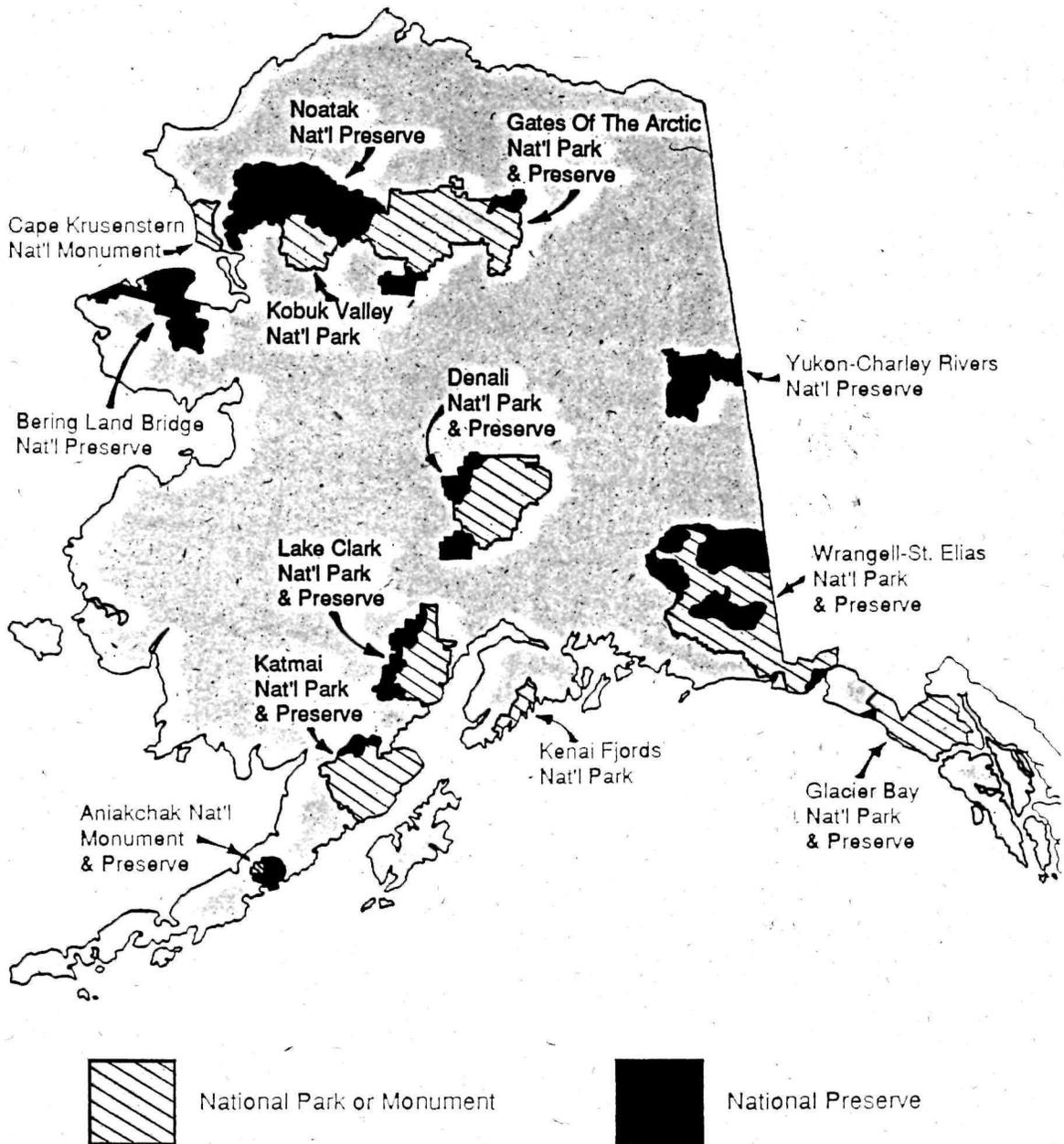


**THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT  
AND THE NATIONAL PARK SERVICE IN ALASKA:  
A PRIMER ON ACCESS**

**written and produced by**

**DAVID AARON FUNK**

**June 1990**



MAP 1. National Parks, Monuments, and Preserves Created Or Expanded By ANILCA

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DAVID AARON FUNK

A THESIS

Presented to the Department of Planning,  
Public Policy and Management  
and the Graduate School of the University of Oregon  
in partial fulfillment of the requirements  
for the degree of  
Master of Urban Planning

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David Aaron Funk  
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THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT  
AND THE NATIONAL PARK SERVICE IN ALASKA:  
A PRIMER ON ACCESS

Approved:

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Maradel Gale

The Alaska National Interest Lands Conservation Act of 1980 (ANILCA) created vast federal land reserves in Alaska, and in part, doubled the total acreage administered by the National Park Service (NPS). However, ANILCA was an extensive omnibus act of Congress, and as such it represents a compromise between many interests. NPS access management in Alaska must confront the complexity of ANILCA and interpret the agency's role within the Act's balance of preservation and development.

This analysis reviews ANILCA, federal regulations, legislative history, NPS planning documents, and case law to determine the pragmatic effect of ANILCA on the NPS. Most of the Act's provisions for the NPS modify the agency's traditional interpretation of its mandate or create outright exceptions to NPS access policy in Alaska. Although these modifications and exceptions are consistent with the history of the National Park System, ANILCA indicates a continued lack of commitment to complete conservation in contemporary American society.

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This thesis is dedicated to Denali, and those who represent the spirit of that place and time,  
with love and enduring friendship to:

Bob Butterfield

Evan Holmes

Harry P. Karstens

Nancy Medlin

Al Smith

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## CHAPTER I

### INTRODUCTION

Say "The Alaska National Interest Lands Conservation Act" real fast three times; Congress provided an appropriately complex title for the complicated omnibus Alaska land statute of 1980. One of the principle intentions of the Alaska National Interest Lands Conservation Act was reservation of outstanding federal lands in the public interest. However, not only did the Act delineate 103 million acres of national parks, forests, rivers, and refuges, it also instituted many exceptions to established policies for the management of such areas. These exceptions permitted Congress to effect a precarious balance between preservation and development in a convoluted 180-page document. Nonetheless, ten years after enactment, there are many aspects and ramifications of the Alaska National Interest Lands Conservation Act which remain enigmatic. Much as the acronym "ANILCA" simplifies the Act's title, this paper summarizes ANILCA to interpret its effect on the National Park Service in Alaska.

### HISTORY OF ANILCA

The uncertainty surrounding ANILCA is the product of its history.<sup>1</sup> Geopolitical prominence and population growth in Alaska following World War Two forced the federal government to address land distribution in Alaska. The state of Alaska was added to the union in 1959 and given the most generous state land-grant in U.S. history — 104 million acres to be selected within twenty-five years.<sup>2</sup>

State land selections, however, threatened traditional Native land use in Alaska. The Native population organized and won temporary suspension of state land selections in 1966 to allow review of Native land rights and subsistence

needs. When commercially viable oil resources were located at Prudhoe Bay in 1968, development interests pressed for rapid resolution to uncertain land ownership. This resolution took form in the Alaska Native Claims Settlement Act (ANCSA) of 1971.<sup>3</sup> ANCSA granted 44 million acres and nearly one billion dollars to Alaska Natives and cleared the way for construction of the Alaska Pipeline.<sup>4</sup>

ANCSA also began the legislative process which resulted in ANILCA. Section 17(d)(2) of ANCSA authorized the Secretary of the Interior to withdraw up to 80 million acres of federal land for study of public interest in those lands and potential inclusion in the federal systems of national parks, forests, wild and scenic rivers, and wildlife refuges. Section 17(d)(2) also set December 18, 1978 as the deadline for Congress to act on the Secretary's withdrawals and recommendations. Section 17(d)(2) was not universally welcomed and provided the stage for a protracted battle over distribution of Alaska federal lands among developers, environmentalists, Natives, state's rights activists, and federal agencies.

