HCR

3

<TARGET><BILL>HCR 3</BILL><SUBJECT>HCR
3</SUBJECT><COMM>HSTA28</COMM></TARGET>

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: February 6, 2013 **FURTHER REFERRALS: Finance**

Date of Committee Action: 3-28-2013

The STATE AFFAIRS Committee considered: **HCR 3**

HOUSE CONCURRENT RESOLUTION NO. 3
Establishing the Joint Committee on Federal Overreach.

HCR 3 JOINT COMMITTEE ON FEDERAL OVERREACH

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HCR 3 (STA)
For Senate Bills with new title: [ ] Technical Title [X] New Title: HCR 3 **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	LEG		X	

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Kreiss-Tomkins			X	
	Gattis	X			
	Keller	X			
	Jackson	X			
	Millett	X			
	Hughes	X			
Chair:	LYNN	X			
Chair:					

Nancy Manly

From: Nancy Manly
Sent: Friday, March 29, 2013 9:54 AM
Subject: CS for HCR 3 (STA) Version C
Attachments: CS for HCR3 (STA) v.c.PDF

Attached is a copy of HCR 3 Version C that moved from House State Affairs Committee yesterday amended by Representative Keller. The conceptual amendment is incorporated on Page 2 Lines 16-24 and Page 5 Lines 17-25. If you have any questions please call. We have taken the final CS up to the Chief Clerk's office and HCR 3 will move from committee during today's floor session.

Nancy Manly, Chief of Staff and
House State Affairs Committee Aide *for*
Representative Bob Lynn
House District 23
907-465-2794 Fax: 907-465-4316

CS FOR HOUSE CONCURRENT RESOLUTION NO. 3(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-EIGHTH LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MILLETT, Austerman

A RESOLUTION

Establishing the Joint Committee on Access and Federal Overreach; and recommending that the Governor establish a working group to consider establishing a permanent office or authority to preserve state sovereignty.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS, in recognition of the powers reserved to the states and people under the Tenth Amendment to the Constitution of the United States, the State of Alaska has a right to review and voice concerns to federal authorities about actions taken by the federal government that encroach on state affairs to a deeper and greater extent than permitted by law; and

WHEREAS, in the Alaska Statehood Act, the State of Alaska received a grant of 103,350,000 acres of land to provide for the newly formed state to be economically self-supporting; and

WHEREAS the legislature has cause for concern when federal officials and departments overreach their constitutional and lawful mandate and compromise the capacity of state government, through measures such as

(1) abrogating the "No More Clause" of the Alaska National Interest Lands Conservation Act;

(2) the use by the United States Environmental Protection Agency of administrative decisions to involve itself in the permitting process of development projects occurring exclusively on state land;

(3) the implementation of the National Ocean Policy with regard to arctic shores and the reach of the mandate traversing coasts into inland waterways of the state; and

(4) the use on state lands and waterways by federal officials of the Endangered Species Act, the Clean Air Act, and the Clean Water Act, adversely affecting the state's right to determine how to harvest its own resources according to its constitutional mandate; and

WHEREAS the federal government refuses to recognize its responsibility for allowing an environmental disaster in the National Petroleum Reserve - Alaska by its own actions of creating and failing to reclaim the more than 110 remaining "legacy wells," while denying to the state the ability to actualize state resources under the claim of responsible stewardship; and

WHEREAS the legislature recognizes that numerous Alaskans in the private sector are being required to respond to federal overreach in the conduct of business, industrial, subsistence, and recreational activities; and

WHEREAS the legislature recognizes there are numerous public sector entities engaged in responding to federal overreach, including but not limited to the Citizens' Advisory Commission on Federal Areas, the interagency Public Access Assertion and Defense Unit, the Alaska National Interests Lands Conservation Act Program in the Department of Natural Resources, attorneys in the Department of Law, and the Alaska Health Care Commission in the Department of Health and Social Services; and

WHEREAS the legislature finds that the state requires a process whereby the attorney general, in consultation with executive branch departments, reviews and reports to the legislature regarding federal statutes, regulations, presidential orders, and secretarial orders that may exceed the authority of the United States Congress under the Constitution of the United States and that may unfairly limit the authority of the state, so that the legislature may consider appropriate action; and

WHEREAS the state has a strong interest in securing rights-of-way and easements

across federal and other land to allow access for subsistence and recreational hunting and fishing and outdoor recreation, to lower transportation costs for heating fuel, groceries, and other goods and services, to provide for medical care and emergency medical evacuation routes, and to provide access for exploration and production of natural resources essential to the creation of good jobs that pay wages that can support a family; and

WHEREAS, as a territory and then a state, a number of federal laws, including R.S. 2477, granted Alaska a legal right and opportunity to establish and vest a right-of-way or easement across federal and other land; and

WHEREAS several federal laws, including the Alaska National Interest Lands Conservation Act, protect valid existing rights of access and provide an opportunity to establish access; and

WHEREAS the state has a strong interest in gathering and preserving evidence of rights-of-way and easements and asserting claims to rights-of-way or easements, as it has done in AS 19.30.400; and

WHEREAS the state is engaged in an ongoing effort to collect aerial imagery and digital elevation mapping data of the entire state; and

WHEREAS state government and residents of the state who have contributions to make to the collection, preservation, identification, and assertion of rights-of-way and easements would benefit from an electronic central repository, accessible on the Internet, that included maps and images of trails and roads and provided an opportunity for members of the public to input data, including Global Positioning System coordinates and other Global Positioning System information, pictures, maps, and other documentation of existing and potential rights-of-way and easements; and

WHEREAS, because identification and assertions of rights-of-way and easements affect all concerned property owners, all parties involved in a claim for access would benefit from a repository of information on rights-of-way and easements, as well as the establishment of methods for alternative dispute resolution to resolve claims for rights-of-way and easements;

BE IT RESOLVED by the Alaska State Legislature that a Joint Committee on Access and Federal Overreach is established to

(1) review federal statutes, regulations, presidential executive orders, and

secretarial orders that create compulsory federal legislation that directs certain state action or requires the state to pass legislation to be in compliance;

(2) review federal statutes, regulations, presidential executive orders, and secretarial orders that, in reliance on art. I, sec. 8, Constitution of the United States, or any other legal authority, overreach and that unfairly burden the lives of Alaskans or adversely affect the development of the land, economy, infrastructure, and resources of the state;

(3) consider matters of access to federal and other lands referred to the committee by a legislator, a committee, the governor, a department, or a concerned member of the public, to ensure that matters regarding federal overreach and access that adversely affect the people of the state or the State of Alaska's constitutional obligation to maximize its resources for the maximum benefit of all Alaskans are identified and investigated;

(4) review federal statutes in effect during the period Alaska was a territory along with current statutes and compile a comprehensive list of federal statutes granting rights-of-way or easements that may have vested or that may currently provide opportunities for assertion of rights-of-way or easements;

(5) review databases and records in the possession of the state and federal governments and other persons relating to the historical use of roads and trails in the state, including those identified in AS 19.30.400, and provide recommendations to the legislature for development of a summary of databases and other records to be gathered and preserved in an electronic repository on the Internet that may be accessed by the public and that will provide the public an opportunity to comment on data concerning roads and trails and to upload to the repository evidence of established use of roads and trails in the state;

(6) review and report on current policy positions being taken by federal agencies regarding assertions of rights-of-way and easements across federal land in the state and the effects of those policies on residents of the state;

(7) review and report on efforts by other states to establish rights-of-way and easements across federal land, including methods used by other states to gather evidence of R.S. 2477 and other historical rights-of-way and easements and the types of documentation and other evidence required of other states that have brought suit to establish rights-of-way and easements;

(8) review and identify amendments to federal law or changes to federal

agency policy that would assist states in identifying and establishing rights-of-way and easements across federal land by a reasonable and fair administrative process;

(9) meet during legislative sessions and between sessions and hold public hearings if the committee considers hearings desirable;

(10) hire consultants and experts; and be it

FURTHER RESOLVED that the membership of the Joint Committee on Access and Federal Overreach shall be composed of the Speaker of the House of Representatives, or the speaker's designee, and three members of the house appointed by the speaker, one of whom shall be a member of the minority caucus of the house, and the President of the Senate, or the president's designee, and three members of the senate appointed by the president, one of whom shall be a member of the minority caucus of the senate; and be it

FURTHER RESOLVED that the Joint Committee on Access and Federal Overreach shall submit reports to the legislature and the governor by January 15, 2014, and January 15, 2015, containing recommendations concerning how to contain federal overreach and identifying legislation that the committee determines is appropriate to respond to federal overreach; and be it

FURTHER RESOLVED that the Alaska State Legislature encourages the governor, using existing resources, to form a working group made up of private and public sector members, including members from the legislature, to make recommendations and advise the legislature at the beginning of the Second Regular Session of the Twenty-Eighth Alaska State Legislature regarding the formation, composition, placement, and budget needs of a permanent office or authority charged with preserving state sovereignty by increasing the effectiveness of state and private sector responses to federal overreach and, where appropriate, facilitating and enhancing the exchanges of information among the legislature, state agencies, and the private sector related to federal overreach; and be it

FURTHER RESOLVED that the Joint Committee on Access and Federal Overreach shall terminate on January 15, 2015, unless extended.

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Committee
Joint Armed Services Committee
Military & Veterans Affairs Committee

Finance Subcommittees
Administration
Corrections
Military and Veterans Affairs

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us

Session:
Alaska State Capitol, #108
Juneau, AK 99801-1182

Phone: (907) 465-4931
Fax: (907) 465-4316
Toll Free: (800) 870-4391

Interim:
716 W. 4th Ave., #650
Anchorage, AK 99501-2133

Phone: (907) 269-0205
Fax: (907) 269-0207

FAX

To: Legal Services Fax #: 465-2029

From: Nancy Manly 465-2794 # of Pages (including cover): 2
Alaska State Capitol, Room 108
Juneau, AK 99801-1182

Phone: 907-465-4931
Fax: 907-465-4316

Re Final CS for HCR 3

03-28-2013

HCR 3 moved from the House State Affairs Committee this morning. Please draft a final CS for HCR 3 Version N with the following amendment.

Conceptual Amendment #1 (Keller)
28-LS0440\U.A
This amendment was drafted to another version of the bill so Keller made it conceptual so it could be amended into Version N

Thanks!

3/28/13 "Ver. N" Working DOC

Isaacson Objects for discussion removed

28-LS0440\UA
Keller
03/28/2013

Passed

Conceptual Amendment #1

OFFERED IN THE HOUSE
TO: CS HCR 3

BY: REPRESENTATIVE KELLER

Page3 line 7 insert

Ver C Pg 2 16-18

Whereas, the legislature recognizes the numerous private sector Alaskans who are being forced to respond to federal overreach in the context of business, industry, subsistence, and recreation; and

Pg 2 19-24

Whereas the legislature recognizes the various public sector entities engaged in responding to federal overreach, including but not limited to, CACFA, PAAD, and the ANILCA team in DNR, litigators in the Department of Law, the ~~Alaska Health Commission~~ in HSS, and

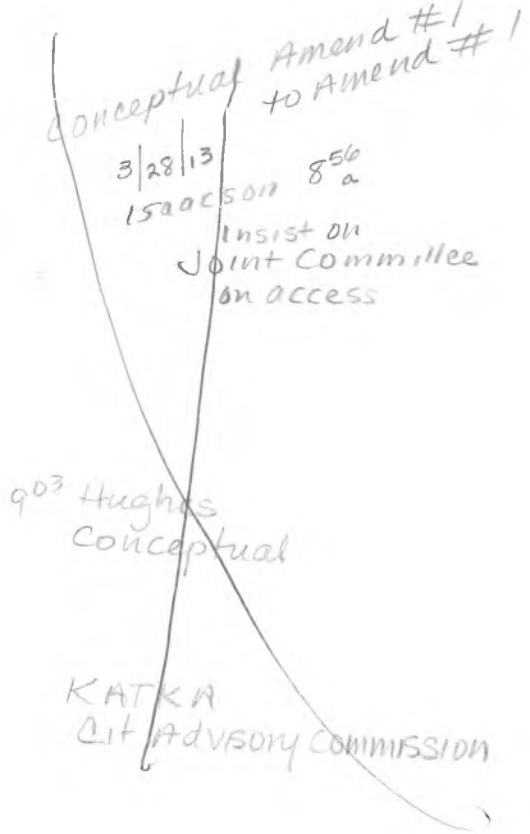
Spelled out

Page 3, Line 10 insert

Ver C Pg 5 Lines 17-25

encourages

(1) request the Governor to use existing resources to form a working group to formulate recommendations for the makeup, role, name, and organizational location of a permanent State sovereignty preservation authority to increase the effectiveness of the numerous semi-independent efforts, to coordinate with the legislature, to enhance information exchange and collaborative responses to federal overreach. This working group should consist of leaders in the before-mentioned private and public sectors already engaged, two legislators appointed by the speaker of the House and the President of the Senate. This working group should be tasked with providing recommendations that can be implemented in the next gubernatorial budget proposal for consideration in the 2014 legislative session.


Conceptual Amend #1
to Amend #1
3/28/13
Isaacson 8:56 a
Insist on
Joint Committee
on access
903 Hughes
Conceptual
KATKA
Cit Advisory Commission

Nancy Manly

From: Vasilios Gialopsos
Sent: Monday, March 04, 2013 5:16 PM
To: Nancy Manly
Subject: List of Testifiers for HCR 3

Mrs. Manly,

The following individuals have agreed to testify on HCR 3 tomorrow:

1. Reed Christensen – the treasurer for the Alliance Board of Directors and the General Manager for Dowland Bach Corporation
2. Joe Mathis- Emeriti Board Member of the Alliance and NANA Corporation.
3. John Lewis of the Alliance.

They will be calling in at around 8:45. If there is a change in the meeting, I'll contact them and make sure they call in. If you need anything else, please let me know. Thank you once again for all the work that you do.

Respectfully,
Vasilios Gialopsos
Office of Representative Charisse Millett
State Capitol, Office 403
Juneau, Alaska
465-4937

Nancy Manly

From: Apache <apache@wwwjnu02.legis.state.ak.us>
Sent: Tuesday, March 05, 2013 7:36 AM
To: LIO Juneau; Nancy Manly
Subject: Teleconference Order Form

Meeting: existing

Sponsor and/or Committee Name: House State Affairs Committee

Date of Teleconference: Tuesday, March 5, 2013

Start Time: 8:00am

End Time: 10:00am

Chairing Site: Capitol Building

Juneau Room: 106

Bill Information:
: , Public, N/A

Streamed to akl.tv: yes

Executive Session: no

Contact Person: Nancy Manly

Telephone Number: 465-2794

Email Address: nancy.manly@akleg.gov

LIO Sites:

May other LIO's add: yes

Offnet Name(s):

Additional folks to testify on HCR 3:
1. Reed Christensen, Treasurer Alliance Board of Directors and General Manager Dowland Bach Corp.
2. Joe Mathis - Board Member Alliance and Nana Corp.
3. John Lewis of the Alliance

Other Information:

Thank you!

Your teleconference information has been sent to the Juneau Legislative Information Office.

Please contact us at 907-465-4648 if you have any questions.

Online Teleconference Order Form

*Indicates a required response

Type of meeting:

- ○ New Meeting
- ◉ Update to an existing meeting
- ○ Cancel Meeting

Sponsor and/or Committee Name:

House State Affairs Committee

Date of Teleconference:

Tuesday, March 5, 2013

Start Time:

8:00am

End Time (estimate):

10:00am

Chairing Site:

Capitol Building

Juneau Room:

106

Bill Information:

Bill 1: _____ Testimony: Public ▾ Time Limit: N/A ▾

Add Bill

Do you want this streamed on AlaskaLegislature.tv?

◉ Yes ○ No

Will there be an Executive Session during this meeting?

○ Yes ◉ No

Your Name:
Nancy Manly

Your Phone:
465-2794

Your Email:
nancy.manly@akleg.gov

Requested LIO sites to be online:

- [ ] All LIOs
- [ ] Anchorage
- [ ] Barrow
- [ ] Bethel
- [ ] Cordova
- [ ] Delta Junction
- [ ] Dillingham
- [ ] Fairbanks
- [ ] Glennallen
- [ ] Homer
- [ ] Juneau
- [ ] Kenai
- [ ] Ketchikan
- [ ] Kodiak
- [ ] Kotzebue
- [ ] Matsu
- [ ] Nome
- [ ] Petersburg
- [ ] Seward
- [ ] Sitka
- [ ] Tok
- [ ] Valdez
- [ ] Wrangell
- [ ] Unalaska
- [ ] No LIOs

May other LIOS attend if there is local interest?
(•) Yes ( ) No

Offnet Name(s) (Please list all offnet callers):

Additional folks to testify on HCR 3:
1. Reed Christensen, Treasurer Alliance Board of Directors and General Manager Dowland Bach Corp.
2. Joe Mathis - Board Member Alliance and Nana Corp.
3. John Lewis of the Alliance

Other Information:

VIDEO CONFERENCING - Video Conferencing is available in the Juneau, Anchorage and Fairbanks Legislative Information Offices. For more information or to schedule a video conference call the Juneau LIO at (907) 465-4648.

Submit Reset

Alaska Legislature
Representative Charisse Millett

Session:
State Capitol Building, Room 403
Juneau, AK 99801
Phone (907) 465-3879
Fax (907) 465-2069
Toll free (888) 269-3879

Interim:
Anchorage LIO
716 W 4th Ave., Room 390
Anchorage, AK 99501
Phone (907) 269-0222
Fax (907) 269-0223

District 24

House Concurrent Resolution 3
Sponsor Statement

In her speech before the both chambers of the Alaska Legislature, Senator Lisa Murkowski said one of her most pressing priorities was dealing with the continuing Federal encroachment of state affairs. The Senator has good reason to be concerned, as should all Alaskans. The Federal government has reneged on its commitment to the "no more clause" of the Alaska National Interest Lands Conservation Act by continuing to absorb more state land. Notoriously, the people of King Cove were denied an emergency access road through Izembek National Wildlife Refuge by the Department of the Interior on the grounds of environmental concerns. To add insult to injury, the Federal government has endangered the development and lives or Alaskans while lethargically cleaning up over one hundred of the "legacy wells" in the National Petroleum Reserve-Alaska that it drilled. It is a cliché to say these are outrages. The people of Alaska are tired of being outraged by acts such as these. The proper response to these challenges is action.

House Concurrent Resolution 3 would establish a joint committee between the House and the Senate to look into federal overreach at the legislative, executive and administrative levels. By having the Speaker of the House and the Senate President as the co-chairs, and requiring participation from both caucuses, the committee would be a comprehensive representation of the State of Alaska, investigating the barrage of new regulations and rules that affect the lives of residents all across the state. After reviewing these issues, the committee would issue a report and recommend legislation for the next legislative session. The committee would also hold public hearings and take testimony from communities. This is a crucial step in the assertion of a state being a member of a federation and not simply a servile region. Residents of Alaska should know that their state representatives and senators speak for them, and will advocate on their behalf.

Prepared by Vasilios Gialopsos February 26th, 2013

Fiscal Note

State of Alaska
2013 Legislative Session

Bill Version: HCR 3
Fiscal Note Number:
() Publish Date:

Identifier: HCR3-LEG-SESS-03-01-13
Title: JOINT COMMITTEE ON FEDERAL OVERREACH
Sponsor: MILLETT
Requester: House State Affairs

Department: Alaska Legislature
Appropriation: Legislative Operating Budget
Allocation: Session Expenses
OMB Component Number: 782

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2014 Appropriation Requested	Included in Governor's FY2014 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2014**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**	**FY 2018**	**FY 2019**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Fund Source (Operating Only)							
None							
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Positions							
Full-time							
Part-time							
Temporary							
Change in Revenues							

Estimated SUPPLEMENTAL (FY2013) cost: 0.0

Estimated CAPITAL (FY2014) cost: 0.0

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency?
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Initial Version

Prepared By: Jessica Geary, Finance Manager — Phone: (907)465-6626
Division: Legislative Affairs Agency — Date: 03/02/2013 01:44 PM
Approved By: Pamela Varni, Executive Director — Date: 03/02/2013
Legislative Affairs Agency

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. HCR3

Analysis

The intent of this legislation is to create a joint committee, consisting of eight Legislators, appointed jointly by the Speaker of the House and the President of the Senate. The committee will meet during regular sessions and at existing LIO's and public facilities or telephonically at no cost to the committee. The committee will utilize existing staff to the Alaska State Legislature and State departmental experts from various State agencies to discuss and report on findings. A report will be prepared by the committee and presented to the Legislature and the Governor by January 15, 2014 and January 15, 2015. Since existing resources will be utilized, there will be no fiscal impact on the Legislative Affairs Agency.

Alaska Legislature
Representative Charisse Millett

Session:
State Capitol Building, Room 403
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MEMORANDUM

To: Chairman Bob Lynn, House State Affairs Committee
From: Rep. Charisse Millett
Re: Teleconferencing Request
Date: February 26th, 2013

Chairman Lynn,

I respectfully request teleconferencing capabilities along with my hearing request for House Concurrent Resolution 3. It is my understanding there may be individuals available to testify who are unable to do so in person. The list of individuals and groups being able to testify will be updated once a hearing is scheduled.

Respectfully,
Rep. Charisse Millett

Alaska Legislature
Representative Charisse Millett

Session:
State Capitol Building, Room 403
Juneau, AK 99801
Phone (907) 465-3879
Fax (907) 465-2069

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Anchorage, AK 99501
Phone (907) 269-0222
Fax (907) 269-0223

MEMORANDUM

To: Chairman Bob Lynn, House State Affairs Committee
From: Rep. Charisse Millett
Re: Hearing Request for House Concurrent Resolution 3
Date: February 26th, 2013

Chairman Lynn,

I respectfully request a hearing in the House State Affairs Committee for HCR 3 at your earliest convenience. My staffer on this legislation is Vasilios "Akis" Gialopsos. He can be reached at 465-4937.

Respectfully,
Rep. Charisse Millett

HCR 3

Date: January 16, 2013
Contact: Rebecca Talbott, 907-644-3371

The compendium is a compilation of all designations, closures and restrictions imposed under the discretionary authority within the regulations covering national parks. The compendium is a regulatory tool to help manage Alaska's national park areas for the public's enjoyment, use and protection.

This year, several NPS areas in Alaska are proposing restrictions to taking wildlife in national preserves. These proposals are based on recent changes in State of Alaska regulations pertaining to the take of wolves, coyotes, and bears in some game management units, including certain national preserves. Other proposed changes include the closure of an old trail in Wrangell-St. Elias where a newly constructed trail reaches the same destination, and human waste disposal practices in Glacier Bay.

The NPS is proposing to prohibit the take of wolves and coyotes between May 1 and August 9 in the following national preserves: Denali, Gates of the Arctic, Katmai, Aniakchak, Alagnak Wild River, Lake Clark, Wrangell-St. Elias, and Yukon-Charley Rivers. In some or all areas within these preserves, the State of Alaska now allows wolves and coyotes (including pups) to be taken in late spring and summer when the animals are denning and raising vulnerable offspring. The proposed shortening of the wolf and coyote season will protect animals at the den and during the period when their pelts have little economic or trophy value. It will also protect a subsistence opportunity for taking that wolf or coyote later in the year when their coats are prime in order to sell the pelt for cash. The proposed shorter season is also more consistent with federal subsistence regulations.

The proposed compendiums for Denali, Wrangell-St. Elias and Yukon-Charley Rivers include a prohibition on the taking of brown bears at a bait station. Bait stations typically consist of things such as grease or dog food set in a location that will attract the desired animal where it can then be taken. The public safety concerns posed by food-conditioned bears are widely recognized. These bears are more likely to be a danger to humans, and it is incongruent with best management practices and public educational messaging found in national park areas on the issue of food and bears.

The NPS also proposes to renew a temporary prohibition on using artificial light to take black bears at dens and taking black bear sows with cubs at dens in Denali and Gates of the Arctic National Preserves.

