

No. 11-35517

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ORGANIZED VILLAGE OF KAKE, et al.,

Plaintiff-Appellees,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Defendants,

ALASKA FOREST ASSOCIATION, INC.,

Intervenor-Defendant,

and

STATE OF ALASKA,

Defendant-Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
Case No. 09-cv-00023-JWS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF JURISDICTION.....	1
ISSUES PRESENTED.....	3
STATEMENT OF THE CASE.....	4
A. Background of the Tongass Exemption	4
B. The Procedural Background of this Case.....	5
C. Statement of the Facts	6
SUMMARY OF ARGUMENT	9
STANDARD OF REVIEW	10
ARGUMENT	11
I. THE TONGASS EXEMPTION RULEMAKING COMPLIED WITH THE ADMINISTRATIVE PROCEDURE ACT	11
A. The Cornerstone of the USDA’s Rationale for the Tongass Exemption is the Congressional Direction In ANILCA and TTRA.....	11
B. USDA Appropriately Considered and Adequately Explained the Socio-Economic Costs Associated with the Roadless Rule as a Rationale for Exempting the Tongass.....	18
1. The Duration of the Tongass Exemption was Indefinite, but was not “Short-Term”	18

2.	USDA Fully Explained its Analysis of the Projected Job Loss that Would Occur if the Roadless Rule were Applied to the Tongass	20
3.	USDA Fully Explained its Analysis of the Impact of the Roadless Rule on the Road and Utility Connections.....	23
C.	USDA Appropriately Relied on Congressional Direction And on 2001 USDA Findings that Roadless Values In the Tongass are Adequately Protected Without the Roadless rule	27
D.	The Tongass Exemption Rule Provided Legal Certainty in 2006 and was Followed by the California District Court Exactly as Intended by USDA.....	31
II.	The Tongass Exemption Rulemaking Complied with the National Environment Policy Act	33
III.	Applying the Roadless Rule to the Tongass is an Inappropriate Remedy	36
	CONCLUSION.....	38

TABLE OF AUTHORITIES

Cases

California ex rel. Lockyer v. U.S. Dep’t of Agric.,
 459 F.Supp .2d 874, 917 (N.D. Cal. 2006),
aff’d, 573 F.3d 999 (9th Cir. 2009)..... 19, 33

Chevron U.S.A., Inc. v. Natural Res. Def. Council,
 467 U.S. 837, 842 (1984)..... 9, 15

Dept. of Transp. v. Public Citizens,
 541 U.S. 752, 764-65 (2004) 36

Dodd v. Hood River County,
 59 F.3d 852, 863 (9th Cir. 1995)..... 34

Kootenai Tribe, 313 F.3d at 1110)..... 29, 31

Lands Council v. McNair,
 437 F.3d 981, 990 (9th Cir. 2008)..... 30, 31

Lockyer v. U.S. Dept. of Agriculture,
 575 F.3d 999, 1020 (9th Cir. 2009)..... 10, 29, 30, 31

National Ass’n of Home Builders v. Defenders of Wildlife,
 551 U.S. 644, 658 (2007)..... 10

North Idaho Cmt Action Network v. United States Dep’t of Transp.
 545 F.3d 1147, 1152 (9th Cir. 2008)..... 10

Paulsen v. Daniels,
 413 F.3d 999, 1008 (9th Cir. 2005) 37

Ross-Whitney Corp. v. Smith Kline & French Labs
 207 F.2d 190, 194 (9th Cir. 1953)..... 29

State of Alaska v. United States Department of Agriculture
 case 1:11-cv-01122-RJL (District of Columbia) 14

Western Watershed v. Kraayenbrink,
632 F.3d 472, 482 (9th Cir. 2011)..... 2, 3

Wyoming v. U.S. Dep’t of Agric.
277 F. Supp. 2d 1197 (D. Wyo. 2003)..... 6, 19, 37

Wyoming v. U.S. Dep’t of Agric.,
414 F.3d 1207 (10th Cir. 2005) 6, 19, 37

Wyoming v. U.S. Dep’t of Agric.
570 F. Supp. 2d 1309 (D. Wyo. 2008)..... 19, 32, 33, 37

Wyoming v. U.S. Dep’t of Agric.,
570 F.Supp.2d 1309 (D. Wyo. 2005), *Rev’d*,
No. 09-8075 (10th Cir. October 21, 2011) 6

Wyoming v. U.S. Dep’t. of Agric., 2011 WL 50 22755 (10th Cir. 2011) 7

Statutes

5 U.S.C. §§ 701-706..... 3

5 U.S.C. § 706(2)(A)..... 10

16 U.S.C. § 473 *et. seq.*..... 1

16 U.S.C. § 528 *et. seq.*..... 1

16 U.S.C. § 1604 *et. seq.*..... 1

16 U.S.C. § 3101(d) 8

16 U.S.C. § 3213(a) 15

28 U.S.C. § 1291 1

28 U.S.C. § 1331 *et. seq.*..... 1

28 U.S.C. § 2201-02..... 1

42 U.S.C. § 4321 *et.seq.*..... 1

Regulations

36 C.F.R. §§ 294.10-14 (2001)..... 1

36 C.F.R. § 294.14(d) (2004)..... 1

INTRODUCTION

This is an appeal of an order invalidating a United States Department of Agriculture (“USDA”) regulation that exempts the Tongass National Forest (“Tongass”) from application of the Roadless Area Conservation Rule¹ (“Roadless Rule”). Plaintiffs (collectively “Greenpeace”) challenged the regulations under the Organic Administration Act, 16 U.S.C. § 473 *et seq.*, the Multiple-Use Sustained Yield Act, 16 U.S.C. § 528 *et seq.*, the National Forest Management Act, 16 U.S.C. § 1604 *et seq.*, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* ER 164.

STATEMENT OF JURISDICTION

Greenpeace invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §§ 2201-02 (injunctive and declaratory relief). ER 155. The State of Alaska (“State”) intervened as a defendant, as did the Alaska Forest Association. ER 33-34. The Honorable Judge John W. Sedwick, District of Alaska, issued an opinion invalidating the Tongass Exemption Rule² (“Tongass Exemption”). ER 6-32. The State timely filed its notice of appeal on June 17, 2011. ER 35-39. This Court has jurisdiction under 28 U.S.C. § 1291.

¹ 36 C.F.R. §§ 294.10-.14 (2001); 66 Fed Reg. 3244, ER 87-116.

² 36 C.F.R. § 294.14(d) (2004); 68 Fed Reg. 75136, ER 75-85.

