

EXHIBIT E
State's Opening Brief
in the
Roadless Rule Challenge

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STATE OF ALASKA
Plaintiff,

and

ALASKA FOREST ASSOCIATION *et al.*
Intervenor-Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, *et al.*
Defendants,

and

SOUTHEAST ALASKA CONSERVATION
COUNCIL *et al.*
Intervenor-Defendants.

Case No. 1:11-cv-01122 (RJL)

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

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I. INTRODUCTION.

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

II. RELEVANT BACKGROUND AND STATEMENT OF FACTS.

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

A. History of the Roadless Rule.

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

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

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

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

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

B. Factors Unique to Alaska.

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

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

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

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

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

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

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

III. LEGAL STANDARDS.

A. Summary Judgment Standard.

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

B. Standard of Review.

Agency action shall be set aside under the APA where it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

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

IV. SUMMARY OF ARGUMENT.

A. Arguments applicable nationwide.

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

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

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

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

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

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

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

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

B. Arguments Unique to Alaska.

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

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

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

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

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

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

V. ARGUMENT.

A. Arguments Applicable Nationwide.

1. The Roadless Rule rulemaking process violated NEPA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Expedited to become effective before the change in administrations, this massive undertaking was accomplished in less than 15 months from the day the presidential directive was given to the Secretary. *Compare* Doc. 1535 (Presidential directive dated October 13, 1999) *with* 66 Fed. Reg. 3,244 (final Roadless Rule published less than 15 months later). Completing such a massive rulemaking in so little time was an extraordinary feat, especially given the Roadless Rule’s expansive scope, its far reaching impacts on development of national forest land and the resulting devastating social and economic impacts visited on those individuals, communities, and businesses reliant on forest resources. To beat the inauguration of the next president, there was no time to include state and local governments as cooperating agencies, no time to grant any of the many requests for extensions to comment periods, no time to timely provide adequate maps or specific information on how individual forests would be impacted, and no time to issue an SEIS when major changes were made in the FEIS, thereby leaving no formal opportunity for comment on the changes. Doc. 123 at 3 (“Dates—get done during the Clinton Administration (Dec. 2000)”).

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

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

i. The rush to gather information internally.

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

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

ii. The rushed approach leads to information accuracy problems.

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

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

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

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

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

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

Doc. 5612 at 31. As a result, “many of the Forests feel that to suggest the volumes that will not be available from roadless areas can easily be made up from roaded areas may be a misrepresentation.”

Id. See also Doc. 5612 at 52 (comment from two forests in Washington that the Roadless Rule’s projected timber harvest effects “are very misleading because they are based on the volume the Forests ‘planned’ over the next five years. Because the interim roadless policy was already in effect, Forests, by and large, were not planning any entry into roadless areas, and effects are underestimated”); Doc. 5612 at 78 (describing as an “obvious fault” that the “DEIS does not explain that the ‘planned sales’ analysis is very limited and the results are very low due to the 80% reduction in timber harvesting that

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

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

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

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

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

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

iv. Denial of all requests to extend comment periods.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 808.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Arguments unique to Alaska.

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

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

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

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

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

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

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

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

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

directive on Tongass timber supply in the TTRA.

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

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

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

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

Implicit in [the district court’s decision] is the district court’s interpretation of TTRA’s provision that the Forest Service shall “seek” to meet market demand for timber. The district court stated that TTRA § 101 is “mandatory,” rather than “hortatory.” In other words, the Forest Service *must* “seek to meet” market demand.

The wording of the statute is awkward, but, as noted . . . TTRA was written to amend ANILCA by eliminating its timber supply mandate and instructing the Forest Service instead to “seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle” The revision clearly gives the Forest Service more flexibility than it had under ANILCA, when it was required to harvest a minimum number of board feet. TTRA envisions not an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation. It thus gives the Forest Service leeway to choose among various site-specific plans, provided it follows the procedural requirements of the applicable statutes.

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

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

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

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

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

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

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

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

VI. REMEDY.

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

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

VII. CONCLUSION.

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

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

Respectfully submitted May 11, 2015.

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CERTIFICATE OF SERVICE

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

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EXHIBIT 5

2017 District Court Decision in
Roadless Rule Challenge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF ALASKA,)
)
 Plaintiff,)
)
 and)
)
 ALASKA FOREST ASSOCIATION,)
)
 SOUTHEAST CONFERENCE,)
)
 ALASKA ELECTRIC LIGHT & POWER,)
)
 ALASKA POWER & TELEPHONE,)
)
 ALASKA MINERS ASSOCIATION,)
)
 CITIZEN'S PRO ROAD,)
)
 ALASKA MARINE LINES, INC.,)
)
 NORTHWEST MINING ASSOCIATION,)
)
 DURETTE CONSTRUCTION COMPANY,)
)
 FIRST THINGS FIRST FOUNDATION,)
)
 JUNEAU CHAMBER OF COMMERCE,)
)
 CITY OF KETCHIKAN,)
)
 KETCHIKAN GATEWAY BOROUGH,)
)
 SOUTHEAST STEVEDORING CORP.,)
)
 CHRIS GERONDALE,)
)
 SOUTHEAST ROADBUILDERS, INC.,)
)
 HYAK MINING CO., INC.,)

FILED

SEP 20 2017

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

Civil Case No. 11-1122 (RJL)

**INSIDE PASSAGE ELECTRIC
COOPERATIVE,**

CITY OF CRAIG,

and

SOUTHEAST ALASKA POWER AGENCY,

Plaintiff-Intervenors,

v.

