REVIEW OF FEDERAL TONGASS FOREST MANAGEMENT POLICY 1980 -2013

INTRODUCTION

The Forest Service has recognized that a three year supply of economic timber[1] is necessary to provide Tongass timber operators with a sufficient timber supply and flexibility to cut for the market.[2] Because the Forest Service has consistently lost/been delayed by National Environmental Policy Act (NEPA) cases before the 9th Circuit, its ability to provide such a supply of timber has been erratic. It has been unable to supply operators with more than a year's volume ahead, and often not that much.

Moreover, notwithstanding a Forest Service Handbook requirement that timber sales meet the mid-market economic test[3], the Forest Service's antiquated appraisal system has failed to recognize that much of the volume which it has managed to put up for sale is uneconomic in fact. The result is that operators have been starved of a sufficient supply of economic timber to cut to the market.

Timber operators thus have had the choice of either trying to adapt to this situation (to their economic detriment), or leaving the industry. The two pulp mill long term sales were forced out of operation by the Forest Service. The termination of the long term sales removed the Forest Service's contractual obligation to make large quantities of timber available to the industry for domestic processing. It eliminated the pulp mills as purchasers of the remaining saw mills' pulp logs and chips, thereby increasing the remaining saw mills' operating costs and risks. This, in turn, resulted in the Forest Service allowing the export of logs. This has effectively done away

[1] . June 24, 2003 letter from Alaska Regional Forester, Dennis Bschor, to Alaska Governor Frank Murkowski: "The Tongass overall goal is to have three years of economical timber under contract." "This practice is not limited to the Alaska Region, but is particularly pertinent to Alaska because of the nature of the land base here. The relative absence of roads, the island geography, the steep terrain, and the consequent isolation of much of the timber land means that timber purchasers need longer than average lead times to plan operations, stage equipment, set up camps, and construct roads prior to beginning harvest." August 20, 1998 letter from Appeal Deciding Officer, James Caplan, Chasina Timber Sale Final Environmental Impact Statement and Record of Decision to Buck Lindekugel at page 3.

[2] "Cut to the market" means selling the wood products then sought by national and international markets at a reasonable profit.

[3] The midmarket test requires that a sale provide a weighted average margin for profit and risk of at least 60% of normal.

with primary manufacture and the associated jobs which was the original justification for creating an industry on the Tongass.

The re-imposition of the 2001 Roadless Rule in March 2011 has made another 9.6 million acres of the Tongass unavailable for timber harvest. In addition, on July 2, 2013 the Secretary of Agriculture announced a Transition Plan which, at its core, stops old-growth timber harvest on Inventoried Roadless Areas (IRAs). The Transition Plan calls for harvesting 2nd growth before it has reached its culmination of mean annual increment (CMAI) as required by the National Forest Management Act of 1976[4] (NFMA).

The re-imposition of the 2001 Roadless Rule in March 2011 has also made it impractical to develop mines and renewable energy projects, including hydropower. In this latter regard, as will be shown below, there is a major contradiction between the Obama Administration's embrace of renewable energy and its anti-development policies on the Tongass which raises numerous barriers to the development of renewable energy projects.

I. FOREST SERVICE MANAGEMENT OF THE TONGASS SINCE ANILCA

1. HISTORY PRIOR TO 2008 AMENDED FOREST PLAN

PRE-ANILCA: Prior to passage of The Alaska National Interest Lands Conservation Act (ANILCA) there was a sufficient volume of economic timber to supply an integrated industry[5] of two pulp mills and six major sawmills. Harvest levels averaged 450 million board feet per year (net Scribner scale) throughout the decade of the 1970s. By allowing the pulp mills to obtain and appraise an estimated five years volume of timber for each operating period and to roll over into the next operating period the

[4] 16 U.S.C. § 1600 et seq., § 1604(a).

[5] An "integrated industry" is an industry with a range of manufacturing facilities that provides for the full development/marketing/sale of saw logs and pulp logs from a clear cut timber sale such that an operator of a sawmill can sell pulp logs and residual chips from a sawmill timber sale and from its sawmill operation to a pulp mill, and a pulp mill is able to sell saw logs from a pulp mill timber sale to a sawmill. "An integrated industry results in better utilization and larger volumes of operable wood, which in effect lowers unit operating costs." Brackley, Rojas, and Haynes *Timber Products Output and Timber Harvests in Alaska: Projections for 2005-2025* at page 13.

timber not harvested in the then current operating period, the pulp mills and their associated sawmills and others in the industry had considerable flexibility to cut and manufacture to the market.

THE IMPORTANCE OF A THREE YEAR SUPPLY OF ECONOMIC TIMBER: The Forest Service has a very good understanding of why industry needs a three year supply of economic timber:

> To be responsive to market demand, the Forest Service attempts to provide an opportunity for the industry as a whole to accumulate a supply of purchased but unharvested timber (i.e. volume under contract) equal to about three years of timber consumption. There are a number of reasons for allowing the accumulation of volume under contract. First, this allows the industry ample time to plan an orderly and systematic harvest schedule that meets all timing restrictions and permit requirements. Second, it allows the industry to better manage its financial resources and to secure financing on the basis of longer term timber supply. Third, it allows time for the necessary infrastructure (roads, log transfer facilities, and logging camps) to be put in place prior to timber harvest. Finally, an ample timber supply gives the industry more opportunity to sustain itself through market cycles. If demand for pulp or lumber in any year suddenly increases, producers will have access to enough timber to respond to the increase in demand without waiting for the Forest Service or the Congress to take action. Normally, the unharvested volume under contract will be drawn down during high points in the market when mills increase production, and built up when markets are poor and production declines. In response to the volume under contract the Forest Service may consider adjusting its budget and timber program.[6]

To its credit, the Forest Service has never waivered in its view that a three year supply of economic timber should be made available to the industry.[7] Unfortunately, it has been unable to achieve this objective for the reasons given below.

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[6] Control Lake Timber Sale FEIS, Vol. II, App. A, at page 2.
[7] See ftnt. 1, *supra.*

THE ROLE OF FEDERAL LAND LEGISLATION IN THE FOREST SERVICE'S INABILITY TO PROVIDE ECONOMIC TIMBER: The Forest Service's ability to provide a three year volume of economic timber under contract to allow industry to cut to the market changed after ANILCA – partly due to markets and partly due to changes made to ANILCA by the Tongass Timber Reform Act of 1990 (TTRA). ANILCA provided a hard target of 450 million board feet net Scribner ASQ and authorized $40 million per year for the Forest Service to do the pre-roading and thinning necessary to achieve that ASQ. Unfortunately, world timber markets crashed shortly after ANILCA took effect (1981-1984), thereby providing environmental groups an economic argument with which to lobby Congress to cancel the 450 MMBF ASQ hard target along with the $40 million dollars per year to achieve that target.[8]

The TTRA was introduced by Representative Robert Mrazek of New York in 1987. As finally passed in November 1990, not only did the TTRA cancel the 450 MMBF ASQ and the $40 million dollars and impose unilateral terms on the pulp mills' long term contracts, it made new Tongass land set asides and required buffer strips along every Class I and II stream on the Tongass.

In place of the 450MMBF hard target, the TTRA merely required the Forest Service to seek to meet market demand. The 9th Circuit later decided this soft requirement was not a mandate, but one factor among others to be considered in making timber available.[9] In the aggregate the final TTRA, reduced suitable commercial forest land and constricted timber harvest in a way that significantly further reduced the ASQ beyond the reductions made by ANILCA.

The commercial forest suitable land base under the 1979 TLMP/ANILCA was approximately 2.44 million acres. The TTRA reduced this by 700,000 acres to 1.74 million acres. In addition TTRA mandated that high volume timber (volume classes 6 and 7) had to be harvested in the same proportion as it occurred in each management unit. This meant that more acres of lower

[8] Publication of *The Tongass: Alaska's Vanishing Rain Forest* in 1987 again brought national attention to the Tongass. The book's author declared: "For most members of Congress, changes in current Tongass management will be a budget rather than environmental concern, but if that is what it takes to stop the destruction, so be it. Budget slashing has proved to be a powerful and successful tool." (page 109).

