Case No. 11-35517

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORGANIZED VILLAGE OF KAKE, et al.,

Plaintiff-Appellees,

v.

U.S. FOREST SERVICE, et al.,

Defendants,

ALASKA FOREST ASSOCIATION, INC.,

Defendant-Intervenor,

and

STATE OF ALASKA,

Defendant-Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
No. CV 09-23-JWS

BRIEF OF AMICUS CURIAE ALASKA FOREST ASSOCIATION, INC. IN SUPPORT OF APPELLANT STATE OF ALASKA'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Alaska Forest Association, Inc. (AFA) is an Alaska nonprofit corporation that does not issue shares to the public or have subsidiaries that issue shares to the public.

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE (CONSENT)

Pursuant to Fed. R. App. P. 29(c)(4), the AFA is one of the oldest trade associations in the State of Alaska and represents more than 120 members having an interest in the public lands of Alaska, including Tongass National Forest lands. The AFA's mission is to advance the restoration, promotion and maintenance of a healthy, viable forest products industry that contributes to the economic and ecological health in Alaska's forests and communities. As such, the AFA is committed to ensuring a reliable and sustainable supply of forest products from Alaska's national forests, particularly the Tongass. AFA and its members believe that management of lands on the Tongass ultimately will dictate not only the health of Alaska's natural resources but also the viability of AFA members' businesses and the economic health of their local communities.

The AFA, which participated in the district court proceedings as a defendant-intervenor, has a direct stake in the federal rule at issue in this case, the

so-called Tongass Exemption which exempted the Tongass National Forest from application of the 2001 Roadless Area Conservation Rule (Roadless Rule). Prior to the district court's reinstatement of the Roadless Rule, only about 4% of the Tongass was available for timber harvest under the current forest plan, with about half of that acreage consisting of roadless areas scheduled for harvest over the current planning cycle. Now, the district court's invalidation of the Tongass Exemption and reinstatement of the Roadess Rule strips away multiple use management options on that 2% of the 17 million acre Tongass. AFA and its members are harmed by fully half of what was previously available for timber harvest under the forest plan being placed off limits by the district court's decision. See generally Exhibit A (Declaration of Owen Graham, AFA Executive Director, filed August 5, 2011 in D.D.C. Case No. 11-cv-01122-RJL).

The AFA's authority to file this brief is based on consent of all parties, none of whom oppose the filing of this brief.

STATEMENT OF AUTHORSHIP AND FUNDING OF BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel authored any portion of this brief, and no party and no party's counsel, nor any other person or entity other

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than AFA and its members, has or is expected to contribute money intended to fund preparing or submitting this brief.

DATED this 1st day of November, 2011.

/s/Julie A. Weis
Julie A. Weis,
Attorney for Alaska Forest Association

I. INTRODUCTION AND INTERESTS OF AMICUS CURIAE.

The Alaska Forest Association (AFA) is one of the oldest trade associations in the State of Alaska and represents more than 120 members having an interest in the public lands of Alaska, including Tongass National Forest (Tongass) lands. Exhibit A at 2 (¶ 3).[1] When a consortium of environmental groups and aligned entities (collectively Greenpeace) filed a lawsuit in U.S. District Court for the District of Alaska challenging the 2003 federal rule that exempted the Tongass from application of the 2001 Roadless Area Conservation Rule (Roadless Rule), AFA quickly sought leave to participate in the lawsuit as a defendant-intervenor alongside defendant-intervenor-appellant the State of Alaska and on the side of the U.S. Forest Service. See Appellant's Excerpts of Record (ER) 252-53 (Docket Nos. 10-14, AFA's intervention filings). AFA was allowed to intervene in the district court, ER 254 (Docket No. 22), and AFA now supports the State of Alaska's appeal.

