

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

**MOTION FOR LEAVE TO INTERVENE AS PARTY INTERVENORS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

By this pleading, the above captioned Proposed Plaintiff Intervenors, that consist of Southeast Alaska communities, community organizations, utilities, mining trade associations, forest road contractors, and individuals whose members include many small businesses and individuals engaged in hydroelectric, wind power, and geothermal energy production, mining exploration and development, forest road construction, and recreational users who will be substantially harmed by application of the 2001 Roadless Rule to the National Forests in Alaska,¹ by and through their undersigned legal counsel, and pursuant to Federal Rule of Civil Procedure (FRCP) 24 and Rule 7 of this Court, hereby move to intervene in this action as Plaintiffs. The Proposed Plaintiff Intervenors seek intervention as of right under Rule 24(a) (2) or, alternatively, permissive intervention under Rule 24(b) (2) in the State of Alaska's above captioned litigation against the 2001 Roadless Rule.

¹ 66 Federal Register 3244 January 12, 2001

A proposed Order, proposed Complaint, and Corporate Disclosure Certificate accompany this motion as required by Fed. R. Civ. P. 24(c), LCvR 7(c) and (j), LCvR 7.1. Pursuant to LCvR 7(m), counsel for proposed Plaintiff Intervenors has conferred with counsel for other parties to determine whether they will oppose this motion. Plaintiff's counsel states that the State supports the motion. Defendants' counsel states that the Defendants will provide their position to the Court regarding the proposed intervention once they have reviewed Proposed Plaintiff Intervenors' moving papers.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As it was leaving office on January 12, 2001 the Clinton Administration promulgated the Roadless Rule prohibiting timber harvest and road construction on 58.5 million acres of inventoried roadless areas (IRAs) on National Forests, including the National Forests in Alaska.²

In 2001 the State of Alaska challenged the application of the Roadless Rule to the National Forests in Alaska on the ground that it violated the Administrative Procedures Act (APA) (5 U.S.C. §§ 701-706), the National Forest Management Act (NFMA) (16 U.S.C. § 1601 et seq.), the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.), the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 (16 U.S.C. § 3101 et seq.), the Tongass Timber Reform Act (TTRA) of 1990 (16 U.S.C. 559d; Pub. L. 101-616, 104 Stat. 4430 (November 28, 1990)), the Organic Administration Act (OAA) (16 U.S.C. § 475), the Multiple Use Sustained Yield Act

² 66 Fed. Reg. 3244-3273 January 12, 2001.

(MUSYA) (as amended) (16 U.S.C. §§ 528 to 531), and the Wilderness Act (16 U.S.C. § 1131 et seq.).

In 2003 Alaska settled the case with the Department of Justice. The United States agreed to promulgate a proposed rule which, if adopted, would temporarily exempt the Tongass from the Roadless Rule. It also agreed to publish a separate advance notice of proposed rulemaking seeking comment on whether to permanently exempt the National Forests in Alaska from the Rule.

In December 2003, after conducting additional analysis pursuant to NEPA, the Department of Agriculture promulgated a final rule temporarily exempting the Tongass from the 2001 Roadless Rule. In 2005 it promulgated the State Petitions Rule which applied nationally, including to the two National Forests in Alaska. The Tongass Exemption remained in place until issuance of the State Petitions Rule in 2005.

In September 2006 the District Court of California enjoined the State Petitions Rule on the ground that it violated NEPA and reinstated the 2001 Roadless Rule. However, the Court held that 2003 interim rule exempting the Tongass was reinstated.³ In August 2008 the District Court for the District of Wyoming ordered a nationwide injunction of the 2001 Roadless Rule on the ground that it violated the Wilderness Act and NEPA.⁴ This case is on appeal to the 10th Circuit.

³ *California v. United States Department of Agriculture*, 459 F. Supp.2d 874, 915-916 (N.D. Calif. 2006). In *California ex. Rel. Lockyer v. United States Department of Agriculture*, 575 F.3d. 999 (9th Cir. 2009) the Ninth Circuit upheld the District Court's decisions to enjoin the State Petitions Rule, reinstate the 2001 Roadless Rule, and maintain the Tongass Exemption.

⁴ *Wyoming v. United States Department of Agriculture*, 570 F. Supp. 2d 1309 (D. Wyo. 2008).

In December 2009 the Organized Village of Kake and environmental groups filed an action against the 2003 interim rule that exempted the Tongass from the Roadless Rule. In March 2011 the District Court for the District of Alaska determined that the 2003 interim rule exempting the Tongass violated the APA. On May 24, 2011 the Court issued a judgment which, for reasons explained below, is inconsistent with the requirements of the Roadless Rule. The State of Alaska has filed a notice of appeal of the District Court's May 24, 2011 Judgment with the Ninth Circuit Court of Appeals.

II. LEGAL ISSUES RAISED BY THE ROADLESS RULE

Application of the 2001 Roadless Rule to the National Forests in Alaska, particularly to the Tongass National Forest in Southeast Alaska, has injured the Proposed Plaintiff Intervenors by violating the law in five distinct ways: First, it raises all of the legal issues that caused the District Court for the District of Wyoming to enjoin application of the Rule to the all of the United State's National Forests (except for those in the Ninth Circuit): specifically, 1) it violates NEPA; and 2) it violates the Wilderness Act.⁵

Second, the entire premise of the Roadless Rule, as applied to the National Forests in Alaska, violates the Administrative Procedures Act. The stated Purpose and Need justifying the Roadless Rule is that:

“[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

⁵ *Wyoming v. United States Department of Agriculture*, 570 F. Supp. 2d 1309 (D. Wyo. 2008).

which it was built; and national concern over roadless area management] *in the context of a national rulemaking.*”⁶

“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.”⁷

This “national ‘whole picture’” “purpose and need” for the Roadless Rule is arbitrary and capricious because the Forest Service “relied on factors Congress did not intend it to consider” and offers an explanation that is “so implausible [when applied to the National Forests in Alaska] that it could not be ascribed to a difference in view or the product of agency expertise” and thus violates the Administrative procedures Act when applied to the National Forests in Alaska. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *abrogated on other grounds by Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 375 (2008).

Moreover, there is no mention or acknowledgment in the January 12, 2001 Final Rule and Record of Decision (ROD) of the fact that Congress twice considered the “national ‘whole picture’” management of the Tongass National Forest in Title VII of ANILCA in 1980 and in the Tongass Timber Reform Act of 1990 (TTRA) or why the actions Congress took in these laws was an insufficient consideration of the “national ‘whole’” picture management of the National Forests in Alaska.⁸

Congress specifically made it clear that its judgment regarding designations on the public lands in Alaska, including the National Forests in Alaska, was not to be second guessed or countermanded by the Secretary. For example, ANILCA § 101 (d)

⁶ 66 Fed. Reg., *supra.*, at 3244.

⁷ 66 Fed. Reg., *supra.*, at 3246.

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

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 thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby." Thus, the Forest Service "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem," and offers an explanation that is "so implausible [when applied to the National Forests in Alaska] that it could not be ascribed to a difference in view or the product of agency expertise" and thus violates the Administrative Procedures Act when applied to the National Forests in Alaska. *Lands Council, supra*.

