# TESTIMONY BEFORE THE U.S. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES HEARING ON THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

December 3, 2015

**Testimony on behalf of the**
**Citizens' Advisory Commission on Federal Areas**

Submitted by Senator John Coghill, Commissioner

## I. Introduction

In 1981, the Citizens' Advisory Commission on Federal Areas in Alaska (CACFA; Commission) was established by the Alaska State Legislature to monitor and minimize the impacts to Alaska and Alaskans from implementation of the Alaska National Interest Lands Conservation Act (ANILCA). The Commission continues to provide a forum and a voice to those most intimately impacted by the complex mandates and highly discretionary laws, regulations and policies applicable to over 225 million acres of federal land.

CACFA primarily works with individual Alaskans in navigating these rules and policies to safeguard and preserve their rights and interests. The Commission provides a consistent, diverse and updated memory of public engagement with federal agencies in Alaska since ANILCA. Our 12 commissioners and staff work diligently to address the ongoing need to assist and inform the public of federal actions, to examine and comment on those actions to prevent undue encroachment on public uses and to apply and add to our detailed historical understanding of how ANILCA's many compromises are actually experienced by the public.

ANILCA was conceived through a clause in the 1971 Alaska Native Claims Settlement Act (ANCSA), Section 17(d)(2), which directed the Secretary of the Interior to withdraw up to 80 million acres of existing public lands in Alaska for consideration by Congress as new or expanded National Wildlife Refuges, National Parks, National Forests and/or Wild and Scenic Rivers. What took place between the passage of ANCSA in December 1971 and the passage of ANILCA in December 1980 was truly extraordinary. The consideration of these designations, along with the effect on subsistence uses, resource development, economic growth, transportation and infrastructure, hunting, fishing and trapping, and Alaskan traditions, cultures and lifestyles, was rigorously studied and heavily debated. Various coalitions, stakeholders, industries and interest groups descended on the "d2 debates" to lobby for favored provisions and conservation areas. Congress held extensive field hearings throughout Alaska to take testimony and gain insight into the "Alaska context." The resulting statute was a hard-fought, comprehensive and highly nuanced culmination of these efforts, which fundamentally changed the way the federal government manages its public lands.

Congress began its review of Alaska lands by looking at the roughly 250 million acres of general public lands that had been withdrawn from other uses and carefully considered which of those acres should be set aside as conservation system units and under what terms, balancing the national interest with the economic and social needs of Alaska and its citizens. Even though most of the land classifications used were familiar ones (e.g., parks, refuges, forests, wilderness, wild and scenic rivers), ANILCA made them new again, with management direction intended to be unique to Alaska. And, even though the federal land management agencies had long histories and pre-existing authorities, ANILCA served as an "organic act" for just how these enormous areas would be managed. Specific provisions addressed critical deviations from current laws and management objectives, while more general provisions expressed Congressional intent on how future management would be tempered by this unprecedented balancing act.

Especially considering the enormity of what was accomplished here 35 years ago, and no doubt thanks to the intense studies, negotiations and deliberation which preceded it, ANILCA has truly withstood the test of time. That said, this "great compromise" between the many participants has been greatly compromised in many ways. Capturing 35 years in one written testimony is as impossible a task as it is inadvisable. Thus, what follows here are brief overviews and targeted insights into **four major implementation challenges**, each of which ANILCA sought to avoid:

- the demise of meaningful federal-state cooperation and consultation;
- the undermining and loss of substantive balancing provisions;
- the corruption of Congressional intent through agency and judicial misinterpretations; and,
- the disproportionate impact of increasingly centralized and prohibitive management practices.

## II. Building and Maintaining Cooperative Working Relationships

ANILCA oversaw the thorny marriage of multiple competing interests, and Congress recognized early on that, sometimes, meaningful cooperative engagement should be a requirement. Further, due to the sheer size of designations, over thriving communities and interlaced with private, Native and state lands, federal land management would impact Alaska in novel and severe ways. As such, Congress provided for affected user involvement and interagency cooperation as absolutely critical to realizing the true promise of ANILCA.

A number of provisions require federal agencies to work with the State, including in the development of land use plans and through consultation with the Alaska Department of Fish & Game regarding fish and wildlife. Strong direction for coordination is found in Title XII, which established the Alaska Land Use Council, the Federal Coordination Committee, and directed cooperative land management planning in Bristol Bay. Individuals and groups have also benefited from these provisions, as well as from the vigilance and longevity of CACFA, the State's ANILCA Implementation Program and numerous other entities devoted to agency collaboration and public participation, either established by ANILCA or in response to its sweeping effect.

Unfortunately, many cooperative mechanisms have either been dissolved or completely disenfranchised. Less formal arrangements have also become strained recently, as administrative policies and goals fail to account for the unique Alaska context. While Alaska-based federal agency staff are approachable, helpful and invested in sound management, a multitude of considerations, positions, personalities and variables frequently keep us from working together to resolve issues outside of established venues and mandates. The following recommendations aim to promote a return to meaningful cooperation and its inimitable and ample benefits.

### Alaska Land Use Council

The concept of a cooperative interagency body was initially recommended by ANCSA's Joint Federal-State Land Use Planning Commission and was included as part of a "consensus" bill following the introduction of H.R. 39. Developed by Alaska Governor Jay Hammond, Representative Don Young and Senator Ted Stevens, the bill created a "lands commission" to foster cooperation and coordination between Alaska's land and resource managers. This concept made it through many Congressional debates and into the final bill as Section 1201, establishing the Alaska Land Use Council (ALUC), its membership and its functions.

The ALUC provided an opportunity for in-person consultation, cooperation and coordination among high-level Alaskan decision-makers contemplating the management of federal lands and public uses. Membership included the heads of six federal agencies, four state agencies and two representatives from the Alaska Native community. The council was co-chaired by a Presidential appointee and either the Governor of Alaska or his delegate.

