

ANILCA—Promises versus Performance

by James S. Burling

A prince never lacks legitimate reasons to break his promise.

—Niccolò Machiavelli, from *THE PRINCE*

THE PROMISES

Finality

Statute: ANILCA §101(d), 16 U.S.C. § 3101(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.”

Statute: ANILCA § 1326(b), 16 U.S.C. § 3213(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” (emphasis added).

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THE PERFORMANCE

In reality, ANILCA has proven not to be the last act in the struggle over Alaska's resources, but a starting point from which all further attempts to lock up more of Alaska begin.

For many years after ANILCA was adopted, this language was interpreted by the federal government as precluding wilderness studies. See, e.g., BLM Memorandum 91-127. In more recent times, however, the federal government has avoided the intent of ANILCA by grafting wilderness studies onto other land management studies so that agencies can claim that the study does not have the “single purpose” of wilderness study.

THE PROMISES

from the legislative history:

"[T]he delicate balance between competing interests which is struck in the present bill should not be upset in any significant way." Senate Report 96-413 at 136, reproduced in 1980 United States Code of Congressional and Administrative News (U.S.C.C.A.N.) 5070, 5080 (1980).

from the legislative history: an opposition opinion by Senators Metzenbaum and Tongass:

"The bill committee fails to provide wilderness studies for designated rivers, unlike the House bill, which requires wilderness studies of all conservation system units." Senate Report at 408, 1980 U.S.C.C.A.N. at 5349.

from Senator Gravel:

"The Committee bill contains two provision which I think are absolutely necessary to reassert Congress' authorities in the matter of land designations: . . . (2) the exemption of Alaska from the wilderness study provisions of FLPMA in the just belief that with passage of this bill 'enough is enough.' . . . 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 Administration's desires for land designations in Alaska." Senator Gravel's written remarks, Senate Report at 446, 1980 U.S.C.C.A.N. at 5385.

THE PERFORMANCE

BLM's policy against wilderness studies was attacked in 1991 by the environmental community in *American Rivers v. Babbitt*, Civ. No. J-91-023. Without much of a fight, the BLM settled the case, agreeing that it had the discretion to do whatever it wished and that it would embark on wilderness studies whenever it liked.

Since the *American Rivers* suit, rivers have been studied for wild and scenic river status, and the Forest Service is examining both the Tongass and the Chugach for wilderness additions.

THE PROMISES

Access

Statute: ANILCA § 811, 16 U.S.C. § 3121:

“(a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

“(b) . . . Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.”

ANILCA § 1105, 16 U.S.C. § 3165 states that the Secretary may authorize the creation of a Transportation Utility System upon determination that: “(1) such system would be compatible with the purposes for which the unit was established; and (2) there is no economically feasible and prudent alternative route for such system.”

THE PERFORMANCE

Native Alaskans have generally been able to obtain access in many areas; however, the antipathy from some federal agencies even towards native access has been the cause of some contention over the years.

Title XI has proven to be a completely inadequate vehicle for obtaining new access routes in Alaska. For example, rather than utilizing the Title XI provisions for access, the Red Dog Mine developers found it more expedient to obtain access through a special act of Congress.

THE PROMISES

from the applicable regulations: 43 C.F.R. § 36.2(f):

“Compatible with the purposes for which the unit was established means that the system will not significantly interfere with or detract from the purposes for which the area was established.

“(h) Economically feasible and prudent alternative route means a route either within or outside an area that is based on sound engineering practices and is economically practicable, but does not necessarily mean the least costly alternative route.

from the former regulation (prior to November 7, 1997):

“(h) Economically feasible and prudent alternate route means an alternate route must meet the requirements for being both economically feasible and prudent. To be economically feasible, the alternate route must be able to attract capital to finance its construction and an alternate route will be considered to be prudent only if the difference of its benefits minus its costs is equal to or greater than that of the benefits of the proposed TUS minus its cost.” See 62 F.R. 52510 (1997) (here, bold text has been replaced.)

THE PERFORMANCE

In a legal fight that lasted over ten years, the Trustees for Alaska sued the Department of Interior alleging that its Title XI regulations were unlawful because they actually made, in theory, it reasonably possible to gain motorized access to inholdings. The suit was baseless, and most of it was thrown out on procedural grounds, and the remainder settled with the Clinton administration. The only change made after a ten year battle was the “clarification” to 43 C.F.R. § 36.2(h) shown on the left.

