

Comments on Environmental Assessment McCarthy Creek Access

INTRODUCTION

On June 20, 2003 Butterfly Sunstar, Nava Sunstar and Joshua Hale (“the Applicants”) verbally applied to the Alaska Regional Director of the National Park Service (“NPS”) for motorized access to their home enclaved within the Wrangell – St. Elias National Park (“the Park”) utilizing a right-of-way that had been granted to the State of Alaska under the provisions of Revised Statute 2477. The McCarthy Green Butte Road has been in continuous use since early in the Twentieth Century, at least sixty years before the creation of the Park. The right-of-way constitutes the real property of the State of Alaska; the United States lacks jurisdiction over its maintenance and control. The Applicants also have a right to access to their property (presumably over this same right-of-way) under the provisions of the Alaska National Interest Lands Conservation Act (“ANILCA”) Section 1110(b) “Access to Inholdings,” 43 USC 3170(b). After extensive exchanges between the Applicants and various representatives of the National Park Service, on January 23, 2004 the NPS released an environmental assessment (“EA”) arraying two alternatives against the Applicants’ proposal. For the reasons hereinafter stated, neither alternative to the application is reasonable, prudent or within the scope of the law.

Comments prepared by J. P. Tangen, Attorney at Law (P.C.), Attorney for Applicants
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SUMMARY OF THE ALTERNATIVES

The application was for access by the Applicants' and members of their family and friends, guests and invitees to their home at the end of an existing road. The specific application consisted of two parts, first for an immediate nine round trips using a tracked vehicle hauling a trailer or sled laden with building materials and other supplies for their personal use. It was the view of the Applicants that these trips would be sufficient to afford them the opportunity to secure their needs before the onset of winter conditions in November 2003 while they focused their attention on providing such additional information as the NPS may require for more permanent motorized access. The applications were specifically under the provisions of ANILCA Section 1110(b).

Pursuant to the request of the NPS, Applicants submitted a SF 299 and answered such additional questions as the NPS generated over the space of the ensuing six months. During the period beginning on the date of the initial application, June 20, 2003, and extending through the date of the filing of the SF 299, the NPS fielded a significant force of investigators, including biologists, geologists and surveyors apparently for the purpose of evaluating the conditions along the contemplated access route. Reference to the findings of that investigation is conspicuously absent from this EA.

In the EA, the NPS has identified two alternatives to that part of the application relating to the need for immediate access. In summary, both alternatives deny the application: 1.) Alternative A constitutes an outright denial of the application¹ and 2.) Alternative C essentially denies the application by burdening the permit with stipulations that make it unworkable and useless². Notably a key element of this part of the application was for summertime access. As the 2003 summer season came to an end with no action being taken by the NPS, the application

¹ NPS EA Alternative A (No Action)

² NPS EA Alternative C (Frozen Ground and Mostly Frozen Water) *NPS Preferred*

was specifically amended to request a permit to haul materials to the homesite before winter conditions set in (before the end of November 2003).

The existing right of way crosses McCarthy Creek a number of times. Applicants' bulldozer (with the blade up) is the vehicle of choice, among other reasons, because it can readily ford open water. Forms of access allowed without a permit by ANILCA, such as traveling by horseback or on foot are wholly insufficient to haul the proposed building materials to their land and access by light aircraft, even if one could be found to haul the required material is economically prohibitive.³ Snow machines have limited application because they can only be used in certain restricted wintertime conditions.

³ For instance, it is very expensive to haul hay for livestock in an airplane, no matter what size it is.

FINDINGS OF THE EA

The EA evaluated the application in conjunction with seven conceptual areas of concern:

1. Effects on Soil and Substrata
2. Effects on Vegetation
3. Effects on Aquatic Habitat and Fish
4. Effects on Wildlife
5. Effects on Cultural Resources
6. Effects on Visitor Use and Aesthetics
7. Effects on Safety

With regard to the first item, soils and substrate, the EA concludes: *“The level of effects on soils and substrate [of the application] would not result in an impairment of park resources that fulfill specific purposes identified in the park and preserve enabling legislation or that are key to the natural and cultural integrity of the park and preserve.”* EA page 39, ¶ 4.1.2.3.

With regard to the second item, vegetation, the EA concludes: *“The level of effects on vegetation resources with this alternative [the application] would not result in an impairment of park resources that fulfill specific purposes identified in the park and preserve enabling legislation or that are key to the natural and cultural integrity of the park and preserve.”* EA page 43, ¶ 4.2.2.3.

