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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. THE USDA'S DECISION TO EXEMPT THE TONGASS FROM THE ROADLESS RULE WAS NOT ARBITRARY OR CAPRICIOUS........3

A. The Significance of Congressional Direction in the Tongass Exemption Rulemaking 4

B. The Tongass Exemption Did Not Provide an Expiration Date.............11

C. The Rule Resolves Legal Uncertainties Regarding the Tongass 12

D. USDA's Jobs Rationale is Reasonable and Supported by the Record 15

E. The USDA Rationale on Community Connections is Reasonable and Supported by the Record...17

F. The Tongass is Adequately Protected without the Roadless Rule 21

II. THE TONGASS EXEMPTION COMPLIED WITH NEPA.........................23

III. THE DISTRICT COURT FAILED TO CONSIDER ALTERNATIVE REMEDIES..24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,
462 U.S. 87, 103 (1983)..........16

Chevron U.S.A., Inc. v. Natural Resource Defense Council,
467 U.S. 837, 842 (1984)..........4, 10

F.C.C. v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009) 1, 2, 3

Lands Council v. McNair, 357 F.3d 981, 988 (9th Cir. 2008) (*en banc*) 16

Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 917 (N.D. Cal. 2006),
aff'd, 575 F.3d 999 (9th Cir. 2009)..........12, 14, 25, 26, 27

Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29, 42 (1983)..........1

Natural Res. Defense Council v. U.S. Forest Serv., 4212 F.3d 797,
808-09 (9th Cir. 2005)..........9

Statutes

16 U.S.C. § 1604..........26

16 U.S.C. § 3101..........2

16 U.S.C. § 539(d)..........2

Regulations

36 C.F.R. §§ 294.20-14..........1

36 C.F.R. § 294.14(d)..........2

66 Fed. Reg. 3244..........1

68 Fed. Reg. 75136..........2

INTRODUCTION

This appeal concerns a federal agency's ability to reconsider a prior decision in light of litigation that caused it to question whether its current course best represented the letter and spirit of congressional direction. As the Supreme Court has recognized, "regulatory agencies do not establish rules of conduct to last forever and . . . an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (internal quotations and citations omitted). When an agency reconsiders and changes its prior position, it must show that there are "good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

> But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. *Id.*

The policy in this case is the "Roadless Rule,"[1] as applied to the Tongass National Forest, with the Roadless Rule having been intended to preserve over 50 million acres of national forest in a wilderness-like state by prohibiting road construction and timber harvest. At the start of the rulemaking process, the United States Department of Agriculture (USDA) proposed to exempt the Tongass

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[1] See 36 C.F.R. §§ 294.20-14 (2001); 66 Fed. Reg. 3244, ER 82-116.

National Forest (Tongass) from the policy. USDA's position regarding the Tongass shifted multiple times throughout the rulemaking process, and then, despite legal, socio-economic and other concerns clearly reflected in the draft environmental impact statement (DEIS) and the final environmental impact statement (FEIS), USDA adopted a final rule that immediately applied the Roadless Rule to the Tongass. The State challenged the USDA's final decision ultimately causing USDA to reconsider whether application of the Roadless Rule to the Tongass was appropriate.

In reconsidering its prior position and adopting a new rule that exempted the Tongass from the Roadless Rule entirely,[2] USDA clearly recognized that it was making a change in policy and its reasons for making that change were completely rational. *See F.C.C.*, 129 S. Ct. at 1812 (stating that the federal agency clearly recognized its new course and the reasons given for the new direction were entirely rational). In light of the congressional direction provided in the Alaska National Interest Land Conservation Act (ANILCA)[3] and the Tongass Timber Reform Act (TTRA)[4] regarding Tongass management, as well as the site-specific concerns identified in the original rulemaking, the agency concluded that the better course is to continue management under the Tongass Land Management Plan

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

[3] 16 U.S.C. § 3101.

[4] 16 U.S.C. § 539(d).

without the additional restrictions of the Roadless Rule. This policy change is clearly permissible under the applicable statutes, there are "good reasons" for the change, and the agency clearly articulated its reasons for that change in the Record of Decision (ROD) for the 2003 "Tongass Exemption." Its decision should therefore be upheld.