[9] *Alaska Wilderness and Tourism Ass'n v. Morrison*, 60 F.3d 647 (9th Cir. 1995); *Alaska Forest Ass'n., Inc. v. U.S.* (Case No. J94-007 CV (JKS)).

volume timber had to be harvested to maintain the same level of harvest. Thus TTRA both reduced the suitable commercial forest land base for timber production and forced a higher level of acres to be harvested per year to maintain the industry at the 1979/ANILCA level.

In reality this meant that unless the Forest Service had sufficient budget, political will, and court approval to provide timber up to the 450 MMBF ASQ per year and all that timber was economic and actually reached the pulp mills and sawmills on schedule (which, of course, never happened), there was insufficient timber to supply the industry as it had existed in the pre-ANILCA period (1970-1979) or even at the 1979 TLMP/ANILCA level. Put another way, the industry lost all of its pre-ANILCA pre-roading and timber harvest scheduling and manufacturing flexibility. In sum, the period of economic timber starvation of Southeast Alaska wood products manufacturing facilities was accelerated by TTRA with consequential adverse impacts on every business, worker, and community involved with the industry.

THE ROLE OF THE TONGASS LAND MANAGEMENT PLANS AND FOREST SERVICE POLICY DECISIONS IN ITS INABILITY TO PROVIDE ECONOMIC TIMBER: The 1979 Tongass Land Management Plan was the first such plan in the nation following the amendments to the Forest and Rangeland Renewable Resource Planning Act of 1974[10] made by the National Forest Management Act of 1976.[11] The Plan set an ASQ of 450 MMBF and divided the Forest into four Land Use Designations (LUDs). LUD I was an administrative version of Wilderness and LUD II was an administrative version of roadless areas. Development, including timber sales, was permitted in LUDs III and IV. The 1979 TLMP foretold, almost exactly, the land designations that would be made by Congress in ANILCA.

In 1984 the Forest Service conducted a 5 Year Plan review which resulted in the first amendment to TLMP in 1986. The Forest Service began work on the required TLMP Revision in 1987. A second amendment was made in 1991 to the 1979 TLMP due to the passage of TTRA in 1990. Then Regional Forester, Mike Barton, was prepared to sign the Record of Decision (ROD) for the TLMP Revision in 1993. The Barton Revision would have provided an ASQ of 423 MMBF. However, he was asked to

[10] Pub. L. 93-378 (1974).
[11] 16 U.S.C. § 1600 et seq., § 1604(a).

delay by the Forest Service's Washington Office because of "new information" regarding wildlife habitat concerns. Concurrently, the draft report of the TLMP Viable Wildlife Population biologists was released which advocated adding a series of habitat conservation areas (HCAs) to the TLMP Revision that would result in the removal of another 600, 000 acres of suitable commercial forest land from the timber base. On June 30, 1994 new Regional Forester Phil Janik announced a new schedule for timber sales which incorporated the HCA strategy through sale modifications and deferrals calculated to preserve future options for the then pending TLMP Revision.

The HCA strategy was incorporated into the 1997 TLMP which reduced the ASQ to 267 MMBF with 47 MMBF of that (NIC II) available only in the highest of markets.[12] Secretary Lyons unilaterally amended the 1997 TLMP in 1999 to set aside an additional 18 areas from timber harvest and road building which further constrained economic timber availability and timber harvest flexibility.[13] The 1997 TLMP Revision reduced the suitable commercial forest land base to 781,000 acres.[14]

Notwithstanding the substantial reductions in economic timber availability and timber harvest flexibility imposed by Congress in the TTRA, the 1997 TLMP, and the loss of the pulp mills, discussed below, the Clinton Administration (1992-2000), under the leadership of Undersecretary of Agriculture, Jim Lyons, Council of Environmental Quality Chair, Katie McGinty, Forest Service Chief, Jack Ward Thomas, and Regional Forester, Phil Janik, was very aggressive in finding new ways to reduce the suitable commercial forest land base.

For example, when he announced the HCA strategy, new Regional Forester, Phil Janik, set an interim policy direction and timber sale screening process patterned after the policy developed on the East side of Region 6 for the PACFISH conservation strategy. Although this policy initiative was discontinued after the Bush administration took office, it illustrates the type

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[12] Forest Service *Five Year Review of the 1997 Land and Resource Management Plan*, December 2004 at page 16.

[13] The 1999 Forest Plan reduced the ASQ from 267MMBF to 187MMBF. It was enjoined by the federal District Court in March 2001 until the Forest Service prepared a SEIS that evaluated the changes it made to the 1997 Forest Plan. *Alaska Forest Ass'n v. United States Department of Agriculture,* Case No. J99-0013 CV (D. Alaska)..

[14] 2008 Amended Forest Plan, Final EIS, Table 3.13-1 at page 3-321.

of problem faced by the industry in obtaining an economic timber supply during the eight year Clinton/Lyons period.

An even more difficult problem effecting the stability of the timber sale program during the Clinton years was Undersecretary Lyons' attempt to apply the national roadless policy to Region 10 notwithstanding the clear prohibition against doing so in §708 of ANILCA. This was challenged in *State of Alaska v. United States Department of Agriculture*, Case No. A01-39 CV (D. Alaska). A settlement resolving the litigation required the Forest Service to publish a proposed rule that the national roadless rule would not apply to the Tongass and an advance notice of proposed rulemaking taking public comment on whether the rule should apply to the Tongass. In December 2003 the Forest Service adopted an interim final rule that excluded the Tongass from application of the national roadless rule until issuance of a final rule.[15]

THE ROLE OF LITIGATION IN THE CLOSURE OF THE PULP MILLS: TTRA and the Forest Service implementation of TTRA thus made it inevitable that certain mills would have to close for lack of economic timber. If a sale, particularly a five year operating period sale to either of the pulp mills, were delayed, the industry could not "go somewhere else" to get the timber.

Alaska Pulp Corporation's operations had already been seriously disrupted by post-ANILCA litigation. The 1986-1990 five year operating period plan was delayed by litigation which in 1986 resulted in a federal District Court injunction and interim settlement agreement among the parties that allowed only a certain volume of timber from certain specified units to be made available to supply APC's pulp mill and sawmill.

In November 1989 the Forest Service issued a ten volume SEIS for the 1981-1986 and 1986-1990 five year operating periods. In June 1990 the federal District Court denied the environmental plaintiffs' renewed request for an injunction. In September 1990 the 9th Circuit enjoined the Forest Service from making available to Alaska Pulp Corporation the 696 MMBF to which it was entitled under its long term contract.[16]

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[15] 68 Fed. Reg. 75,136-75,146, December 30, 2003.

[16] *City of Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990). The Court opined that because APC could not possibly harvest the remaining 350 MMBF in the last two years of the combined 1981-1986 and 1986-1991 five year operating periods, the Forest Service could not rely on the contractual volume

In June 1992 the 9th Circuit denied a permanent injunction to environmental plaintiffs on the ground that further review of the SEIS was unnecessary because the TTRA addressed the 9th Circuit's concerns.[17]

Thus, from 1986 until June 1992 APC's timber supply was subject to court administered injunctions. The injunctions limited APC's Wrangell sawmill to timber insufficient for a full single shift. By 1991 even the 9th Circuit agreed that APC needed additional timber and modified the injunction to provide 44MMBF more volume.[18]

In 1987 APC sued the Forest Service for $80 million dollars for failing to provide a sufficient volume of economic timber. The litigation was settled in June 1990 pursuant to an agreement by which APC gave up its right to select timber for a five year operating period, and the Forest Service agreed to provide timber that would meet the mid-market test – a numeric formula that applied certain cost and pricing criteria to achieve an economic return on timber offerings. In November 1990 TTRA breached this settlement agreement by unilaterally making the mid-market test optional.[19]

From early 1991 until 1993 APC sought to negotiate with the Forest Service regarding the meaning of the terms used in TTRA and how they would be applied to the contract. In June 1993 APC sued the Forest Service in federal District Court to nullify the TTRA and to enforce the terms of the settlement contract. Also in June 1993 APC announced that it would indefinitely suspend its pulp mill operations in September 1993. In January 1994 the Forest Service terminated the long term contract on the ground that by suspending operation of the pulp mill, APC had failed to meet the contract's primary manufacture requirement. So APC was the first major manufacturing facility casualty due to an insufficient supply of economic timber caused by ANILCA's and TTRA's reductions in the suitable commercial forest land base, exacerbated by a further starvation of economic timber to its mills due to injunctions caused by the Forest Service's frequent

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requirements (especially the carry over provision) of the long term contract in determining reasonable alternatives to meet the purpose and need for the five year operating periods environmental impact statement.

