

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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August 31, 2011

Bob Abbey  
Bureau of Land Management  
Director (210)  
Attn: Brenda Hudgens-Williams  
20 M Street SE, Room 2134LM  
Washington, D.C. 20003

Dear Mr. Abbey,

Pursuant to 36 C.F.R. § 1610.5-2, the State of Alaska protests certain issues in the Environmental Assessment for the Proposed Delta River Special Recreation Management Area Plan and East Alaska Resource Management Plan Amendment (Delta SRMA Plan and EARMP, or “Plan”) dated August 1, 2011. Alaska protests issues and statements that are inconsistent with the Alaska National Interest Lands Conservation Act (ANILCA), the Wild and Scenic Rivers Act (WSRA), and various federal regulations.

The Plan states that the protest period ends on August 31, 2011. This protest is being submitted on or before August 31, 2011, and is therefore timely filed. This protest is separate from and in addition to the Governor’s consistency review.

The State of Alaska participated in every stage of the planning process for the Plan. The State’s previous comments are referenced in this protest and attached hereto. All previous applicable comments are incorporated into this protest by reference.

### **Issue Being Protested: Various ANILCA Access and Use Restrictions**

### **Statement of Issues and Why the State Director’s Decision is Believed to be Wrong:**

#### **1. Use of ANILCA Title XI regulations is not discretionary.**

The Plan indicates the closure process under 43 CFR § 36.11(h) will be “considered” if BLM finds that a certain use is detrimental to resource values. Use of 43 CFR Part 36 regulations to implement ANILCA § 1110(a) access is not discretionary,

hence this statement is not consistent with ANILCA. The Plan must fully commit to the regulatory closure process.

**2. Without further clarification or sideboards, “discouraging” motorized boating or airplane landings is inconsistent with ANILCA.**

The Plan includes new language indicating that, in place of closures, motorized boating and airplane landings will be “discouraged” or “highly discouraged” in RMZ 1 and 4, and 3 respectively. ANILCA § 1110(a) explicitly permits motorized boating and airplane landings in conservation system units (CSUs) in Alaska, subject to reasonable regulation to protect the resource values of the CSU. Motorized boating and airplane landings may only be prohibited after notice and hearing and a specific finding by the Secretary that such use is detrimental to the resource values of the CSU. Without guidance as to how boating and airplane landings will be “discouraged,” “discouraging” use appears to be a surrogate closure and thus contrary to ANILCA and the implementing regulations at 43 CFR § 36.11. If BLM has different intentions than described above, those intentions must be clarified.

**3. The required 43 CFR 36.11(h) closure process also applies to “nonmotorized surface transportation methods.”**

The Plan proposes immediate restrictions to dog mushing, mechanical travel (e.g. mountain bikes), pack animals, and foot travel (e.g. group-size camping limits) under 43 CFR § 8351.2-1. These nonmotorized surface transportation methods are also specifically protected by ANILCA § 1110(a), and may not be restricted except in accordance with the closure process at 43 CFR § 36.11(h), which requires specific justification, hearings and rulemaking notice in the Federal Register for permanent closures or restrictions.

The Plan also is unclear as to whether any of the proposed non-motorized restrictions would affect subsistence activities. If so, the fourth protest issue below regarding the closure process with the more rigorous subsistence criteria, and accompanying notice and hearing requirements also applies.

**4. The Plan fails to identify which of the proposed access and use restrictions apply to subsistence users, and confuses the requirements of ANILCA §§ 810 and 811, thus bypassing the intent of Section 811(b).**

While we recognize that an ANILCA § 810 subsistence impacts analysis is already included in the Plan, the Plan itself does not clearly identify which of the proposed restrictions apply to subsistence users, nor does it recognize that restrictions to subsistence *access and uses* require an additional regulatory process tailored to meet the intent of ANILCA. The ANILCA § 810 analysis is required when a federal agency is “determining whether to withdraw, reserve, lease, or otherwise permit the use,

occupancy, or disposition of public lands under any provision of law authorizing such actions...” (ANILCA § 810(a)); however, this process is a means of disclosing when a federal action is expected to “significantly restrict subsistence use,” and is not a substitute for the regulatory process required to limit subsistence access under ANILCA § 811(b).

