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## Alternative Reasoning: Why the Ninth Circuit Should Have Used NEPA in Setting Aside the Tongass Exemption

Katherine Reynolds

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# Alternative Reasoning: Why the Ninth Circuit Should Have Used NEPA in Setting Aside the Tongass Exemption

Katherine Reynolds\*

*After over a decade of controversy and litigation, the Ninth Circuit finally shielded the Tongass National Forest from road construction and timber harvest. In *Organized Village of Kake v. U.S. Department of Agriculture*, the court's en banc panel struck down the Forest Service's decision to exempt the Tongass from the extensive protections granted to all other national forests via the Roadless Rule. Though many welcomed the decision as an environmental victory, the heart of the Ninth Circuit's analysis focused on the court's interpretation of a procedural issue; the opinion sidestepped any discussion of substantive environmental law, despite the fact that the case would decide the fate of the nation's largest, largely undeveloped, forest.*

*This Note examines the court's analysis, rooting the opinion in the history of the Forest Service as an agency with extensive discretion, and the relationship that agency has had with the Tongass and its timber. Given this history, this Note argues that the Ninth Circuit should have decided the case based on environmental law and not administrative procedure, ideally resulting in a clearer, more environmentally protective holding.*

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## INTRODUCTION

White River is the nation’s most visited national forest.<sup>1</sup> Over 9 million people trek there each year, and though the forest covers only 2.3 million acres, it boasts world-renowned winter sports opportunities as well as 8 wilderness areas and 2500 miles of trails.<sup>2</sup> The Tongass National Forest, on the other hand, is more than seven times the size of White River at almost seventeen million acres.<sup>3</sup> It contains Alaska’s capital city of Juneau, an incredible nineteen

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1. *White River National Forest*, U.S. FOREST SERV., <http://www.fs.usda.gov/whiteriver> (last visited Nov. 7, 2015).

2. *Id.*

3. *Tongass National Forest*, U.S. FOREST SERV., [http://www.fs.usda.gov/detail/r10/about-region/overview/?cid=fsbdev2\\_038671](http://www.fs.usda.gov/detail/r10/about-region/overview/?cid=fsbdev2_038671) (last visited Nov. 7, 2015).

wilderness areas, and glaciers that slide slowly across the landscape.<sup>4</sup> Despite its size and offerings, however, the Tongass only receives approximately one million yearly guests, less than a quarter of White River's.<sup>5</sup> This relative dearth of tourists might be due in part to the Tongass's inaccessibility.

The Tongass's size and recreational opportunities belie the challenge of getting to the forest itself. Although the Tongass makes up nearly 90 percent of southeast Alaska, visitors can access only three of its communities—Hyder, Haines, and Skagway—via the road system residents of the lower forty-eight states use every day.<sup>6</sup> Juneau remains the largest North American community unconnected to a continental highway, with efforts to build such a connection stalled by controversy and economic concerns.<sup>7</sup> For these reasons, most visitors arrive in the Tongass via the water, on cruise ships or an Alaska Marine Highway Ferry.<sup>8</sup> White River, conversely, is just a few hours' drive west of Denver and hosts a portion of Interstate 70.

Upon arrival in the Tongass, travel remains comparatively difficult. Within its borders, White River is equipped with 1900 miles of Forest Service roads as well as a handful of smaller U.S. highways.<sup>9</sup> The Tongass, on the other hand, contains 3640 miles of Forest Service roads—less than twice the length of White River's—despite the seven-fold difference between the sizes of the two forests.<sup>10</sup> Thus, getting around the forest requires unorthodox means. Instead of buses, organized boat trips transport visitors to the Tongass's popular Misty Fjords, and helicopters carry tourists to the Juneau ice fields.<sup>11</sup> In 2015 the Tongass regional tour company Allen Marine Tours introduced a hovercraft tour to bring visitors to the Taku Glacier.<sup>12</sup> Float planes are necessary for transport to more remote communities, such as the town of Gustavus to the east

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4. *Tongass National Forest: Wilderness*, U.S. FOREST SERV., <http://www.fs.usda.gov/detail/tongass/specialplaces/?cid=stelprdb5393510> (last visited Nov. 7, 2015).

5. See ALASKA WILDERNESS LEAGUE, INTRODUCING THE TONGASS NATIONAL FOREST (2014), <http://www.alaskawild.org/wp-content/uploads/2014/10/Introducing-the-Tongass-FINAL.pdf>; *Tongass National Forest: Special Places*, U.S. FOREST SERV., <http://www.fs.usda.gov/attmain/tongass/specialplaces> (last visited Nov. 7, 2015); see also *Tourism in the Tongass*, SITKA CONSERVATION SOC'Y: BLOG (July 21, 2014), <http://www.sitkawild.org/tourisminthetongass>.

6. *Tongass National Forest*, *supra* note 3.

7. See *Juneau Access Improvements*, ALASKA DEP'T. TRANSP. & PUB. FACILITIES, [http://dot.alaska.gov/sereg/projects/juneau\\_access/index.shtml#](http://dot.alaska.gov/sereg/projects/juneau_access/index.shtml#) (last visited Nov. 7, 2015); Pat Forgey, *Controversial Road Project out of Juneau Delayed Again*, ALASKA DISPATCH NEWS (July 17, 2014), <http://www.adn.com/article/20140717/controversial-road-project-out-juneau-delayed-again>.

8. *Tongass National Forest*, *supra* note 3.

9. *White River: About the Forest*, U.S. FOREST SERV., <http://www.fs.usda.gov/main/whiteriver/about-forest> (last visited Nov. 7, 2015).

10. U.S. FOREST SERV., FOREST SERVICE ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT VOLUME 1, at 3-374 (2000), [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5057895.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5057895.pdf).

11. *White River: About the Forest*, *supra* note 9.

12. Lisa Phu, *Allen Marine Brings Tourists to Taku Glacier by Hovercraft*, KTOO PUB. MEDIA (May 4, 2015), <http://www.ktoo.org/2015/05/04/allen-marine-brings-tourists-taku-glacier-hovercraft/>.

of Glacier Bay<sup>13</sup>, as well as all to but 10 of the Forest Service's 150 Tongass Forest cabins.<sup>14</sup>

Many of the roads that do exist within the Tongass were originally built to facilitate timber harvest.<sup>15</sup> However, in *Organized Village of Kake v. U.S. Department of Agriculture*, a Ninth Circuit Court of Appeals en banc panel foreclosed future logging and road building in the forest.<sup>16</sup> In deciding the case, the court reinstated the Clinton-era Roadless Rule, which bans most road construction and timber harvest in inventoried roadless areas of national forests, effectively protecting 300,000 acres of Tongass forest land.<sup>17</sup> The decision reversed the court's own year-old holding supporting the Tongass Exemption, a Bush administration rule that released the forest from the Roadless Rule's protections.<sup>18</sup> Environmental advocacy groups cheered the 2015 decision as a victory, celebrating the end to the fourteen year-long battle over the Tongass' roadless areas.<sup>19</sup> The decision also fit into larger national debates regarding the proper management of roadless areas, how to best balance multiple uses on public lands, and how to resolve conflicts between national and regional decision making.

Despite the rich and complex substance at the case's core, like the original Ninth Circuit panel and the District Court for the District of Alaska before it, the en banc Ninth Circuit focused its opinion on the procedural claim that the Forest Service had acted improperly under the Administrative Procedure Act (APA) in implementing the Tongass Exemption.<sup>20</sup> While I agree with the court's decision to uphold the Roadless Rule because it offers lasting protection for the nation's largest national forest and removes it from the regional decision making that has long prioritized timber above other forest resources, the court should have grounded its decision in a different statute. This Note will argue that the Ninth Circuit should have instead decided the case based on the plaintiffs' claim under the National Environmental Policy Act (NEPA). This alternative reasoning would have allowed the court to engage more thoroughly and transparently with the Forest Service's failure to consider the environmental effects of its actions and would have resulted in a holding that was more protective of the environment. In ruling favorably on the plaintiffs'

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13. *White River: About the Forest*, *supra* note 9.

14. *Tongass National Forest: Maps & Details*, TRAVEL ALASKA, <https://www.travelalaska.com/Destinations/Parks%20and%20Public%20Lands/Tongass%20National%20Forest.aspx?tab=2> (last visited Nov. 7, 2015).

15. *White River: About the Forest*, *supra* note 9.

16. *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015).

17. *Id.* at 970; Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294).

18. See *Organized Village of Kake*, 795 F.3d at 959 *rev'g* *Organized Village of Kake v. U.S. Dep't of Agric.*, 746 F.3d 970 (9th Cir. 2014).

19. Holly Harris, *Huge Victory from the Ninth Circuit Protects the Tongass National Forest*, EARTHJUSTICE: EARTHJUSTICE BLOG (July 30, 2015), <http://earthjustice.org/blog/2015-july/huge-victory-from-the-ninth-circuit-protects-the-tongass-national-forest>.

20. See *Organized Village of Kake*, 795 F.3d at 966–67 (discussing the APA claim).

APA claim, the Ninth Circuit distorted the Forest Service's reasoning, attempting to apply the murky standard for judicial review of an agency policy change to the Forest Service's rationale in adopting the Tongass Exemption. In doing so, the court willfully ignored the political forces that likely motivated the Forest Service's decision. Furthermore, this muscular reading not only muddies the APA standard for future cases, but also opens the door to judicial policy making in an area where agency expertise has traditionally enjoyed judicial deference. At the same time, plaintiffs presented a valid claim under NEPA, with support from Ninth Circuit precedent. Evaluating the plaintiffs' NEPA claim would have allowed the court to make a more intellectually honest decision and better accomplish the majority's implied goal of forcing the Forest Service to openly grapple with the environmental considerations of its actions. At the same time, it would have strengthened future environmental plaintiffs' demands for the rigorous evaluation of environmental impacts, resulting in better environmental precedent overall.

Part I of this Note reviews the historical and legal framework that guides the Forest Service's decision making, as well as how Alaska's national forests, and the Tongass specifically, have been governed within that scheme. It also briefly describes the management of roadless areas, examining the policy leading up to the Roadless Rule, as well as the legal onslaught it faced both before and immediately after its implementation. Part II introduces and describes the case *Organized Village of Kake v. U.S. Department of Agriculture*, reviewing its facts as well as how the District Court of Alaska and the Ninth Circuit Court of Appeals decided it. Part III examines the plaintiffs' claims under the APA and NEPA, arguing that the majority's treatment of the plaintiffs' APA claim was poorly reasoned and less transparent than a treatment of the NEPA claim would have been. For those reasons, I argue that the Ninth Circuit should have instead decided the case based on NEPA, thereby leading to a more environmentally protective holding based firmly in precedent.

#### I. THE FOREST SERVICE: DISCRETION, TIMBER, AND CONTROVERSY

Through its history, the Forest Service has had broad discretion in how it manages the forest land under its control. Several statutes provide the agency with its jurisdiction and general objectives, though recent legislation focuses on the procedure by which the agency designs and implements forest management plans, as opposed to the substance of the plans themselves. For this reason, the Forest Service has been free to consistently prioritize timber harvesting over other potential forest land uses.

The Forest Service was created in 1905 when Theodore Roosevelt signed the Transfer Act, moving the management of national forests from the Department of the Interior to the Department of Agriculture.<sup>21</sup> Its first Chief

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21. Transfer Act of 1905, 16 U.S.C. §§ 472, 524, 554 (2012).

Forester was Gifford Pinchot, who had studied Europe's sustained-yield timber harvest techniques and began working in America in the 1890s to create an agency able to manage and harvest the forest with little constraint imposed by Congress.<sup>22</sup> His efforts were largely successful; the Forest Service has managed its goals and resources with little statutory restraint throughout its history.<sup>23</sup>

The first law governing the behavior of the Forest Service was the Organic Administration Act, passed in 1897, before the agency's transfer to the Department of Agriculture.<sup>24</sup> The Organic Act fit well with Pinchot's vision for the agency, giving whoever managed the forests the right to sell their timber and stating only that the forests should protect water flow conditions and provide adequate timber resources. The Act placed no constraint on how the forests should be managed.<sup>25</sup> The Weeks Act of 1911 authorized the Secretary of Agriculture to purchase tracts of land for the "regulation of the flow of navigable streams or for the production of timber," so long as the state containing the land consented to the purchase.<sup>26</sup> This gave the Forest Service the power to expand the land under its control while providing minimal limits on how the agency governed that land.

