



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Natural Resources

COMMISSIONER'S OFFICE

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January 19, 2018

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

Dear Secretary Perdue,

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

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

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

Sincerely,

A handwritten signature in blue ink that reads "Andrew Mack".

Andrew T. Mack
Commissioner

cc:

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

Before the Department of Agriculture
Washington, DC 20250

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

From: The State of Alaska, Department of Natural Resources

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

Date: January 19, 2018

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

I. SUMMARY

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

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

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

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

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

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

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

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

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

II. HISTORY OF THE TONGASS EXEMPTION

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

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

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

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

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

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

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

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

III. CONTINUING RATIONALE FOR EXEMPTING THE TONGASS

A. Good Policy

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

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

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

B. Compliance with Federal Law

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

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

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

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

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

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

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

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

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

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

C. Compelling Case for Exemption Rulemaking

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

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

IV. CONTENT OF REQUESTED RULE

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

V. OTHER REQUESTED ACTION

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

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

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

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

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

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

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

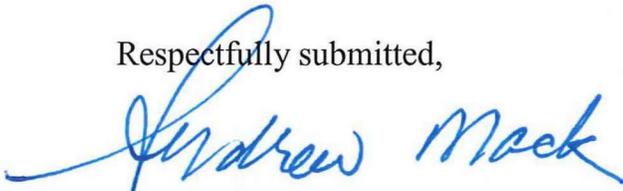
VI. CONCLUSION

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

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

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

Respectfully submitted,



Andrew T. Mack, Commissioner
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EXHIBIT 1

2003 Tongass Exemption Record of Decision

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

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

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

Dated: December 15, 2003.

Curtis A. Springer,

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

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

BILLING CODE 4910-15-P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596-AC04

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

AGENCY: Forest Service, USDA.

ACTION: Final rule and record of decision.

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

In *State of Alaska v. USDA*, the State of Alaska and other plaintiffs alleged that the roadless rule violated a number

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

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

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

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

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

Regional Planner, Forest Service, USDA, (907) 586-8796.

SUPPLEMENTARY INFORMATION:

Background and Litigation History

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

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

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

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

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

Most Southeast Alaska Communities Are Significantly Impacted by the Roadless Rule

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

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

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

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

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

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

Different Approaches Considered for the Tongass National Forest

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

exempting the Tongass from the rule's prohibitions was considered in detail.

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

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

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

Why Is USDA Going Forward With This Rulemaking?

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

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

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

Finally, the Department fully recognizes the unusual posture of this rulemaking, as it is amending a rule that has been set aside by a Federal court. The Department maintains that such an amendment is contrary neither to law nor to the court's injunction. Instead, it

is a reasonable and lawful exercise of the Department's authority to resolve policy questions regarding management of National Forest System land and resources, especially in light of the conflicting judicial determinations. Adopting this final rule reduces the potential for conflicts regardless of the disposition of the various lawsuits.

Changes Between Proposed Rule and Final Rule

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

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

Summary of Public Comments and the Department's Responses

The proposed rule was published in the *Federal Register* on July 15, 2003, for a 30-day public comment period (68 FR 41865). Due to public requests for additional time, the comment period was extended by 19 days for a total of 49 days. The Forest Service received approximately 133,000 comments on the proposed rule. All comments were considered in reaching a decision on the final rule. In addition, appropriate sections of Volume 3 of the November

2000 roadless rule FEIS (Agency Responses to Public Comments) that addressed the Tongass alternatives were also reviewed and considered. A summary of comments and the Department's responses to them are summarized as follows.

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

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

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

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

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

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

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

Desirability of a National Standard for Roadless Protection. Some respondents, including a number of Members of Congress, expressed support for the roadless rule as adopted in January, 2001, which these respondents regard as a landmark national standard that is essential to ensure the long-term protection of roadless values. These respondents maintained that the proposed rule would seriously undermine that national standard by

exempting the largest national forest in the country, which contains nearly 16 percent of the acreage protected by the roadless rule. Other respondents stated that the ecological, geographic, and socioeconomic conditions on the Tongass and among the local communities of Southeast Alaska are so different from those on national forests outside of Alaska that any nationwide approach, such as the prohibitions contained in the roadless rule, would necessarily impose undue hardship on the communities of Southeast Alaska.

