

**HB**

**213**

<TARGET><BILL>HB 213</BILL><SUBJECT>HB  
213</SUBJECT><COMM>HRES29</COMM></TARGET>

29-LS0710\E  
Bullard  
3/16/16

**CS FOR HOUSE BILL NO. 213( )**

IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-NINTH LEGISLATURE - SECOND SESSION

**BY**

**Offered:  
Referred:**

**Sponsor(s): REPRESENTATIVES TILTON, Neuman, Hughes, Talerico**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the authority of the commissioner of natural resources to restrict or**  
2 **prohibit a traditional means of access to state land, water, or land and water for a**  
3 **traditional outdoor activity for the purpose of protecting aesthetic values of the land,**  
4 **water, or land and water; and requiring public notice of certain proposed restrictions or**  
5 **prohibitions of a traditional means of access to state land, water, or land and water for a**  
6 **traditional outdoor activity."**

7 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

8 **\* Section 1.** AS 38.04.200(a) is amended to read:

9 (a) **Notwithstanding any other provision of law, the** [THE] commissioner  
10 may not manage state land, water, or land and water so that a traditional means of  
11 access for traditional outdoor activities is restricted **or prohibited** for the purpose of  
12 protecting aesthetic values of the land, water, or land and water [OR IS  
13 PROHIBITED] unless the

1 **(1) commissioner makes specific, detailed written findings that the**  
 2 restriction or prohibition is

3 **(A)** [(1)] for an area of land, water, or land and water that  
 4 encompasses 640 contiguous acres or less;

5 **(B) to be in effect for not more than three years** [(2)  
 6 TEMPORARY IN NATURE] and [EFFECTIVE] cumulatively **in effect not**  
 7 **more** [LESS] than eight months in **that** [A] three-year period;

8 **(C) necessary** [(3)] for the protection of public safety and  
 9 public or private property **and**

10 **(i) affects only a traditional means of access on or**  
 11 **across a state-improved or state-maintained way or easement; and**

12 **(ii) a reasonable alternative for the traditional**  
 13 **means of access across the land, water, or land and water for**  
 14 **traditional outdoor activities on other land, water, or land and**  
 15 **water is available and approved by the commissioner; or**

16 **(D)** [; (4)] for the development of natural resources, and a  
 17 reasonable alternative for the traditional means of access across the land,  
 18 water, or land and water for traditional outdoor activities on other land, water,  
 19 or land and water is available and approved by the commissioner; or

20 **(2) restriction or prohibition is** [(5)] authorized by act of the  
 21 legislature.

22 \* **Sec. 2.** AS 38.04.200(b)(2) is amended to read:

23 (2) "traditional means of access" means those types of transportation  
 24 on, to, or in the state land, water, or land and water, for which a popular pattern of use  
 25 has developed; the term includes flying, ballooning, boating, using snow vehicles,  
 26 operation of **registered and unregistered** all-terrain vehicles **up to 10,000 pounds,**  
 27 horseback riding, mushing, skiing, snowshoeing, and walking;

28 \* **Sec. 3.** AS 38.05.945(a) is amended to read:

29 (a) This section establishes the requirements for notice given by the  
 30 department for the following actions:

31 (1) classification or reclassification of state land under AS 38.05.300

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and the closing of land to mineral leasing or entry under AS 38.05.185;

(2) zoning of land under applicable law;

(3) issuance of a

(A) preliminary written finding under AS 38.05.035(e)(5)(A) regarding the sale, lease, or disposal of an interest in state land or resources for oil and gas, or for gas only, subject to AS 38.05.180(b);

(B) written finding for the sale, lease, or disposal of an interest in state land or resources under AS 38.05.035(e)(6), except a lease sale described in AS 38.05.035(e)(6)(F) for which the director must provide opportunity for public comment under the provisions of that subparagraph;

(4) a competitive disposal of an interest in state land or resources after final decision under AS 38.05.035(e);

(5) a preliminary finding under AS 38.05.035(e) concerning sites for aquatic farms and related hatcheries;

(6) a decision under AS 38.05.132 - 38.05.134 regarding the sale, lease, or disposal of an interest in state land or resources;

**(7) a restriction or prohibition of a traditional means of access to state land, water, or land and water for traditional outdoor activities for the purpose of protecting aesthetic values of the land, water, or land and water under AS 38.04.200.**



# ALASKA STATE LEGISLATURE

## House Community and Regional Affairs Committee

REP. CATHY TILTON  
*Chairman*  
State Capitol, Rm. 411  
Juneau, AK 99801

Rep. Paul Seaton, Vice-Chair  
Rep. Shelley Hughes  
Rep. Benjamin Nageak  
907.465.2199

Rep. Lora Reinbold  
Rep. Harriet Drummond  
Rep. Dan Ortiz

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## SPONSOR STATEMENT

### House Bill 213

*"An Act requiring the commissioner of natural resources to make specific, detailed written findings before restricting or prohibiting a traditional means of access to state land, water, or land and water for a traditional outdoor activity; and requiring certain public notice of a proposed restriction or prohibition of a traditional means of access to state land, water, or land and water for a traditional outdoor activity."*

HB 213 strengthens two sections of current law to give citizens better access to information about the status of their public lands. Specifically, the bill directs the commissioner of natural resources to notify the public before he or she closes public rights of way. There are two parts to the new requirement: the first part is a written finding by the commissioner; the second part is that notice to the public meets the requirements of AS38.05.945.

