No. 11-35517

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORGANIZED VILLAGE OF KAKE, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants,

STATE OF ALASKA,

Defendant-Intervenor-Appellant,

and

ALASKA FOREST ASSOCIATION,

Defendant-Intervenor.

On Appeal from the United States District Court
For the District of Alaska

APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Organized Village of Kake, The Boat Company, Alaska Wilderness Recreation and Tourism Association, Sierra Club, Southeast Alaska Conservation Council, Natural Resources Defense Council, Tongass Conservation Society, Greenpeace, Inc., Wrangell Resource Council, Center for Biological Diversity, Defenders of Wildlife, and Cascadia Wildlands hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

JURISDICTION

Jurisdiction was proper in the district court under 28 U.S.C. § 1331, because Plaintiffs-Appellees raised federal questions. Jurisdiction is proper in this Court under 28 U.S.C. § 1291, because Appellant appeals a final decision of the district court. The appeal is timely under Fed. R. App. P. Rule 4(a)(1)(A) because the final judgment was filed on May 24, 2011, ER 1-5, and Appellant's notice of appeal was filed on June 17, 2011. ER 35-36.

ISSUES PRESENTED

1. Whether the U.S. Department of Agriculture (USDA) acted arbitrarily in exempting the largest national forest from a rule protecting "roadless" areas, where the agency relied on grounds unsupported by and contrary to the record, failed to acknowledge reversals in previous factual findings, and overlooked obvious and less drastic alternatives.

2. Whether USDA violated the National Environmental Policy Act (NEPA) in the same decision, where the agency failed to consider any reasonable alternatives to its proposed rule.

3. Whether the district court erred in vacating USDA's exemption, reinstating the agency's pre-existing rule, after holding the exemption arbitrary.

STATEMENT OF THE CASE

Organized Village of Kake, et al. ("Kake")—a coalition of an Alaska Native tribal government, tourism businesses, and conservation groups[1]—brought suit to set aside a "temporary" rule exempting Alaska's Tongass National Forest from a regulation addressing management of the remaining road-free areas of the national forests. In 2001, following an extensive public process, the Secretary of Agriculture, who oversees the Forest Service, adopted the Roadless Area Conservation Rule. ER 86-116 (adopting 36 C.F.R. §§ 294.10-.14) ("Roadless Rule" or "Rule").[2] The Rule prohibits, with several specified exceptions, new roads and logging in "roadless areas." ER 115-16 (36 C.F.R. §§ 294.12-.13). In 2003, USDA adopted the exemption for the Tongass, which was, on its face, to last only until the agency completed a previously-announced rulemaking regarding the long-term application of the Roadless Rule in Alaska. ER 75-85 (amending 36 C.F.R. § 294.14(d)) ("Tongass Exemption" or "Exemption"). The Alaska-specific rulemaking was never completed, and the "temporary" Tongass Exemption

[1] The first-named plaintiff in this case has always been Organized Village of Kake. *See* ER 154. Nevertheless, in this Court Appellant and *Amicus* refer to Plaintiffs-Appellees collectively as "Greenpeace." To avoid confusion with the lower court record and the caption of this appeal, Appellees use the first-named party.

[2] The Code of Federal Regulations has up to now omitted the Roadless Rule (and thus the Tongass Exemption) because of injunctions. S*ee infra* p. 10. Citations will be to the Federal Register notices at ER 115-16 and 85. The Roadless Rule is also printed in the Addendum to this brief.

remained in effect until the district court's order in this case, more than seven years later.

Kake brought suit under the Administrative Procedure Act (APA), 5 U.S.C. § 706, alleging that in adopting the temporary Tongass Exemption USDA acted arbitrarily and violated NEPA, 42 U.S.C. § 4332. ER 154-70. The State of Alaska ("Alaska") and Alaska Forest Association ("AFA") intervened as defendants. ER 33-34. Following briefing under the local rule for administrative appeals, the district court granted summary judgment to Kake, holding that USDA's rationale for the temporary Exemption was arbitrary but declining to reach the NEPA claim. ER 20-30. Accordingly, the court vacated the Exemption and reinstated the Roadless Rule on the Tongass. ER 31. After receiving input from all parties, the court subsequently entered a final judgment that addressed the order's impact on specified projects and management categories. ER 1-5; *see* CR 78-84.

Alaska, but not USDA or AFA, appealed. ER 35-39.

STATEMENT OF FACTS

I. ROADLESS AREAS OF THE NATIONAL FORESTS.

Over a period of several decades, USDA has repeatedly grappled with the controversial issue of development in the remaining wild, road-free portions of the national forests. In 1972, the agency initiated the Roadless Area Review and Evaluation (RARE), followed by RARE II, which resulted in a nationwide

inventory of roadless areas. SER 78. Since that time, further reviews and inventories have occurred in connection with individual national forest management plans. *Id.*; *see California ex rel. Lockyer v. USDA*, 575 F.3d 999, 1005-06 (9th Cir. 2009). USDA explained in 2000 that controversy, including appeals and litigation, accompanies "most" development proposals in these areas, illustrating "the importance that many Americans attach to the remaining roadless portions" of the national forests. SER 78.

In 1998, USDA determined that its backlog of deferred maintenance for national forest roads and bridges was $8.4 billion and growing every year, for an expanding system that already comprised over 386,000 miles, in addition to 60,000 miles of unauthorized and unclassified roads. *Id.* In response, the Chief of the Forest Service temporarily suspended new road construction in most roadless areas, pending preparation of a final roads policy. SER 78-79.

Many of the public comments on this policy called for permanent protection of roadless areas. SER 79. Against this backdrop, the President, on October 13, 1999, issued a memo to the Secretary of Agriculture directing the Forest Service "to develop, and propose for public comment, regulations to provide appropriate long-term protection for most or all of these currently inventoried 'roadless' areas." SER 35. USDA issued a notice of intent to do so shortly thereafter. SER 36, 79-80.

Public participation in this proposal was unprecedented for a federal rulemaking. Besides preparing a draft and a final environmental impact statement (EIS), the agency held more than 430 public meetings, attended by 23,000 people, of whom 7,000 spoke publicly. SER 80. The agency received nearly 1.2 million written public comments on the proposal, including 60,000 original letters. *Id.*

The final EIS (FEIS) explained the special biological, recreational, and community water supply values of roadless areas. SER 74-77; *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1121 (9th Cir. 2002), *partially abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (considering the adequacy of the FEIS and discussing roadless area environmental values). The FEIS stated that the Rule was needed because of budget constraints, controversy including appeals and litigation, and the environmental damage caused by roads and logging. SER 87-88. It also set forth a lengthy rationale about the need for a nationally uniform rule, noting that incremental local management decisions often miss the importance of roadless areas to the Nation as a whole. SER 87-90.

II. ROADLESS AREAS OF THE TONGASS.

The Tongass—at almost 17 million acres the largest national forest by far—received careful, individualized consideration throughout the rulemaking process, belying Alaska's portrayal of USDA's final decision as "sudden" and "eleventh

hour." *See* Alaska Br. at 4. USDA's position evolved in response to study, deliberation, and public input, showing that the agency approached the process with an open mind.

The public notice initiating the rulemaking process stated, "We specifically solicit comments on whether or not the proposed rule should apply to the Tongass…." SER 37 (column 2). The proposed rule would have postponed the Tongass question until 2004. ER 121-22, 123 (column 1). The accompanying draft EIS (DEIS) considered four Tongass-specific alternatives, which would have excluded the Tongass altogether, delayed decision on it (in two alternate ways), or limited its geographical scope. SER 52-55. These were in addition to the alternatives considered for the rest of the national forests, which could also apply to the Tongass. SER 52.

The Tongass shared the fiscal constraints that motivated the Roadless Rule nationally. In 2000, the Tongass had a $13.5 million backlog in deferred road maintenance on nearly 5,000 miles of roads, SER 143, 19, 130-31, an estimate that later ballooned. SER 180.

USDA also recognized the high ecological values of roadless areas on the Tongass. "The forest's high degree of overall ecosystem health is largely due to the quantity and quality of its inventoried roadless areas and other special designated areas." SER 140. The agency further recognized the unusual

vulnerability of the region's island ecosystem: "Because ecosystems in Southeast Alaska are naturally fragmented and may be less resilient to further fragmentation, the loss of inventoried roadless area conditions may pose a high risk to species existence and persistence." SER 141. Roadless areas also support tourism and commercial, sport, and subsistence hunting and fishing. SER 141-43.

USDA recognized that these resources had more than merely local significance, being "important nationally and globally." SER 159. "The rare opportunity to apply [the Roadless Rule] to a large, unique, and largely intact ecosystem, before further incremental compromises to the ecosystem occur[], is what makes the Tongass alternatives consequential at a national scale." SER 160.

The Tongass also exemplified the controversy, appeals, and litigation induced by proposals to develop roadless areas, with a long history of challenges by municipalities, tribes, Native clan leaders, tourism businesses, and conservation groups. *See, e.g.*, *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971); *City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985); *Hanlon v. Barton*, 740 F. Supp. 1446 (D. Alaska 1988); *City of Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990); *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059 (9th Cir. 1998); *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223 (9th Cir. 1999). Accordingly, the 2000 Roadless Rule FEIS concluded that the alternative

in which the Tongass was included immediately ("Tongass Not Exempt") would achieve the "[g]reatest savings in appeals and litigation costs." SER 120.

The FEIS also explained that the Rule would not violate the Alaska National Interest Lands Conservation Act (ANILCA), SER 4, or the Tongass Timber Reform Act (TTRA). SER 5-6.

III. THE 2001 ROADLESS RULE.

For these reasons, USDA ultimately decided to include the Tongass in the Roadless Rule immediately, but included a provision grandfathering Tongass timber sales for which a draft EIS had already been released. ER 97-98. Relying on the FEIS, and responding to "many" public comments, ER 97 (column 2), the Record of Decision (ROD)[3] explained at length the basis for USDA's decision to include the Tongass. ER 97-98, 105-06, 109. The grandfather clause created a pool of 851 million board-feet (mmbf) available for logging, estimated to satisfy seven years of then-predicted market demand. ER 98 (column 1).

The Roadless Rule—in all national forests—generally prohibits road construction and tree-cutting in "inventoried" roadless areas, ER 115-16 (36 C.F.R. §§ 294.12-.13), which are normally those greater than 5,000 acres. SER 125. However, it contains important exceptions to both prohibitions: for public safety,

[3] *See* ER 87 (column 2); 40 C.F.R. § 1505.2.

to protect legal rights, to improve habitat, and to reduce wildfire risks, among others. ER 115-16 (36 C.F.R. §§ 294.12-.13); *see* SER 133-34, 139.

