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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

**GREENPEACE, INC.; and CASCADIA
WILDLANDS PROJECT**

Plaintiffs,

v.

FORREST COLE, Tongass National Forest
Supervisor; **DENNIS BSCHOR**, Alaska Regional
Forester; **UNITED STATES FOREST SERVICE**,
an agency of the U.S. Department of Agriculture

Defendants.

Civ. Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Violation of National Environmental Policy
Act, National Forest Management Act, and
Administrative Procedure Act)

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. Plaintiffs challenge decisions by Defendants Forrest Cole, Dennis Bschor, and United States Forest Service (Defendants hereinafter referred to as “Forest Service”) to approve the Scott Peak Project on Kupreanof Island, Petersburg Ranger District (“Scott Peak”), the Overlook Project on Mitkof Island, Petersburg Ranger District (“Overlook”), the Traitors Cove Project on Revillagigedo Island, Ketchikan Ranger District (“Traitors Cove”), and the Soda Nick Project on Prince of Wales Island, Craig Ranger District (“Soda Nick”) on the Tongass National Forest (“Tongass”).

2. The Forest Service’s decisions to approve these projects violate the National Environmental Policy Act (“NEPA”), 40 U.S.C. §§ 4321-4361, its implementing regulations, 42 C.F.R. § 1500 *et seq.*, the National Forest Management Act (“NFMA”) 16 U.S.C. § 1600 *et seq.*, its implementing regulations, 36 C.F.R. § 219 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 706(2).

3. The Scott Peak, Overlook, Traitors Cove, and Soda Nick projects, if implemented, would together log 33.4 million board feet of timber from approximately 1,699 acres of old growth forest, and construct 9.5 miles of new permanent roads to facilitate the logging. These projects—as planned by the Forest Service—will cause significant harm to old growth forests and essential winter habitat for Sitka black-tailed deer (“deer”), the primary prey species of the Alexander Archipelago wolf (“wolf”) and one of the most important subsistence species in the Tongass.

4. The Forest Service has violated NEPA, NFMA, and the APA by failing to

consider and disclose to the public the significant controversy and well documented shortcomings of an important management tool it uses to ensure the viability of wolf – the Deer Winter Habitat Capability Model (the “Deer Model”).

5. First, the Forest Service did not disclose to the public that the underlying data set used in the Deer Model is outdated and inaccurate. The Deer Model relies upon a dataset that supposedly provides data on the condition of forest habitat for wildlife in the planning area or, more specifically, for estimating timber inventory volume in forest stands. Plaintiffs and the Alaska Department of Fish and Game (“ADF&G”) informed the Forest Service that the dataset used by the Forest Service – the Vol-Strata dataset – is not correlated to deer habitat and is therefore unreliable for predicting deer carrying capacity. Yet in preparing these old-growth logging projects, the Forest Service never disclosed to the public the shortcomings of the Vol-Strata dataset, the opposing scientific views provided to the agency during the public comment process, or the availability of two more reliable datasets.

6. Second, the Forest Service committed a basic error in application of the Deer Model, which could have been corrected through simple arithmetic. In applying the Deer Model, the Forest Service translates a habitat ranking produced by the model into a carrying capacity for deer (e.g. a habitat ranking of 1.3 should equal 100 deer/sq. mile). In making this calculation, the Forest Service committed an error that results in a 30% overestimation in the carrying capacity of the habitat for deer. Plaintiffs and ADF&G have both requested that the Forest Service correct this long-standing error in the application of the Deer Model, yet the Forest Service did not correct this error in preparing the timber sales subject to this suit or disclose to the public this error or the controversy over it.

7. Taken together, these two errors resulted in the Forest Service over-estimating the carrying capacity for deer following the old-growth logging projects by as much as 120%. Consequently, the projects will likely have much more significant impacts than predicted by the Forest Service. More specifically, the Forest Service failed to accurately disclose to what degree: 1) these projects may contribute to the Federal Subsistence Board or the Alaska Board of Game imposing hunting restrictions on deer harvest or may otherwise cause a significant decrease of hunter success in each of the project areas, and 2) these projects may contribute to a significant decline in the viability of the wolf in the project areas.

8. The Forest Service's use of the Deer Model results in several violations of NEPA, NFMA and the APA. The Forest Service violated NEPA and its implementing regulations by failing to disclose to the public the significant shortcomings and controversy in the use of the Deer Model and to consider the responsible opposing views of ADF&G and plaintiffs, which are supported by reputable science and leading scientists. By failing to disclose to the public the shortcomings in the underlying dataset and the use of the Deer Multiplier, the Forest Service has failed to disclose relevant information that would enable the public to challenge whether the Forest Service is complying with its legal obligation to ensure the continued viability of the wolf and to ensure adequate subsistence harvest levels of deer.

9. The Forest Service has also violated NFMA and its implementing regulations by approving logging projects that will violate the applicable Forest Plan standard for wolf viability. At the time these projects were approved the Tongass Land Management Plan ("TLMP"), as well as subsequent directives from Tongass National Forest Supervisor Forrest Cole, required the Forest Service to ensure that its projects provide a deer habitat carrying capacity of at least 18

deer/sq. mi. following logging activities, in order to provide adequate prey for wolf populations. Based on a correct application of the Deer Habitat Model, the projects will not meet the applicable standards and guidelines of the TLMP. The Forest Service, therefore, cannot demonstrate compliance with the TLMP as required by NFMA and its implementing regulations.

10. The Forest Service has also violated NFMA and its implementing regulations by using an inadequate dataset when other more reliable datasets are available. The Forest Service cannot rely on inadequate or unverified data to make its determination on wolf viability, and the wolf is a management indicator species (“MIS”). Furthermore, the Forest Service violated NFMA’s “best available science” requirement by failing to consider the alternative scientifically-supported datasets in its project analysis.

11. The Forest Service also violated NEPA by failing to prepare an Environmental Impact Statement (“EIS”) for each of the Overlook and Soda Nick projects. These projects are highly controversial because plaintiffs have raised substantial questions about the significance of each projects’ effects on the environment based on the Forest Service’s erroneous application of the Deer Model, its use of an unreliable dataset uncorrelated to deer habitat quality, and the potential that implementation of the logging projects will cause hunting restrictions or otherwise significantly decrease hunter success in each of the project areas.

12. The Forest Service has further violated NEPA by failing to disclose the many other shortcomings of the Deer Model that cause it to generally overestimate deer habitat capability, including the model’s optimistic bias; its misleading implication of false precision; its disregard for habitat juxtaposition, patch characteristics, and fragmentation; its disregard for stochastic and catastrophic events (including severe winters); its erroneous assumption of a linear

carrying capacity / population relationship; its operation with data uncorrelated to habitat quality; and the fact that the Forest Service has produced no comprehensive documentation for the current model.

13. Plaintiffs seek a declaratory judgment that the projects complained of herein are each contrary to law and seek preliminary and permanent injunctions setting aside these decisions and prohibiting Defendants from implementing these projects until they can demonstrate compliance with the applicable legal requirements. Plaintiffs also seek an award of attorney fees, expenses, and costs pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d).

JURISDICTION AND VENUE

14. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (creation of a remedy), 28 U.S.C. § 2202 (further relief), and the APA, 5 U.S.C. §§ 701-06.

15. There exists now between the parties an actual, justiciable controversy. Plaintiffs have exhausted their administrative remedies, and the Forest Service's decisions denying Plaintiffs' administrative appeals constitute the final administrative decisions of the Department of Agriculture regarding these projects.

16. Venue is appropriate in this judicial district and in this Court under 28 U.S.C. § 1391(e). Land managed by the Forest Service that is the subject of this dispute is located in the Tongass National Forest in this judicial district. Projects approved by Tongass Forest Supervisor Forrest Cole and Tongass District Rangers are located in this judicial district. Final administrative actions by Forest Supervisor Forrest Cole and Alaska Regional Forester Dennis

Bschor were taken in this judicial district. Defendant Forest Service has its headquarters for the Alaska Region of the Forest Service in Juneau, Alaska, and the Tongass National Forest is headquartered in Ketchikan, Alaska. A substantial part of the events or omissions giving rise to the claims in this case occurred in this judicial district. Venue is proper in Anchorage pursuant to D. Ak. LR 3.3.

PARTIES

17. Plaintiff GREENPEACE, INC. (“Greenpeace”) is a non-profit environmental organization incorporated in California. Its headquarters are located in Washington, D.C. and it has other offices in Sitka, Anchorage, and San Francisco. Greenpeace’s mission is to raise public awareness of environmental problems and promote changes that are essential to a green and peaceful future. There are approximately 250,000 current Greenpeace members in the United States. The organization’s involvement in forest issues concerning the National Forest System generally and particularly the Tongass National Forest and other forests of Southeast Alaska goes back to the early 1990s. Its concerns have included the effects of logging and associated road building on ecosystems, roadless areas, fish, wildlife, and hunting, as well as protection of the last remnants of old-growth forest in the United States.