USDA has not appealed, but it is “well established that the government is not the only party who has standing to defend the validity of federal regulations.” *Western Watershed v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011). USDA acknowledged in the Tongass Exemption Record of Decision (“Exemption ROD”) that it initiated the rulemaking pursuant to a settlement agreement with the State in an earlier case challenging the Roadless Rule. ER 75. *See also* ER 146-150 (settlement agreement that required USDA to publish the Tongass Exemption). The State is therefore injured by the order and has independent standing to bring this appeal. *See Kraayenbrink*, 632 F.3d at 482 (explaining that standing may be “based on a concrete injury related to the judgment”).

The State has additional interests that support its standing to pursue this appeal. ER 139-145. (Declaration of Rolfzen) (discussing the flow of monies to the State via the National Forest Receipts Program); ER 136-138 (Declaration of Keith) (providing evidence that Alaska jobs are tied to timber). The trial court’s order will remove additional national forest lands from possible economically-beneficial uses, causing the State injury that would be redressed by a favorable decision from this Court. *See, e.g., Kraayenbrink*, 632 F.3d at 483-84 (standing was established where judgment led to a proposed reduction in grazing allowed under relevant permits).

ISSUES PRESENTED

1. Do the rationales articulated by USDA for the Tongass Exemption, which include implementing congressional intent, avoiding serious social and economic impacts, and creating legal certainty while still adequately protecting the Tongass roadless values, satisfy the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”) requirement that the agency articulate a reasonable explanation for its actions?

2. Did USDA comply with NEPA in promulgating the Tongass Exemption where the agency relied on the reasonable range of Tongass-specific alternatives assessed in the Roadless Rule environmental impact statement after first determining, and documenting in a Supplemental Information Report, that no new information or changed circumstances warranted the preparation of a supplemental NEPA document?

3. If the Tongass Exemption is not valid, is reinstatement of the Roadless Rule an appropriate remedy when the rule was subject to a nationwide injunction both when USDA promulgated the Tongass Exemption and when the district court issued the judgment in this case?

STATEMENT OF THE CASE

A. Background of the Tongass Exemption

USDA management decisions in the Tongass frequently face legal challenge. The desire of some plaintiffs to force USDA to manage for preservation rather than for multiple uses frequently conflicts with the interests of Alaskans dependent on Tongass resources, with the interests of the State, and with USDA's management responsibilities. *See* ER 184 (USDA statement that the timber industry is struggling due to lack of timber supply due in part to litigation).

When USDA began rulemaking for the Roadless Rule in 2001, it intended to exempt the Tongass. ER 121. It analyzed options for applying the Roadless Rule and its preferred alternative in the draft environmental impact statement ("DEIS") was to exempt the Tongass and reconsider the matter in five years. ER 229-231. It was not until the eleventh hour, in the final record of decision, ("Roadless ROD") that USDA decided to immediately apply the Roadless Rule. ER 106. In the DEIS, USDA based its preference for exempting the Tongass on the socio-economic impacts of the Roadless Rule and the need to meet timber demand. ER 236, 238-239. In the Roadless ROD and Roadless FEIS, USDA attributed the sudden shift in its Tongass policy primarily to public comment. ER 97; ER 208.

USDA quickly faced litigation challenging the validity of the Roadless Rule, including a case in which the State alleged that the Roadless Rule violates the

Alaska National Interest Lands Conservation Act (“ANILCA”) and the Tongass Timber Reform Act of 1990 (“TTRA”). ER 75. As a result, USDA reconsidered the “Tongass Not Exempt” alternative it had selected and replaced it with the “Tongass Exempt” alternative that it had earlier preferred in the DEIS. The validity of USDA’s rulemaking exempting the Tongass is the subject of this case.

The issue here is not whether USDA chose the best policy. Clearly USDA has struggled with this policy decision, having switched from exempt, to non-exempt, and then back to exempt. Rather, the question is whether USDA provided a reasonable explanation for returning to its original policy decision to exempt the Tongass from the Roadless Rule.

B. The Procedural Background of this Case

Six years after USDA promulgated the Tongass Exemption, Greenpeace filed this action seeking a declaratory judgment that it violates the APA and NEPA. ER 154. The district court ruled in favor of the plaintiffs, holding that USDA failed to give an adequate and rational explanation for why it changed its choice of Tongass alternative. ER 6-32.

The court rejected USDA’s explanations of its reconsideration of the socio-economic cost, the need to protect roadless values, and the legal uncertainty that it had discussed in the Exemption ROD. The court also rejected USDA’s

explanation that exempting the Tongass was how to “best implement the letter and spirit of congressional direction” as found in ANILCA and the TTRA. ER 81.

The court then reinstated the Roadless Rule in the Tongass based on its status as the rule previously in force. ER 26. But the District Court for the District of Wyoming had twice invalidated the Roadless Rule and enjoined its application nationwide. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003), *vacated on mootness grounds*, 414 F.3d 1207 (10th Cir. 2005); *Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309 (D. Wyo. 2008), *rev'd*, No. 09-8075 (10th Cir. October 21, 2011). When the Tongass Exemption was promulgated and when the court invalidated it, USDA managed the roadless areas of the Tongass according to the then-current Tongass Land Management Plan, not the Roadless Rule. The Ninth Circuit has never ruled on the merits of the Roadless Rule.³

C. Statement of Facts

In 1999, President Clinton directed USDA to begin a rulemaking to withdraw roadless national forest lands from development nationwide. ER 120. The Tongass contains the most roadless area of any national forest, with over nine million acres. ER 234. USDA recognized that the Tongass roadless areas would

³ On October 21, 2011, the Tenth Circuit reversed the Wyoming District Court's invalidation of the Roadless Rule. *Wyoming v. U.S. Dep't. of Agric.*, 2011 WL 50 22755 (10th Cir. 2011)

present the greatest challenge due to the unique character of the forest and the people who depend upon its resources. ER 121-122.

In the Advanced Notice of Proposed Rulemaking, USDA solicited public comments about the status of the Tongass. *Id.* It initially proposed that the Tongass would be exempt. Most of the Tongass roadless area was already closed to logging, and the exemption would only affect approximately 300,000 acres. ER 75, 121-122.

USDA found that the Tongass roadless areas were adequately protected by various other federal land designations and by the Tongass Land Management Plan. ER 121-122. USDA also recognized that applying the Roadless Rule to the Tongass would have serious consequences for the Southeast Alaskan population. ER 121-122, 128.