An important exception to the road construction prohibition is for Federal Aid Highways. ER 115 (36 C.F.R. § 294.12(b)(6)). The Roadless Rule was not intended to prevent construction of federal or state highways, which normally receive federal funding under Title 23 of the U.S. Code. These highways are planned cooperatively by the Federal Highway Administration and State Departments of Transportation, and the Secretary of Agriculture may grant rights-of-way across national forests for this purpose. SER 59, 100. USDA staff looking specifically at the Tongass concluded that the Secretary would have discretion to approve future transportation routes in the region. SER 168.

The Roadless Rule does not prohibit all types of development in roadless areas. Electric transmission lines, pipelines, mines, hydroelectric dams, visitor facilities, motor vehicle use, and everything else but roads and cutting timber are allowed. USDA interprets the Rule to allow construction zones in which vehicles may be used, as long as they do not add to the forest road system. *See Wilderness Workshop v. U.S. BLM*, 531 F.3d 1220, 1226-28 (10th Cir. 2008) (allowing vehicle corridor for pipeline construction).

Another important exception allows cutting trees "incidental to the implementation of a management activity not otherwise prohibited by" the Rule.

ER 116 (36 C.F.R. § 294.13(b)(2)). This ensures that permissible management activities, like transmission lines, are not prohibited simply because they require clearing trees. The FEIS, citing a study, concluded that only a "couple" of utility lines could potentially be affected throughout the West and that any effects from the Rule would therefore be "minimal." SER 136. A Forest Service briefing paper looking specifically at the Tongass found that utility lines in the region were typically built without roads. SER 168.

Nevertheless, a number of states and other parties, including Alaska and AFA, immediately challenged the Roadless Rule. *See* ER 75-76. Reversing a preliminary injunction in one case, this Court rejected the central claims advanced in most of these lawsuits. *See Kootenai Tribe*, 313 F.3d at 1115-23. However, a district court in Wyoming disagreed with this Court and, in July 2003, struck down the Rule in a decision that was later vacated as moot. *See Wyoming v. USDA*, 414 F.3d 1207 (10th Cir. 2005). Subsequently, the case was reinstated, the same district court struck down the Rule again, but the Tenth Circuit reversed in accord with *Kootenai Tribe*. *Wyoming v. USDA*, ___ F.3d ___, Nos. 08-8061, 09-8075, 2011 WL 5022755 (10th Cir. Oct. 21, 2011). As a result, there are no longer any judgments outstanding against the Roadless Rule, and both appellate courts that have considered these challenges have upheld it.

IV. THE 2003 TEMPORARY TONGASS EXEMPTION.

While *Kootenai Tribe*, *Wyoming*, and the other cases were working their way through the courts, Alaska and AFA settled theirs. ER 146-50. The out-of-court agreement required the federal defendants to publish "[a] proposed temporary regulation that would exempt the Tongass National Forest from the application of the Roadless Rule until completion of the rulemaking process for any permanent amendments to the Roadless Rule." ER 147. It also called for an Advance Notice of Proposed Rulemaking to exempt both of Alaska's national forests—the Tongass and the Chugach—permanently from the Rule. *Id.* The agreement did not require the agency to take any particular final action, but allowed the State and AFA to reinstate their cases if they were dissatisfied with the outcome. ER 148. USDA promptly published the proposed rules, discharging its obligations under the agreement. SER 206-12.

On December 30, 2003, USDA published the Tongass Exemption as a temporary final rule. ER 75-85. The ROD emphasizes the limited intended duration of the Exemption, repeatedly using the words "temporary," "temporarily," or "short term." ER 75-77, 81-82, 84-85. The text of the Exemption states that it would last only until adoption of a permanent rule for which an advance notice had been published five months earlier, ER 85 (36 C.F.R. § 294.14(d)), and which USDA had committed to resolving "in a timely fashion." ER 147.

USDA did not prepare a new EIS for the temporary exemption, but relied on the 2000 Roadless Rule FEIS. ER 80 (columns 2-3). The agency prepared a Supplemental Information Report (SIR), SER 213-31, concluding that there were no new circumstances or information requiring a supplement to that EIS. SER 231. The SIR found that this was specifically true as to community road and utility connections, SER 229, noting that roads in the public interest "could go forward" under the Rule. SER 230.

Explaining why USDA was proceeding with the Exemption, the ROD cites "the factors and issues described in this preamble," ER 76 (column 3), which focus on three principal concerns.

First, referencing timber-related employment, the ROD averred that "900 jobs could be lost in the long run in Southeast Alaska due to the application of the roadless rule." ER 76 (column 1). This contradicted USDA's prior analysis. In the three years preceding the Exemption ROD, Tongass logging averaged 44 mmbf/year. ER 80 (column 1). The SIR, citing the FEIS, concluded that logging in areas unaffected by the Rule could realistically yield 50-55 mmbf/year. SER 221-22; *see* SER 147. Thus, federal logging at or above 2003 levels could continue in perpetuity under the Rule, without causing any job losses.

Second, again notwithstanding the contrary conclusions of both the 2000 FEIS and the SIR, *see supra* pp. 10, 12, the 2003 ROD announced that "the

roadless rule significantly limits the ability of communities to develop road and utility connections." ER 76 (column 1). While asserting that these connections "may be critical to economic survival of many of the smaller communities in Southeast Alaska," ER 82 (column 1), the ROD produced no examples of projects that might actually be impeded by the Rule.

Third, the ROD asserted that litigation created uncertainty about implementation of the Roadless Rule, while the temporary exemption "reduces the potential for conflicts." ER 77 (columns 1, 2). In so reasoning, the agency did not address its own prior conclusion that logging and road construction in roadless areas increased controversy and litigation. *See supra* pp. 5, 6-7. Nor did the ROD explain how a merely temporary rule could reduce uncertainty.

Despite having a dramatically different purpose in 2003 than in 2000, USDA did not, in the Exemption ROD, consider any alternatives other than those addressed in the 2000 FEIS.

V. THE 2005 ATTEMPTED REPEAL OF THE ROADLESS RULE AND THIS LITIGATION.

USDA never adopted the Alaska-specific rule referenced in the temporary Tongass Exemption. Instead, seventeen months later, the Department repealed the Roadless Rule nationwide, substituting a "state petitions" process. 70 Fed. Reg.

25,654 (May 13, 2005). "This rule thus negates the need for the further Tongass-specific rulemaking anticipated by the 2003 rule." *Id.* at 25,659 (column 2).

In October 2006, however, in response to a suit filed by States and conservation groups, a federal district court struck down the repeal, finding that USDA violated NEPA and the Endangered Species Act. *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009). The court reinstated the Roadless Rule as it existed when USDA repealed it, including the Tongass Exemption, *Lockyer*, 459 F. Supp. 2d at 916-17, and enjoined violations of the Rule. *Id.* at 919. In August 2009, this Court affirmed. *Lockyer*, 575 F.3d at 1021.

Thus, in the fall of 2009, the Tongass stood in a position unique among the national forests, languishing under a "temporary" exemption to the Roadless Rule for nearly six years. In January 2008, the Forest Service had published an amended Tongass forest plan allowing development—including new roads and, where suitable, logging—in approximately 2.3 million acres of roadless areas. SER 242 (Table 3.19-6, Alternative 6).[4] Thereafter, the Forest Service promptly began authorizing new timber sales and roads in roadless areas. SER 255-67, 268-78, 280-89.

[4] The plan amendment adopted Alternative 6 with slight modifications. SER 248, 254.

Threatened by adverse impacts to traditional subsistence hunting and fishing, tourism, recreation, and other uses, Kake filed this action in December 2009. ER 154-70. In response to the district court's judgment, Alaska not only appealed, ER 35-39, but refiled its lawsuit (in a different venue) challenging the 2001 Roadless Rule. *See* Alaska Br. at 14 n.6, 16 n.7. AFA intervened as a plaintiff in that case, which is the only remaining action pending against the Roadless Rule nationwide.

SUMMARY OF THE ARGUMENT

Alaska gets off on the wrong foot by misunderstanding the purposes of the Tongass Exemption, asserting a rationale not only unsupported by the ROD, but contrary to what USDA itself argued below and to what the district court found. USDA never changed its position that the Roadless Rule complied fully with ANILCA and TTRA. The agency adopted the temporary Exemption principally because of purported concerns about timber industry jobs, community road and utility connections, and litigation uncertainty.

These reasons, however, were arbitrary. They were unsupported by and contrary to the record and based on unexplained reversals of previous factual findings. A pattern of errors recurred through the ROD.

These rationales represented complete reversals of findings made not only in the 2000 FEIS, but in the 2003 SIR prepared specifically for the Tongass

Exemption. Regarding jobs, the FEIS and SIR both concluded that logging could continue indefinitely at a rate of 50-55 mmbf/year under the Rule. This was significantly more timber than was cut annually in 2001-2003, requiring no reduction in logging and no loss of timber jobs. Yet, the Exemption ROD found that the Rule could cause the loss of 900 jobs. Similarly, the FEIS and SIR, based on analysis and studies in the record, found that the Roadless Rule would have little or no impact on community road and utility connections in Southeast Alaska, yet the ROD asserted that the Rule would significantly impair them, threatening the survival of many communities. One of the major rationales for the Roadless Rule was that it would reduce litigation and appeals over logging and road construction in roadless areas, including specifically in the Tongass, yet the Exemption ROD stated just the opposite: that suspending the Rule on the Tongass would reduce the uncertainty attributable to litigation. For each of these reversals, USDA failed not only to explain why it was reversing its past factual findings, but even to acknowledge that it was doing so.

Another recurring error was the failure to demonstrate the need for an immediate, temporary, and short-term exemption. For example, even had there been a genuine basis for concern about the Rule's long-term effect on timber jobs, the ROD completely failed to demonstrate why the seven-year timber supply pipeline grandfathered by the Rule would not be sufficient to maintain full

employment for the intended duration of the temporary Exemption and longer. Nor was USDA able to demonstrate even one example of a road or utility line that would be hindered by the Rule during that short duration (or, for that matter, in the long term). The agency also failed to explain how a merely temporary rule could increase certainty for residents of Southeast Alaska and others, who would have no way of knowing the outcome of the forthcoming permanent rule.

