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Comments: The State of Alaska's consolidated comments are attached.

Take care,

Kyle Moselle

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December 16, 2019

Alaska Roadless Rule

USDA Forest Service, Alaska Region

P.O. Box 21628

Juneau, AK 99802-1628

Submitted electronically at <https://www.fs.usda.gov/project/?project=54511>

Re: 36 CFR Part 294, Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska

In coordination with the Alaska Departments of Natural Resources (DNR), Environmental Conservation (DEC), Fish and Game (ADF&G), Transportation and Public Facilities (DOT&PF), and Commerce, Community and Economic Development (DCCED), and on behalf of the State of Alaska (State), the Office of Project Management and Permitting (OPMP) submits the following consolidated comments in response to the U.S. Department of Agriculture (USDA), Forest Service's Notice of Proposed Rulemaking (Federal Register Vol. 84, No. 201, p. 55522-55529) and Draft Environmental Impact Statement (DEIS) for the proposed Alaska Roadless Rule. Please consider the following comments from the State as the petitioner, a cooperating agency, and a state government during preparation of the Final Environmental Impact Statement (FEIS), Record of Decision (ROD), and Final Rule.

The State supports a full exemption for the Tongass National Forest (Tongass) from the 2001 Roadless Area Conservation Rule (Roadless Rule), as it (1) addresses the critical socioeconomic needs of Alaskans and Southeast Alaska communities; (2) is the most responsive action alternative to the State's petition for rulemaking;

(3) provides the USDA, Forest Service the greatest flexibility for managing the Tongass to achieve multiple-use, sustained yield objectives; and (4) is consistent with Congressional directives.

#### Summary of Proposed Alaska Roadless Rule

The USDA is proposing to exempt the Tongass from the 2001 Roadless Rule, which prohibits tree harvest and road construction/reconstruction within inventoried roadless areas (IRAs) with certain limited exceptions. In addition, the proposed rule would provide an administrative procedure for correcting and modifying inventoried roadless area boundaries in the Chugach National Forest (Chugach).

#### Summary of Alternatives

The DEIS, prepared under the National Environmental Policy Act (NEPA), analyzes six alternatives related to managing roadless areas in the Tongass. The alternatives range from no action to fully exempting the Tongass from application of the 2001 Roadless Rule. The USDA has identified Alternative 6 (full exemption) as the preferred alternative in the DEIS. The full range of alternatives considered are summarized below:

\* Alternative 1 takes no action and would continue to apply the 2001 Roadless Rule to 9.2 million acres of the Tongass.

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\* Alternative 2 removes approximately 113,000 acres from roadless designation that have been substantially altered (e.g. "roaded roadless" areas), allocates about 9.22 million acres of the Tongass across three Alaska Roadless Area (ARA) Priorities (Land Use Designation (LUD) II, Watershed, and Roadless), and converts 18,000 old-growth acres and 10,000 young-growth acres previously identified as unsuitable timber lands to suitable timber lands.

\* Alternative 3 proposes a net decrease of about 1.1 million acres from roadless designation. The majority of those (826,000) acres will continue to be managed for their wildland and roadless characteristics as congressionally designated LUD II areas. The remaining acres removed from roadless designation include roughly 212,000 acres comprised of substantially altered areas and their logical operational extensions. Alternative 3 allocates about 8.1 million acres of the Tongass across three ARA Priorities (Watershed, Roadless and Community) and would convert 76,000 old-growth acres and 14,000 young-growth acres previously identified as unsuitable timber lands to suitable timber lands.

\* Alternative 4 proposes a net decrease of about 343,000 acres from roadless designation comprised of substantially altered areas, their logical operational extensions, and selected additional locations for economic timber sales. Alternative 4 allocates about 8.86 million acres of the Tongass to three ARA Priorities (LUD II, Roadless, and Timber). The 749,000 acres allocated to the Timber Priority ARA category would allow for timber to be cut, sold, or removed and construction, reconstruction, or maintenance of permanent or temporary roads<sup>1</sup>. Alternative 4 converts roughly 158,000 old-growth acres and 15,000 young-growth acres previously identified as unsuitable timber lands to suitable timber lands.

\* Alternative 5 would remove all Timber Development, Modified Landscape, and Scenic Viewshed LUDs identified by the 2016 Tongass Land and Resource Management Plan (Forest Plan) from roadless designation and convert 165,000 old-growth acres and 17,000 young-growth acres previously identified as unsuitable timber lands to suitable timberlands. Areas with mineral potential, as identified by the 2016 Forest Plan's minerals overlay, are also removed from roadless designation under this alternative.

\* Alternative 6 is the Preferred Alternative and would exempt the Tongass from the 2001 Roadless Rule. This alternative proposes to remove roadless designations on all 9.2 million acres of IRAs in the Tongass. Alternative 6 converts a net total of 165,000 old-growth acres and 20,000 young-growth acres previously identified as

unsuitable timber lands to suitable timber lands and includes an administrative correction and modification provision that would only apply to the Chugach. Importantly, existing Congressional directives and the 2016 Forest Plan would continue to govern activities in the Tongass.

#### General Comments

The 2001 Roadless Rule remains a national, one-size-fits-all regulation that inappropriately, and unlawfully, limits opportunities for Alaskans that live and work in the Tongass. As such, the State, along with Alaska's Congressional Delegation, has worked tirelessly over the consecutive terms of six governors (Democratic, Independent, and Republican) to exempt the Tongass from the Roadless Rule.

In January 2018, the State petitioned USDA Secretary Sonny Perdue for rulemaking to exempt the Tongass from the Roadless Rule in the interest of the socioeconomic well-being of its residents. Following acceptance of the State's petition, the State and the USDA entered a Memorandum of Understanding (MOU), in which the State agreed to assist the USDA, as a cooperating agency, in

1 The 749,000 acres allocated to Timber Priority ARA are designated for development (e.g. Timber Production, Modified Landscape, or Scenic Viewshed) under provisions of the 2016 Forest Plan.

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developing an Environmental Impact Statement (EIS) in accordance with NEPA. Through Alaska Administrative Order 299, the State established the Alaska Roadless Rule Citizen Advisory Committee (Committee) to provide an opportunity for Southeast Alaskans to advise the State on the future management of IRAs in the Tongass. The Committee was charged with providing recommendations to assist the State in fulfilling its role as a cooperating agency under the MOU.

Following review of the DEIS and consideration of the Committee's input, the State continues to support fully exempting the Tongass from the 2001 Roadless Rule, as described in the Preferred Alternative (Alternative 6) of the DEIS. The Preferred Alternative is the most responsive action alternative to the State's petition and would allow the UDSA, Forest Service the greatest flexibility to implement management decisions at the forest and regional levels, consistent with multiple-use and sustained yield principles, to address the unique challenges faced by the communities, residents, and industries that rely on the Tongass; consistent with Congressional directives.

#### The Tongass is unique

At nearly 17 million acres, the Tongass is the largest forest in the National Forest System - covering an area larger than West Virginia and one of the world's most important intact ecosystems. Thirty-two communities are located within the forest boundaries, with roughly 72,000 residents. The Tongass is home to the Tlingit, Haida and Tsimshian peoples, who have lived in Southeast Alaska since time immemorial. The Tongass is also known as the "salmon forest", and it is a source of great pride and passion for Alaskans.