For ten years, the ALUC sought balanced consideration of ANILCA implementation issues by bringing federal, state and Native leadership to the table to oversee and collaborate on both discrete and broad matters. In 1989, pursuant to ANILCA Section 1201(l), the council submitted a report to Congress recommending the ALUC continue operating with certain changes and improvements, based on experiences during the preceding decade. A survey attached to the 1201(l) report found that over 80% of respondents and organizations were in favor of a cooperative interagency organization that dealt with Alaska land and resource issues. Unfortunately, the report's recommendations were not acted upon by Congress, and the council sunsetted in 1990.

Many of the ALUC's most significant functions are sorely missed and could be central to improving federal-state-public relations in land and resource management in Alaska. Those functions include fostering cooperative and consistent management and planning, improving agency responsiveness to public input and concerns, resolving interagency and interest group conflicts, providing for information exchange and dialogue, maintaining and promoting the unique Alaska context, and furthering economic growth and prosperity through informed and respectful deliberation.

CACFA strongly encourages this Committee to explore reinstatement of the ALUC, or a similarly constituted and empowered entity, taking into consideration the insights and recommendations that were made in the council's 1989 report. The Land Use Advisors Committee was also an important compliment to the ALUC, as the private citizens on that committee regularly gave the career bureaucrats on the council some much needed perspective. CACFA and the committee actually shared a member for most of the time it operated, and several joint meetings were held. We would welcome the opportunity to realize the exceptional benefits of that collaboration once again.

## ANILCA Guidance

Congress incorporated significant direction throughout ANILCA to preserve the unique Alaska context in management planning and decision-making on federal lands. Through the simple passage of time, due to staffing turnover and with the increasing abundance, complexity and overlay of national laws, regulations and policies, this direction has been forgotten and/or incrementally disregarded. One has only to compare regulations and land use plans put forth today with those from the 1980s, when meaningful cooperative mechanisms were functioning and the distinction of ANILCA and its special provisions were consistently acknowledged and fresh in everyone's minds.

Before we find ourselves even further removed from a contemporaneous understanding of ANILCA, before even more rules and policies are developed lacking any reference to or accommodation of ANILCA, and before the rest of our most experienced state and federal staff members retire or leave Alaska, we need to recognize and replace what has been lost and provide for the future.

CACFA encourages this Committee to direct federal agency staff and other upper-level Directors and policy makers with responsibilities that affect land management in Alaska to attend comprehensive ANILCA training; Department of the Interior-approved training is currently provided in Alaska by Institute of the North. CACFA further requests the Committee strongly encourage federal agencies to work with the State and the public in crafting regional guidance that implements ANILCA and, at a minimum: incorporates the unique Alaska context that is missing in national policies and regulations; applies statewide and to all federal planning processes; identifies all applicable ANILCA provisions and associated regulations (e.g., closure processes, access authorizations); and, provides consistent interpretations of those provisions for planning purposes and plan implementation.

## III. Trending Away From the Balance

ANILCA has survived five federal administrations and 18 sessions of Congress and, while it has been frequently amended, it is largely intact and little the worse for wear. However, its compromise provisions have suffered heavy losses along the way. Most of the guarantees and influence Alaskans started out with have been depreciated or summarily annexed. It would be one thing to say our current situation is simply one full arc of a political pendulum, and that we have but to weather the passing storm to pick up the pieces. Unfortunately, far too many intrusions and unwarranted, unilateral decisions have accumulated over the years and form a barrier to ever fully rebuilding and restoring the balance Congress intended in ANILCA (absent costly, uncertain and time-consuming litigation).

To understand where ANILCA's balance rests today, and to contemplate how it might be restored, it is important to understand its foundational principles and how it came into being. In October 1978, Congress adjourned without passing legislation or extending ANCSA's December deadline for the termination of any undesignated withdrawals. Sensing a need to push the issue along, on November 16, 1978, Secretary of the Interior Cecil Andrus used his then brand-new "emergency withdrawal" authority under Section 204(e) of the Federal Land Policy and Management Act (FLPMA) to withdraw 110,750,000 acres in Alaska from mineral entry and selection for three years. Days later, on December 1, 1978, President Jimmy Carter used his executive authority under Section 2 of the Antiquities Act to set aside 56 million acres into 17 new national monuments. Additional threats to use (and the subsequent1980 use of) FLPMA's authority to withdraw millions of acres for up to twenty years served as an incentive to draw everyone to the table to finalize a bill that would settle Alaska's land management issues once and for all.

Unnerved by this unprecedented "land freeze," and recognizing the importance of a consolidated Alaskan voice, Governor Hammond and the Alaska Legislature worked with a wide array of constituent groups to agree on certain essentials, described as "consensus points", to ensure our needs were met. The Alaska Federation of Natives and ANCSA Corporations joined the State in developing and then promoting these consensus points during the final negotiations with Congress.

All of the consensus points were addressed with the passage of ANILCA, yet all have since experienced varying degrees of erosion. Some are just barely recognizable, most have been interpreted away and none are given deference anymore. The following subsections offer just a few examples of how these concessions are sidelined or disregarded.

**THE SEVEN "CONSENSUS POINTS"**

*Based on Legislative Resolve #2 from the 1979 Alaska State Legislature*

1) Revoke all 1978 monuments and executive withdrawals
2) Grant and satisfy full land entitlements to the State and Native Corporations
3) Guarantee access across federal lands to state and private lands
4) State management of fish and game on all lands
5) Conservation boundaries should exclude economically important natural resources
6) Continue traditional land uses on all lands
7) Preclude any administrative additions or expansions of conservation units

### Land Use Withdrawals

The 1970s-era Public Land Orders (PLOs) that withdrew lands in order to implement ANCSA and ANILCA are still in place, despite having fulfilled their purpose, and have significantly interfered with the State's ability to complete its land selections, as guaranteed in the Alaska Statehood Act. These so-called "17(d)(1) withdrawals" are enormous in scope, covering almost 160 million acres of federal lands in Alaska, and frequently have several layers of withdrawals over the same acre of land. Certain concessions have allowed withdrawn lands to be selected by the State and ANCSA Corporations, but the lands cannot be conveyed until the withdrawals are lifted, during which time multiple public uses of the land are also prohibited according to the extent of the applicable PLO(s).

