

02/26/13

OVERVIEW:

FEDERAL

OVERREACH -

ACTIVITIES OF

DEPARTMENTS

OF LAW AND

NATURAL

RESOURCES

<TARGET><BILL></BILL><SUBJECT>02-26-13 OVERVIEW
FEDERAL OVERREACH - ACTIVITIES OF DEPARTMENTS OF LAW AND
NATURAL RESOURCES</SUBJECT><COMM>SSTA28</COMM></TARGET>

ALASKA STATE LEGISLATURE

Sen. Fred Dyson, Chair
Sen. Cathy Giessel, Vice Chair
Sen. John Coghill
Sen. Bert Stedman
Sen. Bill Wielechowski



State Capitol, Room 121
Juneau AK 99801-1182
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Joint Senate State Affairs Committee & House State Affairs Committee

AGENDA

February 26, 2013
Capitol Room 106
8:00 a.m. – 9:30 a.m.

9:00 - Federal Overreach: Federal Overreach: Activities of Departments of Law and Natural Resources

Overview and presentations by department staff on State activities related to RS 2477 easements over federal lands and disputes over submerged lands and navigable waters:

Kent Sullivan, Assistant Attorney General, State of Alaska, Office of the Attorney General

Scott Ogan, Manager Navigability Project, Department of Natural Resources, Division of Mining, Land & Water

Overview of Citizens' Advisory Commission on Federal Areas, Department of Natural Resources

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

CITIZENS' ADVISORY COMMISSION
ON FEDERAL AREAS



BACKGROUND AND HISTORY

- Original Commission created by the Alaska Legislature in July 1981.
 - Created primarily in response to ANILCA.
 - Established as a temporary advisory agency of the executive branch of the state.
 - Authorized until June 30 1988.
 - Reauthorized in 1988 for 10 years and in 1998 for 5 years.
 - Ceased operations June 30, 1999.
 - Reauthorized by the Legislature in 2007.
 - HB 87 established CACFA within the ADNR.
 - Resumed operations in 2008.
 - Commission sunsets June 30, 2014
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Membership

- Composed of 12 members.
- Membership to represent each region of the state to give a geographical balance.
- Governor appoints 6 members.
- Speaker of the House appoints 1 member from the House and 2 public members.
- President of the Senate appoints 1 member from the Senate and 2 public members.
- Public members “shall be representative of the diversity of users and uses of federal land in the state.”

Current Membership

Rod Arno Willow (S)	Warren Olson Anchorage (S)
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Sen. John Coghill North Pole (S)	Susan Smith Chokosna (G)
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Mark Fish Anchorage (G)	Ron Somerville Juneau (H)
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Rep. Wes Keller Wasilla (H)	Alex Tarnai Tanana (G)
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Charlie Lean Nome (G)	Frank Woods Dillingham (G)
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Mike Meekin Palmer (H)	
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Duties of the Commission

Alaska Statute Section 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 that manages federal land in the state.
 - (d) The Commission shall consider the views, research, and reports of advisory groups established by it ...as well as the views, research, and reports of individuals and other groups in the state.
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Suit

- AS 41.37.240 The commission may request the attorney general to file suit against a federal official or agency if the commission determines that the federal official or agency is acting in violation of an Act of Congress, congressional intent, or the best interests of the state.

Agency Cooperation

- AS 41.37.250. Each state department, agency, board, and commission shall cooperate with the commission in the fulfillment of the duties of the commission under AS 41.37.220

Administrative

- Commission within the Department of Natural Resources
 - Two staff members
 - Staff is responsible to the Commission
 - Office is located in DNR Northern Region in Fairbanks
 - Minimum of 3 regular Commission meetings per year.
(Anchorage, Juneau and Fairbanks)
 - Website: <http://dnr.alaska.gov/commis/cacfa/>
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Working Relationships & Consultation