The U.S. Forest Service is governed by numerous federal laws including the Organic Administration Act, the Multiple-Use Sustained-Yield Act, and the National Forest Management Act. Three Alaska-specific federal laws significantly affect management of the Tongass: the Alaska National Interest Lands Conservation Act (ANILCA), the Tongass Timber Reform Act (TTRA), and the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (FFY 2015 Defense Authorization Act). In 1980, Congress passed ANILCA, which established more than 100 million acres of federal land across Alaska as new or expanded

Conservation System Units (CSUs), including 14 Wilderness Areas and two National Monuments in the Tongass. Through ANILCA, Congress balanced the unprecedented scale of these designations with similarly unprecedented accommodations for Alaskans' way of life and reliance on a resource-based economy. Section 101(d) of ANILCA succinctly captures the intent of Congress to provide "sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time [provide] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." Congress included key provisions intended to ensure the balance established for Alaska in ANILCA could only be modified by a future act of Congress.<sup>2</sup> While Congress has amended ANILCA

2 ANILCA SEC. 1326. (a) No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress. [Emphasis added]

(b) No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation areas or

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numerous times through the TTRA and other subsequent legislation, the letter and intent of those key provisions remain intact.

Through ANILCA, Congress also provided direction to assure the timber industry in Southeast Alaska would continue to provide economic benefit to local communities. Specifically, ANILCA Section 705 required annual funding be made available to the Secretary of Agriculture to maintain a defined level of timber supply from the Tongass to support the dependent industry. In 1990, the TTRA amended ANILCA Section 705 to require the Secretary "seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle", to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources. The TTRA also prohibited timber harvest within 100 feet of fish streams and established six additional Wilderness Areas and 12 LUD II areas, which are managed in a roadless state to retain their wildland character. The FFY 2015 Defense Authorization Act finalized the outstanding Alaska Native Claims Settlement Act land entitlements of Sealaska Regional Native Corporation and established eight additional LUD II areas in the Tongass. The congressionally designated Wilderness and LUD II areas established and expanded through these laws protect the wilderness and roadless character of 6.8 million acres of the Tongass. These statutory protections, along with the 2016 Forest Plan management prescriptions, provide the balance sought by Congress and allow for multiple use, sustained yield management to occur on the Tongass. Application of the 2001 Roadless Rule, an administrative action, conflicts with and unnecessarily complicates the management regime established by Congress for the Tongass; it has stifled forest-level decision making processes; and it has significantly impacted the timber, mining, electric utility, and transportation sectors in the region by limiting access in and through remote areas of the Tongass and increasing uncertainty, cost, and delay in the permitting processes. Resulting job losses, increased costs, and deferment of critical infrastructure projects have, in turn, negatively impacted Southeast Alaska communities.

Socioeconomics impacts of the Roadless Rule

The 2001 Roadless Rule significantly and disproportionately impacts the Southeast Alaska timber industry and rural communities. Through the 1990s, an average annual harvest of nearly 250 million board feet (MMBF) of timber was supplied from the Tongass, supporting over 3,500 fulltime jobs, which supported families, schools, and local businesses. Today, less than 350 timber industry jobs remain<sup>3</sup>.

The 2001 Roadless Rule FEIS projected up to 895 jobs and up to \$38.7 million in personal income would be lost following application of the 2001 Roadless Rule in the Tongass<sup>4</sup>. Equally concerning, annual school enrollment has decreased by 3,400 students (23%) in the region since 1997.<sup>5</sup> Edna Bay, Elfin Cove, Hyder, Kasaan, Meyers Creek, and Whale Pass have each seen school closures since 1990, with all but one of these closures occurring since 2000. Schools in Edna Bay, Hyder, Kasaan, and

for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.  
[Emphasis added]

ANILCA SEC. 708. (b)(4) unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System. [Emphasis added]

3 Southeast Conference, Southeast Alaska by the Numbers 2019, p. 12

4 2001 Roadless Rule FEIS, p. 3-380

5 DEIS, p. 3-23

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Whale Pass reopened by the 2014 school year.<sup>6,7</sup> However, since that time schools have closed in Edna Bay (2015), Craig (2015), Port Protection (2017), and Tenakee Springs (2017).<sup>8</sup> Greater connectivity among Southeast communities will contribute positively to community sustainability, but the 2001 Roadless Rule presents significant barriers to connecting communities in Southeast Alaska.

Electric utility and transportation sectors have also faced significant challenges from the 2001 Roadless Rule, affecting important infrastructure projects that would connect communities through transmission lines, roads, and shorter ferry routes.

Although mining industry jobs have increased steadily over the last decade due to the continued success of the Greens Creek Mine and operations starting at the Kensington Mine in 2010, surface access to mineral claims in inventoried roadless areas have been limited by the 2001 Roadless Rule, which has impacted the timing, scope and scale of mineral exploration in Southeast Alaska.

Rather than acknowledging and evaluating the difficulties faced by applicants to secure approvals for roadbuilding or tree cutting activities in IRAs of the Tongass, the USDA has predominately dismissed the issue and instead highlighted 57 Alaska projects approved in IRAs.<sup>9</sup> A closer evaluation by the State of these approvals revealed concerns that the information being provided to the public is misleading. The 38 mining projects noted by the USDA in their Frequently Asked Questions (FAQ) document are not individual projects, as implied. The 33 approvals for mineral activities in Tongass IRAs were issued to eight (8) individual project applicants over multiple years for continued mineral exploration. None of the 33 approvals for mineral exploration authorized road building, and instead required applicants to rely on helicopters to support operations.

The ROD for the Kake to Petersburg Intertie Project states "[t]he alternatives as initially proposed all included construction of a pioneer road along those sections of the proposed transmission line that do not follow existing roads, including locations within IRAs. The alternatives were modified during the alternative development process and pioneer roads are no longer proposed under any of the action alternatives, including the Selected Alternative."<sup>10</sup>

Another example of misleading information highlighted by USDA in their FAQ document is "the issuance of a road easement to the State of Alaska", which relates to the Katlian Bay Road Project proposed by the DOT&PF. However, the "land allocated for the Katlian Bay Road was through a Federal-State land exchange that included a transportation and utility easement for the Katlian Bay Road project corridor (PL-109-59; SAFETEALU Section 4407, D-1 Easement).<sup>11</sup> The Section 4407 easement granted by Congress under Public Law 109-59 ensured that the Katlian Bay Road would be approved despite the regulatory prohibitions to roadbuilding found in the 2001 Roadless Rule.

In addition to the barriers the 2001 Roadless Rule presents potential developers and investors, IRAs have also become important to outfitters and guides, small cruise vessels, and other visitor industry

6 2016 Forest Plan, FEIS, p. 3-542

7 Data compiled by Department of Commerce, Community and Economic Development (12/12/19) from Department of Education and Early Development (FY1999-FY2019 School Closures; updated 10/1/19)

8 Data compiled by Department of Commerce, Community and Economic Development (12/12/19) from Department of Education and Early Development (FY1999-FY2019 School Closures; updated 10/1/19)

9 USDA (September 2018), Frequently Asked Questions Regarding Inventoried Roadless Areas. Available at [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd595403.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd595403.pdf)

10 USDA, Forest Service (November 2016), Final Record of Decision, Kake to Petersburg Transmission Line Intertie Project, Tongass National Forest. Available at [https://www.fs.usda.gov/nfs/11558/www/nepa/66847\\_FSPLT3\\_3908226.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/66847_FSPLT3_3908226.pdf)

11 ADOT&PF (January 2018). Katlian Bay Road Project Environmental Document. Available at [http://dot.alaska.gov/sereg/projects/sitka\\_katlianbayroad/assets/Katlian\\_EA.pdf](http://dot.alaska.gov/sereg/projects/sitka_katlianbayroad/assets/Katlian_EA.pdf)

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stakeholders due to their relative accessibility compared to the restrictive management of statutorily designated wilderness areas in the Tongass. This increased reliance by visitor industry users of IRAs has created public expectations that may not align with management directions of the 2016 Forest Plan for the development land base. The State believes these competing uses can be effectively managed through forest and regional-level decision making processes under the 2016 Forest Plan, but not under the rigid 2001 Roadless Rule prohibitions. For example, roads and visitor-related facilities in the Remote Recreation and other non-development LUDs could provide for greater distribution of recreational uses in areas of the Tongass that may provide experiences similar to those one could expect in statutory wilderness areas, while at the same time not competing with timber production and other commercial uses that are restricted to an extremely limited portion of the Tongass. Unfortunately, such an approach is not possible while the command and control prohibitions with limited exceptions under the 2001 Roadless Rule are applied to the Tongass.

