OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF GOVERNMENTAL COORDINATION

SOUTHCENTRAL REGIONAL OFFICE
3601 "C" STREET, SUITE 370
ANCHORAGE, ALASKA 99503-5930
PH: (907) 269-7470/FAX: (907) 561-6134

CENTRAL OFFICE
P.O. BOX 110030
JUNEAU, ALASKA 99811-0030
PH: (907) 465-3562/FAX: (907) 465-3075

PIPELINE COORDINATOR'S OFFICE
411 WEST 4TH AVENUE, SUITE 2C
ANCHORAGE, ALASKA 99501-2343
PH: (907) 271-4317/FAX: (907) 272-0690

December 3, 1996

Gary Marsh
Bureau of Land Management
Administrative Record Room 401LS
1849 C Street, N.W.
Washington, D.C. 20240

Dear Mr. Marsh:

The State of Alaska has reviewed the Bureau of Land Management's (BLM) September 10, 1996, Notice of Proposed Rulemaking which revises existing regulations and renumbers the Code of Federal Regulations citation from 43 CFR 8350 to 43 CFR 6400. We have also reviewed the associated Environmental Assessment (EA) dated September 2, 1996. This letter represents the consolidated comments of State of Alaska resource agencies.

The proposed regulations and EA assert their intended purpose is to establish uniform standards and procedures in considering federal licensing of, or assistance to, water resource projects within or affecting wild and scenic rivers or study rivers administered by BLM. The Notice further asserts that the regulations will "harmonize" BLM's definitions and procedures with those of the U.S. Forest Service (USFS). Finally, the proposed rule is intended to "streamline" administration of the wild and scenic rivers system. While the State appreciates streamlining existing regulations, this rule goes beyond this laudable goal, leaving a wake of unresolved problems and jurisdictional issues. Specifically, the proposed rule

- inappropriately grants authority to the BLM Director to authorize a water resources project, thereby usurping existing state management authorities;

- is not consistent with the special provisions of the Alaska National Interest Lands Conservation Act (ANILCA), especially titles VI, VIII, and XI;

- inappropriately authorizes an override decision of a local federal agency without a clear appeal process; and

- inappropriately defines suction dredging as a water resource project.

In addition, the associated EA is incomplete and inadequate, failing to address a number of relevant issues. When the issues raised in these comments are addressed, we believe it unlikely that a Finding of No Significant Impact (FONSI) can be justified under Department of the Interior regulations for compliance with the National Environmental Policy Act.

In light of these serious issues, the State of Alaska urges expansion of the National Environmental Policy Act analysis and reconsideration of these proposed regulations.

The following comments detail specific agency concerns. If you have questions regarding any of these issues, please contact me and I will put you in touch with technical staff having the appropriate expertise.

Exclusion of Non-Federal Land

The proposed BLM regulations do not reflect the fact that all units of the national wild and scenic rivers system in Alaska have a different statutory framework (regardless of the federal agency in charge) than similar units in other states. Specifically, the proposed regulations do not consider the amendment in Title VI of ANILCA (Section 606(a)) that provides

> "...such boundary *shall not include* any lands owned by the *State or a political subdivision* of the State nor shall such boundary extend around any *private lands* adjoining the river in such manner as to surround or effectively surround such private lands..." (emphasis supplied)

Section 6400.111 of the proposed regulations provide that the BLM Director in Washington D.C. will approve or disapprove a water resource project on the basis of whether (1) "any portion" of the water resource project is *within* the boundaries of a wild and scenic river unit or (2) when "any portion" of the water resource project is "*located above, below, or outside*" the boundaries of such a unit. The terms "above" "below" and "outside" should be defined in Section 6400.2.

A recent draft study by federal land managers[1] responsible for management of units of the national wild and scenic rivers system concluded that there are

> "...no explicit standards for resource protection on non-federal lands in the Act or Interagency Guidelines. Neither provide much guidance...As a result, federal agency staff have had to rely heavily on professional judgement in interpreting and applying the Act and Guidelines on Wild and Scenic Rivers that flow through lands held by state and local governments or private landowners."

While non-federal lands are expressly excluded from the boundaries of the national wild and scenic river units in Alaska, the proposed regulations do not make this distinction and do not

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[1]Undated Draft. Inter-Agency Wild and Scenic Rivers Coordinating Council. Approaches for Protecting Resource Values on Wild and Scenic Rivers Flowing Thought Non-Federal Lands. C. Thomas NPS/NESO, Boston.

provide clear guidance on how a water resource project will be approved or disapproved by the BLM Director.