ARGUMENT

I. THE USDA'S DECISION TO EXEMPT THE TONGASS FROM THE ROADLESS RULE WAS NOT ARBITRARY OR CAPRICOUS.

When an agency reflects on a prior decision and decides to change course and implement a new policy, that agency does not need "to provide a more detailed justification than what would suffice for a new policy created on a blank slate." *F.C.C.*, 129 S. Ct. at 1811 (2009). In challenging the Tongass exemption, Greenpeace argues that USDA's reasons for its new policy contradict factual findings previously made, and therefore, the agency must "provide a more detailed justification." *See id.* (stating that, in limited circumstances, such as when a "new policy rests upon factual findings that contradict those which underlay its prior policy, an agency may need to provide a more detailed justification" for its new policy). Greenpeace's arguments are unavailing. First, the new policy was not a result of contradictory factual findings, it was a result of the agency reweighing factors already outlined in the DEIS and FEIS in light of congressional directives

applicable specifically to Alaska. Second, despite Greenpeace's arguments to the contrary, the question is not whether the reasons for the new policy are *better* than those for the old policy, the question is whether USDA provided "good reasons" for a new policy and that the agency believes that this policy presents a better course going forward. The ROD for the Tongass Exemption reflects that the agency believed the best way to implement congressional directive was to exempt the Tongass from the Roadless Rule until further rulemaking could take place. The agency's decision is reasoned, well-justified, and in accordance with the statutory requirements. The district court therefore erred in finding the agency's actions arbitrary and capricious.

A. The Significance of Congressional Direction in the Tongass Exemption Rulemaking.

The agency is entitled to broad discretion when implementing the intent of Congress. Under *Chevron U.S.A., Inc. v. Natural Resource Defense 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.

The Tongass Exemption ROD explicitly states that "[t]his final rule reflects the Department's assessment of how to best implement the letter and spirit of congressional direction." ER 81. This sentence is in a paragraph that begins

"[t]hese statutes provide important Congressional determinations, findings, and information relating to management of National Forest System lands on the Tongass National Forest, and were considered carefully during this rulemaking." *Id.* This paragraph is in a section under the heading "*Alaska National Interest Lands Conservation Act (ANILCA.)*" *Id.* The entire section is devoted exclusively to the significance of ANILCA and TTRA to management of the Tongass and to this rulemaking. *Id.*

Despite the clear and direct reference to ANILCA and TTRA in this section, Greenpeace claims that USDA's reference to its assessment of how to best implement the letter and spirit of congressional direction does not include direction provided in ANILCA or TTRA but rather refers to "seven other statutes, including NFMA [National Forest Management Act] and MUSYA [Multiple Use and Sustained Yield Act], but not ANILCA or TTRA." Dkt. 25 at 36. Greenpeace notes that these are the seven statutes USDA cited as authority for the agency to conduct rulemaking. *Id.* However, unlike ANILCA and TTRA, none of these seven statutes provide specific guidance to USDA on management of the Tongass. While ANILCA and TTRA are not the basis of the general rulemaking authority of USDA, they do provide congressional mandates and guidance to USDA on

management of lands in Alaska, including the Tongass.[5] Where USDA states, "[t]hese statutes provide important Congressional determinations, findings, and information relating to management of National Forest System lands on the Tongass National Forest and were considered carefully during this rulemaking" and the "final rule reflects the Department's assessment of how to best implement the letter and spirit of congressional intent," it is plainly a reference to ANILCA and TTRA. ER 81.[6]

Greenpeace attempts to minimize the significance of USDA's clear statement on the importance of congressional intent in this rulemaking by attacking where USDA placed its ANILCA discussions within the ROD. Dkt 25 at 36. Greenpeace claims that because at least part of the discussion on ANILCA and TTRA is in a response to comments section of the ROD, it carries no weight and should simply be dismissed by the Court. Arguing for an unreasonably rigid and inaccurate reading of the ROD, Greenpeace claims that any rationale not explicitly

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[5] In the ROD for the 2008 amendment to the Tongass Land Management Plan, USDA explains its "statutory obligation pursuant to TTRA to seek to meet market demand for timber from the Tongass." SER 306-310.

[6] The State contends that NFMA and MUSYA support USDA's decision to exempt the Tongass from the Roadless Rule. These statutes provide no guidance specific to the Tongass, but they identify timber production as an important purpose among the congressionally-recognized multiple uses of a forest. Greenpeace fails to identify any NFMA or MUSYA language that specifically direct USDA to a decision to close nearly all of the largest national forest to virtually all resource development.

listed in the section titled "Why is USDA Going Forward With This Rulemaking" cannot be considered part of USDA's rationale in support of the Tongass Exemption. Dkt. 25 at 35. This claim is wrong.

