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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF ALASKA Plaintiff, and ALASKA FOREST ASSOCIATION *et al.* Intervenor-Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.* Defendants, and SOUTHEAST ALASKA CONSERVATION COUNCIL *et al.* Intervenor-Defendants.	Case No. 1:11-cv-01122 (RJL)

PLAINTIFF'S STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION.

The United States Department of Agriculture (USDA) was directed by President Clinton as his second term drew to a close to push through one of the most far-reaching environmental/natural resources regulations in history – the Roadless Area Conservation Rule (Roadless Rule) – in an unrealistic time frame, without regard for the needs of individual states, and with devastating consequences to multiple-use management on national forest lands. The Administrative Procedure Act (APA), National Environmental Policy Act (NEPA) and other statutory directives from Congress were trampled in the rush to accomplish the President's policy goal before the change in administrations. The harmful consequences of the hurried and myopic rulemaking fell with particular force on plaintiff the State of Alaska (State, or Alaska),[1] which is why Alaska and its aligned plaintiff-intervenors ask this Court to recognize the legal infirmities of the Roadless Rule and provide appropriate relief.

II. RELEVANT BACKGROUND AND STATEMENT OF FACTS.

Pursuant to Local Rule 7(h)(2), because this is a case in which review is based solely on the administrative record, this background and statement of facts with citation to the administrative record is offered in lieu of a separate statement of undisputed material facts.

A. History of the Roadless Rule.

In a prior Memorandum Opinion, this Court nicely summarized the relevant background of the Roadless Rule, particularly the convoluted litigation history leading up to the present case. Dkt. 58 at 2-5. The State and its numerous allies provided additional factual background on the Roadless Rule in their Joint Opposition to Motions to Dismiss. Dkt. 51 at 2-6. The State therefore limits this section to an overview of the rulemaking with specific facts supporting its claims of statutory violations presented below.

[1] USDA acknowledges that Alaska will suffer a highly disproportionate level of harm under the Roadless Rule. 66 Fed. Reg. 3,244, 3,255 (Jan. 12, 2001).

On October 13, 1999, then-President Clinton directed the Secretary of Agriculture to undertake one of the most far reaching natural resource rulemakings ever, one that would ultimately prohibit road construction and timber harvest on more than 58 million acres of national forest constituting nearly 2% of the land in the United States. *See generally* Administrative Record Document (Doc.) 1535 (President Clinton's October 1999 Memo to the Secretary). *See also Wyoming v. U.S. Dep't of Agric.*, 570 F.Supp.2d 1309, 1326 (D. Wyo. 2008) (noting that the Roadless Rule impacts "two percent of America's land mass" and nearly one third of "the National Forest System lands"), *rev'd*, 661 F.3d 1209 (10th Cir. 2011). Remarkably, this massive rulemaking was to be completed before President Clinton left office, or less than 15 months from the day the President directed the Secretary to begin the effort. Doc. 123 at 3 (agency notes from October 1999 stating, "Dates—get done during the Clinton Administration (Dec. 2000)").

In the incredible rush to beat the inauguration of President George W. Bush, there was not enough time for the USDA or the U.S. Forest Service (USFS) to comply with the process required by NEPA. Insufficient information was made available to inform the public and local forest managers on the scope of the rulemaking and the likely impacts to public lands. Public and governmental requests for maps, reasonable time extensions, and cooperating agency status were uniformly denied. Extensive and poorly explained changes were made between release of the Draft Environmental Impact Statement (DEIS) and the Final Environmental Impact Statement (FEIS) without providing a Supplemental Environmental Impact Statement (SEIS) and opportunity to comment on the significant changes. Complaints from the Small Business Administration (SBA) that USDA was in violation of the Regulatory Flexibility Act (RFA) were simply ignored. And in some cases, important information was deliberately withheld from the public, such as USDA's conservative estimate that the amount of roadless areas in our national forests would not decrease as claimed in the Roadless Rule Preamble, but would actually *increase* by millions of acres in the future, even without the Roadless Rule's

promulgation. Had this information been disclosed to the public, it would have cast serious doubt on the validity of the Roadless Rule's stated foundation, *i.e.*, the USDA's alleged need to protect an ever diminishing resource.

B. Factors Unique to Alaska.

In addition to the decisions USDA made with regard to restrictions applicable nationwide on road construction and timber harvest, this rulemaking included a second decision process on whether the rule would be applied to the Tongass National Forest in Alaska. Special consideration of the Tongass was necessary because two federal statutes that are central to this case apply uniquely to federal lands in Alaska.

The Alaska National Interests Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 *et. seq*., prohibits administrative withdrawals of federal land in Alaska without congressional approval as follows:

> No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress.

16 U.S.C. § 3213(a). Congress prohibited such administrative withdrawals after concluding that ANILCA already struck the proper balance between use and non-use of federal lands in Alaska:

> This Act provides 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 provides 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 are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

16 U.S.C. § 3101(d). Despite this clear language, among the prohibitions that USDA foisted upon Alaska via promulgation of the Roadless Rule is prohibited access to minerals that the public otherwise is entitled to lease under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq*.

In the Tongass Timber Reform Act of 1990 (TTRA), 16 U.S.C. § 539d(a), Congress directed USDA to "seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle." During the rulemaking, USDA estimated annual Tongass timber demand for 2000-2004 at 96-205 MMBF [million board feet], Doc. 215 at 1, but acknowledged that with the Roadless Rule in place on the Tongass, no more than 50 MMBF could possibly be offered for sale annually. Doc. 6067. The USDA candidly acknowledged that "we don't come close to meeting even low market demand relying only on the roaded portion of the planned harvest." Doc. 215 at 2.

III. LEGAL STANDARDS.

A. Summary Judgment Standard.

Typically, summary judgment is proper where the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). However in cases involving judicial review of agency action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706, the APA does not call for the reviewing court to make factual findings on the merits or to determine the existence of genuine issues of disputed material facts. Rather, in cases involving APA challenge to final agency action, the Court has a "limited role . . . in reviewing the administrative record," *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 89 (D.D.C. 2006), with the goal being "*to test the agency action against the administrative record*." Comment to Local Rule 7(h)(2) (italics in original). Alaska is entitled to summary judgment on the issues raised in this case. It is strictly a question of law whether Federal Defendants' January 12, 2001 Record of Decision (ROD) violated ANILCA, NEPA, the APA, the TTRA and the Regulatory Flexibility Act (RFA).

B. Standard of Review.

Agency action shall be set aside under the APA where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."
Id. § 706(2)(C). Although review under the APA is narrow, it requires the Court to determine whether "the agency . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). A decision would normally be arbitrary if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Id*. at 43. Similarly, an action may be arbitrary if the agency's reasoning is not supported by evidence in the record. *See, e.g.*, *Public Employees for Envtl. Responsibility v. U.S. Dep't of Interior*, 832 F.Supp.2d 5, 15 (D.D.C. 2011); *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (stating that a reviewing court will "not defer to the agency's conclusory or unsupported suppositions").

IV. SUMMARY OF ARGUMENT.

A. Arguments applicable nationwide.

USDA was directed by President Clinton to protect roadless areas of the national forests by undertaking one of the most far reaching rulemakings in its history, and to publish a final rule before the President left office in less than 15 months. Due in part to this unrealistic and imprudent schedule, multiple violations of NEPA and the APA produced a rule that should be invalidated and vacated.

First, the administrative record does not support the underlying assumption of the need to preserve disappearing roadless areas in the national forests. To the contrary, the record shows that

USDA expected the amount of roadless forest to increase by millions of acres without any roadless area prohibitions.

The NEPA requirement for analysis and disclosure of cumulative effects, in this case the effects of multiple rules being developed by USDA, was not met when critical information was deliberately not analyzed or disclosed to the public in the DEIS. The Specialist Reports reveal that the rate of road construction on the national forests was expected to continue to decline without the Roadless Rule, and that a new Roads Policy stressing decommissioning of at least 3,000 miles of existing roads annually was expected to create over eight million acres of new unroaded areas. The record shows a deliberate decision to *not* properly disclose this information to the public, or even to USFS personnel.

Driven by the President's schedule to create a Roadless Rule legacy before time ran out on his term, the rulemaking imposed road and timber prohibitions on more than 58 million acres of national forest without adequate and informed comment, resulting in USDA not engaging in informed decision making as required by NEPA. USDA presented inaccurate data and maps for public review and comment, leaving even individual forest supervisors and other agency personnel in the dark as to what lands were affected within their own forests. Contrary to agency policy, all of the many requests for cooperating agency status from state and local governments were summarily denied. And all requests for reasonable extensions of comment periods from the public, state and local governments, and members of Congress, were summarily denied despite the unparalleled breadth of the rulemaking. In addition to inaccurate and/or missing information due to the rush to the goal line, some information, such as the number of comments on scoping, was admittedly "made up" and grossly overstated to the public. As described above, other information, such as the expected increase in roadless areas without the Roadless Rule, was intentionally withheld from the public and agency personnel alike.

When the FEIS unexpectedly added more than seven million additional roadless acres to the scope of the Roadless Rule, and when it abruptly reversed USDA policy on the Tongass by opting *not* to exempt the Tongass from immediate application of the Roadless Rule based on unexplained "public comment," the USDA refused to issue an SEIS to allow comment on these significant changes from the DEIS. Obviously, preparation of an SEIS would have pushed release of the final Roadless Rule beyond the term of President Clinton, which was inconsistent with the rigid political agenda.

In sum, when the entire rulemaking process and associated environmental analysis is considered, USDA fell far short of making an informed decision utilizing informed comment, contrary to the very purpose of NEPA.

