

# COMMENTS

## ON THE “ROAD” AGAIN: THE “ROADLESS RULE” SAGA, THE TONGASS NATIONAL FOREST EXEMPTION, AND THE FUTURE OF STATE-SPECIFIC ROADLESS RULES

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## INTRODUCTION

The world’s forests are the “lungs” of the earth.<sup>1</sup> Deforestation is a major contributor to the global climate crisis.<sup>2</sup> Trees, forests, and undeveloped wilderness are imperative for trapping harmful greenhouse gases while simultaneously contributing to the world’s oxygen supply.<sup>3</sup> Loggers, both internationally and domestically, destroy biodiverse forests for profit, developing once untouched wilderness, ruining natural habitats, and releasing carbon into the atmosphere.<sup>4</sup> Deforestation has a long and deeply rooted history in American development.<sup>5</sup> Without adequate regulation, deforestation will continue to exacerbate global climate change and the environmental crisis threatening our current way of life.<sup>6</sup>

Deforestation began when the English colonizers invaded America in the early 1600s.<sup>7</sup> Settlers destroyed once undeveloped lands to set up their

1. Theresa Macherer, *Tongass National Forest Loses Restrictions on Logging and Road Development*, SMITHSONIAN MAG. (Oct. 29, 2020), <https://www.smithsonianmag.com/smart-news/tongass-national-forest-loses-restrictions-logging-and-road-development-180976163/>.

2. See Annika Dean, *Deforestation and Climate Change*, CLIMATE COUNCIL (Aug. 21, 2019), <https://www.climatecouncil.org.au/deforestation/> (describing how deforestation releases stored carbon into the atmosphere, contributing to warming the planet and causing increasingly severe droughts, storms, fires, and changing ecosystems).

3. Christina Nunez, *Deforestation Explained*, NAT’L GEOGRAPHIC (Feb. 7, 2019), <https://www.nationalgeographic.com/environment/global-warming/deforestation/#close>.

4. See Randall S. Abate & Todd A. Wright, *A Green Solution to Climate Change: The Hybrid Approach to Crediting Reduction in Tropical Deforestation*, 20 DUKE ENV’T L. & POL’Y F. 87, 88–89 (2010) (explaining how deforestation directly leads to climate change—deforestation practices alone have released at least 121 gigatons of carbon into the atmosphere over the past 200 years).

5. See *About Us: A Historical Perspective*, U.S. FOREST SERV., <https://www.fs.fed.us/forestmanagement/aboutus/histperspective.shtml> (last visited May 7, 2021) (noting that the post-World War II development surge increased logging in national forests to meet the growing demand for timber).

6. See Paul J. Burgess et al., *Assessing Climate Change Causes, Risks and Opportunities in Forestry*, 39 OUTLOOK ON AGRIC. 263, 264 (2010) (“Reducing deforestation and increasing afforestation [] constitute a key mechanism for constraining atmospheric [Greenhouse Gas (GHG)] emissions.”).

7. See generally Michael Williams, *DEFORESTING THE EARTH: FROM PREHISTORY TO GLOBAL CRISIS* 59, 204 (2006) (estimating that early settlers cleared 8.7 million acres or 3.2% of North America’s forests during the conquest of America).

colonies and conquer the “New World.”<sup>8</sup> As industries and American society shifted, deforestation practices changed to accommodate for the developing society, and ranchers and farmers cleared land for the cattle industry and agrarian farming.<sup>9</sup>

While deforestation is now heavily regulated in the United States, it is still prevalent.<sup>10</sup> Currently, regulated deforestation takes the form of timber production, urban development, mining, drilling, and agriculture.<sup>11</sup> Additionally, the United States has an illegal logging industry<sup>12</sup> and loses millions of acres of forest each year due to disasters such as wildfires and droughts.<sup>13</sup> In the last decade, there was a 14% decrease in tree coverage in the United States, which amounts to almost 100 million acres.<sup>14</sup> Alaska suffered the most tree cover loss—14 million acres from 2001 to 2019.<sup>15</sup>

The Alaskan Tongass National Forest is the largest national forest in the United States, covering 16.8 million acres—6.6 million of which are

8. See Stephanie Buck, *The First American Settlers Cut Down Millions of Trees to Deliberately Engineer Climate Change*, TIMELINE (Aug. 22, 2017), <https://timeline.com/american-settlers-climate-change-5b7b68bd9064> (positing that early colonizers destroyed forests purposefully to make the extreme North American winters more temperate and livable); see also Dina Spector, *American Forests Look Nothing Like They Did 400 Years Ago*, BUS. INSIDER (Sept. 4, 2013, 5:02 PM), <https://www.businessinsider.com/northeastern-us-forest-transformation-2013-9> (describing how modern North American forests look drastically different than precolonial times, largely because of logging and clear-cutting for agricultural purposes).

9. See U.S. DEP’T OF AGRIC., U.S. FOREST FACTS AND HISTORICAL TRENDS 3–4 (2001), <https://www.fia.fs.fed.us/library/brochures/docs/2000/ForestFactsMetric.pdf> (explaining that approximately 300 million acres of forests have been cleared to make way for agricultural practices since the seventeenth century).

10. See Andrea Becker, *Rates of Deforestation & Reforestation in the U.S.*, SEATTLEPI, <https://education.seattlepi.com/rates-deforestation-reforestation-us-3804.html> (last visited May 7, 2021) (reporting that between 1990 and 2010, an average of 949,750 acres of forest disappeared each year in the United States).

11. Nunez, *supra* note 3; see also *United States Deforestation Rates & Statistics*, GLOB. FOREST WATCH, <https://tinyurl.com/y5d69w87> (last visited May 7, 2021) (noting that the drivers of permanent deforestation are mainly “Urbanization” and “Commodity Driven Deforestation”).

12. Nunez, *supra* note 3.

13. See Tom Tidwell, Chief, U.S. Forest Serv., Address at the World Conservation Congress (Sept. 4, 2016), <https://www.fs.usda.gov/speeches/state-forests-and-forestry-united-states-1>; see also The Visual and Data Journalism Team, *California and Oregon 2020 Wildfires in Maps, Graphics and Images*, BBC NEWS (Sept. 18, 2020), <https://www.bbc.com/news/world-us-canada-54180049> (reporting that the 2020 raging fires in California and Oregon were the worst the region had seen in almost twenty years, and many scientists attributed their fervor to climate change).

14. *United States Deforestation Rates & Statistics*, *supra* note 11.

15. *Id.*

currently designated as wilderness, national monuments, or roadless areas.<sup>16</sup> Logging is still active in Alaska, but one study found the timber harvest declined by 67% from 1990 to 2004.<sup>17</sup> The study warned that logging could once again increase depending on a myriad of factors, including demand, international supply, changing milling practices, and changing legislation and regulations.<sup>18</sup>

Alaska petitioned the U.S. Forest Service (USFS) for a state-specific Roadless Rule<sup>19</sup> (Rule) that exempts the Tongass Forest from all roadless protections.<sup>20</sup> The Rule opens up millions of acres of forest to new development, road construction, mining, and timber production.<sup>21</sup> This Rule will have grave environmental consequences—opening up that much land to loosely regulated development would only add to the dire climate condition.<sup>22</sup> Additionally, an Alaska-specific Rule violates the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA) because it fails to substantively consider alternatives and comments from invested members of the public, namely, various Alaskan Tribal leaders.<sup>23</sup> Further, the Rule presents policy challenges, as it would directly contribute to the ills of climate change and fails to consider a national environmental agenda.<sup>24</sup>

Part I of this Comment examines the legislative and judicial history of the Rule. Part II argues the USFS violated the APA when promulgating the Rule. Part III contends the Rule fails to comply with NEPA. Part IV looks to the state-specific rules promulgated in other states, analyzing their path to enactment, judicial challenges, and the new rules' effect on roadless areas. Finally, Part V recommends changes to the petitioning process and

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16. *Alaska Forest Facts*, ALASKA FOREST ASS'N, <https://www.akforest.org/facts.htm> (last visited May 7, 2021) (categorizing land as wilderness when it is untouched by humans).

17. ALLEN M. BRACKLEY ET AL., U.S. DEP'T OF AGRIC., *TIMBER PRODUCTS OUTPUT AND TIMBER HARVESTS IN ALASKA: PROJECTIONS FOR 2005–25*, at 28 (2006), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev2\\_038293.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev2_038293.pdf).

18. *Id.* at 3–6, 27–28.

19. *See generally Tongass Roadless Rule 101*, AM. SALMON FOREST BLOG (July 30, 2019) <http://www.americansalmonforest.org/blog/tongass-roadless-rule-101> (explaining that the Roadless Rule is a conservation rule that designates certain areas of land as roadless, which then prohibits road construction, logging, and development).

20. Coral Davenport, *Trump Administration Releases Plan to Open Tongass Forest to Logging*, N.Y. TIMES, <https://www.nytimes.com/2020/09/24/climate/tongass-logging.html> (Dec. 1, 2020).

21. Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 85 Fed. Reg. 68,688, 68,688 (Oct. 29, 2020) (to be codified at 36 C.F.R. pt. 294).

22. Davenport, *supra* note 20. Environmental scientists agree that exempting the Tongass would devastate the forest and dramatically affect the global climate. *Id.*

23. *Infra* Parts II & III.

24. *Infra* Part IV.

mechanisms to challenge the Alaska-specific Rule. It also suggests legislative actions to codify the 2001 Rule to protect the Tongass, solidify a national forest management agenda, and safeguard the ever fragile environment from further destruction.

### I. LEGISLATIVE AND JUDICIAL JOURNEY OF THE ROADLESS RULE

In 1905, the U.S. Department of Agriculture (USDA) created the USFS to regulate, protect, manage, and control the nation's forests and grasslands.<sup>25</sup> The USFS is responsible for promulgating rules, creating plans, and funding studies.<sup>26</sup> For many years, USFS had free rein to conduct its affairs with little congressional oversight, even promoting and practicing clear-cutting<sup>27</sup> during the 1960s through the 1970s.<sup>28</sup> Since the 1970s and the dawn of an environmental reckoning, the USFS has shifted focus and has begun concentrating its efforts on a more holistic forest management approach; however, conservation groups plagued the agency with lawsuits when they found USFS's efforts lacking.<sup>29</sup>

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25. U.S. FOREST SERV., THIS IS WHO WE ARE 7 (2019), <https://www.fs.usda.gov/sites/default/files/This-is-Who-We-Are.pdf>.

