

# STATE OF ALASKA

## ANILCA IMPLEMENTATION PROGRAM

**SARAH PALIN, Governor**

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September 24, 2007

Carol A. Goularte, District Ranger  
Sitka Ranger District  
Tongass National Forest  
204 Siginaka Way  
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Dear Ms. Goularte:



The State of Alaska reviewed the Revised Environmental Assessment (EA) for the Sitka Access and Travel Management (ATM) project. This letter provides consolidated comments of State agencies.

### General Comments

As indicated in our comments dated February 2, 2006, regarding the initial Sitka ATM Plan and EA, we appreciate the difficulties faced by the Sitka District (District) in managing its road system with increasing resource concerns and reduced funding for maintenance. We understand that some road closures will be necessary to maintain the integrity of the remaining road system and to prevent habitat damage. We are not convinced, however, that the District has taken sufficient measures to keep as many roads as possible open and available for continuing public use. Unfortunately we have little ability to comment on specific road closures because the criteria used to prioritize the closures is not apparent in either the original or the revised EA. The EA contains a tremendous amount of detail about the nature of the proposed action, but little about how the decisions were made. In response to our February 2006 request for additional background, the revised EA unhelpfully notes (e.g. page 3-1) that such background information is on file and available for public inspection at the Sitka office. The 30 day review period for this revised EA does not provide adequate time to request, disseminate, and sort through internal decision records.

We recognize that, while the revised EA does contain some new information, the primary purpose of the revision is to add a new alternative. Since a few of our comments on the first EA were addressed in the revision, we don't know the District's intentions regarding our remaining comments. To the extent that the revision does not address our previous comments, we incorporate them herein by reference.<sup>1</sup> This letter highlights or expands upon key outstanding concerns.

<sup>1</sup> See letter at [http://www.dnr.state.ak.us/opmp/anilca/pdf/06\\_02\\_02\\_Sitka\\_ATM\\_EA.pdf](http://www.dnr.state.ak.us/opmp/anilca/pdf/06_02_02_Sitka_ATM_EA.pdf)

The new fourth alternative is designed to present a management scenario based on an updated understanding of the District's anticipated budget. If the new alternative better responds to anticipated reductions to the District's maintenance budget, then we question why a more costly alternative with fewer road closures remains the preferred alternative. The intent to retain a reportedly unattainable alternative seems misleading, particularly since the August 2007 Wrangell ATM decision document chose a Maintenance Cost Alternative over the original preferred alternative to respond to reduced funding.

## **Access for Subsistence Purposes**

### Rulemaking

While we appreciate improvements regarding subsistence access between the original and the revised EA (e.g. the subsistence survey), our fundamental concerns remain. 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.

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.

The revised ATM Plan still does not recognize the regulatory closure process required in ANILCA Section 811(b). Unlike the National Park Service and the US Fish and Wildlife Service, the Forest Service has no baseline regulations or policies specifically addressing subsistence access closures under ANILCA. Some creative thinking is necessary to come up with regulatory closure procedures for the Forest Service. This effort will be particularly complex given the various categories of "closures," some of which are more permanent than others and may vary by District. Given our extensive background with other federal agencies on rulemaking, we desire to work with the Forest Service on appropriate regulations.

We suspect the Forest Service considers the national Travel Management rule as adequate authority for proposed closures. This may be adequate for general public access, but not for subsistence access. When the national regulations were proposed, we argued that the statutory requirements of ANILCA could not be substantively overridden by regulation. Appropriate changes were made in the final rule addressing snowmachines. Other ANILCA access provisions (especially 811(b)) were simply relegated to a "*valid existing right*." Thus Section 811 remains an exception to the national Travel Management regulations, but precedents are not yet in place to define this relationship.

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.

### Subsistence Road Survey

Although we are not familiar with the referenced survey, the State appreciates the District's efforts to determine what roads were used by OHVs prior to 1980. This type of analysis helps put local subsistence use into perspective. A determination that a given road was not used before 1980, however, is not adequate justification to conclude or imply that Section 811(b) rulemaking requirements do not apply to post-ANILCA use of such road. ANILCA legislative history clearly shows that Congress understood that subsistence was an evolving activity and purposely chose not to establish a pre-existing use test. If subsistence activities were occurring in the general area prior to 1980, and if use of ORVs was part of the mix of access methods, then closure regulations would be needed to restrict that use throughout the area, even if the Forest Service has no direct evidence of pre-ANILCA ORV use on a given route.