**UNITED STATES DEPARTMENT OF
AGRICULTURE,**

**UNITED STATES DEPARTMENT OF
AGRICULTURE FOREST SERVICE,**

GEORGE ERVIN "SONNY" PERDUE III¹,
**in his official capacity as Secretary of
Agriculture,**

and

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

Defendants,

**SOUTHEAST ALASKA CONSERVATION
COUNCIL,**

**ALASKA CENTER FOR THE
ENVIRONMENT,**

BOAT COMPANY,

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

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


MEMORANDUM OPINION

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

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

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

BACKGROUND

A. Statutory Framework

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

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

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

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

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

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

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

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

B. History of the Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Litigation History

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

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

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

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

STANDARD OF REVIEW

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

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

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

D. Procedural History of this Case

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

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

DISCUSSION

A. Standing

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

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

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

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

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

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

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

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

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

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

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

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

B. Res Judicata

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

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

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

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

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

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

1. Alaska's Challenge under NEPA

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

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

a. The Purpose and Need Statement

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

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

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

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

b. The Cumulative Effects of the Roadless Rule

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

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

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

c. Informed Comment and Decisionmaking

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

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

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

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

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

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

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

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

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

d. The Supplemental EIS

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

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

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

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

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

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

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

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

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

The record makes clear that the USDA disclosed the potential impacts the Rule would have on small businesses, as well as the SBA’s views, during the NEPA process. The USDA sought public comment on economic issues during the scoping period, and as a result of comments concerning the economic effects on small entities, the SBA prepared an RFA analysis that was publicly disclosed with the DEIS. *See* 64 Fed. Reg. at 56,307; AR Doc. 1362 (DEIS Vol. 1), at A-1, A-21 to A-23; AR Doc. 1350, at 11–12. In the FEIS, the USDA included a discussion of socio-economic factors and published the SBA’s comment letter, which clearly outlined the SBA’s position on the applicability of the RFA. *See* AR Doc. 4609 (FEIS Vol. 1), at 3-264 to 3-371. Based on this record, I find that the USDA complied with its duty—if such a duty existed⁴—to disclose the SBA’s position on the rulemaking.

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

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

In addition to its challenges to the general rulemaking process of the Roadless Rule, Alaska levels specific challenges to the Rule as it applies to Alaska. I will address each of these arguments in turn below.

1. The TTRA

Alaska urges this Court to find that the Roadless Rule violates the TTRA because, “[t]hroughout the rulemaking, USDA was well aware that if the Roadless Rule was applied to the Tongass, there would be no possibility of meeting timber demand.” Pl.’s Mem. 38 (citing AR Doc. 4609 (FEIS Vol. 1), at 3-378 to 3-379). Under the TTRA, the Forest Service must seek to meet market demand for timber on the Tongass National Forest. 16 U.S.C. § 539d(a). Specifically, Congress directed the Forest Service to seek to provide a supply of timber from the Tongass that would “(1) meet[] the annual market demand for timber from the forest; and (2) meet[] the market demand from the forest for each planning cycle.” *Id.* Alaska and plaintiff-intervenors allege that the Roadless Rule makes “so much suitable acreage on the Tongass off limits to timber harvest” such that it is impossible to comply with the statute. Pl.-Intervenors’ Br. Supp. Summ. J. 8, 10, 14 (“Pl.-Intervenors’ Br.”), ECF No. 73-1; Pl.’s Mem. 40-41. While plaintiff and plaintiff-intervenors are correct that the TTRA imposes additional planning requirements for the Tongass, they fail to accurately state the Forest Service’s obligations under that statute. Indeed, the TTRA does *not* obligate the Forest Service to *actually meet* market demand.

Instead, the statute requires the Forest Service to consider and *seek* to meet market demand, consistent with its multiple-use management obligations. *See* 16 U.S.C. § 539d(a); *see also* *Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 138 (D.D.C. 2010) (finding that TTRA requires the Forest Service to “at least *consider* market demand and *seek* to meet market demand” (quoting *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 801 (9th Cir. 2005))). Importantly, under its multiple-use mandate, the USDA retains discretion to balance market demand for timber with other needs and, if appropriate, reach a balance among the multiple-uses that does not fully satisfy timber demand on the Tongass. *See, e.g., Wind River Multiple-Use Advocates v. Epsy*, 835 F. Supp. 1362, 1372 (D. Wyo. 1993) (“Courts that have considered this issue have held that the MUSYA grants the Forest Service ‘wide discretion to weigh and decide the proper uses within any area.’” (quoting *Big Hole Ranchers Ass’n v. U.S. Forest Serv.*, 686 F. Supp. 256, 264 (D. Mont. 1988))), *abrogated on other grounds by Wyo. Timber Indus. Ass’n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245 (D. Wyo. 2000). I therefore must assess whether the balance the USDA struck in promulgating the Roadless Rule conflicted with the TTRA and thus violated the APA.

As set forth in my earlier discussion of the statutory framework above, the Organic Act, the MUSYA, and the NFMA authorize and direct the Forest Service to establish and administer the national forests for multiple uses. *See* 16 U.S.C. § 551; 16 U.S.C. § 528; 16 U.S.C. § 1600. Given the competing obligations the Forest Service must balance, and the significant discretion it has to make these decisions, “the courts are reluctant to overrule its decisions” as long as “the Forest Service considers the other competing uses.”

Wind River Multiple-Use Advocates, 835 F. Supp. at 1372–73 (quoting *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 592 F. Supp. 921, 938 (D. Or. 1984)); see also *Sierra Club v. Hardin*, 325 F. Supp. 99, 123 (D. Alaska 1971) (“Congress has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service.”).⁵

Here, the record reveals that the USDA complied with its duty to seek to meet market demand while balancing the other competing land uses in the Tongass. The USDA performed an extensive analysis specific to the Tongass, which it did not do for any other national forest. See AR Doc. 1362 (DEIS Vol. 1), at 3-226 to 3-239; AR Doc. 4609 (FEIS Vol. 1), at 3-371 to 3-392; AR Doc. 6004, at 696-711; 66 Fed. Reg. at 3254–55, 3266–67, 3270. As part of this analysis, the USDA considered the timber market demand in Southeast Alaska, finding that timber harvest had fallen sharply in the prior decade. AR Doc. 4609 (FEIS Vol. 1), at 3-376 (finding that the timber industry was “undergoing a fundamental transformation”). In fact, the USDA determined that timber harvest on NFS lands in Alaska had dropped approximately 69 percent in the decade prior to the Roadless Rule. *Id.* The USDA also assessed future market demands, finding no evidence of industry-wide changes in processing efficiency that would indicate a potential future increase in market demand. *Id.* Based on its analysis, the USDA