26. *Meet the Forest Service*, U.S. FOREST SERV., [https://www.fs.usda.gov/Internet/FS\\_E\\_DOCUMENTS/stelprdb5346156.pdf](https://www.fs.usda.gov/Internet/FS_E_DOCUMENTS/stelprdb5346156.pdf) (last visited May 17, 2021).

27. ROSS W. GORTE, CONG. RSCH. SERV., 98-917 ENR, CLEARCUTTING IN THE NATIONAL FORESTS: BACKGROUND AND OVERVIEW 1 (1998) (defining clear-cutting as a timber production method where all the trees in an area are cut down); cf. Melissa Denchak, *Want to Fight Climate Change? Stop Clearcutting Our Carbon Sinks*, NRDC (Dec. 13, 2017), <https://www.nrdc.org/stories/stop-clearcutting-carbon-sinks> (stating that many conservation groups criticize clear-cutting because it destroys habitats, advances the effects of erosion, decreases biodiversity, and contributes to global warming by destroying forests that store carbon).

28. Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 661, 664–65 (1997) (explaining how clear-cutting practices came under public scrutiny, which prompted Congress to enact the National Forest Management Act (NFMA)); cf. Katie Kendall, Note, *The Long and Winding "Road" How NEPA Noncompliance for Preservation Actions Protects the Environment*, 69 BROOK. L. REV. 663, 667–68 (2004) (describing Congress's enactment of the National Environmental Policy Act (NEPA) after years of unaccountable environmental decisions, "as a procedural guide for federal agencies to make the environment a paramount concern").

29. Doug MacCleery, *Re-inventing the United States Forest Service: Evolution of National Forests from Custodial Management, to Production Forestry, to Ecosystem Management*, in RE-INVENTING FOREST AGENCIES 45, 53–54 (2008) (noting that in the 1970s, there was an environmental revolution that prompted legislation such as NEPA and changed the U.S. Forest Service's (USFS's) role); see, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972) (representing an example of an environmental lawsuit brought against the USFS in the post-NEPA era of public

### A. Rulemaking History

In 2001, the Clinton Administration's USFS published a Rule that applied to all the inventoried roadless areas in the United States.<sup>30</sup> The purpose of the Rule was to “establish[] prohibitions on road reconstruction[] and timber harvesting on 58.5 million acres of inventoried roadless areas on National Forest System lands . . . [and] provide lasting protection for inventoried roadless areas.”<sup>31</sup> Different administrations have taken varied stances on the broadness of the Rule's application, often lining up with that administration's overarching policy choices regarding the environment and climate change.<sup>32</sup>

Through the course of its lifetime, the Rule has become politicized; instead of basing the Rule's reach on science and the desires of the public, politicians have used the Rule to further their own agendas.<sup>33</sup> Thus, despite an immense show of support,<sup>34</sup> the Rule has faced challengers.<sup>35</sup> Soon after the

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participation and conservation advocacy); *see also* GERALD W. WILLIAMS, U.S. FOREST SERV., THE USDA FOREST SERVICE—THE FIRST CENTURY 111–14 (2005), [https://www.fs.usda.gov/sites/default/files/media/2015/06/The\\_USDA\\_Forest\\_Service\\_TheFirstCentury.pdf](https://www.fs.usda.gov/sites/default/files/media/2015/06/The_USDA_Forest_Service_TheFirstCentury.pdf) (explaining the litigation the USFS endured throughout its early history as public participation in conservation causes began to emerge).

30. Protection of Inventoried Roadless Areas, 36 C.F.R. § 294.10 (2001).

31. *2001 Roadless Rule*, U.S. FOREST SERV., <https://www.fs.usda.gov/roadmain/roadless/2001roadlessrule> (last visited May 7, 2021).

32. *Compare* Maurie J. Cohen & Anne Egelston, *The Bush Administration and Climate Change: Prospects for an Effective Policy Response*, 5 J. ENV'T POL'Y & PLANNING 315, 315 (2003) (explaining the Bush Administration's lax approach and how it withdrew from the Kyoto Protocol on greenhouse emissions), *and* Madison Park, *6 Obama Climate Policies that Trump Orders Change*, CNN, <https://www.cnn.com/2017/03/28/politics/climate-change-obama-rules-trump/index.html> (Mar. 28, 2017, 8:34 PM) (describing the Obama Administration's climate-centered policies that the Trump Administration rolled back), *with* *Timeline of the Roadless Rule*, EARTHJUSTICE, <https://earthjustice.org/features/timeline-of-the-roadless-rule> (Dec. 23, 2020) (following the ebb and flow of the White House's support of the Rule over the Bush, Obama, and Trump Administrations).

33. *See* Lora Shinn, *The Roadless Rule Rules*, NRDC (Mar. 15, 2016) <https://www.nrdc.org/stories/roadless-rule-rules> (explaining how a more pro-corporation focused Bush Administration attempted to roll back the Clinton Administration's Rule).

34. *See generally* *Timeline of the Roadless Rule*, *supra* note 32 (describing how wide public involvement in the process garnered “more than 1.6 million comments on the Rule—more comments than any other rule in the nation's history”).

35. Because the Clinton Administration finalized the rule in the last month of its term, when President George W. Bush took office, he delayed the enactment and eventually modified the Rule. *See id.*; *see also* Felicity Barringer, *Bush Seeks Shift in Logging Rules*, N.Y. TIMES (July 13, 2004), <https://www.nytimes.com/2004/07/13/us/bush-seeks-shift-in-logging-rules.html> (describing

promulgation of the Rule, the State of Alaska brought a lawsuit seeking to exempt the Tongass National Forest from the Rule.<sup>36</sup> To settle that lawsuit, the USFS temporarily exempted the Tongass from the Rule's protection.<sup>37</sup>

In 2004, the Bush Administration proposed a new Rule which allowed governors to petition the USFS for a state-specific alternative.<sup>38</sup> The APA allows for rulemaking by petition, where "an interested person" can "petition for the issuance, amendment, or repeal of a rule."<sup>39</sup> In 2005, that petition-based rule officially replaced the 2001 Rule.<sup>40</sup> In 2019, after the State of Alaska submitted a petition for a state-specific Rule, President Trump specifically advised Secretary Perdue to exempt the Tongass.<sup>41</sup>

### B. Battle in the Courts

The Rule has also had a rough path to travel in the courts, and its legislative history is tightly connected to the lawsuits brought in response to the Rule's various changes. Even before the 2001 Rule went into effect, the U.S. District Court for the District of Idaho blocked the Rule through an injunction.<sup>42</sup> Similarly, the U.S. District Court for the District of Wyoming

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the Bush Administration's change to the Rule, which permitted governors to petition for state-specific changes to the Rule).

36. News Release, Alaska Dep't of Law, Alaska and Federal Government Reach Settlement in Roadless Rule Lawsuit (June 9, 2003), [http://www.law.alaska.gov/pdf/press/060903-roadless\\_rule.pdf](http://www.law.alaska.gov/pdf/press/060903-roadless_rule.pdf).

37. *Id.*; see also U.S. DEP'T OF AGRIC., BRIEFING PAPER: ROADLESS AREA CONSERVATION 1 (2018), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd595402.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd595402.pdf).

38. See *Timeline of the Roadless Rule*, *supra* note 32 ("The proposed Rule is praised by timber companies and universally derided by environmental organizations.").

39. Administrative Procedure Act, 5 U.S.C. § 553(e); see also MAEVE P. CAREY, CONG. RSCH. SERV., R46190, PETITIONS FOR RULEMAKING: AN OVERVIEW 1, 5 (2020) (explaining that the agency must respond to the petition in a reasonable time; however, states can petition for rulemaking without any public input, meaning that the petition process itself does not require a comment period, and the agency has wide discretion in deciding whether to accept the petition).

40. State Petitions for Inventoried Roadless Area Management, 36 C.F.R. § 294.10 (2005).

41. Juliet Eilperin & Josh Dawsey, *Trump Pushes to Allow New Logging in Alaska's Tongass National Forest*, WASH. POST (Aug. 27, 2019, 5:29 PM), [https://www.washingtonpost.com/climate-environment/trump-pushes-to-allow-new-logging-in-alaskas-tongass-national-forest/2019/08/27/b4ca78d6-c832-11e9-be05-f76ac4ec618c\\_story.html](https://www.washingtonpost.com/climate-environment/trump-pushes-to-allow-new-logging-in-alaskas-tongass-national-forest/2019/08/27/b4ca78d6-c832-11e9-be05-f76ac4ec618c_story.html).

42. See *Kootenai Tribe of Idaho v. Veneman*, No. CV01-10-N-EJL, 2001 WL 1141275, at \*1-2 (D. Idaho May 10, 2001) (granting a preliminary injunction because the court found that the U.S. Department of Agriculture's (USDA's) Rule would have a "chilling effect" on future forest management efforts). *But see* *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d

found the Rule illegal and blocked its implementation with an injunction in 2003.<sup>43</sup> In 2005, the Tenth Circuit vacated this decision because the USFS had already adopted the Bush Administration's new rule.<sup>44</sup> In 2011, the U.S. District Court for the District of Alaska restored the 2001 Rule's application to the Tongass and vacated the 2003 exception.<sup>45</sup> The Supreme Court refused to hear the State of Alaska's petition to review this decision; thus, the Ninth Circuit's ruling that the protection extends to the Tongass holds.<sup>46</sup> In March 2020, while the USFS was still working on the Alaska Rule, the U.S. District Court for the District of Alaska issued an injunction to stop logging in the Tongass because the Environmental Impact Statement (EIS) was insufficient and violated NEPA.<sup>47</sup> The Rule's tumultuous history demonstrates the need for a national agenda. Amid a dire climate crisis, environmental rules should not be left to the whims of states.

## II. ADMINISTRATIVE PROCEDURE ACT COMPLIANCE

The APA outlines the rulemaking process an agency must undertake before it can promulgate a new rule.<sup>48</sup> Agencies must adhere to several procedures to ensure that the new rule is valid and avoids judicial scrutiny.<sup>49</sup> The Alaska-specific Rule must follow all of the requirements set forth under the APA because it is an official rule promulgated by a federal agency—the USFS.<sup>50</sup> If the rule fails to adhere to the requirements, either procedurally or substantively, it may be successfully challenged and ruled invalid.<sup>51</sup>

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1094, 1104 (9th Cir. 2002) (reversing the district court's ruling and reinstating the Rule, including application to the Tongass forest).

43. See *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1237–38 (D. Wyo. 2003) (holding that the Rule “was promulgated in excess of Forest Service’s statutory jurisdiction and authority”).

