STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF GOVERNMENTAL COORDINATION

☑ SOUTHCENTRAL REGIONAL OFFICE
3601 "C" STREET, SUITE 370
ANCHORAGE, ALASKA 99503-5930
PH: (907) 561-6131/FAX: (907) 561-6134

☐ CENTRAL OFFICE
P.O. BOX 110030
JUNEAU, ALASKA 99811-0300
PH: (907) 465-3562/FAX: (907) 465-3075

☐ PIPELINE COORDINATOR'S OFFICE
411 WEST 4TH AVENUE, SUITE 2C
ANCHORAGE, ALASKA 99501-2343
PH: (907) 278-8594/FAX: (907) 272-0690

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Molly Ross
Special Assistant
Office of Assistant Secretary for Fish and Wildlife and Parks
Department of the Interior
1849 C Street NW, Mail Stop 3156
Washington, D.C. 20240

Dear Ms Molly Ross:

State agencies appreciated the opportunity to meet with you on February 2 to discuss the status of the Alaska National Interest Lands Conservation Act (ANILCA) Title XI regulations.

We are pleased that you have shown an interest in increasing your understanding of the regulations themselves, how they have been implemented in Alaska, and what problems may exist. Fully informing yourself of the range of interests and issues of all affected parties, not just those of Trustees for Alaska, should prove useful in this effort. We also appreciated your acknowledgment that Alaska's vast and remote conservation system units (CSUs), coupled with our infant transportation infrastructure, led Congress to recognize that existing law was not adequate to insure necessary access.

We continue to stand by the Governor's letter of December 9, 1993 which urges the Department of the Interior not to consider revisions to the regulations until the Ninth Circuit Court of Appeals has ruled on the appeal. Assuming that the court upholds the regulations, which we believe they will, it would be premature to formally revisit the issues raised by Trustees. The State, the Alaska Land Use Council and it Staff Committee (including all DOI agencies) and other affected parties worked diligently on the development of the regulations. Title XI was the product of Congressional compromise, necessary to the passage of ANILCA. It balances the establishment of vast CSUs on one hand, with reasonable access over these areas on the other hand, and represents the best outcome that could be expected given the diversity of legitimate interests and perspectives involved.

To further your understanding of the State's perspective, we offer the following thoughts for your consideration. In many instances, the problems we have identified to date are not rooted in the regulations themselves, but in discretionary administrative actions or application of the regulations.

This letter includes input from the Citizen's Advisory Commission on Federal Areas (CACFA), which has also closely followed implementation of Title XI. For this expedited effort, we have avoided an exhaustive analysis and are providing you with a streamlined run-down of some of the major issues.

Special Access

While the intent of ANILCA was to guarantee continuation of access means and methods for traditional activities (ANILCA Section 1110(a)) , the *application* of the Title XI regulations has generally fallen short of meeting this intent. For example:

* Access between Seward Peninsula villages across the Bering Land Bridge National Preserve and into Serpentine Hot Springs using ORVs has been prohibited by the NPS even though under the "generally occurring use" test discussed in the legislative history, such use should be allowed.

* Certain closures contained in the compendia for various park units, implemented without following the procedures contained in the Title XI regulations, are excellent examples of problems not so much with the regulations, but with agencies' misuse of them.

* The list of lakes on the Kenai Refuge which are closed to aircraft access continues to grow nearly every year with little or no notice, no finding of resource damage, and no opportunity for public comment, in spite of regulatory requirements.

* Proposed access restrictions for Kodiak Refuge similarly circumvent the required process for regulating access.

The current regulations have not been used effectively to address these situations, which is not necessarily a weakness of the regulations themselves. If revisions to the Title XI regulations are going to be pursued, consideration should be given to limiting federal agencies' ability to thwart legislative intent regarding access for traditional activities.