In addition to NEPA violations, the USDA also violated the RFA as determined by the SBA, which is responsible for oversight of RFA compliance. While the State does not claim standing to directly enforce the RFA, conducting a rulemaking in violation of federal law is arbitrary and capricious under the APA, as is the case here.

B. Arguments Unique to Alaska.

Each of the statutory violations identified above (and discussed below) is a fatal flaw to the Roadless Rule as it applies nationwide and hence to Alaska. Therefore, the Roadless Rule should be invalidated in its entirety. But in addition, USDA's eleventh hour decision to apply the Roadless Rule immediately to the Tongass violated laws of unique application to the State, including ANILCA and the TTRA, thus providing additional reasons for setting aside the Roadless Rule on the Tongass.

First, under ANILCA Congress explicitly prohibited federal agencies from any further withdrawals of federal land in Alaska. Case law in this Court has applied the Federal Land Policy and Management Act (FLPMA) definition of "withdrawal" to ANILCA as the statute lacks its own definition. Under the law of this Court, a regulation that interferes with public land rights is a "withdrawal," such as prohibitions that prevent leasing of leasable minerals. The USDA after

considerable discussion in the rulemaking process, concluded that no road access would be permitted to leasable minerals other than existing leases. The Roadless Rule thus squarely conflicts with ANILCA as to both the Tongass and Chugach National Forests in Alaska.

The TTRA, which was an ANILCA amendment, requires that USDA seek to meet timber demand from the Tongass. But the record is exceedingly clear that USDA cannot even come close to meeting timber demand under the Roadless Rule, and very consciously determined that it would no longer seek to do so – in direct violation of the TTRA. USDA's decision to apply the Roadless Rule to the Tongass (Tongass Roadless Rule decision) thus is unlawful.

In addition to running afoul of ANILCA and the TTRA, USDA's Tongass Roadless Rule decision also has NEPA flaws. While an agency may change its preferred alternative between publication of the DEIS and FEIS, it must provide a reasoned explanation for that change. Yet here, USDA offers unexplained "public comment" as the primary reason for making the sea change from Tongass Exempt (decision deferred for 5 years) to Tongass Not Exempt in the FEIS. Further, the DEIS' discussion of the TTRA "seek to meet timber demand" requirement on the Tongass was abandoned in lieu of a conclusory statement in the FEIS that the rulemaking complies with the TTRA. Despite this draconian change of direction, no SEIS was issued to offer the public an opportunity to comment on the abrupt reversal, or on the addition of seven million acres of additional roadless national forest to the scope of the rule. The Tongass Roadless Rule decision also violated NEPA by failing to consider important aspects of the problem on the Tongass – for example, USDA did not consider that the then-current Tongass Land Management Plan (TLMP) was signed by the Undersecretary of Agriculture after full review and revision by the national office, as a result of which the Roadless Rule purpose of having national direction on roadless areas already had been satisfied for the Tongass with a decision out of the Washington office.

Other Tongass-specific impacts also were not considered in the rulemaking, such as impacts on renewable energy and associated jobs, hydropower, geothermal energy and mining. The many plaintiff-intervenors in this case are uniquely positioned to offer this Court additional analysis on the illegal application of the Roadless Rule in Alaska. The State fully endorses all arguments set forth in the plaintiff-intervenors' summary judgment memorandum and adopts them as its own.

V. ARGUMENT.

A. Arguments Applicable Nationwide.

1. The Roadless Rule rulemaking process violated NEPA.

NEPA requires a federal agency to examine the potential environmental effects of a proposed federal action and inform the public about those effects. 42 U.S.C. § 4332(2)(C). This statutory requirement serves two fundamental goals: (1) "ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) "guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To implement its goals, NEPA requires an agency to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), and to "study, develop, and describe [in the EIS] appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(E). The alternatives analysis is the "'heart'" of the EIS and "require[s] that an agency 'rigorously explore and objectively evaluate' the projected environmental impacts of all 'reasonable alternatives' for completing the proposed action." *City of Alexandria v. Slater*, 198 F.3d 862, 866 (D.C. Cir. 1999) (quoting 40 C.F.R. § 1502.14).

As the D.C. Circuit has acknowledged, "'[t]he goals of an action delimit the universe of the action's reasonable alternatives.'" *Id.* (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C.Cir. 1991)) (alteration in original). Thus, a reviewing court must "first consider whether the agency has reasonably identified and defined its objectives." *Id.* Although agencies have discretion to define the purpose and need of a project, *id.*, that discretion "is not unlimited." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998).

The record in this case shows that USDA went beyond the bounds of reasonable discretion and violated NEPA from the outset by developing a purpose and need statement founded on factual misrepresentation. USDA's fatally flawed factual statement of purpose and need undermined its presentation and evaluation of alternatives, thereby misleading the public and agency personnel alike.

a. USDA's stated Purpose and Need for the Roadless Rule rests on an erroneous factual foundation and is arbitrary in violation of NEPA.

The stated objective for the Roadless Rule was arbitrary and capricious because it was founded on a fundamental assumption that ran contrary to evidence then known to USDA, *i.e.*, that inventoried roadless areas were being increasingly lost to roadbuilding. According to the USFS, 2.8 million acres of inventoried roadless areas had been roaded in the 20 years prior to the rulemaking. Doc. 4609 at 73 (FEIS 2-23). The stated purpose of the proposed Roadless Rule thus was to avoid further loss of roadless areas. Doc. 4609 at 42 (FEIS 1-4) ("The purpose of this action is to conserve and protect the increasingly important values and benefits of roadless areas. . . .").

However, the USFS failed to disclose in the DEIS, or adequately disclose in the FEIS, that even without the Roadless Rule, USFS wilderness experts conservatively estimated that the amount of unroaded national forest land would *increase* by at least 8.4 million acres over the next 40 years due to road decommissioning. Doc. 6004 at 690 (Specialist Report for Wilderness and Special Designated Areas ("Wilderness Report")). Meanwhile, road building in the national forests was in rapid decline

with an 85% decrease during the last decade preceding the rulemaking, with a "likely . . . continued downward trend of about 5% to 10% per year in the coming decade." Doc. 6004 at 601 (National Forest System Roads Specialist Report ("Roads Report") at 8. With creation of new roadless areas outstripping the loss due to building of new forest roads in inventoried roadless areas, it is apparent (once presented with the facts) that even if road building were to continue at the rate of the last 20 years (2.8 million acres), which again was not the expectation, the 8.4 million acres of new roadless areas created during the first four decades of the 21st century would far exceed the 5.6 million (and probably far fewer) acres that might become roaded during that time period. Based on simple subtraction, the *net increase* in unroaded areas should be at least 2.8 million acres and likely far greater. This undisclosed information contradicted the stated purpose and need for the Roadless Rule, tainted the alternatives analysis and mislead the public.

USDA made a conscious decision to withhold this information from the public, as more fully explained *infra* in the cumulative effects section. For example, a September 29, 2000 USDA working draft Summary of Changes Between Draft and Final EIS initially included a bullet stating, "[a]s part of the section on cumulative effects, the extent to which new roadless areas may be created as the result of this and other rulemaking, through decommissioning and lower road density requirements, has been added." Doc. 5151 at 3. But this entire bullet was *edited out* of the Summary of Changes, *id.*, and the information was never disclosed in the cumulative effects section of the EIS. Contrary to claims later made by USDA in the Tenth Circuit Court of Appeals (which likely will be repeated here), the information was not withheld because it was speculative. Rather, the agency wilderness specialist called the projections of new unroaded areas a "conservative estimate" based on "reasonabl[y] foreseeable factors." Doc. 6004 at 690 (Wilderness Report at 14).

The General Accounting Office (GAO) independently documented that even without the Roadless Rule, few new roads were expected to be constructed in roadless areas. After visiting ten

national forests and interviewing the forest supervisor for each, the GAO concluded that "the forests generally did not plan to construct roads in roadless areas with or without the roadless rule." Doc. 5111 at 24 (Potential Impacts of Proposed Regulations on Ecological Sustainability at 12). *See also* Doc. 5111 at 25 (Potential Impacts of Proposed Regulations on Ecological Sustainability at 13) ("Few roads have been built in roadless areas in recent years and few were likely to be built in the future, even before the proposal of the roadless rule."). Although not intending to build roads in roadless areas, the forest supervisors all wanted to retain decision making flexibility without prohibitions on road construction and timber harvest that would inhibit their ability to manage things like fire, insects, disease and species protection. Doc. 5111 at 24-25 (Potential Impacts of Proposed Regulations on Ecological Sustainability at 12-13).

Other USFS employees also recognized that the agency was overstating the need for the Roadless Rule by inflating the estimate of road entry into roadless areas in the future. AR 5612 (Internal Comments on Draft) at 11 ("We do not anticipate steady nor extensive roading of roadless areas. The DEIS overstates the case."); *id.* at 34 ("The number of miles of roads that would be constructed in these inventoried Roadless areas in the next 20 years under no action is way overstated."); *id.* at 74 ("Roads are certainly not the boogie man that the DEIS makes them to be."). Agency employees also viewed the DEIS as "biased" and "more a public relations document than a public disclosure document." *Id.* at 9 (emphasis in original).

Put simply, the evidence in the administrative record does not support the stated objective of needing to avoid future road construction in inventoried roadless areas that would otherwise result in net loss of roadless areas with a commensurate loss of roadless values. Given that an accurate statement of purpose and need is a basic requirement of NEPA, USDA's decision to prohibit road building and timber harvest at high cost to jobs and the economy while deliberately failing to disclose

that roadless areas would be *significantly increasing* without the Roadless Rule was arbitrary and capricious in violation of NEPA and the APA.

b. The USDA violated NEPA by failing to disclose the cumulative effects of other roads policies expected to create more than eight million acres of new unroaded national forest in the foreseeable future.

