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

Neil Kagan

*University of Michigan Law School*

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# BLAZING A PATH TO WILDERNESS: A CASE STUDY OF IMPACT LITIGATION THROUGH THE LENS OF LEGISLATIVE HISTORY<sup>†</sup>

Neil Kagan<sup>††</sup>

*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 9.218 million acres in twenty-four states as wilderness from 1984 through 1989. Of that number, more than 7.383 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*

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† This article was updated in April of 2023 to include additional wilderness laws passed in the wake of the RARE II controversy and the corresponding amounts of Forest Service lands protected.

†† Formerly Adjunct Clinical Assistant Professor of Law, University of Michigan Law School, 1996-2017; Formerly Senior Counsel, National Wildlife Federation, Great Lakes Regional Center, Ann Arbor, Michigan, 1996-2017; J.D. University of Oregon School of Law, 1981; M.Sc. Entomology Michigan State University, 1978; B.Sc. Biology Pennsylvania State University, 1975. I dedicate this article to the late Elizabeth K. Reed. When I was a fledgling lawyer barely contributing what was essentially pocket change to our joint income, Betty paid our bills, making it possible for me to represent the Oregon Natural Resources Council for free when it was desperate to find a pro bono lawyer. Professor John Bonine taught me everything I know about legislative history. Wayne Schmidt reviewed drafts, offered excellent suggestions, and pushed me to extend myself. My editors at MJEAL, Matt Piggins, Makayla Lopez, and Nora Baty, were patient with my many edits, and they offered a number of constructive edits and suggestions of their own. Together, we made this final version better than the one I originally submitted. They all have my gratitude.

*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.<sup>1</sup> In most years, Congress adds ten or fewer wilderness areas to the National Wilderness Preservation System; that year, Congress added 175.<sup>2</sup> In most years, Congress adds 1 million or fewer acres to the system; that year, Congress added more than 8.3 million.<sup>3</sup>

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)<sup>4</sup> 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.

1. See *Public Laws Enacted by Year*, WILDERNESS CONNECT, <https://wilderness.net/practitioners/wilderness-areas/summary-reports/public-laws-enacted-by-year.php> (last visited Sept. 28, 2021). In 1972, the year with the next highest number, Congress enacted nine wilderness laws. See *id.*

2. In 1980, the year with the next highest number, Congress added seventy wilderness areas. *Wilderness Areas Designated by Year*, WILDERNESS CONNECT, <https://wilderness.net/practitioners/wilderness-areas/summary-reports/wilderness-areas-designated-by-year.php> (last visited Sept. 28, 2021).

3. Congress added more acres only in 1964 and 1980. *Acreage Legislated by Year*, WILDERNESS CONNECT, <https://wilderness.net/practitioners/wilderness-areas/summary-reports/acreage-legislated-by-year.php> (last visited Sept. 28, 2021).

4. ONRC changed its name to "Oregon Wild" in 2006. *Oregon Wild Accomplishments*, OREGON WILD, <https://oregonwild.org/about/accomplishments> (last visited Sept. 28, 2021).

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.<sup>5</sup> 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 seven more from 1985 through 1989. These laws designated 9.218 million acres in twenty-four states as wilderness, including 7.383 million acres in national forests in twenty-four 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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5. See Neil Kagan, *Wilderness, Luck & Love: A Memoir and a Tribute*, 7 MICH. J. ENV'T. & ADMIN. L. 315, 348 (2018), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1077&context=mjeal>.

legislative history can illuminate the underlying causes and policy choices that lead to legislation.

## DISCUSSION

In the Wilderness Act of 1964, Congress described a wilderness as "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain."<sup>6</sup> 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.<sup>7</sup> He acknowledged the recreational and aesthetic value of wilderness, as well its function as a genetic reserve.<sup>8</sup> 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."<sup>9</sup> 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."<sup>10</sup>

### 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."<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> Wilderness advocates in Washington, Oregon, and California were incensed that the Forest Service allocated most of the roadless areas that qualified as

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6. Wilderness Act, Pub. L. No. 88-577, 78 Stat. 891 (1964).

7. Letter from Wallace Stegner to David E. Pesonen (Dec. 3, 1960), WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* (1969), reprinted in *Wallace Stegner*, WILDLAND RESEARCH CENTER, <https://www.wilderness.org/articles/article/wallace-stegner>.

8. *Id.*

9. *Id.*

10. *Id.*

11. U.S. DEP'T OF AGRIC., FOREST SERV. FS-325, RARE II FINAL ENVIRONMENTAL STATEMENT, ROADLESS AREA REVIEW AND EVALUATION iv (Jan. 4, 1979) [hereinafter RARE II EIS].

12. *Id.* at iii-iv.

13. *Id.* at iv.

wilderness to non-wilderness.<sup>14</sup> Huey Johnson, the head of the California Resources Agency, considered the recommendations for wilderness designation inadequate.<sup>15</sup>

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.<sup>16</sup> 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).<sup>17</sup> NEPA requires a federal agency to prepare an EIS when it proposes major federal action that may significantly impact the quality of the environment.<sup>18</sup>

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)."<sup>19</sup> 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.<sup>20</sup> 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 for wilderness suitability; and precluded judicial review of the legal sufficiency of the RARE II EIS with respect to national forests in Oregon.<sup>21</sup>

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14. DENNIS M. ROTH, U.S. DEP'T OF AGRIC., FOREST SERV. FS-410, THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1964-1980 58-59 (1988) [hereinafter ROTH I] (Roth was the Chief Historian of the U.S. Forest Service).

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.

17. *California v. Bergland*, 483 F. Supp. 465, 470 (E.D. Cal. 1980).

18. 42 U.S.C. § 4332(C) (2019).

19. DENNIS M. ROTH, U.S. DEP'T OF AGRIC., FOREST SERV. FS-410, THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1980-1984 3 (1988) [hereinafter ROTH II].

20. ROSS W. GORTE & PAMELA BALDWIN, CONG. RSCH. SERV., 93-280 ENR, WILDERNESS LEGISLATION: HISTORY OF RELEASE LANGUAGE, 1979-1992 CRS-6 (1993).

21. S. 2031 - Oregon Wilderness Act of 1979, <https://www.congress.gov/bill/96th-congress/senate-bill/2031/all>.

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.<sup>22</sup> Hatfield was the committee's ranking minority member.<sup>23</sup> 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."<sup>24</sup> Then, mentioning the *Bergland* lawsuit by name, the report observes that the same kind of lawsuit could be filed in Oregon.<sup>25</sup> "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."<sup>26</sup>

The committee report further states, "The principal objective of th[e bill's] language is to lessen the uncertainty over the amount and location of lands available for nonwilderness uses."<sup>27</sup> "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."<sup>28</sup> 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."<sup>29</sup> On the same day, November 26, 1979, the Senate passed S. 2031.<sup>30</sup>

The Speaker referred the bill to the House Committees on Interior and Insular Affairs and Agriculture on November 27, 1979, and it died there.<sup>31</sup> One reason 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.<sup>32</sup> Perhaps as important as their disagreement was the

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actions?q=%7B%22search%22%3A%5B%22oregon+wilderness%22%5D%7D&cs=5&tr=2; 125 Cong. Rec. 33,441 (Nov. 26, 1979); S. REP. NO. 96-421 at 2-4 (§ 3), 6 (§ 5) (1979), *reprinted in* 13247 U.S. Cong. Serial Set, at 1331-33, 1335 (96th Cong. 1st. Sess.) (1979).

22. *Id.* at 1, *reprinted in* 13247 U.S. Cong. Serial Set, at 1330.

23. 125 CONG. REC. 33,440 (1979).

24. S. REP. NO. 96-421 at 16, *reprinted in* 13247 U.S. Cong. Serial Set, at 1345.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. 125 CONG. REC. 33,440 (1979).

30. *Id.* at 33,441.

31. S. 2031 – Oregon Wilderness Act of 1979, <https://www.congress.gov/bill/96th-congress/senate-bill/2031/all-actions?q=%7B%22search%22%3A%5B%22oregon+wilderness%22%5D%7D&cs=5&tr=2>.

32. ROTH II, *supra* note 19, at 27.



bill's hard release language, which the Sierra Club and The Wilderness Society found unacceptable.<sup>33</sup>

### 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."<sup>34</sup> 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.<sup>35</sup> Finally, the judge held that the Forest Service "undercut the possibility of serious public participation in its decision making process."<sup>36</sup>

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.<sup>37</sup> 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."<sup>38</sup>

The committee had good reason for concern. Judge Karlton had granted California and its co-plaintiffs' motions for summary judgment.<sup>39</sup> Summary judgment is only appropriate where material facts are undisputed and "the movant is entitled to judgment as a matter of law."<sup>40</sup> In other words, the judge determined that

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33. *Id.* at 27; GERALD W. WILLIAMS, *THE FOREST SERVICE: FIGHTING FOR PUBLIC LANDS* 182 (2007).

34. *California v. Bergland*, 483 F. Supp. 465, 470 (E.D. Cal. 1980).

35. *Id.*

36. *Id.*

37. H.R. 39 – Alaska National Interest Lands Conservation Act, 96th Cong. (bill passed House only, May 16, 1979), <https://www.congress.gov/bill/96th-congress/house-bill/39/all-actions?q=%7B%22search%22%3A%5B%22wilderness%22%5D%7D&sr=1&cr=7>; H.R. 5487 – Colorado National Forest Wilderness Act of 1980, 96th Cong. (bill passed House only, Dec. 10, 1979), <https://www.congress.gov/bill/96th-congress/house-bill/5487/actions?q=%7B%22search%22%3A%5B%22wilderness%22%5D%7D&sr=1&cs=6>.