The Bureau of Land Management (BLM) addressed this complex issue in a 2006 report to Congress, tellingly required by Section 207 of the Alaska Land Transfer Acceleration Act of 2004. The statute required the BLM to report to Congress on which of these withdrawals should be lifted. In its report, the BLM referred to the withdrawals as "*an unnecessary encumbrance*" and recommended lifting 95% of them as "*consistent with the protection of the public's interest*." Withdrawals on just over 6.7 million acres were recommended for retention only "*until another withdrawal is put into place*."

To put an even finer point on the need to lift 17(d)(1) withdrawals, recent federal agency planning efforts have attempted to retain and "repurpose" these withdrawals. Management plans seeking to limit public uses for ambiguous conservation purposes are using the outdated withdrawals to do so, circumventing Congress' prohibition on administrative withdrawals in ANILCA, negating Congress' intent provided through Section 207 of the Alaska Land Transfer Acceleration Act and further frustrating the ability of the State to receive its lands and the public's ability to use them.

For example, most 17(d)(1) withdrawals prohibit mineral entry, to prevent encumbrances on the land during selection, conveyance and/or designation. If a draft land use plan wants to limit mineral entry, which is primarily being done to protect wilderness character or sensitive habitats, an existing 17(d)(1) withdrawal is used to implement that requirement. In actuality, a *new* withdrawal would need to be imposed, because the use is only coincidentally withdrawn under the outdated 17(d)(1) withdrawal. A withdrawal and its intended purpose are not severable, meaning a new withdrawal is required when an area is closed to entry for a different purpose. In accordance with Section 1326(a) of ANILCA, new withdrawals of a certain size must be presented to Congress for approval.

CACFA recommends this Committee request the Secretary of the Interior to implement the 2006 report's recommendation to lift these comprehensive and obsolete 17(d)(1) withdrawals. Previous federal resource management plans have reviewed and recommended lifting them, and the Alaska State Legislature passed a resolution in 2015 formally making the same recommendation. To our knowledge, the Secretary has taken no action on these recommendations. The BLM Alaska State Office should be directed to work through the national office and the BLM Director to complete the process of lifting these withdrawals consistent with Congressional intent for federal land management in Alaska and to facilitate the final and long overdue resolution of the State's land entitlements.

## Administrative Designations

Consistent with the seventh Consensus Points (preclude administrative additions or expansions of conservation units), which was a direct reaction to the sweeping Executive withdrawals in 1978, ANILCA required a Congressional decision in addition to the administrative decision that a large scale withdrawal is warranted in Alaska, or that conservation system units, including wilderness areas and wild and scenic rivers, should be expanded or established.

Section 101(d) provides an overall intent statement, noting Congress believed it had thought through the conservation versus development balance comprehensively and had arrived at a fair solution regarding the disposition of federal lands in Alaska which would not need to be revisited. Congress further clarified in Section 1326(a) that any Executive Branch action which withdraws more than 5000 acres in Alaska would require notification to both Houses of Congress before any such withdrawal would become effective, and that the withdrawal terminates unless Congress passes a joint resolution of approval within one year of that notification.

Additionally, Section 1317 provided a one-time authorization for the U.S. Fish and Wildlife Service (FWS) and the National Park Service (NPS) to conduct wilderness reviews under the Wilderness Act. Those reviews were done in the 1980s during development of the first management plans for refuges and parks in Alaska. No action was taken on the recommendations that stemmed from these reviews. Even so, studied and recommended lands are still being managed by these agencies to protect

wilderness character and, despite intentional prohibitions in Sections 1317 and 1326(b), the agencies continue to evaluate and recommend additional areas for potential designation as wilderness.

Only in Section 1320 was one agency, the BLM, allowed to identify areas in Alaska suitable for designation as wilderness, and to make recommendations "from time to time." Section 1320 also specifically exempted any application of FLPMA Section 603, including the direction to manage recommended lands to the "non-impairment" standard while awaiting Congressional action. This means, should the BLM go through the study and recommendation process, there would be no discernable impact or changes to land management while Congress debated the merits.

However, while no Secretary of the Interior since 1980 has chosen to exercise its Section 1320 wilderness study authority in Alaska, the BLM has instead been studying lands for "wilderness character" and effectively managing them to a "non-impairment" standard, refusing to acknowledge the very purpose of Section 1320 and its sidebars. As described earlier, this and other conservation-oriented management objectives are frequently facilitated through the "repurposing" of 17(d)(1) withdrawals, resulting in a patchwork of *de facto* designations that can be managed even more restrictively than conservation system units established by ANILCA.

The self-administered authority federal agencies have assumed to make decisions regarding expanded and additional designations has significantly upset the careful balance Congress created in ANILCA and results in untenable embargos on planning for public land use and economic investments in Alaska. The following examples highlight two relatively recent and creative work-arounds which undermine Congress' intent to both reserve designation decisions for itself and to govern the process associated with making wilderness recommendations.

*BLM Areas of Critical Environmental Concern*

Through designation of Areas of Critical Environmental Concern (ACEC), a BLM management tool established under FLPMA, public use, access and resource development in Alaska can be curtailed, prohibited or held hostage through application of agency policy, developed and maintained without a public process, Congressional oversight or any means of accountability. Thanks in large part to the repurposing of obsolete 17(d)(1) withdrawals, ACECs can easily be managed more restrictively than conservation system units established under ANILCA, including wilderness. If Congress refused to grant any agency the authority to establish conservation system units, witnessing agencies claim an authority to establish *even more restrictive* designations is as incredible as it is frustrating.

Moreover, CACFA believes the use of ACECs in Alaska is also operating well beyond Congressional intent in FLPMA. The application of policy-based, wholly internal designation criteria has been highly subjective and scantily justified, particularly in light of the resulting decreased availability of enormous areas of public lands and the BLM's mandate to manage lands for multiple and non-conflicting uses. The criteria used to designate ACECs make no provision to incorporate or demand sound science or a detailed and thorough explanation of need. This unilateral and overly employed approach to land use designation ignores the ecological, social and legal context in Alaska, and is strongly reminiscent of the "land freezes" which prompted Congress to require significant restraint.

