THE STATE
of ALASKA
GOVERNOR BILL WALKER

Department of Natural Resources
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January 19, 2018

U.S. Department of Agriculture
Attention Sonny Perdue, Secretary of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250

Dear Secretary Perdue,

Enclosed you will find a request from the State of Alaska to consider a petition for rulemaking on the applicability of the 2001 Roadless Rule to the Tongass National Forest in Alaska. The history of the exemption and the ensuing legal challenges are covered in detail in our petition and exhibits. The State also lays out clear and sound rationale for why an exemption should be addressed through the rulemaking process.

The State appreciates your interest in this topic. We see this as one of many significant opportunities to work with you to support a diverse and robust forest products sector in Southeast Alaska. Rebuilding this sector will create jobs and prosperity for our rural communities located in the Tongass National Forest.

The State looks forward to participating in the process and is available to answer questions you or your staff may have on this subject.

Sincerely,

Andrew Mack

Andrew T. Mack
Commissioner

cc:
Bill Walker, Governor of Alaska
U.S. Senator Lisa Murkowski, Chairman, Senate Energy & Natural Resources Committee
U.S. Senator Daniel S. Sullivan
U.S. Representative Don Young
Tony Tooke, Chief USFS
Cathy Giessel, State Senator and Chair Senate Resources Committee
Geran Tarr, State Representative and Co-chair House Resources Committee
Andy Josephson, State Representative and Co-chair House Resources Committee

Before the Department of Agriculture
Washington, DC 20250

To: George Ervin "Sonny" Perdue, Secretary of Agriculture

From: The State of Alaska, Department of Natural Resources

Re: The Department of Agriculture Roadless Area Conservation Rule and The 2016 Tongass National Forest Land and Resource Management Plan

Date: January 19, 2018

STATE OF ALASKA
PETITION FOR USDA RULEMAKING TO EXEMPT THE TONGASS NATIONAL FOREST FROM APPLICATION OF THE ROADLESS RULE AND OTHER ACTIONS

I. SUMMARY

In a 2003 Record of Decision (ROD) Ex. 1, the USDA promulgated a regulation (Tongass Exemption) exempting the Tongass National Forest (Tongass) from the Roadless Area Conservation Rule (Roadless Rule). In this ROD, the USDA provided in-depth analysis of the requirements and limitations of the Tongass Timber Reform Act (TTRA) and the Alaska National Interest Lands Conservation Act (ANILCA) if the Roadless Rule were applied to the Tongass. After this statutory analysis, the USDA concluded that the best way to implement the spirit and the letter of these laws was to exempt the Tongass from the Roadless Rule.

The USDA also concluded that exempting the Tongass was consistent not only with the intent of Congress, but also with sound management of the Tongass because roadless areas in the Tongass are adequately protected without adding the additional restrictions in the Roadless Rule. USDA stated that roadless areas are common, not rare in the Tongass and the vast majority of the 9.34 million acres of roadless areas have restrictions on road building and timber harvest irrespective of the Roadless Rule. Even without the Roadless Rule, only about four percent of the Tongass is designated as suitable for timber harvest. *See* ROD, Ex. 1.

In its decision to exempt the Tongass, USDA weighed the value of imposing these unnecessary additional restrictions against the very significant social and economic costs to Southeast Alaska that were discussed in depth in the 2001 Roadless Rule decisional documents. When USDA reconsidered the same facts in this second rulemaking that it had considered in 2001, the USDA this time concluded that the needs of the people of

Alaska outweighed adding more restrictions when roadless areas in the Tongass are adequately protected without the Roadless Rule.

After environmental interest groups challenged the Tongass Exemption in 2009, the USDA aggressively defended the rule in its 2010 opening brief in the Federal District Court for the District of Alaska. *See* USDA Brief Ex. 2. USDA argued that "the Tongass Exemption was a well-reasoned decision, supported by the evidence" and that after reweighing the same economic, social and environmental factors considered in the 2001 ROD, USDA concluded that "the roadless values on the Tongass could be protected and social and economic impacts minimized by exempting the Tongass from the Roadless Rule. USDA Brief at 1-4.

The District Court nevertheless invalidated the Tongass Exemption, but upon appeal, a three-judge panel of the Ninth Circuit Court of Appeals reversed and upheld the Exemption. However, in a 6-5 *en banc* decision, the Ninth Circuit struck down the Tongass Exemption on a procedural ruling, holding that the USDA failed to adequately explain its change of position from the 2001 Roadless Rule to the 2003 Tongass Exemption. *See En Banc* Opinion, Ex.3. The Court did not find any substantive legal infirmities with the Tongass Exemption, that is, the Court did not hold that the USDA analysis or rationale could not support exempting the Tongass, or that the USDA reached the wrong decision, but only that USDA failed to provide an adequate explanation of its change of position from 2001. No judge questioned the fact that the USDA had a right to change position on exempting the Tongass, if the change was adequately explained. *Id.*

The rationale USDA provided for exempting the Tongass in the 2003 ROD and again in the 2010 USDA Brief remains valid today. The extensive damage resulting from the application of the Roadless Rule to the economic and social fabric of Southeast Alaska remains as real today as it was 15 years ago, while the Tongass roadless values remain more than adequately protected without the Roadless Rule. Therefore, for the reasons more fully explained below, the State of Alaska (State) respectfully requests that the Secretary of Agriculture grant this petition and direct the USDA and USFS to immediately undertake a rulemaking to consider once again exempting the Tongass from the Roadless Rule.

In addition, the State requests that the Secretary also direct the USFS to undertake a revision to the 2016 Tongass Land & Resource Management Plan (TLMP). In a recent amendment to the TLMP, the USFS implemented the Roadless Rule by including many of the most restrictive provisions and prohibitions of the Roadless Rule into the fabric of the TLMP. As a result, even if the Tongass is once again exempted from the Roadless Rule, these Roadless provisions would remain in the TLMP and be independently applicable unless also removed from the TLMP. A Forest Plan amendment or revision under the 2012 USFS planning rules is the mechanism for the Executive Branch to

remove these provisions. The State also requests that the provisions inserted into the TLMP in 2016 requiring a rapid transition from old growth to young growth timber harvest also be revised.

II. HISTORY OF THE TONGASS EXEMPTION

Controversy over federal management of the Tongass goes back many decades. The most relevant history regarding whether to exempt the Tongass from the Roadless Rule begins at the turn of the 21st Century in the waning days of the Clinton Administration. Entire books have been written on the high-profile policy and legal battles over the Tongass spanning many decades, and the basic facts have been set forth in many legal briefs and judicial decisions. *See e.g.* USDA Brief Ex.2 at 1-5; State Brief in the Federal District Court for the District of Columbia (State Roadless Rule Brief), Ex. 4 at 1-3; and *State of Alaska v. USDA,* case 11-1122 RLJ, Opinion filed 9/20/17, Ex. 5 at 7-15. Therefore, only a very brief summary is presented here in addition to the more comprehensive discussions in the attached exhibits.

Beginning with an interim rule in 1999, as the USDA developed the Roadless Rule, the administration's preferred approach was to exempt the Tongass or to limit its application. USDA Brief, Ex. 2 at 1-2. It was not until the final decision in the 2001 ROD, at the very conclusion of the rulemaking process, that USDA unexpectedly fully and immediately applied the Roadless Rule to the Tongass. *Id.*

During the rulemaking process, USDA recognized that the Tongass would be so uniquely and severely impacted by the Roadless Rule that what was effectively a separate rulemaking within a rulemaking was conducted for the Tongass. USDA recognized that the Roadless Rule would severely interfere with seeking to meet timber demand as required by Tongass Timber Reform Act, that the social and economic impact on Southeast Alaska would be severe, and that adequate protections were in place to protect the environmental values of the Tongass without the Roadless Rule. *Id.* at 2-5. These were the rationale stated throughout the process for choosing limited, if any, application to the Tongass as the USDA preferred alternative; at least until the surprise ending when in the final ROD the Roadless Rule was made immediately fully applicable to the Tongass. *Id.* For example, the USDA preferred alternative in the draft environmental impact statement was "Tongass exempt". *Id.*

Many lawsuits immediately followed promulgation of the Roadless Rule, including one by the State of Alaska challenging its application to Alaska national forests. In 2003, a temporary rule exempting the Tongass (Tongass Exemption) was promulgated to satisfy a settlement of Roadless Rule litigation between USDA and the State of Alaska. It is this temporary rule that was invalidated by the Federal District Court in Alaska in 2011. The rulemaking to promulgate permanent exemptions for both

national forests in Alaska – also a term of the settlement agreement – was never commenced after the 2005 State Petitions Rule replaced and effectively (at least temporarily) repealed the Roadless Rule nationwide. *Id.*

However, a federal court in California invalidated the State Petitions rule in 2006 and reinstated the Roadless Rule nationwide even though it had been invalidated by a federal court in Wyoming and was enjoined nationwide. The reinstatement of the Roadless Rule was, however, explicitly made subject to the Tongass Exemption rule, and therefore the Tongass remained exempt until the District Court in Alaska invalidated it in 2011. *Id.*

The Tongass Exemption rule then remained in litigation until the United States Supreme Court on March 29, 2016 declined the State's Petition for Certiorari for review of the Ninth Circuit *en banc* decision invalidating the Tongass Exemption rule due to the argued inadequate explanation of USDA's change in policy.

Following the loss of the Tongass Exemption, the State and many supporting intervenors continue to appeal the Roadless Rule and the Roadless Rulemaking decision to apply the rule to the two national forests in Alaska in the United States Court of Appeals for the District of Columbia Circuit. If the Court rules in the favor of the State, three different remedies are possible depending upon which claim(s) the case is decided; the Roadless Rule could be invalidated nationwide, it could be invalidated as applied to Alaska or it could be invalidated solely as applied to the Tongass.

III. CONTINUING RATIONALE FOR EXEMPTING THE TONGASS

A. Good Policy

Rationales for exempting the Tongass from the Roadless Rule in a new USDA rulemaking are not entirely equivalent to Alaska's legal claims and arguments challenging the Roadless Rule in federal court. The most important difference is that USDA can enact or change policy via a rulemaking whether such action is legally mandated or just good policy as determined by the agency. The *en banc* decision of the Ninth Circuit striking down the Tongass Exemption did not in any way cast doubt on USDA's authority to set policy on the Roadless or on the Tongass other than to clarify the extent to which the agency must explain its rationale in the record of decision. *See En Banc* Opinion Ex. 3.

Therefore, the first and most compelling reason that USDA should grant this petition to undertake a rulemaking to restore an exemption for the Tongass is that it remains good policy. The 2010 USDA brief (Ex. 2) supporting the policy decision to exempt the Tongass remains as persuasive today as it was then. No federal court has

opined that there was any issue with the policy choice to exempt the Tongass, but instead ruled only on the procedural flaw of not including a sufficient explanation for the change in policy from the 2001 ROD. The State is therefore requesting that USDA now correct this procedural problem through a new rulemaking and in effect reinstate the Tongass Exemption based on the same sound policy decision it made in 2003. All of the rationales that USDA offered for exempting the Tongass in the 2003 ROD remain valid today. ROD Ex. 1.

B. Compliance with Federal Law

In 2003, USDA offered rationales for exempting the Tongass as policy decisions that the State contends are legal requirements that mandate a Tongass or Alaska exemption. In particular, this includes compliance with ANILCA and the TTRA.

USDA devoted a considerable portion of the 2003 ROD to discussion of these two statutes and ultimately stated that the Tongass Exemption Rule

> "reflects the Department's assessment of how to best implement the letter and spirit of congressional direction along with public values, in light of the abundance of roadless values on the Tongass, the protection of the roadless values already included in the Tongass Forest Plan, and the socioeconomic costs to the local communities of applying the roadless rule's prohibitions." Ex. 1 at 75142.

USDA further stated that ANILCA and the TTRA "provide important congressional determinations, findings, and information relating to management of National Forest System lands on the Tongass." *Id.*

More specifically, USDA explained that in ANILCA Congress set aside another 5.5 million acres of the Tongass wilderness and found that this additional wilderness set aside represents "a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition" and that no additional conservation areas will be needed in the future on the Tongass. *Id.* Congress attempted to prevent the Executive Branch from circumventing this directive by prohibiting "future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska" without the approval of Congress. 16 U.S.C. §3213(a).

There is a fine line between the USDA's statement in the 2003 ROD that the Tongass Exemption implements "the letter and spirit of congressional direction" and the State's legal argument in the current litigation that by failing to exempt the Tongass from the Roadless Rule USDA has violated ANILCA by withdrawing millions of acres from

more intensive use without the consent of Congress. State Roadless Rule Brief, Ex.4 at 43-44. USDA may view exempting the Tongass as policy to implement the letter and the spirit of congressional direction in ANILCA or as a legal mandate to comply with ANILCA. Either way, complying with congressional intent as set forth in ANILCA is a powerful rationale for a new rulemaking to restore the Tongass Exemption.

The TTRA presents a similar rationale for a new rulemaking. In 1990, Congress amended ANILCA with the TTRA, which included a directive to the USDA Secretary to "seek to provide a supply of timber from the Tongass National Forest, which (1) meets the annual market demand for timber and (2) meets the market demand for timber for each planning cycle" consistent with multiple use and sustained yield management and the requirements of the National Forest Management Act. ROD, Ex.1 at 75142. USDA analyzed the demand numbers for the Tongass timber and the effect of the road construction and timber harvest prohibitions of the Roadless Rule and concluded that "the roadless prohibitions operate as an unnecessary and complicating factor limiting where timber harvesting may occur." *Id.* at 75141.

The State fully concurs with the USDA policy decision that further timber harvest restrictions were not necessary and complicated compliance with the TTRA directive to seek to meet timber demand. However, as with ANILCA, the State continues to argue in federal court that the timber harvest and road construction restrictions of the Roadless Rule limit the ability of the Tongass Forest Supervisor to plan and execute timber sales to the extent that it is impossible to even seek to meet timber demand. Intentionally tying your own agency's hands with such unnecessary restrictions that ensure failure to meet timber demands is a violation of the TTRA provisions to seek to meet demand. The State's full argument why the TTRA legally mandates a Tongass Exemption from the Roadless Rule is presented in the State Roadless Rule Brief, Ex. 4 at 38-43.

As with ANILCA, in 2003 USDA viewed an exemption as policy to implement the letter and the spirit of TTRA while the State determined that TTRA legally mandates an exemption. But again, implementing the directive of Congress is a powerful rationale for a new rulemaking under either analysis.

C. Compelling Case for Exemption Rulemaking

Addressing the serious socioeconomic consequences to Alaskans and complying with ANILCA and TTRA are all compelling rationale for a Tongass Exemption today, as they were in 2003. Other rationales offered by USDA in the 2003 ROD and supported by counsel in the 2010 USDA brief also remain valid today. As noted above, the Ninth Circuit did not invalidate the Tongass Exemption due to flawed rationales, but rather only because of an inadequate explanation for the change in policy. The State respectfully

submits this petition for a rulemaking to exempt the Tongass from the Roadless Rule in the interest of the socioeconomic well-being of its residents.

IV. CONTENT OF REQUESTED RULE

The Tongass Exemption Rule that was invalidated by the Ninth Circuit was a single sentence under 36 CFR § 294.14. The invalidated language in CFR § 294.14 can be replaced by new similar language as simple as: "This subpart does not apply to the Tongass National Forest."

V. OTHER REQUESTED ACTION

In 2016, the USFS completed an extensive amendment process to the TLMP. Among the changes that were made to the TLMP, significant changes included the implementation of the Roadless Rule and the implementation of the Transition Strategy intended to rapidly shift timber harvest in the Tongass from primarily old-growth to young-growth timber. The State was among many objectors to this TLMP amendment based on a wide range of procedural issues and substantive issues in forestry, transportation and resource development. The State's August 30, 2016 formal objection to the 2016 TLMP amendment is attached as Exhibit F. The exhibits filed with the objection can be accessed on the USFS Tongass website at:

https://cloudvault.usda.gov/index.php/s/l6my9KpoJk90wUa.

The State's objections did not result in changes to the final TLMP.

In addition to requesting that USDA commence a rulemaking to exempt the Tongass from the Roadless Rule, the State also requests that the USDA Secretary direct the USFS to commence a new amendment or revision process for the TLMP as amended in 2016. The State asks that this new TLMP process reconsider all of the objections in the State's objection letter in Exhibit 6. However, section III "The Amended Forest Plan violates the TTRA and ANILCA" is of particular relevance to this petition. Ex. 6 at 6.

This section explains that the Roadless Rule violates both the TTRA and ANILCA as is also discussed above. *Id.* It also explains that in adopting this TLMP amendment "USFS now compounds this violation of federal law by selecting an alternative that not only fully implements the Roadless Rule in the management plan governing the Tongass, but also implements a transition plan to young-growth timber with a rapid phase out of the old-growth timber on which the timber industry is dependent." *Id.*

As a result of implementing the Roadless Rule restrictions in the TLMP, along with additional restrictions on old-growth timber harvest outside of roadless areas, a new

Tongass Exemption rule alone will not provide relief to Southeast Alaska. The Roadless Rule and the 2016 TLMP now each independently restrict road construction and timber harvest to such a degree as to have devastating socioeconomic effects on Alaskans. A more complete discussion of the effects of the TLMP on Alaska and the reasons why the TLMP violates TTRA and ANILCA are set forth in Exhibit 6.

VI. CONCLUSION

Beginning in 2003, USDA has recognized that roadless values in the Tongass are well protected without the Roadless Rule. USDA has also recognized that the prohibitions on road construction and timber harvest in the Roadless Rule come with severe socioeconomic consequences to Alaskans that outweigh any value of adding unnecessary restrictions to those already in place. With this understanding, USDA exempted the Tongass from the Roadless Rule from 2003 until 2011 when a federal court invalidated the Exemption based on a procedural flaw in the 2003 ROD. During this court battle, USDA fully defended USDA's above stated rationale for the exemption.

Subsequent to the court imposing the Roadless Rule on the Tongass, the situation has only been compounded by the USFS's incorporation of the restrictions on roadbuilding and timber harvest into the TLMP. Therefore, both an exemption rulemaking and a TLMP plan revision or amendment are now necessary to reinstate USDA's policy of Tongass exemption set forth in the 2003 ROD.

For the reasons set forth above, the State of Alaska respectfully requests that this petition for rulemaking be granted and that the USDA promptly commences a rulemaking proposing a rule to permanently exempt the Tongass National Forest from application of the Roadless Rule. The State also requests that the Secretary of Agriculture direct the USFS to commence a TLMP revision or amendment to remove provisions of the Roadless Rule that have been incorporated into the plan and to reconsider the State objections set forth in Ex. 6 that were not addressed in the final TLMP.

Respectfully submitted,

Andrew Mack

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EXHIBIT 1

2003 Tongass Exemption
Record of Decision

and 165.33 of this part, entry into or movement within this zone is prohibited unless authorized by the Coast Guard Captain of the Port, Baltimore, Maryland or his designated representative. Designated representatives include any Coast Guard commissioned, warrant, or petty officer.

(2) Persons desiring to transit the area of the zone may contact the Captain of the Port at telephone number (410) 576–2693 or via VHF Marine Band Radio channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his designated representative.

(c) Enforcement. The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, local, and private agencies.

Dated: December 15, 2003.

Curtis A. Springer,

Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.

[FR Doc. 03–31788 Filed 12–29–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596–AC04

Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska

AGENCY: Forest Service, USDA.

ACTION: Final rule and record of decision.

SUMMARY: The Department of Agriculture is adopting this final rule to amend regulations concerning the Roadless Area Conservation Rule (hereinafter, referred to as the roadless rule) to temporarily exempt the Tongass National Forest (hereinafter, referred to as the Tongass) from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas. This temporary exemption of the Tongass will be in effect until the Department promulgates a subsequent final rule concerning the application of the roadless rule within the State of Alaska, as announced in the agency's second advance notice of proposed rulemaking published on July 15, 2003 (68 FR 41864).

In *State of Alaska* v. *USDA*, the State of Alaska and other plaintiffs alleged that the roadless rule violated a number of Federal statutes, including the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). Passed overwhelmingly by Congress in 1980, ANILCA sets aside millions of acres in Alaska for the National Park Service, Forest Service, National Monuments, National Wildlife Refuges, and Wilderness Areas with the understanding that sufficient protection and balance would be ensured between protected areas established by the act and multiple-use managed areas. The Alaska lawsuit alleged that USDA violated ANILCA by applying the requirements of the roadless rule to Alaska's national forests. USDA settled the lawsuit by agreeing to publish a proposed rule which, if adopted, would temporarily exempt the Tongass from the application of the roadless rule (July 15, 2003, 68 FR 41865), and to publish a separate advance notice of proposed rulemaking (July 15, 2003, 68 FR 41864) requesting comment on whether to permanently exempt the Tongass and the Chugach National Forests in Alaska from the application of the roadless rule.

Under this final rule, the vast majority of the Tongass remains off limits to development as specified in the 1997 Tongass Forest Plan. Commercial timber harvest will continue to be prohibited on more than 78 percent of the Tongass as required under the existing forest plan. Exempting the Tongass from the application of the roadless rule makes approximately 300,000 roadless acres available for forest management—slightly more than 3 percent of the 9.34 million roadless acres in the Tongass, or 0.5 percent of the total roadless acres nationwide. This rule also leaves intact all old-growth reserves, riparian buffers, beach fringe buffers, and other protections contained in the 1997 Tongass Forest Plan.

The preamble of this rule includes a discussion of the public comments received on the proposed rule published July 15, 2003 (68 FR 41865) and the Department's responses to the comments. This final rule also serves as the record of decision (ROD) for selection of the Tongass Exempt Alternative identified in the November 2000 final environmental impact statement for the roadless rule.

EFFECTIVE DATE: This rule is effective January 29, 2004.

FOR FURTHER INFORMATION: In Washington, DC contact: Dave Barone, Planning Specialist, Ecosystem Management Coordination Staff, Forest Service, USDA, (202) 205–1019; and in Juneau, Alaska contact: Jan Lerum, Regional Planner, Forest Service, USDA, (907) 586–8796.

SUPPLEMENTARY INFORMATION:

Background and Litigation History

On January 12, 2001 (66 FR 3244), the Department published a final roadless rule at Title 36 of the Code of Federal Regulations, part 294 (36 CFR part 294). The roadless rule was a discretionary rule that fundamentally changed the Forest Service's longstanding approach to management of inventoried roadless areas by establishing nationwide prohibitions generally limiting, with some exceptions, timber harvest, road construction, and reconstruction within inventoried roadless areas in national forests. The draft environmental impact statement (DEIS) (May 2000) and final environmental impact statement (FEIS) (November 2000) included alternatives that specifically exempted the Tongass from the roadless rule's prohibitions. As described in the FEIS, the roadless rule was predicted to cause substantial social and economic hardship in communities throughout Southeast Alaska (FEIS Vol. 1, 3–202, 3–326 to 3–352, 3–371 to 3–392). Nonetheless, the final roadless rule's prohibitions were extended to the Tongass.

Since its promulgation, the roadless rule has been the subject of a number of lawsuits in Federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. In one of these lawsuits, the U.S. District Court for the District of Idaho issued a nationwide preliminary injunction prohibiting implementation of the roadless rule. The preliminary injunction decision was reversed and remanded by a panel of the Ninth Circuit Court of Appeals. The Ninth Circuit's preliminary ruling held that the Forest Service's preparation of the environmental impact statement for the roadless rule was in conformance with the general statutory requirements of the National Environmental Policy Act (NEPA).

Subsequently, the U.S. District Court for the District of Wyoming held that the Department had violated NEPA and the Wilderness Act in promulgating the roadless rule. As relief, the court directed the roadless rule be set aside and the agency be permanently enjoined from implementing the roadless rule at 36 CFR part 294. An appeal is pending in the Tenth Circuit. Several other cases remain pending in other Federal district courts.

In another lawsuit, the State of Alaska and six other parties alleged that the roadless rule violated the Administrative Procedure Act, National Forest Management Act, National

Environmental Policy Act, Alaska National Interest Lands Conservation Act, Tongass Timber Reform Act, and other laws. In the June 10, 2003, settlement of that lawsuit, the Department committed to publishing a proposed rule with request for comment that would temporarily exempt the Tongass from application of the roadless rule until completion of a rulemaking process to make permanent amendments to the roadless rule. Also pursuant to the settlement agreement, the Department agreed to publish an advance notice of proposed rulemaking (ANPR) to exempt both the Tongass and Chugach National Forests from the application of the roadless rule. The ANPR and the proposed rule were both published in Part II of the **Federal Register** on July 15, 2003 (68 FR 41864). The Department made no representations in the settlement agreement regarding the content or substance of any final rule that might result.

Most Southeast Alaska Communities Are Significantly Impacted by the Roadless Rule

There are 32 communities within the boundary of the Tongass. Most Southeast Alaska communities lack road and utility connections to other communities and to the mainland systems. Because most Southeast Alaska communities are nearly surrounded on land by inventoried roadless areas of the Tongass, the roadless rule significantly limits the ability of communities to develop road and utility connections that almost all other communities in the United States take for granted. Under this final rule, communities in Southeast Alaska can propose road and utility connections across National Forest System land that will benefit their communities. Any such community proposal would be evaluated on its own merits.

In addition, the preponderance of Federal land in Southeast Alaska results in communities being more dependent upon Tongass National Forest lands and having fewer alternative lands to generate jobs and economic activity. The communities of Southeast Alaska are particularly affected by the roadless rule prohibitions. The November 2000 FEIS for the roadless rule estimated that a total of approximately 900 jobs could be lost in the long run in Southeast Alaska due to the application of the roadless rule, including direct job losses in the timber industry as well as indirect job losses in other sectors.

Roadless Areas Are Common, Not Rare, on the Tongass National Forest

The 16.8-million-acre Tongass National Forest in Southeast Alaska is approximately 90 percent roadless and undeveloped. Commercial timber harvest and road construction are already prohibited in the vast majority of the 9.34 million acres of inventoried roadless areas in the Tongass, either through Congressional designation or through the Tongass Forest Plan. Application of the roadless rule to the Tongass is unnecessary to maintain the roadless values of these areas.

Congress has designated 39 percent of the Tongass as Wilderness, National Monument, or other special designations, which prohibit timber harvest and road construction with certain limited exceptions. An additional 39 percent of the Tongass is managed under the Forest Plan to maintain natural settings where timber harvest and road construction are generally not allowed. About 4 percent of the Tongass is designated suitable for commercial timber harvest, with about half of that area contained within inventoried roadless areas. The remaining 18 percent of the Forest is managed for various multiple uses. The Tongass Forest Plan provides high levels of resource protection and has been designed to ensure ecological sustainability over time, while allowing some development to occur that supports communities dependent on the management of National Forest System lands in Southeast Alaska.

In addition, within the State of Alaska as a whole, there is an extensive network of federally protected areas. Alaska has the greatest amount of land and the highest percentage of its land base in conservation reserves of any State. Federal lands comprise 59 percent of the State and 40 percent of Federal lands in Alaska are in conservation system units. The Southeast Alaska region contains 21 million acres of additional protected lands in Glacier Bay National Park and Preserve, and the Wrangell-St. Elias National Park and Preserve.

Different Approaches Considered for the Tongass National Forest

The unique situation of the Tongass has been recognized throughout the Forest Service's process for examining prohibitions in inventoried roadless areas. The process for developing the roadless rule included different options for the Tongass in each stage of the promulgation of the rule and each stage of the environmental impact statement. At each stage, however, the option of exempting the Tongass from the rule's prohibitions was considered in detail.

In February 1999, the agency exempted the Tongass and other Forests with recently revised forest plans from an interim rule prohibiting new road construction. The October 1999 notice of intent to prepare an environmental impact statement for the roadless rule specifically requested comment on whether or not the rule should apply to the Tongass in light of the recent revision of the Tongass Forest Plan and the ongoing economic transition of communities and the timber program in Southeast Alaska. The May 2000 DEIS for the roadless rule proposed not to apply prohibitions on the Tongass, but to determine whether road construction should be prohibited in unroaded portions of inventoried roadless areas as part of the 5-year review of the Tongass Forest Plan.

The preferred alternative was revised in the November 2000 FEIS to include prohibitions on timber harvest, as well as road construction and reconstruction on the Tongass, but with a delay in the effective date of the prohibitions until April 2004. This was one of four Tongass alternatives analyzed in the FEIS, including the Tongass Exempt Alternative, under which the prohibitions of the roadless rule would not apply to the Tongass. The FEIS recognized that the economic and social impacts of including the Tongass in the roadless rule's prohibitions could be of considerable consequence in communities where the forest products industry is a significant component of local economies. The FEIS also noted that if the Tongass were exempt from the roadless rule prohibitions, loss of habitat and species abundance would not pose an unacceptable risk to diversity across the forest.

However, the final January 12, 2001, roadless rule directed an immediate applicability of the nationwide prohibitions on timber harvest, road construction and reconstruction on the Tongass, except for projects that already had a notice of availability of a draft environmental impact statement published in the **Federal Register**.

Why Is USDA Going Forward With This Rulemaking?

This final rule has been developed in light of the factors and issues described in this preamble, including (1) serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions would cause in communities throughout Southeast Alaska, (2) comments received on the proposed rule, and (3) litigation over the last two years.

Given the great uncertainty about the implementation of the roadless rule due to the various lawsuits, the Department has decided to adopt this final rule, initiated pursuant to the settlement agreement with the State of Alaska, to temporarily exempt the Tongass National Forest from the prohibitions of the roadless rule. This final rule at § 294.14 allows the Forest to continue to be managed pursuant to the 1997 Tongass Forest Plan, which includes the non-significant amendments, readopted in the February 2003 record of decision (2003 Plan) issued in response to the District Court's remand of the 1997 Plan in *Sierra Club* v. *Rey* (D. Alaska), until the 2003 Plan is revised or further amended. Both documents were developed through balanced and open planning processes, based on years of extensive public involvement and thorough scientific review. The 2003 Tongass Forest Plan provides a full consideration of social, economic, and ecological values in Southeast Alaska. This final rule does not reduce any of the old-growth reserves, riparian buffers, beach fringe buffers, or other standards and guidelines of the 2003 Tongass Forest Plan or in any way impact the protections afforded by the plan. The final rule maintains options for a variety of social and economic uses of the Tongass, which was a key factor in the previous decision to approve the plan in 1997.

The final rule also addresses the important question of whether the rule should apply on the Tongass in the short term if the roadless rule were to be reinstated by court order. The Department has determined that, at least in the short term, the roadless values on the Tongass are sufficiently protected under the Tongass Forest Plan and that the additional restrictions associated with the roadless rule are not required. Further, reliance on the Tongass Forest Plan in the short term does not foreclose options regarding the future rulemaking associated with the permanent, statewide consideration of these issues for Alaska. Indeed, this final rule reflects a conclusion similar to that identified as the preferred alternative in the original proposed roadless rule and draft EIS; that is, not to impose the prohibitions immediately, but to allow for future consideration of the matter when more information may be available.

Finally, the Department fully recognizes the unusual posture of this rulemaking, as it is amending a rule that has been set aside by a Federal court. The Department maintains that such an amendment is contrary neither to law nor to the court's injunction. Instead, it is a reasonable and lawful exercise of the Department's authority to resolve policy questions regarding management of National Forest System land and resources, especially in light of the conflicting judicial determinations. Adopting this final rule reduces the potential for conflicts regardless of the disposition of the various lawsuits.

Changes Between Proposed Rule and Final Rule

Only one substantive change has been made between the proposed rule and the final rule. At § 294.14, the proposed rule stated at paragraph (d) that the temporary exemption of the Tongass would be in effect until the USDA promulgates a revised final roadless area conservation rule, for which the agency sought public comments in the July 10, 2001, advance notice of proposed rulemaking (66 FR 35918). Intervening events necessitate an adjustment, and, therefore, § 294.14 of the final rule now states at paragraph (d) that the temporary exemption of the Tongass National Forest remains in place until the USDA promulgates a final rule concerning applicability of 36 CFR part 294, subpart B within the State of Alaska, as announced in the agency's second advance notice of proposed rulemaking published on July 15, 2003 (68 FR 41864). A minor change also has been made for clarity by adding the word ''road'' before ''reconstruction.''

The Department has previously indicated that it would proceed with the roadless rulemakings, while taking numerous factors into consideration, including the outcomes of ongoing litigation. The Wyoming District Court's setting aside of the roadless rule with the admonition that the Department ''must start over'' represents such a circumstance. Since the roadless rule has been set aside, the Department has determined that the best course of action is to clarify that the duration of this Tongass-specific rulemaking will last until completion of rulemaking efforts associated with the application of the roadless rule in Alaska.

Summary of Public Comments and the Department's Responses

The proposed rule was published in the **Federal Register** on July 15, 2003, for a 30-day public comment period (68 FR 41865). Due to public requests for additional time, the comment period was extended by 19 days for a total of 49 days. The Forest Service received approximately 133,000 comments on the proposed rule. All comments were considered in reaching a decision on the final rule. In addition, appropriate sections of Volume 3 of the November 2000 roadless rule FEIS (Agency Responses to Public Comments) that addressed the Tongass alternatives were also reviewed and considered. A summary of comments and the Department's responses to them are summarized as follows.

General Comments. Virtually all of the Southeast Alaska municipalities that responded to the proposed rule expressed strong support for it. Many noted that Alaska contains more land in protected status than all other States combined, and that applying the roadless rule to the Tongass would foreclose opportunities for sustainable economic development throughout Southeast Alaska. Several respondents asked the Department to discontinue or abandon this rulemaking based on their preference to retain the roadless rule prohibitions for the Tongass. Others argued that it was illegal for USDA to pursue amendments to a rule that has been set aside by a Federal district court.

Respondents expressed different views regarding the roadless rule and its applicability to the Tongass. In general, they took one of two positions: (1) Some saw the exemption of the Tongass as a positive step toward reversing what they consider to be overly restrictive management direction imposed by the roadless rule, and therefore they recommended the exemption; and (2) others wanted the Forest Service to retain the roadless rule as adopted in 2001 because they believed it offers a well-balanced approach to forest management that has received overwhelming public support.

Response. The Department believes that the best course of action is to complete this rulemaking for the Tongass that would govern should the roadless rule come back into effect as a result of the pending litigation.

Environmental Effects of the Proposed Rule. The agency received comments regarding the effects the proposed exemption from the roadless rule would have on the natural resources of the Tongass. Some respondents expressed their view that 70 percent of the highest volume timber stands in Southeast Alaska have been harvested, and exempting the Tongass from the roadless rule would lead to the harvest of most or all of the remainder of such stands. Some regarded the highest volume stands as ''the biological heart of the forest,'' and believed any additional harvest would have severe adverse effects on the environment, especially fish and wildlife habitat. Other respondents stated that the Tongass Forest Plan provides stringent environmental protection measures that

will minimize the effects of timber harvest activities on the other resources of the Tongass.

Response. The Tongass has about 9.4 million acres of old-growth forest, of which about 5 million acres contain trees of commercial size. These 5 million acres are referred to as productive old-growth forest. The Tongass Forest Plan allows no timber harvest on nearly 90 percent of the 5 million acres of existing productive old growth. The agency calculates that, at most, 28 percent of the highest volume stands have been harvested, not the 70 percent as claimed. The Tongass Forest Plan prohibits harvest on the vast majority of the remaining highest volume stands.

Although timber volume has often been used as a proxy for habitat quality, a variety of forest attributes and ecological factors influence habitat quality, with different attributes being important for different species. The Tongass Forest Plan, developed over several years with intensive scientific and public scrutiny, takes these and other factors into consideration in its old-growth habitat conservation strategy. The forest plan includes a system of small, medium, and large old growth reserves, well distributed across the Forest, and a stringent set of measures to protect areas of high quality wildlife habitat, such as areas along streams, rivers, estuaries, and coastline. As explained in the 1997 Tongass Forest Plan FEIS and the 2003 supplemental environmental impact statement (SEIS), good wildlife habitat is abundant on the Tongass, on which 92 percent of the productive old-growth forest that was present in 1954 remains today. Even if timber is harvested for 120 years at the maximum level allowed by the Tongass Forest Plan, 83 percent of the productive old-growth forest that was present on the Tongass in 1954 would remain. Extensive, unmodified natural environments characterize the Tongass and will continue to do so. Even with the exemption of the Tongass from the prohibitions in the roadless rule, old-growth is and will continue to be the predominant vegetative structure on the Tongass.

Desirability of a National Standard for Roadless Protection. Some respondents, including a number of Members of Congress, expressed support for the roadless rule as adopted in January, 2001, which these respondents regard as a landmark national standard that is essential to ensure the long-term protection of roadless values. These respondents maintained that the proposed rule would seriously undermine that national standard by exempting the largest national forest in the country, which contains nearly 16 percent of the acreage protected by the roadless rule. Other respondents stated that the ecological, geographic, and socioeconomic conditions on the Tongass and among the local communities of Southeast Alaska are so different from those on national forests outside of Alaska that any nationwide approach, such as the prohibitions contained in the roadless rule, would necessarily impose undue hardship on the communities of Southeast Alaska.

Response. The agency recognized the unique situation of the Tongass in the discussion of a national roadless policy throughout the development of the EIS for the roadless rule. In addition to the range of policy alternatives considered in the EIS, the agency developed a full range of alternatives specifically applicable to the Tongass, ranging from the Tongass Not Exempt Alternative (selected as part of the final rule in the 2001 record of decision) to the Tongass Exempt Alternative (now proposed for selection). The tradeoffs involved in these alternatives are fully evaluated in the roadless rule EIS. The comments raised no new issues that are not already fully explored in the EIS.

The Tongass has a higher percentage of roadless acres, over 90 percent, than nearly any other national forest except the Chugach National Forest. The Tongass Forest Plan generally prohibits road construction on 74 percent of the roadless acres, which will ensure that the Tongass remains one of the most unroaded and undeveloped national forests in the system. Even if timber were to be harvested at maximum allowable levels for 50 years, at least 80 percent of the currently existing roadless areas will remain essentially in their natural condition after 50 years of implementing the Forest Plan. Roadless areas and their associated values are and will continue to be abundant on the Tongass, even without the prohibitions of the roadless rule. Southeast Alaska is also unique in that 94 percent of the area is Federal land (80 percent Tongass National Forest, 14 percent Glacier Bay National Park), and 6 percent is State, Native Corporation, and private lands.

The impacts of the roadless rule on local communities in the Tongass are particularly serious. Of the 32 communities in the region, 29 are unconnected to the nation's highway system. Most are surrounded by marine waters and undeveloped National Forest System land. The potential for economic development of these communities is closely linked to the ability to build roads and rights of ways for utilities in roadless areas of the National Forest System. Although Federal Aid Highways are permitted under the roadless rule, many other road needs would not be met. This is more important in Southeast Alaska than in most other States that have a much smaller portion of Federal land. Likewise, the timber operators in Southeast Alaska tend to be more dependent on resource development opportunities on National Forest System land than their counterparts in other parts of the country because there are few neighboring alternative supplies of resources for Southeast Alaska.

The agency also recognized the unique situation on the Tongass during the development of the roadless rule, and proposed treating the Tongass differently from other national forests until the final rule was adopted in January 2001. At that time, the Department decided that ensuring lasting protection of roadless values on the Tongass outweighed the attendant socioeconomic losses to local communities. The Department now believes that, considered together, the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions to the Tongass, all warrant treating the Tongass differently from the national forests outside of Alaska.

Scientific Basis for the Proposed Rule. The agency received comments that there is no scientific basis for exempting the Tongass from the roadless rule, and that the old growth conservation strategy included in the 1997 Tongass Forest Plan is scientifically inadequate. Indeed, some of the scientists who provided input during the development of that plan commented in opposition to exempting the Tongass from the roadless rule. Others noted that the 1997 Forest Plan, developed with over 10 years of intensive public involvement and scientific scrutiny, and embodied an appropriate balance between the ecological, social, and economic components of sustainability.

Response. Science can predict, within certain parameters, the impacts of policy choices, but it cannot tell what policy to adopt. The 1997 Tongass Forest Plan FEIS and roadless rule FEIS describe the impacts of a wide range of possible land management policies. The science underlying these predictions was subject to rigorous peer review. However, ultimately, the role of science is to inform policy makers rather than to make policy.

The Tongass Forest Plan is based on sound science. As an example, the forest

plan includes an old growth habitat conservation strategy, outlined in the response to comments on environmental effects of the proposed rule that is one of the best in the world. The strategy provides habitat to maintain well-distributed, viable populations of old-growth-associated species across the Forest. The strategy also considers development on adjacent State and private lands. Many existing roadless areas were also incorporated into reserves using non-development land use designations. The strategy was scientifically developed and was subjected to independent scientific peer review.

The science consistency review process used in developing the 1997 Tongass Forest Plan is seen as a model for science-based management that has been emulated in other Forest Service planning efforts. Planning is not a process of science, but rather is a process that uses scientific information to assist officials in making decisions. Under the scientific consistency process, the role of science in planning is explicitly defined as requiring that all relevant scientific information available must be considered; scientific information must be understood and correctly interpreted, including the uncertainty regarding that information; and the resource risks associated with the decision must be acknowledged and documented. The 1997 Tongass Forest Plan meets these criteria, as documented in ''Evaluation of the Use of Scientific Information in Developing the 1997 Forest Plan for the Tongass,'' published by the Department's Pacific Northwest Research Station in 1997. Exempting the Tongass from the prohibitions of the roadless rule returns management of the Tongass to the direction contained in a forest plan that has undergone thorough scientific review, which found the Tongass Forest Plan to be consistent with the available science.

Compliance with Executive Order 13175 and Finding of No ''Tribal Implications.'' An Alaska Native community disagreed with the agency's finding that the proposed rule does not have ''Tribal implications'' under Executive Order 13175. The community's comment included concerns about ''catastrophic economic and social losses due to the shutdown of the Tongass,'' and noted that more than 200 timber-related jobs have been lost in that community since the roadless rule was implemented. The comment also outlined Federal law and policy that mandates consideration of Tribal economic well-being.

Response. The agency did not conclude that the roadless policy has ''no impact'' on Tribes, because clearly the loss of jobs and economic opportunity has greatly affected some of them. The stated severe effect on the social and economic fabric of life in Southeast Alaska from the decline in the timber industry is one of the reasons the Department is adopting an exemption to the roadless rule for the Tongass. Exempting the Tongass from the prohibitions in the roadless rule will mean that more options will be available to alleviate some of these impacts. A primary focus of the exemption is to reduce the social and economic impacts to Tribes.

The agency did conclude that the proposed rule to exempt the Tongass from the roadless rule would not impinge on Tribal sovereignty, would not require Tribal expenditures of funds, and would not change the distribution of power between the Federal government and Indian or Alaska Native Tribes. It is under this narrow sense of Executive Order 13175 that the finding of no Tribal implications was made for the proposed rule. For this final rule, the Department has determined that there could be substantial future direct effects to one or more Tribes, and that these effects are anticipated to be positive. A discussion regarding consultation and coordination with Indian Tribal Governments about this final rule in accordance with Executive Order 13175 can be found in the Regulatory Certification section of this preamble.

Volume of Public Comment and Support for the Roadless Rule. Many comments discussed the volume of public comment received over the past 5 years in support of the roadless rule and its application to the Tongass. Some people said that the roadless rule is a landmark conservation policy that has been supported by 2.2 million people, and, therefore the proposed rule ignored the wishes of the vast majority of roadless rule comments supporting protection of roadless areas in all national forests, including Alaska's. Other people noted that nearly all elected officials in Alaska opposed the roadless rule and supported the exemption.

Response. Every comment received is considered for its substance and contribution to informed decisionmaking whether it is one comment repeated by tens of thousands of people or a comment submitted by only one person. The public comment process is not a scientifically valid survey process to determine public opinion. The emphasis in the comment review process is on the content of the comment rather than on the number of times a comment was received. The comment analysis is intended to identify each unique substantive comment relative to the proposed rule to facilitate its consideration in the decisionmaking process. In matters of controversial national policy, it is impossible to please everyone. When those commenting do not see their view reflected in the final decision, they should not conclude that their comments were ignored. All comments are considered, including comments that support and that oppose the proposal. That people do not agree on how public lands should be managed is a historical, as well as modern dilemma faced by resource managers. However, public comment processes, while imperfect, do provide a vital avenue for engaging a wide array of the public in resource management processes and outcomes.

Adequacy of Timber Volume along Existing Roads. The agency received comments regarding the effect of the roadless rule's prohibitions on supplies to forest product industries in Southeast Alaska. Some respondents stated the exemption of the Tongass from the roadless rule was not necessary because the roadless rule FEIS projected 50 million board feet could be harvested annually in the developed areas along the existing road system on the Tongass. Some commented they believed there was an adequate amount of national forest timber currently under contract to keep the forest products industry supplied for a number of years. Other respondents stated the exemption was necessary if forest product industries in Southeast Alaska were to have enough timber volume to maintain their operations.

Response. Only 4 percent of the Tongass is available for commercial timber harvest under the forest plan. About half of this is in inventoried roadless areas. Further reductions in areas available for timber harvest to an already very limited timber supply would have unacceptable social, aesthetic, and environmental impacts. As was disclosed in the roadless rule FEIS, a sustained annual harvest level of 50 million board feet would not support all of the timber processing facilities in the region.

The Tongass Timber Reform Act directs the Secretary of Agriculture to seek to provide a supply of timber from the Tongass, which (1) meets the annual market demand for timber from the forest and (2) meets the market demand from the forest for each planning cycle, consistent with providing for the

multiple use and sustained yield of all renewable forest resources, and subject to appropriations, other applicable law, and the requirements of the National Forest Management Act.

Benchmark harvest levels displayed in the roadless rule FEIS for the Tongass Exempt Alternative were based on a long-term market demand estimate of 124 million board feet (MMBF) per year. The procedure used to derive this figure is documented in a 1997 report by Forest Service economists, which predicted Tongass National Forest timber demand through 2010, relying upon such factors as current processing capacity in the region and the market share of Southeast Alaskan products in their principal markets (Timber Products Output and Timber Harvests in Alaska: Projections for 1997 to 2010. Brooks and Haynes, 1997. Pacific Northwest Research Station). Copies of this report may be obtained at 333 Southwest First Avenue, P.O. Box 3890, Portland, OR 97208–3890. Three different market scenarios (low, medium, and high) were considered, and the 124 MMBF figure represents the average value of the low market scenario estimates for the years 2001 through 2010. Comparable estimates for the medium and high scenarios are 151 and 184 MMBF per year, respectively.

