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USDA Forest Service

Attn: Alaska Roadless Rule
P.O. Box 21628

Juneau, Alaska, 99802

To Whom It May Concern:

INTRODUCTION

This comment urges the United States Forest Service (USFS) to reconsider their choice of preferred alternative related to their reevaluation of the 2001 Roadless Rule as it applies to the Tongass National Forest. The authors of this comment are two graduate students at the

University of Colorado at Boulder, who are both personally invested in the outcome of this decision and the effects it will have on the Tongass.

Nathan Stottler is a first-year student in the Masters of the Environment program, specializing in Environmental Policy. In his career, he plans to work at the intersection of renewable energy transitions and rural economies. Nathan was born in rural Minnesota and grew up on the sweeping prairies of the Great Plains. Raised in a family centered around hunting, fishing, camping, and general outdoorsmanship, he came to appreciate the value of public lands and natural areas, especially in a landscape dominated by industrial agriculture. Beginning during his undergraduate education and continuing to the present day, he has had the opportunity to explore a number of our nation's wild places. His first encounter with wilderness areas was during an internship with the Bureau of Land Management in Fairbanks, AK in the summer of 2013. He spent the summer as a backcountry gold mining camp inspector in the Fortymile

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National Wild and Scenic River system, and through this experience he came to appreciate the value of untouched wilderness, and the lasting effects of natural resource extraction in wilderness areas. Nathan plans to return to Alaska to continue his exploring, including a trip to Southeast Alaska to experience the region's rich wildlife and untouched landscapes.

Kayla Jankowski is a third-year law student at the University of Colorado School of Law. She plans to use her legal career to work on issues related to American Indian law and natural resources. Kayla was born and raised in Conifer, Colorado, and has grown up appreciating the tranquility and beauty of undisturbed natural landscapes. She made it a practice to walk through the woods on her own from an early age. Many of the most formative and meaningful experiences of her life have taken place while spending time in the backcountry. She has formed deep emotional connections to the landscapes she has been lucky enough to explore. In her free time Kayla enjoys hiking, running, camping, rock climbing, mountain biking, backcountry skiing, and rafting.

Kayla was enchanted by the amount of untouched wilderness in Alaska that is unrivaled by any other state in this country from an early age. After graduating from college, Kayla moved to Haines to work as a raft guide. She guided tours on the Chilkat and Klehini Rivers, both of which pass through the Tongass, and spent much of her free time exploring the splendor that the Tongass has to offer. She plans to return to Southeast Alaska in the near future, as it is the most awe-inspiring natural area she has ever experienced.

This comment aims to elucidate the reasons why, after considering all the relevant factors, the No Action Alternative that would leave the 2001 Roadless Rule intact as it applies to the Tongass is the best decision that the USFS can make. The comment will also explain why, out of the action alternatives, Alternative 3 would be the least detrimental to the Tongass and the people who rely on it. The USFS did a commendable job in analyzing a reasonable range of

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alternatives in the DEIS, but many of the action alternatives, if chosen, would constitute bad policy decisions and may qualify as an arbitrary and capricious agency action because the USFS has failed to consider important aspects of the problem and offered explanations for its decision that run counter to the evidence before the agency. The USFS should not bend to the pressure exerted upon it by the State of Alaska and should attempt to put forth a more impartial analysis of the alternatives in the final EIS that reflects the broader national public interest.

In particular, this comment will request that the USFS take the following actions in the Final EIS:

1. Choose Alternative 1 rather than Alternative 6
2. Acknowledge that many of the conclusions the USFS makes in the DEIS rely on information found in the 2016 Tongass Forest Plan, such as PTSQ levels and the policy to transfer from old-growth to new-growth timber harvest, and as such are unsound and subject to change
3. Commit to either: 1) Not amending the Forest Plan after choosing an alternative in the DEIS or 2) Writing a new EIS if the Forest Plan is amended or 3) Adopting the Forest Plan PTSQ levels as maximum harvest levels and the transition from old-growth to new-growth harvesting in a supplemental EIS
4. Conduct a full cost benefit analysis to form a fuller economic picture of the impacts of the alternatives, affording the USFS a better basis for their choice of alternative, as required under 40 CFR 1502.14
5. Prepare a Biological Evaluation and obtain a Biological Opinion from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service

1. Acknowledge that there is an undertaking being considered under the NHPA, and commit to completing a broad cultural resources survey in consultation with interested Alaska Native Tribes
2. Commit to monitoring and mitigation through adaptive management tools
3. Prepare a Supplemental DEIS in order to provide an opportunity for public comment on the changes proposed above

THE STATED PURPOSE AND NEED IN THE DEIS DO NOT SUPPORT THE PROPOSED ALTERNATIVE

Per 40 CFR 1502.10, the USFS must include a statement in the DEIS which outlines their purpose of and need for undertaking this rulemaking. In general, a purpose and need statement that is clear in its intent, local in its scope, and contextual in its substance will provide the best basis for completing the other sections of the DEIS. In the Purpose and Need for Action section of this DEIS¹, the USFS presents an argument for a new approach to roadless area management that "can be adjusted for the Tongass in a manner that meaningfully addresses local economic and development concerns and roadless area conservation needs."² In making this argument, the USFS lays out three key issues³ which they see as necessary for this rulemaking: 1) conserve roadless area characteristics; 2) support local and regional socioeconomic well-being, Alaska Native culture, rural subsistence activities, and economic opportunity across multiple economic sectors; and 3) conserve terrestrial habitat, aquatic habitat, and biological diversity. However, the evidence put forward in the DEIS regarding these

three key issues does not support the proposed alternative, nor does it support any of the action alternatives. If addressing these three key issues

1 DEIS Pg 1-1

2 DEIS Pg 1-11

3 DEIS Pg 1-5

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is the primary focus of this DEIS, then the no action alternative is the best decision the USFS can make to advance the three key issues they have laid out.

Common sense tells us that for the first key issue, conservation of roadless area characteristics, no action is the best action. The idea of repealing the Roadless Rule in order to conserve roadless area characteristics is farcical at best, and the evidence⁴ presented in the DEIS points clearly to the no action alternative as the best way to conserve roadless area characteristics. Information⁴ presented regarding the second key issue, support for local and regional socioeconomic wellbeing, Alaska Native culture, rural subsistence activities, and economic opportunity across multiple sectors, also would be best served by the no action alternative. Finally, the evidence⁴ presented suggests that any of the action alternatives will lead to greater development and increased habitat disturbance, indicating the no action alternative as the best course to address the third key issue. The reasons for these conclusions will be discussed in further detail in the sections below.

THE ARGUMENT IN THE DEIS THAT SUBSTANTIAL IMPACTS OF

ALTERNATIVE 6 WILL BE AVOIDED DUE TO ADHERENCE TO PTSQS IN 2016 FOREST PLAN AMENDMENT IS FLAWED

As put forth in the Purpose and Need for Action⁵ the main argument behind the USFS's selection of Alternative 6 as the preferred alternative is that because the 2016 Forest Plan (Forest Plan) will not be changed by the rulemaking in question, and the Projected Timber Sale Quotas (PTSQs) within the Forest Plan along with the policy of transitioning from old-growth to new-growth harvest will still be in place, the impacts of Alternative 6 will not be very severe. This argument is problematic on three fronts: 1) PTSQs are not a limitation on timber harvests, nor

4 DEIS Chapter 2

5 DEIS Pg 1-11

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are they a target⁶ 2) The Forest Plan can be amended at any time, meaning PTSQs could be raised dramatically if the Roadless Rule were repealed from the Tongass; and 3) The Forest Plan can be amended at any time to reverse the policy of transition from old-growth to new-growth harvest.

