



May 15, 2008

Abigail Kimbell, Chief  
USDA Forest Service  
Attn: EMC Appeals  
Mail Stop 1104  
1400 Independence Avenue, S.W.  
Washington, D.C. 20250-1104

**DELIVERY VIA EMAIL** to: [appeals-chief@fs.fed.us](mailto:appeals-chief@fs.fed.us)

**Re: Notice of Appeal Pursuant to 36 C.F.R. Part 217: Tongass Land and Resource Management Plan Amendment, January 23, 2008 Record of Decision**

Dear Ms. Kimbell:

Pursuant to 36 C.F.R. Part 217, Sealaska Corporation ("Sealaska") submits this Notice of Appeal of portions of the Tongass Land and Resource Management Plan ("TLMP") Amendment Record of Decision signed by Regional Forester Dennis E. Bschor on January 23, 2008 ("ROD").

## I. INTRODUCTION AND BACKGROUND

Sealaska is the Regional Corporation for Southeast Alaska established under the Alaska Native Claims Settlement Act ("ANCSA"), as part of implementing a fair and just settlement of Alaska Native land claims in conformity with the real economic and social needs of Alaska Natives. Sealaska represents over 19,262 Native shareholders, including 10,000 families living in Southeast and throughout Alaska. Sealaska is entitled under ANCSA to select and receive title to acreage to meet the cultural and socioeconomic needs of its Alaska Native shareholders. This entitlement will exceed the 354,000 acres shown in the Federal Register, 70 Fed. Reg. 77180 (Dec. 29, 2005) and is estimated to be as high as 375,000 total acres in Southeast Alaska.

Sealaska is the largest private landowner in Southeast Alaska, currently owning and managing more than 290,767 acres of land adjacent to the Tongass National Forest and other ownerships. Sealaska is a leader in the forest product and broader economy of Alaska. Sealaska and its contractors, collectively, have historically comprised the single largest private employer in Southeast Alaska, providing an average of 700 jobs with an annual payroll of \$30 million. As verified by independent market research studies<sup>1</sup>, Sealaska corporate and contractor operations and expenditures sustain the broader forest industry and service infrastructure in the region. Sealaska is also a civic leader in Alaska and in land stewardship. As the Regional Alaska Native Corporation Sealaska has led efforts to resurrect and protect the languages and culture of the

<sup>1</sup> McDowell Reports dated April 2004, August 2004 and October 2005.

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## **I. INTRODUCTION AND BACKGROUND**

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Tlingit, Haida and Tsimpshian Indians of Southeast Alaska through a variety of avenues; especially in the establishment of the Sealaska Heritage Institute.

In these roles, Sealaska is a member of the Tongass Futures Roundtable and has actively participated throughout the TLMP revision and subsequent amendment processes. Sealaska has supported the Roundtable efforts to establish a sustainable forest industry in the region. Sealaska has supported modifications to national forest regulations and TLMP that will facilitate a sustainable timber supply and industry. Sealaska has also consistently provided comments regarding completion of its ANCSA land entitlements and needed land adjustments during the TLMP process.

Sealaska attaches and incorporates its April 30, 2007 comments on the January 2007 Draft Environmental Impact Statement ("EIS"), TLMP Amendment by reference as if stated fully herein. Our April 30, 2007 comments further explain the important role of Sealaska in the culture and economy of the State of Alaska, as well as the status of Sealaska's ANCSA entitlement, our entitlement concerns, and our interest in the TLMP Amendment.

## **II. PORTIONS OF DECISION TO WHICH SEALASKA OBJECTS:**

### **A. Erroneous Land Adjustment Direction**

Sealaska focuses this appeal upon the following direction included in the ROD and Plan:

In the ROD, the Forest service includes a "Potential Land Adjustments" section that references the pending Sealaska H.R. 3560 legislation and other proposed or potential adjustments to Tongass National Forest lands under the authority of ANCSA. ROD at 54-55. In that section, the Forest Service includes the following statement:

To continue to meet the conservation strategy and timber management goals and objectives of this Forest Plan decision, major discretionary land adjustment proposals will be considered if the proposed exchange of lands maintains the conservation strategy, ensures public access for subsistence uses, and at least a portion of the timber volume from the lands conveyed from the Tongass National Forest contributes to the timber manufacturing industry in Southeast Alaska.