THE PROMISES

Statute: ANILCA § 1110, 16 U.S.C. § 3170(a):

“Notwithstanding any other provision of this Act or other law, the Secretary shall permit, on conservation system units, national recreation areas, and national conservation areas, and those public lands designated as wilderness study, the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units, national recreation areas, and national conservation areas, and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area. Nothing in this section shall be construed as prohibiting the use of other methods of transportation for such travel and activities on conservation system lands where such use is permitted by this Act or other law.

“(b) . . . Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

THE PERFORMANCE

The advocates of preservation and the federal agencies have shown a substantial antipathy toward motorized access. From restrictions on airplane landings in the National Forests to the closure of snowmobile access to a significant portion of Denali, Alaskans are slowly losing their traditional rights of access. The Denali closure has been particularly distressing to the Alaska Snowmobile Association, which has been forced to bring suit to regain their traditional access into Denali.

THE PROMISES

from the legislative history:

"This alters the traditional discretionary role of most existing law for conservation [system] units. . . .

"The Committee does not agree with the arguments that existing law is sufficient." Senate Report 96-413, Senate Report at 248, 1980 U.S.C.C.A.N. at 5189 (1980).

"Based on these considerations, the Committee adopted a procedure for future siting of transportation facilities which supersedes rather than supplements existing law." *Id* at 5190.

"The Committee recommends that traditional uses be allowed to continue in those areas where such activities are allowed. This is not a wilderness type pre-existing use test. Rather, if uses were generally occurring in the area prior to its designation, those uses shall be allowed to continue and no proof of pre-existing use will be required."

"The adverse environmental impacts associated with these transportation modes are not as significant . . . In order to prevent the land manager from using his discretion to unnecessarily limit such access, the Committee amendment provides that such *access shall not be prohibited unless the Secretary finds after holding a hearing in the area that it would detrimental to the resource values of the unit.*" Senate Report at 248, 1980 U.S.C.C.A.N. at 5192 (emphasis added).

"The Committee believes that routes of access to inholdings should be practicable in an economic sense. Otherwise, an inholder could be denied any economic benefit resulting from land ownership." Senate Report at 249, 1980 U.S.C.C.A.N. at 5193.

"Rights for the *general use* of snowmobiles, motorboats, airplanes which may land on snow, ice, water or designated sites, are specifically provided for..

"These are rights subject to reasonable regulation by the Secretary to protect the values of the unit. *This removes the discretion for allowing or not allowing use of these vehicles that currently exists.*" Senate Report at 299, 1980 U.S.C.C.A.N. at 5243 (emphasis added).

THE PERFORMANCE

For many years the environmental community has been decrying the fact that the lower 48 standards do not apply, in theory, to access into conservations system units. The decade-long battle over the Title XI regulations involved allegations that lower the 48 standards *should* be applied, the legislative history notwithstanding. As a practical matter, however, access is nearly as difficult in Alaska's conservation system units as it is in many parts of the lower 48.

THE PROMISES

Valid Existing Rights

Statute: ANILCA § 206, 16 U.S.C. § 410hh-5:

Subject to valid existing rights, and except as explicitly provided otherwise in this Act, the Federal lands within units of the National Park System established or expanded by or pursuant to this Act are hereby withdrawn from all forms of appropriation or disposal under the public land laws, including location, entry, and patent under the United States mining laws, disposition under the mineral leasing laws, and from future selections by the State of Alaska and Native Corporations. (Emphasis added).

from the legislative history (on valid existing rights and the right of access):

from Morris Udall:

“We want to make it abundantly clear that it is our intention that those persons possessing valid existing mineral rights should be permitted access to their claims to exercise those rights. Reasonable access should not mean access which is so hedged with burdensome restrictions as to render the exercise of his valid rights virtually infeasible. . .