Further, most if not all user limitations proposed in ACECs could be addressed through BLM's existing management tools and frameworks; therefore, the BLM frequently fails to credibly assert any "*harmful effects*" requiring "*special management attention*" in its proposals, both of which are required under the ACEC policy. For example, significant capacity to mitigate concerns is housed in BLM's permitting and leasing authorities. Exploration and development can be managed through terms, conditions and stipulations in a permit or lease or any of a number of standing requirements, including operations plan approvals, reclamation and bonding.

CACFA acknowledges some user limitations *do* require designation, but such management prescriptions should accompany at least some targeted management necessity, and be limited by it. BLM policy provides that the "*size of a proposed ACEC shall be as necessary to protect . . . the important and relevant values within the context of the set of management prescriptions for public lands in the vicinity*." Thus, if designation is *necessary* to protect resource values or provide for certain activities, the ACEC should be limited to the areas where those values are present or to the places where and times in which those activities occur. Yet, ACECs in Alaska can be hundreds of thousands to over a million acres in size, frozen in place through a designation process lacking any meaningful consideration of scale or scope.

*BLM Lands with Wilderness Character*

While the identification of areas suitable for wilderness designation is consistent with ANILCA Section 1320, this option has never been exercised, largely in deference to the protracted and sensitive negotiations involving all interest groups which led to a balanced amount of designated wilderness in Alaska. CACFA would like to see this entirely warranted forbearance continue. Alaskans lived through the tumult and controversy of ANILCA and should not have to relive that experience and uncertainty with every resource management process. And yet, such a scenario would be preferable to what has been taking place the last few years.

In 2010, then-Secretary Salazar issued Secretarial Order 3310, directing the BLM to identify and designate "Wild Lands." Congress subsequently passed a Continuing Resolution prohibiting the BLM from spending funds to implement the order. Rather than rescinding the order, however, the agency just revised its implementing manuals to identify and protect "lands with wilderness character" instead of designating "Wild Lands." Since then, planning processes have been used to identify these areas, which has included up to 99% of BLM-managed lands in each planning area.

Because these lands are not designated wilderness, none of ANILCA's numerous provisions which would apply in wilderness (e.g., access provisions, cabins, temporary structures, the transportation and utility system process) are being honored. Conversely, restrictive Wilderness Act-style provisions (e.g., prohibitions on roads, structures, commercial uses, mineral entry) are proposed. No general or case-by-case analysis is performed to reasonably evaluate whether detrimental impacts to wilderness character will manifest if a use is authorized or allowed to continue. These blanket prohibitions on uses and infrastructure, simply owing to the decision to manage for wilderness character, is inconsistent with the BLM's mandate to provide for multiple use and sustained yield on the federal public lands. More than that, it contaminates the balance ANILCA created for Alaska.

CACFA acknowledges the goal of identifying and providing for the adequate protection of wilderness values in BLM planning documents. That said, where a planning process finds 99% of the planning area possesses wilderness character, this should be an indication current management is more than adequate. CACFA requests the Committee direct the BLM to exempt Alaska from its "lands with wilderness character" policy (and any other policy with a different name but a similar intent) or prevent funding implementation in Alaska, in order to defend and restore the protections and balance Congress provided in ANILCA.

## Access, Traditions and Opportunities

The State's third consensus point requested guarantees for access to the millions of acres of state and private lands interwoven with federal lands throughout the state. The fifth and sixth consensus points sought to preserve economic opportunities in resource-rich areas and to ensure continuation of Alaska's diverse culture and traditions, which are intimately connected to the land. Each consensus point represented a major concern associated with the enormous, unprecedented size of potential conservation system units being designated in inhabited, culturally significant and economically valuable areas, as well as the largely prohibitive management regimes employed by the intended

federal land managers. To address these concerns in ANILCA, Congress included multiple access provisions, granting the strongest access guarantees and protections to landowners within or effectively surrounded by conservation system units.

ANILCA was designed to ensure that transportation and utility infrastructure projects would not be thwarted or frustrated simply because they must cross federal conservation lands. Title XI recognized Alaska's transportation and utility network as largely undeveloped and established a process through which federal agencies must coordinate the review of Alaskan infrastructure projects that needed to cross federal land. Section 1110(a) specifically provides for both motorized and non-motorized access on federal land for traditional activities and for travel to and from villages and homesites. Section 1110(b) guaranteed adequate and feasible access for economic and other purposes to both surface and subsurface inholdings. Section 1111 grants the State and private property owners' access to their lands for purposes of survey, geophysical, exploratory, or other temporary uses. Since ANILCA's passage, however, each provision has been increasingly compromised and ignored.

For example, subsistence access under Section 811 and general access under Section 1110(a) are being unduly restricted in furtherance of national policies that preemptively protect unit values, including wilderness, soundscapes and scenery. The historical interpretation of Section 1110(a) is that the use must be allowed until there is actual or likely potential for resource damage. Internal policy and guidance have been creating expansive values and nebulous degradation standards which render Congressionally-guaranteed protections under these sections meaningless. Federal agencies are also increasingly micromanaging commercially guided uses (another Congressionally-protected use) as an alternative means to limit general public access outside the confines of ANILCA, such as severely limiting public access by air taxis.

The Title XI infrastructure development process is also being fundamentally mismanaged by federal agencies. Since regulations implementing Title XI require preferences for applicant-selected routes, agencies have been requiring proponents to modify projects during the pre-application phase, or even strong-arming them into forgoing the process altogether, denying them ANILCA protections and their appeal rights under the law. Title XI also established statutory time periods for review processes, which are rarely, if ever, followed. Unsubstantiated barriers to the process are visited on those seeking resource development opportunities, energy transmission, telecommunications upgrades, monitoring stations, hardened trails and even small driveways. This mismanagement means rural villages with real infrastructure needs – such as Angoon, which needs a new airport and is not on the road system – are faced with insurmountable bureaucratic roadblocks.

