



<b>TRANSMITTAL MEMORANDUM</b>
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TO: The Honorable Mayor and City Council

FROM: Karl R. Amylon, City Manager

DATE: January 13, 2021

RE: **Authorizing Budget Transfer – Request for Financial Assistance and City Participation as an Intervenor in Support of the Forest Service and State’s Defense of the Alaska Specific Rulemaking that Exempts the Tongass National Forest from the 2001 Roadless Rule Against the Complaint Filed in Federal District Court for the District of Alaska by the Southeast Alaska Conservation Council (SEACC)**

My office has been approached by Robertson, Monagle and Eastaugh with a request for additional funding in the amount of \$5,000 to support efforts to defend the Alaska specific rulemaking that exempts the Tongass National Forest from the 2001 Roadless Rule. Copies of the firm’s request and briefing paper are attached and require no elaboration on the part of my office. In addition to the financial assistance, the City is also being asked to participate as an Intervenor in the case.

In the event Councilmembers wish to consider participating in and funding such an effort, a motion has been prepared for City Council consideration.

**Motion:** I move the City Council authorize the City Manager to transfer \$5,000 from Appropriated Reserves of the General Fund to the City Council’s 2021 Community Promotion account (Account No. 610.01) for payment to Robertson, Monagle and Eastaugh in support of continued legal intervention associated with defense of the Alaska specific rulemaking that exempts the Tongass National Forest from the 2001 Roadless Rule; and direct the City Manager to take such actions as necessary for the City to intervene in the case.

## Karl Amylon

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**From:** Steve Silver <ssilver628@aol.com>  
**Sent:** Monday, January 11, 2021 2:14 PM  
**To:** Karl Amylon  
**Subject:** TONGASS LITIGATION is this what you need for the agenda item? thx very much  
**Attachments:** REQUEST FOR PARTICIPATION IN ROADLESS CASE --.docx

### **CAUTION: External Email**

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Dear Karl:

As you know, on October 29<sup>th</sup> USDA promulgated an Alaska-specific Rule exempting the Tongass from the 2001 Roadless Rule. As expected, SEACC et al filed suit on December 23<sup>rd</sup>. The Department of Justice's Answer is due February 21<sup>st</sup>, by which time the Biden Administration, including new and former Secretary of Agriculture, Tom Vilsack, will be in office. This makes unclear the extent to which the new administration will defend the Exemption in Court going forward. You'll recall that the Obama Administration defended the 2003 Exemption through the District Court, but failed to file an appeal of the District Court's adverse decision. That was left up to the State.

I was hoping that the City would be an Intervenor and contributor to the defense fund in this new case. The State, the Southeast Conference, and the Alaska Forest Association (AFA) have already agreed to intervene. Along with the AML, I am contacting folks who previously intervened and contributed to the defense fund, to see if they will help out again. These include ALASKA ELECTRIC LIGHT & POWER, CITY AND BOROUGH OF WRANGELL, ALASKA POWER & TELEPHONE, ALASKA MINERS' ASSOCIATION, ALASKA MARINE LINES, FIRST THINGS FIRST FOUNDATION, JUNEAU CHAMBER OF COMMERCE, KETCHIKAN GATEWAY BOROUGH, SOUTHEAST STEVEDORING CORP., SOUTHEAST ROADBUILDERS, INC., HYAK MINING CO., INC., INSIDE PASSAGE ELECTRIC COOPERATIVE, THE CITY OF CRAIG, and FIRST BANK of Ketchikan.

I have attached a short memo which more fully describes the situation. Would the City please consider a \$5000 contribution as described above?

Thank you for your consideration of this request.

Steve Silver  
Robertson, Monagle, and Eastaugh  
11180 Samuel Morse Dr. Suite 202  
Reston, VA 20180  
703 527-4414 office  
703 587-7792 cell

## REQUEST FOR PARTICIPATION IN ROADLESS CASE

### Request

That: 1) The City participate as an Intervenor in support of the Forest Service's and State's defense of the Alaska Specific Roadless Rule against the Complaint filed in the Federal District Court for the District of Alaska on December 23, 2020 by SEACC and other environmental organizations (we expect another 16-17 entities to intervene with you); and 2) also contribute to the legal defense fund. Such a contribution is a one-time payment that covers intervention and all activity in the District and 9<sup>th</sup> Circuit Courts. The request is for a one-time \$5000. payment/contribution.