Third, the January 12, 2001 Final Rule and ROD contains no mention of, or explanation why, ANILCA § 708 (b) (4) (prohibiting another roadless area and review on the National Forests in Alaska) and ANILCA § 1326 (a) (prohibiting a withdrawal of more than 5,000 acres of public lands in Alaska without a notice to Congress and a joint resolution of approval within a year of the withdrawal) do not prohibit application of the 2001 Roadless Rule and the roadless area review and evaluation that preceded it to the National Forests in Alaska. 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 regarding the "national 'whole picture'" of lands within the National forests in Alaska without usurping Congress's authority. Thus, application of the 2001 Roadless Rule to the Tongass not only violates ANILCA, it violates the Administrative procedures Act because it is contrary to governing law.

Fourth, notwithstanding the fact that hydropower has been a source of energy on the Tongass for over 100 years, the 2001 Rule and ROD do not mention or discuss the adverse impacts of the Rule's road construction prohibition on hydropower development in the Tongass. Notwithstanding the long known presence of geothermal sites in the

Tongass National Forest there is no discussion of the impact of the 2001 Rule and ROD prohibition on leasing new geothermal sites within the Tongass. Notwithstanding the long known availability of renewable energy opportunities on the Tongass, such as biomass, wind power, and hydrokinetic power, there is no discussion of the impact of the 2001 Rule and ROD on such renewable energy resources. Notwithstanding the fact that there has been more than 100 years of mining on the Tongass, the 2001 Rule and ROD do not discuss the impact of the Rule on exploration and development of new mines in the Tongass. Thus, the 2001 Rule and ROD is arbitrary and capricious because it fails to consider important aspects of applying the 2001 Roadless Rule to the Tongass. *Lands Council, supra*.

Fifth, the justification provided in the January 12, 2001 Rule and ROD for immediately applying the Roadless Rule to the Tongass is that there would be sufficient timber under contract to maintain the timber industry for seven years until the allowable sale quantity (ASQ) dropped to 50 million board feet (MMBF) per year. This justification no longer applies because there is far less timber under contract. Moreover, the justification is inconsistent with the stated need in the 2008 Amended Tongass Land Management Plan (TLMP) for an ASQ of 267 MMBF in order to meet market demand as required by the TTRA. Thus, the Defendants' 2001 justification for immediate application of the 2001 Roadless Rule to the Tongass is arbitrary and capricious because it is contrary to the agency's own more current evidence and, thus, not plausible. *Lands Council, supra*.

All of the foregoing is alleged in detail in the Proposed Complaint attached to this Motion to Intervene.

III. THE PROPOSED PLAINTIFF INTERVENORS

The Proposed Plaintiff Intervenors are injured by application of the 2001 Roadless Rule to the Tongass:

- A. ALASKA ELECTRIC LIGHT & POWER – AEL&P was founded in 1893. 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 hydroelectric project was developed in 1915. The Gold Creek, Salmon Creek, and Annex Creek hydroelectric facilities continue to provide power to the City and Borough of Juneau (CBJ) today.

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.

AEL&P provides power to residential and business customers within the CBJ and interruptible power to the cruise ship docks in the CBJ and to the Greens Creek Mine adjacent to Juneau. As the CBJ's, the cruise ship docks, and the mining companies adjacent to the CBJ's power needs increase, AEL&P is already searching for new sites capable of producing hydroelectric and other renewable energy sources of power. Given the fact that IRAs surround the CBJ, it is highly probable that such hydroelectric and other renewable energy sites necessarily must be located in IRAs.

AEL&P will be harmed by the inability to develop new hydroelectric and other renewable energy projects in IRAs, by the inability to construct roads

from tidewater to such hydroelectric and other renewable energy sites to transport generators and other heavy equipment, and by the inability to construct new transmission lines from such hydroelectric and other renewable energy sites through IRAs to distribute new electric power to the CBJ, to the cruise ship docks, and to the mines in the area adjacent to the CBJ.⁹

Finally AEL&P is harmed because, notwithstanding U.S. Government policies, rules and regulations encouraging the use of renewable energy resources as a means of lowering carbon emissions from the use of fossil fuels, the 2001 Roadless Rule prevents significant renewable energy development on the Tongass and thus denies AEL&P and society the benefit of these positive environmental attributes. (Declaration of Tim McLeod, Exhibit A).

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 hydroelectric facilities. AP&T constructed the 4.5 megawatt Black Bear Lake Hydroelectric Project on Prince of Wales Island in 1995. It built the 4.0 megawatt Goat Lake

⁹ 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.

Hydroelectric Project serving Haines and Skagway, Alaska in 1997, the 2.0 megawatt South Fork Hydroelectric Project in 2006, and the 3.0 megawatt Kasidaya Creek Hydroelectric Project near Skagway in 2008.

AP&T filed a draft license application with the Federal Energy Regulatory Commission and invested \$2 million to construct the 77.4 megawatt Soule River Hydroelectric Project on Portland Canal, nine miles Southwest of Hyder in Southeast Alaska. This project is within an IRA. AP&T has entered a joint venture with Cape Fox Village Corporation to construct the 9.5 MW Mahoney Lake Project to supply hydroelectric power to the Ketchikan Gateway Borough. While the project is on private land the preferred route for the transmission lines to deliver the power to Ketchikan passes through an IRA. AP&T will be harmed by the inability to obtain the necessary permits to develop these projects due to the 2001 Roadless Rule.

AP&T also has a Joint Venture with Haida Energy (HE), which is owned 75% by Haida Corporation and 25% by AP&T. The purpose of this JV is to develop 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. The project is located on private lands owned by Sealaska and Haida Energy. This project will have some excess energy and capacity that could be made available to the Niblack and Bokan Mountain mineral prospects located on POW Island. However, a thirty mile long transmission line would need to be constructed and would impact IRA.

AP&T is harmed by the inability to obtain a Special Use Permit to construct this transmission line due to the 2001 Roadless Rule.

AP&T must continue to develop new hydroelectric and other renewable energy projects in order to provide sufficient power to communities and to mining projects in Southeast Alaska. Given the fact that there are 9.6 million acres of IRAs in the Tongass, it is highly probable that such hydroelectric sites must necessarily be located in IRAs and that power lines needed to distribute that power will need to cross IRAs. AP&T will be harmed by the inability to develop new electric power for communities and for mines at new hydroelectric projects and other renewable energy sites within IRAs, by the inability to construct roads to bring generators and other heavy equipment from tidewater to such sites, and by the inability to cross IRAs with power lines to distribute the power to communities and industries within the Tongass.¹⁰

In addition AP&T's business plan is to bring clean energy technology to Alaska in the form of wind power and hydrokinetic power. The Roadless Rule would preclude such projects in the IRAs along with the transmission lines needed to distribute such power to communities and industries within the Tongass.

¹⁰ 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.