38. S. REP. NO. 96-914, at 24 (1980), *reprinted in* 13329 U.S. Cong. Serial Set, at 33 (96th Cong. 2d Sess.) (1980).

39. *California v. Bergland*, 483 F. Supp. at 502.

40. FED. R. CIV. P. 56(a).

the Forest Service violated NEPA based on the flaws evident from the RARE II EIS itself.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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."<sup>44</sup> The committee stated it "considers this language to be a general model for dealing with the . . . 'sufficiency' issue."<sup>45</sup>

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."<sup>46</sup> 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.<sup>47</sup> Johnson and Burton were sponsoring California wilderness bills.<sup>48</sup>

These Congressmen had convened meetings attended by representatives of the forest industry, environmental groups, and the Forest Service.<sup>49</sup> The attendees compromised "on statutory language which would ensure sufficiency (protection against RARE II lawsuits) and which would release land examined but not designated as wilderness for one cycle (10 to 15 years) of the planning process required by the National Forest Management Act of 1976."<sup>50</sup> This was labeled "California release."<sup>51</sup>

California release became interchangeable with "Colorado release"<sup>52</sup> 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

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41. *California v. Bergland*, 483 F. Supp. 465, 470 (E.D. Cal. 1980).

42. *Id.* at 502.

43. GORTE & BALDWIN, *supra* note 20, at CRS-5.

44. S. REP. NO. 96-914, at 24 (1980), *reprinted in* 13329 U.S. Cong. Serial Set, at 33.

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.*

50. *Id.*

51. *Id.* at 4. The House's 1980 California wilderness bill did not survive in the Senate. *Id.*

52. *Id.*

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."<sup>53</sup> "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."<sup>54</sup> 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."<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> Yet, it did not expressly require such consideration.<sup>59</sup> 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 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.<sup>60</sup>

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53. S. REP. NO. 96-914, at 25 (1980), *reprinted in* 13329 U.S. Cong. Serial Set, at 34.

54. GORTE & BALDWIN, *supra* note 20, at CRS-6.

55. S. REP. NO. 96-914 at 26 (1980), *reprinted in* 13329 U.S. Cong. Serial Set, at 35.

56. H.R. REP. NO. 96-1521, at 19 (1980) (Conf. Rep.), *reprinted in* 13382 U.S. Cong. Serial Set, at 336 (96th Cong. 2d Sess.) (1980).

57. Pub. L. No. 96-560, § 107, 94 Stat. 3265, 3270-71.

58. *Id.* at § 107(b), 94 Stat. 3270-71.

59. *Id.*

60. *Id.* at § 107(b)(2), 94 Stat. 3271.

Congress included the same language in wilderness bills enacted as the Alaska National Interest Lands Conservation Act (ANILCA)<sup>61</sup> and the New Mexico Wilderness Act of 1980.<sup>62</sup>

### 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.<sup>63</sup> On October 22, 1982, in *California v. Block*, the Ninth Circuit upheld the district court's decision,<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup>

The conservation community had been intensely disappointed with these allocations when the Forest Service announced them in 1979.<sup>68</sup> As discussed earlier, Congress had a legitimate concern that this disappointment might fuel a rash of litigation in *Bergland's* mold.<sup>69</sup> The Ninth Circuit's affirmance exacerbated this concern because the appellate court's ruling bound all the states in the circuit and served as persuasive authority in those outside the circuit.<sup>70</sup>

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.<sup>71</sup>

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61. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 708(b)(2), 94 Stat. 2371, 2421 (1980).

62. New Mexico Wilderness Act of 1980, Pub. L. No. 96-550, § 104(b)(2), 4 Stat. 3221, 3224 (1980).

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.

68. KEVIN R. MARSH, DRAWING LINES IN THE FOREST: CREATING WILDERNESS AREAS IN THE PACIFIC NORTHWEST 127 (Univ. of Wash. Press 2009).

69. *See supra* text accompanying notes 39-42.

70. The Ninth Circuit covers California, Oregon, Washington, Montana, Idaho, Nevada, Arizona, and Hawai'i. Map of the Ninth Circuit, [ca9.uscourts.gov/content/view.php?pk\\_id=0000000135](http://ca9.uscourts.gov/content/view.php?pk_id=0000000135). Alaska is in the Ninth Circuit, too, but Congress had already insulated the Forest Service from a lawsuit by enacting ANILCA in 1980. *See supra* note 61.

71. MARSH, *supra* note 68, at 127.

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.<sup>72</sup> 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.<sup>73</sup> The Forest Service had allocated the North Kalmiopsis to non-wilderness based on the RARE II EIS invalidated in *Bergland*.<sup>74</sup> The Sierra Club lost the case to stop the Bald Mountain Road.<sup>75</sup>

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.<sup>76</sup> The law included the same form of soft release and sufficiency language found in the Colorado, Alaska, and New Mexico wilderness laws of 1980.<sup>77</sup> 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 bills."<sup>78</sup> California, Oregon, and Washington produced most of the timber in the West.<sup>79</sup>

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.<sup>80</sup> 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."<sup>81</sup>

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72. *Id.* at 127-28.

73. SUSAN ZAKIN, COYOTES AND TOWN DOGS, EARTH FIRST! AND THE ENVIRONMENTAL MOVEMENT, 238-40 (1993); ANDY KERR, OREGON WILD: ENDANGERED FOREST WILDERNESS 58 (2004), <http://www.andykerr.net/oregon-wild-the-book/> (click "Chapter 3: A Brief Political History of Oregon's Wilderness Protections").

74. *Earth First v. Block*, 569 F. Supp. 415, 417 (D. Or. 1983).

75. *Sierra Club v. Block*, Civ. No. 82-1006-FR (D. Or. Aug. 30, 1982) (unpublished order denying motion for preliminary injunction).

76. Pub. L. No. 97-384, § 1, 96 Stat. 1942-43 (1980).

77. *Id.* at § 4, 96 Stat. 1942-43.

78. ROTH II, *supra* note 19, at 15.

79. *Id.* at 14.

80. *Id.* at 3.

81. *Id.* at 4.

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.<sup>82</sup>

#### 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.<sup>83</sup> The other designated three wilderness areas totaling 47,800 acres in the Monongahela National Forest in West Virginia.<sup>84</sup>

On February 1, 1983, Oregon Congressman Weaver introduced H.R. 1149 to designate certain national forest lands and other lands in Oregon as wilderness.<sup>85</sup> 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,<sup>86</sup> three times more than the Forest Service had recommended in RARE II.<sup>87</sup> The bill provided for Colorado release and precluded judicial review of the RARE II EIS.<sup>88</sup> 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.<sup>89</sup>

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

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82. MARSH, *supra* note 68, at 134.

83. Paddy Creek Wilderness Act of 1981, Pub. L. No. 97-407, §§ 2, 5, 96 Stat. 2033-34 (1983).

84. Pub. L. No. 97-466, §§ 1, 5, 96 Stat. 2538, 2540-41 (1983).

85. H.R. 1149, 98th Cong. (introduced in House, Feb. 1, 1983), <https://www.congress.gov/bill/98th-congress/house-bill/1149/all-actions?q=%7B%22search%22%3A%5B%22oregon+wilderness%22%5D%7D&rs=2&r=1>; H.R. REP. NO. 98-13, pt. 1 (1983), *reprinted in* 13533 U.S. Cong. Serial Set at 488 (98th Cong., 1st Sess.) (1984).

86. *Id.* at 1-3 (§ 2), *reprinted in* 13533 U.S. Cong. Serial Set at 488-90.

87. *See* RARE II EIS, *supra* note 11, at App. O-1.

88. H.R. REP. NO. 98-13 at 4-5 (§ 6), *reprinted in* 13533 U.S. Cong. Serial Set, at 491-92.

89. *See id.* at 4 (§ 6(b)(2)), *reprinted in* 13533 U.S. Cong. Serial Set, at 491.

Forest Service during RARE II.<sup>90</sup> The House passed the bill on March 21, 1983.<sup>91</sup> The roadless areas designated for wilderness by the bill were temporarily protected from development while Congress considered whether to designate them as wilderness.<sup>92</sup>

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.<sup>93</sup> He held these hearings to help him develop a Senate bill.<sup>94</sup> He chided both wilderness advocates and opponents for their hardline positions.<sup>95</sup> 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."<sup>96</sup>

James Monteith, the Executive Director of the Oregon Natural Resources Council (ONRC), testified at Hatfield's hearing in Bend.<sup>97</sup> ONRC was then a small group operating on a shoestring budget with a handful of employees.<sup>98</sup> 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 rare ecosystems."<sup>99</sup> He said "we are prepared to sue the Forest Service again,"<sup>100</sup> until

90. Letter from Congressman Jim Weaver et al., to Members of the House of Representatives, Congress of the U.S. (Mar. 14, 1983) (on file with author). The letter shows that Oregon Congressmen Les AuCoin and Ron Wyden who co-sponsored Weaver's bill, also signed it. H.R. 1149, 98th Cong. (cosponsored, Feb. 1, 1983), <https://www.congress.gov/bill/98th-congress/house-bill/1149/cosponsors?q=%7B%22search%22%3A%5B%22oregon+wilderness%22%5D%7D&r=1&s=1>. So did Congressmen John Seiberling, Chair of the House National Parks and Public Lands Subcommittee, and Morris Udall, Chair of the House Committee on Interior and Insular Affairs. Richard Pearson, *Environmental Leader Rep. Mo Udall Dies*, WASHINGTON POST, Dec. 14, 1998, at E6, available at <https://www.washingtonpost.com/wp-srv/politics/daily/dec98/udall14.htm>; Andy Kerr, *John Seiberling*, <https://www.andykerr.net/john-seiberling/> (last visited Oct. 8, 2021).

