U.S. Senate Committee on Energy and Natural Resources
December 3, 2015 Hearing: ANILCA
Answers to Questions for the Record Submitted to Senator John Coghill

Question 1: I was particularly interested in your and the Commission's written discussion on how BLM has used new land designations to effectively place far more land into protected status in Alaska, protecting the land more fully in many ways than would be the case if lands had been placed in wilderness in Alaska given the expressed permission for cabins, and for motorized accessing Alaska's wilderness areas. You talk about BLM repurposing the Public Land Order withdrawals of the 1970s, since Congress specifically prevented a 2010 Wild Lands policy from going into effect, by overlaying the lands covered by PLO's with new designations: "Areas of Critical Environmental Concern," areas of "wilderness character," and by creating "new landscape-level planning processes" to protect far more lands than ANILCA ever allowed. Can you or the Commission explain specifically how ANILCA's no more clause of Section 1326, or the more general clause in Section 101(d), or any other provision in the Act or because of congressional intent, should block BLM from using its general land planning processes required by the Federal Land Management Planning Act (FLMPA) to regulate its lands in the state?

Answer: The Commission would not argue in favor of prohibiting the BLM from using the land planning processes outlined in FLPMA, only to employ them in Alaska consistent with the letter and intent of ANILCA. As described in the testimony, both the Wild Lands policy and the inventory of lands with "wilderness character" bypass specific direction in ANILCA §1320. Also as noted, the repurposing of obsolete withdrawals is an end-run around the prohibition on withdrawing lands in ANILCA §1326(a) without Congressional approval. All prohibitive administrative designations also exist without the ANILCA provisions purposefully intended for prohibitive designations, like guaranteed access to inholdings or for traditional activities and travel to and from villages or homesites.[1]

What follows is an arrant generalization to illustrate the point. Imagine Congress was weighing two types of land in drafting ANILCA: federal public lands managed for multiple uses and conservation system units (CSU). To create CSUs, Congress took many existing management designations like parks, refuges, forests, wild and scenic rivers and wilderness and, considering the "Alaska context" (including relative size, traditional uses, existing communities, nascent infrastructure, etc.), enhanced and tailored the capacity for public use and development in those designations in Alaska. In this balancing act, the remaining public lands and the BLM's multiple use mandate provided a constant. By using land use plans to dramatically limit the capacity for public use and responsible development on *those* lands, the BLM has administratively shifted the balance Congress struck in ANILCA.

Further, even under FLPMA, authorizations for prohibitive administrative designations have criteria and sidebars which should not be unilaterally expanded to the point of insignificance. Alaska possesses an overwhelming abundance of significant and highly valued natural resources, which is what made the "d2 debates" on what to designate as a CSU both easy and challenging. The first version of H.R. 39 proposed 145 million acres of designated wilderness! Since FLPMA and implementing regulations and policies provide standards for prohibitive administrative designations that almost any acre in Alaska could satisfy, some other reductive metric must be employed in managing lands where everything is "special."

[1] The Title XI access provisions described here only apply to conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study.

More importantly, everything ANILCA represents – particularly but not exclusively the "no more" clauses – requires some manner of self-control in using this broad discretion to limit public use in Alaska. Areas of Critical Environmental Concern (ACEC) provide a useful example of where a grievously expansive interpretation of a FLPMA authorization is patently inappropriate given the "Alaska context" recognized by Congress in ANILCA.

ACEC designation is a meaningful tool where "*special management attention is required*."[2] Criteria for designation require "*relevant*" and "*important*" resources or values which prompt the limitation of activities otherwise allowed under a land use plan.[3] Other available management tools (e.g., permit stipulations, trail designations) must be insufficient, as designation is not warranted where the activities being limited "*could not result in harmful effects to the important and relevant resource values*[.]"[4] However, the BLM's application of these criteria and liberal restrictions on public use in Alaska are highly subjective, overly inclusive and scantily justified, especially considering the millions of acres being set aside absent any consideration of access and public use guarantees provided for lands designated under ANILCA.