18. Plaintiff CASCADIA WILDLANDS PROJECT (“CWP”) is a non-profit public interest membership organization headquartered in Eugene, Oregon. CWP has maintained a field office in Cordova, Alaska since 1998. CWP’s mission statement is educating, organizing and agitating for a more compassionate and responsible relationship with the ecosystems of the Cascadia bioregion. CWP defines the “Cascadia” bioregion as the watersheds of the western temperate rainforests, from California to Kodiak, Alaska. Traditionally CWP has worked to

defend wild places on public lands against unsustainable logging, road building, mining and other resource extraction activities. Two of CWP's primary strategic and long-term goals are protection and restoration of old-growth forest ecosystems and large predators, including in particular wolves. CWP and its members and staff participate in government decision-making with regard to public lands throughout our bioregion.

19. Plaintiffs are each membership organizations with individual members who live and work near and visit the Tongass National Forest, including the Scott Peak, Overlook, Traitors Cove, and Soda Nick project areas. They use these national forest lands for a variety of purposes, such as hiking, backpacking, skiing, photography, scientific studies, wildlife observation, hunting and fishing, and they intend to continue to do so, on an ongoing basis, in the future. Plaintiffs' members derive recreational, spiritual, professional, aesthetic, educational, and other benefits and enjoyment from these activities.

20. The Scott Peak, Overlook, Traitors Cove, and Soda Nick projects, if implemented as currently planned, will adversely affect Plaintiffs' members' use and enjoyment of the project areas by clear-cutting and partial-cutting of old-growth forest. The cutting and related activities planned for these projects will harm the values that Plaintiffs associate with these areas and will adversely affect declining habitat for deer and wolves in the Tongass.

21. Plaintiffs have a long-history of involvement in planning and decision-making for the Tongass, including specifically for the Scott Peak, Overlook, Traitors Cove, and Soda Nick project areas. Plaintiffs filed written comments on the proposed Scott Peak, Overlook, Traitors Cove, and Soda Nick project and filed administrative appeals for each of these projects. The Forest Service denied the final appeals of these projects. Plaintiffs have been, are being, and will

continue to be adversely affected and irreparably injured by the decisions challenged in this case. These injuries are actual and concrete and would be redressed by the relief sought herein. Plaintiffs have no adequate remedy at law.

22. Defendant FORREST COLE is the Forest Supervisor of the Tongass National Forest. In his capacity as Forest Supervisor, Mr. Cole has the responsibility to ensure that the Forest Service acts in accordance with applicable laws and regulations.

23. Defendant DENNIS BSCHOR is the Regional Forester of the Alaska Region of the U.S. Forest Service. In that capacity he has the responsibility to ensure that the Forest Service acts in accordance with applicable laws and regulations.

24. Defendant UNITED STATES FOREST SERVICE is an agency within the United States Department of Agriculture entrusted with the management of our national forests.

LEGAL BACKGROUND

The National Environmental Policy Act

25. Congress enacted the National Environmental Policy Act (NEPA) “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321. NEPA was also enacted to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4331.

26. To accomplish these purposes, NEPA requires all agencies of the federal government to prepare a “detailed statement” that discusses the environmental impacts of, and reasonable alternatives to, all “major Federal actions significantly affecting the quality of the

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human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an environmental impact statement (“EIS”). Id.

27. To determine whether a proposed action significantly affects the environment, and whether an EIS is required, the acting agency may prepare an environmental assessment (“EA”). 40 C.F.R. § 1508.9.

28. The purpose of an EA is to determine whether the likely impacts of a proposed federal action are potentially “significant” enough to require an EIS. An EA must contain a brief discussion of the need for the proposed action; alternatives to the proposal; a discussion of the environmental impacts of the proposal and the alternatives; sufficient evidence and analysis to determine whether to prepare an EIS; and a listing of the agencies and persons consulted during the assessment period. 40 C.F.R. § 1508.9. If the agency concludes in an EA that a project may have significant environmental impacts on the environment, then an EIS must be prepared. 40 C.F.R. § 1501.4. If an EA concludes that there are no significant impacts to the environment, the federal agency must provide a detailed statement of reasons why the project’s impacts are insignificant and issue a “finding of no significant impact” (“FONSI”). 40 C.F.R. § 1508.13.

29. To determine whether a proposed action significantly affects the environment, the agency must consider the intensity of the proposed action, including the degree to which the effects on the environment are likely to be highly controversial. 40 C.F.R. § 1508.27. A proposal is considered controversial if substantial questions are raised as to whether the project may cause significant degradation of some human environmental factor, thereby requiring the preparation of an EIS. Anderson v. Evans, 371 F.3d 475, 489 (9th Cir. 2004); Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir.1992).

30. NEPA requires that federal agencies take a “hard look” at the potential environmental impacts of their proposed actions. 42 U.S.C. § 4332(2)(C). The “hard look” is required by NEPA to ensure the agency has detailed information about significant environmental impacts before it makes a decision, and to ensure that the information is available to the public.

31. NEPA further requires that a federal agency ensure the professional integrity, including scientific integrity, of the discussions and analyses in its environmental impact statements. 40 C.F.R. § 1502.24. An environmental impact statement “shall provide full and fair discussion of significant environmental impacts” 40 C.F.R. § 1502.1. An EIS summary must stress areas of controversy, including issues raised by other agencies and the public. 40 C.F.R. § 1502.12. “The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement” 40 C.F.R. § 1502.9(b).

The National Forest Management Act

32. The NFMA provides the statutory framework for the management of National Forests, and imposes a duty on the Forest Service to preserve and enhance the diversity of plants and animals, consistent with overall multiple-use objectives stated in a Forest Plan. 16 U.S.C. § 1604(g)(3)(B). NFMA involves two levels of forest planning. At the first level, the Forest Service is required to create a comprehensive land and resource management plan (commonly referred to as a “forest plan”) for each national forest. The forest plan governs land management activities in that forest. 16 U.S.C. § 1604(a). At the second level, implementation of the forest plan occurs through site-specific projects, such as timber sale projects. All site-specific projects, including timber sales, must be consistent with the forest plan. 16 U.S.C. § 1604(i).

33. Before a forest plan may be adopted, NFMA requires the Secretary of Agriculture to issue regulations that: (1) set forth the process for the development and revision of plans within the national forests; and (2) establish management planning standards and guidelines. 47 Fed. Reg. 43026, 43037 (Sept. 30, 1982). The NFMA planning regulations were originally adopted in 1979 and were revised in 1982, codified at 36 C.F.R. § 219 (1982).

34. In November 2000, the Forest Service promulgated the 2000 NFMA regulations, which were intended to supplant the 1982 regulations, codified at 36 C.F.R. § 219 (2000). 65 Fed. Reg. 67,514-67,582 (Nov. 9, 2000). The 2000 regulations contained a provision that established a transition period, during which the Forest Service could choose to use the standards of the 1982 regulations or the 2000 regulations in revising or adopting Forest Plans. 36 C.F.R. § 219.35(a), (d) (2000). The 2000 regulations required the Forest Service to consider the “best available science” for projects implementing a forest plan. Id.

35. Subsequent actions by the Forest Service suspended the 2000 Rule, postponed the effective date of the 2000 Rule, and left the 1982 regulations in place. 66 Fed.Reg. 27,552 (May 17, 2001); 67 Fed. Reg. 35,431-35,434 (May 20, 2002). The Forest Service then adopted its “Interpretative Rule” in 2004, which stated that the 2000 regulations were in effect (not the 1982 regulations) until a new set of NFMA regulations were promulgated. (Under the 2004 Interpretive Rule, the Forest Service had the option to rely on the 1982 Regulations to prepare forest plan amendments and revisions if it chose to do so. 69 Fed. Reg. 58,055, 58,057 (Sept. 29, 2004)).

36. The 2004 Interpretive Rule and 2000 transitional regulations were terminated when new substantive regulations were implemented in 2005, codified at 36 C.F.R. § 219

(2005). 70 Fed. Reg. 1,022 (Jan. 5, 2005). The 2005 NFMA rules were subsequently enjoined. Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F. Supp. 2d 1059, 1100 (N.D. Cal. 2007) (“The USDA is ENJOINED from implementation and utilization of the 2005 Rule until it has fully complied with the pertinent statutes.”).

37. In March of 2003, the Ninth Circuit Court of Appeals stated that the Forest Service had developed and promulgated the 2000 NFMA rule in contravention of NEPA, and remanded the case to the district court on the merits. Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961, 970-971, 978 (9th Cir. 2003). Subsequently, the U.S. District Court for the Northern District of California ruled that the Ninth Circuit’s conclusion that defendants violated NEPA in developing the 2000 Rule was a ruling on the merits. Citizens for Better Forestry v. U.S. Dept. of Agriculture, Civ. No. 01-728 MJJ (EMC) (N.D. Cal.) (July 24, 2006, Report and Recommendation Re: Plaintiffs’ Motion for Attorneys’ Fees and Costs) and (April 17, 2007, Order adopting without change the Report and Recommendation).

