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**No. 17-5260, 17-5262, 17-5263 (consolidated)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF ALASKA, et al.,  
*Plaintiff-Appellant,*

ALASKA FOREST ASSOCIATION, et al.,  
*Intervenors-Plaintiffs-Appellants,*

v.

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

SOUTHEAST ALASKA CONSERVATION COUNCIL et al.,  
*Intervenors-Defendants-Appellees*

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On Appeal from the District Court for the District of Columbia  
No. 1:11-cv-01122-RJL

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**[PROOF] ANSWERING BRIEF FOR FEDERAL DEFENDANTS  
UNITED STATES DEPARTMENT OF AGRICULTURE ET AL.**

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**CERTIFICATE AS TO PARTIES,  
RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The parties, intervenors, and amici appearing before the district court are:

1. *Plaintiff (Appellant in No. 17-5260)*

State of Alaska

2. *Intervenors for Plaintiff (Appellants in No. 17-5262)*

Alaska Forest Association  
Southeast Conference  
Southeast Alaska Power Agency

*Intervenors for Plaintiff (Appellants in No. 17-5263)*

Alaska Electric Light & Power Co., Inc.  
Alaska Marine Lines, Inc.  
Alaska Miners Association  
Alaska Power & Telephone  
American Exploration & Mining Association  
Citizens Pro Road  
City of Craig  
Durette Construction Company, Inc.  
First Things First Foundation  
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Hyak Mining Co., Inc.  
Inside Passage Electric Cooperative  
Juneau Chamber of Commerce  
City of Ketchikan, d/b/a Ketchikan Public Utilities  
Ketchikan Gateway Borough  
Southeast Roadbuilders, Inc.  
Southeast Stevedoring Corp.

3. *Defendants*

United States Department of Agriculture  
United States Forest Service  
George Ervin “Sonny” Perdue, III  
in his official capacity as Secretary,  
United States Department of Agriculture  
Victoria Christiansen, in her official capacity as  
Interim Chief, United States Forest Service

4. *Intervenors for Defendants*

Southeast Alaska Conservation Council  
Alaska Center for the Environment  
Boat Company  
Tongass Conservation Society  
Sierra Club  
Wilderness Society  
Natural Resources Defense Council  
Greenpeace, Inc.  
Defenders of Wildlife  
Center for Biological Diversity

B. Rulings Under Review

The rulings under review are the memorandum opinion (Doc. 102) and final order (Doc. 103) issued on September 20, 2017 by the District Court for the District of Columbia (Hon. Richard J. Leon), granting summary judgment in favor of the defendants.

### C. Related Cases

This case involves a 2011 challenge to the 2001 Roadless Area Conservation Rule (“Roadless Rule”), 66 Fed. Reg. 3244 (Jan. 12, 2001), issued by the United States Department of Agriculture (“USDA”). This case was previously before this Court in consolidated appeals filed in 2013 (Nos. 13-5147, 13-5150, 13-5151). This Court reversed the district court’s 2013 opinion (Doc. 58) and final order (Doc. 59), which dismissed plaintiffs’ claims under the statute of limitations. *Alaska v. USDA*, 772 F.3d 899 (D.C. Cir. 2014).

Plaintiff State of Alaska and others have also challenged the Roadless Rule in other courts. *See Organized Village of Kake v. USDA*, 795 F.3d 956, 961 (9th Cir. 2015) (en banc) (describing Alaska’s prior challenge); *see also Wyoming v. USDA*, 661 F.3d 1209, 1225-26 & n. 9 (10th Cir. 2011) (upholding rule in challenge by State of Wyoming). Alaska’s original (2001) challenge to the Roadless Rule was settled in exchange for an agreement by USDA to conduct a rulemaking to consider an exemption for the Tongass National Forest in Alaska. *See Village of Kake*, 795 F.3d at 962. USDA promulgated a Tongass exemption in 2003. *Id.* (citing 68 Fed. Reg. 75,136 (Dec. 30, 2003)). In 2011, the District Court for the District of Alaska set aside the Tongass Exemption and declared the Roadless Rule “reinstated” in the Tongass. *Organized Village of Kake v. USDA*, 776 F.Supp.2d 960, 976 (D. Alaska 2011). The Ninth Circuit affirmed. *Village of*

*Kake*, 795 F.3d at 970. The State of Alaska and the Alaska Forest Association were intervenor-defendants in *Village of Kake*. *Id.* at 958, 963 n.4.

Respectfully submitted,

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**GLOSSARY OF ACRONYMS & ABBREVIATIONS**

ANILCA .....	Alaska National Interest Lands Conservation Act
CEQ .....	Council on Environmental Quality
DEIS.....	Draft Environmental Impact Statement
EIS .....	Environmental Impact Statement
FEIS .....	Final Environmental Impact Statement
FLPMA.....	Federal Land Policy Management Act
Forest Association .....	Alaska Forest Association
NEPA.....	National Environmental Policy Act
Tongass Act .....	Tongass Timber Reform Act
USDA.....	United States Department of Agriculture

## **INTRODUCTION**

In this appeal, the State of Alaska, joined by the Alaska Forest Association (“Forest Association”) and other intervenor-plaintiffs, challenge the Roadless Area Conservation Rule (“Roadless Rule”), a 2001 rulemaking of the United States Department of Agriculture (“USDA”). The rule prohibits most road construction, reconstruction, and timber harvests within inventoried roadless areas of the National Forest System, in order to preserve roadless-area values and characteristics. Alaska and the Forest Association argue that USDA failed to conduct an adequate environmental-impacts review under the National Environmental Policy Act (“NEPA”), and that the Roadless Rule, as applicable to Alaska and the Tongass National Forest, violates the Alaska National Interest Lands Conservation Act (“ANILCA”) and the Tongass Timber Reform Act (“Tongass Act”). As explained herein, Alaska and the Forest Association raise policy issues that are properly considered in conjunction with Alaska’s pending petition for rulemaking, but not in the present judicial challenge. USDA took a “hard look” under NEPA at environmental impacts, and the Roadless Rule is not contrary to ANILCA or the Tongass Act. The district court’s judgment should be affirmed.

## **ISSUES PRESENTED**

1. Whether USDA complied with NEPA when promulgating the Roadless Rule, and particularly:
  - (a) whether USDA's environmental impact statement ("EIS") reasonably articulated the purpose and need for the rulemaking;
  - (b) whether the EIS adequately disclosed cumulative impacts relating to USDA's policy on road decommissioning;
  - (c) whether USDA took sufficient time to gather necessary information and enable public participation;
  - (d) whether the EIS adequately considered issues and alternatives specific to the Tongass National Forest; and
  - (e) whether USDA reasonably declined to prepare a supplemental EIS when deciding not to exempt the Tongass;
2. Whether the Roadless Rule as applicable to Alaska is consistent with ANILCA; and
3. Whether the Roadless Rule as applicable to the Tongass National Forest is consistent with the Tongass Act.

## STATEMENT OF THE CASE

### **A. Introduction**

The 58.5 million acres of inventoried roadless areas within the National Forest System are vital to the nation's environmental health. They are an important source of clean drinking water; they provide opportunities for hunting, fishing, and other dispersed outdoor recreation; they are "biological strongholds" for endangered, threatened, and at-risk species; and they serve as a "bulwark" against the spread of nonnative invasive species. *See* 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001). After years of study, litigation, and controversy over roadless-area management, USDA in January 2001 promulgated the Roadless Areas Conservation Rule ("Roadless Rule") to provide uniform management prescriptions for inventoried roadless areas nationwide. *Id.* at 3244. The Roadless Rule prohibits most road construction, reconstruction, and timber harvesting within these areas, based upon USDA's determination that such activities have the "greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics." *Id.*; *see also Ark Initiative v. Tidwell*, 816 F.3d 119, 123 (D.C. Cir. 2016).

In the rulemaking, USDA acknowledged concerns by Alaska and others that applying the Roadless Rule to the 9.34 million acres of inventoried roadless areas within the Tongass National Forest could adversely impact the communities and

timber industry of Southeast Alaska. *See id.* at 3254-55. In light of these concerns, USDA considered various Tongass-specific exemptions. *Id.* at 3254. Following public comments and further review, however, USDA decided not to exempt the Tongass, but instead only certain Tongass timber projects already in planning. *Id.* at 3254-55; *see also id.* at 3273 (36 C.F.R. § 294.14(d)).

Alaska promptly sued, alleging that USDA failed to comply with NEPA and that the Roadless Rule as applicable to the Tongass is contrary to ANILCA and the Tongass Act. *See Organized Village of Kake v. USDA*, 795 F.3d 956, 961 (9th Cir. 2015). Alaska ultimately dismissed its suit pursuant to a settlement in which USDA agreed to conduct further rulemaking specific to the Tongass. *Id.* at 962. In 2003, USDA promulgated a final rule exempting the Tongass from the Roadless Rule, after concluding that Tongass inventoried roadless areas were sufficiently protected under the Tongass forest plan. 68 Fed. Reg. 75,136, 75,138 (Dec. 30, 2003) (“Tongass Exemption”).

In 2005, USDA replaced the Roadless Rule with procedures for developing state-specific roadless-area protections. 70 Fed. Reg. 25,654 (May 13, 2005). This “State Petitions Rule,” however, was set aside by a federal district court in California. *See Ark Initiative*, 816 F.3d at 123-24 (citing *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874 (N.D. Cal. 2006), *aff’d*, 575 F.3d 999 (9th Cir. 2009)). And the reinstated Roadless Rule (with the Tongass exemption) was

subsequently upheld by the Tenth Circuit. *Wyoming v. USDA*, 661 F.3d 1209 (10th Cir. 2011); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1105 (9th Cir. 2002) (reversing preliminary injunction against Roadless Rule).<sup>1</sup>

The 2003 Tongass rulemaking itself, however, did not survive judicial challenge. *See Village of Kake*, 795 F.3d at 962-63. In 2011, a district court in Alaska set aside the Tongass Exemption, ruling that that USDA failed adequately to explain its change of position from the 2001 rulemaking. *See Organized Village of Kake v. USDA*, 776 F. Supp. 2d 960, 969-76 (D. Alaska 2011). In a divided en banc decision, the Ninth Circuit affirmed. *Village of Kake*, 795 F.3d at 970.

Alaska filed the present action in response to the *Village of Kake* judgment. Numerous southeast Alaska commercial organizations intervened as plaintiffs. Numerous environmental organizations intervened as defendants. The district court granted summary judgment for USDA and the environmental defendants. This appeal followed. Alaska, joined by all Intervenor Plaintiffs, filed a brief on the NEPA claims. The Forest Association filed a separate brief on the ANILCA and Tongass Act claims.

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<sup>1</sup> USDA has promulgated state-specific rules for inventoried roadless areas in Idaho and Colorado, which supersede the Roadless Rule in those states. *See* 36 C.F.R. §§ 294.20-29, 294.40-49.