The first criterion of "*relevance*" requires presence of "*a significant historic, cultural, or scenic value; a fish or wildlife resource or other natural system or process; or natural hazard*."[5] As noted above, the vast majority of federal public lands in Alaska possess one or more of these characteristics, and this criterion only requires something be present. There is scope for discretionary limits, however, as BLM policy uses specific adjectives like "*rare*," "*essential*" and "*endangered, sensitive or threatened*."[6] These adjectives only describe examples of "*relevant*" resources, but they are illustrative of an inherent singularity which should also be present.

The second criterion of "*importance*" requires the "*value, resource, system, process or hazard*" identified under "*relevance*" to have "*substantial significance and values*," generally meaning "*more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern*."[7] On its face, this criterion also fails to offer a sufficient distinction for areas in Alaska that could and would not merit designation as an ACEC. Yet, the "*importance*" criterion also has scope for discretionary limits in BLM policy, which describes qualifying areas as "*fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change*."[8]

Even without ANILCA, where each proposed designation ranges from hundreds of thousands to millions of acres, the calculus here must be given some context, meaningful sidebars, relative scale and considerable justification, otherwise designations are simply dividing up planning areas according to common landscape specifics. With ANILCA, however, what would be a matter of simply requiring more common sense in discretionary decision-making becomes a mandate.

[2] FLPMA §103(a); 43 C.F.R. §1601.0-5(a)
[3] 43 C.F.R. §1610.7-2(a); BLM Manual 1613.12
[4] BLM Manual 1613.2.22(B)(1)
[5] 43 C.F.R. §1610.7-2(a)(1)
[6] BLM Manual 1613.1.11(A)
[7] 43 C.F.R. §1610.7-2(a)(2)
[8] BLM Manual 1613.1.11(B)

The essence of a "no more" clause – whether in §101 or §1326 – is that the ecological, social and legal context of Alaska requires significant restraint in taking land uses off the table on our federal public lands. ANILCA provided a balance between the social and economic needs of Alaska and its citizens and protection for the national interest in the scenic, natural, cultural and environmental values on the public lands. Crafting this balance required unique guarantees to land users and fundamental limitations on the use of executive withdrawals. The current overly expansive use of administrative designation through landscape-level land use planning, including millions of acres of ACECs, undermines both.

Question 2: During the hearing a number of witnesses argued that Section 1326 – the "no more clause" – paired with Section 1317 specifically setting up a one-time period for the National Park Service and U.S. Fish and Wildlife Service to propose new wilderness designations in Alaska parks and refuges, should prevent the agencies from placing more acreage in parks and refuges into protected status. Another witness at the hearing, however, argued that new land protections were proper for consideration because Section 203 requires the Secretary to administer the "lands, waters and interests… pursuant to the Act of August 25, 1916" (the National Park Service Organic Act), while Section 304 (a) specifically requires that wildlife refuges also be governed in accordance with the laws governing units of the National Wildlife Refuge System. Could you or the Commission explain in greater detail why you believe ANILCA's other provisions should pre[v]ent such wilderness and conservation protection set asides in parks and refuges? Is there a conflict in the statute that requires congressional clarification?

Answer: First, the Commission finds no conflict in ANILCA providing for the application of other federal laws to Alaska parks and refuges where appropriate. The conflict arises primarily from agenda-based attempts to manipulate general intent language to undo very specific direction. For example, ANILCA §203 indeed references the 1916 NPS Organic Act, but does so in combination with "*applicable provisions of this Act* [ANILCA]." If Congress intended the general 1916 Organic Act to override the specific provisions ANILCA, this express direction would not have been included.

