

Joshua M. Kindred, Environmental Counsel, Alaska Oil & Gas Association

Chairman Murkowski, Ranking Member Cantwell and Members of the Committee, I am Joshua Kindred, Environmental Counsel for the Alaska Oil and Gas Association. The Alaska Oil and Gas Association (AOGA) is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. We represent the majority of companies that are exploring, developing, producing, refining, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska.

AOGA appreciates the opportunity to address the Committee regarding the implementation of ANILCA and the role that it has played on oil and gas development in Alaska. In reality, oil and gas operations in Alaska are academically and practically removed from traditional ANILCA issues. However, that is simply because the ANILCA issues affecting industry are often resolved, for better or worse, absent private sector involvement. Nevertheless, ANILCA has over the past thirty-five years effectively dictated the scope of natural resources development in Alaska.

In order to properly address ANILCA's role on Alaska's natural resource development, one must understand both the impetus for the legislation and the compromise that it ultimately represented. I will spare this committee a lengthy history dissertation, but the context of ANILCA's implementation is necessary to fully evaluate its ongoing role in Alaska.

The Alaska Native Claims Settlement Act, or ANCSA, represented the federal government's first attempt at resolving Alaska Native aboriginal rights. Ultimately, ANCSA served to extinguish aboriginal land rights in Alaska through the grant of 44 million acres of lands and over \$950 million in compensation to Alaska Natives. To accomplish this goal, ANCSA created an arrangement by which Native Corporations could identify lands for subsequent conveyance. This was by no means a simple or linear process, but for our purposes today, it is important to note that almost a half-century has passed and still ANCSA lands have yet to be fully conveyed. Nevertheless, the enactment of ANILCA became necessary in response to a series of executive withdrawals of federal lands in Alaska for parks, refuges, and

wilderness purposes, far in excess of what was originally contemplated in the compromise that gave rise to ANSCA, which will be a consistent theme in my testimony. The most notable of these withdrawals occurred on December 1, 1978, when President Carter designated 56 million acres as national monuments. By 1980, the executive branch had withdrawn over 100 million acres of federal land. In response, Congress enacted legislation aimed at regulating Alaska lands under a comprehensive and permanent program.

During the congressional discourse giving rise to ANILCA, a wide spectrum of Alaskan stakeholders articulated Alaska's needs and concerns. Namely, Alaskans sought to revoke all 1978 monuments and executive withdrawals, receive full Statehood and ANCSA land entitlements, exclude economically important natural resources from conservation areas, guarantee that traditional land uses continue on all lands, and preclude administrative expansion of conservation units. Alaskan interests were represented in the House debates, as Congress attempted to achieve the proper balance between development and conservation, which highlights an important point: ANILCA was not simply legislation aimed at advancing conservation and preservation.

As President Carter stated upon ANILCA's ratification: "It strikes a balance between protecting areas of great beauty and value and allowing development of Alaska's vital oil and gas and mineral and timber resources." Representative Udall echoed that sentiment, affirming that ANILCA allowed for "the development of Alaska [to] go forward with balance." At the signing of the bill, Senator Stevens concluded: "Over half of the Federal lands that will remain under control of the Department of Interior will be in Alaska after the passage of this bill. Over half of the hydrocarbon resources of the United States are in Alaska's lands. We know that the time will come when those resources will be demanded by other Americans."

ANILCA represented substantial congressional and ideological compromise, acknowledging that considerable conservation withdrawals could not be achieved without accommodating the interests of the State of Alaska and Alaska Natives. As to the former objective, ANILCA effectively doubled the size of the nation's national park and refuge systems and tripled the amount of land designated as wilderness. And although issues remain on the periphery, this must be considered a great success from an environmental perspective.

However, as to one of the other primary goals of ANILCA, thirty-five years later, the optimism of those who drafted ANILCA is starkly contrasted by numerous examples of the subsequent erosion of Congress' vision of collaborative, unique, and balanced legislation.

This is neither a new or novel assessment of ANILCA. Roughly twenty years ago, the State of Alaska's ANILCA team provided a report detailing the "deteriorating relationship between the State and Department of Interior. That report concluded that the federal agencies were increasingly failing to coordinate with Alaska and ignoring the state's comments as decisions were being made at higher levels in Washington, D.C without a full understanding of ANILCA provisions, its intended cooperation and consultation, and lacking the Alaska context. And today, an ongoing divergence from the ANILCA's carefully considered compromises over the subsequent decades has resulted in ever-increasing conflicts with federal agency decisions and diminished involvement by the public, Native corporations, and state in federal decisions affecting public uses and adjacent landowners. This illustrates federal agencies' poor understanding of ANILCA and its consultation requirements, particularly given that federal agencies increasingly choose to take actions unilaterally. Simply stated, federal agencies are not engaged in genuine consultation with Alaskans and state agencies, and it should be noted that merely giving notice does not constitute consultation. Federal regional leadership will often alter significant policy interpretations affecting management of federal lands without notice and increasingly defer such decisions to the political leadership in the agencies' national offices, which, of course, fails to provide opportunity for the appropriate consultation envisioned by ANILCA.