44. See *Wyoming v. USDA*, 414 F.3d 1207, 1210 (10th Cir. 2005) (holding that “the new [R]ule has mooted the issues in this case”).

45. *Organized Vill. of Kake v. USDA*, 776 F. Supp. 2d 960, 977 (D. Alaska 2011); see also *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 970 (9th Cir. 2015) (affirming the district court’s ruling that the Rule applies to the Tongass).

46. See *Alaska v. Organized Vill. of Kake*, 136 S. Ct. 1509, 1510 (2016) (denying certiorari).

47. See *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 443 F. Supp. 3d 995, 1000, 1004, 1023 (D. Alaska 2020) (finding the Environmental Impact Statement (EIS) arbitrary and capricious).

48. See generally Administrative Procedure Act, 5 U.S.C. §§ 551–559.

49. See *id.* §§ 553, 706(2) (detailing the agency rulemaking process and noting that courts may set aside agency actions that do not adhere to the requirements).

50. See *id.* § 706(2) (requiring agency action to, among other requirements, comply with statutory procedural requirements and constitutional limits).

51. See *id.* § 704 (providing for judicial review of final agency action, such as the Rule).



A reviewing court must invalidate the Alaska-specific Rule because the USFS arbitrarily and capriciously disregarded the public's comments without substantive response.<sup>52</sup>

#### A. Public Comment Requirement

After notifying the public of a proposed rule, the APA requires agencies to allow sufficient time for the public to comment.<sup>53</sup> While the agency has procedurally followed the APA process for the comment period,<sup>54</sup> it has not truly considered public comments, especially from integral Tribal leaders. Therefore, this does not satisfy the statement of basis and purpose requirements.<sup>55</sup> In *Home Box Office, Inc. v. FCC*,<sup>56</sup> the D.C. Circuit explained an agency must provide a “concise general statement” and respond to all significant comments.<sup>57</sup> Further, in *California Hotel & Motel Ass'n v. Industrial Welfare Commission*,<sup>58</sup> the Supreme Court of California held the agency must

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52. See *id.* § 706(2)(A) (requiring a court to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); see also Louis J. Virelli II, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 723–24 (2014) (explaining that the Administrative Procedure Act’s (APA’s) arbitrary and capricious standard “protect[s] against agency choices that run afoul of our democratic expectations”).

53. See 5 U.S.C. § 553(c) (“[T]he agency shall give interested persons an opportunity to participate in the rule making . . . .”); see also TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 2 (2017) (explaining that the comment period requires giving the public “a meaningful opportunity to comment on the rule’s content”).

54. See Roadless Area Conservation; National Forest System Lands in Alaska, 83 Fed. Reg. 44,252, 44,252 (Aug. 30, 2018) (to be codified at 36 C.F.R. pt. 294) (keeping the public comment period open for forty-six days).

55. See 5 U.S.C. § 553(c) (requiring agencies to provide interested parties with the basis and purpose of the proposed rule). Although the rulemaking is not plebiscite, the agency must still meaningfully consider the public comments and justify why it disregarded the public’s comments in the proposed rule; failing to do so would open the rule up for challenges. See GARVEY, *supra* note 53, at 3 (noting that the agency is not obligated to respond to all comments from the public, but it must respond to those raising material issues); see also Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79, 85–86 (2012) (explaining that agencies should include public concern in the statement of basis and purpose).

56. 567 F.2d 9 (D.C. Cir. 1977).

57. *Home Box Office, Inc.*, 567 F.2d at 35–36 (“[D]ialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”); see also *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 248–49, 252–53 (2d Cir. 1977) (holding that the agency did not meet the requirements under the APA when it essentially “silence[d]” the “vital questions” of the public by failing to answer).

58. 599 P.2d 31 (Cal. 1979).

back the statement of basis and purpose with “factual, legal, and policy foundations” that are “reasonably supported by the material gathered.”<sup>59</sup>

In May 2020, Alaskan Tribal leaders asked the USDA to extend the consultation time for the proposal.<sup>60</sup> After receiving neither a response nor extra time, in July 2020, nine Alaskan Tribes filed a petition to stop the USDA’s removal of the Tongass from the Rule.<sup>61</sup> In their petition, Tribal leaders specifically noted the USFS’s lack of cooperation during the public comment period, stating that the agency’s proposed rule was completely contrary to the comments it received in the rulemaking process.<sup>62</sup> Additionally, Tribal leaders asserted that the agency “ha[d] imposed short, arbitrary deadlines for critical comment periods throughout the Alaska Roadless Rulemaking process in order to satisfy an expedited, predetermined timeline.”<sup>63</sup> Leaders also claimed that the “USDA ha[d] ignored the tribes’ concerns in the Alaska Rule rulemaking process, which ‘amount[ed] to the collective disenfranchisement of [their] sovereign Tribal governments.’”<sup>64</sup>

An aggrieved party can request a court to set aside final agency action that fails to procedurally or substantively follow the APA’s requirements.<sup>65</sup> Thus, the Alaskan Tribal leaders can challenge the Alaska Rule because the USFS

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59. *California Hotel & Motel Ass’n*, 599 P.2d at 39.

60. Marc Heller, *Tribes Seek Delay in Trump’s Tongass Rule*, GREENWIRE (May 8, 2020), <https://www.eenews.net/greenwire/stories/1063082965/search?keyword=roadless> (citing the COVID-19 pandemic as one factor leading to the need for extra time).

61. See Katelyn Weisbrod, *Alaska Tribes Petition to Preserve Tongass National Forest Roadless Protections*, INSIDE CLIMATE NEWS (July 31, 2020), <https://insideclimatenews.org/news/30072020/alaska-tribes-petition-tongass-national-forest-roadless-rule-protections> (reporting that Tribal leaders felt “their comments were disregarded and appeared to have no impact during the rulemaking process”).

62. Petition from Organized Vill. of Kasaan et al., to U.S. Dep’t of Agric. 2 (July 16, 2020), <https://www.alaskawild.org/wp-content/uploads/2020/07/FINAL-Southeast-Tribes-APA-Petition-7-17-2020-Nine-Tribe-Signatures.pdf>; see also Press Release, Se. Alaska Conservation Council, FOIA: 96% of Americans Support Keeping National Roadless Rule on the Tongass Despite Attempted Rollback (May 5, 2020), <https://www.seacc.org/americans-want-to-keep-roadless-rule/> (reporting that 96% of the 15,909 unique letters the USFS received during the public comment process opposed a state-specific Rule and favored retaining the original 2001 Rule, while less than 1% of commenters favored a Tongass exemption).

63. Petition from Organized Vill. of Kasaan et al., *supra* note 62.

64. Environmental and Energy Law Program (EELP) Staff, *Alaska Roadless Rule*, EELP (May 28, 2020), <https://eelp.law.harvard.edu/2020/05/alaska-roadless-rule/>.

65. See Administrative Procedure Act, 5 U.S.C. §§ 701–704, 706 (detailing a person’s right of review of an agency action, the applicable form and venue for these proceedings, and what actions are reviewable).

completely disregarded their comments without justification.<sup>66</sup> During the public comment period, the Tribal leaders expressed serious concerns over the USFS's exemption of the Tongass<sup>67</sup> and communicated alarm about how the USFS was handling their comments.<sup>68</sup> Even so, the response the USFS gave was sorely lacking in substance.<sup>69</sup> The USFS failed to explain why it chose to completely disregard the Tribal leaders' preferred alternative, even though the agency specifically said it would "continue to listen to all views and perspectives in reaching a final decision."<sup>70</sup> Further, in its EIS, the USFS explained that "[t]he sole decisionmaker in the Alaska rulemaking process is the Secretary of Agriculture" instead of actually substantively addressing the public's comments.<sup>71</sup>

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66. See *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251, 253 (2d Cir. 1977) (holding that even though a cooperating agency's suggestion was acknowledged, it "was never answered" in the rulemaking process and thus the regulation is arbitrary and invalid); see also Elizabeth Jenkins, *With a Roadless Rule Decision Pending, Tribal Governments Petition for New Process*, ALASKA PUB. MEDIA (July 21, 2020), <https://www.alaskapublic.org/2020/07/21/with-a-roadless-rule-decision-pending-tribal-governments-petition-for-new-process/> (explaining that Tribal leaders filed the petition to reexamine the rulemaking process because the USFS failed to fulfill its promise to substantially consult with them).

67. The Craig Tribal Association state that:

[G]iven the serious and long-lasting [t]ribal implications from any reduction in current Roadless Rule protections, the [] Tribes strongly object to the Forest Service's failure to engage in meaningful consultation[,] . . . support lasting protection for all inventoried areas[,] . . . and . . . urge the Secretary of Agriculture to select a 'no-action alternative' . . . .

Craig Tribal Ass'n, CTA Resolution 2019-26, at 5–6 (May 21, 2019), [https://www.fs.usda.gov/nfs/11558/www/nepa/109834\\_FSPLT3\\_5214250.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5214250.pdf)

68. See U.S. DEP'T OF AGRIC., R10-MB-867b, FINAL ENVIRONMENTAL IMPACT STATEMENT, H-2 (2020) (noting that all six cooperating tribes were opposed to the full exemption of the Tongass and the tribes also expressed concern with how the USFS was approaching the collaboration).

69. See *id.* at H-1 (addressing tribal concerns regarding communication with the agency, USFS responded to comment 001 in the Final EIS with empty conclusory statements instead of a substantive explanation of efforts taken to engage with tribal communities).

70. See *id.* at H-2.

71. See *id.* (noting public concern that it appeared tribal communities were only consulted after the Agency had already made its decision); see also ROBERT EVANS, DECISION MAKING IN THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS 3 (2014), [https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/8416/R.%20Evans%20-%20Decision%20Making%20in%20the%20EIA%20Process\\_FINAL.pdf?sequence=1&isAllowed=y](https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/8416/R.%20Evans%20-%20Decision%20Making%20in%20the%20EIA%20Process_FINAL.pdf?sequence=1&isAllowed=y) ("[F]ederal officials are supposed to use the information gained during the EIS development process, in conjunction with other relevant material, to plan actions and to make decisions.").

