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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE STATE OF ALASKA

Plaintiff,

ALASKA ELECTRIC LIGHT & POWER,
ALASKA POWER & TELEPHONE,
ALASKA MINERS' ASSOCIATION,
CITIZENS PRO ROAD, ALASKA
MARINE LINES, INC., NORTHWEST
MINING ASSOCIATION, DURETTE
CONSTRUCTIONCOMPANY, INC.,
FIRST THINGS FIRST FOUNDATION,
JUNEAU CHAMBER OF COMMERCE,
CITY OF KETCHIKAN D/B/A
KETCHIKAN PUBLIC UTILITIES,
KETCHIKAN GATEWAY BOROUGH,
SOUTHEAST STEVEDORING CORP.,
CHRIS GERONDALE, SOUTHEAST
ROADBUILDERS, INC., HYAK MINING
CO., INC., INSIDE PASSAGE ELECTRIC
COOPERATIVE, THE CITY OF CRAIG

Proposed Plaintiff

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

CASE NO. 1:11-CV-01122 _____

Intervenors

vs.

THE UNITED STATES DEPARTMENT
OF AGRICULTURE, THE UNITED
STATES DEPARTMENT OF
AGRICULTURE FOREST SERVICE,
TOM VILSACK, and TOM TIDWELL, in
their official capacities respectively as
Secretary of Agriculture and Chief, Forest
Service,

Defendants,

INTRODUCTION

1. This is an action by the Plaintiff Intervenors seeking a judgment declaring that, by applying the 2001 Roadless Area Conservation Final Rule and Record of Decision (Roadless decision) to the Tongass National Forest and Chugach National Forest, Defendants violated The Administrative Procedure Act (APA), the Alaska National Interest Lands Conservation Act (ANILCA), the Wilderness Act, the Tongass Timber Reform Act (TTRA), The National Forest Management Act (NFMA), and the National Environment Policy Act (NEPA) and their implementing regulations. By failing to follow these laws and by applying them to the National Forests in Alaska in an arbitrary and capricious manner, Defendants have irreparably harmed the Plaintiff Intervenors.¹

JURISDICTION AND VENUE

¹ A table of Acronyms and Abbreviations is provided as Appendix 1 to this Complaint.

2. This action is brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706, and the Declaratory judgment Act, 28 U.S.C. §§ 2201 and 2202. The United States has waived sovereign immunity in this type of action in 5 U.S.C. § 702.

3. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1361 because this case arises under the Administrative Procedure Act (5 U.S.C. §§ 701 to 706), the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 (as amended) (16 U.S.C § 3101 et seq.), the Wilderness Act (16 U.S.C § 1131 et seq.), the Tongass Timber Reform Act (TTRA) of 1990, (16 U.S.C. § 559(d)) (Pub. L. 101-616, 104 Stat. 4430 (November 28, 1990)), the National Forest Management Act (NFMA) (16 U.S.C. § 1601 et seq.), and the National Environmental Policy Act (NEPA), (42 U.S.C. § 4321 et seq.)

4. Venue in this action is proper in the District of Columbia under U.S.C § 1391(b) (2) and § 1391(e).

PARTIES

5. As alleged herein, Plaintiff Intervenors conduct business, or have members and citizens who conduct business, on the Tongass National Forest which will be harmed substantially by application of the 2001 Roadless Rule to the Tongass National Forest. The Tongass National Forest, the nation's largest national forest, is located in Southeast Alaska within the State of Alaska.

- a. ALASKA ELECTRIC LIGHT & POWER – Alaska Electric Light and Power (AEL&P) was founded in 1893. AEL&P has used hydropower to produce electricity for the citizens, and businesses of Juneau, including its mines, for

more than 100 years. In 1914 AEL&P built a run of river facility in Gold Creek after fire destroyed the original power house that had been built in 1893. In 1914 construction of the Salmon Creek Dam was completed. It was the first constant-angle arch dam of its height and width ever built. The Annex Creek lake tap hydro project was developed in 1915. The Gold Creek, Salmon Creek, and Annex Creek hydro projects continue to provide power to the City and Borough of Juneau (CBJ) today.

i. The Snettisham Hydroelectric Project was constructed between 1967 and 1973 by the Alaska Power Authority and transferred to the State of Alaska in 1998. By contract the Snettisham project is managed, operated, and maintained by AEL&P. The Snettisham facility is the major source of electric power to the CBJ today. Because of increasing power needs AEL&P constructed the Lake Dorothy Project starting in 1998. The project went on line in 2009.

ii. As the CBJ's and the mining companies' adjacent to the CBJ power needs increase, AEL&P is already searching for new sites capable of producing hydroelectric power. Given the fact that inventoried roadless areas (IRAs) surround the CBJ, it is highly probable that such hydro sites will be located within IRAs and that power lines needed to transmit such power to the CBJ and adjacent mines will cross such IRAs. AEL&P will be harmed by the inability created by the 2001 Roadless Rule to develop new hydro projects in IRAs, by the inability to construct the roads needed to bring generators and other heavy equipment from tidewater to such

hydro sites, and by the inability to construct new transmission lines from such hydro sites to provide new electric power for the CBJ and for mines in the area adjacent to the CBJ.²

- b. ALASKA POWER & TELEPHONE – Alaska Power & Telephone Co., (AP&T) is a privately held, employee owned utility formed in Skagway, Alaska in 1957. Starting in 1995 AP&T began transforming its power generation in Alaska from fossil fuels to renewable, small hydro facilities, many of which would be in what are now IRAs. AP&T constructed the 4.5 megawatt Black Bear Lake Hydro Project on Prince of Wales Island in 1995. It built the 4.0 megawatt Goat Lake Hydro Project serving Haines and Skagway, Alaska in 1997, and the 3.0 megawatt Kasidaya Creek Hydro Project near Skagway in 2002. AP&T filed a draft license application with the Federal Energy Regulatory Commission (FERC) to construct the 77.4 megawatt Soule River Hydroelectric Project on Portland Canal, nine miles Southwest of Hyder in Southeast Alaska.
 - i. AP&T plans to continue to develop new hydroelectric projects to provide power to communities and mining projects in Southeast Alaska. Given the fact that there are 9.6 million acres of IRAs in the Tongass, it is almost certain that such hydro sites will be

² See 2001 Roadless Rule and ROD Comment and Response 66 Fed. Reg. 3259, January 12, 2001: Comment: "Some respondents were concerned about the ... ability to construct or maintain roads in inventoried roadless areas to access electric power or telephone lines, pipelines, hydropower facilities, and reservoirs." Response: "**Existing** authorized uses would be allowed to maintain and operate within their **current** authorization, including any provisions regarding access." (**Emphasis added**). The use of the words "existing" and "current" indicates that future (i.e. after January 1, 2001) construction of hydropower facilities or roads to access them would not be allowed.

located in IRAs and that the power lines needed to distribute such power will cross such IRAs.

- ii. AP&T will be harmed by the inability created by the 2001 Roadless Rule to develop new electric power for communities and for mines at new hydro projects in IRAs, by the inability to construct roads to bring generators and other heavy equipment from tidewater to such sites, and the inability to cross such IRAs with power lines.³
- iii. In addition, AP&T's business plan is to bring clean energy technology to Alaska in the form of wind power, geothermal power, biomass, and hydrokinetic power. The 2001 Roadless Rule would preclude such projects along with the construction of power lines to transmit such energy in the IRAs, thereby harming AP&T.

- c. THE CITY OF KETCHIKAN D/B/A KETCHIKAN PUBLIC UTILITIES – Ketchikan Public Utilities (KPU) is a public utility in Ketchikan, Alaska, which is wholly owned by the City of Ketchikan, a political subdivision of the State of Alaska, a sovereign State of the United States. Plaintiff KPU holds a valid FERC license no. 11841-002 issued March 17, 2009, which expires

³ See 2001 Roadless Rule and ROD Comment and Response 66 Fed. Reg. 3259, January 12, 2001: Comment: "Some respondents were concerned about the ... ability to construct or maintain roads in inventoried roadless areas to access electric power or telephone lines, pipelines, hydropower facilities, and reservoirs." Response: "**Existing** authorized uses would be allowed to maintain and operate within their **current** authorization, including any provisions regarding access." (**Emphasis added**). The use of the words "existing" and "current" indicates that future (i.e. after January 1, 2001) construction of hydropower facilities or roads to access them would not be allowed.

March 17, 2013. The FERC license authorizes construction of the Whitman Lake Hydroelectric Project. The 2001 Roadless Rule jeopardizes construction of the road and pipe line needed to develop the project under the FERC license.

- i. Even if the Whitman Lake Project is permitted to go forward the energy it will provide will be consumed almost immediately. Significant increases in Ketchikan's load are anticipated from new development and additions/upgrades to existing facilities. The increase in the price of oil heating will force more residential users to convert to electric heat.
- ii. Ketchikan-based Alaska Ship and Dry Dock will need more power to expand its business with the potential construction of an Alaska Class ferry and other vessels in connection with development of Off Shore drilling in the Chukchi and Beaufort Seas.
- iii. Seventeen of the twenty-one identified potential hydropower projects that would logically follow the Whitman Lake Project are within IRAs and thus could not be constructed under the 2001 Roadless Rule. This means that Ketchikan's increasing power needs would be met by diesel power rather than hydropower.
- iv. KPU will be harmed by the inability created by the 2001 Roadless Rule to develop new electric power for Ketchikan at the new, identified hydro projects within IRAs and by the inability to construct roads from tidewater

to transport generators and other heavy equipment to such sites in any event.⁴

- d. KETCHIKAN GATEWAY BOROUGH – Ketchikan Gateway Borough (KGB) is a local government and political subdivision of the State of Alaska located in Southeast Alaska. KGB is one of the largest geographical and populated governmental units located within the Tongass. KGB depends upon KPU for power. All of KGB’s power is currently supplied by hydroelectric power from the Swan Lake and Tyee dams. KGB’s needs for power are increasing as residential users and businesses within the KGB switch from heating oil to lower cost electric heat. The KGB will be harmed if KPU is unable to supply its electric power needs by hydropower because such power will have to be supplied by diesel generation which costs more and is source of air pollution.
- e. ALASKA MARINE LINES, INC. - (AML) is a marine transportation company that carries all types of freight to and from Southeast Alaska in support of the mining, timber, fishing, energy, and other industries, along with delivering the necessities and commodities of every day life. AML provides barge service to the communities of Juneau, Ketchikan, Wrangell, Sitka, Petersburg, Haines, Skagway, Kake and Prince of Wales Island, year round

⁴ See 2001 Roadless Rule and ROD Comment and Response 66 Fed. Reg. 3259, January 12, 2001: Comment: “Some respondents were concerned about the ... ability to construct or maintain roads in inventoried roadless areas to access electric power or telephone lines, pipelines, hydropower facilities, and reservoirs.” Response: “**Existing** authorized uses would be allowed to maintain and operate within their **current** authorization, including any provisions regarding access.” (**Emphasis added**). The use of the words “existing” and “current” indicates that future (i.e. after January 1, 2001) construction of hydropower facilities or roads to access them would not be allowed.

with twice a week departures from Seattle. With the high fixed costs of operating a barge line, freight volume is the key to an efficient operation. Commercial activity, particularly hydropower development, mining, timber harvest, and fishing, is essential to AML's ability to maintain affordable, frequent, and regular service to Southeast communities.