The socioeconomic impacts of the 2001 Roadless Rule are disproportionately significant and create challenges that cannot be adequately addressed locally or regionally through project or forest-level planning. The State supports the growth experienced in the visitor (2,133 jobs added)<sup>12</sup> and mining (353 jobs added)<sup>13</sup> sectors in the Southeast Alaska region between 2010 and 2018. However, rural communities have borne the costs from a national policy that should never have been applied to the Tongass. Success of Southeast Alaska communities depends on a diversified regional economy. Connectivity - whether by roads or utilities - is a critical component of sustainability. Through a combination of statutory and management plan protections, the Tongass can effectively manage for environmental, social, and economic outputs that contribute to the overall wellbeing of Southeast Alaska and the Nation.

In summary, the 2001 Roadless Rule projected a loss of 895 jobs in Southeast Alaska. Instead, the region has lost over 3,000 jobs in just one economic sector. Since 2010, two sectors (notable bright spots in the Southeast economy) added just under 2,500 jobs but were likely greatly inhibited by the bureaucratic hurdles imposed on the Tongass. A decrease of 23% of K-12 students is directly related to the timber sector's job losses. The 2001 Roadless Rule has placed such a burden on the region that few economic sectors have grown sufficiently, even over decades, to ensure a vibrant future for the Southeast region of Alaska.

#### Transportation and Utility Infrastructure

Congress recognized Alaska's lack of roads and infrastructure in Title XI of ANILCA and established a process to ensure proposed transportation and utility projects that affect CSUs would be fairly considered and not summarily dismissed by federal land management agencies otherwise tasked with protecting CSUs, including designated Wilderness.

#### FINDINGS

ANILCA SEC. 1101. Congress finds that - (a) Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would best be identified and provided for through an orderly, continuous decision-making process involving the State and Federal Governments and the public;...[Emphasis added]

Ironically, this assurance does not apply to IRAs in Alaska because they are not congressionally designated CSUs. This conundrum of an administratively designated area having greater restrictions than a congressionally designated area is also found in the administratively designated "eligible" Wild,

12 Comparison of Southeast by the Numbers 2013 and 2019; published for Southeast Conference by Rain Coast Data.

13 Comparison of Southeast by the Numbers 2013 and 2019; published for Southeast Conference by Rain Coast Data.

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Scenic, and Recreational Rivers LUDs and areas that have been found suitable and recommended for Wilderness designation, which are all managed under the 2016 Forest Plan as if they are CSUs with development restrictions but no Title XI process for development approval. Additionally, the limited exceptions included in the 2001 Roadless Rule<sup>14</sup> are much narrower than the decision criteria identified by Congress in the ANILCA Title XI process<sup>15</sup>. As a result, the 2001 Roadless Rule circumvents the clear congressional intent in

ANILCA to allow the State and local communities to develop needed roads and infrastructure.

#### The 2003 Tongass Exemption Rule

In a 2003 ROD, the USDA promulgated a regulation (Tongass Exemption) exempting the Tongass from the 2001 Roadless Rule, in which the USDA provided in-depth analysis of the requirements and limitations of TTRA and ANILCA if the Roadless Rule were applied to the Tongass. After thorough statutory analysis, the USDA concluded that the best way to implement the spirit and the letter of these laws was to exempt the Tongass from the 2001 Roadless Rule. Furthermore, the USDA concluded that exempting the Tongass was not only consistent with the intent of Congress but was also sound management, because roadless values in the Tongass are adequately protected without the additional restrictions included in the 2001 Roadless Rule. The USDA stated that roadless areas are common, not rare, in the Tongass, and the vast majority of the more than nine million acres of IRAs have restrictions on road building and timber harvest, irrespective of the 2001 Roadless Rule<sup>16</sup>.

In the 2003 decision to exempt the Tongass, the USDA weighed the value of imposing unnecessary additional restrictions against the very significant social and economic costs to Southeast Alaska that were disclosed in the 2001 Roadless Rule decisional documents. Upon considering these facts, the USDA concluded in the 2003 Tongass Exemption that the needs of the people of Alaska outweighed adding more restrictions when IRAs in the Tongass are adequately protected without the 2001 Roadless Rule.

After the Tongass Exemption was challenged in 2009, the USDA aggressively defended the rule in its 2010 opening brief before the Federal District Court for the District of Alaska. The USDA argued that "the Tongass Exemption was a well-reasoned decision, supported by the evidence" and that after reconsidering the same economic, social and environmental factors considered in the 2001 ROD, the USDA concluded that "the roadless values on the Tongass could be protected and social and economic impacts minimized by exempting the Tongass from the Roadless Rule."<sup>17</sup>

The District Court nevertheless invalidated the Tongass Exemption, but upon appeal, a three-judge panel of the Ninth Circuit Court of Appeals reversed and upheld the Tongass Exemption. However, in a 6-5 en banc decision, the Ninth Circuit struck down the Tongass Exemption on a procedural ruling, holding that the USDA failed to adequately explain its change of position from the 2001 Roadless Rule to the 2003 Tongass Exemption. The Court did not find any substantive legal infirmities with the Tongass Exemption, that is, the Court did not hold that the USDA analysis or rationale could not support exempting the Tongass, nor that the USDA reached the wrong decision, but only that the USDA failed to provide an adequate explanation of its change of position from 2001 to 2003. No judge questioned the

14 36 CFR 294.12(b)

15 Section 1104(g)(2)

16 Final Rule and Record of Decision, Federal Register Vol. 68, No. 249, December 30, 2003, p. 75136-75146

17 Federal Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgement and in Support of Defendants' Cross-Motion for Summary Judgement, Case No. 1:09-cv-00023-JWS

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fact that the USDA had a right to change position on exempting the Tongass, if the change was adequately explained.



Given that the No Action" alternative (Alternative 1) in this rulemaking was judicially reinstated and not the product of a new decision by the USDA, the State recommends the USDA analyze, and adequately explain in the FEIS and ROD, the degree to which the Proposed/Selected Alternative differs from the last position taken by the USDA under the 2003 Tongass Exemption Rule. The State further recommends that the USDA adequately explain its change in position from the 2001 Roadless Rule to the Final Rule promulgated by this rulemaking.

The State supports and appreciates that the USDA is once again reviewing application of the 2001 Roadless Rule and proposing to fully exempt the Tongass. The USDA's reasoning to exempt the Tongass in 2003, as well as the USDA's arguments defending its decision, remains valid today and should be made part of the administrative record for this rulemaking to inform the Responsible Official's consideration of the Proposed Alaska Roadless Rule and the Preferred Alternative described in the DEIS. A recent unanimous ruling by the United States Supreme Court in *Sturgeon v. Frost*<sup>18</sup> repeatedly reminded the federal government that Alaska is unique, and should be "the exception, not the rule." The same holds true for the 2001 Roadless Rule and its application to the Tongass.

#### Comments Specific to the Draft Environmental Impact Statement Purpose and Need

Without explanation, the stated purpose and need in the DEIS omits the following language from the initial purpose and need statement published in the Notice of Intent (NOI)<sup>19</sup> for this rulemaking:

The State of Alaska believes that roadless conservation interests for the Tongass National Forest can be adequately protected under the Tongass Land Management Plan and that the 2001 Roadless Rule prohibitions are unnecessary. In addition, the State believes application of the 2001 Roadless Rule substantially impacts the social and economic fabric of southeast Alaska and violates ANILCA and TTRA.

