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File Code: 1570-1 (EMC)

Date: April 13, 1999

Mr. LeRoy W. Wilder
Representative for
Metlakatla Indian Community
0225 SW Montgomery Street, #10
Portland, Oregon 97201

RE: Appeal of the Record of Decision for the Tongass National Forest Land and Resource Management Plan (#97-13-00-0100)

Dear Mr. Wilder:

Pursuant to 36 CFR 217, this letter is our decision on your appeal of Regional Forester Phil Janik's May 23, 1997, Record of Decision (1997 ROD) which approved a revised Land and Resource Management Plan (1997 Forest Plan) for the Tongass National Forest in Alaska.

Your Notice of Appeal (NOA) was received on September 30, 1997. Your appeal on behalf of Metlakatla Indian Community was timely as it was postmarked September 25, 1997. The Regional Forester transmitted the relevant decision documentation and pertinent appeal records (AR) to this office on November 21, 1997. Many interested parties requested and were granted intervenor status (see enclosed list of parties). Intervenors whose comments were received are also listed on the enclosed list of parties.

Secretary Review and Evaluation

The 1997 Forest Plan is based on Alternative 11 in the Tongass Land and Resource Management Plan Revision Final Environmental Impact Statement (FEIS), with modifications as documented in the 1997 ROD. The decision to approve the 1997 Forest Plan was subject to appeal in accordance with Forest Service appeal regulations at 36 CFR 217. Thirty-three notices of appeal were filed on the May 23, 1997, decision. In addition, two lawsuits have been filed that involve the appeals of the 1997 ROD. Also, the 1997 Forest Plan is implicated in at least one other lawsuit unrelated to appeals.

As the Under Secretary for Natural Resources and Environment at USDA, I have elected to exercise discretionary review of the administrative appeals relating to the Regional Forester's approval of the 1997 Forest Plan. This is not a step I take lightly. It is my belief that the continuing controversy and exceptional circumstances surrounding the Tongass Land and Resource Management Plan warrant my direct and immediate participation in order to bring this controversy to closure as quickly as possible so that the Forest Service can move forward with the Modified 1997 Forest Plan implementation. The residents of Southeast Alaska, their

communities and elected officials, as well as business and organizations from the region, have long sought certainty in the management of the Tongass National Forest. A key to this certainty is ensuring the sustainability of the goods and services produced by the Tongass National Forest, and all the resources on which they depend. The enclosed 1999 ROD seeks to provide that certainty built upon a foundation of sustainable natural resource stewardship. Therefore, I have reviewed these appeals and related records. My decisions in the appeals reflect modifications contained in the enclosed 1999 ROD.

The 1999 ROD documents my decision and rationale to modify the 1997 Forest Plan. I am modifying some aspects of the 1997 Forest Plan, not because I find that it fails to meet mandatory requirements, but because I have concluded that, for multiple use reasons and to reduce the level of environmental risk, the Secretary's responsibilities and authorities should be exercised differently to improve the Forest Plan. The enclosed 1999 ROD changes development land use designations (LUD's) to mostly natural LUD's in 18 Areas of Special Interest totalling approximately 234,000 acres. The 1999 ROD also strengthens a standard and guideline (S&G) and adds another to address certain wildlife species, to improve subsistence opportunities and to reduce risk to old-growth ecosystem viability. Adjustments I made to management direction, together with unchanged portions of the 1997 Forest Plan, will hereinafter be referred to as the Modified 1997 Forest Plan. The Modified 1997 Forest Plan is the document titled "Land and Resource Management Plan - Tongass National Forest", dated 1997, and is based on Alternative 11 in the "Tongass Land Management Plan Revision Final Environmental Impact Statement" with modifications as noted in the enclosed 1999 ROD.

Regulatory Authorities

The regulations governing forest plan appeals are not based on statutes that require an appeal system, but instead are one way the Department meets its responsibilities under the Organic Act (16 U.S.C. 472, 551), the Multiple Use-Sustained Yield Act (16 U.S.C. 528-531) (MUSYA), and the National Forest Management Act (16 U.S.C. 1600, et seq.) (NFMA). As Under Secretary I am charged to provide leadership in resource management and assure the protection, management, and administration of the National Forests (7 U.S.C. 2.20). I also am charged under 7 U.S.C. 2.20(a)(2)(viii) to "exercise the administrative appeal functions of the Secretary of Agriculture in review of decisions of the Chief of the Forest Service pursuant to 36 CFR 215 and 217, and 36 CFR 251 Subpart C."

