No. _____

In The
Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

ORGANIZED VILLAGE OF KAKE; THE BOAT COMPANY; ALASKA WILDERNESS RECREATION AND TOURISM ASSOCIATION; SOUTHEAST ALASKA CONSERVATION COUNCIL; NATURAL RESOURCES DEFENSE COUNCIL; TONGASS CONSERVATION SOCIETY; GREENPEACE, INC.; WRANGELL RESOURCE COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; CASCADIA WILDLANDS; SIERRA CLUB; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; TOM VILSACK, in his official capacity as Secretary of Agriculture, et al.,

Respondents.

On Petition For Writ Of Certiorari To The U.S. Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the waning days of the Clinton administration, the United States Department of Agriculture adopted a nationwide rule prohibiting logging and road construction in roadless areas of the national forests. The Department considered exempting the Tongass National Forest of Southeast Alaska from this rule but ultimately chose not to, concluding that the ecological benefits of applying it to the Tongass outweighed the socio-economic harms it would cause local communities. Two years later the Bush administration changed course and exempted the Tongass from the rule, concluding that the socio-economic well-being of local communities outweighed the value of additional environmental protections for a forest with many roadless areas already protected by existing law. In a 6-5 decision, the *en banc* Ninth Circuit struck down the Tongass exemption, ruling that the Department failed to provide sufficient justification for the policy change.

The question presented is: whether the Ninth Circuit's decision contravenes the basic administrative law principle, established by this Court's decisions, that an executive agency may change the policies of a previous administration based on the new administration's different values and priorities, even though the relevant facts are unchanged.

PARTIES TO THE PROCEEDING

The State of Alaska was a defendant-intervenor before the district court and an appellant before the Ninth Circuit.

Organized Village of Kake, The Boat Company, Alaska Wilderness Recreation and Tourism Association, Southeast Alaska Conservation Council, Natural Resources Defense Council, Tongass Conservation Society, Greenpeace, Inc., Wrangell Resource Council, Center for Biological Diversity, Defenders of Wildlife, Cascadia Wildlands, and the Sierra Club were plaintiffs before the district court and appellees before the Ninth Circuit.

The United States Department of Agriculture and Tom Vilsack, Harris Sherman, and Tom Tidwell, in their respective official capacities as Secretary of Agriculture, Under Secretary of Agriculture of Natural Resources and Environment, and Chief of the U.S. Forest Service, were defendants before the district court but did not participate in the appeal before the Ninth Circuit.

The Alaska Forest Association, Inc. was a defendant-intervenor before the district court and participated as an amicus curiae before the Ninth Circuit.

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RULEMAKINGS

PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit struck down an executive agency's decision to reverse a policy of the previous administration. Though purporting to apply this Court's decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Ninth Circuit contravened a basic principle underpinning *Fox* and other decisions of this Court: different values and priorities are a legitimate reason for a new administration to change the policies of its predecessor.

Judicial deference to the policy judgments of the executive branch is a basic principle of the separation of powers. *E.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . ."). An essential aspect of this deference is permitting the executive branch discretion to implement policy changes that reflect the values of a new administration. Even if the relevant facts remain unchanged, a new administration may—and is often expected to—change the policies of the previous administration based on the new administration's different value judgments and priorities. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought

about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. . . . [The agency] is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.").

This deference is essential to the proper functioning of American democracy. Every election, voters have the chance to direct the executive branch to change its policies to better reflect their priorities and values. Allowing executive branch agencies to change course on the basis of those priorities and values gives the government the flexibility it needs to carry out the evolving will of the electorate.

This Court most recently affirmed the principle that an agency may re-weigh the costs and benefits of existing policies in light of its own values and change course accordingly—without undue interference from the courts—in *Fox*, 556 U.S. 502. The Court held that an agency need not "demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one" or satisfy "heightened" judicial review. *Id.* at 515 (emphasis in original). If the agency's "new policy rests on factual findings that contradict those which underlay its prior policy," it must supply a reasoned explanation for the factual contradiction. *Id.* Otherwise, the normal rules apply: an agency merely has to acknowledge that it is changing course and show there are "good reasons" for the new policy, just as it would

need to do if it were writing "on a blank slate." *Fox*, 556 U.S. at 515.

In this case the *en banc* Ninth Circuit purported to apply *Fox* but contravened its underlying principles. The court ruled that the United States Department of Agriculture did not adequately explain its decision to exempt the Tongass National Forest from the Roadless Rule, a nationwide rule prohibiting logging and roadbuilding in roadless areas of the national forests. Under the Clinton administration, the agency had considered exempting the Tongass from this rule but ultimately decided the ecological benefits of applying the rule to the Tongass outweighed the socio-economic harms. Two years later, the Bush administration reversed that decision. It acknowledged the relevant facts had not changed but explained it was changing course because it believed the socio-economic costs of the Roadless Rule outweighed the value of Roadless Rule's additional environmental protections in a forest with abundant roadless areas already protected under existing law. The Ninth Circuit disregarded this value-based explanation. Citing *Fox*'s caveat about contradictory factual findings, it treated the Department's judgment that the Tongass's roadless values were "sufficiently protected" without the Roadless Rule as a "factual finding" that contradicted the previous administration's conclusion that additional protections were needed. The court then held that the agency had not adequately explained the supposed contradiction.

The Ninth Circuit's decision stretched *Fox*'s straightforward caveat that factual contradictions must be explained far beyond its proper application and used it as a license to reject the agency's policy judgments. In treating the agency's judgment that a certain level of environmental protection was sufficient as a contradictory factual finding that had to be explained and ruling the agency's valued-based explanation inadequate, the Ninth Circuit set a nearly impossible bar for an agency to clear. An agency's judgments are not facts; they are conclusions reached after interpreting facts in light of the agency's values and priorities. And when an agency, considering the same facts as its predecessor, reaches a different judgment, the only real explanation it can offer is that it balanced the relevant concerns differently. By treating different judgments as factual contradictions for which value-based explanation is insufficient, the Ninth Circuit gutted the principle that a new administration is free to change course if it weighs the relevant interests differently than its predecessor.

If allowed to stand, the Ninth Circuit's approach to reviewing policy changes will curtail the executive branch's power to make changes that are the very point of democratic elections. As the dissent below pointed out, "[e]lections have legal consequences"—or at least they should. But those legitimate consequences will be thwarted if courts entrench the policies of outgoing administrations by ruling that the different values of a new administration are not a sufficient explanation for changing course. This Court

should grant a writ of certiorari to review the decision below and restore the separation of powers balance in the Ninth Circuit.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals is reported at 795 F.3d 956 and reprinted in the appendix at App. 1-58. The opinion of the panel is reported at 746 F.3d 970 and reprinted at App. 69-105. The opinion of the district court is reported at 776 F. Supp. 2d 960 and reprinted at App. 106-45.

JURISDICTION

The Court of Appeals for the Ninth Circuit rendered its *en banc* opinion on July 29, 2015. App. 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Administrative Procedure Act, 5 U.S.C. § 706, provides in pertinent part that:

> The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law. . . .

STATEMENT OF THE CASE

This case arises out of a change in policy for managing the nation's largest national forest, the Tongass National Forest. The Tongass, which is 90% roadless and undeveloped, spans 16.8 million acres of Southeast Alaska. *Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska*, 68 Fed. Reg. 75,136, 75,137 (Dec. 30, 2003) (reprinted at App. 160-205). The abundance of roadless areas in the Tongass, a stark contrast to national forests in the Lower 48, presents a policy choice to forest managers. This abundance gives foresters the unique opportunity to manage a forest primarily for roadless values: untouched landscapes, dispersed recreation, and wildlife habitat. Yet the forest's sheer size and abundant roadless areas means that much of the Tongass's uniquely wild nature can be preserved even if logging and roadbuilding—key to the economic survival of isolated towns and villages scattered throughout the forest—continue in some designated areas.

In the last days of the Clinton administration, the U.S. Department of Agriculture adopted a rule prohibiting logging, roadbuilding, and road reconstruction in inventoried roadless areas of all national forests (the "Roadless Rule"). *Special Areas; Roadless*

Area Conservation, 66 Fed. Reg. 3244, 3244-45 (Jan. 12, 2001) (reprinted in part at App. 146-59).[1] The Department adopted the rule, covering approximately 58.5 million acres, to preserve the ecological, cultural, and social properties of roadless areas ("roadless values") in an increasingly developed and fragmented national landscape. *Id.* at 3244-45.

During the rulemaking process, the Department analyzed the special case of the Tongass National Forest, the only forest to receive individual consideration. The agency proposed deferring the decision about whether to apply the Roadless Rule to the Tongass until 2004 "in light of recent Forest Plan[2] decisions that conserve roadless areas and a Southeast Alaska

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[1] The phrase "inventoried roadless areas" refers to geographic areas of the national forests and grasslands managed by the U.S. Department of Agriculture that had previously been identified as areas without roads in periodic inventories of the agency's lands dating back to the 1970s. 66 Fed. Reg. at 3244.

[2] A "forest plan" is the Department of Agriculture's shorthand for the land and resource management plan establishing goals and standards designed to permit multiple uses of forest resources—e.g., recreation, logging, wildlife habitat, mineral development, and protection of water quality—that the agency is statutorily required to produce for each national forest. 16 U.S.C. § 1604. Any project or activity undertaken in the forest must be consistent with the plan. § 1604(i). Plans must be revised periodically, but at least every fifteen years. § 1604(f)(5). At the time the Roadless Rule was being considered, the forest plan for the Tongass National Forest had last been revised in 1999. *Notice of Proposed Rulemaking; Special Areas; Roadless Area Conservation*, 65 Fed. Reg. 30,276, 30,279-80 (May 10, 2000).

economy that is in transition." *Notice of Proposed Rulemaking: Special Areas; Roadless Area Conservation*, 65 Fed. Reg. 30,276, 30,279 (May 10, 2000).

The agency prepared an environmental impact statement (EIS), which observed that "the forest's high degree of overall ecosystem health is largely due to the quantity and quality of its inventoried roadless areas" and found that "[a]pproximately 84% of the forest is in land use designations, such as Wilderness Areas and National Monuments, which limit road construction and timber harvest activities." ER 211. It found that the Tongass—which is so large it is comparable to entire Forest Service *regions* in the Lower 48—"has a higher percentage of inventoried roadless areas where road construction and reconstruction are prohibited" than any other region. ER 211. The agency found that exempting the Tongass from the Roadless Rule would increase ecosystem fragmentation in areas that have been heavily logged, but that "under the current [Forest Plan] there is a moderate to high likelihood that habitat conditions will support well-distributed species." ER 220. Applying the Roadless Rule to the Tongass would lower risk to fish and wildlife species and maintain the wild nature of many inventoried roadless areas but would also sharply reduce timber harvest, eventually resulting in the loss of roughly 900 jobs in the region. ER 218-20. The EIS's preferred alternative was to apply the Roadless Rule to the Tongass, but defer its application until 2004 to blunt the socioeconomic impacts of the rule. ER 208-09.

The agency ultimately chose to apply the Roadless Rule to the Tongass immediately, permitting logging only pursuant to timber sales already in the pipeline. App. 150-51. The Department acknowledged the socioeconomic costs to Tongass communities but concluded that "the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to those local communities." App. 152.

After the Bush administration came into office, the Department changed course. It agreed to settle a lawsuit against the Roadless Rule filed by the State of Alaska. As part of the settlement, the Department agreed to initiate new rulemakings concerning the management of Alaska's two national forests, the Tongass and the Chugach. App. 164.

In the record of decision for its 2003 final rule, the Department explained that it had decided to exempt the Tongass from the Roadless Rule because of "serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions could cause in communities throughout Southeast Alaska." App. 169. It also explained that it had changed course due to litigation brought by the State of Alaska and others alleging that the application of the Roadless Rule to the Tongass violated statutes applicable to the management of Alaska's lands. App. 164, 169.

In the process of re-visiting the previous administration's decision, the agency concluded that "the

overall decisionmaking picture is not substantially different from what it was" when the Roadless Rule was adopted two years before. App. 187-88. It concluded a supplemental EIS was unnecessary and relied on the EIS prepared for the earlier rulemaking. App. 187-88.

Reviewing the same administrative record (plus a new round of public comment), the Department explained that "[a]pproximately 90 percent of the 16.8 million acres in the Tongass National Forest is Roadless and undeveloped" and "[o]ver three quarters (78 percent) of these 16.8 million acres are either Congressionally designated or managed under the forest plan as areas where timber harvest and road construction are not allowed." App. 189. It observed that the total acreage suitable for commercial timber harvest within inventoried roadless areas is about 300,000 acres. App. 189. It also noted that the 1999 Forest Plan prohibits timber harvest "on the vast majority of the remaining highest volume stands" of old growth forest, App. 174, and that "[e]ven if the maximum harvest permissible under the Tongass Forest Plan is actually harvested, at least 80 percent of the currently remaining roadless areas will remain essentially in their natural condition after 50 years." App. 177. And it acknowledged the EIS's estimate that approximately 900 jobs could be lost in Southeast Alaska as a result of the Roadless Rule. App. 165.

Although none of these facts had changed, the agency weighed the costs and benefits differently:

> [In 2001], the Department decided that ensuring lasting protection of roadless values on the Tongass outweighed the attendant socioeconomic losses to local communities. The Department now believes that, considered 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 forests outside of Alaska. [App. 178].

The agency also concluded that allowing some logging and roadbuilding in roadless areas of the Tongass reflected "how best to implement the letter and spirit of congressional direction" in the Tongass Timber Reform Act, which requires the agency to "seek to provide a supply of timber from the Tongass National Forest" that meets market demand, subject to the duty to manage forest resources for sustained yield and multiple uses. App. 192; 16 U.S.C. § 539d(a). It therefore decided to exempt the Tongass National Forest from the Roadless Rule.[3]

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[3] The Department later repealed the Roadless Rule entirely and replaced it with a new regime for managing roadless areas of national forests. *Inventoried Roadless Area Mgmt. Rule*, 70 Fed. Reg. 25,654 (May 13, 2005). But in 2005 a federal district court in California held the repeal of the Roadless Rule was

(Continued on following page)

The plaintiffs filed suit in 2009 challenging the Tongass exemption as arbitrary and capricious under the Administrative Procedure Act and as a violation of the National Environmental Policy Act. The district court granted summary judgment in favor of the plaintiffs, concluding that the Department failed to provide a reasoned explanation for its change of policy. App. 142-43. The district court did not rule on the NEPA claim. App. 143.

A three-judge panel of the Ninth Circuit reversed. Judge Bea, writing for the court, held that the Department acknowledged that it was changing its policy for the Tongass and gave reasoned explanations for doing so: to decrease socio-economic costs for Tongass communities, to meet demand for timber, and to cease litigation. The court ruled that each of these reasons was acceptable under the APA. App. 77-87. It observed that the agency was reconsidering the same facts that underlay the 2001 rulemaking and "decide[d] the socioeconomic hardships the 2001 Roadless Rule put on the unique and isolated communities of Southeast Alaska were no longer acceptable." App. 86. Judge McKeown, in dissent, argued this "monumental decision deserves greater scrutiny

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invalid, and as a remedy the court reinstated the Roadless Rule and the Tongass exemption. *California ex rel. Lockyer v. U.S. Dept. of Agric.*, 459 F. Supp. 2d 874, 916 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009). The Tongass exemption remained in effect until enjoined by the district court in the proceedings below.

than the majority gives it" and concluded that the agency did not provide the "more detailed justification" she believed was required by *Fox*. App. 89.

The full court voted to vacate the panel decision and hear the case *en banc*. In a 6-5 decision, the *en banc* court affirmed the district court's decision to strike down the Tongass Exemption.

Judge Hurwitz, writing for the court, reasoned that "[t]he central issue in this case is whether the 2003 ROD rests on factual findings contradicting those in the 2001 ROD, and thus must contain the 'more substantial justification' or reasoned explanation mandated by *Fox*." App. 27. The agency had explained that "the decisionmaking picture is not substantially different from what it was" when the roadless rule was adopted in 2001 and had relied on the factual findings of the EIS prepared for the earlier rulemaking. App. 187-88. But the court concluded that the rule of decision announcing the new policy "made factual findings directly contrary to the 2001 ROD and expressly relied on those findings to justify the policy change." App. 25. It ruled that the agency failed to provide a reasoned explanation for these supposed contradictions.

The court asserted a contradiction between the 2001 decision's conclusion that exempting the Tongass from the Roadless Rule "would risk the loss of important roadless area values" and the 2003 decision's conclusion "that the Roadless rule was 'unnecessary to maintain the roadless values'" that are

"sufficiently protected by the Tongass Forest Plan." App. 25. The court did not mention that the 2003 decision acknowledged some roadless areas would be lost due to an exemption, as it had in 2001. App. 175. Nor did it discuss the Department's explanation for why, despite those losses, it believed the Roadless Rule was unnecessary. First, almost 80% of the forest is already off-limits to logging and road-building—a fact noted in the roadless rule EIS. App. 166; ER 211. And second, even if timber is harvested for 120 years at the maximum level allowed by the Tongass Forest Plan, over 80% of productive old-growth forest that was present on the Tongass in 1954 would remain—a point taken from the EIS for the 1999 Forest Plan, which was discussed extensively in the Roadless Rule EIS. App. 175; ER 215-20.

The court also asserted a factual contradiction between the Department's 2003 view of the risk from loss of roadless values as "minor" and—as the court put it, in a phrase the agency itself did not use—the Department's earlier "finding" that continued management under the Tongass Forest Plan was "unacceptable because it posed a high risk to the 'extraordinary ecological values of the Tongass.'" App. 26; *see also* App. 148-59. Again, the court did not discuss the actual facts offered by the agency to explain its judgment.

The court rejected the explanation that the new administration "merely decided that it valued socio-economic concerns more highly than environmental protection," instead concluding that the agency failed

to give a "reasoned explanation" for the supposed factual contradictions in its decision. App. 26.

Judge Smith, joined by four other judges in dissent, argued that the court flouted the requirements of *Fox* by "select[ing] what it believes to be the better policy, and substitut[ing] its judgment for that of the agency, which was simply following the political judgments of the new administration." App. 57. The dissent rejected the court's assertion that the 2003 decision rested on contradictory factual findings; rather, "[a]fter analyzing essentially the same facts, the USDA changed policy course at the direction of the new president, prioritizing some outcomes over others." App. 59. Recognizing that "*Fox* fully envisions such policy changes," the dissent identified four independent reasons for the change supported by the 2003 decision: "(1) resolving litigation by complying with federal statutes governing the Tongass, (2) satisfying demand for timber, (3) mitigating socioeconomic hardships caused by the Roadless Rule, and (4) promoting road and utility connections in the Tongass." App. 60-61. Judge Smith concluded that *Fox*'s central tenet—that courts must uphold regulations resulting from policy changes, even if explained with "less than ideal clarity," so long as "the agency's path may reasonably be discerned"—is "clearly" met

in this case. App. 59 (quoting *Fox*, 556 U.S. at 513-14).[4]

By enjoining the Tongass exemption, the Ninth Circuit has condemned the forest communities of Southeast Alaska to suffer socio-economic harms the executive branch did not want to impose. The EIS concluded that roaded areas can yield only 50 million board-feet (MMBF) of timber harvest annually, far short of projected market demand of 124 MMBF. ER 218. The shortfall will push loggers and mills out of business, eventually resulting in roughly 900 lost jobs in the region. ER 218-20. Though losing 900 jobs might not seem earth-shattering in the far more populated, prosperous, and connected cities of the Lower 48, it would be devastating to the small, geographically isolated towns and villages of the Tongass, where few other cash jobs are available for residents. The inability to build roads may make it cost-prohibitive to improve the efficiency of Southeast Alaska's power grid by connecting towns and villages, let alone develop hydropower, geo-thermal, and other

[4] In addition to the main opinions for the majority and dissent, three judges wrote separate opinions. Judge Christen joined the majority's opinion but wrote separately to emphasize that the personal views of the judges had no bearing on the outcome of the case. App. 31. Judge Callahan joined Judge Smith's dissent on the merits but wrote separately to argue that the State of Alaska did not have standing to maintain the appeal. App. 34. Judge Kozinski also joined the dissent on the merits but wrote separately to bemoan the "glacial pace of administrative litigation." App. 68.

renewable energy resources that could alleviate Southeast Alaska's reliance on expensive diesel fuel power generation. App. 193-94.

In short, the loss of well-paying jobs and prohibition against building roads threatens to mire the small communities of Southeast Alaska in isolated poverty, unable to enjoy basic amenities "that almost all other communities in the United States take for granted." App. 165.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision conflicts with this Court's decisions and with the approach of the D.C. Circuit.

The Ninth Circuit's decision conflicts with the rule that courts must accept a new administration's different values and priorities as a legitimate reason for changing policies so long as the explanation provided is reasonable. If the Ninth Circuit is permitted to re-cast differing value judgments as contradictory factual findings for which value-based explanations are inadequate, then a court can strike down any policy change based on a new administration's priorities if it does not find them compelling—exactly what this Court rejected in *Fox*. *See* 556 U.S. at 515 (an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one" (emphasis in original)). The Ninth Circuit's approach gives courts far too much

power to hinder—under the guise of APA review—policy changes that are the legitimate result of democratic elections.

Judicial review of executive agency action under the APA is supposed to be "narrow." *Fox*, 556 U.S. at 513 (quoting *State Farm*, 463 U.S. at 43). To satisfy this review, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Id.* (quoting *State Farm*, 463 U.S. at 43). But a court "is not to substitute its judgment for that of the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 513-14 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

These principles apply with equal force when an agency changes course. "An agency's view of what is in the public interest may change, either with or without a change in circumstances," and the agency may change course on this basis so long as it "suppl[ies] a reasoned analysis." *State Farm*, 463 U.S. at 43. Indeed, an agency "must consider . . . the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *Chevron*, 467 U.S. at 863-64, and *State Farm*, 463 U.S. at 59 (internal citations and quotation marks omitted)). Courts cannot second-guess the wisdom of policy changes by requiring the agency to

"demonstrate to [their] satisfaction that the reasons for the new policy are *better* than the reasons for the old one" or by subjecting a change in policy to more "searching" review. *Fox*, 556 U.S. at 515 (emphasis in original). An agency must provide more detailed justification for a policy change only if the change is based on factual findings that contradict factual findings underlying the previous rule. *Id.*

In striking down the Tongass Exemption, the Ninth Circuit used *Fox*'s straightforward caveat that factual contradictions require reasoned explanation as a license to reject the agency's value judgments. The Ninth Circuit purported to identify "factual contradictions" between the 2003 decision and the 2001 decision and then ruled that these supposed contradictions were not adequately explained. But none of the asserted contradictions the majority opinion identifies is truly factual. Rather, they are differing judgments about the appropriate balance between environmental and socio-economic interests.

The opinion starts with the 2001 decision's statement that allowing logging and road construction to continue under the Forest Plan "would risk the loss of important roadless area values." App. 25. It asserts a contradiction with the 2003 conclusion that "roadless values in the Tongass are sufficiently protected under the Tongass Forest Plan." App. 25. But this statement is not factual. It is a judgment that the level of roadless values protected by the Forest Plan is "sufficient"—in other words, "good enough" in light of competing considerations. And this judgment is

based on undisputed facts from the same administrative record as before—that roughly 80% of the Tongass is already off-limits to logging and road-building and that "[e]ven if timber is harvested for 120 years at the maximum level allowed by the Tongass Forest Plan, 83 percent of the productive old-growth forest that was present on the Tongass in 1954 would remain." App. 166, 175. In other words, the Department did not alter the factual conclusion about how much protection the Forest Plan provides roadless values. It changed its judgment about how much protection the Tongass's roadless values need given competing concerns.

The other supposed contradictions identified by the Ninth Circuit are similar. The Ninth Circuit faults the 2003 decision for concluding the Roadless Rule is "unnecessary to maintain the roadless values." App. 25. But this too is a judgment about how much protection roadless values need in a vast forest with abundant roadless areas, many of them already protected by law. Not only that, the Ninth Circuit also failed to acknowledge the express factual basis for that judgment, which the court excerpted from a longer passage explaining that "[c]ommercial timber harvest and road construction are already prohibited in the vast majority of the 9.34 million acres of inventoried roadless areas in the Tongass" and that the Roadless Rule "is unnecessary to maintain the roadless values *of these areas*." App. 166 (emphasis added).

Likewise, the opinion faults the agency for not explaining "why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a 'minor' one." App. 26. But the agency itself did not use the term "prohibitive" to describe the risk to roadless values under the Forest Plan, so the majority can only mean that the agency in 2001 perceived the risk to roadless values as great enough to prohibit future logging and road-building. In other words, in 2001 the agency believed the risks of management under the Forest Plan outweighed the benefits. In 2003, the agency weighed the competing interests differently and viewed the risk to roadless values as "minor" enough that socio-economic considerations warranted an exemption from the Roadless Rule. The asserted contradiction rests solely on the difference between "prohibitive" and "minor"—*i.e.*, on the agency's changed judgment about how the same facts should be weighed.

Unlike a true factual contradiction, which an agency could explain by pointing out why the earlier finding was wrong or irrelevant, a decision to give different weight to the same facts can be explained only by reference to the values and priorities of the administration making it. By disregarding the agency's value-based explanation for reaching a different judgment as an insufficiently reasoned explanation for the change, the Ninth Circuit has made it difficult, if not impossible, for agencies to govern in accordance with evolving values and effectuate new priorities. Even though the Clinton administration

concluded important roadless values would be lost without the Roadless Rule, the Bush administration concluded that the existing environmental protections offered "sufficient"—enough—protection to those values when weighed against the socio-economic concerns it gave more weight to. App. 170. If this clear value-based explanation for the Department's action is insufficient, it is hard to imagine what more the Department could say that would satisfy the Ninth Circuit.

Not only does the Ninth Circuit's decision conflict with this Court's decisions, it conflicts with the D.C. Circuit's approach as well. In *National Association of Home Builders v. Environmental Protection Agency*, 682 F.3d 1032 (D.C. Cir. 2012), the D.C. Circuit rejected an argument that *Fox* required an agency to supply more detailed justification for changed policy judgments like those at issue here. *Id.* at 1037-38. That case arose from a petition to review a change in EPA regulations for renovation activities that increased risk of exposure to lead-based paint. In 2008, the EPA issued regulations containing an "opt-out" provision exempting certain owner-occupied homes. 682 F.3d at 1035. Two years later, under a new presidential administration, the EPA eliminated the opt-out provision. *Id.* at 1036. The D.C. Circuit acknowledged the petitioners' argument that under *Fox* an agency must sometimes provide a more detailed justification for changing course. *Id.* at 1037. But it ruled that because the petitioners could not identify any new factual findings on which the EPA relied, the

agency had only to satisfy *Fox*'s "core requirements": that it "display awareness that it is changing position" and "provide[ ] a reasoned explanation for its decision." *Id.* at 1038 (quoting *Fox*, 556 U.S. at 515) (emphasis omitted).

The D.C. Circuit rejected the invitation to conflate policy judgments with facts the way the Ninth Circuit did here. The EPA originally created the opt-out provision because it believed that a more stringent rule "would not be 'an effective use of society's resources.'" 682 F.3d at 1035 (quoting, *Lead; Renovation, Repair, and Painting Program*, 73 Fed. Reg. 21,692, 21,710 (Apr. 22, 2008)). But the new administration concluded that the opt-out provision "was not sufficiently protective . . . for . . . the most vulnerable populations" and did not "sufficiently account for . . . the health effects of lead exposure on adults and children age 6 and older." *Id.* at 1038-39 (quoting, *Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program*, 75 Fed. Reg. 24,802, 24,805-06 (May 6, 2010)). The D.C. Circuit recognized that these competing conclusions about the sufficiency of the protections against lead exposure—analogous to the Department's conclusions about the sufficiency of the Forest Plan's protections for the Tongass's roadless values—were not contradictory factual findings that required more detailed justification. *See id.* at 1037-38 ("But the petitions cannot point to any new findings, let alone contradictory ones, upon which EPA relied.").

Instead, the D.C. Circuit observed that the election of a new president and the appointment of a new EPA administrator "go a long way toward explaining why EPA reconsidered the opt-out provision" and reiterated that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." 682 F.3d at 1043 (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). Because the Ninth Circuit has decided otherwise, this Court should grant certiorari to resolve the split between the circuits and reaffirm this basic principle of administrative law.

II. This Court should review the Ninth Circuit's decision because it harms the isolated communities of the Tongass and undermines the separation of powers.

This Court should review the Ninth Circuit's decision because it harms the isolated communities of the Tongass and undermines the government's ability to carry out the will of the electorate.

Applying the Roadless Rule to the Tongass will cause small, poor communities to suffer disproportionate socioeconomic harms. With the Roadless Rule in place, the Southeast Alaska timber industry cannot meet market demand for Tongass timber, which will ultimately devastate it. The EIS concluded that

roaded areas can yield only a fraction of the projected demand for Tongass timber. ER 218. The harvest reductions will drive timber outfits out of business, resulting in job losses in the industry the loss of many Forest Service jobs related to timber management. ER 219. The agency predicted the eventual result would be loss of around 900 jobs, concentrated in the smaller communities of Southeast Alaska. ER 220. These communities, with populations in the hundreds or less, can scarcely afford the loss of well-paying jobs with so few other opportunities for residents to earn cash income.

"The potential for economic development of [Tongass] communities is closely linked to the ability to build roads and rights of way for utilities in roadless areas of the National Forest System." App. 177. As the 2003 decision observed, "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." App. 165. Although the Roadless Rule permits federal-aid highways, it does not permit construction of logging or other roads that, over time, have organically evolved into the limited road system that exists in Southeast Alaska. App. 194-95.

The inability to build new roads may also make it cost-prohibitive to improve the efficiency of Southeast Alaska's power grid by connecting towns and villages, let alone develop alternative sources of energy like hydropower that could offset the need for expensive imports of diesel fuel. App. 193-94. And because roads

are often needed for development of leasable minerals, the Roadless Rule will likely hinder this kind of development as well, 66 Fed. Reg. at 3268, further limiting economic opportunities for Southeast Alaska communities.

The Ninth Circuit's decision will also have profound effects far beyond the Tongass because it upsets the separation of powers balance established by this Court's decisions.

The judiciary generally defers to executive branch decision-making because "[t]he responsibilities for assessing the wisdom of [ ] policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Chevron*, 467 U.S. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)). In allowing an agency to change course for the sole reason that it has different values and priorities than the previous administration —without being second-guessed by the judiciary— this Court's decisions give the executive branch sufficient flexibility to carry out changes in policy that are the legitimate result of democratic elections.

The Ninth Circuit's decision threatens that flexibility. By recasting different policy judgments as contradictory factual findings for which value-based explanations are inadequate, the Ninth Circuit's approach entrenches the policies of outgoing administrations by making it much harder for their successors to change course. If an agency concludes

that keeping people employed is more important than keeping forests untouched by modern life, that purely value-based judgment is not susceptible to mathematically precise justification of the sort demanded by the Ninth Circuit. As Judge Kozinski lamented in dissent: "How can a President with a mere four or eight years in office hope to accomplish any meaningful policy change—as the voters have a right to expect when they elect a new President—if he enters the White House tethered by thousands of Lilliputian ropes of administrative procedure?" App. 68.

