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DRAFT FINAL REPORT

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ASLAG PETITION

I. EXECUTIVE SUMMARY

The State of Alaska is petitioning the federal government for a fundamental alteration of the federal/state relationship regarding ownership and management of 225 million acres of federal lands within Alaska, constituting 60% of the State. Beginning with the Statehood Act compact in 1958, the federal government made repeated contractual and statutory commitments and promises that Alaska, and Alaskans, would be able to acquire valuable lands for resource development, share in the stream of revenues from use and development of multiple use federal lands, exercise sovereignty and control over state lands and waters, freely access lands transferred to the State, Alaska Native Corporations, and individuals, manage the fish and wildlife resources of Alaska, and engage in traditional activities on lands retained by the federal government. These commitments and promises were expressed plainly in the letter and spirit of the 1958 Alaska Statehood Act, the 1971 Alaska Native Claims Settlement Act ("ANCSA"), and the 1980 Alaska National Interest Lands Conservation Act ("ANILCA").

Rather than honor these commitments, federal land management agencies have repeatedly and systematically disregarded the law and shredded all of these promises. Alaska was denied the right to freely select its Statehood Act lands, the very heart of the Statehood Act compact, with nearly one third of originally available lands taken off the table by federal action, and the State shunted from first in line for land choices to third. After 120 million acres of federal lands (nearly one third of the State) were set aside as Parks, Wildlife Refuges, Wilderness, Monuments, and Wild and Scenic Rivers, Alaska was promised in law that there would be no more restrictive federal land designations and remaining federal lands would be subject to multiple use management (per applicable federal law) for resource use development (*e.g.*, oil and gas, mining, and timber) with Alaska entitled to a share of related revenues (as are other public land states). Instead, the federal government has engaged in blatant administrative subterfuge to impose more land use restrictions and prohibit or obstruct resource use, destroying jobs, economic opportunities, and revenue streams. Efforts by the State, ANCSA Corporations, and individuals to develop surface access to their lands have been regularly blocked and obstructed in derogation of the law. The State's authority to control its lands and waters has been disregarded and compromised by excessive federal power grabs. These grabs have extended to the state's sovereign power to manage fish and wildlife, another key feature of the Statehood Act compact and protected by ANILCA. And lastly, the ability of Alaskans to pursue traditional uses (*e.g.*, fishing, hunting, camping) on federal lands, as well as associated access, guaranteed in the 1980 Act is barred, impeded, or obstructed by federal bureaucrats.

The arbitrary, unilateral systematic federal "back of the hand" to these commitments over a 40-year period is an outrageous and unacceptable breach of the contract principles and equities enshrined in the three statutes referenced above. Federal agency misbehavior and derogation of law and the compact/contract underpinning statehood, frees the State to demand fundamentally new arrangements regarding the apportioning of federal lands in Alaska, as well as the structures

and mechanisms for management of those lands that may remain in federal hands. It is far too late for another set of empty federal promises (*i.e.*, this time it will be different, this time we will adhere to the rule of law), hence the compelling need and appropriateness for a fundamental realignment of public land ownership and management in the 49th State. And based on decades of federal mismanagement and malfeasance, state management is the only way to assure that multiple use lands are managed for multiple use, wildlife lands and fish and wildlife are in fact conserved, and lands dedicated for traditional uses will welcome statutorily protected uses.

Ample precedents and principles support this remedy. At our nation's founding, states were admitted to the Union and received vacant lands previously held by the British Crown or by the new federal government. These federal lands were those that reached from the Appalachians to the Mississippi and had also been secured by the treaty that ended the American Revolution. It was deemed important that early states received these lands as well to ensure both equal footing among the states as well as equal sovereignty. Alaska's remedy represents a reapplication of these founding principles.

In the international arena, other Arctic nations have seen fit to empower provinces and local governments by providing them land to be administered and managed locally rather than from a distant national capital. Canada, Denmark, and Russia have all taken steps to devolve Arctic land management to their regional or local branches of government. Transferring federal lands in Alaska to the State would be consistent with these precedents.

This petition indicts the federal government for its specific multiple violations of law and identifies remedies for those incessant violations. Transfer of multiple use Bureau of Land Management ("BLM") and U.S. Forest Service lands to the State is the first remedy (which would leave Forest Wilderness and Monument lands in federal ownership). Since the federal agencies have refused and failed to manage these lands consistent with multiple use principles, the State is fully prepared to take such action. Similarly, the State seeks to assume management authority over Fish and Wildlife Refuges as part of its primary authority over fish and wildlife resources within Alaska and consistent with provisions of the National Wildlife Refuge System Improvement Act of 1997 authorizing state management of refuge lands.

National Preserve lands in Alaska, now managed by the National Park Service ("NPS"), are open as a matter of law to sport and subsistence hunting and other traditional uses. NPS has demonstrated unrelenting hostility to these statutorily permitted activities, which are not allowed in most Lower 48 Parks. Alaska is far better suited to effectively and efficiently conserve and manage these land units without overt hostility to permitted uses and users. Fundamental rearrangement of land ownership and management in Alaska, with the State assuming a greater role, is the only way to remedy the federal government's fundamental and systematic disregard of law and related promises.

II. BACKGROUND AND HISTORY

Alaska is a place like no other. Its unique history of Statehood and land agreements further support that Alaska's lands cannot be viewed with the same lens as those in the Lower 48. The State and the federal government have entered into a series of agreements unique to Alaska that shape how natural resources and land must be managed. It is these agreements that the federal agencies have continually violated and serve as the bases for this petition for returning Alaska's lands to Alaskans.

A brief overview of the key laws and agreements forming the key history is provided below. In reviewing the background and intent behind each of these laws, the blatant violations by the federal government of Alaska's rights and the rights of those living here only become more glaring.

A. STATEHOOD

Alaska entered the union as the 49th State in 1959, per the terms and conditions of the 1958 Alaska Statehood Act[1] and the 1958 vote of acceptance by its citizens. The State of Alaska was supposed to be able to select 103.5 million acres as the central feature of its statehood compact with the federal government; the State was also to receive an additional 1.5 million acres for education and mental health purposes. This acreage (about 105 million acres) constitutes only 28% of Alaska's overall land mass of over 375 million acres. At statehood, approximately 75 million acres of Alaska's lands were off limits to the State to choose as its land selections. These off limits areas consisted primarily of National Monuments, National Forests, the then Naval Petroleum Reserve, Wildlife Ranges, military withdrawals, and Indian reservations. The remaining nearly 300 million acres of "vacant and unappropriated" federal land was to be available for the State's selections.

The sizeable land selection rights accorded to Alaska were the result of concern that, without a broad grant of valuable land, Alaska would become a "welfare" state dependent on the federal government and other states: "[A]bsent a land grant from the Federal Government to the State, there would be little land available to drive private economic activity and contribute to the state tax base."[2] Beyond providing land selection rights to Alaska, the Statehood Act was designed to ensure that the remaining nearly 200 million acres of multiple use federal lands (held and managed by BLM and the Forest Service) would remain available for use and development. Essentially, these lands would be open under relevant mining and, federal mineral leasing laws, and the BLM public domain to other allotment and private disposition programs, providing ways for private individuals to secure land and related access. Federal mineral leasing revenues from these public lands would be shared with the State on a 90% state/10% federal sharing arrangement to secure for the new state additional forms of revenue. It was plainly understood

[1] Pub. L. No. 85-508, 72 Stat. 339 (1958) (hereinafter "Alaska Statehood Act").
[2] *Sturgeon v. Frost*, 136 S. Ct. 1061, 1065 (2016) (citing S. Rep. No. 1163, at 2, 12 (1957)).

that the combination of Alaska's land selections and a substantial share of revenues from use and development of remaining federal lands were in essence the new state's "dowry."

Like the other states, "[u]pon statehood, Alaska also gained 'title to and ownership of the lands beneath navigable waters' within the state, in addition to 'the natural resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'"[3] The Submerged Lands Act was the basis for the transfer of the navigable waters and submerged lands, and it has long been recognized as transferring "title to and ownership of the submerged lands and waters" to the states.[4]

Promises made to Alaska regarding the future state's ability to continue to manage its own fish and wildlife were also key factors in its decision to join the Union. The Alaska Constitution calls on the State to make its bountiful natural resources "available for maximum use consistent with the public interest" and for the "maximum benefit of its people."[5] Fish and wildlife resources "are reserved to the people for common use" and "shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."[6] Alaska has worked diligently since statehood to become more and more self-reliant, managing its natural resources and wildlife to this end.

These were the key elements of the Statehood Agreement, which is not a mere or ordinary statute. It is a binding compact (contract) between the United States and the people of Alaska. Alaska's citizens had to vote to accept the Statehood Agreement following passage of the Statehood Act.[7] Besides the basic question of entry into the Union, the statehood plebiscite ballot asked Alaskans to consent to this specific land related proposition: "[Are] [a]ll provisions of the Act of Congress approved [July 7, 1958] … prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska … consented to fully by said state and its people."[8] The vote was held on August 26, 1958. Then Secretary of the Interior Fred Seaton toured Alaska, explaining the terms of the agreement including the land selection provisions and the 90/10 revenue sharing. Alaska's citizens agreed, voting to ratify the compact and join the Union. On January 3, 1959, President Eisenhower certified Alaska as the 49th State.

This kind of process has led the U.S. Supreme Court to characterize such acts as "both a contract and a statute."[9] Such agreements cannot be "unilaterally nullified."[10] Moreover, the Supreme Court has held the land grant provisions of statehood acts to constitute a "'solemn agreement' which in some ways may be analogized to a contract between private parties."[11]

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[3] *Id.* (citing Alaska Statehood Act, § 3(a)).
[4] *Id.* at 1068 (2016) (quoting *United States v. California*, 436 U.S. 32, 40 (1978)).
[5] ALASKA CONST. art. VIII, §§ 1, 2.
[6] *Id.* at § 4.
[7] *See* Alaska Statehood Act, §8(b).
[8] *Id.* at §8(b)(3).
[9] *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991).
[10] *See State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).
[11] *Andrus v. Utah*, 446 U.S. 500, 507 (1980).

Lastly, the Alaska Statehood Act and the subsequent plebiscite bear heavily on construing the meaning of the Act and the obligations it created on the parties involved.[12]

A binding two party compact/contract providing Alaska the right to select 103 million acres from among nearly 300 million acres of "vacant and unappropriated" federal land and 90% of the revenue stream from federal mineral leases was the arrangement the State and its citizens accepted and approved in 1958. However, just a few short years later, the first federal breach occurred when the Department of the Interior altered unilaterally the terms of the State's land selection rights. Alaska was supposed to have 25 years to make its selections from the land pool of available federal lands. But just as the State got started making its selections, the federal government broke the bargain and imposed the first of many land-related constraints on the State.

B. ALASKA NATIVE CLAIMS SETTLEMENT ACT

As Alaska moved deliberately and prudently to make its land choices, Alaska's Native population maintained that its aboriginal land claims needed to be settled before the State had chosen its land. Discovery of oil at Prudhoe Bay on Alaska's North Slope and early proposals for a Trans-Alaska Oil Pipeline exacerbated conflicts over who would own and control lands possessing oil or a pipeline right-of-way. Instead of a cooperative effort to resolve these issues, Secretary of the Interior Stewart Udall imposed in 1966 a unilateral "land freeze" barring the State from exercising its Statehood Act land selection rights. Then Sen. Ernest Gruening (D-AK) objected to the freeze declaring "this situation is intolerable… and constitutes repudiation by fiat of an executive agency of provisions of the statehood act enacted by the Congress. In effect, the Department of the Interior has arrogated to itself the legislative function of Congress by its refusal to act on land selections filed the by the State."[13] The comment would not be the last time Alaska leveled this charge at the federal agencies. When the freeze was imposed, the State had selected and acquired only 12 million acres (or 11%) of its entitlement. Alaska ultimately supported settlement of aboriginal land claims but objected strongly to the arbitrary, unilateral federal change to its compact-based land selection rights.

Five years later Congress enacted the Alaska Native Claims Settlement Act ("ANCSA").[14] The law created 13 regional corporations and more than 200 villages and other corporations. These Native corporations were authorized to select 44 million acres of land from the federal land base to be owned in fee and managed for the benefit of their Alaska Native shareholders. Approximately 80 million acres of federal land previously available to the State

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[12] *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 65 (1962) (stating that a provision of the Alaska Statehood Act "must be construed in light of the circumstances of its formulation and enactment.").

[13] "Excerpts from 'History of Events Leading to the Passage of the Alaska Native Claims Settlement Act,'" Kornelia Grabinska, Tanana Chiefs Conference, Inc., January 1983, available at http://www.alaskool.org/projects/ancsa/ancsaindx.htm, citing "Senate Proposes Cash Payments for Valid Native Land Claims," *Tundra Times*, April 15, 1966, at p. 6, available at http://www.alaskool.org/projects/ancsa/ARTICLES/tundra_times/TT7_Valid_Claims.htm.

[14] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. § 1601 *et seq*.).

were withdrawn to be made available first to the Native entities (from which the new Native corporations would select 44 million acres), and the new Native entities were essentially ahead of the State when it came to land choice. Even though the State went along with ANCSA, this seminal land act represented a fundamental change from the deal Alaska struck with the federal government just a few years earlier with its statehood. After ANCSA, 240 million acres were off the table, and the State was shunted to third in line for land selection behind the federal government and the Native Corporations in selecting prime lands.

