



File Code: 1570-1 (EMC)

Date: April 13, 1999

*Mr. Thomas S. Waldo
Earthjustice Legal Defense Fund, Inc.
325 Fourth Street
Juneau, Alaska 99801*

RE: Appeal of the Record of Decision for the Tongass National Forest Land and Resource Management Plan (#97-13-00-0094)

Dear Mr. Waldo:

Pursuant to 36 CFR 217, this letter is my 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 the Hoonah Indian Association, Organized Village of Kake, Klawock Cooperative Association, Angoon Community Association, and Sitka Tribe of Alaska 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 20, 1997. Many interested parties requested and were granted intervenor status (see enclosed lists of parties). Intervenors whose comments were received are also listed on the enclosed lists 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.

On February 12, 1999, Chief Dombek issued an 18-month interim rule temporarily suspending decisionmaking regarding road construction and reconstruction in many unroaded areas of the National Forest System. The interim moratorium is needed to safeguard the significant ecological values of unroaded areas from the potentially adverse effects often associated with road construction until a new, permanent road policy is in place. The long-term policy will guide decisions of where, when, and if new roads should be constructed in unroaded portions of the National Forest System. As explained in the interim rule preamble, the Tongass National Forest was exempt from the moratorium as a newly revised plan that had the benefit of considerable science and public involvement. The preamble also noted that the 1997 Forest Plan was still undergoing evaluation as part of the administrative appeal process under 36 CFR 217. The interim rule allows for any issues related to the construction of roads in unroaded areas to be addressed in the appeal decision. As such, the transportation system analysis in general, and as it relates to unroaded areas specifically, is discussed below where appropriate.

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

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).*

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 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

Your appeal contains concerns related to the protection of customary and traditional uses of fish and game, population viability and subsistence, multiple uses, restricting subsistence, range of alternatives, identification of subsistence areas, guidance, and federal trust responsibilities. Your requested relief is that the revised Tongass Forest Plan be amended.

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.

Protection of Customary Uses

The appellants contend that the 1997 Forest Plan "does not provide adequate protection for customary and traditional uses of wild fish and game resources -- often called 'subsistence' -- as required by section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA)" specifically, certain "portions of the plan permit moderate and intensive timber development and roadbuilding within the core customary and traditional subsistence use areas of villages" (NOA, p. 2). The appellants also contend that the 1997 Forest Plan will have a devastating effect on customary and traditional uses of fish and game in Southeast Alaska (NOA, pp. 4-13).

Discussion

In 1988, the Region identified ten public issues for the 1997 Forest Plan, including subsistence (1997 Forest Plan Summary, pp. i, ii). Subsistence issues were carried through and updated for the DEIS, SDEIS, RSDEIS, and FEIS. The issue appears in the form of a question, "What should the Forest Service do to continue providing subsistence opportunities?"

The Regional Forester stated, "[t]he maintenance of habitats needed to ensure the long-term viability of all Tongass wildlife and fish species and to sustain commercial, sport and subsistence use, is a key factor in my decision" (1997 ROD, p. 15). "I want a Forest Plan that . . . gives me a relatively high assurance that the habitat needed for long-term viability of all wildlife species would be maintained and commercial, sport, and subsistence use sustained" (1997 ROD, p. 15).

The ANILCA addresses subsistence in Section 810. It states in part:

(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency -

- (1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;*
- (2) gives notice of, and holds, a hearing in the vicinity of the area involved; and*
- (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the*

utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such uses, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

The FEIS, page 3-227, correctly states that an ANILCA Section 810 evaluation and determination is not required for approval of a revised Forest Plan; a programmatic level decision that is not a determination whether to "withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition" of National Forest System lands. Those types of decisions are site-specific entailing additional analysis including compliance with the NEPA, the Endangered Species Act (ESA), and other laws, including ANILCA. Even though it is not required, a Forest-wide evaluation and determination is included for the Forest Plan revision to facilitate project level planning and decision making in compliance with ANILCA Section 810.

The first determination is that the restriction must be "necessary, consistent with the sound management of public lands" (ANILCA Section 810 (a) (3) (A)). After evaluating alternatives and considering resources in a multiple-use context, the Regional Forester selected the alternative that best met the overall goals and objectives of the 1997 Forest Plan. The Regional Forester recognized the potential to adversely affect subsistence uses within the Tongass, but concluded these effects would be necessary in order to achieve the overall goals and objectives.