Within those broad directives, the agency's early management planning focused on timber, range, fire, watershed, and finance in the 1910s, later expanding to include recreational and wilderness planning in the 1920s.<sup>27</sup> Despite the growing number of interests to balance, the Forest Service remained largely free from conflict until the 1950s, when it was struck both by an increased demand for timber and rising recreational use.<sup>28</sup> In an attempt to account for these conflicting demands, Congress passed the Multiple-Use Sustainable-Yield Act (MUSYA) in 1960.<sup>29</sup> MUSYA stated that the forests were created for, and should be administered for, "outdoor recreation, range, timber, watershed, and wildlife and fish purposes."<sup>30</sup> To that end, the Forest Service was charged with giving each of those interests "due consideration"<sup>31</sup> to promote multiple uses and sustained yields of the forests' various resources.<sup>32</sup> However, Congress unhelpfully defined "multiple use" as "making

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22. Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 *DENV. U. L. REV.* 625, 632-33 (1997).

23. *Id.*

24. *Id.*; §§ 551, 473-478, 479-482.

25. § 475; Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 *OR. L. REV.* 1, 17-18 (1985).

26. § 515.

27. Wilkinson, *supra* note 25, at 24-26.

28. *Id.* at 28-29; U.S. FOREST SERV., *THE U.S. FOREST SERVICE—AN OVERVIEW 2*, [http://www.fs.fed.us/documents/USFS\\_An\\_Overview\\_0106MJS.pdf](http://www.fs.fed.us/documents/USFS_An_Overview_0106MJS.pdf) (last visited Apr. 27, 2016).

29. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (2012).

30. § 528.

31. § 529.

32. *Id.*

the most judicious use of the land for some or all of these resources.”<sup>33</sup> Congress further acknowledged that some land could be used for only some of the listed resources, weakening the multiple-use mandate.<sup>34</sup> Finally, the law did not specify any procedure for determining a balance of uses, but instead left that to the Service to decide.<sup>35</sup>

Left largely to its own devices in the wake of MUSYA, the Forest Service’s clear-cutting practices during the 1960s and early 1970s generated controversy.<sup>36</sup> That controversy led to the enactment of the National Forest Management Act (NFMA) in 1976, which remains the Forest Service’s chief planning statute.<sup>37</sup> NFMA requires the Forest Service to create plans for the management of each forest.<sup>38</sup> Plans set forth general guidelines, including descriptions of the forest’s multiple-use goals,<sup>39</sup> designations of land for timber harvest and permitted sale quantity,<sup>40</sup> and management requirements that apply to future planning decisions.<sup>41</sup> Although NFMA, in addressing the clear-cutting concerns that inspired it, imposes some substantive limits on where and how much timber might be harvested,<sup>42</sup> the statute is primarily focused on procedural standards for forest planning.

Despite the development of statutes guiding Forest Service actions, several themes have remained constant throughout the agency’s history. First, the agency continues to enjoy a large degree of discretion in how it balances its many goals. The laws that initially created and governed the Service had few substantive requirements, and even though NFMA imbues the agency with planning requirements, Congress has left the agency with significant discretion as to what those plans look like.<sup>43</sup> Second, this discretion has allowed the Forest Service to consistently prioritize timber harvesting over other management goals. One commentator tied the Forest Service’s focus on timber to the ease with which the agency can measure and evaluate timber cutting relative to other goals such as conservation.<sup>44</sup> Another commentator attributed the dearth of conservation goals in the agency’s planning to the fact that

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33. *Id.*

34. *See* § 531.

35. George C. Coggins & Parthenia B. Evans, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411, 422 (1982).

36. *See* Arnold W. Bolle, *The Bitterroot Revisited: A University Re-View of the Forest Service*, 10 PUB. LAND & RESOURCES L. REV. 1, 5 (1989).

37. Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 16 (1997).

38. National Forest Management Act of 1976 §§ 5, 6, 16 U.S.C. §§ 1602, 1604 (2012).

39. 36 C.F.R. § 219.11(b) (2015).

40. 16 U.S.C. §§ 1604(k), 1611; 36 C.F.R. §§ 219.14, 219.16.

41. 36 C.F.R. § 219.13–219.27.

42. §§ 1604(g)(3)(E)(i)–(iii), 1611(a).

43. Stephanie M. Parent, *The National Forest Management Act: Out of the Woods and Back to the Courts?*, 22 ENVTL. L. 699, 700 (1992).

44. Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 25 (2009).



“Forest Rangers have been inculcated with the notion that timber production is the highest management priority.”<sup>45</sup> Regardless of the driver—measurability, normative goals, or something else—the Forest Service has continued to balance its many interests and resources so that timber comes out on top.

*A. The Forest Service in Alaska*

President Roosevelt made the Tongass a national forest by proclamation in 1907, only two years after the Forest Service itself was created. This timeline produces a unique connection between the two entities—unlike most other forests in the West, the Tongass had not been subjected to extensive resource utilization before it came under Forest Service management.<sup>46</sup> Even when the Forest Service became its governing agency, the activities that impacted the Tongass were mainly timber and road construction.<sup>47</sup>

The Tongass’s history is also intertwined with Alaska’s own. Alaska began applying for statehood five years after the Tongass was created. In the mid-1910s, shortly after the first application for statehood, the Forest Service began its attempts to establish a pulp industry in the southeast portion of the territory, the majority of which lies within the Tongass.<sup>48</sup> However, high shipping costs and barriers to breaking into the market meant initial efforts were ill fated: each of the ten long-term timber contracts the Forest Service signed up until 1927 ended in default.<sup>49</sup>

Towards the end of World War II, a change in conditions made the development of a pulp industry in the region a more promising choice: Newspapers nationwide were suffering from an acute shortage.<sup>50</sup> Prompted by this scarcity, Forest Service officer Frank Heintzleman signed a successful, fifty-year contract between the agency and Ketchikan Pulp Company in 1951.<sup>51</sup> To encourage the company to sign the contract, the Forest Service guaranteed the mill enough timber to operate for fifty years.<sup>52</sup> That same year, postwar Japan—having lost access to timber resources in both Manchuria and Sakhalin—approached the Forest Service about buying Alaskan timber.<sup>53</sup> The Forest Service signed a fifty-year contract with the Japan-financed Alaska Pulp Development Company,<sup>54</sup> and agreed to provide almost fifty billion board feet

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45. Coggins & Evans, *supra* note 35, at 418.

46. LAWRENCE RAKESTRAW, A HISTORY OF THE UNITED STATES FOREST SERVICE IN ALASKA, at v (photo. reprint 2002) (1981).

47. U.S. FOREST SERV., *supra* note 10, at 3-371.

48. KATHIE DURBIN, TONGASS: PULP POLITICS AND THE FIGHT FOR THE ALASKA RAIN FOREST 12 (2d ed. 2005).

49. *Id.*

50. Martin Nie, *Governing the Tongass*, 36 ENVTL. L. 385, 396 (2006).

51. *Id.*

52. DURBIN, *supra* note 48, at 10.

53. RAKESTRAW, *supra* note 46, at 128.

54. *Id.*

of timber over the course of the contract.<sup>55</sup> Heintzleman, who oversaw the execution of both contracts, had long supported timber as the key to promoting economic development in the region.<sup>56</sup> And the mills did seem to symbolize a new phase of the region's development; in 1954, the same year that the Ketchikan Pulp Company opened its mill, the town's red light district, previously prosperous, was shut down.<sup>57</sup> Five years later, an even more auspicious event took place when Alaska finally joined to the union.<sup>58</sup>

After Congress passed MUSYA in 1960, the Alaska Forest Service began writing its first multiple-use management plan.<sup>59</sup> However, when the plan was released in 1964 it tilted heavily toward one use: ensuring the sale of 824 million board feet<sup>60</sup> of Tongass timber each year. The plan made no mention of reserving land for wildlife habitats or of creating stream buffers to protect salmon runs near timber mills.<sup>61</sup> Although the 1960s saw an increase in complaints and alarm regarding the effect of timber harvest on the land, including harmful effects on rivers and salmon in the region,<sup>62</sup> little changed in logging practices.<sup>63</sup> The 1970s, however, saw change begin to brew, as timber management in the Tongass experienced "a series of shocks and readjustments."<sup>64</sup> According to one commentator's analysis, various forces prompted these readjustments, including new environmental laws and a shift in the public's desire from large timber sales, long-term contracts, and economic stability toward the preservation of old-growth forests.<sup>65</sup>

The Alaska National Interest Lands Conservation Act (ANILCA) represented a culmination of those changes.<sup>66</sup> Signed into law by President Jimmy Carter in 1980, ANILCA provided for the protection of 104 million acres, including the designation of 5.4 million acres of the Tongass as wilderness.<sup>67</sup> Perhaps as the price for this rash of conservation, the act also included a provision that required the Forest Service to make 4.5 billion board

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55. DURBIN, *supra* note 48, at 22.

56. *Id.* at 12.

57. *Id.* at 19.

58. An Act to Provide for the Admission of the State of Alaska into the Union, Pub. L. No. 85-508, 72 Stat. 351 (1958).

59. DURBIN, *supra* note 48, at 27.

60. One measurement used for timber is board feet, with each board foot representing a one-inch thick square of wood, twelve inches long by twelve inches wide. Paul Oester & Steve Bowers, *Measuring Timber Products Harvested from Your Woodland*, in THE WOODLAND WORKBOOK 2 (2009), <http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/13600/EC1127.pdf>.

61. DURBIN, *supra* note 48, at 27.

62. DURBIN, *supra* note 48, at 27-29.

63. *Id.*

64. Rakestraw, *supra* note 46 at 174.

65. *Id.*

66. Nie, *supra* note 50, at 386.

67. *Id.* at 400.

feet of timber available for logging each decade.<sup>68</sup> ANILCA also included a “no-more clause” which stated that the act should be read as affecting the proper balance between conservation and other uses of the Tongass, and thus prevented the need for any more land to be designated for conservation purposes.<sup>69</sup> Therefore, despite the swaths of land that the act preserved, ANILCA nonetheless attempted to halt future preservation and ensured that making the timber sale quota would remain the forest’s top priority.

Passed in 1990, the Tongass Timber Reform Act (TTRA) was intended to correct this imbalance in the Forest Service’s management priorities.<sup>70</sup> It did away with the 4.5 billion board feet harvest requirement, and replaced it with language which instead referred to a timber supply sufficient to meet annual and market demand for each planning cycle.<sup>71</sup> The law also modified the long-term contracts that first stimulated development in the area, no longer allowing the contract holders to receive pricing advantages,<sup>72</sup> and required that contracts were drafted with reference to environmental and forestry laws.<sup>73</sup>

Many of the issues seen in the Forest Service’s historical approach to land management—prioritization of timber harvesting and a high degree of discretionary authority—are on full display in governance of the Tongass. Additional statutory requirements, such as those described above, provide little resolution, and arguably made the Tongass even more difficult to properly govern. For these reasons, management of the Tongass Forest has been described as “one of the most divisive, intractable, high-profile, and longest running environmental conflicts” in the nation.<sup>74</sup>

### *B. Roadlessness in the National Forests*

Debate over the management of roadless areas on federal lands came long before debate over the Roadless Rule. Initially protected on an individual, area-by-area basis, roadless areas were later catalogued by several controversial federal surveys before President Clinton granted them the Roadless Rule’s sweeping protection. In determining the scope of the Roadless Rule, the Forest Service gave special attention to the possible effects of applying the rule within the Tongass, considering factors unique to the forest such as its size, level of development, and ecological fragility.

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68. *Id.* at 401; Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, § 705, 94 Stat. 2371, 2420 (repealed and replaced by Tongass Timber Reform Act of 1990, Pub. L. No. 101-626, § 101, 104 Stat. 4426, 4426, as codified at 16 U.S.C. § 539d(a) (2012)).

69. 16 U.S.C. § 3101(d).

70. Nie, *supra* note 50, at 403.

71. Tongass Timber Reform Act of 1990, Pub. L. No. 101-626, § 101, 104 Stat. at 4426 (amending 16 U.S.C. § 539d(a) (1990)).

72. § 301(c)(8).

73. § 301(c)(1).