If left unchecked, the Ninth Circuit's opportunistic interpretation of *Fox* will have ripple effects far beyond management of Alaska's forests. Administrative agencies regulate a wide swath of American life. The circuit courts have already applied *Fox*'s rule for agency policy shifts in subject areas as diverse as protections against lead paint exposure, *see Nat'l Ass'n of Home Builders*, 682 F.3d at 1034, minimum wage and overtime laws to home health care workers employed through agencies, *see Home Care Ass'n of America v. Weil*, 2015 WL 4978980 at *10 (D.C. Cir. Aug. 15, 2015), and eligibility for asylum, *see Rivera Barrientos v. Holder*, 658 F.3d 1222, 1227 (10th Cir. 2011), *as corrected on denial of reh'g en banc sub nom. Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012). Under the Ninth Circuit's new approach, however, courts can prevent evolution of policies in any of these areas by demanding that agencies provide detailed justification for their actions—even for policies that would be upheld if the agency were writing

on a "blank slate" rather than attempting to effectuate change. *Fox*, 556 U.S. at 515. In this way, the Ninth Circuit's decision transforms the judicial branch from a deferential reviewer of agency action into a roadblock against political will. This Court should not leave such a troubling decision unreviewed.

CONCLUSION

For these reasons, the State of Alaska respectfully requests the Court to issue a writ of certiorari to review the decision of the Ninth Circuit below.

Respectfully submitted,

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October 12, 2015

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORGANIZED VILLAGE OF KAKE; THE BOAT COMPANY; ALASKA WILDERNESS RECREATION AND TOURISM ASSOCIATION; SOUTHEAST ALASKA CONSERVATION COUNCIL; NATURAL RESOURCES DEFENSE COUNCIL; TONGASS CONSERVATION SOCIETY; GREENPEACE, INC.; WRANGELL RESOURCE COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; CASCADIA WILDLANDS; SIERRA CLUB,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; TOM VILSACK, in his official capacity as Secretary of Agriculture; HARRIS SHERMAN, in his official capacity as Under Secretary of Agriculture of Natural Resources and Environment; TOM TIDWELL, in his official capacity as Chief, USDA Forest Service,
Defendants,

No. 11-35517

D.C. No. 1:09-cv-00023-JWS

OPINION

ALASKA FOREST ASSOCIATION, INC.,
Intervenor-Defendant,

and

STATE OF ALASKA,
Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the District of Alaska,
John W. Sedwick, District Judge, Presiding.

Argued and Submitted En Banc
December 16, 2014 – Pasadena, California

Filed July 29, 2015.

Before: Sidney R. Thomas, Chief Judge,
and Harry Pregerson, Alex Kozinski, William A.
Fletcher, Richard C. Tallman, Richard R. Clifton,
Consuelo M. Callahan, Milan D. Smith, Jr.,
Morgan Christen, Jacqueline H. Nguyen,
Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz;
Concurrence by Judge Christen;
Dissent by Judge Callahan;
Dissent by Judge Milan D. Smith, Jr.;
Dissent by Judge Kozinski

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OPINION

HURWITZ, Circuit Judge:

In 2001, the United States Department of Agriculture promulgated the "Roadless Rule," limiting road construction and timber harvesting in national forests. The Department expressly found that exempting the Tongass National Forest from this Rule "would risk the loss of important roadless area [ecological] values." Just two years later, relying on the identical factual record compiled in 2001, the Department reversed course, finding "[a]pplication of the roadless rule to the Tongass . . . unnecessary to maintain the roadless values."

The issue in this case is whether the Department sufficiently explained this dramatically changed finding. Like the district court, we conclude that the Administrative Procedure Act requires a reasoned explanation for this change in course, and affirm the judgment below.

I.

A. The 2001 Roadless Rule

Approximately one-third of National Forest Service lands, some 58.5 million acres, is designated by the Department of Agriculture as inventoried roadless areas. *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. §§ 294.10-294.14) (the "2001 ROD"). These "large, relatively undisturbed landscapes" have a variety of scientific, environmental, recreational, and aesthetic attributes and characteristics unique to roadless areas, which the Department refers to as "roadless values." *Id.* at 3245, 3251. As the 2001 ROD explained, these include healthy watersheds critical for catching and storing water, protecting downstream communities from flooding, providing clean water for domestic and agricultural purposes, and supporting healthy fish and wildlife populations. *Id.* at 3245. Roadless area attributes also include habitats for threatened and endangered species, space for wilderness recreation, environments for research, traditional cultural properties and sacred sites, and defensive zones against invasive species. *Id.*

Inventoried roadless lands were historically managed through local- and forest-level plans. *Id.* at 3246-47. In 2000, citing the "costly and time-consuming appeals and litigation" that plagued this process, *id.* at 3244, the Department considered a national roadless lands policy that would look at "the

'whole picture' regarding the management of the National Forest System," *id.* at 3246-48. The Department undertook to answer two questions when it started this process. The first was whether to prohibit timber harvesting and road construction (or reconstruction) within inventoried roadless areas of our national forests. *Id.* at 3262. The second question recognized the unique nature of the Tongass National Forest, which, at 16.8 million acres, is the nation's largest national forest.[1] *Id.* The issue was whether to exempt the Tongass from the proposed Roadless Rule in whole or in part. *Id.* at 3262-63. Thus, the Department examined four alternatives for treating the Tongass under the Roadless Rule: applying any new rule to the Tongass with no exceptions (Tongass Not Exempt), excluding the Tongass from a new rule altogether (Tongass Exempt), postponing any decision on the application of a new rule to the Tongass until 2004 (Tongass Deferred), and applying some of the prohibitions of a new rule only to certain parts of the Tongass (Tongass Selected Areas). *Id.* No other national forest received such special consideration in

[1] The Tongass is vitally important to the economy of Southeast Alaska; it supports significant timber and mining activity as well as commercial and recreational fishing, hunting, recreation, and tourism. The Tongass is also part of the Pacific coast ecoregion, which encompasses one fourth of the world's coastal temperate rainforests. *Id.* at 3254. The Tongass has a very high degree of ecosystem health, and a higher percentage of inventoried roadless acreage than any Forest Service region in the contiguous United States.

the Department's nationwide assessment of the proposed Roadless Rule.

Given the unique importance of the Tongass and the many competing interests in its use and management, it was not surprising that thousands of public comments concerning the proposed rule were received, or that the Department gave the Tongass special consideration. *Id.* at 3248. Approximately 16,000 people attended 187 public meetings, and the Department received more than 517,000 comments on the proposed rule. *Id.* The 2001 ROD squarely recognized that adopting the Roadless Rule risked significant and negative local economic impact for the Tongass:

> With the recent closure of pulp mills and the ending of long-term timber sale contracts, the timber economy of Southeast Alaska is evolving to a competitive bid process. About two-thirds of the total timber harvest planned on the Tongass National Forest over the next 5 years is projected to come from inventoried roadless areas. If road construction were immediately prohibited in inventoried roadless areas, approximately 95 percent of the timber harvest within those areas would be eliminated.
>
> * * *
>
> Based on the analysis contained in the [Final Environmental Impact Statement], a decision to implement the rule on the Tongass National Forest is expected to cause additional

> adverse economic effects to some forest dependent communities ([Final Environmental Impact Statement] Vol. 1, 3-326 to 3-350). During the period of transition, an estimated 114 direct timber jobs and 182 total jobs would be affected. In the longer term, an additional 269 direct timber jobs and 431 total jobs may be lost in Southeast Alaska.

Id. at 3254-55.

In light of these socio-economic concerns, the proposed Roadless Rule suggested the Tongass Deferred option. *See* Special Areas; Roadless Area Conservation, 65 Fed. Reg. 30,276, 30,277, 30,280-81 (May 10, 2000) (notice of proposed rulemaking). But the 2001 ROD expressly found that such an approach "would risk the loss of important roadless area values" in the Tongass. 66 Fed. Reg. at 3254. The 2001 ROD also rejected the Tongass Selected Areas option, finding that even under that more limited approach, "[i]mportant roadless area values would be lost or diminished." *Id.* at 3266. Ultimately, the Department adopted a national Roadless Rule prohibiting road construction and timber harvesting in inventoried roadless areas of the National Forest System except for specified "human and environmental protection measures." *Id.* at 3263. The Department decided that the Roadless Rule would apply to the Tongass, but with several exceptions designed to mitigate the impacts of the Rule in Southeast Alaska. The exceptions allowed: (1) road construction and reconstruction in certain mineral-leasing areas, (2) timber

harvest in areas where roadless characteristics had been substantially altered by road construction or timber harvest since the area was designated an inventoried roadless area but before implementation of the Roadless Rule, and (3) planned timber harvest and road construction in areas where a notice of availability of a draft environmental impact statement had been published in the Federal Register prior to publication of the Roadless Rule. *Id.* at 3266. The Department estimated that these exceptions would together allow enough continued timber harvest from the Tongass "to satisfy about seven years of estimated market demand." *Id.*

B. The Roadless Rule Litigation

Although the Department intended the Roadless Rule to reduce litigation about forest management, *see id.* at 3244, 3246, that hope was promptly dashed. Litigation over the Roadless Rule began immediately after its adoption. In 2001, an Idaho district judge preliminarily enjoined implementation of the Roadless Rule, citing violations of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 ("NEPA"). *Kootenai Tribe of Idaho v. Veneman*, No. 01-10-N-EJL, 2001 WL 1141275, at *2 (D. Idaho May 10, 2001). This court reversed, finding that plaintiffs had not shown a likelihood of success on their NEPA claim. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1126 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178-80 (9th Cir. 2011) (en banc). The Roadless Rule

took effect when the *Kootenai* mandate issued in April 2003. *See California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1007 (9th Cir. 2009) (describing history of the Roadless Rule).

The State of Alaska also challenged the Roadless Rule soon after its adoption. The State's complaint, filed in the District of Alaska in 2001, claimed that the promulgation of the Roadless Rule violated NEPA, the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 ("APA"), the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 ("ANILCA"), the Tongass Timber Reform Act, Pub. L. No. 101-626, 104 Stat. 4426 (1990) (codified as amended in scattered sections of 16 U.S.C.) ("TTRA"), and other federal statutes. Complaint, *Alaska v. U.S. Dep't of Agric.*, No. 3:01-cv-00039-JKS (D. Alaska Jan. 31, 2001), ECF No. 1; *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960, 964 (D. Alaska 2011) (describing this litigation). The case settled, and Alaska's complaint was dismissed.[2] *Organized Vill.*, 776 F. Supp. 2d at 964.

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[2] Alaska again challenged the validity of the Roadless Rule in 2011, this time in the District of Columbia. The district court found the action barred by the statute of limitations. *Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d 30, 33-34 (D.D.C. 2013). The D.C. Circuit reversed, holding that the limitations period had reset when the Roadless Rule was reinstated in 2006. *Alaska v. U.S. Dep't of Agric.*, 772 F.3d 899, 900 (D.C. Cir. 2014). This litigation remains pending.

Four months after this court decided *Kootenai*, the Roadless Rule was permanently enjoined by a Wyoming district court that found the rule violated both NEPA and the Wilderness Act, 16 U.S.C. §§ 1131-1136. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003), *vacated*, *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211, 1214 (10th Cir. 2005). While that ruling was on appeal, the Department promulgated the "Special Areas; State Petitions for Inventoried Roadless Area Management" rule (the "State Petitions Rule"). 70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at 36 C.F.R. §§ 294.10-294.18). The State Petitions Rule replaced the Roadless Rule with a process under which the "Governor of any State or territory that contains National Forest System lands" could "petition the Secretary of Agriculture to promulgate regulations establishing management requirements for all or any portion of National Forest System inventoried roadless areas within that State or territory." *Id.* at 25,661. In light of the new rule, the Tenth Circuit dismissed the Department's appeal from the Wyoming district court judgment as moot and vacated the judgment. *Wyoming*, 414 F.3d at 1211, 1214.

A year later, however, a California district court set aside the State Petitions Rule, finding it invalid under NEPA and the Endangered Species Act, 16 U.S.C. §§ 1531-1544; the district court therefore reinstated the Roadless Rule. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F Supp. 2d 874, 909, 912, 919 (N.D. Cal. 2006). This court affirmed. *Lockyer*,

575 F.3d at 1021. In 2008, a Wyoming district court again permanently enjoined the Roadless Rule. *Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309, 1355 (D. Wyo. 2008), *rev'd, Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011). In 2011, the Tenth Circuit once again reversed. *Wyoming*, 661 F.3d at 1272.

C. The Tongass Exemption

In return for Alaska's dismissal of its 2001 suit challenging the Roadless Rule, the Department agreed to publish (but not necessarily to adopt) a proposed rule, the "Tongass Exemption," to "temporarily exempt the Tongass from the application of the roadless rule" as well as an advanced notice of proposed rulemaking to permanently exempt the Tongass and another Alaska national forest from the Roadless Rule. *See* Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 41,865, 41,866 (Jul. 15, 2003) (notice of proposed rulemaking). In December of 2003, the Department issued a record of decision (the "2003 ROD") promulgating the final Tongass Exemption, the "Special Areas; Roadless Conservation; Applicability to the Tongass National Forest, Alaska" rule. 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. § 294.14). The 2003 ROD expressly found that "the overall decisionmaking picture" was not "substantially different" from when the 2001 ROD was promulgated, *id.* at 75,141, and that public comments about the Tongass Exemption

"raised no new issues . . . not already fully explored" in the earlier rulemaking, *id.* at 75,139. Thus, the Department relied on the 2001 Roadless Rule Final Environmental Impact Statement ("Roadless Rule FEIS"), rather than preparing a new one. *Id.* at 75,136, 75,141.

The 2003 ROD adopted the Tongass Exempt Alternative identified in the 2001 ROD, thus returning the Tongass to management through a local forest plan, the Tongass Forest Plan. *Id.* at 75,136. Contrary to the 2001 ROD, the 2003 ROD concluded "[a]pplication of the roadless rule to the Tongass is unnecessary to maintain the roadless values of these areas," *id.* at 75,137, which the Department found were already "well protected by the Tongass Forest Plan," *id.* at 75,144.

D. The Procedural History of This Case

In 2009, the Organized Village of Kake and others (collectively, the "Village") filed this suit in the District of Alaska, alleging that the Tongass Exemption violated NEPA and the APA. *See Organized Vill.*, 776 F. Supp. 2d at 967. The State of Alaska intervened as a party-defendant. *Id.* at 961. The district court granted summary judgment to the Village, finding the promulgation of the Tongass Exemption violated the APA, 5 U.S.C. § 706(2)(A), because "the Forest Service provided no reasoned explanation as to why the Tongass Forest Plan protections it found deficient in [2001], were deemed sufficient in [2003]."

Id. at 974, 977. The court thus vacated the Tongass Exemption and reinstated application of the Roadless Rule to the Tongass.[3] *Id.* at 977.

The Department declined to appeal. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 746 F.3d 970, 973 (9th Cir. 2014). Alaska, however, did appeal, and a divided three-judge panel of this court reversed the district court's APA ruling and remanded for consideration of the Village's NEPA claim.[4] *Id.* at 973, 980. A majority of the nonrecused active judges on this court then voted to grant the Village's petition for rehearing en banc. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 765 F.3d 1117 (9th Cir. 2014).

II.

A. Jurisdiction

We begin, as we did in *Kootenai*, by examining "whether the intervenor[ ] may defend the government's alleged violations of . . . the APA when the federal defendants have decided not to appeal." 313 F.3d at 1107. Although the Village does not challenge Alaska's standing, that silence does not excuse us

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[3] Because the court found the Tongass Exemption invalid under the APA, it did not reach the Village's NEPA claim. *Organized Vill.*, 776 F. Supp. 2d at 976.

[4] The Alaska Forest Association also intervened below, but did not appeal, instead filing a brief as amicus curiae. Amicus Brief, *Organized Vill.*, No. 11-35517 (9th Cir. Nov. 1, 2011), ECF No. 19.

from determining whether we have appellate jurisdiction. *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 966-67 (9th Cir. 2004).[5]

"[I]ntervenors are considered parties entitled . . . to seek review," but "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). To establish Article III standing, a party must demonstrate "injury in fact," causation, and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). When the original defendant does not appeal, "the test is whether the intervenor's interests have been adversely affected by the judgment." *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992).

Under the National Forest Receipts program, Alaska has a right to twenty-five percent of gross receipts of timber sales from national forests in the State. *See* 16 U.S.C. § 500. Accordingly, from 1970 through 2001, Alaska received more than $93 million in Tongass receipts. The permitted amount of timber harvesting in the Tongass is directly affected by the

[5] The D.C. Circuit did not question Alaska's standing in the litigation before that court about the 2001 ROD. *Alaska*, 772 F.3d at 899-900.

Tongass Exemption. *See* 2001 ROD, 66 Fed. Reg. at 3270 (finding that under the Roadless Rule, "[h]arvest effects on the Tongass National Forest will be reduced about 18 percent in the short-term" and "about 60 percent" in the long-term). The effect of the Roadless Rule on Alaska's statutory entitlement to timber receipts means that Alaska has an interest in the judgment, *Didrickson*, 982 F.2d at 1338, sufficient to establish Article III standing, *see Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160-61 (1981).

Our dissenting colleague argues that Article III standing is absent because "Congress did not intend to legislate standing" for a state under 16 U.S.C. § 500. This argument misses the mark. As the Supreme Court has recently made clear, whether Congress created a private cause of action in legislation is not a question of Article III standing. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 & n.4 (2014). Notwithstanding that courts sometimes have mistakenly referred to this inquiry as involving "prudential standing," the Court has made plain that it "does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Id.* at 1387 & n.4 (internal quotation marks omitted) (noting that "prudential standing" is a "misnomer"). Here, Alaska does not pursue a claim under the National Forest Receipts program. Rather, this is an APA action initiated by the Village challenging the Tongass Exemption. In such an action, we apply the

familiar "zone of interests" test. *Id.* at 1388-89. The Supreme Court has emphasized,

> in the APA context, that the test is not especially demanding. In that context we have often conspicuously included the word "arguably" in the test to indicate that the benefit of any doubt goes to the plaintiff, and have said that the test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue. That lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review. We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes.

Id. at 1389 (citations and internal quotation marks omitted).

There can be no doubt that the Village more than amply met the forgiving "zone of interests" test when it instituted this APA action. That resolves the issue, because "[a]n intervenor's standing to pursue an

appeal does not hinge upon whether the intervenor could have sued the party who prevailed in the district court." *Didrickson*, 982 F.2d at 1338.[6]

Of course, Alaska must also have Article III standing. Thus, the only issue really before us is whether the judgment below threatens Alaska with an injury in fact that gives the State a "stake in defending . . . enforcement" of the Tongass Exemption sufficient to satisfy Article III. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (internal quotation marks omitted). In this respect, contrary to the dissent, *Energy Action Educational Foundation* is on all fours. Under the Outer Continental Shelf Lands Act Amendments of 1978 ("OCS"), the federal government was required to share revenues from a federal OCS lease with a state owning adjoining portions of an oil and gas pool. *Energy Action Educ. Found.*, 454 U.S. at 160-61. When California challenged the bidding system used for awarding federal leases, the Secretary of the Interior disputed the State's standing. *Id.* In finding that California alleged a potential injury sufficient to establish Article III

[6] Even if we were required to determine whether Alaska satisfied the zone of interest test in this action, the answer would be the same. The State's interests in timber harvesting, road construction, and economic development are directly impacted by the Tongass Exemption, and are extensively discussed in the 2003 ROD. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (explaining that APA standing requires only that a party's interests be "marginally" related to the challenged action).

standing, the Court relied expressly on the State's right to revenues under the 1978 OCS amendments:

> The 1978 Amendments require the Federal Government to turn over a fair share of the revenues of an OCS lease to the neighboring coastal State whenever the Federal Government and the State own adjoining portions of an OCS oil and gas pool. California thus has a direct financial stake in federal OCS leasing off the California coast. In alleging that the bidding systems currently used by the Secretary of the Interior are incapable of producing a fair market return, California clearly asserts the kind of distinct and palpable injury that is required for standing.

Id. at 160-61 (citations and internal quotation marks omitted).[7]

The royalties due California under the OCS are indistinguishable for Article III purposes from the fractional timber receipts due Alaska under the National Forest Receipts program. It is not disputed that reinstatement of the Roadless Rule in the

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[7] Contrary to the dissent, the Court did not rely on California's ownership of adjacent oil deposits in finding a sufficient injury to establish Article III standing. Although the Court properly noted that the OCS required the Secretary "to use the best bidding systems and thereby assure California a fair return for its resources," *Energy Action Educ. Found.*, 454 U.S. at 161, it did so when analyzing causation and redressability *after* it had already found that California's right to statutory payment established the requisite injury in fact.

Tongass will limit timbering and thereby reduce Alaska's statutory entitlement to fractional receipts. Alaska's claimed injury is thus precisely the same kind of "injury in fact" alleged by California with respect to the federal lease bidding system – loss of funds promised under federal law – and satisfies Article III's standing requirement.[8]

To be sure, Alaska and its government subdivisions have elected since 2001 to receive payments under the Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393, 114 Stat. 1607, and successor legislation, in lieu of the fractional payments.[9] But, Congress's current decision to protect beneficiaries of the National Forest Receipts program against declines in timbering revenues does not vitiate Alaska's Article III standing to challenge the reinstatement of the Roadless Rule.

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[8] The dissent correctly does not contest that the causation and redressability prongs of Article III standing are satisfied here.

[9] The Secure Rural Schools Act was reauthorized numerous times before it briefly expired in 2014. *See* U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act § 5401, Pub. L. No. 110-28, 121 Stat. 112 (2007); Emergency Economic Stabilization Act § 601, Pub. L. No. 110-343, 122 Stat. 3765 (2008); Moving Ahead for Progress in the 21st Century Act § 100101, Pub. L. No. 112-141, 126 Stat. 405 (2012); Helium Stewardship Act of 2013 § 10(a), Pub. L. No. 113-40, 127 Stat. 534 (2013). The Secure Rural Schools Act was reauthorized for two years on April 27, 2015. *See* Medicare Access and CHIP Reauthorization Act § 524, Pub. L. No. 114-10, 129 Stat. 87 (2015).

The Rule directly affects the size of Alaska's statutory entitlement to receipts from timbering, whether or not Congress chooses in any year to hold the state harmless against those losses, just as a plaintiff with an insurance policy has standing to sue a defendant who has damaged his home, even though in the end the insurer (or even the homeowner's uncle) has agreed to indemnify the homeowner for all losses.[10]

B. The APA claim

1. The APA Requirements for a Change of Agency Policy

The APA requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is "arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Unexplained inconsistency" between agency actions is "a reason for holding an interpretation

[10] Because the Roadless Rule's impact on Alaska's right to fractional receipts under the National Forest Receipts program suffices to establish Article III injury in fact, we need not consider other possible bases for Article III standing.

to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

The Supreme Court addressed the application of the APA to agency policy changes in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). In *Fox*, the Court held that a policy change complies with the APA if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515-16, 129 S.Ct. 1800 (emphasis omitted).

Fox involved the FCC's decision to treat isolated uses of non-literal profanity in television broadcasts as indecency, a reversal of agency policy. *Id.* at 508-10. Because the FCC had not based its prior policy on factual findings, but rather on its reading of Supreme Court precedent, the *Fox* majority did not explore the kind of "reasoned explanation" necessary to justify a policy change that rested on changed factual findings. *See id.* at 538 (Kennedy, J., concurring). But, Justice Kennedy, whose concurrence provided the fifth vote in the *Fox* 5-4 majority, plumbed this issue in his opinion. *See id.* at 535-39.

As a paradigm of the rule that a policy change violates the APA "if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so," Justice Kennedy cited *State Farm*. *Id.* at 537. That case involved congressional direction to an agency to issue regulations for "motor vehicle safety." *Id.* (quoting *State Farm*, 463 U.S. at 33). The agency issued a regulation requiring cars to have airbags or automatic seatbelts, finding that "these systems save lives." *Id.* at 537-38 (citing *State Farm*, 463 U.S. at 35, 37). After a change in presidential administrations, however, the agency rescinded the regulation, never addressing its previous findings. *Id.* at 538 (citing *State Farm*, 463 U.S. at 47-48). As Justice Kennedy noted, the "Court found the agency's rescission arbitrary and capricious because the agency did not address its prior factual findings." *Id.* (citing *State Farm*, 463 U.S. at 49-51).

The central issue in this case is whether the 2003 ROD rests on factual findings contradicting those in the 2001 ROD, and thus must contain the "more substantial justification" or reasoned explanation mandated by *Fox. Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1209 (2015). We conclude that the 2003 ROD falls short of these APA requirements.

2. The Tongass Exemption Violated the APA

After compiling a detailed factual record, the Department found in the 2001 ROD that "the long-term

ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to [southeast Alaska] communities" from application of the Roadless Rule. 66 Fed. Reg. at 3255. On precisely the same record, the 2003 ROD instead concluded that the [sic] "the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits" of the Roadless Rule. 68 Fed. Reg. at 75,141. Alaska contends, and we agree, that the 2003 ROD is a change in policy.

We also agree with Alaska that the 2003 ROD complies with three of the *Fox* requirements. First, the Department displayed "awareness that it *is* changing position." *Fox*, 556 U.S. at 515. The 2003 ROD acknowledges that the Department rejected the Tongass Exemption in 2001 and recognizes that it is now "treating the Tongass differently." 68 Fed. Reg. at 75,139. Second, the 2003 ROD asserts that "the new policy is permissible" under the relevant statutes, ANILCA and TTRA. *Fox*, 556 U.S. at 515; 68 Fed. Reg. at 75,142. Third, we assume the Department "believes" the new policy is better because it decided to adopt it. *Fox*, 556 U.S. at 515 (emphasis omitted).

It is the Department's compliance with the fourth *Fox* requirement, that it give "good reasons" for adopting the new policy, upon which this case turns. *Id.* The 2003 ROD explicitly identifies the Department's reasons for "Going Forward With This Rulemaking" as "(1) serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions would cause in communities

throughout Southeast Alaska, (2) comments received on the proposed rule, and (3) litigation over the last two years." 68 Fed. Reg. at 75,137. We examine below whether these constitute "good reasons" under the APA, and whether a factual finding contrary to the findings in the 2001 ROD underlays the Department's reasoning.

i. Socioeconomic Concerns

The 2003 ROD explains the Department's reversal of course as arising out of concern about "economic and social hardships that application of the [roadless] rule's prohibitions would cause in communities throughout Southeast Alaska." *Id.* Those concerns were not new. In both the 2001 and 2003 RODs, the Department acknowledged the "unique" socioeconomic consequences of the Roadless Rule for the timber-dependent communities of southeast Alaska. *See id.* at 75,139; 2001 ROD, 66 Fed. Reg. at 3266. For this reason, the Roadless Rule included special mitigation measures – not added for any other national forest – allowing certain ongoing timber and road construction projects in the Tongass to move forward. 2001 ROD, 66 Fed. Reg. at 3266. Moreover, both RODs incorporated potential job loss analysis from the Roadless Rule FEIS. *See* 2003 ROD, 68 Fed. Reg. at 75,137; 2001 ROD, 66 Fed. Reg. at 3255.

We do not question that the Department was entitled in 2003 to give more weight to socioeconomic concerns than it had in 2001, even on precisely the

same record. "*Fox* makes clear that this kind of reevaluation is well within an agency's discretion." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012). There was a change in presidential administrations just days after the Roadless Rule was promulgated in 2001. Elections have policy consequences. But, *State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.

That is precisely what happened here. The 2003 ROD did not simply rebalance old facts to arrive at the new policy. Rather, it made factual findings directly contrary to the 2001 ROD and expressly relied on those findings to justify the policy change. The 2001 ROD explicitly found that wholly exempting the Tongass from the Roadless Rule and returning it to management under the Tongass Forest Plan "would risk the loss of important roadless area values," 66 Fed. Reg. at 3254, and that roadless values would be "lost or diminished" even by a limited exemption, *id.* at 3266. The 2003 ROD found in direct contradiction that the Roadless Rule was "unnecessary to maintain the roadless values," 68 Fed. Reg. at 75,137, and "the roadless values in the Tongass are sufficiently protected under the Tongass Forest Plan," *id.* at 75,138.

There can be no doubt that the 2003 finding was a critical underpinning of the Tongass Exemption. The 2003 ROD states that "[t]he Department has concluded that the social and economic hardships to

Southeast Alaska outweigh the potential long-term ecological benefits *because* the Tongass Forest Plan adequately provides for the ecological sustainability of the Tongass." *Id.* at 75,141-42 (emphasis added). The 2003 ROD also makes plain that "[t]his decision reflects the facts . . . that roadless values are plentiful on the Tongass and are well protected by the Tongass Forest Plan. The minor risk of the loss of such values is outweighed by the by the [sic] more certain socio-economic costs of applying the roadless rule's prohibitions to the Tongass." *Id.* at 75,144.

Thus, contrary to the contentions of both Alaska and dissenting colleagues, this is not a case in which the Department – or a new Executive – merely decided that it valued socioeconomic concerns more highly than environmental protection. Rather, the 2003 ROD rests on the express finding that the Tongass Forest Plan poses only "minor" risks to roadless values; this is a direct, and entirely unexplained, contradiction of the Department's finding in the 2001 ROD that continued forest management under precisely the same plan was unacceptable because it posed a high risk to the "extraordinary ecological values of the Tongass." 66 Fed. Reg. at 3254. The Tongass Exemption thus plainly "rests upon factual findings that contradict those which underlay its prior policy." *Fox*, 556 U.S. at 515. The Department was required to provide a "reasoned explanation . . . for disregarding" the "facts and circumstances" that underlay its previous decision. *Id.* at 516; *Perez*, 135 S. Ct. at 1209. It did not.

Consistent with *Fox*, we have previously held that unexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA. In *Humane Society of the United States v. Locke*, we confronted a determination by the National Marine Fisheries Service that sea lions posed a "significant negative impact" on fish populations, and could therefore be "lethally removed." 626 F.3d 1040, 1045-46 (9th Cir. 2010). The agency had made four previous findings, however, that comparable or greater dangers to similar fish populations would *not* have a significant adverse impact. *Id.* at 1048. We found that the APA required the agency to provide a "rationale to explain the disparate findings." *Id.* at 1049 (citing *Fox*, 556 U.S. 502).

The same result is mandated here. The 2003 ROD does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a "minor" one. The absence of a reasoned explanation for disregarding previous factual findings violates the APA. "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring).

Of course, not every violation of the APA invalidates an agency action; rather, it is the burden of the opponent of the action to demonstrate than an error is prejudicial. *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010); *see also*

Shinseki v. Sanders, 556 U.S. 396, 409 (2009) ("This Court has said that the party that seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." (internal quotation marks omitted)).

But the required demonstration of prejudice is "not . . . a particularly onerous requirement." *Shinseki*, 556 U.S. at 410. "If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further." *Jicarilla*, 613 F.3d at 1121. Because the Department's 2003 finding that the threat to the environment from the Tongass Exemption had now become "minor" is the centerpiece of its policy change, the absence of a reasoned explanation for that new factual finding is not harmless error. *See Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1091-92 (9th Cir. 2011) (applying *Shinseki* prejudice review to rulemaking). The Tongass Exemption therefore cannot stand.

ii. The Department's Other Rationales

Although we conclude that the Tongass Exemption is invalid because the Department failed to provide a reasoned explanation for contradicting the findings in the 2001 ROD, we also briefly consider the two other rationales offered by the Department. These rationales do not rest on factual findings contrary to the 2001 ROD, but neither withstands even the forgiving general requirement that the

proffered reason for agency action not be "implausible." *State Farm*, 463 U.S. at 43.

The second of the three reasons given by the Department in the 2003 ROD for promulgating the Tongass Exemption was "comments received on the proposed rule." 68 Fed. Reg. at 75,137. But, the 2003 ROD expressly conceded that these "comments raised no new issues" beyond those "already fully explored in the [Roadless Rule FEIS]." *Id.* at 75,139. It is implausible that comments raising "no new issues" regarding alternatives "already fully explored" motivated the adoption of the final Roadless Rule.

