

# STATE OF ALASKA

## DEPARTMENT OF LAW

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September 1, 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,

The State of Alaska submitted a protest dated August 31, 2011 on the Environmental Assessment for the Delta River Special Recreation Management Area Plan and East Alaska Resource Management Plan Amendment. The purpose of this letter is to clarify that the protest was submitted pursuant to regulations at 43 C.F. R. § 1610.5-2 instead of 36 C.F.R § 1610.5-2 as indicated in the August 31, 2011 letter. We are also submitting two additional documents, which supplement the protest's enclosures. The first document dated March 17, 2010 are informal comments on the draft ANILCA Section 810 Analysis and the second is an informal email to Heath Emmons dated March 28, 2008, which identified the State's preliminary issues.

Sincerely,

JOHN J. BURNS  
ATTORNEY GENERAL

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

Encl.

Att. 6: State of Alaska informal comments on draft ANILCA section 810 Analysis, dated March 17, 2010

Att. 7: Informal email from State of Alaska to Heath Emmons, BLM, dated March 28, 2008

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

## **Delta River SRMA and East Alaska Mgmt. Plan Amendment**

Informal State of Alaska Comments

March 17, 2010

*Supplement: SOA Comments on ANILCA Section 810 Analysis*

Even though we have some substantive comments on this 810 Analysis, we appreciate the effort to describe the alternatives and their effects on subsistence in comparative terms. This ANILCA Section 810 Analysis is also easy to read and in most cases provides an appropriate amount of information given the subject matter. With a few modifications as suggested below, this could be a model 810 Analysis.

### **Comments Applicable to All Alternatives**

A. Effect of [each Alternative] on subsistence uses and needs:

All alternatives include the same statement. We request modification as follows to account for consumptive harvest that occurs under state sport regulations, as these regulations do not address individual motivation:

*“Fisheries – The Delta River is currently closed to all subsistence fishing regulated subsistence harvest. Therefore the proposed action has no significant effect on fishing for subsistence fishery uses and needs.”*

B. Availability of other lands, if any, for the purposes sought to be achieved.

Although we understand the intent, the response associated with this subheading is confusing.

We offer the following revision as a possible alternative:

*The Delta Wild and Scenic River Corridor is already established; therefore, there are no other lands available for the intended planning purposes.*

C. Instead of indicating the *only* alternative is to not allow activities that conflict with subsistence uses, this section could direct the reader to the alternatives analyzed in the plan and discussed in the 810 analysis.

Since all three of these evaluation criteria are the same for each alternative, we recommend addressing them once at the beginning with an explanation that they apply to all the alternatives. This will eliminate unnecessary duplication.

### **Effects Analysis**

It appears that conclusions about proposed actions generally under-disclose potential effects to subsistence uses and needs. ANILCA does not state that effects to subsistence uses are not allowed. Instead it requires the federal agency to analyze potential effects, and where they are expected to be significant, requires notice, hearing, and reasonable steps to minimize adverse impacts.

Despite substantial proposed changes to current subsistence practices, including permit requirements for OHV use, motorized boating, and campsite occupancy, this analysis concludes that none of the proposed management actions or alternatives will have *any* impact on subsistence uses and needs. Below are some specific examples.

- Alt. 2, Wildlife: The analysis appropriately recognizes a permit requirement for certain OHV use as an “*additional burden*” but does not similarly characterize a permit requirement for motorized boat use. In both instances, the analysis concludes the proposed action “*will not have an effect on subsistence uses and needs,*” which ignores the fact that the permit requirement, by itself, will have an impact on users that are accustomed to obtaining subsistence resources freely, without first having to obtain “permission” from BLM.
- Alt. 2 and 4, Wildlife: Camping will be restricted to designated campsites in both alternatives and dispersed camping will be allowed when using “Leave No Trace” (LNT) camping methods. Alternative 4 also establishes a mandatory camping permit system for the designated sites but exempts subsistence users who camp away from designated sites. In all instances, the evaluation concludes that “*allowing dispersed camping for subsistence users will not have an effect on subsistence uses and needs.*” While we recognize allowing dispersed camping has a positive effect on subsistence use, the analysis ignores the potential negative effects of being limited to specific campsites, use of possibly unfamiliar camping methods, and having to compete with recreational users over designated sites. See also page specific comment on LNT camping techniques below.
- Alt. 4, Wildlife: Motorized boat engine size is limited and airboats and hovercrafts are prohibited, yet the Analysis states these limitations “*do not pose an added burden to subsistence users*” and “*...will not have an effect on subsistence uses and needs.*” At a minimum, these statements need to be supported as to why they do not create a burden or effect subsistence uses and needs.