The second determination is the amount of public land necessary to accomplish the proposed action. The regulation at 36 CFR 219.4 (b) (3) directs Forests "to prepare a Forest Plan for all lands which a Forest Supervisor has responsibility . . . These plans shall constitute the land and resource management plans under section 6 and 13 of RPA." The amount of land necessary to accomplish the proposed project is, therefore, the entire National Forest. The three Forest Supervisors for the Tongass National Forest evaluated the range of alternatives presented in the 1997 Forest Plan. After careful consideration, the Forest Supervisors determined that to accomplish the goals and objectives of the 1997 Forest Plan the amount of public land needed was the minimum necessary. The Regional Forester agreed, noting that while the plan does not by itself authorize activities, its land use designations protect high-value subsistence areas across the Tongass.

The third determination is to identify reasonable steps to minimize adverse impacts to subsistence uses. The Regional Forester did just that through standards and guidelines (S&G's) specific to subsistence as well as S&G's for riparian areas, fish and wildlife, and beach fringe, as well as other S&G's that contribute to minimizing impacts to subsistence uses. Forest-wide S&G's for subsistence are listed on pages 4-85 through 4-86 of the 1997 Forest Plan and explained in more detail later in this discussion. In addition, many important

subsistence areas were "assigned land use designations that exclude timber harvesting" (1997 ROD, p. 37) to limit timber management and roadbuilding within core customary and traditional subsistence use areas. These non-timber land use designations (LUD's) were assigned to minimize adverse impacts to subsistence uses and resources.

Forest plans are required by NFMA, and must provide for the multiple use and sustained yield of renewable forest resources in accordance with the MUSYA. Multiple-use is defined as "the management of all the various renewable surface resources of the National Forest System so that they are utilized in the combination that will best meet the needs of the American people" (36 CFR 219.3). In his decision the Regional Forester stated:

"[t]he 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" (1997 ROD, p. 37).

The Ninth Circuit Court of Appeals ruled (March 24, 1999) that the Forest Service complied with statutory requirements concerning subsistence deer hunting in the Tongass National Forest. The ruling came in cases that two Southeast Alaska tribes filed over the Eight Fathom and Northwest Baranof timber sales, located on Chichagof Island and Baranof Island respectively. The appeals court held that the Forest Service decisions about the impacts of timber sales on subsistence hunting complied with section 810 of the ANILCA. In doing so, the court rejected the claims of the Hoonah Indian Association and the Sitka Tribe of Alaska that additional protections were needed. The court found that the Forest Service correctly determined, in accord with the terms of ANILCA, that the sales were "necessary, consistent with sound management principles" and "involve the minimal amount of public lands necessary to accomplish the purposes" of the sales.

Decision

The 1997 Forest Plan was consistent with ANILCA, NFMA and the requirements of NEPA, as well as other law, regulation, and policy with regard to the evaluation of the impacts on subsistence uses and needs.

Although a forest plan does not determine whether to withdraw, reserve, lease or otherwise permit the use, occupancy, or disposition of public lands, the Forest Service has satisfied all the requirements of ANILCA 810 (a) as if it applied to the decision to adopt the forest plan.

However, based upon my review of the record, I have determined that there was a need to modify the provisions of the plan to better address subsistence uses. I have converted additional acres from development to non-development LUD's in 18 Areas of Special Interest (see enclosed 1999 ROD, Wildlife section) to further protect traditional subsistence needs and other special values associated with these lands. Of these 18 Areas of Special Interest 15 have been identified as significant for meeting subsistence needs (see enclosed 1999 ROD, Areas of Special Interest section). In addition the 1,000-foot beach and estuary fringe buffer connecting the beach fringe to the lowlands will protect more subsistence areas.

Further, I have added a standard which extends timber rotation from 100 to 200 years in 42 Wildlife Analysis Areas (WAA) where deer habitat capability concerns exist (see enclosed 1999 ROD, Deer Winter Range section). Reducing the rate at which timber is harvested diminishes the risk to deer habitat capability and thus subsistence use of deer. Because there is a strong relationship between those WAA's and the areas identified as important "heavy use" areas for rural communities across the forest (FEIS Chapter 3, Wildlife Analysis tables), the extended timber rotation focuses on all areas where deer habitat capability is a concern. The rotation strategy addresses the concern of increased competition for deer that might result from shifts in hunting pressure that could occur if only a few areas of concern were addressed.

These actions will increase the Forest's ability to meet subsistence needs over the long term.

Population Viability and Subsistence

The appellants contend that the Tongass Land and Management Plan will have a devastating effect on customary and traditional uses of fish and game in Southeast Alaska (NOA, pp. 4-13).

Discussion

The NFMA planning regulations at 36 CFR 219.19 specify "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area In order to ensure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area." In addition, 36 CFR 219.27 (a) (6) directs Forests to "provide for adequate fish and wildlife habitat . . . maintained and improved to the degree consistent with multiple use objectives established in the plan." The Ninth Circuit Court of Appeals recognized that NFMA does not create a concrete standard for diversity within multiple use objectives. Diversity is to be addressed in light of "overall multiple-use objectives" (Seattle Audubon Society v. Lyons, 80 F.3d 1401 (9th Cir. 1996).