The third rationale for the Tongass Exemption, "litigation over the last two years," *id.* at 75,137, fares no better. The 2003 ROD states that "[a]dopting this final rule reduces the potential for conflicts regardless of the disposition of the various lawsuits" over the Roadless Rule. *Id.* at 75, 138. Alaska candidly conceded in its opening brief that the Tongass Exemption "obviously will not remove all uncertainty about the validity of the Roadless Rule, as it is the subject of a nationwide dispute and . . . nationwide injunctions." These other lawsuits involved forests other than the Tongass, so it is impossible to discern how an exemption for the Alaska forest would affect them. And, the Department could not have rationally expected that the Tongass Exemption would even have brought certainty to litigation about this particular forest. It predictably led to this lawsuit, and did not even prevent a separate attack by Alaska on the

Roadless Rule itself.[11] most, the Department deliberately traded one lawsuit for another.

C. Remedy

"'Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.'" *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)); *see* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."). "The effect of invalidating an agency rule is to reinstate the rule previously in force." *Paulsen*, 413 F.3d at 1008. A district court's reinstatement of a prior rule is reviewed for abuse of discretion. *Lockyer*, 575 F.3d at 1011, 1019-20.

Alaska argues, however, that because the remedy for an invalid rule is not the reinstatement of another invalid rule, *see Paulsen*, 413 F.3d at 1008, the district court abused its discretion reinstating the Roadless Rule because that Rule had been enjoined by the Wyoming district court both when the Tongass Exemption was promulgated and when the judgment

[11] The settlement of Alaska's 2001 suit against the Department required the department to promulgate an advance notice of proposed rulemaking to permanently exempt several national forests in Alaska from the Roadless Rule; the State's concerns with the Roadless Rule thus extend beyond the Tongass. *See* 2003 ROD, 68 Fed. Reg. at 75,136.

below was entered. But, wholly aside from the obvious conflict between the first Wyoming district court judgment and our later opinion in *Lockyer*, 575 F.3d 999, the argument is of no avail. The Tenth Circuit vacated both Wyoming district court injunctions. *See Wyoming*, 661 F.3d at 1272; *Wyoming*, 414 F.3d at 1214. The Roadless Rule therefore remains in effect and applies to the Tongass.

III.

We **AFFIRM** the judgment of the district court.

CHRISTEN, Circuit Judge, with whom THOMAS, Chief Circuit Judge, joins, concurring:

As the court's opinion recognizes, the Tongass is vitally important to Southeast Alaska. The court is equally express in acknowledging that changes of administration can indeed have consequences. Neither of these points is in dispute.

This case is unique because no new facts were presented between the time the Department of Agriculture adopted the Roadless Rule in 2001 and the time it reversed its decision in 2003. The outcome of the case pivots on the undeniable: the 2003 decision was contradicted by the agency's previous factual findings. In 2001, the agency found that "[a]llowing road construction and reconstruction on the Tongass National Forest to continue unabated would risk the

loss of important roadless area values." Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,254-55 (Dep't of Agric. Jan. 12, 2001) (to be codified at 36 C.F.R. §§ 294.10-294.14). In 2003, the agency concluded that "the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits *because the Tongass Forest Plan adequately provides for the ecological sustainability of the Tongass.*"Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,141-42 (Dep't of Agric. Dec. 30, 2003) (to be codified at 36 C.F.R. § 294.14) (emphasis added).

The dissent suggests that the 2003 decision was likely the result of a change in administrations, and argues that the agency, "following the policy instructions of the new president," was free to weigh the same evidence and "simply conclude[ ] that the facts mandated different regulations than the previous administration." Supreme Court authority directs otherwise. Under *FCC v. Fox Television Stations, Inc.*, when a new policy is contradicted by an agency's previous factual findings, the law does not allow the agency to simply ignore the earlier findings. 556 U.S. 502, 516 (2009). Instead, the law requires that the agency provide a reasoned explanation for changing course and adopting a position contradicted by its previous findings. *Id.*

In this case, the agency was unable to defend its flip-flop when the case was argued in the district court, and the agency chose not to participate in the

appeal. Despite the efforts of the intervenor, the record and arguments presented to the district court support its decision, which we affirm today.

I write separately to voice my view that there is no indication the conscientious district court judge who first ruled in this case decided it based on his own views, and our court does not do so either. Judges do not have the expertise to manage national forests, but we are often called upon to decide whether a federal agency followed correct procedures. Whether or not they are reflected in the headlines, our rulings in environmental cases sometimes have the result of permitting resources to be extracted, *e.g., Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989 (9th Cir. 2013), roads to be constructed, *e.g.*, *Sierra Club v. BLM*, 786 F.3d 1219 (9th Cir. 2015), forests to be logged, *e.g.*, *Lands Council v. McNair*, 629 F.3d 1070 (9th Cir. 2010), or forests to be thinned to manage the risk of fire, *e.g.*, *Friends of the Wild Swan v. Weber*, 767 F.3d 936 (9th Cir. 2014). Other times, they do not. *See, e.g.*, *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) (enjoining logging project while Forest Service completed supplemental environmental impact statement). Regardless of the outcome, the court's aim is to fairly and impartially apply the law when we entertain such procedural challenges. Because in this case the Department of Agriculture did not follow the rule articulated by the Supreme Court in *Fox*, I join the majority in affirming the district court's decision.

CALLAHAN, Circuit Judge, dissenting:

The State of Alaska appeals the District Court for the District of Alaska's decision setting aside the Departure of Agriculture's exemption of the Tongass National Forest from the Roadless Rule. The majority holds that Alaska has standing to appeal based on a statutory entitlement – an option to collect a share of the revenue the United States makes from timber harvested from national forests in Alaska. *See* 16 U.S.C. § 500 (creating the National Forest Receipts Program). But Alaska does not have standing based on this statutory interest. A statutory provision is insufficient to establish Article III standing where, as here, the right it creates has not been invaded, Congress did not intend to legislate standing, and no factual injury has been suffered. The majority strays well beyond Article III's confines in holding that Congress legislated standing by creating a revenue-sharing program. The majority alarmingly opens the door to governance of the nation's natural resources by injunction, but only to those groups powerful enough to secure a statutory entitlement tied to development of those resources. Moreover, Alaska has not lost any revenue or even alleged that it will receive less money from the federal government if the district court's decision stands. I respectfully dissent.

I.

This Court's jurisdiction is limited by Article III of the Constitution to "cases" and "controversies."

U.S. Const., Art. III, § 2. One element of the Constitution's case-or-controversy requirement is that a litigant must demonstrate standing to sue. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). The standing requirement is built on separation-of-powers principles; it "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* The standing requirement "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citation omitted).

States generally may seek to bring suit in three capacities: (1) "proprietary suits," in which states sue like private parties to remedy a concrete, particularized injury; (2) "sovereignty suits," in which states, for example, seek adjudication of boundary or water rights; and (3) "*parens patriae* suits," in which states sue on behalf of their citizens.[1] *Alfred L. Snapp & Son v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600 (1982). To establish standing to sue in a proprietary capacity a State, like other litigants, must meet the following, familiar requirements:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and

[1] States also may seek to protect their "quasi-sovereign" interests in such suits, but "evidence of actual injury is still required." *Sturgeon v. Masica*, 768 F.3d 1066, 1074 (9th Cir. 2014); *see also Snapp*, 458 U.S. at 607.

> particularized, and (b) "actual or imminent, not 'conjectural or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (footnote and citations omitted).

Alaska's standing fails at the first step. Alaska has not demonstrated that reinstatement of the Roadless Rule's application to the Tongass has caused, or imminently will cause, the State an injury in fact. This is the "first and foremost" requirement of standing, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997), "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

II.

Alaska advances three interests for purposes of demonstrating injury in fact: (1) a statutory interest in "the flow of monies to the State via the National Forest Receipts Program"; (2) a procedural interest based on the fact that the Department of Agriculture "initiated the rulemaking [that led to the Tongass

exemption] pursuant to a settlement agreement with the State"; and (3) a *parens patriae* interest in Alaskan jobs that are "tied to timber." None of these asserted harms satisfies Article III's injury-in-fact requirement.

A.

The majority finds that Alaska has standing because of "the effect of the Roadless Rule on Alaska's statutory entitlement" under the National Forest Receipts Program to twenty-five percent of gross receipts of timber sales from national forests in the State. Without the Tongass exemption, the majority explains, less timber will be harvested from the Tongass National Forest, thus potentially decreasing the amount of revenue that Alaska may receive under the National Forest Receipts Program. This statutory entitlement argument fails for at least two reasons.

1.

First, by creating a "statutory entitlement" to a share of federal timber revenue, Congress did not legislate the Article III standing of state and local governments to challenge federal natural resource management. The Supreme Court has strongly suggested that Congress cannot create injury in fact by legislative fiat – rather, a litigant must have suffered not only a violation of a legal right, but also a factual harm. *See, e.g.*, *Summers*, 555 U.S. at 497; *Lujan*, 504 U.S. at 578. But it still may be that

"Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). We, for example, have held that a statutory provision may provide a litigant with Article III standing where (1) Congress indicated that it intended for the provision to create a statutory right by creating a "private cause of action to enforce" the provision, (2) the litigant's statutory right has been infringed, and (3) the litigant has also suffered a concrete, "de facto injury," albeit one that was previously inadequate at law. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412-13 (9th Cir. 2014), *cert. granted*, No. 13-1339, 2015 WL 1879778 (U.S. Apr. 27, 2015).

Even if Congress may legislate standing in some circumstances, however, it has not done so here. There is no indication in 16 U.S.C. § 500's text or history that Congress intended to legislate state and municipal standing to challenge the federal government's management of national forests. *See Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) ("Essentially, the standing question in such cases [where a litigant asserts standing based on a statutory right] is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.") (citation omitted), *cert. dismissed as*

improvidently granted, 132 S. Ct. 2536 (2012).[2] Indeed, in the 107 years since § 500 was enacted, no court has found that the law gives states standing to challenge actions or inactions that may reduce federal timber receipts.

Moreover, even if Congress intended for § 500 to confer a statutory right to revenue, the invasion of which constitutes injury in fact, the right does not entitle Alaska to standing here because it has not been infringed. *See Linda R.S.*, 410 U.S. at 617 n.3 ("Congress may enact statutes creating legal rights, *the invasion of which creates standing*, even though no injury would exist without the statute." (emphasis added)).[3] Section 500 entitles Alaska to a share of

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[2] Other courts have disagreed that a statutory provision can create standing in the absence of actual harm. *See, e.g.*, *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013) ("[T]his theory of Article III standing is a non-starter as it conflates statutory standing with constitutional standing."); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.). To the extent that Congress may legislate Article III standing, however, it follows that a Court must employ the usual tools of statutory interpretation to determine if Congress intended for a statutory provision to create standing.

[3] *See also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (same); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002) ("To establish standing [to appeal], the defendant-intervenors must first show that they have suffered an injury in fact, [which involves, among other things,] an invasion of a legally-protected interest. . . ." (quotation marks omitted)), *abrogated by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Consumer Watchdog v. Wisc. Alumni Research Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014) (dismissing for lack of standing because, "[u]nlike the plaintiffs in the [Freedom of

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revenue generated, not a right to have revenue generated. *Alpine Cnty., Cal. v. United States*, 417 F.3d 1366, 1368 (Fed. Cir. 2005) (there is "no duty to generate revenue" under the National Forest Receipts Program). Thus, Alaska's entitlement to a share of federal timber revenue has not been "invaded" by reinstatement of the Roadless Rule, even assuming that Alaska could show that the Roadless Rule will cause Alaska to receive less money from the federal government.

The majority conflates the injury-in-fact requirement with the zone-of-interest test in discussing *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). The zone-of-interest test asks whether an injury to a litigant that meets Article III's injury-in-fact requirement falls within the zone of interests protected by the substantive statute under which that litigant sues. *Id.* at 1387-89. If not, the litigant's claim under that statute may not proceed.[4] *Id.* at 1388-89 (explaining that "the

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Information Act] and [Federal Election Campaign Act] cases, Consumer Watchdog was not denied anything to which it was entitled"), *cert. denied*, 135 S. Ct. 1401 (2015).

[4] For example, if Alaska had alleged that reinstatement of the roadless rule caused a State-owned timber business to suffer a financial loss, Alaska would have demonstrated an injury in fact for purposes of Article III standing. However, this "purely economic interest" would fall outside of the zone of interests protected by the National Environmental Policy Act under our precedent. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005).

zone-of-interests test is [a] tool for determining who may invoke [a] cause of action. . . ."). I agree with the majority that whether an injury in fact falls within a statute's zone of protected interests is not a jurisdictional question. *See id.* at 1387-88 & n.4.

This appeal presents a different, critical, and jurisdictional question that is rooted in Article III's case-or-controversy requirement: whether a statutory provision that has not been invaded and does not include a cause of action endows a litigant who has not suffered a de facto injury with Article III standing. The answer to this jurisdictional question is clearly no. Because Alaska's statutory right under § 500 has not been invaded, Alaska lacks both injury in law and injury in fact. Attempting to sidestep this problem, the majority suggests that Alaska does not need to demonstrate an injury in fact to maintain this appeal, it need only demonstrate a "stake in defending" the Tongass exemption. Maj. Op. 16-17, 19. This suggestion is contrary to controlling Supreme Court precedent and our circuit precedent. *Diamond v. Charles*, 476 U.S. 54, 66-69 (1986) (dismissing for lack of jurisdiction because a defendant intervenor did not demonstrate an injury in fact necessary to establish his standing to appeal); *Kootenai Tribe of Idaho*, 313 F.3d at 1109 ("To establish standing [to appeal], the defendant-intervenors must first show that they have suffered an injury in fact. . . .").

The prospective effects of the majority's decision are alarming. After today, states and many local governments presumably have standing, at least in

the Ninth Circuit, to challenge federal actions and inactions that may result in, among other things, fewer trees being felled in federal forests, less oil, gas, and coal being extracted from federal mineral estates, fewer cattle being turned out on public lands, or even the devaluation of federal land. States and local communities get a share of revenue generated from these and many other federal resources.[5] Surely by creating a revenue-sharing program tied to the development of natural resources Congress did not legislate state and municipal standing to challenge the pace and manner of the federal government's management of the nation's natural resources.

This case is not like *Watt v. Energy Action Educational Foundation*, 454 U.S. 151(1981), the case on which the majority relies. In *Watt*, California had standing based on its interest in "assur[ing] a fair return for *its* resources," specifically state-owned oil and gas reserves drained by drilling on adjoining

[5] *See, e.g.,* 43 U.S.C. §§ 315b, 315i, 315m (Grazing Leases Payments); 7 U.S.C. § 1012 (National Grasslands Payment); 30 U.S.C. §§ 191, 355 (Mineral Leasing Payments); 43 U.S.C. § 1337(g) (Offshore Mineral Leasing Payment); 42 U.S.C. § 6506a (National Petroleum Reserve in Alaska Payment); 16 U.S.C. § 715s (Refuge Revenue Sharing Payment); 31 U.S.C. §§ 6901-6907 (Payments in Lieu of Taxes); 16 U.S.C. §§ 577g, 577g-1 (Payments to Minnesota); 43 U.S.C. § 1181f (Oregon and California Grant Lands Payments); 43 U.S.C. § 1181f-1 (Coos Bay Wagon Road Grant Fund Payment); P.L. 100-446, § 323 (Arkansas Smoky Quartz Payment).

federal leases.[6] *Id.* at 161 (emphasis added); *see also id.* at 160 ("California . . . claim[ed] standing as an involuntary 'partner' with the Federal Government in the leasing of [Outer Continental Shelf (OCS)] tracts in which the underlying pool of gas and oil lies under both the OCS *and the 3-mile coastal belt controlled by California.*" (emphasis added)). The very language that the majority excerpts also makes it plain that California's standing was based on the State's "own[ership of] adjoining portions of an [OCS] oil and gas pool" and interest in securing a "fair market return" for drainage of those State-owned resources. Maj. Op. 19 (quoting *Watt*, 454 U.S. at 160-61). Alaska has not alleged injury to its interest in being fairly compensated for or avoiding damage to *its* natural resources, which would implicate an injury in fact. *Watt*, 454 U.S. at 160-61.[7]

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[6] In *Watt*, California challenged the federal government's bidding system for lease sales allowing for oil and gas development of the Outer Continental Shelf. California claimed that the bidding system was incapable of producing a fair market return for California's oil and gas drained by drilling on federal leases. *Id.* at 160-61.

[7] *See also*, *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) ("Because the Commonwealth owns a substantial portion of the state's coastal property," and "rising seas have already begun to swallow Massachusetts' coastal land," it "has alleged a particularized injury in its capacity as a landowner." (internal citation, quotation marks, and footnote omitted)); *Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309, 1329 (D. Wyo. 2008), *rev'd on other grounds,* 661 F.3d 1209 (10th Cir. 2011) (finding that "Wyoming has presented evidence that the Roadless Rule will increase the risk of environmental harm to its thousands of

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To be clear, the Supreme Court did *not* hold in *Watt*, as suggested by the majority, that the revenue sharing required by section 8(g) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337(g)(2), provides states with standing to challenge federal actions and inactions that may result in less oil and gas being extracted from the federal OCS. Rather, section 8(g) embodies a state's interest in being fairly compensated for development of the federal OCS that diminishes the state's resources. Absent harm to a state's resources or an invasion of that state's right to be fairly compensated for diminishment of those resources, section 8(g) does not support that state's standing to challenge federal management of the OCS.[8] *Watt* does not support Alaska's standing to appeal.

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acres of state forest land that are adjacent to, or intermingled with, lands designated by the Forest Service as inventoried roadless areas").

[8] Section 8(g) can thus be viewed as an exercise of Congress's uncontroversial power to "expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person. . . ." *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (Becker, C.J., joined by Scirica and Alito, JJ.). Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law," *Lujan*, 504 U.S. at 578, or that were deemed incognizable as a prudential matter by the courts, *Warth*, 422 U.S. at 500 & n.12. *See also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). Section 500 is not such a statute; it does not elevate any de facto harm. But section 8(g) does. Section 8(g) was intended to provide states with fair and easily administered compensation for

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2.

Second, when Alaska appealed in June of 2011, Alaska had not lost *any* National Forest Receipts Program money and did not even allege that it would receive less money from the federal government as a result of the district court's decision setting aside the Tongass exemption. This was no oversight. Rather, as Alaska acknowledged in its declaration in support of its motion to intervene, it has for many years elected to forego its share of federal timber revenue in order to receive much larger federal funding under the Secure Rural Schools Program. *See* Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393, 114 Stat. 1607.[9] Thus, for example, in fiscal year 2010 – before the Tongass exemption had been set aside by the district court – Alaska would have been due only about $517,948 under the National Forest Receipts Program as

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drainage of state oil and gas from common-pool reservoirs. *See, e.g.*, H.R. Rep. No. 95-590, at 1550 (1977) (explaining that the statute was intended to resolve "the problem of drainage of state resources by a lessee operating on the Outer Continental Shelf"); H.R. Rep. No. 99-300 at 547 (1985) (explaining that an amendment of section 8(g) was necessary because case-by-case determinations of " 'fair and equitable disposition' of the common pool revenues" had led to "lengthy litigation").

[9] Congress created the Secure Rural Schools Act and has continued to reauthorize it, *see* Maj. Op. 21 n.9, because "precipitously" declining timber revenue from national forests had decreased "the revenues shared with the affected counties." Pub. L. No. 106-393 § 2(a)(9)-(10), 114 Stat. 1607 (Oct. 30, 2000).

compared to the $16,027,564.62 it was paid under the Secure Rural Schools Act Program.[10]

Stated simply, Alaska cannot show us the money. Alaska has neither suffered a financial loss traceable to the district court's decision nor shown that such injury is "certainly impending." *Clapper*, 133 S. Ct. at 1147. That Alaska might elect to receive payments under the National Forest Receipts Program at some unknown future date in the currently unforeseeable event that the Secure Rural Schools Program is discontinued is too "conjectural or hypothetical" and insufficiently "actual or imminent" of an injury to support Alaska's standing. *Lujan*, 504 U.S. at 560; *see also*, *e.g.*, *Sturgeon*, 768 F.3d 1at [sic] 1075 ("Alaska's claims regarding its sovereign and proprietary interests lack grounding in a demonstrated injury. . . . Any injury to Alaska's sovereign and proprietary interest is pure conjecture and thus insufficient to establish standing.").[11]

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[10] This data is available on the U.S. Forest Service's website, http://www.fs.usda.gov/main/pts/securepayments/projectedpayments (last visited June 18, 2015), and taken specifically from the "View ASR 10-1 FY2010" spreadsheet and "all counties FY 2010" tab of the "Estimated 25-percent payments, FY 2008-FY2010" spreadsheet.

[11] The majority's analogy to the loss of one's home due to a neighbor's negligence misses the point. Loss of one's home is an injury in fact. A statutory financial entitlement untethered to a violation of that entitlement and an actual or imminent financial loss traceable to that violation is not.

Alaska's entitlement under 16 U.S.C. § 500 to a share of federal timber revenue does not give it standing to maintain this appeal.

B.

Alaska also alleges injury to what it characterizes as a procedural interest in the Tongass exemption. Alaska states that the Department of Agriculture "initiated the rulemaking [that resulted in the Tongass exemption] pursuant to a settlement agreement with the State." This interest is not an injury in fact. First, Alaska has not alleged that its rights under the settlement agreement have been violated. As the settlement agreement required, the Department of Agriculture initiated the rulemaking and published the resulting rule. Second, even assuming that Alaska has alleged a violation of a relevant procedural right, Alaska cannot establish its standing to appeal based on a procedural interest alone. It is well established that "deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient. . . ." *Summers*, 555 U.S. at 496; *see also Sturgeon*, 768 F.3d at 1075. Thus, Alaska's asserted legal interests do not demonstrate an injury in fact.

C.

Without an injury of its own, Alaska attempts to invoke someone else's injury. Alaska asserts that it has standing because "Alaska jobs are tied to timber."

This general interest in the employment of its citizens is a *parens patriae* interest.[12] However, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Snapp*, 458 U.S. at 610 n.16. That is because "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)).

Alaska lacks *parens patriae* standing in this case for another reason. Alaska has not shown, as it must, that directly interested private parties – Alaskans and companies interested in jobs tied to Tongass timber – could not represent themselves. *See, e.g.*, *Snapp*, 458 U.S. at 607 ("In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties. . . ."); *Sturgeon*, 768 F.3d at 1075 n.4; *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970-71 (9th Cir. 2009). These groups are entirely capable of representing themselves. Indeed, the Alaska Forest Association, a trade

[12] *See, e.g.*, *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044-45 (9th Cir. 1979) (alleged "loss of investment profits and tax revenues" by citizens if development did not proceed implicates a *parens patriae* interest); *Pennsylvania v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976) ("[A]lleged injuries to the state's economy and the health, safety, and welfare of its people clearly implicate the *parens patriae* rather than the proprietary interest of the state.").

association for the timber industry in Alaska, intervened in the district court but decided not to appeal. Alaska's interest in protecting the jobs of Alaskans and the bottom line of the timber industry is an insufficient *parens patriae* interest to support its standing to appeal.

Alaska has not satisfied the injury-in-fact requirement. Its alleged injuries fail to ensure that the decision to appeal has not been "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests'" or party politics, rather than to remedy actual or imminent harm. *Hollingsworth*, 133 S. Ct. at 2663 (citing *Diamond*, 476 U.S. at 62). This appeal should be dismissed for lack of jurisdiction.

III.

As the majority finds that this Court has jurisdiction and thus decides this appeal on the merits, I must reach the merits too. The same concern with the judiciary's limited role compels me to join Judge M. Smith's dissent on the merits. Congress in the Administrative Procedure Act did not authorize a judge, or even an en banc panel of judges, to set aside an agency decision because the reasons the agency proffered for the decision were not, from the viewpoint of the bench, "good" enough. Rather, an agency's decision must stand if it is not "arbitrary or capricious." 5 U.S.C. § 706. The Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502,

514-16 (2009), does not hold otherwise. *See, e.g.*, *White Stallion Energy Ctr. LLC v. EPA*, 748 F.3d 1222, 1235 (D.C. Cir. 2014) (judicial review of a "change in agency policy is no stricter than our review of an initial agency action" (citing *Fox*, 556 U.S. at 514-16)). *Fox* holds that an agency must "provide reasoned explanation for its action," which normally requires "that it display awareness that it is changing position." *Fox*, 556 U.S. at 515 (emphasis omitted); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.").

Here, the Department of Agriculture met *Fox*'s requirement by acknowledging that it was changing its mind. The Department also met the APA's requirements by explaining that the exemption would allow for a better balance between environmental preservation, road access, and timber availability. The balance the Department struck is reasonable and well within its mandate under the National Forest Management Act and the Tongass Timber Reform Act to "provide for multiple use and sustained yield" of forest resources. 16 U.S.C. §§ 539d(1), 1604(e)(1).

"Litigation over the last two years" was not, as the majority suggests, an extra-statutory weight that entered into the Department's "enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004)

(addressing the Bureau of Land Management's similar statutory charge). Rather, litigation was part of what prompted the Department to consider striking a different balance.

The significance of the Tongass exemption's foreseeable environmental and socioeconomic impacts did enter into that balance, and were detailed by the Department in its Environmental Impact Statement (EIS) and discussed in its Record of Decision. The majority latches onto one word in setting aside the Department's decision. It faults the Department for calling the risk to roadless values – one of the many natural resources provided by the Tongass – "minor." *See* 68 Fed. Reg. 75,136, 75,144 (Dec. 30, 2003). It is clear, however, that the Department was not tossing aside its analysis of the significance of environmental impacts set forth in the EIS. Instead, after further consideration, the Department found that the loss of some roadless values did not outweigh "the socioeconomic costs of applying the roadless rule's prohibitions to the Tongass." *Id.* The Department's explanation of its balance was not arbitrary or capricious.

IV.

I would dismiss this case for lack of appellate jurisdiction. Stuck with the majority's finding that this Court has jurisdiction, I would reverse and remand.

M. SMITH, Circuit Judge, with whom KOZINSKI, TALLMAN, CLIFTON, and CALLAHAN, Circuit Judges, join, dissenting:

Elections have legal consequences. When a political leader from one party becomes president of the United States after a president from another party has occupied the White House for the previous term, the policies of the new president will occasionally clash with, and supplant, those of the previous president, often leading to changes in rules promulgated pursuant to the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 701 *et seq.*). *See, e.g., Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 830-31 (9th Cir. 2006) (withdrawal under President George W. Bush of agricultural policy announced under President Clinton), *vacated en banc,* 490 F.3d 725 (9th Cir. 2007); *Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 824 F.2d 1146, 1149 (D.C. Cir. 1987) (withdrawal under President Reagan of an emission standard from President Carter's administration), *vacated,* 817 F.2d 890 (D.C. Cir. 1987); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 617 (D.C. Cir. 1987), *vacated sub nom., Farmworkers Justice Fund, Inc. v. Brock*, 817 F.2d 890 (D.C. Cir. 1987) (withdrawal by President Reagan's Secretary of Labor of sanitation standard proposed under President Carter); Press Release, Department of the Interior, Salazar and Locke Restore Scientific Consultations under the Endangered Species Act To Protect Species and Their Habitats (Apr. 28, 2009), *available*

at 2009 WL 1143690 (withdrawal by President Obama's Secretary of Commerce and Secretary of Interior of rule pertaining to consultation of federal wildlife experts proposed under President George W. Bush).

This phenomenon is particularly common in the period between the last few months of an outgoing administration and the first few months of an incoming administration, as was the case here. Recent legal scholarship has shed light on the concept of "midnight regulations," whereby, during their final period in office, outgoing administrations accelerate rulemaking and agency actions, which incoming administrations then attempt to stay and reverse. *See* Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 Mich. J. Envtl. & Admin. L. 285 (2013); Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. Chi. L. Rev. 1157, 1196 (2009); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471 (2011). For example, on President Obama's first day in office, Chief of Staff Rahm Emanuel issued a memo to the heads of federal agencies mandating that they stop the publication of regulations unless they obtained approval of the new administration. *See* Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, the White House, to Heads of Executive Departments and Agencies (Jan. 20, 2009), in 74 Fed. Reg. 4435 (Jan. 26, 2009). On the first day of President George W. Bush's presidency, Chief of Staff

Andrew Card similarly directed agencies to stop all regulatory notices. *See* Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, the White House, to Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001), in 66 Fed. Reg. 7702 (Jan. 24, 2001).

Inevitably, when the political pendulum swings and a different party takes control of the executive branch, the cycle begins anew. There is nothing improper about the political branches of the government carrying out such changes in policy. To the contrary, such policy changes are often how successful presidential candidates implement the very campaign promises that helped secure their election. That is simply the way the modern political process works.

On the other hand, when party policy positions clash, it is improper and unwise for members of the judiciary to decide which *policy* view is the better one, for such action inevitably throws the judiciary into the political maelstrom, diminishes its moral authority, and conflicts with the judicial role envisioned by the Founders. As the Supreme Court has cautioned, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law." *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946), *overruled on other grounds by Baker v. Carr*, 369 U.S. 186 (1962).

This case involves a clash between the policies of the outgoing Clinton administration and those of the incoming George W. Bush administration. The two presidents viewed how certain aspects of the laws governing national forests should be implemented very differently. On October 13, 1999, President Clinton issued a memo to the Secretary of Agriculture, instructing him "to develop, and propose for public comment, regulations to provide appropriate long-term protection for most or all of [the] currently inventoried 'roadless' areas." The United States Department of Agriculture (USDA) followed those instructions in promulgating the Roadless Area Conservation Rule, 66 Fed. Reg. 3244 (Jan. 12, 2001) (the Roadless Rule). In keeping with President Clinton's policies, the Roadless Rule emphasized "prohibit[ing] road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics." *Id.*

In November 2001, after President Bush took office and sought to implement his own policy preferences respecting national forests, the USDA began a process of "reevaluating its Roadless Area Conservation Rule." The USDA believed that "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 forests outside of Alaska." Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,139 (Dec. 30, 2003) (Tongass Exemption herein). It also found that "[t]he repercussions of delaying the project planning process regarding road building and timber harvest [in the Tongass], even for a relatively short period, can have a significant effect on the amount of timber available for sale in the next year." Slide Ridge Timber Sale Environmental Impact Statement, 66 Fed. Reg. 58710-01 (Nov. 23, 2001). The USDA ultimately modified the Clinton-era Roadless Rule due to, among other reasons, "(1) serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions would cause in communities throughout Southeast Alaska, (2) comments received on the proposed rule, and (3) litigation over the last two years." Tongass Exemption, 68 Fed. Reg. at 75,137.

While the APA requires a reasoned explanation for a change in policy, "a court is not to substitute its judgment for that of the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-15 (2009) (internal citation and quotation marks omitted). The USDA followed President Bush's policy instructions when it amended the Roadless Rule in 2003, 68 Fed. Reg. 75,136 (Dec. 30, 2003), and the agency's explanation for its decision *easily* meets the requirements of *Fox*. Unfortunately, it appears that, contrary to the

requirements of *Fox*, the majority has selected what it believes to be the better *policy*, and substituted its judgment for that of the agency, which was simply following the political judgments of the new administration. Accordingly, I respectfully dissent.