Finally AP&T is harmed because, notwithstanding U.S. Government policies, rules and regulations encouraging the use of renewable energy resources as a means of lowering carbon emissions from the use of fossil fuels, the 2001 Roadless Rule prevents significant renewable energy development on the Tongass and thus denies AP&T and society the benefit of these positive environmental attributes. (Declaration of Robert S. Grimm, Exhibit C).

C. THE CITY OF KETCHIKAN D/B/A KETCHIKAN PUBLIC UTILITIES -

Electric power for Ketchikan, Alaska, is provided by Ketchikan Public Utilities (KPU) which is wholly owned by the City of Ketchikan, a political subdivision of the State of Alaska, a sovereign State of the United States. KPU holds a valid FERC license no. 11841-002 issued March 17, 2009, which expires March 17, 2013. The FERC license authorizes construction of the Whitman Lake Hydroelectric Project. The 2001 Roadless Rule jeopardizes construction of the road and pipeline needed to develop the project under the FERC license.

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.

For example, AP&T has entered a joint venture with Cape Fox Village Corporation to construct the 9.5 MW Mahoney Lake Project to supply

hydroelectric power to Ketchikan. While the project is on private land the preferred route for the transmission lines to deliver the power to Ketchikan passes through an IRA. The City of Ketchikan will be harmed by the inability of AP&T to obtain the necessary permits to develop this project due to the 2001 Roadless Rule.

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.

Seventeen of the twenty-one identified potential hydroelectric power 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. KPU will be harmed by the inability to develop new electric power for Ketchikan at the new, identified hydro projects within IRAs and by the inability to construct roads to bring generators and other heavy equipment from tidewater to such sites in any event.¹¹

The City of Ketchikan is harmed because, notwithstanding U.S. Government policies, rules and regulations encouraging the use of renewable

¹¹ 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.

energy resources as a means of lowering carbon emissions from the use of fossil fuels, the 2001 Roadless Rule prevents significant renewable energy development on the Tongass and thus denies the City of Ketchikan and society the benefit of these positive environmental attributes.

Finally, the City of Ketchikan is harmed by the impacts of the 2001 Roadless Rule upon the timber industry. One of the key economic components of the Ketchikan economy for the last fifty years has been the jobs, equipment sales, and other economic activity generated by timber harvest and associated road building from the Tongass National Forest. The 2001 Roadless Rule will effectively decrease the Allowable Sale Quantity (ASQ) for timber harvest authorized by the 2008 Amended Tongass Land Management Plan (TLMP) from 267 million board feet per annum (MMBF) to 50 MMBF. The 2001 Roadless Rule Final Environmental Impact Statement (FEIS) admits that this reduced ASQ will close mills and cost timber related jobs.¹² This will reduce economic opportunity for Ketchikan businesses and residents and affect the economy of Ketchikan and the tax base of the City which depends on property tax and sales tax for 51% of its annual revenue. (Declaration of Karl Amylon, Exhibit B).

D. KETCHIKAN GATEWAY BOROUGH – (KGB) Plaintiff 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.

¹² 2001 Roadless Rule FEIS at 3-378 to 3-379.

KGB depends upon KPU for power. All of KGB's electric power is currently supplied by Southeast Alaska Power Authority (SEAPA) from 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.

Residents of the KGB are anticipating additional hydroelectric power from the joint venture AP&T has entered with Cape Fox Village Corporation to construct the 9.5 MW Mahoney Lake Project. Although the project is on private land, the preferred route for the transmission lines to deliver the power to Ketchikan passes through an IRA.

The KGB will be harmed if KPU, SEAPA, or the AP&T/Cape Fox Village Corporation Joint Venture is unable to supply KGB's electric power needs by hydroelectric power because the alternative source of such power is diesel generation which costs more and is a source of air pollution. (Declaration of Mayor David Kiffer, Exhibit N).

- 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, energy, and fishing 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 around with twice a week departures from Seattle. With the high fixed costs of operating a barge line, freight volume is key to an efficient operation.

Commercial activity, particularly hydropower development, mining, fishing, and timber harvest, is essential to AML's ability to maintain affordable, frequent, and regular service to Southeast communities.

AML is harmed by the inability of its customers 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. 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 resulting from the reinstatement of the 2001 Roadless Rule on the Tongass National Forest. (Declaration of Everett H. Billingslea, Exhibit M).

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 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. They are now cut off from their investments and precluded from realizing their value.

As a consequence of the District Court's Opinion and Order reinstating the 2001 Roadless Rule¹³ AMA's members' ability to prospect, explore for, and develop new mines on the 9.6 million acres of IRAs on the Tongass will be severely constrained, if not prevented as a practical matter.

While "reasonable access" to locatable minerals is technically authorized in Wilderness and IRAs under 36 C.F.R. Part 228, there are very few mines in Wilderness Areas. Even though the Roadless Rule specifies: "Reasonable rights of access may include, but are not limited to, road construction and reconstruction, helicopters, or nonmotorized access (FEIS Vol. 1, 3-329 to 3-350),¹⁴ the experience of the mining community is that Special Use Permits permitting road access in or near Wilderness Areas are very difficult to obtain.

The same adverse access result is expected in IRAs. For example, in 1977 the Forest Service denied a Special Use Permit to U.S. Borax to construct a road for a bulk sample of 5,000 tons of ore at the Quartz Hill Project, requiring access to be by helicopter. *SEACC v. Watson*, 697 F.2d 1305 (9th Cir. 1983). As the opinion shows, six years later Borax still did not have a permit to build the road needed to move that volume of ore.

Mining exploration requires the drilling of multiple holes to determine from the surface the subsurface characteristics and extent of the mineral resource. Mine development requires site clearing for buildings, tailings piles,

¹³ 66 Fed. Reg. 3244 January 12, 2001.

¹⁴ 66 Fed. Reg. 3244, 3264 January 12, 2001.

mills, and other facilities. The needed level of exploration to develop a mine on the Tongass National Forest would typically require the substantial cutting of trees. Mine development would typically require even significantly more cutting of trees.

While “reasonable access” is technically permitted in IRAs, cutting trees associated with mining exploration and development does not appear to be allowed. 36 C.F.R. § 294.13 (b) (2) authorizes the cutting of timber “incidental to implementation of a management activity not otherwise prohibited by this subpart.” However, there is no mention of mining in the examples of what this section authorizes provided in the 2001 Rule and ROD.¹⁵ Moreover, in describing this section the 2001 Rule and ROD provides: “Such management activities are expected to be rare and to focus on small diameter trees.”¹⁶

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 AMA members desire to prospect, explore, and develop new mines will be located in IRAs. AMA’s members will be harmed by their inability to obtain the access necessary to prospect, explore for and develop new mines in IRAs and by their inability to cut the trees within IRAs necessary to allow the substantial exploration needed to develop a mine and the construction associated with mine development, all of which is due to the reinstatement of the 2001 Roadless Rule to the Tongass. (Declaration of Steve Borell, Exhibit D).

¹⁵ *Ibid.*, at page 3258.

¹⁶ *Ibid.*, at page 3257.

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 Mining was instrumental in the planning, design, construction, operation and maintenance of a 5.5 mile road from tidewater to the Jualin Mine.