38. The Forest Service, however, maintains that the 2000 NFMA rule, its transition provisions, and its 2004 Interpretive Rule apply, which continue to require that the Forest Service consider the “best available science” in implementing projects subject to the relevant forest plan. See 36 C.F.R. § 219.35(a), (d) (2000).

39. In March of 2006, the Forest Service revised the transition provision for implementing plan revisions to allow the Tongass National Forest to revise its land management plan using planning regulations in effect before November 9, 2000 (meaning the 1982 planning regulations). 71 Fed. Reg. 10837 (March 3, 2006); 36 C.F.R. § 219.14(d)(1) (2007). Pursuant to the revised transition provision, the Forest Service has chosen to revise its Tongass Land

Management Plan (“TLMP”) pursuant to the 1982 planning regulations.

40. The 1997 TLMP and subsequent amendments and revisions to TLMP were all adopted pursuant to the 1982 planning regulations. Those regulations require the Forest Service to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. 36 C.F.R. § 219.19(a) (1999). Further, the 1997 TLMP Standard and Guideline WILD112 II.B specifically requires the Forest Service to “[p]rovide the abundance and distribution of habitat necessary to maintain viable populations of existing native and desirable introduced species well-distributed in the planning area. (Consult 36 CFR 219.19 and 36 CFR 219.27).”

41. Even though TLMP was revised recently (by Record of Decision issued January 25, 2008), the 1997 TLMP requirements and directives in effect prior to the current revision continue to control the Scott Peak, Overlook, Traitors Cove, and Soda Nick projects.

The Alaska National Interest Lands Conservation Act

42. In passing the Alaska National Interest Lands Conservation Act (“ANILCA”), Congress declared a policy that the “utilization of public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands.” 16 U.S.C. § 3112(1). Section 804 of ANILCA provides that the taking of fish and wildlife “for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.” 16 U.S.C. § 3114.

43. Section 810 of ANILCA places an affirmative obligation on the Forest Service to evaluate proposed uses of public lands to determine whether those uses “would significantly restrict subsistence uses.” 16 U.S.C. § 3120(a). If the responsible federal agency determines that

a proposed use will “significantly restrict subsistence uses,” the agency must demonstrate that the restriction on subsistence uses: 1) “is necessary, consistent with sound management principles for the utilization of the public lands;” 2) “will involve the minimal amount of public lands necessary to accomplish the purposes of such use;” and 3) that “reasonable steps will be taken to minimize adverse impacts upon subsistence uses.” Id.

44. The Secretaries of the Interior and Agriculture have established a Federal Subsistence Board assigned with the responsibility for “administering the subsistence taking and uses of fish and wildlife on public lands.” 50 C.F.R. § 100.10(a). The Federal Subsistence Board is also authorized to establish Regional Councils. 50 C.F.R. § 100.11. When necessary, the Board, in consultation with the Regional Councils, may limit the hunting of deer and other wildlife for both subsistence and non-subsistence needs in order to ensure the viability and conservation of wildlife populations. 50 C.F.R. § 100.17(a).

45. In recent years, the ADF&G and the Federal Subsistence Board have had to issue emergency closures of both the subsistence hunt and sport hunt of deer on federal lands as a result of heavy winter snowfall. For instance, the Federal Subsistence Board closed Unit 4 in Southeast Alaska to subsistence doe deer hunting starting January 1, 2008 to conserve deer populations because heavy winter snows resulted in high deer mortality. Similarly, the Alaska Department of Fish and Game had already issued an emergency closure of resident and non-resident deer sport hunting for does in Units 1C and 4 as of December 14, 2007.

FACTS

The Tongass National Forest, Sitka Black-Tailed Deer and the Alexander Archipelago Wolf

46. The Tongass National Forest in Southeast Alaska is comprised of the mainland

and most islands within the Alexander Archipelago. Created in 1907 by President Theodore Roosevelt, the Tongass is the nation's largest national forest, and along with other land ownerships in the region is the largest intact temperate rainforest in the world. The Tongass contains almost seventeen million acres (not all of which are forested) and occupies about seven percent of Alaska's area. It contains the most significant expanse of old-growth forest remaining within the United States.

47. Since 1954 the Forest Service has allowed industrial-scale logging of old-growth timber stands, resulting in the clearcutting of about 440,000 total acres (nearly 700 square miles), comprising a substantial loss of high-quality deer habitat because of the general targeting of high-quality forest stands which had the most valuable timber available (i.e. the practice of “high-grading”). Roughly an equal acreage of old-growth forest on other land ownerships in the region has also been logged.

48. Traditionally, abundant wildlife populations have provided essential subsistence hunting and fishing opportunities for the many local and indigenous communities throughout the 500-mile Alexander Archipelago. Subsistence is an important, non-cash element of the regional community, economy and culture at all times, but especially in times of a downturn in the cash-economy, given the remoteness and isolation of the region. The most important terrestrial subsistence species for these communities is the Sitka black-tailed deer.

49. The forest’s dramatic scenic beauty and rich biodiversity have also made the Tongass a major destination for sport hunting, fishing, outdoor recreation, and scientific research, and this is an important non-timber element of the cash-economy.

50. The Tongass National Forest provides essential habitat for a wide variety of fish

and wildlife species, including two mammal species particularly adapted to and dependent on the old-growth temperate landscape of Southeast Alaska: the Sitka black-tailed deer (*Odocoileus hemionus sitkensis*) and the Alexander Archipelago wolf (*Canis lupus ligoni*), which is endemic to Southeast Alaska. The Forest Service has designated both the deer and the wolf as MIS and species having special management concerns.

51. Throughout most of their range on the Tongass, wolves depend primarily on deer as their prey. The deer, in turn, rely on old-growth forest habitats for their survival. The old-growth forest is a necessary habitat feature for providing optimal winter habitat because the high, broken canopy intercepts much snow but still provides enough light for the growth of forage plants used by deer. During winter, the distribution of deer at various elevations is influenced by snow depth, which for given winter conditions varies with the quality of other habitats features in addition to old-growth forest structure. Heavy winter snows threaten the deer's ability to forage, find cover, and move through the forest. For a given forest type, lower elevation forest stands that get less snow and more sunlight based on aspect have the highest value for deer as winter habitat. During extreme snow accumulation, many deer congregate in old-growth timber stands at lower elevations, favoring locations that get the most sun.

52. Clearcutting old-growth renders areas generally inaccessible to deer much of the time in winter, due to the accumulation of deep snow. Moreover, as clearcuts grow back, the conifer second-growth becomes dense, shading out understory forage plants leaving very poor habitat for deer. Clearcuts and dense second-growth have resulted in a significant decline in deer habitat throughout the Tongass.

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The TLMP Standard and Guideline to Maintain Deer Habitat for Subsistence Hunting and Wolf Viability

53. The viability and wide distribution of Southeast Alaska's endemic wolf subspecies has long been a significant concern of federal agencies and the public. In 1995 and again in 1997, the U.S. Fish and Wildlife Service recognized the threats posed to the wolf but declined to list the species pursuant to the Endangered Species Act because of management options available pursuant to the TLMP. 60 Fed Reg 10056 (February 15, 1995); 62 Fed Reg 46709 (August 28, 1997). In order to avoid the likely ESA listing by USF&WS, the Forest Service had to include features in the TLMP that would avoid jeopardy to the wolf, and it did so in part through standard and guideline WILD112 XI. The standard and guideline was also designed to meet NFMA's requirement to "provide for the diversity of plant and animal species based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. § 1604(g)(3)(B).

54. Because deer are the primary prey of the wolf, TLMP includes standard and guideline WILD112 XI.A.3 (herein "the Standard and Guideline"), which requires the Forest Service to:

Provide sufficient deer habitat capability to first maintain sustainable wolf populations, and then to consider meeting estimated human deer harvest demands. This is generally considered 13 deer/square mile in biogeographic provinces where deer are the primary prey of wolves. Use the most recent version of the interagency deer habitat capability model and field validation of local deer populations to estimate deer habitat capability.

55. In 2002 and again in 2005, the Forest Supervisor clarified the Forest Service's interpretation of the Standard and Guideline. In order to achieve a population density of 13 deer/square mile, the Forest Service must ensure an average long term habitat capability or

carrying capacity of 18 deer/square mile.

56. The demand of hunters is included in the Standard and Guideline because if losses of deer habitat (such as through logging) create a NFMA loss of viability or an ESA listing situation for the wolf due to inability of the land to support a sufficient number of deer, the human take of deer hunting would further contribute to the adverse situation. However, at that point hunting could not be effectively regulated to protect population levels, since, as the Forest Service finds, a significant illegal take of deer would be certain to occur. Hence, the Standard and Guideline aims to provide sufficient habit to support the needs of both wolves and humans (i.e. hunting).

57. Pursuant to Section 810 of ANILCA, 16 U.S.C. § 3120(a), for each of the timber projects challenged in this case the Forest Service has determined that “there is a significant possibility of a significant restriction” of the subsistence use of deer, due to habitat loss.