The regulations governing forest plan appeals (36 CFR 217.17) provide for discretionary review by the Under Secretary. Discretionary review is based on the appeal record presented to the Chief (36 CFR 217.17(e)). The appeal regulations grant broad latitude in deciding when to invoke discretionary review (36 CFR 217.17(a)). The 1997 Forest Plan falls within the scope of the identified factors that include, but are not limited to, the "controversy surrounding the decision, the potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy." In fact, probably not since the Secretaries of Agriculture and the Interior jointly signed the 1994 "Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl" has there been as compelling a need for final resolution of such a long-standing land management controversy. An expedited discretionary review harms no appellant's interests as the Chief's decision would be subject to discretionary review in any event, and the review is based on the same record. In sum,

expediting the discretionary review portion of the appeal process, although unconventional, is in the best interest of the residents of Southeast Alaska and the public at large, and within the spirit and letter of the appeal regulations.

I find that the Regional Forester complied with applicable Federal law and agency policy in his approval of the 1997 ROD for the 1997 Forest Plan. However, as previously discussed, I feel modifications are needed to reduce the level of risk and uncertainty for ensuring environmental protection regarding three key issues which I found could be improved upon from the 1997 Forest Plan: (1) subsistence use and associated deer winter range/deer habitat capability; (2) assurance of adequate amounts and distribution of old-growth forest for species viability; and (3) protection of Areas of Special Interest.

My decision on the appeals reflects those modifications contained in the enclosed 1999 ROD and is the final administrative action by the Department of Agriculture.

The Modified 1997 Forest Plan

The Modified 1997 Forest Plan is a programmatic framework for management of an administrative unit of the National Forest System.[1] The enclosed 1999 ROD explains what the Modified 1997 Forest Plan does. "This Plan provides the broad, programmatic direction necessary to manage the resources and uses of the Tongass National Forest in a coordinated and integrated manner" (Modified 1997 Forest Plan). It "will guide the management of the Tongass National Forest for the next 10 to 15 years" (1999 ROD). The components of Forest Plan direction, "along with the Land Use Designation map, establish a management framework that governs the location, design, and scheduling of all Forest management activities. Within the management framework, project-level planning is undertaken to achieve Forest Plan implementation" (Modified 1997 Forest Plan). The Modified 1997 Forest Plan sets forth goals and objectives for management and establishes programmatic standards to follow in pursuit of those goals. "Goals are achieved through the allocation of lands to the set of LUD's, through implementation of the Standards and Guidelines specified for the LUD's, and through other activities conducted on the Forest" (Modified 1997 Forest Plan). Pursuant to NFMA, the Modified 1997 Forest Plan identifies land that is suitable for timber production and determines the allowable sale quantity (ASQ), and other resource outputs, all of which are estimates.

Implementation of the Modified 1997 Forest Plan will take place through project-level decisions which must be within the bounds of the programmatic framework. As stated in the Modified 1997 Forest Plan, implementation is "accomplished through the recurrent identification of proposed actions . . . consistent with activities anticipated in the Plan; the analysis and evaluation of such actions . . . ; related documentation and decisionmaking; and project execution and administration, in a manner that is consistent with the management direction of the Plan" (Modified 1997 Forest Plan). Thus, the Modified 1997 Forest Plan standards operate as parameters within which projects must take place. Approval of any project must be consistent with the management standards. If a project cannot be conducted

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[1]The Modified 1997 Forest Plan and FEIS were prepared under the authority of the Multiple Use-Sustained Yield Act (MUSYA) (16 U.S.C. 528-531); the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), as amended by the NFMA (16 U.S.C. 1601-1614); the implementing regulations of NFMA (36 CFR 219); and the NEPA (42 U.S.C. 4321-4335 and its implementing regulations (40 CFR 1500-1508).

within these parameters, these safeguard mechanisms in the Modified 1997 Forest Plan will prevent such development from going forward (see Swan View Coalition v. Turner, 824 F.Supp 923, 933 (D. Mont. 1992)).

