

THE SPIRIT OF 76: DOES PRESIDENT CLINTON'S ROADLESS LANDS DIRECTIVE VIOLATE THE SPIRIT OF THE NATIONAL FOREST MANAGEMENT ACT OF 1976?

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This Article explores the competing resource protection and production interests surrounding President Clinton's proposal to ban new road building in areas of the Tongass National Forest. The Tongass is currently exempted from a temporary moratorium on road building while the Forest Service determines whether to include the Tongass in the roadless ban. This Article analyses the current legislative framework that guides Forest System management of the Tongass and legal challenges to the roadless ban's application to the Tongass. Finally, the Author suggests a potential compromise that balances commercial and production interests.

I. INTRODUCTION

The “‘crown jewel of the national forest system,’”¹ Alaska's Tongass National Forest stands tall among America's natural treasures. Created by President Theodore Roosevelt in 1907 and named after the Tlingit Indian clan,² the Tongass is the largest na-

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1. Paula Dobbyn, *Lobbies Pit Protection of Alaskan Rain Forest Against Logging Interests*, ANCHORAGE DAILY NEWS, Oct. 9, 1999 (quoting Tom Waldo, Juneau attorney), available in 1999 WL 28696811 [hereinafter Dobbyn, *Lobbies Pit Protection*].

2. See Paula Dobbyn, *President Clinton Does Not Discuss Protecting Alaska Forests*, ANCHORAGE DAILY NEWS, Oct. 14, 1999, available in 1999 WL 28698164 [hereinafter Dobbyn, *President Clinton Does Not Discuss*].

tional forest by a factor of three.³ In fact, it is the largest remaining coastal temperate rainforest in the world,⁴ rendering the forest of inestimable value to biologists, conservationists, and recreational users. The seventeen million acres of the Tongass is home to the nation's largest remaining old growth stands, hundreds of species of fish and wildlife, and 9.4 million acres of roadless area, more roadless acres than any other national forest.⁵ The timber extracted from the Tongass, however, is of determinable, tangible value to the timber industry of southeast Alaska. The magnitude and gravity of competing resource protection and production values have fueled the dispute over timber harvesting in the Tongass and the national forests in general, the "single longest-running unresolved conflict in federal public land law and policy."⁶ This conflict has generated debate over how best to protect the nation's largest remaining old growth stands, located in roaded and unroaded portions of the Tongass. The roadless acres are the subject of what may be the most significant environmental initiative of William J. Clinton's Presidency,⁷ and possibly of this century.

The Tongass National Forest is at the eye of a mounting hurricane of public and political debate over President Clinton's recently announced Roadless Lands Directive (the "Roadless Directive"). On October 13, 1999, President Clinton unveiled an initiative that William H. Meadows, president of the Wilderness Society, described as "the most significant land preservation undertaking since Teddy Roosevelt built the national forest system."⁸ The Roadless Directive is a proposal for a nationwide change to the Forest Service's management of roadless areas in the National Forest System, requiring the Forest Service to analyze methods for identifying, managing, and preserving the roadless areas. Previous congressional and Forest Service efforts to encourage the Tongass-

3. See Telephone Interview with Matt Zencey, Campaign Manager, Alaska Rainforest Campaign National Office, Washington, D.C. (Feb. 2, 2000).

4. See *id.*

5. See Dobbyn, *President Clinton Does Not Discuss*, *supra* note 2.

6. Charles F. Wilkinson, *The National Forest Management Act: the Twenty Years Behind, the Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 665 (1997).

7. See Memorandum for the Secretary of Agriculture, President William J. Clinton (Oct. 13, 1999) (announcing President Clinton's Roadless Land Directive), available in <<http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1999/10/13/5.text.1>> [hereinafter Memorandum].

8. Dobbyn, *President Clinton Does Not Discuss*, *supra* note 2. The Tongass has 9.4 million roadless acres.

based timber industry⁹ suggest that the impact of the changes proposed will be more keenly felt in southeast Alaska than elsewhere in the country. The Roadless Directive proposes a road building ban in the unroaded portions of inventoried roadless areas of the National Forests, which would effectively halt most major logging operations in the Tongass National Forest.¹⁰

Prior to the announcement of Clinton's Roadless Directive, in February 1999, the Forest Service imposed a temporary moratorium on road building in most unroaded areas of the National Forest System.¹¹ The temporary moratorium granted the Forest Service a "timeout" period to develop a new policy for managing the road system in the National Forest System.¹² The Tongass, however, was exempted from the interim suspension. The Forest Service determined that inclusion of the Tongass would "disrupt projected timber harvest substantially."¹³ Moreover, the Tongass Land Management Plan, the document that guides Forest Service management of the forest, had recently been amended through a process that involved extensive regional and local public participation. The temporary moratorium is set to expire after eighteen months, unless a revised road management policy is adopted before then.¹⁴ Clinton's Roadless Directive urges the Forest Service to impose a permanent ban on road building in roadless areas of the National Forest System. If adopted, such a ban would restrict road construction and reconstruction in areas covered by the new road management policy and a forest land management plan mandated by the National Forest Management Act ("NFMA").¹⁵ The Administration has not yet declared whether the Tongass will be included in any regulations adopting the Roadless Directive and prohibiting the building of roads in roadless areas in national for-

9. Congress has a long history of encouraging the Tongass-based timber industry, beginning with the passage of the Tongass Timber Act of 1947, which authorized the Forest Service to enter into timber sale contracts. *See* H.R.J. Res. 205, 80th Cong., 1st Sess., Pub. L. No. 80-385, 61 Stat. 920 (1947) (not codified). The Forest Service's continued commitment to supply timber for sale each year is discussed below.

10. *See* National Forest System Roadless Areas, 64 Fed. Reg. 56,306, 56,306 (1999).

11. *See* Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7290 (1999) (codified at 36 C.F.R. pt. 212).

12. *See id.*

13. *Id.* at 7300.

14. *See id.*

15. *See* Act of Oct. 22, 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600-87 (1994)) (amending the Forest and Rangeland Renewable Resources Planning Act of 1974).

ests. Conservation-minded citizens, environmentalists, and politicians such as former President Jimmy Carter have urged President Clinton to include the Tongass, “an area of global ecological significance.”¹⁶ Alaskan politicians and many of their constituents, including the southeast Alaska timber industry, oppose the inclusion of the Tongass, arguing that unique local and regional concerns call for different treatment of the Tongass.

Part II of this Article concerns the current legislative framework that guides the management and protection of the Tongass National Forest. This section focuses on the NFMA-mandated regional approach to managing the National Forest System in the form of forest land management plans individualized for different forests. Part II also discusses congressional legislation of management goals and objectives directing the Forest Service in the development of the Tongass Land Management Plan.

Part III of the Article describes the Roadless Directive as well as Forest Service efforts to revise its strategies for road management. In addition, it analyzes the viability of legal challenges to the Roadless Directive and concludes that, while the action most likely does not violate the letter of any law, it violates the spirit of the NFMA, which requires decisions regarding forest management be made on a regional basis.

Finally, in Part IV, this Article suggests that the Forest Service’s recently proposed revised road management policy represents the optimal approach to achieving a balance between conservation values and resource production objectives.

II. EXECUTIVE AND LEGISLATIVE ACTION GUIDING THE MANAGEMENT OF THE TONGASS NATIONAL FOREST

A. Conservation by Executive Decree in the Tongass National Forest

President Theodore Roosevelt, widely recognized as our nation’s greatest conservation president, designated the Tongass a National Forest in 1908 by presidential proclamation.¹⁷ The birth of the Tongass initiated debate between conservationists and economic users of forest resources over the appropriate extent of supervision and regulation to be levied by the federal government.

16. Dobbyn, *Lobbies Pit Protection*, *supra* note 1 (quoting former President Jimmy Carter).

17. See T.H. WATKINS & DYAN ZASLOWSKY, *THESE AMERICAN LANDS* 288 (1994).

The growth of federal regulation has paralleled the growth of the Tongass, designated largely by executive decree.

Designation of Alaskan lands for federal protection moved at a slow pace until the latter part of the twentieth century. Alaskan lands customarily joined the National Park System by executive decree, which aroused anti-federalist sentiment in the territory.¹⁸ When Alaska achieved statehood in 1959, Congress granted the state 104.6 million acres of public lands administered by the Bureau of Land Management, to be selected within twenty-five years.¹⁹ Five years after Alaska's entry into the Union, Congress passed the Wilderness Act of 1964.²⁰ Alaskan lands were not included in the federal protection scheme set forth in the Wilderness Act due to heated disputes between Native Alaskans, the State, and the federal government over the ownership of Alaskan lands.²¹

Prior to the 1970's, the Forest Service was given broad discretion to permit logging and clearcutting in the National Forest System. During the 1960's, the passage of the Wilderness Act and a growing awareness of federal land damage resulting from human activities heightened interest in conserving Alaskan lands. This effort was led by Stewart Udall, Interior Secretary for the Johnson Administration. At Udall's behest, President Johnson considered signing into law a presidential proclamation that would have "sen[t] Johnson into history as the greatest conservation President since T.R."²² The proclamation would have designated several million acres in Alaska, as well as around the country, for inclusion in federal conservation legislation. In a dramatic turn of events, President Johnson changed his mind and backed away from the sweeping designations just hours before President Nixon took office. Instead, Johnson chose to add 94,000 acres to the Katmai National Monument and permit Secretary Udall to establish two new wildlife refuges.²³

18. *See id.* at 291.