With regard to the third item, fish, the EA concludes: *“Alternative B [the Applicants’ proposal] **may result** in a loss of viability to a unique Dolly Varden population which [sic] would be a permanent impact to the natural integrity of the Park. Therefore, if Alternative B is selected, the purpose and values for which the Park/Preserve was established **could be impaired.**”* EA page 48, ¶4.3.2.3 (Emphasis added.)

With regard to the fourth item, wildlife, the EA concludes: *“The level of effects on wildlife resources with this alternative [the application] would not result in an impairment of park*

resources that fulfill specific purposes identified in the park and preserve enabling legislation or that are key to the natural and cultural integrity of the park and preserve.” EA page 52, ¶ 4.4.2.3.

With regard to the fifth item, cultural resources, the EA concludes: *“The level of effects on cultural resources with this alternative [the application] would not result in an impairment of park resources that fulfill specific purposes identified in the park and preserve enabling legislation or that are key to the natural and cultural integrity of the park and preserve.” EA page 55, ¶ 4.5.2.3.*

With regard to the sixth item, visitor effects and aesthetics, the EA concludes: *“Alternative B would result in **minor** adverse effects on visitor use and aesthetics. There would be moderate cumulative effects.* Page 57, ¶ 4.6.2.3 (Emphasis added.)

With regard to the seventh item, safety, the EA concludes: *“There is in [sic] a **minor to moderate** increase in risks to safety under this alternative [B] due to the window of operations from aufeis, flooding and snow avalanche. These would have only a minor additional adverse impact on the safety conditions if proper reconnaissance, alignment selection and avoidance of dangerous reaches and periods are integrated into operation while transporting or materials and driving the bulldozer within McCarthy Creek Valley.* Page 60, ¶ 4.7.2.3 (Emphasis added.)

In other words, with regard to four of the seven standards the NPS examined, the application *“would not result in an impairment of park resources that fulfill specific purposes identified in the park and preserve enabling legislation or that are key to the natural and cultural integrity of the park and preserve.”* Accordingly, the permit application should not be denied or modified on the basis of any of these criteria.

With regard to the criteria for which there was some perceivable risk: fisheries, visitor use and aesthetics, and safety, the factual basis for objection is skimpy and open to substantial question. For instance, under section 4.3.2.1 (page 46) the EA says, *“Fine sediments (<2 mm*

diameter) in the channel at the crossing site would be mobilized and would travel downstream, depositing on stream channel substrate or within the interstitial area of stream channel substrates. Should stream crossings occur while fish eggs are incubating in the channel (September through April), the deposition of fine sediment in salmonid redds is expected to result in reduced egg to fry survival.” However in actuality the streambeds have virtually no fine grained material that would be mobilized by the tracked vehicle crossings. Again it should be noted that the results of the NPS field investigations are conspicuously absent from this EA. In addition, the NPS has access to unrebutted expert testimony on this subject.⁴

A little further in this same section, the EA notes that “*Should stream crossings occur while fish eggs are incubating in the channel (September through April), the deposition of fine sediment in salmonid redds is expected to result in reduced fry survival.*”

Still further in this same section, the EA notes that “*While the exact sediment transport distance will vary substantially based upon particle size, stream flow, channel gradient, and additive effects for the timing and frequency of other crossings of McCarthy Creek, 300 open water stream crossings occurring potentially within a two month or shorter period, during or following the spawning period for Dolly Varden (September through November), has at least a moderate potential to have a major impact on the viability of the Dolly Varden population in McCarthy Creek.*

In other words, from the point of view of the impact of the proposal on the fishery, it is clear that the worst time to access the property using open water crossings is during the time eggs are

⁴ (*Hale v. Norton*, Federal District Court No. A03-0257-CV – Declaration of Raymond A. Kreis in support of Motion for Temporary Restraining Order and Preliminary Injunction – November 3, 2003), “Sixteen stream crossings have been identified. In all cases these stream crossings are in reaches of the stream where the bed consists of coarse-grained cobbles and boulders. ... There are no fine-grained soils where tracked vehicle crossings would generate any significant amount of mud in the water. As long as the crossings are made at near right angles to the stream beds, these stream crossings will affect an insignificant portion, 0.26%, of the stream bed of McCarthy Creek. This figure is arrived at based on the following assumptions: tracked vehicle width of eight feet or less; each traverse crosses the stream at virtually the same locations as used for the existing road and each previous traverse; allow for a 12-foot wide crossing zone at right angles to the stream; 12-foot wide crossing zone multiplied by 16 stream crossings equals 192 feet of stream bed disturbed divided by 14 miles of stream bed equals 0.26% total disturbance of stream bed.”

incubating, the months of September through April. The NPS preferred alternative would have all crossings take place from October 20, 2004 through April 15, 2005.

