

STATE OF ALASKA

SARAH PALIN, Governor

DEPARTMENT OF NATURAL RESOURCES
OFFICE OF PROJECT MANAGEMENT AND PERMITTING

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January 7, 2008

Forrest Cole, Tongass Forest Supervisor
Tongass National Forest
648 Mission Street, Federal Building
Ketchikan, AK 99901-6591

Dear Mr. Cole:

This letter constitutes the State of Alaska's appeal of the Decision Notice by Carol Goularte, Sitka District Ranger, dated November 15, 2007, to implement the Sitka Access and Travel Management (ATM) decision. This appeal, pursuant to 36 CFR Part 215, is brought because the Sitka ATM project does not comply with the Alaska National Interest Lands Conservation Act (ANILCA). In particular, and as explained in our formal comments on both the Draft Environmental Assessment (EA) and Revised Draft EA, the Sitka ATM project fails to meet the intent and letter of Section 811 of ANILCA, especially with respect to restrictions and closures of access by off-road vehicles (OHVs) used by rural residents for subsistence purposes. It appears the Forest Service has erroneously concluded that meeting the requirements of Section 810 of ANILCA is sufficient to meet obligations related to access for subsistence purposes under Section 811 of ANILCA as it implements the national Travel Management rule.

Appellant:

Ed Fogels, Director
Office of Project Management and Permitting
Alaska Department of Natural Resources
550 West 7th Ave, Suite 705
Anchorage, AK 99501
907-269-8423

The Office of Project Management and Permitting is leading this appeal on behalf of all state agencies with interests and responsibilities concerning public access in Alaska, including but not limited to the Alaska Department of Fish and Game, the Alaska Department of Transportation and Public Facilities, the Alaska Department of Law, and other divisions with the Alaska Department of Natural Resources.

"Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans."

Introduction

The State of Alaska has long been concerned about the inadequate attention to, and compliance with, ANILCA in Forest Service planning and decision making, including Access and Travel Management decisions. Our concerns were heightened with the November 2005 national rulemaking for Travel Management; Designated Routes and Areas for Motor Vehicle Use (36 CFR Parts 212, 251, 261, and 295), referred to hereafter as the “national OHV rule.” In our comments on the draft national OHV rule, we sought one of the following remedies:

- Recognize and provide for motorized uses authorized under ANILCA;
- Develop Alaska-specific OHV regulations consistent with ANILCA; or
- Exempt the Alaska Region from the proposed rule.

Ultimately, the final national OHV rule addressed snowmobile use in Alaska under ANILCA; but other Alaska-specific motorized access provisions are only addressed in the Preamble:

To the extent other provisions of ANILCA may address rights for motor vehicle access, they are covered by Section 212.55(d)(1), which requires that the responsible official recognize valid existing rights in making designations under the final rule.

While summarily referring to access rights guaranteed by ANILCA as “valid existing rights,” the rule did not clarify the specific relationship between the national OHV rule and ANILCA as we had hoped, we were assured at the time that the Forest Service Alaska Region would work with the State to further clarify that relationship during implementation. We subsequently made numerous overtures to initiate dialogue -- all to no avail. See chronology in Appendix A.

This appeal of the Sitka ATM includes these required elements under 36 CFR Part 215:

215.14(b)(6) Decision changes sought and rationale

We request the Sitka District delay implementation of the Sitka ATM project (i.e. publication of the required map of designated routes of travel for OHVs) until an implementation strategy is identified that is consistent with ANILCA access rights as valid existing rights under 36 CFR 212.55(d)(1). We expect this implementation strategy to include regulations similar, if not identical, to rules promulgated by the Secretary of the Interior for the National Park Service and the US Fish and Wildlife Service (36 CFR 13.460 and 50 CFR 36.12 respectively). Alternatively, the District could proceed to immediately publish the map as a valid designation of routes for motorized travel for recreation and other forms of public access, except that the map designations and remaining closures would not apply to access for subsistence purposes by rural residents. We understand this latter option could be problematic under the circumstances, as noted later. There may be other options as well.

