THE STATE of ALASKA
GOVERNOR BILL WALKER

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Scott Covington
U.S. Fish and Wildlife Service
Division of Natural Resources and Planning
MS: NWRS, 5275 Leesburg Pike
Falls Church, VA 22043

Dear Mr. Covington:

The State of Alaska reviewed the "Management of Non-Federal Oil and Gas Rights" Federal Register Notice (Notice), dated December 11, 2015, which proposes to revise 50 CFR Parts 28 and 29 (RIN 1018-AX36). The following comments represent the consolidated views of state agencies.

In the State's April 24, 2014 comments on the Advanced Notice of Proposed Rulemaking and Notice of Intent to prepare a programmatic environmental impact statement, we summarized the unique legislative authorities that apply to the complex patchwork of non-federal oil and gas interests and development activities in Alaska. Through the Alaska National Interest Lands Conservation Act (ANILCA) and the Alaska Native Claims Settlement Act (ANCSA), Congress put statutory provisions in place to protect the property rights of inholders and accommodate the State's economic and infrastructure needs. On that basis, we requested the Service exempt Alaska refuges from unneeded regulation that would complicate the existing regulatory framework and infringe on the rights of inholders. The specific statutory provisions that apply in Alaska are detailed in our scoping comments and are incorporated herein by reference.

Instead of an exemption, the proposed rule defers to the Department of Interior (DOI) Title XI regulations at 43 CFR 36 to specifically address the access portion of an oil and gas operation in Alaska, but also adds regulatory requirements that apply to the oil and gas operations themselves (e.g. operating standards and well plugging requirements). The proposed rule does not reference ANCSA §22(g) and the limited discretion afforded the Service in regulating the private Native-owned lands pursuant to 50 CFR 25.21.

While the Notice initially identifies non-Federal oil and gas development as "*activities associated with any private, State or tribally owned mineral interest where the* ***surface estate is administered by the Service*** *as part of the Refuge System*" (80 FR77200, emphasis added), the proposed rule also specifically defines operations to include access[1] and applies these additional regulatory requirements *whenever*

[1] "Operations means all existing and proposed functions, work and activities in connection with the exercise of oil or gas rights not owned by the United States and located or occurring within a refuge. (1) Operations, **include**, but are not limited to: **Access by any means to or from an area of operations**…." (80 FR 77220, emphasis added)

refuge lands are needed to access the non-federal mineral interest.[2] It is therefore unclear whether the proposed rule's additional regulatory requirements would be limited to operations conducted entirely on refuge surface lands or if they would apply to oil and gas operations conducted on non-federal inholdings when refuge lands are needed only for access. If the latter applies, the proposed rule inappropriately expands the Service's authority to regulate activities occurring on non-federal inholdings located within refuge boundaries, which ignores the underlying statutory basis for Title XI of ANILCA and the implementing DOI regulations.

The Notice also states the proposed rule applies to waters subject to the jurisdiction of the United States, regardless of ownership of the submerged lands, tidelands, or lowlands. This is in direct violation of ANILCA Section 103(c), which explicitly states that State and private inholdings are not part of national wildlife refuges in Alaska and cannot be regulated as such unless acquired by the Secretary in accordance with applicable law.[3] This issue is currently before the Supreme Court and any rule based on the 9th Circuit decision is premature.

These and other issues are addressed in greater detail below.

National Park Service Non-Federal Oil and Gas Regulations

The Notice states the proposed rule was developed in cooperation with the National Park Service (NPS) and that the Service intends for this proposed rule to be consistent with the corresponding NPS regulations at 36 CFR 9B, which are also currently undergoing revision. Similar to our concerns with this proposed rule, the NPS rule proposed to inappropriately expand its authority to regulate non-federal oil and gas activities on inholdings within Alaska park units.