Likewise, Section 304(a) appropriately references general administrative provisions for the wildlife refuges, then goes on to add pages of special provisions. When Congress subsequently passed the National Wildlife Refuge System Improvement Act in 1997, which consolidated and updated the general direction for wildlife refuges, it concluded with this definitive clause in Section 9(b): "*If any conflict arises between any provision of this Act and any provision of the Alaska National Interest Lands Conservation Act, then the provision in the Alaska National Interest Lands Conservation Act shall prevail*." Congress plainly meant for the provisions that specifically apply to Alaska to carry forward, even while the general provisions were overhauled.

Secondly, with respect to Section 1317 wilderness reviews, clearly Congress intended that all lands within the National Park System and the National Wildlife Refuge System not already designated as wilderness be reviewed for suitability and possible recommendations. The initial park and refuge wilderness reviews and agency-level proposed wilderness recommendations were well within the scope of Section 1317, even if a little late according to the prescribed schedule. The question then arises whether this was to be a one-time-only process.

While there is no "Section 1317(d)" that outright prohibits subsequent wilderness reviews, the fact that §1317(a) and (b) provide specific timelines from the date of the Act would seem to make such a prohibition unnecessary. Also, note the corresponding wilderness review provision applicable to the BLM in Section 1320, which authorizes the Secretary of the Interior to make wilderness recommendations "*from time to time*" at his or her discretion, and without deadlines. Looking at these two provisions side-by-side further supports the view that ANILCA §1317 was intended as a one-time exercise.

There is a small complication, however: the agency-level proposed wilderness recommendations were finalized at the department level, but neither the Secretary nor the President carried them forward as required. Does that mean the Secretary and the President can effectively submit recommendations 27 or more years late, or even go back and completely revisit the entire wilderness review process, as was recently done with the wilderness recommendations for the Arctic National Wildlife Refuge? The Commission would argue that failure to complete the required process in the 1980s does not grant the Administration unrestricted license to conduct park and refuge wilderness reviews and advance wilderness recommendations anytime. Some Congressional clarification on this point would be helpful.

Question 3: Several witnesses in their testimony concerning hunting and fishing regulatory issues, said that the Park Service and Fish and Wildlife Service, in proposing new wildlife management regulations, are violating the act because Sections 1313 and 1314 say that the act does not enlarge or diminish state authority to manage wildlife, and Title 8 of the act specifically requires consultation with Alaska when federal agencies manage for subsistence purposes. The Commission's testimony specifically talks about the growing lack of consultation – it becoming only a "check the box" exercise. Can you or the Commission elaborate on what it believes the law requires federal agencies to do to properly consult with Alaska and private and Native land owners in crafting and implementing wildlife management policies in Alaska, both for sport and commercial hunting and fishing and for subsistence hunting and fishing?

Answer: The concept of coordination, consultation and cooperation is infused into ANILCA. As passed, the Act directly required consultation with the State of Alaska and Native land owners multiple times, and even more consultation requirements have been added through subsequent amendments. In ANILCA §1201(h), Congress also directed the Alaska Land Use Council to recommend "*ways to improve coordination and consultation between* [federal and state] *governments in wildlife management, transportation planning, wilderness review, and other governmental activities which appear to require regional or statewide coordination.*" Congress further encouraged federal members of the Council, including the Regional Directors of the NPS and USFWS, to "*enter into cooperative agreements with Federal agencies, with State and local agencies, and with Native Corporations providing for mutual consultation, review, and coordination of resource management plans and programs*[.]"[9]

[9] ANILCA §1201(j)(1)

Despite its prevalence and emphasis, "*consultation*" is not defined in ANILCA. The Commission does not believe this is an impediment to its effectiveness, however, as it allows for the purpose and process of consultation to be uniquely defined by the parties involved. In other words, ANILCA is necessarily comprehensive to accommodate diverse specialization respecting individual authorities, interests and expertise on an issue-by-issue basis.