National regulations and policies frequently fail to make even the most cursory mention of the hard-won, critical access provisions in ANILCA. Even regulations which initially recognized these provisions are being arbitrarily amended to exclude them. For example, the NPS recently proposed changes to existing regulations to make them apply to "*all operators conducting non-federal oil or gas operations on lands or waters within an NPS unit, regardless of the ownership or jurisdictional status of those lands or waters*." The proposed rule includes a procedure for bringing previously exempt (i.e., Alaskan) operations into compliance. We understand the FWS plans to similarly amend its regulations regarding non-federal oil and gas development within wildlife refuges, which could easily and instantaneously destroy the economic value of many state and private inholdings, including lands granted to Alaska Natives under ANCSA.

At a bare minimum, Alaska sought from Congress, and obtained in ANILCA, the right to connect communities by road, air and sea; but, any capacity to provide for this infrastructure has been blocked by unapologetic indifference infused into federal agency regulations, policies, practices and culture. Forced inflexibility and bottlenecking further hinders our ability to invite economic investment, to explore and develop our resources and provide for a sustainable future. At this time, it is hard to see what guarantees, if any, Alaskans managed to secure in 1980 to accommodate and provide for our nascent infrastructure, resource economy, lifestyles, livelihoods and overwhelming access needs.

## State Management of Fish and Game

Full realization of this fourth consensus point (state management of fish and game on all lands) has been an ongoing challenge with mixed success and failure, but is currently experiencing significant setbacks. Early on, under ANILCA's special provisions for state management and inclusion as a true partner in federal decision-making processes, many successes were realized. Primarily facilitated by decades of operation under a comprehensive Memorandum of Understanding, close communication and cooperation was the rule. It is currently the rare exception.

In ANILCA, Congress required consultation with the Alaska Department of Fish and Game on fish and game matters; however, compliance with this mandate has become entirely superficial. The increasing trend by federal land managers has been to "notify" or provide "positional briefings" to state managers in lieu of meaningful dialogue or efforts to resolve differences. Essentially, a box gets checked to ensure that the letter of the law is met, but not the intent. For instance, the State has been granted no sufficient opportunities to influence or participate in recent and pending federal regulations targeting the methods and means of take in Alaska. These value-based regulations will severely undercut the State's ability to manage fish and wildlife in Alaska, as well as eliminate long-standing opportunities for public participation, destabilize viable subsistence opportunities, and cause disastrous and unsalvageable damage to our presently healthy wildlife populations, biological diversity of species and the security and welfare of Alaska residents who rely on wild foods.

One of these regulations packages was finalized by the NPS in October (effective January 1, 2016) to prohibit certain state-authorized hunting and trapping practices on national preserves and will require the management of wildlife for undefined natural ecological processes that may leave little or no harvestable surplus for humans, including purportedly exempt federally qualified subsistence users. Some hunting practices now prohibited were in place for decades without objection by the NPS, while others were adopted in the past decade at the request of subsistence users to reasonably recognize traditional practices. These now-prohibited state regulations were developed consistent with the evolving and scientific nature of regulated hunting, necessary to respond to new knowledge, technologies, interests and wildlife population research by the states. Wildlife in Alaska is maintained by the State under the sustained yield principle enshrined in the Alaska Constitution, a concept that has successfully rebuilt many of the significantly degraded fish and wildlife populations the State was finally able to manage through statehood.

In addition, the NPS eliminated certain hearings in areas affected by proposed regulations – a requirement under ANILCA – in favor of simply holding meetings near the affected park unit in certain situations. Given the vast size of parks in Alaska, this has the very real likelihood of significantly disenfranchising those with the most at stake to serve some administrative convenience far from the impacted area. The regulations also codify the NPS's interpretation of "consultation" with the State, which will now mean simply advising the State of its decisions prior to or just after taking any action. The FWS is preparing to adopt similar rules and is expected to publish its notice of rulemaking in the coming weeks.

Most notably, when considering how far the NPS has deviated from ANILCA's direction for open coordination and cooperation, these regulations will now allow individual park superintendents to simply publish a notice online each year preempting any state wildlife laws and regulations they feel are inconsistent with broad park policies and values. This notice will not be subject to public comment, meetings or rulemaking, and the listed state regulations will be *retroactively* prohibited and can be extended indefinitely, raising significant due process concerns.

Through these rulemaking efforts, both the NPS and the FWS are unilaterally codifying troubling internal policy directives regarding how fish and wildlife populations are to be managed. The agencies will now require that fish and wildlife be managed for undefined "natural ecological

processes" (parklands) and to "maintain natural functioning ecosystems" (refuges). Basic application of either of these edicts would require eliminating all human interference, including for hunting, fishing, conservation and science. Assurances have been provided that this is not the intent, but it opens a barn door for polarizing anti-consumptive use groups to litigate and force implementation to the most extreme ends of these concepts. CACFA has little doubt this litigation will occur, and soon, nullifying the remaining vestiges of these hard-won compromises and guarantees in ANILCA.

The states are responsible for the conservation and sustainability of fish, wildlife and water having entered the union on equal footing. That responsibility can only be diminished by specific acts of Congress, such as in the Migratory Bird Treaty Act, Marine Mammal Protection Act, and Bald Eagle Protection Act. ANILCA only diminishes Alaska's authority by authorizing federal regulation of harvests for subsistence by rural residents on federal land. Congress specifically stated ANILCA does not diminish the State's ongoing conservation and harvest programs for subsistence and other purposes, except where Congress prohibited it. In contrast, federal agencies are attempting to overrule state programs and harvest authorities based on recent agency interpretations of policy and values, neither of which can trump the law or the will of Congress. These rulemakings should be stopped immediately.