The "d-2" struggle eventually resulted in H. R. 39. In 1977, Congressman Morris Udall introduced the bill and proposed reservation of 115

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<sup>1</sup> For brief accounts of the background and passage of ANILCA see: Eugenia Horstman Connally, "Saving Our Last Frontier," *National Parks*, vol. 55, no. 33 (March 1981), pp. 5-8 or Julius Duschka, "How the Alaska Act was Won," *The Living Wilderness*, vol. 44, no. 152 (Spring 1981), pp. 4-9. For a specialized history of ANILCA from the perspective of the National Park Service see: G. Frank Williss, "*Do Things Right the First Time*": *The National Park Service and the Alaska National Interest Lands Conservation Act of 1980*, (NPS D-81, U.S. Government Printing Office: 1985—576-039/20005 Region No. 8., September 1985). For broader historical treatments of ANILCA and its implications see: Roderick Nash, *Wilderness and the American Mind*, 3rd ed. (New Haven and London: Yale University Press, 1982), pp. 272-315; Alfred Runte, *National Parks: The American Experience*, (Lincoln, Nebraska and London: University of Nebraska Press, 1987), pp. 236-258.

<sup>2</sup> Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958).

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<sup>3</sup> Alaska Native Claims Settlement Act, 43 U.S.C. § 1601.

<sup>4</sup> For a detailed analysis of the actual destructive assimilationist effects of ANCSA on Alaska Native peoples, see: Thomas R. Berger, *Village Journey* (New York: Hill and Wang, 1985).

million acres. The House of Representatives passed an amended H. R. 39 for just over 100 million acres in May, 1978. The Senate, however, was less favorable to extensive land reservation and the Alaska delegation, led by Senator Mike Gravel, was able to block Senate votes on either the proposed bill or an extension of the "d-2" process before the 1978 deadline ran out.

The Carter administration, however, was committed to resolving the Alaska land controversy. On December 1, 1978, President Carter invoked his authority under the Antiquities Act of 1906 and reserved 56 million acres of Alaska land in national monuments.<sup>5</sup> Secretary Cecil Andrus designated another 39 million acres for wildlife refuges and Secretary of Agriculture Bob Bergland closed eleven million acres of national forest land to mineral entry, pursuant to the Federal Land Policy and Management Act of 1976.<sup>6</sup> These executive actions were intended as a stopgap and lever; the land withdrawals and formation of 17 national monuments permitted a de facto extension of "d-2" land negotiations and, in effect, forced Congress to commit itself to an Alaska land act if it wished to re-establish its legislative prerogative and rectify a politically unacceptable resolution.

The Senate finally passed an amended H.R. 39 over the protests of the Alaska delegation in August, 1980. The Senate shifted the bill's

balance toward development interests, but faced with the landslide election of President Reagan in 1980, the House was forced to accept the compromise in November, 1980; preservationists recognized that opportunity for any Alaska land act would evaporate with inauguration of the impending pro-development administration. President Carter signed the Alaska National Interest Lands Conservation Act on December 2, 1980.

ANILCA may be the most important conservation legislation ever enacted. Certainly it affected vast tracts of land: ANILCA doubled the National Park System with 43.6 million additional acres; it added 53.8 million acres to the National Wildlife Refuge System; it added 3.4 million acres including two national monuments to the National Forest System; it designated 26 wild and scenic rivers (13 are within national park units); and it tripled the National Wilderness System with 56.4 million additional acres (32.3 million acres of this wilderness are within the National Park System). Map 1 locates the thirteen national park areas created or expanded by ANILCA.

### PROBLEM STATEMENT

When federal land management agencies began to administer the new enclaves, they found "while ANILCA had settled most of the remaining questions regarding ownership of Alaska's public lands, it had not put to rest the basic debate over

<sup>5</sup> Antiquities Act, 16 U.S.C.A. § 431.

<sup>6</sup> Federal Land Policy and Management Act, 43 U.S.C.A. § 1761.

the use of those lands."<sup>7</sup> That debate revolved about diverse definitions of the public good. Developers, preservationists, private businesses, Native groups, local communities, and distant urban organizations contended their values represented the nation's interest in Alaska lands. Conflict was so sharp Congress was unable to fashion an acceptable compromise until time pressure and a changing political environment forced each extreme to grant unwilling concessions. Even then, however, issues remained which defied resolution.

When lawmakers can not resolve an issue, they have several options. If agreement is absolutely imperative, they may resort to intentional ambiguity to provide the pretense of consensus. Congress may also delegate clarification of a controversial law to administrative agencies. Indeed, technical expertise is an important attribute of administrative agencies; lawmakers frequently call on agencies to complete laws requiring special knowledge beyond Congressional resources. In some cases, therefore, avoidance may not only allow legislators to dissemble before their constituencies, but may actually result in more appropriate law.

The tortuous legislative history of ANILCA may have forced Congress to adopt both of these avoidance strategies. In the long run, ANILCA will profit from the expertise of affected federal

land management agencies. Initially, however, agency action has been hindered by the ambiguity of the Act; purposefully or not, ANILCA is a difficult statute to interpret and apply consistently. After ten years, ANILCA remains an enigma. What does the Alaska National Interest Lands Conservation Act of 1980 really say?

### SCOPE

ANILCA is an extensive statute covering many issues often barely linked by a common geographic thread. A summary of the Act's fifteen titles is provided in Appendix A, but analysis of the entire act is beyond the ambition of this paper. This analysis examines one category of ANILCA public interest lands, and this examination focuses on statutory interpretation. Political forces play a large role in ANILCA management, but they too are beyond the limits of this paper.

Policy is most easily studied in an extreme application. Of the agencies affected by ANILCA, the National Park Service (NPS) in the Department of the Interior offers the clearest policy environment. The traditional and virtually exclusive function of the NPS has been protection of scenic, historic, wildlife, and recreation resources. Although the NPS mandate is often considered paradoxical, its twin directives — conservation of resources and recreational use of resources — are far simpler than the multiple-use mandates of other federal land management

<sup>7</sup> Williss, *"Do Things Right the First Time,"* p. 294.

agencies. Therefore, this study will focus on the effect of ANILCA on the NPS in Alaska.

ANILCA both designated land areas and provided management directives. Most of the management provisions of the Act define who can go where, how they can get there, and what they can do when they arrive. Furthermore, most of these directives deal with non-recreational resource use and access for purposes and by methods not traditionally associated with national parks. Therefore, this study will further focus on the effect of ANILCA on NPS access management of national parks in Alaska.

The problem posed by ANILCA can be restated within this narrowed scope: how has the Alaska National Interest Lands Conservation Act of 1980 affected the National Park Service and access management of Alaska national park areas? This is a timely issue as the NPS will approach the second round of management planning for ANILCA park areas in the mid-1990's.

