



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

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VIA Email

Jorjena Daly, Project Manager
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Re: Six Preliminary Reports Prepared for Development of the Bering Sea-Western Interior Draft Resource Management Plan/Environmental Impact Statement

Dear Ms. Daly,

The Citizens' Advisory Commission on Federal Areas (Commission) sincerely appreciates the opportunity to comment on the planning documents released in February and April related to development of the Bering Sea-Western Interior (BSWI) Resource Management Plan (RMP) and associated Environmental Impact Statement. Draft RMPs in Alaska have grown to a staggering size and complexity, substantially limiting reviewers' ability to carefully read and develop meaningful and targeted comments. This advance review period of preliminary planning documents is a welcome opportunity to relieve some of that burden and provide input at an early stage in the process to create a more defensible and informed draft management plan.

The following comments are primarily general (applying overall or to multiple components) with some page-specific comments (applying to only one or a few components) and are organized per report, as requested in the call for comments.

Preliminary Alternatives

The two draft alternatives, actions common to all alternatives and proposed management actions include virtually no mention of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). Even though the report and its recommendations are very preliminary in nature, this fundamental statute has and will have a significant impact on both proposed management and implementation in the planning area. The lack of essential ANILCA references and application at this point in the process makes it very challenging to fully consider what is being planned.

For example, Section 811 of ANILCA provides that the Secretary of the Interior "*shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.*" Because this section applies to all federal public lands in Alaska where subsistence activities are permitted, the draft RMP should directly address this use and how the reasonable regulation standard will be applied.

Regulations at 43 CFR 36.11(a)-(f) also address the use of off-road vehicles within conservation system units. The BLM should consult closely with user groups in identifying the need to make changes to the management of use areas. User groups should also be consulted in developing and implementing a monitoring program and establishing threshold standards that would trigger closures or use restrictions.

Title XI of ANILCA and the regulations at 43 CFR Part 36 also provide for the development of any transportation and utility system within or across conservation system units, including the Unalakleet Wild and Scenic River and the Iditarod National Historic Trail. Additionally, Section 1110(a) allows, subject to reasonable regulation, the use of snowmachines, motorboats, airplanes and non-motorized surface transportation methods. Regulations at 43 CFR 36.11(d)-(f) do not restrict use to only traditional activities or travel to and from villages and homesites. *See also* 51 FED. REG. 31626 (Sept. 4, 1986). Further, these uses shall not be prohibited unless, after notice and hearing, it is determined that a use is detrimental to the resource values of the area.

ANILCA Section 1323(b) states:

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to access across public lands.

This guarantee of access is similar to that found in Section 1110(b) for conservation system units, but applies to all BLM-managed lands in Alaska. The draft RMP should address this provision as it applies to future access needs for State of Alaska, Native Corporation and other private lands within the planning area.

The RMP should also address current types and levels of access for recreation and other purposes. Existing access restrictions should be fully assessed to determine if they are still needed for resource protection or management purposes. For conservation system units, any decision to implement additional restrictions on types of access or to close areas can only be implemented through the process outlined in 43 CFR 36.10(h); such closures cannot be legally implemented simply through adoption of a RMP. This includes the closure to the use of pack animals proposed on page 17. Further, any existing restrictions or closures which may have been implemented without following these procedures should be reassessed and brought into compliance with the regulations. The RMP must fully incorporate applicable provisions of ANILCA which provide management and planning direction and amend multiple provisions of the Federal Land Policy and Management Act (FLPMA) and the Wild and Scenic Rivers Act.

For motorized vehicle use in winter, it would be beneficial to take advantage of the codified definition at 43 CFR 36.11 for “adequate snow cover” to eliminate potential confusion and/or conflicts between the law and management proscriptions. “Adequate snow cover” is defined as “snow of sufficient depth, generally 6-12 inches or more, or a combination of snow and frost depth sufficient to protect underlying vegetation and soil.” The standards proposed in the preliminary alternatives are variable – e.g., minimum of 10 inches of snow, when frost and snow

cover is sufficient, appropriate snow cover and frozen ground. Having a consistent standard, especially one used by other federal land management agencies, would be informative for all users regarding what to expect. Moreover, if the standard proposed in the RMP were more restrictive than the existing regulatory standard, which each of these examples could be, the procedures at 43 CFR 36.11(h) would need to be followed where applicable.