The EA makes it clear that the only resident fish specie identified in McCarthy Creek is Dolly Varden. This population is not known to be anadromous or to represent a unique or significant subpopulation.

Similarly, under the heading of Safety, the EA finds that there are safety risks relating to snow avalanches, aufeis (icing), and flooding (see ¶¶ 4.7.2.1, page 59 and 4.7.3.1, page 60). Accordingly, it would appear that under Alternative C, the preferred alternative, travel over the road from McCarthy to the Applicants after freeze up with a tracked vehicle would be unnecessarily hazardous. Under Alternative B, the Applicants' proposal, the risk of the perils identified in the EA is minimized because the timeframe requested is before severe winter weather generally sets in.

The third topic, relating to the possible effects on visitor use, the summary conclusion is simply that the adverse effects of the Applicants' proposal on visitor use and aesthetics would be "minor." ¶ 4.6.2.3, page 57.

If it is assumed that the only crossing of McCarthy Creek would be by fording running water as the application has proposed, it is clear that the timing of the crossings ought be before there is substantial icing and with an eye to reducing any conceivable impact on spawning redds. In other words, during low water periods in the spring, late summer and early fall. Further, it is clear that the Applicants' proposal would have no notable impact on any of the issues the NPS evaluated. On the other hand, if the "preferred" alternative were selected wherein river crossings were limited to snow and ice bridges, it is clear that not only might there be an increased risk to the fishery, but there is a palpable safety risk as well. These impacts are not quantified in the EA; however, from the position of a catskiner, the risk of sideslipping or rolling a cat into a river is a matter of grave concern.

In summary, the preferred alternative is contrary to the supporting argumentation and should be rejected in favor of the Applicants' original proposal.

THE STIPULATIONS

Twenty terms and conditions have been proposed for the permit. The first thirteen are grouped under the heading of “General” and include:

GENERAL TERMS AND CONDITIONS

1. Vehicle Type. The type of vehicle to be used is limited to a D5 or smaller bulldozer with the option of substituting a comparable vehicle with the approval of the superintendent. Although this condition does not so state, it is presumed that the superintendent’s approval will not be unreasonably withheld. As is generally known, this is a small family of limited means that must use what is available to them. A D4 and later a D5 was proposed because that is what they have had access to, however, given the length time it takes for the NPS to make a decision, it is reasonably foreseeable that an alternative vehicle may be the vehicle of choice by the time access is initiated. In any case, it is extremely unlikely that anything larger than a D5 would ever be considered.

Subject to the foregoing, we have no objection to this condition.

2. Travel
 - a. Travel is limited to the period between October 20 and April 15 conditioned upon the ground being frozen to a depth of 12 inches and approximately six inches or more of snow cover. This is contrary to the application and the Applicants’ intent. For safety reasons discussed at length in the EA, it is very important to access this property before freeze-up. A tracked vehicle of the type proposed is not suitable for traversing glaciated slopes where there is a risk of slipping or rolling into the river.

In addition, traveling over frozen ground necessarily means that the load sizes will have to be reduced to probably one-half of the proposed size. This

means that at least twice as many trips will have to be taken. In addition, the requirements of the Preferred Alternative C means a number of additional trips not associated with the transportation of supplies and materials that would have to be authorized. At least one trip to break the trail would have to be taken at the outset without a load. Furthermore, if ice bridges will have to be constructed, they cannot be readily incorporated into a trip intended to haul supplies and materials.

Such maintenance and repair trips should be done in such a fashion as to permit the maximum amount of work to be done during periods of available light. The commitment of several hours, or perhaps several days, to perform maintenance and construction along the road will preclude hauling supplies and materials all the way through to the Marvelous Millsite in a single day. It would be unduly burdensome to have to cache a trainload of materials along the route while road maintenance and construction is being undertaken.

This condition alone makes the alternative unworkable.

- b. Open water crossings require advance approval by the superintendent. The purpose of the application is to secure the “advance approval of the superintendent” and that approval ought to be integrated into the permit.

This condition is unworkable and should be removed.

3. Permits. It is agreed and understood that permits from other federal agencies, specifically the Army Corps of Engineers must be secured prior to commencing access. The NPS has no standing or interest in permits from the state or private landowners and these references should be deleted from the conditions.

Subject to the foregoing, we have no objection to this condition.

