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October 10, 2008

The Honorable Jeff Bingaman
Chairman
Committee on Energy and Natural Resources
United States Senate

The Honorable Jon Tester
United States Senate

Subject: Proposed Easement Amendment Agreement between the Department of Agriculture and Plum Creek Timber Co.

In your request letter of June 24, 2008, you asked GAO to examine a proposed transaction between the Department of Agriculture (USDA) and Plum Creek Timber Co. (Plum Creek), under which the parties would enter into an agreement amending a large but undetermined number of easements Plum Creek holds on certain lands managed by USDA's Forest Service. In your request you asked GAO to examine a number of issues associated with this proposed transaction. This letter addresses some of these issues, as discussed below.

The draft agreement's stated purpose is to clarify that Plum Creek may use these easements to access its own lands for any purposes, including specifically to provide access to residential subdivisions that may come to be located on these lands. These easements—conveyed to Plum Creek or its predecessors under the National Forest Roads and Trails Act of 1964 (FRTA), 16 U.S.C. §§ 532-538—are located in western Montana, where Plum Creek owns a substantial amount of land. While USDA and Plum Creek officials state that the agreement simply clarifies rights that Plum Creek already has, county officials and others in Montana have raised concerns that the agreement grants Plum Creek new access rights, and therefore, should be developed using a public process, particularly since in their view the agreement could lead to increased development in sensitive forest areas. There is general agreement that many of Plum Creek's lands in western Montana would have a substantially higher value if the amendment is carried out, because the clear provision for residential access would enhance these lands' value for residential development purposes.

The draft agreement has not yet been executed. However, because the transaction may occur soon, and as agreed with your staff, we have prepared this letter in order to (1) describe the proposed transaction; (2) identify the key laws potentially affecting USDA's authority to proceed with the transaction; and (3) identify key

unresolved issues associated with the transaction. We do not express an opinion concerning USDA's authority to enter into the proposed transaction. Based on the information contained in this letter, we plan to discuss with you what further GAO work, if any, may be helpful.

FACTUAL BACKGROUND

This controversy exists because of the unusual "checkerboard" land ownership pattern prevalent in much of the West. In order to promote the development of transportation improvements such as railroads, the government often granted land in alternating sections along and near the proposed route. The government typically donated the odd-numbered sections while reserving the even-numbered sections for later disposal that often did not occur.¹

In areas of checkerboard ownership, federal and nonfederal landowners must often cross the other's property to get to their own, which can create numerous legal difficulties with respect to land access. Beginning in the 1950s, in order to facilitate timber harvesting, the Forest Service and adjacent private landowners began developing "cost share road systems" in which each party contributed to the construction and maintenance of a road network serving a defined area of checkerboard ownership. The easements at issue here are for roads constructed as part of cost share road systems.

FRTA easements today cover over 20,000 miles of roads in seven western states. We do not have information on what portion of these provide access over Forest Service lands. In Montana alone, there are approximately 2,000 miles of reciprocal easements covering Forest Service and Plum Creek road systems, with each party having easements over approximately half the total mileage.² FRTA easements have typically been based on a template document, and as such the substantive language of many FRTA easements may be virtually identical.

While FRTA cost share easements exist on Forest Service lands across the west, the scope of these easements is of particular interest in western Montana because a peculiar confluence of circumstances limits the ability of the affected counties to control subdivision development on the private checkerboard lands at issue. Specifically, Montana state law gives private agricultural and timber landowners

¹ See generally, Leo Sheep v. United States, 440 U.S. 668, 671-72 (1979). It appears that Congress devised this method of facilitating railroad construction in order to address objections that direct federal financial aid to private corporations exceeded the government's constitutionally enumerated powers. Id. For a history of the use federal land grants to facilitate the development of railroads and other internal improvements, see generally Gates and Swenson, HISTORY OF PUBLIC LAND LAW DEVELOPMENT at 341-386 (1968).

² Approximately 1100 miles of roads are on Plum Creek land while 900 miles are on Forest Service land.

such as Plum Creek, who own more than 50% of the private land in a county planning area, the right to veto zoning changes within that planning area.³ Plum Creek owns more than 50% of the private land in several such county planning areas, and thus could veto any zoning change that would effectively prevent it from selling its lands to subdivision developers.