⁵ And the Forest Service is afforded similar discretion as to what constitutes market demand for Tongass timber. See *Se. Conference*, 684 F. Supp. 2d at 147 (noting that the Forest Service is entitled to an “extreme degree of deference” on this question (quoting *Am. Farm Bureau Fed. 'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009))).

predicted a market demand for Tongass timber of 124 MMBF for the 10-year planning cycle. *Id.* at 3-377. After completing its assessment, the USDA disclosed that, under the Roadless Rule, the currently projected level of timber demand would not be met. *Id.* at 3-378 to 3-379; 66 Fed. Reg. at 3254. The USDA accordingly balanced the timber demand against the “extraordinary ecological values” of the Tongass and concluded that the long-term benefits of conserving IRAs on the Tongass outweighed the potential for economic harm that would result from the reduced timber harvest. 66 Fed. Reg. at 3254. To reduce the strain on the state and local economies, the USDA grandfathered in already-planned timber projects. *Id.*

Alaska hangs its hat on the fact that “when USDA chose to impose a prohibition on road construction and timber harvest in Tongass roadless areas, the agency did so with full knowledge of the TTRA consequences.” Pl.’s Mem. 40. But the fact that the USDA was aware of the consequences the Roadless Rule would pose to the timber market does not “render meaningless the congressional directive on Tongass timber supply” as Alaska suggests. *Id.* at 40–41. Indeed, this Court would be more concerned if the USDA were *unaware* of the consequences of its actions, because the USDA was tasked with making an informed decision. Although Alaska is disappointed with the decision the USDA reached, there can be no doubt that the USDA considered market demand and sought to meet market demand under the TTRA while balancing its obligations to consider multiple uses under the MUSYA, the NFMA, and the Organic Act. Accordingly, I find that the Roadless Rule does not violate the TTRA.

2. ANILCA

Alaska next challenges the Rule on the ground that it constitutes an unlawful withdrawal of public land, in violation of ANILCA. *Id.* at 43. Section 1326(a) of ANILCA prohibits “executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska” without the approval of Congress. 16 U.S.C. § 3213. According to plaintiff and plaintiff-intervenors, the USDA’s designation of 9.6 million acres of IRAs on the Tongass and 5.2 million acres of IRAs on the Chugach National Forest—another national forest in Alaska—are unlawful withdrawals under Section 1326 because the USDA did not obtain congressional approval. Pl.’s Reply 20. Defendants counter that these land designations are not withdrawals under Section 1326. Defs.’ Mem. 55. Indeed, defendants note that no court has ever applied Section 1326 to invalidate a federal agency’s multiple-use management decision-making, and they counsel this Court against doing so today. *Id.* at 55–56. Unfortunately for plaintiffs, defendants are correct.

Our Circuit has defined a withdrawal as an action that “exempts the covered land from the operation of public land laws.” *New Mexico v. Watkins*, 969 F.2d 1122, 1124 (D.C. Cir. 1992) (citing 43 U.S.C. § 1702(j)); *see also Se. Conference*, 684 F. Supp. 2d at 143 (importing the definition of the term withdrawal in ANILCA from the Federal Land Policy and Management Act). The public land laws to which the statute refers are those that “authorize the transfer of federal lands to the private domain for private use.” *Se. Conference*, 684 F. Supp. 2d at 143. Critically, the Roadless Rule does not exempt IRAs from the operation of the mineral leasing laws. Instead, the Rule restricts the terms of

surface occupancy of the land, which is within the USDA's authority under the mineral leasing laws. 66 Fed. Reg. at 3256. Indeed, the Rule explicitly allows for new mineral leases in IRAs, provided that there are no new roads constructed in conjunction with those new leases. *Id.* Thus, the Rule does not withdraw the IRAs from the mineral leasing laws; it regulates the IRAs within the bounds of the mineral leasing laws. And other courts have similarly held that the USDA's decision not to make certain lands available for mineral leasing is not a withdrawal. *See Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229–30 (9th Cir. 1988) (“We fail to see how a decision not to issue oil and gas leases on Deep Creek would be equivalent to a formal withdrawal.”). In light of the USDA's broad discretion on this issue, I find no violation of the ANILCA.

3. NEPA

In addition to its general challenges to the rulemaking under NEPA, Alaska and plaintiff-intervenors raise distinct challenges to the NEPA process as the Rule applies to Alaska. I will assess each of these claims in turn below.

a. The Purpose and Need Statement

Plaintiff-intervenors contend that there have been three “national” and “whole picture” reviews of the Tongass (the first through ANILCA in 1980, the second through the TTRA in 1990, and the third through the Tongass Land Management ROD in 1999), and thus there was no need for another Forest Service review of Alaska's national forests in conjunction with the Roadless Rule rulemaking process. Pl.-Intervenors' Br. 24. They insist that, had the USDA disclosed these comprehensive reviews of land management on the Tongass, it would have made clear that there was no permissible purpose or need to

apply the Roadless Rule to Alaska's national forests. *Id.* Defendants counter that "neither the Tongass's unique statutory status nor its recent Forest Plan amendment demonstrate that the purpose and need for the Roadless Rule is not applicable to the Tongass." Defs.' Reply 20. On the record before me, I must agree with defendants.