An Alaska Tribe successfully challenged a rule exempting the Tongass before. In *Organized Village of Kake v. USDA*,<sup>72</sup> the court ruled that because the Bush 2003 Rule exempted the Tongass without providing a “reasoned explanation” and directly contradicted the agency’s past findings without good reason, the Tongass exemption could not stand.<sup>73</sup> When an agency does not meaningfully address public comments, it is vulnerable to challenges under the arbitrary and capricious clause; courts have routinely invalidated rules for failing to provide an adequate statement of basis and purpose in addressing public comments.<sup>74</sup>

### B. Judicial Review

Under the APA’s judicial review process, parties with standing can challenge agency rules in court.<sup>75</sup> Rules can be subject to judicial review for a variety of reasons.<sup>76</sup> An agency action may be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>77</sup> *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto Insurance*<sup>78</sup> set forth the arbitrary and capricious standard in judicial review.<sup>79</sup> The Court held:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to

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72. 795 F.3d 956 (9th Cir. 2015).

73. *Organized Vill. of Kake*, 795 F.3d at 959 (en banc) (holding that when the USFS failed to adequately provide a reason for changing the analysis of the environmental threat from an integral part of the analysis to a minor factor, it committed a harmful error).

74. See *Waterkeeper All. v. EPA*, 853 F.3d 527, 537–38 (D.C. Cir. 2017) (determining that where the public’s comments “undermine the EPA’s primary justification for the Final Rule” and the agency continues anyway without adequate reasoning, the rule should be vacated); see also *Del. Dep’t of Nat. Res. & Env’t Control v. EPA*, 785 F.3d 1, 15–16 (D.C. Cir. 2015) (concluding that while an agency need not respond to every single comment, it must respond to the major issues, and that when the EPA failed to “engage with the commenters” the rulemaking was arbitrary and capricious); *Sierra Club v. EPA*, 863 F.3d 834, 838 (D.C. Cir. 2017) (finding that the EPA’s actions were arbitrary under the public comment requirements of the Clean Air Act when it “failed to respond adequately to comments disputing” the agency’s scientific claims and explanations).

75. See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (laying out the required elements for establishing standing).

76. See *Administrative Procedure Act*, 5 U.S.C. § 706 (setting out the scope of judicial review and describing when a court may set aside an agency’s action).

77. *Id.* § 706(2)(A).

78. 463 U.S. 29 (1983).

79. *State Farm*, 463 U.S. at 43; see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining a four-factor test to determine if an agency’s change in policy complies with the APA).

consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>80</sup>

When the USFS completely disregarded the comments, insights, and opinions of numerous Tribal communities and leaders it “entirely failed to consider an important aspect of the problem” and “fail[ed] to consider an important factor relevant to its action, such as the policy effects.”<sup>81</sup> The agency’s brush of the hand towards the numerous public comments may fulfill its procedural obligation to address the public comments but fails to address them substantively.<sup>82</sup> In its proposed rule, the USFS arguably meets the procedural requirements—it dedicates a section to the public comments.<sup>83</sup> However, the agency failed to substantively engage with the issues Tribal leaders expressed.<sup>84</sup>

### III. NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE

Rules that have a significant environmental impact must also comply with NEPA.<sup>85</sup> This includes the Rule because of its significant impact on land and the environment.<sup>86</sup> If the agency fails to comply with NEPA’s requirements,

80. *State Farm*, 463 U.S. at 43; *see also* GARVEY, *supra* note 53, at 15 (citations omitted) (stating, a rule “that fails to consider an important factor relevant to its action, such as the policy effects of its decision . . . or that fails to consider ‘less restrictive, yet easily administered’ regulatory alternatives” fails under judicial review as arbitrary and capricious).

81. GARVEY, *supra* note 53, at 14–15; *State Farm*, 463 U.S. at 43.

82. Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 614–15 (2018) (asserting that conclusory responses to significant comments do not satisfy the APA’s notice-and-comment requirements); *see also* U.S. DEP’T OF AGRIC., R10-MB-867b, FINAL ENVIRONMENTAL IMPACT STATEMENT, H-19 (2020) (responding to comment 066, the USDA addressed concerns about lack of engagement with “marginalized and low-income communities” with the conclusory assertion that it “provided opportunity for meaningful engagement”).

83. Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 85 Fed. Reg. 68,688, 68,696 (Oct. 29, 2020) (to be codified at 36 C.F.R. pt. 294) (describing the main themes of the public comments).

84. *Id.* at 68,694, 68,696–97 (claiming that it had considered all comments but was prioritizing the state’s preference for economic development); *see also* Complaint for Declaratory and Injunctive Relief at ¶¶ 72–74, *Organized Vill. of Kake v. Perdue*, No. 1:20-cv-00011-HRH, 2020 WL 7698877 (D. Alaska Dec. 23, 2020) (disregarding tribal input, the USFS failed to use tribal maps of the land).

85. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370m-12.

86. *See id.* § 4332(2)(C) (requiring agencies to assess the potential environmental impacts of any “major [f]ederal actions that significantly [affect] the quality of the human environment”).

the rule will be invalid.<sup>87</sup> The Alaska Rule, while procedurally complying with NEPA, substantively fails and should be challenged.<sup>88</sup>

#### A. *Environmental Impact Statement Requirement*

The new Alaska Rule will have a destructive impact on the environment and the global climate; thus, an EIS was necessary.<sup>89</sup> An EIS is a document in which the federal agency considers an array of environmental factors the rule may affect and the potential impact each would have.<sup>90</sup> In the EIS, the federal agency must describe the proposed impact of the governmental action and assess the activities “significantly affecting the quality of the human environment.”<sup>91</sup> The USFS released a draft EIS in October 2019 offering six alternative solutions for the Alaskan Tongass and analyzing the impact each would have.<sup>92</sup> In September 2020, after a period of further investigation, the USFS produced a final EIS, but much to the dismay of both conservation advocates and the cooperating Alaskan Tribes, the final EIS still offered a full Tongass exemption as the preferred alternative.<sup>93</sup>

Although the report lists support for the Alaska Native culture as a key issue, the report fails to explain how the suggested alternative would offer support and fails to reference the Tribal leaders’ comments.<sup>94</sup> In contrast,

87. See 40 C.F.R. § 1500.3 (2019) (explaining that the regulations in Parts 1500 through 1508 of Title 40 implement the procedural provisions of NEPA and are binding on all federal agencies).

88. The USFS met the basic, procedural requirements of the Act by finding it necessary to create both a Draft and Final EIS. See U.S. DEP’T OF AGRIC., R10-MB-867a, DRAFT ENVIRONMENTAL IMPACT STATEMENT ES-1 (2019); U.S. DEP’T OF AGRIC., R10-MB-867b, FINAL ENVIRONMENTAL IMPACT STATEMENT ES-1 (2020).

89. See MAEVE P. CAREY, CONG. RSCH. SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 8 (2013) (explaining that if the environmental assessment reveals the agency action will significantly impact the environment, it must then prepare an EIS); see also *supra* notes 2–8 and accompanying text.

90. See Tiffany Middleton, *What Is an Environmental Impact Statement?*, AM. BAR ASS’N (Dec. 17, 2018), [https://www.americanbar.org/groups/public\\_education/publications/teaching-legal-docs/teaching-legal-docs--what-is-an-environmental-impact-statement-/#:~:text=B](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs--what-is-an-environmental-impact-statement-/#:~:text=B) (outlining the contents of an EIS).

91. NEPA, 42 U.S.C. § 4332(2)(C).

92. U.S. DEP’T OF AGRIC., R10-MB-867a, DRAFT ENVIRONMENTAL IMPACT STATEMENT (2019) 2-1, 2-9 (stating one of the alternatives listed in the EIS is a “no action alternative” where the 2001 Rule, which includes the Tongass, would be reinstated).

93. U.S. DEP’T OF AGRIC., R10-MB-867b, FINAL ENVIRONMENTAL IMPACT STATEMENT ES-10 (2020) (calling Alternative Six the preferred alternative as it “provides maximum additional timber harvest opportunities as the full exemption alternative, [and] removes all 9.2 million inventoried roadless acres on the Tongass from roadless designation”).

94. *Id.* at 1-9 to 1-10, 2-16, 2-20 to 2-23.

the report states that although Alternative Six will open up culturally significant Tribal land to road construction and timber production, it is still the preferred option.<sup>95</sup> Further, in the final EIS, the USFS states that the carbon emissions would be minor for all alternatives and would likely not affect the global climate, but that assertion runs contrary to the studies of most environmental scientists.<sup>96</sup>

### B. Presenting Alternatives Requirement

The Council on Environmental Quality (CEQ) is an overseeing body that creates environmental standards and oversees agency action.<sup>97</sup> The CEQ oversees NEPA compliance during agency rulemaking.<sup>98</sup> The CEQ requires an agency to offer alternative options in the EIS; the agency must list more than one action option and the proposed impact of each.<sup>99</sup>

In its proposed rule, the USFS listed six alternative actions regarding the Tongass forest and chose Alternative Six.<sup>100</sup> Alternative One is a “no action alternative” where the 2001 national Rule would continue to apply with full protection of the Tongass.<sup>101</sup> Alternative Six, the alternative the USFS

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95. *Id.* at 2-22, 3-16.

96. *See id.* at 3-148 to 3-149. *But see* DOMINICK A. DELLASALA, ANALYSIS OF CARBON STORAGE IN ROADLESS AREAS OF THE TONGASS NATIONAL FOREST 1, 5 (2019), [https://forestlegacies.org/wp-content/uploads/2019/12/tongass\\_carbon\\_2019\\_12\\_16.pdf](https://forestlegacies.org/wp-content/uploads/2019/12/tongass_carbon_2019_12_16.pdf) (arguing that the USFS’s draft EIS “does not present or consider the best available scientific information about the impact of the proposed action on forest carbon”); *cf.* Alaska Conservation Council v. U.S. Forest Serv., 443 F. Supp. 3d 995, 1010, 1014 (D. Alaska 2020), *appeal dismissed*, No. 20-35738, 2020 WL 6882569 (9th Cir. Oct. 22, 2020) (ruling that an EIS for a recently proposed timber project in the Tongass was not specific enough to satisfy NEPA because it excluded virtually all details into the actual activities that would occur under the rule and the effects those activities would have on the environment, thus failing to take a “hard look” at the environmental consequences).

97. *Council on Environmental Quality*, WHITE HOUSE, <https://www.whitehouse.gov/ceq/#:~:text=CEQ%20oversees%20Federal%20agency%20NEPA,and%20meet%20the%20Nation's%20goals> (last visited May 7, 2021); *see* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 151 (6th ed. 2018).

98. However, the Trump Administration rescinded much of the guidance regarding greenhouse gas emissions and climate change by executive order in 2017. *See* LUBBERS, *supra* note 97, at 151.

99. 40 C.F.R. § 1505.1(e) (2019); *see also* LUBBERS, *supra* note 97, at 151–52.