HB 213 seeks to address situations where the public needs advance notice of restrictions or prohibitions of access to public land for traditional outdoor activities. In the past, the Department of Natural Resources has closed trails used by the public for hunting, mining, or to access their cabins, without adequate public notice, leaving the public without options to access public lands and conduct their activities.

HB 213 will help to clarify DNR's responsibility to the public in managing public lands for them on their behalf.

# Representative Cathy Tilton

Alaska State Legislature – House District 12



## SUMMARY OF CHANGES

HB 213 (29-LS0701\W) to CSHB 213 (29-LS0701\E)

Both versions contain the requirement for the commissioner of the Department of Natural Resources (DNR) to make “specific, detailed written findings” if the commissioner manages state land or water that restricts or prohibits traditional means of access for the purpose of protecting aesthetic value of the land or water.

In addition, both versions amend AS 38.05.945(a)(The Alaska Land Act) to add public notice requirements for restrictions or prohibitions to traditional means of access.

The changes in the E version were included to be more responsive to the points of law ruled on by the Alaska Supreme Court in Caywood v. State Department of Natural Resources.

### Key Differences

The proposed CS (Version E) provides greater specificity about what must be contained in the detailed, written findings required of the commissioner if the management of state land restricts or prohibits traditional means of access for aesthetic purposes.

Specifically, those findings must demonstrate that the restriction or closure:

- (A) Must be for an area of 640 contiguous acres or less (*Page 2, lines 2-3*);
- (B) May not be in effect for more than 3 years and cannot be in effect for more than 8 month, cumulatively, during that time (*Page 2, lines 5-7*);
- (C) Must be deemed “necessary” for public safety purposes (*Page 2, lines 8-9*) and
  - a. Affects only a traditional means of access on a state improved or state maintained way or easement (*Page 2, lines 10-11*); and
  - b. A reasonable alternative for the traditional means of access is **provided if available** (*Page 2, lines 12-15*); or

# Representative Cathy Tilton

*Alaska State Legislature – House District 12*



*(D) Must be for the development of natural resources or is authorized by the legislature.  
(Page 2, lines 16-20)*

In addition, Version E amends the definition of "traditional means of access" found in AS 38.04.200(b)(2) to include "registered and unregistered" vehicles "up to 10,000 pounds." (Page 2, line 26).

State Capitol Rm. 411  
907.465.2199  
Rep.Cathy.Tilton@akleg.gov

# Fiscal Note

State of Alaska  
2016 Legislative Session

Bill Version: HB 213  
Fiscal Note Number: \_\_\_\_\_  
( ) Publish Date: \_\_\_\_\_

Identifier: HB213-DNR-MLW-3-24-16  
Title: RESTRICT ACCESS ST.  
LAND;FINDINGS;NOTICE  
Sponsor: TILTON  
Requester: House Resources Committee

Department: Department of Natural Resources  
Appropriation: Fire Suppression, Land & Water Resources  
Allocation: Mining, Land & Water  
OMB Component Number: 3002

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates					
			FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	
<b>OPERATING EXPENDITURES</b>								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants & Benefits								
Miscellaneous								
<b>Total Operating</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**Fund Source (Operating Only)**

None								
<b>Total</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**Positions**

Full-time								
Part-time								
Temporary								

<b>Change in Revenues</b>								
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**Estimated SUPPLEMENTAL (FY2016) cost:** 0.0 *(separate supplemental appropriation required)*  
*(discuss reasons and fund source(s) in analysis section)*

**Estimated CAPITAL (FY2017) cost:** 0.0 *(separate capital appropriation required)*  
*(discuss reasons and fund source(s) in analysis section)*

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No  
If yes, by what date are the regulations to be adopted, amended or repealed? N/A

**Why this fiscal note differs from previous version:**

Not applicable, initial version.

Prepared By: <u>Brent Goodrum, Director</u>	Phone: <u>(907)269-8625</u>
Division: <u>Mining, Land and Water</u>	Date: <u>03/24/2016 12:00 AM</u>
Approved By: <u>Marty Rutherford, Acting Commissioner</u>	Date: <u>03/24/16</u>
Agency: <u>Department of Natural Resources</u>	

FISCAL NOTE ANALYSIS

STATE OF ALASKA  
2016 LEGISLATIVE SESSION

BILL NO. HB 213

**Analysis**

DNR does not anticipate any fiscal impact from this legislation.

Section 1: Modifies AS 38.04.200(a). The modification requires the commissioner to make specific, detailed written findings regarding the requirements of paragraphs (1) -(5) of that subsection.