ANILCA, as a statute, cannot be overridden by an administrative regulation; therefore, in case of conflict, *the statute must prevail*. Otherwise administrative actions regarding subsistence access taken under the national OHV rule are unenforceable. The rationale for this request is to insure that implementation of the national OHV rule is consistent with ANILCA.

In addition to the Interior agency ANILCA regulations noted above, both the National Park Service and the US Fish and Wildlife Service operate under the assumption that separate rulemaking is the preferred means of closing or restricting access for subsistence purposes in specific areas. Despite the fact that the Alaska Regional Forester was delegated authority to promulgate rulemaking as necessary to implement Title VIII in 1990 (FSM 2614.04),¹ the Forest Service has no such rulemaking relative to Section 811, so use of a published map under the national OHV rule as a basis for subsistence access closures is not consistent with ANILCA's commitment to use "reasonable regulation" as the means for implementation.

While the national OHV rule creates an exception for the provisions of ANILCA that provide for subsistence access (as a "valid existing right"), it does not provide direction regarding how those ANILCA provisions should be addressed. Therefore, referring back to the national OHV rule as the regulatory justification to restrict traditional access for subsistence purposes demonstrates flawed circular logic. Without ANILCA-specific regulations, we consider these closures unenforceable for rural residents engaged in subsistence activities. Thus the Sitka ATM project does not comply with Section 811 of ANILCA for the purpose of implementing restrictions or closures of access for subsistence purposes. This statutory conflict is not unique to the Sitka District, as it will apply to other ATM projects with subsistence access closures that are not supported or accompanied by a Section 811 regulation.

215.14(b)(7) Portion of the decision with which the State disagrees

Several of the District Ranger's November 15, 2007 responses to State comments note that the ANILCA consistency issues are outside the scope of the ATM project. We have always recognized that the Sitka District Ranger does not have the authority to promulgate region-wide regulations implementing ANILCA, even though that would be have been, and still is, the proper solution. Alternatively, the Sitka District Ranger could have initiated reasonable regulations focused on making the District's specific decisions consistent with ANILCA, which is clearly within the scope of the project. The lack of either Regional or District regulations, however, renders the implementation of the existing ATM project (and any other similar ATM projects that restrict rural residents engaged in subsistence activities) ineffective and unenforceable. We therefore strongly disagree with the Forest Service position that ANILCA access provisions are "outside the

¹ "...the Alaska Region (Region 10) is delegated authority to promulgate proposed and final rules as may be necessary to implement Title VIII of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3111-3126) and to act for the Chief of the Forest Service on all matters related to subsistence uses pursuant to Title VIII."

scope of this project,” even if the solution is developed outside the context of the any individual ATM project. Regulations pursuant to ANILCA Section 811 are necessary to fully implement the ATM decision.

215.14(b)(8) Why the District Ranger failed to consider the substantive comments

It appears that, due to a lack of familiarity and understanding of the letter of the law and the intent of Congress, the District has not adequately considered and addressed the State’s (and public’s) substantive concerns about ANILCA. First, it appears that the District is confusing Section 811 with Section 810 of ANILCA. The ATM project itself, the draft and revised EAs, and the Finding of No Significant Impact all devote considerable attention to compliance with Section 810. However, although occasionally referenced or quoted, there is no meaningful discussion of Section 811 of ANILCA. When we raised compliance with Section 811 in the context of the revised EA, the responses either suggested it was outside the scope of the ATM project or the District’s compliance with Section 810 was offered as a response. See Appendix B for selected representative rebuttals to the District’s responses to State comments.

The District response to SOA Comment 101-47 quoted in Appendix B (“ANILCA is not a Forest Service law”) also supports the conclusion that the agency does not fully grasp the scope and intent of ANILCA. ANILCA unequivocally applies to the US Forest Service. See Appendix C, which excerpts the section-by-section analysis in the legislative history (Senate Report 96-413) and confirms Section 811 in particular applies equally to the Forest Service. Compliance with ANILCA Section 811 is not discretionary nor is it readily dismissed with a general statement that reasonable access to subsistence resources is provided. We also note that the Forest Service has not yet explained how it believes that the current approach is consistent with ANILCA – other than pointing to Section 810, which does not address closure procedures.