- i. AML is harmed by the inability of its customers due to the 2001 Roadless Rule to build roads from tidewater to project sites and to cut trees to access hydroelectric and other renewable resource energy, mining, and timber resources on the Tongass.
 - ii. AML will be harmed by the loss of business to AML due to its customers' loss of business caused by the reduction in mining, timber harvest, and hydroelectric development, and by the reduction in road construction associated with all three activities that result from the reinstatement of the 2001 Roadless Rule on the Tongass National Forest.
- f. ALASKA MINERS' ASSOCIATION – (AMA) is a non-profit membership organization established in 1939 to represent the mining industry throughout Alaska. AMA has a diverse membership composed of more than 1,200 individual prospectors, geologists, engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. The AMA has a Juneau branch that represents much of the mining community in Southeast Alaska. AMA's membership includes many small businesses with ten or fewer employees. Many AMA members conduct and have made

substantial expenditures of funds conducting prospecting, exploration, and development on lands within the Tongass that were previously open to road construction and timber cutting that are now within the 9.6 million acres of IRAs. Mining companies that are AMA members will be harmed by the substantial restrictions and practical limitations imposed by the 2001 Roadless Rule on their ability to construct roads and cut trees and otherwise access the 9.6 million acres of the Tongass within IRAs for exploration and mine development.

g. HYAK MINING COMPANY, INC. – Hyak Mining Company, Inc. has been involved with mineral exploration and development on the Tongass National Forest since 1978. As the underlying owner of the Jualin Mine in Berners Bay, Hyak was instrumental in the planning, design, construction, operation and maintenance of a 5.5 mile road from tidewater to the Jualin Mine.

i. It is now seeking to construct a 700 foot access road from a forest road at the old Puyallup Mine to the Cracker Jack group of patented mining claims it owns in U.S. Mineral Survey 1527A at Maybeso Creek on Prince of Wales Island near Hollis, Alaska. Reapplication to construct the road was made February 12, 2010, but authorization has been delayed by the Forest Service because the road is adjacent to an IRA. . Hyak is harmed by the application of the 2001 Roadless Rule to the Tongass, which is delaying access to its Cracker Jack group of patented mining claims by delaying

construction of the 700 feet of road it must construct to access its mining properties.

ii. Because Hyak desires to continue to prospect, explore and develop new mines on the Tongass in what are now IRAs, it is harmed by the access problems that will result, and are resulting, from the application of the 2001 Roadless Rule to the Tongass.

- h. NORTHWEST MINING ASSOCIATION – (NWMA) is a 114-year old, 1,800 member nonprofit, non-partisan trade association based in Spokane, Washington. Many NWMA members are individuals and small companies actively involved in prospecting, exploring, mining, and reclamation on National Forest and Bureau of Land Management (BLM) administered lands in the western states, including Alaska and the Tongass National Forest. Like the AMA, many NWMA members conduct and have expended funds to prospect, explore for, and develop mines within the Tongass previously open to the road construction and the tree cutting, required for access to mines, that will now be restricted within the 9.6 million acres of IRAs due to the 2001 Roadless Rule. Like the AMA, members the NWMA members will be harmed by the substantial restrictions and practical limitations imposed by the 2001 Roadless Rule on their ability to construct the roads and cut the trees needed for access to explore and develop such mines within the 9.6 million acres of IRAs.
- i. CHRIS GERONDALE – Chris Gerondale is President of the Juneau Branch of the AMA. He also works for, and has an ownership interest in, a company

that sells prospecting, exploration, and mining equipment to members of the AMA and NWMA. His company also sells machinery for road construction, timber harvest, and hydro development on the Tongass. Commercial activity, particularly hydropower development, mining and timber harvest, is essential to Chris Gerondale's ability to make a living in Southeast Alaska. Gerondale is harmed by the loss of business associated with the inability of his company's customers to construct the roads and cut the trees necessary to gain access to prospect, explore and develop mines, to construct hydropower and other renewable energy projects, and to harvest timber within the 9.6 million acres of IRAs on the Tongass due to the 2001 Roadless Rule.

- j. DURETTE CONSTRUCTION COMPANY, INC. – DuRette Construction Company, Inc. is a small, family owned business that has conducted road building related to timber harvest on the Tongass for 35 years. Much of DuRette Construction Company's road building has been preparatory to the harvest of old growth timber within what are now IRAs under the 2001 Roadless Rule. The 2008 Amended TLMP and Forest Land Management Plan authorized timber harvest and building related forest roads into IRAs. However, the 2008 Amended TLMP has been significantly amended by application of the 2001 Roadless Rule to the Tongass. DuRette Construction Company's business has been, and will be, substantially harmed by the restrictions imposed by the 2001 Roadless Rule on the construction of roads in support of Forest Service timber sales within the 9.6 million acres of IRAs.

- k. FIRST THINGS FIRST FOUNDATION - (FTF) is a nonprofit Alaska corporation organized for charitable and/or educational purposes. FTF members engage in natural resource development activities, natural resource development jobs, and natural resource related jobs on the Tongass National Forest in Southeast Alaska. Juneau is the headquarters office and bedroom community for two underground hardrock mines. Both of these mines are located within or are surrounded by IRAs. FTF members participate directly and indirectly in the economies of these two underground mines. FTF participated in the planning and permitting process for the latest of these mines to help educate the public about the importance of development of that mine to the local and regional economy. Continued development of that mine and employment related to its expansion is vital to maintaining the current Juneau population in the face of declining revenues from declining Alaska oil production.
- i. FTF members participate directly and indirectly in renewable energy (hydropower, geothermal, wind, tide, wave, biomass) on the Tongass National Forest, none of which could be developed in the IRAs due to the 2001 Rule's prohibitions on road construction and power line construction from the power source to communities.
 - ii. FTF members also participate directly and indirectly in developing hydropower for export to the greater North American electrical grid via the Northern B.C. Hydro power line extension. If

the many renewable hydroelectric power sites in Southeast Alaska were linked to the North American Grid, this extensive generating potential could be developed far beyond the power requirements of Southeast Alaska to the betterment of all North American consumers and the economic viability of the region. The inability to construct hydroelectric projects, roads, and power lines within and through the IRAs would cause the loss of this opportunity.

iii. FTF supports construction of the Juneau Access Road which traverses Lynn Canal from Juneau to Haines. FTF members are harmed by the fact that the right of way for that road is within the ubiquitous IRAs that surround the CBJ. The 2001 Roadless Rule will present significant new obstacles to the approval the road has already obtained from the Federal Highway Administration. Specifically, the Secretary of Agriculture must now also determine that the road is “a Federal Aid Highway project, authorized pursuant to Title 23 of the United States Code, is in the public interest or is consistent with the purposes for which the land was reserved or acquired, and no other reasonable and prudent alternative exists.” (36 C.F.R. § 294.12 (b) (6).

1. THE JUNEAU CHAMBER OF COMMERCE – (JCC) The Juneau Chamber of Commerce (JCC) is a nonprofit business membership organization which supports economic diversity, encourages entrepreneurship, and endorses

responsible, sustainable develop throughout Southeast Alaska, and the entire State.

- i. Juneau is served by hydroelectric power from Snettisham Dam and Lake Dorothy. As Juneau's power needs increase, the community will need the potential of additional renewable energy opportunities, such as hydro power and geothermal power, within the IRAs surrounding the CBJ to fill that need. The JCC is harmed by the inability of its members to develop potential renewable energy sites in, and construct the power lines through IRAs to distribute such power to the CBJ due to the 2001 Roadless Rule.
- ii. The JCC represents 400 business members, two of which are the largest operating mines in Southeast Alaska. The employees of these mines live in the CBJ and the mines purchase supplies from JCC members. The JCC is harmed by the practical obstacles caused by the 2001 Roadless Rule to the exploration for, and development of, additional mineral resources to extend the life of these mines within the ubiquitous IRAs that totally surround these mines.
- iii. JCC has long supported the construction of a road to connect the CBJ with the Haines Highway, and thus the rest of the State. JCC members are harmed by the facts that the right of way for that road is within the ubiquitous IRAs that surround the CBJ and that reinstatement of the 2001 Roadless Rule will present significant new obstacles to the approval the road has already obtained from the Federal Highway Administration. Specifically, the Secretary of Agriculture must now also determine that the

road is “a Federal Aid Highway project, authorized pursuant to Title 23 of the United States Code, is in the public interest or is consistent with the purposes for which the land was reserved or acquired, and no other reasonable and prudent alternative exists.” (36 C.F.R. § 294.12 (b) (6).