USDA considered four alternatives for protections applicable to inventoried roadless areas, plus four alternatives for application of the Roadless Rule to the Tongass. In the Roadless Rule DEIS, USDA's preferred Tongass alternative was to exempt the forest from the Roadless Rule.⁴ ER 242. It determined that the Tongass was already adequately protected and that the rule would harm the local residents and the Alaskan economy. It also reasoned that some timber harvest in roadless areas might be necessary to meet its legal obligations under the TTRA,

⁴ The status of the Tongass exemption was to be reevaluated in about five years at the next renewal of the Tongass Land Management Plan. ER 243.

which requires USDA to “seek to meet timber demand” from the Tongass. ER 245.

But USDA made a sudden reversal in the Final Environmental Impact Statement (“FEIS”). It changed the preferred alternative to “Tongass Not Exempt,” with a four-year delay to allow a transition period. ER 208. USDA’s position then shifted again in the final Roadless ROD when it selected the “Tongass Not Exempt” alternative with no transition period. ER 97. USDA acknowledged that socio-economic impacts on Southeast Alaskans would be significant, and did not explain how it would meet its statutory requirement to seek to meet timber demand over the long term.

Following promulgation of the final rule, the State filed suit to challenge the validity of the Roadless Rule. The State claimed that, applied to the Tongass, the rule violates both ANILCA and the TTRA. ER 75, 146. In ANILCA, Congress found that sufficient Alaska wilderness had already been protected and the proper balance between land for development and land preservation had been reached. 16 U.S.C. § 3101(d). Congress also prohibited administrative agencies from designating more than 5,000 acres of additional Alaska land for protection without Congressional approval. 16 U.S.C. § 3213(a).

USDA settled this litigation by agreeing to promulgate an advanced notice of proposed rulemaking to consider permanent exemption from the Roadless Rule

of both Alaskan national forests, the Chugach and the Tongass. In addition, USDA agreed to publish a proposed rule that would exempt the Tongass until a permanent version of the Roadless Rule addressing applicability in Alaska was completed. ER 75. The validity of this rule, the “Tongass Exemption,” is now before this Court.

SUMMARY OF ARGUMENT

During the Roadless Rule rulemaking, USDA initially proposed exempting the Tongass. In the DEIS, USDA chose Tongass exempt as its preferred alternative. Based primarily on public comment, USDA abandoned this choice at the last minute and subjected the Tongass to the Roadless Rule, even while acknowledging that the negative impacts on Alaskans would be significant.

USDA has authority to reconsider and alter a policy in a subsequent rulemaking, and it provided a reasonable explanation for reverting to the original preferred alternative of exempting the Tongass. It devoted a significant portion of the Exemption ROD to explaining its reconsideration. After re-reviewing ANILCA and the TTRA, USDA concluded that the exemption would “best implement the letter and spirit of congressional direction.” ER 81. Under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984), if Congress has spoken directly on an issue, the agency must implement that intent. Even if Congress is silent or ambiguous on the specific issue in question, the Court should

defer to the agency interpretation if it is reasonable. *Id.* at 843. Despite this clear Congressional direction, the district court afforded the agency little deference in reviewing the Tongass Exemption.

Even if this Court finds the Tongass Exemption to be invalid, it should reverse the district court's remedy of reinstating the Roadless Rule to the Tongass. At the time of the Tongass Exemption Rulemaking, a federal judge had invalidated and enjoined the Roadless Rule and USDA was managing the Tongass under the Tongass Land Management Plan.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *North Idaho Cmty Action Network v. United States Dep't of Transp.*, 545 F.3d 1147, 1152 (9th Cir. 2008). Under the APA, the Court may only set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). This standard requires a narrow review of agency action and precludes a reviewing court from substituting its own judgment for that of the agency. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

This Court reviews the district court's reinstatement of the enjoined Roadless Rule under an abuse of discretion standard. *Lockyer v. U.S. Dept. of Agriculture*, 575 F.3d 999, 1020 (9th Cir. 2009).

ARGUMENT

I. THE TONGASS EXEMPTION RULEMAKING COMPLIED WITH THE ADMINISTRATIVE PROCEDURE ACT.

USDA's reasons for reevaluating the Roadless Rule in the Tongass are not implausible, are well supported by the record and do not conflict with Ninth Circuit precedent. The district court erred in finding to the contrary.

A. The Cornerstone of USDA's Rationale for the Tongass Exemption is Congressional Direction in ANILCA and TTRA.

The district court found that USDA did not proffer compliance with ANILCA and TTRA as a reason for the Tongass Exemption, even though such explanation is in the explicit language of the Exemption ROD. ER 29.

In the Exemption ROD, USDA explained that the State had filed suit to challenge the validity of the Roadless Rule, claiming that it violates these federal statutes. ER 75-76. USDA further explained that in the settlement of the case, it "committed to publishing a proposed rule with request for comment that would temporarily exempt the Tongass from application of the roadless rule until completion of a rulemaking process to make permanent amendments to the roadless rule." ER 76. A press release from the USDA Forest Service Alaska Region further explained that the State's challenge under ANILCA could threaten other federal administrative land-use reservations in Alaska. ER 177.

The Exemption ROD's list of reasons for going forward with the rulemaking include serious concerns about economic and social hardships, public comments on the proposed Tongass Exemption and "litigation over the last two years." ER 76. USDA cited the "great uncertainty about the implementation of the roadless rule due to the various lawsuits." ER 77. Although USDA makes reference to "various lawsuits" in this statement, it acknowledged that the proposed Tongass Exemption was being published in accordance with the settlement agreement of a lawsuit that claimed the Roadless Rule violated ANILCA and TTRA. In the context of the entire ROD, it is obvious that USDA's primary legal concern in pursuing this rulemaking was to comply with these statutes.

In the response to comments section of the Exemption ROD, USDA explained that TTRA legally obligated it to seek to make timber available from the Tongass at a level that both "meets the annual market demand for timber" and "meets the market demand from the forest for each planning cycle." ER 79. USDA noted that from 1980-2002 the average annual harvest was 269 million board feet (MMBF). ER 80. Yet the FEIS and the Supplemental Information Report concluded that if the Roadless Rule applied to the Tongass, the maximum possible timber harvest would be 50 MMBF. ER 182; ER 218.