In response to the State's petition, commercial and non-profit organizations have expressed strong opinions, for and against, the idea of a regulatory review.

The omitted language provides important context to the purpose and need for rulemaking, particularly with respect to the role of the 2016 Forest Plan in managing those portions of the Tongass where roadless designations would be removed under Alternatives 2, 3, 4, 5, and 6 and the need to comply with ANILCA and TTRA.

Procedurally, the USDA's decision to truncate the purpose and need statement between the NOI and the DEIS appears arbitrary due to the lack of any explanation and may affect applicability of the Preferred Alternative due to the change in scope. The State requests that the complete purpose and need statement published in the NOI for this rulemaking be restated in the FEIS.

#### Background

The State disagrees with the statement "[t]he Forest Service and the State of Alaska believe that the proposed action represents a unique opportunity to collaboratively resolve and provide certainty to the roadless issue in the State of Alaska."<sup>20</sup> The proposed rulemaking does not provide statewide relief from the 2001 Roadless Rule, and the State believes that the provisions in the proposed rulemaking that

<sup>18</sup> 139 S. Ct. 1066 (2019)

<sup>19</sup> Federal Register Vol. 83, No. 169, p. 44252-44253

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would apply to the Chugach are outside the scope of the purpose and need (see next section for details). The State requests that the USDA revise this statement in the FEIS to read "the Forest Service and the State of Alaska believe that the proposed action represents one opportunity to collaboratively address and provide certainty to roadless issues in the Tongass."

Proposed Alaska Roadless Boundary Correction and Modification Provisions

Alternatives 2, 3, 4, and 5 include administrative correction and modification provisions for inclusion in the proposed Alaska Roadless Rule to provide for future boundary and classification changes. This provision would apply to both the Tongass and the Chugach. This same provision is included in Alternative 6, but only for the Chugach. 21

The DEIS purpose and need statement is limited to the Tongass. Therefore, the proposed provision for future boundary and classification changes on the Chugach does not adequately respond to the purpose of or need for action. The State recommends that the USDA remove this proposed provision from application to the Chugach under the Alaska Roadless Rule and propose it through separate rulemaking as a revision to the 2001 Roadless Rule, as the need for making administrative corrections and modifications for future boundary and classification changes to IRAs is not limited to any individual national forest or state.

If promulgated under any rulemaking, a definition for the terms "minor boundary change" and "minor administrative corrections" should be included.

2016 Tongass Land and Resource Management Plan

Approximately 55% of the forested land in the Tongass (approximately 5.5 million acres) is classified as productive forest land; these lands are considered biologically capable of producing industrial wood products. Approximately 500,000 acres of the productive forest lands on the Tongass have been converted to young-growth forest due to harvest or other disturbances such as fire or wind. This equates to approximately three percent of the total Tongass land base and nine percent of the productive forest lands and represents approximately 15 billion board feet of harvested timber<sup>22</sup>. However, only half of the total young-growth forest is available for harvest under the 2016 Forest Plan, as the remainder of the young-growth forest acres are managed in non-development LUDs or otherwise not available for harvest due to 2016 Forest Plan standards and guidelines.

In addition to productive forest lands, the Tongass includes approximately 4.6 million acres of unproductive forest. These are lands that are not capable of producing industrial forest products, but are important for watershed protection, wildlife habitat, recreation, scenic values and other multiple use purposes.

Under the 2016 Forest Plan, about 560,000 acres of forest lands are identified as suited for timber production. The U.S. Forest Service projects about 23,000 acres of old-growth and 43,000 acres of young-growth will be harvested in the first 25 years of plan implementation from these lands. One hundred years following implementation, the U.S. Forest Service projects that about 42,000 acres of old-growth and 280,000 acres of young-growth could be harvested from these lands.<sup>23</sup> This equates to only nine percent of the original productive old-growth forest being harvested over the next 100 years; thus, retaining 91% for future generations. Moreover, the 2016 Forest Plan anticipates 6,100 total miles of

21 DEIS, p. 2-3 and 2-4.

22 FEIS, 2016 Forest Plan, p. 3-328

23 ROD, 2016 Forest Plan, Table 1, p. 9

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roads to exist on the Tongass by 2095; substantially fewer than the 8,500 total miles of roads anticipated under the 1997 Forest Plan.<sup>24</sup>

The Preferred Alternative (Alternative 6) for the Alaska Roadless Rule proposes to exempt the Tongass from the 2001 Roadless Rule. If implemented, the roughly nine million acres currently inventoried as roadless areas would continue to be managed under the 2016 Forest Plan and statutory laws that provide lasting protections for roadless values. Alternative 6 would add about 165,000 old-growth acres and 20,000 young-growth acres to the land base suitable for timber production. Although the DEIS projects harvest on these additional suitable acres would be about 18,000 acres over 100 years, none of the action alternatives for the Alaska Roadless Rule would result in changes to the timber objectives of the 2016 Forest Plan, including the current projected timber sale quantity (PTSQ) of 46 million board feet (MMBF) annually and transitioning to primarily young-growth harvest within the next 15 years. This Young-Growth Transition Strategy is enumerated in the 2016 Forest Plan and implements the intent of then-Secretary of Agriculture Thomas Vilsack<sup>25</sup> to transition the Tongass to a young-growth-based timber program in 10 to 15 years, more rapidly than considered in the 2008 Forest Plan<sup>26</sup>.

The degree to which the 2016 Forest Plan may contribute to maintaining roadless area characteristics is not adequately evaluated or described in detail in the DEIS<sup>27</sup>. For the FEIS, the State recommends the USDA analyze and adequately discuss aspects of the 2016 Forest Plan that will direct management for areas removed from roadless designations under Alternatives 2, 3, 4, 5, and 6 and contribute to maintaining roadless characteristics. We note that the 2016 Forest Plan's removal of the Transportation and Utility System (TUS) LUD is widely considered as an additional impediment to road building in the Tongass, as fully explained by the many comments and objections to the 2016 Forest Plan revision. Rather than having a TUS LUD corridor become the dominant LUD once a road or utility project is fully permitted, as was the case under previous Tongass management plans, under the 2016 Forest Plan road or utility projects must conform to the requirements of every LUD crossed by a proposed linear project. The removal of the TUS LUD from the 2016 Forest Plan substantially increases the number of approval conditions a project must receive and raises the risks that a project may never be developed. The Roadless Priority ARA is a step forward from the 2016 Forest Plan's Transportation Systems Direction and may improve the possibility of beneficial road projects being approved, which was lost with the removal of the TUS LUD. However, conflicts between administrative (2016 Forest Plan) and regulatory (Alaska Roadless Rule) management objectives related to roads would persist.

Likewise, Chapter 3 of the DEIS does not accurately describe the current limitations on the construction, operation and maintenance of roads and utilities connecting the communities of Southeast Alaska. For instance, the DEIS repeatedly states that the 2001 Roadless Rule provides an exception for Federal Aid Highway projects.<sup>28</sup> That exception is only available when "no other reasonable or prudent alternative exists."<sup>29</sup> Since Southeast Alaska is an archipelago, marine transportation systems have consistently been considered reasonable or prudent alternatives despite significantly higher lifetime costs and lower reliability compared to roads. The FEIS should also note that the vast majority of the State's current projects to connect Southeast Alaska communities are State-funded and cannot qualify for the Federal Aid Highway exemption, which is the same situation faced by communities, utilities, and developers in Southeast Alaska. The DEIS also downplays

the difficulties faced by utilities installing transmission

24 ROD, 2016 Forest Plan, p. 22

25 Memorandum 1044-009, Addressing Sustainable Forestry in Southeast Alaska; USDA. 2013.

26 2016 Forest Plan FEIS, p. 1-1.

