

STATE OF ALASKA

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF GOVERNMENTAL COORDINATION

BILL SHEFFIELD, GOVERNOR

STATE CSU COORDINATOR
2600 DENALI STREET, SUITE 700
ANCHORAGE, ALASKA 99503-2798
PHONE: (907) 274-1581

June 26, 1985

Roger Contor
Regional Director
National Park Service
2525 Gambell Street
Anchorage, AK 99503-2892


Dear Mr. Contor:

The State has completed its review of the National Park Service's (NPS) draft General Management Plan (GMP), Land Protection Plan, Wilderness Suitability, and Environmental Assessment for the Aniakchak National Monument and Preserve (NM&P). The following comments reflect a variety of concerns regarding impact assessments, lack of management intent on selected topics, the need to address management issues involving the statutory responsibilities of State agencies, and other items. In general some issues and management actions are not described sufficiently to assess their significance. If in fact there are no significant issues or actions anticipated over the next ten years, then this should be more clearly described. Also, certain requirements of the Alaska National Interest Lands Conservation Act (ANILCA) Section 1301 do not appear to have been met, such as 1301 (b) (3), (b) (4), and (b) (8).

We have commented only on parts of the plan to which we have concerns. However, agency reviewers wish to be advised of any changes to other parts of the plan that may result from comments of other agencies or individuals. Many of the comments included here will reappear in our comments on the remaining eight National Park Service GMP's. Unless there is a reason why the response to these comments should be different the comments deserve a consistent response on a statewide basis. Some of our concerns span several portions of the document and are discussed together; the remaining comments are presented sequentially. Therefore the order of our comments does not reflect their importance.

ACCESS AND TRANSPORTATION

The State suggests several additions to various sections in the plan addressing access and transportation. These proposed additions would help clarify a number of issues. Incorporation of these comments will satisfy the GMP requirements of ANILCA Section 1301 (b) (4).

Description of Existing Access

The Access and Transportation discussion (page 86) should be expanded to contain a summary of the existing trails, airstrips, and waterways used at one time or another for transportation in the unit by residents and visitors. The discussion should include a description of Chignik Lagoon N.E. Trail (Map 31, Trail 1, Alaska Existing Trail System, 1973 see attached) and note that the trail is a possible Revised Statute (RS) 2477 right-of-way.

A discussion about 17(b) easements should also be included in this section of the plan. Although there are no 17(b) easements in the unit at present, the plan should acknowledge that as land is conveyed to Native ownership, 17(b) easements crossing these Native lands may become a management concern and should indicate the general approach NPS intends to take concerning these easements.

Map of Access Patterns

A map should be inserted into the plan after page 86 showing public access routes in the NM&P. The map, among other things, should include the Chignik Lagoon Trail. The map should also include a footnote identifying the possibility of 17(b) easements in the unit.

Public Access, Services, and Development

This entire section (pages 13-17) could be clarified by reorganizing the parts around subheadings. There should be a separate section for 17(b) easements, RS 2477 ROW's, and non-exclusive use easements.

The new section on 17(b) easements should acknowledge that 17(b) easements may become a management concern and should indicate the general approach the NPS intends to take concerning these easements.

The section addressing RS 2477's should include a discussion of the possible RS 2477 ROW mentioned previously. After considerable review and deliberation, State agencies request that the language in the first paragraph of page 16 starting with the words, "The National Park Service is aware..." be replaced with the following:

The NM&P is subject to valid existing rights, including rights-of-way established under RS 2477 (43 U.S.C. 932). The State may identify and assert RS 2477 rights-of-way within the unit.

- The State has authority to manage these rights-of-way and may do so cooperatively with the underlying fee landowner. The National Park Service, as the landowner, may petition the State to disclaim an interest in or vacate any rights-of-way identified by the State and/or may enter into a cooperative management agreement with the State.

The summary on page 137 that addresses RS 2477 should also be consistent with this new language.

The new section that addresses non-exclusive use easements should outline the NPS general policy on this issue. The use of non-exclusive use easements is established in the Regional Solicitor's Opinion dated December 22, 1983 (attached). Non-exclusive use easements may be reserved by BLM across Native allotments when trails or areas of prior established public use overlap an allotment application.

Regarding Table 1 on page 15, the traditional recreational and subsistence uses of offroad vehicles are not totally prohibited by ANILCA. Neither is the use of aircraft for subsistence use totally prohibited by ANILCA, as reflected in 36 CFR 13.45. We also note that ANILCA's restrictions on aircraft for subsistence uses are pertinent to parks and monuments. The "Except: 3" may be intended to modify "No" in the previous row; we suggest clarification of the footnote directly on a "Yes" instead. The table also indicates that helicopter use is prohibited throughout the Monument and Preserve for recreational uses. We are not aware of any other prohibition of helicopters on NPS lands in Alaska, except when used for fisheries and wildlife harvest purposes. We request reconsideration. Otherwise a discussion of NPS intent to pursue more restrictive regulations for Aniakchak should be included in the text.

LAND PROTECTION PLAN

Modifications Regarding Access

The introduction to the Land Protection Plan states that a plan is created "for each unit which contains private or other non-federal land or interest in land within its authorized boundaries" (p. 21). The section then addresses many of these non-federal lands and interests. However, it does not include a discussion about 17(b) easements, RS 2477 ROW, or non-exclusive use easements. The State feels that these potential non-federal interests should be addressed consistent with Land Protection Plan purposes. To do so, we recommend the following changes or additions to the land protection plan.

Page 23 - The summary in this section should acknowledge RS 2477 rights-of-way even though specifics of the corridors and actual acreages affected are not known at this time. A statement should also be included delineating the proposed method of protection of these corridors.

Page 27 - The table on page 27 should acknowledge that there is an undetermined amount of land that is or may be encumbered with RS 2477 rights-of-way or 17(b) easements. This could be added as a footnote to the table.

