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THE HONORABLE ELIZABETH D. LAPORTE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants.	Case No. 05-03508-EDL related to
THE WILDERNESS SOCIETY, et al., Plaintiffs, v. UNITED STATES FOREST SERVICE, et al., Defendants.	Case No. 05-04038-EDL PLAINTIFFS' MOTION AND MEMORANDUM FOR SUMMARY JUDGMENT AND DECLARATORY AND INJUNCTIVE RELIEF Date: July 25, 2006 Time: 9:00 a.m. Courtroom: E Judge: The Hon. Elizabeth D. LaPorte

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NOTICE OF MOTION

Pursuant to Fed. R. Civ. P. 56(a), plaintiffs The Wilderness Society et al. ("TWS") respectfully move this Court for summary judgment and declaratory and injunctive relief. The Court has scheduled a hearing for July 25, 2006 at 9:00 a.m.

TWS asks the Court to declare the Final Rule, Special Areas; State Petitions for Inventoried Roadless Area Management ("Roadless Repeal), 70 Fed. Reg. 25,654 (May 13, 2005) invalid pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq.; and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq. Plaintiffs further ask the Court to issue an injunction (1) vacating and setting aside the Roadless Repeal; (2) reinstating the Roadless Area Conservation Rule ("Roadless Rule"), 66 Fed. Reg. 3,243 (Jan. 12, 2001); and (3) prohibiting federal defendants U.S. Forest Service et al. from undertaking any actions in violation of the Roadless Rule until they comply with applicable legal requirements.

This motion is based on the accompanying memorandum, the pleadings previously filed with the Court, the declarations, exhibits, and other papers submitted herewith, the memorandum, declarations, exhibits, and other papers submitted by the State of California et al. in the related case,[1] and such other evidence as the Court deems appropriate.

INTRODUCTION

Roadless National Forest lands represent some of the last unprotected remnants of the

[1] TWS's case is related to People of the State of California et al. v. U.S. Dep't of Agriculture, No. 05-03508-EDL ("States' Action"). By agreement and request of the Court, plaintiffs in both cases have coordinated their summary judgment briefing as much as possible. TWS will incorporate by reference certain arguments advanced in the States' Action and will use materials submitted in the States' Action, if necessary, instead of submitting duplicate copies. Additionally, the States and TWS are submitting Joint Excerpts of the Administrative Records for the Court's convenience.

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United States' once-vast forested wildlands. These relatively unspoiled areas provide the habitat and migration corridors essential for healthy populations of elk, moose, deer, grizzly bears, and a host of other wildlife species. Roadless areas provide the clean water necessary to protect dwindling populations of salmon, steelhead, and other native fish and aquatic species. Roadless areas also provide unique hiking, fishing, and other recreational opportunities not found in more developed national forest areas.

This case is about those roadless areas and about what kind of protection, if any, we give to our last, pristine public lands. This case is also about how federal agencies make and unmake regulatory decisions. In 2001, at the end of an extensive administrative process, the Forest Service adopted the Roadless Rule, a rule that, with specified exceptions, "prohibit[ed] road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless values and characteristics." 66 Fed. Reg. at 3,244.

But 2001 also brought a change in the Executive Branch, and, on May 13, 2005, the Forest Service repealed the Roadless Rule and replaced it with a process in which states may petition the Forest Service to adopt rules specific to roadless areas within their state. In sharp contrast to the process leading to the adoption of the Roadless Rule, for the Roadless Repeal, the Forest Service engaged in no environmental analysis under NEPA, nor did the agency comply with the consultation requirements of the ESA. Plaintiffs challenge both those failings. Additionally, while a federal agency has the discretion to change its mind about regulations, when doing so, it must engage in rational, internally consistent reasoning that is supported by substantial evidence. Such reasoned decisionmaking is missing from the Forest Service's Roadless Repeal. Plaintiffs challenge this failing as well. For these violations of law, TWS

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seeks declaratory and injunctive relief, including reinstatement of the 2001 Roadless Rule.

JURISDICTION

TWS challenges a final agency action as defined by the APA, 5 U.S.C. § 551(13), and the Court has jurisdiction over this action pursuant to 5 U.S.C. § 706. Plaintiffs have standing because their members regularly use and enjoy roadless areas across the nation. The injury to plaintiffs caused by federal defendants' violations of NEPA, ESA, and the APA can be remedied by the relief sought in this action. See Declarations of Irene Alexakos (Feb. 14, 2006), Michael Anderson (Feb. 14, 2006), David Bayles (Feb. 20, 2006), David Beebe (Feb. 15, 2006), Corrie Bosman (Feb. 22, 2006), Doug Heiken (Feb. 15, 2006), Ryan Henson (Feb. 17, 2006), Marv Hoyt (Feb. 21, 2006), Marcel LaPerriere (Feb. 16, 2006), Erik Molvar (Feb. 21, 2006), Jonathan Oppenheimer (Feb. 16, 2006), Carl Siechert (Feb. 22, 2006), Suzanne Stone (Feb. 23, 2006), Barbara Ullian (Feb. 22, 2006), and David Werntz (Feb. 22, 2006), filed concurrently.[2]

FACTUAL BACKGROUND

TWS adopts and incorporates by reference the "Factual and Procedural Background" section of the States' Summary Judgment Motion (Feb. 24, 2006) at 6-14.

STANDARDS OF REVIEW

Summary judgment must be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Plaintiffs' motion raises purely legal issues based on an administrative record, rendering summary judgment appropriate.

Judicial review of plaintiffs' claims is governed by the APA, 5 U.S.C. § 706(2). Under

[2] TWS has not submitted a standing declaration for each of the twenty environmental plaintiffs; however, TWS is prepared to do so to support all environmental plaintiffs' standing if the Court desires.

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the APA, courts are to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). The standards of review for each of TWS's claims are discussed in the respective arguments below.

ARGUMENT

I. AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED TO EVALUATE REASONABLE ALTERNATIVES TO THE ROADLESS REPEAL.

The Forest Service must prepare an environmental impact statement ("EIS") for the purpose of considering reasonable alternatives to the Roadless Repeal. When the Forest Service proposed to repeal the Roadless Rule, the agency identified a number of concerns prompting it to take action. However, the agency put before the public but a single proposal to address these concerns: the wholesale repeal of the rule and its replacement with a state petition process. There are other reasonable alternatives, retaining the basic rule, that would address the agency's stated concerns as least as well as the Roadless Repeal, with less adverse impact to the environment. One option is to expand or amend the list of exceptions to the rule to address concerns that the rule is too inflexible, rather than casting aside the entire rule. Another alternative is to allow states to submit petitions to opt out of the rule. While the agency retains the ultimate discretion to choose rationally among these alternatives, NEPA requires the agency to disclose them, to discuss their impacts, and to accept public comment on them in an EIS, before taking action. This is one of the most fundamental requirements of NEPA, and the Forest Service violated it here.

As a threshold matter, there can be no serious dispute that a rule of this type is generally a "major Federal action significantly affecting the quality of the human environment" requiring an EIS under NEPA. 42 U.S.C. § 4332(2)(C). The Ninth Circuit held that an EIS was required for

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the adoption of the Roadless Rule initially, even though it was a rule that would "leave nature alone." Kootenai Tribe v. Veneman, 313 F.3d 1094, 1115 (9th Cir. 2002). It would make no sense to require compliance with NEPA to take an action that protects the environment, like adoption of the Roadless Rule, but to exempt an action that may cause significant adverse effects to the environment, like the Repeal. This would contradict the purpose of NEPA, which "is first and foremost to protect the natural environment." Id. at 1123. See also Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 945 (9th Cir. 2005) ("Each of NEPA's various procedural provisions is designed to further that goal of environmental protection.").

Perhaps recognizing this contradiction, the Forest Service addressed NEPA compliance explicitly in the Federal Register notice promulgating the Roadless Repeal and advanced three justifications for its refusal to prepare an EIS: (1) the impacts would be the same as those of the "no action alternative" disclosed in the Roadless Rule Final Environmental Impact Statement ("FEIS"); (2) the final rule repealing the Roadless Rule is categorically excluded from NEPA because it is merely procedural; and (3) the Forest Service would fully consider the environmental impacts of any rulemaking resulting from state petitions at the time any such rulemaking occurred. AR SPR-095, Roadless Repeal, 70 Fed. Reg. 25,654, 25,660 (May 13, 2005).[3] None of these arguments can withstand scrutiny.