74. Nie, *supra* note 50, at 400.

President Clinton promulgated the Roadless Rule eight days before the end of his final term in office, ending a decades-long period of controversial and aborted attempts at identifying and protecting roadless areas.<sup>75</sup> Prior to the Roadless Rule, special attention and protections were given to roadless areas on an individual basis.<sup>76</sup> In the late 1960s, however, this piecemeal method of managing roadless areas gave way to a more systematic management approach following the passage of the Wilderness Act.<sup>77</sup>

The Wilderness Act provides the highest level of protection by prohibiting the construction of temporary or permanent roads, commercial uses, motorized transport, and structures to lands poetically described in the Act as “untrammeled by man, where man himself is a visitor.”<sup>78</sup> The Act was passed in 1964 after nine years of debate<sup>79</sup> and faced early opposition from lumber, mining, power, irrigation developers, as well as the National Park Service and the Forest Service.<sup>80</sup> The Forest Service was especially worried that a wilderness bill would interfere with the agency’s multiple-use management policy.<sup>81</sup> Once the Wilderness Act was finally enacted, however, it designated 9.1 million acres<sup>82</sup> of land already labeled as “wilderness,” “wild,” or “canoe” as federally protected wilderness area, and outlined a procedure that Congress could use to grant additional areas the same wilderness status.<sup>83</sup> The Wilderness Act also instructed the Secretaries of Agriculture and the Interior to study the remaining primitive areas under their control to decide which lands were suitable for wilderness designation.<sup>84</sup>

Three years later, the Forest Service undertook an effort to inventory all roadless areas larger than 5000 acres as well as lands adjacent to the designated areas.<sup>85</sup> This study, the Roadless Area Review and Evaluation (RARE I), voluntarily went beyond the study of already-designated primitive areas

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75. The Forest Service published the Roadless Rule in the *Federal Register* on January 12, 2001, and President Clinton’s term ended on January 20 of the same year. Sandra Zellmer, *The Roadless Area Controversy: Past, Present, and Future*, in PROC. ROCKY MOUNTAIN MINERAL L. FORTY-EIGHTH ANN. INST. 21-2 (2002) (reviewing the history of roadless area management in the United States).

76. See Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 296 (1966) (discussing the initial steps toward wilderness protection as seen in management of the Gila Wilderness and Superior National Forest).

77. Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2012).

78. § 1133(c).

79. See McCloskey, *supra* note 76, at 298–300.

80. *Id.* at 298.

81. *Id.*

82. Kenneth D. Hubbard et al., *The Wilderness Act’s Impact On Mining Activities: Policy Versus Practice*, 76 DENV. U. L. REV. 591, 591 (1999).

83. § 1132(a).

84. § 1132(b).

85. George C. Coggins & Robert L. Glicksman, *RARE I, II, and III*, 3 PUB. NAT. RESOURCES L. § 25:9 (2nd ed. 2015).

mandated by the Wilderness Act.<sup>86</sup> Concluded in 1972, RARE I identified fifty-six million roadless acres that might be suitable for wilderness designation.<sup>87</sup> However, shortcomings in the RARE I inventory process and litigation concerning the study's compliance with NEPA caused the Forest Service to disregard its results and initiate a second study, RARE II.<sup>88</sup> Under RARE II, sixty-two million acres were identified as roadless and suitable for wilderness designation.<sup>89</sup> Once again, however, litigation concerning RARE II's failure to consider a sufficient number of alternatives, in violation of NEPA, prevented enactment of the wilderness designations that it recommended.<sup>90</sup> A third RARE was proposed by the Reagan administration, but Congress enacted a series of state wilderness bills which rendered another RARE unnecessary.<sup>91</sup> In 1983, the Forest Service also revised regulations so that regional forest management plans were required to consider roadless areas, meaning that they spent the remainder of the twentieth century largely governed by NFMA.<sup>92</sup>

President Clinton, however, had different plans for roadless areas. Several months after the publication of the Interim Roads Rule, which temporarily halted all decisions regarding road construction and reconstruction in national forest "unroaded" areas,<sup>93</sup> President Clinton proposed a new protective regime. At the Reddish Knob Overlook of the George Washington and Jefferson National Forest in Virginia, he publically announced his proposal for what would become the Roadless Rule.<sup>94</sup> In his speech, President Clinton connected his efforts to those of Theodore Roosevelt and Gifford Pinchot's 1908 Conference of Governors, which focused largely on national conservation efforts.<sup>95</sup> Linking that historic event to his own announcement underscored the

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86. *Id.*; Heather S. Fredriksen, *The Roadless Rule that Never Was: Why Roadless Areas Should Be Protected Through National Forest Planning Instead of Agency Rule Making*, 77 U. COLO. L. REV. 457, 462 (2006).

87. Zellmer, *supra* note 75 at 21-1, 21-9.

88. Wilkinson & Anderson, *supra* note 25, at 349-50.

89. *Id.* (describing individual items of lands under inventory).

90. *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (holding that the EIS for RARE II violated NEPA for failing to clearly state the consequences of releasing thirty-six million acres to multiple-use management as RARE II recommended).

91. Fredriksen, *supra* note 86, at 463; Kirsten Rønholt, *Where the Wild Things Were: A Chance to Keep Alaska's Challenge of the Roadless Rule Out of the Supreme Court*, 29 ALASKA L. REV. 237, 239 (2012).

92. Fredriksen, *supra* note 86, at 461.

93. Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas; Interim Rule, 64 Fed. Reg. 7290 (Feb. 12, 1999).

94. David E. Sanger & Sam Howe Verhovek, *Clinton Proposes Wider Protection for U.S. Forests*, N.Y. TIMES (Oct. 14, 1999), <http://www.nytimes.com/1999/10/14/us/clinton-proposes-wider-protection-for-us-forests.html> (references that from the beginning Alaskan Senators were against the Roadless Rule's application to the Tongass).

95. Press Release, White House Office of the Press Sec'y, Remarks by the President at "Roadless" Lands Event (Oct. 13, 1999), <https://clinton4.nara.gov/CEQ/991013.html>.

national-scale management both his and Pinchot's plans emphasized, as well as the break from the previous management regime it represented. Speaking more directly, President Clinton also emphasized the virtues of roadlessness, including recreation, wildlife, and water quality.<sup>96</sup> He also took a moment to address the concerns regarding timber harvest and economic consequences arising in response to this new program, emphasizing that only 5 percent of the nation's timber came from national forests.<sup>97</sup> President Clinton also attempted to reconcile the conservationist and economic perspectives, stating that he was determined "to prove that environmental protection and economic growth can, and must, go hand in hand."<sup>98</sup>

The same day that he announced the Roadless Rule, President Clinton sent a memorandum to the Secretary of Agriculture instructing the Forest Service to develop the plan he had described.<sup>99</sup> The Forest Service complied, and after two years of study and planning—eight days before President Clinton's term ended—the Forest Service published the final Roadless Rule record of decision (ROD) in January of 2001.<sup>100</sup> The Roadless Rule would prohibit road construction, reconstruction, and timber harvest in the 58.5 million inventoried roadless acres within national forests.<sup>101</sup> In the ROD, the Forest Service echoed the sentiments that President Clinton expressed at Reddish Knob, stressing the myriad environmental values of preserving roadless areas.<sup>102</sup> The agency also justified the need for planning on a national level, stating that a nationwide prohibition was essential due to the fact that regional forest management plans might fail to appreciate the importance of preserving roadless areas.<sup>103</sup> In addition to highlighting the protections the Roadless Rule offered roadless areas, the Forest Service gave two more pragmatic rationales for its implementation, appealing to budgetary constraints on the Forest Service's ability to maintain existing roads, and the high cost of litigation over roadless area management.<sup>104</sup>

Through the entirety of the Roadless Rule study and planning process, the Forest Service acknowledged the "unique" nature of the Tongass.<sup>105</sup> The Tongass is so vast it is comparable in size to the remainder of the national forest system.<sup>106</sup> It is also naturally fragmented, making it more sensitive to the consequences of artificial fragmentation connected with road construction, such

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96. *Id.*

97. Sanger & Verhovek, *supra* note 94.

98. White House Office of the Press Sec'y, *supra* note 95.

99. *Id.*

100. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

101. *Id.* at 3245.

102. *See id.*

103. *Id.* at 3246.

104. *Id.* at 3244.

105. *Id.* at 3254.

106. U.S. FOREST SERVICE, *supra* note 10, at 3-371.

as wildlife population isolation and extinction.<sup>107</sup> Furthermore, the Tongass lacks the history of multiple-use management common to most forests in the contiguous states, and what multiple-use management the Tongass has experienced is tied to roading and timber harvest.<sup>108</sup> Finally, as a largely undeveloped area, the Tongass's ecosystem remains relatively healthy and embodies a feeling of wilderness which draws tourists and visitors.<sup>109</sup>

For these reasons, the Tongass alone was given special consideration during the Roadless Rule decision-making process.<sup>110</sup> Specifically, the Forest Service considered four possible alternatives for how the Roadless Rule might apply to the Tongass.<sup>111</sup> First, the Tongass might have been subject to the same Roadless Rule regulations as all other national forests, with optional mitigation measures to ease the transition for forest-dependent communities.<sup>112</sup> Second, the Tongass might have been completely exempt from the rule, with management continuing under previous land management plans.<sup>113</sup> Third, the Tongass Selected Areas alternative would have applied roadless prohibitions only within specifically designated areas of the Forest.<sup>114</sup> Fourth, the Tongass Deferred alternative would have delayed any decision as to what protections the forest would be granted until 2004.<sup>115</sup> The Service selected the first option, applying roadless protections to the Tongass as the protection would be applied throughout the nation. At the conclusion of the ROD, the Forest Service recognized that applying the Roadless Rule to the Tongass would have negative effects on local communities that bore a "disproportionate share of the burden."<sup>116</sup> Regardless, the Forest Service believed such economic concerns were outweighed by the environmental benefits of the rule,<sup>117</sup> ultimately choosing not to exempt the Tongass.<sup>118</sup>

### C. Litigation Over the Roadless Rule

Attempts to challenge the Roadless Rule came before the law was finalized, and continued for years after. Suits filed against the Roadless Rule alleged that it violated federal statutes, and President Bush both halted the Rule's implementation and replaced it with a less environmentally protective substitute. After years of litigation, however, President Bush's rule was struck down, and the Roadless Rule was upheld.

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107. *Id.* at 3-372.

108. *Id.* at 3-371.

109. *Id.* at 3-372 to 3-373.

110. 66 Fed. Reg. at 3262.

111. *Id.*

112. *Id.* at 3262-63.

113. *Id.* at 3263.

114. *Id.*

115. *Id.*

116. *Id.* at 3267.

117. *Id.*

118. *Id.* at 3266.

In 1999 the Kootenai Tribe of Idaho and Idaho—the state with the second-most roadless acres (9.3 million) after Alaska<sup>119</sup>—attempted to prevent the Forest Service from releasing a Roadless Rule draft Environmental Impact Statement (EIS).<sup>120</sup> They alleged that the Forest Service had failed to provide the opportunity for them to participate in the rule-making process.<sup>121</sup> The District Court for the District of Idaho dismissed the claim as not ripe.<sup>122</sup> On January 8, 2001, the Kootenai Tribe and several other plaintiffs filed suit again, asking for the court to issue an injunction against the rule.<sup>123</sup> The court held that issuing a preliminary injunction would be premature based on actions taken by President Bush following the Rule’s publication.<sup>124</sup> Specifically, upon entering office, the Bush administration had halted implementation of the Roadless Rule until the administration reviewed it,<sup>125</sup> so the rule was not actually implemented until May of 2001.<sup>126</sup> However, once the Bush Administration review was complete, the Idaho District Court issued a permanent injunction against the Rule.<sup>127</sup> That injunction was in place for less than two years before the Ninth Circuit reversed it and reinstated the Roadless Rule at the end of 2002.<sup>128</sup>

The state of Wyoming also sued the Forest Service over the Roadless Rule, asking the District Court for the District of Wyoming to grant an injunction against the Rule.<sup>129</sup> In July of 2004, Judge Brimmer complied, opening his opinion by referring to the Roadless Rule’s passing as “a vehicle smelling of political prestidigitation.”<sup>130</sup> Environmental groups appealed the decision as Defendant-Intervenors.<sup>131</sup> However, before the Tenth Circuit could reach a decision, the State Petitions Rule—which replaced the Roadless Rule—was published in the Federal Register.<sup>132</sup> Like the Roadless Rule, the State Petitions Rule was intended to manage roadless areas, but deliberately

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119. Kootenai Tribe of Idaho v. Veneman, 142 F. Supp. 2d 1231, 1234 (D. Idaho 2001).

120. Idaho et al. v. U.S. Forest Service, CV99-611-N-EJL, slip op. (D. Idaho Feb. 18, 2000) (memorandum decision and order).