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

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

The impacts of the roadless rule on local communities in the Tongass are particularly serious. Of the 32 communities in the region, 29 are unconnected to the nation's highway system. Most are surrounded by marine waters and undeveloped National Forest System land. The potential for economic development of these communities is closely linked to the ability to build roads and rights of ways for utilities in roadless areas of the National Forest

System. Although Federal Aid Highways are permitted under the roadless rule, many other road needs would not be met. This is more important in Southeast Alaska than in most other States that have a much smaller portion of Federal land. Likewise, the timber operators in Southeast Alaska tend to be more dependent on resource development opportunities on National Forest System land than their counterparts in other parts of the country because there are few neighboring alternative supplies of resources for Southeast Alaska.

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

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

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

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

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

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

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

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

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

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

Response. Every comment received is considered for its substance and contribution to informed decisionmaking whether it is one comment repeated by tens of thousands of people or a comment submitted by only one person. The public comment process is not a scientifically valid survey process to determine public opinion. The emphasis in the comment

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

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

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

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

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

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

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

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

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

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

Response. The determination of whether a supplemental EIS is required involves a two-step process. First new information must be identified and, second, an analysis of whether the new information is significant to the proposed action must be completed. The Forest Service has prepared a supplemental information report that describes this process, the analysis completed, and the conclusions reached. This report is available on the World Wide Web/Internet on the Forest

Service Roadless Area Conservation Web site at <http://www.roadless.fs.fed.us>.

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

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

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

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

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

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

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

Response. In passing ANILCA in 1980, Congress established 14 wildernesses totaling 5.5 million acres on the Tongass, and found that this act provided sufficient protection for the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska, and at the same time provided adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people. Accordingly, the designation and disposition of the public lands in Alaska pursuant to this

act were found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition. Congress believed that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, had been obviated by provisions in ANILCA.

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

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

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

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

consistent with congressional direction and intent in the ANILCA and the TTRA legislation.

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

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

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

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

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

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

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

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

Tongass Roads and Fiscal Considerations. Some people said that because the Tongass has a backlog of road maintenance and fish passage

problems, primarily inadequate culverts, it makes no sense to spend money on new roads until these problems are corrected. Others said that the funds the Tongass receives from Congress to prepare timber sales and do roadwork could be better spent on other needs.

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

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

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

Relationship of This Rule to Other Rulemaking. One commenter read 40 CFR 1506.1 as requiring an EIS for the temporary exemption of the Tongass. The commenter reasoned that because the agency was considering whether to adopt a permanent exemption for the Tongass, the agency may not take any action that tends to prejudice the choice

of alternatives on that decision unless reviewed in a separately sufficient, stand-alone EIS. One commenter suggested that the effort the agency might put into preparing site-specific EISs for timber sales in roadless areas under this final rule might prejudice the decision on the advance notice of proposed rulemaking. Others viewed the proposed rule as an emergency rule that has not been adequately justified by the Forest Service, and recommended action be delayed until the permanent exemption is resolved.

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

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

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

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

Alternatives Considered

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

The Environmentally Preferable Alternative

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

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

Record of Decision Summary

For the reasons identified in this preamble, the Department has decided to select the Tongass Exempt

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

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

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

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

This decision reflects the facts, as displayed in the FEIS for the roadless rule and the FEIS for the 1997 Tongass Forest Plan that roadless values are

plentiful on the Tongass and are well protected by the Tongass Forest Plan. The minor risk of the loss of such values is outweighed by the more certain socioeconomic costs of applying the roadless rule's prohibitions to the Tongass. Imposing those costs on the local communities of Southeast Alaska is unwarranted.