## B. Setting

There are approximately 192 million acres of land within the forests, grasslands, and other designated areas that comprise the National Forest System. 71 Fed. Reg. 75,481, 75,482 (Dec. 15, 2006). The Forest Service manages each administrative unit of that system under a comprehensive land and resource management plan. *See* 16 U.S.C. § 1604; *Ark Initiative*, 816 F.3d at 122. Each forest plan must provide for “multiple use and sustained yield of the products and services obtained” from the relevant unit and must “include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness” uses. 16 U.S.C. § 1604(e)(1); *see also id.* §§ 528-31.

In the 1970s, the Forest Service conducted reviews to identify roadless areas within the National Forest System, generally of 5,000 acres or greater, to evaluate their suitability for “wilderness” designation under the 1964 Wilderness Act. *See* 66 Fed. Reg. 35,918, 35,919 (July 10, 2001); *Ark Initiative*, 818 F.3d at 123; *see also* 16 U.S.C. § 1132(b). Congress subsequently designated approximately 34.7 million acres of national forest lands as wilderness. *See* 66 Fed. Reg. at 35,919. The reviews left USDA with a nationwide inventory of roadless areas that were not designated wilderness. *See* 66 Fed. Reg. at 3246; *Wyoming*, 661 F.3d at 1222. These areas lie within 120 national forests in 38 states and Puerto Rico, AR 4609@88, and contain “beneficial environmental features”—including “high-quality

and undisturbed soil, water, and air; plant and animal diversity and habitat for various sensitive categories of species; and scenic and cultural properties”—in addition to the mere “absence of roads.” *Ark Initiative*, 816 F.3d at 123; 66 Fed. Reg. at 3245.

There are two national forests in Alaska. AR 4609@523. The Tongass National Forest in Southeast Alaska is the largest unit of the National Forest System, encompassing approximately 16.59 million acres, including approximately 9.34 million acres of inventoried roadless areas. AR 4609@459; AR 4609@523. The Tongass has a significant timber program and surrounds several “timber dependent” communities. AR 4609@418, 421. The Chugach National Forest in southern Alaska contains approximately 5.49 million acres surrounding Prince William Sound, including approximately 5.44 million acres of inventoried roadless areas. AR 4609@523. There is no significant timber program in the Chugach. *See* AR 4609@421.

## **C. 2001 Roadless Rule**

### *1. Rulemaking*

USDA initiated roadless-area rulemaking in the late 1990s, in response to three nationwide trends: (1) a substantial shift in national forest use toward recreation, (2) insufficient funds to maintain roads to safety and environmental standards, and (3) mounting evidence that ecological impacts from roads are more

extensive than previously believed. 63 Fed. Reg. 4350 (Jan. 28, 1998); *see also Wyoming*, 661 F.3d at 1222-23. In 1998, USDA invited public comments on managing roads in view of these trends. 63 Fed. Reg. at 4350-52. After considering comments, USDA adopted an 18-month moratorium on road construction in many of what the agency calls “unroaded” areas. 64 Fed. Reg. 7,290 (Feb. 12, 1999). During that time, the President directed USDA to initiate a rulemaking to consider long-term roadless-area protections. AR 4609@34.

Under NEPA, any federal agency proposing “major Federal action[] significantly affecting the quality of the human environment” must prepare, for public review, a detailed statement discussing the likely environmental impacts and potential alternatives. 42 U.S.C. § 4332(2)(C); *see also NRDC v. Nuclear Regulatory Commission*, 879 F.3d 1202, 1207 (D.C. Cir. 2018). The Council on Environmental Quality (“CEQ”) has issued regulations that govern the form, content, and preparation of an environmental impact statement (“EIS”). *See* 40 C.F.R. § 1500 et seq. CEQ’s regulations are binding on agencies and are owed “substantial deference” by the courts. *TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006).

In October 1999, USDA published a notice of intent to prepare an EIS for a nationwide roadless-area conservation rule. 64 Fed. Reg. 56,306 (Oct. 19, 1999). In light of the Tongass Act and the significance of inventoried roadless areas to the

Tongass timber program, AR 1362@1:11-1:12, USDA “specifically solicit[ed] comments on whether or not the proposed rule should apply to the Tongass.” 64 Fed. Reg. at 56,307. In the 60-day “scoping” period, the Forest Service received over 517,000 comments and held 187 public meetings around the country. 66 Fed. Reg. at 3248; AR 4609@35, 497. In Alaska, USDA held public meetings in Anchorage, Cordova, Craig, Girdwood, Honnah, Juneau, Kake, Ketchikan, Petersburg, Seward, Sitka, Thorne Bay, Wrangell, and Yakutat. *See* 64 Fed. Reg. 67,822, 67,839-40 (Dec. 3, 1999).

USDA released a draft EIS (“DEIS”) and proposed Roadless Rule in May 2000. 65 Fed. Reg. 30,276 (May 10, 2000). The DEIS studied various alternatives ranging from no rulemaking to prohibitions on all timber harvests and road construction activities, including in the Tongass. AR 1362@S:7-S:8. The DEIS considered four potential Tongass exemptions or partial exemptions, including the then “preferred” alternative of deferring decision for the Tongass until the 5-year review of the Tongass forest plan (scheduled for 2004). AR 1362@S:11-S:12. USDA held more than 400 informational and open-forum meetings on the proposed Roadless Rule, 66 Fed. Reg. at 3248, including in all of the Alaska communities where earlier meetings were held, AR 1370@1-3. USDA received more than one million comments on the proposed rule. 66 Fed. Reg. at 3248; AR 4609@497-98.

USDA issued a final EIS (“FEIS”) in November 2000. *See* 65 Fed. Reg. 69,513 (Nov. 17, 2000). In response to comments, USDA adopted a new “preferred” Tongass alternative, which would not exempt the Tongass, but would delay the rule’s effective date in the Tongass until 2004. AR 4609@63-64.

## 2. *Tongass Considerations*

The Tongass National Forest consists of 22,000 islands and a narrow strip of mainland, which together comprise the majority of the Pacific coast ecoregion, a narrow coastal band containing one quarter of the world’s temperate rainforests. AR 4609@459. The Tongass remains one of the most pristine temperate rainforest and shoreline ecosystems in the world, enjoying a “high degree of . . . ecosystem health . . . largely due to the quantity and quality of inventoried roadless areas and other special designated areas.” *Id.* The mostly undeveloped old-growth and riparian habitats support an abundance of wildlife, as well as significant subsistence use, hunting and fishing, and other recreation and tourism activities. AR 4609@460-64. The Tongass is home to 80 percent of the salmon stocks in Southeast Alaska. AR 4609@463. The seafood industry (commercial fishing and processing) is Southeast Alaska’s largest private employer. *Id.*

As the FEIS indicated, timber harvests and road construction pose unique challenges to Tongass wildlife. AR 4609@459. In the Tongass’s “naturally fragmented” landscape, such habitat disturbances raise heightened concerns about

fragmentation, isolation of populations, and local population extinctions. AR 4609@460. Further, unlike game species in other forests that respond favorably to timber harvests, the majority of subsistence and game species within the Tongass—including Sitka black-tailed deer, marten, wolf, brown bear, salmon, trout, and steelhead—are “integrally linked” to the quantity and quality of intact old-growth and riparian habitats. AR 4609@462. The presence of roads in these habitats has been “extensively associated with reduced subsistence productivity.” AR 4609@461. In addition, the majority of lands in Southeast Alaska outside of the Tongass “have been intensively managed for timber harvest,” leaving the Tongass to play a “critical role in conserving the biodiversity” of the ecoregion. AR 4609@478.

At the time of the FEIS, there were approximately 3,640 miles of classified roads within the Tongass, mostly built for timber operations. AR 4609@462. Areas of the Tongass that have been “intensively managed” for timber operations have seen habitat loss and increased species mortality. AR 4609@462-63, 468-69. The FEIS reported that, if applied to Tongass, the Roadless Rule would maintain the “unspoiled” nature of Tongass inventoried roadless areas, lowering risks to fish and wildlife species valued for hunting, fishing, and subsistence uses. AR 4609@466.

The FEIS also acknowledged, however, that applying roadless-area proscriptions to the Tongass would likely reduce timber harvests in inventoried

roadless areas by 95 percent. AR 4609@465, 473. In the planning period from 1999 to 2004, two-thirds of the projected Tongass timber harvest was projected to come from inventoried roadless areas. AR 4609@466. Due to forest-plan restrictions and other factors, the EIS deemed it unlikely that forest planners could substantially increase offerings from outside of inventoried roadless areas. *Id.* As a result, the FEIS projected that “annual timber offerings” would be reduced from around 124 million board feet to around 50 million board feet. *Id.* The FEIS predicted that this would “restrict the timber supply available to the industry and bring about a fundamental shift in the region’s timber market,” with attendant job losses and economic impacts. AR 4609@466-67.

The FEIS also observed, however, that numerous other factors impact the Southeast Alaska timber industry, including global competition and a steady drop in demand from foreign markets. AR 4609@464-65; *see also* AR 5795@1-9, 12. In the 1990s, timber harvests on all Southeast Alaska timber lands significantly declined due to market factors. AR 4609@463, 478; AR 6004@46-48. The FEIS reported that roadless-area proscriptions were “unlikely to have an immediate effect on harvest activity” in the Tongass, because existing contracts provided “a supply of volume” sufficient to maintain operations for several years. AR 4609@466.

### 3. *Roadless Rule*

After receiving and considering comments on the FEIS, USDA promulgated the final Roadless Rule in January 2001. 66 Fed. Reg. at 3244, 3248. The rule prohibits road construction and reconstruction and timber harvests in inventoried roadless areas nationwide, subject to various exceptions, including exceptions related to existing roads and access rights and to roads needed for non-prohibited management activities. *See id.* at 3272-73 (§§ 294.12, 294.13, 294.14). In adopting these proscriptions, USDA concluded that the risks to watersheds, wildlife habitat, and other “roadless area characteristics” outweigh the benefits from road building and timber harvests in these areas. *Id.* at 3244-47. USDA observed that it “makes little fiscal or environmental sense” to build new roads that put “irretrievable values at risk,” when the agency has a “backlog of about \$8.4 billion in deferred maintenance and construction” and is “struggling to maintain its existing road system.” *Id.* at 3245-46.

As for the Tongass, USDA acknowledged that the Tongass Act, 16 U.S.C. § 539d, directs the Forest Service, subject to other applicable laws, to “seek to meet market demand” for timber from the Tongass National Forest. 66 Fed. Reg. at 3255. USDA explained, however, that the Tongass Act “does not envision an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation.” *Id.* Finding that “ecological benefits to the nation” from protecting

inventoried roadless areas in the Tongass “outweigh the potential economic loss to . . . local communities,” USDA decided against a full Tongass exemption. *Id.* Instead, USDA exempted only planned timber sales from the Tongass for which a notice of availability of a draft EIS had been published. *Id.* at 3254, 3273 (§ 294.14(d)). These projects plus harvest outside of inventoried roadless areas would “satisfy about 7 years of estimated market demand.” *Id.* at 3255. USDA chose this option to provide a “smooth transition for forest dependent communities,” while “assur[ing] long-term protection” of “important roadless area values.” *Id.* at 3254-55.