As noted in our public comments submitted on May 6, 2010, BLM does not currently have implementing regulations to address ANILCA § 811 access restrictions for subsistence purposes. The Plan itself is not sufficient to meet the ANILCA § 811 standards. The Plan must acknowledge and provide for the more rigorous criteria and the accompanying notice and hearing requirements that apply to subsistence access restrictions under ANILCA § 811. The fact that ANILCA contains two separate access provisions (§§ 1110(a) and 811), illustrates that Congress recognized the differences and the need for a process tailored to subsistence uses. For reference, such criteria are appropriately reflected in the National Park Service and Fish and Wildlife Service regulations at 50 CFR § 36.12 and 36 CFR § 13.460, as well as the applicable regional policy more recently adopted by the US Forest Service on May 27, 2008.<sup>1</sup>

Additionally, the Plan cites the ANILCA § 816 procedural requirements for closing or restricting access to subsistence resources (page 7, Section 1.8.3, second paragraph); however, § 816 only applies to the taking of fish and wildlife. It is not applicable to *access* to subsistence resources, nor does it address other activities such as gathering of timber and plant materials (e.g. firewood, berries and house logs). The Plan needs to also acknowledge a regulatory process is required for restricting other non-fish and wildlife subsistence uses, as appropriately reflected in the Fish and Wildlife Service and National Park Service ANILCA implementing regulations at 50 CFR Part 36 and 36 CFR Part 13.

While the referenced implementing regulations and policies are agency-specific, they reflect the intent of ANILCA, which applies to all federal land management agencies. For consistency with that intent and the public’s benefit, the plan needs to mirror the process already established when implementing restrictions that affect subsistence users.

### **Parts of the Plan Being Protested:**

#### Alternative 2 Proposed Action

##### Tangle Lakes Zone 1

Page 18 – Outcomes to be avoided: Motorized boating, Airplane Landings.

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<sup>1</sup> Interim Guide dated May 23, 2008. Related Federal Register notice at 73 Fed. Reg. 40845 (July 16, 2008).

Page 19 – Unauthorized OHV routes will be closed and rehabilitated (Subsistence access pursuant to Section 811 is open until closed by “reasonable regulation.” Existing routes cannot be considered illegal until closure is implemented.)

Page 19 – Motorized boating and airplane landings will be “discouraged” (§ 1110 and potential § 811 access restriction).

Page 19 – ANILCA closure process will be “considered.”

Page 20 – OHVs limited to designated trails from May 16 – October 15 or until there is adequate snow cover (potential Section 811 subsistence access restriction).

Page 20 – Campsite group size limit (§ 1110(a) and potential § 811 access restriction).

Page 21 – Camping limited to 14 consecutive days, designated campsites within 200 feet of the river or lake, and dispersed camping beyond 200 feet only allowed when using Leave No Trace camping methods (§ 1110(a) and § 811 access restrictions).

Page 21 – Firewood and vegetation cutting restrictions (potential subsistence use restriction).

Page 21 – Supply caching permit (potential subsistence use restriction).

### Tangle Lakes Zone 2

Page 24 – Unauthorized OHV route (Round Tangle Lake) will be closed and rehabilitated (Subsistence access pursuant to Section 811 is open until closed by “reasonable regulation.” Existing routes cannot be considered illegal until closure is implemented).

Page 24 – Public use of pack animals, mechanized travel (e.g. mountain bikes) and dog mushing will be allowed throughout the zone, except on developed hiking trails (§ 1110 restriction).

Page 25 – OHVs limited to designated trails from May 16 – October 15 or until there is adequate snow cover (potential § 811 subsistence access restriction).

Page 25 – Firewood and vegetation cutting restrictions (potential subsistence use restriction).

Page 25 – Use of pack animals, mechanized travel (e.g. mountain bikes) and dog mushing will not be allowed on the Lower Tangles Ridge Trail, Rock Creek Trail, Upper Tangles Ridge Trail, and the Round Tangle Lake Trail (§ 1110 restriction).

Page 25 – Campsite group size limit (§ 1110(a) and potential § 811 access restriction).

Page 25 – Camping limited to 14 consecutive days, designated campsites within 200 feet of the river or lake, and dispersed camping beyond 200 feet only allowed when using Leave No Trace camping methods (§ 1110(a) and § 811 access restrictions).

Page 25 – Firewood and vegetation cutting restrictions (potential subsistence use restriction).

Page 25 – Supply caching permit (potential subsistence use restriction).