History and Status of USDA-Plum Creek Negotiations

The current controversy began when a developer who was about to purchase a parcel of Plum Creek land contacted the Forest Service for additional information concerning the scope of a FRTA easement for a road crossing Forest Service land to the parcel. In response, the cognizant Forest Service district ranger wrote a letter stating that the easement did not provide access for residential or subdivision purposes. The letter said that the easement was granted for the express purpose of providing the original easement holder (in this case Burlington Northern, a predecessor in interest to Plum Creek) access for timber utilization purposes, in exchange for similar Forest Service access across Burlington Northern land—and that this intent of the parties established the scope of permissible road uses under the easement.⁴ In 2007 the Regional Forester for an adjacent Forest Service region issued a memorandum to the field stating that FRTA easements "*were not developed for residential use* and the roads were rarely designed to accommodate it safely."⁵

The interpretation of FRTA contained in the district ranger's letter (and the later regional forester's memorandum) could create uncertainty among potential buyers as to whether they would have full access to the land they were purchasing, thus

³ MCA § 76-2-205(6) provides that within 30 days after the expiration of a protest period, the board of county commissioners may in its discretion adopt a resolution establishing the zoning regulations for a planning district. However, if landowners representing 50% of the titled property ownership whose property is taxed for agricultural purposes or whose property is taxed as forest land have protested the adoption of the regulations, the board of county commissioners may not adopt the resolution and a further zoning resolution may not be proposed for the district for a period of 1 year.

⁴ Prior to selling the parcel in question, Plum Creek had been in discussions with the Forest Service regarding the potential decommissioning (i.e., removal) of the road because of its potentially problematic effects on the grizzly bear and the bull trout, two species listed as threatened under the Endangered Species Act.

⁵ Memorandum from Regional Forester to Forest Supervisors at 1 (June 18, 2007) (emphasis in original). The memorandum stated that "in general, easements issued under the Federal Land Policy Management Act (FLPMA) [43 U.S.C. §§ 1761-1771] better address residential type use than do FRTA cost share easements." *Id.* at 2. In a letter to GAO, USDA asserted that the district ranger's letter and the regional forester's memorandum "reflect historic understandings by non-lawyers, not a legal analysis of the scope of the easement grants." Letter from Tom Millet to Karen Keegan, September 8, 2008, at 3. We asked USDA to provide a list of agency attorneys that reviewed each of these documents or affirmatively state that no such reviews occurred. In response a USDA official informed us that the regional forester's memorandum and the district ranger's letter were "reflective of longstanding informal discussions between the Forest Service and OGC" and that "OGC viewed that as valid legal position, although not necessarily as the only interpretation of applicable law."

hindering Plum Creek's ability to sell its checkerboard lands.⁶ As a result, Plum Creek contacted officials within USDA to discuss the matter. After considerable internal disagreement, USDA officials eventually concluded that FRTA easements provided reciprocal access to each landowner for any lawful purposes the appurtenant landowner desires. USDA officials told us they considered implementing this conclusion by issuing policy guidance to the field; however, Plum Creek expressed concern that a new administration could simply revise or revoke such guidance.

Ultimately the parties agreed to pursue an approach that they believed would provide more certainty: amending Plum Creek's FRTA easements en masse to explicitly state that the easements provide for residential access. In exchange for USDA's willingness to amend the easements, Plum Creek would agree to the inclusion of certain restrictions in the easements that would bind subsequent owners. First, the easement for each subsequent owner would be conditional on the owner taking certain fire protection measures specified in the easement, under the Firewise Communities program.⁷ Second, access would be conditional on the easement holder belonging to a road users' association with which the Forest Service could negotiate road maintenance responsibilities. The approach of amending the easements was intended to provide Plum Creek the certainty it desired regarding the easements' scope, while benefiting the Forest Service and local communities by both reducing the risk of wildland fire to communities accessed by the easements and limiting the severe administrative burden that could result if the Forest Service had to negotiate road maintenance cost share responsibilities with each individual property owner.⁸

⁶ The letter stated that the landowner could obtain an easement under FLPMA to provide year-round residential access to his property. The letter and other documents related to this matter are available at <http://www.co.missoula.mt.us/Rural/>.