### LITERATURE REVIEW

Little has been published to answer the question above. Review of government documents, environmental periodicals, histories, and law journals reveals that what has been written about ANILCA is either a small part of a broader study, or the whole of far more specific analyses. Although these sources provide related insights, no analysis has been conducted since 1980 of either ANILCA as a whole or its impact on the NPS.

The primary sources for this study include:

- ANILCA itself, in both its statutory and codified forms.<sup>8</sup> The language of ANILCA provides the most certain meaning of the act, as well as evidence of where that meaning is incomplete. Therefore, the bulk of this study deals directly with ANILCA.
- the Organic Act of the NPS.<sup>9</sup> As the formative legislation of the National Park Service, the Organic Act provides a "control" for the ANILCA "experiment;" the Organic Act is one measure of the effect of ANILCA on the NPS.
- the Code of Federal Regulations (C.F.R.).<sup>10</sup> Title 36 C.F.R. Parts 1-199 is the codification of general NPS regulations. Part 13 contains specific regulations for Alaska national park areas. Title 43 C.F.R. Part 36 addresses further ANILCA provisions applicable to all federal lands in Alaska. The CFR indicates how the executive branch has interpreted both the Organic Act and ANILCA. The CFR is updated

<sup>8</sup> Alaska National Interest Lands Conservation Act, Public Law 96-487, 94 Stat. 2371-2551 (1980); 16 U.S.C.A. §§ 410bb, 410hh - 410hh-5, 431, 460mm - 460mm-4, 539 - 539e, 688dd, 1132, 1274, 1276, 1279, 1280, 1285b, 3101-3233 ; 43 U.S.C.A. §§ 1602, 1605 -1607, 1611, 1613, 1614, 1618, 1620, 1621, 1631-1641, 1784; 48 U.S.C.A. § 21 (1980); See also U.S.C.A. 1989 Cumulative Annual Pocket Parts.

<sup>9</sup> National Park Service Act, 16 U.S.C.A. §§ 1.  
<sup>10</sup> Parks, Forests, and Public Property, 36 C.F.R. Parts 1 to 199 (July 1, 1989); Public Lands: Interior, 43 C.F.R. Part 36 (October 1, 1989).

- annually, and intermittent revisions are published in the Federal Register.<sup>11</sup>
- the General Management Plans (GMPs) of ANILCA national park areas.<sup>12</sup> National park areas are required to prepare and revise plans in a timely manner, generally about every ten years.<sup>13</sup> GMPs apply ANILCA within the context of individual national park areas. Like CFR regulations, they state how the NPS has interpreted ANILCA and how the agency intends to implement the Act.
  - the official legislative history of ANILCA. Legislative hearings and reports are often referred to for clarification of Congressional intent. The official documents for ANILCA are overwhelmingly voluminous. However, two House committees and one Senate committee presented final reports on H. R. 39 before either house voted on the bill.<sup>14</sup> These reports

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11 The "CFR Parts Affected" table found on page i in the back of every issue of the Federal Register indicates whether any pertinent revisions have occurred during that month.

12 GMPs and associated documents for the national park areas created or expanded by ANILCA are listed under "National Park Area Documents" in the bibliography.

13 *Planning Process Guideline*, NPS-2, Release No. 3, Amendment No. 1 (Washington, D.C.: Department of the Interior, National Park Service, March 1983): Ch. 1, p. 1.

14 U.S. Congress, House, Committee on Interior and Insular Affairs, Alaska National Interest Lands Conservation Act of 1979, H. Rept. 96-97, pt. 1, to accompany H.R. 39, 96th Cong., 1st sess. (April 18, 1979); U.S. Congress, House, Committee on Merchant Marine and Fisheries, Alaska National Interest Lands Conservation Act of 1979, H. Rept. 96-97, pt. 2, to accompany H.R. 39, 96th Cong., 1st

represent the culmination of ANILCA legislative history and provide insights to the meaning of several sections.

- the case law resulting from ANILCA challenges. ANILCA has been litigated on several points. Court decisions offer another authoritative interpretation of the meaning of ANILCA. Briefs of all cases identified from the first ten years of ANILCA are provided in Appendix C.

### ORGANIZATION

The purpose of this analysis is to clarify the content of ANILCA and identify its effect on National Park Service access management in Alaska. NPS access provisions are spread throughout several titles in ANILCA. Appendix B provides a list of relevant sections. However, coherent analysis requires a less sequential review. Therefore pertinent sections have been topically categorized and the resulting five-part organization provides the structure for the remainder of this paper:

- Chapter II — reviews the general purpose of ANILCA and the specific purposes of the thirteen national park areas created or expanded by the Act. ANILCA park area purposes are consistent with the fundamental purpose of the

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sess. (April 23, 1979); U.S. Congress, Senate, Committee on Energy and Natural Resources, Alaska National Interest Lands Conservation Act of 1979, S. Rept. 96-413 to accompany H.R. 39, 96th Cong., 1st sess. (November 14, 1979).

- NPS framed by the Organic Act of 1916, but the overall purpose of ANILCA contains potential contradictions.
- Chapter III — analyzes access provisions for subsistence use of Alaska national park areas. ANILCA emphasis on preservation of subsistence opportunity significantly modified traditional NPS access policy in Alaska, but did not necessarily contradict the Organic Act.
  - Chapter IV — reviews access provisions for consumptive natural resource use within Alaska national park areas. ANILCA dramatically modified traditional NPS access policy by permitting sport hunting in extensive National Preserves and created a new management role for the NPS with large scale inclusion of pre-existing mineral rights in new park areas.
  - Chapter V — analyzes ANILCA provisions for use of Alaska national park areas unrelated to the express purposes of those areas. ANILCA significantly restricted NPS authority to manage incidental access to national park areas in Alaska.
  - Chapter VI — considers specific methods of travel mandated for Alaska national park areas. ANILCA significantly altered exiting NPS access policy for modes of access within Alaska national parks.
  - Chapter VII — summarizes and presents final conclusions on the effect of ANILCA on access management in Alaska national park areas within the context of NPS history.

## CHAPTER II

### THE FUNDAMENTAL PURPOSE

ANILCA land designations include vast acreages, a broad range of resources, and an equally wide spectrum of purposes. Each national park area created or expanded by ANILCA is subject to the mandate of the Organic Act of the National Park Service, the general purpose of ANILCA, and individual statements of purpose stated in ANILCA. These three definitions of ANILCA park areas are part of a relatively consistent yet potentially contradictory hierarchy of national park area purposes.

### THE ORGANIC ACT

The Organic Act of the National Park Service was enacted in 1916 to consolidate existing national park areas under one administration. The Organic Act created the NPS and directed that agency to

promote and regulate the use of the Federal areas known as national parks, monuments, and reservations ... by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to *conserve the scenery and the natural and historic objects and the wildlife therein* and to *provide for the enjoyment of the same* in such manner and by such means as will *leave them unimpaired* for the enjoyment of future generations.<sup>1</sup> [emphasis added]

Although phrased in flowery language, the Organic Act provides a pragmatic foundation for the management of national park areas.

However, the Congress of 1916 could not anticipate and resolve all future policy questions. An inherent conflict between preservation of scenic, natural, historic, and wildlife resources, and provision for the enjoyment of such resources has emerged from the Organic Act mandate. Debate over the meaning of the Organic Act is still unresolved and historic NPS interpretation of the mandate has not always been consistent. However, a persuasive argument can be made that the fundamental purpose of the National Park System is ultimately preservation.

