nevertheless, their concern had never been compelling enough to overcome the main stumbling block to wilderness legislation for most states, especially the major timber-producing western states: the form of release.

Congress only hammered out a generally acceptable compromise on the issue when confronted with judicial review likely to have staggering consequences – namely, when I filed ONRC v. Block. As Senator Hatfield well knew, the lawsuit presaged an injunction that would stop logging, road building, and any other activity that would impair the wilderness character of millions of acres of national forest lands in Oregon. The Forest Service itself anticipated the judge, bringing such development to a halt shortly after the filing of the lawsuit.

If ONRC v. Block succeeded in court, as widely expected, other wilderness advocates would only feel encouraged to file their own RARE II lawsuits in other states, potentially locking up millions more acres of national forest lands in the West and parts east. The pressure to forestall a judgment placing roadless areas in Oregon (and elsewhere) off limits was, therefore, overwhelming. Those who had stubbornly obstructed expansive wilderness legislation by opposing soft release capitulated.

In short, ONRC functioned as the catalyst for the compromise on release that had for so long proved unattainable. ONRC created the pressure that produced the compromise by greenlighting a statewide RARE II lawsuit and gambling on a young solo practitioner eager to build and try a strong case pro bono. In effect, ONRC v. Block drove Congress to pass eighteen wilderness bills in a single year.

Third, this story is instructive with respect to the importance of strategically choosing the timing and the target of litigation. ONRC allowed itself to be persuaded by the national conservation groups to trust in them and keep its
powder dry, but its restraint was finally exhausted when the progress of Congressman Weaver’s wilderness bill ground to a halt in 1983. At that point, ONRC could no longer stand by while the purity of Oregon’s remaining pristine forest ecosystem was being ravaged, while undisturbed groves of ancient trees were being cut down for lumber and subdivided by roads, eliminating the dwindling reserve of roadless areas from wilderness consideration.

ONRC was well aware that Senator Hatfield was the final arbiter when it came to an Oregon wilderness law. ONRC may have deliberately designed its litigation strategy to put pressure on Hatfield specifically. Whether or not that was the design, it worked brilliantly and may well have exceeded ONRC’s expectations.

By using litigation, the last effective weapon it had recourse to, ONRC managed to engage Hatfield’s power in its cause, perhaps despite himself. Hatfield’s power derived not only from his position as the senior senator from Oregon, but more consequentially from his chairmanship of the Senate Appropriations Committee. The latter position made him the one person with the clout to break the logjam caused by the deadlock over release, which for years had held up not only an Oregon wilderness law but wilderness laws for most other states.

Because of ONRC v. Block, wilderness bills that had been moribund were revived and made into law. New wilderness bills were introduced and enacted. As a result, more wilderness laws were enacted, and more wilderness areas were added to the National Wilderness Preservation System in more states in 1984 than in any other year, before or since.

Stegner wrote that "[t]he reminder and the reassurance that [wilderness] is still there is good for our spiritual health even if we never once in ten years set foot in it."220 Thanks largely to the Oregon RARE II lawsuit, much more wilderness has been saved, contributing not merely to our spiritual health, but preserving the integrity of the protected forests’ ecosystems.

Last, this is a story of an environmental lawyer’s initiation. This is the most enduring lesson I learned in prosecuting Earth First and ONRC v. Block: The independent federal judiciary is the great equalizer. For imperfect as they are, judges being only human, the courts are the one venue where opposing parties have the best assurance of being equal, before the law, however unequal they might be outside a courtroom. This ought to inspire every lawyer with hope when considering whether to represent a person with a just cause and few resources.

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### Table 1. State-by-state comparison of the number of acres that the Forest Service recommended for designation as wilderness pursuant to RARE II and the number of acres that Congress actually designated as wilderness in 1984.

<table>
<thead>
<tr>
<th>State</th>
<th>Forest Service recommendation (acres)</th>
<th>Wilderness Act designation (acres)</th>
<th>Percentage Change between Forest Service recommendation and Wilderness Act Designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>400,312(^{221})</td>
<td>699,140(^{222})</td>
<td>+ 75%</td>
</tr>
<tr>
<td>Arkansas</td>
<td>27,106(^{223})</td>
<td>91,103(^{224})</td>
<td>+ 236%</td>
</tr>
<tr>
<td>California</td>
<td>899,231(^{225})</td>
<td>1,792,930(^{226})</td>
<td>+ 99%</td>
</tr>
<tr>
<td>Florida</td>
<td>24,633(^{227})</td>
<td>49,150(^{228})</td>
<td>+ 100%</td>
</tr>
<tr>
<td>Georgia</td>
<td>39,670(^{229})</td>
<td>14,439(^{230})</td>
<td>- 64%</td>
</tr>
<tr>
<td>Mississippi</td>
<td>5,460(^{231})</td>
<td>5,500(^{232})</td>
<td>+ 1%</td>
</tr>
</tbody>
</table>

\(^{221}\) U.S. DEP’T OF AGRIC., FOREST SERV. FS-325, RARE II FINAL ENVIRONMENTAL STATEMENT, ROADLESS AREA REVIEW AND EVALUATION App. B-1 (Jan. 4, 1979) [hereinafter RARE II EIS].