To address wildlife habitat and subsistence issues, the Tongass National Forest commissioned an Interagency Viable Population (VPOP) Committee to develop a landscape conservation strategy addressing wildlife viability. The VPOP committee designed a series of old-growth habitat conservation areas (HCA's), riparian buffers, and landscape habitat connectivity corridors "that were an important component of conservation to facilitate animal dispersal and movement . . . through the overall habitat matrix" (FEIS Appendix N, p. N-17). The Alaska Region requested the Pacific Northwest Research Station to conduct an independent scientific peer review of the VPOP strategy. The VPOP committee used the PNW recommendations to further strengthen the wildlife habitat conservation strategy for the 1997 Forest Plan. "Long-term viability for wildlife species has been extensively studied and analyzed, and is discussed in detail in the Final EIS (pp. 3-380 to 3-429) and Appendix N" (1997 ROD, p. 15). The resulting strategy adopted by the Regional Forester formed the cornerstone for habitat conservation which addresses and maintains fish and wildlife viability on the Tongass National Forest.

As noted by the Regional Forester: "Wildlife habitat needs are predicated to a great extent on maintenance of old-growth forest. The old-growth habitat strategy is comprised of two key components. The first is a forest-wide system of reserves that is designed to protect the integrity of the existing old-growth ecosystem" (1997 ROD, p. 6). "The second component of the forest-wide old-growth habitat strategy . . . is a set of standards and guidelines that apply in the development of LUD's where commercial timber harvesting is permitted. In these areas, the standards and guidelines will sustain key components of the landscape that the available scientific information indicates is important for wildlife. Collectively these standards and guidelines maintained approximately 69 percent of current productive old growth within areas of commercial timber harvest. The Forest Plan also provided a 1,000-foot buffer along the entire marine shoreline with no scheduled timber harvest" (1997 ROD, p. 6). Riparian management S&G's are designed to provide habitat and connectivity in the zones between aquatic and terrestrial ecosystems. Connectivity requirements may be instituted where project-level analysis indicates that the above are not sufficient to completely meet wildlife habitat objectives. "In all, the Forest Plan protects 86 percent of high-value deer winter range and 83 percent of deer habitat capability" (1997 ROD, p. 17).

Specific rural native communities are identified in the 1997 ROD (p. 39). Non-development LUD's have been designated on Forest lands that surround them. Within the 1997 Forest Plan, specific Wildlife Habitat Improvement S&G's are included to ensure habitat improvement is considered in project planning, including deer winter range (1997 Forest Plan, p. 4-113).

The various S&G's and management direction provide for population viability and subsistence (1997 Forest Plan, p. 4-87). The 1997 Forest Plan also included a monitoring and evaluation plan which provided an ongoing assessment of the effectiveness of 1997 Forest Plan S&G'S affecting subsistence (1997 Forest Plan, p. 6-11).

Decision

After my review of the record, I find that the issue related to population viability and subsistence use was adequately discussed and considered. The 1997 Forest Plan has complied with all obligations under ANILCA and is consistent with NFMA and NEPA.

As previously discussed in my response to the Protection of Customary Uses, I have added provisions to enhance opportunities for subsistence. With regard to viability, I have added new protection measures to improve viability for old growth dependent species including wolf, goshawk, and marten. (See Management Indicator Species and Other Species of Special Concerns in the enclosed 1999 ROD for a detailed discussion).

I have added a deer habitat capability standard which extends timber harvest rotation from 100 to 200 years in WAA's where deer habitat capability is a concern for subsistence. (See Deer Winter Range section of the enclosed 1999 ROD). Deer habitat is also protected under a standard for wolf conservation. In addition, the Modified 1997 Forest Plan's 1,000-foot beach and estuary fringe widens riparian buffers, and large, medium, and small old growth habitat reserves to maintain needed habitat for old growth dependent species.

Multiple Uses & Subsistence

The appellants contend that "[T]he Alaska Region mistakenly treats subsistence the same as, or less than, any other resource use subject to multiple use balancing" (NOA, p. 13) and that the Regional Forester failed to adequately show why the particular restriction to subsistence resulting from the 1997 Forest Plan revision was necessary (NOA, p. 16).

Discussion

Multiple-use as defined by MUSYA "means the management of all the various renewable surface resources of the National Forests so that they are utilized in the combination that will best meet the needs of the American people; . . . and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit of output" (P.L. 86-517 Sec. 4 (a)). This law gives the Forest the latitude of developing multiple-use direction without the constraint of obtaining the greatest dollar return or unit of output. The Act directs the Agency to "cooperate with interested State and local governmental agencies and others in the development and management of the National Forests." It also states that "[i]n the administration of the National Forests due consideration shall be given to the relative values of the various resources in particular areas."