⁷ The Firewise Communities program is the primary national effort to educate homeowners about wildland fire risks. It is a multi-agency effort designed to involve homeowners, community leaders, planners, developers, and others in the effort to protect people, property, and natural resources from the risk of wildland fire - before a fire starts. The Firewise Communities approach emphasizes community responsibility for planning in the design of a safe community as well as effective emergency response, and individual responsibility for safer home construction and design, landscaping, and maintenance. For more information see <http://www.firewise.org/>.

⁸ The process for amending individual easements as presently contemplated by USDA and Plum Creek representatives is as follows. First, Plum Creek will identify the FRTA easements it holds in each of seven western Montana counties. Plum Creek will review these to see if they are consistent with the draft easement amendment, and will submit easements meeting this requirement to the Forest Service for review. Once the Forest Service and Plum Creek agree upon the easements to be included in the amendment, the parties will execute the amendment. Plum Creek will then attach the relevant easements to the signed easement amendment and file the signed amendment with the appropriate county recorder. Plum Creek has stated it will not file such an amendment in any county that chooses to opt-out of the process. As we discuss below, the efficacy of such a process is unclear. The potentially affected counties are Flathead, Lake, Mineral, Missoula, Powell, Ravalli, and Sanders.

USDA and Plum Creek began negotiating the proposed amendment in early 2007 and were about to execute the easement amendment, when a draft of it was leaked in April 2008—resulting in considerable public outcry. USDA did not involve the public in its negotiations with Plum Creek. USDA officials, including the Under Secretary for Natural Resources and Environment, said that a public process was not needed, since the proposed amendment only clarified Plum Creek’s existing rights. USDA officials also told us that litigation was virtually certain regardless of the decision they made—but that the risks of litigation brought by or on behalf of Plum Creek were the most substantial, and therefore the most important to address. Once the proposed amendment was leaked, however, concerned members of the public questioned whether the proposed transaction is consistent with, among other laws, FRTA, the National Environmental Policy Act of 1969, the Endangered Species Act of 1973, and the Alaska National Interest Lands Conservation Act of 1980. We describe each of these laws below.

LEGAL BACKGROUND

In section 1 of FRTA, Congress found that:

"the construction and maintenance of an adequate system of roads and trails within and near the national forests and other lands administered by the Forest Service is essential if increasing demands for timber, recreation, and other uses of such lands are to be met; that the existence of such a system would have the effect, among other things, of increasing the value of timber and other resources tributary to such roads; and that such a system is essential to enable the Secretary of Agriculture to provide for intensive use, protection, development, and management of these lands under principles of multiple use and sustained yield of products and services."⁹

16 U.S.C. 532. Subject to this and the other provisions of the act, FRTA authorizes the Secretary of Agriculture "under such regulations as he may prescribe" to "grant permanent or temporary easements for specified periods or otherwise for road rights-of-way ... over national forest lands and other lands administered by the Forest Service." 16 U.S.C. § 533. The act also provides specific authority for a road construction cost-sharing mechanism already being used by the Forest Service and adjacent landowners, in which the agency and the landowners cooperated in building, financing, and maintaining a road system that served all their lands in a

⁹ The Multiple Use and Sustained Yield act of 1960 defines multiple use to mean "the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people." 16 U.S.C. § 531(a). Sustained yield means "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." 16 U.S.C. § 531(b).

given area (such as a watershed).¹⁰ The legislative history of FRTA demonstrates that a primary purpose was to enable the Forest Service to exchange permanent easements with adjacent landowners in order to spur timber harvesting on checkerboard lands.¹¹ Regulations implementing this section provide for the issuance of "reciprocal" easements – that is, easements conveying rights to a private landowner similar to those the landowner is conveying to the agency.¹² 36 C.F.R. § 212.8. Neither the law nor regulations specifically address whether FRTA authorizes USDA to grant easements over Forest Service lands for year-round residential access purposes.¹³ The Forest Service Manual describes the agency's policy with respect to the use of FRTA easements for subdivision access.¹⁴

¹⁰ 16 U.S.C. § 535. This provision resolved a dispute between the Forest Service and adjacent timber companies concerning the allocation of road construction costs by providing that "where roads of a higher standard than that needed in the harvesting and removal of the timber and other products covered by the particular sale are to be constructed, the purchaser of the national forest timber and other products shall not be required to bear that part of the costs necessary to meet such higher standard." *Id.*

¹¹ The attachment to this letter describes the legislative history of this provision.