ROD at 55. The Forest Service has also added this statement to its Land Ownership Adjustment Standards and Guidelines in the Plan document itself at 4-36 to 4-37.

Sealaska objects to and appeals the inclusion of the above quoted language in the ROD and Plan. The criteria stated in the quoted language for the Forest Service to consider proposed land adjustments is contrary to Sealaska and other Native Corporation rights and ANCSA direction.

There is no basis in law applicable to national forest management for the quoted language. The Regional Forester included this language in the ROD and Plan without following notice, consultation and public comment procedures required by law.

**B. Erroneous Treatment Of Sealaska ANCSA Rights And Related Land Adjustment Issues In Amendment Documents**

As pointed out in Sealaska's April 30, 2007 comments on the Draft EIS, the TLMP Amendment EIS and related documents contain numerous mischaracterizations, inaccuracies, and other errors pertaining to Sealaska's ANCSA entitlement and related land adjustment proposals and issues. Most of these errors appear to persist or were not fully remedied in the Final EIS and related documents. The Final EIS and other Amendment documents also contain new errors. Appendix C to the Final EIS in particular still does not objectively or accurately portray ANCSA entitlement and land adjustment facts and issues, and the defects in Appendix C carry over to at least the body of the Final EIS and responses to comments on the EIS. Our review of the Amendment documents indicates at least the following items that need to be corrected, which is not an exhaustive list:

**1. Low projection for acres remaining to be conveyed to Sealaska under ANCSA**

In Appendix C and elsewhere, the Forest Service states that 64,000 acres are expected to be conveyed to Sealaska in addition to approximately 290,767 acres already conveyed. Final FEIS, App. C at C-2. This compares to the estimate that Sealaska provided of between 65,000 to 85,000 or more acres. Final FEIS, App. H at H-79. The Forest Service acknowledges that the amount remaining to be conveyed "may be unknown" at this time, but asserts that the BLM agrees with the Forest Service estimate of approximately 64,000 acres, and further asserts that Pub. L. 108-452 enacted in 2004 "helped verify" the current estimate of 64,000 acres. *Id.* Pub. L. 108-452 establishes a minimum further acreage to be conveyed; Sealaska's review of BLM estimates and other information supports Sealaska's higher estimate. Pub. L. 108-452 didn't 'help verify' what the Forest Service asserts; rather, it established that Sealaska is entitled to receive *at least* an additional 64,000 acres under ANCSA. Further it did not finalize Sealaska's ANCSA land entitlement under section 14(h)(8).

**2. Negative assertions regarding H.R. 3560**

The Forest Service asserts that the "economic development" land selection component of H.R. 3560 is assumed to have similar impacts to those evaluated for the Sealaska proposed comprehensive land exchange in the Draft EIS for the 2008 Amendment. Final FEIS, App. C at C-3. The Forest Service then asserts that a TLMP revision will be required to implement H.R. 3560. *Id.* Forest Service asserts that this conclusion is warranted as a result of net losses in the

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Conservation Strategy, the lack of ability to make up key lands associated with old-growth reserves, effects on ASQ, and impacts associated with other existing uses. *Id.*

In fact and to the contrary, H.R. 3560 includes a specific provision stating that the change in ownership authorized by H.R. 3560 will not require a further revision to the revised plan. The Plan is also using lands withdrawn for Native selection in the conservation strategy for the forest including old growth reserves and roadless areas. The selections authorized by H.R. 3560 actually result in an increase in many conservation strategy components, including Productive Old Growth, Designated Roadless Areas, and Old Growth Reserves. In addition, Sealaska is foregoing harvesting on 8,600 acres in selections for the Native Futures (formerly Native Enterprise Sites) and sacred sites which further enhances the conservation strategy outcome. The conservation strategy benefits forest-wide are clearly greater than if Sealaska proceeded with selection in the normal course.