#### **D. 2003 Tongass Exemption**

In July 2003, in accordance with the settlement that resolved Alaska’s initial challenge to the 2001 Roadless Rule, USDA issued a proposed rule to temporarily exempt the Tongass, 68 Fed. Reg. 41,865 (July 15, 2003), along with a notice soliciting comments on whether the rule should apply in Alaska, 68 Fed. Reg. 41,864 (July 15, 2003). In December 2003, USDA promulgated the Tongass Exemption. 68 Fed. Reg. at 75,136. USDA concluded that, “at least in the short term . . . roadless values on the Tongass are sufficiently protected under the Tongass Forest Plan.” *Id.* at 75,138, 75,145. USDA therefore exempted the Tongass “[u]ntil USDA promulgates a final rule concerning application [of the Roadless Rule] within the State of Alaska.” *Id.* at 75,156 (new § 294.14(d)).

In *Village of Kake*, the Ninth Circuit affirmed the 2011 judgment of the District Court for the District of Alaska that USDA acted arbitrarily and capriciously under the Administrative Procedure Act (“APA”) by failing to sufficiently explain this change in policy. *See* 795 F.3d at 966-70 (citing *Motor Vehicle Manufacturers Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The court declared, as remedy, that the “Roadless Rule . . . remains in effect and applies to the Tongass.” *Id.* at 970.

#### **E. Proceedings Below**

In response to the judgment in *Village of Kake*, Alaska and Intervenor-Plaintiffs brought this action to again challenge the 2001 Roadless Rule and decision not to exempt the Tongass. The district court dismissed the actions under the six-year statute of limitations. *Alaska v. USDA*, 932 F. Supp. 2d 30 (D.D.C. 2014). In a “narrow” ruling specific to the unique procedural history of this case, this Court reversed, holding that “a new right of action necessarily accrued” in 2006, when the 2001 Roadless Rule was reinstated by the judgment in *Village of Kake*. *Alaska v. USDA*, 772 F.3d 899, 900 (D.C. Cir. 2014).

On remand, the parties filed cross motions for summary judgment. The district court determined that Alaska and Intervenor-Plaintiffs had Article III standing to challenge the Roadless Rule and that *Village of Kake* did not preclude any of their claims. Doc. 102@17-24. But the district court ruled that their claims

failed on the merits, and it granted summary judgment for USDA and the Environmental Defendants. *Id.* at 24-44.

#### **F. Pending Administrative Proceedings**

On January 19, 2018, Alaska petitioned USDA to “undertake a rulemaking to consider once against exempting the Tongass from the Roadless Rule.” On April 25, 2018, Secretary Perdue advised Alaska that USDA would “explore and discuss the petition and the options to address application of the 2001 Roadless Rule on the Tongass National Forest.” USDA has not yet taken formal action on Alaska’s petition.

### **SUMMARY OF ARGUMENT**

#### **A. NEPA**

As required by NEPA, USDA took a “hard look” at the environmental impacts of the Roadless Rule, including impacts on the Tongass National Forest and timber-dependent communities in Southeast Alaska. Alaska fails to show any deficiency in the FEIS or in USDA’s overall NEPA review.

First, Alaska fails to show any flaw in the FEIS’s statement of “purpose and need.” Alaska does not allege that the statement was unduly narrow or precluded review of reasonable alternatives. Instead, Alaska argues that USDA failed to show that the Roadless Rule was “needed,” and that the Roadless Rule (as applicable to

Alaska) conflicts with ANILCA and the Tongass Act. Neither of these substantive objections states a cognizable NEPA claim.

Second, Alaska fails to show any deficiency in the FEIS's cumulative-impacts analysis. Alaska is simply mistaken in arguing that the FEIS failed to disclose potential increases in unroaded areas within the National Forest System as a result of USDA's Roads Policy and the decommissioning of unneeded roads. The FEIS revealed every potential impact that Alaska incorrectly alleges was concealed or buried in specialists' reports.

Third, Alaska fails to show that USDA acted arbitrarily or abused its discretion in expediting the rulemaking. USDA complied with all timing requirements set out in the CEQ regulations. Alaska fails to identify any relevant information that USDA did not disclose and review in the FEIS, or any relevant information that Alaska needed (and did not have) for purposes of providing informed comment. Moreover, because CEQ regulations do not require federal agencies to grant "cooperating agency" status to interested non-federal agencies and do not provide any standards for governing such decisions, Alaska's complaint that western states should have been included as cooperating agencies is not subject to judicial review. In any event, given the infeasibility of joining all potentially interested state and local agencies as cooperating agencies, USDA's decision not to grant cooperating agency status to non-federal agencies was reasonable.

Fourth, Alaska is incorrect in arguing that the FEIS failed to consider socio-economic impacts in Southeast Alaska other than timber-related impacts. The FEIS considered a wide range of impacts, including impacts on hydropower, geothermal, electric-transmission, and mineral development. Alaska overstates the impacts of the Roadless Rule on these activities (which are mostly insignificant) and disregards the relevant discussions in the FEIS.

Finally, Alaska errs in supposing that USDA should have prepared a supplemental EIS in association with its decision not to exempt the Tongass from the Roadless Rule. Although the DEIS identified a Tongass exemption as the agency's preferred alternative, the DEIS and FEIS fully evaluated the impacts of not exempting the Tongass. USDA's decision—informed by its NEPA review and public comments—to choose a studied alternative different from the proposed rule does not require additional NEPA review.

## **B. ANILCA**

Alaska argues that USDA violated ANILCA, 16 U.S.C. § 3213(a), by “withdrawing” inventoried roadless areas in Alaska's national forests from mineral leasing under the Mineral Leasing Act of 1920. This argument fails for two reasons. First, the Roadless Rule does not prohibit mineral leases in inventoried roadless areas; the rule merely precludes (in practical effect) most new leases that would require road construction or reconstruction. Second, as evidenced by context and

legislative history, the term “withdraw” as used in § 3213(a) refers to executive decisions to withhold lands from some or all general land laws that provide a right of entry for purposes of staking private land or mineral claims. Because the Mineral Leasing Act provides an *opportunity* but not a *right* to lease, restricting leasing opportunities under that Act is not a withdrawal.

### **C. Tongass Act**

Nor is Alaska correct in arguing that the Roadless Rule violates the Tongass Act, 16 U.S.C. § 539d. While that Act provides a qualified instruction that USDA “seek to provide a supply of timber” from the Tongass that meets market demand, nothing on the face of the Roadless Rule prevents USDA from seeking to meet or actually meeting market demand through timber sales on lands outside of inventoried roadless areas or consistent with Roadless Rule exceptions. Further, although the rulemaking record suggested that the Roadless Rule’s proscriptions could make it more difficult to meet market demand (depending on market factors), the Tongass Act does not require USDA to meet market demand, but only to “seek to . . . meet[]” such demand. Even that qualified directive is “subject to” applicable law and must be “consistent with” USDA’s authority to provide for the multiple use and sustained yield of renewable forest resources, including recreation, watershed, and wildlife and fish, in addition to timber. The Roadless Rule is consistent with this aspirational directive.

## **STANDARD OF REVIEW**

This Court reviews the district court’s grant of summary judgment de novo. *Roberts v. United States*, 741 F.3d 152, 157-48 (D.C. Cir. 2014). Under the APA, USDA’s actions must be upheld unless “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). When reviewing an agency’s NEPA compliance, this Court asks whether the agency has “adequately considered and disclosed the environmental impacts of its action.” *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014); *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983). NEPA’s mandates are “essentially procedural.” *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). NEPA “does not dictate particular decisional outcomes, but ‘merely prohibits uninformed—rather than unwise—agency action.’” *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)). The Court’s task is not to “flyspeck” an agency’s environmental analysis, but merely to ensure that the agency took a “hard look” at potential environmental impacts before deciding whether and how to proceed. *Sierra Club v. U.S. Dept. of Energy*, 867 F.3d 189, 196 (D.C. Cir. 2017).

## ARGUMENT

### I. USDA COMPLIED WITH NEPA

#### A. USDA Reasonably Stated the Roadless Rule's "Purpose and Need"

CEQ's regulations provide that an EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. This requirement is interrelated with an agency's duty to "rigorously explore and objectively evaluate all reasonable alternatives." *Davis v. Latschar*, 202 F.3d 359, 367-68 (D.C. Cir. 2000) (quoting 40 C.F.R. § 1502.14). As this Court has explained, the "goals of an action delimit the universe of . . . reasonable alternatives." *Id.* (quoting *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 ((D.C. Cir. 1991))). Accordingly, the goals must be reasonably stated so not to unduly narrow potential alternatives. *Id.*; *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 72-73 (D.C. Cir. 2011).

Here, USDA's stated purpose was to "conserve and protect the increasingly important values and benefits of roadless areas." AR 4609@42. Responding to this purpose, USDA developed a range of alternatives to limit road construction, reconstruction, and timber harvests, because these activities have the greatest likelihood of causing "immediate, irretrievable, and long-term loss of roadless characteristics." *Id.* at 44. Recognizing the Tongass's "unique" circumstances and

need for “special attention,” USDA also developed a range of potential Tongass exemptions. *Id.* Alaska does not contend that USDA’s purpose-and-need statement limited the range of alternatives in the FEIS. *Cf. Theodore Roosevelt Conservation Partnership*, 661 F.3d at 73; *Davis*, 202 F.3d at 368. Indeed, Alaska does not proffer a single alleged reasonable alternative that USDA neglected to study. *See* 40 C.F.R. § 1502.14(a). Instead, Alaska makes two arguments (Brief at 11-16, 32-43) that are not viable NEPA claims and otherwise lack merit.

*1. USDA Reasonably Stated the Need for Nationwide Rulemaking*

Alaska first argues (Brief at 11-16) that USDA overstated the need for the Roadless Rule by failing to account for the impacts of road decommissioning. As explained in the FEIS, when developing the Roadless Rule, USDA simultaneously considered regulatory and policy changes for roads management (collectively, the “Roads Policy”), which would encourage the decommissioning of unneeded roads. AR 4609@46-48, 485-86; *see also* 66 Fed. Reg. 3,206 (Jan. 12, 2001); 66 Fed. Reg. 3,219 (Jan. 12, 2001).

