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by

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THE TONGASS TIMBER REFORM ACT: RESTORING RATIONALITY AND RESPONSIBILITY TO THE MANAGEMENT OF AMERICA'S LARGEST NATIONAL FOREST

*Daniel G. Drais**

Southeast Alaska is an archipelago 500 miles long and about 100 miles wide located between the Pacific Ocean and the Coast Mountains on the U.S.-Canadian border. Seventy percent of its population lives in Juneau, Sitka, and Ketchikan, although there exist hundreds of villages and tiny townships of a few hundred people or less.¹ The federal government owns about 85% of the land in Southeast.² It owns 97% of the timber land.³ Nearly all of the government holdings in Southeast lie within the boundaries of the Tongass National Forest.

Created by President Roosevelt in 1907, the Tongass National Forest is America's largest national forest.⁴ Its 16.8 million acres make it slightly smaller than West Virginia, but larger than South Carolina.⁵ Over 200 inches of precipitation each year creates a true rain forest ecosystem in many of the low-altitude parts of the forest.⁶ In those same areas, abundant, commercially valuable growths of western and yellow cedar, Sitka spruce, and western hemlock often occur.⁷ Where watersheds have not been destroyed by fire, disease, or logging, stands of giant trees ten feet across tower 250

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¹ See G. Rogers, *The Southeast Alaska Regional Economy and Communities: Evolution and Structure* 50 (1985) (copy on file in the offices of the Virginia Environmental Law Journal).

² House Comm. on Interior and Insular Affairs, Report to Accompany H.R. 1516, H.R. Rep. No. 600, 100th Cong., 2d Sess. 4 (1988) [hereinafter Committee Report].

³ *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, No. C75-165SR (W.D. Wash. June 8, 1981) (Westlaw, 1981 WL 2124), *aff'd*, 699 F.2d 1292 (9th Cir. 1983), *cert. denied*, 464 U.S. 916 (1983).

⁴ U.S. General Accounting Office, *Tongass National Forest: Timber Provision of the Alaska Lands Act Needs Clarification* 10 (1988) [hereinafter GAO Report]; Committee Report, *supra* note 2, at 5.

⁵ The Wilderness Society, *America's Vanishing Rain Forest: A Report on Federal Timber Management in Southeast Alaska* 1 (1986) [hereinafter AVRFP]; P. Emerson & R. Turnage, *The Great Tongass Timber Heist: Vested Interests and Obsolete Policies on the National Forests* 1 (1986) (unpublished manuscript presented at the Political Economy Research Center's National Conference for Journalists in Big Sky, Montana (Oct. 8-11, 1986)) (copy on file in the offices of the Virginia Environmental Law Journal).

⁶ Barlow, *Mandate for Oblivion*, Wilderness, Spring 1984, at 25-26.

⁷ *Id.* at 26.

feet high, their thick branches forming a canopy strong enough to keep the winter snowfall from covering the forest floor.⁸ An incredible array of wildlife depends upon such a habitat; so, too, do numerous communities supported by the timber industry. The United States Forest Service (USFS), charged with managing the forest, must try to maintain a precarious balance between the competing values of environmentalists, non-timber-related users of forest resources, and those who depend on the timber industry.

Because the present management scheme has failed to adequately serve any of the groups dependent upon Tongass resources, Congress last session made substantial progress towards passing legislation⁹ which would significantly alter the way the Forest Service currently manages the forest. The Alaska Congressional delegation and timber industry advocates claim that the proposed changes would threaten the economies and even the existence of dozens of towns and villages. On the other hand, advocates of the legislation fear that without prompt action, the country's largest remaining old-growth rain forest faces imminent extinction — generously paid for by the federal government.

This note examines the history of logging in the Tongass, the management structure established by Congress in 1980, the economic and ecological costs associated with the current regime, and how last year's proposed legislation would have affected the forest. Are new laws necessary to preserve an irreplaceable resource? Would this legislation accomplish that purpose? Would the price be paid by the people of Southeast whose jobs would disappear, whose schools would close, and whose economy would collapse? Is the old-growth timber resource, in fact, irreplaceable? Congress must confront these questions this year as it again considers Tongass timber reform legislation.¹⁰

⁸ *Id.*

⁹ The Tongass Timber Reform Act, H.R. 1516, 100th Cong., 2nd Sess., 134 Cong. Rec. H5940-51 (daily ed. July 27, 1988).

¹⁰ Four bills proposing reforms in the management of the Tongass National Forest had been introduced in the 101st Congress at the time this note was prepared for publication. See S. 237, 101st Cong., 1st Sess., 135 Cong. Rec. S678 (daily ed. Jan. 25, 1989) (introduced by Sen. Murkowski); S. 346, 101st Cong., 1st Sess., 135 Cong. Rec. S1105 (daily ed. Feb. 2, 1989)(introduced by Sen. Wirth); S. 324, Title XI, 101st Cong., 1st Sess., 135 Cong. Rec. S1050 (daily ed. Feb. 2, 1989)(introduced by Sen. Wirth); H.R. 987, 101st Cong, 1st Sess., 135 Cong. Rec. H273 (daily ed. Feb. 9, 1989)(introduced by Rep. Mrazek). Because significant action on these bills is not predicted until summer, the focus of this note will be on last session's legislation. The note will, however, indicate differences found in the new bills where appropriate.

I. THE TONGASS BEFORE THE ALASKA NATIONAL INTEREST LAND CONSERVATION ACT (ANILCA)¹¹

The management of Tongass resources is controlled by statute to a degree not found in the management of any other national forest.¹² To understand how this came about, one must become acquainted with the history of logging in the Tongass.

A. Forest Service Efforts to Stabilize Southeast

In many ways the history of the Tongass in this century is the history of the Forest Service's attempts to "encourage settlement of Southeast Alaska by using Tongass timber to establish a pulp industry."¹³

Theodore Roosevelt created the Tongass National Forest during the era of utilitarian conservationism propounded by men such as Gifford Pinchot. A 1910 Forest Service analysis of the forest reflected this philosophy when it recommended that timber "be cut and utilized as soon as possible."¹⁴ The Forest Service suggested that the Tongass be divided into fourteen "working circles," or timber regions, each with its own pulp mill.¹⁵ The USFS pursued that goal vigorously for most of four decades, but without success.¹⁶

The 1940's saw both mining and salmon fishing in the region decline drastically.¹⁷ At the same time, veterans returning home after the war needed jobs. In the lower forty-eight, post-war America was experiencing a tremendous construction boom, greatly strengthening the market for wood products. Alaska politicians and the USFS together renewed their attempts during this period to establish a permanent large-scale timber industry in Southeast.¹⁸ Passage of the Tongass Timber Sale Act in 1947¹⁹ removed

¹¹ Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 539d & 539e, 1132, 3101-3233 and in scattered sections of 16 and 33 U.S.C. (1982 & Supp. IV 1986)).

¹² Committee Report, *supra* note 2, at 19.

¹³ *Id.* (citing AVRF, *supra* note 5, at 23-50).

¹⁴ AVRF, *supra* note 5, at 28 (quoting R. Kellogg, *The Forests of Alaska* 27 (1910)). See also Rogers, *supra* note 1, at 9-10 (discussing the Kellogg report and early Forest Service efforts to develop the Tongass).

¹⁵ Rogers, *supra* note 1, at 9.

¹⁶ *Id.* at 9-10; G. Rogers, *Alaska in Transition: The Southeast Region* 292-93 (1960).

¹⁷ Rogers, *supra* note 1, at 5-7.

¹⁸ Rogers, *supra* note 1, at 12.

¹⁹ Pub. L. No. 80-385, 61 Stat. 920 (1947). The Act provided that the proceeds of the sales would be held in escrow until title was cleared.

the last major obstacle by authorizing timber sales from federal holdings despite pending Native claims to title of the land. The Committee Report from the House version of that Act expressed the dominant feeling that "the establishment of important business enterprises and the employment of many persons . . . on a year-round basis is essential to the maintenance of a prosperous and stable economy in the Territory."²⁰

B. An Overview of the Fifty-year Contracts

In the early 1950's the Forest Service capitalized on the strong world market for wood products and the availability of labor in Alaska by signing four unusually long-term timber purchase agreements. The first contract, signed in 1951, obligated the Service to provide 8.25 billion board feet (BBF)²¹ of timber over fifty years. The purchaser, the Ketchikan Pulp Company (LPK),²² agreed in return to build a pulp mill near Ketchikan. The contract's term began upon commencement of operations in 1954. A similar arrangement was signed in 1953 with the Alaska Lumber & Pulp Company (APC),²³ and provided for five BBF to be sold by 2011. In return, APC built a pulp mill in Sitka. APC took over and completed a third contract when the purchaser failed to build a mill, and a fourth was eventually cancelled by mutual agreement.

In those four contracts, the Forest Service finally realized its goal of developing "working circles" centered on pulp mills. The bulk of the volume of timber in each contract must be drawn from certain long-term "allotments" of land.²⁴ The contract holders wield considerable influence in selecting the timber "released" by the Forest Service within these allotments.²⁵ While not a normal USFS sale provision, this arrangement certainly increases efficiency, because the establishment of logging camps and the trans-

²⁰ *Management of the Tongass National Forest: Oversight Hearings Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. 272 (1986) [hereinafter *Oversight Hearings*] (testimony of Joe Galen, Executive Vice-President of the Alaska Loggers Association) (quoting H.R. Rep. No. 873, 80th Cong., 1st Sess. (1947)).

²¹ A board foot is a unit of measure denoting a volume of wood equivalent to a board measuring twelve inches by twelve inches by one inch.

²² The company is sometimes referred to as Louisiana Pacific/Ketchikan. It shall be referred to as such herein.

²³ Alaska Lumber & Pulp is now the Alaska Pulp Corp.

²⁴ AVRF, *supra* note 5, at 34.

²⁵ Committee Report, *supra* note 2, at 6.

portation of logs to the mills are major expenses. The working circles diminish costs associated with both of these factors.

Several other provisions of the contracts are similarly unusual. The fifty-year term, for instance, is unprecedented, as is the enormous volume of timber contracted to the purchasers.²⁶ The contracts' stumpage rates — the price paid per thousand board feet for standing timber — were then and remain significantly lower than the rates paid by loggers who bid competitively for the ordinary Tongass non-contract sale.²⁷ Equally important, the long-term purchasers possess "an exceptional degree" of control over when, where, and even whether to log the tracts proposed by the USFS.²⁸ The fifty-year contracts also uniquely established an "emergency rate redetermination" procedure for periods when the stumpage price, ordinarily set at five-year intervals, becomes uneconomical. The Forest Service felt that the risk of constructing a mill in Southeast before the industry had established itself justified these extraordinary terms.²⁹ Moreover, the potential benefits the mills could provide Southeast communities in the form of jobs, taxes, population growth, and stability, indisputably merited some substantial concessions. Accordingly, the purchase agreements "were intended to provide only nominal revenues to the Federal government."³⁰ The goal was to get the industry established, and therefore, to harvest trees quickly; in other words, "to convert as quickly as possible the old growth climax stands to a new forest."³¹ Pinchot's utilitarian philosophy still dominated the Forest Service.

²⁶ *Id.* at 4.

²⁷ "[S]ome analysts suggested the government had given the timber away." AVRF, *supra* note 5, at 34. For a comparison of short-term purchasers' prices and long-term contract-holders' prices, see *infra* note 165 and accompanying text.

²⁸ Committee Report, *supra* note 2, at 6-7.

²⁹ *Id.* According to one source, the total investment required for each mill was about \$50 million. G. Rogers, *Alaska in Transition: The Southeast Region* 78, 83 (1960). Sen. Murkowski stated that the replacement value of the APC mill is around \$600 million. *Alaska Timber Contract Modification Act: Hearing before the Subcomm. on Energy and the Env't of the House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. 28 (1987) [hereinafter *Contract Modification Hearings*].

³⁰ Committee Report, *supra* note 2, at 6.

³¹ AVRF, *supra* note 5, at 36 (quoting USFS, *Timber Management Plan, Tongass National Forest, 1958-1967* at 20 (1958)).

C. *The National Forest Management Act,³² The Tongass Land Management Plan,³³ and the Tongass*

Congress passed the National Forest Management Act of 1976 (NFMA) in an effort to foster comprehensive planning and efficient, balanced management of forest resources. The Act's directives and standards varied dramatically in some aspects from the practices in the Tongass, especially where the fifty-year contracts were concerned.³⁴ Despite the justifications for the extraordinary terms explained above, Congress wrote into NFMA a provision requiring the USFS to bring the Tongass contracts into compliance with the standards applicable to the other national forests.³⁵

The Service had to develop NFMA regulations before it could pursue compliance. That took until 1979.³⁶ However, the first five-year operating plans developed for the long-term purchasers after promulgation of the regulations failed to even approach compliance with NFMA.³⁷ The next two plans — those in effect at the moment — accomplished little more.³⁸

A more successful result of NFMA was the preparation and issuance of the Tongass Land Management Plan (TLMP), the first management plan developed under NFMA. Finalized in the spring of 1979, TLMP inventoried and divided the Tongass into more than 850 watersheds. Each watershed received a Land Use Designation of I to IV, corresponding to planned levels of development from wilderness to intensive harvesting.³⁹ The Plan expressly anticipated steady demand for Southeast timber over the years 1979 to 1989, such that 4.5 BBF per decade would be needed, purchased, and harvested.⁴⁰ TLMP's development coincided with in-

³² Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600-1614 and in scattered sections of 16 U.S.C. (1982 and Supp. IV 1986)).

³³ USFS, Tongass Land Management Plan (1979) [hereinafter TLMP]. The more recent TLMP amended in 1985-86 incorporates and supersedes where relevant the original 1979 document. USFS, Tongass Land Management Plan, Amended Winter 1985-86 (1986) [hereinafter TLMP Amended].

³⁴ See Committee Report, *supra* note 2, at 6-7 (listing discrepancies such as the amount of purchaser discretion over harvesting terms, infrequent and overly generalized review pursuant to the National Environmental Policy Act (NEPA), and the extraordinary volume of guaranteed timber). NEPA is codified at 42 U.S.C. §§ 4321-4370a (1982 & Supp. IV 1986).

³⁵ NFMA §15(b), Pub. L. No 94-588, 90 Stat. 2960-61 (1976), *reprinted* in notes following 16 U.S.C.A. § 476 (1985).

³⁶ 36 C.F.R. § 219.1-.29 (1988).

³⁷ Committee Report, *supra* note 2, at 7.

³⁸ *Id.* at 7, 14-15.

³⁹ AVRF, *supra* note 5, at 46 (citing TLMP, *supra* note 33).

⁴⁰ GAO Report, *supra* note 4 (citing TLMP, *supra* note 33).

creasing debate in Congress over the disposition of Alaska lands. The Plan laid the foundation for the law that now controls Tongass management.

II. ANILCA AND THE TONGASS

The mills in Sitka and Ketchikan operated according to plan through the 1950's and 1960's.⁴¹ They markedly affected the local economies, just as the USFS had predicted. From 1949 to 1953, fisheries produced 87% of the region's commodities, while from 1960 to 1963 its share had dropped to half of that, with timber picking up the difference.⁴² Native claims to land throughout Alaska persisted, however, clouding the future.

A. *Prelude to the Present Tongass Management Program in ANILCA: The Alaska Native Claims Settlement Act*⁴³

The Alaska Native Claims Settlement Act of 1971 (ANCSA) began the resolution of the Native claims. More importantly, it ensured and necessitated the subsequent passage of a comprehensive Alaska lands act. ANCSA first resolved the title disputes, giving the Natives nearly \$1 billion in trust and forty-four million acres of land in return for the abandonment of all aboriginal claims.⁴⁴ Second, section 17(d)(2) of the Act⁴⁵ authorized the Secretary of the Interior to withdraw eighty million acres of federal land for evaluation as to its suitability for inclusion in the "national interest" lands system (parks, forests, wilderness, wildlife refuges, etc.). Congress would then make actual selection and designation after considering the Secretary's suggestions.⁴⁶ The designation of these "(d)(2)" lands — five million acres of which Congress drew from the Tongass — and the resulting effect of their withdrawal on local communities sparked intense debate, which culminated in ANILCA, the law currently controlling management of the Tongass. Finally, ANCSA also authorized certain Native corporations

⁴¹ That is, the mills operated according to plan except for engaging in extensive antitrust activity, which presumably was not planned. See *infra* notes 185-205 and accompanying text.

⁴² AVRF, *supra* note 5, at 36 (citing G. Rogers, *The Economic Importance of Commercial Fishing in the Southeastern Alaska Region* 34 (1982)).

⁴³ Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1628 (1982 and Supp. III 1985)).

⁴⁴ ANCSA §§ 4 & 6, 43 U.S.C. §§ 1603(b) & 1605 (1982).

⁴⁵ 43 U.S.C. § 1616(d)(2)(A) (1982).

⁴⁶ *Id.*

to select over half a million acres of prime timberland then within the Tongass.⁴⁷ This gave Natives a solid foothold in the Southeast timber market.⁴⁸ As the next several years demonstrated, Native timber was to absorb much of the demand for Tongass wood products and contribute to the instability of the Tongass timber industry.