Regulatory Certifications

Regulatory Impact

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

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

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

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

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

Environmental Impact

A draft environmental impact statement (DEIS) was prepared in May 2000 and a final environmental impact statement (FEIS) was prepared in November 2000 in association with promulgation of the roadless area conservation rule (January 12, 2001 (66 FR 3244)). The DEIS and FEIS examined in detail sets of Tongass-specific alternatives. In the DEIS, the agency considered alternatives which would not have applied the rule's prohibitions to the Tongass National Forest, but would have required that the agency make a determination as part of the 5-year plan to review whether to prohibit road construction in unroaded portions of inventoried roadless areas. In the FEIS, the Department identified the Tongass Not Exempt as the Preferred Alternative, which would have treated

the Tongass National Forest the same as all other national forests, but would have delayed implementation of the rule's prohibitions until April 2004. This delay would have served as a social and economic mitigation measure by providing a transition period for communities most affected by changes in management of inventoried roadless areas in the Tongass. In the final rule published on January 12, 2001, however, the Department selected the Tongass Not Exempt Alternative without any provision for delayed implementation. Therefore, the rule's prohibition applied immediately to inventoried roadless areas on the Tongass, but the rule also allowed road construction, road reconstruction, and the cutting, sale, and removal of timber from inventoried roadless areas on the Tongass where a notice of availability for a DEIS for such activities was published in the **Federal Register** prior to January 12, 2001.

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

Because the 2000 FEIS for the roadless rule included an alternative to exempt the Tongass National Forest from the provisions of the roadless rule, the decision to adopt this final rule may be based on the FEIS, as long as there are no significant changed circumstances or new information relevant to environmental concerns bearing on the proposed action or its impacts that would warrant additional environmental impact analysis. The Forest Service reviewed the circumstances related to this rulemaking and any new information made available since the FEIS was completed; including the SEIS and public comments received on the proposed rule, and documented the results in a

Supplemental Information Report (SIR), dated October 2003. The agency concluded—and the Department agrees—that no significant new circumstances or information exist, and that no additional environmental analysis is warranted. The SIR and the FEIS are available on the World Wide Web/Internet on the Forest Service Roadless Area Conservation Web site at <http://www.roadless.fs.fed.us>. The Tongass Forest Plan is available at <http://www.fs.fed.us/r10/tlmp>, and the 2003 SEIS is available at <http://www.tongass-seis.net/>.

No Takings Implications

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

Energy Effects

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

Civil Justice Reform

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

Unfunded Mandates

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

Federalism

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

Consultation and Coordination With Indian Tribal Governments

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

Controlling Paperwork Burdens on the Public

This final rule does not contain any record keeping or reporting requirements, or other information

collection requirements as defined in 5 CFR part 1320, and therefore imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR part 1320 do not apply.

Government Paperwork Elimination Act Compliance

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

List of Subjects in 36 CFR Part 294

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

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

PART 294—SPECIAL AREAS

Subpart B—Protection of Inventoried Roadless Areas

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

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

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

§ 294.14 Scope and applicability.

* * * * *

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

* * * * *

Dated: December 23, 2003.

David P. Tenny,

Deputy Under Secretary, Natural Resources and Environment.

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

BILLING CODE 3410-11-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

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

Satellite Licensing Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule, announcement of effective date.

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

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

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

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

List of Subjects in 47 CFR Part 25

Satellites.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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

BILLING CODE 6712-01-P

EXHIBIT 2

2010 USDA Tongass Exemption Federal Court Brief

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ORGANIZED VILLAGES OF KAKE, et al.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, et al.

Defendants,

ALASKA FOREST ASSOCIATION,

Defendant Intervenor, and

STATE OF ALASKA,

Defendant Intervenor.

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

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

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I. INTRODUCTION

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

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

II. BACKGROUND

A. The Roadless Rule

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

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

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

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

During preparation of the Roadless Rule EIS, the USDA considered four Tongass-specific alternatives: (1) "Tongass Not Exempt," which included an option of delaying application of the rule until 2004; (2) "Tongass Exempt," which would leave management of the Tongass to the Tongass Land and Resource Management Plan (TLMP); (3) "Tongass Deferred," under which a decision about whether to apply the Roadless Rule's restrictions to the Tongass would be made as part of the 5-year review of the 1997 TLMP; and (4) "Tongass Selected Areas," which would apply the Rule only in those IRAs classified as Old Growth, Semi-Remote Recreation, Remote Recreation and LUD II under the TLMP. Ex. 3 at 58-60.¹

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

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

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

B. Roadless Rule Litigation

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

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

C. The Tongass Exemption

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

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

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

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

D. The State Petitions Rule

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

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

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

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

E. The Transition Framework

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

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

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

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

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

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

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

working on a package of stewardship contracts. We expect the first such contract to be offered in early 2011. In the long-term, as young growth stands mature, the expectation is that all timber harvests will be sustained in young growth stands.