The proposed BLM regulations fail to discuss the fundamental basis for the federal government authority over a water resource project that is not within or does not invade the boundaries of a designated unit that is not otherwise prohibited in the approved river management plan. The provisions of Section 6400.111 add more confusion about federal authority, appearing to encroach on state and local authority for federal decisions that have previously been the subject of much debate and comment in the preparation of the Final Cumulative Impacts EIS's, legislation, and river management plans associated with each unit of the national wild and scenic rivers system.

Given the plain language of ANILCA Section 606(a) that expressly excludes non-federal ownerships, the regulations need to carefully explain how activities on non-federal land in Alaska (e.g. suction dredge operations) will be addressed when it does not invade the boundaries and otherwise meets performance standards evaluated by the BLM Alaska State Director and U.S. Army Corps of Engineer, Alaska District in their federal court accepted EIS's.

State Jurisdiction

Section 13(f) of the Wild and Scenic Rivers Act provides:

> "Nothing in this Act shall affect existing rights of any State, including the right of access, with respect to beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area."

The proposed BLM regulations do not discuss how this requirement would be impacted by the proposed decision process for a water resource project. BLM should also give more attention to Executive Orders 12612 and 12630. The final decision authority to approve or disapprove a water resource project could interfere with constitutionally protected property rights granted to the State of Alaska under the Alaska Statehood Act and to Alaska Native corporations under the Alaska Native Claims Settlement Act as amended.

The BLM Director's Section 6400.111 authority regarding water resource projects should be limited to rivers where the submerged lands are not owned by the sovereign state, or where the water is not held in trust by a sovereign state for the benefit of the public. The only exception should be if the BLM has an agreement with the state granting specific authority to manage that state's land or assume the state's trust responsibilities for public water.

Consideration of Suction Dredges

Section 6400.2 expands the definition of a "water resource project" to include "suction dredging associated with mining." The proposed BLM regulations do not explain the rationale for this definition change. Inclusion of suction dredging is inconsistent with the final BLM Alaska State

Director "boundaries, classification, and development plans" that were submitted to the President of the Senate and the Speaker of the House under section 3(b) of the Wild and Scenic Rivers Act. Specifically, BLM recognized suction dredging for mining in Alaska as an acceptable use since it (1) caused no significant stand-alone or no significant cumulative environment impact, and (2) that there were no expected non-point sources that would be distinguishable from expected natural conditions.

See also page 37 of the BLM River Management Plan for the Fortymile River, December 1983:

> "Most dredges are over 5-inch intake diameter are operated on claims located on the bed of the stream under Alaska State Mining laws.... *Valid riverbed claims are those on State lands, and are excluded from river boundaries*....However, the BLM has a clear responsibility to manage *related* activities such as camping and vehicle use that occur *above* the ordinary high water mark." (emphasis added)

Furthermore, the "water resource project" definition change should be explained in light of Section 9(a) of the Wild and Scenic Rivers Act establishing national policy for mining activities, which states

> "Nothing is this Act shall affect the applicability of the United States mining and mineral leasing laws *within* components of the national wild and scenic rivers system except that--(I) ...all mining operations...shall be subject to such regulations as the Secretary...may prescribe to effect the purposes of this Act;....Regulations issued pursuant to paragraphs (I) and (ii) shall, among other things, provide safeguards against pollution of the river involved and *unnecessary* impairment of scenery *within* the component in question." (emphasis added)

Placer Mining Final Cumulative Environmental Impact Statements

The proposed BLM regulations do not consider the findings contained in the federal court ordered Placer Mining Final Cumulative Environmental Impact Statements prepared by the BLM Alaska State Director in cooperation with the U.S. Army Corps of Engineers, Alaska District in 1989. Page 4-3 of the EIS for the Fortymile River concludes:

> "...Little riparian bank or soil damage is projected as a result of undercutting banks, channelizing the riverbed, or other activities conducted by *suction dredging*. No effects are projected as a result of long-term camping." (emphasis added)

This document (page S-2) also notes that, in cooperation with the U.S. Army Corps of Engineers,

> "BLM intends to authorize long term camping associated with suction dredge mining on State river bed claims within Scenic and Wild [River] Segments."

Finally, on page S-5, BLM asserts:

> "With the possible exception of surface flow from large storms, downstream effects from non-point sources would be indistinguishable from expected natural conditions."