I. The USDA's 2003 Change in Policy

Without acknowledging that the factual findings in the 2003 Record of Decision (ROD) rest on different policy views than those in the 2001 ROD, the majority argues that "[t]he Tongass Exemption thus plainly 'rests upon factual findings that contradict those which underlay [the agency's] prior policy.'" This conclusion is simply incorrect. The agency, following the policy instructions of the new president, weighed some of the facts in the existing record differently than had the previous administration, and emphasized other facts in the record that the previous administration had not. Stated differently, the two administrations looked at some of the same facts, and reached different conclusions about the meaning of what they saw. The second administration simply concluded that the facts called for different regulations than those proposed by the previous administration.

There is little dispute that the underlying facts analyzed by the USDA had not changed meaningfully between November 2000, when the USDA completed the original rule's Final Environmental Impact Statement (FEIS), and 2003. The USDA acknowledged as

much when it considered the environmental impact of the Tongass Exemption in 2003. It concluded that "the identified new information and changed circumstances do not result in significantly different environmental effects from those described in the roadless rule FEIS. Such differences as may exist are not of a scale or intensity to be relevant to the adoption of this final rule or to support selection of another alternative from the roadless rule FEIS. Consequently, the overall decisionmaking picture is not substantially different from what it was in November 2000, when the roadless rule FEIS was completed." 68 Fed. Reg. at 75,141.

Nor had the facts underlying the USDA's assessment of the socioeconomic impact of the Tongass Exemption changed meaningfully by 2003; the USDA simply prioritized different aspects of the same socioeconomic data that it had considered in 2000. In the original Roadless Rule, the USDA had found that "[c]ommunities with significant economic activities in these sectors could be adversely impacted. However, the effects on national social and economic systems are minor. . . . None of the alternatives are likely to have measurable impacts compared to the broader social and economic conditions and trends observable at these scales, however the effects of the alternatives are not distributed evenly across the United States." 66 Fed. Reg. at 3261. In the 2003 ROD, on the other hand, the USDA assigned greater importance to the adverse socioeconomic impact of the Roadless Rule: "This decision reflects the facts, as displayed in the

FEIS for the roadless rule and the FEIS for the 1997 Tongass Forest Plan that roadless values are plentiful in the Tongass and are well protected by the Tongass Forest Plan. The minor risk of the loss of such values is outweighed by the more certain socioeconomic costs of applying the roadless rule's prohibitions to the Tongass. Imposing those costs on the local communities of Southeast Alaska is unwarranted." 68 Fed. Reg. at 75,144. In 2003, then, the USDA concluded that it was important to give greater weight to *some* adverse socioeconomic effects than was done when the original Roadless Rule was promulgated.

Given the substantial similarity between the facts the USDA weighed in the 2003 ROD and those it weighed in the 2001 ROD, it is abundantly clear that the differences between the two are the result of a shift in policy. After analyzing essentially the same facts, the USDA changed policy course at the direction of the new president, prioritizing some outcomes over others. *Fox* fully envisions such policy changes. It directs courts to uphold regulations that result from such changes, even if the agency gives an explanation that is of "less than ideal clarity," as long as "the agency's path may reasonably be discerned." *Fox*, 556 U.S. at 513-14 (internal quotation marks and citation omitted). That requirement is clearly met here.

II. The USDA Was Not Arbitrary and Capricious

The APA requires that we set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In 2003, the USDA carefully reconsidered the facts before it, going through a full notice-and-comment process before exempting the Tongass National Forest from the Roadless Rule. The USDA was not arbitrary and capricious in making this decision.

The majority contends that the USDA does not meet a key requirement under *Fox* – that an "agency must show that there are good reasons for the new policy." 556 U.S. at 515. Respectfully, the majority misconstrues *Fox*. Under *Fox*, an agency "need not demonstrate to a court's satisfaction that *the reasons for the new policy* are *better* than the reasons for the *old one*; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, *which the conscious change of course adequately indicates*." *Id.* (emphases added).

Accordingly, although the USDA only needed one good reason to change its policy, it had four independent ones, all of which are supported by the 2003 ROD: (1) resolving litigation by complying with federal statutes governing the Tongass, (2) satisfying demand for timber, (3) mitigating socioeconomic hardships

caused by the Roadless Rule, and (4) promoting road and utility connections in the Tongass.

A. Litigation and Statutory Compliance

The USDA promulgated the exemption to the Roadless Rule in part to comply with statutes governing the Tongass and in response to lawsuits challenging the Roadless Rule. The Supreme Court has suggested that it is appropriate for an agency to engage in new rulemaking when litigation reveals new information. *See Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 741 (1996) ("Nor does it matter that the regulation was prompted by litigation, including this very suit."). This is precisely what occurred here: A number of lawsuits filed against the USDA brought to light issues concerning potential conflicts between the Roadless Rule, the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980), and the Tongass Timber Reforms Act (TTRA), Pub L. No. 101-626, 104 Stat. 4426 (1990). The majority focuses on the fact that the 2003 ROD engendered new litigation, and concludes that it was therefore arbitrary and capricious for the USDA to act in response to the earlier litigation. However, the fact that the 2003 ROD led to additional litigation says very little about whether the earlier litigation pointed to legitimate issues regarding the Roadless Rule's compliance with various statutes ordering preservation of an adequate supply of timber to Southeast Alaskan communities whose inhabitants depend on it for their livelihood.

The agency acted well within the bounds of its authority if it believed that revising the Roadless Rule would ensure compliance with the statutory mandates that had generated the original litigation.

We have previously concluded that ANILCA and TTRA require that the USDA balance multiple goals in the Tongass: "recreation, environmental protection, and timber harvest." *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 808 & n.22 (9th Cir. 2005). The USDA's 2003 ROD clearly finds that the Tongass Exemption was meant to bring the Roadless Rule in line with the purposes of ANILCA and TTRA. The USDA noted that, under ANILCA, Congress placed 5.5 million acres of Tongass in permanent wilderness status and the designation of disposition of lands in the act "represent[s] a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition." 68 Fed. Reg. at 75,142. The USDA also stated that TTRA requires it to ensure that enough timber is available to "meet[ ] the annual market demand for timber" and "meet[ ] the market demand from the forest for each planning cycle. . . ." 68 Fed. Reg. at 75,140.

After promulgating the revised Roadless Rule, the USDA issued a press release stating that the Tongass Exemption sought to maintain "the balance for roadless area protection struck in the Tongass Land Management Plan." The 2003 ROD also concluded that "[t]his final rule reflects the Department's

assessment of how to best implement the letter and spirit of congressional direction along with public values, in light of the abundance of roadless values on the Tongass, the protection of roadless values already included in the Tongass forest plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions." 68 Fed. Reg. at 75,142.

I do not suggest that ANILCA and TTRA explicitly forbid the USDA from applying the Roadless Rule to the Tongass. TTRA, for example, is "[s]ubject to appropriations, other applicable law, and the requirements of the National Forest Management Act. . . ." 16 U.S.C. § 539d(a). The USDA therefore had discretion to adopt the Roadless Rule to protect wildlife, recreation, sustained use, and other values. *See Natural Res. Def. Council*, 421 F.3d at 801. By the same token, nothing prevented the USDA from striking a different balance and choosing to exempt the Tongass. Considering the purposes of ANILCA and TTRA, it is clear that Congress sought to promote a balance between environmental preservation, road access, and timber availability. The USDA recognized this directive in promulgating the revised rule. The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. . . ." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). We should abide by this principle,

and defer to the actions of the USDA in promulgating an exemption to the Roadless Rule.

B. Timber Demand

Likewise, the USDA's determination that applying the Roadless Rule to the Tongass would have led to a timber shortage was not arbitrary and capricious. The majority fails to even acknowledge the agency's effort to promote timber production, a factor which, by itself, suffices to uphold the agency's 2003 rulemaking.

"A court generally must be 'at its most deferential' when reviewing scientific judgments and technical analyses within the agency's expertise." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (citation omitted). The USDA calculated that the average annual timber harvest in the Tongass between 1980 and 2002 was 269 million board feet (MMBF), which was higher than usual. The USDA estimated that in the years following the Roadless Rule, demand for timber would fall, but that demand would still be at least 124 MMBF. The USDA found that if the Roadless Rule were applied to the Tongass, the maximum timber harvest would be 50 MMBF, which would create a shortage of around 75 MMBF. The agency concluded that exempting the Tongass from the Roadless Rule would allow infrastructure to be built and boost timber production to meet national demand. 68 Fed. Reg. at 75,141-42.

C. Socioeconomic Hardships

The USDA also revised the Roadless Rule because it reconsidered socioeconomic hardships caused by applying the rule to the Tongass. The majority fails to address this justification for the Tongass Exemption, which is yet another independent basis on which to uphold the agency's 2003 rulemaking.

The district court held that the Roadless Rule would not lead to job losses because reductions in timber demand had already occurred. It suggested that the fall in timber demand would have led to job losses, even without the Roadless Rule in place. However, the district court impermissibly substituted its factual determination for that of the agency. Although some jobs would have been lost with the fall in demand, the USDA concluded that the application of the Roadless Rule to the Tongass would have exacerbated these losses. The USDA had clear reasons to revise the Roadless Rule to mitigate job losses caused by the fall in timber demand. This decision is adequately supported by material in the record.

D. Road and Utility Connections

Finally, the USDA promulgated the Tongass Exemption to encourage road and utility construction in the Tongass, another independent factor ignored by the majority that justifies the agency's action. Such infrastructure helps the timber industry and supports isolated communities in the national forest. The USDA found, for example, that "[t]he impacts of the

roadless rule on local communities in the Tongass are particularly serious. Of the 32 communities in the region, 29 are unconnected to the nation's highway system. Most are surrounded by marine waters and undeveloped National Forest System land." 68 Fed. Reg. at 75,139.

E. Notice and Comment

Several of the arguments raised by Organized Village of Kake (the Village), and now affirmed by the majority, are policy-based. By overturning the Tongass Exemption, the majority conflates the process of judicial review with the agency's review of factual and policy questions. *See* 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

The Village questions the merits of the USDA's decision to exempt the Tongass by raising what are primarily policy issues that were addressed by the notice and comment process. The USDA carefully considered comments it received before promulgating the 2003 exemption. *E.g.*, 68 Fed. Reg. at 75,138 ("The agency received comments regarding the effects the proposed exemption from the roadless rule would

have on the natural resources of the Tongass. Some respondents expressed their view that 70 percent of the highest volume timber stands in Southeast Alaska have been harvested, and exempting the Tongass from the roadless rule would lead to the harvest of most or all of the remainder of such stands."); 68 Fed. Reg. 41,864, 41,865 (July 15, 2003) ("All interested parties are encouraged to express their views in response to this request for public comment on the following question: Should any exemption from the applicability of the roadless rule to the Tongass National Forest be made permanent and also apply to the Chugach National Forest?"). As long as the agency's decision has clear factual support in the record, as is the case here, it is not our place to substitute our policy preferences for those of the agency. *See Fox*, 556 U.S. at 513-14.

III. National Environmental Policy Act (NEPA) Claims

The Village claims that the USDA violated NEPA by neglecting to prepare a new environmental impact statement and by failing to consider alternatives to exempting the Tongass. The district court did not reach this issue because it reversed the agency on other grounds. Given my disagreement with the majority, I would remand to the district court to consider the NEPA claims in the first instance.

I respectfully dissent.

KOZINSKI, Circuit Judge, dissenting:

I join Judge M. Smith's masterful dissent in full. I write only to note the absurdity that we are in the home stretch of the Obama administration and still litigating the validity of policy changes implemented at the start of the George W. Bush administration. How can a President with a mere four or eight years in office hope to accomplish any meaningful policy change – as the voters have a right to expect when they elect a new President – if he enters the White House tethered by thousands of Lilliputian ropes of administrative procedure? The glacial pace of administrative litigation shifts authority from the political branches to the judiciary and invites the type of judicial policymaking that Judge Smith points out. This is just one of the ways we as a nation have become less a democracy and more an oligarchy governed by a cadre of black-robed mandarins. I seriously doubt this is what the Founding Fathers had in mind and worry about the future of the Republic if the political branches fail to take back the power the Constitution properly assigns to them.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ORGANIZED VILLAGE OF KAKE; THE BOAT COMPANY; ALASKA WILDERNESS RECREATION AND TOURISM ASSOCIATION; SOUTHEAST ALASKA CONSERVATION COUNCIL; NATURAL RESOURCES DEFENSE COUNCIL; TONGASS CONSERVATION SOCIETY; GREENPEACE, INC.; WRANGELL RESOURCE COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; CASCADIA WILDLANDS; SIERRA CLUB,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; TOM VILSACK, in his Official Capacity as Secretary of Agriculture; HARRIS SHERMAN, in his Official Capacity as Under Secretary of Agriculture of Natural Resources and Environment; TOM TIDWELL, in his official capacity as Chief, USDA Forest Service,
Defendants,

No. 11-35517

D.C. No. 1:09-cv-00023-JWS

OPINION

ALASKA FOREST ASSOCIATION, INC.,
Intervenor-Defendant,

and

STATE OF ALASKA,
Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
August 30, 2012 – Anchorage, Alaska

Filed March 26, 2014

Before: Michael Daly Hawkins, M. Margaret McKeown, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Bea;
Dissent by Judge McKeown

COUNSEL

Thomas E. Lenhart, Assistant Attorney General, Office of the Alaska Attorney General, Juneau, Alaska, for Intervenor-Defendant-Appellant.

Nathaniel S.W. Lawrence, Senior Attorney, Natural Resources Defense Council, Olympia, Washington; Thomas S. Waldo, Earthjustice, Juneau, Alaska, for Plaintiffs-Appellees.

Katherine Wade Hazard, Attorney, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C., for Defendants.

Julie A. Weis, Haglund Kelley Jones & Wilder, LLP, Portland, Oregon, for Intervenor-Defendant and Amicus Curiae.

OPINION

BEA, Circuit Judge:

When a federal agency decides to change its rules to allow roads to be built through a federal forest it had previously ruled be preserved roadless, what reasons are sufficient to justify that change?

The United States Department of Agriculture ("USDA") decided to change its rules to allow roads to be built through an Alaskan forest the USDA had previously ruled should be preserved roadless. We are called on to determine whether the USDA's stated reasons for its change to such rules were sufficient, and the rule change valid, or arbitrary and capricious, and the rule change invalid.

The district court held invalid, as arbitrary and capricious, a 2003 USDA regulation that temporarily exempts the Tongass National Forest ("Tongass") from application of the 2001 Roadless Area Conservation

Rule ("Roadless Rule").[1,2] The State of Alaska appeals that order.

We reverse the district court's order because, in its 2003 Record of Decision ("ROD"), the USDA articulated a number of legitimate grounds for temporarily exempting the Tongass from the Roadless Rule. These grounds and the USDA's reasoning in reaching its decision were neither arbitrary nor capricious.

I. Background

Various environmental organizations and Alaskan villages brought an action against the USDA and the United States Forest Service and several government officials challenging a 2003 Forest Service rule which temporarily exempts the Tongass from the

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[1] 68 Fed. Reg. 75136-1 (Dec. 30, 2003) (to be codified at 7 C.F.R. pt. 294).

[2] The Roadless Rule prevents all construction in unroaded portions of inventoried roadless areas, and "would establish national direction for managing inventoried roadless areas, and for determining whether and to what extent similar protections should be extended to uninventoried roadless areas." The final Roadless Rule included prohibitions on timber harvest, road construction and reconstruction except for projects that already had a notice of availability of an Environmental Impact Statement ("EIS") published in the Federal Register prior to the Roadless Rule's publication in the Federal Register. 66 Fed. Reg. 3244-01 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). There are many such exempted projects. These exempted projects are not in dispute here.

Roadless Rule. The State of Alaska and the Alaska Forest Association intervened as Defendants.

Plaintiffs moved for summary judgment. Defendants opposed Plaintiffs' motion and filed a cross-motion for summary judgment. The district court granted Plaintiffs' motion and denied Defendants' motion, entering an order setting aside the Tongass Exemption, reinstating the 2001 Roadless Rule as to the Tongass, and vacating all previously-approved Tongass area timber sales that were in conflict with the Roadless Rule. Only the State of Alaska now appeals.[3]

II. Standard of Review

We review *de novo* the district court's grant of summary judgment. *N. Idaho Cmty. Action Network v. United States Dep't of Transp.*, 545 F.3d 1147, 1152 (9th Cir. 2008). This action arises under the Administrative Procedures Act ("APA"), which provides for judicial review of final agency action. 5 U.S.C. §§ 701-706. Under the APA, a court may set aside agency actions only if such actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

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[3] The Alaska Forest Association filed an amicus brief in support of the State of Alaska, but did not file its own notice of appeal. Neither the USDA nor the Forest Service appealed.

Under this standard of review, an "agency must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if 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 if the agency's decision is contrary to the governing law. *Id.*

An "initial agency interpretation," however, "is not instantly carved in stone"; the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis[.]" *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)). To prevent a claim it was acting in an arbitrary or capricious manner, where an agency changes its policy, the agency must show awareness that it is changing a policy and give a reasoned explanation for the adoption of the new policy. *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009). The agency *does not* always have to "provide a more detailed justification than what would suffice for a new policy." *Id.* at 515. But the Supreme Court cautioned judges not to determine whether "the reasons for the new policy are *better* than the reasons for the old one," just whether the

policy is permissible under the statute and "the agency *believes* it to be better." *Id.* The Court emphasized: "the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so." *Id.* at 519. "[A] court is not to substitute its judgment for that of the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 513-14 (internal citations and quotation marks omitted).

Contrary to the district court's finding that the USDA acted arbitrarily and capriciously, we find that the USDA clearly acknowledged the 2003 ROD is inconsistent with its previous Roadless Rule and gave a reasoned explanation for the change.

III. Discussion

The USDA clearly acknowledged that the 2003 ROD, which excluded the Tongass from the Roadless Rule, is inconsistent with its previous Roadless Rule, which included the Tongass. The USDA's ROD stated that,

> In *State of Alaska v. USDA*, [3:01-CV-00039-JSK] the State of Alaska and other plaintiffs alleged that the roadless rule violated a number of Federal statutes, including the Alaska National Interest Lands Conservation Act of 1980 (ANILCA)
>
> . . . .

> The Alaska Lawsuit alleged that USDA violated ANILCA by applying the requirements of the roadless rule to Alaska's national forests [including the Tongass]. USDA settled the lawsuit by agreeing to publish a proposed rule which, if adopted, would temporarily exempt the Tongass from the application of the roadless rule (July 15, 2003, 68 FR 41865), and to publish a separate advance notice of proposed rulemaking (July 15, 2003, 68 FR 41864) requesting comment on whether to permanently exempt the Tongass . . . from the application of the roadless rule.

68 Fed. Reg. 75136.

Furthermore, the USDA gave a reasoned explanation for the change which may "reasonably be discerned." *Fox Television*, 556 U.S. at 513-14. The USDA's ROD explained that it created the Roadless Rule exemption to cease litigation,[4] meet timber demand, and decrease socioeconomic hardships on isolated Alaskan communities.

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[4] The dissent claims that we have "side-stepped the primary justification that Alaska claims as the basis for the rule change: complying with the operative statutes" including ANILCA and the Tongass Timber Reform Act of 1990 ("TTRA"). We examine the *agency's* reasons for promulgating the ROD – not an intervener's assertion made in litigation. As the dissent points out, the ROD does not say that the USDA promulgated the rule to comply with ANILCA or the TTRA. However, what is determinative to establish the USDA's reasons for the rule change are the USDA's statements in the ROD that it promulgated the rule to remove the threat of litigation that sought to establish the roadless rule violated ANILCA or the TTRA.

A. Ending the Alaska Litigation

The ROD's preamble highlighted that the "roadless rule has been the subject of a number of lawsuits in Federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia." 68 Fed. Reg. 75136. The ROD explained that the district court of Wyoming had even permanently enjoined implementation of the rule, telling the USDA that it "must start over" with its roadless rulemaking.

The ROD detailed this ongoing litigation because, when it started roadless rulemaking, it had decided it would take numerous factors into consideration, including litigation. The ROD then drew on these facts and gave a detailed explanation of the reason for change in the rule:

> Why is USDA Going Forward With This Rulemaking?
>
> . . .
>
> (3) litigation over the last two years. Given the great uncertainty about the implementation of the roadless rule due to the various lawsuits, the Department has decided to adopt this final rule, initiated pursuant to the settlement agreement with the State of Alaska.

Id. at 75137-38. The USDA also explained that, "Given the pending litigation, the [USDA] believes it is prudent to proceed with a decision on temporarily exempting the Tongass from prohibitions in the

[R]oadless [R]ule." *Id.* at 75142. Finally, the ROD concluded, "[f]or the reasons identified in this preamble" the USDA decided to exempt the Tongass from the Roadless Rule. *Id.* at 75144. These stated reasons in the ROD's preamble clearly and repeatedly identify a reasoned explanation for the changed policy: a strategy to attempt to end the constant and continuous litigation stemming from the 2001 Roadless Rule.

Simply promulgating a rule pursuant to a settlement is not necessarily "arbitrary or capricious." We can "reasonably discern" that the USDA became worried about the amount of resources it was expending to defend the Roadless Rule and that the Roadless Rule *might*[5] violate ANILCA. Thus, the USDA promulgated the Roadless Rule exemption to conserve resources and avoid a potential negative litigation outcome (*i.e.*, a final binding decision from a circuit court permanently enjoining the application of the Roadless Rule). By promulgating the Roadless Rule exemption, the USDA stopped litigation that may have resulted in a court-ordered *permanent* injunction

[5] The settlement between the USDA and Alaska has boilerplate language stating that by entering into the settlement agreement the USDA did not agree with Alaska's interpretation of ANILCA. This boilerplate is akin to recitations in standard settlement agreements that payor does not acknowledge liability simply by paying money to payee. But that language is not very relevant to determining the agency's reason for the rule change; the settlement exists to end the litigation. As the ROD states, the USDA promulgated the Roadless Rule exception to end litigation. Actions speak louder than words.

against the application of the Roadless Rule in several states. The USDA's ROD, on the other hand, is a solution that does not "foreclose options regarding future rulemaking" and allows the Roadless Rule to continue to exist in many other areas of Alaska and the country.

The district court held that the USDA's rationale of providing "legal certainty" was "implausible" because all the temporary rule did was generate more litigation later and thus prolong the uncertainty. But this is merely *post hoc ergo propter hoc* analysis. Further, nowhere does the ROD state that the purpose of the Roadless Rule exemption is to create "legal certainty." Of course, no settlement provides a "legal certainty" of no future litigation, even as between the *parties*, much less as to nonparties.[6] The ROD states the purpose of the exemption was to cease current on-going litigation that was draining the USDA's limited resources and which may have resulted in a negative outcome, similar to the negative outcome the USDA had experienced in Wyoming. The settlement agreement agreed to by the USDA *did* end the 2001 litigation by the State of Alaska.

The dissent claims that promulgating the roadless rule to end the Alaska and Tongass litigation is arbitrary and capricious because the USDA had

[6] Just ask a circuit judge whether he or she ever sees an appeal of a sentence arrived at in a plea agreement.

promulgated the 2001 Roadless Rule to reduce nationwide litigation costs. Dissent at 26-27. As is plain, it had not quite ended litigation, at least in Idaho, North Dakota, Wyoming, Alaska, and the District of Columbia. All of these lawsuits were prompted by the 2001 Roadless Rule; each action sought to invalidate it. So, as the Supreme Court has instructed, an agency can change its policy. *Fox Television*, 556 U.S. at 515-19. The ROD states, "The Wyoming District Court's setting aside of the roadless rule with the admonition that the Department 'must start over' represents" a changed circumstance warranting the ROD.[7] 68 Fed. Reg. at 75144. In the face of such instruction by a federal court it is reasonable for an agency to re-think its rule and, as the dissent characterizes it, "bow[ ] to pressure."[8] Dissent at 27.

Further, our district court examined the USDA's decision, and this litigation, retrospectively. The dissent makes this mistake as well.[9] The dissent

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[7] Beyond litigation, the USDA also gave another detailed explanation of why it abandoned its 2001 decision that nationwide regulation was preferable. The USDA decided that "given factors unique to Southeast Alaska, "the socioeconomic costs to local communities of applying the roadless rule's prohibitions to the Tongass . . . warrant[s] treating the Tongass differently from the national forests outside Alaska."." 68 Fed. Reg. at 75139.

[8] Surely the dissent does not mean to suggest that promulgating a rule in light of *a federal district court's order* is an arbitrary and capricious act of "bowing to pressure."

[9] Ironically, the dissent criticizes the USDA's reason of promulgating the ROD to settle litigation based on *hindsight*

(Continued on following page)

seems to imply that the USDA did not need to end litigation because it turned out well for the USDA in Wyoming, eight years after the Alaskan settlement was made. Dissent at 20 (citing *Wyoming v. USDA*, 661 F.3d 1209, 1272 (10th Cir. 2011) for the proposition that the Tenth Circuit had upheld the 2001 Roadless Rule). The dissent later argues that the ROD created more litigation than it resolved. Dissent at 25-26 (citing a 2005 regulation and a 2006 case). But such an analysis second guesses the USDA's decision based on 20/20 hindsight. Agencies are not soothsayers, and litigation is an uncertain art. These post-settlement results on appeal and new cases occurred two-to-eight years after the USDA promulgated the ROD. Absent any showing of corruption, we must presume the government was acting in good faith to avoid further negative outcomes such as the unreversed Wyoming district court judgment telling the USDA to start over.

With the help of that 20/20 hindsight it is debatable whether the USDA was *correct* in choosing to settle the Alaska lawsuit in the way it did and to think that such a settlement would remove legal uncertainty may be debatable. But whether the USDA was *correct* in its prediction of what the future might bring is not the correct question; it is important to apply the correct standard of review to the ROD. This court's duty is not to determine whether

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and its reason of meeting timber demand (discussed *infra* part § III.B) based on too much *foresight*.

the exemption was the *best* or *correct* way to avoid litigation, or even whether the litigation should be ended, but merely to decide whether such litigation-ending policy is permissible and "the agency *believe*[*d*] it to be better." *Fox Television*, 556 U.S. at 515. In 2003, the USDA was faced with Alaska's lawsuit and the District Court of Wyoming's ruling and could not predict what future litigation would bring. The USDA's actions in settling the lawsuit and its reasoned explanation in the ROD supports the finding that the USDA *believed* that promulgating the Tongass exception would decrease litigation over the Roadless Rule. Under *Fox Television*'s deferential standard, the USDA's ROD is not "arbitrary and capricious."

B. Timber Demand

The USDA also explained that the Roadless Rule exception was being promulgated to increase timber production to meet predicted future demand. The agency decided that while 2001 timber demand could be satisfied with the Roadless Rule in effect, the Roadless Rule, if continued, would result in unacceptable consequences. The ROD states that,

> The last three years represent a significant aberration from historical harvest levels. The 1980-2002 average harvest was 269 MMBF, and in no year prior to 2001 did the harvest level fall below 100 MMBF. . . . In light of this historical performance, the 124 MMBF low market estimate is not an unreasonable

> expectation for the coming decade, particularly if the current slump is merely a cyclical downturn.

68 Fed. Reg. at 75141. Thus, the USDA examined historical averages spanning twenty-two years, looked at the last three years of low demand data as a significant aberration, and determined that a "low market" historical estimate was a valid prediction of the future. The USDA has recognized expertise and discretion in predicting timber demand. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1219 (10th Cir. 1997) (Forest Service could discount study with technical defects based on its "substantial expertise" on the "relevant issues" of timber demand); *Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 146 (D.D.C. 2010) ("The Forest Service has discretion to make predictions of market demand" for timber.). It is certainly reasonable for the agency to determine that a higher market estimate from twenty-two years of data is preferable to a lower market estimate based upon demand in a short cyclical downturn, even for a "short-term"[10] rule. The economy could return to pre-downturn figures even in a short time span.[11] As the

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[10] The 2003 Roadless Rule exemption does not have an "expiration date." The ROD states the exemption will last until a final rule is promulgated, however long that may take. As yet, no final rule has been promulgated. Thus this "short-term" rule has lasted over a decade.

[11] In fact, as soon as 2002 the State of Alaska was selling timber in quantities above its projected harvest – and at what the State of Alaska claims is an unsustainable level – to help

(Continued on following page)

Supreme Court has instructed, we defer to agency expertise and should not "substitute [our] judgment for that of the agency." *Fox Television*, 556 U.S. at 513. Further, we do not have to determine whether the USDA chose the *best* method for predicting demand so long as the method is neither arbitrary nor capricious. *Id.* at 515; 5 U.S.C. § 706(2)(A).

The plaintiffs argue that using the low market scenario of 124 MMBF appears far too optimistic in light of the depressed demand from 2001 to 2003, and the dissent attacks the USDA's decision as "speculation." Dissent at 30. But we do not require agencies to be constant pessimists that may not promulgate a future rule – even a "short-term" future rule – based upon the opinion that the economy will improve and demand for timber will rise. Further, it is reasonable for the USDA to decide that even a potentially "short-term" rule could last long enough for the economy to make a marked improvement, which would result in rapidly changing near-term demand. Promulgating a rule that is meant to last at least several years on the basis of *extensive* historical averages and increased economic experience from the years 2001-2003 is not "arbitrary and capricious."

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bridge the gap between national forest harvest and local industry needs.

C. Socioeconomic Hardships

Another reason for the USDA's promulgation of the ROD was because of its appreciation of the socio-economic hardships created by the Roadless Rule.[12]

The USDA's ROD explains that "impacts of the roadless rule on local communities in the Tongass are particularly serious. Of the 32 communities in the region, 29 are unconnected to the nation's highway system. Most are surrounded by marine waters and undeveloped National Forest System land." 68 Fed. Reg. at 75139. The Roadless Rule would condemn these communities to continued isolation. Recognizing these unique circumstances, "the abundance of [other Tongass] roadless values," 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

[12] The dissent states that one of the reasons the USDA went forward with the rule was "roadless values" and such a reason is also arbitrary and capricious. Dissent at 24-25. With respect, that is a misreading of the ROD. The USDA weighted roadless values in the ROD. But in its explicit statement "Why is the USDA Going Forward With This Rulemaking?", the USDA never stated it was promulgating the rule *because* of roadless values. Instead, the ROD weighed roadless values as a reason for not exempting the Tongass from the 2001 Roadless Rule against reasons for doing so, and found the roadless values in the Tongass so abundant as not to require further protection. However, if "roadless values" is an independent reason for promulgating the ROD, then it is well within the discretion and expertise of the USDA to determine whether roadless values are abundant or not, even without the 2001 Roadless Rule.

forests outside of Alaska." *Id.* The ROD states that this conclusion is consistent with the extensive 1997 Tongass Forest Plan. This is a reasoned explanation based on observable conditions and the USDA's expertise. It may not be the decision the dissent would make, but it is not arbitrary and capricious.

The dissent argues that the ROD is arbitrary and capricious because the ROD was a temporary rule based on long-term predictions and did not identify any new facts to justify a change in policy. Dissent at 20-21. But as discussed above, it was not arbitrary and capricious for the USDA to use long-term, rather than short-term, data to promulgate a ROD, the expiration date of which was, and is, unknown. Further, as also discussed above, there *was* a change that forced the USDA to re-examine prior information and request new comments – changed legal circumstances caused by pending litigation and a different economic outlook. The USDA reexamined its prior policy and used its expertise to decide the socioeconomic hardships the 2001 Roadless Rule put on the unique and isolated communities of Southeast Alaska were no longer acceptable. This evaluation was not arbitrary and capricious, and the dissent cannot use the fact that the USDA had a prior policy as a reason to make it so. *See Fox Television*, 556 U.S. at 519 ("the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so").

IV. Conclusion

The USDA's reasons for promulgating the 2003 ROD are neither arbitrary nor capricious. The agency acknowledges that it has changed its previous policy of not exempting the Tongass from the Roadless Rule, and it has given reasoned explanations for the change based on litigation, changes in economic predictions, and previously found socioeconomic costs.

