



September 15, 2020

Perry Edwards, Sitka District Ranger  
USDA Forest Service  
2108 Halibut Point Road  
Sitka, AK 99835

Dear Mr. Edwards:

The State of Alaska reviewed the Sitka Ranger District Outfitter/Guide Lakes Access Project Environmental Assessment (EA) and Finding of No Significant Impact located within the Tongass National Forest. The following comments represent the consolidated views of state resource agencies.

The State supports the project's intent to provide increased opportunities for recreational activities, including guided recreational activities, as well as efforts to maintain existing recreational cabins. However, we have serious concerns regarding the project's proposed closures and restrictions to aircraft lake landings, both within and outside designated wilderness. These and other issues are addressed more fully in the following comments.

### **Lake Closures Not Applicable to State-owned Navigable Waterbodies**

Under the preferred alternative, aircraft landings and guide and outfitter activities, other than guided hunting, would either not be authorized or would be restricted on the following waterbodies: **Blue Lake, Green Lake, Hidden Falls Lake, Takatz Lake, Klag Lake, Cold Storage Lake, Indigo Lake, Lake Diana, Rosenberg Lake, and Lake Eva**. The State asserts that these lakes are considered navigable for title purposes and the State of Alaska owns the submerged lands of Alaska's navigable waters unless there is a valid pre-statehood withdrawal. The Tongass National Forest withdrawal did not include the submerged lands under navigable-in-fact waters within its boundaries; hence, the submerged lands below the ordinary high-water mark of all navigable-in-fact waters are solely owned, since January 1, 1959, by the State of Alaska pursuant to the Equal Footing Doctrine of the United States Constitution, the Federal Submerged Lands Act of 1954 and the Alaska Statehood Act. Therefore, the Forest Service cannot limit public and commercial uses, specifically aircraft landings and guide and outfitter activities on these state submerged lands.

Any effort under any of the alternatives, including the "no action" alternative, to manage and control state-owned submerged lands represents a cloud on state title, 28 U.S.C. § 2409a, and violates the language of the United States Supreme Court in its two unanimous opinions in the Sturgeon litigation. Sturgeon v. Frost, 136 S. Ct. 1061 (2016) [Sturgeon I]; Sturgeon v. Frost, 139 S. Ct. 1066 (2019) [Sturgeon II]. Limitations on public and commercial use of state-owned submerged lands can only be made by the State of Alaska, or through application. The proposed federal closures and restrictions on

state-owned submerged lands, shorelands, and waters will create confusion and uncertainty for the public; and will undoubtedly lead to costly litigation pursuant to the Federal Quiet Title Act whereby the State of Alaska is compelled to enforce its ownership of submerged lands due to federal actions clouding state title. See Katalla River, 102 IBLA 357 (June 10, 1988); Alaska v. United States, Case No. 3:15-cv-0226-RRB (D. Alaska July 26, 2016) (Beistline, J.); Taku River, Recordable Disclaimer of Interest, AA-94268 (Dec. 7, 2018). Public and commercial use on state submerged lands, shorelands, and waters is under the sole purview of the State of Alaska. We request the Forest Service direct applicants requesting use of state navigable waters to the Alaska Department of Natural Resources' Southeast Regional Office to determine if the proposed activity requires state authorization.

### **Floatplane Landing Tours in Designated Wilderness**

This project carries forward a decision by the Forest Service in the Shoreline II project and Final Environmental Impact Statement (see Wilderness Commercial Needs Determination (WCND) in Appendix F) to not authorize guided floatplane landing tours on any lakes located within designated Wilderness on the Sitka District (i.e., West Chicagof-Yakobi Wilderness and South Baranof Wilderness). Appendix C of this EA identifies 40 lakes that are located within these Wilderness areas. The Alaska National Interest Lands Conservation Act (ANILCA) defines designated Wilderness as a conservation system unit (CSU) and the Supreme Court affirmed in Sturgeon v. Frost, 139 S. Ct. 1066 (2019), that ANILCA Section 103(c) prohibits federal land management agencies, including the Forest Service, from applying their agency regulations and policies to state owned submerged lands and waters located within the boundaries of CSUs. Therefore, the WCND's are not applicable to state-owned submerged lands and waters. We request these earlier decisions be rescinded in final decision document for this EA. We also request the Forest Supervisor revise the Shoreline II FEIS and ROD to rescind similar decisions applicable to other Districts that are outside the Forest Service's authority, consistent with the Supreme Court's decision in Sturgeon v. Frost.

### **Stipulations for Outfitter/Guide Activities – Flying**

The stipulation requiring guided parties to choose another location if another group is on a lake is not only not applicable to state submerged lands, shorelands, and waters, it also does not appear functional and well thought out (page 28). For example, there are two cabins on Sitkoh Lake that are available by reservation. Under the proposed stipulation, only the first group to land on Sitkoh Lake would be allowed to complete their reservation. Even on a lake with only one cabin available for reservation, a guided group with a reservation would not be able to stay at their cabin if another group is on a day trip or camping in the vicinity of the lake. This stipulation is particularly problematic during hunting and fishing seasons when multiple groups are participating in allowed harvest activities. It is also not supported by Alaska hunting and fishing regulations and introduces a misalignment with State-regulated allowed uses. We request deletion of this stipulation in the errata sheet.