19. *See id.* at 295.

20. Pub. L. No. 88-577, 78 Stat. 890 (codified in scattered sections of 16 U.S.C.). The Act required the Secretary of Agriculture to determine whether the lands classified as "primitive" at the time of the act's passage would be suitable for preservation as "wilderness" and to make recommendations to Congress within ten years. *See* 16 U.S.C. § 1132(b) (1994).

21. *See* H. Michael Anderson & Alike Moncrief, *America's Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 431 (1999).

22. WATKINS & ZASLOWSKY, *supra* note 17, at 296.

23. *See id.*

B. Congress Steps in: ANCSA, ANILCA, and the TTRA

Congress became involved in the protection of federal lands in Alaska in 1971. Congress attempted to settle ownership disputes that had prevented the inclusion of Alaskan lands in the Wilderness Act and other federal legislative protections with the Alaska Native Claims Settlement Act of 1971 (“ANCSA”).²⁴ ANCSA granted 44 million acres of land to Alaska Natives, directed the Secretary of the Interior to withdraw up to 80 million acres for possible conservation areas (commonly called “D-2” lands) and required Congress to act on those withdrawals by December 1978.²⁵ While congressional failure to act on the D-2 lands did necessitate executive action in the form of a 56 million acre withdrawal by President Carter in December 1978,²⁶ ANCSA is credited with setting in motion “a sequence of events which may well constitute the most significant single land conservation action in the history of our country.”²⁷

The Alaska National Interest Lands Conservation Act of 1980 (“ANILCA”)²⁸ was passed on the heels of President Carter’s executive withdrawal of Alaskan lands and was intended to “virtually complete” the public land allocation process that had begun with the Statehood Act of 1958.²⁹ ANILCA reserved more than 104 million acres of Alaska’s federal lands for conservation, including an additional 8.4 million acres to the National Forest System and the first designation of National Wilderness Preservation System lands in Alaska,³⁰ totaling 56.4 million acres.³¹ A compromise measure between timber and conservation interests on Alaskan

24. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. § 1601 (1994)).

25. See 43 U.S.C. § 1601(d)(2) (1994).

26. See S. REP. NO. 96-413, at 133 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5077.

27. *Id.* at 129, *reprinted in* 1980 U.S.C.C.A.N. 5070, 5074.

28. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101-233 and scattered sections of 16 U.S.C. and 43 U.S.C.).

29. S. REP. NO. 96-413, at 129 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5074.

30. Under the Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-36 (1994)), lands can be added to the Wilderness Preservation System only by congressional designation. See 16 U.S.C. § 1131(a). Congress explicitly rejected executive designation of wilderness lands. See *id.* § 1132(b).

31. See S. REP. NO. 96-413, at 126-27 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5071-72.

land uses,³² ANILCA struck a “delicate balance” between competing claims for protection and development of Alaskan lands.³³

Congress attempted to compensate for the reduction in the timber base wrought by Wilderness Act designation and other land withdrawals prior to the enactment of ANILCA with three provisions offering some degree of protection for the timber industry.³⁴ The chief timber provision directed the Forest Service “to maintain the timber supply . . . to dependent industry at a rate of 4.5 billion foot board measure per decade.”³⁵ Second, Congress directly appropriated at least \$40 million to enable the Forest Service to maintain the timber supply in accordance with this requirement.³⁶ Finally, ANILCA exempted the Tongass from Section 6(k) of the NFMA, which requires the Forest Service to remove lands from the timber base that are not physically, economically, or otherwise suitable for timber production.³⁷ ANILCA Sections 708 and 1326, discussed below, attempted to eliminate the practice of withdrawing Alaskan federal lands by executive action.³⁸

Upon passage of ANILCA, Congress cautioned against adopting future legislative measures that too easily upset the compromise struck by the legislation between public resource use and protection.³⁹ However, the “timber-dominant” policies of the Forest Service during the 1980’s led Congress to amend ANILCA by the passage of the Tongass Timber Reform Act of 1990 (the “TTRA”).⁴⁰ The TTRA eliminated and amended the timber protection provisions of ANILCA in order to restore balance to the

32. See Debate Over Tongass Timber Reform Act, 136 CONG. REC. 13,707 (1990) (statement of Sen. McClure).

33. S. REP. NO. 96-413, at 232 (1980), reprinted in 1980 U.S.C.C.A.N. 5070, 5176.

34. See Steven A. Daugherty, *The Unfulfilled Promise of an End to Timber Dominance on the Tongass*, 24 ENVTL. L. 1573, 1585 (1994) (citing S. REP. NO. 96-413, at 225-30 (1980), reprinted in 1980 U.S.C.C.A.N. 5070, 5169-74).

35. Alaska National Interest Lands Conversation Act, Pub. L. No. 96-487, § 705(a), 94 Stat. 2371, 2420 (1980) (codified at 16 U.S.C. § 539d (1994)), amended by Tongass Timber Reform Act, Pub. L. No. 101-626, tit. I, §§ 101-103, 104 Stat. 4426, 4426-27 (1990) (codified as amended at 16 U.S.C. § 539e(b) (Supp. V 1999)) [hereinafter ANILCA].

36. See 136 CONG. REC. S7754-02, *S7755 (1990) (statement of Sen. Bumpers).

37. See ANILCA, *supra* note 35, § 705(a).

38. See *id.* § 1326, codified at 16 U.S.C. § 3213 (1994) (ANILCA § 708 is not codified).

39. See S. REP. NO. 96-413, Part VI, (1980), reprinted in 1980 U.S.C.C.A.N. 5070.

40. Pub. L. No. 101-626, 104 Stat. 4426 (1990) (codified at 16 U.S.C. §§ 539(d), 539(e) (1994)).

management of the Tongass. Most significantly, the TTRA eliminated ANILCA's timber supply mandate "to maintain the timber supply . . . to dependent industry at a rate of 4.5 billion foot board measure per decade" and the automatic appropriations clause.⁴¹ The appropriations clause in ANILCA had automatically supplied the Forest Service with funds to use in maintaining the permissible timber supply at the rate of 4.5 billion foot board per decade. Instead, the Forest Service was directed to use appropriations granted through the normal process to "provide a supply of timber from the Tongass National Forest which . . . meets the annual market demand for timber from such forest."⁴² The TTRA also partially eliminated the Tongass exemption from NFMA Section 6(k), amending ANILCA to require the Forest Service to consider all NFMA-mandated factors with the exception of economics prior to removal of lands from the timber base.⁴³ Finally, the TTRA prohibited logging in buffer zones around certain streams.⁴⁴

The TTRA provisions amending the "mandate" language of ANILCA and providing only a partial exemption from the NFMA were criticized as inconsistent with the TTRA goal of ending timber dominance.⁴⁵ Conservationists were concerned that the Forest Service would still be encouraged to meet the demands of the timber industry at the expense of conservation concerns and to conduct below-cost sales. However, these criticisms were mooted by the closure of the two major pulp mills in southeastern Alaska in the wake of the TTRA.⁴⁶

41. ANILCA, *supra* note 35, § 705(a).

42. 16 U.S.C. § 539d(a).

43. *See id.* § 539d(d).

44. *See id.* § 539d(e).

45. *See* Daugherty, *supra* note 34, at 1590.

46. The Ketchikan Pulp Company ("KPC") and the Alaska Pulp Company ("APC") held long-term contracts with the Forest Service for timber from the Tongass. Prior to the passage of the TTRA, the price the companies paid for the timber was set, which permitted the Forest Service to engage in below-cost timber sales to these two companies. The TTRA required these companies to pay prevailing prices for timber but granted the companies the first right to put timber up for sale. Nevertheless, in the wake of the TTRA, both companies have gone out of business and closed their large pulp mills. The remaining smaller-scale, independent contractors pay prevailing market rates. *See* Telephone Interview with Jack Phelps, Executive Director of the Alaska Forest Association (Feb. 25, 2000) (notes on file with author); Nicole A. Bonham, *Alaska Timber Industry Ponders Future Without Pulp Mills*, ALASKA J. COM., Nov. 7, 1999, at 14.

C. The NFMA and the Tongass Land Management Plan

The Forest Service manages 192 million acres of National Forest System, or approximately nine percent of the total land area of the United States.⁴⁷ The National Forest Management Act of 1976 is the organic act promulgated to provide the Forest Service with guidelines for administering the vast and varied lands under its control.⁴⁸ The Act sets forth the Service's mission and goals and provides a procedural framework to achieve them.⁴⁹ The NFMA created "the most detailed and participatory forest and rangeland planning process ever undertaken."⁵⁰ It was enacted in part to reduce the dominant role of timber production in Forest Service policies.⁵¹ Prior to the passage of the NFMA, the Forest Service had such unbridled discretion that its operation was criticized as being "antidemocratic."⁵² The Forest Service's timber-dominant policies permitted clearcutting projects without interdisciplinary input and public participation.⁵³

The planning process mandated by the NFMA uses national forests as the "functional planning units" and requires an interdisciplinary approach to forest management, combining the knowledge of foresters, road engineers, biologists, and other scientists with public participation and input.⁵⁴ This planning process was designed to curtail the formerly vast amount of agency discretion to allow extraction of forest resources and ensure forest preservation and productivity.⁵⁵ The NFMA mandated that national forest lands be allocated among multiple uses, including conservation and resource production.⁵⁶

47. See More "Protection" Planned for U.S. Forests, 126 WOOD TECH. 610 (1999), available in 1999 WL 14902208.

48. See Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 ENVTL. LAW. 149, 153 (1996) (noting that the NFMA was also enacted to guide the Forest Service away from the timber industry).