Section 2: Modifies existing AS 38.05.945(a) to require public notice for a restriction or prohibition of a traditional means of access to state land, water, or land and water for traditional outdoor activities for the purpose of protecting aesthetic values of the land, waters or land and water under AS 28.04.200.

11 AAC 96.020. Generally allowed uses (a) A permit or other written authorization is required for uses and activities not appearing on the list in this subsection. Unless otherwise provided in (b) of this section, in a special use land requirement in 11 AAC 96.014, or in a public use area land requirement under 11 AAC 96.016, the following land uses and activities, alone or in combination, are generally allowed uses on state-owned public domain land without any permit or other written authorization from the department, except that a land use or activity for a commercial recreation purpose requires prior registration under 11 AAC 96.018: (1) travel or travel-related activities, as follows: (A) hiking, backpacking, skiing, climbing, or other foot travel; (B) bicycling; (C) travel by horse or dogsled or with pack animals; (D) using a highway vehicle with a curb weight of up to 10,000 pounds, including a pickup truck and four-wheel-drive vehicle, on or off an established road easement, if the use off the road easement does not cause or contribute to water quality degradation, alteration of drainage systems, significant rutting, ground disturbance, or thermal erosion; (E) using a recreational-type off-road or all-terrain vehicle with a curb weight of up to 1,500 pounds, including a snowmobile and four-wheeler, on or off an established road easement if use off the road easement does not cause or contribute to water quality degradation, alteration of drainage systems, significant rutting, ground disturbance, or thermal erosion; (F) landing an aircraft or using watercraft without damaging the land, including shoreland, tideland, and submerged land; (G) driving livestock, including any number of reindeer or up to 100 horses, cattle, or other domesticated animals; (2) access improvements, as follows: (A) brushing or cutting a trail less than five feet wide using only hand-held tools such as a chainsaw; making a trail does not create a property right or interest in the trail; (B) anchoring a mooring buoy in a lake, river, or marine waters, or placing a float, dock, boat haulout, floating breakwater, or boathouse in a lake, river, or marine waters, for the personal, noncommercial use of the upland owner, if the use does not interfere with public access or another public use, and if the improvement is placed within the projected sidelines of the contiguous upland owners parcel or otherwise has the consent of the affected upland owner; in this subparagraph, (i) "float" or "dock" means an open structure without walls or roof that is designed and used for access to and from the water rather than for storage, residential use, or other purposes; (ii) "boat haulout" means either a rail system, at ground level or elevated with pilings, or a line attached from the uplands to an anchor or mooring buoy; (iii) "floating breakwater" means a structure, including a log bundle, designed to dissipate wave or swell action; (iv) "boathouse" means a structure designed and used to protect a boat from the weather rather than for other storage, residential use, or other purposes; (3) removing or using state resources, as follows: (A) hunting, fishing, or trapping, or placement of a crab pot, shrimp pot,

herring pound, or fish wheel; nothing in this subparagraph relieves a person from complying with applicable state and federal statutes and regulations on the taking of fish and game; (B) harvesting wild plants, mushrooms, berries, and other plant material for personal, noncommercial use; however, the cutting of trees is not a generally allowed use under this subparagraph; (C) using dead and down wood for a cooking or warming fire, unless the department has closed the area to fires during the fire season; (D) grazing no more than five domesticated animals; (E) recreational gold panning; (F) hard-rock mineral prospecting or mining using light portable field equipment, including a hand-operated pick, shovel, pan, earth auger, or a backpack power drill or auger; (G) suction dredging using a suction dredge with a nozzle intake of six inches or less, powered by an engine of 18 horsepower or less, and pumping no more than 30,000 gallons of water per day; (4) other improvements and structures on state land, as follows: (A) setting up and using a camp for personal, noncommercial recreational purposes, or for any non-recreational purpose, including as a support camp during mineral exploration, for no more than 14 days at one site, using a tent platform or other temporary structure that can readily be dismantled and removed, or a floathouse that can readily be moved; the entire camp must be moved at least two miles before the end of the 14-day period; a cabin or other permanent improvement is not allowed, even if on skids or another nonpermanent foundation; the camp must be removed immediately if the department determines that it interferes with public access or other public uses or interests; (B) brushing or cutting a survey line less than five feet wide using only hand-held tools, including a chainsaw, or setting a survey marker; however, a survey monument may not be set without written survey instructions issued under 11 AAC 53; (C) placing a residential sewer outfall into marine waters from a contiguous privately owned upland parcel, with the consent of the affected parcel owners, if the outfall is within the projected sidelines of the contiguous upland parcel and is buried to the extent possible or, where it crosses bedrock, secured and covered with rocks to prevent damage; nothing in this subparagraph relieves a person from complying with state and federal statutes and regulations applicable to residential sewer outfalls; (D) placing riprap or other suitable bank stabilization material to prevent erosion of a contiguous privately owned upland parcel if (i) no more than one cubic yard of material per running foot is placed onto state shoreland; and (ii) the project is otherwise within the scope of the United States Army Corps of Engineers Nationwide Permit 13 (Bank Stabilization), as set out in 67 Fed. Reg. 2,020 - 2,095, dated January 15, 2002 and adopted by reference; (5) uses not listed in (1) - (4) of this subsection that (A) are not conducted for a commercial recreational purpose; (B) are not listed in 11 AAC 96.010; (C) do not cause or contribute to significant disturbance of vegetation, drainage, or soil stability; (D) do not interfere with public access or other public uses or