¹² The use of FRTA easements is generally governed by construction and use ("cost share") agreements. See FSH 2709.12 § 31.2. The agreements we have reviewed provide for the road at issue to be used for timber hauling purposes. However, either the Forest Service or the cooperator may terminate such an agreement unilaterally, so they do not provide permanent limitations on easement use.

¹³ There is only one reported case construing the scope of FRTA easements. In Fitzgerald Trust v. United States, 460 F.3d 125 (9th Cir. 2006), plaintiffs sought to compel the Forest Service to issue them a FRTA easement to access their ranch. In arguing against this the Department of Justice asserted that

"[t]he Fitzgeralds do not use [the Forest Service road at issue] to facilitate timber production or recreation, or to otherwise assist the Forest Service in managing the Apache-Sitgreaves National Forests. (Indeed, the Forest Service does not use [the road] to manage the National Forest. Accordingly, granting a [FRTA] easement to the Fitzgeralds for personal access over [the road] would not serve the purposes for which Congress enacted [FRTA]."

Fitzgerald Trust v. United States, Brief of Federal Appellees, 2005 WL 2158220 at *37-39. The Ninth Circuit agreed and rejected plaintiffs' assertion that they were entitled to a FRTA easement along a Forest Service road to access their land, holding that "[t]he Fitzgeralds are not entitled to a FRTA easement because they are not using [the road at issue] to assist the Forest Service in managing the Sitgreaves National Forest." 460 F.3d 1259, 1268 (9th Cir. 2006).

¹⁴ FSM 2732.3 states that Forest Service officials should:

"[a]uthorize access to subdivisions by FRTA easements to the proper public road authority. If the public road authority refuses to accept the road as part of its system, require the owners of the property served to form a local improvement district or an owners association to assume the maintenance responsibilities under a Federal Land Policy and Management Act (FLPMA) easement for the road to ensure access to all parties who need the road for access to their property[.]"

Under the National Environmental Policy Act of 1969 (NEPA), agencies evaluate the likely environmental effects of projects they are proposing using an environmental assessment (EA) or, if the projects likely would significantly affect the environment, a more detailed environmental impact statement (EIS). 42 U.S.C. §§ 4332(2)(C), (E). If the agency determines that activities of a proposed project fall within a category of activities the agency has already determined has no significant environmental impact—called a categorical exclusion—then the agency generally need not prepare an EA or EIS. See 40 C.F.R. § 1508.4.

The purpose of the Endangered Species Act of 1973 (ESA) is to conserve threatened and endangered species, and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). An endangered species is a species facing extinction throughout all, or a significant portion of, its range; threatened species are those likely to become endangered in the foreseeable future. 16 U.S.C. § 1532(6). The act requires the Secretary of the Interior to publish, in the *Federal Register*, a list of species determined to be threatened or endangered. 16 U.S.C. § 1533(c)(1). Section 7 of the act requires that federal agencies, in consultation with the Fish and Wildlife Service (FWS), ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). Following the consultation, FWS must issue a biological opinion stating how the action will affect the species or its critical habitat. 16 U.S.C. § 1536(b)(3)(A). If jeopardy or adverse modification is found, the opinion identifies the steps (called “reasonable and prudent alternatives”) needed to avoid such harm. Id. These consultations may result in an agency modifying its activities.

A provision of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. § 3210(a), established a permanent statutory right of access over national forest lands to private inholdings. Section 1323(a) of the act requires USDA "subject to such terms and conditions as the Secretary of Agriculture may prescribe," to "provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof."¹⁵ 16 U.S.C. § 3210(a).

¹⁵ The access necessary to effect "reasonable use and enjoyment" is broad but not unlimited. Adams v. United States, 255 F.3d 787, 794 (9th Cir. 2001) (although landowners whose property was surrounded by national forest land had easement to travel road through forest land to the extent to which road was traveled by general public, owners were required to apply for special use authorization for any use beyond that, such as maintenance of the road for passenger vehicles, or for access which would cause surface-disturbing activities). Landowners' access to their property is subject to reasonable regulation by the Forest Service. Id. at 795. The Forest Service defines "adequate access" as "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 C.F.R. § 251.111.