The Forest Service further asserts that the lands expected to be released to the Tongass generally do not have existing road systems, and costs for developing roads on those lands would likely constrain economic timber supply. The Forest Service supports this conclusion only with broad generalities without any factual back up. *Id.* In fact many of the areas are near roaded areas with established log transfer facilities that will potentially enhance the operability of timber to be extracted from the land, if the management strategy is to develop the released land instead of retaining for the conservation strategy.

The Forest Service concludes that the combined impacts of H.R. 3560 on Tongass timber availability "could" have a significant adverse impact on the supply of timber to mills on Prince of Wales Island ("POW") and surrounding areas. *Id.* Finally, the Forest Service asserts that there is a high probability that implementation of H.R. 3560 would trigger reconsideration by the Fish & Wildlife Service of its November 2007 determination the Endangered Species Act listing of the Queen Charlotte goshawk is not warranted, since that determination was made in part based on TLMP federal land habitat protection measures, and because the legislation would give emphasis to lands on POW being acquired by Sealaska. *Id.*

These assertions appear to be tenuous at best. The Forest Service did not complete any specific analysis of the impact of transfer of the economic development lands contemplated in H.R. 3560 and the release of Sealaska selection rights to lands withdrawn for Alaska Native selection upon completion of Sealaska's ANCSA land entitlement. Rather, any impacts were assumed to be accounted for in the Model Inventory Reduction Factor (MIRF). Such an overly broad brush approach can not be reliably used to support the Forest Service statements and conclusions about impacts of H.R. 3560; especially when according to the Forest Service's own information there are over 112,000 acres of Productive Old Growth and 61,000 acres of Old Growth Reserves in the lands withdrawn for Alaska Native selection but not conveyed. Conversely there are only 55,000 acres of Productive Old Growth and 15,000 acres of Old Growth Reserves in the 95,000 acres economic development land pool identified in H.R. 3560. Nor did the Forest Service

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consider the benefits from the selection of 8,600 acres for non-timber selections for the conservation strategy. Further, it appears that the Forest Service erroneously assumes that Sealaska would harvest every tree on land conveyed to it and that no remaining conservation values would exist on the lands selected under H.R. 3560.

Actual economic development lands conveyed to Sealaska in accordance with H.R. 3560 should it become law would be far less than 95,000 acres. Sealaska's unfulfilled ANCSA Land Entitlement is an estimated 85,000 acres and 8,600 acres of this would be for additional sacred sites and Alaska Native enterprise sites. Commendably, the Forest Service has not objected to conveyance of sacred sites or Alaska Native enterprise sites, and by simply subtracting 8,600 acres from 85,000 acres only 76,400 acres of economic development lands would be conveyed, i.e. much less than the 95,000 acre economic development land pool.

As was identified in Sealaska's April 30, 2007 comments on the January 2007 Draft EIS, it is entitled to its full ANCSA land entitlement so it is a matter of where these lands will come from, not whether Sealaska is allowed to select unfulfilled land entitlement. And, as shown above, Sealaska would actually select less Productive Old Growth acres from the economic development pool in H.R. 3560 than it would from lands withdrawn for Alaska Native selection but not yet conveyed.

Not all lands in the economic development pool for Sealaska selection are suitable for timber production under the TLMP standards. The 95,000 acre economic development pool identified in H.R. 3560 impacts only 9 % of the old growth acres classified as scheduled suitable in Phase I in the Timber Sale Program Adaptive Management strategy for the Thorne Bay and Craig Ranger districts in the 2008 Tongass Land Management Plan. The plan fall down from the mapped suitable to actual suitable and scheduled suitable is 24 % and 36 % respectively in the Forest Service planning process. By order of magnitude (i.e., 24 % and 36 %) there is ample room for the Forest Service to compensate for a minor adjustment as a result of HR 3560; especially taking into account the rest of the Tongass National Forest outside of the Thorne Bay and Craig Ranger Districts. The Plan does not consider the 327,000 acres lands withdrawn for Alaska Native selection that Sealaska would release that could qualify as scheduled suitable lands for Forest Service timber sales.