- m. **CITIZENS PRO ROAD** – Citizens Pro Road (CPR), which was founded in 2006, is a non-profit, citizens group whose members travel Lynn Canal from Juneau to Haines and Skagway for recreational and business reasons. CPR supports the construction of a road to connect the CBJ with the Haines Highway and thus the rest of the State. CPR members are harmed by the fact that the right of way for that road is within the ubiquitous IRAs that surround the CBJ. The Roadless Rule will present significant new obstacles to the approval the road has already obtained from the Federal Highway Administration. Specifically, the Secretary of Agriculture must now also determine that the road is “a Federal Aid Highway project, authorized pursuant to Title 23 of the United States Code, is in the public interest or is consistent with the purposes for which the land was reserved or acquired, and no other reasonable and prudent alternative exists.” (36 C.F.R. § 294.12 (b) (6).
- n. **SOUTHEAST STEVEDORING CORP.** - Southeast Stevedoring is a privately owned corporation that was formed in 1950 to contract with timber product suppliers and/or purchasers of such products to load them on ocean going ships for transport to various markets. The Company performs ship loading

services at port locations throughout Southeast Alaska wherever timber products are being processed.

i. Whenever a timber supplier accumulates a sufficient quantity of timber product at a given location to warrant shipment, Southeast Stevedoring uses in house supervisory personnel in conjunction with a considerable number of directly employed laborers, who typically reside in communities that are in proximity to the ship loading.

ii. The number of individuals associated with a particular ship loading operation, inclusive of related support personnel, is approximately 55. The employment opportunity that this activity represents, and its indirect effect on economies of the communities in which these individuals reside, is significant.

iii. The Southeast Alaska's timber industry is an integral and significant component of the economies of numerous communities in the region. It provides employment opportunities not only in terms of direct jobs, but indirectly to numerous supply and support entity's businesses.

iv. Over the last 20 years there have been continual and significant reductions in the volume of economic timber sold by the Forest Service on the Tongass National Forest. This has reduced the number of timber operators to just a few who provide the jobs that are essential to the economies of the communities in the region, all of which has adversely impacted the business of Southeast Stevedoring Corp.

- v. The application of the 2001 Roadless Rule will adversely and irreparably impact the few timber operators remaining in Southeast Alaska. This in turn has, and will, further adversely and irreparably impact the amount of business available to Southeast Stevedoring Corporation, along with all of the various related support business that provide goods and services to the timber industry.
- o. SOUTHEAST ROADBUILDERS, INC. – Roger Schnabel, the owner of Southeast Roadbuilders, Inc., is a third generation Alaskan whose family lives in Haines, Alaska. Southeast Roadbuilders, Inc. constructs roads preparatory to timber harvest and mine exploration and development in the Tongass National Forest. Given the fact that there are 9.6 million acres of IRAs in the Tongass, it is highly probable that the areas of the Tongass in which Southeast Roadbuilders, Inc. seeks contracts to construct roads to access Forest Service timber sales in areas that had previously been authorized for timber harvest by the 2008 Amended Tongass Land Management Plan (TLMP), to construct roads to provide access to explore for and develop new mines, and to provide access from tidewater to hydro sites to allow machinery and equipment to be moved to such sites, will be located in IRAs. The reinstatement of the 2001 Roadless Rule to the Tongass will thus adversely and irreparably impact roadbuilding opportunities in Southeast Alaska. This in turn has, and will, further significantly and irreparably reduce the amount of business available to Southeast Roadbuilders Inc.

p. INSIDE PASSAGE ELECTRIC COOPERATIVE – Inside Passage Electric Cooperative (IPEC) is a nonprofit, tax exempt, consumer owned and governed, electric utility formed in Juneau, Alaska in 2004 (prior to that date IPEC operated as Tlingit-Haida Regional Electrical Authority, a political subdivision of the State of Alaska, beginning in 1977). IPEC has supplied safe, reliable electric power to communities in rural Southeast Alaska for 34 years. IPEC serves about 1,300 members in the rural, primarily Alaska Native, communities of Angoon, Hoonah, Kake, Klukwan, and the Chilkat Valley.

i. One of IPEC's major goals is to transform its power generation in rural Southeast Alaska from expensive diesel-dependent generators to less expensive, renewable resource based generation. The difference in cost of electricity in rural Southeast Alaska communities compared to Juneau, Ketchikan, and Sitka (the major population centers of Southeast Alaska) is staggering. The cost /kWh for Juneau in 2008 was 11¢/kWh, for Ketchikan it was 9.58¢/ kWh, and for Sitka it was 9.2¢/kWh. It is significant that each of these communities is on hydro power with diesel backup. By contrast the average cost of power/kWh sold in 2008 by IPEC to its rural customers was 53.9¢. IPEC's cost of power is variable with fuel costs, which averaged \$3.52/gallon in 2008. This year prices through July 2011 have averaged \$4.01/gallon and seem to be increasing.

ii. IPEC's business plan is to bring clean energy technology to rural Southeast Alaska in the form of hydropower, geothermal, biomass, and tidal power.

iii. IPEC has obtained a grant of nearly \$600,000 from the Alaska Energy Authority (AEA) to do a reconnaissance study of the Tenakee Inlet Geothermal Resource. The site is located at the head of Tenakee Inlet on Chichagof Island. IPEC sought funding from AEA to determine the extent of the resource and its ability to economically supply electric power to Hoonah (population 860), and possibly to other Chichagof Island communities.

iv. The site of the geothermal resource at the head of Tenakee Inlet, along with the land that would have to be traversed by powerlines and a maintenance road to distribute the power to these communities, are all within IRAs.

v. The 2001 Final Rule and ROD allow “reasonable access” to locatable minerals, but denies access to new leases for minerals subject to the Mineral Leasing Act of 1920, including geothermal resources:⁵ “because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas.”⁶ (There is no explanation why the access impacts on IRAs associated with locatable minerals is different from the access impacts on IRAs associated with leasable minerals).

vi. In addition to IPEC’s site at the head of Tenakee Inlet on Chichagof Island there are numerous geothermal sites in the Tongass that

⁵ 66 Fed. Reg. 3244 January 12, 2001, at pages 3255-3256.

⁶ *Ibid.*, at page 3256.

have the potential to generate renewable electric power, all of which is now prohibited by the 2001 Roadless Rule.

vii. The 2001 Roadless Rule will harm IPEC by prohibiting IPEC from developing new electric power for rural Southeast Alaska communities at the Upper Tenakee Inlet geothermal and other geothermal sites, by prohibiting IPEC from developing new hydropower sites in IRAs, by prohibiting IPEC from constructing the roads needed to bring generators and other heavy equipment from delivery points at tidewater to such sites, and by prohibiting IPEC from crossing such IRAs with power lines to distribute the power to rural communities within the Tongass.⁷ Most particularly, IPEC will be harmed by the consequential inability to reduce its members' cost of electricity by allowing them to convert from fossil fuels to hydropower and other less expensive forms of renewable energy.

q. THE CITY OF CRAIG - The City of Craig is the largest community on Prince of Wales Island. Prince of Wales Island has a population of approximately 4,000. It is a remote island in Southeast Alaska with ten identifiable small communities ranging in population from about 10 to 1,200. Access is only by boat or small plane. Some communities on Prince of Wales Island still rely entirely on diesel-generated electricity, at extraordinarily high

⁷ See 2001 Roadless Rule and ROD Comment and Response 66 Fed. Reg. 3259, January 12, 2001: Comment: "Some respondents were concerned about the ... ability to construct or maintain roads in inventoried roadless areas to access electric power or telephone lines, pipelines, hydropower facilities, and reservoirs." Response: "**Existing** authorized uses would be allowed to maintain and operate within their **current** authorization, including any provisions regarding access." (**Emphasis added**). The use of the words "existing" and "current" indicates that future (i.e. after January 1, 2001) construction of hydropower facilities or roads to access them would not be allowed.

costs of up to \$0.60 per kilowatt hour. The balance of the Island relies on diesel-generated electricity to back up its two small hydroelectric generators and other less expensive forms of renewable energy.

i. The City of Craig undertook a unique and innovative alternative energy project beginning in 2004, one that uses wood to heat three publicly-owned buildings: The Craig Elementary School building, the Craig Middle School building, and the Craig Aquatic Center. The wood used for this project comes from the milling process at Viking Lumber Company, which is the City's only reliable source of supply for the wood boiler. Last year, the project reduced the cost of heating the three buildings by approximately \$60,000. For the current year, the fuel savings promises to be even greater, while continuing to provide greenhouse gas-neutral energy to public buildings. The Craig wood heating project is the first of its kind in Alaska, and is seen as a prototypical model for other small wood heating systems for use in Rural Alaska.

ii. Without timber sales from IRAs to Viking Lumber Company, the wood heating project is unlikely to sustain itself. Craig has no other source for the wood necessary for the alternative energy wood fire boilers. In a time of dramatically increasing fossil fuel costs, and extensive encouragement and involvement by the Federal and State government to use alternative fuel sources, Craig will be harmed by the loss of a successful alternative energy wood fire boiler project that heats three significant City buildings and return to using fossil fuels.

iii. AP&T has formed a Joint Venture with Haida Energy (HE) the purpose of which is the development of the 5 MW Reynolds Creek Hydropower Project. This hydropower project already has its FERC permit and construction has commenced. The project will supply needed energy and capacity to the interconnected electric system on Prince of Wales Island, including Craig. The Reynolds Creek project is located on private lands owned by Sealaska and Haida Corporation. This project will have some excess energy and capacity that could be made available to the Niblack and Bokan Mountain⁸ Mines located on Prince of Wales Island. However, this would require a 30 mile transmission line that would go through an IRA. If the transmission line cannot be constructed it means that the mines will have to generate their own energy using diesel fuel, which usually means that local processing of ore will be more expensive and could result in those jobs being exported to other areas where affordable energy is available, all of which would be to the detriment of Craig residents economic opportunity and well-being.

iv. Craig will be harmed by the inability of Haida/AP&T and others to develop new electric power for communities and for mines at new hydroelectric project sites in IRAs on Prince of Wales Island, by the inability to construct roads needed to bring generators and other heavy equipment to such sites, and by the inability to cross such IRAs with the transmission lines needed to distribute the power to communities and

⁸ The Bokan Mountain prospect is a rare earth deposit. Rare earth is a mineral used to manufacture electric equipment.

industries on Prince of Wales Island, all of which is due to the reinstatement of the 2001 Roadless Rule.

v. As a consequence of the reinstatement of the 2001 Roadless Rule, the ASQ has been reduced to 50MMBF per year, which the 2001 Roadless Rule Final Environmental Impact Statement (FEIS) admits will close mills and cost timber related jobs.⁹ The ability of the Forest Service to construct the roads into IRAs and to offer the economic timber sales needed to meet market demand in accordance with 2008 Amended TLMP has, in effect, been repealed by the reinstatement of the 2001 Roadless Rule.

vi. The failure of the Forest Service to offer sales of sufficient economic timber from areas that are not within IRAs would likely lead to closure of that mill. Closure of the Viking Lumber Mill would have a seriously detrimental effect on the City of Craig's socio-economic well being, including Craig's economy, school enrollment, and delivery of governmental services. The mill's 32 full time employees support many indirect jobs. Approximately 92 total jobs are directly and indirectly supported by Viking which is a huge part of the economy in Craig and the surrounding area.

vii. Additionally, the families of these 92 workers represent a large percentage of the school population. Twenty two students are from the families of the approximately 92 jobs supported by the Viking Lumber Mill. If 22 students leave the school district, there will naturally be a

⁹ 2001 Roadless Rule FEIS at 3-378 to 3-379.

similar loss of school jobs, such as special educational aides and possibly a teacher. Those job losses will further compound the economic harm that will result from closure of Viking Lumber.

viii. If the Mill closes almost all of these jobs and school population discussed above will be lost since there is no alternative employment in the area and these families will almost certainly leave. Craig's records show that the seasonal unemployment rate on Prince of Wales Island currently ranges to about 23%. The shutdown of Viking Lumber, or other Prince of Wales Island sawmills, would reduce the number of private sector jobs in Prince of Wales Census Area by over 10%, and severely impact and irreparably harm the City of Craig.