There are times when the Preliminary Alternatives appear to imply that multiple uses need to be provided for in separate areas/times rather than balanced. This implicit concept of mutual exclusivity is odd, particularly in a large area without identified user conflicts. ANILCA and other laws and regulations provide for a range of subsistence activities, motorized and non-motorized access, hunting and fishing, as well as other recreational, traditional and commercial activities, which often overlap without impact or consequence. The need to have users or uses effectively relegated to individual areas, seasons or degrees/levels of use should be justified.

This is further compounded by certain approaches which appear to favor managing for or towards “untouched” landscapes. For example, one of the objectives for vegetation management is to “*manage for at least 95% of vegetation in the planning area to a ‘very high’ condition (unaffected by the human footprint).*” Extensive right-of-way exclusion or avoidance areas fail to take access needs into consideration. The preservation of intact areas by aggressively limiting human occupancy and use does not comport with the land management principles identified by Congress in FLPMA. The Commission recommends a less conservative approach in the draft RMP unless management action is genuinely warranted by explicit resource concerns.

The Commission especially hopes the BLM will review and reconsider, or provide detailed justification for, the following relatively onerous actions common to all alternatives: collection of three years of hydrologic and fish data prior to any proposed stream crossing with a part or all of its structure below the ordinary high water mark (page 10); aircraft restrictions for *all* flights associated with BLM-permitted activities (page 14); bi-annual third party engineering/stability measurement reports for state-approved tailings dams (page 26); prohibition on certain structures in areas managed for wilderness character (pages 35 and 36); right-of-way avoidance areas, construction and travel restrictions on permafrost soils (page 38); mitigation of *any* activity that *may* result in air pollution (page 42); winter-only limitation on timber harvest permits (pages 6 and 44); and, prohibitions on commercial harvesting and reindeer grazing in the Unalakleet Wild and Scenic River corridor and any lands managed for wilderness character (pages 18, 19 and 45).

Even if not reconsidered, the ability of the BLM to implement some of these requirements needs clarification in the draft RMP alternatives. Many appear to be subject to other jurisdictions and preemptive rules. Some may be obviated where the State owns the submerged land. Some may require additional process under ANILCA or other federal laws. The public needs to be aware of these details to effectively comment, especially on wholesale proscriptions of this magnitude.

Lands With Wilderness Character Inventory Report

The Commission acknowledges the need to identify and provide for the adequate protection of wilderness values in BLM planning documents, and commends the BLM for providing detailed inventory information to enable meaningful scoping comments. Although possible management decisions connected to these findings are not provided, the fact 99% of the planning area possesses wilderness character should be an indication that current management is more than adequate. If anything, lands proposed to be set aside for the protection of wilderness character

should accompany significant justification in the draft RMP to support any associated management actions, limitations or monitoring in the proposed alternatives.

While the report does not indicate whether any recommendations will be made for designation, the Commission wishes to note its strong opposition to any formal wilderness reviews, suitability inventories, recommendations for designation or management of lands as *de facto* wilderness. While the identification of areas suitable for designation is consistent with ANILCA Section 1320, all Secretaries of the Interior for three decades refused to exercise this option in deference to the protracted, sensitive negotiations involving all interest groups which led to a balanced amount of designated wilderness in Alaska (over half the Congressionally-designated wilderness in the United States). The Commission would like to see this entirely warranted forbearance continue. Alaskans lived through the tumult and controversy of ANILCA and it would be incredibly frustrating to have to relive that experience and uncertainty with every RMP process.

