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BEFORE THE CHIEF OF THE FOREST SERVICE

In the Matter of:	)	
	)	
Tongass Land Management Plan Amendment	)	
	)	
NATURAL RESOURCES DEFENSE COUNCIL	)	
	)	NOTICE OF APPEAL AND
Appellant	)	STATEMENT OF REASONS
	)	IN SUPPORT OF APPEAL
	)	
v.	)	
	)	
DENNIS E. BSCHOR, Alaska Regional Forester,	)	
	)	
Appellee.	)	
	)	

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## NOTICE OF APPEAL

This document contains both a Notice of Appeal and a Statement of Reasons, relating to the revised Land and Resource Management Plan (LRMP) for the Tongass National Forest. It is filed pursuant to 36 C.F.R. Part 217. The appellant is the Natural Resources Defense Council (NRDC). NRDC appeals Regional Forester Dennis Bschor's January 23, 2008 Record of Decision approving the 2008 Amendment to the Tongass Land Management Plan (TLMP or "Plan") and the associated TLMP Amendment Final Environmental Impact Statement (FEIS).<sup>1</sup>

NRDC files this appeal on behalf of its 1.2 million members and online activists. NRDC has a long history of engagement with the Forest Service over management of the Tongass, and of national forest wildlands across the country. We commented on the draft Plan amendment and its draft environmental impact statement (EIS) last year. Previously we also commented on and appealed the 1997 TLMP and FEIS, and have commented on and/or appealed numerous timber sales implementing forest plans for the Tongass over the years.

We appreciate and acknowledge the numerous ways in which the new Plan documents reflect investment, commitment, and professionalism by Regional Forester Bschor, Forest Supervisor Forrest Cole, and their staffs and contractors. It is not without reflection that we appeal the end product of their efforts.

### I. THE TLMP ROD AND FEIS MUST COMPLY WITH THE ROADLESS AREA CONSERVATION RULE.

Both the ROD and FEIS erroneously assume that the Roadless Area Conservation Rule (RACR or "Roadless Rule") no longer applies to the Tongass. In fact, the December, 2003 "temporary exemption" of the Tongass from the RACR was illegal, and therefore ineffective. This error makes the TLMP ROD arbitrary and capricious, since it is predicated on a cost-benefit balancing that cannot lawfully be accomplished in practice, and because it adopts management rules whose implementation would be illegal. These flaws violate the Administrative Procedure Act (APA). In addition, because only one of the FEIS's alternatives would be lawful in practice, and the FEIS does not reveal potential legal violations from implementation of alternatives, it violates the National Environmental Policy Act (NEPA).

In summary, the 2003 RACR exemption was illegal for three reasons. First, the rationales advanced for adopting a temporary exemption are demonstrably false. The decision: was not justified by the need to connect communities; failed to offer the

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<sup>1</sup> Throughout this appeal, where "TLMP," "ROD," "FEIS," and "DEIS" are used without qualifiers, they refer to documents produced in connection with the decision herein appealed, during 2007 and 2008. Where these abbreviations are used to refer to similar documents from other administrative processes, those processes are specifically identified.

economic benefits postulated; did not and could not end uncertainty over use of Tongass roadless areas; and could not rely on the 1997 TLMP to protect roadless areas in the way that the RACR recognized was needed. Second, no minimally rational explanation was offered for reversing direction and rejecting the reasons articulated by the Forest Service when it previously included the Tongass in the Roadless Rule initially. And third, the Forest Service failed to undertake NEPA review that would be required to support any such exemption decision.

The Forest Service might decide, through a lawful public process and for sufficient reasons, to change direction and drop RACR protections for the Tongass. Prior to doing so, however, it was not free to ignore the RACR's strictures in this planning process. And by the terms of the RACR, it could not – for good reasons articulated when the Roadless Rule was adopted – use the NFMA forest planning process as a vehicle for deciding to roll back those protections.

A. The Forest Service Identified No Factual Rationale For a Temporary Exemption.

In adopting a temporary Tongass exemption from the Roadless Rule, the Forest Service advanced four rationales, each of which is either demonstrably wrong or completely unsupported in the record. The agency mistakenly argued that a temporary exemption was needed to help connect communities in Southeast Alaska, to preserve jobs, and to reduce uncertainty. It also argued that other protections made the RACR unnecessary, negating any claimed benefits.

1. The Temporary Exemption Was Not Needed to Connect Communities.

The Federal Register notice adopting the exemption wrongly ascribed social harms to the Roadless Rule. The notice claimed that the RACR “significantly limits the ability of communities to develop road and utility connections.” 68 Fed. Reg. 75136, 75137 (Dec. 30, 2003). However, because roads to and from Southeast Alaskan communities are generally eligible for funding under 23 U.S.C. § 317, their construction is expressly allowed under an exception in the Roadless Rule for Federal Direct Aid Highways. See 36 C.F.R. § 294.12(b). The notice vaguely asserted that connecting roads might not meet the RACR's requirement that such projects be “in the public interest” and have “no other reasonable and prudent alternative.” 68 Fed. Reg. at 75143. Plainly, however, a road that even the agency could not in good conscience say is in the public interest and reasonably needed would not provide a rationale for sweeping aside landmark resource protections.