CACFA recommends this Committee engage in meaningful oversight of the systematic elimination of state management authorities regarding fish and wildlife, an established and long-respected province of the many states. This is not just an Alaskan issue but one that will affect all states where hunting is currently allowed in refuges and parklands. For Alaska, in particular, CACFA recommends specific language be incorporated in pending appropriation legislation to prohibit any funds from being used to implement, administer or enforce the final regulations on Hunting and Trapping on National Preserves in Alaska (80 FED. REG. 64325, October 23, 2015) or to finalize the pending proposed regulations on Non-Subsistence Take of Wildlife and Public Participation and Closure Procedures on National Wildlife Refuges in Alaska. CACFA views this as an essential action needed to halt the unlawful preemption of the states' authority to manage fish and wildlife within their borders.

## IV. Entrenched and Pernicious Interpretations of Statutory Text

While it is frustrating to encounter and be forced to repeatedly challenge inaccurate and harmful agency interpretations of federal law, it is near impossible once those interpretations are remotely sanctioned by highly deferential judicial review. The following sections explore two recent examples of disputes where two of ANILCA's most cherished "no more" clauses were effectively nullified by the courts. Since agencies must adhere to binding judgements, even when prior interpretations are later understood to be erroneous, a legislative fix is the simplest and possibly the only remedy. And since both judgements below are based on a single word or phrase, the legislative fix itself might also be a simple matter of clarification.

### Section 103(c): Solely Applicable

In 1997, the NPS revised its national regulations to ignore ANILCA Section 103(c), which states that non-federal land is not part of any conservation system unit established by ANILCA and that associated management regulations do not apply to state and private inholdings (including state-owned navigable waters). From 1980 through 1996, the agency had respected ANILCA's prohibition against applying "*regulations applicable solely to public lands within such units*" to state and private lands (NB: ANILCA Section 102 defines "public lands" as federally owned lands). The NPS's reversal was predicated almost entirely on the word "*solely*," arguing that national regulations apply nationwide, not "*solely*" to the lands within a particular conservation system unit.

Eight years ago, citing the amended regulations, NPS officials threatened an Alaskan hunter, John Sturgeon, with a criminal citation for operating his personal hovercraft on state-owned lands within Yukon-Charley Rivers National Preserve. Not long after that, the NPS required the Alaska Department of Fish and Game to obtain a research permit to conduct salmon research on state-owned

lands within Katmai National Preserve. Under its unilaterally established and self-administered regulatory authority, the NPS can oversee, limit and even refuse access to state and private lands by those with a right to be there, including state regulators, private citizens and licensees, throughout the U.S. In Alaska, this includes the ability to prohibit access to and use of millions of acres of lands conveyed to Alaska Natives under ANCSA, a settlement of lands intended to allow Alaska's Native people to provide for their economic future. Not surprisingly, most if not all ANCSA Corporations have been amici curiae in John Sturgeon's ongoing legal challenge targeting this assumed authority.

To be fair, each of these actions was arguably required by the amended regulations, and many other actions *not* taken may also have been required, simply because the NPS had interpreted Section 103(c) into non-existence. And, since Section 103(c) applies to all conservation system units in Alaska, the NPS's interpretation could be extended to national wildlife refuges, national forest monuments, wild and scenic rivers and all other units.

John Sturgeon's case is currently before the U.S. Supreme Court. Should lower court decisions be upheld, a true parade of absurdities is inevitable. Federal agencies could be legally required to enforce all national regulations on all state and private lands within the external boundaries of the conservation system units they manage, and the many protections ANILCA put into place for activities and uses within conservation system units may not apply. As an extreme but possible example, if some national implementation of the Wilderness Act prohibits anything motorized in designated wilderness, the people who live in designated wilderness areas in Alaska would have to park their snowmachine *in the wilderness area* because it could not be used on their private property.

In 1959, Congress gave all Alaskans millions of acres and a promise – that we could use those lands in a sovereign capacity to support our economy and maintain our honored traditions and livelihoods. As our territorial delegate, Bob Bartlett, put it: "*No area can make proper headway unless it has a land base*." 104 CONG. REC. 9514. Ironically, statehood was also prompted in large part by the remote and generally uninformed territorial management of Alaska's resources, particularly when servicing a national agenda at our irrecoverable expense.

Then, in 1971, Congress gave Native Alaskans millions of acres and a promise – that they could exercise some recognizable dominion on at least a small portion of the lands they had cared for and lived on for generations. Since territorial days, Congress had endeavored to protect Native use and occupancy, but ANCSA was the follow-through for clear title that had been promised as far back as the Alaska Organic Act of 1884.

And finally, in 1980, Congress gave all Americans millions of acres of parklands and gave Alaskans a promise – that, even though parks and preserves would be managed pursuant to System-wide and unit-specific rules, this management authority could not be used on state and private lands. That is what Section 103(c) means; it says non-federally owned lands are not part of the park. This was the savings clause for all the promises that went before (e.g., continuity of the "Alaskan lifestyle," the sovereign rights of the State to manage its lands and resources, including submerged lands and fish and game) and was meant to be the leverage we might need to safeguard our property interests, as well as our social and economic future, once we were surrounded by massive conservation areas.

To negate everything provided at statehood and through ANCSA and ANILCA based on the presence of a single word is beyond the pale. The transformative domino effect in completely upending how we all understood Section 103(c) to apply has not fully revealed itself yet, but mass confusion is a certainty, as it has informed the way uses have been permitted, regulations have been worded, projects have been authorized, etc., for 35 years. Since the proper application of Section 103(c) is so patently obvious to us, we never imagined it would be necessary to ask this, but, should resolution of the Sturgeon case fail to provide a remedy, CACFA asks the Committee to consider clarifying the original intent to exclude non-federally owned lands from conservation system unit boundaries.

## Section 1326(b): Single Purpose Study

In March 2001, one of many debates regarding planning and roadless areas in the Tongass National Forest culminated in a brief, unpublished order on a pre-trial motion that included a terse, tacked-on finding regarding one of many statutory claims which, somehow, completely obliterated one of ANILCA's cherished promises: that the rigorous debates of the 1970s were over, and that Congress' careful balance between the national interest in conservation and Alaska's social and economic needs should not be lightly disturbed. The unanticipated loss of this foundational premise had such obscure beginnings that agencies taking advantage of it rarely even cite to the opinion (and those that do, without exception, cite to its companion case instead).