A further recurring error was the failure to consider obvious alternatives less drastic than exempting the entire Tongass from the entire Roadless Rule. Were the seven-year pipeline really insufficient to maintain employment in the short term, it would not have been necessary to throw out the entire Rule to address the shortfall. A few select areas could have provided whatever additional supply was needed. Similarly, had there been evidence that the Rule would hinder needed road and utility connections in the short term, exemptions for those corridors could have been adopted.

The failure to consider such alternatives also violated NEPA. Reliance on those considered in the 2000 FEIS was misplaced, since the FEIS was based on an entirely different set of purposes.

The district court appropriately vacated the Exemption and reinstated the Roadless Rule in the Tongass. Alaska and AFA have presented no convincing reasons supporting their extraordinary position that the Tongass should remain

exempt from the Rule, even after the Exemption has been held arbitrary and the Rule consistently upheld.

ARGUMENT

I. THE TEMPORARY TONGASS EXEMPTION WAS ARBITRARY.

A. Standards of Review.

This Court reviews the district court's grant of summary judgment *de novo*. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

The APA directs the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary." 5 U.S.C. § 706(2)(A). This requires that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). A decision would normally be arbitrary if the agency "entirely failed to consider an important aspect of the problem," "offered an explanation for its decision that runs counter to the evidence before the agency," *id.* at 43, or advanced a rationale not supported by the record. *See, e.g., Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1201 (9th Cir. 2008) ("there is no evidence to support NHTSA's conclusion"); *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d 1028, 1037-38 (9th Cir. 2001).

The courts will pay particular attention to reversals in policy, such as the Tongass Exemption. "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change…." *State Farm*, 463 U.S. at 42. When "its new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1811 (2009); *see also id.* at 1824 ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past") (Kennedy, J., concurring); *id.* at 1831 (same) (Breyer, J., dissenting).

A decision may further be arbitrary if the agency failed to consider a clear alternative, thereby ignoring an important aspect of the problem. *See, e.g.*, *State Farm*, 463 U.S. at 48 ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment"); *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th Cir. 1993) ("We may conclude that an agency has ignored relevant factors where its action amounts to an '"artificial narrowing of options" which is antithetical to reasoned decisionmaking'" (quoting *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983) (text alterations omitted))).

"The reviewing court should not attempt itself to make up for such deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *State Farm*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

B. The Tongass Exemption Was Not Based on ANILCA or TTRA.

Without analyzing the text of either statute, Alaska argues at length that compliance with ANILCA and TTRA was USDA's primary concern in adopting the Tongass Exemption. *See* Alaska Br. at 11-17. This argument misconstrues those statutes as well as the Tongass Exemption ROD.

Neither statute constrains USDA's substantial discretion to manage the national forests for multiple use. Thus, when USDA adopted the Roadless Rule in 2001, the agency explicitly and correctly rejected arguments that the Roadless Rule would violate either statute. USDA has never reversed that position.

Nor, when adopting the Tongass Exemption, did USDA find discretionary direction in either statute about how much to protect roadless areas. Instead, it rested on factual assertions specific to Tongass management and regional conditions, focusing on jobs, road and utility connections, and legal uncertainty. In the court below, USDA vigorously defended the Tongass Exemption on the basis of those factors, but did not rely on ANILCA or TTRA. The district court

correctly rejected Alaska's argument that ANILCA or TTRA formed the basis for USDA's decision.

1. The Roadless Rule Does Not Violate ANILCA or TTRA.

Citing both statutes, Alaska asserts that "Congress has spoken on the issue and USDA has followed these directives," ending the Court's review. Alaska Br. at 15. The relevant sections of ANILCA and TTRA do speak clearly, but Alaska's interpretations of them are flatly mistaken, and—as Alaska concedes elsewhere—USDA did not adopt them.

The "market demand" provision of TTRA does not constrain USDA's discretionary management authority. It was written to eliminate a previous timber supply mandate for the Tongass. *Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d at 730. TTRA's exhortation to "seek" to meet market demand for timber is explicitly "[s]ubject to appropriations, other applicable law, and the requirements of the National Forest Management Act" (NFMA), and only "to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources." 16 U.S.C. § 539d(a); *see* ER 81 (column 2). Thus, meeting market demand for timber is explicitly subordinate in the statutory scheme to multiple-use management under other laws. The Multiple-Use Sustained-Yield Act (MUSYA) sets forth a highly discretionary standard, calling for the mix of

uses "that will best meet the needs of the American people."[5] 16 U.S.C. § 531(a); *see also id.* § 529 (directing USDA to manage for multiple use and sustained yield); ER 95 (columns 2-3) (USDA explaining MUSYA's broad mandate and wide discretion). As USDA recognizes, this discretionary direction—paramount under TTRA's plain language to the non-binding timber market demand goal—includes protection of wildlife, recreation, and other values the Roadless Rule was designed to protect. *See Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 809 (9th Cir. 2005). Accordingly, in both the FEIS and the Roadless Rule ROD, USDA rejected the contention that the Rule would violate TTRA: "[T]he agency does not interpret the market demand provision of the TTRA as a goal to be pursued at the expense of other environmental provisions embodied in applicable law." SER 5; *see also* SER 6; ER 98 (column 1) (citing *Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d at 731).

Nor does section 101(d) of ANILCA, 16 U.S.C. § 3101(d), constrain USDA's multiple-use discretion.[6] It is merely a statement of congressional intent

[5] NFMA incorporates the same standard. 16 U.S.C. § 1604(e).

[6] In a footnote, Alaska also asserts that the Roadless Rule violated section 1326(a) of ANILCA, 16 U.S.C. § 3213(a), which limits executive branch authority to "withdraw" public land. *See* Alaska Br. at 14 n.6. While Alaska notes that USDA's communication plan, adopted before the draft rule was proposed, alludes to the "withdrawal" provision, ER 195-200, Alaska cannot and does not assert that USDA relied on this provision in the ROD. Moreover, Alaska's view of section

(footnote continued…)

that the Act designated enough new "conservation system units," obviating the need for future legislation. *Id.* As the Exemption ROD recognized, this section pertains not to agencies but only to congressional action: "Congress believed that the need for future legislation ... had been obviated by provisions in ANILCA." ER 81 (column 2). "Conservation system units," as defined in ANILCA, are not multiple use lands like roadless areas but rather congressional land designations such as national parks, national wildlife refuges, wilderness areas, and the like. 16 U.S.C. § 3102(4). This provision does not place any restrictions on USDA's authority to adopt appropriate regulations to manage national forests. If Alaska were correct, federal land management agencies in that state would be precluded from adopting not only the Roadless Rule, but management plans and other measures restricting development as needed to protect water quality, fish, wildlife, and other resource values under NFMA and other laws. Congress plainly did not intend this result, leaving agency authority under existing laws intact. Accordingly, in adopting the Roadless Rule, USDA expressly dismissed the argument that section 101(d) precluded application of the Rule in Alaska: "The proposed rule does not seek legislation or establishment of new types of areas;

1326(a) fails because the Roadless Rule is not a "withdrawal." *See Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 142-45 (D.D.C. 2010).

rather it proposes to regulate areas already in the National Forest System and under the authority of the Executive Branch." SER 4.

2. USDA Did Not Cite ANILCA or TTRA as Reasons for the Temporary Tongass Exemption.

The Exemption ROD unambiguously identifies a set of specific social and economic rationales for the action, not including ANILCA or TTRA. *See supra* pp. 12-13. In its robust defense of the Exemption below, USDA did not assert that ANILCA or TTRA motivated its decision. SER 10-14. To the contrary, tracking the text of the Exemption ROD, USDA argued that it adopted the temporary exemption based on traditional multiple use balancing, focusing specifically on "road and utility connections," "social and economic impacts," "the uncertainty caused by the ongoing litigation," and "protections for roadless values already in place for the Tongass." SER 14. The district court agreed, carefully assessing each of these considerations (holding them arbitrary), ER 21-28, and rejecting Alaska's contention that the decision was based on ANILCA or TTRA. ER 28-29.

Alaska concedes that USDA never altered its conclusion that the Roadless Rule complied fully with ANILCA and TTRA. *See* Alaska Br. at 16 ("USDA did not explicitly reverse its legal conclusion about whether applying the Roadless Rule to the Tongass violates ANILCA or TTRA"). Regardless, the State claims that even if USDA was not required to exempt the Tongass, it nonetheless made,

and deserves deference for, a discretionary choice to change policy based on "how to best implement the letter and spirit of congressional direction." *Id.* at 15.

At no point in the ROD, however, did USDA assert that it was adopting the Exemption in response to direction, even non-binding direction, from ANILCA or TTRA. The passage cited by Alaska was USDA's response to public comments from Alaska and others arguing that the Roadless Rule violated ANILCA and TTRA. The agency said that these statutes were "important" and had been "considered carefully," ER 81 (column 2), and that the exemption was "consistent" with them. *Id.* (columns 2-3). Nowhere, however, did it state that those statutes were the reason for its decisions.

In the sentence on which Alaska relies most heavily, USDA adverted to "congressional direction" broadly, without citing ANILCA or TTRA. ER 81 (column 2). This reflected the fact that in adopting the Exemption USDA was acting explicitly under the authority of seven other statutes, including NFMA and MUSYA but not ANILCA or TTRA. ER 85 (column 2). That these multiple-use statutes provided the relevant "congressional direction" is apparent later in the passage, which states that the agency was acting "in light of the abundance of roadless values on the Tongass, the protection of roadless values already included in the Tongass Forest Plan, and the socioeconomic costs to local communities," *i.e.*, traditional multiple-use considerations. And nowhere did it assert that it was

completely backtracking on its ANILCA and TTRA positions from 2001, let alone explain any such reversal. *Cf. Fox Television Stations,* 129 S. Ct. at 1811 ("An agency may not ... depart from a prior policy *sub silentio*").

Alaska disputes the district court's correct finding that even if USDA did rely on ANILCA or TTRA, the "'failure to provide a reasoned explanation for its reversal of position was arbitrary and capricious.'" Alaska Br. at 16 (quoting ER 29). First, Alaska says, USDA's (alleged) change of position on ANILCA and TTRA was attributable at least partly to "legal uncertainties demonstrated by the State's lawsuit." *Id.*; *see also id.* at 17 (the "State's lawsuit prompted [USDA] to more fully examine ANILCA and TTRA and conclude that its ability to implement the Roadless Rule in the Tongass was questionable"). The Exemption ROD cites legal uncertainties but at no point singles out Alaska's case, let alone its ANILCA and TTRA claims, as driving its decision. Instead, it points to "various lawsuits" yet to be disposed of, ER 77 (column 1), at a time when Alaska's had already been dismissed. *See* ER 147-48 (settlement agreement requiring dismissal). Far from explaining a reversal, the Exemption ROD's position that it reduced uncertainty was itself an unexplained reversal from 2001, *see infra* pp. 43-45, and was properly rejected by the district court. ER 28.