First, the purpose of the "Going Forward" section of the ROD was primarily to explain the appropriateness of the rulemaking even in light of a federal court's decision to set aside the Roadless Rule. ER 77. Had the purpose been to set forth an exclusive list of rationales for the rule, the heading would have more likely been "USDA's Rationale for this Rulemaking."

Second, Greenpeace mischaracterizes this section of the ROD when it states the "ROD unambiguously identifies a set of specific social and economic rationales for the action, not including ANILCA or TTRA." Dkt. 25 at 35. The opening sentence in the section relied upon by Greenpeace reads in its entirety:

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

ER 76. To claim that this ROD language unambiguously identifies the specific rationales for the rulemaking and those rationales do not include guidance from ANILCA and TTRA is simply wrong. Although the section may not specifically identify ANILCA and TTRA by name, the section should not be read in a vacuum,

and it is clear from the context that USDA considered ANILCA and TTRA in promulgating the Tongass Exemption. USDA specifically identifies the factors and issues raised in the "comments received" — which included an extensive discussion on ANILCA and TTRA — as well as the "litigation over the last two years" as a basis for its rule. *Id.* Furthermore, in the opening section of the ROD, USDA explains that this rulemaking is the result of an agreement to settle a legal challenge based largely on the State's claim that the Roadless Rule as applied to the Tongass violates ANILCA. ER 75. Certainly the very litigation that prompted this rulemaking, and its ANILCA and TTRA claims, is a significant part of the "litigation over the last two years." ER 76. If there were any doubt, USDA explicitly incorporated all of the agency's reasoned explanation contained in the preamble by concluding that "[f]or the reasons identified in this preamble, the department has decided to select the Tongass Exempt Alternative . . ." ER 83.

Greenpeace implies that USDA disagrees with the State and the Alaska Forest Association, Inc. on the role of congressional direction from ANILCA and TTRA because the USDA briefing below was silent on the issue. Dkt. 25 at 35. Such an inference is unfounded, and even if true, not relevant to whether USDA's decision was reasoned and within the applicable statutory framework. Even if USDA does not want to concede that ANILCA and TTRA *prohibited* application of the Roadless Rule to the Tongass, that does not negate

the fact that the agency clearly looked at the congressional directive provided within those two statutes and concluded that exempting the Tongass would be the best course going forward.

In any event, Greenpeace's arguments on the statutory construction of ANILCA and TTRA are not relevant to this appeal.[7] The question of whether the underlying Roadless Rule was validly promulgated as to application in Alaska turns primarily on the legal analysis of the record for the 2001 Roadless Rule. As noted in the State's opening brief, the validity of the 2001 Roadless Rule is not before this Court, but is the subject of a separate legal action. Dkt. 15-1 at 20. Although the State intends to argue in that case that ANILCA and TTRA preclude application of the Roadless Rule in Alaska, USDA did not explicitly proffer legal

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[7] The State vehemently disagrees with Greenpeace's statutory analysis, which runs afoul of governing Ninth Circuit case law. Greenpeace argues that meeting timber demand is subordinate to multiple-use management, but ignores the fact that timber production is one of the primary uses Congress established for our national forests and is to be included among the multiple uses. Dkt. 25 at 32-33. Indeed, with the unique TTRA overlay to forest management on the Tongass, this Court has held that the Forest Service must strive particularly carefully to properly balance multiple use goals on the Tongass – including "recreation, environmental protection and timber harvest" – without elevating any one leg of "this tripodal balance" above the others. *Natural Res. Defense Council v. U.S. Forest Serv*., 4212 F.3d 797, 808-09 (9th Cir. 2005). Only four percent of the total Tongass is designated suitable for commercial timber harvest and about one-half of that is in roadless areas. ER 76. Applying the Roadless Rule to the Tongass makes 98 percent of the 17 million acres of the forest off-limits to timber production and largely starves the timber industry out of existence. This approach to management is in direct conflict with the congressional intent expressed in ANILCA, TTRA, and MUSYA.

preclusion as a rationale for the Tongass Exemption but rather relied on congressional guidance from these statutes.