Appellants contend that the Region mistakenly treats subsistence the same as or less than, any other resource use subject to multiple use balancing. In Amoco Production Co. v. Village of Gambell, 480 U.S. 531,544, the Supreme Court ruled that Congress did not state in ANILCA that subsistence uses have preferences over the development of energy resources, or other uses of Federal land; rather, it expressly declared that preservation of subsistence resources is a public interest and established a framework for reconciliation, where possible, of competing public interests.

As one of the ten original issues for the 1997 Forest Plan, subsistence was considered in the development of alternatives, and evaluated in the Environment and Effects section of the 1997 Forest Plan. Alternatives were modified to address subsistence under ANILCA between draft and final in a multiple-use context as directed by ANILCA. Subsistence was clearly a high profile issue receiving evaluation.

Subsistence is identified under Goals Common to All Alternatives in the FEIS, with the direction to "[p]rovide for the continuation of subsistence uses and resources by all rural Alaskan residents" (FEIS, p. 2-25) and "[e]valuate and consider the needs of subsistence users in making project land management decisions" (1997 Forest Plan, p. 2-4).

With respect to the priority of uses, the 1997 Forest Plan states, subsistence uses "shall be the priority consumptive use of such resources . . . when it is necessary to restrict the taking of such resources" (1997 Forest Plan, p. 4-86). During 1997 Forest Plan implementation, the Regional Forester has directed that "[s]pecific public involvement and analysis requirements will be followed to ensure that management activities consider impacts upon rural residents who are subsistence users" (1997 ROD, p. 5).

Decision

After my review of the record, I find that the issue related to multiple use over-riding subsistence uses and needs was discussed and considered. Impacts to subsistence were evaluated in a multiple-use context. Although a forest plan does not determine whether to withdraw, reserve, lease or otherwise permit the use, occupancy, or disposition of public lands, the Forest Service has satisfied all the requirements of ANILCA 810 (a) as if it applied to the decision to adopt the forest plan. The 1997 Forest Plan is consistent with NFMA and the requirements of NEPA, as well as other law, regulation, and policy with regard to the evaluation of the impacts on subsistence uses and needs.

However, based upon my review of the record, I have determined that there was a need to modify the provisions of the plan to better address subsistence uses. I have converted additional acres from development to non-development LUD's in 18 Areas of Special Interest (see enclosed 1999 ROD, Wildlife section) to further protect traditional subsistence needs and other special values associated with these lands. Of these 18 special interest areas 15 have been identified as significant for meeting needs (see enclosed 1999 ROD, Areas of Special Interest section). In addition, the 1,000-foot beach and estuary fringe buffer connecting the beach fringe to the lowlands will protect more subsistence areas.

In addition, I have added a standard which extends timber rotation from 100 to 200 years in 42 WAA's where deer habitat capability concerns exist (see enclosed 1999 ROD, Deer Winter Range section). Reducing the rate at which timber is harvested diminishes the risk to deer habitat capability and thus subsistence use of deer. Because there is a strong relationship between those WAA's and the areas identified as important "heavy use" areas for rural communities across the forest (FEIS Chapter 3, Wildlife Analysis tables), the extended timber rotation better addresses the demand for subsistence. The extended timber rotation focuses on all areas where deer habitat capability is a concern. The rotation strategy addresses the concern of increased competition for deer that might result from shifts in hunting pressure that could occur if only a few areas of concern were addressed.

I feel that the new management direction incorporated into the 1999 ROD constitutes reasonable steps to further minimize impacts on subsistence uses and resources.

Restricting Subsistence

The appellants contend that, "[t]he determinations purporting to justify the restrictions to subsistence are contrary to law and arbitrary and capricious " (NOA, p. 43) and they further contend that "[t]he restrictions to subsistence are not necessary" (NOA, p. 43).

Discussion

The FEIS notes that Section 810(a) of ANILCA requires the Forest Service ". . . to evaluate the potential effects on subsistence uses and needs, followed by specific notice and determination procedures should there be a significant possibility of a significant restriction of

*subsistence uses" (FEIS, p. 3-224). The Alaska Land Use Council defined an action as significantly restricting subsistence uses if the "proposed action . . . can be expected to result in a substantial reduction in the opportunity to continue subsistence uses of renewable resources" (FEIS, p. 3-224). In *Kunaknana vs. Watt*, the U.S. District Court clarified this definition. The Court states in part that "restrictions for subsistence uses would be significant if there were large reductions in abundance or major redistribution of these resources, substantial interference with harvestable access to active subsistence-use sites, or major increases in non-rural resident hunting" (FEIS, p. 3-224). All of the alternatives in the 1997 Forest Plan were evaluated for potential effects on subsistence uses and need. The FEIS states that "[b]ased on this evaluation it was determined that, in combination with other past, present and reasonably foreseeable future actions, one or more of the RSDEIS alternatives, if implemented through project-level decisions and actions, may result in a significant restriction of subsistence uses of deer, and possibly other land mammals, due to potential effects on abundance and distribution, and on competition" (FEIS, p. 3-227).*

