

**August 29, 2026**

## **Strategic Considerations for Tribal Nations in the 2001 Roadless Rule Rescission Comment Period (FS-2025-0001)<sup>1</sup>**

(Comments due September 21, 2026)

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<sup>1</sup> This memorandum is published for general educational and informational purposes. It provides a framework for analyzing the current Roadless Rule proceeding and is not legal advice to any Tribe or other person. Publication of this memorandum does not create an attorney-client relationship with the author, the Indigenous Law & Policy Center, Michigan State University, or Turtle Talk. The legal and factual circumstances of individual Tribal Nations, including treaty provisions, trust responsibilities, affected resources, existing agreements, and potential litigation posture, differ substantially. Tribal governments should rely on their own counsel in determining whether and how the considerations discussed here apply to them.

## **Introduction**

The current Roadless Rule comment period presents Tribal Nations with a different task than the one they faced during the 2025 scoping process. USDA has now selected full rescission as its proposed action, published a Draft Environmental Impact Statement and Tribal Summary Impact Statement, and explained how it believes the concerns raised during the earlier process should be addressed. The question for current commenters is therefore no longer simply what interests USDA should consider. It is how effectively the agency has responded to the Tribal record already before it, what remains missing or inadequately addressed, and what should be placed in the administrative record before USDA makes a final decision.

This memorandum is intended to help frame that second-stage task. It accompanies the ILPC white paper, *The Tribal Administrative Record on the Roadless Rule*, which independently reviews the written Tribal comments submitted in 2025 and identifies the principal areas of convergence, disagreement, and unresolved concern in USDA's 2026 response. Rather than reproduce that empirical analysis, this memorandum asks what legal and strategic significance those findings may have during the current comment period.

The discussion therefore focuses on the functions a comment can serve at this stage of an administrative rulemaking: supplying Tribe-specific evidence that the existing record lacks; testing USDA's reasoning against the concerns, evidence, and alternatives already presented to it; preserving legal and factual issues for possible later review; identifying concrete alternatives or changes USDA could still adopt; and creating a public record useful for governmental advocacy, negotiation, oversight, and, if necessary, litigation. The sections that follow identify the principal administrative-law mechanisms through which those objectives can be pursued and several places where the existing record suggests particular opportunities or vulnerabilities.

### **1. The procedural significance of the current comment period**

The 2025 and 2026 comment periods occupy different stages of the rulemaking process and therefore serve different legal functions.

USDA's August 2025 Notice of Intent initiated the environmental review process and invited scoping comments concerning the issues, impacts, information, and alternatives the agency should consider. The August 2026 proceeding is different. USDA has now published a proposed rule and Draft Environmental Impact Statement identifying full rescission as the proposed action and explaining the analysis supporting that choice. Current comments therefore respond to an agency position and an evidentiary record that did not yet exist during scoping.

That distinction matters for administrative law purposes. A current comment can identify errors or omissions in USDA's analysis, challenge factual assumptions or reasoning, respond to the agency's treatment of alternatives raised during scoping, submit additional evidence, and request specific changes before the agency acts. It also becomes part of the administrative record against which a reviewing court may later evaluate the final rule.

The proposed rule is not yet final agency action under APA § 704, and the legal validity of a final rescission ordinarily cannot be adjudicated until USDA issues its final rule and Record of Decision. The present comment period is therefore both an opportunity to influence the agency's decision and an important record-preservation stage. A well-developed comment speaks to two potential audiences at once: USDA now and, if litigation later occurs, a reviewing court examining what the agency was told, what evidence and alternatives were placed before it, and how the agency responded.

## **2. The legal levers a comment can pull**

**Arbitrary-and-capricious review (APA § 706(2)(A)) and the "hard look" doctrine.** Under *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983), and its progeny, an 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, and it must respond to significant comments that, if accepted, would require a different outcome (*Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977)). A comment that identifies a specific analytical gap, contradiction, or unsupported factual assumption in the DEIS is doing arbitrary-and-capricious spadework. A comment that just says "we oppose this" is not; it gives the agency nothing concrete to fail to respond to.