### Tangle Lakes Developed Zone 3

Page 28 – OHVs limited to designated trails from May 16 – October 15 or until there is adequate snow cover (potential § 811 subsistence access restriction).

Page 28 – Unauthorized OHV routes (unspecified) will be closed and rehabilitated (subsistence access pursuant to § 811 is open until closed by “reasonable regulation.” Existing routes cannot be considered illegal until closure is implemented.)

Page 28 – motorized boating and airplane landings will be “highly discouraged” (§ 1110 and potential § 811 access restriction).

Page 29 – OHVs for cross country travel allowed only during periods of adequate snow cover and OHVs are not allowed within the Tangle River (potential § 811 access restriction).

Page 29 – Camping limited to 14 days within river corridor (§ 1110 and potential § 811 restriction).

#### Delta River Zone 4

Page 32 – Outcomes to be avoided: Motorized boating, Airplane landings.

Page 33 – OHV restricted to designated trails from May 16-October 15, or until there is adequate snow cover (potential § 811 subsistence access restriction).

Page 33 – Unauthorized OHV routes (unspecified) will be closed and rehabilitated (Subsistence access pursuant to § 811 is open until closed by “reasonable regulation.” Existing routes cannot be considered illegal until closure is implemented.)

Page 33 – motorized boating and airplane landings will be “discouraged” (§ 1110 and potential § 811 access restriction).

Page 33 – ANILCA closure process will be “considered.”

Page 34 – OHVs will only be allowed during periods of adequate snow cover (potential § 811 subsistence access restriction).

Page 34 – Campsite group size limit (§ 1110(a) and potential § 811 access restriction).

Page 35 – Camping limited to 14 consecutive days, designated campsites within 200 feet of the river or lake, and dispersed camping beyond 200 feet only allowed when using Leave No Trace camping methods (§ 1110(a) and § 811 access restrictions).

Page 35 – Supply caching permit (potential subsistence use restriction).

#### Delta River Zone 5

Page 38 – OHV use limited to designated trails – Top of the World/Yost Trail and Rainy Creek Trail. Unauthorized trails will be closed and rehabilitated. (Potential § 811 subsistence access restriction.)

Page 39 – OHVs must remain on designated OHV trails, and will not be allowed to operate off designated trails for any purposes, including game retrieval, except during periods of adequate snow cover. OHVs limited to 2000 lbs GVW, including rural residents engaged in subsistence uses. Exceptions allowed if permit obtained in advance. (§ 811 subsistence access restriction).

Page 39 – Campsite group size limit (§ 1110(a) and potential § 811 access restriction).

Page 39 – Camping limited to 14 consecutive days, designated campsites within 200 feet of the river or lake, and dispersed camping beyond 200 feet only allowed when using Leave No Trace camping methods (§ 1110(a) and § 811 access restrictions).

Page 39 – Vegetation cutting prohibition, permit required for firewood and houselog gathering (potential subsistence use restriction).

Page 39 – Supply caching permit (potential subsistence use restriction).

**Issue Being Protested: Fish and Wildlife Management**

**Statement of Issue and Why the State Director's Decision is Believed to be Wrong:**

We protest the omission of a description of the State's fish and wildlife management authorities from the plan as a whole and from Chapter 1 in particular. The Plan states that "wildlife habitat management will be consistent with... Alaska Department of Fish and Game objectives and mandates" but fails to recognize the State's authority for managing fish and wildlife and does not acknowledge State authorized fish and wildlife harvest. Section 1314(a) of ANILCA specifically recognizes and protects State authority for managing fish and wildlife on all lands in Alaska:

Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act, or to amend the Alaska constitution.

As written, the Plan does not recognize this provision in ANILCA, or the State's general authority to manage its fish and wildlife resources.

**Parts of the Plan Being Protested:**

Page 6, Sec. 1.8 Relationship to Laws, Regulations, Statutes, and other Policies (no mention of State's authority for managing fish and wildlife, Master Memorandum of Understanding, or ANILCA Section 1314).

Page 14, Sec. 2.2.1.5 ORV-Wildlife, Management Objectives: Ensure sound wildlife management (BLM is not the wildlife manager).

Page 72, Sec. 3.2.9 Subsistence ("[t]he DWSR corridor is a federal subsistence hunting area..." State authorities, seasons, or bag limits are not recognized).

Page 85, Sec. 3.2.14 Wildlife (only discusses federal subsistence hunt; no mention of state authorized hunting).