A definition of "traditional", consistent with Congressional intent, has not been adopted by Department of the Interior (DOI) agencies, either individually or collectively. Nor have the agencies ever developed a reasonable process for defining this term. Even within one agency there appears to be no consistency. For example, NPS is applying different standards and procedures in Wrangell-St. Elias, Bering Land Bridge, Gates of the Arctic, and Denali.

This issue was addressed in the DOI brief (page 29), arguing that the Secretary is not required to define traditional activities. The brief quotes from the supplementary information accompanying the final regulations:

> Because these regulations apply to a number of areas under the administrative jurisdiction of three agencies, it has been decided that it would be unwise, and perhaps impossible to develop a definition that would be appropriate for all areas under all circumstances. Exactly what "traditional activities" are must be decided on a case by case basis. Once the agencies have had the opportunity to review this question for each area under their jurisdiction, it may be possible to specifically define "traditional activity" for each area. (51 FR 31627)

While we recognize that a definition in regulation may be too inflexible, we have repeatedly asked DOI agencies to develop both a reasonable working definition and a process for applying the definition. The State has consistently taken the position that activities and access methods and means that were taking place at the time each CSU was established should be considered traditional. Furthermore, Congress clearly intended to protect the continuation of pre-ANILCA activities and related access.

Access and Transportation Plans

Another important facet of the proper implementation of Section 1110(a) is the ANILCA requirement for transportation and access studies in Sections 304(g) and 1301(b). While this is not an issue of the Title XI regulations themselves, it is another example of an administrative failure which severely hampers access for traditional activities. Only when federal managers understand the history of use in an area, how the area was previously accessed, and what future access requirements can be anticipated, can they reasonably and fairly regulate access. Before considering revisions to the regulations, both the NPS and FWS also should be directed to complete the required studies.

Access to Inholdings

Similar to problems associated with ANILCA Section 1110(a), DOI has also hampered Congressional intent to ensure access for inholders who are within or effectively surrounded by a CSU under Section 1110(b). For example, access problems for inholders in Denali National Park and Preserve have been extensively reported in the press. Discussion of access problems for mining activities was a major element during a November 3, 1993 hearing in Anchorage by the U.S. Senate Committee on Energy and Natural Resources Subcommittee on Public Lands, National Parks and Forests. Inholders seeking access have typically been met with burdensome requirements and a less-than-cooperative attitude of the part of the federal managers.

Trustees Concerns

We appreciated your frank reporting of discussions with Trustees for Alaska on issues that concern them. While we continue to advocate that DOI should defend the regulations, we also strongly believe that any discussions addressing Trustees concerns should include the State. This letter touches upon a few of Trustees' issues, but is not comprehensive and does not address each issue since we understand such "negotiations" are not underway.

Trustees has expressed concern that the Title XI process is not consistent with NEPA or sound public process. In fact, the Title XI process is a NEPA process with a few more guidelines and time limits. One objective was to have a single EIS prepared under the guidance of a lead agency (in those instances where more than one agency is affected) rather than having each agency prepare a separate EIS. Title XI does not avoid NEPA; instead, full NEPA compliance is still required throughout the entire process.

Trustees also points out that the regulations allow for an extension of a draft decision for "good cause" (§36.6(a)(2)), but that such an extension does not apply to the final decision. This is true as far as the regulations go, but Section 1104(e) of ANILCA does allow an extension for release of a final EIS and decision for "good cause."

The suggestion that DOI should automatically conduct validity examinations on every inholding is wasteful and unnecessary. In 1985, the NPS made an effort to review all Native allotment applications within park units to invalidate as many as possible. This effort was a public relations nightmare and turned up very few questionable applications. Mining claim owners have also been subjected to various validity tests. Furthermore, we understand that NPS can elect to address access needs for mining claimants under a plan of operations rather than through Title XI. Under the present regulations, federal agencies are not

precluded from conducting a validity determination if questions arise. To require such a determination in all instances would place an undue burden on both the inholders and the agencies.

