ALASKA MINERS ASSOCIATION

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September 15, 2017

Secretary Sonny Perdue
United States Department of Agriculture
Via Federal eRulemaking Portal: http://regulations.gov

Dear Secretary Purdue:

The Alaska Miners Association (AMA) appreciates the opportunity to provide comments on the U.S. Department of Agriculture's request for ideas on how USDA can provide better customer service and remove unintended barriers to participation in USDA programs in ways that least interfere with its customers.

AMA is a professional membership trade organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,400 members that come from eight statewide branches: Anchorage, Denali, Fairbanks, Haines, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, suction dredge miners, small family mines, junior mining companies, and major mining companies, and the contracting sector that supports Alaska's mining industry.

Many of our members prospect, operate, or are otherwise interested in mining in the Tongass and Chugach National Forests, the nation's largest forests. These forests are critical components of Alaska's resource and economic development prosperity, therefore, should be managed with the multiple-use mandate and Congressional intent expressed in the passing of the Alaska National Interest Lands Conservation Act (ANILCA). The multiple-use mandate has long been a U.S. Forest Service policy to manage forests separately from parks and refuges, for the forest to be managed under a working forest model. Working forests foster economic development, jobs, and other benefits while enhancing the environment, wildlife, recreational opportunities and subsistence. Working forests managed for multiple uses are absolutely the right fit for Alaska's national forests.

To respond to the USDA request for feedback on unintended barriers and improved customer service, AMA's comments will address ongoing land management processes and practices for the Tongass and Chugach National forests in Alaska.

TONGASS NATIONAL FOREST

The Tongass National Forest comprises 16.9 million acres of the landmass of Southeast Alaska, and is endowed with mineral wealth that supported the initial industrial developments of the Alaska Territory. Early mines included the Treadwell Mine in Douglas and the Alaska Juneau Mine in Juneau.

Mineral wealth continues to be extracted from the Tongass at two major operating mines near Juneau; Greens Creek and Kensington. In light of the declining population, declining availability of timber, and limited economic growth in Southeast, and the positive contribution of Greens Creek and Kensington to

the Southeast economy, it is essential that additional mineral resources be developed to grow the Southeast Alaska economy and strengthen the regional culture.

As you consider AMA's comments please recognize that USDA and Congress have always treated management of the Tongass as special and different from other National Forests.

The Tongass Timber Act of 1947 specifically authorized commercial timber harvest on the Tongass.

The Alaska Native Claims Settlement Act (ANCSA) of 1971 directed how the 50-year contracts on the Tongass would interact with the transfer of lands on the Tongass to the ownership of Native Corporations.

The Alaska National Interest Lands Conservation Act of 1980 (ANILCA) and the Tongass Timber Reform Act of 1990 (TTRA) were specific Acts of Congress that directed how the Tongass would be managed.

The Tongass was the only National Forest for which there was an individual consideration of impacts and a separate ROD in the 2001 Roadless Rule.

Accordingly, the changes in Tongass National Forest management that AMA requests below reflect the fact that Congress has directed USDA to manage the Tongass differently from other National Forest thereby recognizing that Tongass management issues and concerns warrant special consideration.

USDA SHOULD EXEMPT THE TONGASS FROM THE 2001 ROADLESS RULE

On January 12, 2001, eight days before President Bush's Inauguration, the Clinton Administration promulgated the Roadless Rule, which included separate consideration and a separate Record of Decision for the Tongass. The Roadless Rule adversely affects mining in the following ways:

a. The 2001 Roadless Rule[1] designated 9.6 million acres of the Tongass as inventoried roadless areas (IRAs). This is in addition to the 5.6 million acres of the Tongass that Congress designated as Wilderness in ANILCA and TTRA. As a consequence, AMA's members' ability to prospect, explore for, and develop new mines or develop energy to support these endeavors on the on the Tongass is severely constrained, if not prevented as a practical matter; and

b. While "reasonable access" to locatable minerals is technically authorized in Wilderness and IRAs under 36 C.F.R. Part 228, there are very few mines in Wilderness Areas. Even though the 2001 Roadless Rule specifies: "Reasonable rights of access may include, but are not limited to, road construction and reconstruction, helicopters, or other non-motorized access" (FEIS Vol. 1, 3-329 to 3-350),[2] the experience of the mining community is that Special Use Permits authorizing road access in or near Wilderness Areas are very difficult to obtain; and

c. Experience teaches that the same practical adverse result can be expected in IRAs. For example, in 1977 the Forest Service denied a Special Use Permit to U.S. Borax to construct a road for a bulk sample of 5,000 tons of ore at the Quartz Hill Project, requiring access to be by helicopter. *SEACC v.*

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[1] 66 Fed. Reg. 3244 January 12, 2001.
[2] 66 Fed. Reg. 3244, 3264 January 12, 2001.