Furthermore, the Sitka District’s approach to the ATM process suggests a lack of understanding of ANILCA’s mandates. Specifically, the compilation and analysis of information about subsistence activities and access should have been assigned a higher priority, and the public should have been better informed on the purposes of public involvement and the subsistence hearings. As it stands, the ATM project did little to distinguish between subsistence and recreational use (contemporary or historical), exacerbating the current challenge and making it difficult, at best, to segregate recreational and subsistence uses for purposes of enforcement.

215.14(b)(9) How the decision specifically violates law, regulation or policy

As previously noted, the statutory terms of ANILCA cannot be overridden by administrative action, such as regulation. Although the State has raised this concern before, the Forest Service has not explained how this conflicting direction can be rectified without ANILCA-specific regulations. The conflict between the national OHV rule and ANILCA in the context of Forest Service ATM projects is expressed primarily in the treatment of off-highway vehicles (OHVs) for subsistence purposes. Section 811 of

ANILCA describes the requirement for access for subsistence purposes on all public lands in Alaska: (emphasis added)

- (a) *The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.*
- (b) *Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.*

Without question, OHVs are commonly understood by both the departments of Interior and Agriculture to be included among “*other means of surface transportation*” where they have been traditionally employed for subsistence purposes. Furthermore, the legislative history of ANILCA indicates that it was not Congress’ intention to foreclose the use of new or presently unidentified means of surface transportation (Senate Report 96-413, November 14, 1979, page 275). Use of OHVs, therefore, did not necessarily need to be established on given routes or areas in 1980.

Prior to 2005, Forest Service lands were generally “open until closed” to motorized vehicles, which was consistent with ANILCA. As a result of the 2005 national OHV rule, the Forest Service is now required to publish Access and Travel Management maps showing designated routes that may be used by the public with specified motorized vehicles. Unless such routes are identified and designated by each District by the end of 2009, all non-designated routes within that District will automatically be closed to all motorized vehicles (except snowmachines, which are addressed under 36 CFR 212.81). This national “closed until open” approach is in direct conflict with ANILCA’s “open until closed” access directives and prescribed access methodology. For access closures to be effective for ANILCA-protected subsistence activities, “**reasonable regulation**” is required.

The national “closed until open” process is also problematic for the non-roaded portions of the Sitka District. For example, federal uplands above the line of mean high tide, which are sometimes used by OHVs for access, would also be closed by the ATM decision under the principal that any route or area not specifically designated is automatically closed.

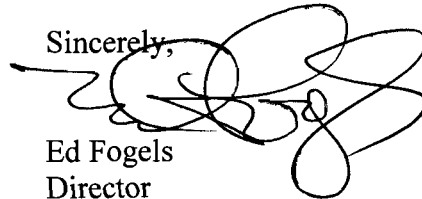
Conclusion

The State appeals the Sitka ATM project with regret, as we had hoped to reach a mutually-acceptable understanding of the application of ANILCA to ATM projects long before any final access decisions were reached. As we recently reiterated to the Regional Forester on September 25, 2007, the State is not systematically opposed to all Tongass road closures. We recognize that the Forest Service is under pressure to reduce operating expenses, and that local Districts do not control the size of their budgets. We understand

that some road closures are necessary to maintain the integrity of the remaining road system and to prevent habitat damage. However, a legal implementation process consistent with ANILCA Section 811 is lacking.

State representatives are available to assist the Forest Service in developing and promulgating regulations as soon as possible to assist the Sitka District, and all other Tongass Ranger Districts, in completing their ATM projects in a timely manner and in compliance with ANILCA.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ed Fogels', written over a horizontal line. The signature is stylized with several loops and a long horizontal stroke.