Alaska also argues that USDA was free to reverse direction on ANILCA and TTRA, apparently without explanation, because the agency did not adequately

explain why it initially applied the Roadless Rule to Alaska. Alaska Br. at 17. This argument is both irrelevant and wrong. No claim or cross-claim has put the legality of the 2001 Roadless Rule at issue in this case, nor has any party asked the Court to declare the Rule invalid or to enjoin or vacate it. Further, USDA did not cite inadequacy of the explanation for the 2001 Rule as a reason for adopting the Tongass Exemption, and it therefore cannot be a basis for upholding the latter decision. *See State Farm*, 463 U.S. at 43 (courts will not rely on justifications not provided by the agency).

Moreover, the record belies Alaska's allegation that USDA's explanation for including the Tongass was merely "cursory." Alaska Br. at 17 (citing ER 105). The ROD for the 2001 Rule: responded extensively to the "many" public comments addressing the Tongass, ER 97-98; described the Tongass alternatives considered, ER 105-06; identified and explained the environmentally preferred alternative for the Tongass, ER 106; and thoroughly explained USDA's final choice. ER 109. It expressly took into account the high roadless area values of the Tongass, the volume of timber available, jobs, social and economic impacts to communities and to the region as a whole, and a special Tongass provision grandfathering enough timber for seven years at then-prevailing cut levels. *Id.*, ER 97-98. Mostly pointedly for present purposes, the FEIS explained why this decision did not violate ANILCA or TTRA. SER 4, 5-6; *see also* ER 98

(column 1) (explaining TTRA). In short, USDA's explanation of its 2001 decision was thorough and reasoned.

C. The Temporary Exemption was Intended to Have a Short Duration.

Alaska opens its defense of the rationales actually advanced by USDA for the Tongass Exemption by disputing one of its central features. The State argues that the Exemption was not intended as short-term or temporary, but rather as "indefinite." Alaska Br. at 18-19. In fact, the ROD consistently emphasizes the limited intended duration of the Rule, using the words "temporary," "temporarily," or "short term" seventeen times. ER 75-77, 81-82, 84-85. One paragraph describes it as a "short term" measure three times. ER 77 (column 1). The very text of the Exemption states that it would last only until adoption of a final rule for which an advance notice had been published five months earlier, ER 85 (36 C.F.R. § 294.14(d)), and which USDA had committed to move forward "in a timely fashion." ER 147. Nothing in the ROD suggests the "indefinite" duration asserted by Alaska or uses that word.

D. USDA's Jobs Rationale Was Unsupported by and Contrary to Evidence in the Record.

USDA's assertion in the Exemption ROD that the Roadless Rule could cost Southeast Alaska 900 jobs was contrary to the evidence in the record. That projection, from 2000, was based on logging and job levels that had already

plummeted three years later. The 2003 levels could have been, and can be, maintained forever without logging roadless areas. Had jobs actually been threatened by the Roadless Rule in 2003, USDA could have sustained them by drawing on the enormous pipeline of grandfathered sales. Alaska's arguments that an impending fall-off in state lands logging was USDA's real rationale, and that future job growth was the actual issue, contradict the record.

As the district court found, "neither the SIR nor the Tongass Exemption ROD offer any evidence showing actual job loss due to application of the Roadless Rule." ER 23. The ROD cites the 2000 FEIS for the proposition that "900 jobs could be lost" because of the Roadless Rule. ER 76 (column 1); *see also* ER 81 (column 1). That projection, however, was no longer possible in 2003. The 2000 job loss projection was derived from a projected 77 mmbf annual logging reduction caused by the Rule. ER 218-20. By 2003, this reduction and more—from 146 mmbf in 1999 to an average of 44 mmbf in 2001-03, ER 80 (column 1)—had already occurred without the Rule, which had been inoperative due to suspensions and injunctions.[7] *See Lockyer*, 575 F.3d at 1006-07. Further,

[7] The lower court correctly concluded that "job losses were attributable to the decline in market demand rather than the prohibitions in the Roadless Rule." ER 23. USDA recognized in 2000 that the recent closure of two pulp mills was causing "a fundamental transformation" in the region's timber industry. SER 144. By 2003 the agency recognized that "[c]losure of these mills has had a significant

(footnote continued…)

both the SIR and the FEIS projected that Tongass logging could continue in perpetuity at 50-55 mmbf annually under the Rule. *See supra* p. 12. With Tongass logging by then averaging 44 mmbf/year, full application of the Rule would have required no reduction in federal logging and hence no job losses.

Projected job loss was even less plausible considering that the Exemption was temporary. The Roadless Rule grandfathered a predicted seven-year pipeline of 851 mmbf, ER 98 (column 1), on top of the 50-55 mmbf available annually from areas with existing roads. Thus even if demand for Tongass timber rebounded to its previously projected levels, the Roadless Rule would not have caused any job losses for many years. Because USDA's rationale was both unsupported by and contrary to the record, its decision was arbitrary.

The Tongass Exemption was further arbitrary because USDA ignored alternatives that would have addressed any genuine, temporary job concerns without a wholesale exemption. It could have utilized its huge grandfathered pipeline. Alternatively, given the low volumes then prevailing, it could have logged extra volume for several years, even if it formally lowered its allowable average cut levels to the 79 mmbf that would be allowed under the Roadless Rule. *See* SER 221; 16 U.S.C. § 1611(a) ("within any decade, the Secretary may sell"

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effect on the regional demand for timber," SER 198, causing a substantial decline in employment that was projected—accurately—to continue. SER 200, 279.

more than annual allowable quantity if decadal average not exceeded). The agency could have exempted just a few roadless areas from the Rule. USDA failed to consider an important aspect of the problem by overlooking these alternatives, rendering its decision arbitrary.

Alaska is also mistaken to suggest that impending changes in state lands logging levels motivated the Tongass Exemption. *See* Alaska Br. at 20-21. USDA never cited this rationale in the ROD, the SIR, or its briefing below. Moreover, even complete cessation of Alaska's harvest, which stood at less than 35 mmbf in 2003, ER 173 (Table 3.13-7), would readily have been accommodated by the grandfathered pipeline.

Alaska also errs in arguing that USDA really was concerned with prospective job growth. *See* Alaska Br. at 21-23. Though job gain might have been conceivable in 2003, it would be a different rationale from avoiding job loss, with its attendant social and economic dislocation. In the ROD, USDA spoke only of job losses, not prospective job gains. Moreover, the Roadless Rule's impact on future job gains is a particularly implausible rationale for a merely temporary suspension.

E. The Evidence Does Not Show Interference with Community Connections.

The Exemption ROD mistakenly asserts that "the roadless rule significantly limits the ability of communities to develop road and utility connections." ER 76 (column 1). This assertion is unsupported by and contrary to the evidence in the record. Without explanation, it contradicts USDA's factual findings just three years earlier. USDA also failed to consider reasonable alternatives that would have answered these concerns (assuming they were well-founded) without taking the drastic step of entirely exempting the largest national forest from the Rule. For all these reasons, this rationale is arbitrary.

Tellingly, USDA did not assert that any specific planned or potential road or utility connections might be impeded by the Roadless Rule. This omission is striking given the intended short-term duration of the Exemption. USDA was in the untenable position of saying it had to suspend the Rule immediately to allow for construction—before it could complete a permanent new rule—of hypothetical road and utility connections not even yet foreseeable.

1. The Roadless Rule does not prevent construction of roads to connect communities in Southeast Alaska.

The Exemption ROD correctly recognizes two ways that new roads may be built to connect communities in Southeast Alaska: as Federal Aid Highways; or as logging roads, which are sometimes later upgraded to state highways. ER 82

(column 1). However, as the district court correctly held, ER 24-25, no record evidence shows that the Roadless Rule will hinder potential community connections by either method. Alaska does not acknowledge this distinction but addresses the upgrade approach first, Alaska Br. at 24, followed by Federal Aid Highways. *Id.* at 24-25.

a. Upgraded logging roads.

USDA's assertion in the Exemption ROD that the Roadless Rule would prevent construction of logging roads that could later be upgraded to new community connections was unsupported by anything in the record. The ROD correctly notes that past logging roads upgraded to state highways have connected the communities on Prince of Wales Island. ER 82 (column 1). However, as the Forest Service concluded when it looked at this question in 2000, those communities are already connected, and other communities in the region are not plausible candidates to be connected by logging roads. SER 168 ("Most of the other communities in Southeast Alaska are so isolated that roaded access is unlikely to be proposed"). The Roadless Rule would act as a bar to any such connections only if the Forest Service would, but for the Rule, plan and sell a timber sale requiring roads through a roadless area connecting communities too remote to have been connected during the boom years of logging in the region.

The 2000 FEIS found no such possibility. Referring to planned logging roads in Tongass roadless areas, it states that "[a]lmost all of these roads will be maintained for high-clearance vehicles or closed between timber sales," with no mention of potential upgrades for community connections. SER 143. Nothing changed in the subsequent three years. The SIR found no relevant new information. SER 228-30. Nothing in the ROD or the record discloses any communities that could be connected by future logging road upgrades or the potential timber sales that could connect them over any time horizon, and certainly not during the intended short duration of the temporary Exemption.[8]

Nevertheless, USDA concluded in the 2003 ROD that the issue had become potentially "critical to economic survival" for "many" communities. ER 82 (column 1). USDA not only failed to provide the required level of detailed justification for this reversal of its prior factual findings, *see Fox Television Stations*, 129 S. Ct. at 1811, it provided no justification at all. The reversal is unsupported by and contrary to the record, and therefore arbitrary.

Alaska's entire response to this issue is to assert that USDA should be allowed to reevaluate the information in the record. Alaska Br. at 24. This misses

[8] None of the projects referenced in Alaska's brief on pages 24-25 are logging roads that could potentially be upgraded to community connections. *See infra* pp. 37-38.

the point: There was nothing in the record to support the purported concern and no explanation or even acknowledgement of the agency's reversal of recent past factual findings.

b. Federal Aid Highways.