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<sup>1</sup> National Park Service Act, 16 U.S.C.A. § 1.

The language of the Organic Act conditions enjoyment of national park area resources on sustainable use. Congress stated what resources were to be available for public use and limited that use to manners and means which would leave those resources unimpaired. Although "unimpaired" is itself an ambiguous standard, the legislative history of the Organic Act indicates Congress intended national park areas for "preservation of nature as it exists" as opposed to the "conservation of national assets" conducted in forest preserves.<sup>2</sup> Therefore, the Organic Act may be justifiably interpreted to balance conservation and use of national park area resources on the fulcrum of preservation.

### PURPOSE OF ANILCA

Congress enacted ANILCA "[i]n order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values ...." More specifically, enactment of ANILCA was intended

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<sup>2</sup> H.R. Rep. No. 1136, 64th Cong., 1st Sess. 1-2 (1916) and H.R. Rep. No. 700, 64th Cong., 1st Sess. 3 (1916). As cited in John Lemons and Dean Stout, *A Reinterpretation of National Park Legislation*, 15(1) *Environmental Law* 41-65 (Fall 1985).

to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

Furthermore, Congress intended ANILCA "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."<sup>3</sup>

Congress concluded its opening statement of purpose in ANILCA with the belief that "the designation and disposition of the public lands in Alaska ... 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 ...."<sup>4</sup> Although the purposes of ANILCA appear substantially complimentary to those of the Organic Act, it is significant that whereas the balance implied by the Organic Act is between conservation versus sustainable enjoyment of national park area resources, the balance created by

ANILCA is between public interests in preservation versus development. Clearly, there is potential for contradiction since the two statutes define national parks within different contexts.

#### ANILCA STATEMENTS OF PURPOSE

Each of the thirteen national park areas created or expanded by ANILCA is accompanied by a separate statement of purpose beginning with the phrase, "[this NPS area] shall be managed for the following purposes, among others ...."<sup>5</sup> Committee reports indicate Congress did not intend individual statements of purpose to be limiting; "[e]numeration of purposes is not exclusive, but is set forth as a guide to management."<sup>6</sup> These statements provide justification of each areas' inclusion in the National Park System and direction for their management. However, while the NPS must fulfill these specific directives, it is not prevented from managing ANILCA park areas for other purposes derived from the broader mandate of the Organic Act.

Individual statements of purpose are critical, however. They must be understood in order to weigh Congressional intent for each ANILCA park area. Discretionary management action by the NPS must often be justified by an area's explicit

<sup>3</sup> Alaska National Interest Lands Conservation Act, 16 U.S.C.A. § 3101(a,b,c).

<sup>4</sup> Alaska National Interest Lands Conservation Act, 16 U.S.C.A. § 3101(d).

<sup>5</sup> Alaska National Interest Lands Conservation Act, §§ 201-2. Hereafter, notes drawn from the statute will be presented in abbreviated form, for example: ANILCA §§201-2.

<sup>6</sup> S. Rept. 96-413, p. 138; H. Rept. 96-97, pt. 1, p. 146.

purposes. Table 1 consolidates the following analysis of the individual statements of purpose for Alaska national park areas provided in sections 201 and 202 of ANILCA.

The only mandate included in all thirteen ANILCA park areas is protection of "habitat for and populations of fish and wildlife, including but not limited to" bears, moose, caribou, Dall sheep, wolves, raptors, waterfowl, other birds, marine mammals, and salmon; if it's alive and living in any of these areas, it's to be preserved.<sup>7</sup> There can be little doubt of Congressional intent to provide comprehensive protection of fish and wildlife in Alaska national park areas.

Nor can Congressional intent to preserve the general environment, geology, biology, and wilderness character of the ANILCA national park areas be doubted. Eleven of thirteen statements of purpose include all or parts of the following composite mandate. The purpose of ANILCA park areas is:

- to protect, or maintain;
- the natural features, rivers, forests, sand dunes, watersheds, landscapes, coasts, volcanic features, geologic and biological processes, natural environmental integrity, opportunities for solitude, or wild and undeveloped character of the area;

<sup>7</sup> Ten statements of purpose use this exact language with various wildlife species listed. ANILCA §§ 201(1,2,4,6,7,8,9,10), 202(2,3). Three statements of purpose use different language but include the twin concepts of preservation of wildlife populations and habitat. ANILCA §§ 201(3,5), 202(1).

- in a natural, undeveloped, or unimpaired state.<sup>8</sup>

Again, it is clear that the natural environments of Alaska national park areas are not to be altered.

Educational functions are explicitly targeted in seven statements of purpose.<sup>9</sup> In the park areas affected, Congress mandated opportunity for scientific research and active interpretation of resources in cooperation with Alaska Natives and consistent with other purposes. Although not as frequently stated, education is another fundamental purpose of ANILCA park areas.

Six of the ANILCA park areas received a mandate to preserve cultural, historic, and archeological resources.<sup>10</sup> Bering Land Bridge, Cape Krusenstern, and Kobuk Valley are directed to study and protect archeological, paleontological, and cultural history sites in cooperation with Alaska Natives. Noatak, Yukon-Charley, and Katmai were also created or expanded to protect archeological and cultural features. Cultural preservation is a predominant purpose of ANILCA park areas.

Six of the ANILCA park areas were also reserved to provide continued opportunity for wilderness recreation activities.<sup>11</sup> In Bering Land Bridge, this specifically includes public access to the Serpentine Hot Springs area, and in Kenai Fjords, the Secretary is authorized to develop

<sup>8</sup> ANILCA §§ 201(1,2,4,5,6,7,8,9,10), 202(1,3).

<sup>9</sup> ANILCA §§ 201(1,2,3,6,8,10), 202(3).

<sup>10</sup> ANILCA §§ 201(2,3,6,8,10), 202(2).

<sup>11</sup> ANILCA §§ 201(2,4,5,9), 202(2,3).

TABLE 1. Purposes of National Parks, Monuments, and Preserves Created or Expanded by Sections 201-2 of ANILCA

National Park Areas and Classifications	Preserve Fish, Bird, & Wildlife Habitat & Populations					
	Preserve the Environment, Geology, Biology, & Wilderness					
	Allow Scientific Research & Interpretation					
	Preserve Cultural, Historic, & Archeological Resources					
	Allow Recreation					
	Preserve Scenery					
Aniakchak Nat'l Mon. & Pres.	√	√	√			
Bering Land Bridge Nat'l Preserve	√	√	√	√	√	
Cape Krusenstern Nat'l Monument	√		√	√		
Denali (expansion) Nat'l Park and Pres.	√	√	√		√	√
Gates of the Arctic Nat'l Park & Pres.	√	√			√	√
Glacier Bay (expansion) Nat'l Park & Pres.	√	√				
Katmai (expansion) Nat'l Park and Pres.	√			√	√	√
Kenai Fjords Nat'l Park	√	√			√	√
Kobuk Valley Nat'l Park	√	√	√	√		
Lake Clark Nat'l Park & Pres.	√	√				√
Noatak Nat'l Preserve	√	√	√	√		
Wrangell-St. Elias Nat'l Park & Pres.	√	√			√	√
Yukon-Charley R.s. Nat'l Preserve	√	√	√	√		

access for recreation with mechanized equipment on the Harding Icefield.<sup>12</sup> Recreation is yet another fundamental purpose of ANILCA park areas.