PTSQs are merely estimates of the amount of timber projected to be harvested, not hard limits⁷, and are dependent upon many factors including regulatory constraints and local and global economics. Should the roadless designation be removed in the Tongass, the PTSQs could immediately be raised, making more old-growth timber available for harvest. For this reason, PTSQs are a flawed metric for the given analysis because they are not binding commitments and cannot guarantee any level of protection for the lands in the Tongass that hold roadless and wilderness values.

Additionally, the argument that the Forest Plan, on its own, would continue the same protections as the Roadless Rule is faulty. Should the Roadless Rule be lifted, the USFS would be under immediate pressure

from industry groups and the State of Alaska to amend the Forest Plan and raise the PTSQs and reverse the policy to transition from old-growth to new-growth harvests. If that were to happen, the logic that was used to argue that the negative impacts of Alternative 6 would not be severe would be nullified.

The USFS points to their need for flexibility in creating timber sales to justify their preference for Alternative 6 in this rulemaking 8. However, this same need for flexibility suggests that USFS will have a large incentive to amend the Forest Plan in the near future in order to make use of newly available old-growth timber and larger PTSQs in order to make its timber

6 FSH 1909.12, Chap. 60

7 DEIS glossary, Pg 7-18

8 DEIS Pg. 1-11

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sales economical. Doing so would undercut the basis of the USFS justification for selecting Alternative 6, which relies upon the fact that the PTSQs will remain the same when predicting impacts of the proposed alternative.⁹ If the USFS intends to change those harvest numbers and the goal of protecting old-growth forest, then it will undermine the justification used in the DEIS that the selection of Alternative 6 will not have severe environmental consequences.

The justification of Alternative 6 creates a false standard of comparison amongst the alternatives, as the impacts of Alternative 6 and all the other action alternatives are likely to be grossly understated if the PTSQ levels and old-growth protection are altered in the future. Given the results predicted in the DEIS, the USFS should choose Alternative 1 as its preferred option. The analysis of impacts to other industries shown below will show why Alternative 1 makes the most sense from a variety of perspectives.

With the current approach, the USFS is currently failing to utilize a logical approach to decision making. The USFS is also failing to act in a manner consistent with the purpose of creating an EIS, to allow for an informed analysis of the reasonably foreseeable potential impacts of an agency action before a decision is made. The current approach appears to be a

disingenuous way to justify the revocation of the Roadless Rule based on the idea that the environmental impacts for doing so will not be severe because the Forest Service plans to stick to the 2016 Forest Plan PTSQs and policy to protect old-growth timber. However, the preferred alternative sets the USFS up to have an incentive to change the PTSQs and the policy of avoiding the cutting of old-growth in order to make future timber sales economical. Under 40 CFR 1502.22 the DEIS contains incomplete information, therefore at the very least the USFS needs to make it clear that important information on reasonably foreseeable impacts is missing

9 DEIS Pg. 1-8

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from their analysis due to the likely changes that will be made to the 2016 Forest Plan. The USFS would also be wise to recognize that the foreseeable impacts that would come from the selection of Alternative 6 and a subsequent amendment to the Forest Plan are "essential to a reasoned choice among alternatives" and that the cost of analyzing such impacts would not be exorbitant.

Should the USFS choose not to change the preferred alternative to Alternative 1, they should commit to either: 1) Not amending the Forest Plan after they choose an alternative in the FEIS or 2) Writing a new EIS if the Forest Plan is amended or 3) Adopt the Forest Plan PTSQ levels as maximum harvest levels along with the policy to transition from old-growth to new-growth harvest in a supplemental EIS. Committing to one of these

three options would show good faith on the part of the USFS to adhere to its stated long-term goals of environmental stewardship in the Tongass,¹⁰ and would ensure that the chosen action alternative would not compromise the USFS' stated purposes of conserving roadless area characteristics and terrestrial habitat, aquatic habitat, and biological diversity. ¹¹ It would also show that the agency is committed to accurately analyzing the impacts of its proposed actions.

AN ECONOMIC ANALYSIS SUPPORTS ALTERNATIVE 1, RATHER THAN

ALTERNATIVE 6

CHOICE OF ALTERNATIVE 6 WILL SUBSIDIZE BELOW-COST TIMBER SALES

In the Purpose and Need for Action, the USFS ¹² presents an argument proposing to open up more old-growth timber for availability to be harvested under Alternative 6 that centers on the economic viability of timber sales in the Tongass. The USFS proposes that in order to make sales

¹⁰ Tongass National Forest Land and Resource Management Plan Amendment of 2016, Pg. 1-1

¹¹ DEIS Pg. 1-5

¹² DEIS, Pg 1-11

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of new-growth timber profitable, they will need to be combined with sections of old-growth timber. Alternative 6 greatly expands the amount of old-growth timber available for these sales, and would allow what could be likened to gerrymandering for timber sales, taking formerly non-economical new-growth timber sales and attaching them to more-profitable sales of old-growth timber, resulting in a net sale that would generate profit. However, the USFS fails to justify this action through the lens of the Forest Plan, which mandates a transition to new-growth harvest over the next 10-15 years.¹³ The Forest Plan's mandated shift away from old-growth harvest will be undermined by the need to supplement new-growth cuts with old-growth cuts to make them economical.

Additionally, the use of this reasoning to justify Alternative 6 suggests that without the full repeal of the Roadless Rule, the forest products industry in Southeast Alaska is not viable. This is supported by data put forth by the group Taxpayers for Common Sense,¹⁴ which indicates that the USFS has lost the taxpayers over \$600 million in the past 20 years in uneconomical timber sales. This trend is expected to continue and would be exacerbated by the proposed alternative. This would further indicate that the damages to other industries (which are currently economically self-sustaining) wrought by the selection of Alternative 6 are somehow outweighed by the gains to the forest products industry. Yet, no economic proof has been provided in the DEIS to support this claim.

According to statistics released by the Southeast Conference, ¹⁵ total regional earnings in the seafood industry (over \$209 million) and the tourism industry (over \$202 million) far outstrip

¹³ DEIS, pg ES-2

¹⁴ Taxpayers for Common Sense, 2019 <https://kcaw-org.s3.amazonaws.com/wp-content/uploads/2019/10/TCS-Cutting-Our-Losses-2019-.pdf>

¹⁵ Southeast Conference, 2017

<http://www.seconference.org/sites/default/files/Southeast%20Alaska%20by%20the%20numbers%202017%20FINAL.pdf>

the total regional earnings of the timber industry (over \$16 million). In terms of employment, the seafood industry (3854 jobs) and the tourism industry (7752 jobs) also far outpace the timber industry (313 jobs). The Southeast Conference also projects no new growth or contributions by the timber sector, whereas they estimate the seafood and tourism industries to remain pivotal in the economic success of the region for the foreseeable future. USFS should not prioritize the needs of a single, small industry over the needs of two industries that form the backbone of the region.

Furthermore, according to the USFS' own research, 16 the vast majority of timber products originating in the Tongass are exported to other countries, for their use and benefit. The degradation of American public lands for the benefit of foreign nations should not be taken lightly, and needs to be factored into a cost-benefit analysis and the greater decision making process for this proposed action.

A further gap in the economic analysis provided in the DEIS is a lack of accounting for the building of logging road infrastructure in areas currently protected by the roadless rule. The USFS should prepare a supplemental DEIS that includes the following:

1. What is the estimated scope and extent of infrastructure expected to be built and maintained in the Tongass?
2. Who will bear the cost of building and maintaining this infrastructure? How does this cost fit into an overall cost-benefit analysis?
3. What is the expected cost of reclaiming this infrastructure after timber harvests have been completed?

