STATE OF ALASKA

ANILCA IMPLEMENTATION PROGRAM

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Marcia Blaszak
Regional Director
National Park Service
240 West 5th Avenue
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Dear Ms. Blaszak:

We commend the time and effort the National Park Service has devoted to preparation of the "User's Guide to Accessing Inholdings in a National Park Service Area in Alaska" (Guide). This is the first time that a federal agency has attempted to lay out a process, pursuant to ANILCA, to ensure that holders of non-federal land and other valid occupants within or effectively surrounded by conservation system units have adequate and feasible access to their inholdings. We also appreciate the Service's request for substantive public input prior to final decisions on the Guide. Public comment on permit requirements, fee structures, and other aspects of the process to provide the statutorily protected access are invaluable in evaluating the many complex considerations. With the aid of extensive public involvement, we expect that a final policy can be achieved that meets the intent of the law and responds to the needs of Alaskans. State agencies are committed to working with the Service to this end.

As you know, the Guide was developed in response to a letter from Governor Frank Murkowski to Secretary of the Interior Gale Norton, dated April 15, 2004. In his letter, the Governor noted "*compelling reasons to provide further direction to Park Service personnel to guide their implementation of the access provision of ANILCA.*" The Governor's letter contained nine bullet points, which state agencies used as a framework to provide comment on the Guide. Each of these is articulated below, along with discussion and comment.

The State's comments are influenced by several factors. First, the State of Alaska itself is a major inholder. Most, if not all, national park system units in Alaska contain state land, including the beds of state-owned navigable waterways. We have a direct interest in ensuring that state managers and the public that use state land continue to have access to these public lands and resources for activities including hunting, fishing and general recreation, as well as for economic and other purposes. Second, as fellow public land managers, we recognize that the National Park Service has a substantial interest in how parklands are used and that ANILCA 1110(b) grants the Service authority to promulgate "reasonable regulations... to protect the natural and other values of such lands." Third, the State is compelled to protect the substantial interests of other park inholders, including mining claim holders, individual owners of pre-

ANILCA private parcels, native corporation landowners, native allotments, and holders of pre-ANILCA cabins under permit, among others. Honoring ANILCA's commitment to existing and future access to inholdings is critical to the well being and economic viability of individuals, families, and businesses throughout the state.

The State's views on these issues are longstanding, going back to the years leading up to passage of ANILCA and into the early days of implementation. For example, a November 14, 1983 letter signed by Governor Bill Sheffield in response to the draft Department of the Interior regulations implementing ANILCA Title XI is as relevant today as it was then. Regarding Section 1110(b), Governor Sheffield commented:

> *The legal basis for gaining access to an inholding is significantly different than that for granting a TUS right-of-way. The inholder has a guaranteed right of access, and the process should focus on the government's responsibility to accommodate the inholder's legitimate needs while providing a reasonable level of protection for the particular CSU involved.*

Given the breadth of issues raised by the State, described below, and the public during this public review period, we recommend the Service conduct additional consultation with affected stakeholders and generate a new draft document for additional public review.

Criteria from Governor Murkowski's April 2004 letter, followed by discussion and comment:

- *An articulation of when and what type of access authorization may be required and a specification of required information in the case of a formal permit.*

Both park managers and the public need to clearly understand that providing "adequate and feasible access" to inholdings is not discretionary. Such access is a right guaranteed by ANILCA. When generally allowed methods of access are not "adequate and feasible" for access to inholdings, we concur with the Service that some form of formal documentation of this right of access is desirable for both the Service and the inholder. Documentation is important to assure that future managers do not take away or unduly diminish that right. We have researched the legislative and regulatory history of permit requirements pursuant to Section 1110(b) and believe the Service has some flexibility to modify or relax the procedures to establish adequate and feasible access to inholdings.

We therefore recommend a full reevaluation of the procedures outlined in the Guide. Especially for access to inholdings that already exists, we strongly urge the Service to evaluate ways to quickly and simply provide inholders with the security of a permanent authorization. The Guide tends to focus on future needs for newly constructed access across parklands that have not yet been disturbed. It does not adequately address the needs of those with access established many years ago under common law that continues to be used without harm to park resources. Treating existing access differently, especially routes and methods established prior to ANILCA and other statutes, is also consistent with Section 1109 of

ANILCA: "Nothing in this title shall be construed to adversely affect any valid existing right of access."