91. H.R. 1149, 98th Cong. (passed House, Mar. 21, 1983), <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>.

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

93. *Oregon Wilderness Act of 1983: Part I Hearing on H.R. 1149 Before the Subcomm. on Pub. Lands and Reserved Water of the S. Comm. on Energy and Nat. Res.*, 98 Cong. 1-2 (1984).

94. *See id.* at 535-36; *Oregon Wilderness Act of 1983: See Part II Hearing on H.R. 1149 Before the Subcomm. on Pub. Lands and Reserved Water of the S. Comm. on Energy and Nat. Res.*, 98 Cong. 1-2 (1984) (statement of Sen. Mark Hatfield).

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

96. *Id.* at 536.

97. *Id.* at 23-26 (statement of James Monteith, Exec. Dir., Or. Nat. Res. Council).

98. ROTH II, *supra* note 19, at 25.

99. *Part I Hearing on H.R. 1149, supra* note 93, at 25 (statement of James Monteith, Exec. Dir., Or. Nat. Res. Council).

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.

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."<sup>101</sup>

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[.]"<sup>102</sup>

One roadless area ONRC refused to give up was Oregon's North Kalmiopsis, which was in imminent peril.<sup>103</sup> 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.<sup>104</sup>

On July 15, 1983, U.S. District Judge James Redden ruled in ONRC's favor, holding that the Forest Service violated NEPA.<sup>105</sup> 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.<sup>106</sup> Accordingly, the judge enjoined road construction, logging, and other non-wilderness uses until the Forest Service prepared a valid EIS.<sup>107</sup> His 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."<sup>108</sup>

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

101. *Part I Hearing on H.R. 1149, supra* note 93, at 25 (statement of James Monteith, Exec. Dir., Or. Nat. Res. Council).

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.

104. *Earth First v. Block*, 569 F. Supp. 415, 418-19 (D. Or. 1983).

105. *Id.* at 419.

106. *Id.* at 419-20.

107. *Id.* at 417.

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 C1. 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.*



Colville National Forest in Washington.<sup>109</sup> The four roadless areas that were the subject of the lawsuit together totaled approximately 85,000 acres.<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> On September 9, 1983, the Assistant Secretary 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 so."<sup>114</sup>

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 *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 *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

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109. *Kettle Range Conservation Group v. Block*, Civ. No. C-83-590-JLQ (E.D. Wash. Jan. 16, 1984) (unpublished judgment and decree of injunction); *Kettle Range Conservation Group v. Block*, Civ. No. C-83-590-JLQ (E.D. Wash. Oct 6, 1983) (unpublished order granting motion for preliminary injunction).

110. See U.S. FOREST SERVICE, COLVILLE NAT'L FOREST, WILDERNESS EVALUATION: BALD SNOW ROADLESS AREA, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev3\\_053099.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_053099.pdf); U.S. FOREST SERVICE, COLVILLE NAT'L FOREST, WILDERNESS EVALUATION: PROFANITY ROADLESS AREA (2009), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev3\\_053290.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_053290.pdf); U.S. FOREST SERVICE, COLVILLE NAT'L FOREST, WILDERNESS EVALUATION: THIRTEENMILE ROADLESS AREA (2009), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev3\\_053335.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_053335.pdf); U.S. FOREST SERVICE, COLVILLE NAT'L FOREST, WILDERNESS EVALUATION: TWIN SISTERS ROADLESS AREA (2009), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev3\\_053336.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_053336.pdf).

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

112. *Id.*

113. Complaint at 33, Exhibit 7 at 1, *Or. Nat. Res. Council v. Block* (D. Or. Dec. 13, 1983) (Civ. No. 83-1902) (Letter from R. Max Peterson, Chief, Forest Serv., to Reg'l Foresters (Mar. 9, 1983)); *id.* 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)).

114. *Id.* at 40, Exhibit 8 at 1.

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.<sup>115</sup>

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.<sup>116</sup> He asked me to take the statewide lawsuit the group had in mind. Lucky to be able to accept,<sup>117</sup> 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, *Oregon Natural Resources Council v. Block* (ONRC v. Block or the Oregon RARE II lawsuit).<sup>118</sup>

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.<sup>119</sup> 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."<sup>120</sup> ONRC hoped such an injunction would motivate the timber industry to pressure Congress to designate more wilderness than the Forest Service had recommended as a way to "unlock" the rest for timber harvesting.<sup>121</sup> 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.<sup>122</sup>

The Oregon RARE II lawsuit was front-page news in Oregon cities: Salem, Eugene, and Grants Pass, for example.<sup>123</sup> 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

115. "Competent, and pro bono, legal counsel was hard to find back then." Email from Andy Kerr to Neil Kagan (Apr. 10, 2017) (on file with author).

116. "[Professor John] Bonine [recommended] you to us. You'd work 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." *Id.*

117. See Kagan, *supra* note 5, at 349.

118. Complaint, Or. Nat. Res. Council v. Block, (D. Or. filed Dec. 13, 1983) (Civ. No. 83-1902).

119. *Id.* at 10 ¶ 26, 18-32, Or. Nat. Res. Council v. Block, (D. Or. Dec. 13, 1983) (Civ. No. 83-1902).

120. *Id.* at 14.

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.

123. Richard Green, *Suit Seeks to Prevent Timber Cut*, SALEM STATESMAN J., Dec. 14, 1983, at 1A; *Suit Filed to Stop Logging on RARE 2 Land*, GRANTS PASS DAILY COURIER, Dec. 13, 1983, at 1A; Dan Wyant, *Suit Seeks Timber-Sales Halt*, EUGENE REG.-GUARD, Dec. 14, 1983, at 1A.

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.<sup>124</sup> 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.<sup>125</sup> 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."<sup>126</sup>

## 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 regarding roadless areas for which reliance is placed on the RARE II EIS for NEPA compliance."<sup>127</sup>

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<sup>128</sup> have stopped selling timber from the roadless areas studied in . . . RARE II."<sup>129</sup> "The halt . . . [came] in response to a lawsuit filed last month in federal court . . . by the Oregon Natural Resources Council."<sup>130</sup> "Unless

124. *RARE II Pressures Mount*, EUGENE REG.-GUARD, Dec. 18, 1983, at 22A.

125. *Oregon Wilderness Act of 1983: Part II Hearing on H.R. 1149 Before the Subcomm. on Pub. Lands and Reserved Water of the S. Comm. on Energy and Nat. Res.*, 98th Cong. 1–2 (1984) (statement of Sen. Mark Hatfield).

126. *RARE II Pressures Mount*, EUGENE REG.-GUARD, Dec. 18, 1983, at 22A.

127. Complaint at 33, Exhibit 7 at 1 Or. Nat. Res. Council v. Block, (D. Or. Dec. 13, 1983) (Civ. No. 83-1902) (Letter from R. Max Peterson, Chief, Forest Serv., to Reg'l Foresters (Mar. 9, 1983)) (emphasis added).

128. The Forest Service claimed that the Willamette National Forest had prepared an EIS that evaluated the wilderness potential of its roadless areas. *Willamette Sees Slight Reduction*, EUGENE REG.-GUARD, Feb. 2, 1984, at 1B. Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. Dec. 13, 1983), did not challenge the allocation of any roadless areas in the Willamette National Forest anyway.

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

130. *Id.*

this lawsuit gets resolved, we won't be selling any of this timber,' . . . [Sirmon] said."<sup>131</sup>

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.<sup>132</sup> 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.<sup>133</sup> He considered the situation it had created urgent.<sup>134</sup> Sensitive as always to the health of Oregon's timber-based economy, he wanted to pass a bill that would resolve the lawsuit.<sup>135</sup> He deemed a bill necessary both to lift the moratorium on the logging of 700 million board feet 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.<sup>136</sup>

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.<sup>137</sup> He expressed confidence that Senator McClure would go along with soft release, notwithstanding McClure's intransigent support for hard release.<sup>138</sup>

Hatfield had good reason for his confidence. He chaired the Senate Appropriations Committee, which gave him powerful influence over other senators.<sup>139</sup> They wanted to fund projects back in their home states. As chairman,

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131. *Id.*

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

133. 130 CONG. REC. 14,058–59 (1984) (statement of Sen. Hatfield).

134. ROTH II, *supra* note 19, at 18–19 (quoting from U.S. Senate Energy Comm. Bus. Meeting, Apr. 11, 1984).

135. 130 CONG. REC. 14,058–59 (1984) (statement of Sen. Hatfield).

136. *Id.*

137. ROTH II, *supra* note 19, at 17.

138. *Id.*

139. *Mark O. Hatfield: A Featured Biography*, U.S. SENATE, [senate.gov/senators/FeaturedBios/Featured\\_Bio\\_HatfieldMark.htm](https://senate.gov/senators/FeaturedBios/Featured_Bio_HatfieldMark.htm) (last visited Oct. 8, 2021).