While actual harvest of federal timber from the Tongass slumped in years 2001-2003,⁵ USDA considered this slump an aberration, and estimated that annual market demand for the following decade would be 124 MMBF. ER 80. If market conditions improve, USDA estimated that such demand would climb to 184 MMBF. *Id.* Even using the low-end demand estimate of 124 MMBF, the Roadless Rule reduction to 50 MMBF created a major challenge for USDA to meet its obligation to seek to meet timber demand. USDA stated in the ROD that “the roadless rule prohibitions operate as an unnecessary and complicating factor limiting where timber harvesting may occur.” *Id.* USDA stopped short of directly stating it cannot comply with TTRA under the Roadless Rule, but its numbers demonstrate a large gap between market demand for Tongass timber and the maximum possible harvest. As stated in the Supplemental Information Report, the Roadless Rule “would result in a level of timber harvest well below the low-market estimate of average annual market demand of 124 million board feet.” ER 182.

⁵ Market demand in 2001-2003 was considerably greater than the USDA was able to meet from the Tongass due to litigation and other factors. The State fully explained in the district court how the excess demand in these years was partially met by the State of Alaska timber program in which the State accelerated the sale of State timber from Southeast Alaska at an unsustainable level to bridge the gap until USDA could increase sales. For example, whereas in 1999 the State sold 7.3 MMBF of timber, ER 173 (2008 TLMP FEIS 3-335), the State had dramatically increased its annual sale of timber to about 48 MMBF by 2000. *Id.* See also ER 174 (2008 TLMP FEIS 3-501) (explaining that from 2000-2005, harvest from State lands ranged from 59.9 to 24.2 MMBF). The district court appears not to have considered this information.

USDA also discussed the significance of ANILCA in its decision to exempt the Tongass. ER 81. In ANILCA, Congress placed 5.5 million acres of the Tongass in permanent wilderness status and stated that, the designation and disposition of lands in the act “represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use.”⁶ *Id.*

After explaining how ANILCA and TTRA apply to management of the Tongass, USDA stated that exempting the Tongass from the Roadless Rule would implement the intent of these statutes:

These statutes provide important Congressional determinations, findings, and information relating to management of National Forest Lands on the Tongass National Forest, and were considered carefully during this rulemaking. Expressions of legal concerns and support for the various rulemakings have also been considered. This final rule reflects the Department’s assessment of how to best implement the letter and spirit of congressional direction along with public values, in

⁶ In addition to finding that sufficient land had been set aside for protection in Alaska, Congress also prohibited administrative agencies, such as USDA, from setting aside additional lands in excess of 5,000 acres without the consent of Congress. 16 U.S.C. § 3213(a). In the lawsuit challenging the validity of the Roadless Rule, the State claimed the administrative designation of additional protected Tongass and Chugach National Forest lands where road construction is prohibited violates this ANILCA provision. USDA explained the “no more administrative land withdrawals” provision of ANILCA and the State’s lawsuit in the Forest Service’s communication plan on the Tongass Exemption. ER 195-200. The State has renewed this claim in a new lawsuit challenging the Roadless Rule under various federal statutes. *State of Alaska v. United States Department of Agriculture*, case 1:11-cv-01122-RJL (District of Columbia).

light of the abundance of roadless values on the Tongass, the protection of roadless values already included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions. [*Id.*]

Because Congress has spoken on the issue and USDA has followed these directives in exempting the Tongass from the Roadless Rule, the Court's review of the action should end under *Chevron*, 467 U.S. at 842-43. Even if Congress left the determination of Roadless Rule applicability open to agency interpretation, USDA is entitled to deference on its reasonable conclusion about implementing ANILCA and the TTRA. *Id.*

The district court disagreed. It found that "neither rationale is identified in the Tongass Exemption ROD or the notice of proposed rulemaking as a reason for temporarily exempting the Tongass from the Roadless Rule." ER 29. In light of USDA's clear statement that the Tongass Exemption Rule "reflects the Department's assessment of how to best implement the letter and spirit of congressional direction," the district court's finding that the Tongass Exemption ROD never identified congressional direction as a rationale is simply mistaken.

The district court further held that even assuming that "ensuring compliance with TTRA and ANILCA was a reason for promulgating the Tongass Exemption, the USDA failed to provide a reasoned explanation for changing its position that applying the Roadless Rule to the Tongass was consistent with the TTRA." The

court found that this “failure to provide a reasoned explanation for its reversal of position was arbitrary and capricious.” *Id.*

This holding is incorrect for several reasons. First, while USDA stated that exempting the Tongass was the best approach to “implement the letter and spirit of congressional direction,” (ER 81) it did not state that it is the *only* legally permissible approach or that the FEIS conclusion that the Roadless Rule is consistent with ANILCA and TTRA had been wrong.⁷ It did, however, discuss how the Roadless Rule limits its ability to meet Tongass timber demand and it acknowledged that the State’s legal claims created uncertainty about implementation of the Roadless Rule. ER 77, 79-81. The DEIS for the Roadless Rule and the Supplemental Information Report for the Tongass Exemption both show that USDA’s concerns about its ability to meet the requirements of TTRA under the Roadless Rule began when the Roadless Rule was first developed. ER 182, 376-378. Although USDA did not explicitly reverse its legal conclusion about whether applying the Roadless Rule to the Tongass violates ANILCA or TTRA, it changed its policy on managing Tongass roadless areas based largely on these statutes, and the legal uncertainties demonstrated by the State’s lawsuit. USDA fully explained these reasons in the Tongass Exemption ROD.

⁷ The State has claimed – in both the lawsuit settled in 2003 and the recently-filed lawsuit challenging the validity of the Roadless Rule – that ANILCA and TTRA do in fact prohibit the application of the Roadless Rule to the Tongass.

Second, USDA's reversal was not arbitrary and capricious because USDA never explained fully why it initially applied the Roadless Rule. During the Roadless Rule rulemaking process, USDA was concerned with meeting the TTRA requirement that it must seek to meet timber demand from the Tongass. Based largely on this congressional directive to meet timber demand, and also on the hardships the rule would create for Alaskans, the preferred alternative for application of the Roadless Rule to the Tongass during the original Roadless rulemaking was and remained "Tongass Exempt" until the FEIS and the final Roadless ROD. USDA gave only a cursory explanation for suddenly changing the Tongass alternative in 2001 to "Tongass Not Exempt," primarily referring to "public comment." ER 105.

Finally, USDA had good reasons to reconsider its earlier decision. The State's lawsuit prompted it to more fully examine ANILCA and TTRA and conclude that its ability to implement the Roadless Rule in the Tongass was questionable. When the Exemption ROD is read in its totality,⁸ the State respectfully submits that USDA has very clearly explained its valid reasons for exempting the Tongass.

Even if the Court agrees with the district court that USDA did not identify the congressional direction of ANILCA and TTRA as a rationale in the Exemption

⁸ Six of the 11 pages of the Exemption ROD include discussion of the litigation with the State and/or discussion of ANILCA and TTRA. ER 75-85.

