



# Alaska Outdoor Council

## Alaska Fish & Wildlife Conservation Fund

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November 28, 2015

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Darla Ripchensky, Chief Clerk  
U. S. Senate Committee on Energy and Natural Resources  
304 Dirksen Senate Office Building  
Washington, DC 20510

### RE: Hearing on the Alaska National Interest Lands Conservation Act of 1980

Dear Senator Murkowski and Committee members:

The Alaska Outdoor Council (AOC) respectfully appreciates the opportunity to provide comment before the Committee on Energy and Natural Resources on the impacts and future of the implementation of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) on Alaska and its citizenry. AOC is a statewide non-profit conservation organization that has actively participated in the regulatory process of fish and game management since before statehood. AOC represents over 10,000 Alaskans who hunt, trap, fish, and recreate on public lands and waters throughout Alaska.

AOC offers the following perspectives on ANILCA's impacts in Alaska over the last 35 years.

### Congressional history of ANILCA

By the 1960s Congress had recognized Alaska's intact landscape ecosystems were "a special category" unlike anything remaining in the rest of the United States. Armed with that understanding Congress took action by passing The Alaska Native Claims Settlement Act of 1971 (ANCSA), Section 17d(2) of which directs the Secretary of the U.S. Department of the Interior (DOI) to withdraw up to 80 million acres of land for conservation purposes. Alaska's vast intact wilderness habitat provided Congress with the opportunity to select lands rich in natural resources with only minimal disturbance by human development for potential congressional designation as National Parks, Wildlife Refuges, Wild and Scenic Rivers, or National Forests.

Under the authority of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), nine years after the passage of ANCSA, Congress took action to set aside over a 100 million acres of relatively undeveloped national interest lands as Conservation System Units (CSUs). Today Alaska contains 65% of all the National Park Service lands in the entire nation, 48% of all U.S. Fish & Wildlife Service Refuges (USFWS), and 31% of all Bureau of Land Management lands. These are not "postage-stamp size" enclaves like those east of the Mississippi River. These are landscape-scale ecosystems.

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Congress chose to include Title VIII - Subsistence Management and Use Findings in ANILCA on the recommendation from the 1971 Conference Committee on ANCSA which had offered its opinion that state and federal governments should take action necessary to insure that Alaska Natives' subsistence uses should continue. **Congress made no commitment in ANCSA to protect subsistence uses on federal lands.**

## **Federal subsistence priority to public resources**

Congress' decision to adopt legislation in Title VIII of ANILCA, Section 802 giving a priority to public resources on federal lands based on an individual's address has led to 35 years of conflict among Alaska's citizenry.

PUBLIC LAW 96-487—DEC. 2, 1980  
POLICY

*"SEC. 802. It is hereby declared to be the policy of Congress that—*

- 1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on **rural residents** who depend upon subsistence uses of the resources of such lands, consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;*
  
- 2) non-wasteful subsistence uses of fish and wildlife and other renewable resources shall be the **priority consumptive uses of all such resources on the public lands of Alaska** when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for non-wasteful subsistence uses shall be given preference on the public lands over other consumptive uses;" (emphasis mine)*

The implementation of Title VIII - Subsistence Management and Use Findings in ANILCA by the DOI has resulted in years of litigation and tens of millions of dollars in expense to the federal government. And after 25 years no party of subsistence users are the least bit satisfied by the process or the outcome (See Alaska Federation of Natives, Native American Rights Fund, State of Alaska, and AOC comments on *DOI Comprehensive Review of Native Alaskan Subsistence Policy and Programs 2009*). The agreed-upon compromise Congress passed in ANILCA in 1980 has clearly been hijacked by national preservation organizations and Native rights activists for their own self-interests over that of the common good of Alaskans.

- Today there is no crisis of Alaska Native access to a wildfood harvest. Both State and Federal laws give priorities to subsistence use in Alaska. The State of Alaska manages for sustained yield (see Alaska State Constitution Article 8, Section 4) and on appropriate state lands for increased harvest (see Alaska Statute 16.05.255 e-g and k 1-5). According to the US Fish and Wildlife Service, rural residents harvest an average of 375 lbs/person/year (Juneau Empire 12/14/09) a figure that has

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fluctuated very little since subsistence harvest reporting began. An article in the Alaska Magazine in June 2009 states, "Today's Native population gets at least 50% of its food from stores."