Consistent with sound management principles and conservation of wildlife, practices that disturb animals when they are in a vulnerable state - in dens, when reproducing, or very young – are usually avoided. Accordingly, these practices have generally been prohibited under federal subsistence and state harvest regulations. Additionally, management practices that seek to increase harvest of predators in order to boost populations of prey species are not consistent with the management of National Park Services areas which are to retain naturally dynamic wildlife populations.

Public involvement in the compendium process began in early December when the National Park Service held the first of seven public hearings to hear input as these restrictions were being drafted. After this round of public comment on the compendium provisions ends on February 15, the NPS will consider revisions and expects to publish the final compendiums in April 2013.

Each park's proposed 2013 compendium is available at http://www.nps.gov/akso/management/compendiums.cfm. A written copy may be requested directly from the park or the National Park Service, 240 W. 5th Avenue, Anchorage, AK 99501, Attn: Compendium.

Comments will be accepted by mail or e-mail between January 15 and February 15, 2013. Comments are welcome at any time in addition to this timeframe, but comments received after February 15 will be considered in future compendium revisions.

INTRODUCTION

This Annual Report provides an overview of the activities of the Citizens' Advisory Commission on Federal Areas during 2012. During the year the Commission again focused its effort on monitoring, reviewing and commenting on an extensive list of federal land management agency plans, policies, regulations, proposed legislation and projects. A summary of the comments submitted by the Commission can be found later in this report The Commission also held regular meetings in Juneau, Fairbanks and Anchorage. At those meetings, individual members of the public as well as representatives from interest groups and organizations testified about problems and concerns on topics such as access to inholdings, mining, subsistence management, wilderness management, use of cabins, guiding for hunting and fishing, transporting services, proposed federal legislation, land selections and use of the State's navigable waters.

Commission members and staff also met and discussed management and planning activities, regulatory changes, endangered species listings, transportation planning, fish and game management issues, as well as other federal policies and programs with representatives from the National Park Service, U.S. Fish and Wildlife Service, U.S. Forest Service, Bureau of Land Management and the Department of the Interior. Commission staff continued to provide information to the public on federal land management agencies' activities and to help resolve problems or issues related to use of federal public lands and resources.

As first outlined in previous Annual Reports, the U.S. Department of the Interior under Secretary Salazar continues to implement changes to long standing policies for the planning and management of federal public lands in Alaska. A 2010 directive instructing the U.S. Fish & Wildlife Service Alaska Region to conduct a complete wilderness review of refuge lands and waters was prominently reflected in the proposed alternatives in the draft Revised Comprehensive Conservation Plan (CCP) for the Arctic National Wildlife Refuge released in 2011. The results of the review and possible wilderness recommendations will not be known until the final plan is released. The final CCP was expected to be released in late 2012, but has been delayed indefinitely. The National Park Service is progressing with the amendment to the general management plans for Gates of the Arctic National Park & Preserve and Lake Clark National Park & Preserve. Those plan amendments also will include a wilderness suitability review, with possible recommendations for designation of additional wilderness.

In 2012 Congress extended its funding prohibition on implementation of Secretarial Order 3310 which directed the Bureau of Land Management to inventory the wilderness characteristics of all lands under its management and created a new Wild Lands classification for BLM managed lands. While the controversial Wild Lands Policy is no longer operational, the agency continues to inventory lands for their wilderness characteristics. These changes in policy and related actions will affect the status and management of millions of acres of federal lands and the future use of those lands by Alaskans.

The U.S. Forest Service completed revision of the regulations guiding National Forest Land Management Planning. The Chugach National Forest in Alaska will be one of the first national forests to develop a management plan under the new regulations. That planning effort began in late 2012. The Tongass National Forest will be conducting a five year review of the 2008 Tongass Land and Resource Management Plan.

BACKGROUND

The Citizens' Advisory Commission on Federal Areas was established originally in 1981 as a temporary advisory agency in the executive branch of the state. Its purpose was to provide assistance to the citizens of Alaska affected by the management of federal lands within the state. The original Commission operated from 1982 until funding was eliminated in 1999.

The Commission was reestablished in 2007 by the Alaska State Legislature and resumed full operations in July 2008. The Commission is attached administratively to the Department of Natural Resources, Office of the Commissioner, but operates independently of the department. Its purposes, duties and responsibilities remain unchanged from the original and are outlined below.

DUTIES OF THE COMMISSION

The duties and responsibilities of the Commission are contained in AS 41.37.220:

> (a) The commission shall consider research and hold hearings on the consistency with federal law and congressional intent on management, operation, planning, development and additions to federal management areas in the state.

(b) The commission shall consider research and hold hearings on the effect of federal regulations and federal management decisions on the people of the state.

(c) The commission may, after consideration of the public policy concerns under (a) and (b) of this section, make a recommendation on the concerns identified under (a) and (b) of this section to an agency of the state or to the agency of the United States which manages federal land in the state.

(d) The commission shall consider the views, research, and reports of advisory groups established by it under AS 41.37.230 as well as the views, research, and reports of individuals and other groups in the state.

(e) The commission shall establish internal procedures for the management of the responsibilities granted to it under this chapter.

(f) The commission shall report annually to the governor and the legislature within the first 10 days of a regular legislative session.

(g) The commission shall cooperate with each department or agency of the state or with a state board or commission in the fulfillment of its duties.

The Commission also may establish advisory groups. Members of an advisory group must be broadly representative of individuals involved in activities affected by the establishment or management of units of federal land within the state.

Although the Commission's role is advisory, it is authorized by AS 41.37.240 to request the attorney general to file suit against a federal official or agency if the Commission determines that the federal agency or official is "acting in violation of an Act of Congress, congressional intent, or the best interests of the State of Alaska."

COMPOSITION

The Commission is composed of twelve members, six appointed by the Governor and six appointed by the Legislature. Commission officers for 2012 were: Chairman, Rep Wes Keller (Wasilla) and Vice-Chairman, Mr. Mark Fish (Anchorage). The Chairman, Vice-Chairman and Mr. Rod Arno (Wasilla) and Mr. Charlie Lean (Nome) comprise the Commission's Executive Committee.

2012 MEMBERS

Rod Arno (S) **Willow**	**Mark Fish (G)** **Anchorage**	**Rep. Wes Keller (H)** **Wasilla**
Charlie Lean (G) **Nome**	**Mike Meekin (H)** **Palmer**	**Sen. Linda Menard (S)** **Wasilla**
Warren Olson (S) **Anchorage**	**Colleen Richards (G)** **Anchorage**	**Susan Smith (G)** **Chickosna**
Ron Somerville (H) **Juneau**	**Alex Tarpa (G)** **Tanana**	**Frank Woods (G)** **Dillingham**

(G) Governor's Appointment
(S) Senate Appointment
(H) House Appointment

STAFF

The Commission currently has two staff positions: Executive Director, Stan Leaphart, and Commission Assistant, Karrie Improta. The office is located in the Department of Natural Resources Northern Regional Office, 3700 Airport Way, Fairbanks, AK 99709-4699. (907) 374-3737 or 451-2035. FAX 451-2751.

NEWSLETTER

Commission staff produces a newsletter ***Alaska Lands Update*** that is distributed electronically to several hundred recipients each month. Printed copies are also distributed at the DNR Public Information Centers in Fairbanks, Anchorage and Juneau. Contact the Commission staff if you are interested in receiving the newsletter.

COMMISSION MEETINGS

The Commission holds three regular meetings each year. The meeting are open to the public and testimony is accepted on any issue related to the management of federal public lands in Alaska. There are four public participation segments at each 2 day meeting and the public is provided a toll-free number to participate even if they are unable to attend the meeting. During 2102, regular Commission meetings were held in Juneau, Fairbanks and Anchorage. Minutes of the meetings are available on the Commission's website and any material distributed at the meetings is available to the public upon request.

COMMISSION ACTIVITIES IN 2012

Following is an overview and summary of the comments and recommendations submitted on the federal land management plans, regulations, policies and related issues the Commission addressed during 2012. The full text of all comments and correspondence, as well as previous annual reports, meeting minutes, the monthly newsletter and other information can be found at http://dnr.alaska.gov/commis/cacfa/. Printed copies of all Commission documents can also be obtained from to the Commission office at the address above.

NATIONAL PARK SERVICE

National Park Service 2012 Compendiums – In January of each year the National Park Service updates the compendium for each of the Alaskan units of the National Park System. A compendium is a compilation of the designations, closures, openings, permit requirements and other provisions established by the park superintendent under the discretionary authority found in National Park Service regulations. The public is provided a 30 day review period to submit comments on revisions proposed by the agency or to make their own recommendations for changes.

As this Commission has acknowledged in previous annual reports, the National Park Service compendium process has seen many improvements since the agency first began using them in Alaska more than 20 years ago. The most significant improvement has been the addition

of the 30 day public review period and the opportunity for the public to comment on proposed changes, closures or restrictions or to suggest other actions. On occasion, public meetings are held to discuss proposed revisions, particularly those involving closures or use restrictions. Another improvement in the revision process is an annual meeting between the State ANILCA Implementation Program staff and the National Park Service staff, including the chief rangers for each of the park units. At this meeting potential compendium revisions are discussed along with other potential management issues before public release of the documents. Commission staff has participated in those annual meetings in each of the last three years.

Despite improvements in the compendium process, significant problems remain and in some cases, have worsened. Park compendiums continue to be used to improperly implement what the agency categorizes as "temporary" or seasonal closures of park areas to activities and uses. In violation of the agency's own regulations, these closures can remain in place for several years. The National Park Service maintains that because the seasonal closures are less than 12 months in duration, they can be renewed each year and do not require a formal rulemaking. The Commission has consistently maintained that when a closure or restriction is in effect indefinitely, even if it is for only a portion of the year, it constitutes a permanent closure.

Since 2010, the National Park Service has also issued regulations through the annual compendium process that preempt State hunting regulations. In one instance the Service restriction was temporary. However, in at least one other instance the closure has become effectively permanent. Permanent closures or use restrictions require initiation of a formal rulemaking process. That process requires publication of proposed regulations in the *Federal Register*, public notice, public meetings or hearings in the affected area(s), and opportunity for public comment. Most importantly, permanent closures or restrictions require a clear finding by the agency that the proposed action is necessary to protect park resources or values or for protection of public safety.

In late 2012 the Service announced its intention to adopt regulations for 2013 that would again preempt State hunting regulations adopted by the Board of Game earlier in the year. Hearings were held in December and continued into January 2013. The Commission determined the hearing schedule was inadequate and requested that additional hearings be held in all affected areas. The Service declined to hold additional public hearings, but indicated it would provide for additional public participation via social media. At the time of this report, the proposed revised compendiums for 2013 are undergoing review by the Commission and the public.

Katmai National Preserve Hunting Guide Environmental Assessment- In August the National Park Service issued a draft environmental assessment (EA) to

examine the potential impacts from reconfiguring two existing hunting guide areas and authorizing two guided hunting concessions within the Katmai National Preserve. The two guide areas had been in existence since the preserve was designated by ANILCA in 1980, but one area had been abandoned and the guide concessions contract for the other area was due to expire at the end of 2012.

Because the existing two guide areas differed significantly in both size and in the number of allocated hunts, the Service proposed redrawing the guide area boundaries and redistributing the hunt allocations. The Commission questioned the need to prepare an EA since there was no proposed increase in either the number of guide areas or in the total number of allocated hunts. The Commission expressed concern that the decision to prepare an environmental document signaled an intent to require similar documentation for issuing or renewing future hunting guide concession contracts in other national preserve units. Previously, contracts were issued or renewed under a categorical exclusion.

After reviewing the document, the Commission submitted comments supporting the action proposed by the Service. A Finding of No Significant Impact, approving the proposed action was signed in September 2012 and a prospectus was issued in November 2012. Contracts are expected to be awarded in early 2013.

Denali Park Road Final Vehicle Management Plan - The Commission submitted comments on the Denali Park Road Draft Vehicle Management Plan (VMP) and Environmental Impact Statement (EIS) in September 2011. The plan was designed to manage public and agency use of the Denali Park Road under an adaptive management approach. In addition to the staff review, Commission members met with National Park Service officials to discuss the various alternatives in the plan. Members of the public, including property owners in the Kantishna area of Denali National Park, testified before the Commission at its October 2011 meeting.

The draft plan asserted that while the existing seasonal limit of 10,512 vehicles established by the 1986 General Management Plan (GMP) was clearly measurable, a numerical limit alone was not be the best approach for managing use of the park road. The plan proposed to set measurable indicators and standards intended to protect park resources and values along the road corridor using an adaptive management approach.

In July 2012 the NPS released the final VMP. Rather than adopting one of the three alternatives analyzed in the draft plan and EIS, the agency announced its intention to adopt a new alternative which was not included in the draft. While the new alternative contained elements of two of the original draft alternatives, it contained two significant components not in either of the original alternatives and which had not been fully analyzed.

The first component in the new alternative is a limit of 160 vehicles on the park road within a 24 hour period. According to the final VMP the 160 vehicle limit was derived from traffic model simulation results and research on visitor preferences and resource conditions. Formal regulations to implement the daily vehicle limit would be adopted once the VMP goes into effect. Neither action alternative proposed in the draft included a fixed daily limit for all vehicle use on the park road.

In a letter to the NPS Regional Director, the Commission stated that implementing a fixed daily limit of vehicles contradicted the concept of an adaptive management strategy. Replacing the current annual limit of 10,512 vehicles with a daily fixed limit would remove the desired flexibility that the adaptive management strategy was intended to provide. The Commission strongly recommended against the agency adopting formal regulations establishing a fixed 160 vehicle limit or any fixed limit until it had conducted further analysis and field testing.

VMP proposed maintaining the allocation of 360 permits for inholder access. The Commission supported the decision to not reduce the number of permits for inholder access, at the same time pointing out that no provision was made in any of the alternatives for potential future increases in access needs for inholders, whether for business related access or personal access. Logically, an adaptive management strategy should provide similar opportunities for proportionate increases in access allocations for inholders as is provided for park concessionaires and park visitors.

The final EIS failed to include any analysis or discussion of possible negative economic impacts resulting from maintaining current restrictions on the allocated access for Kantishna inholders. By precluding any increase in access allocations for Kantishna area businesses and property owners, the VMP will adversely affect economic growth of existing visitor services as well as the development of new businesses. However, the EIS failed to examine potential impacts to Kantishna business and property owners from maintaining current access restrictions.

The second component in the proposed alternative of concern to the Commission was the proposal to require concession contracts for those Kantishna businesses conducting day trips. This also represented a significant departure from the proposal in the draft EIS. Under the draft action alternatives commercial use authorizations would be required to conduct day trips, however there was no proposal in the draft plan to require the more restrictive and costly concession contracts, meaning that issue was not adequately analyzed or discussed. The final EIS provided no explanation for requiring concession contracts rather than commercial use authorizations. The Commission requested a full explanation for the change and strongly recommend removing the requirement for a concession contract for providing Kantishna day tours under all alternatives in the final VMP.

The request was also made for clarification of the final VMP intentions for managing and allocating access to inholdings under ANILCA 1110(b) and that ANILCA 1110(b) access be exempt from the transit priority. And finally, because the two significant components in the new preferred alternative were not included in the draft VMP and EIS and not subjected to public review and comment, the Commission requested an additional 30 days comment period on the proposed final VMP.

The agency declined to provide any additional opportunity for comment and in September issued the Record of Decision adopting the Vehicle Management Plan with the new preferred alternative. The plan is expected to be fully implemented by the 2014 season.

Lake Clark National Park & Preserve GMP Amendment – The Commission submitted comments on the preliminary alternatives for the GMP Amendment and identified several issues that were of concern.

A major concern for the Commission was the decision to re-assess the eligibility of park lands for wilderness designation. The NPS proposed conducting a "Wilderness Eligibility Re-assessment" for two units within the Park. The Commission has a longstanding opposition to any further wilderness review, study or re-assessment of lands within Conservation System Unit in Alaska, including Lake Clark Park & Preserve.

The Commission reminded the agency that any further effort to study, review or re-assess NPS lands for wilderness designation is a clear violation of the provisions of ANILCA in sections 101(d), 1326(a) and 1320(b). All of these ANILCA provisions are clearly applicable and supersede any NPS policies.

The Commission also objected to the proposal to create a Wild Zone within the park & preserve. We considered this type of designation excessive, particularly within that portion of the park that is already designated Wilderness. Considering the purposes of a wild zone, as outlined in the newsletter, designation of a portion or portions of the park and preserve as a "wild zone" increases the potential for visitor use restrictions or limitations that are unnecessary to protect the purposes for which the park and preserve were created. It also creates a "de-facto" wilderness area which is inconsistent with Congressional intent regarding management of national park units in Alaska. The designated Wilderness within the park is already managed for purposes virtually identical to those of a "wild zone", making any additional zoning unnecessary.

Glacier Bay National Park & Preserve – Huna Tribal House – At its meeting in February, the Commission discussed the National Park Service proposal to build a Huna Tribal House in the Bartlett Cover area of Glacier Bay National Park. After

reviewing the environmental assessment for the project, the Commission submitted a letter of support to the agency.

The proposed construction of the Huna Tribal house is a commendable example of the continuing cooperation between the National Park Service and the Hoonah Indian Association (HIA). The incorporation of traditional Tlingit design, construction, decoration and furnishings will help park visitors interpret and better understand the culture of the Huna Tlingit. More importantly, the project will serve to recognize the importance of Glacier Bay as the ancestral homeland of the Huna Tlingit and/or the historical and cultural connections that existed long before designation of Glacier Bay as a unit of the National Park System and which still exists.

The Commission encouraged the NPS to continue consultation with HIA to further refine the final interior and exterior design of the tribal house and to move forward with the completion of this project.

Bering Land Bridge National Preserve Hunting Guide EA – The National Park Service released an environmental assessment on a proposal to issue up to 3 sport hunting guide concessions within the Bering Land Bridge National Preserve. There have been no hunting guides operating in the preserve in more than 20 years.

During its November meeting, the Commission was briefed on the proposal by NPS staff. Following a discussion of the three alternatives, the Commission decided to support the National Park Service preferred alternative. Under this alternative, up to 3 sport hunting guide concessions would be licensed for separate guide areas within the preserve. Members felt that separate guide areas would provide the best opportunity for applicants. Additionally, they felt that separate areas are preferred by most guides, as it allows them to better manage their hunting activities. Members also recommended that the National Park Service consult closely with the State of Alaska Big Game Commercial Services Board in deciding on guide use area assignments.

The preferred alternative would set client limits for one guide use area at 10 per year and a combined total of 180 clients per year for the other guide use areas. This would allow a maximum of 200 clients over the expected ten year life of the concession contracts. In establishing or adjusting client limits, the Commission encouraged the NPS to work closely with the State of Alaska Department of Fish and Game (ADF&G). Because the proposed client limits represent an indirect allocation of wildlife resources, it is essential that the NPS works closely with the ADF&G to determine harvestable surplus of those resources and to meet biological objectives under the State's sustained yield principles.

The environmental assessment referenced the 1986 General Management Plan (GMP) for the preserve which states that no temporary facilities other than tents have been used on preserve lands and are not needed in the future. However, the GMP did not rule out the possibility that prohibition could change if future analysis indicates that provisions for temporary facilities are necessary because of changing use patterns on the preserve.

Under the proposed hunting guide alternatives, no long-term facilities or structures would be authorized. While not advocating for the establishment of temporary shelters to support guide activities, the Commission suggested that the option remain available, consistent with the current GMP and with the provisions of ANILCA Section 1316. That section of the law allows, subject to reasonable regulation, the use and construction of temporary facilities "directly and necessarily related" to the harvest of fish and game.

The environmental assessment stated that the possibility of establishing camps within the Preserve on Native allotments was mentioned, but it was "not clear whether this would be permitted within the Preserve boundaries."

The Commission noted that it was unaware of any NPS authority that would prevent an allotment owner from entering into a rental or lease agreement with a guide or any other person, even if the allotment is located within the boundaries of a national park unit. All certificated Native allotments are private lands and under the provisions of ANILCA Section 103(c) are not subject to NPS regulations that apply only to preserve lands. The sale or lease of a Native allotment in most instances requires approval by the Bureau of Indian Affairs, but would not require any approval by the NPS.

The Commission commended the NPS efforts in consulting with and involving local communities and landowners in developing the hunting guide proposal. We encouraged the agency to continue that consultation as it makes the final decisions on authorizing guided hunting in the preserve. Continuing consultation will help ensure the interests of the local communities and subsistence users are met while also providing for sport hunting activity for other Alaskan hunters and visitors. The Commission noted that it was pleased to see the NPS provide this opportunity for guided hunting on the preserve and the positive economic impacts which will result.

Serpentine Hot Springs Master Plan & Environmental Assessment - The National Park Service is preparing a master plan for the Serpentine Hot Springs area within Bering Land Bridge National Preserve. The Commission was briefed on the proposed plan by NPS staff at its November meeting in Anchorage The hot springs are extremely important to residents living in this region of Alaska. The hot springs and the surrounding area have been in use for some 12,000 years.

The Commission's review of the environmental assessment indicated the range of action alternatives developed by the NPS represented a common sense approach to recognizing the historic use of the hot springs and surrounding area. The alternatives also recognized the traditional and cultural significance of the hot springs to the residents of the region. The alternatives also are consistent with the mandate for Bering Land Bridge National Preserve in Section 201(2) of ANILCA "*to provide for outdoor recreation and environmental education activities including public access for recreational purposes to the Serpentine Hot Springs area.*"

Our comments also suggested that, as the project alternatives are refined, it is important that all alternatives include provisions to improve safe access to the hot springs and the facilities there. This should include improved trail marking, expanding and hardening of trails and safety upgrades to the airstrip. Maintenance and upkeep of the bunkhouse and bathhouse to improve public safety and health at those facilities should also be included in each action alternative.

The Commission also supported updating the preserve's wilderness eligibility status by removing the Iyat Area from wilderness eligibility. The NPS was also encouraged to consider removing additional acreage from eligibility as necessary to meet the ANILCA mandate for the hot springs area. In light of the longstanding use of this area, the presence of the facilities and airstrip, this area should not have been determined to eligible in the original ANILCA 1317 wilderness review.

U.S. FISH AND WILDLIFE SERVICE

Izembek National Wildlife Refuge Land Exchange- The Commission reviewed the Draft Environmental Impact Statement (DEIS) for the proposed Izembek National Wildlife Refuge Land Exchange and Road Corridor Project. In its comments the Commission supported the exchange of federal public lands within the Izembek NWR and on Sitkinak Island for lands owned by the State of Alaska and King Cove Corporation. The exchange would allow for the construction of a road between the communities of King Cove and Cold Bay to provide better emergency access during inclement weather.

The Commission supported the exchange and construction of the road because it would best address the health and safety needs of the residents of King Cove by providing dependable access to and from the airport in Cold Bay,. The Commission encouraged Secretary of the Interior Salazar to make a finding that the exchange was in the public interest.

The State of Alaska had previously taken action to support the project by authorizing the exchange of State lands and designating Kinzarof Lagoon as part of the Izembek State Game Refuge. HB 210 was passed unanimously by the Alaska State Legislature and signed into law by Governor Parnell in 2010. The exchange and designation will be finalized only if construction of the road is approved.

In its comments, the Commission acknowledged the international importance of the Izembek NWR and the waters of the Izembek State Game Refuge as vital habitat for migratory waterfowl, waterbirds, and shorebirds. While recognizing the concerns about the potential impacts from construction and use of a road, the Commission also pointed out the land exchange represented an equitable compromise that would accomplish several important things. First, a road would provide a much needed link for the residents of King Cove in the case of medical and other emergencies.

As a mitigating measure, the exchange would also place a substantial amount of acreage into designated wilderness and retain other acreage in public ownership as part of the Izembek NWR wilderness. It would provide additional protection for Kinzarof Lagoon by including it in the Izembek State Game Refuge. Proper design and management of the road, along with cooperation between State and Federal land managers and area residents will minimize any adverse impacts to this important area.

The Commission's review of the DEIS found that the document failed to present the type of balanced and objective discussion and analysis of proposed alternatives required under the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) Guidelines. We found the DEIS to be inadequate in a number of areas and encouraged the agency to correct the deficiencies before finalizing the document.

