



Southeast Alaska Conservation Council

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TO: Beth Pendleton, Regional Forester for Alaska Region
FR: Olivia Sinaiko, Southeast Alaska Conservation Council (SEACC)
DT: May 11, 2011
RE: Subsistence Cabin Fees

Several Yakutat families own cabins on Tongass National Forest (TTNF) land that they use solely for subsistence purposes. The Forest Service currently charges these subsistence users \$853.44 per year for a special use permit that allows them to continue to use their cabins – cabins their families built, and have used for these same subsistence purposes for decades. The Forest Service charges the same rate to those utilizing shelters on TNF land for commercial fishing camps,¹ mineral exploration,² commercial outfitter and guide operations,³ and personal recreation retreats.⁴

We believe that this policy is unfair, and inconsistent with both the spirit and letter of the Alaska National Interest Lands Conservation Act (ANILCA). We ask that the Forest Service bring the fee schedule into compliance with ANILCA by eliminating or, at the very least, substantially reducing the fees paid by local rural residents to use shelters on TNF land solely for subsistence purposes.

I. Background

Currently, the fee schedule contained in the Alaska Supplement to the Forest Service Handbook does not include a category for subsistence cabins.⁵ The only ANILCA shelters the fee schedule contemplates are the temporary shelters referred to by ANILCA section 1316,⁶ and the cabins and tent platforms used for ANILCA-sanctioned

¹ Forest Service Handbook (FSH) 2709.11, Chap. 30, Reg. 10 Supp. (Alaska Land Use Rent Schedule) § 31.5 exh. 01, Type Code 512-13 (effective Dec. 4, 2009).

² *Id.* at Type Code 561. Although it is not entirely clear from the FSH that Type Code 561 concerns shelter usage, Daryl James – who manages special uses on the Yakutat Ranger District – confirmed to me over email that the fee is, indeed, for “cabin or tent use.”

³ *Id.* at Type Code 514.

⁴ *Id.* at Type Code 121.

⁵ *See, generally, id.*

⁶ *Id.* at Type Code 116 (“ANILCA Shelter. Used for section 1316 temporary structures, noncommercial purposes.”) ANILCA section 1316(a) states in its entirety:

On all public lands where the taking of fish and wildlife is permitted in accordance with the provisions of this Act or other applicable State and Federal law *the Secretary shall permit subject to reasonable regulation to insure compatibility, the continuance of existing uses, and the future establishment, and use, of temporary campsites, tent platforms, shelters, and other temporary facilities and equipment directly and necessarily related to such activities.* Such facilities and equipment shall be constructed, used, and maintained in a manner consistent with the protection of the area in which they are located. All new facilities shall be constructed of materials which blend with, and are

commercial set-netting.⁷ For lack of a more accurate special use category, the Forest Service presently applies these ANILCA-related permits to cabins used solely for subsistence in the Yakutat area.⁸

In practice, it makes little difference which special use permit the Forest Service applies because under Region 10's fee schedule, all shelters on TNF land are charged at the same rate. All temporary shelters are charged \$426.72 for the first three months plus \$142.24 for each additional month, or \$853.44 for use that exceeds five months, regardless of purpose.⁹ Similarly, all cabins are charged the same \$853.44 yearly fee, regardless of purpose.¹⁰ The result of this undifferentiated fee structure is that rural residents who use temporary shelters or cabins *solely for subsistence* are charged at the same rate as those using TNF shelters for commercial fishing, mineral exploration, outfitter and guide camps, and personal recreation.¹¹