ROD, the Tongass Exemption is still valid because additional reasons support the rulemaking.

B. USDA Appropriately Considered and Adequately Explained the Socio-Economic Costs Associated with the Roadless Rule as a Rationale for Exempting the Tongass.

The district court held that USDA failed to articulate a rational connection between the Roadless Rule and socio-economic costs. ER 22-23. This holding is incorrect. The evidence before the agency demonstrates the significant socio-economic cost of the Roadless Rule.

1. The Duration of the Tongass Exemption was Indefinite, but was not “Short-Term”.

The district court found that the use of “long-term potential job losses to justify a short-term temporary rule is implausible,” particularly emphasizing USDA’s agreement to proceed with further rulemaking in a timely manner. ER 22. But the plain language of the Exemption ROD and the facts before the court demonstrate otherwise.

USDA intended the Tongass Exemption to be “in effect until the Department promulgates a subsequent final rule concerning the application of the roadless rule within the State of Alaska.” ER 75. The exemption has no sunset provision terminating it, should a final rule be delayed or never occur. USDA discussed the unusual posture of a rulemaking to exempt the Tongass from an enjoined rule and stated that “the best course of action is to clarify that the duration of this Tongass-

specific rulemaking will last until completion of rulemaking efforts associated with the application of the roadless rule in Alaska.” ER 77. USDA thus intended the exemption to be in effect indefinitely until replaced by another rule. The exemption continued in existence for nearly eight years without further rulemaking.⁹

The district court improperly substituted its judgment in evaluating the impact on the Southeast Alaska economy and misapplied a “short-term” analysis to a rule of indeterminate duration. Because the Tongass Exemption was to remain in effect indefinitely, USDA was correct not to limit its analysis to some arbitrary “short-term” period.

⁹ The need for a further rulemaking was obviated by the fact that the Roadless Rule has spent most of its existence not in effect. *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459 F. Supp. 2d 874, 917 (N.D. Cal. 2006), *aff’d*, 573 F.3d 999 (9th Cir. 2009) (acknowledging the reasonableness of USDA not having issued a final Tongass Exemption rule where “the repeal of the Roadless Rule . . . made such a final rule unnecessary”). Shortly before the Tongass Exemption issued in 2003, the Wyoming District Court invalidated and permanently enjoined the 2001 Roadless Rule. *Wyoming v. U.S. Dep’t of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003). The federal government then promulgated the State Petitions Rule, after which the Wyoming District Court’s decision was vacated on appeal due to mootness. *Wyoming v. U.S. Dep’t of Agric.*, 414 F.3d 1207 (10th Cir. 2005). The State Petitions Rule then was invalidated, and the 2001 Roadless Rule reinstated by the *Lockyer* court with the Tongass Exemption intact. Subsequently, the Wyoming District Court again invalidated and permanently enjoined the 2001 Roadless Rule, *Wyoming v. U.S. Dep’t of Agric.*, 570 F. Supp. 2d 1309 (D. Wyo. 2008). On October 21, 2011, the Tenth Circuit reversed the Wyoming District Court. On these facts, as the *Lockyer* court acknowledged, the Tongass Exemption “has not expired.” 459 F. Supp. 2d at 917.

2. USDA Fully Explained its Analysis of the Projected Job Loss that Would Occur if the Roadless Rule were Applied to the Tongass.

The district court also found USDA's conclusions about job loss to be counter to the evidence before the agency. In reaching this conclusion, the district court relied on discreet statements from the Supplemental Information Report taken out of context, and largely ignored the report's overall conclusions. ER 21-24.

The purpose of the Supplemental Information Report was to determine whether USDA could make a decision to exempt the Tongass using the analysis and data in the 2001 FEIS. ER 180. USDA concluded that it did not need a supplemental environmental impact statement as the decision making picture had not changed.

One of USDA's significant findings was the continuing validity of the estimate that not more than 50 MMBF of timber could be harvested annually under the Roadless Rule. ER 182. USDA also confirmed the continuing accuracy of the timber demand estimate of 124 MMBF annually. *Id.* This confirmation was relevant because, as the Supplemental Information Report notes, the TTRA directs the Secretary to seek to meet annual market demand. *Id.*

USDA also presented its expert opinion that the low harvest rates of federal timber in 2000-2002 are probably cyclical aberrations from historical levels. ER

186. In 2002, when harvest of federal Tongass timber was 34 MMBF, the total timber harvest in the Tongass region was 211 MMBF. ER 185. Some of this additional timber came from private lands, but much was supplied by the State in its “Bridge Timber” program. *See, e.g.*, ER 174 (2008 Tongass Land Management Plan FEIS 3-501) (explaining that “[i]n recent years the state has sold above its annual projected harvest levels to help bridge the gap between national forest harvest and local industry needs”). In an effort to bridge the gap between supply and demand, the State offered increased timber sales during these years because USDA was unable to offer sufficient timber to meet market demand in part due to legal challenges. *See, e.g.*, ER 173 (2008 Tongass Land Management Plan FEIS 3-335) (showing in Table 3.13-7 that timber harvest from State lands jumped from about 7 MMBF in 1999 to about 48 MMBF in 2000, after which it remained at an elevated level). However, the State was selling timber at levels that are not sustainable with its limited land base in the area. ER 174. Thus, the district court’s characterization that 34 MMBF represented the total actual timber demand in 2002 is a distortion of the record, as 211 MMBF was actually sold, much from unsustainable short-term non-federal sources.

Regardless of the extent or the cause of the downturn in federal timber harvest in 2000-2002, the Supplemental Information Report explained that the policy goal of the Tongass Forest Plan is to maintain options for the industry to

recover when markets improve, as they have done following cyclical downturns in the past. ER 183. This policy statement is consistent with USDA's statement in the Exemption ROD that "the roadless rule prohibitions operate as an unnecessary and complicating factor limiting where timber harvesting may occur." ER 80. Put simply, despite a downturn in the harvest of federal timber, USDA was planning for the probable rebound in this cyclical resource market.

USDA also explained why the cyclical dip in harvest did not invalidate its earlier analysis of the impact of the Roadless Rule on jobs. ER 186-189. USDA stated that the Roadless FEIS used the relative difference in expected harvest between alternatives to calculate its impacts and, in fact, makes no reference to the absolute level of timber employment. As long as the choice of a prohibition alternative results in a reduction in federal harvest of approximately 75 MMBF and the parameters translating this volume into employment and income hold, then the Roadless FEIS impact calculations are valid regardless of changes in total sector employment. ER 186.