The final category of specific purposes for ANILCA park areas is preservation of scenic resources. This mandate continues the NPS tradition of protecting monumental scenery. Gates of the Arctic, Kenai Fjords, Lake Clark, Wrangell-St. Elias, Katmai, and Denali are justified as national interest lands by many of the purposes discussed above, but they in particular qualify as national park areas simply by the grandeur of their scenery.<sup>13</sup>

### ANILCA PARK AREAS: CONCLUSIONS

In summary, the thirteen ANILCA park areas designated in sections 201 and 202 were created or expanded specifically for the following reasons:

- preservation of fish and wildlife habitat and populations, and
- preservation of environments, geologic and biological processes, and wilderness character.

Many of these areas were further justified for the preservation of:

- opportunities for scientific research and interpretation,
- cultural, historic, and archeological resources,
- opportunities for recreation, and
- outstanding scenery.

Furthermore, while these purposes provide specific direction and authority for management of Alaska national park areas, ANILCA statements of purpose are not exclusive of the broader mandate provided by the Organic Act of the NPS.

Therefore, individual statements of purpose for ANILCA park areas appear to compliment both the Organic Act and ANILCA as a whole; national park areas in Alaska are dedicated to the preservation of scenic, natural, historic, wildlife, and recreation resources and embody the preservation side of the balance between preservation and development created by ANILCA. However, the true measure of purpose is in the application. Although ANILCA statements of purpose consistent with the Organic Act as stated, enactment of ANILCA and its balance required many exceptions to traditional NPS access policies. The next four chapters examine each category of non-traditional access provided by ANILCA and the extent to which they modify NPS access management of national park areas in Alaska.

<sup>12</sup> ANILCA §§ 201(2,5); Congress suggested a tramway to the Exit Glacier area of the Harding Icefield, but the NPS currently considers the project economically unviable and public sentiment has been negative. S. Rept. 96-413, p. 150; *Kenai Fjords: GMP*, pp. 50-51.

<sup>13</sup> ANILCA §§ 201(4,5,7,9); 202(2,3).

### CHAPTER III

#### SUBSISTENCE ACCESS

Wilderness was institutionalized in the Wilderness Act of 1964 as "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain."<sup>1</sup> Many national parks in the contiguous 48 states were able to embody this relatively recent, Eurocentric concept due to previous forced removal of indigenous Americans from their traditional homes. In 1980, however, Tlingit, Haida, Tsimshian, Athapaskan, Aleut, Inupiat, and Yup'ik cultures continued to subsist on the resources of federal lands in Alaska.<sup>2</sup> Designation of most new national parks in Alaska therefore required either cultural genocide or a new conceptualization of the human role in natural landscapes. Congress chose the second alternative and acknowledged "subsistence uses by local rural residents have been, and are now, a natural part of the ecosystem ...." Congress remained wary of the human role in wilderness, however, and intended the NPS to "take appropriate steps when necessary to insure that consumptive uses of fish and wildlife populations within National Park System units not be allowed to adversely disrupt the natural balance which has been maintained for thousands of years."<sup>3</sup>

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<sup>1</sup> Wilderness Act, 16 U.S.C.A. § 1131(c).

<sup>2</sup> Berger, *Village Journey*, p. 11. For a brief historical sketch of Native cultures, see: Claus-M. Naske and Herman Slotnick, *Alaska: A History of the 49th State*, 2nd ed. (Norman, Oklahoma and London: University of Oklahoma Press, 1987): pp. 11-22.

<sup>3</sup> S. Rept. 96-413, p. 171.

### BACKGROUND

Consumptive uses by Alaska Natives and others who live in remote parts of the state are referred to collectively as "subsistence." Subsistence uses include hunting, trapping, fishing, timber cutting, and plant gathering. These activities require access to natural resources, access for support facilities, and access by various modes of transportation. Many aspects of subsistence are therefore discussed in the following three chapters under these topics. The overall phenomenon of subsistence, however, deserves separate analysis as one of the greatest single modifications of NPS access policy in ANILCA.

Traditionally, the NPS has interpreted the Organic Act mandate and promulgated regulations to prohibit any taking of wildlife in national park areas. Although small scale sport fishing is typically allowed, hunting and trapping in national park areas is exceptional and permitted only under authority of statutory law.<sup>4</sup> Conservation of wildlife in national parks has long been understood to mean "no hunting."

ANILCA, however, authorizes subsistence hunting throughout most Alaska federal lands including much of the National Park System. Congress recognized the importance of subsistence access, the growing pressures on subsistence resources, and the lack of alternative resources for Natives and other remote rural residents of Alaska.

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<sup>4</sup> 36 C.F.R. §§ 2.2, 2.3.

Consequently, Congress established an administrative structure to sustain opportunity and provide access for subsistence lifestyles in Alaska. Furthermore, Congress provided subsistence use precedence; all other use of federal land in Alaska must minimize negative effects on subsistence opportunity and, in the event of fish and wildlife rationing, subsistence use has priority.<sup>5</sup> Currently, the only limitation tentatively proposed by the NPS is a restriction on recreational access to the Onion Portage area of Kobuk Valley during the autumn caribou migration and subsistence harvest.<sup>6</sup>

An apparent conflict exists between the conservation mandate of the Organic Act and the subsistence mandate of ANILCA. For example, statements of purpose for Bering Land Bridge, Cape Krusenstern, and Kobuk Valley direct the NPS to protect the viability of subsistence resources as well as habitats for and populations of fish and wildlife.<sup>7</sup> However, if humans are acknowledged as a legitimate part of the environment, these functions of Alaska national park areas are not necessarily contradictory. Although subsistence viability implies the taking

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<sup>5</sup> ANILCA §§ 802, 811(a), 1314(c)(1); 36 C.F.R. § 13.40(a,b,c). Congress discussed the threshold for this priority designation in terms of continued productivity; "other uses are to be limited when annual recruitment of fish and wildlife populations no longer exceed or equal annual mortality." H. Rept. 96-97, pt. 2, pp. 192-3.

<sup>6</sup> *Kobuk Valley: GMP*, p. 77.

<sup>7</sup> ANILCA § 201(2,3,6).

Table 2. Summary of ANILCA Provisions and NPS Regulations for Subsistence Access to Alaska National Park Areas.