[17] *City of Tenakee Springs v.Franzel*, 960 F.2d 776, 779 (9th Cir. 1992).

[18] Id., at page 778.

[19] *APC v. U.S.* 48 Fed.Cl. 655, 664 (2001).

inability to prepare a NEPA document which in the federal courts' opinion met the requirements of the law.[20]

Without the closure of the APC mills and the consequent availability of the 171 MMBF of uncut, NEPA cleared timber that had been pledged to APC's long term sale, there would have been insufficient timber in 1994 to implement TTRA and the HCA conservation strategy and at the same time supply timber to meet KPC's long term contract commitments and supply the independent sale program. The Forest Service intended to make 71 MMBF available for sale in July, 1994 and 100 MMBF available for sale in 1995. However, as described below, the 9th Circuit enjoined the Forest Service from its plan in March 1995.

Environmental organizations sued the Forest Service for making all of the remaining uncut APC timber available for sale to KPC and other operators without a new NEPA document.[21] They argued that the APC contract requirement that resulted in 696 MMBF being made available to APC during its 1986-1990 five year operating period restricted the alternatives considered by the Forest Service during the APC NEPA process to meeting the requirements of APC's contract. There was no obligation for the Forest Service to make all of the uncut APC timber available to industry, and, thus, alternatives making a lesser volume available needed to be presented in a SEIS. The Forest Service argued that because the EIS (and the court) had cleared APC timber for the long term contract, and because release of uncut timber from the APC sale was necessary to meet the timber goals set out in TLMP and the obligation to meet market demand directed by the TTRA, termination of the APC contract was not a significant new factor requiring a SEIS.

The District Court held that because "the APC contract was merely a vehicle for the sale of the timber anticipated by" the 1979 TLMP, and because "market demand for timber had not changed as a result of cancellation of the APC sale", there was not a "significant" new circumstance requiring a new NEPA document.[22] The District Court also held that § 101 of TTRA was "mandatory", not "hortatory" and that the Forest Service must meet market demand.[23]

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[20] Id., at pages 657-658.
[21] *Alaska Wilderness Recreation and Tourism Association v. Morrison,* 67 F.3d 723 (9th Cir. 1995)
[22] Id., at 728.
[23] Id., at 730.

The 9th Circuit disagreed, holding that the APC NEPA documents were contract driven, and that but for the requirement to supply the volume owed by the contract to APC, alternatives might have been considered that were eliminated from consideration because they did not meet APC's volume requirements. The 9th Circuit also held that § 101 of TTRA gave the Forest Service the flexibility to exercise its discretion to provide timber volumes which also met other requirements of law, and thus it was not mandatory that the Forest Service seek to meet market demand.[24]

What is remarkable about the 9th Circuit's decision in this case is that Congress passed an Appropriations Bill rider, sponsored by Senator Ted Stevens, designed to set policy for this situation which the Court simply did not follow. The Legislation specifically named the APC EISs at issue and said that an EIS "for a timber sale or offering to one party shall be deemed sufficient if the Forest Service sells the timber to an alternate buyer."[25] Notwithstanding the clear Congressional intent to override NEPA and authorize the sale and distribution of the uncut APC timber (which had been subject to three NEPA reviews starting in 1986) to KPC and the independent sale program, the 9th Circuit side-stepped the Congressional direction:

> The EISs in question were not prepared in order to allow the APC contract to go into effect as the legislation suggests, but were driven by the pre-existing long term contract which could not be legally executed today. In other words, the EISs were not prepared for 'a timber sale,' as § 503 specifies, but crafted around a contract effected in advance of statutory requirements aimed at balancing competing claims, including those of the market, subsistence and recreation users, wildlife, and preservation.[26]

Based on this reasoning, the Court held:

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[24] Id., at 731. See also,*Alaska Forest Ass'n v. United States,* Case No. J94-007 CV (JKS). Citing *AWRTA* the District Court said: "This assumption is based on an interpretation of federal law which would have placed a 'duty' on the Forest Service with respect to TTRA § 101(a) to seek to meet market demand for forest products. The Ninth Circuit has made it clear that the Forest Service has no such duty.

[25] Section 503, Emergency Supplemental Appropriations for Additional Disaster Assistance for Anti-Terrorism Initiatives (1995).

[26] *AWRTA, supra.,* at 733.

> Section 503 offers no new statutory basis on which to analyze the matter at issue here: the effect of the cancellation of a pre-existing timber sales contract on the EIS process. Consideration of alternatives is the 'heart' of the public decion-making process which culminates in the EIS. There is not the slightest indication that Congress intended through § 503 to vitiate the EIS process by eliminating the consideration of alternatives requirements of NEPA and ANILCA.[27]

This rationale ignores the fact that by § 503 Congress "deemed" the EISs "sufficient" for NEPA and ANILCA purposes. "Deemed" is defined to mean "treat as if," "adjudge," "To hold".[28] "Sufficient" is defined to mean "adequate," "that which may be necessary to accomplish an object."[29] This combination of words clearly demonstrates that Congress intended to make the policy decision that the NEPA document was adequate to accomplish the objective of allowing the sale/distribution to KPC and the rest of industry of APC's uncut timber, notwithstanding any defects in the NEPA process that the Court might find. There could have been no other purpose in enacting the legislation. That the Court chose to defy this clear Congressional directive, shows the extent to which the courts, not the Forest Service, control and restrict the timber supply to manufacturers on the Tongass.

The delay in making the APC timber available to the industry had an impact on Ketchikan Pulp Company (KPC). KPC's long term contract was terminated in March 1997. The shutdown was announced by KPC's parent company, Louisiana Pacific Corporation, in October 1996, citing many of the same reasons as those given for the APC pulp mill closure:

> Mr. Suwyn said the decision to close the pulp mill was forced on the company by the Federal government's unwillingness to restore critical and essential terms of KPC's original log-term timber supply contract. Wholesale changes to the contract were unilaterally imposed by the U.S. Forest Service following passage of the "Tongass Timber Reform Act of 1990," and resulted in diminished profitability followed more recently by progressively larger operating losses at KPC.[30]

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[27] Id.
[28] Black's Law Dictionary (Abridged 6th Ed.) at page 287.
[29] Id., at page 999.
[30] October 7, 1996 press release from Louisiana-Pacific Corp.

An agreement between the Forest Service and KPC was reached in February 1997. While KPC's long term timber sale contract was cancelled, KPC received 300 MMBF over a three year period to supply its sawmill operations in Metlakatla and Ketchikan. In addition the federal government agreed to pay KPC $140 million dollars to resolve all of KPC's outstanding claims against the government for breach of the long term contract and takings.

The environmental law firm, Earthjustice, which had litigated against the contracts in behalf of local and national environmental groups since 1972, gave credit for closing the pulp mills to its relentless and successful litigation:

> A big problem was two voracious pulp mills, at Ketchikan and Sitka, whose appetites required a vast flow of trees. The only permanent solution to this problem was to get rid of the mills; our litigation successfully challenged much logging proposed under the mills contracts, and they finally shut down in the 1990s.[31]

A Southeast Alaska regional development organization found that the closure of the two pulp mills led to the loss of more than 2,000 direct jobs and a payroll of $100 million dollars per year.[32] Moreover, because without the pulp mills there is no local market for low quality logs and residual chips, the Forest Service has had to abandon its long held primary manufacture policy regarding the export of logs from the Tongass.[33]

The Forest Service acknowledges the adverse economic impact of the loss of the pulp mills on the remainder of the industry:

> As explained in detail in the section of this ROD on this subject, the existing timber industry has been at a competitive disadvantage in world markets since the closure of the pulp mills in the 1990s. Reestablishing an integrated industry, including processing facilities for all types of materials

[31] Notes from Executive Director, Earthjustice Newsletter August 14, 2007. Emphasis added.
[32] Timber Market Demand and Analysis of Potential for Integrated Southeast Timber Industry, Southeast Conference, Alaska Regional Development Organization (ARDOR), 2006.
[33] 2008 Amended Forest Plan ROD, at page 48.