Though the 1999 harvest level, at 146 MMBF, more closely approximates the medium market demand scenario, the roadless rule FEIS chose the low market for its benchmark analysis, and recent developments support this decision. If anything, the low market scenario appears optimistic in light of the 48 MMBF of Tongass National Forest timber harvested in 2001, the 34 MMBF harvested in 2002, and the 51 MMBF harvested in 2003 (fiscal years). At the end of fiscal year 2003, the amount of timber under contract on the Tongass was 193 MMBF, although the agency seeks to provide a sustained flow of timber sale offerings sufficient to maintain a volume under contract equal to 3 years of estimated timber demand. Recently, Congress enacted P.L. 108–108, Department of Interior and Related Agencies Appropriation Act for fiscal year 2004. Section 339 of this Act authorizes cancellation of certain timber sale contracts on the Tongass National Forest and provides that the timber included in such cancelled contracts shall be available for resale by the Secretary of Agriculture. Complete descriptions of the timber scheduling and pipeline process are found in Appendix A of all timber sale project environmental impact statements for the Tongass.

The last three years represent a significant aberration from historical harvest levels. The 1980–2002 average harvest was 269 MMBF, and in no year prior to 2001 did the harvest level fall below 100 MMBF. As recently as 1995, the Tongass National Forest harvests were in excess of 200 MMBF, and the average harvest over the 1995–2002 time period was approximately 120 MMBF. In light of this historical performance, the 124 MMFB low market estimate is not an unreasonable expectation for the coming decade, particularly if the current slump is merely a cyclical downturn. Of course market conditions may continue to deteriorate, and current low or even lower levels of harvest may become the norm. But in this case both the ''negative'' impacts of roading in roadless areas as well as the ''positive'' impacts related to employment would be reduced.

The Department believes that the roadless rule prohibitions operate as an unnecessary and complicating factor limiting where timber harvesting may occur. Accomplishment of social, economic, and biological goals can best be met through the management direction established through the Tongass Forest Plan.

Need for a Supplemental Environmental Impact Statement. Some respondents said a supplemental environmental impact statement (SEIS) is necessary before a decision can be made to exempt the Tongass from the prohibitions in the roadless rule. They suggested that new information or changed circumstances have occurred that have changed the effects disclosed in the roadless rule FEIS, so a supplement is required. The changes most often cited included the set aside of the 1999 record of decision (ROD) for the Tongass Forest Plan and the changes in timber harvest levels and related employment in Southeast Alaska. Others also mentioned the updated roadless area inventory that was completed for the 2003 record of decision on wilderness recommendations and the pending land exchange with Sealaska, an Alaska Native Corporation.

Response. The determination of whether a supplemental EIS is required involves a two-step process. First new information must be identified and, second, an analysis of whether the new information is significant to the proposed action must be completed. The Forest Service has prepared a supplemental information report that describes this process, the analysis completed, and the conclusions reached. This report is available on the World Wide Web/Internet on the Forest Service Roadless Area Conservation Web site at *http://www.roadless.fs.fed.us.*

The conclusion in the supplemental information report is that the identified new information and changed circumstances do not result in significantly different environmental effects from those described in the roadless rule FEIS. Such differences as may exist are not of a scale or intensity to be relevant to the adoption of this final rule or to support selection of another alternative from the roadless rule FEIS. Consequently, the overall decisionmaking picture is not substantially different from what it was in November 2000, when the roadless rule FEIS was completed. The effects of adopting the proposed rule as final have been displayed to the public and thoroughly considered. For all these reasons, no additional environmental analysis is required.

Economic Effects of the Roadless Rule. The agency received many comments regarding the economic effects that the roadless rule has had or would have in Southeast Alaska. People who commented were concerned about the ability of Southeast Alaska to develop a sustainable economy if the Tongass is not exempted from the roadless rule prohibitions. Concerns expressed included the limitation of the development of infrastructure, such as roads and utilities that are taken for granted elsewhere in the United States, the loss of jobs, and the loss of opportunity for Southeast Alaska to grow and develop responsibly. Other people said that any economic benefits from exempting the Tongass from the prohibitions in roadless rule are far smaller than estimated, while the adverse effects to the environment will be far greater.

Response. In the January 2001 record of decision on the roadless rule, the Secretary of Agriculture acknowledged the adverse economic effects to some forest-dependent communities from the prohibitions in the roadless rule. The decision was made to apply the roadless rule to the Tongass even though it was recognized there would be adverse effects to some communities. Due to serious concerns about these previously disclosed economic and social hardships the roadless rule would cause in communities throughout Southeast Alaska, the Department moved forward to reexamine the rule.

The Department has concluded that the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits because the Tongass Forest Plan adequately provides for the ecological sustainability

of the Tongass. Every facet of Southeast Alaska's economy is important, and the potential adverse impacts from application of the roadless rule are not warranted, given the abundance of roadless areas and protections already afforded in the Tongass Forest Plan. Approximately 90 percent of the 16.8 million acres in the Tongass National Forest is roadless and undeveloped. Over three-quarters (78 percent) of these 16.8 million acres are either Congressionally designated or managed under the forest plan as areas where timber harvest and road construction are not allowed. About 4 percent are designated suitable for commercial timber harvest, with about half of that area (300,000 acres) contained within inventoried roadless areas.

As discussed in the roadless rule FEIS (Vol. 1, 3–202, 3–326 to 3–350, 3–371 to 3–392), substantial negative economic effects are anticipated if the roadless rule is applied to the Tongass, which include the potential loss of approximately 900 jobs in Southeast Alaska. With the adoption of this final rule, the potential negative economic effects should not occur in Southeast Alaska. Even if the maximum harvest permissible under the Tongass Forest Plan is actually harvested, at least 80 percent of the currently remaining roadless areas will remain essentially in their natural condition after 50 years of implementing the forest plan. If the Tongass is exempted from the prohibitions in the roadless rule, the nation will still realize long-term ecological benefits because of the large area that will remain undeveloped and unfragmented, with far less social and economic disruption to Southeast Alaska's communities.

Alaska National Interest Lands Conservation Act (ANILCA). Some people said that ANILCA was enacted with the promise that it provided sufficient protection for Alaska land and that no further administrative withdrawals could be allowed without express Congressional approval. Others said that the roadless rule does not violate the provisions in ANILCA.

Response. In passing ANILCA in 1980, Congress established 14 wildernesses totaling 5.5 million acres on the Tongass, and found that this act provided sufficient protection for the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska, and at the same time provided adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people. Accordingly, the designation and disposition of the public lands in Alaska pursuant to this act were found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition. Congress believed that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, had been obviated by provisions in ANILCA.

In 1990, Congress enacted the Tongass Timber Reform Act (TTRA) to amend ANILCA by directing the Secretary of Agriculture, subject to certain limitations, to seek to provide a supply of timber from the Tongass National Forest, which (1) meets the annual market demand for timber and (2) meets the market demand for timber for each planning cycle, consistent with providing for the multiple use and sustained yield of all renewable forest resources, and subject to appropriations, other applicable laws, and the requirements of the National Forest Management Act.

Further, the TTRA designated 5 new wildernesses and 1 wilderness addition on the Tongass, totaling 296,000 acres. The act also designated 12 permanent Land Use Designation (LUD) II areas, totaling 727,765 acres. Congressionally designated LUD II areas are to be managed in a roadless state to retain their wildland characteristics; however, they are less restrictive on access and activities than wilderness, primarily to accommodate recreation and subsistence activities and to provide vital Forest transportation and utility system linkages, if necessary.

These statutes provide important Congressional determinations, findings, and information relating to management of National Forest System lands on the Tongass National Forest, and were considered carefully during this rulemaking. Expressions of legal concerns and support for the various rulemakings have also been considered. This final rule reflects the Department's assessment of how to best implement the letter and spirit of congressional direction along with public values, in light of the abundance of roadless values on the Tongass, the protection of roadless values already included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions.

Roadless areas are common, not rare, on the Tongass National Forest, and most Southeast Alaska communities are significantly impacted by the roadless rule. The Department believes that exempting the Tongass from the prohibitions in the roadless rule is consistent with congressional direction and intent in the ANILCA and the TTRA legislation.

Adequacy of the Roadless Rule Concerning NEPA and Other Laws. Some people commented that the roadless rule was adopted in violation of NEPA because, according to those commenters, the roadless rule EIS failed to take the hard look that NEPA requires. Other concerns expressed about the roadless rule included alleged violations of the National Forest Management Act, Multiple Use Sustained Yield Act, and Wilderness Act, and concerns that the roadless rule failed to explicitly acknowledge valid and existing access rights to private lands.

Response. The roadless rule continues to be the subject of ongoing litigation in the district courts and one Federal appeals court. Hence, the validity of the roadless rule is still in question. However, the Department believes that application of the roadless rule to the Tongass is inappropriate, regardless of whether the roadless rule is otherwise found to be valid or lawful. Given the pending litigation, the Department believes it is prudent to proceed with a decision on temporarily exempting the Tongass from the prohibitions in the roadless rule.

Effects of the Roadless Rule on Construction of Roads and Utility Corridors. Some people who commented said that because the roadless rule allows construction of Federal Aid Highway projects and roads needed to protect public health and safety, there are no significant limits on the ability of communities to develop road and utility connections in Southeast Alaska. Similarly, they said that utility corridors can be built and maintained without roads by using helicopters, so the opportunities for utility transmissions would not be limited either. Others, including local communities and elected officials, said that the roadless rule would impact the development of the Southeast Alaska Electrical Intertie System that is planned to provide communities throughout the region with clean, reliable, and affordable power.

Response. There is a need to retain opportunities for the communities of Southeast Alaska regarding basic access and utility infrastructure. This is related primarily to road systems, the State ferry system, electrical utility lines, and hydropower opportunities that are on the horizon. This need reflects in part the overall undeveloped nature of the Tongass and the relationship of the 32 communities that are found within its boundaries. Most, if not all, of the

communities are lacking in at least some of the basic access and infrastructure necessary for reasonable services, economic stability, and growth that almost all other communities in the United States have had the opportunity to develop.

The roadless rule permits the construction of Federal Aid Highways only if the Secretary of Agriculture determines that the project is in the public interest and that no other reasonable and prudent alternative exists (36 CFR 294.12). Such a finding may not always be possible for otherwise desirable road projects.

Similarly, although some utility corridors can be constructed and maintained without a road, others may require a road. Even where a utility corridor without a road may be physically possible, it may be more expensive or otherwise less desirable than a utility accompanied by a service road. If the road construction is inexpensive or needed for other reasons, then utility corridors may often adjoin the road because of the ease of access for maintenance and repairs of utility systems. Indeed, most utility corridors in the United States were developed next to a pre-existing road.

The history of road development in Southeast Alaska since statehood is that most State highway additions have been upgraded from roads built to harvest timber. In the last 20 years, this has occurred predominantly on Prince of Wales Island, better connecting the communities of Hollis, Hydaburg, Craig, Klawock, Thorne Bay, Whale Pass, Naukati, Kaasan, and Coffman Cove with all-weather highways. Without the pioneering work done by the Forest Service in building roads to harvest timber, it is unclear whether the State would have undertaken the construction of those road connections. By precluding the construction of roads for timber harvest, the roadless rule reduces future options for similar upgrades, which may be critical to economic survival of many of the smaller communities in Southeast Alaska. Moreover, roads initially developed for timber or other resource management purposes often have value to local communities and sometimes become important access links between communities, even if they are never upgraded as Federal Aid Highways. By exempting the Tongass from the prohibitions in the roadless rule, each utility or transportation proposal can be evaluated on its own merit.

Tongass Roads and Fiscal Considerations. Some people said that because the Tongass has a backlog of road maintenance and fish passage problems, primarily inadequate culverts, it makes no sense to spend money on new roads until these problems are corrected. Others said that the funds the Tongass receives from Congress to prepare timber sales and do roadwork could be better spent on other needs.

Response. The Tongass is currently spending about $2 million per year to correct fish passage barriers and continues to seek funding and opportunities to clear the maintenance backlog. Forest Service roads in Alaska are vital to neighboring communities because most areas have at most an underdeveloped road system. Permanent Forest Service roads (known as classified roads) are often the only roads available to communities and for recreation opportunities. The Alaska Region, with only 3,600 miles of classified Forest Service roads, has the fewest miles of roads of all the regions of the Forest Service, and about one-third of these are closed to motorized use. New roads will be necessary to access sufficient timber to support existing small sawmills. Over the years, standards for construction and maintenance of roads have changed significantly. Roads and stream crossings built today adhere to very high standards designed to protect fisheries, important wetlands, unstable soils, wildlife use and habitats, and other resource values.

Roads on the Tongass are used by the public for a variety of reasons, including recreation, subsistence access, and other personal uses. The roads are also used by the Forest Service in accomplishing work for various resource programs. None of these programs is sufficient to provide for all the road maintenance needs. In the 2003 Tongass Forest-Level Roads Analysis, fish passage and sedimentation maintenance needs were identified as the critical categories of the deferred maintenance cost schedule.

Transportation planning is an integral part of the interdisciplinary process used to develop site-specific projects on the Tongass. The transportation planning process includes collaboration between the agency and local communities to identify the minimum road system that is safe and responsive to public needs while minimizing maintenance costs.

Relationship of This Rule to Other Rulemaking. One commenter read 40 CFR 1506.1 as requiring an EIS for the temporary exemption of the Tongass. The commenter reasoned that because the agency was considering whether to adopt a permanent exemption for the Tongass, the agency may not take any action that tends to prejudice the choice of alternatives on that decision unless reviewed in a separately sufficient, stand-alone EIS. One commenter suggested that the effort the agency might put into preparing site-specific EISs for timber sales in roadless areas under this final rule might prejudice the decision on the advance notice of proposed rulemaking. Others viewed the proposed rule as an emergency rule that has not been adequately justified by the Forest Service, and recommended action be delayed until the permanent exemption is resolved.

Response: The decision to adopt the proposed rule as final is supported by the environmental analysis presented in the roadless rule FEIS, which considered in detail the alternative of exempting the Tongass from the prohibitions of the roadless rule, as well as the analysis and disclosure of alternative management regimes for roadless lands presented in the 1997 Tongass Forest Plan EIS and the 2003 Supplemental EIS. The Department has determined that no additional environmental analysis is warranted. The Supplemental Information Report documenting that decision is available on the World Wide Web/Internet at *http://www.roadless.fs.fed.us.* In any event, the temporary rules on the Tongass and the proposal set forth in the advance notice of proposed rulemaking are separate and have separate utility. The July 15, 2003, advance notice of proposed rulemaking sought comment on whether both forests in Alaska should be exempted permanently from the prohibitions of the roadless rule. This final rule has separate utility in temporarily preventing socioeconomic dislocation in Southeast Alaska while protecting forest resources, regardless of whether the agency ultimately decides to exempt both national forests from the prohibitions of the roadless rule on a permanent basis.

Promulgating this final rule would not prejudice the ultimate decision on the advance notice of proposed rulemaking. An action prejudices the ultimate decision on a proposal when it tends to determine subsequent development or limit alternatives. The preparation of EISs does neither.

Finally, this final rule is not an emergency rule. All the requirements and procedures for public notice and comment established by the Administrative Procedure Act for Federal rulemaking have been met with the publication of the proposed rule with request for comment and with the subsequent publication of this final rule. Emergency rulemaking involves the promulgation of a rule without

providing for notice and public comment prior to adoption, when conditions warrant immediate action. That is not the case with this final rule.

Alternatives Considered

The alternatives considered in making this decision are the Tongass National Forest Alternatives identified in the November 2000 FEIS for the roadless rule, as further described in the rule's record of decision (66 FR 3262). These include the Tongass Not Exempt, Tongass Exempt, Tongass Deferred, and Tongass Selected Areas alternatives. The Tongass Not Exempt Alternative was selected by the Department as set out in the final roadless rule in January 2001, with mitigation explained in that record of decision. The Tongass Exempt Alternative would not apply the prohibitions of the roadless rule to the Tongass. Under the Tongass Deferred Alternative, the decision whether to apply the prohibitions of the roadless rule to the Tongass would be made in 2004 as part of the 5-year review of the Tongass Forest Plan. Under the Tongass Selected Areas Alternative, the prohibitions on road construction and reconstruction would apply only to certain land use designations, where commercial timber harvest would not be allowed by the forest plan. These areas comprise approximately 80 percent of the land in inventoried roadless areas on the Tongass.

The Environmentally Preferable Alternative

Under the National Environmental Policy Act, the agency is required to identify the environmentally preferable alternative (40 CFR 1505.2(b)). This is interpreted to mean the alternative that would cause the least damage to the biological and physical components of the environment, and which best protects, preserves, and enhances historic, cultural, and natural resources (Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026).

The Department concurs in the assessment described in the January 12, 2001, roadless rule record of decision (66 FR 3263) that the environmentally preferable alternative is the portion of Alternative 3 of the roadless rule FEIS combined with the Tongass Not Exempt Alternative, which would apply the roadless rule's prohibitions to the Tongass without delay.

Record of Decision Summary

For the reasons identified in this preamble, the Department has decided to select the Tongass Exempt Alternative described in the roadless rule FEIS, until the Department promulgates a final rule concerning the application of the roadless rule within the State of Alaska, to which the agency sought public comments in the July 15, 2003, second advance notice of proposed rulemaking (68 FR 41864). Until such time, the Department is amending paragraph (d) of § 294.14 of the Roadless Area Conservation Rule set out at 36 CFR part 294 to exempt the Tongass National Forest from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas.

The Tongass Not Exempt Alternative (identified as the environmentally preferable alternative in the previous section) is not selected because the Department now believes that, considered together, the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, and the socioeconomic costs and hardships to local communities of applying the roadless rule's prohibitions to the Tongass, outweigh any additional potential long-term ecological benefits; and therefore, warrant treating the Tongass differently from the national forests outside of Alaska.

The Tongass Deferred Alternative is not selected because there is no reason to delay a decision until 2004. On the contrary, a decision is needed now to reduce uncertainty about future timber supplies, which will enable the private sector to make investment decisions needed to prevent further job losses and economic hardship in local communities in Southeast Alaska.

The Tongass Selected Areas Alternative is not selected because it also would ''be of considerable consequence at local levels where the timber industry is a cornerstone of the local economy and where the Forest Service has a strong presence,'' as stated in the roadless rule's record of decision. While these adverse socioeconomic consequences would be less than those under the Tongass Not Exempt Alternative, the roadless rule's record of decision states, ''For most resources, the effects of this alternative would probably not be noticeably different from those under the Tongass Exempt Alternative.'' Accordingly, there is no noticeable environmental benefit to selecting the Tongass Selected Areas Alternative over the Tongass Exempt Alternative that would justify the additional socioeconomic costs.

This decision reflects the facts, as displayed in the FEIS for the roadless rule and the FEIS for the 1997 Tongass Forest Plan that roadless values are plentiful on the Tongass and are well protected by the Tongass Forest Plan. The minor risk of the loss of such values is outweighed by the more certain socioeconomic costs of applying the roadless rule's prohibitions to the Tongass. Imposing those costs on the local communities of Southeast Alaska is unwarranted.

Regulatory Certifications

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order (E.O.) 12866, Regulatory Planning and Review. It has been determined that this is not an economically significant rule. This final rule will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This final rule will not interfere with an action taken or planned by another agency. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. However, because this final rule raises novel legal or policy issues arising from legal mandates or the President's priorities, it has been designated as significant and, therefore, is subject to Office of Management and Budget (OMB) review in accordance with the principles set forth in E.O. 12866.

A cost-benefit analysis has been conducted on the impact of this final rule and incorporates by reference the detailed regulatory impact analysis prepared for the January 12, 2001, roadless rule, which included the Tongass Exempt Alternative. Much of this analysis was discussed and disclosed in the final environmental impact statement (FEIS) for the roadless rule. A review of the data and information from the original analysis and the information disclosed in the FEIS found that it is still relevant, pertinent, and sufficient in regard to exempting the Tongass from the application of the roadless rule. As documented in the Supplemental Information Report, the Department has concluded that no new information exists today that would significantly alter the results of the original analysis.

Moreover, this final rule has been considered in light of E.O. 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A final regulatory flexibility

analysis conducted on the roadless rule included the effects associated with the Tongass National Forest. The agency solicited comments on the regulatory flexibility analysis for the roadless rule. Although numerous comments were provided that indicated a concern about the roadless rule's impacts on small entities, only a small portion provided data documentation on their status as a small entity and the likely effects of the roadless rule. In many cases, the agency was unable to determine the effects quantitatively, based on comments on the regulatory flexibility analysis. However, all of the businesses in Southeast Alaska engaged in timber harvest and processing of Tongass timber are small businesses. Therefore, this final rule would be expected to have future positive impacts on the small entities in Southeast Alaska due to the increased opportunity to remain viable in the marketplace. This opportunity would be reduced if the prohibitions in the roadless rule are applied to the Tongass.

Therefore, based on the final regulatory flexibility analysis conducted for the roadless rule, which is available electronically on the World Wide Web/Internet on the Forest Service Roadless Area Conservation Web site at *http://www.roadless.fs.fed.us,* a small entities flexibility assessment has been made for this final rule. It has been determined that this action will not have a significant negative economic impact on a substantial number of small entities as defined by SBREFA. This final rule will not impose record keeping requirements; will not affect small entities' competitive position in relation to large entities; and will not affect small entities' cash flow, liquidity, or ability to remain in the market.

Environmental Impact

A draft environmental impact statement (DEIS) was prepared in May 2000 and a final environmental impact statement (FEIS) was prepared in November 2000 in association with promulgation of the roadless area conservation rule (January 12, 2001 (66 FR 3244). The DEIS and FEIS examined in detail sets of Tongass-specific alternatives. In the DEIS, the agency considered alternatives which would not have applied the rule's prohibitions to the Tongass National Forest, but would have required that the agency make a determination as part of the 5-year plan to review whether to prohibit road construction in unroaded portions of inventoried roadless areas. In the FEIS, the Department identified the Tongass Not Exempt as the Preferred Alternative, which would have treated the Tongass National Forest the same as all other national forests, but would have delayed implementation of the rule's prohibitions until April 2004. This delay would have served as a social and economic mitigation measure by providing a transition period for communities most affected by changes in management of inventoried roadless areas in the Tongass. In the final rule published on January 12, 2001, however, the Department selected the Tongass Not Exempt Alternative without any provision for delayed implementation. Therefore, the rule's prohibition applied immediately to inventoried roadless areas on the Tongass, but the rule also allowed road construction, road reconstruction, and the cutting, sale, and removal of timber from inventoried roadless areas on the Tongass where a notice of availability for a DEIS for such activities was published in the **Federal Register** prior to January 12, 2001.

In February 2003, in compliance with a district court's order in *Sierra Club* v. *Rey* (D. Alaska), the Forest Service issued a record of decision and a supplemental environmental impact Statement (SEIS) to the 1997 Tongass Forest Plan that examined the site-specific wilderness and non-wilderness values of the inventoried roadless areas on the Forest as part of the forest planning process. The February 2003 ROD readopted the 1997 Tongass Forest Plan with non-significant amendments as the current forest plan. Congress has prohibited administrative or judicial review of the February 2003 ROD. Section 335 of the 2003 Omnibus Appropriations Act provides that the ROD for the 2003 SEIS for the 1997 Tongass Land Management Plan shall not be reviewed under any Forest Service administrative appeal process, and its adequacy shall not be subject to judicial review by any court in the United States.

Because the 2000 FEIS for the roadless rule included an alternative to exempt the Tongass National Forest from the provisions of the roadless rule, the decision to adopt this final rule may be based on the FEIS, as long as there are no significant changed circumstances or new information relevant to environmental concerns bearing on the proposed action or its impacts that would warrant additional environmental impact analysis. The Forest Service reviewed the circumstances related to this rulemaking and any new information made available since the FEIS was completed; including the SEIS and public comments received on the proposed rule, and documented the results in a Supplemental Information Report (SIR), dated October 2003. The agency concluded—and the Department agrees—that no significant new circumstances or information exist, and that no additional environmental analysis is warranted. The SIR and the FEIS are available on the World Wide Web/Internet on the Forest Service Roadless Area Conservation Web site at *http://www.roadless.fs.fed.us.* The Tongass Forest Plan is available at *http://www.fs.fed.us/r10/tlmp,* and the 2003 SEIS is available at *http://www.tongass-seis.net/.*

No Takings Implications

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12360, and it has been determined that the final rule does not pose the risk of a taking of private property, as the rule is limited to temporarily exempting the applicability of the roadless rule to the Tongass National Forest.

Energy Effects

This final rule has been analyzed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this final rule does not constitute a significant energy action as defined in the Executive order.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. After adoption of this final rule, (1) all State and local laws and regulations that conflict with this rule or that would impede full implementation of this rule will be preempted; (2) no retroactive effect will be given to this final rule; and (3) this final rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Department has assessed the effects of this final rule on State, local, and Tribal governments and the private sector. This final rule does not compel the expenditure of $100 million or more by any State, local, or Tribal government, or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Federalism

The Department has considered this final rule under the requirements of Executive Order 13132, Federalism. The agency has made an assessment that the rule conforms with the federalism principles set out in this Executive order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Based on a review of the comments received on the proposed rule, the Department has determined that no additional consultation is needed with State and local governments prior to adopting this final rule, because virtually all comments received from State and local governments supported the proposed rule.

Consultation and Coordination With Indian Tribal Governments

This final rule has Tribal implications as defined by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Forest Service line officers in the field have contacted Tribes to ensure their awareness of this rulemaking, provide an overview of this final rule, and conduct government-to-government dialog with interested Tribes. A letter from the Alaska Regional Forester (Region 10) was sent on July 15, 2003, to Tribal officials via e-mail notifying them that the proposed rule to temporarily exempt the Tongass from the prohibitions of the roadless rule was published in the **Federal Register** that same day. A follow up informational meeting was requested and held with Sitka Tribal officials. One comment was received on the proposed rule from the Metlakatla Indian Community regarding the catastrophic economic and social losses due to the shutdown of the Tongass was in reference to the roadless rule. This final rule to temporarily exempt the Tongass from the prohibitions of the roadless rule would potentially reduce the social and economic impacts the Tribe noted. Therefore, the Department has determined that there could be substantial future direct effects to one or more Tribes, and that these effects are anticipated to be positive.

Controlling Paperwork Burdens on the Public

This final rule does not contain any record keeping or reporting requirements, or other information collection requirements as defined in 5 CFR part 1320, and therefore imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR part 1320 do not apply.

Government Paperwork Elimination Act Compliance

The Department of Agriculture is committed to compliance with the Government Paperwork Elimination Act (44 U.S.C 3504), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

List of Subjects in 36 CFR Part 294

National Forests, Navigation (air), Recreation and recreation areas, Wilderness areas.

■ Therefore, for the reasons set forth in the preamble, the Department of Agriculture is amending part 294 of Title 36 of the Code of Federal Regulations as follows:

PART 294—SPECIAL AREAS

Subpart B—Protection of Inventoried Roadless Areas

■ 1. The authority citation for subpart B continues to read as follows:

Authority: 16 U.S.C. 472, 529, 551, 1608, 1613; 23 U.S.C. 201, 205.

■ 2. Revise paragraph (d) of § 294.14 to read as follows:

§ 294.14 Scope and applicability.

* * * * *

(d) Until the USDA promulgates a final rule concerning application of this subpart within the State of Alaska [to which the agency originally sought public comments in the July 15, 2003, second advance notice of proposed rulemaking (68 FR 41864)], this subpart does not apply to road construction, road reconstruction, or the cutting, sale, or removal of timber in inventoried roadless areas on the Tongass National Forest.

* * * * *

Dated: December 23, 2003.

David P. Tenny,

Deputy Under Secretary, Natural Resources and Environment.

[FR Doc. 03–32077 Filed 12–23–03; 4:47 pm]

BILLING CODE 3410–11–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 02–34 and 00–248; FCC 03–154]

Satellite Licensing Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule, announcement of effective date.

SUMMARY: The Commission adopted rule revisions to require use of new satellite and earth station application forms. Certain rules contained new and modified information requirements and were published in the **Federal Register** on November 12, 2003. This document announces the effective date of these published rules.

DATES: The amendments to §§ 25.103, 25.111, 25.114, 25.115, 25.117, 25.118, 25.121, 25.131, 25.141, and part 25, Subpart H, published at 68 FR 63994, November 12, 2003, will become effective March 1, 2004.

FOR FURTHER INFORMATION CONTACT: Steven Spaeth, International Bureau, Satellite Policy Branch, (202)418–1539.

SUPPLEMENTARY INFORMATION: On December 1, 2003, the Office of Management and Budget (OMB) approved the information collection requirement contained in §§ 25.103, 25.111, 25.114, 25.115, 25.117, 25.118, 25.121, 25.131, 25.141, and part 25, Subpart H pursuant to OMB Control No. 3060–0678. Accordingly, the information collection requirement contained in these rules will become effective on March 1, 2004.

List of Subjects in 47 CFR Part 25

Satellites.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–31968 Filed 12–29–03; 8:45 am]

BILLING CODE 6712–01–P

EXHIBIT 2

2010 USDA Tongass Exemption Federal Court Brief

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ORGANIZED VILLAGES OF KAKE, et al.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.

Defendants,

ALASKA FOREST ASSOCIATION,

Defendant Intervenor, and

STATE OF ALASKA,

Defendant Intervenor.

Case No. 1:09-cv-00023-JWS

FEDERAL DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs allege that the United States Department of Agriculture (USDA) violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) by promulgating a regulation, the Tongass Exemption, which removed the Tongass National Forest from the 2001 Roadless Area Conservation Rule (Roadless Rule).

Contrary to Plaintiffs' depiction, the Tongass Exemption was a well-reasoned decision, supported by the evidence. After carefully weighing both the abundance of roadless lands on the Tongass and the robust protections afforded those lands in the absence of the Roadless Rule against the Rule's potential negative impacts on local communities, the USDA determined it was appropriate to exclude the Tongass from the Roadless Rule. This decision does not violate the APA or NEPA. Plaintiffs' motion for summary judgment should be denied and Defendants' cross-motion granted.

II. BACKGROUND

A. The Roadless Rule

In January 2001, the USDA adopted the Roadless Area Conservation Rule (Roadless Rule). See Ex.1. Issued after a robust public process and after completion of an Environmental Impact Statement (EIS) under NEPA, the Roadless Rule prohibited, with certain exceptions, road construction and reconstruction and timber harvest within all Inventoried Roadless Areas (IRAs) nation-wide. See Id.

In developing the Roadless Rule, the USDA recognized the "unique" situation presented by the Tongass. First, in contrast to many units in the National Forest System, the Tongass is largely unroaded and undeveloped. Of the Tongass' 16.8 million acres, 9.34 million acres are classified as IRAs, and because of other designations prohibiting road-building and timber harvest, approximately 90 percent of the Forest as a whole is unroaded. Ex. 2 at 2. The Tongass is also unique from a social and economic perspective: 29 of the 32 communities within the Tongass are unconnected to the nation's highway system, and many lack some of the basic access and infrastructure necessary to provide for reasonable services, economic stability and growth. Id. at 4.

For these reasons, the USDA treated the Tongass separately throughout the process of developing the Roadless Rule. Indeed, until the final Record of Decision (ROD) adopting the Roadless Rule, the USDA consistently favored limiting the Rule's application on the Tongass or

exempting the Forest altogether. For example, the 1999 interim rule prohibiting new road construction, which served as a prelude to the Roadless Rule, entirely exempted the Tongass. Ex. 2 at 2. The draft EIS issued in May 2000, proposed that the rule not be applied to the Tongass. Id. Finally, the preferred alternative in the final EIS included the Tongass in the Roadless Rule, but proposed delaying the effective date of the rule on the Tongass for four years to reduce the rule's negative economic and social impacts. Id.

During preparation of the Roadless Rule EIS, the USDA considered four Tongass-specific alternatives: (1) "Tongass Not Exempt," which included an option of delaying application of the rule until 2004; (2) "Tongass Exempt," which would leave management of the Tongass to the Tongass Land and Resource Management Plan (TLMP); (3) "Tongass Deferred," under which a decision about whether to apply the Roadless Rule's restrictions to the Tongass would be made as part of the 5-year review of the 1997 TLMP; and (4) "Tongass Selected Areas," which would apply the Rule only in those IRAs classified as Old Growth, Semi-Remote Recreation, Remote Recreation and LUD II under the TLMP. Ex. 3 at 58-60.[1]

The Roadless Rule EIS also comprehensively examined the impacts of the Roadless Rule and the alternatives to the Rule on the Tongass. Ex. 3 at 91-111. This examination revealed that "the effects of implementing the prohibitions [of the Roadless Rule] may be more dramatic on the Tongass than on other NFS lands." Id. at 97. The EIS projected that application of the Roadless Rule to the Tongass would reduce average annual timber harvest from 124 million board feet (MMBF) to 50 MMBF, and could trigger the loss of 864 to 895 jobs and $37.3 to $38.7 million in personal income in Southeast Alaska. Id. at 100. The EIS also found that, in contrast to many of the National Forests, if the Tongass were exempt from the Roadless Rule, loss of habitat and species abundance would not pose an unacceptable risk to biodiversity on the Forest. Ex. 2 at 2.

While the draft EIS favored not applying the rule to the Tongass, and the final EIS proposed delaying application of the rule, the USDA determined in its ROD to apply the rule to the Tongass immediately. Ex. 1 at 13. This decision reflected USDA's determination as a policy matter that the "long-term ecological benefits . . . outweigh the potential economic loss to [] local communities." Id.

[1] LUD II refers to 12 specific areas allocated for special management by Congress in the Tongass Timber Reform Act. See Ex. 3 at 60. Tongass Timber Reform Act, Pub. L. No. 101-626, §201, 104 Stat. 4426, 4427 (1990).

B. Roadless Rule Litigation

The Roadless Rule was challenged in nine lawsuits in six judicial districts, including a suit brought by the State of Alaska in this district. The Rule was preliminarily enjoined by the District Court for the District of Idaho, but that decision was reversed on appeal. Kootenai Tribe of Idaho v. Veneman, 142 F. Supp. 2d 1231 (D. Idaho 2001), rev'd, 313 F.3d 1094 (9th Cir. 2002). The Rule was then invalidated and enjoined by the District Court of the District of Wyoming. Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003). That decision was vacated on appeal when the USDA issued a superseding rule, the State Petitions Rule. 414 F.3d 1207 (10th Cir. 2005).

In June 2003, the USDA settled Alaska's lawsuit by agreeing to publish a proposed rule which, if adopted, would temporarily exempt the Tongass from the Roadless Rule and to publish a separate advance notice of proposed rulemaking seeking comment on whether to permanently exempt the Tongass and Chugach National Forests from the Rule. Ex. 4 at 2.

C. The Tongass Exemption

On July 15, 2003, the USDA fulfilled its settlement obligations, publishing for notice and comment a proposed rule exempting the Tongass from the Roadless Rule. Ex. 4. Because the proposed rule and several other Tongass-specific alternatives had been fully evaluated in the Roadless Rule EIS, and the wilderness values of Tongass IRAs had been reconsidered in a 2003 Supplemental EIS, there was no need to prepare a new EIS for the Tongass Exemption. The USDA nevertheless prepared a Supplemental Information Report (SIR) to determine whether significant new information or changed circumstances existed such that it needed to supplement the Roadless Rule EIS. Ex. 5. The SIR concluded that "the overall decision-making picture is not substantially different now from what it was in November 2000," when the Roadless Rule EIS was completed, and thus there was no need to prepare a supplemental EIS. Ex. 5 at 59.

On December 30, 2003, the USDA issued a final rule exempting the Tongass from the Roadless Rule. Ex. 2. In adopting the Exemption, the Department reconsidered the same fundamental ecological, economic and social factors it had weighed in its decision to apply the Roadless Rule to the Tongass. The Department noted that roadless areas are abundant and well-protected on the Tongass in the absence of the Roadless Rule. In fact, while there are approximately 9.34 million acres of IRAs on the Tongass, exempting the Tongass from the Rule only makes about 300,000 of those acres available for more active forest management. Ex. 2 at

1. Additionally, the USDA noted that the Roadless Rule had the potential to significantly limit the ability of communities to develop road and utility connections, and could result in the loss of approximately 900 jobs in Southeast Alaska. Id. at 2. On balance, the USDA determined the roadless values on the Tongass could be protected and social and economic impacts minimized by exempting the Tongass from the Roadless Rule. Id. at 3.

The Tongass Exemption was anticipated to "be in effect until the Department promulgates a subsequent final rule concerning the application of the Roadless Rule within the State of Alaska." Ex. 2 at 1. When it promulgated the State Petitions Rule in 2005, the USDA noted that the rule negated the need for the future Tongass-specific rulemaking that had been anticipated when the Tongass Exemption was promulgated. Ex. 6 at 7. Now, as a result of litigation, the State Petitions Rule has been set aside and the Roadless Rule and Tongass Exemption reinstated. At this time, the USDA expects that the Tongass Exemption will be kept in place while the Department undertakes its recently announced transition framework process.

D. The State Petitions Rule

In May 2005, the USDA superseded the Roadless Rule and the Tongass Exemption with the State Petitions for Inventoried Roadless Area Management Rule (State Petitions Rule). Ex. 6. The State Petitions Rule established a voluntary process under which States were invited to submit a petition seeking to adjust the management requirements for the IRAs within the state. If a petition was accepted, the Forest Service would work with the State to develop a State-specific rulemaking. If a State chose not to submit a petition, management of IRAs in that State would be governed by individual Forest Plans. Ex. 6 at 2. Because the State Petitions Rule left management of the Tongass to the TLMP unless the State submitted a petition, it obviated the need for the Tongass Exemption and any further Tongass-specific rulemaking. Id. at 7.

The State Petitions Rule also spurred litigation, and it was declared invalid by the District Court for the Northern District of California. California ex rel. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006), aff'd, 575 F.3d 999 (9th Cir. 2009). As a remedy, that court reinstated the 2001 Roadless Rule as well as the Tongass Exemption. Id.

Litigation then returned to Wyoming, with a new challenge to the Roadless Rule. The Wyoming District Court again held the Roadless Rule invalid and enjoined its application nation-wide. Wyoming v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309 (D. Wyo. 2008). Confronted with conflicting nation-wide injunctions, the USDA sought relief from both district courts. The California district court limited its relief to the Ninth Circuit and the State of New

Mexico. California ex rel. Lockyer, 2008 WL 5102864 (N.D. Cal. Dec. 2, 2008). The Wyoming district court declined to modify its injunction. The USDA's appeal from the Wyoming District Court's invalidation of the Roadless Rule remains pending.

E. The Transition Framework

In 2009, the USDA Forest Service and USDA Rural Development held a series of meetings throughout Alaska to hear from communities how the agencies could help improve the economic situation in the region. As a result of those sessions, Secretary Vilsack announced a "Transition Framework" for focusing on economic development and on timber harvesting outside of IRAs.[2] USDA is working with the Department of Commerce's Economic Development Administration to create the Transition Framework and a project implementation team that will work with communities, as well as other federal agencies, state and local governments, tribes and tribal corporations, and the for-profit and nonprofit sectors. Ex. 7.

On May 24, 2010, Regional Forester Pendleton sent an open letter to the Tongass Futures Roundtable outlining steps that the Forest Service believes can provide economic opportunities to communities in the Tongass while conserving the Tongass National Forest.[3] The Regional Forester explained that "the Forest Service believes it is possible to provide economic opportunity and jobs to local residents and to sustain a viable timber industry while at the same time transitioning from timber harvesting in roadless areas and old-growth forests to long-term stewardship contracts and young growth management." Ex. 8.

Regarding economic development, the Regional Forester emphasized that it is the Department's goal to help communities transition to a more diversified economy by providing jobs around renewable energy, forest restoration, timber, tourism, subsistence, and fisheries and mariculture. Id. at 1.

With regard to timber management, the Regional Forester explained that:

> USFS will work with its USDA counterpart, Rural Development, to facilitate a transition of the forest sector to young growth management. Moving towards a forest industry that relies on young growth timber will require retooling of current infrastructure and a steady supply of timber as the industry makes the transition. This can be accomplished by bridging the transition with long-term stewardship contracts in young growth areas to create investment certainty for forest operator business owners. We believe this transition can be made without entering into roadless areas. To demonstrate this in the near-term, the agency is currently

[2] See Ex. 7 (http://www.fs.fed.us/r10/ro/projects-plans/transition_frame/index.shtml).

[3] See Ex. 8 (http://www.fs.fed.us/r10/ro/projects-plans/transition_frame/100524_rf_cover_letter_final.pdf).

> working on a package of stewardship contracts. We expect the first such contract to be offered in early 2011. In the long-term, as young growth stands mature, the expectation is that all timber harvests will be sustained in young growth stands.
> . . .
> Building from the existing Tongass Land Management Plan, the Forest Service will continue to offer a limited number of old-growth sales in the near-term in roaded forest areas, in order to ensure that a bridge exists for the remaining forest industry infrastructure to make the transition. Ensuring that these sales and the proposed stewardship contracts move forward expeditiously is critically important to maintaining a robust forest industry while we transition to young growth management.

Id. at 2, 3. The Forest Service currently has no plans to implement the projects named by Plaintiffs –Scratchings and Iyouktug— before the end of fiscal year 2012. See Declaration of Forrest Cole (Cole Decl.) at ¶ 7. In light of the USDA's commitment to transitioning away from harvest in IRAs, it is not clear whether these projects will be implemented as approved.

III. ARGUMENT

A. Plaintiffs' Challenge to the Tongass Exemption is Not Justiciable

Plaintiffs seek direct judicial review of a regulation, the Tongass Exemption. Supreme Court precedent and the plain text of the APA, dictate that, with the exception of certain conditions not present here, direct judicial review of agency regulations is unavailable. Instead, the agency action subject to judicial review should be a specific application of the rule in a context that threatens injury-in-fact to plaintiffs. Plaintiffs' failure to bring such a challenge dictates that their complaint must be dismissed.

1. An Agency Regulation is Ordinarily Subject to Judicial Review Only as Part of a Challenge to a Specific Application of the Regulation

Supreme Court precedent provides that, except where Congress specifically authorizes immediate review of regulations or where the regulations govern plaintiffs' primary conduct and impose penalties for violations, judicial review apart from a concrete application of the regulations is unavailable. In Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) (NWF), the Supreme Court explained:

> Under the terms of the APA, [a plaintiff] must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action

> applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.)

Id. at 891 (internal citations omitted).

Subsequent decisions of the Supreme Court are to the same effect. See Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808-812 (2003) (holding that a facial challenge to a regulation governing procedures applicable to concession contract disputes was unripe where the plaintiff would not suffer significant hardship if judicial review were deferred until regulations were applied); Reno v. Catholic Social Serv., Inc., 509 U.S. 43, 57 (1993) (CSS) (rejecting facial challenge to INS regulations where regulations did not "present[] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation."). Cf. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-737 (1998) (holding that facial challenge to forest plan for a particular National Forest was not ripe, and that review should focus on the application of the plan's provisions to site-specific projects).

Thus, under NWF and subsequent cases, one of two special circumstances -- a statutory provision authorizing direct review of agency regulations, or a substantive rule requiring immediate adjustment of primary conduct under threat of serious penalties -- is required to "permit broad regulations to serve as the 'agency action' and thus to be the object of judicial review directly." 497 U.S. at 891. Although these principles have generally been addressed under the rubric of "ripeness," that term does not capture the full substance of the Court's rulings. The applicable rules of reviewability do not simply identify the time at which judicial review may take place, but also the subject of that review.

Absent one of the circumstances identified in NWF, an agency regulation is not an independently reviewable agency action for purposes of 5 U.S.C. § 704 and § 706, even after the regulation has been applied in the course of making a site-specific decision. Rather, the agency action that is the proper focus of judicial review is the site-specific decision in which the regulation has been applied. To the extent the site-specific decision turns on the validity of the

regulation, the plaintiff may assert that the regulation is unlawful; but the action that the court ultimately upholds or sets aside is the site-specific decision rather than the regulation itself.[4]

Here, the Tongass Exemption does not satisfy either of the conditions required for direct facial review, and thus any judicial review must come through a challenge to a particular project issued under the exemption. While Plaintiffs have listed three projects as *examples* of the Rule's impact, they have not brought a project-specific challenge, and their claims must be dismissed.[5]

2. The APA Supports Limiting Direct Judicial Review of Regulations

The circumstances under which a regulation may be subjected to judicial review articulated in NWF and subsequent Supreme Court decisions correspond closely to those identified in APA Section 704.

The APA defines the term "agency action" to include "the whole or a part of an agency rule." 5 U.S.C. § 551(13). Under that definition, the Tongass Exemption is certainly an "agency action." The APA does not authorize immediate judicial review of *every* agency action, however, but only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Tongass Exemption is not made reviewable by any separate statute, and therefore is reviewable under Section 704 only if it is "a final agency action for which there is no other adequate remedy in a court."[6]

A rule that "as a practical matter requires the plaintiff to adjust his conduct immediately," NWF, 497 U.S. at 891, or face serious penalties, is the principal example of an agency regulation that is subject to immediate judicial review because there is no other adequate remedy in a court. In Abbott Labs v. Gardner, for example, the plaintiff could have pursued an as-applied challenge to newly-promulgated agency rules only by violating the regulations and subjecting itself to a government enforcement action. 387 U.S. 136, 153 (1967). In contrast, the rule at issue here

[4] Plaintiffs are well aware of how to properly challenge a regulation. In 2004, they included a challenge to the Tongass Exemption in their challenge of the Threemile Timber Sale. See Organized Vill. of Kake v. U.S. Forest Serv., No J04-029 CV (D. AK Nov. 5, 2004). Plaintiffs later amended their complaint to withdraw their claim against the Tongass Exemption.

[5] In their pleadings Plaintiffs note that decisions authorizing timber harvest in IRAs "include" the Kuiu and Scratchings II timber sales, see Compl. at ¶ 34, and the Iyouktug timber sale, see Pl. Br. at 10. Naming projects as examples of implementation of a rule is not sufficient. Plaintiffs must bring a challenge to the project that they believe causes them injury.

[6] Section 704's authorization of review of "[a]gency action made reviewable by statute," corresponds with the NWF Court's recognition that "[s]ome statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly." 497 U.S. at 891.

governs the Forest Service's, not Plaintiffs' conduct. In these circumstances, judicial review of the rule's application is an "adequate remedy" for any defect in the regulation. See CSS, 509 U.S. at 60-61; Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 165 (1967). Challenging a site-specific project that threatens actual or imminent injury would provide Plaintiffs with an "adequate remedy" for any legal defect in the Tongass Exemption.