Watson, 697 F.2d 1305 (9th Cir. 1983). As the opinion shows, six years later Borax still did not have a permit to build the road needed to move that volume of ore; and

d. While the 2001 Roadless Rule allows "reasonable access" to locatable minerals, it denies access to new leases for minerals subject to the Mineral Leasing Act of 1920, including geothermal resources:[3] "because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas."[4] There is no explanation in the 2001 Final Roadless Rule and ROD why the access impacts to IRAs associated with locatable minerals is different from the access impacts to IRAs associated with leasable minerals. This is further evidence that as a practical matter the 2001 Roadless Rule will prevent road access in connection with mining exploration and development; and

e. Mining exploration requires the drilling of multiple holes to determine from the surface the subsurface characteristics and extent of the mineral resource. Mine development requires site clearing for buildings, tailings piles, mills, and other facilities. The needed level of exploration to develop a mine on the Tongass National Forest would typically require the substantial cutting of trees. Mine development would typically require even significantly more cutting of trees; and

f. While "reasonable access" is technically permitted in IRAs, cutting trees associated with mining exploration and development does not appear to be allowed. 36 C.F.R. § 294.13 (b) (2) authorizes the cutting of timber "incidental to implementation of a management activity not otherwise prohibited by this subpart." However, there is no mention of mining in the examples provided in the 2001 Rule and ROD of what this section authorizes.[5] Moreover, in describing this section the 2001 Rule and ROD states: "Such management activities are expected to be rare and to focus on small diameter trees."[6]

g. The 2001 Roadless Rule prohibitions deny communities such as Craig and Klawock from accessing mines with a road on Prince of Wales Island, thereby denying access to jobs to the residents of those communities and a local workforce to Prince of Wales' mines, such as Niblack and Bokan Mountain; and

h. By prohibiting access to renewable energy site within IRAs on the Tongass, specifically hydropower,[7] the Roadless Rule, deprives mining in remote areas of the Tongass of the opportunity to replace fossil fuel use with cleaner, cheaper renewable energy resources:

   1. The 2001 Roadless Rule allows access to locatable minerals, but denies access to new leases for minerals subject to the Mineral Leasing Act of 1920, including geothermal resources:[8] "because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas."[9] (There is no explanation why the access impacts on IRAs associated with locatable minerals is different from the access impacts on IRAs associated with leasable minerals).

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[3] *Ibid.,* at page 3255-3256.
[4] *Ibid.,* at page 3256.
[5] *Ibid.,* at page 3258.
[6] *Ibid.,* at page 3257.
[7] The 1947 Water Powers of Southeast Alaska Report, conducted in part with the Forest Service, identified over 200 such potential sites, many of which are located within IRAS designated by the 2001 Roadless Rule.
[8] 66 Fed. Reg. 3244 January 12, 2001, at pages 3255-3256.
[9] *Ibid.,* at page 3256.

There are numerous geothermal sites in the Tongass that have the potential to generate renewable electric power, access to which is prohibited by the 2001 Roadless Rule.

2. The 2001 Roadless Rule and ROD Comment and Response at 66 Fed. Reg. 3259, January 12, 2001 provide: Comment: "Some respondents were concerned about the … ability to construct or maintain roads in inventoried roadless areas to access electric power or telephone lines, pipelines, hydropower facilities, and reservoirs." Response: "***Existing*** authorized uses would be allowed to maintain and operate within their ***current*** authorization, including any provisions regarding access**." (Emphasis added).** The use of the words "existing" and "current" indicates that future (i.e. after January 12, 2001) construction of hydropower facilities or roads to access them would not be allowed.

3. Such access to renewable energy would allow not only mines, but entire communities in Southeast Alaska to significantly decrease the GHG and other emissions in the Tongass, reduce the need for shipment and potential spills of diesel and operate these communities' economies and mines at a lower cost than diesel. Moreover, it would avoid the need for expensive air control devices which would reduce capital costs for mines on the Tongass.

4. Renewable energy projects, developed at a lower cost than the rising cost of diesel, would help improve the economic competitiveness of these communities and thereby create jobs in high unemployment communities that suffer the brunt of the social and economic injustices created by the 2001 Roadless Rule's land use designations, policies and guidelines.