[3] The Forest Service has filed an administrative record that both state and environmental plaintiffs believe is incomplete, and plaintiffs have a joint motion to complete the administrative record before the Court. For this opening brief, TWS refers to the documents in the record as currently produced in the following manner: documents that can be found in the record are cited by Administrative Record number, document name, and internal page number (i.e., AR SPR-043, FRWG, Final Recommendations (March 26, 2003) at 2). Documents not in the record are cited by exhibit number submitted concurrently with this motion (Environmental Plaintiffs' Exh. 1-2). Documents cited many times, such as the Federal Register notice for the Roadless Repeal, will be cited by AR number only the first time the citation appears and by title thereafter.

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A. Standard of Review

Review for compliance with NEPA occurs under the provision of the APA that authorizes courts to set aside agency actions adopted "without observance of procedure required by law." Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 810 n.27 (9th Cir. 2005) (quoting 5 U.S.C. § 706(2)(D)); Center for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1165 (9th Cir. 2003). The question of whether the Roadless Rule FEIS provides adequate analysis to support the 2005 Roadless Repeal is addressed under a "rule of reason" standard:

> We apply a "rule of reason" standard when reviewing the adequacy of an agency's EIS, asking "whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001), amended by 282 F.3d 1055 (9th Cir. 2002). Under this standard, we make "a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." Id.

Natural Res. Def. Council, 421 F.3d at 810 n.27. The question of whether the Forest Service may invoke a categorical exclusion to avoid compliance with NEPA is, in this case, primarily a legal issue based on undisputed facts. In these cases, the court applies a "reasonableness" standard of review, which is less deferential than the "arbitrary and capricious" standard applicable to factual or technical determinations within the agency's expertise. Northcoast Envt'l Ctr. v. Glickman, 136 F.3d 660, 667 (9th Cir. 1998).

B. The Roadless Rule FEIS Was Written to Advance a Different Purpose and Does Not Consider Reasonable Alternatives to the Roadless Repeal.

The Forest Service's first asserted justification for refusing to prepare an EIS for the Roadless Repeal is that the impacts of the repeal "are essentially those disclosed and discussed for the no action alternative displayed in the [Roadless Rule] FEIS." Roadless Repeal, 70 Fed. Reg. at 25,660. The FEIS does not provide adequate documentation for the Roadless Repeal, however, because that FEIS was written for a different purpose and does not analyze reasonable

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alternatives to the Repeal in light of the agency's new underlying goals. Even if it were true that the "no action alternative" in the FEIS adequately discloses the impacts of the Roadless Repeal,[4] it misses the point. The point is that a new EIS is needed to analyze alternatives to the Roadless Repeal that reflect the Repeal's underlying purposes.

1. An EIS must consider all reasonable alternatives consistent with the purpose and need for the action.

In an EIS, agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed decision with potentially significant environmental consequences. 40 C.F.R. § 1502.14(a). The study of alternatives to an agency's proposed course of action is the "heart" of an EIS. City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) (quoting 40 C.F.R. § 1502.14).

> The goal of the statute is to ensure that federal agencies infuse in project planning a thorough consideration of environmental values. The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers have before them and take into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. … Informed and meaningful consideration of alternatives—including the no action alternative—is ... an integral part of the statutory scheme.

Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995) (quoting Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988)) (emphasis removed). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985). See also Natural Res. Def. Council, 421 F.3d at 813.

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[4] Plaintiffs do not concede this point. First, the Roadless Rule FEIS does not disclose the impacts of adopting a state petition process. Second, circumstances have changed since the FEIS was published such that the "no action alternative" no longer reflects 2005 baseline conditions in the absence of the Roadless Rule. TWS joins in the States' argument on this point. See States' Motion for Summary Judgment at 27-29.

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The scope of reasonable alternatives is determined by the "underlying purpose and need" for the agency's action. City of Carmel-by-the-Sea, 123 F.3d at 1155 (quoting 40 C.F.R. § 1502.13); Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815-16 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 332 (1989). If the underlying purpose of the action changes, the range of reasonable alternatives to the action may change as well, and a new EIS may be required. See Alaska Wilderness Recreation & Tourism Ass'n, 67 F.3d at 729-30 (holding supplemental EIS required to consider new alternatives where purpose changed from meeting timber volume requirements of specific contract to meeting general forest plan goals). While the agency retains discretion as to which among the reasonable alternatives to select in its final decision, the EIS must disclose the effects of all the reasonable alternatives. See id. at 730 ("While we cannot predict what impact the elimination of the [long-term] contract will have on the Forest Service's ultimate land use decisions, clearly it affects the range of alternatives to be considered.").

2. The purpose and need for the Roadless Repeal differed significantly from that of the Roadless Rule FEIS.

As required by NEPA regulations, 40 C.F.R. § 1502.13, the FEIS for the original Roadless Rule states its underlying purpose and need explicitly: "The purpose of this action is to conserve and protect the increasingly important values and benefits of roadless areas by … prohibiting activities that have the greatest likelihood of degrading desirable characteristics of inventoried roadless areas…." AR RACR-4609, Roadless Rule FEIS (Nov. 2000) at 1-14. The FEIS continues:

> This action is needed because:
>
> - Road construction, reconstruction, and timber harvest activities in inventoried roadless can directly threaten the fundamental characteristics of these areas by altering natural landscapes, including habitat fragmentation and changes in native plant and animal communities;

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- Budget constraints permit only a small portion of the Agency road system to be effectively managed; and
- National concern over roadless area management continues to generate controversy, including costly and time-consuming appeals and litigation.

FEIS at 1-14 to 1-15. The FEIS proceeds to explain that a national rule is needed, because "[l]ocal land management planning efforts may not always recognize the cumulative national significance of inventoried roadless areas and the values they represent, especially given the increasing development of the nation's landscape." Id. at 1-15.

Consistent with these purposes, the FEIS considered four principal alternatives, with four variations applicable to the Tongass National Forest in Alaska. Id. at 2-3 to 2-12. The first was the "no action" alternative required by NEPA. 40 C.F.R. § 1502.14(d). The other three alternatives and Tongass variations all involved a national rule to conserve roadless areas; none of them included any type of state petition process. FEIS at 2-3 to 2-12. In the face of a challenge to these alternatives, the Ninth Circuit held that the agency's purposes were reasonable, that the alternatives were specifically designed to achieve these purposes, and that the alternatives provided a legally adequate range of choices in light of these purposes. Kootenai Tribe, 313 F.3d at 1120-23 (reversing preliminary injunction of Roadless Rule because "[t]he Forest Service's consideration of the three alternatives was adequate….").

The Forest Service significantly changed its underlying purposes when it proposed and adopted the Roadless Repeal, and the reasonable alternatives changed accordingly. Because there was no EIS for the decision, there was no formal statement of purpose and need, but the agency explained its purposes in the Federal Register notice adopting the Roadless Repeal. There, the agency identified numerous purposes, reiterating the core purposes stated in the Roadless Rule FEIS, but adding significant new concerns that led the agency to propose a different course of action. The agency reasserted its "commitment to the objective of conserving

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inventoried roadless area values in the [National Forest System]" and reaffirmed the principal purpose of the Roadless Rule, which was to "address those activities having the greatest likelihood of altering, fragmenting, or otherwise degrading roadless area values and characteristics." Roadless Repeal, 70 Fed. Reg. at 25,654. See also id. at 25,655 (expressing Department's commitment to "conserving and managing inventoried roadless areas"). The agency stated in general terms that its goals were "to improve protection and accomplishment of management objectives…," and "to design an improved system for protecting roadless areas." Id. at 25,658. The notice also describes numerous other goals that led to the new rule: to "enhanc[e] roadless area values and characteristics," id. at 25,654, 25,656; to correct the ostensibly inflexible "one-size-fits-all" approach of the original rule, id. at 25,656; to provide access for active management "to restore or maintain habitat conditions for the management of some fish and wildlife species," id. at 25,654; to collaborate with states to recognize local situations and resolve unique management challenges, id. at 25,655; and to address concerns raised by the parties that filed lawsuits challenging the original rule. Id. at 25,654. The concerns raised in the litigation included:

> the sufficiency and the accuracy of the information available for public review during the rulemaking process; the inclusion of an estimated 2.8 million acres of roaded lands in the inventoried roadless area land base; the denial of requests to lengthen the public review period; the denial of cooperating agency status requested by several Western States; the sufficiency of the range of alternatives considered in the rulemaking process; the need for flexibility and exceptions to allow for needed resource management activities; and the changes made in the final rule after the closure of the public comment period. Concerns were also expressed about applying one set of standards uniformly to every inventoried roadless area.

