

Katharine S. Glover
Thomas S. Waldo
EARTHJUSTICE
325 Fourth Street
Juneau, Alaska 99801
Ph: 907-586-2751
Fax: 907-463-5891
kglover@earthjustice.org
twaldo@earthjustice.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TONGASS CONSERVATION SOCIETY; SIERRA)
CLUB; NATURAL RESOURCES DEFENSE)
COUNCIL; GREENPEACE, INC.; CENTER FOR)
BIOLOGICAL DIVERSITY; and CASCADIA)
WILDLANDS PROJECT,)
Plaintiffs,)

v.)

Case No. _____

FORREST COLE, in his official capacity as Forest)
Supervisor, Tongass National Forest; UNITED)
STATES FOREST SERVICE; and UNITED)
STATES DEPARTMENT OF AGRICULTURE,)
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(5 U.S.C. §§ 702, 706(2)(A); 42 U.S.C. § 4332)

INTRODUCTION

1. This action challenges the Sea Level Roads Contract and the Orion North Reoffer Timber Sale in the Tongass National Forest. The U.S. Forest Service approved these actions in a

Record of Decision signed nearly ten years ago, on May 3, 1999, for the Sea Level Final Environmental Impact Statement (FEIS). Notwithstanding the enormous changes that have occurred in Southeast Alaska since that time, and notwithstanding the substantial body of new information about the impacts of clearcuts and roads on various plant and animal species that has developed since that time, the Forest Service refused to supplement the EIS to take into account the new circumstances and information. This refusal violates the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.9(c).

JURISDICTION, RIGHT OF ACTION, AND VENUE

2. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02. Judicial review is available under the Administrative Procedure Act. 5 U.S.C. §§ 701-06.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

PLAINTIFFS

4. Tongass Conservation Society (TCS), based in Ketchikan, Alaska, is dedicated to conserving the biodiversity of the many island forests of the Tongass through protection of habitat and promotion of sustainable use. TCS strives to nourish an attitude of responsible stewardship and to enable the community at large to become more active and informed. TCS is a non-profit organization with over 300 members, the majority of whom live in southeast Alaska.

5. The Sierra Club is a national grassroots conservation organization. The Sierra Club's members are about 800,000 Americans, including about 1,800 Alaska residents, who are inspired by nature. They explore, enjoy, and protect the wild places of the earth including the Tongass National Forest. They practice and promote the responsible use of the earth's ecosystems and resources. For over a hundred years they have sought to educate and enlist humanity to protect

and restore the quality of the natural and human environment. In Southeast Alaska the Sierra Club is represented by the Juneau Group of the Sierra Club. Sierra Club members reside in nearly every community of Southeast Alaska, from Yakutat to Ketchikan, and derive benefits and enjoyment from the natural environment and unlogged areas of the Tongass National Forest.

6. The Natural Resources Defense Council (NRDC) is a non-profit organization dedicated to protection of the earth's environment. NRDC has over 1,200 members in the State of Alaska and more than 400,000 members in all. NRDC's ongoing conservation and public education efforts involving the Tongass National Forest date back almost to the organization's inception.

7. Greenpeace, Inc. is a non-profit environmental organization headquartered in Washington, D.C., with offices in Sitka and Anchorage among other locations. Greenpeace's mission is to raise public awareness of environmental problems and promote changes that are essential to a green and peaceful future. There are approximately 250,000 current Greenpeace members in the United States, several hundred of whom live in Alaska. The organization's involvement in forest issues concerning the National Forest System generally, and the Tongass National Forest in particular, goes back to the early 1990s. Its concerns have included the effects of logging and associated road building on ecosystems, roadless areas, fish, and wildlife, as well as protection of the last remnants of old-growth forest in the United States.

8. The Center for Biological Diversity (the Center) is a non-profit organization with nearly 200,000 members and online activists, with offices in Arizona, California and a number of other states. The Center has numerous members in southeast Alaska and an office in Anchorage. The Center works to insure the long-term health and viability of animal and plant species across the United States and elsewhere, and to protect the habitat these species need to

survive. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. The Center has been actively involved in protecting Alaska's wildlife since the early 1990's. With regard to the Tongass National Forest, the Center has filed petitions to protect the Queen Charlotte goshawk and the Alexander Archipelago wolf under the Endangered Species Act. The Center carefully follows the fate of these and many other species that depend upon Tongass wildlands.

9. Cascadia Wildlands Project ("Cascadia") is a non-profit public interest membership organization, headquartered in Eugene, Oregon, with about 1,500 members. Cascadia has maintained a field office in Cordova, Alaska since 1998. Cascadia's mission is educating, organizing and agitating for a more compassionate and responsible relationship with the ecosystems of the Cascadia bioregion, defined as the watersheds of the western temperate rainforests from California to Kodiak, Alaska. Two of Cascadia's primary strategic and long-term goals are protection and restoration of old-growth forest ecosystems and large predators, including in particular wolves. Cascadia and its members and staff participate in government decision-making with regard to public lands throughout the bioregion.

