United States Department of Agriculture | Forest Service | Alaska Region | P.O. Box 21628 Juneau, AK 99802-1628

File Code: 1570
Date: APR 27 2005

Mr. David C. Crosby, P.C.
5280 Thane Road
Juneau, AK 99801-7717

Dear Mr. Crosby:

Pursuant to 36 CFR 215.17, I have reviewed the administrative appeal record for the Shoreline Outfitter/Guide Final Environmental Impact Statement (FEIS) and Record of Decision (ROD). The Tongass Forest Supervisor signed the ROD. I have also considered the Appeal Reviewing Officer's (ARO) recommendation (enclosed) regarding the disposition of the appeal you filed on behalf of the Boat Company (Appeal No. 05-10-00-0011). The ARO recommended that the decision be affirmed and your requested relief be denied.

DECISION

I concur with the ARO's recommendation and I affirm the Forest Supervisor's decision. Your requested relief is denied. As discussed in the ARO's recommendation, the Forest Supervisor is directed to prepare an implementation plan, working with the appellants, other parties to the appeals, and interested permit holders, to ensure that the permittees understand the decision and its effects on their permitted operations. This implementation plan should be completed within 90 days of the date of my decision.

My decision incorporates, by reference, the entire administrative record, which includes the appeal and project planning records, and constitutes the final administrative determination of the Department of Agriculture (36 CFR 215.18)). The ROD may be implemented 15 days following the date of this decision (36 CFR 215.10(b)).

Sincerely,

DENNIS E. BSCHOR
Appeal Deciding Officer

cc: Tongass Forest Supervisor, Tongass Appeal Coordinator

United States Department of Agriculture **Forest Service** **Alaska Region** **P.O. Box 21628 Juneau, AK 99802-1628**

File Code: 1570 **Date:** April 22, 2005

Subject: Shoreline Record of Decision and Final Environmental Impact Statement

To: Appeal Deciding Officer

This is my recommendation, as Appeal Reviewing Officer, on the action you should take, as Appeal Deciding Officer, on the pending appeals of the Shoreline Outfitter/Guide project. The following appeals were filed under 36 CFR 215:

No. 05-10-00-0005, City of Port Alexander
No. 05-10-00-0006, Jerry Reinwand
No. 05-10-00-0009, Cruise West
No. 05-10-00-0010, Lindblad Expeditions, Inc.
No. 05-10-00-0011, The Boat Company

The decision being appealed is the decision by the Tongass Forest Supervisor to select Alternative 5 with modifications from the Shoreline Outfitter/Guide Final Environmental Impact Statement (Shoreline FEIS). The Shoreline analysis area included approximately 7,018,700 acres along the shoreline of Admiralty Island National Monument and the Hoonah, Sitka, and Juneau Ranger Districts on the northern half of the Tongass National Forest. This translates to approximately 5,291 miles of National Forest System (NFS) shoreline. The shoreline zone of the analysis area extends one-half mile inland from mean high tide, and nearly 988,030 acres of the shoreline zone is NFS land.

The Selected Alternative will:

- Authorize the issuance of special use permits for commercial recreation through the next 5 years, beginning with the 2005 outfitter/guide spring operating season.
- Allow for a maximum of 7,888 group days of commercial recreation use within the analysis area rather than the 17,530 group days identified in the Shoreline FEIS for Alternative 5.
- Authorize commercial groups of up to 75 persons in appropriate Forest Plan Land Use Designation (LUD) areas.
- Include 35 large group areas (28 Enclaves and 7 Fifteen-Percent Areas).
- Change the beginning and end dates for the spring, summer, and fall seasons as follows:
  - The spring season will begin on April 25 rather than on April 20 for all Use Areas.
  - The fall season will end on October 10 rather than on October 31 for all Use Areas.
  - The spring season will close either on May 20 or May 31 depending on the end of the brown bear season as identified by the State of Alaska Department of Fish and Game (ADF&G) for the Use Area.