The DEIS analysis focused almost exclusively on the potential negative impacts of the two alternatives involving the exchange of lands within the Izembek NWR which would result in the removal of between 131 and 152 acres of designated wilderness. At the same time, the positive benefits from the addition of 44,491 acres of State and King Cove Corporation lands to the Izembek and Alaska Peninsula National Wildlife Refuges and other actions taken by the State and the corporation were minimized or ignored.

For example, a key element of the exchange package, the inclusion of Kinzarof Lagoon in the Izembek State Game Refuge, received little recognition in the DEIS as a beneficial impact or mitigating factor. The Izembek State Game Refuge was established by the Alaska Legislature to protect natural habitat and game populations, especially waterfowl. Although the lagoon would remain in State ownership, it would be included in a legislatively designated area with purposes and goals similar and complementary to the purposes of the Izembek NWR.

Perceived impacts to wilderness were handled in a similar fashion. Under two of the alternatives some 44,491 acres would be added to the National Wilderness Preservation System. In addition, the existing 5,430 acre King Cove Corporation selection would be relinquished and remain part of the Izembek NWR wilderness. Although the exchange would create a new wilderness area within the Alaska Peninsula NWR and add 2,604 acres to the Izembek wilderness, the positive impacts to wilderness were considered in the DEIS to have only a "medium" positive impact. The Commission questioned why the addition of these state and corporation lands was not recognized as having any mitigating effect on the perceived impacts from the removal of 131 acres from wilderness and the construction of the road.

Our review found other examples in the DEIS of the lack of balance in the discussion of the beneficial vs. adverse impacts from the proposed exchange and road construction. The positive aspects of the State and corporation lands to be exchanged were minimized when compared to the refuge lands. The result was a document that did not meet the CEQ guidelines requiring a "full and fair" review of the impacts of the proposed action.

The Commission's review also showed that the DEIS was lacking data on some key wildlife resources. For example, in the discussion of brown bear on State land, the DEIS noted that the refuge areas immediately east and west of this parcel are designated under a USFWS ranking system as "high density – spring summer and fall" and the area immediately south is designated "high density – denning" and "medium density – spring, summer and fall." The DEIS then points out that State lands are not designated under this ranking system but offered no data on bear use on the State lands, even though these lands are known to have high density of bears in spring summer and fall.

The DEIS also failed to include any meaningful data on birds on the State parcels, simply stating that the 41,887 acres of State lands have not been covered by many bird surveys. While acknowledging that may be the case, the Commission questioned the accuracy of maps showing distributions of Emperor Goose, Brant and Tundra Swans that labeled the State parcels as "no data available."

We did not accept that no data were available for these parcels. For example, the map for Tundra Swans showed high density use area directly adjacent to the east of the state parcel and a low density use area to the west. The DEIS even noted that Tundra Swan surveys are conducted each spring over lands within or adjacent to the Izembek NWR. The Alaska Peninsula National Wildlife Refuge surveys Tundra Swans every five years both inside and outside refuge boundaries. Additionally, aerial surveys of waterfowl are conducted regularly along the north side of the Alaska Peninsula. The Commission suggested that data sources be reviewed more closely and any relevant data for these parcels included in the final EIS.
A final EIS was released in January 2013. The U.S. Fish and Wildlife Service recommended that the 'no action" alternative be selected. This would preclude the land exchange and the

construction of the road from King Cove to Cold Bay. The Secretary of the Interior is responsible for selecting the final alternative and making the final decision as part of the public interest finding.

Arctic National Wildlife Refuge Special Use Permit Application Instructions and Reporting Requirements – In 2010, Commission staff, in cooperation with the State ANILCA Implementation Program, reviewed and suggested revisions for three forms proposed intended to be used as applications for special use permits within the National Wildlife Refuge System. The three forms were designed to replace the single form then in use for all refuges, including those in Alaska. Previously, applications for special use permits for Alaskan refuges were made using an Alaska specific form, but which had expired. Final application forms were approved in 2011.

In early 2012 the Commission was provided with a copy of a document entitled *Special Use Permit Application Instructions for Commercial Guided Education, Recreation (non-hunting), Sport Fishing and Air Operations within Arctic National Wildlife Refuge.* This instruction sheet was being distributed to individuals or companies to provide guidance in applying for a special use permit authorizing commercial activities in the Arctic National Wildlife Refuge.

The Arctic Refuge instructions were intended to supplement and replace the OMB approved instructions for completing the Commercial Activities Special Use Permit Application and Permit Form The approved instructions are an integral part of that form. Applicants were told in the refuge instruction sheet that "*Supplemental questions and other required items must accompany your application before your application packet will be considered complete and evaluated.*"

In a letter to the refuge manager, the Commission objected to the use of the unapproved instruction sheet and requested that its use be discontinued. The unauthorized supplemental form instructions and resultant collection of personal and other unnecessary information violated the Paperwork Reduction Act and the Privacy Act since applicants are directed to provide more information and different information than is required by the OMB approved form and instructions.

In our comparison of the OMB approved instructions with the refuge generated instructions, Commission staff found at least 3 instances where the applicant were directed to provide information not required under the approved instructions.

In the first example, the OMB instructions require the applicant to provide the names and addresses of assistants, subcontractors or subpermittees only if the assistants, subcontractors or subpermittees will be operating on the refuge without the permittee being present. Volunteers, assistants, subcontractors or subpermittees that are accompanied by the permittee are not required to be identified. The refuge instructions failed to make this

distinction and required an applicant to list any other business that assists their operation regardless of whether or not the other business actually operates on the refuge or provided assistance when the applicant is not present.

A second example of where the refuge was asking for information beyond that approved by OMB was in requiring the applicant to provide "*the names, addresses and phone numbers of the individuals involved in your operation and the functions they will perform.*". Here, the refuge instructions were inconsistent with the approved instructions on two points. The approved instructions simply require an applicant who indicates that overnight stays are a regular part of their operation to "*provide the name(s) of any personnel required to stay overnight, if applicable.*" This information was being solicited by the refuge even when the applicant indicated that overnight stays were not a part of the permitted activity. The Commission pointed out that the request was intrusive and went well beyond the purposes stated for the approved information collection

Even if overnight stays are a regular part of an operation, the refuge is authorized to request only the name of employees, not their address and phone number. Additionally, consistent with the approved information requirements, only those employees who would be operating on the refuge without the permittee present are required to be identified. Most importantly, if there is no overnight stay, the refuge had no legal authority for requiring the name, much less the personal contact information of an employee.

The final example of information solicited by the refuge that exceeded its authorization under the OMB instructions was when guides who access the refuge overland via the Dalton Highway were required to "*provide a description of and specific auto license registration number for your vehicle – or if you contract an auto rental business to assist your operation, list the business....*" The approved instructions state that motor vehicle descriptions are only required for a permittee vehicle and/or if the vehicle will be operated on the refuge without the permittee being present. Given that there are no roads within the refuge or roads connecting the refuge to the Dalton Highway by which a highway vehicle can enter the refuge, there was no rational, nor legal, justification for the refuge to solicit this information.

The Commission received a response from the Arctic Refuge Manager stating that the supplemental instruction sheet used by the refuge had been revised so that it was consistent with the OMB approved instructions.

U.S. Fish & Wildlife Service Friends Policy - In October 2010 the U.S. Fish & Wildlife Service (Service) released a draft Friends Organization Policy for a 45 day public review and comment period and reopened the comment period for an additional 30 days in March 2011. The National Friends Program was established in 1966 to encourage and organize community involvement in Service activities.

The Commission submitted comments on the draft policy during the initial review period. By the end of 2012, nearly two years later, the agency still had issued no final policy. Despite this, the agency continues its involvement with and support of friends groups such as the Friends of Alaskan Wildlife Refuges. In December 2012 Commission staff wrote to Daniel Ashe, director of the agency inquiring about the status of the final policy.

The Commission also requested copies of any interim policy guidelines or directives which may have been provided to individual refuges or regional offices to guide their work with Friends organizations pending release of the final policy. Even in the absence of a final policy, it was reasonable to expect that some level of policy guidance is necessary to ensure that the relationships and interactions between Service staff and the more than 200 Friends organizations are both transparent and fully consistent with the provisions of the *National Wildlife Refuge System Administration Act of 1966, the Refuge Recreation Act of 1962, the National Wildlife Refuge System Volunteer and Community Partnership Act of 1998,* or other relevant statutes.

The Commission's earlier critique of draft policy identified the potential for conflicts of interest between Friends organizations and Service staff. We pointed out that the likelihood of a conflict increases when a Service employee is also a member of a Friends group. Our comments on the draft policy outlined some of the potential conflicts we have noted in Alaska. With no final policy yet in place or any other guidance of which we are aware, the Commission has been unable to determine if those potential conflicts have been addressed by the Service.

One way the Service provides support to Friends groups is by offering specialized training at no cost to volunteers. As the Commission pointed out in our letter the classes are not actually free. They are paid for with taxpayer dollars and other public funds appropriated to the Service. Use of public funds to support the activities of a private organization, even when the agency benefits, further emphasizes the need for clear policy guidance on the relationship between the Service and Friends groups.

Clear guidance is critically important when a Friends group, which may also include Service employees as members, takes an advocacy role on a proposed management action, proposed legislation or other Service proposal. There are several example of this in Alaska. Friends of Alaska National Wildlife Refuges, which includes advocacy "through outreach to decision makers" in its mission statement, advocated strongly against the land exchange in Izembek National Wildlife Refuge. At the same time, some of its members are Service employees involved to varying degrees in both the preparation of the draft environmental impact statement analyzing the proposed exchange and in making decisions related to the exchange. While the Commission has no knowledge of any improper behavior, this involvement increases the possibility, as well as the public perception, that a conflict of interest may exist or an abuse of authority could occur.

As of the date of this report, the Commission has received no response to our inquiry.

Endangered Species Act Regulations – The Commission reviewed proposed draft policy on interpretation of the phrase "Significant Portion of Its Range" (SPR) in the Endangered Species Act's (ESA) Definitions of "Endangered Species" and "Threatened Species."

The original goal and primary objective of the ESA was to prevent the extinction of imperiled plant and animal life. There are a number of successful recoveries, such as the bald eagle and grizzly bear, which can be attributed in part to the ESA as well as other conservation strategies and recovery measures. The Alaska populations of both these species were thriving and were never seriously considered for listing even when they were listed as endangered in other parts of their natural range.

Today's ESA, which is a combination of amendments to the original statute supplemented by policies and regulations that change as each successive administration reinterprets its provisions and responds to an endless series of lawsuits and court decisions, is a law considerably different from what Congress intended when it passed the ESA in 1973. The 16 pages of background information, consisting of more than 20,000 words to explain a draft policy of less than 400 words is a clear indication of the regulatory and legal chaos that currently surrounds the administration of the Endangered Species Act. It is less flexible, less science based, less objective and too often misused to list species such as the polar bear that do not meet the criteria necessary for listing.

As we understand the proposed policy, it requires that if a species is found to be endangered or threatened in only a significant portion of its range, the entire species will be listed and the provisions of the ESA applied across the species' entire range. The Commission's primary concern with the proposed policy was that it would result in the unnecessary or inappropriate listing of a species or subspecies in Alaska. These restrictions would adversely affect the ability of the State of Alaska to manage its fish and wildlife resources for the benefit of its citizens. It could also unnecessarily hinder or even prevent the development of the state's mineral, oil and gas and timber resources.

The Commission pointed out that Alaska occupies a unique position with respect to the application of the ESA. This is in part due to its solitary geographic relationship with the contiguous 48 states, but also because of its size, diverse ecosystems and intact habitats. Ranges for species like the grizzly bear, the grey wolf and the bald eagle extend from Alaska, through Canada and into the contiguous 48 states. These ranges are enormous and encompass areas with varying degrees of human development and interaction, climate variations, different ecosystems and varying species population densities. Due to a wide

variety of factors, there are areas within these ranges where the species are stable or growing and areas where populations remain low or are absent. Applying ESA restrictions to a portion of a species' range that is as geographically isolated as Alaska provides no benefits for populations segments in other portions of the range.

The Commission did agree with the portion of the proposed policy that states that if a species is not endangered or threatened throughout all of its range, but is endangered or threatened within a significant portion of its range and the population is a valid distinct population segment, then the population segment could be listed rather than the entire species or subspecies. This is critical for Alaska, as there are a number of species whose populations are healthy in Alaska, but in jeopardy in the contiguous 48 states.

Having the flexibility to list those populations separately as distinct populations segments will prevent the improper application of ESA restrictions on healthy populations in Alaska. Listing of the entire range of a species determined to be endangered or threatened in only a portion of its range must be scientifically justifiable as being critical to its survival. Listing of a species, subspecies or distinct populations segments as endangered or threatened must be the minimum necessary to assure its survival.

U.S. FOREST SERVICE

Final National Forest System Land Management Planning Regulations - In February 2012 the U.S. Forest Service released final planning regulations under 36 CFR Part 219 along with a final programmatic environmental impact statement. The Commission had previously reviewed and submitted comments on the proposed revisions to the planning regulations and the accompanying draft environmental impact statement. At our February meeting in Juneau Commission members discussed their continuing concerns about the revised regulations with Forest Service representatives.

In addition, the Commission sent a letter to the U.S. Forest Service noting that the proposed final regulations failed to include reference to the Alaska National Interest Lands Conservation Act (ANILCA). While recognizing that the regulations could not include a comprehensive list of all applicable laws, failure to include specific reference to ANILCA was extremely disappointing given its importance in guiding management and planning for many of the the National Forest Lands in Alaska. The Commission reminded the agency that it has shown an increasing reluctance to recognize provisions in ANILCA, particularly if those provisions are unique to Alaska. The result of this effort to create a "one size fits all" management approach for the National Forest System has been the development of policies

and management decisions in Alaska that too often fail to meet the requirements of the act and which ignore the intent of Congress.

More importantly, we found that the regulations themselves violate key provisions of ANILCA. For example, one section requires the Forest Service to identify and evaluate lands that may be suitable for designation as wilderness even though ANILCA prohibits such evaluations unless authorized by Congress. Another section requires review of rivers for their suitability for designation as wild and scenic. However, ANILCA Section 1326(b) clearly prohibits such reviews:

> *(b) No further studies of the Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress"*

Section 708(4)(b) of ANILCA also restricts any further wilderness review in Alaska by the Forest Service:

> *Unless expressly authorized by Congress, the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System Lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.*

Congress clearly retained for itself the sole authority for future studies or reviews for the purpose of creating additional conservation system units, including designated wilderness areas and wild and scenic rivers in Alaska. The Commission again requested the inclusion of language in these two sections stating that no wilderness review or wild and scenic river review is required when preempted by law, such as ANILCA.

Finally, the Commission renewed its request to revise the regulation to broaden the scope of who may file an objection to a plan, plan amendment or plan revision. Provisions should be made for an individual who has submitted substantive formal comments to submit an objection verbally. The definitions define *substantive formal comments* as "Written comments submitted to, **or oral comments recorded by**, the responsible official or his designee during an opportunity for public participation...." Therefore, we argued that provisions need to be made for filing an objection or protest verbally. The Commission's experience in working with the public in Alaska demonstrates that many people who participate in a planning process by attending public meetings and presenting formal verbal comments at those meetings would be effectively precluded from filing an objection if it had to be filed in writing.

The Forest Service is developing a set of planning directives to provide further guidance on implementation of the final rule. The public is supposed to have the opportunity to review and comment on these directives. The Commission strongly encouraged the U.S. Forest Service to establish a well structured and open public outreach program to involve the public in the development of these planning directives. We suggested a minimum 60 day public review and comment period for any draft directive. Notice of availability should be published in the *Federal Register* as well as in local and state-wide newspapers. Opportunities for public meetings, work-shops or open house question and answer sessions also should be provided.

On February 15, 2013 the Forest Service the proposed 2012 Planning Rule Directives for a 60 day comment period beginning when a formal notice is published in the *Federal Register*..

White Sulphur Springs Bath House Project – This project originally proposed the reconstruction and relocation of a Forest Service public use cabin and bathhouse at White Sulphur Springs. The cabin and bathhouse are located in the West Chichagof-Yakobi Wilderness Area on the Tongass National Forest. The Commission commented in support of the proposal in December 2010.

When the decision document was signed in August 2011, however, the Forest Service altered the proposed action and decided to remove but not replace the bathhouse. The agency's decision was based on a finding that the bathhouse was an amenity that was inconsistent with wilderness values. According to the decision document, its removal would move the site to a more undeveloped state and improve on the primitive and unconfined qualities of the area. The Commission and a number of local residents and users of the bathhouse questioned that assertion and objected to the decision.

Pursuant to the Forest Service regulations at 36 CFR Part 215, the Commission, along with the City and Borough of Sitka, the City of Pelican and three individuals successfully appealed the decision to remove the bathhouse. Following an appeal hearing in early November 2011 the Forest Service agreed to modify its decision. The decision was to proceed with the cabin relocation and delay a decision on removal of the bathhouse.

The Forest Service agreed to conduct further analysis and gather additional information on the emergency use of the bathhouse as well as the historical, traditional and cultural use of the structure. All appellants agreed to withdraw their appeals so that the cabin replacement component of the project could continue. If, after gathering the additional information, the Forest Service decided to remove the bathhouse, all appellant retained the right to re-file their appeal.

In March 2012, after gathering additional information and conducting further analysis, the Forest Service released an environmental assessment for replacing the existing bathhouse. The Commission provided comments in support of the proposed replacement, along with additional information from the legislative history of ANILCA regarding wilderness management, including the use, construction, and replacement of cabins and other structures in designated wilderness.

The Forest Service issued a Decision Notice and Finding of No Significant Impact approving the replacement of the White Sulphur Springs Bathhouse. That decision was appealed by Wilderness Watch. However, the appeal was denied by the regional forester and construction is expected in 2013.

Bell Island Geothermal Leases - The Commission reviewed the *Bell Island Geothermal Leases Draft Supplemental Environmental Impact Statement* (DSEIS). The Commission submitted scoping comments in June 2011, expressing support for the development of alternative energy sources in Alaska, including geothermal, but took no position on the Bell Island lease proposal.

Based upon its review of the DSEIS, information in the *Final Programmatic EIS for Geothermal Leasing in the Western United States* (PEIS) and provisions in the 2008 *Tongass National Forest Land and Resources Management Plan* (Forest Plan) the Commission supported the proposed action, under which the Forest Service would consent to the pending lease applications on Bell Island.

Approval of the leases is consistent with the forest-wide standards and guidelines in the Forest Plan that encourage the exploration, development and extraction of locatable and leasable minerals and energy resources. Approval of the leases is also consistent with the goals of the *Energy Policy Act of 2005* and the PEIS, both of which promote the development of renewable energy resources.

The Commission noted that any Forest Service consent to issuance of the leases by BLM is not the final step in the lease approval process. Additional site-specific National Environmental Policy Act (NEPA) analyses will be necessary once a plan of operations is submitted for exploration and development of the lease areas.

Because the proposed lease areas are located in the North Cleveland Inventoried Roadless Area (IRA), the recent decision which subjects National Forest lands in Alaska to the Roadless Rule means that any affirmative consent determination will require final authorization by the Secretary of Agriculture.

However, the proposed lease acreage encompasses only 7.3 percent of the IRA, with development of the geothermal plant likely occurring on the private land on Bell Island. The Swan Lake to Tyee Lake Electrical Intertie is also located in the IRA in close proximity to the pending lease areas. As described in the SEIS, any additional impacts to the IRA resulting from the exploration, drilling and utilization of geothermal resources would be minimal and should not preclude the Secretary from authorizing the consent determination.

BUREAU OF LAND MANAGEMENT

Trapping Cabin Policy – Beginning in 2008, the Commission worked with the BLM in an effort to revise the agency's longstanding trapping cabin policy for Alaska. Since that time, Commission members and staff have met with trappers, including the Alaska Trappers Association, BLM managers and State agency representatives to discuss concerns with the current policy which has been in place since 1987. Little progress was made through 2010.

Finally, in March 2011, the Commission wrote to the BLM State Director asking the agency to take the logical next step and initiate a formal public process. A formal process would provide trappers and other interested individuals an opportunity to suggest changes and to review any proposed changes to the existing agency policy for permitting the use and construction of trapping cabins. In response to the Commission's request, the State Director decided to refer the issue to the BLM Resource Advisory Council (RAC) and asked that group to advise him regarding the need for a policy revision.

The Commission submitted written comments to the RAC at its April 2011 meeting in Anchorage. Those comments pointed out what we had learned in our discussions with trappers. The 1987 cabin policy contained economic criteria that were difficult, if not impossible, for the majority of trappers to meet. Because the BLM classifies trapping cabins (other than those permitted for use by federally qualified subsistence users) as commercial cabins, existing policy required that the commercial activity generate at least 25% of an individual's annual gross income before a lease or permit for cabin use or construction could be issued. Every trapper the Commission heard from clearly felt that this figure was not feasible and did not reflect current economics with respect to trapping.

The RAC formed a subcommittee to make recommendations for revisions to the cabin policy and at presented those at its November 2011 meeting in Fairbanks. Commission staff reviewed the subcommittee's recommendations in consultation with the Alaska Trappers Association and individual trappers and presented testimony supporting those

recommendations. The RAC adapted several recommendations for revising the cabin policy and submitted those to the BLM State Director.

A final decision was made and an Instruction Memorandum was issued by the BLM State Director in September 2012. The revised cabin policy is a significant improvement from the 1987 policy. Under the revised policy, in addition to holding all required State, local or federal authorizations, an applicant must show: a) Sixty days of trapping activity during at least on of the preceding three seasons; b) Ownership of 20 or more traps; c) receipts for investment in the activity (fuel, trapping equipment, food, etc.) and d) Proof of commercial sale, barter, and /or creation of commercial value added products. The trapping community has endorsed the revised policy and several cabin permit applications have been filed with the BLM.

National Petroleum Reserve – Alaska - Draft Integrated Activity Plan - The Draft Integrated Activity Plan/Environmental Impact Statement (IAP/EIS) for the National Petroleum Reserve-Alaska (NPR-A) was released in 2012. In commenting on the plan the Commission supported the general purpose and intent of the planning effort to determine the appropriate management of federal lands and subsurface resources within the NPR-A. However, we strongly objected to the manner in which BLM alternately followed and ignored key provisions in an extensive list of statutes, regulations, policies and manuals, in some instances omitting relevant information. The result was a draft plan that the Commission found to more closely resembled a management plan for a conservation system unit or similarly designated area than one which met Congressional direction for the management of the NPR-A.

The Commission opposed the inclusion of eligibility and suitability determinations for rivers within the planning area for the purpose of recommending their designation as wild and scenic rivers. Inclusion of these determinations is inconsistent with the provisions of the Alaska National Interest Lands Conservation Act (ANILCA). The draft IAP/EIS incorrectly asserted that the BLM is required by the Wild and Scenic Rivers Act to conduct reviews of the rivers within the NPR-A to determine their eligibility and suitability for possible designation. In light of the provisions of Section 1326(b) and other actions taken by Congress in passing ANILCA, this is incorrect.

Congress added 26 rivers to the Wild and Scenic River System through ANILCA and directed the study of an additional 12 rivers under Section 5(a) of the Wild and Scenic Rivers Act. That is the sole authority for wild and scenic river studies in Alaska, unless Congress directs additional studies.

Because four of the rivers studied under the draft IAP/EIS were studied previously, we questioned both their re-evaluation and, as applicable, the proposed decision to recommend

designation, particularly since they were previously found unsuitable. We also found the wild and scenic river reviews to be inconsistent with the BLM's own Wild and Scenic River Manual 8351.

The draft IAP/EIS made a number of basic assumptions regarding impacts to oil and gas exploration and development activities, including transportation needs. The draft IAP/EIS then looked at how these activities, including transportation, would be affected under each of the four alternatives. One effect that was not considered under the two alternatives recommending wild and scenic river designation is how designation would impact development of transportation and utility system corridors.

