STATE OF ALASKA

SEAN PARNELL, Governor

ANILCA IMPLEMENTATION PROGRAM
Office of Project Management and Permitting

550 W. 7TH AVENUE, SUITE 1430
ANCHORAGE, ALASKA 99501
PH: (907) 269-7529 / FAX: (907) 334-2509
susan.magee@alaska.gov

February 28, 2011

Sandy Hamilton
Environmental Quality Division
National Park Service
Academy Place, P.O. Box 25287
Denver, CO 80225

Dear Ms. Hamilton:

The State of Alaska reviewed the December 30, 2010 Notice of Intent to prepare a programmatic environmental impact statement for proposed revisions to National Park Service Regulations at 36 CFR Part 9 governing the exercise of nonfederal oil and gas rights within the boundaries of National Park System units. The following comments represent the consolidated views of the State's resources agencies.

In 1980, two years following promulgation of the original Part 9 regulations, the Alaska National Interest Lands Conservation Act (ANILCA) established more than 100 million acres of federal land in Alaska as new or expanded conservation system units (CSUs), including 51 million acres of park lands. Due to their vast size, most CSUs in Alaska contain or effectively surround numerous state and private inholdings, including lands owned by Alaska Native regional corporations pursuant to the Alaska Native Claims Settlement Act. Congress incorporated Title XI of ANILCA specifically to ensure that Alaskans would retain their ability to develop the state's fledging economy and infrastructure and assure inholders adequate and feasible access to their lands for economic and other purposes. ANILCA provides separate statutory authority, specific to Alaska, which pertains to oil and gas development of non-federal lands within the boundaries of national parks. We request the EIS acknowledge that the regulations promulgated by the Department of Interior at 43 CFR Part 36, which implement Title XI of ANILCA, supersede 36 CFR Part 9B and exempt Alaska from further rulemaking on this issue.

ANILCA Section 1101 specifies that ANILCA is the "*single, comprehensive statutory authority*" for approval of transportation and utility systems, including oil and gas development and distribution systems, in Alaska:

> Congress finds that - (a) Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would best be identified and provided for through an

> orderly continuous decisionmaking process involving the State and Federal Governments and the public; (b) the existing authorities to approve or disapprove application for transportation and utility systems through public lands in Alaska are diverse, dissimilar, and, in some cases, absent; and (c) to minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this Act and to insure the effectiveness of the decisionmaking process, *a single comprehensive statutory authority* for the approval or disapproval of applications for such systems must be provided in this Act. [Emphasis added]

ANILCA Section 1110(b) explicitly protects access by State and private landowners, including owners of subsurface rights underlying public lands, for exploration and development purposes:

> Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

ANILCA Section 1111(a) secures temporary access across conservation system units for resource exploration and other temporary use by State or private owners:

> IN GENERAL. - Notwithstanding any other provision of this Act or other law the Secretary shall authorize and permit temporary access by the State or a private landowner to or across any conservation system unit, national recreation area, national conservation area, the National Petroleum Reserve - Alaska or those public lands designated as wilderness study or managed to maintain the wilderness character or potential thereof, in order to permit the State or private landowner access to its land for purposes of survey geophysical, exploratory, or other temporary uses thereof whenever he determines such access will not result in permanent harm to the resources of such unit, area, Reserve or lands.

Also, Section 1109 of ANILCA specifically preserves all valid existing rights of access: "*Nothing in this title shall be construed to adversely affect any valid existing right of access.*"

Finally, ANILCA Section 103 (c) specifically excludes State and private inholdings from Alaska CSUs, and prohibits application of public lands regulation to them:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.

Therefore, State and private inholdings are not part of Alaska national parks, even though such inholdings fall within park external boundaries. State and private inholdings are therefore not subject to CSU-specific regulation. The mere fact that an inholding is surrounded by national park land provides insufficient legal justification to regulate activities occurring on the inholding.

In 1981, the National Park Service promulgated implementing regulations at 36 CFR 13.10 -13.16 that recognized these important ANILCA provisions, and explicitly negated the applicability of 36 CFR Part 9B in Alaska. As stated in the Section-by-Section Analysis (46 FR 31845) of the final rule:

> Section 13.15(d)(2) is an interpretive rule stating the Department's views that the regulations of 36 CFR Part 9B are no longer applicable in Alaska park areas. These regulations concerning the development of non-federal oil and gas rights in parks were premised on the land manager's discretion to restrict access. Section 1110(b) of ANILCA effectively removes this discretion from the land manager. Therefore, 36 CFR Part 9B does not apply to Alaska park areas.

