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June 26, 2020

SUBMITTED VIA REGULATIONS.GOV

Secretary David Bernhardt
U.S. Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Re: *Proposed Rule National Park Service Jurisdiction in Alaska [RIN 1024-AE63]*

Dear Secretary Bernhardt:

I last wrote to you on September 17, 2019 on behalf of the State of Alaska to petition for rulemaking to amend the National Park Service's (NPS) regulations to be consistent with the Alaska National Interest Lands Conservation Act (ANILCA) and the Supreme Court's decision in *Sturgeon v. Frost*, 587 U.S. ___, 139 S. Ct. 1066 (2019). In general, the proposed rule appropriately revises the scope of the NPS regulations to properly implement the Court's decision.

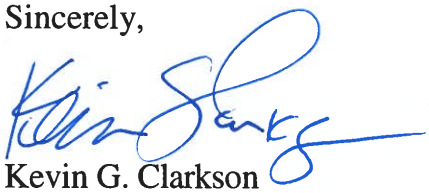
In 1996, over the State of Alaska's objections and despite ANILCA section 103(c), the NPS wrongly revised its regulations to expand its regulatory jurisdiction to apply to all navigable waters within park unit boundaries, regardless of ownership. In its 2019 decision, the Court confirmed that section 103(c) of ANILCA prohibits the National Park Service and other federal agencies that manage ANILCA designated areas in Alaska from applying their agency-specific regulations to state and private lands located within those boundaries, including State owned and managed submerged lands, and the waters that flow over them. The Court also confirmed that federal reserved water rights do not give a title interest to the United States.

The State respectfully submits the attached comments in support of the revisions that appropriately limit the NPS' authority and highlight where additional clarity is needed and to recognize other provisions in ANILCA and existing Department of Interior ANILCA implementing regulations that are already in alignment with ANILCA and the Court's decision.

The Court's decision applies to all federally managed conservation system units in Alaska. While only the NPS revised its regulations, I reiterate my May 22, 2019 request to have all federal land management agencies initiate a thorough review of their plans and policies, consistent with current law. For example, in the Togiak National Wildlife Refuge Public Use Management Plan, the US Fish and Wildlife Service (USFWS) applied public use restrictions to state navigable rivers. While the USFWS did not promulgate regulations to implement the restrictions, these plan decisions conflict with Section 103(c) of ANILCA and still need to be removed in a targeted plan amendment.

Thank you for your attention to this important rulemaking to implement's the Court's unanimous decision in *Sturgeon v. Frost*. The Court recognized that NPS authority in Alaska may fall short of its usual power, but ANILCA "reflects the simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 139 S.Ct. at 1077-1078.

Sincerely,



Kevin G. Clarkson
Attorney General

CRB/smn

cc: Michael J. Dunleavy, Governor, State of Alaska
Kip Knudson, Director of State and Federal Relations, Office of the Governor
Doug Vincent Lang, Commissioner, Alaska Department of Fish and Game
Corri Feigi, Commissioner, Alaska Department of Natural Resources
Lisa Murkowski, United States Senator
Dan Sullivan, United States Senator
Don Young, United States Representative
Stephen Wackowski, Senior Advisor for Alaska Affairs, US Department of Interior
Don Striker, Acting Alaska Regional Director, National Park Service

ATTACHMENT

State of Alaska Comments on the Proposed Rule
National Park Service Jurisdiction in Alaska
[RIN 1024-AE63]

I. Introduction

The State of Alaska reviewed the National Park Service's (NPS) proposed rule, which revises national and Alaska-specific regulations at 36 CFR Parts 1 and 13 to implement the Supreme Court's (Court) unanimous ruling on *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019).

The State supports this rulemaking effort to revise the NPS regulations governing Alaska park units to comply with Congress' carefully crafted compromises in the Alaska National Interest Lands Conservation Act (ANILCA) that apply to all conservation system units (CSUs) in Alaska as an important first step toward proper implementation of the Court's ruling in *Sturgeon v. Frost*. The Court's findings are based on ANILCA Section 103(c), which prohibits the application of NPS regulations to lands and waters not owned by the United States. The two general questions the Court answered in the context of the case of the operation of a hovercraft by Mr. John Sturgeon on the Nation River have universal application to submerged lands throughout Alaska. The Court expressed this universality through numerous statements which illustrate the Court's decision applies not to just one river and one NPS regulation, but to *all* non-federally owned lands and waters, including state-owned navigable waters and *all* federal land management agency regulations that apply to the management of public lands in Alaska.

In 1980, ANILCA designated over 100 million acres of CSUs in Alaska. Rather than only including federal lands in these CSUs, as was typical prior to ANILCA for units outside Alaska, the boundaries of these expansive new units instead followed topographic or natural features.[1] As a result, the newly designated CSUs enclosed not just federal lands, but also the lands and waters that were owned by the State of Alaska, Alaska Native Corporations, and other private landowners. ANILCA Section 103(c) was essential to provide assurance that the land management agency's regulations (e.g. NPS regulations at 36 CFR) would *only* apply to federally owned lands and waters within the CSUs.