Despite the title of the act, this provision applies nationwide.¹⁶ Forest Service regulations establish a process for making case-by-case determinations concerning the access constituting "reasonable use and enjoyment" under ANILCA. 36 C.F.R. § 251.114(a).¹⁷ Landowners must pay an annual fee to maintain a permit for access under ANILCA. 36 C.F.R. § 251.114(b). The Forest Service generally will not make a reasonable use and enjoyment determination if a private party already has a formal right of access such as an easement. 36 C.F.R. § 251.114(f)(1).

USDA believes the proposed transaction would be consistent with each law mentioned above. An internal USDA legal memorandum dated April 22, 2008—some time after USDA was originally planning to move forward with the easement amendment—states that FRTA authorizes the conveyance of easements allowing access across Forest Service land for any purpose.¹⁸ The memorandum then states that the general granting clause in the typical FRTA easement—"Grantee shall have the right to use the road on the premises without cost for all purposes deemed necessary and desirable by Grantee"—controls the outcome.¹⁹ The phrase "all purposes deemed necessary by the Grantee" meant that the Grantee (in this case Plum Creek) has the sole authority to determine the purposes for which it uses the easement, and that the Forest Service cannot infringe on that determination.²⁰ USDA acknowledges that "a narrower construction of the easement would suggest that it is limited to multiple uses on appurtenant lands because that was the stated objective of FRTA," but then states "unless the deed is ambiguous there is no basis for looking beyond the words of the instrument to ascertain its meaning." USDA officials have

¹⁶ E.g., Montana Wilderness Ass'n v. U. S. Forest Service, 655 F.2d 951, 957 (9th Cir. 1981), certiorari denied 455 U.S. 989 (1982).); but see United States v. Srnsky, 271 F.3d 595, 602-603 (4th Cir. 2001) (noting in dicta that while the statute does not define the term "National Forest System," it does define "public lands" as certain public lands "situated in Alaska," giving rise to "a strong presumption that the nearly identical language in the immediately preceding subsection also applies only to land in Alaska").

¹⁷ 36 C.F.R. § 251.114(a) provides as follows:

"In issuing a special-use authorization for access to non-Federal lands, the authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria."

¹⁸ Although USDA officials had been discussing this issue at least since early 2007, we are not aware of any earlier legal memoranda on this matter. However, in preparing this preliminary response we did not attempt to obtain such records.

¹⁹ The memorandum relied on easement template language appearing in the Forest Service Handbook, FSH 2709.12 § 31.2, Exh. 01.

²⁰ Memorandum from Tom Millet, Associate General Counsel, to Mark Rey, Under Secretary for Natural Resources, USDA, at 2 (April 22, 2008).

stated that the draft easement amendment would merely clarify Plum Creek's already existing rights and therefore the amendment would not be an action having any environmental effects requiring analysis under NEPA or the ESA. In a letter to GAO, USDA described the relationship between ANILCA and the easement amendment, an issue we discuss below.

KEY UNRESOLVED ISSUES

While we reach no conclusion as to whether FRTA would authorize the proposed transaction, we note that USDA's initial analysis of this issue in its April 22, 2008 memorandum was unusual. The department stated that the granting clause of the easement is broad and unambiguous and that therefore there was no need to "look beyond the words of the instrument." However, in assessing an agency's authority to act, it is always necessary to look to the underlying statute—in this case, FRTA. USDA cannot convey a greater property interest than the statute allows, and the agency did not clearly explain its apparent conclusion that FRTA authorizes the very broad conveyance it says the easement contains, particularly in light of the provision's legislative history indicating that the purpose of the provision was to allow the exchange of reciprocal easements to facilitate timber harvesting.²¹

In a subsequent letter responding to questions from GAO, USDA focused more on the language of FRTA, correctly noting that the language does not specifically forbid USDA from issuing easements for residential access, or indeed, for any other purpose. However, the easement granting authority in § 2 of the act is "subject to the provisions of" FRTA, including the purpose provision of § 1. Section 1 states that road systems within and near Forest Service lands are "essential" for (a) "meeting the demands for timber, recreation and other uses of such lands"; (b) "increasing the value of timber and other resources tributary to such roads;" and (c) providing for "intensive use, protection, development and management of [Forest Service] lands under principles of multiple use and sustained yield of products and services." 16 U.S.C. § 532. USDA has not clearly explained the core of its legal argument: that in order to facilitate multiple use development of Forest Service lands, Congress intended to authorize USDA to grant easements to adjacent landowners for land uses that could vary substantially from the multiple use purposes outlined in § 1.²²

²¹ USDA argues that Fitzgerald (see footnote 13 above) is not relevant because (a) there the issue was whether the plaintiff could compel the Forest Service to issue a FRTA easement, not at issue here, and (b) the Forest Service was not using the road at issue there for forest development purposes.