"*Consultation*" is typically defined by the participants through a mutually agreed-upon process that meets the specific needs of each party. For example, with direction to consult on a particular matter, the parties would mutually identify the issues each may encounter, establish triggers for contacting each other, identify points of contact and processes for contact with timelines for responses and information exchanges. Processes must recognize that staff change over time and lines of communication must be attached to positions and not individual personnel. Some deference can also be incorporated where one of the parties possesses special expertise or primary management authority. While cumbersome to develop, the consultation process can lead to recognizable lines of communication between participants that maximizes efficient and sound decision-making and avoids surprises and acrimony.

Beyond complying with the process, the content and extent of the participants' exchange under the process can be a factor in determining whether there was meaningful "consultation" as opposed to perfunctory "notification." For instance, if one party provides limited or no credible information supporting a particular decision, the other part(ies) cannot reasonably "consult" on how their respective mandates and authorities may be impacted by that decision, or provide feedback to inform or influence that decision. Recent restrictions on methods and means of wildlife harvest in National Preserves provide a keen example of how the purpose of consultation can be negated by construing the terms of an established process to avoid information sharing.

Under ANILCA §1313, the Secretary of the Interior "*may designate zones where and periods when no hunting… may be permitted for reasons of public safety, administration, floral and faunal protection, or public use and enjoyment. Except in emergencies, any regulations prescribing such restrictions relating to hunting, fishing, or trapping shall be put into effect only after consultation with the appropriate State agency having responsibility over hunting, fishing, and trapping activities.*" Absent an emergency, Congress required consultation with the Alaska Department of Fish & Game and specified the "*reasons*" to support regulatory closure.

The NPS has interpreted this section to mean it may also enact a closure "*if those activities cause impacts or impairment or are otherwise contrary to the NPS legal, regulatory, or policy framework*." [10] By bringing in other all other laws and adding "*policy framework,*" this extension of ANILCA's limited authorization provides the basis for unilateral preemption without specific "*regulations*" and indeterminately tied to the "*reasons*" outlined in §1313. The NPS relied on inherent vagueness in its enabling act to develop sweeping management policies, and amended its regulations to preempt any state harvest regulation it determines to be "*contrary*" to those policies, all of which effectively invented the opportunity to close areas to hunting and trapping at-will.

[10] This language has been a component of numerous background documents issued to coincide with the NPS Alaska Region annual compendium, noting when closure was appropriate under the previous version of 36 CFR §13.40(e).

Throughout this evolution, the requirement for consultation with the State remains intact; however, the manner and content of that consultation appears altered, and the Commission is not aware of any corresponding amendments to the established consultation process. As to manner, the recently amended regulations at 36 C.F.R. Part 13 *automatically* preempt certain future state harvest authorizations, subject to a discretionary determination, meaning there is no consultation with the State prior to restriction.[11] The State was not even afforded an opportunity to review either the proposed or final regulatory amendments prior to publication in the *Federal Register*, meaning it was "consulted" at the same time as the general public.

As to content, it is difficult to tell at this point which "*reason*" under ANILCA §1313 or other federal law is being brought to bear in any given closure, so that at least must be shared, but this has not been the case. The NPS tends to rely mostly on broad value statements and speculation that unacceptable impacts or impairment could occur. Preemptive actions do not specify a cause and effect relationship between state regulations and possible impairment to park resources or values, and generally lack scientific rationale or data (e.g., current/expected harvest numbers, current/expected visitor use, etc.) to demonstrate the potential for that impairment. These would be things any agency, Native Corporation or individual would need to "consult" on the NPS' determination, otherwise each party is simply being told while the NPS checks a box.

To avoid this, appropriate participants must be brought together to identify the consultation process and content which best works to address the issues and satisfy each party's needs while mutually providing for respective authorities and mandates. Some opportunity for elevation may also be necessary, since compliance with the consultation process is apparently subject to fluid interpretations. Some parties may also need to be coaxed from their corners to ensure the intent of consultation is well represented in the defined process.