B. ANILCA: Legislative History

No one disputes that the primary purpose of Congressional action on "(d)(2) lands" in the Tongass was to "designate wilderness without job loss."⁴⁹ Congress intended the wilderness designations not to reduce the amount of timber available to the industry, and this was expressly stated a number of times.⁵⁰ The problem seemed to be in deciding how much wilderness was too much. Bills offering varying combinations of wilderness and "special management areas" (lands set aside to be designated ten years hence as either wilderness or timber supply) were considered in 1978 and 1979.⁵¹ In May 1979 the House overwhelmingly passed a bill designating 5.86 million acres of wilderness.⁵² This number was based largely on USFS assumptions in TLMP, which had stated that 5.5 million wilderness acres would still allow an annual harvest of 450 million board feet (MMBF), an amount sufficient to provide some growth from 1979 employment levels.⁵³ But the Senate Committee on Energy and Natural Resources reported a somewhat different bill the next year, reducing the wilderness acreage and adding acreage to special management areas.⁵⁴ It was thought this would supply a commercial base adequate to provide 520 MMBF annually.⁵⁵ On

⁴⁷ See *Id.*; TLMP Amended, *supra* note 33, at B-2.

⁴⁸ AVRf, *supra* note 5, at 42; Committee Report, *supra* note 2, at 11.

⁴⁹ 126 Cong. Rec. 21,883 (1980) (statement of Sen. Henry Jackson, Chairman, Senate Energy Committee).

⁵⁰ "This Congressional intent is explicit in all the Committee reports, in both the 95th and 96th Congresses, and in the floor debates." Committee Report, *supra* note 2, at 7.

⁵¹ See, e.g., H.R. 39, 96th Cong., 1st Sess., 125 Cong. Rec. 128 (1979) (proposing 6.5 million acres of wilderness); H.R. 39 as amended by the Senate, S. Rep. No. 1300, 95th Cong., 2d Sess. (1978) (proposing 2.88 million acres of wilderness and 1.75 million acres of special management areas); H.R. 39, 95th Cong., 2d Sess., 123 Cong. Rec. 126 (1977) (proposing 2.4 million acres of wilderness).

⁵² H.R. 39, 96th Cong., 1st Sess., 125 Cong. Rec. 11,459 (1979).

⁵³ 126 Cong. Rec. 21,883 (1980) (statement of Sen. Stevens).

⁵⁴ H.R. 39, §§ 701-05, *reprinted in* Senate Committee on Energy & Natural Resources, Report to Accompany H.R. 39, S. Rep. No. 413, 96th Cong., 1st Sess. 29-32 (1979).

⁵⁵ *Id.* at 228-29.

the Senate floor this bill was replaced by a substitute shortly before the break for the 1980 elections.⁵⁶ This last version of the bill passed as ANILCA after the elections, without having gone to a conference committee for compromise.⁵⁷

Political tensions ran high as Congress debated ANILCA. In late 1978, when members of the two houses of Congress seemed unable to fashion any sort of compromise legislation, the Carter Administration abruptly decided to act on Executive authority. Relying on the Antiquities Act of 1906⁵⁸ and the Federal Land Policy and Management Act of 1976,⁵⁹ the Administration withdrew 166 million acres of Alaska land from possible resource development.⁶⁰ Much of this land was in Southeast, and barring subsequent legislation or judicial intervention, the withdrawals were permanent.⁶¹ Timber interests and other development advocates naturally felt pressured by this move to come closer to the environmentalists' position.⁶²

Two years later, with the (d)(2) designations still unresolved, the shoe was on the other foot. Following the election of President Reagan and a Republican-dominated Congress, Democrats perceived that time was running out for ANILCA as they hoped to enact it. Instead of risking the loss to the next Administration and Congress of the entire lands act, of which the Tongass provisions were only a part, they thus reluctantly supported the "compromise" from the Senate floor in late 1980 — an act with wilderness designations (although less than the House had sought), but also with a harvest mandate, non-appropriated funds at the Secretary's disposal, and freedom from NFMA section 6(k).⁶³ "We had no choice The House had to go along with the Senate version or there would have been no Alaska lands bill passed that year at all," said John Sieberling, former chairman of the House subcommittee

⁵⁶ H.R. 39, 96th Cong., 2d Sess., 126 Cong. Rec. 21,891 (1980).

⁵⁷ *Id.* at 31,394.

⁵⁸ 16 U.S.C. § 431 (1982).

⁵⁹ 43 U.S.C. § 1714(e) (1982).

⁶⁰ Executive Orders Nos. 4611-27, 43 Fed. Reg. 57,009-131 (1978) (withdrawing and designating lands as national monuments). *See also* S. Rep. No. 113, 96th Cong., 2d Sess. 133 (1980).

⁶¹ H.R. Rep. No. 97, Pt. I, 96th Cong., 1st Sess. 142-43 (1979).

⁶² AVRF, *supra* note 5, at 48.

⁶³ ANILCA §§ 703, 705, 16 U.S.C. §§ 539d, 1132 (1982). NFMA § 6(k) (codified at 16 U.S.C. § 1604(k) (1982)), requires the Secretary of Agriculture to identify lands not suitable for timber production for economic, physical, or other reasons.

on Alaska lands.⁶⁴ From this perspective, ANILCA was neither a deal nor a compromise, but was and should be treated as a contract signed under duress. On the other hand, Senator Stevens of Alaska maintains that the final compromise was proposed by environmental advocates as a way to "lock up" in permanent wilderness land that which would have been at risk in special management areas.⁶⁵ He denies that the law resulted from political extortion, insisting that the ANILCA provisions relating to logging in the Tongass were the product of careful negotiation. He argues that environmentalists obtained in ANILCA a sweeping Alaska lands act; development advocates merely negotiated some concessions in exchange for allowing the Act to pass.⁶⁶ This interpretation is shared by many timber-oriented people. To change the law now, they argue, would be to renege on a deal.⁶⁷

C. Wilderness Withdrawals Under ANILCA

The lands act finally passed by Congress designated 5.5 million acres of the 16.8 million acres in the Tongass as wilderness (or national monument).⁶⁸ This removed some amount of timberland from that in the land base otherwise available to industry, but the question of how much it reduced the base has generated considerable debate between environmentalists and development advocates. The Wilderness Society maintains that "the newly designated wilderness preservation areas, with the exception of [900,000 acres on] Admiralty Island, protected primarily tundra, rock, and ice, leaving most of the old growth, virgin rain forest vulnerable to logging."⁶⁹ To see how this could be, one must first realize that only

⁶⁴ Laycock, *Trashing the Tongass*, Audubon (1987), reprinted in *Tongass Timber Reform Act: Hearings before the Subcomm. on Public Lands, National Parks, and Forests of the Senate Comm. on Energy and Natural Resources*, 100th Cong., 1st Sess. 107 (1987) [hereinafter Senate Hearings].

⁶⁵ Senate Hearings, *supra* note 64, at 16 (statement of Sen. Stevens).

⁶⁶ *Id.*

⁶⁷ See, e.g., *Tongass Timber Reform Act: Hearings before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. 505 (1987) [hereinafter 1987 Hearings] (statement of William Privett, Mayor of Wrangell, Alaska: "At the time, all parties accepted [ANILCA's wilderness designations and harvesting subsidies] as a workable compromise.").

The issue of whether Tongass reform at this point is justifiable in the context of arguably compromise legislation like ANILCA is discussed in more detail *infra* at notes 340-344 and accompanying text.

⁶⁸ ANILCA § 703, 16 U.S.C. § 1132. See TLMP Amended, *supra* note 33, at 10-12 (particularly Table 5: TLMP Land Allocation Summary).

⁶⁹ AVRF, *supra* note 5, at 49 (citing R. Cooley, *Evolution of Alaska Land Policy*, Alaska

57% of the Tongass is forested.⁷⁰ Much of the "forest," therefore, was outside the timber base long before Congress intervened. Of the 9.6 million forested acres, only 5.9 million are designated "productive forest land," that is, stands containing at least eight thousand board feet (MBF) per acre of timber at maturity.⁷¹ Much of this ostensibly commercial timber is in fact inoperable because harvesting would threaten irreversible damage to the soil or watershed, or because of unusual access or reforestation problems, or due to other conflicting USFS management goals.⁷² ANILCA removed only about 800,000 acres of actually operable, commercially viable timberland from the base formerly available to industry,⁷³ and left fully 1.75 million acres in the programmed harvest base.⁷⁴ Thus, 70% of ANILCA wilderness is either non-forested or incapable of producing eight MBF per acre of timber, and half of the rest would not have been operable anyway due to site conditions or Forest Service objectives.

A look at timber volume reveals that the withdrawals cost the industry even less than the acreage statistics would indicate. A 1987 Forest Service report shows that although 194,592 acres of wilderness are capable of producing at least thirty MBF per acre, only 41% of this area is in fact operable.⁷⁵ Moreover, fully 90% of the highest-volume land (capable of producing more than fifty MBF per acre) remains available for harvest.⁷⁶ This is the most commercially and environmentally valuable acreage in the forest.

Resources Development 24-28 (J. Morehouse ed. undated)).

⁷⁰ See USFS, Timber Supply and Demand 1984 18 (1985) (percentage derived from Table 10: Tongass National Forest Land Base by Land Use Designation) [hereinafter Tongass Supply and Demand 1984] (copy on file in the offices of the Virginia Environmental Law Journal). The Timber Supply and Demand reports are prepared pursuant to ANILCA § 706(a), 16 U.S.C. § 539e(a) (1982). See *infra* notes 92-95 and accompanying text.

⁷¹ Tongass Supply and Demand 1984, *supra* note 70, at 17.

⁷² *Id.* at 18 n.5.

⁷³ See *id.* at 18 n.6 ("Roughly one-half of the productive forest lands recommended for Wilderness . . . would have been categorized as not suitable" if not withdrawn). See also 1987 Hearings, *supra* note 67, at 400 (USFS table showing 679,459 acres of operable capable forest land in wilderness and monument areas).

⁷⁴ Tongass Supply and Demand 1984, *supra* note 70, at 18.

⁷⁵ See USFS, Status of the Tongass National Forest: 1987 Report 22-23 (1988) (percentages derived from Tables 2.1 and 2.2) (copy on file in the offices of the Virginia Environmental Law Journal).

⁷⁶ AVRF, *supra* note 5, at 60 (citing data from USFS, TLMP: Landtype/Timber Task Force Working Report (1978)). According to Senator Wirth, Forest Service data shows that "70 per cent of the high value wildlife areas and 72 per cent of the high value fishery areas lie outside the Tongass' designated wilderness areas - and are subject to whatever management the forest plan prescribes for them." 135 Cong. Rec. S1104-05 (daily ed. Feb. 2, 1989).

The same data lead pro-development advocates to other conclusions. For instance, fifteen million acres of land in the Tongass National Forest will *never* be cut.⁷⁷ Moreover, only 10% of the Tongass lies in the programmed timber harvest base. An additional 9.5% would be suitable for timber production if not Congressionally or administratively withdrawn. Timber people also point out that because the harvest is spread out over a 100-year cycle in the Tongass, only 175,000 acres of the 16.8-million-acre forest will be subject to harvest each decade.⁷⁸ Of course, they also emphasize that trees grow back.⁷⁹

Arguments based more on values and needs and less on pure acreage and timber volumes immediately surface in such a debate, and can either increase or decrease the significance of the wilderness withdrawals. In ANILCA, Congress sidestepped this issue. It recognized and agreed that the removal of land from the commercial timber base must have some impact on harvesting, on industry, and on employment, and so it developed what seemed like a flexible plan to make up for the impact of the wilderness designations on the region. The goal was to balance the need for wilderness with the interests of Southeast's economy.⁸⁰ That plan became section 705 of ANILCA.⁸¹

D. An Overview of Sections 705 and 706 of ANILCA

Section 705 of ANILCA lies at the heart of the Tongass controversy. Two of that section's four parts have stirred up relatively little disagreement: section 705(b),⁸² which calls for the creation of a program of federally guaranteed or insured loans to Tongass timber purchasers to assist them in acquiring equipment and implementing new technology, and section 705(c),⁸³ a provision directing the Secretary of Agriculture to conduct a study on ways to increase the timber yields in Alaskan national forests. While one could perhaps quarrel with the administration of the loan program, or the methodology of the yield study, neither objective can be seriously challenged as bad policy or substantively unwise.

⁷⁷ Of course, such a statement is misleading to the extent that it implies that fifteen million acres of forested land exists. See *supra* notes 69-71 and accompanying text.

⁷⁸ See, e.g., Senate Hearings, *supra* note 64, at 374 (statement of Sen. Murkowski).

⁷⁹ See, e.g., *id.* at 127 (testimony of Dale Robertson, Chief, USFS).

⁸⁰ See *supra* notes 49-50 and accompanying text.

⁸¹ 16 U.S.C. § 539d (1982).

⁸² 16 U.S.C. § 539d(b).

⁸³ 16 U.S.C. § 539d(c).

Conversely, sections 705(a) and (d)⁸⁴ involve fundamental policy choices. They reflect Congressional awareness that a wilderness set-aside would affect the timber industry to some extent and could reduce employment, given the assumptions in TLMP about future conditions. Congress enacted section 705(a) as a means of balancing employment concerns and wilderness needs. Section 705(a) provides:

The Congress shall make available to the Secretary of Agriculture the sum of at least \$40,000,000 annually or as much as the Secretary of Agriculture finds is necessary to maintain the timber supply from the Tongass National Forest to dependent industry at a rate of four billion five hundred million foot board measure per decade. Such sums will be drawn from receipts from oil, gas, timber, coal and other natural resources collected by the Secretary of Agriculture and the Secretary of the Interior notwithstanding any other law providing for the distribution of such receipts: *Provided*, that such funds shall not be subject to deferral or rescission under the Budget Impoundment and Control Act of 1974, and such funds shall not be subject to annual appropriation.⁸⁵

The Forest Service has generally interpreted the 4.5 billion board foot (BBF) goal to mean that the law mandates an offering of that size each decade, regardless of demand.⁸⁶ The \$40 million represents the amount of money that the USFS predicted in TLMP would be necessary to make available economically marginal timber to replace the more economic timber that ANILCA removed from the available land base.⁸⁷ Since ANILCA's passage, more than \$40 million has been spent annually to meet the supply mandate, although substantially less than 450 MMBF per year has actually been sold.⁸⁸

⁸⁴ 16 U.S.C. § 539d(a)&(d).

⁸⁵ § 705(a), 16 U.S.C. § 539d(a). In 1987, Congress temporarily made the \$40 million subject to appropriation until fiscal year 1989, and simultaneously appropriated the funds for that suspension period. Act of December 22, 1987, Pub. L. No. 100-203, § 5202, 101 Stat. 1330-267 (codified at 16 U.S.C.A. § 539d(a) (West Supp. 1988)).

⁸⁶ 1987 Hearings, *supra* note 67, at 104 (testimony of Dale Robertson, Chief, USFS). *But see id.* at 398 (Post-Hearing Questions on the Tongass National Forest for Dale Robertson, Chief, USFS: "if the market for timber products from the Tongass National Forest does not exist, then the Forest Service is not compelled to supply 4.5 billion board feet per decade").

⁸⁷ *See Oversight Hearings, supra* note 20, at 275 (reprinting table, U.S.F.S. Estimates of Funds Needed to Maintain 450 MMBF Harvest in Tongass, taken from TLMP, *supra* note 33, at xv); GAO Report, *supra* note 4, at 14-15.

⁸⁸ *See* GAO Report, *supra* note 4, at 57 (Appendix VIII: Net Outlays of the Tongass Timber Sales Program, Fiscal Years 1981-85); Committee Report, *supra* note 2, at 13 (Table 2: Net Outlays of Tongass Timber Supply Fund, Fiscal Years 1982-87); GAO Report, *supra*

Section 705(d) essentially condones any institutional tendencies to be spendthrift with the non-appropriated \$40-million-plus. That provision simply states that section 6(k) of NFMA⁸⁹ shall not apply to section 705. That is, when scheduling and preparing sales the Forest Service need not identify timberlands "not suited" for production, considering economic, physical, and other pertinent factors. Thus, timber that requires enormous pre-roading, access, or mitigation costs need not have those costs taken into account when the USFS schedules a sale, and the permanent appropriation may be drawn on to cover at least the expenses of preparing the sale. Without implying that the Forest Service ignores costs purposefully, the arrangement might not foster agency efficiency.⁹⁰ Of all the National Forests, only the Tongass has received such an exemption from NFMA.⁹¹

Section 706 establishes two reporting requirements. First, it directs the Secretary to report annually on timber supply and demand in the Tongass to House and Senate oversight committees.⁹² The law specifically requires mention of any period when the available land base cannot maintain the 4.5 BBF per decade supply to dependant industry.⁹³ Section 706 also calls for periodic comprehensive status reports on the forest, prepared in consultation with the State, the Southeast Alaska Conservation Council (SEACC), Natives, and the Southeast Alaska timber industry.⁹⁴ Topics must include harvest levels; the impact of wilderness designations on the timber, tourism, and fishing industries; Forest Service fish and wildlife protection actions; and the small business set-aside program.⁹⁵ Debate over the two reports issued so far has sometimes been heated, but is mostly derivative of disputes over the substantive provisions of section 705.

note 4, at 30 (only about 53% of the volume offered has been sold).

⁸⁹ 16 U.S.C. § 1604(k) (1982).

⁹⁰ See Senate Hearings, *supra* note 64, at 241 (Mr. Mehrkens, former USFS Regional Economist, referring to the "blank check syndrome" of the Tongass timber program).

⁹¹ *Id.* at 237.

⁹² ANILCA § 706(a), 16 U.S.C. § 539e(a) (1982). The committees responsible are the House Interior and Insular Affairs Committee and the Senate Committee on Energy and Natural Resources.