Rule's Relationship to other Federal Agencies

The proposed BLM regulations are intended to "harmonize" BLM's procedures and definitions with those of the U.S. Forest Service. The proposed regulations infer that the USFS regulations are superior, but neither the regulations nor the EA indicate where BLM and the USFS are not now in harmony. Accordingly, it would be helpful if an analysis of the BLM and USFS differences were included. Also the proposed regulations do not indicate whether adoption of these BLM regulations will require amendment of the existing USFS regulations and decision process, and if so, which parts and why. Finally, the proposed BLM regulations do not indicate whether, if adopted, the regulations would or would not be in "harmony" with regulations of the National Park Service, the U.S. Fish and Wildlife Service and other federal agencies' decision process when a water resource project is associated with a unit of the national wild and scenic rivers system.

Inadequate EA

The EA asserts that proposed regulations "...will be accomplished without affecting the rights of BLM, its customers, or the public at large." In part III. A. of the EA, the proposed action "...advances...regulatory reform initiative without any material negative consequences." Part V. A. further asserts the proposed regulations will be "more user-friendly", will "lessen BLM's administrative burden" and will have "no significant on-the-ground action." These are unsupported assertions that do not apply to BLM administered units of the national wild and scenic rivers system in Alaska. On the contrary, these regulations would have significant direct and cumulative negative consequences to suction dredgers operating on state owned land that are expressly excluded from the authority of federal land managing agencies under the Wild and Scenic Rivers Act as amended by ANILCA.

The EA does not describe how the absence of a defined regulatory appeal process is more user-friendly than the process which is now handled at the local level by knowledgeable federal and state officials. Rather it will add a minimum of 60 days to the final decision for something as small as a 1 inch recreational suction dredge operating without a federal mining claim on land not owned by the federal government . The EA does not acknowledge or address sections of ANILCA and the Alaska Native Claims Settlement Act that make implementation of most federal laws and regulations in Alaska (including units of the wild and scenic rivers system) different from similar federal land management units in other states.

Significant Impacts on Mining

Neither the EA nor the proposed BLM regulations address the likely significant negative impact on existing mining activities within ANILCA units. For example, the Department of the Interior's U.S. Geological Survey[2] documents that colluvium along creeks in steep-sided valleys is often gold bearing. Many of the potential placer gold deposits are located further from the stream bed than the statutory ½ mile mineral withdrawal provided in the ANILCA amendment to the National Wild and Scenic Rivers Act.

The BLM river management plan for the Fortymile River has closed a substantial part of these prospective placer gold deposits that are beyond the statutory limit. Placer gold mining operations require water. Neither the EA nor the proposed regulations have evaluated how the BLM decision process under the proposed regulations would impact getting water to the location of the placer deposit, or alternatively, the concentrate to water. The historic pattern of placer mining relies on a series of hillside ditches with down slope conveyance to the placer operation on the river bank. These ditches are plainly visible from the river and from the surrounding terrain.

The issue of using water for existing and potential placer operations is significant since the Department of the Interior's report also estimates that "...5,167 metric tons of gold may exist in the placers of the Fortymile region." Using the current market value of $380 per ounce, the value of the remaining placer gold in the Fortymile River basin is about $6 billion. A conservative estimate would be at least $2 billion if it is assumed that 2/3 of the deposits are uneconomic or located outside the boundaries of the wild and scenic river unit.

Water Pollution Authority

These regulations appear to grant BLM authority to regulate water pollution. This is inappropriate. Regulatory authority associated with water quality rests with the Environmental Protection Agency, which has in turn delegated this authority to the State. The proposed regulations also provide no guidance as to what is "unnecessary impairment of the scenery."

Application to ANILCA Areas

The proposed rulemaking indicates the regulations will apply not only to designated wild and scenic rivers, but also to "Study Rivers" under Section 5(a) of the Act. We have concerns that rivers within BLM "Resource Management Plans" in Alaska could also be extended to other study rivers under Section 5(d). If so, then the proposed rulemaking may contravene Sections 101(d) and 1326(b) of ANILCA which express Congress intention that no more land in Alaska be considered for inclusion as a conservation system unit, which includes wild and scenic rivers.

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[2] 1996. Warren Yeend. Gold Placers of the Historical Fortymile River Region, Alaska. U.S. Geological Survey Bulletin 2125.

BLM should also review these regulations for consistency with the November 1982 "Synopsis for Guiding Management of Wild, Scenic, and Recreation River Areas in Alaska" prepared by a federal/state interagency team for ANILCA rivers and adopted by the direction of the Alaska Land Use Council.