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 700 feet of road was made February 12, 2010, but authorization has been delayed by the Forest Service because the road is adjacent to an IRA.

Hyak desires to continue prospecting, exploring, and developing mines on the Tongass National Forest as it has done for 33 years. Mining exploration requires the drilling of multiple holes to determine from the surface the subsurface characteristics and extent of the mineral resource. Mine development requires site clearing for buildings, tailings piles, mills, and other facilities. The needed level of exploration to develop a mine on the Tongass National Forest would typically require the substantial cutting of trees. Mine development would typically require even significantly more cutting of trees.

While “reasonable access” is technically permitted in IRAs, cutting trees associated with mining exploration and development does not appear to be allowed. 36 C.F.R. § 294.13 (b) (2) authorizes the cutting of timber “incidental to implementation of a management activity not otherwise

prohibited by this subpart.” However, there is no mention of mining in the examples of what this section authorizes provided in the 2001 Rule and ROD.¹⁷ Moreover, in describing this section the 2001 Rule and ROD provides: “Such management activities are expected to be rare and to focus on small diameter trees.”¹⁸

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 Hyak desires to prospect, explore, and develop new mines will be located in IRAs. Just as it has not been able to obtain the permit necessary to gain access to its patented Cracker Jack mine adjacent to an IRA near Hollis, Alaska on Prince of Wales Island, Hyak will be harmed by the inability to obtain the access necessary to prospect, explore for and develop new mines in IRAs and by the inability to cut the trees within IRAs necessary to allow the substantial exploration needed to develop a mine and the construction associated with mine development, all of which is due to the reinstatement of the 2001 Roadless Rule on the Tongass. (Declaration of Neil MacKinnon, Exhibit F).

H. NORTHWEST MINING ASSOCIATION – (NWMA) is a 114 year old 1800 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

¹⁷ *Ibid.*, at page 3258.

¹⁸ *Ibid.*, at page 3257.

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 such mines, that may 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 to explore and develop mines within the 9.6 million acres of IRAs. (Declaration of Laura Skaer, Exhibit E).

- 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 hydroelectric development on the Tongass. Commercial activity, particularly hydroelectric power development, mining and timber harvest, is essential to Chris Gerondale’s ability to make a living in Southeast Alaska.

As a consequence of the reimposition of the 2001 Roadless Rule, the Juneau Branch AMA’s members’ ability to prospect, explore for, and develop new mines on the Tongass will be severely constrained by the 9.6 million acres of IRAs created by the 2001 Roadless Rule.¹⁹ The ability of the Forest Service to offer the timber sales needed to meet market demand and construct

¹⁹ 66 Fed. Reg. 3244 January 12, 2001.

the roads into IRAs in accordance with 2008 Amended TLMP will, in effect, be repealed by the reinstatement of the 2001 Roadless Rule. The ability to access hydroelectric sites and other renewable energy project sites by road to transport the equipment needed to develop such sites will be severely constrained, if not prohibited, by application of the 2001 Roadless Rule to the Tongass.

Chris Gerondale is harmed by the inability of his company's customers and Juneau branch AMA members and NWMA members to build roads and cut trees to access timber, mining, and hydroelectric power resources on the Tongass. (Declaration of Chris Gerondale, Exhibit H).

- 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 an ASQ of 267MMBF and timber harvest and building related forest roads into IRAs. However, as a practical matter the 2008 Amended TLMP has been effectively significantly amended by application of the 2001 Roadless Rule to the Tongass.

As a consequence of the Alaska District Court's March 4, 2011 Opinion and Order vacating the Tongass Exemption and reinstating the 2001 Roadless Rule, the ASQ has effectively been reduced to 50MMBF per year, which the

2001 Roadless Rule FEIS admits will close mills and cost timber related jobs.²⁰ The ability of the Forest Service to offer the timber sales needed to meet market demand and construct the roads into IRAs in accordance with 2008 Amended TLMP has, in effect, been repealed by the reinstatement of the 2001 Roadless Rule.

DuRette Construction Company, Inc.'s ability build roads in support of timber harvest on the Tongass will be severely constrained, if not eliminated, by the 9.6 million acres of IRAs created by the 2001 Roadless Rule.²¹ Accordingly, the reinstatement of the 2001 Roadless Rule to the Tongass will adversely and irreparably impact roadbuilding opportunities in Southeast Alaska. This in turn has, and will, further significantly and irreparably reduce, if not eliminate, the amount of road construction work available to DuRette Construction Company, Inc. (Declaration of Jackie DuRette, Exhibit K).

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.

²⁰ 2001 Roadless Rule FEIS at 3-378 to 3-379.

²¹ 66 Fed. Reg. 3244 January 12, 2001.

FTF participated in the planning and permitting process for the most recent of these mines by helping to 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.

FTF members participate directly and indirectly in renewable energy (hydropower, geothermal, wind, tide, wave, and biomass) on the Tongass National Forest, none of which could be developed in the IRAs due to the 2001 Roadless Rule's prohibitions on road and power line construction and distribution.

FTF members also participate directly and indirectly in developing hydropower for export to the greater North American electrical grid via the Northern B.C. hydropower 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 the IRAs caused by the 2001 Roadless Rule is resulting in the loss of this opportunity and thereby harms FTF.

The FTF supports construction of a road up Lynn Canal linking Juneau with the rest of the State. This road right of way traverses IRAs. The FTF is

harmful by the significant new obstacles that the 2001 Roadless Rule presents 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)).

Juneau is served by hydroelectric power from the Snettisham Dam and Lake Dorothy. As Juneau’s power needs increase, the community must be able to access the potential of additional renewable energy opportunities to fill that need such as hydropower, geothermal power, and other renewable energy resources that exist in the IRAs that surround the CBJ. The FTF is harmed by the inability of the State to construct the roads and transmission lines necessary to develop the potential renewable energy sites and to distribute such power as a consequence of the reinstatement of the 2001 Roadless Rule.

FTF’s contributors include major and small mining companies whose employees live in the CBJ and that purchase supplies from FTF members. FTF contributors are harmed by the practical obstacles presented 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.

As a consequence of the Alaska District Court's March 4, 2011 Opinion and Order vacating the Tongass Exemption and reinstating the 2001 Roadless Rule, the FTF's contributors' ability to prospect, explore for, and develop new mines on the Tongass will be severely constrained by the 9.6 million acres of IRAs created by the 2001 Roadless Rule. The ability of the Forest Service to offer the timber sales to FTF's contributors and others needed to meet market demand and construct the roads into IRAs in accordance with 2008 Amended TLMP will, in effect, be repealed by the reinstatement of the 2001 Roadless Rule. (Declaration of Frank Bergstrom, Exhibit G).

- L. 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 development throughout Southeast Alaska, and the entire State.

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 hydropower and geothermal power in 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 and the power lines needed to distribute such power from such sites to communities as a consequence of the ubiquitous IRAs that totally surround the CBJ.

JCC represents nearly 400 business members, two of which are the largest operating mines in Southeast Alaska. Employees of these mines live in the CBJ and the mines purchase supplies from JCC members. The JCC is harmed by the practical obstacles presented 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.