The undisclosed information on the near term creation of new roadless areas directly conflicts with USDA's stated purpose and need, and the failure to properly analyze and disclose this information in the DEIS and FEIS as part of the cumulative effects analysis of closely related ongoing rulemakings also violated NEPA. *Hammond v. Norton*, 370 F. Supp. 2d 226, 245 (D.D.C. 2005) ("When actions 'will have cumulative or synergistic environmental impact upon a region' and 'are pending concurrently' before an agency, 'their environmental consequences must be considered together.'") (quoting *Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976). *See also* 40 C.F.R. § 1508.7 ("Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . .").

In the Roads Report, the USFS states that under the companion Roads Policy, "at a minimum, approximately 2,900 roads would be decommissioned annually." Doc. 6004 at 612 (Roads Report at 19). The goal of the USFS as of fiscal year 2001 was to decommission 3000 miles of national forest roads annually. Doc. 6004 at 601 (Roads Report at 8). Due to large scale decommissioning of current roads, even without the Roadless Rule the USFS estimated that "unroaded area acres are likely to increase 5% to 10% by the time NFS roads stabilize." Doc. 6004 at 612 (Roads Report at 19). This decommissioning goal and unroaded area creation estimate was not disclosed in the Roadless Rule DEIS, FEIS (there is limited but inadequate partial disclosure in sections other than Cumulative Effects), response to comments regarding road closures, or in the Record of Decision (ROD).

In the Wilderness Report, also prepared in support of the Roadless Rulemaking, the USFS stated that the "reasonable foreseeable factors" that could cause a major baseline shift in the supply of

wilderness or potential wilderness are the Roads Policy and new wilderness designations. Doc. 6004 at 690 (Wilderness Report at 14). More specifically, "if a conservative estimate were realized, there would be an increase of 10%, or 8.4 million acres, of roadless areas created over the next 40 years due to road decommissioning." *Id*. This conservative projection was also never disclosed in the DEIS, FEIS, response to comments on roads closures, or in the ROD. As noted above, *see supra* part V.A.1.a, the *net increase* of new unroaded areas is expected to be at least 2.8 million acres without the Roadless Rule after subtracting the acres that may become newly roaded as the result of multiple use management. And because the rate of new road building (even without the Roadless Rule) was in rapid decline, the net growth of new unroaded areas likely would be much greater.

In the FEIS discussion of cumulative effects, the USFS states only that the "Forest Service recognizes that the Roadless Rule together with the other proposed and finalized rules and policies could have cumulative effects. These other efforts are discussed below." Doc. 4609 at 484 (FEIS 3-396). However, the very brief discussion of the Roads Policy that follows makes absolutely no mention of the projected 8.4 million acres of new roadless areas to be created by USFS decommissioning of existing roads or the USFS goal of closing 3000 miles of roads per year. *See* Doc. 4609 at 485-86 (FEIS 3-397 to 3-398). Instead of disclosing these major cumulative effects on roadless areas, the USFS states only that "[t]he proposed Roads Policy is complementary to the proposed Roadless Rule and provides an additional level of review and analysis in certain unroaded areas of NFS land." Doc. 4609 at 486 (FEIS 3-398).

In the DEIS, the USFS acknowledges that the Roads Policy and the proposed Forest Planning rule were "ongoing rulemaking efforts related to the proposed Roadless Area Conversation Rule." Doc. 1362 (DEIS 1-14). However, after a brief discussion of the Roads Policy that makes no mention of the road decommissioning goals or the expectation of creating at least 8.4 million acres of new roadless areas, the USFS states that "[d]evelopment of the Road Management Policy is distinct from

the roadless rulemaking process." Doc. 1362 (DEIS 1-16). The discussion of the Roads Policy in the cumulative effects section of the DEIS acknowledges that even without the Roadless Rule, road building in roadless areas would be curtailed by the Roads Policy due to a required showing of "compelling need" to construct such roads. Doc. 1362 (DEIS 3-241). But once again, the DEIS does not disclose the agency's goal to decommission 3000 miles of existing road annually with an expectation of creating at least 8.4 million acres of new roadless areas. Doc. 1362 (DEIS 3-240 to 3-242).

Without regard to the transparency required by NEPA, USDA even actively directed agency personnel to misrepresent the effect of the Roads Policy and road decommissioning to the public. In a March 2000 Proposed Road Management Policy Rollout document providing key messages for responding to media inquiries, USDA prepared staff to answer the likely media question, "[w]ill the road policy create new unroaded areas," with the answer "[u]nroaded areas of various sizes already exist throughout the National Forest System. The policy itself will not create any more." Doc. 2315 at 836.

When USDA released the DEIS to the public on May 9, 2000, USFS Chief Mike Dombeck sent a memorandum to all USFS employees announcing the release. On the topic of road access to the national forests, Chief Dombeck told his employees that this proposal proves those people wrong who charged that the Roadless Rule would block public access to their public lands. Doc. 1345 at 1. According to the Chief, "[n]ot a single authorized road will be closed as a result of our roadless proposal. All existing and legal access would be preserved." *Id.* This statement is grossly misleading. While the Roadless Rule may not itself close any roads, the cumulative effect with the Roads Policy was expected to block public access by closing roads at the rate of 3,000 miles of existing roads annually, creating the 8.4 million acres of new unroaded areas in the foreseeable future. USDA was not even transparent with its own employees. The statement that all "existing and legal access would

be preserved" is simply false no matter how hard the spin. Moreover, given that the USDA estimate (and goal) was to decommission 3,000 miles of road annually, this key talking point on the roads policy is at worst disingenuous and at best fully intended to mislead. USDA may offer the unpersuasive argument that including the word "itself" makes this statement accurate, as the policy is not self-implementing and still requires USFS action to decommission a particular road. But the Wilderness Report concluded such actions were reasonably foreseeable and conservatively projected a resulting increase of 8.4 million acres of new unroaded areas. Doc. 6004 at 690 (Wilderness Report at 14).

Failure of the Roadless Rule EIS team to disclose such significant information cannot be ascribed to lack of communication or the rush to complete this massive rulemaking in less than 15 months. The specialist report explains that the projections regarding the extensive amount of decommissioning and the creation of new roadless areas over the next 40 years "were made after consultation with EIS team members" Doc. 6004 at 613 (Roads Report at 20). These projections also cannot be dismissed as speculative as the USFS considered them conservative and stated they "were made using historic trends and a panel of transportation experts that interpreted trends and made reasonable projections for the future." *Id.*

Notably, the USFS had even started implementation of the new Roads Policy that would limit new road construction and maximize decommissioning of existing roads prior to opening the NEPA process on the Roadless Rule. The Associate Chief for Natural Resources notified USFS leadership in an October 18, 1999 memorandum that they could begin implementation of the new Roads Policy immediately by limiting new roads and maximizing the decommissioning of existing roads. Doc. 3138 at 1. The USDA Roadless Rule team thus was clearly aware that decommissioning of roads would create significant areas of new roadless acreage – so much so that it rightly considered disclosing this information in the FEIS, only to have the planned disclosure struck by a reviewer. Doc. 5151 at 3. As

noted above, in a draft Summary of Changes Between Draft and Final EIS, the USDA initially stated that disclosure of the effects of creating new unroaded areas had been added to the cumulative effects section of the FEIS. *Id.* Again, the entire bullet was stricken, and the described addition to the FEIS never saw the light of day.

Failing to disclose this highly relevant information to the public in the DEIS or to adequately disclose it in the FEIS runs contrary to the goals of NEPA. *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) ("NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own."). Even when public comments on the DEIS raised specific concerns about potential road closures, the information on USFS goals for decommissioning roads and creating new roadless areas was withheld from the public. In response to comments that the USFS should "keep existing roads and trails open," Doc. 4610 at 130 (FEIS Vo. 3 at 127), and that the USFS "should not decommission roads," the USFS stated that "[t]he range of alternatives in the DEIS and FEIS does not make any decisions on decommissioning any roads because that is outside the scope of this proposal; management of existing roads will be addressed under the Roads Policy." Doc. 4610 at 131 (FEIS Vol. 3 at 128). In response to another comment on possible closure of existing roads, the USFS responded that the "Roadless Rule by itself would not close any roads . . . ." Doc. 4610 at 125 (FEIS Vol. 3 at 122). The concerted failure to disclose the USFS' plan to use the three related proposed rules to close thousands of miles of existing forest roads and create millions of acres of new roadless areas was misleading and did not comport with NEPA's requirement that the interested public be provided with sufficient information "to evaluate and balance the factors on their own." *Calvert Cliffs*, 449 F.2d at 1114. The intentional decision to withhold the Roads Policy effects analysis in the Roadless Rule FEIS denied the public the

opportunity to consider information that was central to the proposed rulemaking, stymied informed public comment and violated NEPA.

