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Governor Sean Parnell
STATE OF ALASKA

April 27, 2012

Mr. Bob Abbey
Director
Bureau of Land Management
1849 C Street NW, Room 5665
Washington, DC 20240

Dear Mr. Abbey,

I am writing pursuant to 43 C.F.R. § 1610.3-2(e) to appeal the Alaska State Director's response to the Governor's Finding of Inconsistency for the Environmental Assessment (EA) and Finding of No Significant Impact for the Delta River Special Recreation Management Area (SRMA) Plan and East Alaska Resource Management Plan Amendment, and to respond to the December 9, 2011 Director's Protest Resolution Report.

While the Bureau of Land Management (BLM) did not view the State's issues as being within the very narrow limits of the consistency review criteria, I appreciate the State Director's efforts to be responsive and explain BLM's perspective. Unfortunately, many of the responses illustrate a misinterpretation of the Alaska National Interest Lands Conservation Act (ANILCA) and a lack of understanding of how ANILCA's access provisions have been implemented by other Department of Interior (DOI) agencies in Alaska since the law was enacted. The consistency required by Federal Land Policy and Management Act, as implemented by 43 C.F.R. § 1610.3-2(a) and (b), requires that resource management plans "*be consistent with the policies, programs and provisions of Federal laws and regulations applicable to public lands.*" The Delta River SRMAP/EA fails to meet this standard.

As you are aware, ANILCA established 100 million acres of federal land in Alaska as new or expanded conservation system units, including the Delta Wild and Scenic River. ANILCA also includes numerous provisions that recognize Alaska's fledgling economy and infrastructure, and distinctive rural way of life. Of particular relevance to this plan are the provisions of ANILCA that ensure Alaskans and visitors alike have access to these vast areas for both practical use of the land and for realizing the purposes for which these conservation areas were established. Following passage of ANILCA in 1980, DOI implemented regulations that were carefully crafted and vetted through an extensive and rigorous public process to establish clear and concise procedures for times when limiting access was necessary. It also provided the public with ample opportunities to communicate with federal land managers on how proposed limitations would affect their use and enjoyment of these lands.

I am, therefore, alarmed by BLM's interpretation of these important provisions of ANILCA and the casual manner in which subsistence and general access to BLM lands across the State will be

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incrementally eliminated by the process forwarded in this planning effort and BLM's responses to the Governor's Consistency Review finding, and in the Director's Protest Resolution Report. In addition, I am gravely concerned that some of BLM's proposed decisions to "recommend" to the public that they *not* partake in legally protected activities will create unnecessary conflicts in the field similar to those experienced by the National Park Service in Yukon-Charley Rivers National Preserve.

I urge you to give careful consideration to the attached appeal of the State Director's decision regarding the issues raised in the Governor's Consistency Review and Protest. These issues are not limited to the scope of the Delta SRMA Plan and, if left unresolved, will carry over to other BLM planning efforts in Alaska. I am confident that we can work toward a resolution that respects both the clear intent of ANILCA and the rights of Alaskans and the visiting public, as envisioned by Congress.

Sincerely,



Sean Parnell
Governor

Enclosure

cc: The Honorable Lisa Murkowski, United States Senate
The Honorable Mark Begich, United States Senate
The Honorable Don Young, United States House of Representatives
The Honorable Cora Campbell, Commissioner, Alaska Department of Fish and Game
The Honorable Dan Sullivan, Commissioner, Alaska Department of Natural Resources
Bud Cribley, Alaska State Director, Bureau of Land Management
Kip Knudson, Director of State/Federal Relations, Office of the Governor
Susan Magee, ANILCA Program Coordinator, Alaska Department of Natural Resources
Samantha Carroll, BLM Coordinator, Alaska Department of Natural Resources

State of Alaska's Appeal of the
State Director's Response to the Governor's Finding of Inconsistency
for the Delta River SRMA Plan
April 25, 2012

The State of Alaska received the Alaska State Director's March 28, 2012 response to the Governor's Consistency Review finding of inconsistency for the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the Delta River Special Recreation Management Area Plan (Plan) and the East Alaska Resource Management Plan Amendment, which was released July 25, 2011.

In response to the State's finding of inconsistency, the State Director dismissed all of the State's issues as not "*properly the subject of this Governor's Consistency Review process*" because the basis for the issues raised included the Alaska National Interest Lands Conservation Act (ANILCA), the Wild and Scenic Rivers Act (WSRA), and various federal regulations instead of "*State or local plans, policies or programs.*"

However, the regulations that implement the Federal Land Policy and Management Act (FLPMA) consistency requirements and guide the Governor's Consistency Review process at 43 CFR § 1610.3-2(a) state:

Guidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein of other Federal agencies, State and local governments and Indian tribes so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands... [Emphasis added]

The State of Alaska appeals the following issues that remain inconsistent with the federal law, including ANILCA, the WSRA, and other Department of Interior (DOI) land management agency regulations that implement relevant provisions of ANILCA in Alaska. The discussion of issues below that are the subject of this appeal have been tailored to address the Bureau of Land Management's (BLM) responses to the Governor's Consistency Review finding and the Protest. To the extent they are relevant; all previous comments submitted by the State to BLM are incorporated by reference.