Currently, we are aware of at least four cabins on TNF land near Yakutat used solely for subsistence and charged \$853.44 a year. These cabins are not merely a luxury; rather, due to Yakutat's harsh winters, highly exposed coastline, and the very real danger of being weathered in during a cold time of year, these permanent structures are absolutely essential to the year-round subsistence lifestyle. Subsistence users rely on these cabins for harvesting and processing such resources as deer, salmon, halibut, clams, mushrooms, and berries. Although four cabins may seem insignificant, these cabins represent families – and often, multiple generations thereof – that rely on them for access to the subsistence resources they depend on for a substantial portion of their food. Moreover, because the majority of these cabins are owned by Alaska Natives, they provide an essential means for these multiple generations to engage in the subsistence lifestyle that has historically been and continues to be part and parcel of Tlingit culture.¹²

compatible with, the immediately surrounding landscape. Upon termination of such activities and uses (but not upon regular or seasonal cessation), such structures or facilities shall, upon written request, be removed from the area by the permittee.
(Emphasis added.)

⁷ FSH 2709.11, Chap. 30, Reg. 10 Supp. § 31.5 exh. 01, Type Code 512-13.

⁸ See, e.g., Appendix A (Harold Gray's 2009 bill, listing special use permit as "512 ANILCA SET NET CAMPS"); Appendix B (Samuel Johnson's 2009 bill, listing special use permit as "116 ANILCA 1316 SHELTER"); and Appendix C (Verna Henniger's 2009 bill, listing special use permit as "116 ANILCA 1316 SHELTER").

⁹ See FSH 2709.11, Chap. 30, Reg. 10 Supp. § 31.5 exh. 01, Type Codes 116 (ANILCA 1316 temporary shelters), 512 (commercial fishing camps), 514 (commercial trapping, outfitter, and guide camps), 561 (mineral exploration).

¹⁰ See *id.* at Type Codes 121 (isolated personal use cabins), 513 (commercial fishing cabin), 561 (mineral exploration).

¹¹ See *id.* and footnote 9, *supra*.

¹² See ANILCA § 801(1) ("the continuation of the opportunity for subsistence by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence. . ."). See also ANILCA author Rep. Morris Udall's comments to the House of Representatives, H 10545 (Nov. 12, 1980):

Of all the groups in Alaska with a stake in the passage of [ANILCA], no group will be more profoundly affected than the Alaska Native residents of the more than two hundred Native villages scattered throughout rural Alaska. The cultural identity of those

Although the fees may seem insubstantial, \$853.44 per year is a significant burden for families living in a cash-poor subsistence-based economy like Yakutat's. In Yakutat, where about 34% of adults do not work and 38% of those that do work make less than \$10,000 a year,¹³ this fee threatens to put families in the impossible position of having to choose between certain basic necessities, on the one hand, and access to food, culture, and tradition, on the other. Furthermore, the Forest Service's decision to charge subsistence users the same rate that it charges mining companies and commercial guide operations sends the message that the agency neither appreciates the prominent role that subsistence plays in Native life, nor respects the unique historical connection that Alaska Natives have to this land and its resources. This message is heard loud and clear not only by those who own and use cabins for subsistence purposes, but by the Native community at large.

Finally, this policy is inconsistent with the federal government's commitment to indigenous rights. President Obama recently took the significant step of endorsing the United Nations Declaration on the Rights of Indigenous People.¹⁴ Article 20 of that Declaration states:

1. Indigenous peoples have the right to maintain and develop their . . . own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.^[15]

Articles 25 and 26 go on to protect indigenous peoples' rights to land and resources that they have traditionally used.¹⁶ Although this endorsement's legal significance may be a matter of controversy, one thing is certain – President Obama's formal endorsement unequivocally expresses the United State of America's commitment to indigenous peoples' rights, and specifically, to their right to maintain their subsistence lifestyle. For the reasons already stated, and in order to make its special use policy consistent with this commitment, the Forest Service must eliminate or, at the very least, substantially reduce the fee charged for subsistence use of shelters on TNF land.

residents, and the economy of their villages, remain interwoven today, as they have for generations, with the harvest of fish, wildlife and plants, for subsistence uses. . . . Indeed, if rural Alaska is to continue to exist, the Alaska Native subsistence way of life and the fish stocks and wildlife populations upon which the continuation of that way of life depends must be adequately protected by Congress.