100. U.S. DEP’T. OF AGRIC., R10-MB-867b, FINAL ENVIRONMENTAL IMPACT STATEMENT 21, 2-16 (2020).

101. *Id.* at 2-9; *see also* Lance N. McCold & James W. Saulsbury, *Defining the No-Action Alternative for National Environmental Policy Act Analyses of Continuing Actions*, 18 ENV’T. IMPACT ASSESSMENT REV. 15, 16 (1998) (explaining the requirement of agencies to analyze a no-action alternative).

recommends, is the most permissive alternative and removes all roadless protection from the Tongass.<sup>102</sup> That the USFS chose the most permissive alternative, while claiming such an act will not drastically affect the global climate, is contrary to the opinions of almost all major scientists in the field.<sup>103</sup> Under the hard look doctrine described below, the rule should fail for failing to consider all of the environmental factors.<sup>104</sup>

### C. Comment Requirement

NEPA demands that federal agencies consider the input and garner advice from experts in the specific environmental field that the rule affects as a part of the EIS creation process.<sup>105</sup> This usually looks like sending the EIS to conservation organizations, Indian tribes that will be affected by the proposed action, interested communities or small businesses, as well as other agencies.<sup>106</sup> While the USFS specifically mentions its consultation with Tribal communities in its proposal,<sup>107</sup> the question remains how meaningful this consultation actually was.<sup>108</sup> Tribal communities have voiced concerns over how the USFS conducted the scoping process.<sup>109</sup> They claim that despite the USFS's promises

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102. U.S. DEP'T. OF AGRIC., R10-MB-867b, FINAL ENVIRONMENTAL IMPACT STATEMENT 21, 2-16 (2020).

103. See Juliet Eilperin, *Trump to Strip Protections from Tongass National Forest, One of the Biggest Intact Temperate Rainforests*, WASH. POST (Oct. 28, 2020, 11:50 AM) <https://www.washingtonpost.com/climate-environment/2020/10/28/trump-tongass-national-forest-alaska/> (describing the environmental importance of the Tongass).

104. See *infra* Part Hard Look Doctrine

105. LUBBERS, *supra* note 97, at 151–52 (“To comply with NEPA, all federal agencies with legislative rulemaking authority should have regulations establishing the procedures for . . . preparing and obtaining comment[s] on the statement.”); 40 C.F.R. § 6.203(c)(3)(iv), (vi) (2018).

106. See 40 C.F.R. § 1506.6(b)(2) (2019) (requiring notice by mail to interested national organizations for actions “with effects of national concern”); *cf. id.* § 1502.6 (asking agencies to employ “an interdisciplinary approach” in environmental rulemaking).

107. Special Areas; Roadless Area Conservation; National Forest Systems Lands in Alaska, 85 Fed. Reg. 68,688, 68,696 (Oct. 29, 2020) (to be codified at 36 C.F.R. pt. 294).

108. See *Alaska Conservation Council v. U.S. Forest Serv.*, 443 F. Supp. 3d 995, 1016, 1021–22 (D. Alaska 2020), *appeal dismissed*, No. 20-35738, 2020 WL 6882569 (9th Cir. Oct. 22, 2020) (holding that the USFS failed to provide sufficient details and prevented plaintiffs from providing meaningful comments on the proposal); *Complaint for Declaratory and Injunctive Relief at ¶¶ 72–74, Organized Vill. of Kake v. Perdue*, No. 1:20-cv-00011-HRH, 2020 WL 7698877 (D. Alaska Dec. 23, 2020) (filing a complaint arguing the USFS disregarded tribal input).

109. See Cassidy Randall, *Trump Administration Set to Lift Protections on Alaska's Tongass National Forest*, FORBES (Sept. 27, 2020, 7:30 AM), <https://www.forbes.com/sites/cassidyrandall/2020/09/27/trump-administration-set-to-lift-protections-on-one-of-alaskas->



to collaborate with the invested communities,<sup>110</sup> the collaboration was all for show, and no substantial consultation resulted from the process.<sup>111</sup> The Tribal leaders were so enraged with the USFS's lack of collaboration that they sent a joint letter expressing their concerns and withdrawing from the consultation.<sup>112</sup>

The USDA also granted a forty-five-day scoping period<sup>113</sup> for the Alaska Rule.<sup>114</sup> The agency received over 144,000 entries including 32,500 form letters, 110,000 signatures on petitions, and 1,400 unique submissions.<sup>115</sup> In its report

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most-beloved-tourism-destinations/#4c2307877fef (noting that there is significant public support for the protection of the Tongass); *see also* Ken Rait, *Forest Service Set to Rule on Road Building in Tongass National Forest*, PEW CHARITABLE TR. (June 9, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/06/09/forest-service-set-to-rule-on-road-building-in-tongass-national-forest> (voicing the overwhelming opposition against a rule that exempts the Tongass, both in Alaska and America in general).

110. *See, e.g.*, Letter from David E. Schmid, Acting Reg'l Forester, U.S. Dep't of Agric., to Albert Howard, President of Angoon Cmty. Ass'n (July 30, 2018), [https://www.fs.usda.gov/nfs/11558/www/nepa/109834\\_FSPLT3\\_5136016.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5136016.pdf) (asking the Alaskan Tribes to participate in the rulemaking process as cooperating agents).

111. Letter from Jeannette Kookesh, President, Angoon Coop. Ass'n et al., to Sonny Perdue, Sec'y of Agric., U.S. Dep't of Agric. (Oct. 22, 2019), [https://www.fs.usda.gov/nfs/11558/www/nepa/109834\\_FSPLT3\\_5136565.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5136565.pdf) (stating their frustration with the USFS's failure to "address all the substantive concerns raised by the cooperating agency Tribes" and the "[b]latant disregard for any of the needs of the Cooperating Agency Tribes disregards the mandates of the NEPA process").

112. Letter from Ronald Leighton, President of the Organized Vill. of Kasaan, et al., to Sonny Perdue, Sec'y of Agric., and Victoria Christiansen Chief of Forest Serv., U.S. Dep't of Agric. (Oct. 13, 2020), <https://media.ktoo.org/2020/10/Cooperating-Agencies-AKRR-FEIS-Response-2020.pdf> ("We refuse to endow legitimacy upon a process that has disregarded our input at every turn . . . Blatant disregard for our input during the NEPA process over the past two years is a disregard for the mandates of the law.") (emphasis removed).

113. 43 C.F.R. § 46.235(a) (2019) (outlining the scoping process and explaining that the purpose of the scoping period is for an agency "to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions"). *See generally* COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, A CITIZEN'S GUIDE TO NEPA: HAVING YOUR VOICE HEARD 13 (2007), [https://ceq.doe.gov/docs/get-involved/Citizens\\_Guide\\_Dec07.pdf](https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf) (describing the scoping process as a first step to determine and define issues and identify individuals or interest groups to communicate with, before the more in-depth analysis of the EIS).

114. U.S. FOREST SERV., ALASKA ROADLESS RULE SCOPING PERIOD: WRITTEN PUBLIC COMMENT SUMMARY 1 (2019), [https://www.fs.usda.gov/nfs/11558/www/nepa/109834\\_FSPLT3\\_4631713.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_4631713.pdf).

115. *Id.* at 2.

on the comments, the USFS explained that most of the comments opposed removing protection from the Tongass.<sup>116</sup>

#### D. *Hard Look Doctrine*

The USFS's questionable compliance with NEPA warrants the use of the hard look doctrine. The hard look doctrine is a way to challenge agency rules where facts do not adequately support the EIS.<sup>117</sup> The hard look doctrine comes into play when an agency, in creating its EIS, failed to consider relevant factors in its analysis or "offered an explanation for its decision that runs counter to the evidence before the agency."<sup>118</sup> Further, under the hard look doctrine, an agency's EIS is considered valid, and the agency can move forward with the proposed action, only if it performs a "well-considered" and "fully informed" analysis of all the environmental consequences.<sup>119</sup>

The proposed Alaska Rule failed to comply with NEPA when it suggested Alternative Six, which removes all protection from the Tongass Forest, disregarded Alaskan Tribal culture and input, and failed to articulate why it chose Alternative Six over the more protective alternatives.<sup>120</sup> Because of this failure, conservation groups and Tribal communities with standing should challenge this rule for failing to comply with NEPA.<sup>121</sup>

### IV. STATE-SPECIFIC ROADLESS RULES

Alaska is not the only state to petition the USFS to create a state-specific Rule.<sup>122</sup> Since the Bush Administration's Rule that allows a petitioning

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116. *Id.*

117. See Monica Mercola, *The Hard Look Doctrine: How Disparate Impact Theory Can Inform Agencies on Proper Implementation of NEPA Regulations*, 28 J. L. & POL'Y 318, 325 (2019) ("Under NEPA, when preparing an EIS, an agency is 'not required to select the course of action that best serves environmental justice, [but is] only [required] to take a 'hard look' at environmental justice issues.'") (quoting *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017)).

118. *Id.* at 327 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) and explaining that courts give agencies a high level of discretion).

119. *Id.* at 329 (internal citations omitted) (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1324–25 (D.C. Cir. 2015)).

120. U.S. DEP'T OF AGRIC., R10-MB-867b, FINAL ENVIRONMENTAL IMPACT STATEMENT 2-16 (2020) (noting only that the full exemption alternative "was requested by the State of Alaska's petition").

121. *Infra* Part V.B.

122. Petition from Andrew T. Mack, Comm'r of Nat. Res., Alaska Dep't of Nat. Res., to Sonny Perdue, Sec'y of Agric., U.S. Dep't of Agric. (Jan. 19, 2018), <https://www.fs.usda.gov>

process, three other states have also petitioned the USFS for a state-specific Rule.<sup>123</sup> Each rule varies in terms of scope of coverage and effects. Analyzing the procedures behind each rule as well as the practical effects the rules have had on the states, offers insight into what may result in Alaska.<sup>124</sup>

#### A. Idaho Roadless Rule

Idaho petitioned for a state-specific Rule in 2006, and the USFS promulgated the Rule in October 2008.<sup>125</sup> The Idaho Rule categorizes land into five types with differing allowances for each.<sup>126</sup> Under Idaho's Rule, 5.3 million acres—the largest amount—were put into the backcountry designation, where road construction and specific types of logging are now allowed, subject to certain restrictions.<sup>127</sup> Idaho's approach opens up once untouchable land to potential logging, mining, and development.<sup>128</sup>

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/nfs/11558/www/nepa/109834\_FSPLT3\_4406959.pdf (including economic factors as well as timber production as reasons to exclude the Tongass).