In 1996, over the objections of the State of Alaska, the NPS revised its national regulations, without regard to ANILCA, to unlawfully expand its authority on all navigable waters, regardless of ownership. In 2007, John Sturgeon used his hovercraft on a portion of the Nation

[1] The Court recognized the unusual method of establishing boundaries for the new or expanded ANILCA CSUs was in part due to Alaska's complex land ownership pattern "in more recently established parks, Congress has used gerrymandered borders to exclude most non-federal land (citation omitted) But Congress had no real way to do that in Alaska. Its prior cessions of property to the State and Alaska Natives had created a 'confusing patchwork of ownership' all but impossible to draw one's way around." (*Sturgeon,* 139 S. Ct. at 1075) (quoting Claus M. Naske, Herman E. Slotnick, Alaska: A History 317 3d. ed. 2011)

River, a navigable waterway that passes through the Yukon Charlie National Preserve, as he had done annually for decades to access an area where he hunts. It was on that trip that Mr. Sturgeon was stopped by NPS law enforcement and told that the NPS regulations did not allow use of the hovercraft within the Preserve. That incident was the beginning of a precedent setting legal battle that resulted in the Court's unanimous ruling on two critical questions: (1) Whether the Nation River in the Yukon-Charley Rivers National Preserve is public land for the purposes of ANILCA, making it indisputably subject to NPS regulation; and (2) if not, whether the NPS has an alternative source of authority to regulate Mr. Sturgeon's activities on that portion of the Nation River. The Court answered "no" to both questions, affirming that the NPS had improperly asserted its jurisdiction on state owned lands and waters.

The Court went to great lengths to explain the definitions for "Federal land" and "public lands" in ANILCA, which were foundational to its conclusion that "only the federal property in system units is subject to the Service's authority" (*Sturgeon,* 139 S. Ct. at 1081-1082) and therefore, "non-federally owned waters and lands inside system units (on a map) are declared outside them (for the law). So those areas are no longer subject to the Service's power over 'System units' and the 'water located within' them" *Id.* at 1081.

Equally important in the Court's decision, and as explained in the background section of the preamble, is the reference to legislation that set the stage for many of ANILCA's carefully crafted provisions and the Court's ruling, such as the Submerged Lands Act, which when incorporated into the Alaska Statehood Act, gave the State "title to and ownership of the lands beneath navigable waters." As clarified by the Court, "a State's title to lands beneath navigable waters brings with it regulatory authority over 'navigation, fishing, and other public uses' of those waters" *Id.* at 1074.

The preamble to the proposed rule appropriately summarizes the Court's findings in clarifying that Federal reserved water rights are not the type of property interests to which title can be held.[2] Because the Court dedicated much of its opinion to explaining the limits of reserved water rights, we take the opportunity to recognize that reserved water rights do not equate to "public land" as defined in ANILCA 102(3) and do not convey federal jurisdiction over sate submerged lands. It is only a usufructuary (i.e., use) right for taking (appropriating) some water from a water source or maintaining some water in the water source for the specific amount of water (and no more) needed to satisfy the purpose of the federal land withdrawal. It is a right to the use of water that the federal government does not own (i.e., does not have title to the water). It is a limited, non-ownership right to use from or preserve in a water source a specific volume of water. Congress did not intend that a federal usufructuary right (an interest far less than a title interest) would transform entire rivers into "public land," thus enabling broad federal regulation for all purposes.

[2] "The Court held that that the Nation River did not meet the definition of 'public land' because (1) 'running waters cannot be owned'; (2) 'Alaska, not the United States, has title to the lands beneath the Nation River'; and (3) federal reserved water rights ('**not the type of property interest to which title can be held**') do not 'give the Government plenary authority over the waterway.'" (85 FR 23935, quoting *Sturgeon*, 139 S. Ct. at 1078-79 (emphasis added))

The State of Alaska, estimating very conservatively, has approximately 800,000 miles of navigable-in-fact rivers and 30,000,000 acres of navigable-in-fact lakes. Alaska owns all the associated submerged lands, and the Alaska Department of Natural Resources (DNR)--as the public trustee and steward--holds title to the same for the overall public good. The Equal Footing Doctrine of the United States Constitution, U.S. Const. art. IV, § 3, cl. 1, the Federal Submerged Lands Act, 43 U.S.C. § 1301 *et seq.,* and the Alaska Statehood Act of 1958, Pub. Law 85-508, 72 Stat. 339, expressly provide that the State of Alaska owns the submerged lands beneath each and every navigable-in-fact river or other waterway and beneath each and every navigable-in-fact lake or other waterbody located within its borders. State ownership of these submerged lands is only defeated by valid pre-statehood federal withdrawals specifically intending to defeat state title;[3] the vast majority of lands held by the NPS in Alaska represent post-statehood withdrawals pursuant to ANILCA, 16 U.S.C § 3101 *et seq.* do not defeat state title to the submerged lands that fully vested in 1959.