⁹³ *Id.*

⁹⁴ *Id.* § 706(b)&(c), 16 U.S.C. § 539e(b)&(c) (1982).

⁹⁵ *Id.*

III. MANAGEMENT PROBLEMS OF THE TONGASS UNDER ANILCA

The Tongass suffers from numerous management problems. They generally result from a combination of three factors: the restraints that ANILCA imposes upon the Forest Service; faulty assumptions underlying both TLMP and ANILCA; and the fifty-year contracts. The following discussion will first examine how section 705 has failed to deliver on its promise to stabilize the employment in Southeast, and will then focus on some of the economic and biological costs associated with the existing management regime.

A. *Employment Has Declined Despite Section 705(a)*

Senator Henry Jackson, chair of the Senate Energy Committee, stated during debates over ANILCA that the "entire underpinning" of the Tongass provisions of that Act was "to designate wilderness without job loss."⁹⁶ Employment during the 80s, however, dropped dramatically despite the Act. According to Forest Service figures, employment associated with Tongass timber fell from about 2,700 jobs in 1980 to about 1,420 jobs in 1986.⁹⁷ The Chief of the Forest Service even admitted in oversight hearings that "no amount of ANILCA investments could have maintained the timber industry employment at historic levels" between 1981 and 1986.⁹⁸ Section 705 thus failed to achieve its primary purpose.

Several reasons explain why the annual \$40-million-plus added investment of section 705 has proven ineffective. The idea behind section 705 was to sustain employment levels by maintaining the *supply* of logs to the mills.⁹⁹ TLMP assumed steady demand would continue, if not increase.¹⁰⁰ Starting in 1981, however, *demand* from outside Alaska for Southeast timber products began to drop. For instance, in 1980 the USFS offered 523.5 MMBF for sale, and 82% of it was harvested.¹⁰¹ By 1985, low demand resulted in only 162.5 MMBF (about 37%) being harvested out of the approxi-

⁹⁶ 126 Cong. Rec. 21,883 (1980).

⁹⁷ GAO Report, *supra* note 4, at 31. Although preliminary figures indicate that employment rose significantly in 1988, *see infra* note 136 and accompanying text.

⁹⁸ Oversight Hearings, *supra* note 20, at 475 (statement of R. Max Peterson, Chief, USFS).

⁹⁹ TLMP Amended, *supra* note 33, at 2. ("The goal is to make enough timber available . . . to maintain current levels of timber-related employment.")

¹⁰⁰ Tongass Supply and Demand 1984, *supra* note 70, at 23.

¹⁰¹ *See Id.* at 22.

mately 433.5 MMBF offered.¹⁰² Adjusting the data to exclude offerings mandated by the long-term contracts increases the disparity. For example, only one-fourth of the timber offered in "independent" sales (sales unrelated to the long-term contracts) in 1984 was actually sold, compared to a 98% rate in 1980.¹⁰³ From 1980 through 1986, industry purchased only 53% of all Tongass timber offered.¹⁰⁴

The figures above demonstrate that maintaining a constant supply of timber cannot by itself sustain employment. Timber industry employment reflects resource extraction and processing industries generally in that it depends primarily on the amount of the resource extracted, and industry will not extract it if no profitable market for it exists. The proposition is neither novel nor controversial. The TLMP environmental impact statement released in March 1979 described this characteristic of the timber market;¹⁰⁵ the Forest Service explained it to a Senate subcommittee in 1987;¹⁰⁶ and a General Accounting Office (GOA) study remarked upon it last May.¹⁰⁷ It is accordingly difficult to see how the 4.5 BBF mandate could be expected to stabilize employment.

The timber industry and its allies argue that in times of such a depressed market, the Secretary's responsibility under section

¹⁰² See USFS, Timber Supply and Demand 1985 22 (1986) [hereinafter Tongass Supply and Demand 1985] (copy on file in the offices of the Virginia Environmental Law Journal).

¹⁰³ Tongass Supply and Demand 1984, *supra* note 70, at 22.

¹⁰⁴ GAO Report, *supra* note 4, at 30.

¹⁰⁵ [I]ndustrial output [in the timber industry] will tend toward the level where maximum net returns will be received, rather than utilizing the full quantity of timber made available. Since employment is closely related to output, it follows that *merely making a given volume of timber available will not assure employment at a desired level.* The important consideration will be the availability of timber in stands characterized by recovery costs low enough to induce the industry to utilize them *However, shifts in demand can have considerable influence on industrial output and thus employment.*

USFS, Tongass Land Management Plan Final Environmental Impact Statement, Part I at 26 (1979) (emphasis added) [hereinafter TLMP Final EIS].

¹⁰⁶ *It is the harvest and processing of the timber that creates the jobs in the timber industry, not the supply of timber by the Forest Service* Market demand (and the cyclical nature of free markets) will continue to determine the use of timber in Southeast Alaska and employment in the timber industry.

Senate Hearings, *supra* note 64, at 487 (emphasis added)(USFS Responses to Additional Committee Questions).

¹⁰⁷ *Merely making timber available to industry, regardless of demand or net cost to the purchaser, cannot ensure that this timber will be sold or harvested. Unless the planned volume of timber is harvested, there is no assurance that the level of timber industry jobs projected to be provided by this timber volume will be achieved.*

GAO Report, *supra* note 4, at 33 (emphasis added).

705(a) to maintain the timber supply from the Tongass requires him to make available *and economical* — that is, profitable — 450 MMBF annually.¹⁰⁸ They insist that employment would remain stable if the Forest Service managed the added investment program to insure profitability.¹⁰⁹ However, they misunderstand, or misstate, the nature of the problem. It would be virtually impossible to make Tongass timber profitable at a rate of 450 MMBF per year. As the GAO, the USFS, and parties familiar with the situation have recognized, the principal problem lies with world markets.¹¹⁰ First, the long-term contract holders, APC and LPK, primarily produce dissolving pulp, a substance generally exported to Pacific Rim countries for use in the manufacture of rayon and acetate. Petrochemical products, such as polyester, have absorbed much of this market over the past decade, while there has been a simultaneous shift in consumer preference to cottons and wool.¹¹¹ Second, cheaper supplies of pulp from less developed countries have entered the market in the last few years. Hence, export value of Southeast pulp fell 42% between 1980 and 1985.¹¹² The USFS wrote in 1986 that even with a short-term market improvement, a further “long-term decline” in the export of dissolving pulp was probable.¹¹³ As Jim Clark, counsel for APC and lobbyist for APC and the Alaska Loggers’ Association, has acknowledged, the dissolving pulp business is “a declining industry.”¹¹⁴

Tongass sawlog exporting may face an equally difficult future. The primary market for Tongass cants¹¹⁵ has been the Japanese

¹⁰⁸ “To meet its obligation that it ‘supply’ the timber, TLMP and ANILCA require the Forest Service to make the necessary expenditures to provide adequate [timber] volume at a price industry can afford.” Oversight Hearings, *supra* note 20, at 317 (prepared statement of Joseph R. Henri, Vice President, Resource Development Council).

¹⁰⁹ *Id.* at 317-18.

¹¹⁰ “Forest Service economists contend that the demand for Southeast Alaska timber and Pacific rim markets are what really controls [sic] the well-being of the industry in Alaska.” Senate Hearings, *supra* note 64, at 233 (statement of Joseph Mehrkens, Economist, The Wilderness Society, former Regional Economist, USFS, Alaska).

¹¹¹ AVRF, *supra* note 5, at 88 (citing D. Reaume, Demand for Alaska Wood Products: History and Prospects (1985) (unpublished manuscript)); Tongass Supply and Demand 1985, *supra* note 102, at 11 n.7.

¹¹² USFS, Timber Supply and Demand 1986 13 (1987) (copy on file in the offices of the Virginia Environmental Law Journal).

¹¹³ Tongass Supply and Demand 1985, *supra* note 102, at 15.

¹¹⁴ *Timber Industry Practices in the Tongass National Forest, Alaska: Oversight Hearings before the Subcomm. on Mining, Forest Management, and Bonneville Power Administration of the House Committee on Interior and Insular Affairs*, 98th Cong., 1st Sess. 88 (1983) [hereinafter *Timber Industry Practices*] (testimony of Jim Clark, counsel to APC).

¹¹⁵ Cants are rough-hewn timbers cut lengthwise on at least two sides.

housing industry.¹¹⁶ Housing starts in Japan declined from 909,000 wood-based units in 1979 to 591,000 such units in 1985.¹¹⁷ Furthermore, over the past fifteen years British Columbia and the Pacific Northwest solidified their positions as preferred exporters of logs and cants to Japan, such that one source estimated that by 1984, 88% to 94% of North American log, cant, and lumber shipments to Japan came from those two regions.¹¹⁸ Historically, then, Alaska is the "last in/first out" supplier to Japan's construction grade timber market, meaning that only when primary sources are unavailable does Japan generally use Alaskan-supplied timber.¹¹⁹

At the same time that the world market has been unreliable, if not depressed, Native corporations have acquired a significant share of the Alaskan timber market. TLMP predicted Native harvests would remain steady at about 130 MMBF per year through the 80s,¹²⁰ but Native corporations have actually cut more than 200 MMBF each year since 1982, with their share of the regional harvest still increasing.¹²¹ By 1987, Native corporations had boosted their harvest to 335 MMBF.¹²² Observers generally cite three factors for the sudden rise of the corporations: first, Natives' selection following ANCSA of over 500,000 acres of high quality Southeast timberland;¹²³ second, freedom from the primary manufacture rule,¹²⁴ which allows them to ship the round logs preferred by Japanese buyers; third, the need of several of the corporations to raise capital quickly in a time of diminishing returns, in order to pay for their heavy initial investments in logging facilities and

¹¹⁶ GAO Report, *supra* note 4, at 31.

¹¹⁷ Tongass Supply and Demand 1985, *supra* note 102, at 13. The strength of the yen and the the booming Japanese economy recently seem to have led to a resurgence in housing, at least for the moment. See *infra* notes 136-140 and accompanying text.

¹¹⁸ AVRF, *supra* note 5, at 82 (citing La Resche & Co., Export Markets for Cants and Round Logs (1984) (report prepared for Sealaska Corp.)). For example, in 1983 the Pacific Northwest exported ten times the volume of logs that Alaska did. *Id.* at 84.

¹¹⁹ Tongass Supply and Demand 1985, *supra* note 102, at 13.

¹²⁰ See Senate Hearings, *supra* note 64, at 594 (letter from SEACC to Sen. Bumpers (November 19, 1987)) (citing J. Sisk, A Historical Analysis of Forest Management and Policy on the Tongass National Forest in Southeast Alaska (1987) (unpublished manuscript)).

¹²¹ GAO Report, *supra* note 4, at 13, fig. 1.2.

¹²² Committee Report, *supra* note 2, at 11. See also 135 Cong. Rec. S1104 (daily ed. Feb. 2, 1989) (statement of Sen. Wirth that Native share of harvest climbed from 13% to 58% between 1980 and the first two quarters of 1986).

¹²³ See *supra* notes 47-48 and accompanying text.

¹²⁴ In order to create mill employment for Alaskans, USFS regulations require timber harvested from federal lands in Alaska to undergo some form of "primary manufacture" in Alaska. 36 C.F.R. § 223.161 (1988). Usually this results in sawlogs being turned into cants.

equipment.¹²⁵

The Forest Service maintains that since Native land in Southeast generally has not been managed for sustained yield, Native corporations' rate of production must drop.¹²⁶ When that happens, the argument goes, Tongass production will pick up again.¹²⁷ This analysis ignores the difference between Native round logs and Tongass cants. Native corporations satisfy only about 10% of the North American supply to Pacific rim markets, and only 2% to 4% of Japan's demand for wood products.¹²⁸ If Natives should stop selling logs tomorrow, the major buyers of Tongass wood would not significantly increase their purchases of cants. Their preference has been clear for some time. A report prepared for the Sealaska Corporation stated that Japanese demand for Southeast cants dropped from 400 MMBF in 1973 to just 250 MMBF five years later.¹²⁹ That was *before* the timber industry depression. By 1984, Japanese demand for cants had dropped another 50%, to 121 MMBF.¹³⁰

Eliminating the primary manufacture rule might appear to solve the problem of the diminishing cant market. But since Alaska's domestic market for sawlogs and finished lumber is trivial, without a cant requirement many sawmills might be forced out of business as exporters abandoned cants in favor of round logs. Because mills are five times more labor-intensive than logging,¹³¹ such a "solution" would also frustrate the employment goals behind ANILCA. Moreover, the government would find itself in the uncomfortable position of subsidizing (through the permanent appropriation as well as through the standard USFS practice of below-cost timber sales) an industry competing directly with the private Native corporations. Finally, the pulp mills and the sawmills need one another to exist. Tongass timber tends to grow in stands of roughly 50% sawlog-quality timber and 50% pulp-grade timber. The wood

¹²⁵ Tongass Supply and Demand 1985, *supra* note 102, at 11 n.6.

¹²⁶ See, e.g., Senate Hearings, *supra* note 64, at 132 (prepared statement of Dale Robertson, Chief, USFS).

¹²⁷ *Id.*

¹²⁸ 134 Cong. Rec. H5939 (daily ed. July 27, 1988) (letter from Sealaska Corp. to Rep. Young (July 27, 1988)).

¹²⁹ AVRF, *supra* note 5, at 81 (citing Le Resche & Co., *supra* note 118).

¹³⁰ *Id.* Today's unusually competitive yen and thriving Japanese economy have sparked increased Japanese purchases of value-added (processed) wood products, contrary to the historical pattern. See *infra* note 140.

¹³¹ Senate Hearings, *supra* note 64, at 395 (statement of Don Finney, Manager of the Alaska Loggers Association).

chips produced in the sawmill operations augment the lesser value of the pulp wood; without this added value, the pulp mills could not afford to harvest many of the marginal tracts.¹³² Repeal of the primary manufacture rule would thus drive up the pulp mills' costs and do little to improve the long-term employment picture.

Increased industry productivity has compounded the difficulties created by the market and by competition from round-log producers. The National Forest Products Association noted before Congress that the industry has steadily improved productivity over the past decade. The wood products industry's capacity increased by 20% from 1980 to 1987, with sawmilling alone gaining 11% in productivity in 1986.¹³³ Unfortunately for Southeast Alaska, increased efficiency in a time of shrinking markets contributes to still more job losses. The GAO concluded that greater productivity in the industry had eliminated almost one-third of the processing jobs dependent on Tongass timber.¹³⁴ Thus, even had demand remained steady from 1980 to 1986, technology advances alone would have caused the loss of 800 jobs.¹³⁵

Southeast's timber-related economy should bounce back to some extent from the lows it hit in the first years after passage of ANILCA. Indeed, a draft section 706(a) report for 1988 released in February 1989 indicates that the cycle has already started on a vigorous upswing.¹³⁶ Nonetheless, the preceding discussion demonstrates that factors unforeseen by the drafters of TLMP and ANILCA section 705, and well beyond the control of the Forest Service or of the timber industry in Southeast, effectively guarantee instability like that seen over the last decade. Signs of this are scattered throughout even this most recent 706(a) report, which is the most optimistic one in years. For example, increased profitability in Southeast has inspired competing mills to open in British Columbia and, for the first time, in South Central Alaska.¹³⁷ Pa-

¹³² Oversight Hearings, *supra* note 20, at 277 n.6 (statement of John Galea, Executive Vice-President, Alaska Loggers' Associates).

¹³³ Senate Hearings, *supra* note 64, at 457-58 (statement of Mark Rey, National Forest Products Association).

¹³⁴ It took six jobs to harvest and process one MMBF in 1980, and only 4.2 in 1986. GAO Report, *supra* note 4, at 32.

¹³⁵ See *id.* at 31-32.

¹³⁶ The 1988 Tongass harvest was up 18%, to 331 MMBF; Southeast timber-related employment rose dramatically; Japanese housing starts increased significantly; and several mills made major investments in their physical plants. USFS, 1988 Timber Supply and Demand Draft Report 1, 3, 22, 27 (1989).

¹³⁷ *Id.* at 1.

cific Rim buyers “[c]learly . . . continue to prefer round logs” to cants.¹³⁸ Transportation costs reduce the competitiveness of Tongass lumber compared to that from British Columbia and the Pacific Northwest.¹³⁹ Unpredictable and uncontrollable international exchange rates play a crucial role in determining demand for Tongass timber.¹⁴⁰ Yet the Forest Service downplays these factors, highlights the positive trends, and predicts continued expansion in Southeast through at least 1992.¹⁴¹

This view of the Tongass market fails to reflect reality. History shows it to be highly unstable, if not actually decaying. Substitutes for dissolving-pulp products; competition from Natives, British Columbia, the Pacific Northwest, third-world producers, and now from South Central Alaska as well; and the lack of domestic demand for Tongass products ensure that the Tongass timber industry will never be consistently strong. Even if the crash of the 80s proves abnormally severe, other depressions are bound to occur in such a notoriously cyclical industry.¹⁴² The recognition of that fact, and of the fact that demand rather than supply controls timber-related employment, compels the conclusion that section 705(a) cannot possibly achieve its legitimate goal of sustaining employment, regardless of the massive support offered by the Tongass Timber Fund.

B. *The Economic Costs of Section 705(a)*

It could be argued that even if section 705(a) does not com-

¹³⁸ *Id.* at 14.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 20. The current “competitiveness” (or weakness) of the U.S. dollar makes Tongass products, and especially value-added (processed) products, a far better buy for the Japanese than they were a few years ago. The strength of the Canadian dollar relative to the yen and the American dollar can also be critical in determining the success of Southeast exporting.