The FEIS reported that the Roads Policy would likely result in “reductions in road densities” in “roaded areas,” and “*possibly* the creation of [new] unroaded areas.” AR 4609@124-126. The FEIS estimated that, over a 40-year period, road decommissioning could result in a 5% to 10% increase in overall unroaded areas, or up to 8.4 million acres of new unroaded areas. AR 4609@124-26, 201, 309, 318,

329, 455. The FEIS further explained, however, that any newly-created unroaded areas would not be protected by the Roadless Rule. AR 4609@124.<sup>2</sup> Alaska contends (Brief at 11-16) that 8.4 million acres of new unroaded areas would “far exceed” the inventoried roadless areas likely to become roaded over the same 40-year period (without a Roadless Rule), and that this road-decommissioning impact “contradicts” USDA’s rulemaking premise that inventoried roadless areas need protection.<sup>3</sup>

Contrary to Alaska’s argument, however, there is nothing contradictory in pursuing a rulemaking to “conserve and protect” existing inventoried roadless areas, AR 4609@42, while simultaneously pursuing a road-decommissioning policy that might create new unroaded areas. New unroaded areas do not necessarily have the same ecological values as inventoried roadless area that never have been roaded. Moreover, USDA reasonably may adopt a policy to increase unroaded areas overall. In its NEPA review, USDA specifically considered a “no net loss” alternative, under which the agency would permit road construction in inventoried roadless areas as long as such actions were offset by the creation of new unroaded areas elsewhere.

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<sup>2</sup> The Roadless Rule applies to specific areas, not to unroaded areas generally. *See* 66 Fed. Reg. at 3,244, 3,272 (§ 294.11).

<sup>3</sup> In the 20 years prior to the rulemaking, 2.8 million acres of inventoried roadless areas became “roaded.” AR 4609@73, 243. At the same rate, 5.6 million acres of inventoried roadless areas would become roaded by 2040.

AR 4609@68. USDA declined to study this alternative in detail, finding it contrary to the purpose of the rulemaking. *Id.* As USDA explained, “rotating” unroaded areas within a forest ultimately would result in more road-related impacts on more acres of forest and could have essentially the same adverse effects as no action. *Id.*

In any event, whether USDA should strive to increase unroaded areas generally, or should conserve inventoried roadless areas specifically, are *policy* decisions for USDA to make under its land-management authorities, including the Organic Administration Act, 16 U.S.C. §§ 473-482, 551; the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-31; and the National Forest Management Act, 16 U.S.C. §§ 1600-1614. USDA acted well within its “broad discretion” under these statutes in proposing and promulgating the Roadless Rule. *Wyoming*, 661 F.3d at 1234-35, 1270-72.

Contrary to Alaska’s argument (Brief at 16), the CEQ regulations do not specifically require agencies to “support” the “purpose and need” of a proposed action. Rather, the rule cited by Alaska (*id.*) provides that an EIS should be “supported by evidence that the agency has made the necessary environmental analysis.” 40 C.F.R. § 1502.1. In arguing that the Roadless Rule is not “needed” (Brief at 11-16), Alaska does not allege that USDA failed to conduct “necessary environmental analysis.” Rather, Alaska invites this Court to “second-guess substantive decisions committed to [USDA’s] discretion,” which Alaska does not

challenge directly. *See Delaware Riverkeeper Network*, 753 F.3d at 1313.<sup>4</sup> This is not a viable NEPA claim. *Id.*

## 2. *USDA Reasonably Included the Tongass*

In addition to challenging USDA's finding of need for the Roadless Rule, Alaska contends (Brief at 32-43) that the Roadless Rule's statement of purpose and need was improperly applied to the Tongass. As explained above (pp. 21-22), USDA gave "special attention" to the Tongass when defining the purpose and need for the Roadless Rule and considered a full range of Tongass-specific exemptions. While Alaska baldly asserts (Brief at 36) that the FEIS's purpose-and-need statement "skewed the selection of alternatives" for the Tongass, Alaska does not challenge the range of Tongass-specific alternatives. Instead, Alaska argues (Brief at 34-37, 39-43) that there was no "need" to protect Alaska's inventoried roadless areas, and that USDA could not make such protection a valid "purpose" of rulemaking, because Congress had already determined (through ANILCA and the Tongass Act) the appropriate level of protection for Alaska's forests.

Properly considered, this argument asserts violations of ANILCA and the Tongass Act, not a failure to study reasonable alternatives and impacts under NEPA.

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<sup>4</sup> Alaska forfeited its claims under the National Forest Management Act, the Multiple-Use Sustained-Yield-Act, and the Organic Act, *see* Doc. 1@24-26, 29-30, by not pursuing them below. *See Chichakli v. Tillerson*, 882 F.3d 229, 234 (D.C. Cir. 2018); *see also Wyoming*, 661 F.3d at 1234-35 (rejecting similar claims).

Alaska has, by reference, joined the arguments of Intervenor-Plaintiff Forest Association that the Roadless Rule (as applicable to Alaska) was contrary to the Tongass Act and ANILCA. But those claims fail for reasons explained below (pp. 47-56). Because USDA acted consistently with ANILCA and the Tongass Act when proposing and promulgating the Roadless Rule, there is no room for Alaska to argue that USDA acted inconsistently with congressional intent for NEPA purposes. *Delaware Riverkeeper Network*, 753 F.3d at 1313.

Alaska's reliance (Brief at 39) on *Citizens Against Burlington* is misplaced. There, this Court observed that, when determining the range of NEPA alternatives, "an agency should always consider the views of Congress, expressed . . . in the agency's statutory authorization to act, as well as in other congressional directives." 938 F.2d at 196. In so stating, however, this Court did not hold that NEPA *precludes* study of options alleged to be beyond an agency's statutory authority. *Id.* Indeed, this Court has otherwise held that NEPA may require discussion of alternatives that depend on new legislation. *NRDC, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972); *see also* 40 C.F.R. § 1502.14(c) (agency must include reasonable alternatives not within its jurisdiction).

*Citizens Against Burlington* merely affirmed an agency's discretion to *decline* to study far flung alternatives in cases where Congress has directed specific action. 938 F.2d at 196 (citing *City of New York v. DOT*, 715 F.2d 732, 742-43 (2d Cir.

1983); *Izaak Walton League v. Marsh*, 655 F.2d 346, 372 (D.C. Cir. 1981)); accord *National Parks Conservation Ass'n v. U.S. Forest Service*, 177 F. Supp. 3d 1, 16-17 (D.D.C. 2016). For example, when Congress called for regulations to govern the safe transport of nuclear fuel by interstate highway, the Department of Transportation reasonably declined to study the “alternative of carrying nuclear fuel around New York City by barge.” *Citizens Against Burlington*, 938 F.2d at 196 (citing *City of New York*, 715 F.2d at 743)). Here, USDA studied Alaska’s preferred alternative (a Tongass exemption). That USDA also studied alternatives alleged to be contrary to ANILCA and the Tongass Act is not a NEPA violation.

**B. The FEIS Adequately Considered the Cumulative Effects of the Roads Policy**

Under the CEQ regulations, an EIS must consider direct, indirect, and cumulative effects. *See* 40 C.F.R. § 1508.25(c); *see also TOMAC*, 433 F.3d at 864. “Cumulative” effects are impacts resulting “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *See* 40 C.F.R. § 1508.7; *see also id.* § 1508.27(b)(7).

In the DEIS and FEIS, USDA identified the Roads Policy as a related regulatory initiative with potential cumulative effects. *See* AR 1362@1:14-16, 3:240-42 (DEIS); AR 4609@46-48, 485-86 (FEIS). The Roads Policy (published on the same date as the Roadless Rule) is a coordinated set of regulatory amendments and revisions to the Forest Service Handbook. 66 Fed. Reg. 3206,

3219. The policy changed USDA's roads-management emphasis from transportation development to ensuring that new roads are "essential" to forest use, that adverse road-related impacts are minimized, and that unneeded roads are decommissioned. *Id.*

There were (at the time of the rulemaking) approximately 386,000 miles of classified roads in the National Forest transportation system. AR 4609@109. In addition, there are approximately 77,000 miles of roads in the national forests and grasslands that are part of county, state, or federal highways or maintained by private owners, plus an estimated 60,000 miles or more of unclassified roads (created by public use but not officially maintained). AR 4609@110-113. As noted in the DEIS and FEIS, forest managers had begun over the previous decade to decommission roads at a rate of 2,660 miles annually. AR 4609@114; AR 1362@3:15-16. The Forest Service decommissions roads most frequently to reduce road density but also occasionally to create new unroaded areas (e.g., to restore a watershed). AR 4609@125. The FEIS projected that, under the Roads Policy, the National Forest transportation system would ultimately "stabilize" at between 260,000 and 300,000 miles, with an associated 5% to 10% increase in overall unroaded areas. AR 4609@122, 125.

While acknowledging that USDA considered the cumulative effects of road decommissioning in "internal reports," Alaska argues (Brief at 22) that USDA failed

to disclose these effects in the DEIS and FEIS, contrary to NEPA's mandate to ensure informed public participation. *See Sierra Club*, 803 F.3d at 36-37; *Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). The Tenth Circuit has already rejected a similar argument, holding that USDA sufficiently considered the cumulative effects of the Roadless Rule, Roads Policy, and other regulatory initiatives. *See Wyoming*, 611 F.3d at 1250-54. Alaska urges a different result here, on the view (Brief at 21-22) that USDA deliberately concealed the effects of the Roads Policy, both during rulemaking and from the Tenth Circuit. These arguments are without merit.

*1. The FEIS Disclosed All Projected Impacts That Alaska Claims Were Withheld*

Alaska's argument fails first and foremost because it repeatedly misstates the contents of the FEIS. First, Alaska contends (Brief at 18) that the FEIS contains only a "brief discussion" of the Roads Policy and that such discussion "states only" that the Roads Policy is "complementary to the Roadless Rule." *Id.* (citing AR 4609@486). But as the FEIS index reveals (*see* AR 4609@641), there are additional and extended discussions of the Roads Policy throughout the FEIS. *See, e.g.*, AR 4609@46-48, 116-17, 121-26, 484-86 (discussing Roads Policy and cumulative effects generally); *see also* AR 4609@69-71, 309, 318, 329, 344, 455-57, 479 (discussing Roads Policy in relation to proposed alternatives and effects on particular resources).

Second, Alaska contends (Brief at 17) that a specific goal and potential impact of the Roads Policy—to decommission approximately 2,900 miles in unneeded roads annually—was buried in the final road specialists’ report (“Roads Report”) and “not discussed in the EIS section of cumulative effects.” *See* AR 6004@612. To the contrary, this goal was specifically reported in the FEIS, AR 4609@126, within a section entitled “Other Indirect and Cumulative Effects on National Forest System Roads,” AR 4609@121-26. The FEIS also disclosed USDA’s related projection that the National Forest transportation system will eventually stabilize at 260,000 to 300,000 miles overall. AR 4609@125.

Third, Alaska asserts (Brief at 12, 15-16, 17-18) that the FEIS failed to disclose the estimate—allegedly “well-buried” in the wilderness specialists report (“Wilderness Report”), AR 6004@690—that the Roads Policy could lead, over 40 years, to the creation of 8.4 million acres of new unroaded areas. This is again plainly mistaken: as the district court observed (Doc.102@28), the 8.4-million-acre estimate is not only disclosed in the FEIS, it is reported *three times*. AR 4609@309 (cumulative effects on recreation); AR 4609@318 (cumulative effects on scenic quality); AR 4609@329 (cumulative effects on wilderness).