Regarding *de facto* wilderness, the Commission is also opposed to the management of wilderness characteristics through restrictive Wilderness Act provisions, which is proposed in several components of the Preliminary Alternatives (e.g., prohibitions on roads, structures, commercial uses, mineral entry). This is especially concerning where uses are ongoing or capable of expansion. At a bare minimum, a detailed case-by-case analysis should be performed to reasonably evaluate whether detrimental impacts to wilderness characteristics will manifest if a use is authorized or allowed to continue. Blanket prohibitions on uses and infrastructure, simply owing to the existence of wilderness characteristics, is inappropriate and inconsistent with the BLM's mandate to provide for multiple use and sustained yield on the federal public lands.

Wild and Scenic River Eligibility Report

Existing statutory and regulatory authorities are more than adequate to protect all rivers and waters within the planning area, making any additional designations redundant and wholly unnecessary. More than that, however, similar to our above comments on proposed wilderness, ANILCA very explicitly intended to provide Alaskans with finality regarding river designations.

Section 1326(b) of ANILCA states that “[n]o further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.” By definition, a wild and scenic river is a conservation system unit and any study of rivers within the planning area for possible designation is a violation of Section 1326.

The Commission suggests that, if the BLM feels there is some compelling need for state-owned rivers in the planning area to be included in the Wild and Scenic River System, the agency, through the Secretary of the Interior, should take advantage of Section 2(a) of the Wild and Scenic Rivers Act and petition the Alaska State Legislature for state designation and addition to the federal system.

Visual Resource Inventory Report

This report provides a very clear explanation of how visual resources are identified and inventoried and the variables supporting classification. What is not clear in the report, but which will hopefully be explained in the draft RMP, is what that classification truly means in terms of

resource management. Without more, the holistic, table-top exercise described in this report, performed by one individual during a single summer, may not provide sufficient support for certain management decisions intended to preserve visual resources.

Watershed Analysis Framework

This report also provides a very clear explanation of how the proposed framework is used to identify aquatic resource management needs. While the need to wholly assess the planning area through modeling, assumptions and professional judgment may be required due to its size, remoteness and limited field data, the fact conclusions are based solely on modeling should be clearly acknowledged when developing management alternatives based on those conclusions.

Further, similar to the above comments on the Preliminary Alternatives, there is some indication of a bias towards *non-use* of these areas as a management priority. For example, the “systematic approach” noted on page 1 entirely omits any reference to the guidance (also noted on page 1) to maintain both ecological balance *and multiple-use relationships*.

The notable lack of context in identifying areas for more aggressive management is also indicative of an approach that favors non-use over multiple-use. For example, strict adherence to the goals of the National Fish Habitat Action Plan to develop “priority” habitats, as described on page 2, fails to acknowledge and account for the context of the planning area, including its size, traditions, remoteness, habitation, health and overall intactness.

Also, the “priority” fish species include most of the fish found in the planning area. This may accurately follow the BLM’s discretionary standard, but renders the word “priority” meaningless and has a significant domino effect, including its noted amplification of “priority” habitat scores. Artificially heightened scores can lead to undue establishment as a Riparian Conservation Area or a High Priority Restoration Watershed, which accompany more restrictive management under the Preliminary Alternatives. Without an approach that judiciously identifies “priority” status, increased management will be employed in a larger area than is warranted by current conditions.

The Commission sincerely hopes these concerns are excessive and that the draft RMP will emphasize context and respect existing and potential uses of the planning area in applying the watershed framework to proposed management actions.

PLO Withdrawal Summary

While the summary is not technically one of the “reports” open for comment, the Commission would like to remark on the existing withdrawals in the planning area, particularly with respect to the use of those withdrawals to administratively limit new or expanding uses.

Virtually all of the BLM-managed lands within the planning area appear to be under some type of withdrawal pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA), ANILCA or other federal law or requirement. The Commission supports revoking or modifying ANCSA (17)(d)(1) withdrawals (d-1 withdrawals), as well as any other withdrawals that are no longer necessary, within the planning area.