16 Tongass National Forest Timber Demand: Projections for 2015-2030, 2016
https://www.fs.fed.us/pnw/pubs/pnw_gtr934.pdf

1. Who will bear the costs of this reclamation? How does this affect the economic viability of timber sales?

Analysis by America's Salmon Forest¹⁷ indicates that current maintenance costs on existing logging roads in the Tongass amount to \$68 million/year. This cost is currently borne not by the logging companies that use the roads, but by the taxpayers. Furthermore, the existing backlog of watershed reclamation due to past logging and road building are estimated at \$100 million. This DEIS should provide estimates on how these burdens will be increased by the proposed rulemaking and whether it is possible for timber sales to be economically viable, taking these costs into account while still abiding by the forest plan PTSQs and the switch from old-growth to new-growth timber.

The best approach the USFS can take to making an informed decision regarding timber sales and the roadless rule is to perform a full cost-benefit analysis. Suggested details for this analysis are laid out in a separate section below.

THE DEIS FAILS TO PROVIDE DATA WHICH JUSTIFIES THE FORESEEABLE

NEGATIVE IMPACTS THE PREFERRED ALTERNATIVE WILL HAVE ON THE RECREATION AND TOURISM INDUSTRIES

Impacts to the recreation and tourism industry would be greatest under the preferred alternative, and could be even greater given the failure of the DEIS to acknowledge that the Forest Plan is likely to be amended in the near future.¹⁸ Alternatives 1-3 would provide very little impact to the recreation and tourism industries, as the land opened up for timber harvest (if any) is primarily located adjacent to already-developed areas, minimizing its impact on areas with wilderness or roadless qualities. They also provide the least impact to backcountry outfitters and

17 America's Salmon Forest, 2019

http://www.americansalmonforest.org/uploads/3/9/0/1/39018435/what_is_the_roadless_rule.pdf

18 DEIS, Pg. 2-21

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guides, whereas Alternatives 4-6 would place pressures on remote areas that are already near capacity in terms of guiding trips per year, possibly causing some outfitters to abandon those areas in favor of other remote areas that are also already near capacity.

Adequate justification for selecting an alternative with the greatest impacts to the tourism and recreation sector has not been given by the DEIS. According to America's Salmon Forest,¹⁹

"Tourism, especially via cruise ships, is a tremendous growth sector for the region. Some 1.3 million cruise ship passengers are expected to visit this season, more than double the number of cruise ship visitors in 2000. A study conducted by the Alaska Wilderness League in 2014 found tourism generated over \$1 billion in economic contribution and over 10,000 jobs in the region annually."

No in-depth economic analysis has been provided to prove that the positive impacts to the forest products industry will overcome potential losses to the recreation and tourism industry under the preferred alternative. The USFS should complete a full cost-benefit analysis to further inform their choice of alternative. Without further justification, the facts presented by this DEIS point to Alternative 1 as the choice with the greatest benefit for the greatest number of parties. Should the USFS refuse to choose Alternative 1, Alternative 3 would be the best choice among the action alternatives. This is due to the reduced impact to lands that contribute to the recreation and tourism economy seen under Alternative 3, as stated in the DEIS²⁰.

Under the standard set forth by the Supreme Court in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*,²¹ in applying the arbitrary and capricious standard of judicial review mandated by the Administrative Procedure Act²² a reviewing court will overturn an agency action as arbitrary and capricious if (1) "the agency has relied on factors which Congress has not intended it to consider" (2) "entirely failed to consider an important aspect of the problem" (3)

19 America's Salmon Forest <http://www.americansalmonforest.org/the-people--economy.html>

20 DEIS, Pg. 2-21

21 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856 (1983)

22 5 USC [sect]551 et seq. (1946)

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"offered an explanation for its decision that runs counter to the evidence before the agency" or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."²³ Under this standard, the agency is also required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."²⁴

Here, the USFS has failed to satisfy the third standard in the *State Farm* test. The USFS has offered an explanation for its decision to prefer Alternative 6 which runs counter to the evidence before the agency regarding the economic impacts that Alternative 6 will have on the tourism and recreation industries in Southeast Alaska. The DEIS recognized that Alternatives 4-6 will have the greatest impacts to recreation and

tourism in Southeast Alaska compared to the other alternatives. This conclusion is likely understated based on the assumption that old-growth timber harvest will not be increased in compliance with the 2016 Forest Plan. People move to and travel to Southeast Alaska to see wildlife and the vast, pristine, wilderness habitats that the area is known for. Increased logging and road building activities in the Tongass will limit the availability of the opportunities that tourists and recreationalists are looking for and may lead them to choose to take their business elsewhere.

Additionally, the Forest Service has completely failed to explain why it has decided to risk harm to the tourism and recreation industries in order to aid the forest products industry, especially when recreation and tourism are much larger contributors to the area's economy, and when the recreation and tourism are projected to grow in the future while the forest products industry is not. The DEIS itself recognizes that the timber industry makes up but a fraction of the

23 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm, 103 S.Ct. 2856, 2867 (1983)

24 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm, 103 S.Ct. 2856, 2867 (1983)

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local economy compared to the recreation and tourism industries.²⁵ One of the major concerns of this rulemaking, as stated in the DEIS, is to support local and regional socioeconomic well-being in Southeast Alaska. Yet the evidence before the Forest Service indicates that the preferred alternative risks causing more harm than benefit to the economy of the area by prioritizing the timber industry over larger industries like recreation and tourism. If the Forest Service does not revise its analysis on this subject, by either producing data that actually supports its proposed alternative or by changing the goals set forth in the chapter on purpose and need so they are consistent with the reasonably foreseeable impacts of the proposed agency action, a reviewing court is likely to find that the agency action is arbitrary and capricious under the APA.

THE USFS CLAIM THAT THERE WILL BE NO NEGATIVE IMPACTS TO SALMON FISHERY AND RELATED INDUSTRIES IS NOT SUPPORTED IN THE DEIS

According to the Alaska Longline Fishermen's Association,²⁶ "Commercial fishing is the backbone of Southeast Alaska's economy, employing one in ten people in the region. High-quality fish habitat supports the livelihoods of the fishing families, independent owners/operators, tenders, deckhands." Yet, no scientific evidence has been provided to substantiate the USFS claim that there will be minimal impact to anadromous fisheries in the Tongass under the preferred alternative. Especially regarding the concern that the PTSQs and old-growth protection will be modified after an alternative is selected, scientific justification must be provided that demonstrates that no significant impacts will occur under the proposed alternative before the USFS moves forward with this rulemaking. The economic consequences

25 DEIS Pg. 3-27

26 Alaska Longline Fishermen's Association

<https://drive.google.com/file/d/1fsNGRHcMGThyowQdaL-S28ZDmQIZAu7o/view>

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felt by the people of Southeast Alaska and the greater United States in the event of significant impacts to the salmon populations could be vast. According to research by Trout Unlimited,²⁷

"salmon and trout fishing contribute some \$1 billion to the regional economy annually and account for more than 7,300 jobs directly or indirectly. Over 80 percent of Southeast Alaska rural residents rely on subsistence hunting, fishing or gathering for dietary and cultural purposes and nearly 90% of rural households in the region

use salmon, roughly 66,000 salmon, most of which are sockeye, are harvested for personal use annually and an average of 1 million salmon, mostly coho, are caught by sport anglers each season."

Further research,²⁸ published in the North American Journal of Fisheries Management, asserts that the "forest fish" produced in the rivers and lakes of the Tongass and Chugach National Forests account for some 25% of all salmon caught in Alaska, totaling 16% of the total commercial value of Alaska's salmon fishery. These forest fish also comprise 80% of the salmon caught in Southeast Alaska each year,²¹ leading local fishers to the conclusion that priority watersheds and spawning grounds are more valuable to the local economy if they are left intact. Intact salmon habitat will continue to reliably produce profitable annual harvests for the foreseeable future; opening these areas to logging would sacrifice these sustainable fishery industry profits for short-term gains in the timber industry.