Pages 29 and 43 - These maps should include the Chignik Lagoon Trail mentioned previously. The legend should mention that there may be additional trails identified and that these routes might be asserted under RS 2477 in the future. The legend should also state that since Native conveyances have not been completed, the locations and number of 17(b) easements is not known.

Pages 35-40, Alternative Means of Land Protection - A discussion should be included in this section about the use of non-exclusive use easements through Native allotments. The reservation of such easements in appropriate circumstances could protect long-standing public access to adjacent public lands and resources within the NM&P while retaining the allotment holders' property rights. There are a number of management questions associated with this land protection alternative which should be addressed in this section.

Pages 41-47 - A separate section should be developed for each of the following topics:

- 1) the Chignik Lagoon Trail,
- 2) other potential RS 2477 ROW's, and
- 3) possible 17(b) easements.

The section addressing RS 2477's should also include a discussion of non-exclusive use easements as a method of protecting RS 2477 routes. The management intent for RS 2477 should also be consistent with the new language proposed for page 16.

Other Land Protection Plan Comments

Pages 27-28, Compatibility of Land Uses - Based on this discussion, it could be inferred that virtually any residential or commercial activity developed on State or private land will result in NPS attempting to acquire these lands. We also infer that NPS intends to block any hunting guides or trappers even though their bases are located on private lands. We question the appropriateness of this intent, given the history of human residency in the area and ANILCA Section 103(c) which excludes nonpublic lands from being considered "within the boundaries".

Page 31, paragraphs 1-3 - This section outlines the proposed activities on adjacent State land that could affect the NM&P. However, NPS concerns regarding these activities are not specified. We suggest that this discussion be expanded to clarify the nature of NPS concerns. We also note that most State lands adjacent to the NM&P are State-owned, not selected.

- Pages 34-35, State and Local - The ADF&G Division of Habitat issues permits for construction activities in specified anadromous fish streams pursuant to Alaska Statute (AS) 16.05.870. The second line of this section should be revised to read: "The Act requires any person or governmental agency that desires to construct a hydraulic project, or to use, divert, obstruct, pollute, or change the natural flow or bed of a specified river, lake, or stream, or to use wheeled, tracked, or excavating equipment or log dragging equipment in the bed of a specified river, lake, or stream to notify the Commissioner of the Department of Fish and Game (ADF&G) of this intention and to receive approval from ADF&G before beginning the construction or use." Please note that AS 16.05.870 is a portion of the title establishing the latter agency, not Environmental Conservation.

Page 40, Methods of Acquisition - Boundary adjustments are also effective in assuring protection of resources, as provided in ANILCA Section 103(b) and should be included in this discussion.

Page 41, Priority 1 Analysis - We question the contention that use of these private tracts for a recreational hunting or river floating camp would necessarily have

significant impact or be incompatible with management of Aniakchak NM&P. We are also concerned that fee acquisition is the preferred method of protection when other options such as a cooperative agreement or easement may be more realistic in light of budget constraints and remote location.

Page 42, Priority 2 Analysis, paragraph 2 - Given the actual numbers involved, a "significant increase" in hunting and other recreational uses would not be expected to have significant negative effects on the wildlife resources.

Page 47, Priority 5 Analysis - We question the contention that use of this tract as a base for hunting activities would impact values of the unit.

The Land Protection Plan should also include a rough estimate of the cost of implementation. These figures should then be compiled for all nine NPS GMP's, and statewide recommendations for acquisition reconsidered based on this information. Until this is done, it will be unclear how realistic the acquisition recommendations are for the various NPS units.

In light of budget constraints, we question the viability of the emphasis on acquisition as a preferred method of protection. Greater emphasis on other methods such as cooperative agreements and easements would be more cost effective, increase NPS flexibility, and likely improve working relationships with local inholders.

NAVIGABILITY

The NPS proposes to ask the State to close the beds of navigable rivers in the NM&P to mineral appropriation under State law (page 47). Specifically requested is closure to mining claims, mineral leasing, and sand and gravel. The State's Bristol Bay Area Plan, adopted in 1984, directs DNR to close lands beneath navigable waters in the unit to mineral entry. The State is willing to consider other proposals for these lands but only upon application by NPS to the DNR Division of Land and Water Management.

Although the plan recognizes that the Aniakchak River is navigable, it does not address the status of other rivers in the unit. We encourage NPS to formally request that the Bureau of Land Management (BLM) complete navigability determinations for the other waterbodies within the NM&P. If other rivers are determined to be navigable, they should also be identified on future NPS maps. The State recommends the following revisions to address these concerns:

Navigability should be addressed in the GMP portion of the document. We suggest inclusion of the following paragraphs:

At the time of Statehood, the State received ownership of the beds of navigable waters to the "ordinary high water mark". At present the Aniakchak River upstream to Albert Johnson Creek (tract L) and Aniakchak Lagoon (tract K) have been administratively determined navigable by the Bureau of Land Management. Navigability determinations have not been made on other rivers within the NM&P. Determination of which waters are navigable is an ongoing process in Alaska at both administrative and judicial levels. The NPS will formally request BLM to make navigability determinations for other waterbodies in the NM&P.

The State's Bristol Bay Area Plan directs that lands beneath navigable waters in the NM&P be closed to mineral entry. The National Park Service may make other requests for the use of these lands to the appropriate State agencies. Once an application has been made, the request will be considered by the State.

Pages 23 and 27 - Table 2 and Table 3 should be expanded via footnote or other means to acknowledge the unresolved navigability status of many of the waterbodies in the NM&P.

Pages 29 and 43 - The landownership and land protection priorities maps on these pages acknowledge the State submerged lands on that portion of the Aniakchak River that has been determined navigable, but do not identify the uncertain status of lands in other drainages. At a minimum, a footnote should be included in the legends of these maps mentioning the possibility that other rivers in the NM&P may be navigable, and therefore the beds of which would be State-owned.

