Alaska National Interest Lands Conservation Act of 1980 — Promises Broken

By Steven C. Borell, P.E.

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Thank you Mr. Chairman.

My name is Steve Borell, I am the Executive Director of the Alaska Miners Association and I am testifying on behalf of the Association. We are very pleased that you are again holding a hearing on this issue. We are also pleased, Mr. Chairman, that you continue to take a personal interest in this topic that has had and continues to have such a huge impact on Alaska.

The Alaska Miners Association has a membership of approximately 1000 individual miners, prospectors, mining companies and vendors, many of which have been affected by passage of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). Our members, and indeed all Alaskans and all Americans, were promised many things in ANILCA. Many of these promises have been broken.

SUMMARY

The Alaska National Interest Lands Conservation Act of 1980 was the result of many years of review, debate and compromise. In order to reach a settlement, many specific promises and assurances were placed in the Act. These included promises for access and for continued use of valid existing rights, lands and resources. Mr. Chairman and members of the Committee, many of these promises have been broken. Several federal agencies have broken and continue to break the promises made in ANILCA.

COMMENT

The promises made in ANILCA that apply most directly to the mining industry can be grouped into four general categories:

1. That valid existing rights would be protected;
2. That existing access would continue and new access would be available when needed;
3. That the mineral potential of the State would continue to be assessed by the federal government.
4. That "no more" land in Alaska would be considered for set-aside into special, restrictive designations.

These promises were an integral part of ANILCA and each of these promises has been broken repeatedly. These promises continue to be broken today. It is time for ANILCA to be reviewed at the Congressional level and that consideration be given to changes that will ensure that the intent of the law is fulfilled, and that the offending federal agencies will be reigned-in and forced to follow the law.

1. **Protection of Valid Existing Rights.** The first promise was for the protection of valid existing rights where lands containing such rights were being withdrawn and placed in Conservation System Units (CSUs). Another way to say this is that activities previously allowed would continue to be allowed. This included such things as sport and subsistence hunting and fishing, guiding operations and mining. This promise meant that miners with existing claims could continue to develop and mine those claims and if they could meet all the necessary requirements, they could still patent those claims, just as before passage of ANILCA. All the rights they had before passage of ANILCA were to continue.

Promise Broken — Guarantees and assurances for the protection of valid existing rights appear throughout ANILCA. However, some agencies, most notably the National Park Service, have repeatedly and consistently violated this promise where mining claims have been involved.

The National Park Service has done everything possible to stop all mining activity within the boundaries of the park units. This has been a calculated, deliberate and illegal effort to deprive the miners of rights that were promised by ANILCA. Elements of the NPS strategy, especially regarding Kantishna (located inside Denali National Park and accessed by a 96 mile State-owned road that was constructed over fifty years ago to provide access for the miners) have included:

1) stringing miners along by continually asking for more data;
2) not approving any plans of operation for mechanized mines;
3) crafting an EIS such that mining could not be permitted;
4) not allowing sampling so miners could prove the value of the property "taken" by the actions of the NPS;
5) not allowing access to the claims;
6) ongoing harassment over use of the State-owned road to Kantishna;
7) delay, stonewalling and similar forms of harassment in the hope miners will give up and drop their claims;
8) waiting for the older mining claim holders to die so NPS will not have to deal with them.

Numerous examples can be cited to support each of the above points. In the case of one Kantishna miner, he was strung along for two years while he worked in good faith to get his plan of operation approved. During the process he was repeatedly asked to provide more data, rewrite the plan, redesign, etc. at a cost of over $30,000. In the end he was effectively told that a plan would never be approved at which point he filed suit for a taking. Even then, because of the unlimited time and legal resources available to the NPS, he eventually reached an out-of-court settlement that did not even cover his legal costs.

At least two major cases are now pending against the NPS for the "taking" of mining claims. Throughout the administrative process, and then during the legal proceedings, the NPS tactic is not to find an equitable settlement with the inholders (persons owning property that

became engulfed when the CSUs were established), but rather to devalue their property and to place every possible stumbling block in their path.