These potential future effects would add on to and exacerbate significant salmon habitat damage already caused by the timber industry in the Tongass. According to studies commissioned by Trout Unlimited and America's Salmon Forest, 33% of all existing logging road stream crossings in the Tongass do not meet State of Alaska²⁹ standards for fish passage. This amounts to a total of 1216 impassable road crossings, cutting off 661 miles of fish habitat from native and anadromous fish in the Tongass. The cost to update just these existing crossings to suitable standards for fish passage would total up to \$37 million (based on actual costs of 604

²⁷ Trout Unlimited <http://www.americansalmonforest.org/the-people--economy.html>

²⁸ Johnson, et. al., 2019 <https://afspubs.onlinelibrary.wiley.com/doi/full/10.1002/nafm.10364>

²⁹ Tongass National Forest Monitoring and Evaluation Report, 2016-2017, pg. 3

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Tongass crossing updates from 1997-2017, in 2018 dollars). With this current backlog of work to restore degraded fish habitat already existing in the Tongass, consenting to further habitat degradation without conducting a full cost-benefit analysis (as detailed in a separate section below) is not in the best interest of the Tongass or the people who rely on it, especially in light of the key issues laid out by the purpose and need for this rulemaking³⁰.

Under the standard set forth by the Supreme Court in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*,³¹ in applying the arbitrary and capricious standard of judicial review mandated by the Administrative Procedure Act 5 USC [sect]551 et seq. (1946) a reviewing court will overturn an agency action as arbitrary and capricious if (1) "the agency has relied on factors which Congress has not intended it to consider" (2) "entirely failed to consider an important aspect of the problem" (3) "offered an explanation for its decision that runs counter to the evidence before the agency" or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."³² Under this standard, the agency is also required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."³³

Here, the USFS has failed to satisfy the third standard in the *State Farm* test. The USFS has offered an explanation for its decision to prefer Alternative 6 which runs counter to the evidence before the agency in regard to assessing the economic impacts that Alternative 6 will have on the fishing industry, both commercial, and recreational, in Southeast Alaska. The DEIS predicts that removing the application of the Roadless Rule to the entire Tongass National Forest, the largest intact temperate rainforest in the world, is not expected to significantly impact

³⁰ DEIS, Pg. 1-5

³¹ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856 (1983)

³² *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856, 2867 (1983)

³³ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856, 2867 (1983)

the commercial fishing or fish processing industries. This conclusion is partially based on the assumption that old-growth timber harvest will not be increased in compliance with the 2016 Forest Plan. As explained above, the contention that removal of Roadless Rule protections to the Tongass will not harm the fisheries of Southeast Alaska is not supported by the science linking the health of watersheds and fisheries with the preservation of old-growth forest stands.

Additionally, the Forest Service has completely failed to explain why it has decided to risk harm to the fishing industry in order to aid the forest products industry, especially when fishing is a much larger contributor to the area's economy than the timber industry. The DEIS itself recognizes that the timber industry makes up but a fraction of the local economy compared to the fishing industry.³⁴ One of the major concerns of this rulemaking, as stated in the DEIS, is to support local and regional socioeconomic well-being in Southeast Alaska. Yet the evidence before the Forest Service indicates that the preferred alternative risks causing more harm than benefit to the economy of the area as a whole by prioritizing the timber industry over the larger fishing industry. If the Forest Service does not revise its analysis on this subject, a reviewing court is likely to find that the agency action is arbitrary and capricious under the APA.

THE PREFERRED ALTERNATIVE IS UNNECESSARY TO FACILITATE RESPONSIBLE MINING DEVELOPMENT IN THE TONGASS, AND MAY ENCOURAGE HARMFUL, LOW-VALUE DEVELOPMENT

The DEIS predicts that little to no new mining activity will take place in the Tongass if the Roadless Rule is repealed,³⁵ meaning that even under the action alternatives (all of which would open up new land to mining access and road construction), no significant impacts from mining are expected to occur. The Forest Service attempts to justify this conclusion by pointing

34 DEIS, Pg. 3-27

35 DEIS, Pg. 2-22

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to the fact that there has been little to no mining activity in the Tongass in the past. This reasoning is questionable because the Roadless Rule may have inhibited mining development in the Tongass in the past, so it is not reasonable to conclude that the same trend will continue if the Roadless Rule no longer applies to the Tongass.

Additionally, the current Roadless Rule poses no undue constraints upon the mining and mineral development industry. To date, 100% of all mining projects in the Tongass have been granted roadless rule exemptions (along with local transportation, small hydro, etc.)³⁶ Keeping the roadless rule in place and using the exemption process ensures that all mining projects that take place in roadless areas are thoroughly vetted. This vetting also prevents marginal mining operations from going forward that may do lasting damage to the Tongass, with little to no value gained in return. With no evidence in place to support the selection of alternative 6, and for the reasons presented here, the USFS should change the preferred alternative from Alternative 6 to Alternative 1.

NEGATIVE IMPACTS TO RURAL SUBSISTENCE ACTIVITIES ARE UNDERSTATED IN THE DEIS

As with other aspects of the USFS's analysis supporting the selection of Alternative 6 as the preferred alternative, the information in the DEIS does not support the contention that repealing the Roadless Rule would not substantially harm rural subsistence activities ³⁷. To the contrary, The Southeast Alaska Conservation Assessment³⁸ suggests that increased timber

³⁶ America's Salmon Forest, <http://www.americansalmonforest.org/blog/tongass-roadless-rule-101>

38 Southeast Alaska Conservation Assessment

https://www.conservationgateway.org/ConservationByGeography/NorthAmerica/UnitedStates/alaska/seak/era/cfm/Documents/9.1_Subistence.pdf

harvests, particularly old-growth harvests, are the greatest current threat to subsistence uses in Southeast Alaska. Removal of key habitat for fish and game species leads to tougher survival conditions for these species, especially in terms of winter deer survival and road construction effects on salmon habitat. The success of subsistence hunting and fishing uses are directly dependent on the ability of hunters to reach high quality wildlife habitats that are not far from the villages they reside in, which indicates that large amounts of intact habitat throughout the Tongass is needed for successful subsistence uses to continue. According to the Southeast Alaska Conservation Assessment,

"Successful subsistence harvests are a function of both abundance and accessibility. Success depends on high-quality fish and wildlife habitat that is capable of supporting abundant populations, and that is within safe and reliable travel distance from each community or village. In many cases, access for subsistence hunting, fishing, or gathering in Southeast is by small boats with limited capability to travel long distances in rough water."³⁹

Subsistence hunting and fishing activities are extremely important to the wellbeing and survival of many of the residents of Southeast Alaska. Trout Unlimited states that:

"Over 80 percent of Southeast Alaska rural residents rely on subsistence hunting, fishing or gathering for dietary and cultural purposes and nearly 90% of rural households in the region use salmon, roughly 66,000 salmon, most of which are sockeye, are harvested for personal use annually"⁴⁰

It is crucial that the USFS consider all of the reasonably foreseeable impacts that the action alternatives could have on the wildlife populations which subsistence hunters and fishers depend on. Such reasonably foreseeable impacts must include what will happen to those populations if the 2016 Forest Plan is amended in order to allow for the flexibility the USFS needs in order to make timber sales in the Tongass economically viable.

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https://www.conservationgateway.org/ConservationByGeography/NorthAmerica/UnitedStates/alaska/seak/era/cfm/Documents/9.1_Subistence.pdf

⁴⁰ Trout Unlimited <http://www.americansalmonforest.org/the-people--economy.html>

If any action alternative is chosen by the USFS, the FEIS should provide scientific data supporting the claim that the wildlife populations relied on by subsistence users will not be significantly affected. Given the importance the USFS places on protecting subsistence uses shown by their inclusion of this in key issue #2 of the purpose and need statement,⁴¹ all possible efforts should be taken to quantify the potential costs that would be borne by subsistence uses as a result of the action alternatives, as mentioned in the section on cost-

benefit analysis below. In order to act accordingly with the goals of the rulemaking as set forth in the purpose and need statement and the evidence that increased logging and road building will harm wildlife populations, the USFS should change its preferred alternative to Alternative 1.