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.<sup>140</sup> He demanded their help in enacting wilderness legislation to resolve the Oregon RARE II lawsuit.<sup>141</sup> 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."<sup>142</sup> 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.<sup>143</sup> Knowledge of the lawsuit thus extended beyond the Oregon congressional delegation to the senators on the Energy and Natural Resources Committee.<sup>144</sup>

ONRC's "intent . . . to put more pressure on the timber industry and the legislative process . . . was successful."<sup>145</sup> The filing of the lawsuit was just the beginning.<sup>146</sup> 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 Judge Owen Panner issued an order compelling the production of the information I sought.<sup>147</sup> 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.<sup>148</sup> On April 16, Judge Panner refused to certify a class but allowed me to amend the complaint to name the companies as individual defendants.<sup>149</sup> 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

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140. ROTH II, *supra* note 19, at 18–19 (quoting from U.S. Senate Energy Comm. Bus. Meeting, Apr. 11, 1984).

141. *Id.*

142. *Id.*

143. *Id.* at 19.

144. *See id.*

145. MARSH, *supra* note 68, at 137.

146. For a discussion of the development of *ONRC v. Block*, see Kagan, *supra* note 5, at 339–42.

147. Docket Sheet at no. 36, *Or. Nat. Res. Council v. Block*, (D. Or. Feb. 21, 1986) (No. 83-1902).

148. *Id.* at nos. 27, 28, 31, 41, 49, 50; Memorandum in Support of Plaintiff's Motion for Determination of a Class, *Or. Nat. Res. Council v. Block*, (D. Or. Feb. 23, 1984) (No. 83-1902).

149. Hearing on Motion to Certify a Class at 2–3, 6–8, *Or. Nat. Res. Council v. Block*, (D. Or. Apr. 16, 1984) (No. 83-1902).

one of the companies that had contracted with the Forest Service.<sup>150</sup> Going global ratcheted up the pressure. We got Congress's attention.

Congressman Weaver dubbed the Oregon RARE II lawsuit a "jewel."<sup>151</sup> *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,<sup>152</sup> 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.<sup>153</sup>

As late as April 25, 1984, Senator McClure was reportedly maintaining steadfast resistance to soft release.<sup>154</sup> 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.<sup>155</sup> In May, McClure acceded to a compromise with the House on soft release language.<sup>156</sup> 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 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

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150. Docket Sheet at nos. 57-146, 148, *Or. Nat. Res. Council v. Block*, (D. Or. Dec. 13, 1983) (No. 83-1902).

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.*

154. *Atiyeh Wants Area Protected as Wilds*, PORTLAND OREGONIAN, Apr. 25, 1984, at C4.

155. *Id.*

156. MARSH, *supra* note 68, at 138; GORTE & BALDWIN, *supra* note 20, at CRS-7.

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 . . . .<sup>157</sup>

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.<sup>158, 159</sup> Hatfield regarded the "release language as the primary legacy of the 1984 bills."<sup>160</sup> Wilderness advocates might disagree with Hatfield's opinion, but there is no denying that release was the linchpin of the bills, including the "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."<sup>161</sup>

Congressman Seiberling was one of those principally responsible for negotiating the release/sufficiency compromise with the Senate.<sup>162</sup> 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.<sup>163</sup>

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157. Oregon Wilderness Act of 1984, Pub. L. No. 98-328, § 7(b)(2) (emphasis added), (3), 98 Stat. 278 (1984).

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 Natural [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].")

159. Congress enacted three additional wilderness bills in 1984. However, Congress's designation of wilderness in Missouri and New Mexico was not prompted by RARE II. See Irish Wilderness Act of 1984, Pub. L. No. 98-289, 98 Stat. 199 (1984); San Juan Basin Wilderness Protection Act of 1984, Pub. L. No. 98-603, 98 Stat. 3155 (1984). The third wilderness bill enacted in 1984 simply re-named the "River of No Return Wilderness" in Idaho as the "Frank Church—River of No Return Wilderness." Pub. L. No. 98-231, 98 Stat. 60 (1984).

160. MARSH, *supra* note 68, at 141.

161. Oregon Wilderness Act, Pub. L. No. 98-328, § 7(b)(1), 98 Stat., 272, 278 (1984).

162. 130 CONG. REC. 25,137 (1984) (statement of Rep. Seiberling).

163. *Id.*

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.<sup>164</sup> The committee report acknowledges *Bergland* and *California v. Block*.<sup>165</sup> 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."<sup>166</sup>

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*.<sup>167</sup> 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."<sup>168</sup> The inclusion of this provision was of utmost importance to Hatfield and the timber industry because it would nullify the Oregon RARE II lawsuit.<sup>169</sup> As Hatfield explained on the Senate floor:

[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.<sup>170</sup>

On May 24, 1984, the Senate passed the Oregon wilderness bill, amended to reflect the compromise release/sufficiency language.<sup>171</sup>

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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).

165. S. REP. NO. 98-465, at 8 (1984), *reprinted in* 13558 U.S. Cong. Serial Set at 1335 (1985).

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.*

169. MARSH, *supra* note 68, at 138.

170. 30 CONG. REC. 14,058–59 (1984) (statement of Sen. Hatfield).

171. H.R. 1149, 98th Cong. (passed Senate, 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); *compare* S. REP. NO. 98-465, at 5–6 (1984), *reprinted in* 13558 U.S. Cong. Serial Set, at



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 *ONRC v. Block*.<sup>172</sup> He vigorously rebutted Oregon Congressman Denny Smith's contention that the bill "is not a great compromise,"<sup>173</sup> calling that contention "a bunch of bunk."<sup>174</sup> 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."<sup>175</sup> 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."<sup>176</sup> In the end, the House agreed to the Senate amendments by a vote of 281 to 99 on June 6, 1984.<sup>177, 178</sup>

The Senate Committee on Energy and Natural Resources reported out three more wilderness bills in May 1984 (Washington, Arizona, and Arkansas)<sup>179</sup> and three more in August (California, Utah, and Florida).<sup>180</sup> Progress on five of these bills had stopped completely or showed no sense of urgency in 1983;<sup>181</sup> the Arizona

1332–33 (1985), with H.R. REP. NO. 98-13 at 4–5 (1983), reprinted in 13533 U.S. Cong. Serial Set at 491–92 (1984).

172. See 130 CONG. REC. 14,804–05 (1984) (statement of Rep. AuCoin).

173. 130 CONG. REC. 14,804 (1984) (statement of Rep. Smith).

174. 130 CONG. REC. 14,804 (1984) (statement of Rep. AuCoin).

175. *Id.*

176. *Id.* at 14,805.

177. 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%5B%22oregon+wilderness%22%5D%7D&s=2&r=1>.

178. On June 13, Judge Panner stayed all proceedings in *ONRC v. Block* pending the signing of the Oregon Wilderness Act of 1984. Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. Jun. 13, 1984) (order staying proceedings). On August 6, based upon the enactment of the law, the judge entered a final judgment dismissing the Oregon RARE II lawsuit as moot. Or. Nat. Res. Council v. Block, No. 83-1902, slip op. at 1 (D. Or. Aug. 6, 1984). Even so, I spent another month more defeating motions to make ONRC pay the defendants' attorney fees. See Docket Sheet at nos. 255, 263, Or. Nat. Res. Council v. Block, (D. Or. Dec. 13, 1983) (No. 83-1902).

179. S. REP. NO. 98-461 (1984), reprinted in 13558 U.S. Cong. Serial Set, at 1208 (Washington); S. REP. NO. 98-643 (1984), reprinted in 13558 U.S. Cong. Serial Set, at 1264 (Arizona); S. REP. NO. 98-462 (1984), reprinted in 13558 U.S. Cong. Serial Set, at 1240 (Arkansas).

180. S. REP. NO. 98-582 (1984), reprinted in 13562 U.S. Cong. Serial Set, at 912 (98th Cong. 2d sess.) (1985) (California); S. REP. NO. 98-581 (1984), reprinted in 13562 U.S. Cong. Serial Set, at 880 (Utah); S. REP. NO. 98-580 (1984), reprinted in 13562 U.S. Cong. Serial Set, at 864 (Florida).