¹³ See Alaska Local and Regional Information: Workforce Info, Yakutat City and Borough (Feb. 22, 2011). Available at: http://labor.alaska.gov/research/alari/5_28_0.htm

¹⁴ "Remarks by the President at the White House Tribal Nations Conference," The White House, Office of the Press Secretary (Dec. 16, 2010). Available at: <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>

¹⁵ UN Declaration on the Rights of Indigenous People, Article 20.

¹⁶ *Id.* Articles 26-26.

II. ANILCA § 802(1) – Providing Rural Residents the Opportunity to Engage in a Subsistence Lifestyle

ANILCA Title VIII governs subsistence management on Alaska’s federal public lands. In presenting ANILCA to the House of Representatives, ANILCA author Rep. Morris Udall stated:

[T]he subsistence title and the other subsistence provisions are included in recognition of the ongoing responsibility of the Congress to protect the opportunity for continued subsistence uses in Alaska by the Alaska native people, a responsibility consistent with our well recognized constitutional authority to manage Indian affairs.

...

[A]s the subsistence title itself specifically states, *it is the intent of this legislation to protect the Alaska Native subsistence way of life, and the Alaska Native culture of which it is a primary and essential element, for generation upon generation, for as long as the Alaska Native people themselves choose to participate in that way of life, and to leave for the Alaska Native people themselves, rather than to Federal and State resources managers, the choice as to the direction and pace, if any, of the evolution of the subsistence way of life and of Alaska native culture.*^[17]

To that end, ANILCA § 802(1) provides:

consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, *the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands;* consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to Titles II through VII of this Act, *the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so*^[18]

ANILCA is unequivocal that public lands must be managed in a way that causes the least possible adverse impact to subsistence users.

Quite simply, the current fee structure is not “the least adverse impact possible.” By charging \$853.44 per cabin, the Region 10 special use policy imposes a substantial cost on a segment of subsistence users. Although these special use permits are not subsistence

¹⁷ ANILCA author Rep. Morris Udall’s comments to the House of Representatives, H 10545-47 (Nov. 12, 1980).

¹⁸ (Emphasis added.) Note that in his discussion of this section before the House, Rep. Udall described it as providing that “the *management* of the public lands shall cause the least adverse impact possible on rural residents who depend on subsistence resources.” Rep. Udall’s statements, H 10546 (Nov. 12, 1980) (emphasis added). Thus, ANILCA’s author appears to have considered “utilization of the public lands” and “management of the public lands” to be interchangeable in this context.

permits, per se, they are their functional equivalent – as described above, these cabins are necessary for year-round access to these resources, especially in the winter months when conditions are exceptionally harsh and the likelihood of being weathered in is particularly high. Without the cabins, owners and their family members would be cut off from the land and resources that they have harvested for decades, and in many cases, that their ancestors have harvested for centuries. Requiring rural residents to pay nearly a thousand dollars in order to retain access to these resources constitutes exactly the kind of adverse impact on subsistence users that Title VIII aims to prevent.¹⁹

Moreover, by requiring Native members of a cash-poor subsistence economy to pay a large fee in order to continue harvesting in the way they have historically, the special use policy exemplifies the kind of heavy-handed Federal management of subsistence activities that, as Rep. Udall made clear, it was one of ANILCA's central aims to prevent. In order to make its special use policy consistent with ANILCA and the Congressional intent that motivated Title VIII's enactment, the Forest Service must substantially – if not, wholly – reduce the fees required from those rural residents who use their cabins on TNF land solely for subsistence purposes.

III. ANILCA § 811(a) – Ensuring Reasonable Access to Subsistence Resources

ANILCA Title VIII's access provision, section 811(a) states:

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

The \$853.44 yearly fee charged to subsistence cabin owners is, in our view, an unreasonable restriction on access to subsistence resources.