²² As noted above, just four years prior to FRTA's enactment Congress had identified the "principles of multiple use and sustained yield" in the 1960 act bearing that name. Residential development is not mentioned. This said, FRTA easements are being used now to provide subdivision access. E.g., Appeal Reviewing Officer's Recommendation: Falls Creek Road Improvements and FRTA Easement, Appeal #07-13-00-0005 (available at

http://www.fs.fed.us/emc/applit/includes/woappdec/070712_falls_creek_rd_aro.pdf). We did
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The draft easement amendment contains a provision referring to ANILCA that may effect a substantial change in minimum legal access provided by FRTA easements. Specifically, the draft easement amendment provides that "[t]he access afforded by ... this instrument ... shall also constitute access for purposes of section 1323(a)" of ANILCA. The Forest Service's ANILCA regulations provide that the determination of the degree of access necessary to effect the private landowner's "reasonable use and enjoyment" of its property is done on case-by-case basis, and is only necessary if the landowner has no other right of access.²³ The easement amendment, in contrast, would make a blanket determination that its terms define the minimum access across Forest Service lands that the agency must provide on all FRTA easements subject to the amendment—regardless of any individual circumstances. Moreover, the agency would be making an ANILCA determination regarding Plum Creek's access despite Plum Creek's possession of easements that already provide access across Forest Service lands. USDA and Plum Creek representatives have stated that the purpose of this provision is merely to prevent a Plum Creek successor in interest from asserting that ANILCA requires the agency to give the successor *greater* access than that provided by the easement amendment. However, this explanation of the

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not determine the extent of this practice or the extent to which FRTA easements for subdivision access are held by entities other than counties or other public road authorities.

²³ 36 C.F.R. § 251.114. A federal district court recently observed:

"The Forest Service's determinations regarding 'reasonable use and enjoyment' and access adequate for such use under ANILCA § 1323(a) are not ... a matter of the Forest Service rubber-stamping whatever use the landowner announces it intends to make of its property and then providing access adequate to meet this purpose. ANILCA § 1323(a) only requires the Forest Service to provide access "that the Secretary deems adequate for the reasonable use and enjoyment" of the property, "subject to such terms and conditions as the Secretary of Agriculture may prescribe." 16 U.S.C. § 3210(a). By the statute's terms, therefore, the Secretary must determine what constitutes reasonable use and enjoyment of the lands, what access is adequate to allow for those reasonable uses and what, if any, terms and conditions should be placed on that access to meet other statutory and regulatory obligations and goals. See id.; High Country Citizens' Alliance v. United States Forest Service, 203 F.3d 835 (10th Cir.2000) (unpublished). Forest Service regulations governing ANILCA access requests reiterate these statutory requirements. See 36 C.F.R. § 251.114(a) (requiring agency to determine what constitutes reasonable use and enjoyment of non-Federal lands and to authorize only the access needed for such use and enjoyment); see also Final Rule, 56 Fed.Reg. 27410, 27410 (June 14, 1991) (ANILCA access determination 'is a discretionary decision of the authorized officer based upon given circumstances')."

Colorado Wild v. United States Forest Service, 523 F.Supp.2d 1213, 1228 n.15 (D. Colo. 2007).

provision's purpose is not explicit in the provision itself, which contains no limiting language.²⁴

In fact, this provision could have a nationwide impact. USDA maintains that it is merely clarifying the rights Plum Creek already has in its FRTA easements. However, FRTA easements generally contain template language, so in interpreting the scope of Plum Creek's easements, USDA is necessarily interpreting the scope of all FRTA easements that fit the template, not just those that belong to Plum Creek and that will be subject to the easement amendment. Thus, the easement amendment's ANILCA provision would amount to a statement by USDA that many FRTA easement holders *already* possess the rights contained in the easement amendment, and that those rights are not merely contained in easement terms but rather implement ANILCA's statutory guarantee of access, and thus cannot be reduced in the future without giving rise to a takings claim.²⁵