In addition to formally recognizing 44 million acres to become Native lands, Section 17(d)(2) of ANCSA authorized the Secretary of the Interior to choose and withdraw *up to* 80 million acres of land to be studied for possible additions to federal conservation systems (*i.e.*, Parks, Refuges, Forests, and Wild and Scenic Rivers). These lands were also off limits to state selection, further shrinking substantially the range of Statehood Act land choices available to Alaska. Initially, as a result of ANCSA, the State saw its land pool shrink by more than 50%. To add insult to injury, and consistent with repeated federal disregard of law in Alaska, the "(d)(2) withdrawals" totaled 83 million acres even though Congress prescribed "up to 80 million acres."

After ANCSA, 240 million acres of federal land were no longer available for state selection and the State was shunted to third in line for land choices behind the federal government (picking the (d)(2) lands) and the Native Corporations in selecting prime lands

C. ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

The "(d)(2) Lands Debates" were (predictably) contentious and ultimately resulted in the 1980 enactment of the Alaska National Interest Lands Conservation Act ("ANILCA").[15] Several proposals concerning disposition of these millions of acres of lands failed to resolve disputed issues. Oil continued to dominate the discussion over natural resources and state lands, particularly with the completion of the Trans-Alaska Oil Pipeline in 1977. And Congress was operating under a deadline set forth in ANCSA: the various land withdrawals, including the key (d)(2) withdrawals, were set to expire in December 1978. Expiration would open these lands to state selection. The Carter Administration threatened a new round of unilateral federal withdrawals, including permanent Monument designations pursuant to the federal Antiquities Act, if the withdrawals were not extended by Congress. To preserve the status quo and block presidential Antiquities Act action, there were bipartisan efforts in October 1978 to extend the withdrawals for two years. The House passed the extension unanimously, but similar action in the Senate was blocked by Senator Mike Gravel (D-AK). Hence the (d)(2) and related withdrawals were set to expire that December.

[15] Pub. L. No. 96-487, 94 Stat. 2371 (1980).

1. President Carter Uses Antiquities Act to Restrict Use and Access to 56 Million Acres of Alaska Land

On December 1, 1978, President Jimmy Carter took the unprecedented move of using the Antiquities Act (which authorizes the President to establish national Monuments) to withdraw 56 million acres of Alaska land and designate them permanently as national Monuments.[16] Interior Secretary Cecil Andrus withdrew another 40 million acres under the Federal Lands Policy Management Act ("FLPMA").[17] Carter defended this unilateral withdrawal of over 106 million acres of federal land, claiming that congressional failure to temporarily extend the (d)(2) withdrawals had forced his hand. But these actions drew ire from Alaskans for infringing upon their rights and led prominent Alaskan leaders such as Governor Jay Hammond (R), Senator Ted Stevens (R), and Representative Don Young (R) to claim that the federal government was at war with Alaska. Protests broke out across the State with hundreds of Alaskans picketing and protesting the actions of the President and Secretary Andrus. Alaskans across the State threatened to ignore federal enforcement attempts, and some outright violated the regulations implemented by the Antiquities Act action.

The Carter Monuments did, in fact, fundamentally change the political dynamic. As permanent executive withdrawals, only an Act of Congress could change or supersede the monuments. Moreover, Carter made it plain that if the 96th Congress did not pass an Alaska land bill in 1980, he would make more Antiquities Act designations in Alaska. It was naked political blackmail representing a bald power play against the State of Alaska and its citizens. And it represented yet another breach of the promises enshrined in Alaska's Statehood Compact.

Additional massive monuments were only part of the problem. Emerging Alaska lands legislation included a wide variety of special provisions regarding "no more" restrictive land designations (including Antiquities Act withdrawals), protection of existing resource industry jobs, recognition of valid existing rights, guaranteed access, wilderness exemptions, special designations to protect sport hunting, protection of existing Statehood Act land selections, needed corrections to ANCSA, and unit boundaries carefully drawn to allow development projects to proceed (*e.g.*, the Red Dog mine). None of the 1978 Carter Monuments were subject to any of these special provisions and any new 1980 Monuments would not be either. Hence, most of Alaska's political leadership concluded that a lands bill, specifically one that revoked and superseded the Carter action, was necessary as long as it included a specific set of special provisions as indicated above.

The Alaska State Legislature asked the Alaska Delegation to address the following seven consensus points in connection with a (d)(2) lands bill:

[16] *See* Proclamation Nos. 4611-4627, 3 C.F.R. §§ 69-104 (1978).
[17] *See* Pub. L. No. 94-579, § 204(c), 90 Stat. 2743 (1976).

1) Congress should revoke the 1978 Antiquities and FLPMA land withdrawals;
2) Congress should convey the lands owed to the State under the Statehood Act and the lands owed to Alaska Natives under ANCSA;
3) There should be reasonable access to state and private lands;
4) The State should be allowed to manage its own fish and game;
5) Resources and mineral deposits should not be placed into the federal system so as to prevent their development;
6) Traditional land uses should continue; and
7) There should be no more restrictive land withdrawals.

Intense Congressional negotiations throughout 1980 finally yielded a bill that seemed to achieve these goals.

2. Enactment and Features of Alaska National Interest Lands Conservation Act

The Alaska National Interest Lands Conservation Act ("ANILCA")[18] was passed by the U.S. Congress in November 1980 as "one of the most important pieces of conservation legislation ever passed in this Nation."[19] When President Jimmy Carter signed ANILCA into law on December 2, 1980, the Act established an unprecedented vast new array of Parks, Preserves, Refuges, Wild and Scenic Rivers, and Wilderness areas from the existing multiple use federal lands in Alaska. This was one side of the bargain. The other was to provide that there would be "no more" such designations, remaining multiple use federal lands would be available for resource use and development, traditional uses and access to the new federal conservation lands was ensured, and the State's remaining land rights (diminished again) and sovereignty would be protected.

ANILCA placed over 120 million acres of federal lands in Alaska under new restricted federal designations, an area greater than the State of California. These newly withdrawn lands were designated as:

- 10 National Parks and Preserves
- 2 National Monuments
- 9 National Wildlife Refuges
- 1 National Recreation Area
- 1 National Conservation Area
- 25 Wild and Scenic Rivers

[18] Pub. L. No. 96-487, 94 Stat. 2371 (1980).
[19] Alaska National Interest Lands Conservation Act Presidential Remarks on Signing H.R. 39 Into Law (Dec. 2, 1980), available at http://www.presidency.ucsb.edu/ws/?pid=45539.

- 57 million acres of Wilderness and additional Wilderness managed Wilderness Study Areas, such as the 2.1 million-acre Nellie Juan-College Fjord Wilderness Study Area (making up what was at that time 61% of the nation's Wilderness designations).

While ANILCA imposed substantial restrictive land management designations covering nearly one third of the state, it was also intended to maintain a balance between wilderness, development, and Alaskan livelihoods. In exchange for withdrawing this unprecedented amount of lands from multiple use, Congress made a series of promises to the State of Alaska and to its people that were meant to ensure that their rights were protected from federal overreach.

III. PROMISES OF ANILCA AND OTHER FEDERAL STATUTES AND COMPACTS

A. "NO MORE"

Perhaps most importantly, ANILCA promised "no more" restrictive designations of federal lands in Alaska. Section 101(d) clearly states that, with the passage of ANILCA, the need for these federal land designations in Alaska had been met, signaling that the "national interest" in setting aside conservation lands in Alaska had been satisfied and there will be "no more."

Section 101(d) of ANILCA plainly states that Congress intended the disposition of federal lands in Alaska under the Act to be final:

> This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus ***Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby***.

Additionally, the heart of "no more," ANILCA Section 1326(a), provided that automatic administrative closures of over 5,000 acres (frequently used in other parts of the country) could not be used in Alaska unless Congress explicitly approved the withdrawal within one year. Section 1326(b) protected lands within the State from consideration for set-aside study absent specific congressional authorization. This was specifically done to strip the President of the ability to use Antiquities Act authority and to avoid any repeat of Carter's 1978 Monument designations and threatened 1980 action.

1. No More Wilderness

Another particularly important aspect of the "no more" promise pertained to federal designations and management of "Wilderness" areas. A "Wilderness" designation, pursuant to the 1964 Wilderness Act[20] generally prohibits any type of development, a wide range of recreational and traditional uses, most commercial uses, and many land management activities, including those designed to benefit fish and wildlife.[21] For example, the 1964 Act has already been used in Alaska to terminate fisheries enhancement programs in the Kenai National Wildlife Refuge.[22] As such, the process to designate wilderness lands is critically important, particularly in the State of Alaska. Under circumstances existing elsewhere in the country, once the Secretary of the Interior (for BLM, FWS, and NPS land) or Agriculture (for Forest land) (or his or her appointed delegates) determine that an area is "eligible" or "suitable" for a Wilderness designation, these lands are automatically subject to Wilderness management restrictions unless the agency or Congress takes specific affirmative action to release the lands from Wilderness management. ANILCA curbed this substantial administrative power as it pertains to federal lands in Alaska.

Recognizing that Alaska is fundamentally different than other states, Congress also created a series of Wilderness exemptions in ANILCA. Section 1317 prescribes that there will be no interim "Wilderness management" imposed on non-Wilderness lands administratively found to be eligible or suitable for a subsequent Wilderness designation by Congress. This was designed to ensure that the non-Wilderness portions of ANILCA's Parks, Preserves, Refuges, and Wild and Scenic Rivers would remain exempt from Wilderness Act restrictions. The Wilderness management provisions of ANILCA, specifically Section 1317(c), mandated that only congressionally designated Wilderness units in NPS or Refuges in Alaska were to be managed as Wilderness pursuant to the 1964 Wilderness Act. Congress included this provision expressly to prevent federal agencies from unilaterally imposing restrictive Wilderness-type management on lands that the agencies deemed eligible or suitable for Wilderness status. Moreover, this section of ANILCA was a direct counter to 1970's agency action and court rulings that administratively imposed Wilderness restrictions on an array of public lands.

Similarly, ANILCA Section 1320 exempted all BLM lands in Alaska (approximately 50 million acres) from Wilderness reviews otherwise required by Section 603 of FLPMA. These lands could not be managed for multiple use, including resource development, if subjected to Wilderness restrictions by virtue of Wilderness eligibility findings. Consistent with the letter and spirit of this provision, in early 1981 the Secretary of the Interior instructed BLM to not conduct Wilderness reviews on its lands in Alaska. While Section 1320 of ANILCA provides that the BLM "may identify" areas that are suitable as Wilderness and make such recommendations to

[20] Pub. L. No. 88-577, 78 Stat. 890 (1964) (hereinafter "1964 Wilderness Act").
[21] *See, e.g., Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024 (9th Cir. 2010); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004).
[22] *The Wilderness Soc'y v. U.S. Fish & Wildife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003).

Congress, any area so identified must be managed in accordance with the applicable FLPMA multiple use plan.

In sum, the statutory Wilderness designations established in ANILCA were effectively a ceiling, and additional restrictions via unilateral agency action were barred.

2. Open Undesignated Federal Lands

With the "national interest" having been satisfied with 120 million acres of new federal conservation system units (or "CSUs"), providing for elimination of withdrawals and restrictions on undesignated federal public domain was a key part of the grand ANILCA bargain. Millions of acres of BLM land remained subject to "(d)(1)" withdrawals that impeded mineral entry, state land selections, ANCSA selections, and oil and gas leasing, among other activities. Clearing the decks and opening these federal lands was the other side of the ANILCA coin.

Nearly 60 million acres of these withdrawals were still on the books in early 1981. The Reagan Administration acted promptly to eliminate approximately 10 million acres of (d)(1)s, but the process soon ran out of steam. There was virtually no action during the next two Administrations. Halfway through George W. Bush's presidency, BLM prepared a series of Resource Management Plans ("RMPs") proposing to terminate another 20 million acres of (d)(1)s, but the necessary public land orders were not executed. The Obama Administration has done nothing to advance implementation of these RMPs, and Alaska remains saddled with nearly 50 million acres of obsolete but burdensome (d)(1) withdrawals.

B. STATE SOVEREIGNTY OR AUTHORITY

1. Protection of State Authority Over Inholdings and Navigable Waters

In addition to the 100 plus million acres of federal acres made part of ANILCA's CSUs, these vast CSU boundaries also encompassed millions of acres of non-federal lands – mostly state and Alaska Native Corporation lands. For example, approximately 50% of lands and waters within the Yukon Delta National Wildlife Refuge are held by ANCSA Corporations or the State.[23] This pattern is repeated throughout Alaska.

To ensure that the federal agencies would not, and could not, impose land use controls on these non-federal, non-public lands within ANILCA CSUs, Congress added Section 103(c) to ANILCA: "only those lands within the boundaries of any conservation system unit which are public [i.e., federal] lands 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

[23] *See* U.S. FISH AND WILDLIFE SERVICE, YUKON DELTA NATIONAL WILDLIFE REFUGE LAND CONSERVATION PLAN: OPTIONS FOR THE PROTECTION OF FISH AND WILDLIFE HABITATS at 1 (Sept. 2004), available at https://catalog.data.gov/dataset/yukon-delta-national-wildlife-refuge-land-conservation-plan-options-for-the-protection-of-/resource/dc718787-ea51-4412-aefc-168378dee8a1.

Native Corporation, or to any private party shall be subject to the regulations applicable solely to public land within such units." The U.S. Supreme Court has explained these two sentences as follows:

> In sum, [the first sentence of Section 103(c) provides] only "lands, waters, and interests therein" to which the United States has "title" are considered "public" land "included as a portion" of the conservation system units in Alaska. The second sentence of Section 103(c) concerns the [agencies'] authority to regulate "non-public" lands in Alaska, which include state, Native Corporation, and private property.[24]

The Court added, "it is clear that Section 103(c) draws a distinction between 'public' and 'non-public' lands within the boundaries of conservation system units in Alaska."[25]

Ensuring that state-owned lands and waters, as well as ANCSA lands, within the huge federal CSUs would remain exempt from federal regulatory control was a key Alaska goal in 1980. Alaska believed it had achieved this crucial objective with the enactment of Section 103(c).