49. See Wilkinson, *supra* note 6, at 659.

50. Gippert & DeWitte, *supra* note 48, at 153.

51. See *Sierra Club v. Thomas*, 105 F.3d 248, 249-50 (6th Cir. 1997).

52. Wilkinson, *supra* note 6, at 662 (discussing views of Arnie Bolle, who authored the Bolle Report, as "one of the main triggering forces of the NFMA," *id.* at 660).

53. See *id.*

54. *Id.* at 667 (citing 16 U.S.C. § 1604(b),(f)(3)(1994)); see also 36 C.F.R. § 219.5 (1999).

55. See *House v. United States Forest Service*, 974 F. Supp. 1022, 1033 (E.D. Ky. 1997).

56. See 16 U.S.C. § 1604(e) (1994).

Prior to authorizing a logging sale in a national forest, the Forest Service must establish management goals on a forest-wide basis.⁵⁷ These goals are incorporated into a programmatic Forest Plan, which delineates where logging may occur in the forest, and may authorize specific logging projects.⁵⁸ The Tongass National Forest Land and Resource Management Plan (“Tongass Plan”) is the planning document that identifies the Forest Service’s strategy for managing the forest. Management prescriptions set forth in the Tongass Plan limit how and where activities will be conducted. Timber activities in the Tongass are limited by the Allowable Sale Quantity (“ASQ”),⁵⁹ the acreage that may be scheduled for timber harvest annually,⁶⁰ and the timber stand rotation period.⁶¹ Successive revisions of the Tongass Plan have reduced the ASQ and scheduled acreage, and increased the timber stand rotation period for some stands. These revisions reflect the incorporation of public concerns over resource protection into the Tongass Plan.

The 1979 Tongass Plan was created during the first round of the NFMA planning process.⁶² This plan provided an ASQ of 520

57. *See id.* § 1604(a)-(f); *see also* 36 C.F.R. § 219.4(b)(3) (1999).

58. *See id.*; *see also* *Smith v. United States Forest Service*, 33 F.3d 1072, 1074 (9th Cir. 1994). The Forest Service must prepare an EIS in connection with each Forest Plan to evaluate the forest-wide environmental effects of the particular management scheme outlined in the Plan. *See* 42 U.S.C. § 4332 (1994). Individual, site-specific projects such as a particular timber sale require a second EIS to ensure compliance with the management goals of the Forest Plan. *See Smith*, 33 F.3d at 1074-75.

59. The ASQ is the maximum amount of timber that may be sold each decade from suitable lands (designated by the Forest Service) covered by the Forest Plan. The ASQ is expressed in decadal terms of billion board feet, and in annual terms of million board feet (“mmbf”). *See 1997 TLMP: Final Environment Impact Statement* (visited Apr. 9, 2000) <<http://www.fs.fed.us/r10/tlmp/>>.

60. To determine how much timber is scheduled for harvest, the Forest Service first determines what lands are available (not otherwise withdrawn under protective legislation, such as designated wilderness) and suitable (land for which technology is available that will ensure timber production without irreversible resource damage and for which there is (1) reasonable assurance that such lands can be adequately restocked, and (2) management direction that timber production is an appropriate use of that area). The Forest Service then applies the Management Implementation Reduction Factor (“MIRF”) to subtract from suitable and available lands acreage that cannot be harvested due to factors not accounted for, such as riparian buffer zones. *See id.*

61. The timber stand rotation period reflects the amount of time after which a given harvested stand may be harvested again. *See id.*

62. The 1997 revised Tongass National Forest Land and Resource Management Plan is available at <<http://www.fs.fed.us/r10/tlmp/>>.

million board feet (“mmbf”), an annual average timber stand rotation of 100 years, and scheduled 1.4 million acres for harvest. The NFMA required that second round plans be completed within ten to fifteen years after the first round plans.⁶³ Accordingly, the Tongass Plan was amended in 1986 and again in 1997. The 1997 Tongass Plan did not amend the average timber stand rotation period, but reduced the ASQ to 267 mmbf and the scheduled acreage for harvest to 676,000. Appeals filed in response to the 1997 Tongass Plan were considered by Forest Service Chief Mike Dombeck and addressed by Department of Agriculture Under Secretary James Lyons in the 1999 Record of Decision, which modified the 1997 Tongass Plan.⁶⁴ The 1997 Tongass Plan, as modified by the 1999 Record of Decision, reduced the ASQ by twenty-five percent to 187 mmbf, and the scheduled acreage for harvest to 576,000. The average timber rotation period remains 100 years, but the 1999 Record of Decision introduced a 200-year rotation period applicable to 276,000 acres.⁶⁵

The successive amendments to the Tongass Plan represent the effectiveness of the NFMA planning process, which strikes a balance between statutory directives regulating Forest Service decision-making and agency discretion.⁶⁶ While executive action was necessary to protect parts of the Tongass National Forest in the early years of Alaska statehood, subsequent legislative action directed the Forest Service’s management of the Tongass and mandated conservation practices. ANILCA and the TTRA were necessary to adjust Forest Service practices under the NFMA to achieve a balance between the competing values of resource protection and production. However, the recent amendments to the Tongass Plan demonstrate that the Forest Service has embraced the conservation concerns voiced by Congress through the TTRA and is seeking to protect the valuable old-growth stands of the Tongass while allowing the reduced timber industry of southeastern Alaska to remain viable. The coordinated approach toward management of the Tongass set forth in the NFMA has permitted the Forest Service to cooperate with the Tongass-based timber in-

63. See 16 U.S.C. § 1604(k) (1994).

64. See *1999 Record of Decision: Tongass National Forest Land and Resource Management Plan Alaska* (last modified Apr. 7, 1999) <<http://www.fs.fed.us/r10/tongass>>.

65. The figures are contained in the 1979, 1997, Modified 1997, and 1999 Tongass Plans. See *Modified 1997 Tongass Land Management Plan Decision: Comparison of TLMP Decisions* (last modified Apr. 7, 1999) <<http://www.fs.fed.us/r10/tongass>>.

66. See Wilkinson, *supra* note 6, at 669.

dustry, as well as with state and local governments. These collaborative efforts combined with the careful analysis of region-specific factors by the Forest Service have resulted in proscribing management goals designed to achieve protection of forest resources while also providing a sustainable yield of timber. Such progress provides grounds for questioning the application of President Clinton's Roadless Lands Directive to the Tongass National Forest.

III. THE CHANGING FACE OF FOREST SERVICE ROAD SYSTEM MANAGEMENT POLICIES AND PRESIDENT CLINTON'S ROADLESS LANDS DIRECTIVE

A. Impetus Behind the Roadless Directive: Intrinsic Values of Undisturbed Land and the High Cost of Road Maintenance

When the Clinton Administration first proposed a revision of the National Forest Transportation System regulations in early 1998, Forest Service Chief Mike Dombeck set forth reasons necessitating a change in road management policy.⁶⁷ Among the reasons given for the proposal were shifts in public opinion, public demand, and public use of National Forest System resources.⁶⁸ Budgetary concerns also prompted the policy review, as the Forest Service had an approximate \$8.4 billion backlog in road maintenance and reconstruction.⁶⁹ Later, after Clinton's announcement of the Roadless Directive and the accompanying publication of the Notice of Intent to prepare an environmental impact statement to consider the effect of banning road building in unroaded areas,⁷⁰ the Forest Service collected approximately 500,000 comments,⁷¹ an estimated 150,000 of which were submitted in support of the inclusion of the Tongass in the Roadless Directive.⁷²

National Forest System lands include approximately 373,000 miles of inventoried forest system roads.⁷³ National Forest roads are mainly used for the harvesting of timber and the development

67. See Administration of the Forest Development Transportation System, 63 Fed. Reg. 4350 (1998) (to be codified at 36 C.F.R. pt. 212).

68. See *id.* at 4350.

69. See National Forest System Roadless Areas, 64 Fed. Reg. at 56,306.

70. See *id.*

71. See *Statement of James R. Lyons: Regarding the Development of Rules Concerning Roadless Areas within the National Forest System* (last modified Mar. 14, 2000) <http://roadless.fs.fed.us/documents/31400_roadless_lyons.htm>.