Under the standard set forth by the Supreme Court in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*,⁴² in applying the arbitrary and capricious standard of judicial review mandated by the Administrative Procedure Act⁴³ a reviewing court will overturn an agency action as arbitrary and capricious if (1) "the agency has relied on factors which Congress has not intended it to consider" (2) "entirely failed to consider an important aspect of the problem" (3) "offered an explanation for its decision that runs counter to the evidence before the agency" or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."⁴⁴ Under this standard, the agency is also required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."⁴⁵

41 DEIS, Pg ES-3

42 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856 (1983)

43 5 USC [sect]551 et seq. (1946)

44 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856, 2867 (1983)

45 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856, 2867 (1983)

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Here, The USFS has failed to satisfy the third standard in the State Farm test. The USFS has offered an explanation for its decision to prefer Alternative 6 which runs counter to the evidence before the agency regarding the impacts that Alternative 6 will have on subsistence activities in Southeast Alaska. The DEIS claims that the preferred alternative will have "minimal effects on rural subsistence activities."⁴⁶ This claim is partially based on the problematic assumption that timber harvest levels will remain the same, due to the PTSQs set in the 2016 Forest Plan. Subsistence activities are a vital part of the survival and way of life of rural Alaskans, and there is abundant data which demonstrates that the populations of the species they hunt and fish are directly damaged by logging and road building activities

One of the major concerns of this rulemaking, as stated in the DEIS, is to support local and regional socioeconomic well-being, Alaska Native culture, and rural subsistence activities. Yet the evidence before the Forest Service indicates that the preferred alternative risks causing more harm than benefit to the people in the area by prioritizing the timber industry over other important uses, like subsistence, that will be negatively impacted by increased activity in the timber industry. If the Forest Service does not revise its analysis on this subject, a reviewing court is likely to find that the agency action is arbitrary and capricious under the APA.

A COST-BENEFIT ANALYSIS THAT LAYS OUT THE COSTS AND BENEFITS OF EACH ALTERNATIVE, INCLUDING COSTS AND BENEFITS THAT ARE

DIFFICULT TO MONETIZE, IS NECESSARY TO ENSURE A REASONED DECISION As discussed in the sub-sections above, the USFS should conduct a full cost-benefit analysis. The DEIS fails to accurately weigh several of the economic impacts that could result from this rulemaking thereby providing weak justifications for the selection of Alternative 6 as

46 DEIS Pg. 2-22

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the preferred alternative, even though Alternative 6 is ultimately being proposed for its supposed economic benefits. Even if the USFS believes that it lacks all of the information to complete a cost-benefit analysis, it

should still complete the cost-benefit analysis to the best of its ability. According to 40 CFR 1502.22 "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." Looking at the costs and benefits of the rulemaking from an economic perspective is an essential aspect that the Forest Service should analyze in looking at the reasonably foreseeable effects that could result from this rulemaking. There are undoubtedly many impacts to the environment that will be difficult to quantify in terms of cost, but the USFS is required to include all of the complete information in the EIS, in addition to an acknowledgement of what information is incomplete and to what extent the information is incomplete.

The Forest Service should be sure to consider the value of aspects of the Tongass such as future value of roadless areas as they become more scarce, ecosystem services, existence values, environments for research, traditional cultural properties and sacred sites, defensive zones

against invasive species, and habitats for threatened and endangered species.

Though climate change effects were discussed in Chapter 3 of the DEIS, it is also necessary for the USFS to discuss climate change and its economic consequences in a cost-benefit analysis. According to Alaska Wild "The Tongass is a buffer against climate change, absorbing around eight percent of the nation's annual global warming pollution and storing an estimated 10-12 percent of all carbon in our national forests."⁴⁷ If it is going to take into account all the reasonably foreseeable impacts of this rulemaking, The Forest Service must account for

⁴⁷ Alaska Wilderness League <https://www.alaskawild.org/places-we-protect/tongass-national-forest/>

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the social cost of carbon associated with the proposed action using figures from the government or other sources which use peer reviewed studies.

Courts are now sympathetic to claims that agencies need to account for the greenhouse gasses that will result from proposed agency actions. It is very important that the Forest Service take this aspect of the proposed action into account because the potential differences in greenhouse gasses released over time as a result of the USFS choosing Alternative 1 versus Alternative 6 are immense. In *CBD v. NHTSA*, the Ninth Circuit Court of Appeals instructed the NHTSA to take the social cost of carbon into account when performing a cost benefit analysis related to a proposed agency action.⁴⁸ The Court also held that it was unacceptable for the agency to assign a value of zero to the social cost of carbon in its analysis.⁴⁹ A current conservative estimate of the social cost of carbon is over 50 dollars per ton in today's dollars. ⁵⁰ However, other studies have calculated that the median value per ton of CO₂ is as high as 417 dollars per ton.⁵¹ The USFS can look to a variety of sources to help them determine an estimate of the social cost of carbon to include in the FEIS, including the Interagency Working Group on Carbon or a variety of environmental nongovernmental entities.

In calculating the social cost of carbon related to the proposed agency action at hand, the Forest Service should look into both the direct and indirect impacts this action could have on the climate. Indirect impacts include lost carbon sequestration abilities due to the removal of old-growth forest, the reduced ability (by comparison) of new-growth forest to sequester carbon, and the cumulative impacts of deforestation in the Tongass and around the world. Direct impacts

⁴⁸ *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008)

⁴⁹ *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008)

⁵⁰ Environmental Defense Fund <https://www.edf.org/true-cost-carbon-pollution>

⁵¹ Ricke, K., Drouet, L., Caldeira, K., & Tavoni, M. (2018). Country-level social cost of carbon. *Nature Climate Change*, 8(10), 895-900. <https://doi.org/10.1038/s41558-018-0282-y>

include emission of greenhouse gasses from road building, logging, and mining activities, as well as increased industrial processing activities that would accompany increased timber harvests. Though the direct emission of greenhouse gasses may be low in this case, the removal of carbon-sequestering vegetation in the Tongass has the potential to lead to massive consequences since the Tongass is the largest intact temperate rainforest remaining in the world.

Under the standard set forth by the Supreme Court in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*⁵², in applying the arbitrary and capricious standard of judicial review mandated by the Administrative Procedure Act⁵³ a reviewing court will overturn an agency action as arbitrary and capricious if (1) "the agency has relied on factors which Congress has not intended it to consider" (2) "entirely failed to consider an important aspect of the problem" (3) "offered an explanation for its decision that runs counter to the evidence before the agency" or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."⁵⁴ Under this standard, the agency is also required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."⁵⁵

By failing to include a cost benefit analysis in the DEIS, the USFS has failed to satisfy the second prong of the State Farm test. If the USFS does not complete a cost benefit analysis, and if that cost benefit analysis does not support the conclusion that the preferred alternative would support local and regional socioeconomic well-being, as stated as a key issue in the purpose and need statement, then the USFS will have entirely failed to consider an important aspect of the problem before it.

52 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856 (1983)

53 5 USC [sect]551 et seq.(1946)

54 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856, 2876 (1983)

55 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 103 S.Ct. 2856, 2876 (1983)

Instead of examining the potential economic impacts the preferred alternative will have on each industry in Southeast Alaska, and then determining if overall the potential costs outweigh the potential benefits, the USFS uses an approach where they address each industry separately and justify the preferred alternative as it relates to each action. If the USFS decides to amend their approach by conducting a cost-benefit analysis, they will be more likely to consider all the relevant aspects of the problem and weigh them appropriately instead of overvaluing the potential impacts to one aspect of the problem, such as the forest products industry. It is highly likely that an accurately conducted cost benefit analysis would demonstrate that the economic costs to the preferred alternative will vastly outweigh the potential economic benefits, which is the opposite of the conclusion the Forest Service came to in the DEIS. While agencies are not specifically required to complete a cost benefit analysis in every EIS, it is likely that performing a cost benefit analysis in this scenario is necessary to a reasoned decision and not prohibitively expensive to implement under 40 CFR 1502.22.