As Alaska observes (Brief at 16-19), the foregoing estimates regarding the extent to which the Roads Policy might accelerate road decommissioning or create new unroaded areas were not in the DEIS. *See* AR 1362@1:14-16, 3:240-42.

USDA developed and added these estimates to the FEIS in response to public comments on the DEIS. *See* AR 4610@37-38, 92-93. But Alaska does not argue and cannot show that the additional information came too late to satisfy NEPA's public-participation objective. USDA received and considered comments on the FEIS—including comments from Alaska, AR 5958—before promulgating the Roadless Rule. *See* 66 Fed. Reg. at 3248; *Wyoming*, 661 F.3d at 1262 n.39. Alaska thus had the relevant information and the opportunity to comment before USDA made its final decision.

## 2. *USDA Did Not Conceal Impacts*

Because the FEIS *actually discloses* the very projections that Alaska accuses USDA of withholding, this Court need not consider Alaska's argument (Brief at 19-22) that USDA engaged in "concerted" efforts to "misrepresent the effect of the Roads Policy." Regardless, the various non-NEPA documents upon which Alaska relies do not support its argument.

To begin with, there was nothing "misleading" or "disingenuous," as Alaska argues (Brief at 19), in the March 2000 "talking points" on the Roads Policy or in a May 2000 announcement by the Forest Service Chief. The talking points *correctly* stated that the Roads Policy "itself" would not create new unroaded areas. *See* AR 2315@836. Any decision to decommission a road or create a new unroaded area must be made on a project-specific basis, subject to public participation and NEPA

review. AR 4609@124-26, 485-86. Similarly, the May 2000 announcement *correctly* stated that the proposed Roadless Rule would not close “a single authorized road.” *See* AR 1345@1. The Roadless Rule allows maintenance of existing roads and new road construction as needed for existing or reserved rights. *See* 66 Fed. Reg. at 3272 (§§ 294.12(b)(3), 294.12(c)). In stating that the Roadless Rule would not cut off “existing and legal access,” the May 2000 announcement did not purport to address the issue of unneeded roads outside of inventoried roadless areas. AR 1345@1.<sup>5</sup>

Nor is there any merit to Alaska’s argument (Brief at 13, 20) that the “planned disclosure” of road-decommissioning effects tied to the Roads Policy was “struck” from the FEIS in a “conscious decision to suppress” such information. While a reviewer struck a line from the “summary of changes” that would have alerted readers to the new FEIS discussions regarding the “extent to which new roadless areas may be created as a result of this and other rulemaking,” AR 5151@3, that edit did not strike the new content itself, *see* AR 4609@125, 309, 318, 329, 455. As published, moreover, the FEIS otherwise alerted readers to the new content, noting that the FEIS contained “expanded” discussions of the “combined effects” of the

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<sup>5</sup> Similarly, the briefing notes cited by Alaska (Brief at 31) merely indicate that USDA informed lawmakers that road decommissioning was a Roads Policy objective. AR 3977@2. The notes do not disclose the details of any briefing or suggest any effort to withhold relevant information. *Id.*

Roadless Rule and “concurrent rulemaking efforts,” including “expanded” discussions of “cumulative effects . . . for all resources.” AR 4609@16-17.

3. *Alaska’s Effort to Distinguish Wyoming Is Misplaced*

Alaska urges this Court (Brief at 21-22) to follow the district court’s decision in *Wyoming* instead of the Tenth Circuit’s decision, on the view that USDA “even concealed” relevant information from the Tenth Circuit by arguing that cumulative effects could not be forecasted. To the contrary, USDA expressly advised the Tenth Circuit that, due to the Roads Policy, the FEIS projected a possible “five to ten percent” increase in unroaded areas and a reduction in overall National Forest transportation system road miles from 368,000 miles to between 260,000 and 300,000 miles. *See* Opening Brief of Federal Defendants-Appellants at 56, 10th Cir. Nos. 09-8075 & 08-8061 (Nov. 2, 2009).

In the Tenth Circuit, the plaintiff State of Wyoming did not have the temerity to argue—as Alaska does here—that USDA concealed these cumulative-impact forecasts, which are plainly in the FEIS. *See* AR 4609@125, 201, 309, 318, 329, 455. Wyoming instead argued that those system-wide forecasts were inadequate. As the FEIS noted, however, the decommissioning of particular roads will depend upon future plan- and project-level decisions by managers of the various national forests and grasslands. AR 4609@121-22, 124-26. For this reason, it was “impossible to [precisely] predict” where road decommissioning would occur and

“how much and where unroaded areas would be created or enlarged.” AR 4609@124-25. The United States’ Tenth Circuit argument highlighted this inability to “forecast specific impacts,” not an inability to project an increase in unroaded areas generally. *See* Reply Brief of Federal Defendants-Appellants at 25, 10th Cir. Nos. 09-8075 & 08-8061 (Feb. 3, 2010). The Tenth Circuit acknowledged USDA’s projection of possible increased unroaded areas, and it correctly held that this discussion of cumulative effects was sufficient. *Wyoming*, 661 F.3d at 1250-54. This Court should likewise reject Alaska’s arguments.

### **C. USDA Took Sufficient Time**

To ensure sufficient time for public review of environmental impact statements, the CEQ regulations provide that an agency may not take a proposed action until 90 days after notice of the publication of a DEIS or 30 days after notice of the publication of an FEIS, whichever is later, 40 C.F.R § 1506.10(b), and that an agency must provide at least 45 days for comment on a DEIS, *id.* § 1506.10(c). But the CEQ regulations do not otherwise prescribe timeframes for NEPA review, leaving agencies with discretion to set time limits “appropriate to individual actions” in light of various factors that agencies “may consider,” including the “potential for environmental harm” and “size of the proposed action.” *Id.* § 1501.8; *see also Wyoming*, 661 F.3d at 1238-39. Alaska does not contend that USDA failed to provide the prescribed time for public review under § 1506.10(b). Nor does Alaska

argue that USDA abused its discretion under § 1501.8. Instead, in a string of loosely-connected complaints (Brief at 23-32), Alaska merely opines that USDA acted too hastily. Alaska's arguments lack merit.

*1. USDA Reasonably Expedited Its Rulemaking*

Alaska begins by observing (Brief at 23-24) that NEPA team leaders set ambitious goals for collecting information from regional foresters. But these requests simply show that USDA made expedited rulemaking a priority. Most of the information sought from Forest Service regional and field offices (e.g., data on prior or projected timber harvests and road construction) was already in the possession of those offices. And USDA committed nearly 100 employees and \$10 million to the rulemaking and public outreach. *See* AR 4609@501-10 (list of preparers and contributors); AR 1172 (budget estimate). Setting ambitious deadlines for internal data compilation is not arbitrary if sufficient resources are committed to the effort and the required information is compiled.

Nor did USDA act arbitrarily, as Alaska argues (Brief at 28-29), merely by declining to extend time periods for public comment, which were already more generous than required by rule. *See* AR 388; AR 1258@1; AR 4098@1, 6; AR 4485@1; *see also Wyoming*, 661 F.3d at 1238-41; *Kootenai Tribe*, 313 F.3d at 1118-19 (rejecting similar arguments). Indeed, Alaska does not allege that USDA gave the public insufficient opportunity to comment on environmental impacts and

on alternatives. Rather, Alaska relies (Brief at 29) on a comment seeking a new analysis under the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12, and extended time for public review of that analysis. AR 4485@6. But Alaska has forfeited any claim it might have raised under that statute by not raising it in this appeal. *See American Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008).

## 2. *USDA Did Not Rely On Inaccurate Data*

Alaska also variously alleges (Brief at 24-27, 30-32) that the accelerated timeline caused USDA to compile and provide inaccurate or incomplete data for NEPA purposes. But none of the evidence proffered by Alaska supports this claim.

First, Alaska cites three internal agency emails that questioned certain roadless-area data compiled at the *beginning* of the NEPA process. *Id.* at 24-25 (citing AR 2315@201, AR 2626, and AR 2217). These emails are irrelevant. Alaska does not challenge the roadless-area data subsequently presented in the DEIS, much less the data and maps in the FEIS, which are referenced in the final rule. *See* AR 4609@514-25; 66 Fed. Reg. at 3272 (§ 294.11).

Second, Alaska cites an April 4, 2000 report indicating that the number of public comments received in response to the October 1999 notice of intent was then only 364,728 and not “over 500,000,” as earlier estimated. AR 1012. But this discrepancy regarding initial public participation has no bearing on the subsequent environmental analysis in the DEIS and FEIS. And the estimate ultimately proved

to be accurate: USDA received more than 517,000 comments by May 2000, when the DEIS and proposed rule were published. 66 Fed. Reg. at 3248; AR 4609@35.

Third, Alaska relies (Brief at 25-26) on two internal comments questioning USDA's estimate that the Forest Service faced an \$8.4 billion backlog in deferred maintenance and capital improvement costs for the National Forest transportation system. But this preexisting budgetary concern was part of USDA's rationale for the rulemaking. *See* 64 Fed. Reg. at 56,306. It has little (if any) relevance to USDA's subsequent analysis of environmental impacts. In any event, as the DEIS, FEIS, and Roads Report explained, the \$8.4 billion estimate derived from a 1998 survey, which included random field sampling from roads in every national forest and grassland. *See* AR 1362@3:17 & n.5 (DEIS); AR 4609@33, 110 (FEIS); AR 6004@596-98 (Roads Report). The methodology used by USDA to calculate deferred maintenance and capital improvement costs is set out in a 1999 report to Congress. AR 697@1-2, 36-39. The comments cited by Alaska do not acknowledge or dispute the survey or accounting methodology. AR 3140, 5612@50. Nor does Alaska acknowledge or dispute this evidence.

Fourth, Alaska relies (Brief at 26-27) on internal comments that the DEIS may have underestimated timber-sale impacts by restricting analysis to planned timber offers between 2000 and 2004. *See* AR 5612@31, 53, 78. The comments cautioned that planned offers might already have been dampened by the rulemaking

initiative. *Id.* But this speculation about the quality of the five-year planning data does not prove that USDA acted arbitrarily in presenting the data along with other analysis. The FEIS also reported historic harvests in inventoried roadless areas. AR 4609@287. And the FEIS projected long-term differences in harvests through the year 2040 under the various regulatory alternatives. *Id.* at 289. Alaska disregards the additional analysis and proffers no better data for the five-year planning period.