While both parties acknowledge the unique status of the Tongass, the administrative record makes clear that IRAs provide the same ecological and social values on the Tongass as they do throughout the rest of the country. AR Doc. 1362 (DEIS Vol. 1), at 3-371 to 3-373. And the FEIS projected that, in the absence of the Roadless Rule, 61 miles of roads would be constructed on the Tongass by 2040. AR Doc. 4609 (FEIS Vol. 1), at 3-253. Indeed, the USDA's analysis concluded that, by applying the Rule to the Tongass, it would "greatly reduce[] much of the incremental loss of habitat and species abundance." AR Doc. 4240. Put simply, it is clear that the USDA considered the unique circumstances of the Tongass, and the USDA did not act arbitrarily and capriciously by finding that there was, in fact, a legitimate purpose and need to apply the rule to the Tongass.

b. The Decision to Focus Mitigation Efforts on Timber

As I noted in my discussion of Alaska's challenge pursuant to the TTRA, the USDA opted to help mitigate the Roadless Rule's impact on the Tongass by allowing timber harvesting projects already planned in IRAs on the Tongass to be grandfathered in and proceed as planned.⁶ Plaintiff and plaintiff-intervenors urge this Court to find that

⁶ Plaintiff-intervenors—joined by Alaska—also challenge the USDA's decision not to issue a supplemental EIS to explain the shift among preferred alternatives for the Tongass from the DEIS to the

this mitigation was arbitrary because it did not address the negative impacts outside of the timber context, including impacts on mining, tourism, hydropower, geothermal energy, and community access. Pl.'s Reply 32. The record is clear, however, that the primary adverse consequence of the Roadless Rule on the Tongass was the potential that timber harvest would be reduced. 66 Fed. Reg. at 3254. Indeed, the USDA specifically found that there would be no meaningful adverse impacts on other resources or industries. *See* AR Doc. 4609 (FEIS Vol. 1), at 3-330 (noting that the Rule's social and economic effects would be minor outside the context of the timber industry); *see also id.* at 3-254 (finding locatable mineral exploration and development "would not be affected under these alternatives"); *id.* at 3-373 (finding that the Tongass will continue to meet recreation and tourism demand); AR Doc. 3097, at 17-18 (finding no planned geothermal projects in IRAs in Alaska and only two planned hydropower projects on the Tongass); AR Doc. 5567, at 2 (finding that the Roadless Rule would not interfere with transportation projects on the Tongass). As such, it was not unreasonable for the USDA to focus its mitigation efforts on easing the transition to a timber market not dependent on harvest from IRAs. 66 Fed. Reg. at 3254.

c. Whether the USDA Considered the Social and Economic Impacts of the Rule as Applied to the Tongass

Finally, plaintiff and plaintiff-intervenors assert that the USDA violated NEPA by failing to consider the social and economic impacts of the Rule on various resources and

FEIS. *See* Pl.-Intervenors' Br. 25-28. Because I addressed and disposed of this challenge in my earlier discussion of plaintiff's and plaintiff-intervenors' general challenges to the rulemaking, above, I do not revisit these substantially similar arguments here.

industries. In particular, plaintiffs take issue with the USDA's failure to consider: (1) the Southeast Alaska Transportation Plan; (2) Executive Order 12866 and the Rule's impacts on renewable energy resources; (3) the Southeastern Alaska Intertie, which provided funds for constructing transmission lines in Southeastern Alaska; (4) the impact on geothermal resources and leasable minerals; and (5) the impact on mining. *See* Pl.-Intervenors' Br. 33-45. Upon review of the record, however, I find that the USDA adequately considered each of these concerns in its decision to apply the Roadless Rule to Alaska. *See* AR Doc. 5567, at 2 (finding that future major road transportation projects in Alaska would not be impacted by the Rule because it allows for the construction of Federal Aid Highway projects in IRAs); 66 Fed. Reg. at 3267-71 (discussing the costs and benefits of the Rule in the context of its impact on renewable energy sources, such as hydroelectric and geothermal power); AR Doc. 5567, at 2 (considering "whether roads [through IRAs] are necessary to build or maintain the intertie" and finding that they are not); AR Doc. 4609 (FEIS Vol. 1), at 3-68 to 3-69) (noting that "[p]otential near future geothermal development associated with inventoried roadless areas appears limited"); 66 Fed. Reg. at 3253 (clarifying that, under the Rule, the Forest Service will continue to provide reasonable access for the exploration and development of locatable minerals under the Mining Law of 1872). As such, Alaska's claim that the USDA violated NEPA by failing to consider the Rule's impact on these industries and resources accordingly fails.

CONCLUSION

For the foregoing reasons, defendants' and defendant-intervenors' cross motions for summary judgment are GRANTED and plaintiff's and plaintiff-intervenors' motions for summary judgment are DENIED. Accordingly, it is hereby ORDERED that judgment be entered in favor of defendants and this case be DISMISSED WITH PREJUDICE.

An order consistent with this decision accompanies this Memorandum Opinion.



RICHARD J. LEON
United States District Judge

EXHIBIT 6

State Objection to 2016 TLMP



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Natural Resources

COMMISSIONER'S OFFICE

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August 30, 2016

Beth G. Pendleton, Regional Forester/Objection Reviewing Officer
U.S. Forest Service – Alaska Region
Attention: Tongass Objections
P.O. Box 21628
Juneau, AK 99802-1628

RE: Objection to the 2016 Tongass National Forest Land and Resource Management Plan Amendment.
Submitted electronically at: objections-alaska-regional-office@fs.fed.us.

Responsible Official: Earl Stewart, Tongass National Forest Supervisor

Objector:

State of Alaska
Governor Bill Walker
State Capitol
P.O. Box 110001
Juneau, AK 99811-0001

INTRODUCTION

The State of Alaska (State) has been an active participant in the management of the Tongass National Forest (Tongass) for many decades. Working under a variety of memoranda of understanding and cooperative agency agreements, as well as serving together on planning teams and in many other forums, the State and the U.S. Forest Service (USFS) have frequently participated in Tongass management as *de facto* partners.