Id. Though not grouped this way by the agency, these various purposes fall into four general categories: (1) conserving or enhancing roadless areas; (2) providing more flexibility than the original rule; (3) providing for more collaboration with states; and (4) addressing perceived flaws

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in the procedure followed for adopting the original rule.

3. The changed purpose and need required the consideration of new alternatives that had never been considered in an EIS.

Notwithstanding these multiple concerns and goals, the agency proposed only one option to address them: the complete repeal of the Roadless Rule and its replacement with a state petition process. This was not the only alternative that would adequately address these underlying purposes. Other options identified by the public and by the agency itself would meet all of these goals with less adverse impact to the environment. NEPA requires the agency to consider such alternatives in an EIS before adopting a new rule.

One obvious alternative would be to expand the exceptions contained in the original rule, or otherwise refine the rule, to address various concerns raised about it. This was the direction the Forest Service originally announced. On May 4, 2001, the U.S. Department of Agriculture ("USDA") issued a press release announcing that it would "allow[] the current Rule to go into effect on May 12, 2001 with amendments to be proposed in June." AR SPR-002, USDA Remarks on Roadless Rule (May 4, 2001). The agency actions were "aimed at protecting the principles of the rule, correcting data errors, and addressing concerns raised by the court, local communities, tribes, and state governments." Id. On the same day, the USDA filed a status report, accompanied by a sworn declaration from the Chief of the Forest Service, in the U.S. District Court for the District of Idaho explaining the agency's actions in greater detail. The status report explained that the USDA "is developing proposed amendments to the Rule that will seek to maintain the protections embodied in the current rule" while addressing other concerns. Environmental Plaintiffs' Exh. 1, Federal Defendants' Status Report with attached Declaration of Dale Bosworth (May 4, 2001) at 3.[5] The Forest Service Chief explained that the USDA and

[5] The USDA Status Report and Bosworth Declaration at Exh. 1 were not included in the

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Forest Service would:

> propose amendments to the regulation which will (1) retain the Rule's principles against timber harvesting and road building within our National Forest System; (2) address the concerns which have been expressed by States, Tribes, local communities, and this Court with regard to the process through which the Rule was promulgated; and (3) examine possible modifications to the Rule's present exceptions in order to augment local participation while seeking to maintain the roadless area values and characteristics which the current Rule protects.

Id. at ¶ 4. These options could address all of the purposes stated in the Federal Register notices eventually published in connection with the Roadless Repeal, with less adverse impact to the environment. NEPA requires agencies to consider alternatives such as these in an EIS.

This was similar to the recommendation of the Forest Roads Working Group ("FRWG"), a multi-stakeholder collaborative process supported by the Forest Service to address the debate over the Roadless Rule. The Group consisted of conservation groups, sportspersons, members of the forest products industry, and outdoor recreation business. AR SPR-043, FRWG Final Recommendations (March 26, 2003) at 1. The Forest Service encouraged and participated in this process. See, e.g., AR SPR-018, Letter from Dale Bosworth, Chief, U.S. Forest Service, to James Range (Nov. 7, 2001). After conducting a dialogue attended by over 40 people with diverse interests, FRWG Final Recommendations at 4, the Group recommended retaining the

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administrative record filed with this Court, but clearly should have been. They are public documents from the key decisionmakers explaining in detail the agency's actions announced in the May 4, 2001 press release that was included in the record. It is implausible that, in the decision process, the decisionmakers could have considered their press release but not their own more detailed statements explaining their actions, particularly a sworn declaration signed by one of them. Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) ("The 'whole record' includes everything that was before the agency pertaining to the merits of its decision."); Thompson v. Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989) ("The 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decisionmakers and includes evidence contrary to the agency's position.") (emphasis in original). Plaintiffs request that the Court consider the Status Report, including the Bosworth Declaration, as part of the record.

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Roadless Rule, but recognized that many participants in the process "felt that the current exceptions are neither broad enough nor sufficiently flexible to accommodate legitimate, local needs and concerns." Id. at 16. Accordingly, the Group recommended convening an advisory committee that would address:

> (a) the structure of the rule and its decision-making process, including questions such as the relevance of geographic and historical differences among areas, the importance of current forest plan designations, and appropriate means of considering local needs and perspectives; (b) management approaches for addressing recreational vehicle impacts; (c) fire and fuels management policy; (d) access to public and private lands for ecosystem improvements; (e) mechanisms to assure the accuracy of [Roadless Area Conservation Rule] coverage; and (f) policies that can reduce pressures on the IRAs by improved management of roaded areas.

Id. at 20. The Forest Service, however, failed to analyze such an alternative.

Another obvious alternative would be to retain the original Roadless Rule, but permit states to petition for exceptions to it or to opt out altogether. This was also a Forest Service idea reflected in the record. On June 9, 2003, the agency issued a press release proposing this alternative:

> The USDA Forest Service will propose for public review an amendment to the rule to identify how Governors may seek relief for exceptional circumstances, such as to protect public health and safety or reduce wildfire risks to communities and critical wildlife habitat. These exceptions will clarify and augment exceptions already present in the rule. The rule will remain unchanged in states where Governors choose not to seek relief for exceptional circumstances.

AR SPR-045, News Release (June 9, 2003).

These ideas are not mutually exclusive. A reasonable alternative might retain the core rule while expanding the exceptions, refining the coverage, and/or providing for a state petition process. Public comments on the proposed Roadless Repeal supported an EIS that would consider such alternatives. AR SPR-081, Content Analysis Team, Issues Narrative (April 8, 2005) at 1-17) ("The absence of public meetings and of alternatives to the proposed rule was the

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issue most often raised."); see also id. at 2-21 to 2-22, 2-46 to 2-47.

Each of these alternatives would meet the agency's purposes as described in the Federal Register notices proposing and adopting the Roadless Repeal. Indeed, they would fit the purposes better in many respects. For example, one major set of concerns about the original Roadless Rule involved perceived deficiencies in the FEIS process, such as allegedly insufficient information, allegedly insufficient time to comment, the denial of cooperating agency status to some states, and an allegedly inadequate range of alternatives. A more responsive way to address these concerns would be by preparing a new EIS that specifically addresses perceived deficiencies – not by repealing the rule in its entirety.

Notwithstanding the high level of public interest in a process that would consider less extreme approaches to achieve the agency's stated objectives, the Forest Service refused to prepare an EIS or to evaluate publicly any alternatives other than the course of action selected by the agency internally. When an agency changes its purposes in a way that changes the reasonable alternatives to the proposed action, a new EIS is required. See Alaska Wilderness Recreation & Tourism Ass'n, 67 F.3d at 729-30. The agency's reliance on the FEIS is misplaced because that FEIS was prepared for a different purpose and did not address reasonable alternatives in light of the agency's new purposes.

C. The Roadless Repeal Is Not Categorically Excluded From NEPA.

The Forest Service's second stated reason for refusing to prepare an EIS is that the Roadless Repeal "is merely procedural in nature and scope and, as such, has no direct, indirect, or cumulative effect on the environment." Roadless Repeal, 70 Fed. Reg. at 25,660. Contrary to this assertion, the Roadless Repeal is not "merely procedural." It repealed a rule that the defendants themselves have described in this litigation as providing "substantive site-specific management direction and allocations for 58.5 million acres of federal lands." Opposition to

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Plaintiffs' Joint Motion to Compel Completion of Admin. Record at 11 (Feb. 21, 2006) (emphasis added). It is not plausible to argue that the adoption of the rule was substantive while its repeal was merely procedural. If the adoption of the Roadless Rule in the first instance required an EIS, as held in Kootenai Tribe, 313 F.3d at 1114-15, then clearly the repeal of the same rule cannot be categorically excluded. TWS joins in the argument of the States on this point. See States' Summary Judgment Motion at 19-23.