27 The State filed objections to the 2016 Tongass Forest Plan. To the extent that the State discusses the 2016 Forest Plan here, the State's comments are intended only to aid in this rulemaking. The State maintains its objections to the 2016 Forest Plan.

28 DEIS, p. 2-22, 3-51, and 3-145

29 36 C.F.R 294.12(b)(6)

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lines. A more accurate description would let the public know that the Roadless Rule functionally prohibits the installation of transmissions lines, except in the very limited circumstance where the lines can be installed and maintained by helicopter or other non-road access methods (see also Appendix G comments below).

In several sections of Chapter 3, Environmental Effects, of the DEIS the mitigating effects of the 2016 Forest Plan are discussed with respect to aspects of each alternative and key issue, but a more comprehensive discussion of the degree to which the 2016 Forest Plan may contribute to maintaining roadless area characteristics, values, and functions in the Tongass seems lacking. For example, the section on Tongass Forest Plan Old-growth Habitat Conservation Strategy<sup>30</sup> provides a concise summary of how old-growth habitats are maintained through a network of reserves on the Tongass to protect species that have the highest viability concerns, and how components of the old-growth ecosystem are maintained through 2016 Forest Plan standards and guidelines designed to provide important ecological functions in areas outside the reserve network. Unfortunately, there appears to be little correlation described in the DEIS of protections to roadless area characteristics, which are also maintained by the same conservation strategy. Similar examples can be found when evaluating the Young-growth Transition Strategy, Tongass Timber Sale Program Adaptive Management Strategy, Tongass 77 Watersheds, The Nature Conservancy / Audubon Conservation Priority Areas, non-development land use designations, forest-wide standards and guidelines and other 2016 Forest Plan components that limit commercial timber harvest and road construction, reconstruction, or maintenance activities on the Tongass. The State recommends that the FEIS include a section that summarizes the various analyses found throughout the DEIS related to those components of the 2016 Forest Plan that may contribute to maintaining roadless area characteristics, values, and functions in the future for areas removed from designation under the 2001 Roadless Rule, as proposed in Alternatives 2, 3, 4, 5, and 6.

#### Key Issue 1 - Roadless Area Conservation

Pursuant to Alaska Administrative Order 299, the State convened the Alaska Roadless Rule Citizen Advisory Committee (Committee) in September 2018. Thirteen Committee members represent diversity of perspectives, including Alaska Native corporations and tribes, fishing, timber, conservation, tourism, utilities, mining, transportation, local government, and the Alaska Division of Forestry. A U.S. Forest Service representative serves in an ex officio capacity to provide technical expertise for the Committee's deliberations. The Committee was facilitated by Meridian Institute, a non-profit organization that helps people solve complex and often

controversial problems, make informed decisions, and implement solutions that improve lives, the economy, and the environment<sup>31</sup>.

In their Final Report to the Governor and State Forester (November 21, 2018)<sup>32</sup>, the Committee determined that the 2001 Roadless Rule characteristics "do not align with the unique characteristics found in Alaska." Instead, the Committee found that the unique roadless characteristics represented by the roadless areas in the Tongass include the following<sup>33</sup>:

- \* Alaska Native people who have been on this land for more than 10,000 years, and for whom this place has cultural and spiritual significance. The use of places, sites, waters, structures, resources, and objects are historically significant in the beliefs, customs, practices, and perpetuation of the culture(s) of communities and indigenous peoples of the area. While the

30 DEIS, p. 3-59

31 Alaska Roadless Rule Citizen Advisory Committee, Final Report to the Governor and State Forester, State of Alaska, November 21, 2018, p. 1-2

32 Submitted to the USDA by the State on November 23, 2018 as an enclosure to the State's cooperating agency comments on Preliminary DEIS Chapter 2.

33 Alaska Roadless Rule Citizen Advisory Committee, Final Report to the Governor and State Forester, State of Alaska, November 21, 2018, p. 4-5

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Alaska Native people now share this place with other residents, it is critical that they continue to have the ability to sustain their cultures and their communities through economic, social, and cultural opportunities.

- \* Expansive areas where high quality intact habitat exist and ecosystems function with all of their native species and components; there are no listed or endangered species; and invasive species are generally not present. These areas function as biological strongholds and refuges for many species, harbor a diversity of plant and animal communities, and serve as a globally significant example of a temperate rainforest ecosystem that is both utilized and conserved by the people that live within and adjacent to it. Species exist in Alaska Roadless Areas<sup>34</sup> that are endangered, threatened, or reduced in other places on the continent.

- \* Opportunities for economic development of visitor industry products, including remote-setting guided nature tours to view wildlife, hunt, fish, and hike. Alaska Roadless Areas contribute to a regional resource of undeveloped lands that are an important resource for a segment of the visitor sector - an important component of the matrix of Tongass lands that provide opportunity for medium to larger groups to go ashore in a wilderness-type setting. The intact ecological systems in these areas, with natural settings and iconic fish and wildlife, are a draw for visitors.

- \* Stands of old growth forests. These old growth forests are nationally and globally significant because they exist in quantities and extensions in Alaska like few other places on the planet. They support subsistence and traditional hunting and gathering, unique plant and wildlife populations, a significant volume of sequestered carbon and forest/soil processes that mitigate climate change and represent a globally significant reference landscape and intact old growth forest ecosystem.

- \* Multiple species of fish (including salmon) harvested for subsistence and personal use, commercial fisheries, and tourism and guided recreational fishing. Salmon, trout, char, and hooligan of the Tongass National Forest are harvested in subsistence fisheries and for personal use by local residents. Salmon and trout are also the basis of

tourism and guided fisheries enjoyed by thousands of visitors, supporting hundreds of tourism and support businesses. The commercial fisheries derived from Tongass streams and rivers produce a significant proportion of the total Alaska salmon harvest, and support fishing and processing jobs for thousands of local residents and nonresidents.

\* High-quality scenery, especially scenery with natural-appearing landscapes, is a primary quality that people value in Alaska Roadless Areas. Quality scenery contributes directly to the quality of life and recreation opportunities for residents, property owners, and visitors.

\* Watersheds that are important sources of public drinking water and water sources for fish and aquatic resources, including hatcheries. State regulations are currently enforced and applied using the most restrictive standard for water quality criterion as listed in 18 AAC 70. Careful management of these watersheds is crucial in maintaining the flow of clean water to local communities, and to support continued production of fisheries and aquatic food webs.

\* An important source of subsistence resources for Alaskans. Roadless Areas are rich in important subsistence resources, including game, fish, and foraging resources for those residents whose use and access rights are specifically recognized and guaranteed by the Alaska National Interest Lands Conservation Act (ANILCA).

34 In this context, Alaska Roadless Areas are the same 9.2 million acres of Inventoried Roadless Areas in the Tongass

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\* A major source of economic activity for Southeast Alaskans. The Tongass National Forest surrounds 34 communities and approximately 73,000 year-round residents. These residents heavily rely on Roadless Areas for economic activities, including mining, visitor products, ocean products, forest products, energy production, and other economic activities.

Some Committee members raised concerns to the State that the USDA, Forest Service did not alter the definition of roadless areas in the DEIS or consider implementing an Alaska-specific definition for roadless areas, even though such areas in Alaska have specific, unique characteristics that set them apart from IRAs in the lower 48.<sup>35</sup> A summary of feedback from individual interviews with Committee members by Meridian Institute is enclosed. Interviews were conducted in December 2019.

The State recommends that the FEIS include an evaluation and adequate discussion of the roadless area characteristics developed by the Committee for this rulemaking. These characteristics provide greater specificity than the 2001 Roadless Rule Characteristics, Modified for Alaska<sup>36</sup> presented and discussed in the DEIS. It should be noted, this is a state specific rule making process and these important and widely supported recommendations are not provided adequate weight and inclusion in the DEIS.