6. Defendant United States Forest Service is an agency of the United States Department of Agriculture and is charged with the administration of the National Forests, including the Tongass National Forest and the Chugach National Forest.

7. Defendant Tom Vilsack is the Secretary of Agriculture and is sued in his official capacity. The Forest Service is an agency of the United States Department of Agriculture and is subject to the direction and control of defendant Vilsack in his official capacity.

8. Defendant Tom Tidwell is the Chief of the Forest Service and is sued in his official capacity. Defendant Tidwell is responsible for operations and activities of the Forest Service on National Forest System lands under delegations of authority from the Secretary of Agriculture to the Chief of the Forest Service.

FACTS

9. Citing Forest Service budgetary concerns about maintenance of the existing road system and a perceived public concern about protecting IRAs in the National Forest System, the Forest Service suspended all road construction and reconstruction in certain roaded areas of the National Forest System for an “interim” period of 18 months beginning March 1, 1999. 64 Fed. Reg. 7290 (1999). The terms of suspension are set forth in 36 C.F.R.212.13.

10. The Tongass National Forest was excluded from the March 1, 1999 interim suspension on the ground that the revised Tongass Land Management Plan (TLMP) had been completed after January 1, 1996. The Chugach National Forest was included in the interim suspension.

11. On October 13, 1999 President Clinton issued the Roadless Area Conservation Initiative which stated that he found it to be “in the best interest of our Nation” ... “to provide strong and lasting protection for these forests” and directed the Forest Service “to develop, and propose for public comment, regulations to provide appropriate long-term protection for most or all of these currently inventoried ‘roadless’ areas and to determine whether such protection is warranted for any smaller ‘roadless’ areas not yet inventoried.” (FEIS at 1-6.)

12. On October 19, 1999, the Forest Service issued a Notice of Intent to prepare an EIS for a nationwide roadless policy consisting of two parts. (Fed. Reg. 56306). Part One would restrict activities such as new road construction in IRAs. Part Two would establish a national direction for managing IRAs and for determining

whether similar restrictions should be extended to non-inventoried roadless areas. The scoping and comment period for the proposal closed on December 20, 1999.

13. In soliciting scoping comments on the Roadless Initiative, the Notice of Intent asked for public comment on whether the 9.3 million acres of IRAs in the Tongass National Forest should be covered by the Final Rule. The Notice of Intent also asked for public comment on whether the Tongass should be covered under Part One of the Rule or only under Part Two.

14. In addition to the IRAs, the 16.9 million acre Tongass National Forest contains 5.6 million acres of Congressionally designated Wilderness and 580,000 acres of Congressionally designated LUD II areas which are roadless and in which road construction and timber harvest are severely restricted.

15. On May 10, 2000, the Forest Service published a DEIS entitled “Forest Service Roadless Area Conservation. (65 Fed. Reg. 30275.)

16. The Roadless DEIS accompanied proposed rules that: (1) prohibited road construction and reconstruction in IRAs (hereinafter the “prohibition rule”); and (2) required local managers to identify unroaded areas other than IRAs and determine, at the time of land and resource management plan revisions required under the NFMA, which unroaded areas warranted protection and the level of protection to be afforded (hereinafter the “procedural rule”).

17. The Roadless DEIS included four “prohibition alternatives:” 1) a no-action alternative; 2) a prohibition on road construction and reconstruction within the unroaded portions of inventoried roadless areas; 3) a prohibition on road construction, reconstruction, and timber harvest except for stewardship purposes within the unroaded

portions of IRA; and 4) a prohibition on road construction, reconstruction, and all timber harvest within the unroaded portions of IRAs.

18. Every alternative, except the legally required “no action” alternative, achieved President Clinton’s direction of prohibiting nearly all future road construction within IRAs. Prior to issuance of the draft rule, the Forest Service Exemption Team internally considered additional alternatives for the Tongass National Forest and for nationwide prohibitions that would have allowed varying levels of development, but the Exemption Team determined that it would not be appropriate to consider alternatives that were not consistent with President Clinton’s direction.

19. The Roadless DEIS preferred alternative was the second alternative, which prohibited road construction and reconstruction within the unroaded portions of IRAs, but allowed timber harvest where such harvest could occur without the construction of roads. Very little commercial timber harvest was expected to occur in areas that did not allow road construction due to the high cost of harvesting timber in areas without road access.

20. The DEIS also included four “procedural alternatives:” 1) a no-action alternative; 2) a requirement for evaluation and implementation of protections for unroaded areas at the next forest plan revision; 3) a requirement that the local manager evaluate whether and how to protect roadless characteristics on a project-by-project basis; and 4) a requirement for consideration of roadless characteristics on a project-by-project basis pending completion of a forest plan revision (a combination of 2 and 3). The preferred alternative was the second alternative, requiring evaluation and implementation of protections for unroaded areas at the next forest plan revision.

21. The DEIS also included four “Tongass alternatives:” 1) including the Tongass in the alternative selected for the rest of the National Forest System; 2) exempting the Tongass from the alternative selected; 3) not immediately including the Tongass in the alternative selected, but to determine at the 5-year TLMP review whether road construction in IRAs should be prohibited; and 4) prohibiting road construction only in old-growth and remote recreation areas of the Tongass.

22. The third alternative was the preferred of the Tongass alternatives - postponing a decision on whether to apply the prohibitions to any or all of the unroaded portions of IRAs in the Tongass until the 5-year review of the 1999 revised TLMP in April 2004. It specifically required the Forest Supervisor to consider § 101 of TTRA as part of this determination. TTRA § 101 requires the Forest Service to “seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) which meets the market demand from such forest for each planning cycle.” The DEIS stated that two-thirds of future Tongass timber was expected to come from the roadless areas in the Tongass and that application of the Roadless Rule to the Tongass would result in a shortfall in relation to demand. The DEIS further stated that a delay in making a decision on the Tongass until 2004 would allow the Forest Service to determine whether market demand could be met solely from the roaded portions of the Tongass.

23. Defendants submitted the Regulatory Flexibility Analysis required by the Regulatory Flexibility Act (RFA) (5 U.S.C. § 601 et. seq.) to the Small Business Administration (SBA) for final review. On November 14, 2000, Jennifer Smith, Assistant Chief Counsel for Economic Regulation, advised Defendants of significant

deficiencies in the analysis, and notified Defendants that the changes that had been made between the draft and the final rule, such as changes regarding the Tongass, required public notice and the opportunity to comment. The SBA found that Defendants' failure to correct the deficiencies in the Regularity Flexibility Analysis and to provide for public comment violated the RFA and APA.

24. On November 13, 2000, the Forest Service published the Final Roadless EIS (FEIS). In a change from the DEIS, the Forest Service chose Road Prohibition Alternative 3, prohibiting construction, reconstruction, and timber harvest except for stewardship purposes, and applying the prohibitions to both the roaded and unroaded portions of IRAs. Some of the changes had not been proposed in the DEIS. For example, without preparing a Supplemental Environmental Impact Statement (SEIS) or accepting public comment on the changes, the Forest Service restricted the maximum diameter of timber in stewardship projects, and added within the scope of the "roadless" rule 4.2 million acres of classified roads.

25. Again without the benefit of a SEIS and without opportunity for public comment, the FEIS eliminated analysis of the Procedural Alternatives, on the ground that the Procedural Rule had been incorporated into the Final Planning Rule adopted on November 9, 2000. (36. C.F.R. 219.9(b) (8)). The Forest Service acknowledged that the Final Planning Rule and the National Forest System Road Management and Transportation System Rule were being simultaneously promulgated in separate rulemakings, and that these rules "might have a cumulative impact." FEIS 3-240. However, the cumulative impact of these closely related rules that were being rushed

through the agency before the change of administrations was never properly evaluated or disclosed for public comment.

26. In addition to the prohibition alternatives, the FEIS included four alternatives for analyzing whether any of the selected Alternative 3 nationwide prohibition alternatives should apply to the Tongass. These alternatives were: 1) “Tongass Not Exempt,” which applied the same prohibition alternative to the Tongass that applied to National Forests nationwide; 2) “Tongass Exempt,” which fully and permanently exempted the Tongass; 3) “Tongass Deferred,” which postponed a decision on whether or not to apply the nationwide prohibitions to the Tongass until April 2004; and 4) “Tongass Selected Area,” which applied prohibitions on IRAs located in certain land use designations identified in the 1997 TLMP.

27. In a major change from the DEIS (which delayed a decision about application of the Roadless Rule to the Tongass until April 2004), the FEIS selected Alternative 3 which fully applied the 2001 Roadless Rule to the Tongass, but deferred implementation on the Tongass until April 1, 2004. The FEIS explained the change in preferred alternatives by replacing the DEIS discussion of Defendants’ duty to seek to meet market demand as required by TTRA § 101 with a brief discussion of why it did not have to comply with TTRA § 101 and why exempting the Tongass would not meet the President’s directive establishing the purpose and need for the rulemaking.