72. See Telephone Interview with Matt Zencey, *supra* note 3.

73. See Administration of the Forest Development Transportation System, 63 Fed. Reg. at 4350. The roads in our national forests could circle the globe more than 15 times. See National Forest System Roadless Areas, 64 Fed. Reg. at 56,306.

of other resources, activities which have shown an overall steady decrease in the last decade.⁷⁴ The decrease in timber harvests in Alaska during the 1990's is due mainly to the legislative reforms of the TTRA, which reduced allowable harvest levels and significantly reduced the Forest Service's obligation to supply timber.⁷⁵ In addition, the amendments of the Tongass Plan, which reduced the Allowable Sale Quantity ("ASQ"), increased the timber stand rotation for a large portion of the Forest deemed suitable for timber harvest, and reduced the acreage of scheduled timber harvest.⁷⁶

While roads are essential for the timber industry and for human use and enjoyment of the National Forests System, there is evidence that they are hazardous to the overall health of the forests. Hazards posed by roads are aggravated by the inability of the Forest Service to maintain existing roads. Failure to maintain existing roads has increased the extent of ecological degradation in the form of flooding, landslides, stream sedimentation, and associated reductions in fish habitat productivity.⁷⁷

Road building introduces a separate set of environmental hazards. The fragmentation and degradation of habitat for some wildlife species is attributed to the large number of roads in some areas of the national forests.⁷⁸ In addition, road-building permits increased visitation to previously less-accessible regions of the forests, accompanied by an increase in human-associated resource impacts.⁷⁹

1. *Changing the Policy for Managing the Roads System Within the Parameters of the NFMA: Temporary Moratorium on Road Building to Consider New Policy and the Exemption of the Tongass National Forest.* Public outcry over environmental and budgetary disasters threatened by the neglect of old roads and the construction of new ones prompted Forest Service Chief Dombeck to take action. In January 1998, Dombeck proposed a study aimed

74. See Administration of the Forest Development Transportation System, 63 Fed. Reg. at 4350.

75. The TTRA eliminated the automatic appropriations and timber supply clauses under ANILCA and instructed the Forest Service to attempt to meet market demand "to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources." 16 U.S.C. § 539d(a) (1994).

76. See *Modified 1997 Tongass Land Management Plan Decision*, *supra* note 65.

77. See Administration of the Forest Development Transportation System, 63 Fed. Reg. at 4350.

78. See *id.*

79. See *id.*

at revising regulations covering the National Forest Road Management and Transportation System.⁸⁰ The Forest Service simultaneously proposed a rule to suspend temporarily road construction and reconstruction in certain unroaded areas.⁸¹ In response to the proposed policy, the agency received over 80,000 public comments.⁸² The period of public comment, review of comments received, and scientific evaluations by the Forest Service led to the issuance of a final interim rule imposing a temporary moratorium on road building in unroaded inventoried roadless areas.⁸³ The moratorium became effective March 1, 1999, and is set to expire upon the earliest of an adoption of a revised road management policy or eighteen months from the effective date.⁸⁴

The temporary moratorium applies to the following unroaded areas:

- (1) All remaining unroaded portions of RARE II inventoried roadless areas within the National Forest System, and all other remaining unroaded portions of roadless areas identified in a land and resource management plan prepared pursuant to NFMA that lie one-quarter mile or more beyond any existing classified road;
- (2) All National Forest System unroaded areas of more than 1,000 acres that are contiguous to areas inventoried in land and resource management plans;
- (3) Specific Appalachian roadless areas;
- (4) All National Forest System unroaded areas greater than 1,000 acres that are contiguous to congressionally designated wilderness areas or National Wild and Scenic River System areas that are classified as "Wild"; and
- (5) All National Forest System unroaded areas greater than 1,000 acres that are contiguous to unroaded areas of 5,000 acres or more on other federal lands.⁸⁵

Exempted from the interim rule were unroaded areas in national forests covered by a forest plan that was finalized after January 1, 1996.⁸⁶ The temporary moratorium exempted unroaded areas in national forests covered by a recently revised forest plan that was finalized after January 1, 1996, such as the Tongass Plan, in order

80. *See id.* at 4350-51.

81. *See id.* at 4354.

82. *See* National Forest System Roadless Areas, 64 Fed. Reg. at 56,306.

83. *See* Administration of the Forest Development Transportation System, 64 Fed. Reg. 7290, 7304 (1999).

84. *See id.* at 7290.

85. *See* 36 C.F.R. § 212.13(b)(1)-(5) (1999).

86. *See id.* § 212.13(c)(1).

to avoid the “undue interruption or interference with established planning processes”⁸⁷ set forth in the newly revised Plan and to “honor current decisions that incorporate current available science.”⁸⁸ Thus, the interim rule does not apply to the unprotected roadless lands in the Tongass National Forest.

The Tongass National Forest Land and Resource Management Plan is the planning document required by the NFMA that identifies the Forest Service’s strategy for managing the Forest.⁸⁹ In the Interim Final Rule, the Forest Service acknowledged that the public involvement in revising the Tongass Plan was greater than the involvement of most other recently revised land management plans.⁹⁰ This public process exemplifies the coordinated approach to forest management that is permitted and required by the NFMA and its successful incorporation into the Tongass planning process.

The temporary moratorium has allowed the Forest Service to assess the ecological, economic, and social values associated with roadless areas in national forests and to evaluate long-term options for the management of these areas as well as roaded areas.⁹¹ The Forest Service determined that not only would inclusion of the Tongass in the road building plan interfere with management strategies set forth in the 1997 revision of the Tongass Plan, but inclusion of the Tongass would be highly detrimental to the southeastern Alaska timber industry.⁹² The environmental impact assessment considering the possible effects that suspending road building would have in the Tongass showed that its inclusion in the road building ban would disrupt the timber industry substantially.⁹³ Thus, the Forest Service rejected the alternative that would have included the Tongass in the Interim Final Rule adopted in February 1999.

The Forest Service has used the “timeout” period provided by the temporary moratorium to prepare proposed revisions to the

87. Administration of the Forest Development Transportation System, 64 Fed. Reg. at 7300.

88. *Id.*

89. See 1999 revised Tongass National Forest Land and Resource Management Plan, available at <<http://www.fs.fed.us/r10/tongass>>.

90. See *id.* at 7290.

91. In his Memorandum to the Secretary of Agriculture announcing his Roadless Directive to the Forest Service, President Clinton remarked that the temporary moratorium had allowed the Forest Service to perform these functions. See Clinton, Memorandum, *supra* note 7.

92. See *id.* at 7300.

93. See *id.*

policy governing management of the roads of the National Forest System.⁹⁴ This proposed policy, discussed in further detail below, was issued on March 3, 2000, and represents the best approach to achieving heightened protection for unroaded areas that still allows the flexibility mandated by the NFMA to account for regional factors warranting different treatment of different forests.

2. *The Roadless Lands Directive.* While the Forest Service was in the midst of considering policy changes in its management of the road system in the national forests, President Clinton announced the Roadless Lands Directive. On October 13, 1999, President Clinton directed the Forest Service to consider banning road development altogether in certain unroaded portions of the national forests. He urged the Forest Service to develop a proposal to protect more than 40 million acres of currently “inventoried” roadless areas⁹⁵ within the National Forest System, and to determine whether such protection should be afforded to smaller unroaded areas not yet inventoried.⁹⁶ If adopted, Clinton’s Roadless Directive would afford some level of protection to 40 million acres of the 192 million total acres in national forests and grasslands nationwide.⁹⁷ The regulations Clinton hopes to sign into effect before the end of his term would prevent any type of road development in the remote sections of national forests and grasslands, most of which have never been developed or roaded.⁹⁸ Forest Service Chief Mike Dombeck has described the plan as “one of the most significant conservation efforts in United States history.”⁹⁹ Most of the newly set-aside land would be tracts of 5,000 acres or more that are currently undeveloped but not protected by any formal wilderness designation.¹⁰⁰ The Roadless Directive calls for the Forest Service to accelerate the administrative process and devise a preservation plan for the lands under consideration by the

94. See Forest Transportation System, 65 Fed. Reg. 11,684, 11,684 (2000).

95. “Inventoried” roadless areas are those tracts of roadless areas identified and inventoried by the Forest Service during the Second Roadless Area Review and Evaluation, conducted in 1979.

96. See Clinton, Memorandum, *supra* note 7; see also National Forest System Roadless Areas, 64 Fed. Reg. at 56,306.

97. See Clinton, Memorandum, *supra* note 7.

98. See *id.*

99. Mike Dombeck, *Letter from the Chief* (visited Mar. 27, 2000) <http://roadless.fs.fed.us/documents/letter_to_emp.htm>.