181. For the last significant congressional action in 1983, and the gap between that and the next significant congressional action, see S. 837, 98th Cong. (hearings concluded, Sep. 30, 1983; Comm. on Energy and Nat. Res. rep. to full Senate ordered to be printed, May 18, 1984) (Washington), <https://www.congress.gov/bill/98th-congress/senate-bill/837/all-actions?q=%7B%22search%22%3A%5B%22washington+wilderness+act%22%5D%7D&s=2&r=1>; S. 2125, 98th Cong. (referred to Comm. on Energy and Nat. Res., Nov. 17, 1983; comm. rep. to full Senate ordered to be printed, May 18, 1984) (Arkansas), <https://www.congress.gov/bill/98th-congress/senate-bill/2125/all-actions?q=%7B%22search%22%3A%5B%22arkansas+wilderness+act%22%5D%7D&s=6&r=1>;

bill was introduced in 1984.<sup>182</sup> 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.<sup>183</sup>

All six committee reports contain language identical to the language quoted or described in the committee's report on the Oregon wilderness bill regarding litigation and the necessity for including sufficiency language to resolve the "cloud of uncertainty" caused by the RARE II lawsuits that had been filed after *California v. Block*.<sup>184</sup> 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.<sup>185</sup> 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";<sup>186</sup> *ONRC v. Block* was the only RARE II lawsuit pending

H.R. 1437, 98th Cong. (hearings held, Jul. 28, 1983; Comm. on Energy and Nat. Res. rep. to full Senate ordered to be printed, Aug. 7, 1984) (California), <https://www.congress.gov/bill/98th-congress/house-bill/1437/all-actions?q=%7B%22search%22%3A%5B%22california+wilderness%22%5D%7D&cs=8&tr=1>; S. 2155, 98th Cong. (referred to Comm. on Energy and Nat. Res., Nov. 18, 1983; comm. rep. to full Senate ordered to be printed, Aug. 6, 1984) (Utah), <https://www.congress.gov/bill/98th-congress/senate-bill/2155/all-actions?q=%7B%22search%22%3A%5B%22utah+wilderness%22%5D%7D&cs=10&tr=1>; H.R. 9, 98th Cong. (referred to Comm. on Energy and Nat. Res., Jun. 15, 1983; comm. rep. to full Senate ordered to be printed, Aug. 6, 1984) (Florida), <https://www.congress.gov/bill/98th-congress/house-bill/9/all-actions?q=%7B%22search%22%3A%5B%22florida+wilderness%22%5D%7D&cs=2&tr=1>.

182. H.R. 4707, 98th Cong. (introduced in House, Feb. 1, 1984) (Arizona), <https://www.congress.gov/bill/98th-congress/house-bill/4707/all-actions?q=%7B%22search%22%3A%5B%22arizona+wilderness+act%22%5D%7D&cs=4&tr=1>.

183. S. 837, 98th Cong. (as amended to make technical corrections, May 24, 1984) (Washington), <https://www.congress.gov/bill/98th-congress/senate-bill/837/all-actions?q=%7B%22search%22%3A%5B%22washington+wilderness+act%22%5D%7D&cs=2&tr=1>; S. 2125, 98th Cong. (as amended to make technical change, Aug. 9, 1984) (Arkansas), <https://www.congress.gov/bill/98th-congress/senate-bill/2125/all-actions?q=%7B%22search%22%3A%5B%22arkansas+wilderness+act%22%5D%7D&cs=6&tr=1>; H.R. 1437, 98th Cong. (as amended to make technical corrections, Aug. 9, 1984) (California), <https://www.congress.gov/bill/98th-congress/house-bill/1437/all-actions?q=%7B%22search%22%3A%5B%22california+wilderness%22%5D%7D&cs=8&tr=1>.

184. S. REP. NO. 98-461, at 16 (1984), *reprinted in* 13558 U.S. Cong. Serial Set, at 1223 (Washington); S. REP. NO. 98-643, at 25 (1984), *reprinted in* 13558 U.S. Cong. Serial Set, at 1288 (Arizona); S. REP. NO. 98-462, at 7 (1984), *reprinted in* 13558 U.S. Cong. Serial Set, at 1246 (Arkansas); S. REP. NO. 98-582, at 37 (1984), *reprinted in* 13562 U.S. Cong. Serial Set, at 948 (California); S. REP. NO. 98-581, at 12-13 (1984), *reprinted in* 13562 U.S. Cong. Serial Set, at 891-92 (Utah); S. REP. NO. 98-580, at 6 (1984), *reprinted in* 13562 U.S. Cong. Serial Set, at 869 (Florida).

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.")

186. 130 CONG. REC. 14,077 (statement of Sen. Gorton) (emphasis added).

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.<sup>187</sup>

The Senate Committee on Agriculture, Nutrition, and Forestry reported out four wilderness bills in April (Wisconsin, Vermont, New Hampshire, and North Carolina)<sup>188</sup> and six more in September (Georgia, Mississippi, Texas, Tennessee, Pennsylvania, and Virginia).<sup>189</sup> Six of these bills had little or no more momentum of note in 1983 (Wisconsin, Vermont, New Hampshire, North Carolina, Texas, and

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187. 30 CONG. REC. 28,677, 28,6768 (1984); compare Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, § 401, 98 Stat. 2807, 2811-12 (1984), with Wisconsin Wilderness Act of 1984, Pub. L. No. 98-321, § 5, 98 Stat. 250, 251-52 (1984), and Vermont Wilderness Act of 1984, Pub. L. No. 98-322, § 105, 98 Stat. 253, 255-56 (1984), and New Hampshire Wilderness Act of 1984, Pub. L. No. 98-323, § 104, 98 Stat. 259, 260-61 (1984), and North Carolina Wilderness Act of 1984, Pub. L. No. 98-324, § 5, 98 Stat. 263, 265-66 (1984), and Oregon Wilderness Act of 1984, Pub. L. No. 98-328, § 7, 98 Stat. 272, 278-79 (1984), and Washington State Wilderness Act of 1984, Pub. L. No. 98-339, § 5, 98 Stat. 299, 302-03 (1984), and Arizona Wilderness Act of 1984, Pub. L. No. 98-406, § 103, 98 Stat. 1485, 1489-90 (1984), and California Wilderness Act of 1984, Pub. L. No. 98-425, § 111, 98 Stat. 1619, 1628-29 (1984), and Utah Wilderness Act of 1984, Pub. L. No. 98-428, § 201, 98 Stat. 1657, 1659-60 (1984), and Florida Wilderness Act of 1983, Pub. L. No. 98-430, § 6, 98 Stat. 1665, 1667-68 (1984), and Arkansas Wilderness Act of 1984, Pub. L. No. 98-508, § 4, 98 Stat. 2349, 2350-51 (1984), and Georgia Wilderness Act of 1984, Pub. L. No. 98-514, § 5, 98 Stat. 2416, 2417-18 (1984), and Mississippi National Forest Wilderness Act of 1984, Pub. L. No. 98-515, § 5, 98 Stat. 2420, 2421-22 (1984), and Texas Wilderness Act of 1984, Pub. L. No. 98-574, § 5, 98 Stat. 3051, 3052-53 (1984), and Tennessee Wilderness Act of 1984, Pub. L. No. 98-578, § 5, 98 Stat. 3088, 3089-90 (1984), and Pennsylvania Wilderness Act of 1984, Pub. L. No. 98-585, § 8, 98 Stat. 3100, 3103-04 (1984), and Virginia Wilderness Act of 1984, Pub. L. No. 98-586, § 5, 98 Stat. 3105, 3106-07 (1984).

188. S. REP. NO. 98-413 (1984), reprinted in 13558 U.S. Cong. Serial Set, at 148 (Wisconsin); S. REP. NO. 98-416 (1984), reprinted in 13558 U.S. Cong. Serial Set, at 236 (Vermont); S. REP. NO. 98-414 (1984), reprinted in 13558 U.S. Cong. Serial Set, at 172 (New Hampshire); S. REP. NO. 98-415 (1984), reprinted in 13558 U.S. Cong. Serial Set, at 204 (North Carolina).

189. S. REP. NO. 98-611 (1984), reprinted in 13563 U.S. Cong. Serial Set, at 298 (98th Cong. 2d Sess.) (1985) (Georgia); S. REP. NO. 98-613 (1984), reprinted in 13563 U.S. Cong. Serial Set, at 354 (Mississippi); S. REP. NO. 98-614 (1984), reprinted in 13563 U.S. Cong. Serial Set, at 378 (Texas); S. REP. NO. 98-615 (1984), reprinted in 13563 U.S. Cong. Serial Set, at 410 (Tennessee); S. REP. NO. 98-616 (1984), reprinted in 13563 U.S. Cong. Serial Set, at 434 (Pennsylvania); S. REP. NO. 98-612 (1984), reprinted in 13563 U.S. Cong. Serial Set, at 322 (Virginia).

Tennessee)<sup>190</sup>; four were introduced in 1984 (Georgia, Mississippi, Pennsylvania, and Virginia).<sup>191</sup>

Using the same language, word for word, the committee report on each of the ten bills expressly states that litigation challenging the RARE II recommendations "has had a direct bearing on congressional consideration of wilderness legislation."<sup>192</sup> 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."<sup>193</sup> Of course, the California lawsuit on its own had not driven the

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/all-](https://www.congress.gov/bill/98th-congress/house-bill/3578/all-actions?q=%7B%22search%22%3A%5B%22wisconsin+wilderness+act%22%5D%7D&ts=4&r=1)

actions?q=%7B%22search%22%3A%5B%22wisconsin+wilderness+act%22%5D%7D&ts=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/all-](https://www.congress.gov/bill/98th-congress/house-bill/4198/all-actions?q=%7B%22search%22%3A%5B%22vermont+wilderness+act%22%5D%7D&ts=2&r=1)

actions?q=%7B%22search%22%3A%5B%22vermont+wilderness+act%22%5D%7D&ts=2&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/all-](https://www.congress.gov/bill/98th-congress/house-bill/3921/all-actions?q=%7B%22search%22%3A%5B%22new+hampshire+wilderness+act%22%5D%7D&ts=4&r=1)

actions?q=%7B%22search%22%3A%5B%22new+hampshire+wilderness+act%22%5D%7D&ts=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/all-](https://www.congress.gov/bill/98th-congress/house-bill/3960/all-actions?q=%7B%22search%22%3A%5B%22north+carolina+wilderness+act%22%5D%7D&ts=6&r=1)

actions?q=%7B%22search%22%3A%5B%22north+carolina+wilderness+act%22%5D%7D&ts=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/all-](https://www.congress.gov/bill/98th-congress/house-bill/3788/all-actions?q=%7B%22search%22%3A%5B%22texas+wilderness+act%22%5D%7D&ts=2&r=1)

actions?q=%7B%22search%22%3A%5B%22texas+wilderness+act%22%5D%7D&ts=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/all-](https://www.congress.gov/bill/98th-congress/house-bill/4263/all-actions?q=%7B%22search%22%3A%5B%22tennessee+wilderness+act%22%5D%7D&ts=4&r=1)

actions?q=%7B%22search%22%3A%5B%22tennessee+wilderness+act%22%5D%7D&ts=4&r=1.

