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Public Comments Processing
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U.S. Fish and Wildlife Service
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To whom it may concern:

The State of Alaska reviewed the February 24, 2014 Advanced Notice of Proposed Rulemaking and Notice of Intent to prepare a programmatic environmental impact statement (PEIS) regarding management of activities associated with nonfederal oil and gas development occurring on lands and waters of the National Wildlife Refuge System. The following comments represent the consolidated views of the State's resource agencies.

The notice indicates the proposed rule is intended to clarify and expand existing regulations at 50 CFR 29.32 and defines non-federal oil and gas development as "*oil and gas activities associated with any private, state, or tribally owned mineral interest where the surface estate is administered by the Service as part of the Refuge System*."

Alaska contains a complex patchwork of land ownership affected by targeted legislation (e.g., Alaska National Interest Land Conservation Act (ANILCA) and the Alaska Native Claims Settlement Act (ANCSA)) that apply unique statutory provisions to nonfederal oil and gas development activities in Alaska. These provisions were put in place to protect the property rights of inholders and accommodate the State's economic and infrastructure needs.

The majority of inholdings within Alaska refuges are not split estate as described in the notice and therefore would not be subject to the proposed rulemaking. While there are limited instances in which such a split estate would be encountered, other laws, regulations and contractual agreements also apply to the various inholdings. Applying additional regulation of oil and gas activities on state and private inholdings in Alaska could impose financial, administrative, and procedural barriers that would be potentially inconsistent and problematic from both a legal and practical standpoint.

The following comments apply generally to all issues identified in the notice but most specifically to the question under Issue 7: "*What unique legislation or legal consideration should the PEIS take into account when analyzing potential impacts on specific regions or states*?"

The Alaska National Interest Lands Conservation Act

In 1980, ANILCA established more than 100 million acres of federal land in Alaska as new or expanded conservation system units (CSUs). Sixteen refuges comprising 80 million acres are located within Alaska. Due to their vast size, most CSUs in Alaska contain or effectively surround numerous state and private inholdings, including lands owned by Alaska Native corporations pursuant to ANCSA. Congress incorporated Title XI of ANILCA specifically to ensure that inholders would be guaranteed adequate and feasible access to their lands for economic and other purposes and to further Alaskan's ability to develop the state's fledgling economy and infrastructure. ANILCA provides separate statutory authority, specific to Alaska, which pertains to oil and gas development of non-federal lands within the boundaries of national wildlife refuges.

ANILCA Section 1101 specifies that ANILCA is the "*single, comprehensive statutory authority*" for approval of transportation and utility systems, including oil and gas development and distribution systems, in Alaska:

> *Congress finds that - (a) Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would best be identified and provided for through an orderly continuous decisionmaking process involving the State and Federal Governments and the public; (b) the existing authorities to approve or disapprove application for transportation and utility systems through public lands in Alaska are diverse, dissimilar, and, in some cases, absent; and (c) to minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this Act and to insure the effectiveness of the decisionmaking process,* ***a single comprehensive statutory authority*** *for the approval or disapproval of applications for such systems must be provided in this Act.* [Emphasis added]

ANILCA Section 1110(b) explicitly protects access by State and private landowners, including owners of subsurface rights underlying public lands, for exploration and development purposes:

> *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 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]

ANILCA Section 1111(a) secures temporary access across conservation system units for resource exploration and other temporary use by State or private owners:

> *IN GENERAL. - Notwithstanding any other provision of this Act or other law the Secretary **shall authorize and permit** temporary access by the State or a private landowner to or across any conservation system unit, national recreation area, national conservation area, the National Petroleum Reserve - Alaska or those public lands designated as wilderness study or managed to maintain the wilderness character or potential thereof, in order to permit the State or private landowner access to its land **for purposes of survey geophysical, exploratory, or other temporary uses** thereof whenever he determines such access will not result in permanent harm to the resources of such unit, area, Reserve or lands.*

ANILCA Section 1109 specifically preserves all valid existing rights of access:

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

ANILCA Section 103(c) specifically excludes State and private inholdings from Alaska CSUs, and prohibits application of public lands regulation to them. "Land" as defined in ANILCA Section 102(1) includes "*lands, waters and interests therein*."

> *Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. **No lands** which, before, on or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party **shall be subject to the regulations applicable solely to public lands within such units**.* [Emphasis added]

State and private inholdings are therefore not part of national wildlife refuges in Alaska, even though such inholdings fall within refuge external boundaries. State and private inholdings are therefore not subject to CSU-specific regulation.

Section 9(b) of the National Wildlife Refuge System Improvement Act of 1977 also supports the applicability of ANILCA to Alaska refuges:

> *Conflicts of Laws – **if any conflict arises** between any provision of this Act and any provision of the Alaska National Interest Lands Conservation Act, then the **provisions of the Alaska National Interest Lands Conservation Act shall prevail**.* [Emphasis added]

NPS Exemption for Alaska

Under Issue 1, the notice asks readers to consider whether National Park Service (NPS) regulations should be used as a model for managing oil and gas resources on refuge lands. In 1981, the NPS promulgated implementing regulations at 36 CFR 13.10-13.16, which recognized these important

ANILCA provisions, and explicitly negated the applicability of 36 CFR 9B in Alaska. As stated in the Section-by-Section Analysis (46 FR 31845) of the final rule:

> *Section 13.15(d)(2) is an interpretive rule stating the Department's views that the regulations of 36 CFR Part 9B are no longer applicable in Alaska park areas. These regulations concerning the development of non-federal oil and gas rights in parks were premised on the land manager's discretion to restrict access.* ***Section 1110(b) of ANILCA effectively removes this discretion from the land manager. Therefore, 36 CFR Part 9B does not apply to Alaska park areas.*** [Emphasis added]