**Record review limits.** Under *Camp v. Pitts*, 411 U.S. 138 (1973), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), judicial review of the final rule will ordinarily be confined to the administrative record as it existed when the agency acted. That record is built now. If a fact, a Tribe-specific harvest number, a cultural-resource sensitivity, an economic dependency, or a legal argument is not in this docket by September 21, a reviewing court will generally not consider it later (with narrow exceptions for bad faith or genuinely inadequate explanation). This is the single most important reason "share information" and "build the record" are not really separate strategies. Information that is not filed does not exist for judicial-review purposes, no matter how well documented it is somewhere else.

**Issue exhaustion.** Courts generally will not entertain an objection to a rule that was not raised with reasonable specificity during the comment period (*Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004); *Appalachian Power Co. v. EPA*, 251 F.3d 1026 (D.C. Cir. 2001), on the general rulemaking-forfeiture principle). For a Tribe that may later consider litigation, the record-preservation concern generally favors raising with reasonable specificity during this comment period the legal theories it may later wish to pursue. A Tribe cannot "save" its strongest argument for court.

**NEPA's reasonable alternatives requirement.** NEPA case law requires an agency to rigorously explore and objectively evaluate a reasonable range of alternatives, and to explain and not merely assert why alternatives raised in scoping were eliminated from detailed study. This is the doctrine that gives teeth to a specific gap in this record: multiple Tribal-specific alternatives (a "Strengthened Roadless Rule Alternative," a "Traditional Homelands Conservation Rule," binding co-stewardship/consent mechanisms, a Southeast Alaska-specific homelands alternative modeled on the Idaho/Colorado approach) were raised by name in 2025 scoping, and the Draft EIS disposes of the entire category in two sentences, concluding that "co-stewardship with

Tribes" is "better addressed through local land management planning or site-specific project level planning than through National Rulemaking" (DEIS at 29). Neither of the two action alternatives actually studied in detail (full rescission, and the geography-based Alternative 3) contains a Tribal-specific option at all. That is a substantive gap a comment can exploit directly, because it goes to whether USDA satisfied its own obligation to develop and disclose a reasonable alternative it was specifically asked to study.

**Executive Order 13175 and the federal trust responsibility.** Neither of these is independently enforceable in court the way a statute is, since E.O. 13175 creates no private right of action, and the trust responsibility generally requires a money-mandating statute to support a Tucker Act claim (*United States v. Navajo Nation*, 537 U.S. 488 (2003)). But both do real work inside arbitrary-and-capricious review. An agency that invokes its own trust obligations and its own E.O. 13175 consultation process (as USDA does at length in the Tribal Rights and Interests section and the Tribal Summary Impact Statement) has made those obligations part of the reasoning it must defend. A comment showing the consultation process fell short of what USDA itself says it is doing, or that the agency's Tribal Summary Impact Statement is stale, attacks the agency on its own terms rather than asking a court to enforce a freestanding duty. In addition, the Tribal Summary Impact Statement published with the August 20, 2026 proposed rule states in its own footnote that it "captures feedback received from Tribes through consultations as of December 5, 2025," meaning the document Congress and OMB will see as USDA's account of Tribal consultation is, on its face, roughly eight and a half months out of date at the moment it was published, and does not reflect anything from the 5 consultations still pending between "scheduled" (34) and "held" (29), let alone any consultation activity since. That is a concrete, citable defect a comment can put directly into the record.