191. S. 2773, 98th Cong. (introduced in Senate, Jun. 19, 1984) (Georgia), <https://www.congress.gov/bill/98th-congress/senate-bill/2773/actions?q=%7B%22search%22%3A%5B%22georgia+wilderness+act%22%5D%7D&ts=2&r=1>; S. 2808, 98th Cong. (introduced in Senate, Jun. 28, 1984) (Mississippi),

[https://www.congress.gov/bill/98th-congress/senate-](https://www.congress.gov/bill/98th-congress/senate-bill/2808/actions?q=%7B%22search%22%3A%5B%22mississippi+wilderness+act%22%5D%7D&ts=4&r=1)

bill/2808/actions?q=%7B%22search%22%3A%5B%22mississippi+wilderness+act%22%5D%7D&ts=4&r=1; H.R. 5076, 98th Cong. (introduced in House, Mar. 8, 1984) (Pennsylvania),

[https://www.congress.gov/bill/98th-congress/house-bill/5076/all-](https://www.congress.gov/bill/98th-congress/house-bill/5076/all-actions?q=%7B%22search%22%3A%5B%22pennsylvania+wilderness+act%22%5D%7D&ts=6&r=1)

actions?q=%7B%22search%22%3A%5B%22pennsylvania+wilderness+act%22%5D%7D&ts=6&r=1; H.R. 5121, 98th Cong. (introduced in House, Mar. 14, 1984) (Virginia),

[https://www.congress.gov/bill/98th-](https://www.congress.gov/bill/98th-congress/house-bill/5121/all-actions?q=%7B%22search%22%3A%5B%22virginia+wilderness+act%22%5D%7D&ts=6&r=1)

congress/house-bill/5121/all-actions?q=%7B%22search%22%3A%5B%22virginia+wilderness+act%22%5D%7D&ts=6&r=1.

192. S. REP. NO. 98-413, at 5 (1984), *reprinted in* 13558 U.S. Cong. Serial Set, at 152 (Wisconsin); S. REP. NO. 98-416, at 10 (1984), *reprinted in* 13558 U.S. Cong. Serial Set, at 245 (Vermont); S. REP. NO. 98-414, at 9 (1984), *reprinted in* 13558 U.S. Cong. Serial Set, at 180 (New Hampshire); S. REP. NO. 98-415, at 9 (1984), *reprinted in* 13558 U.S. Cong. Serial Set, at 212 (North Carolina); S. REP. NO. 98-611, at 5 (1984), *reprinted in* 13563 U.S. Cong. Serial Set, at 302 (Georgia); S. REP. NO. 98-613, at 5 (1984), *reprinted in* 13563 U.S. Cong. Serial Set, at 358 (Mississippi); S. REP. NO. 98-614, at 8 (1984), *reprinted in* 13563 U.S. Cong. Serial Set, at 385 (Texas); S. REP. NO. 98-615, at 7 (1984), *reprinted in* 13563 U.S. Cong. Serial Set, at 416 (Tennessee); S. REP. NO. 98-616, at 8 (1984), *reprinted in* 13563 U.S. Cong. Serial Set, at 441 (Pennsylvania); S. REP. NO. 98-612, at 11 (1984), *reprinted in* 13563 U.S. Cong. Serial Set, at 332 (Virginia).

193. S. REP. NO. 98-413, at 6, *reprinted in* 13558 U.S. Cong. Serial Set, at 153 (Wisconsin); S. REP. NO. 98-416, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 245 (Vermont); S. REP. NO. 98-414, at 9, *reprinted in* 13558 U.S. Cong. Serial Set, at 180 (New Hampshire); S. REP. NO. 98-415, at 10, *reprinted in*

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.<sup>194</sup>

The committee stated, "There have been three lawsuits filed in the Northwest that rely extensively on *California v. Block*."<sup>195</sup> 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.

First, they name *Earth First* and *Kettle Range*,<sup>196, 197</sup> 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

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13558 U.S. Cong. Serial Set, at 213 (North Carolina); S. REP. NO. 98-611, at 6, *reprinted in* 13563 U.S. Cong. Serial Set, at 303 (Georgia); S. REP. NO. 98-613, at 5, *reprinted in* 13563 U.S. Cong. Serial Set, at 358 (Mississippi); S. REP. NO. 98-614, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 385 (Texas); S. REP. NO. 98-615, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 417 (Tennessee); S. REP. NO. 98-616, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 441 (Pennsylvania); S. REP. NO. 98-612, at 12, *reprinted in* 13563 U.S. Cong. Serial Set, at 333 (Virginia).

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

195. S. REP. NO. 98-413, at 6, *reprinted in* 13558 U.S. Cong. Serial Set, at 153 (Wisconsin); S. REP. NO. 98-416, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 245 (Vermont); S. REP. NO. 98-414, at 9, *reprinted in* 13558 U.S. Cong. Serial Set, at 180 (New Hampshire); S. REP. NO. 98-415, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 213 (North Carolina); S. REP. NO. 98-611, at 6, *reprinted in* 13563 U.S. Cong. Serial Set, at 303 (Georgia); S. REP. NO. 98-613, at 5, *reprinted in* 13563 U.S. Cong. Serial Set, at 358 (Mississippi); S. REP. NO. 98-614, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 385 (Texas); S. REP. NO. 98-615, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 417 (Tennessee); S. REP. NO. 98-616, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 441 (Pennsylvania); S. REP. NO. 98-612, at 12, *reprinted in* 13563 U.S. Cong. Serial Set, at 333 (Virginia).

196. S. REP. NO. 98-413, at 6, *reprinted in* 13558 U.S. Cong. Serial Set, at 153 (Wisconsin); S. REP. NO. 98-416, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 245 (Vermont); S. REP. NO. 98-414, at 9–10, *reprinted in* 13558 U.S. Cong. Serial Set, at 180–81 (New Hampshire); S. REP. NO. 98-415, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 213 (North Carolina); S. REP. NO. 98-611, at 6, *reprinted in* 13563 U.S. Cong. Serial Set, at 303 (Georgia); S. REP. NO. 98-613, at 5, *reprinted in* 13563 U.S. Cong. Serial Set, at 358 (Mississippi); S. REP. NO. 98-614, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 385–86 (Texas); S. REP. NO. 98-615, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 417 (Tennessee); S. REP. NO. 98-616, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 441 (Pennsylvania); S. REP. NO. 98-612, at 12, *reprinted in* 13563 U.S. Cong. Serial Set, at 333 (Virginia).

197. I could not find the order granting the motion for preliminary injunction in *Kettle Range* to independently verify that the court relied on *California v. Block*. The court's order is unpublished. The court sent the case file to the National Archives years ago. Email from Penny Lamb, Courtroom Deputy to the Honorable Rosanna Malouf Peterson, U.S. District Court, Eastern District of Washington, to Neil Kagan (Feb. 9, 2021, 18:14 PST) (on file with author). The National Archives disposed of the case file in December 2011. Email from National Archives to Neil Kagan (Feb. 22, 2021, 13:13 PST) (on file with author). The attorney for the plaintiffs also destroyed his files. Telephone Interview with Tom P. May, Attorney for Plaintiffs Kettle Range Conservation Group et al. (Feb. 15, 2021).

Oregon until the requirements of NEPA have been met. That suit is pending. *Oregon Natural Resources Council v. Block*, Civil No. 83-1902, D. Oreg.<sup>198</sup>

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."<sup>199</sup> To eliminate the potential for litigation 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.<sup>200</sup> 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.<sup>201</sup>

Congress proceeded to pass all eighteen wilderness bills as reported or amended by the two Senate committees to include the compromise release and

198. S. REP. NO. 98-413, at 6, *reprinted in* 13558 U.S. Cong. Serial Set, at 153 (Wisconsin); S. REP. NO. 98-416, at 11, *reprinted in* 13558 U.S. Cong. Serial Set, at 246 (Vermont); S. REP. NO. 98-414, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 181 (New Hampshire); S. REP. NO. 98-415, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 213 (North Carolina); S. REP. NO. 98-611, at 6, *reprinted in* 13563 U.S. Cong. Serial Set, at 303 (Georgia); S. REP. NO. 98-613, at 5, *reprinted in* 13563 U.S. Cong. Serial Set, at 358 (Mississippi); S. REP. NO. 98-614, at 9, *reprinted in* 13563 U.S. Cong. Serial Set, at 386 (Texas); S. REP. NO. 98-615, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 417 (Tennessee); S. REP. NO. 98-616, at 8-9, *reprinted in* 13563 U.S. Cong. Serial Set, at 441-42 (Pennsylvania); S. REP. NO. 98-612, at 12, *reprinted in* 13563 U.S. Cong. Serial Set, at 333 (Virginia).