Under the present regulations, access for inholders is subject to the same application and approval process as for a transportation and utility system (TUS). If construction of a new access route is not sought by an inholder, then the same application process should not be required. Ideally, the only procedure required of an inholder to secure access over an existing trail or to use traditional means should be to document their access requirements. The State and the CACFA have consistently stated that the application process for access to inholdings should be simplified. Perhaps a modification of the application could be made administratively (without rulemaking) to account for the differences between inholders access and TUSs.

The requirement in §36.10(e)(iii) that an inholder's method and route of access across a CSU must be consistent with the management plan for an area is another provision of the existing regulations which we find objectionable. For example, this provision of the regulations was used in the Alaska Peninsula Refuge Comprehensive Conservation Plan to conclude that the trans-peninsula corridors identified in the Bristol Bay Cooperative Management Plan were incompatible and would not be allowed. Given the regulatory requirement regarding consistency with a plan, this would prevent the approval of any future application for a TUS across this refuge.

At the February 2 meeting, you mentioned the possibility of developing a 4(f) type of test for access to inholdings, including a plan to minimize damage and an assurance that there are no economically feasible alternatives. We appreciate your recognition that both the statute and its legislative history clearly emphasize economics as a key factor in considering alternative routes. Title XI already requires that impact and damage to an area be minimized. In fact, development of a mitigation plan is part of the process. The DOI brief (page 15) rejected Trustees' contention that the Secretary must adopt a definition of "economically feasible and prudent alternative route" consistent with Section 4(f) of the Interstate Commerce Act because the 4(f) standard and the ANILCA 1105 standard are not the same. The 4(f) standard refers only to a "prudent and feasible alternative." The Section 1105 standard adds the concept of "economically" feasible.

Finally, the State would strongly object to removal of the modifier "significantly" from the definition of compatibility at 36.2(f). Such a revision could prove detrimental to those seeking access opportunities when the current language is already very restrictive.

The Application Process

The State is concerned that use of the current Title XI application form effectively precludes consideration of legitimate transportation projects before they can enter into the Title XI deliberative process. This difficulty does not appear to be a fault of the regulations, but is a serious problem that should be addressed before Title XI can work successfully.

The predetermined steps and decision points in Title XI are intended to insure that federal land managers wespond to proposed transportation systems in a timely manner. Recognizing the conflict between the agency mandates and the development goals of applicants, Congress also added an escape avenue to either the President or Congress should the access request be denied. But Title XI can only work if applicants are able to follow the predetermined steps, gain decisions within the mandated time lines, and are afforded relief from adverse decisions.

Although some would argue that the process is a success because permits have been issued under Title XI, convincing evidence exists that the process is being manipulated by federal land managers who appear to be controlling access in Alaska by selectively denying entry into the Title XI process. Federal land managers know that once an applicant has gained an entry into the Title XI process, the outcome is less than predictable. As a result, decisions concerning who gets into the process appear to be closely guarded and controlled.

The gatekeeper to the process is the application form, Standard Form 299, coupled with the land manager's ability to reject the application for insufficient information (43 CFR 36.5(c)). Standard Form 299 was developed as a result of ANILCA Section 1104 (b)(1) where Congress required (1) its development in 180 days after passage of ANILCA, and, (2) that it "elicit such information as may be necessary to meet the requirements of this subchapter and the applicable law with respect to the type of system concerned." In retrospect, it seems these two mandates may have resulted in a form that conflicts with overall Congressional intent to facilitate access across CSUs in Alaska.

Whatever the history behind the form, the result is clear: the only way to get into the Title XI process, Standard Form 299, is so general and unfocused that land managers can easily reject an application due to insufficient information. Consequently, entry into the process has become the hallmark of success for an applicant. The right of access is being arbitrarily determined at the starting gate, before the mandated deliberative process is even invoked. This action, intentional or not, circumvents Congress' intent to have the application process evolve in the normal course of review and places an undue burden on the applicant to produce information before the process is initiated.