Similarly, the Roadless Rule does not bar powerline construction. It provides no exception specifically for utility corridors. However, in Southeast Alaska, experience with the Swan Lake – Lake Tyee Intertie shows that roadless construction of such facilities is not only possible but actually preferable on purely economic grounds. Moreover, the logging incidental to such otherwise permitted activities is expressly allowed under the Rule. Again, the Federal Register notice theorized that sometimes it might be more “desirable” to build a utility corridor with a road, but offered no evidence

to support its speculation. Id. Moreover, elsewhere, the Forest Service asserts that travelways constructed with utility corridors are in fact compatible with the Roadless Rule. The Bull Mountain Pipeline project in Colorado, running through IRAs in the White River and Grand Mesa-Uncompahgre-Gunnison National Forests, is designed to include a 25-foot “construction lane” for heavy machinery, a 25-foot “passing lane,” and an additional 50-foot “truck turn-around” in some areas. See FEIS, Bull Mountain Natural Gas Pipeline, U. S Forest Service and Bureau of Land Management, July 2007 ([http://www.fs.fed.us/r2/gmug/policy/lands/bull\\_mtn/Bull\\_Mtn\\_Natural\\_Gas\\_Pipeline\\_FEIS\\_17july07.pdf](http://www.fs.fed.us/r2/gmug/policy/lands/bull_mtn/Bull_Mtn_Natural_Gas_Pipeline_FEIS_17july07.pdf)), at 281.

Most fatally, for a “temporary” exemption, undertaken in advance of a permanent decision on applying the Roadless Rule, the agency offered not a single even potential example of an actual project that might be affected by the RACR during the intended duration of the exemption. Thus, for example, the Federal Register notice asserts that “many other road needs would not be met,” id. at 75139, without any elaboration or examples. Had there been a need in 2003 to undertake an immediate temporary exemption to build a road or utility project, there would have had to have been some proposal to point to. Otherwise, the question could have been addressed in the subsequent permanent rulemaking expressly contemplated in the Federal Register notice for the temporary exemption. The inability to cite any proposal, however remote, for any road or utility corridor that might be hampered in some way by the RACR shows definitively that there was no need to undertake a temporary exemption in 2003 on that basis.

The agency’s social impact argument is also legally deficient because it omitted mention of offsetting social benefits to the Rule. Most notably, as discussed in detail elsewhere in this appeal, the presence of roads adversely affects subsistence opportunities for rural residents in Southeast Alaska. See RACR FEIS at 3-373 (“the presence of roads is extensively associated with reduced subsistence productivity”). The Forest Service was reminded of this in citizen comments on its proposal to exempt the Tongass from the Roadless Rule, but did not acknowledge the fact in deciding to adopt the exemption. Indeed, without factual basis, the agency concluded that impacts of the temporary exemption on ‘effects to one or more Tribes ... are anticipated to be positive.’ 68 Fed. Reg. at 75146.

## 2. The Temporary Exemption Was Not Needed to Preserve Jobs.

The exemption ROD also mistakenly rests in part on the finding in the 2000 RACR FEIS that 900 jobs could eventually be lost in the region. 68 Fed. Reg. at 75137. However, as adopted, the Rule grandfathered a huge pipeline of Tongass sales, which together with roaded area volume by then under contract amounted to 851 million board feet (mmbf) of timber, or more than 7 years of logging at then-current rates. See 66 Fed. Reg. 3244, 3266 (Jan. 12, 2001). Since then, with close out in 2001 of logging residual volume from the cancelled Ketchikan Pulp Corporation contract, demand for Tongass timber has sunk even lower, further extending the period covered by the grandfathered roadless sales. See Attachment A. Thus economic impacts, even if they could someday be a legitimate

downside to the Roadless Rule, would not occur for years and did not support a short term change in Tongass management.

Moreover, recent cut levels on the Tongass are sustainable from the roaded timber base. The agency calculated in 2000 that, even utilizing the more restrictive allocations and standards of the 1999 TLMP ROD, after the grandfathered sales were exhausted the Tongass could produce on the order of 50 million board feet (mmbf) annually outside of inventoried roadless areas.<sup>2</sup> RACR FEIS at 3-378. The TLMP FEIS confirmed this fact, recently calculating the annual allowable sale quantity (ASQ) for Alternative 1, which is more restrictive than the RACR, at 49 mmbf. FEIS at 2-18. The temporary exemption ROD opined that the low harvest levels of “the last three years [2001, 2002, and 2003] represent a significant aberration from historical harvest levels.” 68 Fed. Reg. at 75141. In fact, however, the average cut level for independent operators on the Tongass in the ten years leading up to the exemption decision was 47 mmbf. With the pulp mill contracts over that trend has continued, and today the average for the independents over the last fifteen years is 45.5 mmbf. See Attachment A. Thus no factual basis existed in 2003 (or today) to assert any near-term economic dislocations justifying a temporary exemption from the Roadless Rule.

Moreover, as with social impacts, preserving roadless areas has offsetting economic benefits in both the fisheries and tourism sectors ignored by the exemption ROD. The Forest Service noted these in applying the RACR to the Tongass. For instance, it pointed out that outfitters, guides, and others in the tourism and recreation sector depend on wild and unspoiled landscapes for their business opportunities. RACR FEIS at 3-373. And prominent federal government researchers have concluded that the long-term sustainability of salmonid fisheries in Southeast Alaska is directly tied to preserving the remaining undisturbed forested watersheds. See Bryant, M.D. and Everest, F.H. 1998. Management and condition of watersheds in Southeast Alaska: The persistence of anadromous salmon. *Northwest Science* 72: 249-267 (Attachment B).