interests; and (E) do not continue for more than 14 consecutive days at any site; moving the use to another site at least two miles away starts a new 14-day period. (b) The list of generally allowed uses in (a) of this section does not (1) apply to land withdrawn from the public domain and no longer managed under AS 38, including a state park and land owned by the University of Alaska; (2) exempt a user from complying with other applicable federal, state, or municipal statutes, ordinances, and regulations; or (3) authorize a use if another person has already acquired an exclusive property right to undertake that use. (c) In order to operate under a generally allowed use listed in this section, the user must comply with the conditions set out in 11 AAC 96.025. (d) If the department determines that, under the circumstances of a particular case, an otherwise generally allowed use interferes with public access or other public uses or interests, the use must cease.

[http://www.newsminer.com/news/alaska\\_news/department-of-natural-resources-limits-heavy-vehicles-on-rex-trail/article\\_0f1368fe-52d8-11e5-beda-fb8b6fff89df.html](http://www.newsminer.com/news/alaska_news/department-of-natural-resources-limits-heavy-vehicles-on-rex-trail/article_0f1368fe-52d8-11e5-beda-fb8b6fff89df.html)

## Department of Natural Resources limits heavy vehicles on Rex Trail

Staff Report newsroom@newsminer.com Sep 3, 2015

FAIRBANKS—The Alaska Department of Natural Resources will again limit heavy “moose buggies” on the Eastern Rex Trail during the 2015 hunting season.

The department extended a permit system last week that’s been in place since 2009 for the popular 50-mile trail off the Parks Highway. The continued permit process came over the objection of statewide sportsmen’s group, the Alaska Outdoor Council, which wants the state to lift the vehicle restrictions.

Like previous permit systems, the 2015 Rex Trail permitting system doesn’t require permits for conventional ATVs, only off-road vehicles heavier than 1,500 pounds. Vehicles that are heavier than 1,500 pounds need a \$100 permit and must be no larger than the Nodwell 110 model. The permits are only available for tracked vehicles and do not allow vehicles to pull trailers. They authorize travel only along the trail and in designated pull-out areas. The state has given 78 permits since the permitting system started in 2009.

The Rex Trail system is different than the state’s normal system for travel on state land with heavy-duty vehicles. People who want to travel off trail throughout other state lands could potentially take a wheeled vehicle or a moose buggy larger than the Nodwell 100 if they obtain a land use permit.

The state began limiting large vehicle use on the trail in 2008, citing safety concerns about large ruts on the trail as large as 3 feet deep.

In one of two comments the state received about the rule extension, Alaska Outdoor Council Executive Director Rod Arno criticized the state for continuing to limit access without making noticeable improvements to the trail.

The department's northern region manager, Jeanne Proulx, responded in a formal record of decision about the trail that the state has identified four parts of the trail for repair. It has funding for two of the projects and has completed one, a side trail for small ATVs that avoids some of the most rutted parts of the main trail. Proulx also described the Rex Trail system as a benefit to public access because the department can often turn Rex Trail permits around in a day. Land use permits for taking moose buggies to other state lands can take months to obtain, she said.

The decision and required permit application is available on the Department of Natural Resources website at [dnr.alaska.gov/mlw/rextrail](http://dnr.alaska.gov/mlw/rextrail).

For additional information related to the Rex Trail, call Proulx at 451-2711 or email [jeanne.proulx@alaska.gov](mailto:jeanne.proulx@alaska.gov).

*Contact the newsroom at 459-7572.*

**Clarification:** *This article has been changed to reflect the fact that the state only has funding for two Rex Trail repair projects. It has identified two additional projects, but does not have funding for these.*

# **Rex Trail – Resource Management Evaluation**

Alaska Department of Natural Resources  
Division of Mining, Land & Water

## **Executive Summary**

### **What is the Rex Trail?**

The subject of this White Paper is the eastern Rex Trail, an important commercial, recreational, and residential access route north of the foothills of the Alaska Range. It runs east from the George Parks Highway for more than 50 miles to the Wood River. North of the Wood River, it enters Fort Wainwright Military Reserve near the Blair Lakes Impact Area. The Rex Trail is a reserved public right of way easement, created and managed for general access purposes to adjacent state lands and past land disposal projects in the area. In the early 1900's, miners created this route for winter access to mineralized areas near Bonnifield and Gold King Creek. Active mines still operate there today, and heavy equipment travel is actively managed through the Annual Placer Mining Application (APMA) permit process. To better protect the public's right of access to planned land sale offerings at Browns Court, Southwind Homestead, Gold King Remote Parcel and Wood River Remote Parcel areas, the state overlaid portions of the original RS 2477 route (RST 119) with Alaska Division of Lands (ADL) public access easements.