D. Future EISs for Possible State Petitions Cannot Remedy the Lack of an EIS for the Roadless Repeal.

Finally, the Forest Service argues that "subsequent State-specific inventoried roadless area rulemaking may be proposed in the future, at which time, the Forest Service would fully consider the environmental effects of that rulemaking in compliance with National Environmental Policy Act (NEPA) procedures." Roadless Repeal, 70 Fed. Reg. at 25,660. The possible future preparation of state-specific EISs does not remedy the lack of an EIS for the Roadless Repeal because NEPA requires an agency to prepare an EIS before taking action. See Metcalf v. Daley, 214 F.3d 1135, 1141-45 (9th Cir. 2000) (agency violated NEPA by committing to action before preparing environmental assessment). Here, the agency has already repealed the Roadless Rule without having considered the alternatives in an EIS, and it is proceeding with actions that would have violated the Roadless Rule. See, e.g., Hoyt Decl. at ¶¶ 11-12. Even if the agency later prepares EISs for state-specific actions – a possibility that is by no means certain – it will be too late to assess alternatives to the Roadless Repeal. Further, many of the 39 states with national forest roadless areas may never submit petitions, and the substantive protections of the Roadless Rule will have been lost without the consideration of reasonable alternatives.[6] TWS joins in the argument of the States on this point. See States' Summary

[6] A state's decision not to submit a petition will not necessarily indicate a lack of concern for

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Judgment Motion at 29-34.

II. THE FOREST SERVICE VIOLATED THE ENDANGERED SPECIES ACT.

TWS also seeks to remedy federal defendants' failure to comply with one of the most important requirements of the Endangered Species Act – the obligation of all federal agencies under § 7(a)(2) to "insure that any action … by such agency … is not likely to jeopardize" a species protected by the Act. 16 U.S.C. § 1536(a)(2). In particular, the Forest Service has failed to consult with either the United States Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS"), as the ESA requires, and obtain biological opinions concerning the effects of the Roadless Repeal on threatened and endangered species. When the Roadless Rule was originally promulgated, the Forest Service consulted with FWS and NMFS, but it failed to do so when it repealed this protective rule. That failure violates the ESA.[7]

A. Standard of Review

This Court reviews the failure of the Forest Service to comply with the mandates of the ESA under the arbitrary, capricious, and contrary to law standard of the APA, 5 U.S.C. § 706(2)(A); see Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988). "Agency decisions may not, of course, be inconsistent with the governing statute." Defenders of Wildlife v. U.S. Environmental Protection Agency, 420 F.3d 946, 959 (9th Cir. 2005), citing 5 U.S.C. § 706(2)(A) (instructing courts to "set aside" agency action "not in accordance with law"). The meaning of

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roadless areas. The petition process is time-consuming, expensive, and uncertain to produce results. It is also risky, for even a successful petition does not guarantee the requested level of protection, only that a rulemaking will be initiated. Moreover, state-by-state petitions cannot ensure the landscape-wide protection that the Forest Service originally determined was needed.

[7] The Court has jurisdiction over this claim under the ESA citizen suit provision, 16 U.S.C. § 1540(g). All plaintiffs except Biodiversity Conservation Alliance, Environmental Protection Information Center, Forests Forever, Greenpeace, and National Audubon Society sent a 60-day notice letter of intent to sue on June 8, 2005 (attached as Exhibit A to TWS's Complaint); those five groups do not join in this claim.

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"agency action" under the ESA is a legal issue reviewed de novo by this Court. See Greenpeace v. NMFS, 80 F. Supp.2d 1137, 1144 (W.D. Wash. 2000) ("Greenpeace I").

B. The ESA Requires All Federal Agencies to Ensure That Their Actions Do Not Harm Threatened and Endangered Species or Their Habitat.

The U.S. Supreme Court has called the ESA "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." Id. at 184. The ESA reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." Id. at 185. To accomplish this goal, the ESA includes both substantive and procedural provisions designed to protect and recover imperiled species.

For federal actions, the heart of the ESA is section 7(a)(2), which requires that every federal agency insure that its actions are not likely to "jeopardize" a listed species or "adversely modify" its critical habitat. 16 U.S.C. § 1536(a)(2). The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. See Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987). To ensure that this strict substantive mandate is carried out, agencies must engage in a consultation process with the appropriate expert wildlife agency on the impacts of any federal action to listed species.

The formal consultation process commences when a federal agency determines that a proposed federal action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Consultation is complete when NMFS or FWS issues a "biological opinion" that determines if the action is likely to jeopardize the species. If so, the opinion may specify alternatives that will avoid jeopardy while still allowing the agency to proceed with the action. 16 U.S.C.

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§ 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5)-(6); (h)(3); (i)(1)-(2). NMFS or FWS may also suggest modifications to the action to limit negative impacts even when it concludes that jeopardy is unlikely. Id.; 50 C.F.R. § 402.13. Under this framework, federal actions that may affect a listed species may not proceed unless and until the federal agency insures, through completion of the consultation process with the issuance of a biological opinion, that the action is not likely to cause jeopardy. See 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.13, 402.14; Conner, 848 F.2d at 1455. In carrying out these duties, agencies are required to use the best scientific information available. 16 U.S.C. § 1536(a)(2).

The Ninth Circuit, and this Court, have emphasized that strict compliance with the ESA's procedures is critical to the success of the ESA, because only through the consultation process can the effects of agency action on listed species be fully and objectively evaluated. See Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985); PCFFA v. U.S. Bureau of Reclamation, 138 F. Supp.2d 1228, 1248-50 (N.D. Cal. 2001); Greenpeace v. NMFS, 106 F. Supp.2d 1066, 1073 (W.D. Wash. 2000) ("Greenpeace II"). Accordingly, scrupulous adherence to the letter and spirit of the ESA consultation process is to be strictly enforced by the courts.

> [T]he strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions . . .. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter is, of course, impermissible.

Thomas, 753 F.2d at 764 (emphasis in original); see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056-57 (9th Cir. 1994) (enjoining logging, grazing, and road-building activities for failure to reinitiate consultation on forest plans upon listing of salmon species).

Consultation under the ESA must encompass all aspects of the agency action. 50 C.F.R. § 402.14(c) (agency must consider effects of action "as a whole"). The law does not allow

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agencies to segment agency action into separate components to be viewed in isolation. Greenpeace I, 80 F. Supp.2d at 1146 ("an agency may not unilaterally relieve itself of its full legal obligations under the ESA by narrowly describing the agency action at issue in a biological opinion.").

C. The Forest Service Must Consult on the Roadless Repeal Because It Is an "Agency Action" That "May Affect" Listed Species.

There are only three facts material to TWS's motion under ESA § 7(a)(2), and they are beyond dispute. First, the Roadless Repeal is a final agency action. Second, the Roadless Repeal may affect species protected under the ESA. Third, the Forest Service has not determined, in consultation with NMFS and FWS, whether the Roadless Repeal is likely to jeopardize the continued existence of threatened and endangered species. Under the ESA, the Forest Service must initiate consultation with NMFS and FWS on the Roadless Repeal.

1. Under Ninth Circuit precedent, the Roadless Repeal is an agency action within the meaning of ESA § 7.

There can be no serious dispute in this case that the Roadless Repeal is an "agency action" under the ESA. "Agency action" is defined in § 7(a)(2) as "any action authorized, funded, or carried out by" a federal agency. 16 U.S.C. § 1536(a)(2). Regulations implementing section 7 broadly define the scope of agency actions subject to consultation:

> [A]ll activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal Agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02 (defining "action") (emphasis added). The Ninth Circuit, following U.S. Supreme Court precedent, has consistently construed "agency action" broadly, see Pacific Rivers Council v. Thomas, 30 F.3d at 1054-55; Conner, 848 F.2d at 1453, and agencies regularly

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consult on the promulgation of regulations. See, e.g., National Wildlife Fed'n v. FEMA, 345 F. Supp.2d 1151, 1169 (W.D. Wash. 2004) (consultation required on FEMA's flood insurance regulations). The Forest Service's repeal of the 2001 Roadless Rule is a federal agency action subject to the ESA.