The State's opening brief sets forth the convoluted history of the Roadless Rule's path through the U.S. legal system. See, e.g., State Opening Brief at 19 n.9 (noting that the Roadless Rule has spent much of its existence not in effect, though it recently was upheld by the Tenth Circuit). Notably, throughout the period of roller

[1] Exhibit A is the Declaration of Owen Graham, AFA Executive Director, filed August 5, 2011 in D.D.C. Case No. 11-cv-01122-RJL in support of AFA's motion to intervene in that case challenging the Roadless Rule. The declaration is provided without its one exhibit, which was the Tongass Exemption settlement agreement found in Appellant's Excerpts of Record at ER 146-50.

coaster public lands jurisprudence involving inventoried roadless areas, the protections for roadless areas on the Tongass have grown only stronger. The governing Tongass Land and Resource Management Plan was revised most recently by way of a conservative 2008 Amendment (2008 Tongass Forest Plan), the development of which involved further intensive analysis of Tongass roadless areas and included extensive public comment, resource analysis, and alternative uses analysis. See, e.g., ER 172 (stating in the 2008 Tongass Forest Plan Final Environmental Impact Statement (EIS) that the first key issue addressed in amending the Tongass Forest Plan was "protecting high-value roadless areas from road development and timber harvest activity in order to protect roadless area values").

From the AFA's vantage point, the 2008 Tongass Forest Plan is so overly protective of roadless areas to the detriment of other forest uses that it runs afoul of governing laws, including those requiring a more balanced approach to multiple use management. See, e.g., Natural Resources Defense Council v. U.S. Forest Serv., 421 F.3d 797, 808-09 & n.22 (9th Cir. 2005) (stating that under the National Forest Management Act, the Forest Service must 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). Even the Forest Service seems to acknowledge that its elevation of conservation goals above

those of other multiple uses has pushed the Alaska wood products industry to the brink of collapse. ER 176 (acknowledging in the 2008 Tongass Forest Plan Record of Decision (ROD) that if the 2008 Tongass Forest Plan is "inadequate to meet the needs of the timber industry over the next 10-15 years, the industry simply will not be around for corrections to be made during the next Plan revision"). The district court's decision in this case, which was erroneous on the merits and an abuse of discretion on the choice of remedy, has pushed the AFA and its members ever closer to the edge of the precipice. See generally Exhibit A at 5-8 (¶¶ 9-16) (describing the difficulties of surviving in an environment where only 1% of the nation's largest national forest is even available for potential timber harvest). The AFA thus joins the State in asking this Court to reverse the district court.

II. SUMMARY OF ARGUMENT.

The district court erred by invalidating and vacating the Tongass Exemption, and by then reinstating the Roadless Rule on Alaska's Tongass National Forest.

Contrary to the district court's determination, and as demonstrated by the State of Alaska in its Opening Brief, the Tongass Exemption was promulgated lawfully under the Administrative Procedure Act (APA). The Tongass Exemption also is wholly lawful under the National Environmental Policy Act (NEPA), a determination the district court did not reach because of its erroneous APA holding. The district court's merits determination thus should be reversed.

Even if this Court were to uphold the district court's conclusion as to the legality of the Tongass Exemption, the district court abused its discretion in reinstating the Roadless Rule on the Tongass. The district court automatically reinstated the Roadless Rule, without any analysis, even though the Roadless Rule had been declared invalid and enjoined nationwide both at the time of the Tongass Exemption's promulgation and at the time of the district court's decision. Contrary to the district court's holding, reinstatement of a prior rule is not an appropriate remedy where the prior rule also has been declared invalid. Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005).

In fashioning a remedy, the district court should have exercised its equitable discretion to determine whether it was appropriate to vacate the Tongass Exemption and, if so, whether it was appropriate to reinstate the Roadless Rule on the Tongass. Instead, the district court took both actions without any consideration of its discretion, and without even acknowledging that it had discretion as to choice of remedy. See, e.g., Sierra Pacific Indus. v. Lyng, 866 F.2d 1099, 1111 (9th Cir. 1989) (stating that under the APA, a court "'may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action'") (quoting Ford Motor Co. v. NLRB, 305 U.S. 364 (1939)). In so doing, the district court abused its discretion and should be reversed.

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III. ARGUMENT.

A. The Tongass Exemption Complies with NEPA.

The State's opening brief demonstrates that the Tongass Exemption properly relied on reasonable assumptions about the effects and/or legality of the Roadless Rule on the Tongass and hence was lawful under the APA's arbitrary and capricious standard of review, 5 U.S.C. § 706(2)(A). See generally State Opening Brief at 11-33. The AFA joins in that argument without reservation. But as the State also points out, the district court did not reach Greenpeace's strained argument that the Tongass Exemption violated NEPA, 42 U.S.C. § 4321 et seq., which alleged the Forest Service did not consider sufficient alternatives to exempting the Tongass National Forest from the Roadless Rule. The AFA supports the State's argument on this topic as well, see State Opening Brief at 33-36, and writes separately to further illustrate the Tongass Exemption's compliance with NEPA.