Depicted on USGS topographic maps as a "sled road", this essentially unimproved trail crosses multiple terrain types including permafrost-rich wetlands, riparian zones at 3 river crossings, white and black spruce forest. While some summer/fall travel has been possible on this route (requiring careful timing and favorable conditions), the nature of terrain and equipment limitations has historically favored winter travel. The Rex Trail supports mining, hunting, residents, and various forms of public recreation. It is one of the main access routes into Game Management Unit 20A, which has been legislatively designated for Intensive Management (meat production).

### **What Is The Problem?**

Rex Trail use patterns have changed significantly in recent years. Intense seasonal motorized use of standard ATV's and increased numbers of large ORVs such as Nodwells and custom-built "moose buggies" have caused severe trail damage, which in turn has compromised the opportunity for reasonable and safe passage for some traditional trail users – both in the fall and also in winter, when travel has historically been very dependable. While the overall goal has and continues to be the protection of long-term public access opportunities, to date, DNR has passively managed non-commercial travel on the Rex Trail under regulations written to guide generally allowed uses on state lands (11 AAC 96.020). There is every indication that this trail will see increased traffic in the future; it is likely that trail conditions will continue to degrade and more opportunities for accessing state lands will be lost, if an effective management strategy for the Rex Trail is not reviewed and implemented. Public opinions are

extremely varied regarding what constitute reasonable and safe passage, and appropriate trail management. Comments range from requests for DNR to actively restrict vehicles (based on season, weight, ground pressure, or other factors), to requests to upgrade or "fix" the trail to accommodate all-season traffic with all vehicle types; some recommend that no active management is necessary – that any and all travel methods are acceptable regardless of impacts to the land and other trail users.

Although this paper focuses on the Rex Trail, similar problems are developing on state lands in other areas. Any management strategies developed and applied to the Rex Trail situation will have relevance to other similar situations; therefore the statewide impact of the Rex Trail decision must be taken into account.

The Division's response to the problems identified is seriously constrained by staffing and budgetary limitations, the absence of enforcement authority, and the lack of a regulatory framework which clearly differentiates management goals and objectives for easements versus general state lands. The issue is complicated by the fact that trail degradation is not the result of a single action or user, but a combination of cumulative (but otherwise legal) ATV use, unpermitted large equipment activity which has gone unrestricted for years, and individual cases of reckless motorized use.

## **Discussion**

In managing public uses of and impacts on state land, DNR must recognize and adjust for a wide variety of natural resource conditions and user preferences (means and methods). Because the goal is multiple-use management, the size and scope of this responsibility is vast, and the means for implementation (staffing and operational funds) are limited, the division has developed policies and rules which encourage the widest possible scope of public use of state lands without direct agency oversight (permitting). The Generally Allowed Uses regulations regarding access across state lands (11 AAC 96.020) reflect this. In light of this situation, the Division's management profile is often reactionary and not pro-active towards on-the-ground management of state lands. Essentially, the Division reacts when resource impacts or user conflict rises to a level where the State's interest or public safety is being compromised. In such instances, the potential need for trail restrictions or closures, and the authority to accomplish this is found in state statute – AS 38.04.058; regulations 11 AAC 51.100 (a) guide the process.

In the case of easements, the Division's primary responsibility has been to identify, reserve, and defend the public's right to use those access easements consistent with the purposes for which they were established. The Division generally does not initiate or manage projects to construct, upgrade, or improve accessibility on public easements. Traditionally in Alaska, it is the public sector (working with the Division, other relevant authorizing agencies, and appropriate funding sources) which makes improvements on established easements. Those improvements – whether privately or publicly funded – are then available for general public use.

## **Options and Goals:**

In its initial evaluation of Rex Trail management issues, the Division of Mining, Land, and Water is reviewing a number of possible options including:

- no change to the current management strategy
- seasonal trail closures to all or to certain motorized vehicles
- trail maintenance or upgrades
- trail realignments
- regulation changes

The evaluation of these options includes identification of the benefits, disadvantages, and limiting factors to implementation. Due to the complexity of the issue, all options are expected to have impacts on some or several user groups.

The final plan for management of the Rex Trail must consider the overall intent to protect long-term public access opportunities. Responsible management will require both short- and long-term goals/actions. Short-term goals must address the immediate need for appropriate public involvement and notice, coordination with ADF&G and the US Military, identification of additional trail assessment needs, and a clear decision regarding Rex Trail management for the upcoming summer season. Long-term goals must address the potential need for regulation or policy changes that may be necessary to clarify the Division's management of unimproved easements. A system which acknowledges the intentional concentration of public use (and inevitable impacts) to easement corridors, while providing workable, fair mechanisms for reasonable resource damage control must be developed. In addition, long-term management of the Rex Trail and other state lands must address the use and potential impacts of large ORVs. Use of these vehicles is increasing, and operators are seeking opportunities to legally operate their vehicles without need for individual permitting. If large ORVs displaced from the Rex Trail by a restriction, they would have few options for summer/fall access to hunting areas east of the Parks Highway, as no hardened trails lead to current motorized hunting areas north of Gold King where large ORVs are currently hunting.