58. The Forest Service has an ANILCA duty to employ sound management, a NFMA duty to protect wolf viability, and a NEPA duty to evaluate the affected environment and the effects of the projects to inform sound management. In order to fulfill those duties the Forest Service had an obligation to determine as accurately as possible both the current deer carrying capacity and the effects of project alternatives on that capacity. Doing so is necessary to determine whether and to what degree wolf viability and subsistence hunting are likely to be impaired under current habitat conditions and under the conditions that would result from executing the alternatives. The available means for doing this is the Standard and Guideline.

The Deer Habitat Capability Model and the Unreliability of the Underlying Dataset

59. To determine whether its proposed timber projects will meet the subsistence and

viability requirement of the Standard and Guideline, the Forest Service adopted a Deer Model in 1997 (herein “Deer Model”), which it also used in preparing the 1997 TLMP. The Deer Model replaced an earlier model dating to 1992 (herein “1992 Model”) and was used in the NEPA analysis for all of the timber projects in this case.

60. Both models estimate the relative abilities of small areas (map grid “polygons”) of forest to provide winter cover and forage habitat for deer. These polygons are a few acres to a few tens of acres in size, and collectively they cover the entire land area of the national forest. The models aggregate these polygon-level estimates into an overall (or averaged) habitat quality result for whatever larger land area that is being analyzed. The output of the model is a unitless number, called the Habitat Suitability Index score (“HSI”), that can be converted into deer carrying capacity per square mile.

61. The Deer Model “values” the habitat in a polygon on the basis of several features: forest type, snow level zone, elevation zone, and solar aspect. Forest type refers to the forest characteristics. The model judges, as an example, higher volume old-growth timberland to provide good habitat for deer, because the heavy canopy intercepts snow, and provides thermal cover and areas for deer to forage during winter snows. In contrast, closed-canopy second-growth stands (26-100 years after logging), where the trees are even-aged and the canopy is dense and closed (often > 90% cover), are poor quality habitat. Understory production in closed-canopy second-growth stands is essentially non-existent, and therefore these areas are judged by the model to provide less than two percent of the habitat capability of the best quality old-growth.

62. The Deer Model has seven categories for classifying forest types: a) high-volume

old-growth timberland, b) mid-volume old-growth timberland, c) low-volume old-growth timberland, d) non-productive forest land, e) second-growth less than 25 years post-logging, f) second-growth >25 years post-logging (i.e. closed-canopy), and g) group selection logging in mid and higher volume stands.

63. The Deer Model has scored (in a look-up table) each of those seven forest types for where they exist in each combination of 3 snow level zones, 3 elevation zones, and 4 aspects (i.e. north, south, east, and west). When the model is run, it determines the values of all the polygons and aggregates them into an overall (averaged) value for the land area being analyzed.

64. A central dispute in this case focuses on the dataset the Forest Service used to represent forest types in the Deer Model. The 1992 Model used the “Tim-Type” dataset of forest stand classifications. The 1997 Deer Model is based instead on the “Vol-Strata” dataset. It has been established by scientific study that the Vol-Strata dataset upon which the Deer Model is based is uncorrelated to deer habitat quality because Vol-Strata considers timber volume irrespective of tree size, meaning it is suited to inventorying the stock of timber but not to evaluating habitat quality.

65. Plaintiffs and ADF&G scientists have pointed out the flaws in using the Vol-Strata data and have asked the Forest Service to return to the TimTyp dataset or to use the newer “Size-Density” dataset that is ready for use. Scientific analysis has demonstrated that the TimTyp and Size-Density datasets are correlated to deer habitat quality.

66. The Forest Service has not responded to plaintiffs’ and ADF&G scientists’ concerns about the misapplication of the Vol-Strata dataset in project-level NEPA analyses and has not explained why it cannot use one of the more accurate and reliable datasets.

67. The Forest Service has demonstrated that it can use the more accurate Size-Density dataset by running this dataset in the current Deer Model in support of its analysis in the January 2007 TLMP Adjustment Draft Environmental Impact Statement (“DEIS”), and the agency has adopted Size-Density in the 2008 TLMP revision and its Final Environmental Impact Statement (“FEIS”).

68. In its DEIS (2007) and FEIS (2008) for the TLMP Adjustment, the Forest Service acknowledged that using the Size-Density dataset results in an overall reduction in average deer HSI values (and in the resulting carrying capacities) because fewer polygons would be classified as high and medium volume strata and more polygons would be classified as low volume strata, compared to the old Vol-Strata dataset used in the Deer Model for projects developed under the 1997 TLMP Final EIS.

69. The application of the less accurate Vol-Strata dataset compared to the more accurate TimTyp or Size Density datasets results in a potential overestimation of habitat capability by as much as 90% that varies from place to place across the region.

70. This is significant because, were the Forest Service to apply either the older TimTyp or the newer Size-Density dataset in the Deer Model, the current condition of the “wildlife analysis areas” (herein “WAAs”) that contain the projects challenged in this case is such that even now none of the projects meet the 18 deer/square mile requirement of the Standard and Guideline.

The Deer Habitat Capability Model, the Habitat Suitability Index and the Deer Multiplier

71. The “valuation” described above of a forest polygon or a larger analysis area is known as a “Habitat Suitability Index” (“HSI”). HSI scores have no units of measure and those

produced by the 1997 Deer Model are on a range of zero to 1.3. For an area that provides no cover or forage, the model assigns a value of zero, whereas for an ideal polygon of old-growth that provides the maximum amount of cover and forage in an average winter, the model assigns a value of 1.3. The higher the overall Habitat Suitability Index before and after implementation of a proposed project, the more likely that the area will provide enough habitat to maintain deer for subsistence and wolf viability needs.

72. The 1992 Model used on the Tongass had a different range for its Habitat Suitability Index, representing all deer habitats on a range from zero to 1.0 (as opposed to the current Deer Model's range of zero to 1.3 for those same habitats). Here, similarly, zero meant no suitable habitat and the highest HSI of 1.0 meant maximum habitat capability or an ideal stand of old-growth.

73. In its NEPA analysis of a project that would log old-growth timber stands, the Forest Service computes the above described overall (i.e. average) Habitat Suitability Index for each Wildlife Analysis Area that would be affected by the project. A WAA consists of several watersheds (which are generally of small land area on the Tongass), and this scale is important for two reasons. One or two WAAs approximate the size of a wolf pack home range, which is what is of concern for wolf viability considerations. Also, a WAA is the smallest land area for which the Deer Model gives reasonable results, due to the nature of the data the model uses. The 1997 TLMP and the projects being challenged all did analysis at the WAA scale or the larger biogeographic province scale, and model results by WAA or biogeographic province are referenced in this Complaint.

74. As previously mentioned, an important reason the Forest Service determines the

overall Habitat Suitability Index of a Wildlife Analysis Area, or in some cases a larger Biogeographic Province, is to enable calculation of the carrying capacity for deer in that area before and after logging, in order to apply the Standard and Guideline of providing a carrying capacity of at least 18 deer/square mile.

75. To determine a Wildlife Analysis Area's carrying capacity, the Forest Service multiplies the WAA's overall Habitat Suitability Index score (a unitless, relative number in the range of zero to 1.3) by a "constant" that is the maximum number of deer per square mile that southeastern Alaska's best quality deer habitat can support. This constant is referred to as the "Deer Multiplier," and applying it to an area's overall Habitat Suitability Index produces the area's estimated carrying capacity, expressed as deer per square mile (which is a potential carrying capacity and not a population estimate). In an EA or EIS, the Forest Service makes this calculation for the "current condition" and for each of the various logging alternatives being considered, including the no-action alternative.

76. Based on scientific research acknowledged and applied to project analysis by Forest Service directives issued in 2002 and again in 2005, the Forest Service requires the use of a Deer Multiplier of 100 deer/square mile, which was intended by its originators to represent the maximum carrying capacity for deer in the best old-growth habitat: high volume old-growth, low elevation, south aspect, low snow level zone.

77. However, in applying the Deer Multiplier in these timber sales, the Forest Service matched the Deer Multiplier to the Deer Model's HSI of 1.0 instead of its maximum of 1.3. While a match to 1.0 would make sense if the Forest Service's Deer Model were still using the zero to 1.0 range of the 1992 Model (where 1.0 represented maximum habitat quality), to

correctly determine the habitat capability in the Wildlife Analysis Area using the 1997 Deer Model, the Forest Service must instead match the Deer Multiplier to the current model's maximum of 1.3.

78. The erroneous application of the Deer Multiplier to the smaller HSI of 1.0 instead of 1.3 results in an overestimation of deer habitat capability for each Wildlife Analysis Area by 30%. (The percentage error equals $100 * (1.3 - 1.0) / 1.0$).

79. On a number of occasions since 2005, Plaintiffs, the ADF&G and a number of scientists have pointed out to the Forest Service this significant error in applying the Deer Multiplier. Comments to this effect have been provided on each of the projects challenged in this case, as well as in concurrent scientific proceedings.