1. **Recommending the public refrain from legally allowed activities is inconsistent with ANILCA Section 1110 and Department of Interior implementing regulations at 43 CFR § 36.11.**

ANILCA Section 1110(a) is clear that the use of snowmachines, motorboats, airplanes and non-motorized surface transportation "shall" be allowed on conservation system units and other areas designated by the Act, subject to reasonable regulation. Because of the importance of these modes of transportation to ensuring access, ANILCA Section 1110(a) set a high bar for limiting access:

... [such use] 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. [Emphasis added]

This intent and resulting process is codified in DOI regulations at 43 CFR § 36.11(h), and the State Director, in his response to the Governor, committed to following this closure process.

This revision clarifies that the BLM will fully commit to the use of the 43 CFR 36.11(h) procedures before implementing an ANILCA Section 1110(a) closure...

However, despite this commitment, BLM is proposing to instead “recommend” the public refrain from using motorboats, airplanes, and certain non-motorized methods of access in specific areas in order to “prevent” resource degradation. This alternative approach blatantly circumvents both the intent of ANILCA and implementing regulations at 43 CFR § 36.11(h). If restrictions focused only on *potential* for resource impacts, the access provisions of ANILCA would be rendered meaningless as all modes of access have the *potential* to cause resource impacts. The correct test for limiting these protected modes of access is whether degradation has occurred or is likely to occur. Based on State staff’s first-hand knowledge of the river corridor, their participation in BLM planning meetings, and statements in the plan itself, the areas affected by the proposed restrictions are not degraded, nor is the current or projected level of use likely to cause resource damage in the future. BLM’s response to the State’s Protest acknowledges that “*the current level of motorized boating and airplane landings do not warrant an ANILCA closure.*”

By advising the public not to engage in legally protected modes of access, whether in the form of a “discouraging” statement or a “recommendation,” BLM ignores the requirement in ANILCA that access to Alaska’s remote areas be permitted unless resource values are threatened. Such actions are not only unenforceable and legally questionable, as a practical matter these “recommendations” will be confusing to the public – especially those Alaskans who are keenly aware of the protections afforded by ANILCA – and will likely lead to conflicts in the field between the public and BLM staff, as well as public safety officers.

BLM must not only commit to following the closure process, it must also remove the proposed direction to “recommend” the public *not* engage in legally protected activities.

2. Group size limitations must be implemented by regulation consistent with ANILCA Section 1110 and Department of Interior implementing regulations at 43 CFR § 36.11.

The Plan proposes to require groups consisting of more than ten people obtain written authorization to camp within the river corridor. We disagree that this requirement is not an ANILCA Section 1110(a) access limitation, which is subject to reasonable regulation, especially considering that other DOI agencies promulgate regulations to implement group size restrictions in ANILCA conservation system units. For example, the National Park Service promulgated an Alaska-specific regulation at 36 CFR § 13.905 to implement a decision made in the 2006 Backcountry Management Plan to limit the group size in certain areas of Denali National Park and Preserve, unless authorized by the Superintendent.

To ensure consistency throughout Alaska and to maintain the intent of Congress, proposed group size limits, including those that require the public to obtain an authorization, must be implemented by regulation. Additionally, FLPMA requires that BLM coordinate Resource

Management Plans with the land use planning and management programs of other federal departments and agencies in Alaska.

3. Following the direction in ANILCA Section 810 to determine whether subsistence access restrictions need to be implemented by regulation pursuant to ANILCA Section 811 is a misinterpretation of ANILCA and is inconsistent with the regulatory process followed by other Department of Interior land management agencies.

The State Director's response to this issue fails to address the very basis for the State's comment, which is that BLM's use of the ANILCA Section 810 process to implement Section 811 access restrictions is inconsistent with the law, mixes terminology found in both sections of ANILCA, and is in stark contrast with the process established in regulation by the DOI for other federal land management agencies.

Both Sections 810 and 811 serve an important purpose in ensuring subsistence use and access are properly maintained; however, the two provisions are distinctly different in their application. Under ANILCA Section 810(a), federal agencies are directed to make an administrative determination as to whether proposed restrictions "*significantly restrict subsistence uses*" [emphasis added]. If the determination is positive, ANILCA further requires the agency take certain actions to give notice, hold hearings, and minimize impacts of the proposed restrictions to the extent possible. Subsistence *access* is addressed in ANILCA Section 811, and similar to ANILCA Section 1110, states that certain modes of access "*shall*" be permitted, "*subject to reasonable regulation.*" Nothing in Section 811 indicates regulations are to be promulgated to implement *access* restrictions *only* when the Section 810 analysis concludes that the proposed actions *significantly* restrict subsistence *uses*. Regulations are necessary to implement access restrictions regardless of whether the effect is deemed significant or not.