The chosen option for short-term management must, inevitably, be made based on the current information, and with the understanding that future information may lead to a change in management decisions. Additional work and analysis must be done to develop a comprehensive and responsible management strategy for the Rex Trail. This evaluation documents our initial efforts to identify the issues and possible options for future management.

FindLaw Caselaw Alaska AK Supreme Ct. CAYWOOD v. STATE DEPARTMENT OF NATURAL RESOURCES

## CAYWOOD v. STATE DEPARTMENT OF NATURAL RESOURCES

Print

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### Supreme Court of Alaska.

**Robert CAYWOOD, Paula Caywood, Michael Caywood, Harold Bryant, Ann Bryant, Jubal Bryant, Melvin Grove, Cheryl Grove, Seth Grove, Tom Anderson, Brad Krueger, Bruce Carter, Greg Shaffer, John Bradshaw, Stephen R. Jones, Jack J. Jones, Daniel McCabe, Ron Woods, Craig Woods, Jeff Woods, Frank Hollis, William Everett, David Dickey, Davie Malzac, Gregory E. Dabney, and The Alaska Outdoor Access Alliance, Appellants, v. STATE of Alaska, DEPARTMENT OF NATURAL RESOURCES, Appellee.**

**No. S-14253.**

**Decided: November 23, 2012**

Before: CARPENETI, Chief Justice, FABE, WINFREE, and STOWERS, Justices, and MATTHEWS, Senior Justice.\* Darryl L. Thompson, Darryl L. Thompson, P.C., Anchorage, for Appellants. Cameron M. Leonard, Senior Assistant Attorney General, Fairbanks, and John J. Burns, Attorney General, Juneau, for Appellee.  
OPINION

#### I. INTRODUCTION

The Department of Natural Resources restricted the non-winter use of large vehicles on the Rex Trail. The main question in this case is whether these restrictions are within the Department's authority. Because the Department has broad authority to manage public lands in general and specific authority to manage rights-of-way such as the Rex Trail, and the restrictions do not violate any statutory limitations on this authority, we conclude that they are authorized.

#### II. FACTS AND PROCEEDINGS

##### A. Facts

The Rex Trail is a route extending some 50 miles between the Parks Highway and the Wood River north of the Alaska Range. Except for a portion about one-and-a-half miles in length nearest the Parks Highway the trail has not been improved. The trail almost exclusively crosses state and federal land. It was established in the early twentieth century as a transportation route to mining claims, and in light of its historic use, the Alaska Legislature has recognized it as an R.S. 2477 right-of-way.<sup>1</sup> In the 1970s the trail was used for access to remote parcels that were made available for sale by the State. The trail has also traditionally been used by hunters to gain access to productive moose habitat. In 2004 the Board of Game legalized antlerless moose hunts on lands adjacent to the trail. The amount of traffic on the trail increased substantially due to this hunt. Many different types of vehicles use the Rex Trail including light 3- and 4-wheel all-terrain vehicles (ATVs) as well as heavier, large-tired and tracked vehicles.

In 2007 the State Department of Natural Resources (DNR) received numerous complaints about the deteriorating condition of the trail. DNR personnel inspected the trail several times and determined that vehicular use of the trail was causing extensive rutting, with some ruts as deep as four feet. They noted that in some places the trail had essentially become a long channel filled with water. In order to avoid ruts, vehicles would create new paths along the trail. These new paths would themselves become rutted resulting in a continual process of widening and degradation. The DNR observers concluded that the rutting of the trail made travel for ATVs and snowmachines both dangerous and difficult. They also noted that the trail conditions were much worse than when they had checked the same route in the winter of 2002.

##### B. Proceedings

In May 2008 DNR's northern region manager issued a decision restricting vehicles weighing more than 1,500 pounds from using the Rex Trail every year from April 15 to October 31. The stated goals of the restrictions were

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"to slow the degradation of access conditions, reduce the risks to public safety during trail travel, and to reduce the potential for more significant resource damage." The restrictions did not include the 1.5 miles of the trail nearest the Parks Highway that have been hardened for general vehicle use. As grounds for the decision, DNR indicated that heavy-vehicle use during the summer was particularly damaging:

In its current unimproved state, the Rex Trail is most suitable for safe, reliable travel and most resistant to damage in winter, when frozen conditions and snow cover stabilize and protect wet, permafrost-underlain soils. Traditionally, summer motorized use by standard ATVs has not been reliable for continuous access from the highway to Wood River (due to presence of wetlands and river crossings), but was possible in dry years/seasons, and certainly possible in discontinuous sections of the trail.