80. Despite the best efforts of plaintiffs, ADF&G and scientists, the Forest Service refused to correct the error in the projects subject to challenge in this case.

81. This is significant because, were the Forest Service to correctly apply the Deer Multiplier, by pegging it to the maximum Habitat Suitability Index figure of 1.3, none of the projects challenged in this case would meet the 18 deer/square mile requirement of the Standard and Guidelines. In fact, for most of these projects the affected WAA or WAAs already fail the Standard and Guideline by a significant margin, and further logging will only worsen their habitat conditions and their abilities to support wolves and subsistence hunting.

82. Moreover, in combination with the potential 90% error resulting from the use of an inaccurate dataset, the Forest Service has overestimated the carrying capacity of the planning areas by as much as 120%.

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The Forest Service's Use of the Deer Model to Determine Deer Numbers for Subsistence Hunting

83. In addition to estimating deer habitat capability, the Forest Service uses the Deer Model to assess whether deer population objectives for subsistence and sport hunting demand will be met. However, the Deer Model was never intended to be used for this purpose. In fact, the Forest Service provides a disclaimer in its NEPA documents and in the 1997 TLMP that the Deer Model may be useful for estimating changes in habitat capability resulting from timber harvest activities, but it is not intended to estimate actual deer populations.

84. Nevertheless, the Forest Service continues using the Deer Model to estimate deer populations for subsistence and hunter demand in its NEPA project analyses. It does so for the purpose of determining whether its proposed logging could lead to a diminution of deer populations to a point at which a finding of significant possibility of significant restrictions on deer hunting is necessary.

85. In applying ANILCA the Forest Service relies on a threshold, representing the estimated demand of hunters that is equivalent to 20% of the area's deer habitat capability (hereinafter the "ANILCA threshold").

86. In the event that deer carrying capacity is reduced by a timber project to the point that the demand for deer by hunters exceeds the ANILCA threshold (or 20% of the estimated carrying capacity for deer), causing deer harvest to potentially exceed the threshold, deer harvest may be restricted either directly through restrictions in seasons and bag limits by the Alaska Board of Game or the Federal Subsistence Board, or indirectly through reduced hunter efficiency and increased difficulty in obtaining deer relative to the historical rate.

87. Although the projects challenged in this case will cause the ANILCA threshold to

be exceeded or nearly exceeded according to the Forest Service's calculation method (and in some cases the existing pre-project condition of affected Wildlife Analysis Areas exceeds the threshold already), the agency has not adequately disclosed the significance of the possible hunting restrictions that would be foretold if the Deer Multiplier were correctly applied or if the Deer Model were to use one of the alternate datasets (TimTyp or Size-Density) that are better correlated to deer habitat quality.

The Shortcomings of the Deer Model

88. In its project-level NEPA analyses the Forest Service commonly excuses low carrying capacity scores from the Deer Model by discounting the Deer Model as one that generally underestimates deer carrying capacity. At the same time, the Forest Service has failed to disclose several significant shortcomings of the Deer Model which, as suggested by the best available science, cause it to overestimate carrying capacity (and consequently cause impacts to be underestimated). These shortcomings are a result of the model's simplicity, and ecological factors that it does not consider, and give the model an optimistic bias. The Forest Service has not disclosed or taken into account that:

A. The model can be misleading by implying a false sense of precision. The Forest Service has frequently fallen victim to this pitfall in its NEPA documents, calculating deer model results out to as much as four or five significant digits when at most two are justified. This was the greatest concern of the 1994 peer review of the various Tongass wildlife habitat capability models, which warned that despite disclaimers about the limitations in this regard, the model's quasi-quantitative structure will be taken by planners and the public to mean a high level of precision which can be mistaken for

accuracy.

B. The model ignores the juxtaposition, varying patch sizes, and fragmentation of habitats across a WAA. Model results should be treated as potentially underestimating deer carrying capacity because, for example, the model assumes every habitat patch is accessible to deer and is located in reasonable proximity to other suitable habitat – that is, that every patch is given its full theoretical value when determining the cumulative value of all. As habitat is fragmented by logging, the juxtaposition and interspersions of habitats will become more adverse, but the model continues to assume an optimum arrangement, making the results optimistic.

C. The model ignores stochastic, possibly catastrophic events (including severe winters) that over the centuries-long period that logging effects will endure can cause a worse outcome than Forest Service analysis acknowledges. The effect of stochastic events, such as extreme snow events at long term intervals, is ignored by the model and by more general Forest Service analysis. The model's Habitat Suitability Index estimates carrying capacity for deer during an average snow winter, but it may not matter what the average winter conditions are, if by chance several severe winters occur in sequence. For example, in Game Management Unit 3 (Mitkof, Kupreanof, Etolin, and Zarembo Islands), the severe winters of 1969 and 1971 resulted in a major crash in the deer population. It has taken over 30 years for that population to recover, largely because predation retarded recovery long after the severe winter seasons. Further, climate change predictions for Southeast Alaska indicate a likelihood of extremes of warm and cold during future winters, along with much greater precipitation in winter and a corresponding

increased potential for deep snow.

D. Forest Service analysis that relies on the Deer Model erroneously assumes a linear relationship between carrying capacity and deer numbers, and because deer numbers cannot be predicted, carrying capacity serves as a surrogate measure. Where there is predation (as in the timber sales included in this complaint) a reduction in carrying capacity (as from logging) can be expected to precipitate a larger reduction in deer numbers. This is because the net annual recruitment of deer, which represents the portion of a deer population that can be removed by wolves and hunters without causing a decline in the population, is reduced disproportionately to the decline in carrying capacity. However, the U. S. Forest Service regularly uses modeled carrying capacity as an analog for actual numbers of deer to compare effects of alternative timber harvest plans on the supply of deer to subsistence users, either by estimating the support or testing against the Standard and Guideline. To use the model for that purpose, the Forest Service necessarily assumes the erroneous linear relationship.

E. In its NEPA documents the Forest Service has not disclosed that the model's underlying Vol-Strata dataset is uncorrelated to deer habitat quality.

F. The Forest Service has not disclosed the fact that the current model has no comprehensive documentation that describes how the model was constructed, how it is intended to function, what changes have been made to it over time and why, the reasons its construction and changes are believed by the Forest Service to be valid, and the technical details of how the model should be applied in project analysis. This has made the model a black-box for project-level planners.

Facts Common to All Projects Challenged in this Case

89. Each project described below would log high volume strata old-growth forest. This type of forest can be valuable habitat for many species including Sitka black-tailed deer. Each project area and the associated Wildlife Analysis Areas also provide habitat for Alexander Archipelago wolves, which have been documented in the vicinity of each of the project areas in this case.

90. The deer modeling done for each of the projects discussed below relies on the Vol-Strata dataset as the basis for determining the quantity and quality of old growth habitat available in each project area. In each of the projects discussed below, the Forest Service has not used either the TimTyp or Size-Density datasets to determine habitat capability in applying the Deer Model.

91. In each project analysis for the projects discussed below, the deer modeling matched the 100 deer/square mile Deer Multiplier (the maximum capability) to a Habitat Suitability Index score of 1.0 instead of the maximum index of 1.3.

92. Neither the 1997 TLMP Final EIS nor the NEPA analyses for each of the projects discussed below described or made allowance for the various shortcomings of the Deer Model, including the model's optimistic bias; its misleading implication of false precision; its disregard for habitat juxtaposition, patch characteristics, and fragmentation; its disregard for stochastic and catastrophic events (including severe winters); its erroneous assumption of a linear carrying capacity / population relationship; its operation with data uncorrelated to habitat quality; and the fact that the Forest Service has produced no comprehensive documentation for the current model.

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The Scott Peak Project

93. The Scott Peak project area is located on Kupreanof Island in Southeast Alaska, on the Petersburg Ranger District. On September 20, 2006, Forest Supervisor Forrest Cole signed the Record of Decision for the Scott Peak project, which authorizes removing 8.3 million board feet of timber from 347 acres of the Tongass National Forest. The selected Alternative C would log ten percent of the remaining low elevation, high volume strata old-growth forest in the project area.

94. For the Scott Peak project, the Forest Service estimated “current” deer habitat capability at approximately 23 deer/square mile for the Kupreanof/Mitkof Biogeographic Province. Had the Forest Service correctly matched the 100 deer/square mile Deer Multiplier (the maximum capability) to the Habitat Suitability Index score of 1.3 (the maximum in the model), the estimated current deer habitat capability would have come out to approximately 18 deer/square mile (rounded up from 17.7).

95. Deer modeling the Forest Service has done using Size-Density data (instead of Vol-Strata data) and the correctly matched deer multiplier for the 2008 TLMP Adjustment FEIS, reveals that the current (2006) deer habitat capability in the Kupreanof/Mitkof Biogeographic Province is approximately 16 deer/square mile. This is an indication that implementing the project will worsen a failure to provide sufficient deer habitat for wolf viability and subsistence uses.