Ed Fogels
Director

cc: Mark Rey, Undersecretary of Agriculture
Dennis Bschor, Alaska Regional Forester
Carol Goularte, Sitka District Ranger
John Katz, Director of State/Federal Relations and Special Counsel to the Governor
Joe Balash, Special Assistant, Governor's Office
Tom Irwin, Commissioner, Department of Natural Resources
Denby Lloyd, Commissioner, Department of Fish and Game
Leo van Scheben, Commissioner, Department of Transportation and Public Facilities

Appendix A
**Chronology of State of Alaska Attempts to Work Cooperatively with the
Forest Service to Address ANILCA Section 811**

- September 12, 2004: SOA to Sharon Metzler, Content Analysis Team, USFS, Washington DC
Topic: Proposed Rule for Designated Routes and Areas for Motor Vehicle Use
Intent: Requests recognition in the national rule of applicable ANILCA provisions, including Section 811, and consultation on follow up actions affecting Alaska.
http://www.dnr.state.ak.us/opmp/nilca/pdf/04_09_12_USFS_draft_ohv_rule.pdf
- April 14, 2005, SOA to Carol Goularte, Sitka District Ranger
Topic: Sitka Access and Travel Management Project
Intent: Advises the District Ranger of State concerns about the inconsistency of the national OHV rule with ANILCA Sections 811 and 1110(a) in general and specifically the management of OHVs used for access for subsistence activities on the Sitka District.
http://www.dnr.state.ak.us/opmp/nilca/pdf/05_04_14_USFS_Sitka_ATM_District.pdf
- April 14, 2005, SOA to Forrest Cole, Tongass Forest Supervisor
Topic: Tongass District ATMs in general
Intent: Requests to work with the Forest Service to develop policy, regulations and management plans to implement the national OHV rule consistent with ANILCA.
http://www.dnr.state.ak.us/opmp/nilca/pdf/05_04_14_Tongass_ATM_Plans.pdf
- February 2, 2006, SOA to Carol Goularte, Sitka District Ranger
Topic: Sitka ATM/EA
Intent: State comments on the EA for the Sitka ATM project includes concerns that subsistence access is not adequately addressed to meet the intent of ANILCA Section 811 and expresses intent to arrange for meeting to discuss comments. [Subsequent meeting with Sitka and Yakutat District Rangers (and other FS staff) included discussion of need for ANILCA specific regulations to implement subsistence access closures.]
http://www.dnr.state.ak.us/opmp/nilca/pdf/06_02_02_Sitka_ATM_EA.pdf
- September 24, 2007, SOA to Carol Goularte, Sitka District Ranger
Topic: Sitka ATM/Revised EA
Intent: Reiterating State concern that ANILCA Section 811 subsistence access rulemaking requirement is still not addressed and as such, any subsequent subsistence access closures will be unenforceable under the process defined in the national rule.
http://www.dnr.state.ak.us/opmp/nilca/pdf/07_09_24_Sitka_ATM_%20Revised_EA.pdf
- September 9, 2007, SOA to Dennis Bschor, Regional Forester
Topic: ANILCA 811 and Title XI Regulations
Intent: Reviews history of State's requests to address implementation of the national OHV rule consistent with ANILCA and requests an opportunity to discuss concerns, including: ANILCA 811 subsistence access and closure procedures, ATM budgetary issues, consultation and coordination with the State, and ANILCA Title XI regulations.
http://www.dnr.state.ak.us/opmp/nilca/pdf/07-09-25_ATM+ANILCA_regs_Bschor.pdf

Appendix B**Selected Rebuttals in support of Sitka ATM Appeal****Rebuttals of selected November 15, 2007 District Responses to State of Alaska Comments:**

SOA Comment (101-8): The revised EA still does not address ANILCA Section 811 subsistence access requirements for rulemaking. We are raising this concern with the Regional Forester because we recognize some of the specific issues and their solutions are likely beyond the scope of the Sitka District's decision-making authority.