In response to public reports of intense seasonal motorized use, increased travel with large off-road vehicles (such as Nodwells and large-tired "moose buggies") and degrading travel conditions on the eastern Rex Trail, DNR conducted an evaluation of information including DNR field work (a preliminary trail condition assessment), land records, current statutes and regulations, scientific studies, varying public reports and concerns, data from other agencies, and possible trail management options. The report documenting this preliminary evaluation (attached to this decision) noted that the type and intensity of motorized use of the eastern Rex [T]rail has changed in recent years, that travel conditions on the trail are deteriorating due to seasonal rutting and thermal degradation, and that public resources are being damaged and wasted due to off-trail travel. The report also noted that the resource damage which contributes to deteriorating travel conditions cannot be attributed to a single operator or vehicle type—impacts are cumulative, and public interpretations of "damage" vary. Certain conditions on the trail and nearby lands observed this fall and winter, however, are unquestionably due to the operation of wheeled and tracked vehicles larger than standard ATVs or snowmachines. Ruts in excess of 3 feet deep with tracks too wide for an ATV or snowmachine to span, and wide swaths of downed trees left in newly-created trails originating from the Rex represent forms of travel disruption and resource damage above and beyond what is possible for traditional off-road vehicles. The poor trail conditions interfere with traditional travel both in summer (which has always been variable, depending on wet or dry years) and in winter, which has traditionally been very reliable. Most of the summer large equipment use has occurred without DNR permitting, in violation of current regulations. The report listed several options for both short- and long-term management; this decision is based on the most feasible short-term management option evaluated, given the available information.[2]

Robert Caywood and numerous other trail users (Caywood) appealed this decision to the DNR commissioner. The commissioner denied the appeals on August 27, 2009.

Meanwhile, on August 25, 2009, the northern region manager amended the restrictions to allow tracked vehicles heavier than 1,500 pounds to use the trail on an individual permit basis. This modification was made "so that DNR can monitor impacts of this additional use." DNR explained that "[t]he goal of the monitoring program will be to gather trail/travel conditions, use and impact data, and to evaluate the usefulness of the program for making future management decisions."

Caywood also appealed the amended decision to the commissioner, who again denied the appeal. Caywood then appealed both decisions to the superior court. The superior court affirmed the commissioner, and Caywood now brings the appeal to this court.

### III. STANDARD OF REVIEW

Where the superior court has acted as an intermediate appellate court reviewing an agency decision, we review the agency decision directly.<sup>3</sup>

The questions in this case are whether the restrictions imposed on the use of the trail are (1) authorized by statute and (2) arbitrary or unreasonable. The first question is a question of law to which we apply our own independent judgment without affording significant deference to the agency's decision.<sup>4</sup> The second question involves a discretionary decision of the agency. We review it deferentially, asking primarily whether the agency has taken a hard look at the problem under review and has engaged in reasoned decision making.<sup>5</sup>

### IV. DISCUSSION

#### A. Statutory And Regulatory Background

Under the Alaska Land Act, the Department of Natural Resources is charged with administering state lands.<sup>6</sup> Within the Department, the Division of Mining, Land and Water bears this responsibility.<sup>7</sup> Specifically, the director of the Division of Mining, Land and Water has the delegated authority to manage and control state lands.<sup>8</sup>

Under AS 19.30.400(a), R.S. 2477 rights-of-way such as the Rex Trail are "available for use by the public under regulations adopted by the Department of Natural Resources."<sup>9</sup> One such regulation is 11 Alaska Administrative Code (AAC) 51.100, which vests the commissioner with management authority and permits the commissioner to restrict right-of-way uses in order to protect public safety, the right-of-way, and the servient estate.<sup>10</sup>

The statute primarily in controversy in this case is AS 38.04.058 which provides:

The commissioner may, under terms agreed to in writing by a grantee, lessee, or interest holder of state land, restrict the use of an easement or right-of-way reserved under AS 38.04.050, 38.04.055, or other law in order to protect public safety or property. The commissioner may not agree to or enforce a restriction under this section unless the restriction is narrowly tailored to achieve the protection of public safety and property while

preserving access to the maximum extent practicable and the commissioner makes a written finding identifying how the restriction will protect public safety and public or private property.

The text of the statutes to which section .058 refers, AS 38.04.050 and AS 38.04.055, is set forth in the margin.<sup>11</sup>

Alaska Statute 38.04.200 limits the authority of the commissioner of the Department of Natural Resources to restrict traditional means of access for the purpose of protecting "aesthetic values" except under certain conditions and for certain purposes.<sup>12</sup>

Regulation 11 AAC 96.020, in effect since 1970, defines generally allowed uses of state land that may be engaged in without a permit. These include using a highway vehicle with a curb weight of up to 10,000 pounds and using a recreational off-road or all-terrain vehicle with a curb weight of up to 1,500 pounds.<sup>13</sup>

#### B. The Restrictions Are Authorized By Law.

The northern region manager relied on AS 38.04.058 and 11 AAC 51.100 as the authority for the initial restrictions. The commissioner's decision of August 27, 2009 relied on the same statutory section and regulation.