Key Issue 2 - Support Local and Regional Socioeconomic Well-being, Alaska Native Culture, Rural Subsistence Activities, and Economic Opportunity Across Multiple Economic Sectors

In general, the discussion of Key Issue 2 in the DEIS downplays the critical importance of resource extraction and the associated increased economic opportunities that resource extraction may bring to communities in Alaska. The State recommends the FEIS expand on the contributions resource extraction sectors makes to local and regional economies.

To better evaluate and understand the potential availability of economic timber resources to support and maintain a viable timber industry in the Tongass, the State contracted with the Alaska Forest Association (AFA) to analyze each alternative described in the DEIS for this rulemaking (see enclosed report). The AFA concluded, in part, that

"[n]o matter the alternative selected in the Record of Decision for the "Rulemaking for Alaska Roadless Areas" at least 82 out of every 100 acres of suitable old growth forest within the Tongass National Forest will not be available to maintain the existing timber industry through transition."<sup>37</sup>

#### Mining and Mineral Development

The DEIS states, "The right of access is guaranteed and is not at the discretion of the Forest Service. Exploration, mining, and mineral processing activities, including road construction and reconstruction, are presently allowed in IRAs and would continue to be allowed under all alternatives."<sup>38</sup> It is the State's understanding that the question regarding access to mineral resources in IRAs is not one of whether a right exists, but rather the significant discretion used by the U.S. Forest Service in determining what is "reasonable" access.

Although Alternatives 1 through 5 for the Alaska Roadless Rule include an exception to the prohibition on road construction in IRAs when "A road is needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty", there is no apparent criteria to guide the Responsible Official for determining when a road is needed to support mineral exploration or development. Therefore, the

35 Meridian Institute, (December 2019). Alaska Roadless Rule Citizen Advisory Committee: Summary of Feedback on the Alaska Roadless Rule Draft Environmental Impact Statement.

36 Table 3.1-1 and DEIS p. 3-7 through 3-12

37 Alaska Forest Association (December 2019). Alaska State Specific Rulemaking: Analysis of Draft Environmental Impact Statement Alternatives to Determine Economic Timber Acreage and Volume by Geographic Areas in the Tongass National Forest.

38 DEIS, p. 3-50 and 3-51.

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question or issue of what constitutes "reasonable access" is subjective and at the discretion of the Responsible Official despite the "right of access" afforded under the 1872 Mining Law and ANILCA.

In scoping comments<sup>39</sup>, a broad coalition of entities discussed the issue of road access for mineral exploration and development in Alaska-specific IRAs, provided a number of examples of where the discretion used by the U.S. Forest Service has limited such road access, and recommended using 36 C.F.R. Part 228 for authorizing roads for access to mineral resources in Tongass IRAs, just as it is used in non-IRA. Similarly, the Committee also recommended the U.S. Forest Service use its existing regulations under 36 C.F.R Part 228 for approving mineral-related roads in roadless areas of the Tongass (see Recommended exceptions for road construction, reconstruction, or maintenance in ARAs below). The State recommends that the FEIS acknowledge that the relevant issue regarding mineral exploration and development in IRAs under the 2001 Roadless Rule is determining what constitutes "reasonable access", and that roaded access to mineral resources, especially during the early and intermediate exploration phases, has been restricted to non-roaded access in IRAs of the Tongass due to the discretion afforded the Responsible Official under the 2001 Roadless Rule. The State supports the use of 36 C.F.R Part 228 for determining the minimum level of environmental protections roaded access to mineral resources must attain in its design before it is authorized by the U.S. Forest Service.

#### Leasable Minerals

Prohibiting roadbuilding for new leasable mineral projects through rulemaking (e.g. oil, gas, coal, or geothermal) in either IRAs (Alternative 1) or ARAs (Alternatives 2, 3, 4, and 5)<sup>40</sup> effectively precludes these uses and constitutes a withdrawal of federal lands.

ANILCA Section 1326(a) prevents future administrative withdrawals over 5,000 acres in the aggregate, unless authorized by Congress.

#### FUTURE EXECUTIVE ACTIONS

ANILCA SEC. 1326. (a) No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress. [Emphasis added]

The Selected Alternative in the ROD and the Final Alaska Roadless Rule must comply with ANILCA, TTRA, and other applicable laws.

#### Key Issue 3 - Conserve Terrestrial Habitat, Aquatic Habitat, and Biological Diversity

The State generally agrees with the following conclusion in the DEIS related to cumulative effects:

Overall, biological diversity on the Tongass and in Southeast Alaska remains in good condition and the landscape continues to be dominated by old-growth forest ecosystems. As development

39 Crocket, D., MacKinnon, N., Dahl, C., Venerables, R., Graham, O., Starkey, C., Acteson, T., & Hall, M. (2018). Scoping comments on proposed rulemaking for Alaska-specific Roadless Rule; submitted to Ken Tu (USDA, Forest Service) Oct. 15, 2018

40 DEIS, p. 3-51

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continues through timber harvest and associated activities such as road building, mining activities, energy development, and community expansion, particularly in areas where extensive development has already occurred (i.e., Prince of Wales Island), maintaining connectivity and roadless refugia will become increasingly important, particularly for wide-ranging species whose distribution depends on some level of connectivity across the landscape. In addition, the management of human resources will continue to play a role in maintaining biological diversity across the Tongass. Within the Tongass boundary, the Old-growth Habitat Conservation Strategy was designed to address the more extensive harvest on non-NFS lands through the old-growth reserve system and Forest-wide standards and guidelines, both of which were intended to maintain ecological components needed to maintain the ecological integrity important to a variety of organisms and maintain connectivity across the landscape, with or without much contribution from non-NFS lands. The overall Old-growth Habitat Conservation Strategy approach was developed prior to roadless designations and would be maintained regardless of the alternative selected.



In addition to the Old-Growth Habitat Conservation Strategy, other aspects of the 2016 Forest Plan will contribute positively to the maintenance of roadless characteristics, values, and functions in the Tongass and should be discussed in greater detail in the FEIS (see Forest Plan comments above).

#### Appendix G: Draft Roadless Rule Regulatory Language

The State appreciates USDA's efforts to incorporate the 16 exceptions recommended by the Committee and submitted by the State to the USDA<sup>41</sup> for inclusion in the Alaska Roadless Rule.<sup>42</sup> Although the drafted roadless rule language<sup>43</sup> for Alternatives 2 through 5 propose additional exceptions for timber cutting, sale, or removal and road construction, reconstruction or maintenance - beyond what is currently afforded under the 2001 Roadless Rule - the language of the proposed exceptions repeatedly use two phrases that undermine the exceptions and fail to address the inherent uncertainty as to whether the exceptions will be applied fairly or consistently in practice by the Responsible Official.

First, Alternatives 2 through 5 use the phrase "no other feasible alternative," whereas the 2001 Roadless Rule uses the phrase "no other reasonable and prudent alternative." The 2001 Roadless Rule is currently unworkable in Southeast Alaska as marine or helicopter access alternatives can always be suggested to prevent road or utility construction; however, the proposed language exacerbates the problem by using the term feasible[mdash]which could prevent road building anytime a project could be built without a road[mdash]without regard to cost or practicability that arguably are considerations in the current 'reasonable and prudent' standard. For any Alaska Roadless Rule, any prerequisite of an unavailable alternative means of access should be eliminated, as that requirement obliterates any exception since Southeast Alaska largely consists of a group of islands that can be accessed by boat or helicopter.