In adopting the Tongass Exemption, the Forest Service relied on the Roadless Rule EIS which examined the very alternative of exempting the Tongass National Forest from the Roadless Rule's application, along with other Tongass-specific alternatives. ER 205-07 (setting forth the Tongass Not Exempt, Tongass Exempt, Tongass Deferred and Tongass Selected Areas alternatives in the Roadless Rule EIS). Because it is beyond dispute that the Forest Service

conducted a Tongass-specific alternatives analysis in the NEPA process for the Roadless Rule, Greenpeace essentially argued in the district court that the alternative of exempting the Tongass from the Roadless Rule was not a proper alternative to have been considered in the Roadless Rule EIS in the first instance.

The gist of Greenpeace's argument was that the purpose and need for the Roadless Rule was so different from the purpose and need for the Tongass Exemption that the Tongass-specific alternatives in the former, which explored a range of alternatives specific to managing roadless areas on the Tongass, could not support the Tongass Exemption. The logical corollary to that argument is that the Tongass-specific alternatives in the Roadless Rule EIS, or at least the alternative that exempted the Tongass from the Roadless Rule, did not (and could not) support the Roadless Rule's purpose and need. That is an odd argument to make given that at least three of the plaintiff-appellees in this case – the Sierra Club, Natural Resources Defense Council and Defenders of Wildlife – were intervenors who defended a challenge to the 2001 Roadless Rule, including its NEPA analysis, both at the district court level and also as intervenors pursuing their own interlocutory appeal in the Ninth Circuit after the federal defendants declined to defend an adverse preliminary injunction ruling. See generally Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002).

Under NEPA, an agency must "study, develop, and describe appropriate

alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The reasonableness of an agency's alternatives analysis turns not so much on the number of alternatives considered but rather on whether the agency examined all reasonable alternatives. Whether an alternative is reasonable in turn depends on the proposed action's purpose and need. Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815-16 (9th Cir. 1987) (emphasizing that the purpose and need for an agency's proposed action defines the extent of the alternatives analysis that the EIS must include), rev'd on other grounds sub nom., Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

Given appellees' role in defending the Roadless Rule in the Kootenai Tribe case, they apparently had no issue with the reasonableness of the alternatives considered in the Roadless Rule EIS generally, nor more specifically with the reasonableness of the particular set of alternatives that evaluated exempting the Tongass from the Roadless Rule's prohibitions entirely. In addition, though not binding on this Court, the Tenth Circuit recently upheld as reasonable the range of alternatives considered by the Forest Service in the Roadless Rule EIS. Wyoming v. U.S. Dep't of Agric., Nos. 08-8061 & 09-8075, 2011 U.S. App. LEXIS 21288, at *97-98 (10th Cir. Oct. 21, 2011).

Again, the Forest Service in the Roadless Rule EIS considered no less than

four Tongass-specific alternatives for management of roadless areas. ER 205-07. Those four alternatives included Tongass Not Exempt, Tongass Exempt, Tongass Deferred and Tongass Selected Areas. Id. Thus, one of the alternatives considered in the Roadless Rule EIS described the very scenario on review before this Court, namely the Tongass being exempt from the Roadless Rule and instead governed by the current forest plan, regardless of whether the Roadless Rule is generally applicable throughout the United States. ER 206. The remaining Tongass-specific alternatives in the Roadless Rule EIS comprised the requisite reasonable range of alternatives for the exemption approach. ER 205-07.

The NEPA supplemental information report[2] prepared for the Tongass Exemption described the issue this way:

> The Roadless FEIS explored four alternatives for the management of inventoried roadless areas within the National Forest System (Roadless FEIS Vol. 1, 2-5 to 2-14). A subset of alternatives applicable to the prohibition alternatives (Alternatives 2, 3, 4 and the preferred alternative in the Roadless FEIS) were considered (Roadless

[2] An agency need not supplement an environmental document "every time new information comes to light" after the document's completion. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 373 (1989). Instead, a decision whether to supplement an environmental document is based on a "rule of reason" which entails determining whether there is new information "sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered." Id. at 374 (alteration in original). Federal courts have consistently upheld the use of supplemental information reports like the one prepared for the Tongass Exemption for the purpose of making such a determination. See, e.g., id. at 379-85 (upholding agency's use of a supplemental information report to assess the importance of alleged new information in post-EIS documents that discussed the possible environmental effects of a dam).

