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Chief Dale Bosworth
USDA Forest Service
Attn: Barbara Timberlake, NFS -- EMC Staff
Stop Code 1104
1400 Independence Avenue, SW
Washington, D.C. 20250-1104

Re: Notice of Administrative Appeal of the Chugach National Forest Revised Land and Resource Management Plan and Final Environmental Impact Statement.

Dear Ms. Timberlake and NFS -- EMC Staff,

On behalf of the Alaska Center for the Environment, the Coastal Coalition, the Eastern Kenai Peninsula Environmental Action Association, the Eyak Preservation Council, the National Wildlife Federation, the Northern Alaska Environmental Center and the Wilderness Society, and pursuant to the Forest Service Regulations contained in 36 C.F.R. part 217, Trustees for Alaska submits the following administrative appeal of the Chugach National Forest Revised Land and Resource Management Plan (Revised Plan) and Final Environmental Impact Statement (FEIS) issued by Dennis Eschor, Regional Forester, and published on July 26, 2002. *See* 67 Fed. Reg. 48894 (July 26, 2002). This appeal concerns the following decisions of the Forest Service in promulgating the Revised Plan: (1) the adoption of a definition of "traditional activities" inconsistent with the Alaska National Interest Lands Conservation Act (ANILCA) and Congressional intent; (2) the failure of the Forest Service to make an integrated plan for all the lands and resources of the Chugach National Forest in violation of the National Forest Management Act (NFMA) and NEPA. Individual appellants may raise additional issues in individual appeals of the Revised Plan, ROD, and FEIS.

I. The Definition of "Traditional Activities" Should Not Include Recreational Activities.

A. Requirements of ANILCA Title XI and Section 1110(a).

"In order to preserve for the benefit, use, education, and inspiration of future generations certain lands and waters in the State of Alaska," Congress, through the passage of ANILCA, added 104 million acres of land to the conservation system units in Alaska. 16 U.S.C. §3101(a). This landmark act was intended to preserve the unrivaled scenic values associated with Alaska's natural landscapes, to provide for the maintenance of wildlife habitat and populations, to "preserve in their natural state extensive unaltered arctic . . . ecosystems," and to preserve "wilderness resource values and related recreational opportunities." 16 U.S.C. §3101(b).

When it enacted ANILCA, Congress recognized that its creation or expansion of federal conservation lands in Alaska might interfere with "traditional means and levels of access across" the protected federal lands. H.R. Rep. No. 96-97, pt. 1, at 236 (1978). This consideration, among others, led

Congress to create, in ANILCA Title XI, a single comprehensive authority concerning appropriate types and levels of access across and into Alaska conservation lands. 16 U.S.C. §3161. Specifically, Title XI addresses issues of (1) growth and development of Alaska's transportation infrastructure; (2) routes of access to non-federal lands within or adjacent to the new parks, refuges, and preserves; and (3) access for continuing "traditional activities."

This third area memorializes the balance made through ANILCA concerning, on the one hand, preservation and protection of conservation lands and, on the other hand, preservation and protection of "special access" to such lands for traditional activities. Section 1110(a) of ANILCA, entitled "Special Access," requires the Forest Service to allow the continued use of snowmachines, motorboats, and airplanes to access "traditional activities" and "for travel to and from villages and homesites" on conservation system units, national recreation areas, national conservation areas, and public lands designated as wilderness study areas. 16 U.S.C. §3170(a). The section also requires the Forest Service to regulate uses and activities in order to protect the "natural and other values" of the affected area, and it authorizes the agency to altogether close an area otherwise open if, after notice and a hearing in the vicinity of the affected area, the Service finds that such use would be "detrimental to the resource values of the unit or area." *Id.*

A review of ANILCA and its legislative history reveals that Congress intended Section 1110(a) to require that conservation system units remain open to the use of snowmachines, motorboats and airplanes for the consumptive activities of a utilitarian Alaskan lifestyle where those traditional activities and the associated motorized access were already occurring when ANILCA was enacted in 1980. *See, e.g., S. Rep. No. 96-413, at 247-248 (1980), reprinted in 1980 U.S.C.C.A.N. 5191-92* ("[Section 1110(a)] guarantees access subject to reasonable regulation by the Secretary... for traditional or customary activities such as subsistence and sport hunting, fishing, berry picking, and travel between villages.").