USDA looked to ANILCA for direction on the proper balance between protection of Alaska land and multiple use management that provides "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." ER 81. From TTRA, USDA drew congressional guidance that it is to "seek to provide a supply of timber from the Tongass" to meet both annual demand and the planning cycle demand. *Id.* USDA then concluded that exempting the Tongass was the best way to implement the "letter and spirit" of this congressional direction. *Id.* Regardless of whether the congressional directives on "balance" and "meeting demand" are legal mandates or exhortations, it is entirely appropriate for USDA to consider and follow these directives in such an important rulemaking on the Tongass. Implementing even the non-mandatory direction of congress is entitled to broad discretion upon judicial review.

In sum, USDA provided a very reasonable explanation as to how congressional guidance on the proper balance of Tongass preservation and economic development such as timber harvest guided its decision to exempt the Tongass. Under *Chevron*, this rationale alone is sufficient to affirm the USDA rulemaking.

B. The Tongass Exemption Did Not Provide an Expiration Date.

Greenpeace argues that nothing in the ROD suggests that USDA meant the Tongass Exemption to be "indefinite," and therefore USDA cannot rely on the use of long-term potential job loss to support a "temporary" rule. Dkt. 25 at 39. Although USDA meant the Tongass Exemption to be temporary, providing a bridge until the agency completed a final rule on the applicability of the Roadless Rule on Alaska, it is clear from the context of the ROD that the agency was mindful of the fluid legal situation surrounding the Roadless Rule generally. The most in-depth and definitive discussion in the ROD on the temporal nature of the Tongass Exemption is found in the section captioned "Changes between Proposed Rule and Final Rule." ER 77. Here, USDA explains that it will proceed with the final rulemaking on the application of the Roadless Rule in Alaska taking "numerous factors into consideration, including the outcomes of ongoing litigation" such as the setting aside of the Roadless Rule by a federal court in Wyoming. *Id*. With the Roadless Rule set aside nationwide, USDA "determined that the best course of action is to clarify that the duration of this Tongass-specific rulemaking will last until completion of rulemaking efforts associated with the application of the roadless rule in Alaska." *Id.*

This Court has in effect already upheld the USDA's intent that the Tongass Exemption remain in place indefinitely until the final resolution of the

status of the Roadless Rule in Alaska, and in so doing concluded that the Tongass Exemption is not "short-term." The plaintiffs challenging the State Petition Rule raised the issue of the temporary nature of the Tongass Exemption in *Lockyer*. *See* Dkt. 15.1 n. 9. This Court affirmed the district court's holding that it was reasonable for USDA to have never completed the rulemaking for a "permanent" Tongass rule as the repeal of the Roadless Rule had obviated the need and the Tongass Exemption therefore did not expire. *Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 917 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009).

USDA intended the Tongass Exemption to be in effect until it could implement a permanent decision on the Roadless Rule in Alaska. The ROD discussion regarding how changing circumstances may affect such future rulemaking is clear evidence that USDA was well aware the exemption may not be "short-term" at all. Therefore, the district court erred by substituting its judgment and re-analyzing the record using unsupportable "short-term" assumptions.

C. The Rule Resolves Legal Uncertainties Regarding the Tongass.

Greenpeace argues that the Tongass Exemption cannot possibly reduce legal conflict and therefore is not a rational basis for the exemption. Dkt. 25, 54-57. Greenpeace is mistaken.

First, Greenpeace argues that a "short-term" rule cannot by its very nature provide certainty. Dkt. 25 at 54. As discussed above, the Tongass

exemption was meant to be in place until a permanent decision was reached on the applicability of the Roadless Rule to Alaska. USDA recognized that it might not be a short-term rule and therefore did not apply a "short-term" analysis. ER 77.

Next, Greenpeace attempts to cloud the issue of what uncertainties USDA addressed with the Exemption by citing the ROD language on "various lawsuits." Dkt. 25 at 37, 54. This language is found in the ROD section on why the agency is "Going Forward with this Rulemaking." ER 76. As discussed above, the purpose of this section is largely to explain why USDA proceeded with a rulemaking to exempt the Tongass from a rule that had already been set aside by a federal court. ER 77. When read in its proper context, it is clear that USDA was concerned with the status of the Tongass if the "various lawsuits" resulted in the Roadless Rule being reinstated nationwide. In that event, the status of the Roadless Rule in the Tongass would again be uncertain due to the unresolved ANILCA, TTRA and other claims raised in the State challenge to the application of the Roadless Rule to Alaska. Therefore, to provide certainty on the status of the Roadless Rule in the Tongass, USDA proceeded with the rulemaking to exempt the Tongass.