The 1999 ROD (Section VIII, Appeal Rights) notes that decisions on site-specific projects are not made in the ROD and that such decisions will not be made until completion of environmental analysis and documentation for the specific project, in compliance with the National Environmental Policy Act (NEPA). Thus, approval of the Modified 1997 Forest Plan does not mandate any project decisions. Each project or activity must be consistent with the programmatic environmental protection direction in the Modified 1997 Forest Plan (16 U.S.C. 1604 (i)).

Finally, the Modified 1997 Forest Plan establishes monitoring requirements to help determine how well the standards and management direction are working and whether the goals remain appropriate throughout the plan period. As stated in the Modified 1997 Forest Plan, ". . . monitoring and evaluation comprise an essential feedback mechanism within an adaptive management framework to keep the Plan dynamic and responsive to changing conditions."

In summary, the Modified 1997 Forest Plan establishes a framework for decisionmaking on the Tongass National Forest using programmatic direction as a gateway for compliance with environmental laws at the project level.

Response to Concerns

My response to your concerns provides a focused response to contentions involving complex resource management issues. Although every contention made by you may not be cited in this decision, all of your concerns have been considered. My review of the concerns has focused upon the Regional Forester's compliance with law, regulation, and policy.

The appeal contains various concerns related to the Metlakatla Indian Community involvement in the timber industry. The appellant you represent requests incorporation by reference, in their entirety, the points made by the Alaska Forest Association (AFA) and its related remedies. Additionally, the appellant contends that the Metlakatla interests were not adequately considered by the Forest Service in light of its "trust responsibility." The forest-wide context of the 1997 Forest Plan, although not specifically articulated as an issue in this appeal, also appears relevant. As relief the appellant requests an opportunity to meet with the planning team to resolve the issues raised in the AFA's appeal and the specific issue of the trust responsibility.

The request to incorporate the AFA's appeal by reference, is insufficient under 36 CFR 217.9. Incorporating other appeals by reference fails to identify specifically the decision issues about which the requester objects. The request for relief by meeting with members of the planning team for the Tongass National Forest should be easily resolved through direct contact with the local Forest Service office in Alaska.

With regard to your concerns, I find that the Regional Forester complied with applicable Federal law and agency policy in his approval of the 1997 ROD for the 1997 Forest Plan.

1997 Forest Plan

You contend that "[i]f the [1997] ROD if implemented as submitted, the Community will face total economic collapse" and therefore incorporate ". . . herein by this reference, in their entirety, the points made by AFA in its appeal, including its cover letter and all attachments and its requests for remedies" (NOA, p. 1).

Discussion

Your appeal was focused on Metlakatla involvement in timber industry activities (NOA, p. 1). The Regional Forester must consider timber issues within the larger context of the entire National Forest, and not limited to one community. The 1997 Forest Plan is a programmatic framework for management of the Tongass National Forest, part of the National Forest System. The 1997 ROD (pp. 1-3) describes what the 1997 Forest Plan is, its overall goals and objectives, and its management prescriptions.

Under the MUSYA, the Forest Service is directed to manage National Forests for multiple use and sustained yield of the renewable products and resources with consideration given to the relative values of the various resources in particular areas. The NFMA implementing regulations at 36 CFR 219.1(a) further require that "the resulting plans shall provide for multiple use and sustained yield of goods and services from the national forest in a way that maximizes long term net public benefits in an environmentally sound manner." The NFMA implementing regulations at 36 CFR 219.3 define Net Public Benefit, which includes both quantitative and qualitative criteria.