**NHPA Section 106.** This is real and judicially enforceable, but it generally attaches to a specific "undertaking," such as an individual road or timber project, rather than to the rulemaking itself, because rescission of the Roadless Rule does not itself authorize ground-disturbing activity. The DEIS relies on that distinction, explaining that Section 106 compliance will "continue" at the project level. But Section 106 now presents two distinct and interacting risks: multiplication and diminution. Rescission could multiply the number and geographic spread of future undertakings that Tribal historic-preservation offices must track and participate in, while a separate pending federal rulemaking could simultaneously diminish the scope and procedural force of the Section 106 process on which USDA relies as a future safeguard. USDA therefore cannot reasonably treat the existing Part 800 process as a stable substitute for the national Roadless Rule without acknowledging that the federal government is simultaneously considering substantial revisions that could narrow the projects, properties, effects, and Tribal participatory rights encompassed within that process. The strategic use of Section 106 at this stage is accordingly not limited to preserving an argument about the governmental capacity burden created by repeated project-level review. Tribal commenters can also question the premise that existing project-level protections will remain available in their present form after USDA eliminates the national protective baseline, reinforcing the "fragmentation" and "future management burden" themes already reflected in the 2025 Tribal record.

**Treaty rights.** Where a specific Tribe's treaty secures hunting, fishing, or gathering rights, and there's an evidentiary basis connecting roadless-area habitat condition to the continued exercise

of that right (the "right to habitat" theme present in about a quarter of the 2025 comments; see, by analogy, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), and the "culverts case," *Washington v. United States*, 138 S.Ct. 1832 (2018) (per curiam, affirming judgment by an equally divided Court)), invocation of treaty rights provide an especially important substantive legal basis for a Tribe whose treaty text, geography, and resource conditions support the argument. It's a substantive federal right that agency action can be tested against.

**Loper Bright's effect.** Post-*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), courts no longer defer to an agency's reasonable interpretation of an ambiguous statute it administers; they exercise independent judgment. This mostly cuts in USDA's favor here, because the discretion to rescind the 2001 Rule rests on broadly discretionary organic statutes (the Organic Administration Act of 1897, the Multiple-Use Sustained-Yield Act of 1960, NFMA) rather than an ambiguous term needing interpretation; there's no *Chevron* step-two gap for a court to fill either way. Where it could matter is on narrower statutory questions embedded in specific Tribal arguments. For instance, whether ANILCA § 810's subsistence-evaluation requirement for Alaska applies to this rulemaking, or how NFMA's multiple-use-and-sustained-yield mandate interacts with treaty-reserved rights, because a court will now decide those questions itself rather than defer to USDA's reading.

### 3. What the record already shows, and where it's thin

The ILPC white paper's coding of the 38 distinct 2025 Tribal comments, and USDA's own Draft EIS, together identify the shape of the dispute with unusual clarity, which is useful because it means the current round of comments doesn't have to start from zero.

USDA's Draft EIS recognizes Tribal sovereignty, the trust relationship, treaty rights, co-stewardship, sacred sites, Indigenous Knowledge, and subsistence at real length in its Tribal Rights and Interests section, and it concludes that full rescission (Alternative 2, the proposed action) would present the greatest potential for adverse effects on Tribal rights and interests of the three alternatives it studied. That is a significant admission sitting in the agency's own document: USDA is proposing to adopt the alternative its own analysis identifies as worst for Tribal rights and interests, without a developed Tribal-specific alternative in the mix and without (on the current record) an explanation for why that trade-off is reasonable. That gap between what the agency *recognizes* and what it *does* about what it recognizes is the throughline the ILPC white paper identifies, and it's the most legally exploitable feature of this record: it's not a dispute about whether USDA read the comments, it's a dispute about whether the response is reasoned.

A few other specific, citable weaknesses worth knowing about:

- Of the three alternatives actually studied in detail, none contains a Tribal-specific management track, despite specific requests for one from at least two separate Tribal or multi-Tribal filings in 2025 (the 12-Tribe Southeast Alaska coalition and the Confederated Salish and Kootenai). The DEIS's rejection of that category is two sentences long.