The final regulation at 36 CFR 13.15 (d)(2) stated:

> Non-Federal Oil and Gas Rights and 36 CFR Subpart 9B. Since Section 1110(b) of ANILCA guarantees adequate and feasible access to park area inholdings notwithstanding any other law, and since 36 CFR Subpart 9B was predicated on the park area Superintendent's discretion to restrict and condition such access, 36 CFR Subpart 9B is no longer applicable in Alaska park areas.

When the Department of Interior adopted final Title XI regulations on September 4, 1986 (51 FR 31629), 36 CFR 13.10 through 13.16 were repealed and 43 CFR Part 36 became the sole regulatory authority governing access to non-federal inholdings within CSUs in Alaska. It should remain so. This is confirmed in the Section-by-Section analysis for Section 36.10 Access to Inholdings (51 FR 31624):

> Section 36.10(b) has been modified slightly to correct an error in drafting the proposed regulation. The change clarifies that this part is to address all access issues in CSUs, and it was incorrect to also refer to "other applicable law."

The December 30, 2010 Notice of Intent describes the purpose of the 9B regulations (75 FR 82363):

> …to avoid or minimize the adverse effects of nonfederal oil and gas operations on natural and cultural resources, visitor uses and experiences, provide for public safety, and minimize adverse effects on park infrastructure and management.

This is a significant expansion from the purpose described in the original 9B regulations (36 CFR 9.30):

> These regulations are designed to insure that activities undertaken pursuant to these rights are conducted in a manner consistent with the purposes for which the National Park System and each unit thereof were created, to prevent or minimize damage to the environment and other resource values, and to insure to the extent feasible that all units of the National Park System are left unimpaired for the enjoyment of future generations.
>
> These regulations are *not intended to result in the taking of a property interest*, but rather to impose reasonable regulations on activities which involve and affect federally-owned lands. [Emphasis added]

Contrary to the stated intent emphasized above, many of the reasons and objectives cited in the Notice of Intent as the basis for revising the 9B regulations may so interfere with a property owner's ability to develop their lands that these regulations could resemble a taking of property interest if applied in Alaska.

In addition, the State believes that many of the reasons and objectives for revising the 9B regulations have limited or no applicability in Alaska, and appear to be based on the Service's desire to extend its jurisdiction to non-federal land. As discussed above, ANILCA strongly protects inholder access and development rights. Thus, while the intent to revise the 9B regulations appears to be aimed at providing an opportunity for the Service to address previously grandfathered operations (all within the lower 48 states), or establish more "*comprehensive and enforceable operating standards*," or recover costs for administering inholder access, these "opportunities" exceed ANILCA 1110(b)'s limitation on regulation of access rights to that necessary to "*protect the natural and other values*" of Service lands in Alaska. These "opportunities" also may interfere with ANILCA 1110(b)'s direction to the Secretary of Interior to grant inholders "*such rights as may be necessary to assure adequate and feasible access for economic and other purposes*" to their land.

Building on ANILCA's intent to allow access to State and private inholdings for "economic" development purposes, the imposition in Alaska of the goals and objectives identified in the notice would likely severely constrain an inholder's ability to pursue such economic opportunities, and thus would not meet the "reasonable regulation" test in Section 1110(b).

Furthermore, some of the objectives identified in the Notice of Intent clearly conflict with ANILCA. For example, the Notice of Intent states that "[a]*ll operations within the boundary of Park units are regulated under the 9B regulations*." This objective conflicts with the provisions of ANILCA identified above, especially ANILCA Section 103(c). The State is also concerned that the stated objective to regulate directional drilling, when operations are outside of parks, extensively overreaches Park Service authority, especially in Alaska.

We therefore request the revised regulations exempt Alaska park units from its application and recognize that Department of Interior Title XI regulations at 43 CFR 36 as the applicable regulatory authority for oil and gas development activities on non-federal lands within park units in Alaska.

Thank you for this opportunity to comment.

Sincerely,

Susan Magee
ANILCA Project Coordinator

cc: Sally Gibert, ANILCA Program Coordinator