100. See Clinton, Memorandum, *supra* note 7.

spring of 2000 in the hopes of issuing regulations before the end of Clinton's Presidency in January 2001.¹⁰¹

The public process required to achieve the President's proposal began with the publication of a Notice of Intent to prepare an Environmental Impact Statement ("EIS") to examine alternative methods to meet the President's goals.¹⁰² In a hearing before the Senate Forests and Public Lands Management Subcommittee on November 2, 1999, Agriculture Secretary Dan Glickman called the then-upcoming process of public comment one of the most extensive ever.¹⁰³ Interested citizens submitted comments during a sixty-day public comment period that started on October 19, 1999, and ended on December 20, 1999.¹⁰⁴ The Forest Service is scheduled to "speed through" hearings and review comments submitted during the public comment phase,¹⁰⁵ and is currently working on a Draft EIS expected to be completed in the spring of 2000.¹⁰⁶ Another public comment period will follow the publication of the EIS. Whether the Tongass will be included in the final regulations to be issued in late 2000 will be determined during the environmental review phase of the expedited administrative proceedings.¹⁰⁷

The Forest Service intends to promulgate a rule that would initiate a two-part process to protect roadless areas (the "Proposed Rule"). The most contested part of the Proposed Rule, Part One, would immediately restrict road construction and possibly other activities in unroaded portions of inventoried roadless areas as previously identified in RARE II and existing forest plan inventories.¹⁰⁸

101. See National Forest System Roadless Areas, 64 Fed. Reg. at 56,306.

102. See *id.*

103. See Dave Hogan, *Senators Tee Off On the President Over Protection of Roadless Areas*, PORTLAND OREGONIAN, Nov. 3, 1999, at A5.

104. See *id.*

105. David E. Sanger & Sam Howe Verhovek, *Clinton to Ban Logging Roads in Remote Areas*, SEATTLE POST-INTELLIGENCER, Oct. 14, 1999, at A1.

106. The Forest Service maintains a website about the Roadless Initiative and provides regular updates and progress reports on the Initiative. The Forest Service estimates that the Draft EIS will be posted in May 2000. The website address is <<http://www.roadless.fs.fed.us>>.

107. See Paula Dobbyn, *Clinton Plans Forest Shield, Tongass Areas May Become Protected*, ANCHORAGE DAILY NEWS, Oct. 14, 1999, at F1.

108. See National Forest System Roadless Areas, 64 Fed. Reg. at 56,306. The Forest Service initiated its second Roadless Area Review and Evaluation ("RARE II") in 1977. RARE II sought to survey roadless areas within the National Forest System and make recommendations to Congress as to which of the roadless areas should be protected by congressionally approved wilderness designation and which should be released for non-wilderness uses.

The Forest Service is considering certain alternatives for Part One in the Draft EIS, including making no change in the current policy. Once the subject areas are identified and the ban imposed, Part Two of the Proposed Rule would “establish national direction for managing inventoried roadless areas, and for determining whether and to what extent similar protections should be extended to uninventoried roadless areas.”¹⁰⁹ Part Two would be implemented at the forest plan level through the plan amendment and process contained in the National Environmental Protection Act.

The Forest Service is also considering alternatives for Part Two, including a no-action alternative. The Forest Service specifically sought public comments on whether the Tongass should be included in the Proposed Rule, and if so, whether inventoried Tongass areas should be covered under Part One of the Rule, or only under Part Two.¹¹⁰

B. Legal Challenges to the Roadless Directive

The authority of the Forest Service to impose a blanket prohibition on road construction and reconstruction in national forests, rather than considering such a management strategy on the regional level, has been questioned. Opponents have raised legal challenges based on the NFMA and ANILCA.¹¹¹

1. *NFMA-based Challenges to the Roadless Directive.* Opponents of the Roadless Directive claim it violates the NFMA because it represents an impermissible unilateral change to the Tongass Land Management Plan and does not comply with the procedure for plan amendment.¹¹² While “[a] high value of law is its stability and predictability, and . . . the burden will always rightly lie with those who propose change,”¹¹³ the Forest Service has broad discretion to make policy changes that affect management of the national forests. Because of the latitude granted the Forest Service to set policy under the NFMA, the Roadless Directive most likely does not technically violate the Act. The sacrifice of stability and predictability represented by the Directive and the Proposed Rule does, however, violate the spirit of the NFMA.

109. *Id.* at 56,307.

110. *See id.* at 56,306.

111. *See* Jack E. Phelps, *Briefing Paper on the USFS's Proposed Action Roadless Areas on the Tongass National Forest* (last modified Feb. 6, 1998) <<http://www.akforest.org/2-98.htm>>.

112. *See id.*

113. Wilkinson, *supra* note 6, at 660.

a. *The Letter of the NFMA.* The NFMA establishes a procedure for amending a Forest Plan.¹¹⁴ Once a Forest Plan such as the Tongass Land Management Plan is adopted or amended in accordance with NFMA-mandated procedures, the covered lands are to be managed under the plan until a new plan is developed or the existing plan is further amended in conformity with required procedures.¹¹⁵ Opponents of the Directive claim that its implementation through a rulemaking will result in a policy that significantly changes the Tongass Plan and, thus, cannot be adopted without following NFMA procedures for adopting a “significant change” amendment.¹¹⁶

In order to amend an existing plan “in any manner whatsoever,” the Secretary of Agriculture must first provide public notice.¹¹⁷ A non-significant amendment may be adopted after such notice is provided.¹¹⁸ Prior to making an amendment that would result in a “significant change” in the plan, the NFMA mandates a public comment and involvement process similar to that required for the initial development of a plan, including an environmental impact statement and an opportunity for meaningful public participation.¹¹⁹ To guide determination of what constitutes a “significant change” in a plan, the Forest Service relies on a non-exhaustive list of four factors. These factors have been criticized as providing “little guidance,”¹²⁰ and include (1) timing, which involves consideration of when the amendment is to take place relative to the next scheduled revision of the forest plan; (2) consideration of the location and size of the area involved in the change; (3) goals and objectives, urging consideration of whether the change “alters long-term relationships between the levels of goods and services projected by the forest plan”; and (4) if the change is in a management prescription, determination of whether the change is only for a specific situation, or whether it would apply to future decisions and alter desired future conditions.¹²¹

Opponents of the Proposed Rule characterize it as an amendment to the Tongass Plan that cannot be implemented without

114. See 16 U.S.C. § 1604 (1994).

115. See *id.* § 1604(c).

116. Phelps, *supra* note 111, § I.

117. 16 U.S.C. § 1604(f)(4) (1994).

118. See *id.*

119. *Id.* § 1604(d), (f).

120. *Sierra Club v. Cargill*, 11 F.3d 1545, 1548 (10th Cir. 1993).

121. *Prairie Wood Products v. Glickman*, 971 F. Supp. 457, 462-63 (D. Or. 1997) (discussing factors set forth in Forest Service Handbook § 1909.12, ch. 5.31, 53 Fed. Reg. at 26,836-37 (1988)).

following the significant change plan amendment procedures set forth in the NFMA.¹²² Environmentalists, on the other hand, characterize it as a land management regulation and a nationwide change in policy rather than an amendment to the Tongass Plan.¹²³ Even if it represents an amendment, they contend that the administrative review process being used to evaluate the Proposed Rule satisfies the requirements of the NFMA.¹²⁴

There is no question that the Proposed Rule would effectively amend the Modified 1997 Tongass Land Management Plan, and such an amendment in Alaska would likely be deemed significant.¹²⁵ Under the terms of the Tongass Plan, 938,000 acres of land are available and suitable for timber harvest.¹²⁶ Of the available and suitable acreage, 403,000 acres are roadless and would be removed by the Proposed Rule as unavailable lands.¹²⁷ Thus, if the Proposed Rule is adopted, only about 535,000 acres would be available and suitable for timber harvest. To determine how many acres of those deemed “suitable and available” are actually timber

122. See Phelps, *supra* note 111, § I(A).

123. See Zencey, *supra* note 3.

124. See, e.g., Anderson & Moncrief, *supra* note 21, at 437-38.

125. The Forest Service has broad discretion in determining the significance of a proposed change. In two law suits raising NFMA plan amendment issues, regional interim policies were challenged on the basis that they could not be implemented without a significant plan amendment. See *Southern Timber Purchasers Council v. Alcock*, 779 F. Supp. 1353 (N.D. Ga. 1991), *vacated sub nom.* *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 811 (11th Cir. 1993) (vacating for jurisdictional reasons); *Prairie Wood Products*, 971 F. Supp. at 457. In both instances, the policies were upheld, due largely to their interim status. However, the Proposed Rule is a long-term policy, which is national in scope and will have a major impact on timber output. In *Prairie Wood Products*, the Oregon district court did not upset the Forest Service’s finding of no significant impact where timber outputs were reduced by approximately 58 mmbf/yr. See 971 F. Supp. at 465. However, the reduction in timber output likely to result from the adoption of the Proposed Rule is much greater. There is evidence that the Proposed Rule would reduce timber output by approximately 150 mmbf/yr in the Tongass, from the ASQ under the 1999 Record Of Decision of 187 mmbf/yr down to the likely ASQ under the Proposed Rule of 30-40 mmbf/yr. See Telephone Interview with Jack Phelps, *supra* note 46. Thus, a majority of the factors considered by the Forest Service in evaluating the significance of a change weigh in favor of a finding that incorporation of the Proposed Rule into the Tongass Plan would be a significant amendment.

126. This figure does not represent the acreage that would be harvested. 576,000 acres are suitable, available, and scheduled for harvest under the 1997 Tongass Plan, as modified by the 1999 Record of Decision. See 1999 Record of Decision, *supra* note 64.