Thus, USDA expected the timber cycle to experience a rebound and concluded that the low market estimate for demand of 124 MMBF for the next decade remained reasonable. *Id.* Because only 50 MMBF annually could be harvested with the Roadless Rule prohibitions in place, USDA reasonably expected that this would decrease harvest in the future by approximately 75 MMBF annually

and therefore would reduce jobs as estimated in the Roadless Rule FEIS. Even with a three year downturn in federal timber production from the Tongass, it was reasonable for USDA to continue to rely on the FEIS economic analysis. ER 185-189.

But the district court failed to consider these USDA explanations of the data and methodology on which USDA based its projections on future job loss. Instead, it reinterpreted the record using an unsupported assumption that the three-year downturn in federal timber harvest is permanent rather than cyclical. ER 23.

USDA fully explained its analysis of projected job loss. This analysis was set forth in the FEIS for the 2001 Roadless Rule, reconfirmed in the Supplemental Information Report, and summarized in the Exemption ROD in compliance with the APA. Even if this Court independently considers the estimates of potential future job loss, USDA's conclusions are entitled to deference.

3. USDA Fully Explained its Analysis of the Impact of the Roadless Rule on the Road and Utility Connections.

The district court called USDA's conclusion that the Roadless Rule significantly limits the development of important road and utility connections an unsupported "bald assertion." ER 23. It also held that USDA's conclusion that the Roadless Rule reduces options for future road upgrades was a "post-hoc" rationalization that could not be considered under the APA, even though USDA set

forth this rationale in the Exemption ROD. ER 25. The court concluded this rationale was “post-hoc” because USDA did not address this concern in the 2001 Roadless rulemaking or in the Supplemental Information Report. *Id.*

But even the district court acknowledged that USDA may “reevaluate its approach to roadless area management in the Tongass.” ER 30. That is what USDA did in the Tongass Exemption. After reconsidering the record in the Roadless rulemaking and the Supplemental Information Report, USDA concluded that the Roadless Rule reduces “future options for similar upgrades” that may be critical to Southeast Alaska. ER 82. USDA cited this conclusion in the Exemption ROD as one of the rationales for exempting the Tongass. If the agency is not allowed to draw new conclusions after reevaluating information in the record, then the reevaluation process has no purpose. USDA timely considered the impact on future options for road construction in determining whether an exemption was appropriate as explained in the Exemption ROD. This rationale, set forth in the decision document for the rule in question, cannot be said to be “post-hoc.”

The district court also found that USDA’s assertion that the Roadless Rule will limit road construction is not supported by evidence of any projects that will be impacted. ER 23-25. To the contrary, in the FEIS for the Roadless Rule, USDA identified 12 projects that could not be completed without road construction that would be barred by the Roadless Rule. ER 73. USDA also considered the

Southeast Alaska Proposed Road and Ferry Projects report, which identifies six projects that would cross Tongass roadless areas. ER 45-71. In addition to these identified projects, the Roadless Rule also precludes consideration of new projects that might become necessary in the future. Economic development is not static, after all.

The Roadless Rule creates new hurdles for road construction that are not easily cleared. While certain road construction projects in roadless areas can be approved by the Secretary of Agriculture under either the Roadless Rule or the Tongass Exemption, under the Roadless Rule the secretary can approve road projects only if the secretary affirmatively finds both that the road is in the public interest and that “no other reasonable and prudent alternative exists.” ER 115. In the Exemption ROD, USDA states that it may not always be possible to make such a finding for otherwise desirable projects. ER 82.

USDA found “a need to retain opportunities for the communities of Southeast Alaska regarding basic access and utility infrastructure.” ER 81. In rejecting USDA’s concerns and concluding that the secretary’s discretion was unchanged by the Roadless Rule, despite the addition of the affirmative finding requirement, the district court overlooked the supporting evidence in the record and the agency’s expertise in forest management. ER 24.

The district court also found the USDA's assertion that the Roadless Rule limits utility development to be arbitrary because the FEIS "did not identify any impacts to utility corridors in southeast communities." ER 25. In fact, the FEIS identifies three such projects, namely Lake Dorothy, Otter Creek and Cascade Point. ER 73.

Even if specific utility projects had not been identified, USDA can apply its expertise in roadless area management to assess the potential impact of the Roadless Rule on future projects not yet identified. In addressing the impact of roadless prohibitions in general on future utility projects, USDA stated in the Exemption ROD that:

[A]lthough some utility corridors can be constructed and maintained without a road, others may require a road. Even where a utility corridor without a road may be physically possible, it may be more expensive or otherwise less desirable than a utility accompanied by a service road. If the road construction is inexpensive or needed for other reasons, then utility corridors may often adjoin the road because of the ease of access for maintenance and repairs of utility systems. [ER 82.]

The Tongass Exemption provides communities with flexibility to propose utility projects that are efficient and effective. Under the Tongass Exemption, whether a given project is best facilitated by a road is a site-specific determination, and should not be proscribed by a nationwide rule.

C. USDA Appropriately Relied on Congressional Direction and on 2001 USDA Findings that Roadless Values in the Tongass are Adequately Protected without the Roadless Rule.

According to the district court, the “Forest Service provided no reasoned explanation as to why the Tongass Forest Plan protections it found deficient in its 2001 FEIS and ROD were deemed sufficient in its 2003 ROD.” ER 27. In fact, USDA’s explanation is well reasoned. It explained that, subsequent to the 2001 Roadless ROD, it recognized that Congress had provided statutory direction that the Tongass already has adequate environmental protections. Implementing the direction of Congress is a valid reason for reversing its position, as is fully explained in the Exemption ROD. ER 81.

Following an analysis of ANILCA prompted by the State’s lawsuit, USDA stated that Congress “found that this act provided sufficient protection for the national interest in the environmental values on the public lands in Alaska, and at the same time provided adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people.” *Id.* USDA further stated that in ANILCA, Congress found “a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use.” *Id.* Therefore, USDA lacked authority to override this Congressional finding by applying the Roadless Rule to Alaska. Alternatively,

even if USDA has authority to override the intent of Congress, in this case it appropriately deferred to Congress's strong guidance by exempting the Tongass.

Even if USDA were not implementing the intent of Congress, its position on protecting roadless values is well reasoned and adequately explained in the Exemption ROD. Exempting the Tongass does not contradict any factual findings of the district court.