28. Notwithstanding Congress’ finding that ANILCA provided sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, the stated purpose of the 2001 Roadless Rule was to “conserve and protect the increasingly important values and benefits of roadless

areas by prohibiting activities that have the greatest likelihood of degrading desirable characteristics of inventoried roadless areas....” The FEIS states that the action was needed because “[r]oad construction, reconstruction and timber harvest activities in inventoried roadless areas can directly threaten the fundamental characteristics of these areas by altering natural landscapes including habitat fragmentation and changes in native plant and animal communities.” The FEIS goes on to explain that the action is needed because “[l]ocal land management planning efforts may not always recognize the cumulative national significance of inventoried roadless areas and the values they represent, especially given the increasing development of the nation’s landscape.” (FEIS at 1-14 through 1-15.)

29. The Roadless FEIS admitted that the economic effects of prohibition alternatives 2 through 4 would cause Tongass mill closures and reduce Tongass timber harvest activity which “would trigger direct job losses of 364 to 383 employees in the private sector and direct income losses estimated at \$16.7 to \$17.6 million.” The job losses would occur in Ketchikan, Coffman Cove, Craig, Thorne Bay, Klawock, Metlakatla, Wrangell, Petersburg, and Hoonah. “Over the long term as the effect of the direct job losses and business closures progressed through the economy, another 218 to 230 jobs may eventually be lost along with an additional \$10.1 to \$10.6 million in income.” Finally, approximately 141 Forest Service jobs along with an income of \$7.1 million would be lost under the prohibition alternatives, along with 141 indirect jobs and \$3.4 million in personal income. The total direct and indirect job and income losses from application of the prohibition alternatives on the Tongass would be 864 to 895

jobs along with a loss of \$37.3 to \$38.7 million dollars in income. (FEIS at 3-379 to 3-380.)

30. The Roadless FEIS admitted that application of the prohibition alternatives to the Tongass would prevent the Forest Service from exercising its discretion to meet market demand: “Relative to current industry operations and projected timber demand, the prohibition alternatives may result in a harvest shortfall of approximately 73 to 77 MMBF of timber annually. In the short-term, the immediate effect of supply shortages is likely to be intense competition and bidding activity for timber sales that are made available. As time goes by, competition will drive out the least efficient operations, thereby reducing mill capacity and the associated long-term demand for Tongass timber. In the long term, a sustained level of 50 MMBF may support some but not all of the existing and planned timber processing facilities in the region.” (FEIS at 3-378 to 3-379.)

31. In the 2008 Amended TLMP Record of Decision (ROD) the Regional Forester primarily relied upon a market demand projection by the Pacific Northwest Research Station (PNRS) (See 2008 Amended TLMP ROD at pages 31-35.) The PNRS provided four different scenarios of market demand. The Regional Forester adopted the expanded lumber scenario as the measure of market demand for the period 2007 – 2022. **It ranged from 61.9 MMBF in 2007 to 187.1 MMBF in 2022.** See *Id.* at page 33. (Emphasis added).

32. In a change from the FEIS, the Final Roadless Rule and ROD (Roadless decision), which was signed on January 5, 2001 and published on January 12, 2001, immediately applied the roadless restrictions to the Tongass National Forest.

The ROD states that approximately two-thirds of the total timber harvest planned on the Tongass over the following five years was projected to come from IRAs on the Tongass. The ROD further acknowledged that an immediate prohibition on road construction would eliminate 95% of the timber harvest from those areas and thus cause adverse impacts to timber dependent communities. (66 Fed. Reg. at 3254). The ROD does not discuss how the Forest Service could exercise its discretion to meet market demand on the Tongass without timber from IRAs. The ROD provides no rationale for the ROD's sudden reversal from the Forest Service's position in the DEIS that access to timber in IRAs on the Tongass was needed to exercise its discretion to meet market demand as required by TTRA § 101.

33. However, without discussing Congress's finding in ANILCA § 101 (d) that it had properly balanced conservation and development on the Tongass, the ROD concluded that "the long-term ecological benefits to the nation of conserving this inventoried roadless areas outweigh the potential economic loss to those local communities and that a period of transition for affected communities would still provide certain and long term protection of these lands." (66 Fed. Reg. at 3255).

34. The ROD provided that the prohibitions did not apply to Tongass IRAs for which a notice of availability of a DEIS allowing road construction, reconstruction and the cutting, sale, or removal of timber from IRAs was published in the Federal Register prior to the January 12, 2001 date of publication of the Roadless decision in the Federal Register. (66 Fed. Reg. at 3254). There was no explanation of how this temporary supply of timber would affect the Forest Service's long term

obligation of TTRA § 101 that it retain the ability to exercise its discretion to meet market demand.

35. The Final 2001 Roadless Rule does not provide an exception for, or even discuss, existing hydropower or future hydropower opportunities on the Tongass, even though hydropower has been extensively used by communities in the Tongass for over 100 years.

36. There are at least 17 known hydropower sites of importance to public utilities in Southeast Alaska which cannot be accessed by the road needed to construct them solely because of the failure of the Final 2001 Roadless Rule to allow access to them.

37. The Final 2001 Roadless Rule expressly refused to provide an exception for access to new leasable minerals “because of the potentially significant impacts that road construction could cause to inventoried roadless areas,…” (66 Fed. Reg. at 3265). However, there is no explanation why these impacts would be any different than the impacts caused by accessing locatable minerals.

38. By prohibiting future mineral leasing in IRAs¹⁰ the Final 2001 Roadless Rule prohibits the road construction and tree cutting needed to access geothermal sites for which a lease had not been in existence on January 12, 2001. There are an unknown number of geothermal power sites on the Tongass which cannot be accessed by road to construct them solely because of this prohibition in the Final Roadless Rule.

¹⁰ 66 Fed. Reg. at 3265.

39. The Final 2001 Roadless Rule makes no exceptions for the development and construction within IRAs of the power lines needed to transmit hydro power, geothermal power, biomass or wind power from future sites to communities and makes no exception to allow such power lines to cross IRAs.

40. In the Final 2001 Roadless Rule Defendants certify that the benefits and costs of the Rule had been weighed in accordance with Executive Order 12866 (Regulatory Planning and Review) and the Small Business Regulatory Enforcement and Fairness Act (5 U.S.C. 800).¹¹ Defendants acknowledged that although the benefits and costs of the Rule were not “quantifiable,” they believed “the benefits of the rule outweigh the costs.”¹² In applying the Rule to the National Forests in Alaska Defendants analysis did not consider: (i) Congress’ finding in ANILCA § 101 (d) that it had sufficiently balanced resource and environmental values in Alaska; (ii) the impact of the Rule on hydropower, geothermal power, and other renewable energy resources on the Tongass; or (iii) the impact of the Rule on high diesel costs to rural villages in Southeast Alaska.

41. In 2001 the State of Alaska litigated the Final Roadless Rule on the ground, among others, that its application to the national forests in Alaska violated ANILCA § 1326 (a) (the “no more” clause) and TTRA § 101 (the requirement that the Forest Service seek to meet market demand for timber on the Tongass).

42. On June 10, 2003 the State of Alaska and the Department of Justice settled the Roadless litigation. In Paragraph 1.B. of the Settlement Agreement the Defendants agreed to publish in the Federal Register and Advanced Notice of Proposed

¹¹ 66 Fed. Reg. at 3267.

¹² *Ibid.*

Rulemaking (APRN) “to exempt both the Tongass and Chugach National Forests from application of the Roadless Rule.” Defendants also agreed to publish an interim rule temporarily exempting the Tongass until the new rule was effective.

43. On July 14, 2003, the U.S. District Court for the District of Wyoming ruled that the 2001 Roadless Decision violated NEPA and the Wilderness Act and invalidated the rule pursuant to the APA. *Wyoming v. United States Department of Agriculture* 277 F.Supp.2d 1197, 1238 (D. Wyo. 2003).

44. On October 30, 2003, the Forest Service published a supplemental information report (“SIR”) concluding that “no significant new information or changed circumstances existed that required the preparation of a supplemental [EIS] before making the decision to adopt the proposed rule to exempt the [Tongass] from the prohibitions of the roadless rule or select another alternative from the roadless rule’s environmental impact statement.”

45. The SIR specifically considered three new circumstances: 1) the Tongass was being managed under the 1997 Tongass Forest Plan ROD instead of the 1999 ROD, as contemplated by the 2000 Roadless Rule FEIS; 2) the continuing decline in timber harvest levels and associated employment since the Roadless Rule FEIS was published; and 3) a proposed land exchange with Sealaska Corporation. After considering the above circumstances, the SIR concluded that “the decision-making picture” was not substantially different than it was at the time of the Roadless Rule was adopted in January 2001, and that no additional environmental analysis was required.

46. Defendants promulgated an interim rule, 36 C.F.R. 294.14 (d), temporarily exempting the Tongass from the Roadless Rule (68 Fed. Reg. 75,136 (Dec.

30, 2003)). In so doing, the Secretary acknowledged that the 2001 Roadless Rule ROD had concluded that ensuring lasting protection of roadless values outweighed socioeconomic costs to local communities. The Secretary also stated that the Tongass Exemption best embodied “the letter and spirit of congressional direction” as expressed in ANILCA and the TTRA (68 Fed. Reg. 75,136, 75,142 (Dec. 30, 2003)).

47. In explaining why it was exempting the Tongass from the Roadless Rule in 2003 after selecting the “Tongass Not Exempt” alternative in the 2001 ROD, the Secretary stated that although the 2001 Roadless Rule ROD had concluded that national roadless values outweighed socioeconomic costs to communities, the Forest Service now believed that: “[C]onsidered together the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule’s prohibitions to the Tongass, all warrant treating the Tongass differently from the national forest outside Alaska” (*Id.* at 75,139).

48. In exempting the Tongass in 2003, the Secretary found: “Because most Southeast Alaska communities are nearly surrounded on land by inventoried roadless areas of the Tongass, the roadless rule significantly limits the ability of communities to develop road and utility connections that almost all other communities in the United States take for granted.” (*Id.* at 75,137).

49. On May 13, 2005 the Forest Service promulgated the so called States Petition Rule, which eliminated the national Roadless Rule for managing roadless areas. Management of roadless areas reverted to the prior system by which the Forest Service administratively designated roadless areas, and determined the mix of multiple

uses authorized in such roadless areas, by individual forest plan. The State Petition Rule added an option by which a state could petition the USDA to alter the level of protection afforded by the forest plan for roadless area on National Forest Lands within that state. (70 Fed. Reg. 25661).