Page 47, Priority 6 - This section should be expanded to address the unresolved status of submerged lands. The discussion should note that the acreage involved is currently unknown and that NPS will formally request BLM to make navigability determinations for the other waterbodies within the NM&P. It should also note that the State's Bristol Bay Area Plan directs that lands beneath navigable waters in the NM&P be closed to mineral entry, and that NPS may make requests to the appropriate State agencies for other actions concerning these lands.

Page 49 - The river management plan should include a discussion about the navigability status of the Aniakchak River or reference other appropriate portions of the GMP.

Page 86 - The map of access routes that is recommended to accompany this section (see previous comment under Access and Transportation) should also identify waters in the NM&P that are used for travel.

WATER RIGHTS

Federal reserved water rights are created either expressly or by implication when federal lands are withdrawn from entry (by Congress or other lawful means) for federal use. It is the State's position that federal water rights, both instream and out-of-stream, are either generally or specifically reserved for the primary purposes of the reservation. Characteristics of a federal reserved water right include:

- 1) it may be created without actual diversion or beneficial use,
- 2) it is not lost by non-use,
- 3) its priority date is from the date the land is withdrawn for the primary purpose(s) involved,
- 4) it is the right to the minimum amount of water reasonably necessary to satisfy both existing and reasonable foreseeable future uses of water for the primary purpose(s) for which the land is withdrawn. Water for secondary purposes must be obtained under State law, AS 46.15.

Discussions at the March, 1985 meeting of the Alaska Water Resources Board emphasized the importance of two aspects of federal reserved water rights. First, they are recognized only for the primary purposes for which the land was withdrawn, and second, they apply only to the minimum amount of water reasonably necessary to satisfy the primary purposes of the withdrawal. Legislation establishing the withdrawal of land is critical, because it establishes the priority date for the federal reserved water right, and often expressly states the primary purposes of the withdrawal. All of these aspects of federal reserved water rights - the priority date, the primary purposes, and the minimum amount of water reasonably necessary to maintain the primary purposes - are important concepts that should be reflected in the plan. To reflect these concerns, we recommend that the following changes or additions be made to the GMP and Land Protection Plan.

We suggest the following language be included in the GMP under a subheading titled Water Rights:

"The water resources of the Aniakchak NM&P will be managed to maintain the primary purposes for which the unit was established. The primary purposes of this NM&P are _____, as cited in the following legislation establishing this conservation system unit _____. Water for secondary purposes and all other uses within the NM&P will be applied for under AS.46.15. Specific water resource requirements for the primary purposes of the NM&P will be identified and the minimum amount of water reasonably necessary to maintain these purposes will be quantified in cooperation with the State of Alaska. Once federal reserved water rights have been quantified, the National Park Service will file this information with the State in accordance with State laws."

The Alaska Attorney General's office is currently reviewing the legislative history of this park and identifying the information that should be inserted into the blanks in the above paragraph. This information will be forwarded to NPS shortly.

Although addressing the water appropriation issue is different than addressing inholdings within the NM&P, some mention of these "non-federal interests" within the unit boundary should be made in the land protection priorities section. Portions of the language suggested above could be used. NPS water needs above and beyond the minimum amount reasonably necessary to maintain the primary purposes of the unit should accordingly not be considered a federal reserve right or interest.

TIDE AND SUBMERGED LANDS

The document does not adequately address the State's management authority over tide and submerged lands. The following comments address this concern.

The GMP portion of the document should include a section on tide and submerged lands. We suggest the following paragraph:

All tide and submerged lands in the NM&P are under the jurisdiction of the State of Alaska. Tidelands are defined by the State as lands between mean high tide and mean low tide. Submerged lands extend from mean low tide to three miles offshore. NPS use of the term "submerged lands" also includes "shorelands" which are defined by the State as the lands beneath navigable waters between the ordinary high water marks. The NPS will submit proposals for the management of these lands to the appropriate State agency. Once an application has been made to the State, the request will be considered by the Department of Natural Resources.

Page 23 - Table 2 should include the acreage for tide and submerged lands including lands beneath navigable waters. The Proposed Methods of Protection column should reflect this revision.

Page 27, Table 3 - Footnote "SB" should be redefined as State tide and submerged lands. We assume from this table that the NM&P boundary does not encompass any additional tide and submerged lands. Also see our comment regarding this table under NAVIGABILITY.

Pages 29 and 43 - These maps should identify any tide and submerged lands within the NM&P boundary and note their priority for protection.

Page 47, Priority 6 - Tidelands and offshore submerged lands should also be addressed in this section.

REMAINING SEQUENTIAL COMMENTS

Management Objectives

Page 4, paragraph 1 - "Detailed management objectives from the Statement for Management as given in appendix B." We have several problems with this. The Statement for Management was not subject to the same comprehensive public participation process required by ANILCA for the GMP. Yet these objectives are the basis upon which the GMP has been developed. We therefore object to the management objectives being located in the Appendix rather than at the beginning of the plan. Location in the Appendix inadvertently reduces adequate public review on a key aspect of this GMP.

Resource Concerns

We request that an understanding or management objective be included that maintains the State's opportunities for scientific sampling, investigations, and fisheries improvement programs. Objectives regarding the latter issue specifically need resolution. ADF&G wishes to work with NPS to develop appropriate language for inclusion in the final plan.

The GMP should include any on-going cooperative NPS/ADF&G studies and the ADF&G species management plans that are applicable to Aniakchak NM&P. For example, the plan should outline NPS intended procedures for dealing with human/ bear conflicts and objectives for avoiding potential conflicts. Particularly, the plan should recognize the futility of transplanting nuisance bears.

Page 10, paragraph 1 - In the sentence "The State licenses both commercial and . . . ", replace " along with sport hunters," with " hunters and trappers". There is no need to distinguish recreation from subsistence in this discussion.

Page 10, paragraph 2 - Replace "Alaska Department of Fish and Game (ADF&G)" with "State of Alaska". This accurately reflects ANILCA Title VIII provisions. We also note that the Boards of Fisheries and Game establish harvest regulations rather than ADF&G.