- Submits comments & recommendations to Federal land management agencies.
 - Provides Input to Governor and Legislature on Federal Land Management Issues.
 - Commission operates independently from State ANILCA Program.
 - Consults with ANILCA Coordinator and State agencies.
 - Works with Congressional delegation on proposed legislation and other issues affecting federal public lands in Alaska.
 - Consults with the public and interest groups to identify issues/problems.
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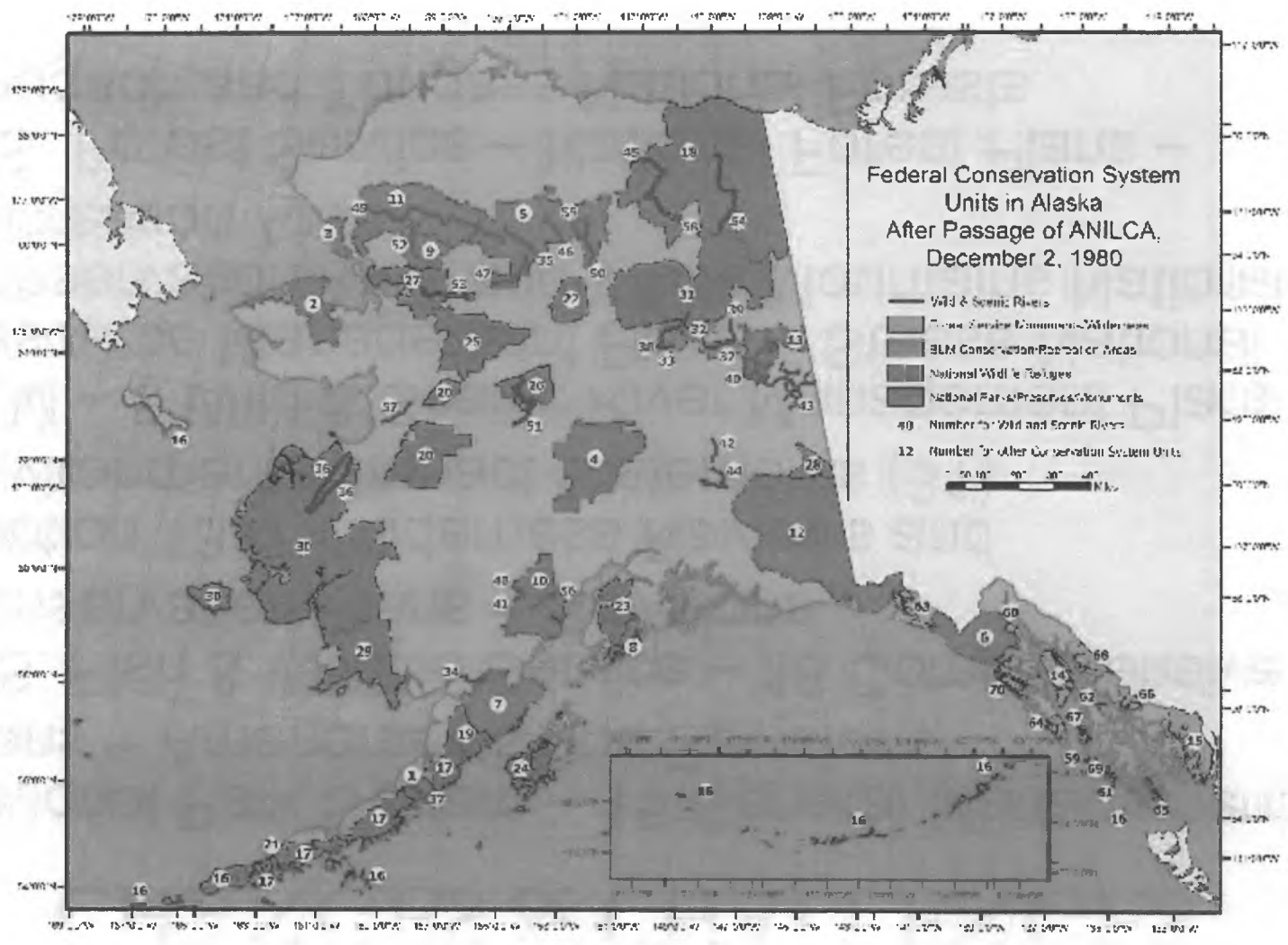
ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

Section 17(d)(2) of the Alaska Native Claims Settlement Act directed the Secretary of the Interior to withdraw up to “...eighty million acres of unreserved public lands in the State of Alaska, including previously classified lands, which the Secretary deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems...”