### 3. A Temporary Exemption Could Not Reduce Litigation Uncertainty.

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<sup>2</sup> In fact, because the RACR FEIS assumed that the ‘99 TLMP ROD would govern, and it was the ‘97 TLMP ROD which was now in force in 2003, substantial increases in annual logging would have been possible consistent with the Roadless Rule. The ‘97 ROD left over 5 billion board feet of residual timber available in already roaded areas, along with 8 billion board feet of second growth that will become available over time. (These figures are for “tentatively suitable and available” commercial forest outside of riparian zones, beach and estuary fringes, and wildlife set-asides; they were calculated by Interrain Pacific using the Tongass National Forest database and “fall-down” factor reduction estimates, and are available upon request from NRDC). If the 5 billion board feet were spread evenly over an estimated 40 years prior to the second growth coming online, an annual yield of 120 mmbf would be possible, far more than is now logged on the Tongass. Hence job growth, even in the timber industry, is fully consistent with continued application of the Roadless Rule to the Tongass.

The most obviously specious rationale for the temporary exemption was that it would somehow increase certainty. 68 Fed. Reg. at 75138. Specifically, the exemption notice argues that “a decision is needed now to reduce uncertainty about future timber supplies, which will enable the private sector to make investment decisions needed to prevent further job losses and economic hardship in local communities in Southeast Alaska.” *Id.* at 75144. However, a temporary arrangement cannot, by its nature, provide certainty. The Roadless Rule itself was in part adopted to reduce conflict and uncertainty about management of national forest wildlands. RACR FEIS at 1-5. Inevitably, such a decision, whatever its parameters, sparks disagreement and litigation that need several years to play themselves out. Reopening the debate, and making a new decision does not end the litigation. It only resets the clock to zero, postponing the day when the controversy is laid to rest. In the instant case, by the time the Forest Service signed the temporary exemption ROD, its announced intention of doing so had already precipitated a new lawsuit over management of Tongass roadless areas.

The Forest Service also implied that constraints in the Alaska National Interest Lands Conservation Act (ANILCA) and/or the Tongass Timber Reform Act (TTRA), or litigation under those laws, contributed to its decision to exempt the Tongass from the Roadless Rule. In fact, neither ANILCA nor TTRA barred further conservation of Alaskan roadless areas. Indeed, TTRA, which created new conservation units on the Tongass, itself shows that ANILCA was not the end of that process, even for Congress. Additionally, as the courts have found, beyond congressional action, there exists separate executive branch authority under established statutory law to conserve additional lands, avoid expense, and save future options – quite apart from what actions Congress may have taken – or take in the future – to set aside certain lands for even more restrictive management. See *Kootenai v. Veneman*, 313 F.3d 1094, 1117, n.20 (CA9 2002) (“nothing in the National Forest Management Act, which establishes procedures and standards for National Forest System land and resource management plans, precludes national action on a conservation issue within the power of the Forest Service”).

The Tongass exemption was also not justified by the baseless claims in *Alaska v. USDA*, (U.S. Dist. Ct. for the District of Alaska, Civ. No. J01-0039 CV), settlement of which precipitated the exemption process. Plaintiffs in that case claimed violations of 4 different provisions of ANILCA: the statutory statement of purpose; the prohibition on “withdraw[ing]” more than 5,000 acres; the ban on studies for the “single purpose” of establishing conservation units; and the bar to statewide reviews of the wilderness eligibility of roadless areas. All these claims founder on the fact that the Roadless Rule did nothing that is not routinely done in the forest planning process (which post-dates ANILCA): it stopped some activities – i.e. most logging and road-building – in some parts of national forests. The only difference from forest planning – which no one is rash enough to argue is illegal under ANILCA – is that the Roadless Rule was action by the Chief of the Forest Service rather than the forest supervisor or regional forester. But nothing in ANILCA, or any other law, restricts such decision-making to the supervisor/forester level.

In addition to this overarching failing, each of the four cited ANILCA provisions is on its face inapplicable to the Roadless Rule and/or not binding on the Forest Service. The first is section 101, the “Congressional statement of purpose” which says “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.” 16 U.S.C. § 3101(d). This states a congressional opinion but does not attempt to ban future action. It refers to legislation, not executive branch action. And it addresses the creation of new units or areas, not the regulation of uses in existing units/areas. Further, section 708(b)(2) of ANILCA makes clear that Congress contemplated future administrative and congressional action to conserve additional Tongass roadless areas, by acknowledging that the Forest Service has to conduct wilderness reviews during forest plan revisions for both the Tongass and the Chugach. In that section, Congress specified that prior roadless area reviews be deemed adequate only “for the purposes of the initial land management plans,” and stated that “the Department of Agriculture shall not be required to review the wilderness option prior to the revision of the initial plans...” This statement reflects a clear understanding that, while the initial plans were exempt, subsequent revisions would remain subject to the requirement of wilderness reviews, and thus to the potential for both administrative and congressional protection.