123. See, e.g., Colorado Roadless Area Management, 36 C.F.R. § 294.40 (2019) (providing the guidelines for roadless areas in Colorado); Idaho Roadless Area Management, 36 C.F.R. § 294.22 (2019) (stating the conditions for Idaho roadless areas); *Roadless Rule Public Notice*, OUR FORESTS (Feb. 28, 2020), <https://ourforests.utah.gov/index.php/the-states-petition/> (describing Utah's petition for its own Rule).

124. See also *Roadless Rule Public Notice*, *supra* note 123 (noting that Utah is still in the early stages of the rulemaking process). Like Alaska, Utah recently submitted a petition. *Id.* (“The State’s petition asks for a new Utah-specific Rule that would give local Forest Service professionals more ability to thin overgrown trees . . . [and] asks that the Forest Service have more latitude to construct temporary administrative roads.”). Compare Colorado Roadless Area Management, 36 C.F.R. § 294.40 (2019) (“restricting tree cutting, sale, and removal”), and *Roadless Rule Public Notice*, *supra* note 123 (requesting the ability to manage overgrown trees and potential fire starters), with Idaho Roadless Area Management, 36 C.F.R. § 294.22 (2019) (providing different levels of classifications for roadless areas).

125. 36 C.F.R. § 294.22; Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61,456, 61,456 (Oct. 16, 2008) (to be codified at 36 C.F.R. pt. 294).

126. 36 C.F.R. § 294.22(b).

127. *Id.* §§ 294.23(b), 294.24(c); see also MICHAEL ANDERSON, WILDERNESS SOC’Y, THE ROADLESS RULE: A TENTH ANNIVERSARY ASSESSMENT 12 (2011), <https://www.wilderness.org/sites/default/files/media/file/Roadless-Rule-paper-10th-anniversary.pdf>.

128. Compare 36 C.F.R. §§ 294.23(b), 294.24(c), 294.25(d) (laying out specific conditions that must be established to permit development activities in backcountry designated areas), with Brett Haverstick, *Roadless Rules Are Not Protecting Idaho’s Public Land*, IDAHO MOUNTAIN EXPRESS (June 5, 2019), [https://www.mtexpress.com/opinion/letters\\_to\\_editor/roadless-rules-are-not-protecting-idaho-s-public-land/article\\_356e1896-86e6-11e9-9b71-dbc5fc179bf7.html](https://www.mtexpress.com/opinion/letters_to_editor/roadless-rules-are-not-protecting-idaho-s-public-land/article_356e1896-86e6-11e9-9b71-dbc5fc179bf7.html) (describing the Idaho roadless rule as “a gift to the timber industry”).

Recently, conservation groups have filed suit against the USFS for its failure to consider the roadless characteristics of the contested land.<sup>129</sup> Complainants argue that Idaho's Rule has allowed the USFS to avoid preparing an EIS before clearing over 1,500 acres of land.<sup>130</sup> A report on the Idaho Rule concluded that it is "more permissive and less transparent" than the national Rule, leading to an increase in logging and a decrease in the consideration of the long-term effects.<sup>131</sup> Opponents to the Alaska Rule have made similar claims, arguing that the new rule will only benefit timber companies at the expense of ecosystems and tribal communities.<sup>132</sup>

### B. Colorado Roadless Rule

In 2012, Colorado petitioned the USFS to create a Colorado-specific Rule and the USFS published it in 2016.<sup>133</sup> In 2017, during President Trump's

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129. *Wildlands Def. v. Bolling*, No. 4:19-CV-00245-CWD, 2020 WL 5042770, at \*4 (D. Idaho Aug. 25, 2020).

130. See John O'Connell, *Lawsuit over Forest Thinning in S.E. Idaho Canyon Tests Idaho Roadless Rule*, IDAHO STATE J. (Feb. 20, 2020), [https://www.idahostatejournal.com/news/local/lawsuit-over-forest-thinning-in-s-e-idaho-canyon-tests-idaho-roadless-rule/article\\_00704b6f-d2eb-5bbe-8077-4a5c4413901c.html](https://www.idahostatejournal.com/news/local/lawsuit-over-forest-thinning-in-s-e-idaho-canyon-tests-idaho-roadless-rule/article_00704b6f-d2eb-5bbe-8077-4a5c4413901c.html) (reporting the plaintiff's contention that the USFS is using Idaho's rule to avoid proper procedures and clear land for cattle grazing, which in turn destroys habitats and disrupts natural ecosystems).

131. See KATIE BILODEAU & GARY MACFARLANE, FRIENDS OF THE CLEARWATER, THE ROADLESS REPORT: ANALYZING THE IMPACTS OF TWO ROADLESS RULES ON FORESTED WILDLANDS 52–54 (2020) (finding that the Idaho Rule has led to a relaxation of environmental assessments before acting—an incredibly harmful practice that fails to identify potential environmental issues); see also Laura Lundquist, *Forest Advocates: Nez Perce Clearwater Forest Plan Favors Resource Extraction*, MISSOULA CURRENT (Feb. 13, 2020), <https://missoulacurrent.com/outdoors/2020/02/clearwater-forest-plan/> (describing how environmental activists fear that the Idaho Rule has allowed a new forest plan which removes quantitative environmental standards, and instead uses vague and difficult to define terms—such as “at risk”—that defer to the USFS's discretion, decrease public accountability, and make it harder to challenge agency action in court).

132. Katherine Quaid, *Indigenous Women Call for Systemic Changes to Subsistence Regulations for Further Protection of Indigenous Sovereignty and the Tongass Forest*, WOMEN'S CLIMATE ACTION NETWORK INT'L (Mar. 31, 2020), <https://www.wecaninternational.org/PressReleases/Indigenous-Women-Call-for-Systemic-Changes-to-Subsistence-Regulations-for-Further-Protection-of-Indigenous-Sovereignty-and-the-Tongass-Forest> (explaining how removing the protection will interfere with traditional subsistence practices and will result in “cultural genocide for the Tlingit, Haida[,] and Tsimshian”).

133. See 36 C.F.R. §§ 294.40, 294.42–294.44 (2019) (protecting most of the roadless areas in Colorado and only allowing road construction, tree cutting, and linear construction in a few well-delineated areas, originally); see also Roadless Area Conservation; National Forest System Lands in Colorado, 81 Fed. Reg. 91,811, 91,812 (Dec. 19, 2016) (to be codified at 36 C.F.R. pt. 294).

first year in office, the USFS altered the Rule to include an exemption of the “North Fork” area to allow road construction for coal mining.<sup>134</sup> This exemption recently came under scrutiny when environmental groups challenged the change in court, claiming the new exemption failed to comply with NEPA and “provide legitimate consideration to alternatives” when it arbitrarily excluded more protective options.<sup>135</sup>

In *High Country Conservation Advocates v. USFS*,<sup>136</sup> the District Court for the District of Colorado enjoined mining exploration because it ruled that the federal agency failed to adequately consider the environmental impacts such action would have on the area.<sup>137</sup> State-specific Rules allow the USFS to sidestep accountability in environmental actions, as demonstrated through the recent cases in Colorado and Idaho.

### C. Importance of Setting a National Agenda

There are several broad concerns with state-specific Rules. States are often concerned with profit, political agendas, and job creation over protecting the environment.<sup>138</sup> When protecting the environment, it is important to have a singular national agenda that cannot be altered by states’ independent desires.<sup>139</sup> There must be a united consensus on how to combat

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134. *Id.* § 294.43(c)(1)(ix); see also Jason Blevins, *Coal Company Says Its Freshly Bulldozed Road in Roadless Area Near Paonia Is Legal*, COLO. SUN (June 20, 2020, 4:20 AM), <https://coloradosun.com/2020/06/20/mountain-coal-road-gunnison-forest-roadless-legal/> (explaining how the North Fork exemption has led to expanded mining operations).

135. *High Country Conservation Advoc. v. U.S. Forest Serv.* 951 F.3d 1217, 1224–25, 1229 (10th Cir. 2020) (voiding the North Fork exemption, the court said “[w]here the agency omits an alternative but fails to explain why that alternative is not reasonable, the EIS is inadequate”); see also Dennis Webb, *North Fork Coal Roadless Exception Again Tossed*, DAILY SENTINEL, <https://tinyurl.com/y22v9gtv> (Apr. 8, 2021) (reporting how the court recently vacated the exemption for its failure to consider alternative options that would protect more land).

136. 52 F. Supp. 3d 1174 (D. Colo. 2014).

137. See *High Country Conservation Advoc.*, 52 F. Supp. 3d at 1181, 1195, 1201 (explaining that the USFS’s allowance of mining in the North Fork Valley failed to take “a hard look” at the environmental impacts on the land and did not “rigorously explore” an alternative that would conserve more land).

138. See 83 Fed. Reg. 44,252, 44,252–53 (Aug. 30, 2018) (to be codified at 36 C.F.R. pt. 294) (stating in the proposed Alaska-specific Rule that the agency prioritized the state’s preference for economic development opportunities over environmental concerns); see also 76 Fed. Reg. 21,272, 21,281 (Apr. 15, 2011) (to be codified at 36 C.F.R. pt. 294) (explaining that Colorado chose an economically beneficial alternative).

139. See Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis* 127 U. PA. L. REV. 197, 210, 212 (1978) (noting that competing state and federal environmental

climate change.<sup>140</sup> Forest management, in general, would benefit from legislative action to set a singular agenda that is not bound to the whims of the separate states.<sup>141</sup> In a California case where the court decided whether the state-petition based Rule adequately considered the impact on the environment, the judge expressed the importance of setting a national agenda for managing public lands:

At the national level, Forest Service officials have the responsibility to consider the ‘whole picture’ regarding the management of the National Forest System, including inventoried roadless areas. Local land management planning efforts may not always recognize the national significance of inventoried roadless areas.<sup>142</sup>

Additionally, the current management and rulemaking processes often can lead to secrecy and hidden political agendas when they should be promoting democracy and transparency.<sup>143</sup> Climate advocates agree that the more nationalized or even globalized a climate policy, the better it is for effectuating actual change.<sup>144</sup> Some scholars suggest that federal intervention

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regulations create uncertainty, deter state cooperation, and “frustrate national environmental policy”); *cf.* Teresa Parejo Navajas & Nathan Lobel, *Framing the Global Pact for the Environment: Why It’s Needed, What It Does, and How It Does It*, 30 FORDHAM ENV’T L. REV. 32, 35 (2018) (arguing for a global environmental agenda because the current disjointed method fails to create a much needed “mutually reinforcing environmental code”).