The Bureau of Land Management is tasked with determining navigability status of waters in Alaska within federal boundaries. After 60 years of statehood, many waters have not yet been adjudicated, including those within NPS boundaries. To fully implement the direction of the Court in the *Sturgeon* decision all waters must be presumed navigable unless determined otherwise through established processes. Absent this determination, all navigable waters are "State waters" and the submerged lands under them are State lands and therefore, not "public lands" under ANILCA 102(3). These waters are managed under applicable state statutes, regulations, and policies; NPS regulations can only be enforced in Alaska on lands to which the US government holds title. As BLM continues its process, the State is receptive to the concept of a cooperative agreement as suggested by the Court in *Sturgeon.*

Given the importance of this issue to the sovereign management of the State's lands, waters, and resources, the State welcomes the rulemaking proposed by NPS as a step in the right direction.

II. Support for Proposed Rulemaking

The State supports the proposed revision to 36 CFR 1.2(a), which limits the NPS' authority in Alaska park units to Federally owned lands and waters. The following two comments express this support in more detail.

1. Proposed Rule Appropriately Reduces the Scope of NPS Regulations for Alaska

In 1996, contrary to ANILCA Section 103(c), the NPS finalized changes to the scope of its regulations to include all waters within the exterior boundaries of Alaska park units, regardless of ownership. In the *Sturgeon* case, the Court confirmed the expansion of jurisdiction was inconsistent with ANILCA. The proposed rule appropriately scales back the scope of the NPS regulations at 36 CFR 1.2(a)(3) consistent with the Court's ruling. By inserting an exception for Alaska before "without regard to the ownership of submerged lands, tidelands, and lowlands," the proposed rule is in line with Congress' language in ANILCA Section 103(c) and will conform to the Court's ruling by clarifying that *both* the NPS national regulations and the

[3] Alaska v. United States, 545 U.S. 75 (2005)

Alaska-specific regulations at 36 CFR Part 13, where applicable, only apply to "Federal land" as defined in ANILCA section 102(2)[4] and waters within the exterior boundaries of Alaska park units.

2. Definition for "Boundary" Excludes State and Private Lands and Waters in Alaska

The State's petition for rulemaking requested the term "boundary" be revised to clarify that non-federally owned lands and waters are not part of a CSU. The proposed rule does not modify the definition of "boundary" and instead revises 36 CFR 1.2 by adding a new paragraph (f), which reads "In Alaska, unless otherwise provided, the boundaries of the National Park System include only federally owned lands, as defined in 36 CFR 13.1, regardless of external unit boundaries." (85 FR 23936) The preamble to the proposed rule appropriately quotes the Court in justifying this change and further explains:

> The proposed addition states that, except as otherwise provided, the boundaries of National Park System units in Alaska do not include non-federally owned lands, including submerged lands, irrespective of external unit boundaries. The definition of "boundary" in 36 CFR 1.4 has limited operation in Alaska, as NPS published legal descriptions for each unit boundary in 1992 and modifications must be consistent with ANILCA 103(b) and 1302(c) and (h).

(84 FR 23936) If the changes to the scope of the NPS regulations at 1.2(a)(3) and the definitions in ANILCA are incorporated into the regulations and appropriately explained, as requested, we agree the national definition of boundary will have limited operation in Alaska. With that caveat, we have no objections to this aspect of the proposed rule.

III. Recommended Revisions to the Proposed Rule

To improve clarity and avoid potential misinterpretation, the State requests the following revisions.

1. Congress Gave NPS Management Authority for Alaska Park Units in the Organic Act and ANILCA

- Issue: NPS has no alternative source of authority to the Organic Act, as amended, and ANILCA, as specified in ANILCA Section 203 and by the Court.
- Recommendation: Remove the term "ordinary regulatory authority" in the final rule and clarify the NPS' authority to manage Alaska park units is the authority granted in the Organic Act, as amended, and ANILCA, as specified in ANILCA Section 203 and by the Court.

In describing the Court's decision affirming that the NPS' management authority is limited to federally-owned lands and waters, the preamble refers to the NPS' "ordinary regulatory

[4] "The term 'land' means lands, waters, and interest therein." ANILCA section 102(1). "The term 'Federal land' means lands the title to which is in the United States after the date of enactment of this act." ANILCA section 102(2).

authority." (85 FR 23935-23936). The use of this undefined term in the proposed rule is inaccurate, as it implies the NPS has authority beyond that granted in the Organic Act, as amended, and ANILCA to manage Alaska park units. In responding to the second question, the Court ruled that the NPS does not have an alternative source of authority (i.e., "if not, whether NPS has an **alternative source of authority** to regulate Mr. Sturgeon's activities on that portion of the Nation River" (85 FR 23935 (emphasis added)) and both ANILCA and the Court clearly identify the source of NPS' regulatory authority as the Organic Act.[5] ANILCA Section 203 explicitly states:

> the Secretary shall administer the [Federal lands] added to existing areas or established by the foregoing sections of this title as new areas of the National Park System, pursuant to the provisions of the Act of August 25, 1916 (39 Stat. 535), as amended and supplemented (16 U.S.C. 1 et seq.), and, as appropriate under section 1313 and other applicable provision of this Act. *Provided however,* That hunting shall be permitted in areas designated as national preserves . . .