The FEIS also notes that the reason a restriction may be necessary ". . . at least in the short-term is largely due to the continuation of reduced habitat capabilities resulting from past habitat alterations . . ." (FEIS, p. 3-225). It was also noted that there are "portions of the Tongass where such restrictions may already be occurring . . ." (FEIS, p. 3-225; SDEIS, 1991, pp. 3-762 and 3-763). The guiding direction is that "[t]he Forest Plan must be designed to provide a mix of resources and uses to best meet the needs of the American people" (1997 ROD, p. 37). This statement by the Regional Forester is consistent with NFMA implementing regulations which direct forest plans to provide for the net public benefits (36 CFR 219.1). The Regional Forester determined that subsistence may be restricted in some circumstances. However, as previously noted, ANILCA does not prohibit such a restriction of subsistence.

Once the determination that restriction of subsistence uses may be necessary, consistent with Section 810 (a) of ANILCA, the "USDA Forest Service notified the appropriate State agencies, local communities, the Southeast Alaska Federal Subsistence Regional Advisory Council, and State Fish and Game Advisory Committees, and held hearings in affected communities throughout Southeast Alaska after publication and dissemination of the RSDEIS" (FEIS, p. 3-228).

As outlined above, Section 810 (a) of ANILCA requires a determination that: "(a) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (b) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (c) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions." With respect to section (a), the Regional Forester correctly stated that "[t]he Forest Plan must be designed to provide a mix of resources and uses to best meet the needs of the American people" (1997 ROD, p. 37). When addressing section (b), the Regional Forester correctly determined that "[a] forest plan must involve, by law, the entire forest" (1997 ROD, p. 37). Addressing section (c) he again correctly stated "[t]he continuation of subsistence opportunities, and reasonable steps to minimize

effects on subsistence resources, are provided for the forest-wide standards and guidelines for subsistence, as well as related standards and guidelines for riparian areas, fish, and wildlife. Many important subsistence areas were assigned land use designations that exclude timber harvesting. The beach and estuary fringe forest-wide standards and guidelines apply to all beach fringe and estuarine areas not under more restrictive designations (1997 ROD, p. 37). And, importantly, the Regional Forester noted "[t]he potential site-specific effects on subsistence uses, and reasonable ways to minimize these effects, will be analyzed and considered during project-level planning" (1997 ROD, p. 37).

Finally, the 1997 Forest Plan stated that subsistence uses "shall be the priority consumptive uses of such resources . . . when it is necessary to restrict the taking of such resources" (1997 Forest Plan, p. 4-86). If restrictions should therefore become necessary, "[s]port hunting restrictions would occur first, followed by selective subsistence reductions, based on ANILCA section 804" (FEIS, p. 3-225).

Decision

After my review of the record, I find that the issue related to restricting subsistence uses and needs was adequately discussed and considered. Although a forest plan does not determine whether to withdraw, reserve, lease or otherwise permit the use, occupancy, or disposition of public lands, the Forest Service has satisfied all the requirements of ANILCA 810 (a) as if it applied to the decision to adopt the forest plan. The 1997 Forest Plan is consistent with the requirements of NFMA and NEPA, as well as other law, regulation, and policy. The Regional Forester considered the correct factors related to your concern and did not make a clear error of judgment when he made his determination of consistency with sound principles of the utilization of public lands. Therefore, the Regional Forester was not arbitrary and capricious.

Please refer to my decisions on other issues in this letter and Appendix B of the enclosed 1999 ROD regarding modifications I made to the 1997 Forest Plan, which will increase opportunities for subsistence.

Range of Alternatives

The appellants contend that, "[t]he Alaska Region did not consider an adequate range of alternatives to protect subsistence" (NOA, p. 21).

Discussion

The planning regulations (36 CFR 219.1 (a)) state that "plans shall provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner." Net public benefits include all outputs and effects, both positive and negative values that cannot be quantitatively valued and, therefore, require the decisionmaker to subjectively balance such benefits with costs, with each other, and with those that can be quantified. The planning regulations (36 CFR 219.12 (f)) state that "the primary goal in formulating alternatives,

besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements of sections 219.13 through 219.27." Thus, the evaluation of the range of alternatives does not turn upon consideration of a single factor, such as subsistence, but rather must consider the alternatives as a whole.

