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January 26, 2009

Victoria Rutson
Chief
Section of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001



Re: Finance Docket No. 34658, Comments of the
Alaska Railroad Corporation on the Northern Rail
Extension Draft Environmental Impact Statement
Section 4(f) Evaluation (Appendix M)

Dear Ms. Rutson:

Thank you for providing our client, the Alaska Railroad Corporation (ARRC), with the opportunity to review and comment on the *Northern Rail Extension Draft Environmental Impact Statement* (DEIS). We plan to submit formal comments on the entire document at a later date. This letter addresses ARRC's immediate concerns regarding the DEIS Section 4(f) Evaluation (Appendix M). As you know, Section 4(f) of the Department of Transportation Act does not apply to Surface Transportation Board (STB) actions. It is, however, applicable to the proposed Northern Rail Extension project through the involvement of the Federal Railroad Administration (FRA) and the Federal Transit Administration (FTA).

Since the DEIS was published, ARRC has gathered information about the properties described in the Draft Section 4(f) Evaluation that may not have been fully considered during the preparation of that document. Based on this information and additional legal research, this letter raises several concerns about the DEIS's identification of Section 4(f) resources, de minimis impacts to those resources, and the applicability of archeological resource guidance. We think that the discussion below will prove valuable as the Board finalizes its Section 4(f) Evaluation, and ask that ARRC's views be incorporated into the final document where appropriate.

Identification of Section 4(f) Resources

ARRC's initial concern is that certain properties not qualified for protection under Section 4(f) have been identified in the DEIS as Section 4(f) resources. Under Section 4(f), protected resources include publicly owned parks, recreation areas, or wildlife or waterfowl refuges or any publicly or privately owned historic sites. See 49 U.S.C. § 303(c). Federally-funded transportation programs and projects may use these lands only if "there is no prudent and feasible alternative" to such use. *Id.* In cases where the use of Section 4(f) resources cannot be

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avoided, the project must include “all possible planning to minimize harm” to these protected areas. *Id.* Regulations recently promulgated by the Federal Highway Administration (FHWA) provide further guidance regarding the application of Section 4(f). *See* 23 C.F.R. § 771.135. As explained below, our specific concerns in this instance involve the application of Section 4(f) to Alaska Department of Natural Resources (ADNR) Dispersed Use Areas, the Chena Lakes Flood Control Project, the Eielson Air Force Base (AFB) Outdoor Recreation Area, and certain trails (ADNR Forestry Winter Road, U.S. Army Permit Route, Koole Lake Trail and Donnelly-Washburn trails, and Silver Fox Lodge Trail).

Dispersed Use Areas

DEIS Appendix M points out that “[a]reas where dispersed recreation takes place represent the vast majority of lands that would be crossed by the proposed project and its alternatives.” DEIS at M-20. These parcels include thousands of acres at many points along various segment alternatives. *See id.* Appendix M goes on to note that Section 4(f) protects “includes areas that have been officially designated an important recreational resources or have recreational activities as primary uses”—without deciding one way or the other whether the “Dispersed Use Areas” crossed by the project meet these criteria. We believe that a closer examination of these Dispersed Use Areas will show that their protection lies far beyond the intent of Section 4(f).

In 2005, FHWA published a Section 4(f) Policy Paper that included the following Questions and Answers addressing the applicability of Section 4(f) to various types of land and resources.

2. Public Parks, Public Recreation Areas and Wildlife and Waterfowl Refuges

Question A: When is publicly owned land considered to be a park, recreation area or wildlife and waterfowl refuge and who makes this determination?

Answer A: Publicly owned land is considered to be a park, recreation area or wildlife and waterfowl refuge when the land has been officially designated as such by a Federal, State or local agency and the officials of these governmental entities, having jurisdiction over the land, determine that one of its major purposes and functions is for park, recreation or as a refuge. Incidental, secondary, occasional or dispersed park, recreational or refuge activities do not constitute a major purpose

* * *

6. Public Multiple-Use Land Holdings

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Question: Are multiple-use public land holdings (e.g., National Forests, State Forests, Bureau of Land Management lands, etc.) subject to the requirements of Section 4(f)?

Answer: Section 4(f) applies to historic properties (those on or eligible for the National Register of Historic Places) located on these multiple-use land holdings and only to those portions of the lands which are designated by statute or identified in the management plans of the administering agency as being primarily for park, recreation, or wildlife and waterfowl refuge purposes, and determined to be significant for such purposes. For example, within a large multiple-use resource, like a National Forest, there can be areas that qualify as 4(f) property (e.g. a campground, picnic area, etc.) while other areas of the property function primarily for purposes other than park, recreation or refuges. Coordination with the official having jurisdiction and examination of the management plan for the area are necessary to determine Section 4(f) applicability. For public land holdings, which do not have management plans or existing management plans are out-of-date, Section 4(f) applies to those areas that are publicly owned and function primarily for 4(f) purposes. Section 4(f) does not apply to areas of multiple-use lands which function primarily for purposes other than park, recreation or refuges such as for those areas that are used for timber sales or mineral extraction in National Forests.