ANILCA Directives to the Secretary of the Interior	ANILCA Qualifications on Subsistence Access	Related NPS Regulations From 36 CFR
<p>§811(a)</p> <ul style="list-style-type: none"> <li>• Shall ensure reasonable access to subsistence resources on public lands.</li> </ul> <p>§1314(c)(1)</p> <ul style="list-style-type: none"> <li>• Shall administer new park areas &amp; additions to provide opportunity for subsistence uses.</li> </ul>	<p>§§811(a), 1314(c)(1)</p> <ul style="list-style-type: none"> <li>• For local rural residents engaged in subsistence uses.</li> </ul> <p>§1314(c)(1)</p> <ul style="list-style-type: none"> <li>• Where permitted by ANILCA.</li> </ul>	<p>§§13.47, 13.48 subsistence taking of fish and wildlife permitted by adopted state and federal law.</p> <p>§13.40(a,b,c) subsistence uses given priority.</p> <p>§13.42(a,c) "local, rural resident" &amp; "subsistence uses" defined.</p>
<p>§201(2,3,6)</p> <ul style="list-style-type: none"> <li>• Protect viability of subsistence resources in Bering Land Bridge, Cape Krusenstern, &amp; Kobuk Valley.</li> </ul>		
<p>§§203, 1313</p> <ul style="list-style-type: none"> <li>• Shall allow subsistence use of fish and wildlife in preserves.</li> </ul>	<p>§1313</p> <ul style="list-style-type: none"> <li>• Pursuant to applicable law and regulation.</li> </ul> <p>§203</p> <ul style="list-style-type: none"> <li>• By local residents.</li> </ul>	<p>§13.41(a) subsistence uses permitted in preserves.</p> <p>§13.42(c) "subsistence uses" defined.</p> <p>§13.40(f) maintain "healthy" populations of fish &amp; wildlife in preserves.</p>
<p>§§201-2, 203, 816(a)</p> <ul style="list-style-type: none"> <li>• Shall permit subsistence uses in the following parks, monuments, &amp; park additions: Aniakchak, Cape Krusenstern, Gates of the Arctic, Kobuk Valley, Lake Clark, Wrangell-St. Elias, Denali.</li> </ul>	<p>§201</p> <ul style="list-style-type: none"> <li>• Where such uses are traditional.</li> </ul> <p>816(a)</p> <ul style="list-style-type: none"> <li>• Where specifically permitted by this act.</li> </ul> <p>§§201-2, 203</p> <ul style="list-style-type: none"> <li>• By local residents.</li> </ul> <p>§§201-2, 816(a)</p> <ul style="list-style-type: none"> <li>• In accordance with Title VIII, ANILCA, and other law.</li> </ul>	<p>§13.41(b,c) park &amp; monument areas open to subsistence uses where traditional.</p> <p>§13.2 areas excluded from subsistence regulations.</p> <p>§13.42(a,c) "local, rural resident" &amp; "subsistence uses" defined.</p> <p>§13.40(f) maintain "healthy and natural" populations of fish and wildlife in parks and monuments.</p>
<p>§815(2)</p> <ul style="list-style-type: none"> <li>• Nothing in Title VIII shall be construed as permitting subsistence use of fish and wildlife in public land areas closed to such use 12/1/78.</li> </ul>		<p>§§13.2(c), 13.67 areas excluded from subsistence access.</p>
<p>§816(b)</p> <ul style="list-style-type: none"> <li>• May temporarily close any public land to subsistence uses.</li> </ul>	<p>§816(b)</p> <ul style="list-style-type: none"> <li>• If necessary for reasons of safety, administration, or to assure continued viability of fish and wildlife populations.</li> </ul>	<p>§13.42(c) "subsistence uses."</p> <p>§§13.49(c), 13.50 temporary closure to use of plant or fish &amp; wildlife for public health &amp; safety, administration, viability of populations.</p>

of fish and wildlife, such activity does not impair the conservation of fish and wildlife if the balance between subsistence use and fish and wildlife productivity is sustainable without artificial manipulation of habitat or populations.<sup>8</sup> The question therefore is not whether subsistence access violates the Organic Act mandate, but whether ANILCA provides the NPS adequate authority to manage subsistence access within that mandate. Table 2 provides a summary of ANILCA provisions and relevant NPS regulations for subsistence access to Alaska national park areas.

#### SUBSISTENCE DEFINED

The term "subsistence" does not carry the connotation of marginal economic existence in Alaska. Rather, subsistence is the combination of culture and land in a comprehensive and wholistic lifestyle.<sup>9</sup> Subsistence access to Alaska national park areas is not universal, but defined by user residence, location of use, and management discretion.

Section 803 of ANILCA provides the legislative definition of "Subsistence uses:"

the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or

transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.<sup>10</sup>

"Customary and traditional use" receives no further definition in ANILCA. Legislative history, however, indicates Congress intended that phrase to "place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources" where "such uses have played a long established and important role in the economy and culture of the community" and where "such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation."<sup>11</sup>

For lack of a statutory definition, the NPS adopted definitions of "traditional" from *Webster's Third New International Dictionary of the English Language* (unabridged, 1976). The various connotations of these definitions can be summarized as an inherited cultural system of attitudes, beliefs, and institutions which influence the present. Therefore, the NPS has stated that "to qualify under ANILCA, a 'traditional means' or 'traditional activity' has to have been an established cultural pattern, per these definitions, *prior to 1978 when the unit was established.*"<sup>12</sup> [emphasis added]

<sup>8</sup> Congress did not "expect the NPS to engage in habitat manipulation or control of other species for the purpose of maintaining subsistence uses within National Park System units." S. Rept. 96-413, p. 171.

<sup>9</sup> Berger, *Village Journey*, pp. 51-4.

<sup>10</sup> ANILCA, § 803.

<sup>11</sup> S. Rept. 96-413, p. 269.

<sup>12</sup> This definition of "traditional" is included as a standard appendix in nine of the ANILCA national park area GMPs: Aniakchak, Bering Land Bridge, Cape Krusenstern, Denali, Gates of the Arctic, Katmai, Kobuk Valley, Noatak,

"Family" is defined by ANILCA to include all persons living in a household on a permanent basis, and "barter" is defined as the noncommercial exchange of fish and wildlife taken for subsistence uses, for other fish and wildlife, or other items besides money.<sup>13</sup> "Customary trade" is not defined by ANILCA. The Act's legislative history, however, is again helpful; Congress did "not intend that 'customary trade' be construed to permit the establishment of significant commercial enterprises under the guise of 'subsistence uses.'" <sup>14</sup> The language of section 803 and legislative history indicate Congress intended to permit all activities necessary for subsistence lifestyles short of commercial resource use.

An operational definition of "subsistence" for ANILCA park areas derived from the Act, its legislative history, and NPS interpretations may be summarized as the:

- inherited cultural pattern of use
- established before 1978 of
- renewable resources, particularly fish and wildlife, for either
- direct household consumption as food, shelter, fuel, clothing, tools, and transportation, or
- making and selling handicrafts from the byproducts of fish and wildlife taken for direct household consumption, or
- noncommercial exchange for items other than money by
- rural Alaska residents.

This definition, however, is still not complete. For example, how long and how

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and Wrangell-St. Elias. See, for example: *Aniakchak: GMP*, p. 173.

<sup>13</sup> ANILCA § 803(1,2).

<sup>14</sup> S. Rept. 96-413, p. 234.

extensive a history must an activity accrue before it qualifies as "traditional?" Are "traditional" uses transferrable? Are they permanent, or are they ceded if not continuously practiced? Alaska Native and non-Native subsistence users have both customarily and traditionally adopted new technology for subsistence applications. Is there a limit to technological innovation in ANILCA park areas? At what point does "customary trade" cross the line and become "significant commercial enterprise?" Questions like these complicate NPS management of subsistence access.

#### SUBSISTENCE ACCESS: WHO?

Qualification by residence is a critical element in the definition of subsistence access. ANILCA restricts subsistence use of national park areas in Alaska to local rural residents.<sup>15</sup> Congress envisioned subsistence as "something done only by Native and non-Native residents of 'rural' Alaska" including communities like Dillingham, Bethel, Nome, Kotzebue, Barrow, and other remote villages.<sup>16</sup> Residents of urban centers like Juneau, Fairbanks, and Anchorage, were not intended to qualify for subsistence access.<sup>17</sup>

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<sup>15</sup> ANILCA §§ 201-2, 203, 811(a), 1314(c)(1).