2. The Roadless Repeal may affect threatened and endangered species and adversely modify their critical habitat.

The ESA consultation process is triggered whenever a federal action "may affect" a listed species. The threshold for such a determination is exceedingly low. "Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement . . . ." 51 Fed. Reg. 19,926, 19,949 (June 3, 1986); Final ESA Section 7 Consultation Handbook (Mar. 1998) ("Consultation Handbook," excerpts submitted as Environmental Plaintiffs' Exh. 2), at xvi (defining "may affect" as "the appropriate conclusion when a proposed action may pose **any** effects on listed species . . . .") (emphasis in original). As noted, even indirect effects (such as the private development that might be expected to occur after a new federal highway is built) must be evaluated through the ESA consultation process. See National Wildlife Federation v. Coleman, 529 F.2d 359, 373 (5th Cir. 1976); Consultation Handbook at 4-18, 4-26; 50 C.F.R. § 402.02.

Promulgation and implementation of the Roadless Repeal unquestionably "may affect" threatened and endangered species and their designated critical habitat.

> Roadless areas function as biological strongholds and refuges for many species. Of the nation's species currently listed as threatened, endangered, or proposed for listing under the Endangered Species Act, approximately 25% of the animal species and 13% of the plant species are likely to have habitat within inventoried roadless areas on National Forest System lands. Roadless areas support a diversity of aquatic habitats and communities, providing or affecting habitat for more than 280 threatened, endangered, proposed, and sensitive species. More than 65% of all Forest Service sensitive species are directly or indirectly affected by inventoried roadless areas.

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AR RACR-5796, Roadless Rule, 66 Fed. Reg. 3,243, 3,245 (Jan. 12, 2001). For threatened and endangered salmon and steelhead, "[i]nventoried roadless areas are key to recovery of salmon and steelhead in decline, providing habitat to protect species until longer-term solutions can be developed for migration, passage, hatchery, and harvest problems associated with the decline of anadromous fish." Id. at 3,247.

Inventoried roadless areas provide clean drinking water and "function as biological strongholds for populations of threatened and endangered species. They provide large, relatively undisturbed landscapes that are important to biological diversity and the long-term survival of many at risk species." Id. at 3,245. The Roadless Rule FEIS took special note of the importance of roadless areas to the conservation of threatened grizzly bears in the lower 48 states and included a map showing the roadless areas in various designated grizzly bear recovery zones. FEIS at 3-137 – 3-139. See also FEIS, Appendix C (Summary of Threatened, Endangered, and Proposed Species). The Roadless Repeal, with its removal of protections against road building and timber harvest in these areas that are critically important to the survival of many threatened and endangered species, easily trips the "may affect" trigger for ESA § 7(a)(2) consultation.

3. The Forest Service did not consult on the Roadless Repeal.

The Forest Service did not consult under ESA § 7(a)(2) on the issuance or implementation of the Roadless Repeal. This failure to consult on an action that "may affect" listed species violates the Endangered Species Act.

The failure to consult stands in sharp contrast to the consultation that occurred for the promulgation of the 2001 Roadless Rule. Pursuant to ESA § 7(a)(2), the Forest Service prepared a biological evaluation of the effects on threatened and endangered species and their designated critical habitat from the Roadless Rule and consulted with both NMFS and FWS.

Both agencies concurred with the determination in the biological evaluation that all of the

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action alternatives analyzed in the biological evaluation may affect, but are not likely to adversely affect threatened or endangered species or adversely modify designated critical habitat; are not likely to jeopardize proposed species or adversely modify proposed critical habitat; and may beneficially affect threatened, endangered, and proposed species and critical habitat. Roadless Rule, 66 Fed. Reg. at 3,271.

For the repeal of the same rule, the Forest Service failed to engage in any similar process. To the contrary, the record provided to date by the Forest Service contains only a single document prepared by the Forest Service to determine whether the agency needed to consult under ESA § 7. See AR SPR-084, Determination for Threatened, Endangered, and Proposed Species (April 18, 2005). This document makes two crucial errors. First, it relies on the 2003 district court injunction of the Roadless Rule in Wyoming v. U.S. Dep't of Agric., 277 F. Supp.2d 1197 (D. Wyo. 2003), vacated, 414 F.3d 1207 (10th Cir. 2005),[8] to state that the repeal of the rule has an effect only "on paper." Determination for Threatened, Endangered, and Proposed Species at 1. Second, it describes the state petition process as "merely procedural in nature." Id. at 2. Based on these two characterizations of the Roadless Repeal, the Forest Service determined that the repeal would have "no effect" on threatened or endangered species. Id.

This analysis, such as it is, improperly segments the Roadless Repeal into two parts, see 50 C.F.R. § 402.14(c). The law does not allow agencies to segment agency action into separate components to be viewed in isolation. Conner, 848 F.2d at 1453; National Wildlife Fed'n v. FEMA, 345 F. Supp.2d at 1176 (responding to FEMA argument that the flood insurance program itself did not affect salmon by noting "[t]he regulations implementing Section 7(a)(2) of

[8] For a description of the Wyoming injunction, see States' Motion for Summary Judgment at 11.

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the ESA require an action agency to consider 'the effects of the action as a whole.'"). The Roadless Repeal eliminated the Roadless Rule and replaced it with a state petition process in one coordinated action. Moreover, as discussed above with respect to NEPA, the repeal of the substantive Roadless Rule protections is a substantive action. "By altering how the Forest Service manages inventoried roadless areas, the Roadless Rule will have a demonstrable impact on the physical environment." Kootenai Tribe, 313 F.3d at 1115. The same, of course, is true of the Roadless Repeal; it is not a merely a paper exercise.

Nor can the Forest Service hide behind the district court injunction to insist that repeal of the Roadless Rule had no effect. The Wyoming district court injunction was entered in July 2003, over two years after the Roadless Rule was promulgated and five years after road-building was temporarily halted in roadless areas. While the Forest Service acquiesced to the lower court decision, the Wyoming district court injunction was not the final legal word on the Roadless Rule; the ruling and injunction had been appealed to the Tenth Circuit, and the outcome of that appeal was far from certain. The defendants themselves acknowledged this uncertainty in the record. See AR SPR-062, Proposed Roadless Repeal, 69 Fed. Reg. 42,636, 42,637 (July 16, 2004) (proposed rule based in part on "legal uncertainty"). Indeed, the Forest Service adopted a temporary exemption from the Roadless Rule for the Tongass National Forest after the Wyoming injunction in an attempt to ensure that the Tongass would not be covered "if the roadless rule were to be reinstated by court order." AR TRS-0401_ii 301, 68 Fed. Reg. 75,136, 75,138 (Dec. 30, 2003).

It was also uncertain whether the Wyoming district court's injunction could preclude application of the Roadless Rule nationwide, given that its reasoning conflicted on many points with the Ninth Circuit's decision in Kootenai Tribe, a ruling that upheld the Roadless Rule

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against many of the same challenges raised a year later in the Wyoming case. Compare Kootenai Tribe, 313 F.3d at 1115-20 (addressing NEPA process claim), at 1120-24 (addressing range of alternatives claim) with Wyoming, 277 F. Supp.2d at 1218-20 (NEPA process claim), at 1222-26 (range of alternatives claim).

With conflicting decisions about both the validity of the Roadless Rule and the effect of the Wyoming injunction, the Forest Service's "no effect" determination was based purely on the speculation that the injunction would remain in place. But "any possible effect" triggers consultation, 51 Fed. Reg. at 19,949 (emphasis added), and the outright repeal of the rule, even in the face of an unclear legal situation, is a possible effect. The "may affect" threshold for consultation is extremely low for good reasons. The consultation process, using the best available science, examines the environmental baseline, cumulative effects, and direct and indirect impacts of the action, and it is through the consultation process that more specific effects – beneficial or harmful – are examined and analyzed. See 50 C.F.R. Part 402. Unlike the Wyoming district court injunction, which was not legally certain, the Forest Service's repeal of the Roadless Rule removed any uncertainty about what protections roadless areas did or did not enjoy. The effect of the Roadless Rule was to banish all doubt and open these areas up for development, and, given the importance of roadless areas to imperiled species, that effect easily meets the "may affect" threshold.[9] The Forest Service cannot rely on the Wyoming district court injunction to avoid its ESA duties.