> FEIS Vol. 1, 2-10 to 2-12). The proposed change to the roadless rule contained in the Federal Register announcement of July 15, [i.e. Tongass Exemption] is equivalent to the nation-wide preferred alternative coupled with the Tongass Exempt option contained in the FEIS.

ER 181. The Tongass Exemption itself explained the situation as follows:

> The agency recognized the unique situation of the Tongass in the discussion of a national roadless policy through the development of the EIS for the roadless rule. . . . the agency developed a full range of alternatives specifically applicable to the Tongass . . . . The tradeoffs involved in these alternatives are fully evaluated in the roadless rule EIS.

ER 78 (68 Fed. Reg. at 75,139). See also ER 82 (68 Fed. Reg. at 75,143) (stating that the Tongass Exemption "is supported by the environmental analysis presented in the roadless rule FEIS, which considered in detail the alternative of exempting the Tongass from the prohibitions of the roadless rule"). Put simply, given that one of the alternatives considered in the Roadless Rule EIS assessed the precise exemption approach that is before this Court, and given that the EIS also assessed a reasonable range of Tongass-specific alternatives to that approach, the Forest Service's reliance on the 2001 Roadless Rule EIS was wholly warranted and complied with NEPA.

Greenpeace also wrongly asserted in the district court (and likely will do so on appeal) that the Forest Service cannot rely on the Roadless Rule EIS to support the Tongass Exemption because the Forest Service in Lockyer was held to have improperly relied on the Roadless Rule EIS, particularly its "no action" alternative,

to support a nationwide State Petitions Rule which permitted any state to petition the Secretary of Agriculture to adopt a rule governing that state's roadless management. See California ex rel. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 905 (N.D. Cal. 2006), aff'd, 575 F.3d 999 (9th Cir. 2009)). Lockyer is readily distinguishable.

First, unlike the fact pattern before this Court, the Roadless Rule EIS did not consider the State Petitions Rule, or anything analogous to it, among its alternatives. Lockyer, 459 F. Supp. 2d at 906-07 (stating that "the 'no action' alternative did not contain a state petitioning process overlay and so cannot substitute for consideration of the State Petitions Rule"). Nor did the Roadless Rule EIS consider a reasonable range of alternatives to the State Petitions Rule. Id. at 907. In contrast, the Roadless Rule EIS fully considered the Tongass Exemption, along with a reasonable range of other Tongass-specific roadless alternatives, as was discussed above.

Second, Lockyer narrowly held that the Forest Service's decision to withdraw the Roadless Rule nationwide could not be supported under NEPA by the Roadless Rule EIS, id. at 905-07, which argument had been offered as an alternative to the primary assertion that the State Petitions Rule was a purely procedural rule and hence rightfully categorically excluded from NEPA analysis requirements. Relative to our case, the Lockyer court in no way considered the

question of whether the implementation of an alternative to exclude the Tongass from the Roadless Rule satisfied NEPA when that very alternative had been assessed in the Roadless Rule EIS. The Lockyer decision thus has limited application in this case, although as the State points out, State Opening Brief at 19 n.9, the Lockyer court correctly acknowledged that the passage of time did not cause the Tongass Exemption to "expire" or lose effect. Lockyer, 459 F. Supp. 2d at 917 (observing that it was immaterial that the "temporary" Tongass Exemption was never replaced by a final rule, "the repeal of the Roadless Rule having made such a final rule unnecessary").

In summary, both for the reasons set forth in the State's Opening Brief and as demonstrated above by the AFA, the Tongass Exemption complies with NEPA.

B. The District Court Abused Its Discretion by Automatically Reinstating the Roadless Rule on the Tongass.

The State's opening brief demonstrates that the Tongass Exemption is legally sound and that the district court erred in holding otherwise. See generally State Opening Brief at 11-36. But even if this Court were to uphold the district court's conclusion as to the legality of the Tongass Exemption, the AFA agrees with the State that the district court abused its discretion in reinstating the Roadless Rule on the Tongass. Id. at 36-38. This is because without any analysis, the district court automatically reinstated the Roadless Rule even though it had been declared invalid

and enjoined nationwide both at the time of the Tongass Exemption's promulgation and at the time of the district court's decision. As this Court has recognized, reinstatement of a prior rule is not an appropriate remedy where the prior rule also has been declared invalid. Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) (holding, after invalidating a rule regarding the early release of certain federal prisoners, that reinstatement of the prior rule was not an appropriate remedy where the prior rule also had been declared illegal).