<sup>16</sup> S. Rept. 96-413, p. 233; H. Rept. 96-97, pt. 1, p. 279.

<sup>17</sup> H. Rept. 96-97, pt. 2, p. 192; Karen J. Atkinson, *ANILCA: Striking the Balance In Favor of "Customary and Traditional" Subsistence Uses By Alaska Natives*, 27 *Natural Resources Journal* 428 (Spring 1987).

The NPS has refined this concept in its application. A "local rural resident" is either someone with a primary, permanent home within designated resident zones, or someone qualified to hold a subsistence permit.<sup>18</sup> "Resident zones" include areas within a national park or monument and communities near any park area whose members customarily and traditionally use a park or monument for subsistence purposes without reliance on aircraft access (although access by aircraft may not disqualify a community in extraordinary cases).<sup>19</sup> Subsistence permits are available for local rural residents independent of resident zones, and superintendents must issue these permits to individuals if they have customarily and traditionally used a park or monument for subsistence purposes without the aid of aircraft (again, exceptions are possible).<sup>20</sup>

Subsistence access to Alaska national park areas is therefore established by local rural residence. However, there are factors involved

<sup>18</sup> 36 C.F.R. § 13.42(a).

<sup>19</sup> 36 C.F.R. §§ 13.42(b), 13.43(a). Alaska national parks and monuments open to subsistence access have identified the following number of communities within their respective resident zones: Aniakchak — 5; Cape Krusenstern — 3; Denali — 4; Gates of the Arctic — 10; Kobuk Valley — 7; Lake Clark — 6; Wrangell-St. Elias — 18. 36 C.F.R. §§ 13.60, 13.62, 13.63, 13.64, 13.69, 13.70, 13.73.

<sup>20</sup> 36 C.F.R. § 13.44. Alaska national parks and monuments open to subsistence access have apparently issued insignificant numbers of subsistence permits since only one GMP addresses subsistence permits; Denali recorded 16 in 1986. *Denali: GMP*, p. 192.

which require clarification. Do non-traditional subsistence users acquire subsistence rights upon immigrating to resident zone communities? Of the rural communities recognized in the Act's legislative history, Bethel has the largest population — approximately 3,600 residents. Of the communities considered urban, Juneau has the smallest population — approximately 19,500 residents.<sup>21</sup> At what population threshold does a community become "urban?" What other factors determine whether a community is "urban" or "rural?" Again, issues remain which complicate NPS management of subsistence access to ANILCA park areas.

#### SUBSISTENCE ACCESS: WHERE?

Congress required reasonable access to subsistence resources on public lands in Alaska including national park areas. However, Congress also limited subsistence access to those areas in the National Park System designated by ANILCA.<sup>22</sup> A summary of subsistence access status for ANILCA park areas is provided in Table 3.

Subsistence access is permitted in all ten Alaska national preserves.<sup>23</sup> All national parks and monuments in Alaska are closed to subsistence access unless specifically permitted by

<sup>21</sup> Rand McNally, *1985 Road Atlas*, (Chicago: Rand McNally and Company, 1985), p. 120.

<sup>22</sup> ANILCA §§ 811(a), 1314(c)(1).

<sup>23</sup> ANILCA §§ 203, 1313; 36 C.F.R. § 13.41(a).

ANILCA.<sup>24</sup> National parks and monuments explicitly open to subsistence access under ANILCA include Aniakchak and Cape Krusenstern National Monuments, and Denali (those areas added by ANILCA), Gates of the Arctic, Kobuk Valley, Lake Clark, and Wrangell-St. Elias National Parks.<sup>25</sup> NPS regulations recognize the right to subsistence access throughout Cape Krusenstern and Kobuk Valley.<sup>26</sup> In other ANILCA parks and monuments open to subsistence access, the Act states "[s]ubsistence uses by local residents shall be permitted in the [park or monument] *where such uses are traditional* ...."<sup>27</sup> [emphasis added] Although this implies there may be districts closed to subsistence use in parks and monuments otherwise accessible, GMPs for ANILCA park areas do not report any such districts.<sup>28</sup>

The NPS has interpreted ANILCA to exclude Glacier Bay, Katmai, Kenai Fjords, and parts of Denali National Parks from subsistence access.<sup>29</sup> ANILCA never explicitly mandated subsistence access for Kenai Fjords, Katmai, or Glacier Bay. Kenai Fjords was exempted since "[s]ubsistence uses were not known to occur within the area to be designated as a park at the time ANILCA authorized Kenai Fjords; therefore, subsistence

activities are not permitted within the park under this legislation."<sup>30</sup> ANILCA includes a savings clause which exempts lands permanently closed to the taking of fish and wildlife on December 1, 1978 from ANILCA subsistence provisions.<sup>31</sup> This clause affects that portion of Denali originally in Mt. McKinley National Park<sup>32</sup> and reinforces the omission of subsistence mandates for areas originally in Glacier Bay and Katmai National Monuments.<sup>33</sup>

Congress mandated subsistence access to many of the Alaska national park areas created in 1980 and, at the same time, upheld traditional NPS

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<sup>30</sup> *Kenai Fjords: GMP*, U. S. Government Printing Office: 1984-776-031/4013 Region No. 8, NPS D-2059A (July 1984), pp. 3, 33.

<sup>31</sup> ANILCA § 815(2).

<sup>32</sup> Mt. McKinley National Park was founded by Congress in 1917 "for the preservation of animals, birds, and fish, and for the preservation of the natural curiosities and scenic beauties thereof." 16 U.S.C.A. § 351. Originally, prospectors were permitted to hunt for personal subsistence needs when other sources of food were in short supply. This exception, however, was repealed by a 1928 amendment which declared Mt. McKinley a game refuge and prohibited all taking of wildlife. 16 U.S.C.A. § 352.

<sup>33</sup> The presidential proclamations for Katmai and Glacier Bay National Monuments do not discuss the taking of wildlife. Katmai was proclaimed in 1918 for the scientific values of volcanic processes and scenic attractions. 40 Stat. 1855 (vol. II). Glacier Bay was proclaimed in 1925 for scientific study of glaciers, revegetation, and paleontology, and protection of historic exploration sites. 43 Stat. 1988 (vol. II). Both monuments were delegated to the NPS for management. Therefore, under NPS regulation, Katmai and Glacier Bay were closed to hunting on Dec. 1, 1978. 36 C.F.R. 2.2.

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<sup>24</sup> ANILCA § 203, 816(a).

<sup>25</sup> ANILCA §§ 201, 202.

<sup>26</sup> 36 C.F.R. § 13.41(b,c).

<sup>27</sup> ANILCA §§ 201, 202.

<sup>28</sup> Legislative history supports this interpretation for Gates of the Arctic National Park. S. Rept., 96-413, p. 147.

<sup>29</sup> 36 C.F.R. §§ 13.2(c), 13.67.