The Wyoming district court twice invalidated the Roadless Rule, each time concluding that one of the flaws in the rulemaking was the failure to adequately analyze and disclose the cumulative effects of the contemporaneous rulemakings. *Wyoming v. U.S. Dep't of Agric.*, 277 F.Supp.2d 1197, 1228-29 (D. Wyoming 2003), *vacated*, 414 F.3d 1207 (10th Cir. 2005);[2] *Wyoming v. U.S. Dep't of Agric.*, 570 F.Supp.2d 1309, 1341-43 (D. Wyoming 2008), *rev'd*, 661 F.3d 1209 (10th Cir. 2011). Although the latter decision was reversed on appeal, the plaintiffs in the Wyoming litigation did not raise, and the USFS did not disclose, the very specific forecasts in the Roads Report and the Wilderness Report on road decommissioning and creation of new unroaded areas. In fact, the USFS represented on appeal that the USFS "did not forecast specific impacts" regarding any new unroaded areas given uncertainties in decisions yet to be made. Brief of Federal-Defendants-Appellants at 25, Nos. 09-8075 & 08-8061 (10th Cir. Nov. 2, 2009).[3] The USFS further argued that it was proper to rely on such forecasting difficulties, including because the Council on Environmental Quality (CEQ) regulations do not require speculation when impacts are not reasonably foreseeable. *Id.*

These statements of record in the Tenth Circuit appeal directly contradict the specialist reports, which explicitly state that the creation of new roadless areas is reasonably foreseeable and conservatively estimated to lead to the creation of 8.4 million acres of new roadless areas due to upcoming road decommissioning. Doc. 6004 at 690 (Wilderness Report at 14). *See also* Doc. 6004 at 601 (Roads Report at 8) (stating that the goal was to decommission 3,000 miles of national forest roads annually); Doc. 6004 at 612 (Roads Report at 19) (even without the Roadless Rule, the effects of

[2] The decision was vacated after the State Petitions Rule issued, thereby replacing (temporarily) the Roadless Rule and mooting the case.

[3] The brief, which was filed in 10th Circuit Case No. 08-8061 on November 2, 2009, is available electronically via PACER. The cited page refers to the document's original pagination, not the PACER pagination.

decommissioning roads was likely to increase "unroaded area acres . . . 5% to 10%"). And as stated in the Roads Report, these projections were done in consultation with the EIS team. Doc. 6004 at 613 (Roads Report at 20). Respectfully, because the Tenth Circuit's decision was based on a misrepresentation regarding projected cumulative effects, this Court should give no weight to that decision.

Further, any argument by the USFS in this case that creation of new roadless areas under the Roads Policy was too speculative to consider should also be viewed in a dim light as it would contradict the agency's own specialists reports. Notably, any such argument also would undermine the very rationale presented by USDA as the need for this rulemaking, given that the stated need was based on an assumption that roadless areas were being lost to roadbuilding and would continue to diminish absent a prohibition on new roads. Doc. 4609 at 73 (FEIS 2-23) (stating that 2.8 million acres of inventoried roadless areas had been lost to roadbuilding over the last two decades); Doc. 4609 at 42 (FEIS 1-4) ("The purpose of this action is to conserve and protect the increasingly important values and benefits of roadless areas . . . .").

Logically, given USDA's desire to decommission 3,000 miles of national forest roads annually under the Roads Policy, getting approval to decommission a road would be far easier and more certain than the process of proving a compelling need for construction of a new road in a previously unroaded area. Nevertheless, USDA portrayed future roading of roadless areas as inevitable – hence the alleged need for the Roadless Rule – while dismissing the effects of decommissioning existing roads and creating new roadless areas as too speculative to analyze or disclose to the public in the NEPA process. The USFS cannot choose a single side to this coin. The choice to present only one side to the public in the Roadless Rule rulemaking process biased the analysis and ran afoul of NEPA. *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (to satisfy NEPA, an "agency

must comply with 'principles of reasoned decisionmaking [and] NEPA's policy of public scrutiny'") (quoting *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1995)).

c. USDA failed to make an informed decision based on informed comment in violation of NEPA.

On October 13, 1999, nearing the end of his second term in office, President Clinton directed the Secretary of Agriculture to commence a rulemaking that would "protect" about 2% of all the land in the United States from future road construction. Doc. 1535 at 2. This massive undertaking resulted in a monumental environmental regulation that ultimately applied to over 58 million acres of National Forest Land. The final rule was published on January 12, 2001, just eight days before George W. Bush was sworn in as President. *See generally* 66 Fed. Reg. 3,244 (Jan. 12, 2001).

Expedited to become effective before the change in administrations, this massive undertaking was accomplished in less than 15 months from the day the presidential directive was given to the Secretary. *Compare* Doc. 1535 (Presidential directive dated October13, 1999) *with* 66 Fed. Reg. 3,244 (final Roadless Rule published less than 15 months later). Completing such a massive rulemaking in so little time was an extraordinary feat, especially given the Roadless Rule's expansive scope, its far reaching impacts on development of national forest land and the resulting devastating social and economic impacts visited on those individuals, communities, and businesses reliant on forest resources. To beat the inauguration of the next president, there was no time to include state and local governments as cooperating agencies, no time to grant any of the many requests for extensions to comment periods, no time to timely provide adequate maps or specific information on how individual forests would be impacted, and no time to issue an SEIS when major changes were made in the FEIS, thereby leaving no formal opportunity for comment on the changes. Doc. 123 at 3 ("Dates—get done during the Clinton Administration (Dec. 2000)").

A primary goal of NEPA is public disclosure to facilitate informed decision making. *See, e.g.*, *Robertson, supra*, 490 U.S. at 349. Informed decision making by the agency will only be achieved if

all relevant information is made available to the public, the public has adequate time to evaluate and comment on this information, and the agency properly considers those comments. Due in large part to the urgency to complete this rulemaking before President Clinton left the White House, the public was denied the opportunity to participate fully in this rulemaking as required by NEPA, rendering the Roadless Rule arbitrary and capricious in violation of the APA.

i. The rush to gather information internally.

The rushed effort to pull together agency information for this rulemaking is documented in the record. After the mid-October, 1999 notice from the President to commence the Roadless Rule process, the timeline required a DEIS in the spring of 2000 and a final rule in December 2000 as set forth under the agency heading "Roadless Rule NOI/Presidents Instructions." Doc. 2315 at 377. In this same USDA document (a response to a House Resource Committee Request), an October 26, 1999 memorandum to all regional foresters instructed them to provide the Washington USDA office will information on the inventoried roadless areas in their forests by the close of business on October 28, *less than two days later*. Doc. 2315 at 7 (referring to the need as "urgent" and offering an apology "for the short timeframe we have given you for this response"). Each national forest then was given four days to provide the EIS team with additional information on the extent of existing roads in the forest and the estimated number of roads to be constructed, reconstructed, and closed in conjunction with timber projects. Doc. 2315 at 109 (explaining that the "time frame for this is extremely short. The reason for this short time frame is due to the cut-off date for final edits of the DEIS"). The EIS team apologized to the regional foresters for the last minute request and explained they also were "working through the weekends" to meet the hurried deadlines. Doc. 2315 at 16. *See also* Doc 2315 at 56 (giving regional foresters an unrealistic *15 days* to provide information on timber volumes sold and offered, threatened or endangered species, recovery tasks, sensitive species, conservation strategies, wildlife, fish and rare plants, and planned projects on the national forests).

An email string on September 19, 2000 epitomizes the rushed nature of the entire rulemaking. This time, given only until "COB today" to provide information on an aspect of impacts from prohibiting entry into roadless areas, a USFS representative states, "I realized that many of you will not read this prior to COB today, but this is just the way it is these days." Doc. 4036 at 1. In other words, insufficient time to prepare a proper analysis of the effects of the proposed rulemaking was accepted as "just the way it is." *Id.*

ii. The rushed approach leads to information accuracy problems.

As a direct result of this rushed approach, significant internal issues arose regarding the accuracy of the data that was compiled. For example, the Wayne National Forest called attention to the fact that USDA was reporting roadless areas in their forest that did not exist. Doc. 2315 at 201 ("We don't have any roadless areas."). The Washington office noted they expected "other Forests will have problems with these stats [on roadless areas.] We don't know how they were derived nor who provided them." *Id.* *See also* Doc. 2626 (email from January 2000 inquiring about a "2.75 million acre difference" in inventoried roadless areas reported for Alaska); Doc. 2217 at 1 (email from February 2000 discussing the Alaska data issues and noting that "we are dealing with very crude data for very large areas. Differences of 10% can be seen in certain circumstances.").

The EIS team was aware that other data credibility issues also were developing. With regard to information that USDA was widely distributing on the public comment process, an April 14, 2000 email from Scott Conroy, leader of the rulemaking team, disclosed that the reported count of over 500,000 public comments on the Notice of Intent "was an estimate made up" by the USDA contractor and that the real number was only 364,728. Doc. 1012 at 1. Not surprisingly, Mr. Conroy acknowledged that "this will create a substantial credibility problem given the wide use we have made of this number." *Id.* Indeed, this "made up" information was provided as fact to U.S. Representative Don Young of Alaska (then Chairman of the House Committee on Resources) in response to his letter

to USFS Chief Mike Dombeck. Doc. 193 at 23 ("The Forest Service has also received more than 500,000 comments on the Notice of Intent.").

USFS information on the magnitude of the backlog of road maintenance also was called into question by its own regional coordinators. Region 10 (Alaska) stated that it took issue with the "$8.4 billion maintenance and reconstruction backlog Forest Service-wide. We are having trouble reconciling that number with either regional or forest information." Doc 3140 (noting that other regional coordinators had similar issues with this number). The Willamette National Forest in Oregon similarly commented that the stated "$8.4 billion dollar backlog of road repairs . . . . seems exorbitant and out of scale." Doc. 5612 at 50.

Also called into question were USDA suggestions that the Roadless Rule would have minimal impact on timber harvest levels because previously planned harvest in roadless areas would simply be relocated to other areas of forests. For example, Region 4 (Intermountain Region) commented that several of its forests feared:

> the DEIS did not adequately disclose the true long-term effects on the timber program due to limiting the analysis period to 5 years. Most Forests adjusted planned programs out of roadless areas in the past several years to avoid short-term impacts due to the temporary moratorium on road construction and other issues related to roadless.

