



THE STATE  
of **ALASKA**  
GOVERNOR BILL WALKER

**ANILCA Implementation Program**

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Edward O. Kassman, Jr.  
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Dear Mr. Kassman:

The State of Alaska reviewed the October 26, 2015 Federal Register Notice regarding the National Park Service's proposed rule "General Provisions and Non-Federal Oil and Gas Rights" (RIN 1024-AD78). The following comments represent the consolidated views of State agencies.

The proposed rule expands the National Park Service's (Service or NPS) authority to regulate previously exempt non-federal oil and gas activities, including activities on non-federal lands located within Alaska park units, which pursuant to the Alaska National Interest Lands Conservation Act (ANILCA) are explicitly *not* part of the park unit and cannot be regulated as such unless acquired by the Secretary in accordance with applicable law.<sup>1</sup> While the proposed rule appropriately acknowledges the Department of Interior (DOI) regulations at 43 CFR 36 that implement Title XI of ANILCA as the controlling regulatory authority that governs access within Alaska's park units, it at the same time fails to recognize the reasoning behind Alaska's long-held exemption from additional regulation under 36 CFR Part 9B and imposes new regulatory requirements that infringe on State and private inholder's rights under ANILCA Section 1110(b).

While issues associated with active oil and gas operations in national park units located outside Alaska appear to be the driving factor for the proposed revisions, by applying the rulemaking to the entire national park system, the Service is ignoring the very basis for the compromise provisions that led to the passage of ANILCA and the establishment of Alaska's park units. The proposed rule contains three fundamental flaws specific to park units within Alaska - 1) the NPS lacks authority to regulate oil and gas activities on State and private lands in Alaska, including Alaska Native corporation lands; 2) the proposed rule overturns a long-held exemption that ANILCA implementing regulations at 36 CFR Part 13 and 43 CFR Part 36 both recognized; and 3) the proposed rule violates rights granted State and private inholders by ANILCA. These and other issues are addressed in greater detail below.

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<sup>1</sup> ANILCA Section 103.(c) **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. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.** [Emphasis added]

## **ANILCA Governs Access and Limits Discretionary Authority in Alaska Park Units.**

In 1980, two years following promulgation of the original Part 9 regulations, 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 (ANCSA).

Congress incorporated Title XI of ANILCA specifically to ensure that Alaskans would retain their ability to develop the State's fledgling economy and infrastructure and assure inholders adequate and feasible access to their lands for economic and other purposes. Congress further ensured that nonfederal lands falling within these newly expanded park boundaries would not be treated as if they were federally-owned public lands. Therefore, ANILCA provides separate statutory authority, specific to Alaska, which pertains to oil and gas development on non-federal lands within the boundaries of national parks, and as a result, the original 36 CFR Part 9B regulations exempted Alaska from their application. The exemption should remain in effect.

Specifically, 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.<sup>2</sup> ANILCA Section 1110(b) explicitly guarantees adequate and feasible access for inholders, including owners of subsurface rights underlying public lands, for exploration and development purposes.<sup>3</sup> ANILCA Section 1111(a) guarantees temporary access across conservation system units for resource exploration and other temporary use by State or private owners.<sup>4</sup>

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

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<sup>2</sup> ANILCA Section 1101. 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]

<sup>3</sup> ANILCA Section 1110(b). **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. [Emphasis added]

<sup>4</sup> ANILCA Section 1111. 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. [Emphasis added]

*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.*

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

Lastly, 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.*”

In 1981, the National Park Service promulgated ANILCA implementing regulations at 36 CFR 13.10 -13.16, which recognized these important provisions, and explicitly exempted Alaska parks from 36 CFR Part 9B.

*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. [46 FR 31845, Section by Section Analysis, Emphasis added]*

The final regulation at 36 CFR 13.15 (d)(2) confirmed Alaska’s exemption.

*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 (DOI) adopted final Title XI regulations on September 4, 1986 (51 FR 31629), the National Park Service Alaska-specific regulations at 36 CFR 13.10 through 13.16 were repealed and the DOI regulations at 43 CFR Part 36 became the sole regulatory authority governing access to non-federal inholdings within CSUs in Alaska. This is confirmed in the Section-by-Section analysis for Section 36.10 Access to Inholdings.