199. S. REP. NO. 98-413, at 6, *reprinted in* 13558 U.S. Cong. Serial Set, at 153 (Wisconsin); S. REP. NO. 98-416, at 11, *reprinted in* 13558 U.S. Cong. Serial Set, at 246 (Vermont); S. REP. NO. 98-414, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 181 (New Hampshire); S. REP. NO. 98-415, at 10, *reprinted in* 13558 U.S. Cong. Serial Set, at 213 (North Carolina); S. REP. NO. 98-611, at 6, *reprinted in* 13563 U.S. Cong. Serial Set, at 303 (Georgia); S. REP. NO. 98-613, at 6, *reprinted in* 13563 U.S. Cong. Serial Set, at 359 (Mississippi); S. REP. NO. 98-614, at 9, *reprinted in* 13563 U.S. Cong. Serial Set, at 386 (Texas); S. REP. NO. 98-615, at 8, *reprinted in* 13563 U.S. Cong. Serial Set, at 417 (Tennessee); S. REP. NO. 98-616, at 9, *reprinted in* 13563 U.S. Cong. Serial Set, at 442 (Pennsylvania); S. REP. NO. 98-612, at 12, *reprinted in* 13563 U.S. Cong. Serial Set, at 333 (Virginia).

200. S. REP. NO. 98-413, at 7, *reprinted in* 13558 U.S. Cong. Serial Set, at 154 (Wisconsin); S. REP. NO. 98-416, at 11-12, *reprinted in* 13558 U.S. Cong. Serial Set, at 246-47 (Vermont); S. REP. NO. 98-414, at 10-11, *reprinted in* 13558 U.S. Cong. Serial Set, at 180-81 (New Hampshire); S. REP. NO. 98-415, at 11, *reprinted in* 13558 U.S. Cong. Serial Set, at 214 (North Carolina); S. REP. NO. 98-611, at 7, *reprinted in* 13563 U.S. Cong. Serial Set, at 304 (Georgia); S. REP. NO. 98-613, at 6-7, *reprinted in* 13563 U.S. Cong. Serial Set, at 359-60 (Mississippi); S. REP. NO. 98-614, at 10, *reprinted in* 13563 U.S. Cong. Serial Set, at 387 (Texas); S. REP. NO. 98-615, at 9, *reprinted in* 13563 U.S. Cong. Serial Set, at 418 (Tennessee); S. REP. NO. 98-616, at 9-10, *reprinted in* 13563 U.S. Cong. Serial Set, at 442-43 (Pennsylvania); S. REP. NO. 98-612, at 13, *reprinted in* 13563 U.S. Cong. Serial Set, at 334 (Virginia).

201. S. REP. NO. 98-413, at 7, *reprinted in* 13558 U.S. Cong. Serial Set, at 154 (Wisconsin); S. REP. NO. 98-416, at 12, *reprinted in* 13558 U.S. Cong. Serial Set, at 247 (Vermont); S. REP. NO. 98-414, at 11, *reprinted in* 13558 U.S. Cong. Serial Set, at 182 (New Hampshire); S. REP. NO. 98-415, at 11, *reprinted in* 13558 U.S. Cong. Serial Set, at 214 (North Carolina); S. REP. NO. 98-611, at 7, *reprinted in* 13563 U.S. Cong. Serial Set, at 304 (Georgia); S. REP. NO. 98-613, at 7, *reprinted in* 13563 U.S. Cong. Serial Set, at 360 (Mississippi); S. REP. NO. 98-614, at 10, *reprinted in* 13563 U.S. Cong. Serial Set, at 387 (Texas); S. REP. NO. 98-615, at 9, *reprinted in* 13563 U.S. Cong. Serial Set, at 418 (Tennessee); S. REP. NO. 98-616, at 10, *reprinted in* 13563 U.S. Cong. Serial Set, at 443 (Pennsylvania); S. REP. NO. 98-612, at 13, *reprinted in* 13563 U.S. Cong. Serial Set, at 334 (Virginia).

sufficiency language.<sup>202</sup> 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.<sup>203</sup> This is nearly twice the wilderness the Forest Service had recommended for all the states involved.<sup>204</sup> The Oregon Wilderness Act of 1984 designated more than double the wilderness the Forest Service had recommended for Oregon.<sup>205</sup> The Washington Wilderness Act of 1984 designated almost four times the wilderness the Forest Service had recommended for Washington.<sup>206</sup>

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.<sup>207</sup>

### B. 1985–1989

The compromise on release/sufficiency forged in response to *ONRC v. Block* opened the way for seven more wilderness laws from 1985 through 1989: for Alabama, Kentucky, Nebraska, Nevada, Michigan, Oklahoma, and Tennessee. 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.<sup>208</sup>

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

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202. See *supra* note 187.

203. See Appendix, Table 1.

204. *Id.*

205. *Id.*

206. *Id.*

207. Arizona Wilderness Act of 1984, Pub. L. No. 98-406, §§ 105, 202, 301, 98 Stat. 1491-93 (1984) (404,820 acres); California Wilderness Act of 1984, Pub. L. No. 98-425, § 106, 98 Stat. 1626-27 (1984) (1,418,230 acres); Oregon Wilderness Act of 1984, Pub. L. No. 98-328, § 3(22), 98 Stat. 274 (1984) (5,500 acres); Washington State Wilderness Act of 1984, Pub. L. No. 98-339, § 6, 98 Stat. 304 (1984) (7,140 acres).

208. Compare Oregon Wilderness Act of 1984, Pub. L. No. 98-328, § 7, 98 Stat. 277-79 (1984), with Kentucky Wilderness Act of 1985, Pub. L. No. 99-197, § 4, 99 Stat. 1351-52 (1985), and Nebraska Wilderness Act of 1985, Pub. L. No. 99-504, § 104, 100 Stat. 1803-04 (1986), and Tennessee Wilderness Act of 1986, Pub. L. No. 99-490, § 5, 100 Stat. 1236-37 (1986), and Michigan Wilderness Act of 1987, Pub. L. No. 100-184, § 6, 101 Stat. 1276-77 (1987), and Sipsy Wild and Scenic River and Alabama Addition Act of 1988, Pub. L. No. 100-547, § 202, 102 Stat. 2738-39 (1988), and Winding Stair Mountain National Recreation and Wilderness Area Act, Pub. L. No. 100-499, § 6, 102 Stat. 2493-94 (1988), and Nevada Wilderness Protection Act of 1989, Pub. L. No. 101-195, § 5, 103 Stat. 1786-87 (1989).

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."<sup>209</sup> 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."<sup>210</sup>

The reports of the House Committee on Interior and Insular Affairs on the Tennessee and Nebraska wilderness bills explain their release/sufficiency language obliquely — for Tennessee, by referring to the Senate committee report on the Tennessee wilderness bill enacted in 1984;<sup>211</sup> for Nebraska, by referring to the House committee report on the Arizona wilderness bill enacted in 1984.<sup>212</sup> 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*.<sup>213</sup>

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*];"<sup>214</sup> "the standard 'release/sufficiency' language that has been included in State wilderness bills since the 98th Congress";<sup>215</sup> "the 'release/sufficiency' language incorporated by the Congress in virtually all national forest wilderness bills enacted over the past several years";<sup>216</sup> "the standard

209. H.R. REP. NO. 100-29, pt. 1, at 10 (1987), *reprinted in* 13797 U.S. Cong. Serial Set at 1375 (100th Cong., 1st Sess.) (1989).

210. S. REP. NO. 99-122, at 2 (1985), *reprinted in* 13621 U.S. Cong. Serial Set at 609 (99th Cong., 1st Sess.) (1987).

211. H.R. REP. NO. 99-853, pt. 1, at 5 (1986), *reprinted in* 13709 U.S. Cong. Serial Set at 258 (99th Cong., 2d Sess.) (1986). *See* text at notes 192–201.

212. H.R. REP. NO. 99-854, pt. 1, at 5 (1986), *reprinted in* 13709 U.S. Cong. Serial Set at 266 (99th Cong., 1st Sess.) (1986).

213. H.R. REP. NO. 98-643, pt. 1, at 23–24 (1984), *reprinted in* 13588 U.S. Cong. Serial Set at 818–19 (99th Cong., 1st Sess.) (1984).

214. S. REP. NO. 100-206, at 5 (1987), *reprinted in* 13738 U.S. Cong. Serial Set at 614 (100th Cong., 1st Sess.) (1988) (Michigan).

215. H.R. REP. NO. 100-1057, pt. 2, at 6 (1988), *reprinted in* 13905 U.S. Cong. Serial Set at 235 (100th Cong., 2d Sess.) (1988) (Alabama).

216. H.R. REP. NO. 99-411, pt. 1, at 3 (1985), *reprinted in* 13657 U.S. Cong. Serial Set at 1185 (99th Cong., 1st Sess.) (1987) (Kentucky).



release/sufficiency language found in most wilderness bills";<sup>217</sup> "standard release and sufficiency language";<sup>218</sup> or simply "release and sufficiency language."<sup>219</sup>

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 language of 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 national forests in Alabama, Kentucky, Nebraska, Nevada, Michigan, Oklahoma, and Tennessee, 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 907,994 acres of national forest lands in the seven states.<sup>220</sup> This is greater than one and a half times more wilderness than the Forest Service's recommendation of 575,479 acres for the states involved.<sup>221</sup>

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 9,218,746 acres in twenty-four of the thirty-eight states studied in RARE II as wilderness. Of that number, 7,383,056 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*

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217. H.R. REP. NO. 100-792, pt. 1, at 8 (1988), *reprinted in* 13898 U.S. Cong. Serial Set at 1469 (100th Cong., 2d Sess.) (1988) (Oklahoma).