**Other Resources**

For all alternatives, this section does not address whether proposed management actions affect *access* to these resources.

**D. Finding**

For all alternatives, the statement “*...recreation management on the Delta WSR will not...*” While we recognize this is a *recreation* management plan, proposed management actions are not limited to recreational use. We therefore recommend substituting “*proposed*” for “*recreation.*”

**Page-specific Comments**

Page 2, Alternative 2, sixth sentence from the bottom of page. We suggest this revision since the previous language also discusses mining: “These estimates combine mining, recreational and subsistence users of the designated trails.”

Page 3, first full paragraph, last three sentences. If low water and geography impede motorized travel in June and July, why would the plan go to the trouble of requiring a permit for subsistence hunters using motorized boats?

Page 3, second paragraph. This discussion implies that subsistence hunters already use LNT camping methods. If so, it would be helpful to clarify this point. If not, then BLM will need to work with subsistence users to facilitate adoption of LNT camping techniques. Changing the behavior of subsistence users in the field would be a “significant effect” – although one that can

be mitigated with communication and education. This comment also applies to Alternatives 3 and 4.

Page 3, second to last paragraph. The second sentence states that “trapping” requires adequate snow cover. Since the “activity” is trapping, not snowmachine use, the sentence is inaccurate as written. This comment also applies to Alternatives 3 and 4.

Page 4, last paragraph. We question whether fragmentation of habitat is a noteworthy issue. The presence of a few trails will not likely influence the overall movement of wildlife, nor will the amount of vegetation lost affect the viability of individual animals or overall populations. On the other hand, loss of vegetation is an issue in terms of potential erosion and the usability of routes due to ruts or mud holes.

Page 5, second full paragraph. To more fully explain the thinking behind the last two sentences in this paragraph, we suggest the following revision:

*However, recreationists are largely gone during the hunting season, so encounters with subsistence users are likely to be minimal. Therefore Alternative 3 will not significantly affect subsistence users and needs.*

Page 6, last paragraph. This paragraph cites moose harvest figures from 1990 to 2009. We presume this information is provided because subsistence users rely on OHVs to retrieve meat from these large animals. If so, we recommend such an explanation. If OHVs are also commonly used to retrieve caribou meat, we recommend addressing caribou as well.

March 28, 2008

Heath,

This note summarizes our pivotal “red flag” interests, concerns, and issues associated with the update of the Delta Wild and Scenic River Management Plan. We are also providing a draft mock-up of a scoping newsletter that would be appropriate for this stage in the planning process.

Red flag issues further described below include:

- Selection of Outstandingly Remarkable Values
- Avoid the appearance of a pre-decisional planning process
- Avoid premature and/or unnecessary public use limits
- Ensure consistency with ANILCA Title VIII in proposals and public outreach
- Clarity about the respective federal and state management authorities

### **Outstandingly Remarkable Values**

We understand BLM is directed to identify “Outstandingly Remarkable Values” (ORVs) within the river corridor based on the unique features of the resource. Since no formal ORVs were included in the legislative designation, we suggest identifying ORVs based on the characteristics of the river and lakes that set it apart from other corridors.

Based on ANILCA legislative history and our own understanding of the Delta River, we recognize that such special river corridor values would include:

- *Cultural values*, highlighting the occupation and use of this area for approximately 10,000 years.
- *Recreational values*, especially the diversity to recreational opportunities ranging from primitive to road-accessible and developed facilities, motorized and non-motorized boating, hunting, fishing, hiking and camping.
- *Scenic values*, including the unique geologic features that dominate this landscape.

Values such as fisheries, wildlife, and water quality do not rise to the same level of importance as the bulleted values above and are more appropriately addressed as natural or biological resources or resource uses consistent with the Land Use Planning Handbook (BLM Handbook H-1601-1). Similarly, the cumulative list of 30 management objectives is more than necessary to hone in on the truly important values associated with the Delta River corridor. To the extent they are applicable, these management objectives could still be addressed even if they do not tier off a proposed ORV.

### **Process**

As we discussed at our February 29 meeting, we are concerned about presenting too much information to the public during the upcoming scoping effort. In particular, it would be premature at this time to make available the draft standards and indicators and proposed actions. This makes the proposal appear pre-decisional, and public debate will focus on the conclusions before adequate dialogue takes place on the issues and range of options. We are also concerned about the pressure that will undoubtedly be directed to the State by those who tend to oppose

limits, which will make interagency dialogue more difficult. The BLM has invested considerable effort in stakeholder outreach that produced much beneficial information, which could be summarized for the public in the newsletter we have suggested. An additional concern about early release of the proposed action is addressed in the next item.