FHWA Section 4(f) Policy Paper (March 1, 2005) at 11-12, 17. The conclusions reached in the 2005 Policy Paper are reinforced in FHWA's Section 4(f) implementing regulations, which specify that when lands are "managed for multiple uses, Section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl purposes." 23 C.F.R. § 771.135(d).

The Dispersed Use Areas discussed in DEIS Appendix M are owned and managed by ADNR. They are located within an area covered by the Tanana Basin Area Plan, which was adopted by ADNR in 1985 and last updated in 1991, 18 years ago. Our position is that these areas' management plan is "out-of-date," and, therefore, that Section 4(f) applies only to the extent those areas "*function primarily* for 4(f) purposes." *Id.* at 17 (emphasis added). The DEIS notes that the specific management subunits at issue here are 7F1, 7G2, 7G3, and 7I2 within Delta-Salcha Subregion. In our view, the following information from the Tanana Basin Area Plan verifies that these lands do not "function primarily for Section 4(f) purposes." Rather, recreation is merely one of a variety of uses:

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- **Management unit 7F.** Primary surface uses for subunit 7F1 are wildlife habitat, forestry, and public recreation; in other words, recreation is only one of several primary uses. Moreover, the plan specifies that “[t]he Alaska Railroad extension shall remain as a reserved use corridor, 300 feet in width.” (page 3-220)
- **Management unit 7G.** Primary surface uses for subunit 7G2 are agriculture, wildlife habitat, forestry, and public recreation. Primary surface uses for subunit 7G3 are watershed, wildlife habitat, and public recreation. Recreation is only one of several primary uses in both 7G2 and 7G3. Again, the plan states that “[t]hroughout this unit, the Alaska Railroad extension shall remain as a reserved use corridor, 300 feet in width.” (page 3-221 to 3-222)
- **Management unit 7I.** Unlike management units 7F and 7G, the plan designates public recreation as the primary use in Subunit 7I2. And although the Alaska Railroad extension is not specifically mentioned in connection with unit 7I, the plan states that “[t]ransportation and pipeline corridors are key elements in this management unit.” (page 3-224)
- Other portions of the plan also emphasize the importance of transportation uses: “The design of an efficient transportation system is key to resource development and is a major determinant of land use patterns within the Tanana Basin. No attempt is made to identify actual routes of proposed roads and railroads. However, potential general transportation corridors have been identified. These corridors are designed to help resource development, increase opportunities for public recreation and tourism, and open land for settlement.” (page 4-11)
- Finally, the plan touts the benefits of what is now known as the Northern Rail Extension: “An extension of the Alaska Railroad from Fairbanks would provide access to the Delta Belt mineral area and could provide a connection to Canada . . . A route has been identified through the Tanana Basin . . .” (page 4-12)

Based on this information, there can be no dispute that a rail corridor through the area is wholly consistent with the Tanana Basin Area Plan. Because of this, the properties in the Dispersed Use Areas should not receive blanket Section 4(f) protection. We believe it is more consistent with the plan—and with Section 4(f)—to protect specific recreational trails within these Dispersed Use Areas. Section 4(f) regulations require a closer inspection of the function of the particular affected portion of the lands at issue. Indeed, it would be inconsistent with the Plan to consider vast swaths of land as a Section 4(f) simply because recreational use is designated as one of several primary uses in these areas.

Chena Lakes Flood Control Project Management Units 12 and 14

The Chena Lakes Flood Control Project functions primarily as part of a USACE flood control project. It includes portions of the Chena River Floodway and its southern levee, which protect the City of Fairbanks from flooding. The flood control project includes approximately 20,000 acres at the northernmost section of the proposed project area. According to DEIS Appendix M, the project would affect just 14.3 of these 20,000 acres.

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In non-flood periods, portions of the Chena Lakes Flood Control Project area are used for public recreation, accommodating a variety of trail-based recreation activities. These areas include a portion of the Fairbanks North Star Borough (FNSB) 100-mile Loop Trail that follows a braided path through the floodway area. There are also specific areas designated for recreational use within the Chena Lakes Flood Control Project, including the FNSB Chena Lake Recreation Area and the Moose Creek Dam Bikeway. We do not disagree that these specific recreational areas within the Chena Lakes Flood Control Project warrant protection under Section 4(f). But we do not believe the entire area should be considered a Section 4(f) resource, because its primary use is not recreational.