Another condition that cancels out the USDA's proposed exceptions is that nearly all of the USDA's rephrased recommendations from the Committee have added a preliminary decision by the Responsible Official that "[a] road is needed for ..." This, again, gives the Forest Service unlimited discretion to reject a road project on a finding that a road is not needed. The Committee's recommendations for when a road could be constructed or reconstructed were clearly written to apply when certain circumstances are met[mdash]without any preliminary decision by the Forest Service of whether marine or helicopter access made the road unnecessary.

41 Submitted to the USDA by the State on November 23, 2018 as an enclosure to the State's cooperating agency comments on Preliminary DEIS Chapter 2.

42 Alaska Roadless Rule Citizen Advisory Committee, Final Report to the Governor and State Forester, State of Alaska, November 21, 2018, p. 8-9

43 DEIS, Appendix G

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The proposed regulations implementing alternatives 2 through 5 must also be consistent with provisions in ANILCA that apply to public lands. For example, on all public lands where the taking of fish and wildlife is permitted, ANILCA Section 1316 allows for temporary campsites, tent platforms, shelters, and other temporary facilities and equipment. As currently drafted, 36 CFR 294.54(a) under alternatives 2-5 would preclude tree cutting associated with ANILCA Section 1316, effectively precluding this allowance altogether. Similarly, the exceptions listed in subsection (c)(2) and (d)(3) for Alaska Native customary and traditional uses should not be limited to Watershed Priority ARAs or Roadless Priority ARAs, as subsistence use is allowed on all public lands.

## Alaska Roadless Rule Citizen Advisory Committee Recommendations

Many Committee members feel that their recommendations were not carefully considered and/or reflected in the DEIS, particularly the exceptions language that the Committee had agreed should be applied to any option or alternative put forward. The Committee's recommended exceptions considered specific resource uses that the Committee saw as critical for community livelihoods and socioeconomic wellbeing in the Tongass. Several Committee members felt the omission of these exceptions made all of the DEIS alternatives less viable as long-term, durable solutions that reflect community needs.<sup>44</sup> A summary of feedback from the Committee in response to the DEIS is enclosed.

The State once again requests that the USDA adopt all of the Committee's exceptions into the draft language for Alternatives 2 through 5, without additional conditions or open-ended Forest Service discretion to reject proposed road building, to more clearly define activities that are excepted from the proposed general prohibitions:

### Recommended exceptions for timber cutting, sale, or removal in ARAs

1. Mining Exploration and Development. While "reasonable access" is technically permitted in IRAs, cutting and removal of trees associated with mining exploration and development does not appear to be allowed. 36 C.F.R. [sect] 294.13(b)(2) authorizes the cutting or removal of trees "incidental to implementation of a management activity not otherwise prohibited by this subpart." The necessary level of exploration to develop a mine on the Tongass National Forest requires the cutting and removal of trees. Mine development would typically require even more cutting and removal of trees.

However, there is no mention of mining in the examples provided in the 2001 Rule of what this section authorizes.<sup>45</sup> Moreover, in describing this section the 2001 Rule states: "Such management activities are expected to be rare and to focus on small diameter trees."<sup>46</sup>

Accordingly, a new exception for Alaska-specific rulemaking be added to 36 C.F.R. [sect] 294.13(b):

The cutting and removal of trees in connection with mineral exploration and mine development is authorized and shall be permitted as if the mineral exploration or mine development were being permitted on non-IRA National Forest land. Cutting and removal of trees may be sold and/or utilized on the project.

1. Hydroelectric and Other Renewable Energy Infrastructure and Transmission Infrastructure Development. The Committee recommends that the following new exception for hydroelectric and other renewable energy projects and related infrastructure be added to 36 C.F.R. [sect] 294.13:

44 Meridian Institute, (December 2019). Alaska Roadless Rule Citizen Advisory Committee: Summary of Feedback on the Alaska Roadless Rule Draft Environmental Impact Statement.

45 2001 Roadless Rule., at page 3258.

46 2001 Roadless Rule., at page 3257.

The cutting and removal of trees incidental to the construction and maintenance of hydroelectric

and other renewable energy projects and related infrastructure, including transmission, is authorized. Such trees

may be sold and/or utilized on the project.

1. Forest Health. The Committee recommends that the following new exception for Forest Health be added to 36 C.F.R. [sect] 294.13:

The cutting and removal of trees incidental to fire prevention, removal of hazard trees that reduce risk to the public, blowdown/windfall management, and/or insect and disease management, is authorized. Such trees may be sold and/or utilized on the project.

1. Alaska Native Culture. The Committee recommends that the following new exception for Alaska Native Culture be added to 36 C.F.R. [sect] 294.13:

The cutting and removal of trees in connection with Alaska Native custom and traditional uses is authorized.

1. Fish and Wildlife Habitat Improvement. The Committee recommends that the following new exception for fish and wildlife habitat be added to 36 C.F.R. [sect] 294.13:

The cutting and removal of trees for fish and wildlife habitat improvement is authorized. Such trees may be sold and/or utilized on the project.

1. Road Building. The Committee recommends that the following new exception for road building be added to 36 C.F.R. [sect] 294.13:

The cutting and removal of trees for permitted road building (as described in 36 C.F.R [sect] 294.12) is authorized. Such trees may be sold and/or utilized on the project.

1. Biofuels. The Committee recommends that the following new exception for biofuels be added to 36 C.F.R. [sect] 294.13(b):

The cutting and removal of trees for biofuel for Southeast Alaska residential and municipal needs is authorized and will comply with current standards and regulations for harvest.

1. Municipal Watersheds. The Committee recommends that the following new exception for municipal watersheds be added to 36 C.F.R. [sect] 294.13:

The cutting and removal of trees for municipal watershed construction and management is authorized and such trees may be sold and/or utilized on the project.

Recommended exceptions for road construction, reconstruction, or maintenance in ARAs

1. Roads in Transportation Utility System (TUS) corridors identified in the Southeast Alaska Transportation Plan (SATP) for development and/or essential for reservation for the

connection of communities and development of the regional transportation system shall be permitted. Adjustment of these TUS corridors shall be allowed outside of the corridor or easement if it provides a lower cost alternative or provides an alignment that is the Least Environmentally Damaging Practicable Alternative (LEDPA).

1. Roads in all Section 4407 Easements as Congress enacted in August 2005 in the Safe, Accountable, Flexible, Efficient Transportation Equity Act - A Legacy for Users (SAFETEA-LU; Public Law 109-59) shall be permitted. Adjustment of these Easements shall be allowed outside of the corridor or easement if it provides a lower cost alternative or provides an alignment that is the LEDPA.

2. A road to access Congressionally authorized Southeastern Alaska Intertie System Plan Routes (PL 106-511, February 1, 2001) as identified in report #97-01 of the Southeast Conference

Alaska Roadless Rule DEIS: State of Alaska Comments Page 18 of 21 shall be permitted.

1. A road to access mineral operations authorized by the United States mining laws (30 U.S.C.[sect] 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.
2. A road to access leasable minerals in IRAs shall be permitted 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.
3. A road to access hydropower and renewable energy projects and their transmission infrastructure, including their maintenance, shall be permitted in the same way as if the application for the road to access such projects were being permitted on non-IRA National Forest lands. Renewable energy includes energy that is collected from renewable resources, which are naturally replenished on a human timescale, such as sunlight, wind, rain, tides, waves, geothermal heat, biomass, or other forms of energy.
4. A road included in a community, municipal, or tribal government plan to provide access and development of water resources, renewable energy resources, sanitary landfills, connecting isolated road networks, and subsistence resources, including maintenance of such roads and these facilities, shall be an allowed use.
5. A road for transportation, communication, and utility infrastructure and maintenance shall be permitted.
6. A road to access an authorized facility or location for fishery research, management, enhancement, and rehabilitation activities, fishways, fish weirs, fish ladders, fish hatcheries, spawning channels, stream clearance, egg planting, and other permitted aquaculture facilities or activities, including mariculture, shall be permitted.