Although the State declined full cooperating agency status for this national forest plan amendment process, it nevertheless provided formal written comments multiple times and participated in the Tongass Advisory Committee (TAC). The State even developed a separate State Alternative and proposed that the USFS analyze and consider it in the National Environmental Policy Act (NEPA) process along with the other USFS alternatives. As is the normal practice, many state employees engaged with USFS representatives on a broad range of topics including wildlife, timber, and transportation.

Unfortunately, the State Alternative was rejected without analysis. On July 18, 2016, Tongass National Forest Supervisor Earl Stewart published a Draft Record of Decision (ROD), Final Environmental Impact Statement and amended Land and Resource Management Plan, adopting an alternative that fully implements the Roadless Area Conservation Rule (Roadless Rule) as well as U.S. Secretary of Agriculture Tom Vilsack's direction on transitioning from old-growth to young growth timber harvest. This alternative ignores the State's proposed changes which were necessary to avoid devastating impacts to the residents of Southeast Alaska. Therefore, the State appreciates the opportunity to submit this objection and respectfully seeks your thoughtful consideration of the issues that we raise.

SUMMARY OF THE ISSUES ON THE OBJECTION

I. The USFS failed to analyze and properly consider the proposed State Alternative in violation of NEPA.

During the scoping process, the State timely notified the USFS of its intent to provide a new alternative for consideration and analysis. This State Alternative would allow for transition to young-growth harvest at a more realistic rate that would allow the survival of the existing timber industry. However, the USFS declined to analyze or properly consider this reasonable and viable alternative as required under NEPA.

II. The USFS deletion of the Transportation and Utility System Land Use Designation (TUS LUD) in this plan amendment process is a violation of the federal planning regulation applicable to this amendment, a violation of the National Forest Management Act (NFMA), and a violation of NEPA.

Pursuant to 36 CFR 219.7(c) and 219.13(b), the designation or elimination of a management area or a geographic area from an existing forest plan must be done through a plan revision, not an amendment. Failure to comply with the planning regulations results in an amendment in violation of NFMA.

Furthermore, neither the scoping documents nor the DEIS purpose and need statement disclose an intent to consider elimination of the TUS LUD. Failure to provide adequate and timely public notice of this significant federal action is a violation of NEPA.

III. The amended forest plan violates the Tongass Timber Reform Act (TTRA)¹ and the Alaska National Interest Lands Conservation Act (ANILCA).

Due primarily to the decision to implement the Roadless Rule² without modification to national forests in Alaska and due to the decision to rapidly implement the transition from the sale of old-growth to young-growth timber, the USFS has decided that it will not attempt to meet the demand for timber from

¹ The Tongass Timber Reform Act of 1990. 16 U.S.C. § 539d(a).

² 66 Fed. Reg. 3,244 (Jan. 12, 2001) The Roadless Rule was implemented only days before President Clinton left office.

the Tongass in violation of the TTRA. The TTRA mandates that the USFS must “seek to meet” timber demand.

Implementing the Roadless Rule by inclusion in the forest plan also constitutes a withdrawal of federal land in violation of ANILCA.³ Issues regarding the validity of the Roadless Rule, including violations of TTRA and ANILCA, remain in active litigation in federal District Court for the District of Columbia where the case is currently ripe for a decision.⁴

IV. In violation of NEPA, the USFS has failed to appropriately consider and respond to a broad range of substantive comments provided to the USFS by the State.

During the plan amendment process, the State has provided substantive comments on the scoping process⁵, the Draft Environmental Impact Statement (DEIS),⁶ and the Final Environmental Impact Statement (FEIS),⁷ all of which are hereby incorporated into this Objection to the Draft ROD and which are attached as Exhibits A, B and C. In addition, informal comments were provided to the USFS frequently during the process as the USFS and the State have a long history of cooperating on Tongass management. But in this plan amendment process, many of the State’s comments were either rejected or not considered and did not receive an adequate response from the USFS.

Failure to appropriately consider and respond to comments from a commenter, especially when the commenter is a state with decades of cooperation with the USFS on the management of the national forest, is a violation of NEPA. The state comments on the FEIS emphasized many of the state comments on the scoping process and the DEIS upon which the USFS failed to either take action or provide an adequate response (Exhibit C).

V. The State meets all requirements for filing an objection.

The State has filed substantive formal comments on the plan amendment scoping, DEIS and the FEIS (Exhibits A, B, and C). In addition, the State submitted the proposed State Alternative, requesting that the USFS analyze and consider it in the DEIS process (Exhibit D). State Objection issues I, II, and III are all addressed in these comments and the requirement for a link between comments and objection therefore exists as required by 36 CFR 219.54.

³ 16 U.S.C. § 3213(a) prohibits federal executive action land withdraws over 5,000 acres in Alaska without approval of Congress.

⁴ Case No. 1:11-cv-01122 (RJL)

⁵ Scoping Comments, Letter of June 26, 2014 from Kyle Moselle, State Large Project Coordinator, to Forrest Cole, Tongass Forest Supervisor. Exhibit A.

⁶ DEIS Comments, Letter of February 22, 2016 from Bill Walker, Governor of Alaska, to Earl Stewart, Tongass Forest Supervisor. Exhibit B.

⁷ FEIS Comments, Letter of August 1, 2016 from Elizabeth Bluemink, State Project Assistant to the Commissioner, to Earl Stewart, Tongass Forest Supervisor. Exhibit C

The State's Issue IV is the failure of the USFS to appropriately consider and respond to many of the comments submitted on scoping and on the DEIS (Exhibits A and B). Although the USFS does not provide a formal comment period on the FEIS, the State nevertheless provided timely formal written comments on the FEIS regarding the issues set forth in Issue IV (Exhibit C). Therefore, Issue IV also links to substantive comments. Alternatively, the failure to address scoping and DEIS comments in the FEIS is an issue that cannot be raised prior to the objection period. Either way, the matters raised as Issue IV also met the criteria for objection under 36.CFR 219.54.