140. Robert L. Glicksman, *From Cooperative Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 731–35 (2006) (asserting that the benefits of a unified federal agenda include more cost-efficient management and a more effective policing of interstate pollution).

141. *See* Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENV’T L. 385, 466–69 (2006) (recommending federal legislation in forest management because localized rules, the use of courts, and the current forest management systems can be easily manipulated due to the weak laws protecting public land).

142. *See* Roadless Area Conservation, Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,246 (Jan. 12, 2001) (“If management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced through road construction and certain forms of timber harvest.”).

143. *See* Katherine Reynolds, Note, *Alternative Reasoning: Why the Ninth Circuit Should Have Used NEPA in Setting Aside the Tongass Exemption*, 43 ECOLOGY L.Q. 381, 409 (2016) (commenting on the shrouded nature of the political factors in the USFS’s rulemaking process because of the forest management and rulemaking procedures). The USFS easily hid the political pressure the Bush Administration exerted to create the Tongass exemption, and the USFS was not required to explain how that pressure outweighed the opinions of industry experts. *See id.*

144. *See* Denise A. Grab & Michael A. Livermore, *Environmental Federalism in a Dark Time*, OHIO ST. L.J. 667, 672 (2018) (“[T]here are massive inter-jurisdictional externalities in the

in environmental issues is especially necessary when public goods are involved.<sup>145</sup> A unitary, national climate agenda also makes more sense from a regulatory, economic, and efficiency standpoint.<sup>146</sup> The state petition-based Rule allows individual states to carve out exceptions that weaken environmental protection, essentially undermining any national standard and contributing to the harms of climate change for the entire nation.

## V. RECOMMENDATIONS

As it stands, the Alaska Rule violates both the APA and NEPA because the USFS failed to meaningfully consider public comments and other alternatives.<sup>147</sup> As demonstrated by action in other states, removing roadless protections is destructive to the environment because it opens up land for development, mining, and logging, which all directly contribute to the threat of global warming.<sup>148</sup> First, Congress should codify the 2001 Rule so that it applies to all states. Second, Alaskan Tribes or conservation groups should challenge the new rule under the APA and NEPA. Third, the federal government should implement a more cooperative petitioning system. Finally, under the Congressional Review Act, the Biden Administration should review and withdraw the late-term Trump Administration Rule.

### A. Codify the 2001 Roadless Rule

Congress should enact the proposed 2019 Roadless Rule Conservation Act, which applies to the Tongass, into law to apply to all states.<sup>149</sup> The law would

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case of climate change, and—absent a policy or liability regime—rational but self-interested jurisdictions will release levels of emissions that are sensible from a local perspective but inefficiently high from a global perspective.”).

145. Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, N.Y.U. ENV'T L.J. 130, 143 (2005) (arguing that federal regulation is desirable where the state's resources provide a benefit to citizens of other states).

146. Justin Fisch, *The Case for Effective Environmental Politics: Federalist or Unitary State? Comparing the Cases of Canada, the United States of America, and the People's Republic of China*, 51 U. MICH. J.L. REFORM 777, 803–04 (2018) (analyzing both centralized and state-driven climate policies this author explains a unitary, nationally-based system of implementation and regulation would save money and create a more efficient method of creating environmental policies); *see also* Glicksman, *supra* note 140, at 733 (“In terms of efficiency, it makes little sense for each state to duplicate the underlying research and collection of data necessary to regulate air pollution. There are also economies of scale in standard setting when the standards are nationally uniform.”).

147. *Supra* Parts ADMINISTRATIVE PROCEDURE Act Compliance NATIONAL ENVIRONMENTAL Policy Act Compliance

148. *Supra* Part STATE-SPECIFIC Roadless Rules.

149. Roadless Area Conservation Act of 2019, H.R. 2491, 116th Cong. (2019).

protect the forest from the whims of whatever political party is in power.<sup>150</sup> Maria Cantwell (D–Wash) in the Senate and Ruben Gallego in the House (D–Ariz) each introduced a codified version of the 2001 Rule.<sup>151</sup> The bills explain that the act would codify the 2001 Rule, limit development, ensure protection of endangered species and habitats, and provide clean water to communities.<sup>152</sup>

There is broad public support for the Rule law as well as backing from several states and many conservation organizations.<sup>153</sup> The Act currently has 107 co-sponsors in the House of Representatives,<sup>154</sup> but all the supporters are Democrats, so it may have trouble passing with bipartisan support, especially given the current political climate.<sup>155</sup> After being introduced in the House, the Act was referred to subcommittees on Agriculture and Natural Resources, and that is where the Bill currently sits, without much sign of movement.<sup>156</sup> However, there may be a surge of movement because of the widespread opposition to the Alaska-specific Rule and Tongass exemption, which could encourage lawmakers to garner support for the Bill.<sup>157</sup>

### B. *Litigation Under the APA and NEPA*

Since the Alaska-specific Rule fails under the APA and NEPA, conservation groups or Alaskan Tribal communities should challenge the

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150. Monica Voicu, Note, *At a Dead End: The Need for Congressional Direction in the Roadless Area Management Debate*, 37 *ECOLOGY L.Q.* 487, 517 (2010) (arguing for the codification of the Rule because it is a permanent option that will outlast the agendas of individual parties and politicians).

151. S. 1311, 116th Cong. (2019); H.R. 2491.

152. Press Release, Sen. Maria Cantwell, Cantwell, Gallego, Udall, DeGette, Wyden Introduce Legislation to Permanently Protect Nearly 60 Million Acres of Wild Public Forests (May 2, 2019), <https://www.cantwell.senate.gov/news/press-releases/cantwell-gallego-udall-degette-wyden-introduce-legislation-to-permanently-protect-nearly-60-million-acres-of-wild-public-forests->.

153. *See id.*

154. *H.R.2491 - Roadless Area Conservation Act of 2019: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/2491/cosponsors> (last visited May 7, 2021).

155. *See* Jay Cost, *Why Congress Can't Manage to Get Anything Done*, N.Y. POST (Apr. 22, 2018, 8:48 PM) <https://nypost.com/2018/04/22/why-congress-cant-manage-to-get-anything-done/>.

156. *H.R.2491 - Roadless Area Conservation Act of 2019: Committees*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/2491/committees> (last visited May 7, 2021).

157. *See* Rachel Frazin, *More than 60 Democrats Ask Feds to Reconsider Tongass Logging Plan*, HILL (Oct. 5, 2020, 5:21 PM), <https://thehill.com/policy/energy-environment/519709-more-than-60-democrats-are-ask-feds-to-reconsider-tongass-logging> (reporting that sixty members of both the Senate and the House wrote a letter objecting to the USFS's disregard of tribal input and failure to consider the environmental impact).



Rule in court.<sup>158</sup> Any group or individual that has standing may bring a claim against a federal agency rule for violating the APA or NEPA.<sup>159</sup>

To establish standing, Alaskan Tribes must show they suffered an “actual,” “particularized,” and “concrete” injury.<sup>160</sup> In this case, the Alaskan Tribes would be able to demonstrate injury by showing their culturally important land is infringed upon by the Rule.<sup>161</sup> Additionally, they may also be able to prove economic harm by showing decreased earnings because the land is now open to large timber corporations and commercial fishing operations.<sup>162</sup>

Next, the party must show there is a causal connection between the injury and the conduct.<sup>163</sup> The Tribes will be able to show that the harm they suffer, whether economic, environmental, or other, came from the removal of protection by showing that the injury only occurred after lawmakers enacted the Tongass-exempt Rule.<sup>164</sup> Finally, the Tribal leaders must show redressability or that the harm would be cured by a court declaring the Alaska-specific Rule invalid, which they could prove by showing the reinstatement of

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158. *Supra* Parts ADMINISTRATIVE PROCEDURE Act Compliance NATIONAL Environmental Policy Act Compliance

159. *See* Administrative Procedure Act, 5 U.S.C. § 706(2) (requiring courts to set aside agency rules that fail to abide by applicable statutory requirements, such as those set forth by the APA and NEPA); *see also* Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (holding that the state of Massachusetts had standing to challenge because of the potential injury that would come to the state when climate change eroded the state’s coasts).

160. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 575–77 (1992) (explaining that standing requires more than a generalized interest in the government to act in accordance with the law); *see also* Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc., 528 U.S. 167, 181 (2000) (holding that the complaining party need not prove there was harm to the environment, only that the plaintiff suffered injury).

161. *But see* Poe v. Ullman, 367 U.S. 497, 504–05 (1961) (describing the doctrine of ripeness and holding that the party must actually suffer harm before a court can rule on the validity of a statute).

162. *See* Cole v. Gen. Motors Corp., 484 F.3d 717, 721–23 (5th Cir. 2007) (determining that proof of economic harm is sufficient to establish injury in fact); *see also* Letter from Christine Rolfes, Sen. Wash. State Senate District 23, et. al., to Sonny Perdue, Sec’y of Agric., and Vicki Christiansen, Chief of Forest Serv. (Oct. 26, 2020), <https://wawild.org/wp-content/uploads/2020/10/2020-Tongass-Roadless-Letter-FINAL.pdf> (emphasizing that Alaskan Tribes depend on the Tongass for their livelihoods, food security, and traditional cultural practices).

163. *See* Lujan, 504 U.S. at 562 (noting that, in the context of a challenge to government regulation, redressability is usually dependent on the action of a third party that is the subject of the regulation).

164. The Tribes may have to wait until after corporations or private entities come into the Tongass and begin to take advantage of the lax protections for the action to be sufficiently ripe for judicial review. *See* Poe, 367 U.S. at 503–04 (requiring that the harm must be actual or immediately threatened).

the Tongass protection removes the harm the new Rule created.<sup>165</sup>

Certain conservation groups may also be able to bring a challenge for NEPA violations if they can prove standing.<sup>166</sup> Although showing injury may be more difficult for conservation groups than for tribal communities, conservation groups have previously established standing by proving harm to the environment.<sup>167</sup> Removing the roadless designation from the Tongass Forest would harm the environment because it would lead to an increase in logging.<sup>168</sup> This loss of trees would release carbon into the atmosphere and contribute to global warming.<sup>169</sup> Once the Tribes or conservation groups establish standing, they could successfully challenge the Rule under NEPA through the hard look doctrine because the USFS failed to consult substantively with the Tribal communities and failed to truly consider the alternative options.<sup>170</sup>

Alaskan Tribes can also bring a claim under the APA.<sup>171</sup> Once the Tribes prove they have standing, they can complain that the Rule is arbitrary and capricious for substantively disregarding public comments.<sup>172</sup> Additionally, the challengers may need to establish they exhausted the issue before bringing the case to court.<sup>173</sup> Under the doctrine of issue exhaustion, if the specific concerns were not addressed in the comments, the public cannot

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165. *Lujan*, 504 U.S. at 561–62; *see also* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105–06 (1998) (holding that private citizens did not have standing in an environmental suit when the requested relief would not actually ameliorate the plaintiff's complained harm); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (explaining that redressability can include curing an injury or preventing an injury).