Doc. 5612 at 31. As a result, "many of the Forests feel that to suggest the volumes that will not be available from roadless areas can easily be made up from roaded areas may be a misrepresentation." *Id. See also* Doc. 5612 at 52 (comment from two forests in Washington that the Roadless Rule's projected timber harvest effects "are very misleading because they are based on the volume the Forests 'planned' over the next five years. Because the interim roadless policy was already in effect, Forests, by and large, were not planning any entry into roadless areas, and effects are underestimated"); Doc. 5612 at 78 (describing as an "obvious fault" that the "DEIS does not explain that the 'planned sales' analysis is very limited and the results are very low due to the 80% reduction in timber harvesting that

has occurred during this Administration, nor is it mentioned that few of the IRAs had 'planned sales' due to politics").

iii. Denial of all requests to participate as a cooperating agency.

While USDA was scrambling to compile basic information for the rulemaking, such as how much forest acreage was unroaded and how many miles of road actually might be created in roadless areas in the future, state and local governments were asking to participate in the rulemaking as cooperating agencies. The answer was a resounding no. All state and local government requests for cooperating agency status were rebuffed even though in July 1999, the CEQ had issued a cooperating agency memorandum to all federal agencies urging them "to more actively solicit in the future the participation of state, tribal and local governments as 'cooperating agencies' in implementing the [EIS] process" under NEPA. Doc. 3544 at 2 (citing to 40 C.F.R. § 1508.5). *See also id.* at 3 (pointing out that recognizing states and local governments as cooperating agencies furthers the goals of "NEPA to work with other levels of government 'to promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans'").

As early as December 28, 1999, Joseph Carbone (USDA NEPA Coordinator) and Scott Conroy in the Washington office were actively discussing how best to deny all such requests *despite* receipt of the CEQ memorandum urging federal agencies to solicit more cooperating agency participation, and *despite* USDA's acknowledgement that "[t]he CEQ memo is quite clear as to our responsibilities to solicit state, tribal and local governments for cooperating agency participation . . . ." Doc. 2292 at 1. The Carbone and Conroy discussion acknowledged that state and local governments "could provide more detailed analysis about local impacts" but suggested that requests for cooperating agency status could be rejected on the basis that USDA did not need such information, even though USDA was not yet sure of the scope of the proposed rule. *Id.* Less than a month later, USDA was preparing to seek

CEQ's blessing on denying all requests for cooperating agency status on the grounds that "it is not practical to include so many potentially interested non-federal agencies as cooperating agencies in this national initiative." Doc. 2293 at 2.

On February 25, 2000, USDA met with four western governors, including Governor Knowles of Alaska, and the staff of the other members of the Western Governors' Association, to discuss state participation in the Roadless rulemaking. Doc. 1258 at 3. The States' requests for cooperating agency status were denied, and the denial letter to the Western Governors' Association then was used as an attachment to letters of rejection responding to other requests for cooperating status. *Id.* at 1. Despite the decision to flout CEQ's admonition that "cooperator status for appropriate non-federal agencies should be routinely solicited," Doc. 3544 at 3, USDA assured the Western Governors that "we value our partnership very much and look forward to working with you on the roadless area rulemaking . . . ." Doc. 514 at 2.

iv. Denial of all requests to extend comment periods.

Given the rushed timeline for the rulemaking, it is not surprising that many state and local governments, along with members of the public, sought extensions on comment periods so that they might offer more meaningful comments on such a major undertaking. Once again, all requests were denied. *See, e.g.*, Doc. 1258 at 1.

The individual reasons offered in each request for extension of a comment period were not even considered. Rather than considering each request and responding to the concerns expressed, a form letter of denial was prepared in advance. For example, as discussed in an email dated December 20, 1999, the USFS had a "number of people asking that the scoping comment period be extended" and was anticipating more requests for additional time. Doc. 388. The USFS wanted to reply to all such requests with "some formalized documentation of Glickman's (the Secretary of Agriculture)

decision not to extend." *Id.* The Secretary had previously stated in a letter to Senator Gregg that no extension on scoping was needed because USDA had three decades of experience with roadless issues and there would be additional opportunities to comment at meetings, on the DEIS and on the proposed rule. *Id.* None of these reasons addressed the public's desire to have meaningful input on the scope of the project.

One example of a request to extend the comment period on the proposed rule came from North Dakota Governor Schafer, who explained that interested entities were "currently considering six different rules consisting of thousands of pages of complex and technical information." Doc. 4098 at 5. The Governor explained that the 60 day comment period for the proposed rule provided inadequate time for consideration and comment, "particularly in view of the host of rule-makings currently under way from the Forest Service." *Id.* The USFS response dismissed the Governor's concerns without even acknowledging the basis of his request for an extension on the comment period. Doc. 4098 at 1.

With regard to the many requests to extend the comment period on the DEIS, the Small Business Subcommittee of the United States Congress requested that the agency complete an adequate regulatory flexibility analysis and extend the comment period. Doc. 4485 at 5. Having held a hearing on July 11, 2000, the Subcommittee determined that the Forest Service "has not adequately considered the impact of the roadless area conservation rule, much less its other efforts at changing land management practices, on the small businesses and communities that rely on economic activity emanating from the National Forests." *Id.* at 5-6. In their request for additional time, Congressmen Thune and Hill pointed out that good decision making requires an open dialogue with the public and further noted that the law requires the agency to consider the impacts on small businesses and rural communities. *Id.* at 6. The Congressmen concluded by stating that USDA "certainly has not complied with the spirit of that law and should extend the comment period pending completion of an adequate

initial regulatory flexibility analysis." *Id.* In reply, USDA stated "the Forest Service does not agree that an extension of the comment period is warranted or necessary." Doc. 4485 at 1.

Given the magnitude of this rulemaking, the credibility issues surrounding the data being presented and the tremendous interest in having adequate time to present well informed comments, USDA's failure to extend comment periods, coupled with denial of all cooperating agency requests, violated NEPA. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 47 (2008) (NEPA seeks to inform both the decision maker and the public as to the "'effects of proposed agency action,'" thereby "'ensur[ing] that the agency will not act on incomplete information, only to regret its decision after it is too late.'") (quoting *Marsh v. ORNC*, 490 U.S. 360 (1989)).

v. Failure to make important information available for public review and comment, including maps and USDA projections of creation of new unroaded areas from road decommissioning.

In some instances, extending comment periods would not have helped because the USDA decided not to disclose relevant information making informed comment impossible. As discussed above, *see supra* part V.A.1.a,, the leading example of this failure was the USDA decision to not disclose the conservative estimate of reasonably foreseeable cumulative effects set forth in the specialist reports, *i.e.*, the undisclosed fact that 8.4 million acres of new unroaded areas were projected to be created due to road decommissioning. Without such critical information that goes right to the heart of the need (or lack therefore) for the Roadless Rule, the comments received from the public were not informed comments and the USDA decision was not an informed decision process, the central goal of NEPA. *Winter*, 555 U.S. at 47.

Other critical information also was either withheld from the public or never compiled by USDA. This includes such basic information as what lands would be subject to the roadless area prohibitions. USDA received many requests for individual forest maps identifying the roadless areas at issue, but once again the public was largely denied.

During the rulemaking, even Regional Foresters had difficulty in obtaining access to the mapping information that was in the hands of the rulemaking team. For example, USFS Regions 1 and 4 requested the "roadless and special designated area mapping information" from the rulemaking team. Doc. 5487 at 2. On August 29, 2000, Scott Conroy of the Washington office responded that his Washington office team was "fine with their use of the information, but we want to be sure that its use and analysis is coordinated with our use and analysis." *Id.* The next day, Mr. Conroy reiterated that "I would like to be sure their use of the information is coordinated with us. How can we best accomplish that goal?" *Id.* Apparently, use of roadless mapping information was closely controlled from Washington, even with regard to USFS Regional Foresters.

USDA notes on congressional briefing sessions provide insight as to the concerns of Congress regarding the lack of information during the process. Some of the questions asked of USDA during the November 18, 1999 session were described as follows:

> Are areas mapped?
> Will the scoping period be extended?
> Why isn't there maps [sic] at public meetings?
> . . . .
> How can you expect people to provide thoughtful comments without providing the necessary information at the public meetings?

Doc. 3977 at 1. In a congressional briefing session on January 14, 2000, among the questions asked of USDA were:

> Why did (road less) scoping end before maps were available?
> . . . .
> [I] attended all the public scoping meetings in Montana…concerned because even the Forest Supervisors didn't have specific answers for their forests, and had no idea which lands we were talking about as affected?

Doc. 3977 at 3. In this briefing, USDA also briefed members of Congress on the companion road management policy rule, noting that decommissioning of roads was one goal of the policy, but there was no disclosure that the magnitude of the decommissioning was reasonably and conservatively expected to create over eight million acres of new unroaded areas. Doc. 3977 at 2.

During the rulemaking, superior maps in the possession of Regional Foresters were not permitted to be used. For example, in an August 17, 2000 email from Dave Thomas to Scott Conroy, Mr. Thomas said that he had been in contact with two Regional Foresters, both of whom had "accepted the recommendation not to use the data from the 2nd Idaho map, though both had reservations. They noted, as you did earlier, that it is very difficult to explain why we shouldn't use the map and the data that could be derived from it. . . ." Doc. 5135. This was in follow up to conversations with the two Regional Foresters three months prior after the Regional Foresters had become aware of serious deficiencies in DEIS "maps generated by the roadless team, " Doc. 3527 at 1, which could not be rectified given the tight timeframe for the NEPA process. *Id.* at 2 (explaining that one of the Regional Forester's "question continually was 'what you are telling me is that the data isn't worth much mapped as is, but the map is out there, I'm going to get questioned, come up with some good answers for me.'" *Id.*

An email from the Gifford Pinchot National Forest to the EIS team illustrates the concerns and frustrations of the individual forests in meeting the time demands of the Washington Office. Doc. 5612 at 71 ("Please give us some latitude to adjust roadless area boundary lines to make them conform to easily identifiable features on the ground."). The USFS employee described the maps used in the public process as "very imprecise" with "errors which we were unable to correct in time to meet forest planning production schedules." *Id.* He elaborated that the GIS layer was "hastily assembled this winter to respond to information requests related to the roadless initiative. The time frame we were given did not allow the production of more accurate maps." *Id.* Similarly deficient was the Alaska roadless map used in the process, which "contains numerous inaccuracies and problems." Doc. 312. For example, a brown line was "so wide that it fills up all the water area within the boundaries of the Tongass and Chugach [National Forests] – including all of Prince William Sound!" *Id.*

vi. Failure to issue a supplemental NEPA document to allow comment on major changes from DEIS to FEIS.