50. In September 2006 the State Petitions Rule was enjoined on NEPA and Endangered Species Act grounds, but the 2003 interim rule exempting the Tongass from the 2001 Roadless Rule was reinstated by the Court in *California v. United States Department of Agriculture*, 459 F.Supp.2d 874, 915-916 (N.D. Cal.). The court did not review or rule on the merits of the 2001 Roadless Rule.

51. In *California ex. rel. Lockyer v. United States Department of Agriculture*, 575 F.3d. 999 (9th Cir. 2009), the 9th Circuit upheld the District Court's decision to enjoin the States' Petition Rule and reinstate the 2001 Roadless Rule, and to maintain the 2003 Tongass Exemption.

52. In August 2008 the District Court for the District of Wyoming ordered a nationwide injunction of the 2001 Clinton Administration Roadless Rule, finding that it violated the Wilderness Act and NEPA (*Wyoming v. U.S. Dep't of Agric.*, 570 F.Supp.2d 1309, 1352, 1355 (D. Wyo. 2008)). This decision is now on appeal to the Tenth Circuit Court of Appeals. No court in the Ninth Circuit has ever ruled on the merits of the 2001 Roadless Rule.

53. On May 28, 2009 the Secretary of Agriculture issued Memorandum 1042-154, which reserves "to the Secretary the authority to approve or disapprove road construction or reconstruction and the cutting, sale, or removal of timber" from inventoried roadless areas, including the 9.3 million acres of inventoried roadless areas

on the Tongass National Forest. As a result of this directive, any decision regarding a “significant action” in a roadless area, such as obtaining a mining permit in a new area, building or reconstructing or upgrading an existing road or trail or RS-2477, harvesting timber, cutting timber or building a road in a utility corridor - must obtain final approval from the Office of the Secretary.

54. On May 28, 2010 the Secretary signed a memorandum renewing the interim directive for one more year. A second one year extension was issued on May 30, 2011 by Memorandum 1042-156.

55. On December 22, 2009 the Organized Village of Kake and other plaintiffs filed a complaint against the Tongass Exemption on the ground that its adoption violated the Administrative Procedures Act because it was arbitrary and capricious and that its adoption was in contravention of the National Environmental Policy Act.

56. On March 4, 2011 the District Court for the District of Alaska vacated the Tongass Exemption and reinstated the 2001 Roadless Rule’s application to the Tongass National Forest on the ground that the promulgation of the Tongass Exemption was arbitrary and capricious because the reasons proffered by the Forest Service in its support were implausible, contrary to the evidence in the record, and contrary to Ninth Circuit precedent.¹³ Judgment was entered in this case on May 24, 2011.

¹³ Organized Village of Kake, *supra.*, Order and Opinion at page 25.

First Claim
(APA)

57. Plaintiff Intervenors repeat and incorporate by reference the allegations of Paragraphs 1 through 56 of this complaint.

58. An agency's action is arbitrary and capricious if:

- a. It fails to consider an important aspect of a problem;
- b. The agency offers an explanation for the decision that is contrary to the evidence;
- c. The agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise; or
- d. The agency's decision is contrary to governing law.

59. "When an agency's new policy rests upon factual findings that contradict those which underlay its prior policy a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."¹⁴

60. The stated Purpose and Need justifying the Roadless Rule is that:

- a. "[t]his final rule addresses these needs [long-term loss of roadless area values and characteristics; budget constraints prevent the agency from managing its road system to the safety and environmental standards to which it was built; and national concern over roadless

¹⁴ Organized Village of Kake, *supra.*, Order and Opinion at page 22. (quoting *F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009)).

area management] in the context of a national rulemaking.”¹⁵

- b. “At the national level, Forest Service officials have the responsibility to consider the ‘whole picture’ regarding the management of the National Forest System, including inventoried roadless areas. Local land management planning efforts may not always recognize the national significance of roadless areas and the values they represent in an increasingly developed landscape.”¹⁶

61. This “national ‘whole picture’” need for the Roadless Rule is implausible, contrary to the evidence, and contrary to the law when applied to the National Forests in Alaska. It fails to distinguish, or even recognize, Title VII of ANILCA passed by Congress in 1980 or the Tongass Timber Reform Act of 1990 (TTRA).¹⁷ Because these were Acts of Congress the roadless characteristics of the National Forests in Alaska were considered at the highest national policymaking level – there was nothing that the Forest Service could add without usurping Congress’s authority, because:

- a. Congress specifically made it clear that its judgment on this issue was not to be second guessed by the Forest Service. ANILCA § 708 (b)(4) specifically provides:

¹⁵ 66 Fed. Reg., *supra.*, at 3244.

¹⁶ 66 Fed. Reg., *supra.*, at 3246.

¹⁷ 16 U.S.C. § 539d. P.L. 101-626; 104 STAT. 4426.

“unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of the National Forest Systems lands in the State of Alaska for determining their suitability for inclusion in the National Wilderness Preservation System.”

- b. ANILCA § 101 (d) asserts: “[t]his Act provides sufficient protection for the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska, ... ;” and “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 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.”

62. The stated Purpose and Need of the 2001 Roadless Rule as applied to the National Forests in Alaska is implausible, contrary to the evidence, and contrary to the law. Congress designated Wilderness areas in the Tongass National Forest and the Chugach National Forest in ANILCA. Congress made additional Wilderness and LUD

II (Roadless) area designations in the Tongass in the TTRA. Congress specifically told the agency in ANILCA not to act, reserving such land “designation and disposition” in the National Forests in Alaska to itself. Congress expressly directed the Defendants not to conduct another roadless area review and evaluation in the National Forests in Alaska. Accordingly, the 2001 Roadless Rule is arbitrary and capricious as applied to the National Forests in Alaska and not in accordance with law. For these reasons it violates the APA.

63. Another stated purpose and need for the Rule is because “[l]ocal land management planning efforts may not always recognize the cumulative national significance of inventoried roadless areas and the values they represent, especially given the increasing development of the nation’s landscape.” (FEIS at 1-14 through 1-15). This is arbitrary and capricious because it is contrary to the evidence as applied to the Tongass. In ANILCA, enacted in 1980, Congress validated the March 1979 Tongass Land Management Plan by designating as Wilderness only those areas recommended by the Forest Service Region 10 March 1979 “local land management planning effort.”

64. The 2001 Final Rule fails to mention or consider ANILCA § 708 (b) (4) or to attempt to explain why it does not apply to the 2001 Roadless Rule. It follows, that by including the National Forests in Alaska in the 2001 Final Rule, the Forest Service failed to consider an important aspect of the problem and thus, such inclusion is arbitrary and capricious and is contrary to governing law, including the APA.

65. Hydropower has been used as an energy source on the Tongass for over 100 years. The 2001 Roadless Rule is arbitrary and capricious as applied to the

Tongass because it did not consider “an important aspect of the problem” – namely, how the blanket prohibition on road construction would affect hydropower development in Southeast Alaska.

- a. There are at least 17 proposed projects that will be affected by the prohibition on road construction and tree cutting. Because IRAs cover 57% of the Tongass National Forest in addition to the 35% that is currently set aside in Monuments and Wilderness areas, 92% of the Tongass National Forest is now set aside from hydropower development.
- b. Hydroelectric projects are major construction projects that require the use of heavy machinery and equipment. The generators at Tyee, for example, weigh 30 tons. This requires a road for access. A hydropower project cannot be constructed with helicopters alone. Because the 2001 Roadless Rule prohibits road construction as well as tree cutting, no new hydroelectric projects will be built in IRAs.

66. There is no mention or consideration of the impact that the Rule’s prohibition on road construction in IRAs will have on hydropower construction, transmission line construction, or the maintenance of each in the portion of the Rule that discusses the Tongass. Because there is no mention of new utilities, or any mention of hydropower, the 2001 Roadless Rule did not consider or allow an exception for such

development. Accordingly, “an important aspect of the problem” was not considered by the Rule, which makes it arbitrary and capricious as applied to the National Forests in Alaska.

67. There is no mention or consideration of the impact on the Tongass that prohibiting road construction will have on construction of geothermal plants, transmission line construction to geothermal plants, or the maintenance of each. Because there is no mention of new utilities, or any mention of geothermal power, the 2001 Roadless Rule did not consider or allow an exception for such development. Accordingly, “an important aspect of the problem” was not considered by the Rule which makes it arbitrary and capricious as applied to the National Forests in Alaska.

68. There is no mention or consideration of the impact on the Tongass that prohibiting road construction will have on construction of wind power turbines, transmission line construction to wind power generation, or the maintenance of each. Because there is no mention of new utilities, or any mention of wind power, the 2001 Roadless Rule did not consider or allow an exception for such development. Accordingly, “an important aspect of the problem” was not considered by the Rule, which makes it arbitrary and capricious as applied to the National Forests in Alaska.

69. The 2001 Final Roadless Rule allows access to locatable minerals, but denies access to new leases for minerals subject to the Mineral Leasing Act of 1920:¹⁸ “because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas.”¹⁹ There is no explanation why the access

¹⁸ 66 Fed. Reg. *supra.*, at pages 3255-3256.

¹⁹ *Ibid.*, at page 3256.

impacts on IRAs associated with locatable minerals are different from the access impacts on IRAs associated with leasable minerals.

70. The 2001 Roadless Rule is arbitrary and capricious as applied to leasable minerals on the National Forests in Alaska because it provides no explanation for its different policies for activities having the same effects on the roadless character of the Tongass. Moreover, the 2001 Roadless Rule violates the APA because it fails to consider an important aspect of the problem and the reason it does offer is implausible.

71. Changes in Defendants' decision on how to apply the Rule to the Tongass were made during the 2001 Rulemaking process without adequate explanation. The 1999 interim suspension on road construction in the National Forests excluded the Tongass, but included the Chugach.²⁰ The DEIS exempted the Tongass, the FEIS deferred the Tongass for four years, and the ROD made the 2001 Rule immediately applicable to the Tongass, based on the assertion that over 800 MMBF of timber was available to the timber industry – a fact that is not now the case. Nothing on the ground had changed between 2000 and 2001 – the agency just changed its mind:

- a. In referring to its decision of whether or not to exempt the Tongass, which was answered “yes” in the 1999 interim suspension; “determine in 5 years” in the Rule’s DEIS; and “no, but defer implementation until April 2004)” in the FEIS, the Forest Service asserts: “Social and economic considerations were key factors in analyzing those alternatives, along with the unique and

²⁰ 64 Fed Reg. 7290 (1999).

sensitive ecological 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.” However, there is no explanation of what the social and economic considerations were or what about such considerations changed in reaching a different conclusion.²¹

- b. There is no mention of how any resource or industry other than timber is affected by the decision changes. Thus, not only is the Rule arbitrary and capricious because it failed to consider important aspects of the problem (such as the Rule’s impacts on hydropower development, geothermal power development, and mining), it is arbitrary and capricious because it failed to discuss how the Forest Service’s decisional changes affected such development.