Background

A Notice of Intent (NOI) to prepare an environmental impact statement (EIS) was published in the *Federal Register* on January 18, 2000. A Revised NOI was published in the *Federal Register* on April 5, 2001 to inform the public of changes in the scope of the analysis and planning schedule. On August 8, 2002, the Forest Service published a Notice of Availability in the *Federal Register* for the Shoreline Draft EIS, with a 90-day public comment period. Due to a mistake with the mailing list, a revised Notice of Availability for the Shoreline Draft EIS was published in the *Federal Register* on September 4, 2002, which extended the timeframe for comments on the document. The Forest Supervisor signed the Record of Decision (ROD) for the project on December 3, 2004, and Notice of Decision was published in the *Juneau Empire* on January 28, 2005. The City of Port Alexander, Jerry Reinwand, Cruise West, Lindblad Expeditions, Inc., and the Boat Company appealed the ROD. Allen Marine Tours submitted an appeal, but as they had not previously participated in the planning process for the Shoreline project, they do not have standing to appeal the Forest Supervisor's decision. In a telephone conversation with Cherie Shelley, the Director of Ecosystem Planning, a representative for Allen Marine Tours indicated that they would like to participate as an interested party to the appeals pursuant to 36 CFR 215.11(b), and that we could consider their appeal as interested party comments.

My review of these appeals was conducted pursuant to 36 CFR 215.19. The appeals and project record have been carefully reviewed in my consideration of the objections raised by the appellants and their requested relief. The Sitka Ranger District prepared the enclosed indices of the documentation supporting the decision, which are keyed to specific issues raised by the appellants. My recommendation hereby incorporates by reference the entire administrative record for the project.

Appeal No. 05-10-00-0005, City of Port Alexander

The City of Port Alexander contends that they did not receive the Shoreline ROD/FEIS until January 23, 2005, which did not allow enough time for review by the community or City before the 45-day appeal period expired. Based on my review of this appeal, it appears that the appellants misunderstood the time frame in which they could file an appeal. As discussed above, the ROD was signed on December 13, 2004, but the Notice of Decision was not published in the Juneau Empire until January 28, 2005. The 45-day appeal period began on the day after the Notice of Decision and ended on March 14, 2005. The planning team leader contacted the Mayor of the City of Port Alexander on January 31, 2005 to explain the process, and informed her that the appeal period did not end until March 14 [Appeal Record, Doc.3]. After the City's appeal was received in this office on February 1, a member the Ecosystem Planning staff contacted Debra Rose Gifford, the Mayor of the City of Port Alexander to inform her that the appeal period had not yet ended in case she wanted to submit further information relating to their appeal. At that time, Ms. Gifford indicated that she would like to receive a copy of the appeal regulations, which the staff member provided. No further correspondence was received from the City of Port Alexander.

The City of Port Alexander also contends that the Forest Supervisor did not consider their December 2, 2002 resolution calling for an extension of the 1-mile perimeter around Port Alexander for guided brown bear hunting to a 3-mile buffer. Appendix C of the Shoreline FEIS lists the stipulations, permit clauses, and additional conditions that will be included in applicable Outfitter/Guide special use authorizations, including the stipulation that no shooting is allowed in or within 150 yards of a residence, building, developed recreation site or occupied area. The mitigation measures included on the Port Armstrong Use Area card extend the required 150-yard distance to 1 mile around the community of Port Alexander to further address safety concerns [ROD, Appendix A at 45]. Notes from a meeting on the project held on March 31, 2003 indicate that the interdisciplinary team considered the City's request for a 3-mile buffer around Port Alexander; however, the request was determined to be outside the scope of the analysis. In my opinion, the record indicates that the Forest Supervisor adequately considered the City of Port Alexander's request.

Appeal No. 05-10-00-0006, Jerry Reinwand

Mr. Reinwand contends that the decision violates the 9th Circuit Court Tustumena Lake decision, which ruled "…the Wilderness Act states that there shall be 'no commercial enterprise' within designated wilderness." In my opinion, Mr. Reinwand did not interpret this statement in the full context of the Court's opinion, which states:

> This statutory structure, with prohibitions including an express bar on commercial enterprise within wilderness, limited by specific and express exceptions, shows a clear congressional intent generally to enforce the prohibition against "commercial enterprise" *when the specified exceptions are not present*.

[The Wilderness Society v. U.S. Fish & Wildlife Service, 353 F.3d 1051, 1062 (9th Cir. 2003) (emphasis added)].

The 9th Circuit Court in this decision examined whether a sockeye salmon enhancement project that annually introduced about six million hatchery-reared sockeye salmon fry into Tustumena Lake, the largest freshwater lake in the Kenai National Wildlife Refuge and Kenai Wilderness, was prohibited by the Wilderness Act. Finding that the enhancement project constituted a commercial enterprise within a designated wilderness area and that none of the exceptions to commercial activity provided by the Act were relevant, the Court ruled that the enhancement project violated the Wilderness Act.