121. *Id.*

122. Kootenai Tribe of Idaho, 142 F. Supp. 2d at 1235.

123. *Id.* at 1231.

124. *Id.*

125. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001) (directing that proposed or final regulations should not be sent to the Office of the Federal Register until a President-appointed agency or department head could review and approve the regulation).

126. Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1165 (2004).

127. Kootenai Tribe of Idaho v. Veneman, No. CV01-10-N-EJL, 2001 WL 1141275, at 2\*-3\* (D. Idaho 2001).

128. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1105-06 (9th Cir. 2002).

129. Wyoming v. U.S. Dep’t of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003).

130. *Id.* at 1202.

131. *Id.* at 1211.

132. Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654, 25,655 (May 13, 2005).



eliminated the former's blanket, nationwide protection.<sup>133</sup> Instead, the State Petitions reverted roadless area management to the previously used forest management plans and allowed individual states to petition for the ability to manage national forests within their boundaries.<sup>134</sup> With its implementation replacing the Roadless Rule, the Tenth Circuit found that the appeal was moot, and vacated the lower court's judgment.<sup>135</sup>

In the meantime, the State Petitions Rule faced its own legal challenges. The states of California, New Mexico, and Oregon filed a complaint alleging that the enactment of the State Petitions Rule violated NEPA and the APA.<sup>136</sup> Numerous environmental plaintiffs filed similar charges in October of that same year.<sup>137</sup> The two cases were consolidated and decided in the plaintiffs' favor by the District Court for the Northern District of California.<sup>138</sup> The court reasoned that because the State Petitions Rule effectively repealed the Roadless Rule and replaced it with a less protective regime, it should have been accompanied by a NEPA review as well as Endangered Species Act (ESA) consultation<sup>139</sup> to evaluate its potential environmental effects.<sup>140</sup>

Following this reinstatement of the Roadless Rule, the state of Wyoming renewed its challenge against the rule.<sup>141</sup> Judge Brimmer struck down the Roadless Rule again, writing an impassioned opinion in which he accused the California federal district court of "surreptitiously re-institut[ing] the 2001 Roadless Rule."<sup>142</sup> He wrote of the Roadless Rule's numerous failures to comply with NEPA and the Wilderness Act, expressing his "shock" that the California court would reinstate a policy already deemed invalid.<sup>143</sup>

The District of Wyoming decision, however, would be the last decision opposed to the Roadless Rule. In 2009 the Ninth Circuit affirmed the Northern District of California decision to reinstate the Roadless Rule.<sup>144</sup> When the Forest Service and environmental groups appealed the Wyoming court's decision, the Tenth Circuit reversed and remanded, ordering the lower court to vacate its injunction against the Roadless Rule.<sup>145</sup> Although Wyoming

133. *Id.* at 25,654.

134. *Id.* at 25,655.

135. *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1210 (10th Cir. 2005).

136. Complaint for Declaratory and Injunctive Relief at 13-16, *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006) (No.05-cv-03508), 2005 WL 2613535. The state of Washington later intervened as a plaintiff. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009) (Nos. 07-15613, 07-15614, 07-15695), 2007 WL 3081497.

137. *Id.*

138. *Id.*

139. The ESA requires federal agencies to consult with the Secretary of the Interior to ensure that the agency's actions are unlikely "to jeopardize the continued existence of any endangered species or threatened species" unless the agency has been granted an exemption. 16 U.S.C. § 1536 (2012).

140. *California ex rel. Lockyer*, 459 F. Supp. 2d 874, 910-11.

141. *Wyoming v. U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309, 1318 (D. Wyo. 2008).

142. *Id.*

143. *Id.* at 1352.

144. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009).

145. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1220 (10th Cir. 2011).

attempted to appeal the decision in a final bid to end the Rule's implementation, the Supreme Court denied certiorari.<sup>146</sup> Thus, the Tenth Circuit's decision to uphold the Roadless Rule represented the last word on the issue.

#### *D. The Roadless Rule in the Tongass*

Like the Roadless Rule's national implementation, the Roadless Rule's applicability to the Tongass was also called into question by a state challenger. After settling with plaintiffs in the ensuing litigation, the Forest Service proposed and adopted a new rule exempting the Tongass from the Roadless Rule.

The state of Alaska filed suit against the Roadless Rule soon after it went into effect,<sup>147</sup> alleging that it violated several federal laws, including NEPA, the APA, NFMA, ANILCA, and the TTRA.<sup>148</sup> Unlike the suits outlined above, however, the parties in the Alaska litigation did not initially reach the courthouse, instead entering into a settlement agreement.<sup>149</sup>

As part of the settlement agreement, the Forest Service agreed to publish an advance notice of the proposed rulemaking to permanently exempt Alaska's Tongass and Chugach National Forests from the Roadless Rule, as well as a proposed temporary regulation exempting the Tongass National Forest from the Roadless Rule.<sup>150</sup> That temporary exemption would remain in place until the Forest Service could make any permanent amendments to the original Roadless Rule.<sup>151</sup> Despite the proposed permanent exemption, the Forest Service made no firm commitments about whether the Tongass would be permanently exempted from the Roadless Rule.<sup>152</sup> A little over a month later, the Forest Service published an advance notice of proposed rulemaking, stating its intention to amend the Roadless Rule to temporarily exempt the Tongass as promised.<sup>153</sup> After an extended notice and comment period, the Forest Service published a second ROD temporarily exempting the Tongass to remain in effect until the Department of Agriculture "promulgates a subsequent final rule concerning the application of the roadless rule within the state of Alaska."<sup>154</sup>

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146. *Wyoming v. U.S. Dep't of Agric.*, 133 S. Ct. 417 (2011) (denying cert.).

147. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960, 964 (D. Alaska 2011).

148. *Id.* at 964.

149. *Id.*

150. *Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska*, 68 Fed. Reg. 41,865 (July 15, 2003).

151. *See DEP'T OF AGRIC., Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska*, FEDERAL REGISTER (Dec. 30, 2003), <https://www.federalregister.gov/articles/2003/12/30/03-32077/special-areas-roadless-area-conservation-applicability-to-the-tongass-national-forest-alaska>.

152. *See id.*

153. *Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska*, 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294).

154. *Id.*

However, as the Tongass Exemption only counted insofar as it exempted the Tongass from the Roadless Rule, its legal status remained uncertain while courts determined the Roadless Rule's validity. Thus, despite its initial passage in 2003, it was not until the Ninth Circuit upheld the Roadless Rule in 2009 that the Tongass Exemption itself came under fire.

## II. *ORGANIZED VILLAGE OF KAKE V. U.S. DEPARTMENT OF AGRICULTURE*

In response to the promulgation of the Tongass Exemption, plaintiffs brought suit alleging that the rule failed to comply with both the APA and NEPA. Although the District Court for the District of Alaska initially held that the rule violated the APA, on appeal by defendant-intervenor state of Alaska the Ninth Circuit reversed and remanded the case before deciding to rehear it en banc. In its final opinion, the Circuit Court split six-to-five, with the narrowest possible majority overruling its previous opinion and deciding that the Tongass Exemption violated the APA.

The Organized Village of Kake (the Village) is a federally recognized tribal government located on the northwest corner of Kupreanof Island, within the boundaries of the Tongass.<sup>155</sup> The Village has acted as a plaintiff in several suits against federal agencies over the years, including a suit over the operation of salmon traps that the Supreme Court heard in 1959. In 2009 the Village, along with numerous other environmental advocacy plaintiffs, including Southeast Alaska Conservation Council, Natural Resources Defense Council, and the Center for Biological Diversity, filed suit against the Forest Service in the District Court for the District of Alaska. The complaint alleged that the Forest Service violated the APA by acting arbitrarily and capriciously when it enacted the Tongass Exemption, meaning the agency insufficiently justified its choice to change policies, and that the Forest Service violated NEPA by failing to identify reasonable alternatives in the Tongass Exemption's EIS.<sup>156</sup>

In deciding the case, Judge John W. Sedwick focused on whether the Forest Service acted arbitrarily and capriciously under the APA when it changed findings guiding its 2001 decision not to exempt the Tongass and its 2003 decision to do the opposite.<sup>157</sup> Judge Sedwick evaluated whether the reasons that the Forest Service put forth in support of the Tongass Exemption constituted a "rational basis" for the exemption.<sup>158</sup> These reasons included: socioeconomic costs incurred by southeast Alaska communities due to the Roadless Rule, the protection already granted to the Tongass by its forest plan, and the legal uncertainty the previous two years' litigation had caused.<sup>159</sup> As to

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155. See Complaint for Declaratory and Injunctive Relief at ¶ 6, *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960 (D. Alaska 2011) (No. 1:09CV00023), 2009 WL 6353156 (Dec. 22, 2009).

156. *Id.*

157. *Organized Vill. of Kake*, 776 F. Supp. 2d at 970.

158. *Id.* at 970.

159. *Id.*

economic concerns, the court criticized the mismatch between the exemption's temporary nature and the Service's stated concern about long-term job loss, highlighted measures in the Roadless Rule aimed at mitigating potential negative economic effects, and noted the lack of conclusive evidence regarding job loss related to the Roadless Rule.<sup>160</sup> Judge Sedwick was likewise skeptical of the agency's 2003 determination that the Tongass's roadless values could be sufficiently protected without the Roadless Rule, since the determination directly conflicted with the Forest Service's 2001 finding that the Tongass's Land Management Plan insufficiently protected the forest.<sup>161</sup> Finally, Judge Sedwick found that the temporary nature of the Tongass Exemption and the need for the agency to reach a permanent decision undermined the agency's argument that the exemption eliminated legal uncertainty.<sup>162</sup>

Based on this reasoning, the court held that the Forest Service failed to adequately justify the policy change from 2001 to 2003, because the agency's reasons were insufficient and often lacking evidentiary support.<sup>163</sup> The court held that the Tongass Exemption violated the APA, and correspondingly replaced it with the original Roadless Rule.<sup>164</sup> Notably, the court chose not to evaluate the plaintiffs' second claim that the Forest Service had violated NEPA in enacting the Tongass Exemption.<sup>165</sup>

The District Court's decision was appealed by the defendant-intervenor state of Alaska alone, with the Forest Service declining to participate in further litigation.<sup>166</sup> Initially, the Ninth Circuit reversed the District Court's holding, restoring the legitimacy of the Tongass Exemption.<sup>167</sup> In its opinion, the Ninth Circuit emphasized the court's role in evaluating, but not supplementing, the judgment of an agency while engaged in a review under the APA.<sup>168</sup> In response to this ruling plaintiffs sought an en banc rehearing from the Ninth Circuit, which granted their request on August 29, 2014.<sup>169</sup>

The en banc panel of eleven judges split six-to-five when deciding in favor of the plaintiffs. Judge Andrew Hurwitz, writing for the majority, addressed the plaintiffs' claim under the APA, finding that the Forest Service violated the APA when it failed to provide a reasonable explanation for implementing the Tongass Exemption in place of the Roadless Rule. Specifically, the majority found that the agency failed to adequately justify why, in 2003, it no longer believed that exempting the Tongass from the Roadless Rule would pose a

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160. *Id.*

161. *Id.* at 974.

162. *Id.* at 975.

163. *Id.* at 973.

164. *Id.* at 976–77.

165. *Id.* at 976.

166. *Id.* at 970.

167. *Id.*

168. *Id.* at 975.

169. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 765 F.3d 1117 (9th Cir. 2014) (agreeing to rehear the case en banc).

“prohibitive risk” to the forest.<sup>170</sup> As a remedy for this violation, the court set aside the Tongass Exemption and reinstated the Roadless Rule.