- Wildfire risk reduction is USDA's central rationale for rescission, but 20 of 38 Tribal commenters (52.6%) directly disputed that rationale in 2025, and the DEIS's own biodiversity discussion concedes that "lack of roads has not prevented fire-prevention or protection measures, particularly prescribed fire and managed wildfire," undercutting the rationale from inside the agency's own document.
- The quantified cost-benefit analysis (timber benefit of \$9.9–22.0 million/year; forgone recreation and passive-use values of roughly \$11.4–17.6 million/year) has no corresponding quantified line for subsistence harvest loss, cultural-site risk, or Tribal governmental capacity costs. These are categories the 2025 comments raised repeatedly (subsistence: 78.9% of commenters) but that don't appear in Table 1's ledger at all. An economic analysis that quantifies the timber industry's side of the ledger and not the Tribal side is a concrete, citable asymmetry.
- The Tribal Summary Impact Statement's consultation data is stale on its face (discussed above).

#### **4. The three strategic objectives, assessed**

##### **A. Maximize information-sharing about impacts**

This is the lowest-friction strategy and the easiest for any Tribe to execute on a 24-day runway, but by itself it's also the weakest, for a specific doctrinal reason: USDA's Draft EIS already demonstrates fairly sophisticated awareness of the *categories* of Tribal impact (access, resource usability, disturbance; sacred sites; subsistence; co-stewardship). Comments that supply more of the same *kind* of information USDA already has, such as general statements that rescission threatens cultural and subsistence resources, are useful for building public pressure and for the 99%-opposed optics, but they don't obviously move the arbitrary-and-capricious needle, because the agency can point to its existing Tribal Rights and Interests section and say the category was already considered.

Where information-sharing has real legal bite is when it is *Tribe-specific and quantified* in ways the generic record isn't, such as harvest data tied to a named roadless area, GIS overlays of sacred sites or treaty-usual-and-accustomed areas against the specific IRAs affected by Alternative 2 or 3, THPO staff-hours and budget data showing the practical capacity cost of project-by-project Section 106 participation, or documented reliance on a specific existing co-stewardship agreement that fragmentation would disrupt. That kind of information does two things at once: it gives USDA something concrete it must either accept or explain away (State Farm), and it builds exactly the kind of record a reviewing court would need later to find the cost-benefit analysis's omissions were more than harmless.

##### **B. Document whether the Draft EIS and Tribal Summary Impact Statement fairly account for Tribal input**

This is the objective the companion ILPC white paper is essentially designed to serve. It builds the factual predicate for an arbitrary-and-capricious and NEPA-hard-look challenge to the *final* rule. Its output is focused on comparison, rather than persuasion. For each theme a Tribe raised in 2025 (or raises now), the comment traces what USDA's response actually was, and states

specifically why that response is or isn't adequate. That is precisely the "identify the concern, examine USDA's specific response, explain why it's adequate or inadequate, supply Tribe-specific evidence, and identify a concrete requested change" structure the white paper itself recommends, and it directly produces the "significant comment requiring a response" record that *State Farm* and *Portland Cement* case law protects.

This strategy's payoff is mostly downstream rather than immediate. A well-documented "recognition without response" comment probably will not change what USDA does in the final rule by itself, but it substantially increases the odds that a future arbitrary-and-capricious or NEPA challenge survives past summary judgment, because the court will be looking at a record showing the agency was told, in detail, exactly where its reasoning was thin, and adopted the rule anyway.

### **C. Draft comments engineered to help downstream political pressure, negotiation, and litigation**

A comment written for downstream leverage does a few things a purely informational or purely documentary comment doesn't:

- **It proposes concrete regulatory text or a concrete alternative**, not just an objection; e.g., a Tribal-specific IRA management track modeled on the Idaho/Colorado state-specific rules, incorporated into Alternative 3 rather than left as an unstudied idea. Under the "logical outgrowth" doctrine, a final rule must be a logical outgrowth of what was proposed; a comment that puts specific regulatory language for a Tribal alternative into the docket increases the odds that if USDA does modify course, it modifies toward something Tribes actually asked for, and it strengthens a later NEPA claim that the agency's alternatives analysis was incomplete when a specific, textually developed alternative sat in the record and went unaddressed.
- **It explicitly invokes cooperating-agency or consulting-party status** now rather than waiting for the forest-plan stage, since the DEIS's own answer to co-stewardship requests is "wait for local planning." A Tribe that formally asks, in this docket, to be treated as a cooperating agency for this rulemaking (36 CFR 219.4(a)(1)(v) is the land-management-planning analog USDA cites; a comment can ask that the same status be extended here, or press USDA to explain in the final rule why it isn't) forces USDA to either grant something concrete or generate more explicit reasoning for refusing it, and this is reasoning that a court can review.
- **It preserves every legal theory a Tribe might use later**, even ones unlikely to move USDA now (treaty right-to-habitat arguments, ANILCA § 810, NHPA programmatic concerns, trust-responsibility arguments), because of issue exhaustion. A comment that only pursues the "nicest" or most diplomatically framed arguments and holds back its strongest legal theories for court will likely find those theories forfeited.
- **It creates a public, dated, citable record** usable outside the docket for congressional oversight letters, for media, for coalition-building with state attorneys general or environmental co-plaintiffs, and for future settlement negotiations if litigation is filed. A comment that is written well enough to also function as a public document Tribes can point to in other venues gets more use out of the same drafting effort.

The tradeoff is that this kind of comment takes more time and more Tribe-specific fact-gathering than either A or B alone. This is exactly why, with under a month left, triage matters (see Section 6).

## **5. Why the highest-value comment does all three at once**

Given the doctrine above, the strategies aren't competing uses of scarce time so much as layers of the same document. A comment that (1) supplies Tribe-specific quantified information the current record lacks, (2) explicitly maps that information onto a theme USDA's Draft EIS claims to have already addressed and explains why the agency's response is inadequate, and (3) closes with a specific requested change to the regulatory text or the alternatives analyzed is simultaneously an information-sharing document, a record-integrity document, and a litigation/negotiation document. It doesn't cost much more to draft a comment this way than to draft an "informational" comment; it mostly costs discipline in the closing paragraph (state exactly what change is being requested and exactly what legal theory would be violated if it isn't made).

The one real forced choice is between the maximalist E.O. 13175/trust-responsibility-as-sovereign framing (positioning the Tribe as a government entitled to consent or mutual concurrence, not merely as an especially important stakeholder) and a framing pitched to persuade this particular agency to move Alternative 3 in a Tribe-favorable direction within the existing three-alternative structure. Both are legitimate and Tribes have split on this in the 2025 record. Fifty percent sought enhanced governmental authority beyond ordinary consultation, while others focused on securing better outcomes within conventional consultation. A comment can gesture at both without contradiction (assert the sovereignty and consent framing as the Tribe's position of principle, then state a specific fallback ask in case USDA proceeds on its own terms), which is in fact what several of the 2025 comments already did.

## **6. Concrete, time-sensitive recommendations given the compressed timeline**

- **Comments are due September 21, 2026**, roughly three weeks from today. Tribe-specific data-gathering (harvest records, staff-capacity figures, GIS overlays) is the slowest input and should start immediately if it's going to make it into a comment at all.
- Treat the ILPC's 14 theme families as a checklist against USDA's Draft EIS response, not as a script to resubmit. The highest-value comments will name a theme, name USDA's specific response (with a page citation to the Draft EIS or Tribal Summary Impact Statement), and explain the gap to maximize usefulness in arbitrary-and-capricious and NEPA review.
- Flag the Tribal Summary Impact Statement's stale December 5, 2025 consultation cutoff explicitly and ask USDA to issue an updated one reflecting current consultation status before any final rule issues. This is concrete, verifiable, and costs USDA little to fix, which makes it a good test of whether the agency is engaging in good faith.
- A Tribe considering the sovereignty/consent framing may wish to explicitly request cooperating-agency or consulting-party status for *this* rulemaking process now, rather than waiting to be told that co-stewardship requests belong at the forest-plan stage.