[9] The Wyoming injunction did not stop the Forest Service from reviewing the Roadless Repeal's impact on Civil Rights and Environmental Justice (AR SPR-079) and from performing a cost-benefit analysis of the repeal (AR SPR-073).

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III. THE ROADLESS REPEAL IS AN IRRATIONAL, UNSUPPORTED AGENCY REVERSAL IN LIGHT OF THE FOREST SERVICE'S STATUTORY OBLIGATIONS.

Underlying the procedural legal violations discussed above is a fundamental failure of rational agency decisionmaking. The Forest Service is bound by many substantive statutes – all of which, with one focus or another, direct the Forest Service to care for the resources found on our nation's public forests. When the Forest Service promulgated the 2001 Roadless Rule, the agency took those duties into account and explained why the Roadless Rule was needed; it gave lots of reasons why the Roadless Rule was needed to fulfill its statutory mandates. When the Forest Service reversed course and repealed the Roadless Rule, the agency's silence was deafening. The Forest Service failed to explain how repeal of the rule would meet the agency's substantive obligations or how it would otherwise address the concerns that led to the initial adoption of the rule. Nor could the Forest Service offer these explanations, given the negative impact of repealing the Roadless Rule's protections. Because the Roadless Repeal is "internally inconsistent and inadequately explained," General Chem. Corp. v. United States, 817 F.2d 844, 857 (D.C. Cir. 1987), the Court should invalidate it as arbitrary and capricious.

A. Standard of Review

Under the APA, this Court must reverse the Roadless Repeal if it finds the decision "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Specifically, an agency decision is unlawful if the agency has acted contrary to controlling statutes, has failed to consider all relevant factors, has "offered an explanation for its decision that runs counter to the evidence before the agency," or has not articulated "a rational connection between the facts found and the choice made." Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quotation omitted). More importantly here, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for

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the change beyond that which may be required when an agency does not act in the first instance." Id. at 42.

"Also, internally contradictory agency reasoning renders resulting action 'arbitrary and capricious;' such actions are not founded on a reasoned evaluation of the relevant factors." Defenders of Wildlife, 420 F.3d at 959, citing Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001) (internal quotation omitted). The decision must also be supported by substantial evidence. "We must set aside the Secretary's decision if it was 'arbitrary' or 'capricious' because the decision was based on inadequate factual support. See 5 U.S.C. § 706(2)(A). We review the full agency record to determine whether substantial evidence supports the agency's decision…." Bonnichsen v. United States, 367 F.3d 864, 879-80 (9th Cir. 2004).

B. The Forest Service Has a Fundamental Duty to Protect the Values of Roadless Areas.

The Forest Service faces numerous clear statutory mandates in administering the National Forest System. The National Forest System is comprised of 155 national forests, 20 national grasslands and various other lands across the United States. See 65 Fed. Reg. 67,514 (Nov. 9, 2000). The Forest Reserve Act of 1897 (also known as the "Organic Administration Act") established the protection of national forests. 16 U.S.C. §§ 473-82, 551. Under the Organic Administration Act, the Secretary of Agriculture "may make such rules and regulations … to regulate [the forests'] occupancy and use and to preserve the forests thereon from destruction." Id. at § 551.

Congress revisited national forest management in the Multiple-Use Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-31, and the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1687. MUSYA set forth multiple-use goals for national forests; the forests

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"shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. NFMA enacted requirements to "develop, maintain, and … revise land and resource management plans" for national forests. 16 U.S.C. § 1604(a). NFMA contains substantive requirements; for example, the Forest Service must provide for diversity of plant and animal communities. 16 U.S.C. § 1604(g)(3)(B). The Forest Service also must "insure that timber will be harvested from National Forest System lands only where soil, slope, or other watershed conditions will not be irreversibly damaged" and protection is afforded to "streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures … and deposits of sediment" so that serious and adverse effects of water conditions or fish habitat will not result. 16 U.S.C. § 1604(g)(3)(E)(i) and (iii).[10]

The Forest Service's administration of national forest lands is bound by other federal statutes as well. The Endangered Species Act, discussed above, directs all federal agencies to insure that their actions do not jeopardize threatened and endangered species or adversely modify their designated critical habitat. See generally Defenders of Wildlife, 420 F.3d at 950-51. The Clean Water Act mandates that all federal agencies comply with water quality standards. See 33 U.S.C. § 1323(a); National Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1167 (9th Cir. 2004). National forest lands contain streams that violate water quality standards and must be restored. See Roadless Rule FEIS at 3-50 ("Many states have identified impaired stream segments on NFS lands and they are working with the Forest Service to determine how to reduce pollutant impacts…."). The Clean Air Act, 42 U.S.C. § 7401 et seq., the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 et seq., the Safe Water Drinking Act, 42 U.S.C. § 300 et seq., and

[10] For a full discussion of the history and legal context of Forest Service authority, see Charles F. Wilkinson and H. Michael Anderson, Land and Resource Planning in the National Forests 15-66 (1987).

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many other "environmental" statutes all place legal duties on the Forest Service. Non-environmental statutes, such as the National Historic Preservation Act, 16 U.S.C. § 470 et seq., and the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq., also direct the Forest Service's actions.

C. The 2001 Roadless Rule Flowed From the Forest Service's Underlying Duties.

When the Forest Service adopted the Roadless Rule, the agency focused on its concerns for the natural resources of our nation's forests, imperiled species on those forests, clean water and watershed health, the agency's inability to maintain the existing road system, and the need for a national rule, as opposed to forest-by-forest or state-by-state protections. Consideration of these issues stemmed from the Forest Service's fundamental legal responsibilities in managing our nation's public forests.

1. Forest health, threatened and endangered species, and clean water

The purpose of the Forest Service's 2001 Roadless Rule was to "prohibit[] road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics." Roadless Rule, 66 Fed. Reg. at 3,244. The Forest Service noted that it was responsible for the health, diversity, and productivity of the nation's forests and grasslands "to meet the needs of present and future generations." Id.

The Forest Service focused on the ecological characteristics of roadless areas. "Inventoried roadless areas provide clean drinking water and function as biological strongholds for populations of threatened and endangered species. They provide large, relatively undisturbed landscapes that are important to biological diversity and the long-term survival of many at risk species." Id. at 3,245. These undeveloped wildlands provide secure habitat for numerous sensitive wildlife species, including fisher, marten, mountain lion, elk, and wolverine. See

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Roadless Rule FEIS at 3-142 to 3-145. For many rare and hard-pressed wildlife species, National Forest roadless areas are a final refuge. From condors of the southern California mountains, to grizzly bears and wolves near Yellowstone National Park, to migratory songbirds among the Appalachian hardwoods, many species would no longer exist – or would be severely depleted – but for National Forest roadless areas. See id. at 3-162, 3-179 to 3-184, Appendix C. The Forest Service highlighted high quality or undisturbed soil, water, and air, public drinking water, diversity of plant and animal communities, habitat for imperiled species, recreation, and high quality scenery among the prominent roadless area values. Id.

In promulgating the Roadless Rule, the Forest Service also noted the particular importance of roadless areas to watershed protection on National Forest System lands. Although inventoried roadless areas represent less than 2% of the land base of the United States, "[o]verall, National Forest System watersheds provide about 14% of the total water flow of the nation, about 33% of water in the West." Roadless Rule FEIS at 3-46. "Of the watersheds on National Forest System land, 661 contain inventoried roadless areas and 354 of those watersheds serve as source areas of drinking water used by millions of people across the nation." Roadless Rule, 66 Fed. Reg. at 3,246. The Forest Service also noted the importance of roadless areas for salmon, steelhead, and other aquatic species. "In addition to their ecological contributions to healthy watersheds, many inventoried roadless areas function as biological strongholds and refuges for a number of species and play a key role in maintaining native plant and animal communities and biological diversity." Id. at 3,247. See States' Summary Judgment Motion at 37-38.