The purpose of the 1997 Forest Plan is to direct all resource management activities on the Tongass National Forest. The 1997 Forest Plan provides programmatic direction in the form of multiple-use goals and objectives, land allocations, and management direction to make site-specific project decisions in an environmentally and economically efficient manner (FEIS Appendix L, pp. L-129 through L-130). A primary goal of the 1997 Forest Plan is to provide for the sustainability of the resources of the Tongass National Forest, while directing the coordination of multiple uses, such as outdoor recreation, timber, wildlife, fish, watershed, and wilderness. Components of the decision made include:

> ***"(A) the goals and objectives which establish the desired conditions for implementing the Plan (Chapter 2); (B) management prescriptions which include specific goals and objectives and standards and guidelines for 19 different Land Use Designations (Chapters 3 and 4); (C) identification of the amount of land suitable for timber production; (D) establishment of an allowable sale quantity (ASQ) for the amount of timber that can be sold in the first decade; (E) a monitoring plan that ensures quality control of and learning from Plan implementation (Chapter 6); and (F) recommendations for, and approvals of, special management areas, such as Research Natural Areas and Wild and Scenic Rivers" (1997 ROD, p. 1-2).***

Within this overall context, the FEIS addresses economic and social effects (FEIS, Chapter 3), including community impacts associated with timber harvesting changes for Metlakatla and other communities (FEIS, p. 3-486). Metlakatla was addressed in detail (FEIS, pp. 3-603 through

3-607), including community comments.

Maintaining options for a variety of social and economic uses of the Tongass, from continuing a timber harvest program that provides a sustainable supply of timber and other timber products to providing for subsistence opportunities and unspoiled settings for recreation and tourism, was a key factor in the Regional Forester's decision (1997 ROD,
p. 15). In the 1997 ROD the Regional Forester stated that: "The Forest Plan must be designed to provide a mix of resources and uses to best meet the needs of the American people. It must be designed to maximize net public benefits" (36 CFR 219.1) (1997 ROD, p. 37). After considering all the information, the Regional Forester selected an alternative he felt met these requirements. A forest plan must involve, by law, the entire forest (1997 ROD, p. 37). The Regional Forester's difficult decision was to determine what the best mix of resources is, while considering the forest as a whole.

Decision

After reviewing the record, I find that the Regional Forester fully considered resources in a forest-wide context. His decision is consistent with the NFMA, as well as other related laws, regulations and policies. However, based on this review, I have decided to modify the Regional Forester's 1997 ROD to reduce the level of risk and uncertainty for ensuring environmental protection for three key issues including old growth species viability, subsistence uses, and protection of Areas of Special Interest (see enclosed 1999 ROD, Rationale for Decision section). It should be noted that even with these changes the ASQ is sufficient to meet all anticipated timber harvest scenarios according to the Forest Service's market demand report (see enclosed 1999 ROD, Timber Demand section). Also, on November 27, 1998, the Forest Service published in the Federal Register an announcement that a draft methodology, prepared by the Forest Service's Pacific Northwest Research Station, for evaluating market demand

In addition, to address concerns of sustaining timber industries in Southeastern Alaska, the PNW and the Forest Service's Forest Products Laboratory in Madison, Wisconsin, are conducting a study entitled "Evaluating Wood Quality Potential for Young-Growth Western Hemlock/Sitka Spruce and Small-Diameter Old-Growth Sitka Spruce in Southeast Alaska." This study is one of the high-priority information needs identified in the Modified 1997 Forest Plan. It will produce basic product-recovery information and estimate likely markets for products from the young-growth timber and from pulpwood available from the Tongass. Results should be available over the next 2-4 years.

Incorporation by Reference of Alaska Forest Association Appeal

Your appeal requests incorporation, by reference, of "the points made by the Alaska Forestry Association in its appeal, including its cover letter and all attachments and its requests for remedies" (NOA, p. 1). The regulations (36 CFR 217.9 (b) (5-7)) addresses the appropriate content of a NOA. It states:

> *"[a]t a minimum, a written notice of appeal filed with the Reviewing Officer must: (5) Identify specifically that portion of the decision or decision document*

> *to which the requester objects; (6) State the reasons for objecting, including issues of fact, law, regulation, or policy, and, if applicable, specifically how the decision violates law, regulation, or policy; and (7) Identify the specific change(s) in the decision that the appellant seeks."*

Decision

I find that your request to incorporate the AFA appeal by reference is insufficient under 36 CFR 217.9 since your request fails to identify specifically that portion of the decision to which the Metlakatla Community objects. The Regional Forester fully considered all comments received through the public involvement process, in an orderly, thorough, and equitable fashion, and in accordance with the NEPA. Various Metlakatla residents, as well as the Annette Natural Resources Center, provided oral and/or written comments on the 1997 Forest Plan revision DEIS or Supplement (FEIS, p. 3-604). I affirm the Regional Forester's decision. Nothing in the enclosed 1999 ROD affects the 1997 ROD on this issue.