Fifth, Alaska contends (Brief at 30-31) that the speed of the rulemaking prevented USDA from timely providing the public with accurate maps of inventoried roadless areas. But USDA publicized maps of inventoried roadless areas—by state and by individual forests—on a website launched months before the publication of the DEIS. AR 76; AR 4609@497. Alaska cites one complaint about the first-published Alaska map and two complaints about other state maps. *See Brief* at 30-31 (citing AR 312; AR 5135; AR 3527@1-2; AR 5612@71).<sup>6</sup> But Alaska does not challenge the accuracy of the final maps in the DEIS or FEIS. *See* AR 4110@15-20 (FEIS Alaska maps); AR 1364@14-19 (DEIS Alaska maps). Nor does Alaska contend that its ability to comment was thwarted by the available maps. Complaints similar to Alaska’s have already been rejected by the Ninth and Tenth Circuits. *Wyoming*, 661 F.3d at 1240; *Kootenai Tribe*, 313 F.3d at 1117.

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<sup>6</sup> The questioned Idaho map showed “fire regime” classifications, not inventoried roadless areas. AR 5135; AR 3527@1-2. The questioned Washington map (Gifford Pinchot National Forest) was corrected. AR 4231@15; AR 3682@8.

At bottom, none of the evidence proffered by Alaska supports its claim (Brief at 27) that USDA, in its alleged haste or otherwise, failed to “insure the professional [and] scientific integrity . . . of the discussions and analysis” in the FEIS. 40 C.F.R. § 1502.24. Nor is there any basis for Alaska’s argument (Brief at 32) that USDA failed to disclose the alleged absence of critical information. *See* 40 C.F.R. § 1502.22 (requiring disclosure when evidence necessary to discern impacts is unavailable). Alaska does not even state (Brief at 32) what information is alleged to be missing.

3. *USDA Reasonably Declined to Designate States as “Cooperating Agencies”*

Finally, Alaska is mistaken in arguing (Brief at 27-28) that USDA “disregarded NEPA and the APA” by declining requests by western states to become “cooperating agencies.” CEQ regulations provide that any “*Federal* agency which has jurisdiction by law” over a proposed action “*shall* be a cooperating agency” during NEPA review and shall evaluate impacts within its jurisdiction. 40 C.F.R. § 1501.6 (emphasis added). In contrast, any federal, state, or local agency with “special expertise with respect to any environmental issue” that “should be addressed” in an EIS “*may*” be a cooperating agency, with the lead agency’s agreement. *Id.* § 1508.5 (emphasis added).

As Alaska observes (Brief at 27), CEQ issued a memorandum encouraging federal agencies to identify non-federal agencies with “special expertise” and

interest in becoming cooperating agencies. AR 3544. But nothing in the CEQ regulation compels federal agencies to grant cooperating-agency status to non-federal agencies or sets out factors that federal agencies must consider in responding to cooperating-agency requests. For this reason, the Tenth Circuit correctly held that USDA's decision to deny cooperating-agency status to western states is not judicially reviewable. *See Wyoming*, 661 F.3d at 1242 (citing 5 U.S.C. § 701(a)(2)); *see also Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

But even if USDA's decision on cooperating-agency status were reviewable, that decision must be affirmed as reasonable. USDA met with western governors to outline steps for collaborating on the rulemaking. AR 514; AR4609@498. USDA reasonably declined to treat any individual state or local agency as a "cooperating agency" given the nationwide scope and focus of the rule and the impracticality of joining so many potential partners. *See, e.g.*, AR 2977@2. Alaska fails to explain how USDA practicably could have worked with so many potentially interested agencies as true "cooperating agencies," i.e., in roles meaningfully different from that of interested parties. And Alaska identifies no information or analysis that Alaska or other states were unable to provide through comments on the rulemaking.

#### **D. The FEIS Adequately Considered Tongass-Specific Impacts**

CEQ regulations direct agencies to consider "economic or social effects" that are "interrelated" with effects on the "natural or physical environment." 40 C.F.R.

§ 1508.14. In accordance with this rule, USDA evaluated the effects of the proposed Roadless Rule on “human uses” of national forests and grasslands generally, as well as associated “social and economic factors.” AR 4609@6-7, 352-53. Recognizing that the Roadless Rule would have substantial impacts on the Tongass timber program, AR 4609@418, 421, the FEIS specifically discussed those impacts and related social and economic effects. *See, e.g.*, AR 4609@282-84, 288, 290, 385-91, 418-34, 462-68. Alaska has no quarrel with such analysis.

Instead, Alaska argues (Brief at 48), that the FEIS is deficient because it contains “no mention” of any effects “on any Tongass resource or industry other than timber.” To the contrary, the FEIS specifically references Alaska or the Tongass in multiple discussions of non-timber related social and economic impacts. *See, e.g.*, AR 4609@336-38 (access to inholdings), 356 (passive use values), 363 (recreation and tourism), 370-74 (hunting and fishing), 398 (mineral revenues), 408 (oil and gas reserves), 413-14 (non-timber roads), 421, 439-43, 453 (Alaska Native issues). Likewise, the Tongass-specific section of the FEIS (AR 4609@459-80) discusses impacts on Southeast Alaska communities relating to commercial fishing, subsistence use, hunting and fishing, tourism, and other matters distinct from timber production. *See, e.g.*, AR 4609@460-64, 475-76.

Nor is Alaska correct (Brief at 48-55) that the FEIS disregarded possible impacts on energy development, electric transmission, and mineral location. As for

hydroelectric projects, the Federal Power Act authorizes the Federal Energy Regulatory Commission to issue licenses for facilities on national forests, subject to conditions that USDA might impose to protect forest resources. 16 U.S.C. §§ 797(e), 823d. The Roadless Rule does not prohibit such development or impact existing licenses. 66 Fed. Reg. at 3273 (§ 294.14(a)). Rather, the rule specifically allows road construction or reconstruction “needed pursuant to reserved or outstanding rights, or as provided by statute or treaty.” *Id.* (§ 294.12(b)(3)). Thus, the Roadless Rule impacts hydropower development only if associated roads do not fall within this exemption. Contrary to Alaska’s representation (Brief at 48-51), the FEIS disclosed this possible impact, observing that road construction was planned for two hydropower projects (since constructed) within Tongass inventoried roadless areas. AR 4609@462; *see also* AR 3097@17; <https://alaskafisheries.noaa.gov/habitat/hydro-projects> (noting that “Dorothy Lake” and “Kasidaya Creek (Otter Creek)” projects are “operating”).

More importantly for present purposes, Alaska’s claim regarding possible impacts on hydropower development is moot. When reinstating the Roadless Rule as to the Tongass, the district court in *Village of Kake* included a stipulation that “nothing in this judgment shall be construed to prohibit otherwise lawful road construction, . . . reconstruction, or cutting or removal of timber” as approved by USDA for “hydroelectric development pursuant to the standards and procedures set

forth in the Federal Power Act.” *See* Judgment, D. Alaska No. 1:09-cv-0023, at 2-5 (May 24, 2011). This means that USDA may approve road development and timber clearing for hydropower projects licensed under the Federal Power Act, notwithstanding any restriction that the Roadless Rule otherwise might have imposed.<sup>7</sup> Absent potential impacts, there is no basis for a remand for NEPA review. *See Gordon v. Lynch*, 817 F.3d 804, 806 (D.C. Cir. 2016) (case is moot if court cannot grant “effectual relief”).

As for electric transmission, USDA has authority to grant rights of way for transmission lines across national forests or grasslands, including lines that might be constructed as part of the Southeast Alaska “Intertie” under 43 U.S.C. § 1761(a)(4). *See also* Pub. L. No. 106-511, § 601, 114 Stat. 2365, 2376 (2000) (authorizing Intertie funding subject to “otherwise applicable State or Federal law”). Although the Roadless Rule specifically allows timber clearing “incidental” to such non-prohibited management activities, 66 Fed. Reg. at 3273 (§ 294.13(b)(2)); *see also Wilderness Workshop v. U.S. BLM*, 531 F.3d 1220, 1224-28 (10th Cir. 2008), the rule would preclude new or reconstructed access roads. *See* AR 4609@337-39. Again, however, the FEIS disclosed this impact and the potential increase in transmission development costs. AR 4609@338. Alaska does not show that this

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<sup>7</sup> The *Village of Kake* judgment does not address whether the listed activities otherwise “would . . . violate the terms of the [Roadless Rule].” *Id.*

disclosure was insufficient. The record revealed that at least one 50-mile section of the Intertie already had been constructed without roads, and that road construction would not necessarily be cost-effective for other sections, as roads grow over quickly in Southeast Alaska and road construction and maintenance costs are high. AR 5567@2; AR 4609@412. The record also showed that a more specific impact analysis was not feasible, because much of the Intertie then remained “conceptual.” *Id.*; *see also* 40 C.F.R. § 1508.8(b) (limiting NEPA analysis to “reasonably foreseeable” effects).

As for geothermal development, the Department of the Interior may (with the Forest Service’s consent) grant leases for geothermal exploration and development in national forests and grasslands in the same manner as leases for oil, gas, or coal. *See* R 4609 at 342-46. The Roadless Rule protects existing mineral leases, *see* 66 Fed. Reg. at 3273 (§ 294.14(a)), and it permits road construction and reconstruction as needed for the continuation, extension, or renewal of such leases, *id.* at 3272-73 (§ 294.12(b)(7)), but it precludes road development for new leases, AR 4609@347. Again, however, the FEIS disclosed this generic impact and potential impacts on planned leasing. AR 4609@342-48; *see also* 66 Fed. Reg. at 3264-66, 3268. The FEIS noted that there was “limited potential” for “near future geothermal development” in inventoried roadless areas, because only one forest (not in Alaska) had any such plans. AR 4609@156, 276; *see also* AR 3097@11. Alaska did not

(and does not) identify any potentially impacted project within the Tongass.

Accordingly, Alaska has not shown that the FEIS's analysis was deficient.

Finally, as Alaska itself acknowledges (Brief at 54), the Roadless Rule does not prohibit the right to explore and develop locatable minerals under the General Mining Law of 1872, including the right to construct or reconstruct roads needed for such activities. *See* 66 Fed. Reg. at 3253, 3272 (§ 294.12(b)(3)). While Alaska speculates (Brief at 55) that the Roadless Rule might not permit tree clearing “incidental” to the exploration and development of locatable minerals, the Roadless Rule plainly would allow such activity, *see* 66 Fed. Reg. at 3273 (§ 294.13(b)(2)), and the FEIS confirms the absence of any impact on mineral location and development, AR 4609@341-42. At bottom, USDA took a “hard look” at Tongass impacts, *Sierra Club*, 867 F.3d at 196, and Alaska fails to show otherwise.

#### **E. USDA Reasonably Declined to Prepare a Supplemental EIS**

Under the CEQ regulations, an agency must prepare and circulate, for public comment, a supplemental DEIS or FEIS, (1) if the agency “makes substantial changes in the proposed action that are relevant to environmental concerns,” or (2) if “[t]here 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). Contrary to Alaska's Argument (Brief at 43-47), USDA's final decision to apply the Roadless Rule to the Tongass did not implicate this duty to supplement. Although

USDA’s decision constituted a “substantial change” in policy from the initial proposal (to defer decision on the Tongass), the change did not raise new “environmental concerns.” *Id.* This is so because USDA selected an alternative (not exempting the Tongass) that was studied in both the DEIS and the FEIS. *Cf. California ex rel. Imperial Air Pollution Control Dist. v. U.S. Dept. of the Interior*, 767 F.3d 781, 795-96 (9th Cir. 2014) (supplemental EIS not required for action “within the range of alternatives considered”).