Following the withdrawals, and 8+ years of studies, environmental impact statements, reports and recommendations by the Federal-State Land Use Planning Commission, public hearings, Congressional debate, and Monument designations, ANILCA was signed into law December 2, 1980.

Conservation System Units And Federally Designated Areas In Alaska

- National Park Service – 17 Areas - 51,104,225 Acres
 - 32,979,406 Acres Designated Wilderness
 - National Wildlife Refuges – 16 Refuges – 76,807,314 Acres
 - 18,691,294 Acres Designated Wilderness
 - National Forests – 2 Units – 22,265,384 Acres
 - National Forest Wilderness Areas and Wilderness Study Areas – 19 Areas – 7,165,778 Acres
 - Bureau of Land Management – 3 Designated Areas – 2,686,026 Acres
 - National Wild & Scenic Rivers – 26 Designated Rivers – 3194 River Miles
 - National Trails System – 1 Unit – 418 Miles
 - Approximately 154,000,000 Acres
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32 YEARS OF ANILCA

CHANGES & CHALLENGES

- National Park System – 15 General Management Plans + Amendments and Revisions
 - U.S. Fish & Wildlife Service – 16 Comprehensive Conservation Plans + Revisions
 - Section 1317 Wilderness Reviews and Environmental Impact Statements (31)
 - BLM – 6 Wild & Scenic River Management Plans – Resource Management Plans – Steese National Conservation Area and White Mountains National Recreation Area
 - U.S. Forest Service – National Forest Plans – Chugach and Tongass National Forests
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KEY PAST LITIGATION

- Northern Alaska Environmental Center v. Evison – Cumulative Impacts of Mining in Denali NP&P, Wrangell-St. Elias NP&P and Yukon –Charley Rivers NP.
 - Sierra Club v. Penfold – Placer Mining on Birch Creek, Beaver Creek & Fortymile Wild & Scenic Rivers
 - Alaska Wildlife Alliance v. Jensen – Commercial Fishing in Glacier Bay National Park
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Plans, Policies and Projects Reviewed in 2012

- ❖ National Park Service – Alaska Park Units Compendiums
 - ❖ U.S. Fish & Wildlife Service – ESA – Significant Portion of Range Draft Policy
 - ❖ Alaska Federal Lands Long Range Transportation Plan (4 Federal Agencies)
 - ❖ Lake Clark NP&P- General Management Plan Amendment – Alternative Concepts & Management Zones
 - ❖ Izembek National Wildlife Refuge Land Exchange Draft EIS
 - ❖ National Petroleum Reserve – (NPRA) Draft Integrated Activity Plan/EIS
 - ❖ U.S. Air Force Joint Pacific Alaska Range Complex (JPARC) Draft EIS
 - ❖ Denali National Park Road Final Vehicle Management Plan
 - ❖ Katmai National Preserve – Hunting Guide Environmental Assessment
 - ❖ Serpentine Hot Springs (Bering Land Bridge NP) – Master Plan
 - ❖ Glacier Bay National Park - Huna Tribal House Project
 - ❖ Bering Land Bridge National Preserve – Hunting Guide Environmental Assessment
 - ❖ U.S. Forest Service – Final Planning Rule
 - ❖ Bell Island Geothermal Leases – Supplemental EIS
 - ❖ Tongass National Forest - Sustainable Cabin Management Program
 - ❖ White Sulphur Springs Bathhouse EA
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CURRENTLY UNDER REVIEW

- BLM – Eastern Interior Draft Resource Management Plan and Environmental Impact Statement
 - BLM – Ring of Fire Draft Resource Management Plan Amendment – Haines Planning Block
 - U.S. Fish & Wildlife Service – Surrogate Species Draft Guidance
 - U.S. Fish & Wildlife Service – Wood Bison Proposed Regs – Endangered Species Act Section 10(j)
 - National Park Service – 2013 Revisions to Park & Preserve Compendiums
 - Izembek National Wildlife Refuge – Proposed Land Exchange Final EIS
 - U.S. Forest Service – Proposed Planning Rule Directives
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ON THE RADAR SCREEN