The majority’s opinion was followed by a concurrence and three dissents. The concurrence, authored by Judge Christen and joined by Chief Circuit Judge Thomas, echoed the majority’s analysis on the agency’s violation of the APA. Judge Callahan authored the first dissent, and began by revisiting the question of Alaska’s standing to find that, in contradiction to the majority’s view, the state had no standing on which to pursue its claim.<sup>171</sup> Judge Callahan then moved on to analyze the environmental plaintiffs’ APA claim, and accused Judge Sedwick and the judges in the majority of “set[ting] aside an agency decision because the reasons the agency proffered for the decision were not, from the viewpoint of the bench, ‘good’ enough.”<sup>172</sup> For Judge Callahan, the agency’s explanation satisfied all requirements and represented a reasonable balance of its statutory mandates.<sup>173</sup>

Judge Smith also dissented from the majority, and was joined by Judges Kozinski, Tallman, Clifton, and Callahan. Judge Smith’s dissent emphasized the political nature of the agency’s change in policy, reframing the Tongass Exemption as the Forest Service’s attempt to follow the instructions of the Bush administration.<sup>174</sup> In this context, the dissenting judges held that the agency was within its discretion when it rebalanced the facts in 2003 and that the reasons it supplied in support of the Tongass Exemption satisfied the requirements of the APA.<sup>175</sup>

A final dissent by Judge Kozinski was only a single paragraph in length, and was joined by no other judges.<sup>176</sup> Less moved by the facts of the case itself, Judge Kozinski wrote “to note the absurdity” of the court deciding a case in 2014 regarding a policy put in place by President Bush in 2003, and to express his concern that the “glacial pace of administrative litigation” had allowed the judiciary to usurp the authority of the political branches.<sup>177</sup>

### III. THE MAJORITY SHOULD HAVE DECIDED THE CASE BASED ON THE PLAINTIFFS’ NEPA CLAIM

As described above, both the District Court of Alaska and the Ninth Circuit chose to strike down the Tongass Exemption based on their findings that it violated the APA. This led the Ninth Circuit to produce an opinion that misunderstood the Forest Service’s permissible exercise of discretion in reweighing its priorities, interfered with the court’s ability to examine the

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170. *Organized Village of Kake*, 795 F.3d at 969.

171. *Id.* at 971–72.

172. *Id.* at 978.

173. *Id.* at 978–79.

174. *Id.* at 979.

175. *Id.* at 968.

176. *Id.* at 986.

177. *Id.*

political influences on the agency's decision making, and opened the door to greater judicial policy making while simultaneously curbing agency discretion.

*A. The Plaintiffs' Claim Under the APA*

In their complaint, plaintiffs alleged that the Forest Service acted arbitrarily and capriciously in violation of the APA when it promulgated the Tongass Exemption.<sup>178</sup> Specifically, plaintiffs claimed that the reasons offered by the Forest Service, such as the need for roads to connect the region's communities and potential job loss, were not sufficient to justify the change in the agency's positions between 2001 and 2003.<sup>179</sup>

*1. The APA Standard for Judicial Review*

The APA allows for judicial review of agency actions according to an arbitrary and capricious standard. Though the courts typically accord agencies deference, the Supreme Court has outlined factors courts may consider when conducting this type of review. These factors focus on the reasoned analysis underlying an agency's choice to change from one policy to another, with an elevated standard of review used when an agency uses new factual findings that run counter to previous factual findings to justify a change in policy.

Since *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the judiciary accords agencies' interpretations of statutes they administer great deference.<sup>180</sup> *Chevron* review involves two steps. First, the court determines whether Congress unambiguously indicated how a statute should be interpreted. If so, that intent controls. Second, if no congressional intent can be divined, the court asks whether an agency's interpretation of the statute is permissible and defers to that interpretation so long as it is reasonable. Scholars have read the *Chevron* framework for review of agency action as shifting authority from the judiciary back to administrative agencies and have referred to it as a counter-*Marbury*.<sup>181</sup>

Questions have arisen within the *Chevron* framework about how courts should review changes in an agency's action or policy of matters that fall within the APA's scope of substantive review, which grants courts the power to set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>182</sup> This type of review is

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178. Complaint for Declaratory and Injunctive Relief at 6-7, *Organized Vill. of Kake*, 776 F. Supp. 2d 960 (D. Alaska 2011) (No. 1:09CV00023), 2009 WL 6353156.

179. *Id.*

180. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

181. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990).

182. 5 U.S.C. § 706(2)(A) (2012).

often described as “hard look” review,<sup>183</sup> and focuses on the procedure of the agency’s decision making, rather than its substantive outcome.<sup>184</sup>

The Supreme Court fleshed out the standard for arbitrary and capricious review in *Motor Vehicle Association of the U.S. v. State Farm Mutual Automobile Insurance Company*, where it found that an agency is “obligated to supply a reasoned analysis for the change” when it revokes a policy.<sup>185</sup> In this reasoned analysis, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>186</sup> By that logic, an agency considering factors Congress did not intend it to, failing to contemplate an important aspect of the problem, or offering a justification that is “counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,” would be arbitrary and capricious.<sup>187</sup> Nonetheless, a court operating under this standard is not permitted to replace an agency’s reasoning with its own, and should uphold decisions “of less than ideal clarity” as long as an agency’s reasoning can reasonably be determined.<sup>188</sup>

Since *State Farm*, the Court has continued to refine what an agency must do to properly justify a change in policy. In *FCC v. Fox*, the Court determined that the standard of review for changed actions is typically no higher than for original actions, and that to withstand such review an agency must display awareness that it is changing position and have good reasons for the new policy. Although the Court also mentions that an agency should believe the new policy is better than the previous one, it found that such a belief is implied in the agency’s awareness that it is changing policy and that there is no need for the agency to demonstrate that the reasons for the new action are better than the old ones.<sup>189</sup>

In addition to the review described above, *Fox* also contemplates a separate, slightly more searching review that agencies trigger when a new policy is based on factual findings that run counter to the findings supporting a previous policy.<sup>190</sup> In these cases, the agency must provide a reasoned explanation for “disregarding [the] facts and circumstances” underlying its previous policy.<sup>191</sup> Although the facts of the *Fox* case did not lend themselves

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183. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

184. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 386 (2011).

184. *Ethyl Corp. v. EPA*, 541 F.2d 1, 35 (D.C. Cir. 1976).

185. *Motor Vehicle Mfrs. Ass’n of the U.S.*, 463 U.S. at 42.

186. *Id.* at 43.

187. *Id.*

188. *Id.* (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.* 419 U.S. 281, 286 (1974)).

189. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

190. *Id.*

191. *Id.*

to an analysis under this standard, Justice Kennedy's concurrence directly addressed what such a review might look like.<sup>192</sup> For Kennedy, this review would investigate whether the new policy "rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority."<sup>193</sup> By way of example, Justice Kennedy looked to the Court's analysis in *State Farm* and remarked on how the agency in question failed to address or even acknowledge its previous findings.<sup>194</sup> Even under this heightened standard, however, Justice Kennedy wrote that the agency's reasoning is still accorded some level of deference, as it should be "viewed in light of the data available to it, and . . . informed by the experience and expertise of the agency."<sup>195</sup>

## 2. *The APA Standard as Applied to Kake*

In applying the standard for arbitrary and capricious review to the Forest Service's choice to implement the Tongass Exemption, the Ninth Circuit majority focused on the change in the agency's determination that roading in the Tongass posed a minor, instead of a prohibitive, threat. Dissenting judges, on the other hand, found that the agency complied with the APA by providing a reasoned explanation for its change. Thus, they interpreted the agency's actions as permissibly rebalancing the weight the agency assigned to socioeconomic concerns and forest protection.

The majority in *Kake* held that the Forest Service had violated the APA by acting arbitrarily and capriciously in promulgating the Tongass Exemption,<sup>196</sup> relying heavily on the *Fox* framework.<sup>197</sup> In the majority's view, *Fox* requires an agency to satisfy four requirements: (1) awareness that it is changing position, (2) a demonstration that the new action is statutorily permissible, (3) a belief the new policy is better, and (4) good reasons for the new policy, and, if the new policy rests on facts contradictory to the facts underlying the previous policy, a reasoned explanation for disregarding those previous facts.<sup>198</sup> The majority found that the Forest Service satisfied the first three *Fox* factors—it was aware of a change in its position, which implies a belief that the new policy is better, and demonstrated that the new policy was permissible under relevant laws (ANILCA & TTRA).<sup>199</sup> Thus, the majority identified the fourth factor as the "central issue": whether the Forest Service's 2003 decision to exempt the

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192. *Id.* at 535–39 (Kennedy, J., concurring).

193. *Id.* at 535–37 (Kennedy, J., concurring).

194. *Id.* 537–38 (Kennedy, J., concurring).

195. *Id.* (Kennedy, J., concurring).

196. *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 965, 966 (D. Alaska 2011).

197. *See id.* at 966–71.

198. *Id.* at 966 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 502 (2009)).

199. *Organized Village of Kake*, 795 F.3d at 967.



Tongass relied on “factual findings contradicting those in the 2001 ROD” and thus required *Fox*’s elevated standard of review.<sup>200</sup>

According to the majority’s analysis, the 2003 ROD did rest on such contradictory factual findings. In its 2003 decision, the Forest Service wrote that the Tongass Forest Plan adequately protected the forest’s roadless values, and the Tongass Exemption posed only a minor threat to those values.<sup>201</sup> The 2001 ROD, on the other hand, categorized the Tongass Forest Plan as inadequately protective, and held that road construction posed a significant threat to the Tongass.<sup>202</sup> Placing these two conclusions side by side, the majority found that the Forest Service disregarded its previous factual finding about the degree of risk that road construction posed to the Tongass, and was required under the elevated *Fox* standard to present “good reasons” explaining why it did so.<sup>203</sup>

The Forest Service provided at least three reasons as to why it was implementing the Tongass Exemption: socioeconomic concerns, comments on the proposed rule, and litigation over the past two years.<sup>204</sup> The bulk of the majority’s examination focuses on the adequacy of the first reason: socioeconomic concerns. In the 2003 ROD, the Forest Service stated that the Roadless Rule “significantly limited” the ability of southeast Alaskan communities to construct new utility and road connections, and classified those communities as especially vulnerable to economic consequences such as job loss based on their dependence on the forest.<sup>205</sup> The majority, however, dismissed these socioeconomic concerns as “not new” because they were highlighted in both RODs.<sup>206</sup> Although the majority admitted that the Forest Service is entitled to rebalance environmental and socioeconomic concerns, the majority instead held that the Forest Service failed to explain why the great risk in 2001 was seen as only minor in 2003.<sup>207</sup> As to the Service’s other two reasons, comments on the proposed rule and litigation over the past two years, the majority found neither to be an adequate reason for the Forest Service’s change in policy.<sup>208</sup>

On the other hand, two dissenting opinions found that the Forest Service did not trigger the more searching *Fox* standard of review but satisfied *Fox*’s basic requirements. Judge Callahan wrote of her concern that the majority was

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200. *Id.* at 966.

201. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,144 (Dec. 30, 2003).

202. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3254 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

203. *Organized Village of Kake*, 795 F.3d at 967.

204. 68 Fed. Reg. at 75,137.

205. *Id.*

206. *Organized Village of Kake*, 795 F.3d at 967–68.

207. *Id.* at 968.

208. *Id.* at 970; Judge Christen’s concurrence involved a similar analysis and finding. *Id.* at 970–71 (Christen, J., concurring).

overstepping its bounds by requiring the agency to provide good enough, instead of just “good” reasons as *Fox* actually requires.<sup>209</sup> Similarly, Judge Smith’s dissent, on behalf of four additional Judges, characterized the majority’s opinion as deciding which policy, the Tongass Exemption or the Roadless Rule, was better.<sup>210</sup> For Judge Smith, it was “abundantly clear” that the Forest Service looked at the same facts in 2001 and 2003 but simply balanced them differently to come to disparate conclusions, failing to trigger the more stringent review outlined in *Fox*.<sup>211</sup> Using *Fox*’s basic standard of review requiring only that the agency supply “good reasons” for its change, Judge Smith found that the Forest Service in fact supplied four: (1) resolving litigation, (2) satisfying timber demand, (3) mitigating socioeconomic hardships, and (4) promoting utility connections and roads.<sup>212</sup> Thus, because the policy change was spurred not by changed facts but by the desires of a new administration, and because *Fox*’s framework both contemplated and accepted such a change, it should have been upheld based on the fact that the court could easily determine the agency’s reasoning.<sup>213</sup>

### 3. *The Majority Should Not Have Decided the Case Based on the APA*

The majority’s choice to address the plaintiff’s claim under the APA leads to an unsatisfying and inadequate analysis for several reasons. First, in applying *Fox*’s higher standard of review, the majority misreads the Forest Service’s discretionary findings as facts as opposed to expressions of the agency’s priorities, and thus applies an unnecessarily stringent level of review. Second, the generally unsettled judicial approach to executive branch influence on agency policy decisions within arbitrary and capricious review makes such review unwieldy to apply to a case where presidential politics arguably played an integral role. Finally, the majority sets a dangerous precedent for future cases, curbing agency discretion while opening the door for judicial policy making.