Trust Responsibility

You contend that the Metlakatla interests were not adequately considered by the Forest Service in light of its "trust responsibility" (NOA, p. 2). As relief you request "an opportunity to meet with the planning team to resolve the issues raised in the AFA's appeal and the specific issue of the trust responsibility" (NOA, p. 4).

Discussion

The Forest Service recognizes that it has certain responsibilities to federally recognized Indian Tribal governments. The Forest Service Manual (FSM) 1563.03 lists these basic responsibilities of the Forest Service toward tribal governments:

> *1. Maintain a governmental relationship with federally recognized Tribal Governments.*
> *2. Implement programs and activities honoring Indian treaty rights and fulfill legally mandated trust responsibilities to the extent they are determined applicable to National Forest System lands.*
> *3. Administer programs and activities to address and be sensitive to traditional Native religious beliefs and practices, and*
> *4. Provide research, transfer of technology, and technical assistance to Tribal Governments.*

Forest planning regulations (36 CFR 219.7) require notification and coordination with tribal governments during the development of a forest plan. Additional direction for fulfilling tribal trust responsibilities to tribal and other interests is contained in the Alaska National Interest Lands Conservation Act (ANILCA). Consistent with the requirements of ANILCA, during the development of the 1997 Forest Plan and EIS, 810 (a) hearings were held with communities and Tribes to obtain input on cultural, traditional, and subsistence uses of National Forest System lands (Record 1920-2-5 (P-4), Data Lib # 18188). Alternatives were evaluated to see how they met these uses (FEIS, p. 3-227). Even though an ANILCA Section 810 (a) evaluation and determination is not required for approval of a 1997 Forest Plan, such an evaluation and determination was included in the revision to facilitate subsequent project level

planning and decision making of the potential alternatives on subsistence uses and needs. An ANILCA Section 810 final determination, including a summary of the evaluation, was included in the 1997 ROD (pp. 36-37).

Prior to the 810 (a) hearings, the Forest Service also held public open houses to gain input from councils, tribes, and communities under the provisions of ANILCA (Record 1920-2-5 (P-4), Data Lib # 18671). The record is replete with documentation that shows the Forest Service fulfilled its responsibilities under ANILCA.

Consultations will continue with implementation of the 1997 Forest Plan. Provisions are included within the document to monitor traditional or subsistence resources and uses as noted in the monitoring plan (1997 ROD, p. 29; 1997 Forest Plan, p. 6-11). Provision also was made for monitoring effects on employment and income in local and regional economies (1997 Forest Plan, p. 6-8); and, for monitoring whether the Forest Service worked with local communities to identify and pursue Rural Community Assistance opportunities (1997 Forest Plan, p. 6-8).

The record clearly shows that the Tongass National Forest took steps to include the appellant and associated tribes in the planning process. The record shows that the 1997 Forest Plan and FEIS direct managers to continue dialogue with all affected Native American tribes and to take all reasonable and prudent measures to comply with applicable laws during implementation.

The request to meet with the planning team to discuss the 1997 Forest Plan, can be fulfilled by the appellants directly contacting Jim Barteleme, Acting Forest Supervisor. The Forest Supervisor would best be able to direct you to the appropriate person to discuss your concerns. He can be contacted at the following address and phone number:

Jim Bartelme, Acting Forest Supervisor
Tongass National Forest
Federal Building
Ketchikan, AK 99901
907-225-3101

Decision

After reviewing the record, I find that each of the Metlakatla Community concerns specifically addressed in the appeal was adequately discussed and considered. As previously stated, the reference to the AFA appeal did not merit consideration. However, the request for relief by meeting with the planning team for the Tongass National Forest, or other Forest Service officials, can readily be fulfilled as described above. I affirm the Regional Forester's decision. Nothing in the enclosed 1999 ROD affects the 1997 ROD on this issue.

Sincerely,

/s/ James R. Lyons

JAMES R. LYONS
Under Secretary
Natural Resources and Environment

Enclosures
List of Parties
1999 ROD