- ❖ Squirrel River – Special Recreation Management Area Plan
 - ❖ Gates of the Arctic National Park & Preserve – General Management Plan Amendment – 2013
 - ❖ Arctic National Wildlife Refuge Revised Comprehensive Conservation Plan & Final Environmental Impact Statement – 2013
 - ❖ Lake Clark National Park & Preserve – General Management Plan Amendment - 2013
 - ❖ Chugach National Forest – Plan Assessment/ Revision - Underway
 - ❖ Tongass National Forest – 5 Year Review of 2008 Plan – Underway
 - ❖ Central Yukon (Includes Dalton Highway Corridor) – Resource Management Plan – Scoping Begins 2013
 - ❖ Bering Sea/Western Interior Resource Management Plan – Scoping Begins 2013
 - ❖ Bureau of Land Management – Guide Capacity Study & Environmental Assessment for BLM Lands – Began 2012
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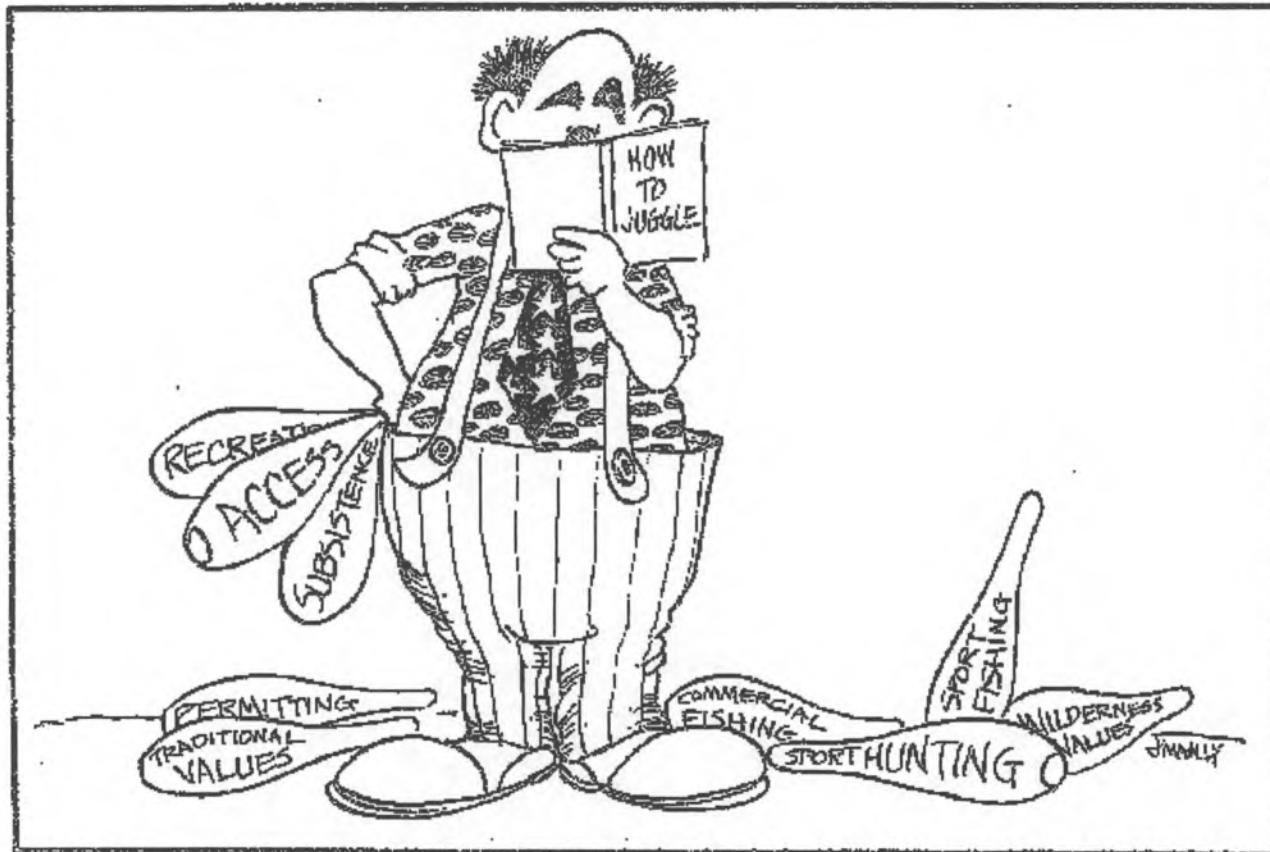
KEY ISSUES