*Arguments raised by the appellants here are similar to those addressed by several Federal courts in their review of Forest Service land and resource management plans. In Resources Limited, Inc. v. Robertson, 789 F. Supp. 1529 (D. Mont. 1991), affirmed 8 F.3d at 1401-1402, plaintiffs argued that the Flathead Forest Plan EIS was inadequate because it allegedly was developed using "unrealistic timber prices and harvest costs." The district court reviewed the Flathead Forest Plan's range of alternatives using a "rule of reason: "the agency is required to set forth only those alternatives necessary to permit a reasonable choice." The "touchstone" for the court's inquiry is whether the EIS's selection and discussion of alternatives fosters informed decisionmaking and informed public participation (*Id.* at 1537). The court concluded that assumptions underlying the EIS were reasonable (*Id.* at 1539).*

In Sierra Club v. Robertson, 810 F. Supp. at 1021 (W.D. Ark. 1992), affirmed, 28 F. 3d 753 (8th Cir., 1994), plaintiffs argued that the Ouachita Forest Plan EIS was inadequate because it did not contain a "herbicide-free, selection cutting" alternative. The court noted that the Forest Plan EIS considered 13 alternatives and their environmental consequences and concluded that the Forest Service "considered sufficient alternatives to permit a reasoned choice."

For a forest plan, the choice is among management scenarios affecting all the multiple-use resources of the forest. Alternatives cannot be completely specified by a single output or LUD. Displays of estimated resource levels under the alternatives are presented to assist the public to better understand the possible consequences of implementing a particular alternative. In developing a forest plan, it is reasonable to expect that alternatives designed to meet established goals and objectives may produce similar results. The effects of each alternative on subsistence was considered by the Regional Forester as demonstrated in the FEIS (p. 2-23).

A total of 34 alternatives were developed and considered over the course of the DEIS, SDEIS, RSDEIS, and FEIS. "Some of these alternatives have been carried from one EIS to another and refined in response to public comments, new information, or changing circumstances" (1997 ROD, p. 11). Alternative 11, for example, "was developed from Alternative 10, the former Preferred Alternative, considering public and agency comments on the Revised Supplement, and using additional analysis" (FEIS, p. 2-24) to better address the issues. This methodology was used in developing the final array of alternatives considered in the FEIS. The FEIS (pp. 2-25) identifies that all of the alternatives shared a common goal of providing for the continuation of subsistence uses and resources by all rural Alaskan residents. Alternatives 1 and 2 provided a particular emphasis on subsistence uses (FEIS, Part 1, Summary, Table 2, pp. v, 2-26 and 2-29).

Decision

After my review of the record, I find that the issue related to an adequate range of alternatives was discussed and considered. The Forest satisfied the procedural requirements under ANILCA section 810 (a) and included the appellants and associated tribes in the planning process. The 1997 Forest Plan is consistent with the requirements of NFMA and NEPA, as well as other law, regulation, and policy.

However, to further strengthen Alternative 11, I have added provisions to enhance subsistence by increasing deer winter range/deer habitat capability. I have also increased protection for old growth and old-growth dependent species. In addition, I have provided new protection for Areas of Special Interest (see Rationale for Decision in the enclosed 1999 ROD).

Identification of subsistence areas

The appellants argue that because the Forest Plan did not identify the areas most important for subsistence use and consider alternatives that would protect those critical places, the 1997 Forest Plan failed to satisfy the procedural requirements of Section 810 (a) and provide a basis to support the substantive determinations (NOA, p. 22).

Discussion

The Forest recognizes that "Forest plans are programmatic, meaning that they establish direction and allowable activities for broad land areas . . . This is a common source of frustration to local residents, who want to know exactly how they and the places they care about will be affected" (FEIS, p. 3-525).

To address that concern, each community was described with respect to subsistence uses. The FEIS, pages 3-529 to 3-680, contains community assessments of subsistence use, including an identification of the areas most important to community subsistence use. Maps were developed that identified where each community obtained approximately 75 percent of their average annual deer harvest demonstrating the Regional Forester's consideration of local subsistence use areas.

Descriptions also included "a summary of public comments and testimony from community residents received by the Forest Service during the TLMP revision periods" (FEIS, p. 3-524). This information was used to identify "community use areas" (CUA's). The CUA's are areas community residents have developed "deep attachments to as places they use and visit regularly

. . . The CUA maps and tables are intended to help community residents gain a better understanding of what management direction is proposed for their immediate surroundings under each alternatives" (FEIS, p. 3-524).

In addition to the above mentioned pages in the FEIS, Appendix H also includes maps of communities' subsistence use areas, as well as estimated effects on deer habitat capability and harvest opportunities. Maps identify traditional hunting areas for each community as well as the number of households that traditionally use each area. Information about areas where

each community obtained their deer in recent years, and relative amounts of deer taken from each area is included also.