Nor is Alaska correct in asserting (Brief at 46-47) that USDA failed to acknowledge the policy change or to provide a “reasoned explanation” for it. The Roadless Rule was a policy change for all national forests. While USDA initially favored exempting the Tongass—and ultimately adopted a Tongass exemption in 2003—USDA has never interpreted ANILCA or the Tongass Act as *mandating* a Tongass exemption. *See* AR 1362@2:14, 3:228-30; AR 4609@44-45, 464-68; 68 Fed. Reg. at 75,142.<sup>8</sup>

Further, USDA fully explained its reasons for the overall rulemaking, 66 Fed. Reg. at 3244-47, as well as its 2001 decision to apply the Roadless Rule to the Tongass, *id.* at 3248-49, 3254-55. Accordingly, the authority cited by Alaska (Brief

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<sup>8</sup> The Forest Association likewise errs (Brief at 27-28) in arguing that USDA changed its interpretation of the Tongass Act. The principal policy document cited by the Forest Association specifically states that the “seek to . . . meet[.]” directive is not a “mandate” but rather an “admonition” to be considered with other forest management goals. AR 5795@8-9.

at 46-47) is inapposite. Those cases involved an agency's failure to acknowledge a policy change, or departure from prior policy "sub silentio." *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 923-24 (D.C. Cir. 2017); *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009). Here, USDA explicitly proposed a policy change and exemption, considered the impacts of applying the change and exemption, and explained its decision to adopt the policy without the exemption. The APA and NEPA require nothing more.

## II. USDA COMPLIED WITH ANILCA

In enacting ANILCA in 1980, Congress set aside 104 million acres of land in Alaska for preservation purposes. *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1066 (2016). ANILCA placed these lands into "conservation system units," along with all existing Alaska units of the "National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or [any] National Forest Monument." *Id.* (quoting 16 U.S.C. § 3102(4)); *see also* 16 U.S.C. § 3101(a). In so doing, Congress stated its "belie[f]" that such designations "obviated" the "need for future legislation designating new conservation system units." *Id.* § 3101(d). Congress also prohibited any "future executive branch action [to] withdraw[] more than five thousand acres, in the aggregate, of public land [in] Alaska," absent approval by joint congressional resolution under specified procedures. *Id.* § 3213(a).

The Forest Association argues (Brief at 32-37) that the Roadless Rule violated ANILCA's "withdrawal" prohibition, by de facto "withdrawing" Alaska inventoried roadless areas from leasing under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq.<sup>9</sup> But as noted above (p. 44), the Roadless Rule does not prohibit mineral leasing. It expressly allows new or reconstructed roads in connection with the continuation, extension, or renewal of an existing lease or the issuance of a new lease immediately upon the expiration of a lease. 66 Fed. Reg. at 3272-73 (§ 294.12(b)(7)); *see also Wyoming*, 661 F.3d at 1233. And it erects no barrier to leasing without surface occupation (e.g., for access via slant drilling). *See California ex rel. Lockyer v. USDA*, 468 F. Supp. 2d 1140, 1145-46 (N.D. Cal. 2006) (discussing no-surface-occupancy leases).

Moreover, restricting *discretionary* leasing does not amount to land "withdrawal" as that term is used in ANILCA. Although the statute does not define "withdrawal," the meaning of that term is evident from ANILCA's history. Prior to the mid-1900s, the public lands of the United States were subject to a "policy of disposal," under which "the government transferred vast acreages of land . . . to

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<sup>9</sup> Alaska also argues (Brief at 36) that the Roadless Rule contravenes ANILCA § 708(b)(4), which directs USDA not to undertake further statewide reviews to determine the suitability of Alaska national forest lands for wilderness designation. Pub. L. No. 96-487, § 708(b)(4), 94 Stat. 2422. But Alaska failed to raise this argument below. *See* Doc. 72@43-44, Doc. 81 @26-29. And the Roadless Rule concerns the management of inventoried roadless areas, not wilderness designation. *Wyoming*, 661 F.3d at 1227-1234.

private citizens, states, counties, cities, and companies” for purposes such as homesteading, railroad construction, agricultural development, and mining. *National Wildlife Fed’n v. Burford*, 835 F.2d 305, 307 (D.C. Cir. 1987). In 1910, Congress enacted the Pickett Act, which gave the President “at any time in his discretion,” the authority to “temporarily withdraw from settlement, sale, location, or entry any of the public lands of the United States” for any specified “public purpose.” Act of June 25, 1910, ch. 421, 36 Stat. 847. The Supreme Court also recognized the President’s implied authority to withdraw lands that Congress had declared open to private land and mineral claims, given longstanding congressional acquiescence. See *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

In 1976, as part of the Federal Land Policy and Management Act (“FLPMA”), Congress repealed both the Pickett Act and the President’s implied withdrawal authority. See Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976). FLPMA substituted a new “withdrawal” provision that remains in effect. See 43 U.S.C. § 1714. In accordance with longstanding usage, Congress defined “withdrawal” to mean to “withhold” public land “from settlement, sale, location, or entry, under some or all of the general land laws,” in order to maintain or reserve the land for other public values or purposes. *Id.* § 1702(j).

In 1978, after Congress declined to act on President Carter’s recommended national interest land designations in Alaska under the Alaska Native Claims

Settlement Act, the President unilaterally withdrew 56 million acres of land in Alaska as national monuments, citing his authority under the Antiquities Act, 54 U.S.C. § 320301 (formerly 16 U.S.C. § 431), and under FLPMA, 43 U.S.C. § 1714. *See Sturgeon*, 136 S. Ct. at 1065; *Alaska v. Carter*, 462 F. Supp. 1165 (D. Alaska 1978). Congress enacted ANILCA just two years later, in the wake of prominent protests in Alaska against the President's action. *Sturgeon*, 136 S. Ct. at 1066. Through ANILCA, Congress made its own land conservation designations; rescinded the President's land withdrawals, Pub. L. No. 96-487, § 1322(a), 94 Stat. 2371, 2487 (1980); and imposed restrictions on future executive withdrawals, 16 U.S.C. § 3213(a). In context, Congress plainly intended to restrict withdrawals like the President's 1978 designation of Alaska national monuments.

The Forest Association acknowledges this history in part, arguing (Brief at 33) that this Court should look to 43 U.S.C. § 1702(j) in interpreting "withdrawal" for purposes of ANILCA § 3213(a). *Accord Southeast Conference v. Vilsack*, 684 F. Supp. 2d 135, 143-44 (D.D.C. 2010). Yet the Forest Association fails to observe the fundamental distinction between the "general land laws" referenced in § 1702(j), which provide rights of "settlement, sale, location, or entry" that cannot be abrogated without executive withdrawals (and independent withdrawal authority), *id.*, and statutes like the Mineral Leasing Act, 30 U.S.C. § 181 et seq., which provide federal agencies discretion whether to allow occupancy. *See Schraier v.*

*Hickel*, 419 F.2d 663, 667 (D.C. Cir. 1969); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975).<sup>10</sup>

Simply put, the Roadless Rule’s de facto restrictions on mineral leasing do not amount to land “withdrawals” for purposes of 43 U.S.C. § 1702(j) and ANILCA, because leasing *opportunities* under the Mineral Leasing Act are not rights of “settlement, sale, location, or entry.” *Id.*; *see also Schraier*, 419 F.2d at 667; *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229-30 (9th Cir. 1988). Conversely, the Roadless Rule specifically allows roads as needed in connection with any such rights “provided by statute.” 66 Fed. Reg. at 3272 (§ 294.12(b)(3)). Thus, the Roadless Rule does not conflict with ANILCA.

### **III. USDA COMPLIED WITH THE TONGASS ACT**

ANILCA included a “timber utilization program” for the Tongass National Forest, which made available “at least” \$40 million annually to “maintain the timber supply . . . to dependent industry” at a rate of 4.5 “billion . . . board foot measure per decade.” Pub. L. No. 96-487, § 705(a), 94 Stat. at 2420. The 1990 Tongass Act repealed this fixed-supply mandate and replaced it with more flexible management direction, akin to that applicable to other forests. *Alaska Wilderness Recreation &*

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<sup>10</sup> The sole authority cited by the Forest Association (Brief at 34) makes the same mistake. *See Mountain States Legal Fund v. Andrus*, 499 F. Supp. 383, 391 (D. Wyo. 1980).

*Tourism Ass'n v. Morrison*, 67 F.3d 723, 730-31 (9th Cir. 1995). Under the Tongass Act, USDA shall

[s]ubject to appropriations, other applicable law, and the requirements of the National Forest Management Act . . . , [and] to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources, seek to provide a supply of timber from the Tongass . . . 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.

16 U.S.C. § 539d(a). Contrary to the Forest Association's argument (Brief at 9-31), the Roadless Rule is consistent with this flexible "seek to . . . meet[]" directive. *Id.*

When reviewing an agency's construction of a statute that it administers, this Court follows the "familiar two-pronged test" set out in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *Washington Regional Medicorp v. Burwell*, 813 F.3d 357, 361-62 (D.C. Cir. 2015). When Congress has "directly spoken to the precise question at issue," that "unambiguously expressed intent" controls. *Id.* at 362 (quoting *Chevron*, 467 U.S. at 842-43). If the statute is silent or ambiguous on the relevant issue, the court will defer to an agency's "permissible" or "reasonable" construction. *Id.* Further, to prevail on its facial challenge to the Roadless Rule (as applicable to the Tongass), the Forest Association must show that there is "no set of circumstances under which" the Roadless Rule could be validly applied to the Tongass, consistent with the Tongass Act. *Sherley v. Sebelius*, 644 F.3d 388, 397 (D.C. Cir. 2011) (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993)).

While the Forest Association contends (Brief at 18, 27) that the Roadless Rule makes it “impossible” for USDA to “seek to meet the demand for Tongass timber,” this plainly is not the case. Significantly, nothing on the face of the Roadless Rule prevents managers, during forest planning or in implementing the Tongass timber program, from seeking to meet—or actually meeting—market demand for timber, through harvests outside of inventoried roadless areas and as allowed by exception within such areas. As the Forest Association observes (Brief at 25-27), USDA projected (in 2000) that it would be unable to meet then-existing market demand exclusively from harvests outside of inventoried roadless areas. *See* AR 4609 at 466. But market demand is not static, and future market predictions are subject to a “high degree of uncertainty.” AR 4609@465. Moreover, USDA promulgated the Roadless Rule with an exemption for timber sales already in planning, 66 Fed. Reg. at 3273 (§ 294.14(d)), leaving sufficient supply (from within and outside inventoried roadless areas) to meet market demand for an estimated 7 years. *Id.* at 3255.

