LAW OFFICE OF JAMES F. CLARK

December 16, 2019

Alaska Roadless Rule
USDA Forest Service, Alaska Region
Ecosystem Planning and Budget Staff
P.O. Box 21628
Juneau, Alaska 99802–1628.

Re: Comments on Draft Environmental Impact Statement (DEIS) and Alaska-specific Roadless Rule.

Dear Madam/Sir.

INTRODUCTION

The undersigned hereby incorporates by reference and endorses the comments made by the State of Alaska to the Secretary of Agriculture in its January 19, 2018 "Petition for USDA Rulemaking to Exempt the Tongass National Forest from the Application of the Roadless Rule and other Actions" which: 1) explained the enduring significance of USDA's 2003 Record of Decision (ROD) that totally exempted the Tongass National Forest (Tongass) from the application of the 2001 Roadless Rule; 2) explained that after analyzing the requirements and limitations of the Alaska National Interest Lands Conservation Act (ANILCA) and the Tongass Timber Reform Act (TTRA) "the USDA concluded that the best way to implement the spirit and letter of these laws was to exempt the Tongass from the Roadless Rule;" 3) explained that USDA also concluded that exempting the Tongass was consistent with the intent of Congress, but also with sound management of the Tongass because roadless areas in the Tongass are adequately protected without adding the additional barriers of the Roadless Rule; 4) explained that even without

the Roadless Rule only about four percent of the Tongass is designated as suitable for timber harvest; 5) described the litigation regarding the 2001 Roadless Rule and the 2003 Roadless Rule including the Department of Justice's rational for its aggressive defense of USDA's 2003 ROD; 6) explained why the serious socioeconomic consequences to Alaskans and complying ANILCA and TTRA are as compelling today for totally exempting the Tongass from the Roadless Rule as they were when offered by USDA for that purpose in 2003; and 7) explained why the Secretary should direct the United States Forest Service (Forest Service) to commence a Tongass Land Management Plan (TLMP) revision or amendment to remove provisions of the Roadless Rule that have been incorporated into the 2016 Tongass Transition Plan.

The undersigned also incorporates by reference and endorses the December 17, 2019 Comments of the Alaska Roadless Rule Coalition (Coalition) that represent the views of the Alaska Chamber, the Alaska Forest Association, the Alaska Miners Association, the Associated General Contractors of Alaska, the Resource Development Council for Alaska, Inc., the Alaska Support Industry Alliance, First Things First Alaska Foundation, Hyak Mining Co., the Juneau Chamber of Commerce, Coastal Helicopters, Inc. the Ketchikan Chamber of Commerce, the City of Ketchikan, Red Diamond Mining Company, the Southeast Alaska Power Agency, the Southeast Conference, Alaska Electric Light & Power, Alaska Marine Lines, Alaska Power & Telephone, Tyler Rental, First Bank, and Southeast Stevedoring Inc. The Coalition, that includes urban and rural Alaskans, and businesses and associations having a membership composition representing tens of thousands of Alaskans, has joined the State of Alaska and Alaska's Congressional Delegation in urging USDA to Totally Exempt the Tongass from application of the Roadless Rule for the reasons given by the State in its January 19, 2018 Petition. As noted in the Coalition's Comments every Alaska Governor and Congressional Delegation member since the Roadless Rule was promulgated in 2001 has supported Total Exemption of the Tongass from the Roadless Rule.

The undersigned agrees with the Coalition that Total Exemption would exchange the Roadless Rule's inflexible national prohibitions on access and development in the Tongass, for the more flexible TLMP process. Since the goal of the 2016 Tongass Transition Plan is to foster change, it is only logical to use the more flexible land planning system to accommodate to achieve that goal. The undersigned also agrees with the State and the Coalition that the Secretary should direct the Forest Service

to revise or amend TLMP to remove the provisions of the Roadless Rule that have been incorporated into the 2016 Tongass Transition Plan.

USDA'S FAILURE TO INCORPORATE THE CITIZEN ADVISORY COMMITTEE'S NEW EXCEPTIONS FOR ROAD CONSTRUCTION AND TIMBER HARVEST LEAVES TOTAL EXEMPTION AS THE ONLY MEANS OF OBTAINING RELIEF FROM THE ACCESS AND OTHER UNNECESSARY BARRIERS TO REASONABLE DEVELOPMENT ON THE TONGASS

The Citizen's Advisory Committee (CAC), (representing diverse interests) appointed by former Governor Walker to inform the State in its role a s a cooperating agency in the National Environmental Policy Act (NEPA) process associated with the DEIS, identified significant new road and timber harvest exceptions that would have to be added to the Roadless Rule to protect communities, renewable energy, and mining if IRAs were to remain in place.