In sum, Plaintiffs' attempt to secure direct judicial review of the Tongass Exemption fails, and this case should be dismissed.

B. Plaintiffs' Claims are Not Ripe

If this Court finds that Plaintiffs' complaint against the Tongass Exemption is justiciable in the absence of challenge to a site-specific application of the Rule, it should still dismiss Plaintiffs' claims as unripe. Given the considerable time before any projects impacting IRAs are scheduled for implementation and the uncertain future of those projects under the Transition Framework, the doctrine of ripeness militates against considering Plaintiffs' claims at this time.

The ripeness doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs, 387 U.S. at 148-49. In evaluating ripeness, courts consider: "the fitness of the issues for judicial decision," and the "hardship to the parties of withholding court consideration." Id. at 149.

In this case, the two timber sales named, Iyouktug and Scratchings II, are not planned for implementation before the end of fiscal year 2012.[7] Cole Decl. at ¶ 7. In the meantime, the USDA is actively pursuing a Transition Framework designed to shift the timber program on the Tongass away from old-growth harvest in roadless areas. The USDA has indicated it "believe[s] this transition can be made without entering into roadless areas." Ex. 8 at 2.

The issues before this Court are not fit for judicial review. The timeframe for implementation of the Iyouktug and Scratchings II projects, and the Department's announced transition away from timber harvest in roadless areas, cast doubt as to whether the projects will move forward as currently configured. Where a claim rests on "future events that may not occur as anticipated, or indeed may not occur at all," the issue is not fit for judicial review. Texas v. United States, 523 U.S. 296 (1998) (internal quotations and citations omitted).

[7] The third sale, Kuiu, no longer proposes timber harvest in IRAs. Cole Decl. at ¶ 4.

Nor will delaying review cause any hardship to plaintiffs. Plaintiffs suffer no harm from the Tongass Exemption in the absence of site-specific projects implementing the exemption. Plaintiffs have ample time to bring a challenge against the Iyouktug or Scratchings II projects when and if those projects move closer to implementation.

C. The Tongass Exemption Does Not Violate the APA

Plaintiffs' first claim is that promulgation of the Tongass Exemption was arbitrary and capricious in violation of the APA. This claim fails. First, a claim alleging a freestanding violation of the APA that is not grounded in any substantive statute is not justiciable. Second, if such a claim is valid, the USDA complied with the law, proffering reasoned explanation of its decision, considering all relevant factors, and acting within the scope of its delegated authority.

1. Plaintiffs' "Stand-Alone" APA Claim is Not Justiciable

A plaintiff cannot bring a "stand-alone" allegation that an agency decision is "arbitrary or capricious" and therefore in violation of the APA. Rather than imposing substantive requirements, section 706 of the APA provides the framework for review of allegations that an agency has violated some other underlying statutory requirement. See Sierra Club v. Martin, 110 F.3d 1551, 1554-55 (11th Cir. 1997) ("As a procedural statute, the APA does not expand the substantive duties of a federal agency, but merely provides the framework for judicial review of agency action."). It is the underlying statute – not the APA itself – that provides the legal content by which courts can assess an agency's actions. See Stockman v. Fed. Election Comm'n, 138 F.3d 144, 151 n. 14 (5th Cir. 1998) ("[T]he provisions of the APA do not declare self-actuating substantive rights, but rather . . . merely provide a vehicle for enforcing rights which are declared elsewhere.") (internal quotations omitted); Oregon Natural Res. Council v. Thomas, 92 F.3d 792, 798 (9th Cir. 1996) (court must have "'law to apply'" under the APA) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)). Arbitrary and capricious review cannot be conducted in a vacuum, independent of an allegation that the agency has violated some substantive statute. See El Rescate Legal Serv. v. Executive Office of Immigration Review, 959 F.2d 742, 753 (9th Cir. 1991) ("There is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint.'") (quoting NWF, 497 U.S. at 883).[8]

[8] Plaintiffs note that an agency rule may be found arbitrary or capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the

The text of the APA also recognizes the need for an underlying statutory obligation when reviewing an agency's actions. Section 702 of the APA creates a cause of action for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." 5 U.S.C. § 702 (emphasis added). "The relevant statute, of course, is the statute whose violation is the gravamen of the complaint." NWF, 497 U.S. at 886. See Thomas, 92 F.3d at 798 ("[W]hether an agency has overlooked 'an important aspect of the problem . . .' turns on what a relevant substantive statute makes 'important.'").

Rather than grounding their claim of "arbitrary or capricious" action on any specific provision of a substantive statute, Plaintiffs simply list the statutes that govern the Forest Service. Pl. Br. at 12. A mere list of statutes applicable to the agency, unaccompanied by a reference to the specific provision of the statute violated and the facts supporting that violation, does not give the Court "law to apply." See Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996) ("[T]he plaintiff must identify a substantive statute or regulation that the agency action had transgressed and establish that the statute or regulation applies to the United States.").

If Plaintiffs believed that the Tongass Exemption violated the Organic Administration Act, the Multiple-Use Sustained-Yield Act (MUSYA), or the National Forest Management Act (NFMA), they were obligated to have pled such a violation in their complaint. The fact that these laws are generally applicable to the Forest Service does not mean that the Court has substantive law by which to evaluate Plaintiffs' APA claim. Indeed, were it sufficient to simply list a host of statutes applicable to an agency without identifying the specific provisions of those statutes the agency allegedly violated, the prohibition on stand-alone APA claims would be meaningless. Plaintiffs repeatedly state that the Forest Service "failed to consider an important aspect of the problem" when promulgating the Tongass Exemption though never explain what

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evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Pl. Br. at 11 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). But nothing in Motor Vehicle Mfrs. suggests that such a review can take place in the absence of a substantive statute. In Motor Vehicle Mfrs. the substantive requirements of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, informed the court's review under Section 706 of the APA. In holding that the National Highway Traffic Safety Administration's rescission of a safety standard was arbitrary and capricious, the Court determined that the agency had not met Section 1392(f)'s mandate to consider "relevant available motor vehicle safety data" and that the agency did not consider an alternative that would have met the Act's purpose of reducing traffic accidents. Motor Vehicle Mfrs. at 33.

those aspects are, or point to statutory language that would have required their consideration. Pl. Br. at 12-13. Without specific allegations grounded in another statute, Plaintiffs may be unhappy with the Forest Service's decision, but they cannot seek its invalidation based solely on the APA's "arbitrary or capricious" review standards.

Plaintiffs' blanket citation to the organic authorities governing the Forest Service – the Organic Act, MUSYA and NFMA – is particularly unavailing because of the breath of management discretion those statutes give to the Department. Because the USDA possesses broad authority to make management decisions regarding the disposition of its lands, see Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979) (noting the Forest Service's multiple use mandate "breathes discretion at every pore") (citation omitted), the necessity of pointing to specific statutory requirements, against which a court has the competency to measure an agency's compliance, is all the more critical.

Without identifying specific provisions of these statutes – the "relevant factors" – that the Forest Service was obligated to consider, there are no grounds for finding the Tongass Exemption "arbitrary or capricious." Plaintiffs' stand-alone APA claim should be dismissed.

2. Standard of Review

Should the Court choose to hear Plaintiffs' APA claim, the Supreme Court has made clear that an agency's rescission or modification of a regulation is subject to the same deferential arbitrary and capricious standard of review as the initial rulemaking:

> The agency's action in promulgating [the rule] may be set aside if found to be 'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.' We believe that the rescission or modification of [the rule] is subject to the same test.

Motor Vehicle Mfrs., 463 U.S. at 41.

Under the APA's deferential arbitrary and capricious standard, "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." Motor Vehicle Mfrs., 463 U.S. at 42. See also Rust v. Sullivan, 500 U.S. 173, 187 (1991) (an agency need only provide a "reasoned analysis" in support of regulatory change).

3. The Tongass Exemption is Rational, Based on Consideration of Relevant Factors, and Within the Scope of USDA's Authority

The record for the Tongass Exemption demonstrates that the rule is a rational one, grounded in the consideration of relevant factors. Motor Vehicle Mfrs., 463 U.S. at 42. In

particular, the USDA considered: (1) the robust protections for roadless values already in place for the Tongass; (2) the impact of the Roadless Rule on the ability of communities in Southeast Alaska to develop road and utility connections; (3) the social and economic impacts of the Roadless Rule; and (4) the uncertainty created by the ongoing litigation against the Roadless Rule. Ex. 2 at 2. Weighing these factors, the USDA explained that,

> Considered together, the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, and the socioeconomic costs and hardships to local communities of applying the roadless rule's prohibitions to the Tongass, outweigh any additional potential long-term ecological benefits; and therefore, warrant treating the Tongass differently from the national forests outside of Alaska.

Id. at 9.[9]

a. The USDA Reasonably Considered Existing Protections of Roadless Values on the Tongass

In attacking the Tongass Exemption, Plaintiffs focus on perceived flaws in the USDA's evaluation of economic and social impacts of the Roadless Rule. They ignore, however, the fact that in promulgating the Tongass Exemption, and in seeking to ameliorate the social and economic impacts of the Roadless Rule, the USDA found that even in the absence of the Roadless Rule the vast majority of IRAs were off-limits to road-building and timber harvest. This context provides critical support for the USDA's decision.

In promulgating the Exemption, the USDA noted that among National Forests, the Tongass is unique for the degree to which it is unroaded and undeveloped. Of the Forest's 16.8 million acres, 9.34 million acres are classified as IRAs. Ex. 2 at 2. Approximately 90 percent of the forest is currently unroaded, and the vast majority of the Forest is subject to designations prohibiting road-building and timber harvest. Id. Only about 4 percent of the Tongass is designated as suitable for commercial timber harvest, and about half of that acreage (300,000 acres) falls within IRAs. Id.; Ex. 10 at 12. Even with full implementation of activities allowed under the 1997 TLMP for 50 years, 87 percent of the Tongass would remain roadless. Id.

The USDA was also informed by the results of a 2003 Supplemental EIS, which evaluated IRAs on the Tongass to determine whether to designate additional Wilderness areas. Ex. 10 at 5; Ex. 8 at 20. After an exhaustive evaluation, the Forest Service concluded that the

[9] Plaintiffs do not allege that the Tongasss Exemption exceeds the USDA's delegated authority.

1997 TLMP would leave the vast majority of the Forest wild and roadless, and there was no need to recommend the designation of additional Wilderness. Ex. 10 at 12.

The USDA's conclusion that roadless area values will continue to be protected on the Tongass in the absence of the Roadless Rule was affirmed with the Forest Service's issuance of the 2008 TLMP Amendment. Ex. 11. Like the 1997 TLMP, the 2008 TLMP Amendment only includes about 3 percent of the acres in IRAs (about 300,000 acres) in the land base suitable for timber harvest. Id. at 49. In addition, in the Record of Decision for the 2008 TLMP Amendment, the Regional Forester adopted a strategy that further subdivides those 300,000 acres into Lower, Moderate and Higher Value roadless areas, and adds an extra level of protection to the moderate and higher value roadless areas. Id. Under this adaptive strategy, so long as annual timber harvest remains below 100 MMBF – which Plaintiffs contend will always be the case (see Pl. Br. at 18) – harvest is confined to already roaded areas and lower value roadless areas. Id. at 50. If timber harvest exceeds 100 MMBF for two consecutive years, the timber sale program is allowed to operate in some moderate value roadless areas. Only if timber harvest levels reach 150 MMBF for two consecutive years will timber harvest be allowed in high value roadless areas. Id.[10] Thus, so long as harvest levels remain as low as Plaintiffs claim they will, harvest under the 2008 TLMP Amendment is limited to roaded areas and lower value roadless areas.

In sum, the effect of the Tongass Exemption, when considered against the backdrop of the TLMP and existing land designations, is that only a small fraction of the acres in IRAs are even potentially available for timber harvest and road-building. The USDA therefore rationally concluded that "[r]oadless areas and their associated values are and will continue to be abundant on the Tongass, even without the prohibitions of the roadless rule." Ex. 2 at 4.

b. The USDA Reasonably Considered Impacts on Road and Utility Connections

In promulgating the Tongass Exemption, the USDA noted the extreme isolation of many of the communities in Southeast Alaska. Twenty-nine of the thirty-two communities within the Tongass are unconnected to the highway system, and many lack the basic access and infrastructure needed to provide for reasonable services, economic stability and growth. Ex. 2 at 4. Moreover, to the extent the communities on the Tongass have road connections, those roads are mostly the result of roads originally constructed for timber harvest. Id. at 8. The USDA

[10] The Timber Sale Program Adaptive Management Strategy and other aspects of the 2008 TLMP were upheld in Southeast Conf. et al. v. Vilsack, 684 F. Supp. 2d 135 (D.D.C. 2010).

found that "the roadless rule significantly limits the ability of communities to develop road and utility connections that almost all other communities in the United States take for granted." Under the Exemption, "communities in Southeast Alaska can propose road and utility connections across National Forest System land that will benefit their communities." Id. at 2. This conclusion is rational and well supported by the record.

Plaintiffs assert that the USDA's conclusion that the Roadless Rule interfered with the development of road connections was arbitrary because the Roadless Rule includes an exception allowing the construction of certain Federal Aid Highways on IRAs. Pl. Br. at 13. See also, 36 C.F.R. § 294.12(b)(7). To the contrary, the record shows this narrow exception, which the Department emphasized "will have a very limited application," does not encompass all needed community connections. Ex. 1 at 22. First, the exception is applicable only to Federal Aid Highway Projects, a requirement that excludes a broad range of roads that a community might need, including local roads and minor collector roads. See 23 U.S.C. § 101(a)(5) (defining Federal-Aid Highways). See also, Ex. 2 at 4 ("Although Federal Aid Highways are permitted under the roadless rule, many other road needs would not be met."). Second, in addition to qualifying as a Federal Aid Highway, any proposed road requires a Secretarial determination that the road "is in the public interest or is consistent with the purpose for which the land was reserved or acquired and no other reasonable and prudent alternative exists."[11] Ex. 12. Such a finding is not required for roads on Forest Service lands outside of IRAs, and as the USDA reasonably noted, "may not always be possible for otherwise desirable projects." Ex. 2 at 8.[12]

Contrary to Plaintiffs' claim, the record demonstrates that there are numerous proposed roads crossing IRAs which would potentially be prohibited by the Roadless Rule. For example,

[11] Plaintiffs' reference to a Forest Service statement in a draft informational brief that "[f]uture major transportation routes are very likely, if not certain to be Federal Aid Highway Projects," Pl. Br. at 13, does not undermine this analysis. First, not all roads between the small communities of Southeast Alaska are likely to be "major" projects. Second, even if projects qualify as Federal Aid Highway Projects, they will not necessarily make the additional showing needed to obtain Secretarial approval.

[12] Plaintiffs note that in the Roadless Rule EIS the USDA explained that this exception "maintains the Secretary's discretion as it already exists" in 23 U.S.C. § 317(b). Pl. Br. at 13. While the exception preserves the Secretary of Agriculture's discretion to *prevent* the Department of Transportation from using Forest Service land for highways by certifying that the road is contrary to the public interest or inconsistent with the purpose for which the land was reserved, it also goes further. The Roadless Rule exception requires an *affirmative* finding by the Secretary not only that road in public interest and consistent with the purpose for which the land was reserved, but also that "no other reasonable and prudent alternative exists." Ex. 1 at 14. Such a determination is not required in the absence of the Roadless Rule.

in developing the Roadless Rule, the USDA identified at least twelve planned projects that could not be completed without road construction barred by the 2001 Roadless Rule. Ex. 13. The 2003 "Southeast Alaska Proposed Road and Ferry Projects" report considered by the Forest Service in the Tongass Exemption SIR also lists at least six projects which would cross IRAs.[13] Finally, the TLMP contains multiple designated corridors for proposed state-highways which cross IRAs. See Ex. 3 at 108; Ex. 15 at 5; Id. at 4 ("At this time the Juneau-Skagway corridor, Swan-Tyee Power Intertie, and the East Bradfield Canal corridor are the most likely corridors to be developed."); Ex. 9 at 79 (noting multiple state-proposed corridors would potentially cross IRAs, including Juneau-Skagway Icefield, Juneau Urban, Sitka to Baranof Warm Springs road, Sitka Urban, North Baranof, and the Bradfield Canal road corridor); Cole Decl. at Att. A (Map). While the precise routes of any roads within these corridors would be subject to future site-specific proposals, the USDA was not arbitrary to note that the Roadless Rule would likely interfere with the road-building needed to connect the communities of Southeast Alaska.

Plaintiffs next claim that the USDA was arbitrary in noting that the Tongass Exemption would allow for the construction of logging roads barred by the Roadless Rule, which could in the future be upgraded to connect the many isolated communities in the Tongass. According to Plaintiffs, the Forest Service was obligated "to identify those communities and the potential timber sales that could connect them." Pl. Br. at 15. This demand misconstrues the Forest Service's reasoning, which was not that any specific logging road was precluded by the Roadless Rule, but that the Roadless Rule limited future opportunities for such roads. As the USDA explained, most State Highways in Southeast Alaska are the result of upgrading roads originally built to harvest timber, and "[b]y precluding the construction of roads for timber harvest, the roadless rule reduces future options for similar upgrades, which may be critical to economic survival of many of the smaller communities in Southeast Alaska." Ex. 2 at 8. Exempting the Tongass from the prohibitions in the Roadless Rule does not clear the way for any particular proposal, but allows "each utility or transportation proposal [to] be evaluated on its own merit." Id. The USDA's reasoning is rational and supported by the record.

Finally, Plaintiffs dispute USDA's finding that the Roadless Rule limits the ability of communities in Southeast Alaska to develop utility connections. Paralleling their claims about

[13] Those projects include: Ketchikan to Shelter Cove Road, Sandy Beach Road (Prince of Wales Island), Shelter Cove to Bradfield Canal Road, Wrangell to Fools Inlet (Wrangell Island), Bradfield Access and Juneau Access. Ex. 14.

road connections, Plaintiffs fault the Department for allegedly failing to identify utility connections that would be barred by the Rule, and assert that the Rule would allow for the construction of any needed connections. In both cases, Plaintiffs err.

First, Plaintiffs' claim that there are no planned utility connections that would potentially be impeded by the Roadless Rule is belied by the record. In preparing the EIS for the Roadless Rule, the USDA found that the rule would interfere with hydropower projects and accompanying transmission lines at Lake Dorothy, Otter Creek and Cascade Point. Ex. 13 at 39. In addition, the TLMP specifies a number of potential projects which cross IRAs and, depending on the site-specific nature of project, could require road construction, including transmission lines from Juneau to Hoonah, Kake to Petersburg, Juneau to Skagway, Hoonah to Pelican, Hoonah to Tenakee Springs, Angoon to Sitka, and Sitka to Kake. Ex. 9 at 30; Cole Decl. at Att. A (Map).

Second, with regard to whether utility connections can be constructed pursuant to the Roadless Rule, Plaintiffs are correct in noting that the Roadless Rule does not directly prohibit construction of utility lines and that utility connections have at times been constructed without roads. Pl. Br. at 17. The USDA, however, has not taken the position that all utility connections are impossible under the Roadless Rule. To the contrary, by precluding the construction of roads the Roadless Rule limits the options available for utility lines, limiting the ability of communities in Alaska to take advantage of the most common routing of utility-lines in the United States – next to a road. Ex. 2 at 8. As the Department explained:

> [A]lthough some utility corridors can be constructed and maintained without a road, others may require a road. Even where a utility corridor without a road may be physically possible, it may be more expensive or otherwise less desirable than a utility accompanied by a service road. If the road construction is inexpensive or needed for other reasons, then utility corridors may often adjoin the road because of the ease of access for maintenance and repairs of utility systems.

Id. In sum, the Tongass Exemption allows the communities in Southeast Alaska the flexibility to propose utility connections that are the most efficient and effective for that community. Whether that connection is facilitated by road or other mechanism is left to site-specific determination.

While Plaintiffs dispute the degree to which the Tongass Exemption was needed to facilitate community road and utility connections and believe that any such connections are possible under the terms of the Roadless Rule, there is no question that the Department's decision was a rational one supported by the evidence before it.

c. The USDA Reasonably Considered Economic Impacts

In developing the Roadless Rule, the USDA carefully considered the economic impacts of reduced timber harvest on communities throughout the country. Ex. 3 at 68. The Department found that with the exception of the Tongass, the impacts of the Rule were relatively minor. Id. On the Tongass, however, the economic impacts were more significant. Ex. 3 at 78-79.[14]

The USDA projected that without the Roadless Rule, timber harvest on the Tongass would average 124 MMBF annually. Ex. 3 at 98; Ex. 5 at 22. Under the Rule, timber harvest was projected to fall to about 50 MMBF. Id. This decline was projected to precipitate direct job losses in the timber industry of between 364 and 383 employees and another 218 to 230 indirect job losses. Ex. 3 at 99. The EIS also projected that the reduced timber program would reduce Forest Service employment by 141 jobs, triggering another 141 private sector job losses. Id. All told, the Roadless Rule EIS projected that applying the Rule to the Tongass could lead to the loss of up to 895 jobs, and $38.7 million in personal income in Southeast Alaska. Id. at 100.

When it determined to apply the Rule to the Tongass the USDA acknowledged the Rule's negative economic impact on Southeast Alaska, but concluded that "the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to those communities." Ex. 1 at 13. In 2003, the Department reconsidered the situation and concluded that

> [C]onsidered together, the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, the socioeconomic costs to local communities of applying the roadless rule's prohibition to the Tongass, all warrant treating the Tongass differently from the national forests outside of Alaska.

Ex. 2 at 4.

Plaintiffs do not challenge the USDA's authority to reconsider its policy judgment regarding roadless protection and potential economic impacts on communities near the Tongass, but instead challenge the estimate that application of the Roadless Rule to the Tongass would potentially lead to the loss of almost 900 jobs in Southeast Alaska. Pl. Br. at 18.

Plaintiffs assert that because timber harvest under the Roadless Rule was expected to be 50 MMBF annually, and timber harvest on the forest from 2001 to 2003 averaged 44 MMBF annually, the Tongass timber sale program could continue under the Roadless Rule "without losing even one job." Pl. Br. at 18. This argument errs in assuming that harvest equates to future

[14] The Roadless Rule EIS found communities on the Tongass had "low resilience" to the economic shock of reduced timber harvest on IRAs. Ex. 3 at 76, 78.

demand, and in extrapolating from a 3-year period which "represent[s] a significant aberration from historical harvest levels." Ex. 2 at 6. The 2003 SIR explains that the 1980-2002 average annual harvest on the Tongass was 269 MMBF, and in no year prior to 2001 did the harvest fall below 100 MMBF. Id. The agency concluded that the estimate used in the 2001 Roadless Rule EIS of 124 MMBF remained a reasonable estimate of annual timber demand for the Tongass. Id. This conclusion is supported by subsequent projections. Ex. 17 at 13 (2003 SEIS estimated demand of 152 MMBF annually); Ex. 11 at 43 (2008 TLMP projected demand of 187 MMBF annually by 2022).

Plaintiffs claim that the 2001-2003 harvest levels represent a "fundamental transformation" of the Alaska timber industry precipitated by the closure of two large pulp mills in the 1990s. Pl. Br. at 19. The USDA, however, accounted for the mill closures in the Roadless Rule EIS. See Ex. 3 at 95. The Department also reviewed current timber market conditions in its 2003 SIR and concluded that the projections in 2000 EIS remained valid. Ex. 5 at 18-19.

In short, Plaintiffs have not identified a factor that the USDA failed to consider, but instead have identified a dispute over whether timber harvest levels between 2001-2003 represent a permanent change in timber demand. This is a question of agency expertise in which the USDA deserves judicial deference. Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701, 712 (9th Cir. 2009) ("[W]e grant the Service great deference as it made a scientific prediction within the scope of its technical expertise"); Lands Council v. McNair, 537 F.3d 981, 992-93 (9th Cir. 2008) (courts should "conduct a 'particularly deferential review' of an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise").

The USDA considered appropriate evidence of the economic impacts of the Roadless Rule on Southeast Alaska and made a rational decision on the basis of that evidence. While Plaintiffs may disagree with that policy decision, it was not arbitrary or capricious.

d. The USDA Reasonably Considered the Ongoing Litigation Against the Roadless Rule

Plaintiffs' final claim is that USDA arbitrarily abandoned its position that the Roadless Rule would reduce conflict and litigation over the management of IRAs. Pl. Br. 20. This assertion mischaracterizes that Department's rationale in promulgating the Tongass Exemption.

When it promulgated the Roadless Rule, the USDA observed that:

> roadless area management has been a major point of conflict in land management planning . . . The large number of appeals and lawsuits, and the extensive amount of congressional debate over the last 20 years illustrates the need for national

> direction and resolution and the importance many Americans attach to the remaining inventoried roadless areas . . . . Based on these factors the agency decided that the best means to reduce this conflict is through a national level rule.

66 Fed. Reg. 3243, 3253. In other words, USDA reasoned that it could stop much of the ongoing debate about site-specific proposals to build roads and harvest timber in IRAs by simply taking those areas "off the table" on a nation-wide basis.

Plaintiffs accuse the Forest Service of abandoning this position without explanation with the Tongass Exemption, asserting that the Forest Service also claimed that one purpose of the Tongass Exemption was to reduce conflicts over roadless area management. Pl. Br. at 20. This claim rests on a mischaracterization of the conflicts at which the Tongass Exemption was directed. At the time the Exemption was promulgated, the Ninth Circuit had ruled, in the context of a preliminary injunction, that the Roadless Rule complied with NEPA, Kootenai Tribe of Idaho v. Veneman, but the Wyoming district court had held the Rule violated NEPA and the Wilderness Act and enjoined its implementation nation-wide, Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003). "[I]n light of the conflicting judicial determinations," the USDA determined it to be prudent to resolve the dispute over the application of the rule to the Tongass. Ex. 2 at 3. It was not USDA's expectation –as Plaintiffs suggest—that allowing timber harvest in IRAs on the Tongass would avoid litigation, but that exempting the Tongass would avoid entangling the Tongass in the conflicting determinations regarding the Roadless Rule. This rationale is a reasonable one, and in no way conflicts with the USDA's hope in 2001 that the Roadless Rule would reduce conflict and litigation.

D. The Tongass Exemption Complies With NEPA

Plaintiffs' second cause of action is a claim that the USDA violated NEPA by failing to evaluate an adequate range of alternatives to the Tongass Exemption. Plaintiffs assert that the Tongass Exemption addressed a "fundamentally different" purpose and need than the Roadless Rule and, because purpose and need drives the range of alternatives, USDA's reliance on the EIS for the Roadless Rule and the multiple Tongass-specific alternatives considered therein was inappropriate. Pl. Br. at 23. This claim mischaracterizes the purpose of both the Roadless Rule and the Tongass Exemption, and should be rejected by this Court. Moreover, Plaintiffs have waived their right to allege the USDA should have considered specific alternatives by failing to bring those alternatives to the Department's attention during the public comment period.

1. Standard of Review

NEPA, 42 U.S.C. §§ 4321-4347, establishes a process by which federal agencies are to consider the environmental impacts of, and alternatives to, their actions. Vermont Yankee Nuclear Power v. NRDC, 435 U.S. 519, 558 (1978). NEPA imposes procedural, not substantive, requirements. So long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Under NEPA, a federal agency must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

NEPA requires that an EIS consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii), (E). While this consideration of alternatives is "at the heart" of the EIS, NEPA does not require an agency to consider all alternatives; rather, only "reasonable alternatives" need be "explore[d] and objectively evaluate[d]." 40 C.F.R. § 1502.14(a). Whether an alternative is reasonable depends on the purpose and need for the project; an agency need not consider alternatives which do not meet the purpose and need of the proposed action. City of Angoon v. Hodel, 803 F.2d 1016, 1021-22 (9th Cir. 1986); Northwest Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1538 (9th Cir. 1997). "An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives." Seattle Audubon Soc'y v. Moseley, 80 F.3d 401, 1404 (9th Cir. 1996). An agency also need not consider alternatives that are "infeasible [or] ineffective." Headwaters, Inc. v. Bureau of Land Mgmt., 914 F.2d 1174, 1180 (9th Cir. 1990).

Allegations of NEPA violations are reviewed under the APA, 5 U.S.C. § 706 et seq. See NWF, 497 U.S. at 882. This Court may set aside the USDA's NEPA analysis only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

2. The USDA Properly Relied on the Tongass-Specific Alternatives Developed in the Roadless Rule EIS

Plaintiffs allege that the USDA's reliance on the evaluation of Tongass-specific alternatives in the Roadless Rule EIS was misplaced because the two rules have different purposes and need. This claim fails because the Roadless Rule and the Tongass Exemption share

the same core purpose and need with regard to the Tongass: to protect roadless values within the unique social, economic and ecological setting posed by that Forest.

The purpose and need of the Roadless Rule was "to protect and conserve inventoried roadless areas on National Forest System lands" and "to provide lasting protection for inventoried roadless areas within the National Forest system in *the context of multiple-use management*." Ex. 1 at 1 (emphasis added). From the outset, the USDA recognized that it was consistent with this purpose and need "to address the Tongass National Forest separately" both because of its "unique social and economic conditions," Ex. 3 at 43, and because of the abundance of roadless areas on the forest and the already robust protection they are afforded under the TLMP, id. at 91. Not only was consideration of Tongass-specific alternatives consistent with purpose of the Roadless Rule, but in both the draft EIS and the final EIS, the USDA's preferred alternative would have exempted or limited the Rule's application to the Tongass. In other words, at the time it developed the EIS, the USDA believed that exempting or limiting application of the rule to the Tongass was consistent with the purpose and need for the Roadless Rule. If the purpose of the Roadless Rule was as simplistic as shutting down all activities that threatened roadless area values, the USDA had no need to consider the Tongass-specific alternatives in the first place. Seattle Audubon Soc'y v. Moseley, 80 F.3d at 1404 (agency not required to consider alternatives "inconsistent with its basic policy objectives").

Of course, the purpose of the Roadless Rule was not as simple as shutting down all harmful activities on the Tongass, but was to strike a balance between protecting roadless resources and not causing undue economic and social disruption. See Ex. 1 at 13 (finding ecological benefits *outweigh* economic loss). The purpose and need was no different in 2001 than it was in 2003. Rather than a change in purpose and need, the Tongass Exemption simply reflects a reexamination of the same policy-based decision and selection of a different alternative from the 2001 EIS. As the Agency explained:

> At that time [January 2001], the Department decided that ensuring lasting protection of roadless values on the Tongass outweighed the attendant socioeconomic losses to local communities. The Department now believes that, considered together, the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions to the Tongass all warrant treating the Tongass differently from the national forests outside of Alaska.

Ex. 2 at 4. While this policy change is objectionable to Plaintiffs, it does not violate NEPA. The alternative of exempting the Tongass and three other Tongass-specific alternatives were examined in detail in the Roadless Rule EIS. Because the Tongass Exemption did not alter the USDA's purpose and need with regard to the Tongass, the USDA did not violate NEPA in deciding to return to the EIS and choose a different alternative.

Plaintiffs also posit a series of alternatives that they contend the Forest Service should have considered. Plaintiffs did not, however, bring these alternatives to the Agency's attention during the public comment process for the Tongass Exemption, and have thus waived their right to raise them in this court. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 764-65 (2004) (holding that failure to raise alternatives at appropriate time during administrative process resulted in forfeiture of claim).

Even were the Department obligated to consider other alternatives, consideration of the principal alternative cited by Plaintiffs would have been "ineffective," as it is not materially different from the Tongass Exemption itself. Headwaters, Inc. v. Bureau of Land Mgmt., 914 F.2d at 1180. Plaintiffs assert the USDA should have considered addressing road and utility concerns by exempting the Transportation and Utility Corridors designated in the TLMP, and economic concerns by opening only a small number of IRAs to timber harvest. Pl. Br. at 23-24. This alternative, however, is little different than the Tongass Exemption, which by returning management to the TLMP, directs highway and utility projects to the specified corridors, and opens only 3 percent of IRAs to potential timber harvest.

In sum, the USDA complied with NEPA in relying on the Tongass-specific alternatives evaluated in the Roadless Rule EIS when it promulgated the Alaska Exemption.

E. Remedy

Plaintiffs ask this Court to "vacate the Tongass Exemption, reinstate the Roadless Rule on the Tongass and vacate actions inconsistent with the Rule." Pl. Br. at 25. Such broad and invasive relief is not justified. Defendants address the question of remedy briefly below, but respectfully submit that, should this Court find any legal defect in the Tongass Exemption, it should hold separate proceedings on remedy to insure that relief is narrowly tailored to whatever injury may be demonstrated by Plaintiffs.

Equitable relief, whether in the form of vacatur or an injunction, does not issue automatically upon a finding of legal error. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (An injunction is an "extraordinary remedy" that "should issue only where the

intervention of a court of equity is essential in order effectually to protect . . . against injuries otherwise irremediable.") (quotations omitted); Idaho Farm Bureau v. Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures."). Rather, a request for injunctive relief or vacatur of the challenged action requires that plaintiffs demonstrate irreparable harm and that courts consider and balance the equities. eBay Inc. v. MercExchange, 547 U.S. 388, 391 (2006) (factors governing issuance of injunctive relief); Cent. Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001) (factors governing vacatur); Idaho Farm Bureau Fed'n, 58 F.3d at 1405 (same).

Here Plaintiffs' request for equitable relief falters at the first step, as they have failed to show the "irreparable injury" necessary to justify injunctive relief, and have not shown that other remedies at law are not adequate to address any such injury. See Steffel v. Thompson, 415 U.S. 452, 466 (1974) ("Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction"). Should the Court find the Tongass Exemption invalid in any respect, declaratory relief affords an adequate remedy: when, or if, the Forest Service proposes to implement a project under the Tongass Exemption, Plaintiffs can challenge and seek to enjoin the project based on the weight of that declaratory relief and ordinary principles of stare decisis. Cf. NWF, 497 U.S. at 894 (case-by-case challenges are "understandably frustrating . . . . [b]ut this is the traditional, and remains the normal, mode of operation of the courts.").

While Defendants do not believe any equitable relief is appropriate, if the Court finds to the contrary, any such relief must be carefully tailored to "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." See Califano v. Yamasaki, 442 U.S. 682, 702 (1979). With regard to the Tongass Exemption, there is ample precedent for leaving regulations or program-level decisions in place pending the agency's correction of legal errors. See, e.g., N. Cheyenne Tribe v. Norton, 503 F.3d 836, 844-45 (9th Cir. 2007) (allowing some oil and gas development to proceed pending completion of an EIS); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 638, 642-43 (9th Cir. 2004) (allowing limited access by commercial outfitters and guides to wilderness areas pending completion of further NEPA review); Idaho Watersheds Proj. v. Hahn, 307 F.3d 815, 833-34 (9th Cir. 2002) (allowing grazing activities to continue under conditions proposed by agency pending further NEPA review); Idaho Farm Bureau Fed'n, 58 F.3d at 1405 (remanding without vacating rule); Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C.

Cir. 1990) (same).[15] In this case, the strong protections afforded IRAs under the TLMP militate against reimposing the 2001 Roadless Rule on the Tongass while the Department remedies any legal deficiencies found in the Tongass Exemption.[16]

With regard to the projects listed in Plaintiffs' pleadings, this Court has no grounds for including such projects in any injunctive order. Plaintiffs have not challenged the projects, and the administrative record and other needed factual information for those projects is not before the Court. Without such information this Court cannot weigh the equities or craft injunctive relief. Winter v. NRDC, 129 S. Ct. 365, 374 (2008) (in considering injunctive relief courts must weigh equities and public interest). Nor can the Court assume that a legal error in the Tongass Exemption automatically requires enjoining projects. See, e.g., id. at 381 (assuming NEPA violation but nonetheless denying injunctive relief as contrary to the public interest).

In sum, the broad relief sought by Plaintiffs is inappropriate. Should this Court find any legal error issuing from the Tongass Exemption, separate proceedings should be held to determine the appropriate remedy.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs' motion for summary judgment should be denied and Defendants' cross-motion for summary judgment should be granted.

Respectfully submitted November 1, 2010.

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[15] Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005), is not to the contrary. While that Court opted – based on the facts before it – to "reinstate the rule previously in force," it first acknowledged that there are times when "equity requires an invalid rule to stay in place." Id.

[16] As Plaintiffs note, upon finding the State Petitions Rule invalid, the district court in California ex rel. Lockyer, 459 F. Supp. 2d at 913-19, enjoined that rule and reinstated the 2001 Roadless Rule. There, however, the court, after weighing the equities, concluded that an injunction reinstating the Roadless Rule was necessary to protect roadless areas. Here, no such threat to IRAs exists, because even in the absence of the Roadless Rule, the TLMP provides robust protections of roadless areas on the Tongass.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, the foregoing document was electronically via the CM/ECF system by the United States District Court, District of Alaska to the following parties:

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EXHIBIT 3

2015 Ninth Circuit En Banc Decision on Tongass Exemption

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORGANIZED VILLAGE OF KAKE; THE BOAT COMPANY; ALASKA WILDERNESS RECREATION AND TOURISM ASSOCIATION; SOUTHEAST ALASKA CONSERVATION COUNCIL; NATURAL RESOURCES DEFENSE COUNCIL; TONGASS CONSERVATION SOCIETY; GREENPEACE, INC.; WRANGELL RESOURCE COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; CASCADIA WILDLANDS; SIERRA CLUB, *Plaintiffs-Appellees*, v. UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; TOM VILSACK, in his official capacity as Secretary of Agriculture; HARRIS SHERMAN, in his official capacity as Under Secretary of Agriculture of Natural Resources and Environment; TOM TIDWELL, in his official capacity as Chief, USDA Forest Service, *Defendants*,	No. 11-35517 D.C. No. 1:09-cv-00023-JWS OPINION

ALASKA FOREST ASSOCIATION, INC.,
Intervenor-Defendant,

and

STATE OF ALASKA,
Intervenor-Defendant–Appellant.

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted En Banc
December 16, 2014—Pasadena, California

Filed July 29, 2015

Before: Sidney R. Thomas, Chief Judge, and Harry Pregerson, Alex Kozinski, William A. Fletcher, Richard C. Tallman, Richard R. Clifton, Consuelo M. Callahan, Milan D. Smith, Jr., Morgan Christen, Jacqueline H. Nguyen, Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz;
Concurrence by Judge Christen;
Dissent by Judge Callahan;
Dissent by Judge M. Smith, Jr.;
Dissent by Judge Kozinski

SUMMARY*

Environmental Law

The en banc court affirmed the district court's summary judgment in favor of the Organized Village of Kake, finding that the United States Department of Agriculture's promulgation of the Tongass National Forest Exemption to the Department's "Roadless Rule" (limiting road construction and timber harvesting in national forests) violated the Administrative Procedure Act; vacated the Tongass Exemption; and reinstated application of the Roadless Rule to the Tongass National Forest in Alaska.

The U.S. Department of Agriculture declined to appeal, but intervenor-defendant State of Alaska appealed. Under the National Forest Receipts program, Alaska has a right to twenty-five percent of gross receipts of timber sales from national forests in the State.

In 2001, the Department of Agriculture promulgated the Roadless Rule, and expressly refused to exempt the Tongass National Forest from the Rule (the "2001 Record of Decision"). In 2003, relying on the identical factual record complied in 2001, the Department reversed course and found that application of the Roadless Rule to Tongass was unnecessary. The Department's 2003 Record of Decision promulgated the Tongass Exemption.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The en banc court held that the effect of the Roadless Rule on Alaska's statutory entitlement to timber receipts meant that the State of Alaska had an interest in the judgment sufficient to establish Article III standing. The en banc court also held that the 2003 Record of Decision fell short of Administrative Procedure Act requirements. The en banc court further held that the Tongass Exemption was invalid because the Department failed to provide a reasoned explanation for contradicting the findings in the 2001 Record of Decision. As a remedy, the en banc court upheld the district court's reinstatement of the Roadless Rule which remained in effect and applied to the Tongass Forest.

Concurring, Judge Christen, joined by Chief Judge Thomas, wrote separately to voice her view that there was no indication that the district court judge who first ruled in this case decided it based on his own view, and this court did not do so either.

Dissenting, Judge Callahan would hold that Alaska does not have Article III standing to appeal, and the appeal should be dismissed for lack of appellate jurisdiction. Judge Callahan also joined Judge M. Smith's dissent on the merits, and would reverse and remand.

Dissenting, Judge M. Smith, joined by Kozinski, Tallman, Clifton, and Callahan, wrote that the Department of Agriculture followed President Bush's policy instructions when it amended the Roadless Rule in 2003, and the agency's explanations for its decisions easily met the requirements of *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–15 (2000) (holding that a court should not substitute its judgment for that of an agency and should uphold an agency decision where the agency's path may be reasonably discerned).

Judge M. Smith would hold that the Department was not arbitrary and capricious in 2003 when it exempted the Tongass National Forest from the Roadless Rule, and would reverse the district court's decision. He would also remand to the district court to consider the Village's National Environmental Policy Act claims in the first instance.

Dissenting, Judge Kozinski joined Judge M. Smith's dissent in full, and wrote separately to note the glacial pace of administrative litigation.

COUNSEL

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Julie A. Weis, Haglund Kelley Jones & Wilder LLP, Portland, Oregon, for Amicus Curiae Alaska Forest Association, Inc.

OPINION

HURWITZ, Circuit Judge:

In 2001, the United States Department of Agriculture promulgated the "Roadless Rule," limiting road construction and timber harvesting in national forests. The Department expressly found that exempting the Tongass National Forest from this Rule "would risk the loss of important roadless area [ecological] values." Just two years later, relying on the identical factual record compiled in 2001, the Department reversed course, finding "[a]pplication of the roadless rule to the Tongass . . . unnecessary to maintain the roadless values."

The issue in this case is whether the Department sufficiently explained this dramatically changed finding. Like the district court, we conclude that the Administrative Procedure Act requires a reasoned explanation for this change in course, and affirm the judgment below.

I.

A. The 2001 Roadless Rule

Approximately one-third of National Forest Service lands, some 58.5 million acres, is designated by the Department of Agriculture as inventoried roadless areas. *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. §§ 294.10–294.14) (the "2001 ROD"). These "large, relatively undisturbed landscapes" have a variety of scientific, environmental, recreational, and aesthetic attributes and characteristics unique to roadless areas, which the Department refers to as "roadless values." *Id.* at 3245, 3251. As the 2001 ROD

explained, these include healthy watersheds critical for catching and storing water, protecting downstream communities from flooding, providing clean water for domestic and agricultural purposes, and supporting healthy fish and wildlife populations. *Id.* at 3245. Roadless area attributes also include habitats for threatened and endangered species, space for wilderness recreation, environments for research, traditional cultural properties and sacred sites, and defensive zones against invasive species. *Id.*

Inventoried roadless lands were historically managed through local- and forest-level plans. *Id.* at 3246–47. In 2000, citing the "costly and time-consuming appeals and litigation" that plagued this process, *id.* at 3244, the Department considered a national roadless lands policy that would look at "the 'whole picture' regarding the management of the National Forest System," *id.* at 3246–48. The Department undertook to answer two questions when it started this process. The first was whether to prohibit timber harvesting and road construction (or reconstruction) within inventoried roadless areas of our national forests. *Id.* at 3262. The second question recognized the unique nature of the Tongass National Forest, which, at 16.8 million acres, is the nation's largest national forest.[1] *Id.* The issue was whether to exempt the Tongass from the proposed Roadless Rule in whole or in part. *Id.* at 3262–63. Thus, the Department

[1] The Tongass is vitally important to the economy of Southeast Alaska; it supports significant timber and mining activity as well as commercial and recreational fishing, hunting, recreation, and tourism. The Tongass is also part of the Pacific coast ecoregion, which encompasses one fourth of the world's coastal temperate rainforests. *Id.* at 3254. The Tongass has a very high degree of ecosystem health, and a higher percentage of inventoried roadless acreage than any Forest Service region in the contiguous United States.

examined four alternatives for treating the Tongass under the Roadless Rule: applying any new rule to the Tongass with no exceptions (Tongass Not Exempt), excluding the Tongass from a new rule altogether (Tongass Exempt), postponing any decision on the application of a new rule to the Tongass until 2004 (Tongass Deferred), and applying some of the prohibitions of a new rule only to certain parts of the Tongass (Tongass Selected Areas). *Id.* No other national forest received such special consideration in the Department's nationwide assessment of the proposed Roadless Rule.

Given the unique importance of the Tongass and the many competing interests in its use and management, it was not surprising that thousands of public comments concerning the proposed rule were received, or that the Department gave the Tongass special consideration. *Id.* at 3248. Approximately 16,000 people attended 187 public meetings, and the Department received more than 517,000 comments on the proposed rule. *Id.* The 2001 ROD squarely recognized that adopting the Roadless Rule risked significant and negative local economic impact for the Tongass:

> With the recent closure of pulp mills and the ending of long-term timber sale contracts, the timber economy of Southeast Alaska is evolving to a competitive bid process. About two-thirds of the total timber harvest planned on the Tongass National Forest over the next 5 years is projected to come from inventoried roadless areas. If road construction were immediately prohibited in inventoried roadless areas, approximately 95 percent of the timber harvest within those areas would be eliminated.

* * *

> Based on the analysis contained in the [Final Environmental Impact Statement], a decision to implement the rule on the Tongass National Forest is expected to cause additional adverse economic effects to some forest dependent communities ([Final Environmental Impact Statement] Vol. 1, 3-326 to 3-350). During the period of transition, an estimated 114 direct timber jobs and 182 total jobs would be affected. In the longer term, an additional 269 direct timber jobs and 431 total jobs may be lost in Southeast Alaska.

Id. at 3254–55.