Building from the existing Tongass Land Management Plan, the Forest Service will continue to offer a limited number of old-growth sales in the near-term in roaded forest areas, in order to ensure that a bridge exists for the remaining forest industry infrastructure to make the transition. Ensuring that these sales and the proposed stewardship contracts move forward expeditiously is critically important to maintaining a robust forest industry while we transition to young growth management.

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

III. ARGUMENT

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

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

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

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

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

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

Id. at 891 (internal citations omitted).

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

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

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

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

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

2. The APA Supports Limiting Direct Judicial Review of Regulations

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

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

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

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

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

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

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

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

B. Plaintiffs' Claims are Not Ripe

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

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

In this case, the two timber sales named, Iyouktug and Scratchings II, are not planned for implementation before the end of fiscal year 2012.⁷ Cole Decl. at ¶ 7. In the meantime, the USDA is actively pursuing a Transition Framework designed to shift the timber program on the Tongass away from old-growth harvest in roadless areas. The USDA has indicated it "believe[s] this transition can be made without entering into roadless areas." Ex. 8 at 2.

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

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

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

C. The Tongass Exemption Does Not Violate the APA

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

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

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

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

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

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

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

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

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

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

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

2. Standard of Review

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

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

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

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

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

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

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

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

Id. at 9.⁹

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

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

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

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

⁹ Plaintiffs do not allege that the Tongass Exemption exceeds the USDA's delegated authority.

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

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

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

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

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

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

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

Plaintiffs assert that the USDA’s conclusion that the Roadless Rule interfered with the development of road connections was arbitrary because the Roadless Rule includes an exception allowing the construction of certain Federal Aid Highways on IRAs. Pl. Br. at 13. *See also*, 36 C.F.R. § 294.12(b)(7). To the contrary, the record shows this narrow exception, which the Department emphasized “will have a very limited application,” does not encompass all needed community connections. Ex. 1 at 22. First, the exception is applicable only to Federal Aid Highway Projects, a requirement that excludes a broad range of roads that a community might need, including local roads and minor collector roads. *See* 23 U.S.C. § 101(a)(5) (defining Federal-Aid Highways). *See also*, Ex. 2 at 4 (“Although Federal Aid Highways are permitted under the roadless rule, many other road needs would not be met.”). Second, in addition to qualifying as a Federal Aid Highway, any proposed road requires a Secretarial determination that the road “is in the public interest or is consistent with the purpose for which the land was reserved or acquired and no other reasonable and prudent alternative exists.”¹¹ Ex. 12. Such a finding is not required for roads on Forest Service lands outside of IRAs, and as the USDA reasonably noted, “may not always be possible for otherwise desirable projects.” Ex. 2 at 8.¹²

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The USDA Reasonably Considered Economic Impacts

In developing the Roadless Rule, the USDA carefully considered the economic impacts of reduced timber harvest on communities throughout the country. Ex. 3 at 68. The Department found that with the exception of the Tongass, the impacts of the Rule were relatively minor. Id. On the Tongass, however, the economic impacts were more significant. Ex. 3 at 78-79.¹⁴

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

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

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

Ex. 2 at 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Tongass Exemption Complies With NEPA

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

1. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Remedy

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Respectfully submitted November 1, 2010.

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

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

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CERTIFICATE OF SERVICE

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

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EXHIBIT 3

2015 Ninth Circuit En Banc
Decision on Tongass Exemption

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ORGANIZED VILLAGE OF KAKE; THE
BOAT COMPANY; ALASKA
WILDERNESS RECREATION AND
TOURISM ASSOCIATION; SOUTHEAST
ALASKA CONSERVATION COUNCIL;
NATURAL RESOURCES DEFENSE
COUNCIL; TONGASS CONSERVATION
SOCIETY; GREENPEACE, INC.;
WRANGELL RESOURCE COUNCIL;
CENTER FOR BIOLOGICAL
DIVERSITY; DEFENDERS OF
WILDLIFE; CASCADIA WILDLANDS;
SIERRA CLUB,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE; UNITED STATES
FOREST SERVICE; TOM VILSACK, in
his official capacity as Secretary of
Agriculture; HARRIS SHERMAN, in
his official capacity as Under
Secretary of Agriculture of Natural
Resources and Environment; TOM
TIDWELL, in his official capacity as
Chief, USDA Forest Service,

Defendants,

No. 11-35517

D.C. No.
1:09-cv-00023-
JWS

OPINION

ALASKA FOREST ASSOCIATION, INC.,
Intervenor-Defendant,

and

STATE OF ALASKA,
Intervenor-Defendant-Appellant.