5. Public Law 106-511 enacted on November 13, 2000 which established the Southeast Alaska Intertie System is not referenced, explained or identified in the 2001 Roadless Rule, although every other Public Law affecting the Tongass, such as Alaska Statehood Act, ANILCA, ANSCA, Wild and Scenic Rivers Act is referenced; and

6. The 2001 Roadless Rule failed to consider or analyze the adverse economic costs, or the opportunity for jobs related to the development of renewable energy resources, to rural Southeast Alaska communities, or the direct economic impact on Southeast Alaska residents caused by their inability to access and develop mines and renewable energy resources in rural Southeast Alaska.

In short, the 2001 Roadless Rule harms AMA's members because of their inability to obtain the access necessary to prospect, explore for and develop new mines in IRAs, by their inability to cut the trees within IRAs necessary to allow the substantial exploration needed to develop a mine and the construction associated with mine development; and by their inability to access renewable energy resources to provide non-carbon power to mines.

The State of Alaska sued USDA in 2001 to set aside the Roadless Rule as applied to the Tongass on the ground, among others, that it violated the no more clause of ANILCA (§ 1326 (a)). In 2003 the Department of Justice and USDA settled the suit by agreeing to engage in rulemaking to determine whether the Tongass should be exempt from the 2001 Roadless Rule. In its 2003 Rule the USDA agreed to temporarily exempt the Tongass from the Roadless Rule because "the roadless values on the Tongass are sufficiently protected under the Tongass Forest Plan and the additional restrictions associated with the roadless rule are not required." The 2003 Regulation also stated:

The Department has concluded that the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits because the Tongass forest plan adequately provides for the ecological sustainability of the Tongass. Every facet of Southeast Alaska's economy is important and the potential adverse impacts from application of the roadless rule are not warranted, given the abundance of roadless areas and protections already afforded in the Tongass Forest Plan.[10]

The State of Alaska defended the litigation brought by environmental groups, alleging that USDA's rulemaking was arbitrary and capricious. The District Court Judge agreed with the environmental groups. A three-judge panel of the Ninth Circuit reversed the District Court on a 2-1 vote. An en banc panel of the Ninth Circuit reversed the three-judge panel on a 6-5 vote. Thus, seven federal judges out of 14 found that the Tongass Exemption Rule was valid. For these reasons, USDA should engage in rulemaking to restore the Tongass Exemption.

USDA SHOULD SUBMIT THE 2017 TONGASS TRANSITION PLAN TO THE COMPTROLLER GENERAL AS A RULE PURSUANT TO SECTION 801 OF THE CONGRESSIONAL REGULATORY REVIEW ACT.

The Tongass Transition Plan was a midnight rule, submitted to the federal register by the Obama Administration on December 9, 2016 which took effect on January 8, 2017 – 12 days before President Trump's Inauguration. This is the same as was done to the Tongass by Clinton's Roadless Rule which became effective 8 days before President Bush's Inauguration. The Tongass Transition Plan was the only Forest Plan in the nation that was put into effect after Election Day.

The Tongass Transition Plan further restricts the areas in which old growth timber harvesting can occur, does not authorize renewable energy (hydropower and geothermal power) development to the extent contemplated by national policy, and unduly impacts mining exploration and development. Accordingly, the above comments on the 2001 Roadless Rule also apply to the 2017 Tongass Transition Plan.

By prohibiting the harvest of old-growth timber in Inventoried Roadless Areas (IRAs) and phasing out the harvest of old-growth timber on roaded areas, the Tongass Transition Plan's land use allocations interlock with the land use allocations made when USDA applied the 2001 Roadless Rule to the Tongass. This combined structure results in the creation of 9.6 million acres of de facto Wilderness on the Tongass.

It will do no good to rescind the Roadless Rule if the Tongass Transition Plan is not also rescinded. The Roadless Rule is being litigated by the State of Alaska, supported by 19 intervenors, including Southeast Alaska communities, Statewide organizations, and businesses and individuals operating in Southeast Alaska. The case has been fully briefed and is before the District Court for the District of Columbia. Hopefully, we will be getting a decision soon, although it will most certainly be appealed. The Transition Plan is the issue that can and should be resolved now.

USDA did not submit the Tongass Transition Plan to the Comptroller General as a Rule for CRA purposes. Senator Murkowski has requested a ruling from GAO on whether the Tongass Transition Plan is a Rule for CRA purposes (see her very compelling letter attached), based in part on the ground that the GAO had previously determined that the 1997 Tongass Plan was a Rule for CRA purposes (see attached). She is currently awaiting the GAO decision.