The second ANILCA provision cited in Alaska v. USDA is equally inapplicable to the Roadless Rule. Section 1326(a) prohibits “executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska.” 16 U.S.C. § 3213(a). But the Roadless Rule does not “withdraw” anything. Withdrawal, though not defined in ANILCA, has a specialized meaning in federal public lands law, basically barring the disposal of land or interests in land (or sometimes its transferral between agencies). For example, it’s defined in the Federal Land Management and Policy Act of 1976. “The term ‘withdrawal’ means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land ... from one department, bureau or agency to another.” 43 U.S.C. § 1702(j). President Carter blocked the acquisition of federal lands in Alaska by the state or by Native corporations, withdrawing it through national monument designations, and that was what ANILCA sought to prevent in the future. By its terms, the Roadless Rule does not withdraw land or otherwise affect in any way whether it can be acquired by others, e.g. through the Alaska Native Claims Settlement Act, or who manages it. Again, it simply prohibits most logging and road-building.

The plaintiffs’ third specious ANILCA claim was that the Roadless Rule violates section 1326(b), which bars “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.” 16 U.S.C. § 3213(b). But again, the Roadless Rule does not establish new units or areas; it simply regulates what uses are made of existing ones. Moreover, it does not serve a “single purpose.” In addition to a series of different conservation purposes, it was adopted

because of fiscal and safety concerns about the existing road system and in order to reduce controversy, expense, and delay in local decisions. 66 Fed. Reg. at 3244 (Jan. 12, 2001).

Finally, the Alaska v. USDA plaintiffs were wrong that the Roadless Rule violates ANILCA section 708(b)(4), which directs that the “Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the state of Alaska for the purpose of determining their suitability for inclusion in the national Wilderness Preservation System” (this provision does not appear to have been codified in the United States Code). Far from reviewing wilderness suitability, let alone creating wilderness, the Roadless Rule allows motorized and other activity that is prohibited in wilderness. Hence, sec. 708(b), like the other cited ANILCA provisions, is completely inapplicable to the Roadless Rule.

TTRA also provides no basis for exempting the Tongass from the Roadless Rule. The Forest Service has repeatedly taken the position, and the courts agree, that TTRA leaves it free to offer timber from the Tongass or not, as part of the normal balancing of multiple uses done throughout the national forest system. As noted above, some roadless areas were previously administratively removed from the timber base of the Tongass through the planning process, in order to preserve other multiple uses. And removing the remainder through the Rule still left a large volume of timber available to cut in areas of the Tongass that are already roaded.

The plain language of TTRA does not constrain the Forest Service to sell any particular amount of timber. Section 101 of TTRA exhorts the agency to “seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest” and the demand throughout the 10-15 year life of the forest management plan. 16 U.S.C. § 539d(a). For those inclined to overlook the non-mandatory nature of the term “seek”, TTRA explicitly specifies that the agency “seek” to meet market demand only “to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources.” Id. Renewable resources, in turn, are defined by the Multiple-Use Sustained-Yield Act as including “outdoor recreation, ... watershed, and wildlife and fish purposes.” 16 U.S.C. § 528; see also 16 U.S.C. § 529 (“areas of wilderness are consistent with the purposes of [the Multiple-Use Sustained-Yield Act]”). Because on its face TTRA allows the Forest Service not even to seek to meet market demand, in order to serve the kinds of purposes for which the Roadless Rule was adopted, it cannot remotely be construed as inconsistent with the Rule.

When this issue has gone to the courts they have agreed that TTRA requires no set amount of logging. As a federal appeals court has concluded: “TTRA envisions not an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation.” Alaska Wilderness Rec. & Tourism Assn. v. Morrison, 67 F.3d 723, 731 (9<sup>th</sup> Cir. 1995). An Alaska District Court also has noted that: “[t]he Ninth Circuit has held that ‘no action’ or, in other words, no timber sales is a viable option for every section of the Tongass National Forest.” Alaska Forestry Association v. United

States, U.S. Dist. Ct. for the Dist. of Alaska, No. J 94-007 CV (JWS), Order from Chambers, 10/18/95, at p. 2.

Moreover, the Forest Service itself has long taken the position that it is unconstrained by TTRA's "seek to meet" provisions. In the AFA v. US case quoted directly above, the agency's defense asserted:

"Plaintiff's attempts to frame the TTRA as a life support system for the timber industry notwithstanding, the clear Congressional intent in enacting the TTRA was to make it absolutely clear the Tongass independent timber sale program is 'subject to the requirements of the National Forest Management Act of 1976 ('NFMA') and all other applicable laws.' House Conf. Rep. No. 931, 101st Cong. 2d Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6267. See also 136 Cong. Rec. S7736 (daily ed. June 12, 1990)(amount of timber actually sold and cut each year to be set on the Tongass in 'the same way any other national forest')(statement of Sen. Murkowski)."

See Defendants' Memorandum in Support of Motion for Summary Judgment, dated 6/9/94, pp. 10-11. In a subsequent brief in the same case, the agency asserted that "use of the word 'seek' necessarily implies a congressional recognition that the Forest Service may be in full compliance with Section 101's mandates, even though less than 'market demand' is offered." See Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment, 4/14/95, p. 10. And in a later case, the Forest Service told the court that "reliance on the TTRA is misplaced because the TTRA directive is subject to numerous qualifications and because the Ninth Circuit has rejected the interpretation that the TTRA directive to seek to meet market demand is 'mandatory.'" Southeast Alaska Conservation Council v. Lyons, U.S. Dist. Ct. for the Dist. of Alaska, No. J 99-0025 CV (JWS), Defendants' Opposition to Plaintiffs' Brief on the Merits, 2/18/00, p. 27.