> harvested on the Tongass, would require a reliable supply of economic timber from the Forest. Providing an opportunity for additional processing facilities to be established is an important step to securing the economic sustainability of the industry.[34]

Without an integrated industry the economics of a timber sale increase significantly. Low grade timber, usable only for pulping, must be clearcut for silviculture and safety purposes, but must be left in the woods for lack of a market. Chips residual to the manufacture of those logs that do go to the sawmills are sold at what are in effect disposal cost rates in all but the highest markets. Accordingly, the loss of the pulp mills has made it more difficult for the Forest Service to supply economic timber to the remainder of the industry.

THE CONTINUING SIGNIFICANCE OF THE ROLE OF LITIGATION IN THE FOREST SERVICE'S INABILITY TO PROVIDE ECONOMIC TIMBER: The Forest Service has recognized that a three year supply of economic timber is necessary to supply the flexibility each operator needs to cut for the market.[35] However, because of ANILCA, the TTRA, and the Forest Service reductions of the suitable commercial forest land base imposed during the Clinton years, the Forest Service has not been able to put up sufficient economic timber to supply the industry with three years of volume ahead. Nor has the Forest Service been able to actually award many of the sales that it did propose, because it failed over and again to prepare a NEPA document that in the view of the 9th Circuit met the requirements of law. The combined result of these factors has been to starve the industry of raw material and the flexibility to cut to the market. This in turn has caused a slow death spiral of the industry since passage of ANILCA.

The State of Alaska explained it well in its 2007 comments on the Draft EIS for the 2008 Amended Forest Plan:

> During the first few years of this century, housing starts took a significant jump and the western U.S. timber markets recovered significantly from the slump that occurred in the late 1990s. Yet, sawmills in Southeast Alaska were unable to increase their production to participate in these good market years because

[34] Id., at page 17,

[35] June 24, 2003 letter from Alaska Regional Forester, Dennis Bschor, to Alaska Governor Frank Murkowski: "The Tongass overall goal is to have three years of economical timber under contract."

> timber supply from the Tongass was artificially constrained. This constraint took at least three forms: 1) specifications of the 1997 TLMP, including elements of the wildlife conservation strategy [i.e. HCAs], particularly marten standards and guides, make it very difficult for the agency to prepare and offer timber sales that are economic to harvest; 2) the requirement to prepare a SEIS examining potential wilderness withdrawals ordered by the 9th Circuit Court [March 2001 Order by federal District Court of Alaska in *Sierra Club v. Rey*, Case No. J00-009 CV] consumed man-hours and dollars that would have otherwise would have gone to the Tongass timber sale program; and 3) nearly every timber sale offered over the past five years has been litigated and thereby delayed. As a result of these and other factors, the Forest Service has not offered and the industry has not been able to purchase a sufficient supply of timber from the Tongass to meet the production levels that would have allowed it to capture a reasonable portion of the market during the period 2000-2006.[36]

The Forest Service recognized that significant changes have occurred in the industry:

> During the 1990s, changes in ownership patterns and market conditions[37] led to the closure of southeast Alaska's two pulp mills and numerous closures of sawmill facilities. Between 2001 and 2005, six mills in southeast Alaska were sold or went out of business, and two became idle. The twelve remaining active mills operated at about 13 percent of their estimated capacity in 2005.[38]

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[36] State 2007 Comments on the 2008 Amended Forest Plan Draft EIS at page 2. An example of being unable to cut to the market is when the timber industry does not have sufficient economic timber to sell to the market when the market is strong.

[37] The Forest Service often cites poor markets as the reason for the failure of its timber to sell. If the timber is economic, meaning it does not have so many constraints upon it that its cost of harvest and manufacture and a reasonable profit exceed the sale price, then by definition it will sell on national and international markets and is available to operators to cut for the market.

[38] Susan Alexander, Regional Economist, *Tongass National Forest Timber Sale Procedures,* January, 2008.

Moreover, the Forest Service acknowledged that the industry has been starved of economic timber, but attributes its inability to make timber available to litigation:

> Due to litigation and court orders, the Forest is offering a level of timber for sale that is substantially below that analyzed and permitted under the Forest Plan ASQ calculation and planned programmed harvest.[39]

However, the Forest Service does not seem ready to recognize, or act on the fact, that the industry is in a death spiral because of economic timber starvation or that its own policies have played a significant role in that starvation.

The most significant example of economic timber starvation due to litigation was the 9th Circuit decision which led to the 2008 Amended Forest Plan.[40] In that case the Forest Service incorrectly interpreted a market demand study by Brooks and Haynes which the Forest Service had used to assess whether the 1997 TLMP would supply enough timber to meet market demand. The Forest Service incorrectly acted on the belief that the high, medium, and low market demand projections were presented as net Scribner scale (which included only the sawlog volume) when, in fact, they were presented as gross scale (which included pulp and utility volume in addition to sawlog volume). The Forest Service's mistake had the effect of nearly doubling the TLMP EIS and ROD timber demand numbers. It was made in part because the Haynes and Brooks study was late and included in the 1997 TLMP EIS at the last minute and, even then, in draft form as Appendix M.

The District Court concluded that the mistake was not significant to the planning process and that because it was speculative, the Forest Service did not rely on the market demand report.[41] The 9th Circuit reversed the District Court, holding:

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[39] Forest Service Five Year Review of the 1997 Land and Resource Management Plan at page 2. December, 2004.

[40] *Natural Resources Defense Council v. United States Forest Service,* 421 F.3d 797 (9th Cir. 2005).

[41] Id., at page 810. At ftnt. 2 on page 3 of its Order on Remand the District Court stated that it finding of harmless error was based on the following: "…[E]stimates of market demand are at best speculative and, thus, of limited value in an environment in which Congress feared that too little, rather than too much, timber would be available to meet market demand. … Under this reasoning, an overestimate would be harmless error, and only an underestimate would violate Congressional intent. The Ninth Circuit unequivocally rejected this argument. Order, *Organized Village of Kake v. United States Forest Service,* Case No: 1:04-cv-00029-JKS.

> Because the law [TTRA § 101] requires a market demand assessment for the Tongass Land Management Plan, and the Forest Service tried, but failed, to comply properly with the requirement, we hold that the mistaken interpretation of the Brooks and Haynes projections was not harmless. The Forest Service has not met its burden of showing that its misinterpretation of the Brooks and Haynes report 'clearly had no bearing on the … substance of the decision' to choose Alternative 11, and so we reverse the District Court.[42]

The 9th Circuit also found multiple violations of NEPA in the 1997 TLMP EIS, most of which arose out of the Forest Service's misinterpretation of the Brooks and Haynes report. Specifically, the Court determined that the Forest Service's effort to update and correct its error of interpretation in the Brooks and Haynes report was insufficient to avoid a violation of NEPA because:

> … Appendix M fails to mention or correct the error made in the economics section of the EIS. Similarly, Appendix M fails to conduct a new analysis of employment and earnings predictions in light of the updated Brooks and Haynes report. Appendix M does not cure the misleading economic information presented to the decision makers and the public in the EIS.[43]

Pursuant to the 9th Circuit's Order, the District Court on remand enjoined "contracts for timber sales or associated road construction" on nine major EISs until completion of the 2008 Amended Forest Plan,[44] (which has just been competed). Thus, a significant volume of timber has been enjoined since August 2005 because of a mistaken Forest Service interpretation of a report that it had rushed to include in draft in the 1997 TLMP EIS, some 10 years after it had begun the TLMP Revision process.

As with the APC EISs at issue in the *AWRTA* case, the 9th Circuit enjoined the sales despite contrary Congressional policy direction:

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[42] Id., at page 810.
[43] Id., at page 812.
[44] Order on Remand, *supra.*, at pages 6-7.