The Commission also objected to the inclusion of any inventory of wilderness characteristics in the IAP/EIS. As with the wild and scenic river review, the question of wilderness within the NPR-A has been addressed under the National Petroleum Reserve Production Act.

In July 2012 Secretary Salazar announced that a new preferred alternative for the NPRA was being developed. The final IAP/EIS was released in late December 2012. A Record of Decision is expected in early 2013.

OTHER ACTIONS AND ISSUES

Joint Pacific Alaska Range Complex Modernization and Enhancement Draft EIS. In March 2011 the Commission submitted scoping comments on the proposal to expand the overall military operation areas used for training purposes by both the U.S. Army and U.S. Air Force. A primary concern heard from residents of the affected region and others was air safety related to low level military aircraft operations. Other issues identified included possible negative impacts on the Nelchina Caribou herd calving and migration, impacts to waterfowl nesting, staging and migration, moose winter range and fish stocks. This expansion also could introduce negative impacts from high noise levels over important recreation areas along the Richardson and Denali Highway corridors, Summit, Paxson and Fielding Lakes, Lake Louise, and the Gulkana, Delta and Wood Rivers.

The Joint Pacific Alaska Range Complex (JPARC) Modernization and Enhancement Draft Environmental Impact Statement (DEIS) was released in Spring 2012. Because of the size and complexity of the document, the Commission requested an extension to the original 60 day comment period. The Alaska Command granted that request and extended the comment period an additional 30 days.

In commenting on the DEIS, the Commission recognized the crucial role the military plays in defending our nation and expressed its support for the Department of Defense's mission and understanding of the need for training areas to ensure the readiness of our military forces. Commission members did, however, have concerns about the potential impacts from the proposed expansion of some of the training areas as well as other elements of the proposals outlined in the DEIS.

The Commission fully understands the vital role the military plays in Alaska's economy. At the same time, the civil aviation industry makes significant economic contributions to the state. According to the Aircraft Owners and Pilots Association, the civil aviation industry in Alaska contributes approximately $3.5 billion to the state's economy and supports an estimated 47,000 directly and indirectly related jobs. In addition, civil aircraft routinely provide the most economical and feasible means of travel for Alaskans as well providing the primary method of access for utilizing many of the resources of the state. The Commission stressed that it was essential that a balance be struck between the military's operational and training needs and those of the civilian populations as they are supported by the civil aviation industry.

The proposed expansion of the Fox 3 Military Operations Area (MOA) and designation of a new Paxon MOA represent a significant expansion in the amount of Alaskan airspace directly affected by military training activity. The Commission has heard from members of the public who are concerned that 67% of the lands affected by the existing MOA and the proposed expansion areas are State owned. They find it disconcerting that with 60% of the lands in Alaska federally owned, the lands most impacted by the proposals in the DEIS are state lands. Many Alaskans believe that it would be more appropriate to designate MOAs over federal lands.

The DEIS indicated that the proposed expansion of the FOX 3 MOA and designation of a new Paxon MOA have the potential for significant adverse impacts to airspace management and use, noise levels, flight safety, land management and use, recreation and socioeconomics and that management actions or mitigations are required to avoid or reduce impacts. The Commission agreed with this assessment.

The public expressed significant concern with the expansion of the FOX 3 MOA and the creation of the Paxon MOA. Of even greater concern was the proposal to lower the minimum altitude restriction for military aircraft from 5,000 feet AGL to 500 feet AGL. The area that would be included in the proposed expansion is used extensively by general aviation pilots, air taxi operators and transporters to support hunting camps and mining operations, conduct air tour operations, access recreational areas or make other uses of this region.

Given its proximity to Fairbanks, Anchorage, the Mat Su Borough and the Copper River Basin, the airspace is heavily used by civilian aircraft throughout the year. The Commission commented that lowering the minimum altitude to 500 feet AGL greatly increases the collision potential with high-speed military aircraft engaged in training maneuvers in the Fox 3 MOA. Because of the heavy use of the proposed Fox 3 expansion area for access to the southern Alaska Range, the Denali Highway, the Nelchina Basin and the Talkeetna Mountains, and to minimize the risk of mid-air collision, the Commission recommended that expansion of the Fox MOA should be limited to no lower than 5,000 feet AGL, and to the smallest possible lateral extent to minimize the risk of mid-air collision.

The Commission was also disappointed that there was no high altitude only alternative for the proposed Paxon MOA which covers Isabel Pass and portions of the Eastern Alaska Range. During scoping, there was considerable public concern about the potential negative impacts to civilian air operations from military aircraft operating as low as 500' AGL if this MOA is designated. Isabel Pass is a major Visual flight Rules (VFR) route for civilian aircraft. It links northern and interior Alaska with south central and southeast Alaska. As with the proposed Fox 3 expansion area, this route is used extensively by civilian aircraft to access hunting and fishing areas, private cabins and homesites, mining operations and small airstrips on the southern flanks of the Alaska Range.

The DEIS proposed establishing or expanding existing VFR flyway corridors as mitigation measures for the Fox 3 MOA and the proposed Paxon MOA if designated. After discussing the issue with several pilots familiar with the areas, the Commission commented that while designation of specific VFR flyway corridors may be realistic in the Fox 3 MOA, the highly variable weather in the area of the proposed Paxon MOA makes designation of a single corridor unfeasible. It would also concentrate VFR traffic in an already limited area and increase the potential for a mid-air collision between civilian and military aircraft. We strongly suggested that if the Paxon MOA is designated, it should be limited to high altitude use only.

The DEIS stated there is a potential for adverse impacts on biological resources, public access, and subsistence, but that impacts are not expected to be significant and that management actions or mitigations may be required to avoid or reduce impacts. Based on our assessment, the Commission stated it belief that the potential exists for significant adverse impacts to these three resources. We suggested the development of mitigation measures for inclusion in the final EIS and Record of Decision.

Because of the importance of this area and its wildlife resources for a wide range of uses and user groups, the Commission commented that simply monitoring the effects of training overflights is not sufficient to protect those resources. Previous studies and surveys have established the effects of these types of activities on biological resources. We recommended that the Final EIS and Record of Decision include specific mitigation measures for caribou

and moose during calving and post-calving periods in the existing Fox 3 MOA and for the proposed expansion area, including the proposed Paxon MOA.

Again, based on our discussions with ADF&G biologists and others, the Commission suggested that a minimum elevation of 5,000 feet AGL be maintained from May 15 through July 15 throughout the existing Fox 3 MOA, including any expansion area. This will reduce stress on the Nelchina Caribou Herd during critical calving and post-calving period.

The DEIS listed an existing mitigation measure for the Delta Caribou Herd calving areas which established a minimum oveflight altitude of 3,000 feet AGL from May 15 to June 15. The Commission suggested modifying the mitigation by increasing the minimum altitude to 5,000 feet AGL and extending it from May 15 to July 15. We also suggested adoption of the same May 15 to July 15 flight restriction of 5,000 feet AGL for moose in both the Fox 3 MOA and the proposed Paxon MOA. Even though moose do not have concentrated calving areas, they are susceptible to low level, high speed aircraft overflights during calving and post calving periods.

To avoid significant adverse impacts to hunting activities regulated under the State of Alaska's general hunting regulations in the Fox 3 MOA (existing and proposed expansion area) and the proposed Paxon MOA, we recommended that no major flying exercises be conducted in these areas from August 10 to September 30 and October 21 to November 31. This will prevent disruption of big game hunting in these areas during the peak seasons

The Commission also noted that the Fox 2 MOS and Eielson MOA areas are used extensively by moose hunters during the fall and winter. The fall hunt extends from August 15 to September 25 with most use occurring between September 1 and September 15. Winter hunting usually falls within two time frames, November 15 to December 15 and January 15 to February 15. As a mitigating measure, the Commission recommended no major flying exercises during the fall and winter hunting periods and no flights below 5000 feet AGL.

Because of the high potential for adverse impacts to the resources in the MOAs, appropriate mitigation measures must be developed. In order to effectively identify, develop and implement necessary mitigation measures the Commission suggested that the Alaskan Command establish a comprehensive program involving regular consultation and coordination with the Alaska Department of Fish and Game, the Alaska Department of Natural Resources, and Federal land management agencies. Consultation should also include public user groups, private property owners, and the civil aviation community. This consultation and coordination should continue through the FEIS and Record of Decision, the FAA review of the airspace proposals and the implementation of this plan as its impacts will continue to affect all parties.

The Commission questioned the Impact Assessment Methodology used in the DEIS to assess the level of dependence on subsistence resources by communities potentially affected by the proposed Fox 3 MOA expansion and the proposed Paxon MOA. Chistochina, Dot Lake and Gulkana were listed as having a high dependency and Cantwell, Gakona, Glennallen and Paxson were considered to have a medium dependency. Chickaloon was assigned no ranking.

The Commission found no basis for making different high dependency-medium dependency rankings for these communities when all pertinent factors are considered. All of the communities are on the road system and have similar access to alternative resources. In addition, for the eight communities listed, an average of 77.2% of households participated in subsistence, with no community having less than 58.7% participation. For the seven communities for which information was available, residents harvested an average of 158 pounds of subsistence resources per capita. Harvest for Paxson, which was ranked as having a medium dependence, harvested 289 pounds per capita. This is more than the amount of per capita harvest for Dot Lake (115 pounds) and Gulkana (152 pounds). However, both of those communities were ranked by the DEIS as having a high dependence on subsistence.

A more realistic assessment of the subsistence harvest data for these communities would indicate that all of them have a high dependence on subsistence. As the Commission did in its our scoping comments, we pointed out that the preference for subsistence uses on Federal public lands in Alaska is provided to all rural residents, both Native and non-Native, under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). Ranking a community's dependency on subsistence resources on the basis of the percentage of Native or non-Native residents is inconsistent with both ANILCA Title VIII, as well as federal and state regulations. While it may be appropriate to rank an affected community's dependency, other criteria should be used. We suggest that the discussion in final EIS , including any discussion of statutory or regulatory provisions, be revised accordingly.

Draft Alaska Federal Lands Long Range Transportation Plan- The Commission reviewed and commented on the Draft Alaska Federal Lands Long Range Transportation Plan (LRTP). The LRTP is intended to address strategic and policy level issues rather than specific plans or projects for the Federal public lands in the state.

The Commission expressed concern that on the policy level the LRTP focuses primarily on transportation needs for tourism, recreation and subsistence, but did not adequately address future transportation needs for resource development or community growth and development.

The Commission commented that the plan also failed to recognize that the potential for increased development of oil and gas, minerals, and timber resources on State, Federal and

Native Corporation lands are directly affected by Federal land management agencies' laws and policies. While resource development activities may not be permitted on millions of acres of Federal lands within conservation system units or other withdrawn areas, in many cases they occur on State and private lands that are within or effectively surrounded by these areas. We found that even as strategic and policy level documents neither the umbrella plan nor the individual step down plans addressed this issue in sufficient detail. The federal agencies issued their final plans in September 2012.

CONCLUSION

During 2013 the Commission will continue to expand its outreach efforts to individuals, user groups and organizations. We will also continue to provide the public with information and updates on federal land management issues and activities. Monthly distribution of the electronic newsletter will continue via e-mail and also made available on the Commission website.

The Commission will continue to develop and expand its working relationships with federal agencies and will work diligently to keep those relationships productive. Our focus will be on finding ways to resolve conflicts in a positive manner. At the same time, the Commission will closely monitor changes in policy and management direction that could affect Alaskans' rights and guarantees under ANILCA and other federal statutes.

Citizens' Advisory Commission on Federal Areas
Stan Leaphart, Executive Director

Conservation System Units and Federally Designated Areas in Alaska

National Park Service

Park Unit	Size in Acres	Wilderness Acreage
Aniakchak National Monument & Preserve	514,000	0
Bering Land Bridge National Preserve	2,457,000	0
Cape Krusenstern National Monument	560,000	0
Denali National Park & Preserve	6,028,200	2,124,783
Gates of the Arctic National Park and Preserve	7,592,000	7,167,192
Glacier Bay National Park & Preserve	3,283,000	2,664,876
Katmai National Park & Preserve	4,358,000	3,384,358
Kenai Fjords National Park	567,900	0
Klondike Gold Rush National Historical Park	13	0
Kobuk Valley National Park	1,710,000	174,545
Lake Clark National Park & Preserve	3,363,000	2,619,550
Noatak National Preserve	6,700,000	5,765,427
Sitka National Historical Park	113	0
Wrangell-Saint Elias National Park & Preserve	12,318,000	9,078,675
Yukon-Charley Rivers National Preserve	1,713,000	0
Alagnak Wild and Scenic River	30,665	0
Aleutian World War II National Historical Area	134	0
Total	**51,104,225**	**32,979,406**

U.S. Fish & Wildlife Service

National Wildlife Refuge	Size in Acres	Wilderness Acreage
Alaska Maritime National Wildlife Refuge	3,417,756	2,576,320
Alaska Peninsula National Wildlife Refuge	3,563,329	0
Arctic National Wildlife Refuge	19,286,242	8,000,000
Becharof National Wildlife Refuge	1,200,060	400,000
Innoko National Wildlife Refuge	3,850,321	1,240,000
Izembek National Wildlife Refuge	311,075	307,981
Kanuti National Wildlife Refuge	1,430,160	0
Kenai National Wildlife Refuge	1,912,425	1,354,247
Kodiak National Wildlife Refuge	1,980,270	0
Koyukuk National Wildlife Refuge	3,550,080	400,000
Nowitna National Wildlife Refuge	1,560,000	0
Selawik National Wildlife Refuge	2,150,161	240,000
Tetlin National Wildlife Refuge	700,058	0
Togiak National Wildlife Refuge	4,100,857	2,272,746
Yukon Delta National Wildlife Refuge	19,162,296	1,900,000
Yukon Flats National Wildlife Refuge	8,632,224	0

Total	**76,807,314**	**18,691,294**

U.S. Forest Service

National Forest	Size in Acres	Wilderness Acreage
Tongass National Forest	16,773,804	5,753,548
Chugach National Forest	5,491,580	0
Total	**22,265,384**	**5,753,548**

National Forest Wilderness and Wilderness Study Areas	Size in Acres
Kootznoowoo Wilderness (Admiralty Island National Monument)	956,255
Misty Fjords Wilderness (Misty Fjords National Monument)	2,142,442
Coronation Island Wilderness	19,232
Chuck River Wilderness	74,298
Endicott River Wilderness	98,729
Karta River Wilderness	39,889
Kuiu Wilderness	60,581
Maurille Islands Wilderness	4,937
Petersburg Creek-Duncan Salt Chuck Wilderness	46,849
Pleasant/Lemusurier/Inian Islands Wilderness	23,096
Russell Fjord Wilderness	348,701
South Baranof Wilderness	319,568
South Etolin Wilderness	82,619
South Prince of Wales Wilderness	90,968
Stikine-LeConte Wilderness	448,926
Tebenkof Wilderness	66,812
Tracy Arm-Ford's Terror Wilderness	653,179
Warren Island Wilderness	11,181
West Chichagof-Yakobi Wilderness	265,286
Nellie Juan - College Fiord Wilderness Study Area	1,412,230
Total	**7,165,778**

Bureau of Land Management

Designated Area	Size in Acres
Steese National Conservation Area*	1,208,624
White Mountains National Recreation Area	998,702
Central Arctic Management Area – Wilderness Study Area*	478,700
Total	**2,686,026**

BLM Wild and Scenic River Corridors	River Miles	Size in Acres
Beaver Creek Wild and Scenic River*	111.0	71,040
Birch Creek Wild and Scenic River*	126.0	80,640

Delta Wild and Scenic River*	62.0	39,680
Fortymile Wild and Scenic River*	392.0	250,880
Gulkana Wild and Scenic River*	181.0	115,840
Unalakleet Wild and Scenic River*	80.0	51,200
Total	**952**	**609,280**

National Trails System	**Miles**
Iditarod National Historic Trail*	418.0
Total	**418.0**

* Component of the National Landscape Conservation System (P.L. 111-11)

National Wild and Scenic Rivers

Within the National Park System

River	Park Unit	River Miles
Alaganak	Katmai National Preserve	67.0
Alatna	Gates of the Arctic National Park	83.0
Aniakchak	Aniakchak Nat. Monument & Preserve	63.0
Charley	Yukon-Charley Rivers Nat. Preserve	208.0
Chilikadrotna	Lake Clark National Park & Preserve	11.0
John	Gates of the Arctic National Park	52.0
Kobuk	Gates of the Arctic Nat. Park & Preserve	110.0
Mulchatna	Lake Clark National Park & Preserve	24.0
Noatak	Gates of the Arctic Nat. Park and Noatak National Preserve	330.0
North Fork of the Koyukuk	Gates of the Arctic National Park	102.0
Salmon	Kobuk Valley National Park	70.0
Tinayguk	Gates of the Arctic National Park	44.0
Tlikakila	Lake Clark National Park & Preserve	51.0
	Total	**1215.0**

Within the National Wildlife Refuge System

River	Refuge Unit	River Miles
Andreafsky	Yukon Delta National Wildlife Refuge	262.0
Ivishak	Arctic National Wildlife Refuge	80.0
Nowitna	Nowitna National Wildlife Refuge	225.0
Selawik	Selawik National Wildlife Refuge	160.0
Sheenjek	Arctic National Wildlife Refuge	160.0
Wind	Arctic National Wildlife Refuge	140.0
	Total	**1027.0**

UTAH

= HB 148 - Rep Ivory

= "Feds don't provide $"

— Next Marker

Public lands policy coordinat

Compact UTAH State

ANILCA ≥ ANCSA

Diff = Tailoring compacts

= subsequent Bills

Most western states See problem + looking...

G.. on 2ocard

Set up mechanism to really get a handle on problem

Funding for —

Supremacy

Ander's case

Sincere Thank You

+ Thanks for

Chugach National Forest 2002 plan revision

2015 = signed Decision goal

Don Reese - Anchor

2012 Rev Plan very Different

- cost effective efficient (7 yrs → 3 yrs)
- Collab
- all land owners considered

Gino Seward

Report now "not a decision paper"

Advocacy?

MID MAY

No Allowable use quantity in Chugach

...monthly updates on Federal management actions for the people of Alaska

February 2013
Supplemental
Issue 34

Alaska Lands Update

Jeep Crossing Bridge in Izembek NWR, 1961. Photo Credit—USF&WS

Citizens' Advisory Commission on Federal Areas, Department of Natural Resources, State of Alaska
3700 Airport Way Fairbanks, AK 99709

Final EIS Released on Izembek National Wildlife Refuge Proposed Land Exchange/Road Corridor

The U.S. Fish and Wildlife Service, announced in Federal Register on Wednesday, February 6, 2013 the availability of a final environmental impact statement (EIS) for a proposed land exchange/road corridor on the Izembek National Wildlife Refuge (Refuge), Alaska. The alternatives in the EIS considered: Alternative 1 – the no action alternative, involving no land exchange, continue current modes of transportation, including air and marine. Alternative 2 - Land exchange and southern road alignment through Izembek Refuge and Wilderness; Alternative 3 - Land exchange and northern alignment through Izembek Refuge and Wilderness; Alternative 4 - Hovercraft operation 6 days per week from Northeast Hovercraft Terminal to Cross Wind Cove; and Alternative 5 - Lenard Harbor ferry with Cold Bay dock improvement.

The final EIS requires agencies to identify the agency's preferred alternative in a final EIS. The Service's preferred alternative is Alternative 1, the no action alternative. This alternative was so identified because it is believed to best meet refuge purposes and the Service mission. While the proposed land exchange would provide many more acres of land as part of the Refuge System; the habitat values of these lands do not compare with the habitat values of the areas within the proposed road corridors and do not compensate for the effects that locating a road within the Izembek Wilderness would have on wildlife, habitat, and wilderness values of the refuge. The identification of Alternative 1 as the preferred alternative in the EIS was made by the U. S. Fish and Wildlife Service as lead agency and is not preferred by all the cooperators on the project. The Izembek Refuge and Alaska Peninsula Refuge would receive over 55,000 acres offered by the State and King Cove Corporation in exchange for de-designating approximately 200 acres of Izembek Refuge Wilderness and transferring it to the State of Alaska for road construction. While the over 55,000 acres offered contain important wildlife habitat, they do not provide the wildlife diversity of the internationally recognized wetland habitat of the Izembek isthmus. Simply exchanging lands will not compensate for myriad ripple effects on habitat and wildlife due to uses on and beyond the road, nor would new lands provide habitat for all the same species.

The final EIS has been released for a 30-day public review period until March 8, 2013. We are not soliciting public comments at this time. After the public review period, a Record of Decision (ROD) will be signed, in which we disclose the Service's final decision and any conditions of approval.

Questions or requests for more information may be submitted by: *Email:* izembek_eis@fws.gov; include "Izembek National Wildlife Refuge final EIS" in the subject line of the message; by *fax:* Attn: Stephanie Brady, Project Team Leader, (907) 786–3965. *U.S. Mail:* Stephanie Brady, Project Team Leader, U.S. Fish and Wildlife Service, 1011 East Tudor Rd., MS–231, Anchorage, AK 99503. The final EIS and additional information can be found at the Izembek refuge web site: http://izembek.fws.gov/eis.htm.

IN THIS ISSUE:

Cold Bay, home of the Izembek NWR Offices, 2008
Photo Credit—USF&WS

Comment Deadline Reminders

- **Tongass National Forest Land and Resource Management Plan Five-Year Review** Public Comment period ends March 31, 2013. Public meeting schedule and project information at: http://prdp2fs.ess.usda.gov/detail/tongass/landmanagement/planning/?cid=stelprdb5402695;
- BLM Alaska **Eastern Interior Resource Management Plan** supplemental documents on hard rock mining were released on January 11, 2013. A 90-day public comment period for both the Draft RMP/EIS and the Supplement began on that date and will close on April 11, 2013. The project can be found at: http://www.blm.gov/ak;
- USF&W Service has extended the comment deadline for it's Draft Technical Guidance for selecting **Surrogate Species** in their **Strategic Habitat Conservation** concept until March 29, 2013. The project website can be found at: http://www.fws.gov/landscape-conservation/draft-guidance.html;
- **BLM Alaska Ring of Fire RMP and Haines Planning Area Amendment** March 14, 2013. The project website is http://www.blm.gov/ak/st/en/prog/planning/ring_of_fire_plan/Haines_Block_Supp_EIS_Amend.html;
- The January 2013 **Schedule of Proposed Actions for the Tongass National Forest** is now available and can be found online at http://www.fs.fed.us/sopa/forest-level.php?111005. If you have any questions, please contact Suzanne Webb, 907-228-6293 or suzannewebb@fs.fed.us;
- **Katmai National Preserve, Brooks River Visitor Access Final Environmental Impact Statement** has been released on Wednesday, February 6, 2013, the project website can be found at: *http://parkplanning.nps.gov/BrooksVisitorAccess*;
- **Izembek Land Exchange/Road Final Environmental Impact Statement** is available for review at: http://izembek.fws.gov/eis.htm, public review of the document is open until March 8, 2013;

Documents expected out soon:

- The **Final Comprehensive Conservation Plan** for the **Artic National Wildlife Refuge** is still pending Secretary approval. There is no projected release date at this time;

Final EIS for Brooks River Visitor Access for Katmai National Park and Preserve

On Wednesday, February 6, 2013, the National Park Service announces the availability of the Final Environmental Impact Statement for Brooks River Visitor Access, for Katmai National Park and Preserve, Alaska. The Plan/FEIS evaluated five alternatives, four action alternatives that include bridge and boardwalk systems to replace the existing Brooks River floating bridge and sites to relocate the existing Naknek Lake barge landing area at the mouth of the Brooks River, and a no-action alternative. If implemented this EIS would amend the access provisions of the 1996 Brooks River Area Final Development Concept Plan and Environmental Impact Statement. Alternative 4 (NPS Preferred Alternative): This alternative evaluates construction of a new wooden bridge and boardwalk system across the Brooks River. The bridge would be approximately 350 feet in length with a minimum distance of 24 feet between piles. The bridge and boardwalk system would have a total estimated length of 1,550 feet. A barge landing would be located on the shore of Naknek Lake about 2,000 feet south of the existing barge landing. A new access road, approximately 1,500 feet long and 14 feet wide, would intersect the Valley Road and extend to the new barge landing site on Naknek Lake. Alternative 4 is the environmentally preferred alternative.