127. See Telephone Interview with Jack Phelps, *supra* note 46.

that would be scheduled for harvest, the Forest Service applies the Management Implementation Reduction Factor, which subtracts areas that cannot be logged due to buffer zones and beach fringes.¹²⁸ It is estimated that under the Proposed Rule, approximately 183,000 acres of timber could be scheduled for harvest, or approximately 353,000 acres less than what is scheduled under the Tongass Plan.¹²⁹ Imposing such a reduction in the timber output would be devastating to the timber industry of southeast Alaska.¹³⁰

It is equally clear that the Forest Service has exceptionally broad authority to manage the National Forest System and protect resources, such as the old-growth stands of the Tongass. The Organic Act of 1897 authorizes the Forest Service to “make such rules and regulations . . . as will insure the objects of [the National Forest System], namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.”¹³¹ The power vested in the Forest Service to manage the National Forest System was reinforced by the Multiple-Use Sustained-Yield Act of 1960 (“MUSYA”),¹³² which broadened the acceptable uses of the national forests.¹³³ Protection of roadless areas in order to further the purposes of national forests is unquestionably within the power vested in the Forest Service. It is the *way* in which the Forest Service is seeking to provide such protection that has opponents of the Roadless Directive incensed. Where such a change significantly amends the Tongass Plan, as seems to be the case here, op-

128. Tongass Land Management Plan Revision: Final Environmental Impact Statement, at 7-26 (May 1997)(visited Apr. 7, 2000) <<http://www.fs.fed.us/r10/tlmp/feis/chap7.pdf>>.

129. See Telephone Interview with Jack Phelps, *supra* note 46.

130. See *id.* The mills currently operating in southeast Alaska require approximately 200-250 mmbf/year to survive. If the Roadless Directive is put into place, only one or two mills could continue to operate. Environmentalists maintain that adoption of the Proposed Rule would permit timber companies to continue to log on existing infrastructure. The timber industry acknowledges that logging could continue at a reduced pace, but estimates that such a change would permit an annual sale quantity of 30-40 mmbf, which is enough for only one or two mills. See *id.*

131. Organic Act of 1897, ch. 2, 30 Stat. 35 (codified as amended at 16 U.S.C. § 551 (1994)).

132. See Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, § 1, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528-531 (1994 & Supp. V 1999)).

133. See Anderson & Moncrief, *supra* note 21, at 437 (noting that the Forest Service has “ample authority to adopt regulations that prohibit road construction and logging in roadless areas in order to protect the watershed, wildlife, recreational, and wilderness values of the national forests”).

ponents contend that the Forest Service must use the NFMA amendment process.

Assuming that implementation of the Proposed Rule in Alaska will require amendment of the Tongass Plan,¹³⁴ the NFMA-based challenge will succeed only if the Forest Service has not satisfied the NFMA amendment process required for a significant change.¹³⁵ The Forest Service employed informal rulemaking procedures to consider adoption of the Proposed Rule. Although the informal rulemaking procedures do substantially satisfy the public notice and participation requirements for plan amendments under the NFMA, opponents have questioned the sufficiency of the expedited review process.¹³⁶ Whether the administrative review process follows the NFMA procedures for significant amendments to existing plans is subject to debate.

Even if procedures used to implement the Proposed Rule satisfy the letter of NFMA, they do not satisfy the spirit of the Act. The Proposed Rule would set uniform standards applicable to forests nationwide, and thus would not permit evaluation of regional or local issues such as the effect it would have on the Tongass-reliant timber industry.

b. *The Spirit of the NFMA.* The National Forest Management Act of 1976¹³⁷ was enacted in reaction to the Forest Service's substantial failure to achieve a balance between resource production and preservation, reflected in years of Forest Service cooperation with timber interests at the expense of the

134. See Telephone Interview with Eric Jorgensen, attorney with Earthjustice Defense Fund (Feb. 2, 1999) (notes on file with author). Jorgensen noted that one possible way the Administration could implement the Proposed Rule would be by amending forest plans. A district court has ruled that a policy change adding guidelines, rather than merely clarifying existing guidelines, may not be implemented until the forest plan is properly amended. See *House v. U.S. Forest Service*, 974 F. Supp. 1022, 1034 (E.D. Ky. 1997).

135. See 16 U.S.C. § 1604(f)(4) (1994).

136. Senator Murkowski has criticized the expedited public comment period used to adopt the Moratorium and consider the Proposed Rule, alleging that it "makes a mockery of the environmental review and public participation requirements of the 1969 National Environmental Policy Act, the 1976 National Forest Management Act, the 1980 Alaska National Interest Lands Conservation Act, and other laws." Statement by Sen. Murkowski in Response to the Announcement by the Clinton Administration of a New Policy for the Management of Forest Service Roadless Areas, Fed. Document Clearing House, Inc., ASSOC. PRESS POL. SERV. (Jan. 22, 1998) available in 1998 WL 7378759.

137. 16 U.S.C. § 1600 et seq. (1994).

environment.¹³⁸ The Act introduced a formal planning process designed to reduce agency discretion while permitting the agency flexibility to meet local and regional forest management goals. This goal was achieved through the use of a coordinated process with state and local governments and other federal agencies.¹³⁹

The NFMA incorporated the principles, goals, and mandates of the MUSYA.¹⁴⁰ While the “multiple-use mandate” included in the MUSYA grants the Forest Service considerable discretion,¹⁴¹ it also requires the Forest Service to manage the lands for a balance of resource uses, including timber.¹⁴² This provision of the MUSYA echoed and incorporated the purposes of public lands laid out in the Organic Act of 1897, which include “furnish[ing] a continuous supply of timber for the use and necessities of the citizens of the United States.”¹⁴³ Thus, the NFMA requires the Forest Service to seek to achieve a delicate balance between protecting natural resources, such as old-growth stands, and furnishing a sustainable supply of timber.

The Roadless Directive proposes a forest-wide policy that would prohibit road-building in all roadless areas without exception. Such a proposal directly conflicts with the spirit of the NFMA, which mandates that (1) planning be done on a local and regional basis; (2) plans be revised to incorporate new information and adjust to new conditions; and (3) a cooperative approach be taken to balance resource production and protection. Whereas the TTRA was a permissive legislative circumvention of the process Congress had mandated in the NFMA,¹⁴⁴ executive circumvention of the NFMA-mandated planning process is unjustifiable in the context of the Tongass, where management strategies have incorporated resource protection goals. Imposing a blanket prohibition on all roadless forest areas is fundamentally wrong in the Tongass, where the NFMA-mandated regional planning process has worked to achieve a balance between competing interests.

The NFMA requires a planning process that takes place at local and regional levels. As Professor Charles F. Wilkinson has noted, this planning process is necessarily elaborate and extensive,

138. See *Sierra Club v. Thomas*, 105 F.3d 248, 249-50 (6th Cir. 1997).

139. See *House v. U.S. Forest Service*, 974 F. Supp. 1022, 1033 (E.D. Ky. 1997).

140. See *id.*

141. Administration of the Forest Development Transportation System, 64 Fed. Reg. at 7291.

142. See 16 U.S.C. § 528 (1994).

143. *Id.* § 475.

144. See 136 CONG. REC. S7754-02 (daily ed. June 12, 1990) (statement of Sen. McClure).

in order to balance and achieve competing objectives for the management of nearly two hundred million acres of varied terrain.¹⁴⁵ The NFMA forest-planning process, establishing management goals and objectives to be adhered to in the authorization of site-specific projects, permits goals to be determined and implemented on a local basis. Thus, the Forest Service has discretion in the way it implements the goals of the Tongass Plan, such as determining the ASQ at the local level in the Tongass. The flexibility permitted under the NFMA allows the Forest Service to employ “adaptive management” strategies.¹⁴⁶ Such strategies recognize that scientific knowledge about ecosystem management is constantly growing and changing, and management strategies must adapt with the introduction of new information.

The Roadless Directive, however, does not permit variation of the policy or local input in response to the goal of protecting roadless areas at the regional or local level. Rather, it proposes an inflexible policy that may be the best or only way to protect roadless areas in some forests, but not in others. The Tongass is the nation’s largest forest by a factor of three, located in a state in which more acreage is protected by Wilderness Act designation than all other states combined. The forest’s size, combined with the fact that much of it is protected by federal conservation legislation such as the Wilderness Act, warrants different treatment of the Tongass. In addition, there is little question that inclusion of the Tongass would have a particularly severe impact on the Tongass timber industry. A current Clinton Administration official has admitted that the adverse effects of a road construction ban “may be more adverse in certain local communities.”¹⁴⁷ The harsh adverse effects that a road building ban would visit on local communities in southeast Alaska caused the Tongass to be excluded from the temporary moratorium.¹⁴⁸

The NFMA encourages a cooperative approach to national forest management. To this end, the Alaska Region of the Forest

145. See Wilkinson, *supra* note 6, at 681.

146. Gipper & DeWitte, *supra* note 48 (citing National Forest System Land and Resource Management Planning, 60 Fed. Reg. 18,886, 18,910 (1995)).

147. *Regarding the Promulgation of Regulations Concerning Roadless Areas within the National Forest System* (Feb. 22, 2000) (Statement of James R. Lyons, Under Secretary, Natural Resources and Environment, U.S. Dept. of Agriculture) (visited Apr. 4, 2000) <http://www.roadless.fs.fed.us/documents/2000_02_22_lyons.html>.