We very much appreciate what all three members of the Alaska Delegation have done to ensure fair treatment for the inholders. However, very few inholders have received any settlement and, to my knowledge, none have felt that they were treated fairly by the NPS.

2. **Access.** The second general promise was that access to private lands inside CSUs (inholdings) and across CSUs would be guaranteed. This was a major theme found throughout ANILCA. Access to Native Corporation lands; access to Native allotments; access to homesteads; access to mining claims; access to State-owned lands; access to guide and outfitter camps, etc. were all addressed in the Act. ANILCA addresses historic access routes, temporary access and new access needs, both into and across CSUs. Access was such a big issue that one major section of the Act, Title XI, focuses entirely on new access routes where none existed previously.

Promise Broken — ANILCA promised continued and new access but efforts to utilize these provisions have, in most cases, been blocked. In one instance, a specific Act of Congress was required to obtain access that was guaranteed by ANILCA. In the mid-1980's Cominco and the NANA Regional Corporation began two parallel efforts to gain road access across the Cape Krusenstern National Monument from the Red Dog zinc mine to the Bering Sea coast. One approach was to follow the requirements of ANILCA Title XI. The other approach was to get an Act of Congress. In the end it was easier to get an Act passed in the Congress and signed by the President than it was to use Title XI.

A recent example involves the request for access along Spruce Creek at Kantishna. In this case a historic road, very likely a right-of-way under RS-2477, has been in place since long before passage of ANILCA but the private property inholders want to upgrade the road so they can construct and operate a remote lodge. Even though a road exists, the NPS required and has now completed a Draft EIS that is one-and-a-half inches thick to see if it can approve an upgrade. This is for a 12 mile gravel road. The cost of the EIS may be more than the cost of the road.

3. **Continued Assessment of Mineral Resources.** Because only a small portion of Alaska has been explored and evaluated for its mineral potential, ANILCA included specific promises in Section 1010(a) that an "Alaska Mineral Resources Assessment Program" (AMRAP) would be used to do the assessment of the mineral resources:

> "(a) Mineral Assessments.-The Secretary shall, to the full extent of his authority, assess the oil, gas, and other mineral potential of all public lands in the State of Alaska in order to expand the data base with respect to the mineral potential of such lands..."

Promise Broken — AMRAP was funded and pursued immediately after ANILCA became law. However, within a few years the program began to receive less and less funding. Support for AMRAP at the USGS headquarters level and in the office of the Secretary of Interior waned and AMRAP was eliminated. Today, Alaska is not even listed as a budget line item for the USGS and the U.S. Bureau of Mines has been closed. The promise of continued assessment of mineral resources has been ignored by the agencies and it is only through the intervention of the Alaska Delegation that any work continues.

4. **No More Set-Asides.** The fourth general promise, often called the "no more" clause, simply says that Alaska has given its share of land for federal CSUs. Section 101(d) contains the general guideline and it states that the need for more parks, preserves, monuments, wild and scenic rivers, etc. in Alaska has been met:

> "(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 the satisfaction of the economic and social needs of the State of Alaska's 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.*" (Emphasis added)

ANILCA also specifically and individually addressed administrative closures and studies by federal agencies. Regarding administrative closures, Section 1326(a) states specifically that *administrative closures, including the Antiquities Act, of more than 5,000 acres can no longer be used* in Alaska and that if a larger area is administratively withdrawn:

> "Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress."

Regarding studies by federal agencies, Section 1326(b) states that the *federal agencies are not even allowed to study lands for consideration for CSUs* unless the Congress specifically authorizes the study:

> "(b) No further studies of 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."

Another aspect of the promise of "no more" came from the fact that ANILCA not only designated key areas for segregation into restricted CSUs, but *also designated buffers as part of the CSUs.* Massive buffers had been included in the CSUs so there was no conceivable reason that areas not already designated would need to be studied by the agencies. The CSUs already include buffers that would ensure that the core areas would be protected.