Eielson AFB Outdoor Recreation Area

The DEIS has identified two areas on Eielson Air Force Base (AFB) as Section 4(f) resources: the Twentythreemile Slough Trails and the Eielson Outdoor Recreation Area. The trails, maintained by the Salcha Dog Musers Association, are largely located throughout the Eielson Farm District, with one trail entering Eielson AFB on a slough. The maintenance and use of the slough for trails purposes is subject to permit by Eielson AFB and must be renewed on an annual basis.

The Eielson Recreation Area is located amongst several old gravel extraction areas that have since filled with water. Recreational improvements are limited to several picnic tables and some fire pits. Public access and use of the area is by permit only, and may be denied if use of the area is deemed to be in conflict with the greater designation of the land for military purposes. Additionally, camping is limited to military purposes only.

FHWA's 2005 Policy Paper once again provides useful guidance:

2. Public Parks, Public Recreation Areas and Wildlife and Waterfowl Refuges

Question C: Are publicly owned parks and recreation areas, which are significant but not open to the public as a whole, subject to the requirements of Section 4(f)?

Answer C: The requirements of Section 4(f) would apply if the entire public park or public recreation area permits visitation by the general public at any time during the normal operating hours of the facility. Section 4(f) would not apply when visitation is permitted to only a select group and not the entire public. Examples of select groups include residents of a public housing project; military and their dependents (see also Question 11 B); students of a school; and students, faculty, and alumni of a college or university. FHWA does, however, strongly encourage the preservation of such parks

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and recreation areas; even though they may not be open to the general public.

FHWA Section 4(f) Policy Paper at 12. Because the Eielson AFB Recreational Area and the crossings of the Twenthythreemil Slough Trails where they are located on Eielson AFB are not accessible to the general public, we submit that those areas do not qualify for Section 4(f) protection under FHWA guidance.

Selected Roads/Trails (ADNR Forestry Winter Road, U.S. Army Permit Route, Koole Lake Trail and Donnelly-Washburn Trails, and Silver Fox Lodge Trail)

We agree that some of the trails identified and discussed in Appendix M are Section 4(f) resources. However, we believe that more detailed analysis of the following trails is warranted, for the reasons described below:

- The U.S. Army Permit Route crosses the Little Delta River with the Koole Lake/Donnelly-Washburn Trail and collocates with all trails on the river's western bank for a stretch of approximately 1.5 miles, then diverges west across ADNR land toward the Tanana Flats Training Area (TA). It is not designated for public access, although public access is a generally-allowed use across ADNR-owned lands.
- The ADNR Forestry Winter Road, a multi-use road established by the Division of Forestry located entirely on ADNR land, is approximately 14.8 miles long, and connects the Delta River and Delta Creek across the benchlands above the Richardson Clearwater River. The road provides public access to a number of public and commercial timber sales in the Tanana Flats, and is also used for recreational vehicle activity.
- The Koole Lake Trail and Donnelly-Washburn trails are located west side of the Tanana River on both the east and west sides of the Little Delta River. The Koole Lake Trail is an ADF&G trail that collocates with the Donnelly-Washburn Trail from a trailhead at Richardson Highway near Birch Lake south along the western bank of the Little Delta River, crossing the Little Delta to a point within the Donnelly Training Area. At this point, the Koole Lake Trail diverges toward Koole Lake and the Donnelly-Washburn Trail continues to the southeast through the Donnelly TA. The Donnelly-Washburn Trail is an RS 2477 trail (number 0064). RS 2477 stands for Revised Statute 2477 from the Mining Act of 1866, which granted a public right-of-way across unreserved federal land to guarantee access as land transferred to state or private ownership. Located on both ADNR and U.S. Army land, the trails are multi-use, but primarily receive winter use. ADNR land in this area is managed primarily for forestry and wildlife habitat according to the Tanana Basin Area Plan (ADNR 1991), while military land is primarily for military use, but is provisionally open to recreation activities.

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- The approximately 6.1-mile long Silver Fox Lodge Trail leads south from the Silver Lake Lodge historical site along Richardson Highway and crosses the Tanana River. It is located on ADNR land south of the river, where it provides access to state land along the Fivemile Clearwater River, although portions of the trail may intersect some land in private ownership. The trail is established and recognized by the ADNR (lease assignment, or ADL lease number 409488). This multi-use trail provides public access across the Tanana River to areas surrounding the Fivemile Clearwater River. The trail also provides public access to ADNR lands further west, which may otherwise be inaccessible due to the military lands to the north and south. ADNR land surrounding the trail is designated for forestry and wildlife habitat uses in the Tanana Basin Area Plan. One management subunit contains accessible white spruce stands, and forestry activity has been ongoing. Appendix M states “. . . no other trail or road provides access to the private forestry lands adjacent to the trail.”