The case was Alaska Forest Ass'n v. U.S. Dep't of Agriculture, No. J99-013 CV (D.C. Alaska March 30, 2001) and one of the legal provisions at issue was ANILCA Section 1326(b), which states that

> *[n]o further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit . . . or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.*

Plaintiffs argued that the U.S. Forest Service's study and recommendation of wild and scenic rivers in the Tongass Land Management Plan revision "*violates this 'no more' clause*." The district court summarily rejected this argument, finding that, because the Service had performed the river study for the purpose of revising a general land management plan, it had not done so for "*the single purpose*" of considering the establishment of a conservation system unit.

There was no discussion of, for example, an earlier 9th Circuit decision which found that: "*As a compromise between logging and environmental interests, the Alaska Lands Act was to be the final word on what land in Alaska was to remain wilderness and what land was to be open to further development*." City of Tenakee Springs v. Block, 778 F.2d 1402, 1405 (9th Cir. 1985). There was no discussion of what the court's finding would mean in the context of the statute, or even as a matter of common sense. All any agency need do to side-step Section 1326(b) is include one other thing in its study, or simply incorporate its study into another study, management plan or decision document, which is exactly what has happened, most recently in the Arctic National Wildlife Refuge.

As with Section 103(c), federal land managers have begun routinely ignoring Section 1326(b), a key provision to relieve Alaskans from the specter of additional designations by agency fiat. This is done most commonly by conducting wilderness and wild and scenic river reviews in conjunction with updating large-scale management plans. And, as with Section 103(c), this reversal is justified based on one small part of the original provision: the phrase "*single purpose*." Agencies claim that, because the studies are conducted in conjunction with management plan revisions, they are not conducted "*for the single purpose*" of establishing a new conservation system unit. Additionally, and even more harmful to Alaskan interests, areas and rivers reviewed and/or recommended for designation are protectively managed until Congress takes action, or indefinitely if Congress does not act. Some lands in the U.S. have had this type of *de facto* designation over them for decades.

As just one example, in accordance with the 1993 Settlement Agreement for American Rivers v. Lujan, the BLM has been conducting agency-identified (not Congressionally-directed) wild and scenic river reviews in all of its land use plans in Alaska. Even the recent planning effort for the National Petroleum Reserve included a review, which was not required by the settlement. The number of rivers involved is astonishing. For example, the currently ongoing plan for the Bering Sea-Western Interior area evaluated 255 waterways and found 22 of them met the criteria for eligibility.

Notwithstanding certain obtuse judicial orders, CACFA believes these and other similar reviews are patently illegal. Wild and scenic rivers and wilderness areas are conservation system units, and Section 1326(b) prohibits studies which consider the establishment of conservation system units

unless authorized by ANILCA or another Act of Congress. Since the reviews authorized by ANILCA have already been completed, unless Congress has authorized these reviews, they all fall entirely within this prohibition. The consideration of new conservation system units *is their purpose*.

Federal agencies have also interpreted Section 5(d)(1) of the Wild and Scenic Rivers Act as providing the authority to conduct "agency-identified" reviews, but Section 1326(b) requires Congressional authorization. Even worse, internal agency policies ensure that any rivers which are merely *studied* for potential recommendation *are protected indefinitely*. For instance, BLM policy directs staff to manage and protect both eligible (merely studied) and suitable (meet criteria for recommended designation) rivers. Compare this to the Wild and Scenic River Act itself, which only provides direction to protect "*Congressionally-directed*" rivers, and only while Congress deliberates on agency recommendations. Even if Section 1326(b) can be interpreted away, there is no statutory provision authorizing interim protection to all studied rivers, especially not "agency-identified" study rivers.

CACFA recommends this Committee consider clarifying the original intent to prohibit further reviews for the establishment of conservation system units in Alaska, which may include an explicit exemption from Section 5(d)(1) of the Wild and Scenic Rivers Act and the defunding or preemption of any attempt to either study lands and waters in Alaska for designation, in any context, or to manage areas based on suitability or eligibility without specific authorization from Congress.

## V. Public Use Management and Processes

A large number of ANILCA's compromise guarantees provided for "reasonable regulations" by the respective land manager (typically the Secretary of the Interior). Many of those provisions were implemented through rulemaking in the 1980s, with the benefit of multiple cooperative mechanisms, like the Alaska Land Use Council, and also an informed and contemporaneous understanding of the Congressional intent in ANILCA. Some regulations were never developed, including implementation of subsistence access provisions on BLM-administered lands and Title XI access provisions in areas managed by the U.S. Department of Agriculture, though the majority of management actions and land use plans still took those provisions into account.

Recently, however, those regulations have been either amended, to the detriment of both the public and Congressional intent, misinterpreted or flatly ignored in federal management actions, or effectively overridden by internal (and frequently national) policies and directives. Two relatively insidious trends have been to amend or ignore the "public participation" aspects in these regulations, to make it easier to unilaterally manage uses without accountability, and the omission or substantive revision of these regulations through implementing policies and planning documents. Specific examples are numerous and convoluted, so the following sections focus on two systemic contributors to this arcane affront on the compromises and guarantees Congress intended in enacting ANILCA.

### The Age of Policy

Statutory authorizations for federal agencies intentionally include broad value statements to establish an all-encompassing agency mission and inspire a foundational management ethic. Unfortunately, this vague statutory language, and related language in implementing regulations, has been effectively co-opted into strict, highly detailed, thoroughly unaccountable internal policy documents that result in verifiable legal and procedural consequences to the regulated public.