#### a. *The Majority Accuses the Forest Service of Changing the Facts, Not Their Balance*

One crucial area of divergence between the majority and Judge Smith’s dissent is the extent to which the Forest Service disregarded facts in its 2003 decision that it relied on in 2001. According to the dissent, the Forest Service did not ignore earlier facts, but simply rebalanced them.<sup>214</sup> For the majority, however, the Forest Service’s statement in 2003 that allowing roading in the

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209. *Id.* at 978.

210. *Id.* at 981.

211. *Id.* at 982.

212. *Id.* at 983.

213. *Id.* at 981.

214. *Id.* at 984.

Tongass posed a minor risk to roadless values ignored the agency's earlier statement that such activities posed a prohibitive risk, triggering a higher standard of review.<sup>215</sup>

The majority's analysis, however, presupposed that the Forest Service's conclusions in either year were objective facts that were not in play. In support of its analysis, the majority quoted two statements from the 2001 ROD: (1) road construction "would risk the loss of important roadless area values," and (2) roadless values "would be lost or diminished" by a limited exception.<sup>216</sup> The majority examined those statements in conjunction with quotes from the 2003 ROD, which read: (1) the Roadless Rule is "unnecessary to maintain the roadless values," and (2) "the roadless values in the Tongass are sufficiently protected under the Tongass Forest Plan."<sup>217</sup> In making this comparison, the majority attempted to show the factual irreconcilability between the two decisions. In reality, however, these statements are expressions of values and priorities rather than declarations of fact. In either ROD, the Forest Service determined what was good enough, as Judge Callahan wrote in her dissent, but not what was factually true. When the Forest Service described the Tongass as "sufficiently protected" in its 2003 ROD, it was defining "sufficiently" according to the policy goals of the agency at that moment in time. These goals prioritized timber, roading, and economic concerns differently than in 2001. Whether roadless values are "sufficiently protected" is not a statement driven by objective criteria that can be factually contradicted; sufficiency defines the point at which we subjectively decide we have had enough. What is "sufficiently protected" varies from one administration to the next, but that does not render one administration's choice objectively incorrect in the face of a new determination.

The majority also contested that "the 2003 ROD does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a 'minor' one."<sup>218</sup> But "prohibitive" and "minor" are not clearly defined terms. Prohibitive costs change when the scales of balance shift, and minor risks might be offset by major certainties. The majority's desire to make the Forest Service account for this change of heart mistakes subjective line-drawing for objective fact and reads the majority's opinion in an intellectually dishonest way.

Reading the two RODs on the Tongass reveals the large extent to which the Forest Service rebalanced old facts to arrive at a new conclusion, a change that would trigger *Fox's* lower standard of review. Looking at how the 2001 and 2003 RODs frame the decision provides a window into this rebalancing.

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215. *See id.* at 968–69.

216. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3254, 3266 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

217. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,137–38 (Dec. 30, 2003).

218. *Organized Village of Kake*, 795 F.3d at 969.

The 2001 ROD carefully describes nine different values associated with roadless areas, including plant and animal diversity, public drinking water sources, and reference landscapes.<sup>219</sup> It presents undeveloped lands as threatened by the pace of urbanization, and statistics in the ROD remind the reader of how much pristine land is lost to development each year.<sup>220</sup> In contrast, the 2003 ROD reminds the reader that around 90 percent of the 16.8 million acre Tongass is already roadless and undeveloped, and timber harvest is “already prohibited in the vast majority of the 9.34 million acres of inventoried roadless areas.”<sup>221</sup> To further drive this point home, the Forest Service included an entire section in the 2003 ROD titled “Roadless Areas Are Common, Not Rare, on the Tongass National Forest” to demonstrate that the Roadless Rule was unnecessary to conserve those numerous, already-protected areas.<sup>222</sup> It took two years, and one change of administration, for the Forest Service to move the casting of the issue from a necessary defense of scarce and beneficial land to a matter already settled by existing policies.

It should also be noted that the overlap between the two RODs about social and economic concerns is greater than the majority acknowledges, demonstrating the consistency of the facts at play. In 2001 the Forest Service chose to include mitigation measures to ease the expected “adverse economic effects” on the Tongass’s forest dependent communities.<sup>223</sup> Thus, the Forest Service acknowledged from the beginning that the Tongass’s communities might suffer socially and economically from the application of the Roadless Rule in a way that few, if any, other communities might suffer.<sup>224</sup> The only difference between the agency’s reasoning in 2001 and 2003 was how that suffering would weigh in comparison to environmental risks.

It might be that the majority’s struggle to fit the 2001 and 2003 RODs into the *Fox* framework is partly due to the unwieldiness of the framework itself. *Fox* did not concern a case where an agency had disregarded previous facts, and although Justice Kennedy attempted to describe what such a case might look like, the reader is still left without a prototype. Furthermore, the language used in *Fox* is itself slippery. Both Kennedy and the *Fox* majority write about the need for the agency to have a reasoned explanation, but neither describe what such an explanation should include, or what differentiates it from the “good reasons” required by the lower standard of review.<sup>225</sup> The mismatch between the *Fox* framework and the case of *Kake* itself is underscored by the near split in judgment it has produced, with one District Court judge and seven

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219. 66 Fed. Reg. at 3245.

220. *Id.*

221. 68 Fed. Reg. at 75,137.

222. *Id.*

223. 66 Fed. Reg. at 3255.

224. *Id.*

225. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 503 (2009).

Circuit Court judges finding an APA violation, and seven Circuit judges finding none.<sup>226</sup>

*b. The Court Was Unable to Transparently Address the Role of Politics in the Forest Service's Decision to Exempt the Tongass*

In addition to the question of whether the Forest Service disregarded facts when exempting the Tongass, another chief area of disagreement between the majority and dissent is the role that politics might have played in the agency's decision making. According to Judge Smith's dissent, a change in agency policy is a natural consequence of a presidential election, with "nothing improper about the political branches of government carrying out such changes."<sup>227</sup> On the other hand, the majority felt that the degree of the agency's change had gone too far, as "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation."<sup>228</sup> However, this divergence of opinion is understandable as neither the majority nor the dissent was able to accurately discern the role the new administration actually played in the promulgation of the Tongass Exemption, since the Forest Service offered no account of the political influences it faced.

The proper place of politics in agency decisions remains unsettled. At present, agencies are reluctant to appeal to political influence when justifying their actions, and the Court has given political influence a mixed reception.<sup>229</sup> The subject has attracted attention from legal scholars Nina Mendelson and Kathryn Watts. In *Disclosing 'Political' Oversight of Agency Decision Making*, Mendelson provided an overview of the current treatment of politics and the President's influence on the reasons agencies present to justify their actions, specifically examining the effect that political influence might have on the legitimacy of agencies.<sup>230</sup> For Mendelson, the question of legitimacy turns on the nature of political influence exerted, which remains a little-known subject.<sup>231</sup> This is, of course, despite the long-standing sway Presidents do in fact have over the executive agencies, and evidence of the direction that Presidents provide to agencies through memoranda, instructions to develop rules, and so on.<sup>232</sup> Mendelson proposes that increased transparency regarding

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226. *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015). When the Ninth Circuit originally heard the case, two judges (Judges Bea and Hawkins) found there was no violation and one (Judge McKeown) found a violation. *Organized Village of Kake v. U.S. Dep't of Agric.*, 746 F.3d 970 (9th Cir. 2014).

227. *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 965, 980 (D. Alaska 2011).

228. *Id.* at 968.

229. Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH L. REV. 1127, 1137–39 (2010).

230. *Id.* at 1127.

231. *Id.* at 1141.

232. *Id.* at 1146–48.

this type of Presidential direction would increase the legitimacy of both the president and the administrative state.<sup>233</sup>

Commentator Kathryn Watts echoes this plea for more open disclosure of political influence, arguing that political reasons should be discussed and reported transparently by agencies undergoing arbitrary and capricious review.<sup>234</sup> For Watts, the Supreme Court has shown ambivalence toward political reasons as demonstrated by its different reactions to political influence in *FCC v. Fox* and *Massachusetts v. EPA*<sup>235</sup> and has left the question largely unanswered. Nonetheless, Watts argues that allowing agencies to give political reasons in justifying their choices would, among other things, facilitate greater political accountability.<sup>236</sup> Such political reason giving would obviate the need for agencies to hide “behind technocratic façades” and “enable more political influences to come out into the open.”<sup>237</sup>

Mendelson’s and Watts’ concerns apply neatly to the present case. After a change in administration, President Bush ordered a delay in implementing President Clinton’s Roadless Rule, settled out of court when that same rule was challenged, and completely replaced it several years later.<sup>238</sup> There is a clear connection between the incoming Bush administration and the Tongass Exemption, but the Forest Service was unable to candidly describe how the President’s influence shaped the exemption and how the agency balanced that influence against more traditional expertise-based reasons.<sup>239</sup> Without this disclosure by the Forest Service, the reviewing court was in turn unable to evaluate the full picture of the agency’s reasoning or to thoroughly examine its decision-making process. Since the majority was only able to evaluate a portion of the Forest Service’s actual motivation in implementing the Tongass Exemption, a holding based on the APA led the majority to a less transparent interpretation of the agency’s reasoning.

*c. The Majority’s Decision Makes It More Difficult for Agencies to Change Policy, and Easier for Courts to Uphold Their Preferred Policy*

Finally, the holding itself simultaneously curbs agency discretion and gives the judiciary more policy-making power. As discussed above, agencies have typically enjoyed deference under *Chevron*, and even the *State Farm* and *Fox* decisions left leeway for agency discretion. The majority’s standard is more stringent, creating a higher bar for agencies to overcome. Some

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233. *Id.* at 1159.

234. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2 (2009).

235. *Id.* at 10–11; see also *Massachusetts v. EPA*, 549 U.S. 497 (2007).

236. Watts, *supra* note 234, at 42.

237. *Id.*

238. Fredriksen, *supra* note 86, at 464–65.

239. See Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,136–38 (Dec. 30, 2003).

practitioners have already noted the break from previous policy that this represents, as well as the difficulties that agencies might now face in changing their policies.<sup>240</sup> This elevated standard is especially troubling when applied to an agency such as the Forest Service, which historically has had little statutory guidance on which agency actions might be reviewed. Furthermore, the potential legal challenges the agency will face when it changes policies will lead to more static and inflexible governance, making it harder for agencies to adjust or update their policies when necessary. This is an even less desirable consequence for the Forest Service now that it appears to be moving toward a model of forest governance increasingly based on multiple uses and an understanding of the forest as a complex ecological system.<sup>241</sup>

This decrease in agency discretion is matched by an increase in judicial discretion. Given the difficulties of applying the *Fox* standard and the lack of helpful precedent supplied by the *Kake* opinion, courts will be faced with a more rigorous but less defined standard of judicial review. As demonstrated by the sharp division of judges in the present case—with their opinions falling largely along party lines<sup>242</sup>—it is arguable that a lack of well-defined precedent might allow judges to decide cases based less on the application of a clear legal rule and more based on personal politics, even if the latter's influence is unintentional. While *Kake* resulted in a victory for environmentalists, a future court could use the same reasoning to block an agency from adopting a new, more environmentally protective policy. These consequences are even more significant because they are coming from an en banc panel, so this precedent will guide the Ninth Circuit's decisions until it is modified or overruled either by another Ninth Circuit panel or the Supreme Court.

The majority opinion's lack of clear precedent, combined with its potential longevity, makes it unsatisfying. The opinion subtly criticizes the Forest Service for being underhanded and dishonest with its reasoning while simultaneously twisting that reasoning to fit the majority's own analysis. The majority seems to crave transparency while disregarding *Kake*'s important political context. Finally, the opinion sets a confusing standard that curbs agency discretion while giving future courts the opening to make decisions more based on their own determinations than a careful application of the law. Based on these shortcomings, the majority should have decided the case based on the plaintiffs' claim under NEPA.

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240. Vaneeta Chintamaneni & J. Michael Showalter, *Ninth Circuit Establishes Standard for EPA Policy Reversals*, NAT'L L. REV. (Sept. 1, 2015), <http://www.natlawreview.com/article/ninth-circuit-establishes-standard-epa-policy-reversals>.

241. See SAMUEL P. HAYS, *THE AMERICAN PEOPLE AND THE NATIONAL FORESTS: THE FIRST CENTURY OF THE U.S. FOREST SERVICE* 106–36 (2009).