> The Record of Decision for the 2003 Supplemental Environmental Impact Statement for the 1997 Tongass Land Management Plan shall not be reviewed under any Forest Service administrative appeal process, and its adequacy shall not be subject to judicial review by any court of the United States.[45]

The Court engaged itself in remarkable sophistry over the precision of the language used in the legislation to avoid the clear policy direction of Congress:

> The 2003 ROD and SEIS were the Forest Service's response to a court order to reassess *only* the wilderness component of the 1997 Plan. …
>
> - - -
>
> Because Congress precluded judicial review of only the 2003 ROD reassessing the wilderness recommendations of the 1997 ROD, and not the entire 1997 Plan, and because NRDC challenges the adequacy of the 1997 Plan, we hold that Congress has not stripped us of our jurisdiction… ."[46]

Because the 2003 SEIS by definition supplemented and thus incorporated the EIS for the 1997 TLMP, the Court's analysis is wrong on its face. The Court should have asked what the purpose of the legislation was other than to end the seemingly endless TLMP litigation. After 16 years of NEPA reviews for which it had spent millions of dollars, Congress had a good reason to allow the timber to be sold and good reason to conclude that the "hard look" had long before been taken at the physical environmental impacts of the Plan. The 9th Circuit ignored this in its zeal to enjoin the Forest Plan. There is no reason to think that the 2008 Amended Forest Plan will be treated any differently.

2. THE 2008 AMENDED TLMP

As a consequence of the 9th Circuit's decision in NRDC I, the Forest Service was required to amend the 1997 Forest Plan.[47] The 2008 Tongass Forest

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[45] Section335,Omnibus Appropriations Act, Pub. L. 108-7 (Feb. 20, 2003).

[46] NRDC I, *supra.* at 805.

[47] NRDC I held in part: "the cumulative impacts on wildlife viability from continued 'high grading' by non-federal entities, as well as by the Forest Service to the extent permissible under the NFMA, ought to be considered in a single programmatic EIS." *NRDC I, supra.*, at 816. See also, 2008 Amended Forest Plan ROD at page 43.

Plan Amendment adopted the Tongass Timber Sale Program Adaptive Management Strategy (TAMS), "which restricts timber harvest and associated road construction activities to the low quality roadless areas of the Tongass unless the level of timber harvested warrants allowing such activities to take place in higher quality roadless areas that are perceived by many as more environmentally sensitive."[48]

In an effort to avoid litigation over the amended Plan, the Undersecretary of Agriculture established the Tongass Roundtable made up of the industry, local communities, significant national and Alaskan environmental groups, and the Forest Service. The Roundtable held endless meetings over the last three years until the State of Alaska and industry resigned. It is significant that nine of the twelve organizations which made up the Roundtable filed administrative appeals with respect to the 2008 Amended TLMP. [49]

CONCLUSIONS ON THE FAILURE OF THE TIMBER PROGRAM THROUGH 2008

The Forest Service failed to provide economic timber to industry in sufficient volumes on schedule due to: i) federal land policies which have removed significant suitable commercial TNF land from the timber base; ii) Forest Service policies included in the TLMP which removed suitable commercial TNF land from the TLMP timber harvest schedule; iii) a timber appraisal process which was seemingly incapable of identifying and selecting for sale timber which meets the mid-market test which the Forest Service Handbook for Region 10 requires; iv) its inability to prepare NEPA documents capable of surviving the scrutiny of the 9th Circuit; and v) a 9th Circuit Court willing to even override Congressional policy direction to find an enjoinable legal problem in what has become complex, multi-volume, land and resource planning NEPA documents.

The combination of the Forest Service's failure to produce NEPA documents in support of its timber sales which survive court challenge in many cases and to provide economic timber from those sales when settling those cases (or from sales which are not litigated) has starved the timber

[48] 2008 Amended Forest Plan ROD, at page 29.

[49] On July 9, 2008 Greenpeace and Cascadia Wildlands Project (which were not part of the Roundtable) filed suit in federal District Court in Anchorage seeking an injunction with respect to four timber sales having a combined volume of 33.4MMBF. This is all the volume the Forest Service had prepared for sale that year. Their litigation failed in the District Court and in the 9th Circuit.

industry of raw material and flexibility to cut to the market. As a result, industry operators and contractors have been starved of the raw material necessary to amortize their investments in plant and equipment which they made in good faith based on repeated Congressional and Forest Service commitments to provide three years volume of economic timber ahead.

This, in turn, has caused operators to leave the industry one by one. At this point there is only one significant sawmill operating on the Tongass – and it does not have three years of economic timber ahead.

II. THE IMPACT OF 2001 ROADLESS RULE

1. HISTORY OF THE 2001 ROADLESS RULE AND OTHER OBAMA ADMINISTRATION INITIATIVES AFFECTING THE TONGASS

As it was leaving office on January 12, 2001 the Clinton Administration promulgated the Roadless Rule prohibiting timber harvest and road construction on 58.5 million acres of inventoried roadless areas (IRAs) on National Forests, including the National Forests in Alaska.[50]

In 2001 the State of Alaska challenged the application of the Roadless Rule to the National Forests in Alaska on the ground that it violated numerous federal laws.[51]

In 2003 Alaska settled the case with the Department of Justice. The United States agreed to promulgate a proposed rule which, if adopted, would temporarily exempt the Tongass from the Roadless Rule. It also agreed to publish a separate advance notice of proposed rulemaking seeking comment on whether to permanently exempt the National Forests in Alaska from the Rule.

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[50] 66 Fed. Reg. 3244-3273 January 12, 2001.

[51] The Administrative Procedures Act (APA) (5 U.S.C. §§ 701-706), the National Forest Management Act (NFMA) (16 U.S.C. § 1601 et seq.), the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.), the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 (16 U.S.C. § 3101 et seq.), the Tongass Timber Reform Act (TTRA) of 1990 (16 U.S.C. 559d; Pub. L. 101-616, 104 Stat. 4430 (November 28, 1990)), the Organic Administration Act (OAA) (16 U.S.C. § 475), the Multiple Use Sustained Yield Act (MUSYA) (as amended) (16 U.S.C. §§ 528 to 531), and the Wilderness Act (16 U.S.C. § 1131 et seq.).

In December 2003, after conducting additional analysis pursuant to NEPA, the Department of Agriculture promulgated a final rule temporarily exempting the Tongass from the 2001 Roadless Rule.[52]
In 2005 the Forest Service promulgated the State Petitions Rule which applied nationally, including to the two National Forests in Alaska. The Tongass Exemption remained in place until issuance of the State Petition.

In September 2006 the District Court of California enjoined the State Petitions Rule on the ground that it violated NEPA and reinstated the 2001 Roadless Rule. However, the Court held that 2003 interim rule exempting the Tongass was reinstated.[53]

In August 2008 the District Court for the District of Wyoming ordered a nationwide injunction of the 2001 Roadless Rule on the ground that it violated the Wilderness Act and NEPA.[54] This case was appealed to the 10th Circuit, which overturned the District Court Order on October 21, 2011.

On May 28, 2009 the Secretary of Agriculture issued Memorandum 1042-154, which reserves "to the Secretary the authority to approve or disapprove road construction or reconstruction and the cutting, sale, or removal of timber" from inventoried roadless areas, including the 9.6 million acres of inventoried roadless areas (IRAs) on the Tongass National Forest. As a result of this directive, any decision regarding a "significant action" in a roadless area, such as obtaining a mining permit in a new area, building or reconstructing or upgrading and existing road or trail or RS-2477, harvesting timber, cutting timber or building road in a utility corridor - must obtain final approval from the Office of the Secretary. This Memorandum was reinstated in May 2010.

On December 22, 2009 the Organized Village of Kake and environmental groups filed an action against the 2003 interim rule that exempted the Tongass from the 2001 Roadless Rule. In March 2011 the District Court for the District of Alaska determined that the 2003 interim rule exempting the Tongass violated the APA.

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[52] 68 Fed. Reg. 75,136-75,146, December 30, 2003.
[53] *California v. United States Department of Agriculture*, 459 F. Supp.2d 874, 915-916 (N.D. Calif. 2006). In *California ex. Rel. Lockyer v. United States Department of Agriculture*, 575 F.3d. 999 (9th Cir. 2009) the Ninth Circuit upheld the District Court's decisions to enjoin the State Petitions Rule, reinstate the 2001 Roadless Rule, and maintain the Tongass Exemption.
[54] *Wyoming v. United States Department of Agriculture*, 570 F. Supp. 2d 1309 (D. Wyo. 2008).

In a May 25, 2010 letter to the Tongass Future Roundtable Regional Forester, Beth Pendleton, stated that "Agriculture Secretary Tom Vilsack today joined with USDA Forest Service and Rural development leaders "in proposing a *"Transition Framework" for Economic Development and Timber Harvesting Outside of Roadless Areas*. The letter purports to "move timber harvesting into roaded, young growth areas and away from old-growth timber in roadless areas."

