

**State of Alaska’s Appeal of the
State Director’s Response to the Governor’s Consistency Review
Inconsistent Finding for the proposed
Eastern Interior Resource Management Plan and Final EIS**

Pursuant to 43 C.F.R. §1610.3-2(e), the State of Alaska appeals the Alaska State Director’s October 12, 2016 response to the Governor’s Consistency Review (GCR) finding dated September 28, 2016 for the proposed Eastern Interior Resource Management Plan (EIRMP or Plan) and Final Environmental Impact Statement (FEIS).

The State identified several issues that formed the basis for the inconsistent GCR finding on the EIRMP and FEIS. Among several issues, the Plan:

- Does not respect the congressional mandate in ANILCA to make multiple use lands not already designated as conservation system units (CSUs) available for more intensive use, and instead applies layers of protective measures to buffer CSUs within the planning area, including segments of the Fortymile Wild and Scenic River not withdrawn from mineral entry under ANILCA;
- Relies on outdated ANCSA 17(d)(1) withdrawals to support restrictions on access, use, and resource development instead of recognizing that existing federal and state environmental laws and regulations already protect resource values;
- Does not provide for sustainable opportunities for mineral exploration or development, consistent with state area plans, including areas within the White Mountains National Recreation Area (NRA) that have high potential for rare earth elements;
- Frustrates the State’s ability to prioritize land selections; and
- Interferes with the State’s ability to develop a resource-based economy

While the State Director’s response dismisses all but one of these issues as not being within the narrow scope of the GCR process, all of these issues directly relate to the State’s unique history and complex management framework, which is governed by several federal statutes at the core of the State’s findings, including the Alaska Statehood Act (ASA), the Alaska Native Claims Settlement Act (ANCSA), the Alaska National Interest Lands Conservation Act (ANILCA), and the Alaska Land Transfer Acceleration Act (ALTAA). As recently confirmed by the United States Supreme Court, ANILCA in particular, establishes a different framework for federal land management in Alaska. Specifically, the Act’s unique provisions “...reflect the simple truth that Alaska is often the exception, not the rule.”¹

Dismissing the majority of the State’s issues in this manner not only misses the very points raised, but is at odds with Section 202(c)(9) of FLPMA, which requires BLM land use plans to be consistent with state and local plans to the maximum extent possible, providing they are also

¹ “Those Alaska specific provisions reflect the simple truth that Alaska is often the exception, not the rule.” (Sturgeon v. Frost, 136 S. Ct. 1061, 1065 (2016)).

consistent with Federal law and the purposes of FLPMA.² The State's overarching request to recommend full removal of outdated ANCSA 17(d)(1) withdrawals recognizes that existing extensive federal and state environmental and natural resource regulatory authorities conserve and protect resource values in the planning area. This request is not only consistent with state plans, policies and programs, but is also consistent with the above referenced federal laws and the purposes of FLPMA, including:

- ANILCA's direction that BLM manage multiple-use lands for more intensive uses to ensure the State's economic and social needs are met.
- The need to revoke all ANCSA 17(d)(1) withdrawals that have fulfilled their intended purpose to allow for Native land selections and to satisfy the national conservation interests by designating over 100 million acres of CSUs in Alaska.
- BLM's recommendation in its ALTA 2006 Report to Congress that the majority of 17(d)(1) withdrawals be revoked because existing federal and state environmental laws and regulations that are now in place protect resource values.
- The State's efforts under the ASA to complete the resource assessments necessary to completing its land selections, which are impeded by outdated ANCSA 17(d)(1).
- FLPMA's requirement to recognize the Nation's need for domestic sources of minerals, because the plan only opens land with low mineral potential to mineral exploration.

The State therefore requests the national Director reconsider all issues raised in full view of the consistency requirements in FLPMA 202(c)(9), which includes consistency with the unique laws that apply to Federally-managed lands in Alaska. In addition, we request the national Director consider the following responses to the State Director's findings that the Plan is consistent with the State's "policy to make mineral resources available for development."³

1. ***"The Proposed RMP if implemented, will not preclude development on State Lands or access across BLM managed lands to State lands within the planning area... the Proposed RMP still allows for a wide variety of multiple-uses."***

The EIRMP applies layers of special designations and delineations within the mineral rich Fortymile Subunit; recommending mineral withdrawals on approximately 685,000 acres of high mineral potential lands. While it is encouraging that BLM recognizes that proposed management for BLM-managed lands cannot preclude access to state or private lands, the layering of multiple designations/delineations in the EIRMP sets a baseline that will affect future step-down travel management decisions and likely result in overly burdensome restrictions on access and use, which will impede mineral exploration and development activities on state and private lands. The Plan provides no explanation as to why existing environmental and resource development laws and regulations provide insufficient protection for resource values.

² "Land use plans of the Secretary under this section **shall** be consistent with **State and local plans** to the **maximum extent** he finds **consistent with Federal law and the purposes of this Act.**" (FLPMA Section 202(c)(9), emphasis added)

³ Page 2, State Director's response to Governor Bill Walker regarding the EIRMP GCR finding of inconsistency, dated October 12, 2016.