Under the circumstances of this case, including the fact that the Tongass Exemption had been relied on to govern Tongass land management activities for about eight years at the time of the district court's decision, the district court should have exercised its equitable discretion to determine whether it was appropriate to vacate the Tongass Exemption and, if so, whether it was appropriate to reinstate the Roadless Rule on the Tongass. Instead, the district court took both actions without any consideration of its discretion, devoting only three conclusory sentences to its decision:

> "Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid." "The effect of invalidating an agency rule is to reinstate the rule previously in force." Because the Tongass Exemption is invalid, the Roadless Rule is reinstated on the Tongass.

ER 31. Contrary to the district court's fatalism, the APA did not compel such action. See, e.g., Sierra Pacific Indus. v. Lyng, 866 F.2d 1099, 1111 (9th Cir. 1989)

(stating that under the APA, a court "'may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action'") (quoting Ford Motor Co. v. NLRB, 305 U.S. 364 (1939)).

First, vacatur of a legally-infirm rule is not automatic – courts can and do exercise their equitable discretion *not* to vacate a rule when there is a curable procedural defect. For example, a rule may remain in place where an agency can cure the procedural defect, such as failing to follow notice and comment procedures. See Sugar Cane Growers Coop. v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002) (automatic vacation of agency action "is simply not the law" in response to an APA violation); Fertilizer Inst. v. U.S. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991) ("[W]hen equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy."); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 2005) (citing the Fertilizer case in concluding that "when equity demands, the regulation can be left in place while the agency follows the necessary procedures").

Second, where a legally-infirm rule is vacated, neither the Paulson case cited by the district court nor equity favor replacing it with another legally-infirm rule, i.e. the Roadless Rule. The AFA acknowledges that the Tenth Circuit recently upheld the Roadless Rule. Wyoming v. U.S. Dept. of Agric., Nos. 08-8061 & 09-8075, 2011 U.S. App. LEXIS 21288 (10th Cir. Oct. 21, 2011). But at the time of the

district court's decision in this case, the Roadless Rule had been declared invalid and permanently enjoined on a nationwide basis by the Wyoming District Court. Wyoming v. U.S. Dept. of Agric., 570 F. Supp. 2d 1309 (D. Wyo. 2008). And at the time of the Tongass Exemption's promulgation, the Roadless Rule also had been declared invalid and enjoined nationwide. Wyoming v. U.S. Dept. of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003), vacated on mootness grounds, 414 F.3d 1207 (10th Cir. 2005). Thus, the district court should have exercised its discretion by declining to impose an invalid land management rule on the Tongass. Paulsen, 413 F.3d at 1008 (declining, when fashioning a remedy, to reinstate a prior rule where that prior rule had been ruled invalid). Instead, the district court acted as though it lacked discretion and that the remedy was preordained.

Third, the Supreme Court acknowledged in Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010), that a district court should give an agency the freedom to decide how best to respond if a rule is vacated. See Monsanto, 130 S. Ct. at 2757-59 (so discussing in the context of reviewing a decision that both vacated an order of deregulation and enjoined subsequent agency conduct relating to deregulation). Although decided before Monsanto, the case of Citizens for Better Forestry v. U.S. Dept. of Agric., 632 F. Supp. 2d 968 (N.D. Cal. 2009), illustrates this principle regarding affording an agency flexibility on remand. In Citizens, the district court left to the agency the decision how best to proceed after the court

vacated the Forest Service's nationwide rule for development of forest plans. The court acknowledged that the prior forest planning rule was less than perfect, and that the agency had "expressed in the past its view that the 2000 Rule is unworkable in practice. Accordingly, the agency may choose whether to reinstate the 2000 Rule or, instead, to reinstate the 1982 Rule." Id. at 982.

Here, the district court should have exercised its discretion in a similar fashion, particularly given the agency's express statement in the Tongass Exemption that the Tongass Exemption should apply even in the event that "the roadless rule were to be reinstated by court order." ER 77. Yet the district court failed to even acknowledge that there were options other than reinstating the Roadless Rule – like allowing the Forest Service to explore the better course of either conducting additional analysis to support the Tongass Exemption, or allowing the existing 2008 Tongass Forest Plan to govern the management of Tongass roadless areas. After all, although the AFA believes the 2008 Tongass Forest Plan goes too far in conserving roadless areas, to date the Plan has withstood legal challenge. See generally Southeast Conference v. Vilsack, 684 F. Supp. 2d 135 (D.D.C. 2010).