On July 2, 2013, three days after the closure of the public comment period on the Five Year review of the 2008 Amended Forest Plan, the Secretary issued Memorandum 1044-009. The Memorandum called for a transition away from old-growth forests within 10-15 years.

2. AS A CONSEQUENCE OF THE SECRETARY'S MAY 25, 2010 LETTER AND JULY 2, 2013 MEMORANDUM AND THE DISTRICT COURT FOR THE DISTRICT OF ALASKA'S MARCH 2011 ORDER, THE 2008 AMENDED FOREST PLAN HAS BEEN AMENDED IN FACT

Even though the Forest Service has not formally recognized the fact, the 2008 Amended Tongass Land Management Plan (Forest Plan) has already been amended by two events subsequent to its promulgation in January 2008:

a. REIMPOSITION OF THE 2001 ROADLESS RULE

The March 4, 2011 Court Order applied the 2001 Roadless Rule, covering 9.6 million acres to the previously exempt TNF. By restricting road access and prohibiting timber harvest within Inventoried Roadless Areas (IRAs), the 2001 Roadless Rule has destroyed The Adaptive Management Strategy (TAMS) that was the basis of the Regional Forester's decision to select Alternative 6 in the 2008 Amended Forest Plan Record of Decision (ROD), imposed practical barriers to mining, has made renewable energy resource projects impractical to develop under the 2008 Amended Forest Plan.

In part, the Regional Forester selected Alternative 6 in the 2008 Amended TLMP ROD[55] to secure the objective of an integrated timber industry:

[55] 2008 Amended TLMP ROD at pages 14 and 35.

> Therefore, a reliable annual supply of at least 200 MMBF of economic timber would be needed from the Tongass to meet the objective of providing an opportunity for the reestablishment of an integrated industry. None of the alternatives with an ASQ lower than the amended Forest Plan's meet that criterion.[56]

In describing Alternative 6 the 2008 Amended TLMP FEIS points out: "The vast majority of current roadless areas would remain in natural condition; however, the majority of roadless areas that contain substantial Productive Old Growth, outside of wilderness, would be partially developed."[57] Table 2-14 in the 208 Amended TLMP FEIS shows that under Alternative 6, 2.3 million acres of the Tongass would be in "Development LUDs in Roadless Areas."[58]

Indeed, the selected alternative's stated need for 200 MMBF of economic timber to achieve an integrated timber industry cannot be met without harvesting in roadless areas:

> As noted earlier, and as depicted in Figure 1[See page 65, 2008 Amended TLMP ROD], the VCUs in the Alternative 6 suitable land base have been evaluated according to each VCUs roadless values. The land base includes Roaded, Lower Value, Moderate Value, and Higher Value Roadless components. The Roadless column on the right side of the figure can be compared with the corresponding volume numbers on the left. The volume numbers reflect the estimated sustainable level of timber harvest associated with that portion of the land base. In general, a sustained harvest level of 100 MMBF would require the Roaded and **much of the Lower Value portion of the land base**; a level of 150 MMBF would require Roaded, **Lower Value Roadless and some Moderate Value Roadless portions**; a harvest level of 200 MMBF would require **most of the remaining moderate Value Roadless portions**. Any harvest level over 200 MMBF would require entry into **some of the Higher Value Roadless portions** of the suitable land base.[59]

[56] *Ibid.* at page 37.
[57] 2008 Amended TLMP FEIS at page 2-35.
[58] *Ibid.* at page 2-38.
[59] 2008 Amended TLMP ROD at page 64. (Emphasis added).

It is thus beyond argument that by prohibiting the harvest of old growth timber in IRAs, re-imposition of the 2001 Roadless Rule to the TNF completely removed the Regional Forester's legal authority to adopt TAMS in the 2008 Amended TLMP ROD. The removal of the Forest Service's legal authority to implement TAMS can only be viewed as a significant Plan amendment.

While the Court is not subject to NEPA, the Forest Service should have recognized that as a result of the March 4, 2011 decision "conditions in a unit [i.e., the entire TNF] have significantly changed" and revised the Forest Plan in accordance with NEPA, as the National Forest Management Act (NFMA) commands. (16 U.S.C. § 1604(f) (5)).[60] That the reinstatement of the 2001 Roadless Rule on the Tongass was a significant amendment is recognized by the example of such given in the Forest Plan itself:

> **Significant Amendments** The following examples indicate circumstances that may cause a significant change to the Plan:
>
> 1. Changes that would significantly alter the long-term relationship between levels of multiple-use goods and services originally projected (See section 219.10(e) of the planning regulations in effect before November 9, 2000 [36 C.F.R. parts 200 to 299, revised as of July 1, 2000].)
>
> 2. Changes that may have an important effect on the entire Plan, or affect land and resources throughout a large portion of the planning area during the planning period.[61]

The only way to restore TAMS is to engage in rulemaking to again exempt the TNF from the 2001 Roadless Rule. However, instead of defending the 2008 Amended Forest Plan, the Forest Service has simply acquiesced in the re-imposition of the 2001 Roadless Rule on the Tongass. It failed to join the State of Alaska in appealing the District Court for the District of Alaska's March 4, 2011 Decision that the Forest Service's 2003 rulemaking exempting the TNF was arbitrary and capricious.

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[60] Surely, if the Forest Service has determined that a Forest Plan amendment is appropriate to "remove this requirement for evaluation of hydropower proposals in TUS Avoidance LUDs" (see next point), the post January 2008 overlay of 9.6 million acres of IRAs on the Forest Plan was a "significant change" that required the Forest Service to amend or revise the Forest Plan.

[61] 2008 Amended Forest Plan at page 5-3.

Notwithstanding its 2003 Settlement Agreement with the State in which it agreed to engage in rulemaking to exempt the TNF, it has failed to engage in new rulemaking to correct the errors determined by the Court. Defective rulemaking simply does not meet the Forest Service's commitment to the State under the 2003 Settlement Agreement.

In addition, by removing 300,000 acres of IRAs from the 576,000 acres available for timber harvest under the 2008 Amended Forest Plan, re-imposition of the 2001 Roadless Rule to the TNF, would make it impossible to achieve the ROD's selected alternative's stated need for 200 MMBF of economic timber to attain an integrated timber industry. By removing the Forest Service's discretion to provide a sufficient volume of timber to meet market demand, re-imposition of the 2001 Roadless Rule to the TNF violates § 101 of the Tongass Timber Reform Act of 1990 (TTRA).

b. THE TRANSITION TO SECOND GROWTH

On May 25, 2010, which was reiterated in the Secretary's July 2, 2103 Memorandum, the Forest Service decided as a policy matter to immediately transition from the 2008 Amended Forest Plan ROD;s TAMS strategy of harvesting old growth timber on roaded areas ***and low and moderate value IRAs*** to harvesting old growth and 2nd growth timber ***solely*** on roaded areas of the TNF. This transition is to occur in 8 to 15 years.

NFMA requires that timber cannot be harvested until it has achieved its culmination of mean annual increment of growth (CMAI).[62] The TNF has almost no second growth timber older than 60 years and the CMAI for TNF timber averages 100 years, depending on a variety of technical factors.[63] It follows that, not only is this policy change a significant amendment to the 2008 Amended Forest Plan (16 U.S.C. § 1604(f) (5)), it is a violation of NFMA.

In conclusion on this point, the 2008 Amended Forest Plan has already been amended in fact by re-imposition of the 2001 Roadless Rule and by the Forest Service's May 25, 2010 Transition Plan and by the Secretary's July 2, 2013 Transition Memorandum. Under these circumstances NFMA requires a

[62] 16 U.S.C. § 1604(m) (1).
[63] 2008 Amended TLMP FEIS at page 3-348.

formal plan amendment, including a NEPA review of the changes (16 U.S.C. § 1604(f) (5)). Moreover, unless the TNF is again exempted from the 2001Roadless Rule through rulemaking, the Forest Service will not retain the discretion to meet physically market demand as the TTRA requires.