Appendix M's listing of these roads/trails as Section 4(f) resources cannot be reconciled with the information detailed above. A distinction ought to be recognized between trails used for public access and those used for recreational activities. The primary purpose of the ADNR Forestry Winter Road is access to public and commercial timber sales in the Tanana Flats, although we understand it is also used for recreational vehicle activity. The primary purpose of the Koole Lake Trail and Donnelly-Washburn trails is for access to ADNR land managed primarily for forestry and wildlife habitat and access to military land that is primarily for military use, although provisionally open to recreation activities. The primary purpose of the Silver Fox Lodge Trail is public access to ADNR lands designated for forestry and wildlife habitat uses, including lands where forestry activity has been ongoing. The primary purpose of the U.S. Army Permit Route is for military use, and it is not designated for public access except for a small portion collocated with other public trails. Because the primary use of these roads/trails is not recreational, we believe that they should not be considered Section 4(f) resources.

De minimis Impacts

Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) amended existing Section 4(f) statutory requirements to include an exception for uses of protected land that had a “de minimis” impact on that land. With respect to parks and recreation areas, SAFETEA-LU specifically authorized the Secretary of Transportation to find “that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section.” 49 U.S.C. § 303(d)(3). Importantly, this finding of no adverse effect may include consideration of impact avoidance, minimization and mitigation or enhancement measures. *See id.* § 303(d)(1)(C).

FHWA has developed a set of questions and answers that reinforce the importance of applying SAFETEA-LU's “de minimis” impact rules. *See FHWA, Questions and Answers on the Application of the Section 4(f) De Minimis Impacts Criteria.* That document makes clear that FTA applies the Section 4(f) de minimis rules. *See id.*, Question 1A. FRA has also applied the

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Section 4(f) de minimis rules in prior environmental reviews. *See, e.g.*, Draft Section 4(f)/303 Statement for the Dakota, Minnesota & Eastern Railroad Application for Railroad Rehabilitation and Improvement Financing (RRIF) Relating to the Powder River Basin Project (August 2006).

To date, it is our understanding that neither the Department of Transportation, FRA or FTA have weighed in on the Section 4(f) findings contained in DEIS Appendix M, including the possibility that any impacts to Section 4(f) properties are de minimis. As the Board proceeds with the Section 4(f) process, we believe it would be appropriate for the agencies to consider whether the impacts described in Appendix M are de minimis. If FRA and FTA conclude the project's impacts on a Section 4(f) property is indeed de minimis, the substantive requirements of Section 4(f) should not apply to that property.

As part of the project, ARRC plans to provide continuity of trails to ensure continued access to public lands. Please note the following statement regarding the proposed action from DEIS page 2-38:

To maintain access to existing public and private roads and trails across the rail line, ARRC would install grade crossings where the rail line would cross a roadway. . . . Where the rail line would cross legally authorized trails and FNSB trail easements, ARRC has indicated that the crossings would likely be grade separated. (DEIS page 2-38)

Also, the STB has included in the DEIS a mitigation measure (No. 62) requiring ARRC to provide a number of trail crossings, including crossings for the trail to the Blair Lakes Area; Silver Fox Lodge Trail; ADNR Winter Trail; Koole Lake Trail; Donnelly-Washburn Trail; ADNR Forestry Winter Road; and Rainbow Lake Trail. Notably, ARRC included two crossings of the ADNR Winter Trail as part of the proposed action. Implementation of ARRC's voluntary mitigation included as part of the project and STB measure 62 should make Section 4(f) impacts on these trails de minimis, assuming the agency with jurisdiction concurs.

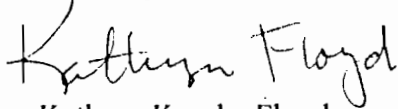
Archeological Sites

Page M-21 page states "In the case of archaeological sites, Section 4(f) applies to those sites that are on or eligible for inclusion in the National Register of Historic Places and that warrant preservation in place. It does not apply to sites that are eligible only for their research potential." We understand that this applies to FTA funded projects. Although we believe it will also apply to FRA funded projects, we urge STB to confirm this with FRA.

Thank you for your assistance in a timely resolution of these concerns. Please contact me at the telephone number or email address printed above if you have questions or require additional information.

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Sincerely,

A handwritten signature in black ink, appearing to read "Kathryn Floyd". The signature is written in a cursive, flowing style.

Kathryn Kusske Floyd

cc: David Navecky
Alan Summerville