72. The reason given in the 2001 Final Rule to justify the immediate application of the Roadless Rule to the Tongass is no longer valid. The 2001 Final Rule asserts:

The final rule applies immediately to the Tongass National Forest, but adopts a mitigation measure that both assures long term protection and a

²¹ 66 Fed. Reg. *supra.*, at pages 3254-3255.

smooth transition for forest dependent communities. The final rule provides that the prohibitions do not apply to road construction, reconstruction, and the cutting, sale or removal of timber from inventoried roadless areas on the Tongass National Forest where a notice of availability for a draft environmental impact statement for such activities has been published in the Federal Register prior to the date of publication of this rule in the Federal Register. This mitigation measure allows an adjustment period for the timber program in Southeast Alaska, but will also assure more certain long-term protection of the Forest's unique ecological values and characteristics.²²

73. The foregoing Forest Service justification for changing its policy in the 2001 ROD to immediately apply the Roadless Rule to the Tongass is arbitrary and capricious because it is not supported by the evidence.

- a. A notice of availability for a DEIS for a timber project now eleven years old does not protect the timber industry in 201- it is implausible and contrary to the evidence.
- b. Because hydropower projects, geothermal projects, and mining projects are not even discussed, there is no evidence that the so called "mitigation measure" even addresses the key issues that adversely impact

²² 66 Fed Reg. *supra.*, at page 3254.

Southeast Alaska communities – the mitigation fails to consider important aspects of the problem .

- c. There is thus not only no evidence to support Defendants’ assertion quoted in Paragraph 72, there is no explanation to justify the Forest Service’s change in policy. Accordingly, the immediate application of the Rule to the Tongass is arbitrary and capricious on both counts.

74. The failure of the Defendants to consider: (i) Congress’ finding in ANILCA § 101 (d) that it had sufficiently balanced resource and environmental values in Alaska; (ii) the impact of the Rule on hydropower and other renewable energy resources on the Tongass; or (iii) the impact of the Rule on high diesel costs to rural villages in Southeast Alaska when weighing the costs and benefits of the Rule as required by Executive Order 12866 (Regulatory Planning and Review) and the Small Business Regulatory Enforcement and Fairness Act (5 U.S.C. 800) was arbitrary and capricious because it failed to consider important aspects of the problem and is contrary to the evidence.

75. The above actions by Defendants were arbitrary and capricious, an abuse of discretion, and not in accordance with or in observance of law within the meaning of APA, 5 U.S.C. § 706(2), all of which has caused and will continue to cause immediate, direct, adverse and irreparable harm to the State of Alaska.

SECOND CLAIM
(ANILCA)

76. Plaintiff Intervenors repeat and incorporate by reference the allegations of Paragraphs 1 through 75 of this complaint.

77. ANILCA § 708 (b)(4) provides:

unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of the National Forest System lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.

- a. The Forest Service admits in its 2001 Final Rule that it conducted a nationwide review of each National Forest, which included the Tongass and Chugach National Forests, to determine the National Forest lands that should be “protected” by the Roadless Rule. (66 Fed. Reg. at 3246).
- b. In *Wyoming v. United States Department of Agriculture*,²³ the Court found that roadless area designation was as restrictive, or more restrictive, than Wilderness: “[A] comparison of the uses permitted in wilderness areas and those permitted in inventoried roadless areas leads inescapably to the conclusion that

²³ 570 F.Supp.2d. 1309, 1349-1350 (D. Wyo. 2008).

the two types of areas are essentially the same.

(Citations omitted.) *In fact, uses in inventoried roadless areas are even more restricted than those permitted in congressionally designated wilderness areas.* For example, a road could be constructed in a wilderness area to ‘control fire, insects, and diseases’, whereas a road could be constructed in an inventoried roadless area in the ‘case of an imminent flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property.’” (Citations omitted.) (Emphasis added).

- c. Notwithstanding Congress’s clear assertion in ANILCA § 101 (d) that the actions it had taken in ANILCA “obviated” the need to designate more areas of Alaska for protection and the clear direction in ANILCA § 708 (b) (4) not to repeat the statewide Roadless Area Review and Evaluation on National Forests in Alaska, Defendants, in fact, violated ANILCA and expressly usurped Congressional authority by designating new areas of the Tongass and Chugach National Forest as part of the inventoried roadless system, all of which is in violation of ANILCA § 708 (b) (4).

78. By ANILCA § 101(d) Congress determined that the land set asides it had made resulted in the appropriate balance between protection and development. By ANILCA § 1326(a) Congress required that because of this, Congress itself had to approve by joint resolution any further designation and disposition of public land in excess of 5,000 acres that would no longer be available for “more intensive use and disposition.” (ANILCA § 101 (d)).

- a. Application of the 2001 Roadless Rule to the National Forests in Alaska makes most of the Tongass and Chugach National Forests unavailable to timber harvest, to hydropower development, to geothermal power development, to wind power development, to the construction of power transmission lines, to mining, or to any other development that will require roads.
- b. Because the 2001 Roadless Rule is a regulation, it has the same effect as a withdrawal by public land order.
- c. Accordingly, ANILCA § 1326 (a) requires Defendants to obtain a Congressional joint resolution of approval for a withdrawal of more than 5,000 acres to continue to apply the Rule to the National Forests in Alaska for more than one year.
- d. Because Defendants failed to obtain a Congressional joint resolution of approval for the application of the

2001 Roadless Rule to the National Forests in Alaska, the inventoried roadless area withdrawals on the Tongass and Chugach violate ANILCA §1326(a) and should be set aside.

79. ANILCA § 1326 (b) prohibits a “study 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 similar or related purposes*” unless authorized by Congress. (Emphasis added).

- a. The 2001 Final Rule admits that the Roadless rulemaking process began with such a study: “[t]he 58.5 million acres of inventoried roadless areas used as the basis for this analysis were identified from the most recent analysis for each national forest or grassland, including RARE II, land and resource management planning, or other large scale assessments such as the Southern Appalachian Assessment.” (66 Fed. Reg. at page 3246).
- b. The 2001 Final Rule admits further that: “Adoption of this final rule ensures that inventoried roadless areas will be managed in a manner that *sustains their values now and for future generations.*” (66 Fed. Reg. at page 3247).

- c. The roadless system created by the 2001 Roadless Rule has a “similar or related purpose” to the conservation systems mentioned in ANILCA § 1326 (b).
- d. Accordingly, Defendants violated ANILCA § 1326 (b) by conducting Roadless Area Rulemaking on the National Forests in Alaska.

80. By setting aside without Congressional authorization 9.6 million acres of IRAs in the Tongass National Forest and 5.4 million acres of IRAs in the Chugach National Forest, Defendants have violated §§ 101, 708, and 1326 of ANILCA. Application of the 2001 Roadless Rule to the National Forests in Alaska was arbitrary and capricious, an abuse of discretion and not in accordance with or in observance of law within the meaning of the APA, 5 U.S.C. § 706(2) and has caused and will continue to cause immediate, direct, adverse and irreversible harm to the Plaintiff Intervenors.

**THIRD CLAIM
(Wilderness Act)**

81. Plaintiff Intervenors repeat and incorporate by reference the allegations of paragraphs 1 through 80 of this complaint.

82. The Wilderness Act reserves exclusively to Congress the authority to designate wilderness areas. 16 U.S.C. § 1131(A). The Executive Branch makes recommendations to Congress, which become effective “only if so provided by an Act of Congress.” 16 U.S.C. § 1132(b).

83. “Wilderness” is defined as an area, generally 5,000 acres or more, “untrammeled by man,” and as “undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation.” 16 U.S.C. § 1131(c). Commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations generally are prohibited in wilderness areas. 16 U.S.C. § 1133(c).

84. The 2001 Roadless Rule admits that it mandates management of IRAs in the National Forests in Alaska as *de facto* wilderness, without an act of Congress: “Adoption of this final rule ensures that inventoried roadless areas will be managed in a manner that *sustains their values now and for future generations.*” (66 Fed. Reg. at page 3247).

85. In *Wyoming v. United States Department of Agriculture*²⁴ the Court held that “through the promulgation of the Roadless Rule” the Forest Service “designated 58.5 million acres of National Forest land as *de facto* wilderness areas in violation of the Wilderness Act.” The Court asserted three reasons for this finding, which apply equally to the Final Rule’s inclusion of the TNF and CNF:

- a. “First, as the Forest Service itself seems to acknowledge, a roadless forest is synonymous with the Wilderness Act’s definition of ‘wilderness.’”²⁵

²⁴ 570 F.Supp.2d. 1309, 1349-1350 (D. Wyo. 2008).

²⁵ In *Kootenai Tribe of Idaho, supra.*, 313 F.3d at 1121 and at 1124 the Ninth Circuit twice referred to roadless as wilderness. “Roadless areas in our national forests also help conserve some of the last unspoiled wilderness in our country.” “There can be no serious argument that restrictions on human intervention in these wilderness areas will not result in immeasurable benefits from a conservationist standpoint.”

- b. “Second, a comparison of the uses permitted in wilderness areas and those permitted in inventoried roadless areas leads inescapably to the conclusion that the two types of areas are essentially the same. (Citations omitted.) ***In fact, uses in inventoried roadless areas are even more restricted than those permitted in congressionally designated wilderness areas.*** For example, a road could be constructed in a wilderness area to ‘control fire, insects, and diseases’, whereas a road could be constructed in an inventoried roadless area in the ‘case of an imminent flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property.’ (Citations omitted.) (Emphasis added).
- c. “Third, the fact that most, if not all, of the inventoried roadless areas were based on the RARE II inventories, which were designed to recommend wilderness areas to Congress, further evidences that the Forest Service usurped congressional authority. One of the stated purposes of the Wilderness Act was to assure that no future administrator could make wholesale designations of additional wilderness areas in which use could be limited. Chief Dombeck, acting at the behest of

President Clinton, acted directly contrary to this purpose.”