\(^{223}\) RARE II EIS, supra note 1, at App. P-1.


\(^{225}\) RARE II EIS, supra note 1, at App. C-1.


\(^{227}\) RARE II EIS, supra note 1, at App. F-1.


\(^{229}\) RARE II EIS, supra note 1, at App. Q-1.


\(^{231}\) RARE II EIS, supra note 1, at App. F-1.

<table>
<thead>
<tr>
<th></th>
<th>Forest Service recommendation (acres)</th>
<th>Wilderness Act designation (acres)</th>
<th>Percentage Change between Forest Service recommendation and Wilderness Act Designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Hampshire</td>
<td>168,176233</td>
<td>77,000234</td>
<td>- 54%</td>
</tr>
<tr>
<td>North Carolina</td>
<td>64,817235</td>
<td>68,750236</td>
<td>+ 6%</td>
</tr>
<tr>
<td>Oregon</td>
<td>368,120237</td>
<td>854,000238</td>
<td>+ 132%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>9,556239</td>
<td>9,705240</td>
<td>+ 2%</td>
</tr>
<tr>
<td>Tennessee</td>
<td>3,887241</td>
<td>24,942242</td>
<td>+ 542%</td>
</tr>
<tr>
<td>Texas</td>
<td>10,212243</td>
<td>34,346244</td>
<td>+ 236%</td>
</tr>
<tr>
<td>Utah</td>
<td>492,088245</td>
<td>749,550246</td>
<td>+ 52%</td>
</tr>
<tr>
<td>Vermont</td>
<td>0247</td>
<td>41,265248</td>
<td>N/A</td>
</tr>
<tr>
<td>Washington</td>
<td>268,887249</td>
<td>998,790250</td>
<td>+ 272%</td>
</tr>
</tbody>
</table>

233. RARE II EIS, supra note 1, at App. N-1.
235. RARE II EIS, supra note 1, at App. Q-1.
237. RARE II EIS, supra note 1, at App. O-1.
239. RARE II EIS, supra note 1, at App. N-1.
241. RARE II EIS, supra note 1, at App. Q-1.
243. RARE II EIS, supra note 1, at App. F-1.
245. RARE II EIS, supra note 1, at App. R-1.
247. RARE II EIS, supra note 1, at App. N-1.
249. RARE II EIS, supra note 1, at App. S-1.
### Table 1 continued

<table>
<thead>
<tr>
<th></th>
<th>Forest Service recommendation (acres)</th>
<th>Wilderness Act designation (acres)</th>
<th>Percentage Change between Forest Service recommendation and Wilderness Act Designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wisconsin</td>
<td>39,084(^{251})</td>
<td>24,339(^{252})</td>
<td>- 38%</td>
</tr>
<tr>
<td>Wyoming</td>
<td>627,137(^{253})</td>
<td>884,129(^{254})</td>
<td>+ 41%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>3,510,954</td>
<td>6,475,062</td>
<td>+ 84%</td>
</tr>
</tbody>
</table>

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Table 2. State-by-state comparison of the number of acres that the Forest Service recommended for designation as wilderness pursuant to RARE II and the number of acres that Congress actually designated as wilderness from 1985-89.

<table>
<thead>
<tr>
<th>State</th>
<th>Forest Service recommendation (acres)</th>
<th>Wilderness Act designation (acres)</th>
<th>Percentage Change between Forest Service recommendation and Wilderness Act Designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kentucky</td>
<td>11,115\textsuperscript{255}</td>
<td>13,300\textsuperscript{256}</td>
<td>+ 20%</td>
</tr>
<tr>
<td>Michigan</td>
<td>51,609\textsuperscript{257}</td>
<td>91,535\textsuperscript{258}</td>
<td>+ 77%</td>
</tr>
<tr>
<td>Nebraska</td>
<td>7,360\textsuperscript{259}</td>
<td>8,100\textsuperscript{260}</td>
<td>+ 10%</td>
</tr>
<tr>
<td>Nevada</td>
<td>484,175\textsuperscript{261}</td>
<td>733,400\textsuperscript{262}</td>
<td>+ 52%</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>13,500\textsuperscript{263}</td>
<td>13,954\textsuperscript{264}</td>
<td>+ 3%</td>
</tr>
<tr>
<td>Total</td>
<td>567,759</td>
<td>860,289</td>
<td>+ 52%</td>
</tr>
</tbody>
</table>

\textsuperscript{255} RARE II EIS, supra note 1, at App. Q-1.
\textsuperscript{257} RARE II EIS, supra note 1, at App. H-1.
\textsuperscript{259} RARE II EIS, supra note 1, at App. D-1.
\textsuperscript{261} RARE II EIS, supra note 1, at App. K-1.
\textsuperscript{263} RARE II EIS, supra note 1, at App. P-1.