242. Obama appointees Andrew Hurwitz, Jacqueline Nguyen, and Morgan Christen, Clinton appointees William Fletcher and Sidney Thomas, and Carter appointee Harry Pregerson all sided with the majority. George W. Bush appointees Consuelo Callahan, Milan Smith, and Richard Clifton, Reagan appointee Alex Kozinski, and conservative Clinton appointee Richard Tallman dissented. *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956 (9th Cir. 2015) (en banc).

*B. The Plaintiffs' Claim Under NEPA*

In addition to the APA claim that the courts focused on, plaintiffs also raised the claim that the Forest Service violated NEPA when it promulgated the Tongass Exemption.<sup>243</sup> Although neither the District Court nor the Ninth Circuit addressed this claim, I argue that the court should have used this claim as the basis for its decision to set aside the Tongass Exemption. Doing so would have more firmly rooted the opinion in precedent, and would have led to a more transparent and honest holding. Finally, it would have strengthened environmental claims brought under NEPA, strengthening the environmental accountability required of federal agencies.

On a procedural level, this holding would require the Ninth Circuit to remand the case to the District Court of Alaska with instructions to evaluate the plaintiffs' NEPA claim to decide the matter on those grounds. If, in turn, the District Court did find a violation of NEPA, the Forest Service would be given an opportunity to amend its error and complete another alternatives analysis before implementing the policy. However, given the fact that the Forest Service declined to participate in the appeals process once the first verdict was returned against the Tongass Exemption, it seems unlikely that the agency would invest the necessary time and effort to analyze additional alternatives and satisfy NEPA.

*1. NEPA Requires Consideration of Reasonable Alternatives*

Compliance with NEPA requires federal agencies to assess the potential environmental impacts of a proposed action. NEPA also mandates that the agency consider less environmentally damaging alternatives that might be chosen in place of the proposed action. Though there is no minimum number of alternatives that must be proposed, courts have determined that the purpose and need of an agency action should define the scope of alternatives it evaluates.

Congress passed NEPA in 1969, summarizing its purpose as to encourage harmony between humans and the environment, to discourage environmental damage, and to deepen our knowledge of the nation's ecology and resources.<sup>244</sup> It requires an agency to evaluate the environmental impacts of any major federal action it is proposing which "significantly affect[s] the quality of the human environment," and focuses on the procedure underlying that evaluation.<sup>245</sup> As part of that process, NEPA requires agencies to prepare environmental impact statements, for any agency actions "significantly affecting the quality of the human environment."<sup>246</sup> The purpose of the EIS

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243. Complaint for Declaratory and Injunctive Relief at ¶¶ 48–54, *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960 (D. Alaska 2011) (No. 1:09CV00023), 2009 WL 6353156 (Dec. 22, 2009).

244. 42 U.S.C. § 4321 (2012).

245. § 4332(C).

246. *Id.*



process is to ensure that agencies evaluate and consider environmental effects.<sup>247</sup> Within the EIS, agencies must define the purpose and need for the action and analyze any significant environmental impacts it might have, as well as any reasonable alternatives that might be executed in place of the proposed action.<sup>248</sup> Although NEPA does not require an agency to select the least environmentally damaging alternative, a discussion of the alternatives lies at the core of the NEPA analysis, and should “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>249</sup>

Despite the centrality of the alternatives discussion to the NEPA process, defining the number or range of alternatives necessary to fulfill an agency’s duty has been a challenge for courts and agencies alike.<sup>250</sup> The Ninth Circuit has held that there is no minimum number of alternatives that must be considered,<sup>251</sup> and has generally demonstrated great deference toward agency judgment in the alternatives that are proposed.<sup>252</sup> Nonetheless, the court has placed some limits on what alternatives are acceptable. For instance, the Ninth Circuit has interpreted NEPA to require that the alternatives proffered should fit what the agency has defined as the purpose and need of the proposed action.<sup>253</sup> In a leading case on the matter, *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, the Ninth Circuit held that the “stated goal of a project necessarily dictates the range of reasonable alternatives” such that an agency “cannot define its objectives in unreasonably narrow terms.”<sup>254</sup>

Much litigation has focused on determining the sufficiency of an agency’s reasonable alternatives. Plaintiffs in such cases typically challenge the number or content of alternatives offered in support of an original agency action. However, the claim asserted by plaintiffs in *Kake* offers a twist on that trope, as plaintiffs challenged the Forest Service’s choice to reuse the alternatives initially proposed in the Roadless Rule’s EIS when the agency evaluated the Tongass Exemption.<sup>255</sup> Given that courts have determined that an action’s purpose and need should define the scope of alternatives that must be considered, it follows that two projects with different purposes—the nationally

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247. 40 C.F.R. § 1502.1 (2015).

248. *Id.*

249. *Id.*

250. George Cameron Coggins & Robert L. Glicksman, *Discussion of Alternatives—Range of Alternatives*, in 2 PUB. NAT. RESOURCES L. § 17:48 (2nd ed. 2015); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (defining reasonable alternatives as only bounded by some concept of feasibility).

251. *Native Ecosys. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) (holding that there is no minimum number of alternatives that an agency must consider).

252. *See generally id.*

253. *City of Carmel-By-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

254. *Id.*

255. Complaint for Declaratory and Injunctive Relief at ¶¶ 52–53, *Organized Village of Kake v. U.S. Dept. of Agriculture*, 776 F. Supp. 2d 960 (D. Alaska 2011) (No. 1:09CV00023), 2009 WL 6353156 (Dec. 22, 2009).

applicable Roadless Rule and the Tongass Exemption—should have two sets of alternatives.<sup>256</sup> On those grounds, the plaintiffs alleged that the Forest Service violated NEPA when it failed to propose any new alternatives tailored to meet the purpose and need of the Tongass Exemption.<sup>257</sup>

## 2. Using the Same Alternatives for Two Different Actions Violates NEPA

Although plaintiffs do not frequently raise claims analogous to the plaintiffs' in *Kake*, plaintiffs in two other cases raised claims touching on similar issues. In the following subpart, I will describe the cases *California ex rel Lockyer v. U.S. Department of Agriculture* and *Alaska Wilderness Recreation & Tourism Association v. Morrison* and the court's NEPA analysis in both.<sup>258</sup> Though factual and procedural differences between those cases and *Kake* make exact comparisons difficult, both cases stand for the proposition that new actions must be accompanied by new NEPA alternatives. Thus, both cases set a standard that the *Kake* court could have used.

Plaintiffs in the first case, *California ex rel Lockyer v. U.S. Department of Agriculture*, used NEPA to challenge the legitimacy of President Bush's less protective Roadless Rule substitute, the State Petitions Rule.<sup>259</sup> The states of California, Oregon, Washington, and New Mexico all joined in suit over the new rule, alleging that it violated NEPA, the ESA, and the APA.<sup>260</sup> Their NEPA claim rested on the fact that the State Petitions Rule was less environmentally protective than the Roadless Rule, but was not accompanied by any new NEPA evaluation or ESA analysis.<sup>261</sup> Despite defendants' argument that the State Petitions Rule was purely procedural, the District Court for the Northern District of California found that the State Petitions Rule did effectively repeal the Roadless Rule, and thus was not simply a procedural matter.<sup>262</sup> Furthermore, the court reasoned that even if the State Petitions Rule was eligible for a categorical exemption from NEPA, an analysis would still be required for the "extraordinary circumstances" of the rule's promulgation.<sup>263</sup>

Alternatively, defendants argued that the EIS requirements under NEPA were satisfied by previous consideration of the "no action" alternative in the Roadless Rule's 2001 final EIS.<sup>264</sup> According to their reasoning, because the State Petitions Rule repealed the Roadless Rule, it had already been considered

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256. ¶¶ 51–52.

257. ¶ 54.

258. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006); *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995).

259. *California ex rel. Lockyer*, 459 F. Supp. 2d at 879.

260. *Id.*

261. *Id.* at 894.

262. *Id.* at 882.

263. *Id.* at 902.

264. *Id.* at 905.

as the “no action” alternative in the Roadless Rule’s original EIS.<sup>265</sup> The court, however, was quick to strike down this argument, reinforcing the central role that the alternatives discussion plays in NEPA analyses, writing that the “failure to consider reasonable alternatives thwarts the goals of informed decisionmaking.”<sup>266</sup> The District Court drew on the holding in *Carmel-by-the-Sea* to find that, because a rule’s purpose and need define its range of reasonable alternatives, the same reasonable alternatives cannot be used to evaluate rules with baldly different purposes (i.e., preventing versus enabling local decision making over the management of roadless areas).<sup>267</sup> Moreover, the court highlighted the fact that the “no action” alternative in the Roadless Rule was not a proper substitute for the State Petitions Rule. First, the “no action” alternative did not include a state-petitioning scheme. Second, many of the prior forest plans contemplated by the original EIS had since been amended, and thus represented a different status quo.<sup>268</sup> Third, the court found that the agency violated NEPA when it failed to consider any other reasonable alternatives that might have satisfied the purpose and need of the State Petitions Rule.<sup>269</sup> Defendants appealed the District Court’s decision to the Ninth Circuit, which affirmed the lower court.<sup>270</sup> However, the Ninth Circuit based its holding on the fact that implementing the State Petitions Rule was more than a paper exercise, and thus warranted a new analysis overall.<sup>271</sup> Thus, the Ninth Circuit did not reach the question of whether or not the Forest Service failed to consider reasonable alternatives as the District Court did.<sup>272</sup>

The second case, *Alaska Wilderness Recreation and Tourism Association v. Morrison*, involved a challenge to a series of timber sales executed by the Forest Service within the Tongass.<sup>273</sup> Plaintiffs, including the Organized Village of Kake, raised claims that the agency had violated NEPA and ANILCA in creating the sales without preparing a new or supplemental EIS.<sup>274</sup> The plaintiffs’ NEPA claim focused on the Forest Service’s attempt to reuse EISs prepared in 1992–93 when a fifty-year contract with the Alaska Pulp Company (APC) constrained the range of reasonable alternatives considered therein.<sup>275</sup> Though the APC contract to harvest in the Tongass was not set to expire until 2011, the Forest Service cancelled the contract in 1994 when the company’s Tongass pulp mill closed.<sup>276</sup> At that point, the Forest Service chose

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265. *Id.*

266. *Id.*

267. *Id.* at 906.

268. *Id.*

269. *Id.* at 907.

270. *Id.* at 999.

271. *Id.* at 1015–16.

272. *Id.* at 1018.

273. *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723 (9th Cir. 1995).

274. *Id.*

275. *Id.* at 728.

276. *Id.* at 725.

to “periodically offer for sale” a portion of the timber allocated for harvest under the old contract.<sup>277</sup> These timber offerings were not accompanied by new EISs, as the Forest Service argued that the end of the APC contract was not a significant event that warranted a new or supplemental EIS.<sup>278</sup> Instead, the Forest Service utilized the most recent EIS for the areas covered by the proposed sales, written in 1992–1993.<sup>279</sup> Plaintiffs, however, contended that the previous EISs’ consideration of alternatives was limited by the terms of the APC contract then in place. Thus, past EISs, constrained by the goals for which they were written, did not provide an adequate number of reasonable alternatives in the absence of the contract. The District Court for the District of Alaska initially decided the case in favor of the Forest Service,<sup>280</sup> but upon appeal the Ninth Circuit reversed, holding the agency had violated NEPA.<sup>281</sup>

In evaluating the case, the Ninth Circuit emphasized the central role that reasonable alternatives play in NEPA analyses, twice citing the Council on Environmental Quality statement that consideration of alternatives makes up “the heart of the environmental impact statement.”<sup>282</sup> The court also paid close attention to the earlier EISs and RODs the Forest Service prepared, noting the influence the APC contract had on the agency’s consideration of alternatives.<sup>283</sup> Highlighting the agency’s frequent references to evaluating an alternative in light of its compliance with the APC contract, the court held that the contract had affected the alternatives the Forest Service had considered in the past.<sup>284</sup> Thus, the cancellation of the contract opened up an array of alternatives that “could not be freely reviewed when the APC contract was in force.”<sup>285</sup> Such a change warranted a “serious and detailed evaluation” by the agency.<sup>286</sup> While the APC contract in this case constrained the Forest Service’s consideration of alternatives in a more extreme way than the purpose and need of a proposed action typically would, it nonetheless highlights the common thread in both situations: when the purpose of an action changes, the alternatives that must be considered change also.

These cases provide exemplars of how the District Court of Alaska and the Ninth Circuit could have used NEPA to better decide *Kake*. In *Kake*, plaintiffs raised the claim that the Forest Service had failed to comply with NEPA when it relied on the same alternatives for both the Roadless Rule and Tongass Exemption. The above cases establish that, under NEPA, a change in the

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277. *Id.*

278. *Id.* at 727.