The Roadless Rule specifically allows construction of Federal Aid Highways. ER 115 (36 C.F.R. § 294.12(b)(6)). USDA explained that "[t]his exception maintains the Secretary's discretion as it already exists." SER 100; *see* 23 U.S.C. § 317(b) (requiring finding paralleling section 294.12(b)(6)). Looking specifically at the Tongass, the agency concluded: "Future major transportation routes are very likely, if not certain, to be Federal Aid Highway Projects. Thus, the Secretary would have discretion to approve such routes under the rule." SER 168. In the 2000 FEIS, USDA determined that, quite apart from the operation of the Rule, "[i]t appears that in the reasonably foreseeable future, construction of State highways through inventoried roadless areas in Alaska may not be an issue." SER 157. Reexamining the issue in the 2003 SIR, the agency concluded that any such roads "could go forward" under the Federal Aid Highway provision and that there was no relevant new information on the topic. SER 230.

Yet, as with upgraded logging roads, the Exemption ROD inexplicably came to the opposite conclusion. Citing the Rule's requirement that the Secretary must determine that the project is in the public interest and that no other reasonable and

prudent alternative exists, it asserted that "[s]uch a finding may not always be possible for otherwise desirable road projects." ER 82 (column 1). Without explanation, this assertion ignored USDA's findings in the FEIS and SIR that the Rule preserved the Secretary's existing discretion, that such projects may not even be an issue, and that any such projects could go forward. There is no support for the conclusion that the Rule created significant new hurdles.[9]

In short, the Exemption ROD's conclusion that something about the Roadless Rule could hinder construction of Federal Aid Highways was unsupported by the record and contrary to earlier findings. It was arbitrary, as the district court correctly held. ER 23-24.

Contrary to Alaska's assertions, USDA was unable to produce even one example of a road that might be barred by the Roadless Rule. The SIR identified only one transportation project for the region, a proposed ferry for Prince of Wales Island that it conceded "will not directly affect inventoried roadless areas."

[9] The Secretary's discretion over Federal Aid Highways in the national forests generally is slightly different from that under the Roadless Rule. The Rule requires an affirmative determination, ER 115 (36 C.F.R. § 294.12(b)(6)), while Title 23 provides a veto power. *See* 23 U.S.C. § 317(b). However, USDA did not even mention this difference in the 2003 Tongass Exemption and certainly did not argue that it created a significant new hurdle. Since the agency did not rely on this explanation, it cannot be a basis to uphold the Tongass Exemption. *See State Farm*, 463 U.S. at 43 (courts will not rely on justifications not provided by the agency).

SER 229. The fact that USDA looked for but was unable to identify any project the Rule might bar belies the assertion that an exemption was needed to ensure community road connections, all the more so given its intended short-term duration.

The two lists Alaska cites do not identify any roads barred by the Roadless Rule. The first, *see* Alaska Br. at 24, identifies four (not twelve) projects that require roads in Tongass roadless areas: the Cascade Point Access Road, the East Bradfield Canal Access Road, and two hydroelectric projects (Lake Dorothy and Otter Creek) with minimal road needs. ER 73.[10] The list includes other projects in Region 10 (i.e., Alaska), *id.*, but they are in the Chugach National Forest and therefore not affected by the Tongass Exemption.[11]

Further, none of the four projects would likely be hindered by the Roadless Rule. The Cascade Point road (completed in 2005) was for the purpose of

[10] This list was not included "in the FEIS" as asserted by Alaska, but was a specialist report prepared for it. *See* ER 72.

[11] The projects' locations can be determined readily through internet searches. One of the Chugach projects on the list, the 5.5-mile Sterling Highway Realignment, is discussed in the FEIS, SER 292, the Roadless Rule ROD, ER 107 (column 3), and the record. SER 59.

Another project on the list— "Small Timber Sale Roads" with two miles of roads for "Free use, house logs, firewood"—could potentially be in either forest. *See* ER 73. Regardless, it was a minor project scheduled for 2002, when the Roadless Rule was enjoined, and would have been completed by the time of the Tongass Exemption.

providing access to private land, *see* SER 9, thereby requiring USDA to provide reasonable access under 16 U.S.C. § 3210(a). The Rule permits construction of roads "as provided for by statute," ER 115 (36 C.F.R. § 294.12(b)(3)), and therefore would not plausibly have posed an obstacle. *See* SER 133-34; ER 96 (columns 1-2). The East Bradfield Canal project would be an 86-mile, $300 million major transportation link to Canada, *see* ER 65, that would clearly require Federal Aid Highway funding. The other two are hydropower projects, which USDA did not identify as a concern in adopting the Tongass Exemption. USDA cited none of these projects as a problem in the FEIS, the SIR, or the RODs for either the Rule or the Exemption.

The other document cited by Alaska is a long-term, comprehensive vision of future access projects throughout Southeast Alaska, calling for 19 major road and ferry projects. Alaska Br. at 24-25 (citing ER 45-71). Of course, were financing ever secured, many would cross roadless areas. However, neither Alaska nor USDA could cite even one of them that would be built during the intended short duration of the temporary Exemption. Even if near-term needs had existed, they were all major projects eligible for Federal Aid Highway funding and therefore not prohibited by the Rule.

If USDA had genuinely been concerned, contrary to its original findings, that the Roadless Rule created significant new hurdles for Federal Aid Highways, a

reasonable alternative would have been simply to eliminate the requirement for the determinations in section 294.12(b)(6). This would have fully answered the ROD's stated concern that it may not always be possible to make the required findings. Another obvious alternative would have been to exempt Southeast Alaska transportation corridors, which had recently been identified by the agency and assigned a "Transportation and Utility Systems" planning designation. SER 192, 194-96. USDA's failure to consider such obvious and less drastic alternatives ignored an important aspect of the problem and rendered the decision arbitrary. *See, e.g.*, *State Farm*, 463 U.S. at 48.

2. The Roadless Rule does not prevent construction of utility lines.

For similar reasons, the ROD's finding that a temporary exemption was needed to allow construction of utility lines was also arbitrary. *See* ER 76 (column 1) (Rule "significantly limits" utility connections). The Roadless Rule does not prohibit construction of utility lines, and the record unequivocally shows that roads are not needed to build them. USDA's speculation to the contrary in the Exemption ROD, without evidence or explanation, contradicts the agency's own well-supported findings made when the Rule was adopted. Had legitimate concerns existed over the ability to construct needed utility lines, there were reasonable options to address them short of exempting the entire forest.

The Roadless Rule does not prohibit utility lines. It contains an exception that allows for cutting of trees incidental to otherwise authorized activity. ER 116 (36 C.F.R. § 294.13(b)(2)). One of the explicit purposes of that allowance was to permit clearing of utility corridors. ER 101 (column 2). The Rule also is construed to allow vehicles and heavy motorized equipment in "construction zones" for utility lines. *See Wilderness Workshop*, 531 F.3d at 1227-28.

USDA studied this issue before adopting the Rule and found that it would not have a major effect on utility lines. The FEIS, citing a recent study, notes that "only a couple of proposed corridors in the Western States may be affected," and goes on to question whether the Rule would preclude even those. SER 136. It concludes that any effects would be "minimal." *Id.*

USDA also examined the impacts of the Roadless Rule on utility lines in the Tongass and found none, because utility connections in Southeast Alaska have always been built without roads even absent federal restrictions. In 2000, agency staff produced a short "Information Brief" on the question. It cites a 50-mile intertie route from Wrangell to Petersburg "which did not require one mile of road construction." SER 168. It also mentions a sub-marine intertie from Haines to Skagway. *Id.* It explains that the 1997 final decision for the Swan-Tyee Intertie included no road construction, *id.*, a decision based on lower costs for both construction and operation. SER 22, 33. The intertie was built accordingly, even

though the Roadless Rule was not at that point in force on the Tongass. SER 239. Other utility connections in the region have similarly been built without roads. *See* SER 169-71 (maps of Bradfield Canal, Blake Channel, and Snettisham connectors).[12]

In 2003, the agency looked at the issue again in the SIR, specifically for the Tongass Exemption, and found no relevant new information. SER 229.

The Exemption ROD contains no actual evidence of interference with utility connections that would contradict the findings in the FEIS and SIR. The only stated basis for USDA's conclusion that the Rule may interfere with utility lines in Southeast Alaska, and the entire point on which Alaska bases its argument, was that some utility corridors "may" require a road or be more expensive without one. ER 82 (column 1); *see* Alaska Br. at 26. This speculation is wholly unsupported by and contrary to the record. Without explanation, it contradicts the agency's well-supported previous factual findings. These failings render the exemption arbitrary, especially given the Exemption's temporary nature.

Alaska wrongly asserts that three of the projects in the 2000 specialist report were utility lines that could be barred by the Rule. *See* Alaska Br. at 26. The

[12] The map at SER 171 does not identify the Snettisham line by name. It is the narrow, yellow strip from the powerhouse below Long Lake, along the beach around Port Snettisham and under Taku Inlet to Juneau.

Cascade Point Access Road is precisely that, an access road, not a utility corridor.[13] ER 73; SER 9. Alaska's other two examples—Lake Dorothy Hydro and Otter Creek Hydro—are hydropower projects (both now complete), not utility lines. ER 73. Of course, transmission lines were required to connect them to the existing grid, but, as discussed, the Roadless Rule does not prohibit transmission lines. There is no evidence that any roads were required for these lines. USDA cited none of these projects in the Exemption ROD.

Finally, had there been some basis for the ROD's conclusion that the Roadless Rule could prevent construction of utility lines in the short term, it was not necessary to exempt the entire Tongass from the Rule to address that concern. The Rule was never intended or predicted to stop utility lines. One alternative would have been to allow roads if needed for utility lines. Another obvious alternative, as with Federal Aid Highways, would have been to exempt just the Transportation and Utility Corridors identified in the forest plan. *See supra* p. 39; SER 192, 196-97. Here, too, the failure to consider such obvious and less drastic alternatives renders the decision arbitrary.

[13] Even if a utility line were planned along this road, which is not reflected in the record, the Rule does not prohibit utility lines. The access road itself is allowed by the Rule. *See supra* pp. 37-38.

F. The Tongass Exemption Did Not and Could Not Reduce Uncertainty About Roadless Area Logging and Road-Building.

A temporary management rule cannot, by its nature, enhance certainty. USDA did not, and legally could not, purport to adopt a temporary exemption that could be relied on as permanent. In asserting that exempting the Tongass would reduce conflict and uncertainty, the agency without explanation reversed its prior position.