4. Notification. Notification to the superintendent 48 hours prior to each trip is unduly specific. No purpose or procedure for this requirement is identified in the condition. General notice to the effect that there will be a specific number of trips between break-up and freeze-up ought to be sufficient unless there is an undertaking on the part of the NPS to have a ranger accompany a given trip for the purpose of facilitating resolution of questions relating to the alignment and the necessity for road maintenance.

In any case, 48 hours notice is unreasonable because it could place the Applicants in danger and expose them to unreasonable hardships. In this area, especially in the early spring and late fall, weather conditions can change very rapidly. If a warm front moves through the area rain it could be followed by flash flooding within the space of a few hours; likewise, a sudden drop in the temperature could result in extreme cold or blizzard conditions developing. If a trip-by-trip notification is necessary at all, it should be on a much shorter time schedule.

This condition is unworkable and should be removed.

5. Number of Trips. The number of one-way trips is limited to eighteen. There is no disagreement with this condition if we are talking about summer and fall open water trips. It is assumed that if there is a need for additional trips while consideration of the permit application for permanent access is pending an appropriate amendment to this application will be entertained.

If, on the other hand, the Applicants are limited to frozen ground transit, this eighteen trips are insufficient. There will probably have to be at least twice as many trips in order to transport the same amount of supplies and materials. In addition, there will have to be a number of trips for trail maintenance and repair.

This condition is unworkable and should be removed.

6. Reconnaissance and alignment selection. There is no problem associated with having representatives of the NPS accompanying the Applicants on the various trips. They are welcome and their input in the decision-making process will be helpful where alternatives must be considered.

Subject to the foregoing, we have no objection to this condition.

7. Permit compliance. Applicants commit to ensuring that those persons over whom they have control will not violate the terms of the permit. Applicants cannot commit to controlling third parties or NPS employees.

Subject to the foregoing, we have no objection to this condition.

8. Travel with the blade up. Applicants intend to travel with the blade up except where the removal of vegetation, snow or slumped material is necessary and appropriate, or, if wintertime travel is required, when necessary to construct snow or ice bridges.

Presumably the NPS employee traveling with the train will have the superintendent's fully delegated authority to make on the spot decisions as to what can be bladed in order to ensure reasonable transit consistent with the purposes of the permit. It is requested that the condition be modified to allow the blading of other areas where appropriate, as well, subject to the advise of NPS agents accompanying the train.

As noted, if travel is limited to winter conditions an additional trip will be required to break trail. This must be done in such a fashion as to not destroy the trails for subsequent snow machine use.

If the cat high centers or if it falls through the river ice it could take the Applicants several days to get it out. Furthermore, there is at least one place on one mountain passage that must have the slope bladed to be passable.

Finally, it should be noted that plowing snow off the road 15 miles is not possible or desirable.

This condition is unworkable as written and should be removed or substantially modified.

9. Vegetation.
 - a. The restriction on clearing live trees with a diameter of less than 3 inches at breast height is unduly restrictive. Generally, the trees found in this area are limited to alder, spruce and birch all of which are fast growing and all of which are extremely common. This restriction should be applied only to trees outside the alignment. Presumably the RS 2477 is at least 60 feet wide, therefore the limitation should be to such trees more than thirty feet on either side of the centerline of the approved alignment.

This condition is unworkable as written and should be removed or substantially modified.

- b. The restriction on the removal of trees of any size (including apparently saplings and brush 1 inch or less in size) within 300 feet of the river is likewise unduly restrictive and should also be modified to relate only to vegetation beyond thirty feet from the centerline of the alignment. Again, the superintendent's representative should have the delegated authority to approve the removal of vegetation outside the alignment, and the removal of vegetation within the alignment ought to be integral to the permit.

We request this condition to be removed or modified substantially as indicated.

10. Moving downed trees. It is not at all clear what is accomplished by limiting the disposition of downed trees to manual means. If the purpose is to ensure that the trees are handled in a neat and orderly manner, there is no obvious justification for

limiting the means. If there is some other objective, it needs to be identified. Placing downed trees parallel to the alignment may be reasonable, however it should be clear that they should be placed on Park Service land and not within thirty feet of the centerline of the alignment.

We request this condition to be removed or modified substantially as indicated.

11. Locked track turns. Locked track turns with a bulldozer are generally a conventional technique associated with working in tight quarters. The use of locked track turns should be subject to approval by the superintendent's duly authorized representative accompanying the trip.

We request this condition to be removed or modified substantially as indicated.