The Plan/FEIS is available in electronic format online at the NPS Planning, Environment and Public Comment (PEPC) Web site *http://parkplanning.nps.gov/BrooksVisitorAccess*. For Hard copies and compact discs of the Plan/FEIS or for more information contact: Brooke Merrell, National Park Service, 240 West 5th Avenue Anchorage, AK 99501. Telephone: 907-644-3397. Email: *brooke_merrell@nps.gov*.

Tongass National Forest Land & Resource Management Plan 5-Year Review Public Meeting Schedule

The Forest Service has announced their public meeting schedule on the 5-Year review of the 2008 Tongass National Forest Land and Resource Management Plan. All meetings will include a brief review of the Forest Plan and provide time for questions and comments. Comments are being accepted through March 31, 2013. The preferred method to submit comments is online using the form at www.tnf-5yearreview.com.

For more information about the 5-year Tongass Plan review go to the Forest Plan 5-year Review Project Website at: http://prdp2fs.ess.usda.gov/detail/tongass/landmanagement/planning/?cid=stelprdb5402695.

Southeast Alaska Public Meeting Schedule

All Public Meetings will be from 6:00 to 8:00 pm

Community	Date	Location
Wrangell	Thursday, Feb. 7	City Hall Assembly Chambers
Petersburg	Monday, Feb. 11	Petersburg Indian Association Conference Room
Sitka	Wednesday, Feb. 13	Harrigan Centennial Hall
Craig	Wednesday, Feb. 20	Craig Tribal Association Hall
Ketchikan	Thursday, Feb. 21	Ted Ferry Civic Center
Juneau	Thursday, Feb. 28	Juneau Arts and Culture Center

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN STURGEON,

Plaintiff,

and

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

KEN SALAZAR, in his official capacity as the United States Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service, SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service, THE NATIONAL PARK SERVICE, and THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

CIVIL ACTION NO.:

3:11-cv-00183-HRH

PLAINTIFF-INTERVENOR STATE OF ALASKA'S OPENING SUMMARY JUDGMENT BRIEF

I. INTRODUCTION

Section 103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA") prohibits application of National Park Service ("NPS") regulations to state owned lands and waters that lie within national park system units in Alaska.[1] Yet, despite that clear prohibition, in 1996 the Park Service greatly and unlawfully expanded its jurisdiction by adopting and enforcing on state owned submerged land and waters regulations that otherwise apply only to units of the national park system. Citing this self-granted authority, the Park Service has applied its regulations—regulations that apply only within National Parks and Preserves—against the State of Alaska, requiring the State to obtain permits to conduct activities on state owned land.

In 2010, the Park Service required the Alaska Department of Fish and Game (ADF&G) to apply for a scientific research and collecting permit to conduct genetic sampling on chum salmon in the Alagnak River—a state owned navigable waterway—even though all ADF&G activities occurred on state owned lands and waters.[2] Similarly, in 2009, the Park Service illegally required ADF&G to obtain a scientific research and collecting permit to continue ongoing caribou collaring and blood sampling activities in Kobuk Valley National Park even though all research activities occurred on state owned navigable waters.[3]

The regulations lack legal authority, violate ANILCA, and therefore should be declared invalid and the Park Service enjoined from applying them to state owned lands and waters that lie within national parks and preserves in Alaska. By enacting section 103 of ANILCA, Congress exercised its power under the commerce and property clauses of the

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[1] 43 U.S.C. § 3103(c) ("no lands" that belong to the State "shall be subject to regulations applicable solely to public lands within [conservation system] units").

[2] Ex. 1 (Scientific Research and Collecting Permit # ALAG-2010-SCI-0004).

[3] Ex. 2 (Scientific Research and Collecting Permit #KOVA-2009-SCI-0001).

Constitution to expressly limit the Secretary's authority to regulate state owned lands and waters within the boundaries of national parks in Alaska.

Alaska repeatedly asked the Park Service to repeal or amend the regulations to bring them into compliance with ANILCA, but to no avail. Most recently, the State met with the leadership of the National Park Service Alaska Regional Office and wrote to Park Service Director Jon Jarvis raising concerns about the legality of these regulations.[4] When these efforts proved fruitless, Alaska petitioned the Secretary on September 30, 2010 to repeal or amend the regulations to make them inapplicable to Alaska.[5] Two months later, the State received a cursory response that its petition had been received,[6] and on January 13, 2012, the State's petition was summarily denied.[7] Because the Secretary's decision to deny the State's petition was not in accordance with law, the regulations should be declared invalid and unenforceable.

II. BACKGROUND

A. Alaska's Title to Its Submerged Lands and Navigable Waters

Alaska's title to and right to govern its submerged lands and waters vested at statehood, and is rooted in the constitutional equal footing doctrine. Under this doctrine, new states enter the Union "on an 'equal footing' with the original 13 Colonies and succeed to the United States' title to the beds of navigable waters within their boundaries."[8] The Submerged Lands Act of 1953 grants and confirms the states' "equal footing" title to the land beneath inland navigable waters, and vests in the State the right and power to manage and administer that

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[4] Ex. 3 (May 14, 2010 letter from Sally Gibert, State ANILCA Program Coordinator to Jon Jarvis, Director National Park Service); Ex. 4 (July 6, 2010 letter from Jarvis to Gibert).

[5] Doc. 62-2.

[6] Doc. 62-4.

[7] Doc. 62-6.

[8] *Alaska v. United States*, 545 U.S. 75, 78-79 (2005).

submerged land in accordance with state law.[9] The Submerged Lands Act also vests the States with ownership of land submerged under tidal waters between the line of mean high tide and seaward to three geographical miles from the coastline of the state, together with ownership of the natural resources "within such lands and waters" as may have previously been in Federal ownership, and the right and power to manage, administer and use all such lands, waters and natural resources in accordance with state law.[10] Section 6(m) of the Alaska Statehood Act explicitly applies the Submerged Lands Act to Alaska.[11]

As a sovereign state, Alaska holds title to lands under navigable waters in trust for the people of Alaska, "that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties ...."[12] Alaska's constitution and laws unequivocally recognize the rights of all Alaskans to use and have access to the water for public purposes consistent with the public trust.[13] The people of Alaska "have a constitutional right to free access to and use of the navigable or public water of the state," and the "state has full power and control of all of the navigable or public

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9 43 U.S.C. § 1311(a).

10 43 U.S.C. § 1311(a); *United States v. California*, 436 U.S. 32, 33-37 (1978).

11 Pub. L. No. 85-508 § 6(m); *State of Alaska v. Ahtna, Inc. & United States*, 891 F.2d 1401, 1403-04, 1406 (9th Cir. 1989).

12 Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

13 *See, e.g.,* Alaska Const., art. VIII, sec. 1 ("It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest"); sec. 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); sec. 6 ("Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain"); sec. 14 ("Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State...."); AS 38.04.062(a) ("the state owns all submerged land underlying navigable water to which title passed to the state at the time the state achieved statehood under the equal footing doctrine or 43 U.S.C. 1301-1315 (Submerged Lands Act of 1953)"). *See also Alaska, Dept. of Nat. Resources v. Alaska Riverways, Inc.,* 232 P.3d 1203, 1211 (Alaska 2010).

water of the state … and … holds and controls all navigable or public water in trust for the use of the people of the state."[14]

B. ANILCA Limits the Secretary's Authority to Regulate State Owned Lands and Waters that Lie within National Parks and Preserves

The Park Service cites the 1976 National Park Service Administration Improvement Act as authority to regulate state owned waters in Alaska. The 1976 Act authorized the Park Service to:

> Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.[15]

This statute authorizes the Park Service to regulate "boating and other activities on or related to waters located *within areas of the National Park System*." It further provides that such regulations will complement Coast Guard authority, which relates to navigation and boating safety concerns.[16]

ANILCA, however, recognizes Alaska's sovereign title to its lands and waters, and explicitly protects Alaska's responsibility to manage those lands and waters in accordance with the public trust. Enacted in 1980,[17] ANILCA affected over 100 million acres of federal lands in Alaska and expanded the national park system in Alaska by over 43 million acres,

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[14] AS 38.05.126(a), (b).

[15] 16 U.S.C. §1a-2(h).

[16] The State does not challenge in this litigation the authority of the Park Service to adopt and administer United States Coast Guard regulations that pertain to boating and related activities on waters within the external boundaries of National Park System units. The State challenges the blanket application of Park Service regulations to all waters and submerged lands within park system units, regardless of ownership.

[17] Pub. L. No. 96-487 (1980).

creating ten new national parks and increasing the acreage of three existing units. From the time it was introduced in the U.S. House of Representatives in 1977 until it was enacted in 1980, Congress considered more than a dozen versions of the legislation. The final Act is a carefully crafted compromise that reflects Congress' struggle for balance between the conservation of public lands in Alaska and the opportunity for Alaska to responsibly develop its natural resources in order to meet the economic and social needs of Alaska and Alaskans.[18] ANILCA contains unique and specific limitations on executive branch jurisdiction over the conservation system units established by the Act.[19] These limitations, and the corresponding assurances regarding access to federal lands and Alaska's sovereignty over its resources, are the core of the grand compromise of ANILCA, and are clearly set forth in section 103(c), which explicitly states that "no lands" that belong to the State "shall be subject to the regulations applicable solely to public lands within [conservation system] units."[20]

From 1981, when the first regulations implementing this statute were adopted, until 1996, the Park Service respected the jurisdictional limits Congress had placed on it in enacting ANILCA § 103, and the regulations did not apply to Alaska owned lands and waters.[21] However, over the objections of the State of Alaska and other commenters, in 1996 the Park Service abruptly changed its interpretation of its statutory authority and adopted the national regulation extending federal jurisdiction to regulate public activities in state waterways within national park unit boundaries, 36 CFR §

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[18] 16 U.S.C. § 3101(d).

[19] 16 U.S.C. § 3103(c); *City of Angoon v. Marsh*, 749 F.2d 1413, 1418 (9th Cir. 1984) (interpreting ANILCA sections 503(b) & (d), Pub. L. 96-487 § 503(a)&(d)).

[20] 16 U.S.C. § 3103(c).

[21] 46 FR 31843.

1.2(a)(3), along with a corresponding modification to the Alaska-specific regulations, 36 CFR Part 13.

III. ARGUMENT

A. Summary Judgment Standard

Civil Rule of Procedure 56(a) states that "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The pleadings in this case establish that no material facts are at issue. As argued below, judgment as a matter of law is appropriate.

B. Standard of Review

Alaska's first two causes of action allege that the Park Service regulations violate federal law and thus must be declared invalid and the Park Service enjoined from applying them.[22] Similarly, the State's third cause of action asserts that the Defendants' denial of Alaska's petition to repeal or amend the regulations at 36 C.F.R. § 1.2(a)(3) and 36 C.F.R. § 13.2 exceeds the agency's statutory authority and thus violates the legal standards for agency action set forth in the Administrative Procedure Act.[23] All of Alaska's causes of action therefore require the Court to interpret *de novo* the statutes at issue and determine whether the Park Service has acted within its authority. [24]

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22 Sec. Am. Compl. ¶56-59 (Doc. 45).

23 *Id.* at ¶¶ 60-63

24 *United States v. Horvath*, 492 F.3d 1075, 1077 (9th Cir. 2007).

The *Chevron*[25] two-step standard for judicial review of an administrative agency's interpretation of a statute that it administers is a familiar one. As explained by the Ninth Circuit:

> Under the first step, we employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron,* 467 U.S. at 843 n. 9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.[26]

When Congress has spoken clearly and unambiguously, the judicial inquiry ends with step one.[27] The Court employs the "traditional tools of statutory construction" and first considers the words that Congress used.[28] The entire statute provides context for divining congressional intent.[29] Where possible, meaning is ascribed to all provisions that Congress has enacted, avoiding interpretations that render any provision superfluous.[30] When the Court determines that Congress has left "no gap" for the agency to fill, the statute is interpreted *de novo* and no deference is accorded the agency's interpretation:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[31]

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25 *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

26 *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999).

27 *Id.* at 1164.

28 *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

29 *Id.* (citing *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999)).

30 *Id.* at 1165 (citing *Gov't of Guam ex rel. Guam Econ. Dev. Auth. v. United* States, 179 F.3d 630, 634 (9th Cir. 1999)).

31 *Chevron*, 467 U.S. at 843 n.9 (collecting cases, internal citations omitted).

Agency regulations that ignore Congress' clear intent therefore must be set aside.[32]

C. The Plain Language of ANILCA Divests the Park Service of Authority to Apply its Regulations to Alaska's Navigable Waters

Regardless of whether the Park Service has authority to apply 36 CFR §1.2(a)(3) in other states, Congress has spoken clearly and directly with respect to Alaska: Park Service regulations do not apply to State owned lands and waters. Adopted 4 years after the 1976 act, ANILCA plainly provides:

> 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. ...[33]

Section 102(1) of ANILCA defines "land" as "lands, waters, and interests therein."[34] Section 103(c) clearly states that "*no lands*" owned by the State, including waters, will be subject to Park Service regulations. Furthermore, ANILCA specifically defines "public lands" to exclude:

> land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law.[35]

Title to the beds of navigable waterways within the state was confirmed to Alaska at statehood. In addition, §103(a) provides:

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32 *Chevron*, 467 U.S. at 843 n.9.
33 16 U.S.C. §3103(c).
34 16 U.S.C. §3102(1).
35 16 U.S.C. §3102(3)(A).

> the boundaries of areas added to the National Park ... System[] shall, in coastal areas not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred .... [36]

These provisions are facially clear: In Alaska, Park Service regulations do not apply to State lands, including submerged lands, even when state owned lands and waters lie within the external boundaries of a national park system unit.[37]

Congress adopted these very specific provisions of ANILCA after it enacted the 1976 general authority. "[C]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute."[38] Under this well-settled principle of statutory construction, the Park Service regulations do not apply to State owned navigable waterways in Alaska.

D. Legislative History Confirms the Plain Language of Section 103

Not only does the plain language of ANILCA section 103 unambiguously prohibit application of Park Service regulations to state land and waters, but the statute's legislative history permits no other interpretation. Provisions preserving the rights of all non-federal owners

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[36] 16 U.S.C. §1303(a).

[37] The federal government has argued that section 103(c) does not apply to State owned navigable waters and submerged land because such interests were not "conveyed" to the State, and section 103(c) references conveyed land. Pl. Opp. Mot. Dismiss at 16-17, *United States v. Wilde*, No. 4:10-cr-00021-SAO (Doc. 20) (Nov. 1, 2010). While the State agrees that the lands and waters transferred to the State at statehood by operation of law, the dictionary defines "convey" as "to transfer or deliver (something, such as a right or property) to another." Black's Law Dictionary 383 (9th ed. 2009). There can be no disagreement that the equal footing doctrine, the Submerged Lands Act, 43 U.S.C. §§1301-1315, and the Alaska Statehood Act, 72 Stat. 339, "transferred" or "conveyed" these interests to Alaska. Additionally, section 103(c) is clear that only "public lands (as such term is defined in this Act) shall be deemed to be included as a portion of [a conservation system unit]." Therefore, state lands, including submerged lands, that lie within the external boundaries of a National Park System unit and were owned by the State prior to ANILCA are not part of the unit, regardless whether they were conveyed to State by deed or operation of law. *See City of Angoon v. Marsh*, 749 F.2d 1413, 1416 (9th Cir. 1984).

[38] *Mangano v. U.S.*, 529 F.3d 1243, 1247 (9th Cir. 2008), *quoting Acosta v. Gonzales*, 439 F.3d 550, 555 (9th Cir. 2006).

of inholdings to the vast, new system of conservation system units and federal public lands were present from the very beginning of the legislative process. When the plain language of the statute is determinative of its meaning, a court "look[s] to the legislative history to determine only whether there is clearly expressed legislative intention contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses."[39] No such contrary intention exists.

In 1978, in an early version of the Alaska lands bill, Congressman Young offered an amendment to the definitions section of the bill to clarify that Alaska's rights in and to navigable waters confirmed to the State under §6(m) of the Alaska Statehood Act were protected. Congressman Young stated: "Every time I raised this point, the drafters of this legislation continually assured me that no existing States rights or lands were being adversely affected."[40] His amendment passed.[41]

The Alaska lands bill that was the main foundation for ANILCA was passed by the House of Representatives on May 16, 1979. Known as the "Udall-Anderson bill," HR 39 included section 810(c), which, with the minor exception of an internal cross-reference at the tail end of the section, tracks the enacted language of section 103(c) exactly:

> (c) LANDS INCLUDED.—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 the 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. If the State, a Native Corporation, or other owner desires to convey

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[39] *Immigration & Naturalization Svc. v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987). *See also United States v. James*, 478 U.S. 597, 606 (1986); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[40] 124 Cong. Rec. H4233 (May 18, 1978).

[41] *Id.*

> any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, pursuant to section 801(g)(3) of this Act.[42]

During floor debates in May 1979 House members stressed their intention to

> make clear beyond any doubt that any State, Native or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands which, in fact, are part of the unit.[43]

In 1979, a Senate Report accompanying H.R. 39 stated:

> Those private lands, and those public lands owned by the State of Alaska or a subordinate political entity, are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands. Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetlands regulations and other Federal statutes and regulations of general applicability would be applicable to private or non-Federal public land inholdings within conservations [sic] system units, and to such lands adjacent to conservation system units, and are thus unaffected by the passage of this bill.[44]

Congress' intent is crystal clear: in Alaska the Park Service may not apply Park Service regulations that are specific to management of Park Service units to State lands that lie within the unit. The Park Service regulations at issue in this case are not the kind of generally applicable regulations Congress intended to be "unaffected" by ANILCA. Congress clearly intended to curb such sweeping grabs at jurisdiction as that set out in 36 C.F.R. § 1.2(a)(3). Indeed,

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[42] *Compare* 125 Cong. Rec. H 3386 (*Also available at* H.R. 39, May 21, 1970, Vol. 7 at 143, Alaska Department of Fish and Game, Legislative History of ANILCA) *with* 43 U.S.C. 3103(c).

[43] 125 Cong. Rec. H 3240 (May 15, 1979). *See also* 125 Cong. Rec. H 3237, H3239.

[44] S. Rep. No. 96-413, at 303 (Nov. 14, 1979).

application of Park Service regulations that are specific to management of Park System Units—such as scientific research and collection permits—without regard to ownership of the affected lands and waters, is exactly what Congress meant to prohibit.

On August 19, 1980, H.R. 39 was ordered to be printed as passed with the Senate amendment. The entirety of H.R. 39, including section 810(c), is stricken, and the language in sections 810(a) and (b) slightly modified and moved to sections 103(a) and (b) in the Senate amendment.[45] On November 21, 1980, Representative Udall offered House Concurrent Resolution 452 "to make corrections in the enrollment of the bill H.R. 39."[46] House Concurrent Resolution 452 added §103(c) to the bill that became ANILCA on November 21, 1980. Its purpose was to "specif[y] that only public lands (and not State or private lands) are to be subject to the conservation system unit regulations applying to public lands" and "to make clear that other particular provisions of the bill apply only to public lands."[47] Reinstating the language from section 810(c) of HR 39 to its new location at 103(c) of the Senate Amendment was thus characterized as a "correction," implying that it had inadvertently been omitted from the Senate substitute.

Therefore, contrary to the United States' assertions that because the correcting provisions found in Concurrent Resolution 452 are listed as "minor revisions"—thus making section 103(c) of minor importance[48]—Congress' intent to exclude State and private lands from

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[45] 125 Cong. Rec. H3386 (*Also available at* H.R. 39, May 21, 1979, Vol. 7 at 1, 141-143, 367-68, Alaska Department of Fish and Game, Legislative History of ANILCA).

[46] 126 Cong. Rec. H 11111 (Nov. 21, 1980).

[47] 126 Cong. Rec. H 1113-14 (Nov. 21, 1980) (repeated in 126 Cong. Rec. S 15129, daily ed., December 1, 1980).

[48] AR 51 (61 FR 35135 ("NPS does not think that ANILCA § 103(c), which was characterized by Congress as a minor technical provision, should be read in isolation from the context of the whole act.")). *See also* Pl. Opp. Mot. Dismiss at 4-5, 20, *United States v. Wilde*, No. 4:10-cr-00021-SAO Doc. 20 (Nov. 1, 2010).

ANILCA conservation system units was expressed throughout the legislative process. The language adopted in ANILCA and its legislative history leave no room for doubt. Section 103(c) prohibits the blanket application of the Park Service regulations to State owned submerged lands and navigable waters.

The Ninth Circuit recognizes the import of section 103(c) in the context of ANILCA's unique compromise approach and other provisions in the statute that limit federal executive jurisdiction. In *City of Angoon v. Marsh*, the Court examined ANILCA's definition of "public lands,"[49] and "federal lands"[50] to conclude that *only* public or federally owned lands were included in Admiralty Island National Monument, and that Shee Atika, an Alaska Native corporation, could sell and harvest timber on its land within the Monument notwithstanding the ANILCA 503(d) prohibition against timber sale and harvest within the Monument.[51] ANILCA defines the monument to include "approximately nine hundred and twenty-one thousand acres of *public lands* as generally depicted on a map entitled "Admiralty Island National Monument—Proposed," dated July 1980."[52] The Court noted that ANILCA defines "public lands" to mean "Federal lands, except land selections of a Native Corporation made under [the Alaska Native Claims Settlement Act]," and that ANILCA defines "Federal lands" as "lands the title to which is in the United States after December 2, 1980." Based on the plain language of the statute, the Ninth Circuit concluded that Shee Atika's lands were not part of the National Monument and not

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49 16 U.S.C. §3102(3)(B).

50 16 U.S.C. § 3102(2).

51 *City of Angoon v. Marsh*, 749 F.2d 1413, 1416 (9th Cir. 1984).

52 16 U.S.C. § 431 note, Pub.L. 96-487, Title V, § 503(a), 94 Stat. 2399 (Dec. 2, 1980) (emphasis added).

subject to the timber sale and harvest prohibition—a provision that applied only to the Monument.[53]

In recognizing Congress' repeatedly stated intent to exclude non-federal lands from ANILCA's conservation system units and preserve the rights of non-federal landowners whose property remained within the external boundaries of such units,[54] the Ninth Circuit elaborated on the importance of section 103:

> Congress clearly recognized the possibility that selected private lands might be deemed to be within the Monument and therefore subject to the regulations applicable to public lands by virtue of their location within the general conservation system unit. Thus, section 103(c) was added to ANILCA immediately prior to its enactment as part of the legislative 'fine tuning' process for the express purpose of 'specifying that only public lands (and not State owned or private lands) are to be subject to the conservation system unit regulations applying to 'public lands' and 'to make clear that other particular provisions of the bill apply only to public lands.' 126 Cong. Rec. H. 30498 (November 21, 1980) (supplementary material furnished by Rep. Udall). Section 103(c) provides, in pertinent part, that '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.' 16 U.S.C. § 3103(c). In addition to the aforementioned language, section 103(c) specifically states that 'no lands which, before, on, or after Dec. 2, 1980 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.'[55]

City of Angoon also noted that Congress has been very specific when it intends to affect private lands within CSUs.[56] Here, Congress has been very specific in its intent to *not* affect State and private lands within CSUs.

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53 *City of Angoon*, 749 F.2d at 1416-17.

54 *Id.* at 1416-18.

55 *Id.* at 417-18.

56 *Id.* at 1418 n.5 (citing ANCSA § 22(g) and ANILCA section 906(o) as evidence that Congress is very specific when it speaks to management of private lands within CSUs).

Available statements of Congressional intent unwaveringly endorse the plain language of section 103(c): State owned lands and waters that lie within conservation system units are not part of the unit and are not to be regulated as if they were. The Ninth Circuit already has found that section 103(c)'s "express purpose" is to "specify[] that only public lands (and not State owned or private lands) are to be subject to the conservation system unit regulations applying to public lands."[57] The Park Service regulations therefore do not apply to state owned lands and waters within units of the National Park System.