2. Fish and Wildlife Conservation and Management

Congress intended for Alaska to retain the right to conserve and manage its own fish and wildlife resources as a fundamental feature of Alaska's statehood. This state primacy over fish and wildlife extended to federal lands and waters, as is the case throughout the Lower 48 States.

As noted previously, wresting control from the federal government over fish and wildlife management was a major motivation of the statehood movement. Alaskans chafed under federal mismanagement during the Alaska Territorial Era as the political shots were called in Washington, D.C. or Seattle. The reluctance of these non-Alaska interests to give up this control was manifested in unique provisions in the Statehood Act. Alaska was not simply granted traditional fish and wildlife related authority as were the other states. Instead, the 49th State had to formulate a fish and wildlife conservation and management program and submit it to the Secretary of the Interior for review. Only after the Department of Interior was satisfied with the plan would fish and wildlife authority be transferred from the federal government to the new state.[26] Alaska agreed reluctantly to this program and submitted its plan, which the Secretary of the Interior approved in April 1959.

Two decades later, ANILCA included a major savings provision to protect the state's hard-won authority over fish and wildlife. Section 1314 prescribed that nothing in ANILCA was "intended to enlarge or diminish the responsibility and authority of the State of Alaska for

[24] *Sturgeon v. Frost*, 136 S. Ct. 1061, 1067 (2016).
[25] *Id*. at 1071.
[26] Alaska Statehood Act, § 6(e).

management of fish and wildlife on the [federal] public lands." Concurrently, Congress spelled out that nothing in the Act would "enlarge or diminish the responsibility and authority of the Secretary over [fish and wildlife] management of the [federal] public lands."

In 1982, following enactment of ANILCA, the Alaska Department of Fish and Game and the U.S. Fish and Wildlife Service signed a Master MOU outlining the goal of cooperation and coordination between the two entities. As set forth in the agreement, Alaska was to continue managing fish and wildlife on federal lands within the State, while the feds would defer to state regulations on hunting and trapping unless such actions are "incompatible with refuge goals, objectives, or management plans."

Fast forward another 15 years to when Congress enacted the 1997 National Wildlife Refuge System Improvement Act;[27] Representative Don Young (R-AK) was the primary sponsor. The statute set forth, for the first time, a primary conservation mission statement for all National Wildlife Refuges (including the 77 million acres of Refuge units in Alaska), directed how that conservation mission was to be achieved, and reiterated protection of state fish and wildlife authority on Refuge lands. "Conservation" was defined as "sustain[ing] and, where appropriate, restor[ing] and enhanc[ing], healthy populations of fish [and] wildlife."[28] To achieve this overall objective, Congress provided 18 specific directions. Six of these related to ensuring that "wildlife-dependent recreation" (*e.g.*, fish and hunting) would occur on Refuge lands. One indicated that maintenance of biological integrity, diversity, and environmental health was to be a component of administering the Refuge system.[29] Lastly, the Act prescribed that state fish and wildlife authority was not to be impacted by the new law, and that Refuge rules regarding fishing and hunting "shall be, to the extent practicable, consistent with state fish and wildlife laws, regulations, and management plans."[30] Alaska applauded the 1997 statute as consistent with the Statehood Act, ANILCA, and the State's hard won responsibility and authority regarding fish and wildlife.

3. State Water Rights

Alaska's right to control water rights within the State should be paramount. ANILCA Title XIII provided a savings clause to prevent expansion of Federal Reserved Water Rights (FRWRs) at the expense of Alaska's Statehood authority. ANILCA's preservation of the legal status quo regarding such rights meant that U.S. Supreme Court standards regarding FRWR claims remained in full force and effect. These standards, set forth in seminal cases including *Cappaert v. United States*[31] and *United States v. New Mexico*,[32] provide highly specific requirements that the federal government must satisfy in order to establish the existence of FRWRs. Moreover, the federal government cannot unilaterally establish such rights. It can

[27] Pub. L. No. 105-57, 111 Stat. 1252 (1997) (hereinafter "1997 Refuge Act").
[28] *Id.*, § 3(a).
[29] *See id.*, § 5.
[30] *Id.*, § 8.
[31] 426 U.S. 128 (1976).
[32] 438 U.S. 696 (1978).

claim these rights, but any such claims are subject to strict adjudicatory procedures in which a third party (*e.g.*, a state court, federal court, state water board, etc.) reviews the federal claims and determines whether or not the Supreme Court requirements have been satisfied. If satisfied, then the FRWR is established; if not, the federal claim is denied.

C. NATURAL RESOURCE DEVELOPMENT

At the ANILCA signing ceremony, President Carter specifically discussed the importance of the Act's balance between conservation and development of natural resources. This balance was to specifically include the promise that 100% of offshore areas and 95% of potentially productive oil and mineral areas would be available for exploration and drilling. ANILCA was intended to leave plenty of room for Alaska to develop its plethora of natural resources for economic development.

1. Oil & Gas

a) *National Petroleum Reserve of Alaska*

Formerly known as "Naval Petroleum Reserve No. 4," President Harding originally established the 23.5 million acre National Petroleum Reserve of Alaska (NPR-A) as a source of oil for the U.S. Navy. The Naval Petroleum Reserves Production Act of 1976 transferred the Reserve's administration to the BLM.[33] Importantly, Congress *explicitly rejected* proposals to set aside portions of the NPR-A as Refuges or Wild and Scenic Rivers, instead leaving the NPR-A as a "petroleum reserve." While the Secretary is authorized to mitigate adverse effects of resource development, the Act specifically authorizes oil and gas leasing, exploration, and related operations within the Reserve. Congress has statutorily directed the BLM to allow leasing on these lands for resource development. Further, the State of Alaska is entitled to receive 50% of federal royalties derived from developing these resources within the NPR-A.

The estimated resources within the NPR-A are enormous. The 2010 U.S. Geological Survey estimated that there are approximately 900 million barrels of conventional oil and over 53 trillion cubic feet of natural gas in the Reserve.[34] Alaska expected, especially in the wake of ANILCA, that these resources would be developed expeditiously so that the State and nation would benefit from new oil and gas resources and the revenues provided to the State and federal treasuries.

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[33] *See* Pub. L. No. 94-258, § 102, 90 Stat. 303 (1976).

[34] *See* U.S. GEOLOGICAL SURVEY, 2010 UPDATED ASSESSMENT OF UNDISCOVERED OIL AND GAS RESOURCES OF THE NATIONAL PETROLEUM RESERVE IN ALASKA (NPRA) at 1 (Oct. 2010), available at http://pubs.usgs.gov/fs/2010/3102/pdf/FS10-3102.pdf.

b) *Oil and Gas Leasing on Non-North Slope Federal Lands Under ANILCA Title X*

The BLM administers the federal oil and gas leasing program in Alaska, issuing the necessary permits for related exploration, development, drilling, and other related production requirements. ANILCA Section 1008 *requires* the Interior Secretary to establish an "Oil and Gas Leasing Program for Non-North Slope Federal Lands." Oil companies and developers benefitting from this development are required to pay royalties on their productions, which are split 90/10 between the State of Alaska and the Interior Department's Office of Natural Resource Revenue. Again, Alaska expected the federal government to act consonant with this 1980 legislative directive providing both energy and revenue benefits to the State and the nation.

c) *Arctic National Wildlife Refuge*

President Eisenhower initially established this area as the Arctic National Wildlife Range. While a Range is a large block of public land committed primarily to conservation, the Arctic National Wildlife Refuge ("ANWR") original executive orders specifically permitted oil and gas leasing to occur on those lands.

ANILCA doubled ANWR's size to 18 million acres and made most of the original unit Wilderness, but it also prescribed that a 1.2 million acre area along the Arctic Ocean/Beaufort Sea coast – east of Prudhoe Bay and thought to contain massive oil reserves – be studied for oil and gas development. The State was to benefit from the royalties on resource development 50/50 within ANWR, just as with the NPR-A. The Interior Department was to report to Congress and recommend whether or not this area (referred to as the Section 1002 area from the ANILCA provision setting forth the study plan) should be open for responsible oil development. In 1987, the Department of Interior sent its report to Congress noting that the Section 1002 area had enormous oil and gas potential, might contain billions of barrels of oil, and recommended that the 1002 area within ANWR be opened for oil and gas leasing. Congress responded favorably and passed legislation consistent with the 1987 recommendation, but it was vetoed by President Clinton. No subsequent action has been taken to open the 1002 area and generate energy and revenue benefits.

2. Forests

a) *Alaska's Timber Industry*

Alaska enjoys vast timber resources, which previously sustained vital logging and mill industries in the 16-million acre Tongass National Forest in Southeast Alaska. Leading up to ANILCA, the timber industry within the Tongass supported over 3,000 good paying jobs in logging, sawmills, and pulp mills in communities throughout the region.[35] In the years following

[35] *See* S. Rep. No. 95-1300, at 191-92 (1978).

statehood, the forest yielded approximately 520 million board feet of timber annually to sustain these jobs. The fate of these jobs, and the economic future of forest communities, became part of the ANILCA debate when lower 48 Congressmen advanced proposals to designate millions of acres of new Wilderness area within the Tongass. The effect of these Wilderness areas would be to put so much timber off limits that the annual allowable timber cut would drop far below the level needed to maintain jobs and mills.

After four years of often bitter debate, ANILCA struck a major compromise. Large-scale Wilderness areas were designated encompassing 40% of the Tongass Forest, even though this would reduce the allowable timber cut below that needed to maintain jobs and mills. However, to offset the anti-timber effect of the new Wilderness units, the Forest Service would be provided the tools and funding to more intensively manage the non-Wilderness areas to provide 450 million board feet of timber each year. This lower level would cost some jobs but not devastate the people and communities in southeast Alaska. Sections 703-708 of ANILCA codified this compromise to ensure an annual allowable cut of 450 million board feet, enabling jobs and communities to be sustained.

3. Mining

Mineral resource development was another major component of the ANILCA debate. The original House of Representatives bill – H.R. 39 – would have designated 147 million acres of Wilderness lands in Alaska, foreclosing mining options in a number of areas known to have excellent mineral resources and development potential. The first phase of the battle focused on boundary lines: identifying which mineral areas would be in CSUs (and largely off limits) and which areas would remain in multiple use managed areas where mining would be a viable options. Alaska interests including the State, Native Corporations, mining companies, and communities fought hard to keep prime resource areas outside of Parks, Refuges, and Wilderness areas, and they succeeded in some measure.

But for every success (*e.g.*, Red Dog), there were losses. Traditional mining districts, such as Kantishna, north of Mount McKinley/Denali, were encompassed within an expanded Denali National Park. A massive molybdenum deposit, Quartz Hill, ended up inside a new Misty Fjords National Monument, and the Greens Creek silver deposit found itself within the Admiralty Island Monument. The mineral-rich area around Nabesna (where even the Carter Administration proposed special land status to accommodate mining) became part of the Wrangell-St. Elias National Park and Preserve. Within the 120 million acres of new CSUs were thousands of mining claims and patented mining lands.

Congress appreciated that slamming the door on these mineral rights would likely constitute a "taking," exposing the federal treasury to millions of dollars of Fifth Amendment compensation claims. To avoid such liability, the second phase of the battle was to ensure that mining claims and patents within CSUs would be able to exercise their "valid existing rights" to develop their mineral interests. And, as noted below, special access guarantees were written into

the law to enable economic ingress and egress to these mineral properties. In the case of major known mineral deposits, such as Quartz Hill and Greens Creek, ANILCA also included specific provisions to authorize mining development and avoid takings claims, even though the deposits were within Monuments. *See* ANILCA Section 503(a)-(i).

A more complicated situation arose in the Brooks Range. The proposed NPS boundary for the Gates of the Arctic National Park included a southern feature that looked like a boot facing west. This "boot" hooked around a highly productive mineralized area known as the Ambler or Bornite area, much of which was, and is, state land. The Park boot sat astride the logical and efficient access route to connect the mineral district to the Pipeline Haul road to the east. Many cynics were sure that NPS and the environmentalists were pushing for the boot as a way to cut off access and development in Ambler/Bornite. Alaska's congressional representatives pressed for a Park boundary that eliminated the "boot" and kept the prospective access route on multiple use federal and state lands. A compromise was struck in which the "boot" was made part of the Park, but the Secretary of the Interior was mandated to permit access across it for mineral development in Ambler/Bornite. *See* ANILCA Section 201(4).

D. TRADITIONAL USES: ACCESS

ANILCA expressly protected "traditional uses" when those uses were implicated by actions withdrawing lands and placing them into CSUs. A number of activities previously allowed on newly restricted federal lands would continue. For example, at Section 1110(a), ANILCA mandated more "traditional use" types of access within CSUs, including hunting and fishing (for both sport and subsistence), guide operations, and other similar types of activities, stating:

> Notwithstanding any other provision of this Act or other law, the Secretary ***shall*** permit, on conservation system units, national recreation areas, and national conservation areas, and those public lands designated as wilderness study, the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units, national recreation areas, and national conservation areas, and ***shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area***. Nothing in this section shall be construed as prohibiting the use of other methods of transportation for such travel and activities on conservation system lands where such use is permitted by this Act or other law.