#### 4. The Forest Plan Did Not and Could Not Adequately Protect Tongass IRAs.

The exemption ROD wrongly asserted, repeatedly, that without the Roadless Rule Tongass roadless areas would nonetheless be adequately protected. Seventy-eight percent of the Tongass, it said, would be protected either by congressional action or the forest plan. 68 Fed. Reg. at 75137; see also id. at 75144 (citing "the protection of roadless values included in the Tongass Forest Plan" and asserting that "roadless values are plentiful on the Tongass and are well protected by the Tongass Forest Plan"). In fact, with those protections in place, over 2.4 million acres of IRAs were left unprotected, subject to loss of their wildland character from the impacts of roads, logging, and other development. 1997 TLMP FEIS at 3-169. Congressional protections cover less than 40% of Tongass wildlands. Similarly, more forested roadless areas are open to administrative development than are protected by wilderness status, 1.48 million acres versus 1.33 million. Id. at 3-162. And forest plan protections, susceptible to revision every 10 to 15 years, and unlimited amendment in between at the discretion of local

officials, cannot by their nature be as secure as those offered by the Roadless Rule. The potentially transient nature of plan provisions is underscored by this administration's position that a forest plan "is a programmatic level decision that is not a determination to 'withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition' of National Forest land." 2008 TLMP FEIS at 3-433.

The exemption ROD also mistakenly focused on the issue of whether TLMP's old growth conservation strategy was adequate in the absence of the RACR. 68 Fed. Reg. at 75140. Similarly, it concluded that the "Forest Plan adequately provides for the ecological sustainability of the Tongass." *Id.* at 75141-42. The old growth strategy, however, was designed to provide for minimum wildlife population viability, not to safeguard wildlands. The Roadless Rule expressly went beyond minimum protections to reach and put off limits lands that the agency thought could be developed consistent with its wildlife viability obligations.

Ultimately, the Forest Service in its 2003 exemption ROD, simply asserted that less protection was enough, much less protection. This is not a rationale, not a reasoned conclusion. It amounts to saying "we're going to protect less because we want to protect less." But simply wanting to do something is not a reasoned basis for federal agency-decision-making. The APA demands more.

#### B. The Exemption ROD Did Not Explain the Agency's Reversal of Course.

In formulating and adopting the Roadless Rule, and making it applicable to the Tongass, the Forest Service articulated several well-documented rationales, never addressed by the exemption decision. The agency wanted to halt the practices identifiable at a national level that damaged roadless area values, reduce budget problems from an overlarge road network, and lessen controversy and conflict over management of national forests. 66 Fed. Reg. 3244 (Jan. 12, 2001). It chose to do so at a national level to account for the "national significance of roadless areas" and to halt the incremental loss of roadless areas through local and regional decision-making. *Id.* at 3246. It found that when viewed from the perspective of the entire system under the Chief's jurisdiction, "the nation-wide results of these reductions could be a substantial loss of quality and quantity of roadless area values and characteristics over time." *Id.* The history of development in our country had already resulted in the loss of 98% of all wildlands in the continental United States. *Id.*

For the Tongass, inclusion in the RACR was found to be appropriate because allowing "road construction and reconstruction on the Tongass National Forest to continue unabated would risk the loss of important roadless area values." *Id.* at 3254. The wealth of roadless areas within the Tongass was cited as a major reason to include it. The ROD adopting the Roadless Rule expressly relied on "the unique and sensitive character of the Tongass National Forest, the abundance of roadless areas where road construction and reconstruction are limited, and the high degree of ecological health." *Id.* The Forest Service was well aware that in the words of a panel of leading natural

resource scientists earlier assembled by the agency, “the Tongass holds as important a place in the world’s ranking of forests as any.”<sup>3</sup>

In short, the Tongass was included in the Roadless Rule in substantial part precisely because of its unique status. Continued logging and roadbuilding in Tongass IRAs entails the same loss of roadless values as in other national forests. However, in addition, it irrevocably damages the last great national forest wildland we have. The exemption of the Tongass in 2003 treated abundance and ecological integrity as reasons to sacrifice Tongass IRAs. In so doing, that rollback decision never explained why it was rejecting the contrary opinion of the agency from three years earlier. This failure violated the APA.

### C. Dropping the RACR for the Tongass Required NEPA Review.

The Tongass exemption also violated NEPA. The exemption ROD relied on the environmental analysis of the RACR FEIS as adequately reviewing its environmental impacts and trade-offs. 68 Fed. Reg. at 75137, 75142. That FEIS, however, did not adequately reflect the impacts of rolling back the Roadless Rule on the Tongass. As described above, the potential jobs at stake were by 2003 (and remain today) much lower than projected in 2000. This is in part because demand for Tongass timber has not materialized, in part the RACR FEIS estimates were based on the 1999 TLMP ROD, with its more restrictive standards and guidelines and land use allocations. By 2003, the operative forest plan was the 1997 version, which allowed for much more logging in roaded areas than the 1999 ROD. The exemption ROD is unequivocal that it relied, mistakenly, on the outdated projections from 2000: “As discussed in the roadless rule FEIS ... substantial economic effects are anticipated if the roadless rule is applied to the Tongass, which include the potential loss of approximately 900 jobs in Southeast Alaska.” Id at 75142.