Nonetheless, these misgivings and issues, while crucial, do not represent an indictment of ANILCA. Rather, they serve to highlight that the designed flexibility inherent to ANILCA has failed to come to fruition. In that vein, and as it relates to natural resource development in Alaska, I would advocate that federal agencies embrace the collaborative design found in ANILCA. We must all strive to capture the balance originally envisioned by the drafters of ANILCA, and not forget the broad concessions to development articulated in its provisions. To better understand ANILCA's true endeavor, one need look no further than the Act's "statement of purpose":

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental value 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.

It is impossible to discuss the “economic and social needs of the State of Alaska and its people”, without discussing oil and gas development. Currently, proceeds from oil and gas development provide the State of Alaska with billions in annual revenue, representing nearly 90% of the State’s unrestricted general revenue. ANILCA does play a substantial role on the industry in Alaska, if, for no other reason, it dictates those lands available for exploration and subsequent development. Of course, it would be imprudent to discuss the interplay of ANILCA and oil and gas development without mentioning Section 1002, which mandated the Coastal portion of the Arctic National Wildlife Refuge be studied, and provided for a potential path to oil and gas exploration and development. In 1987, following detailed and comprehensive studies, the Department of Interior recommended opening the area for oil and gas exploration and development. And today, decades later, even absent Congressional action, there is little room to debate the extraordinarily resource potential of ANWR’s Coastal Plain, which USGS estimates to contain over 10 billion barrels of recoverable oil. Regardless of ANWR’s potential and politically-charged status, it highlights the manner in which ANILCA discourages greater oil and gas exploration and development in Alaska. For, if the federal government is not willing to sanction oil and gas operations in arenas congressionally envisioned for development where the resource potential is known, what incentive does Alaskan industry have to broaden their search to areas of unknown resource potential?

Another aspect of ANILCA that serves to undermine resource development pertains to Title XI. In the oil and gas context, the key examples pertain to proposals to transport North Slope natural gas to market. The Alaska Pipeline Project (APP), a joint undertaking of Exxon Mobil and TransCanada, that would have resulted in a natural gas pipeline from the North Slope into Canada, connecting to existing pipeline infrastructure to transport the gas to Midwest refineries and markets, concluded that it could neither navigate the procedural requirements of ANILCA

Title XI where a portion of the pipeline traversed a national wildlife refuge nor successfully accomplish a land exchange. The APP is no longer a viable project, and plans for transporting North Slope natural gas have shifted to the Alaska LNG Project, which is a proposal supported by ExxonMobil, ConocoPhillips, BP and the State of Alaska. Alaska LNG is also struggling to envision a successful path through ANILCA Title XI because a small 7-mile portion of the most direct pipeline route would follow the Parks Highway as it traverses Denali National Park.

It is difficult to succinctly summarize the problems posed by ANILCA Title XI for complex projects, such as Alaska LNG. Generally stated, Title XI establishes an inflexible and likely impracticable process for obtaining federal permits for complex projects such as the APP and Alaska LNG. Title XI establishes tight deadlines and mandates simultaneous application, environmental review and permitting decisions in a manner that cannot be rationalized for a complex project proceeding through a phased design and financial approval process. A second significant issue is that Title XI mandates additional substantive requirements that fundamentally alter the authority of any involved federal agency to condition or disapprove a proposed project. Under Title XI, each involved federal agency must make detailed findings regarding, among other things, economic feasibility, alternative routes, social, economic, subsistence and environmental impacts, and public values. The result being that if merely one agency disapproves an application for the project, the project is deemed disapproved in its entirety. These provisions render the process unduly unpredictable and risky.

In regards to mineral exploration and production, the Red Dog mine represents an example of how Title XI failed Alaska. NANA and Cominco (now Teck) decided, after careful consideration, that neither Title XI of ANILCA nor the existing land exchange provisions of ANCSA and ANILCA could be effectively navigated. As a result, the relevant parties chose to pursue congressional approval for a land exchange agreement between the Secretary of the Interior and NANA, which Congress subsequently approved. See Act of Sept. 25, 1985, Pub. L. No. 99-96, 99 Stat. 460 (adding ANCSA § 34, 43 U.S.C. § 1629).

However, despite these numerous issues, there are also examples of ANILCA operating in a manner that corresponds with the Congress's initial intent:

ANILCA § 906, which clarified the ability of the State to select and receive its land entitlements, notwithstanding many historic and continuing withdrawals of land in Alaska, and clarified that a "tentative approval" under section 6(g) of the

Statehood Act is the legal equivalent of a patent without benefit of a formal survey.

ANILCA § 901 (as amended in Aug. 1988), which provided for conveyance, by operation of law, of any remaining federal interest in lands under meanderable waters to the adjoining upland owners, and for not counting such acres against the entitlements of the State and Native corporations.

ANILCA § 907 (as amended and supplemented in Feb. 1988), which enacted automatic land bank protections for Native corporation lands, until they are sold, leased, or developed.

Title XIV of ANILCA allowed for the approval of numerous negotiated ANCSA conveyances and land exchanges

ANILCA § 1431, which has been particularly important for oil and gas exploration and development in the Colville Delta and eastern NPR-A.

Together, we can design a prudent path forward that recognizes the dual needs of Alaskans.