USDA's most directly asserted rationale for the Tongass Exemption is also its most palpably irrational. The agency stated that "[g]iven the great uncertainty about the implementation of the roadless rule due to the various lawsuits, the Department has decided to adopt this final rule ... to temporarily exempt the Tongass National Forest from the prohibitions of the roadless rule." ER 77 (column 1). It elaborated that "[a]dopting this final rule reduces the potential for conflicts regardless of the disposition of the various lawsuits" then pending over the Roadless Rule. *Id.* (column 2). Reducing uncertainty, the agency opined, "will enable the private sector to make investment decisions needed to prevent further job losses." ER 83 (column 2). By its nature, however, a temporary exemption cannot produce long-term predictability, because the permanent rule remains unknown. Indeed, the multiplicity of rulemakings embraced by USDA in the Exemption—a permanent rule, followed by a temporary exemption, followed by a different permanent rule—provides a corresponding multiplicity of probable

lawsuits. USDA's conclusion that this approach "would provide legal certainty," the district court correctly found, "is implausible." ER 28.

Legally, the temporary Exemption had to create uncertainty. It was to be followed by a permanent rulemaking, the outcome of which USDA could not legally prejudge. *See, e.g.*, *Wyoming*, 2011 WL 5022755, at *39-40 (arbitrary and capricious for agency to commit itself to an outcome before finishing NEPA process) (quoting *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010)). Moreover, USDA expressly foreswore such a predetermination: "Promulgating this final rule would not prejudice the ultimate decision on the advance notice of proposed rulemaking" for an Alaska-wide directive. ER 82 (column 3); *see also* ER 77 (column 1) (temporary Exemption "does not foreclose options regarding the future rulemaking").

USDA's position on uncertainty in the Tongass Exemption represented yet another unexplained change from the Roadless Rule. In 2001, the agency concluded that, though the Rule would not eliminate conflict over roadless areas, it would reduce it. ER 96 (column 1) ("the agency decided that the best means to reduce this conflict is through a national level rule"); *see also* SER 120 (predicting Tongass Not Exempt alternative in 2000 FEIS would have lowest appeal and litigation costs). The agency abandoned that position in 2003, asserting that exempting the Tongass would reduce uncertainty, without even acknowledging its

previous, opposite conclusion that including the Tongass in the Rule would reduce conflict.

The State is demonstrably wrong in suggesting that USDA's real motive was not litigation broadly, but only to reduce uncertainty about the Rule's application to the Tongass. *See* Alaska Br. at 32. The agency asserted that it was addressing the "potential for conflicts regardless of the disposition of the various lawsuits." ER 77 (column 2). At a time when the State's lawsuit was already dismissed, USDA cited "ongoing litigation in the district courts and one Federal appeals court" and "pending litigation" as motivation for the Exemption. ER 81 (column 3).

Regardless, even had its focus been only on Tongass-specific legal certainty, the Exemption could not have advanced that goal. As noted above, both the temporary nature of the Exemption and its reopening of conflict over roadless area management enhanced rather than reduced uncertainty. This was particularly the case since the agency sought to encourage long-range private investment in the region.

G. The Tongass Land Management Plan Does Not Provide a Basis for Upholding the Tongass Exemption.

USDA's forest plan for the Tongass did not constitute an affirmative reason for the agency to eliminate the Roadless Rule there. To the extent the plan

protected many roadless areas during its fifteen-year life expectancy, *see* 16 U.S.C. § 1604(f)(5), it merely mitigated the Exemption's adverse environmental impacts. While mitigation might make the Exemption more palatable, it could not logically have been a rationale, in itself, for the Exemption, any more than pain medication provides an affirmative reason to have surgery. The affirmative reasons the agency wanted to remove those protections were purported concerns over community road and utility connections, jobs, and litigation uncertainty. Because those reasons were arbitrary, the Exemption must be set aside regardless of the forest plan's impact-mitigating potential.

To the extent Alaska implies that the Roadless Rule was not needed to protect environmental values on the Tongass, *see* Alaska Br. at 28-29, the record refutes this. In 2000, for instance, USDA specifically found that the Rule would enhance wildlife protections: "[T]here is a higher likelihood for less desirable species viability outcomes under the Tongass Exempt Alternative." ER 220-21. In 2003, the agency unequivocally reaffirmed that applying the Rule to the Tongass was the environmentally preferable alternative. ER 83. Furthermore, Alaska is wrong to attack the lower court's reliance on Ninth Circuit caselaw as indicating that the Roadless Rule better protected roadless areas than the local management plan. *See* Alaska Br. at 29. Far from being a limited ruling on preliminary relief, this Court's statement that "there can be no doubt that the 58.5 million acres

subject to the Roadless Rule, if implemented, would have greater protection if the Roadless Rule stands" was made in the course of conclusively determining standing. *Kootenai Tribe*, 313 F.3d at 1109-10.

II. THE TONGASS EXEMPTION VIOLATED NEPA.

USDA violated a core command of NEPA by failing to consider any alternatives to its proposal that responded to its asserted concerns while better preserving the environment. Its reliance on alternatives in the Roadless Rule FEIS was misplaced, since they were designed for a wholly different purpose. Numerous obvious alternatives could have been evaluated. The State's assertion that the real purpose of the Exemption was only to reconsider ANILCA and TTRA direction is belied by the record and irrelevant. Its argument is also wrong that USDA was free to ignore obvious alternatives as long as the public did not specifically identify them, and to do so outside of any NEPA process.

A. Appellate Court Consideration.

The district court did not reach Kake's NEPA claim. ER 30. Normally, "a federal appellate court does not consider an issue not passed upon below." *Bibeau v. Pac. Nw. Research Found., Inc.*, 188 F.3d 1105, 1114 (9th Cir. 1999) (Wallace, J., concurring) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). However, this Court "may affirm on any basis the record supports, including one the district court did not reach." *Herring v. FDIC*, 82 F.3d 282, 284 (9th Cir. 1995) (citing

USA Petroleum Co. v. Atl. Richfield Co., 13 F.3d 1276, 1279 (9th Cir. 1994)). As the State and AFA have briefed this issue, Kake responds here.

B. Standards of Review.

Review for compliance with NEPA occurs under the provision of the APA that authorizes courts to set aside agency actions adopted "without observance of procedure required by law." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1165 (9th Cir. 2003) (quoting 5 U.S.C. § 706(2)(D)). When the question before the court is predominantly a legal one, and not the sort of factual one implicating agency expertise, the applicable standard of review is reasonableness. *Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d at 727. District court rulings on the merits of NEPA claims are reviewed *de novo* by this Court. *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1124 (9th Cir. 2007).

C. USDA Unlawfully Failed to Consider Alternatives for Accomplishing Its Asserted Purpose and Need.

The goal of NEPA is "to ensure that federal agencies infuse in project planning a thorough consideration of environmental values." *Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d at 729 (quoting *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988)). In furtherance of that goal, NEPA requires that agencies "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015,

1020 (9th Cir. 2009) (quoting 40 C.F.R. § 1502.14(a)). Indeed, the purpose of an EIS, in addition to full disclosure of a proposal's environmental impacts, is "to inform decision makers and the public of reasonable alternatives that would minimize adverse environmental impacts." *Lockyer*, 575 F.3d at 1012 (citing 40 C.F.R. § 1502.1); *see also Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 785 (9th Cir. 2006). The source of this requirement is, in part, the congressional admonition that "to the fullest extent possible" federal agencies contemplating actions that require an EIS must address "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii); *see also id.* at § 4332(2)(E) (alternatives required for any proposal involving unresolved resource conflicts). Thus, the "existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Natural Res. Def. Council* , 421 F.3d at 813 (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)).

More specifically, an agency "must consider all reasonable alternatives within the purpose and need it has defined." *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1097 (9th Cir. 2006); *see also City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("The stated goal of a project necessarily dictates the range of 'reasonable' alternatives"); 40 C.F.R. § 1502.13 (an EIS "shall briefly specify the underlying purpose and need to which

the agency is responding in proposing the alternatives including the proposed action").

USDA erroneously failed to develop and consider alternatives that responded to its stated purpose and need for the Tongass Exemption, alternatives that would have reduced or eliminated environmental harm. The agency decided, based on the SIR, not to prepare an EIS for the Exemption, but instead to rely on the Roadless Rule's EIS. ER 80 (column 3). Consequently, the only alternatives it considered were those from the earlier EIS. ER 83 (column 1). It mistakenly assumed that the EIS for a different and prior decision fulfilled its NEPA duties as long as it deemed factual circumstances and information not significantly changed during the intervening years. ER 80 (columns 2-3).

The 2000 EIS did not and could not meet the agency's NEPA obligation to study alternatives to the Tongass Exemption. The Roadless Rule process had, and its EIS reflected, a profoundly different purpose from the Exemption: "to immediately stop activities that pose the greatest risks to the social and ecological values of inventoried roadless areas." *Lockyer*, 459 F. Supp. 2d at 906 (quoting Roadless Rule FEIS); SER 65. USDA identified three needs for the Roadless Rule: (1) damage from road-building and logging to roadless area characteristics; (2) budgetary constraints that left most Forest Service roads poorly managed; and

(3) controversy over roadless areas, including "costly and time-consuming appeals and litigation." SER 87-88.

By contrast, the Exemption aimed to mitigate asserted socio-economic impacts of the Rule, including (1) interference with community road and utility connections; (2) job loss; and (3) uncertainty attributable to litigation. *See supra* pp. 12-13. That dramatic change of goals put the Forest Service in the same situation here as it was in *Sierra Forest Legacy*, where "introduction of these new objectives plainly constituted a change in circumstances that is 'relevant to the development and evaluation of alternatives' that USFS 'must account for … in the alternatives it considers.'" 577 F.3d at 1021-22 (quoting *Natural Res. Def. Council*, 421 F.3d at 813). By not analyzing a set of reasonable alternatives that minimized environmental impacts, it omitted a core component of NEPA analysis. *See, e.g.*, *Lockyer*, 575 F.3d at 1012. In fact, the change from protecting the environment to loosening development restrictions heightened its obligation to formulate and consider environmentally preferable alternatives. *See Kootenai Tribe*, 313 F.3d at 1120 ("The NEPA alternatives requirement must be interpreted less stringently when the proposed agency action has a primary and central purpose to conserve and protect the natural environment").