Moreover, exemption of the Tongass in 2003 entailed significantly greater exposure of protected areas than contemplated by the 2000 RACR FEIS. In the first place, many locally important roadless areas were put off limits by the 1999 ROD and hence not at risk when the Roadless Rule was reviewed. By 2003, those areas were left unprotected by TLMP, so that dropping the RACR exposed them to previously unaccounted development and loss of roadless values. Second, a subsequent revision of the Tongass roadless area inventory, done in connection with the court-ordered review of wilderness potential in roadless areas, revealed a number of areas that were wrongly omitted from the inventory used in the RACR FEIS. Whether or not the Forest Service had by 2003 formally moved to amend the RACR maps of IRAs, it knew that these areas were eligible for inclusion in and protection by the Roadless Rule. And as with the areas

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<sup>3</sup> Kiester, A.R. and C. Eckhardt. 1994. Review of Wildlife Management and Conservation Biology on the Tongass National Forest: A Synthesis With Recommendations. U.S. Forest Service, Pacific Northwest Research Station, Corvallis, OR.

exposed by loss of the 1999 TLMP protections, impacts to these IRAs were not disclosed in the RACR FEIS. In short, the calculus, in 2003 (and today), of properly disclosed harms and benefits from undoing the Roadless Rule was (and is) much different from that portrayed in the RACR FEIS.

Moreover, an environmental impact statement (EIS) governing the temporary exemption of the Tongass was required by 50 C.F.R. § 1506.1. The Forest Service was, in 2003, considering whether to adopt permanent exemptions for all of Alaska. 86 Fed. Reg. at 75138. While such programmatic actions are under consideration, any interim action that tends to prejudice the choice of alternatives in it is barred unless reviewed in a separately sufficient, stand-alone EIS. Since a temporary exemption facilitates preparation of roadless area timber sales, and that investment of agency resources, as well as the foregone opportunity to develop roaded area sales, would doubtless tend to influence the choice of an eventual rule for the Tongass, any such decision must be “accompanied by an adequate environmental impact statement,” as well as be justified independently of the pending decision. *Id.* at subsection (c)(1) and (2).

The Forest Service’s temporary exemption ROD misapprehends the agency’s obligations under sec. 1506.1. In denying any such obligation, it asserts that:

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

68 Fed. Reg. at 75143. The issue, however, is not whether EISs prejudice future choices, but rather whether making IRAs available for development does. And that latter action, opening roadless areas, was expressly taken by the Forest Service in order to try to settle issues permanently and encourage exactly the kinds of actions that complicate later reversals. The exemption ROD says that “a decision [exempting the Tongass] is needed now to reduce uncertainty about future timber supplies, which will enable the private sector to make investment decisions.” *Id.* at 75144.

The exemption ROD also wrongly states that the separate EIS requirement of sec. 1506.1 is met by the RACR FEIS. *Id.* 68 Fed. Reg. at 75143. The RACR FEIS did not review the rollback impacts of the exemption, and for reasons discussed above, is not an accurate source of information about that decision’s costs and benefits.

## II. THE FEIS WRONGLY FAILS TO RESPOND TO SCIENTIFIC CRITICISM OF THE OLD GROWTH CONSERVATION STRATEGY ON WHICH IT RELIES.

The FEIS relies heavily on the coarse filter wildlife conservation strategy for old growth associated species from the 1997 Plan. It measures the 2008 Plan’s ability to ensure the well-distributed viability of vertebrate wildlife species found within the Tongass largely by comparing it to this earlier strategy. The discussion of the old growth

conservation strategy in Appendix D of the 2008 FEIS summarizes the relationship between the plans in this regard as follows:

The 1997 Forest Plan FEIS analysis of Alternative 11 (without consideration of specific additional goshawk and marten standards and guidelines) stated that the 1997 alternative 11 was explicitly designed to address issues related to wildlife viability conservation planning. It was projected to have a moderately high likelihood of maintaining viable, well distributed populations of old-growth associated species across the Tongass National Forest (USDA Forest Service 1997c). Alternatives 1, 2, 3, and 6 of the 2008 Forest Plan Amendment FEIS do not negatively affect the conservation strategy that this conclusion was based on; in fact, the acreage in reserves and the acreage of old growth in reserves would be higher and the total protected POG [productive old growth] would be slightly higher. These positive effects would occur under Alternatives 6, 3, 2, and 1, in increasing order.

FEIS at D-90. The exact net increase in protected POG under Alternative 6, as compared to the 1997 TLMP is 17,000 acres.

The old growth strategy was the subject of extensive scientific criticism. Most notably, peer reviewers contracted by the Forest Service, at congressional direction, to review a predecessor Tongass conservation strategy reported unequivocally that in their view the 1997 strategy would not protect viable, well-distributed populations of vertebrate species on the Tongass.<sup>4</sup> These scientists were well aware that the old growth reserves of the strategy were augmented by non-development Land Use Designations (LUDs) and designated wilderness across the Tongass.<sup>5</sup> And they concluded that “[p]erhaps of greatest concern is the failure to protect the Forest’s remaining pristine watersheds.”<sup>6</sup> Additional science-based criticisms of the 1997 strategy were detailed in appeal documents for the 1997 TLMP that are in the Forest Service’s possession that we incorporate here by reference.<sup>7</sup>

Because of the 2008 Plan’s reliance on the 1997 conservation strategy, those concerns continue to be relevant, and to require consideration by the Forest Service today. The 2008 FEIS, however, simply ignores most of this criticism. Instead, it treats

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<sup>4</sup> Powell, R, et al. 2007. Joint Statement of Members of the Peer Review Committee (appended here as Attachment C) at 10.

<sup>5</sup> Id. at 4.

<sup>6</sup> Id. at 6.