Recognizing that Congress withheld federal management agency authority over non-federal lands and waters located within the unit's exterior boundaries, the Court identified the additional "tools" Congress provided through ANILCA that would facilitate protection of Alaska park units. Specifically, the Court identified cooperative agreements with the State (e.g., ANILCA Section 1201, planning requirements and acquisition authority in accordance with ANILCA Sections 1301 and 1302, respectively), and proposals to "state or other federal agencies with appropriate jurisdiction to undertake needed regulatory action on those rivers" (*Sturgeon*, 139 S. Ct. at 1086). The Court also recognized that that there are other regulatory authorities that apply to both federal and non-federal lands and waters within these units, e.g., the authority granted to the U.S. Army Corps of Engineers and the Environmental Protection Agency, and delegated to the Alaska Department of Environmental Conservation, to implement the Clean Water Act.

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[5]The Court repeatedly refers to the NPS' authority to manage park lands as that granted under the Organic Act and even defines its use of the term "ordinary regulatory authority" as authority granted pursuant to the Organic Act: "The effect of that exclusion, as Section 103(c)'s second sentence affirms, is to exempt non-public lands, including waters, from the Park Service's **ordinary regulatory authority. Recall that the Organic Act pegs that authority to system units**." (*Sturgeon*, 139 S. Ct. at 1081 (emphasis added)). In another example, the Court explains the consequences had Congress not included ANILCA Section 103(c), and, again, refers to the NPS' authority under the Organic Act. "Had Congress done nothing more, those inholdings could have become subject to many Park Service rules—the same kind of 'restrictive federal regulations' Alaskans had protested in the years leading up to ANILCA (and further back too) (citation omitted) That is because the Secretary, acting through the Director of the Park Service, has broad authority under **the National Park Service Organic Act (Organic Act), 39 Stat. 535**, to administer both lands and waters within all system units in the country (citation omitted) . . . So Alaska and its Natives had reason to worry about how the Park Service would regulate their lands and waters within the new parks. Congress thus acted, as even the Park Service agrees, to give the State and Natives 'assurance that their [lands] wouldn't be treated just like' federally owned property." (*Sturgeon*, 139 S.Ct. at 1076 (emphasis added))

However, Congress did not give the NPS authority to implement these general regulatory authorities.[6] Therefore, it is inaccurate for the NPS use the term "ordinary regulatory authority," implying that it somehow has additional authorities beyond those granted in the Organic Act, as amended, and ANILCA.

We request the NPS remove the term "ordinary regulatory authority" in the final rule and clarify the NPS' authority to manage Alaska park units is the authority granted in the Organic Act, as amended, and ANILCA, as specified in ANILCA Section 203 and by the Court.

2. NPS Definitions for Federally Owned Lands, Public Lands, and Park Areas Must be Consistent with ANILCA

- Issue: Rather than using the term "Federal lands" as Congress did in ANILCA section 102(2), the proposed rule retains and moves a revised regulatory definition for "federally owned lands" to the NPS Part 13 regulations, and incorporates it into a revised definition for "park areas" at 36 CFR 13.1.
- Recommendation: Remove the definition for "federally owned lands" and instead adopt the ANILCA definitions for "Lands" and "Federal Lands" and "public lands" into the Part 13 regulations, while also clarifying the full intent in the preamble.

[6] "Congress made clear that the exemption granted was not from such generally applicable regulations. Instead it was from rules applying only in national parks – i.e., the newly looming Park Service rules. Congress thus ensured that inholdings would emerge from ANILCA not worse off – but also not better off – than before" (*Sturgeon*, 139 S. Ct. at 1084). The footnote to this statement (footnote 9) includes quotes from the 1986 Kobuk Valley National Park Land Protection Plan that illustrate the NPS recognized the Court's interpretation of ANILCA Section 103(c) at the time, along with state and other federal regulatory authorities that would still apply: "'[w]hile [Park Service] regulations do not generally apply to private lands in the park (Section 103, ANILCA),' the regulations 'that do apply' include those issued under 'the Alaska Anadromous Fish Act, the Endangered Species Act, the Clean Water and Clean Air acts, and the Protection of Wetlands, to name a few.'") The footnote also references the Noatak National Preserve Land Protection Plan, which includes similar statements. The Court then continues "The legislative history (for those who consider it) confirms, with unusual clarity, all we have said so far. The Senate Report notes that State, Native, and private lands in the new Alaskan parks would be subject to '"[f]ederal laws and regulations of general applicability,"' such as '"the Clean Air Act, the Water Pollution Control Act, [and] U.S. Army Corps Engineers wetlands regulations."' S. Rep. Nol. 96-4413, p. 303(1980). But that would not be so of regulations applying only to parks. The Senate Report states: "Those private lands, and those public lands owned by the State of Alaska or subordinate political entity, are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." *Sturgeon*, 139 S. Ct. at 1085.