Comments received from individuals and groups offer a variety of suggested changes in response to the draft Guide. We strongly encourage the Service to meet further with stakeholders, including the State, to explore solutions that resolve the issues. Goals of this process should include:

- maximum deference to the inholder's identification of adequate and feasible access,
- minimum administrative burden on the inholder and the Service;
- guidelines for the administrator's use of discretion;
- clarification that "adequate and feasible" access cannot be denied;
- a substantial role for inholders in determining how to protect park resources from the impacts of access;
- recognition that access rights are permanent;
- ability to conduct minimum impact maintenance without further approval; and
- ability to transfer property without requiring administrative "approval."

The State continues to favor working within the flexibility granted in existing regulations to achieve solutions that do not require new regulations. However, as we reviewed the draft policy, it became apparent that existing Alaska-specific or national regulations may limit the Service's ability to implement solutions that arise from public comment, further analysis, and stakeholder discussions. In this event, we offer to work cooperatively with the Service to pursue rulemaking to amend current regulatory processes if necessary to achieve the desired solution.

We request the Guide be expanded to address what happens if access to an inholding relies on methods generally allowed under Section 1110(a) and that public access is subsequently restricted by regulation. For example, if airplane landings by the general public are restricted by regulation under ANILCA Section 1110(a) because of public safety concerns in a high use area, or to prevent resource damage, how will this affect a local inholder who has historically relied on airplanes to reach their land? We also request clarification that the Service will work with such inholders to ensure that the regulation will not apply to them if this is the only adequate and feasible access. If alternate feasible access is available, the Service should work with the inholder to document and enable continued access under 1110(b).

Even though the Guide correctly defines "inholding," the discussion and examples tend to emphasize access to individual private parcels such as old homesteads and mining claims. We request inclusion of additional examples such as access to general state land for subsistence purposes and access across parkland to state-owned waterways. It would also be helpful to include an example of an inholding outside, but "effectively surrounded," by park boundaries. The legislative history contains examples that could be included for further explanation of Congressional intent in the Guide.

The State also requests that the Guide explicitly address state administrative access to state land. State agency access for management and administrative purposes (e.g., fish and wildlife management, search and rescue, law enforcement) should not be encumbered by

policies in the Guide. Such access is already addressed in other regulations, documents and forums, such as the Master Memorandum of Understanding between the National Park Service and the Alaska Department of Fish and Game.

- *A standardized procedure specifically designed to process applications for access to inholdings (as opposed to access requested under other provisions of ANILCA or other federal laws).*

In the 1983 letter from Governor Sheffield, the State objected to the use of Standard Form 299 for inholders:

> *The State objects to requiring inholders to use the consolidated application form for TUS applications. The State proposes that a separate, simplified form be used for processing of an inholder's access needs.*
>
> *There is nothing in Title XI or legislative history which suggests that the TUS application process is to be mixed with ensuring that the access rights of inholders are satisfied. The State is concerned that efforts be taken to avoid confusing the relationship between the separate types of access issues.* ***The consolidated application form should be simplified since a lesser, different level of detail is appropriate for inholders as compared to a TUS applicant.*** [emphasis added]

We continue to object to its use without modification. This form was designed to address all types of access granted under Title XI of ANILCA, including major pipelines, highways and utility corridors. Such a one-size-fits all application is far more complex and burdensome than necessary to address most needs for access to inholdings, especially when the access is already established. We urge the Service to offer a simpler approach (e.g., a modified form) to document existing access to inholdings that are more consistent with statutory and regulatory intent. Two Preamble responses to comments in the 1986 final rulemaking at 43 CFR Part 36 recognize the need for this approach:

> *Several commenters requested a simpler application form for access to inholdings than the SF 299 currently being used. Because of the great variety in size and nature of inholdings, the variety of potential access needs, and the potential range of environmental consequences, the agencies will continue to use SF 299 because it is adaptable to a variety of situations. However,* ***the information required for each application should be tailored by the applicant and the applicable Federal agency. This can best be accomplished through a preapplication meeting.*** [emphasis added]
>
> *A number of commenters stated in a variety of ways that the procedures for application processing and NEPA compliance should be more specifically tailored to the needs of inholders. The procedures for the application processing and NEPA compliance provided in the proposed regulations have been retained.... However, agency processing can be tailored to the complexity of the proposal on a case-by-case basis. Applications will all be filed, reviewed and processed in the same manner as under §§36.4, 36.5 and 36.6.* ***Agencies with frequent applications can however establish internal procedures***

involving shorter time periods or other means of handling applications that involve minor degrees of access and have little impact on the environment. [emphasis added]

The Guide should take the opportunity to explain for the manager as well as the applicant the intended degree of flexibility in the final regulations regarding use of this form.