We hold that all of the USDA's reasons are acceptable under the APA. However, even had we found that some of the USDA's reasons were arbitrary and capricious, our scope of review requires affirmance if *any* of the reasons given are not arbitrary and capricious. *See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) (reversing the district court's holding that an agency decision was arbitrary and capricious while agreeing with the district court's analysis as to one of the agency's reasons as being, in fact, arbitrary and capricious).[13]

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[13] In *Bowman*, motor carriers filed applications with the Interstate Commerce Commission ("Commission") to conduct general commodities operations between points in the United States. *Bowman*, 419 U.S. at 283. The applicants submitted evidence that the applicants' service was required for public convenience, and the existing carriers submitted evidence that the existing carriers' service was satisfactory and no new carriers were needed. *Id.* at 285. The Commission granted three of the applications. *Id.* at 283. The Commission found that the existing carriers' evidence did not rebut the applicants' evidence that more carriers were needed because the existing carriers' evidence (1) related to short periods of time or specific shippers

(Continued on following page)

The USDA's reasons for the exemption are entirely rational, and the ROD should be upheld. Because the district court decided the USDA's reasons for exempting the Tongass from the Roadless Rule were arbitrary and capricious, it did not reach the question whether the USDA should have performed a Supplemental Environmental Impact Statement. Because we reverse the district court's findings, we remand the case to the district court to decide whether a Supplemental Environmental Impact Statement is required in the first instance.

REVERSED and REMANDED.

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and (2) the studies represented service provided by the existing carriers *after* the Commission had noticed the hearing. *Id.* at 287. The existing carriers brought an action in the district court to suspend, enjoin, and annul the order as arbitrary and capricious. *Id.* at 283. A three-judge district court invalidated the order as arbitrary and capricious. *Id.* The district court held that the Commission had applied inconsistent standards because the evidence was based on the same study periods. *Id.* at 287. On direct appeal, the Supreme Court reversed and remanded. *Id.* at 284. The Supreme Court *agreed* with the district court's conclusion of arbitrary and capriciousness as to the Commission's first reason and found there was no basis for the Commission to distinguish the evidence based on the short time period because all the evidence was based on short periods of time and particular shippers. *Id.* at 288. Then the Supreme Court found that the Commission's second reason regarding the studies was a rational basis on which to distinguish the evidence. *Id.* Therefore, the Supreme Court upheld the Commission's finding that the existing carriers did not rebut the applicant's evidence of fitness and public need for new carriers.

McKEOWN, Circuit Judge, dissenting:

I respectfully dissent. After extensive public comment, in 2001 the United States Department of Agriculture ("USDA"), acting through the United States Forest Service, adopted the Roadless Area Conservation Rule. Special Areas; Roadless Area Conservation ("Roadless Rule" or "Rule"), 66 Fed. Reg. 3244, 3253 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). The Rule specifically applied to Alaska's Tongass National Forest (the "Tongass"), which is by far the nation's largest forest. The Ninth Circuit reversed a preliminary injunction enjoining the USDA from implementing the Roadless Rule nationally, and the Tenth Circuit upheld the Rule. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1126 (9th Cir. 2002), *partially abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Wyoming v. USDA*, 661 F.3d 1209, 1272 (10th Cir. 2011).

In an about-face, the USDA decided in 2003 to temporarily exempt the Tongass from the Roadless Rule, pending the USDA's adoption of a final, permanent rule, which the agency never actually promulgated. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska ("Tongass Exemption"), 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294). That monumental decision deserves greater scrutiny than the majority gives it. Our precedent demands a "thorough, probing, in-depth review" of the USDA's decision, not a cursory quick look. *See Nat'l Ass'n of Home*

Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003). In an extensive, well-reasoned decision, the district court held that the Tongass Exemption is arbitrary and capricious. I agree. Tellingly, the USDA did not appeal this decision, leaving only the State of Alaska before us now.

The majority fails to adequately probe the record for a reasoned justification for the USDA discarding its previous position – adopted only two years earlier – to apply the Roadless Rule to the Tongass. Of course agencies may change their positions over time, and over administrations, but they cannot completely reverse course lightly. Rather, the USDA must have "good reasons" for the policy and it must "*believe[ ]* it to be better." *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009); *see id.* at 515-16 ("[I]t is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."). Contrary to the majority's contention, Maj. Op. at 7, where, as here, a "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox Television*, 556 U.S. at 515. That justification is missing here.

In assessing the USDA's proffered reasons, the majority entirely side-steps the main rationale that Alaska provides for the rule change: complying with the operative statutes, the Alaska National Interest

Lands Conservation Act of 1980 ("ANILCA"), 16 U.S.C. § 3101 *et seq.*, and the Tongass Timber Reform Act of 1990 ("TTRA"), 16 U.S.C. § 539d, which amended ANILCA. The reasons the majority does provide – legal uncertainty, timber demand, and socioeconomic hardships – are unsupported by the record and thus are insufficient to uphold the USDA's decision.

I would affirm the district court's decision because the administrative record does not support the reasons for the rule change that the USDA gave in its Tongass Exemption Record of Decision ("ROD"). *See* Tongass Exemption, 68 Fed. Reg. 75136; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

I. THE USDA DID NOT REST ITS RULE CHANGE ON COMPLIANCE WITH ANILCA AND TTRA

Alaska principally argues that, in viewing the ROD as a whole, the "USDA's primary legal concern in pursuing this rulemaking was to comply" with ANILCA and TTRA. The majority's analysis omits this issue entirely, stating without further discussion

that applying the Roadless Rule to the Tongass "*might* violate ANILCA."[1] Maj. Op. at 10-11.

The ROD provides no support for Alaska's proposition or the majority's conjecture. In initially adopting the Roadless Rule, the USDA took the position that such a rule would not violate ANILCA and TTRA. As Alaska acknowledges, in the ROD the "USDA did not explicitly reverse its legal conclusion about whether applying the Roadless Rule to the Tongass violates ANILCA or TTRA."

In fact, the USDA neither explicitly nor implicitly changed its position on complying with these statutes. The ROD makes no reference to ANILCA and TTRA as a basis for the USDA's decision. Rather, the ROD merely recounts the factual history of the USDA's settlement in Alaska's earlier legal dispute, stating: "The Alaska lawsuit *alleged* that USDA violated ANILCA by applying the requirements of the roadless rule to Alaska's national forests. USDA *settled the lawsuit* by agreeing to publish a proposed rule which, if adopted, would temporarily exempt the Tongass from the application of the roadless rule. . . ." Tongass Exemption, 68 Fed. Reg. at, 75,136 (emphasis added). Even the settlement agreement explicitly

[1] The majority dismisses the need to explore this argument further because it was presented by Alaska, not the agency that promulgated the decision on review. Maj. Op. at 9, n.4. Yet the USDA is not before us now, and this is the key argument made on appeal by Alaska, which is defending the Tongass Exemption.

provided that it "shall not be evidence of any agreement by any party to any allegations raised by any other party in the case. . . ."

In responding to public comments on the import of ANILCA, the ROD explained that the statute, as amended by TTRA, should allow for considerations other than timber demand. Tongass Exemption, 68 Fed. Reg. at 75,142. It directed the Secretary of Agriculture to seek to provide a supply of timber meeting market demand "consistent with providing for the multiple use and sustained yield of all renewable forest resources, and subject to appropriations, other applicable laws, and the requirements of the National Forest Management Act." *Id.* The ROD stated that the USDA "considered carefully" the statutes and that the Exemption was "consistent" with ANILCA. *Id.* But significantly, the USDA did not state that the statute mandated an exemption. *Id.*

Alaska has no basis to bootstrap its allegations from a prior suit to impose a theory or obligation on the USDA that the agency did not adopt or articulate. Yet this unsupported statutory theory permeates Alaska's entire argument on appeal. Consequently, the district court correctly determined that the ROD did not include compliance with ANILCA and TTRA as an express rationale for the Tongass Exemption.

II. THE USDA'S JUSTIFICATIONS FOR THE RULE CHANGE FALL SHORT

Beyond statutory compliance, Alaska argues that the USDA provided four main reasons for the Tongass Exemption: (i) legal uncertainty, (ii) timber demand, (iii) socioeconomic costs, and (iv) roadless values.[2] To properly assess the ROD, we must ask whether – in light of all the proffered justifications – the record supports the USDA's rationale for excluding the Tongass from the Roadless Rule's reach.

According to the ROD, the USDA in part adopted the Tongass Exemption because it "best implement[ed] the letter and spirit of congressional direction along with public values, in light of the abundance of roadless values on the Tongass, the protection of roadless values already included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions." Tongass Exemption, 68 Fed. Reg. at 75,142. The record contradicts the USDA's rationale for finding an exemption necessary or believing it to be the "best" option in light of legal uncertainty,

[2] Apart from the four main justifications listed in the ROD, Alaska offers a number of other reasons to justify the USDA's position reversal, including that the USDA never gave a full explanation for why it initially applied the Roadless Rule to Alaska. Alaska's effort falls flat, however, because the USDA did not proffer these explanations and the record does not support them.

timber demand, socioeconomic costs, and roadless values.

A. Legal Uncertainty

The ROD stated that the Tongass Exemption would reduce the "great uncertainty about the implementation of the roadless rule due to the various lawsuits." Tongass Exemption, 68 Fed. Reg. at 75,138. The USDA's stated aim was not to "end[ ] the Alaska litigation," as the majority asserts, *see* Maj. Op. at 9, but to mitigate legal uncertainty. The district court's conclusion captures the disingenuity of the USDA's explanation and the majority's uncritical acceptance of its rationale: "In light of the fact that the Tongass Exemption was promulgated as a *temporary* exemption and the Forest Service agreed to engage in further rulemaking addressing the Tongass and Chugach in a 'timely manner,' the USDA's rationale that adoption of the temporary Tongass exemption would provide legal certainty is implausible."

Unsurprisingly, the temporary rule and the attempted repeal of the Roadless Rule generated more litigation and prolonged the legal uncertainty – a foreseeable consequence of promulgating a permanent rule, granting a temporary exemption, and then attempting to repeal the permanent rule. *See* Special Areas; State Petitions for Inventoried Roadless Management, 70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294) (repealing the Roadless Rule nationwide in favor of a "State petitions"

process); *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874, 909, 912 (N.D. Cal. 2006) (striking down the repeal for violating the National Environmental Policy Act and the Endangered Species Act). Critical here is not that additional litigation ultimately ensued, but that a temporary change was unlikely to address the legal uncertainty surrounding the Roadless Rule's implementation when the USDA reversed course. That the rule change was "initiated pursuant to the settlement agreement with the State of Alaska," as the majority emphasizes, does nothing to support a claim that the temporary change would reduce this uncertainty. *See* Maj. Op. at 10. In the ROD, the USDA even acknowledged that the temporary rule would not "foreclose options regarding the future rulemaking" for the permanent statewide rule, Tongass Exemption, 68 Fed. Reg. at 75138, making clear that it viewed the temporary rule as just that.

Before changing its position, the USDA determined that maintaining the Roadless Rule in the Tongass would *lower* lawsuit-related costs. The USDA's 2000 final environmental impact statement ("FEIS") stated that the Roadless Rule was "needed" in part because of "[n]ational concern over roadless area management continu[ing] to generate controversy, including costly and time-consuming appeals and litigation" from proposals to develop the roadless areas. The FEIS concluded that the selected "Tongass Not Exempt" alternative would result in the "[g]reatest savings in appeals and litigation costs." Similarly, in 2001 the USDA "decided that the best

means to reduce this conflict [wa]s through a national level rule," i.e. the Roadless Rule. Roadless Rule, 66 Fed. Reg. at 3,253.

The agency then completely reversed its position in 2003, stating without explanation that the Tongass Exemption would reduce legal uncertainty. The USDA did not address the predicted increase in litigation costs, nor did it acknowledge that carving out the Tongass from the Roadless Rule's reach likely would set off another litigation firestorm. The USDA failed to provide a "more detailed justification" for this blatant internal inconsistency and reversal of position, and no rationale that the USDA articulated suggests that it had a basis to believe at the time that a temporary exemption would create greater legal certainty. *See Fox Television*, 556 U.S. at 515, 516. After advocating for a national rule to bring uniform application, the USDA bowed to pressure to exempt the Tongass and upended uniformity. The district court rightly rejected the USDA's legal uncertainty rationale as "implausible." The majority erroneously contends that this determination constituted *post hoc* analysis, Maj. Op. at 11, despite the district court's clear examination of whether the reasons the USDA provided when it implemented the rule change logically supported the position reversal *at that time.*

B. TIMBER DEMAND AND TTRA

The second proffered rationale – that the USDA promulgated the Tongass Exemption to meet predicted

future timber demand – also lacks support in the record. We have recognized that "TTRA was written to amend ANILCA by eliminating its timber supply mandate" and to make the goal of meeting timber demand contingent on other additional criteria. *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 730-31 (9th Cir. 1995); *see also* 16 U.S.C. § 539d(a) (subordinating the aim of meeting timber demand to "appropriations, other applicable law, and the requirements of the National Forest Management Act of 1976," and "to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources"). Importantly, "TTRA envisions not an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation." *Alaska Wilderness Recreation*, 67 F.3d at 731.

Without mentioning TTRA or acknowledging that Congress specifically crafted the statute to accommodate competing goals, the majority states that the Tongass Exemption "was being promulgated to increase timber production to meet predicted future demand." Maj. Op. at 14. The ROD concluded that "the roadless rule prohibitions operate as an unnecessary and complicating factor limiting where timber harvesting may occur," Tongass Exemption, 68 Fed. Reg. at 75141, but it did not explain why its cited facts regarding the potential *long-term* variability of the timber market supported a *temporary* exemption. The ROD recognized that, according to FEIS projections, "50 million board feet [("MMBF") of timber]

could be harvested annually in the developed areas along the existing road system in the Tongass." *Id.* at 75,140. The FEIS for the Roadless Rule estimated in 2000 that this harvest would not support all of the timber processing facilities in the region. *Id.* However, as the ROD pointed out, the FEIS based these projections on a long-term market demand estimate of 124 million board feet that had proven several times greater than the *actual* market demand of subsequent years: "[T]he low market scenario [of 124 MMBF] appears optimistic in light of the 48 MMBF of Tongass National Forest timber harvested in 2001, the 34 MMBF harvested in 2002, and the 51 MMBF harvested in 2003. . . ." *Id.* at 75,141.[3] In short, the facts in the administrative record unequivocally showed a depressed timber demand. The Roadless Rule decision concluded that the available timber under contract provided "enough timber volume to satisfy about 7 years of estimated market demand." Roadless Rule, 66 Fed. Reg. at 3,255. Based on the record, the timber demand did not support the Tongass Exemption.

The agency failed to give adequate reasons for adopting the temporary exemption, particularly given

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[3] Market forces, not the Roadless Rule, explain these levels, given that the Roadless Rule did not go into effect in the Tongass due to various injunctions, *see California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 575 F.3d 999, 1006-07 (9th Cir. 2009) (recounting history of legal challenges to the Roadless Rule), and due to the Tongass Exemption.

the USDA's acknowledgment that the intervening years had shown timber demand was even lower than had been expected. It simply stated that timber demand in recent years was below long-term historical averages and speculated that this level could have been due to a mere cyclical downturn. This rationale failed to take account of the FEIS's explicit conclusion that available timber was sufficient to meet near-term demand.[4] Although the rationale that the majority proposes, that it would be reasonable for the agency to employ long-range data over short-term trends, may be plausible, *see* Maj. Op. at 15, the agency itself never proffered such a rationale or otherwise provided an explanation for its evasive treatment of the low timber demand. To reiterate, its use of timber demand data need not be proven prescient with the benefit of time. Where it fails is in providing logical support for the rule change when it was made. Thus, the USDA's long-range speculation justifying a near-term solution is at odds with the facts in the record.

C. Socioeconomic Costs

The ROD's discussion of the Exemption's socioeconomic impact on local communities in the Tongass,

[4] During the 2003 rulemaking on the Tongass Exemption, the Forest Service found that no significant factual developments arose since the Roadless Rule that justified another EIS and accordingly relied on the FEIS prepared for the Roadless Rule. 68 Fed. Reg. at 75141.

particularly with respect to job losses and road and utility needs, is similarly flawed. The ROD relied on the FEIS, which "estimated that a total of approximately 900 jobs could be lost *in the long run* in Southeast Alaska due to the application of the roadless rule." Tongass Exemption, 68 Fed. Reg. at 75137 (emphasis added). The ROD's use of this estimate was arbitrary and capricious for two reasons. First, the estimate applied to long-term job losses, and the ROD failed to relate it to the short-term duration of the explicitly *temporary* Tongass Exemption. Second, the ROD did not consider the dramatic post-2000 decline in timber demand. The USDA based its FEIS job loss estimate on the assumption that the Roadless Rule would cause a reduction of 77 MMBF per year in timber harvesting that no longer held true in 2003. Yet, as explained above, between 2000 and 2003 timber harvests dropped dramatically due only to market demand. The USDA failed to account for these factual omissions, which the majority may not backfill for the USDA now. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) ("The court is not empowered to substitute its judgment for that of the agency." (internal quotation marks omitted)); *see* Maj. Op. at 17-20. While the majority emphasizes the socioeconomic costs imposed by the isolation of local communities in the Tongass, *see* Maj. Op. at 16, the USDA provides no explanation for how a temporary rule change would alter the economic outlook for these communities. Because the record does not support the job loss rationale provided in the ROD and because the USDA did not take

into account reduced timber demand and the short-term nature of the rule change when it was adopted, the district court correctly found the socioeconomic cost justification arbitrary and capricious.

The record also belies the USDA's position in the ROD that the Roadless Rule would have significant negative impacts on meeting road and utility needs in the Tongass. The Roadless Rule maintained the Secretary of Agriculture's discretion to approve Federal Aid Highways, if the project was "in the public interest," or if it maintained the purpose of the land and "no other reasonable and prudent alternative exist[ed]."[5] Roadless Rule, 66 Fed. Reg. at 3256. Regarding state roads, the FEIS concluded in 2000 that "in the reasonably foreseeable future, construction of State highways through inventoried roadless areas in Alaska may not be an issue," because "none of the [proposed State] transportation corridors identified in [the Tongass Land and Resource Management Plan] have received serious local or State support, and none are on any approved project lists." The ROD did not identify any new road proposals that suggested a need for the Exemption.[6] The USDA

[5] Even without the Roadless Rule, the Secretary's decision to approve such highways is discretionary. *See* 23 U.S.C. § 317(b).

[6] The agency's Supplemental Information Report ("SIR") for the Tongass Exemption specifically stated that "no new information has come to light that would alter the expectations of major roads or transportation corridors or associated economic impacts estimate[d] in the Roadless [Rule] FEIS. . . ."

failed to explain why road considerations warranted a temporary exemption given the lack of any potential road construction on the horizon.

Nor did the ROD explain the basis for the USDA's new position that the Roadless Rule would impact utility corridors in southeastern Alaska. The Roadless Rule specifically permits construction of utility lines, along with the necessary vehicles and heavy motorized equipment. *See* Roadless Rule, 66 Fed. Reg. at 3,258, 3,272. The FEIS concluded that the nationwide utility corridor impacts "would be minimal" and it did not identify any impacts in southeastern Alaska. The ROD's reliance on utility needs is at odds with the evidence. Moreover, as with its conclusion regarding road construction, the USDA failed to explain in the ROD why a temporary exemption was necessary when the agency could not point to any utility projects that it might affect.

D. ROADLESS VALUES[7]

In the ROD, the USDA stated that it had "determined that, at least in the short term, the roadless values on the Tongass are sufficiently protected under the Tongass Forest Plan and that the additional

[7] Roadless values include high quality or undisturbed soil, water, and air; sources of public drinking water; diversity of plant and animal communities; habitat for threatened, endangered, and sensitive species; varieties of dispersed recreation; reference landscapes; and traditional cultural properties and sacred sites. Roadless Rule, 66 Fed. Reg. at 3,245.

restrictions associated with the roadless rule are not required."[8] Tongass Exemption, 68 Fed. Reg. at 75,138. This posture, a reversal of the position the USDA adopted in the Roadless Rule,[9] also is the kind of policy judgment – on what is "enough" protection – that cannot be readily deemed right or wrong. The agency's ultimate policy decision on whether sufficient roadless value protection existed is necessarily linked to its reasoning on timber demand, community impact, and other factors, which are unsupported by the record. At bottom, the USDA failed to provide a logical explanation for its complete position reversal.

III. THE USDA'S ERROR WAS NOT HARMLESS

In the rulemaking context, an error is "harmless only where the agency's mistake clearly had no bearing on the procedure used or the substance of decision reached." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992). Several of the USDA's key rationales underlying the ROD "run[ ]

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[8] The majority asserts that the USDA did not express roadless values as a reason for the rule change. Maj. Op. at 16, n.12. However, as the quoted ROD text reveals, the USDA did expressly factor into its rationale its view that the roadless values were sufficiently protected. *See also* Tongass Exemption, 68 Fed. Reg. at 75,142.

[9] The USDA's position also expressly contradicts Ninth Circuit precedent determining that "the Roadless Rule provide[s] greater substantive protections to roadless areas than the individual forest plans it superseded." *Lockyer*, 575 F.3d at 1014 (citing *Kootenai Tribe*, 313 F.3d at 1110, 1124-25).

counter to the evidence before the agency, or . . . [are] so implausible that [they] could not be ascribed to a difference in view or the product of agency expertise." *Montana Wilderness Ass'n v. McAllister*, 666 F.3d 549, 555 (9th Cir. 2011) (internal quotation marks omitted). The USDA failed to account for relevant facts in the FEIS and the SIR that plainly contradicted the substance of the ROD's conclusions. Therefore, the ROD cannot overcome the harmless error hurdle.

I respectfully dissent.

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

ORGANIZED VILLAGE OF KAKE, *et al*., **Plaintiffs,** **vs.** **UNITED STATES DEPARTMENT OF AGRICULTURE, *et al*.,** **Defendants,** **and** **STATE OF ALASKA and ALASKA FOREST ASSOCIATION,** **Intervenor-Defendants.**	**1:09-cv-00023 JWS** **ORDER AND OPINION** **[Re: Motions at Dockets 42 and 54]** (Filed Mar. 4, 2011)

I. MOTIONS PRESENTED

At docket 42, plaintiffs Organized Village of Kake, *et al.*, move for summary judgment setting aside the Tongass Exemption, reinstating the Roadless Rule, and vacating approved timber sales in conflict with the Roadless Rule. At dockets 53 and 56, intervenor-defendants State of Alaska and Alaska Forest Association oppose the motion, respectively. At docket 54, the United States Department of Agriculture ("USDA") and United States Forest Service ("Forest Service") (jointly "federal defendants or "the Forest Service") oppose the motion and cross-move for

summary judgment dismissing plaintiffs' claims. Plaintiffs reply at docket 66. Oral argument was not requested, and it would not assist the court.

II. FACTUAL AND PROCEDURAL BACKGROUND

This action challenges a Forest Service rule[1] exempting the Tongass National Forest ("the Tongass") from the Roadless Area Conservation Rule[2] ("the Roadless Rule"). The National Forest System consists of approximately 192 million acres of national forests, national grasslands, and related areas. The Tongass in southeast Alaska includes 16.8 million acres and is the largest national forest. The Forest Service manages the National Forest System under several federal statutes, including the National Forest Management Act ("NFMA"),[3] which requires the Forest Service to develop and periodically revise a land and resource management plan, commonly known as a "forest plan," for each unit of the National Forest System. Each forest plan must "provide for multiple use and sustained yield of the products and services obtained" from the forest unit pursuant to the Multiple Use Sustained Yield Act of 1960,[4] and

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[1] 36 C.F.R. § 294.14(d) (2004).

[2] 36 C.F.R. §§ 294.10 -.14 (2001).

[3] 16 U.S.C. §§ 1600-1614.

[4] 16 U.S.C. §§ 528-531.

coordinate "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness."[5]

In the 1970s, the Forest Service developed an inventory of roadless areas generally larger than five thousand acres in national forests. From the 1970s through the late 1990s, inventoried roadless areas were governed primarily by individual forest plans developed under the NFMA. In the late 1990s, the Forest Service began reevaluating its approach to roadless area management. On October 13, 1999, President Clinton directed the Forest Service to initiate a nationwide plan to protect the approximately 58.5 million acres of inventoried roadless areas in national forests.

In the notice of intent to prepare an EIS, the Forest Service proposed promulgation of a rule that would initiate a two-part process to protect roadless areas. Part one would immediately restrict certain activities, such as road construction in unroaded portions of inventoried roadless areas, and part two "would establish national direction for managing inventoried roadless areas, and for determining whether and to what extent similar protections should be extended to uninventoried roadless areas."[6] The notice also solicited comments on whether or not the proposed rule should apply to the Tongass and, if so, whether inventoried Tongass roadless areas

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[5] 16 U.S.C. § 1604(e)(1).

[6] Doc. 42-7 at p. 2.

should be covered under part one of the rule or only under part two.[7]

The accompanying notice of proposed rulemaking stated that the Forest Service "is proposing to delay consideration of protecting inventoried roadless areas for the [Tongass] until April 2004, in light of recent Forest Plan decisions that conserve roadless areas and a Southeast Alaska economy that is in transition."[8] The notice stated that 1999 revisions to the Tongass Land and Resource Management Plan ("TLMP") protected additional lands from road construction, the timber economy in Southeast Alaska is transitioning to a competitive bid process, and "about two-thirds of the total timber harvest planned on the [Tongass] over the next 5 years is projected to come from inventoried roadless areas."[9] The notice acknowledged that use of inventoried roadless areas has helped the Forest Service meet market demand for timber in the Tongass, but that

> . . . with the continuing transition of the southeast Alaska timber market to an independent bid market, coupled with the long-term projected decline in timber demand for southeast Alaska timber, it is also possible that, by 2004 (when a review of the revised Tongass Land Management Plan is required), the long term demand for timber

[7] *Id.*

[8] Doc. 42-8 at p. 5.

[9] *Id.* at p. 6.

> may be substantially reduced and market demand could be met consistent with protecting existing inventoried roadless areas."[10]

In May 2000, the Forest Service published a Draft Environmental Impact Statement ("EIS") for the Roadless Rule. The May 2000 DEIS "proposed not to apply prohibitions on the Tongass, but to determine whether road construction should be prohibited in unroaded portions of inventoried roadless areas as part of the 5-year review of the Tongass Forest Plan."[11]

In November 2000, the Forest Service published the Final EIS ("FEIS") for the Roadless Rule.[12] The Roadless Rule FEIS considered two sets of alternatives concerning prohibitions on road construction, reconstruction, and timber harvesting in national forests. The first set included four prohibition alternatives that applied to inventoried roadless areas nationwide. The second set included four alternatives for applying any selected prohibition to the Tongass: 1) the "Tongass Not Exempt" alternative which applied the same prohibition alternative to the Tongass that applied to the rest of National Forest System; 2) the "Tongass Exempt" alternative which did not apply a national prohibition to the Tongass; 3) the "Tongass Deferred" alternative which postponed a

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[10] *Id.*

[11] Doc. 42-9.

[12] Doc. 42-11.

decision on whether to apply prohibitions to the Tongass until April 2004; and 4) the "Tongass Selected Areas" alternative which applied prohibitions on inventoried roadless areas located in certain land use designations identified in the TLMP.[13]

On January 12, 2001, the Forest Service published the final rule and record of decision ("ROD") for the Roadless Rule.[14] The ROD stated that the purpose of the Roadless Rule "is to provide lasting protection for inventoried roadless areas within the National Forest System in the context of multiple-use management,"[15] and that the Roadless Rule was needed because 1) road construction, reconstruction, and timber harvest in inventoried roadless areas "have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics"; 2) budget constraints prevent the Forest Service from adequately maintaining the existing road system; and 3) national concern over roadless area management continues to generate costly and time-consuming appeals and litigation.[16] The ROD indicated that a national rule was necessary because the Forest Service has "the responsibility to consider the 'whole picture' regarding the management of the National

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[13] *Id.* at pp. 8-9.

[14] Doc. 42-15.

[15] *Id.* at p. 2.

[16] *Id.*

Forest System, including inventoried roadless areas" and "[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."[17]

As promulgated, the Roadless Rule directed immediate applicability of the nationwide prohibitions on timber harvest, road construction and reconstruction on the Tongass, except for projects that already had a notice of availability of a [DEIS] published in the Federal Register prior to the Roadless Rule's publication in the Federal Register.[18] The ROD recognized that implementation of the Roadless Rule on the Tongass would cause some adverse economic effects to some forest-dependent communities, but concluded that "the long-term ecological benefits to the nation of conserving these 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."[19]

Since its promulgation, the Roadless Rule has been the subject of numerous lawsuits in federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. In May 2001, the U.S. District Court for the District of Idaho

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[17] *Id.* at p. 4.

[18] *Id.*

[19] Doc. 42-15 at p. 13.

issued a preliminary injunction enjoining the Forest Service from implementing the Roadless Rule nationwide.[20] On appeal, the Ninth Circuit reversed the preliminary injunction, concluding that plaintiffs had not shown a substantial likelihood of success on the merits of their claim that the Roadless Rule violated the National Environmental Policy Act ("NEPA"), and that the balance of hardships weighed against enjoining the Roadless Rule.[21] The Ninth Circuit's mandate "issued in April 2003, and the Roadless Rule went into effect nationwide."[22]

In *State of Alaska v. USDA,*[23] the State of Alaska and six other parties filed suit against the USDA, alleging that the Roadless Rule violated the APA, NFMA, NEPA, Alaska National Interest Lands Conservation Act ("ANILCA"), the Tongass Timber Reform Act of 1990 ("TTRA"), and other laws. On June 10, 2003, the parties entered a settlement agreement to resolve and dismiss the litigation. The settlement agreement provided in pertinent part that the federal defendants would publish in the Federal Register within 60 days,

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[20] *Kootenai Tribe of Idaho v. Veneman*, 2001 WL 1141275 (D.Idaho 2001).

[21] *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

[22] *California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 575 F.3d 999, 1007 (9th Cir. 2009).

[23] Case No. 3:01-cv-00039 (JKS).

> A. A proposed temporary regulation that would exempt the Tongass National Forest from the application of the Roadless Rule until completion of the rulemaking process for any permanent amendments to the Roadless Rule.
>
> B. An [advance notice of proposed rulemaking] to exempt both the Tongass and Chugach National Forests from application of the Roadless Rule.[24]

The settlement agreement further provided:

> Federal defendants make no representation regarding the content or substance of any final rule, but will move toward final decisions on the proposed temporary regulation exempting the [Tongass] from the application of the Roadless Rule and on permanent amendments to the Roadless Rule, including consideration of exempting both the Chugach National Forest and the Tongass National Forest from the Roadless Rule, in a timely manner.[25]

On July 15, 2003, the Forest Service published an advance notice of proposed rulemaking ("ANPR") in the Federal Register, stating that it was considering a permanent exemption for the Tongass and Chugach National Forests from the applicability of

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[24] Doc. 42-24 at p. 2

[25] *Id.*

the Roadless Rule.[26] The Forest Service also published a notice of proposed rulemaking,[27] stating its intention to amend regulations to exempt the Tongass from the Roadless Rule's "prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas until a final rule is promulgated as announced by the Forest Service" in its July 2003 ANPR.[28] The Forest Service stated that it was publishing the proposed rule and ANPR to fulfill "part of the Department's obligations under the June 10, 2003 settlement agreement for *State of Alaska v. USDA*, while also maintaining the ecological values of inventoried roadless areas in the Tongass and Chugach National Forests."[29] The proposed rule was initially published for a 30-day public comment period, which was extended by 19 days for a total of 49 days.