¹⁴¹ See *id.* at 24. Three assumptions expressly underlie this projection. They are, as the USFS admits, major: the U.S. will take fiscal and monetary steps to correct its trade and budget deficits; the steps will succeed, while causing “only a moderate contraction in [U.S.] domestic spending” by late 1990; and Japan, faced with this contraction, will shift to consumption-based trade policies from its traditional export-oriented ones, resulting in Pacific Rim economic growth, rising real incomes, and consequently increased demand for imports of wood-fiber products.

¹⁴² “[T]he timber industry is about the most cyclical industry in the country. . . .” Senate Hearings, *supra* note 64, at 144 (testimony of Dale Robertson, Chief, USFS); “First, the nature of the forest industry, including the industry in Alaska, is such that we experience relatively sharp market cycles.” *Id.* at 450 (statement of Mark Rey, Vice President, Public Forestry Programs, on behalf of the National Forest Products Association).

pletely prevent job losses, it is nonetheless necessary to cushion the blow to employment brought about by the wilderness designations. However, as the previous section points out, the wilderness withdrawals did not create the employment problems. It thus makes no sense to focus ameliorative measures on increasing the amount or accessibility of timber in the land base.

Moreover, the cost of the government's effort to purchase employment has far exceeded any reasonable amount. The cost has been felt several ways, each of which will be addressed below. This section will look at the economic results — the price paid in terms of enormous financial expenditures, diminished and even excluded competition in the Southeast forest products industry, and negative effects on other major regional industries.

1. Tongass Timber Supply Fund: Expenditures, Revenues, and Net Outlays

The most substantial fiscal costs of managing the Tongass have arisen under the Tongass Timber Supply Fund (TTSF), the permanent annual appropriation of at least \$40 million to the Secretary of Agriculture under section 705(a). That amount of money was thought necessary to fund a timber management program that could provide an allowable sale quantity of 450 MMBF per year, given the proposed land allocation pattern in TLMP (including, of course, its wilderness designations).¹⁴³ The money then being spent on the Tongass timber program would only be able to supply 338 MMBF of timber annually.¹⁴⁴ To meet section 705(a)'s 4.5 BBF mandate, "added investments" in the program would be necessary to make available otherwise marginal timber and to accelerate the growth of "regenerated" stands.¹⁴⁵ The TTSF has consequently been spent primarily on precommercial thinning, pre-roading, and developing sophisticated techniques for logging difficult areas (helicopter and balloon logging, for instance).¹⁴⁶ The fund has also paid for administrative activities and facilities necessary to implement the strategy.¹⁴⁷

¹⁴³ TLMP Amended, *supra* note 33, at 205.

¹⁴⁴ *Id.* at 206.

¹⁴⁵ GAO Report, *supra* note 4, at 14.

¹⁴⁶ *Id.* at 15.

¹⁴⁷ *See id.* at 20-29.

a. Expenditures

Given this mandate, the Forest Service has not been hesitant about spending. From fiscal year 1981 through fiscal year 1986, TTSF expenditures totalled approximately \$257 million.¹⁴⁸ (The Forest Service also spent an additional \$176 million in appropriated funds, some of which supported non-timber purposes.)¹⁴⁹ Virtually everyone outside the Forest Service has criticized the expenditure of this money. Both the State of Alaska and industry advocates have complained about the \$17.3 million of TTSF money spent on administrative roads and administrative facilities such as ranger stations, garages, and associated buildings. These critics charge that TTSF money should be applied more directly to the goal of making marginal timber stands available for harvesting.¹⁵⁰ Industry representatives have also criticized the Forest Service for refusing to grant direct subsidies to purchasers for road-building related to sales that have already been awarded.¹⁵¹

The USFS defends its use of the fund. It insists that the TTSF may properly be applied to "all activities normally recognized as timber management programs," including administrative activities and facilities.¹⁵² The Forest Service also maintains that it would be illegal to award funds to purchasers for construction without going through a competitive bidding procedure.¹⁵³ The GAO study, which was requested largely to examine these particular questions, concluded that the Forest Service was correct.¹⁵⁴

At the other extreme, the USFS has been attacked for spending anything at all from the fund, regardless of the activity supported.¹⁵⁵ This argument relies on the exceedingly low demand for timber over most of the eight years since ANILCA's passage. Since TLMP assumed added investments would be required only to supply demand surpassing the volume of timber "normally" available,

¹⁴⁸ *Id.* at 20.

¹⁴⁹ *See id.* at 47 (App. II: Tongass National Forest Appropriations Summary, Fiscal Years 1981-86).

¹⁵⁰ *Id.* at 20-29; *See also, e.g.,* Oversight Hearings, *supra* note 20, at 319 (statement of Joseph R. Henri, Vice President, Resource Development Council). Notwithstanding industry's complaints, the Forest Service has spent \$123 million on roads, bridges, etc. GAO Report, *supra* note 4, at 21.

¹⁵¹ GAO Report, *supra* note 4, at 26-27.

¹⁵² *Id.* at 25 (quoting United States Dept. of Agriculture, Office of General Counsel Opinion (1981)).

¹⁵³ *Id.* at 27.

¹⁵⁴ *Id.*

¹⁵⁵ *See, e.g.,* Senate Hearings, *supra* note 64, at 65-68 (statement of Sen. Proxmire).

any year in which industry demanded less than the normally available volume should not need any added investment. The "normally" available volume estimated in TLMP was 338 MMBF.¹⁵⁶ Industry harvested less than that each year from fiscal 1982 through fiscal 1986, with 52% less in 1985.¹⁵⁷ Hence, in those years the wilderness withdrawals were inconsequential, the Forest Service could have provided all the timber that industry needed without implementing any special programs or spending any of the nonappropriated funds. In other words, the strategy did not increase the harvesting of *any* marginal timber.

However, because the USFS felt compelled by ANILCA to make available 450 MMBF annually regardless of demand, it spent tens of millions of dollars to prepare offerings of timber that industry did not want. According to the GAO,

[h]ad the Forest Service geared its timber sales program to provide only the amount of timber needed to meet demand, we estimate that [the program] would have cost about \$126 million in Tongass timber funds [instead of \$257 million] during this period. Forest Service officials in the Alaska Region agreed with our estimate.¹⁵⁸

b. Revenues

Revenues produced by the Tongass timber program have been substantially less than the enormous sums spent to maintain it. For instance, the Wilderness Society asserts that 1986 revenues amounted to just \$82,000.¹⁵⁹ The next year netted even less: according to the House Interior Committee, 1987 generated no revenues at all.¹⁶⁰

Other analyses of the statistics present a somewhat more justifiable program. The GAO, for instance, counts purchaser road credits as receipts,¹⁶¹ boosting the \$82,000 cited by the Wilderness So-

¹⁵⁶ See GAO Report, *supra* note 4, at 35.

¹⁵⁷ See Committee Report, *supra* note 2, at 12.

¹⁵⁸ GAO Report, *supra* note 4, at 36. The Service also admitted that the investments did not affect employment, at least in the short term. *Id.* at 36.

¹⁵⁹ See 1987 Hearings, *supra* note 67, at 196 (statement of Gaylord Nelson, Counselor, The Wilderness Society).

¹⁶⁰ See Committee Report, *supra* note 2, at 13. The lack of revenues resulted from the implementation of retroactive emergency rate redeterminations going back to 1981 (for LPK) and 1982 (for APC). *Id.* at n. 20; see Timber Industry Practices, *supra* note 114, at 309 (USFS Responses to Questions by Congressman James Weaver) (describing retroactivity of the rate redeterminations).

¹⁶¹ See GAO Report, *supra* note 4, at 52 (App. VI: Methodology Used to Compare Reve-

ciety to \$3.3 million.¹⁶² Moreover, the GAO found \$768,000 in actual cash payments received for stumpage in fiscal 1986, compared to the Society's figure of \$82,000.¹⁶³ Industry representatives and development advocates in Southeast also mention other, less tangible revenue generated by the fund: tax revenues from numerous sources (payroll, property, sales, etc.), indirect revenues from timber-dependent businesses and industries, and stumpage fees paid to the state, counties, and municipalities. One source found \$62 million in total timber-industry related wages for fiscal 1986 alone.¹⁶⁴

While the disparity of the figures sometimes makes it difficult to assess revenues accurately, a look at the cash price paid for a Tongass tree unmistakably shows that management problems exist. The following table¹⁶⁵ compares the prices paid by the long-term contract holders with the average short-term purchaser's price, and also shows the range of short-term prices.

	Long-term sales APC	LPK	Average short-term	Range of short-term
Fiscal year:				
1979	\$35.98	\$23.89 to Mar. 1, 1979 \$73.15 after March 1, 1979	\$103.08	\$2.15-269.72
1980	\$35.98	\$73.15	105.91	\$6.30-208.80
1981	\$35.98 to Jan. 1, 1981 86.29 after "	\$73.15	48.19	\$15.00-190.00
1982	\$86.29 to July 1, 1982 1.48 after "	73.15 to Dec. 1, 1981 3.09 after Mar. 31, 1984	29.65	5.94-216.41
1983	\$1.48	\$3.09	14.61	5.27-123.44
1984	\$1.48	\$3.09 to Mar. 31, 1984 2.12 after Mar. 31, 1984	16.25	2.85-80.90
1985	\$1.48	\$2.12	8.69	1.87-51.00
1986	\$1.48	\$2.12	8.03	3.23-56.07

The \$1.48 and \$2.12 currently being paid are the base rates established in the 1950's when the contracts began. The contracts pro-

nues and Costs for the Tongass Timber Sales Program). Purchaser road credits (PRCs) are given to timber buyers in exchange for road construction — representing instances where "the Forest Service [has], in essence, traded national forest timber in return for roads." Committee Report, *supra* note 2, at 13. Such credits are common: the USFS received \$25 million in PRCs and only \$3.2 million in stumpage fees between 1982 and 1987. *Id.*

¹⁶² GAO Report, *supra* note 4, at 44.

¹⁶³ *See id.* at 56.

¹⁶⁴ *See* Senate Hearings, *supra* note 64, at 470 (statement of Jim Clark).

¹⁶⁵ Reprinted from Committee Report, *supra* note 2, at 16. The committee's table mistakenly indicates that LPK's redetermined rates take effect on March 31, 1984. They were, in fact, "retroactively applied to timber cut after [January 1, 1981]." Timber Industry Practices, *supra* note 114, at 309 (USFS Responses to Questions by Congressman James Weaver).

vide that prices will never fall below the base levels.¹⁶⁶ These prices became effective as a result of the mills' request for an emergency redetermination of the five-year operating period rate agreement, a procedure for which the contracts expressly provide.¹⁶⁷ The table below indicates in more detail the original and redetermined stumpage prices as of 1983.

ORIGINAL AND REDETERMINED STUMPAGE PRICES
FOR FIFTY-YEAR TIMBER SALE CONTRACTS,
TONGASS NATIONAL FOREST, 1983¹⁶⁸

Company, Species and Product	Appraisal Rates	Emergency Rate Redetermination
Alaska Lumber and Pulp Company:		
	<u>1981 - 86</u>	<u>Effective 7/1/82</u>
		(\$/MBF)
Spruce Sawlogs	\$215.98	\$2.26
Hemlock Sawlogs	1.36	1.36
Alaska Cedar Sawlogs	1,058.27	1.22
Spruce Utility Logs	.50	.50
Hemlock Utility Logs	.50	.50
Louisiana-Pacific Corporation:		
	<u>1979 - 84</u>	<u>Effective 12/1/81</u>
		(\$/MBF)
Spruce Sawlogs	\$114.96	\$2.87
Hemlock Logs	30.97	1.97
Alaska Cedar Sawlogs	182.34	13.42
Western Redcedar Sawlogs	86.57	1.62
Spruce Utility Logs	114.96	2.87
Hemlock Utility Logs	30.97	1.97

APC has refused to allow a contractual amendment granting the Forest Service the right to seek similar rate redeterminations in rising markets. Thus, APC has locked in until 1990 the prices it obtained in 1982, when the market was very nearly at rock bot-

¹⁶⁶ Committee Report, *supra* note 2, at 16.

¹⁶⁷ Oversight Hearings, *supra* note 20, at 146 (testimony of Max Peterson, Chief, USFS).

¹⁶⁸ Taken from Emerson & Turnage, *supra* note 5, at 9.

tom.¹⁶⁹ LPK agreed to allow the Forest Service a reciprocal emergency redetermination right, on the condition that the company be allowed to offset *all* road costs against timber value, "thus insuring that [LPK] will continue to receive timber at 1951 rates until the end of the contract term in the year 2004."¹⁷⁰ Consequently, for example, the long-term contract holders can fell a spruce tree four centuries old for a mere \$2.26, less than the price of a Tongass tourist map. With two-thirds of Tongass timber committed to the mills,¹⁷¹ prices like these virtually guarantee revenues to be minimal and to add up to far less than the government spends through the TTSF.

c. Net Losses

The figures cited in the preceding sections can be paired in truly remarkable combinations. For example, the Wilderness Society frequently compares the 1986 TTSF outlay of \$48 million with the \$82,000 generated by timber sales, noting that receipts thus covered spending for less than four hours of the fiscal year.¹⁷² (Because timber sales generated no cash revenues at all in 1987,¹⁷³ the program failed to pay for the first minute of that fiscal year.) The Society asserts that the TTSF lost ninety-three cents on the dollar in 1984 and ninety-nine cents in the next two years.¹⁷⁴ It forecasts losses to the government of \$500 million over the next decade, should the pattern continue.¹⁷⁵

Industry and the Forest Service both insist that such a straight revenue-expenditure comparison distorts reality. Added investments made today, they argue, will pay off in the future when de-

¹⁶⁹ Committee Report, *supra* note 2, at 21.

¹⁷⁰ *Id.* Astonishingly, APC has filed suit against the government, seeking \$80 million for failing to provide a subsidy such that the company can make a profit. Complaint of Alaska Pulp Corp., Alaska Pulp Corp. v. United States, No. 675-87 (Cl. Ct., filed Oct. 30, 1987). The claim asserts that: "the Forest Service should have committed itself to provide government investment (such as road construction) in the amount of [as much as \$105.46] per MBF and/or otherwise to modify the terms and conditions of the contract in order to make the rates to be paid for the timber equitable as of July 1, 1982." *Id.* at 34. APC also claims that the USFS is liable for imposing such environmental requirements as streamside protection measures that cost APC money. *Id.* at 72-75.

¹⁷¹ Senate Hearings, *supra* note 64, at 133 (statement of Dale Robertson, Chief, USFS).

¹⁷² See, e.g., 1987 Hearings, *supra* note 67, at 196 (statement of Gaylord Nelson, Counselor, The Wilderness Society).

¹⁷³ See Committee Report, *supra* note 2, at 13.

¹⁷⁴ 1987 Hearings, *supra* note 67, at 196 (statement of Gaylord Nelson, Counselor, The Wilderness Society).

¹⁷⁵ *Id.*

mand returns to pre-ANILCA levels, because "the costs to grow and sell a timber stand are generally incurred for many years before and for several years after the timber is sold and any revenue is generated."¹⁷⁶ Planning and preparing sales, pre-commercial thinning, pre-roading, and reforestation exemplify activities that may bring a return years after the costs arise. The GAO worked with the USFS to develop a new accounting method that would more favorably reflect these long-term values.¹⁷⁷ However, it still came up with a net loss of \$23 to \$34 million in fiscal 1986 alone.¹⁷⁸

Congressman Don Young of Alaska and others strenuously assert that many of the road-construction costs inure to the long-term benefit of the people of Alaska, just as any highway program in the lower forty-eight helps the local population.¹⁷⁹ However, many of Southeast's communities apparently disagree. The City of Tenakee Springs twice obtained injunctions to halt construction of an eleven-mile road that would open up a nearby watershed,¹⁸⁰ while a resident of Pelican testified that only "considerable opposition" from local residents, fishermen, and the City Council blocked Forest Service roading and logging in his area.¹⁸¹ Sixteen communities passed resolutions opposing the 4.5 BBF mandate and endorsing

¹⁷⁶ GAO Report, *supra* note 4, at 42.

¹⁷⁷ *Id.* However, the accuracy of this accounting system has been sharply criticized. See O'Toole, *The Case of the Missing \$400 Million*, Forest Watch, Dec. 1988, at 6 (arguing that the new GAO/USFS accounting system is misleading, inaccurate and unrealistic); J. Mehrkens, Forest Service: The 1987 Below Cost Timber Sale Report (undated press release) ("Forest Service accounting procedures grossly underestimate the net losses of the Tongass timber program by forty to sixty-five percent.") (copy on file in the offices of the Virginia Environmental Law Journal).

¹⁷⁸ See GAO Report, *supra* note 4, at 56 (App. VII: Comparative Statement of Costs and Revenues Using Different Accounting Methods for Allocating Forest Roads Costs, Tongass National Forest, Fiscal Year 1986). The lowest figure derives from amortizing road construction costs over the 100 year-life of the timber harvest rotation. See also Senate Hearings, *supra* note 64, at 148 (testimony of Dale Robertson, Chief, USFS). Some might find this unrealistic for any road, much less one used by heavy equipment in Alaska.

¹⁷⁹ See, e.g., 1987 Hearings, *supra* note 67, at 135-136 (statement of Ted Ferry, Mayor of Ketchikan).

¹⁸⁰ *City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985); *City of Tenakee Springs v. Courtwright*, No. J86-024 Civil (D. Alaska, June 24, 1987) (copy on file in the offices of the Virginia Environmental Law Journal).