E. The Legislative History of the National Park Service Administration Improvement Act Does Not Support the Jurisdiction Claimed by the Park Service in 36 C.F.R. § 1.2(a)(3) and 36 C.F.R. Part 13

As discussed above, the plain language of the statute under which the NPS asserts authority for this regulation, 16 U.S.C. §1a-2(h), only authorizes the Park Service to regulate boating and related activities already subject to Coast Guard regulation, not any and all activities on waters within parks. The legislative history for this statute also demonstrates Congress' intent to grant the Park Service more limited authority than that claimed in 36 CFR § 1.2(a)(3) and 36 C.F.R. Part 13. The House Report that accompanied the final bill states:

> A clarification of the ability of the Secretary to promulgate boating activities [sic] is included, thus ensuring that this expanding use within our national parks can be specifically controlled. The Committee amendment ensures that any exercise of this regulatory authority will not be in derogation of the regulatory powers of the U.S. Coast Guard.[58]

The section-by-section analysis describes the authority granted as follows:

> The Secretary is specifically authorized to promulgate and enforce regulations concerning boating and related activities on any waters within the system. A proviso is included to make clear that any such regulations would be complementary to the authority of the

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57 *Id.* at 1417 (quoting 126 Cong. Rec.H. 30498 (Nov. 21, 1980)).

58 H.R. Rep. 94-1569, 1976 U.S.C.C.A.N. 4291-92.

> U.S. Coast Guard to regulate navigable waters and would not lessen this authority in any way. The National Park Service would thus have the specific ability to regulate boating and related uses, but this would be accomplished as a supplement to, and not in conflict with, any Coast Guard regulations and enforcement.[59]

The Department of the Interior report on the bill admits: "In effect, Congress would be clarifying its intent to invoke its powers under the Commerce Clause of the Constitution to regulate boating and other activities to assist in the administration of the Park System."[60] Congress only authorized the National Park Service to act within the limits of Coast Guard authority over navigable waters.

Congress made no statement of intent to diminish the equal footing and public trust doctrines and supplant state management of navigable waterways. Congress would not have made such a sweeping change without more explicit language, and could not constitutionally usurp traditional state authority, at least without a clear statement of intent to do so. The legislative history of the 1976 Act never hints that it was intended to authorize a significant expansion of federal regulatory authority, nor implicitly repeal in part the 1953 Submerged Lands Act and the equal footing doctrine, nor diminish states' traditional authority to manage state navigable waters.

F. The 1996 Rule is Ultra Vires and thus a Legally Unsupported Expansion of Authority by the Park Service

From 1976 to 1996, the Park Service respected the exclusion of State owned land and waters from park regulations. The first regulations adopted after ANILCA's enactment were published in 1981 to "provide interim guidance on public uses of National Park System units in

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59 *Id.*

60 *Id.* at 4298.

Alaska, including units established by the Alaska National Interest Lands Conservation Act."[61]

The section-by-section analysis in the preamble states:

> Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of National Park Service regulations to federally owned lands within park area boundaries. Consistent with the statute and the explanatory legislative history, 126 Cong. Rec. H11115 (November 21, 1980) and S15130-15131 (December 1, 1980), § 13.2(e) restricts the applicability of these regulations to "federally owned" lands (defined to mean all land interests held by the Federal government including unconveyed Native selections) within park area boundaries. With the legislative conveyance of 98 million acres of State selections in section 906 of the Act, no unconveyed State selections remain within park areas. These regulations would not apply to activities occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries.[62]

When promulgated in 1983, 36 CFR §1.2(b) clearly stated that NPS regulations "are not applicable on privately owned lands and waters except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States."[63] Section 1.4 defined "legislative jurisdiction" to mean "lands and waters under the exclusive or concurrent jurisdiction of the United States."[64] The preamble to the 1983 rule clarifies that the provision was "intended to also include state inholdings that are under the legislative jurisdiction of the United States,"[65] and elaborated that "legislative jurisdiction" meant that the State had ceded police powers to the federal government:

> Numerous commenters requested a clarification of the term, "legislative jurisdiction." As a result, the Service has defined the term in § 1.4, below. Other individuals expressed concern that NPS was attempting to regulate privately owned lands and waters

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61 46 FR 31836 (June 17, 1981).
62 46 FR 31843.
63 48 FR 30275.
64 48 FR 30276.
65 48 FR 30261.

> within park areas. Only 10 of these regulations[66] are applicable on the privately owned lands and waters under the exclusive or concurrent jurisdiction of the United States, *that is, lands and waters over which a State has ceded police powers to the United States*. This will allow the National Park Service to respond to the complaints on private property such as: Disorderly conduct, fighting, hunting or discharging weapons, playing loud music or other loud disturbances, trespassing on privately owned boats, planes, or in houses or sheds on private property, and gambling. The National Park Service has determined that this is the minimum necessary to protect property rights and ensure public safety for owners of both private and commercial properties within park areas.[67]

In 1987, 36 CFR §1.2(b) was revised to read "Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters . . . within the boundaries of a park area."[68] The 1987 preamble confirmed the limited application of select regulations by stating the revision "clarifies the fact that those regulations apply, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States."[69] The preamble to the 1987 rule also elaborated further on the meaning of "legislative jurisdiction," stating that "[t]he term 'legislative jurisdiction' is defined in 36 C.F.R. § 1.4 to mean 'lands and waters under the exclusive or concurrent jurisdiction of the United States,' which, *when applied to non-federal lands, means lands and waters over which the State has ceded some or all of its legislative authority to the United States.*"[70] Later in the preamble, the Park Service explained that the "legislative jurisdiction" definition was "intended to be an

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66 The 10 regulations that were applicable to privately owned lands were § 2.2, Wildlife Protection; § 2.3, Fishing; § 2.4, Weapons, Traps and Nets; § 2.13, Fires; § 2.22, Property; § 2.30, Misappropriation of Property and Services; § 2.31, Trespassing, Tampering, and Vandalism; § 2.32, Interfering with Agency Functions; § 2.34, Disorderly Conduct; and § 2.36, Gambling. 48 FR 30253.

67 48 FR 30253 (emphasis added).

68 52 FR 12037.

69 52 FR 12037.

70 52 FR 35238 (emphasis added).

editorial change, not a substantive change expanding the applicability of NPS regulations. The NPS has carefully reviewed the proposal in its entirety and has determined that no expansion of authority, applicability or scope has taken place."[71] The Park Service elaborated further:

> The second State official suggested that the definition of the term "legislative jurisdiction" codified in 36 CFR 1.4 be revised to clarify the fact that the jurisdiction of the United States is based upon that which has been clearly and expressly ceded to it by the State. Cession by a State is a common method by which the NPS acquires legislative jurisdiction within a park area and the only method by which jurisdiction over non-federal lands and waters may be acquired. However, acquisition of legislative jurisdiction by the United States may also take place by State consent pursuant to article I, section 8, clause 17 of the U.S. Constitution or by reservation at the time a State was admitted to the Union. Therefore, the extent of jurisdiction exercised by the United States does not in all cases depend on that which was ceded by the State. To define the term "legislative jurisdiction" in a way that would alter its common meaning and that would not apply in all cases in which the term might be used would create unnecessary confusion. For this reason, the NPS has not adopted the suggested revision in regulatory text but has explained the issue in greater detail.[72]

The 1983 and 1987 revisions to Park Service regulations contain both language and intent to clearly limit the application of Park Service authority to lands and waters under legislative jurisdiction and specifically exclude State owned lands and waters for which the State has not ceded jurisdiction.[73] Most important, however, is the Park Service's recognition that, absent a grant of regulatory authority by Congress, a federal reservation of rights at statehood, or an express cession of jurisdiction by a state, the Park Service lacks authority to regulate state owned lands and waters.

This recognition vanished in 1996. In 1996, 36 CFR §1.2(b) and 36 CFR §13.2(e) (now §13.2(f)) were revised to apply all National Park Service regulations to "waters subject to

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71 52 FR 35238-39.

72 52 FR 35239. *See also* AR 29.

73 *See also* 52 FR 35238, 35239.

the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters . . . *without regard to the ownership of submerged lands, tidelands, or lowlands*."[74] The stated purpose of the regulations was to "clarify" the Park Service's jurisdiction in the wake of litigation concerning a seal shot in the navigable waters of Glacier Bay National Park.[75] In that case, the Park Service had cited Mr. Brown for taking wildlife in a National Park.[76] In the federal district court, the parties and amicus curiae State of Alaska raised various jurisdictional issues based on the ownership of the submerged lands in Glacier Bay National Park.[77] The Park Service decided that it was unwilling to litigate ownership of the submerged lands at issue in the context of Mr. Brown's misdemeanor citation, but concluded that "a careful examination of 36 C.F.R. § 1.2(b), as then written, revealed that the United States must have either legislative jurisdiction over Glacier Bay National Park or ownership of the involved portion of the park for the regulation under which Brown was charged, 36 C.F.R. § 2.2(a)(1), to be enforceable."[78] Because ownership of the submerged lands had not been determined and there had been no cession by the State, the case was dismissed and the dismissal upheld by the Ninth Circuit.[79]

Interestingly, the United States asserted that it sought dismissal in the federal district court because

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74 AR 49 (61 FR 35133) (emphasis added).

75 *Id.* *See also* Brief of Appellee United States, *United States v. Brown*, No. 94-30019 (May 17, 1994), 1994 WL 16122537 (hereinafter "*Brown* Appellee Br."). Unpublished Table Opinion at 36 F.3d 1103 (9th Cir. 1994), 1994 WL 481220.

76 *Brown* Appellee Br., 1994 WL *2.

77 *Id.* at *5. The Supreme Court later determined that the United States owns the submerged lands in Glacier Bay National Park. *Alaska v. United States*, 545 U.S. 75 (2005).

78 *Brown* Appellee Br., 1994 WL at *5-6.

79 *Id.* at * 5-6 & n.2; *United States v. Brown*, 36 F.3d 1103 (9th Cir. 1994), 1994 WL 481220.

> the Park Service had available to it, under its existing statutory authority, the alternative of simply changing its regulations to assert regulatory authority irrespective of ownership of the submerged lands in Glacier Bay National Park. That alternative was quicker, easier, less expensive, and more complete than engaging in a quiet title action in the context of this case would have been. It is what the National Park Service opted to do.

Indeed the Defendants did just that.

The 1996 preamble for the revisions to 36 CFR Parts 1 and 13 reaches back to the National Park Service Organic Act of 1916[80] and the 1976 Park Service Administration Improvement Act[81] for the authority to expand regulatory jurisdiction over non-federal lands and waters.[82] The Park Service dismissed section 103(c) of ANILCA as "a minor technical provision" and responded to Alaska's comments thus:

> NPS does not agree with the State of Alaska's contention that ANILCA §103(c) preempts NPS's well-established authority on navigable waters. NPS does not think that ANILCA § 103(c), which was characterized by Congress as a minor technical provision, should be read in isolation from the context of the whole act. ANILCA should be interpreted consistent with its underlying protective purposes: to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.[83]

Not only does this response ignore the plain language of ANILCA, the fact that ANILCA is a more specific and later-enacted statute than either of the authorities cited, and the fact that the substance of section 103(c) was ubiquitous throughout ANILCA's legislative history, but it completely disregards and contradicts the Park Service's 15-year old position that "[s]ections

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80 16 U.S.C. § 1.
81 16 U.S.C. § 12-2(h).
82 AR 49 (61 FR 35133).
83 AR 51 (61 FR 35135).

103(c) and 906(o) of ANILCA generally restrict the applicability of National Park Service regulations to federally owned lands within park area boundaries."[84]

When an agency reverses a prior policy or statutory interpretation, its most recent expression is accorded less deference than is ordinarily extended to agency determinations.[85] The agency will be required to show not only that its new policy is reasonable, but also to provide a reasonable rationale supporting its departure from prior practice.[86] Here, the Park Service's 1996 interpretation of section 103(c) of ANILCA is diametrically opposed to its 1981, 1983, and 1987 interpretations. And far from providing a reasonable rationale to support its departure from prior practice, the Park Service disingenuously claims that "[t]he proposed rule clarifies and interprets existing Park Service regulatory intent, practices and policies, and generally would not place new or additional regulatory controls on the public."[87] As demonstrated in the previous discussion, this was a gross mischaracterization of what was in essence a major expansion of Park Service jurisdiction. Furthermore, no reasonable rationale may justify the agency's non-compliance with Congress' plainly stated intent.

G. Property and Commerce Clause Authority Belongs to Congress, which has not Delegated it to the National Park Service

The United States has argued in other contexts that the Commerce[88] and Property Clauses[89] of the United States Constitution authorize extraterritorial jurisdiction such as that

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84 46 FR 31843.

85 *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1345-46 (9th Cir. 1990) *citing INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n. 30 (1987); *Watt v. Alaska,* 451 U.S. 259, 273 (1981).

86 *Id., citing Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 42 (1983) (overturning an agency reversal because the agency had provided no explanation for its change in policy).

87 AR 49 (61 FR 35133).

88 U.S. Const. Art. I, § 8, cl. 3.

89 U.S. Const. Art. IV, § 3, cl. 2.

claimed here by the Park Service.[90] This argument overlooks the fact that the Commerce and Property Clauses grant power to Congress, not the Executive Branch, and Congress expressly refused to delegate these authorities to the Park Service when it enacted section 103(c) of ANILCA.

"Property Clause jurisdiction is dependent upon specific enabling legislation by Congress."[91] Here, Congress has spoken through section 103(c) of ANILCA to explicitly *deny* jurisdiction to the Park Service to regulate non-federally owned lands and waters within units of the National Park System in Alaska. A general grant of authority over federal resources does not constitute a delegation of specific authority to regulate non-federal property.[92] In *Stewart v. United States* the federal district court in Oregon held that the United States Forest Service abused its discretion in presuming that Waldo Lake, which lies entirely within the Willamette National Forest, was non-navigable and thus subject to Forest Service regulatory jurisdiction to prohibit use of floatplanes and internal combustion motors on the lake.[93] The administrative proceedings supporting the regulatory prohibition on internal combustion motors and floatplanes did not consider potential Property Clause jurisdiction, but the federal government presented this

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[90] *See* Pl. Opp. Mot. Dismiss at 8, *United States v. Wilde*, No. 4:10-cr-00021-SAO Doc. 20 (Nov. 1, 2010).

[91] *Stewart v. U.S. ex rel. Dept. of Agric.*, 639 F. Supp. 2d 1190, 1201-02 (D. Or. 2009). Where Congress has intended for an agency to exercise extraterritorial jurisdiction it has specifically provided for it. *See United States v. Lindsey,* 595 F.2d 5 (9th Cir.1979). *citing* 16 U.S.C. § 551 (providing authority to protect against destruction by fire and other degradation upon the national forests), 16 U.S.C. § 460gg (providing authority to regulate privately owned property within the Hells Canyon Recreation Area), and 16 U.S.C. § 1281(d) (providing authority to regulate under the Wild and Scenic Rivers Act); *see also, United States v. Hells Canyon Guide Service, Inc.,* 660 F.2d 735 (9th Cir.1981), *citing* 16 U.S.C. § 551 and 1281(d); and *Minnesota v. Block,* 660 F.2d 1240 (8th Cir.1981) (upholding regulation over state owned navigable waters pursuant to Boundary Waters Canoe Area Wilderness Act).

[92] *Stewart*, 639 F. Supp.2d at 1201.

[93] *Id.* at 1201.

theory in litigation.[94] The federal district court rejected it, finding that "[t]he government's failure to address this issue at the administrative proceedings all but precludes the exercise of substantive review of a newly developed alternative theory of jurisdiction."[95] Additionally, the court found that Congress expressed an intent to *not* exercise Property Clause power over Waldo Lake (if it were indeed navigable and owned by Oregon) when it enacted the Oregon Wilderness Act. That Act states:

> Congress does not intend that designation of wilderness areas in the State of Oregon lead to the creation of protective perimeters or buffer zones around each wilderness area. The fact that nonwilderness activities or uses can be seen or heard from the areas within the wilderness shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.[96]

The same reasoning applies in this case. The Park Service cannot rely on its general management authorities to create jurisdiction where Congress has explicitly prohibited it.[97]

Congress similarly refrained from granting general Commerce Clause authority to the Park Service in the 1976 Park Service Administration Improvement Act. Instead, 16 U.S.C. § 1a-2(h) authorizes the Park Service to adopt and enforce regulations concerning boating and related activities consistent with the authority of the United States Coast Guard; it is not a general grant of regulatory jurisdiction over non-federally owned land within park boundaries.[98]

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94 *Id.* at 1201-1202.

95 *Id.* at 1201, citing *United States v. Garner,* 767 F.2d 104, 123 (5th Cir.1985) (rejecting post hoc rationalization for agency action); *Tanners' Council of America, Inc. v. Train,* 540 F.2d 1188, 1194 (4th Cir.1976) (citing "well-settled principle of administrative law that agency action cannot be sustained on the basis of information not relied upon by the Administrator and disclosed in the record").

96 98 Stat. 272 § 6 (Oregon Wilderness Act)(1984).

97 *Stewart*, 639 F.Supp.2d at 1201-1202.

98 AR 21.

Even if 16 U.S.C. § 1a-2(h) could be read as such, Congress explicitly curbed the Park Service's authority in Alaska four years later when it enacted section 103(c) of ANILCA.

H. This Case Does Not Require Interpretation of the Statutory Definition of "Public Lands"

Within the context of ANILCA's subsistence provisions, the Ninth Circuit in *Alaska v. Babbitt* interpreted the term "public lands" to include navigable waters in which the federal government holds a reserved water right.[99] The Court found that "[n]either the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters."[100] However, faced with the need to reconcile the inherent conflict in the statute between Congress' intent to "protect and provide the opportunity for subsistence fishing" and the absence of authority to hold that "public lands" include all navigable waters in Alaska,[101] the Court relied on Congress' explicit invocation of its Commerce Clause authority in section 801(4) of ANILCA[102] to find a reservation of water rights only to the extent necessary to "protect and provide the opportunity for continued subsistence uses on the public lands."[103] The Court was clear that its holding is limited to subsistence activities:

> Our interpretation of the term public lands in this case will not allow the United States to usurp state power over navigable waters elsewhere. ANILCA applies only to Alaska and our interpretation of its definition of public lands is necessary to give meaning to its purpose of providing an opportunity for a subsistence way of life.[104]

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99 *Alaska v. Babbitt*, 72 F.3d 698, 700 (9th Cir. 1995).
100 *Id.* at 703.
101 *Id.* at 704.
102 16 U.S.C. § 3111(4).
103 *Babbitt*, 72 F.3d at 703.
104 *Id.* at 702 n.9.

The Court also acknowledged that its decision constituted an imperfect resolution to the dispute, because it essentially wrote the term "title" out of the definition of "public lands" in order to give effect to Congressional intent to protect subsistence uses within Alaska.[105]

Resolution of the instant case does not call for such intricate analysis. A straightforward reading of the plain language of section 103(c) reveals no ambiguity or conflicting terms. In fact, the Park Service itself acknowledges in the 1996 final rule that the judicially constructed definition of "public lands" applicable to ANILCA's subsistence provisions does not apply to the regulations at issue in this case:

> ...NPS would like to emphasize that this rulemaking does not affect subsistence uses conducted in National Park System units in Alaska.... Although the term "public lands" appeared in the proposed rule (rather than "federally owned lands") NPS intended no change. Application of Federal Subsistence Board regulations (i.e., seasons and bag limits) to navigable waters or selected but not yet conveyed lands it outside the scope of this rulemaking.[106]

Section 13.2 of the final rule retained the term "federally owned lands."[107]

In other proceedings concerning the application of 36 C.F.R. § 1.2(a)(3) and 36 C.F.R. Part 13 to state owned waters, the federal government has argued that the Commerce Clause authorizes application of these regulations to navigable waters without regard for ownership.[108] This argument fails to acknowledge, however, that the Commerce Clause authority belongs to Congress, not the Executive branch, and that in enacting section 103(c) of

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105 *Id.*at 704. Section 102(2) of ANILCA defines "federal land" to mean "lands the title to which is in the United States after the date of enactment of this Act." 16 U.S.C. § 3102(2). Section 102(3) of ANILCA defines "public lands" to mean "land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except ..." 16 U.S.C. § 3102(3).

106 AR 51 (61 FR 35135).

107 "(c) Subpart B of this part 13 contains regulations applicable to subsistence uses. Such regulations apply on federally owned lands and interest therein within park areas where subsistence is authorized." AR 53 (61 FR 35137).

108 Pl. Opp. Mot. Dismiss at 8-9, *United States v. Wilde*, No. 4:10-cr-00021-SAO Doc. 20 (Nov. 1, 2010).

ANILCA, Congress has explicitly stated its intent to not invoke this authority and to not delegate authority to the Park Service to regulate state owned navigable waters as part of National Park System units.[109] Furthermore, the fact that Congress specifically invoked its Commerce Clause authority in enacting Title VIII of ANILCA and failed to do so in enacting Title I indicates that Congress did not intend for the Executive branch to cite the Commerce Clause as justification for abrogating the plain language of section 103(c).

IV. CONCLUSION

The Court need look no further than the plain language of section 103(c) to conclude that the Park Service lacks legal authority to apply its regulations to "navigable waters … without regard to the ownership of submerged lands, tidelands or lowlands." ANILCA plainly states that only federally owned lands are included in National Park System units in Alaska, and that "no lands" belonging to the state "shall be subject to the regulations applicable solely to public lands within such units,"[110] and the statute's legislative history permits no other interpretation. In enacting section 103, Congress explicitly declined to exercise its Property Clause or Commerce Clause authority to grant the Park Service regulatory jurisdiction over state lands and waters. Therefore the 1996 regulations may not be applied to state lands and waters within National Park System units.

Defendants have claimed that ANILCA's conservation purposes necessitate their exercise of broad extraterritorial jurisdiction. Defendants overlook that in addition to setting aside vast tracts of land for conservation management, ANILCA also protects the traditional rural Alaskan way of life and the right of the young State to develop its resources and sustain

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[109] "No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State . . . shall be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. 3103(c).

[110] 16 U.S.C. § 1303(c).

itself. Congress explicitly recognized that ANILCA was a grand compromise designed to protect "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provide[] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people."[111] Section 103(c) is key to meeting the economic and social needs of the State and Alaskans and must be read to prohibit Park Service regulation of state owned lands and waters.

Dated this 11th day of January, 2013, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2013, a copy of the foregoing State of Alaska's Memorandum in Support of Plaintiff-Intervenor's Motion for Summary Judgment was served electronically, on the following:

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/s/ J. Anne Nelson
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[111] 16 U.S.C. § 3101(d).

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

JOHN STURGEON, Plaintiff, vs. SUE MASICA, GREG DUDGEON, ANDEE SEARS, NATIONAL PARK SERVICE, KEN SALAZAR, UNITED STATES DEPARTMENT OF INTERIOR, Defendants.	**Case No. No. 3:11-cv-00183-HRH** **PLAINTIFF'S OPENING SUMMARY JUDGMENT BRIEF**

Pursuant to Local Rule 16.3 and this Court's Agency Appeal Scheduling Order of November 19, 2012, Plaintiff John Sturgeon files this opening summary judgment brief.

I. INTRODUCTION

Plaintiff John Sturgeon brought this action because the National Park Service (the "NPS") unlawfully prohibited him from using his small personal hovercraft on navigable waters owned by the State of Alaska within the boundaries of the Yukon Charley Rivers National Preserve (the "Yukon-Charley"). For years, Sturgeon had used this hovercraft to ply the Yukon and Nation Rivers to access moose hunting grounds within the Yukon-Charley and upstream from the preserve. In 2007, however, the NPS informed Sturgeon that its regulations prohibited operation of his hovercraft within the Yukon-Charley, regardless of whether he was operating it on state-owned navigable waters. This NPS action is unlawful because the NPS regulations prohibiting the use of hovercraft on waters within NPS boundaries are inapplicable to navigable waters and other lands owned by the State of Alaska under the plain language of the Alaska National Interest Lands Conservation Act ("ANILCA").