Question 4: Let me ask you or the Commission to expand on your comments about agencies redefining the law and then counting on highly deferential judicial review to uphold their views. For example, Alaska moose hunter John Sturgeon has a case before the Supreme Court concerning whether the Park Service can prevent motorized access on state waters that run through parks. It is a case that up to now has turned on a single word in Section 103 (c) of ANILCA and whether agencies can limit activities on federal lands if their regulations cover all parks, not just ***"solely***" Alaska parks. Another example of this is from 2008 when the Park Service required the Alaska Department of Fish and Game to obtain a research permit simply to conduct salmon research on state-owned lands in Katmai National Preserve. Unless the Supreme Court rules in the State's favor next year, is there any other solution, except congressional clarification of the meaning of ANILCA, to prevent such textual problems from continuing to arise?

[11] *See* 80 Fed. Reg. 64325, 64343-44 (Oct. 23, 2015). The amended NPS regulation now located at 36 C.F.R. §13.42 notes State of Alaska actions, laws or regulations "*with the intent or potential to alter or manipulate natural predator-prey dynamics and associated natural ecological processes, in order to increase harvest of ungulates by humans*" are "*not adopted*" and automatically "*prohibited*" in park areas. Notice of exactly which state harvest authorizations this applies to will be provided at least annually. This provision operates entirely independently from the amended regulations requiring consultation with the State when restricting the take of fish or wildlife.

Answer: Alaskans are intimately familiar with and highly frustrated by the mystifying breakdown in checks and balances that finds John Sturgeon at the U.S. Supreme Court. As described in the testimony, ANILCA §103(c) is the cornerstone that makes the edifice of laws and promises in Alaska work, and the Commission has never believed its structure to be so vulnerable to leveling. There are other ways it could have been stated, but the wording is not ambiguous and the legislative history is on point. To see the State's and John Sturgeon's defense of it fail, in two English-speaking courts, is staggering. If the pending appeal fails, the deference pendulum has simply swung too far for even elementary judicial oversight and there is no meaningful, neutral mechanism for the enforcement of Congressional direction.

Understanding that, the only other solution that springs to mind would be systematic litigation avoidance until the pendulum swings back. This is not really a solution, but it could manage the symptoms until a cure is found. The simplest way to accomplish this is through open, respectful, balanced and informed communication between sovereigns. Considering present opportunities for mutual dialogue of this nature, Alaskans may need some assistance with that.

Opportunities for this level of communication may need to be mandated, or at least overseen. Continuing to conduct committee hearings and require justification for federal actions could import essential accountability and introspection. Resuscitating the cooperative aspirations of ANILCA Title XII by bringing back the Alaska Land Use Council and Federal Coordination Committee could help bring all parties to the table through a proven, results-oriented process.

The capacity for substantive dialogue may require considerable effort and guidance. Ensuring the availability of ample funding for ANILCA training and curriculum development would simultaneously enhance the credibility and the creativity level of cooperative problem-solving. Directing and funding the development of ANILCA guidance for each federal land management agency, in close collaboration with the State of Alaska's ANILCA Implementation Program, would yield inestimable and far-reaching benefits. To the extent this can be successfully accomplished, it will permeate multiple planning and administrative decision-making processes and save future managers from having to reinvent the wheel where understandings are in place. This "template" technique was used successfully during the first round of land management plans in the 1980s and beyond, and saved considerable time and effort by all involved parties.

Duly empowering the State may also be necessary. Requiring the State assent to or ratify federal land use plans could reinforce basic aspects of federalism and stimulate dialogue and buy-in at multiple stages. Irretrievable devolution of federal public lands and/or management authorities to the states could also restore some balance, and possibly even result in overall economic stabilization and growth. The Commission has created the nine-member Alaska State Lands Advisory Group to study and make recommendations on this very concept. The group's efforts will culminate in a report issued in early summer 2017.

Whatever the Court decides with respect to ANILCA §103(c), and wherever the deference pendulum lands afterward, the ability to communicate and work together will spare us similar frustrations in the future. In fact, litigation avoidance should be our default and not our refuge. These and other steps will help us work together to pave the road Congress mapped in 1980.