The issue of withdrawals under ANCSA, ANILCA or a long list of Public Land Orders is complicated, particularly when there are frequently several layers of withdrawals over the same

acre of land. The BLM addressed the issue of d-1 withdrawals in a 2006 report to Congress, as noted on the BSWI Open House website. This report was required by Section 207 of the Alaska Land Transfer Acceleration Act of 2004 and summarized the issues as follows:

The ANCSA withdrawals were intended to protect resources, to prevent encumbrances that could interfere with State or Native entitlements, and to study lands for further inclusion into conservation units. In the early 1970s when the lands were withdrawn under Section 17(d)(1) and (d)(2) of the ANCSA, there were few regulations to oversee the development of the public lands and protect important natural resources. Since then Congress has passed significant legislation for the orderly development of the public lands and to protect the environment from adverse impacts. The BLM has 1) developed extensive oil and gas lease stipulations, required operating procedures (ROPs), and surface management regulations for miners, which are now in place and sufficient to assess and protect the resources in most situations, 2) the selection period is over and the BLM is completing conveyance of State and Native entitlements, and 3) more than 102,097,900 acres have been withdrawn by ANILCA and incorporated into CSUs sufficient to protect those lands.

In summary, there are more than 158,958,000 acres of d-1 withdrawals in Alaska. Many of these d-1 withdrawals have outlived their original purpose. It may be appropriate to lift many of d-1 withdrawals and the most effective and preferred means in managing this process is through BLM's land use planning process. Approximately 152,181,400 acres or 95% of these withdrawals could be lifted consistent with the protection of the public's interest. Many of these lands would remain segregated or require additional administrative procedures (NEPA/decisional) before any development can take place. Because remaining segregations overlap the d-1 withdrawals, lifting these withdrawals would provide immediate entry on only 21,459,700 acres or 14% of the d-1s recommended to be lifted. A majority of these lands have low to medium locatable mineral potential with a few scattered areas of high potential. Very few of these lands have any known potential for coal, oil or gas. Most lands with medium to high locatable mineral potential, or known leasable mineral potential, were previously opened, or selected by the State of Alaska or Native corporations. This and more stringent requirements for managing development, means the original protections from the d-1 withdrawals are no longer critical for the protection of the public's interest. The d-1 withdrawals are an unnecessary encumbrance on the public land records complicating interpretation of the title records by the public. In contrast, it is apparent that the retention of approximately 6,776,600 acres of d-1 withdrawals is warranted to provide temporary protection on specific sensitive areas. Maintenance of these withdrawals is appropriate until another withdrawal is put into place. (pgs. 5-6)

In reviewing the preliminary reports, especially the Preliminary Alternatives and Areas of Critical Environmental Concern Report, the Commission found discussions and proposals regarding existing and future withdrawals fragmented and insufficient. In many instances, reference is made to existing withdrawals (e.g., prohibitions on mineral entry) when, in actuality, a new or modified withdrawal would need to be imposed because, for example, a use is newly withdrawn or coincidentally withdrawn under a withdrawal which has "outlived" its purpose.

FLPMA considers a withdrawal to be withholding an area from entry for the purpose of limiting uses in an area to maintain certain values or reserve the area for a particular purpose. The withdrawal and its intended purpose are not severable, meaning a new withdrawal is required when a withdrawal has outlived its purpose or an area is closed to entry for another purpose. This is critically important where the BLM intends to use existing d-1 withdrawals to facilitate special management attention in proposed ACECs without violating ANILCA.

Any Executive Branch action which withdraws more than 5000 acres in Alaska is subject to the provisions of ANILCA Section 1326. This section and the regulations at 43 CFR 2300.0-3(a)(5) require publication in the *Federal Register* and notification to both Houses of Congress before any such withdrawal becomes effective. The withdrawal terminates unless Congress passes a joint resolution of approval within one year of notice of the withdrawal. This provision in ANILCA was intended largely to address concerns regarding the over 150 million acres administratively withdrawn in a single month when the Alaska Lands Act failed to pass by the deadline set in ANCSA. For Alaska, ANILCA required action by legislature in addition to the administrative decision that a large scale withdrawal is warranted.