The proposed rule diverges from the request in the State's petition for rulemaking. The State asked for rulemaking to reflect the Court's decision regarding the meaning of "public lands" which excludes selected lands and those lands already conveyed.

Rather than using the term "Federal lands" as Congress did in ANILCA section 102(2), the proposed rule revises and moves a regulatory definition for "federally owned lands" in the NPS Part 13 regulations from 36 CFR 13.2(f) to a subset of the national regulations defining the scope of the regulations at 36 CFR 1.2(f). The definition is also incorporated into a revised definition for "park areas" at 36 CFR 13.1. The preamble states the intent is to reflect the Court's decision and to account for ANILCA Section 906(o)(2) that applies to selected lands that are not yet conveyed.[7] ANILCA section 102 already defines "lands" to include lands, waters, and interests therein; and "Federal Lands" means lands the title to which is in the United States after December 2, 1980. Therefore, it is not necessary to include a new term in the regulations.

ANILCA Section 102 defines "Lands," "Federal Lands," and "Public Lands" as follows.

> *(1) The term "land" means* ***lands, waters, and interests therein****.*
> *(2) The term "Federal land" means lands* ***the title to which is in the United States after the date of enactment of this Act.***
> *(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except –*
> *(A)* ***land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;***
> *(B)land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and*
> *(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act*
> (emphasis added).

Section 906(o)(2) states:

> ***Until conveyed, all Federal lands*** *within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest*

[7] The preamble to the proposed rule justifies these changes "to reflect ANILCA's limitations on lands and waters that are administered by the NPS in Alaska, as outlined in the *Sturgeon* decision. As stated above, this would not affect NPS administration under a valid cooperative agreement, which would be governed by the terms of the agreement." Further, "The term 'federally owned lands' is used instead of 'public lands' to account for the authority granted by ANILCA Section 906(o)(2) over validly selected lands, an exception to the definition of 'public lands' in ANILCA (16 U.S.C. 3102(3))). As before, selected lands are not considered 'federally owned lands' once they are subject to a tentative approval or an interim conveyance; title has been transferred although it is not recordable until the lands are surveyed." (85 FR 23936)

addition, shall be administered in accordance with the laws applicable to such unit (emphasis added).

This section is contained within Title IX of ANILCA, *Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act*. After statehood, submerged lands under navigable waters were no longer federal lands to be selected or conveyed; therefore, section 906(o)(2) applies only to uplands and does not apply to the State's submerged lands. As noted in the preamble to the proposed rule, this was also not an issue in the *Sturgeon* litigation.

Also, while the NPS Part 13 regulations include a definition for "Public Lands" that correctly includes the appropriate exceptions; it substitutes the term "Federal lands" as used and defined in ANILCA, with the NPS-defined term "federally owned lands."

As the preamble explains, "[t]he Court held that the Nation River did not meet the definition of 'public land' because (1) 'running waters cannot be owned'; (2) 'Alaska, not the United States, has title to the lands beneath the Nation River'; and (3) federal reserved water rights ('not the type of property interest to which title can be held') do not 'give the Government plenary authority over the waterway.'" (85 FR 23935, quoting *Sturgeon*, 139 S. Ct. 1978-1079) The preamble also appropriately recognizes that the exclusion for validly selected lands in the definition of "public lands" were not at issue in the *Sturgeon* case, nor was the administrative exception for selected lands, not yet conveyed, in ANILCA Section 906(o).[8] Therefore, the regulations need only clarify that NPS regulations that apply to Alaska park units only apply on "Federal lands," i.e., lands the title to which is in the United States, which in accordance with the definition of "lands" includes federally owned waters and interests therein, and *not* to non-federally owned lands (State and private), including submerged lands and the waters that flow over them.

To avoid perpetuating any confusion or misinterpretation from using terms different from ANILCA, we recommend the NPS remove the definition for "federally owned lands" and instead adopt the ANILCA definitions for "Lands" and "Federal Lands" and "public lands" into the Part 13 regulations, while also clarifying the full intent, as noted above and recognized by Congress and the Court, in the preamble. If the definition is retained, we request the final rule confirm "federally owned lands" has the same meaning as "Federal land" in ANILCA section 102(2), meaning "lands the title to which is in the United States . . ."

The same logic applies to the definition of Park areas. If "Federal lands" is correctly defined as noted above, Park areas would be correctly defined by adding "Federal" to the current definition

[8] "and 'public lands' are 'Federal lands,' subject to several statutory exclusions that were not at issue in the Sturgeon case. As such, the Court found 'public lands' are 'most but not quite all [lands, waters, and interests therein] that the Federal government owns.'" (85 FR 23935, citing *Sturgeon*, 139 S. Ct. 1076-1077); "Fourth, ANILCA section 906(o)(2) contain an administrative exception relative to State and Native corporation land selections, which are excluded from the definition of 'public land' in section 102. This exemption did not feature in the Sturgeon case and would not be affected by this rulemaking." (85 FR 23936)

as follows: "Federal lands and waters administered by the National Park Service within the State of Alaska."