Greenpeace argues that legal uncertainties raised in the State's lawsuit cannot be part of the rationale for the Exemption rulemaking because the case was dismissed prior to the rulemaking. Dkt. 25 at 37. But under the terms of the

settlement agreement, the State was free to re-file its case if dissatisfied with the "pace or substantive result" of the rulemaking. ER 148. In other words, USDA acknowledged that the State's lawsuit created uncertainties as to whether the Roadless Rule could legally be applied to the Tongass, and the State was free to re-file these claims if it was dissatisfied with the ultimate result of the Tongass Exemption rulemaking.

USDA made no claims in the ROD that the Roadless Rule will reduce uncertainty about the application of the rule anywhere except in the Tongass. In addition, there is no claim that the Tongass Exemption can or will reduce litigation surrounding any individual timber sale in the Tongass. Rather, USDA claimed that the Tongass Exemption created one legal certainty: if the Roadless Rule is reinstated by any court, the Tongass is to be exempt. ER 77.

As USDA anticipated might happen, a court reinstated the Roadless Rule on a nationwide basis. *See Lockyer v. USDA,* 459 F. Supp. 2d 874 (N.D. Cal. 2006) a*ff'd,* 575 F.3d 999 (9th Cir. 2009). In response to the plaintiffs' argument that the rule should also be reinstated on the Tongass, the court looked to the Tongass Exemption after striking down the State Petitions Rule and held the Tongass Exemption had not expired. *Id*. at 916. Thus, on the very issue USDA anticipated, the court looked to the Tongass Exemption and found legal certainty.

Nevertheless, Greenpeace claims it is "palpably irrational" and "implausible" that the Tongass Exemption could provide any legal certainty, despite the record to the contrary. Dkt. 25 at 54-55. Greenpeace attempts to cloud the issue with broader legal uncertainties that USDA never contemplated resolving with the Tongass Exemption.

The Tongass Exemption definitively resolved the legal question of whether a revived Roadless Rule would be applicable in the Tongass. The district court therefore erred in finding that reducing legal uncertainty was not a reasonable rationale for the Tongass Exemption.

D. USDA's Jobs Rationale is Reasonable and Supported by the Record.

Greenpeace misconstrues the facts and USDA's rationale in determining that application of the Tongass Rule would result in job loss for the State of Alaska. First, Greenpeace implies that in certain years the Southeast Alaska timber industry was sustained by only 44 MMBF of timber annually. Dkt. 25 at 41. Even in 2002, when the Tongass harvest hit its low point of 34 MMBF, the total harvest in Southeast Alaska was 211 MMBF. ER 185. During these lean times for the mills, the State was supplying significant timber to the industry to bridge the gap until USDA once again made more federal timber available. Dkt. 15.1 at 27; ER 173-174. The quantities made available by the State during this period are not sustainable, *id.*, and the Tongass area timber industry cannot be

sustained with 44 MMBF annually from the national forest. Dkt. 25 at 41; SER 306-307.

Greenpeace correctly states that the USDA projects a maximum annual harvest under the Roadless Rule of approximately 50 MMBF annually, but ignores the corresponding annual demand estimate of 124 MMBF. USDA thoroughly explained in the ROD and in the Supplemental Information Report (SIR) why the annual demand estimate of 124 MMBF derived in the Roadless Rule FEIS remained valid in 2003. ER 80, 185-188. Offering no real explanation as to why the USDA analysis is flawed, Greenpeace asks this Court to throw out the expert analysis and perform its own analysis based on a couple of years of low actual harvest during a period USDA considers an "aberration." ER 80. The analysis of timber market demand is clearly a technical matter well within the agency's expertise and as such USDA's determination that the annual market demand is 124 MMBF is entitled to significant deference. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Lands Council v. McNair*, 357 F.3d 981, 988 (9th Cir. 2008) (*en banc*).

In the SIR, USDA also fully explains and confirms its 2000 FEIS calculation of job loss based on a projected annual timber shortfall of 75 MMBF. ER 185-189. Again, Greenpeace does not offer an explanation as to why this Court should reject the expert analysis by the agency, other than to suggest that it

is invalidated by a cyclic market downturn that USDA considers an aberration. USDA's estimates of timber market demand and potential job loss are both entitled to substantial deference and are not invalidated by a cyclic downturn. The district court erred in finding that USDA's rationale of preventing job loss was unreasonable.