This provision makes clear that the Secretary of the Interior and the various Interior agencies *shall* permit access to conservation system units via plane, boat, and snowmachines.

If the plain statutory language is not enough, the purpose of Section 1110(a) was described as an access "guarantee" tied to the pursuit of "traditional activities."[36] The substantive and procedural limitations on access restrictions and closures were purposefully designed "to prevent the land manager from using his discretion to unnecessarily limit such access."[37] Additionally, legislative history is also clear that Congress wanted to allow traditional uses to continue as well to anticipate later efforts to bar access by first prohibiting traditional uses.[38] The Senate Committee on Energy and Natural Resources used most of the same language to underscore this special access grant in its report.[39]

Importantly, there is no "pre-existing use" test in ANILCA, which would have required that the specific method of transportation mandated in Section 1110(a) be in use at the time of ANILCA's enactment in order for the statute to protect it. In fact, Section 1110(a) reflected Congress's deliberate shift away from the pre-existing use test contained in the 1964 Wilderness Act.[40] Section 4(d)(1) of the Wilderness Act provides that certain forms of motorized use could continue in designated Wilderness areas if such use occurred in the area at the time of designation. Congress did not impose a comparable preexisting use test in Section 1110(a), and the legislative history also makes it plain that Congress intended to provide a much broader access guarantee in ANILCA. The legislative history in the Senate Report provides insight on exactly this point:

> The Committee recommends that traditional uses be allowed to continue in those areas where such activities are allowed. This is ***not*** a wilderness type pre-existing use test. Rather, if uses were generally occurring in the area prior to its designation, those uses ***shall*** be allowed to continue and ***no proof of pre-existing use will be required***.[41]

As the plain text of the statute and certainly the legislative history cited above shows, there is no "pre-existing" use test for Section 1110(a) access, and Congress did not intend there to be one here. That Section 811 of ANILCA *does* contain a pre-existing use test makes the point even clearer. Congress clearly knew how to impose such a test if it wanted to do so, and it chose not to use the test with regard to Section 1110(a).

Motorized use access is allowed under the law whenever needed to engage in a traditional activity; motorized use did not need to be preexisting as of 1980. Anyone seeking to engage in

[36] *See* H. Rep. No. 96-97, Part I, at 238 (1979).
[37] *Id.* at 239.
[38] *See id.* at 238-39.
[39] *See* S. Rep. No. 96-413, at 248 (1979).
[40] 16 U.S.C. § 1133(d)(1).
[41] S. Rep. No. 96-413, at 248 (1979) (emphasis added); *see also* H. Rep. No. 96-97, Part I, at 238-39 (1979).

hunting today may use airplanes, motorboats, all-terrain vehicles, or snowmachines to pursue that traditional activity. No permit should be required for a user to exercise this statutorily provided access. That was made clear in the law, legislative history, and agency regulations implementing Section 1110(a). "ANILCA unambiguously establishes that snowmachine use for traditional activities shall be permitted unless such use would be detrimental to the resource values of the area."[42]

Original Department of Interior regulations regarding Section 1110(a) fulfilled congressional intent,[43] and for many years after ANILCA, these forms of traditional access continued unimpeded. Alaska anglers, hunters, campers, villagers, recreationists, and others took full advantage of this unique access guarantee on millions of acres of federal lands until the late 1990s.

E. TRADITIONAL USES: WILDERNESS ACT EXCEPTIONS

ANILCA passed Congress as H.R. 39. The original 1977 version of the bill sought to designate 147 million acres, over 41% of Alaska, as Wilderness subject to the myriad use prohibitions in the 1964 Wilderness Act. Ultimately, that number was whittled down to approximately 51 million acres, but the proposal joined a major debate about whether or not traditional Lower 48 Wilderness restrictions (*e.g.*, bans on airplanes, motorboats, snowmachines, and cabins) were appropriate in Alaska. Congress concluded these restrictions were not appropriate and that ANILCA must include a series of exceptions and exemptions to enable a variety of traditional uses and access to continue on lands in Alaska that would be designated as Wilderness areas. Section 1110(a) was one of these exceptions, but it was not the only one.

An early concern was the impact of Wilderness designations on fishing and hunting. A variety of activists have long argued for Wilderness restrictions related to fish and wildlife management, access and land use for fishing and hunting, and the activities themselves.[44] To address these concerns and limit agency discretion to restrict hunting and fishing on Wilderness lands, ANILCA contained multiple provisions mandating hunting and fishing on these lands. For example, Section 1313 states that National Preserve units (administered by NPS) "shall" be open for hunting, fishing, and trapping, even if the Preserve lands are also designated as Wilderness. This was an important provision for Alaskans, as many of the Preserve lands, and those overlaid with a Wilderness designation, included some of the best hunting areas in the State (*e.g.*, Wrangells-St. Elias for Dall sheep, Katmai for brown bears, and Lake Clark for caribou).

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[42] *Alaska State Snowmobile Ass'n, Inc. v. Babbitt*, 79 F. Supp. 2d 1116, 1141 (D. Alaska 1999), vacated as moot, No. 00-35113, 2001 WL 770442 (9th Cir. 2001).

[43] *See* 43 C.F.R. Part 36.

[44] *See, e.g., Wilderness Watch, Inc., v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024 (9th Cir. 2010); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004); *The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003), discussed *supra* at 10.

Congress also became aware that guaranteed access for traditional activities, especially in Wilderness areas, needed to be matched by special provisions for camping in the areas. Guided fishing and hunting – important recreational uses with significant economic value in Alaska – relied on the continued use of cabins and tent platforms to protect visitors from the harsh climate. However, the 1964 Wilderness Act prohibits such use and also bars use of other motorized equipment. As a solution, ANILCA included critical exceptions directing that the "Secretary shall permit" cabins, platforms, and use of related camping equipment on designated Wilderness lands in Alaska that are open to fishing and hunting. *See* ANILCA Sections 1316, 1303.

F. ACCESS TO PROTECT "VALID EXISTING RIGHTS"

1. Access to Inholdings

Another critical ANILCA promise regarding access established guaranteed access to "inholdings" (*i.e.*, private lands inside or across CSUs). These private lands vary from Alaska Native Corporation-owned lands, native land allotments, homesteads, mining claims, and guide and outfitter leases to lands owned by the State of Alaska itself. ANILCA specifically addressed these access routes, discussing historic access routes, temporary access, and action to take if the need for new access arose. For example, Title XI of ANILCA is entirely devoted to these new access routes.

ANILCA Section 1110(b) protects access across and through federal lands for owners to access their inholdings. It reads:

> 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.

This access guarantee was enacted "in recognition of the fact that restrictions placed on public access on or across many federal land areas in Alaska may interfere with the ability of private inholders to exercise their right to use their lands."[45] In addition, the legislative history recognized that "owners of inholdings should not have their ability to enjoy their land reduced simply because restrictions are placed on general public access to the land surrounding their

[45] H. Rep. No. 96-97, Part I, at 239 (1979).

inholdings," and the ANILCA provision was "intended to assure a permanent right of access to the [inholdings] across, through or over these Federal lands by such State or private owners."[46]

The interaction of ANILCA Sections 103(c) and 1110(b) gave teeth to promises regarding recognition of valid existing rights on lands within the vast federal conservation areas. The private lands (inholdings) were largely shielded from public land related restrictions (Section 103(c)), and owners were assured that their access rights could not be cut off. During the ANILCA debates, some argued that inholders had sufficient rights under common law and related principles and no special access provisions were needed. Property rights advocates had serious reservations. The result was Section 1110(b) – just to be extra clear, it was lastly described as "intended to be an independent [access] grant supplementary to all other rights of access."[47]

2. R.S. 2477

Section 8 of the Mining Law of 1866, known as R.S. 2477, provided, "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." In other words, this statute came into play when a public highway (or right-of-way) was created across public lands in accordance with relevant state laws. Although FLPMA repealed R.S. 2477 in 1976, it specifically protected R.S. 2477 rights-of-way perfected prior to FLPMA's enactment as "valid existing rights."[48] FLPMA § 701(h) plainly states, "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." Essentially, FLPMA froze R.S. 2477 rights as they were in 1976.[49]

Federal agencies are not supposed to play a role in determining the validity of R.S. 2477 claims. BLM historically claimed that it did not have the authority to regulate R.S. 2477 rights-of-way; rather, state courts were the appropriate venue for determining rights established under R.S. 2477.[50] In fact, the Interior Department had gone so far as to state that "refusal to adjudicate R.S. 2477 disputes has been the consistent position of the BLM … for over one hundred years."[51] This position extended to a reluctance to issue any R.S. 2477 regulations, and the earliest regulation on point specifically disclaimed any role of the federal government in implementing R.S. 2477:

> The grant [under R.S. 2477] becomes effective upon the construction or establishing of highways, in accordance with the State laws, over public lands not

[46] *Id.*
[47] *Id.* at 240.
[48] *See* FLPMA, § 701(a) ("Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.").
[49] *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005), as amended on denial of reh'g (Jan. 6, 2006) (citing *Sierra Club v. Hodel*, 848 F.2d 1068, 1081 (10th Cir. 1988)).
[50] *See S. Utah Wilderness All.*, 425 F.3d at 754-55.
[51] *Id.* at 755.

> reserved for public uses. No application should be filed under said R.S. 2477 as no action on the part of the Federal Government is necessary.[52]

Moreover, when BLM sought to shift gears with regard to its R.S. 2477 authority and proposed significant regulations attempting to adjudicate the validity of R.S. 2477 rights-of-way, Congress passed a law explicitly prohibiting the Interior Department from doing so:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. [§] 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act [Sept. 30, 1996].[53]

Courts have confirmed, "R.S. 2477 creates no executive role for the BLM to play," and title to R.S. 2477 rights-of-way may pass independently of any agency involvement, action, or approval.[54]

These valid existing rights stemming from R.S. 2477 are critical, and they are protected in explicit terms not only by FLPMA, but also by ANILCA. ANILCA Section 3169 provides, "Nothing in this subchapter shall be construed to adversely affect any valid existing right of access." Alaska has recognized more than 600 of these R.S. 2477 rights-of-way. These rights-of-way in Alaska are vital components for preserving the public's access to lands, and for the State in being able to manage state lands, particularly for resource development.

IV. SPECIFIC STATUTORY PROVISIONS AND OTHER KEY COMMITMENTS VIOLATED BY THE FEDERAL GOVERNMENT

The federal government's recurring and systematic breach of the promises and commitments to the State in both the letter and spirit of the 1958 Alaska Statehood Act, the 1971 Alaska Native Claims Settlement Act, and the 1980 Alaska National Interest Lands Conservation Act frees the State to seek a new arrangement for the federal/state relationship regarding ownership and management of federal lands in Alaska. The purpose of this petition is to demonstrate the specific violations and disregard of law and associated agreements that have stripped Alaska of the benefits of its land and management bargains with the federal government. The federal evisceration of Alaska's interests shows plainly the need for fundamental change in oversight and management of federal lands in Alaska. Alaska needs to regain control of its lands if it is ever to enjoy the promises that it bargained for at statehood and in ANILCA and consistent with founding principles of Equal Footing and Equal Sovereignty.

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[52] *S. Utah Wilderness All.*, 425 F.3d at 756 (quoting 43 C.F.R. § 244.55 (1939)).

[53] U.S. Department of the Interior and Related Agencies' Appropriations Act, 1997, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[54] *See S. Utah Wilderness All.*, 425 F.3d at 754.

While ANILCA mandated that huge swaths of multiple use federal lands be restricted and off limits to statehood land selections, the final version of the law contained crucial compromises intended to limit the negative effects of the law on Alaskans. ANILCA made many promises to the State of Alaska and to Alaska's peoples protecting Alaska's access to and use of its valid existing rights concerning its lands and natural resources. Chief among these promises, Alaskans would not have to live in a "permit society." Alaskans could continue to use most of the ANILCA CSUs for hunting, fishing, and subsistence activities, for access to inholdings, and for development of timber, oil, gas, and mineral resources. The federal government has compromised, if not eviscerated, all of these promises, either through overt disregard for ANILCA's directives or through overregulation to the point where no one can conduct the activities ANILCA permitted.

Rather than enforcing ANILCA as Congress wrote it or intended it be implemented, federal bureaucrats have chosen to interpret the law to fit their visions of how they want it to be. Simply ignoring the spirit (and often the letter) of the law, the federal government has imposed, or proposed, new restrictions on 40 million acres over the past 7 years alone, including half of the Naval Petroleum Reserve and all of the Arctic National Wildlife Refuge.[55] The feds removed another 15 million acres from the timber base, and repeatedly and continually reduced the allowable annual board feet to levels too small to support any sustainable timber industry, thus crushing a once-thriving industry in Southeast Alaska.[56] Federal agencies continually ignore ANILCA's Title XI commands that agencies are to ensure access for Alaskans. They continually release new plans that disregard or so slantingly interpret ANILCA so as to gut its "no more" and other core provisions through use of new agency strategies and designations such as "areas of critical environmental concern."

It is not just one federal violation or broken promise that has led Alaska to file this petition to regain the benefits of its bargain through a new land ownership and management arrangement. As outlined in detail below, federal agencies have systematically worked to undo the promises made to Alaska in ANILCA almost since the outset of the law's enactment. The federal government has broken its promises regarding protection of state sovereignty over its lands, water, and fish and wildlife, access, natural resource management and development, and in particular, the promise that there would be no further withdrawals of Alaska's lands. The cumulative effect of these denials of rights and illegal agency actions over more than three decades is causing Alaska to stand up and assert its right to "no more."