Further, this management approach will make it difficult, if not impossible, for industry to assess the resource value of the lands that BLM is either effectively or actually closing to reasonable exploration activities. This also interferes with the State's ability to determine if mineral entry is in the State's interest on adjacent state lands, which further limits the State's ability to fully assess and prioritize its remaining entitlement lands under the ASA. Combined, the proposed withdrawals and restrictive area designations and delineations will discourage or limit access across federal lands located within one of the oldest mining districts in the state, and result in lost economic opportunity, which will negatively impact the mining industry overall and the economic health of the state in general.

2. ***“The Proposed RMP recommends revoking ANCSA 17(d)(1) withdrawals on 1.7 million acres to open these lands to mineral location, entry, and leasing. This includes 1.1 million acres or almost two thirds of the Fortymile Subunit, most of which is within the Fortymile Mining District. Other areas recommended to be opened include 4,000 acres in the White Mountains subunit near the Tower Hills prospect; 547,000 acres in the Upper Black River Subunit adjacent to State and State-selected land; and 30,000 acres in the Steese Subunit adjacent to State land.”***

While the Plan proposes to revoke ANCSA 17(d)(1) withdrawals to open over one million acres within the planning area, the majority of those lands contain low mineral potential. As such, there is little likelihood that resource development would be viable in any of the areas recommended as open. Areas with high mineral potential, such as the recreational and scenic segments of the Fortymile Wild and Scenic River, which are currently closed under outdated ANCSA 17(d)(1) withdrawals, will remain closed, despite the fact that ANILCA only closed the wild segment of the river to mining and legislative history affirms congressional intent to accommodate existing and future mining activities.⁴ The White Mountains NRA, which contains high potential for rare earth elements, considered by the U.S. Geological Survey and the Department of Defense to be strategic and critical metals important to the nation's security interests, remains closed despite discretionary authority contained within ANILCA Section 1312 to allow mineral exploration and development. These decisions, along with a similar decision to keep all but 30,000 acres closed in the Steese National Conservation Area (NCA) lack meaningful justification, both in the Plan and in the State Director's response to the State's GCR finding.

The Plan proposes to revoke several outdated ANCSA 17(d)(1) withdrawals in the planning area. However, the Plan conditions revocation of the outdated withdrawals on receiving new FLPMA withdrawals. As a result, if the new withdrawals are not authorized by Congress as required in ANILCA Section 1326(a), BLM will continue to prohibit mining on lands that should otherwise be open to mineral entry.

Decisions that close or impede exploration and development in the planning area are inconsistent with the State's planning goals in the Upper Yukon Area Plan to “[m]ake the metallic and non-metallic resources available to contribute to the energy and mineral supplies and economy of

⁴ ANILCA § 606(a)(2) and 126 Cong. Rec. S11186 (daily ed. Aug. 9, 1980) (statement of Senator Gravel)

Alaska” and to “[c]ontribute to Alaska’s economy by making subsurface resources available for development, which will provide job opportunities, and stimulate economic growth” (UYAP Chapter 2, page 2-32). They are also inconsistent with BLM’s 2006 Report to Congress, submitted pursuant to Section 207 of ALTAA, which justified lifting outdated ANCSA (d)(1) withdrawals that prohibit resource development in Alaska by stating that current environmental laws and regulations, which did not exist when ANCSA was enacted, are now in place to protect resource values.

3. ***“As noted in ADNR’s letter, the State’s Upper Yukon Area Plan identifies approximately 194,000 acres in the Middle Fork region as habitat lands recognizing use by caribou for calving. Likewise, the Proposed RMP designates the Fortymile ACEC for caribou calving and Dall sheep and identifies a management prescription for the ACEC and additional caribou calving/post-calving areas outside of the ACEC. This is consistent with the State’s program/policy of setting aside areas for habitat use in State land use plans. By identifying management prescriptions for crucial caribou and Dall sheep in the Proposed RMP, the BLM is following a similar process.”***

While the EIRMP and the UYAP both identify important wildlife habitat, the proposed management in the EIRMP is significantly different from the State’s area plans. For example, the State’s Upper Yukon Area plan identifies approximately 194,000 acres within the Middle Fork region as habitat used by caribou for calving; however, unlike the proposed Fortymile ACEC in EIRMP, the state lands are *not* closed to mineral entry. In addition, the proposed ACEC in the EIRMP, which identifies caribou calving and Dall sheep habitat as justification for the designation and associated withdrawal, is twice the size of the habitat area identified in the State’s area plan.

Further, the State relies upon existing environmental laws, regulations and policies to avoid, minimize, or mitigate impacts from proposed mining activities. This same management approach was applied to BLM’s previous RMPs in Alaska, and as mentioned above, is consistent with BLM’s 2006 Report to Congress pursuant to Section 207 of ALTAA. In contrast, the EIRMP proposes to preemptively close a significantly larger area to mineral entry, ignoring the effectiveness of existing environmental laws and regulations in conserving and protecting natural resource values. Closing large swaths of BLM multiple-use lands with high mineral potential in the EIRMP planning area is *inconsistent* with multiple-use management under the State’s area plans.