The Regional Forester took additional steps to determine effects on subsistence when he had the original RSDEIS alternatives evaluated by a group of subsistence specialists. This group reviewed the effects of implementing proposed alternatives on 30 subsistence communities in Southeast Alaska (FEIS, p. 3-528). Thus further demonstrating his desire to fully address subsistence issues.

Subsistence areas are site-specific, as is pointed out by the appellants (NOA, p. 23). The Forest is directed under the subsistence forest-wide S&G's to "locate and manage forest management activities considering impacts upon rural residents who depend upon subsistence uses of resources . . ." (1997 Forest Plan, p. 4-86), meaning that site-specific analysis for projects will further evaluate effects on subsistence during project planning.

The point was also made by the appellants that subsistence sites are not static. "Intensity of use may shift geographically from year to year . . ." (NOA, p. 32). To accommodate these shifts, the subsistence S&G's contain direction to "evaluate changes in subsistence use patterns and activities . . . by conducting periodic surveys of wildlife populations and subsistence harvest and consulting with subsistent user groups" (1997 Forest Plan, p. 4-87). Thus, there is a built in mechanism for reviewing subsistence use and patterns, with the ability to adjust accordingly.

Decision

After my review of the record, I find that the issue related to identification of subsistence use areas was adequately discussed and considered. Although a forest plan does not determine whether to withdraw, reserve, lease or otherwise permit the use, occupancy, or disposition of public lands, the Forest Service has satisfied all the requirements of ANILCA 810 (a) as if it applied to the decision to adopt the forest plan. The 1997 Forest Plan is consistent with the requirements of NEPA, as well as other law, regulation, and policy with regard to the evaluation of the impacts on subsistence uses and needs.

Please refer to my decisions on other issues in this letter and Appendix B of the enclosed 1999 ROD regarding modifications I have made to the 1997 Forest Plan, increasing opportunities for subsistence. The standard I have included will provide additional protection for areas important to subsistence. I have also identified specific Areas of Special Interest important for subsistence (See Areas of Special Interest in the enclosed 1999 ROD) and directed changes in the rotation age from 100 to 200 years for 42 WAA's to increase retention of deer winter range which is also an important element in addressing future subsistence needs.

Guidance

The appellants contend that there is no guidance to maintain the "abundance and distribution of subsistence resources necessary to meet subsistence user needs" and no guidance as to how to reconcile this "guideline with the timber Objective of seeking to meet market demand for

timber" (NOA, p. 41). And finally, the appellants contend that: "The Determinations Purporting to Justify the Restrictions to Subsistence are Contrary to Law and Arbitrary and Capricious" (NOA, p. 43).

Discussion

The NFMA planning regulation 36 CFR 219.11 (b) and (c) requires a forest plan to contain "Forest multiple-use goals and objectives", and "multiple-use prescriptions and associated standards and guidelines for each management area including proposed and probable management practices . . ." Thus, "[s]tandards and guidelines specify how projects and activities are to be carried out to satisfy multiple resource needs " (FEIS, p. 1-3). Goals and objectives provide broad forest management direction. The S&G's provide protection for the land and its resources in order to maintain healthy, whole, sustainable ecosystems over time. They set the bounds within which management prescriptions are formulated.

The Forest goal applying to subsistence directed the Forest to "[p]rovide for the continuation of subsistence uses and resources by all rural Alaskan residents." The associated objective directed the Forest to "[e]valuate and consider the needs of subsistence users in making project land management decisions" (1997 Forest Plan, p. 2-4). Each Management Prescription includes specific direction, called LUD S&G's for subsistence uses.

The most comprehensive direction pertaining to subsistence is contained in the Forest-wide S&G's. This language directed the Forest to:

- 1. "Manage for healthy populations of fish and wildlife" and to "cause the least adverse impact possible on rural residents who depend upon subsistence"*
- 2. "Provide for the continuation of . . . subsistence uses by rural Alaskan residents . . ."*
- 3. If it becomes necessary to restrict use, "(n)on-wasteful subsistence uses of fish and wildlife shall be the priority consumptive uses of such resources . . ."*
- 4. "Cooperate with adjacent landowners and land managers in managing subsistence activities and in maintaining the continued viability of all wild renewable resources . . ." (1997 Forest Plan, p. 4-86).*