E. The USDA Rationale on Community Connections is Reasonable and Supported by the Record.

As an initial matter**,** Greenpeace overstates the degree of USDA reliance on community connections as a rationale for the Tongass Exemption. In fact, applying Greenpeace's logic that ANILCA and TTRA were never cited as rationales by USDA requires a conclusion that community connections were also never cited.

Greenpeace claims the "Exemption ROD unambiguously identifies a set of social and economic rationales for the action, not including ANILCA or TTRA." Dkt. 25 at 35. This unambiguous set of rationales is, according to Greenpeace, set forth in the section explaining why USDA is going forward. *Id*. at 23. Greenpeace then states that this set of rationales is timber-related employment, road and utility connections, and litigation uncertainty. *Id*. at 23-24. However, the section cited by Greenpeace actually lists economic and social hardship, comments received, and litigation over the last two years as reasons for going forward. ER 76. As discussed above, it is true that ANILCA and TTRA are not specifically

listed in this section on "going forward," but references to road and utility connections are also conspicuously absent. *Id*. Greenpeace cannot have it both ways. If it insists on arguing that "economic and social hardship" is to be read as encompassing community connections, then certainly "comments received" and "litigation over the last two years" must be read to include ANILCA and TTRA concerns as reasons for going forward. ER 76. More fundamentally, USDA specifically stated both at the outset and conclusion of the ROD that the purpose for the Tongass Exemption included all of the reasons proffered in the preamble. *See* ER 76 ("This final rule has been developed in light of the factors and issues described in this preamble . . ."); ER 83 ("For the reasons identified in this preamble, the Department has decided to select the Tongass Exempt Alternative . . .").

Nevertheless, although USDA discusses community connections as a social and economic concern elsewhere in the ROD, the matter receives far less emphasis than job loss and the issues raised by ANILCA and TTRA. The primary argument raised by Greenpeace on community connections is that USDA reversed its factual findings on road and utility connections without adequately explaining such reversal. Dkt. 25 at 43. However, USDA states that the social and economic concerns weighed in the Tongass Exemption rulemaking are those "previously

disclosed" in the Roadless Rule rulemaking. ER 76. USDA does not explain any changes in factual findings because there were none.

In 2001, USDA "decided that ensuring lasting protection of roadless values on the Tongass outweighed the attendant socioeconomic losses." ER 78. In 2003, USDA reweighed those same socioeconomic costs against the benefits of the Roadless Rule and concluded that the Tongass should be treated differently than other forests. *Id.* Congressional guidance on the balance of preservation and development provided in ANILCA and TTRA significantly influenced the reweighing of these same factors. ER 80-81.

In an attempt to create an apparent reversal on factual findings regarding community connections, Greenpeace quotes the USDA statement that "the roadless rule significantly limits the ability of communities to develop road and utility connections." Dkt. 25 at 43. Greenpeace then argues there is a lack of evidence in the record to support the finding of a significant limitation. *Id.*

The context of this statement is important. The paragraph containing this statement is describing Southeast Alaska communities in comparison to other United States communities. ER 76. USDA notes that Tongass communities are "nearly surrounded on land by inventoried roadless areas" and therefore the Roadless Rule "significantly limits the ability of communities to develop road and utility connections that almost all other communities in the United States take for

granted." *Id.* USDA did not intend this as a "factual finding" based on concrete examples of currently proposed projects. Rather, USDA is simply pointing out the obvious; these Tongass communities are unique in being completely surrounded by land subject to the Roadless Rule restrictions. They are therefore impacted differently than communities elsewhere in the country that may share some border with a roadless area.

Greenpeace makes a similar attempt to turn a second statement into a reversal of a finding of fact. Dkt. 25 at 44-45. In a discussion of the history of road development in the Tongass, USDA makes the observation that precluding road building for timber harvest "reduces future options" for potentially upgrading the logging roads at a later time. ER 82. The simple truth in this statement that you cannot upgrade a road that was never built appears irrefutable. USDA adds that the upgrade of such timber roads "may be critical to economic survival of many of the smaller communities in Southeast Alaska." *Id.* There is no new finding of fact in these statements that reverses a prior finding. USDA is making the point that permanently reducing future options today may have economic consequences sometime in the future, even if such impacts are not obvious today. This paragraph concludes by stating that the Tongass Exemption will allow each utility or transportation proposal to be evaluated on its own merits rather than be foreclosed forever by the Roadless Rule. *Id.*

The entire USDA discussion of community connections is one of policy consideration, and not a reversal of factual findings. To the extent that community connections were part of the socioeconomic rationale relied upon for the Tongass Exemption, USDA appropriately considered the same concerns that were before it in the Roadless Rule rulemaking. The district court erred in finding to the contrary.