THE FOLLOWING ITEMS SHOULD BE INCLUDED FOR CONSIDERATION IN A COST-BENEFIT ANALYSIS
(This List is Not Exhaustive)

1. Climate Change Impacts

- * Emissions from increased logging & other direct effects
- * Lost carbon sequestration capacity & other indirect effects

1. Impacts to the Commercial Fishing industry

- * Projected impacts on fish populations due to degraded water quality
- * Projected impacts on fish populations due to increased stream crossing barriers

1. Impacts to the Recreation and Tourism Industry

- * Projected impacts on tourism and sightseeing revenue due to lost roadless and wilderness qualities that tourists come to see
- * Projected impacts on sport fishing due to habitat loss and degraded water quality
- * Projected impacts on hunting and outfitters due to habitat loss, degraded wilderness qualities, and over-crowded hunting units

1. Impacts to USFS budget

- * Costs of building new infrastructure
- * Costs of maintaining new and current infrastructure

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- * Costs of preparing timber sales

1. Impacts to Subsistence Uses
2. Impacts to Mining
3. Impacts to Forest Products Industry

A COST BENEFIT ANALYSIS WOULD DEMONSTRATE THAT THE FINANCIAL COSTS TO THE ACTION ALTERNATIVES OUTWEIGH THE FINANCIAL BENEFITS.

According to the USFS' own projections, demand for timber in the Tongass over the next 15 years is expected to range from 46 to 76 million board feet per year.⁵⁶ These projections stem from greater economic trends that have reduced the demand for Alaskan forest products over the last 20 years. The existing PTSQs in the 2016 Tongass Forest Plan Amendment⁵⁷ are already aligned with these projections, rendering pointless the stated need in this DEIS for more flexibility in timber sales.

No in-depth economic justification has been provided by the Forest Service to prove that the positive impacts to the forest products industry overcome potential losses to the recreation and tourism industry, the fishing industry, Alaska Native cultural activities, or subsistence activities under the preferred alternative. Without the further justification that could be provided by a full cost-benefit analysis as requested above, the facts presented by this DEIS point to Alternative 1 as the choice with the greatest benefit for the greatest number of parties.

The USFS has failed to explain to American taxpayers what appears to be an instance of the agency subsidizing a single, small, and shrinking industry (that has high potential to harm other industries) in a region dominated by these other growing industries. Without further justification, the USFS should recognize that Alternative 1 is the best option to address the three

⁵⁶ Tongass National Forest Timber Demand: Projections for 2015-2030, 2016
https://www.fs.fed.us/pnw/pubs/pnw_gtr934.pdf

⁵⁷ Tongass National Forest Land and Resource Management Plan Amendment of 2016, Pg. A-6

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key issues they set forth in the DEIS. The facts that were presented in the DEIS suggest that the no action alternative would lead to the greatest benefit and least harm for all industries, as well as to Alaskans, and Americans as a whole.

Should the USFS decline to update the DEIS with a full cost-benefit analysis or refuse to select Alternative 1, Alternative 3 should become the preferred alternative. As stated in the DEIS,⁵⁸ the additional acres removed from roadless protection under Alternatives 4-6 are unlikely to be economical in terms of harvest due to their distance from existing infrastructure, and therefore should remain protected by the roadless rule.

If the agency declines to follow the suggestion to complete a cost-benefit analysis, the USFS should include in its final EIS a statement that lays out its reasons for not completing a cost-benefit analysis on the proposed rulemaking. Per 40 CFR 1502.22 (b), this should include the following: "(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community."

THE USFS IS LIKELY VIOLATING THE ENDANGERED SPECIES ACT. THE USFS MUST BEGIN BY REQUESTING INFORMATION FROM FISH AND WILDLIFE AND THE NATIONAL MARINE FISHERIES SERVICE REGARDING WHETHER LISTED SPECIES ARE IN THE ACTION AREA.

58 DEIS, Pg. 2-22

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Under the Endangered Species Act, Section 7 the USFS must ask the US Fish and Wildlife Service along with the National Marine Fisheries Service whether listed species exist in the action area, meaning the entire Tongass National Forest. If either FWS or NMFS indicates that listed species exist in the action area, the Forest Service is required to partake in a biological assessment/ evaluation in order to determine if a listed species in the action area will be adversely affected by the agency action. That biological assessment needs to be made available for public notice and comment. If that is the case, the USFS is required to engage in formal consultation with FWS and NMFS. Formal consultation will result in a biological opinion, meant to determine whether the proposed agency action will jeopardize the continued existence of the species or adversely modify its critical habitat. If this question is answered in the affirmative, an agency decision to go forward with the action will likely be overturned in court. According to the DEIS, it appears that the Forest Service has not complied with any of the steps outlined above in relation to the current proposed action, which is likely to result in this rulemaking being overturned in court unless the USFS changes course. The Forest Service should not attempt to rely on the biological assessment done in 2016 in relation to the 2016 Forest Plan for several reasons. A significant amount of time has passed since the last meaningful evaluation of the status of listed species in the area, the proposed action will allow significantly different levels of activity to take place in the action area than was estimated under the Forest Plan, resulting in impacts to the forest that were not considered in the 2016 biological opinion, and the 2016 Forest Plan will likely be amended in order to further the goals of the proposed action if the USFS ultimately chooses Alternative 6.

THE USFS IS LIKELY VIOLATING THE NATIONAL HISTORIC PRESERVATION ACT BY FAILING TO ACKNOWLEDGE THAT AN UNDERTAKING IS BEING CONSIDERED AND BY FAILING TO ADEQUATELY CONSULT WITH ALASKA NATIVE TRIBES.

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The Draft EIS addresses the Forest Service's obligations under the NHPA in the following manner:

"In carrying out the responsibilities under Section 106 of the National Historic Preservation Act (NHPA), the Forest Service consulted with the State of Alaska Department of Natural Resources, Division of Parks and

Outdoor Recreation, Office of History and Archaeology, resulting in a letter (10/08/2018) from the State Historic Preservation Officer concurring with the Forest Service's determination that changes in management direction for designated roadless areas on the Tongass would not result in undertaking, as defined in 36 CFR 800.16(y). Although road construction and/or timber harvest could potentially increase within some designated roadless areas, impacts under the NHPA would be based on site-specific proposals, which are currently unknown, and would be addressed in subsequent project environmental analyses."⁵⁹

Under the NHPA, "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking... prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property."⁶⁰ If an undertaking is found, the NHPA requires that "agencies must make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking" ⁶¹ In this case, USFS has attempted to postpone its obligations under NHPA by determining that "changes in management direction for designated roadless areas on the Tongass would not result in undertaking."⁶² Under the NHPA, an undertaking is defined as:

"[A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--

1. those carried out by or on behalf of the Federal agency;
2. those carried out with Federal financial assistance;
3. those requiring a Federal permit, license, or approval; and
4. those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." ⁶³

59 DEIS, Pg. 1-10

60 54 USCA [sect] 306108

61 36 CFR 800.4(b)

62 DEIS, Pg. 1-10

63 36 CFR 800.16(y)

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A decision by the USFS to remove the protections of the Roadless Rule is almost certainly "a project, activity, or program ... carried out by ... the Federal agency" and would thus constitute an undertaking under the NHPA. The position of the USFS seems to be that because the current rulemaking does not involve an undertaking because it would only determine what types of activities would be allowed in the Tongass and would not authorize any specific projects that would alter the property.