Alaska acknowledges that an agency is not required to prepare a supplemental NEPA document any time new information or changed circumstances come to light. *Marsh v. ORNC*, 490 U.S. 360, 373 (1989). But supplemental NEPA analysis is required if there are "*significant* new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c) (emphasis added). Here, despite the significant changes from the DEIS to the FEIS, the USDA dismissed the need for supplemental NEPA analysis in cursory fashion. Doc. 4610 at 97 (Response to Comments at 94) ("The agency has determined that the threshold that would trigger a need to prepare either a supplement or revised draft EIS has not been met.").

Among the many reasons that the SBA determined the USDA was in violation of the RFA was the failure to issue an SEIS to allow public comment on the significant changes made between the DEIS and the FEIS and ROD. AR 5584 at 2 ("The decision to disallow timber harvests, except for stewardship purposes and to apply the prohibitions to the Tongass will have a significant economic impact . . . . The public should be notified of the changes and the potential economic impacts so that meaningful comments can be provided prior to finalization of the rule."). Among the changes that warranted a supplemental NEPA document was the decision to flip from Tongass Exempt to Not Exempt (offering public comment as a primary justification), *see* 66 Fed. Reg. at 3,248, 3,249, 3,254, the addition of seven million additional acres to the scope of the roadless and timber prohibitions, and further restrictions placed on timber harvest. *See, e.g.*, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d at 1224 (describing changes "that were not included in the DEIS"). The last minute addition of seven million acres to the Roadless Rule's scope was the result of applying the Roadless Rule prohibitions to 2.8 million acres of already roaded lands within inventoried roadless areas along with the addition of 4.2 million acres not previously identified on the maps used in the public comment portion of the rulemaking. *Id.*

The Wyoming District Court twice invalidated the Roadless Rule, and each time held that failure to prepare an SEIS was among the NEPA violations. *Wyoming v. U.S. Dep't of Agric.*, 277 F.Supp.2d at 1230-31, *vacated*, 414 F.3d 1207 (10th Cir. 2005); *Wyoming v. U.S. Dep't of Agric.*, 570 F.Supp.2d at 1344, *rev'd*, 661 F.3d 1209 (10th Cir. 2011). In reversing the latter decision, the Tenth Circuit found that the last minute addition of seven million more acres to the scope of the Roadless Rule prohibitions was either "insignificant" or was qualitatively within the spectrum of analyzed alternatives. 661 F.3d at 1259-61. Again, Alaska does not find the non-binding Tenth Circuit analysis persuasive.

While it may be true that qualitatively the prohibitions on one acre of land are similar to the next acre, the conclusion that USDA may misrepresent the total size of the affected area by seven million acres without significant (negative) effect on the informed comment and decision making process is neither logical nor legally correct. For example, in a case involving the Tongass, the Ninth Circuit reached a different conclusion. *See Natural Resources Defense Council v. U.S. Forest Serv.*, 421 F.3d 797 (9th Cir. 2005) (*NRDC*). In that case, the agency argued that a mistake that had doubled the projected timber volume needed to meet market demand under low, medium and high market demand scenarios was harmless error "because the projections were not significant to the Regional Forester's decision choice among the Plan Alternatives." 421 F.3d at 807. The Ninth Circuit disagreed, reasoning that:

> Common sense, as well as the record, tells us that the Forest Service's assessment of market demand was important for its determination through the ASQ of how much timber is allowed to be cut. Given the competing goals to be accommodated under NFMA [the National Forest Management Act], it is clear that trees are not to be cut nor forests leveled for no purpose. If market demand exists for timber, the need for timber harvest may outweigh the competing goals for environmental preservation and recreational use. But if the demand for timber was mistakenly exaggerated, it follows that the timber harvest goal may have been given precedence over the competing environmental and recreational goals without justification sufficient to support the agency's balancing of these goals.

Id. at 808.

In the same way, the addition of 7 million acres of inventoried roadless areas in the ROD, and the decision to reverse course from Tongass Exempt to Tongass Not Exempt, all without analysis of the resulting impacts, was a significant change that may have changed the balance with other competing goals such as development of renewable energy sites, recreational facilities, timber harvest, and other purposes that would otherwise be allowed. Yet USDA denied the public an opportunity for review of the significant changes that appeared for the first time in the FEIS.

As discussed above, USDA was aware that its maps were of very poor quality and refused to let USFS personnel substitute more accurate information during the comment period. The public was therefore hamstrung in its ability to offer meaningful comment on the 51 million acres originally proposed for restriction under the Roadless Rule. But *no opportunity* was provided for comment on the additional seven million acres added after the fact – only a supplemental NEPA document fully assessing the effects of including the additional seven million acres in the Roadless Rule prohibitions could have corrected this deficiency.

The same is true regarding the sudden reversal on the Roadless Rule's application to the Tongass, *i.e.*, the switch from Tongass Exempt to Tongass Not Exempt that USDA characterized "a clarified and reformatted description of [an alternative] that was implicit in the DEIS . . . ." Doc. 4610 at 193 (FEIS Response to Comments at 190). In the DEIS, a primary reason for exempting the Tongass from roadless area prohibitions under the Preferred Alternative was the need to meet the demand for timber as required under the TTRA. Doc. 1362 (DEIS 1-11 to 1-12) (discussing four reasons why the Tongass is "unique among national forests," including USFS' timber supply obligations under the TTRA). The DEIS also referred to the "adverse social and economic effects" that would flow from the "drastic decrease in timber volume outputs projected for the" Tongass in the event the roadless area prohibitions were made applicable to the forest. Doc. 1362 (DEIS 3-231). Yet in the FEIS, the USDA without sufficient explanation changed the preferred Tongass alternative to

"Tongass Not Exempt," albeit with a delayed application until 2004. Doc. 4609 at 27 (FEIS ES-9). "Public Comment" was offered as the primary reason for the sudden reversal. Doc. 4609 at 63 (FEIS 2-13) (attributing the abrupt change to "responses received during the public comment period"). Lacking, moreover, was any detail offered as to the number, origin, or content of the comments on which USDA relied in abruptly changing its decision for the Tongass. The lack of explanation is especially worrisome given USDA's admission that the number of comments on the scoping notice was "made up" by its contractor. Doc. 1012 at 1.

The Content Analysis Enterprise Team stated in the preliminary report on DEIS comments that a total of 1,155,896 comments were received. Doc. 4906 at 2. However, the contractor also reported that the total included approximately 750,000 form letters from one environmental interest group consortium. *Id.* at 3. Indeed, the total number of form letters was 1,141,931, or more than 97% of the total comments. *Id.* at 2-3. There is no indication, of course, that the comments were in any way representative of the country as a whole or any segment thereof. Rather, the indication is that the "ballot box" was stuffed to overflowing with form letters from an environmental consortium. In any event, USDA certainly had not announced an intent to base its decision on the Tongass on some form of popular vote or unscientific survey. Nor would such an approach be proper. *See California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F.Supp.2d 874, 903 (N.D. Cal. 2006) (stating in the context of the State Petitions Rule, which temporarily replaced the Roadless Rule, that "regulation is not a popularity contest," but that comments rather showed "the heated public debate" over the management of roadless areas"), *aff'd*, 575 F.3d 999 (9th Cir. 2009). If USDA truly did turn the rulemaking process into a popularity contest, at a minimum it should have disclosed this radical departure from the proper NEPA decision making process to the public, which of course did not happen. For all of the foregoing reasons, USDA violated NEPA by failing to allow for additional public comment on a supplemental

NEPA document that disclosed the significant changes made between the DEIS and the FEIS and ROD.

2. The Roadless Rule rulemaking violated the Regulatory Flexibility Act and therefore the APA.

The Office of Advocacy of the SBA is the federal entity responsible for monitoring compliance of other federal agencies with the RFA, 5 U.S.C. §§ 601-612. The RFA "obliges federal agencies to assess the impact of their regulations on small businesses." *U.S. Cellular Corp. v. F.C.C.*, 254 F. 3d 78, 88 (D.C. Cir. 2001). The RFA, though procedural, requires a good faith effort to assess the impact of a rule on small businesses. *Id.* Although the State is not alleging a violation of the RFA *per se* as it cannot bring such a claim, the Court "'may consider [the agency's compliance with the RFA] in determining whether [USDA] complied with the overall requirement that an agency's decisionmaking be neither arbitrary nor capricious.'" *Nat'l Assoc. of Home Builders v. EPA*, 682 F.3d 1032, 1042 (D.C. Cir. 2012) (quoting *Allied Local and Reg'l Mfrs.' Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000)). As described below, USDA's disregard for the RFA concerns of the SBA during the rulemaking process demonstrates that USDA's decision making was arbitrary and capricious in violation of the APA.