148. See Administration of the Forest Development Transportation System, 64 Fed. Reg. at 7300.

Service initiated a “Collaborative Stewardship” program in 1997.¹⁴⁹ This program is based on Forest Service Chief Mike Dombeck’s “emphasis on shared leadership and involvement by citizens in national forest management.”¹⁵⁰ This cooperative approach seeks to build working relationships between the Forest Service and the affected communities.¹⁵¹ The Collaborative Stewardship program encourages cooperation at the local level to gather information helpful to fashioning management policies for the Tongass and Chugach National Forests. The approach has encouraged the southeastern Alaska timber industry to adjust to the recent reductions in ASQ and scheduled timber harvest levels. For example, in Ketchikan, a new plant is being built that will produce wood veneer, a product made from the lower-grade timber that was formerly processed by the large pulp mills when they were operational.¹⁵² Thus, the efforts of the Forest Service to cooperate with the public have stimulated public efforts to adjust to new management strategies.

The Roadless Directive would hamper this coordinated approach to forest management. Further, the absolute prohibition on developing roads in the Tongass would alienate the timber industry. Once dominant, the timber industry of southeast Alaska has shrunk considerably but is adjusting to survival on reduced timber availability. However, categorically denying the consideration of road development in the Tongass stifles this process.

Efforts such as the “Collaborative Stewardship” program embody the spirit of the NFMA and guarantee consideration of competing interests in developing management strategies. Amended Tongass Plans have successively increased protection for Tongass acreage but have permitted the survival of a small timber industry. The blanket prohibition proposed by the Roadless Directive would bypass the regional level of input into management strategies in favor of a uniform rule with widely variant impacts on different regional and local communities. As such, it violates the spirit of the

149. USDA Forest Service, *Collaborative Stewardship*, 18 TONGASS FOREST PLAN REVIEW NEWSLETTER (Sept. 1999) (visited Apr. 4, 2000) <http://www.fs.fed.us/r10/tongass/management%20news/tlmp/tongass_review/newsletter1.html#top>.

150. *Id.*

151. *See id.* As an example of how the program is to be implemented, the Forest Service cites the effort on Prince of Wales Island in the Thorne Bay Ranger District, where the Forest Service worked with other agencies and the public to gather information about road management objectives to be incorporated in a new roads analysis process.

152. *See* Telephone Interview with Jack Phelps, *supra* note 46; *see also* *Tongass Agreement Could Aid Proposed Plant*, 10 AM. POL. NETWORK (Aug. 6, 1999).

NFMA, which calls for careful consideration of factors affecting each of the unique forests that fall within the National Forest System.

2. *ANILCA: the "No More" Clause.* In addition to claims that the Proposed Rule would violate the NFMA, opponents claim it would violate ANILCA. Soon after Clinton's announcement of the Roadless Directive, the Alaskan congressional delegation began urging Alaska Governor Tony Knowles to file a suit against the Administration. The delegates contend that ANILCA bars the federal government from conducting studies for the purpose of adding areas to the federal conservation system, unless authorized by Congress.¹⁵³ Opponents of the Clinton Administration's Roadless Directive claim that three clauses of ANILCA, collectively referred to as the "No More" Clauses, prohibit (1) the adoption of a regulation enacting the protections set forth in the Roadless Directive or any alternative listed therein other than the "no action" alternative; (2) Forest Service studies mandated by the Roadless Directive to consider inclusion of the Tongass in conservation regulations; and (3) the Forest Service's review of roadless areas in the Tongass for the purpose of considering their suitability for wilderness designation.¹⁵⁴

a. *ANILCA Section 1326.* ANILCA section 1326¹⁵⁵ has been used to support opponents of the Roadless Directive. The statute reads:

(a) No future 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 such 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 conserva-

153. See *Alaska Lawmakers Urge Roadless Lawsuit*, ENV'T NEWS SERV. (Nov. 5, 1999).

154. See Phelps, *supra* note 111.

155. 16 U.S.C. § 3213 (1994).

tion area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.¹⁵⁶

Opponents of the Roadless Directive refer to section 1326(a) as the “No More Withdrawals Clause.”¹⁵⁷ They assert that this clause prohibits the permanent withdrawal of Tongass land that will likely be proposed in the draft EIS to be issued in May 2000.¹⁵⁸ According to timber industry advocates, the clause requires any large withdrawal of public lands in Alaska to be effected by an Act of Congress, and not by executive order. In order to make such withdrawals, the clause requires the President or Secretary of Agriculture to “give specific notice of those Tongass roadless areas it intends to withdraw under this section via notice in the Federal Register and to both Houses of Congress.”¹⁵⁹ In order to become effective, Congress must approve the withdrawals through a joint resolution within one year.¹⁶⁰

Supporters of the Roadless Directive argue it does not propose a “withdrawal” and, therefore, this subsection is inapplicable.¹⁶¹ Historically, executive-ordered withdrawals have been the source of great debate.¹⁶² The Federal Land Policy and Management Act of 1976 (“FLPMA”),¹⁶³ signed into law by President Ford on the same day as the NFMA, prohibited the executive from making any withdrawal that requires an Act of Congress, including withdrawals for national forests.¹⁶⁴ The FLPMA defines “withdrawal” to mean “withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area of a particular public purpose or program.”¹⁶⁵

ANILCA section 1326(b), referred to by Roadless Directive critics as the “No More Studies Clause,”¹⁶⁶ prohibits further studies of Alaska “for the single purpose of considering the establishment

156. *Id.*

157. *See* Phelps, *supra* note 111.

158. *See* Telephone Interview with Jack Phelps *supra* note 46.

159. 16 U.S.C. § 3213 (1994).

160. *See id.*

161. *See* Telephone Interview with Eric Jorgensen, *supra* note 134.

162. Throughout the early to mid-twentieth century, Alaskan lands customarily joined the National Park System by executive proclamation, which aroused anti-federalist sentiment. *See* WATKINS & ZASLOWSKY, *supra* note 17, at 291.

163. 43 U.S.C. § 1701-84 (1994).

164. *See id.* § 1714(j).

165. *Id.* § 1702(j).

166. Phelps, *supra* note 111, § II(A).

of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes.”¹⁶⁷ The Act defines “conservation system unit” as any unit in Alaska of “the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or a National Forest Monument.”¹⁶⁸ Opponents of the Roadless Directive contend that this clause prohibits studies of the Tongass for purposes of considering its inclusion in the Roadless Directive. They contend studies for the proposed protections are for the “related or similar purpose” of considering the establishment of a conservation system unit.¹⁶⁹ Those in favor of the Roadless Directive argue it is not designating additional conservation units.¹⁷⁰ Rather, they argue that the Roadless Directive proposes a forest-wide policy directing the Forest Service’s management of roadless areas within the National Forest System.¹⁷¹ Although Clinton’s Proposed Rule would implement a form of protection paramount to a Wildlife Act designation, it does not purport to establish a conservation unit, and likely would not be found to violate Section 1326(b).

b. *ANILCA Section 708(b)(4)*. ANILCA subsection 708(b)(4)¹⁷² is referred to as the “No More Wilderness Reviews” Clause.¹⁷³ This subsection prohibits any further review of national forests in Alaska “for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.”¹⁷⁴ Opponents of the Roadless Directive have relied upon this provision as well in challenging the Forest Service’s right to study lands in the Tongass National Forest.¹⁷⁵

The Ninth Circuit partially addressed the scope of subsection 708(b)(4) in *City of Tenakee Springs v. Block*.¹⁷⁶ The suit was brought by an Alaskan city and a conservation group seeking an injunction against a logging company’s construction of roads

167. 16 U.S.C. § 3213 (1994).

168. *Id.* § 3213(b).

169. Phelps, *supra* note 111, § II(A).

170. *See* Telephone Interview with Eric Jorgensen, *supra* note 134.

171. *See id.*

172. Pub. L. No. 96-487, 94 Stat. 2421 (1980).

173. *See* Phelps, *supra* note 111.

174. *Id.*

175. *See* Telephone Interview with Eric Jorgensen, *supra* note 134; Phelps, *supra* note 111.

176. 778 F.2d 1402 (9th Cir. 1985).

throughout an area of the Tongass National Forest.¹⁷⁷ The defendants contended that section 708 prevented the Forest Service's land management plan from affecting a specific non-wilderness area suitable for development and, thus, the court could not prevent the defendants from developing roads in that area.¹⁷⁸ The Ninth Circuit reversed the lower court's conclusion that ANILCA section 708 immunized from review the allocations of non-wilderness areas made in the Tongass Plan EIS.¹⁷⁹ The Ninth Circuit noted that ANILCA was amended to include section 708 in order to avoid challenges to the recently completed RARE II EIS,¹⁸⁰ which might upset the land use compromises in ANILCA.¹⁸¹ The RARE II EIS addressed the environmental impact of allocating certain lands to wilderness status.¹⁸² Rather than performing a separate evaluation of the environmental impact of wilderness designations in the Tongass for inclusion in the RARE II EIS, the Forest Service relied upon the substantive analysis it performed in the recently-prepared Tongass Plan EIS.¹⁸³ While the RARE II EIS addressed only the impact of the recommended wilderness designations contained in the Tongass Plan, the Tongass Plan was much more detailed and assigned non-wilderness lands to one of three specific land use designations.¹⁸⁴ The Ninth Circuit concluded that section 708 immunizes from judicial review only the wilderness/non-wilderness allocations made by RARE II and not the Tongass Plan allocations of non-wilderness areas, which were considerably more broad.¹⁸⁵

As its wording suggests, subsection 708(b)(4) pertains only to management or designation of wilderness lands. The Roadless Directive, however, contemplates protection of non-designated Tongass land not as part of the National Wilderness Preservation System, but as part of a new roadless conservation unit. Opponents of the plan argue that, in effect, the Roadless Directive amounts to a Wilderness Act designation because it permanently prohibits development.¹⁸⁶ Some believe that the temporary moratorium and

177. *See id.* at 1403.