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[10] 68 Fed Reg. 75137

The CRA contains a procedure for processing a Rule submitted to the Comptroller General by an agency (5 U.S.C. Sec. 801). The CRA does not authorize the Comptroller General to "second-guess" an agency on the rule status of its submissions;
Because the GAO had previously determined that the 1997 Tongass Plan was a Rule for CRA purposes, it is reasonable to assume that the Comptroller General would accept the Transition Plan as a Rule if it were submitted by USDA - the Comptroller General would defer to the agency.

There are five major reasons why it is in USDA's interest to present the Tongass Transition Plan to the Comptroller General as a Rule for CRA purposes now:

1. The Tongass Transition Plan Could Be Distinguished from Land Plans on Other National Forests If the Secretary Were to Submit the Transition Plan as a Rule for CRA Purposes on the Basis of the Distinction.

   Section 801 (a)(1)(A) of the CRA provides:

   Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing— (i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.

   Because the GAO had previously determined that the 1997 Tongass Plan was a Rule for CRA purposes (see attached), the Tongass Transition Plan is subject to a Preliminary Injunction (PI) on the ground: 1) that the Plan was a Rule as proven by analogy to GAO's determination that the 1997 Tongass Land Plan was a Rule for CRA purposes; and 2) that, because it was a Rule, the Tongass Transition Plan is prohibited from taking "effect" until the Forest Service submitted the necessary "report" to Congress and the Comptroller General.

   USDA could cite the distinguishing characteristics of Tongass National Forest management listed in the sixth paragraph of these comments on pages 1 and 2 and the fact that GAO had previously determined that the 1997 Tongass Plan was a Rule for CRA purposes as the reasons why submission of the Tongass Transition Plan as a Rule for CRA purposes was not precedent for treating Lower 48 land plans as a Rule.

   WHY NOW? GAO says it will act soon on Senator Murkowski's February 13, 2017 request for a Rule determination. The four-month delay runs into the July and August Congressional recesses. If GAO determines (again) that the Tongass Forest Plan is a Rule for CRA purposes, then a nationwide precedent that land plans are Rules under the Administrative Procedures Act will be set. If USDA submits it to the Comptroller General now, citing the unique and distinctive characteristics of the Tongass, USDA would have a basis for limiting the impact

ADVERSE IMPACTS OF THE TONGASS TRANSITION PLAN ON FOREST SERVICE BUDGETS.

That considerable public investment will be needed to achieve the volume 2nd growth timber required by the TTRA to meet market demand was explained at page 23 of Forest Service's May 2010 *The Economic Analysis of Southeast Alaska*:

Based on the best available information regarding the costs of conducting commercial thinning of young growth, the products that can be made from it, and the values of such products, ***young growth management is not currently economically viable without substantial public investments to pay for thinning. This is because the vast majority of young growth currently available on the developed land base is too young and small to generate profits in excess of the logging and transportation costs used in this analysis*** *(see appendices C, D and E for cost and price details).*
The Transition Plan fails to mention its own May 2010 *The Economic Analysis of Southeast Alaska* or explain the basis for its apparent assumption that *substantial public investments to pay for thinning* will be made available by Congress**.** The Economic Analysis does not say how much investment would be necessary. But, the Secretary could credibly say that the Administration is not going to make the money available.

TECHNICAL/OPERATIONAL PROBLEMS WHY THE TRANSITION PLAN WON'T WORK

a. **The Transition Plan was not preceded by an inventory of the Second Growth on The Tongass to Determine whether there would be sufficient Second Growth to Meet Market Demand as required by The Tongass Timber Reform Act Of 1990.** Unlike the situation in the Lower 48, significant timber harvesting in Alaska has only been ongoing for 55 - 60 years and there is insufficient young growth timber of sufficient size in Southeast Alaska to support even a single sawmill, let alone an industry. There should have been a complete inventory of second growth timber before fully committing to any early transition to young growth so that a reliable feasibility analysis could have been made.

b. **The Transition Plan draft ROD admits that Second Growth Timber is not economic or marketable.** At page 10 the Draft ROD admits that:

   Harvesting 55-year old trees does not appear to be practical or economic in Southeast Alaska at this time. The market for large volumes of young-growth logs has not been demonstrated and this is especially true for small logs from 55-year old stands.

CHUGACH NATIONAL FOREST

AMA, throughout the decision process for the Chugach Land Management Plan revision, has expressed concerns that the process is prone to result in prohibited development and wilderness designations or management tools that have a wilderness effect. Land use decisions should be achieved by using sound science, which would balance economic and environmental considerations.

One of the original mandates of the national forest system is to provide a reliable source of timber to a domestic forest products industry. Yet in its Forest Plan Revision Newsletters, the Forest Service does not even acknowledge timber harvests except for firewood as a multiple use. Timber harvesting is not discretionary, no more so than habitat preservation, ecosystem management, watershed protection, and recreation.