The last paragraph on page 3-11 states that "*Apart from a few exceptions, the mainline roads that were identified during this survey are currently open for OHV use or will be open pending repair or replacement of bridges and/or acceptable stream crossings in all alternatives.*" This statement downplays the fact that numerous spur roads off the mainline routes will be closed. It also does not recognize that a road that "*will be open pending repair*" is in fact a closure – either temporary or permanent dependent on funding. The EA readily admits that funding will be insufficient to undertake many of the hoped for repairs. Therefore the *intent* to repair and open a road is hardly a guarantee the road will be open and available for use.

This misleading representation, taken together with other statements in this section that 1) most current subsistence use is by motorboat, and 2) the large majority of subsistence users would not be affected by the closures, seems to say that additional statutory responsibilities toward subsistence users are minimal. Even if the above assumptions are true, the Forest Service still has an obligation to follow ANILCA closure procedures. We are not suggesting that the Forest Service cannot close or restrict subsistence access (ANILCA Section 811 provides a process), and we recognize that some loss of subsistence access is inevitable under present fiscal realities. Instead, we seek a more complete and forthcoming accounting of the impacts of the proposed closures (including stored roads and trails or roads closed pending repair) along with a commitment to develop appropriate regulations.

Setting aside for a moment our earlier comments regarding Section 811 rulemaking, even though we have some substantive concerns about the "stored" or "pending repairs" categories, we do understand the purpose of these de facto closures in the context of the Travel Management rule. We understand that the national rule asks Districts to designate all roads or trails that will or may be opened in the future, even if funding to keep them physically open is currently inadequate and they will be effectively closed in the meantime. We appreciate that the Service is trying to provide flexibility for future road openings under appropriate circumstances. Under the national rule, the alternative is to permanently close all routes with any sort of management challenge, which would be the least desirable approach of all.

## Road Closure Alternatives

We appreciate that the District has had discussions with the Alaska Department of Natural Resources (DNR), Office of Habitat Management and Permitting (OHMP) on the Service's options under the State's Title 41 authority for repairing inadequate crossings on anadromous streams. Through that consultation, OHMP presented the Service with less expensive acceptable alternatives. Unfortunately, however, the EA does not clearly indicate which, if any of those options were incorporated in the ATM Plan, or how they affected decisions to close or store specific roads or trails. Our interest, of course, is maximizing the number of accessible roads that can be managed effectively within a limited budget.

The EA does include a significant amount of information regarding the Service's proposed alternatives. However, as noted in our general comments, the information provided speaks more to the outcomes identified in the alternatives than to the decision process or any specifics about why certain roads were selected for a specific action. For example, while Appendix A in the original EA lists out the criteria for prioritizing road actions, there is still no discussion in the revised EA that helps discern how the District reached its conclusions. This is especially important in the context of the revised EA with the additional proposed closures in the new alternative. Page 2-6 regarding Southeast Chichigof Island provides another specific example. The first paragraph includes a lengthy list of closures without accompanying justification, simply noting "resource issues and lack of access." The second paragraph lists numerous closures with no justification at all. In contrast, the third paragraph concerning the Crab Bay road system does include at least superficial rationale.

We are aware the revised EA indicates decision records are available upon request; however, the paucity of such background information in the EA makes specific comment difficult at best. As a result, we cannot tell if the following considerations have already been factored into your previous deliberations. To the extent they have not been addressed, we include them for your continued consideration:

- Many roads are proposed for closure pending replacement or repair of stream crossing structures or bridges; however, blanket closures of entire roads may not be necessary. For example, OHV use could possibly be allowed on segments of roads unaffected by inadequate crossings.
- Certain bridges have been labeled "failed" since they are no longer able to carry fully loaded log trucks; however, they may still be able to carry lighter vehicles, such as ORVs, and may not need to be closed or stored.
- Many roads that begin near the beach may provide upstream access for fishing without stream crossings or bridges to maintain. Since access to many of these remote roads is by boat, these more remote routes get relatively little use and consequently, maintenance needs would be minimal.
- Incremental culvert maintenance or "storm proofing" for some ML 2 roads may be preferable to more costly culvert repair or replacement.