Alaska has held up its end of the bargain, and the federal government achieved what it bargained for at statehood and in ANILCA. The State took third place behind the feds under (d)(2) and the Native Corporations established under ANCSA. However, the elements promised

[55] *See* Press Release, U.S. Dep't of the Interior, Obama Administration Moves to Protect Arctic National Wildlife Refuge (Jan. 25, 2015), https://www.doi.gov/news/pressreleases/obama-administration-moves-to-protect-arctic-national-wildlife-refuge.

[56] *See* Press Release, Sen. Lisa Murkowski, Federal Government Has Failed to Keep Promises Made in ANILCA (Dec. 3, 2015), https://www.murkowski.senate.gov/press/release/federal-government-has-failed-to-keep-promises-made-in-anilca.

to Alaska – state sovereignty, access, continued exercise of valid existing rights, multiple use of other federal lands, etc. – have been consistently and systematically whittled away. . Enough is enough. As aptly put by Alaska Senator Lisa Murkowski, ANILCA "must be implemented as written, not as federal agencies wish that it was written."[57] Because the federal land managers did not hold up their end of the bargain, everything is now back on the table for negotiation. The federal government must honor rural preferences, protect subsistence rights, allow Alaskans access to their lands, and allow the State to develop its resources.

The federal government has broken its compact with the State. The principles of contract and equity demand that the concessions Alaska made at statehood and in reaching the ANILCA deal are all back on the table for renegotiation. Alaska has suffered from the federal government's broken promises and the consequences of an absentee landlord managing its lands for long enough. The government can only remedy these infractions and fulfill the purpose of this petition by returning management and control of Alaska's lands to the State of Alaska and to Alaskans.

A. NO MORE

Chief among its violations of ANILCA, the federal government has blatantly and willfully disregarded its promise to Alaska that, with the passage of ANILCA, it would not impose new restrictions on federal lands in Alaska. As described above, Congress explicitly stated in Section 101(d) of ANILCA that there would no further need for the designation of any additional CSUs in Alaska. This broad policy provision was buttressed by a variety of specific provisions referenced previously that barred unilateral presidential Antiquity Act designations, terminated the Wilderness study program in Alaska, and prohibited imposition of de facto (or interim) Wilderness management restrictions via agency action.

However, federal agencies and bureaucrats insist that they administer ANILCA as they interpret it, not as the text of the statute mandates. Federal agencies have systematically violated ANILCA Section 1317's prohibition of "no more" regarding Wilderness withdrawals and designation through the backdoor. These backdoor impositions of Wilderness restrictions are some of the most glaring violations of no more, and these actions effectively result in the same default Wilderness designations that ANILCA explicitly prohibits.

NPS in particular has made repeated attempts to violate "no more" through administrative tools like its "Backcountry Management Plans" and imposition of Wilderness Act limitations under a different name. The U.S. Fish and Wildlife Service does the same by slapping Wilderness-like rules under the name of "minimal management" areas. These repeated actions are clearly inconsistent with the letter and spirit of ANILCA Section 1317.

[57] Sen. Murkowski Opening Statement, Oversight Hearing on ANILCA before Senate Energy and Natural Resources Committee, http://www.energy.senate.gov/public/index.cfm/2015/12/federal-government-has-failed-to-keep-promises-made-in-anilca.

And BLM has taken many similar actions of late. The Clinton Administration revoked the 1981 secretarial directive regarding no BLM Wilderness reviews and instructed the agency to perform wilderness studies as part of their land use planning contrary to section 1320. Now, BLM freely uses Department of Resource Management Plans to study Alaskan lands for new Wilderness designations, circumventing ANILCA and the "no more" policy. Consequently, 50 million acres of BLM multiple use land, supposedly released by ANILCA for traditional development activities, remains tied in knots by potential Wilderness studies and other obsolete withdrawals discussed below.

It should be no surprise that there are other examples showing that agencies are breaking the promise of "no more" through the backdoor. The U.S. Forest Service unilaterally interprets the "no more" clauses as non-applicable if it studies new set-asides as part of its normal forest management plan review process. As such, the Forest Service continues to eagerly carry out these studies and proposes to convert more multiple use lands to restrictive Wilderness-like management all the time. This is not the only extensive change that the Forest Service has made through its Wilderness management policies. For example, the agency's refusal to allow Territorial Sportsmen to use chainsaws and other powered equipment in their volunteer work maintaining the public use cabins on the Tongass National Forest resulted in the end of a 50+ year relationship and the loss of a valuable source of essentially free maintenance on public use cabins. In addition, fishing and hunting guides have been denied permits to take clients into several Wilderness areas with little to no explanation.

The U.S. Fish and Wildlife Service is another "no more" culprit with its decision to conduct Wilderness suitability reviews as part of future refuge management plan revisions. In 2006, after the opportunity for public review and comment and consultation with the State, FWS adopted formal policies for refuge management. The policies for Wilderness and Wilderness suitability reviews contained a specific exemption for Alaska that clearly stated that Wilderness reviews had already been completed (in the 1980's) in accordance with ANILCA Section 1317 and no further reviews would be conducted. However, in 2010, as the ANWR management plan revision was getting underway, FWS reversed course issuing a one-page memo disregarding this Alaska exemption and directing that Wilderness suitability reviews be conducted as part of future plan revisions. There was no consultation with the State.

ANILCA is supposed to represent a balance between "the national interest in the scenic, natural, cultural, and environmental values on public lands in Alaska," and the rights of Alaskans. Agencies flagrantly violate Alaskan's rights by continually disregarding the fundamental premise of the "no more" agreement.

B. STATE SOVEREIGNTY OR AUTHORITY

1. State Authority Over Inholdings and Navigable Waters

In 1996, the Clinton Administration issued NPS regulations expanding agency control over inholdings, especially waters within the boundaries of NPS units. The new rule stated that the agency could exercise regulatory control over "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters … without regard to the ownership of submerged lands."[58] The rules were national in scope and did not acknowledge or recognize any of the special Alaska provisions regarding non-federal lands within NPS unit boundaries, navigable waters, or submerged lands (*i.e.*, ANILCA Section 103(c)).

Eleven years later, NPS enforced this rule in Alaska, citing John Sturgeon for operating a hovercraft on a portion of the Yukon River within the Yukon-Charley Rivers National Preserve.[59] Sturgeon protested that use of the hovercraft was authorized by state law and that he was on a navigable river and over submerged lands controlled by the State of Alaska pursuant to the terms of the Statehood Act and the limitations on NPS contained in ANILCA.[60]

Lengthy litigation proceeded during which NPS and the U.S. Department of Justice argued that Section 103(c) imposed no limits on the agency's ability to regulate activities on state lands and waters within the Preserve. They also argued they held a yet-to-be-claimed and unadjudicated federal reserved water right in that section of the Yukon and that was a sufficient "interest" to turn the navigable River into federal public land contrary to the Statehood Act and the Submerged Lands Act. And, they argued, even if the river was state owned and/or controlled, NPS could still regulate its use because its regulation did not apply solely to federal public lands, a rather startling circular argument shot down by the U.S. Supreme Court.[61]

Because the Supreme Court remanded the case for further proceedings, the case remains unresolved and the regulation remains in force and effect, even though it is plainly contrary to ANILCA Section 103(c). This case demonstrates the severe difficulty, if not impossibility, of reining in a federal bureaucracy bent on control. Here, a statutory provision was drafted by highly capable attorneys, including a former Department of Interior Solicitor (Senator Ted Stevens), in the plainest of language to strip the land agencies of control over state and ANCSA inholdings. And still NPS disregards it (with support from San Francisco's Ninth Circuit Court of Appeals).

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[58] General Regulations for Areas Administered by the National Park Service and National Park System Units in Alaska, 61 Fed. Reg. 35,133, 35,136 (July 5, 1996) (codified at 36 C.F.R. § 1.2(a)(3)).
[59] *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1064 (2016).
[60] *See id.*
[61] *See Sturgeon*, 136 S. Ct. at 1069-70.

2. State Fish and Wildlife Conservation and Management

The U.S. Department of the Interior has broken nearly all of the statutory commitments and promises to the State designed to ensure Alaska's right to manage its own fish and wildlife resources. Federal bureaus, especially the U.S. Fish and Wildlife Service and NPS, have repeatedly ignored and disregarded the Statehood Act, ANILCA, and the 1997 Refuge Act when it comes to fish and wildlife conservation and management.

Both bureaus have recently promulgated regulations that preempt state wildlife and hunting rules on Refuge and Preserve lands in plain violation of ANILCA Sections 1313 and 1314, as well as the 1997 Refuge Act. In both instances, the federal rules block state-approved hunting activities on these public lands. Alaska is not alone in expressing outrage over these illegal, preemptive federal regulations. The Association of Fish and Wildlife Agencies ("AFWA"), which represents all state fish and wildlife agencies, objects to these rules as violating the fundamental premise of state primacy regarding regulation of fishing and hunting on public lands.

Fish and wildlife conservation has also been systematically disregarded by the Department of Interior. On Alaska's Unimak Island (part of the National Wildlife Refuge system governed the 1997 Refuge Act and ANILCA), the caribou herd declined precipitously from 1200 animals in 2002 to 200 in 2012. State biologists determined heavy predation by wolves and grizzly bears was the dominant factor, and that a reduction in the wolf population would enable the caribou to rebound. Absent intervention, the caribou would likely disappear; with no prey left, bear and wolf populations would subsequently collapse. Hence, the Alaska Department of Fish and Game planned a small reduction in wolves. The U.S. Fish and Wildlife Service blocked the State, claiming that Wilderness and "biological diversity" *policies* barred the control effort. The caribou herd is stuck at 200 animals and is hardly a "healthy population" as defined in the 1997 Refuge Act. Yet FWS has decided that Wilderness and diversity considerations trump "healthy populations" (*i.e.*, conservation). This sorry story has been repeated throughout Alaska, especially in the last eight years, demonstrating continued federal disregard for the principles of wildlife conservation and applicable law.

3. State Water Rights

ANILCA Section 1319 expressly preserved the legal status quo regarding water rights in Alaska. As explained earlier, this meant any federal agency action to claim Federal Reserved Water Rights ("FRWRs") would follow well established Supreme Court precedent (*i.e.*, *Cappaert*, *New Mexico*) setting forth substantive standards as well as the adjudicatory procedures for any claims. Instead, Alaska now finds itself subject to utterly unprecedented agency established FRWRs. Both the Interior and Agriculture Departments have established – not claimed – FRWRs via unilateral agency rulemaking rather than adjudication by a court. Never in the history of western water law has this occurred.

In addition, neither department has bothered to demonstrate how their regulatory FRWRs meet the applicable Supreme Court substantive standards. The agencies have simply made bald unsubstantiated claims and told Alaska to "live with it." State efforts to have these actions reviewed by the courts has been stymied by San Francisco's U.S. Court of Appeals for the Ninth Circuit, which has also told Alaska to "live with it" without ever explaining why case law such as *Cappaert* and *New Mexico* are inapplicable.

NPS has gone even further in asserting the existence of unestablished, unadjudicated FRWRs in derogation of ANILCA Section 1319 and U.S. Supreme Court precedent. NPS claims the ability to regulate activities on navigable waters (and submerged lands) held by the State because the agency has an "interest" in those waters: a FRWR. Even though NPS has not formally claimed any such right, nor demonstrated that the alleged right satisfies applicable standards, NPS asserts that this unestablished "interest" turns the state waters into federal "public lands" allowing the agency to prohibit activities on these waters that are allowed by the State.[62]

So add Section 1319 to the list of statutory promises shredded by agency action. And add one more unique federal "right" jammed down Alaska's throat: unadjudicated FRWRs that give the feds new regulatory authority over Alaskans.

C. NATURAL RESOURCE DEVELOPMENT

1. Oil & Gas

a) *The National Petroleum Reserve of Alaska Remains Undeveloped*

Federal actions have prevented the development of the NPR-A contrary to statutory directive. Rather than leasing lands within the Reserve per the statute, BLM has placed over a quarter of these lands "off limits" to development, citing environmental reasons. BLM is standing in the way of statutorily directed resource development in the face of a Congressional directive to allow leasing on these lands. The estimated resources within the NPR-A are enormous. The 2010 U.S. Geological Survey estimated that there are approximately 900 million barrels of conventional oil and over 53 trillion cubic feet of natural gas in the Reserve. BLM's refusal to work to open these lands significantly hinders resource development within the State, and it deprives the State of the 50% royalties that it is entitled to receive from oil companies developing these resources within the NPR-A.

b) *BLM Refuses to Conduct Oil and Gas Leasing on Non-North Slope Federal Lands Under ANILCA Title X*

BLM, which administers the federal oil and gas leasing program in Alaska by issuing the necessary permits for related exploration, development, drilling, and other related production

[62] *See Sturgeon*, 136 S. Ct. at 1069.

requirements, has completely shirked its responsibilities regarding oil and gas leasing in Alaska. ANILCA Section 1008 *requires* the Interior Secretary to establish an "Oil and Gas Leasing Program for Non-North Slope Federal Lands." Oil companies and developers benefitting from this development are required to pay royalties on their productions, which are split 90/10 between the State of Alaska and the Interior Department's Office of Natural Resource Revenue. However, the feds have wholly failed to pursue development of these lands since ANILCA's passage, depriving the State of potentially substantial revenues derived from development royalties.

c) *Arctic National Wildlife Refuge*

Federal land managers, Congress, and the President have failed to open ANWR for resource exploration and development, which was originally provided for in the related executive orders. President Eisenhower's original executive orders regarding ANWR specifically permitted oil and gas leasing to occur on those lands. Twenty-nine years after the Department of Interior report recommended opening ANWR to responsible oil and gas development of the Section 1002 area, access to the oil and gas resources there remains blocked by the federal government. Such lack of action deprives the State of the benefit of the royalties on resource development 50/50 within ANWR, just as with the NPR-A.