178. *See id.* at 1403-04.

179. *See id.*

180. *See* discussion of RARE II *supra* note 108.

181. *See Tenakee Springs*, 778 F.2d at 1405 (citing, *inter alia*, 127 CONG. REC. 29390 (1981) (post-enactment statement of Sen. Tsongas)).

182. *See id.* (discussing the RARE II Final EIS).

183. *See id.*

184. *See id.*

185. *See id.*

186. *See* Telephone Interview with Jack Phelps, *supra* note 46.

Clinton's Proposed Rule are the Administration's method for circumventing the Wilderness Act and its requirement of congressional approval for the designation of a wilderness. Senate Energy and Natural Resources Committee Chairman Frank H. Murkowski has criticized the Clinton Administration's efforts to engineer a new Forest Service road management policy for roadless areas by executive action, calling it a "ready-fire-aim, scattershot proposal."¹⁸⁷ However, supporters of the Roadless Directive contend that it offers substantially less forest protection because it is an administrative rather than a congressional act and could conceivably be modified by a subsequent administration.¹⁸⁸ The extreme criticism that would follow the undoing of such wide-scale environmental protections, however, makes the possibility of its later reversal unlikely.¹⁸⁹

A Wyoming group, challenging the Final Interim Rule effecting the temporary moratorium on road building in national forests, based their challenge on a clause in the Wyoming Wilderness Act of 1984.¹⁹⁰ The district court concluded that the group lacked standing and did not reach the merits of the claim.¹⁹¹ The court indicated in dicta, however, that the clause cited by the plaintiffs did not provide a basis to challenge the rule.¹⁹² Section 708 of ANILCA likewise does not prohibit further consideration of the designation of forest lands for protection. In fact, several sections of ANILCA anticipate and actually require additional wilderness review of forests and other conservation areas.¹⁹³ Moreover, the

187. Scott Sonner, *Log Plan to Protect 33 Million Acres: Spotted-Owl Forests Would Not Be Included*, SEATTLE TIMES, Jan. 22, 1998, at A3 (quoting Senate Energy and Natural Resources Committee Chairman, Senator Frank Murkowski).

188. See Telephone Interview with Eric Jorgensen, *supra* note 134.

189. See *id.*

190. Pub. L. No. 98-550, §102(b), 98 Stat. 2807 (1984); see *Wyoming Timber Industry Assn. v. United States Forest Service*, 80 F. Supp. 2d 1245, 1260 (D. Wyo. 2000).

191. See *Wyoming Timber*, 80 F. Supp. 2d at 1260. The court considered a similar provision of the Wyoming Wilderness Act, and concluded that the provision did not extinguish the Forest Service's rulemaking authority and that the provision was intended to preserve the Agency's authority to make certain decisions via rulemaking in lieu of forest plan amendment. See *id.*

192. See *id.* at 1259-60 (explaining that plaintiff's interpretation was "untenable" because it created an inconsistency with § 401(b)(3) of the National Forest Management Act of 1976).

193. The Act required the Secretary of Agriculture to review forest lands within "wilderness study" boundaries, as established by ANILCA, and to report recommendations to the President and Congress within three years. See 16 U.S.C. § 1132(c) (1994).

Proposed Rule does not contemplate designating additional lands for Wilderness Act designation; however, much of the proposed protections do resemble Wilderness Act designation. Therefore, although the Tongass was exempted from the final interim rule, ANILCA does not prohibit the consideration of Tongass roadless areas for inclusion in the Roadless Directive.¹⁹⁴

IV. PROPOSED NATIONAL FOREST SYSTEM ROAD MANAGEMENT POLICY

While debate over the Roadless Directive rages on in Congress and in the media, the Forest Service has published a proposed rule to revise the National Forest System Road Management and Transportation System.¹⁹⁵ The new proposed road management policy is the product of the study initiated with the issuance of the temporary moratorium and would shift Forest Service road management practices from building new roads to maintaining and reconstructing existing roads.¹⁹⁶ The policy proposes a method to effectuate this shift without imposing a blanket prohibition on new road construction (the “Proposed Road Management Policy”).¹⁹⁷

The Proposed Road Management Policy proposes three “primary actions” to achieve an appropriate balance between safe and efficient access for all forest road users and protection of healthy ecosystems.¹⁹⁸ The Forest Service seeks to (1) develop new and more rigorous scientific tools to determine when and if new and existing roads are necessary to meet resource management objectives, as identified through land and resource management planning; (2) aggressively decommission non-beneficial roads causing environmental degradation; and (3) maintain and improve existing roads for needs that do not threaten healthy land and waters.¹⁹⁹

The analysis process to be used in evaluating road construction projects is comprised of six steps (1) setting up the analysis; (2) describing the situation; (3) identifying issues; (4) assessing benefits, problems, and risks; (5) describing management opportunities, es-

194. Mr. Jorgensen dismissed any possible conflicts between the Roadless Directive and ANILCA. *See* Jorgensen, *supra* note 134.

195. *See* National Forest System Road Management, 65 Fed. Reg. 11,676 (2000).

196. *See id.* at 11,677.

197. If the Roadless Directive is adopted, the road building ban would direct the management of affected roadless areas, and the rigorous method proposed in the Forest Service road management policy for evaluating new road construction projects would be mooted.

198. *See* National Forest System Road Management, 65 Fed. Reg. at 11,676-77.

199. *See id.*

tablishing priorities, and formulating technical recommendations that respond to issues and effects; and (6) reporting, which includes supporting information for decision-making.²⁰⁰ The hallmarks of the proposed process are its flexibility, reference to regional issues and forest plan objectives, and incorporation of public values.

The Proposed Road Management Policy thus embodies the spirit of the NFMA by referencing land management plan objectives but imposing a more rigorous scientific analysis on the approval of road construction projects. The policy has been called a “positive change” by environmental organizations.²⁰¹ Indeed, the Proposed Policy would permit the Forest Service to protect roadless areas at the regional level but provide flexibility to account for regional factors and concerns. The main objective of the Roadless Directive, the protection of resources in national forests, would be better achieved through the implementation of the Proposed Road Management Policy.

V. CONCLUSION

The undeniable breathtaking beauty of the Tongass National Forest rightfully inspires a desire to preserve and protect it for its own intrinsic value and for the enjoyment of future generations. As scientific knowledge about the harmful effects of certain forest-based activities grows, forest management goals and objectives should change to reflect the new information. These changes should be made on a regional basis through a flexible planning process that permits collaborative efforts between the Forest Service and local communities and citizens. This is the process mandated by the NFMA, a process that can most effectively accommodate competing interests and achieve a balance between resource protection and production.

The effectiveness of this process is demonstrated in the successive amendments to the Tongass Land Management Plan. These amendments have reduced timber extraction levels but have permitted the survival of a small timber industry as well. Whereas a road-building ban may be appropriate in some national forests, the size of the Tongass and the large number of protected acreage warrants a flexible approach to road building.

The Roadless Directive would circumvent the NFMA-mandated regional planning process in favor of an inflexible blan-

200. *See id.* at 11,677-78.

201. Robinson Shaw, *Forest Service Posts New Road Policy*, ENVTL. NEWS NETWORK (Mar. 6, 2000) (quoting Jay Watson of the Wilderness Society) (last modified Mar. 6, 2000) <<http://www.enn.com/news/enn-stories/2000/03/03062000>>.

ket measure not necessarily appropriate for each region it would affect, particularly the Tongass. The size and location of the Tongass, as well as the success of planning efforts in achieving a balance between resource protection and production, warrant its exemption from any rule adopting the rigidity proposed in the Roadless Directive. Any measure undertaken to protect the resources of the “crown jewel” of the National Forest System must acknowledge the region’s unique attributes and be implemented with an eye towards effecting lasting change. The Proposed Road Management Policy requires a rigorous analysis prior to approval of road construction projects that accounts for regional factors and permits road building only in highly circumscribed conditions. This Policy is the best method by which to achieve protection of the unroaded portions of the national forests because it permits informed decision making through a process that coordinates and recognizes local and regional interests. Lasting protection can only be achieved through management policies that permit collaborative efforts, and a measure that categorically discounts the interests of local forest users will simply fractionate the inhabitants of the Tongass region who, united, are best poised to provide future generations with a legacy of sustainable use and protection of forest resources.