<sup>7</sup> Specifically, we incorporate Appeal No. 97-13-00-0108 (NRDC et al.), intervenor comments filed by The Wilderness Society et al. (TWS); the Request for Interim Relief for Timber Sale Projects Pending Resolution of the Tongass Land Management Plan Administrative Appeals, sent to Chief Dombek on 7/31/98; and all documents attached to and/or referenced in those filings. All of these filings, with their attachments, have been provided to Region 10, and should be readily available from the Regional Forester, but are also available from NRDC if needed.

the 1997 approach as a non-controversial and sufficient coarse filter strategy to meet the agency's obligation to ensure wildlife population viability for the many old-growth associated species inhabiting the Tongass, in combination with species-specific standards and guidelines that cannot be considered to have improved materially from those adopted in 1997 (see below).

The Forest Service's failure to respond adequately to this body of criticism, and the agency's related failure to meet its wildlife viability regulation, were also the subject of claims and extensive briefing in a past legal challenge to the 1997 Plan and FEIS, in NRDC v. U.S. Forest Service, 421 F.3d 797 (9th Cir. 2005). While the Court of Appeals found it unnecessary to resolve those claims because it invalidated the plan decision on other grounds, id., 421 F. 3d at 810, n. 25, they remain valid here.

Failure to respond meaningfully to the scientific controversy raised about the conservation strategy's sufficiency violates the APA. Likewise, failure to reveal the opposing scientific opinion in the FEIS, violates NEPA. We ask that the Forest Service consider and respond to these criticisms and revise its management plan accordingly.

### III. THE PLAN DOES NOT ENSURE THE VIABILITY OF INDIVIDUAL OLD GROWTH ASSOCIATED SPECIES.

In the 1997 Plan process, the Forest Service convened experts in individual species and suites of species to assess the likelihood that various alternatives would maintain viable populations well-distributed across their Tongass ranges. These experts rated alternatives with substantial old growth logging as entailing significant risks to some species, notably marten, goshawks, and small mammals, particularly endemic species. See generally 2008 FEIS at D-55 through D-75. The FEIS massages these results, and recharacterizes them, but acknowledges their continued relevance in the 2008.

The agency now argues that ratings initially considered to represent a viability risk only partly do so. It divides Outcome III ("significant gaps in historic range") into an upper and lower half and assigning half of its points to its estimated "meets viability" likelihood. Id. at D-54, D-79. It also argues that, using this new, optimistic calculus, alternatives estimated to have as low as a 66% chance of sustaining viable populations should be rated as "moderately high." Id. at D-81. And it dismisses the added risks from downgrading habitat protections for marten and goshawk, and monitoring protocols for goshawk, to conclude that "the ratings for [2008 Alternative 6] would be similar to the ratings for 1997 Alternative 11." Id. at D-80, Table D-16.

The 1997 panel results showed that harvest alternatives in that process were incompatible with the requirement that forest plans "insure [vertebrate species'] continued existence is well distributed in the planning area." 36 C.F.R. § 219.19 (1999). This requirement applies to the 2008 Plan as well. And no amount of spin-doctoring can change the fact that alternatives in 2008 with similar timber bases and standards entail

similar risks. As a result, the Plan does not meet its wildlife population viability obligations.

#### IV. THE FEIS OMITTS REASONABLE ALTERNATIVES

Like the DEIS, the FEIS contains no alternative which maximizes the Forest Service's ability to meet increases in demand without entering inventoried roadless areas. Alternative 1 avoids virtually all new roadless area entry. However, it schedules only 144,000 of 312,000 suitable acres for logging, or 46%. FEIS at 2-59. Other alternatives schedule a far higher percent of their available acres. Plainly, far more logging could be done under Alternative 1 than the 49 mmbf the FEIS reports. How much more is impossible to tell, but other alternatives schedule in excess of 90% of the suitable land.

In addition, Alternative 1 has been substantially changed from DEIS to FEIS, removing many roaded acres that are available for further logging and road construction in other alternatives. In the DEIS, Alternative 1 approximately represented limitation of development to areas already developed and available for logging in other alternatives. Its total suitable landbase was 427,000 acres. DEIS at 2-55. The genesis' of the change from DEIS to FEIS is that in the FEIS's Alternative 1 "a number of higher value roaded areas, including all of Kuiu, Baranof, and Kruzof Islands, many portions of Chichagof Island, all mainland areas, and other areas, would be excluded from commercial timber management." FEIS at 2-15. Without those removals, Alternative 1 in the DEIS scheduled 155,000 of its 427,000 acres, meaning that at 37% scheduled its 52 mmbf sale quantity undershot its potential, relative to other alternatives, even more sharply than the FEIS version.

Thus there are two regards in which the FEIS fails to investigate the maximum demand flexibility compatible with roadless area protection: the "no-roadless" alternative both under-reported the maximum potential harvest levels and under-included the otherwise available roaded lands in its timber base. These failings render the FEIS unlawful under NEOPA, which requires inclusion of all reasonable alternatives in an FEIS. It is also wholly inconsistent with the Court of Appeals' directive to the agency in NRDC v. U.S. Forest Service, 421 F.3d 797 (2005). There, the court expressly found that the agency needed to investigate alternatives that would allow it to meet market demand with no or fewer impacts to roadless areas. The FEIS, however, leaves completely unexplored the degree to which rising market demand could be satisfied without roadless area entry.