¹⁸¹ Senate Hearings, *supra* note 64, at 326 (statement of Reuben Yost, member of Pelican City Council). The newspaper serving Prince of Wales Island expressed disbelief at the assertion that roads served Southeast's local residents: "That sounds like a bunch of bull when you try to drive the roads and find that nothing has been done to maintain them since the last logger hauled out the last load of logs . . ." Letter from Bart Koehler, Executive Director of SEACC to Rep. Morris Udall (May 31, 1977) (quoting *The Island News*, Prince of Wales Island newspaper), reprinted in Senate Hearings, *supra* note 64, at 284).

last year's reform legislation.¹⁸² Finally, even if residents supported extensive Forest Service roading, the wisdom of building hundreds of miles of very expensive roads seems suspect in light of the population served. In an area the size of Massachusetts, Rhode Island, New Jersey, Delaware, and Connecticut, there are roughly 60,000 people. With roads costing \$150,000 per mile and up, and only a fraction of them actually linking towns and villages, that makes for a tremendously costly per capita infrastructure.¹⁸³

The Forest Service and timber advocates correctly assert that ANILCA was never meant to return a profit to the government, nor did the USFS sign the long-term contracts intending thereby to fill its coffers with timber receipts. However, since the Tongass provisions of ANILCA have proven so inept at accomplishing their primary goal of employment stability, conditions surely warrant a more critical look at "the most egregious example of below cost timber sales in the National Forest System."¹⁸⁴ Losing tens of millions of dollars every year in pursuit of a strategy that has shown itself unnecessary and ineffective defies justification.

2. *The Pulp Mills' Anti-competitive Behavior*

The management regime in the Tongass has taken a significant economic toll aside from the below-cost timber sales and the needless spending of funds not subject to the appropriations process. Shortly after ANILCA was enacted, a federal judge found that the pulp mills had engaged in a long, concerted pattern of illegal practices in restraint of trade.¹⁸⁵ The record developed in the case illustrates a panoply of anticompetitive practices. Starting in 1959, APC's first year in business, the two mills regularly exchanged

¹⁸² The communities are the cities of Pelican, Hydaburg, Craig, Gustavus, Elfin Cove, Edna Bay, Klawock, Port Alexander, Angoon, Yakutat, Tenakee Springs, Port Protection, Point Baker (Prince of Wales Island), Kupreanof, Kasaan, and Hoonah. Copies of these resolutions are on file in the offices of the Virginia Environmental Law Journal.

¹⁸³ In fiscal 1986, the Forest Service paid for 40.4 miles of "public works" roads at a cost of \$11.4 million, and through purchaser credits financed 71.5 miles of roads costing \$6.03 million, for a total of 111.9 miles of roads with a price tag of \$17.5 million. 1987 Hearings, *supra* note 67, at 437 (Forest Service table of roads and costs). In previous years, the "public works" roads constructed by the USFS have averaged well over \$300,000 per mile. Even figuring in the less expensive roads constructed by timber purchasers, costs per mile have approached \$200,000. *See id.*

¹⁸⁴ Committee Report, *supra* note 2, at 13.

¹⁸⁵ Reid Brothers Logging Co. v. Ketchikan Pulp Co., No. C75-165SR (W.D. Wash., June 8, 1981) (Westlaw, 1981 WL 2124), *aff'd*, 699 F.2d 1292 (9th Cir. 1983), *cert. denied*, 464 U.S. 916 (1983).

“confidential” information detailing how much each was willing to bid on independent sales (sales outside of their allotment areas), and quickly developed a pattern of not bidding against one another.¹⁸⁶ For instance, between March 1966 and March 1975, the USFS offered twenty-seven sealed-bid sales. The two mills did not directly compete on any of them.¹⁸⁷ Of the 143 sales offered between 1959 and 1975, the two mills bid against each other only three times.¹⁸⁸ And while logs were in great demand during much of this period, each mill consistently refused to buy logs from a logger whom it understood to be supplying the other mill,¹⁸⁹ effectively preventing independent loggers from benefitting from the competitive market in existence at the time. Even more disturbing, the court found that the defendants “concertedly prevented outside mills from establishing competitive facilities” in Southeast.¹⁹⁰ By bidding preclusively and by denying new mills access to logs purchased by independents, the long-term contract holders kept new mills from obtaining the raw materials necessary to do business.¹⁹¹ Often the preclusive bidding occurred through “fronts” and companies under the mills’ control established solely for a particular sale or series of sales.¹⁹² This avoided having the two mills associated with high-priced stumpage and kept the Forest Service from discovering the mills’ anticompetitive behavior.¹⁹³ Additionally, APC and LPK eliminated competition by systematically acquiring ownership or control of nearly all of the independent sawmills.¹⁹⁴ The acquisitions often took place after aggressive anticompetitive actions had brought the third-party mill to the brink of bankruptcy.¹⁹⁵

The court also found that APC and LPK paid artificially low prices to loggers, manipulated log prices and credit so as to completely control “independent” loggers, fraudulently double-invoiced certain transactions to deceive the Forest Service as to the actual value of the logs, and took advantage of numerous tech-

¹⁸⁶ *Id.* at 7-8.

¹⁸⁷ *Id.* at 10.

¹⁸⁸ Reid Brothers Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1297 (9th Cir. 1983).

¹⁸⁹ Reid Brothers, No. C75-165SR, (Westlaw, 1981 WL 2124) at 10.

¹⁹⁰ *Id.* at 10-11.

¹⁹¹ *Id.*

¹⁹² *Id.* at 14-15.

¹⁹³ *Id.* at 14.

¹⁹⁴ *Id.* at 12.

¹⁹⁵ See *id.* at 12, 13.

niques to fraudulently reduce stumpage costs. They even jointly marketed and sold logs in Japan, afterwards sharing the profits. These collusive and unlawful activities took place from the very year the second mill opened until at least 1975, when Reid Brothers filed suit. After reviewing all the evidence, the court concluded that "the two mills began with a natural advantage in the form of the 50-year [contracts] . . . and that the mills utilized this advantage as a starting point . . . to control the Alaska timber market, to eliminate competition, and to maintain and exercise monopoly power."¹⁹⁶ The Ninth Circuit affirmed the trial court's award of \$1.5 million in damages.¹⁹⁷

The Forest Service appointed a review team made up of an attorney, an accountant, and a forester to follow up *Reid Brothers* with its own investigation into timber practices in the Tongass. Its conclusions paralleled the District Court's, finding substantial evidence of fraud, collusion, and restraint of trade, and it detailed numerous ways in which the natural monopoly power created by the long-term contracts resulted in millions of dollars of waste and lost federal revenues.¹⁹⁸ The report also disclosed the existence of a clearly collusive bidding boycott in the Tongass when purchasers thought stumpage rates were too high.¹⁹⁹ This boycott took place from 1975 to 1978, indicating that problems have continued since Reid Brothers sued in 1975.²⁰⁰ The review team determined that APC's and LPK's illegal activities cost the government from \$63 to \$81 million.²⁰¹ Less than \$10 million of this has been recovered from the mills. Although the Department of Agriculture twice referred the matter to the Department of Justice, hoping to see some sort of fraud, breach of contract, or antitrust proceeding, Justice refused to pursue either civil or criminal actions.²⁰²

¹⁹⁶ See Reid Brothers Anti-Trust Case Review Team Findings, reprinted in *Timber Industry Practices*, *supra* note 114, at 292 (quoting Judge Rothstein's oral findings)(elipses in original).

¹⁹⁷ See Reid Brothers, 699 F.2d 1292.

¹⁹⁸ See generally Reid Brothers Anti-Trust Case Review Team Findings, *supra* note 196, at 241-304.

¹⁹⁹ See *id.* at 271-73.

²⁰⁰ *Id.*

²⁰¹ Committee Report, *supra* note 2, at 14. Later estimates reduced the figure to between \$46.2 and \$49.7 million. 1987 Hearings, *supra* note 67, at 109 (information provided by USFS).

²⁰² 1987 Hearings, *supra* note 67, at 108. Principal factors in the Department of Justice's decision included possible judicial reluctance to impose a judgment that would dramatically affect a community (e.g., force a mill closure) and statute of limitations problems. See *Timber Industry Practices*, *supra* note 114, at 357 (statement of Helmut Furth, Deputy Assis-

The claim that government money should continue to flow unabated to support a dying or crippled industry rings hollow in these circumstances. The industry's major players have engaged in patently illegal actions in order to defraud the government subsidizing them, at the same time driving out of business local operators whose competition provided jobs, stability, and increased stumpage revenues. (When Reid Brothers sued the mills in 1975, the court found it to be the last of the independent purchase loggers.²⁰³ The rest were either controlled by the big mills or had gone bankrupt.) Industry advocates have testified that the absence of other mills demonstrates the difficulty of operating in the Tongass and the necessity of continued federal assistance,²⁰⁴ yet APC and LPK bear substantial, perhaps primary responsibility for this lack of competitors. Even the initiation of the *Reid Brothers* suit in 1975 may not have been sufficient to shame the mills into better behavior, according to a 1983 Congressional report that found evidence of continued illegal activity occurring from 1975 through the summer of 1981.²⁰⁵ It rankles in such a situation to continue to provide generously for the parties who have been so corrupt. Furthermore, it calls into question the justification for subsidizing, with large sums of government money, an unstable and resource-depleting industry.

3. *The Impact of Logging on Other Industries*

The timber industry employs a sizeable percentage of Southeast's workers, but by no means does it corner the market. Government employment accounted for 39% of the jobs in Southeast in

tant Attorney General). According to the former chief of the USFS, there have been other successful civil antitrust suits by small timber operators "both in court and out of court." *Id.* at 12 (testimony of R. Max Peterson, Chief, USFS). However, no other evidence of such suits was found in researching this note.

²⁰³ Reid Brothers, No. C75-165SR, (Westlaw, 1981 WL 2124) at 4.

²⁰⁴ "Those [timber businesses] that were lured in by representations in prior days are stuck there. But you don't see anybody new coming to invest there because of the attitude of the Government," *i.e.*, the Forest Service's alleged failure to provide "economic" timber. 1987 Hearings, *supra* note 67, at 170 (testimony of Joseph Henri, Vice President, Resource Development for Alaska, Inc.).

²⁰⁵ See Timber Industry Practices, *supra* note 114, at 97-98 (Summary of Documentation of Illegal and Potentially Illegal Activities on the Tongass National Forest, Alaska, prepared by the House Subcommittee on Mining, Forest Management, and Bonneville Power Administration (citing the Reid Brothers Anti-Trust Case Review Team findings, *supra* note 196 and other USFS documents)).

1983.²⁰⁶ In comparison, commodity-producing employment (primarily fishing and timber) provided only 24.6% of the job pool that year.²⁰⁷ Even excluding government employment, timber by no means predominates in the job market. The following table, based on figures obtained from the Forest Service, shows the number of employees in particular industries in Southeast.²⁰⁸

	1986	1987
Commercial fishing and fish processing	4,600	3,654
Tourism	4,342	4,559
Timber-related (TNF)	1,860	2,305

In other words, fishing and tourism combined provided 3.5 times more jobs than the Tongass-based timber industry in 1987, and almost five times more jobs in 1986. Additionally, these statistics reflect the woodproducts industry coming out of a depression. In both 1984 and 1985, the industry supplied fewer than 1,300 jobs to Southeast workers.²⁰⁹

In terms of revenue, the three industries run neck and neck. Timber brought in \$80.2 million in 1986, followed closely by fishing (\$79.9 million), and a rapidly-gaining tourism industry (\$71.1 million).²¹⁰

Obviously, then, any timber policies or practices that stabilize timber-related employment at the expense of fishing or tourism may cause more harm than good to Southeast's economy. The evidence, while not entirely consistent, indicates that such may now be the case. For instance, USFS and timber advocates boast that salmon catches have increased as much as 400% since ANILCA was enacted in 1980.²¹¹ The Forest Service has employed fisheries enhancement measures in conjunction with logging, and the

²⁰⁶ Rogers, *supra* note 1, at 53.

²⁰⁷ *Id.*

²⁰⁸ Letter from Bart Koehler, Exec. Director, SEACC, to Rep. Harold Volkmer, Chair, House Subcommittee on Forests, Family Farms and Energy (June 9, 1988) (relaying statistics obtained from USFS Region 10 Office in Juneau on May 20, 1988) (copy on file in the offices of the Virginia Environmental Law Journal).

²⁰⁹ GAO Report, *supra* note 4, at 31. The GAO Report appears to exclude indirect employment; the 1986 and 1987 USFS statistics do account for it. Neither source adjusts for the fact that more than one third of the jobs in the timber industry are ordinarily held by non-residents. See Committee Report, *supra* note 2, at 13 n.22.

²¹⁰ Committee Report, *supra* note 2, at 13 n.22.

²¹¹ See, e.g., 1987 Hearings, *supra* note 67, at 96 (testimony of Dale Robertson, Chief, USFS).

Agency asserts that possibly seven million pounds of salmon per year will result from these measures.²¹² But fishermen in Southeast flatly deny the USFS assertions. They point out that a combination of various factors determines the productivity of a given fishing season.²¹³ Several commercial fishing trade groups angrily declared in a joint statement that

[f]or the Forest Service to take credit for the State of Alaska's much-improved management practices, for a succession of exceptionally good years for salmon ocean survival, for the reduction of foreign fleet salmon interceptions on the high seas, and for the catch reductions endured by Alaska fishermen in the name of conservation is an affront to the public and to Congress.²¹⁴

A representative of the Alaska Trollers Association testified that current Tongass logging practices pose a serious threat to spawning grounds.²¹⁵ He also pointed out that 1987's salmon catch was dramatically less than that of previous years, and that the "area of largest run failure" was off those parts of Southeast that have been most intensively logged.²¹⁶ In fact, in 1987 the Alaska Department of Fish and Game closed the pink salmon commercial season early because logging near crucial fish habitats exacerbated difficulties brought on by a drought.²¹⁷ Since fishing may be responsible for as much as 40% of the private-sector personal income in Southeast,²¹⁸ any adverse impact of logging on fisheries has widespread repercussions.

Tourism has boomed in Southeast since the enactment of ANILCA, implying that perhaps Tongass management benefits that industry. Tourist business increased 5% per year from 1980 to 1985; in 1985 and 1986, it jumped 12%; and "preliminary figures"

²¹² *Id.* at 96-97. See also Senate Hearings, *supra* note 64, at 151 (USFS statement that halting timber harvesting in the Tongass could lower the present net value of commercial salmon fisheries).

²¹³ Senate Hearings, *supra* note 64, at 304-307 (statement of Gordon Williams, representing four commercial fishing groups).

²¹⁴ 1987 Hearings, *supra* note 67, at 379 ("Views of the Southeast Fishing Industry as Represented by the Alaska Trollers Association, United Southeast Alaska Gillnetters, Southeast Seine Boat Owners and Operators Association, and Petersburg Vessel Owners Association").

²¹⁵ Senate Hearings, *supra* note 64, at 309-310 (statement of Gordon Williams on behalf of the Alaska Trollers Association, United Fishermen of Alaska, Southeast Alaska Seine Boat Owners & Operators Association, and United Southeast Alaska Gillnetters).

²¹⁶ *Id.* at 305.

²¹⁷ *Id.* at 313 (reprinting Alaska Dept. of Fish & Game, Commercial Fisheries News Release (Aug. 24, 1987)).

²¹⁸ *Id.* at 304.

in 1987 showed growth of 15%, with 250,000 visitors going through the Tongass that year.²¹⁹ Despite these statistics, the trade group representing Southeast tourism and recreational businesses stated that it is “deeply concerned about the future of tourism in Southeast Alaska.”²²⁰ Like the fishing trade groups, this industry is convinced that the regime operating in the Tongass prevents proper multiple-use resource management. The concern is that logging and milling, “a diminishing segment of [Southeast’s] economy,” drive Forest Service planning and operating at the expense of equally important industries.²²¹ The industry finds it telling that no forest in the country has a smaller percentage of its budget allocated to recreation than does the Tongass (10%).²²² One tour operator complained bitterly that her company must pay the Forest Service more to take a tourist into the forest for one day to photograph and leave intact an old-growth tree (\$3) than the long-term contract holders sometimes pay to cut it down and sell it (\$1.50-\$2.50).²²³

Some people argue that because logging results in roads, and tourists can use roads, logging helps tourism.²²⁴ Even assuming that the roads are maintained, that argument has only limited merit. Many of Southeast’s visitors have no intention or desire to drive into or through the forest. Visitors come through on ferry boats on their way to Anchorage or elsewhere; they come on charter cruise ships; they come to make excursions out of a port village on charter fishing boats.²²⁵ These activities do not require roads. Many hunters and fishers reach their camps by bush plane precisely because they want to *avoid* roaded areas. Moreover, loggers build logging roads to link mills, logging camps, and drainages being logged — places on few travel agendas. According to an industry survey, logging is the activity that tour operators most often seek to avoid.²²⁶ Any roads that the tourist industry might need

²¹⁹ *Id.* at 317-18 (testimony of Bonnie Kaden, Manager, Alaska Discovery, Inc., on behalf of the Tongass Tourism & Recreation Business Ass’n); 1987 Hearings, *supra* note 67, at 75 (testimony of Bonnie Kaden, Manager, Alaska Discovery, Inc.).

²²⁰ Senate Hearings, *supra* note 64 at 318 (testimony of Bonnie Kaden, Manager, Alaska Discovery, Inc., on behalf of the Tongass Tourism & Recreation Business Ass’n).