3. Alaska-specific Regulations "Supersede" National Regulations

- Issue: The State's petition for rulemaking requesting the term "supplement" be replaced with "supersede" in 36 CFR 13.2(a) was not addressed to clarify where the Part 13 regulations allow for uses and activities otherwise prohibited or restricted under the national regulations, Part 13 prevails.
- Recommendation: Replace the term "supplement" with "supersede" in 36 CFR 13.2(a).

The State's petition for rulemaking requested the term "supplement" be replaced with "supersede" in 36 CFR 13.2(a) to clarify that where the Part 13 regulations allow for uses and activities otherwise prohibited or restricted under the national regulations, Part 13 prevails. The proposed rule does not include that change. We recognize the term "supplement" was used in the original 1981 NPS Alaska-specific interim regulations, and while the scope of the Part 13 regulations also clarifies that the national regulations apply "except as they are modified by Part 13" (36 CFR 13.2(a)), the term itself does not accurately describe that relationship. While the Part 13 regulations are additive (i.e., supplemental) to the national regulations, the Part 13 regulations actually override (i.e., supersede) national regulations that would otherwise prohibit or restrict ANILCA allowed uses.

Further, the 1981 preamble to the Part 13 Alaska-specific regulations used the term "superseded" in a section that responded to comments on the proposed rule, titled "Summary of 36 CFR Parts 1-9 provisions **Superseded** by or Still Applicable After This Rulemaking." The discussion in that section also used the term "superseded," as follows:

> Several commenters had requested that the Service provide an unofficial listing of 36 CFR Parts 1-9 regulations (ordinarily applicable to all National Park System Units) which have either been **superseded** by or are still effective after this Alaska park rulemaking. In general, the **superseded** regulations for Alaska park areas include 36 CFR 2.1 (**superseded** by §13.22 except for Klondike Gold Rush National Historic Park and Sitka National Historic Park; 2.2(a) (**superseded** by §13.13) . . .

The list continues and each regulation listed uses the term "superseded" in the same way (46 FR 31853-54 (emphasis added)).

The 1983 revisions to the NPS national regulations at 36 CFR Parts 1-7 and 12 also explained the relationship to the Part 13 regulations as follows: "In general, the rules found in 36 CFR Part 13 apply to Alaska park areas and **supersede** the general regulations found in 36 CFR Parts 1-6. . . " (48 FR 30253) (emphasis added). Therefore, consistent with the NPS' prior explanations, the term "supersede" more accurately describes the relationship between the national and the Part 13 Alaska-specific regulations; therefore, we reiterate our request to revise 36 CFR 13.2(a) and replace term "supplement" with "supersede."

4. 36 CFR Part 13 Authorities Must Include ANILCA

- Issue: The list of citations for applicable Part 13 NPS authorities does not include ANILCA.
- Recommendation: Include ANILCA in the citations for applicable NPS authorities.

The proposed rule indicates the authority citations for the Part 13 regulations will remain the same; however, the list of citations does not include ANILCA. The authorities cited in the original 1981 Part 13 regulations specifically included "Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371 and 1281, Pub. L. No. 96-487" (46 FR 31854). It is unclear when or why ANILCA was removed from the authorities' section in subsequent revisions or why it was not reinstated in the proposed rule. Since the 36 CFR Part 13 regulations are the Alaska-specific regulations that implement ANILCA provisions applicable to Alaska park units designated or expanded under ANILCA, there can be no reasonable explanation for not including it, and we request it be listed in the final rule.

IV. Preamble Clarifications

The following three issues illustrate how the revisions to the scope of the proposed rule are consistent with other provisions in ANILCA and existing Department of Interior (DOI) regulations that implement Title XI of ANILCA.

1. Proposed Rule Consistent with ANILCA Wild and Scenic River Boundaries

- Issue: The proposed revision to 36 CFR 1.2(a) is consistent with ANILCA's boundaries for WSRs, which exclude non-federally owned lands and waters, including state-owned submerged lands received by the State of Alaska at statehood.
- Recommendation: Affirm this in the preamble to the final rule.

ANILCA amended the Wild and Scenic Rivers Act (WSRA) to designate wild and scenic rivers (WSR) in Alaska. WSRs are also defined by ANILCA as CSUs, subject to the same provisions in ANILCA that apply to all CSUs, including National Parks and Preserves managed by the NPS.[9] Consistent with the Court's interpretation of ANILCA Section 103(c), ANILCA Section 606 excludes state and private lands and waters from the boundaries of WSRs.[10] And, as

[9] ANILCA Section 102(4): "The term '**conservation system unit**' means any unit in Alaska of the National Park System, National Wildlife Refuge System, **National Wild and Scenic Rivers Systems**, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units **established, designated, or expanded by or under the provisions of this Act**, additions to such units, and any such unit established, designated, or expanded hereafter." (Emphasis added.)