- ❖ Access – ANILCA Section 1110(a)&(b) - Special Access and Access to Inholdings
 - ❖ ANILCA “No More Clause” - Ongoing Wilderness and Wild & Scenic River Suitability Reviews
 - ❖ Wilderness Management – ANILCA Provisions/Exceptions vs. National Policies
 - ❖ Future Management of Public Use in Conservation System Units
 - ❖ Cabins for Public Use, Trapping and Commercial Fishing
 - ❖ Regulation of Commercial Visitor Service Providers
 - ❖ Protecting Opportunities for Hunting and Fishing on Federal Lands
 - ❖ Ensuring Federal Land Management Agencies Honor ANILCA Compromises
 - ❖ Full Public Participation in Federal Land Management Decisions & Plan Development
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SUGGESTED READING

- ❖ “Do Things Right the First Time” by G. Frank Williss - Administrative History – The NPS and ANILCA
 - ❖ “d(2), Part 2 – Alaska National Interest Lands Conservation Act of 1980 – Promises Broken” Alaska Miners Association
 - ❖ “A Land Gone Lonesome” – Dan O’Neill
 - ❖ “The Final Frontiersman” – James Campbell
 - ❖ “Navigating Troubled Waters” A History of Commercial Fishing in Glacier Bay, Alaska – James Mackovjak
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WHAT IS INVOLVED IN IMPLEMENTATION OF ANILCA?



State of Alaska
CITIZENS' ADVISORY COMMISSION ON FEDERAL AREAS
3700 Airport Way
Fairbanks, AK 99709
(907) 374-3737

TO: Senate State Affairs Committee
House State Affairs Committee

FROM: Staff - Citizens' Advisory Commission on Federal Areas

DATE: February 26, 2013

RE: **Alaska National Interest Lands Conservation Act - No-More Clauses"**

One of the most contentious and continuous debates since passage of ANILCA surrounds the issue of the so-called "No-More Clause." The essence of the debate can be summed up fairly briefly. This Commission, the State of Alaska and many other organizations and individuals have consistently maintained that "no-more" simply means what it says. No additional wilderness reviews, no additional wild and scenic river suitability reviews and no additional administrative withdrawals without further authorization from Congress.

The Federal land management agencies have been somewhat less consistent in their interpretation of the term – swinging from a literal interpretation during the first 12 or so years following the passage of the act to the current interpretation which is found in an appendix to the draft Comprehensive Conservation Plan for the Arctic National Wildlife Refuge at the end of this memo. To summarize the wonderfully creative explanation in the plan, it explains that the "no-more" clauses found in ANILCA do not apply primarily because the agency has decided that to be the case.

In commenting on the Arctic Refuge plan, the Commission was not persuaded by the flawed explanation given by the U.S. Fish & Wildlife Service to support its claim that the wilderness and wild and scenic river reviews in the plan did not violate the provisions in sections 101(d), 1326(a) and 1326(b) of ANILCA. The Commission refused to accept the claim that the reviews did not violate the "no more" clauses in ANILCA simply because they are bundled into a bigger planning package and are "required" by a questionable Service policy with no statutory foundation.

The "no more clauses" were key pieces in the final Alaska Lands bill and were critical to its passage. Had these and other compromise provisions not been included, it is quite possible passage of an Alaska lands bill would have been delayed well into the next Congress and new administration. Alaska's Congressional delegation insisted that these provisions be included.

It is important to point out that ANILCA Section 1317 required the National Park Service and the U.S. Fish & Wildlife Service to conduct wilderness reviews of all non-wilderness lands within national park and refuge units and make recommendations for additional designations within five years of the passage of ANILCA. Those reviews were completed more than 25 years ago. In addition to designating 26 wild and scenic rivers under Title VI of ANILCA Congress also directed the study of 12 additional rivers for possible designation. Those studies were completed as well.