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

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

Filed July 29, 2015

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

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

SUMMARY*

Environmental Law

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

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

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

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

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

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

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

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

ORGANIZED VILLAGE OF KAKE V. USDA 5

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

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

COUNSEL

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

OPINION

HURWITZ, Circuit Judge:

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

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

I.

A. The 2001 Roadless Rule

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

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

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

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

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

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

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

* * *

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

Id. at 3254–55.

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

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

B. The Roadless Rule Litigation

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

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

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

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

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

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

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

C. The Tongass Exemption

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

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

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

D. The Procedural History of This Case

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

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

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

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

II.

A. Jurisdiction

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

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

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

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

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

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

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

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

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

prevailed in the district court.” *Didrickson*, 982 F.2d at 1338.⁶

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

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

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

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

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

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

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

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

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

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

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

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

B. The APA claim

1. The APA Requirements for a Change of Agency Policy

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

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

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

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

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

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

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

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

2. The Tongass Exemption Violated the APA

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

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

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

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

i. Socioeconomic Concerns

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. The Department’s Other Rationales

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

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

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

C. Remedy

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

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

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

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

III.

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

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

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

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

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

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

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

CALLAHAN, Circuit Judge, dissenting:

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

I.

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

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

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

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

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

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

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

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

II.

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

A.

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

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

1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and the 3-mile coastal belt controlled by California.” (emphasis added)). The very language that the majority excerpts also makes it plain that California’s standing was based on the State’s “own[ership of] adjoining portions of an [OCS] oil and gas pool” and interest in securing a “fair market return” for drainage of those State-owned resources. Maj. Op. 19 (quoting *Watt*, 454 U.S. at 160–61). Alaska has not alleged injury to its interest in being fairly compensated for or avoiding damage to *its* natural resources, which would implicate an injury in fact. *Watt*, 454 U.S. at 160–61.⁷

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

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

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

2.

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

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

1607.⁹ Thus, for example, in fiscal year 2010—before the Tongass exemption had been set aside by the district court—Alaska would have been due only about \$517,948 under the National Forest Receipts Program as compared to the \$16,027,564.62 it was paid under the Secure Rural Schools Act Program.¹⁰

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

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

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

and proprietary interest is pure conjecture and thus insufficient to establish standing.”)¹¹

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

B.

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

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

C.

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

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

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

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

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

III.

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

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

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

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

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

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

IV.

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

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

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

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

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

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

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

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

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

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

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

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

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

I. The USDA's 2003 Change in Policy

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

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

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

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

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

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

II. The USDA Was Not Arbitrary and Capricious

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

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

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

A. Litigation and Statutory Compliance

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

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

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

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

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

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

B. Timber Demand

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

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

C. Socioeconomic Hardships

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

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

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

D. Road and Utility Connections

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

E. Notice and Comment

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

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

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

III. National Environmental Policy Act (NEPA) Claims

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

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

I respectfully dissent.

KOZINSKI, Circuit Judge, dissenting:

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

United States Court of Appeals for the Ninth Circuit

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

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

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

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

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

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

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

(1) A. Purpose (Panel Rehearing):

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

B. Purpose (Rehearing En Banc)

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

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

(2) Deadlines for Filing:

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

(3) Statement of Counsel

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

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

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

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

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

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

Attorneys Fees

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

Petition for a Writ of Certiorari

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

Counsel Listing in Published Opinions

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

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

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

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

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

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

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

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

Continue to next page

Form 10. Bill of Costs - Continued

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

Signature

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

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk

EXHIBIT 4

State's Opening Brief in the Roadless Rule Challenge