F. The Tongass is Adequately Protected without the Roadless Rule.

Greenpeace makes an unsupportable argument that the Tongass Land Management Plan does not provide a basis for upholding the Tongass Exemption. Dkt. 25 at 56-58. This argument presumes that USDA must automatically select the most environmentally protective alternative, an idea that flies in the face of multiple uses of our forest resources and is without legal support. Greenpeace attempts to support this position by citing the FEIS and a court finding that not exempting the Tongass is more environmentally protective than exempting it. *Id.* In the Exemption ROD, USDA did not dispute that "Tongass Not Exempt" remains the environmentally preferred alternative. ER 83. But there is no legal requirement that the agency choose the most environmental preferred alternative, especially in the face of the other policy considerations applicable in Southeastern Alaska.

Contrary to the Greenpeace claim, USDA did not proffer the Tongass Land Management Plan as a "rationale" for the Tongass Exemption. Dkt. 25 at 56-57. Rather the current land management plan, and the other federal protections already in place on the Tongass, were reviewed as part of the balancing between the value of additional environmental protection and the cost to society of the Roadless Rule restrictions. As discussed repeatedly in the ROD, USDA looked to ANILCA for guidance in re-examining the proper balance between preservation and more intensive development. ER 81. USDA also explained that of the 9.34 million roadless acres in the Tongass, even without the Roadless Rule, there is already such extensive protection in place that the Tongass Exemption would only permit timber harvest on 300,000 acres of roadless forest. ER 75.

Furthermore, the 2000 FEIS did not conclude that the Tongass Exempt alternative presented unacceptable environmental risks, but only that the environmental risks under the "Tongass Not Exempt" alternative were lower. ER 220-221.[8] Greenpeace can point to no requirement that USDA must select the alternative with the most restrictive environmental protections when other alternatives do not present unacceptable risks. USDA appropriately considered the

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[8] Regarding wildlife habitat, USDA concluded that, under the existing land management plan for the Tongass, "there is a moderate to high likelihood that habitat conditions will support well-distributed species." ER 220.

level of protection of Tongass roadless areas, both with and without the prohibitions of the Roadless Rule.

II. THE TONGASS EXEMPTION COMPLIED WITH NEPA.

The 2000 FEIS analysis of Tongass Alternatives was not conducted for a "wholly different purpose" than the 2003 Tongass Exemption, and therefore the agency did not violate NEPA when it decided not to prepare an environmental impact statement specifically for the Tongass Exemption.

Greenpeace contends that the real purpose of the Tongass Exemption was to "mitigate asserted socio-economic impacts" including interference with community connections, job loss, and legal uncertainty. *Id* at 62. To be sure, USDA's serious socioeconomic concerns were part of the impetus that caused USDA to move "forward to reexamine" the Roadless Rule. ER 80. Nevertheless, in both 2000 and in 2003, USDA's purpose was exactly the same: decide whether to apply the Roadless Rule prohibitions to the Tongass despite the many significant hardships that will result due to the uniqueness of the Tongass and the state in which it is located. USDA considered the same facts and the same four alternatives for application to the Tongass in each rulemaking. ER 83. USDA also explained multiple times that it conducted a re-weighing of the Tongass Alternatives based on the analysis in the 2000 FEIS and reached a different conclusion in 2003. ER 78, 80.

Nowhere does USDA even hint that it had a more limited purpose of only "mitigating" some of the impacts. Proposing a mitigation rule would not have resolved ANILCA and TTRA claims and would not have satisfied USDA's obligation under the settlement. ER 146-153.

Given that the purpose of the 2003 rulemaking was to reexamine the 2001 Roadless Rule's application to the Tongass, USDA fulfilled its NEPA obligations by completing a thorough SIR that analyzed changes between the two rulemakings and by then relying on the 2000 FEIS. ER 178-194. The SIR concluded that no significant changes required additional analysis before reconsidering the original four Tongass alternatives. ER 82. Greenpeace's NEPA argument is therefore unpersuasive.

The State also joins in and refers the Court to the NEPA argument set forth in the Alaska Forest Association's brief. Dkt. 19-1 at 12-18 (Brief of *Amicus Curiae* at 5-11), which further illustrates the flawed nature of Greenpeace's NEPA argument.