*If it can be conducted safely prior to a lake landing, the pilot is required to conduct a fly-over to look for other visitors to the lake. If people are present, the guided party must choose another location.*

## **Stipulations for Outfitter/Guide Activities Hiking/Hunting/Fishing**

The project stipulations on page 28 state that outfitter/guide “clients should also limit their time spent fishing in one location to 30 minutes or less to reduce the time fish are dispersed from that location.” This is phrased as a suggestion, not a stipulation, and the intent is unclear. A restriction of this type is not applicable to fishing occurring on state submerged lands, shorelands, and water and is not needed for the level of angler effort at these freshwater lakes. If fish have dispersed and are not being caught, anglers will move on. If anglers are catching fish, why would guided anglers arbitrarily have to stop after 30 minutes given the present level of angler effort level in an area? In the Sitka area, guided angler effort is focused primarily on saltwater fishing, not freshwater fishing. We request the removal of this stipulations in the errata sheet as it is not consistent with Alaska sportfishing regulations.

*~~It is suggested that clients should also limit their time spent fishing in one location to 30 minutes or less to reduce the time fish are dispersed from that location.~~*

In addition, the taking of fish and wildlife is specifically allowed in designated Wilderness in accordance with State and federal law (ANILCA 1314(c)). The Alaska Department of Fish and Game (ADF&G) is responsible for fish and wildlife management, actively monitors the fishery, and has found no conservation concerns for the sportfish in these areas.

If the Service identifies a conservation concern associated with lake fishing in wilderness, we request the USFS notify ADF&G and utilize the Alaska Board of Fish (BOF) process for regulatory proposals. The BOF’s main role is to conserve and develop the fishery resources of the state. This involves setting seasons, bag limits, and methods and means for the state's subsistence, commercial, sport, guided sport, and personal use fisheries. It also involves setting policy and direction for the management of the state's fishery resources. The BOF is charged with making allocative decisions, and ADF&G is responsible for management based on those decisions.

### **Alternative 3: Fewer Wilderness Lakes and Lakes with Recreation Cabins**

Alternative 3 further restricts commercial use by only authorizing new use for outfitting and guiding services on **non-wilderness** lakes (page 6). As discussed above, the Forest Service does not have authority to restrict public and commercial use on state submerged lands, shorelands, and waters within designated Wilderness. Further, these lakes have very conservative sportfish bag limits and all lakes could see more sportfish harvest effort without conservation concerns. There is no evidence presented to justify limiting guided sportfish harvest effort, given the current level of use.

In addition, the taking of fish and wildlife is specifically allowed in wilderness areas in accordance with State and federal law. ADF&G has found no conservation concerns for the sportfish in these areas and is actively monitoring the fishery. If the Service identifies a conservation concern associated with fishing in wilderness lakes, ADF&G should first be notified before utilizing the BOF process for any regulatory proposals.

Further, big game hunts for brown bear and mountain goat require out of state hunters to use a guide and most people do not own their own float plane or have the specialized knowledge, skills, and equipment needed to safely to hunt, fish, and experience these wilderness areas.

## Public Use Cabins

We appreciate the recognition in the EA of the importance of maintaining even public use cabins with low use in remote areas in Alaska, including designated wilderness, in order to meet the management objectives of the Forest Plan, as well as to meet the recreational purpose of the Wilderness Act. The two proposed alternatives each propose allowing additional outfitter and guide use at public use cabins. We support this allowance and note it is consistent with the Tongass National Forest Land and Resource Management Plan, which includes management intent to maintain public use cabins at present or improved conditions (pg. 3-17 Recreation Use Administration:REC3, E.). Cabins facilitate public use of an area for activities such as hunting, fishing, and commercial services by allowing for extended trips into Alaska's rugged and remote backcountry and wilderness areas. Cabins are also important for public health and safety, particularly during inclement weather conditions, which can be especially prevalent in Southeast Alaska. As noted in the EA, the cabins proposed for outfitter guide use have very low unguided use (6-15 visits per year) and are almost unreachable without a floatplane. This provides the added benefit of increasing cashflow that can be put toward cabin maintenance.

The Direct and Indirect Effects section for Wilderness Character: "Undeveloped" (page 15) states that: "...loss or removal of some cabins would improve the undeveloped quality in those areas [where cabins were either removed or allowed to deteriorate through benign neglect]." ANILCA Section 1315(c) and (d) allows for existing cabins in Alaska to be retained, maintained, and replaced, as well as the construction of new cabins for public health and safety. The significance of this provision is emphasized by the requirement for federal agencies to notify Congress of any plans to remove to construct cabins within designated Wilderness. Simply concluding that the wilderness would benefit from the removal of cabins by whatever means, without also recognizing the impact on the ability of the public to access and enjoy the wilderness area is short sighted. We request a more balanced analysis that takes into consideration the allowances in ANILCA that amend the Wilderness Act and provide for access and use in Alaska's remote wilderness areas, and to not automatically conclude that structures, such as cabins, degrade wilderness character.

Thank you for this opportunity to comment. Please contact me at (907) 269-7529 if you have any questions or to discuss these comments further.

Sincerely,



Susan Magee  
ANILCA Program Coordinator