²²¹ *Id.* at 319.

²²² *See id.*

²²³ *See id.* at 315-16.

²²⁴ *See, e.g.*, 1987 Hearings, *supra* note 67, at 137 (testimony of William B. Privett, Mayor of Wrangell).

²²⁵ *Id.* at 75.

²²⁶ *Id.* at 364 (statement of Bonnie Kaden, Manager, Alaska Discovery, Inc.).

are roads to the vicinity of old growth wilderness, not roads to partially or entirely cut watersheds.²²⁷

Neither fishing nor tourism requires a complete halt to logging in the Tongass in order to thrive. Representatives of those industries often have backgrounds in timber-related businesses, and stress that they do not seek the abolition of logging. They simply resent the Forest Service's current single-purpose management. One long-time Alaska resident put it this way:

The great majority of us who depend on the Tongass National Forest in ways other than timber harvesting - who live by subsistence hunting and fishing, who hunt and fish for sport, who are commercial fishermen, guides, tourism promoters, recreationalists, and tourists - have our interests left largely out of the equation. . . .

In effect, the Tongass National Forest, outside those areas designated as wilderness, could better be called the Tongass Industrial Forest. It is being managed almost entirely for the short-range benefit of a single interest and for the long-range benefit of no one at all.²²⁸

Not only do these non-timber interests compare favorably with timber in terms of revenue and employment, they leave the forest essentially intact, thereby preserving its non-economic values. Unlike timber, scenery can be harvested day after day, and salmon and steelhead regenerate in only a few years.

The tourism and fishing industries assert and the record suggests that the present management regime neglects the concerns of these important segments of Southeast's economy. Driven by section 705(a) and the fifty-year contracts, the Forest Service focuses with tunnel-vision on the needs of the timber industry, much to the detriment of sport and commercial fishing and recreational and passive tourism. To calculate the true economic cost of current Tongass management, one must add to the millions of dollars lost each year on the timber program the significant toll which logging takes on the economy through its adverse effects on fishing and tourism.²²⁹

²²⁷ To the extent that many Tongass watersheds are pre-roaded years before they are harvested, logging roads may provide recreational access to nearly-virgin drainages. By definition, however, pre-roaded areas turn into clearcuts, making such access roads only temporarily suitable for tourism purposes.

²²⁸ Oversight Hearings, *supra* note 20, at 417-18 (testimony of Richard Nelson, local resident, anthropologist, and writer).

²²⁹ The toll is liable to be even higher in the future because the adverse environmental effects of logging are cumulative. See 1987 Hearings, *supra* note 67, at 72-73 (testimony of

C. Current Management is Ecologically Costly

The cyclical nature of the timber industry means that the economic costs of current management practices may be less dramatic in future years than they have been recently. Nevertheless, severe ecological costs associated with the present regime are accumulating independently of the Forest Service balance sheet. The following section explores threats to Tongass resources that cannot be quantified monetarily.

1. The Value of an Old-growth Rain Forest

The Tongass is not the last rain forest in America, or even the only one that remains largely intact. Its distinguishing factor is its age. The Forest Service has classified 90% of the "commercial" forest land in the Tongass as "old growth."²³⁰ That means that the majority of the trees in a given stand are more than a century and a half old.²³¹ It also means that the stand has reached a natural, dynamic equilibrium in which the death rate of old trees and the growth rate of new trees are finely balanced. This condition produces a very stable, complex, and productive ecosystem. The large old trees dominate the stand, but not to the exclusion of younger trees. As disease, decay, and insects kill old trees, their root structures weaken and they eventually topple, allowing sunlight to penetrate and providing space and nutrients for new trees and other understory plants. The process creates an area where trees vary considerably in age and size, marked by a multi-level canopy that admits enough sunlight to sustain a rich understory of diverse vegetation.²³²

An old growth rain forest caters to the needs of thousands of

Gordon Williams on behalf of the Alaska Trollers Ass'n).

²³⁰ AVRF, *supra* note 5, at 58-59.

²³¹ *Id.*

²³² For discussions of the old-growth ecosystem, see generally 1987 Hearings, *supra* note 67, at 574-607 (Statement of Reasons for Appeal of the Record of Decision on the Final Environmental Impact Statement for the 1986-90 Operating Period for the Alaska Pulp Corporation Long-Term Sale Area, submitted by the Wildlife Society, Alaska Chapter); Oversight Hearings, *supra* note 20, at 61-68 (testimony of John Schoen, Ph.D., Alaska Dept. of Fish & Game research biologist, representing the Territorial Sportsmen and the Alaska Outdoor Council); *Management of Old-Growth Forests: Hearing before the Subcomm. on General Oversight, Northwest Power, and Forest Management of the House Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. 22-28 (reprinting "Characteristics of Old-Growth Douglas-Fir Forests," by Jerry Franklin, USDA, and Thomas Spies, Oregon State University (1986)); Schoen and Kirchoff, *Wildlife and Old-Growth Forests in Southeastern Alaska*, 8 Nat. Areas J. 138 (1988).

living creatures. The canopy alone can provide habitat for up to 1,500 invertebrates.²³³ "In the rare temperate old-growth [rain] forest, upper surfaces of the large branches are covered with organic 'soil' several centimeters thick, which supports entire communities of plants and animals. Large branches are the home of birds and arboreal mammals."²³⁴ Huge decaying trees that have not yet fallen, called "snags," provide dens for grizzly bears and other mammals and nesting sites for birds. Bald eagles select the biggest, strongest coastal trees to support their heavy eyries. The understory offers plentiful forage to deer, moose, bears, and smaller animals. Riverside and estuarine old growth mitigates against harsh weather, keeping the water temperature from rising too dramatically, stabilizing the flow of rain and snow runoff, and minimizing streambank erosion and the amount of non-organic particulate matter washed into the water. Woody debris in the water also provides stream channel stability, important cover from predators, and water-velocity stabilization, effects which are crucial in the life cycles of anadromous fish such as salmon, cutthroat, and steelhead.²³⁵

As timber industry advocates point out, trees do grow back. But the post-clearcut forest that replaces a stand of old growth is for years a vastly different biological entity. Dr. John Schoen, former president of a professional organization of 8,000 wildlife biologists, testified before a Congressional committee that in Alaska, a second-growth forest is "a very sterile wildlife habitat" for its first 150 to 200 years.²³⁶ Dr. Schoen explained that second growth in Southeast comes in extremely fast and thick and evenly spaced.²³⁷ This results in a dense, even canopy that prevents almost all sunlight from reaching the forest floor. Such a forest lacks the understory of a virgin stand.²³⁸ It lacks snags and nest trees; it lacks many of the attributes which make it valuable as fish habitat; it lacks the nutri-

²³³ Barlow, *supra* note 6, at 26.

²³⁴ *Id.*

²³⁵ See generally American Inst. of Fisheries Research Biologists, *Fish and Wildlife Relationships in Old-Growth Forests* 187-204 (W. Meehan, T. Merrell and T. Hanley, eds. 1984), reprinted in *Oversight Hearings*, *supra* note 20, at 420-36.

²³⁶ *Oversight Hearings*, *supra* note 20, at 63-64 (testimony of Dr. Schoen, President, Alaska Chapter, The Wildlife Society).

²³⁷ *Id.* at 63.

²³⁸ This has been called the "stem exclusion stage" because of the difficulty seedlings and shrubs have in trying to colonize. AVRF, *supra* note 5, at 145 (citing Oliver, *Forest Development in North America Following Major Disturbances*, 3 *J. Forest Ecology & Mgmt.* 153-68 (1981)).

ents from generations of decaying organic matter; in short, it lacks the biological productivity of old growth. To speak of an old-growth forest as being renewable on 100-year cycle makes no sense.²³⁹ The only thing "renewed" is the wood.

The Forest Service and the timber industry have together been trying to artificially create some old-growth attributes in second growth stands, primarily through thinning techniques.²⁴⁰ Besides raising Forest Service timber program deficits to even greater levels, the effectiveness of these techniques has yet to prove itself.²⁴¹ In 1984, a task force of the Society of American Foresters studied old growth and determined that it is presently impossible either to mimic or to catalyze the natural richness of old-growth forests.²⁴² The report continued:

Certain attributes, such as species composition and structural elements, could perhaps be developed or enhanced through silviculture, but we are not aware of any successful attempts. Old-growth is a complex ecosystem, and lack of information makes the risk of failure high. . . . [E]rrors could be very costly. At least until substantial research can be completed, the best way to manage for old growth is to conserve an adequate supply of present stands and leave them alone.²⁴³

One should bear in mind when discussing old growth's biological value that the age of a stand is not the only determining factor. Low altitude stands, often found on beach fringes or in river valleys, tend to be more productive biologically than old-growth found at higher altitudes.²⁴⁴ The former type more likely will be high-volume old-growth, often defined as stands containing more than thirty MBF per acre.²⁴⁵ High-volume acreage attracts loggers as well as wildlife because it brings in the biggest return on a log-

²³⁹ Oversight Hearings, *supra* note 20, at 63, 67 (testimony of Dr. Schoen).

²⁴⁰ *Id.* at 74-75.

²⁴¹ *See id.* (The Forest Service does "not have data that demonstrates that thinning is a productive tool.")

²⁴² AVRF, *supra* note 5, at 146 (quoting Society of American Foresters, *Scheduling the Harvest of Old-growth in the Pacific Northwest: A Position of the Society of American Foresters and Report of the SAF Task Force on Scheduling the Harvest of Old-growth Timber* (SAF Resource Policy Series 1984). The former Chief of the USFS "generally agree[s] with those statements." Oversight Hearings, *supra* note 20, at 165 (testimony of Max Peterson).

²⁴³ AVRF, *supra* note 5, at 145-46 (quoting Society of American Foresters, *supra* note 242).

²⁴⁴ 1987 Hearings, *supra* note 67, at 570 (testimony of Matthew Kirchoff, The Wildlife Society). Four percent of the Tongass is comprised of such stands. *Id.*

²⁴⁵ *Id.*

ger's investment.²⁴⁶ Hence, half of the highest volume stands (those containing more than fifty MBF per acre) that existed in 1950 have already been cut, according to the Wildlife Society.²⁴⁷ Ninety percent of that valuable land remains available for logging. Twenty-eight percent of it was scheduled in TLMP for harvest by 1990,²⁴⁸ and the harvesting of high-volume stands often exceeds TLMP's goals. Tongass logging in the last eight years has averaged over forty MBF per acre of timber cut, fifteen MBF per acre greater than the Forest Service planned in TLMP.²⁴⁹ Such a schedule of rapid old-growth depletion plainly multiplies the biological costs of logging described below.

2. Effect of Old-growth Destruction on Deer, Grizzlies, and Eagles

To lose substantial amounts of the complex and productive system characteristic of old growth would be tragic. Even if old growth in Southeast is not eradicated by logging, its gradual erosion from the relentless pressure of the timber industry results in other ecological costs. As the amount of old growth dwindles, certain kinds of life which are components of the system may fail to adapt and so perish. Three of the species threatened by the current logging practices in the Tongass are the Sitka black-tailed deer, the grizzly bear, and the bald eagle.

The Sitka black-tailed deer is sometimes regarded as an indicator species reflecting the overall health of the Tongass.²⁵⁰ The deer presently occur in abundant quantities throughout Southeast. For instance, the State of Alaska allowed a Southeast deer harvest of 15,100 in 1986, as compared to 3,100 in 1980.²⁵¹ Congressman

²⁴⁶ For instance, by 1986 only 13.5% of the timber in the eight to twenty MBF volume class scheduled for harvest in TLMP was actually cut, while 86% of the scheduled highest volume timber was in fact harvested. Oversight Hearings, *supra* note 20, at 140 (testimony of Michael Barton, Regional Forester, Alaska).

²⁴⁷ *Id.* at 72 (testimony of Dr. Schoen).

²⁴⁸ See AVRF, *supra* note 5, at 4 (Table 1: Distribution of the Remaining Old-Growth Forest) (citing USFS, Tongass Land Management Plan, Landtype/Timber Task Force Working Report (1978), and Rideout, Miyata, & Olson, A Statistical Profile of the Timber Supply Base of the Tongass in Southeast Alaska (1984) (unpublished manuscript); Committee Report, *supra* note 2, at 18.

²⁴⁹ Committee Report, *supra* note 2, at 23.

²⁵⁰ That is, if deer can thrive in the midst of logging, other species probably can as well. If deer populations decline, the entire ecosystem will probably suffer. TLMP Final EIS, *supra* note 105, at 86.

²⁵¹ 1987 Hearings, *supra* note 67, at 32 (testimony of Rep. Young).

Young of Alaska and other advocates of Tongass logging see this as persuasive proof that deer thrive in logged areas, but biologists seem almost uniformly to disagree,²⁵² and even the Forest Service admits that the current population level is unsustainable.²⁵³ The Alaska Department of Fish & Game (ADF&G) prepared a model of deer population changes over the first 100-year logging rotation period. Its model, based on habitat preferences of radio-tagged deer, predicts that 74% of the watersheds slated for logging will lose more than half of their deer populations, and that losses in some drainages will exceed 75%.²⁵⁴

Old growth provides critical long-term habitat to deer²⁵⁵ for two reasons. First, as mentioned above, its understory contains much more browse than that found in second growth.²⁵⁶ Second, the canopy effectively intercepts snow so that in winter the deer can get to the forage vegetation.²⁵⁷ A second-growth stand cannot provide as desirable a year-round habitat due to a kind of natural Catch-22: when the trees are quite young and the understory is abundant, even a six-inch accumulation of snow makes the forage unavailable; but about the same time that the canopy increases enough to shelter vegetation on the forest floor, its extreme density prevents forage from growing. Probably only a series of mild winters has allowed the deer population in Southeast to flourish in the last few years.²⁵⁸ According to a former regional game supervisor for the ADF&G, "As soon as [Southeast] gets one or two bad winters, those populations are going down. They may never again come back to levels they were at previously."²⁵⁹

²⁵² See, e.g., Schoen and Kirchoff, *supra* note 232, at 140 ("Clearly the ability to maintain moderate to high population levels of Sitka black-tailed deer in [Southeast] is dependent on providing an abundance of high-quality old-growth habitat.")

²⁵³ See 1987 Hearings, *supra* note 67, at 33 (testimony of K. J. Metcalf, Director of SEACC, formerly Manager of Admiralty Island National Monument (citing USFS, 1986-90 Environmental Impact Statement)).

²⁵⁴ AVRF, *supra* note 5, at 161 (citing J. Schoen, M. Kirchoff, & M. Thomas, *Seasonal Distribution and Habitat Use by Sitka Black-Tailed Deer in Southeastern Alaska*, (Alaska Dept. of Fish & Game, 1985)).

²⁵⁵ Much of the following discussion obviously applies equally to other herbivorous mammals.

²⁵⁶ AVRF, *supra* note 5, at 159. See also F. Bunnell & G. Jones, *Black-Tailed Deer and Old-Growth Forests—A Synthesis*, in *Amer. Inst. of Fisheries Research Biologists, Fish & Wildlife Relationships in Old-Growth Forests* 411-20 (W. Meehan, T. Merrell & T. Hanley eds. 1984).

²⁵⁷ AVRF, *supra* note 5, at 160.

²⁵⁸ 1987 Hearings, *supra* note 67, at 76 (testimony of Jack Lentfer, representing the Territorial Sportsmen).

²⁵⁹ *Id.* Mr. Lentfer has spent thirty years in Alaska as a wildlife biologist, five of them as

Grizzly bears are on the endangered species list in many states of the West,²⁶⁰ but they exist in Southeast in greater numbers and concentrations than anywhere else in America.²⁶¹ A four-year-long radio-telemetry study of grizzlies on two Tongass islands confirmed that the bears much prefer old growth to clearcuts and second-growth.²⁶² Because omnivorous grizzlies eat the forage found in the old-growth understory as well as the salmon found in the streams that the forest shelters, and because they often den in snags or beneath the enormous spread of an ancient tree's roots, clearcuts significantly reduce their food supply and habitat.²⁶³

Just as harmful to bear populations as habitat destruction is the proximity of human activity. "There is irrefutable evidence that brown [bear] populations have declined precipitously across their former range as wildlands became developed, roaded, and inhabited . . ." ²⁶⁴ A biologist formerly in charge of bear research and management for the ADF&G agrees. Either the activity — especially roadbuilding and logging — drives the bears into adjacent areas, where they must compete with a formerly stable population, or the bears remain, risking direct bear-human conflict.²⁶⁵ In short, "[s]pace and solitude are essential for maintaining grizzly bears in perpetuity. . . ." ²⁶⁶

Old growth also provides crucial habitat to bald eagles. Biolo-

Southeast Regional Game Supervisor for ADF&G. *See also id.* at 33 ("the first hard winter we have, well, [the deer] population will simply crash.") (testimony of K. J. Metcalf).

The loss of Sitka black-tailed deer would create hardships for subsistence communities in Southeast, where deer provides about 30% of the meat consumed. AVRF, *supra* note 5, at 201-02 (citing U.S. Fish & Wildlife Service, Report on the Implementation of Title VIII of ANILCA: Subsistence Management and Use (1985)). The social costs of Tongass management — that is, the devastating effects on subsistence populations — justify extensive treatment which is, unfortunately, beyond the scope of this note.

²⁶⁰ 1987 Hearings, *supra* note 67, at 372 (letter from Jack Lentfer to Rep. Gejdenson (May 24, 1987)). Mr. Lentfer was a bear biologist with ADF&G from 1965-77 and served for a time as that agency's director of bear research and management.