3. IMPACT OF APPLICATION OF 2001 ROADLESS RULE ON ACCESS FOR MINING

While "reasonable access" to locatable minerals is technically authorized in Wilderness and IRAs under 36 C.F.R. Part 228, there are very few mines in Wilderness Areas. Even though the 2001 Roadless Rule specifies: "Reasonable rights of access may include, but are not limited to, road construction and reconstruction, helicopters, or other non-motorized access" (FEIS Vol. 1, 3-329 to 3-350),[64] the experience of the mining community is that Special Use Permits authorizing road access in or near Wilderness Areas are very difficult to obtain.

Experience teaches that the same practical adverse result can be expected in IRAs. For example, the Quartz Hill Project was adjacent to the Misty Fjords Wilderness Study Area. In 1977 the Forest Service denied a Special Use Permit to U.S. Borax to construct a road for a bulk sample of 5,000 tons of ore at the Quartz Hill Project, requiring access to be by helicopter.[65] As the opinion shows, six years later Borax still did not have a permit to build the road needed to move that volume of ore.

While the 2001 Roadless Rule allows "reasonable access" to locatable minerals, it denies access to new leases for minerals subject to the Mineral Leasing Act of 1920, including geothermal resources:[66] "because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas."[67] There is no explanation in the 2001 Final Roadless Rule and ROD why the access impacts to IRAs associated with locatable minerals is different from the access impacts to IRAs associated with leasable minerals. This is further evidence that as a practical matter the 2001 Roadless Rule will prevent road access in connection with mining exploration and development.

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[64] 66 Fed. Reg. 3244, 3264 January 12, 2001.
[65] *SEACC v. Watson*, 697 F.2d 1305 (9th Cir. 1983).
[66] *Ibid.*, at page 3255-3256.
[67] *Ibid.*, at page 3256.

Mining exploration requires the drilling of multiple holes to determine from the surface the subsurface characteristics and extent of the mineral resource. Mine development requires site clearing for buildings, tailings piles, mills, and other facilities. The needed level of exploration to develop a mine on the Tongass National Forest would typically require the substantial cutting of trees. Mine development would typically require even significantly more cutting of trees.

While "reasonable access" is technically permitted in IRAs, cutting trees associated with mining exploration and development does not appear to be allowed. 36 C.F.R. § 294.13 (b) (2) authorizes the cutting of timber "incidental to implementation of a management activity not otherwise prohibited by this subpart." However, there is no mention of mining in the examples provided in the 2001 Rule and ROD of what this section authorizes.[68] Moreover, in describing this section the 2001 Rule and ROD state: "Such management activities are expected to be rare and to focus on small diameter trees."[69]

It follows that mining, particularly exploration and the special use permits needed to develop potential claims, will be made more difficult. Because of the Secretary's emphasis on staying out of IRAs one should think of the practicalities of gaining "reasonable access" for mining as a continuum which access to patented claims will be easier to obtain than access to exploration sites. This will limit mining on the Tongass.

4. THE FAILURE TO CONSIDER THE ECONOMIC BENEFITS OR THE JOB OPPORTUNITIES RELATED TO THE DEVELOPMENT OF RENEWABLE ENERGY IN THE 2001 ROADLESS RULE OR THE 2008 AMENDED FOREST PLAN WAS INCONSISTENT WITH GOVERNMENT POLICY

Neither the 2001 Roadless Rule nor the 2008 Amended Forest Plan considered or analyzed the economic opportunities, or the job opportunities related to the development of renewable energy resources in rural Southeast Alaska communities. Nor did the 2001 Roadless Rule or 2008 Amended Forest Plan consider the direct economic costs to Southeast Alaska residents

[68] *Ibid.,* at page 3258.
[69] *Ibid.,* at page 3257.

caused by their inability to access and develop renewable energy resources in rural Southeast Alaska.

It is hard to understand this omission in the 2001 Roadless Rule because Executive Order 12866, promulgated by President Clinton in 1993, required an agency to determine that the benefits of a regulation outweigh its costs. The Final Rule and ROD acknowledged that EO 12866 applied to the 2001 Roadless Rule and that the Rule would have an annual effect on the economy of $100 million or more.[70] While the agency found that the benefits of the 2001 Roadless Rule outweighed the costs, it recognized that the impact of the Rule on lost business opportunities in the Alaska Region "may be more pronounced" "with effects in Alaska increasing in the longer term."[71]

Yet the EO 12866 review failed to include the adverse impacts and costs of application of the Rule to the Tongass on hydroelectric power development and other renewable energy resources such as wind, tidal, wave, geothermal, biomass and the transmission lines needed to transfer power from the sites of these resources to communities. Nor did the EO 12866 review consider the lost opportunity costs of not being able to replace diesel fired generators in rural Southeast Alaska with renewable energy. No consideration was given to the lost opportunity costs of creating a renewable energy industry in Southeast Alaska or to the local jobs that would be associated with such an industry.

By providing a low-carbon energy alternative the development of renewable energy resources would avoid emitting millions of metric tons of carbon emissions into the atmosphere. However, the EO 12866 review placed no value on the benefits to the environment of replacing diesel fired generators in Southeast Alaska with renewable energy. The value of the positive benefit to the environment by using renewable energy instead of diesel is estimated to be $84 billion in 2007 dollars. This is a loss to Southeast Alaska that was not recognized during the 2001 Roadless Rulemaking process.

This failure of EO 12866 review to properly analyze the value of renewable energy in Southeast Alaska should be remedied by amending the 2008 Forest Plan to include a Renewable Energy Resources Plan and LUD, the

[70] 66 Fed. Reg. 3244, January 12, 2001, at page 3267.
[71] *Ibid.* at page 3270.

goal of which is to authorize significant renewable energy development on the TNF.

It is hard to understand the omission of an analysis of the value of renewable energy in Southeast Alaska within the 2008 Amended Forest Plan because the Forest Service had previously acknowledged the importance of utility connections among communities in rural Southeast Alaska in its July 15, 2003 rulemaking to exempt the TNF from the 2001 Roadless Rule:

There are thirty two communities within the boundary of the TNF. Most Southeast Alaska communities lack road and utility connections to other communities and to mainland systems. Because most Southeast Alaska communities are surrounded on land by IRAs of the TNF, the roadless rule significantly limits the ability of communities to develop road and utility connections that almost all other communities in the United States take for granted. If the proposed rule [to exempt the TNF from the roadless rule] is adopted, communities in Southeast Alaska would be able to propose road and utility connections across national forest system land that will benefit their communities.[72]

The 2008 Forest Plan should be amended to include a Renewable Energy Resources Plan and LUD, the goal of which is to authorize significant renewable energy development on the TNF.

The Obama Administration's Executive Orders Require A Forest Plan Amendment to Add A Renewable Energy Plan and LUD for the TNF

In addition to EISA, which pre-dated the 2008 Amended Forest Plan, the current Administration has made its support of renewable energy crystal clear. Specifically, the Obama Administration is seeking to replace fossil fuel use with cleaner, renewable energy resources because of its concern about greenhouse gas (GHG) emissions,

To comply with the spirit of the Obama Administration's policies, rules and regulations encouraging the use of renewable energy resources and the lowering of carbon emissions from the use of fossil fuels (set out below), the 2008 Forest Plan should be amended to include a Renewable Energy

[72] 68Fed. Reg. 41865, at 41867 (July 15, 2003).

Resources Plan and LUD, the goal of which is to authorize significant renewable energy development on the TNF.