96. For the Scott Peak project the Forest Service also estimated current deer habitat capability for WAA 5136. The estimate was 19 deer/square mile. Corrected as above for the Deer Multiplier error, the estimate becomes 15 deer/square mile. When the estimate is made with

Size-Density data from the 2008 TLMP planning process and the corrected multiplier, the estimate becomes 14 deer/square mile. This too is an indication that the project fails to provide sufficient habitat for wolf viability and subsistence uses, and that it can only worsen a bad situation.

97. The Scott Peak project analysis uses the Deer Model to make a determination that after project implementation there may already be a significant possibility of a significant restriction on subsistence use of deer in the Kupreanof/Mitkof Biogeographic Province due to cumulative effects. The carrying capacity for deer as determined by the Deer Model was compared to the estimated demand of hunters for deer (in number of deer) to determine whether or by how much the demand exceeds the 20% ANILCA threshold. This comparison was used to evaluate the risk that regulatory orders or defacto circumstances will restrict hunting or bag limits; however, the fact that ADF&G opposes this method of analysis was not disclosed. Moreover, applying the Deer Model with Size-Density data and the correct multiplier would reveal that project implementation is likely to contribute to such restrictions and will likely lead to a significantly greater reduction in hunter success than already revealed.

98. Plaintiffs Greenpeace and Cascadia Wildlands Project filed a timely administrative appeal of the first Scott Peak decision. On April 14, 2006, Regional Forester Dennis Bschor denied plaintiffs' appeal but reversed the Forest Supervisor's decision on the basis of another appeal and remanded it for further NEPA analysis.

99. Plaintiffs Greenpeace and Cascadia Wildlands Project also filed a timely second administrative appeal of the second Scott Peak decision and EIS. On March 8, 2007, Regional Forester Dennis Bschor denied plaintiffs' appeal, which constituted the final administrative

decision of the Department of Agriculture.

The Overlook Project

100. The Overlook project area is located on Mitkof Island in Southeast Alaska, on the Petersburg Ranger District. On November 1, 2006, Forest Supervisor Forrest Cole signed a Decision Notice for the Overlook project, which authorizes removing 4.1 million board feet of timber from 190 acres of the Tongass National Forest. The selected Alternative 4B would log 8.3 percent of the remaining low elevation, high volume strata old-growth forest in the project area. The Forest Service only prepared an EA and FONSI for the Overlook project and did not prepare an EIS.

101. For the Overlook project, the Forest Service estimated the “current” deer habitat capability at approximately 22 deer/square mile for the Wildlife Analysis Area 2007 (Mitkof Island). Had the Forest Service correctly matched the 100 deer/square mile Deer Multiplier (the maximum capability) to the Habitat Suitability Index score of 1.3 (the maximum in the model), the estimated current deer habitat capability would have come out to approximately 17 deer/square mile.

102. Unpublished results of deer modeling the Forest Service has done using Size-Density data (instead of Vol-Strata data) and which was used in analysis for the 2008 TLMP FEIS revealed that that the current (2006) deer habitat capability in Wildlife Analysis Area 2007 (Mitkof Island) is approximately 14 deer/square mile when the Deer Multiplier is correctly matched to a Habitat Suitability Index of 1.3. This is an indication that implementing the project will worsen a failure to provide sufficient deer habitat for wolf viability and subsistence uses.

103. The Overlook project analysis uses the Deer Model to make a determination that after project implementation there may already be a significant possibility of a significant restriction on subsistence use of deer in Wildlife Analysis Area 2007 (Mitkof Island) due to cumulative effects. The carrying capacity for deer as determined by the Deer Model was compared to the estimated demand of hunters for deer (in number of deer) to determine whether or by how much the demand exceeds the 20% ANILCA threshold. This comparison was used to evaluate the risk that regulatory orders or defacto circumstances will restrict hunting or bag limits; however, the fact that ADF&G opposes this method of analysis was not disclosed. Moreover, applying the Deer Model with Size-Density data and the correct multiplier would reveal that project implementation is likely to contribute to such restrictions and will likely lead to a significantly greater reduction in hunter success than already revealed.

104. Plaintiffs Greenpeace and Cascadia Wildlands Project filed a timely administrative appeal of the Overlook decision. On February 22, 2007, Regional Forester Dennis Bschor denied plaintiffs' appeal, which constituted the final administrative decision of the Department of Agriculture.

The Traitors Cove Project

105. The Traitors Cove project area is located on Revillagigedo Island in Southeast Alaska, on the Ketchikan Ranger District. On April 3, 2007, Forest Supervisor Forrest Cole signed the Record of Decision for the Traitors Cove project, which authorizes removing 17.1 million board feet of timber from 905 acres of the Tongass National Forest. The selected Alternative 2 (modified) would log 4.6 percent of the remaining low elevation, high volume strata old-growth forest in the project area. Prior to project implementation, the project area has

already lost 67% of its high volume strata old growth to logging. Alternative 2 (modified) will log 3 % of the remaining coarse canopy old-growth forest, of which 84% has already been lost to logging in the area.

106. For the Traitors Cove project, the Forest Service estimated the “current” deer habitat capability at approximately 21 deer/square mile for Wildlife Analysis Area 510. Had the Forest Service correctly matched the 100 deer/square mile Deer Multiplier (the maximum capability) to the Habitat Suitability Index score of 1.3 (the maximum in the model), the estimated the current deer habitat capability at approximately 16 deer/square mile.

107. Deer modeling the Forest Service has done using Size-Density data (instead of Vol-Strata data) for the 2008 TLMP Adjustment FEIS, reveals that the current (2006) deer habitat capability in Wildlife Analysis Area 510 is approximately 9.5 deer/square mile when the Deer Multiplier is correctly matched to a Habitat Suitability Index of 1.3. This is an indication that implementing the project will worsen a failure to provide sufficient deer habitat for wolf viability and subsistence uses. The Traitors Cove FEIS over-estimated the habitat capability by about 120%.

108. The Traitors Cove project analysis uses the Deer Model to make a determination that after project implementation there may already by a significant possibility of a significant restriction on subsistence use of deer in Wildlife Analysis Area 510. The carrying capacity for deer as determined by the Deer Model was compared to the estimated demand of hunters for deer (in number of deer) to determine whether or by how much the demand exceeds the 20% ANILCA threshold. This comparison was used to evaluate the risk that regulatory orders or defacto circumstances will restrict hunting or bag limits; however, the fact that ADF&G opposes

this method of analysis was not disclosed. Moreover, applying the Deer Model with Size-Density data and the correct multiplier would reveal that project implementation is likely to contribute to such restrictions and will likely lead to a significantly greater reduction in hunter success than already revealed.

109. Plaintiffs Greenpeace and Cascadia Wildlands Project filed a timely administrative appeal of the Traitors Cove decision. On August 20, 2007, Regional Forester Dennis Bschor denied plaintiffs' appeal, which constituted the final administrative decision of the Department of Agriculture.

Soda Nick Project

110. The Soda Nick project area is located on Prince of Wales Island in Southeast Alaska, on the Craig Ranger District. On June 4, 2007, Craig District Ranger Gregory Killinger signed the Decision Notice for the Soda Nick project, and selected Alternative 3 which authorizes removing 3.9 million board feet of timber from 257 acres of the Tongass National Forest. The selected alternative would log 7.7 percent of the remaining high volume strata old-growth in the project area. The Forest Service only prepared an EA and FONSI for the Soda Nick project and did not prepare an EIS.

111. For the Soda Nick project, the Forest Service estimated the "current" deer habitat capabilities of Wildlife Analysis Areas 1317 and 1332 at approximately 14 and 25 deer/square mile, respectively, and 20 deer/square mile in both combined. Had the Forest Service correctly matched the 100 deer/square mile Deer Multiplier (the maximum capability) to the Habitat Suitability Index score of 1.3 (the maximum in the model), the estimated current deer habitat capability at approximately 11 and 19 deer/square mile in Wildlife Analysis Areas 1317 and

1332, respectively, and 15 deer/square mile in both Wildlife Analysis Areas combined.

112. Deer modeling the Forest Service has done using Size-Density data (instead of Vol-Strata data) for the 2008 TLMP Adjustment FEIS, revealed that that the current (2006) deer habitat capabilities in Wildlife Analysis Areas 1317 and 1332 is approximately 11 and 17, respectively, and 14 deer/square mile in both Wildlife Analysis Areas combined when the Deer Multiplier was correctly matched to a Habitat Suitability Index of 1.3. This is an indication that implementing the project will worsen a failure to provide sufficient deer habitat for wolf viability and subsistence uses.

113. The Soda Nick project analysis uses the Deer Model to make a determination that there may already be a significant possibility of a significant restriction on subsistence use of deer Wildlife Analysis Areas 1317 and 1332 due to cumulative effects. The carrying capacity for deer as determined by the Deer Model was compared to the estimated demand of hunters for deer (in number of deer) to determine whether or by how much the demand exceeds the 20% ANILCA threshold. This comparison was used to evaluate the risk that regulatory orders or defacto circumstances will restrict hunting or bag limits; however, the fact that ADF&G opposes this method of analysis was not disclosed. Moreover, applying the Deer Model with Size-Density data and the correct multiplier would reveal that project implementation is likely to contribute to such restrictions and will likely lead to a significantly greater reduction in hunter success than already revealed.