ANILCA Section 101(d) provides the general statement that Congress believed no further legislation designating new conservation system units, national recreation areas or national conservation areas was necessary because ANILCA struck a proper balance between protection of the national interest in the public lands in Alaska and the future economic and social needs of the State of Alaska and its citizens.

Section 101(d)- This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

Congress provides confirmation of this by taking additional steps in Section 1326 to limit the power of the Executive Branch to use its authority to upset that “proper” balance. Section 1326 provides clear and unambiguous restrictions on future executive branch actions with respect to future withdrawals and further studies or reviews without Congressional approval:

Sec. 1326 (a) No further executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after notice of such withdrawal has been submitted to Congress.

(b) No further studies of the Federal lands in the State of Alaska for the single purpose¹ of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes

¹ The qualifying term, “single purpose” has been the key to the Federal agencies’ successful circumvention the “no-more” clauses. By including the reviews and studies in a larger planning effort, the agencies have maintained the studies are not for the “single purpose” of considering the establishment of a conservation system unit.

shall be conducted unless authorized by this Act or further Act of Congress”
(emphasis added)

Inclusion of this section was not unintentional, nor was it done without considerable effort. At least one early versions of the “D-2” legislation contained language curbing the authority of the executive branch. However, most of the bills introduced during the time of the “D-2” deliberations did not address this issue. Following the December 1978 Presidential Proclamations designating 17 national monuments under the *Antiquities Act of 1906* by President Carter, the Alaska delegation and other members of Congress noted this deficiency and moved to correct it. At the invitation of Senator Jackson, chairman of the Senate Committee on Energy and Natural Resources, Senator Gravel submitted a letter to the committee expressing his views on H.R. 39, the bill which is the primary foundation for the final ANILCA. One section of Senator Gravel’s letter addressed the “no more” issue directly:

Title XII – Administrative Provisions - “No More”

The Committee bill contains two provisions which I think are absolutely necessary to reassert Congress' authorities in the matter of land designations: (1) the revocation of the monuments and the other FLPMA withdrawals which were made last year by the Administration to put pressure on the legislative process, and (2) the exemption of Alaska from the wilderness study provisions of FLPLMA in the just belief that with passage of this bill "enough is enough".

However, one further critical provision is lacking. With the designation of over 100 million acres by this bill, coupled with the 50 million acres of units already existing in Alaska, nearly 40 percent of the land mass of the State would be within conservation systems. Surely that sufficiently meets even the most generous allocation of land for this specific purpose to the exclusion of most other land uses. Should this bill become law, we in Alaska must have some assurance that this represents a final settlement of the nation's conservation interests. We cannot continue to be exposed to the threats and intimidation of a zealous Executive which may feel in the future that the Congress did not meet the Administrations desires for land designations in Alaska.

Thus, absent from this bill is a provision barring further conservation system designations through administration action such as the Antiquities Act. Obviously, the Congress could act again in the future if it were so inclined, but the arbitrary permanent removal of federal lands from the public domain can no longer be left to the Executive in Alaska. Deletion of such a provision in this bill is a serious deficiency which must be corrected prior to any final action.” (Senate Report No. 96-413, pg. 446)²

A later version of the Alaska lands legislation, the so-called Tsongas Substitute for H.R. 39, was amended to include the language now found in ANILCA Section 1326. During the August 18, 1980 Senate floor debate on the Tsongas Substitute, Senator Stevens

² While the legislative history of ANILCA is extensive, given the number of bills introduced by both the House and Senate, *Senate Report 96-413* from the Senate Committee on Energy and Natural Resources is acknowledged as one of 2 committee reports that constitute the most relevant legislative history for the Act. It was cited at the end of the original slip law under *Legislative History*.

explained that the Alaska State Legislature had asked the Alaska delegation to address seven consensus points not originally found in the bill:

"I have uniformly responded to questions in those areas [Alaska communities] concerning the revised Tsongas substitute. This substitute now is a version of the Senate Energy Committee bill, but it does not satisfy the seven points that our State legislature asked us to address in connections with this legislation.

I have told Alaskans that while I cannot vote for the Tsongas substitute, I think it has to be judged as being a compromise that is better than the existing situation under the national monuments and certainly better than those the President has indicated he will impose if a bill does not pass.