In its review of the USFS' Final Regulatory Flexibility Analysis (FRFA), the SBA stated that the FRFA for the Roadless Rule "violates the APA and the RFA." AR 5584 at 2. This determination came eight months after the SBA provided its initial comments on the Roadless Rule after review of the draft preamble, proposed rule, and EIS. AR 255 at 1. At that time (February 2000), the SBA had informed the USFS that the paragraph in the preamble on Regulatory Impact was "wholly inadequate for RFA purposes." *Id.* at 2. The SBA found this deficiency particularly "bothersome given the fact that it appears that FS has access to the economic information necessary to perform the baseline analysis that is required by the RFA." *Id*. More specifically, SBA noted that the USFS knew the Roadless Rule would reduce timber offerings by 73% overall, and therefore the "lack of an analysis, in

view of a known 73% reduction, makes the conclusion (of no significant economic impact on small business) highly suspect." *Id.* at 3. Not mincing words, the SBA informed the agency that what it had "developed thus far in justification of its rule is grossly deficient." AR 255 at 7.

Two months later (April 3, 2000), SBA notified the USFS that despite the SBA having been in "constant contact" with the agency, the SBA had "not received the documents that it needs to complete its review." AR 1053 at 3. This was followed on April 19, 2000 by SBA's comments on the draft of the Initial Regulatory Flexibility Analysis (IRFA) finally provided by USFS, which the SBA concluded "does not satisfy the requirements of the RFA."AR 1697 at 6. Among other identified deficiencies, the SBA pointed out that the IRFA lacked an accurate description of the affected industries, contained incomplete economic data, failed to adequately consider alternatives and was founded on unsupported assertions. *Id.*

The SBA also challenged the introductory statement in the IRFA alleging that the USFS was not even required to provide an economic analysis because the Roadless Rule does not directly regulate any small businesses. AR 1697 at 2. The SBA observed that if small businesses are prohibited by the rule from building roads, harvesting timber and engaging in other business opportunities, "it is illogical" to claim that such businesses are not directly impacted by the rule. *Id.* The SBA further noted that even if the impact on small business was characterized as indirect, the impact on entities in the timber harvest and road construction industries "is foreseeable and measurable." *Id.* at 3 (also stating that the "consequences of the rule may also have a predictable and foreseeable indirect impact on small neighboring communities and small businesses in several industries including, mining, recreation, grazing, timber products").

In any event, the USFS accepted the responsibility to prepare an IRFA, followed by an FRFA, stating that "in the interests of completeness, and because the agency received comments on this issue during the scoping process, the agency has elected to do such an analysis, to the extent feasible and

based upon available information." AR 1698 at 3. Having committed to that action as part of the NEPA process for the Roadless Rule, the agency was obligated to complete an accurate analysis of economic impacts. *NRDC*, 421 F.3d at 811 ("Inaccurate economic information may defeat the purpose of an EIS [or an IRFA or FRFA] by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action.").

The USFS subsequently submitted the FRFA to the SBA,[4] after which (on November 15, 2000) the SBA provided comments that identified multiple violations of the RFA and the APA.[5] AR 5584 at 1. As stated at the outset of this section, SBA observed that the USFS made "significant changes to the final rule" that required an additional comment period under the APA, including the last minute decision to *not* exempt the Tongass from the rule along with significant changes to the timber harvest prohibition. *Id.* at 2. SBA concluded that the changes "will have a significant economic impact" on many small businesses and hence necessitated an additional public comment opportunity. *Id.* SBA properly concluded that USFS's failure to provide an opportunity for meaningful comment on these changes violated the APA. *Id.* As discussed in the NEPA section of this brief, such failure also violated NEPA.

The SBA identified other violations of the RFA (and the APA) as well. For example, the USFS failed to explain in the FRFA "why other 'significant alternatives to the rule were rejected.'" *Id.* The USFS also failed to provide information on the number of small businesses affected by the Roadless Rule, despite possessing such information. *Id.* at 3. On that note, the SBA took issue with the USFS' rejection of information provided by a wood products industry trade association – namely that "78% (11 of 14) of the small family owned sawmills in Utah will cease to operate" due to the Roadless Rule

[4] The Administrative Record contains a November 20, 2000 clearance copy of the FRFA, Doc. 6083, but it is unclear when USFS submitted the FRFA to the SBA given the November 15, 2000 date of the SBA's comments on the FRFA.

[5] Although identified as RFA and APA violations by SBA, the failures described by SBA are also NEPA violations addressed in the NEPA section of this memorandum.

– because it was "different from FS estimates." *Id.* (asking why the agency "decide[d] not to use the information provided by Utah Forest Products Association, other trade associations, and the public in the FRFA"). Finally, the SBA observed that the USFS failed to include in the FRFA the required "legal, factual and policy reasons for selecting the chosen alternative." *Id.* Indeed, the USFS failed to provide this information for either the Roadless Rule generally or the separate decision to not exempt the Tongass.

The USFS failed to comply with the RFA despite a specific public commitment to do so, including in the FEIS. For example, in the FEIS Response to Comments, the agency responded to a comment that it "should not violate the Regulatory Flexibility Act" by stating it had "completed an Initial Regulatory Flexibility Analysis in accordance with the Regulatory Flexibility Act" and that it also would complete an FRFA to "address possible effects of the rule." Doc. 4610 at 18 (FEIS Vol. 3 at 15). In response to another comment stating that the "rule will adversely impact . . . small businesses" and that the "effects were not adequately addressed," the agency relied exclusively upon the information in the IRFA and FRFA, stating that its analysis under the RFA was "conducted to assess impacts on small businesses." Doc. 4610 at 13 (FEIS Vol. 3 at 10). Having fully incorporated its flawed RFA analyses into the NEPA process for the rulemaking (without acknowledging the SBA's criticism of those analyses), the agency's arbitrary failings under the RFA returned full circle as NEPA violations. In the ROD, in fact, the USFS devoted four pages to a summary of the results of its FRFA, Doc. 6978 at 104-07, stating that the Roadless Rule "has the potential to affect a subset of small businesses that may seek opportunities" in the future, particularly "in the Intermountain and Alaska Regions, with the effects in Alaska increasing in the longer term." *Id.* at 105. Nowhere, however, did the USFS disclose that the SBA, the agency responsible for overseeing agency compliance with the RFA, repeatedly informed the agency that its economic analyses and disclosures were seriously deficient and in violation of the RFA, and that as a result of the RFA violation, the decision to

promulgate the Roadless Rule was arbitrary and capricious in violation of the APA. *Allied Local and Reg'l Mfrs.' Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000) (reviewing court may consider violations of the RFA "in determining whether [an agency] complied with the overall requirement that any agency's decisionmaking be neither arbitrary nor capricious"). Finally, as a result of consistently misrepresenting its RFA analyses in the FEIS and in the ROD by failing to disclose the SBA's rejection of same, the USFS also violated NEPA. *Delaware Riverkeeper*, 753 F.3d at 1312-13 ("Judicial review of agency actions under NEPA is available 'to ensure that the agency has adequately considered and disclosed the environmental impact of its actions . . . .'").

B. Arguments unique to Alaska.

The Roadless Rule rulemaking considered alternatives regarding not only the general, nationwide roadless area prohibitions but also regarding the application of the rule to the Tongass. *See, e.g.*, Doc. 1362 (DEIS S-6); Doc. 4609 at 20 (FEIS ES-2). All of the above arguments regarding the Roadless Rule's illegality are applicable to the rulemaking generally and hence encompass Alaska, but the Roadless Rule also violated federal laws relevant only to Alaska. In addition, the separate decision process regarding how to treat the Tongass – recognized as being "unique among national forests," Doc. 1362 (DEIS 1-11 to 1-12) – violated NEPA and the APA for additional reasons beyond those associated with flaws in the general rulemaking. The unique rationale for invalidating the Roadless Rule in Alaska is set forth in the plaintiff-intervenors' opening summary judgment brief, which the State fully endorses and incorporates herein. Still, the State offers the following overview of why USDA's decision to apply the Roadless Rule in Alaska, particularly on the Tongass, was patently irrational.

1. The Roadless Rule violates the "Seek To Meet Timber Demand" provision of the Tongass Timber Reform Act.

The TTRA requires that the USFS seek to meet market demand for timber on the Tongass National Forest. 16 U.S.C. § 539d(a) (congressional directive to "seek to provide a supply of timber

from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle"). Throughout the rulemaking, USDA was well aware that if the Roadless Rule was applied to the Tongass, there would be no possibility of meeting timber demand. *See, e.g.*, Doc. 4609 at 466-47 (FEIS 3-378 to 3-379) (explaining that under all of the Roadless Rule alternatives under consideration, timber supply would be constricted, leading to a "harvest shortfall of approximately 73 to 77 MMBF of timber annually"). A self-imposed prohibition on harvesting the Tongass timber needed to meet market demand cannot be construed as seeking to meet timber demand.

The knowledge that applying roadless area prohibitions on the Tongass would frustrate the USFS' ability to seek to meet Tongass timber demand permeated the NEPA process. For example, on January 20, 2000, Julia Riber in the Washington Office of the EIS team emailed other team members certain information that had been requested by Under Secretary of Agriculture Jim Lyons on Tongass timber demand. Doc. 215. The email explained that the USFS planned to offer an average of 153 MMBF of Tongass timber per year from 2000-2004 and that the roadless area portion of that offer would be 102-108 MMBF. *Id.* The corresponding market demand projections for those years ranged from 96 MMBF to 205 MMBF per year, depending on the market scenario, with the agency believing actual demand would be on the higher end of the estimates. *Id.* Regardless of which market scenario proved to be accurate, the EIS team was informed that "we don't come close to meeting even low market demand relying only on the roaded portion of the planned harvest." *Id.* In other words, prohibiting entry into roadless areas on the Tongass would preclude even a good faith effort to comply with the TTRA.