10. Members of plaintiff organizations reside near, visit, or otherwise use and enjoy the Sea Level project area. They use and enjoy this area for recreation, subsistence use, sport hunting and fishing, wildlife viewing, photography and education, and aesthetic and spiritual enjoyment. The Sea Level roads and the Orion North Reoffer timber sale will directly and irreparably injure these interests.

11. The plaintiff organizations monitor the use of forest ecosystems and compliance with the laws respecting these ecosystems, educate their members and the public concerning management of these ecosystems, and advocate policies and practices that conserve the natural

value of these ecosystems. It is impossible to achieve these organizational purposes fully without adequate information and public participation in the processes required by law. The interests and organizational purposes of the plaintiffs are directly and irreparably injured by defendants' violations of the laws as described in this complaint.

DEFENDANTS

12. Defendant Forrest Cole is sued in his official capacity as the Forest Supervisor for the Tongass National Forest. Mr. Cole signed the decision, dated September 19, 2008, to proceed with the Sea Level road and Orion North Reoffer timber sale without a supplemental EIS.

13. The full name of Defendant United States Forest Service is United States Department of Agriculture, Forest Service. It is an agency of the Department of Agriculture charged with the administration of the national forests, including the Tongass.

14. Defendant United States Department of Agriculture is the department of the executive branch responsible for overseeing the activities of the Forest Service.

FACTS

15. On May 3, 1999, the Assistant Forest Supervisor for the Tongass National Forest signed a Record of Decision for the Sea Level Timber Sale FEIS. The project area for this EIS encompassed most of Carroll Inlet and Thorne Arm on Revilla Island near Ketchikan, Alaska. The decision authorized logging of approximately 47 million board-feet (mmbf) of timber, plus another 4 mmbf in road right-of-ways, for a total of 51 mmbf. It also authorized reconstruction of 14 miles of existing roads and construction of 29 miles of new roads.

16. In the decade since the adoption of the Sea Level decision, the Forest Service has offered and sold much of the timber in this project in several timber sales.

17. Of the areas approved for logging in the Sea Level FEIS, the principal area that remains unlogged is the Sea Level Creek area in Thorne Arm, located in Value Comparison Units 7552 and 7570.

18. The Forest Service awarded a contract for a timber sale in the Sea Level Creek area called the Orion North timber sale in 2004. However, the Ninth Circuit Court of Appeals enjoined implementation of the sale in an injunction pending appeal in *Natural Resources Defense Council v. U.S. Forest Service*, No. 04-35868 (9th Cir. Oct. 18, 2004). The Forest Service later canceled the timber sale contract by mutual agreement with the purchaser pursuant to an interim, partial settlement agreement in that case. In an April 2007 final settlement agreement of the relief issues in that case, the Forest Service agreed not to offer any timber sales or road contracts in inventoried roadless areas, which included the Sea Level Creek/Orion North timber sale area, pending completion of a Final Environmental Impact Statement for the Tongass Land Management Plan review then underway.

19. The Forest Service issued the Final Environmental Impact Statement for the Tongass Land Management Plan Amendment, and signed a Record of Decision for the Amendment, in January 2008.

20. In April 2008, the Forest Service published an advertisement soliciting bids for the Orion North Reoffer Timber Sale. The appraised value of the sale was \$214,450.39. Before any bids were opened, the Forest Service canceled the offering.

21. In May 2008, the Forest Service prepared a “change analysis” for the Orion North Reoffer. The change analysis addressed changes in the proposed timber sale subsequent to the 1999 Sea Level FEIS and recommended that the Forest Supervisor find the project consistent

with the 2008 amended forest plan. The change analysis did not address new information subsequent to the 1999 Sea Level FEIS.

22. In August 2008, the Forest Service published an advertisement soliciting proposals to build the Sea Level Creek Roads, which are the principal roads needed for the Orion North Reoffer timber sale. Proposals were due September 4, 2008.

23. On September 9, 2008, before the Forest Service awarded a contract for the Sea Level Roads, several conservation groups submitted a letter to the Forest Service asking that the agency prepare a supplemental EIS, before awarding a road contract or offering a timber sale contract, to take into account significant new information and new circumstances since the 1999 Sea Level FEIS.

24. On September 19, 2008, the Forest Supervisor signed a “Supplemental Information Report” for the Orion North Reoffer timber sale, concluding that there was no significant new information or circumstances that required preparation of a supplemental EIS. On the same day, the Forest Service awarded a contract for construction of the Sea Level Creek Roads at a contract price of \$580,380, more than double the \$214,450.39 appraised value of the April 2008 Orion North Reoffer timber sale.