In mistakenly relying on the Roadless Rule EIS for the Tongass Exemption, USDA ignored numerous reasonable and environmentally superior alternatives that

would have served its asserted needs, had they been genuine. For example, as discussed above, had the agency had a well-grounded basis for its concern that the Roadless Rule might prevent needed community road and utility connections, it could have considered exempting recently identified Transportation and Utility Corridors, or some subset of specific foreseeable projects, rather than jettisoning the Rule entirely. *See supra* pp. 39, 42. Similarly, it could have considered an alternative with a more relaxed highway exemption. *See supra* pp. 38-39. If the agency were concerned about resurgent timber demand during the short intended duration of the temporary exemption, it could have relied on the pipeline of hundreds of millions of board feet in grandfathered timber sales, or, if even that were insufficient, it could have temporarily accelerated logging in roaded areas. *See supra* p. 30. It could have opened up a small number of roadless areas that it determined, with public input, to be least likely to engender conflict. These options would not only have dealt with any genuine concerns about job loss, they would also have lowered the risk of controversy and litigation, and hence reduced the uncertainty about which the agency voiced concerns. By failing to consider any such environmentally preferable alternatives keyed to its asserted purpose and need, USDA violated NEPA, just as surely as it did in *Natural Resources Defense Council*, where it "omit[ted] the viable alternative of allocating less unspoiled area to development." 421 F.3d at 814.

D. The State's and AFA's NEPA Arguments Are Unavailing.

The State is mistaken that the Exemption's purpose 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." Alaska Br. at 35 (citing ER 75). The cited passage of the Exemption ROD asserts neither that USDA changed its position nor that it formed the basis for the Exemption. Moreover, the passage contains no mention of TTRA. Tellingly, in the proceedings below, USDA never asserted that ANILCA or TTRA supplied the agency's purpose. Just as fatally to the State's argument, the obligation to study environment-sparing alternatives arises not merely from the agency's asserted purpose but also from the needs it identifies (which here were specified socio-economic issues).

AFA objects that if the purpose and need for the two agency actions were so different, then the Tongass Exempt alternative in the Roadless Rule EIS could not have served that first decision's purpose and need. AFA Br. at 6. AFA is, in fact, correct. The Tongass Exempt alternative applied the Roadless Rule's "no action" alternative to the Tongass. In fact, under the "no action" alternative, the Tongass accounted for nearly half of the foreseen timber sales nationally. SER 302. The agency, far from finding it compatible with its Roadless Rule objectives, "rejected the 'no action' alternative as fundamentally inconsistent with its purpose and

need." *Lockyer*, 459 F. Supp. 2d at 906 (quoting the Roadless Rule EIS). USDA was required to analyze "no action" not to fulfill its purpose and need, but rather to establish a baseline for other alternatives. *Id.* at 905. The fact that USDA could later adopt this major portion of the "no action" alternative, so wholly incompatible with the Roadless Rule, as the Tongass Exemption necessarily means that the two processes had radically different purposes and needs.

AFA additionally argues at length, and wrongly, for the irrelevance of this Court's holding in *Lockyer* that USDA improperly relied on the Roadless Rule's EIS alternatives in trying to rescind the rule nationwide. *See* AFA Br. at 9-11. *Lockyer* did differ from this case in that there USDA adopted the State Petitions Rule as well as rescinding the Roadless Rule. However, as this Court found, "[t]he duplicative nature of the State Petitions Rule and the very limited duration of the state petition window (eighteen months) strongly suggest that the primary purpose of the State Petitions Rule was to eliminate permanently the Roadless Rule." *Lockyer*, 575 F.3d at 1015. Functionally, the Tongass Exemption and the State Petitions Rule, though differing in geographic and temporal scale, shared the central purpose of eliminating the Roadless Rule's protections. The alternatives in the 2000 FEIS were not designed to support this purpose.

Finally, USDA cannot, as the State would have it, ignore reasonable alternatives simply because the public has not specially flagged them. *See* Alaska

Br. at 35-36. Agencies bear primary responsibility for ensuring that they comply with NEPA's dictates. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004); *see also 'Ili'ulaokalani Coalition*, 464 F.3d at 1092 ("Plaintiffs have not waived their opportunity to challenge the range of alternatives"); *Wash. Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1167 (9th Cir. 1975), *overruled on other grounds by State of Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990) ("The primary and nondelegable responsibility for [considering environmental values] lies with the Commission" (quoting *Greene County Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412, 420 (2d Cir. 1972))). Alaska's reliance on *Public Citizen*, Alaska Br. at 36, is misplaced. *Public Citizen* concerned alleged flaws that could have been raised during a NEPA process. 541 U.S. at 765-66. Here, there was no NEPA process for the Tongass Exemption, and Kake thus did not fail to participate in one. In taking public comment, USDA advanced rationales for exempting the Tongass, to which Kake objected as not reflecting genuine needs, but the agency never proposed or sought comment on any alternatives other than its preferred action of exempting the Tongass altogether. *See* 68 Fed. Reg. 41,865-69 (July 15, 2003). Further, unlike the situation here, *Public Citizen* expressly found that those challenging the agency's decision could point only to non-obvious alternatives that were at best tenuously superior from an environmental standpoint. 541 U.S. at 765.

III. THE DISTRICT COURT CORRECTLY VACATED THE TONGASS EXEMPTION.

The district court acted entirely within its discretion in vacating the Tongass Exemption, thereby reinstating the Roadless Rule on the Tongass. Indeed, to do anything less would have been an abuse of discretion. Alaska and AFA seek an extraordinary result: They would have the court keep the Tongass exempt from the Roadless Rule, despite the Exemption having been held arbitrary, and despite the fact that the Roadless Rule has been reviewed and approved by both the Ninth and Tenth Circuits. *See Kootenai Tribe*, 313 F.3d at 1116, 1118, 1120, 1123 (reversing preliminary injunction and rejecting legal theories advanced by plaintiffs); *Wyoming*, 2011 WL 5022755, at *48. That result is unjustifiable.

The "general rule" in APA cases is to vacate actions not sustainable on the record. *ASARCO, Inc. v. OSHA*, 647 F.2d 1, 2 (9th Cir. 1981). This is what courts "ordinarily" do. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). It is the remedy Congress specified in the APA for cases like this. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall ... hold unlawful and set aside agency action ... found to be ... arbitrary"); *see also Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("where a regulation is promulgated in violation of the APA and the violation is not harmless, the remedy is to invalidate the regulation"). "The effect of invalidating an agency rule is to

reinstate the rule previously in force." *Paulsen*, 413 F.3d at 1008; *see also Lockyer*, 575 F.3d at 1020.

Alaska and AFA are correct in noting that the district court retains discretion where the circumstances call for a different remedy. However, a court should not lightly leave an arbitrary or unlawful rule in place. Alaska and AFA have failed to present any convincing reason to depart from the normal remedy here.

Their leading argument is that USDA intended the Tongass to be exempt from the Roadless Rule regardless of the outcome of litigation. Alaska Br. at 36-37; AFA Br. at 15. This argument, if accepted, would defeat the purpose of judicial review. Presumably, agencies would normally like their actions to remain in place regardless of court holdings. This Court rejected exactly the same argument in *Lockyer*, 575 F.3d at 1020. There, as here, opponents of reinstating the Rule argued that USDA "stated unequivocally its desire that the Roadless Rule not be implemented." *Id.* In upholding the district court's reinstatement of the Rule, this Court noted, "That the district court found unpalatable the USDA's proposed remedy ... is not surprising." *Id.*

Undeterred, AFA wrongly suggests that *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), and *Citizens for Better Forestry v. USDA*, 632 F. Supp. 2d 968 (N.D. Cal. 2009), support deferring to the agency's wishes. *See* AFA Br. at 14-15. Both of these cases vacated unlawful rules and allowed the

agency, on remand, to change the pre-existing regulatory status quo, as long as the agency complied with applicable law. The district court's remedy here was entirely consistent with these cases.

In *Monsanto*, various parties challenged a deregulation decision. The Supreme Court assumed without deciding that the district court had properly vacated the challenged agency action. 130 S. Ct. at 2756. In the discussion cited by AFA, the Court examined the propriety of injunctive relief above and beyond vacatur, concluding that the injunction entered by the district court unnecessarily limited the agency's discretion to consider future deregulation. *Id.* at 2761. This analysis has no applicability here, where the district court's order contains no injunction and in no way otherwise limits USDA's ability to conduct future rulemaking.

The same is true of *Citizens for Better Forestry*. There, USDA had made a series of attempts to amend its NFMA planning regulations. As here and in *Monsanto*, the district court vacated the unlawful rule. *Citizens for Better Forestry*, 632 F. Supp. 2d at 982. In doing so, it gave USDA the choice of which previous set of rules—1982 or 2000—to reinstate. *Id.* The agency administratively reinstated the last valid rule in effect (the 2000 rule) rather than undertake the rulemaking that would have been required to return to the 1982 rule. 74 Fed. Reg. 67,059, 67,060 (Dec. 18, 2009) (column 1) (citing *Paulsen*). The

choice the court gave to USDA is no different from what the district court did here, where it remains within USDA's discretion to proceed with a rule other than the 2001 Roadless Rule, so long as it complies with applicable laws and procedures.

Alaska and AFA next argue that the Roadless Rule was invalid at the time of the district court's judgment and at the time of the Tongass Exemption, and therefore should not have been reinstated. Alaska Br. at 37-38; AFA Br. at 13-14. This argument ignores *Lockyer*, a controlling case in which this Court in 2009 affirmed a district court judgment reinstating the Roadless Rule,[14] 575 F.3d at 1020, despite the fact that the district court in Wyoming had twice enjoined it. *See Wyoming v. USDA*, 570 F. Supp. 2d 1309, 1354-55 (D. Wyo. 2008), *rev'd*, 2011 WL 5022755. Without citing the Ninth Circuit's holding in *Lockyer*, Alaska and AFA argue that the district court here should have blindly followed the Wyoming injunction, which conflicted with this Court's *Kootenai Tribe* decision, *see California ex rel. Lockyer v. USDA*, 710 F. Supp. 2d 916, 920 (N.D. Cal. 2008) (explaining conflict between *Wyoming*'s reasoning and *Kootenai Tribe*), was on appeal at the time, and was later reversed. *See supra* p. 10. At the time of the district court's judgment here, USDA was under conflicting injunctions, having been ordered to comply with the Roadless Rule in *Lockyer* and not to comply with

[14] *Lockyer* reinstated the Roadless Rule in every forest but the Tongass, because of the Tongass Exemption at issue in this case. *Lockyer*, 459 F. Supp. 2d at 916-17.

it in *Wyoming*. *See Lockyer*, 710 F. Supp. 2d at 924 (partially staying injunction outside Ninth Circuit to reduce conflict); *Lockyer*, 575 F.3d at 1020 (affirming injunction). It cannot be an abuse of discretion for a district court in Alaska to follow this Court's precedent rather than that of a district court in Wyoming. This is all the more inarguable given the Tenth Circuit's recent reversal in *Wyoming*, meaning there are no longer any extant judgments against the Roadless Rule.