FS Response (partial): ...Sec 811 (b) also discusses access for subsistence purposes by local residents, subject to reasonable regulations. The Sitka Ranger District held informational meetings and subsistence hearings in Sitka, Angoon and Tenakee Springs to provide information on the proposed project and to receive testimony from individuals, agencies, and organizations on the activities proposed in the EA and how the proposed activities may potentially affect users of subsistence resources from these communities. The results of the subsistence hearings are as follows:... (emphasis added)

SOA Rebuttal: Appears to indicate confusion between Sections 810 and 811 of ANILCA. The referenced hearings were expressly held pursuant to Section 810, as confirmed by the response to SOA Comment 101-37. See also rebuttal to SOA Comment 101-37.

SOA Comment (101-9): As you know, the nationwide Travel Management rule established a process by which all routes that are not designated for motorized use will automatically be closed to motorized access. In contrast ANILCA Section 811(b) says federal managers "shall permit" access for subsistence purposes, "subject to reasonable regulation." Thus the national direction amounts to a "closed unless open" approach, while ANILCA is premised on an "open until closed" approach, with rulemaking as the tool for implementing closures.

FS Response: The Sitka Ranger District held subsistence hearings and received very few comments related to how our proposed implementation of Alternative 4 will adversely affect subsistence opportunities. (emphasis added)

SOA Rebuttal: This response does not address this key comment, and again indicates confusion between Sections 810 and 811 of ANILCA. See also rebuttal to SOA Comment 101-37.

SOA Comment (101-10): The revised ATM Plan still does not recognize the regulatory closure process required in ANILCA Section 811(b).

FS Response: This issue is outside the scope of this project. (emphasis added)

SOA Rebuttal: This response illustrates the fundamental disagreement between the Forest Service and the State. While we have repeatedly articulated our position and rationale, the Forest Service has not explained or even attempted to justify the validity of the current approach.

SOA Comment (101-14): Without regulations, any Forest Service closures for subsistence access will ultimately be unenforceable, and proactive wholesale efforts to make these routes unusable will not have an adequate basis in law. Again, we do not dispute the need for selected road closures, but we must draw attention to the lack of a legal closure process.

FS Response: As described on page 1-7 of the Revised EA, when the Travel Management Rule, our Forest Service regulations, is adopted on the Sitka Ranger District, the Motor Vehicle Use Map will identify which OHV routes will be open. This map will be made available for all forest users at our office and on-line and will be updated annually. The Sitka Ranger District has one law enforcement officer, and two Forest Protection Officers, assigned to the District who will patrol the roads and trails and enforce the closures. We disagree with your statement and do believe we have legal closures.

SOA Rebuttal: We strongly disagree. Without regulations to ensure compliance with ANILCA, implementation of the Sitka ATM is procedurally flawed.

SOA Comment (101-37): What is the nature and purpose of the subsistence hearings mentioned in the second paragraph? (References EA page 1-3, Public Meetings)

FS Response: The subsistence hearings were intended to meet subsistence evaluation requirements outlined in Section 810, ANILCA. The hearings were held in Sitka, Angoon, and Tenakee Springs and were designed to receive testimony from individuals, agencies, and organizations on the activities proposed in the Access and Travel Management Revised Environmental Assessment located on the Sitka Ranger District and how the activities proposed may potentially affect users of subsistence resources within the project area. (emphasis added)

SOA Rebuttal: We appreciate the thorough attention to detail regarding Section 810, which makes it all the more perplexing that ANILCA Section 811 is not even mentioned in the EA or the Finding of No Significant Impact, even though it similarly applies. While our comments consistently address the lack of regulation to implement closures under Section 811, the District Ranger consistently responds regarding the evaluation requirements established under Section 810, as if the testimony (or lack thereof) at the hearings somehow justify not fulfilling the requirements of Section 811. Compliance with Section 810 does not constitute compliance with Section 811. Section 810 directs federal land management agencies to evaluate how their actions effect subsistence uses and resources, while Section 811 provides direction regarding access to subsistence resources. Regardless of the conclusions drawn from the 810 analysis or the magnitude of impacts to subsistence uses, all subsistence access closures are separately subject to the requirements of Section 811. And, while the Sitka ATM 810 evaluation concludes there is not a "significant possibility of a significant restriction of subsistence use of wildlife, fish or other foods" (an assumption with which we disagree), there is no conclusion in the EA that the proposed project results in no subsistence access closures. In fact, the District Ranger concludes in her response to State comments letter: "In closing, I recognize that my selected alternative has a high impact on road access via motorized vehicles, and thus a high impact on recreation and subsistence by those using motorized equipment to access areas and resources."