Some policies are not even shared with the public, let alone given anything close to a public review opportunity. Some are implemented while still in "draft" form. A good recent example would be the BLM's "Planning 2.0" policy, which is both being implemented prior to finalization *and* has not been shared with the public. Some are not implemented at all; usually older policies where the public is told the instructions are "discretionary." Sometimes that can be a good thing and other times not, like when the FWS abandoned its policy against wilderness reviews during the Arctic Refuge plan revision, inexplicably and without notice, based on an internal 2010 memorandum. Most shocking,

though, are policies so far removed from the original statutory language that it is laughable to call them a natural outgrowth, let alone a justifiable "implementation."

Even noncontroversial provisions in ANILCA have been marginalized through regional and national policies. For example, Congress provided for Alaska refuges to be "open until closed," the reverse of refuges in other states where all uses must be authorized and can be limited at-will. Closing a refuge to public uses in Alaska has a strict public process, generally involving notice and a public hearing. This provision is profoundly important, particularly considering the sheer size of Alaska refuges and long histories of traditional uses, but has created serious tensions with national policies in the past – most notably the Compatibility Policy (603 FW 2), which included unique direction for Alaska and under which managers have generally sided with ANILCA where no direction was specified.

That said, most national policies make no provisions for ANILCA, including ones that implicate its many and varied requirements. For example, the FWS has adopted closure plans in the event of a government shutdown, including one in September of this year. In verbal conversations with the Alaska Department of Fish & Game, the FWS said all hunting would remain open; however, the national plan would close every refuge in Alaska to all hunting except federally qualified subsistence hunters and certain waterfowl harvests. The FWS justifies this action by asserting that any closure would be on an emergency basis and thus would not be subject to legal requirements for notice and a hearing; however, this supposed "emergency" *has a plan*. ANILCA is particularly clear that, if they are going to rely on a plan, that plan should be adopted through the regulatory process.

CACFA is seriously concerned about the persistence of this approach to managing shutdowns. This brash defiance of ANILCA provisions has serious consequences for Alaskans. In addition to the impacts on guides, assistant guides, air taxi operators, transporters, and their clients, rural residents suffer by loss of employment and the use of lawfully donated meat to feed their families. Residents in communities near or within refuges are subjected to even more uncertainty – under what circumstances would they even be allowed to leave? These are things national, single-focus, one-size-fits-all directives frequently fail to take into account, circumventing the very special provisions and compromises in ANILCA which must be enforced before agreeing to live among these massive conservation units becomes the worst mistake Alaskans ever made.

## Landscape-Level Planning

The whole concept of a "landscape-level" approach to land management is fairly recent, taking shape primarily through guidance and memoranda issued by the current administration. Essentially, land use planning, policies and decision-making are to take into account regional concerns and ecosystems without regard for ownership. Since it appears largely intended to address management issues prompted by climate change, and because of our diverse land ownership mosaic and large, contiguous blocks of federal land, particular focus has been placed on Alaska in implementing this approach. Unfortunately, the associated directives and policies are not coming from Alaska, and lack even a rudimentary understanding of ANILCA or the unique Alaska context. ANILCA and its implementing regulations do not contemplate or provide for "landscape-level" management, and vice versa. This leaves Alaskans, and regional federal agency staff, in a difficult position.

Dividing the state into large, landscape-level planning areas means one plan could conceivably govern the management of an area equal in size to several states. This provides agencies with the capacity to apply national policies to the largest possible area, and to influence the management of non-federal lands. Further, developing meaningful comments on these highly complex plans is an enormous undertaking for the State and the public, who may only be directly impacted by one discrete area. During the initial implementation of ANILCA's planning provisions in the 1980s, areas had individual, targeted plans with significant local stakeholder engagement. That dynamic is gone.

Even though some "step-down" plans are scheduled for individual areas and public uses, those plans will still be servient to the larger plans. Alaskans who have their lives and livelihoods intimately impacted by one or many of these areas must review and comment on thousands of pages of planning documents, along with everyone else, trying to capture everything and hoping to be heard. Promising them a step-down plan with local focus is meaningless with these larger plans calling the shots.

While CACFA remains vigilant in reviewing and commenting on these massive and multi-faceted land use plans, it is next to impossible to capably track all the interpretations of laws and evolution of policies being brought to bear in their creation and effect. While the "landscape-level" approach could conceivably translate into efficiencies, cooperation and responsible, comprehensive resource management, its present roll-out does not inspire much confidence in that result. Potential safeguards, however, could be realized through the collaborative development of regional ANILCA guidance, suggested above. This could help to incorporate a common and consistent framework for implementing ANILCA in a landscape-level framework, which could resolve a number of issues.

## VI. Summary

CACFA truly appreciates that the Committee is considering the many challenges associated with the implementation of ANILCA, as well as the possibility of amendments to the law to address those challenges. As you can see, from this small sampling, it is quite an undertaking. The intent of our testimony today, however, is to simply highlight the need for a return to the compromise, not an attempt to see it revisited. ANILCA was a carefully crafted, heavily debated, and intensely deliberate sorting of various needs and interests, impossible to repeat and delicate to disturb. Everybody walked away with something and no one walked away with everything.

Luckily, Alaska is big enough for everything – for parks, for refuges, for mining, for oil and gas, for hunting, for sanctuary, for cities, for solitude, for embracing the past, for dreaming of the future. We have a knowledgeable and passionate population that sees the big picture, knows things others have long forgotten, befriends their ideological opposites, and wakes up every day to wondrous beauty and bounty. No laboratory of democracy is so rich with liberties, diversity, compromise and interconnectedness, to each other and the land, on both of which we dearly depend.

ANILCA may be a federal law but it has completely transformed the lives of Alaskans, many of whom greatly rely on and invest in its protection of their interests, pursuits and livelihoods. Attacks on the "compromise" can be cyclical and transient, bending with the wants, needs and ideations of the Presidential administration and the composition of Congress. But ANILCA was intended to be our solid touchstone, and finding our interests and futures dependent on political frameworks is exhausting, unsustainable and persists to our mutual detriment. Things have strayed so far from the statute that made it through the "d2 debates," and it will be a huge challenge to find our way back. But we can, particularly by remembering and trusting in what we came together to accomplish on December 2, 1980. Thank you for this opportunity to testify and for your consideration.