These three specific efforts on oil and gas leasing described above – NPR-A, 1008, and ANWR – have all been thwarted by federal roadblocks, signaling a significant dereliction of duty by federal agencies and resulting in a potentially tremendous loss of income for the State of Alaska.

2. Forests

a) *Agency Violations of Timber Agreements Decimated the Southeast Alaska Timber Industry*

After four years of often bitter debate on the issue of how much wilderness to designate in the Tongass National Forest versus how to protect the thousands of Alaskan jobs sustained by the timber industry, ANILCA struck a major compromise. Sections 703-708 of ANILCA designated large-scale Wilderness areas encompassing 40% of the Tongass Forest and reduced the allowable timber cut below that needed to maintain jobs and mills while offsetting this effect by providing the tools and funding to more intensively manage the non-Wilderness areas to provide 450 million board feet of timber each year. This lower level would cost some jobs but not devastate the people and communities in southeast Alaska.

Before the ink was dry on the deal, the wilderness advocates and their congressional allies sought to abrogate the hard-won compromise. For the next ten years, there were unceasing efforts to cut off the Forest Service's timber management funding, insistent pressure to amend the Tongass land to plans to further reduce available timber, and advocacy for even more

Wilderness designations in the Tongass – so much for the "no more" pledge. Alaska found itself overwhelmed again by national environmental advocates, and Congress in 1990 enacted the Tongass Timber Reform Act ("TTRA"). [63] The allowable cut was reduced from the 450 million board feet in ANILCA to a Forest Service valuation of 150 million board feet ("MMBF"). And, more recently, the reductions have continued even further. According to the June 2016 Final Environmental Impact Statement for the Tongass Land Management Plan, the allowable cut will be 46 MMBF for the next fifteen years based on demand projections, well below 150 MMBF.[64] TTRA also unilaterally modified the long-term timber contracts and designated six new Wilderness areas and twelve Land Use Designation II (LUDII) Management Areas. These designations placed an additional one million acres off limits to timber harvest. This breach of the ANILCA compromise (*i.e.* assurances of 450 million board feet for harvest) devastated Alaska's timber industry and shut down the mills, resulting in many of the logging companies throwing thousands of Alaskans out of work.

Perhaps more important than the lost timber is the effect these actions have had on Alaskan jobs. Timber industry employment used to comprise a substantial number of jobs in the State. From 1970 to 1977, when timber harvest levels in the Tongass were 520 million board feet, these numbers corresponded to 3,006 people being employed in the timber industry.[65] Now this once-thriving industry is virtually gone.

What happened with the Tongass is characteristic of the wanton disregard of statutory commitments made to Alaska. The federal government takes what it wants (in this case, massive Wilderness areas) and then fails to live up to its side of the bargain: for the feds, it is "what's mine is mine and what's yours is negotiable."

3. Mining

In 1980, ANILCA promised recognition of valid existing rights and guaranteed access for mining claimants turned into inholders by the vast conservation designations in the 1980 law. These two statutory commitments were designed to treat claim holders equitably and allow development to avoid millions of dollars of takings liabilities against the federal government.

Fast forward 36 years. Valid existing rights were rendered a joke by the federal land agencies. The miners in Kantishna – who had been there since the 1890s – were systematically run out starting in the late 1980s. A few fought back and insisted on fair compensation for the taking of their mines. NPS gamed the appraisal process, routinely low balled the values (often refusing to value the mineral estate and valuing only the surface estate), and would not even spend money appropriated to fairly compensate the miners. Environmentalist lawsuits and

[63] Pub. L. No. 101-626, 104 Stat. 4426 (1990)
[64] Tongass Land and Resource Management Plan, Final Environmental Impact Statement, Plan Amendment, Vol. 1, at 2-34. http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd507713.pdf
[65] *See* S. Rep. No. 95-1300, at 191-92 (1978).

onerous Environmental Protection Agency ("EPA") rules were the final straw sounding the death knell for Kantishna.

Elsewhere in Alaska, miners sought to use their Section 1110(b) guaranteed access rights. federal agencies said that was acceptable, but only after the applicant paid for an agency environmental impact statement ("EIS") or environmental assessment ("EA"); and the price tag was tens of thousands of dollars. So much for guaranteed access.

In southeast Alaska, the owners of Quartz Hill spent years trying to develop the deposit as provided in the ANILCA Section 503 rules. More activist lawsuits, new EPA rules, and new forest plans killed that effort. The valuable molybdenum deposit lies undeveloped and probably not capable of being developed given the regulatory morass it would face.

Farther north, the State of Alaska decided it was time to develop the mineral resources of the Ambler/Bornite district and began the application process to secure the mandated access across the Gates of the Arctic "boot" discussed above. Even though ANILCA Section 201(4)(b) is clear – "Congress finds that there is a need for access for surface transportation purposes across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road) and the Secretary shall permit such access…" – the State is mired in federal regulatory red tape. Since the law also mandates that any EIS on the proposed road be completed in nine months following receipt of a "final application," the agencies have spent years asking for more and more application information to avoid accepting a "final" version and triggering the nine-month EIS clock. Thirty-six years after Congress expressly found the need for access to Ambler, the agencies are still finding ways to block it.

ANILCA guaranteed Alaskans "adequate opportunity for satisfaction of the economic needs" of the State and its people. The mining community of the 49th State would disagree.

D. TRADITIONAL USES: ACCESS

While providing access to Alaska's lands is an ongoing objective throughout the whole of ANILCA, Congress included two particularly relevant access provisions that the federal government has frequently disregarded or purposefully attempted to eviscerate. As explained in detail above, the drafters of ANILCA took great pains to ensure that Alaskans would forever be guaranteed access to their lands. Specially, Alaskans were to be guaranteed access for traditional activities and to reach their inholdings. Both of these types of access – which are explicitly protected by Sections 1110(a) and 1110(b) – are under frequent attack from overzealous federal land managers who seek to impose a regulatory regime on Alaskans that the law does not support.

1. NPS Unilaterally and Illegally Reinterprets the Meaning of "Traditional Uses"

ANILCA Section 1110(a) makes clear that the Secretary of the Interior and the various Interior agencies *shall* permit access to CSUs via plane, boat, and snowmachines. However, this provision has been systematically ignored or even intentionally whittled away at by various federal agencies, particularly by NPS. Despite the clear language of Section 1110(a) itself and the relevant legislative history, federal agencies continue to ignore this language and administer restrictions on access as they see fit. One well-known example was NPS's constriction of snowmobile access in Denali National Park in its 2000/2001 plan.[66] NPS went after Section 1110(a) and constrained permissible ways of access on national park land by reading a "pre-existing use" test into 1110(a) that does not exist in the law. In NPS regulations governing "Special Regulations" of Denali National Park and Preserve, one provision is entitled, "What is the definition of a traditional activity for which Section 1110(a) of ANILCA permits snowmobiles to be used in the former Mt. McKinley National Park (Old Park) portion of Denali National Park and Preserve?" In that provision, the Park Service explains:

> **A *traditional activity* is an activity that generally and lawfully occurred in the Old Park contemporaneously with the enactment of ANILCA**, and that was associated with the Old Park, or a discrete portion thereof, involving the consumptive use of one or more natural resources of the Old Park such as hunting, trapping, fishing, berry picking or similar activities. ***Recreational use of snowmachines was not a traditional activity.*** If a traditional activity generally occurred only in a particular area of the Old Park, it would be considered a traditional activity only in the area where it had previously occurred. In addition, a traditional activity must be a legally permissible activity in the Old Park.[67]

As this regulation clearly shows, NPS interprets "traditional" activity to mean an activity that was in use at the relevant location at the time of ANILCA's passage in 1980. However, this "pre-existing use" test that NPS reads into ANILCA simply is not there. In fact, as discussed above, in Section 1110(a), Congress intentionally shifted away from the "pre-existing use" test contained in Section 4(d) of the 1964 Wilderness Act. Congress imposed no comparable pre-existing use test in Section 1110(a), and legislative history also makes it plain that it was providing a much broader access guarantee in ANILCA. Congress *did* choose to impose a pre-existing use test for the use of off-road vehicles in Section 811 of ANILCA, demonstrating that, if Congress wanted to add a pre-existing use requirement in 1110(a), it knew how to do so. It opted not to take such action. NPS cannot unilaterally reverse Congress' choice and rewrite the statute, via this Plan, to air drop a pre-existing use standard onto the motorized access guarantees set forth in Section 1110(a).

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[66] National Park System Units in Alaska; Denali National Park and Preserve, Special Regulations, 65 Fed. Reg. 37,863 (June 19, 2000) (codified at 36 C.F.R. Parts 5 and 13).
[67] 36 C.F.R. § 13.950 (emphasis added).

Rather, motorized use access is allowed under the law whenever needed to engage in a traditional activity; motorized use did not need to be pre-existing as of 1980. Someone seeking to engage in hunting today is provided the ability to use airplanes, motorboats, all-terrain vehicles, or snowmachines to pursue that traditional activity. No permit should be required for a user to exercise this statutorily provided access. That was made clear in the law, legislative history, and agency regulations implementing Section 1110(a). "ANILCA unambiguously establishes that snowmachine use for traditional activities shall be permitted unless such use would be detrimental to the resource values of the area."[68]

The attempt to restrict snowmobile access is particularly disturbing because Alaskans own and use snowmobiles more regularly than anywhere in the nation. There are 53,317 snowmobiles in Alaska, the highest per-capita number of snowmobiles of any state. Alaskans ride their snowmobiles twice as far as owners in the Lower 48 States do, they purchase snowmobiles more frequently and purchase more parts for repairing their snowmobiles, and do so far more often. Snowmobiles are a way of life in Alaska: they are part of the culture, ridden both for sport and as a necessary form of winter transportation.

Further, snowmobile access to public lands is critical in Alaska. In the wintertime, that is often the only way Alaskans can access the lands and resources they need to continue living in the State they love. Many subsistence users in Alaska rely on snowmobile access during winter simply to put food on the family table. In some rural Alaska communities where roads are scarce, snowmobiles are the only means of winter transportation at all. Snowmobile access was explicitly protected in ANILCA, and federal attempts to whittle away at this crucial access right are arbitrary and capricious, as well as contrary to federal law.

Snowmachine use has not been the only federal target. NPS recently mounted another attack on the section 1110(a) access guarantee. In its Proposed Action for the Backcountry and Wilderness Stewardship Plan for Wrangell-St. Elias National Park & Preserve,[69] the agency continues to erode the definition of traditional activity and impose a pre-existing use test in Wrangell-St. Elias that does not exist in ANILCA, illustrating NPS's incessant bureaucratic efforts to chisel away at the guaranteed traditional use provisions of ANILCA when those guarantees do not comport with how it wishes to interpret ANILCA illegally.

2. National Park Service Attempts Unauthorized Airstrip Limitations

NPS's latest proposal regarding Wrangell-St. Elias also seeks to impose unauthorized permit requirements on the use of existing airstrips found throughout the Wrangells backcountry. Most, if not all, of these strips were established before ANILCA was enacted in December 1980.

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[68] *Alaska State Snowmobile Ass'n, Inc. v. Babbitt*, 79 F. Supp. 2d 1116, 1141 (D. Alaska 1999), vacated as moot, No. 00-35113, 2001 WL 770442 (9th Cir. 2001).

[69] Proposed Action for the Backcountry and Wilderness Stewardship Plan for Wrangell-St. Elias National Park & Preserve, May 2016, https://parkplanning.nps.gov/document.cfm?parkID=21&projectID=44299&documentID=72980.

For the past 36 years, use of these airstrips has been an integral component of exercising Section 1110(a) access rights. NPS violates the spirit and legislative history of ANILCA to decide now – more than 30 years after ANILCA's passage – to impose an entirely new permit requirement on the exercise of access rights that Congress were explicitly protected. Indeed, a motorized access guarantee provision makes little sense if tight restrictions can be placed on where aircraft can land.

The federal government's repeated attempts to impose a permit lifestyle on Alaskans violate the promises that Alaskans bargained for in ANILCA.

E. TRADITIONAL USES: WILDERNESS ACT EXCEPTIONS

1. NPS Interpretation of the Law Regarding Temporary Structures Violates ANILCA

Under land management procedures for the Lower 48, a Wilderness designation forbids users from erecting temporary structures. However, recognizing the impracticality and undesirability of this prohibition in Alaska, Congress enacted an express exemption from this regulation in ANILCA. Section 1316(a) provides that, where hunting and fishing are permitted within a CSU, the Secretary *shall* allow these types of structures. This provision was added at insistence to ensure that sport hunting camps would continue to be allowed in the newly designated federal units such as Wrangells. This allows necessary protection in areas where land users' need for these structures – particularly those engaging in traditional use activities such as hunting, fishing, and guiding – is unique. Federal agencies must allow of these structures. They do not have the authority to forbid their use. However, over the years, the agencies have decided to impose their own (illegal) interpretation that the temporary structures' exemption only applies to subsistence users, not to other Alaskans engaging in traditional Alaskan activities.