Even less convincing is the assertion that the district court should have relied on the 2003 Wyoming injunction, which had been vacated as moot. *Wyoming v. USDA*, 277 F. Supp. 2d 1197 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005). The very purpose of such a vacatur is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).

Similarly, this Court in *Lockyer* rejected the suggestion of Alaska and AFA that the district court should have "reinstated ... USDA management under the land and resource management plan," which would simply achieve the same effect as leaving the arbitrary Exemption in place. *See* Alaska Br. at 37-38; AFA Br. at 15. As an initial matter, the Tongass forest plan remains in effect, subject to the Roadless Rule as well as other federal laws, and thus requires no district court order to "reinstate" it. *See generally Wyoming*, 2011 WL 5022755, at *46 (explaining relationship of forest plans to Roadless Rule); *accord Kootenai Tribe*,

313 F.3d at 1117 n.20. In *Lockyer*, the opponents of reinstating the Roadless Rule contended "that the district court should have 'reinstated' the forest management plans," an argument both the district court and this Court rejected. 575 F.3d at 1020. The Court should reject it again here.

CONCLUSION

For the foregoing reasons, Kake requests that this Court affirm the decision of the district court.

Respectfully submitted, this 23rd day of November, 2011,

/s/

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,979 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 Word 2010 in 14 point Times New Roman.

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Attorney for Plaintiffs-Appellees Organized Village of Kake, et al.

Dated: November 23, 2011

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Organized Village of Kake, The Boat Company, Alaska Wilderness Recreation and Tourism Association, Sierra Club, Southeast Alaska Conservation Council, Natural Resources Defense Council, Tongass Conservation Society, Greenpeace, Inc., Wrangell Resource Council, Center for Biological Diversity, Defenders of Wildlife, and Cascadia Wildlands hereby state that they are not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, I electronically filed the foregoing APPELLEES' 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.

I also certify that on November 23, 2011, four (4) copies of APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD were sent by Priority Mail, postage prepaid, to the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, California 94119-3939, and one (1) copy of APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD was served, by the same manner, on:

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ADDENDUM

STATUTES

REGULATIONS

STATUTES

ADMINISTRATIVE PROCEDURE ACT (APA)

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . .

(D) without observance of procedure required by law;

. . .

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

MULTIPLE-USE SUSTAINED-YIELD ACT (MUSYA)

16 U.S.C. § 529

§ 529. Authorization of development and administration; consideration to relative values of resources; areas of wilderness

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528 to 531 of this title.

MULTIPLE-USE SUSTAINED-YIELD ACT

16 U.S.C. § 531

§ 531. Definitions

As used in sections 528 to 531 of this title the following terms shall have the following meanings:

(a) “Multiple use” means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

. . .

TONGASS TIMBER REFORM ACT (TTRA)

16 U.S.C. § 539d

§ 539d. National forest timber utilization program

(a) Tongass National Forest timber supply; satisfaction of certain market demands

Subject to appropriations, other applicable law, and the requirements of the National Forest Management Act of 1976 (Public Law 94-588), except as provided in subsection (d) of this section, the Secretary shall, to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources, seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle.

. . .

NATIONAL FOREST MANAGEMENT ACT (NFMA)

16 U.S.C. § 1604

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

. . .

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans--

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. §§ 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms “multiple use” and “sustained yield” as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall--

. . .

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

. . .

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA)

16 U.S.C. § 3101

§ 3101. Congressional statement of purpose

. . .

(d) Need for future legislation obviated

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA)

16 U.S.C. § 3210

§ 3210. Access by owner to nonfederally owned land

(a) Reasonable use and enjoyment of land within boundaries of National Forest System

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

. . .

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA)

16 U.S.C. § 3213

§ 3213. Future executive branch actions

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

. . .

FEDERAL AID HIGHWAYS

23 U.S.C. § 317

§ 317. Appropriation for highway purposes of lands or interests in lands owned by the United States

(a) If the Secretary determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State transportation department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State transportation department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

(d) The provisions of this section shall apply only to projects constructed on a Federal-aid system or under the provisions of chapter 2 of this title.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on

Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

. . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

. . .

REGULATIONS

ROADLESS AREA CONSERVATION RULE

36 C.F.R. §§ 294.10-.14

Subpart B—Protection of Inventoried Roadless Areas

§ 294.10 Purpose.

The purpose of this subpart is to provide, within the context of multiple-use management, lasting protection for inventoried roadless areas within the National Forest System.

§ 294.11 Definitions.

The following terms and definitions apply to this subpart:

Inventoried roadless areas. Areas identified in a set of inventoried roadless area maps, contained in Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume 2, dated November 2000, which are held at the National headquarters office of the Forest Service, or any subsequent update or revision of those maps.

Responsible official. The Forest Service line officer with the authority and responsibility to make decisions regarding protection and management of inventoried roadless areas pursuant to this subpart.

Road. A motor vehicle travelway over 50 inches wide, unless designated and managed as a trail. A road may be classified, unclassified, or temporary.

(1) *Classified road*. A road wholly or partially within or adjacent to National Forest System lands that is determined to be needed for long-term motor vehicle access, including State roads, county roads, privately owned roads, National Forest System roads, and other roads authorized by the Forest Service.

(2) *Unclassified road*. A road on National Forest System lands that is not managed as part of the forest transportation system, such as unplanned roads, abandoned travelways, and off-road vehicle tracks that have not been designated and managed as a trail; and those roads that were once under permit or other

authorization and were not decommissioned upon the termination of the authorization.

(3) *Temporary road*. A road authorized by contract, permit, lease, other written authorization, or emergency operation, not intended to be part of the forest transportation system and not necessary for long-term resource management.

Road construction. Activity that results in the addition of forest classified or temporary road miles.

Road maintenance. The ongoing upkeep of a road necessary to retain or restore the road to the approved road management objective.

Road reconstruction. Activity that results in improvement or realignment of an existing classified road defined as follows:

(1) *Road improvement*. Activity that results in an increase of an existing road's traffic service level, expansion of its capacity, or a change in its original design function.

(2) *Road realignment*. Activity that results in a new location of an existing road or portions of an existing road, and treatment of the old roadway.

Roadless area characteristics. Resources or features that are often present in and characterize inventoried roadless areas, including:

(1) High quality or undisturbed soil, water, and air;

(2) Sources of public drinking water;

(3) Diversity of plant and animal communities;

(4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land;

(5) Primitive, semi-primitive non-motorized and semi-primitive motorized classes of dispersed recreation;

(6) Reference landscapes;

(7) Natural appearing landscapes with high scenic quality;

(8) Traditional cultural properties and sacred sites; and

(9) Other locally identified unique characteristics.

§ 294.12 Prohibition on road construction and road reconstruction in inventoried roadless areas.

(a) A road may not be constructed or reconstructed in inventoried roadless areas of the National Forest System, except as provided in paragraph (b) of this section.

(b) Notwithstanding the prohibition in paragraph (a) of this section, a road may be constructed or reconstructed in an inventoried roadless area if the Responsible Official determines that one of the following circumstances exists:

(1) A road is needed to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property;

(2) A road is needed to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or to conduct a natural resource restoration action under CERCLA, Section 311 of the Clean Water Act, or the Oil Pollution Act;

(3) A road is needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty;

(4) Road realignment is needed to prevent irreparable resource damage that arises from the design, location, use, or deterioration of a classified road and that cannot be mitigated by road maintenance. Road realignment may occur under this paragraph only if the road is deemed essential for public or private access, natural resource management, or public health and safety;

(5) Road reconstruction is needed to implement a road safety improvement project on a classified road determined to be hazardous on the basis of accident experience or accident potential on that road;

(6) The Secretary of Agriculture determines that a Federal Aid Highway project, authorized pursuant to Title 23 of the United States Code, is in the public interest or is consistent with the purposes for which the land was reserved or acquired and no other reasonable and prudent alternative exists; or

(7) A road is needed in conjunction with the continuation, extension, or *3273 renewal of a mineral lease on lands that are under lease by the Secretary of the Interior as of January 12, 2001 or for a new lease issued immediately upon expiration of an existing lease. Such road construction or reconstruction must be conducted in a manner that minimizes effects on surface resources, prevents

unnecessary or unreasonable surface disturbance, and complies with all applicable lease requirements, land and resource management plan direction, regulations, and laws. Roads constructed or reconstructed pursuant to this paragraph must be obliterated when no longer needed for the purposes of the lease or upon termination or expiration of the lease, whichever is sooner.

(c) Maintenance of classified roads is permissible in inventoried roadless areas.

§ 294.13 Prohibition on timber cutting, sale, or removal in inventoried roadless areas.

(a) Timber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System, except as provided in paragraph (b) of this section.

(b) Notwithstanding the prohibition in paragraph (a) of this section, timber may be cut, sold, or removed in inventoried roadless areas if the Responsible Official determines that one of the following circumstances exists. The cutting, sale, or removal of timber in these areas is expected to be infrequent.

(1) The cutting, sale, or removal of generally small diameter timber is needed for one of the following purposes and will maintain or improve one or more of the roadless area characteristics as defined in § 294.11.

(i) To improve threatened, endangered, proposed, or sensitive species habitat; or

(ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period;

(2) The cutting, sale, or removal of timber is incidental to the implementation of a management activity not otherwise prohibited by this subpart;

(3) The cutting, sale, or removal of timber is needed and appropriate for personal or administrative use, as provided for in 36 CFR part 223; or

(4) Roadless characteristics have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest. Both the road construction and subsequent timber harvest must have occurred after the area was designated an inventoried roadless

area and prior to January 12, 2001. Timber may be cut, sold, or removed only in the substantially altered portion of the inventoried roadless area.

§ 294.14 Scope and applicability.

(a) This subpart does not revoke, suspend, or modify any permit, contract, or other legal instrument authorizing the occupancy and use of National Forest System land issued prior to January 12, 2001.

(b) This subpart does not compel the amendment or revision of any land and resource management plan.

(c) This subpart does not revoke, suspend, or modify any project or activity decision made prior to January 12, 2001.

(d) This subpart does not apply to road construction, reconstruction, or the cutting, sale, or removal of timber in inventoried roadless areas on the Tongass National Forest if a notice of availability of a draft environmental impact statement for such activities has been published in the Federal Register prior to January 12, 2001.

(e) The prohibitions and restrictions established in this subpart are not subject to reconsideration, revision, or rescission in subsequent project decisions or land and resource management plan amendments or revisions undertaken pursuant to 36 CFR part 219.

(f) If any provision of the rules in this subpart or its application to any person or to certain circumstances is held invalid, the remainder of the regulations in this subpart and their application remain in force.