The State supports the use of Section 1110(b) to authorize utilities (such as telephone and water lines) that directly serve inholdings (in contrast to the "transportation and utility" application process spelled out elsewhere in 43 CFR Part 36).

RS 2477 Rights-of-Way

The Guide currently is confusing about how RS 2477 rights-of-way (ROW) are addressed. The Appendix contains a detailed history of the issue, but it is not clear in the Guide itself how this history affects access to inholdings from the perspective of the inholder. The State clearly asserts that these ROW are valid; however, we understand that the Service in Alaska is constrained from taking administrative actions to acknowledge these ROWs as fallout from a 1996 Congressional "moratorium" on related federal regulatory actions. The moratorium prevents the Department of the Interior from implementing regulations related to RS 2477 ROWs unless expressly authorized by Congress. Hence landowners that rely on RS 2477 routes are unfortunately caught in the middle of a much larger state/federal conflict playing out in another arena that has yet to be resolved.

There are undoubtedly many instances where an inholder will document a desire to use or improve 1110(b) access across parkland that obviously follows a visible historic track on the ground. If that track or route is indeed the best and least damaging way to access an inholding, then we expect the Service will authorize its use under ANILCA Section 1110(b) regardless of actual or potential RS 2477 status. To make improvements on a state-asserted RS 2477 ROW, the State must also authorize any groundbreaking construction or maintenance. Therefore, where questions of ROW validity are involved, the Guide needs to clarify that all agencies with jurisdiction affected by the dispute must be involved in separate but parallel authorization processes if new construction or maintenance will damage soils and vegetation. Until the larger questions about the validity of RS 2477 ROWs are resolved at the federal level, the State is committed to working with the National Park Service to facilitate reasonable implementation of 1110(b) access to inholdings on a case-by-case basis to avoid abandoning inholders in legal limbo.

- *A precise timeline for the NPS' processing of an application.*

The Guide outlines the general ANILCA Title XI timeframe for access applications based on the 43 CFR Part 36 regulations. Consistent with the State's position in 1983, we continue to request consideration of a simpler and shorter timeframe (as supported by the above Preamble language) to document access to inholdings that are already in place. In most cases, the Service could administratively process the documentation for existing access within a matter of weeks or months. We also recommend that the Service allow a generous time period (at least one year) after finalizing any new policy or procedures to get the word

out. This will allow inholders with existing access adequate opportunities to take the initiative to work with the Service to document and formalize their right of access.

- *Further guidance concerning compliance with the National Environmental Policy Act (NEPA), including an articulation of situations when no environmental impact statement or environmental assessment is required. This should include a categorical exclusion for de minimus situations involving access to inholdings (for example, access to a single family dwelling or small business).*

In the final Guide, all quotations of the Section 1110(b) statutory provision for access to inholdings need to include the significant introductory phrase "*Notwithstanding any other provisions of this Act or other law,... .*" Congress gave the administering agency discretion to adopt "*reasonable regulations*" to implement this section, but limited that discretion with direction that access "shall be given by the *Secretary"* to valid occupants. The "*notwithstanding . . .*" phrase clarifies that requirements of other laws cannot be used to override the substantive grant of access provided by this section.

The tension between the statute's discretionary authority ("*reasonable regulations*") and the Congressional limit on that authority ("*notwithstanding"*) creates confusion for managers accustomed to addressing access through other statutes and regulations that implement other sections in ANILCA. The State urges clarification of this legal distinction in the Guide.