This reasoning is problematic. In *Muckleshoot Indian Tribe v. United States Forest Service*, the Ninth Circuit Court of Appeals held that transfer of federal land from the Forest Service to a private owner constituted an undertaking under the NHPA.⁶⁴ The Court found the action to be an undertaking because the transfer would lead to alterations of the property that could render it ineligible for listing as a historic property.⁶⁵ The situation at hand is similar to *Muckleshoot* because while the removal of the Roadless Rule itself would not alter the property just as a transfer of property in *Muckleshoot* did not immediately alter the property, the USFS decision in both cases would pave the way to allow alterations to the property that could render it ineligible for listing in the National Register of Historic Places. Additionally, the proposed removal of the Roadless Rule from the Tongass constitutes a project or program under the Act, even if a reviewing court did not think it constitutes an activity as defined by the Act.

The Forest Service should also consider recognizing that the proposed rule is an undertaking even if it does not approve a specific land altering project at this point because such an approach would be more consistent with the regulations applicable to both the NHPA and NEPA. The regulations implementing the NHPA state that:

64 Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 803 (9th Cir. 1999)

65 Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 808 (9th Cir. 1999)

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"Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner."

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The D.C. Circuit Court of Appeals has also recognized the similarity between the requirements of the NHPA and NEPA. In *McMillan Park Committee v. National Capital Planning Com'n*, 968 F.2d 1283 (D.C.Cir. 1992), a case where the court found that there was no undertaking, Judge Randolph wrote in his concurrence that "Because of the operational similarity between the two statutes, courts generally treat "major federal actions" under NEPA as closely analogous to "federal undertakings" under the NHPA."⁶⁷ There is no dispute that under NEPA, the current rulemaking contemplates a major federal action since the removal of the Roadless Rule to the Tongass would permit activities that would undoubtedly "significantly affect the quality of the human environment."⁶⁸ The NEPA process is well underway and it would be prudent of the Forest Service to start the NHPA process now in order to follow the requirements set forth in 36 C.F.R. [sect] 800.8. The current strategy of claiming that no undertaking is being considered is only delaying the inevitable and will only serve to give the Forest Service less time to fulfill its obligations under Section 106.

The Forest Service should also consider reassessing how they plan to use tiering in relation to this proposed action. According to 40 CFR [sect] 1508.28, "Tiering refers to the coverage of general matters in broader environmental impact statements... with subsequent narrower statements or environmental analyses...incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." The use of

66 36 C.F.R. [sect] 800.8

67 36 C.F.R. [sect] 800.8

68 40 CFR [sect] 1508.18

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tiering in analyzing the effects of a large-scale agency action like the one involved here certainly has many benefits. However, tiering, if used incorrectly, has the potential to lead to a failure to analyze the cumulative impacts a project could have on resources. The use of tiering also has the potential to lead to an irretrievable or irreversible commitment of resources, where an agency waits too long into a decision making process to objectively analyze certain impacts of the proposed action because the agency has already invested resources in the project or made commitments to third parties. In order to guide agencies away from making these mistakes, 40 CFR 1502.5 requires that "The EIS should be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made." Additionally, In *Conner v. Burford*, the 9th Circuit held that agencies may not make irreversible and irretrievable commitments of resources until they comply with NEPA.⁶⁹

It is true that it is difficult for agencies to determine the particular effects a proposed agency action could have on various resources while the proposed action is still being considered at an abstract or broad level. It is also true that tiering can aid in reducing the need for agencies to repeat the same analysis multiple times. However,

if an agency uses tiering inappropriately and decides to wait until the agency action is too far along before analyzing the effects the proposed action could have on a resource, the agency could miss important aspects of its analysis because the analysis is now being tailored to a level where the agency is only able to assess one small piece of the impacts the larger agency action will have on the resource, while forgetting to look at the big picture. The USFS's obligations under the NHPA in this case exemplify this dilemma. Here, the USFS is using their determination that there is no undertaking being

69 Conner v. Burford, 836 F.2d 1521 (9th Cir. 1988)

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considered at this time to forestall the requirement to assess the impacts the rulemaking could have on cultural resources within the Tongass. Instead, they think it is more appropriate to assess those impacts at a more specific project level, after this rulemaking has already come and gone.

As an added benefit, if the USFS admits that there is an undertaking being considered now, they can begin to prepare to mitigate the adverse effects of the proposed action at an early stage, instead of at the last minute. The agency's ability to mitigate the adverse impacts a repeal of the Roadless Rule will have on cultural resources within the Tongass will undoubtedly be impaired if the agency waits until logging is about to take place before analyzing what impacts could occur and how to mitigate them.

The USFS determination that this rulemaking does not constitute an undertaking also likely violates the NHPA due to the impacts this rulemaking will have on Alaska Native Tribes. Certain provisions of the Act apply specifically to Indian Tribes and impose additional responsibilities on agencies when Tribes are involved.

1. In General.—Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
2. Consultation.—In carrying out its responsibilities under [sect] 302303 of this title [i.e., NHPA [sect] 106], a federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural importance to property described in subsection (a)70

The Tongass National Forest makes up the aboriginal lands of the Tlingit, Haida, and Tsimshian people. These groups and their ancestors have inhabited these lands since time immemorial and as a result they have built deep and invaluable bonds to the land and wildlife in the area. Not only does the Tongass National Forest provide the setting in which these communities lead their lives, it provides their food, defines their cultures, and makes up an

integral part of the fabric of their societies. There are undoubtedly properties that are of traditional religious and cultural importance to Alaska Native Tribes within the Tongass National Forest. The Forest Service should be sure to not only do the bare minimum to protect these sites under the NHPA, but to do their utmost to make sure the actions of the agency do not negatively impact the important cultural resources that exist within the Tongass.

While the authors of this paper were unable to examine the contents of the communications between the USFS and the Tribes in Southeast Alaska in relation to this rulemaking due to the amount of time it would take to make a FOIA request, the brief treatment the USFS has given its duties under the NHPA in the Draft EIS demonstrates that the USFS is not working to meet its obligation to consult with the Tribes in the area to the fullest extent possible. Further supporting the idea that the USFS has an obligation to consult with the Tribes early on in the NEPA process, 40 CFR [sect]1502.25 requires that the agency "to the fullest extent possible" prepare the draft EIS "concurrently and integrated with" requirements imposed by the National Historic Preservation Act. By only designating a paragraph in the DEIS that essentially says "we will do it later" the USFS failed to prepare the DEIS to the fullest extent possible in concordance with the requirements of NHPA.

The USFS may argue that they have satisfied their consultation requirement thus far in the process by sending out letters to Alaska Native Tribes requesting comment on the rulemaking in general or by sending out letters

inquiring about the existence of properties in the Tongass with traditional religious and cultural importance to the Tribes, but such action likely falls short of the consultation requirement imposed by the NHPA. In Pueblo of Sandia, the Tenth Circuit held that even though the Forest Service requested information from the Sandia Pueblo about the existence of cultural sites within the area that would be affected by the proposed project "a mere

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request... is not necessarily sufficient to constitute the "reasonable effort" section 106" requires.⁷¹ Additionally, as the Tenth Circuit pointed out in Pueblo of Sandia, "National Register Bulletin 38 warns that knowledge of traditional cultural values may not be shared readily with considered as such information is regarded as powerful, even dangerous in some societies."⁷²

In this situation, the USFS needs to do more than simply request information from Alaska Native Tribes in order to fulfill its consultation requirement under the NHPA. By waiting to acknowledge that an undertaking is being considered, the USFS will hinder its ability to adequately consult with interested Tribes by reducing the amount of time the agency and Tribes have to build the relationships and trust needed to work together to determine what types of cultural resources are in the area and how they could be affected by the proposed action. Importantly, at the time this comment was written, the USFS had not consulted with the Tribal Historic Preservation Officer at the Village of Kake. Clearly, the USFS needs to consult with the THPO as part of its consultation obligations under the NHPA.