114. Plaintiffs Greenpeace and Cascadia Wildlands Project timely filed an administrative appeal of the Soda Nick decision. On August 30, 2007, Tongass Forest Supervisor Forrest Cole denied plaintiffs' appeal, which constituted the final administrative

decision of the Department of Agriculture.

FIRST CLAIM FOR RELIEF

The Forest Service's Failure to Consider, Disclose and Respond to the Responsible Opposing Views and Controversy Regarding the Inaccuracy and Unreliability of the Data Set used in the Deer Model Violates NEPA and the APA

115. Plaintiffs incorporate by reference all preceding paragraphs.

116. NEPA requires the Forest Service to:

discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

40 C.F.R. § 1502.9(b). An EIS summary must stress areas of controversy, including issues raised by other agencies and the public. 40 C.F.R. § 1502.12; see also 40 C.F.R. § 1508.27(b)(4).

117. NEPA also requires the Forest Service to ensure the professional integrity, including scientific integrity of an EIS. 40 C.F.R. § 1502.24. The Forest Service must use the best available information and data to ensure the scientific integrity of an EIS. Id. at §§ 1500.1; 1502.24. The Forest Service must follow specified procedures to address gaps in data and scientific uncertainty. Id. at § 1502.22. These requirements apply equally to an EA to ensure that the Forest Service has adequately disclosed the environmental impacts of the proposal and the alternatives to the proposed action. 40 C.F.R. § 1508.9.

118. NEPA requires the Forest Service to respond to comments both individually and collectively in its final statement. 40 C.F.R. § 1504. If the Forest Service feels that no further response is necessary, it must "explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position." Id.

119. The EISs and EAs for the Scott Peak, Overlook, Traitors Cove, and Soda Nick projects violate NEPA because the Forest Service has refused to discuss or respond to the controversy over the inherent unreliability of the underlying Vol-Strata dataset it uses to support the Deer Model, and which is uncorrelated to deer habitat quality. Plaintiffs and ADF&G have repeatedly commented to the Forest Service regarding the inaccuracy and unreliability of the Vol-Strata dataset. Plaintiffs and ADF&G have also recommended the use of more accurate and reliable datasets (TimTyp and Size-Density), but the Forest Service has refused to discuss the accuracy and reliability of the underlying datasets in the NEPA analyses for its projects. By omitting this discussion and denying the controversy, the Forest Service has not considered or responded to these responsible opposing views, which are supported by reputable science and leading scientists. Moreover, the Forest Service has acknowledged the need to move to a more accurate dataset through its use of the Size-Density dataset in the 2007 TLMP DEIS and the 2008 TLMP FEIS.

120. Defendants' failure in its EISs and EAs to discuss the scientific controversies and ensure the professional and scientific integrity in the use of an inaccurate and unreliable dataset in the Deer Model violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and NEPA's implementing regulations, and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2).

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SECOND CLAIM FOR RELIEF

The Forest Service's Failure to Consider, Disclose and Respond to the Responsible Opposing Views and Controversy Regarding the Inaccurate Use of the Deer Multiplier Used in the Deer Model Violates NEPA and the APA

121. Plaintiffs incorporate by reference all preceding paragraphs.

122. The EISs and EAs for the Scott Peak, Overlook, Traitors Cove, and Soda Nick projects violate NEPA because the Forest Service has refused to disclose to the public or respond to the controversy over the erroneous application of the Deer Multiplier to the Deer Model's Habitat Suitability Index. Plaintiffs and the ADF&G have repeatedly commented to the Forest Service regarding the agency's error in matching the Deer Multiplier of 100 deer/square mile (the maximum) to the Deer Model's Habitat Suitability Index of 1.0 (where 1.3 is the maximum), yet the Forest Service has not disclosed or considered these responsible opposing views, which are supported by reputable science and leading scientists. By omitting this discussion and denying the controversy, the Forest Service has violated NEPA's requirement to ensure the professional integrity, including the scientific integrity, of the projects' analysis.

123. Defendants' failure in its EISs and EAs to discuss the scientific controversies and ensure professional and scientific integrity in its application of the Deer Model and the use of the deer multiplier to determine deer habitat capability violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and NEPA's implementing regulations, and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2).

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Greenpeace et al. v. Cole et al., Case No.

PAGE 40 - COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF

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THIRD CLAIM FOR RELIEF

The Forest Service's Determination of Compliance with the TLMP Standard and Guideline WILD112 XI.A.3 Related to Deer Habitat Capability is Arbitrary and Capricious, which Violates NFMA and the APA.

124. The National Forest Management Act, 16 U.S.C. § 1604(i), requires that contracts, including for the sale of timber, be consistent with the governing land and resource management plan.

125. Standard and Guideline WILD.XI.A.3 and subsequent directives from Forest Supervisor Cole require the Forest Service to provide a habitat carrying capacity, as determined by the Deer Model, of at least 18 deer/square mile.

126. The Forest Service's determination that the Scott Peak, Overlook, Traitors Cove, and Soda Nick projects will comply with the 18 deer/square mile requirement is arbitrary and capricious, because the Forest Service relied upon the Vol-Strata dataset, which is uncorrelated to deer habitat quality, and misapplied that Habitat Suitability Index. These projects are therefore arbitrary, capricious, not in accordance with law, and in violation of the Administrative Procedure Act, 5 U.S.C. 706(A)(2).

FOURTH CLAIM FOR RELIEF

The Forest Service's Reliance on an Inadequate Habitat Dataset Not Reasonably Reliable to Determine Deer Habitat Capability, Given more Accurate and Reliable Datasets, Violates NFMA and the APA

127. Plaintiffs incorporate by reference all preceding paragraphs

128. NFMA imposes a duty on the Forest Service to preserve and enhance the diversity of plants and animals, consistent with overall multiple-use objectives stated in a Forest Plan. 16 U.S.C. § 1604(g)(3)(B). The NFMA and its implementing regulations impose a duty on the

Forest Service to utilize reliable and verified scientific data and methodology to support its viability determinations and its determinations of habitat capability for management indicator species. 16 U.S.C. § 1604(b); 36 C.F.R. §§ 219.5(a); 219.19 (1999).

129. The Ninth Circuit has held that the Forest Service violates NFMA by relying on inadequate habitat monitoring data that were not reasonably reliable to determine habitat capability for its MIS. Earth Island Institute v. U.S. Forest Service, 442 F.3d 1147, 1176 (9th Cir. 2006); see also Lands Council v. McNair, -- F.3d -- (Slip Op. at pg. 37) (July 2, 2008) (stating that the Forest Service may not base “its habitat calculations on outdated or inaccurate information” in making viability determination).

130. In its analysis of the Scott Peak, Overlook, Traitors Cove, and Soda Nick projects, the Forest Service has relied on inadequate and unreliable data to support its determinations of habitat capability for deer (an MIS) and wolves (an MIS) by using the Vol-Strata dataset to support its Deer Model, in violation of NFMA and its implementing regulations. Furthermore, the Forest Service’s use of the outdated Vol-Strata dataset, known to be uncorrelated to deer habitat quality and which provides inaccurate estimates when other more reliable and accurate datasets (TimTyp and Size-Density) are available to support the Deer Model, violates NFMA and its implementing regulations.

131. Defendants’ use of unreliable and inaccurate data to support its MIS and viability determinations in the Scott Peak, Overlook, Traitors Cove, and Soda Nick project analysis violated and is continuing to violate Section 6(c) of NFMA, 16 U.S.C. § 1604 *et seq.*, and NFMA’s implementing regulations, and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning

of the APA, 5 U.S.C. § 706(2).

FIFTH CLAIM FOR RELIEF

The Forest Service's Failure to Consider the "Best Available Science" in its Application of the Deer Model Violates NFMA and the APA

132. Plaintiffs incorporate by reference all preceding paragraphs.

133. After the 2005 NFMA rule was set aside, the Forest Service elected to reinstate the 2000 NFMA rule, which requires that site-specific projects comply with the transition requirements of 36 C.F.R. § 219.35 (2004) as modified by the Forest Service's 2004 NFMA Interpretive Rule. That regulation applies to all project decisions on the Tongass National Forest (because projects implement plans, 16 U.S.C. §1604(i)) and requires the Forest Service to consider the best available science in implementing the current plan. 36 C.F.R. § 219.35(a) (2007). The Scott Peak, Overlook, Traitors Cove, and Soda Nick project decisions all implement the 1997 TLMP, which at the time of these decisions was the current plan.

134. In its consideration of the best available science, the Forest Service must: (1) seek out and consider all existing scientific evidence relevant to its decision, (2) cannot ignore existing data, and (3) must determine which scientific data are the most accurate, reliable, and relevant. See Ecology Center v. U.S. Forest Service, 451 F.3d 1183 (10th Cir. 2006).