On October 30, 2003, the Forest Service published a supplemental information report ("SIR") concluding that "no significant new information or changed circumstances exist that require 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

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[26] Doc. 42-25 at pp. 1-3.

[27] *Id.* at pp. 3-7.

[28] *Id.* at p. 3.

[29] *Id.*

environmental impact statement."[30] 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 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 the Roadless Rule was adopted in January 2001, and that no additional environmental analysis was required.[31]

In July 2003, the District Court for the District of Wyoming issued a permanent injunction against the Roadless Rule nationwide.[32] The Wyoming district court acknowledged the Ninth Circuit's decision in *Kootenai Tribe*, but declined to follow it.[33]

On December 30, 2003, the Forest Service published a final rule and ROD amending regulations concerning the Roadless Rule to temporarily exempt the Tongass from the Roadless Rule's prohibitions against timber harvest, road construction, and reconstruction

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[30] Doc. 42-27 at p. 3.

[31] *Id.* at p. 19.

[32] *Wyoming v. U.S. Dept. of Agriculture*, 277 F. Supp. 2d 1197 (D.Wyo. 2003).

[33] *Wyoming*, 277 F. Supp. 2d at 1202 n.1.

in inventoried roadless areas ("the Tongass Exemption"). The Tongass Exemption ROD stated that "[t]his temporary exemption of the Tongass will be in effect until the Department promulgates a subsequent final rule concerning the application of the roadless rule within the State of Alaska, as announced in the agency's second [ANPR] published on July 15, 2003."[34] The ROD further stated that when the Roadless Rule was adopted in January 2001, the Forest Service concluded that ensuring lasting protection of roadless values on the Tongass outweighed the socioeconomic costs to local communities, but the Forest Service "now believe[d] that, considered 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 forests outside of Alaska."[35] The effective date of the Tongass Exemption was January 29, 2004.

In July 2004, the Forest Service issued a notice of proposed rulemaking, proposing that "a State petitioning process that will allow State-specific consideration of the needs of [roadless] areas [was] an appropriate solution to address the challenges of

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[34] Doc. 42-28 at p. 1.

[35] Doc. 42-28 at p. 9.

roadless area management."[36] In May 2005, the Forest Service published a final rule adopting the "State Petitions Rule," which revised 36 C.F.R. § 294 "to remove the text of the Roadless Rule and insert in its place provisions establishing an eighteen-month window during which states could petition for state-specific roadless area protections."[37] The final rule stated that under the State Petitions Rule, "management of inventoried roadless areas on the Tongass will continue to be governed by the existing forest plan," thus, the State Petitions Rule negates the need for further Tongass-specific rulemaking as contemplated in the 2003 Tongass Exemption.[38]

In August 2005, several states, including California, Oregon, and New Mexico, filed suit over the State Petitions Rule in District Court for the Northern District of California. In a September 2006 order, the district court held that the Forest Service violated NEPA and the Endangered Species Act in promulgating the State Petitions Rule, permanently enjoined the State Petitions Rule, and reinstated the Roadless Rule.[39] The Ninth Circuit affirmed the district court's order permanently enjoining implementation of the State Petitions Rule and further ruled that the

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[36] *Lockyer*, 575 F.3d at 1007-08 (citing 69 Fed. Reg. 42, 636 (July 16, 2004)).

[37] *Id.* at 1008 (citing 70 Fed. Reg. 25,654 (May 13, 2005)).

[38] 70 Fed. Reg. 25,659.

[39] *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

district court did not abuse its discretion by reinstating the Roadless Rule as a remedy for the procedural shortcomings.

In August 2008, the Wyoming district court again held that the Roadless Rule violated NEPA and the Wilderness Act and permanently enjoined implementation of the Roadless Rule nationwide.[40] The district court's decision is on appeal before the Tenth Circuit.

In 2008, the Forest Service completed an amendment to the TLMP pursuant to the Ninth Circuit's ruling in *Natural Resources Defense Council v. U.S. Forest Service,*[41] finding that the 1997 FEIS for the TLMP contained deficiencies concerning timber demand estimates. Since completion of the 2008 TLMP amendment, the Forest Service has authorized timber sales with new road construction in inventoried roadless areas of the Tongass, including the Iyouktug Timber Sale authorized in April 2008, the Kuiu Timber Sale authorized in May 2008, and the Scratchings II Timber Sale authorized in July 2008.

On December 22, 2009, plaintiffs filed a complaint against the Forest Service challenging the Tongass Exemption. Plaintiffs are "organizations whose members use and rely on the roadless areas of the Tongass for customary and traditional purposes . . . recreation, commercial guiding and tourism,

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[40] *Wyoming v. U.S. Dept. of Agriculture*, 570 F. Supp. 2d 1309 (D.Wyo. 2008).

[41] 421 F.3d 797 (9th Cir. 2005).

scientific research, sport hunting, both sport and commercial fishing, camping, photography, wildlife viewing, and other activities that depend on natural old-growth forest and undisturbed ecological values."[42]

Count I of plaintiffs' complaint alleges that adoption of the Tongass Exemption was "arbitrary, capricious, and not in accordance with law" under the Administrative Procedures Act.[43] Count II alleges that federal defendants violated the National Environmental Policy Act ("NEPA") by failing to prepare an EIS for the Tongass Exemption and relying on the alternatives presented in the FEIS for the Roadless Rule. Plaintiffs' complaint seeks a declaratory judgment that the Tongass Exemption was "arbitrary, capricious and not in accordance with law, and was adopted without observance of procedure required by law."[44] Plaintiffs' complaint requests the court to vacate the Tongass Exemption and all Forest Service decisions inconsistent with the Roadless Rule as adopted in 2001, and to enter "appropriate injunctive relief."[45]

On May 28, 2009, the USDA issued an interim directive reserving to the Secretary of Agriculture "the authority to approve or disapprove road construction or reconstruction and the cutting, sale, or

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[42] Doc. 1 at p. 2.

[43] 5 U.S.C. § 706(2)(A).

[44] Doc. 1 at p. 17.

[45] *Id.*

removal of timber in those areas identified in the set of inventoried roadless area maps contained in Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume 2, dated November 2000,"[46] which includes the Tongass. On May 28, 2010, the Secretary signed a memorandum renewing the interim directive for an additional year.[47]

III. STANDARD OF REVIEW

This action arises under the Administrative Procedures Act ("APA"), which provides for judicial review of final agency action.[48] Under the APA, the court "will reverse the agency action only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[49] Under this standard of review, an agency must "examine the relevant data and articulate a satisfactory explanation for its action."[50] "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the

[46] Secretary's Memorandum 1042-154 (May 28, 2009).

[47] Secretary's Memorandum 1042-155 (May 28, 2010).

[48] 5 U.S.C. §§ 701-706.

[49] *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (citing 5 U.S.C. § 706(2)).

[50] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

product of agency expertise, or if the agency's decision is contrary to the governing law."[51] "The determination whether the [agency] acted in an arbitrary and capricious manner rests on whether it 'articulated a rational connection between the facts found and the choice made.'"[52] The scope of review is narrow, and the court may not substitute its judgment for that of the agency.[53] Although the court presumes regulations to be valid, the court's "inquiry into their validity is a 'thorough, probing, in-depth review.'"[54]

IV. DISCUSSION

A. Justiciability and Ripeness

As a preliminary matter, the Forest Service argues that plaintiffs' claims are neither justiciable nor ripe for adjudication. The Forest Service does not dispute that the plaintiffs have standing to raise their claims under 5 U.S.C. § 702. The Forest Service first argues that plaintiffs' challenge to the Tongass Exemption is not justiciable because "direct judicial

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[51] *Id.* (internal citation omitted).

[52] *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003) (quoting *Pub. Citizen v. Dept. of Transportation*, 316 F.3d 1002, 1020 (9th Cir. 2003)).

[53] *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000).

[54] *National Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)).

review of agency regulations is unavailable."[55] "To obtain judicial review under the APA, [plaintiffs] must challenge a final agency action."[56] "For an agency action to be final, the action must (1) 'mark the consummation of the agency's decisionmaking process,' and (2) 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'"[57] Here, the Forest Service's designation of the Tongass Exemption as a "final rule" satisfies the requirement for final agency action under § 704.[58] Although the Tongass Exemption was intended to be "temporary," it was published as a final rule. Moreover, it was a rule that was to be in effect indefinitely, and has, in fact, been in effect for more than seven years. The second condition is met because the Tongass Exemption amended the existing Roadless Rule, thereby effecting immediate change in existing law or policy.[59]

The Forest Service next argues that plaintiffs' claims against the Tongass Exemption are not justiciable "in the absence of challenge to a site-specific

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[55] Doc. 54 at p. 12

[56] *Oregon Natural Desert Assoc. v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006) (citing 5 U.S.C. § 704).

[57] *Oregon Natural Desert*, 465 F.3d at 982 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

[58] *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 976 (9th Cir. 2003).

[59] *Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001).

application of the Rule."[60] The Ninth Circuit rejected a similar argument in *Idaho Conservation League v. Mumma,*[61] stating,

> [I]f the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.[62]

The Forest Service also argues that plaintiffs' claims are not ripe for review because two timber sales specifically named in plaintiffs' complaint, Iyouktug and Scratchings II, "are not planned for implementation before the end of fiscal year 2012," and the Kuiu sale "no longer proposes timber harvest in [inventoried roadless areas]."[63] Federal defendants' argument is unavailing because plaintiffs are challenging the Tongass Exemption as a whole, in addition to three particular timber sales authorized under the exemption. Ripeness, which is a question of law,[64] prevents courts "from entangling themselves in abstract disagreements over administrative policies,

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[60] Doc. 54 at p. 15.

[61] 956 F.2d 1508 (9th Cir. 1992).

[62] *Idaho Conservation League v. Mumma*, 956 F.2d 1508,1516 (9th Cir. 1992).

[63] Doc. 54 at p. 15.

[64] *Lockyer*, 575 F.3d 999, 1010 (9th Cir. 2009).

and also [ ] protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[65] In determining whether an agency's decision is ripe for judicial review, the court considers the "fitness of the issues for judicial decision," and "the hardship to the parties of withholding court consideration."[66] To do so, the court must consider (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with administrative action; and (3) whether further factual development of the issues presented is necessary.[67]

Here, because the Tongass Exemption has already removed the additional protections afforded under the Roadless Rule, delayed review would cause hardship to the plaintiffs. In addition, "[j]udicial consideration of this dispute would not interfere with further administrative action with respect to the [Tongass Exemption], which is a final rule that has been published in the Federal Register."[68] Nor is additional factual development required for a judicial determination of the issues presented in this action, which concern whether the Forest Service violated

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[65] *Id.* at 1010-11 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

[66] *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (quoting *Abbott Labs.*, 387 U.S. at 149).

[67] *Ohio Forestry*, 523 U.S. at 733.

[68] *Lockyer*, 575 F.3d at 1011.

the APA and NEPA in promulgating the Tongass Exemption.

Moreover, the fact that the Roadless Rule is the subject of ongoing litigation does not make the Tongass Exemption any more or any less ripe for judicial review. Similarly, federal defendants' contention that the Forest Service is transitioning towards a Tongass forest industry that relies on young growth timber instead of old growth timber does not make plaintiffs' claims that the Forest Service violated the APA and NEPA unripe for judicial review. For the above reasons, the court concludes that this dispute is ripe for adjudication.

Having concluded that plaintiffs' challenge to the Tongass Exemption is justiciable and ripe for adjudication, the court turns to the merits of plaintiffs' claims. In their motion for summary judgment, plaintiffs request the court to vacate the Tongass Exemption, reinstate the Roadless Rule on the Tongass, and vacate the Scratchings Timber Sale ROD II, and portions of the Iyouktug Timber Sales ROD and Kuiu Timber Sale Area ROD that authorize cutting trees or road construction in inventoried roadless areas. Federal defendants oppose the motion on the grounds that the Tongass Exemption does not violate the APA and complies with NEPA.

B. APA Claim

Plaintiffs argue that the rationale for the Tongass Exemption, as set forth in the final rule and

ROD, was arbitrary and capricious because defendants "relied on assertions that were unsupported or contradicted by the facts in the record, reversed previous factual findings without explanation, ignored important aspects of the problems, and failed to consider obvious alternative courses of action."[69] Plaintiffs' primary arguments are that the Roadless Rule does not prevent construction of utility lines or roads to connect southeast Alaska communities, no job loss was attributable to the Roadless Rule, and the Tongass Exemption does not reduce legal uncertainty. Federal defendants contend that the Forest Service reasonably considered existing protections of roadless values on the Tongass, impacts of the Roadless Rule on road and utility connections in southeast Alaska, economic impacts of the Roadless Rule, and the impacts of ongoing litigation against the Roadless Rule.

"[The court's] review of an agency decision is based on the administrative record and the basis for the agency's decision must come from the record."[70] As contemplated in both the July 2003 settlement agreement and promulgated in Federal Register, the Tongass Exemption was intended as a temporary rule which would be in effect until "the Department promulgates a subsequent final rule concerning the application of the roadless rule within the State of

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[69] Doc. 42 at p. 8.

[70] *Home Builders*, 340 F.3d at 841.

Alaska, as announced in the agency's second [ANPR] published on July 15, 2003."[71] The settlement agreement further contemplated that federal defendants would move toward "permanent amendments to the Roadless Rule, including consideration of exempting both the Chugach National Forest and Tongass National Forest from the Roadless Rule, in a timely manner."[72]

In the Tongass Exemption ROD, the Forest Service offered the following grounds for promulgating the Tongass Exemption: 1) the previously disclosed socioeconomic costs to local communities of applying the Roadless Rule's prohibitions to the Tongass; 2) the "protection of roadless values included in the Tongass Forest Plan," and 3) the legal uncertainty caused by litigation over the Roadless Rule during the prior two years. The court must determine whether any of these proffered grounds provided a rational basis for temporarily exempting the Tongass from the Roadless Rule's prohibitions.

1. Socioeconomic Costs

In support of temporarily exempting the Tongass from the Roadless Rule's prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas, the Tongass Exemption

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[71] Doc. 42-28 at p. 1.

[72] Doc. 42-24 at p. 2.

ROD stated that application of the Roadless Rule to the Tongass: 1) could result in the loss of approximately 900 jobs in southeast Alaska, and 2) significantly limit the ability of Southeast Alaska communities to develop road and utility connections.

As to potential job losses, the Tongass Exemption ROD specifically stated,

> The November 2000 FEIS for the roadless rule estimated that a total of approximately 900 jobs could be lost in the long run in Southeast Alaska due to the application of the roadless rule, including direct job losses in the timber industry as well as job losses in other sectors.[73]

The ROD's reasoning suggests that temporarily exempting the Tongass from the Roadless Rule's prohibitions is necessary in the short run because 900 jobs could be lost in the long run if the Roadless Rule's prohibitions are applied to the Tongass. The ROD did not discuss or provide any evidence of how many jobs could be lost during the intended temporary duration of the exemption, nor did it identify any other potential negative economic effects. The agency's use of long-term potential job losses to justify a short-term temporary rule is implausible, particularly in light of the fact that the Forest Service agreed in the 2003 settlement agreement to move towards further rulemaking addressing the Tongass in a

[73] Doc. 42-28 at p. 2.

"timely manner." Because the Forest Service did not articulate a rationale connection between long-term job losses and its decision temporarily exempting the Tongass from the Roadless Rule's prohibitions, this rationale for its decision was arbitrary and capricious.

Moreover, the proffered rationale runs counter to the evidence before the agency. As promulgated, the Roadless Rule included a mitigation measure to assure long-term protection of the Tongass's ecological values and a "smooth transition for forest dependent communities."[74] The final rule provided that the Roadless Rule's prohibitions would not apply to "road construction, reconstruction, and the cutting, sale or removal of timber from inventoried roadless areas on the [Tongass] where a notice of availability for a [DEIS] for such activities [had] been published in the Federal Register" prior to the Roadless Rule's publication.[75] The Roadless Rule ROD indicated that the Tongass had 261 million board feet ("MMBF") of timber under contract in inventoried roadless areas, 386 MMBF under a notice of availability for a DEIS, FEIS, or ROD, and 204 MMBF available in roaded areas that was sold, had a ROD or was in the planning process, for a total of 851 MMBF. The ROD further stated that 851 MMBF was "enough timber to satisfy about 7 years of estimated market demand,"[76]

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[74] Doc. 42-15 at p. 12.

[75] *Id.*

[76] *Id.* at p. 13.

based on a market demand of approximately 122 MMBF. The Roadless Rule ROD also indicated that during this period of transition, "an estimated 114 direct timber jobs and 182 total jobs would be affected"[77] in southeast Alaska. Consequently, the Forest Service's explanation that temporarily exempting the Tongass from the Roadless Rule was necessary to prevent significant job losses is not supported by the evidence, at least in the first seven years after adoption of the Roadless Rule.

Furthermore, neither the SIR nor the Tongass Exemption ROD offer any evidence showing actual job loss due to application of the Roadless Rule and any resulting lower timber harvest levels on the Tongass. To the contrary, the evidence offered suggested that job losses were attributable to the decline in market demand rather than the prohibitions in the Roadless Rule. The SIR stated that the amount of timber actually harvested in the Tongass "is limited more by market demand than [maximum allowable level of harvest.]"[78] The SIR also indicated that from 1990 to 1999 southeast Alaska timber harvests declined by 60%, and from 1999 to 2002, fell an additional 46%. The SIR further stated that while the Roadless Rule FEIS harvest levels were based on a market demand estimate of 124 MMBF per year, only 34 MMBF was harvested in 2002 and 51 MMBF in

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[77] *Id.*

[78] Doc. 42-27 at p. 16.

2003, and that while the Forest Service offered 71 MMBF for sale in 2003, only 25 MMBF was purchased.[79] Similarly, the Roadless Rule FEIS stated that "increased competition in the timber industry has eroded Alaska's market share and competitive position in the global timber market, and that "[i]f this trend continues, market demand may continue to decline. Thus, five years from now the effect of the prohibitions might have a very different effect on the local economy than what is projected today."[80] Because the Forest Service's proffer that temporarily exempting the Tongass from the Roadless Rule was necessary to prevent significant job losses runs counter to the evidence, it is arbitrary and capricious.

Another justification offered for the Tongass Exemption was that the Roadless Rule "significantly limits the ability of communities to develop road and utility connections."[81] The Tongass Exemption ROD did not provide any evidence in support of its bald assertion that the Roadless Rule significantly limits the ability of communities in Southeast Alaska to develop road and utility connections, and that a temporary exemption would address such losses. Moreover, the evidence in the remainder of the record is contrary to the proffered justification.

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[79] *Id.* at pp. 24-25.

[80] Doc. 42-12 at p. 66.

[81] Doc. 42-28 at p. 2.

The Roadless Rule specifically allows construction of Federal Aid Highways if the Secretary of Agriculture determines that the project is in the public interest and "no other reasonable or prudent alternative exists."[82] In the Roadless Rule FEIS, the Forest Service concluded "[i]t appears that in the reasonably foreseeable future, construction of State highways through inventoried roadless areas in Alaska may not be an issue" because none of the proposed transportation corridors identified in the existing TLMP "have received serious local or State support, and none are on any approved project lists."[83]

In the Tongass Exemption ROD, the Forest Service acknowledged that the Roadless Rule permits construction of Federal Aid Highways, but contended that it is not always possible to obtain a finding that a project is in the public interest and no other reasonable and prudent alternative exists. The agency's argument is not persuasive because the Roadless Rule maintained the Secretary's discretion as it already existed.[84]

In addition, the SIR for the Tongass Exemption indicated that both the 1997 and 1999 TLMP RODs addressed long-term transportation needs of southeast Alaska by including the use of the Transportation and Utilities System Land Use Designation

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[82] Doc. 42-15 at p. 30.

[83] Doc. 42-12 at p. 66.

[84] *Id.* at p. 9.

("LUD") and that roads recognized under the LUD, if they are in the best public interest and are authorized by the USDA, could go forward.[85] The SIR further concluded that "no new information has come to light that would alter the expectations of major roads or transportation corridors or associated economic impacts estimate[d] in the Roadless FEIS and supported by the Forest Plan FEIS of 1997 or the 2003 SEIS."[86]

In support of the argument that Tongass Exemption was necessary because the Roadless Rule significantly limits the ability of communities to develop road connections, the Tongass Exemption ROD stated,

> The history of road development in Southeast Alaska since statehood is that most State highway additions have been upgraded from roads built to harvest timber. . . . By precluding the construction of roads for timber harvest, the roadless rule reduces future options for similar upgrades, which may be critical to economic survival of many of the smaller communities in Southeast Alaska.[87]

The Forest Service's argument, which is not supported by any evidence, is speculative at best. Moreover,

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[85] Doc. 42-27 at p. 39.

[86] Doc. 52, exh. 5 at p. 41

[87] Doc. 42-28 at p. 8.

it was not considered in the 2001 FEIS, nor addressed in the SIR. Rather, it appears to be a post-hoc rationalization which the court may not consider in conducting review under the APA.[88]

Similarly, the Forest Service's assertion that a temporary exemption was necessary to allow construction of utility lines was also arbitrary because it is unsupported by any evidence. The Roadless Rule FEIS concluded that impacts to utility corridors in the Western States would be minimal, but did not identify any impacts to potential utility corridors in southeast communities.[89] In addition, the Tongass Exemption ROD acknowledged that the TTRA designated 12 permanent LUD II areas, which can be used to "provide vital Forest transportation and utility system linkages, if necessary."[90] Furthermore, the Roadless Rule allows timber cutting, sale, or removal in inventoried roadless areas when incidental to authorized activities such as utility corridors.[91] Because the agency's explanation that the Roadless Rule significantly limits utility connections is not supported by and is contrary to the evidence, it is arbitrary and capricious.

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[88] *Crickon v. Thomas*, 579 F.3d 978, 987 (9th Cir. 2009).

[89] Doc. 42-12 at p. 45.

[90] Doc. 42-28 at p. 7.

[91] Doc. 42-15 at p. 16.

2. Protection of Roadless Values in Tongass Forest Plan

The third rationale offered in support of the Tongass Exemption in the 2003 ROD is that the Forest Service "determined that, at least in the short term, the roadless values on the Tongass are sufficiently protected under the Tongass Forest Plan and that the additional restrictions associated with the roadless rule are not required."[92] The Tongass Exemption ROD further stated that under the 1997 Tongass Forest Plan, commercial timber harvest is prohibited on more than 78 percent of the Tongass.[93]

In the 2001 Roadless Rule ROD, however, the Forest Service reviewed the same facts in the 2001 FEIS and concluded that immediately prohibiting new road construction and timber harvest in all inventoried roadless areas in the Tongass would most effectively protect its roadless values,[94] and that "[a]llowing road construction and reconstruction on the [Tongass] to continue unabated would risk the loss of important roadless area values"[95] The Roadless Rule ROD further stated that delaying implementation of the Roadless Rule on the Tongass even until April 2004 "would not have assured long-term protection of

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[92] Doc. 42-28 at p. 3.

[93] *Id.* at p. 1.

[94] Doc. 42-15 at p. 12.

[95] *Id.*

the Forest's unique ecological values and characteristics."[96]

The 2001 FEIS stated that a substantial amount of timber harvest and roading was projected to occur in inventoried roadless areas of the Tongass in the next five years:

> Under the current TLMP, the total projected timber offer in inventoried roadless areas on the Tongass in the next 5 years (fiscal years 2000 to 2004) is 539 MMBF, requiring 291 miles of road construction and reconstruction, including 77 miles of temporary roads. This represents nearly half the timber volume projected to be offered from inventoried roadless areas nationwide for this 5-year period.[97]

The 2001 FEIS further acknowledged "the heightened sensitivity of the Tongass to further fragmentation" due to the marked decline in the amount of productive old growth in areas of the Tongass that have been intensively managed for timber production. The FEIS also stated, "Based on the extensive amount of roading and harvest currently projected under the current TLMP and the intensive even-aged techniques that are used to harvest timber on the Tongass, forest fragmentation may increase in the areas where harvest is scheduled," including "many

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[96] *Id.*

[97] *Id.* at p. 59.

areas that are adjacent to existing heavily fragmented areas."[98] Despite the above findings in the 2001 FEIS and the finding of no changed circumstances in the SIR, two years later the Forest Service concluded that "in the short term, the roadless values on the Tongass are sufficiently protected under the Tongass Forest Plan."[99]

In reversing course and adopting the Tongass Exemption, the Forest Service provided no reasoned explanation as to why the Tongass Forest Plan protections it found deficient in its 2001 FEIS and ROD, were deemed sufficient in its 2003 ROD. "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position."[100] 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."[101] The USDA's failure to provide a reasoned explanation for its reversal of position on the adequacy of the Tongass Forest Plan's protections of roadless values was arbitrary and capricious.

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[98] Doc. 42-12 at p. 58.

[99] Doc. 42-28 at p. 3.

[100] *F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009).

[101] *Fox Television*, 129 S.Ct. at 1811.

Furthermore, the Forest Service's conclusion that roadless areas in the Tongass were sufficiently protected under the Tongass Forest Plan and that the additional restrictions provided in the Roadless Rule were not required is also contrary to Ninth Circuit precedent. In the Ninth Circuit's two decisions addressing the Roadless Rule, the court found that "the Roadless Rule provide [s] greater substantive protections to roadless areas than the individual forest plans it superseded."[102]

3. Legal Uncertainty

The final rationale offered in support of the Tongass Exemption is that adoption of the Tongass Exemption would provide legal certainty. The Tongass Exemption ROD stated in pertinent part, "Given the great uncertainty about the implementation of the roadless rule due to the various lawsuits, the Department has decided to adopt this final rule, initiated pursuant to the settlement agreement with the State of Alaska, to temporarily exempt the [Tongass] from the prohibitions of the roadless rule."[103] The ROD further stated "[t]his final rule addresses the important question of whether the rule should apply on the Tongass in the short term if the roadless rule

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[102] *Lockyer*, 575 F.3d at 1014 (citing *Kootenai Tribe*, 313 F.3d at 1110).

[103] Doc. 42-28 at p. 3.

were to be reinstated by court order."[104] In light of the fact that the Tongass Exemption was promulgated as a temporary exemption and the Forest Service agreed to engage in further rulemaking addressing the Tongass and Chugach in a "timely manner," the USDA's rationale that adoption of the temporary Tongass exemption would provide legal certainty is implausible.[105]

4. Intervenor-Defendants' Arguments

In its brief, intervenor-defendant State of Alaska suggests that the actual stated purpose for the Tongass Exemption was to "implement[ ] the national interests proclaimed by Congress for the Tongass National Forest" in the TTRA.[106] Intervenor-defendant Alaska Forest Service Association similarly argues that "a fundamental reason for the Forest Service's decision to promulgate the Tongass Exemption was the agency's legitimate concern that the 2001 Roadless Rule violated ANILCA and the TTRA."[107] Neither rationale is identified in the Tongass Exemption ROD or the notice of proposed rulemaking as a reason for temporarily exempting the Tongass from the Roadless Rule.

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[104] *Id.*

[105] *Id.*

[106] Doc. 53 at p. 4 (citing Doc. 42-25 at p. 5).

[107] Doc. 56 at p. 14.

Moreover, the Roadless Rule ROD concluded that immediately applying the Rule to the Tongass was consistent with the TTRA, stating that "[w]hile the TTRA urges the Forest Service to 'seek to meet market demand' for timber from the [Tongass], the TTRA does not envision an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation."[108] On the other hand, the Tongass Exemption ROD stated that the USDA "believes that exempting the Tongass from the prohibitions in the roadless rule is consistent with congressional direction and intent in the ANILCA and the TTRA legislation."[109] Even assuming ensuring compliance with TTRA and ANILCA was a reason for promulgating the Tongass Exemption, the USDA failed to provide a reasoned explanation for changing its position that applying the Roadless Rule to the Tongass was consistent with the TTRA. The Forest Service's failure to provide a reasoned explanation for its reversal of position was arbitrary and capricious.

Intervenor-defendant State of Alaska also argues that the Forest Service promulgated the Tongass Exemption because it was obligated to do so under the July 2003 settlement agreement between the State of Alaska and the USDA. The State's argument is unavailing. Pursuant to the plain language of the 2003 settlement agreement, the USDA agreed to

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[108] Doc. 42-15 at p. 13.

[109] Doc. 42-28 at p. 7.

publish 1) a "proposed temporary regulation" that would exempt the Tongass from application of the Roadless Rule "until completion of the rulemaking process for any permanent amendments to the Roadless Rule," and 2) an ANPR to exempt the Tongass and Chugach from application of the Roadless Rule. The settlement agreement explicitly stated that the federal defendants

> make[ ] no representation regarding the content or substance of any final rule, but will move forward toward final decisions on the proposed temporary regulation exempting the [Tongass] from the application of the Roadless Rule and on permanent amendments to the Roadless Rule, including consideration of exempting both the [Chugach] and the [Tongass] from the Roadless Rule, in a timely manner.[110]

Based on the plain language of the settlement agreement, the USDA was not obligated to promulgate the final rule and ROD adopting the regulation temporarily exempting the Tongass from application of the Roadless Rule.

Because the reasons proffered by the Forest Service in support of the Tongass Exemption were implausible, contrary to the evidence in the record, and contrary to Ninth Circuit precedent, the court concludes that promulgation of the Tongass Exemption

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[110] Doc. 42-24 at p. 2.

was arbitrary and capricious. "With the passage of the Roadless Rule, inventoried roadless areas, 'for better or worse, [were] more committed to pristine wilderness, and less amendable to road development for purposes permitted by the Forest Service.'"[111] While the Forest Service may reevaluate its approach to roadless area management in the Tongass, it must comply with the requirements of the APA in doing so.

C. NEPA Claim

Plaintiffs further claim that defendants violated NEPA by failing to prepare an EIS for the Tongass Exemption and relying on the alternatives presented in the FEIS for the Roadless Rule. Because the court concludes that promulgation of the Tongass Exemption was arbitrary and capricious in violation of the APA, the court finds it unnecessary to address plaintiffs' claim that defendants violated NEPA by failing to prepare a SEIS and relying on the alternatives in the 2001 FEIS for the Tongass Exemption.

D. Remedy

Because the Forest Service violated the APA in promulgating the Tongass Exemption, and the violation is not harmless, the court must fashion a remedy. "Ordinarily when a regulation is not promulgated in

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[111] *Lockyer*, 575 F.3d at 1010 (quoting *Kootenai Tribe*, 313 F.3d at 1106).

compliance with the APA, the regulation is invalid."[112] "The effect of invalidating an agency rule is to reinstate the rule previously in force."[113] Because the Tongass Exemption is invalid, the Roadless Rule is reinstated on the Tongass.

Plaintiffs also seek an order vacating the roadless portions of timber sales previously authorized under the Tongass Exemption, specifically the Scratchings Timber Sale ROD II, and the portions of the Iyouktug Timber Sales ROD and Kuiu Timber Sale Area ROD that authorize cutting trees or road construction in inventoried roadless areas. The court declines to rule on plaintiffs' request for vacatur of the three timber sales in light of the interim directive issued by the Secretary of Agriculture reserving all decision making on timber sales to the Secretary. This means that there is no decision as to any of these three particular sales which actually is ripe for review by this court at the present time. Where a court can not provide relief for a party's claim, "that claim is moot and must be dismissed for lack of jurisdiction."[114] Here, the court can not provide relief for plaintiffs' request for vacatur of timber sales previously authorized under the Tongass Exemption

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[112] *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1991); *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).