279. *Id.* at 726.

280. *Id.*

281. *Id.* at 723.

282. *Id.* at 729, 730; 40 C.F.R. § 1502.14 (2015).

283. *Alaska Wilderness*, 67 F.3d at 730.

284. *Id.*

285. *Id.* at 729–730.

286. *Id.* at 730.

purpose and need for an agency action require a corresponding change in the alternatives that agency considers.

3. *The Majority Should Have Decided the Case Based on NEPA*

Given the judicial precedent available for the court to draw on, the Ninth Circuit should have found that the Forest Service violated NEPA by using the same alternatives for two actions with different purposes and needs. Such a holding, moreover, would have better spoken to the majority's unease with the Forest Service's 2003 dismissal of its 2001 environmental concerns. Finally, a holding rooted in NEPA would have strengthened the serious environmental consideration at the heart of the statute.

a. *The Forest Service Violated NEPA by Failing to Consider New Alternatives*

In the present case, there are clear differences between the purpose and need for the Roadless Rule and the Tongass Exemption. In using the same alternatives for both actions, the Forest Service failed to investigate additional options that would have accomplished the timber harvest goals of the Tongass Exemption without the negative environmental impact of completely exempting the Tongass from the Roadless Rule.<sup>287</sup>

The Roadless Rule's purpose and need was to protect roadless areas on a national scale. This is clear from the content and tone of the Forest Service's 2001 ROD, which emphasized the agency's responsibility for managing National Forest System lands to offset the ongoing expansion of urban areas and the loss of undeveloped land.<sup>288</sup> In the 2001 ROD, the agency defended the choice to prohibit road construction and timber harvest as necessary because such activities were most likely to result in "immediate, long-term loss of roadless values and characteristics."<sup>289</sup> The Forest Service also deemed the Roadless Rule necessary in light of the agency's financial inability to manage its current road system, as well as continuing national concern and controversy over roadless area management.<sup>290</sup>

In sharp contrast to these environmental and financial concerns, the 2003 Tongass Exemption ROD focused on the social and economic harms to southeast Alaskan communities, comments on the proposed rule, and recent litigation.<sup>291</sup> The agency discussed the fate of forest dependent communities

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287. Complaint for Declaratory and Injunctive Relief at ¶ 52, *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960 (D. Alaska 2011) (No. 1:09CV00023), 2009 WL 6353156 (Dec. 22, 2009).

288. *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

289. *Id.*

290. *Id.*

291. *Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska*, 68 Fed. Reg. 75,136, 75,137 (Dec. 30, 2003).

and the potential job loss they might face.<sup>292</sup> Instead of listing out the numerous ecological benefits protected by Roadless Areas, it mentioned the protections already given to roadless areas in the Tongass and referred to how common roadless areas are throughout the Forest.<sup>293</sup> Finally, the Forest Service discussed the special treatment it had given the Tongass from the beginning of the Roadless Rule planning process.<sup>294</sup>

The dissimilar content of the two RODs demonstrates the divergence of the purpose and need for the Roadless Rule and the Tongass Exemption. As the court held in *Carmel-by-the-Sea*, “the stated goal of a project necessarily dictates the range of ‘reasonable’ alternatives” the agency must consider.<sup>295</sup> With such different, even opposite goals, the court should have found that the range of reasonable alternatives for the Tongass Exemption and the Roadless Rule should necessarily be different. Such a finding would fall directly in line with the reasoning applied by the district court in *Lockyer*. Just as the different purposes of the State Petitions and Roadless Rule meant that the “no action” alternative considered in the Roadless Rule could not be an adequate substitute for the State Petitions Rule, the existence of the “no action” alternative under the Roadless Rule’s EIS did not satisfy the Tongass Exemptions NEPA requirement. Similarly, the analysis in *Alaska Wilderness* also demonstrates the central role that “roadless values” played in the 2001 analysis in preventing the Forest Service from considering the full range of alternatives warranted by a new interest in social and economic concerns in 2003.

In the 2003 ROD, “roadless values” no longer stood at the crux of the Forest Service’s goal, and the agency was thus free to consider alternatives that would offer a more balanced compromise between roadlessness and social and economic concerns. For example, the Forest Service could have contemplated alternatives that made it easier for Southeast Alaska to establish utility connections or build roads when needed by communities in the area. Concerns regarding economic hardships could have been addressed by a procedure for permitting certain timber harvests if demand for timber increased such that it could not be met by harvest in unprotected, roaded areas, an alternative proposed by plaintiffs in their complaint.<sup>296</sup> The Forest Service might also have considered an alternative with more extensive mitigation measures,<sup>297</sup> providing a longer transition period during which Southeast Alaska

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292. *Id.*

293. *Id.*

294. *Id.*

295. *City of Carmel-By-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

296. Complaint for Declaratory and Injunctive Relief at ¶ 38, *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 776 F. Supp. 2d 960 (D. Alaska 2011) (No. 1:09CV00023), 2009 WL 6353156.

297. The Forest Service included mitigation measures in the 2001 Roadless Rule allowing for road construction and timber harvest to continue past the Roadless Rule’s effective date so long as the notice of availability for a draft EIS had been published in the Federal Register before the date of the Roadless Rule’s publication. *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. 3244, 3262 (Jan. 12, 2001).

communities could better prepare for an economic shift away from timber harvesting. By considering these and other potential alternatives, the 2003 Forest Service would have been able to address its purpose and need without doing away with the Roadless Rule in the Tongass altogether.

It is also notable that the Forest Service's chosen "no action" alternative represented a lower level of protection in 2003 than the "no action" alternative the agency contemplated in 2001 based on a change in default land management plans that governed the Forest. This demonstrates that, as in *Lockyer*, the "no action" alternatives contemplated by the Tongass Exemption and the Roadless Rule represented different status quos with different environmental consequences. Specifically, when the Roadless Rule was passed in 2001 the Tongass was governed by the 1999 Forest Plan.<sup>298</sup> That plan modified the 1997 plan by increasing the protection for eighteen areas of the Tongass from "development" to "mostly natural" and implementing new guidelines which would "reduce road density on the Tongass."<sup>299</sup> However, in response to a lawsuit challenging the manner in which the 1999 plan was implemented, the District Court for the District of Alaska enjoined the Forest Service from implementing the 1999 plan until it prepared a Supplemental EIS.<sup>300</sup> In 2003 when the Tongass Exemption was drafted, the agency reinstated the less protective 1997 plan.<sup>301</sup>

The agency's failure to consider new alternatives in light of the changes in the project's purpose and need as well as the different environmental impacts of the two "no action" alternatives represent a violation of NEPA. The court should have analyzed this violation.

*b. A NEPA Decision Would Have Given a Stronger Voice to the Majority's Concerns*

Reading the court's decision, it is clear that the Forest Service's choice to lighten the weight of environmental concerns in its balancing despite its

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298. Buck Lindekugel, *Letter: Tongass Deserves Long-Term Protection*, JUNEAU EMPIRE (Apr. 8, 2001) [http://juneauempire.com/stories/040801/Ope\\_letter.html#.VlupK9-rTVo](http://juneauempire.com/stories/040801/Ope_letter.html#.VlupK9-rTVo).

299. U.S. DEPT. OF AGRIC., RECORD OF DECISION: TONGASS NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN, ALASKA at Preface (1999), <http://hdl.handle.net/2027/umn.31951d019157485?urlappend=%3Bseq=3>.

300. U.S. DEPT. OF AGRIC., SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ROADLESS AREA EVALUATION FOR WILDERNESS RECOMMENDATIONS 2 (2003), [http://www.sitnews.net/0203news/022803\\_Record\\_of\\_Decision.pdf](http://www.sitnews.net/0203news/022803_Record_of_Decision.pdf).

301. *See id.* The 1997 plan also was the subject of its own challenges. *Id.* In 2001 the District Court for the District of Alaska held that the Forest Service had violated NEPA and NFMA in failing to consider any alternatives recommending additional wilderness areas when it executed the 1997 Tongass Land Management Plan EIS. *Id.* The court enjoined the Forest Service from making any changes to potential wilderness areas within the Tongass until it prepared a Supplemental EIS evaluating roadless areas for wilderness designation. *Id.* at 2–3. In response, the Service considered eight new alternatives, with recommendations ranging from 0.7 to 9.6 million acres of new wilderness. *Id.* The least protective alternative was selected, with zero acres of wilderness recommended, based on the belief that there was no need for more wilderness on the Tongass. *Id.* at 3.

previous finding troubled the majority.<sup>302</sup> The majority uses this change as the foundation for the APA violation they found, but the concern driving their holding would find a more fitting home within NEPA.

NEPA's goal is to ensure that federal agencies give due consideration to the environmental effects of their actions. Though such consideration does not mandate that an agency choose an environmentally protective alternative, "NEPA looks toward having environmental factors play a central role in the decisions of such agencies . . . [and] it is the function of review under NEPA to ensure that this purpose is served."<sup>303</sup> It is intended to help agencies "make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."<sup>304</sup> A law that is designed to ensure that a federal agency understands and acknowledges the environmental effects of its actions would have represented a much better match for the majority's environmental concerns.

What seemed to bother the majority the most was the Forest Service's glib dismissal in 2003 of the same environmental concerns it prioritized in 2001.<sup>305</sup> Addressing that concern through NEPA analysis would provide a better statutory match than the APA and provide the majority's concern with a more transparent vehicle. For example, the majority puts itself out on a limb in advocating for the consideration of environmental impacts, but then backpedals by reminding the reader that it is simply applying the neutral legal standard for review of agency actions.<sup>306</sup> Basing this holding on NEPA would have allowed the majority to openly acknowledge its belief that environmental concerns should have played an important role in the case's disposition.

*c. A NEPA Decision Would Have Strengthened Environmental Accountability for Federal Agencies*

At the same time, a NEPA-based decision would have created a higher standard for agencies to overcome when they prepare EISs and consider various alternatives in the future. Based on the small number of cases that deal with similar circumstances—a new project attempting to utilize the EIS of an older one—this would have been an excellent opportunity to solidify the importance of employing an adequate number and range of alternatives. Moreover, such a decision would fall nicely in line with the Ninth Circuit's reasoning in *Alaska Wilderness*.<sup>307</sup> This also contrasts with the potential

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302. See *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 965, 966–69 (9th Cir. 2015).

303. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 515 (1974).

304. 40 C.F.R. § 1500.1(c) (2015).

305. *Organized Village of Kake*, 795 F.3d at 968–69.

306. See *id.*

307. See *Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d 723 (9th Cir. 1995).



effects of the APA decision, which are facially neutral and could be used to promote or block environmentally protective regulation.

In addition to strengthening NEPA case law, such a decision would demonstrate to federal agencies the importance of treating NEPA as something more than a paper exercise. With only procedural requirements, NEPA's strength is measured by the extent to which agencies actually follow that procedure. A court holding that the Forest Service failed to satisfy NEPA when it only nominally considered a previous project's reasonable alternatives would have sent the message that NEPA requires agencies to thoroughly consider less environmentally harmful options, in line with NEPA's stated purpose.

#### CONCLUSION

In *Organized Village of Kake v. U.S. Department of Agriculture*, a Ninth Circuit en banc panel of judges upheld roadless protection in the Tongass by a thin majority. Though the effects of this decision on the forest—long-term conservation and restricted timber harvest—are positive from an environmental perspective, the decision itself leaves much to be desired. The majority's choice to focus on plaintiffs' APA claim resulted in an opinion which twists the Forest Service's own reasoning and neglects to account for the obvious political explanations for the agency's decision to exempt the Tongass from the Roadless Rule. At the same time, the opinion creates a more stringent standard for agency reason giving while simultaneously giving future courts little concrete guidance on how to evaluate such reasons. As argued above, an opinion based on the plaintiffs' NEPA claim would have strengthened federal agencies' environmental accountability while also providing a more transparent vehicle for the majority's desire for the Forest Service to acknowledge the environmental effects of its actions.

This argument is especially timely given the upcoming presidential election, and the agency policy changes that will surely ensue regardless of its victor. Like the Tongass Exemption and the State Petitions Rule, some of those changes will likely affect the degree of environmental protection required by various federal agencies, and might be subject to their own bouts of litigation. While in this case, the court resolved that litigation in favor of the forest, the muddy APA standard that emerged could be just as easily used to promote harvesting, develop the undeveloped, and make America's wilderness just a little less wild.