The final regulation at 36 CFR 13.15 (d)(2) stated:

> *Non-Federal Oil and Gas Rights and 36 CFR Subpart 9B. Since Section 1110(b) of ANILCA guarantees adequate and feasible access to park area inholdings notwithstanding any other law, and since 36 CFR Subpart 9B was predicated on the park area Superintendent's discretion to restrict and condition such access,* ***36 CFR Subpart 9B is no longer applicable in Alaska park areas.*** [Emphasis added]

When the Department of Interior adopted final Title XI regulations at 43 CFR 36 on September 4, 1986 (51 FR 31629), 36 CFR 13.10 through 13.16 were repealed and 43 CFR 36 became the sole regulatory authority governing access to all non-federal inholdings within CSUs in Alaska (including refuges). This is confirmed in the Section-by-Section analysis for 36 CFR 36.10 "Access to Inholdings" (51 FR 31624):

> *Section 36.10(b) has been modified slightly to correct an error in drafting the proposed regulation. The change clarifies that this part is to address all access issues in CSUs, and it was incorrect to also refer to "other applicable law."*

For these same reasons, the Service's revised regulations need to also exempt Alaska.

The Alaska Native Claims Settlement Act

ANCSA was enacted to settle aboriginal land claims in Alaska. ANCSA established 12 regional corporations and over 200 village corporations to facilitate the transference of land entitlement allocations via patents to federal lands. Non-federal oil and gas ownership in Alaska refuges is largely the result of patents issued pursuant to ANCSA as well as subsequent land exchanges and other legal agreements, such as the 1975 settlement with Cook Inlet Region, Inc. ANCSA §22(g) addressed the opportunity given to village corporations to select lands within existing refuges as part of their entitlement, with certain conditions:

> *If a patent is issued to any Village Corporation for land in the National Wildlife Refuge System, the patent shall reserve to the United States the right of first refusal if the land is ever sold by the Village Corporation. Notwithstanding any other provision of this Act, every patent issued by the Secretary pursuant to this Act which covers lands lying within the boundaries of a National Wildlife Refuge on the date of enactment of this Act shall contain a provision that such lands remain subject to the laws and regulations governing use and development of such Refuge.*

Not all Native-owned lands within refuge boundaries are subject to ANCSA §22(g). The provision in those affected patents which provides that lands will be subject to the same laws and regulations governing use and development of the surrounding refuge has been more specifically defined through implementation and related regulations and policies. For example, the preamble to the final compatibility regulations (65 FR 62464) provided a detailed discussion of how Alaska refuges generally manage inholdings subject to ANCSA §22(g), recognizing their status as private lands:

> [*W*]*hile the plain reading of ANCSA requires all refuge laws and regulations to apply to 22(g) lands, we have historically maintained that the compatibility requirement is the most basic legal requirement to protect refuge lands against uses that materially interfere with refuges achieving their purposes. We have never proposed to apply any other legal standard to uses of 22(g) lands*.
>
> *We have . . . clarified specifically how compatibility is to apply to 22(g) lands based on substantial comments . . . . These clarifications are substantial and, while recognizing that 22(g) lands are subject to compatibility review, acknowledge that 22(g) lands are also private lands that deserve special attention. We believe we have the authority to adopt regulations that address compatibility differently from those that deal with our own lands because we are, in effect, stating how we are going to implement and require compliance with a provision in a patent.*

The final rule at 50 CFR 25.21(b)(1) implements this intent by including numerous limitations on evaluating compatibility for uses of lands subject to ANCSA §22(g). For example, the Refuge Manager must complete a compatibility determination within 90 days of receiving a request from the landowner (50 CFR 25.21(b)(1)(i)); consultation and an appeal process are provided (50 CFR 25.21(b)(1)(i), (iv)); only effects to adjacent refuge lands (not effects on the §22(g) lands) and the ability of the refuge to achieve its statutory purposes will be evaluated (50 CFR 25.21(b)(1)(v)).

The regulations also state that a Special Use Permit will not be required for compatible uses of §22(g) lands; noting that special conditions to insure compatibility are to be instead included in the compatibility determination (50 CFR 25.21(b)(1)(viii)). The preamble (65 FR 62466) notes that:

> *The commenters stated their desire that proposed uses of 22(g) lands not be subject to the Service's permitting system. We accept this. The final rule states that we will require no additional permits for uses of 22(g) lands beyond the completion of a compatibility determination by the Refuge Manager that finds the use to be compatible with refuge purposes. Any conditions necessary to ensure a proposed use is compatible may be included in the compatibility determination.*

Conclusion

Each of the unique and well-established authorization processes applicable to non-federal oil and gas exploration and development within Alaska refuges was specifically developed to provide for the Alaska context while protecting refuge resources. These existing processes already ensure robust and defensible decision making.

Efforts to accommodate the Alaska regulatory framework within the proposed rule would add unnecessary complexity to the rulemaking effort. The possibility for inadvertent omissions is also likely, potentially creating an untenable legal situation for Alaska refuges, the State, and private property owners.

We therefore request the revised regulations include an exemption for Alaska refuges because existing Department of Interior ANILCA Title XI implementing regulations at 43 CFR Part 36 and Service compatibility regulations at 50 CFR 25.21 for ANCSA 22(g) lands are the applicable regulatory authorities for non-federal oil and gas development activities occurring within refuges in Alaska.

Thank you for this opportunity to comment. Please contact me at (907) 269-7529 if you have any questions.

Sincerely,

Susan Magee
ANILCA Program Coordinator