- A Tribe with a treaty right plausibly tied to roadless-area habitat should consider building that Tribally specific argument now (specific treaty text, specific ceded/usual-and-accustomed territory, specific resource-condition nexus). This is the one strategy on this list that doesn't depend on administrative law procedure and could support relief a court can order regardless of how deferential review of the rule itself turns out to be.
- Whatever else a comment does, it should state affirmatively any requested change to either the proposed rule, the alternatives considered, or the process. An objection without a requested remedy does less work under both *State Farm* and the logical-outgrowth doctrine than one that proposes specific text.

## 7. The consultation-record transparency gap: a second, independent procedural theory

On August 28, 2026, ILPC wrote to the Forest Service Office of Tribal Relations requesting the consultation log and underlying records for the 29 completed (and 34 scheduled) government-to-government consultations that the Draft EIS and Tribal Summary Impact Statement rely on to characterize Tribal input. That request and USDA's response to it, or lack of one, should be treated as a second, largely independent argument, not merely as a footnote to the "recognition without response" theme in Sections 3–5.

**Why this is doctrinally distinct.** The "recognition without response" argument says USDA heard specific Tribal positions and didn't adequately justify its choice not to adopt them. The transparency gap is a different problem. USDA's own documents affirmatively *rely* on the content of the 29 consultations; the Tribal Summary Impact Statement's "Tribal Input Received" section and the Draft EIS's Tribal Rights and Interests analysis are both built on what happened in those sessions. However, the underlying records (notes, positions, evidence, agendas, any commitments made) are not in the public docket. That puts this closer to the D.C. Circuit's data-disclosure line than to ordinary hard-look review: an agency that rests its rulemaking rationale on information it does not make available for public testing has not given commenters a meaningful opportunity to evaluate that rationale. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *American Radio Relay League v. FCC*, 524 F.3d 227, 236–37 (D.C. Cir. 2008) (agency must disclose the data it relied on, not merely represent that it exists); *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (data "critical" to the agency's rationale must be disclosed; merely corroborative data need not be). The consultation record here is not corroborative, it is the evidentiary basis for USDA's central factual claim that "the majority sentiment among Tribal governments consulted is opposition," and for its characterization of which alternatives Tribes proposed and how seriously they were considered. The two examples are not equally exposed. USDA's claim about majority sentiment might arguably find some corroboration in the independently public comment record. Its characterization of which alternatives Tribes proposed does not, since several specific alternative proposals the Tribal Summary Impact Statement attributes to named Tribes could not be found anywhere in the written comments the agency received, so the written record cannot corroborate them even if a court wanted to treat it as doing so. That is precisely the kind of information *Solite* treats as critical rather than corroborative. A comment can argue this directly by stating that the public cannot verify whether the Tribal Summary Impact Statement's characterizations are accurate, complete, or representative, because the records supporting it are not available.

**Why it also reinforces the fragmentation/capacity-burden theme.** Independent of the disclosure doctrine, the fact pattern itself is useful evidence: a national organization with legal staff, writing to the national Office of Tribal Relations, three weeks before the deadline, could not obtain a basic consultation log. That is concrete, present-tense support for the argument, already present in roughly half the 2025 comments, that individual Tribes lack the capacity to meaningfully track and participate in the much larger number of decentralized forest- and project-level consultations that would replace the national rule once it is rescinded. Worth citing in a comment for exactly that proposition, separate from the disclosure argument.

**A formal FOIA request has also been filed.** ILPC emailed a formal FOIA request to the Forest Service's Washington Office FOIA Service Center ([SM.FS.WOFOIA@usda.gov](mailto:SM.FS.WOFOIA@usda.gov)) on August 28, 2026 at 9:29 a.m., covering the same five categories of records as the OTR letter, and including requests for expedited processing under § 552(a)(6)(E) (with the required certification), a public-interest fee waiver under § 552(a)(4)(A)(iii) (with a fallback "educational institution" fee-category request under § 552(a)(4)(A)(ii)(II)), and a fallback ask that the consultation log alone be released on an expedited basis if the full request cannot be. That filing converts the transparency gap from something a comment can merely describe into something a comment can point to as a specific, dated, pending federal request with a statutory clock now running. This is a materially stronger record than the OTR letter alone, and everything below assumes the FOIA request, not just the OTR letter, is now the operative document.