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 the 2001 Roadless Rule will present significant new obstacles to the approval the road has already obtained from the Federal Highway Administration. (Declaration of Cathie Roemmich, Exhibit I).

M. 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 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 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). (Declaration of Richard Knapp, Exhibit J).

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.

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 labor individuals, who typically reside in communities that are in proximity to where the ship loading takes place, in order to accomplish the ship loading procedure.

The number of individuals associated with a particular ship loading operation, inclusive of related support personnel, is approximately 55. As such, the employment opportunity that this activity represents, in conjunction with the related effect on the local economies where these individuals reside, is significant.

The timber industry in Southeast Alaska 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 as well with respect to numerous supply and support entity's businesses.

Over the last 20 years there have been continual and massive reductions in the allowable timber harvest on the Tongass National Forest. Commensurately, this has resulted in the number of timber operators in the region being reduced to only a few who are able to represent financial viability and 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.

As a consequence of the reinstatement of the 2001 Roadless Rule, the ASQ has been effectively reduced to 50MMBF per year, which the 2001 Roadless Rule FEIS admits will close mills and cost timber related jobs.²² The ability of the Forest Service to offer the timber sales needed to meet market demand and construct the roads into IRAs in accordance with 2008 Amended TLMP has, in effect, been repealed by the reinstatement of the 2001 Roadless Rule. Accordingly, 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. (Declaration of James Taro, Exhibit L).

²² 2001 Roadless Rule FEIS at 3-378 to 3-379.

O. SOUTHEAST ROADBUILDERS, INC. – Southeast Roadbuilders, Inc. is a small, family owned business that has conducted road building related to timber harvest on the Tongass for 35 years. Much of Southeast Roadbuilders’ 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 low value IRAs.

However, the 2008 Amended TLMP has been significantly amended as a consequence of the reinstatement of the 2001 Roadless Rule. For example, the Allowable Sale Quantity (ASQ) has effectively been reduced from 267MMBF to 50MMBF per year, which the 2001 Roadless Rule Final Environmental Impact Statement (FEIS) admits will close mills and cost timber related jobs.²³ The 2001 Roadless Rule now proscribes the 2008 Amended TLMP’s authorization to build roads and sell timber within IRAs. The ability of the Forest Service to offer the timber sales needed to meet market demand and construct the roads into IRAs in accordance with 2008 Amended TLMP has, in effect, been repealed by the reinstatement of the 2001 Roadless Rule. Southeast Roadbuilders’ business has been, and will be, substantially harmed if it is unable to construct roads in the 9.6 million acres of IRAs. (Declaration of Roger Schnabel, Exhibit O).

P. THE CITY OF CRAIG - The City of Craig is highly dependent for jobs and revenue on the Viking Lumber Company Mill which is located 6 miles from

²³ 2001 Roadless Rule FEIS at 3-378 to 3-379.

Craig. As a consequence of the District Court's Opinion and Order vacating the Tongass Exemption and reinstating the 2001 Roadless Rule, the ASQ has been reduced to 50MMBF per year, which the 2001 Roadless Rule FEIS admits will close mills and cost timber related jobs.²⁴ The ability of the Forest Service to comply with the Tongass Timber Reform Act's requirement to offer sufficient timber sales to meet market demand and construct the roads in support of such sales within IRAs in accordance with 2008 Amended TLMP has, in effect, been repealed by the reinstatement of the 2001 Roadless Rule. Viking's ability to harvest timber on the Tongass will be severely constrained, if not eliminated, by the 9.6 million acres of IRAs created by the 2001 Roadless Rule.²⁵ Craig will be irreparably harmed if Viking is driven out of business, or if its business is diminished or employment reduced as a consequence of the reduction timber sales due to application of the 2001 Roadless Rule to the Tongass.

In addition to the loss of property taxes and the loss of the \$17 million that Viking contributes to the Prince of Wales Island economy, most of Craig's harms will be irreparable, non-financial impacts. For example, the loss or reduction of the 92 jobs direct and indirect jobs associated with the closure of Viking Lumber Company will inevitably mean the loss of population. As workers who lose their jobs leave Craig with their families for work elsewhere, there will be a dramatic effect on the school population. The initial

²⁴ 2001 Roadless Rule FEIS at 3-378 to 3-379.

²⁵ 66 Fed. Reg. 3244 January 12, 2001.

estimate is that the Craig School District could lose 22 students if Viking closes.

This enrollment loss would be in addition to the 117 students that have been lost since 1998. Enrollment today constitutes a 17-year low. Because in rural areas of Alaska, such as Craig, the school is the center of communal activity, this intangible loss is irreparable.

Because Alaska pays school districts using a formula based on the number of students enrolled in the district, funding for Craig's schools will be reduced. This loss will not be compensated by money damages because there is no State or Federal Law providing for such compensation. Accordingly, the loss of school funds due to a loss of pupils will harm Craig.

There are social impacts associated with the loss of jobs that have a profound impact on small rural communities. These include an increase in alcohol usage that, in turn, creates secondary problems such as alcohol related domestic violence and driving under the influence; an increase in mental health related issues, such as a loss of self esteem, hope, depression, and suicide; increased family and individual dependence upon food banks and other community charities; an increase in crime; a deterioration of community health resulting from released workers' loss of health insurance. These are observable, measurable impacts which in combination will cause an irreparable deterioration of the quality of life for the remaining citizens of Craig. Although these losses are intangible, they are measurable and real.

Viking supplies wood chips to the Craig wood heating project which are used to heat Craig's Elementary and Middle schools and Aquatic Center, thus providing "greenhouse gas-neutral energy to public buildings." There is no other source of wood to supply the alternative energy wood fired boilers.

The wood heating project is part of Craig's plan to use clean energy technology in Craig. Another example is the Reynolds Creek project, located on private lands owned by Sealaska and Haida Energy. This project will have some excess energy and capacity that could be made available to the Niblack and Bokan Mountain²⁶ minereal prospects 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, 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.

Craig will be harmed by the inability of AP&T and others to develop new electric power for communities and for mining opportunities at new hydroelectric project sites in IRAs on Prince of Wales Island. In addition to providing power to Craig and to the mine prospects, roads to those mine prospects (for example to service the transmission lines) would allow those

²⁶ Bokan Mountain is a rare earth mine prospect.

living in Craig to provide goods and services, including labor, to the prospective mines.

The 2001 Roadless Rule would diminish, if not prohibit, the prospects for renewable energy projects within the IRAs. Notwithstanding U.S.

Government policies, rules and regulations encouraging the use of renewable energy resources as a means of lowering carbon emissions from the use of fossil fuels, the 2001 Roadless Rule prevents significant renewable energy development on the Tongass and thus denies Craig the benefit of these environmental benefits. (Declaration of Jon Bolling, Exhibit Q).

Q. INSIDE PASSAGE ELECTRIC COOPERATIVE – Prior to 2004 Inside Passage Electric Cooperative (IPEC) operated as Tlingit-Haida Regional Electrical Authority, a political subdivision of the State of Alaska. IPEC and its predecessor have supplied safe, reliable electric power to communities in rural Southeast Alaska for 34 years. Except for Hyder, Skagway, and Haines, most communities in rural Southeast Alaska are completely enveloped by the Tongass National Forest. There are no roads in or out of these communities. They can only be reached via marine or air transportation.