4. ***“Similar to the State’s land use plans, the Proposed RMP allows for a wide variety of multiple-uses throughout the planning area, including: permits, leases, rights-of-way, mineral material sales, commercial recreation permits, personal and commercial use of timber and forest products, casual recreational use, off-highway vehicle use, mining on existing federal mining claims, and once implemented, mineral leasing and the staking of new mining claims on approximately 1.7 million acres.”***

State statutes provide for management of state lands “... to provide for the maximum use of state land consistent with the public interest...”⁵ and to “use and observe the principles of multiple use and sustained yield.”⁶ Regulations promulgated to enact this statutory direction identify uses that are “generally allowed” to occur on all general domain state lands and provide the conditions that must be followed when conducting a use.⁷ Under state management, all general domain lands are open to multiple use which includes, among other uses: cross country travel, recreational mining, use of a highway or off-road or all-terrain vehicle, access for hunting and trapping, and subsistence harvest. Furthermore, all general domain state land is open to mineral entry unless specifically closed based on a finding that mining would be incompatible with significant surface uses.⁸

In contrast, by dividing the planning area into multiple areas designated or delineated for limited uses, BLM appears to have abandoned FLPMA’s mandate to manage on the basis of “multiple-use and sustained yield” in favor of resource preservation. As a result, the EIRMP preemptively closes over 76% of the available public lands within the planning area to mineral entry, despite BLM’s extensive mining regulations and other management tools, as well as other federal and state laws and regulations that are currently in place to conserve and protect resource values. In addition, travel management decisions, which control access on and across BLM managed lands and are essential for gaining access to state and private lands for a variety of uses, including resource development, are largely deferred to future stepdown plans and will be subject to the restrictive sideboards established in the EIRMP.

Further, as noted in response to statement number two above, the only areas identified as open to mining are areas with low mineral potential; therefore, the Plan is not only inconsistent with State area plans and BLM’s multiple-use and sustained yield mandate, it is inconsistent with Section 102(a)(12) of FLPMA, which directs BLM to manage public lands “...in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands.” Under the EIRMP, BLM-managed lands within the planning area would generally be open to certain uses in select areas; therefore, the above claim that BLM lands within the planning area are open to “multiple uses,” consistent with state lands in the planning area, which are managed as “multiple-use,” is inaccurate and misleading.

⁵ AS 38.04.005(a) states: “In order to provide for *maximum use* of state land consistent with the public interest, it is the *policy* of the State of Alaska to plan and manage state-owned land to establish a balanced combination of land available for both public and private purposes. The choice of land best suited for public and private use *shall be determined through the inventory, planning, and classification processes* set out in AS 38.04.060 - 38.04.070.” [Emphasis added]

⁶ AS 38.04.065(b)(1)

⁷ 11 AAC 96.0020 and 11 AAC 96.025

⁸ AS 38.05.185

Conclusion

The opening policy statement in Section 101(d) of ANILCA specifically identified “...public lands necessary and appropriate for more intensive use and disposition...” as being part of the “proper balance” achieved through ANILCA.⁹ Simply put, BLM multiple-use lands within the EIRMP planning area were intended for more intensive use. Instead, the EIRMP applies management direction intended to enhance protections for ANILCA designated CSUs, including CSU’s managed by other federal agencies and BLM-managed CSUs, such as the Fortymile Wild and Scenic River; no longer providing an expectation for mining opportunities in the oldest mining district in the state. Similar management direction that excludes or limits mining opportunities also applies to the White Mountains NRA and the Steese NCA, where Congress, through ANILCA, granted BLM discretionary authority to allow more intensive uses, including mining.

Maintaining ANCSA 17(d)(1) withdrawals in the Eastern Interior planning area that have long fulfilled their intended purpose in ANCSA is blatantly inconsistent with both ANILCA and FLPMA’s mandate to be consistent with state land use plans, policies and programs. The proposed management direction in the EIRMP unnecessarily prohibits mineral entry and development in an area that has a rich and long-established history of mining, precludes expansion of the State’s resource-based economy, and obstructs the State’s ability to prioritize its final entitlement selections as provided in the ASA.

The State therefore reiterates its request for BLM to revise the EIRMP for management continuity with state land use plans, FLPMA, and federal laws specific to Alaska, by recommending that all ANCSA 17(d)(1) withdrawals that have fulfilled their intended purpose be revoked, unconditionally. In lieu of recommending new FLPMA withdrawals that remove areas with high mineral resource potential from exploration and development, the plan should rely on the extensive federal and state environmental laws and regulations applicable to mining, which include BLM mining regulations and other commonly used management tools, such as standard operating procedures and permit stipulations.

⁹ “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.” [Emphasis added]