86. The 2001 Roadless Rule violates the Wilderness Act because it usurps authority on which Congress has reserved sole authority to act. Moreover, this action is arbitrary and capricious, an abuse of discretion, and not in accordance with or in observance of law, within the meaning of the APA, 5 U.S.C. §706 (2), and has caused, and will continue to cause, immediate, direct, adverse and irreversible harm to Plaintiff Intervenors.

**FOURTH CLAIM
(TTRA)**

87. Plaintiff Intervenors repeat and incorporate by reference the allegations of Paragraphs 1 through 86 of this complaint.

88. In 1980, Congress directed in ANILCA § 705 that the Forest Service take certain actions in order to maintain timber harvest levels and related employment levels existing at the time of passage of ANILCA. In 1990, Congress expressly directed in TTRA § 101 that the Forest Service seek to provide a volume of timber sufficient to meet the annual and planning cycle market demand for Tongass timber.

89. Congress also directed, in § 105 (b) of TTRA, that the Forest Service seek to provide a supply of timber from the Tongass National Forest to those purchasers qualifying as “small business concerns” under the Small Business Act, as amended (15 U.S.C. § 631 *et seq.*).

90. Although the Ninth Circuit Court of Appeals determined that this language was “hortatory,” it nevertheless requires “the Forest Service ... [to] at least consider market demand and seek to meet market demand.” *Natural Res. Def. Council v. United States Forest Service* 421 F.3d 797,809 (9th Cir. 2005).

91. In the 2008 Amended TLMP ROD the Regional Forester primarily relied upon a market demand projection by the Pacific Northwest Research Station (PNRS) (See 2008 Amended TLMP ROD at pages 31-35.) The PNRS provided four different scenarios of market demand. The Regional Forester adopted the expanded lumber scenario as the measure of market demand for the period 2007 – 2022. **It ranged from 61.9 MMBF in 2007 to 187.1 MMBF in 2022.** See *Id.* at page 33. (Emphasis added).

92. The Roadless Rule FEIS admits that applying the Roadless Rule to the Tongass would effectively prevent the Forest Service from exercising its discretion to meet the market demand as determined by the 2008 Amended TLMP ROD: “Relative to current industry operations and projected timber demand, the prohibition alternatives may result in a harvest shortfall of approximately 73 to 77 MMBF of timber annually. In the short term the immediate effect of supply shortages is likely to be intense competition and bidding activity for timber sales that are made available. As time goes by, competition will drive out the least efficient operations, thereby reducing mill capacity and the associated long term demand for Tongass timber. **In the long term, a sustained level of 50 MMBF may support some but not all of the existing and planned timber processing facilities in the region.**” (FEIS at 3-378 to 3-379). (Emphasis added).

93. By deliberately setting aside so much commercial forest land pursuant to the 2001 Roadless Rule that the ASQ for the Tongass National Forest is reduced to 50 MMBF, Defendants have violated TTRA § 101, and effectively negated and repealed TTRA § 101, by eliminating the ability of the Forest Service to even consider the option of offering sufficient timber to meet annual and planning cycle market demand.

94. Defendants' failure to maintain their discretion to analyze, determine and seek to meet the market demand for timber from the Tongass violates TTRA and is arbitrary and capricious, and abuse of discretion and not in accordance with or in observance of law within the meaning of the APA, 5 U.S.C. § 706(2), and has caused and will continue to cause immediate, direct, adverse and irreversible harm to Plaintiff Intervenor.

FIFTH CLAIM

(NFMA)

95. Plaintiff Intervenor repeats and incorporates by reference the allegations of Paragraphs 1 through 94 of this complaint.

96. Under the NFMA each national forest is to be managed in accordance with a comprehensive forest plan. 16 U.S.C. § 1604. All plans, projects and actions that take place on a national forest must be consistent with the forest plan. Any significant amendment to a forest plan may be adopted only after analysis and public comment consistent with the provisions of the NFMA. 16 U.S.C. § 1604 (d) and (f).

97. The Roadless Rule is inconsistent with the 2008 Amended TLMP, which allows hydro development, geothermal development, and timber harvest which are prohibited within most of the 9.6 million acres of IRAs on the Tongass. The 2001

Roadless Rule would provide an ASQ on the Tongass of only 50 MMBF (FEIS 3-379-380), which is insufficient to allow the Forest Service to exercise its discretion to supply the market demand for timber as determined by the 2008 Amended TLMP ROD at pages 31-35. Application of the Roadless Rule to the Tongass is a *de facto* major amendment to the 2008 Amended TLMP without meeting the requirements of 16 U.S.C. § 1604 (d) and (f).

98. Because Defendants have applied the Roadless Rule to the 2008 Amended TLMP without following the process set out in 16 U.S.C. § 1604 (d) and (f), they have violated the NFMA. This action is arbitrary and capricious, an abuse of discretion, and not in accordance with law within the meaning of the APA, 5 U.S.C. § 706 (2), and has caused and will continue to cause immediate, direct, adverse and irreversible harm to Plaintiff Intervenors.

99. By adding 9.6 million acres of IRAs (which are *de facto* Wilderness Areas) to the 5.6 million acres of Congressionally designated Wilderness and 580,000 acres of Congressionally designated LUD II areas application of the 2001 Roadless Rule to the Tongass results in 15.78 million acres of the 16.9 million acre Tongass National Forest thereby elevating one multiple use over the other multiple uses in violation of the NFMA. *Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008) (en banc).

SIXTH CLAIM

(NEPA)

100. Plaintiff Intervenors repeat and incorporate by reference the allegations of Paragraphs 1 through 99 of this complaint.

101. NEPA requires federal agencies to prepare an environmental impact statement (EIS) when a federal action has a significant affect on the quality of the human environment. 42 U.S.C. § 4332 (C).

102. NEPA provides that federal agencies must, to the fullest extent possible, “[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” [42 U.S.C. § 4332](#) (2) (E). The alternatives section is “the heart of the environmental impact statement.” [40 C.F.R. § 1502.14](#).

103. Notwithstanding the fact that the Tongass National Forest is the nation’s largest national forest and is nearly totally roadless, Defendants limited Tongass alternatives to those that precluded road construction based on the premise that “[l]ocal land management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape.”²⁶ Defendants produced no evidence in the FEIS to support this premise with respect to the National Forests in Alaska, which is thus arbitrary and capricious and resulted in an insufficient range of alternatives (such as the inclusion of an exemption for hydropower construction, geothermal plant construction, wind turbine construction, and transmission lines distributing each form of energy).

104. As applied to the Tongass National Forest, the 2001 Roadless Rule FEIS failed to consider a reasonable range of alternatives, because it collapsed the so called Procedural Aspects of the 2001 Roadless Rule (in which it was going to consider “ecological and social characteristics of inventoried roadless areas” during TLMP) into

²⁶ 66 Fed Reg. at 3246.

the Roadless Rule. As a result, alternatives, such as mineral withdrawal exemptions, were eliminated from consideration in the DEIS because they were going to be evaluated in the Procedural Aspect of the Roadless Rule. The Defendants failed to reevaluate such eliminated alternatives in the FEIS. Defendants' actions were arbitrary and capricious and resulted in an insufficient range of alternatives being considered.

105. Defendants violated NEPA by arbitrarily and capriciously failing to prepare a SEIS at the time it promulgated the 2001 Roadless Rule because it had made at least two substantial changes between the DEIS and the FEIS: 1) the FEIS eliminated all of the procedural aspects of the Roadless Rule by incorporating those rules into the Planning Regulations; and 2) the Forest Service limited the "stewardship exception in the 2001 Final Rule to "small diameter timber" which it did not define, and for which change it provided no reason.

106. In applying the Roadless Rule to the Tongass Defendants failed to adequately consider the cumulative impacts on the human environment of their coordinated strategy to simultaneously promulgate the Roadless Rule, new Planning Regulation for Land Management Plans, the Road Management Rule, and the Transportation policy.

107. The above actions of Defendants were arbitrary and capricious, an abuse of discretion, and not in accordance with or in observance of law within the meaning of the APA, 5 U.S.C. § 706 (2), and has caused and will continue to cause immediate, direct, adverse and irreversible harm to Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff Intervenors pray for judgment as follows:

- a. A declaration that the 2001 Roadless Area Conservation Final Rule and Record of Decision violate the APA.
- b. A declaration that the 2001 Roadless Area Conservation Final Rule and Record of Decision violate ANILCA.
- c. A Declaration that the 2001 Roadless Area Conservation Final Rule and Record of Decision violate the Wilderness Act.
- d. A declaration that the 2001 Roadless Area Conservation Final Rule and Record of Decision violate the TTRA.
- e. A declaration that the 2001 Roadless Area Conservation Final Rule and Record of Decision violate the NFMA.
- f. A declaration that the 2001 Roadless Area Conservation Final Rule and Record of Decision violate NEPA.
- g. A declaration that the 2001 Roadless Area Conservation Final Rule and Record of Decision violate the Regulatory Flexibility Act, EO 12866, and the Small Business Regulatory Enforcement and Fairness Act.
- h. An Order permanently enjoining the Defendants from applying the 2001 Roadless Area Conservation Final Rule and Record of Decision to the Tongass National Forest or the Chugach National forest.
- i. An award of the costs incurred by Plaintiff Intervenors and such other fees as may be allowed by applicable law.
- j. Such other relief as the Court deems appropriate.

DATED this 19th day of August 2011, at Juneau, Alaska.

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TABLE OF ACRONYMS AND ABBREVIATIONS

Roadless decision	Roadless Area Conservation Final Rule and Record of Decision.
TLMP	Tongass Land Management Plan
CLMP	Chugach Land Management Plan
APA	Administrative Procedure Act
NFMA	National Forest Management Act
NEPA	National Environmental Policy Act
ANILCA	Alaska National Interest Lands Conservation Act.

TTRA	Tongass Timber Reform Act
ASQ	allowable sale quantity
MMBF	million board feet
LUD II	Land Use Designation II (Roadless areas)
ROD	Record of Decision
FEIS	Final Environmental Impact Statement
DEIS	Draft Environmental Impact Statement
EA	Environmental Assessment
FONSI	Finding of No Significant Impact.