### Background

This issue has been with us since 2001 when President Clinton promulgated the Roadless Rule on January 12, 2001 – eight days before George W. Bush was inaugurated. Governor Knowles sued the federal government to set aside the Roadless Rule's application to Alaska. Governor Murkowski settled that case at the end of 2003 through rulemaking that exempted the Tongass pending passage of a State-specific Roadless Rule. The United States Department of Agriculture (USDA) exempted the Tongass in 2003 because:

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

This *policy* determination has not been changed by the Department of Agriculture or overturned by a Court.

In 2009 SEACC contested the 2003 Rule on procedural grounds and won in the Alaska Federal District Court in March 2011 and the 2001 Roadless Rule was reimposed. President Obama's Department of Justice failed to appeal to the Ninth Circuit. So, the State of Alaska appealed and won at the Ninth Circuit's three judge panel level. Unfortunately, the State lost 6-5 before an 11 judge Ninth Circuit *en*

*banc* panel that followed. The United States Supreme Court denied a request to hear the case.

In anticipation of the potential failure of the USDA's 2003 Rule on appeal, the State renewed its 2001 case in the District Court for the D.C. Circuit in July 2011. ***The City agreed to be an intervenor and financial supporter in that case. Thank you again.***

After winning a Statute of Limitations challenge in the D.C. Circuit Court of Appeals (in an opinion authored by now Justice Brett Kavanaugh), we lost in the D.C. Circuit District Court. That case is now on appeal to the D.C. Circuit Court of Appeals awaiting oral argument.

In January 2018 then Governor Walker requested that USDA initiate rulemaking to exempt the Tongass from the 2001 Roadless Rule and amend the 2016 Tongass Transition Plan. USDA agreed and proceeded to rulemaking which ended on September 24, 2020. In October 2020 USDA promulgated the resulting new Rule exempting the Tongass. On December 23, 2020 SEACC *et al* filed a Complaint.

Contending that the Alaska-specific Rulemaking provided the relief that the State was seeking, SEACC *et al* have also filed a Motion to Dismiss the renewed case regarding that 2001 Rule that is currently awaiting oral argument before the D.C. Circuit Court of Appeals.

### **Description of the Current Case**

The case in which we are requesting you to participate as an intervenor and to help fund the defense was just filed by SEACC *et al* on December 23, 2020. It seeks to set aside the Alaska-specific Rulemaking that effective October 29, 2020 exempted the Tongass from the 2001 Roadless Rule.

It incorrectly claims that the Forest Service violated: 1) Alaska National Interest Lands Conservation Act (ANILCA) by failing to follow Title VIII subsistence procedures; 2) the Administrative Procedures Act (APA) by engaging in arbitrary and capricious decision making; and 3) NEPA by failing to provide a reasonable range of alternatives.

### Steps to Intervention

Should you agree to be an Intervenor we would prepare an engagement letter by which you agree to allow us to represent you and which sets out the one-time payment that covers intervention. We would need an affidavit explaining how you

are injured by the Roadless Rule, which we would help to prepare. We would prepare a Motion to Intervene accompanied by a Memorandum explaining why the members of our group are legally entitled to intervene. The Motion to Intervene would also be accompanied by an Answer to the Complaint.

This is similar to how we prepared the Motion to Intervene in the case regarding the 2001 Rule on which we are currently representing the City in the D, C. Circuit Court. While there is no guarantee, we anticipate that the Alaska District Court would grant this Motion if it is timely filed.

Timing is important. The Justice Department must file its Answer to the Complaint on February 21<sup>st</sup>. While it is not required that we file this Motion to Intervene before then, the chances of success would be enhanced if the Motion to Intervene is filed by then.

We will be following up with your City Manager to answer any questions the City may have.

Thank you.