The impact of the multiple erroneous assumptions and conclusions substantially over states potential negative effects of H.R. 3560, and greatly discounts the benefits from the final resolution of land entitlements owed Sealaska. In its comments on the Draft EIS and other submittals to the Forest Service and in support of H.R. 3560, Sealaska has set out the clear need for the legislation to adequately address Sealaska's ANCSA entitlement rights for the benefit of Alaska Natives, the continued survival of a Southeast Alaska forest industry, and other public interests, without likely significant genuine net impact to the Tongass timber sale program, conservation strategy, or other concerns. No revision or significant amendment of TLMP would be required to complete the conveyances and other actions directed in such legislation.

Net impacts of H.R. 3560 and related issues can be further and better evaluated with more updated and accurate forest inventory information and analysis than what the Forest Service has been employing. Sealaska can collaborate with the Forest Service in this effort. In the meantime, the Forest Service must not present erroneous and misleading assertions about effects of H.R. 3560 and completing Sealaska's entitlement.

### **3. Negative Assertions regarding Sealaska comprehensive exchange proposal**

Appendix C reaches similar conclusions regarding the previously proposed Sealaska comprehensive land exchange, including the assertion that a TLMP revision would be required to implement it. *Id.* at C-12. This statement is somewhat contradicted by the Forest Service response to Sealaska's comments on the Draft EIS, in which the Forest Service acknowledges that TLMP provides for exchanges and other land adjustments, but that implementation "would likely require a Forest Plan Amendment or Revision, based on the magnitude of the resulting changes in LUDs." Final FEIS, App. H at H-82.

The Forest Service acknowledges that the actual acreage conveyed or exchanged would likely be much less than the acres included in the proposed pool of lands for the Sealaska exchange. Final FEIS, App. C at C-12. However, the analysis of potential impacts still appears to be largely based on gross transfer of all lands in the pool, rather than actual likely acreage or net effects compared to effects that will result from completing Sealaska's ANCSA entitlement from existing selections (which should already be accounted for in the "MIRF" percentage reduction in the ASQ). *Id.* In addition to assertions regarding at least potential significant adverse impacts on Tongass timber supply to dependent mills, the Forest Service persists in asserting negative impacts from: 1) lesser levels of resource protection on Sealaska land than national forest land, in particular with respect to sacred and heritage sites (asserting that National Historic Preservation Act conditions and requirements do not apply) and karst and cave resources; 2) lack of assured public access for subsistence and other purposes on lands exchanged to Sealaska; 3) inclusion of a Research Natural Area and Special Interest Area in the exchange pool. *Id.* Again, as indicated in Sealaska's comments on the Draft EIS and other information and analysis that has been provided to the Forest Service, none of these assertions are supported by facts showing an actual likely net significant impact from exchange of the amount and character of lands anticipated to result from the Sealaska proposal. In particular the derogatory references and implications in item one of this paragraph that Native sacred sites will be mismanaged must be removed.

### **4. Failure to adequately recognize the benefits of H.R. 3560 or exchange land adjustments**

The Forest Service description of H.R. 3560 does not reference the release of withdrawn lands or other national forest and public benefits from enactment and resolution of Sealaska's entitlement. Final FEIS App. C at C-2 to C-3. The Forest Service acknowledges some benefits from Sealaska

lands conveyed in an exchange and released from the current withdrawal areas. *See, e.g.*, Final FEIS, App. C at C-11, C-12. However, the Forest Service continues to discount these benefits and emphasize perceived adverse impacts on the Tongass timber sale program and other resources and activities. Again, neither the Forest Service MIRF approach, nor the accounting of acres of Productive Old Growth or Old Growth Reserves, support such conclusions. *Id.*; *See also, e.g., Id.* at C-3. The Forest Service persists in recognizing in their analysis current restrictions on national forest management on only the 171,000 acres of land selected by Sealaska, rather than the restrictions that apply on all 327,000 acres of lands withdrawn for Alaska Native selection, and that would be eliminated by H.R. 3560 or an exchange resolving Sealaska's remaining entitlement. *Id.* at C-11, Final FEIS App. H at H-79 to H-81.