“The bottom line of our position is that holders of valid existing claims will not be precluded by the Federal Government from the reasonable development of those claims. When conflicts arise between the essential needs of the holder of a valid claim for reasonable access to work or develop his claim and restrictions to minimize the adverse impact on the ecology of the conservation system unit, then if such conflicts cannot be resolved by agreement, the Federal Government must be prepared to accept the degree of environmental harm that is unavoidable if the holder’s essential needs are to be met or be prepared to purchase the claim in question.” Congressional Record at H2858 (1979) (Representative Udall’s Congressional Hearings on ANILCA)

THE PERFORMANCE

Mining first began in the Kantishna district in 1903. In the summer of 1985, five years after ANILCA was adopted and the Kantishna and other active districts were surrounded by the newly expanded parks, Park Service employees invited the Sierra Club to sue the Park Service over the cumulative impacts of mining. The Sierra Club Legal Defense Fund happily took up the challenge, and the Park Service put up a minimal defense. The court enjoined all mining activities and the Park Service refused to process any significant mining plans during the five plus years it took to complete environmental impact statements. It has also refused to permit reasonable access, going so far as arresting—in Montana—a geologist who drove into the Park who was unable to obtain a permit under reasonable conditions. The EISs for the Parks recommended that no mining be allowed until the environment was returned to its pristine pre-1903 condition. The Park Service subsequently resisted all demands for compensation. It was only through several special acts of Congress that miners have been given any hope of compensation.

THE PROMISES

Timber

from the legislative history:

"In recommending wilderness designation for portions of Southeastern Alaska, the Committee attempted to ensure that such designation would not adversely impact the existing timber industry in the area. Specifically, the Committee attempted to develop a wilderness package for the Tongass which would maintain a potential average annual harvest and supply of 520 million board feet of timber." Senate Report at 228, 1980 U.S.C.C.A.N. at 5172.

"Thus, it appears that the Committee recommendations will indeed protect the existing timber industry in Southeast while providing wilderness designation for several key areas." Senate Report at 230, 1980 U.S.C.C.A.N. at 5174.

Oil

from the legislative history:

"In attempting to treat the North Slope in a comprehensive way, the Committee was also aware that unnecessary pressure to develop oil and gas could be brought to bear on the North Slope if the policy for oil and gas exploration on all Federal Lands in Alaska was not integrated with the North Slope Study. As a result, the Committee considered and approved a provision which directs the Secretary to develop a program for oil and gas leasing of other Federal lands in Alaska. These lands have, for all practical purposes, been closed to mineral leasing since 1966." Senate Report at 242, 1980 U.S.C.C.A.N. at 4185. *Lands with favorable potential are listed to include 1.8 million acres in National Parks, 6.0 million acres in National Wildlife Refuges, 0.5 million acres in National Forests, and 17.7 million acres in the National Petroleum Reserve, and 4.7 million acres of (d)(2) withdrawals.* Senate Report at 242, 1980 U.S.C.C.A.N. at 5186.

THE PERFORMANCE

In the past decade, 1,500 jobs have been lost in the Tongass due to timber harvest cut-backs. The latest administration revisions to the 1997 Tongass plan call for a cut of 157 million board feet, as compared to a meager 220 million board feet under the 1997 plan. Of the 10 million forested acres in the Tongass, only 7% was open to timber harvesting under the 1997 plan, and that has now been reduced by 15%.

Twenty years after the passage of ANILCA there has been no significant exploration of ANWR, no significant amounts of other federal onshore land have been opened to exploration, federal offshore exploration has ground to a halt with moratoria and changes in administration policy, and we are still debating the future of a mere portion of the NPRA.

THE PROMISES

A Prediction

"Many of the provisions . . . obviously can be read several ways. While we in the Congress may be reading the provisions one way now, the language ambiguities and regulatory tools are all laid out in the bill to give rise to a future bureaucratic nightmare for the people of Alaska. We do not know what future Administrations will do with the bill before us, but . . . [f]rankly, I am expecting the worst.

"The 'worst', as I see it, is the use of the massive conservation system designations to block any further exploration or development (including substantial recreational developments) of these lands and on non-federal adjacent lands. I see our State throttled down economically over the next decade.

. . . "[T]his legislation goes far beyond what is appropriate and proper to ensure this protection. It is a question of balance. This bill does not achieve that balance.

"I feel we are doing the State of Alaska great injustice, and ultimately we are doing the nation a great injustice, by not permitting the other resource contributions which Alaska lands could make in meeting the full spectrum of desires and demands of human existence."

Remarks of Senator Gravel in Senate Report at 447, 1980 U.S.C.C.A.N. at 5386.

(Jim Burling is an attorney with Pacific Legal Foundation. A portion of this paper was presented at the 1999 Alaska Miners Convention in Anchorage.)

THE PERFORMANCE

A promise kept.

