

STATE OF ALASKA

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ANILCA IMPLEMENTATION PROGRAM

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Steve Brink
Deputy Regional Forester, Natural Resources
US Forest Service
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Dear Mr. Brink:

The State of Alaska reviewed the draft Forest Service brochure, dated December 9, 2004, and titled "What Can I Do In Wilderness?" The State greatly appreciates the willingness of the Forest Service to develop this information for circulation to the public. We also appreciate the opportunity to work with you and your staff on the content. As you know, various State representatives have been working with Marti Marshall, Program Leader for Wilderness, and have found discussions with her to be professional and enlightening for all. We appreciate and acknowledge the many changes in organization and content made in response to the State's earlier comments and discussions last fall. We request opportunities to continue working with the Forest Service on the next iteration of the brochure.

Developing a document of this nature is challenging because it raises in-depth questions about the Congressional intent in the Alaska National Interest Lands Conservation Act (ANILCA) and its relationship to other laws and policies developed at the national level. This review highlights the unresolved disparity between Alaska-specific ANILCA direction and conflicting national direction. In some cases, the final brochure will be able to readily clarify some of these differences. For other issues, especially those of a procedural nature, we urge a re-evaluation of other statutes, regulations, and policies that will lead to long term solutions. The State is committed to working with the Forest Service to insure that the intent of ANILCA appropriately prevails on conservation system units established within Forest Service areas in Alaska.

Once completed, the brochure will be as valuable for federal managers as it will be for the public. In our experience, many Forest Service personnel have an insufficient understanding of ANILCA and often rely on decision mechanisms and criteria developed for wilderness areas in other states that do not have legislated protection for access and specific public uses.

The issues and concerns identified in this letter represent the consolidated views of the State's resource agencies and include comments you received informally from the Governor's Office. These comments represent the larger concerns and concepts that need to be addressed, not a comprehensive line-by-line analysis. We are available to discuss the specifics in greater detail.

CARRYING FORWARD ANILCA'S INTENT

Our review of the brochure highlights several fundamental concerns with Forest Service implementation of ANILCA. First and foremost, national requirements for permits based on the Forest Service Manual and Handbook are inconsistent with ANILCA because they grant too much discretion to local managers and do not sufficiently account for the statutory protection of certain public uses in Alaska. As noted above, many Service personnel do not fully understand the ANILCA provisions and may be limiting public uses in a manner inconsistent with the Act.

The plain language and legislative history of ANILCA clearly dictate a very different approach for Alaska. Congressional deliberations expressly intended to "limit the manager's discretionary authority" to protect on going public uses in the areas. [Senate Report 96-413] Public uses generally occurring at the time of ANILCA's passage are authorized to continue without undue paperwork (e.g., permits) and may only be restricted via reasonable regulation when managers demonstrate that such use is causing or will cause measurable harm to resource values. The State asserts that requiring permits is a restriction equivalent to limiting public uses without conducting required rulemaking. Permit requirements and other discretionary restrictions implemented via policy documents developed without full public involvement and federal register publication do not meet the intent of Congress. In summary, the current Forest Service emphasis on permits is unnecessarily burdensome, leaves too much room for discretion and poor accountability, and is based on inadequate public review.

After passage of ANILCA, the Department of the Interior (administering the majority of conservation system units, including wilderness, in Alaska) promulgated regulations establishing procedures to manage public uses allowed by ANILCA, including stringent guidelines to follow before these uses may be restricted. (See 43 CFR Part 36.) In addition, National Park Service regulations at 36 CFR Part 13 and U. S. Fish and Wildlife Service regulations at 50 CFR Part 36 provide supplemental agency-specific guidance. Taken together, these regulations and secondary agency policies substantially reduce agency discretion to restrict activities in Alaska (e.g., relieve many Alaskans from permit requirements). Based on discussions over the last few months, we understand the Forest Service plans to evaluate the Interior Department's procedural requirements for possible similar adoption. The State requests continued opportunities to work with the Forest Service to find ways to authorize ANILCA-protected uses, reduce the burden on the public, increase agency accountability, and provide needed sideboards on agency discretion. We recognize that the solution will likely involve some combination of new or revised ANILCA regulations, policy manual, and Alaska-specific policies in the Alaska Region's Handbook.

SCOPE AND CONTEXT

The scope of this brochure is currently a source of potential confusion. The title and the introduction need to further clarify that the content is focused on public uses, not administrative activities by federal and state agencies. For example, in light of recent publicity surrounding Forest Service use of helicopters for required data collection in remote areas, the public needs to be made aware that such administrative uses are addressed through separate provisions and criteria in both the Wilderness Act and ANILCA. The brochure addresses public access issues only, not administrative access. (To clarify for other readers of this letter, an interagency federal agency task group is working separately with the State of Alaska to clarify the relationship of

ANILCA and the Wilderness Act in conduct of administrative activities. This effort, initiated by the Secretaries of the Interior and Agriculture in response to a letter from the Governor in 2004, is nearing completion and is expected to greatly improve the ability of both federal and state agencies to appropriately conduct activities in wilderness areas.)