[10] ANILCA Section 606(a): "(1) the boundary of each such river shall include an average of not more than six hundred and forty acres per mile on both sides of the river. Such boundary **shall**

concluded by the Court, that includes state-owned submerged lands and control over the water located within them.[11]

The proposed exception for Alaska in the scope of the NPS national regulations excluding non-federally owned lands and waters is consistent with ANILCA's boundaries of WSRs. We request this be affirmed in the preamble to the final rule.

2. Legislative Jurisdiction Not Applicable to ANILCA Park Units in Alaska

- Issue: The prohibition in ANILCA 103(c) also applies to "legislative jurisdiction;" however, the NPS indicated in past regulatory revisions that "legislative jurisdiction" applied to non-federally owned lands in all park units, including in Alaska, and the term remains in the definition section of 36 CFR 1.4.
- Recommendation: Ensure the preamble to the final rule confirms "legislative jurisdiction" does not apply to state or private inholdings in Alaska park units.

The revision to the scope of the national regulations at 36 CFR 1.2(a) clarifies NPS regulations do not apply to non-federally owned lands and waters within Alaska park units. However, because the NPS indicated in the past that "legislative jurisdiction" applied to non-federally owned lands in all park units and the term remains in the definition section of 36 CFR 1.4, we request the preamble to the final rule confirm the exception for Alaska in 36 CFR 1.2(a)(3) applies to "legislative jurisdiction" to clarify it does not apply to state or private inholdings in Alaska park units.

The NPS first expanded the scope of the national regulations at 36 CFR 1.2 in 1983 to include lands under the legislative jurisdiction of the United States. In the final regulation's preamble, the NPS clarified the term "legislative jurisdiction" to be lands and waters over which a state has ceded police powers to the United States. This was presented as an *exception* to the regulatory provision that stated the regulations were not applicable on privately owned lands and waters. The preamble further explained that this exception also applied to state inholdings that were under the legislative jurisdiction of the United States (i.e., where the State has ceded police powers) and its application was limited to ten of the NPS national regulations (48 FR 30261).

This concept was carried forward in the 1987 revisions to NPS national regulations at 36 CFR Parts 1 and 2. The overarching purpose of the rulemaking was to clarify that lands under the

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not include any lands owned by the State or a political subdivision of the State nor shall such boundary extend around any private lands adjoining the river in such manner as to surround or effectively surround such private lands." (Emphasis added.)

[11] "only the federal property in system units is subject to the Service's authority" and therefore, "non-federally-owned waters and lands inside the system units (on a map) are declared outside them (for the law). So those areas are no longer subject to the Service's power over 'System units' and the 'water located within' them." (85 FR 23935-23936, quoting *Sturgeon,* 139 S. Ct. at 1081.)

legislative jurisdiction of the United States was an exception to the general provision that NPS regulations did *not* apply on non-federally owned lands and waters located within park boundaries (52 FR 35238). However, that earlier clarification was ignored by the NPS in 1996 when the NPS expanded the scope of its authority to apply to all non-federally owned lands and waters, without exception.

We provide this brief overview to illustrate the convoluted history of the scope of the NPS regulations, which ultimately resulted in regulations that are inconsistent with ANILCA. Further, while the concept of "legislative jurisdiction" may apply in some park areas outside Alaska, it has *never* applied to Alaska because, as affirmed by the Court, ANILCA Section 103(c) prohibits the NPS from applying *any* of its regulations to non-federally owned lands and waters within the boundaries of Alaska park units.

3. Proposed Rule is to be Aligned with ANILCA 1110(b) and Interior Inholder Access Regulations

- Issue: The proposed revision to 36 CFR 1.2(a) is consistent with ANILCA section 1110(b) and as implemented in DOI regulations at 43 CFR 36; NPS authority does not apply to an inholding itself.
- Recommendation: Ensure the preamble to the final rule recognizes that the inholder access provision in ANILCA Section 1110(b), consistent with the Court ruling, is also applicable to state owned navigable waters and that access to inholdings will be granted consistent with ANILCA and DOI implementing regulations at 43 CFR 36 and the exemption for Alaska in 36 CFR 9.30(b).

The proposed exception for Alaska in 36 CFR 1.2(a) is consistent with the inholder access provision in ANILCA Section 1110(b) and DOI implementing regulations at 43 CFR 36.10. While these regulations give NPS authority over the requested access across park lands, consistent with the Court's interpretation of ANILCA Section 103(c), that authority does not apply to the inholding itself and it does not give the NPS authority to deny an authorization for access, which would be contrary to the rights granted inholders pursuant to ANILCA Section 1110(b).