**Issue Being Protested: Wild and Scenic River Act Outstandingly Remarkable Values**

**Statement of Issue and Why the State Director's Decision is Believed to be Wrong:**

We protest the process and subsequent designation of ORVs for the Delta Wild and Scenic River. BLM has not defined an area, region, or scale of comparison for the various values proposed. Nor has BLM explained how each value is a unique, rare, or exemplary feature that is significant at a comparative regional or national scale. Fisheries

habitat on the Delta River is not unique in a regional context and there are many areas of the state with equal or greater caribou migrations.<sup>2</sup>

Because ORVs are likely to be used to justify more restrictive management on river corridors, post-designation ORVs should be limited to those values that are clearly supportable through pre-designation study reports, legislative history records, and a rigorous present day analysis, including river trips and an independent public process, to determine river-relatedness and regional or national significance.

**Parts of the Plan Being Protested:**

Page 5, Sec. 1.5 Decisions to be Made.

Pages 11-14, Sec. 2.2.1 Outstandingly Remarkable Values (ORV) and Management Objectives.

**Issue Being Protested: Wilderness Characteristic Inventories**

**Statement of Issue and Why the State Director's Decision is Believed to be Wrong:**

We protest both the lack of public review of the Wilderness Characteristics Inventory included in the Plan and potential ramifications that this after-the-fact analysis will apparently have on proposed and future management actions, including the Plan's adaptive management strategy.

The Wilderness Characteristics Inventory was not included or referenced in the March 23, 2010 draft plan, and was not subject to public comment. Though labeled "Appendix 8.5," the Inventory was not included in the Plan itself. The Plan references

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<sup>2</sup> See, e.g., Gryska, A. D. 2011. Stock assessment Arctic grayling in the Delta River, 2008. Alaska Department of Fish and Game, Fishery Data Series No. 11-01, Anchorage; Wuttig, K. and A. D. Gryska, 2010, Abundance and length composition of Arctic grayling in the Delta Clearwater River, 2006, Alaska Department of Fish and Game, Fishery Data Series No. 10-84, Anchorage; Gryska, A. D. and B. D. Taras, 2007, Abundance and length composition of Arctic grayling in the Niukluk River, 2005, Alaska Department of Fish and Game, Fishery Data Series No. 07-22, Anchorage; Gryska, A. D. 2004, Abundance and length and age composition of Arctic grayling in the Richardson Clearwater River, 2001, Alaska Department of Fish and Game, Fishery Data Series No. 04-03, Anchorage; DeCicco, A. L. and M. J. Wallendorf, 2000, Stock assessment of Arctic grayling in the Fish River, Seward Peninsula, Alaska 1999, Alaska Department of Fish and Game, Fishery Data Series No. 00-29, Anchorage. These reports all have similar sampling design, with similar or higher abundance estimates for grayling >300 and >330 mm FL, and demonstrate that the upper Delta River grayling fishery is not unique, rare or exemplary in a regional or statewide context.

the availability of the inventory in the planning record (see page 84, Sec. 3.2.13) and significantly revises Sections 3.2.13 and 4.3.13 to incorporate what appears to be new information. This new information was not made available to the public for review and comment.

Rather than an objective analysis to aid in the decision process, Section 4.3.13.1 Effects of management actions on wilderness characteristics, including naturalness, solitude, and primitive and unconfined recreational opportunities that are found within the DWSR corridor (page 115-117), instead appears to justify decisions already made. For example the following excerpts are from page 116, Alternative 2 (Proposed Action):

RMZs 1 and 4 have been identified as possessing wilderness characteristics, and a targeted nonmotorized management approach in these RMZs would help to preserve the identified wilderness characteristics.

A group size limitation and encounter standards to address user capacity would help to ensure that visitor use does not exceed tolerable limits, allowing for continued opportunities for solitude and a primitive unconfined recreational experience in RMZs 1 and 4.

Chainsaw use would not be allowed in RMZs 1 and 4, where expectations for solitude are the highest among all management zone.

In addition, the following excerpt from the November 2008 Delta River Management Plan Scoping Report indicates the Delta SRMA plan will evaluate how wilderness characteristics are affected by the management prescriptions in the proposed plan:

#### ***4. Wilderness Designation***

One comment said, “We understand that current management prescribes that no wilderness designations or inventories can be made – but we consider this an ever changing administrative priority as we have seen a record of closing and opening for wilderness review and designation, in Alaska. In light of this, wilderness qualities should be documented with goals for protection to prevent degradation that would preclude future designations.”