We also suggest strengthening the context of this brochure, including how ANILCA amended the Wilderness Act of 1964, and the relationship between designated wilderness and other Congressionally designated conservation system units in the Tongass National Forest, e.g. Misty Fjord and Admiralty Island National Monuments. Most, but not all, of these Forest Service monuments are designated wilderness. A map with these boundaries (including the Nellie Juan study area in the Chugach National Forest) that shows where the wilderness provisions do and do not apply would be a useful addition.

EXAMPLES OF SIGNIFICANT REMAINING ISSUES

Administrative “closure orders”: Except to implement emergency closures for public safety, we disagree that the Forest Service can close access guaranteed under ANILCA 1110(a) “*by a closure order.*” Section 1110(a) requires a specific process before restricting public access in all CSUs, including monuments and wilderness areas. (Page 7, permits for recreational use)

Motorized Equipment (e.g., chainsaws and generators): Based on Congressional intent to protect rural Alaska lifestyles, we question the validity of the blanket prohibition of motorized equipment for purposes other than the taking of fish and wildlife. (Page 7, last paragraph)

Helicopters: The brochure needs to explain that under provisions of ANILCA and the Wilderness Act, helicopter access may be allowed for some specific uses. Please add citations for any relevant Forest Service determinations. (Page 7, Helicopters for general public access)

Section 1110(a): The brochure should be revised to avoid the implication that Section 1110(a) provides sideboards on what types of access may be allowed. Section 1110(a) is a minimum guarantee for certain methods of access, not a cap. (Pages 6-7, Recreational Activities)

Managing for “non-degradation”: Managing wilderness to maintain the “non-degradation” of wilderness conditions at the time of designation is inappropriate in light of various ANILCA provisions, e.g., motorized access. (Page 2, paragraph 2)

Subsistence: The brochure subtly but incorrectly paraphrases clear Congressional direction in ANILCA. The brochure states: “*Section 811... allowed reasonable access to subsistence resources.*” In fact, Section 811(b) states “*The Secretary shall permit . . . subject to reasonable regulations.*” This access guarantee is not a discretionary provision for the forest manager to decide what is “reasonable” but only to limit that access under “reasonable regulations.” We also object to the blanket permit requirement for use of mechanical or motorized equipment for subsistence activities, such as cutting of firewood with chainsaws. Permits, especially for subsistence-related activities, should only be required where absolutely necessary to protect resources and only under established criteria to avoid inappropriate use of administrative discretion. (Page 8, Subsistence Activities, Transportation Methods and Equipment)

Permits related to hunting, fishing, and trapping: We object to the blanket requirement that persons engaged in hunting, trapping, and fishing must acquire a permit from the “*local ranger district*” in order to use equipment, when in fact that use is allowed by statute in Section 1316 “*subject to reasonable regulations.*” (Page 9, second question)

Fees for cabins authorized under ANILCA 1316. We object to charging a “*land use rental fee*” for such cabins. At passage of ANILCA, Congress did not envision charging fees for uses of federal public land in support of temporary facilities and equipment related to hunting, fishing, and trapping, which explicitly includes cabins. This is an example of more recent national policies and regulations that are inconsistent with Congressional intent to have minimal impact on the Alaskan way of life. (Page 9, third question)

Transfer of Personal-Use Cabins: Section 1303 does not prohibit the Forest Service from transferring personal use cabins to subsequent owners; however the Forest Service Policy Manual does restrict transfers and renewals. We urge the Forest Service to reevaluate this policy in light of Congressional intent behind ANILCA Section 1303. (Page 9, last paragraph)

Inholder access: In the absence of regulations that support the ANILCA Section 1110(b) guaranteed right of access to inholdings and other valid rights of occupancy, we urge the Forest Service to carefully review current administrative policies to more affirmatively reflect ANILCA’s grant of adequate and feasible access for economic and other purposes. As written, too much discretionary authority is given to the regional forester. The National Park Service is also working to improve their implementation of Section 1110(b) through a public process and may be able to provide some useful insights. (Page 12, Access to Private Land)

“primitive non-motorized” – Use of this phrase in the brochure inappropriately implies that wilderness areas are (or should be) non-motorized, which is in direct conflict with numerous provisions of ANILCA, e.g., Section 1110(a). (Page 12, Administrative Uses)

Thank you for the opportunity to work with you on the wilderness brochure. We look forward to continuing our efforts with you to resolve these issues. In the meantime, if you have any questions, please let me know.

Sincerely,



Sally Gibert
ANILCA Program Coordinator

cc: Marti Marshall, USFS Program Leader for Wilderness, Alaska Region