[113] *Paulsen*, 413 F.3d at 1008.

[114] *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999).

because the Interim Directive currently in place reserves all decision making authority on timber sales to the Secretary of Agriculture.

V. CONCLUSION

For the reasons set out above, plaintiffs' motion for summary judgment at docket 42 is **GRANTED** insofar as it seeks to vacate the Tongass Exemption and reinstate the Roadless Rule's application to the Tongass, and is **DENIED** without prejudice insofar as it seeks an order vacating the Scratchings Timber Sale ROD II, and portions of the Iyouktug Timber Sales ROD and Kuiu Timber Sale Area ROD. It is **FURTHER ORDERED** that defendants' cross-motion for summary judgment at docket 54 is **DENIED**.

DATED at Anchorage, Alaska, this 4th day of March 2011.

/s/ JOHN W. SEDWICK
UNITED STATES
DISTRICT JUDGE

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596-AB77

Special Areas; Roadless Area Conservation

Federal Register

Vol. 66, No. 9

Friday, January 12, 2001

Rules and Regulations

AGENCY: Forest Service, USDA.

ACTION: Final rule and record of decision.

[3244] **SUMMARY**: The Department of Agriculture is adopting this final rule to establish prohibitions on road construction, road reconstruction, and timber harvesting in inventoried roadless areas on National Forest System lands. The intent of this final rule is to provide lasting protection for inventoried roadless areas within the National Forest System in the context of multiple-use management.

EFFECTIVE DATE: This rule is effective March 13, 2001.

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The Final Rule and Alternatives Considered

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Purpose and Need for the Roadless Area Conservation Rule

The Department of Agriculture is responsible for managing National Forest System resources to sustain the health, diversity, and productivity of the nation's forests and grasslands to meet the needs of present and future generations. As noted in the USDA Forest Service Strategic Plan (2000 Revision) (www.fs.fed.us/plan, October 2000), demands for, and supplies of, renewable resources change over time in response to social values, new technology, and new information. In the future, expanding urban areas and increased fragmentation of private lands make it likely that the largest and most extensive tracts of undeveloped land will be those in public ownership.

This final rule prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics. Although other activities may also compromise roadless area values, they resist analysis at the national level and are best reviewed through

local land management planning. Additionally, the size of the existing forest road system and attendant budget constraints prevent the agency from managing its road system to the safety and environmental standards to which it was built. Finally, national concern over roadless area management continues to generate controversy, including costly and time-consuming appeals and litigation (FEIS Vol. 1, 1-16 to 1-17). This final rule addresses these needs in the context of a national rulemaking.

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[3254] *Comment on Application to the Tongass National Forest*. The agency received many comments regarding the Tongass National Forest. Many respondents stated that the Tongass should not be exempt from the provisions of the proposed rule. Others, concerned that local communities had already experienced substantial social and economic effects due to the recent revision of the Tongass Land and Resource Management Plan and other factors, thought that the Tongass should be exempt from the provisions of the proposed rule. Some respondents stated that the Forest Service should defer action on the Tongass National Forest until the next plan revision.

Response. In both the DEIS and FEIS, using the best available science and data, the agency has considered the alternatives of exempting and not exempting the Tongass National Forest, as well as deferring a decision per the proposed rule. Social and

economic considerations were key factors in analyzing those alternatives, along with the unique and 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. In developing the proposed action, the agency sought to balance the extraordinary ecological values of the Tongass National Forest against the needs of the local forest dependent communities in Southeast Alaska.

With the recent closure of pulp mills and the ending of long-term timber sale contracts, the timber economy of Southeast Alaska is evolving to a competitive bid process. About two-thirds of the total timber harvest planned on the Tongass National Forest over the next 5 years is projected to come from inventoried roadless areas. If road construction were immediately prohibited in inventoried roadless areas, approximately 95 percent of the timber harvest within those areas would be eliminated (FEIS Vol. 1, 3-202).

The Tongass National Forest is part of the northern Pacific coast ecoregion, an ecoregion that contains one fourth of the world's coastal temperate rainforests. As stated in the FEIS, the forest's high degree of overall ecosystem health is due to its largely undeveloped nature including the quantity and quality of inventoried roadless areas and other special designated areas. Alternatives that would immediately prohibit new road construction and timber harvest in all inventoried roadless areas would most effectively protect those values. Other alternatives that exempt,

delay, or limit the application of the prohibitions would offer less protection. The environmental impacts of these alternatives are disclosed in Chapter 3 of the FEIS.

The proposed rule would have deferred a decision on whether or not the prohibitions should be applied to the Tongass National Forest until April 2004. This would have allowed an adjustment period for the timber program in Southeast Alaska to occur under provisions of the 1999 Record of Decision for the Tongass Land and Resource Management Plan Revision, but would not have assured long-term protection of the Forest's unique ecological values and characteristics.

In response to public comments, an optional social and economic mitigation measure was considered under the Tongass Not Exempt alternative that would require implementation of the final rule on the Tongass, but delay this implementation until April 2004, to provide a transition period for local communities to adjust to changes that would occur when the prohibitions take effect.

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

Allowing road construction and reconstruction on the Tongass National Forest to continue unabated would risk the loss of important roadless area values. The agency had sufficient information to analyze the environmental, social, and economic effects of prohibiting road construction, reconstruction, and limited timber harvesting on the Tongass National Forest and did not see the value in [3255] deferring the issue to further study prior to making a decision.

Moreover, this course of action is consistent with the provisions of the Tongass Timber Reform Act (TTRA). While the TTRA urges the Forest Service to "seek to meet market demand" for timber from the Tongass National Forest, the TTRA does not envision an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation. (*Alaska Wilderness Recreation and Tourism Ass'n* v. *Morrison, 67 F.3d 723, 731 (9th Cir. 1995))*. The record for this rulemaking fully supports the imposition of the prohibitions on the Tongass National Forest. However, in inventoried roadless areas the Tongass National Forest has 261 MMBF of timber under contract and 386 MMBF under a notice of

availability for a DEIS, FEIS, or Record of Decision. In addition, the Tongass has 204 MMBF available in roaded areas that is sold, has a Record of Decision, or is currently in the planning process. This total of 851 MMBF is enough timber volume to satisfy about 7 years of estimated market demand.

Based on the analysis contained in the FEIS, a decision to implement the rule on the Tongass National Forest is expected to cause additional adverse economic effects to some forest dependent communities (FEIS Vol. 1, 3-326 to 3-350). During the period of transition, an estimated 114 direct timber jobs and 182 total jobs would be affected. In the longer term, an additional 269 direct timber jobs and 431 total jobs may be lost in Southeast Alaska. However, the Department believes that the long-term ecological benefits to the nation of conserving these 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.

The special provision at § 294.14(d) of the final rule allowing 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 of 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** is considered necessary because of the unique social and economic conditions where a disproportionate share

of the impacts are experienced throughout the entire Southeast Alaska region and concentrated most heavily in a few communities.

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[3266] *Tongass National Forest Alternatives*. The Tongass Exempt alternative described in the FEIS was not selected. Allowing road construction and reconstruction on the Tongass National Forest to continue unabated would risk the loss of important roadless area values.

The Tongass Deferred alternative was not selected because the agency presently has sufficient information to make this decision, and the decisionmaking processes used have identified the environmental, social, and economic issues that must be addressed. There is no need to postpone the decision.

The Tongass Selected Areas alternative did not meet the purpose and need as well as the selected alternative. Important roadless area values would be lost or diminished because of the road construction, reconstruction, and timber harvesting activities that this alternative allowed.

By applying the final rule to the Tongass National Forest immediately, but allowing road construction, reconstruction, and the cutting, sale, and removal of timber from inventoried roadless areas 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**, a period of transition is available to affected communities while providing certainty for long term protection of these lands.

The Tongass National Forest has 261 MMBF of timber under contract and 386 MMBF under a notice of availability of a DEIS, FEIS, or Record of Decision. In addition, the Tongass has 204 MMBF available in roaded areas that is sold, has a Record of Decision, or is currently in the planning process. This total of 852 MMBF is enough timber volume to satisfy about seven years of estimated market demand. During the period of transition, an estimated 114 direct timber jobs and 182 total jobs would be affected. In the longer-term, an additional 269 direct timber jobs and 431 total jobs could be lost in Southeast Alaska if current demand trends continue and no other adjustments are provided to allow for more harvest from other parts of the forest. The exception for projects with a notice of availability for a draft environmental impact statement on the Tongass National Forest is because of the unique social and economic conditions where a disproportionate share of the impacts are experienced throughout the entire Southeast Alaska region and most heavily in a few communities.

Decision Summary. It is the decision of the Secretary of Agriculture to select Prohibition Alternative 3 and the Tongass Not Exempt Alternative identified in the FEIS as the final rule, with modifications. These modifications include: (1) an exception to the prohibition on road construction and reconstruction for

mineral leasing in areas under mineral lease as of the date of publication of this rule in the **Federal Register**; (2) an exception to the timber harvest prohibition for the cutting, sale, or removal of timber in portions of inventoried roadless areas where construction of a classified road and subsequent timber harvest have substantially altered the roadless characteristics, and the road construction and subsequent timber harvest occurred after the area was designated an inventoried roadless area and prior to the date of publication of this rule in the **Federal Register**; and (3) the immediate application of the prohibitions to the Tongass National Forest with a provision that exempts road construction, road reconstruction, and the cutting, sale, or removal of timber if a notice of availability for a DEIS for such activities has been published in the **Federal Register** prior to the date of publication of this rule in the **Federal Register**. The final rule best meets the agency's goal of maintaining the health and contributions of existing inventoried roadless areas by preserving the relatively undisturbed characteristics of those areas, thereby protecting watershed health and ecosystem integrity. In evaluating the comments received from the public, the Department believes that there is adequate relevant information to assess reasonably foreseeable significant adverse impacts (40 CFR 1502.22). The FEIS for this final rule documents the adverse impacts road construction and timber harvesting can have in inventoried roadless areas. This final rule reduces potential impacts to a greater degree and with more certainty

than Prohibition Alternatives 1 and 2 and the other Tongass National Forest alternatives.

The final rule retains the ability to use timber harvesting for clearly defined purposes where necessary to meet ecological needs, allowing accomplishment of ecological objectives that Alternative 4 would preclude. Allowing clearly defined, limited timber harvest of generally small diameter trees will maintain a valuable management option for the agency to help improve habitat for threatened, endangered, proposed, or sensitive species recovery and to help restore ecological composition and structure, such as reducing the risk of uncharacteristic wildfire effects. As habitat fragmentation, subdivision, and urbanization of lands continues nationally, this decision allows the agency to avoid most human-caused fragmentation of National Forest System inventoried roadless areas to preserve management options for future generations. Finally, these inventoried roadless areas will remain available to all Americans for a variety of dispersed recreation opportunities.

The final rule:

(1) Recognizes that the agency's first and highest priority is to ensure sustainability for resources under its jurisdiction. It protects inventoried roadless areas from the activities that most directly threaten their fundamental characteristics through the alteration of natural landscapes and fragmentation of forestlands.

(2) Protects public health by promoting watershed health and maintaining important sources of clean drinking water for current and future generations.

(3) Responds to the major issues identified in public comments.

(4) Is fiscally responsible, and does not increase the financial burden by adding expensive roads the agency cannot afford to maintain.

(5) Exemplifies the agency's responsibility as a world leader in natural resource conservation by setting an example for the global community.

[3267] (6) Recognizes that some communities, such as those in Southeast Alaska, bear a disproportionate share of the burden, and offers assistance to mitigate those impacts.

This decision is expected to cause additional adverse economic effects to forest dependent communities because of the potential reduction in future timber harvest, mineral leasing, and other activities (FEIS Vol. 1, 3-326 to 3-350). However, the Department believes that the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to those local communities. To reduce the economic impacts of this decision, the Chief of the Forest Service will seek to implement one or more of the following provisions of an economic transition program for communities

most affected by application of the prohibitions in inventoried roadless areas:

(1) Provide financial assistance to stimulate community-led transition programs and projects in communities most affected by application of the prohibitions in inventoried roadless areas;

(2) Through financial support and action plans, attract public and private interests, both financial and technical, to aid in successfully implementing local transition projects and plans by coordinating with other Federal and State agencies; and

(3) Assist local, State, Tribal and Federal partners in working with those communities most affected by the final roadless area decision.

* * *

[3268] *Potential Costs Of The Roadless Rule*. The prohibition on road construction, reconstruction, and timber harvest except for clearly defined, limited purposes would reduce development of roaded access to resources within inventoried roadless areas compared to the baseline. Roads are required for most timber sales to be economically feasible. For those sales that are financially profitable, the rule would reduce net revenues. In addition to lost revenue, there would be an estimated immediate impact of 461 fewer timber jobs and 841 total jobs, with an associated annual loss of $20.7 million in direct income and $36.2 million in total income. In the longer term, an additional 269 timber jobs and 431 total jobs could be

affected from harvest reductions on the Tongass National Forest. The longer-term income effect was estimated at $12.4 million in direct income and $20.2 million in total income. A reduction in the timber program could also affect about 160 Forest Service jobs, with an additional 100 jobs affected on the Tongass in the longer term.

Jobs associated with road construction and reconstruction for timber harvest and other activities would also be fewer than under the baseline. Initially, between 43 and 51 direct jobs and between 88 and 104 total jobs could be affected by reduced road construction and reconstruction. An additional 39 direct jobs and 78 total jobs could be affected by harvest reductions on the Tongass National Forest in the longer term.

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DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596-AC04

Federal Register

Vol. 68, No. 249

Tuesday,
December 30, 2003

Rules and Regulations

Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska

AGENCY: Forest Service, USDA.

ACTION: Final rule and record of decision.

[75136] **SUMMARY**: The Department of Agriculture is adopting this final rule to amend regulations concerning the Roadless Area Conservation Rule (hereinafter, referred to as the roadless rule) to temporarily exempt the Tongass National Forest (hereinafter, referred to as the Tongass) from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas. This temporary exemption of the Tongass will be in effect until the Department promulgates a subsequent final rule concerning the application of the roadless rule within the State of Alaska, as announced in the agency's second advance notice of proposed rulemaking published on July 15, 2003 (68 FR 41864).

In *State of Alaska* v. *USDA*, the State of Alaska and other plaintiffs alleged that the roadless rule violated a number of Federal statutes, including the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). Passed overwhelmingly by Congress in 1980, ANILCA sets aside millions of acres in Alaska for the National Park Service, Forest Service, National Monuments, National Wildlife Refuges, and Wilderness Areas with the understanding that sufficient protection and balance would be ensured between protected areas established by the act and multiple-use managed areas. The Alaska lawsuit alleged that USDA violated ANILCA by applying the requirements of the roadless rule to Alaska's national forests. USDA settled the lawsuit by agreeing to publish a proposed rule which, if adopted, would temporarily exempt the Tongass from the application of the roadless rule (July 15, 2003, 68 FR 41865), and to publish a separate advance notice of proposed rulemaking (July 15, 2003, 68 FR 41864) requesting comment on whether to permanently exempt the Tongass and the Chugach National Forests in Alaska from the application of the roadless rule.

Under this final rule, the vast majority of the Tongass remains off limits to development as specified in the 1997 Tongass Forest Plan, Commercial timber harvest will continue to be prohibited on more than 78 percent of the Tongass as required under the existing forest plan. Exempting the Tongass from the application of the roadless rule makes approximately 300,000 roadless acres available for forest management

– slightly more than 3 percent of the 9.34 million roadless acres in the Tongass, or 0.5 percent of the total roadless acres nationwide. This rule also leaves intact all old-growth reserves, riparian buffers, beach fringe buffers, and other protections contained in the 1997 Tongass Forest Plan.

The preamble of this rule includes a discussion of the public comments received on the proposed rule published July 15, 2003 (68 FR 41865) and the Department's responses to the comments. This final rule also serves as the record of decision (ROD) for selection of the Tongass Exempt Alternative identified in the November 2000 final environmental impact statement for the roadless rule.

EFFECTIVE DATE: This rule is effective January 29, 2004.

FOR FURTHER INFORMATION: In Washington, DC contact: Dave Barone, Planning Specialist, Ecosystem Management Coordination Staff, Forest Service, USDA, (202) 205-1019; and in Juneau, Alaska contact: Jan Lerum, Regional Planner, Forest Service, USDA, (907) 586-8796.

SUPPLEMENTARY INFORMATION:

Background and Litigation History

On January 12. 2001 (66 FR 3244), the Department published a final roadless rule at Title 36 of the Code of Federal Regulations, part 294 (36 CFR part 294). The roadless rule was a discretionary rule that fundamentally changed the Forest Service's

longstanding approach to management of inventoried roadless areas by establishing nationwide prohibitions generally limiting, with some exceptions, timber harvest, road construction, and reconstruction within inventoried roadless areas in national forests. The draft environmental impact statement (DEIS) (May 2000) and final environmental impact statement (FEIS) (November 2000) included alternatives that specifically exempted the Tongass from the roadless rule's prohibitions. As described in the FEIS, the roadless rule was predicted to cause substantial social and economic hardship in communities throughout Southeast Alaska (FEIS Vol. 1, 3-202, 3-326 to 3-352, 3-371 to 3-392). Nonetheless, the final roadless rule's prohibitions were extended to the Tongass.

Since its promulgation, the roadless rule has been the subject of a number of lawsuits in Federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. In one of these lawsuits, the U.S. District Court for the District of Idaho issued a nationwide preliminary injunction prohibiting implementation of the roadless rule. The preliminary injunction decision was reversed and remanded by a panel of the Ninth Circuit Court of Appeals. The Ninth Circuit's preliminary ruling held that the Forest Service's preparation of the environmental impact statement for the roadless rule was in conformance with the general statutory requirements of the National Environmental Policy Act (NEPA).

Subsequently, the U.S. District Court for the District of Wyoming held that the Department had violated NEPA and the Wilderness Act in promulgating the roadless rule. As relief, the court directed the roadless rule be set aside and the agency be permanently enjoined from implementing the roadless rule at 36 CFR part 294. An appeal is pending in the Tenth Circuit. Several other cases remain pending in other Federal district courts.

In another lawsuit, the State of Alaska and six other parties alleged that the roadless rule violated the Administrative Procedure Act, National Forest Management Act, National [75137] Environmental Policy Act, Alaska National Interest Lands Conservation Act, Tongass Timber Reform Act, and other laws. In the June 10, 2003, settlement of that lawsuit, the Department committed to publishing a proposed rule with request for comment that would temporarily exempt the Tongass from application of the roadless rule until completion of a rulemaking process to make permanent amendments to the roadless rule. Also pursuant to the settlement agreement, the Department agreed to publish an advance notice of proposed rulemaking (ANPR) to exempt both the Tongass and Chugach National Forests from the application of the roadless rule. The ANPR and the proposed rule were both published in Part II of the **Federal Register** on July 15, 2003 (68 FR 41864). The Department made no representations in the settlement agreement regarding the content or substance of any final rule that might result.

Most Southeast Alaska Communities Are Significantly Impacted by the Roadless Rule

There are 32 communities within the boundary of the Tongass. Most Southeast Alaska communities lack road and utility connections to other communities and to the mainland systems. 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. Under this final rule, communities in Southeast Alaska can propose road and utility connections across National Forest System land that will benefit their communities. Any such community proposal would be evaluated on its own merits.

In addition, the preponderance of Federal land in Southeast Alaska results in communities being more dependent upon Tongass National Forest lands and having fewer alternative lands to generate jobs and economic activity. The communities of Southeast Alaska are particularly affected by the roadless rule prohibitions. The November 2000 FEIS for the roadless rule estimated that a total of approximately 900 jobs could be lost in the long run in Southeast Alaska due to the application of the roadless rule, including direct job losses in the timber industry as well as indirect job losses in other sectors.

Roadless Areas Are Common, Not Rare, on the Tongass National Forest

The 16.8-million-acre Tongass National Forest in Southeast Alaska is approximately 90 percent roadless and undeveloped. Commercial timber harvest and road construction are already prohibited in the vast majority of the 9.34 million acres of inventoried roadless areas in the Tongass, either through Congressional designation or through the Tongass Forest Plan. Application of the roadless rule to the Tongass is unnecessary to maintain the roadless values of these areas.

Congress has designated 39 percent of the Tongass as Wilderness, National Monument, or other special designations, which prohibit timber harvest and road construction with certain limited exceptions. An additional 39 percent of the Tongass is managed under the Forest Plan to maintain natural settings where timber harvest and road construction are generally not allowed. About 4 percent of the Tongass is designated suitable for commercial timber harvest, with about half of that area contained within inventoried roadless areas. The remaining 18 percent of the Forest is managed for various multiple uses. The Tongass Forest Plan provides high levels of resource protection and has been designed to ensure ecological sustainability over time, while allowing some development to occur that supports communities dependent on the management of National Forest System lands in Southeast Alaska.

In addition, within the State of Alaska as a whole, there is an extensive network of federally protected areas. Alaska has the greatest amount of land and the highest percentage of its land base in conservation reserves of any State. Federal lands comprise 59 percent of the State and 40 percent of Federal lands in Alaska are in conservation system units. The Southeast Alaska region contains 21 million acres of additional protected lands in Glacier Bay National Park and Preserve, and the Wrangell-St. Elias National Park and Preserve.

Different Approaches Considered for the Tongass National Forest

The unique situation of the Tongass has been recognized throughout the Forest Service's process for examining prohibitions in inventoried roadless areas. The process for developing the roadless rule included different options for the Tongass in each stage of the promulgation of the rule and each stage of the environmental impact statement. At each stage, however, the option of exempting the Tongass from the rule's prohibitions was considered in detail.

In February 1999, the agency exempted the Tongass and other Forests with recently revised forest plans from an interim rule prohibiting new road construction. The October 1999 notice of intent to prepare an environmental impact statement for the roadless rule specifically requested comment on whether or not the rule should apply to the Tongass

in light of the recent revision of the Tongass Forest Plan and the ongoing economic transition of communities and the timber program in Southeast Alaska. The May 2000 DEIS for the roadless rule proposed not to apply prohibitions on the Tongass, but to determine whether road construction should be prohibited in unroaded portions of inventoried roadless areas as part of the 5-year review of the Tongass Forest Plan.

The preferred alternative was revised in the November 2000 FEIS to include prohibitions on timber harvest, as well as road construction and reconstruction on the Tongass, but with a delay in the effective date of the prohibitions until April 2004. This was one of four Tongass alternatives analyzed in the FEIS, including the Tongass Exempt Alternative, under which the prohibitions of the roadless rule would not apply to the Tongass. The FEIS recognized that the economic and social impacts of including the Tongass in the roadless rule's prohibitions could be of considerable consequence in communities where the forest products industry is a significant component of local economies. The FEIS also noted that if the Tongass were exempt from the roadless rule prohibitions, loss of habitat and species abundance would not pose an unacceptable risk to diversity across the forest.

However, the final January 12, 2001, roadless rule directed an immediate applicability of the nationwide prohibitions on timber harvest, road construction and reconstruction on the Tongass, except for projects that already had a notice of availability of

a draft environmental impact statement published in the **Federal Register**.

Why Is USDA Going Forward With This Rulemaking?

This final rule has been developed in light of the factors and issues described in this preamble, including (1) serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions would cause in communities throughout Southeast Alaska, (2) comments received on the proposed rule, and (3) litigation over the last two years.

[75138] Given the great uncertainty about the implementation of the roadless rule due to the various lawsuits, the Department has decided to adopt this final rule, initiated pursuant to the settlement agreement with the State of Alaska, to temporarily exempt the Tongass National Forest from the prohibitions of the roadless rule. This final rule at § 294.14 allows the Forest to continue to be managed pursuant to the 1997 Tongass Forest Plan, which includes the non-significant amendments, readopted in the February 2003 record of decision (2003 Plan) issued in response to the District Court's remand of the 1997 Plan in *Sierra Club* v. *Rey* (D. Alaska), until the 2003 Plan is revised or further amended. Both documents were developed through balanced and open planning processes, based on years of extensive public involvement and thorough scientific review. The 2003

Tongass Forest Plan provides a full consideration of social, economic, and ecological values in Southeast Alaska. This final rule does not reduce any of the old-growth reserves, riparian buffers, beach fringe buffers, or other standards and guidelines of the 2003 Tongass Forest Plan or in any way impact the protections afforded by the plan. The final rule maintains options for a variety of social and economic uses of the Tongass, which was a key factor in the previous decision to approve the plan in 1997.

The final rule also addresses the important question of whether the rule should apply on the Tongass in the short term if the roadless rule were to be reinstated by court order. The Department has determined that, at least in the short term, the roadless values on the Tongass are sufficiently protected under the Tongass Forest Plan and that the additional restrictions associated with the roadless rule are not required. Further, reliance on the Tongass Forest Plan in the short term does not foreclose options regarding the future rulemaking associated with the permanent, statewide consideration of these issues for Alaska. Indeed, this final rule reflects a conclusion similar to that identified as the preferred alternative in the original proposed roadless rule and draft EIS; that is, not to impose the prohibitions immediately, but to allow for future consideration of the matter when more information may be available.

Finally, the Department fully recognizes the unusual posture of this rulemaking, as it is amending a rule that has been set aside by a Federal court. The

Department maintains that such an amendment is contrary neither to law nor to the court's injunction. Instead, it is a reasonable and lawful exercise of the Department's authority to resolve policy questions regarding management of National Forest System land and resources, especially in light of the conflicting judicial determinations. Adopting this final rule reduces the potential for conflicts regardless of the disposition of the various lawsuits.

Changes Between Proposed Rule and Final Rule

Only one substantive change has been made between the proposed rule and the final rule. At § 294.14, the proposed rule stated at paragraph (d) that the temporary exemption of the Tongass would be in effect until the USDA promulgates a revised final roadless area conservation rule, for which the agency sought public comments in the July 10, 2001, advance notice of proposed rulemaking (66 FR 35918). Intervening events necessitate an adjustment, and, therefore, § 294.14 of the final rule now states at paragraph (d) that the temporary exemption of the Tongass National Forest remains in place until the USDA promulgates a final rule concerning applicability of 36 CFR part 294, subpart B within the State of Alaska, as announced in the agency's second advance notice of proposed rulemaking published on July 15, 2003 (68 FR 41864). A minor change also has been made for clarity by adding the word "road" before "reconstruction."

The Department has previously indicated that it would proceed with the roadless rulemakings, while taking numerous factors into consideration, including the outcomes of ongoing litigation. The Wyoming District Court's setting aside of the roadless rule with the admonition that the Department "must start over" represents such a circumstance. Since the roadless rule has been set aside, the Department has determined that the best course of action is to clarify that the duration of this Tongass-specific rulemaking will last until completion of rulemaking efforts associated with the application of the roadless rule in Alaska.

Summary of Public Comments and the Department's Responses

The proposed rule was published in the **Federal Register** on July 15, 2003, for a 30-day public comment period (68 FR 41865). Due to public requests for additional time, the comment period was extended by 19 days for a total of 49 days. The Forest Service received approximately 133,000 comments on the proposed rule. All comments were considered in reaching a decision on the final rule. In addition, appropriate sections of Volume 3 of the November 2000 roadless rule FEIS (Agency Responses to Public Comments) that addressed the Tongass alternatives were also reviewed and considered. A summary of comments and the Department's responses to them are summarized as follows.

General Comments. Virtually all of the Southeast Alaska municipalities that responded to the proposed rule expressed strong support for it. Many noted that Alaska contains more land in protected status than all other States combined, and that applying the roadless rule to the Tongass would foreclose opportunities for sustainable economic development throughout Southeast Alaska. Several respondents asked the Department to discontinue or abandon this rulemaking based on their preference to retain the roadless rule prohibitions for the Tongass. Others argued that it was illegal for USDA to pursue amendments to a rule that has been set aside by a Federal district court.

Respondents expressed different views regarding the roadless rule and its applicability to the Tongass. In general, they took one of two positions: (1) Some saw the exemption of the Tongass as a positive step toward reversing what they consider to be overly restrictive management direction imposed by the roadless rule, and therefore they recommended the exemption; and (2) others wanted the Forest Service to retain the roadless rule as adopted in 2001 because they believed it offers a well-balanced approach to forest management that has received overwhelming public support.

Response. The Department believes that the best course of action is to complete this rulemaking for the Tongass that would govern should the roadless rule come back into effect as a result of the pending litigation.

Environmental Effects of the Proposed Rule. The agency received comments regarding the effects the proposed exemption from the roadless rule would have on the natural resources of the Tongass. Some respondents expressed their view that 70 percent of the highest volume timber stands in Southeast Alaska have been harvested, and exempting the Tongass from the roadless rule would lead to the harvest of most or all of the remainder of such stands. Some regarded the highest volume stands as "the biological heart of the forest," and believed any additional harvest would have severe adverse effects on the environment, especially fish and wildlife habitat. Other respondents stated that the Tongass Forest Plan provides stringent environmental protection measures that [75139] will minimize the effects of timber harvest activities on the other resources of the Tongass.

Response. The Tongass has about 9.4 million acres of old-growth forest, of which about 5 million acres contain trees of commercial size. These 5 million acres are referred to as productive old-growth forest. The Tongass Forest Plan allows no timber harvest on nearly 90 percent of the 5 million acres of existing productive old growth. The agency calculates that, at most, 28 percent of the highest volume stands have been harvested, not the 70 percent as claimed. The Tongass Forest Plan prohibits harvest on the vast majority of the remaining highest volume stands.

Although timber volume has often been used as a proxy for habitat quality, a variety of forest attributes and ecological factors influence habitat quality, with different attributes being important for different species. The Tongass Forest Plan, developed over several years with intensive scientific and public scrutiny, takes these and other factors into consideration in its old-growth habitat conservation strategy. The forest plan includes a system of small, medium, and large old growth reserves, well distributed across the Forest, and a stringent set of measures to protect areas of high quality wildlife habitat, such as areas along streams, rivers, estuaries, and coastline. As explained in the 1997 Tongass Forest Plan FEIS and the 2003 supplemental environmental impact statement (SEIS), good wildlife habitat is abundant on the Tongass, on which 92 percent of the productive old-growth forest that was present in 1954 remains today. Even if timber is harvested for 120 years at the maximum level allowed by the Tongass Forest Plan, 83 percent of the productive old-growth forest that was present on the Tongass in 1954 would remain. Extensive, unmodified natural environments characterize the Tongass and will continue to do so. Even with the exemption of the Tongass from the prohibitions in the roadless rule, old-growth is and will continue to be the predominant vegetative structure on the Tongass.

Desirability of a National Standard for Roadless Protection. Some respondents, including a number of Members of Congress, expressed support for the

roadless rule as adopted in January, 2001, which these respondents regard as a landmark national standard that is essential to ensure the long-term protection of roadless values. These respondents maintained that the proposed rule would seriously undermine that national standard by exempting the largest national forest in the country, which contains nearly 16 percent of the acreage protected by the roadless rule. Other respondents stated that the ecological, geographic, and socioeconomic conditions on the Tongass and among the local communities of Southeast Alaska are so different from those on national forests outside of Alaska that any nationwide approach, such as the prohibitions contained in the roadless rule, would necessarily impose undue hardship on the communities of Southeast Alaska.

Response. The agency recognized the unique situation of the Tongass in the discussion of a national roadless policy throughout the development of the EIS for the roadless rule. In addition to the range of policy alternatives considered in the EIS, the agency developed a full range of alternatives specifically applicable to the Tongass, ranging from the Tongass Not Exempt Alternative (selected as part of the final rule in the 2001 record of decision) to the Tongass Exempt Alternative (now proposed for selection). The tradeoffs involved in these alternatives are fully evaluated in the roadless rule EIS. The comments raised no new issues that are not already fully explored in the EIS.