Some members of the public have asserted that USDA cannot carry out the proposed transaction without completing either an EA or an EIS under NEPA and initiating formal consultations with FWS under the ESA. This is likely to be true if two conditions are present: (1) FRTA authorizes the use of easements for residential development access, but (2) the existing easements do not now provide for such access. Under these conditions, the proposed transaction would constitute an authorized expansion of Plum Creek's existing property rights, and therefore (at least arguably) an agency action significantly affecting the environment and requiring consultation. We have reviewed some of the easements that would be affected by the agreement and have found no examples of language that would specifically prohibit the use of the easement for residential development.²⁶ However,

²⁴ We also note that ANILCA's right of access across Forest Service land applies only where there is no other reasonable method of accessing the private land. 36 C.F.R. § 251.110(g). However, the easement amendment's ANILCA provision contains no similar limitation and we are not aware that the agency intends to verify, for each easement that would be amended, that the easement in question provides the only reasonable method of access to the relevant private land.

²⁵ Indeed, a similar argument concerning the potential nationwide effect of the easement amendment could be made with respect to all the amendment terms addressing the scope of FRTA easements. Accordingly, Plum Creek's offer to counties that they may opt out of the amendment process if they object may have limited effect. Because USDA will have announced the agency's position that all FRTA easements already provide the rights described in the easement amendment, even counties that have opted out may have difficulty convincing their landowners with FRTA easements that the access rights in the proposed easement amendment aren't equally applicable to them.

²⁶ The Forest Service amended its FRTA cost share easement template in 1994 to provide for some restrictions on the use of these easements for residential access:

"The rights herein conveyed do not include the right to use the road for access to developments used for short or long-term residential purposes, unless and until control regulations, rules, and other provisions to accommodate such use of the road are agreed upon by the Grantor and Grantee."

(continued...)

we have not carried out a systematic review of the available easements. Moreover, some have argued that even if the easement amendment merely clarifies Plum Creek's access rights, the clarification nevertheless involves significant changes to existing easement language that could, by virtue of their clarity, facilitate environmentally relevant road use changes warranting NEPA analysis.²⁷ USDA and Plum Creek reject such arguments, stating that the easement amendment would not by itself lead to any ground disturbing activities and therefore requires no NEPA analysis.

CONCLUSIONS

FRTA and the cost share road systems were primarily designed to address a specific problem: how to manage federal and nonfederal lands in the checkerboard for largely similar purposes in the most efficient manner, where there are relatively few nonfederal landowners, and where road usage is often intermittent and easily regulated for environmental and other land management purposes when necessary. In many places in the West this situation no longer exists. Instead, federal and adjacent nonfederal lands are often managed for very different purposes—indeed many private lands now (or will soon) host subdivisions, a land use not authorized on public lands and one requiring year-round access on roads that may not have been originally planned and constructed for that purpose. Moreover, in many places the number of different private landowners has multiplied, creating the potential for even more complex access and administrative problems than those FRTA and the cost-share mechanism were developed to address.

The draft easement amendment would establish USDA's position that all FRTA easements across the west meeting the template language provide for access as stated in the amendment. USDA has thus far foregone the opportunity to analyze alternatives for addressing this highly complicated matter in a systematic public way, whether by carrying out an analysis under NEPA or doing so in some other fashion. USDA's approach has also deprived it of the opportunity to obtain the public's views on a matter of intense public interest in a manner that might meaningfully inform the agency's decision, as well as the opportunity to allay public confusion over the agency's current FRTA easement management policies.

We will discuss with your staffs what further GAO work, if any, would be helpful with respect to the easement amendment in particular or Forest Service road and

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FSH 2709.12 § 31.2 Exh. 01, ¶ I. USDA and Plum Creek officials have stated that the easement amendment would not be applied to easements containing this language.