The district court notes that in the 2001 Roadless ROD the USDA stated that applying the Roadless Rule to the Tongass would "most effectively protect its roadless values." ER 26. However, in the Exemption ROD, USDA stated that "loss of habitat and species abundance would not pose an unacceptable risk to diversity across the forest." ER 76. Contrary to the court's ruling, these statements do not conflict. As USDA explained, although the Tongass Exemption may be less protective of roadless values than the Roadless Rule, the roadless protections on the Tongass are adequate with or without the Roadless Rule. ER 76-78. After considering the intent of Congress, USDA reweighed the balance of social and economic impacts against the additional protections of the Roadless Rule and found the existing pre-Roadless Rule protections sufficient in accordance with the letter and spirit of federal law. ER 81.

In both the 2001 and 2003 rulemakings, ample evidence established that with or without the Roadless Rule, the roadless values of the Tongass were

adequately protected. In 2001, USDA chose to go above and beyond adequate protection. Upon reconsideration in 2003, it determined that the social cost for the extra protections was high, and adding such protections was inconsistent with congressional intent, a finding well within its discretion.

The district court also erroneously held that Ninth Circuit precedent precludes USDA's conclusion that Tongass roadless values are adequately protected without the Roadless Rule. ER 28. This Court has never addressed this issue.

The district court relied on *Lockyer*, 575 F.3d at 1014 (citing *Kootenai Tribe*, 313 F.3d at 1110), for the proposition that “the Roadless Rule provide[s] greater substantive protections to roadless areas than the individual forest plans it superseded.” ER 28. But this statement is not determinative of the adequacy of the provisions that protect roadless values in the Tongass, for two reasons.

First, the case upon which *Lockyer* relied, *Kootenai Tribe*, was a ruling on a motion for preliminary injunction. The Court did not consider the merits of the Roadless Rule. A ruling on a preliminary injunction does not establish controlling precedent. *See, e.g., Ross-Whitney Corp. v. Smith Kline & French Labs*, 207 F.2d 190, 194 (9th Cir. 1953) (holding that “a ruling on the motion for a preliminary injunction leaves open the final determination of the merits of the case”).

Second, a finding that, in general, the Roadless Rule provides greater substantive protections to roadless areas than individual forest plans does not speak to whether greater protections are in fact required. In this case, even if the Roadless Rule actually provides some incremental increase of roadless protection beyond the extensive protections already in place in the Tongass, *Lockyer* in no way precludes a USDA decision that roadless area protections in the Tongass are adequate without the Roadless Rule. Forest management requires the balancing of many interests, and USDA has been delegated considerable discretion to determine the appropriate balance. *Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008) (en banc) (explaining that under the National Forest Management Act and other relevant statutes, “Congress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands. Indeed, since Congress’ early regulation of the national forests, it has never been the case that ‘the national forests were . . . to be set aside for non-use’”). The district court in this case overstated the holding of *Lockyer* by interpreting it to preclude USDA from applying anything but maximum roadless protections to all roadless areas in each and every national forest, regardless of the adequacy of protections already in place and other factors in the balance. There is no legal basis to require USDA to automatically choose maximum roadless protection over lesser but adequate protections. To place such a heavy thumb on the scales of

balanced use of the national forest system would violate the principle of multiple use under which the national forests were created. *McNair*, 537 F.3d at 990.

Applying *Lockyer* in this manner is particularly inappropriate given the unique situation of the Tongass. As discussed above, *see supra* sections 1.A, 1.C, USDA announced in the Exemption ROD that it was exempting the Tongass to best implement the spirit and letter of the law as set forth by Congress in ANILCA and TTRA. The issue of the explicit directives of Congress in ANILCA and TTRA regarding management of the Tongass were not before this Court in *Lockyer*, *Kootenai* or any other case.

The USDA is entitled to deference on its determination as long as it is reasonable. In this case, the court substituted its judgment in determining that the roadless protections provided by the Tongass Land Management Plan and by federal statutes are inadequate. In doing so, it improperly ignored Congress's finding that the proper balance of conservation protection and development opportunity was struck in the Tongass without the Roadless Rule.

D. The Tongass Exemption Rule Provided Legal Certainty in 2006 and was Followed by the California District Court Exactly as Intended by USDA.

The district court found USDA's intent to provide legal certainty about application of the Roadless Rule to the Tongass to be an implausible rationale. ER 28. Exempting the Tongass obviously will not remove all uncertainty about

the validity of the Roadless Rule, as it is the subject of nationwide dispute and has been subject to nationwide injunctions. *Wyoming*, 570 F. Supp. 2d 1309, *rev'd*, No. 09-8075 (10th Cir. Oct. 21, 2011). However, USDA did not intend the Tongass Exemption to resolve legal uncertainty universally, but intended to create certainty as to the status of the rule in the Tongass.

As explained in the Exemption ROD, USDA was faced with a lawsuit brought by the State, which included claims that ANILCA and TTRA prohibited it from applying the Roadless Rule to national forests in Alaska. ER 75-76. Although USDA did not explicitly admit the validity of these claims, its extensive discussion of these statutes and its conclusion that exempting the Tongass was the way to “best implement the letter and spirit of congressional direction,” indicated that it found the legal status of the Roadless Rule in Alaska to be questionable. In a news release regarding the Tongass exemption, USDA stated that the State’s ANILCA claim threatened federal land use decisions in Alaska beyond the Tongass. ER 177. While exempting the Tongass would not resolve legal issues raised in Wyoming and elsewhere, such a rule would bring certainty to the Tongass – the nation’s largest and most controversial national forest. There is nothing “implausible” about this.

When USDA promulgated the Tongass Exemption, the Roadless Rule had been set aside by court order. ER 77. In addition to resolving Alaska’s legal

challenge against the Roadless Rule, USDA also provided direction in this rulemaking about whether the Roadless Rule should apply to the Tongass in the event it was reinstated by a court. *Id.*

In 2005, this chain of events played out in the federal courts exactly as USDA had envisioned. In *Lockyer*, a district court in California invalidated the State Petitions Rule, which had replaced and effectively repealed the enjoined Roadless Rule, and ordered reinstatement of the Roadless Rule. The plaintiffs in that case contended that the Roadless Rule should be reinstated nationwide, including in Alaska. The court reviewed the Tongass Exemption and found that the rule provided legal certainty that the Roadless Rule was not to apply to the Tongass. This Court affirmed that decision. *See generally California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F.Supp.2d 874, 917 (N.D. Cal. 2006), *aff'd*, 573 F.3d 999 (9th Cir. 2009).

Given that this Court already has relied upon the legal certainty provided by the Tongass Exemption that the Roadless Rule should not apply to the Tongass when the State Petitions Rule was invalidated, the district court erred in finding it “implausible” that the Tongass Exemption could ever provide legal certainty.