SOA Comment (101-47): The last sentence says "ANILCA regulations apply to all alternatives and all locations considered in this EA." To our knowledge, the Forest Service has no applicable ANILCA regulations.

FS Response: The Forest Service must comply with all applicable Federal laws and regulations. Although ANILCA is not a Forest Service law, it is Federal Public Law 96-487 and we try to meet the intent of this law to the best of our ability.

SOA Rebuttal: ANILCA unequivocally applies to the US Forest Service. Whole sections of ANILCA apply exclusively to the Forest Service; other portions, like Section 811, apply to multiple federal agencies. See Appendix C, which excerpts the section-by-section analysis in the legislative history (Senate Report 96-413) that confirms Section 811 applies equally to the Forest Service. "Trying" to meet the intent ANILCA is not legally sufficient.

Rebuttal to selected statements in the November 16, 2007 Finding of No Significant Impact:

FONSI ANILCA Section 810, Subsistence Evaluation and Finding: (emphasis added)

"The selected alternative provides unrestricted non-motorized access to the entire District. No documented or reported subsistence use would be restricted as a result of this decision. As for motorized access, some areas will be restricted that were previously open." "...none of the alternatives would result in a significant possibility of a significant restriction of subsistence use of wildlife, fish, or other foods."

SOA Rebuttal: This statement is highly misleading. In remote areas, curtailing motorized access effectively precludes subsistence activities, even if the activity itself is still allowed.

FONSI District responses to selected public comments: (emphasis added)

- "The criteria used for prioritizing which roads to keep open (to passenger vehicle and OHVs) are: administrative use needs, future timber sale needs, and public access."
- "The purpose of this project is to provide sustainable, efficient, and safe access to the forest resources and recreational opportunities on the District. The need for this project is to reduce the number of non-maintained or inadequately maintained roads to better match the level of funding available....to eliminate or reduce risks of adverse environmental impacts and threats to public safety."

SOA Rebuttal: Subsistence is not recognized or addressed in this context. Subsistence is mentioned in the EA, but with little sense of importance or priority.

Appendix C

With regard to congressional intent inherent in the wording of Section 811, the following Section-by-section analysis related to Section 811 is reproduced from Senate Report 96-413 (Volume XXXV, p. 549): (emphasis added)

Section 811: Access

This section requires the Secretary of the Interior and Secretary of Agriculture to ensure that residents engaged in subsistence uses shall have appropriate access to subsistence resources on the public lands, and shall permit the taking of fish and wildlife for subsistence uses in areas of Alaska designated as national preserves, national conservation areas, national recreation areas, national parks and [sic] monuments in which subsistence uses specifically are permitted by this Act, and areas of the National Wildlife Refuge, National Forest, and Wild and Scenic Rivers Systems in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

The committee intends that access to fish and wildlife populations shall be provided to local residents engaged in subsistence uses regardless of where such populations may be located in the future (except that the section is not intended to permit the subsistence use of wildlife in national parks and monuments which are permanently closed to such uses.) Traditional habitat and migration routes may be altered by transportation systems and development activities on the public lands. By focusing on access to the resource itself, rather than on the particular portion of the public lands upon which the resources may presently be located, this section provides the flexibility necessary to ensure the continuation of subsistence uses in the future, subject to reasonable regulation.

This section also recognizes the importance of snowmachines, motorboats, and other means of surface transportation traditionally employed for subsistence purposes on the public lands. Although aircraft are not included within the purview of this section, reference to means “traditionally employed” for subsistence purposes is not intended to foreclose the use of new, as yet unidentified means of surface transportation, so long as such means are subject to reasonable regulation necessary to prevent waste or damage to fish, wildlife, or terrain.