The NPS states that it will develop a "subsistence management plan" but omits statements of management direction and public participation. We desire assurances that development of such a plan will be coordinated with ADF&G, among others. If this plan is part of the Resource Management Plan then mention of it should be included on page 135.

Page 10, paragraph 3 - The paragraph could be further improved by referencing the Department of Interior's

fish and wildlife policy on state-federal relationships (Fed. Reg. V. 48, No. 54, pp. 11642-11645, 18 March 1983). We request that this policy be referenced in all NPS GMP's. We find the reference to using oversight authority prior to exhausting other available regulatory avenues to be unnecessary and inconsistent with existing policy. The third paragraph on page 11, after the first sentence, would be an appropriate substitute.

The sentence "During congressional hearings before the passage of ANILCA, the following policy statement was made: . . ." is referring to a congressional discussion by one member and not necessarily a policy statement. Further, the NPS has excluded the following sentence from the quote: "The National Park Service recognizes that subsistence uses by local rural residents have been, and are now, a natural part of the ecosystem serving as a primary consumer in the natural food chain." This sentence clarifies the intent of the previous statement and should be included. Due to its inappropriateness in the plan, however, we request the entire quote be omitted.

Page 11, paragraph 3 - Species-specific management plans have been provided to NPS in the State's Resource Management Recommendations. We request that NPS reconsider its implied intent to propose independent species plans and commit to cooperation with the State's plans as referenced in the preceding paragraph and pursuant to the memorandum of understanding between ADF&G and NPS. We also express concern that NPS may intend to prepare an independent fire management plan rather than enter the proposed interagency cooperative fire management plan for the area.

Page 11, Cultural Resources - We request the following language be inserted regarding NPS permits:

Permits issued in areas where cultural or paleontological resources may exist will include the following stipulation: "Should cultural or paleontological resources be discovered as a result of this activity, the work which would disturb such resources will, consistent with federal regulations, be suspended and the State Historic Preservation Officer contacted."

Page 12, paragraph continued from page 11 - The NPS defines "stresses on those [natural] systems" as "subsistence and sport harvest". The ANILCA defines subsistence as an integral part of the unit's system. Studies elsewhere in the State indicate that winter weather, food availability, and predation are examples of common

limiting factors for wildlife populations. We request the bias against any form of harvest be removed from this section; it is important that the research program described not be biased from its inception.

Page 12, paragraph 1 - In light of the ADF&G's responsibilities for the fisheries and wildlife populations as described in pages 10 and 11, it seems more appropriate to pursue cooperative research efforts with the State prior to contracting with individuals and institutions not having management responsibilities. The reverse is indicated in this paragraph, so we request reconsideration and revision of the fish and wildlife research portions.

Page 12, Public Use Activities, paragraph 1 - In this and other sections, "subsistence use" is not clarified in regards to trapping. We note that the Board of Game has not found it necessary to distinguish categories of trapping, and ANILCA legislative history recognized trapping as a use allowed in most parks and monuments. There is also no need to distinguish recreational from subsistence harvests as allowed activities in the preserve. We suggest revision of the first sentence as follows: "Sport fishing and subsistence uses including hunting, fishing, and trapping in the monument and hunting, fishing, and trapping in the preserve"

Cabins and Structures

Page 17, paragraph 3 - A blanket prohibition of temporary structures related to "the taking of fish and wildlife" is not necessary in light of the present and projected levels of this type of use. We suggest a more appropriate alternative which provides that temporary structures be removed after the hunting or fishing trip has been completed.

Page 19, paragraph 3 - The inconsistency between this and other discussions on campsites and cabins, including an apparent intent to permit new cabins, should be clarified.

Cooperative Agreements

A section should be added to the GMP (page 19) on cooperative agreements similar to the section on pages 96-97 of the Kobuk Valley National Park draft GMP. The list should include, among other things, cooperative management agreements regarding oil spill contingency planning (see page 44 of the approved GMP for Kenai Fjords), navigable waters, tide and submerged lands, and RS 2477 rights-of-way. Such a list would satisfy the GMP requirements in ANILCA Section 1301 (b) (8).

For example, we encourage consideration of cooperative agreements concerning the management of RS 2477 ROW with the Department of Natural Resources (DNR) to resolve administrative disputes and attempt to avoid lengthy legal challenges. We request that the results of discussions be noted in this section in the final plan and/or mention of a process to proceed with such discussions if NPS is similarly interested.

We further request that NPS consider and discuss the possibility of cooperative agreements with the State for management of navigable waters in the NM&P. An example of such a cooperative agreement is currently nearing completion between the State and BLM for management of the Gulkana River. We request that the final GMP indicate NPS level of interest in and intent regarding these discussions and/or indicate a process to proceed with such discussions if NPS is interested.

River Management Plan

Page 24, paragraph 1 - It would be helpful to include a reference to the River Management Plan on page 49. It is not clear in the current statement that management of the river will be the same management applied generally over the entire unit.

Natural Resource Data

Page 64 - The legend to the map titled "Oil and Gas Potential" is reversed. The area marked as having moderate oil and gas potential has low or unknown oil and gas potential; the area with low or unknown potential has moderate potential.

Page 73, Terrestrial Mammals, paragraph 2 - The caribou herd located between Point Moller and Naknek River should be referred to as the Northern Alaska Peninsula herd. ADF&G's most current population estimate (1984) for this herd is 19,000. Also, the regional migration route illustrated on the preceding map should be drawn to avoid the impression that caribou pass directly through the Caldera.

Page 73, Terrestrial Mammals, paragraph 4 - ADF&G records indicate that there are no marten or arctic fox within the boundaries of Aniakchak NM&P.

Pages 73-74, Marine Mammals - Both Dall porpoise (Phocoenoides dalli) and harbor porpoise (Phocoena phocoena) are common in this area and should be included on the list of marine mammals. The first line of paragraph one on page 74, "Generally speaking, eight species of whales occur in Alaska waters, all of which

are endangered," is misleading. Both killer whales (Orcinus orca) and minke whales (Balaenoptera acutorostrata) are common in this area and are not endangered species. This line should be revised to include this information.