To illustrate, National Park Service and U.S. Fish and Wildlife Section 811 implementing regulations at 36 CFR § 13.460 and 50 CFR § 36.12 respectively, include rigorous criteria, and extensive notice and hearing requirements that apply to *all* subsistence access restrictions, not just those deemed administratively to be significant under ANILCA Section 810. Below is an excerpt from the NPS regulations at 36 CFR § 13.460:

(b) The Superintendent may restrict or close a route or area to use of snowmobiles, motorboats, dog teams, or other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses if the Superintendent determines that such use is causing or is likely to cause an adverse impact on public health and safety, resource protection, protection of historic or scientific values, subsistence uses, conservation of endangered or threatened species, or the purposes for which the park area was established.

(c) No restrictions or closures shall be imposed without notice and public hearing in the affected vicinity and other locations as appropriate. In the case of emergency situations, restrictions or closures shall not exceed sixty (60) days and shall not be extended unless the Superintendent establishes, after notice and public hearing in the affected vicinity and other locations as appropriate, that such extension is justified according to the factors set forth in paragraph (b) of this section. Notice of the proposed or emergency restrictions or closures and the reasons therefore shall be published in at least one newspaper of general circulation within the

State and in at least one local newspaper if appropriate, and information about such proposed or emergency actions shall also be made available for broadcast on local radio stations in a manner reasonably calculated to inform local rural residents in the affected vicinity. All restrictions and closures shall be designated on a map which shall be available for public inspection at the office of the Superintendent of the affected park area and the post office or postal authority of every affected community within or near the park area, or by the posting of signs in the vicinity of the restrictions or closures, or both. [emphasis added]

As is the case with BLM, the Forest Service also does not currently have implementing regulations for Section 811 of ANILCA. However, to provide for implementation of any resulting subsistence access restrictions under the 2005 National Travel Management Rule, the Forest Service, in consultation with the State, developed regional policy guidance, which is consistent with the intent of ANILCA and other DOI agency ANILCA implementing regulations.¹ To be consistent with other federal land management agencies and ensure that ANILCA Section 811 is implemented consistently statewide, BLM needs to establish its own regional policy or promulgate regulations that reflect the intent of Congress and existing DOI regulations for BLM managed lands. In the interim, BLM should correct the Delta SRMA Plan so that it is consistent with ANILCA and other federal land management plans and policies in Alaska.

4. The plan did not follow the cited Interagency Wild and Scenic River Coordinating Council process to determine outstandingly remarkable values for the Delta Wild and Scenic River.

As noted in BLM's responses to the Governor's Consistency Review finding and the Protest, the process for identifying outstandingly remarkable values (ORVs) includes determining whether a value is *a unique, rare or exemplary feature that is significant at a comparative regional or national scale*. Yet neither the responses to the State nor the plan itself make any attempt to define a region of comparison, except to generally refer to the Arctic Grayling fishery as "world-class." The State reiterates its position that fish habitat on the Delta River is not unique in a regional context.² Similarly, for the Wildlife ORV, the plan simply lists the various wildlife species that can be found in the Delta River corridor, most of which can also be found in the vast majority of the State, including metropolitan cities, such as Anchorage.

¹ Interim Guide dated May 23, 2008. Related Federal Register notice at 73 Fed. Reg. 40845 (July 16, 2008)

² See, e.g., Gryska, A. D. 2011. Stock assessment Arctic grayling in the Delta River, 2008. Alaska Department of Fish and Game, Fishery Data Series No. 11-01, Anchorage; Wuttig, K. and A. D. Gryska, 2010, Abundance and length composition of Arctic grayling in the Delta Clearwater River, 2006, Alaska Department of Fish and Game, Fishery Data Series No. 10-84, Anchorage; Gryska, A. D. and B. D. Taras, 2007, Abundance and length composition of Arctic grayling in the Niukluk River, 2005, Alaska Department of Fish and Game, Fishery Data Series No. 07-22, Anchorage; Gryska, A. D. 2004, Abundance and length and age composition of Arctic grayling in the Richardson Clearwater River, 2001, Alaska Department of Fish and Game, Fishery Data Series No. 04-03, Anchorage; DeCicco, A. L. and M. J. Wallendorf, 2000, Stock assessment of Arctic grayling in the Fish River, Seward Peninsula, Alaska 1999, Alaska Department of Fish and Game, Fishery Data Series No. 00-29, Anchorage. These reports all have similar sampling design, with similar or higher abundance estimates for grayling >300 and >330 mm FL, and demonstrate that the upper Delta River grayling fishery is not unique, rare, or exemplary in a regional or statewide context.

Congress did not define the ORVs for any of the rivers ANILCA designated as additions to the Wild and Scenic Rivers System. As such, BLM is defining ORVs post designation – a process which is usually followed by a land management agency to justify recommending a river to Congress. As such, it is equally, if not more important, in this circumstance to ensure the values analyzed in the plan merit consideration as “outstandingly remarkable” consistent with congressional intent in the Wild and Scenic Rivers Act. BLM must follow the process clearly outlined in the USDI-USDA Final Revised Guidelines for Eligibility, Classification, and Management of River Areas (47 FR 39458) and in the Interagency Wild and Scenic Rivers Coordinating Council’s technical report “The Wild and Scenic River Study Process,” and define the area, region or scale of comparison to clearly demonstrate the proposed ORVs are “*unique, rare or exemplary.*”