The issue of wilderness characteristics was recognized and previously addressed in the EARMP in Chapter I, page 17. The EARMP says, “There are no BLM-managed wilderness areas or wilderness study areas within the planning area. There are areas that possess opportunities for a primitive recreation experience, solitude, and naturalness. These will not be designated or managed as Wilderness areas. In many cases, they will be managed to maintain the current primitive recreation experience. A



description of the Recreation Opportunity Spectrum inventory, including primitive opportunities, is discussed in Chapter III in the *Recreation* section. Management prescriptions for recreation are described in Chapter II, and impacts to primitive recreation experiences are described in Chapter IV.”

Given this guidance, wilderness qualities and characteristics will not be documented for the purposes of future wilderness designation, *but will be analyzed in the EA only to the extent that these characteristics are affected by site-specific, recreation-related decisions that are developed in the plan.* Considerations of effects from other uses and activities that may or may not result in changes to wilderness characteristics are outside the scope of this planning effort.<sup>3</sup>

**Parts of the Plan Being Protested:**

Appendix 8.5 (identified in the Plan, but not included in the actual document).

Pages 84-85, Sec. 3.2.13 Wilderness Characteristics.

Pages 115-117, Sec. 4.3.13 Wilderness Characteristics.

**Issue Being Protested: Caching of Supplies**

**Statement of Issue and Why the State Director’s Decision is Believed to be Wrong:**

The Plan states that in all management zones of the Delta WSR corridor, caching of supplies will be permitted only with written authorization and subject to special stipulations from BLM. This violates 43 C.F.R. § 8365.1-2, which provides for caching of personal property on public lands in Alaska for up to 12 months without written authorization.

**Parts of the Plan Being Protested:**

Page 4, Sec. 1.5 Decisions to be Made.

Page 21, Alternative 2 – Tangle Lakes Zone 1.

Page 25, Alternative 2 – Tangle Lakes Zone 2.

Page 35, Alternative 2 – Tangle Lakes Zone 4.

Page 39, Alternative 2 – Tangle Lakes Zone 5.

Page 146, Appendix 8.3.

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<sup>3</sup> 2008 Delta River Management Plan EA Scoping Report, pp. 19-20 (emphasis added).

**Issue Being Protested: Navigability Determination**

**Statement of Issue and Why the State Director's Decision is Believed to be Wrong:**

Under the equal footing doctrine, the Submerged Lands Act, 43 U.S.C. §1301 et seq., and the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. note preceding § 21, Alaska claims title to the bed of the Tangle River, Tangle Lakes, and Delta River system from its headwaters in the Tangle Lakes to its confluence with the Tanana River. Alaska has provided notice under 28 U.S.C. § 2409a(m) of its intent to file a real property quiet title action to confirm Alaska's title. BLM's navigability determination does not defeat Alaska's title, and the Plan is not the proper mechanism for resolving the title dispute. Alaska protests all provisions in the Plan that call for management of State-owned waterways in a manner inconsistent with State law and ANILCA. At the very least, the Plan should acknowledge that Alaska claims title to these waters and include a more cooperative management approach.

**Parts of the Plan Being Protested:**

Page 2, Sec. 1.3 Planning Area.

Pages 14-44, Sec. 2.4 Proposed Action Alternative.

For the reasons stated above, Alaska requests that the Director remand the Plan to the Alaska State Office for appropriate revision.

Sincerely,

JOHN J. BURNS  
ATTORNEY GENERAL



By: J. Anne Nelson  
Assistant Attorney General  
Department of Law

Encl.

Att. 1: State of Alaska comments on scoping notice, dated September 15, 2008

Att. 2: State of Alaska informal comments on chapters 1 and 2, dated June 24, 2009

Att. 3: State of Alaska informal comments, dated March 16, 2010

Att. 4: State of Alaska formal comments on public review draft, dated May 6, 2010

Att. 5: State of Alaska Quiet Title Act notices for Mosquito Fork of the Forty Mile River, Tangle River, Tangle Lakes and Delta River

cc:

Ed Fogels, Deputy Commissioner

Susan Magee, ANILCA Coordinator, Office of Project Management and Permitting

Samantha Carroll, Project Manager, Office of Project Management and Permitting

JAN:ajp