DISCUSSION OF ISSUES

I. The USFS failed to analyze and properly consider the proposed State Alternative in violation of NEPA.

In comments on scoping, the State notified the USFS of its intent to provide a new alternative for consideration and analysis. This State Alternative would, among other things, allow for transition to young-growth harvest, but at a more realistic rate that would allow the survival of the timber industry. The State Alternative submitted to the USFS on November 12, 2014, is attached as Exhibit D and is incorporated herein. The USFS declined to analyze or properly consider this viable alternative, stating instead that it failed to meet the purpose and need of transitioning to young-growth in 15 years.⁸

However, none of the alternatives considered by the USFS provide transition to young-growth in 10-15 years while also providing sufficient timber to maintain the existing timber industry. Therefore, all of the rapid transition alternatives considered by the USFS violate the TTRA congressional directive to seek to meet Tongass timber demand. Thus, none of the alternatives considered – including the selected alternative – meet the purpose and need of transition in 15 years and comply with federal law. These rapid transition alternatives also fail to meet the purpose and need of the plan amendment as established by Secretary Vilsack, which conditioned the transition upon maintaining a viable timber industry.

In contrast, the State Alternative allows for transition to young growth over a longer and more reasonable period while maintaining a viable timber industry consistent with federal law and the Secretary's direction to the USFS. Because it is a viable alternative for transition that unlike the selected alternative is consistent with federal law, the USFS is required under NEPA to analyze and fully consider the State Alternative.

II. The USFS deletion of the TUS LUD in this forest plan amendment process is a violation of the federal planning regulation applicable to this amendment, a violation of NFMA, and a violation of NEPA.

Eliminating the TUS LUD violates USFS planning regulations implementing the NFMA and

⁸ Draft ROD at Page 10.

violates NEPA. The State's comments on the DEIS (Exhibit B at 16-17) provided a methodical and detailed explanation of the flexibility in USFS regulations to allow by amendment the modification or removal of plan components from a specific management or geographic area (36 CFR § 219.13); however, the same regulations are quite inflexible in that they require that the designation or elimination of a specific management or geographic area must be done through a plan revision (36 CFR § 219.7(c) and (d)). The USFS response contains a single sentence conclusion to the state comment on this point: "An amendment may remove all the plan components within a LUD *and may remove the LUD itself*" (FEIS, p. 1-108 emphasis added). This conclusory statement contains a significant leap in logic and is directly contrary to the USFS 2012 planning rule and regulations.

The locations of the transportation and utility corridors in the TUS LUD are based almost exclusively on the locations of the transportation and utility easements established by Congress in SAFETEA-LU Section 4407. Under the USFS 2012 planning rule, all areas designated by Congress must appear in the plan (36 CFR 219.7(c)(2)(vii)), and the TUS LUD fulfills this requirement. Additionally, each of those congressionally-designated areas must have plan components for USFS management within the geographic areas (36 CFR § 219.10(b)(1)(vi)). Removal of all plan components would violate this regulatory requirement. Furthermore, the responsible official is only authorized to modify the existing area by plan amendment, which would necessarily include modification of the TUS LUD by completely removing the LUD itself, if the responsible official was given the delegated authority for the modification (36 CFR 219.7(c)(2)(vii)). Congress did not provide such delegated authority to modify or eliminate the Section 4407 transportation and utility easements; therefore, the USFS does not have the authority to eliminate all TUS LUD components or the authority to eliminate the LUD itself.

Furthermore, elimination of the TUS LUD requires adequate public notice and compliance with NEPA. The State's comments on the DEIS stated the clear and unarguable fact that the public notice, the notice of intent, and the entire scoping process for this forest plan amendment did not indicate a need, desire, or intent to remove the TUS LUD. The USFS responses to comments explain that the elimination of the TUS LUD was first considered in the Five-Year Review for the 2008 Forest Plan (FEIS, pp. 1-107-1-108). This statement and excuse does not address the fact that the USFS chose to take the major and significant action of eliminating the TUS LUD without notifying the public or conducting scoping as required by NEPA.

The concept of removing the TUS LUD appears nowhere in any of the Five-Year Review news releases, community meeting agendas, community meeting summaries or public comments. The idea of removing the TUS LUD appears to have been immaculately conceived within the agency rather than as the response to public comments in the various venues leading up to this proposed forest plan amendment as stated by the Agency.

The State also presented other transportation and utility concerns in comments on the DEIS and FEIS to which the USFS gave inadequate responses. These issues are discussed below in Section IV.

III. The Amended Forest Plan violates the TTRA and ANILCA.

In 2001, the U.S. Department of Agriculture (USDA) promulgated the Roadless Rule and thereby prohibited virtually all road construction and timber harvest in Inventoried Roadless Areas within all national forests. As a separate decision within that rulemaking, USDA applied these prohibitions to the Tongass despite an EIS that clearly indicated that timber demand in the Tongass could not be met with the Roadless Rule in effect. The State's opening and reply briefs in the pending legal challenge to the Roadless Rule in the Federal District Court for the District of Columbia present the full argument as to why the Roadless Rule is itself invalid as it violates TTRA and ANILCA. The briefs are attached as Exhibits E and F and are incorporated herein.

The USFS now compounds this violation of federal law by selecting an alternative that not only fully implements the Roadless Rule in the management plan governing the Tongass, but also implements a transition plan to young-growth timber with a rapid phase out of the old-growth timber on which the timber industry is dependent. The result is a forest plan that violates TTRA and ANILCA – under this plan, the USFS leaves itself with no possibility of meeting timber demand.⁹

The State has acknowledged in other forums that the “seek to meet timber demand” provision is not an inflexible requirement to actually meet all demand every year. The directive is subject to meeting certain other management requirements, such as some environmental concerns. In addition, there has been a history of the USFS offering timber sales in good faith only to have those sales enjoined in federal court by anti-timber interests, which is of course in part beyond the control of the USFS.