The Tongass has a higher percentage of roadless acres, over 90 percent, than nearly any other national forest except the Chugach National Forest. The Tongass Forest Plan generally prohibits road construction on 74 percent of the roadless acres, which will ensure that the Tongass remains one of the most unroaded and undeveloped national forests in the system. Even if timber were to be harvested at maximum allowable levels for 50 years, at least 80 percent of the currently existing roadless areas will remain essentially in their natural condition after 50 years of implementing the Forest Plan. Roadless areas and their associated values are and will continue to be abundant on the Tongass, even without the prohibitions of the roadless rule. Southeast Alaska is also unique in that 94 percent of the area is Federal land (80 percent Tongass National Forest, 14 percent Glacier Bay National Park), and 6 percent is State, Native Corporation, and private lands.

The impacts of the roadless rule on local communities in the Tongass are particularly serious. Of the 32 communities in the region, 29 are unconnected to the nation's highway system. Most are surrounded by marine waters and undeveloped National Forest System land. The potential for economic development of these communities is closely linked to the ability to build roads and rights of ways for utilities in roadless areas of the National Forest System. Although Federal Aid Highways are permitted under the roadless rule, many other road needs would not be met. This is more important in Southeast Alaska than in most

other States that have a much smaller portion of Federal land. Likewise, the timber operators in Southeast Alaska tend to be more dependent on resource development opportunities on National Forest System land than their counterparts in other parts of the country because there are few neighboring alternative supplies of resources for Southeast Alaska.

The agency also recognized the unique situation on the Tongass during the development of the roadless rule, and proposed treating the Tongass differently from other national forests until the final rule was adopted in January 2001. At that time, the Department decided that ensuring lasting protection of roadless values on the Tongass outweighed the attendant socioeconomic losses to local communities. The Department now believes that, considered 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 forests outside of Alaska.

Scientific Basis for the Proposed Rule. The agency received comments that there is no scientific basis for exempting the Tongass from the roadless rule, and that the old growth conservation strategy included in the 1997 Tongass Forest Plan is scientifically inadequate. Indeed, some of the scientists who provided input during the development of that plan commented in opposition to exempting the Tongass from the

roadless rule. Others noted that the 1997 Forest Plan, developed with over 10 years of intensive public involvement and scientific scrutiny, and embodied an appropriate balance between the ecological, social, and economic components of sustainability.

Response. Science can predict, within certain parameters, the impacts of policy choices, but it cannot tell what policy to adopt. The 1997 Tongass Forest Plan FEIS and roadless rule FEIS describe the impacts of a wide range of possible land management policies. The science underlying these predictions was subject to rigorous peer review. However, ultimately, the role of science is to inform policy makers rather than to make policy.

The Tongass Forest Plan is based on sound science. As an example, the forest [75140] plan includes an old growth habitat conservation strategy, outlined in the response to comments on environmental effects of the proposed rule that is one of the best in the world. The strategy provides habitat to maintain well-distributed, viable populations of old-growth-associated species across the Forest. The strategy also considers development on adjacent State and private lands. Many existing roadless areas were also incorporated into reserves using non-development land use designations. The strategy was scientifically developed and was subjected to independent scientific peer review.

The science consistency review process used in developing the 1997 Tongass Forest Plan is seen as a

model for science-based management that has been emulated in other Forest Service planning efforts. Planning is not a process of science, but rather is a process that uses scientific information to assist officials in making decisions. Under the scientific consistency process, the role of science in planning is explicitly defined as requiring that all relevant scientific information available must be considered; scientific information must be understood and correctly interpreted, including the uncertainty regarding that information; and the resource risks associated with the decision must be acknowledged and documented. The 1997 Tongass Forest Plan meets these criteria, as documented in "Evaluation of the Use of Scientific Information in Developing the 1997 Forest Plan for the Tongass," published by the Department's Pacific Northwest Research Station in 1997. Exempting the Tongass from the prohibitions of the roadless rule returns management of the Tongass to the direction contained in a forest plan that has undergone thorough scientific review, which found the Tongass Forest Plan to be consistent with the available science.

Compliance with Executive Order 13175 and Finding of No "Tribal Implications." An Alaska Native community disagreed with the agency's finding that the proposed rule does not have "Tribal implications" under Executive Order 13175. The community's comment included concerns about "catastrophic economic and social losses due to the shutdown of the Tongass," and noted that more than 200 timber-related jobs have been lost in that community since

the roadless rule was implemented. The comment also outlined Federal law and policy that mandates consideration of Tribal economic well-being.

Response. The agency did not conclude that the roadless policy has "no impact" on Tribes, because clearly the loss of jobs and economic opportunity has greatly affected some of them. The stated severe effect on the social and economic fabric of life in Southeast Alaska from the decline in the timber industry is one of the reasons the Department is adopting an exemption to the roadless rule for the Tongass. Exempting the Tongass from the prohibitions in the roadless rule will mean that more options will be available to alleviate some of these impacts. A primary focus of the exemption is to reduce the social and economic impacts to Tribes.

The agency did conclude that the proposed rule to exempt the Tongass from the roadless rule would not impinge on Tribal sovereignty, would not require Tribal expenditures of funds, and would not change the distribution of power between the Federal government and Indian or Alaska Native Tribes. It is under this narrow sense of Executive Order 13175 that the finding of no Tribal implications was made for the proposed rule. For this final rule, the Department has determined that there could be substantial future direct effects to one or more Tribes, and that these effects are anticipated to be positive. A discussion regarding consultation and coordination with Indian Tribal Governments about this final rule in accordance with Executive Order 13175 can be found

in the Regulatory Certification section of this preamble.

Volume of Public Comment and Support for the Roadless Rule. Many comments discussed the volume of public comment received over the past 5 years in support of the roadless rule and its application to the Tongass. Some people said that the roadless rule is a landmark conservation policy that has been supported by 2.2 million people, and, therefore the proposed rule ignored the wishes of the vast majority of roadless rule comments supporting protection of roadless areas in all national forests, including Alaska's. Other people noted that nearly all elected officials in Alaska opposed the roadless rule and supported the exemption.

Response. Every comment received is considered for its substance and contribution to informed decisionmaking whether it is one comment repeated by tens of thousands of people or a comment submitted by only one person. The public comment process is not a scientifically valid survey process to determine public opinion. The emphasis in the comment review process is on the content of the comment rather than on the number of times a comment was received. The comment analysis is intended to identify each unique substantive comment relative to the proposed rule to facilitate its consideration in the decisionmaking process. In matters of controversial national policy, it is impossible to please everyone. When those commenting do not see their view reflected in the final decision, they should not conclude that their

comments were ignored. All comments are considered, including comments that support and that oppose the proposal. That people do not agree on how public lands should be managed is a historical, as well as modem dilemma faced by resource managers. However, public comment processes, while imperfect, do provide a vital avenue for engaging a wide array of the public in resource management processes and outcomes.

Adequacy of Timber Volume along Existing Roads. The agency received comments regarding the effect of the roadless rule's prohibitions on supplies to forest product industries in Southeast Alaska. Some respondents stated the exemption of the Tongass from the roadless rule was not necessary because the roadless rule FEIS projected 50 million board feet could be harvested annually in the developed areas along the existing road system on the Tongass. Some commented they believed there was an adequate amount of national forest timber currently under contract to keep the forest products industry supplied for a number of years. Other respondents stated the exemption was necessary if forest product industries in Southeast Alaska were to have enough timber volume to maintain their operations.

Response. Only 4 percent of the Tongass is available for commercial timber harvest under the forest plan. About half of this is in inventoried roadless areas. Further reductions in areas available for timber harvest to an already very limited timber supply would have unacceptable social, aesthetic, and

environmental impacts. As was disclosed in the roadless rule FEIS, a sustained annual harvest level of 50 million board feet would not support all of the timber processing facilities in the region.

The Tongass Timber Reform Act directs the Secretary of Agriculture to seek to provide a supply of timber from the Tongass, which (1) meets the annual market demand for timber from the forest and (2) meets the market demand from the forest for each planning cycle, consistent with providing for the [75141] multiple use and sustained yield of all renewable forest resources, and subject to appropriations, other applicable law, and the requirements of the National Forest Management Act.

Benchmark harvest levels displayed in the roadless rule FEIS for the Tongass Exempt Alternative were based on a long-term market demand estimate of 124 million board feet (MMBF) per year. The procedure used to derive this figure is documented in a 1997 report by Forest Service economists, which predicted Tongass National Forest timber demand through 2010, relying upon such factors as current processing capacity in the region and the market share of Southeast Alaskan products in their principal markets (Timber Products Output and Timber Harvests in Alaska: Projections for 1997 to 2010. Brooks and Haynes, 1997. Pacific Northwest Research Station). Copies of this report may be obtained at 333 Southwest First Avenue, P.O. Box 3890, Portland, OR 97208-3890. Three different market scenarios (low, medium, and high) were

considered, and the 124 MMBF figure represents the average value of the low market scenario estimates for the years 2001 through 2010. Comparable estimates for the medium and high scenarios are 151 and 184 MMBF per year, respectively.

Though the 1999 harvest level, at 146 MMBF, more closely approximates the medium market demand scenario, the roadless rule FEIS chose the low market for its benchmark analysis, and recent developments support this decision. If anything, the low market scenario appears optimistic in light of the 48 MMBF of Tongass National Forest timber harvested in 2001, the 34 MMBF harvested in 2002, and the 51 MMBF harvested in 2003 (fiscal years). At the end of fiscal year 2003, the amount of timber under contract on the Tongass was 193 MMBF, although the agency seeks to provide a sustained flow of timber sale offerings sufficient to maintain a volume under contract equal to 3 years of estimated timber demand. Recently, Congress enacted P.L. 108-108, Department of Interior and Related Agencies Appropriation Act for fiscal year 2004. Section 339 of this Act authorizes cancellation of certain limber sale contracts on the Tongass National Forest and provides that the timber included in such cancelled contracts shall be available for resale by the Secretary of Agriculture. Complete descriptions of the timber scheduling and pipeline process are found in Appendix A of all timber sale project environmental impact statements for the Tongass.

The last three years represent a significant aberration from historical harvest levels. The 1980-2002 average harvest was 269 MMBF, and in no year prior to 2001 did the harvest level fall below 100 MMBF. As recently as 1995, the Tongass National Forest harvests were in excess of 200 MMBF, and the average harvest over the 1995-2002 time period was approximately 120 MMBF. In light of this historical performance, the 124 MMFB low market estimate is not an unreasonable expectation for the coming decade, particularly if the current slump is merely a cyclical downturn. Of course market conditions may continue to deteriorate, and current low or even lower levels of harvest may become the norm. But in this case both the "negative" impacts of roading in roadless areas as well as the "positive" impacts related to employment would be reduced.

The Department believes that the roadless rule prohibitions operate as an unnecessary and complicating factor limiting where timber harvesting may occur. Accomplishment of social, economic, and biological goals can best be met through the management direction established through the Tongass Forest Plan.

Need for a Supplemental Environmental Impact Statement. Some respondents said a supplemental environmental impact statement (SEIS) is necessary before a decision can be made to exempt the Tongass from the prohibitions in the roadless rule. They suggested that new information or changed circumstances have occurred that have changed the effects

disclosed in the roadless rule FEIS, so a supplement is required. The changes most often cited included the set aside of the 1999 record of decision (ROD) for the Tongass Forest Plan and the changes in timber harvest levels and related employment in Southeast Alaska. Others also mentioned the updated roadless area inventory that was completed for the 2003 record of decision on wilderness recommendations and the pending land exchange with Sealaska, an Alaska Native Corporation.

Response. The determination of whether a supplemental EIS is required involves a two-step process. First new information must be identified and, second, an analysis of whether the new information is significant to the proposed action must be completed. The Forest Service has prepared a supplemental information report that describes this process, the analysis completed, and the conclusions reached. This report is available on the World Wide Web/Internet on the Forest Service Roadless Area Conservation Web site at http://www.roadless.fs.fed.us.

The conclusion in the supplemental information report is that the identified new information and changed circumstances do not result in significantly different environmental effects from those described in the roadless rule FEIS. Such differences as may exist are not of a scale or intensity to be relevant to the adoption of this final rule or to support selection of another alternative from the roadless rule FEIS. Consequently, the overall decisionmaking picture is not substantially different from what it was in

November 2000, when the roadless rule FEIS was completed. The effects of adopting the proposed rule as final have been displayed to the public and thoroughly considered. For all these reasons, no additional environmental analysis is required.

Economic Effects of the Roadless Rule. The agency received many comments regarding the economic effects that the roadless rule has had or would have in Southeast Alaska. People who commented were concerned about the ability of Southeast Alaska to develop a sustainable economy if the Tongass is not exempted from the roadless rule prohibitions. Concerns expressed included the limitation of the development of infrastructure, such as roads and utilities that are taken for granted elsewhere in the United States, the loss of jobs, and the loss of opportunity for Southeast Alaska to grow and develop responsibly. Other people said that any economic benefits from exempting the Tongass from the prohibitions in roadless rule are far smaller than estimated, while the adverse effects to the environment will be far greater.

Response. In the January 2001 record of decision on the roadless rule, the Secretary of Agriculture acknowledged the adverse economic effects to some forest-dependent communities from the prohibitions in the roadless rule. The decision was made to apply the roadless rule to the Tongass even though it was recognized there would be adverse effects to some communities. Due to serious concerns about these previously disclosed economic and social hardships

the roadless rule would cause in communities throughout Southeast Alaska, the Department moved forward to reexamine the rule.

The Department has concluded that the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits because the Tongass Forest Plan adequately provides for the ecological sustainability [75142] of the Tongass. Every facet of Southeast Alaska's economy is important, and the potential adverse impacts from application of the roadless rule are not warranted, given the abundance of roadless areas and protections already afforded in the Tongass Forest Plan. Approximately 90 percent of the 16.8 million acres in the Tongass National Forest is roadless and undeveloped. Over three-quarters (78 percent) of these 16.8 million acres are either Congressionally designated or managed under the forest plan as areas where timber harvest and road construction are not allowed. About 4 percent are designated suitable for commercial timber harvest, with about half of that area (300,000 acres) contained within inventoried roadless areas.

As discussed in the roadless rule FEIS (Vol. 1, 3-202, 3-326 to 3-350, 3-371 to 3-392), substantial negative economic effects are anticipated if the roadless rule is applied to the Tongass, which include the potential loss of approximately 900 jobs in Southeast Alaska. With the adoption of this final rule, the potential negative economic effects should not occur in Southeast Alaska. Even if the maximum harvest permissible under the Tongass Forest Plan is actually

harvested, at least 80 percent of the currently remaining roadless areas will remain essentially in their natural condition after 50 years of implementing the forest plan. If the Tongass is exempted from the prohibitions in the roadless rule, the nation will still realize long-term ecological benefits because of the large area that will remain undeveloped and unfragmented, with far less social and economic disruption to Southeast Alaska's communities.

Alaska National Interest Lands Conservation Act (ANILCA). Some people said that ANILCA was enacted with the promise that it provided sufficient protection for Alaska land and that no further administrative withdrawals could be allowed without express Congressional approval. Others said that the roadless rule does not violate the provisions in ANILCA.

Response. In passing ANILCA in 1980, Congress established 14 wildernesses totaling 5.5 million acres on the Tongass, and found that this act provided sufficient protection for the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska, and at the same time provided adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people. Accordingly, the designation and disposition of the public lands in Alaska pursuant to this act were 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. Congress believed that the need for future legislation designating new

conservation system units, new national conservation areas, or new national recreation areas, had been obviated by provisions in ANILCA.

In 1990, Congress enacted the Tongass Timber Reform Act (TTRA) to amend ANILCA by directing the Secretary of Agriculture, subject to certain limitations, to seek to provide a supply of timber from the Tongass National Forest, which (1) meets the annual market demand for timber and (2) meets the market demand for timber for each planning cycle, consistent with providing for the multiple use and sustained yield of all renewable forest resources, and subject to appropriations, other applicable laws, and the requirements of the National Forest Management Act.

Further, the TTRA designated 5 new wildernesses and 1 wilderness addition on the Tongass, totaling 296,000 acres. The act also designated 12 permanent Land Use Designation (LUD) II areas, totaling 727,765 acres. Congressionally designated LUD II areas are to be managed in a roadless state to retain their wildland characteristics; however, they are less restrictive on access and activities than wilderness, primarily to accommodate recreation and subsistence activities and to provide vital Forest transportation and utility system linkages, if necessary.

These statutes provide important Congressional determinations, findings, and information relating to management of National Forest System lands on the Tongass National Forest, and were considered carefully during this rulemaking. Expressions of legal

concerns and support for the various rulemakings have also been considered. This final rule reflects the Department's assessment of how to best implement the letter and spirit of congressional direction along with public values, in light of the abundance of roadless values on the Tongass, the protection of roadless values already included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions.

Roadless areas are common, not rare, on the Tongass National Forest, and most Southeast Alaska communities are significantly impacted by the roadless rule. The Department believes that exempting the Tongass from the prohibitions in the roadless rule is consistent with congressional direction and intent in the ANILCA and the TTRA legislation.

Adequacy of the Roadless Rule Concerning NEPA and Other Laws. Some people commented that the roadless rule was adopted in violation of NEPA because, according to those commenters, the roadless rule EIS failed to take the hard look that NEPA requires. Other concerns expressed about the roadless rule included alleged violations of the National Forest Management Act, Multiple Use Sustained Yield Act, and Wilderness Act, and concerns that the roadless rule failed to explicitly acknowledge valid and existing access rights to private lands.

Response. The roadless rule continues to be the subject of ongoing litigation in the district courts and one Federal appeals court. Hence, the validity of the

roadless rule is still in question. However, the Department believes that application of the roadless rule to the Tongass is inappropriate, regardless of whether the roadless rule is otherwise found to be valid or lawful. Given the pending litigation, the Department believes it is prudent to proceed with a decision on temporarily exempting the Tongass from the prohibitions in the roadless rule.

Effects of the Roadless Rule on Construction of Roads and Utility Corridors. Some people who commented said that because the roadless rule allows construction of Federal Aid Highway projects and roads needed to protect public health and safety, there are no significant limits on the ability of communities to develop road and utility connections in Southeast Alaska. Similarly, they said that utility corridors can be built and maintained without roads by using helicopters, so the opportunities for utility transmissions would not be limited either. Others, including local communities and elected officials, said that the roadless rule would impact the development of the Southeast Alaska Electrical Intertie System that is planned to provide communities throughout the region with clean, reliable, and affordable power.

Response. There is a need to retain opportunities for the communities of Southeast Alaska regarding basic access and utility infrastructure. This is related primarily to road systems, the State ferry system, electrical utility lines, and hydropower opportunities that are on the horizon. This need reflects in part the overall undeveloped nature of the Tongass and the

relationship of the 32 communities that are found within its boundaries. Most, if not all, of the [75143] communities are lacking in at least some of the basic access and infrastructure necessary for reasonable services, economic stability, and growth that almost all other communities in the United States have had the opportunity to develop.

The roadless rule permits the construction of Federal Aid Highways only if the Secretary of Agriculture determines that the project is in the public interest and that no other reasonable and prudent alternative exists (36 CFR 294.12). Such a finding may not always be possible for otherwise desirable road projects.

Similarly, although some utility corridors can be constructed and maintained without a road, others may require a road. Even where a utility corridor without a road may be physically possible, it may be more expensive or otherwise less desirable than a utility accompanied by a service road. If the road construction is inexpensive or needed for other reasons, then utility corridors may often adjoin the road because of the ease of access for maintenance and repairs of utility systems. Indeed, most utility corridors in the United States were developed next to a pre-existing road.

The history of road development in Southeast Alaska since statehood is that most State highway additions have been upgraded from roads built to harvest timber. In the last 20 years, this has occurred

predominantly on Prince of Wales Island, better connecting the communities of Hollis, Hydaburg, Craig, Klawock, Thorne Bay, Whale Pass, Naukati, Kaasan, and Coffman Cove with all-weather highways. Without the pioneering work done by the Forest Service in building roads to harvest timber, it is unclear whether the State would have undertaken the construction of those road connections. By precluding the construction of roads for timber harvest, the roadless rule reduces future options for similar upgrades, which may be critical to economic survival of many of the smaller communities in Southeast Alaska. Moreover, roads initially developed for timber or other resource management purposes often have value to local communities and sometimes become important access links between communities, even if they are never upgraded as Federal Aid Highways. By exempting the Tongass from the prohibitions in the roadless rule, each utility or transportation proposal can be evaluated on its own merit.

Tongass Roads and Fiscal Considerations. Some people said that because the Tongass has a backlog of road maintenance and fish passage problems, primarily inadequate culverts, it makes no sense to spend money on new roads until these problems are corrected. Others said that the funds the Tongass receives from Congress to prepare timber sales and do roadwork could be better spent on other needs.

Response. The Tongass is currently spending about $2 million per year to correct fish passage barriers and continues to seek funding and opportunities to

clear the maintenance backlog. Forest Service roads in Alaska are vital to neighboring communities because most areas have at most an underdeveloped road system. Permanent Forest Service roads (known as classified roads) are often the only roads available to communities and for recreation opportunities. The Alaska Region, with only 3,600 miles of classified Forest Service roads, has the fewest miles of roads of all the regions of the Forest Service, and about one-third of these are closed to motorized use. New roads will be necessary to access sufficient timber to support existing small sawmills. Over the years, standards for construction and maintenance of roads have changed significantly. Roads and stream crossings built today adhere to very high standards designed to protect fisheries, important wetlands, unstable soils, wildlife use and habitats, and other resource values.

Roads on the Tongass are used by the public for a variety of reasons, including recreation, subsistence access, and other personal uses. The roads are also used by the Forest Service in accomplishing work for various resource programs. None of these programs is sufficient to provide for all the road maintenance needs. In the 2003 Tongass Forest-Level Roads Analysis, fish passage and sedimentation maintenance needs were identified as the critical categories of the deferred maintenance cost schedule.

Transportation planning is an integral part of the interdisciplinary process used to develop site-specific projects on the Tongass. The transportation planning process includes collaboration between the agency

and local communities to identify the minimum road system that is safe and responsive to public needs while minimizing maintenance costs.

Relationship of This Rule to Other Rulemaking. One commenter read 40 CFR 1506.1 as requiring an EIS for the temporary exemption of the Tongass. The commenter reasoned that because the agency was considering whether to adopt a permanent exemption for the Tongass, the agency may not take any action that tends to prejudice the choice of alternatives on that decision unless reviewed in a separately sufficient, stand-alone EIS. One commenter suggested that the effort the agency might put into preparing site-specific EISs for timber sales in roadless areas under this final rule might prejudice the decision on the advance notice of proposed rulemaking. Others viewed the proposed rule as an emergency rule that has not been adequately justified by the Forest Service, and recommended action be delayed until the permanent exemption is resolved.

Response: The decision to adopt the proposed rule as final is supported by the environmental analysis presented in the roadless rule FEIS, which considered in detail the alternative of exempting the Tongass from the prohibitions of the roadless rule, as well as the analysis and disclosure of alternative management regimes for roadless lands presented in the 1997 Tongass Forest Plan EIS and the 2003 Supplemental EIS. The Department has determined that no additional environmental analysis is warranted. The Supplemental Information Report documenting that

decision is available on the World Wide Web/Internet at http://www.roadless.fs.fed.us. In any event, the temporary rules on the Tongass and the proposal set forth in the advance notice of proposed rulemaking are separate and have separate utility. The July 15, 2003, advance notice of proposed rulemaking sought comment on whether both forests in Alaska should be exempted permanently from the prohibitions of the roadless rule. This final rule has separate utility in temporarily preventing socioeconomic dislocation in Southeast Alaska while protecting forest resources, regardless of whether the agency ultimately decides to exempt both national forests from the prohibitions of the roadless rule on a permanent basis.

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

Finally, this final rule is not an emergency rule. All the requirements and procedures for public notice and comment established by the Administrative Procedure Act for Federal rulemaking have been met with the publication of the proposed rule with request for comment and with the subsequent publication of this final rule. Emergency rulemaking involves the promulgation of a rule without [75144] providing for notice and public comment prior to adoption, when conditions warrant immediate action. That is not the case with this final rule.

Alternatives Considered

The alternatives considered in making this decision are the Tongass National Forest Alternatives identified in the November 2000 FEIS for the roadless rule, as further described in the rule's record of decision (66 FR 3262). These include the Tongass Not Exempt, Tongass Exempt, Tongass Deferred, and Tongass Selected Areas alternatives. The Tongass Not Exempt Alternative was selected by the Department as set out in the final roadless rule in January 2001, with mitigation explained in that record of decision. The Tongass Exempt Alternative would not apply the prohibitions of the roadless rule to the Tongass. Under the Tongass Deferred Alternative, the decision whether to apply the prohibitions of the roadless rule to the Tongass would be made in 2004 as part of the 5-year review of the Tongass Forest Plan. Under the Tongass Selected Areas Alternative, the prohibitions on road construction and reconstruction would apply only to certain land use designations, where commercial timber harvest would not be allowed by the forest plan. These areas comprise approximately 80 percent of the land in inventoried roadless areas on the Tongass.

The Environmentally Preferable Alternative

Under the National Environmental Policy Act, the agency is required to identify the environmentally preferable alternative (40 CFR 1505.2(b)). This is interpreted to mean the alternative that would cause

the least damage to the biological and physical components of the environment, and which best protects, preserves, and enhances historic, cultural, and natural resources (Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026).

The Department concurs in the assessment described in the January 12, 2001, roadless rule record of decision (66 FR 3263) that the environmentally preferable alternative is the portion of Alternative 3 of the roadless rule FEIS combined with the Tongass Not Exempt Alternative, which would apply the roadless rule's prohibitions to the Tongass without delay.

Record of Decision Summary

For the reasons identified in this preamble, the Department has decided to select the Tongass Exempt Alternative described in the roadless rule FEIS, until the Department promulgates a final rule concerning the application of the roadless rule within the State of Alaska, to which the agency sought public comments in the July 15, 2003, second advance notice of proposed rulemaking (68 FR 41864). Until such time, the Department is amending paragraph (d) of § 294.14 of the Roadless Area Conservation Rule set out at 36 CFR part 294 to exempt the Tongass National Forest from prohibitions

against timber harvest, road construction, and reconstruction in inventoried roadless areas.

The Tongass Not Exempt Alternative (identified as the environmentally preferable alternative in the previous section) is not selected because the Department now believes that, considered together, the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, and the socioeconomic costs and hardships to local communities of applying the roadless rule's prohibitions to the Tongass, outweigh any additional potential long-term ecological benefits; and therefore, warrant treating the Tongass differently from the national forests outside of Alaska.

The Tongass Deferred Alternative is not selected because there is no reason to delay a decision until 2004. On the contrary, a decision is needed now to reduce uncertainty about future timber supplies, which will enable the private sector to make investment decisions needed to prevent further job losses and economic hardship in local communities in Southeast Alaska.

The Tongass Selected Areas Alternative is not selected because it also would "be of considerable consequence at local levels where the timber industry is a cornerstone of the local economy and where the Forest Service has a strong presence," as stated in the roadless rule's record of decision. While these adverse socioeconomic consequences would be less than those under the Tongass Not Exempt Alternative, the

roadless rule's record of decision states, "For most resources, the effects of this alternative would probably not be noticeably different from those under the Tongass Exempt Alternative." Accordingly, there is no noticeable environmental benefit to selecting the Tongass Selected Areas Alternative over the Tongass Exempt Alternative that would justify the additional socioeconomic costs.

This decision reflects the facts, as displayed in the FEIS for the roadless rule and the FEIS for the 1997 Tongass Forest Plan that roadless values are plentiful on the Tongass and are well protected by the Tongass Forest Plan. The minor risk of the loss of such values is outweighed by the more certain socioeconomic costs of applying the roadless rule's prohibitions to the Tongass. Imposing those costs on the local communities of Southeast Alaska is unwarranted.

Regulatory Certifications

Regulatory Impact

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A cost-benefit analysis has been conducted on the impact of this final rule and incorporates by reference the detailed regulatory impact analysis prepared for the January 12, 2001, roadless rule, which included the Tongass Exempt Alternative. Much of this analysis was discussed and disclosed in the final environmental impact statement (FEIS) for the roadless rule. A review of the data and information from the original analysis and the information disclosed in the

FEIS found that it is still relevant, pertinent, and sufficient in regard to exempting the Tongass from the application of the roadless rule. As documented in the Supplemental Information Report, the Department has concluded that no new information exists today that would significantly alter the results of the original analysis.

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[75145] *Environmental Impact*

A draft environmental impact statement (DEIS) was prepared in May 2000 and a final environmental impact statement (FEIS) was prepared in November 2000 in association with promulgation of the roadless area conservation rule (January 12, 2001 (66 FR 3244). The DEIS and FEIS examined in detail sets of Tongass-specific alternatives. In the DEIS, the agency considered alternatives which would not have applied the rule's prohibitions to the Tongass National Forest, but would have required that the agency make a determination as part of the 5-year plan to review whether to prohibit road construction in unroaded portions of inventoried roadless areas. In the FEIS, the Department identified the Tongass Not Exempt as the Preferred Alternative, which would have treated the Tongass National Forest the same as all other national forests, but would have delayed implementation of the rule's prohibitions until April 2004. This delay would have served as a social and economic mitigation measure by providing a transition period for communities most affected by changes in management of inventoried roadless areas in the

Tongass. In the final rule published on January 12, 2001, however, the Department selected the Tongass Not Exempt Alternative without any provision for delayed implementation. Therefore, the rule's prohibition applied immediately to inventoried roadless areas on the Tongass, but the rule also allowed road construction, road reconstruction, and the cutting, sale, and removal of timber from inventoried roadless areas on the Tongass where a notice of availability for a DEIS for such activities was published in the **Federal Register** prior to January 12, 2001.

In February 2003, in compliance with a district court's order in *Sierra Club* v. *Rey* (D. Alaska), the Forest Service issued a record of decision and a supplemental environmental impact Statement (SEIS) to the 1997 Tongass Forest Plan that examined the site-specific wilderness and non-wilderness values of the inventoried roadless areas on the Forest as part of the forest planning process. The February 2003 ROD readopted the 1997 Tongass Forest Plan with non-significant amendments as the current forest plan. Congress has prohibited administrative or judicial review of the February 2003 ROD. Section 335 of the 2003 Omnibus Appropriations Act provides that the ROD for the 2003 SEIS for the 1997 Tongass Land Management Plan shall not be reviewed under any Forest Service administrative appeal process, and its adequacy shall not be subject to judicial review by any court in the United States.

Because the 2000 FEIS for the roadless rule included an alternative to exempt the Tongass National Forest from the provisions of the roadless rule, the decision to adopt this final rule may be based on the FEIS, as long as there are no significant changed circumstances or new information relevant to environmental concerns bearing on the proposed action or its impacts that would warrant additional environmental impact analysis. The Forest Service reviewed the circumstances related to this rulemaking and any new information made available since the FEIS was completed; including the SEIS and public comments received on the proposed rule, and documented the results in a Supplemental Information Report (SIR), dated October 2003. The agency concluded – and the Department agrees – that no significant new circumstances or information exist, and that no additional environmental analysis is warranted. The SIR and the FEIS are available on the World Wide Web/Internet on the Forest Service Roadless Area Conservation Web site at http://www.roadless.fs.fed.us. The Tongass Forest Plan is available at http://www.fs.fed.us/r10/tlmp, and the 2003 SEIS is available at http://www.tongass-seis.net/.

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