218. H.R. REP. NO. 101-339, pt. 1, at 6 (1989), *reprinted in* 13959 U.S. Cong. Serial Set at 1329 (100th Cong., 1st Sess.) (1991) (Nevada).

219. S. REP. NO. 101-113, at 5 (1989), *reprinted in* 13925 U.S. Cong. Serial Set at 264 (101st Cong., 1st Sess.) (1991) (Nevada).

220. *See* Appendix, Table 2.

221. *Id.*

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."<sup>222</sup> 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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222. Letter from Wallace Stegner to David E. Pesonen (Dec. 3, 1960), WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* (1969), reprinted in *Wallace Stegner*, WILDLAND RESEARCH CENTER, <https://www.wilderness.org/articles/article/wallace-stegner>.

## APPENDIX

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.

	Forest Service recommendation (acres)	Wilderness Act designation (acres)	Percentage Change between Forest Service recommendation and Wilderness Act Designation
State			
Arizona	400,312 <sup>223</sup>	699,140 <sup>224</sup>	+ 75%
Arkansas	27,106 <sup>225</sup>	91,103 <sup>226</sup>	+ 236%
California	899,231 <sup>227</sup>	1,792,930 <sup>228</sup>	+ 99%
Florida	24,633 <sup>229</sup>	49,150 <sup>230</sup>	+ 100%
Georgia	39,670 <sup>231</sup>	14,439 <sup>232</sup>	- 64%
Mississippi	5,460 <sup>233</sup>	5,500 <sup>234</sup>	+ 1%
New Hampshire	168,176 <sup>235</sup>	77,000 <sup>236</sup>	- 54%

223. 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].

224. Arizona Wilderness Act of 1984, Pub. L. No. 98-406, § 101, 98 Stat. 1485-88 (1984).

225. RARE II EIS, *supra* note 1, at App. P-1.

226. Arkansas Wilderness Act of 1984, Pub. L. No. 98-508, § 3, 98 Stat. 2349-50 (1984).

227. RARE II EIS, *supra* note 1, at App. C-1.

228. California Wilderness Act of 1984, Pub. L. No. 98-425, § 101, 98 Stat. 1619-24 (1984).

229. RARE II EIS, *supra* note 1, at App. F-1.

230. Florida Wilderness Act of 1983, Pub. L. No. 98-430, § 1, 98 Stat. 1665-66 (1984).

231. RARE II EIS, *supra* note 1, at App. Q-1.

232. Georgia Wilderness Act of 1984, Pub. L. No. 98-514, § 2, 98 Stat. 2416 (1984).

233. RARE II EIS, *supra* note 1, at App. F-1.

234. Mississippi National Forest Wilderness Act of 1984, Pub. L. No. 98-515, § 2, 98 Stat. 2420 (1984).

235. RARE II EIS, *supra* note 1, at App. N-1.

236. New Hampshire Wilderness Act of 1984, Pub. L. No. 98-323, § 101, 98 Stat. 259 (1984).

*Table 1 continued	Forest Service recommendation (acres)	Wilderness Act designation (acres)	Percentage Change between Forest Service recommendation and Wilderness Act Designation
North Carolina	64,817 <sup>237</sup>	68,750 <sup>238</sup>	+ 6%
Oregon	368,120 <sup>239</sup>	854,000 <sup>240</sup>	+ 132%
Pennsylvania	9,556 <sup>241</sup>	9,705 <sup>242</sup>	+ 2%
Tennessee	3,887 <sup>243</sup>	24,942 <sup>244</sup>	+ 542%
Texas	10,212 <sup>245</sup>	34,346 <sup>246</sup>	+ 236%
Utah	492,088 <sup>247</sup>	749,550 <sup>248</sup>	+ 52%
Vermont	0 <sup>249</sup>	41,265 <sup>250</sup>	N/A
Virginia	62,578 <sup>251</sup>	55,984 <sup>252</sup>	- 11%
Washington	268,887 <sup>253</sup>	998,790 <sup>254</sup>	+ 272%

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237. RARE II EIS, *supra* note 1, at App. Q-1.

238. North Carolina Wilderness Act of 1984, Pub. L. No. 98-324, § 2, 98 Stat. 263-64 (1984).

239. RARE II EIS, *supra* note 1, at App. O-1.

240. Oregon Wilderness Act of 1984, Pub. L. No. 98-328, §§ 3(1)-(21), 3(23)-(29), 4(f), 98 Stat. 272-75, 277 (1984).

241. RARE II EIS, *supra* note 1, at App. N-1.

242. Pennsylvania Wilderness Act of 1984, Pub. L. No. 98-585, § 4, 98 Stat. 3100-01 (1984).

243. RARE II EIS, *supra* note 1, at App. Q-1.

244. Tennessee Wilderness Act of 1984, Pub. L. No. 98-578, § 2, 98 Stat. 3088 (1984).

245. RARE II EIS, *supra* note 1, at App. F-1.

246. Texas Wilderness Act of 1984, Pub. L. No. 98-574, § 2, 98 Stat. 3051 (1984).

247. RARE II EIS, *supra* note 1, at App. R-1.

248. Utah Wilderness Act of 1984, Pub. L. No. 98-428, § 102, 98 Stat. 1657-59 (1984).

249. RARE II EIS, *supra* note 1, at App. N-1.

250. Vermont Wilderness Act of 1984, Pub. L. No. 98-322, § 102, 98 Stat. 254 (1984).

251. RARE II EIS, *supra* note 1, at App. Q-1.

252. Virginia Wilderness Act of 1984, Pub. L. No. 98-586, § 2, 98 Stat. 3105-06 (1984).

253. RARE II EIS, *supra* note 1, at App. S-1.

254. Washington State Wilderness Act of 1984, Pub. L. No. 98-339, § 3, 98 Stat. 299-302 (1984).

*Table 1 continued	Forest Service recommendation (acres)	Wilderness Act designation (acres)	Percentage Change between Forest Service recommendation and Wilderness Act Designation
Wisconsin	39,084 <sup>255</sup>	24,339 <sup>256</sup>	- 38%
Wyoming	627,137 <sup>257</sup>	884,129 <sup>258</sup>	+ 41%
<b>Total</b>	<b>3,510,954</b>	<b>6,475,062</b>	<b>+ 84%</b>

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.

	Forest Service recommendation (acres)	Wilderness Act designation (acres)	Percentage Change between Forest Service recommendation and Wilderness Act Designation
<b>State</b>			
Alabama	7,720 <sup>259</sup>	13,970 <sup>260</sup>	+81%
Kentucky	11,115 <sup>261</sup>	13,300 <sup>262</sup>	+ 20%
Michigan	51,609 <sup>263</sup>	91,535 <sup>264</sup>	+ 77%

255. RARE II EIS, *supra* note 1, at App. H-1.

256. Wisconsin Wilderness Act of 1984, Pub. L. No. 98-321, § 2, 98 Stat. 250 (1984).

257. RARE II EIS, *supra* note 1, at App. T-1.

258. Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, § 201, 98 Stat. 2808–09 (1984).

259. RARE II EIS, *supra* note 1, at App. F-1.

260. Sipsey Wild and Scenic River and Alabama Addition Act of 1988, Pub. L. No. 100-547, § 201, 102 Stat. 2737 (1988).

261. RARE II EIS, *supra* note 1, at App. Q-1.

262. Kentucky Wilderness Act of 1985, Pub. L. No. 99-197, § 2, 99 Stat. 1351 (1985).

263. RARE II EIS, *supra* note 1, at App. H-1.

264. Michigan Wilderness Act of 1987, Pub. L. No. 100-184, § 3, 101 Stat. 1274–78 (1987).

*Table 2 continued	Forest Service recommendation (acres)	Wilderness Act designation (acres)	Percentage Change between Forest Service recommendation and Wilderness Act Designation
Nebraska	7,360 <sup>265</sup>	8,100 <sup>266</sup>	+ 10%
Nevada	484,175 <sup>267</sup>	733,40 <sup>268</sup>	+ 52%
Oklahoma	13,500 <sup>269</sup>	13,954 <sup>270</sup>	+ 3%
Tennessee	0 <sup>271</sup>	33,735 <sup>272</sup>	N/A
<b>Total</b>	<b>575,479</b>	<b>907,994</b>	<b>+ 58%</b>

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265. RARE II EIS, *supra* note 1, at App. D-1.

266. Nebraska Wilderness Act of 1985, Pub. L. No. 99-504, § 101, 100 Stat. 1802 (1986).

267. RARE II EIS, *supra* note 1, at App. K-1.

268. Nevada Wilderness Protection Act of 1989, Pub. L. No. 101-195, § 2, 103 Stat. 1784-85 (1989).

269. RARE II EIS, *supra* note 1, at App. P-1.

270. Winding Stair Mountain National Recreation and Wilderness Area Act, Pub. L. No. 100-499, § 3, 102 Stat. 2492 (1988).

271. RARE II EIS, *supra* note 1, at App. Q-5.

272. Tennessee Wilderness Act of 1986, Pub. L. No. 99-490, § 2, 100 Stat. 1235 (1986).