IPEC serves about 1,300 members in the rural, primarily Alaska Native, Southeast Alaska communities of Angoon, Hoonah, Kake, Klukwan, and the Chilkat Valley. IPEC currently owns and operates diesel generating plants in Angoon, Kake and Hoonah. It owns a backup diesel generation plant in support of purchased hydro power in the Chilkat Valley and Klukwan.

One of IPEC's major goals is to transform the power generation in rural Southeast Alaska from diesel-dependent generators that currently cost on average approximately 60 ¢/kWh to less expensive, renewable resource based generation such as hydropower. The difference in cost of electricity in rural Southeast Alaska communities compared to Juneau, Ketchikan, and Sitka (the major population communities in 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.

In addition to hydropower, IPEC's business plan to achieve this goal is to bring clean energy technology to rural Southeast Alaska in the form of geothermal, biomass, and tidal power. For example, 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. The purpose of the study is to determine the extent of the geothermal resource and its ability to economically supply electric power to Hoonah (population 860), and possibly to other Chichagof Island communities.

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, is all within IRAs.

The Final Rule allows access to locatable minerals, but denies access to new leases for minerals subject to the Mineral Leasing Act of 1920, including geothermal resources:²⁷ “because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas.”²⁸ (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). In addition to IPEC’s site at the head of Tenakee Inlet on Chichagof Island there are numerous geothermal sites in the Tongass that have the potential to generate renewable electric power, all of which would now be prohibited by the 2001 Roadless Rule.

By not considering hydropower and other renewable energy resources located on the Tongass, the 2001 Final Rule and ROD also failed to consider the environmental benefits of renewable energy as compared to the continued use of fossil fuels. The Tongass has significant renewable energy resources that could be developed to displace the use of fossil fuel. By providing a low-carbon energy alternative, the development of renewable energy resources would avoid emitting millions of metric tons of carbon emissions into the atmosphere. Notwithstanding U.S. Government policies, rules and regulations

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

²⁸ *Ibid.*, at page 3256.

encouraging the use of renewable energy resources as a means of lowering carbon emissions from the use of fossil fuels, the 2001 Roadless Rule prevents significant renewable energy development on the Tongass and thus denies society and IPEC's members the benefits of these positive environmental attributes. This does not appear to be considered in any of the environmental analysis that supported the adoption of the 2001 Roadless Rule, all of which greatly harms IPEC and frustrating its goal to supply lower cost renewable energy to communities in rural Southeast Alaska.

R. IMPACTS ON ALL PLAINTIFF INTERVENORS - Each of the Plaintiff Intervenor governments, membership organizations, and businesses has citizens, members, employees and shareholders who live and work in the Tongass National Forest for business and other purposes. They use the Tongass National Forest for economic and recreational purposes such as timber harvest, mining, construction of facilities needed to provide hydropower and other renewable energy opportunities to communities, hiking, camping, and sport and subsistence hunting, and fishing. Each of the Plaintiff Intervenor and the economic interests of its citizens and members will be adversely affected and irreparably injured by the application of the 2001 Roadless Rule to the Tongass National Forest.

IV. DISCUSSION

A. PLAINTIFF INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT

FRCP 24 (a)(2) requires that, on timely motion, the court permit anyone to intervene who satisfies four elements: 1) timeliness of the motion; 2) that they have a cognizable interest; 3) that disposition of the action may impair the applicant's ability to protect that interest; and 4) lack of adequate representation by existing parties. *See Fund for Animals v. Norton*, 322 F. 3d 728, 731 (D.C. Cir. 2003).

Because a liberal policy in favor of intervention encourages both efficient resolutions and broadened access to the courts, when evaluating whether the requirements of Rule 24(a)(2) are met, a court normally follows "practical and equitable considerations" and construes the rule "broadly in favor of proposed intervenors." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002). Generally, a prospective intervenor's interests qualify as "significantly protectable" if the interest is protectable under some law and a relationship exists between the legally protected interest and the claims at issue. *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). In all other cases, such an interest is demonstrated if it will suffer a practical impairment as a result of the pending litigation. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). In addition, the D.C. Circuit requires that a proposed intervenor demonstrate standing under Article III of the Constitution. *See Roeder v. Islamic Republic of Iran*, 333 F. 3d 228, 233 (D.C. Cir. 2003). The Proposed Plaintiff Intervenors satisfy all of these requirements and should be granted intervention as of right.

1. This Motion is Timely

Timeliness is determined based on a consideration of all the circumstances, weighing the factors of (i) time elapsed since the inception of the suit; (ii) the probability of prejudice to existing parties in the case; (iii) the purpose for which intervention is

sought; and, (iv) the need for intervention as a means of preserving the applicant's rights. *United States v. American Tel. and Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

In this case the State of Alaska filed its Complaint on June 17, 2011, and the case is still in the pleadings stage. *See Friends of Animals v. Kempthorne*, 452 F.Supp.2d 64, 66-67 (D.D.C. 2006) (motion to intervene timely where case still in pleadings stage). Because the case is still at a preliminary stage there is no prejudice to existing parties from the requested intervention. *Fund for Animals v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (motion for intervention timely when filed prior to answer to complaint).

The Proposed Plaintiff Intervenors purpose in intervening is to join the State of Alaska in challenging application of the 2001 Roadless Rule to the National Forests in Alaska. The Proposed Plaintiff Intervenors have substantial and longstanding, specific rights and interests in the Tongass IRAs identified by the 2001 Roadless Rule that will be jeopardized if road construction and the cutting of trees is prohibited in such IRAs. Intervention is necessary to protect those rights and interests. Considering the short amount of time since the filing of the Complaint, the fact that Defendants have not yet filed their Answer to the Complaint, the substantial rights and interests the Proposed Plaintiff Intervenors have at stake, and the absence of prejudice to any party, this motion "cannot be regarded as untimely." *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998). *See also Wildearth Guardian v. Salazar*, 72 F.R.D. 4 (D.D.C. 2010) and *Akiachak Native Community v. Department of Interior*, 584 F. Supp.2d 1 (D.D.C. 2008).