Definition of "Intention" in Section 6400.2

Section 6400.10 of the proposed BLM regulations requires federal departments and agencies to provide advance notice to the BLM Director "as soon as possible of their *intention* to issue" a decision on a water resource project. Under Section 6400.12, the Director must approve or disapprove an authorization of a water resources project within 60 days of receiving the notice. The term "intention", as used by many federal agencies, does not occur until after an application has been received and determined to be complete and there is reasonable opportunity for public and other agency input. To avoid confusion by applicants, the general public, agencies that routinely review and comment on various applications, and special interest groups, the term "intended" should be defined in Section 6400.2.

"Streamlined" Application Process

For the U.S. Army Corps of Engineers, Alaska District, providing notice of a complete application with reasonable time for public comment, and determining whether the application is consistent with current law, regulation, and policy, takes between 60 and 90 days. If the application involves an individual permit, it is not unusual for commentors to request additional review time, and often a hearing is requested. In either of these two events, the local federal agency decision time line realistically can extend well beyond the 60 to 90 days. We do not believe this elongated time frame is consistent with the stated goal of "streamlining."

Centralized Decision Making

It appears that local agency expertise and local public and interest group input into the decision process will be diluted or ignored; otherwise, there is no reason to centralize decision making. It is not clear whether a similar centralized decision making process is intended for the National Park Service, U.S. Fish and Wildlife Service, and USFS. Under this scenario, it is further unclear if the federal government intends to implement a similar decision making process for units of the national wild and scenic rivers system that are administered by a state under the provision of Section 2(a) of the Wild and Scenic Rivers Act.

Applicability to Differing Circumstances

Similarly, BLM should clarify how these regulations will distinguish between large commercial operations and small recreational operations that do not traditionally operate under a federal mining claim. For example, it is not clear how BLM intends to authorize small recreational suction dredges on a drainage that is exclusively under federal jurisdiction *within* the boundaries (e.g. Jack Wade Creek). It is further unclear how such a decision process would be applied by

the BLM or USFS to a similar suction dredge operating exclusively on non-federal land "above," "below," or "outside" the boundaries of a component of the national system in Alaska.

ANILCA Title XI

The proposed BLM regulations do not discuss the special provisions for access to non-federal lands within conservation system units in Alaska under Title XI of ANILCA. This needs special attention, since the Congress established a special decision process and time lines for "bridge and other roadway construction/reconstruction projects" that are now included in the definition of a "water resource project" in Section 6400.2. Likewise, there is no indication of potential impacts to lands and resources granted to Alaska Native corporations under the provisions of the Alaska Native Claims Settlement Act as amended.

Lack of Appeal Mechanism

The basic thrust of the proposed BLM regulations is to make it clear that the BLM and USFS, and presumably the National Park Service and U.S. Fish and Wildlife Service, have full and final authority over any water resource project that is within, above, below, or outside a unit of the national wild and scenic rivers system. The proposed regulations are deficient in that an appeal process is not defined. The standards set forth in Section 6400.111 are ambiguous, arbitrary, and capricious. The final regulations should have a specific section that fully and clearly describes how, where, and when an appeal may be filed.

Since the BLM Director and the Chief of the USFS could potentially override a decision of another federal agency, this new section should describe coordination and consultation between the original permitting agency and other federal, state, and local agencies involved with the permit. Particular attention should be given to how this coordination and consultation will take place within the 60 days set forth in Section 6400.12. The new section should also state whether the BLM or USFS decision is a final administrative action so that applicants know when court action may be appropriate for unresolved disputes. The proposed regulations should also identify how and when input from affected parties would be considered by the final decision maker (Director BLM or Chief of the USFS).

Based on these comments, the State of Alaska concludes its comments by again urging reconsideration of these proposed regulations and expansion of the environmental analysis.

Thank you for the opportunity to provide these comments. Please contact this office if you have questions.

Sincerely,

Sally Gibert
State CSU Coordinator

cc: John Katz, Governor's Office, Washington, D.C.
Marilyn Heiman, Governor's Office, Juneau
Diane Mayer, Director, Division of Governmental Coordination
John Shively, Commissioner, Department of Natural Resources
Frank Rue, Commissioner, Department of Fish and Game
Joseph Perkins, Commissioner, Department of Transportation and Public Facilities
Michele Brown, Commissioner, Department of Environmental Conservation
William Hensley, Commissioner, Department of Commerce and Economic Development