The Forest Service states that the agency recognizes Sealaska's "right to receive its full entitlement under ANCSA," but that recognition appears to extend only to continuing "to work with BLM in processing conveyance documents for selected lands." Final FEIS App H at H-82. There is no apparent recognition in Appendix C or elsewhere that completing Sealaska's entitlement in a sustainable manner as proposed by H.R. 3560 or other adjustment, after decades of delay, not only is a statutory obligation but also yields important additional public benefits to the forest industry and broader economy of southeast Alaska. The Forest Service appears to have largely brushed off Sealaska's comments on the Draft EIS that make these points.

**5. Failure to adequately recognize the authority in ANCSA Section 22(f) and ANILCA Section 1302(h) for Sealaska to receive lands outside current withdrawal areas**

The Forest Service continues to resist the authority in ANCSA section 22(f) for land exchanges that convey lands outside existing withdrawal areas to Native Corporations. Most illuminating perhaps is the Forest Service direct response to Sealaska's comments on the Draft EIS on this issue:

The Forest Service disagrees with the statement that Sealaska is currently authorized to receive lands outside the ANCSA withdrawal areas because of Section 22(f) of ANCSA. . . .Section 22(f) of ANCSA allows for land exchanges with Native Corporations. Hypothetically, Sealaska could receive land outside the withdrawal areas through a land exchange. Land exchanges are discretionary and voluntary. Currently, there is no binding land exchange agreement in effect between the Forest Service and Sealaska Corporation.

Final FEIS, App. H at H-81. This amounts to stating that because the Forest Service is not required to enter into a land exchange with Sealaska under Section 22(f), there is no authority in

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the law for the Forest Service to do so. The statement that receipt by Sealaska of lands outside of a withdrawal area in an exchange is "hypothetical" ignores the central land entitlement adjustment purpose of Section 22(f), and the express authority in Section 22(f) to exchange selection rights. 43 U.S.C. § 1621(f). There is generally no need for an exchange to modify selections and conveyances within the existing withdrawal areas.

The Forest Service furthermore ignores the additional land exchange authority in Section 1302(h) of the Alaska National Interest Lands Conservation Act ("ANILCA"). ANILCA 1302(h), employing language that closely tracks that in Section 22 of ANCSA, also authorizes the Forest Service and other federal agencies to engage in public interest exchanges of federal lands in Alaska with Native Corporations and other entities, including exchanges for selection rights, without any restriction to conveyance of lands within vs. outside current ANCSA withdrawal areas. 16 U.S.C. § 3192(h).

#### **6. Error in ranking size of land ownerships**

In a clear error, the Forest Service identifies the State of Alaska as the largest non-federal landowner in Southeast Alaska, despite displaying that Sealaska owns more acres than the State. *See, e.g.* Final FEIS at 3-299.

Sealaska objects to and appeals these defective sections of the Amendment documents. These errors are contrary to Sealaska's ANCSA rights, Forest Service trust obligations to Native Alaskans, and simply factually wrong. As indicated in our April 30, 2007 comments, these errors do not appear critical to the TLMP amendment decisions that address the litigated roadless area issues that are the focus of the ROD and Final EIS. However, these errors mislead the public. They must be corrected and cannot be relied upon by the Forest Service or other parties in further analysis and efforts to complete Sealaska's entitlement and address Native Alaskan issues relating to the Tongass National Forest.

### **III. REASONS FOR OBJECTIONS:**

#### **A. The New Land Adjustment Direction Is Contrary To ANCSA And Not Authorized By Law**

Numerous laws and regulations govern the activities of the Forest Service. A primary law to which the Forest Service must adhere in administering the Tongass National Forest is ANCSA. ANCSA requires the United States and its agencies, including the Forest Service, to recognize and complete the conveyances of land from the Tongass prescribed by ANCSA to Sealaska and other Native Corporations in a timely manner, in accordance with the statute's provisions. 43 U.S.C. § 1601 *et seq.* Conveyance of these lands is to accomplish a "fair and just settlement" of Alaska Native aboriginal land claims, which encompass the entirety of Southeast Alaska, and

be accomplished "in conformity with the real economic and social needs" of Alaska Natives. *Id.*, § 1601(a), (b).