#### Maps

The State recommends that the maps provided in the FEIS (Alternative\_1 through 6 Maps, Outfitter Guide Alternative 1 through 6 Maps, and Suitability Alternative 1 through 6 Maps) clearly identify the various protective land use designations for the Tongass. For example, areas designated as wilderness, LUD II, and national monument. By not identifying such areas, the maps fail to provide viewers with an accurate picture of the existing protections that cover much of the Tongass, which will remain in place regardless of which Alaska Roadless Rule alternative is selected by the USDA.

#### Other Important Issues

##### Climate and Carbon

The FEIS should incorporate broader perspectives related to climate change and carbon-related processes relevant to the Tongass. The State recommends incorporating the National Association of State Foresters (NASF) policy papers: Recommendations for Enhancing the Role of Forests in Climate Change Mitigation and Ecosystem Adaption to Climate Change and Emerging Markets for Wood and Their Positive Impact on Forest Resource Management into the FEIS discussion of these topics (see enclosure).

Alaska Roadless Rule DEIS: State of Alaska Comments Page 19 of 21 ANILCA Section 810 Analysis

The State continues to recommend that the USDA use the available information in the DEIS to complete a Section 810 Analysis for the proposed Alaska Roadless Rule, as stated previously in our cooperating agency comments.<sup>47</sup>

## Subsistence

### The Legal Context for Subsistence Use<sup>48</sup>

The subsistence priority criteria found in Sec. 804 of ANILCA is implemented by prioritizing local subsistence users with direct dependence on the resource; local subsistence users are first among subsistence users. To implement this priority, when necessary, limits are first applied to general hunting, sport fishing, and commercial fishing.<sup>49</sup> The State recommends the following edits (additions ; deletions) be incorporated into the FEIS to reflect this direction as well as recognize the authorities of the federal and state regulatory bodies:

The provisions in ANILCA established a harvest priority for rural residents in an attempt to protect subsistence resource harvest. Under ANILCA, in times of resource scarcity or when demand exceeds biologically sound harvest levels, subsistence harvests have priority over other consumptive use of resources. Such a priority shall be implemented through appropriate limitations based on the application of the following criteria: (1) customary and direct dependence upon the populations as the mainstay of livelihood; (2) local residency; and (3) the availability of alternative resources. In practice, state or federal fish and wildlife management regulatory authorities would limit commercial, sport, or other harvests before subsistence harvests are limited.

The DEIS analyzes the effects of the proposed rule on subsistence uses and needs, including resource abundance and distribution, access, or competition<sup>50</sup>; however, these three factors aren't specifically identified in ANILCA, as the discussion in the DEIS indicates. Section 810(a) of ANILCA requires the evaluation of the effect of the proposed "...use, occupancy or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." If the initial evaluation concludes that the federal action will cause a significant restriction of subsistence uses and needs, the head of the Federal Agency is required to give notice and hold hearings, as well as determine that:

(A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.<sup>51</sup>

<sup>47</sup> State of Alaska cooperating agency comments on Preliminary DEIS Chapter 2. Submitted to the USDA November 23, 2018.

<sup>48</sup> DEIS, p. 3-217

<sup>49</sup> ANILCA Section 804 states: "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

1. customary and direct dependence upon the populations as the mainstay of livelihood;
2. local residency; and
3. the availability of alternative resources."

<sup>50</sup> DEIS, p. 218

<sup>51</sup> ANILCA Sec. 810(a)(3)

To determine if a significant restriction of subsistence uses and needs may result from an alternative, including their cumulative effects, the courts have upheld a BLM definition for "significant restriction of subsistence uses" that identifies three factors for consideration<sup>52</sup>:

- \* The reduction in the availability of subsistence resources caused by a decline in the population or amount of harvestable resources;
- \* Reductions in the availability of resources used for subsistence purposes caused by alteration of their normal locations and distribution patterns; and
- \* Limitations on access to subsistence resource, including from increased competition for the resources

The State recommends the following edits be made in the FEIS to reflect specific language and direction in ANILCA<sup>53</sup>:

ANILCA requires the analysis evaluation of potential effects on subsistence uses and needs of all actions on federal lands in Alaska to determine if the federal action would significantly restrict subsistence uses. This analysis evaluation typically focuses on those food-related resources most likely to be affected by habitat degradation associated with land management activities. If significant restrictions to subsistence uses are identified, prior to putting the federal action into effect, notice and hearings must occur. Per ANILCA Sec. 810(a) (3), the following three determinations must be made: "(A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions." To make these three determinations, the Forest Service shall analyze the following: 1) resource distribution and abundance, 2) access to resources, and 3) competition for the use of resources. These factors are discussed in general terms in the following paragraphs.

#### Appendix E: Communities

The State requests the following language be added in the Subsistence Section<sup>54</sup> of the FEIS, Appendix E:

In the event a subsistence harvest priority is needed for rural residents, the state or federal fish and wildlife management authorities would first limit commercial, sport, and non-local subsistence harvests to mitigate impacts to local subsistence harvests.

In conclusion, the State appreciates the work by the USDA to produce the DEIS and Proposed Alaska Roadless Rule. The State looks forward to continuing to assist the USDA, as a cooperating agency, to incorporate necessary improvements in the FEIS.

Sincerely,

Kyle Moselle

Associate Director

52 Kunaknana v. Clark, No. A83-337 Civil. 742 F.2d (9th Cir. 1984

DEIS, p. 3-218

54 DEIS, Appendix E, p. E-15

Alaska Roadless Rule DEIS: State of Alaska Comments Page 21 of 21 Enclosures:

Meridian Institute, (December 2019). Alaska Roadless Rule Citizen Advisory Committee: Summary of Feedback on the Alaska Roadless Rule Draft Environmental Impact Statement.

Alaska Forest Association (December 2019). Alaska State Specific Rulemaking: Analysis of Draft Environmental Impact Statement Alternatives to Determine Economic Timber Acreage and Volume by Geographic Areas in the Tongass National Forest

National Association of State Foresters (NASF) policy papers: Recommendations for Enhancing the Role of Forests in Climate Change Mitigation and Ecosystem Adaption to Climate Change and Emerging Markets for Wood and Their Positive Impact on Forest Resource Management

Cc: Corri Feige, Commissioner, DNR

Doug Vincent-Lang, Commissioner, ADF&G

Jason Brune, Commissioner, DEC

Brent Goodrum, Deputy Commissioner, DNR

Ben Mulligan, Deputy Commissioner, ADF&G

Lynn Kent, Deputy Commissioner, DEC

John Springsteen, Deputy Commissioner, DCCED

John "Chris" Maisch, Director and State Forester, DNR

Matthew Fagnani, Director, DCCED

Lance Mearig, Director, DOT&PF

[Attachment includes the following technical resource: Meridian Institute Report, "Alaska Roadless Rule Citizen Advisory Committee: Summary of Feedback on the Alaska Roadless Rule"]

[Attachment includes the following technical resource: Technical and policy recommendation report from National Association of State Foresters that provides forestry management operation and policy recommendations to maximize the role of forests to mitigate climate change.]

[Attachment includes the following technical resource: Policy statement from National Association of State Foresters that provides information on the environmental, social, and economic benefits of forest management.]

Draft Environmental Impact Statement.

[Position]

[Attachment includes the following technical resource: Alaska Forest Association Report - "Analysis of Draft Environmental Impact Statement Alternatives to Determine Economic Timber Acreage and Volume by Geographic Areas in the Tongass National Forest"]

[Attachment includes the following technical resource: Alaska Forest Association Report - "Analysis of Draft Environmental Impact Statement Alternatives to Determine Economic Timber Acreage and Volume by Geographic Areas in the Tongass National Forest"]