## **“Non-Significant Issues”**

The “Non-Significant Issues” section beginning on page 1-4 includes, among others, “Road Maintenance Costs” and “Funding for Proposals.” These are highly significant issues, and as noted in the EA, form the basis for the whole EA and for the new alternative in particular. We recommend re-titling this section to something like “*Issues beyond the scope of the Plan*” or “*Responses to comments regarding issues that are beyond the scope of the plan.*”

The “Funding for Proposals” section on page 1-7 says “*Regardless of which alternative is selected, there is no guarantee that funds will be available to fully implement the chosen alternative.*” If inadequate funding for any alternative (including Alternative 4, which was identified as having the lowest road maintenance and trail maintenance costs of the action alternatives on Page 3-23) results in fewer repairs for “closed pending repair” and “stored” roads or trails, the impacts to subsistence users and the community as a whole likely will be greater than indicated in the EA. Clearly, funding is a significant issue that deserves more attention at all levels of ATM planning.

The Fisheries/Water Quality section on page 1-4 notes removal of bridges and culverts for habitat protection. These actions will, by definition, physically block motorized access. We support this approach where habitat is indeed threatened. In contrast, the “Enforcement of Closures” section on page 1-7 says that enforcement efforts are limited and the public will be “*expected to adhere to the law by only riding on routes designated as open on the map.*” This second discussion implies that many or most closed routes will not be physically blocked. Where habitat damage is a major concern, we request that closures be supported by some sort of physical barrier. Again, based on the limited information in the EA, we are unable to comment on specific routes.

## **Page-specific Comments**

Page 1-2, revised definition of “Wilderness.” Although we appreciate the effort to revise this definition in response to our previous comment, the new version now refers to “...traditional activities *that are legal*” (emphasis added) without explanation. The Service has determined that “*traditional activities include, but are not limited to, recreation activities such as fishing, hunting, boating, sightseeing, and hiking*” on all conservation system units, including designated wilderness. (USFS Region 10 Supplement No. R-10 2300-2003-2, specifically 2326.1 - Conditions Under Which Use May Be Approved). We urge replacing the phrase “that are legal” with the explanation from the R-10 Supplement. Without a regulatory definition of “traditional activities,” the Forest Service has no basis for implying that certain uses may not be traditional. The definition also references “*ANILCA, Section 1110 and Wilderness and Rec. & Tourism Sections.*” Other than Section 1110, we have no idea what this reference means. Please provide more specific citations, if any, or delete the remaining general references. We are not aware of other sections of ANILCA that speak specifically to the corrected language.

Page 1-3, Public Meetings. What is the nature and purpose of the subsistence hearings mentioned in the second paragraph?

Page 1-3, Consultation with Other Agencies. The EA indicates that no “permits” are required for implementation of this plan. The EA does not address Addendum One of the Memorandum of Understanding (MOU) between the Forest Service and DNR/OHMP that requires the Service to obtain a “Concurrence” for any work below ordinary high water in anadromous water bodies. Our previous comment letter also requested the Service acknowledge that any work below ordinary high water in navigable waters would also require an authorization from DNR, Division of Mining, Land and Water. In light of the concurrence requirement, the statement that Service personnel determined “no permits, licenses, and/or certifications from federal or state agencies are needed for this project” is at best misleading. Given the amount of work affecting culverts and other stream crossings referenced in the EA, it seems unlikely that none of that work will occur in anadromous and/or navigable waterways that would require some type of authorization from DNR or similarly, from the U.S. Army Corps of Engineers for work in or affecting navigable waters under their jurisdiction. We request the final decision document acknowledge the District’s intention to follow the procedures agreed to in Addendum One of the MOU, which is not directly referenced but inferred by the following statements in the EA: “...60 miles would be closed [to ORV use] until consultation with the State of Alaska occurs, and repairs are made if needed.” (page 3-12) and “Clearance work done by resource specialists and with the State of Alaska to allow OHV use on some roads ‘closed pending repairs’...” (Appendix B-1)

Page 2-3, Off-Road Access for Dispersed Camping. The first sentence of this section, “OHV use off of designated open roads and trails for the purposes of dispersed camping is permitted for up to 100 feet on closed roadbeds year-round.” is confusing and needs to be re-written for clarification. If correct in our assumption about the intended meaning, we suggest revising the sentence as follows: “For the purposes of dispersed camping, OHV access is allowed on up to 100 feet of closed roadbeds year-round.”