Each of the current exceptions to the Roadless Rule (36 C.F.R. §294.12 (b)(1-7) is preceded by the words "if the Responsible Official determines that … a road is needed," thereby leaving it up to the Forest Service's "Responsible Official" to decide whether a road is needed. There are no criteria for making that decision. The language the CAC proposed to implement its new exceptions was specifically intended to eliminate the "Responsible Official's" criteria-less ability to decide whether a road is needed even if the environmental and resource protection criteria for approval of 36 C.F.R. Part 228 were met.

The CAC implementing language (found at pages 7 – 10 of its Report) made granting a road mandatory if the applicant meets the environmental and resource protection criteria for approval of 36 C.F.R. Part 228. The thinking was as follows: It is the Forest Service's job to protect the environment and other resources on the National Forests. As long as that obligation is satisfied, the Responsible Official should not have the discretion to disapprove an application because he/she doesn't think a road "is needed" – particularly when, as here, there are no criteria for making that decision.

By simply comparing the language the CAC proposed to implement its recommendations for new Road and Timber Harvest Exceptions (found at pages 7 –

10 of the CAC Report) with the implementing language for DEIS alternatives 2 -5 set out in Appendix G and the language in 36 C.F.R. §294.12 (b)(1-7) of the 2001 Roadless Rule shows that this is not the case.

For example, the CAC proposed the following mandatory language to provide road access to mining exploration and development projects (so long as such road access meets the criteria of 36 C.F.R. Part 228) be included in each alternative 2 – 5:

> Road Exception 11 (page 7): A road to access mineral operations authorized by the United States mining laws (30 U.S.C. § 22 et seq.) shall be permitted in IRAs if it meets the criteria of 36 C.F.R. Part 228 in the same way as if the application for the road to access such mineral operations were being permitted on non-IRA National Forest lands.

However, the Appendix G language implementing Alternative 5 (the most developmentally oriented of the alternatives other than Total Exemption) provides no change:

> §294.52 (c) Notwithstanding the prohibition in paragraph (a) of this section, a road may be constructed or reconstructed in an Alaska Roadless Area designated as a Roadless Priority if the Responsible Official determines that one or more of the following circumstances exist:
>
> > (1) A road is needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty;

This is exactly the same as the exception language currently used in the 2001 Roadless Rule 36 C.F.R. §294.12 (b)(3) that the CAC language was intended to change:

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

This failure to change the existing regulatory language is replicated throughout each alternative. The CAC's mandatory exception language that the State provided to USDA was not included in any alternative. (See Appendix G, alternatives 2 - 5). Instead, as is seen in the example above, each road and timber harvest exception is preceded by the words "if the Responsible Official determines that … a road is

needed," thereby leaving it up to the Forest Service's "Responsible Official" to decide whether a road is needed without any criteria for doing so.

This is the existing situation already maintained by the "No Action" alternative. It is exactly what the CAC recommendations sought to change in order to provide regulatory certainty and predictability. The undersigned joins the Coalition in finding it "remarkable that ***not one*** of Appendix G's alternatives 2 – 5 contains the CAC's mandatory regulatory language to implement its proposed New Road Exceptions and proposed New Timber Cutting Exceptions.[1]

Comparing the CAC/Appendix G/2001 Roadless Rule regulatory implementing language is critical to understanding that USDA *did not* adopt the CAC proposals. This, in turn, explains why Total Exemption is the only alternative that achieves relief from the Roadless Rule access prohibitions for communities, renewable energy, timber and mining. The CAC recommendations can only be achieved by adopting the Total Exemption alternative as the Final Rule in the ROD.

Respectfully submitted,

James F. Clark

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[1] Consideration of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. "[A]n agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice." *Alaska Wilderness Recreation v. Morrison*, 67 F.3d 723, 729 (9th Cir.1995) (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir.1992)). The Coalition strongly maintains that the CAC's mandatory authorization language to implement its New Road Exceptions 8 – 16 and New Timber Cutting Exceptions 1 - 8 is a reasonable alternative that should have been presented in at least one alternative the DEIS.