Section 1133(d)(5) of the Wilderness Act includes specific provisions allowing for commercial services such as outfitter/guiding in wilderness areas:

> Commercial services may be performed within the wilderness areas… to the extent necessary for activities, which are proper for realizing recreational or other wilderness purposes of the areas.

In my opinion, it is inappropriate to apply the opinion in the Tustumena case to the issuance of special use permits for commercial recreation under the Shoreline Outfitter/Guide ROD as the Wilderness Act specifically provides for the recreational activities authorized in the ROD.

Mr. Reinwand also challenges the decision's consistency with Forest Service management goals and objectives for the Kootznoowoo Wilderness. Again, it appears that Mr. Reinwand has misinterpreted Forest Plan direction in the context of all management goals and objectives for Monument Wilderness areas, which not only include providing opportunities for solitude and primitive recreation activities but also include direction to provide public access and uses consistent with the Wilderness Act. Management prescriptions guiding recreation and tourism activities on National Monument Wilderness Areas allow special-use authorizations for outfitter/guide operations if there is demonstrated need for the service(s) and they are deemed appropriate for the proposed area [TLMP at 3-35].

In my view, the analysis presented in the Shoreline FEIS and project record adequately demonstrates the need for commercial outfitter/guide services. Based on my review of the project record and TLMP management direction, I find that the Selected Alternative is consistent with the Wilderness Act and TLMP management direction.

Appeal No. 05-10-00-0009, Cruise West; Appeal No. 05-10-00-0010, Lindblad Expeditions; and Appeal No. 05-10-00-0011, The Boat Company

These appellants all raised similar issues in their appeals related to the carrying capacity analysis, group size determination, the concept of group days versus groups at one time, management of large group enclaves and 15% areas, consistency with Recreation Opportunity Spectrum (ROS) principles, and how the Forest Supervisor's decision will be implemented.

Linblad Expeditions, Inc. specifically raised an issue regarding the reduced number of group days allowed for commercial use in the Selected Alternative in comparison with the total available group days. They contend that the ROD does not provide adequate rationale for the reduction in commercial group days included in the Selected Alternative. However, given the data presented in the FEIS regarding current commercial use levels and historic growth rates in the tourism industry, I agree with the Forest Supervisor's rationale that his decision allows for growth in the commercial recreation tourism industry while striking a good balance between existing uses and benefits to all potential users [ROD at 13].

In reviewing the documentation related to the other issues raised by these appellants, I believe the analysis in the FEIS and project record is sufficient to support the Forest Supervisor's decision with respect to the potential effects of the project on the environment and other users. However, based on the issues raised in the appeals and my reading of the decision, it is apparent to me that the ROD lacks clarity and is not fully understood by the appellants.

I believe the FEIS and ROD are consistent with direction provided in TLMP and meet all applicable statutory and regulatory requirements; all necessary findings are made and are well founded. Therefore, I recommend that you affirm the Forest Supervisor's decision. However, in order to clarify the decision and to make sure appellants and other parties to the appeal

understand the effects of the decision on their operations and use of the Shoreline Use Areas, I also recommend that you direct the Forest Supervisor to work with interested permit holders and the parties to these appeals to develop an implementation plan that clearly articulates how the ROD will be implemented through the special use permitting process. This information will serve as Forest policy to insure that all Ranger Districts are implementing the Shoreline decision consistently. I recommend that the implementation plan be completed within 90 days from the date of your decision on these appeals.

Summary

Based on my review of the appeals and the Shoreline project area, I recommend that you affirm the Forest Supervisor's decision with respect to all of the issues raised in the City of Port Alexander's and Mr. Reinwand's appeals. With respect to the appeals filed by Cruise West, Lindblad Expeditions, Inc., and the Boat Company, I recommend that you affirm the decision, as the analysis of the potential effects of the project is sufficient to conclude that the Forest Supervisor's decision is reasonable. However, I also recommend that you direct the Forest Supervisor to prepare an implementation plan, working with the appellants, other parties to the appeals, and interested permit holders to ensure that the permittees understand the Shoreline decision and its effects on their permitted operations. This implementation plan should be completed within 90 days of the date of your decision.

/s/ Steven A. Brink
STEVEN A. BRINK
Appeal Reviewing Officer

Enclosures