III. THE DISTRICT COURT FAILED TO CONSIDER ALTERNATIVE REMEDIES.

The district court erred in invalidating the Tongass Exemption and reinstating the Roadless Rule on the Tongass. Even if this Court upholds the conclusion that the Tongass Exemption is invalid, the district court abused its discretion by automatically reinstating the Roadless Rule when it was neither the

status quo at the time USDA promulgated the Tongass Exemption nor at the time the district court issued its decision. At the time of the USDA rulemaking on the Tongass Exemption, and when the district court issued its decision to invalidate that exemption, the 2001 Roadless Rule was invalid and enjoined nationwide. The district court failed to give any consideration to the unique circumstances presented in this case in order to fashion a more appropriate remedy.

Greenpeace argues that the district court's decision to reinstate the prior rule was controlled by this Court's decision in *Lockyer,* 459 F. Supp. 2d at 874, a*ff'd,* 575 F.3d at 999 (9th Cir. 2009). In *Lockyer*, this Court held that the general rule of reinstating the prior rule is not automatic and that under special circumstances a departure from the general rule may be warranted. *Id.* at 999. Such circumstances include when the prior rule (here the Roadless Rule) is invalid, has never been in effect or was intended only as a temporary rule, or when the rule held invalid (here the Tongass Exemption) is "an integral part of a regulatory scheme." *Id.* Under the circumstances presented in *Lockyer*, the Court found that the requisite special circumstances were not present because, although the Roadless Rule had only been in effect for a very brief time period, the State Petitions Rule was not an integral part of a regulatory scheme.

This case is distinguishable from *Lockyer* because the special circumstances *are* present when considering the Tongass Exemption. Unlike the

State Petitions Rule, USDA did not intend to repeal the Roadless Rule nationwide by implementing the Tongass Exemption. This exemption was meant only to amend the Roadless Rule by revisiting the original decision to more carefully consider circumstances unique to Alaska. The resulting Tongass Exemption was most certainly an integral part of the regulatory scheme for management of the Tongass National Forest, and thus the rule falls within special circumstances considered by the Court in *Lockyer*.

Central to the regulatory scheme for management of the Tongass is NFMA, 16 U.S.C. § 1604 *et seq.*, the primary statute governing management of the individual national forests. This statute requires USDA to create a forest plan to govern each forest, and all subsequent management actions must be in accordance with the controlling forest plan. 16 U.S.C. § 1604. Significant amendments to a forest plan must go through an extensive public process not unlike a rulemaking. *Id.*

In the case of the Tongass, the record of decision for the 2008 Tongass forest plan amendment acknowledges that the "Forest Service has a statutory obligation to seek to meet market demand for timber from the Tongass" and includes a commitment to meeting timber demand as required by TTRA. SER 306-310. In order to meet timber demand, the forest plan contemplates significant harvest from roadless areas. SER 306. The SIR for the Tongass Exemption

confirms that without the Tongass Exemption, the annual shortfall between demand and harvest will be approximately 75 MMBF, and therefore the objectives set forth in the forest plan could not be met without the Tongass Exemption. ER 185-189. The Tongass Exemption is therefore an integral part of the agency scheme for regulating the Tongass and meets the special circumstances criteria for not reinstating the prior rule.

Because *Lockyer* is readily distinguishable from the facts of our case, Greenpeace wrongly argues that this Court has already rejected a remedy which allows for continued management of the Tongass under the forest plan without the Roadless Rule prohibitions. Dkt. 25 at 71-72. As such, the district court erred when it failed to even consider (or acknowledge) its discretion to order such a remedy. The district court's error is discussed at length by the Alaska Forest Council. Dkt. 19-1 at 18-25 (*Amicus Curiae* Brief at 11-1), and the State wholly concurs in that analysis. Put simply, it was erroneous for the district court to have automatically reinstated the Roadless rule as a remedy without even acknowledging its considerable discretion to fashion a remedy otherwise.

CONCLUSION

USDA's decision to adopt the Tongass Exemption was reasonable and supported by the record. The district court erred by substituting its judgment for that of the agency and by reinstating the Roadless Rule as a remedy. The State

respectfully asks this Court to reverse the district court and reinstate the Tongass Exemption.

RESPECTFULLY SUBMITTED this 21st day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 21, 2011.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

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