II. THE TONGASS EXEMPTION RULEMAKING COMPLIED WITH THE NATIONAL ENVIRONMENTAL POLICY ACT.

The district court did not address Greenpeace’s claim that USDA violated NEPA by failing to prepare a supplemental environmental impact statement

(“SEIS”) and by relying on the alternatives in the 2001 FEIS for the Roadless Rule. ER 30. If this Court reverses the district court ruling on violations under the APA, it should also affirm USDA’s promulgation of the Tongass Exemption in compliance with NEPA. This Court may affirm USDA’s rulemaking on the NEPA claims under the *de novo* standard of review without remand to the district court. *See, e.g., Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (holding that a circuit court of appeals has discretion to rule on matters not decided below).

Greenpeace argued below that USDA was required under NEPA to prepare an SEIS and consider a new range of alternatives. This argument is incorrect because USDA undertook the Tongass Exemption rulemaking in order to reconsider its earlier selection from the Tongass Alternatives considered in the NEPA process.

In the Roadless rulemaking, the USDA recognized that the Tongass is unique and that the Roadless Rule would create special challenges and hardships in the forest. ER 98. As a result, it considered four alternatives for application of the Roadless Rule in the Tongass, ranging from complete exemption to no exemption. ER 241-244. In the Roadless DEIS, its preferred alternative was to exempt the Tongass and defer a final decision on applying the rule in the Tongass until 2004. ER 244-246. However in the FEIS, it changed its preferred Tongass alternative to Tongass Not Exempt. ER 208.

Contrary to Greenpeace's argument, the purpose of the Tongass Exemption rulemaking was not to consider how best to mitigate the hardships that would befall the Tongass under the Roadless Rule. Rather, the purpose of the Tongass Exemption rulemaking was to consider whether the previously selected Tongass alternative was appropriate in light of USDA's re-evaluation of Congress's intent as expressed in ANILCA and TTRA. ER 75. Given that USDA was reconsidering whether it had selected the correct alternative rather than seeking to mitigate hardships, it correctly considered the original four alternatives rather than devising a new set of alternatives. USDA prepared a Supplemental Information Report that explains in detail that no changes had occurred between the Roadless and Exemption rulemakings that necessitated an SEIS. ER 178-194.

The time to raise concerns with the lack of an appropriate range of alternatives was during the public comment phase of the Tongass Exemption rulemaking. The record in this case does not indicate that Greenpeace or anyone else raised the issue that an SEIS was needed because the Tongass Exemption rulemaking was for a different purpose than the original Roadless rulemaking, or because inadequate alternatives had been considered. ER 80. Although some commenters stated that changed circumstances required an SEIS, it was apparently clear to all that the Tongass Exemption rulemaking was a reconsideration of the Tongass alternatives set forth in the original rulemaking. Having failed to raise

these issues during the administrative process, Greenpeace has waived the argument. *Dep't of Transp. v. Public Citizens*, 541 U.S. 752, 764-65 (2004). Even if not waived, Greenpeace's NEPA arguments are without merit.

III. APPLYING THE ROADLESS RULE TO THE TONGASS IS AN INAPPROPRIATE REMEDY.

The Court need not reach the question of whether the district court fashioned an appropriate remedy because USDA promulgated the Tongass Exemption Rule in full compliance with the APA and NEPA. However, even if the Court affirms the district court's holding that USDA actions in promulgating the Tongass Exemption were arbitrary and capricious, it should reverse the district court's reinstatement of the Roadless Rule.

The district court disregarded USDA's explicit statement in the Tongass Exemption ROD that the Roadless Rule should not apply to the Tongass even "if the roadless rule were to be reinstated by court order." ER 77. As cited by the district court, on May 13, 2005, USDA reaffirmed its intention that the Tongass continue to be managed under the forest plan when it promulgated the State Petitions Rule, which repealed the then-enjoined Roadless Rule. ER 14. USDA stated in the final State Petitions ROD not only that the current forest plan should govern Tongass management, but also that the State Petitions Rule negated the need for further Tongass-specific rulemaking. *Id.* In effect, USDA stated that the Tongass Exemption was to be permanent. USDA's intent to manage the Tongass

indefinitely without the restrictions of the Roadless Rule could not be more certain.

When the court issued its decision, the Roadless Rule was the subject of a nationwide injunction. *Wyoming*, 570 F. Supp. 2d 1309, *rev'd*, No. 09-8075 (10th Cir. Oct. 21, 2011). At the time of promulgation of the Tongass Exemption, the Roadless Rule was also subject to a nationwide injunction by the District Court in Wyoming. *Wyoming*, 277 F.3d 1197, a decision later vacated on mootness grounds by the Tenth Circuit after USDA effectively repealed the rule. *Wyoming*, 414 F.3d 1207.

The district court based its choice of remedy on *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). While *Paulsen* supports the proposition that the rule previously in force should be reinstated when an agency rule is invalidated, it also makes clear that such prior rule will not be reinstated if it has also been declared invalid. *Id.* at 1008. At all relevant times in this case, the only court to ever rule on its merits has twice held it is invalid and issued nationwide injunctions prohibiting its application.

Before promulgation of the Tongass Exemption, while the Roadless Rule was enjoined, USDA managed the Tongass primarily in accordance with the then-governing land and resource management plan. ER 76. Under this Court's decision in *Paulsen*, the district court should have reinstated the *status quo* at the time of promulgation of the Tongass Exemption, which would be USDA

management under the land and resource management plan. To substitute a regulation that was not applicable at the time of promulgation of the Tongass Exemption and that was enjoined at the time of the decision was an abuse of discretion.

There is no legal basis for reinstatement of the Roadless Rule on the Tongass, and the State respectfully requests this Court to reverse the district court on remedy.

CONCLUSION

For the reasons stated above, the Court should reverse the district court's holding that USDA promulgated the Tongass Exemption Rule in violation of the APA, and should affirm the validity of the Tongass Exemption.

If this Court affirms the district court's holding that the Tongass Exemption was promulgated in violation of the APA, the Court should find that application of the Roadless Rule to the Tongass is an inappropriate remedy and an abuse of the district court's discretion.

Alternatively, the Court should remand the case to the district court with instructions to remand the matter to USDA to allow the agency to determine how to best manage its national forest. Management of the Tongass under the existing Tongass Land Management Plan, which has been in effect since 2008, would be appropriate in the interim.

RESPECTFULLY SUBMITTED this 25th day of October, 2011.

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