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Date: April 13, 1999

Mr. Daniel G. Bruce
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P.O. Box 32819
Juneau, Alaska 99803

RE: Appeal of the Record of Decision for the Tongass National Forest Land and Resource Management Plan (#97-13-00-0099-A217)

Dear Mr. Bruce:

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 Whitestone S.E. Logging, Inc., 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 6, 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.

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

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).*

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 pertaining to the Eight Fathom timber sale(s) and its relation to the NEPA, Small Business Act (SBA) and promissory estoppel. You request incorporation of the Alaska Forest Association's (AFA) appeal by reference. Your request for relief is to withdraw the 1997 ROD (NOA, p. 8) and amend the 1997 Forest Plan.

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.

You state you are joining in the appeal filed by the AFA by incorporating by reference the arguments presented in the AFA appeal. This is insufficient under 36 CFR 217.9, since merely incorporating other appeals by reference fails to identify specifically, that portion of the decision to which you object. This review is conducted solely on the basis of materials submitted by you for appeal of the 1997 Forest Plan.

National Environmental Policy Act

The appellant contends that, "[t]he [1997]ROD's ruling to withdraw the Eight Fathom timber sale(s) project is arbitrary and capricious and in violation of the agency's regulations which require the agency to consider alternatives" (NOA, p. 1). The appellant further contends that "the [1997] ROD gives no explanation why this approved project, which, like every other

project, was authorized pursuant to an EIS, is somehow different from other projects. The 1997 ROD gives no explanation why the Eight Fathom Timber Sale(s) Final Environmental Impact Statement is no longer valid" (NOA, p. 1). Additionally, the appellant contends that, "[t]he [1997] ROD does not evaluate the withdrawal of this project with any other alternatives, much less alternatives which would be less drastic" (NOA, p. 2). Finally, the appellants contend that "this LUD [land use designation] decision differs from the general LUD's decision in the [1997] ROD . . .: (1) a completed EIS had been approved for this area; and (2) this area is treated differently from other projects in its class" (NOA, p. 3).

Discussion

To ensure compliance with NFMA implementing regulations (36 CFR 219) and consistency with the 1997 Forest Plan, the Regional Forester provided direction in the 1997 ROD for transition of timber sale projects for which NEPA decision documents were signed before the effective date of the 1997 Forest Plan, but whose timber volume had not been sold before the effective date of the plan. The 1997 ROD does not state that the Eight Fathom timber sale is withdrawn. The Regional Forester reviewed the project for consistency with the 1997 Forest Plan goals, objectives, and projected environmental effects of the 1997 Forest Plan and determined it necessary to modify the Eight Fathom project prior to implementation. The Regional Forester directed the Forest Supervisor to modify the Eight Fathom timber sale project to avoid compromising an Old-growth Habitat LUD in the 1997 Forest Plan (1997 ROD p. 41). Other timber sales for which NEPA decision documents were signed before the effective date of the 1997 Forest Plan, but whose timber volume had not been sold before the effective date also were reviewed and found to be consistent with the 1997 Forest Plan and therefore did not require modification.

As noted in the 1999 ROD, I am providing the following transition provisions for the modifications to the 1997 Forest Plan that are made in the 1999 ROD. Although the 1999 ROD will become effective 30 days after publication of the Federal Register notice, I am choosing to phase in this new direction. The protective measures added in the 1999 ROD will become effective as of October 1, 1999. As of October 1, 1999, all new project decisions will be consistent with the management direction of the Modified 1997 Forest Plan as set forth in this ROD.

*With regard to your concern about alternatives, they are prepared for consideration in a forest plan to provide for a broad range of reasonable management scenarios for the various uses of the forest (36 CFR 219.12 (f)). A primary goal in formulating alternatives is to provide an adequate basis for identifying the alternative that comes closest to maximizing net public benefits in an environmentally sound manner (*id.*). Alternatives developed for the FEIS were designed around a "theme" or management option that reflected a particular emphasis generated in a Forest review of issues, concerns, opportunities and resource inventories, through public scoping and in the 'Analysis of the Management Situation' (FEIS, p. 2-2). Each alternative has goals and objectives that feature the theme emphasis such as timber industry/economic or wildlife habitat. Thus, the evaluation in determining the range of alternatives does not turn upon consideration of a single factor, such as the Eight Fathom project. Nevertheless, the Regional Forester considered at least two alternatives which would have allowed Old-growth LUD in Eight Fathom (Alternatives 7 and 9), and set forth his reasons for choosing the Old-growth LUD's*

In addition, relative to the Eight Fathom project, 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

After reviewing the record, I find no evidence that the Regional Forester treated Eight Fathom differently from other projects discussed in the transition section of the 1997 ROD. The Forest is not in violation of the NFMA with regard to the 1997 Forest Plan timber sale transition rules. The decision to re-evaluate was well reasoned and consistent with law, regulation, and policy. I affirm the Regional Forester's decision.