Similarly, a June 26, 2000 summary comparing maximum Tongass timber offerings possible under different roadless alternatives compared to market demand illustrated the incompatibility of the TTRA and applying the Roadless Rule to the Tongass. Doc. 6067. If road and timber prohibitions

were both imposed on the Tongass, as in the final rule, only 45 MMBF could be offered annually from the roaded areas that would remain open to timber harvest. *Id.* However, even under the low market demand scenario, a minimum of 96 MMBF was needed to meet demand, meaning that only 47% of the market demand could possibly be met under the Roadless Rule assuming the *lowest* estimate of demand. *Id.* The situation grew only more bleak under the high market demand scenario, where no more than 22% of demand could be met. *Id.*

Initially, USDA sought to comply with its TTRA obligations. For example, in the DEIS, the Preferred Alternative for the Tongass was to exempt the Tongass from the roadless area prohibitions until 2004, at which time USDA would assess whether changing market demands might allow timber demands to be met from roaded areas only. Doc. 1362 (DEIS 2-13). The primary rationale offered for the exemption was the TTRA "seek to meet demand" requirement and heavy reliance of Southeast Alaska on timber. *Id.* In a similar vein, a June 25, 2000 draft "talking points" email states that the decision for the Tongass was being postponed because "the Forest Service must meet the requirements of the Tongass Timber Reform Act and seek to meet market demand for timber on the Tongass consistent with providing for the multiple-use and sustained yield of all renewable forest resources." Doc. 5456 at 16. A few months later, a Review Draft of the FEIS stated that one of the reasons the Tongass is unique among the national forests is the "requirements of the Tongass Timber Reform Act." Doc. 5261 at 18. And a draft of "Tongass verbiage" for the Roadless Rule preamble acknowledged that roadless prohibitions "would eliminate approximately 95% of the harvest within inventoried roadless areas [on the Tongass] further destabilizing the timber economy in Southeast Alaska." Doc 1747.

Put simply, the record is conclusive that when USDA chose to impose a prohibition on road construction and timber harvest in Tongass roadless areas, the agency did so with full knowledge of the TTRA consequences. USDA made a conscious decision to render meaningless the congressional

directive on Tongass timber supply in the TTRA.

To the extent Federal Defendants try to argue that the TTRA "seek to meet demand" provision is only aspirational such that the USFS enjoys unfettered discretion in its Tongass timber offerings, such a position would be in marked contrast to the USDA's understanding of the TTRA just prior to the Roadless Rule rulemaking. In September 1999, less than a month before President Clinton directed USDA to undertake the rulemaking on a truncated timeframe, USDA Region 10 (Alaska) produced a 59 page document on "Responding to the Market Demand for Tongass Timber Using Adaptive Management to Implement Sec. 101 of the 1990 Tongass Timber Reform Act." Doc 5795. The document explained that seeking to meet market demand for Tongass timber "requires a great deal of professional judgment, along with a commitment to monitor key parameters of the emerging timber market and to incorporate this information in timber sale planning." *Id.* at 2. The document further explained that the 1997 Tongass Forest Plan included a commitment to ensuring that annual sales were consistent with market demand, and that in 1999, *i.e.*, two years later, Under Secretary Lyons reaffirmed the commitment to use the methodology set forth in the document to implement the timber demand provisions of the TTRA. *Id.* at 5 (explaining that the document "sets forth the process that will be used by the Forest Service to implement the timber demand provisions of the Tongass Timber Reform Act").

Regardless, the FEIS ushered in an abrupt change whereby the Preferred Alternative for the Tongass was Not Exempt. Doc. 4609 at 27 (FEIS ES-9). The primary rationale offered for the changed approach was simply "public comment," *id.* at 63 (FEIS 2-13), as if such a momentous decision was rightly made by popular vote. And in stark contrast to the substantial discussion in the DEIS on why it was necessary to seek to meet timber demand under the TTRA, USDA's final Roadless Rule asserted in conclusory fashion that applying the rule to the Tongass was consistent with the TTRA, 66 Fed. Reg. at 3,254, a conclusion in conflict with both the record and the law. Put simply, given the above

discussed projections for timber demand on the Tongass and the effect of the Roadless Rule on curtailing the Tongass timber supply below that demand, application of the Roadless Rule to the Tongass can only be legal if the seek to meet demand provision of the TTRA has no legal consequence.

But the Court should assume that this section of the TTRA has some meaning. *Tobey v. N.L.R.B.*, 40 F.3d 469, 471 (D.C. Cir. 1994) ("A fundamental principle of statutory construction mandates that we read statutes so as to render all of their provisions meaningful."). That is the conclusion the Ninth Circuit reached in reviewing the statute:

> Implicit in [the district court's decision] is the district court's interpretation of TTRA's provision that the Forest Service shall "seek" to meet market demand for timber. The district court stated that TTRA § 101 is "mandatory," rather than "hortatory." In other words, the Forest Service *must* "seek to meet" market demand.
>
> The wording of the statute is awkward, but, as noted . . . TTRA was written to amend ANILCA by eliminating its timber supply mandate and instructing the Forest Service instead to "seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle" . . . . The revision clearly gives the Forest Service more flexibility than it had under ANILCA, when it was required to harvest a minimum number of board feet. TTRA envisions not an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation. It thus gives the Forest Service leeway to choose among various site-specific plans, provided it follows the procedural requirements of the applicable statutes.

Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 730-31 (9th Cir. 1995). At the very minimum, Congress must have intended that the USFS make a good faith effort to meet timber demand. *NRDC*, 421 F.3d at 809 ("[T]o satisfy the TTRA's earnest admonishment requires the Forest Service to at least *consider* market demand and *seek* to meet market demand."). While many circumstances might make it impossible to actually meet demand, such as serial litigation of timber sales by a recurring cast of environmental litigants, the USFS must at least try. Yet in promulgating the Roadless Rule with immediate application to the Tongass, USDA imposed prohibitions on itself that absolutely guaranteed market demand could not be met on the Tongass. There is simply no rational

interpretation of the TTRA that allows USDA to respond to a congressional directive to "seek to meet timber demand" by promulgating a regulation that prohibits it from offering the very timber needed to meet market demand. The USDA decision to not exempt the Tongass is therefore a violation of the TTRA and should be set aside as unlawful.

2. The Roadless Rule is a withdrawal of federal land in the Chugach and Tongass National Forests in violation of section 1326 of ANILCA.

In ANILCA Congress explicitly prohibited "future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska" without the approval of Congress. 16 U.S.C. § 3213(a).

Despite the clear language of this ANILCA prohibition on executive branch action, the USFS applied the Roadless Rule prohibitions to 14.8 million acres of Alaska national forests. Doc. 4609 at 515 (FEIS A-3). This action was in direct conflict with the finding of Congress that the appropriate balance between protection and development in Alaska had already been achieved and constitutes a withdrawal of public lands in violation of 16 U.S.C. § 3213(a).

When interpreting ANILCA, this Court has previously held that absent a specific definition of "withdrawal" in the statute, it is appropriate to apply the definition of "withdrawal" set forth in the Federal Land Policy and Management Act (FLPMA). *Southeast Conference v. Vilsack*, 684 F. Supp. 2d 135, 144 (D.D.C. 2010). Under FLPMA, a withdrawal is any action that "exempts the covered land from the operation of public laws." *Id.* at 143 (citing *New Mexico v. Watkins*, 696 F.2d 1122, 1124 (D.C. Cir. 1992)).

In *Southeast Conference* this Court distinguished timber harvest from mineral leases because suspending the right to lease minerals is a suspension of public land use laws. *See* 684 F. Supp. 2d at 145. In promulgating the Roadless Rule, USDA choose to prohibit the leasing of minerals. Doc. 4609 at 347 (FEIS at 3-259). Because this suspension of public land use law in Alaska is exactly the type of

action that this Court already has stated is a prohibited withdrawal under ANILCA, *Southeast Conference*, 684 F. Supp. 2d at 145, the Roadless Rule runs afoul of ANILCA and is invalid in Alaska.

VI. REMEDY.

Because Federal Defendants promulgated the Roadless Rule in violation of NEPA and other federal laws, the State requests that the Court vacate the Roadless Rule and reinstate the status quo of national forest management under the NFMA and the individual forest plans required thereunder. 16 U.S.C. § 1604. The normal remedy under the APA for unlawful agency action is for the reviewing court to vacate the agency action. *See Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2000) ("Normally when an agency so clearly violates the APA we would vacate its action . . . ."). And in this case, it is not necessary to reinstate any rule previously in force given that individual forest plans remain in place to govern federal land management. Vacating the Roadless Rule simply will return forest management to the status quo prior to the Roadless Rule's illegal promulgation.

Because Federal Defendants decided to apply the Roadless Rule to the Tongass and Chugach National Forests in Alaska, the action also violated ANILCA and the TTRA (in addition to the above violations that apply nationwide). Therefore, even if this Court were to hold that the Roadless Rule is lawful outside of Alaska, the State asks the Court to vacate the Roadless Rule in Alaska and to return the Tongass and Chugach National Forests to management under their respective forest plans.

VII. CONCLUSION.

For the forgoing reasons, the State of Alaska requests that the Court hold that Federal Defendants acted arbitrarily and in violation of NEPA and the APA in adopting the Roadless Rule. As a result, the Court should vacate the Roadless Rule in its entirety. The State also requests that the Court hold that Federal Defendants acted arbitrarily and in violation of the APA, NEPA, ANILCA and the TTRA when deciding to apply the Roadless Rule to the two national forests in Alaska. Thus,

notwithstanding any other remedy, the Court should vacate the Roadless Rule's application in Alaska, including on the Tongass National Forest.

Respectfully submitted May 11, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015 copies of the foregoing
PLAINTIFF'S STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT FOR MOTION FOR SUMMARY JUDGMENT
were served on all parties registered with ECF for electronic service in this matter

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