



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

ANILCA Implementation Program

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February 3, 2023

Timothy Hammond
Manager, Eastern Interior Field Office
222 University Avenue
Fairbanks, AK 99709

Submitted electronically to birchcreek@blm.gov

Re: Birch Creek (Ikhèenjìk River) Wild and Scenic River Scoping Comments

Dear Mr. Hammond:

The State of Alaska (State) has reviewed the scoping letter and public webinar presentations for the Bureau of Land Management (BLM) Birch Creek Comprehensive River Management Plan (Plan). As noted by the BLM and prior State comments, the Alaska National Interest Lands Conservation Act (ANILCA) designated the Birch Creek Wild River as a component of the Wild and Scenic River System. Birch Creek provides excellent opportunities for floating, fishing, hiking, hunting, and more activities. The State resource agencies offer the following comments.

State Management Responsibilities

The Alaska Department of Natural Resources (DNR) has management authority for state lands (including the land, water, tidelands, and shorelands of navigable waters within the State). This authority includes management of navigable waters, tidelands, and shorelands within and adjacent to the boundaries of federal lands, including conservation system units created under ANILCA. The Alaska Department of Fish and Game (ADF&G) has primary authority and responsibility over the management of fish and wildlife, including State authorized fish and wildlife harvest, on all lands, including BLM's. The Alaska Department of Environmental Conservation (ADEC) conserves, improves, and protects Alaska's natural resources and environment to enhance the health, safety, and economic and social wellbeing of Alaskans. Specifically for Birch Creek this includes working with partners to restore water quality to meet State Water Quality Standards.

Fisheries Management

In the public webinar presentation, Slide 16, titled "National Landscape Conservation System (NLCS) Policy – Key Provisions," indicates BLM will "manage fisheries within NLCS units with an emphasis on achieving the goals of the National Fisheries Habitat Action Plan¹."

¹ [National Fish Habitat Action Plan 2012.pdf \(fishhabitat.org\)](#), pages 25 and 25, accessed on February 1, 2023.

According to the National Fish Habitat Action Plan 2012 “The Action Plan is a science-based, **voluntary, and non-regulatory effort**” and directs Department of Interior agencies to **cooperate** with state and other public or private agencies and organizations in the conservation of fish and wildlife and their habitats as allowed by federal law (emphasis added). ADF&G supports science-based decisions, however, fisheries management is under State purview. Additionally, The Omnibus Public Land Management Act of 2009 (the Act) is not one of the federal laws listed in the Action Plan and Sec. 2002 of the Act, “Establishment of the National Landscape Conservation System,” specifically prohibits the NLCS from affecting: (2) *the authority, jurisdiction, or responsibility of the several states to manage, control, or regulate fish and resident wildlife under state law or regulations, including the regulation of, or access to, hunting, fishing, trapping, and recreational shooting on BLM-managed public land.*

Navigable Waters

The BLM determined Birch Creek (Ikhènjik River) navigable from the Yukon River upstream to the confluence with the South Fork Birch Creek through multiple determinations with the final on May 11, 1983. The State reserves the right to assert its ownership over other river segments within the planning area and manage these waters for both water quality and quantity. The BLM’s planning documents and maps should identify these lands and waters as State-owned throughout the planning process. We look forward to working with the BLM to articulate management of these waters that is accomplished by numerous state agencies including DNR, ADF&G, and ADEC.

RS2477s

The public webinar documents for this scoping process indicate the goal to, when possible, avoid authorizing new rights-of-way within the wild and scenic river boundary. The State notes its claims to numerous rights-of-way across federal land under RS 2477, including rights-of-way identified in Alaska Statute (AS) 19.303.400. There are several rights-of-way owned by the State of Alaska that fall within the boundary of the WSR corridor that remain under State jurisdiction.

Reservations of Water

The 1983 Birch Creek River Management Plan² (1983 Plan) recognizes the numerous Reservations of Water applications and certificates throughout the planning area. DNR determines and adjudicates rights in and appropriation and distribution of water of the state (AS 46.15). BLM should continue to consider existing Certificates of Reservation when contemplating goals for the plan.

The 1983 Plan discusses federal reserved water rights. The 1983 Plan states:

The designation of Birch Creek as a national wild river established a Federal reserved water right to protect the values for which Birch Creek was established. (p. 20)

The State notes that these rights need to be quantified. Federal law (43 U.S.C. 666) allows judicial adjudication of federal reserved water rights in state court. The adjudication must include all water rights in a basin, including all claimed federal reserved water rights and all state administered water rights. For DNR to efficiently manage and allocate the state's water and to

² <https://www.rivers.gov/documents/plans/birch-creek-plan.pdf>

adjudicate water rights, it is necessary to have federal reserved water rights in Alaska inventoried and quantified by the federal land management agencies in cooperation with DNR.

The 1983 Plan also discusses water reservations as part of its management actions:

Action 5.1: A reservation of minimum water flows sufficient for public recreation use and to support the values for which the wild river was designated will be determined in cooperation with the Alaska Department of Natural Resources, Division of Land and Water Management. (p. 29)

The State recommends omitting the word “minimum” in future discussions of obtaining water reservations. While federal reserved water rights are defined as the “minimum amount of water reasonably necessary”³ to support the purposes of the land withdrawal, reserving only the minimum amount of water needed is not a requirement of reservations of water administered under AS 46.15.145. This suggested edit will afford both BLM and DNR flexibility in the water rights application and adjudication process.

Other State Expertise

The public webinar documents for this scoping process discuss other areas in which the State has expertise including mining in the planning area, the use of wildland fire as a management action, and invasive species management. For example, the use of prescribed fire is one of many management tools ADF&G uses to enhance wildlife habitat to ensure continued sustainability of wildlife populations. The Plan should include a statement allowing ADF&G to conduct this activity when needed for its management actions. DNR also provides fire protection services, including the Firewise program, and related fire management and permitting activities throughout Alaska. ADF&G can provide expertise in invasive species management (particularly regarding aquatic species), and with regard to terrestrial species, DNR coordinates prevention, outreach and management strategies for invasive plant issues through collaboration with land managers, agencies, organizations and policy makers across Alaska. The State looks forward to providing this expertise as these areas of the Plan are developed.

ANILCA and Other Regulations

The public presentation on Slide 4 references the ways the NLCS compliments ANILCA purposes. We agree these two statutes are complimentary in many ways; however, NLCS Sec. 2002(d) clarifies that nothing in the NLCS “enhances, diminishes, or modifies any law or proclamation (including regulations relating to the law or proclamation under which the components of the system ... were established or managed...” We request the Plan and Environmental Assessment include specific statutory and regulatory citations. For example, we are unaware of any section of ANILCA that identifies Birch Creek as a special value to be considered in the management of the Steese National Conservation Area.

We also request BLM include reference to the John D. Dingell, Jr. Conservation, Management, and Recreation Act and outline how the Plan will expand and enhance hunting and fishing opportunities.

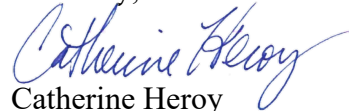
³ <https://dnr.alaska.gov/mlw/water/rights/federal/>

Closing

The State is interested in participating in the planning process as a Cooperating Agency and will be following up on the BLM invitation to do so. The State continues to support efforts to maintain the existing conditions of Birch Creek, and we look forward to working cooperatively throughout the planning process.

Thank you for this opportunity to comment. Please contact me if you have any questions or to discuss any of these issues further.

Sincerely,



Catherine Heroy
State ANILCA Program Coordinator