To be sure, USDA understood that restricting land available to timber harvest (per the Roadless Rule’s proscriptions) ultimately could make it substantially more difficult for USDA to meet timber demand from the Tongass, depending on market factors. *See id.* But contrary to the Forest Association’s argument (Brief at 30), USDA need not “try to meet market demand” for timber as the *singular* objective of

every management action. Rather, under the plain terms of the Tongass Act, USDA reasonably may take actions that prioritize values in addition to timber harvest.

Specifically, when developing and revising forest plans, USDA must determine which lands within each forest are suitable for timber production and set sustainable harvest levels. *See* 16 U.S.C. §§ 1604(e), 1604(k), 1611(a). But USDA need not approve timber sales on all suitable lands or harvest up to maximum sustainable yields. *See Alaska Wilderness*, 67 F.3d at 728. Rather, USDA retains broad discretion to balance “multiple use” objectives—including recreation, watershed, and wildlife and fish purposes—in its forest-wide planning and program-specific actions. *See Wyoming*, 661 F.3d at 1235; *Perkins v. Bergland*, 608 F.2d 803, 806-07 (9th Cir. 1979); *Wind River Multiple-Use Advocates v. Espy*, 835 F. Supp. 1362, 1372-73 (D. Wyo. 1993).

The Tongass Act “refines” USDA’s general authorities with respect to timber harvests by adding a Tongass-specific duty to “assess market demand for timber” and to “seek to . . . meet[]” such demand. *NRDC v. U.S. Forest Service*, 421 F.3d 797, 801 n.7 (9th Cir. 2005). But the Tongass Act makes this obligation “subject to . . . other applicable law” and to USDA’s “multiple use” management authorities. 16 U.S.C. § 539d(a). Read in conjunction with the statutes it references, the Tongass Act plainly gives USDA discretion to consider all relevant resources and

values and to select an appropriate management regime for the Tongass National Forest that falls short of meeting market demand for timber. *Id.*

In contrast, as the district court correctly recognized, Doc. 102@36-37, the Forest Association would have the Court construe the Tongass Act as *compelling* USDA to actually meet market demand. While the Forest Association protests this view of its statutory argument (Brief at 18), the Association opines (*id.* at 17) that the only circumstances that could justify a failure, under the Tongass Act, to meet market demand are those “outside [USDA’s] control.” If this had been Congress’s intention, Congress presumably would have simply directed USDA to “meet market demand to the extent practicable” or “unless precluded by applicable law.” By providing instead that USDA “shall seek to . . . meet[]” market demand, “subject to . . . applicable law” and “consistent” with USDA’s discretion to manage national forests and grasslands for “multiple use and sustained yield of all renewable forest resources,” 16 U.S.C. § 539d(a), Congress signaled a broader discretion. As USDA explained, the Tongass Act “does not envision an inflexible harvest level” but instead leaves the agency with discretion to “balance” market considerations in light of “other uses, including preservation.” 66 Fed. Reg. at 3256; *see also Alaska Wilderness*, 67 F.3d at 731. Even if there were some ambiguity in the terms of the Tongass Act, this interpretation is reasonable.

Indeed, although the dissenting judges in *Village of Kake* would have affirmed the 2003 Tongass Exemption, they also recognized that the Tongass Act did not “forbid . . . USDA from applying the Roadless Rule to the Tongass.” 795 F.3d at 984 (M. Smith, J., dissenting). Rather, the Tongass Act left USDA with “discretion to adopt the Roadless Rule to protect wildlife, recreation, sustained use, and other values.” *Id.* (citing *NRDC*, 421 F.3d at 801). This Court should so hold.

\* \* \*

At bottom, Alaska and the Forest Association have not demonstrated that USDA committed any procedural error or exceeded its statutory authority in promulgating the Roadless Rule.<sup>11</sup> Rather, they simply disagree with the Roadless

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<sup>11</sup> Even if this Court were to find some error, there is no basis for “vacat[ing] the Roadless Rule in its entirety” as Alaska requests (Brief at 56). Alaska and the Intervenor-Plaintiffs allege injuries limited to the Tongass, and most of their claims are Tongass-specific. Any relief can and should be limited to redressing those alleged injuries. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”) Moreover, any relief can and should be limited to remand for further NEPA review or rulemaking as deemed necessary. *See Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974, 978 (D.C. Cir. 2013) (citing *Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (court may remand without vacatur where a rulemaking defect might be corrected without vacatur, and vacatur prior to a new agency action would be unduly disruptive). The Roadless Rule is in effect generally and as to the Tongass, due to the Ninth and Tenth Circuit judgments in *California ex rel. Lockyer*, 575 F.3d 999; *Wyoming*, 661 F.3d at 1272; and *Village of Kake*, 795 F.3d at 970. This Court cannot set aside the Roadless Rule generally or as to the Tongass without contradicting those judgments and leaving USDA in the untenable position of having to comply with contradictory orders. *See Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986) (“Prudence requires that whenever possible, coordinate courts

Rule, as applicable to Alaska and the Tongass National Forest as a matter of policy. These policy concerns are properly pursued through Alaska's petition for rulemaking, not through the present judicial challenge.

### **CONCLUSION**

For the foregoing reasons, the district court's judgment should be affirmed.

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should avoid issuing conflicting orders.”) Remanding without vacatur would avoid disruption and further judicial comity, while redressing the alleged injuries of Alaska and the Intervenor-Plaintiffs.

**ADDENDUM: APPLICABLE STATUTES AND REGULATIONS**

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**A. Multiple-Use Sustained-Yield Act**

**16 U.S.C. § 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services; Congressional declaration of policy and purpose**

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. \* \* \*

**16 U.S.C. § 529. Authorization of development and administration consideration to relative values of resources; areas of wilderness**

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528 to 531 of this title.

**16 U.S.C. § 531. Definitions**

As used in sections 528 to 531 of this title the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) “Sustained yield of the several products and services” means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

**B. Tongass Timber Reform Act (TTRA)**

**16 U.S.C. § 539d. National forest timber utilization program**

**(a) Tongass National Forest timber supply; satisfaction of certain market demands**

Subject to appropriations, other applicable law, and the requirements of the National Forest Management Act of 1976 (Public Law 94-588) \* \* \* the Secretary shall, to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources, seek to provide a supply of timber from the Tongass National Forest 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.

**C. Alaska National Interest Lands Conservation Act (ANILCA)**

**16 U.S.C. § 3101. Congressional statement of purpose**

**(a) Establishment of units**

In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

**(b) Preservation and protection of scenic, geological, etc., values**

It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal

rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

**(c) Subsistence way of life for rural residents**

It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

**(d) Need for future legislation obviated**

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. § 3102. Definitions**

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)--

\* \* \*

(4) The term “conservation system unit” means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness

Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

#### **16 U.S.C. § 3213. Future executive branch actions**

(a) 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.

(b) No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.

#### **D. National Environmental Policy Act**

##### **42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination efforts**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and

the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

\* \* \*

## **E. Council on Environmental Quality NEPA Regulations**

### **§ 1501.6 Cooperating agencies.**

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. \* \* \*

- (a) The lead agency shall:
- (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.
  - (2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.
  - (3) Meet with a cooperating agency at the latter's request.
- (b) Each cooperating agency shall:
- (1) Participate in the NEPA process at the earliest possible time.
  - (2) Participate in the scoping process (described below in § 1501.7).
  - (3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.
  - (4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.
  - (5) Normally use its own funds.

\* \* \*

### **§ 1501.8 Time limits.**

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). \* \* \*

(b) The agency may:

- (1) Consider the following factors in determining time limits:
  - (i) Potential for environmental harm.
  - (ii) Size of the proposed action.
  - (iii) State of the art of analytic techniques.
  - (iv) Degree of public need for the proposed action, including the consequences of delay.
  - (v) Number of persons and agencies affected.
  - (vi) Degree to which relevant information is known and if not known the time required for obtaining it.
  - (vii) Degree to which the action is controversial.
  - (viii) Other time limits imposed on the agency by law, regulations, or executive order.
  
- (2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:
  - (i) Decision on whether to prepare an environmental impact statement (if not already decided).
  - (ii) Determination of the scope of the environmental impact statement.
  - (iii) Preparation of the draft environmental impact statement.
  - (iv) Review of any comments on the draft environmental impact statement from the public and agencies.
  - (v) Preparation of the final environmental impact statement.
  - (vi) Review of any comments on the final environmental impact statement.
  - (vii) Decision on the action based in part on the environmental impact statement.
  
- (3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

\* \* \*

**40 C.F.R. § 1502.1 Purpose.**

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. \* \* \* Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. \* \* \*

**40 C.F.R. § 1502.9 Draft, final, and supplemental statements.**

\* \* \* environmental impact statements shall be prepared in two stages and may be supplemented.

- (a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. \* \* \* The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.
- (b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.
- (c) Agencies:
  - (1) Shall prepare supplements to either draft or final environmental impact statements if:
    - (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

\* \* \*

- (4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

#### **40 C.F.R. § 1502.13 Purpose and need.**

The [environmental impact] statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

#### **40 C.F.R. § 1502.22 Incomplete or unavailable information.**

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

- (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
- (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the

reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. \* \* \*

**§ 1502.24 Methodology and scientific accuracy.**

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

**§ 1506.10 Timing of agency action.**

- (a) The Environmental Protection Agency shall publish a notice in the Federal Register each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.
- (b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:
  - (1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.
  - (2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

\* \* \*

- (c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period

may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

- (d) The lead agency may extend prescribed periods. \* \* \*

#### **40 C.F.R. § 1508.5 Cooperating agency.**

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

#### **40 C.F.R. § 1508.7 Cumulative impact.**

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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

#### **40 C.F.R. § 1508.8 Effects.**

Effects include:

- (a) Direct effects, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and

related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

#### **40 C.F.R. § 1508.14 Human environment.**

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. \* \* \* This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

#### **40 C.F.R. § 1508.25 Scope.**

\* \* \* To determine the scope of environmental impact statements, agencies shall consider \* \* \* 3 types of impacts. \* \* \*

(c) Impacts \* \* \* may be:

- (1) Direct;
- (2) indirect;
- (3) cumulative.

**40 C.F.R. § 1508.27 Significantly.**

Significantly as used in NEPA requires considerations of both context and intensity:

\* \* \*

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

\* \* \*

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.

**CERTIFICATE OF COMPLIANCE**

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is:  
Proportionately spaced, has a typeface of 14 points or more and contains  
**12,989** words (exclusive of the table of contents, table of authorities,  
certificates of counsel, glossary, and addendum).

*June 8, 2018*

\_\_\_\_\_  
Date

*s/ John L. Smeltzer*

\_\_\_\_\_  
John L. Smeltzer

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing *Federal Defendants' Answering Brief* with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on **June 8, 2018**.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s/ John L. Smeltzer*

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