Congress included specific references to the National Environmental Policy Act (NEPA) in the Transportation and Utility System sections of Title XI but notably omitted application of NEPA in providing access under 1110(b). The State asserts that the omission of a NEPA reference in combination with the "*Notwithstanding . . .*" language exempts the required use of NEPA in implementation of Section 1110(b). Congress intended to spare the agencies and valid occupants the burden of going through the full NEPA process while still conducting appropriate environmental analyses. This legal distinction is important because inadequate NEPA compliance is frequently a basis for challenging agency actions in federal court and could be used to forestall Congress' clear intent to provide an access grant to valid occupants. For example, current NEPA process requires consideration of the "no action" alternative even where there is no statutory option for "no action." Including this required alternative in NEPA analysis for access to inholdings has the theoretical potential to administratively defeat the statutory intent of ANILCA.

We recognize, however, that the agency must conduct and document a suitable environmental analysis to guide the exercise of discretion and create an appropriate administrative record. We also recognize that some access projects will require non-Park Service federal authorizations that may require a NEPA component, such as a Corps of Engineer's permit when wetlands are involved. We therefore request the Guide be revised to limit the application of NEPA to the maximum extent practicable.

If it is ultimately determined that NEPA does apply in some instances, we urge maximum use of categorical exclusions. If proposed access routes fail to qualify for a categorical exclusion, we also encourage use of programmatic NEPA compliance (that evaluates

multiple access routes in one analysis document), and/or general permit(s) to streamline the process of evaluating and documenting inholder access.

- *Further guidance concerning what constitutes reasonable stipulations governing access.*

Access that is adequate and feasible for one inholding may not be adequate and feasible for the next inholding. A one-size-fits all approach is, therefore, unlikely to be successful. By the same token, sideboards and criteria that can be applied evenhandedly to avoid abuse of that discretion must accompany necessary administrative discretion. Ultimately each case must pass the reasonableness test, so we urge the development of a commonly understood process or criteria to determine what is reasonable.

Examples of factors that influence reasonable discretion:
- the landowner's identification of the access need, including for "economic and other purposes;"
- the relative impacts of alternatives on park resources;
- use by multiple inholders or the public on similar or overlapping access routes; and
- administrative actions appropriate to designate and manage a park road or trail.

Examples of factors that have no relevance in discretionary decision making:
- commercial vs. non-commercial use;
- designations as Wilderness or recommendations for Wilderness designation;
- history of first use (e.g. the 1110(b) access right is not a "grandfather" right); and
- absence of previous authorizations.

The State urges the Service to give deference to inholding access requests unless a reasonably viable alternative is available that substantially reduces the impact on park resources. While the decision about what is reasonable ultimately rests with the Service, a timely and meaningful appeal process must be in place and clearly explained in the Guide to address disagreements. The appeal process identified in 43 CFR Part 36 regulations may need modification to be more flexible and fully responsive the needs of inholders.

We also request the Guide clarify how trespass and unauthorized use will be addressed. While the landowner is responsible for posting private property and contacting the State Troopers to report trespass on private land, the Service is responsible for managing public uses on the portions of the access route that cross parklands. The landowner should not be held accountable for damage to parklands caused by unauthorized public use of the inholding access route.

To reduce the potential for problematic decisions and appeals, we appreciate and further encourage the Service's emphasis on informal communication between park staff and inholders during preapplication discussions and before taking formal action. Such discussions offer the best opportunity to avoid or resolve potential misunderstandings and expedite a mutually acceptable outcome.

- *A presumption in favor of the access route requested by the applicant, unless the NPS can fully justify the necessity to consider alternative routes.*

We recognize that the Service, as manager of the public land affected by the access, has the ability to reasonably protect park resources. Congress intended that, wherever possible, the inholder should have maximum flexibility to choose routes and methods of access that best address their on-the-ground needs. The burden to identify potential problems with a specific access proposal falls to the administrator. This intent is acknowledged in two passages in the Preamble to the June 17, 1981, 36 CFR Part 13 Final Rule:

> *Several commenters objected to the intimation that the National Park Service would determine what is a "reasonable use or development" of an inholding. The §13.1(a) definition has been revised to clarify that* ***the inholder determines the desired land use or development, and the Service provides reasonable access to meet the desired land use.*** [emphasis added]

> *The definition of "adequate and feasible access" in §13.1(a) has been revised to* ***clarify that the inholder determines the desired land use or development*** *(removing the suggestion that the Service determines "reasonable access to meet the desired land use.)* [emphasis added]

When new construction is sought, we recommend the Service consider developing and making available technical information regarding effective route selection criteria and construction standards that would help inholders identify and propose ways to develop new access while minimizing impacts to park resources.