ANILCA provides that for any lands committed to federal conservation system units (such as the National Park System) as a result of ANILCA, NPS regulations solely applicable to public lands within federal conservation system units do not apply to lands within those units that belong to the State of Alaska, including navigable waters. This provision expressly exempting state-owned lands within newly created or expanded federal conservation system units from certain federal regulations is a critically important component of the statute.

Until 1996, the NPS abided by this Congressional restriction on its authority, and its regulations did not purport to authorize the NPS to enforce its regulations on lands owned by the State of Alaska. In 1996, the NPS altered its regulations to authorize enforcement of all of its regulations on all navigable waters within park areas, including those in Alaska, without regard to state ownership. It is this revised regulation (36 C.F.R. § 1.2(a)(3) and the accompanying change to the Alaska-specific regulations in 36 C.F.R. § 13.2) that the NPS asserts grant it the authority to prohibit Sturgeon's use of a hovercraft on state-owned navigable waters within the Yukon-Charley.

In light of the plain language of ANILCA, Sturgeon respectfully requests that 36 C.F.R. § 1.2(a)(3) be declared invalid as to all state-owned lands within federal conservation system units in Alaska. Sturgeon moves for summary judgment on this claim because Defendants' answer reveals there are no disputed issues of material fact. Specifically, there appears to be no dispute that: (1) Sturgeon has standing to bring this action and to challenge the validity of the 1996 regulation change; (2) this legal issue is ripe for resolution; and (3) Sturgeon's claim is timely. Indeed, in a separate filing, Defendants have recognized that Sturgeon's claim functions as a direct challenge to the 1996 regulation change. Therefore, at this juncture, the only issue presented for the court to resolve is the legal question of whether the 1996 regulation change violates the plain language of ANILCA and is therefore invalid as beyond the scope of the NPS' Congressionally granted authority in Alaska.

II. FACTS

A. Facts Giving Rise to Sturgeon's Claims

The material facts related to Sturgeon's claim are few and are all undisputed. As detailed below, Defendants do not dispute that: (1) Sturgeon sought to use his hovercraft on the Nation River, which is a navigable waterway within the Yukon-Charley;[1] (2) the Yukon and Nation Rivers are navigable waterways;[2] (3) in 2007, Defendants informed Sturgeon of their position that NPS regulations[3] prohibited him from using his hovercraft on navigable waters with the Yukon-Charley;[4] (4) Defendants explained Sturgeon would be subject to criminal prosecution should he continue to use his hovercraft on navigable waters within the Yukon-Charley;[5] (5) Sturgeon attempted to resolve this issue with

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[1] Answer ¶ 33.

[2] Answer ¶ 16. The Yukon and the Nation Rivers, as navigable rivers, are subject to the Submerged Lands Act of 1953. 43 U.S.C. § 1311 (a). Pursuant to that Act and the "equal footing doctrine," the State of Alaska owns the submerged lands within the banks of those rivers. *See United States v. Alaska,* 521 U.S. 1, 5-6 (1997); *State Dept' of Natural Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1213-16 (Alaska 2010). Since statehood, the State of Alaska has been vested with the authority to manage access by watercraft and other vessels on those rivers. *See CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1117-18 (Alaska 1988) (under the public trust doctrine, the State holds title to the beds of navigable waters "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties" (internal citations omitted)).

[3] 36 C.F.R. § 2.17(e). This regulation is solely applicable to public lands (as defined in 16 U.S.C. § 3102(3)(A)) within NPS conservation system unit boundaries. *See* 36 C.F.R. § 1.2.

[4] Answer ¶¶ 33, 36, 44, 48, 53, 57.

[5] Answer ¶ 19.

Defendants by both meeting with certain Defendants, and by petitioning for rulemaking.[6] Because these facts are undisputed, there can be no dispute that: (1) Sturgeon has standing to assert his claim; (2) his claim is ripe; and (3) his claim is timely.

Defendants similarly do not dispute that Sturgeon's challenge to their authority to prohibit him from using his small hovercraft on navigable waters within the Yukon-Charley is in effect a direct challenge to the legality of the NPS regulations enacted in 1996, 36 C.F.R. § 1.2(a)(3) and the accompanying change to 36 C.F.R. § 13.2, purporting to apply all NPS regulations to all lands and waters within federal conservation system units in Alaska, without regard to whether any of these lands are state-owned. In a filing with the court, Defendants stated "Plaintiff's action is, therefore, a challenge to the validity of 36 C.F.R. § 1.2(a)(3) as promulgated on July 6, 1996."[7] Thus, to resolve Sturgeon's claim, this court must address whether the language in 36 C.F.R. § 1.2(a)(3) extending NPS regulations to all navigable waters within federal conservation system units in Alaska regardless of ownership is legally valid. This motion respectfully requests that the court resolve this issue and conclude the regulation is contrary to the plain language of ANILCA and therefore invalid as applied to federal conservation system units created or expanded by ANILCA.

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[6] Answer ¶ 40.

[7] Defendants' Motion to Vacate Scheduling Order filed December 16, 2011 at 2.

B. The 1996 Revision to 36 C.F.R. § 1.2 and 36 C.F.R. § 13.2

1. Until 1996, the NPS excluded state-owned lands and waters within park boundaries from its regulatory jurisdiction.

From the time the NPS first promulgated § 1.2 in 1983 until the 1996 revision, the regulation's assertion of NPS authority over navigable waters was consistent with ANILCA. The original 1983 version of § 1.2(b) provided that NPS regulations would not apply to "privately owned lands and waters":

> The regulations contained in Parts 1 through 7 of this chapter are not applicable on privately owned lands and waters (including Indian lands and waters owned individually or tribally) within the boundaries of a park area, except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States.[8]

The regulation, however, made clear that the subset of NPS regulations applicable to lands and waters under the "legislative jurisdiction of the United States" would remain applicable to privately owned lands and waters under such legislative jurisdiction. While the regulation itself did not mention state-owned land that was under the legislative jurisdiction of the United States, the preamble to the regulation clarified that it was "intended to also include State in holdings that are under the legislative jurisdiction of the United States."[9]

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[8] 48 Fed. Reg. 30252 (June 30, 1983).

[9] 48 Fed. Reg. 30261 (June 30, 1983).

Nonetheless, use of the term "privately owned lands and waters" caused sufficient confusion that in 1987 the NPS revised the language in § 1.2(b) to instead reference "non-federally owned lands":

> Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area.[10]

The preamble explained that as to the subset of regulations applicable to land under the legislative jurisdiction of the United States, this revision "clarifies the fact that those regulations apply, regardless of land ownership, on waters within a park area that are under the legislative jurisdiction of the United States."[11] Notably, this regulatory revision did not purport to extend NPS jurisdiction over all state-owned navigable waters. Rather, it changed the statement that NPS regulations would not apply to "privately owned lands and waters" to a statement that NPS regulations would not apply to "non-federally owned lands."

Similarly, prior to 1996, the NPS regulations specific to Alaska in 36 C.F.R. Part 13 limited applicability of NPS regulations to "federally owned" lands in Alaska.[12] In particular, the 1981 preamble to the final Part 13 regulations made clear that "these

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[10] 52 Fed. Reg. 35238 (September 18, 1987).

[11] 52 Fed. Reg. 12037 (April 14, 1987).

[12] *See* 46 Fed. Reg. 31843 (June 17, 1981); [Admin R. 49] (61 Fed. Reg. 35133 (July 5, 1996)).

regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries."[13]

2. In 1996 the NPS extended its regulatory authority to all navigable waters within park boundaries, including all navigable waters in Alaska.

In July of 1996, the NPS reversed its long-standing policy and interpretation of its authority in NPS conservation system units throughout the country, and in Alaska, by extending NPS jurisdiction to all waters within park boundaries, including "navigable waters located within the boundaries of park areas in Alaska."[14]

The NPS justified this extension of its jurisdiction by claiming that the 1987 revision: "in ensur[ing] that (in areas of legislative jurisdiction) the 10 enumerated regulations clearly apply on all 'non-federally owned lands and waters' . . . [it] inadvertently incorporated language that seems ambiguous and could *preclude park regulation of 'non-federally' owned waters.*"[15] But § 1.2(b) had *always* prohibited park regulation of waters not owned by the United States. Indeed, the 1983 version was crystal clear that NPS regulations did not apply on "privately-owned lands and waters."[16] The 1987 revision added clarity to this point by stating NPS regulations did not apply to "non-federally owned lands," thus making clear "privately-owned" had been meant to include lands owned by states, such as Alaska. Nonetheless, the NPS used this

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[13] 46 Fed. Reg. 31843 (June 17, 1981).

[14] [Admin R. 50] (61 Fed. Reg. 35134 (July 5, 1996)).

[15] [Admin R. 8] (60 Fed. Reg. 62234 (December 5, 1995) (emphasis added)).

[16] 48 Fed. Reg. 30252 (June 30, 1983).

justification to divert attention from what it was really doing in 1996 – reversing decades of policy and expanding its jurisdiction in excess of its legal authority by seeking to apply its regulations to *all* waters within park boundaries, even if those waters were not federally-owned.

To accomplish this expansion of its authority, the NPS created the new 36 C.F. R. § 1.2(a)(3) which provides that NPS regulations would apply within:

> Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and *without regard to the ownership of submerged lands, tidelands, or lowlands.*[17]

36 C.F.R. § 1.2(b) was revised to state:

> The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.[18]

These amendments dramatically expanded the applicability of general NPS regulations,[19] and the NPS regulations specific to Alaska in 36 C.F.R. Part 13. As the preamble to the revisions to Part 13 stated, the revisions were meant "to clarify that NPS general

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[17] [Admin R. 49] (61 Fed. Reg. 35133 (July 5, 1996) (emphasis added)).

[18] *Id.*

[19] 36 C.F.R. § 1.1 *et seq*. These changes also reveal that the NPS was not "fixing" any ambiguity created by the 1987 revision (which was meant to only address application of regulations to lands under "legislative" jurisdiction) but was rather expanding its authority over all private and state-owned waters. Indeed, the entire reference to lands and waters "under the legislative jurisdiction of the United States" disappeared.

regulations (e.g., part 2), as modified by part 13, apply to waters subject to federal jurisdiction, including navigable waters, located within the boundaries of park areas in Alaska."[20]

Among the NPS regulations that these amendments made applicable to state-owned lands is 36 C.F.R. § 2.17(e), which prohibits the operation of hovercraft within NPS boundaries. This regulation is solely applicable to public lands (as defined in 16 U.S.C. § 3102(3)(A)) within NPS conservation system unit boundaries, and is thus precisely the type of regulation ANILCA sought to make inapplicable to state-owned lands.[21]

III. ARGUMENT

A. Summary Judgment Standard

The court reviews a motion for summary judgment under Federal Rule of Civil Procedure 56, which provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The party moving for summary judgment meets its burden "if the pleadings [and] admissions on file . . . show that there is no genuine issue as to any material fact."[22] As discussed in section III, *infra*, the pleadings establish

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[20] [Admin R. 52] (61 Fed. Reg. 35136 (July 5, 1996)).

[21] 36 C.F.R. § 1.2.

[22] *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir. 2003) (citing Fed. R. Civ. P. 56(c)).

that there is no genuine dispute as to any material fact and that judgment as a matter of law is appropriate.

B. Standard of Review

While the present action did not arise as a direct administrative appeal, but rather as an as-applied challenge to certain NPS regulations, this action effectively challenges the legality of the 1996 changes to 36 C.F.R. § 1.2 and 36 C.F.R § 13.2. Specifically, Sturgeon argues that these regulatory revisions are contrary to the restrictions on NPS authority set forth in ANILCA and are thus invalid as a matter of law. Under these circumstances, this court should apply a *de novo* standard of review, giving no deference to the agency's interpretation of ANILCA.

Specifically, Sturgeon has suffered a "legal wrong because of agency action."[23] As a result, the court's review is governed by 5 U.S.C. § 706, which provides that this court shall "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[24] The legal question at issue is whether the agency's regulation and attempts to enforce its regulation exceed the statutory authority granted the National Park Service in ANILCA. This question of statutory interpretation is reviewed *de novo* by this court.[25]

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[23] 5 U.S.C. § 702.

[24] 5 U.S.C. § 706(2)(c).

[25] *See Rodriguez v. Smith*, 541 F.3d 1180, 1183 (9th Cir. 2008).

Because the question presented involves the National Park Service's interpretation of a statute, the court's "analysis is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837[.]"[26] Under that framework, the court must "first determine[] if Congress has directly spoken to the precise question at issue, in such a way that the intent of Congress is clear."[27] The court's review of ANILCA's language will reveal that the intent of Congress is unambiguous. The court "must give effect to the unambiguously expressed intent of Congress."[28] As such, there is no need to evaluate the agency's interpretation or defer to the agency regulation. Instead, the court should evaluate the statute and decide whether Sturgeon is entitled to judgment as a matter of law.

C. 36 C.F.R. § 1.2(a)(3) and 36 C.F.R. § 13.2 Are Contrary to ANILCA's Express Restrictions on NPS Authority and Are Thus Invalid.

1. ANILCA expressly provides that certain federal regulations do not apply to state-owned lands, including navigable waters, within the boundaries of national parks and preserves created or expanded by ANILCA.

In 1980, Congress passed ANILCA, which added 104.3 million acres to various federal conservation system units in Alaska by among other things, expanding the national park system in Alaska by over 43 million acres, creating ten new national park

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[26] *Rodriguez v. Smith*, 541 F.3d 1180, 1183-84 (9th Cir. 2008) (quoting *Mujahid v. Daniels*, 413 F.3d 991, 997 (9th Cir. 2005)).

[27] *Id.* at 1184 (quoting *Mujahid*, 413 F.3d at 997).

[28] *Id.* (quoting *Chevron*, 467 U.S. at 842-43).

units, and increasing and re-designating the acreage of three existing units.[29] As part of this expansion of federal acreage, ANILCA established the Yukon-Charley as a management unit of the NPS in east-central Alaska, west of the village of Eagle, and committed various "public lands" to the Preserve.[30]

ANILCA's vast expansion of federal authority came with express restrictions on federal jurisdiction over lands owned by the State of Alaska prior to its enactment. Under ANILCA, the definition of "public lands" specifically excepts State-owned land:

> [L]and situated in Alaska which, after December 2, 1980, are Federal lands, except – land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law.[31]

Consistent with this definition of "public lands," ANILCA also provided in Section 103(c):

> 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

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[29] Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, §§ 201-202, 94 Stat. 2371 (1980). The term "conservation system unit" is ANILCA's technical nomenclature for certain federal lands managed by the United States government. The term "conservation system unit" is defined in Section 102(4) of the Act to include any unit in Alaska of the: (1) National Park System; (2) National Wildlife Refuge System; (3) National Wild and Scenic Rivers System; (4) National Trails System; and (5) National Wilderness Preservation System, as well as any National Forest Monument. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 102, 94 Stat. 2371 (1980) (codified at 16 U.S.C. 3102). This definition includes preexisting units, units established, designated, or expanded by ANILCA, and future designations or expansion. *Id.*

[30] 16 U.S.C. § 410hh(10).

[31] 16 U.S.C. § 3102(3)(A).

> to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, 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.[32]

Read together, these provisions confirm that lands owned by the State of Alaska, such as navigable waterways conveyed to the State at statehood, are not "public lands" and are not subject to NPS (and other) regulations applicable solely to "public lands" within "conservation system units" (such as the National Park System) established by ANILCA.

2. Because 36 C.F.R. § 1.2(a)(3) and 36 C.F.R. § 13.2 purport to apply NPS regulations to all navigable waters within park boundaries in Alaska without regard to State ownership, they are contrary to ANILCA and thus legally invalid.

Agency regulations that exceed the agency's Congressionally delegated authority are *ultra vires* and invalid as a matter of law.[33] Here, the 1996 amendments to 36 C.F.R. § 1.2 and 36 C.F.R. § 13.2 purport to grant the NPS regulatory authority over State-owned navigable waters within park boundaries in Alaska. But ANILCA expressly

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[32] 16 U.S.C. § 3103(c).

[33] 5 U.S.C. § 706 (a court reviewing agency action shall "hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *see also Talley v. Mathews*, 550 F.2d 911, 919 (4th Cir. 1977) ("The Court has made clear the prerogative of the executive agencies to issue regulations 'reasonably related' to the purposes of the legislation they are charged with enforcing . . . the role of the agencies remains [] to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress"); *Bowman v. U.S.*, 564 F.3d 765, 779 (6th Cir. 2008) ("An agency must interpret its implementing legislation in a reasonable manner and may not promulgate regulations that are . . . manifestly contrary to the statute." (internal citations and quotations omitted)); *Republican National Committee v. Federal Election Commission*; 76 F.3d 400, 404-407 (D.C. Cir. 1996).

prohibits the NPS from exercising this regulatory authority. The 1996 amendments to 36 C.F.R. § 1.2 and 36 C.F.R. § 13.2 cannot be squared with ANILCA's plain language mandating that lands owned by the State of Alaska, such as navigable waterways conveyed to the State at statehood, are not "public lands" subject to NPS (and other) regulations applicable solely to "public lands" within conservation system units established by ANILCA. Thus, Sturgeon respectfully submits that the 1996 amendments to 36 C.F.R. § 1.2 and 36 C.F.R. § 13.2 must be invalidated to the extent they purport to apply NPS regulations to all navigable waters within park boundaries in Alaska.

3. ANILCA's restriction on federal authority over state-owned lands was the result of deliberate Congressional action.

While the plain language of ANILCA is clear, and thus there is no need to analyze Congressional intent, it is worth noting that the inclusion of § 103(c) in ANILCA was a deliberate act by Congress to restrict federal authority. From the time the Act was introduced in 1977 until it was enacted at the end of 1980, Congress considered many versions of the legislation. The issue of protecting Alaska's authority over its navigable waters was repeatedly addressed in these versions of the legislation, with the specific language that became § 103(c) added in late 1980.

A House Concurrent Resolution added § 103(c) to the bill that became ANILCA on November 21, 1980.[34] A "legislative history to accompany House Concurrent Resolution" was placed in the Congressional Record explaining:

[34] *See* H. Con. Res. 452, 96th Cong. (Nov. 21, 1980).

> The concurrent resolution would revise the Alaska National Interest Lands Conservation Act by. . . [s]pecifying that only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands.[35]

In 1978, in an earlier version of the Alaska lands bill, Congressman Don Young offered an amendment to clarify that Alaska's ownership and management rights in navigable waters would be preserved, and the amendment passed.[36] A 1979 Senate Report on the legislation confirmed that:

> Those private lands, and those public lands owned by the State of Alaska . . . are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands.[37]

During floor debates in May 1979, House members stressed this same issue and stated their intention to:

> make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit.[38]

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[35] *See Id.;* This express statement of purpose was repeated in 126 CONG. RECS15129 (1980) (statement of Sen. Stevens).

[36] 124 CONG. REC. H4233 (daily ed. May 18, 1978). Young's amendment added submerged lands conveyed to the State of Alaska by § 6(m) of the Alaska Statehood Act to the list of lands expressly excluded from the definition of "public lands" by inserting "and 6(m)" after "6(b)" in section 103(3)(A)(iii) of the bill. As explained by Young at the time, "this is an amendment to amend the definition to protect State's rights to submerged lands . . . this is a rather technical amendment designed only to guarantee in statute what has been orally agreed to throughout markup . . . ."

[37] S. Rep. No. 96-413 at 303 (November 14, 1979).

[38] 125 CONG. REC. H3240 (May 15, 1979); *see also* CONG. REC. H3239.

This history demonstrates that the issue of preserving State management authority over State lands within any new federal conservation system units created or expanded by ANILCA was an issue that was "front and center" before Congress for over two years, and that the inclusion of § 103(c) in the final version of the Act was a deliberate decision by Congress to agree to the demands of Congressman Young, Senator Stevens, and others for language preserving this state management authority and limiting federal jurisdiction.

D. Defendants' Prior Explanations for Why the 1996 Revision to 36 C.F.R. 1.2(a)(3) Is Not Contrary to ANILCA Are Legally Flawed.

In enacting the 1996 regulations, the NPS relied on a provision in the 1976 National Park Service Administration Improvement Act authorizing it to promulgate and enforce boating and other regulations on waters within the national park system.[39] As explained by the State of Alaska and others during the regulatory comment period however, ANILCA's later enactment in 1980 expressly restricting the application of NPS regulations to state-owned lands within conservation system units created or expanded by ANILCA superseded the general authority granted in the 1976 Act.[40] The NPS not only disregarded this legal principle in promulgating the final regulations, it provided no persuasive explanation for how this expansion of federal authority squared with ANILCA's express restriction on federal jurisdiction. Rather, the NPS focused on the

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[39] [Admin R. 8] (60 Fed. Reg. 62234 (December 5, 1995)); [Admin R. 49] (61 Fed. Reg. 35133 (July 5, 1996) (citing 16 U.S.C. § 1a-2(h))).

[40] [Admin R. 51] (61 Fed. Reg. 35135 (July 5, 1996)).

legal grounds that may justify expanding its authority in states outside of Alaska, and offered the meek justification that the text of § 103(c) should not trump ANILCA's "underlying protective purposes."[41] As explained below, the NPS was mistaken in relying on the 1976 Act in light of ANILCA's later restriction on its authority, and its attempt to use ANILCA's general "purposes" to supersede ANILCA's text is legally flawed.

1. ANILCA expressly restricts the authority previously granted to the NPS to enforce NPS regulations on state-owned navigable waters in Alaska.

The 1976 National Park Service Administration Improvement Act authorized the NPS to:

> Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: *Provided*, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.[42]

This provision may have provided sufficient legal grounds for the NPS to promulgate 26 C.F.R. § 1.2(a)(3) and extend its jurisdiction to navigable waters owned by states other than Alaska.[43] Through ANILCA, however, Congress permanently foreclosed the NPS's

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[41] *Id.*

[42] 16 U.S.C. § 1a-2(h).

[43] The authority granted to the NPS in the 1976 Act regarding other states is not unlimited, however. This provision only authorizes the NPS to regulate boating and related activities already subject to Coast Guard regulation, not any and all activities on waters within national parks. *See, e.g.*, H.R. Rep. 94-1569, 1976 U.S.C.C.A.N. 4291-92.

authority to apply its regulations to navigable waters and other state-owned lands in Alaska. As noted above, ANILCA § 103(c) plainly provides:

> 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 December 2, 1980, 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.[44]

This specific statutory provision, enacted in 1980, supersedes the general authority granted the NPS in the 1976 legislation. It is settled law that "[C]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute."[45] Under this principle of statutory interpretation, the 1976 Act cannot justify application of 36 C.F.R. § 1.2(a)(3) in Alaska.

Further, exercise of NPS authority must be consistent with the Property and Commerce Clauses of the U.S. Constitution which require a showing that activities on State-owned water sufficiently impact NPS controlled lands or resources so as to justify extra-territorial regulation. *State of Minn. by Alexander v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981) (under the Property Clause, Congress's power extends "to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands."); *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) ("the commerce power extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce" (internal citations omitted)).

[44] 16 U.S.C. § 3103(c).

[45] *Mangano v. U.S.*, 529 F.3d 1243, 1247 (9th Cir. 2008), *quoting Acosta v. Gonzales*, 439 F.3d 550, 555 (9th Cir. 2006).

2. The NPS's reliance on the general purposes behind ANILCA is misplaced given the specific limitation on federal authority in § 103(c).