Relying on the application form as the determinant of a meritorious proposal denies the applicant an opportunity to cooperatively develop the necessary information on the system proposed, and keeps the decision out of the stringent time lines Congress incorporated into the Title XI process. This circumvention then denies the applicant the ability to appeal the decision to Congress, the President, and eventually the court system, should the initial application be denied.

Moreover, the application's information requirements present the applicant with a conflict with other federal mandates requiring a more neutral stance before decisions are made. This is particularly true for proposals that seek to provide new access where a variety of routes or modes could satisfy the intended purpose. In these situations, the National Environmental Policy Act (NEPA) requires applicants to enter the process open to a variety of solutions. Implementing NEPA regulations at 40 CFR Ch. V, Section 1502.2 provide that;

> (e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decision-maker.
>
> (f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision.
>
> (g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

Ironically, not only are these guidelines generally required protocol for all actions that have a significant impact on the environment, as undoubtedly a new transportation system does, but these requirements were also specified as part of the Title XI process. Consequently, the land manager's insistence on front loading information in the Title XI application not only creates a conflict for applicants with the NEPA process, but because the NEPA process was made part of the Title XI process by Congress, it also creates a conflict with Title XI.

Therefore, if Congress' intent to facilitate access across CSUs in Alaska can be realized, the initial information requirements must be balanced against the realities of project development. In our opinion, the initial information needed to start the process should be well-defined and tailored to the Title XI decision-making procedures. There should be no burden on the applicant to produce information at the application stage that should rightly be the product of the subsequent procedural steps. This is especially true for a proposed new transportation systems where making early choices on project development issues could prejudice analysis of all possible alternatives. To accomplish this goal, we believe Standard Form 299 should be reviewed and revised to better match the intent of Congress.

Conclusion

The outer limits of DOI's discretion in regulating access under ANILCA are derived from the language and intent of the statute. Bounded by these outer limits, there is permissible range within which DOI's discretion may be exercised. It is the State's view that the current regulations fall within that permissible range and are, therefore, lawful. It must be stressed, however, that the regulations are on the boundary of restrictiveness. Any greater restriction, such as those sought by Trustees, would put the regulations over the line of permissible restrictiveness. Put simply, any greater regulatory restrictions on access would be unlawful. On the other hand, it would be within the range of discretion, under ANILCA, for DOI to allow for freer access and to establish a less cumbersome permitting process.

The current regulations have survived challenge at the trial court level and the State believes that DOI should continue to defend them through the appellate process. This letter has identified some selected problems with the regulations, although many of these could be alleviated without modifying the regulations themselves. A few of Trustees concerns (e.g. validity tests) are not necessary to address in regulation. Most of their concerns run counter to ANILCA intent and would meet with strong objections from the State and other affected parties if considered in new rulemaking. We urge DOI to retain its commitment to the existing regulations, while exploring some much-needed improvements (e.g. Standard Form 299) administratively. The State of Alaska is willing to assist in identifying administrative solutions that will improve the overall functioning of Title XI.

Thank you for the opportunity to provide these comments on the effectiveness of Title XI. If you have questions or desire additional dialogue with State agencies, please let me know.

Sincerely,

Sally Gibert

Sally Gibert
State CSU Coordinator

Molly Ross, Department of the Interior

cc:
George Frampton, Assistant Secretary for Fish and Wildlife and Parks
Daniel Sakura, Special Assistant, Assistant Secretary for Fish and Wildlife and Parks
John D. Leshy, Solicitor's Office
Renee Stone, Special Assistant, Solicitor's Office
John Katz, Governor's Office, Washington, D.C.
Harry Noah, Commissioner, Department of Natural Resources
Carl Rosier, Commissioner, Department of Fish and Game
John Sandor, Commissioner, Department of Environmental Conservation
Bruce Campbell, Commissioner, Department of Transportation and Public Facilities
Richard Burton, Commissioner, Department of Public Safety
Cheri Jacobus, Department of Law
Stan Leaphart, Citizen's Advisory Commission on Federal Areas