- *A quick and simple administrative appeals process, including the establishment of a body in Alaska to hear access related appeals.*

Whenever possible, initial decisions should be made at the level of the park superintendent to increase opportunity for local dialogue, with appeals to the Regional Director. As noted in the Guide, inholders may seek a reconsideration of decisions made by the Regional Director. From there, it would be helpful to clarify that an inholder always has the ability to seek additional redress from the Director of the National Park Service and even the Secretary of the Interior. By the same token, the inholder should have the option of using the federal courts anytime after the Regional Director's decision or reconsideration.

We suggest that the Service consult the three other federal land managers with responsibility to implement Section 1110(b) when decisions appear to trigger larger questions about the intent of ANILCA and to ensure against potential individual agency institutional bias. The U.S. Fish and Wildlife Service, U.S. Forest Service, and the Bureau of Land Management all manage lands with inholdings pursuant to 1110(b).

The Guide should clarify that the Service (or the inholder) may initiate consultation with non-Service expertise on individual access authorizations, or to assist with appeals. For

example, that State has available expertise regarding wildlife resources and movements, anadromous stream and other habitat values, and state land and transportation plans.

- *A minimal application and processing fee, if any. In our opinion, the fee requirement should be very small or eliminated all together in cases involving access to inholdings, especially where the route has been used previously.*

Consistent with Governor Murkowski's letter, the State has consistently opposed required fees for access to inholdings. When the 43 CFR Part 36 regulations implementing Title XI were first proposed in 1983, applications for access to inholdings were exempted from fees. The State supported this approach. By 1986, however, the beginning of the subsequent trend to charge fees was in full swing and the final regulations incorporated fees into the final regulations as explained in the Preamble:

> *Comments were specifically invited on proposed regulation § 36.10(h) which would have excluded applicants for access to inholdings from paying reasonable fees, charges, or rent. . . .* ***Upon further review, we find it would be inappropriate to exclude applicants for access to inholdings from paying reasonable fees****. Nearly all recent legislation authorizing the granting of a right-of-way across Federal lands has required, at least, a payment for the use of Federal lands. Congress has also directed that, where identifiable, the user of public lands or resources pay a reasonable amount for such use. This policy is applicable to inholders. However, this policy should not result in unfair charges.* [emphasis added]

The State strongly asserts that this decision was made in error, since the trend to charge fees developed well after passage of ANILCA (and after draft 1983 regulations that excluded fees). Furthermore, other regulations and policies grant the Service authority to waive fees.

We object to the complex and potentially burdensome fee structure, especially for access that already exists. The Guide lays out four possible fee types, along with an ability to reduce or waive the fees for cause. The proposal leaves too much room for abuse of discretion, which could directly or indirectly prevent access to inholdings. In particular, the State objects to the monitoring fee and the ongoing land rental fee.

We strongly object to a fee structure based on the proposed land use. ANILCA does not provide any basis for a different fee structure for commercial and non-commercial use, since adequate and feasible access specifically encompasses a full range of "economic and other purposes." Fees will be difficult to administer and will do little to support more recent national goals related to cost recovery.

Requiring fees for existing access is particularly inappropriate. Many, if not most, access routes to inholdings have existed for years, often pre-dating park unit designations, and little work should be necessary to document them. At a minimum, we recommend the Service adopt a policy to waive all fees for continued access that has already been established. The State would be willing to support a regulatory change if necessary to reduce this unreasonable burden.

- *A requirement that visits by Park Service personnel to an inholder's residence, as well as low level aircraft overflights, be duly noticed in advance and that such personnel avoid behavior that could alarm livestock or be interpreted as intimidating or threatening.*

  The document does not adequately address this concern. Unless necessary for public safety or other emergency purposes, the policy should clarify the Service will respect the privacy of landowners – especially in remote locations. By the same token, we recognize the Service's continued need to monitor parklands utilized for access to the inholdings.

Thank you for the opportunity to review the Guide. We look forward to working with the Service and other stakeholders to resolve the many issues that have been identified. If you have any questions about these comments, please contact me.

Sincerely,

Sally Gibert
State ANILCA Program Coordinator