In the aftermath of the district court's decision, reinstatement of the Roadless Rule on the Tongass has led to renewed litigation. This is not surprising given that the Tongass Exemption was the outgrowth of a rulemaking that itself was the result of a lawsuit and eventual settlement agreement entered into between the State, AFA

and the U.S. Department of Agriculture, among other parties. See ER 146-50. As that settlement agreement made clear, the Forest Service engaged in the Tongass Exemption rulemaking because it quite rightfully had "become concerned about the application of the Roadless Rule to the national forests in Alaska." ER 146.

The State and AFA settled their challenge to the Roadless Rule without prejudice based on the commitment of the Secretary of Agriculture to "publish for notice and comment a proposed temporary regulation that would exempt the Tongass National Forest from the application of the Roadless Rule."[3] ER 146. The promised rulemaking led to the Tongass Exemption, in which the Forest Service explained the foundation of its concerns regarding the Roadless Rule's conflict with the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 et. seq.:

> In passing ANILCA in 1980, Congress established 14 wildernesses totaling 5.5 million acres on the Tongass, and found that this act provided sufficient protection for the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska, and at the same time provided adequate opportunity for

[3] Although the Tongass Exemption excluded Tongass roadless areas from application of the Roadless Rule, it by no means freed those roadless areas from all management restrictions. Rather, the Tongass Exemption subjected roadless areas to the strictures of the then-governing 1997 Tongass Forest Plan. See, e.g., ER 75 (68 Fed. Reg. at 75,136) ("Under this final rule, the vast majority of the Tongass remains off limits to development as specified in the 1997 Tongass Forest Plan."); id. (stating that the Tongass Exemption "also leaves intact all old-growth reserves, riparian buffers, beach fringe buffers, and other protections contained in the 1997 Tongass Forest Plan").

> satisfaction of the economic and social needs of the State of Alaska and its people. Accordingly, the designation and disposition of the public lands in Alaska pursuant to this act were found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition. Congress believed that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, had been obviated by provisions in ANILCA.

ER 81 (68 Fed. Reg. at 75,142). See also id. (further explaining that in the Tongass Timber Reform Act (TTRA), 16 U.S.C. § 539d, in addition to directing the Forest Service to seek to meet timber demand on the Tongass, Congress also established new wilderness areas totaling almost 300,000 acres).[4] Ultimately, the Forest Service acknowledged that the Tongass Exemption embodied the best way to "implement the letter and spirit of congressional direction along with public values." Id. See also id. (further acknowledging that "exempting the Tongass from the prohibitions in the roadless rule is consistent with congressional direction and intent in the ANILCA and TTRA legislation").

Today, the legal infirmities associated with imposing the Roadless Rule on the Tongass remain unchanged. Despite the Tenth Circuit's upholding of the Roadless Rule, the overlay of laws that govern federal land management in Alaska, two of which are unique to the state (ANILCA and the TTRA), cannot be reconciled with application of the Roadless Rule on the Tongass. This information was before

[4] See Pub. L. No. 101-626, 104 Stat. 4426, § 202 (amending section 703 of ANILCA to add additional wilderness areas on the Tongass).

the district court, yet the district court failed to acknowledge it, or even acknowledge that it had discretion in choosing a remedy. Thus, based on the foregoing, and for the reasons set forth in the State's Opening Brief, the district court abused its discretion by vacating the Tongass Exemption and then reinstating the Roadless Rule on the Tongass.

IV. CONCLUSION.

The district court erred by holding unlawful and vacating the Tongass Exemption, and by reinstating the Roadless Rule as a remedy. The AFA thus joins the State of Alaska in asking this Court to reverse the district court and reinstate the Tongass Exemption.

DATED this 1st day of November, 2011.

/s/Julie A. Weis
Julie A. Weis,
Attorney for Alaska Forest Association

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,106 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, font size 14 and Times New Roman type style.

DATED this 1st day of November, 2010.

/s/Julie A. Weis
Julie A. Weis,
Attorney for Alaska Forest Association

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2011, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE ALASKA FOREST ASSOCIATION, INC. IN SUPPORT OF APPELLANT STATE OF ALASKA'S OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Julie A. Weis
Julie A. Weis,
Attorney for Alaska Forest Association