In light of these socio-economic concerns, the proposed Roadless Rule suggested the Tongass Deferred option. *See* Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276, 30,277, 30,280–81 (May 10, 2000) (notice of proposed rulemaking). But the 2001 ROD expressly found that such an approach "would risk the loss of important roadless area values" in the Tongass. 66 Fed. Reg. at 3254. The 2001 ROD also rejected the Tongass Selected Areas option, finding that even under that more limited approach, "[i]mportant roadless area values would be lost or diminished." *Id.* at 3266. Ultimately, the Department adopted a national Roadless Rule prohibiting road construction and timber harvesting in inventoried roadless areas of the National Forest System except for specified "human and environmental protection measures." *Id.* at 3263. The Department decided that the Roadless Rule would apply to the Tongass, but with several exceptions designed to

mitigate the impacts of the Rule in Southeast Alaska. The exceptions allowed: (1) road construction and reconstruction in certain mineral-leasing areas, (2) timber harvest in areas where roadless characteristics had been substantially altered by road construction or timber harvest since the area was designated an inventoried roadless area but before implementation of the Roadless Rule, and (3) planned timber harvest and road construction in areas where a notice of availability of a draft environmental impact statement had been published in the Federal Register prior to publication of the Roadless Rule. *Id.* at 3266. The Department estimated that these exceptions would together allow enough continued timber harvest from the Tongass "to satisfy about seven years of estimated market demand." *Id.*

B. The Roadless Rule Litigation

Although the Department intended the Roadless Rule to reduce litigation about forest management, *see id.* at 3244, 3246, that hope was promptly dashed. Litigation over the Roadless Rule began immediately after its adoption. In 2001, an Idaho district judge preliminarily enjoined implementation of the Roadless Rule, citing violations of the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 ("NEPA"). *Kootenai Tribe of Idaho v. Veneman*, No. 01-10-N-EJL, 2001 WL 1141275, at *2 (D. Idaho May 10, 2001). This court reversed, finding that plaintiffs had not shown a likelihood of success on their NEPA claim. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1126 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178–80 (9th Cir. 2011) (en banc). The Roadless Rule took effect when the *Kootenai* mandate issued in April 2003. *See California ex*

rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1007 (9th Cir. 2009) (describing history of the Roadless Rule).

The State of Alaska also challenged the Roadless Rule soon after its adoption. The State's complaint, filed in the District of Alaska in 2001, claimed that the promulgation of the Roadless Rule violated NEPA, the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 ("APA"), the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233 ("ANILCA"), the Tongass Timber Reform Act, Pub. L. No. 101-626, 104 Stat. 4426 (1990) (codified as amended in scattered sections of 16 U.S.C.) ("TTRA"), and other federal statutes. Complaint, *Alaska v. U.S. Dep't of Agric.*, No. 3:01-cv-00039-JKS (D. Alaska Jan. 31, 2001), ECF No. 1; *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960, 964 (D. Alaska 2011) (describing this litigation). The case settled, and Alaska's complaint was dismissed.[2] *Organized Vill.*, 776 F. Supp. 2d at 964.

Four months after this court decided *Kootenai*, the Roadless Rule was permanently enjoined by a Wyoming district court that found the rule violated both NEPA and the Wilderness Act, 16 U.S.C. §§ 1131–1136. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003), *vacated*, *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211, 1214 (10th Cir. 2005). While that ruling was on

[2] Alaska again challenged the validity of the Roadless Rule in 2011, this time in the District of Columbia. The district court found the action barred by the statute of limitations. *Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d 30, 33–34 (D.D.C. 2013). The D.C. Circuit reversed, holding that the limitations period had reset when the Roadless Rule was reinstated in 2006. *Alaska v. U.S. Dep't of Agric.*, 772 F.3d 899, 900 (D.C. Cir. 2014). This litigation remains pending.

appeal, the Department promulgated the "Special Areas; State Petitions for Inventoried Roadless Area Management" rule (the "State Petitions Rule"). 70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at 36 C.F.R. §§ 294.10–294.18). The State Petitions Rule replaced the Roadless Rule with a process under which the "Governor of any State or territory that contains National Forest System lands" could "petition the Secretary of Agriculture to promulgate regulations establishing management requirements for all or any portion of National Forest System inventoried roadless areas within that State or territory." *Id.* at 25,661. In light of the new rule, the Tenth Circuit dismissed the Department's appeal from the Wyoming district court judgment as moot and vacated the judgment. *Wyoming*, 414 F.3d at 1211, 1214.

A year later, however, a California district court set aside the State Petitions Rule, finding it invalid under NEPA and the Endangered Species Act, 16 U.S.C. §§ 1531–1544; the district court therefore reinstated the Roadless Rule. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 909, 912, 919 (N.D. Cal. 2006). This court affirmed. *Lockyer*, 575 F.3d at 1021. In 2008, a Wyoming district court again permanently enjoined the Roadless Rule. *Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309, 1355 (D. Wyo. 2008), *rev'd*, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011). In 2011, the Tenth Circuit once again reversed. *Wyoming*, 661 F.3d at 1272.

C. The Tongass Exemption

In return for Alaska's dismissal of its 2001 suit challenging the Roadless Rule, the Department agreed to publish (but not necessarily to adopt) a proposed rule, the "Tongass Exemption," to "temporarily exempt the Tongass

from the application of the roadless rule" as well as an advanced notice of proposed rulemaking to permanently exempt the Tongass and another Alaska national forest from the Roadless Rule. *See* Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 41,865, 41,866 (Jul. 15, 2003) (notice of proposed rulemaking). In December of 2003, the Department issued a record of decision (the "2003 ROD") promulgating the final Tongass Exemption, the "Special Areas; Roadless Conservation; Applicability to the Tongass National Forest, Alaska" rule. 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. § 294.14). The 2003 ROD expressly found that "the overall decisionmaking picture" was not "substantially different" from when the 2001 ROD was promulgated, *id.* at 75,141, and that public comments about the Tongass Exemption "raised no new issues . . . not already fully explored" in the earlier rulemaking, *id.* at 75,139. Thus, the Department relied on the 2001 Roadless Rule Final Environmental Impact Statement ("Roadless Rule FEIS"), rather than preparing a new one. *Id.* at 75,136, 75,141.

The 2003 ROD adopted the Tongass Exempt Alternative identified in the 2001 ROD, thus returning the Tongass to management through a local forest plan, the Tongass Forest Plan. *Id.* at 75,136. Contrary to the 2001 ROD, the 2003 ROD concluded "[a]pplication of the roadless rule to the Tongass is unnecessary to maintain the roadless values of these areas," *id.* at 75,137, which the Department found were already "well protected by the Tongass Forest Plan," *id*. at 75,144.

D. The Procedural History of This Case

In 2009, the Organized Village of Kake and others (collectively, the "Village") filed this suit in the District of Alaska, alleging that the Tongass Exemption violated NEPA and the APA. *See Organized Vill.*, 776 F. Supp. 2d at 967. The State of Alaska intervened as a party-defendant. *Id.* at 961. The district court granted summary judgment to the Village, finding the promulgation of the Tongass Exemption violated the APA, 5 U.S.C. § 706(2)(A), because "the Forest Service provided no reasoned explanation as to why the Tongass Forest Plan protections it found deficient in [2001], were deemed sufficient in [2003]." *Id.* at 974, 977. The court thus vacated the Tongass Exemption and reinstated application of the Roadless Rule to the Tongass.[3] *Id.* at 977.

The Department declined to appeal. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 746 F.3d 970, 973 (9th Cir. 2014). Alaska, however, did appeal, and a divided three-judge panel of this court reversed the district court's APA ruling and remanded for consideration of the Village's NEPA claim.[4] *Id.* at 973, 980. A majority of the nonrecused active judges on this court then voted to grant the Village's petition for rehearing en banc. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 765 F.3d 1117 (9th Cir. 2014).

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[3] Because the court found the Tongass Exemption invalid under the APA, it did not reach the Village's NEPA claim. *Organized Vill.*, 776 F. Supp. 2d at 976.

[4] The Alaska Forest Association also intervened below, but did not appeal, instead filing a brief as amicus curiae. Amicus Brief, *Organized Vill.*, No. 11-35517 (9th Cir. Nov. 1, 2011), ECF No.19.

II.

A. Jurisdiction

We begin, as we did in *Kootenai*, by examining "whether the intervenor[] may defend the government's alleged violations of . . . the APA when the federal defendants have decided not to appeal." 313 F.3d at 1107. Although the Village does not challenge Alaska's standing, that silence does not excuse us from determining whether we have appellate jurisdiction. *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 966–67 (9th Cir. 2004).[5]

"[I]ntervenors are considered parties entitled . . . to seek review," but "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). To establish Article III standing, a party must demonstrate "injury in fact," causation, and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). When the original defendant does not appeal, "the test is whether the intervenor's interests have been adversely affected by the judgment." *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992).

Under the National Forest Receipts program, Alaska has a right to twenty-five percent of gross receipts of timber sales from national forests in the State. *See* 16 U.S.C. § 500.

[5] The D.C. Circuit did not question Alaska's standing in the litigation before that court about the 2001 ROD. *Alaska*, 772 F.3d at 899–900.

Accordingly, from 1970 through 2001, Alaska received more than $93 million in Tongass receipts. The permitted amount of timber harvesting in the Tongass is directly affected by the Tongass Exemption. *See* 2001 ROD, 66 Fed. Reg. at 3270 (finding that under the Roadless Rule, "[h]arvest effects on the Tongass National Forest will be reduced about 18 percent in the short-term" and "about 60 percent" in the long-term). The effect of the Roadless Rule on Alaska's statutory entitlement to timber receipts means that Alaska has an interest in the judgment, *Didrickson,* 982 F.2d at 1338, sufficient to establish Article III standing, *see Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160–61 (1981).

Our dissenting colleague argues that Article III standing is absent because "Congress did not intend to legislate standing" for a state under 16 U.S.C. § 500. This argument misses the mark. As the Supreme Court has recently made clear, whether Congress created a private cause of action in legislation is not a question of Article III standing. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 & n.4 (2014). Notwithstanding that courts sometimes have mistakenly referred to this inquiry as involving "prudential standing," the Court has made plain that it "does not implicate subject-matter jurisdiction, *i.e.,* the court's statutory or constitutional *power* to adjudicate the case." *Id.* at 1387 & n.4 (internal quotation marks omitted) (noting that "prudential standing" is a "misnomer"). Here, Alaska does not pursue a claim under the National Forest Receipts program. Rather, this is an APA action initiated by the Village challenging the Tongass Exemption. In such an action, we apply the familiar "zone of interests" test. *Id.* at 1388–89. The Supreme Court has emphasized,

> in the APA context, that the test is not especially demanding. In that context we have often conspicuously included the word "arguably" in the test to indicate that the benefit of any doubt goes to the plaintiff, and have said that the test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue. That lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review. We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes.

Id. at 1389 (citations and internal quotation marks omitted).

There can be no doubt that the Village more than amply met the forgiving "zone of interests" test when it instituted this APA action. That resolves the issue, because "[a]n intervenor's standing to pursue an appeal does not hinge upon whether the intervenor could have sued the party who

prevailed in the district court." *Didrickson*, 982 F.2d at 1338.[6]

Of course, Alaska must also have Article III standing. Thus, the only issue really before us is whether the judgment below threatens Alaska with an injury in fact that gives the State a "stake in defending . . . enforcement" of the Tongass Exemption sufficient to satisfy Article III. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (internal quotation marks omitted). In this respect, contrary to the dissent, *Energy Action Educational Foundation* is on all fours. Under the Outer Continental Shelf Lands Act Amendments of 1978 ("OCS"), the federal government was required to share revenues from a federal OCS lease with a state owning adjoining portions of an oil and gas pool. *Energy Action Educ. Found.*, 454 U.S. at 160–61. When California challenged the bidding system used for awarding federal leases, the Secretary of the Interior disputed the State's standing. *Id.* In finding that California alleged a potential injury sufficient to establish Article III standing, the Court relied expressly on the State's right to revenues under the 1978 OCS amendments:

> The 1978 Amendments require the Federal Government to turn over a fair share of the revenues of an OCS lease to the neighboring

[6] Even if we were required to determine whether Alaska satisfied the zone of interest test in this action, the answer would be the same. The State's interests in timber harvesting, road construction, and economic development are directly impacted by the Tongass Exemption, and are extensively discussed in the 2003 ROD. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (explaining that APA standing requires only that a party's interests be "marginally" related to the challenged action).

> coastal State whenever the Federal Government and the State own adjoining portions of an OCS oil and gas pool. California thus has a direct financial stake in federal OCS leasing off the California coast. In alleging that the bidding systems currently used by the Secretary of the Interior are incapable of producing a fair market return, California clearly asserts the kind of distinct and palpable injury that is required for standing.

Id. at 160–61 (citations and internal quotation marks omitted).[7]

The royalties due California under the OCS are indistinguishable for Article III purposes from the fractional timber receipts due Alaska under the National Forest Receipts program. It is not disputed that reinstatement of the Roadless Rule in the Tongass will limit timbering and thereby reduce Alaska's statutory entitlement to fractional receipts. Alaska's claimed injury is thus precisely the same kind of "injury in fact" alleged by California with respect to the federal lease

[7] Contrary to the dissent, the Court did not rely on California's ownership of adjacent oil deposits in finding a sufficient injury to establish Article III standing. Although the Court properly noted that the OCS required the Secretary "to use the best bidding systems and thereby assure California a fair return for its resources," *Energy Action Educ. Found.*, 454 U.S. at 161, it did so when analyzing causation and redressability *after* it had already found that California's right to statutory payment established the requisite injury in fact.

bidding system—loss of funds promised under federal law—and satisfies Article III's standing requirement.[8]

To be sure, Alaska and its government subdivisions have elected since 2001 to receive payments under the Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393, 114 Stat. 1607, and successor legislation, in lieu of the fractional payments.[9] But, Congress's current decision to protect beneficiaries of the National Forest Receipts program against declines in timbering revenues does not vitiate Alaska's Article III standing to challenge the reinstatement of the Roadless Rule. The Rule directly affects the size of Alaska's statutory entitlement to receipts from timbering, whether or not Congress chooses in any year to hold the state harmless against those losses, just as a plaintiff with an insurance policy has standing to sue a defendant who has damaged his home, even though in the end the insurer (or even the

[8] The dissent correctly does not contest that the causation and redressability prongs of Article III standing are satisfied here.

[9] The Secure Rural Schools Act was reauthorized numerous times before it briefly expired in 2014. *See* U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act § 5401, Pub. L. No. 110-28, 121 Stat. 112 (2007); Emergency Economic Stabilization Act § 601, Pub. L. No. 110-343, 122 Stat. 3765 (2008); Moving Ahead for Progress in the 21st Century Act § 100101, Pub. L. No. 112-141, 126 Stat. 405 (2012); Helium Stewardship Act of 2013 § 10(a), Pub. L. No. 113-40, 127 Stat. 534 (2013). The Secure Rural Schools Act was reauthorized for two years on April 27, 2015. *See* Medicare Access and CHIP Reauthorization Act § 524, Pub. L. No. 114-10, 129 Stat. 87 (2015).

homeowner's uncle) has agreed to indemnify the homeowner for all losses.[10]

B. The APA claim

1. The APA Requirements for a Change of Agency Policy

The APA requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is "arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Unexplained inconsistency" between agency actions is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

The Supreme Court addressed the application of the APA to agency policy changes in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). In *Fox*, the Court held that a policy change complies with the APA if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the

[10] Because the Roadless Rule's impact on Alaska's right to fractional receipts under the National Forest Receipts program suffices to establish Article III injury in fact, we need not consider other possible bases for Article III standing.

statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515–16 (emphasis omitted).

Fox involved the FCC's decision to treat isolated uses of non-literal profanity in television broadcasts as indecency, a reversal of agency policy. *Id.* at 508–10. Because the FCC had not based its prior policy on factual findings, but rather on its reading of Supreme Court precedent, the *Fox* majority did not explore the kind of "reasoned explanation" necessary to justify a policy change that rested on changed factual findings. *See id.* at 538 (Kennedy, J., concurring). But, Justice Kennedy, whose concurrence provided the fifth vote in the *Fox* 5–4 majority, plumbed this issue in his opinion. *See id.* at 535–39.

As a paradigm of the rule that a policy change violates the APA "if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so," Justice Kennedy cited *State Farm*. *Id.* at 537. That case involved congressional direction to an agency to issue regulations for "motor vehicle safety." *Id.* (quoting *State Farm*, 463 U.S. at 33). The agency issued a regulation requiring cars to have airbags or automatic seatbelts, finding that "these systems save lives." *Id.* at 537–38 (citing *State Farm*, 463 U.S. at 35, 37). After a change in presidential administrations, however, the agency rescinded the regulation, never addressing its previous findings. *Id.* at 538 (citing *State Farm*, 463 U.S. at 47–48). As Justice Kennedy noted, the "Court found the agency's rescission arbitrary and

capricious because the agency did not address its prior factual findings." *Id.* (citing *State Farm*, 463 U.S. at 49–51).

The central issue in this case is whether the 2003 ROD rests on factual findings contradicting those in the 2001 ROD, and thus must contain the "more substantial justification" or reasoned explanation mandated by *Fox*. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015). We conclude that the 2003 ROD falls short of these APA requirements.

2. The Tongass Exemption Violated the APA

After compiling a detailed factual record, the Department found in the 2001 ROD that "the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to [southeast Alaska] communities" from application of the Roadless Rule. 66 Fed. Reg. at 3255. On precisely the same record, the 2003 ROD instead concluded that the "the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits" of the Roadless Rule. 68 Fed. Reg. at 75,141. Alaska contends, and we agree, that the 2003 ROD is a change in policy.

We also agree with Alaska that the 2003 ROD complies with three of the *Fox* requirements. First, the Department displayed "awareness that it *is* changing position." *Fox*, 556 U.S. at 515. The 2003 ROD acknowledges that the Department rejected the Tongass Exemption in 2001 and recognizes that it is now "treating the Tongass differently." 68 Fed. Reg. at 75,139. Second, the 2003 ROD asserts that "the new policy is permissible" under the relevant statutes, ANILCA and TTRA. *Fox*, 556 U.S. at 515; 68 Fed. Reg. at 75,142. Third, we assume the Department "believes" the new

policy is better because it decided to adopt it. *Fox*, 556 U.S. at 515 (emphasis omitted).

It is the Department's compliance with the fourth *Fox* requirement, that it give "good reasons" for adopting the new policy, upon which this case turns. *Id.* The 2003 ROD explicitly identifies the Department's reasons for "Going Forward With This Rulemaking" as "(1) serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions would cause in communities throughout Southeast Alaska, (2) comments received on the proposed rule, and (3) litigation over the last two years." 68 Fed. Reg. at 75,137. We examine below whether these constitute "good reasons" under the APA, and whether a factual finding contrary to the findings in the 2001 ROD underlays the Department's reasoning.

i. Socioeconomic Concerns

The 2003 ROD explains the Department's reversal of course as arising out of concern about "economic and social hardships that application of the [roadless] rule's prohibitions would cause in communities throughout Southeast Alaska." *Id.* Those concerns were not new. In both the 2001 and 2003 RODs, the Department acknowledged the "unique" socioeconomic consequences of the Roadless Rule for the timber-dependent communities of southeast Alaska. *See id.* at 75,139; 2001 ROD, 66 Fed. Reg. at 3266. For this reason, the Roadless Rule included special mitigation measures—not added for any other national forest—allowing certain ongoing timber and road construction projects in the Tongass to move forward. 2001 ROD, 66 Fed. Reg. at 3266. Moreover, both RODs incorporated potential job loss analysis from the

Roadless Rule FEIS. *See* 2003 ROD, 68 Fed. Reg. at 75,137; 2001 ROD, 66 Fed. Reg. at 3255.

We do not question that the Department was entitled in 2003 to give more weight to socioeconomic concerns than it had in 2001, even on precisely the same record. "*Fox* makes clear that this kind of reevaluation is well within an agency's discretion." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012). There was a change in presidential administrations just days after the Roadless Rule was promulgated in 2001. Elections have policy consequences. But, *State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.

That is precisely what happened here. The 2003 ROD did not simply rebalance old facts to arrive at the new policy. Rather, it made factual findings directly contrary to the 2001 ROD and expressly relied on those findings to justify the policy change. The 2001 ROD explicitly found that wholly exempting the Tongass from the Roadless Rule and returning it to management under the Tongass Forest Plan "would risk the loss of important roadless area values," 66 Fed. Reg. at 3254, and that roadless values would be "lost or diminished" even by a limited exemption, *id.* at 3266. The 2003 ROD found in direct contradiction that the Roadless Rule was "unnecessary to maintain the roadless values," 68 Fed. Reg. at 75,137, and "the roadless values in the Tongass are sufficiently protected under the Tongass Forest Plan," *id.* at 75,138.

There can be no doubt that the 2003 finding was a critical underpinning of the Tongass Exemption. The 2003 ROD states that "[t]he Department has concluded that the social

and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits *because* the Tongass Forest Plan adequately provides for the ecological sustainability of the Tongass." *Id.* at 75,141–42 (emphasis added). The 2003 ROD also makes plain that "[t]his decision reflects the facts . . . that roadless values are plentiful on the Tongass and are well protected by the Tongass Forest Plan. The minor risk of the loss of such values is outweighed by the by the more certain socioeconomic costs of applying the roadless rule's prohibitions to the Tongass." *Id.* at 75,144.

Thus, contrary to the contentions of both Alaska and dissenting colleagues, this is not a case in which the Department—or a new Executive—merely decided that it valued socioeconomic concerns more highly than environmental protection. Rather, the 2003 ROD rests on the express finding that the Tongass Forest Plan poses only "minor" risks to roadless values; this is a direct, and entirely unexplained, contradiction of the Department's finding in the 2001 ROD that continued forest management under precisely the same plan was unacceptable because it posed a high risk to the "extraordinary ecological values of the Tongass." 66 Fed. Reg. at 3254. The Tongass Exemption thus plainly "rests upon factual findings that contradict those which underlay its prior policy." *Fox*, 556 U.S. at 515. The Department was required to provide a "reasoned explanation . . . for disregarding" the "facts and circumstances" that underlay its previous decision. *Id.* at 516; *Perez*, 135 S. Ct. at 1209. It did not.

Consistent with *Fox*, we have previously held that unexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA. In *Humane Society of the United States v. Locke*, we confronted

a determination by the National Marine Fisheries Service that sea lions posed a "significant negative impact" on fish populations, and could therefore be "lethally removed." 626 F.3d 1040, 1045–46 (9th Cir. 2010). The agency had made four previous findings, however, that comparable or greater dangers to similar fish populations would *not* have a significant adverse impact. *Id.* at 1048. We found that the APA required the agency to provide a "rationale to explain the disparate findings." *Id.* at 1049 (citing *Fox*, 556 U.S. 502).

The same result is mandated here. The 2003 ROD does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a "minor" one. The absence of a reasoned explanation for disregarding previous factual findings violates the APA. "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring).

Of course, not every violation of the APA invalidates an agency action; rather, it is the burden of the opponent of the action to demonstrate than an error is prejudicial. *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010); *see also Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("This Court has said that the party that seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." (internal quotation marks omitted)).

But the required demonstration of prejudice is "not . . . a particularly onerous requirement." *Shinseki*, 556 U.S. at 410.

"If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further." *Jicarilla*, 613 F.3d at 1121. Because the Department's 2003 finding that the threat to the environment from the Tongass Exemption had now become "minor" is the centerpiece of its policy change, the absence of a reasoned explanation for that new factual finding is not harmless error. *See Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1091–92 (9th Cir. 2011) (applying *Shinseki* prejudice review to rulemaking). The Tongass Exemption therefore cannot stand.

ii. The Department's Other Rationales

Although we conclude that the Tongass Exemption is invalid because the Department failed to provide a reasoned explanation for contradicting the findings in the 2001 ROD, we also briefly consider the two other rationales offered by the Department. These rationales do not rest on factual findings contrary to the 2001 ROD, but neither withstands even the forgiving general requirement that the proffered reason for agency action not be "implausible." *State Farm*, 463 U.S. at 43.

The second of the three reasons given by the Department in the 2003 ROD for promulgating the Tongass Exemption was "comments received on the proposed rule." 68 Fed. Reg. at 75,137. But, the 2003 ROD expressly conceded that these "comments raised no new issues" beyond those "already fully explored in the [Roadless Rule FEIS]." *Id.* at 75,139. It is implausible that comments raising "no new issues" regarding alternatives "already fully explored" motivated the adoption of the final Roadless Rule.

The third rationale for the Tongass Exemption, "litigation over the last two years," *id.* at 75,137, fares no better. The 2003 ROD states that "[a]dopting this final rule reduces the potential for conflicts regardless of the disposition of the various lawsuits" over the Roadless Rule. *Id.* at 75,138. Alaska candidly conceded in its opening brief that the Tongass Exemption "obviously will not remove all uncertainty about the validity of the Roadless Rule, as it is the subject of a nationwide dispute and . . . nationwide injunctions." These other lawsuits involved forests other than the Tongass, so it is impossible to discern how an exemption for the Alaska forest would affect them. And, the Department could not have rationally expected that the Tongass Exemption would even have brought certainty to litigation about this particular forest. It predictably led to this lawsuit, and did not even prevent a separate attack by Alaska on the Roadless Rule itself.[11] At most, the Department deliberately traded one lawsuit for another.

C. Remedy

"'Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.'" *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)); *see* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or

[11] The settlement of Alaska's 2001 suit against the Department required the department to promulgate an advance notice of proposed rulemaking to permanently exempt several national forests in Alaska from the Roadless Rule; the State's concerns with the Roadless Rule thus extend beyond the Tongass. *See* 2003 ROD, 68 Fed. Reg. at 75,136.

otherwise not in accordance with law . . . ."). "The effect of invalidating an agency rule is to reinstate the rule previously in force." *Paulsen*, 413 F.3d at 1008. A district court's reinstatement of a prior rule is reviewed for abuse of discretion. *Lockyer*, 575 F.3d at 1011, 1019–20.

Alaska argues, however, that because the remedy for an invalid rule is not the reinstatement of another invalid rule, *see Paulsen*, 413 F.3d at 1008, the district court abused its discretion reinstating the Roadless Rule because that Rule had been enjoined by the Wyoming district court both when the Tongass Exemption was promulgated and when the judgment below was entered. But, wholly aside from the obvious conflict between the first Wyoming district court judgment and our later opinion in *Lockyer*, 575 F.3d 999, the argument is of no avail. The Tenth Circuit vacated both Wyoming district court injunctions. *See Wyoming*, 661 F.3d at 1272; *Wyoming*, 414 F.3d at 1214. The Roadless Rule therefore remains in effect and applies to the Tongass.

III.

We **AFFIRM** the judgment of the district court.

CHRISTEN, Circuit Judge, with whom THOMAS, Chief Circuit Judge, joins, concurring:

As the court's opinion recognizes, the Tongass is vitally important to Southeast Alaska. The court is equally express in acknowledging that changes of administration can indeed have consequences. Neither of these points is in dispute.

This case is unique because no new facts were presented between the time the Department of Agriculture adopted the Roadless Rule in 2001 and the time it reversed its decision in 2003. The outcome of the case pivots on the undeniable: the 2003 decision was contradicted by the agency's previous factual findings. In 2001, the agency found that "[a]llowing road construction and reconstruction on the Tongass National Forest to continue unabated would risk the loss of important roadless area values." Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,254–55 (Dep't of Agric. Jan. 12, 2001) (to be codified at 36 C.F.R. §§ 294.10–294.14). In 2003, the agency concluded that "the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits *because the Tongass Forest Plan adequately provides for the ecological sustainability of the Tongass*." Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75, 141–42 (Dep't of Agric. Dec. 30, 2003) (to be codified at 36 C.F.R. § 294.14) (emphasis added).

The dissent suggests that the 2003 decision was likely the result of a change in administrations, and argues that the agency, "following the policy instructions of the new president," was free to weigh the same evidence and "simply conclude[] that the facts mandated different regulations than the previous administration." Supreme Court authority directs otherwise. Under *FCC v. Fox Television Stations, Inc.*, when a new policy is contradicted by an agency's previous factual findings, the law does not allow the agency to simply ignore the earlier findings. 556 U.S. 502, 516 (2009). Instead, the law requires that the agency provide a reasoned explanation for changing course and adopting a position contradicted by its previous findings. *Id.*

In this case, the agency was unable to defend its flip-flop when the case was argued in the district court, and the agency chose not to participate in the appeal. Despite the efforts of the intervenor, the record and arguments presented to the district court support its decision, which we affirm today.

I write separately to voice my view that there is no indication the conscientious district court judge who first ruled in this case decided it based on his own views, and our court does not do so either. Judges do not have the expertise to manage national forests, but we are often called upon to decide whether a federal agency followed correct procedures. Whether or not they are reflected in the headlines, our rulings in environmental cases sometimes have the result of permitting resources to be extracted, *e.g.*, *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989 (9th Cir. 2013), roads to be constructed, *e.g.*, *Sierra Club v. BLM*, 786 F.3d 1219 (9th Cir. 2015), forests to be logged, *e.g.*, *Lands Council v. McNair*, 629 F.3d 1070 (9th Cir. 2010), or forests to be thinned to manage the risk of fire, *e.g.*, *Friends of the Wild Swan v. Weber*, 767 F.3d 936 (9th Cir. 2014). Other times, they do not. *See, e.g.*, *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) (enjoining logging project while Forest Service completed supplemental environmental impact statement). Regardless of the outcome, the court's aim is to fairly and impartially apply the law when we entertain such procedural challenges. Because in this case the Department of Agriculture did not follow the rule articulated by the Supreme Court in *Fox*, I join the majority in affirming the district court's decision.

CALLAHAN, Circuit Judge, dissenting:

The State of Alaska appeals the District Court for the District of Alaska's decision setting aside the Departure of Agriculture's exemption of the Tongass National Forest from the Roadless Rule. The majority holds that Alaska has standing to appeal based on a statutory entitlement—an option to collect a share of the revenue the United States makes from timber harvested from national forests in Alaska. *See* 16 U.S.C. § 500 (creating the National Forest Receipts Program). But Alaska does not have standing based on this statutory interest. A statutory provision is insufficient to establish Article III standing where, as here, the right it creates has not been invaded, Congress did not intend to legislate standing, and no factual injury has been suffered. The majority strays well beyond Article III's confines in holding that Congress legislated standing by creating a revenue-sharing program. The majority alarmingly opens the door to governance of the nation's natural resources by injunction, but only to those groups powerful enough to secure a statutory entitlement tied to development of those resources. Moreover, Alaska has not lost any revenue or even alleged that it will receive less money from the federal government if the district court's decision stands. I respectfully dissent.

I.

This Court's jurisdiction is limited by Article III of the Constitution to "cases" and "controversies." U.S. Const., Art. III, § 2. One element of the Constitution's case-or-controversy requirement is that a litigant must demonstrate standing to sue. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). The standing requirement is built on

separation-of-powers principles; it "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* The standing requirement "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citation omitted).

States generally may seek to bring suit in three capacities: (1) "proprietary suits," in which states sue like private parties to remedy a concrete, particularized injury; (2) "sovereignty suits," in which states, for example, seek adjudication of boundary or water rights; and (3) "*parens patriae* suits," in which states sue on behalf of their citizens.[1] *Alfred L. Snapp & Son v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600 (1982). To establish standing to sue in a proprietary capacity a State, like other litigants, must meet the following, familiar requirements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third,

[1] States also may seek to protect their "quasi-sovereign" interests in such suits, but "evidence of actual injury is still required." *Sturgeon v. Masica*, 768 F.3d 1066, 1074 (9th Cir. 2014); *see also Snapp*, 458 U.S. at 607.

> it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (footnote and citations omitted).

Alaska's standing fails at the first step. Alaska has not demonstrated that reinstatement of the Roadless Rule's application to the Tongass has caused, or imminently will cause, the State an injury in fact. This is the "first and foremost" requirement of standing, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997), "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

II.

Alaska advances three interests for purposes of demonstrating injury in fact: (1) a statutory interest in "the flow of monies to the State via the National Forest Receipts Program"; (2) a procedural interest based on the fact that the Department of Agriculture "initiated the rulemaking [that led to the Tongass exemption] pursuant to a settlement agreement with the State"; and (3) a *parens patriae* interest in Alaskan jobs that are "tied to timber." None of these asserted harms satisfies Article III's injury-in-fact requirement.

A.

The majority finds that Alaska has standing because of "the effect of the Roadless Rule on Alaska's statutory entitlement" under the National Forest Receipts Program to twenty-five percent of gross receipts of timber sales from

national forests in the State. Without the Tongass exemption, the majority explains, less timber will be harvested from the Tongass National Forest, thus potentially decreasing the amount of revenue that Alaska may receive under the National Forest Receipts Program. This statutory entitlement argument fails for at least two reasons.

1.

First, by creating a "statutory entitlement" to a share of federal timber revenue, Congress did not legislate the Article III standing of state and local governments to challenge federal natural resource management. The Supreme Court has strongly suggested that Congress cannot create injury in fact by legislative fiat—rather, a litigant must have suffered not only a violation of a legal right, but also a factual harm. *See, e.g.*, *Summers*, 555 U.S. at 497; *Lujan*, 504 U.S. at 578. But it still may be that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). We, for example, have held that a statutory provision may provide a litigant with Article III standing where (1) Congress indicated that it intended for the provision to create a statutory right by creating a "private cause of action to enforce" the provision, (2) the litigant's statutory right has been infringed, and (3) the litigant has also suffered a concrete, "de facto injury," albeit one that was previously inadequate at law. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412–13 (9th Cir. 2014), *cert. granted*, No. 13-1339, 2015 WL 1879778 (U.S. Apr. 27, 2015).

Even if Congress may legislate standing in some circumstances, however, it has not done so here. There is no indication in 16 U.S.C. § 500's text or history that Congress

intended to legislate state and municipal standing to challenge the federal government's management of national forests. *See Edwards v. First Am. Corp.,* 610 F.3d 514, 517 (9th Cir. 2010) ("Essentially, the standing question in such cases [where a litigant asserts standing based on a statutory right] is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.") (citation omitted), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012).[2] Indeed, in the 107 years since § 500 was enacted, no court has found that the law gives states standing to challenge actions or inactions that may reduce federal timber receipts.

Moreover, even if Congress intended for § 500 to confer a statutory right to revenue, the invasion of which constitutes injury in fact, the right does not entitle Alaska to standing here because it has not been infringed. *See Linda R.S.*, 410 U.S. at 617 n.3 ("Congress may enact statutes creating legal rights, *the invasion of which creates standing*, even though no injury would exist without the statute." (emphasis added)).[3] Section 500 entitles Alaska to a share of revenue

[2] Other courts have disagreed that a statutory provision can create standing in the absence of actual harm. *See, e.g.*, *David v. Alphin*, 704 F.3d 327, 338–39 (4th Cir. 2013) ("[T]his theory of Article III standing is a non-starter as it conflates statutory standing with constitutional standing."); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.). To the extent that Congress may legislate Article III standing, however, it follows that a Court must employ the usual tools of statutory interpretation to determine if Congress intended for a statutory provision to create standing.

[3] *See also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (same); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002) ("To establish standing [to appeal], the defendant-intervenors must first show

generated, not a right to have revenue generated. *Alpine Cnty., Cal. v. United States*, 417 F.3d 1366, 1368 (Fed. Cir. 2005) (there is "no duty to generate revenue" under the National Forest Receipts Program). Thus, Alaska's entitlement to a share of federal timber revenue has not been "invaded" by reinstatement of the Roadless Rule, even assuming that Alaska could show that the Roadless Rule will cause Alaska to receive less money from the federal government.

The majority conflates the injury-in-fact requirement with the zone-of-interest test in discussing *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). The zone-of-interest test asks whether an injury to a litigant that meets Article III's injury-in-fact requirement falls within the zone of interests protected by the substantive statute under which that litigant sues. *Id.* at 1387–89. If not, the litigant's claim under that statute may not proceed.[4] *Id*. at

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that they have suffered an injury in fact, [which involves, among other things,] an invasion of a legally-protected interest . . . ." (quotation marks omitted)), *abrogated by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Consumer Watchdog v. Wisc. Alumni Research Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014) (dismissing for lack of standing because, "[u]nlike the plaintiffs in the [Freedom of Information Act] and [Federal Election Campaign Act] cases, Consumer Watchdog was not denied anything to which it was entitled"), *cert. denied*, 135 S. Ct. 1401 (2015).

[4] For example, if Alaska had alleged that reinstatement of the roadless rule caused a State-owned timber business to suffer a financial loss, Alaska would have demonstrated an injury in fact for purposes of Article III standing. However, this "purely economic interest" would fall outside of the zone of interests protected by the National Environmental Policy Act under our precedent. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005).

1388–89 (explaining that "the zone-of-interests test is [a] tool for determining who may invoke [a] cause of action . . . ."). I agree with the majority that whether an injury in fact falls within a statute's zone of protected interests is not a jurisdictional question. *See id.* at 1387–88 & n.4.

This appeal presents a different, critical, and jurisdictional question that is rooted in Article III's case-or-controversy requirement: whether a statutory provision that has not been invaded and does not include a cause of action endows a litigant who has not suffered a de facto injury with Article III standing. The answer to this jurisdictional question is clearly no. Because Alaska's statutory right under § 500 has not been invaded, Alaska lacks both injury in law and injury in fact. Attempting to sidestep this problem, the majority suggests that Alaska does not need to demonstrate an injury in fact to maintain this appeal, it need only demonstrate a "stake in defending" the Tongass exemption. Maj. Op. 16–17, 19. This suggestion is contrary to controlling Supreme Court precedent and our circuit precedent. *Diamond v. Charles*, 476 U.S. 54, 66–69 (1986) (dismissing for lack of jurisdiction because a defendant intervenor did not demonstrate an injury in fact necessary to establish his standing to appeal); *Kootenai Tribe of Idaho*, 313 F.3d at 1109 ("To establish standing [to appeal], the defendant-intervenors must first show that they have suffered an injury in fact . . . .").

The prospective effects of the majority's decision are alarming. After today, states and many local governments presumably have standing, at least in the Ninth Circuit, to challenge federal actions and inactions that may result in, among other things, fewer trees being felled in federal forests, less oil, gas, and coal being extracted from federal mineral

estates, fewer cattle being turned out on public lands, or even the devaluation of federal land. States and local communities get a share of revenue generated from these and many other federal resources.[5] Surely by creating a revenue-sharing program tied to the development of natural resources Congress did not legislate state and municipal standing to challenge the pace and manner of the federal government's management of the nation's natural resources.

This case is not like *Watt v. Energy Action Education Foundation*, 454 U.S. 151(1981), the case on which the majority relies. In *Watt*, California had standing based on its interest in "assur[ing] a fair return for *its* resources," specifically state-owned oil and gas reserves drained by drilling on adjoining federal leases.[6] *Id.* at 161 (emphasis added); *see also id.* at 160 ("California . . . claim[ed] standing as an involuntary 'partner' with the Federal Government in the leasing of [Outer Continental Shelf (OCS)] tracts in which the underlying pool of gas and oil lies under both the OCS

[5] *See, e.g.*, 43 U.S.C. §§ 315b, 315i, 315m (Grazing Leases Payments); 7 U.S.C. § 1012 (National Grasslands Payment); 30 U.S.C. §§ 191, 355 (Mineral Leasing Payments); 43 U.S.C. § 1337(g) (Offshore Mineral Leasing Payment); 42 U.S.C. § 6506a (National Petroleum Reserve in Alaska Payment); 16 U.S.C. § 715s (Refuge Revenue Sharing Payment); 31 U.S.C. §§ 6901–6907 (Payments in Lieu of Taxes); 16 U.S.C. §§ 577g, 577g-1 (Payments to Minnesota); 43 U.S.C. § 1181f (Oregon and California Grant Lands Payments); 43 U.S.C. § 1181f-1 (Coos Bay Wagon Road Grant Fund Payment); P.L. 100-446, § 323 (Arkansas Smoky Quartz Payment).

[6] In *Watt*, California challenged the federal government's bidding system for lease sales allowing for oil and gas development of the Outer Continental Shelf. California claimed that the bidding system was incapable of producing a fair market return for California's oil and gas drained by drilling on federal leases. *Id.* at 160–61.

and the 3-mile coastal belt controlled by California." (emphasis added)). The very language that the majority excerpts also makes it plain that California's standing was based on the State's "own[ership of] adjoining portions of an [OCS] oil and gas pool" and interest in securing a "fair market return" for drainage of those State-owned resources. Maj. Op. 19 (quoting *Watt*, 454 U.S. at 160–61). Alaska has not alleged injury to its interest in being fairly compensated for or avoiding damage to *its* natural resources, which would implicate an injury in fact. *Watt*, 454 U.S. at 160–61.[7]

To be clear, the Supreme Court did *not* hold in *Watt*, as suggested by the majority, that the revenue sharing required by section 8(g) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337(g)(2), provides states with standing to challenge federal actions and inactions that may result in less oil and gas being extracted from the federal OCS. Rather, section 8(g) embodies a state's interest in being fairly compensated for development of the federal OCS that diminishes the state's resources. Absent harm to a state's resources or an invasion of that state's right to be fairly compensated for diminishment of those resources, section 8(g) does not support that state's standing to challenge federal

[7] *See also, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) ("Because the Commonwealth owns a substantial portion of the state's coastal property," and "rising seas have already begun to swallow Massachusetts' coastal land," it "has alleged a particularized injury in its capacity as a landowner." (internal citation, quotation marks, and footnote omitted)); *Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309, 1329 (D. Wyo. 2008), *rev'd on other grounds*, 661 F.3d 1209 (10th Cir. 2011) (finding that "Wyoming has presented evidence that the Roadless Rule will increase the risk of environmental harm to its thousands of acres of state forest land that are adjacent to, or intermingled with, lands designated by the Forest Service as inventoried roadless areas").

management of the OCS.[8] *Watt* does not support Alaska's standing to appeal.

2.

Second, when Alaska appealed in June of 2011, Alaska had not lost *any* National Forest Receipts Program money and did not even allege that it would receive less money from the federal government as a result of the district court's decision setting aside the Tongass exemption. This was no oversight. Rather, as Alaska acknowledged in its declaration in support of its motion to intervene, it has for many years elected to forego its share of federal timber revenue in order to receive much larger federal funding under the Secure Rural Schools Program. *See* Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393, 114 Stat.

[8] Section 8(g) can thus be viewed as an exercise of Congress's uncontroversial power to "expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person . . . ." *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (Becker, C.J., joined by Scirica and Alito, JJ.). Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law," *Lujan*, 504 U.S. at 578, or that were deemed incognizable as a prudential matter by the courts, *Warth*, 422 U.S. at 500 & n.12. *See also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). Section 500 is not such a statute; it does not elevate any de facto harm. But section 8(g) does. Section 8(g) was intended to provide states with fair and easily administered compensation for drainage of state oil and gas from common-pool reservoirs. *See, e.g.*, H.R. Rep. No. 95-590, at 1550 (1977) (explaining that the statute was intended to resolve "the problem of drainage of state resources by a lessee operating on the Outer Continental Shelf"); H.R. Rep. No. 99-300 at 547 (1985) (explaining that an amendment of section 8(g) was necessary because case-by-case determinations of "'fair and equitable disposition' of the common pool revenues" had led to "lengthy litigation").

1607.[9] Thus, for example, in fiscal year 2010—before the Tongass exemption had been set aside by the district court—Alaska would have been due only about $517,948 under the National Forest Receipts Program as compared to the $16,027,564.62 it was paid under the Secure Rural Schools Act Program.[10]

Stated simply, Alaska cannot show us the money. Alaska has neither suffered a financial loss traceable to the district court's decision nor shown that such injury is "certainly impending." *Clapper*, 133 S. Ct. at 1147. That Alaska might elect to receive payments under the National Forest Receipts Program at some unknown future date in the currently unforeseeable event that the Secure Rural Schools Program is discontinued is too "conjectural or hypothetical" and insufficiently "actual or imminent" of an injury to support Alaska's standing. *Lujan*, 504 U.S. at 560; *see also, e.g.*, *Sturgeon*, 768 F.3d 1at 1075 ("Alaska's claims regarding its sovereign and proprietary interests lack grounding in a demonstrated injury. . . . Any injury to Alaska's sovereign

[9] Congress created the Secure Rural Schools Act and has continued to reauthorize it, *see* Maj. Op. 21 n.9, because "precipitously" declining timber revenue from national forests had decreased "the revenues shared with the affected counties." Pub. L. No. 106-393 § 2(a)(9)–(10), 114 Stat. 1607 (Oct. 30, 2000).

[10] This data is available on the U.S. Forest Service's website, http://www.fs.usda.gov/main/pts/securepayments/projectedpayments (last visited June 18, 2015), and taken specifically from the "View ASR 10-1 FY2010" spreadsheet and "all counties FY 2010" tab of the "Estimated 25-percent payments, FY 2008–FY2010" spreadsheet.

and proprietary interest is pure conjecture and thus insufficient to establish standing.").[11]

Alaska's entitlement under 16 U.S.C. § 500 to a share of federal timber revenue does not give it standing to maintain this appeal.

B.

Alaska also alleges injury to what it characterizes as a procedural interest in the Tongass exemption. Alaska states that the Department of Agriculture "initiated the rulemaking [that resulted in the Tongass exemption] pursuant to a settlement agreement with the State." This interest is not an injury in fact. First, Alaska has not alleged that its rights under the settlement agreement have been violated. As the settlement agreement required, the Department of Agriculture initiated the rulemaking and published the resulting rule. Second, even assuming that Alaska has alleged a violation of a relevant procedural right, Alaska cannot establish its standing to appeal based on a procedural interest alone. It is well established that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient . . . ." *Summers*, 555 U.S. at 496; *see also Sturgeon*, 768 F.3d at 1075. Thus, Alaska's asserted legal interests do not demonstrate an injury in fact.

[11] The majority's analogy to the loss of one's home due to a neighbor's negligence misses the point. Loss of one's home is an injury in fact. A statutory financial entitlement untethered to a violation of that entitlement and an actual or imminent financial loss traceable to that violation is not.

C.

Without an injury of its own, Alaska attempts to invoke someone else's injury. Alaska asserts that it has standing because "Alaska jobs are tied to timber." This general interest in the employment of its citizens is a *parens patriae* interest.[12] However, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Snapp*, 458 U.S. at 610 n.16. That is because "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Id*. (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)).

Alaska lacks *parens patriae* standing in this case for another reason. Alaska has not shown, as it must, that directly interested private parties—Alaskans and companies interested in jobs tied to Tongass timber—could not represent themselves. *See, e.g.*, *Snapp*, 458 U.S. at 607 ("In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties . . . ."); *Sturgeon*, 768 F.3d at 1075 n.4; *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970–71 (9th Cir. 2009). These groups are entirely capable of representing themselves. Indeed, the Alaska Forest Association, a trade association for the timber industry in Alaska, intervened in the district court but decided

[12] *See, e.g.*, *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044–45 (9th Cir. 1979) (alleged "loss of investment profits and tax revenues" by citizens if development did not proceed implicates a *parens patriae* interest); *Pennsylvania v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976) ("[A]lleged injuries to the state's economy and the health, safety, and welfare of its people clearly implicate the *parens patriae* rather than the proprietary interest of the state.").

not to appeal. Alaska's interest in protecting the jobs of Alaskans and the bottom line of the timber industry is an insufficient *parens patriae* interest to support its standing to appeal.