2. The Proposed Plaintiff Intervenors Cognizable Interests Could Be Impaired By this Action.

The “cognizable interest” requirement is intended to serve primarily as a “practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). The Proposed Plaintiff Intervenors are clearly “concerned persons” because they and their members have historically conducted and, but for the application of the 2001 Roadless Rule to the Tongass, would now be conducting, the road construction and tree cutting within Tongass IRAs that the Rule prohibits. The Court’s assessment of the Proposed Plaintiff Intervenors’ interests must be guided by the even “greater impetus to intervention that adheres in administrative cases” than in ordinary private litigation, given that Defendants’ application of the 2001 Roadless Rule to the Tongass would significantly prohibit and reduce the Proposed Plaintiff Intervenors’ historic and continuing use of Tongass resources, most recently described in the 2008 Amended TLMP. *Id.*

The historic ability of Proposed Plaintiff Intervenors AEL&P, KPU, AP&T, and IPEC to provide hydroelectric power to communities in Southeast Alaska, including the KGB and the CBJ, will be either prohibited or significantly reduced by the addition of 9.6 million acres of 2001 Roadless Rule IRAs to the 5.6 million acres of Wilderness which already exists and prohibits development on the 16.9 million acres Tongass National Forest. This is because the Rule’s prohibition on road construction means that roads cannot be built in IRAs to bring in heavy equipment such as generators from tidewater to hydro sites and the prohibition on tree cutting means that power lines that are within or cross IRAs cannot be built from hydro sites to communities. Declarations of McLeod (Exhibit A), Amylon (Exhibit B), Grimm (Exhibit C), Mitchell (Exhibit P) and Bolling

(Exhibit Q). As the declarants aver, the opportunity for Proposed Plaintiff Intervenors AEL&P, KPU, AP&T, IPEC, and Craig to provide alternative energy, such as wind power and geothermal power, to communities in Southeast Alaska, including the KGB, Hoonah, Craig and CBJ, will either be prohibited or significantly reduced by the addition of 9.6 million acres of 2001 Roadless Rule IRAs to the 5.6 million acres of Wilderness which already exists on the 16.9 million acres Tongass National Forest.

The addition of 9.6 million acres of IRAs to the Tongass will, as practical matter, significantly reduce the access of Proposed Plaintiff Intervenors AMA, NWMA, Hyak Mining Company, Inc., FTF, Chris Gerondale, the Juneau Chamber of Commerce, the KGB, Southeast Roadbuilders and their members and citizens to explore for and develop valuable mineral deposits throughout the mineral-rich Tongass thereby impacting their business interests.²⁹ Declarations of Borell (Exhibit D), Skaer (Exhibit E), MacKinnon (Exhibit F), Bergstrom (Exhibit G), Gerondale (Exhibit H), Roemmich (Exhibit I), and Schnabel (Exhibit O).

Application of the 2001 Roadless Rule to the Tongass will add new and significant requirements to the process for approving a road from Juneau to Haines, thereby adversely impacting the interests of CPR, FTF and the Juneau Chamber of Commerce. Declarations of Knapp (Exhibit J), Bergstrom (Exhibit G), and Roemmich (Exhibit I).

²⁹ While 36 C.F.R. Part 228 authorizes reasonable access to mining claims in IRAs and Wilderness Areas, the Rule points out that "reasonable access" does not mean road access. Moreover, the Secretary's Memorandum 1042-154 dated May 28, 2009 requires that he, rather than officials on the Tongass National Forest must approve every permit within an IRA, thereby increasing the burden and delaying the issuance of permits needed for access for mining.

The significant reduction of timber harvest and related road building which will result from reducing the suitable Tongass commercial forest land and ASQ available for timber harvest from that allowed by the 2008 Amended TLMP will adversely impact the business interests of Proposed Plaintiff Intervenors KPU, the Juneau Chamber of Commerce, DuRette Construction Corp., Southeast Stevedoring Corp., Chris Gerondale, AML, KGB, Southeast Roadbuilders, and the City of Craig, each of which receives economic and job benefits from, performs work for, and provides supplies and equipment to, those involved in the timber industry. Declarations of Amylon (Exhibit B), Roemmich (Exhibit I), DuRette (Exhibit K), Taro (Exhibit L), Gerondale (Exhibit H), Billingslea (Exhibit M), Kiffer (Exhibit N), Schnabel (Exhibit O), Bolling (Exhibit Q).

These virtually certain economic losses to Proposed Plaintiff Intervenors and their members if the 2001 Roadless Rule is applied to the Tongass is a strong reason justifying intervention. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-136 (1967), *vacated on other grounds sub nom. Utah Public Services Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (economic loss from implementation of proposed consent decree warrants intervention). *See Kleissler v. U.S. Forest Service*, 157 F.3d 964, 973 (3d Cir. 1998) (intervenors' interest in *future* business operations is "substantial interest, directly related to and threatened by" regulation challenging those operations, and "meets the requirements of Rule 24(a)"); *See also Akiachak Native Community v. Salazar*, 584 F. Supp. 2d 1, at 6-7 (interest test to be liberally construed).

In *Kleissler* several environmental groups sought to enjoin a timber sale in the Allegheny National Forest. Shortly thereafter a group of parties sought to intervene, including: school districts that received funds from the receipt of timber harvest

operations in the forest; timber companies with existing harvesting contracts; timber companies that did not have existing contracts but had harvested and desired to harvest timber from the forest in the future; and a non-profit trade association whose members held contracts to harvest timber in the forest or expected to bid on future timber sale contracts in the forest. After comprehensively reviewing relevant cases from other circuits the Third Circuit held that each of the proposed intervenors had sufficient interest in the litigation to compel intervention as of right. *Id.*, at 973.

As in *Kleissler*, each of the Proposed Plaintiff Intervenors has done work, or has members or citizens who work in the Tongass IRAs that the 2001 Roadless Rule would now prohibit or make more difficult to be permitted by the Forest Service as a practical matter.³⁰ As in *Kleissler* this Court should find that each of the Proposed Plaintiff Intervenors has a sufficient interest in the litigation to compel intervention as of right.

In *Fund for Animals*, 322 *supra.* at 735, the D.C. Circuit Court authorized the intervention as of right of the Natural Resources Department (NRD) of the Ministry of Nature and Environment in a case concerning the Fish and Wildlife Service's application of the Endangered Species Act to Mongolia's argoli sheep: "[B]ecause the relevant 'property' is Mongolia's sheep and the relevant 'transaction' is the FWS's decision to permit the importation of those sheep from Mongolia, there is no question that the NRD has the requisite interest." In the same way the Proposed Plaintiff Intervenors have the requisite interest because the proposed transaction would by regulation terminate their ability to: (i) construct renewable energy facilities on the Tongass; (ii) harvest timber in

³⁰ This point is illustrated by the fact that the Secretary of Agriculture requires that every decision on a permit to operate in an IRA be approved by him instead of local Forest Service officials. Secretary's Memorandum 1042-154 dated May 28, 2009.

areas authorized by the 2008 Amended TLMP; and (iii) as a practical matter, access the Tongass mining areas within IRAs for exploration and development.

Proposed Plaintiff Intervenors' regulated-industry interest in avoiding the significant regulatory burdens imposed by the 2001 Roadless Rule also is a sufficient reason for intervention as of right in this case, as it has been in numerous other cases where industry activities would be prohibited or restricted. *See e.g., Kleissler v. U.S. Forest Service*, 157 F.3d 964 (3d. Cir. 1998) (timber industry intervention in environmental suit to restrict timber harvest in National Forests); *Conservation Law Foundation of New England v. Mosbacher*, 966 F.2d 39, 43-44 (1st Cir. 1992) (fishing industry intervention in environmental suit seeking greater restrictions on fish harvesting); *National Wildlife Federation v. Hodel*, 661 F. Supp. 473, 474-475 (E.D. Ky. 1987) (coal industry intervention in suit seeking greater regulation under SMCRA). Finally, due process and simple fairness should authorize those affected by the reimposition of the 2001 Roadless Rule to the Tongass to intervene as of right in this litigation. *See Kleissler*, 157 F.3d at 971.