Page 74, Birds - As written the third sentence implies that there is fall nesting of waterfowl and shorebirds. We suggest the following revision: "Nesting, feeding, and spring and fall staging areas are generally associated with productive estuaries, lagoons, river deltas, and tidal flats."

Page 77, paragraph 1 - We suggest the first sentence be rewritten to read, "Current impacts on wilderness values are relatively few, though they do exist." Possibly the discussion needs to be clarified in order to justify that seeing fishing boats from shore and 10 annual airplane landings are actual impacts.

Cultural Resources

Page 79, Eighteenth Century and Modern History, paragraph 4 - The third sentence should be revised in light of the present statutory definitions of subsistence uses. We suggest the following: "Undoubtedly both missionaries and fur traders travelled throughout Aniakchak's Pacific coast allowing the gradual introduction of a commercial sector to the local economy, whereby locally harvested furs were exchanged for trade goods."

Socioeconomic Environment

Page 84, paragraph 3 - It is our understanding that most of the population of Kodiak Island resides on the Kodiak road system outside of the city limits.

Page 85, paragraph 2 - "The potential for finding commercially extractable quantities of oil and gas in some parts of the region (i.e., the Bristol Bay side) is rated moderate to high." Recent information from U. S. Geological Survey and DNR Division of Geological and Geophysical Surveys indicates that oil and gas potential for the Bristol Bay region could be generally classified as low to moderate.

Page 86, The Chigniks - It is unclear whether Perryville and Ivanoff Bay are intended to be included in the discussion dealing with the Chigniks' commercial pursuits and economic ties. We suggest clarification that this section refers only to Chignik, Chignik Lagoon, and Chignik Lake; or alternatively expand the discussion to include specifics for Perryville and Ivanoff Bay. All five of these communities are socioeconomically related.

Page 88, paragraph 2 - The list of subsistence activities should include the collection of marine invertebrates.

Public Use Patterns

Page 90, Commercial Fishing, paragraph 2 - We do not believe that sewage discharged from commercial fishing vessels in bays adjacent to Aniakchak NM&P is or will be a significant pollution problem. We further doubt whether fish discarded by commercial fishing boats forms a significant portion of the diet of brown bears in the area. However, a major concern not mentioned in this pollutant section is trash and fishing debris (plastic containers, rope, floats, nets, etc.) discarded by fishing vessels that can cause entanglement with fish and wildlife. We suggest that this entire paragraph be omitted or revised.

Page 92, Sport Hunting and Fishing - The first sentence is incorrect in saying there are no data concerning the location and intensity of sport hunting and fishing in the preserve. Since the early 1960s, harvest data have been collected from bear and moose sport hunters and, for the past few years, from caribou hunters. Also, harvest locations for five species of furbearers are and have been collected. These data are available at the ADF&G, Anchorage office.

In addition, the last sentence of this paragraph is erroneous. State regulations do not prohibit aircraft transport of subsistence taken animals; this is a federal regulation for national parks which, we also note, provides for some exceptions.

Alternatives

Page 98, Alternative B, paragraphs 2 and 3 - The cooperation with ADF&G and U. S. Fish and Wildlife Service (FWS) regarding research on the resources is referred to as an "expansion" pertinent only to this Alternative. We request clarification of management intent to cooperate with ADF&G, regardless of alternative, in research and other programs involving the resources and their uses.

Page 100, Alternative C - There is no real difference between these alternatives other than NPS staffing and facilities. Other uses, facilities, and resource management options discussed under this Alternative are also actually compatible and should be possible under the proposed alternative. With the very limited growth in use projected for Aniakchak NM&P, present management seems adequate. We note that the projected operating costs for Aniakchak NM&P at any expanded level might be considered for redirection to cooperative resource programs with ADF&G and the U.S. Fish and Wildlife Service.

Pages 104-105 and 116 - The proposal and range of alternatives seems artificially narrow. We also question why Alternative C, which provides the greatest level of facilities and services, has a lower operating cost than the preferred alternative.

Environmental Consequences

Page 106, General Impacts, paragraph 1 - After "resource management activities" insert "(except routine activities by ADF&G for fisheries and wildlife resources) would be"

Page 106, General Impacts, paragraph 2 - Without an increase in resource uses or needs, ADF&G would probably not consider expanding management activities in the area. Therefore the assessment in the first sentence is misleading. Consistent with the rest of the paragraph, we suggest that the second part of the first sentence read: "but would expand NPS staffing to monitor resource uses." We would also appreciate comparable clarification of the last sentence indicating that these are NPS activities, presumably conducted in cooperation with ADF&G.

Page 106, General Impacts, paragraph 3 - We request that any expansion of fish and wildlife resource management activities include cooperative efforts with ADF&G. This first sentence should be rewritten: "Alternative C would provide for greater recreational uses than Alternative B and expand resource management and protection activities as needed and in cooperation with appropriate State agencies."

Page 108, paragraph 3 - We suggest rephrasing the last line "demands for subsistence and recreational uses within Aniakchak."

Page 108, paragraph 4 - This paragraph inappropriately implies that protection of fish and wildlife resources rests solely with NPS. Lack of NPS resource management

activities would not automatically lead to resource deterioration or user conflicts. ADF&G intends to manage and protect the fisheries and wildlife resources regardless of the alternative selected; therefore, we request that NPS clarify this discussion.

Pages 108-109 - The possible impacts of various increases in human activity would seem to be relatively insignificant if even measurable. Often the real numbers involved will remain very small even with the projected increases.

Page 110, Fish and Wildlife, paragraph 1 - We suggest the second sentence in the first paragraph be revised: "Fishing and hunting involves approximately four or five guided groups annually." Our hunting harvest ticket reports currently provide adequate information for management of the populations.

Page 110, Fish and Wildlife, paragraph 2 - This paragraph should begin with the current last sentence; as written there is an incorrect implication of serious impacts on wildlife populations.