*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.” [51 FR 31624, Emphasis added]*

## **Proposed Rule Conflicts with ANILCA and Infringes on Inholder’s Property Rights**

The proposed rule understates the purpose of the regulatory changes, claiming that they are mere “update(s)” intended to improve their “effectiveness” and provide “clarity” (80 FR 65572). The proposed rule does not recognize that it is reversing Alaska’s long-held exemption from the 9B regulations, nor explain how applying additional regulatory requirements to State and private inholdings, including access already governed by 43 CFR 36, remains consistent with ANILCA, the enabling legislation for all park units in Alaska. The proposed rule cites the 9th Circuit’s decision in *Sturgeon v. Masica* as justification for applying the revised regulations to inholdings within Alaska park units, which is inappropriate for two reasons. First, that lawsuit is pending before the Supreme Court, making any reliance on the 9<sup>th</sup> Circuit decision premature. Second, the proposed

regulations are not park management regulations, but are blanket extra-territorial regulation unsupported by the United States Constitution Property Clause.

In determining that the regulations are not a taking of property interest, the Federal Register Notice (Notice) indicates that, like the original 9B regulations (from which Alaska was exempt), the proposed regulations are intended to impose reasonable regulations on activities involving or affecting federally owned lands (80 FR 65574). The rulemaking also states the Service's intention to work with operators to provide "reasonable access" to their operations while protecting park resources and values so as not to violate the Fifth Amendment of the United States Constitution (80 FR 65575). However, the legal standard for determining whether a compensable taking has occurred is an objective one. The agency's intent has little bearing on the question.

Section 1110(b) of ANILCA provides a *statutory right* to cross federal lands to access State and private inholdings. Specifically, it requires the Secretary of Interior to grant inholders, including those "effectively surrounded" by park units, "*rights of access as may be necessary to assure adequate and feasible access for economic and other purposes.*" These "rights" are subject to "reasonable regulations" to protect park resources and values, which pursuant to implementing regulations promulgated under 43 CFR Part 36, appropriately limit the scope and discretionary authority of land managers to impose requirements that would interfere with State and private inholder's rights to access and use their property.

In addition, the preamble to the final DOI Title XI regulations acknowledge that inholder rights of access are not limited to ingress and egress but also apply to "economic and other purposes:"

*The term "adequate and feasible access" received a number of comments. Some agreed with **the interpretation followed in the proposed rule which includes all forms of access without limitation within the scope of section 36.10.** Others preferred the narrower definition found in the interim or present regulations of the NPS and FWS which guaranteed access but limited it to pedestrian or vehicular means of transportation, arguing that the proposed definition was too broad. Other commenters argued that the law was intended to provide for small scale personal use access only and not pipelines or transmission lines. We have reviewed these comments and determined that the proposed definition of adequate and feasible will be retained with minor modifications. The definition has been restructured into a single sentence.*

*The reason for retaining the definition as stated in the proposed rule is our conclusion that it **reflects Congressional intent.** First, we find no justification for distinguishing between small private routes and larger systems. **The criteria for applicability within the state itself pertain to the type of inholding, not the type of system.** Second, the statute clearly states that **the access right is for "economic and other purposes;" not merely for ingress and egress.** Third, the legislative history clearly states that the grant of access must be **broadly construed:***

*The Committee understands that the common law guarantees owners of inholdings access to their land, and that rights of access might also be derived from other statutory provisions, including other provisions of this title, or from constitutional grants. This provision is intended to an **independent grant supplementary to all other rights of access,** and shall not be construed to limit or be limited by any right of access granted by the common law, other statutory provisions, or the Constitution. (emphasis supplied) H. Rept. No. 97, Part 1, 96<sup>th</sup> Congress, 1<sup>st</sup> Sess. 1979, 240; also, S. Rept. No. 413, 98<sup>th</sup> Congress, 1<sup>st</sup> Sess. 1979, 249. (51 FR 31624)*

Alaska regional guidance confirms that adequate and feasible access is the goal, not regulation of the inholding, by explaining that the reason the application requests information about an inholder's land use objective is that

it assists the Service with its determination of what would constitute adequate and feasible access, not for establishing regulatory requirements associated with activities occurring on the inholding itself.<sup>5</sup>

Yet the proposed rule does exactly that by regulating activities occurring on State and private lands, including the authority to deny an authorization, which is contrary to the rights granted inholders pursuant to ANILCA Section 1110(b). While 43 CFR 36.10 allows for mitigation to address impacts to park resources and values and consideration of alternative routes, protection of “*natural and other values*” cannot be used to frustrate or deny inholders their rights under ANILCA to receive “adequate and feasible” access to their inholding. Even if there are significant impacts, an inholder must be granted the route and method of access requested if adequate and feasible access does not otherwise exist.<sup>6</sup> That intent is confirmed in the preamble to the DOI Title XI regulations, which quotes Senate Report 96-413 from ANILCA’s extensive legislative history.