In the State of Alaska's December 28, 2015 comments on the NPS proposed rule (RIN 1024-AD78), we clarified that in 1981 the NPS promulgated ANILCA implementing regulations at 36 CFR 13.10 -13.16, which recognized the statutory provisions governing access and explicitly exempted Alaska parks from national regulations governing non-federal oil and gas activities at 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*

[2] "Accessing Oil and Gas Rights From a **Non-Federal Surface Location (Including Inholdings)** §29.80 Do I need a permit for accessing oil and gas rights from a non-Federal location? …..**If you require access across Federal surface estate**, that access is subject to applicable provisions of this subpart, **including obtaining an operations permit** for any new access or modification of existing access." (80 FR 77222, emphasis added) *and* "For areas where the United States does not hold a property interest but lie within the boundaries of a refuge (i.e. inholdings), **these regulations do not apply if refuge lands are not accessed**." (80 FR 77220, emphasis added)

[3] 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]

> *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 DOI adopted final Title XI regulations on September 4, 1986 (51 FR 31629), the NPS 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]

The DOI regulations were promulgated to ensure consistent implementation of Title XI of ANILCA on all DOI managed CSUs in Alaska. To be consistent with ANILCA, Alaska refuges must also be exempted from the proposed rule.

The 2015 NPS proposed rule also cites the 9th Circuit's decision in *Sturgeon v. Masica*, 768 F.3d 1066 (9th Cir. 2014) 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 9th 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.

The Notice for the Service's proposed rule attributes the authority to regulate waters within refuge boundaries to the National Wildlife Refuge System Improvement Act (NWRSIA). However, Section 9 of the NWRSIA also specifies that should there be a conflict between *any* provision of the NWRSIA and ANILCA, ANILCA prevails. Therefore, the Service does not have authority to apply additional regulation of oil and gas activities on State and private inholdings in Alaska, including State-owned navigable waters and tidelands.

ANILCA Protects Inholder's Property Rights

The Notice indicates that the proposed regulations are not intended to result in a taking of property interest but to reasonably regulate operations to protect refuge resources (80 FR 77220). The rulemaking also states the Service does not intend for the regulations to result in a denial of access but instead represents the intention to work with operators to provide "reasonable access" to their operations

so as not to violate the Fifth Amendment of the United States Constitution (80 FR 77206). 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 inholders' 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.*
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> *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****:*
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> > *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 be 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, 96th Congress, 1st Sess. 1979, 240; also, S. Rept. No. 413, 98th Congress, 1st Sess. 1979, 249. (51 FR 31624)

NPS Alaska regional guidance confirms that adequate and feasible access is the goal, not regulation of the inholding, by explaining that the reason the application for access (SF 299) 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.[4]

By not completely deferring to 43 CFR 36, which governs access on and through all CSUs in Alaska, including refuges, and applying additional regulatory requirements to State and private inholdings, the proposed rule conflicts with the rights granted inholders pursuant to ANILCA Section 1110(b). While 43 CFR 36.10 allows for mitigation to address impacts to refuge resources 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.[5] 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]

The claimed authority in this rulemaking to deny access to and use of an inholding and impose additional requirements on State and private landowners 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 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

While the proposed rule recognizes that DOI Title XI regulations at 43 CFR 36 address access issues in Alaska, it lacks sufficient legal justification to apply additional regulatory requirements under 50 CFR 28 and 29 to State and private inholdings, including ANCSA §22(g) lands. Alaska-specific DOI regulations at 43 CFR 36 and Service compatibility regulations at 50 CFR 25.21, along with other

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[4] 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."

[5] 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.

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 refuge resources. These supplemental regulations are therefore both unnecessary and unwarranted.

The proposed rule needs to clarify that no portion of the revised rule applies to State and private inholdings, including State-owned navigable waters, within refuge boundaries in Alaska. The cleanest solution to resolve the conflicts between the proposed rule and ANILCA is an explicit exemption for Alaska refuges from the revised regulations, which would appropriately recognize DOI Title XI regulations at 43 CFR 36 and Service compatibility regulations at 50 CFR 25.21 for ANCSA 22(g) lands as the only applicable regulatory authorities for non-federal oil and gas development activities within refuges in Alaska.

Thank you for this opportunity to comment.

Sincerely,

Susan Magee
ANILCA Program Coordinator