12. Proper disposal of all debris, refuse and food is an appropriate requirement; however, the requirement to remove naturally occurring debris from Park Service land is excessive. It should be clear that naturally occurring debris found within thirty feet of the centerline of the alignment may be deposited in an appropriate manner on Park Service land outside of the right of way, subject to the approval of the superintendent's duly authorized representative then present.

Subject to the foregoing, we have no objection to this condition.

13. Breakdowns. It is reasonable to report serious breakdowns and to stabilize any equipment that cannot be immediately recovered. It is not at all clear as to what is intended by the reference to equipment "which becomes stuck." The condition should be limited to situations where the "stuck" equipment cannot be extricated with the available resources.

This condition is unworkable as written and should be removed or substantially modified.

CULTURAL RESOURCES

14. Removal. This condition should provide that cultural resources within the right of way (within thirty feet of the centerline of the alignment) are to be relocated outside of the right of way subject to the guidance of the superintendent's duly authorized representative then present.

We request this condition to be modified substantially as indicated.

15. Damage. Notification of damage to a cultural resource should be immediately reported to the superintendent's duly appointed representative then present.

Subject to the foregoing, we have no objection to this condition.

WATER RESOURCES

16. Snow and ice bridges. These restrictions are unnecessary and burdensome in the following particulars: First, the presence of organic debris and soil in the construction of a snow or ice bridge is virtually unavoidable; furthermore, the presence of such debris contributes integrity to the structure, therefore it is highly desirable. Breaching such bridges before breakup is likewise unnecessary and inappropriate. Doing so will either require additional trips to the site or reducing the aggregate amount of material that can be transported to the Applicants' home. Natural forces will be more than sufficient to dispose of any such structures without further human intervention. In addition, the application does not contemplate the use of snow or ice bridges. Finally, it is unduly dangerous for Applicants to be on the creek at or around the time of breakup, because of the risk of flooding and mass wasting.

As noted above, any time spent on the construction of snow or ice bridges cannot reasonably be charged against trips required for hauling supplies and building materials.

If wintertime transit is required, the danger is quadrupled. Not only will there be a need for twice as many trips, but there will be an enhanced risk of breaching and snow or ice bridges on each trip.

We request this condition to be modified substantially as indicated.

17. Impact on fish or the stream channel. It is reasonable for the Applicants to avoid **unreasonable** impact on resident fish, as well as **unreasonable** alteration or blockage of the stream channel. Proposed activities that may have that impact should be subject to approval by the superintendent's duly authorized representative then present.

Subject to the foregoing, we have no objection to this condition.

FUEL TRANSPORTATION

18. Refueling and storage of fuel. It is reasonable to restrict the storage of fuel on the right of way for extended periods of time; however, it is self-evident that if road work is required, including the construction of ice or snow bridges, the equipment may have to be refueled and an appropriate amount of fuel will have to be cached along the right of way for that purpose. This restriction should also be conditioned upon being subject to the reasonable guidance of the superintendent's duly authorized representative then present.

We request this condition to be modified substantially as indicated.

19. Fuel to be transported in over-pack drums. This is an unnecessary and burdensome requirement and should be modified. The NPS doesn't even comply generally with this sort of stricture. Any fuel should be transported in appropriate containers reasonably calculated to protect against spillage during transport under the circumstances. Where there is an unusual risk of slippage or roll over, additional

protections should be required as warranted. The requirement for absorbent pads being on hand, however, is a reasonable requirement and will be accommodated.

This condition is unworkable as written and should be removed.

20. The requirement to contain spills and report them to ADEC is reasonable and will be accommodated.

This condition is agreed to.

CONCLUSION

As can be seen from the foregoing, Applicants' have a substantial interest in protecting the integrity of the park in which they live. Unlike the representatives of the NPS who may come and go over time, the Applicants have chosen to make the Marvelous Millsite and the McCarthy Creek valley their permanent home and are anxious to ensure that nothing they or anyone else may do will adversely impact the Park.

We urge you to approve the application as submitted as opposed to the preferred alternative in accordance with the foregoing comments. We further urge you to modify the "terms and conditions" in order to avoid unnecessary and unduly burdensome requirements.

Specifically, we request that the requirement that trips be limited to frozen ground travel and the requirement for pre-trip notification to the superintendent be removed.

If there are critical points of disagreement with any of our suggested modifications, we request you bring them to the attention of counsel as soon as is reasonably possible for resolution.

Thank you for your attention to our concerns.

J. P. Tangen, Attorney at Law (P.C.)

By: _____

J. P. Tangen
Attorney for Applicants
ABA #7507051