Section 22(f) of ANCSA contains a land exchange provision specifically authorizing land exchanges between the United States and Native Corporations to adjust ANCSA entitlement conveyances to better meet ANCSA purposes, recognizing that the selection and conveyance provisions elsewhere in the statute would not result in a final configuration of lands for each Corporation that best meet the intent of the statute. Section 22(f) authorizes the Secretary of Agriculture as well as the Secretary of the Interior, Secretary of Defense and State of Alaska to exchange "lands or interests therein, including Native selection rights," with Sealaska and other Native Corporations:

for the purpose of effecting land consolidations or to facilitate the management or development of the land, or for other public purposes. Exchanges shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the property exchanged: *Provided*, that when the parties agree to an exchange and the appropriate Secretary determines it is in the public interest, such exchanges may be made for other than equal value.

43 U.S.C. § 1621(f).

ANCSA does not allow for conditioning any conveyance of land to a Native Corporation with the restrictions contained in the TLMP Amendment ROD and Plan "land adjustment" language to which Sealaska objects: 1) maintaining a national forest "conservation strategy"; 2) ensuring public access for subsistence uses; and 3) requiring at least a portion of the timber volume from the lands conveyed to contribute to the timber manufacturing industry in Southeast Alaska. ANCSA and its implementing regulations contain their own specific provisions for public easements for access across, but not to, lands conveyed to Native Corporations, and leaves management of public access for subsistence or other use on these lands up to the Native Corporation that receives title. ANCSA § 17(b), 43 U.S.C. § 1615(b); 43 C.F.R. § 2650.4 - .4-7. Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA") limits federal agency authority over subsistence uses to lands under federal ownership and management. 16 U.S.C. §§ 3112-3126. ANILCA Section 1302(h), like ANCSA Section 22(f), does not contain any authority to impose subsistence access or other "land adjustment" restrictions proposed by the Forest Service. 16 U.S.C. § 3102(h). ANCSA, ANILCA, the National Forest Management Act ("NFMA"), 16 U.S.C. § 1601 et seq., and other law also do not contain any authorization for the Forest Service or other agency to condition conveyances to Native Corporations upon federal land conservation or other strategies or restrictions on use of the timber on those Native lands.

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The Forest Service limits the ROD and Plan language to "major discretionary land adjustment proposals." ROD at 55; Plan at 4-36. However, the ANCSA Section 22(f) authority for these adjustments with Native Corporations does not contain any authorization for the Forest Service to impose the restrictions contained in the ROD and Plan language on such adjustments. Proposals for adjustments to complete and resolve ANCSA entitlement conveyances, including those from Sealaska, can clearly meet the Section 22(f) criteria of land consolidation, facilitating land development or management, and other public purposes, and be in the public interest. Proposals can easily meet the public interest criteria without addressing any of the three arbitrary restrictions that the Forest Service attempts to impose as a prerequisite to even *considering* such proposals in the ROD and Plan language. The Forest Service has not adopted such restrictions in its own published land exchange regulations. 36 C.F.R. Part 254, Subpart A. Numerous adjustments to ANCSA land entitlements under Section 22(f) and subsequent legislation have been considered and accepted by the Forest Service and the public without reference to the restrictions that the Forest Service attempts to impose in the ROD and Plan. The same points apply to exchanges under ANILCA § 1302(h).

Thus, the Forest Service has no authority to adopt the ROD and Plan land adjustment language and impose such restrictions on considering Sealaska or other land adjustment proposals. Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress. *See Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 993 (C.C.P.A. 1981) ("Any authority delegated or granted to an administrative agency is necessarily limited to the terms of the delegating statute."). Though an agency may promulgate rules or regulations pursuant to authority granted by Congress, no such rule or regulation can confer on the agency any greater authority than that conferred under the governing statute. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Agency action that is in excess of statutory authority or otherwise not in accordance with law shall be set aside under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A), (C).