These S&G's further direct that all management activities consider the impacts upon rural residents who depend upon subsistence uses by complying with ANILCA, Title VIII, Section 810 as described above. They also direct the Forest to "[e]valuate changes in subsistence use patterns"; make recommendations for and enforcing regulations developed by the Federal Subsistence Board; "maintain a subsistence use program"; "seek to maintain the abundance and distribution of subsistence resources"; "[c]onsider subsistence users' needs in the scheduling, location, and design of fish and wildlife habitat management improvement projects"; and "[i]n the development and access of facilities, seek opportunities to provide for subsistence users" (1997 Forest Plan, p. 4-87). It is important to remember that the 1997 Forest Plan provides overall guidance for management of the forest. This guidance is

implemented through project decisions that must be consistent with the 1997 Forest Plan. In addition, concerning the appellants' demand contention, in the 1997 ROD, the Regional Forester directed the Region to develop a methodology to insure compliance with the "seek to meet market demand" standard established in the TTRA. 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 order to meet the agency's obligation under the TTRA was available for review. As stated in the enclosed 1999 ROD,

I have reviewed that methodology and conclude that it is an appropriate methodology for determining market demand for the purposes of implementing the "seek to meet market demand" language of TTRA. I recognize that the methodology is not the only possible methodology for compliance with the congressional directive. Pending receipt and analysis of the public comments on the draft methodology, the 1999 ROD does not make a final decision on which methodology will ultimately be chosen to meet the requirements of the TTRA.

The Regional Forester also provided for potential conflicts in direction. "[T]he management prescription standards and guidelines for each Land Use Designation take precedence over the Forest-wide Standards and guidelines . . . should any conflict occur" (1997 Forest Plan, p. 1-3). Also, "[f]or all projects and activities considered, the standards and guidelines for each management prescription will be used regardless of the levels of outputs . . ." (1997 Forest Plan, p. 1-4). Each management prescription identifies which Forest-wide S&G's become part of that management prescription direction. All sections of the subsistence Forest-wide S&G's have been included for all management prescriptions. The Regional Forester provided clear guidance for subsistence management through the discussion of which direction takes precedence.

Decision

After my review of the record, I find that the issue related to Forest Plan guidance concerning subsistence uses and needs was discussed and considered. The 1997 Forest Plan is consistent with the requirements of NFMA and NEPA, as well as other law, regulation, and policy with regard to the evaluation of the impacts on subsistence uses and needs. In addition, the annual timber sale offerings from the Tongass National Forest will be consistent with, and not exceed the amount of timber for which there is demand as referred to in TTRA. In the 1999 ROD I directed that the Forest Service should not seek to offer timber in excess of actual market demand. As noted above, the Forest Service is developing a methodology for determining demand to insure compliance with the "seek to meet market demand" standard established in the TTRA.

However, based upon my review of the record, I have determined that there was a need to modify the provisions of the plan to better address subsistence uses. I have converted additional acres from development to non-development LUD's in 18 Areas of Special Interest (see enclosed 1999 ROD, Wildlife section) to further protect traditional subsistence needs and other special values associated with these lands. Of these 18 Areas of Special Interest 15 have been identified as significant for meeting needs (see enclosed 1999 ROD, Areas of Special Interest section). In addition the 1,000 foot beach and estuary fringe buffer connecting the beach fringe to the lowlands will protect more subsistence areas.

In addition, I have added a standard which extends timber rotation from 100 to 200 years in 42 WAA where deer habitat capability concerns exist (see enclosed 1999 ROD, Deer Winter Range section). Reducing the rate at which timber is harvested diminishes the risk to deer habitat capability and thus subsistence use of deer. Because there is a strong relationship between those WAA's and the areas identified as important "heavy use" areas for rural communities across the forest (FEIS Chapter 3, Wildlife Analysis tables), the extended timber rotation focuses on all areas where deer habitat capability is a concern. The rotation strategy addresses the concern of increased competition for deer that might result from shifts in hunting pressure that could occur if only a few areas of concern were addressed.

New management direction constitutes reasonable steps to minimize impacts on subsistence uses and resources over the long term.

Recognize tribes in a government-to-government manner

The appellants contend that "[t]he Forest service failed to meet its obligations under the federal trust responsibility to protect customary and traditional uses and to deal with the recognized tribes in a government-to-government manner" (NOA, p. 50).

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 our 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. During the development of the 1997 Forest Plan and EIS hearings were held with communities and tribes to get input on cultural, traditional, and subsistence uses of National Forest System lands (Record 1920-2-5 (P-4), Data Lib #18188).

Prior to the 810 hearings, the Forest Service 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).

Decision

My review of the record clearly shows that the Tongass National Forest was aware of its responsibilities to tribal governments during the preparation of the 1997 ROD, FEIS, and 1997 Forest Plan. The Forest took steps to include the appellants and associated tribes in the planning process. The record shows that the 1997 Forest Plan and FEIS directs managers to continue dialogue with all affected Native American tribes and to take all reasonable and prudent measures during implementation. I find that the 1997 Forest Plan complies with the applicable Federal law, regulation, and policy. 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*