2. Cost of maintaining roads

The Forest Service also focused on the costs of maintaining roads. "[T]he size of the existing forest road system and attendant budget constraints prevent the agency from managing

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its road system to the safety and environmental standards to which it was built." 66 Fed. Reg. at 3,244. The Forest Service discussed its maintenance backlog and the increased costs of roadless area activities, see id. at 3,245-46; the agency estimated that its nationwide road maintenance and repair backlog at more than $8.4 billion – and growing. See FEIS at 1-5; see also 66 Fed. Reg. at 3,246 (because less than 20% of annual upkeep needs are funded, "the cost of fixing deteriorating roads increases exponentially every year"). TWS incorporates the discussion in the States' Summary Judgment Motion at 38-39.

3. Need for a national rule

The Forest Service considered the need for a national rule versus local decisionmaking. 66 Fed. Reg. at 3,246. Because the Forest Service had "the responsibility to consider the 'whole picture'" regarding national forest management, id., the Forest Service found that management decisions for roadless areas made on a case-by-case basis at the forest or regional level would not fulfill the agency's responsibilities. "[T]he nation-wide results of these [incremental] reductions could be a substantial loss of quality and quantity of roadless area values and characteristics over time." Id. The agency specifically discussed its duties to protect watersheds and threatened and endangered species. Id. at 3,246-47. The Forest Service concluded that adoption of the Roadless Rule "ensures that inventoried roadless areas will be managed in a manner that sustains their values now and for future generations." Id. at 3,247.

Previously, the Forest Service concluded that local decision-making – national forest by national forest – was a fundamental problem with roadless area management:

> Regardless of how well informed individual decisions may be at the local level, any new road building in inventoried roadless areas still results in a loss of roadless characteristics …. [W]hen these individual decisions are aggregated over time, and throughout the country … ecological and social outcomes resulting from the loss of roadless areas may become substantial.

FEIS at 1-15. Nothing in the record counters this conclusion.

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D. The 2005 Roadless Repeal Deviates From Carefully-Crafted Agency Policy Without Adequate Explanation, Especially in Light of the Forest Service's Substantive Duties.

The Forest Service's Roadless Repeal deviates from the above-described carefully crafted agency policy for managing inventoried roadless areas without adequate explanation. The Roadless Repeal does not explain how it will protect roadless areas and the clean water and wildlife found within roadless areas. The Roadless Repeal does not explain how it will fulfill the Forest Service's legal obligations to provide for the health, diversity, and productivity of the nation's forests and grasslands; how it will prevent nationwide reduction in roadless area values; how it will protect watersheds; and how it will address fiscal considerations.

The courts have long recognized the importance of insisting on the reasoned exercise of agency discretion. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971) (judicial scrutiny of agency decisions facilitates the "evenhanded application of law, rather than impermissible whim, improper influence, or misplaced zeal" and "furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers."). Through arbitrary and capricious review, the APA mandates basic fairness and rationality in agency decision-making. As the Supreme Court noted, "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962) (quotation omitted) (emphasis in original).

There is nothing in the administrative record that explains how the 2005 Roadless Repeal meets the concerns addressed by the original Roadless Rule, or how the repeal meets the underlying obligations of the Forest Service. For example, the Forest Service's Roadless Repeal harms the ability of the agency to protect plant and animal diversity on national forest lands, as

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required by NFMA, see 16 U.S.C. § 1604(g)(3)(B), including by removing protection from areas that serve as refugia for salmon, steelhead, bull trout, and other native fish species, and that provide a critical refuge for such rare and sensitive species as grizzly bears, lynx, and wolverines. See Roadless Rule FEIS at 3-160 to 3-169. The Roadless Repeal also fails to protect watersheds from harmful water temperatures and sedimentation. These are substantive duties under NFMA that the Forest Service must obey.

While the agency certainly has some discretion as to how it complies with those duties, it does not have discretion to ignore those duties. In its explanation for repealing the Roadless Rule, published in the Federal Register, the Forest Service acknowledged the need to conserve roadless areas and to "address those activities having the greatest likelihood of altering, fragmenting, or otherwise degrading roadless area values and characteristics," Roadless Repeal, 70 Fed. Reg. at 25,654. The Forest Service also stated that its objective for the repeal was "a responsible and balanced approach to re-examining the roadless rule in an effort to address [] concerns while enhancing roadless area values and characteristics." Id. Despite these statements, the Forest Service never even begins to explain how the repeal of the rule and/or the adoption of a state petition process will address these concerns. The Forest Service also fails to discuss how the repeal will address the $8.4 billion road maintenance backlog. Instead, the agency's entire discussion focuses on a laundry list of criticisms leveled against the rule. See id. at 25,654-61.

This discussion is entirely one-sided. It fails completely to address the relevant – and compelling – factors that caused the agency to adopt the rule in the first place. The failure to consider relevant factors will normally render an agency action arbitrary under the APA, but this is particularly true where, as here, the agency has reversed a previous course of action adopted

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after a thorough analysis of all the factors. See Motor Vehicle Mfr. Ass'n, 463 U.S. at 42. The record is devoid of any evidence of the Forest Service considering "enhancing roadless area values and characteristics." 70 Fed. Reg. at 25,654. In reviewing this decision, the Court cannot "supply a reasoned basis for the agency's action that the agency itself has not given…." Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974). Instead, "the agency's path [must] be reasonably discerned." Id. at 286.

Further, there is no evidence, substantial or otherwise, to support the Roadless Repeal's stated concern for protecting roadless areas. Indeed, "even though an agency decision may have been supported by substantial evidence, where other evidence in the record detracts from that relied upon by the agency we may properly find that the agency rule was arbitrary and capricious." American Tunaboat Ass'n v. Baldrige, 738 F.2d 1013, 1016 (9th Cir. 1984) (citing Bowman Transp., 419 U.S. at 284 (agency decision supported by substantial evidence may still be arbitrary and capricious)); see Atchinson v. Wichita Board of Trade, 412 U.S. 800, 808 (1973) (where agency modifies or overrides precedents or policies, it has the "duty to explain its departure from prior norms"). There is no such substantial evidence here.

The only evidence in the record, aside from the public comments, that discusses the impacts of repealing the Roadless Rule in any thoughtful way comes not from the Forest Service, but rather from the recommendations of the Forest Roads Working Group ("FRWG"). AR SPR-043, FRWG, Final Recommendations (March 26, 2003). The FRWG recommended retaining the 2001 Roadless Rule.

> The FRWG maintains and re-emphasizes its strong belief that the protection of [inventoried roadless areas] and their values and characteristics requires a national policy foundation and management structure to ensure consistency and minimize the cumulative, incremental loss of those values and characteristics. The existing [Roadless Rule] recognizes and implements this important principle. Accordingly, while the FRWG believes improvements to the [Roadless Rule] may

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> be warranted over time, and acknowledges that other stakeholders are proposing revisions to the rule, we recommend that the existing rule be retained and implemented while the effects and desirability of potential improvements and revisions are considered through a deliberative process.

Id. at 5. In light of the strong evidence that supported the original Roadless Rule, the only entity that actually gave thoughtful consideration to roadless area management concluded that the rule should be retained. Despite this strong stance, the Forest Service ignored the very process it promoted on this issue.

An agency acts arbitrarily and capriciously when it ignores the analysis of its experts. See Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988). Here, the Forest Service ignored the findings and recommendations of its own prior environmental analysis on the Roadless Rule; it ignored the recommendations of the stakeholder group it supported to study roadless area management issues; and it failed to produce later analyses that contradicted any of these findings. See American Tunaboat Ass'n, 738 F.2d at 1016-17 (court overturned agency regulations because the agency ignored a comprehensive database compiled by trained agency personnel). Because the 2005 Roadless Repeal is an irrational and unsupported reversal of agency action in light of the Forest Service's statutory obligations, it should be vacated.

IV. THIS COURT SHOULD REINSTATE THE ROADLESS AREA CONSERVATION RULE.

To remedy defendants' violations of NEPA, the ESA, and the APA, this Court should award plaintiffs injunctive relief setting aside the challenged Roadless Repeal, reinstating the 2001 Roadless Rule, and prohibiting the defendants from undertaking any actions in violation of the Roadless Rule until they comply with applicable legal requirements.