135. The Forest Service has violated NFMA and its regulations, in its use of the inaccurate and unreliable Vol-Strata, which violates NFMA's "best available science" regulations by failing to consider more accurate and reliable and scientifically-supported datasets in its project analysis. The improper use of the unreliable dataset uncorrelated to deer habitat quality is significant because in combination with the Deer Multiplier error an overestimate of habitat quality at least by as much as 120% may be caused. Use of an accurate and reliable

dataset (especially when combined with corrected use of the Deer Multiplier) is likely to reveal that the Forest Service cannot meet its requirements to maintain wolf viability and subsistence needs in implementing the projects challenged by this action.

136. For the Scott Peak, Overlook, Traitors Cove, and Soda Nick projects, in its application of the Deer Multiplier in the Deer Model, the Forest Service has not considered the best available science, which requires the Deer Multiplier of 100 deer/square mile (the maximum capacity) to be matched with the maximum Habitat Suitability Index value in the Deer Model of 1.3. Instead, the Forest Service continues to match the Deer Multiplier to a lesser Habitat Suitability Index value of 1.0 in contravention of the best available science. In its analysis, the Forest Service has failed to: (1) seek out and consider the relevant scientific evidence about the correct application of the Deer Multiplier, (2) address the existing data that corrects the erroneous application of the Deer Multiplier in the Model, and (3) determine which scientific data is the most accurate, reliable, and relevant in correctly applying the Deer Multiplier to the Deer Model.

137. Defendants' failure to consider the "best available science" in its application of the Deer Model to the Scott Peak, Overlook, Traitors Cove, and Soda Nick project areas violated and is continuing to violate Section 6(c) of NFMA, 16 U.S.C. § 1604 *et seq.*, and NFMA's implementing regulations, and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2).

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SIXTH CLAIM FOR RELIEF

The Forest Service's Failure to Prepare EISs for the Overlook and Soda Nick Projects when There Are Substantial Questions about the Significance of the Projects' Effects on the Environment Violates NEPA and the APA

138. Plaintiffs incorporate by reference all preceding paragraphs.

139. NEPA requires the Forest Service to prepare a detailed EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). To determine whether a project will have “significant” impacts on the environment, the Forest Service must consider the intensity of the proposed action and must evaluate “the degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b)(4).

140. The Ninth Circuit has held that a project is considered controversial if substantial questions are raised as to whether the project may cause significant degradation of some human environmental factor, thereby requiring the preparation of an EIS. Anderson v. Evans, 371 F.3d 475, 489 (9th Cir. 2004); Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir.1992).

141. Forest Service has violated NEPA and its implementing regulations by failing to prepare an EIS for each of the Overlook and Soda Nick projects. These projects are highly controversial because Plaintiffs have raised substantial questions about the significance of the projects' effects on the environment.

142. First, the Forest Service's use in the Deer Model of the inaccurate and unreliable Vol-Strata dataset that is uncorrelated to deer habitat quality is highly controversial because Plaintiffs have raised substantial question about the intensity of the Overlook and Soda Nick projects. If it were to be required, use of the more accurate and reliable TimTyp or Size-Density

datasets in the Deer Model is likely to show that the project areas cannot meet deer subsistence and wolf viability requirements, which is significant.

143. Second, the Forest Service's application of the Deer Multiplier in the Deer Model is highly controversial because Plaintiffs have raised substantial questions about the intensity of the Overlook and Soda Nick projects based on the Forest Service's erroneous application of the Deer Multiplier, the correction of which is likely to show that the project areas cannot meet deer subsistence and wolf viability requirements, which is significant.

144. Third, the Forest Service's misuse of the Deer Model that overestimates deer numbers for subsistence hunting is highly controversial because Plaintiffs have raised substantial questions about the intensity of the projects, which may cause the Alaska Board of Game or the Federal Subsistence Board to impose hunting restrictions or may otherwise cause significant decreases of hunter success in the Overlook and Soda Nick project areas, which is significant.

145. Defendants' issuance of FONSI's and failure to prepare EIS's for the Overlook and Soda Nick project areas due to their significance, intensity, and highly controversial nature violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and NEPA's implementing regulations, and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2).

SEVENTH CLAIM FOR RELIEF

The Forest Service's Failure to Disclose and Analyze the Many Shortcomings of the Deer Model and the Fact that Relevant Data Used in the Deer Model is Incomplete or Unavailable Violates NEPA and the APA

146. Plaintiffs incorporate by reference all preceding paragraphs.

147. NEPA requires that an EIS contain high-quality information and accurate scientific analysis. 40 C.F.R. § 1500.1(b). If relevant data is incomplete or unavailable, the EIS must disclose this fact. 40 C.F.R. § 1502.22. These requirements apply equally to an EA to ensure that the Forest Service has adequately disclosed the environmental impacts of the proposal and the alternatives to the proposed action. 40 C.F.R. § 1508.9. In applying NEPA's scientific accuracy and analysis requirements, the Ninth Circuit has held that the Forest Service must provide an up-front disclosure of any shortcomings in the data or models it uses in its NEPA analysis. Lands Council v. Powell, 395 F.3d 1019, 1032 (9th Cir. 2005).

148. The EISs and EAs for the Scott Peak, Overlook, Traitors Cove, and Soda Nick projects violate NEPA because the Forest Service has not provided an upfront disclosure of the many shortcomings of the Deer Model to accurately determine deer habitat capability, including the model's optimistic bias; its misleading implication of false precision; its disregard for habitat juxtaposition, patch characteristics, and fragmentation; its disregard for stochastic and catastrophic events (including severe winters); its erroneous assumption of a linear carrying capacity / population relationship; its operation with data uncorrelated to habitat quality; and the fact that the Forest Service has produced no comprehensive documentation for the current model.

149. Defendants' failure in its EISs and EAs to provide an upfront discussion in its NEPA analysis for the Scott Peak, Overlook, Traitors Cove, and Soda Nick project areas of the relevant shortcomings of the Deer Model in which relevant data is incomplete or unavailable violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and NEPA's implementing regulations, and is arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning

of the APA, 5 U.S.C. § 706(2).

PLAINTIFFS' PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment in favor of Plaintiffs and issue the following relief:

I. Declare that Defendants violated the National Environmental Policy Act, the National Forest Management Act, and their implementing regulations in preparing and approving the Scott Peak and Traitors Cove Environmental Impact Statements and Records of Decision; and the Overlook and Soda Nick Environmental Assessments, Findings of No Significant Impact, and Decision Notices;

II. Declare that the Forest Service violated NEPA and its implementing regulations in its analysis of the Scott Peak, Overlook, Traitors Cove, and Soda Nick proposals:

A. by failing to consider, disclose and respond to the responsible opposing views and controversy regarding the inaccuracy and unreliability of the Vol-Strata dataset used in the Deer model;

B. by failing to consider, disclose and respond to the responsible opposing views and controversy regarding the inaccurate use of the Deer Multiplier used in the Deer Model;

C. by failing to disclose and analyze the many shortcomings of the deer model and the fact that relevant data used in the deer model is incomplete or unavailable;

III. Declare that the Forest Service violated NEPA and its implementing regulations in its analysis of the Overlook and Soda Nick proposals by issuing Findings of No Significant Impact and failing to prepare EISs because Plaintiffs have raised substantial questions about the

significance of the projects' effects on the environment;

IV. Declare that the Forest Service violated NFMA and its implementing regulations in its analysis of the Scott Peak, Overlook, Traitors Cove, and Soda Nick proposals:

A. by failing to consider the best available science in its use of the Vol-Strata dataset when it should have considered using the TimTyp or Size-Density datasets instead;

B. by failing to consider the best available science in its application of the Deer Multiplier in the Deer Model;

C. by failing to demonstrate that the projects comply with the TLMP requirement for deer habitat capability; and

D. by using the inaccurate and unreliable Vol-Strata dataset to support its viability determinations and its determinations of habitat capability for management indicator species of deer and wolves;

V. Declare that the Scott Peak, Overlook, Traitors Cove, and Soda Nick NEPA analyses and decisions are insufficient as a matter of law, and set aside the Forest Service's NEPA analyses and decisions until such time as Defendants adequately comply with the law;

VI. Through Preliminary and Permanent Injunctions enjoin Defendants and their agents from proceeding with the proposed Scott Peak, Overlook, Traitors Cove, and Soda Nick projects, or any associated activities, unless and until the violations of federal law set forth herein have been corrected;

VII. Award Plaintiffs their costs of suit and attorneys fees; and

VIII. Grant Plaintiffs such other and further relief as the Court deems just and equitable.

DATED this 10th day of July, 2008

Respectfully submitted,

/s/ Christopher Winter

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PROOF OF SERVICE

I hereby certify that on this 10th day of July, 2008, a true and accurate copy of the foregoing with attachments was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email addresses, to:

/s/ Christopher Winter

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