In his brief before us, Caywood's primary focus is on AS 38.04.058. He contends that this statute only applies where a grantee, lessee, or interest holder of state land is involved, and only then when the grantee, lessee, or interest holder agrees in writing with the restrictions imposed by DNR. He argues:

Reasonable application of this statute would be applying it to situations where the State enters into a mineral lease and both the lessee and the State agree to certain restrictions on an easement running through the leasehold interest because it would be unsafe for the public to cross the area in light of the use of heavy equipment, explosives or strip mining on the leasehold.

Such limited applications, Caywood argues, bear no resemblance to the restrictions imposed on the 50-mile-long Rex Trail; therefore section .058 does not authorize the Rex Trail restrictions.

We agree that section .058 is a statute of limited application.<sup>14</sup> It does not apply to this case because, among other reasons, the restrictions here were not mutually agreed upon between the commissioner and interested grantees, lessees, or interest holders. We thus agree that section .058 does not supply authority to restrict the use of the Rex Trail.

But our conclusion that the restrictions on the Rex Trail could not be based on section .058 does not mean that the restrictions are not authorized. They clearly are authorized under 11 AAC 51.100(a). This regulation, as noted above, was promulgated under AS 19.30.400(a). It recognizes the commissioner's management authority over R.S. 2477 rights-of-way. Specifically, the commissioner is authorized to restrict right-of-way uses as necessary to promote public safety, or to protect the right-of-way or the servient estate from damage caused by use during thawing conditions. In this case the written decision of the DNR northern region manager, ratified by the commissioner's decisions on appeal, indicates that these conditions have been satisfied.

In addition, insofar as the right-of-way crosses state land and also because it is a state-owned interest in land, the general management authority delegated to the Division of Mining, Land and Water under AS 38.05.035(a)(2) serves as authority for the restrictions. In its brief on appeal before this court the State has relied on section .035(a)(2), and other related provisions of the Alaska Land Act, arguing that the management of trails across state land falls under the general statutory duties and powers of DNR. We agree. We also note that even though DNR's general management authority was not relied upon by the agency in imposing the restrictions such authority nonetheless can serve as a basis for affirming the agency.<sup>15</sup>

#### C. The Restrictions Are Not Arbitrary Or Unreasonable.

Caywood acknowledges that AS 38.04.200 permits restricting traditional means of access for the protection of public safety and property, but he argues that the protection of public safety and property rationale in this case is merely a ruse and the restrictions are "not supported by substantial evidence of restrictions necessary for public safety or protection of property."

The State responds to Caywood's reliance on AS 38.04.200 on a number of grounds. One is that the statute only applies to restrictions on access imposed to protect aesthetic values and the restrictions here were not imposed for this purpose. "Aesthetic values" in section .200 are defined to mean "those values that exist as an expression of the social or cultural viewpoint held by a portion of the population."<sup>16</sup> The State contends that the restrictions on the Rex Trail were imposed for the purpose of protection of public safety and public property and that these purposes do not fall within the meaning of aesthetic values under the statute.

We agree with the State on this point. Further, even if restrictions to protect public safety and property could also be categorized as for the protection of aesthetic values, subsection (a)(3) of section .200 excepts restrictions for the purpose of protecting public safety and property from the coverage of the act.

Caywood's point that the restrictions are not supported by substantial evidence misconceives the substantial evidence standard. We review administrative adjudications to determine whether they are supported by substantial evidence.<sup>17</sup> Policy decisions such as whether to impose restrictions on the use of state land are reviewed under the deferential reasonable basis test.<sup>18</sup> Under this test we ask whether the decision is reasonable and not arbitrary.<sup>19</sup> In making this determination courts may not "substitute their judgment for the judgment of the agency."<sup>20</sup> Rather "review consists primarily of ensuring that the agency has taken a hard look

at the salient problems and has genuinely engaged in reasoned decision making.”<sup>21</sup>

We consider Caywood’s argument that the restrictions are not based on substantial evidence to raise the question of whether the restrictions are reasonable and not arbitrary. The question is easily answered. The record amply supports the agency’s decision that deep rutting along the Rex Trail presents a safety hazard, especially in winter to travelers on snowmachines. There is also record support for the conclusion that heavy vehicles are responsible for the worst of the rutting along the Rex Trail and that the resulting level of degradation is unacceptable. Further, the record reflects that DNR has given considerable attention and study to the question of whether restrictions should be imposed on the use of the Rex Trail and if so what they should be. The agency therefore has satisfied the “hard look” and reasoned decision-making requirements of the reasonable basis standard.

#### V. CONCLUSION

For these reasons the judgment of the superior court affirming the decisions of the Department of Natural Resources is **AFFIRMED**.

MATTHEWS, Senior Justice.

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