*The Committee adopted a standard providing for adequate and feasible access for economic and other purposes. The Committee believes that **routes of access to inholdings should be practicable in an economic sense. Otherwise, an inholder could be denied any economic benefit resulting from land ownership.** [Emphasis added]*

In addition to financial assurance and liability coverage, the rulemaking proposes to supplement the regulatory authority in 43 CFR Part 36 and impose a “*fee based on fair market value for access (e.g., roads or gatherings lines) across federal lands outside the scope of an operator’s oil and gas right*” (80 FR 65582). This is contrary to Alaska regional guidance for ANILCA Section 1110(b) access which clearly states “...*the NPS does not charge fees and costs regarding the exercise of rights (not privileges) (NPS Reference Manual 53, C5-1 & C10-2), such as the ANILCA 1110(b) access right, to the extent allowable by law and regulations. Accordingly, the NPS will charge fees only for an access request that requires an EIS.*”<sup>7</sup> In addition, the DOI Title XI regulations at 43 CFR 36.6 limits cost reimbursement to application processing, reasonable administrative costs, and the costs of EIS preparation.

The Notice also draws a parallel between the proposed rulemaking and the application of 36 CFR Part 9A in Alaska, stating that the new requirements for oil and gas activities are similar to those applied to mining operations. Unlike the existing subpart B oil and gas regulations, when the subpart A mining regulations were revised in 1988, the Alaska exemption was lifted on the basis that ANILCA did not amend the Mining in the Parks Act. Parallel justification does not exist for the subpart B oil and gas regulations. Further, the preamble to the revised subpart A mining regulations clarified “*The 36 CFR Part 9, Subpart A regulations do not govern mineral activities in connection with Native Corporations-owned subsurface mineral rights established pursuant to the Alaska Native Claims Settlement Act (43 U.S. C. 1601, et seq.) Rather the 36 CFR Part 9 subpart A regulations govern mineral development in National Park System units in connection with mineral*

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<sup>5</sup> 3) An Interim User’s Guide to Accessing Inholdings in National Park System Units in Alaska, July 2007, page 16. “Why does the NPS want to know my land use objectives? Knowing your plans will enable the NPS to assess whether the requested access is adequate and feasible to meet your needs.”

<sup>6</sup> 36 CFR 36.10(e)(1) For any applicant who meets the criteria of paragraph (b) of this section, the appropriate Federal agency **shall** specify in a right-of-way **permit the route(s) and method(s) of access across the area(s) desired by the applicant, unless** it is determined that:

- (i) The route or method of access would cause significant adverse impacts on natural or other values of the area **and adequate and feasible access otherwise exists**; or
- (ii) The route or method of access would jeopardize public health and safety **and adequate and feasible access otherwise exists**; or
- (iii) The route or method is inconsistent with the management plan(s) for the area or purposes for which the area was established **and adequate and feasible access otherwise exists**; or
- (iv) The method is unnecessary to accomplish the applicant’s land use objective.

<sup>7</sup> An Interim User’s Guide to Accessing Inholdings in National Park System Units in Alaska, July 2007, page 8.

*rights established under the Mining Law of 1872 (30 U.S.C. 28 et seq.).*” 53 Fed. Reg. 25160 (July 5, 1988). The same logic applies to Native corporations that acquired their subsurface oil and gas rights pursuant to ANCSA, further justification for retaining the exemption for Alaska park units.

The claimed authority in this rulemaking to deny access to and use of an inholding and impose additional costs and requirements on State and private landowners, including fees for use of federal land to access inholdings, is contrary to the statutory rights granted in ANILCA Section 1110(b). Not only does the proposed regulation violate ANILCA’s guaranteed rights of access, it contravenes the economic development promises to Alaska Natives in ANCSA. Application of the revised 9B regulations to Alaska thus may so interfere with Alaska inholders’ ability to develop their lands that these regulations could, contrary to the assertion in the proposed rule, work a compensable taking.

## **Conclusion**

The proposed rule correctly recognizes that DOI Title XI regulations at 43 CFR 36 address access issues in Alaska. However, it lacks sufficient legal justification to apply additional regulatory requirements under 36 CFR Part 9B, overturning the exemption rooted in ANILCA and its implementing regulations promulgated by both the NPS and DOI. Alaska-specific DOI regulations at 43 CFR 36 and other existing state and federal regulatory authorities that apply to oil and gas activities on all federal, state and private lands, such as the Clean Water Act, the Alaska Oil and Gas Conservation Act, the Fishway Act, and the Anadromous Fish Act, are already in place to protect park resources. These supplemental regulations are both unnecessary and unwarranted.

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

Thank you for the opportunity to comment.

Sincerely,



Susan Magee  
ANILCA Program Coordinator