However, the congressional requirement for the USFS to “seek to meet timber demand” obviously requires at a minimum a good faith attempt to actually meet demand. As the governing plan for all forest management on the Tongass, the forest plan is clearly a document where this congressional mandate must be manifested. If the USFS adopts a forest plan that totally restricts its ability to offer timber at levels that could meet timber demand, it is impossible for the USFS to comply with the clear directive to “seek to meet timber demand.” This plan amendment is a decision by the USFS that it will no longer even consider meeting timber demand in its future management actions, which is a clear violation of TTRA.

In comments on the DEIS and on the FEIS (Exhibits B and C), the State has already provided the USFS with its analysis of why the newly commissioned timber demand study that reduced the most recent estimate of demand from 142 MMBF to 46 MMBF of timber is fatally flawed. Similarly, the State has repeatedly commented on why a rapid transition from old-growth to young-growth timber will not meet

⁹ The Forest Service attempt to establish a new artificially low current demand for timber with commissioning of the Daniels Report fails in that as discussed below this report is highly suspect. In addition, even if this report is accurate, this forest plan amendment leaves the Forest Service no opportunity to meet future increases in market demand for timber.

the timber demand needed to preserve a viable timber industry in Southeast Alaska as required by TTRA (Exhibits A, B and C).

In addition to our previous concerns on the suitability of the demand study, the current methodology is focused on the demand for old-growth logs and makes no differentiation between the demand for old growth and the demand for young growth. The log characteristics between these two types of supply are so different that the Forest Service should not combine the demand number and instead present a demand number for each. As the transition progresses, this relationship between the two types of log supply will change and so will the demand for each type of log. If insufficient volume of either occurs during the transition, it will cause great harm to the current and future forest products industry.

Remarkably, the USFS admits in its decision that there is no demonstrated market for the young-growth timber on which the new plan will force the timber industry to survive. On page 10 of the Draft ROD, the Forest Supervisor states, "The market for large volumes of young-growth logs has not yet been demonstrated and this is especially true for small logs from 55-year old stands." Given that the TTRA mandates that the USFS seek to meet timber demand, and that the purpose and need for this plan amendment includes maintaining a viable timber industry, the USFS nevertheless is adopting a plan that will in a few years force the industry to attempt survival solely on a product for which it admits there is no demonstrated market.

The plan includes no contingency for the industry in the event that such a speculative market does not appear. Furthermore, the industry cannot possibly be expected to risk financing a massive investment in new equipment and in market development, especially when lenders recognize that even the USFS admits there is a lack of a demonstrated market. Therefore, the selected plan alternative does not meet the purpose and need of transition while maintaining a viable industry and violates the seek to meet demand provision of TTRA.

IV. In violation of NEPA, the USFS has failed to appropriately consider and respond to a broad range of substantive comments provided to the USFS by the State.

In a letter dated February 22, 2016, the State timely provided substantial comments to the USFS on the DEIS setting forth a wide range of issues and concerns (Exhibit B). In a letter dated August 1, 2016, the State commented on the FEIS, providing some examples where the USFS failed to adequately address or respond to the State's substantive comments in the comment response section of the FEIS (Exhibit C).

In many cases, the substance of the state comments on the DEIS identified a deficiency that is a violation of law, generally under NEPA or NFMA. However, the failure to adequately respond to state comments constitutes a separate violation of NEPA.

The attached comments dated August 1, 2016, explain that some state comments were accepted and resulted in revisions in the FEIS. Given the long history of cooperation between the State and the USFS on the Tongass forest plan, the State appreciates the USFS's willingness to address those concerns.

However, Exhibit C also explains many areas of substantial disagreement where the State's comments and concerns have not been addressed. Some of those areas are separately addressed above in Sections I, II and III of this Objection. The remaining concerns that were not addressed by USFS are fully incorporated herein from Exhibit C and are only summarized and highlighted below.

A. Transportation and Utilities

1.) The Proposed Plan and FEIS grossly underestimates development in the TUS LUD.

The State's comments provided the actual mileage totals for the hundreds of miles of public highway projects through the Tongass, which are either fully funded for construction or were recently completed. Rather than acknowledge and fully consider the real and current impacts of these development projects, the USFS responded by quoting a draft Alaska Department of Transportation & Public Facilities (DOT&PF) planning document (that has been in a draft form for over a decade) that says DOT&PF "must plan for the possibility of reduced financial resources" (FEIS, p. I-112). The USFS then goes on to forecast that only 35 miles of projects are achievable and realistic given "time constraints as well as anticipated litigation" (FEIS, p. I-112). It is not clear from the USFS responses whether the delays and litigation are due to anticipated actions by the USFS or if the USFS anticipates third parties to cause these delays.

2.) The Proposed Plan could benefit by adding new components in addition to the TUS LUD.

The State provided detailed comments explaining how the USFS's proposed Transportation System Corridor Direction component, and the Renewable Energy Direction component, would be quite beneficial for the development of new power generation facilities and utility feeder lines located outside the TUS LUD. The creation of these new components to address the current void in transportation and utility management directives outside the TUS LUD for this small segment of developments is a proper use of the amendment process. This modification to address a new condition can and should be accomplished without modifying and complicating the process for the much more common transportation and utility infrastructure development to link the communities of Southeast Alaska. The USFS provided an explanation of how the new components are applicable forest-wide (FEIS, p. I-113), which is obvious from reading the DEIS. The USFS response does not explain how the solution to the small-scale problem of power generation and feeder line development outside the TUS LUD cannot be implemented in parallel with the fixed, predictable and clearly manageable transportation and utility corridors in the TUS LUD.

B. Forestry

The State commented that the projected timber sale quantity (PTSQ) in the DEIS, 46 MMBF, does not meet the requirements of TTRA Sec. 101 to seek to meet the annual timber demand. The previous timber demand published by USFS in 2014 was 142 MMBF (three times greater). The explanation for this drop provided in the DEIS Comments and Responses (Appendix I of the FEIS) that the “PNW Research Station’s [new] timber demand projections are based on solid economic theory, peer-reviewed methodology, and rigorous and objective analysis” is unconvincing.