- Changes in Title VIII and/or subsistence regulations will not change the levels of subsistence uses by Alaska Natives (or other rural residents) or reduce the risk to "..... health and well being and ancient way of life." Continuing changes in individual choices of lifestyle will dictate these risks.
- Alaska's subsistence law (see Alaska Statute 16.05.258(4)(B)(i)) is based primarily on the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a **mainstay of livelihood**. Unlike Title VIII of ANILCA, the Alaska State subsistence law is not based on a criterion of residency, which has led to divisiveness among Alaskan residents over the last 35 years.

## **Federal Management of public resources on federal lands - fish and game**

With the passage of ANILCA, Congress made subsistence uses of fish and game the highest priority use on federal lands in Alaska which comprise 59% of the state. Yet for the last 25 years federal land managers have dodged this mandate by using any applicable law, regulation, or policy possible to not provide abundant harvestable surpluses of wildfood for harvest. "Healthy" (and for NPS lands also "natural", ANILCA 815.1) fish and game populations are management criteria mandated by ANILCA 802.1, rather than sustainable abundance for harvest.

Supported by national preservation groups' litigation, DOI land managers have blocked state predator/prey management programs to reverse declining caribou populations, Alaska Board of Game regulations to harvest abundant predator populations responsible for holding prey (human food) species at low population levels, and salmon enhancement projects on federal lands.

The result of declining numbers of harvestable surplus on federal lands, after the federal takeover of subsistence management in 1990, has led to reduced opportunity for non-federally qualified subsistence users, which in turn has led to increasing hostility between urban and rural Alaskan residents. Also, declining harvestable surplus means non-resident hunters and/or anglers who contribute to Alaska's economic development loose opportunity.

On October 23, 2015 in *The Federal Register*, *The Daily Journal of the United States Government*, reported on the National Park Service (NPS) - Final rule on Alaska; Hunting and Trapping in National Preserves. RIN 1024-AE21, Amendments to 36 CFR Part 13.

On page 8 the report states:

*"This rule does not limit the taking of wildlife for Title VIII subsistence uses under the federal subsistence regulations."*

In actuality, reduced harvestable surplus on National Park Preserve lands does limit the taking of wildlife by federally qualified subsistence users (as well as others). Non-federally-qualified subsistence hunters, hunting under State of Alaska regulations on National Park Service lands, take harvestable surpluses of species of predators. That in turn allows for the continuation of "healthy" populations of both prey and predator species on National Park Service lands.

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The NPS goes on to report that their mandate under the NPS Organic Act of 1916 requires them to comply with NPS Management Policies 2006, 4.4.3 which do not allow manipulating natural systems and processes to increase numbers of harvested species.

And because of that, NPS believes the NPS Organic Act of 1916 trumps ANILCA SEC. 1314;

PUBLIC LAW 96-487—DEC. 2, 1980  
TAKING OF FISH AND WILDLIFE

*SEC. 1314. (a) Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act, or to amend the Alaska constitution.*

- 1) Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.*
- 2) The taking of fish and wildlife in all conservation system units, and in national conservation areas, national recreation areas, and national forests, shall be carried out in accordance with the provisions of this Act and other applicable State and Federal law. Those areas designated as national parks or national park system monuments in the State shall be closed to the taking of fish and wildlife, except that—*
  - a. notwithstanding any other provision of this Act, the Secretary shall administer those units of the National Park System, and those additions to existing units, established by this Act and which permit subsistence uses, to provide an opportunity for the continuance of such uses by local rural residents; and*
  - b. fishing shall be permitted by the Secretary in accordance with the provisions of this Act and other applicable State and Federal law.*

The Final Rule went into effect November 23, 2015. The Alaska Outdoor Council and other Alaskans would like to know if it was the intent of Congress to allow federal land managers to takeover wildlife management when DOI determines the State of Alaska is not in compliance with NPS policies.

## **Access to and across federal public lands and private inholdings within CSUs**

Clearly the framers of ANILCA were aware of the fact that by creating CSUs that encompassed entire landscape ecosystems with little to no developed transportation infrastructure, that special access provisions would need to be incorporated in the law to allow subsistence use and development of state and private lands. That's proven by the inclusion of Sections 1110, 1323, and 811 in ANILCA.

National preservationist organizations are fully aware of the fact that federal lands must remain roadless in order to qualify for wilderness designation under the Wilderness Act of 1964 (16 U.S.C. 1131-1136, 78 Stat. 890) -- Public Law 88-577. ANILCA established seven National Wilderness Preservation System areas in Alaska comprising 18,560,000 acres. And 90% of all USFWS-designed wilderness and 75% of all NPS-designed wilderness in the nation is located in Alaska.