B. In the Chugach Plan, The Forest Service Incorrectly Broadened the Definition of "Traditional Activities."

In the Revised Land and Resource Management Plan, the Forest Service defines "traditional activities" in such a way that the agency allows -- as a statutory right -- motorized access for activities in conservation system units that are neither mandated nor authorized by ANILCA Section 1110(a). *See Revised Plan, 3-21; FEIS Glossary-51.*

In the Revised Plan, the Forest Service has expanded the definition of "traditional activities" to include unlimited recreational activities. *See Revised Plan, 3-21* ("The Forest Service Manual defines traditional activities as, *but not limited to, recreational activities* such as fishing, hunting, boating, sightseeing, and hiking.") (emphasis added) (citations omitted). The expanded meaning given to "traditional activities" by the Forest Service makes obsolete ANILCA's differentiation between traditional activities and other activities. Such an expansion of the term flies in the face of the actual purpose of ANILCA by requiring that land protectively set aside for conservation purposes remain unprotected from the invasion of any form of motorized activity -- and in fact open to such motorized activities as a matter of statutory right. *See Southeast Alaska Conservation Council, Inc. v. Watson*, 697 F.2d 1305, 1309 (9th Cir. 1983) ("ANILCA should be interpreted in light of its underlying protective

purposes: 'to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.'") (emphasis in original).

The use of the term "traditional activities" in other provisions of ANILCA supports a more narrow reading of the exception to the rules that would otherwise apply on Alaska's national-interest conservation lands. The phrase "traditional activities" is not simply a shorthand reference to snowmachine use for a variety of wintertime recreation and pastimes by people who do not live and lead traditional lifestyles in ANILCA-created CSUs. Rather, the term's use in Section 1110(a) furthers the legislative goal that ANILCA's unit designations have minimal impact on these local rural and Native residents' traditions. Indeed, the entire Subsistence Title of ANILCA consistently relates the term "traditional activities" to the ethnic, cultural and lifestyle activities by local rural residents. Congress in ANILCA authorized the continuation of certain existing motorized surface access for subsistence uses in Section 811(b) (which, in both the statute and its legislative history, are not to be increased in magnitude beyond their traditional, pre-ANILCA levels). Section 811 states,

(a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Notwithstanding any other provision of this Act or other law, *the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.*

16 U.S.C. §3121 (emphasis added).

It would be incongruous indeed if local subsistence users were limited by ANILCA to those means of transportation which had been "traditionally employed" in a particular area, while recreational users (many of them living hundreds of miles distant from the area in question) would have a claimed right under Section 1110(a) to employ *new* means of motorized transportation which had never before been lawfully or traditionally used in the particular area.¹

¹ Regulations adopted by the National Park Service to implement ANILCA Section 811 draw a clear distinction between snowmachine use by local rural residents in pursuing traditional subsistence activities, and their use of these same vehicles for recreational activities. The regulations state:

At all times when not engaged in subsistence uses, local rural residents may use snowmobiles, motorboats, dog teams, and other means of surface transportation in accordance with §§13.10, 13.11, 13.12, and 13.14, respectively.

36 C.F.R. §13.46(e). The referenced regulations have not yet been promulgated, although they were proposed in a 1981 rulemaking. See 46 Fed. Reg. 31836, 31856 (1981). They will lie within Sections 13.10 to 13.16 of Subpart A of 36 C.F.R., which are presently designated "[Reserved]." Subpart A itself is entitled "Public Use and Recreation," while Subpart B, entitled "Subsistence," contains the quoted Section 13.46(e).

Section 1110(a) provides a floor rather than a ceiling for what must be provided in these areas. The Forest Service is not required to allow snowmachine access on those areas not specified in 1110(a), nor is it required to provide for motorized access for anything other than traditional activities, as that term was used and intended by Congress, in CSUs. Expanding the definition of guaranteed access beyond that which is actually mandated by Section 1110(a) or intended by Congress to include activities that would otherwise be permissive, creates a situation in which areas designated by Congress and the agency itself as protected are required to be open to motorized access that is essentially unlimited. Under the Forest Service definition of "traditional activities," areas of the Chugach National Forest purportedly set aside for conservation purposes will apparently be open to purely recreational motorized pursuits as a matter of law, and thereby protected less than those areas that have not received any protective designation.

The Forest Service has declared that "[f]or the purposes of maintaining access to traditional activities consistent with ANILCA," within the Chugach National Forest the Wilderness Study Area, areas recommended for Wilderness or Wild, Scenic and Recreational River designation, and National Recreation Trails (such as Williwaw National Recreation Trail and Resurrection Pass National Recreation Trail) will be treated as conservation system units. See Revised Plan, 3-42. Four management directions for motorized access also employ the faulty definition of "traditional activities." See ROD, Appendix B. Therefore, the Revised Plan opens the almost the entire forest to motorized access for "traditional activities" (as that term is defined in the Plan) and essentially mandates that the entire Prince William Sound geographic area as well as the most protected areas of the Kenai Peninsula remain open to motorized access for purely recreational pursuits. In fact, "over 80 percent of Chugach National Forest Lands on the Kenai Peninsula are available for motorized recreation opportunities." FEIS, Appendix K-19 (response to Comment 10).