The bases for injunctive relief in the federal courts "are irreparable injury and inadequacy of legal remedies." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and

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is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Id. at 545.

Here each of plaintiffs' claims warrants an injunctive remedy. "In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004); see also National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 738 n.18 (9th Cir. 2001) ("[B]ecause NEPA is a purely procedural statute, the requisite harm is the failure to follow the appropriate procedures."). While every NEPA violation does not dictate injunctive relief, "the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction." High Sierra Hikers Ass'n, 390 F.3d at 642 (quotations and citation omitted).

In addition, plaintiffs bring their NEPA claim, as well as their challenge to the Forest Service's irrational reversal of position in the Roadless Repeal, pursuant to the APA. See ONRC Action v. Bureau of Land Management, 150 F.3d 1132, 1135 (9th Cir. 1998) (NEPA claims must be brought under APA). Where, as here, a plaintiff "prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order." American Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001); see also Alsea Valley Alliance v. Department of Commerce, 358 F.3d 1181, 1185 (9th Cir. 2004) ("[V]acatur of an unlawful agency rule normally accompanies a remand."); 5 U.S.C. § 706(2) (providing for "reviewing court" to "hold unlawful and set aside" illegal agency action).

The ESA imposes an even stronger demand for injunctive relief. In enacting the ESA, Congress "foreclosed the exercise of the usual discretion possessed by a court of equity." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). "Congress has spoken in the plainest

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of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" Sierra Club v. Marsh, 816 F.2d at 1383. Accordingly, the traditional test for injunctive relief is not the test under the ESA. See, e.g., Tennessee Valley Auth., 437 U.S. at 173, 193-95; National Wildlife Fed'n v. NMFS, 422 F.3d 782, 793-94 (9th Cir. 2005) (affirming preliminary injunction that required the Army Corps of Engineers to take affirmative, protective measures at dams on Columbia and Snake Rivers in absence of valid biological opinion); Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) ("Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species."). Pending completion of consultation, the law is clear that injunctive relief should issue to protect listed species. See Pacific Rivers Council, 30 F.3d at 1056-57 (enjoining all national forest management activities that "may affect" listed fish pending completion of consultation); Thomas, 753 F.2d at 764-65 (reversing district court's denial of injunction blocking construction of a timber road pending consultation); PCFFA v. U.S. Bureau of Reclamation, 138 F. Supp.2d at 1247-50 (enjoining certain irrigation deliveries pending completed consultation).

Applying these principles, the Court should issue an injunction vacating and setting aside the Roadless Repeal. Even beyond the irreparable harm that flows from uninformed agency decision-making, see National Parks & Conservation Ass'n, 241 F.3d at 738 n.18, the defendants' actions have already caused irreparable environmental harm in the form of road construction that has scarred a formerly pristine roadless area in the Caribou-Targhee National Forest in Idaho. See Hoyt Decl. at ¶¶ 11-12 and attached exhibits. The defendants' challenged regulatory actions threaten even more irreparable environmental injury in the near future due to

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threatened expansion of a phosphate mine into this same Idaho roadless area; see id. at ¶ 13, logging in an Oregon roadless area that has already been approved by the Forest Service, see Ullian Decl. at ¶ 19 and attached exhibit; and planned road construction and logging across portions of eight roadless areas in Minnesota, see State Plaintiffs' Exhibits 13-14 – all of which would have been illegal under the Roadless Rule. In Alaska's Tongass National Forest, the agency has adopted a five-year timber sale schedule that focuses heavily on roadless areas. It includes 24 timber sale projects in roadless areas, two of which have already been approved, that were prohibited by the Roadless Rule. See Bosman Decl. at ¶ 6.

These severe environmental impacts are more than sufficient to justify injunctive relief vacating and setting aside the Roadless Repeal. See Idaho Sporting Cong. v. Alexander, 222 F.3d 562, 569 (9th Cir. 2000) (noting that imminent and continuing logging activities presented "evidence of environmental harm ... sufficient to tip the balance in favor of injunctive relief"); Neighbors of Cuddy Mtn. v. U.S. Forest Serv., 137 F.3d 1372, 1382 (9th Cir. 1998) ("The old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce.") (citation omitted); cf. Kootenai Tribe, 313 F.3d at 1125 (reversing injunction against Roadless Rule and holding that "the public's interest in preserving precious, unreplenishable resources must be taken into account in balancing the hardships").

Under controlling Ninth Circuit precedent, the Court should fill the resulting regulatory void by reinstating the 2001 Roadless Rule. "The effect of invalidating an agency rule is to reinstate the rule previously in force." Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005); see also Northwest Ecosystem Alliance v. Rey, No. 04-844P, 2006 WL 44361 at *6-*7 (W.D. Wash. Jan. 9, 2006) (setting aside 2004 revisions to national forest management requirements and reinstating 2001 management requirements). Here, the 2001 Roadless Rule is "the rule

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previously in force," Paulsen, 413 F.3d at 1008, and should be reinstated by this Court. Moreover, plaintiffs' request that the Court enjoin defendants from taking any action in violation of the Roadless Rule to ensure that the existing irreplaceable natural legacy of National Forest roadless areas remains protected pending defendants' compliance with federal law.[11]

Finally, plaintiffs wish to make clear their request that in reinstating the Roadless Rule, the Court should make effective the original Roadless Rule that extended its prohibitions on road construction and logging to Alaska's Tongass National Forest – the largest National Forest in the United States – rather than the version of the Roadless Rule that arose after the defendants promulgated an interim exemption excluding the Tongass from the rule. Reinstating the original 2001 Roadless Rule, absent the Tongass exemption, is appropriate because of the short-term duration that was intended for that exemption. On December 30, 2003, the defendants amended the Roadless Rule to "temporarily exempt" the Tongass National Forest in Alaska. AR TRS-0401_ii 301, 68 Fed. Reg. 75,136 (Dec. 30, 2003). This temporary exemption would last "until the Department promulgates a subsequent final rule concerning the application of the roadless rule within the State of Alaska … ." Id. The defendants had, five months earlier, published an advance notice of proposed rulemaking to solicit comments on precisely such a rule. Id.; see AR TRS-0401_wo_t051, 68 Fed. Reg. 41,864 (July 15, 2003). The adoption of the Roadless Repeal in 2005 mooted out the need for any Alaska-specific final rule. 70 Fed. Reg. at 25,659 ("This rule thus negates the need for the further Tongass-specific rulemaking anticipated by the

[11] The Wyoming district court's former injunction against the 2001 Roadless Rule should play no role in this Court's remedial analysis. The Wyoming court's ruling and injunction were vacated by the 10th Circuit precisely to ensure that "the rights of the defendant-intervenors" in that litigation – many of whom are plaintiffs here – "are preserved." Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1213 n.6 (10th Cir. 2005). The very purpose of such a vacatur is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950).

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2003 rule.").

It would be inappropriate to revert to the temporary Tongass exemption because that exemption was never intended to last the additional length of time that will be required for the Forest Service to correct the procedural and substantive deficiencies in the Roadless Repeal. In adopting the temporary exemption, the Forest Service emphasized that it would apply only "in the short term," and that during that time the roadless areas of the Tongass would be "sufficiently protected under the Tongass Forest Plan…." See 68 Fed. Reg. at 75,138. The Ninth Circuit subsequently struck down the Tongass Forest Plan on grounds that the EIS for the plan was inadequate and that the plan was based on a substantial error that "fatally infected its balance of economic and environmental considerations…." Natural Res. Def. Council, 421 F.3d at 816. There is no basis for concluding that adequate short-term protection exists for the roadless areas of the Tongass, and it would be inappropriate to reinstate the temporary Tongass exemption. Plaintiffs urge the Court to exercise its discretion to reinstate the original, permanent rule. See Natural Res. Def. Council v. Southwest Marine, Inc., 236 F.3d 985, 999 (9th Cir. 2000) ("District courts have broad latitude in fashioning equitable relief when necessary to remedy an established wrong.") (quotations and citation omitted).

CONCLUSION

For the reasons discussed above and in the States' Summary Judgment Motion, TWS

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asks the Court to grant it declaratory and injunctive relief.

Respectfully submitted this 24th day of February, 2006.

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