Page 113, Subsistence, paragraph 3 - Recreational hunting is currently monitored through our routine management programs, including required harvest reports. We cannot support the additional and overlapping monitoring system proposed in Alternatives B and C. Any shift in recreational hunting of the magnitude described would be easily discernible through our current monitoring program; therefore, the last sentence of this paragraph should be deleted.

Nowhere throughout this section is there any discussion of restrictions on subsistence use being a possibility during the life of this plan. The conclusion describes, however, efforts to restrict subsistence uses. We suggest clarification or deletion of the first two sentences under the Conclusion.

Pages 116-117, Table 7 - Despite the title, costs of research and development are missing. Estimated development costs are specifically required under Section 1301(b)(3) of ANILCA.

Compliance

Page 119, paragraph 1 - We suggest the following clarification: "Sport fishing and subsistence uses, including hunting, trapping, and sport fishing in the monument and hunting, fishing, and trapping in the preserve would continue" Please see our related discussion for Page 12, Public Use Activities.

The Alaska Coastal Management Program

The Division of Governmental Coordination has also completed the coastal consistency review of this draft plan. Based on our review, the Division agrees with the NPS determination that the plan is consistent with the Alaska Coastal Management Program (ACMP). However, we wish to note that the more detailed Resource Management Plan as well as permitted activities and NPS actions on federal lands that "directly affect" coastal resources are also subject to the requirements of the ACMP. In other words, State agreement with the federal consistency determination of the GMP at this time does not automatically guarantee that the recommended activities will be consistent with the ACMP when detailed later in specific management proposals. We therefore recommend that NPS involve the local Coastal Resource Service Area Boards and State agencies in the development of the more detailed actions.

We request that the GMP acknowledge the ACMP and outline the process under which NPS will ensure that more detailed management plans, NPS actions, and permitted activities will be consistent with the ACMP.

Thank-you for the opportunity to review this draft General Management Plan for Aniakchak NM&P. As noted at the beginning of this letter, we request that our concerns be addressed as consistently as possible in this and all remaining GMP's. If we can be of any assistance in clarifying these comments, please contact this office. The State looks forward to resolution of our concerns in the final plan.

Sincerely,

Robert L. Grogan
Associate Director

By:


Sally Gilbert
State CSU Coordinator

ATTACHMENT

cc: R. Davidge, DOI
R. McCoy, ALUC
M. Frankel, ALUC
J. Leask, AFN
S. Leaphart, CACFA
State CSU Contacts



United States Department of the Interior

OFFICE OF THE SOLICITOR
ALASKA REGION

701 C Street, Box 34
Anchorage, Alaska 99513

IN REPLY REFER TO

December 22, 1983

RECEIVED

Department of Law

DEC 27 1983

Office of the Attorney General
Anchorage Branch
Anchorage, Alaska

MEMORANDUM

To: State Director
Bureau of Land Management
Alaska

From: Regional Solicitor
Alaska Region

Subject: Right-Of-Way On A Native Allotment

You have asked whether a Native Allotment Certificate can be issued subject to a right-of-way. The short answer is that if the right-of-way was granted or acquired prior to the Native's entry on the allotment, the allotment should be issued subject to the right-of-way. This includes Omnibus Act roads, granted rights-of-way for roads, trails, pipelines, telephone lines and the like as well as rights-of-way used by the public that are not granted.

Discussion

1. Land used communally or by others is not available for native allotments.

The Alaska Native Allotment Act of 1906, 43 U.S.C. § 270-1 through 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), allows Alaska Natives to acquire up to 160 acres as an allotment by proof of substantially continuous use and occupancy for a period of five years. The land must be vacant, unappropriated, unreserved and non-mineral except that land valuable for coal, oil or gas may be allotted with the coal, oil or gas reserved to the United States.

As defined in the Native Allotment regulations, 43 CFR Section 2561.0-5(a):

The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

Administrative case law has further amplified the concept of use and occupancy to provide that although evidence of use and occupancy goes only to a part of the area claimed, it will entitle the applicant to the remaining allotment land absent conflicting claims. See Emily B. Hunt, 23 IBLA 205 (1976). Cf. 43 CFR § 2561.0-8(b) which permits use and occupancy of a portion of a 40-acre subdivision to qualify for entitlement to the entire 40 acres. See also Allotment of Land to Alaska Natives, 71 I.D. 340, 359 (1964). In addition, consideration must be afforded to Native customs and mode of living as well as the climate and character of the land. John Nanalook, 17 IBLA 353, 356 (1974).

7. Pre-existing roads or trails are communal uses.

Where an existing trail crosses land claimed as a Native allotment, a factual determination must be made as to whether or not the public's use of the trail predated the applicant's use and occupancy of the land. If the applicant's use and occupancy predated the road or trail, then the subsequent public use of it was in trespass on the allotment claim. This is because Native occupancy segregates the land against other public uses. 43 CFR § 2091.6-3. If, however, the use of the trail by others predated the applicant's, then the applicant's use and occupancy of the land covered by the road or trail was not "potentially exclusive of others."

If the pre-existing road is an Omnibus Act road or a previously granted right-of-way, an additional basis exists on which the allotment applicant is not entitled to it: that is the land was not vacant, unreserved or unappropriated when the applicant entered it.

Roads or trails which predate the applicant's entry may also be public rights-of-way acquired under R.S. 2477 or may be private rights-of-way acquired by implication or necessity. Although BLM has occasionally found it necessary to adjudicate such non-granted rights-of-way, Nick Dire, 55 IRLA 151 (1981), Homer Meads, 26 IBLA 281 (1976), making the allotment subject to the right-of-way does not require an adjudication of the non-granted right-of-way. All that is necessary is to find that the applicant's use of a portion of the land he claims was not potentially exclusive of others.