Alaska has not satisfied the injury-in-fact requirement. Its alleged injuries fail to ensure that the decision to appeal has not been "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests'" or party politics, rather than to remedy actual or imminent harm. *Hollingsworth*, 133 S. Ct. at 2663 (citing *Diamond*, 476 U.S. at 62). This appeal should be dismissed for lack of jurisdiction.

III.

As the majority finds that this Court has jurisdiction and thus decides this appeal on the merits, I must reach the merits too. The same concern with the judiciary's limited role compels me to join Judge M. Smith's dissent on the merits. Congress in the Administrative Procedure Act did not authorize a judge, or even an en banc panel of judges, to set aside an agency decision because the reasons the agency proffered for the decision were not, from the viewpoint of the bench, "good" enough. Rather, an agency's decision must stand if it is not "arbitrary or capricious." 5 U.S.C. § 706. The Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009), does not hold otherwise. *See, e.g.*, *White Stallion Energy Ctr. LLC v. EPA*, 748 F.3d 1222, 1235 (D.C. Cir. 2014) (judicial review of a "change in agency policy is no stricter than our review of an initial agency action" (citing *Fox*, 556 U.S. at 514–16)). *Fox* holds that an agency must "provide reasoned explanation for its action," which normally requires "that it display awareness

that it is changing position." *Fox*, 556 U.S. at 515 (emphasis omitted); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.").

Here, the Department of Agriculture met *Fox*'s requirement by acknowledging that it was changing its mind. The Department also met the APA's requirements by explaining that the exemption would allow for a better balance between environmental preservation, road access, and timber availability. The balance the Department struck is reasonable and well within its mandate under the National Forest Management Act and the Tongass Timber Reform Act to "provide for multiple use and sustained yield" of forest resources. 16 U.S.C. §§ 539d(1), 1604(e)(1).

"Litigation over the last two years" was not, as the majority suggests, an extra-statutory weight that entered into the Department's "enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (addressing the Bureau of Land Management's similar statutory charge). Rather, litigation was part of what prompted the Department to consider striking a different balance.

The significance of the Tongass exemption's foreseeable environmental and socioeconomic impacts did enter into that balance, and were detailed by the Department in its Environmental Impact Statement (EIS) and discussed in its Record of Decision. The majority latches onto one word in setting aside the Department's decision. It faults the

Department for calling the risk to roadless values—one of the many natural resources provided by the Tongass—"minor." *See* 68 Fed. Reg. 75,136, 75,144 (Dec. 30, 2003). It is clear, however, that the Department was not tossing aside its analysis of the significance of environmental impacts set forth in the EIS. Instead, after further consideration, the Department found that the loss of some roadless values did not outweigh "the socioeconomic costs of applying the roadless rule's prohibitions to the Tongass." *Id.* The Department's explanation of its balance was not arbitrary or capricious.

IV.

I would dismiss this case for lack of appellate jurisdiction. Stuck with the majority's finding that this Court has jurisdiction, I would reverse and remand.

M. SMITH, Circuit Judge, with whom KOZINSKI, TALLMAN, CLIFTON, and CALLAHAN, Circuit Judges, join, dissenting:

Elections have legal consequences. When a political leader from one party becomes president of the United States after a president from another party has occupied the White House for the previous term, the policies of the new president will occasionally clash with, and supplant, those of the previous president, often leading to changes in rules promulgated pursuant to the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 701 *et seq*.). *See, e.g.*, *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 830–31 (9th Cir. 2006)

(withdrawal under President George W. Bush of agricultural policy announced under President Clinton), *vacated en banc*, 490 F.3d 725 (9th Cir. 2007); *Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 824 F.2d 1146, 1149 (D.C. Cir. 1987) (withdrawal under President Reagan of an emission standard from President Carter's administration), *vacated*, 817 F.2d 890 (D.C. Cir. 1987); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 617 (D.C. Cir. 1987), *vacated sub nom.*, *Farmworkers Justice Fund, Inc. v. Brock*, 817 F.2d 890 (D.C. Cir. 1987) (withdrawal by President Reagan's Secretary of Labor of sanitation standard proposed under President Carter); Press Release, Department of the Interior, Salazar and Locke Restore Scientific Consultations under the Endangered Species Act To Protect Species and Their Habitats (Apr. 28, 2009), *available at* 2009 WL 1143690 (withdrawal by President Obama's Secretary of Commerce and Secretary of Interior of rule pertaining to consultation of federal wildlife experts proposed under President George W. Bush).

This phenomenon is particularly common in the period between the last few months of an outgoing administration and the first few months of an incoming administration, as was the case here. Recent legal scholarship has shed light on the concept of "midnight regulations," whereby, during their final period in office, outgoing administrations accelerate rulemaking and agency actions, which incoming administrations then attempt to stay and reverse. *See* Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 Mich. J. Envtl. & Admin. L. 285 (2013); Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. Chi. L. Rev. 1157, 1196 (2009); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev.

471 (2011). For example, on President Obama's first day in office, Chief of Staff Rahm Emanuel issued a memo to the heads of federal agencies mandating that they stop the publication of regulations unless they obtained approval of the new administration. *See* Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, the White House, to Heads of Executive Departments and Agencies (Jan. 20, 2009), in 74 Fed. Reg. 4435 (Jan. 26, 2009). On the first day of President George W. Bush's presidency, Chief of Staff Andrew Card similarly directed agencies to stop all regulatory notices. *See* Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, the White House, to Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001), in 66 Fed. Reg. 7702 (Jan. 24, 2001).

Inevitably, when the political pendulum swings and a different party takes control of the executive branch, the cycle begins anew. There is nothing improper about the political branches of the government carrying out such changes in policy. To the contrary, such policy changes are often how successful presidential candidates implement the very campaign promises that helped secure their election. That is simply the way the modern political process works.

On the other hand, when party policy positions clash, it is improper and unwise for members of the judiciary to decide which *policy* view is the better one, for such action inevitably throws the judiciary into the political maelstrom, diminishes its moral authority, and conflicts with the judicial role envisioned by the Founders. As the Supreme Court has cautioned, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially

political contest be dressed up in the abstract phrases of the law." *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946), *overruled on other grounds by Baker v. Carr*, 369 U.S. 186 (1962).

This case involves a clash between the policies of the outgoing Clinton administration and those of the incoming George W. Bush administration. The two presidents viewed how certain aspects of the laws governing national forests should be implemented very differently. On October 13, 1999, President Clinton issued a memo to the Secretary of Agriculture, instructing him "to develop, and propose for public comment, regulations to provide appropriate long-term protection for most or all of [the] currently inventoried 'roadless' areas." The United States Department of Agriculture (USDA) followed those instructions in promulgating the Roadless Area Conservation Rule, 66 Fed. Reg. 3244 (Jan. 12, 2001) (the Roadless Rule). In keeping with President Clinton's policies, the Roadless Rule emphasized "prohibit[ing] road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics." *Id.*

In November 2001, after President Bush took office and sought to implement his own policy preferences respecting national forests, the USDA began a process of "reevaluating its Roadless Area Conservation Rule." The USDA believed that "the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions to the Tongass, all warrant treating the Tongass differently from the national

forests outside of Alaska." Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,139 (Dec. 30, 2003) (Tongass Exemption herein). It also found that "[t]he repercussions of delaying the project planning process regarding road building and timber harvest [in the Tongass], even for a relatively short period, can have a significant effect on the amount of timber available for sale in the next year." Slide Ridge Timber Sale Environmental Impact Statement, 66 Fed. Reg. 58710-01 (Nov. 23, 2001). The USDA ultimately modified the Clinton-era Roadless Rule due to, among other reasons, "(1) serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions would cause in communities throughout Southeast Alaska, (2) comments received on the proposed rule, and (3) litigation over the last two years." Tongass Exemption, 68 Fed. Reg. at 75,137.

While the APA requires a reasoned explanation for a change in policy, "a court is not to substitute its judgment for that of the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–15 (2009) (internal citation and quotation marks omitted). The USDA followed President Bush's policy instructions when it amended the Roadless Rule in 2003, 68 Fed. Reg. 75,136 (Dec. 30, 2003), and the agency's explanation for its decision *easily* meets the requirements of *Fox*. Unfortunately, it appears that, contrary to the requirements of *Fox*, the majority has selected what it believes to be the better *policy*, and substituted its judgment for that of the agency, which was simply following the political judgments of the new administration. Accordingly, I respectfully dissent.

I. The USDA's 2003 Change in Policy

Without acknowledging that the factual findings in the 2003 Record of Decision (ROD) rest on different policy views than those in the 2001 ROD, the majority argues that "[t]he Tongass Exemption thus plainly 'rests upon factual findings that contradict those which underlay [the agency's] prior policy.'" This conclusion is simply incorrect. The agency, following the policy instructions of the new president, weighed some of the facts in the existing record differently than had the previous administration, and emphasized other facts in the record that the previous administration had not. Stated differently, the two administrations looked at some of the same facts, and reached different conclusions about the meaning of what they saw. The second administration simply concluded that the facts called for different regulations than those proposed by the previous administration.

There is little dispute that the underlying facts analyzed by the USDA had not changed meaningfully between November 2000, when the USDA completed the original rule's Final Environmental Impact Statement (FEIS), and 2003. The USDA acknowledged as much when it considered the environmental impact of the Tongass Exemption in 2003. It concluded that "the identified new information and changed circumstances do not result in significantly different environmental effects from those described in the roadless rule FEIS. Such differences as may exist are not of a scale or intensity to be relevant to the adoption of this final rule or to support selection of another alternative from the roadless rule FEIS. Consequently, the overall decisionmaking picture is not substantially different from what it was in November

2000, when the roadless rule FEIS was completed." 68 Fed. Reg. at 75,141.

Nor had the facts underlying the USDA's assessment of the socioeconomic impact of the Tongass Exemption changed meaningfully by 2003; the USDA simply prioritized different aspects of the same socioeconomic data that it had considered in 2000. In the original Roadless Rule, the USDA had found that "[c]ommunities with significant economic activities in these sectors could be adversely impacted. However, the effects on national social and economic systems are minor. . . . None of the alternatives are likely to have measurable impacts compared to the broader social and economic conditions and trends observable at these scales, however the effects of the alternatives are not distributed evenly across the United States." 66 Fed. Reg. at 3261. In the 2003 ROD, on the other hand, the USDA assigned greater importance to the adverse socioeconomic impact of the Roadless Rule: "This decision reflects the facts, as displayed in the FEIS for the roadless rule and the FEIS for the 1997 Tongass Forest Plan that roadless values are plentiful in the Tongass and are well protected by the Tongass Forest Plan. The minor risk of the loss of such values is outweighed by the more certain socioeconomic costs of applying the roadless rule's prohibitions to the Tongass. Imposing those costs on the local communities of Southeast Alaska is unwarranted." 68 Fed. Reg. at 75,144. In 2003, then, the USDA concluded that it was important to give greater weight to *some* adverse socioeconomic effects than was done when the original Roadless Rule was promulgated.

Given the substantial similarity between the facts the USDA weighed in the 2003 ROD and those it weighed in the 2001 ROD, it is abundantly clear that the differences between

the two are the result of a shift in policy. After analyzing essentially the same facts, the USDA changed policy course at the direction of the new president, prioritizing some outcomes over others. *Fox* fully envisions such policy changes. It directs courts to uphold regulations that result from such changes, even if the agency gives an explanation that is of "less than ideal clarity," as long as "the agency's path may reasonably be discerned." *Fox*, 556 U.S. at 513–14 (internal quotation marks and citation omitted). That requirement is clearly met here.

II. The USDA Was Not Arbitrary and Capricious

The APA requires that we set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In 2003, the USDA carefully reconsidered the facts before it, going through a full notice-and-comment process before exempting the Tongass National Forest from the Roadless Rule. The USDA was not arbitrary and capricious in making this decision.

The majority contends that the USDA does not meet a key requirement under *Fox*—that an "agency must show that there are good reasons for the new policy." 556 U.S. at 515. Respectfully, the majority misconstrues *Fox*. Under *Fox*, an agency "need not demonstrate to a court's satisfaction that *the reasons for the new policy* are *better* than the reasons for the *old one*; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, *which the conscious change of course adequately indicates*." *Id.* (emphases added).

Accordingly, although the USDA only needed one good reason to change its policy, it had four independent ones, all of which are supported by the 2003 ROD: (1) resolving litigation by complying with federal statutes governing the Tongass, (2) satisfying demand for timber, (3) mitigating socioeconomic hardships caused by the Roadless Rule, and (4) promoting road and utility connections in the Tongass.

A. Litigation and Statutory Compliance

The USDA promulgated the exemption to the Roadless Rule in part to comply with statutes governing the Tongass and in response to lawsuits challenging the Roadless Rule. The Supreme Court has suggested that it is appropriate for an agency to engage in new rulemaking when litigation reveals new information. *See Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 741 (1996) ("Nor does it matter that the regulation was prompted by litigation, including this very suit."). This is precisely what occurred here: A number of lawsuits filed against the USDA brought to light issues concerning potential conflicts between the Roadless Rule, the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980), and the Tongass Timber Reforms Act (TTRA), Pub L. No. 101-626, 104 Stat. 4426 (1990). The majority focuses on the fact that the 2003 ROD engendered new litigation, and concludes that it was therefore arbitrary and capricious for the USDA to act in response to the earlier litigation. However, the fact that the 2003 ROD led to additional litigation says very little about whether the earlier litigation pointed to legitimate issues regarding the Roadless Rule's compliance with various statutes ordering preservation of an adequate supply of timber to Southeast Alaskan communities whose inhabitants depend on it for their livelihood. The agency acted well within the

bounds of its authority if it believed that revising the Roadless Rule would ensure compliance with the statutory mandates that had generated the original litigation.

We have previously concluded that ANILCA and TTRA require that the USDA balance multiple goals in the Tongass: "recreation, environmental protection, and timber harvest." *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 808 & n.22 (9th Cir. 2005). The USDA's 2003 ROD clearly finds that the Tongass Exemption was meant to bring the Roadless Rule in line with the purposes of ANILCA and TTRA. The USDA noted that, under ANILCA, Congress placed 5.5 million acres of Tongass in permanent wilderness status and the designation of disposition of lands in the act "represent[s] a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition." 68 Fed. Reg. at 75,142. The USDA also stated that TTRA requires it to ensure that enough timber is available to "meet[] the annual market demand for timber" and "meet[] the market demand from the forest for each planning cycle . . . ." 68 Fed. Reg. at 75,140.

After promulgating the revised Roadless Rule, the USDA issued a press release stating that the Tongass Exemption sought to maintain "the balance for roadless area protection struck in the Tongass Land Management Plan." The 2003 ROD also concluded that "[t]his final rule reflects the Department's assessment of how to best implement the letter and spirit of congressional direction along with public values, in light of the abundance of roadless values on the Tongass, the protection of roadless values already included in the Tongass forest plan, and the socioeconomic costs to local

communities of applying the roadless rule's prohibitions." 68 Fed. Reg. at 75,142.

I do not suggest that ANILCA and TTRA explicitly forbid the USDA from applying the Roadless Rule to the Tongass. TTRA, for example, is "[s]ubject to appropriations, other applicable law, and the requirements of the National Forest Management Act . . . ." 16 U.S.C. § 539d(a). The USDA therefore had discretion to adopt the Roadless Rule to protect wildlife, recreation, sustained use, and other values. *See Natural Res. Def. Council*, 421 F.3d at 801. By the same token, nothing prevented the USDA from striking a different balance and choosing to exempt the Tongass. Considering the purposes of ANILCA and TTRA, it is clear that Congress sought to promote a balance between environmental preservation, road access, and timber availability. The USDA recognized this directive in promulgating the revised rule. The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. . . ." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). We should abide by this principle, and defer to the actions of the USDA in promulgating an exemption to the Roadless Rule.

B. Timber Demand

Likewise, the USDA's determination that applying the Roadless Rule to the Tongass would have led to a timber shortage was not arbitrary and capricious. The majority fails to even acknowledge the agency's effort to promote timber production, a factor which, by itself, suffices to uphold the agency's 2003 rulemaking.

"A court generally must be 'at its most deferential' when reviewing scientific judgments and technical analyses within the agency's expertise." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (citation omitted). The USDA calculated that the average annual timber harvest in the Tongass between 1980 and 2002 was 269 million board feet (MMBF), which was higher than usual. The USDA estimated that in the years following the Roadless Rule, demand for timber would fall, but that demand would still be at least 124 MMBF. The USDA found that if the Roadless Rule were applied to the Tongass, the maximum timber harvest would be 50 MMBF, which would create a shortage of around 75 MMBF. The agency concluded that exempting the Tongass from the Roadless Rule would allow infrastructure to be built and boost timber production to meet national demand. 68 Fed. Reg. at 75,141–42.

C. Socioeconomic Hardships

The USDA also revised the Roadless Rule because it reconsidered socioeconomic hardships caused by applying the rule to the Tongass. The majority fails to address this justification for the Tongass Exemption, which is yet another independent basis on which to uphold the agency's 2003 rulemaking.

The district court held that the Roadless Rule would not lead to job losses because reductions in timber demand had already occurred. It suggested that the fall in timber demand would have led to job losses, even without the Roadless Rule in place. However, the district court impermissibly substituted its factual determination for that of the agency. Although some jobs would have been lost with the fall in

demand, the USDA concluded that the application of the Roadless Rule to the Tongass would have exacerbated these losses. The USDA had clear reasons to revise the Roadless Rule to mitigate job losses caused by the fall in timber demand. This decision is adequately supported by material in the record.

D. Road and Utility Connections

Finally, the USDA promulgated the Tongass Exemption to encourage road and utility construction in the Tongass, another independent factor ignored by the majority that justifies the agency's action. Such infrastructure helps the timber industry and supports isolated communities in the national forest. The USDA found, for example, that "[t]he impacts of the roadless rule on local communities in the Tongass are particularly serious. Of the 32 communities in the region, 29 are unconnected to the nation's highway system. Most are surrounded by marine waters and undeveloped National Forest System land." 68 Fed. Reg. at 75,139.

E. Notice and Comment

Several of the arguments raised by Organized Village of Kake (the Village), and now affirmed by the majority, are policy-based. By overturning the Tongass Exemption, the majority conflates the process of judicial review with the agency's review of factual and policy questions. *See* 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the

agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

The Village questions the merits of the USDA's decision to exempt the Tongass by raising what are primarily policy issues that were addressed by the notice and comment process. The USDA carefully considered comments it received before promulgating the 2003 exemption. *E.g.*, 68 Fed. Reg. at 75,138 ("The agency received comments regarding the effects the proposed exemption from the roadless rule would have on the natural resources of the Tongass. Some respondents expressed their view that 70 percent of the highest volume timber stands in Southeast Alaska have been harvested, and exempting the Tongass from the roadless rule would lead to the harvest of most or all of the remainder of such stands."); 68 Fed. Reg. 41,864, 41,865 (July 15, 2003) ("All interested parties are encouraged to express their views in response to this request for public comment on the following question: Should any exemption from the applicability of the roadless rule to the Tongass National Forest be made permanent and also apply to the Chugach National Forest?"). As long as the agency's decision has clear factual support in the record, as is the case here, it is not our place to substitute our policy preferences for those of the agency. *See Fox*, 556 U.S. at 513–14.

III. National Environmental Policy Act (NEPA) Claims

The Village claims that the USDA violated NEPA by neglecting to prepare a new environmental impact statement and by failing to consider alternatives to exempting the Tongass. The district court did not reach this issue because it reversed the agency on other grounds. Given my

disagreement with the majority, I would remand to the district court to consider the NEPA claims in the first instance.

I respectfully dissent.

KOZINSKI, Circuit Judge, dissenting:

I join Judge M. Smith's masterful dissent in full. I write only to note the absurdity that we are in the home stretch of the Obama administration and still litigating the validity of policy changes implemented at the start of the George W. Bush administration. How can a President with a mere four or eight years in office hope to accomplish any meaningful policy change—as the voters have a right to expect when they elect a new President—if he enters the White House tethered by thousands of Lilliputian ropes of administrative procedure? The glacial pace of administrative litigation shifts authority from the political branches to the judiciary and invites the type of judicial policymaking that Judge Smith points out. This is just one of the ways we as a nation have become less a democracy and more an oligarchy governed by a cadre of black-robed mandarins. I seriously doubt this is what the Founding Fathers had in mind and worry about the future of the Republic if the political branches fail to take back the power the Constitution properly assigns to them.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

EXHIBIT 4

State's Opening Brief in the Roadless Rule Challenge

EXHIBIT E

State's Opening Brief
in the
Roadless Rule Challenge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF ALASKA Plaintiff, and ALASKA FOREST ASSOCIATION *et al.* Intervenor-Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.* Defendants, and SOUTHEAST ALASKA CONSERVATION COUNCIL *et al.* Intervenor-Defendants.	Case No. 1:11-cv-01122 (RJL)

PLAINTIFF'S STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION.

The United States Department of Agriculture (USDA) was directed by President Clinton as his second term drew to a close to push through one of the most far-reaching environmental/natural resources regulations in history – the Roadless Area Conservation Rule (Roadless Rule) – in an unrealistic time frame, without regard for the needs of individual states, and with devastating consequences to multiple-use management on national forest lands. The Administrative Procedure Act (APA), National Environmental Policy Act (NEPA) and other statutory directives from Congress were trampled in the rush to accomplish the President's policy goal before the change in administrations. The harmful consequences of the hurried and myopic rulemaking fell with particular force on plaintiff the State of Alaska (State, or Alaska),[1] which is why Alaska and its aligned plaintiff-intervenors ask this Court to recognize the legal infirmities of the Roadless Rule and provide appropriate relief.

II. RELEVANT BACKGROUND AND STATEMENT OF FACTS.

Pursuant to Local Rule 7(h)(2), because this is a case in which review is based solely on the administrative record, this background and statement of facts with citation to the administrative record is offered in lieu of a separate statement of undisputed material facts.

A. History of the Roadless Rule.

In a prior Memorandum Opinion, this Court nicely summarized the relevant background of the Roadless Rule, particularly the convoluted litigation history leading up to the present case. Dkt. 58 at 2-5. The State and its numerous allies provided additional factual background on the Roadless Rule in their Joint Opposition to Motions to Dismiss. Dkt. 51 at 2-6. The State therefore limits this section to an overview of the rulemaking with specific facts supporting its claims of statutory violations presented below.

[1] USDA acknowledges that Alaska will suffer a highly disproportionate level of harm under the Roadless Rule. 66 Fed. Reg. 3,244, 3,255 (Jan. 12, 2001).

On October 13, 1999, then-President Clinton directed the Secretary of Agriculture to undertake one of the most far reaching natural resource rulemakings ever, one that would ultimately prohibit road construction and timber harvest on more than 58 million acres of national forest constituting nearly 2% of the land in the United States. *See generally* Administrative Record Document (Doc.) 1535 (President Clinton's October 1999 Memo to the Secretary). *See also Wyoming v. U.S. Dep't of Agric.*, 570 F.Supp.2d 1309, 1326 (D. Wyo. 2008) (noting that the Roadless Rule impacts "two percent of America's land mass" and nearly one third of "the National Forest System lands"), *rev'd*, 661 F.3d 1209 (10th Cir. 2011). Remarkably, this massive rulemaking was to be completed before President Clinton left office, or less than 15 months from the day the President directed the Secretary to begin the effort. Doc. 123 at 3 (agency notes from October 1999 stating, "Dates—get done during the Clinton Administration (Dec. 2000)").

In the incredible rush to beat the inauguration of President George W. Bush, there was not enough time for the USDA or the U.S. Forest Service (USFS) to comply with the process required by NEPA. Insufficient information was made available to inform the public and local forest managers on the scope of the rulemaking and the likely impacts to public lands. Public and governmental requests for maps, reasonable time extensions, and cooperating agency status were uniformly denied. Extensive and poorly explained changes were made between release of the Draft Environmental Impact Statement (DEIS) and the Final Environmental Impact Statement (FEIS) without providing a Supplemental Environmental Impact Statement (SEIS) and opportunity to comment on the significant changes. Complaints from the Small Business Administration (SBA) that USDA was in violation of the Regulatory Flexibility Act (RFA) were simply ignored. And in some cases, important information was deliberately withheld from the public, such as USDA's conservative estimate that the amount of roadless areas in our national forests would not decrease as claimed in the Roadless Rule Preamble, but would actually *increase* by millions of acres in the future, even without the Roadless Rule's

promulgation. Had this information been disclosed to the public, it would have cast serious doubt on the validity of the Roadless Rule's stated foundation, *i.e.,* the USDA's alleged need to protect an ever diminishing resource.

B. Factors Unique to Alaska.

In addition to the decisions USDA made with regard to restrictions applicable nationwide on road construction and timber harvest, this rulemaking included a second decision process on whether the rule would be applied to the Tongass National Forest in Alaska. Special consideration of the Tongass was necessary because two federal statutes that are central to this case apply uniquely to federal lands in Alaska.

The Alaska National Interests Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 *et. seq*., prohibits administrative withdrawals of federal land in Alaska without congressional approval as follows:

> No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress.

16 U.S.C. § 3213(a). Congress prohibited such administrative withdrawals after concluding that ANILCA already struck the proper balance between use and non-use of federal lands in Alaska:

> This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

16 U.S.C. § 3101(d). Despite this clear language, among the prohibitions that USDA foisted upon Alaska via promulgation of the Roadless Rule is prohibited access to minerals that the public otherwise is entitled to lease under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq*.

In the Tongass Timber Reform Act of 1990 (TTRA), 16 U.S.C. § 539d(a), Congress directed USDA to "seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle." During the rulemaking, USDA estimated annual Tongass timber demand for 2000-2004 at 96-205 MMBF [million board feet], Doc. 215 at 1, but acknowledged that with the Roadless Rule in place on the Tongass, no more than 50 MMBF could possibly be offered for sale annually. Doc. 6067. The USDA candidly acknowledged that "we don't come close to meeting even low market demand relying only on the roaded portion of the planned harvest." Doc. 215 at 2.

III. LEGAL STANDARDS.

A. Summary Judgment Standard.

Typically, summary judgment is proper where the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). However in cases involving judicial review of agency action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706, the APA does not call for the reviewing court to make factual findings on the merits or to determine the existence of genuine issues of disputed material facts. Rather, in cases involving APA challenge to final agency action, the Court has a "limited role . . . in reviewing the administrative record," *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 89 (D.D.C. 2006), with the goal being "*to test the agency action against the administrative record*." Comment to Local Rule 7(h)(2) (italics in original). Alaska is entitled to summary judgment on the issues raised in this case. It is strictly a question of law whether Federal Defendants' January 12, 2001 Record of Decision (ROD) violated ANILCA, NEPA, the APA, the TTRA and the Regulatory Flexibility Act (RFA).

B. Standard of Review.

Agency action shall be set aside under the APA where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."
Id. § 706(2)(C). Although review under the APA is narrow, it requires the Court to determine whether "the agency . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). A decision would normally be arbitrary if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Id*. at 43. Similarly, an action may be arbitrary if the agency's reasoning is not supported by evidence in the record. *See, e.g.*, *Public Employees for Envtl. Responsibility v. U.S. Dep't of Interior*, 832 F.Supp.2d 5, 15 (D.D.C. 2011); *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (stating that a reviewing court will "not defer to the agency's conclusory or unsupported suppositions").

IV. SUMMARY OF ARGUMENT.

A. Arguments applicable nationwide.

USDA was directed by President Clinton to protect roadless areas of the national forests by undertaking one of the most far reaching rulemakings in its history, and to publish a final rule before the President left office in less than 15 months. Due in part to this unrealistic and imprudent schedule, multiple violations of NEPA and the APA produced a rule that should be invalidated and vacated.

First, the administrative record does not support the underlying assumption of the need to preserve disappearing roadless areas in the national forests. To the contrary, the record shows that

USDA expected the amount of roadless forest to increase by millions of acres without any roadless area prohibitions.

The NEPA requirement for analysis and disclosure of cumulative effects, in this case the effects of multiple rules being developed by USDA, was not met when critical information was deliberately not analyzed or disclosed to the public in the DEIS. The Specialist Reports reveal that the rate of road construction on the national forests was expected to continue to decline without the Roadless Rule, and that a new Roads Policy stressing decommissioning of at least 3,000 miles of existing roads annually was expected to create over eight million acres of new unroaded areas. The record shows a deliberate decision to *not* properly disclose this information to the public, or even to USFS personnel.

Driven by the President's schedule to create a Roadless Rule legacy before time ran out on his term, the rulemaking imposed road and timber prohibitions on more than 58 million acres of national forest without adequate and informed comment, resulting in USDA not engaging in informed decision making as required by NEPA. USDA presented inaccurate data and maps for public review and comment, leaving even individual forest supervisors and other agency personnel in the dark as to what lands were affected within their own forests. Contrary to agency policy, all of the many requests for cooperating agency status from state and local governments were summarily denied. And all requests for reasonable extensions of comment periods from the public, state and local governments, and members of Congress, were summarily denied despite the unparalleled breadth of the rulemaking. In addition to inaccurate and/or missing information due to the rush to the goal line, some information, such as the number of comments on scoping, was admittedly "made up" and grossly overstated to the public. As described above, other information, such as the expected increase in roadless areas without the Roadless Rule, was intentionally withheld from the public and agency personnel alike.

When the FEIS unexpectedly added more than seven million additional roadless acres to the scope of the Roadless Rule, and when it abruptly reversed USDA policy on the Tongass by opting *not* to exempt the Tongass from immediate application of the Roadless Rule based on unexplained "public comment," the USDA refused to issue an SEIS to allow comment on these significant changes from the DEIS. Obviously, preparation of an SEIS would have pushed release of the final Roadless Rule beyond the term of President Clinton, which was inconsistent with the rigid political agenda.

In sum, when the entire rulemaking process and associated environmental analysis is considered, USDA fell far short of making an informed decision utilizing informed comment, contrary to the very purpose of NEPA.

In addition to NEPA violations, the USDA also violated the RFA as determined by the SBA, which is responsible for oversight of RFA compliance. While the State does not claim standing to directly enforce the RFA, conducting a rulemaking in violation of federal law is arbitrary and capricious under the APA, as is the case here.

B. Arguments Unique to Alaska.

Each of the statutory violations identified above (and discussed below) is a fatal flaw to the Roadless Rule as it applies nationwide and hence to Alaska. Therefore, the Roadless Rule should be invalidated in its entirety. But in addition, USDA's eleventh hour decision to apply the Roadless Rule immediately to the Tongass violated laws of unique application to the State, including ANILCA and the TTRA, thus providing additional reasons for setting aside the Roadless Rule on the Tongass.

First, under ANILCA Congress explicitly prohibited federal agencies from any further withdrawals of federal land in Alaska. Case law in this Court has applied the Federal Land Policy and Management Act (FLPMA) definition of "withdrawal" to ANILCA as the statute lacks its own definition. Under the law of this Court, a regulation that interferes with public land rights is a "withdrawal," such as prohibitions that prevent leasing of leasable minerals. The USDA after

considerable discussion in the rulemaking process, concluded that no road access would be permitted to leasable minerals other than existing leases. The Roadless Rule thus squarely conflicts with ANILCA as to both the Tongass and Chugach National Forests in Alaska.

The TTRA, which was an ANILCA amendment, requires that USDA seek to meet timber demand from the Tongass. But the record is exceedingly clear that USDA cannot even come close to meeting timber demand under the Roadless Rule, and very consciously determined that it would no longer seek to do so – in direct violation of the TTRA. USDA's decision to apply the Roadless Rule to the Tongass (Tongass Roadless Rule decision) thus is unlawful.

In addition to running afoul of ANILCA and the TTRA, USDA's Tongass Roadless Rule decision also has NEPA flaws. While an agency may change its preferred alternative between publication of the DEIS and FEIS, it must provide a reasoned explanation for that change. Yet here, USDA offers unexplained "public comment" as the primary reason for making the sea change from Tongass Exempt (decision deferred for 5 years) to Tongass Not Exempt in the FEIS. Further, the DEIS' discussion of the TTRA "seek to meet timber demand" requirement on the Tongass was abandoned in lieu of a conclusory statement in the FEIS that the rulemaking complies with the TTRA. Despite this draconian change of direction, no SEIS was issued to offer the public an opportunity to comment on the abrupt reversal, or on the addition of seven million acres of additional roadless national forest to the scope of the rule. The Tongass Roadless Rule decision also violated NEPA by failing to consider important aspects of the problem on the Tongass – for example, USDA did not consider that the then-current Tongass Land Management Plan (TLMP) was signed by the Undersecretary of Agriculture after full review and revision by the national office, as a result of which the Roadless Rule purpose of having national direction on roadless areas already had been satisfied for the Tongass with a decision out of the Washington office.

Other Tongass-specific impacts also were not considered in the rulemaking, such as impacts on renewable energy and associated jobs, hydropower, geothermal energy and mining. The many plaintiff-intervenors in this case are uniquely positioned to offer this Court additional analysis on the illegal application of the Roadless Rule in Alaska. The State fully endorses all arguments set forth in the plaintiff-intervenors' summary judgment memorandum and adopts them as its own.

V. ARGUMENT.

A. Arguments Applicable Nationwide.

1. The Roadless Rule rulemaking process violated NEPA.

NEPA requires a federal agency to examine the potential environmental effects of a proposed federal action and inform the public about those effects. 42 U.S.C. § 4332(2)(C). This statutory requirement serves two fundamental goals: (1) "ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) "guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To implement its goals, NEPA requires an agency to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), and to "study, develop, and describe [in the EIS] appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(E). The alternatives analysis is the "'heart'" of the EIS and "require[s] that an agency 'rigorously explore and objectively evaluate' the projected environmental impacts of all 'reasonable alternatives' for completing the proposed action." *City of Alexandria v. Slater*, 198 F.3d 862, 866 (D.C. Cir. 1999) (quoting 40 C.F.R. § 1502.14).

As the D.C. Circuit has acknowledged, "'[t]he goals of an action delimit the universe of the action's reasonable alternatives.'" *Id.* (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C.Cir. 1991)) (alteration in original). Thus, a reviewing court must "first consider whether the agency has reasonably identified and defined its objectives." *Id.* Although agencies have discretion to define the purpose and need of a project, *id.*, that discretion "is not unlimited." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998).

The record in this case shows that USDA went beyond the bounds of reasonable discretion and violated NEPA from the outset by developing a purpose and need statement founded on factual misrepresentation. USDA's fatally flawed factual statement of purpose and need undermined its presentation and evaluation of alternatives, thereby misleading the public and agency personnel alike.

a. USDA's stated Purpose and Need for the Roadless Rule rests on an erroneous factual foundation and is arbitrary in violation of NEPA.

The stated objective for the Roadless Rule was arbitrary and capricious because it was founded on a fundamental assumption that ran contrary to evidence then known to USDA, *i.e.,* that inventoried roadless areas were being increasingly lost to roadbuilding. According to the USFS, 2.8 million acres of inventoried roadless areas had been roaded in the 20 years prior to the rulemaking. Doc. 4609 at 73 (FEIS 2-23). The stated purpose of the proposed Roadless Rule thus was to avoid further loss of roadless areas. Doc. 4609 at 42 (FEIS 1-4) ("The purpose of this action is to conserve and protect the increasingly important values and benefits of roadless areas. . . .").

However, the USFS failed to disclose in the DEIS, or adequately disclose in the FEIS, that even without the Roadless Rule, USFS wilderness experts conservatively estimated that the amount of unroaded national forest land would *increase* by at least 8.4 million acres over the next 40 years due to road decommissioning. Doc. 6004 at 690 (Specialist Report for Wilderness and Special Designated Areas ("Wilderness Report")). Meanwhile, road building in the national forests was in rapid decline

with an 85% decrease during the last decade preceding the rulemaking, with a "likely . . . continued downward trend of about 5% to 10% per year in the coming decade." Doc. 6004 at 601 (National Forest System Roads Specialist Report ("Roads Report") at 8. With creation of new roadless areas outstripping the loss due to building of new forest roads in inventoried roadless areas, it is apparent (once presented with the facts) that even if road building were to continue at the rate of the last 20 years (2.8 million acres), which again was not the expectation, the 8.4 million acres of new roadless areas created during the first four decades of the 21st century would far exceed the 5.6 million (and probably far fewer) acres that might become roaded during that time period. Based on simple subtraction, the *net increase* in unroaded areas should be at least 2.8 million acres and likely far greater. This undisclosed information contradicted the stated purpose and need for the Roadless Rule, tainted the alternatives analysis and mislead the public.

USDA made a conscious decision to withhold this information from the public, as more fully explained *infra* in the cumulative effects section. For example, a September 29, 2000 USDA working draft Summary of Changes Between Draft and Final EIS initially included a bullet stating, "[a]s part of the section on cumulative effects, the extent to which new roadless areas may be created as the result of this and other rulemaking, through decommissioning and lower road density requirements, has been added." Doc. 5151 at 3. But this entire bullet was *edited out* of the Summary of Changes, *id.*, and the information was never disclosed in the cumulative effects section of the EIS. Contrary to claims later made by USDA in the Tenth Circuit Court of Appeals (which likely will be repeated here), the information was not withheld because it was speculative. Rather, the agency wilderness specialist called the projections of new unroaded areas a "conservative estimate" based on "reasonabl[y] foreseeable factors." Doc. 6004 at 690 (Wilderness Report at 14).

The General Accounting Office (GAO) independently documented that even without the Roadless Rule, few new roads were expected to be constructed in roadless areas. After visiting ten

national forests and interviewing the forest supervisor for each, the GAO concluded that "the forests generally did not plan to construct roads in roadless areas with or without the roadless rule." Doc. 5111 at 24 (Potential Impacts of Proposed Regulations on Ecological Sustainability at 12). *See also* Doc. 5111 at 25 (Potential Impacts of Proposed Regulations on Ecological Sustainability at 13) ("Few roads have been built in roadless areas in recent years and few were likely to be built in the future, even before the proposal of the roadless rule."). Although not intending to build roads in roadless areas, the forest supervisors all wanted to retain decision making flexibility without prohibitions on road construction and timber harvest that would inhibit their ability to manage things like fire, insects, disease and species protection. Doc. 5111 at 24-25 (Potential Impacts of Proposed Regulations on Ecological Sustainability at 12-13).

Other USFS employees also recognized that the agency was overstating the need for the Roadless Rule by inflating the estimate of road entry into roadless areas in the future. AR 5612 (Internal Comments on Draft) at 11 ("We do not anticipate steady nor extensive roading of roadless areas. The DEIS overstates the case."); *id.* at 34 ("The number of miles of roads that would be constructed in these inventoried Roadless areas in the next 20 years under no action is way overstated."); *id.* at 74 ("Roads are certainly not the boogie man that the DEIS makes them to be."). Agency employees also viewed the DEIS as "biased" and "more a public relations document than a public disclosure document." *Id.* at 9 (emphasis in original).

Put simply, the evidence in the administrative record does not support the stated objective of needing to avoid future road construction in inventoried roadless areas that would otherwise result in net loss of roadless areas with a commensurate loss of roadless values. Given that an accurate statement of purpose and need is a basic requirement of NEPA, USDA's decision to prohibit road building and timber harvest at high cost to jobs and the economy while deliberately failing to disclose

that roadless areas would be *significantly increasing* without the Roadless Rule was arbitrary and capricious in violation of NEPA and the APA.

b. The USDA violated NEPA by failing to disclose the cumulative effects of other roads policies expected to create more than eight million acres of new unroaded national forest in the foreseeable future.

The undisclosed information on the near term creation of new roadless areas directly conflicts with USDA's stated purpose and need, and the failure to properly analyze and disclose this information in the DEIS and FEIS as part of the cumulative effects analysis of closely related ongoing rulemakings also violated NEPA. *Hammond v. Norton*, 370 F. Supp. 2d 226, 245 (D.D.C. 2005) ("When actions 'will have cumulative or synergistic environmental impact upon a region' and 'are pending concurrently' before an agency, 'their environmental consequences must be considered together.'") (quoting *Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976). *See also* 40 C.F.R. § 1508.7 ("Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . .").

In the Roads Report, the USFS states that under the companion Roads Policy, "at a minimum, approximately 2,900 roads would be decommissioned annually." Doc. 6004 at 612 (Roads Report at 19). The goal of the USFS as of fiscal year 2001 was to decommission 3000 miles of national forest roads annually. Doc. 6004 at 601 (Roads Report at 8). Due to large scale decommissioning of current roads, even without the Roadless Rule the USFS estimated that "unroaded area acres are likely to increase 5% to 10% by the time NFS roads stabilize." Doc. 6004 at 612 (Roads Report at 19). This decommissioning goal and unroaded area creation estimate was not disclosed in the Roadless Rule DEIS, FEIS (there is limited but inadequate partial disclosure in sections other than Cumulative Effects), response to comments regarding road closures, or in the Record of Decision (ROD).

In the Wilderness Report, also prepared in support of the Roadless Rulemaking, the USFS stated that the "reasonable foreseeable factors" that could cause a major baseline shift in the supply of

wilderness or potential wilderness are the Roads Policy and new wilderness designations. Doc. 6004 at 690 (Wilderness Report at 14). More specifically, "if a conservative estimate were realized, there would be an increase of 10%, or 8.4 million acres, of roadless areas created over the next 40 years due to road decommissioning." *Id*. This conservative projection was also never disclosed in the DEIS, FEIS, response to comments on roads closures, or in the ROD. As noted above, *see supra* part V.A.1.a, the *net increase* of new unroaded areas is expected to be at least 2.8 million acres without the Roadless Rule after subtracting the acres that may become newly roaded as the result of multiple use management. And because the rate of new road building (even without the Roadless Rule) was in rapid decline, the net growth of new unroaded areas likely would be much greater.

In the FEIS discussion of cumulative effects, the USFS states only that the "Forest Service recognizes that the Roadless Rule together with the other proposed and finalized rules and policies could have cumulative effects. These other efforts are discussed below." Doc. 4609 at 484 (FEIS 3-396). However, the very brief discussion of the Roads Policy that follows makes absolutely no mention of the projected 8.4 million acres of new roadless areas to be created by USFS decommissioning of existing roads or the USFS goal of closing 3000 miles of roads per year. *See* Doc. 4609 at 485-86 (FEIS 3-397 to 3-398). Instead of disclosing these major cumulative effects on roadless areas, the USFS states only that "[t]he proposed Roads Policy is complementary to the proposed Roadless Rule and provides an additional level of review and analysis in certain unroaded areas of NFS land." Doc. 4609 at 486 (FEIS 3-398).

In the DEIS, the USFS acknowledges that the Roads Policy and the proposed Forest Planning rule were "ongoing rulemaking efforts related to the proposed Roadless Area Conversation Rule." Doc. 1362 (DEIS 1-14). However, after a brief discussion of the Roads Policy that makes no mention of the road decommissioning goals or the expectation of creating at least 8.4 million acres of new roadless areas, the USFS states that "[d]evelopment of the Road Management Policy is distinct from

the roadless rulemaking process." Doc. 1362 (DEIS 1-16). The discussion of the Roads Policy in the cumulative effects section of the DEIS acknowledges that even without the Roadless Rule, road building in roadless areas would be curtailed by the Roads Policy due to a required showing of "compelling need" to construct such roads. Doc. 1362 (DEIS 3-241). But once again, the DEIS does not disclose the agency's goal to decommission 3000 miles of existing road annually with an expectation of creating at least 8.4 million acres of new roadless areas. Doc. 1362 (DEIS 3-240 to 3-242).

Without regard to the transparency required by NEPA, USDA even actively directed agency personnel to misrepresent the effect of the Roads Policy and road decommissioning to the public. In a March 2000 Proposed Road Management Policy Rollout document providing key messages for responding to media inquiries, USDA prepared staff to answer the likely media question, "[w]ill the road policy create new unroaded areas," with the answer "[u]nroaded areas of various sizes already exist throughout the National Forest System. The policy itself will not create any more." Doc. 2315 at 836.

When USDA released the DEIS to the public on May 9, 2000, USFS Chief Mike Dombeck sent a memorandum to all USFS employees announcing the release. On the topic of road access to the national forests, Chief Dombeck told his employees that this proposal proves those people wrong who charged that the Roadless Rule would block public access to their public lands. Doc. 1345 at 1. According to the Chief, "[n]ot a single authorized road will be closed as a result of our roadless proposal. All existing and legal access would be preserved." *Id.* This statement is grossly misleading. While the Roadless Rule may not itself close any roads, the cumulative effect with the Roads Policy was expected to block public access by closing roads at the rate of 3,000 miles of existing roads annually, creating the 8.4 million acres of new unroaded areas in the foreseeable future. USDA was not even transparent with its own employees. The statement that all "existing and legal access would

be preserved" is simply false no matter how hard the spin. Moreover, given that the USDA estimate (and goal) was to decommission 3,000 miles of road annually, this key talking point on the roads policy is at worst disingenuous and at best fully intended to mislead. USDA may offer the unpersuasive argument that including the word "itself" makes this statement accurate, as the policy is not self-implementing and still requires USFS action to decommission a particular road. But the Wilderness Report concluded such actions were reasonably foreseeable and conservatively projected a resulting increase of 8.4 million acres of new unroaded areas. Doc. 6004 at 690 (Wilderness Report at 14).

Failure of the Roadless Rule EIS team to disclose such significant information cannot be ascribed to lack of communication or the rush to complete this massive rulemaking in less than 15 months. The specialist report explains that the projections regarding the extensive amount of decommissioning and the creation of new roadless areas over the next 40 years "were made after consultation with EIS team members" Doc. 6004 at 613 (Roads Report at 20). These projections also cannot be dismissed as speculative as the USFS considered them conservative and stated they "were made using historic trends and a panel of transportation experts that interpreted trends and made reasonable projections for the future." *Id.*

Notably, the USFS had even started implementation of the new Roads Policy that would limit new road construction and maximize decommissioning of existing roads prior to opening the NEPA process on the Roadless Rule. The Associate Chief for Natural Resources notified USFS leadership in an October 18, 1999 memorandum that they could begin implementation of the new Roads Policy immediately by limiting new roads and maximizing the decommissioning of existing roads. Doc. 3138 at 1. The USDA Roadless Rule team thus was clearly aware that decommissioning of roads would create significant areas of new roadless acreage – so much so that it rightly considered disclosing this information in the FEIS, only to have the planned disclosure struck by a reviewer. Doc. 5151 at 3. As

noted above, in a draft Summary of Changes Between Draft and Final EIS, the USDA initially stated that disclosure of the effects of creating new unroaded areas had been added to the cumulative effects section of the FEIS. *Id.* Again, the entire bullet was stricken, and the described addition to the FEIS never saw the light of day.