Our State legislature asked us to address seven points. We call them the consensus points... ..

The fifth injunction of the legislature was to be sure that there is what we call a no-more provision. This was a provision I insisted on in 1978. It was in the so-called Huckaby bill. It was in the bill that almost was approved in 1978. That clause is not in the committee bill. It is in the revised Tsongas substitute because the agreement we had in committee that when the bill had reached its final version on the floor of the Senate, the committee would agree to the no more clause. Realizing that the Tsongas revised substitute may be final version, the Senator from Massachusetts, at my request, has included that." (Congressional Record – Senate August 18, 1980, pg. S11047)

Senator Stevens later in the floor debate formally introduced Amendment No. 1967 to H.R. 39 for the following purpose:

"To provide congressional oversight for major modifications of areas established or expanded by this Act and to require congressional approval for future major executive withdrawals of certain public lands in Alaska."

The amendment containing the essential wording of Section 1326 was adopted and became part of the Tsongas substitute³. That bill was approved by the Senate on August 19, 1980 and by the House on November 12, 1980.

We provide the Committees this look at the legislative history of this section to emphasize its importance in securing the final passage of the legislation. We are convinced it demonstrates Congress clearly intended that no future studies or reviews for the purpose of creating additional conservation system units in Alaska be conducted without additional authorization .

³ Subsection 1324(a) of Amendment 1967 is identical to the language found in Section 1326(a), however subsection (b) of the amendment was more inclusive than the final language of Section 1326(b): "No further studies of Federal lands for the single purpose of considering the establishment of a conservation system unit, special management area, 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."

From Appendix D: *Arctic Refuge Draft Revised Comprehensive Conservation Plan*

Alaska National Interest Lands Conservation Act “No More” Clauses

ANILCA contains several provisions that are collectively referred to by some as “no more” clauses. These provisions include sections 101(d), 1326(a), and 1326(b).

ANILCA Section 101(d) states the designation and disposition of public lands in Alaska represent a proper balance between national conservation system units and those public lands necessary and appropriate for more intensive use. Section 101(d) goes on to say that Congress believes there should be no future legislation designating new conservation system units, national conservation areas, or national recreation areas.

ANILCA Section 1326(a) limits new withdrawals of public lands in Alaska to 5,000 acres in aggregate. If a withdrawal(s) exceeds 5,000 acres, it would not become effective unless approved by Congress within one year. Section 1326(b) disallows further studies of Federal lands in the State of Alaska for the single purpose of establishing a conservation system unit, national recreation area, national conservation area, or other similar purpose unless authorized by Congress.

ANILCA defines “conservation system units” as national parks, refuges, national forest monuments, and trails, in Alaska, and Alaska units in the National Wild and Scenic Rivers System and National Wilderness Preservation System. Included are units in existence prior to ANILCA; units established, designated, or expanded by or under the provisions of ANILCA; additions to existing and ANILCA-established units; and any unit established, designated, or expanded after ANILCA.

Several commenters stated that these “no more” clauses effectively prohibit the Service from conducting a wilderness review and a wild and scenic river review. People commented that these reviews constitute studies and should not be conducted per ANILCA.

Service policy (601 FW 3 and 610 FW 4), and a recent director’s memorandum (Hamilton 2010), directs refuges to conduct wilderness reviews during comprehensive conservation planning, including refuges in Alaska. For Arctic Refuge, a wilderness review is a tool we can use to evaluate whether we are effectively managing the Refuge according to the Refuge’s purposes and other legal requirements, including ANILCA Section 1004, which requires the Refuge to maintain the wilderness character of the Coastal Plain and its suitability for inclusion in the National Wilderness Preservation System. Section 5(d) of the Wild and Scenic Rivers Act and Service planning policy (602 FW 3.4 C (1)) require the Service to conduct a review of rivers for their potential inclusion in the National Wild and Scenic Rivers System as part of their comprehensive conservation plans. These reviews are administrative actions and a means by which the Refuge can assess the efficacy of its management in meeting Refuge purposes and other legal requirements.

These wilderness and wild and scenic river reviews do not violate the “no more” clauses of ANILCA because they are not a withdrawal and they are not being conducted for the sole purpose of establishing a conservation system unit.