The Wilderness Act was enacted by Congress "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition." 16 U.S.C. §1131(a). To further this purpose, Congress provided the basic tenet that the use of motor vehicles, motorized equipment, and motorboats, as well as the landing of aircraft, on lands designated as Wilderness was prohibited. 16 U.S.C. §1133(c). Requiring areas given protective designation under the Wilderness Act to remain open to motorized access for an unlimited and unspecified range of activities is patently contrary to the purpose for which the land was set aside. Therefore the Forest Service has not acted in accordance with the law in defining "traditional activities" under ANILCA Section 1110(a) so as to include unlimited recreational activities. See 5 U.S.C. § 706(2)(A).

The Forest Service has failed to follow the relevant statutory authority in defining "traditional activities" under ANILCA 1110(a). By broadening the narrow exception of activities for which conservation system units must be opened, the Forest Service has violated the letter and spirit of ANILCA and has undermined the purpose of providing special protective designations under the Wilderness Act. Therefore, the appellants respectfully request that the Chief of the Forest Service reconsider the definition of traditional activities adopted in the Revised Plan and amend it so as to be consistent with the provisions of ANILCA and Congressional intent. See, e.g., 36 C.F.R. §13.63(h)(1).² Once the Forest Service adopts

² The Forest Service should adopt a definition that is based on consumptive activities, in the same way as the National Park Service did in its regulation. See 36 C.F.R. §13.63(h)(1). Because the Park

a proper definition of the statutory term, it may then apply that definition to various areas of the Forest to which Section 1110(a) applies, to determine whether qualifying traditional activities occurred in these areas prior to ANILCA's enactment in 1980, and thus whether the three enumerated modes of access may be used as access for these specified activities.

II. The Forest Service Failed to Make an Integrated Plan for all the Lands and Resources of Chugach National Forest.

The National Forest Management Act requires that the Chugach National Forest Land and Resource Management Plan form one integrated plan for all of the lands and resources of the conservation unit. See 16 U.S.C. § 1600 *et seq.* The National Environmental Policy Act further requires that the Forest Service prepare an Environmental Impact Statement on the Chugach National Forest that encompasses all of the resources found there, including the tidelands and submerged lands of Prince William Sound. See 42 U.S.C. 4321 *et seq.* The Forest Service Revised Chugach Land Management Plan fails to incorporate all of the lands and resources within the Forest. This is despite acknowledged ownership of the submerged lands within Chugach National Forest. ROD at p. 45. The Forest Service may not accede to state regulation of submerged lands simply because the State of Alaska disputes ownership.

Despite the Forest Service's ownership of the submerged lands, the legal mandates for planning for the entire forest, and the clear purpose and need for this revision set out by the Forest Service for Chugach National Forest, the FEIS and the Revised Forest Land Resource and Management Plan completely fail to address significant impacts to and management of the tidelands and submerged lands that are a part of Chugach National Forest.

In comments on the DEIS, the Forest Service was asked to complete the Forest Planning Process through an expansion of the planning process to include an Environmental Impact Statement and a Land and Resource Management Plan that address all of Chugach National Forest. Prince William Sound is an integral part of the forest and the forest planning process. The ROD, FEIS and the Revised Forest Plan failed to address the concerns raised in the DEIS comments, instead noting that the State of Alaska disputes the Forest Service's ownership of submerged lands in Prince William Sound. The Forest Service must adequately plan for and protect its resources regardless of the State's position. The FEIS and the final plan are thus legally inadequate without consideration of the tidelands and submerged lands of Chugach National Forest. Appellants respectfully request that the Forest Service conduct a new NEPA process that adequately addresses all necessary planning for all of the resources in the forest.

Service's definition of "traditional activities" was promulgated only after extensive public review and comment as well as the agency's own review of the legislative history of ANILCA Section 1110(a), it should be persuasive authority for the Forest Service in defining this statutory term. Verna v. Coler, 893 F.2d 1238, 1241 (11th Cir. 1990). Given the unambiguous nature of the statute and evidence of Congressional intent, the Forest Service should not adopt a radically different definition in the Revised Plan. Defenders of Wildlife v. Babbitt, 130 F.Supp.2d 121, 126-30 (D.D.C. 2001).

III. Conclusion

Appellants respectfully request that the Chief of the Forest Service reconsider the definition of traditional activities adopted in the Revised Plan and amend it so as to be consistent with the provisions of ANILCA and Congressional intent. Appellants also request that the Forest Service reinitiate planning under NMFA and NEPA to address all of the land and resources in Chugach National Forest including the submerged lands and tidelands.

Thank you for the opportunity to participate in this planning process.

Respectfully submitted,



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