The Regional Forester's 1997 transitional provisions remain effective for contracts, permits, and other legal instruments issued prior to October 1, 1999. For similar reasons as discussed above, I have decided to allow a transition period for implementation of all projects, including timber projects, in the enclosed 1999 ROD (Section VII, Implementation, Parts B and C).

Small Business Act

The appellant contends that, "the [1997] ROD and, specifically, the withdrawal of the Eight Fathom timber sale(s) project, is in violation of the Small Business Act" (NOA, p. 3).

Discussion

As stated in the previous discussion, the 1997 ROD does not state the Eight Fathom timber sale is withdrawn. In accordance with the 1997 ROD, the Forest Supervisor modified the Eight Fathom timber sale to avoid compromising an Old-Growth Habitat LUD and to incorporate the necessary 1997 Forest Plan standards and guidelines (1997 ROD, pp. 40-41). Timber sales could be offered under the Small Business Act Set-Aside Program (FEIS, p. 3-291) if qualifying as independent sales.

To facilitate the development of competitive enterprises and markets for timber resources, the Forest Service and SBA, in 1995, agreed to an annual set aside goal of approximately 100 million board feet (MMBF) for the Tongass National Forest (Record R-G-12-e, TLMP Doc #1107 and FEIS Appendix L, p. L-129). Section 105 of the Tongass Timber Reform Act (TTRA), Small Business Act Set-Aside Programs, states that the Secretary shall, in consultation with the SBA and to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources: "seek to provide a supply of timber from the

Tongass National Forest to those purchasers qualifying as 'small business concerns' under the Small Business Act as amended (15 U.S.C. 631 et seq.)."

The Small Business Timber Sale Program was established to address issues similar to the concern you raised in your NOA. The proposed agreement between the SBA and the USDA Forest Service, Alaska Region regarding the small business timber sale program, states:

"To assist Small Business purchasers of National Forest System timber from the Tongass National Forest in planning and financing timber harvesting and product marketing, and to assist the Forest Service in seeking to provide a supply of timber from the Tongass National Forest to Small Business Purchasers and which meets market demand, the United States Department of Agriculture, Forest Service, Alaska Region (Forest Service), and the Small Business Administration (SBA) agree that:

1. The independent timber sale program goal for the Tongass National Forest will be 100 MMBF per Fiscal Year [October 1, 1995 to September 30, 2000]. Except as otherwise agreed by the Small Business Administration and the Forest Service, all timber sales offered as 'independent' sales each fiscal year shall be offered as a SBA sale. Timber sales that are designated as Small Salvage Timber Sales, resales of uncompleted contracts (defaulted sales), and previously advertised but unsold timber sales will be exempt from this requirement.

2. If market or other conditions in Southeast Alaska change that affect small business demand for timber, the small business offerings for that year may be adjusted through joint agreement between the SBA and the Forest Service.

3. The agreement will be reviewed for possible modification upon completion Tongass Land Management Plan revision" (Record RS-G-12-e, TLMP 1107 and 1167).

The 1997 ROD clearly indicated the Regional Forester strived to fulfill the requirements of the SBA. The issue of small operator's access to commercial timber sales on the Tongass National Forest has been adequately analyzed.

Decision

After reviewing the record, I find no evidence that the Eight Fathom project has been withdrawn from consideration for the Small Business set-aside program. As demonstrated by his decision in the 1997 ROD, the Regional Forester clearly intended to meet the law and regulations of the SBA as it applies to the Tongass National Forest. The findings of the 1997 Forest Plan are consistent with the TTRA, NEPA, the provisions of the Small Business Timber Sale Program, and other law or regulations related to timber sale opportunities for small businesses.

However, as of October 1, 1999, a portion of the Eight Fathom project area will be managed using a timber harvest rotation of 200 years or greater in accordance with the new Standard

and Guideline I have added in the enclosed 1999 ROD (Appendix B). Also, a portion in the Upper Tenakee Inlet Area of Special Interest changes from a development LUD to a non-development LUD that does not allow timber management (see enclosed 1999 ROD, Appendix B). The Regional Forester will assess any implication of the 1999 ROD for the Eight Fathom Project in the context of project implementation.

Promissory Estoppel

The appellant contends that the Eight Fathom timber sale(s) should be "set aside under the doctrine of promissory estoppel" (NOA, pp. 6-8).

Discussion

A "set aside" of the Eight Fathom project would be premature. At this time, the appellant has no contract with the Forest Service.

Land and resource management plan appeals (36 CFR 217) are limited to decisions related to the relevant land and resource management plan. Specific concerns regarding contractual formation and liability are outside the scope of these appeal regulations (36 CFR 217.3).

Decision

After reviewing the record, I find that the doctrine of promissory estoppel does not apply. The Regional Forester correctly directed the Forest supervisor to re-examine and modify the Eight Fathom project for consistency with the 1997 Forest Plan. 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*