Access provisions in natural resource statutes often concern the most basic level of access. Such provisions protect the right to get in and out of certain areas – in other

¹⁹ In discussing this section of ANILCA, Rep. Udall stated:

[It is] the Congressional policy established by section 802(1) that *the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses*. This policy requires that administrative structures and regulations for conservation system units, including national parks and monuments, shall be established and implemented in a manner consistent with the protection and continuation of Alaska Native culture and Native subsistence activities.

Consequently, in general, *no permit or quota system for the subsistence use of wildlife within national parks and monuments and other conservation system units should be imposed on rural residents unless necessary to protect the continued viability of a particular wildlife population, and then only with respect to that particular population*.

(Emphasis added.) Rep. Udall's statements, H 10546 (Nov. 12, 1980). It appears that Rep. Udall was specifically referencing permits that directly applied to subsistence activities, and not the kind of special use permits at issue here. Nevertheless, in the way described above, these special use permits are functionally equivalent to subsistence permits because of the integral role the cabins play in the harvest of subsistence resources. Consequently, the current fee policy – which is not necessary to protect wildlife or habitat – violates the spirit of Rep. Udall's permit-related comments excerpted here, if not the letter.

words, they protect the right of way. ANILCA has several access provisions that fit this “access to land” description;²⁰ in practice, these access provisions are generally understood to protect the right to use and build roads and/or to utilize the means of transportation necessary to reach a given area.

Section 811(a), on the other hand, is quite different. Unlike ANILCA’s other access provisions, it does not speak of access to land, or access to a particular location or kind of place; rather, it ensures that rural residents have reasonable access to *subsistence resources*. As a result, 811(a) expresses a much more robust concept of access than the access provisions often associated with natural resources statutes. It protects access to the subsistence resources, themselves – not just the land where they are found. As one Yakutat cabin owner explained to us, even if nothing prevented him from physically reaching the coastal area where he has historically engaged in subsistence harvests, during much of the year it would be too dangerous to go for the length of time necessary to fish and hunt if he did not have a permanent structure to protect him from the elements.²¹ Thus, even if his right of way remained intact, he would not have meaningful access to the subsistence resources he has traditionally harvested if he did not have a cabin. In this way, “access to subsistence resources” is a more complex concept than mere access to land. Because section 811(a) ensures access to the resources themselves, it protects more than just the right of way – it also must encompass the right to utilize the means that subsistence users have traditionally relied on and required to harvest those resources.

The provision’s plain meaning demands this interpretation. Merriam-Webster’s Dictionary of Law defines access as:

permission, liberty, or ability to enter, approach, communicate with, or pass to and from a place, thing, or person

but also

freedom or ability to obtain, make use of, or participate in something. . .^[22]

²⁰ See, e.g., ANILCA § 1323(a) (“ . . . the Secretary shall provide such *access to nonfederally owned land* within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof. . .”) (emphasis added); ANILCA § 1111(a) (“ . . . the Secretary shall authorize and permit temporary *access by the state or a private landowner to or across any conservation system unit, national recreation area, national conservation area, the National Petroleum Reserve Alaska or those public lands designated as wilderness study or managed to maintain the wilderness character or potential thereof*, in order to permit the State or private landowner access to its land for purposes of survey geophysical, exploratory, or other temporary uses thereof whenever he determines such access will not result in permanent harm to the resources of such unit, area, Reserve or lands.”) (emphasis added); ANILCA § 1110(b) (“ . . . the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible *access for economic and other purposes to the concerned land* by such State or private owner or occupier and their successors in interest.”).

²¹ Phone call between Samuel Johnson and Olivia Sinaiko (Feb. 11, 2011).

²² MERRIAM-WEBSTER’S DICTIONARY OF LAW 6 (1996).

Thus, 811(a) protects both the right-of-way *and* the right to obtain and make use of subsistence resources. Because the current fee structure unreasonably hinders the Yakutat residents' ability to exercise the latter, it is a violation of ANILCA section 811(a).