Promises Broken — One example of the "no more" clause and how some federal agencies have worked to get around the clear intent of Congress comes from an "isolated and narrow interpretation" of the previous quote from Section 1326(b). The U.S. Forest Service attorneys have reviewed this section and have concluded that they can still study Forest Service lands for set-asides if the study is part of their normal review of forest management plans. This occurred in the Tongass Land Management Plan (TLMP) completed a few years ago and is occurring today in the Chugach Land Management Plan (CLMP) that is currently in progress. The USFS legal argument turns on the phrase "...for the *single purpose* of considering..." They disregard the legislative record and intent and argue that their evaluations are not for a "*single purpose*" and, therefore, studies for more "Wilderness" or Wild & Scenic Rivers are allowed. The Forest Service, therefore, continues full speed ahead studying and proposing more areas in Alaska for these special restrictions.

The Bureau of Land Management (BLM) took a very different approach...until the Clinton Administration came into office. In BLM Instruction Memorandum No. 91-127 (August 10, 1999) the Director of the BLM clarified that the agency was not allowed to study lands for the designation of new CSUs or other restrictive set-asides. It was clear to BLM that such studies were simply not allowed. Memorandum 91-127 quoted ANILCA Sections 101(d) and 1326(d) as the legal reason why such studies were not allowed. However, once the Clinton Administration came into office this Memorandum was disregarded.

Some of the examples where federal agencies have violated or continue to violate the "no more" clause of ANILCA include:

- The USFS in the Tongass Land Management Plan (TLMP) *recommended* more than thirty rivers be designated as Wild & Scenic Rivers;
- The USFS in the Chugach Land Management Plan (CLMP) *is now* studying areas outside the ANILCA-defined wilderness study area for Wilderness designation;
- The USFS in the CLMP *is now* considering rivers for designation as Wild & Scenic Rivers;
- The USFS in the CLMP *is now* considering management regimes that are even more restrictive than Wilderness designation;

- The USFS in the CLMP *is now* considering additional restrictions for ANILCA designated areas in the eastern portion of the Chugach National Forest;
- The BLM, in an out-of-court settlement *agreed to study* portions of the Koyukuk River, where it intersects the Trans-Alaska Pipeline, for designation as a Wild & Scenic River;
- The NPS *has studied and continues to study* and lobby for creation of a "Beringia" International Park, World Heritage Site and Marine Biosphere Reserve as an overlay to the existing CSUs in western Alaska, parts of the Russian Far East, and the waters between them.

RECOMMENDATIONS

It is the belief of the Alaska Miners Association that the intent of ANILCA toward valid existing rights, access, AMRAP, and "no more" was clear. However, the agencies responsible for carrying out the law have gone astray and it is time to reign them in before further damage is done to the promises made to the public. We, therefore, offer the following recommendations:

1. Enforce the "no more" clause. We believe the language and intent is clear and that the agencies have simply chosen to find a way around the law. If such enforcement is not possible, the words "single purpose" should be removed from Section 1326(b).
2. Areas of high-mineralized values, including Kantishna, should be returned to the public domain and reopened to mineral entry.
3. Title XI regarding access should be changed to provide a reasonable process for obtaining access as promised and intended.
4. Congress should provide statutory recognition of the State's RS-2477 rights-of-way.
5. Congress should designate a right-of-way across the existing Conservation System Units for a railroad from northwest Alaska to a deep water port area on Norton Sound to facilitate development of the coal and mineral deposits in that part of the state.
6. The Alaska Mineral Resource Assessment Program (AMRAP) should be restarted and funded.
7. Congress should amend the Quiet Title Act so that the State can establish title to navigable rivers.
8. The Alaska Land Use Council composed of State and Federal representatives should be reinstated to deal with federal land management disagreements, as was done before and after passage of ANILCA.

9. Consideration should be given to removing restrictive conservation designations from some of the lands now in conservation system units. There is too much land for the agencies to manage as CSUs. Much of these lands are not available for use by the general public. Huge amounts of federal lands are available for use only by the very limited portion of the public that is physically fit and independently wealthy.

Thank you for the opportunity to comment on ANILCA and the way it is being implemented by the federal agencies. Many of the promises made in ANILCA have been broken and continue to be broken on a day-to-day basis. We urge that this situation be corrected.

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