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Reducing public access opportunities to federal lands has been the trend for all federal land-managing agencies since the passage of ANILCA.

- Currently the NPS and the USFWS manage all their lands designated as eligible for inclusion by an act of Congress into the National Wilderness Preservation System as if they already had Congressional approval.
- NPS has banned hovercraft use on State navigable waters, restricted aircraft access, closed established motorized trail use to non-locals, and restricted federally-qualified rural residents to specific trails while hunting - all through their rulemaking process.
- BLM has closed numerous pre-ANILCA motorized trails and now is recommending the creation of Areas of Critical Environmental Concern (ACEC) in their Resource Management Plans for the Alaska Eastern Interior in areas with established trails. ACEC are areas where BLM has determined special management is necessary to prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems. BLM attempted to designate areas of Alaska as "Wild Lands" in order to restrict motorized access.
- The US Fish and Wildlife Service continues to reduce aircraft access on Refuge lands long after any concerns for migrating waterfowl had been resolved, and they have also restricted boat access due to perceived user conflict.
- The US Forest Service has closed lands to motorized access by non-federally qualified rural residents when there have been no documented conservation concerns, and they continue to deconstruct stream crossings on established roads over anadromous waters.

## **Alaska Outdoor Council Recommendations and Position**

- 1) Eliminate the "rural" priority and replace it with "in areas where customary and traditional subsistence uses comprise the principal element of the economy." The rural priority is inconsistent with the common use and equal access mandates of the Alaska Constitution as determined in 1989 by the Alaska Supreme Court in *McDowell v. State*. Justice Moore summed it up as follows: "This is an equal protection case, and an easy one at that." AOC does not believe Title VIII of ANILCA is consistent with the equal protection provisions of the U.S. Constitution.
- 2) Clearly define "federal land" as described in ANILCA, Sections 102(2) and 103(c) as not including navigable waters of the State of Alaska. ANILCA clearly states that "federal lands" or "public lands" do not and cannot include lands (or waters) granted to the state or other entities. Alaska's navigable waters and submerged lands were granted in the Alaska Statehood Act in conformity with the 1953 Federal Submerged Lands Act and the "Equal Footing Doctrine." Nowhere in ANILCA is the "Reserved Waters Doctrine" mentioned, yet subsequently federal courts have referred to it as "implicit" in establishing special federal areas without referencing its statutory foundation. "Ambush" would better describe the "Reserved Waters Doctrine" than "implicit." The 9th Circuit Court of Appeals "muddied the waters" in the *Katie John* case by ruling that federal agencies in Alaska had reserved water rights on

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conservation system units, then stated "We recognize that our holding may be inherently unsatisfactory," and "The issue raised by the parties cries for a legislative, not judicial, solution." After vowing to take the case to the U.S. Supreme Court in his obligation as Governor, then-Governor Knowles dismissed the appeal when threatened with political retribution by Alaska Native groups. The Alaska Legislature refused to capitulate to federal rules, and Congress did nothing to clear up the muddied waters.

- 3) Amend ANILCA to explicitly recognize the State of Alaska's authority to manage fish and wildlife on ALL Alaskan lands and waters. Section 1314(a) and (b) make clear that the State of Alaska retains the authority and responsibility to manage fish and wildlife, while the Secretary of Interior retains the authority to manage habitat and to ensure that the rural subsistence priority is provided for. The Secretary is not given authority to manage fish and wildlife. Congress, in the Alaska Statehood Act granted the State of Alaska the authority to manage its own fish and game resources. Despite this, the Interior and Agriculture Departments' agencies have proceeded to set up very costly administrative processes to manage fish and game on federal public lands and conservation system units. This abduction of the state's authority to manage its own fish and game resources duplicates the management and administrative efforts of the State and adds the burden of unnecessary regulations to Alaskans. These actions disadvantage all resources users.
- 4) Withhold funding that would allow NPS to implement the amendments to 36 CFR Part 13 in the Nov. 23, 2015 NPS Final rule on Alaska; Hunting and Trapping in National Preserves. RIN 1024-AE21 until Congress has had an opportunity to review its effects on compliance with the mandates in ANILCA.

Sincerely,

Rod Arno



Executive Director  
Alaska Outdoor Council

Bill Iverson



President  
Alaska Outdoor Council