## **B. The New Land Adjustment Direction Violates Procedures Required by Law**

The Forest Service added the objectionable land adjustment language to the ROD and final Plan document, without including it for comment in the Draft EIS or otherwise, and without consulting with Sealaska or other Alaska Native representatives. This is a violation of the trust obligation that the United States and Forest Service have recognized to consult with the appropriate Native American leaders regarding federal actions or statements that have the potential to substantially affect Native interests. *See, e.g.*, Executive Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Final EIS, 3-438, A-3. Further, under NEPA and NFMA, the Forest Service has no authority to add a substantial restriction to consideration of national forest land adjustments, with the potential to significantly affect the human environment and national forest management, without evaluating the environmental and resource effects and providing an opportunity for public comment on the same. *See, e.g.*, 40 C.F.R. § 1502.9(c); 36 C.F.R. § 219.10(b), (f) (July 1, 2000 ed.). Finally, adding such restrictions, which are absent from the

Forest Service published land exchange regulations, without notice, public comment and other rulemaking procedure, also violates APA requirements. 5 U.S.C. § 553.

The land adjustment language is not within the range of alternatives considered in the Draft EIS and is in fact extraneous and totally unnecessary for the purpose and need for the TLMP Amendment or for any other legitimate objective. As described above, the land adjustment language contained in the ROD and Plan to which Sealaska objects is contrary to law and may not be adopted in any case. Further, any additional land adjustment direction that the Forest Service proposes that could substantially affect Native Alaskan interests must be the subject of adequate notice, consultation, and comment before it can be effective.

**C. The Erroneous Treatment Of Sealaska ANCSA Entitlement And Related Land Adjustment Issues Is Arbitrary And Capricious And Cannot Be Relied Upon For Federal Action**

Federal agency action that the administrative record shows is without factual basis, based on erroneous factors, or a clear error in judgment is arbitrary and capricious and an abuse of discretion for purposes of judicial review and shall be set aside under the APA, along with agency action that is not in accordance with law or legal procedure. 5 U.S.C. §706(2); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). As set out above, many of the statements and characterizations regarding Sealaska ANCSA entitlement in Appendix C and elsewhere in the Amendment documents are not consistent with ANCSA as well as being factually incorrect or inaccurate. Therefore, the misleading and otherwise erroneous analysis and other statements in Appendix C and other Amendment documents to which Sealaska objects must be corrected before they may be validly relied upon by the Forest Service or others for considering land adjustments or for other purposes.

**IV. CHANGES IN THE DECISION SOUGHT BY SEALASKA**

**A. Deletion of Erroneous Land Adjustment Direction**

For the reasons stated in this Notice of Appeal, the following language included on page 55 of the ROD and on pages 4-36 to 4-37 of the Plan must be deleted entirely from the TLMP Amendment and any other Forest Service direction or guidelines:

To continue to meet the conservation strategy and timber management goals and objectives of this Forest Plan decision, major discretionary land adjustment proposals will be considered if the proposed exchange of lands maintains the conservation strategy, ensures public access for subsistence uses, and at least a portion of the timber volume from the lands conveyed from the

Tongass National Forest contributes to the timber manufacturing industry in Southeast Alaska.

**B. Correct Treatment of Sealaska ANCSA Entitlement and Related Land Adjustment Issues**

For the reasons set forth in this Notice of Appeal, the erroneous and misleading treatment of Sealaska's ANCSA rights and related land adjustment issues in Appendix C and other portions of the TLMP Amendment documents must be corrected, and cannot be relied upon by the Forest Service or other parties in further analysis and efforts to complete Sealaska's entitlement and address Native Alaskan issues relating to the Tongass National Forest. This may be accomplished through a further supplemental appendix or addendum to the Final EIS or ROD, or by an updated report or other mechanism agreed upon between Sealaska and the Forest Service. Further analysis should incorporate updated and more reliable and accurate forest inventory information than what the Forest Service has been employing.

**V. REQUEST FOR MEETING WITH DECIDING OFFICER**

In accordance with 36 C.F.R. § 217.12(a), Sealaska requests a meeting with the Regional Forester to resolve this appeal. Sealaska hopes that such a meeting will result in at least agreement by the Regional Forester, without the need for further proceedings, to: 1) eliminate the erroneous land adjustment language as requested by Sealaska; 2) a path for further consideration and correction of the erroneous and misleading treatment of Sealaska's ANCSA entitlement and related land adjustment issues in the Amendment documents.

Sincerely,

SEALASKA CORPORATION



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