It is reasonable for the Forest Service to include an alternative that predicts effects from status quo logging in roaded areas, as Alternative 1 appeared to do in the DEIS. It is also reasonable for the agency to look at alternatives which avoid other high-controversy areas that are already roaded. This could, and probably should, be done in conjunction with avoiding roadless areas. These, however, are separate alternatives from the one required to display and understand how much timber industry expansion could be accommodated without further loss of roadless areas, consistent with the Ninth Circuit's opinion in NRDC v. Forest Service. The reasonableness of examining them does not

make it reasonable – or lawful – to leave the demand-meeting potential of the Tongass’ otherwise suitable roaded timber base unexplored, and unconsidered in the ultimate balancing process.

#### V. SUBSISTENCE USES OF THE TONGASS ARE INADEQUATELY PROTECTED.

The FEIS contains an ANILCA determination that it claims is unnecessary, because the Plan does not actually make decisions subject to ANILCA section 810. However, it also claims that if it did make such decisions, then any ensuing restrictions on subsistence users would be necessary, within the meaning of section 810. FEIS at 3-433. It also asserts that notwithstanding not making decisions, it takes all reasonable steps to minimize the adverse subsistence impacts that it does – or doesn’t -- have. Id. at 3-435.

This linguistic tap dance aside, the Plan fails to put off limits to logging and road construction many areas of importance to subsistence users. Undeniably, subsistence use is already restricted on the Tongass, in many places. Equally undeniably, logging and road construction are principal reasons for these restrictions. The ROD decision did not protect these important subsistence areas, so that the agency would have more flexibility in offering timber sales. However, particularly for roadless areas, the FEIS does not show the necessity of such flexibility. In fact, it cannot show the necessity, because it does not even consider trying to meet current timber demand from less sensitive lands. As a result, the Forest Service in adopting the 2008 Plan, failed to comply with its ANILCA sec. 810 obligations.

#### VI. THE PLAN UNLAWFULLY OMITTS A PLANNED SALE SCHEDULE.

The Plan is illegal because it does not include a ten year sale schedule. The National Forest Management Act requires that the Forest Service include in each forest plan “the planned timber sale schedule.” 16 U.S.C. § 1604(f)(2). Regulations applicable to this revision make clear that such schedules are to cover at least the first decade of the Plan’s life. They direct that “[i]n a forest plan, the selected forest management alternative includes a sale schedule which provides the allowable sale quantity. 36 C.F.R. § 219.16 (1999); see also id. § 219.16(b) (“The sale schedule of the management alternative selected in accordance with § 219.12 provides the allowable sale quantity for the first plan period” (emphasis supplied)). Because the agency has a tentative unit pool for the entire suitable land base in alternative 6, this should not be an onerous or unduly speculative task.

#### VII. THE FEIS DOES NOT ACCURATELY DISPLAY POSSIBLE IMPACTS OF HIGH-GRADING.

The FEIS represents substantial progress in displaying the past, present, and reasonably foreseeable future impacts of logging across ownerships and forest types, when compared to the DEIS. However, it appears wrongly to assume that the Forest Plan will prevent future high-grading of high-volume stands, and/or big trees. The FEIS and administrative record for this amendment of TLMP are replete with testimony to the importance of these high value stands.

The FEIS assesses the impacts of Plan implementation as though they will necessarily be realized evenly over time on high volume stands and big trees, in proportion to their availability. This would be a reasonable assumption if the Plan contained a prohibition on the disproportionate high-grading that characterized so much past logging of both federal and non-federal lands in the region. However, a review of the Plan reveals no such constraint. See Plan at 4-100 through 4-107.

The FEIS thus wrongly assumes that nothing turns on whether environmental resources are destroyed now or many years hence. In fact, it could matter a great deal. The FEIS needs to consider the impacts to all of the wildlife that the habitat would support if logged later rather than earlier. It also needs to consider the possibility that new research, or subsequently changed circumstances, policies, plans, or laws, would result in a decision to save high value stands that had not yet been logged. It should consider the potential impact to the timber industry of a decrease, over time, in the quality of log available because of high-grading. And it also needs to discuss the risk that a timber industry that expands by mining out the most valuable trees might succeed in getting environmental restrictions waived once the unprotected high volume stands are gone.

## VIII. REQUEST FOR RELIEF

Appellants respectfully request the following relief.

1. Remand the Tongass Land Management Plan Amendment and associated Record of Decision and Final Environmental Impact Statement for the Tongass National Forest to the Regional Forester with instructions to:

-- prepare Plan alternatives that correct the deficiencies identified in this appeal and propose multiple, publicly acceptable, approaches to land use allocation consistent with the Roadless Area Conservation Rule, and with fully ensuring the health and long-term welfare of the Forest's fish, wildlife, scenic, and other natural values;

-- review those alternatives in a supplemental EIS that accurately portrays their impacts and discloses the past, present, and reasonably foreseeable future cumulative impacts of forest management across all ownerships, including the impacts on high volume stands; and

-- obtain rigorous independent scientific and technical review of the alternatives and SEIS, with particular attention to old growth associated species and market demand projections.

2. Pending adoption of a final Plan in keeping with the above, direct the Regional Forester to ensure that the Tongass is managed consistent with the Plan adopted in June, 1997 and the Roadless Area Conservation Rule, avoiding differential selection of high volume stands and/or large trees for logging.

Respectfully submitted,

May 15, 2008

\_\_\_\_\_/s/\_\_\_\_\_  
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