While we acknowledge there is a relatively small percentage of high quality commercial timber in the Chugach, the plan revision should allow for specific actions to restore forest health and reduce the risk of wild fire. The revised plan should include measures for ecological restoration on the Chugach, which has seen forest ecosystems convert to grass and sedge ecosystems in the wake of beetle outbreaks. There

should be an opportunity in the plan revision to introduce an annual sales quantity (ASQ) to aid in restoration work and possibly support biomass production or other commercial endeavors in the region. A program of scheduled timber sales should be provided to meet predetermined allowable sale quantity. The revision should also provide for modern silviculture practices to encourage natural regeneration. Forested portions of the Chugach should be managed toward a varied species composition and different age classes to reduce the risk of large beetle infestations in the future and help restore long-term forest health.

USDA SHOULD ENGAGE IN RULEMAKING TO IMPLEMENT ANILCA'S "NO MORE" CLAUSE.

Agencies have gotten around the requirement that only Congress can permanently set aside an area for a specific use (Park, Wilderness, LUD II), including ANILCA's "No More" clause, by using land plans to set aside areas on a de facto permanent basis. (The set-asides are simply rolled forward with each plan iteration). Since these set asides can theoretically be changed by future land use plans, Courts have not found that they violate Congressional land-designation prerogatives.
By Section 1326(a), ANILCA Congress specifically limited the executive branch's authority to withdraw public lands in Alaska:

A. First, Congress found:

   This Act provides sufficient protection for the national interest in the scenic, natural, cultural and **environmental (***emphasis added***)** values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby. (ANILCA § 101(d); 16 U.S.C. § 3101(d)). (Emphasis added.)

B. Congress then directed:

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

   (b) No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purpose shall be conducted unless authorized by this Act or further Act of Congress. ANILCA § 1326; 16 U.S.C. § 3213.

While the Congressional intent is clear, executive agencies have used various devices to circumvent ANILCA § 1326. They have been able to do so because there is no ANILCA definition of "withdrawal." For example, the U.S. District Court for the District of Columbia decided in the attached case of *Southeast Conference v. Vilsack,* 684 F.2d 135 (D.D.C. 2010) that because there was no ANILCA definition of "withdrawal" it would use the definition of "withdrawal" set out in § 204(e) of the Federal Land Management Policy Act of 1976 (FLPMA) and related case law:

[A] withdrawal exempts covered land from the operation of laws that otherwise authorize the transfer of federal lands to the private domain for private use. (Attached Slip Opinion at page 13).
Based on this definition, the Court determined that 1.22 million acres of "Old Growth Reserves" set aside by the 2008 Amended Tongass Land Management Plan were not withdrawals but are merely examples of the Forest Service's statutory responsibility under the National Forest Management Act to "provide for multiple use and sustained yield products and services of units of the National Forest System." 16 U.S.C. § 1604(e). They neither exempt lands from the operation of public land laws, nor suspend the operation of those laws in certain lands. Land-use designations simply have no effect on laws that authorize transfer of federal lands to the private domain…. (Attached Slip Opinion at page 14).

In the same way ACECs on BLM land would be considered land-use designations under FLPMA and not subject to the "no more" clause. This is a gigantic loophole which the agencies can use to set aside as much land in Alaska as they wish notwithstanding the "no more" clause.

AMA requests that USDA close this loophole by amending National Forest Planning rules to add the following definition of "withdrawal" for National Forests subject to ANILCA:

Consistent with the Congressional intent expressed in Section 101 (d) and Section 1326 (a) of ANILCA the terms "withdraw," "withdraws" and "withdrawal" shall mean any agency action or inaction that has the effect of designating public land in Alaska as: a Wilderness Study Area; a Wild and Scenic River; an Endangered Species Act habitat area; or any land use designation, made pursuant to the Federal Land Policy Management Act or the National Forest Management Act or any other planning statute, that has the effect of prohibiting or limiting resource uses allowed before the day of passage of this Amendment or impeding access to or inhibiting the development of: renewable energy projects (including hydropower), mining (including exploration), oil and gas (including exploration), or timber harvest.

This definition would cause the "no more" clause of ANILCA to actually work as a "no more" clause.

For the reasons given above, the AMA requests that USDA take the actions listed above. In addition, AMA endorses the comments offered by the Resource Development for Alaska, Inc. Please do not hesitate to contact me with questions or requests for additional information.

Sincerely,

Deantha Crockett
Executive Director

ALASKA MINERS
ASSOCIATION