Finally, although we found nothing in the legislative history specifically addressing this provision of Title VIII, we note that ANILCA author Rep. Udall did use the phrase "access to subsistence resources" several times in his detailed discussion of the bill.²³ These references indicate that Udall understood the phrase quite broadly – in a manner akin to the way the phrase "access to resources" is used in other federal statutes, to signify the freedom or ability to obtain.²⁴ At the very least, Udall's comments strongly support the notion that Congress did not intend "access" in this context to have the same narrow definition that it has elsewhere in ANILCA.

In conclusion, the right of access is not an absolute one – section 811(a) merely requires the Secretary to ensure that subsistence users have *reasonable* access to subsistence resources. But reasonable access to subsistence resources is a robust concept that includes not only the right-of-way, but the freedom to obtain and make use of those resources. As we have already explained, these cabin users consider their cabins

²³ See ANILCA author Rep. Morris Udall's comments to the House of Representatives, H 10545-46 (Nov. 12, 1980):

Early drafts of the subsistence title by the House Interior Committee allocated *access to subsistence resources* on an ethnic basis, an approach similar in concept to that suggested by the Settlement act Conference Committee.

...

... under the Alaska Constitution the State cannot participate in a subsistence management system which would require it to allocate *access to subsistence resources* on the basis of "Nativity."

...

... I raise the history of the subsistence priority here to point out that while the statutory allocation scheme is racially neutral, its application may result in instances in which significantly more Natives than non-Natives may be afforded *access to a particular subsistence resource*.

Emphasis added.

²⁴ See, e.g., 30 U.S.C. 26 § 1401(b)(1) ("The Congress declares that the purposes of this chapter are . . . to encourage the successful conclusion of a comprehensive Law of the Sea Treaty, which will give legal definition to the principle that the hard mineral resources of the deep seabed are the common heritage of mankind and which will assure, among other things, nondiscriminatory *access to such resources* for all nations") (emphasis added); 25 U.S.C. 43 § 4223(c)(D)(ix) ("[A housing plan will provide] a description of the manner in which the Department of Hawaiian Home Lands will coordinate with welfare agencies in the State of Hawaii to ensure that residents of the affordable housing will be provided with *access to resources* to assist in obtaining employment and achieving self-sufficiency") (emphasis added); 42 U.S.C. 7 § 671(a)(32) ("... the State to administer all or part of the program under this part . . . including foster care maintenance payments on behalf of children who are placed in State or tribally licensed foster family homes, adoption assistance payments, and . . . tribal *access to resources* for administration, training, and data collection under this part. . .") (emphasis added).

essential to their engagement in the subsistence lifestyle, and, in the cash-poor subsistence economy that these cabin owners belong to, \$853.44 is enormously burdensome. In this way, the current fee structure unreasonably restricts access. In order to bring the special use policy into compliance with ANILCA section 811(a), the Forest Service must eliminate or, at the very least, severely reduce the fee charged for subsistence use.

IV. Conclusion

As we have shown, the current fee structure is not only bad policy, but inconsistent with ANILCA. We also note that, although we are centrally concerned with the subsistence cabins in the Yakutat area, we believe that both our policy and law-oriented arguments apply throughout Region 10, and also apply to those temporary subsistence shelters on TNF land which are currently covered by Type Code 116.

In sum, we ask two things of the Forest Service. First, we ask that, in order to more accurately reflect the legal and factual landscape, the agency create a new special use category in Region 10 for those cabins that are used solely for subsistence purposes. Second, we ask that the Forest Service either eliminate, or substantially reduce, the fees charged to those using shelters on TNF land solely for subsistence purposes. This fee reduction should be implemented for both subsistence cabins, and the temporary shelters currently covered by Type Code 116.

Thank you for your consideration of this matter. We look forward to its timely resolution.