²⁷ There are no cases specifically addressing the interaction between FRTA easements and NEPA. The existence of a right to access under ANILCA does not preclude the need to comply with NEPA, because while the agency may not deny access it retains discretion in deciding how access will be allowed. *Alpine Lakes Protective Society v. Forest Service*, 838 F.Supp. 478, 484 (W.D. Wash. 1993).

access management programs more generally. Please contact Rich Johnson, the attorney assigned to this matter, at (202)512-4729 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan D. Sawtelle". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Susan D. Sawtelle
Managing Associate General Counsel

ATTACHMENT I

LEGISLATIVE HISTORY OF THE FOREST ROADS AND TRAILS ACT

The Forest Roads and Trails Act was enacted in 1964, during a period of rapidly rising National Forest timber harvests. However, for several years prior to the law's enactment, western members of Congress, particularly from the Northern Rockies and Pacific Northwest, had expressed concern about the timber "underproduction" occurring on national forests in their states.²⁸ These members identified two main causes: (1) a lack of roads leading to productive timber stands in more remote areas of the national forests;²⁹ and (2) a lack of access over existing roads crossing private lands in the checkerboard because of the Forest Service's unwillingness or inability to secure such access.³⁰ Timber companies owned many of these private lands, and may have had little incentive to allow access to Forest Service lands since the Forest Service was in effect a competing timber supplier.³¹ In addition, until 1962 USDA took the position that timber companies had a statutory right of access across federal lands to their own timber holdings, thus leaving the agency with little leverage in negotiating with the companies.³²

In 1962 the U.S. Attorney General issued an opinion reversing USDA's position, concluding that timber companies had no statutory right of access over federal lands to their properties and that the Forest Service therefore could block timber companies' access to the companies unless it obtained reciprocal access from the

²⁸ E.g., 106 Cong. Rec. 10186 (1960) (statement of Rep. Pfof).

²⁹ Id.

³⁰ E.g., 106 Cong. Rec. 10191 (1960) (statement of Sen. Moss).

³¹ See 106 Cong. Rec. 14949 (1960) (statement of Sen. Morse):

"The western timber industry is divided into two parts-- those who do not own timber and have long been dependent on public timber and those who own timber, largely sufficient for their own use but far too rarely managed on the principle of sustained yield. It is this latter group, whose holdings are often intermingled with the public timber, who, over the years, have exhibited such a narrow vision that they have assured the general public will know that the "robber barons" of old are still with us.

The clear instructions given in this [committee] report require no second reading to be understandable. *It is up to the Department of Agriculture to start at once unlocking by condemnation those national forest areas where public use is denied through private control or [sic] private roads.*"

Id. (emphasis added).

³² See 42 U.S. Op. Atty. Gen. 127, 129 (1962). USDA's position was based on an internal legal opinion prepared in the USDA Solicitor's office but not signed by the Solicitor. Id.

companies.³³ The Forest Service thereafter issued regulations implementing the reciprocal access conditions³⁴ which drew a barrage of criticism from representatives of the timber industry.³⁵

The regulations suffered from at least one serious flaw: while the Forest Service usually sought permanent easements from private landowners, it was not then authorized to convey permanent easements.³⁶ As a result, private landowners often could not obtain genuinely reciprocal access rights. In response to such criticism, the administration proposed a bill that Congress ultimately passed as FRTA,³⁷ including section 2 which specifically authorizes the conveyance of permanent easements.³⁸ The act also provided specific authority for a road construction cost-sharing mechanism already being used by the Forest Service and adjacent landowners, in which the agency and the landowners cooperated in building, financing, and maintaining a road system that served all their lands in a given area.³⁹ Under this mechanism the parties would develop a cost share agreement and exchange the needed easements, the latter containing clauses stating that the cost-share agreements governed the use of the easements.

³³ Id. at 138, 141.

³⁴ 28 Fed. Reg. 6013 (1963).

³⁵ See 109 Cong. Rec. 5734-37.

³⁶ 110 Cong. Rec. 16414 (1964) (statement of Sen. Randolph); see also H.R. Rep. No. 88-1920 reprinted in 1964 U.S.C.C.A.N. 3994, 3998.

³⁷ Compare S. 1147, reprinted in Forest Development Roads and Trails, hearings before a Subcommittee of the Senate Committee on Public Works, 88th Cong., 1st Sess. at 1-2 (1963) with 16 U.S.C. §§ 532-538.

³⁸ 16 U.S.C. § 533. The timber industry failed to secure amendments to the bill that would have limited or reversed the Attorney General's opinion. 110 Cong. Rec. 16413-14 (1964) (statement of Sen. Metcalf).

³⁹ 16 U.S.C. § 535.