3. Pre-existing road should be a "subject to" and not an excluded interest.

Assuming the public use of the road or trail predated the applicant's occupancy, how should the road or trail be protected in the grant of the allotment? Should the strip of land underlying the road be excluded from the allotment, or should the allotment be granted "subject to" the right-of-way?

If the strip of land is excluded, it will remain under BLM management with the State or an individual owning a right-of-way (easement) over it. It will be surveyed by the BLM when the exterior boundaries of the allotment are surveyed.

If the allotment is issued subject to the right-of-way, the allotment holder will own the land crossed by the road. If the public use of the road ceases and the right-of-way is abandoned, the allotment owner will attain full ownership. A "subject to" road will normally not be surveyed, although it could be, if the need existed, at non-federal expense.

The Department has abundant experience in resolving conflicting claims to a tract of land. As a general rule, whichever claimant's rights attached first prevails and the other claimant is out of luck. See e.g., U.S. v. Donald Flynn and Heirs of Henry Orock, 53 IBLA 208, 88 I.D. 373 (1981). Where rights-of-way are involved, however, the Department has held that the land may be granted to one claimant subject to the right-of-way of another. Southern Idaho Conf. of Seventh Day Adventists v. U.S., 418 F.2d 411 (9th Cir. 1969), State of Alaska, 62 IRLA 187 (1983), Eugene McCarthy, 14 L.D. 105 (1892), Instructions, 44 L.D. 359 (1915), Limitation of Access to Through-Highways Crossing Public Lands, 62 I.D. 158 (1955).

In 1892, in Eugene McCarthy, supra, the Department held that a prior grant to a railroad company for station purposes was not a fee interest but only an easement and that a subsequent mineral claimant can obtain a patent which includes the land occupied by the railroad but "subject to" the railroad's use right.

It the land in dispute is not "needed" by the Company for the specified purposes, then the mineral claimant can mine the soil and take therefrom the minerals which belong to him, without infringing upon the grant to the company. If the company does not actually use the land in dispute for station purposes, then it will be presumed not to "need" it, and so long as this non-user continues the mineral claimant can use it for any purpose he pleases, provided he does not thereby interfere with any present or prospective use that may be needed by the company. If the company should at any time abandon the occupancy of the land, or should its right of way be lost or destroyed, the title of the mineral claimant thereto would become free and unrestricted.

14 L.D. 109.

The question was addressed in 1915 in the well known 44 L.D. 513 decision. There the Department ruled that the appropriation by the United States of linear rights-of-way across public lands did not remove the land from subsequent entry and disposal but simply protected the improvement and the surface use. The remaining interests in the land remained subject to entry and use by a homesteader.

In a related decision the Department had ruled that telephone lines constructed by the Department of Agriculture were not subject to disposal to a homesteader.

...under the circumstances of these cases, it seems unnecessary and inadvisable to reserve from disposition and eliminate from the entries and patents definite tracts or areas of land for the protection of such lines. It is believed that the solution of the matter is to convey all of the lands included within the area described in any

such homestead entry, and all rights appurtenant thereto, except the property of the United States, namely, telephone lines and appurtenances and the right of the United States to maintain and operate the same so long as it shall be necessary.

44 L.D. 359 (Aug. 31, 1915). Five months later the Department extended the same ruling to roads and trails. 44 L.D. 513 (Jan. 13, 1916). Instruction memoranda issued by the BLM have developed the standard "subject to" language to implement the 44 L.D. 513 doctrine. The clause inserted in patents provides that the reservation continues "so long as needed or used for by the United States."

Where a granted right-of-way precedes a public land entry, the Departmental regulations from 1954-1979 provided expressly that anyone "entering or otherwise appropriating a tract of land, to part of which a right-of-way has attached under the regulations. . . [will] take the land subject to such right-of-way and without deduction of the area included in the right-of-way." 43 CFR 244.7 (1954), 43 CFR 2234.1-3(a) (1968), 43 CFR 2801.1-2 (1979).

The same principle is applied where free use permits are issued to public agencies: i.e., subsequent claims or entries take subject to the "superior right" of the permittee. 43 CFR 3621.2; State of Alaska, 46 IBLA 12 (1980).

The concept embodied in Eugene McCarthy, *supra* and 44 L.D. 513 that a linear type right-of-way need not segregate the entire fee interest in the land from subsequent disposition, applies, in my opinion, equally to granted and non-granted rights of way across land entered under Native allotment applications. If the prior public use is a linear type use, such as is normally embodied in a right-of-way, it should, in my opinion, be reserved by a "subject to" clause in the Certificate of Allotment.

4. Are there circumstances in which the full fee exclusion is required?

The 44 L.D. concept that only the easement is reserved from subsequent entry and not the land itself is relatively narrow and limited to linear type facilities such as transmission lines, roads, pipelines, and the like. I do not believe it applies to non-linear type uses such as storage yards or substantial

buildings. A certain degree of judgment is required, both in deciding whether the use warrants a "subject to" protection or a full fee exclusion and how wide the exclusion should be.

5. May the applicant amend his land description to exclude the right-of-way?

Some allotment applicants might prefer to have the land underlying the road or other linear use excluded so that the acreage will not come out of the 160-acre allotment entitlement. I do not believe the regulations permit this.

At the time most of the allotment entries would have occurred, the regulations provided expressly that in the case of granted rights-of-way anyone entering later would take "subject to" the right-of-way with no deduction of the acreage. See discussion and citations, supra.

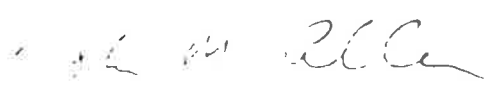
In addition, the regulations require that each Native allotment tract be "in reasonably compact form." 43 CFR 2561.0-8(a). Although "reasonable" is a standard which allows considerable latitude, I do not believe an allotment would normally be held to be reasonably compact if it excludes a strip of land which bisects it. I would view the attempt to exclude a right-of-way in the same light as an attempt to exclude portions of less desirable land from within the allotment such as marsh or bog.