25. In the nearly ten years since the adoption of the Sea Level FEIS, the cost per board-foot to the Forest Service of preparing, offering, building roads for, and implementing timber sales in the Tongass has increased greatly. At the same time, revenues from timber sales have declined. The result is that timber sales in the Tongass now require a much greater economic cost to the public than at the time of the Sea Level FEIS.

26. Since 1999, the Forest Service has made changes in the inputs and output format for the deer habitat capability model.

27. First, instead of using the “volstrata” data set as a measure of forest type to estimate habitat suitability in the deer model, the Forest Service now uses a new “size density” data set for this purpose.

28. Second, instead of using a conversion factor of 125 deer per square mile to convert habitat suitability index scores into an estimate of habitat capability, the Forest Service now uses 100 deer per square mile. The conversion factor of 100 deer per square mile is intended to represent the maximum carrying capacity for the best quality deer habitat.

29. Third, the Forest Service now standardizes the range of habitat suitability results generated by the model. These results are called the habitat suitability index. Previously, the model generated habitat suitability index scores ranging from 0 to 1.3. Now, the Forest Service divides these results by 1.3 to produce a range from 0 to 1.0, representing a range of 0 to 100 percent habitat suitability.

30. The combined effect of the second and third changes described above is that the model generally produces an estimate of theoretical habitat capability 38 percent lower than before (subject to variations resulting from the first change). The earlier methodology effectively assumed that the best quality habitat had a carrying capacity of $125 \times 1.3 = 162.5$ deer per square mile. With the recent changes, the model effectively assumes that the best quality habitat has a carrying capacity of $100 \times 1.0 = 100$ deer per square mile. These corrections properly implement the science underlying the model.

31. These changes produce significantly lower estimates of deer habitat capability. If the Forest Service were to run the deer habitat capability model with its recent changes to determine the effects of the Sea Level project, it would produce estimates of deer habitat capability significantly lower than reported in the Sea Level FEIS.

32. Deer are the primary prey of wolves in the Sea Level Creek area. In areas like this, reducing the number of deer has potentially significant impacts on wolf populations.

33. Since the Sea Level FEIS, scientific research has disclosed distinct or endemic species or subspecies found on Revilla Island that were not considered in the FEIS. Research has also produced significant new information about the southern red-backed vole, a species addressed in the Sea Level FEIS with information that is now known to be wrong.

34. The Sea Level FEIS did not address invasive species. Since that time, the Forest Service has identified invasive species as a high priority issue nationally and regionally. The Forest Service prepared a risk analysis for the Orion North Reoffer concluding that, even with mitigation measures, there was a “moderate risk” of spreading invasive plants along the road corridor.

35. Yellow cedar are in decline across the Tongass, including in the Orion North project area. At the time of the Sea Level FEIS, the cause of this decline was not known. Subsequent research has disclosed that the apparent cause of the decline is a warming climate, which reduces snowpack and causes the roots of the trees to freeze in the spring. The Forest Service has identified new mitigation measures to address this problem in timber sales, but these mitigation measures were not considered in the Sea Level FEIS.

COUNT I

36. The plaintiffs repeat and incorporate by reference the allegations of the preceding paragraphs.

37. NEPA requires federal agencies to prepare environmental impact statements on any proposal for “major Federal actions significantly affecting the quality of the human environment . . .” 42 U.S.C. § 4332(C).

38. Federal agencies are required to prepare supplements to final environmental impact statements if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c).

39. The increased costs of and decreased revenues from timber sales, the changes to the deer habitat capability model, and the new scientific information concerning endemic species, invasive species, and yellow cedar are significant new circumstances and information that require a supplemental EIS for the Sea Level FEIS.

40. The Forest Service’s conclusion in the Supplemental Information Report for the Sea Level project that no supplemental EIS is required was arbitrary, unreasonable, and contrary to law.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that Defendants’ decision to proceed with the Sea Level Roads contract and the Orion North Reoffer timber sale without preparing a supplement to the Sea Level FEIS was arbitrary, unreasonable, and contrary to NEPA;
2. Enter preliminary and permanent injunctive relief to prevent implementation of the Sea Level roads and the Orion North Reoffer timber sale;
3. Award plaintiffs the costs of this action, including reasonable attorneys’ fees; and
4. Grant such other relief as this Court deems just and proper.

Respectfully submitted this 27th day of February 2009,

/s/ Thomas S. Waldo

Thomas S. Waldo (ABA# 9007047)
Katharine S. Glover (ABA# 0606033)
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
Ph: 907-586-2751
Fax: 907-463-5891
twaldo@earthjustice.org
kglover@earthjustice.org

Attorneys for Plaintiffs