Also, any mineral entry withdrawals under ANILCA and the Wild & Scenic Rivers Act, if still applicable, only apply to the minerals in *federal* lands which are part of the system and constitute the bed or bank or are situated within the designated corridor. In the case of a navigable river, the river bed belongs to the State of Alaska. As such, it would not be subject to existing or future withdrawals under the authorities of either act.

The use of d-1 withdrawals to limit or close areas to use, and limitations or closures without an existing withdrawal, will require substantially more detailed discussion in the draft RMP. The Commission suggests the BLM consider including a separate appendix that addresses the issue of withdrawals, how existing withdrawals will be handled in the various alternatives and whether new or additional withdrawals are proposed in one or more of the alternatives.

The Commission also encourages the BLM to actively pursue implementation of the 2006 report's recommendations with the Secretary of the Interior. Previous resource management plans have recommended lifting the d-1 withdrawals. The Alaska State Legislature passed a resolution this past session formally making the same recommendation. To our knowledge, the Secretary has taken no action on these recommendations. The Alaska State Office should work through the national office and the BLM Director to complete the process of lifting these withdrawals consistent with Congressional intent for federal land management in Alaska.

Areas of Critical Environmental Concern Report

The Commission believes the designation of Areas of Critical Environmental Concern (ACECs) in Alaska is operating well beyond FLPMA's intended use of this management tool. Our non-area-specific comments regarding ACEC additions in the Eastern Interior RMP, submitted in a March 3, 2015 letter, are incorporated here by reference.

In general, it begs the question of "uniqueness" when over 4.3 million acres are placed into 16 large ACECs. If a relevant and important characteristic or value requires from thousands to hundreds of thousands to over a million acres to be determined "unique," the issue of scale

should be a factor in considering whether designation is genuinely warranted or whether this is just a segregation of the planning area according to common landscape specifics.

The identification of areas warranting designation needs to be at least somewhat reductive before special management needs are considered, but the preliminary report's use of the liberal ACEC designation criteria at 43 CFR 1610.7-2 appears overinclusive. As just one example, the need for hundreds of thousands of *upland* acres to protect sheefish spawning, especially when it occurs in "*relatively small and specific locations*," is never discussed. Non-spawning acreage outside the Iditarod National Historic Trail did not otherwise satisfy the importance criteria for designation.

For potential special management attention in proposed ACECs, the draft RMP will need to describe a sufficient connection to the criteria identified in this report. According to BLM Manual 1613.2.22(B)(1), no designation is warranted where the use(s) being proscribed "*could not result in harmful effects to the important and relevant resource values[.]*" For example, with respect to mineral entry, the only guaranteed restriction accompanying ACEC designation is that notice level operations would become plan level operations. Closure of an ACEC to *all* mineral entry is thus a deliberate choice and must describe the nexus between that closure and any perceived impact concerns requiring special management.

Finally, even for nominated acres that ably diffuse through the relevance and importance filters, existing management arguably ranges from ample to sufficient in addressing identified concerns. To sufficiently justify special management, as required under FLPMA and implementing regulations, the draft RMP will need to fully consider existing federal and state laws as well as the BLM's present capacity to "*protect and prevent irreparable damage*" or to "*protect life and safety*" within the proposed ACECs. The characterization of this step in Section 2.3 of the report and in Section 1613.02 of the BLM Manual notably lacks an examination of external tools and the statutory authorization's severity, again emphasizing presence over uniqueness.

Thank you for your consideration and for this substantive comment opportunity during the scoping phase. If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Sara Taylor', with a long horizontal flourish extending to the right.

Sara Taylor
Executive Director

cc: Sue Magee, Statewide ANILCA Coordinator
Samantha Carroll, Large Project Coordinator