166. *See Lujan*, 540 U.S. at 560–61 (listing the required elements for standing). *But see* *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) (holding that interest in the problem alone is not enough for standing, the group must show an actual injury).

167. *Massachusetts v. EPA*, 549 U.S. 497, 521–523 (2007) (holding that Massachusetts had standing because it is well-established that greenhouse gas emissions contribute to climate change and Massachusetts would suffer the actual harm of eroding coast lines as a result).

168. *See supra* INTRODUCTION.

169. Eilperin, *supra* note 103 (explaining the importance of the Tongass, the trees “absorb at least 8 percent of all the carbon stored in the entire Lower 48’s forests combined”).

170. *Supra* Part NATIONAL Environmental Policy Act Compliance

171. *Supra* Part II, Judicial Review

172. *Supra* Part ADMINISTRATIVE Procedure Act Compliance

173. *See* Jeffery S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109, 124–25 (2018) (applying the doctrine of issue exhaustion to the notice-and-comment process and noting that courts generally require the complainant to have participated in the rulemaking and expressed the concerns to the agency before bringing suit).

challenge the rule under the APA for ignoring the comments.<sup>174</sup> Here, the Alaskan Tribes clearly mentioned their concerns during the public comment period.<sup>175</sup>

*C. More Public Engagement in the State Petitioning Process*

Federal agencies need a more collaborative system for creating and implementing state-specific rules, especially those that directly affect the environment. The petitioning process is highly politicized and makes it far too easy for different administrations to drastically alter rules that, in turn, have an immense impact on the environment.<sup>176</sup> State-specific rules do not support a consistent national environmental agenda, which is necessary now more than ever with the growing threat of climate change.<sup>177</sup>

If the Bush Administration's state petition-based rule must stand, there needs to be a more objective set of guidelines for the USFS to accept the state's petition. First, petitions themselves should trigger a comment period. The Tongass forest saga has shown how invested members of the community are in environmental issues.<sup>178</sup> To prevent rulemaking that is contrary to public desire and to mitigate time consuming and costly litigation when unpopular rules are enacted, the agency should request public input before automatically granting the state's petition.<sup>179</sup> If there is no public support before the group files the petition, a negotiated rulemaking approach would encourage the agency and petitioning state to take these insights to heart and stop the petitioning process before it even begins.<sup>180</sup>

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174. *Id.*

175. *Supra* Part ADMINISTRATIVE Procedure Act ComplianceA.

176. Christopher Cumings, Comment, *Judicial Iron Triangles: The Roadless Rule to Nowhere—and What Can Be Done to Free the Forest Service's Rulemaking Process*, 61 OKLA. L. REV. 801, 838 (2008) (arguing that state petition-based rules allow for “unaccountable environmental decision[]making”).

177. *See* Glicksman, *supra* note 140, at 777 (arguing for a more cooperative approach to environmental policies); *see also* Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 946–48 (2009) (calling public participation one of the most important parts of rulemaking and arguing for a two-round, interactive comment process).

178. *Supra* Part NATIONAL Environmental POLICY Act Compliance

179. *Cf.* Ari Dobner, Note, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1531, 1574 (explaining that litigation incurs high costs and squanders the courts' limited resources, specifically explaining how frivolous lawsuits are contrary to public policy).

180. *See* Robert L. Sachs Jr., Comment, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 VILL. L. REV. 1505, 1511–12 (1983) (advocating for negotiated rulemaking as an alternative to the current flawed system because it

Second, there should be a stronger collaborative process through the petitioning phase, not just the rulemaking itself.<sup>181</sup> Although NEPA requires collaboration with interested parties,<sup>182</sup> this is simply a procedural requirement, and no substantive collaboration is required.<sup>183</sup> Essentially, the agency can “consult” interest groups to check the procedural box but may completely disregard the comments when it comes time to draft the rule. The petitioning process itself should require real, substantial collaboration that actually bears results in the finalized rule.

#### D. Congressional Review Act

The Congressional Review Act (CRA) is a tool new administrations can use to review the late-term rules promulgated under the preceding administration.<sup>184</sup> The CRA provides an expedited process for review and would allow the rule to be disapproved by a joint resolution of Congress.<sup>185</sup> The CRA allows Congress to reconsider the rules promulgated by federal agencies in the Trump Administration and overturn them.<sup>186</sup>

To disapprove a rule, the resolution needs a simple majority in both the House and the Senate, and then the President must sign off on the resolution.<sup>187</sup>

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would better engage the affected public and offers more efficient, effective, “flexible and consensual results”); *see also* GARVEY, *supra* note 53, at 5 (“Negotiated rulemaking represents a supplement to traditional informal rulemaking procedures that allows agencies to consult with interested persons and interest groups at the developmental stages of the rulemaking process.”).

181. William J. Wailand, Note, *A New Direction? Forest Service Decisionmaking and Management of National Forest Roadless Areas*, 81 N.Y.U. L. Rev. 418, 447–48 (arguing that the USFS must participate in true collaborative decisionmaking from the petitioning stage, and if it fails to substantially collaborate or consider environmental concerns, the rule’s legitimacy should be questioned).

182. 43 C.F.R. § 46.235(a) (2019).

183. *See id.* § 46.235(b) (noting that the agency is the ultimate decisionmaker and suggestions obtained from other sources during the scoping process are merely suggestions to consider).

184. *See* Congressional Review Act of 1996, 5 U.S.C. §§ 801–802 (establishing a procedural mechanism which Congress can exercise to review new agency rules).

185. Phillip A. Wallach & Nicholas W. Zeppos, *How Powerful Is the Congressional Review Act?*, BROOKINGS (Apr. 4, 2017), <https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/>; *see also* RICHARD S. BETH, CONG. RSCH. SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT I (2001) (summarizing the Act’s powers, it allows Congress to reject a variety of agency rules).

186. BETH, *supra* note 185; *see also* 5 U.S.C. § 801(a)(3) (stating that Congress has sixty days to review the rule after it is submitted).

187. *See* 5 U.S.C. § 802 (laying out the procedures for the Senate and House to consider such joint resolutions); *see also* BETH, *supra* note 185, at 14 (noting that these joint resolutions are treated like any other legislation and must be presented to the President for approval).

With the change in administrations, and President Biden's promise to focus on environmental policies, the Roadless Rule could have been one of the many Trump Administration-era rules reviewed.<sup>188</sup> While the Biden Administration did not take this route, the CRA remains a useful tool, and the Administration has promised to nevertheless review the Rule.<sup>189</sup> Currently, the Democratic Party holds the majority in the House of Representatives,<sup>190</sup> and the Senate is evenly split.<sup>191</sup> With the new congressional makeup, a joint resolution may garner bipartisan support to alter the Roadless Rule.<sup>192</sup>

### CONCLUSION

Our country is burning.<sup>193</sup> Despite the need for far-reaching and radical climate policies to curb the effects of climate change, federal agencies are rolling back protections and further contributing to the problem.<sup>194</sup> This

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188. See *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, BIDEN HARRIS, <https://joebiden.com/climate-plan/> (last visited May 7, 2021) (promising that "Biden will reinstate federal protections, rolled back by the Trump Administration, that were designed to protect [Alaskan tribal] communities").

189. See Exec. Order No. 13990, 86 C.F.R. 7037 (2021) (calling for the review of Trump-era environmental rules). This move has left many in the conservation field hopeful that the Biden Administration will reapply protection to the Tongass. See Ellen Montgomery, *Hope for the Tongass National Forest*, ENV'T AM. <https://environmentamerica.org/blogs/environment-america-blog/ame/hope-tongass-national-forest> (Jan. 22, 2021).

190. *U.S. House Election Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-house.html> (Jan 18, 2021, 10:40 AM).

191. *U.S. Senate Election Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-senate.html> (Jan 18, 2021, 10:44 AM).

192. See Dino Grandoni, *The Energy 202: House Passes Major Conservation Package with Bipartisan Support*, WASH. POST (July 23, 2020, 8:00 AM), <https://www.washingtonpost.com/politics/2020/07/23/energy-202-house-passes-major-conservation-package-with-bipartisan-support/> (signaling a potential shift toward bipartisan environmental policies after the passage of the Great American Outdoors Act, a land conservation law similar to the Roadless Rule in its protection of public lands). The Great American Outdoors Act won by 73–25 in the Senate and 310–107 in the House. *Id.*

193. See Blacki Migliozi et al., *Record Wildfires on the West Coast Are Capping a Disastrous Decade*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/interactive/2020/09/24/climate/fires-worst-year-california-oregon-washington.html> (reporting that a record-breaking five million acres of land have burned this year alone, and partially attributing the destruction to poor forest management practices and worsening climate change).

194. See Nunez, *supra* note 3 (describing the agricultural business practices that contribute to deforestation, and thus climate change); see also Georgina Gustin, *Logging Plays Bigger Climate Change Role than U.S. Acknowledges, Report Says*, INSIDE CLIMATE NEWS (May 5, 2017), <https://insideclimatenews.org/news/05052017/climate-change-biomass-renewable-energy-coal-def>

Alaska Rule violates the APA and NEPA. The USFS must procedurally and substantively comply with the requirements of both acts, and if it does not, the Rule will be challengeable under judicial review. Parties with standing, Native Tribes, or conservation groups, should challenge the new Rule.

Unfortunately, because of the ease with which administrations can alter federal rules, environmental protections are often created and destroyed based on the current administration's personal or political whims.<sup>195</sup> There needs to be a better solution for agencies creating environmental rules because the petition-based system allows too much leeway to the individual states, who rarely have the national environment in mind. Finally, under the CRA, the Biden Administration should review and overturn the Rule. The federal government can no longer stand by and watch climate change consume the world. The protection the 2001 Rule offers is a step in the right direction and would help to extinguish the dangerous flames of climate change.

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orestation-paris-climate-agreement/ (observing that the federal government is not taking actions needed to combat the logging industry's contributions to climate change).

195. *Supra* notes 32–33 and accompanying text.