On page 29 of the Draft ROD, the PTSQ of 46 MMBF is described as neither a goal nor a target. Neither is it a ceiling – “it is an estimate” and serves as the average annual figure over the next ten years. Since providing a larger timber supply is less risky than undersupplying market demand, setting a range for the PTSQ would more flexibly meet TTRA’s requirement to ‘seek to meet’ timber demand than using the proposed fixed number.

The proposed plan also does not meet the statutory requirements of TTRA because none of the alternatives provide sufficient quantities of old growth to meet the demands of the existing timber industry, which is recognized as old growth dependent. Providing sufficient old growth timber in compliance with TTRA will require modifying the application of the Roadless Rule as proposed in two alternatives, modifying the Transition Plan, or both. The selected alternative in the FEIS rejects both approaches.

Table 3.22-5, Timber Harvest in Southeast Alaska by Ownership, 2002-2014 does not provide a realistic average harvest figure due to the significant reductions in harvests on State lands taking place after 2007-2008. We pointed out that harvests on state Mental Health Trust and University timber lands are not managed on a sustained yield basis, further lowering future harvest levels when considered along with other State of Alaska lands. This overestimate of timber production from State lands results in lower estimates of the amount of timber that the Tongass is required to provide in order to meet demand.

The USFS failed to analyze the proposed State Alternative submitted by the State, concluding that it does not meet the purpose and need of the plan amendment of transition to young growth in 15 years. However, as noted above, a transition within 15 years fails to seek to meet timber demand. Therefore, the selected alternative violates TTRA. The State Alternative, while proposing a longer transition, is a viable alternative that is compliant with federal law and therefore must be analyzed under NEPA.

C. Wildlife, Fish and Subsistence

The Alaska Department of Fish and Game (ADF&G) agrees Alternative 5 is the alternative that will most benefit fish and wildlife resources and habitats. That said, ADF&G’s wildlife and subsistence comments were not addressed in the FEIS or final amended plan. While the USFS states in Appendix I

of the FEIS the comments were outside the scope of the amendment, comments that would have strengthened document integrity – like updated citations and terms – were ignored.

For example, on comments on the DEIS, the State identified where the USFS could improve its application of science as well as its explanation of the scientific basis regarding decisions on wolves, the conservation strategy, the effects of young-growth management, the FRESH deer model, and the definition of “appropriate research” for the future. However, the USFS generally chose not to respond to the State’s concern about using the best science available.

While ADF&G may be able to address some issues as it continues to work with the USFS on the Tongass National Forest Monitoring Program, ADF&G staff see no venue to discuss the omissions in the FEIS and final amended plan. ADF&G’s wildlife staff have sought to bring their applied wildlife research expertise to assist the USFS with difficult wildlife and forest management problems. The lack of a cooperative dialog is a change from the collaborative relationship the USFS and ADF&G have enjoyed.

Most of ADF&G’s fish comments were addressed in the FEIS, though no suggested changes to the Chapter 5 standards and guidelines were adopted in the final plan or addressed in comment responses.

RESOLUTIONS REQUESTED

1. Resolution Requested for Objection Issue I:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to fully analyze and consider the State Alternative submitted to the USFS on November 12, 2014 attached as Exhibit D.

2. Resolution Requested for Objection Issue II:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to retain the TUS LUD. Alternatively, as required by the USFS Planning Rule, the USFS should rescind the entire plan amendment process and commence a Plan Revision Process. Note that additional issues with transportation and utilities are addressed under Objection Issue IV.

3. Resolution Requested for Objection Issue III:

The State respectfully requests that the USFS withdraw the FEIS and revise the DEIS to include the State Alternative, include a revised and realistic estimate of timber demand, and remove restrictions in the Amendment that will prevent the USFS from meeting timber demand as required by the TTRA. To

achieve compliance with the TTRA, it may be necessary to revise the Transition Plan to young-growth timber and to undertake a rulemaking to address the Roadless Rule in Alaska¹⁰.

The State also requests that the USFS revise the restrictions on land rights that constitute a prohibited withdrawal of federal land under ANILCA. An example is the prohibition of road access to leasable minerals such as geothermal power.

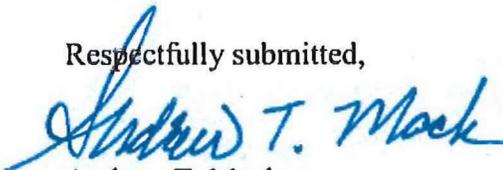
4. Resolution Requested for Objection Issue IV:

The State requests that the USFS withdraw the FEIS and revise the DEIS after full consideration, response and appropriate modifications based on the many previously unaddressed State concerns and comments.

CONCLUSION

On behalf of the State of Alaska and Governor Bill Walker, I respectfully submit this objection to the 2016 Tongass Land and Resource Management Plan Amendment. The State appreciates the very long cooperative relationship between our State and the USFS and looks forward to a resolution of the issues raised in this objection.

Respectfully submitted,



Andrew T. Mack
Commissioner

cc: The Honorable Bill Walker, Governor, State of Alaska
The Honorable Lisa Murkowski, United States Senator
The Honorable Dan Sullivan, United States Senator
The Honorable Don Young, United States Representative
The Honorable Sam Cotten, Commissioner, Alaska Department of Fish and Game
The Honorable Larry Hartig, Commissioner, Alaska Department of Environmental Conservation
The Honorable Marc Luiken, Commissioner, Alaska Department of Transportation & Public Facilities

¹⁰ The State's federal court challenge of the validity of the Roadless Rule is ripe for decision in the District Court for the District of Columbia and invalidation of the Roadless Rule would provide the Forest Service with greater flexibility to comply with the TTRA requirement to seek to meet timber demand.

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