1. At the outset of his presidency President Barack Obama called for the nation to use renewable and clean energy to decrease dependence on foreign oil and the risks of climate change, saying "the ways we use energy strengthen our adversaries and threaten our planet." He continued stating, "[w]e will harness the sun and the winds and the soil to fuel our cars and run our factories;" and

2. Just over a month later, in an address to a joint session of Congress, President Obama called for an increase in renewable energy production in this country as part of his economic recovery plan. Addressing Congress, he said "the country that harnesses the power of clean, renewable energy will lead the 21st century." President Obama committed to "double this nation's supply of renewable energy in the next three years;" and

3. A major component of the economic recovery plan, the American Recovery and Reinvestment Act of 2009 (ARRA), an $800 billion spending bill, included "new national strategies in renewable energy, smart grid, transmission, advanced vehicles, energy efficiency" efforts and other "energy, environment, climate and sustainability" initiatives. President Obama signed the ARRA into law on February 17, 2009. The legislation combined tax incentives, direct spending, and bond and loan programs to increase renewable and clean energy development; and

4. Soon after taking office, President Obama also signed Executive Order 13514, which expanded on the energy reduction and environmental performance requirements of Executive Order 13423. Executive Order 13423 required federal agencies to reduce energy intensity by 3 percent each year with the goal of 30 percent reduction by the end of FY 2015 compared to a FY 2003 baseline; and

5. As a continuation of his focus on renewable and clean energy as a part of energy independence for the U.S., the Obama Administration released its Blueprint for a Secure Energy Future on March 30, 2011. The Blueprint noted that as a result of several efforts – including

grants under the ARRA, funding for research and development, siting solar power plants on public lands and offshore wind development — the country was already on track to double renewable energy generation by 2012. In March 2012, the White House released a Progress Report on goals set out in the Blueprint. According to the report, the use of renewable energy such as wind and solar had doubled since 2008; and

6. Consistent with the goals of the Obama Administration, such a Renewable Energy Resource plan and development would allow communities and development projects in Southeast Alaska to significantly decrease the greenhouse gas (GHG) and other emissions in the TNF, reduce the need for shipment and potential spills of diesel and operate these development projects and communities' economies and at a lower cost than diesel. Moreover, it would avoid the need for some, expensive air control devices; and

7. Consistent with the findings and direction of EISA, such use of renewable energy projects, developed at a lower cost than the rising cost of diesel, would help improve the economic competitiveness of rural Southeast communities and thereby create jobs in high unemployment communities.

Because, neither the 2001 Roadless Rule, nor the EO 12866 review of the 2001 Roadless Rule, nor the 2008 Amended Forest Plan considered or analyzed the economic opportunities, or the job opportunities related to the development of renewable energy resources in rural Southeast Alaska communities or the direct economic costs to Southeast Alaska residents caused by their inability to access and develop renewable energy resources in rural Southeast Alaska, the 2008 Forest Plan should be amended to include a Renewable Energy Resources Plan and LUD, the goal of which is to authorize significant renewable energy development on the TNF.

The Forest Service's Post Promulgation of the 2008 Amended Forest Plan's Recognition of the Importance of Renewable Energy to the Economy and Communities of Southeast Alaska Requires a Forest Plan Amendment to Add a Renewable Energy Plan and LUD to the TNF

Subsequent to the publication of the 2008 Amended Forest Plan, in a March 2011 Region 10 Issue Paper describing the impact on the TNF of the Court's Decision striking down the TNF Exemption, the Forest Service said: "This ruling will affect the Transition Framework for Economic Development in Southeast Alaska. **Moving rural communities off expensive fossil fuels to cheaper renewable energy is the basic foundation of for a successful transition."** (Emphasis added.)

Later, in the same Issue Paper the Forest Service strongly emphasized the importance of renewable energy:

> Affordable energy is **critical** to the success of the Transition. Southeast Alaska has abundant potential to provide renewable energy in terms in terms of hydroelectric and biomass operations. For hydro development to occur, new projects need to construct roads, cut timber, and build infrastructure in 2001 Inventoried Roadless.

In the Executive Summary of a 2011, Region 10, Forest Service document entitled *Roadmap to Rural Wealth in Southeast Alaska: Restoration and Timber in Context* the Forest Service asserted:

> Low-cost energy is critical. The high cost of electric power impedes economic development in the region, yet the region is rich in hydropower potential. The most promising opportunities lie in developing hydroelectric power and building transmission lines to connect Southeast Alaska's communities to each other and to Canada's grid, generating electric power for potential export. Such projects would create new jobs through constructing, operating and maintaining hydroelectric and transmission facilities. Previous work by the Forest Service has estimated job creation by this type of work at 10 jobs for every million dollars invested.

In a Briefing Paper generated by the Natural Resources and Environment group in the Washington Office of the Forest Service the agency observed:

> Proposals for hydroelectric projects are steadily increasing in the Alaska Region as the high cost of electric power remains one of the most significant factors impeding economic growth in both Southcentral and Southeast Alaska. The cost of energy affects the

quality of life for residents, influences economic development in communities, and shapes future opportunities for the whole economy.

Hydroelectric power is Southeast Alaska's largest source of renewable energy but many communities are still served solely by diesel generation, which is far more expensive. The cost of hydropower ranges from 9 cents to 12 cents per kilowatt hour, with diesel-generated power ranging from 48 cents to 63 cents per kilowatt hour. A larger proportion of the population is Alaska Native in these rural Southeast communities and that segment of the population is more notable affected by the high energy costs.

Along with the high cost of buying diesel fuel, diesel generated power produces hydrocarbon emissions and increased risk of fuel spills resulting from shipping, handling and storing petroleum products in the harsh Alaskan climate and ocean conditions. The higher operation and maintenance costs of diesel generation, along with the potential for interruptions in fuel delivery, the susceptibility of fuel prices to wide variation, and resulting noise and air pollution, are all undesirable aspects of diesel power generation.

Interestingly, even the Secretary's July 2, 2013 Memorandum recognized the "renewable energy sector" as deserving "increased investment."[73]

Accordingly, it follows that –

Not only would amending the Forest Plan to add a Renewable Energy Resource Plan and LUD, as we request, allow the Forest Service to comply with the Obama Administration's Executive Orders, it would meet the objectives described in the Forest Service documents set out above.

III. CONCLUSION

For the reasons set out above the Forest Service should amend the 2008 Forest Plan in the following ways:

[73] See Page 2.

1. Consistent with its 2003 Settlement Agreement with the State of Alaska, the Forest Service should immediately engage in rulemaking to once again exempt the TNF from the 2001 Roadless Rule, which among other things, would again authorize geothermal leasing on the TNF;

2. Modify the time period of the transition from old growth to second growth to allow the bulk of second growth stands on the TNF to achieve their CMAI, which is approximately 45 years from now. In the interim allow economic old growth timber to be harvested in Inventoried Roadless Areas (IRA) in a volume sufficient to meet market demand for an integrated timber industry, the need for which was documented in, and authorized by, the 2008 Forest Plan;

3. A Mineral and Strategic Mineral LUD should be added to the 2008 Forest Plan to promote and support mineral and strategic mineral development and related access roads consistent with National Security and National Strategic Mineral Policies. The Mineral and Strategic Mineral LUD would take precedence over any underlying LUD (subject to applicable laws) regardless of whether the underlying LUD is an "Avoidance LUD" or not. As such, it would represent a "window" through the underlying LUD through which minerals and strategic minerals could be accessed and developed;

4. Consistent with the President's Executive Order 13604 as further defined by Presidential Memorandum dated May 17, 2013 permitting on the TNF should be speeded up. In this regard for purposes of the Forest Plan the term "reasonable access" should be defined to provide timely (30 day turnaround) issuance of Forest Service Special Use Permits for those that hold a mining claim or a Federal Energy Regulatory Commission (FERC) preliminary permit to authorize these operations to investigate and develop lawfully permitted federal resources;

5. A Renewable Energy Resource Plan, including a Renewable Energy Resource Development LUD, (see attached) should be added to the Forest Plan to promote and support all forms of public and private renewable energy development (including geothermal) and related transmission lines within the TNF consistent with Public Laws and

National Security and National Energy Policies. The Renewable Energy Development LUD would take precedence over any underlying LUD (subject to applicable laws) regardless of whether the underlying LUD is an "Avoidance LUD" or not. As such, it would represent a "window" through the underlying LUD through which renewable resources could be accessed and developed; and

6. The current TUS LUD should be amended to change the criteria to allow the TUS LUD to apply to hydropower projects and other renewable energy projects within TUS Avoidance Areas and to allow for public and private hydropower development in all LUDs.

7. The Chief of the Forest Service should re-delegate to the Forest Supervisor and District Rangers on the TNF the authority to make permitting decisions within IRAs; and

8. The Forest Plan should include a new LUD called the "Tongass Community Economic Development Zone LUD" to promote and support economic development and activities on the TNF for any community that has lower than average State per capita income or pays higher than the national average for electricity to assure that the Plan's administration and practices promote economic well-being and social justice in all Tongass communities.

In addition, the State of Alaska should sue the Forest Service for amending the 2008 Amended Forest Plan without an EIS. The State should also raise the issue of State management of the Tongass Forest as proposed by the Governor's Timber Task Force.