NPS's latest proposal regarding Wrangell-St. Elias prescribes that only subsistence users may erect and use temporary structures related to fishing and hunting uses in the backcountry. This interpretation contravenes ANILCA Section 1316's direction that "the Secretary shall permit, subject to reasonable regulations … the future establishment, and use, of temporary campsites, tent platforms, shelters, and other temporary facilities and equipment directly and necessarily related to such activities [i.e., fish and hunting]." Absolutely nothing in the statute or the legislative history gives NPS any authority to limit this mandate ("the Secretary shall permit") to subsistence users only. In fact, that would be completely contrary to the plain language of the law and the purposes for which Congress added Section 1316 to the Act.

Similarly, NPS has engaged in prohibited takings of hunting cabins contrary to ANILCA. Continued use of established hunting cabins was a contentious issue during ANILCA's enactment. Most of these cabins, including many in the Wrangells backcountry, were built on public lands without any specific authorization. Congress decided that such cabins could continue to be used as long as a user, such as a hunting guide, acknowledged that he or she did

not own the underlying real estate and the cabin could be open to other public uses when the guide was not using it. Hunting guides operating under state licenses (from 1980 to 1989) and NPS contracts (from the early 1990s to now) have been allowed to retain their interests in cabins as part of their permits or contracts. When NPS has approved transfers of such contracts, cabins have been part of those transfers. Congress set forth this compromise in ANILCA Section 1303(d), which allows the transfer of an existing (at the time of ANILCA's passage) permit or lease. That state of affairs has successfully governed cabin use for 36 years.

NPS now proposes to change over three decades of policy and practice by stripping hunting guides of their cabin interests when and if a guide contract is transferred. In addition, if NPS decides to terminate a hunting contract in an area (a violation of Section 1313), any interests in a hunting cabin will similarly be terminated. There is no solid rationale for making this radical change and abandoning this approach that has worked well for decades. During this long period, Congress, the Department of Interior, NPS, and the guides worked out this approach. NPS's latest actions disregard established law, policy, and practice.

2. NPS Attempts to Unilaterally Redefine "Trammeling Activity" are Grossly Contrary to ANILCA

NPS's latest proposal to manage Wrangell-St. Elias contains further dangerous findings regarding hunting and Wilderness Act values that are wrong as a matter of policy and also violate specific provisions of ANILCA. The 1964 Wilderness Act defines "wilderness" as "an area where the earth and its community of life are ***untrammeled by man***."[70] The proposed Backcountry Plan concludes that sport hunting in Wilderness portions of the Wrangells Preserve constitutes a "trammeling" activity, but that it will continue to allow hunting there. Apparently, NPS has determined that regulated sport hunting is inconsistent with the 1964 Wilderness Act and, absent other considerations, such hunting should, or must, be prohibited in Wilderness areas. It falsely sets up the notion that hunting is not a permissible activity in Wilderness areas, and that it is antithetical to Wilderness.

This is a radical finding wholly at odds with all federal land management agency policy and practice regarding hunting, as well as specific provisions of ANILCA allowing sport hunting on these lands. Until release of this Plan, none of the federal agencies that manage designated Wilderness lands (BLM, U.S. Fish and Wildlife Service, U.S. Forest Service, and NPS) has ever propounded such a conclusion. In fact, hunting has long been considered completely consistent with the terms of the 1964 Wilderness Act. The Obama Administration has testified to Congress that provisions in pending "Sportsmen's Bills" to assure that hunting be allowed in Wilderness areas are wholly unnecessary. But it appears that NPS hasn't gotten this message. It has unilaterally determined that hunting in fact is detrimental to wilderness values since hunting

[70] 1964 Wilderness Act, § 2(c), codified at 16 U.S.C. § 1131(c) (emphasis added).

constitutes a "trammeling" activity, setting the stage for closing these areas to this traditional activity.

The fact that this finding is also contrary to ANILCA seems to have eluded NPS. Congress prescribed in Section 1313 "that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping ***shall be allowed in a national preserve***" in Alaska (emphasis added). Plainly, Congress made its own favorable determination regarding these activities. It made no indication whatsoever that a Wilderness designation overlay on Preserve lands (like those in the Wrangells backcountry) would change the favorable determination and its mandate to allow fishing and hunting. NPS has no basis in fact or law for propounding contrary conclusions in its latest proposed Plan.

F. ACCESS TO PROTECT "VALID EXISTING RIGHTS"

1. Access to Inholdings

ANILCA Section 1110(b) guarantees the owners of non-federal lands (and valid occupancy holders) the right to adequate access of those lands. Federal agencies provide access to these lands through ANILCA 1110(b) Right-of-Way Certificates of Access ("RWCA"). While the federal government is supposed to act as a steward for the lands under its purview within Alaska, agencies also have the duty to honor the explicit provisions within ANILCA guaranteeing landowners the rights to access their inholdings by crossing federal lands if necessary. Federal agencies have repeatedly neglected this ANILCA mandate and have imposed conditions upon landowners beyond those permitted by the statute.

For example, even in the case of an existing access route (such as the Denali Park Road to Kantishna), inholders are restricted in expanding their tourism businesses or establishing new ones because of restrictions on the number of vehicles allowed to use the road during the season. Further, there have been statements by NPS that in some instances, requests for access development under Title XI would trigger acquisitions proceedings. This is a blatant disregard of ANILCA's mandate to allow access to inholdings.

Another example is that agencies are often incorrectly telling landowners that an EIS is required before access can be allowed. Of course, the applicant land owner is told he or she will have to pay for this federal document, which can cost tens if not hundreds of thousands of dollars. Erection of this procedural cost barrier eviscerates the access guarantee contained in Section 1110(b). The agencies have it all wrong. NEPA is a procedural environmental statute designed to assist an agency in deciding how to make a *discretionary* administrative decision with potential environmental consequences. An EIS is prepared as a tool to be used by the agency in its decision making process. NEPA *does not apply* to mandatory statutory directives such as Section 1110(b), which requires that inholders be permitted access to their inholdings. NEPA does not and cannot trump ANILCA despite repeated federal agency efforts to do just that.

2. R.S. 2477

Section 8 of the Mining Law of 1866, known as R.S. 2477, provided, "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Although FLPMA repealed R.S. 2477 in 1976, it protected "valid existing rights." These 600+ R.S. 2477 rights-of-way in Alaska are critical components for preserving the public's access to lands and for the State in being able to manage state lands, particularly for resource development. However, federal land management agencies often refuse to recognize these state-owned rights-of-way unless ordered to do so by a court.

Despite its obligation to manage federal lands subject to the State's valid existing rights, BLM fails to recognize Alaska's interests in these rights-of way and has imposed numerous impermissible management restrictions on the State's use of those access points. These restriction include: requiring permits and environmental assessments (paid for by the State) to access the rights-of-way, requiring bonds before using the rights-of-way, gating the rights-of-way to prevent access, preventing use of motorized vehicles on these routes, requiring a federal escort while using the rights-of-way, and restricting the amount of trips on the roads. For example, the State is currently litigating a case over a significant number of these rights-of-way in the Fortymile Region near Chicken. Alaska (and Alaskans) should not have to enforce their valid existing rights in these R.S. 2477 rights-of-way through the courts; agencies must recognize their obligations to do so without requiring the holders of these rights to pursue judicial relief.

V. REMEDY: TRANSFER OF SELECTED FEDERAL LANDS TO STATE AND ENHANCED STATE AND LOCAL ROLE IN LAND MANAGEMENT

The federal government has systematically shredded 58 years of statutory commitments and promises to uphold its end of the statehood compact, to create "no more" restrictive land designations, to not block Alaska's use and development of its lands and resources, to manage federal multiple use lands to provide resources (oil and gas, minerals, and timber) and revenues, to recognize state sovereignty over its lands, waters, and fish and wildlife, and to ensure Alaskans' access to their lands and inholdings to pursue their recreational interests or economic prosperity. The fact that these commitments are all enshrined and codified in plain law hasn't mattered. Federal land agencies and bureaucrats have done what they want to do and the law be damned. When one party to a bargain abrogates a deal, the other party is no longer bound to its terms. Alaska is done accepting the federal agencies' "what's mine is mine and what's yours is negotiable" attitude and actions. The federal interests are negotiable too, so Alaska is asserting its right to pursue a fundamentally different new deal for management of the federal lands in the 49th State consistent – this time – with decades of prior commitments and promises.

A. WHY LAND TRANSFER IS APPROPRIATE AND NECESSARY

Insanity is often defined as doing the same thing over and over again expecting a different outcome. Alaska is past accepting another round of useless federal promises that this time it will be different, this time the federal bureaucracy will honor its commitments and the law regarding Alaska land management. The 49th State won't play "Charlie Brown" any longer and let the federal "Lucy" snatch away the football yet again.

Alaska, and other Western public land states, learned a hard lesson in the wake of the 1970s Sagebrush Rebellion, a political revolt by those states against the heavy handed absentee landlordism practiced during the Carter Administration. Following Carter's defeat, the then new Reagan Administration promised to be a "good neighbor" and took good-faith steps to redress the Western complaints. But bureaucratic immutability and intransigence proved impossible to overcome, and the inexorable shift of power to Washington and away from the western states and their citizens continued. This unwelcome trend slows at times, but the outcome is always expanded federal control at the expense of the states, local governments, and local citizenry. To make matters worse, these trends have accelerated greatly in recent years. Hence the pressing need for fundamental change in land ownership and control – less radical change will not suffice.

The necessary response to 58 years of Alaska-federal agency history is a fundamental realignment of federal land ownership and management in Alaska. Only with substantial transfer of federal lands to the State can the sorry cycle of statutory promise and subsequent dishonor be broken. The State and its professional land managers (the Department of Natural Resources and the Department of Fish and Game) are fully capable of managing and conserving the lands, waters, and natural resources within Alaska and have done so over nearly six decades of statehood. In fact, the State and its citizens are capable of doing a far better job managing and conserving Alaska lands than the distant federal landlords ensconced at 18th and C Streets, 14th Street and Independence Avenue, and 1600 Pennsylvania Avenue in Washington, D.C.

Alaska is also prepared fully to accept terms and conditions on the federal land transfer consistent with the promises of statehood, ANCSA, and ANILCA. Multiple use lands will be managed be for multiple use. Wildlife lands will be managed and conserved for wildlife. Petroleum Reserves will be managed for oil and gas. And all lands will remain open to public access and statutorily protected forms of traditional use. Despite the federal breach of the legal promises, Alaska wants simply to ensure that those promises are kept and fulfilled on the ground. The State is not seeking any fundamental change in the land management goals and objectives set forth by Congress in existing federal law. But as the federal bureaucracy has demonstrated its utter inability, and unwillingness, to comply with said law, it is time to let the State of Alaska show how it should be done.

B. TRANSFER TERMS AND CONDITIONS

The specifics regarding transfer of federal lands in Alaska are outlined below on an agency-by-agency basis.

1. Multiple Use Lands

a) *Bureau of Land Management*

FLPMA mandates that nearly 50 million acres of public domain lands now held and managed by BLM in the State of Alaska are to be managed as "multiple use." Unfortunately, BLM has failed to manage these lands according to this mandate. State ownership and management of the public domain lands in Alaska is the only way to achieve true multiple use as directed by FLPMA and related ANILCA provisions. As noted, transfer of ownership would come with strings: conditions to assure bona fide multiple use management consistent with the principles prescribed in existing federal law. Alaska will then act to fulfill the goals and objectives of present federal law.

A comparable arrangement would apply to transfer of designated BLM lands such as the NPR-A, the White Mountains National Recreation Area ("NRA"), and the Steese National Conservation Area ("NCA"). The State would control and manage the NPR-A for its oil and gas resources as first spelled out in law over 90 years and reconfirmed by Congress in 1976. Per Sections 401 and 403 of ANILCA, the NCA and NRA would be state-managed within "a program of multiple use and sustained yield" to provide environmental quality and recreational opportunities. The 1980 law already directs BLM to "work closely" with the State of Alaska in this regard. Transfer would simply eliminate the middleman and let Alaska provide the management.

b) *U.S. Forest Service*

The grounds for transferring undesignated lands managed by the Forest Service are simple. ANILCA promised Alaskans maintenance of a diminished timber yield to support timber jobs and an industry in exchange for designating 40% of the Tongass Forest as Wilderness. The ink was barely dry on this major compromise when it was gutted by the Tongass Timber Reform Act. Subsequent federal agency action imposed more administrative restrictions, literally wiping out timber jobs on Forest land in southeast Alaska. Alaska seeks to secure control and management, pursuant to established multiple use principles, of the non-Wilderness, non-monument portions of the Tongass and Chugach National Forests. The Forest Service will continue to own and manage the statutorily designated Wilderness areas (approximately 7.8 million acres) and 3.2 million acres within the Monuments: Admiralty Island and Misty Fjords. Transferring management of the forests back to the State will allow the State to revitalize and renew this once-great industry. As the Forest Service has abandoned its commitment to multiple use management per the law, it would retain the non-multiple use lands

while Alaska would assume control over the non-designated lands. The State would then be capable of restoring traditional forest management on these lands bringing back jobs and related revenue streams.

2. Wildlife Conservation – U.S. Fish and Wildlife Service

The 1997 Refuge Act authorized the U.S. Fish and Wildlife Service to transfer management of a state's wildlife management over to the State. The agency may do this completely consistently with the Act. As such, the State is merely requesting that the agency take actions completely consistent with the Act and turn over statutorily conditioned control management of these lands to the State. The State can better exercise its primacy over its fish and wildlife resources without federal interference consistent with established conservation principles and objectives. The Fish and Wildlife Service has abandoned these traditional principles to favor "biodiversity." Alaska can bring back adherence to the goals and objectives first enunciated by Teddy Roosevelt when he created the Refuge System in 1903 and affirmed by Congress in 1997 (*i.e.*, conservation means sustaining and where appropriate restoring and enhancing healthy populations of fish and wildlife).[71]

Similarly ANILCA Section 304 authorizes the Fish and Wildlife Service to enter into cooperative management agreements with the State and ANCSA Corporations to provide for effective conservation management of mixed lands (*i.e.*, where federal, state, and ANCSA lands abut or are adjacent to each other). Once again the federal government can step aside and let the State take on this primary role.