### **Public Use Limits**

Establishing limits on the public use of these resources (e.g., motorized use limits, group size limits, limitations on boat launches) given the results of the user survey and absent a formal public process such as NEPA is particularly problematic for the State. The Delta River appears capable of accommodating the wide-ranging types and levels of current and reasonably foreseeable use, especially in remote areas. For example, the river segments currently enjoyed primarily by floaters receive very little motorized use due to the physical constraints of the river itself, so motorized use is already largely self-limiting. Floaters can further minimize encounters with motorized craft by timing their trips to avoid the late summer hunting season. In addition, data from the Alaska Department of Fish and Game indicates that fishing (“fishing days”) has declined over the last 5 years. If information comes to our attention that paints a different picture, we will certainly reevaluate our conclusions. In the meantime, we suggest that BLM retain current proposals contained in the proposed action for possible inclusion in future alternatives. Following review of public comment received through the NEPA scoping process and re-evaluation of the pre-scoping (Benefits Based Planning) process results, the range of alternatives would be developed and could include appropriate and applicable portions of the proposed action. We look forward to working together to develop a full range of alternatives that still support the overall goals for the plan to respond to publicly-identified issues. Only through the public process and review of resource data would the State be able to propose restrictions determined consistent with our Constitution and laws.

Additionally, the process for and the science behind the development of the proposed standards and indicators is not clear. When they are introduced in subsequent public documents, additional explanation and/or justification will be warranted.

### **Subsistence and ANILCA Title VIII**

The EA will need to evaluate the effects of the management alternatives on subsistence activities through an ANILCA Section 810 Analysis. Subsequent planning documents need to clearly acknowledge the applicable subsistence provisions in ANILCA, including access for subsistence purposes under Section 811(b). Such access includes off-highway vehicles where traditionally employed. The public should be informed that any restrictions on access on federal land for subsistence activities may only be implemented through regulation.

### **Clarity about the respective federal and state management authorities**

We appreciate that BLM recognizes State ownership and management of navigable waters as indicated in our recent discussions and in *Part 3: Additional Management Issues* of the draft Proposed Action (#17 on page 27). We request carrying this recognition more consistently throughout the process and in public documents. For example, while it may appear that limiting the number of boat launches is an upland management issue, the actual effect is to limit use of the waterway itself, which creates a state jurisdictional concern. Similar to the Gulkana River Management Plan, we suggest BLM address state authorities regarding restrictions as, “This

order does not apply to lands and waters located between the ordinary high watermarks, which are managed by the State of Alaska, Department of Natural Resources.” We recognize that there are many actions BLM may/will implement to address issues and resource impacts occurring on federally-owned and managed uplands. We look forward to future discussions and the public process to determine where common issues of resource impact and management can be identified.

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Notes about the issues list included in the attached scoping letter:

We worked quite a bit on the issue descriptions and made numerous changes. If you use something different, we would appreciate an opportunity to review it.

The issues are derived from pages 25-27 of the January 2008 draft Proposed Action, with some revisions to remove items that could appear pre-decisional and to provide some clarifications. We recognize this list was created based on the issues discussed in the 1983 Delta Plan; however, for the actual revised plan you may wish to organize them more closely along the lines of the Index in the BLM Land Planning Handbook.

Regarding the description of the “Oil and Gas Development” issue: This appears confusing since it’s hard to tell the difference between the two sentences. It appears the second sentence incompletely paraphrases ANILCA Section 606 (a) (2), which states: “the withdrawal made by paragraph (iii) of section 9(a) shall apply to the minerals in Federal lands which constitute the bed or bank *or are situated within one-half mile of the bank* of any river designated a wild river by the Alaska National Interest Lands Conservation Act.” [Emphasis added] Paragraph iii of Section 9 (a) of the WSRA limits the affected Federal land to “...*one-quarter mile*...”

We suggested changing “Biotic Resources” to “Soils and Vegetation.” Also, depending on the context, it looks like “Habitat” may also be a viable alternative.

We combined “Navigability” with “State and Private Lands”

Note a few other minor heading adjustments.

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Heath, we hope our efforts are helpful and were worth your waiting. Again I apologize for the length of time to get back to you but we have been inundated with a record-breaking number of federal NEPA documents.

If you have any questions about any of this, please call me at home on Monday at 258-7349. (Monday is a state holiday.) Otherwise I’ll be back in the office on Tuesday at 269-7477.