My conclusion is supported by the Solicitor's 1964 Opinion "Allotment of Land to Alaska Natives," 71 I.D. 340, 359 (1964), which dealt with proposed regulations that would require allotments to be in tracts of not less than 40 acres and to conform to the rectangular survey system. The Solicitor ruled that the proposed regulations were within the Secretary's statutory authority.

The burdens which would attend a contrary conclusion have proved to be substantial, both with respect to the practical administration of the program for Alaska allotments and with respect to the coordination of this program with other programs for the disposition of land in Alaska. Absent a reference to the regular rectangular survey, each allotment of land requires a special and detailed survey of the tract for which application is made. After the land is allotted,

special steps must be taken to maintain records which relate the nonconforming grant of land to the regular rectangular survey of lands under which the ownership of other lands in Alaska is identified. Notwithstanding the careful maintenance of special records, the different systems of land identification appreciably increase the likelihood of boundary disputes and conflicting claims under Federal programs for the disposition of land in Alaska. These burdens appear to amply justify the rule as a reasonable one under the circumstances.

Although the proposed rule was not promulgated (See 43 CFR 2212.9-1(b) (Jan. 1, 1965 rev.)), the considerations enumerated in defense of it also support the construction I have given to the "reasonably compact" requirement, which has been a regulatory requirement since 1963 (43 CFR 6714(b) (1963 rev.)).



John M. Allen
Regional Solicitor

cc: Area Director, BIA, Juneau
Associate Solicitor, ELR
Associate Solicitor, IA

EXISTING TRAIL SYSTEM

QUADRANGLE 31 TRAIL 1

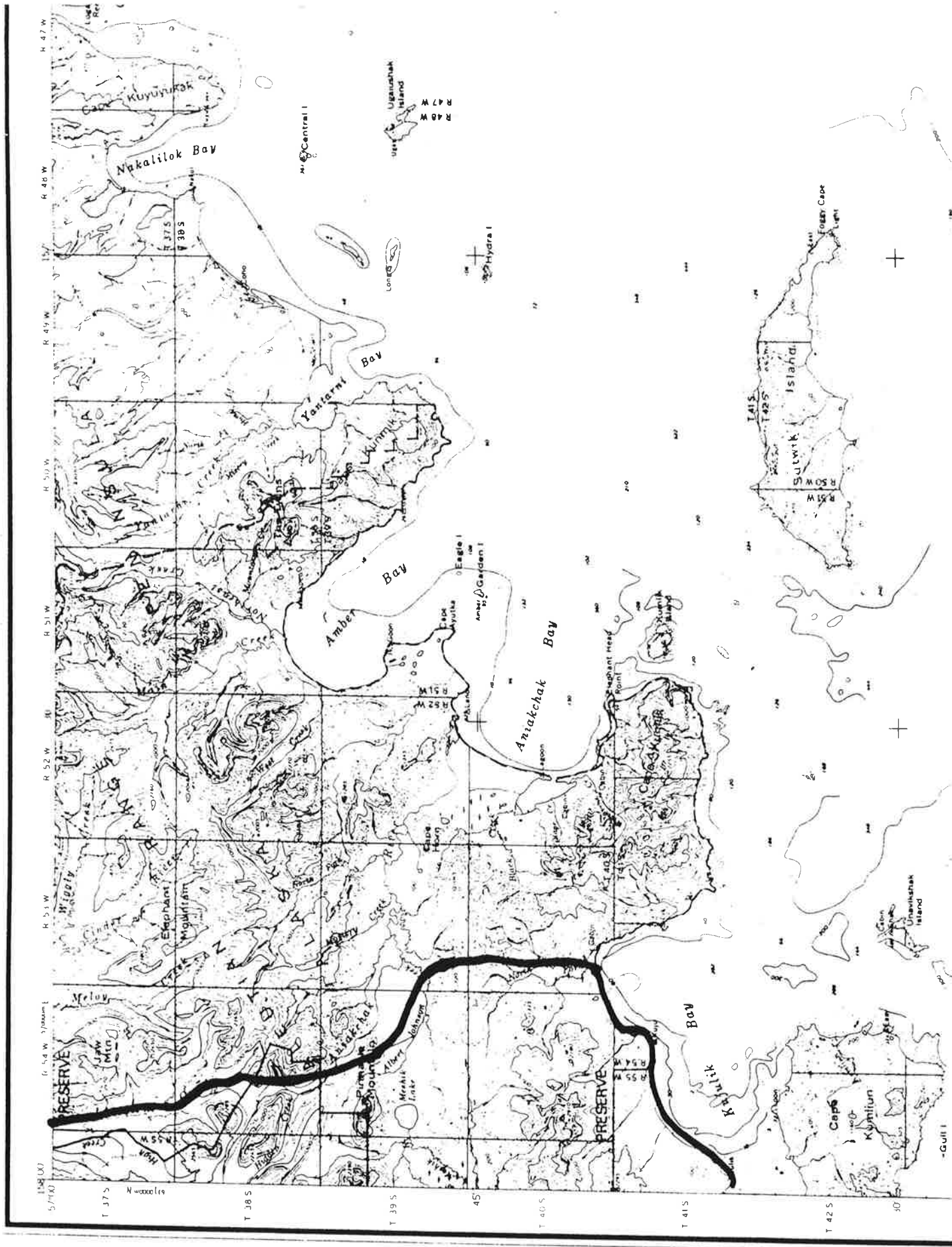
NAME CHIGNIK LAGOON N. E. SEE TRAIL 30-1

IDENTIFICATION AT CHIGNIK LAGOON (INDIAN VILLAGE)

SOURCE USGS 1:250,000 ED 1951

DESCRIPTION RUNS N. E. ALONG COAST OF CHIGNIK BAY, CROSSES LAND TO KUJULIK BAY,
RUNS ALONG COAST N. E. TO NORTH FORK, RUNS NORTH VIA LAVA CREEK.

ANIAKCHAK NATIONAL MONUMENT ANI



quad 31
Sulwik
Island