In promulgating the final version of 26 C.F.R. § 1.2(a)(3), the NPS sidestepped ANILCA's restriction of its authority in Alaska and instead focused on its authority to expand its regulatory reach in other states. Despite receiving comments from the Attorney General of the State of Alaska and the Alaska Legislature, who both clearly and succinctly explained how the proposed regulation change was inconsistent with ANILCA § 103(c), the NPS disregarded these comments. Instead, the NPS attempted to take refuge behind ANILCA's "underlying protective purposes."[46] Specifically, the NPS stated:

> In ANILCA, Congress outlined an expansive and inclusive scope of resource protection that was to apply within national parks in Alaska. Congress further charged NPS to protect populations of fish and wildlife and habitat that necessarily includes the great river systems running through and within the parks (ANILCA Title II). NPS does not agree with the State of Alaska's contention that ANILCA § 103(c) preempts NPS's well-established authority on navigable waters. NPS does not think that ANILCA § 103(c), which was characterized by Congress as a minor technical provision, should be read in isolation from the context of the whole act. ANILCA should be interpreted consistent with its underlying protective purposes: to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.[47]

As an initial matter, Defendants are mistaken to characterize § 103(c) as a "minor technical provision." To the contrary, as demonstrated by the legislative history set forth above, including § 103(c) in the final version of ANILCA was a deliberate act by

[46] [Admin R. 51] (61 Fed. Reg. 35135 (July 5, 1996)).

[47] *Id.*

Congress to limit NPS regulatory authority in Alaska. There was nothing "minor" about the issue of NPS authority in Alaska as it was debated, and there was nothing "minor" about the eventual inclusion of a provision that clearly restricted NPS authority in Alaska.[48]

Moreover, ignoring the specific limitation on federal executive authority expressed in § 103(c) in favor of the alleged general "intent" of the statute is unpersuasive; turning well-settled canons of statutory interpretation on their head. It is simply wrong to argue that the general purposes of a statute should take precedence over the statute's specific text.[49] Specific statutory language trumps general statements of purpose and intent, not the other way around.[50]

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[48] The reference to § 103(c) as a "minor" provision likely arises from the fact that this section was added to the final act as part of House Concurrent Resolution 452, and that this provision was included there under the heading "minor revisions." 126 CONG. REC. H11111 – 11115; 126 CONG. REC. S15129. The text of § 103(c), however, speaks for itself. The technical vehicle for its inclusion in the statute is irrelevant. Further, if Congress meant for this provision to be seen as "minor" and subservient to other provisions of ANILCA, it could have easily memorialized this intent into the statute. Instead, Congress included an unqualified express limitation on NPS authority in Alaska in the final statute.

[49] *In re Padilla*, 222 F.3d 1184, 1192 (9th Cir. 2000) ("Statutory construction canons require that where both a specific and a general statute address the same subject matter, the specific one takes precedence regardless of the sequence of the enactment and must be applied first." (internal citations omitted)); *Union Cent. Life Ins. Co. v. Wernick*, 777 F.2d 499, 501 (9th Cir. 1985) ("It is a fundamental rule of statutory construction that specific statutory language prevails over general provisions."); *Clifford F. MacEvoy Co. v. U.S. for Use and Benefit of Calvin Tomkins Co.*, 322 U.S. 102 (1944) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling" (internal citations omitted)).

This NPS statement, while legally flawed, does reveal the NPS's apparent intent in promulgating the 1996 regulations – to dramatically expand its authority consistent with what *the NPS believed* was the intent of ANILCA and the national park system generally, disregarding specific Congressional direction to the contrary.

E. Defendants' Position that the NPS May Regulate the Water Flowing Over State-Owned Submerged Lands Ignores that Ownership of Submerged Lands Includes Rights to the Water Above.

Defendants' Answer offers a new justification for applying NPS regulations to state-owned navigable waters in defiance of ANILCA – that state ownership of submerged lands does not affect the NPS's ability to apply its regulations to the water flowing over these submerged lands:

> [D]efendants aver that waters above submerged lands may be "public lands" under ANILCA even if the submerged lands themselves are not.[51]

This position finds no support in law or logic.

The United States Supreme Court has long recognized that State ownership of submerged lands extends to the waters flowing over these lands as well, unless either has been explicitly granted to another party:

> The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running.[52]

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[50] *Id.*

[51] Answer ¶ 25.

[52] *McCready v. State of Virginia*, 94 U.S. 391, 394 (1876) (internal citations omitted).

Neither the Submerged Lands Act nor the equal footing doctrine support a legal distinction between the submerged lands and the water flowing over the submerged lands. The Submerged Lands Act makes clear it is granting ownership in submerged lands *and* the right to manage and regulate the resources in the waters themselves. Section 3(a) of the Submerged Lands Act provides (emphasis added):

> It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, *and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States* or the persons who were on June 5, 1950,[3] entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.[53]

The Supreme Court likewise characterizes the Submerged Lands Act as a grant to the states of "submerged lands *and waters*."[54]

Several state courts have relied upon this direction from the Supreme Court to further reiterate the principle that title to and power over both submerged lands, and the waters flowing over them, lies with the states.[55] The Alaska Supreme Court analyzed state jurisdiction over navigable waters in *Totemoff v. State*,[56] and made clear that:

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[53] 43 US.C. § 1311(a) (emphasis added).

[54] *U.S. v. California*, 436 U.S. 32, 37 (1978).

[55] *See, e.g.*, *Harris v. Hylebos Industries, Inc.*, 505 P.2d 457, 460 (Wash. 1973) ("the right of the state to grant the navigable waters, except as restrained by constitutional checks, is as absolute as its rights to grant the dry land which it owns" (internal citations omitted)); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) ("The power of the state to

> The Submerged Lands Act thus gives Alaska ownership of, title to, and management power over the following: *lands beneath the navigable waters of Alaska, the navigable waters themselves, and fish and other marine life located in Alaska's navigable waters.*[57]

ANILCA likewise does not provide that submerged lands should be legally divorced from the waters flowing over them. Indeed, ANILCA expressly defines the term "land" to include both "lands" and "waters."[58] Furthermore, review of the NPS regulations themselves reveals that there is no distinction made between ownership of "submerged lands" as opposed to ownership of "waters." To the contrary, the construct of "ownership" of "waters" is used repeatedly.[59] In this way, the phrase "waters" is used synonymously with "submerged lands."

Finally, permitting regulation of waterways independent of ownership of the submerged lands subverts the purpose of permitting state regulation of navigable waters under the public trust doctrine. The Supreme Court has made clear that the fundamental purpose of the public trust doctrine is to permit regulation and control of navigable waters in order to protect commerce:

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control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the [public] trust, is absolute, except as limited by the paramount supervisory power of the federal government over navigable waters.").

[56] 905 P.2d 954, 964 (Alaska 1995).

[57] *Id.* (emphasis added).

[58] 16 U.S.C. § 3102(1) ("The term 'land' means lands, waters, and interests therein.").

[59] *See* 36 C.F.R. §§ 34.4; 9.37; and 9.38 (all purporting to regulate "federally owned or controlled lands and waters"); *see also* 36 C.F.R. § 13.1406 (regulating "state-owned lands and waters").

> It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways], and consequently to the exclusion of private ownership, either of the waters or the soils under them.[60]

Consistent with this purpose, the Court has long been clear that, pursuant to the public trust doctrine, "title to the lands under the navigable waters . . . necessarily carries with it control over the waters above them . . . ."[61] Defendants' assertion that waters flowing over submerged lands may constitute "public lands" under ANILCA cannot be reconciled with this principle because it purports to divorce control of submerged lands "from the waters above them."

F. Defendants' Past Assertion that Navigable Waters Were Not "Conveyed" to the State of Alaska Disregards that the Submerged Lands Act Was Incorporated into the Alaska Statehood Act, Which Was a Conveyance of Land to the State of Alaska.

Defendants, in another case addressing whether 36 C.F.R § 1.2(a)(3) is consistent with ANILCA § 103(c), have argued that navigable waters were not "conveyed" to the State of Alaska but rather were "acquired at statehood by operation of law," and thus § 103(c)'s exemption for "lands . . . conveyed to the State" is inapplicable to navigable

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[60] *Packer v. Bird*, 137 U.S. 661, 667 (1891); *see also Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 436 (1892) (stating public trust doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment.").

[61] *Illinois Cent. R. Co.*, 146 U.S. at 452.

waters.[62] Defendants are mistaken. The United States government "conveyed" navigable water to the State of Alaska pursuant to the Alaska Statehood Act.

The Alaska Statehood Act expressly incorporated the Submerged Lands Act of 1953[63] in its section 6(m).[64] As explicitly explained by the United States Supreme Court, "[b]y applying the Submerged Lands Act to Alaska through the Alaska Statehood Act, Congress granted the State title to submerged lands . . . ."[65] This transfer of title was a "conveyance" under any commonly understood definition of the term. Black's Law Dictionary defines "conveyance" as "the voluntary transfer of a right or of property," and "convey" as "to transfer or deliver (something, such as a right or property) to another,

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[62] *See* Opposition to Motion to Dismiss and Response to State of Alaska's Amicus Brief filed in *United States of America v. James Albert Wilde*, Case No. 4-10-cr-00021-SAO November 1, 2010 at 16-17.

[63] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, § 6(m) (adopting Submerged Lands Act, Pub. L. No. 31, 67 Stat. 29). The Submerged Lands Act (the "SLA") "recognized, confirmed, established, and vested in and assigned to the respective states" title to and ownership of submerged lands beneath navigable waters within their boundaries. 43 U.S.C. § 1311.

[64] Pub. L. 85-508, 85th Congress, 72 St. 339.

[65] *U.S. v. Alaska*, 521 U.S. 1, 7-8 (1997). Case law referencing the status of submerged lands at statehood universally describes this process as a transfer of an interest in property from the United States to the newly sovereign state, a transaction clearly within the common legal definition of "conveyance." *Idaho v. U.S.*, 533 U.S. 263, 272 (2001) ("the default rule is that title to land under navigable waters passes from the United States to a newly admitted state"); *State v. Gerbing*, 47 So. 353, 355-56 (Fl. 1908) (at statehood, the rights "acquired by the state of Florida" included "[t]he title to lands under navigable waters"); *Alaska v. Ahtna*, 891 F.2d 1401, 1404 (9th Cir. 1989) (considering ownership of the lower thirty miles of the Gulkana River and noting that "[i]f navigable, title to the submerged lands passed to Alaska at statehood"); *Alaska v. U.S.*, 662 F.Supp. 455, 457 (D. Alaska 1987) ("title to the beds of navigable inland waterbodies passes from the United States to the state when the state enters the Union").

esp. by deed or other writing; esp., to perform an act that is intended to create one or more property interests, regardless of whether the act is actually effective to create those interests."[66] Neither definition limits the definition of "conveyance" to exclude transfers by operation of law. To the contrary, federal case law confirms that land may pass through a "congressional conveyance," which can occur "explicitly or by inference."[67] Consistent with these principles, both the Mississippi and Alaska Supreme Courts have explicitly described the transfer of submerged lands to the states at statehood as a "conveyance."[68] For these reasons, § 103(c)'s exemption for "lands . . . conveyed to the State" applies to navigable waters.

G. Decisions Regarding ANILCA's Subsistence Provisions Have No Bearing on the Present Action.

This court and the Ninth Circuit have both addressed the term "public lands" in the context of ANILCA's subsistence provisions in Title VIII of the statute. Specifically, the

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[66] BLACK'S LAW DICTIONARY (9th ed. 2009).

[67] *Yankton Sioux Tribe of Indians v. State of S.D.*, 796 F.2d 241, 244 (8th Cir. 1986). *See also Tyonek v. Secretary of the Interior*, 836 F.2d 1237, 1241 n.5 (9th Cir. 1988) (referencing "lands conveyed under the Alaska Statehood Act").

[68] *Cinque Bambini v. State*, 491 So.2d 508, 511 (Miss. 1986) ("At the time of statehood, the United States created two great public trusts and *conveyed* to each new state . . . lands to be held by the state for the public purpose. The first of these was the familiar school lands trust into which the sixteenth section from each township has been placed. The second trust . . . had placed within it the tidelands and navigable waters of the state together with the beds and lands underneath same.") (emphasis added); *James v. State*, 950 P.2d 1130, 1138 (Alaska 1997) ("We conclude that the tidelands and lands underlying the coastal waters of the Tongass were *conveyed* to the State of Alaska at statehood under the equal footing doctrine and the Submerged Lands Act.") (emphasis added).

Ninth Circuit has concluded that for purposes of ANILCA's subsistence provisions, "public lands" include waters where the federal government has reserved water rights.[69] The animating rationale behind this conclusion was to give effect to ANILCA's subsistence provisions and act consistently with what the court believed was clear congressional intent to protect subsistence fishing by rural residents.[70] These subsistence decisions, however, are not applicable to the present matter, which deals with ANILCA § 103(c)'s prohibition against applying *NPS unit regulations* to certain state-owned lands and waters. The decisions in *Babbitt* and *Katie John* provided an opening to the Department of the Interior to promulgate subsistence regulations that reached to navigable waters where the United States had reserved water rights. Neither decision addressed § 103(c) or any other aspect of NPS authority under ANILCA. And § 103(c)

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[69] *Alaska v. Babbit*, 72 F.3d 698, 703-04 (9th Cir. 1995). Specifically, the Court concluded that in analyzing ANILCA's subsistence provisions, reserved water rights are interests in land to which the federal government has title under ANILCA's definition of public lands for purposes of assuring a subsistence preference under Title VIII of the statute. While this conclusion has been subject to question and challenge, *see, e.g. Totemoff v. State*, 905 P.2d 954, 961-968 (Alaska 1995), the Ninth Circuit, sitting *en banc*, declined to revisit this decision. *Katie John v. United States*, 247 F.3d 1032 (9th Cir. 2001).

[70] *Babbitt*, 72 F.3d at 702 n. 9 & 704 ("ANICLA applies only to Alaska and our interpretation of its definition of public lands *is necessary to give meaning to its purpose of providing an opportunity for a subsistence way of life*." . . . . "If we were to adopt the state's position, that public lands exclude navigable waters, we would give meaning to the term 'title' in the definition of the phrase 'public lands.' *But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing.*") (emphasis added); *Katie John*, 274 F.3d at 1037 ("We are charged with effectuating the congressional purpose to protect and preserve traditional subsistence fishing in waters in the State of Alaska.") (Tallman, J., Tashima, J., and W. Fletcher, J., concurring in the judgment).

does not mention, address, or relate to subsistence issues. Simply put, the issues presented in this case do not implicate ANILCA's subsistence provisions. Indeed, invalidating the 1996 revisions to 36 C.F.R. § 1.2 and 36 C.F.R. § 13.2 as requested by Sturgeon will not invalidate or otherwise affect the subsistence regulations addressing reserved water rights promulgated in response to *Babbitt*.

Moreover, the NPS's stated rationale for revising 36 C.F.R. § 1.2 in 1996 had nothing to do with subsistence issues. Review of the record regarding the regulation change reveals that the regulation was not revised in response to the Ninth Circuit's decision *Babbitt* decision but, instead, was an effort by the NPS to extend its regulatory jurisdiction over state-owned waters. The NPS did not mention or address subsistence as an issue giving rise to the regulatory revision. Thus, concluding that the 1996 revision to 36 C.F.R. § 1.2 is contrary to ANILCA § 103(c) will not implicate ANILCA's subsistence provisions.

Finally, the *Babbitt* and *Katie John* decisions addressing reserved water rights in the context of subsistence have no bearing on the question of lack of NPS authority over navigable waters within park boundaries in Alaska. The land management authority the federal government obtains under the reserved water rights doctrine is expressly limited to the purpose of the reserved water rights.[71] *Babbit* and *Katie John* are explicit that this

[71] *See Cappaert v. U.S.*, 426 U.S. 128, 141 (1976) ("The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."); *U.S. v. New Mexico*, 438 U.S. 696, 700 (1978) ("Each time this court has applied the 'implied-reservation-of-water doctrine,' it has

purpose is to protect and promote ANILCA's subsistence provisions in Title VIII. Therefore, the federal government cannot invoke any reserved water rights asserted in response to *Babbitt* and *Katie John* because neither ANILCA § 103(c), nor 36 C.F.R. § 1.2(a)(3), address or implicate subsistence issues. Put another way, even if the federal government could successfully claim reserved water rights in the Yukon-Charley, these reserved water rights, to the extent they may be "public lands," are "public lands" solely for the purpose of preserving subsistence fishing pursuant to Title VIII of ANILCA, and comprise only those waters explicitly necessary for that purpose. These reserved water rights do not constitute "public lands" for the purpose of general regulation by the NPS or, specifically, for the purposes of this case.

IV. CONCLUSION

ANILCA § 103(c) expressly limits NPS authority over navigable waters within park boundaries in Alaska. The NPS disregarded this express jurisdictional limitation when it revised its regulations in 1996 to expand its regulatory authority over all navigable waters in Alaska. The resulting regulations are therefore invalid because they

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carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."). *See also Totemoff*, 905 P.2d 954 at 966 (". . . even assuming the navigational servitude or reserved water rights are interests to which the United States holds title, the land management authority which the federal government obtains through these interests is limited by the purposes of the interests. The power any easement, servitude, or similar property interest gives to its holder is limited by the interest's purpose." (citing *S. Pac. Co. v. City of San Francisco*, 396 P.2d 383, 386 (Cal. 1964); *Benno v. Central Lake County Joint Action Water Agency*, 609 N.E.2d 1056, 1060 (Ill. App.), appeal denied, 616 N.E.2d 331 (Ill. 1993))).

exceed the scope of the NPS's statutory authority. For these reasons, Sturgeon respectfully requests summary judgment invalidating the 1996 revisions to 36 C.F.R. § 1.2 and 36 C.F.R. § 13.2 to the extent they purport to extend NPS regulatory jurisdiction over state-owned navigable waters in Alaska.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of January 2013, a copy of the foregoing was served electronically on:

J. Anne Nelson ann.nelson@alaska.gov
Dean K. Dunsmore dean.dunsmore@usdoj.gov

s/ [Matthew T. Findley]

28-LS0440\N
Gardner
3/27/13

CS FOR HOUSE CONCURRENT RESOLUTION NO. 3( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-EIGHTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MILLETT, Austerman

A RESOLUTION

Establishing the Joint Committee on Access and Federal Overreach.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS, in recognition of the powers reserved to the states and people under the Tenth Amendment to the Constitution of the United States, the State of Alaska has a right to review and voice concerns to federal authorities about actions taken by the federal government that encroach on state affairs to a deeper and greater extent than permitted by law; and

WHEREAS, in the Alaska Statehood Act, the State of Alaska received a grant of 103,350,000 acres of land to provide for the newly formed state to be economically self-supporting; and

WHEREAS the legislature has cause for concern when federal officials and departments overreach their constitutional and lawful mandate and compromise the capacity of state government, through measures such as

(1) abrogating the "No More Clause" of the Alaska National Interest Lands Conservation Act;

(2) the use by the United States Environmental Protection Agency of

administrative decisions to involve itself in the permitting process of development projects occurring exclusively on state land;

(3) the implementation of the National Ocean Policy with regard to arctic shores and the reach of the mandate traversing coasts into inland waterways of the state; and

(4) the use on state lands and waterways by federal officials of the Endangered Species Act, the Clean Air Act, and the Clean Water Act, adversely affecting the state's right to determine how to harvest its own resources according to its constitutional mandate; and

WHEREAS the federal government refuses to recognize its responsibility for allowing an environmental disaster in the National Petroleum Reserve - Alaska by its own actions of creating and failing to reclaim the more than 110 remaining "legacy wells," while denying to the state the ability to actualize state resources under the claim of responsible stewardship; and

WHEREAS the legislature finds that the state requires a process whereby the attorney general, in consultation with executive branch departments, reviews and reports to the legislature regarding federal statutes, regulations, presidential orders, and secretarial orders that may exceed the authority of the United States Congress under the Constitution of the United States and that may unfairly limit the authority of the state, so that the legislature may consider appropriate action; and

WHEREAS the state has a strong interest in securing rights-of-way and easements across federal and other land to allow access for subsistence and recreational hunting and fishing and outdoor recreation, to lower transportation costs for heating fuel, groceries, and other goods and services, to provide for medical care and emergency medical evacuation routes, and to provide access for exploration and production of natural resources essential to the creation of good jobs that pay wages that can support a family; and

WHEREAS, as a territory and then a state, a number of federal laws, including R.S. 2477, granted Alaska a legal right and opportunity to establish and vest a right-of-way or easement across federal and other land; and

WHEREAS several federal laws, including the Alaska National Interest Lands Conservation Act, protect valid existing rights of access and provide an opportunity to establish access; and

WHEREAS the state has a strong interest in gathering and preserving evidence of

rights-of-way and easements and asserting claims to rights-of-way or easements, as it has done in AS 19.30.400; and

WHEREAS the state is engaged in an ongoing effort to collect aerial imagery and digital elevation mapping data of the entire state; and

WHEREAS state government and residents of the state who have contributions to make to the collection, preservation, identification, and assertion of rights-of-way and easements would benefit from an electronic central repository, accessible on the Internet, that included maps and images of trails and roads and provided an opportunity for members of the public to input data, including Global Positioning System coordinates and other Global Positioning System information, pictures, maps, and other documentation of existing and potential rights-of-way and easements; and

WHEREAS, because identification and assertions of rights-of-way and easements affect all concerned property owners, all parties involved in a claim for access would benefit from a repository of information on rights-of-way and easements, as well as the establishment of methods for alternative dispute resolution to resolve claims for rights-of-way and easements;

BE IT RESOLVED by the Alaska State Legislature that a Joint Committee on Access and Federal Overreach is established to

(1) review federal statutes, regulations, presidential executive orders, and secretarial orders that create compulsory federal legislation that directs certain state action or requires the state to pass legislation to be in compliance;

(2) review federal statutes, regulations, presidential executive orders, and secretarial orders that, in reliance on art. I, sec. 8, Constitution of the United States, or any other legal authority, overreach and that unfairly burden the lives of Alaskans or adversely affect the development of the land, economy, infrastructure, and resources of the state;

(3) consider matters of access to federal and other lands referred to the committee by a legislator, a committee, the governor, a department, or a concerned member of the public, to ensure that matters regarding federal overreach and access that adversely affect the people of the state or the State of Alaska's constitutional obligation to maximize its resources for the maximum benefit of all Alaskans are identified and investigated;

(4) review federal statutes in effect during the period Alaska was a territory

along with current statutes and compile a comprehensive list of federal statutes granting rights-of-way or easements that may have vested or that may currently provide opportunities for assertion of rights-of-way or easements;

(5) review databases and records in the possession of the state and federal governments and other persons relating to the historical use of roads and trails in the state, including those identified in AS 19.30.400, and provide recommendations to the legislature for development of a summary of databases and other records to be gathered and preserved in an electronic repository on the Internet that may be accessed by the public and that will provide the public an opportunity to comment on data concerning roads and trails and to upload to the repository evidence of established use of roads and trails in the state;

(6) review and report on current policy positions being taken by federal agencies regarding assertions of rights-of-way and easements across federal land in the state and the effects of those policies on residents of the state;

(7) review and report on efforts by other states to establish rights-of-way and easements across federal land, including methods used by other states to gather evidence of R.S. 2477 and other historical rights-of-way and easements and the types of documentation and other evidence required of other states that have brought suit to establish rights-of-way and easements;

(8) review and identify amendments to federal law or changes to federal agency policy that would assist states in identifying and establishing rights-of-way and easements across federal land by a reasonable and fair administrative process;

(9) meet during legislative sessions and between sessions and hold public hearings if the committee considers hearings desirable;

(10) hire consultants and experts; and be it

FURTHER RESOLVED that the membership of the Joint Committee on Access and Federal Overreach shall be composed of the Speaker of the House of Representatives, or the speaker's designee, and three members of the house appointed by the speaker, one of whom shall be a member of the minority caucus of the house, and the President of the Senate, or the president's designee, and three members of the senate appointed by the president, one of whom shall be a member of the minority caucus of the senate; and be it

FURTHER RESOLVED that the Joint Committee on Access and Federal Overreach

shall submit reports to the legislature and the governor by January 15, 2014, and January 15, 2015, containing recommendations concerning how to contain federal overreach and identifying legislation that the committee determines is appropriate to respond to federal overreach; and be it

FURTHER RESOLVED that the Joint Committee on Access and Federal Overreach shall terminate on January 15, 2015, unless extended.