As recognized by the Court, due to their vast size, the exterior boundaries of CSUs in Alaska surround numerous state and private inholdings. Before the passage of ANILCA, the State and private landowners were not just concerned with their lands and waters being managed the same as park lands, they also needed guaranteed access across the park units and assurance that they could develop their property. Congress responded by incorporating Section 1110(b) into ANILCA, providing inholders with a *statutory right* to cross federal lands to access state and private inholdings, either located within the exterior boundaries or effectively surrounded by park units, for economic and other purposes.[12] Specifically, it requires the Secretary of the

[12] ANILCA Section 1110. (b): "Notwithstanding any other provisions of this Act or other law, in any case in which **State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy** is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study, the State or

Interior to grant inholders, including those effectively surrounded by park units, "*rights as may be necessary to assure adequate and feasible access for economic and other purposes."* These "rights" are subject to "reasonable regulations" to protect park resources and values, which pursuant to implementing DOI regulations at 43 CFR Part 36, appropriately limit the scope and discretionary authority of land managers to impose requirements that would interfere with state and private inholder's rights to access and use their property.

In addition, the preamble to the final DOI Title XI regulations acknowledge that inholder rights of access are not limited to ingress and egress but also apply to "economic and other purposes:"

> The term "adequate and feasible access" received a number of comments. Some agreed with **the interpretation followed in the proposed rule which includes all forms of access without limitation within the scope of section 36.10.** Others preferred the narrower definition found in the interim or present regulations of the NPS and FWS which guaranteed access but limited it to pedestrian or vehicular means of transportation, arguing that the proposed definition was too broad. Other commenters argued that the law was intended to provide for small scale personal use access only and not pipelines or transmission lines. We have reviewed these comments and determined that the proposed definition of adequate and feasible will be retained with minor modifications. The definition has been restructured into a single sentence.
>
> The reason for retaining the definition as stated in the proposed rule is our conclusion that it **reflects Congressional intent**. First, we find no justification for distinguishing between small private routes and larger systems. **The criteria for applicability within the state itself pertain to the type of inholding, not the type of system.** Second, the statute clearly states that **the access right is for "economic and other purposes;" not merely for ingress and egress**. Third, the legislative history clearly states that the grant of access must be **broadly construed**:
>
> The Committee understands that the common law guarantees owners of inholdings access to their land, and that rights of access might also be derived from other statutory provisions, including other provisions of this title, or from constitutional grants. This provision is intended to be an **independent grant supplementary to all other rights of access**, and shall not be construed to limit or be limited by any right of access granted by the common law, other statutory provisions, or the Constitution. (Emphasis supplied) H. Rept. No. 97, Part 1, 96th Congress, 1st Sess. 1979, 240; also, S. Rept. No. 413, 98th Congress, 1st Sess. 1979, 249. (51 FR 31624)

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private owner or occupier **shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes** to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands." (Emphasis added.)

NPS Alaska regional guidance confirms that adequate and feasible access is the goal, not regulation of the inholding. It accomplishes this by explaining that the reason the application requests information about an inholder's land use objective is that it assists the Service with its determination of what would constitute adequate and feasible access, not for establishing regulatory requirements associated with activities occurring on the inholding itself.[13]

While 43 CFR 36.10 allows for mitigation to address impacts to park resources and values, and consideration of alternative routes, protection of "*natural and other values*" cannot be used to frustrate or deny inholders their rights under ANILCA to receive "adequate and feasible" access to their inholding. Even if there are significant impacts, an inholder must be granted the route and method of access requested if adequate and feasible access does not otherwise exist.[14] That intent is confirmed in the preamble to the DOI Title XI regulations, which quotes Senate Report 96-413 at 249 from ANILCA's extensive legislative history.

> *The Committee adopted a standard providing for adequate and feasible access for economic and other purposes. The Committee believes that* ***routes of access to inholdings should be practicable in an economic sense****.* ***Otherwise, an inholder could be denied any economic benefit resulting from land ownership.*** (Emphasis added.)

We request the preamble to the final rule recognize that the inholder access provision in ANILCA Section 1110(b), consistent with the Court ruling, is also applicable to state owned navigable waters and that access to these inholdings will be granted consistent with ANILCA and DOI implementing regulations at 43 CFR 36. This is also consistent with the exemption for Alaska in the NPS regulations at 36 CFR 9.30(b) *Subpart B – Non-Federal Oil and Gas Rights*.[15]

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[13] "Why does the NPS want to know my land use objectives? Knowing your plans will enable the NPS to assess whether the requested access is adequate and feasible to meet your needs." An Interim User's Guide to Accessing Inholdings in National Park System Units in Alaska, July 2007, page 16.

[14] "43 CFR 36.10(e)(1) For any applicant who meets the criteria of paragraph (b) of this section, the appropriate Federal agency **shall** specify in a right-of-way **permit the route(s) and method(s) of access across the area(s) desired by the applicant, unless** it is determined that:
(i) The route or method of access would cause significant adverse impacts on natural or other values of the area and adequate and feasible access otherwise exists; or
(ii) The route or method of access would jeopardize public health and safety and adequate and feasible access otherwise exists; or
(iii) The route or method is inconsistent with the management plan(s) for the area or purposes for which the area was established and adequate and feasible access otherwise exists; or
(iv) The method is unnecessary to accomplish the applicant's land use objective (emphasis added).

[15] 81 FR 77973.