3. Preserves – National Park Service

The State envisions that NPS's jurisdiction over the National Parks would remain intact. However, designated Preserves would be transferred to the State to be managed for specified Preserve purposes (*see* ANILCA Section 1313). Congress created the Preserves and prescribed that sport hunting, sport fishing, subsistence fishing and hunting, and trapping would be allowed. As these are traditional activities, related motorized access in the form of airplanes, snowmachines, and motorboats was also mandated. And off-road vehicle use is also provided for subsistence activities (*see* ANILCA Section 811). Lastly, tent platforms, cabins, and other structures and equipment are also allowed. Bottom line, Preserves in Alaska are far different from the usual Lower 48 National Parks.

Unfortunately, NPS has proven hostile to these mandated traditional uses in the Preserves, as the agency is wedded largely to a far more restrictive land management and visitor use ethos. Rather than have NPS fight its non-use impulses, and adversely impact Alaskans, transferring the Preserves to Alaska to be managed per ANILCA is a better way to proceed. Only the State has the ability to manage these areas consistent with statutory directives to allow

[71] 1997 Refuge Act, § 3(a).

traditional activities such as sport hunting and fishing on these lands without the agency hostility that is often behind the illegal restrictions on such use. Rather than fight NPS's deep-seated prejudices and hostility against hunting in National Preserves, it would be best to allow the State to manage Preserves in a way that is permitted by statute and consistent with traditional land uses.

C. PRECEDENTS FOR TRANSFER

1. Arctic Devolution

Other countries have transferred ownership and/or significantly more local authority over lands and resources to regional governments in the same manner as Alaska demands here. These transfers represent formal acts of devolution, or, the transfer of lands, resources and/or management authorities from a centralized or higher level government to a regional or lower level of government. The economic, social, and environmental policy issues underlying those transfers, as well as the reforms sought, mirror Alaska's case very closely.

Canada offers a particularly apt precedent. As part of its official Northern Strategy, Canada is in the process of transferring total ownership of its territorial lands and resources to its state equivalents – the Arctic provinces of the Yukon, Northwest Territories, and Nunavut. The policies supporting this transfer include: greater self-governance and accountability to the governed; a stable and perpetual population of northern residents to support Canadian sovereignty; opportunities for a standard of living more equal to that experienced in non-Arctic provinces; improved capacity to tap the vast resources in the Arctic and translate that into improved self-sufficiency and less reliance on government subsidies; and, overall, to recognize that the Arctic is not an abstract protectorate concept to those living there – it is their home.

While still a work in progress, the substantial benefits of Canada's approach are already apparent. For example, following the transfer of governance and ownership of all crown lands to the Yukon Territory in 2003, resource development projects in almost every field became hot investment items due to the local knowledge and significant permitting efficiencies offered by the provincial government. Delivery of health care and social services became less burdensome for the public, who also had significantly greater access to the elected officials responsible for those services and other local needs. Lands and management authorities were also transferred to the province's First Nations, some of which had been struggling for autonomy for decades.

Alaska stands in a very similar position to the rest of the United States as the northern provinces stand to Canada. In fact, each one of Canada's policies supporting devolution applies squarely to Alaska. Like their counterparts in the Northern Canadian provinces, Alaskans are the more knowledgeable and invested stewards of Arctic lands and resources.

Denmark's transfer of local self-governance to Greenland provides another precedent directly on point. In 1979, Greenland obtained "home-rule" (the power to govern itself) from Denmark. Since that time, Denmark has increasingly devolved more and more resources, management authorities, certain jurisdictional authorities (*e.g.*, border control and law enforcement), and recently, full control of mineral and oil rights. Similar to Alaska, Greenland's

income from mineral and oil rights supports a majority of its economy, while it made up less than 1% of Denmark's economy. Further, with devolution of those rights, Greenland will finally be able to support diversification of its economy, streamlined innovations in renewable energy generation, and reasonable development of in-state resources.

These precedents from our Arctic neighbors demonstrate that transfer of lands, resources, and management authorities from a centralized government to a state government not only makes sense from a public welfare perspective but also results in more efficient, cost-effective, productive, and conscientious management of our public lands and resources.

2. U.S. HISTORY AND APPLICABLE POLITICAL PRINCIPLES

Land transfers and devolution are important cornerstone principles derived from our founding in the late 18th century. The Treaty of Paris, that concluded the American Revolution, provided for the British Crown to cede all of its vacant land and land claims to the new American government. This included claims that extended west from the Appalachian Mountains to the Mississippi River. Within the original 13 states, these vacant Crown lands were transferred to the new states. Those new states with "western" land claims, also running to the Mississippi, were obligated to cede those lands and claims to the new national government and it promptly enacted our Nation's first major public land law to govern these lands: the Northwest Ordinance of 1787. The Ordinance provided for the systematic surveying of the lands (creating the township grid system still in use today), the transfer of lands to new states that might be formed from these lands (*e.g*. Ohio), and the disposition of lands to individuals.

Rivers and submerged lands were also part of the original dispositions. These waters and lands had been traditionally held by the Crown as part of the jus publicum: an area available for public use for water, navigation, fishing, etc. This precedent was maintained with the transfer of rivers, lakes and submerged lands to the thirteen states for the same public purposes. And this policy and practice has been continued for over 230 years codified recently in the 1953 Submerged Lands Act and the Alaska Statehood Act.[72]

Principles of Equal Footing and Equal Sovereignty among the states were motivating forces for these actions. But these principles were only partially realized in Alaska statehood, capping a trend that emerged in the 19th century through which the federal government retained substantial lands rather than engage in wholesale transfer that benefitted earlier entrants to the Union. Despite the disparate treatment among the states and retention of federal lands, a truce of sorts prevailed until the 1970's regarding federal land management. There was a common interest in multiple use management of almost all federal lands (*i.e.* those held by BLM and FS) with only a tiny percentage designated by Congress for restricted use and management as Parks or Wildlife Refuges. Federal policy and practice emphasized active land use and management to sustain natural resource based local economies. Most western states possessed year round economies creating well paying full time jobs based on ranching and farming (supported by BLM and Bureau of Reclamation), mining (BLM and FS), oil and gas (BLM), timber (FS) and traditional recreation, usually fishing and hunting (BLM, FS, FWS, and NPS).

[72] *See* Alaska Statehood Act, § 6(m).

By the mid-70's, changes in Washington, DC led to policies elevating preservation and non-management along with bureaucratic hostility to traditional western economies. Congress was busily enacting the Wilderness Act, the Endangered Species Act, the National Forest Management Act, the Wild Horse and Burro Act, FLPMA, the "National Park of the month", and the National Environmental Policy Act while the Executive Branch was conducting Roadless Area reviews and categorizing millions of acres as de facto Wilderness and aggressively wielding the Antiquities Act to create millions of acres of restrictive Monuments from previously multiple use lands. Alaska was thrown into these battles by the original 1977 versions of ANILCA creating 147 million acres of Wilderness – over 40% of the State – and feeling the lash of the Antiquities Act with Carter's unilateral 1978 designations. It is no coincidence that a backlash arose in the west eventually labelled the Sagebrush Rebellion.

These "inside the Beltway" policy changes threw a monkey wrench into the, commitments, expectations and understandings that underpinned Alaska Statehood. And subsequent federal breach of the provisions and promises built into ANILCA simply made matters worse. Alaska is unique in that the federally--shredded promises are of much more recent origin than those extended to the other western states most of which were admitted to the Union between 1864 (Nevada) and 1912 (Arizona). Nonetheless, the land diktats emanating from Washington have created substantial ferment and frustration throughout the states of the west leading to other calls for a fundamental alteration of federal-state relationships regarding land ownership and management.

There are calls for aggressive legal action asking the federal courts to compel the federal agencies to transfer lands to the states. For better or worse, however, there is a near consensus in the legal community (including most western state attorneys general) that state complaints and grievances are unlikely to be redressed via litigation. The U.S. Supreme Court has been unwilling for 150 years to enforce original Equal Footing and Equal Sovereignty principles and order federal land transfers to the more recently admitted western states. Similarly, the Court has been very clear that the Constitution's Property Clause vests Congress with largely unlimited power to control the disposition of federal lands including those in the west. It might be possible to persuade the Court to engage in a thorough review of these precedents and abandon them but nothing in the judicial branch's history indicates such a result is probable. Consequently, the redress of western states' complaints, including Alaska's, is most likely to be via a political route.

Alaska is well positioned to seek a fundamental alteration of its land relationship with the federal government. The present arrangement is in fact inconsistent with the principles of Equal Footing and Equal Sovereignty. Alaska's Statehood compact has in fact been breached by the actions, inactions, policies and practices emanating from Washington, D.C. And the litany of commitments set forth in ANILCA have been systematically abrogated or disregarded by the landlords headquartered at the Department of the Interior. America's third President addressed these kinds of issues regarding governmental relationships, noting that changes should not be made for "light and transient causes." But he proceeded to declare "a long train of abuses and usurpations" creates "the necessity which constrains them to alter their former system of government."[73] Alaska has faced, for over 50 years, a long train of abuses and usurpations

[73] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776)

regarding lands and land management within the 49th State. It is therefore necessary and appropriate to change the federal/state land relationship that has created these longstanding problems.

D. BONA FIDE COOPERATIVE MANAGEMENT: AN ALTERNATIVE TO LAND TRANSFERS

Cooperative management, an alternative concept enacted partially within Title XII of ANILCA, provides another remedy to federal land mismanagement and malfeasance. But rather than limp federal promises of cooperation, bona fide cooperative management in the form of state concurrence regarding land management decisions would provide Alaska status as a full and equal partner able to ensure that lands within the 49th State are in fact managed pursuant to the Statehood Act, ANCSA, and ANILCA.

Alaska Governor Jay Hammond was a primary proponent of cooperative management during the ANILCA debate. He concluded that the intermixed pattern of land ownership in Alaska demanded cooperation among owners and managers and that giving the federal agencies unilateral authority was a recipe for conflict and disaster (and the indictment of federal action and inaction outlined earlier demonstrates that Hammond was correct). Early Alaska-developed versions of ANILCA were consistent with Governor Hammond's view and would have enshrined cooperative federal-state management in lieu of vast federal conservation designations to be managed unilaterally by federal bureaucracies.[74]

The Alaska Land Use Council, created by section 1201 of ANILCA, is an appropriate institution through which genuine cooperative management can be realized. Although the Council has been allowed to lapse, it remains a legally authorized entity that can be resurrected promptly. Moreover, section 1201 can be readily amended to specify that federal land use plans and policies cannot take force and effect nor be implemented on-the-ground without express state consent, creating real cooperative management. Federal agencies would be unable to run roughshod over state sovereignty, unilaterally countermand important features of ANILCA, or simply violate or disregard the Statehood Act.

There are no legal impediments to such an arrangement. The same Supreme Court rulings holding that the Constitution's Property Clause provides for indefinite federal land ownership and management also state plainly that Congress has almost unlimited power under the same Clause regarding disposition and use of these lands. Congress is plainly empowered to instruct the Executive Branch agencies that federal land use decisions within Alaska shall be subject to state consent and concurrence. Such a provision would be consistent with federalism principles as well as the state jurisdictional consent principles codified in the Enclaves Clause.

Alaska is not alone in pursuing state consent/concurrence remedies. Obnoxious and overweening federal preemption and usurpation of traditional state authority over fish and wildlife has generated a backlash among state fish and wildlife agencies. Their national organization, the Association of Fish and Wildlife Agencies (AFWA), finally determined that federal promises of cooperation, or "we won't do it again", are utterly empty. AFWA decided

[74] Alaska National Interest Lands Act, S. 1787, 95th Cong. (1977).

instead to ask Congress to enact a law supporting that federal wildlife-related decisions which impact state authority and interests be done at the impacted state agency or agencies.

The Alaska congressional delegation and others with the support of the AFWA introduced legislation which was known as the "big bang" bills that required Federal agencies to coordinate and get the consent of state agencies for wildlife management decisions on federal lands.

This year, the AFWA endorsed the legislation, H.R. 5650: Recovering America's Wildlife Act of 2016 introduced by Congressman Young and Dingell on July 6, 2016. AFWA recommends a new mechanism to fund fish and wildlife conservation sustainably, bypassing the Federal government. In March 2016, the panel recommended that a $1.3 billion trust fund be created using existing fees from energy and mineral development on federal lands and water to support implementation of state Wildlife Action Plans in every state, territory and the District of Columbia. Interestingly, AFWA on August 9, 2016 also issued a statement criticizing USFWS regulations that essentially vacated the State's hunting regulations. This was another primary example of illegal federal preemption of state authority and a terrible precedent that could lead to similar ill-advised federal action in the Lower 48 States. The bottom line is illegal federal overreach is not merely an issue in Alaska. Many others are pursuing remedies to overreaching federal land management rules and policies.

VI. CONCLUSION

It is our vision that the federal government finally fulfill the promises of the Statehood Act compact, ANCSA, and ANILCA by allowing Alaskans to control the destiny of Alaska. That vision will be achieved by turning the keys to the State back over to those who live here. It is time for the federal government to start living up to the promises made by successive Congresses and deliver, finally, these guarantees to the people of Alaska.