Failing to disclose this highly relevant information to the public in the DEIS or to adequately disclose it in the FEIS runs contrary to the goals of NEPA. *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) ("NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own."). Even when public comments on the DEIS raised specific concerns about potential road closures, the information on USFS goals for decommissioning roads and creating new roadless areas was withheld from the public. In response to comments that the USFS should "keep existing roads and trails open," Doc. 4610 at 130 (FEIS Vo. 3 at 127), and that the USFS "should not decommission roads," the USFS stated that "[t]he range of alternatives in the DEIS and FEIS does not make any decisions on decommissioning any roads because that is outside the scope of this proposal; management of existing roads will be addressed under the Roads Policy." Doc. 4610 at 131 (FEIS Vol. 3 at 128). In response to another comment on possible closure of existing roads, the USFS responded that the "Roadless Rule by itself would not close any roads . . . ." Doc. 4610 at 125 (FEIS Vol. 3 at 122). The concerted failure to disclose the USFS' plan to use the three related proposed rules to close thousands of miles of existing forest roads and create millions of acres of new roadless areas was misleading and did not comport with NEPA's requirement that the interested public be provided with sufficient information "to evaluate and balance the factors on their own." *Calvert Cliffs*, 449 F.2d at 1114. The intentional decision to withhold the Roads Policy effects analysis in the Roadless Rule FEIS denied the public the

opportunity to consider information that was central to the proposed rulemaking, stymied informed public comment and violated NEPA.

The Wyoming district court twice invalidated the Roadless Rule, each time concluding that one of the flaws in the rulemaking was the failure to adequately analyze and disclose the cumulative effects of the contemporaneous rulemakings. *Wyoming v. U.S. Dep't of Agric.*, 277 F.Supp.2d 1197, 1228-29 (D. Wyoming 2003), *vacated*, 414 F.3d 1207 (10th Cir. 2005);[2] *Wyoming v. U.S. Dep't of Agric.*, 570 F.Supp.2d 1309, 1341-43 (D. Wyoming 2008), *rev'd*, 661 F.3d 1209 (10th Cir. 2011). Although the latter decision was reversed on appeal, the plaintiffs in the Wyoming litigation did not raise, and the USFS did not disclose, the very specific forecasts in the Roads Report and the Wilderness Report on road decommissioning and creation of new unroaded areas. In fact, the USFS represented on appeal that the USFS "did not forecast specific impacts" regarding any new unroaded areas given uncertainties in decisions yet to be made. Brief of Federal-Defendants-Appellants at 25, Nos. 09-8075 & 08-8061 (10th Cir. Nov. 2, 2009).[3] The USFS further argued that it was proper to rely on such forecasting difficulties, including because the Council on Environmental Quality (CEQ) regulations do not require speculation when impacts are not reasonably foreseeable. *Id.*

These statements of record in the Tenth Circuit appeal directly contradict the specialist reports, which explicitly state that the creation of new roadless areas is reasonably foreseeable and conservatively estimated to lead to the creation of 8.4 million acres of new roadless areas due to upcoming road decommissioning. Doc. 6004 at 690 (Wilderness Report at 14). *See also* Doc. 6004 at 601 (Roads Report at 8) (stating that the goal was to decommission 3,000 miles of national forest roads annually); Doc. 6004 at 612 (Roads Report at 19) (even without the Roadless Rule, the effects of

[2] The decision was vacated after the State Petitions Rule issued, thereby replacing (temporarily) the Roadless Rule and mooting the case.

[3] The brief, which was filed in 10th Circuit Case No. 08-8061 on November 2, 2009, is available electronically via PACER. The cited page refers to the document's original pagination, not the PACER pagination.

decommissioning roads was likely to increase "unroaded area acres . . . 5% to 10%"). And as stated in the Roads Report, these projections were done in consultation with the EIS team. Doc. 6004 at 613 (Roads Report at 20). Respectfully, because the Tenth Circuit's decision was based on a misrepresentation regarding projected cumulative effects, this Court should give no weight to that decision.

Further, any argument by the USFS in this case that creation of new roadless areas under the Roads Policy was too speculative to consider should also be viewed in a dim light as it would contradict the agency's own specialists reports. Notably, any such argument also would undermine the very rationale presented by USDA as the need for this rulemaking, given that the stated need was based on an assumption that roadless areas were being lost to roadbuilding and would continue to diminish absent a prohibition on new roads. Doc. 4609 at 73 (FEIS 2-23) (stating that 2.8 million acres of inventoried roadless areas had been lost to roadbuilding over the last two decades); Doc. 4609 at 42 (FEIS 1-4) ("The purpose of this action is to conserve and protect the increasingly important values and benefits of roadless areas . . . .").

Logically, given USDA's desire to decommission 3,000 miles of national forest roads annually under the Roads Policy, getting approval to decommission a road would be far easier and more certain than the process of proving a compelling need for construction of a new road in a previously unroaded area. Nevertheless, USDA portrayed future roading of roadless areas as inevitable – hence the alleged need for the Roadless Rule – while dismissing the effects of decommissioning existing roads and creating new roadless areas as too speculative to analyze or disclose to the public in the NEPA process. The USFS cannot choose a single side to this coin. The choice to present only one side to the public in the Roadless Rule rulemaking process biased the analysis and ran afoul of NEPA. *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (to satisfy NEPA, an "agency

must comply with 'principles of reasoned decisionmaking [and] NEPA's policy of public scrutiny'") (quoting *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1995)).

c. USDA failed to make an informed decision based on informed comment in violation of NEPA.

On October 13, 1999, nearing the end of his second term in office, President Clinton directed the Secretary of Agriculture to commence a rulemaking that would "protect" about 2% of all the land in the United States from future road construction. Doc. 1535 at 2. This massive undertaking resulted in a monumental environmental regulation that ultimately applied to over 58 million acres of National Forest Land. The final rule was published on January 12, 2001, just eight days before George W. Bush was sworn in as President. *See generally* 66 Fed. Reg. 3,244 (Jan. 12, 2001).

Expedited to become effective before the change in administrations, this massive undertaking was accomplished in less than 15 months from the day the presidential directive was given to the Secretary. *Compare* Doc. 1535 (Presidential directive dated October13, 1999) *with* 66 Fed. Reg. 3,244 (final Roadless Rule published less than 15 months later). Completing such a massive rulemaking in so little time was an extraordinary feat, especially given the Roadless Rule's expansive scope, its far reaching impacts on development of national forest land and the resulting devastating social and economic impacts visited on those individuals, communities, and businesses reliant on forest resources. To beat the inauguration of the next president, there was no time to include state and local governments as cooperating agencies, no time to grant any of the many requests for extensions to comment periods, no time to timely provide adequate maps or specific information on how individual forests would be impacted, and no time to issue an SEIS when major changes were made in the FEIS, thereby leaving no formal opportunity for comment on the changes. Doc. 123 at 3 ("Dates—get done during the Clinton Administration (Dec. 2000)").

A primary goal of NEPA is public disclosure to facilitate informed decision making. *See, e.g.*, *Robertson*, *supra*, 490 U.S. at 349. Informed decision making by the agency will only be achieved if

all relevant information is made available to the public, the public has adequate time to evaluate and comment on this information, and the agency properly considers those comments. Due in large part to the urgency to complete this rulemaking before President Clinton left the White House, the public was denied the opportunity to participate fully in this rulemaking as required by NEPA, rendering the Roadless Rule arbitrary and capricious in violation of the APA.

i. The rush to gather information internally.

The rushed effort to pull together agency information for this rulemaking is documented in the record. After the mid-October, 1999 notice from the President to commence the Roadless Rule process, the timeline required a DEIS in the spring of 2000 and a final rule in December 2000 as set forth under the agency heading "Roadless Rule NOI/Presidents Instructions." Doc. 2315 at 377. In this same USDA document (a response to a House Resource Committee Request), an October 26, 1999 memorandum to all regional foresters instructed them to provide the Washington USDA office will information on the inventoried roadless areas in their forests by the close of business on October 28, *less than two days later*. Doc. 2315 at 7 (referring to the need as "urgent" and offering an apology "for the short timeframe we have given you for this response"). Each national forest then was given four days to provide the EIS team with additional information on the extent of existing roads in the forest and the estimated number of roads to be constructed, reconstructed, and closed in conjunction with timber projects. Doc. 2315 at 109 (explaining that the "time frame for this is extremely short. The reason for this short time frame is due to the cut-off date for final edits of the DEIS"). The EIS team apologized to the regional foresters for the last minute request and explained they also were "working through the weekends" to meet the hurried deadlines. Doc. 2315 at 16. *See also* Doc 2315 at 56 (giving regional foresters an unrealistic *15 days* to provide information on timber volumes sold and offered, threatened or endangered species, recovery tasks, sensitive species, conservation strategies, wildlife, fish and rare plants, and planned projects on the national forests).

An email string on September 19, 2000 epitomizes the rushed nature of the entire rulemaking. This time, given only until "COB today" to provide information on an aspect of impacts from prohibiting entry into roadless areas, a USFS representative states, "I realized that many of you will not read this prior to COB today, but this is just the way it is these days." Doc. 4036 at 1. In other words, insufficient time to prepare a proper analysis of the effects of the proposed rulemaking was accepted as "just the way it is." *Id.*

ii. The rushed approach leads to information accuracy problems.

As a direct result of this rushed approach, significant internal issues arose regarding the accuracy of the data that was compiled. For example, the Wayne National Forest called attention to the fact that USDA was reporting roadless areas in their forest that did not exist. Doc. 2315 at 201 ("We don't have any roadless areas."). The Washington office noted they expected "other Forests will have problems with these stats [on roadless areas.] We don't know how they were derived nor who provided them." *Id.* *See also* Doc. 2626 (email from January 2000 inquiring about a "2.75 million acre difference" in inventoried roadless areas reported for Alaska); Doc. 2217 at 1 (email from February 2000 discussing the Alaska data issues and noting that "we are dealing with very crude data for very large areas. Differences of 10% can be seen in certain circumstances.").

The EIS team was aware that other data credibility issues also were developing. With regard to information that USDA was widely distributing on the public comment process, an April 14, 2000 email from Scott Conroy, leader of the rulemaking team, disclosed that the reported count of over 500,000 public comments on the Notice of Intent "was an estimate made up" by the USDA contractor and that the real number was only 364,728. Doc. 1012 at 1. Not surprisingly, Mr. Conroy acknowledged that "this will create a substantial credibility problem given the wide use we have made of this number." *Id.* Indeed, this "made up" information was provided as fact to U.S. Representative Don Young of Alaska (then Chairman of the House Committee on Resources) in response to his letter

to USFS Chief Mike Dombeck. Doc. 193 at 23 ("The Forest Service has also received more than 500,000 comments on the Notice of Intent.").

USFS information on the magnitude of the backlog of road maintenance also was called into question by its own regional coordinators. Region 10 (Alaska) stated that it took issue with the "$8.4 billion maintenance and reconstruction backlog Forest Service-wide. We are having trouble reconciling that number with either regional or forest information." Doc 3140 (noting that other regional coordinators had similar issues with this number). The Willamette National Forest in Oregon similarly commented that the stated "$8.4 billion dollar backlog of road repairs . . . . seems exorbitant and out of scale." Doc. 5612 at 50.

Also called into question were USDA suggestions that the Roadless Rule would have minimal impact on timber harvest levels because previously planned harvest in roadless areas would simply be relocated to other areas of forests. For example, Region 4 (Intermountain Region) commented that several of its forests feared:

> the DEIS did not adequately disclose the true long-term effects on the timber program due to limiting the analysis period to 5 years. Most Forests adjusted planned programs out of roadless areas in the past several years to avoid short-term impacts due to the temporary moratorium on road construction and other issues related to roadless.

Doc. 5612 at 31. As a result, "many of the Forests feel that to suggest the volumes that will not be available from roadless areas can easily be made up from roaded areas may be a misrepresentation." *Id. See also* Doc. 5612 at 52 (comment from two forests in Washington that the Roadless Rule's projected timber harvest effects "are very misleading because they are based on the volume the Forests 'planned' over the next five years. Because the interim roadless policy was already in effect, Forests, by and large, were not planning any entry into roadless areas, and effects are underestimated"); Doc. 5612 at 78 (describing as an "obvious fault" that the "DEIS does not explain that the 'planned sales' analysis is very limited and the results are very low due to the 80% reduction in timber harvesting that

has occurred during this Administration, nor is it mentioned that few of the IRAs had 'planned sales' due to politics").

iii. Denial of all requests to participate as a cooperating agency.

While USDA was scrambling to compile basic information for the rulemaking, such as how much forest acreage was unroaded and how many miles of road actually might be created in roadless areas in the future, state and local governments were asking to participate in the rulemaking as cooperating agencies. The answer was a resounding no. All state and local government requests for cooperating agency status were rebuffed even though in July 1999, the CEQ had issued a cooperating agency memorandum to all federal agencies urging them "to more actively solicit in the future the participation of state, tribal and local governments as 'cooperating agencies' in implementing the [EIS] process" under NEPA. Doc. 3544 at 2 (citing to 40 C.F.R. § 1508.5). *See also id.* at 3 (pointing out that recognizing states and local governments as cooperating agencies furthers the goals of "NEPA to work with other levels of government 'to promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans'").

As early as December 28, 1999, Joseph Carbone (USDA NEPA Coordinator) and Scott Conroy in the Washington office were actively discussing how best to deny all such requests *despite* receipt of the CEQ memorandum urging federal agencies to solicit more cooperating agency participation, and *despite* USDA's acknowledgement that "[t]he CEQ memo is quite clear as to our responsibilities to solicit state, tribal and local governments for cooperating agency participation . . . ." Doc. 2292 at 1. The Carbone and Conroy discussion acknowledged that state and local governments "could provide more detailed analysis about local impacts" but suggested that requests for cooperating agency status could be rejected on the basis that USDA did not need such information, even though USDA was not yet sure of the scope of the proposed rule. *Id.* Less than a month later, USDA was preparing to seek

CEQ's blessing on denying all requests for cooperating agency status on the grounds that "it is not practical to include so many potentially interested non-federal agencies as cooperating agencies in this national initiative." Doc. 2293 at 2.

On February 25, 2000, USDA met with four western governors, including Governor Knowles of Alaska, and the staff of the other members of the Western Governors' Association, to discuss state participation in the Roadless rulemaking. Doc. 1258 at 3. The States' requests for cooperating agency status were denied, and the denial letter to the Western Governors' Association then was used as an attachment to letters of rejection responding to other requests for cooperating status. *Id.* at 1. Despite the decision to flout CEQ's admonition that "cooperator status for appropriate non-federal agencies should be routinely solicited," Doc. 3544 at 3, USDA assured the Western Governors that "we value our partnership very much and look forward to working with you on the roadless area rulemaking . . . ." Doc. 514 at 2.

iv. Denial of all requests to extend comment periods.

Given the rushed timeline for the rulemaking, it is not surprising that many state and local governments, along with members of the public, sought extensions on comment periods so that they might offer more meaningful comments on such a major undertaking. Once again, all requests were denied. *See, e.g.*, Doc. 1258 at 1.

The individual reasons offered in each request for extension of a comment period were not even considered. Rather than considering each request and responding to the concerns expressed, a form letter of denial was prepared in advance. For example, as discussed in an email dated December 20, 1999, the USFS had a "number of people asking that the scoping comment period be extended" and was anticipating more requests for additional time. Doc. 388. The USFS wanted to reply to all such requests with "some formalized documentation of Glickman's (the Secretary of Agriculture)

decision not to extend." *Id.* The Secretary had previously stated in a letter to Senator Gregg that no extension on scoping was needed because USDA had three decades of experience with roadless issues and there would be additional opportunities to comment at meetings, on the DEIS and on the proposed rule. *Id.* None of these reasons addressed the public's desire to have meaningful input on the scope of the project.

One example of a request to extend the comment period on the proposed rule came from North Dakota Governor Schafer, who explained that interested entities were "currently considering six different rules consisting of thousands of pages of complex and technical information." Doc. 4098 at 5. The Governor explained that the 60 day comment period for the proposed rule provided inadequate time for consideration and comment, "particularly in view of the host of rule-makings currently under way from the Forest Service." *Id.* The USFS response dismissed the Governor's concerns without even acknowledging the basis of his request for an extension on the comment period. Doc. 4098 at 1.

With regard to the many requests to extend the comment period on the DEIS, the Small Business Subcommittee of the United States Congress requested that the agency complete an adequate regulatory flexibility analysis and extend the comment period. Doc. 4485 at 5. Having held a hearing on July 11, 2000, the Subcommittee determined that the Forest Service "has not adequately considered the impact of the roadless area conservation rule, much less its other efforts at changing land management practices, on the small businesses and communities that rely on economic activity emanating from the National Forests." *Id.* at 5-6. In their request for additional time, Congressmen Thune and Hill pointed out that good decision making requires an open dialogue with the public and further noted that the law requires the agency to consider the impacts on small businesses and rural communities. *Id.* at 6. The Congressmen concluded by stating that USDA "certainly has not complied with the spirit of that law and should extend the comment period pending completion of an adequate

initial regulatory flexibility analysis." *Id.* In reply, USDA stated "the Forest Service does not agree that an extension of the comment period is warranted or necessary." Doc. 4485 at 1.

Given the magnitude of this rulemaking, the credibility issues surrounding the data being presented and the tremendous interest in having adequate time to present well informed comments, USDA's failure to extend comment periods, coupled with denial of all cooperating agency requests, violated NEPA. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 47 (2008) (NEPA seeks to inform both the decision maker and the public as to the "'effects of proposed agency action,'" thereby "'ensur[ing] that the agency will not act on incomplete information, only to regret its decision after it is too late.'") (quoting *Marsh v. ORNC*, 490 U.S. 360 (1989)).

v. Failure to make important information available for public review and comment, including maps and USDA projections of creation of new unroaded areas from road decommissioning.

In some instances, extending comment periods would not have helped because the USDA decided not to disclose relevant information making informed comment impossible. As discussed above, *see supra* part V.A.1.a,, the leading example of this failure was the USDA decision to not disclose the conservative estimate of reasonably foreseeable cumulative effects set forth in the specialist reports, *i.e.,* the undisclosed fact that 8.4 million acres of new unroaded areas were projected to be created due to road decommissioning. Without such critical information that goes right to the heart of the need (or lack therefore) for the Roadless Rule, the comments received from the public were not informed comments and the USDA decision was not an informed decision process, the central goal of NEPA. *Winter*, 555 U.S. at 47.

Other critical information also was either withheld from the public or never compiled by USDA. This includes such basic information as what lands would be subject to the roadless area prohibitions. USDA received many requests for individual forest maps identifying the roadless areas at issue, but once again the public was largely denied.

During the rulemaking, even Regional Foresters had difficulty in obtaining access to the mapping information that was in the hands of the rulemaking team. For example, USFS Regions 1 and 4 requested the "roadless and special designated area mapping information" from the rulemaking team. Doc. 5487 at 2. On August 29, 2000, Scott Conroy of the Washington office responded that his Washington office team was "fine with their use of the information, but we want to be sure that its use and analysis is coordinated with our use and analysis." *Id.* The next day, Mr. Conroy reiterated that "I would like to be sure their use of the information is coordinated with us. How can we best accomplish that goal?" *Id.* Apparently, use of roadless mapping information was closely controlled from Washington, even with regard to USFS Regional Foresters.

USDA notes on congressional briefing sessions provide insight as to the concerns of Congress regarding the lack of information during the process. Some of the questions asked of USDA during the November 18, 1999 session were described as follows:

> Are areas mapped?
> Will the scoping period be extended?
> Why isn't there maps [sic] at public meetings?
> . . . .
> How can you expect people to provide thoughtful comments without providing the necessary information at the public meetings?

Doc. 3977 at 1. In a congressional briefing session on January 14, 2000, among the questions asked of USDA were:

> Why did (road less) scoping end before maps were available?
> . . . .
> [I] attended all the public scoping meetings in Montana…concerned because even the Forest Supervisors didn't have specific answers for their forests, and had no idea which lands we were talking about as affected?

Doc. 3977 at 3. In this briefing, USDA also briefed members of Congress on the companion road management policy rule, noting that decommissioning of roads was one goal of the policy, but there was no disclosure that the magnitude of the decommissioning was reasonably and conservatively expected to create over eight million acres of new unroaded areas. Doc. 3977 at 2.

During the rulemaking, superior maps in the possession of Regional Foresters were not permitted to be used. For example, in an August 17, 2000 email from Dave Thomas to Scott Conroy, Mr. Thomas said that he had been in contact with two Regional Foresters, both of whom had "accepted the recommendation not to use the data from the 2nd Idaho map, though both had reservations. They noted, as you did earlier, that it is very difficult to explain why we shouldn't use the map and the data that could be derived from it. . . ." Doc. 5135. This was in follow up to conversations with the two Regional Foresters three months prior after the Regional Foresters had become aware of serious deficiencies in DEIS "maps generated by the roadless team, " Doc. 3527 at 1, which could not be rectified given the tight timeframe for the NEPA process. *Id.* at 2 (explaining that one of the Regional Forester's "question continually was 'what you are telling me is that the data isn't worth much mapped as is, but the map is out there, I'm going to get questioned, come up with some good answers for me.'" *Id.*

An email from the Gifford Pinchot National Forest to the EIS team illustrates the concerns and frustrations of the individual forests in meeting the time demands of the Washington Office. Doc. 5612 at 71 ("Please give us some latitude to adjust roadless area boundary lines to make them conform to easily identifiable features on the ground."). The USFS employee described the maps used in the public process as "very imprecise" with "errors which we were unable to correct in time to meet forest planning production schedules." *Id.* He elaborated that the GIS layer was "hastily assembled this winter to respond to information requests related to the roadless initiative. The time frame we were given did not allow the production of more accurate maps." *Id.* Similarly deficient was the Alaska roadless map used in the process, which "contains numerous inaccuracies and problems." Doc. 312. For example, a brown line was "so wide that it fills up all the water area within the boundaries of the Tongass and Chugach [National Forests] – including all of Prince William Sound!" *Id.*

vi. Failure to issue a supplemental NEPA document to allow comment on major changes from DEIS to FEIS.

Alaska acknowledges that an agency is not required to prepare a supplemental NEPA document any time new information or changed circumstances come to light. *Marsh v. ORNC*, 490 U.S. 360, 373 (1989). But supplemental NEPA analysis is required if there are "*significant* new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c) (emphasis added). Here, despite the significant changes from the DEIS to the FEIS, the USDA dismissed the need for supplemental NEPA analysis in cursory fashion. Doc. 4610 at 97 (Response to Comments at 94) ("The agency has determined that the threshold that would trigger a need to prepare either a supplement or revised draft EIS has not been met.").

Among the many reasons that the SBA determined the USDA was in violation of the RFA was the failure to issue an SEIS to allow public comment on the significant changes made between the DEIS and the FEIS and ROD. AR 5584 at 2 ("The decision to disallow timber harvests, except for stewardship purposes and to apply the prohibitions to the Tongass will have a significant economic impact . . . . The public should be notified of the changes and the potential economic impacts so that meaningful comments can be provided prior to finalization of the rule."). Among the changes that warranted a supplemental NEPA document was the decision to flip from Tongass Exempt to Not Exempt (offering public comment as a primary justification), *see* 66 Fed. Reg. at 3,248, 3,249, 3,254, the addition of seven million additional acres to the scope of the roadless and timber prohibitions, and further restrictions placed on timber harvest. *See, e.g.*, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d at 1224 (describing changes "that were not included in the DEIS"). The last minute addition of seven million acres to the Roadless Rule's scope was the result of applying the Roadless Rule prohibitions to 2.8 million acres of already roaded lands within inventoried roadless areas along with the addition of 4.2 million acres not previously identified on the maps used in the public comment portion of the rulemaking. *Id.*

The Wyoming District Court twice invalidated the Roadless Rule, and each time held that failure to prepare an SEIS was among the NEPA violations. *Wyoming v. U.S. Dep't of Agric.*, 277 F.Supp.2d at 1230-31, *vacated*, 414 F.3d 1207 (10th Cir. 2005); *Wyoming v. U.S. Dep't of Agric.*, 570 F.Supp.2d at 1344, *rev'd*, 661 F.3d 1209 (10th Cir. 2011). In reversing the latter decision, the Tenth Circuit found that the last minute addition of seven million more acres to the scope of the Roadless Rule prohibitions was either "insignificant" or was qualitatively within the spectrum of analyzed alternatives. 661 F.3d at 1259-61. Again, Alaska does not find the non-binding Tenth Circuit analysis persuasive.

While it may be true that qualitatively the prohibitions on one acre of land are similar to the next acre, the conclusion that USDA may misrepresent the total size of the affected area by seven million acres without significant (negative) effect on the informed comment and decision making process is neither logical nor legally correct. For example, in a case involving the Tongass, the Ninth Circuit reached a different conclusion. *See Natural Resources Defense Council v. U.S. Forest Serv.*, 421 F.3d 797 (9th Cir. 2005) (*NRDC*). In that case, the agency argued that a mistake that had doubled the projected timber volume needed to meet market demand under low, medium and high market demand scenarios was harmless error "because the projections were not significant to the Regional Forester's decision choice among the Plan Alternatives." 421 F.3d at 807. The Ninth Circuit disagreed, reasoning that:

> Common sense, as well as the record, tells us that the Forest Service's assessment of market demand was important for its determination through the ASQ of how much timber is allowed to be cut. Given the competing goals to be accommodated under NFMA [the National Forest Management Act], it is clear that trees are not to be cut nor forests leveled for no purpose. If market demand exists for timber, the need for timber harvest may outweigh the competing goals for environmental preservation and recreational use. But if the demand for timber was mistakenly exaggerated, it follows that the timber harvest goal may have been given precedence over the competing environmental and recreational goals without justification sufficient to support the agency's balancing of these goals.

Id. at 808.

In the same way, the addition of 7 million acres of inventoried roadless areas in the ROD, and the decision to reverse course from Tongass Exempt to Tongass Not Exempt, all without analysis of the resulting impacts, was a significant change that may have changed the balance with other competing goals such as development of renewable energy sites, recreational facilities, timber harvest, and other purposes that would otherwise be allowed. Yet USDA denied the public an opportunity for review of the significant changes that appeared for the first time in the FEIS.

As discussed above, USDA was aware that its maps were of very poor quality and refused to let USFS personnel substitute more accurate information during the comment period. The public was therefore hamstrung in its ability to offer meaningful comment on the 51 million acres originally proposed for restriction under the Roadless Rule. But *no opportunity* was provided for comment on the additional seven million acres added after the fact – only a supplemental NEPA document fully assessing the effects of including the additional seven million acres in the Roadless Rule prohibitions could have corrected this deficiency.

The same is true regarding the sudden reversal on the Roadless Rule's application to the Tongass, *i.e.,* the switch from Tongass Exempt to Tongass Not Exempt that USDA characterized "a clarified and reformatted description of [an alternative] that was implicit in the DEIS . . . ." Doc. 4610 at 193 (FEIS Response to Comments at 190). In the DEIS, a primary reason for exempting the Tongass from roadless area prohibitions under the Preferred Alternative was the need to meet the demand for timber as required under the TTRA. Doc. 1362 (DEIS 1-11 to 1-12) (discussing four reasons why the Tongass is "unique among national forests," including USFS' timber supply obligations under the TTRA). The DEIS also referred to the "adverse social and economic effects" that would flow from the "drastic decrease in timber volume outputs projected for the" Tongass in the event the roadless area prohibitions were made applicable to the forest. Doc. 1362 (DEIS 3-231). Yet in the FEIS, the USDA without sufficient explanation changed the preferred Tongass alternative to

"Tongass Not Exempt," albeit with a delayed application until 2004. Doc. 4609 at 27 (FEIS ES-9). "Public Comment" was offered as the primary reason for the sudden reversal. Doc. 4609 at 63 (FEIS 2-13) (attributing the abrupt change to "responses received during the public comment period"). Lacking, moreover, was any detail offered as to the number, origin, or content of the comments on which USDA relied in abruptly changing its decision for the Tongass. The lack of explanation is especially worrisome given USDA's admission that the number of comments on the scoping notice was "made up" by its contractor. Doc. 1012 at 1.

The Content Analysis Enterprise Team stated in the preliminary report on DEIS comments that a total of 1,155,896 comments were received. Doc. 4906 at 2. However, the contractor also reported that the total included approximately 750,000 form letters from one environmental interest group consortium. *Id.* at 3. Indeed, the total number of form letters was 1,141,931, or more than 97% of the total comments. *Id.* at 2-3. There is no indication, of course, that the comments were in any way representative of the country as a whole or any segment thereof. Rather, the indication is that the "ballot box" was stuffed to overflowing with form letters from an environmental consortium. In any event, USDA certainly had not announced an intent to base its decision on the Tongass on some form of popular vote or unscientific survey. Nor would such an approach be proper. *See California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F.Supp.2d 874, 903 (N.D. Cal. 2006) (stating in the context of the State Petitions Rule, which temporarily replaced the Roadless Rule, that "regulation is not a popularity contest," but that comments rather showed "the heated public debate" over the management of roadless areas"), *aff'd*, 575 F.3d 999 (9th Cir. 2009). If USDA truly did turn the rulemaking process into a popularity contest, at a minimum it should have disclosed this radical departure from the proper NEPA decision making process to the public, which of course did not happen. For all of the foregoing reasons, USDA violated NEPA by failing to allow for additional public comment on a supplemental

NEPA document that disclosed the significant changes made between the DEIS and the FEIS and ROD.

2. The Roadless Rule rulemaking violated the Regulatory Flexibility Act and therefore the APA.

The Office of Advocacy of the SBA is the federal entity responsible for monitoring compliance of other federal agencies with the RFA, 5 U.S.C. §§ 601-612. The RFA "obliges federal agencies to assess the impact of their regulations on small businesses." *U.S. Cellular Corp. v. F.C.C.*, 254 F. 3d 78, 88 (D.C. Cir. 2001). The RFA, though procedural, requires a good faith effort to assess the impact of a rule on small businesses. *Id.* Although the State is not alleging a violation of the RFA *per se* as it cannot bring such a claim, the Court "'may consider [the agency's compliance with the RFA] in determining whether [USDA] complied with the overall requirement that an agency's decisionmaking be neither arbitrary nor capricious.'" *Nat'l Assoc. of Home Builders v. EPA*, 682 F.3d 1032, 1042 (D.C. Cir. 2012) (quoting *Allied Local and Reg'l Mfrs.' Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000)). As described below, USDA's disregard for the RFA concerns of the SBA during the rulemaking process demonstrates that USDA's decision making was arbitrary and capricious in violation of the APA.

In its review of the USFS' Final Regulatory Flexibility Analysis (FRFA), the SBA stated that the FRFA for the Roadless Rule "violates the APA and the RFA." AR 5584 at 2. This determination came eight months after the SBA provided its initial comments on the Roadless Rule after review of the draft preamble, proposed rule, and EIS. AR 255 at 1. At that time (February 2000), the SBA had informed the USFS that the paragraph in the preamble on Regulatory Impact was "wholly inadequate for RFA purposes." *Id.* at 2. The SBA found this deficiency particularly "bothersome given the fact that it appears that FS has access to the economic information necessary to perform the baseline analysis that is required by the RFA." *Id*. More specifically, SBA noted that the USFS knew the Roadless Rule would reduce timber offerings by 73% overall, and therefore the "lack of an analysis, in

view of a known 73% reduction, makes the conclusion (of no significant economic impact on small business) highly suspect." *Id.* at 3. Not mincing words, the SBA informed the agency that what it had "developed thus far in justification of its rule is grossly deficient." AR 255 at 7.

Two months later (April 3, 2000), SBA notified the USFS that despite the SBA having been in "constant contact" with the agency, the SBA had "not received the documents that it needs to complete its review." AR 1053 at 3. This was followed on April 19, 2000 by SBA's comments on the draft of the Initial Regulatory Flexibility Analysis (IRFA) finally provided by USFS, which the SBA concluded "does not satisfy the requirements of the RFA."AR 1697 at 6. Among other identified deficiencies, the SBA pointed out that the IRFA lacked an accurate description of the affected industries, contained incomplete economic data, failed to adequately consider alternatives and was founded on unsupported assertions. *Id.*

The SBA also challenged the introductory statement in the IRFA alleging that the USFS was not even required to provide an economic analysis because the Roadless Rule does not directly regulate any small businesses. AR 1697 at 2. The SBA observed that if small businesses are prohibited by the rule from building roads, harvesting timber and engaging in other business opportunities, "it is illogical" to claim that such businesses are not directly impacted by the rule. *Id.* The SBA further noted that even if the impact on small business was characterized as indirect, the impact on entities in the timber harvest and road construction industries "is foreseeable and measurable." *Id.* at 3 (also stating that the "consequences of the rule may also have a predictable and foreseeable indirect impact on small neighboring communities and small businesses in several industries including, mining, recreation, grazing, timber products").

In any event, the USFS accepted the responsibility to prepare an IRFA, followed by an FRFA, stating that "in the interests of completeness, and because the agency received comments on this issue during the scoping process, the agency has elected to do such an analysis, to the extent feasible and

based upon available information." AR 1698 at 3. Having committed to that action as part of the NEPA process for the Roadless Rule, the agency was obligated to complete an accurate analysis of economic impacts. *NRDC*, 421 F.3d at 811 ("Inaccurate economic information may defeat the purpose of an EIS [or an IRFA or FRFA] by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action.").

The USFS subsequently submitted the FRFA to the SBA,[4] after which (on November 15, 2000) the SBA provided comments that identified multiple violations of the RFA and the APA.[5] AR 5584 at 1. As stated at the outset of this section, SBA observed that the USFS made "significant changes to the final rule" that required an additional comment period under the APA, including the last minute decision to *not* exempt the Tongass from the rule along with significant changes to the timber harvest prohibition. *Id.* at 2. SBA concluded that the changes "will have a significant economic impact" on many small businesses and hence necessitated an additional public comment opportunity. *Id.* SBA properly concluded that USFS's failure to provide an opportunity for meaningful comment on these changes violated the APA. *Id.* As discussed in the NEPA section of this brief, such failure also violated NEPA.

The SBA identified other violations of the RFA (and the APA) as well. For example, the USFS failed to explain in the FRFA "why other 'significant alternatives to the rule were rejected.'" *Id.* The USFS also failed to provide information on the number of small businesses affected by the Roadless Rule, despite possessing such information. *Id.* at 3. On that note, the SBA took issue with the USFS' rejection of information provided by a wood products industry trade association – namely that "78% (11 of 14) of the small family owned sawmills in Utah will cease to operate" due to the Roadless Rule

[4] The Administrative Record contains a November 20, 2000 clearance copy of the FRFA, Doc. 6083, but it is unclear when USFS submitted the FRFA to the SBA given the November 15, 2000 date of the SBA's comments on the FRFA.

[5] Although identified as RFA and APA violations by SBA, the failures described by SBA are also NEPA violations addressed in the NEPA section of this memorandum.

– because it was "different from FS estimates." *Id.* (asking why the agency "decide[d] not to use the information provided by Utah Forest Products Association, other trade associations, and the public in the FRFA"). Finally, the SBA observed that the USFS failed to include in the FRFA the required "legal, factual and policy reasons for selecting the chosen alternative." *Id.* Indeed, the USFS failed to provide this information for either the Roadless Rule generally or the separate decision to not exempt the Tongass.

The USFS failed to comply with the RFA despite a specific public commitment to do so, including in the FEIS. For example, in the FEIS Response to Comments, the agency responded to a comment that it "should not violate the Regulatory Flexibility Act" by stating it had "completed an Initial Regulatory Flexibility Analysis in accordance with the Regulatory Flexibility Act" and that it also would complete an FRFA to "address possible effects of the rule." Doc. 4610 at 18 (FEIS Vol. 3 at 15). In response to another comment stating that the "rule will adversely impact . . . small businesses" and that the "effects were not adequately addressed," the agency relied exclusively upon the information in the IRFA and FRFA, stating that its analysis under the RFA was "conducted to assess impacts on small businesses." Doc. 4610 at 13 (FEIS Vol. 3 at 10). Having fully incorporated its flawed RFA analyses into the NEPA process for the rulemaking (without acknowledging the SBA's criticism of those analyses), the agency's arbitrary failings under the RFA returned full circle as NEPA violations. In the ROD, in fact, the USFS devoted four pages to a summary of the results of its FRFA, Doc. 6978 at 104-07, stating that the Roadless Rule "has the potential to affect a subset of small businesses that may seek opportunities" in the future, particularly "in the Intermountain and Alaska Regions, with the effects in Alaska increasing in the longer term." *Id.* at 105. Nowhere, however, did the USFS disclose that the SBA, the agency responsible for overseeing agency compliance with the RFA, repeatedly informed the agency that its economic analyses and disclosures were seriously deficient and in violation of the RFA, and that as a result of the RFA violation, the decision to

promulgate the Roadless Rule was arbitrary and capricious in violation of the APA. *Allied Local and Reg'l Mfrs.' Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000) (reviewing court may consider violations of the RFA "in determining whether [an agency] complied with the overall requirement that any agency's decisionmaking be neither arbitrary nor capricious"). Finally, as a result of consistently misrepresenting its RFA analyses in the FEIS and in the ROD by failing to disclose the SBA's rejection of same, the USFS also violated NEPA. *Delaware Riverkeeper*, 753 F.3d at 1312-13 ("Judicial review of agency actions under NEPA is available 'to ensure that the agency has adequately considered and disclosed the environmental impact of its actions . . . .'").

B. Arguments unique to Alaska.

The Roadless Rule rulemaking considered alternatives regarding not only the general, nationwide roadless area prohibitions but also regarding the application of the rule to the Tongass. *See, e.g.*, Doc. 1362 (DEIS S-6); Doc. 4609 at 20 (FEIS ES-2). All of the above arguments regarding the Roadless Rule's illegality are applicable to the rulemaking generally and hence encompass Alaska, but the Roadless Rule also violated federal laws relevant only to Alaska. In addition, the separate decision process regarding how to treat the Tongass – recognized as being "unique among national forests," Doc. 1362 (DEIS 1-11 to 1-12) – violated NEPA and the APA for additional reasons beyond those associated with flaws in the general rulemaking. The unique rationale for invalidating the Roadless Rule in Alaska is set forth in the plaintiff-intervenors' opening summary judgment brief, which the State fully endorses and incorporates herein. Still, the State offers the following overview of why USDA's decision to apply the Roadless Rule in Alaska, particularly on the Tongass, was patently irrational.

1. The Roadless Rule violates the "Seek To Meet Timber Demand" provision of the Tongass Timber Reform Act.

The TTRA requires that the USFS seek to meet market demand for timber on the Tongass National Forest. 16 U.S.C. § 539d(a) (congressional directive to "seek to provide a supply of timber

from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle"). Throughout the rulemaking, USDA was well aware that if the Roadless Rule was applied to the Tongass, there would be no possibility of meeting timber demand. *See, e.g.*, Doc. 4609 at 466-47 (FEIS 3-378 to 3-379) (explaining that under all of the Roadless Rule alternatives under consideration, timber supply would be constricted, leading to a "harvest shortfall of approximately 73 to 77 MMBF of timber annually"). A self-imposed prohibition on harvesting the Tongass timber needed to meet market demand cannot be construed as seeking to meet timber demand.

The knowledge that applying roadless area prohibitions on the Tongass would frustrate the USFS' ability to seek to meet Tongass timber demand permeated the NEPA process. For example, on January 20, 2000, Julia Riber in the Washington Office of the EIS team emailed other team members certain information that had been requested by Under Secretary of Agriculture Jim Lyons on Tongass timber demand. Doc. 215. The email explained that the USFS planned to offer an average of 153 MMBF of Tongass timber per year from 2000-2004 and that the roadless area portion of that offer would be 102-108 MMBF. *Id.* The corresponding market demand projections for those years ranged from 96 MMBF to 205 MMBF per year, depending on the market scenario, with the agency believing actual demand would be on the higher end of the estimates. *Id.* Regardless of which market scenario proved to be accurate, the EIS team was informed that "we don't come close to meeting even low market demand relying only on the roaded portion of the planned harvest." *Id.* In other words, prohibiting entry into roadless areas on the Tongass would preclude even a good faith effort to comply with the TTRA.

Similarly, a June 26, 2000 summary comparing maximum Tongass timber offerings possible under different roadless alternatives compared to market demand illustrated the incompatibility of the TTRA and applying the Roadless Rule to the Tongass. Doc. 6067. If road and timber prohibitions

were both imposed on the Tongass, as in the final rule, only 45 MMBF could be offered annually from the roaded areas that would remain open to timber harvest. *Id.* However, even under the low market demand scenario, a minimum of 96 MMBF was needed to meet demand, meaning that only 47% of the market demand could possibly be met under the Roadless Rule assuming the *lowest* estimate of demand. *Id.* The situation grew only more bleak under the high market demand scenario, where no more than 22% of demand could be met. *Id.*

Initially, USDA sought to comply with its TTRA obligations. For example, in the DEIS, the Preferred Alternative for the Tongass was to exempt the Tongass from the roadless area prohibitions until 2004, at which time USDA would assess whether changing market demands might allow timber demands to be met from roaded areas only. Doc. 1362 (DEIS 2-13). The primary rationale offered for the exemption was the TTRA "seek to meet demand" requirement and heavy reliance of Southeast Alaska on timber. *Id.* In a similar vein, a June 25, 2000 draft "talking points" email states that the decision for the Tongass was being postponed because "the Forest Service must meet the requirements of the Tongass Timber Reform Act and seek to meet market demand for timber on the Tongass consistent with providing for the multiple-use and sustained yield of all renewable forest resources." Doc. 5456 at 16. A few months later, a Review Draft of the FEIS stated that one of the reasons the Tongass is unique among the national forests is the "requirements of the Tongass Timber Reform Act." Doc. 5261 at 18. And a draft of "Tongass verbiage" for the Roadless Rule preamble acknowledged that roadless prohibitions "would eliminate approximately 95% of the harvest within inventoried roadless areas [on the Tongass] further destabilizing the timber economy in Southeast Alaska." Doc 1747.

Put simply, the record is conclusive that when USDA chose to impose a prohibition on road construction and timber harvest in Tongass roadless areas, the agency did so with full knowledge of the TTRA consequences. USDA made a conscious decision to render meaningless the congressional

directive on Tongass timber supply in the TTRA.

To the extent Federal Defendants try to argue that the TTRA "seek to meet demand" provision is only aspirational such that the USFS enjoys unfettered discretion in its Tongass timber offerings, such a position would be in marked contrast to the USDA's understanding of the TTRA just prior to the Roadless Rule rulemaking. In September 1999, less than a month before President Clinton directed USDA to undertake the rulemaking on a truncated timeframe, USDA Region 10 (Alaska) produced a 59 page document on "Responding to the Market Demand for Tongass Timber Using Adaptive Management to Implement Sec. 101 of the 1990 Tongass Timber Reform Act." Doc 5795. The document explained that seeking to meet market demand for Tongass timber "requires a great deal of professional judgment, along with a commitment to monitor key parameters of the emerging timber market and to incorporate this information in timber sale planning." *Id.* at 2. The document further explained that the 1997 Tongass Forest Plan included a commitment to ensuring that annual sales were consistent with market demand, and that in 1999, *i.e.*, two years later, Under Secretary Lyons reaffirmed the commitment to use the methodology set forth in the document to implement the timber demand provisions of the TTRA. *Id.* at 5 (explaining that the document "sets forth the process that will be used by the Forest Service to implement the timber demand provisions of the Tongass Timber Reform Act").

Regardless, the FEIS ushered in an abrupt change whereby the Preferred Alternative for the Tongass was Not Exempt. Doc. 4609 at 27 (FEIS ES-9). The primary rationale offered for the changed approach was simply "public comment," *id.* at 63 (FEIS 2-13), as if such a momentous decision was rightly made by popular vote. And in stark contrast to the substantial discussion in the DEIS on why it was necessary to seek to meet timber demand under the TTRA, USDA's final Roadless Rule asserted in conclusory fashion that applying the rule to the Tongass was consistent with the TTRA, 66 Fed. Reg. at 3,254, a conclusion in conflict with both the record and the law. Put simply, given the above

discussed projections for timber demand on the Tongass and the effect of the Roadless Rule on curtailing the Tongass timber supply below that demand, application of the Roadless Rule to the Tongass can only be legal if the seek to meet demand provision of the TTRA has no legal consequence.

But the Court should assume that this section of the TTRA has some meaning. *Tobey v. N.L.R.B.*, 40 F.3d 469, 471 (D.C. Cir. 1994) ("A fundamental principle of statutory construction mandates that we read statutes so as to render all of their provisions meaningful."). That is the conclusion the Ninth Circuit reached in reviewing the statute:

> Implicit in [the district court's decision] is the district court's interpretation of TTRA's provision that the Forest Service shall "seek" to meet market demand for timber. The district court stated that TTRA § 101 is "mandatory," rather than "hortatory." In other words, the Forest Service *must* "seek to meet" market demand.
>
> The wording of the statute is awkward, but, as noted . . . TTRA was written to amend ANILCA by eliminating its timber supply mandate and instructing the Forest Service instead to "seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle" . . . . The revision clearly gives the Forest Service more flexibility than it had under ANILCA, when it was required to harvest a minimum number of board feet. TTRA envisions not an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation. It thus gives the Forest Service leeway to choose among various site-specific plans, provided it follows the procedural requirements of the applicable statutes.

Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 730-31 (9th Cir. 1995). At the very minimum, Congress must have intended that the USFS make a good faith effort to meet timber demand. *NRDC*, 421 F.3d at 809 ("[T]o satisfy the TTRA's earnest admonishment requires the Forest Service to at least *consider* market demand and *seek* to meet market demand."). While many circumstances might make it impossible to actually meet demand, such as serial litigation of timber sales by a recurring cast of environmental litigants, the USFS must at least try. Yet in promulgating the Roadless Rule with immediate application to the Tongass, USDA imposed prohibitions on itself that absolutely guaranteed market demand could not be met on the Tongass. There is simply no rational

interpretation of the TTRA that allows USDA to respond to a congressional directive to "seek to meet timber demand" by promulgating a regulation that prohibits it from offering the very timber needed to meet market demand. The USDA decision to not exempt the Tongass is therefore a violation of the TTRA and should be set aside as unlawful.

2. The Roadless Rule is a withdrawal of federal land in the Chugach and Tongass National Forests in violation of section 1326 of ANILCA.