In order to work towards satisfying its obligations under the NHPA, the USFS should administer a high-level cultural resources survey in a supplemental EIS, give the public an opportunity to comment on it, and give Alaska Native Tribes an opportunity to consult with the agency on the survey and what the next steps will be. This is not to say that the USFS should do a cultural resources survey now and when particular timber sales or road building projects are approved in the future that the agency will have no further obligation under the NHPA, only that the agency would be wise to start preparing to meet its obligations under the NHPA sooner rather than later. This broad survey should aim to explore estimates regarding the number of cultural

71 Pueblo of Sandia v. United States, 50 F.3d 856, 857 (10th Cir. 1995)

72 Pueblo of Sandia v. United States, 50 F.3d 856, 861 (10th Cir. 1995)

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sites in the Tongass, the types of sites that exist, and the relation of those sites to each other. Under this approach, the agency can use tiering in an appropriate manner and supplement these broader findings with more particularized and detailed inquiries into a specific area if specific timber harvesting and road building projects are proposed later on. This approach will give the Tribes an opportunity to participate throughout the entire NHPA process. This approach will also prevent the agency from failing to consider the cumulative impacts that removing the Roadless Rule could have on cultural resources within the Tongass, from failing to consider how various cultural sites may be connected or may be meaningful to the Tribes in relation to each other, or from making an irreversible or irretrievable commitment of resources before fully considering the impacts of such a decision.

Finally, the USFS owes a duty to allow Alaska Native Tribes to meaningfully participate in the NHPA process from the beginning because the United States Government owes a trust responsibility to Indian Tribes.⁷³ As stated in *United States v. Mitchell*, "[A] fiduciary relationship necessarily arises when the Government assumes ... elaborate control over forests and property belonging to Indians."⁷⁴ Fully adhering to the requirements of the National Historic Preservation Act requiring the USFS to consult with Alaska Natives and involve them in the decision making process that will govern the fate of their aboriginal lands is the minimum the USFS should be doing in order to honor the trust responsibility the United States Government

73 E.g., *Cherokee Nation v. State of Georgia*, 5 Pet. 1, 8 L.Ed. 25; *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; *Choctaw Nation v. United States*, 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306; *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676; *United States v. Creek Nation*, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331; *Tulee v. State of Washington*, 316 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115.

74 *United States v. Mitchell* ("Mitchell II"), 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)

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owes to Alaska Natives. Forest Service should take these obligations into account, not only because it is required under the law, but because it is the right thing to do.

THE USFS SHOULD COMMIT TO MONITORING AND MITIGATION USING ADAPTIVE MANAGEMENT TOOLS

Given the large scope of this rulemaking, and the wide variety of potential impacts of any of the action alternatives, the USFS should commit in this EIS to perform ongoing monitoring and mitigation to minimize any impacts, both foreseen and unforeseen. As set forth by 40 CFR 1502.14 (f), in the section of the DEIS addressing the alternatives selection, the agency shall "Include appropriate mitigation measures not already included in the proposed action or alternatives." This DEIS does not lay out or commit to any mitigation measures, relegating these instead to project-level impact statements. Though it is not necessary that a DEIS of this scope to propose site-specific mitigation strategies, the USFS should develop an adaptive management plan that addresses large-scale decision making processes and how these can be utilized to address unforeseen conditions that may arise in the future.

Beyond mitigation, monitoring in the Tongass to ensure the environmental conditions pan out as predicted in this DEIS should be undertaken. Per 40 CFR 1505.2 (c), the agency shall "State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation."

Adaptive management is the correct tool for the USFS to adopt in this DEIS. Developing a plan to monitor for any deviations from the predicted environmental outcomes of this decision making process, and then adjust USFS policies and procedures to address those deviations, would ensure the key issues laid out by this DEIS are being attended to in an ongoing manner.

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An adaptive management plan laid out in a supplemental DEIS should develop policy and procedural actions that the USFS could take if any of the key issues are being negatively affected by this rulemaking. SMART goals should be developed around the key issues in order to ensure that the agency is able to keep the key issues in focus after this decision making process has concluded. SMART goals are developed around the principles of specificity, measurability, achievability, relevance, and timeliness. Following this framework will ensure that the mitigation and monitoring goals being set are clear, focused, and likely to be met based on the existing conditions and the capacities of the agency. The agency should note that any mitigation or monitoring actions committed to in the DEIS are binding, per 40 CFR 1502.3.

The USFS should pay additional attention to adaptive management if it settles on any of the action alternatives as their preferred alternative. Without providing more information (as has been requested in this comment),

committing to monitoring and mitigation is especially crucial, as not enough information has been provided in this DEIS to prove that impacts will be less than substantial.

THE USFS IS PROHIBITED FROM ENGAGING IN AGENCY ACTION THAT IS OTHERWISE CONTRARY TO THE LAW

The APA compels courts to hold unlawful and set aside agency action that is "otherwise not in accordance with law"⁷⁵ As explained in previous sections of this comment, the USFS risks having their rulemaking on this matter overturned in court under the ESA, the NHPA, NEPA, and the APA. In order to rectify these issues, the USFS should contact the U.S Fish and Wildlife Service and the National Marine Fisheries Service to make sure they have up to date information regarding the existence of listed species and critical habitat within the Tongass National Forest.

75 5 U.S. Code [sect] 706

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USFS would also be wise to reconsider their determination that an undertaking is not being considered in relation to this rulemaking, to attempt to do a better job consulting with Alaska Native Tribes and start work on a high-level cultural resources survey and a supplemental DEIS.

The USFS has no requirement under NEPA to conduct a worse case analysis,⁷⁶ but NEPA does require consideration of reasonably foreseeable consequences of the agency action⁷⁷ as well as mitigation⁷⁸ and those requirements have not been met in this case, as the USFS has failed to consider reasonably foreseeable consequences related to several aspects of this rulemaking, especially related to how the predicted consequences of the action alternatives will change if the 2016 Forest Plan is amended after this rulemaking has already occurred. Finally, The Forest Service will have an easier time demonstrating that there is a rational connection between the facts found and the choice made under the APA if the FEIS includes a balancing of all the relevant factors involved in this rulemaking, which can be implemented through a cost benefit analysis.

CONCLUSION

Though the USFS did a commendable job in selecting the goals it decided to focus on furthering in this rulemaking as laid out in the key issues in the DEIS, ultimately the USFS has done an unsatisfactory job demonstrating that the preferred alternative is compatible with the goals the USFS has laid out. The DEIS appears to be a rushed attempt to remove the protections of the Roadless Rule in order to pave the way for the rollback of the 2016 Forest Plan's transition to new-growth timber harvest at the bequest of the timber industry and the State of Alaska. The manner in which this rulemaking was conducted brings up concerns that the agency may be

76 Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)

77 40 CFR [sect] 1502.22.

78 40 CFR [sect] 1502.2; 40 CFR [sect] 1502.3.

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under pressure from certain interest groups to take action that is not actually in the public interest. The lack of a cost-benefit analysis, the disregard of the agency's duties pertinent to the Endangered Species Act, the agency's failure to act in accordance with its obligations under the National Historic Preservation Act, and the omission of a mitigation and monitoring plan point to the overall incomplete nature of this DEIS.

It is simply not a rational decision to risk damage to Southeast Alaska's more successful industries like recreation, tourism, fishing, and subsistence uses, along with non-economic values like the existence value of

the largest intact temperate rainforest in the world, in order to prolong the life of the area's struggling timber industry

This comment has laid out a multitude of suggestions that the USFS should follow in order to more completely inform its decision making process. Implementing these suggestions will lead the USFS to a more complete understanding of the issues facing the Tongass and the people who depend on it and will inform a better final agency action. It will also prevent the USFS from having the hard work put into this rulemaking set aside in future litigation.

Thank you for your time in considering the suggestions laid out in this comment and thank you for your dedication to guiding the future of the Tongass.

[Position]