Page 2-5, Off-Highway Vehicle (OHV) Access. OHVs are defined as “...any motor vehicle that is designed or retrofitted *primarily for recreational use...*” (emphasis added). It is unclear why this distinction is included in the definition when the EA recognizes that OHVs are also used for subsistence purposes. We recommend deleting the distinction in the definition unless the Service has a different definition of OHVs used for subsistence purposes.

Page 2-6, Indian River – Alternative 4 for OHV Access. This section indicates that the subject road is being closed until “repairs or mitigation of failed bridges is completed.” However, according to the 2005 Indian River Roads Analysis Process, the first 11.8 miles of Road 7500 and all of Road 7502 have bridges that can still carry loaded log trucks. Unless new information is available subsequent to the 2005 report, the EA is incorrect.

Page 2-6, Upper Baranof Island, Alternative 4 for OHV Access. We request the second paragraph reference the specific EIS process that did not allow any roads or trails on the Hanus Bay road system.

Page 3-6, Environmental Effects, Hunting and Fishing. The second paragraph states that due to road closures and removal or repair of road crossings “...*these improvements would likely have a positive effect on fish populations and could result in a small, but positive effect to recreational fishing.*” However, the alternatives that close roads (2, 3 and 4) will in many cases limit access

to fishing by motorized vehicles of all types. The analysis does not address how road closures will limit recreational fishing opportunity (a negative effect). For example, closure of Eagle Creek Road on Kruzof Island would limit access to both Eagle Creek and Sukoi Lake on north Kruzof Island.

Page 3-8, first paragraph. 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.

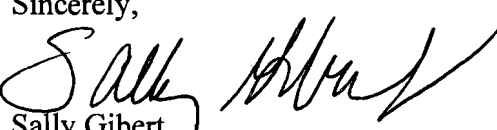
Page 3-9, Environmental Effects, Table 17, Documented Deer Harvest by Road System and WAA, 1995 to 2003. The table appears to be either incorrect or unclear in several aspects. 1) Lisa Creek is listed in Lower Baranof Island and Nakwasina is listed in Upper Baranof Island. Under Lisa Creek, Katlian, Starrigavan Bay, Harbor Mountain, Sitka Local and Blue Lake are listed as subheadings, but Lisa Creek actually drains into Nakwasina Sound. 2) The WAA and number of Deer Harvested are the same for both listings. 3) Some of the column totals are incorrect.

Page 3-11, Access to Resources, first paragraph. Providing data from GMU 4 as an indicator of use in the “project area” is not entirely accurate. While somewhat similar, the areas do differ in available road access resulting in different access methods and harvests.

This same paragraph indicates that most hunting is accessed by boat or airplane. The EA does not acknowledge or address that sometimes people use a boat to haul their OHVs to remotely-accessible road segments. Would this be characterized as primarily boat access? If so, then existing use of OHVs may be under-represented.

Page 3-13, fourth paragraph. This paragraph appropriately notes the potential for displacement of users groups from closed areas, thereby potentially increasing use in adjacent areas; however such displacement is not addressed for other areas. Given the large number of closures (including stored and pending repairs) it appears the potential overall impacts of such displacement have not been adequately considered. Additional use/users may also necessitate increased regulatory action (e.g. harvest levels) to prevent impacts to resources.

Thank you for your consideration of these comments. We look forward to further consultation as you make continued progress toward a final decision document.

Sincerely,  
  
Sally Gibert  
State ANILCA Program Coordinator

cc: Dennis Bschor, Regional Forester  
Forrest Cole, Tongass Forest Supervisor