In ANILCA Congress explicitly prohibited "future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska" without the approval of Congress. 16 U.S.C. § 3213(a).

Despite the clear language of this ANILCA prohibition on executive branch action, the USFS applied the Roadless Rule prohibitions to 14.8 million acres of Alaska national forests. Doc. 4609 at 515 (FEIS A-3). This action was in direct conflict with the finding of Congress that the appropriate balance between protection and development in Alaska had already been achieved and constitutes a withdrawal of public lands in violation of 16 U.S.C. § 3213(a).

When interpreting ANILCA, this Court has previously held that absent a specific definition of "withdrawal" in the statute, it is appropriate to apply the definition of "withdrawal" set forth in the Federal Land Policy and Management Act (FLPMA). *Southeast Conference v. Vilsack*, 684 F. Supp. 2d 135, 144 (D.D.C. 2010). Under FLPMA, a withdrawal is any action that "exempts the covered land from the operation of public laws." *Id.* at 143 (citing *New Mexico v. Watkins*, 696 F.2d 1122, 1124 (D.C. Cir. 1992)).

In *Southeast Conference* this Court distinguished timber harvest from mineral leases because suspending the right to lease minerals is a suspension of public land use laws. *See* 684 F. Supp. 2d at 145. In promulgating the Roadless Rule, USDA choose to prohibit the leasing of minerals. Doc. 4609 at 347 (FEIS at 3-259). Because this suspension of public land use law in Alaska is exactly the type of

action that this Court already has stated is a prohibited withdrawal under ANILCA, *Southeast Conference*, 684 F. Supp. 2d at 145, the Roadless Rule runs afoul of ANILCA and is invalid in Alaska.

VI. REMEDY.

Because Federal Defendants promulgated the Roadless Rule in violation of NEPA and other federal laws, the State requests that the Court vacate the Roadless Rule and reinstate the status quo of national forest management under the NFMA and the individual forest plans required thereunder. 16 U.S.C. § 1604. The normal remedy under the APA for unlawful agency action is for the reviewing court to vacate the agency action. *See Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2000) ("Normally when an agency so clearly violates the APA we would vacate its action . . . ."). And in this case, it is not necessary to reinstate any rule previously in force given that individual forest plans remain in place to govern federal land management. Vacating the Roadless Rule simply will return forest management to the status quo prior to the Roadless Rule's illegal promulgation.

Because Federal Defendants decided to apply the Roadless Rule to the Tongass and Chugach National Forests in Alaska, the action also violated ANILCA and the TTRA (in addition to the above violations that apply nationwide). Therefore, even if this Court were to hold that the Roadless Rule is lawful outside of Alaska, the State asks the Court to vacate the Roadless Rule in Alaska and to return the Tongass and Chugach National Forests to management under their respective forest plans.

VII. CONCLUSION.

For the forgoing reasons, the State of Alaska requests that the Court hold that Federal Defendants acted arbitrarily and in violation of NEPA and the APA in adopting the Roadless Rule. As a result, the Court should vacate the Roadless Rule in its entirety. The State also requests that the Court hold that Federal Defendants acted arbitrarily and in violation of the APA, NEPA, ANILCA and the TTRA when deciding to apply the Roadless Rule to the two national forests in Alaska. Thus,

notwithstanding any other remedy, the Court should vacate the Roadless Rule's application in Alaska, including on the Tongass National Forest.

Respectfully submitted May 11, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015 copies of the foregoing
PLAINTIFF'S STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT FOR MOTION FOR SUMMARY JUDGMENT
were served on all parties registered with ECF for electronic service in this matter

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Attorney for Plaintiff State of Alaska

EXHIBIT 5

2017 District Court Decision in Roadless Rule Challenge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF ALASKA,

Plaintiff,

and

ALASKA FOREST ASSOCIATION,

SOUTHEAST CONFERENCE,

ALASKA ELECTRIC LIGHT & POWER,

ALASKA POWER & TELEPHONE,

ALASKA MINERS ASSOCIATION,

CITIZEN'S PRO ROAD,

ALASKA MARINE LINES, INC.,

NORTHWEST MINING ASSOCIATION,

DURETTE CONSTRUCTION COMPANY,

FIRST THINGS FIRST FOUNDATION,

JUNEAU CHAMBER OF COMMERCE,

CITY OF KETCHIKAN,

KETCHIKAN GATEWAY BOROUGH,

SOUTHEAST STEVEDORING CORP.,

CHRIS GERONDALE,

SOUTHEAST ROADBUILDERS, INC.,

HYAK MINING CO., INC.,

Civil Case No. 11-1122 (RJL)

INSIDE PASSAGE ELECTRIC COOPERATIVE,

CITY OF CRAIG,

and

SOUTHEAST ALASKA POWER AGENCY,

Plaintiff-Intervenors,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE,

GEORGE ERVIN "SONNY" PERDUE III[1], in his official capacity as Secretary of Agriculture,

and

TOM TIDWELL, in his official capacity as Chief of the United States Forest Service,

Defendants,

SOUTHEAST ALASKA CONSERVATION COUNCIL,

ALASKA CENTER FOR THE ENVIRONMENT,

BOAT COMPANY,

[1] Plaintiff filed this case while Secretary Purdue's predecessor, Tom Vilsack, was serving as Secretary of Agriculture. When, during the course of these proceedings, Secretary Purdue succeeded to that office, he became automatically substituted as a defendant. *See* F. R. Civ. P. 25(d).

TONGASS CONSERVATION SOCIETY,)
)
SIERRA CLUB,)
)
WILDERNESS SOCIETY,)
)
NATURAL RESOURCES DEFENSE COUNCIL,)
)
GREENPEACE, INC.,)
)
DEFENDERS OF WILDLIFE,)
)
and)
)
CENTER FOR BIOLOGICAL DIVERSITY,)
)
Defendant-Intervenors.)

MEMORANDUM OPINION
September 20 2017 [Dkt. ## 94, 95, 96, 97]

In 2001, the United States Department of Agriculture ("USDA") promulgated the Roadless Area Conservation Rule—commonly referred to as the "Roadless Rule"—which limits road construction and timber harvesting in national forests. It is this Rule—and its application to the Tongass National Forest (the "Tongass")—that the State of Alaska ("Alaska" or "plaintiff") challenges today. In essence, Alaska argues that the Roadless Rule was promulgated in an unrealistic time frame, without considering the needs of individual states and without weighing the potentially devastating consequences to multiple-use management on national forest lands. Specifically, Alaska alleges that the Roadless Rule violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–70 ("NEPA"), the Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06

("APA"), the Wilderness Act of 1964, 16 U.S.C. §§ 1131–36 ("Wilderness Act"), the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-31 ("MUSYA"), the Organic Administration Act, 16 U.S.C. § 475 ("Organic Act"), the National Forest Management Act, 16 U.S.C. §§ 1600–14 ("NFMA"), the Tongass Timber Reform Act, Pub. L. No. 101–626, 104 Stat. 4426 (1990) (codified as amended in scattered sections of 16 U.S.C.) ("TTRA"), and the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–233 ("ANILCA"). Upon consideration of the record, the relevant law, and the briefs submitted by the parties, I find that plaintiff has not shown that the USDA violated any federal statute in promulgating the Roadless Rule. Defendants' and Defendant-Intervenors' Cross-Motions for Summary Judgment are therefore GRANTED, and Plaintiff's and Plaintiff-Intervenors' Motions for Summary Judgment are DENIED.

BACKGROUND

A. Statutory Framework

The National Forest System ("NFS") currently contains approximately 192 million acres of land. AR Doc. 4609 (FEIS Vol. 1), at 3-111. This land includes 155 proclaimed or designated national forests, 20 national grasslands, 51 purchase units, 8 land utilization projects, 20 research and experimental areas, and 33 "other areas." 36 C.F.R. § 200.1(c)(2). Among the national forests within the Forest Service's jurisdiction is the Tongass National Forest in Southeast Alaska. Covering roughly 16.8 million acres, the Tongass is the nation's largest national forest. 68 Fed. Reg. 75,136, 75,137–39 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294). The Forest Service is responsible for

managing the NFS under, *inter alia*, the Organic Act, the MUSYA, and the NFMA, which authorize the Forest Service to manage NFS lands and designate those lands for multiple uses. In exercising its managerial authority under these statutes, the Forest Service must also comply with the Wilderness Act and NEPA. I will briefly review the relevant statutory text below.

In 1897, Congress enacted the Organic Act, which set forth a multiple-use mandate for the management of the National Forests. The Act mandated that National Forests may be established and administered only for the following purposes: (1) "to improve and protect the forest within the boundaries"; (2) to "secur[e] favorable conditions of water flows"; or (3) "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. Over sixty years later, after the Forest Service was transferred to the Department of Agriculture, Congress codified the Organic Act's multiple-use mandate by enacting the MUSYA. 16 U.S.C. §§ 528–31. The MUSYA directs the Forest Service to "administer the renewable surface resources of the national forests for multiple use and sustained yield." *Id.* § 529. Specifically, the MUSYA identifies "outdoor recreation, range, timber, watershed, and wildlife and fish purposes" as the purposes for which the national forests are to be established and administered. *Id.* § 528.

Four years after Congress enacted the MUSYA, it passed the Wilderness Act, which "established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas.'" 16 U.S.C. § 1131(a). Importantly, the Act explicitly retained Congress's authority to designate

which areas qualify as "wilderness areas." *Id.* § 1132. But to aid Congress in its task of designating wilderness areas, the Act authorized the Secretary of Agriculture to "review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified . . . as 'primitive.'" *Id.* § 1132(b). The Act also delegated to the Forest Service the responsibility of "preserving the wilderness character of the area" and "administer[ing] such area" for "the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." *Id.* § 1133.

In 1976, Congress passed the NFMA, which requires the Forest Service to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). The Act imposes requirements on NFMA's land and resource management plans, including the requirement that any plan for the NFS must "provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the [MUSYA]." *Id.* § 1604(e)(1).

Finally, any time the Forest Service exercises its authority under any of these statutes, it is required to comply with NEPA, which mandates that federal agencies must "carefully consider[] detailed information concerning significant environmental impacts" of their proposed actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Under NEPA, a federal agency must prepare an Environmental Impact Statement ("EIS") whenever a proposed government action qualifies as a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). And that EIS must "state how alternatives considered in it and decisions

based on it will or will not achieve the requirements of [NEPA] and other environmental laws and policies," 40 C.F.R. § 1502.2(d), discuss "[p]ossible conflicts between the proposed action and the objectives of Federal . . . land use plans, policies and controls for the area concerned," *id.* § 1502.16(c), and "present the environmental impacts of the proposal and the alternatives in comparative form," *id.* § 1502.14. Thus, any time the Forest Service takes action to manage NFS lands and designate those lands for multiple uses, it must do so in compliance with NEPA.

B. History of the Rule

The origins of the Roadless Rule date back over four decades, when in 1972 the Forest Service embarked on a Roadless Area Review and Evaluation project ("RARE I") to identify roadless areas on NFS lands and determine their suitability for designation as wilderness, pursuant to its authority under the Wilderness Act. 16 U.S.C. § 1132(b); *see* 66 Fed. Reg. 35,918, 35,919 (July 10, 2001) (to be codified at 36 C.F.R. pts. 219, 294) (describing RARE I efforts). As part of this effort, the Forest Service inventoried approximately 56 million acres that it deemed suitable for designation as wilderness areas. *See Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1205 (D. Wyo. 2003) (discussing RARE I inventory of NFS roadless areas), *vacated and remanded*, 414 F.3d 1207 (10th Cir. 2005). After the RARE I inventory was successfully challenged under NEPA, however, it was abandoned. *See Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973) (enjoining development pursuant to RARE I until the Forest Service completed an EIS), *overruled by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

Four years later, the Forest Service began a more extensive Roadless Area Review and Evaluation project ("RARE II"), which also created an inventory of roadless areas that the Forest Service deemed suitable for designation as wilderness. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d at 1205; *see also California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982) (discussing the Forest Service's second attempt to evaluate the roadless areas in the NFS). Relying on this inventory, Congress designated multiple NFS areas as wilderness, totaling approximately 35 million acres. 66 Fed. Reg. at 35,919; AR Doc. 4609 (FEIS Vol. 1), at 1-5. Areas that were identified as roadless during the RARE II inventory ("inventoried roadless areas" or "IRAs"), but were not subsequently designated as wilderness by Congress, continued to be managed pursuant to each National Forest's individual forest plan. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729–30 (1998). After another successful judicial challenge to the RARE II under NEPA, however, the Forest Service halted its efforts to identify and manage roadless areas. *See Block*, 690 F.2d at 763 (finding the RARE II EIS as submitted by the Forest Service deficient under NEPA).

In the late 1990s, the Forest Service revisited its road-management policy, noting that: (1) use of the National Forests had "shifted substantially toward recreation," (2) there were insufficient funds to maintain existing roads, and (3) there was an "accumulation of new scientific information" suggesting that "ecological impacts from existing roads are more extensive than previously thought." 63 Fed. Reg. 4350, 4350 (Jan. 28, 1998) (to be codified at 36 C.F.R. pt. 212). The USDA subsequently published a proposed interim rule that suspended road construction activities in IRAs, while it

developed "new and improved analytical tools . . . to evaluate the impact of locating and constructing roads." *Id.* at 4352. The Forest Service published the final Interim Roadless Rule on March 1, 1999, which established an 18-month moratorium on road construction in IRAs. 64 Fed. Reg. 7290, 7290 (Feb. 12, 1999) (to be codified at 36 C.F.R. pt. 212).

Later that year, President Clinton ordered the Forest Service to develop a plan to protect IRAs and determine whether non-inventoried roadless areas also needed protection. AR Doc. 4609 (FEIS Vol. 1), at 1-6. Within a week of the President's directive, the Forest Service published a Notice of Intent ("NOI") to prepare a draft EIS ("DEIS"). 64 Fed. Reg. 56,306 (Oct. 19, 1999). Not surprisingly, President Clinton demanded an uncharacteristically fast timeline for government work; he directed the Secretary of Agriculture to publish the final Rule *before* the President left office. AR Doc. 0193, at 23. The Forest Service acknowledged that this would require a very short timeframe for the public to respond to the NOI. AR Doc. 2315, at 7. *Id.* As a result, the NOI provided for a 60-day scoping and public comment period. 64 Fed. Reg. at 56,307.

During the 60-day scoping period, the Forest Service received more than 517,000 comments in response to the NOI, held 187 meetings around the nation (which were attended by approximately 16,000 people), and launched a Roadless Area Conservation website (www.roadless.fs.fed.us) to provide information about the rulemaking. 66 Fed. Reg. 3243, 3248 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294); AR. Doc. 4609 (FEIS Vol. 1, 4-1), at 497. Despite multiple requests to extend the scoping period beyond the 60 days provided for by the NOI, the Forest Service declined to do so. AR Doc. 4485, at 1; AR Doc. 4111 (FEIS Vol. 4), at 80–81, 161, 500, 589.

After assessing the information gathered during the scoping period, the USDA released a proposed rule and DEIS on May 10, 2000. AR Doc. 1362 (DEIS Vol. 1); 65 Fed. Reg. 30,276 (proposed May 10, 2000) (to be codified at 36 C.F.R. pt. 294). The DEIS declared that the purpose of the proposed action was: (1) "to immediately stop activities that have the greatest likelihood of degrading desirable characteristics of inventoried roadless areas"; (2) "to ensure that ecological and social characteristics of inventoried roadless and other unroaded areas are identified and considered through local forest planning efforts"; and (3) "to consider the unique social and economic situation of the Tongass National Forest." AR Doc. 1362 (DEIS Vol. 1), at S-4; 65 Fed. Reg. at 30,277. Based on these three purposes, the proposed rule had three main parts: (1) a Prohibition Rule, which banned road construction and reconstruction in IRAs; (2) a Procedural Rule, which required forest managers to identify additional roadless areas and assess whether they should be protected under individual forest plans; and (3) the Tongass option, which required the Agency to consider the rule's applicability, if any, to the Tongass National Forest. AR Doc. 1362 (DEIS Vol. 1), at S-7 to S-12.

The DEIS identified 54.3 million acres of IRAs that were subject to the proposed rule. 65 Fed. Reg. at 30,276. The Forest Service then considered several alternatives for each of the three parts of the rule. AR Doc. 1362 (DEIS Vol. 1), at S-6 to S-13, 2-2 to 2-13. As to the Prohibition Rule, the USDA considered: (1) taking no action; (2) prohibiting only road construction and reconstruction within unroaded portions of IRAs; (3) prohibiting road building and commodity-purpose timber harvests, but allowing timber cutting for "stewardship purposes" on unroaded portions of IRAs; and (4)

prohibiting road construction, reconstruction, and all timber harvest within unroaded portions of IRAs. *Id.* at S-7 to S-8. For the Procedural Rule, the USDA considered: (1) adding no new procedures; (2) requiring forest managers to consider whether additional conservation measures were warranted for IRAs; (3) requiring that IRAs be considered on a project-by-project basis; and (4) requiring project-by-project consideration until IRAs could be assessed during revisions to forest management plans. *Id.* at S-9 to S-11. Finally, as to the rule's applicability to the Tongass National Forest, the USDA considered: (1) applying the rule to the Tongass; (2) deferring the decision on the rule's applicability to the Tongass until the 5-year review of the Tongass land management plan; and (3) applying the Rule in IRAs falling within specific land use designations defined by the Tongass Forest Plan. *Id.* at S-11 to S-13. In the DEIS, the USDA designated the preferred alternatives as (1) prohibiting only road building on IRAs; (2) deferring consideration of whether additional conservation measures were warranted until forest plan revisions; and (3) deferring the decision as to the rule's applicability to the Tongass until a review of the Tongass's land management plan. *Id.* at 2-13.

In November 2000, as scheduled, the Forest Service issued the final EIS ("FEIS"). AR Doc. 4609 (FEIS Vol. 1). The FEIS contained four material departures from the DEIS. First, the USDA had revised its IRA maps, which increased the total acreage of IRAs subject to the Prohibition Rule from 54.3 million acres to 58.5 million acres. AR Doc. 4609 (FEIS Vol. 1), at 2-23. The revised figure included 4.2 million acres of IRAs not identified in the DEIS or proposed rule. *Id.* Second, it eliminated the distinction

between "roaded" and "unroaded" portions of IRAs so that the Rule would apply to all portions of IRAs, not just the unroaded portions. *Id.* Third, the FEIS changed the preferred alternative with respect to the Prohibition Rule. *Id.* at 2-13 to 2-14. The DEIS chose the alternative that prohibited road construction and reconstruction in IRAs, but the FEIS selected the alternative that prohibited road construction, reconstruction, and timber harvest, except for stewardship purposes, in IRAs. *Id.* And fourth, the FEIS eliminated the Procedural Rule portion of the Roadless Rule on the ground that the procedural aspects of the Rule would be addressed in a separate rulemaking. *Id.* at ES-2. Like the DEIS, the FEIS considered several alternatives for the Prohibition Rule. *Id.* at 3-21 to 3-403. As to the Tongass, while the DEIS considered three alternatives, the FEIS considered four: (1) Tongass Not Exempt—which would apply the Rule to the Tongass; (2) Tongass Exempt—which would exempt the Tongass from the Rule; (3) Tongass Deferred—which would defer the decision as to the Rule's applicability to the Tongass until the 5-year review of the Tongass land management plan; and (4) Tongass Selected Areas—which would apply the Rule only to selected areas of the Tongass identified in the Tongass's land management plan. *Id.* at 2-10 to 2-12.

On January 12, 2001, in the final hours of the Clinton Administration, the Forest Service published the final Roadless Rule and the Record of Decision ("ROD") on the rule. 66 Fed. Reg. 3243 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). The final Rule—applicable to the 58.5 million acres of IRAs identified in the FEIS—prohibits road construction in IRAs, as contemplated by the preferred alternative from the FEIS. *Id.* at 3272–73. This prohibition is subject to several exceptions, including when a road is

needed "in conjunction with the continuation, extension, or renewal of a mineral lease." *Id.* The Rule also prohibits timber harvesting in inventoried roadless areas, subject to limited exceptions. *Id.* at 3273. With respect to the Tongass, the USDA determined that the Tongass should not be exempt from the Rule. *Id.* at 3254. To ease the transition for forest-dependent communities, the USDA exempted any timber projects and related road construction in IRAs that were planned on or before the date the Rule was issued. *Id.*

C. Litigation History

As one might expect for a far-reaching environmental regulation such as this, the Roadless Rule faced several judicial challenges immediately after it was promulgated. Indeed, despite the USDA's hopes that the Rule would reduce litigation about forest management, *id.* at 3244, 3246, within a year of its adoption, a federal judge in Idaho granted a preliminary injunction enjoining the Rule on the ground that it violated NEPA. *Kootenai Tribe of Idaho v. Veneman*, No. CV01-10-N-EJL, 2001 WL 1141275, at *2 (D. Idaho May 10, 2001). The Ninth Circuit reversed, holding that plaintiffs had not shown a likelihood of success on the merits of their NEPA claim. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1126 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178–80 (9th Cir. 2011) (en banc). After the Ninth Circuit issued the mandate in *Kootenai* in April of 2003, the Roadless Rule took effect. *See California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1007 (9th Cir. 2009) (summarizing the history of the Roadless Rule). But in 2008, a Wyoming district court again permanently enjoined the Roadless Rule, finding that it violated NEPA, the Wilderness Act, and the APA. *Wyoming v. U.S. Dep't of Agric.*, 570

F. Supp. 2d 1309, 1355 (D. Wyo. 2008). In 2011, the Tenth Circuit once again reversed that judgment. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011).

The State of Alaska has also challenged the Roadless Rule once before. In a complaint filed in the District of Alaska just 19 days after the Rule was published, Alaska alleged that the Roadless Rule violated, *inter alia*, NEPA, the APA, the ANILCA, and the TTRA. Complaint, *Alaska v. U.S. Dep't of Agric.*, No. 3:01-cv-00039-JKS (D. Alaska Jan. 31, 2001), ECF No. 1. That case settled, and Alaska's complaint was dismissed. In exchange for Alaska's voluntary dismissal of its case, however, the USDA agreed to publish a proposed rule that would *temporarily* exempt the Tongass from the application of the Roadless Rule, as well as an advanced notice of proposed rulemaking to permanently exempt the Tongass from the Rule. 68 Fed. Reg. 41,865, 41,866 (Jul 15, 2003) (to be codified at 36 C.F.R. pt. 294); *see Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 962 (9th Cir. 2015) (en banc) (describing the history of the Alaska litigation). Five months later, the USDA issued a ROD promulgating the final Tongass exemption. 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294). Importantly, the ROD found that "the overall decisionmaking picture [was] not substantially different" from the ROD that was promulgated in 2001 and that the public comments about the Tongass exemption "raised no new issues . . . not already fully explored" in the initial rulemaking. *Id.* at 75,141, 75,139. The USDA accordingly relied on the 2001 FEIS rather than preparing a new one. *Id.* at 75,136, 75,141. Contrary to the 2001 ROD, the 2003 ROD concluded that application of the Roadless Rule to the Tongass was *unnecessary* to maintain the area's roadless values. *Id.* at 75,137.

judgment, but before this Court issued its opinion, the Ninth Circuit decided *Organized Village of Kake*, 795 F.3d at 956. Accordingly, I issued an order shortly thereafter requiring the parties to submit supplemental briefing on the potential res judicata effects of that decision. *See* ECF No. 91. The motions for summary judgment, and the supplemental briefing, are now ripe for review.

STANDARD OF REVIEW

Because NEPA, the NFMA, the MUSYA, the TTRA, ANILCA, the OAA, and the Wilderness Act do not create a private right of action for violations of those statutes, I review the Forest Service's promulgation of the Roadless Rule as a final agency action under the APA. 5 U.S.C. §§ 551–59. Under Federal Rule of Civil Procedure 56(a), summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Because this case challenges a final agency action under the APA, my review "is based on the agency record and limited to determining whether the agency acted arbitrarily or capriciously." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009). The Supreme Court has instructed that agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In conducting my review, I am mindful of the fact that "the role of the agency [is] to resolve factual issues," whereas the sole "function of the district court is to determine

The Tongass Exemption was challenged in the District of Alaska in 2009 on the grounds that it violated NEPA and the APA. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960, 967 (D. Ala. 2011). Alaska intervened as a party-defendant in that case. *Id.* at 961. The district court agreed with plaintiff, finding that the Tongass Exemption violated the APA because "the Forest Service provided no reasoned explanation as to why the Tongass Forest Plan protections it found deficient in [2001], were deemed sufficient in [2003]." *Id.* at 974. The court accordingly vacated the Tongass exemption. *Id.* at 977. Alaska appealed that decision, and the Ninth Circuit reversed. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 746 F.3d 970, 973 (9th Cir. 2014). But on rehearing en banc, the Ninth Circuit reversed, holding that the Department did not provide a reasoned explanation as to why it made such a vast change in policy while relying on the identical factual record it compiled in 2001, when it explicitly chose not to exempt the Tongass from the Rule. *Organized Vill. of Kake*, 795 F.3d at 959.

D. Procedural History of this Case

Alaska filed the present action in this Court in 2011, in which it challenges the Roadless Rule under several federal statutes, including the APA and NEPA. Compl. ¶ 1, ECF No. 1. Various interest groups intervened as both plaintiff-intervenors and defendant-intervenors, and this Court granted their motions. *See* ECF Nos. 11, 17, 25, 27. On March 25, 2013, this Court held that plaintiff's claim was barred by the statute of limitations and accordingly granted defendants' motion to dismiss. *See* ECF Nos. 58, 59. Plaintiff appealed, however, and our Circuit reversed and remanded, holding that plaintiff had timely filed its complaint. *See* ECF No. 66. Both parties moved for summary

whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (quoting *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985)). Accordingly, I must determine "whether the agency acted within the scope of its legal authority, . . . explained its decision, . . . relied [on facts that] have some basis in the record, and . . . considered the relevant factors." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995). Thus, unless I find that the agency has acted arbitrarily and capriciously, I cannot disturb the agency's decision.

DISCUSSION

A. Standing

I begin this case—as I do all cases—by assessing whether I have jurisdiction to review the merits of plaintiff's and plaintiff-intervenors' claims. In their cross motion for summary judgment, the federal defendants argue that plaintiff and plaintiff-intervenors have failed to satisfy their burden on standing because "neither parties' opening brief contains even the briefest averment as to standing." Defs.' Mem. Supp. Summ. J. & in Opp'n to Pl.'s & Pl.-Intervenors' Mots. Summ. J. 12, ECF No. 76-1 ("Defs.' Mem."). In particular, they cite *Sierra Club v. EPA*, in which our Circuit stated that a plaintiff must set forth "its arguments and any affidavits or other evidence" in its motion for summary judgment, "and not . . . in reply to the brief of the respondent agency." 292 F.3d 895, 900 (D.C. Cir. 2002). According to the federal defendants, plaintiff's and plaintiff-intervenors' failure to do so warrants dismissal of their complaints for lack of

jurisdiction. Unfortunately for defendants, our Circuit's rule is not as rigid as they make it out to be. How so?

In *American Library Association v. FCC*, the Court clarified that plaintiffs "should explain the basis for their standing at the earliest appropriate stage in the litigation" when they "*have good reason to know that their standing is not self-evident*." 401 F.3d 489, 493 (D.C. Cir. 2005). The Court further explained that "[n]othing in *Sierra Club* suggests that it is intended to create a 'gotcha' trap whereby parties who reasonably think their standing is self-evident nonetheless may have their cases summarily dismissed if they fail to document fully their standing at the earliest possible stage in the litigation." *Id.* In this case, when plaintiff-intervenors filed their respective motions to intervene, they included affidavits and statements of facts in which they discussed their interest in the litigation and their bases for Article III standing. *See, e.g.*, ECF Nos. 11 to 11-5, 17 to 17-21, 21, 25-1 to 25-2. Defendants did not oppose these motions for intervention, and after satisfying myself of plaintiff-intervenors' Article III standing, I granted the motions. *See* ECF No. 35; *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731–32 (D.C. Cir. 2003) ("[A] party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution."). As such, plaintiff-intervenors had reasonable cause to believe that their standing was self-evident. *American Library*, 401 F.3d at 493.

Alaska, too, had reason to believe that it did not need to submit additional evidentiary support for its Article III standing. The injuries Alaska will suffer as a result of the Roadless Rule are extensively documented in the administrative record for the

rulemaking, which is a part of the record in this case. *See, e.g.*, AR Doc. 4609 (FEIS Vol. 1), at 3-380 (estimating that the application of the Roadless Rule to the Tongass would result in between 864 and 895 lost jobs and between $37.3 million and $38.7 million in lost personal income). Indeed, the very fact that the USDA treated the Tongass Forest differently from any other national forest—and considered four different alternatives for the Tongass in its FEIS—shows that it recognized that the Roadless Rule would have a significant impact on the Tongass. The USDA even acknowledged that job loss and damage to the state and local timber economies were the two main reasons that it chose to consider alternatives specific to the Tongass in its rulemaking. *See* AR Doc. 5796, at 13. And when the USDA promulgated the Tongass exemption in 2003, it did so because "the roadless rule was predicted to cause substantial social and economic hardship in communities throughout Southeast Alaska." 68 Fed. Reg. at 75,136. Thus, I will decline defendants' urging that I summarily dismiss plaintiff's and plaintiff-intervenors' claims for failing to argue standing in their opening briefs.

Having decided that plaintiff and plaintiff-intervenors did not waive their right to argue standing, I now turn to the question whether plaintiff and plaintiff-intervenors have, in fact, established standing.[2] To satisfy Article III's standing requirement, plaintiff and

[2] After the en banc Ninth Circuit vacated the 2003 Tongass exemption to the Roadless Rule, *see Organized Vill. of Kake*, 795 F.3d at 963, I ordered the parties to submit supplemental briefing as to whether this Court was bound by the Ninth Circuit's determination of standing in that case. *See* ECF No. 91. Although the Ninth Circuit held that Alaska had standing to appeal the decision in *Organized Village of Kake*, the parties—and this Court—agree that the Ninth Circuit's holding does not bind this Court to reach the same conclusion. This is because the doctrine of issue preclusion bars successive litigation of an issue of fact or law only where: (1) "the same issue now being raised [was] contested by the parties and submitted for judicial determination in the prior case"; (2) "the issue [was] actually and necessarily determined by a court of competent jurisdiction in that prior case"; and (3) "preclusion in the second case

plaintiff intervenors were required to show that (1) they have suffered an "injury in fact" that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to defendants' challenged action; and (3) it is likely, rather than merely speculative, that a favorable decision in this case will redress the injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Here, Alaska easily satisfies this standard. First, the administrative record confirms that the total direct and indirect job and income losses from the Roadless Rule would be around 864 to 895 jobs and a corresponding 37.3 to 38.7 million dollars in income. AR Doc. 4609 (FEIS Vol. 1), at 3-380. Second, it is clear that the injury can be traced to defendants' promulgation of the Roadless Rule because the decline in logging activity—and the resultant job loss—would not occur but for the USDA's implementation of the Rule. And third, a favorable decision (*i.e.*, a vacatur of the Roadless Rule) would redress Alaska's injury.

As to the plaintiff-intervenors, all of them filed motions to intervene, along with exhibits outlining the injuries they would suffer under the Roadless Rule. *See generally* ECF Nos. 11 to 11-5, 17 to 17-21, 21, 25-1 to 25-2. And all of them adequately identified their respective interests in this case. For example, Southeast Alaska Power

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[would] not work a basic unfairness to the party bound by the first determination." *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Amer. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992). Here, the issue of Alaska's standing was not actually litigated by the parties in *Organized Village of Kake*, 795 F.3d at 956. In that case, Alaska and the United States were not adversaries. Rather, Alaska was defending the Tongass exemption, and Alaska intervened as defendant-intervenor. *See* Fed. Defs.' & Def.-Intervenors' Suppl. Br. Addressing the Court's Sept. 2, 2016 Order, ECF No. 98 ("Defs.' Suppl. Br."), Ex. 7 (Alaska's Mot. Intervene, *Organized Vill. of Kake v. U.S. Dep't of Agric.*, No. 1:09-cv-00023 (D. Alaska Jan. 28, 2010), ECF No. 23). Further, neither Alaska nor the USDA had the opportunity to litigate the question of Alaska's standing in that case; instead, the en banc Ninth Circuit reached the issue *sua sponte* on appeal. I accordingly address the issue of plaintiff's and plaintiff-intervenors' standing *de novo*.

Agency—an owner of two hydroelectric projects and associated transmission facilities—explained that, without road access, its maintenance work would need to be done by a helicopter, which is prohibitively expensive. *See* Mot. Intervene 3 & Ex. 2, ¶ 11, ECF Nos. 25, 25-2. Similarly, the Alaska Forest Association alleged economic injury due to the likely lost timber sales that its members would experience as a result of the Rule. *See* Mot. Intervene 7 & Ex. 2, ¶ 9, ECF Nos. 11, 11-2. And the Southeast Conference demonstrated that its members would face loss of income due to their inability to harvest timber, mine, and operate hydroelectric projects in federal acreage. *See* Mot. Intervene 8 & Ex. 3, ¶ 12, ECF Nos. 11, 11-2. As this Court already determined when deciding to grant plaintiff-intervenors' motions to intervene, *see, e.g.*, Aug. 15, 2011 Minute Order, plaintiff-intervenors have adequately established injuries-in-fact sufficient to satisfy Article III. And, much like Alaska, plaintiff-intervenors satisfy the causation and redressability requirements of constitutional standing because, but for the Roadless Rule, they would not suffer the economic injury of which they complain. I therefore conclude that both Alaska and plaintiff-intervenors have satisfied their burden on Article III standing, and thus this Court has jurisdiction to assess the merits of their claims.[3]

[3] The Supreme Court has previously held that the protection of the environment falls within NEPA's zone of interests. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983); *see also Mountain States Legal Found. v. Madigan*, No. 92–0097, 1992 WL 613292, at *1 (D.C. Cir. May 7, 1992) ("As to what is the zone of interests sought to be protected by NEPA, the Supreme Court has made clear that NEPA was designed to protect 'the physical environment—the world around us so to speak.'" (quoting *Metro. Edison*, 460 U.S. at 772)); *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975) ("[T]he environmental interests [NEPA] seeks to protect are shared by all citizens."). Here, plaintiff and plaintiff-intervenors assert that the Tongass will be threatened by implementation of the Roadless Rule. These interests fall within NEPA's goal of preventing harm to the environment, and thus, plaintiff's and plaintiff-intervenors' alleged injuries fall within the zone of interests that NEPA aims to protect. As such, plaintiff and plaintiff-intervenors have satisfied the requirements of prudential standing as well.

B. Res Judicata

Before turning to the substance of plaintiff's and plaintiff-intervenors' claims, there is one more procedural hurdle this Court must scale: whether the doctrine of claim preclusion bars Alaska from raising its claims in this Court. After the en banc Ninth Circuit vacated the 2003 Tongass exemption to the Roadless Rule, *see Organized Village of Kake*, 795 F.3d at 963, I ordered the parties to submit supplemental briefing as to whether the doctrine of claim preclusion barred Alaska from claiming that the Roadless Rule is invalid as applied to the Tongass. *See* ECF No. 91. Under the doctrine of claim preclusion, "a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). Our Circuit has held that "a subsequent lawsuit will be barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006). Importantly, the doctrine of claim preclusion "precludes the parties or their privies from relitigating issues that were or *could have been raised*" in the first action. *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Because Alaska and the USDA were both parties in *Organized Village of Kake*, and that case resulted in a final, valid judgment by a federal court, three of the four elements of claim preclusion are satisfied here. This Court is therefore tasked with deciding whether the remaining element of claim preclusion is also met. That is, I

must decide whether this case involves the same claims or causes of action such that Alaska could have raised its challenge to the Roadless Rule in *Organized Village of Kake*. I hold that it does not.

Upon review of the Ninth Circuit's decision in *Organized Village of Kake*, it is clear that the Court did not address whether the Roadless Rule is valid as applied to the Tongass. Instead, the Court's review was limited to deciding whether the Tongass Exemption—a regulation promulgated two years after the Roadless Rule—was valid. In ruling that the Tongass exemption violated the APA, the Court did not hold that the Roadless Rule *should* be applied to the Tongass; rather, the Court held that the USDA's record of decision ("ROD") did not provide a reasoned explanation for its change of course. *Organized Village of Kake*, 795 F.3d at 959. Indeed, the Court questioned why, just two years after finding that the Roadless Rule should apply to the Tongass—and relying on an identical factual record to the one that formed the basis of the Roadless Rule—the USDA reversed course and found that it was unnecessary to apply the Rule to the Tongass. *Id.* Critically, nowhere in the Ninth Circuit's opinion does it address whether the Roadless Rule—in its original form—is valid under the APA. It is therefore clear that the issue of the Roadless Rule's application to the Tongass was not raised in *Organized Village of Kake*. The only remaining question is whether Alaska could have—and did not—raise its challenges to the Rule in that case.

Relevant to this question is the fact that the USDA and Alaska were litigating in favor of the same position in *Organized Village of Kake*. In that case, the USDA was defending the Tongass exemption to the Roadless Rule, and Alaska intervened as a

defendant. *See* Defs.' Suppl. Br., Ex. 7. Thus, Alaska's and the USDA's interests were aligned. To raise its challenges to the Roadless Rule, Alaska would have had to bring a crossclaim against the USDA. But neither the parties nor this Court have found authority to support the notion that a defendant who failed to file a crossclaim against a co-defendant is barred by claim preclusion from later raising that claim in a new case. Indeed, crossclaims are permissive by definition. *See* 6 Charles Alan Wright et al., Federal Practice and Procedure § 1431 (3d ed. 2016) ("A party who decides not to bring a claim under Rule 13(g) will not be barred by res judicata, waiver, or estoppel from asserting it in a later action, as the party would if the claim were a compulsory counterclaim under Rule 13(a)."). Indeed, it would be quite the rigid rule to require Alaska to challenge an older version of the Roadless Rule in a litigation focused solely on the new version of the rule. And it would be an even harsher remedy to hold that Alaska forfeited all of its claims by failing to do so. Fortunately for plaintiff, this Court has no reason to conclude that the doctrine of claim preclusion is so unforgiving as that. I accordingly hold that Alaska's claims are not barred by claim preclusion, and I turn to the merits of this dispute.

C. Alaska's General Challenges to the Roadless Rule Nationwide

1. Alaska's Challenge under NEPA

Alaska raises several challenges to the Roadless Rule under NEPA, each of which I address below. Under NEPA, federal agencies must "consider fully the environmental effects of their proposed actions." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010). Importantly, NEPA "does not mandate particular

results," but instead prescribes procedures that agencies must follow to ensure that they "take a 'hard look' at the environmental consequences of proposed federal action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 352 (1989); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 68 (D.C. Cir. 2011) ("Put simply, NEPA ensures 'a fully informed and well-considered decision, not necessarily the best decision.'" (quoting *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 503)). Mindful of these requirements that NEPA imposes, I find that the USDA complied, indeed, with its obligations under the statute.

a. The Purpose and Need Statement

In light of the fact that the Forest Service reported that 2.8 million acres of IRAs had been roaded in the 20 years prior to the rulemaking, the stated purpose of the Roadless Rule was to avoid further loss of roadless areas. AR Doc. 4609 (FEIS Vol. 1), at 1-14 ("The purpose of this action is to conserve and protect the increasingly important values and benefits of roadless areas. . . ."). Alaska insists, however, that the stated objective for the Roadless Rule was arbitrary and capricious "because it was founded on a fundamental assumption that ran contrary to evidence then known to USDA, *i.e.*, that inventoried roadless areas were being increasingly lost to roadbuilding." Pl.'s P. & A. Supp. Summ. J. 10, ECF No. 72 ("Pl.'s Mem."). According to Alaska, the Forest Service failed to disclose in the DEIS—and did not adequately disclose in the FEIS—that "even without the Roadless Rule, [Forest Service] wilderness experts conservatively estimated that the amount of unroaded national forest land would *increase* by at least 8.4 million

acres over the next 40 years due to road decommissioning." *Id.*; AR Doc. 6004, at 690. Upon review of the administrative record, I disagree.

Our Circuit has made clear that it is the prerogative of the agency to define the purpose of a rulemaking, and I must uphold an agency action "so long as the objectives that the agency chooses are reasonable." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991); *see also Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72–73 (an agency's definition of purpose and need is reviewed under the "rule of reason"). Here, the USDA asserts that Alaska misunderstands the important ecological differences between IRAs and new unroaded areas that are created through road decommissioning. Defs.' Mem. 14. The record shows that IRAs protect the watersheds that provide drinking water to millions of Americans, and they contain and protect more than 220 species that are listed as threatened, endangered, or proposed for listing under the Endangered Species Act. 66 Fed. Reg. at 3245, 3247; AR Doc. 4609 (FEIS Vol. 1), at 1-1. But because IRAs were usually managed at the local forest level—rather than on a national level—most forest plans allowed for road building before the promulgation of the Roadless Rule. 66 Fed. Reg. at 3246. In the absence of additional protections, the USDA projected that an additional 5 to 10 percent of IRAs would be roaded by 2020, and 18 to 28 percent of existing IRAs would be roaded by 2040. AR Doc. 4609 (FEIS Vol. 1), at 3-34. Despite Alaska's assertion that all areas without roads are of equal value, the USDA explicitly rejected this idea in the FEIS because decommissioned roads continue to have adverse environmental impacts. *Id.* at 2-18. This Court is therefore satisfied that

the USDA's purpose and need statement for the Roadless Rule does not violate the rule of reason.

b. The Cumulative Effects of the Roadless Rule

Alaska's next attack on the Roadless Rule is that the USDA unlawfully failed to disclose the cumulative effects of other roads policies. Under NEPA, an agency's EIS is required to examine a proposed project's direct, indirect, and cumulative impacts. 40 C.F.R. §§ 1508.7, 1508.8; *see also* 42 U.S.C. § 4332; 40 C.F.R. §§ 1502.16, 1508.25. As part of this process, the agency "must also assess the impact the proposed project will have in conjunction with other projects in the same and surrounding areas . . . and must include past, present, and reasonably foreseeable future actions." *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 503. Here, Alaska claims that the USDA intentionally withheld and misrepresented the fact that other rulemakings related to NFS roads would create more than 8 million acres of new unroaded national forest in the foreseeable future. Pl.'s Mem. 13–14. Unfortunately for plaintiff, I cannot agree with its reading of the administrative record.

Despite plaintiff's claims of intentional withholding of the Forest Service's Roads Policy, the FEIS contains an extensive review of the cumulative effects of the Roadless Rule, including a discussion of the Roads Policy. AR Doc. 4609 (FEIS Vol. 1), at 1-8 to 1-20, 3-34 to 3-39, 3-240 to 3-241, 3-397 to 3-398. For example, the FEIS makes clear that the decommissioning of roads under the Roads Policy—along with the ongoing trend of building fewer roads—would likely result in a reduction of the existing road system from 386,000 miles to between 260,000 and 300,000 miles by 2040. *Id.* at 3-34 to 3-36.

Although the FEIS notes that there is uncertainty regarding precisely how many unroaded areas will be created as a result of the road decommissioning, it discloses that the USDA "estimates that the unroaded area acres are likely to increase 5% to 10% by the time NFS roads stabilize at 260,000 miles to 300,000 miles nationally." *Id.* at 3-38. Alaska insists that this disclosure is not enough, and that the Agency failed to disclose the crucial estimate that 8.4 million acres of new unroaded areas would be created in the near future. Pl.'s Mem. 17. But it is clear from the record that the FEIS identified the 8.4 million acre estimate at least three times. *See, e.g.*, AR Doc. 4609 (FEIS Vol. 1), at 3-221, 3-230, 3-241. As such, this Court finds no evidence that the USDA intentionally misled the public as plaintiff suggests. Pl.'s Mem. 15, 18.

c. Informed Comment and Decisionmaking

Plaintiff also challenges the rulemaking on the ground that the USDA failed to gather informed comment and thus failed to make an informed decision in violation of NEPA. Alaska seems to want this Court to presume that, because the USDA conducted such a far-reaching rulemaking in an extraordinarily short time period, the USDA *necessarily* did not satisfy NEPA's goals of adequate public disclosure and informed decision-making. *Id.* at 20. Indeed, the fact that the USDA issued a rule affecting a whopping 2 percent of all land in the United States in less than 15 months is alarming, especially in light of the crawling pace at which administrative agencies typically conduct their business. AR Doc. 1535, at 2; *compare id.* (October 13, 1999 presidential directive to commence rulemaking), *with* 66 Fed. Reg. 3243 (Jan. 12, 2001) (promulgation of Roadless Rule less than 15 months later). But upon review of the record herein, I find

that the USDA complied with NEPA in conducting its public comment and decisionmaking processes.

First, Alaska insists that the USDA's rushed effort to gather information made it impossible for individual forests to contribute to the decisionmaking process. Pl.'s Mem. 21–23. As evidence of this, Alaska cites a memorandum to regional foresters that required them to provide "information on the inventoried roadless areas in their forests" in just two days, information on the existing roads in the forest and "the estimated number of roads" to be constructed or closed for timber projects in four days, and other information in fifteen days. *Id.* at 21. Alaska also cites an email that, in its view, "epitomizes the rushed nature of the entire rulemaking." *Id.* at 22. This email required information "on an aspect of impacts" by close of business, and acknowledged that "many of you may not read this prior to COB today." *Id.* Based on this evidence, Alaska concludes that the USDA's rushed approach led to "significant internal issues . . . regarding the accuracy of the data." *Id.* Unfortunately for plaintiff, however, the pace of the information-gathering process does not necessarily bear upon the adequacy or reliability of the information gathered.

Although the USDA sought extensive contributions from Forest Service field offices on a relatively abbreviated timeline, the information the USDA sought was generally already in the possession of those field offices. For example, the USDA requested existing acreage data, but IRAs had been mapped for more than 30 years and were included in individual forest plans. *See* AR Doc. 2315, at 7. This Court cannot conclude that such requests were unreasonable in light of the fact that the information

was readily accessible to the field offices. And Alaska has not proffered any other evidence that shows a meaningful inaccuracy in the evidence the USDA relied upon during the rulemaking process.

Second, Alaska argues that the USDA erred in denying Alaska's request to participate in the rulemaking as a "cooperating agency" pursuant to NEPA. Pl.'s Mem. 24–25. The law is clear, however, that the decision whether to grant cooperating agency status is committed to the discretion of the agency and is not judicially reviewable under the APA. *See* 40 C.F.R. §§ 1501.6, 1508.5. This Court's role in reviewing Alaska's argument on this point therefore ends here.