²⁶¹ AVRF, *supra* note 5, at 9.

²⁶² *Id.* at 153 (citing J. Schoen & L. Beier, Brown Bear Habitat Preferences and Brown Bear Logging and Mining Relationships in Southeast Alaska (Alaska Dept. of Fish & Game 1983, 1985, 1986)). For example, only five of 223 Chichagof Island "sitings" in 1984 revealed bears in clearcuts, although clearcuts are common on the island. *Id.*

²⁶³ *Id.*; 1987 Hearings, *supra* note 67, at 372 (letter from Jack Lentfer to Rep. Gejdenson (May 24, 1987)).

²⁶⁴ AVRF, *supra* note 5, at 154.

²⁶⁵ 1987 Hearings, *supra* note 67, at 372-73 (letter from Jack Lenifer to Rep. Gejdenson (May 24, 1987)).

²⁶⁶ AVRF, *supra* note 5, at 154 (citing J. Craighead, J. Sumner, & G. Scaggs, A Definitive System for Analysis of Grizzly Bear Habitat and Other Wilderness Resources (1982)).

gists have found that nesting occurs almost six times as often in old growth as in second growth or on the ground.²⁶⁷ Usually the nest tree is a four- or five-hundred-year-old Sitka spruce or hemlock.²⁶⁸ They most often are located within forty yards of saltwater.²⁶⁹ In short, eagles nest only in prime commercial timber — low-elevation old-growth Sitka spruce and hemlock with easy access to water transportation. Furthermore, bald eagles require much territory to nest; rarely do two pairs nest within a kilometer of each other.²⁷⁰ Although the population of bald eagles has recovered from years when the state offered a bounty for them, the leading biologists in this field state that logging practices will almost certainly reduce present numbers.²⁷¹ They find that despite Forest Service eagle-protection efforts, logging activities have too often encroached upon nests.²⁷² Moreover, 90% of the eagle's natural habitat will be eliminated or altered under current USFS plans, endangering both existing eyries and the ability of young breeding pairs to establish their own nests.²⁷³

IV. THE TONGASS TIMBER REFORM ACT

Identical bills were introduced in both houses of Congress last session to reform Tongass management practices. The Senate proposal²⁷⁴ saw little progress, but the House resoundingly passed legislation²⁷⁵ that would substantially ameliorate many of the problems plaguing the Tongass. Because of the tremendous support the House gave it, and because legislation introduced in this year's Congress²⁷⁶ has adopted several of its principal provisions,

²⁶⁷ *Id.* at 170 (citing F. Robards & J. Hodges, *Observations from 2,760 Bald Eagle Nests in Southeast Alaska* (U.S. Fish & Wildlife Service 1977)).

²⁶⁸ *Id.* at 169-70.

²⁶⁹ *Id.* at 170.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 170-71 (citing Robards & Hodges, *Resurvey of the Bald Eagle Breeding Population in Southeast Alaska*, 43 *J. Wildlife Mgmt.* 1 (1979)).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ S. 708, 100th Cong., 1st Sess., 133 Cong. Rec. S2921 (daily ed. March 10, 1987).

²⁷⁵ H.R. 1516, 100th Cong., 2d Sess., 134 Cong. Rec. H5950 (daily ed. July 27, 1988). The bill passed by a 361-47 vote.

²⁷⁶ S. 346, 101st Cong., 1st Sess., 135 Cong. Rec. S1105 (daily ed. Feb 2, 1989); S. 324, Title XI, 101st Cong., 1st Sess., 135 Cong. Rec. S1050 (daily ed. Feb. 2, 1989); H.R. 987, 101st Cong., 1st Sess., 135 Cong. Rec. H273 (daily ed. Feb. 9, 1989).

A number of Congressional committees have already held hearings on the Tongass this session. The Senate Energy Committee's Subcommittee on Public Lands, National Parks, and Forests held hearings on S. 237, *supra* note 10, and S. 346, *supra*, on Feb. 28, 1989, and

the last section of this note analyzes last year's House bill.

A. Legislative History

On March 10, 1987 Congressman Robert Mrazek introduced H.R. 1516.²⁷⁷ This short bill sought only "to require annual appropriations of funds necessary to support timber management and resource conservation in the Tongass National Forest."²⁷⁸ After the subcommittee had held hearings and several members had visited Southeast, Congressman George Miller offered an amendment in the nature of a substitute in early 1988. The full Committee adopted Congressman Miller's amendment on March 23, 1988.²⁷⁹ A compromise amendment offered by Congressmen Jerry Huckaby and Don Young was rejected by a vote of twenty-two to eighteen.²⁸⁰

The Committee Report on H.R. 1516 explains the Tongass situation carefully and describes a number of reasons behind the Committee's adoption of the proposed legislation. Briefly, it found the following factors critical: first, despite ANILCA and the fifty-year contracts, employment stability in Southeast is not being achieved;²⁸¹ second, Section 705(a)'s supply mandate has proven unnecessary to meet demand;²⁸² third, the permanent appropriations have led to "unjustifiable" Forest Service spending,²⁸³ along with "wasteful fiscal practices and unnecessary resource conflicts;"²⁸⁴ fourth, Forest Service policy under ANILCA has allowed excessive high-volume old-growth harvesting and has failed to protect fish and wildlife resources adequately;²⁸⁵ and fifth, ANILCA has not resulted in the modification of the long-term contracts.²⁸⁶ Specifically criticized in the last category are the antitrust viola-

the full Committee considered Sen. Wirth's energy act, S. 324, *supra*, including its Tongass provisions, on March 14. On the House side, the Interior Committee's Subcommittee on Water, Power, and Offshore Resources conducted a hearing on H.R. 987, *supra*, on March 14, while the Agriculture Committee's Subcommittee on Forests, Family Farms, and Energy met to "review the management" of the forest on March 15.

²⁷⁷ H.R. 1516, 100th Cong., 1st Sess., 133 Cong. Rec. H1183 (daily ed. March 10, 1987).

²⁷⁸ Committee Report, *supra* note 2, at 1, 19.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 35.

²⁸¹ *Id.* at 9-10.

²⁸² *Id.* at 10-12.

²⁸³ *Id.* at 12.

²⁸⁴ *Id.* at 13.

²⁸⁵ *Id.* at 17-19.

²⁸⁶ *Id.* at 14-17.

tions, a backlog of one BBF of sold but unharvested timber, unjustifiably low stumpage rates, the rate redetermination clauses, and certain provisions allowing the purchasers to take high-volume stands while paying lower-volume rates.²⁸⁷ The Committee also expressed displeasure about discrepancies between the long-term contracts and short-term practices, APC's suit against the government, and non-compliance with NFMA and possibly with NEPA.²⁸⁸

After reporting the bill, the Interior Committee referred it to the Committee on Agriculture, which discharged it on June 10.²⁸⁹ On July 27, the full House passed H.R. 1516 (with one amendment) by a 361-47 vote.²⁹⁰

B. Provisions of H.R. 1516

The original Tongass Timber Reform Act is brief and simple. By repealing Sections 705(a) and (d), it eliminates the 4.5 BBF mandate, the \$40 million permanent appropriation, and the exemption from NFMA section 6(k). It also repeals the requirement that the Secretary report to Congress on the ability of the timber base to meet a 4.5 BBF per decade supply rate. Finally, it requires that the Secretary's section 706(b) reports discuss the effects of the timber program on fisheries, wildlife habitats, and subsistence resources, and that the commercial fishing industry be consulted in the preparation of these reports.

Congressman Miller's amendment added two new titles to the original H.R. 1516.²⁹¹ Title II, stating that Congress finds that the long-term contracts "prevent proper management . . . , have undermined fair competition . . . , and fail to provide a fair financial return to the United States,"²⁹² orders the Secretary of Agriculture either to act unilaterally or, if necessary, to negotiate changes in the long-term contracts in order to achieve certain specified objectives. These objectives are, basically, the elimination of each of the

²⁸⁷ *Id.*

²⁸⁸ See *id.* at 6-7, 18. The Reid Brothers Review Team found that "the five-year operating plans cover too large an area to provide for the detail of analysis" required under NEPA, and urged that site-specific environmental impact statement preparation become the rule. *Id.* at 18.

²⁸⁹ 134 Cong. Rec. H4151 (daily ed. June 10, 1988).

²⁹⁰ See 134 Cong. Rec. H5925-H5951 (daily ed. July 27, 1988).

²⁹¹ The text of this version of H.R. 1516 may be found in the Committee Report, *supra* note 2, at 1-3. This will hereinafter be referred to by section.

²⁹² Section 201, in Committee Report, *supra* note 2, at 2.

problems with the contracts described in the Committee Report, such as anticompetitive behavior, low stumpage rates, and non-compliance with NFMA and NEPA.²⁹³ The bill requires the Secretary to report to Congress one year after enactment about the results of the negotiations. That report must include a discussion of whether terminating the contracts would better achieve the title's goals.²⁹⁴

Additionally, Congressman Miller's amendment imposes a five-year moratorium on timber harvesting in nineteen areas of "special fish and wildlife, subsistence, recreation, and other values."²⁹⁵ The moratorium would protect almost 1.7 million acres of the Tongass, much of it high-volume old-growth, and would last until after the Forest Service has completed its next TLMP.²⁹⁶ Three hundred thousand of these acres are already scheduled for logging.²⁹⁷ Without the moratorium, the rest of the acreage could be awarded in the two five-year operating plans that the USFS will finalize before it finishes revising TLMP.²⁹⁸

²⁹³ See § 202, in Committee Report, *supra* note 2, at 2-3.

²⁹⁴ Section 203, in Committee Report, *supra* note 2, at 3.

Congressman Mrazek last session also introduced H.R. 3556, a bill that called not for reformation but for outright termination of the fifty-year contracts. H.R. 3556, 100th Cong., 1st Sess., 133 Cong. Rec. E4141, H9062 (daily ed. Oct. 27, 1987). Three bills introduced in this session have adopted similar termination provisions. See S. 346, 101st Cong., 1st Sess., 135 Cong. Rec. S1105 (daily ed. Feb. 2, 1989); S. 324, Title XI, 101st Cong., 1st Sess., 135 Cong. Rec. S1050 (daily ed. Feb. 2, 1989); and H.R. 987, 101st Cong., 1st Sess., 135 Cong. Rec. H273 (daily ed. Feb. 9, 1989). The Congressional Research Service of the Library of Congress thoroughly explored the issue of governmental liability for such an action and concluded that the legislation would probably not constitute a taking, and that suits by the mills for breach of contract would probably not survive a sovereign immunity defense. See CRS American Law Division and Environment and Natural Resources Policy Division, Proposed Statutory Termination of Long-Term Timber Sales Contracts in the Tongass National Forest (1987) (Memorandum to John Schiebel, House Committee on Interior and Insular Affairs) [hereinafter CRS Memo] (copy on file in the offices of the Virginia Environmental Law Journal). Even if "just compensation" should be awarded, "either by constitutional compulsion or congressional grace," CRS found it very unlikely that the amount would exceed \$150 million plus interest. *Id.* at 18. This conclusion relies heavily on *Hedstrom Lumber Co. v. United States*, 7 Cl. Ct. 16 (1984), a case in which several timber contracts were cancelled by a statute creating a wilderness area. CRS Memo, *supra*, at 17.

²⁹⁵ Section 301, in Committee Report, *supra* note 2, at 3.

²⁹⁶ Committee Report, *supra* note 2, at 25-26.

²⁹⁷ 134 Cong. Rec. H5943 (daily ed. July 27, 1988) (statement of Congressman Young).

²⁹⁸ A draft TLMP is due in December 1989; the final version is expected by the end of 1991. Interview with Dave Rittenhouse, USFS Alaska Affairs Coordinator (Feb. 17, 1989).

This year's legislation increases the amount of acreage to be protected to 1.79 million acres in 23 areas. See bills cited *supra* note 294. H.R. 987 actually calls for the land to permanently protected as wilderness, rather than simply be placed in a for five-year moratorium. See *id.*

The House added a final title to Miller's bill during floor debate before passage.²⁹⁹ Title IV first states that Congress finds commercial fishing, tourism, and recreation to be important segments of Southeast's economy. It therefore directs the Secretary "to change planning and management priorities . . . so as to assure that greater emphasis is given to the long-term best interests" of these three industries, as well as to the interests of subsistence communities and to the national interest in fish, wildlife, and other natural resources in the Tongass.³⁰⁰

C. Probable Effects of the Tongass Timber Reform Act

Despite the heated debate over the Tongass Timber Reform Act, its principal provision — repeal of Section 705(a) of ANILCA — would implement no radical new policy for managing the Tongass. Instead, Congress would simply be committing the forest to the same system of rational multiple-use management to which all the other national forests are subject.³⁰¹ Assuming that the Secretary can successfully modify or cancel the long-term contracts, the Act would release the Forest Service from the constraints imposed by ANILCA and the contractual obligations to the pulp mills. Thus, during boom markets, the Forest Service could provide 450 MMBF per year or more, subject to its normal multiple-use and sustained-yield policies. Moreover, it would have better leverage for inducing the pulp mills to buy lower-volume sales, once the contractual allotments and extraordinary purchaser-control provisions were cancelled. This would spread the harvesting more widely among different volume-class stands, as Section 705(a) tried to do through its added investment mechanism. The repeal of Section 705(a) would also mean that during times of a depressed market, neither natural nor financial resources would be wasted preparing unwanted sales, freeing the Forest Service to concentrate on non-timber resource management.

The contract modification provisions would also lead to better management of the Tongass timber resource. Again assuming the contracts are renegotiated, H.R. 1516 would require timber purchasers to harvest the entire volume of timber appraised for a

²⁹⁹ See 134 Cong. Rec. H5948 (1988) (amendment offered by Rep. Volkmer).

³⁰⁰ *Id.* (§ 401).

³⁰¹ According to the Committee, "The primary purpose of H.R. 1516 . . . is to make Forest Service management of the Tongass . . . consistent with the management of the other 155 forests in the National Forest System." Committee Report, *supra* note 2, at 4.

given sale.³⁰² This would eliminate "pick-and-choose" practices,³⁰³ and would promote a balanced harvest of stands of different volumes. H.R. 1516 also directs the USFS to reduce the size of sale areas subject to NEPA review, so that environmental impact statements can be more thorough, and to renegotiate the long term contracts so as to prevent excessive high-volume harvesting and to "enhance" wildlife protection.³⁰⁴

The simultaneous elimination of the artificial supply goal and modification of the long-term contracts' less resource-oriented provisions will let the Forest Service gauge actual market demand and offer appropriate amounts of acreage for sale. As pressure for preparing more timber lets up due to all of the factors described above, the Forest Service can avoid situations like Berners Bay, an area pre-roaded in 1985 despite the low quality of its timber. According to one witness, Forest Service officials apologized to tour operators and other opponents of the pre-roading but stated, "Quite frankly, we have no choice or flexibility not to proceed."³⁰⁵

Senator Murkowski's currently pending compromise bill³⁰⁶ would improve the current section 705(a), but less than it might seem at first glance. It would eliminate the permanent appropriation and would technically allow the Secretary to base the amount of timber annually offered for sale upon projected demand.³⁰⁷ However, it still requires the Forest Service to "assure the availability" of 4.5 BBF per decade.³⁰⁸ This suggests that the Forest Service's primary duty is to guarantee the supply of commercial timber, necessarily relegating other management objectives to

³⁰² See § 202(b)(5)(A), in Committee Report, *supra* note 2, at 2.

³⁰³ If a long-term contract holder harvests only the most valuable timber in a given stand, it nevertheless pays merely at the appraised rate for the entire stand — a rate which takes into account the less valuable trees. Moreover, the purchaser may retain the unharvested timber to reduce future appraisals of the same area. Reid Brothers Antitrust Case Review Team Findings, *supra* note 196, at 295.

³⁰⁴ See § 202, in Committee Report, *supra* note 2, at 2. The proposed reforms might also lead to an increase in the sale of Native pulp to the mills. Congressman Mrazek has asserted that fifty MMBF per year of pulp from Native-owned lands presently goes to waste because the pulp mills can get their timber at fire-sale prices from the USFS. If forced to pay prices comparable to the rest of the market, the mills may develop interest in buying Native excess. See 135 Cong. Rec. E399 (daily ed. Feb. 9, 1989) (statement of Congressman Mrazek).

³⁰⁵ 1987 Hearings, *supra* note 67, at 68 (testimony of Bonnie Kadens, Manager, Alaska Discovery, Inc.). See also *id.* at 412 (testimony of John Sisk, wilderness guide, Juneau) (stating that Berners Bay exemplifies the "fundamental imbalance" in USFS Tongass management).

³⁰⁶ S. 237, 101st Cong., 1st Sess., 135 Cong. Rec. S678 (daily ed. Jan. 25, 1989).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

secondary status.