3. Disposition of the Action May Impair the Proposed Plaintiff Intervenors' Ability to Protect Their Cognizable Interests.

The Proposed Plaintiff Intervenors are "so situated that disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest." FRCP 24(a) (2) (emphasis added). The D.C. Circuit interprets this language to require evaluation of the practical consequences of denying intervention. *Neusse v. Camp*, 385 F.2d at 702. *See Smuck v. Hobson*, 408 F.2d 175, 180-181 (D.C. Cir. 1981). The mere possibility that *stare decisis* principles could be invoked against the applicant following

disposition of the action may be sufficient to justify intervention. *Neusse v. Camp*, 385 F.2d at 702.

A ruling by this Court adverse to the State would, as a practical matter, make it more difficult for the Proposed Plaintiff Intervenors to protect their development interests within IRAs on the Tongass. The Proposed Plaintiff Intervenors' involvement, therefore, clearly rises to the level of a "significantly protectable interest." Indeed, to the extent that the "interest" test is "primarily a practical guide to disposing of lawsuits by involving as many concerned persons as is compatible with efficiency and due process," *Neusse, supra*. 385 F.2d at 700, the involvement of the Proposed Intervenors makes sense. See also *Wilderness Society v. United States Forest Service*, 630 F.3d 1173, at 1179 (D.C. Cir. 2010), and *Akiachak Native Community v. Salazar*, 564 F. Supp. 2d. 1, at 7 (D.D.C. 2208).

4. Proposed Plaintiff Intervenors and Their Citizens and Members Are Not Adequately Represented.

The Proposed Plaintiff Intervenors' are not adequately represented by the Defendants or the State and they should thus be permitted to intervene as of right. In addressing this prong of the Rule 24 (a) test an intervenor need only show that the representation *may* be inadequate, not that it *is* inadequate. *Conservation Law Foundation v. United States*, 966 F.2d 39, 44 (1st Cir. 1992) (Emphasis added). As pointed out by the D.C. Circuit Court of Appeals in *Fund for Animals*, 322 F.3d *supra*. at 735:

The Supreme Court has held that this 'requirement of the Rule is satisfied if the applicant shows that the representation of his interest 'may be' inadequate *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-539 n.10 (1972); and the burden of making that showing should be

treated as minimal. *Id.* Citing *Trbovich*, we have described this requirement as “not onerous.” *Diamond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); see also *Foster*, 655 F.2d at 1325; *American Tel. & Tel. Co.*, 642 F.2d at 1293 (stating that a petitioner “ ‘ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee).’”

Indeed, the *AT&T* case cited by *Fund for Animals* holds that “the burden is on those opposing intervention to show that the representation for the [Proposed Plaintiff Intervenors] **will be adequate.**” *United States v. AT&T*, 642 F.2d 1285, 1293 (D.C. Cir. 1980). (Emphasis added).

The Proposed Plaintiff Intervenors’ interests are clearly not represented by the Defendants who seek to apply the 2001 Roadless Rule to the Tongass. *See United States v. Stringfellow*, 783 F.2d 821, 828 (9th Cir. 1986).

Nor can the State of Alaska adequately represent the Proposed Plaintiff Intervenors’ interests. As a governmental body, the State of Alaska “must represent the broad public interest, not just the economic concerns of [private] industry.” *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-539 n.10 (1972). *See also Wildearth Guardians v. Salazar*, 272 F.R.D. 4 (D.D.C. 2010) and *Akiachak Native Community v. Salazar*, 584 F. Supp 2d 1, at 7 (D.D.C. 2008). The Proposed Plaintiff Intervenors citizens and members’ business and economic interests are of the kind that may “become lost in the thicket of sometimes inconsistent government policies”. *Kiessler*, 157 F.3d at 973-974. Such differences in interests between Proposed Plaintiff Intervenors and the State of Alaska warrant intervention of right. *See Trbovich*, *supra.*, at 539; *Kiessler*, 157 F.3d at 973-974.

5. The Proposed Plaintiff Intervenors Have Article III Standing

The D.C. Circuit has required prospective intervenors to demonstrate Article III standing by showing “(i) injury in fact, (ii) causation, and (iii) redressability.” *Fund for Animals*, 322 F.3d at 733.³¹ The Court has more recently recognized that “any person who satisfies Rule 24(a) will also meet Article III’s standing requirement.” *Id.* It follows that because the Proposed Plaintiff Intervenors satisfy Rule 24(a)(2) they have standing.

In any event, the Proposed Plaintiff Intervenors have standing: a) Injury in Fact: There is little question that as averred in their attached Declarations the reimposition of the 2001 Roadless Rule on the Tongass will harm each of the Proposed Plaintiff Intervenors, their citizens, and their members by either prohibiting their proposed and current business developments or by making them more difficult; b) Causation: The potential increase in regulatory restrictions caused by the 2001 Roadless Rule creates standing based upon the Proposed Plaintiff Intervenors’, their citizens’, and their members’ affected business interests. *See, e.g., County of San Miguel v. MacDonald*, 244 F.R.D. 36, 445-45 (D.D.C. 2007); c) Redressability: These injuries will be redressed by a favorable ruling from the Court determining that the 2001 Roadless Rule does not apply to the Tongass National Forest. The D.C. Circuit routinely holds that industry has standing in cases challenging regulations that affect its ability to operate and this case should be no exception. *See National Coal Ass’n v. Lujan*, 979 F.2d 1548, 1551-1552 (D.C. Cir. 1992) (R. Ginsburg, J.) (rejecting DOI’s argument that industry association

³¹ Quoting *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir 2002) the Court said at pages 733-734: “‘In many if not most cases the petitioner’s standing to seek review of administrative action is self-evident. In particular, if the complainant is ‘an object of the action (or foregone action) at issue - **as is the case usually in review of rulemaking** and nearly always in review of an adjudication - there should be ‘little question that the action or inaction has caused him injury and that a judgment preventing or requiring the action will redress it.’”

lacked standing to challenge individual penalty provisions in regulations under the Surface Mining Control and Reclamation Act).

**B. PROPOSED PLAINTIFF INTERVENORS SHOULD BE GRANTED
PERMISSIVE INTERVENTION**

If intervention as of right is denied, the Court should grant Proposed Plaintiff Intervenor permissive intervention. Under Rule 24(b)(2), an applicant may be permitted to intervene upon timely application if it has a claim or defense that shares a common question of law or fact with the main action. As explained above, this motion is timely and there is a complete identity between the State of Alaska's claims and those of Proposed Plaintiff Intervenor. It is in the interest of justice to allow the proposed Plaintiff Intervenor to participate as parties in this case. *See Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5 10-11 (D.D. C. 2007).

CONCLUSION

For the foregoing reasons, the Proposed Plaintiff Intervenor motion to intervene should be granted.

Respectfully submitted,

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