Third, Alaska complains that the USDA erred in declining to extend the periods for public comment during scoping and on the DEIS. Pl.'s Mem. 25. While it is not surprising—given the scope of the proposed rule and the condensed timeframe for the rulemaking—that many state and local governments sought extensions on the comment period, the USDA was not required to grant those requests. NEPA's implementing regulations establish a minimum requirement of only 45 days for public comment. 40 C.F.R. § 1506.10(c). The 69-day period the USDA provided here is more than 50 percent beyond the minimum requirement. And it is clear from the record that the Forest Service garnered significant public input during that time. During that 69-day period, the Forest Service held over 400 public meetings (including over 30 in Alaska), which were attended by over 23,000 people. AR Doc. 4609 (FEIS Vol. 1), at 1-7; AR Doc. 3604. The Forest Service also received over 1.1 million written comments on the DEIS during this time. AR Doc. 4609 (FEIS Vol. 1), at 1-7. Despite Alaska's concerns regarding the

breadth of the rule, it is not the role of this Court to decide whether more time would have been beneficial. I must decide only whether the comment period was insufficient under the law, and I hold that it was not.

Finally, Alaska avers that the USDA's failure to disclose adequate maps identifying IRAs to the public undermined the validity of the rulemaking process. Pl.'s Mem. 27. According to Alaska, "[w]ithout such critical information that goes right to the heart of the need (or lack therefore [sic]) for the Roadless Rule, the comments received from the public were not informed comments and the USDA decision was not an informed decision process." *Id.* Based on the record before me, however, I cannot agree. Contrary to Alaska's assertions, the Forest Service made available state-wide maps of all IRAs *four months prior* to the release of the DEIS. AR Doc. 76. And with both the DEIS and the FEIS, the Forest Service produced both a state-level map for each state and a more detailed forest-level map for each forest within the state. *See, e.g.*, AR Doc. 1364 (DEIS Vol. 2), at 1, 5–10; AR Doc. 4110 (FEIS Vol. 2), at 1, 5–10. Both of these maps showed IRAs in detail. *Id.* And while Alaska identifies a handful of comments criticizing the mapping, *see* Pl.'s Mem. 22, 29, these isolated issues fall far short of demonstrating that the alleged deficiencies in the maps violated NEPA.

d. The Supplemental EIS

Alaska's final challenge to the Rule under NEPA is that the differences between the DEIS and FEIS were so significant as to require the USDA to prepare a supplemental EIS for additional public comment. *Id.* at 30. Indeed, supplemental NEPA analysis is required if there are "*significant* new circumstances or information relevant to

environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added). But our Circuit has emphasized that a "supplemental EIS is only required where new information 'provides a *seriously* different picture of the environmental landscape.'" *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002) (quoting *Wisconsin v. Weinberger*, 745 F.2d 412, 218 (7th Cir. 1984)). And an agency is "generally entitled to deference when it determines that new information or a change made to the proposed action does not warrant preparation of a supplemental EIS." *Wyoming*, 661 F.3d at 1258 (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 375–77 (1989)). Alaska sets forth two main changes between the DEIS and the FEIS that allegedly required a supplemental EIS: (1) the FEIS identified approximately 7 million additional acres of IRAs that would be subject to the Rule; (2) the USDA changed its proposed alternative from exempting the Tongass to not exempting the Tongass. Pl.'s Mem. 30. As such, I must decide whether these changes between the DEIS and the FEIS were so substantial as to require a supplemental EIS. Unfortunately for plaintiff, I hold that they were not.

Alaska's claim that seven million additional acres became subject to the Rule refers to two changes that occurred between the DEIS and the FEIS: (1) the decision to eliminate the 2.8 million acres of IRAs that had been roaded after their designation as IRAs; and (2) the addition of 4.2 million acres that occurred after the Forest Service corrected IRA maps. AR Doc. 5091. With respect to the 2.8 million acres, the DEIS proposed excluding them from the road-building prohibition because they had become "roaded." AR Doc. 1362 (DEIS Vol. 1), at 2-13. After public comment revealed

confusion regarding the division between "roaded roadless areas" and "unroaded roadless areas," however, the USDA made the general prohibition on roadbuilding applicable across all IRAs. 66 Fed. Reg. at 3251, 3272; AR Doc. 4609 (FEIS Vol. 1), at 2-23. As such, it is clear that the Forest Service had already considered the environmental effects of applying the Roadless Rule to both roaded and unroaded portions of IRAs in the DEIS, so it did not act arbitrarily and capriciously when it chose not to prepare a supplemental EIS after it made that change in the FEIS.

The Forest Service was similarly not required to prepare a supplemental EIS when it revised the maps to include an additional 4.2 million acres in the IRAs that would be subject to the Rule. The Forest Service indicated in the proposed rule that "[p]rior to finalizing this proposed rule, map adjustments may be made for forests and grasslands currently undergoing assessments or land and resource management plan revisions," thereby increasing or decreasing the total acreage of IRAs affected. 65 Fed. Reg. at 30,279. And after making these map adjustments, the Forest Service increased the "total inventoried roadless area acreage . . . from 54.3 million acres in the DEIS to 58.5 million acres in the FEIS." AR Doc. 4609 (FEIS Vol. 1.), at 2-23; *see also id.* at 1-1 n.2. But because these additional 4.2 million acres shared the same ecological characteristics as those evaluated in the DEIS, they were still "qualitatively within the spectrum of alternatives that were discussed in the draft." 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981); *see also id.* ("If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared.").

With respect to the Tongass alternative, there is nothing in NEPA that requires a supplemental EIS when an agency switches the alternative it identifies as the preferred alternative. Indeed, the Council on Environmental Quality has specifically instructed that, "[i]f [the chosen alternative] is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed." *Id.* Here, the USDA provided a range of alternatives for the Tongass in both the DEIS and the FEIS, and after engaging in the NEPA process and evaluating the public comments and impacts of the alternatives, it decided to switch its preferred alternative. *See* AR Doc. 1362 (DEIS Vol. 1), at 2-10 to 2-13; AR Doc. 4609 (FEIS Vol. 1), at 2-10 to 2-123. Importantly, the USDA disclosed in the DEIS the alternative of not exempting the Tongass, and it received public comment on this alternative. The USDA therefore was not required to prepare a supplemental EIS when it changed the preferred alternative for the Tongass.

2. Alaska's Challenge Pursuant to the Regulatory Flexibility Act

Although Alaska concedes that it may not bring a claim under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601–12, it argues that the USDA's disregard for the RFA concerns of the Small Business Administration ("SBA") during the rulemaking process demonstrates that the rulemaking was arbitrary and capricious. Pl.'s Mem. 34. The RFA "obliges federal agencies to assess the impact of their regulations on small businesses." *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001). But importantly, Alaska does not seek review of the USDA's compliance with the RFA; rather, Alaska alleges that the USDA violated NEPA by failing to disclose the position

of—and comments made by—the SBA. Pl.'s & Intervenor-Pls.' Joint Consolidated Reply Supp. Summ. J. & in Opp'n. to Fed. Defs.' & Intervenor-Defs.' Cross Mots. Summ. J. 12, ECF No. 81 ("Pl.'s Reply"). Specifically, Alaska asserts that the USDA was required to disclose to the public the fact that the SBA disapproved of the Department's efforts. *Id.* According to Alaska, the USDA violated NEPA when it did not mention the SBA's negative opinion in the ROD. *Id.* (citing 66 Fed. Reg. at 3270–71). I disagree.

The record makes clear that the USDA disclosed the potential impacts the Rule would have on small businesses, as well as the SBA's views, during the NEPA process. The USDA sought public comment on economic issues during the scoping period, and as a result of comments concerning the economic effects on small entities, the SBA prepared an RFA analysis that was publicly disclosed with the DEIS. *See* 64 Fed. Reg. at 56,307; AR Doc. 1362 (DEIS Vol. 1), at A-1, A-21 to A-23; AR Doc. 1350, at 11–12. In the FEIS, the USDA included a discussion of socio-economic factors and published the SBA's comment letter, which clearly outlined the SBA's position on the applicability of the RFA. *See* AR Doc. 4609 (FEIS Vol. 1), at 3-264 to 3-371. Based on this record, I find that the USDA complied with its duty—if such a duty existed[4] —to disclose the SBA's position on the rulemaking.

[4] Defendants alternatively argue that they were not required to make these disclosures. Fed. Defs.' Reply Supp. Summ. J. 13–14, ECF No. 83 ("Defs.' Reply"). Because I conclude that the disclosures were adequate, I do not address defendants' argument on this point.

D. Alaska's Challenges to the Roadless Rule as Applied to the Alaska National Forests

In addition to its challenges to the general rulemaking process of the Roadless Rule, Alaska levels specific challenges to the Rule as it applies to Alaska. I will address each of these arguments in turn below.

1. The TTRA

Alaska urges this Court to find that the Roadless Rule violates the TTRA because, "[t]hroughout the rulemaking, USDA was well aware that if the Roadless Rule was applied to the Tongass, there would be no possibility of meeting timber demand." Pl.'s Mem. 38 (citing AR Doc. 4609 (FEIS Vol. 1), at 3-378 to 3-379. Under the TTRA, the Forest Service must seek to meet market demand for timber on the Tongass National Forest. 16 U.S.C. § 539d(a). Specifically, Congress directed the Forest Service to seek to provide a supply of timber from the Tongass that would "(1) meet[] the annual market demand for timber from the forest; and (2) meet[] the market demand from the forest for each planning cycle." *Id.* Alaska and plaintiff-intervenors allege that the Roadless Rule makes "so much suitable acreage on the Tongass off limits to timber harvest" such that it is impossible to comply with the statute. Pl.-Intervenors' Br. Supp. Summ. J. 8, 10, 14 ("Pl.-Intervenors' Br."), ECF No. 73-1; Pl.'s Mem. 40-41. While plaintiff and plaintiff-intervenors are correct that the TTRA imposes additional planning requirements for the Tongass, they fail to accurately state the Forest Service's obligations under that statute. Indeed, the TTRA does *not* obligate the Forest Service to *actually meet* market demand.

Instead, the statute requires the Forest Service to consider and *seek* to meet market demand, consistent with its multiple-use management obligations. *See* 16 U.S.C. § 539d(a); *see also Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 138 (D.D.C. 2010) (finding that TTRA requires the Forest Service to "at least *consider* market demand and *seek* to meet market demand" (quoting *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 801 (9th Cir. 2005))). Importantly, under its multiple-use mandate, the USDA retains discretion to balance market demand for timber with other needs and, if appropriate, reach a balance among the multiple-uses that does not fully satisfy timber demand on the Tongass. *See, e.g.*, *Wind River Multiple-Use Advocates v. Epsy*, 835 F. Supp. 1362, 1372 (D. Wyo. 1993) ("Courts that have considered this issue have held that the MUSYA grants the Forest Service 'wide discretion to weigh and decide the proper uses within any area.'" (quoting *Big Hole Ranchers Ass'n v. U.S. Forest Serv.*, 686 F. Supp. 256, 264 (D. Mont. 1988))), *abrogated on other grounds by Wyo. Timber Indus. Ass'n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245 (D. Wyo. 2000). I therefore must assess whether the balance the USDA struck in promulgating the Roadless Rule conflicted with the TTRA and thus violated the APA.

As set forth in my earlier discussion of the statutory framework above, the Organic Act, the MUSYA, and the NFMA authorize and direct the Forest Service to establish and administer the national forests for multiple uses. *See* 16 U.S.C. § 551; 16 U.S.C. § 528; 16 U.S.C. § 1600. Given the competing obligations the Forest Service must balance, and the significant discretion it has to make these decisions, "the courts are reluctant to overrule its decisions" as long as "the Forest Service considers the other competing uses."

Wind River Multiple-Use Advocates, 835 F. Supp. at 1372–73 (quoting *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 592 F. Supp. 921, 938 (D. Or. 1984)); *see also Sierra Club v. Hardin*, 325 F. Supp. 99, 123 (D. Alaska 1971) ("Congress has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service.").[5]

Here, the record reveals that the USDA complied with its duty to seek to meet market demand while balancing the other competing land uses in the Tongass. The USDA performed an extensive analysis specific to the Tongass, which it did not do for any other national forest. *See* AR Doc. 1362 (DEIS Vol. 1), at 3-226 to 3-239; AR Doc. 4609 (FEIS Vol. 1), at 3-371 to 3-392; AR Doc. 6004, at 696-711; 66 Fed. Reg. at 3254–55, 3266–67, 3270. As part of this analysis, the USDA considered the timber market demand in Southeast Alaska, finding that timber harvest had fallen sharply in the prior decade. AR Doc. 4609 (FEIS Vol. 1), at 3-376 (finding that the timber industry was "undergoing a fundamental transformation"). In fact, the USDA determined that timber harvest on NFS lands in Alaska had dropped approximately 69 percent in the decade prior to the Roadless Rule. *Id.* The USDA also assessed future market demands, finding no evidence of industry-wide changes in processing efficiency that would indicate a potential future increase in market demand. *Id.* Based on its analysis, the USDA

[5] And the Forest Service is afforded similar discretion as to what constitutes market demand for Tongass timber. *See Se. Conference*, 684 F. Supp. 2d at 147 (noting that the Forest Service is entitled to an "extreme degree of deference" on this question (quoting *Am. Farm Bureau Fed.'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009))).

predicted a market demand for Tongass timber of 124 MMBF for the 10-year planning cycle. *Id.* at 3-377. After completing its assessment, the USDA disclosed that, under the Roadless Rule, the currently projected level of timber demand would not be met. *Id.* at 3-378 to 3-379; 66 Fed. Reg. at 3254. The USDA accordingly balanced the timber demand against the "extraordinary ecological values" of the Tongass and concluded that the long-term benefits of conserving IRAs on the Tongass outweighed the potential for economic harm that would result from the reduced timber harvest. 66 Fed. Reg. at 3254. To reduce the strain on the state and local economies, the USDA grandfathered in already-planned timber projects. *Id.*

Alaska hangs its hat on the fact that "when USDA chose to impose a prohibition on road construction and timber harvest in Tongass roadless areas, the agency did so with full knowledge of the TTRA consequences." Pl.'s Mem. 40. But the fact that the USDA was aware of the consequences the Roadless Rule would pose to the timber market does not "render meaningless the congressional directive on Tongass timber supply" as Alaska suggests. *Id.* at 40–41. Indeed, this Court would be more concerned if the USDA were *unaware* of the consequences of its actions, because the USDA was tasked with making an informed decision. Although Alaska is disappointed with the decision the USDA reached, there can be no doubt that the USDA considered market demand and sought to meet market demand under the TTRA while balancing its obligations to consider multiple uses under the MUSYA, the NFMA, and the Organic Act. Accordingly, I find that the Roadless Rule does not violate the TTRA.

2. ANILCA

Alaska next challenges the Rule on the ground that it constitutes an unlawful withdrawal of public land, in violation of ANILCA. *Id.* at 43. Section 1326(a) of ANILCA prohibits "executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska" without the approval of Congress. 16 U.S.C. § 3213. According to plaintiff and plaintiff-intervenors, the USDA's designation of 9.6 million acres of IRAs on the Tongass and 5.2 million acres of IRAs on the Chugach National Forest—another national forest in Alaska—are unlawful withdrawals under Section 1326 because the USDA did not obtain congressional approval. Pl.'s Reply 20. Defendants counter that these land designations are not withdrawals under Section 1326. Defs.' Mem. 55. Indeed, defendants note that no court has ever applied Section 1326 to invalidate a federal agency's multiple-use management decision-making, and they counsel this Court against doing so today. *Id.* at 55–56. Unfortunately for plaintiffs, defendants are correct.

Our Circuit has defined a withdrawal as an action that "exempts the covered land from the operation of public land laws." *New Mexico v. Watkins*, 969 F.2d 1122, 1124 (D.C. Cir. 1992) (citing 43 U.S.C. § 1702(j)); *see also Se. Conference*, 684 F. Supp. 2d at 143 (importing the definition of the term withdrawal in ANILCA from the Federal Land Policy and Management Act). The public land laws to which the statute refers are those that "authorize the transfer of federal lands to the private domain for private use." *Se. Conference*, 684 F. Supp. 2d at 143. Critically, the Roadless Rule does not exempt IRAs from the operation of the mineral leasing laws. Instead, the Rule restricts the terms of

surface occupancy of the land, which is within the USDA's authority under the mineral leasing laws. 66 Fed. Reg. at 3256. Indeed, the Rule explicitly allows for new mineral leases in IRAs, provided that there are no new roads constructed in conjunction with those new leases. *Id.* Thus, the Rule does not withdraw the IRAs from the mineral leasing laws; it regulates the IRAs within the bounds of the mineral leasing laws. And other courts have similarly held that the USDA's decision not to make certain lands available for mineral leasing is not a withdrawal. *See Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229–30 (9th Cir. 1988) ("We fail to see how a decision not to issue oil and gas leases on Deep Creek would be equivalent to a formal withdrawal."). In light of the USDA's broad discretion on this issue, I find no violation of the ANILCA.

3. NEPA

In addition to its general challenges to the rulemaking under NEPA, Alaska and plaintiff-intervenors raise distinct challenges to the NEPA process as the Rule applies to Alaska. I will assess each of these claims in turn below.

a. The Purpose and Need Statement

Plaintiff-intervenors contend that there have been three "national" and "whole picture" reviews of the Tongass (the first through ANILCA in 1980, the second through the TTRA in 1990, and the third through the Tongass Land Management ROD in 1999), and thus there was no need for another Forest Service review of Alaska's national forests in conjunction with the Roadless Rule rulemaking process. Pl.-Intervenors' Br. 24. They insist that, had the USDA disclosed these comprehensive reviews of land management on the Tongass, it would have made clear that there was no permissible purpose or need to

apply the Roadless Rule to Alaska's national forests. *Id.* Defendants counter that "neither the Tongass's unique statutory status nor its recent Forest Plan amendment demonstrate that the purpose and need for the Roadless Rule is not applicable to the Tongass." Defs.' Reply 20. On the record before me, I must agree with defendants.

While both parties acknowledge the unique status of the Tongass, the administrative record makes clear that IRAs provide the same ecological and social values on the Tongass as they do throughout the rest of the country. AR Doc. 1362 (DEIS Vol. 1), at 3-371 to 3-373. And the FEIS projected that, in the absence of the Roadless Rule, 61 miles of roads would be constructed on the Tongass by 2040. AR Doc. 4609 (FEIS Vol. 1), at 3-253. Indeed, the USDA's analysis concluded that, by applying the Rule to the Tongass, it would "greatly reduce[] much of the incremental loss of habitat and species abundance." AR Doc. 4240. Put simply, it is clear that the USDA considered the unique circumstances of the Tongass, and the USDA did not act arbitrarily and capriciously by finding that there was, in fact, a legitimate purpose and need to apply the rule to the Tongass.

b. The Decision to Focus Mitigation Efforts on Timber

As I noted in my discussion of Alaska's challenge pursuant to the TTRA, the USDA opted to help mitigate the Roadless Rule's impact on the Tongass by allowing timber harvesting projects already planned in IRAs on the Tongass to be grandfathered in and proceed as planned.[6] Plaintiff and plaintiff-intervenors urge this Court to find that

[6] Plaintiff-intervenors—joined by Alaska—also challenge the USDA's decision not to issue a supplemental EIS to explain the shift among preferred alternatives for the Tongass from the DEIS to the

this mitigation was arbitrary because it did not address the negative impacts outside of the timber context, including impacts on mining, tourism, hydropower, geothermal energy, and community access. Pl.'s Reply 32. The record is clear, however, that the primary adverse consequence of the Roadless Rule on the Tongass was the potential that timber harvest would be reduced. 66 Fed. Reg. at 3254. Indeed, the USDA specifically found that there would be no meaningful adverse impacts on other resources or industries. *See* AR Doc. 4609 (FEIS Vol. 1), at 3-330 (noting that the Rule's social and economic effects would be minor outside the context of the timber industry); *see also id.* at 3-254 (finding locatable mineral exploration and development "would not be affected under these alternatives"); *id.* at 3-373 (finding that the Tongass will continue to meet recreation and tourism demand); AR Doc. 3097, at 17-18 (finding no planned geothermal projects in IRAs in Alaska and only two planned hydropower projects on the Tongass); AR Doc. 5567, at 2 (finding that the Roadless Rule would not interfere with transportation projects on the Tongass). As such, it was not unreasonable for the USDA to focus its mitigation efforts on easing the transition to a timber market not dependent on harvest from IRAs. 66 Fed. Reg. at 3254.

c. Whether the USDA Considered the Social and Economic Impacts of the Rule as Applied to the Tongass

Finally, plaintiff and plaintiff-intervenors assert that the USDA violated NEPA by failing to consider the social and economic impacts of the Rule on various resources and

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FEIS. *See* Pl.-Intervenors' Br. 25–28. Because I addressed and disposed of this challenge in my earlier discussion of plaintiff's and plaintiff-intervenors' general challenges to the rulemaking, above, I do not revisit these substantially similar arguments here.

industries. In particular, plaintiffs take issue with the USDA's failure to consider: (1) the Southeast Alaska Transportation Plan; (2) Executive Order 12866 and the Rule's impacts on renewable energy resources; (3) the Southeastern Alaska Intertie, which provided funds for constructing transmission lines in Southeastern Alaska; (4) the impact on geothermal resources and leasable minerals; and (5) the impact on mining. *See* Pl.-Intervenors' Br. 33–45. Upon review of the record, however, I find that the USDA adequately considered each of these concerns in its decision to apply the Roadless Rule to Alaska. *See* AR Doc. 5567, at 2 (finding that future major road transportation projects in Alaska would not be impacted by the Rule because it allows for the construction of Federal Aid Highway projects in IRAs); 66 Fed. Reg. at 3267–71 (discussing the costs and benefits of the Rule in the context of its impact on renewable energy sources, such as hydroelectric and geothermal power); AR Doc. 5567, at 2 (considering "whether roads [through IRAs] are necessary to build or maintain the intertie" and finding that they are not); AR Doc. 4609 (FEIS Vol. 1), at 3-68 to 3-69) (noting that "[p]otential near future geothermal development associated with inventoried roadless areas appears limited"); 66 Fed. Reg. at 3253 (clarifying that, under the Rule, the Forest Service will continue to provide reasonable access for the exploration and development of locatable minerals under the Mining Law of 1872). As such, Alaska's claim that the USDA violated NEPA by failing to consider the Rule's impact on these industries and resources accordingly fails.

CONCLUSION

For the foregoing reasons, defendants' and defendant-intervenors' cross motions for summary judgment are GRANTED and plaintiff's and plaintiff-intervenors' motions for summary judgment are DENIED. Accordingly, it is hereby ORDERED that judgment be entered in favor of defendants and this case be DISMISSED WITH PREJUDICE.

An order consistent with this decision accompanies this Memorandum Opinion.

RICHARD J. LEON
United States District Judge

EXHIBIT 6

State Objection to 2016 TLMP

THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Natural Resources
COMMISSIONER'S OFFICE
550 W. 7th #1400
Anchorage, AK 99501
Main: 907.269.8431
Fax: 907.269.8918

August 30, 2016

Beth G. Pendleton, Regional Forester/Objection Reviewing Officer
U.S. Forest Service – Alaska Region
Attention: Tongass Objections
P.O. Box 21628
Juneau, AK 99802-1628

RE: Objection to the 2016 Tongass National Forest Land and Resource Management Plan Amendment. Submitted electronically at: objections-alaska-regional-office@fs.fed.us.

Responsible Official: Earl Stewart, Tongass National Forest Supervisor

Objector:
State of Alaska
Governor Bill Walker
State Capitol
P.O. Box 110001
Juneau, AK 99811-0001

INTRODUCTION

The State of Alaska (State) has been an active participant in the management of the Tongass National Forest (Tongass) for many decades. Working under a variety of memoranda of understanding and cooperative agency agreements, as well as serving together on planning teams and in many other forums, the State and the U.S. Forest Service (USFS) have frequently participated in Tongass management as *de facto* partners.

Although the State declined full cooperating agency status for this national forest plan amendment process, it nevertheless provided formal written comments multiple times and participated in the Tongass Advisory Committee (TAC). The State even developed a separate State Alternative and proposed that the USFS analyze and consider it in the National Environmental Policy Act (NEPA) process along with the other USFS alternatives. As is the normal practice, many state employees engaged with USFS representatives on a broad range of topics including wildlife, timber, and transportation.

Unfortunately, the State Alternative was rejected without analysis. On July 18, 2016, Tongass National Forest Supervisor Earl Stewart published a Draft Record of Decision (ROD), Final Environmental Impact Statement and amended Land and Resource Management Plan, adopting an alternative that fully implements the Roadless Area Conservation Rule (Roadless Rule) as well as U.S. Secretary of Agriculture Tom Vilsack's direction on transitioning from old-growth to young growth timber harvest. This alternative ignores the State's proposed changes which were necessary to avoid devastating impacts to the residents of Southeast Alaska. Therefore, the State appreciates the opportunity to submit this objection and respectfully seeks your thoughtful consideration of the issues that we raise.

SUMMARY OF THE ISSUES ON THE OBJECTION

I. The USFS failed to analyze and properly consider the proposed State Alternative in violation of NEPA.

During the scoping process, the State timely notified the USFS of its intent to provide a new alternative for consideration and analysis. This State Alternative would allow for transition to young-growth harvest at a more realistic rate that would allow the survival of the existing timber industry. However, the USFS declined to analyze or properly consider this reasonable and viable alternative as required under NEPA.

II. The USFS deletion of the Transportation and Utility System Land Use Designation (TUS LUD) in this plan amendment process is a violation of the federal planning regulation applicable to this amendment, a violation of the National Forest Management Act (NFMA), and a violation of NEPA.

Pursuant to 36 CFR 219.7(c) and 219.13(b), the designation or elimination of a management area or a geographic area from an existing forest plan must be done through a plan revision, not an amendment. Failure to comply with the planning regulations results in an amendment in violation of NFMA.

Furthermore, neither the scoping documents nor the DEIS purpose and need statement disclose an intent to consider elimination of the TUS LUD. Failure to provide adequate and timely public notice of this significant federal action is a violation of NEPA.

III. The amended forest plan violates the Tongass Timber Reform Act (TTRA)[1] and the Alaska National Interest Lands Conservation Act (ANILCA).

Due primarily to the decision to implement the Roadless Rule[2] without modification to national forests in Alaska and due to the decision to rapidly implement the transition from the sale of old-growth to young-growth timber, the USFS has decided that it will not attempt to meet the demand for timber from

[1] The Tongass Timber Reform Act of 1990. 16 U.S.C. § 539d(a).

[2] 66 Fed. Reg. 3,244 (Jan. 12, 2001) The Roadless Rule was implemented only days before President Clinton left office.

the Tongass in violation of the TTRA. The TTRA mandates that the USFS must "seek to meet" timber demand.

Implementing the Roadless Rule by inclusion in the forest plan also constitutes a withdrawal of federal land in violation of ANILCA.[3] Issues regarding the validity of the Roadless Rule, including violations of TTRA and ANILCA, remain in active litigation in federal District Court for the District of Columbia where the case is currently ripe for a decision.[4]

IV. In violation of NEPA, the USFS has failed to appropriately consider and respond to a broad range of substantive comments provided to the USFS by the State.

During the plan amendment process, the State has provided substantive comments on the scoping process[5], the Draft Environmental Impact Statement (DEIS),[6] and the Final Environmental Impact Statement (FEIS),[7] all of which are hereby incorporated into this Objection to the Draft ROD and which are attached as Exhibits A, B and C. In addition, informal comments were provided to the USFS frequently during the process as the USFS and the State have a long history of cooperating on Tongass management. But in this plan amendment process, many of the State's comments were either rejected or not considered and did not receive an adequate response from the USFS.

Failure to appropriately consider and respond to comments from a commenter, especially when the commenter is a state with decades of cooperation with the USFS on the management of the national forest, is a violation of NEPA. The state comments on the FEIS emphasized many of the state comments on the scoping process and the DEIS upon which the USFS failed to either take action or provide an adequate response (Exhibit C).

V. The State meets all requirements for filing an objection.

The State has filed substantive formal comments on the plan amendment scoping, DEIS and the FEIS (Exhibits A, B, and C). In addition, the State submitted the proposed State Alternative, requesting that the USFS analyze and consider it in the DEIS process (Exhibit D). State Objection issues I, II, and III are all addressed in these comments and the requirement for a link between comments and objection therefore exists as required by 36 CFR 219.54.

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[3] 16 U.S.C. § 3213(a) prohibits federal executive action land withdraws over 5,000 acres in Alaska without approval of Congress.

[4] Case No. 1:11-cv-01122 (RJL)

[5] Scoping Comments, Letter of June 26, 2014 from Kyle Moselle, State Large Project Coordinator, to Forrest Cole, Tongass Forest Supervisor. Exhibit A.

[6] DEIS Comments, Letter of February 22, 2016 from Bill Walker, Governor of Alaska, to Earl Stewart, Tongass Forest Supervisor. Exhibit B.

[7] FEIS Comments, Letter of August 1, 2016 from Elizabeth Bluemink, State Project Assistant to the Commissioner, to Earl Stewart, Tongass Forest Supervisor. Exhibit C

The State's Issue IV is the failure of the USFS to appropriately consider and respond to many of the comments submitted on scoping and on the DEIS (Exhibits A and B). Although the USFS does not provide a formal comment period on the FEIS, the State nevertheless provided timely formal written comments on the FEIS regarding the issues set forth in Issue IV (Exhibit C). Therefore, Issue IV also links to substantive comments. Alternatively, the failure to address scoping and DEIS comments in the FEIS is an issue that cannot be raised prior to the objection period. Either way, the matters raised as Issue IV also met the criteria for objection under 36.CFR 219.54.

DISCUSSION OF ISSUES

I. The USFS failed to analyze and properly consider the proposed State Alternative in violation of NEPA.

In comments on scoping, the State notified the USFS of its intent to provide a new alternative for consideration and analysis. This State Alternative would, among other things, allow for transition to young-growth harvest, but at a more realistic rate that would allow the survival of the timber industry. The State Alternative submitted to the USFS on November 12, 2014, is attached as Exhibit D and is incorporated herein. The USFS declined to analyze or properly consider this viable alternative, stating instead that it failed to meet the purpose and need of transitioning to young-growth in 15 years.[8]

However, none of the alternatives considered by the USFS provide transition to young-growth in 10-15 years while also providing sufficient timber to maintain the existing timber industry. Therefore, all of the rapid transition alternatives considered by the USFS violate the TTRA congressional directive to seek to meet Tongass timber demand. Thus, none of the alternatives considered – including the selected alternative – meet the purpose and need of transition in 15 years and comply with federal law. These rapid transition alternatives also fail to meet the purpose and need of the plan amendment as established by Secretary Vilsack, which conditioned the transition upon maintaining a viable timber industry.

In contrast, the State Alternative allows for transition to young growth over a longer and more reasonable period while maintaining a viable timber industry consistent with federal law and the Secretary's direction to the USFS. Because it is a viable alternative for transition that unlike the selected alternative is consistent with federal law, the USFS is required under NEPA to analyze and fully consider the State Alternative.

II. The USFS deletion of the TUS LUD in this forest plan amendment process is a violation of the federal planning regulation applicable to this amendment, a violation of NFMA, and a violation of NEPA.

Eliminating the TUS LUD violates USFS planning regulations implementing the NFMA and

[8] Draft ROD at Page 10.

violates NEPA. The State's comments on the DEIS (Exhibit B at 16-17) provided a methodical and detailed explanation of the flexibility in USFS regulations to allow by amendment the modification or removal of plan components from a specific management or geographic area (36 CFR § 219.13); however, the same regulations are quite inflexible in that they require that the designation or elimination of a specific management or geographic area must be done through a plan revision (36 CFR § 219.7(c) and (d)). The USFS response contains a single sentence conclusion to the state comment on this point: "An amendment may remove all the plan components within a LUD *and may remove the LUD itself*" (FEIS, p. 1-108 emphasis added). This conclusory statement contains a significant leap in logic and is directly contrary to the USFS 2012 planning rule and regulations.

The locations of the transportation and utility corridors in the TUS LUD are based almost exclusively on the locations of the transportation and utility easements established by Congress in SAFETEA-LU Section 4407. Under the USFS 2012 planning rule, all areas designated by Congress must appear in the plan (36 CFR 219.7(c)(2)(vii)), and the TUS LUD fulfills this requirement. Additionally, each of those congressionally-designated areas must have plan components for USFS management within the geographic areas (36 CFR § 219.10(b)(l)(vi)). Removal of all plan components would violate this regulatory requirement. Furthermore, the responsible official is only authorized to modify the existing area by plan amendment, which would necessarily include modification of the TUS LUD by completely removing the LUD itself, if the responsible official was given the delegated authority for the modification (36 CFR 219.7(c)(2)(vii)). Congress did not provide such delegated authority to modify or eliminate the Section 4407 transportation and utility easements; therefore, the USFS does not have the authority to eliminate all TUS LUD components or the authority to eliminate the LUD itself.

Furthermore, elimination of the TUS LUD requires adequate public notice and compliance with NEPA. The State's comments on the DEIS stated the clear and unarguable fact that the public notice, the notice of intent, and the entire scoping process for this forest plan amendment did not indicate a need, desire, or intent to remove the TUS LUD. The USFS responses to comments explain that the elimination of the TUS LUD was first considered in the Five-Year Review for the 2008 Forest Plan (FEIS, pp. 1-107-1-108). This statement and excuse does not address the fact that the USFS chose to take the major and significant action of eliminating the TUS LUD without notifying the public or conducting scoping as required by NEPA.

The concept of removing the TUS LUD appears nowhere in any of the Five-Year Review news releases, community meeting agendas, community meeting summaries or public comments. The idea of removing the TUS LUD appears to have been immaculately conceived within the agency rather than as the response to public comments in the various venues leading up to this proposed forest plan amendment as stated by the Agency.

The State also presented other transportation and utility concerns in comments on the DEIS and FEIS to which the USFS gave inadequate responses. These issues are discussed below in Section IV.

III. The Amended Forest Plan violates the TTRA and ANILCA.

In 2001, the U.S. Department of Agriculture (USDA) promulgated the Roadless Rule and thereby prohibited virtually all road construction and timber harvest in Inventoried Roadless Areas within all national forests. As a separate decision within that rulemaking, USDA applied these prohibitions to the Tongass despite an EIS that clearly indicated that timber demand in the Tongass could not be met with the Roadless Rule in effect. The State's opening and reply briefs in the pending legal challenge to the Roadless Rule in the Federal District Court for the District of Columbia present the full argument as to why the Roadless Rule is itself invalid as it violates TTRA and ANILCA. The briefs are attached as Exhibits E and F and are incorporated herein.

The USFS now compounds this violation of federal law by selecting an alternative that not only fully implements the Roadless Rule in the management plan governing the Tongass, but also implements a transition plan to young-growth timber with a rapid phase out of the old-growth timber on which the timber industry is dependent. The result is a forest plan that violates TTRA and ANILCA – under this plan, the USFS leaves itself with no possibility of meeting timber demand.[9]

The State has acknowledged in other forums that the "seek to meet timber demand" provision is not an inflexible requirement to actually meet all demand every year. The directive is subject to meeting certain other management requirements, such as some environmental concerns. In addition, there has been a history of the USFS offering timber sales in good faith only to have those sales enjoined in federal court by anti-timber interests, which is of course in part beyond the control of the USFS.

However, the congressional requirement for the USFS to "seek to meet timber demand" obviously requires at a minimum a good faith attempt to actually meet demand. As the governing plan for all forest management on the Tongass, the forest plan is clearly a document where this congressional mandate must be manifested. If the USFS adopts a forest plan that totally restricts its ability to offer timber at levels that could meet timber demand, it is impossible for the USFS to comply with the clear directive to "seek to meet timber demand." This plan amendment is a decision by the USFS that it will no longer even consider meeting timber demand in its future management actions, which is a clear violation of TTRA.

In comments on the DEIS and on the FEIS (Exhibits B and C), the State has already provided the USFS with its analysis of why the newly commissioned timber demand study that reduced the most recent estimate of demand from 142 MMBF to 46 MMBF of timber is fatally flawed. Similarly, the State has repeatedly commented on why a rapid transition from old-growth to young-growth timber will not meet

[9] The Forest Service attempt to establish a new artificially low current demand for timber with commissioning of the Daniels Report fails in that as discussed below this report is highly suspect. In addition, even if this report is accurate, this forest plan amendment leaves the Forest Service no opportunity to meet future increases in market demand for timber.

the timber demand needed to preserve a viable timber industry in Southeast Alaska as required by TTRA (Exhibits A, B and C).

In addition to our previous concerns on the suitability of the demand study, the current methodology is focused on the demand for old-growth logs and makes no differentiation between the demand for old growth and the demand for young growth. The log characteristics between these two types of supply are so different that the Forest Service should not comingle the demand number and instead present a demand number for each. As the transition progresses, this relationship between the two types of log supply will change and so will the demand for each type of log. If insufficient volume of either occurs during the transition, it will cause great harm to the current and future forest products industry.

Remarkably, the USFS admits in its decision that there is no demonstrated market for the young-growth timber on which the new plan will force the timber industry to survive. On page 10 of the Draft ROD, the Forest Supervisor states, "The market for large volumes of young-growth logs has not yet been demonstrated and this is especially true for small logs from 55-year old stands." Given that the TTRA mandates that the USFS seek to meet timber demand, and that the purpose and need for this plan amendment includes maintaining a viable timber industry, the USFS nevertheless is adopting a plan that will in a few years force the industry to attempt survival solely on a product for which it admits there is no demonstrated market.

The plan includes no contingency for the industry in the event that such a speculative market does not appear. Furthermore, the industry cannot possibly be expected to risk financing a massive investment in new equipment and in market development, especially when lenders recognize that even the USFS admits there is a lack of a demonstrated market. Therefore, the selected plan alternative does not meet the purpose and need of transition while maintaining a viable industry and violates the seek to meet demand provision of TTRA.

IV. In violation of NEPA, the USFS has failed to appropriately consider and respond to a broad range of substantive comments provided to the USFS by the State.

In a letter dated February 22, 2016, the State timely provided substantial comments to the USFS on the DEIS setting forth a wide range of issues and concerns (Exhibit B). In a letter dated August 1, 2016, the State commented on the FEIS, providing some examples where the USFS failed to adequately address or respond to the State's substantive comments in the comment response section of the FEIS (Exhibit C).

In many cases, the substance of the state comments on the DEIS identified a deficiency that is a violation of law, generally under NEPA or NFMA. However, the failure to adequately respond to state comments constitutes a separate violation of NEPA.

The attached comments dated August 1, 2016, explain that some state comments were accepted and resulted in revisions in the FEIS. Given the long history of cooperation between the State and the USFS on the Tongass forest plan, the State appreciates the USFS's willingness to address those concerns.

However, Exhibit C also explains many areas of substantial disagreement where the State's comments and concerns have not been addressed. Some of those areas are separately addressed above in Sections I, II and III of this Objection. The remaining concerns that were not addressed by USFS are fully incorporated herein from Exhibit C and are only summarized and highlighted below.

A. Transportation and Utilities

1.) The Proposed Plan and FEIS grossly underestimates development in the TUS LUD.

The State's comments provided the actual mileage totals for the hundreds of miles of public highway projects through the Tongass, which are either fully funded for construction or were recently completed. Rather than acknowledge and fully consider the real and current impacts of these development projects, the USFS responded by quoting a draft Alaska Department of Transportation & Public Facilities (DOT&PF) planning document (that has been in a draft form for over a decade) that says DOT&PF "must plan for the possibility of reduced financial resources" (FEIS, p. I-112). The USFS then goes on to forecast that only 35 miles of projects are achievable and realistic given "time constraints as well as anticipated litigation" (FEIS, p. I-112). It is not clear from the USFS responses whether the delays and litigation are due to anticipated actions by the USFS or if the USFS anticipates third parties to cause these delays.

2.) The Proposed Plan could benefit by adding new components in addition to the TUS LUD.

The State provided detailed comments explaining how the USFS's proposed Transportation System Corridor Direction component, and the Renewable Energy Direction component, would be quite beneficial for the development of new power generation facilities and utility feeder lines located outside the TUS LUD. The creation of these new components to address the current void in transportation and utility management directives outside the TUS LUD for this small segment of developments is a proper use of the amendment process. This modification to address a new condition can and should be accomplished without modifying and complicating the process for the much more common transportation and utility infrastructure development to link the communities of Southeast Alaska. The USFS provided an explanation of how the new components are applicable forest-wide (FEIS, p. I-113), which is obvious from reading the DEIS. The USFS response does not explain how the solution to the small-scale problem of power generation and feeder line development outside the TUS LUD cannot be implemented in parallel with the fixed, predictable and clearly manageable transportation and utility corridors in the TUS LUD.

B. Forestry

The State commented that the projected timber sale quantity (PTSQ) in the DEIS, 46 MMBF, does not meet the requirements of TTRA Sec. 101 to seek to meet the annual timber demand. The previous timber demand published by USFS in 2014 was 142 MMBF (three times greater). The explanation for this drop provided in the DEIS Comments and Responses (Appendix I of the FEIS) that the "PNW Research Station's [new] timber demand projections are based on solid economic theory, peer-reviewed methodology, and rigorous and objective analysis" is unconvincing.

On page 29 of the Draft ROD, the PTSQ of 46 MMBF is described as neither a goal nor a target. Neither is it a ceiling – "it is an estimate" and serves as the average annual figure over the next ten years. Since providing a larger timber supply is less risky than undersupplying market demand, setting a range for the PTSQ would more flexibly meet TTRA's requirement to 'seek to meet' timber demand than using the proposed fixed number.

The proposed plan also does not meet the statutory requirements of TTRA because none of the alternatives provide sufficient quantities of old growth to meet the demands of the existing timber industry, which is recognized as old growth dependent. Providing sufficient old growth timber in compliance with TTRA will require modifying the application of the Roadless Rule as proposed in two alternatives, modifying the Transition Plan, or both. The selected alternative in the FEIS rejects both approaches.

Table 3.22-5, Timber Harvest in Southeast Alaska by Ownership, 2002-2014 does not provide a realistic average harvest figure due to the significant reductions in harvests on State lands taking place after 2007-2008. We pointed out that harvests on state Mental Health Trust and University timber lands are not managed on a sustained yield basis, further lowering future harvest levels when considered along with other State of Alaska lands. This overestimate of timber production from State lands results in lower estimates of the amount of timber that the Tongass is required to provide in order to meet demand.

The USFS failed to analyze the proposed State Alternative submitted by the State, concluding that it does not meet the purpose and need of the plan amendment of transition to young growth in 15 years. However, as noted above, a transition within 15 years fails to seek to meet timber demand. Therefore, the selected alternative violates TTRA. The State Alternative, while proposing a longer transition, is a viable alternative that is compliant with federal law and therefore must be analyzed under NEPA.

C. Wildlife, Fish and Subsistence

The Alaska Department of Fish and Game (ADF&G) agrees Alternative 5 is the alternative that will most benefit fish and wildlife resources and habitats. That said, ADF&G's wildlife and subsistence comments were not addressed in the FEIS or final amended plan. While the USFS states in Appendix I

of the FEIS the comments were outside the scope of the amendment, comments that would have strengthened document integrity – like updated citations and terms – were ignored.

For example, on comments on the DEIS, the State identified where the USFS could improve its application of science as well as its explanation of the scientific basis regarding decisions on wolves, the conservation strategy, the effects of young-growth management, the FRESH deer model, and the definition of "appropriate research" for the future. However, the USFS generally chose not to respond to the State's concern about using the best science available.

While ADF&G may be able to address some issues as it continues to work with the USFS on the Tongass National Forest Monitoring Program, ADF&G staff see no venue to discuss the omissions in the FEIS and final amended plan. ADF&G's wildlife staff have sought to bring their applied wildlife research expertise to assist the USFS with difficult wildlife and forest management problems. The lack of a cooperative dialog is a change from the collaborative relationship the USFS and ADF&G have enjoyed.

Most of ADF&G's fish comments were addressed in the FEIS, though no suggested changes to the Chapter 5 standards and guidelines were adopted in the final plan or addressed in comment responses.

RESOLUTIONS REQUESTED

1. Resolution Requested for Objection Issue I:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to fully analyze and consider the State Alternative submitted to the USFS on November 12, 2014 attached as Exhibit D.

2. Resolution Requested for Objection Issue II:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to retain the TUS LUD. Alternatively, as required by the USFS Planning Rule, the USFS should rescind the entire plan amendment process and commence a Plan Revision Process. Note that additional issues with transportation and utilities are addressed under Objection Issue IV.

3. Resolution Requested for Objection Issue III:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to include the State Alternative, include a revised and realistic estimate of timber demand, and remove restrictions in the Amendment that will prevent the USFS from meeting timber demand as required by the TTRA. To

achieve compliance with the TTRA, it may be necessary to revise the Transition Plan to young-growth timber and to undertake a rulemaking to address the Roadless Rule in Alaska[10].

The State also requests that the USFS revise the restrictions on land rights that constitute a prohibited withdrawal of federal land under ANILCA. An example is the prohibition of road access to leasable minerals such as geothermal power.

4. Resolution Requested for Objection Issue IV:

The State requests that the USFS withdraw the FEIS and revise the DEIS after full consideration, response and appropriate modifications based on the many previously unaddressed State concerns and comments.

CONCLUSION

On behalf of the State of Alaska and Governor Bill Walker, I respectfully submit this objection to the 2016 Tongass Land and Resource Management Plan Amendment. The State appreciates the very long cooperative relationship between our State and the USFS and looks forward to a resolution of the issues raised in this objection.

Respectfully submitted,

Andrew T. Mack

Andrew T. Mack
Commissioner

cc: The Honorable Bill Walker, Governor, State of Alaska
The Honorable Lisa Murkowski, United States Senator
The Honorable Dan Sullivan, United States Senator
The Honorable Don Young, United States Representative
The Honorable Sam Cotten, Commissioner, Alaska Department of Fish and Game
The Honorable Larry Hartig, Commissioner, Alaska Department of Environmental Conservation
The Honorable Marc Luiken, Commissioner, Alaska Department of Transportation & Public Facilities

[10] The State's federal court challenge of the validity of the Roadless Rule is ripe for decision in the District Court for the District of Columbia and invalidation of the Roadless Rule would provide the Forest Service with greater flexibility to comply with the TTRA requirement to seek to meet timber demand.