The failure to even attempt modification of the long-term contracts also undermines the effect of Murkowski's compromise. The extraordinary amount of control enjoyed by the pulp mills has been recognized as a major reason for the single-use management prevalent in the Tongass.³⁰⁹ Furthermore, two-thirds of the current Tongass timber program must go to meet the obligations of the long-term contracts.³¹⁰ Unless the contracts are modified, a reduction in the amount of timber offered by the Forest Service would be disproportionately felt by the short-term purchasers — the independents such as the now-defunct Reid Brothers. Of course, all of the other concerns about the long-term contracts underlying Title II of H.R. 1516³¹¹ remain unaddressed by Murkowski's bill.³¹²

A compromise to H.R. 1516 offered last July by Congressman Young³¹³ did discuss contract reform, but like Murkowski's bill this session, Young's bill appeared to offer more substantive reform than it actually did. For instance, rather than requiring the Secretary to renegotiate so that LPK and APC pay "stumpage rates comparable to those paid under other [Tongass] sales," as H.R. 1516 proposes,³¹⁴ Young would require only that the mills pay "fair market value."³¹⁵ This phrase is too vague. The pulp mills and the Forest Service, for example, apparently define the mills' market as consisting only of purchasers of "sales primarily of pulp timber involving substantial quantities in the Tongass National Forest."³¹⁶

³⁰⁹ See Committee Report, *supra* note 2, at 21 ("[the Committee finds] that current management of the Tongass under the long-term contracts does not meet modern Forest Service management standards for conservation and protection of forest resource values"); see also *id.* at 22 (citing testimony of former USFS employees that "the long-term contracts have a separate planning process that actually controls the NFMA forest planning process").

³¹⁰ Senate Hearings, *supra* note 64, at 133 (statement of Dale Robertson, Chief, USFS).

³¹¹ See Committee Report, *supra* note 2, at 21 (citing reasons why long-term contracts prevent proper management).

³¹² By insisting that the Secretary "assure the availability" of 4.5 BBF each decade, which could well mean "prepare for sale" 4.5 BBF, the proposal fails even to achieve significant economic benefit, because "[t]he administration of the actual harvest . . . is a relatively small cost compared to preparing the timber to be offered to the timber industry." Senate Hearings, *supra* note 64, at 486 (USFS Responses to Additional Committee Questions). If Congress decides not to seek contractual termination or modification, it is hard to imagine that it would refuse to appropriate the USFS funding necessary to meet the contractual obligations.

³¹³ See 134 Cong. Rec. H5941 (daily ed. July 27, 1988) (amendment in the nature of a substitute offered by Rep. Young of Alaska).

³¹⁴ *Id.* at H5947 (H.R. 1516, § 202(b)(2)).

³¹⁵ *Id.* at H5941 (Young amendment, § 4(a)(ii)).

³¹⁶ U.S. Dept. of Agriculture (Forest Service) Timber Sale Agreement: Alaska Lumber &

This narrow definition would evade a principal purpose of contract reform, namely, to put the short-term and long-term buyers on equal footing.³¹⁷ "Fair," too, is a troublesome term in this context, because "the very structure of the year-to-year operations of the [fifty-year] contract[s] give [sic] the purchasers natural advantages in the forms [sic] of a non-competitive timber supply [Furthermore, [t]here are other built-in aspects that give these purchasers even greater natural advantages over the small sale contract[r]act," such as the "pick-and-choose" provisions and the opportunity to obtain fixed stumpage rates for five years at a time in a fluctuating market situation.³¹⁸ In such circumstances, "fair market value" becomes a phrase without meaning.

In a similarly ineffective way, Young's compromise bill seeks renegotiation of the contracts "to clarify the authority of the Forest Service to protect fish and wildlife habitats,"³¹⁹ when it should require the Secretary to renegotiate "to enhance the protection of fish and wildlife resources and habitats," as the Miller substitute does.³²⁰ It is also silent as to possible USFS non-compliance with NEPA. Finally, Young's bill fails even to mention the possibility of terminating the contracts.³²¹ This may not be a material distinction, since Congress has independent authority to terminate, but it reflects the entirely different tone that the Alaska delegation takes toward contract renegotiation. While Congressman Young's proposal seems a genuine attempt to meet the majority half way, effective change in Tongass management cannot occur without fundamentally reforming the supply mandate and the long-term contracts — the twin engines that drive current management.

Less pressure to log in times of low demand plainly means better protection of fish and wildlife values. This is especially true when

Pulp Co., Oct. 15, 1957 (Contract No. 12-11-101-1545), § 2(d)(2), *quoted in* Complaint of Alaska Pulp Co., *supra* note 170, at 25 (describing the contractual obligation of the USFS to provide "competitive" stumpage rates to APC).

³¹⁷ See H.R. 1516, § 202(b), 100th Cong. 2nd Sess., 135 Cong. Rec. H5947 (daily ed. July 27, 1988) (describing objectives of the contract negotiations).

³¹⁸ Reid Brothers Anti-Trust Case Review Team Findings, *supra* note 196, at 241, 294. The review team cited several other "natural advantages" that the contracts give to the mills, including the contract-holders' ability to determine the stands to be released for harvest from the allotment areas and differing treatment of purchaser road credits afforded to the long-term purchasers. *Id.* at 294-98. See also Rogers, *supra* note 1, at 26 ("the antitrust violations upheld by the courts were inevitable, given the structure of the industry").

³¹⁹ 134 Cong. Rec. H5941 (daily ed. July 27, 1988) (Young Amendment, § 4(A)(iv)).

³²⁰ Section 202(b)(4), in Committee Report, *supra* note 2, at 2.

³²¹ Likewise, S. 237, 101st Cong., 1st Sess., 135 Cong. Rec. S678 (daily ed. Jan. 25, 1989), is silent as to the modification or termination of the contracts.

the alleviation of pressure is combined with a harvest moratorium in certain critical watersheds of high ecological value. H.R. 1516 and two of this year's bills call for just such a moratorium.³²² These bills aim to protect around 1.8 million acres of "the most important and most sensitive" parts of the Forest, at least until after the USFS can complete the next TLMP. Significantly, this protection would not be permanent.³²³ It could happen that future needs for wood products, or a new market for Tongass timber, will raise real market demand above even the 4.5 MMBF per year level, and at that time the Forest Service may decide to provide more timber from old-growth stands. The legislation proposing the moratorium does not put a cap on the allowable sale quantity the Secretary may offer, nor does it lock into wilderness all of the stands of high ecological value. Until other pressures justify its depletion, however, substantially more old-growth would be preserved to maintain ecological stability in the forest under these proposals than under current management.³²⁴

It is important to note a number of effects that passage of a timber reform act would not have. Opponents of H.R. 1516 claimed from the floor that the legislation would "kill the [timber] industry" in Southeast.³²⁵ This is almost certainly *not* likely to result from any of these bills. The doomsayers have produced no documentation of the financial peril of APC and LPK, nor any other support for their assertions. The mills raised the same ominous spectre in the past, when asked to comply with national environmental regulations in 1976.³²⁶ They also threatened cutbacks and shutdowns in 1973 if environmental impact statements were required in the Tongass.³²⁷ Throughout the 1980s, the mills intimated that they would be forced to close if pollution waivers, labor

³²² See H.R. 1516, §§ 301-02, 100th Cong., 2nd Sess., 134 Cong. Rec. H5947 (daily ed. July 27, 1988); S. 346, §§ 301-02, 101st Cong., 1st Sess., 135 Cong. Rec. S1106 (daily ed. Feb. 2, 1989); and S. 324, § 1100, 101st Cong., 1st Sess., 135 Cong. Rec. S1051 (daily ed. Feb. 2, 1989).

³²³ Congressman Mrazek's 1989 bill, on the other hand, would establish permanent wilderness protection for the moratorium areas. See H.R. 987, 101st Cong., 1st Sess., 135 Cong. Rec. H273 (daily ed. Feb. 9, 1989).

³²⁴ 135 Cong. Rec. S1104 (daily ed. Feb. 2, 1989) (statement of Sen. Wirth).

³²⁵ 134 Cong. Rec. H5943 (1988) (statement of Rep. Young).

³²⁶ Williams, "KPC Says It Will Close by July 1, 1977," *Ketchikan Daily News*, May 4, 1976, at 1; "Cry Wolf," *Ketchikan Daily News*, May 5, 1976.

³²⁷ Weiner, "Forest Service Official Says No Shortage for Loggers," *Ketchikan Daily News*, April 19, 1973, at 1; "2 Mills Announce Shift Cut Because of Log Shortage," *Ketchikan Daily News*, Oct. 25, 1973.

union wage cuts, and relaxed logging regulations were not forthcoming.³²⁸ Given the record of unfulfilled prophesies of ruin, it is hard to take seriously the latest cry of "Wolf!" without more evidence of real financial peril.

While not declaring that the industry will shut down entirely, Congressman Young paints a bleak picture of the Southeast employment situation if a Tongass Timber Reform Act should pass. He introduced, in this vein, an amendment to establish "appropriate safeguards" to protect workers displaced by H.R. 1516.³²⁹ Some communities undoubtedly would suffer from the changes the Act requires. The mills would surely feel the effect of having to pay competitive prices for their raw materials, and they would certainly lay off workers as a result. Some unemployment is thus inevitable, especially in the immediate future. Congressman Young's amendment probably deserved more consideration than it received.

Despite these hardships, however, Tongass management reform would probably *improve* Southeast's employment situation over the long term. As Congressman Miller stated from the House floor, the changes urged by the House are designed to "open up the Tongass for competition and bring new mills and new people into the process rather than [to continue] the monopolistic federally subsidized practices that have existed."³³⁰ The hearing record makes it plain that APC and LPK have hardly been friends of the worker. Both mills broke their unions,³³¹ and the *Reid Brothers* court found that for years they conspired to eliminate small independent logging operations and mills.³³² Furthermore, job losses in the timber industry may well be offset by gains in fishing, tourism, and recreation because of better management of Tongass resources. Sound policy would encourage building up these industries, which utilize more easily renewable resources and suffer less from boom-and-bust cycles than does the timber industry.

³²⁸ Poppen, "Sitka Workers Taking Wage Cuts," *Ketchikan Daily News*, April 24, 1984, at 1; Poppen, "EPA Hears Mill Comments," *Southeastern Log*, December 1983; Poppen, "LPK-EPA Pact Expected Next Week," *Ketchikan Daily News*, Dec. 22, 1984, at 1; Carter, "Senate Nixes \$7 Million for Sitka Mill," *Juneau Empire*, Oct. 18, 1985, at 1.

³²⁹ 134 Cong. Rec. H5948-49 (1988) (Amendment offered by Rep. Young).

³³⁰ *Id.* at 5950 (statement of Rep. Miller).

³³¹ Committee Report, *supra* note 2, at 13 n.22; see also Senate Hearings, *supra* note 64, at 335 (testimony of Florian Sever, millwright, discussing events leading up to union decertification).

³³² See *supra* notes 190-195 and accompanying text.

Congress may of course decide that the national interest requires it to help ease any immediate burdens that might result from a new management regime.³³³ There are, however, valid reasons why it need not feel obliged to include a provision like Congressman Young's in a Tongass reform bill. Even if Section 705 was in fact intended to be a "jobs bill," ensuring employment regardless of demand for the product, why should Congress not be able to change the jobs it wants to support? Why may it not conclude after the better part of a decade that the program as originally designed has not worked and needs an overhaul? Congressman Young and other opponents of H.R. 1516 frequently compared it to the Redwood National Park buyout,³³⁴ in which Congress authorized the condemnation and purchase of privately-held land adjacent to a national park in order to protect its environment and aesthetic value.³³⁵ That argument is sophistic at best and disingenuous at worst. The Redwoods legislation involved a taking of private property by the government, for which compensation was constitutionally required.³³⁶ The Tongass National Forest belongs to the federal government. There is no taking involved. Surely the government may manage its own resources without incurring liability to displaced workers. The most compelling argument for liability would be to the mills for placing a harvesting moratorium on timber already offered to them. Owing to the amount of backlogged sales (over one BBF at the end of fiscal 1987)³³⁷ and the availability of alternative acreage, the Interior Committee's "firm position" was that the moratorium would not support such a lawsuit.³³⁸

³³³ In creating the Boundary Waters Wilderness Area in Minnesota, for instance, Congress voluntarily undertook to provide "just compensation" to timber purchasers whose contracts were modified or terminated by the Act. Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978) (codified at 16 U.S.C. § 1132 (1982)).

³³⁴ See, e.g., 134 Cong. Rec. H5949 (1988) (statement of Rep. Young); Senate Hearings, *supra* note 64, at 471 (statement of Jim Clark, Counsel, Alaska Loggers' Association). In fact, Young expressly modeled his amendment after the compensation provision of the Redwood act (Redwoods Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 (codified as amended at 16 U.S.C. § 79b-79q (1982 and Supp. IV 1986))).

³³⁵ 16 U.S.C. §§ 79b(c), 79c.

³³⁶ See Contract Modification Hearings, *supra* note 29, at 121 (letter to Rep. Young from Dale Robertson, Chief, USFS (Dec. 4, 1987), stating that the Redwoods legislation is not exemplary of any compensation possibly due in the Tongass National Forest because it would be "purely the prerogative of the Congress, and termination of the long term contracts would probably not result in noncontract parties having a cause of action through the normal claims procedures").

³³⁷ Committee Report, *supra* note 2, at 12.

³³⁸ *Id.* at 26. Even if the Act were to constitute a breach amounting to unjustifiable cancellation of the contracts, damages might well be no more than 8 to 150 million dollars,

It is critical to note two last effects that passage of reform legislation will not have: it will not affect either citizens' incentives for pursuing responsible resource management (including wilderness designations), nor the power of Congress to heed citizen recommendations it finds compelling by altering prior land management programs. Congressman Young declared that he would sleep better at night if he knew that the issue of Tongass land management would not come up again, if he knew "that the Wilderness Society would not [again] be on our necks. . . . Believe me, this is like the baddest bad penny of all. A new Congress will come in and they will say, 'They are cutting down the Tongass National Forest.' They will be back."³³⁹ Congressman Ron Marlenee of Montana sounded the same theme more vituperatively. He referred to environmentalists' efforts to reform ANILCA as "treachery," "sabotage," and a "bamboozling" of Alaskans and others.³⁴⁰ Congressman Marlenee predicts that dire consequences will result from continued withdrawals of land from the commercial timber base: "If this tide is not stemmed, our timber industry will have no place to go but one, and that is to go broke."³⁴¹ He claims that this is intended: "I know this is what some want and some are working toward in this country and in this Congress."³⁴²

Both men miss the point. Trying to correct a law that has plainly failed to fulfill its purpose is not the equivalent of intentionally killing the timber industry little by little. This legislation concerns thoughtful, rational, balanced resource use. It is not thoughtful to estimate a decade's worth of timber demand and then bind oneself to supplying that amount at enormous expense. It is irrational to deplete non-renewable natural resources when

following the holding in *Hedstrom Lumber v. United States*, 7 Cl. Ct. 16 (1984), that replacement value is the difference between stumpage rates in the cancelled contracts and the average price of the replacement timber. 134 Cong. Rec. H5935-36 (1988) (statement of Rep. Glickman). Such a "loss" would quickly pay for itself, given the costs of continuing the contracts.

The CRS disputes Senator Murkowski's claims that the government would probably be liable for the entire cost of building a new pulp mill, which he estimates to be about \$600 million. Contract Modification Hearings, *supra* note 29, at 28 (statement of Sen. Murkowski). "Terminating the contracts would not make the mills worthless, because other timber would still be available [Also], these mills have undoubtedly been fully depreciated Therefore, it seems unlikely that just compensation . . . would include mill construction costs." CRS Memo, *supra* note 294, at 14.

³³⁹ 134 Cong. Rec. H5944 (1988) (statement of Rep. Young).

³⁴⁰ *Id.* at H5937 (statement of Rep. Marlenee).

³⁴¹ *Id.*

³⁴² *Id.*

they are not needed, especially to the detriment of otherwise renewable resources. Balance is skewed when one use clearly dominates the planning and operation of a seventeen million acre tract of land. Why should members of the public, whose land this is, remain silent in the midst of unnecessary mismanagement? And why should the political process not reflect the public's concern? Congressmen like Young and Marlenee should *want* the flexibility to reform ill-conceived or ineffective efforts of an earlier Congress. If there is a "bad penny," it must have two sides. The Wilderness Society logo adorns one of them, and on the other must be the profile of Jim Clark, the Alaskan attorney who for years has represented loggers and APC and lobbied for their interests before Congress. Both sides of the coin will survive this legislation.

Passage of even the most radical of the Tongass timber reform bills would not, then, allow wilderness advocates or Congress to "sabotage" anything, or to do anything they cannot do now. It would let Congress try to correct a strategy that has proven unworkable. If this attempt fails too, there is little doubt but that the industry "bad pennies" will be back, pointing out the flaws and urging solutions.³⁴³

V. CONCLUSION

Current Tongass management practices make little sense. Driven by a Congressional directive to supply unwanted timber and bound by the extraordinary terms of the fifty-year contracts, the Forest Service finds its hands tied. Congress made the Forest Service's biggest management decision for it in 1980 by passing section 705(a) of ANILCA. The result: thousands of acres of a valuable resource that should be put to its highest and best use have been precommitted to serve the "needs" of the timber industry. Other industries, alarmed to see their uses of the Tongass threatened, protest. Taxpayers and members of Congress are shocked by the enormous expenditures in support of a failing jobs program. Even the timber industry complains because the Forest Service's constrained management cannot possibly achieve what ANILCA

³⁴³ Of course, there may well be heavy *political* costs incurred in seeking to rewrite the terms of too many compromises, even though particular circumstances arguably justify altering a specific agreement. The credibility of environmentalists in future negotiations can only suffer if their adversaries perceive them as acting or having acted in bad faith, despite the applicability of democratic principles and despite even the uniquely compelling situation of the Tongass.

promised. And all the while the steady destruction of a unique and wonderful natural jewel continues. Congress should act quickly to pass a serious and substantial Tongass Timber Reform Act and restore rational management to America's largest national forest.