**A specific timing fact worth putting directly into any comment.** FOIA's standard 20-business-day determination clock, running from August 28, 2026 and accounting for the Labor Day holiday (September 7), does not expire until on or about September 25–28, 2026 — roughly a week *after* the September 21 comment deadline, even before accounting for any extension the agency is entitled to invoke for "unusual circumstances" under § 552(a)(6)(B). That is a clean, citable fact, not an inference, and it means that even if USDA processes this request in perfectly ordinary course, with no delay or resistance at all, Tribes and the public are structurally guaranteed to have to submit comments before they can see records the agency's own Draft EIS and Tribal Summary Impact Statement rely on. A comment can make that point plainly, stating that this isn't a complaint about USDA dragging its feet (yet), it's a description of how the ordinary FOIA timeline and the comment deadline USDA itself set are simply incompatible on their face. That is a strong, low-risk way to frame the transparency argument, because it doesn't depend on speculating about bad faith.

### **How to operationalize it before September 21:**

- *File it into the record, don't leave it in correspondence.* Under *Camp v. Pitts*, 411 U.S. 138 (1973), judicial review of the final rule will ordinarily be confined to what's in this docket. Attach both the August 28 OTR letter and the August 28 FOIA request (and any USDA response, acknowledgment, tracking number, expedited-processing determination, or the absence of one by a stated date) as exhibits to any formal comment, and reference them by date directly in the comment text. Otherwise a reviewing court may never see them.
- *Track the FOIA request's procedural status and update the comment accordingly.* Note the date a tracking number or acknowledgment is received (or isn't); note whether

expedited processing is granted, denied, or unaddressed; and if expedited processing is denied, remember that denial is itself independently appealable within the agency on an expedited basis (§ 552(a)(6)(E)(ii); Forest Service/USDA FOIA appeal regulations), which is worth pursuing quickly given the short remaining window, and worth citing in a comment either way ("as of [date], USDA has [granted/denied/not responded to] the request for expedited processing").

- *Use the request, and particularly the timing mismatch above, as a basis to ask for a comment-period extension or reopening.* Specifically, request that USDA extend or reopen the comment period until a reasonable time after the consultation records are produced, on the ground that the current period doesn't provide a meaningful opportunity to comment on data the agency relied on. See *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (the opportunity to comment must be meaningful, not nominal). USDA may well decline, but making the request now preserves the argument for issue-exhaustion purposes and creates a clean record of a specific, reasonable ask that was refused.
- *State plainly, in any comment filed before records are produced*, that the comment is necessarily incomplete because USDA has not produced records the agency itself relies on, that a FOIA request for those records has been pending since August 28, 2026, and that the Tribe or organization reserves the right to supplement once those records are available. This doesn't guarantee a court will treat later-filed supplementation as part of the record, but it documents contemporaneously that the gap existed, was raised at the time, and was pursued diligently. This matters far more than raising it for the first time in litigation.

## Sources

Sources referenced in this memo (in the docket unless otherwise noted) include:

91 Fed. Reg. 53827 (Aug. 20, 2026) (proposed rule)

USDA Forest Service, *2001 Roadless Area Conservation Rule Rescission: Draft Environmental Impact Statement* (Aug. 2026)

USDA Forest Service, *Tribal Summary Impact Statement: Proposed Rule to Rescind the 2001 Roadless Area Conservation Rule* (Aug. 20, 2026)

USDA Forest Service, *Proposed Rule: Special Areas; Roadless Area Conservation: Cost Benefit Analysis and Consideration of Impacts on Small Entities*

Indigenous Law & Policy Center, *The Tribal Administrative Record on the Roadless Rule* (Aug. 29, 2026)

ILPC letter to USDA Forest Service Office of Tribal Relations re: consultation records (Aug. 28, 2026)

ILPC FOIA request to USDA Forest Service, Washington Office FOIA Service Center, re: consultation records (Aug. 28, 2026, 9:29 a.m.).