TABLE 3. Subsistence Access Status for National Park Areas Created by ANILCA

Preserve Acreage Open To Subsistence Access <sup>1</sup>	Park and Monument Acreage Open To Subsistence Access	Park and Monument Acreage Closed To Subsistence Access
Aniakchak 376,000	Aniakchak <sup>2</sup> (where traditional) 138,000	
Bering Land Bridge 2,457,000		
	Cape Krusenstern <sup>3</sup> (entire area) 560,000	
Denali 1,330,000	Denali <sup>4</sup> (additions only) 2,426,000	Denali <sup>5</sup> (original Mt. McKinley Nat'l Park)
Gates of the Arctic 900,000	Gates of the Arctic <sup>6</sup> (where trad'l) 7,052,000	
Glacier Bay 57,000		Glacier Bay <sup>7</sup> (park addition) 523,000
Katmai 308,000		Katmai <sup>8</sup> (park addition) 1,037,000
		Kenai Fjords <sup>9</sup> 576,000
	Kobuk Valley <sup>10</sup> (entire area) 1,710,000	
Lake Clark 1,214,000	Lake Clark <sup>11</sup> (where trad'l) 2,439,000	
Noatak 6,560,000		
Wrangell-St. Elias 4,171,000	Wrangell-St. Elias <sup>12</sup> (where trad'l) 8,147,000	
Yukon-Charley Rivers 1,713,000		
TOTAL PRESERVES OPEN: 18,986,000	TOTAL PARK & MON. OPEN: 22,472,000	TOTAL PARK & MON. CLOSED: 2,136,000
TOTAL ANILCA NPS ACREAGE OPEN TO SUBSISTENCE USE: (95%) 41,458,000		TOTAL ANILCA NPS ACREAGE CLOSED TO SUBSISTENCE USE: (5%) 2,136,000

(notes on following page)

TABLE 3. (continued)

- 1 ANILCA §§ 203, 1313.
- 2 ANILCA § 201(1).
- 3 ANILCA § 201(3); 36 C.F.R. 13.41(b,c).
- 4 ANILCA § 202(3).
- 5 ANILCA § 815(2).
- 6 ANILCA § 201(4).
- 7 Absence of subsistence mandate in ANILCA § 202(1); ANILCA § 815(2).
- 8 Absence of subsistence mandate in ANILCA § 202(2); ANILCA § 815(2).
- 9 Absence of subsistence mandate in ANILCA § 201(5); 16 C.F.R. § 13.67.
- 10 ANILCA § 201(6); 36 C.F.R. 13.41(b,c).
- 11 ANILCA § 201(7).
- 12 ANILCA § 201(9).

policy against hunting in those areas established before 1978. As may be expected, some of the boundaries delineated on Capitol Hill do not lend themselves to easy administration on site in Alaska. However, boundary and subsistence access designations can generally be determined from ANILCA, and the NPS may propose boundary adjustments to implement ANILCA more effectively.<sup>34</sup> Therefore, ANILCA provides adequate direction and discretion to the NPS for location of subsistence access.

It is worth noting, however, the sheer acreage available for subsistence access in the National Park System. Of 43.6 million acres added to the system by ANILCA, only five percent is closed to subsistence use. Of that five percent, from one third to one half is composed of lifeless rock and ice; virtually all of the 1980 National Park System additions inhabited by plant and wildlife populations are open to subsistence access.<sup>35</sup> ANILCA park areas doubled the acreage of the National Park System. Consequently, ANILCA radically modified NPS access policy and placed half the acreage of the entire system under a subsistence mandate.

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<sup>34</sup> For example, the GMP for Glacier Bay proposed shifting 23,000 acres from park wilderness to preserve wilderness to conform to landforms (and hunting interests) and facilitate administration. *Glacier Bay: GMP*, pp. 59, 73.

<sup>35</sup> See resource maps in ANILCA park area GMPs — cited in bibliography.

### SUBSISTENCE MANAGEMENT

Subsistence access by local rural residents to designated national park areas in Alaska is not without regulation. The subsistence mandate of ANILCA provides a degree of NPS discretion to monitor and control subsistence activities. This authority, however, is limited and shared with subsistence users and the state of Alaska under certain conditions.

#### *Cooperative Management Authority*

Administration of the subsistence program in Alaska national preserves is not specifically outlined by ANILCA. It is apparent, however, that Congress intended subsistence access to federal lands other than national parks or monuments to be directed by "regional advisory councils" and administered by the state of Alaska in cooperation with and monitored by the Secretary of the Interior. The role of the state is predicated on compliance with ANILCA subsistence policy.<sup>36</sup>

Congress delegated management of subsistence use of national parks and monuments to "subsistence resource commissions" and the state of Alaska in cooperation with the Secretary. Each park or monument open to subsistence use is required to maintain a subsistence resource commission composed of three members from the coinciding regional advisory council who engage in subsistence use of that park or monument. The

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<sup>36</sup> ANILCA §§ 805, 806.

Secretary must adopt both regional advisory council and subsistence resource commission recommendations unless they violate recognized principles of wildlife management, threaten wildlife populations, contradict the purposes for which the area was established, or impair subsistence viability.<sup>37</sup>

The NPS, as agent of the Secretary, therefore shares management of subsistence access with subsistence users, appointed to regional advisory councils and subsistence resource commissions, and the state of Alaska. This balance of authority offers several advantages. Regional councils and resource commissions provide representation for subsistence users and supplement professional wildlife expertise with practical field knowledge. State participation offers a pre-existing fish and wildlife system and management experience with Alaska resources. Despite these advantages, the cooperation mandated by ANILCA not only dispersed NPS authority over access management, but it also created administrative dilemmas in Alaska national park areas.

Alaska Natives have managed their resources for thousands of years and, until recently, the relatively few non-Native immigrants to Alaska did not threaten the environmental balance with subsistence resources. Following the Second World War and discovery of oil reserves, conditions changed; Natives faced exacerbated cultural disruption, and non-Native immigration

mushroomed. It may be questioned whether subsistence users could have sustained the viability of their resources under pressures from rapid acculturation and an extensive influx of foreign values. It may also be asked if regional advisory councils and subsistence resource commissions composed of local subsistence users have the perspective necessary for effective management of resources which affect and are affected by factors extending far beyond local regions.<sup>38</sup>

Likewise, it must be asked if an agency like the NPS provides any better an alternative; the NPS lacks familiarity with either local subsistence resources or patterns of use. However, the NPS conservation mandate suggests it would more likely err on the side of preservation which, in turn, would sustain viability of subsistence resources. Therefore, ANILCA may have created a happy combination. Cooperation between subsistence users and the NPS combines the strengths of both; local users define subsistence regulation based on their intensive experience, assisted and monitored by NPS extensive expertise.

Blending this partnership with the state of Alaska, however, is problematic. Alaska was provided the opportunity to exercise states' traditional prerogative to manage wildlife resources and supplant NPS administration if it would comply with the general subsistence policy of

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<sup>37</sup> ANILCA § 808.

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<sup>38</sup> Alaska Native subsistence users have no doubt of their ability to manage subsistence resources for sustainable use. Berger, *Village Journey*, pp. 71, 161-5.

ANILCA. However, the state of Alaska is ambivalent about ANILCA subsistence access. Many urban residents resent any priority afforded the rural 15% of the state's population; the Alaska Constitution declares equal access to fish and wildlife for all state residents, urban or rural. Furthermore, while Title VIII of ANILCA was intended to protect subsistence lifestyles, the state's regulations have been modeled on sport hunting and initially failed to acknowledge customary and traditional patterns of subsistence which vary by culture and region.<sup>39</sup> After ten years, the state of Alaska has yet to adequately reconcile ANILCA and its constitution to devise a comprehensive, legal, and durable subsistence program.<sup>40</sup>

Assuming the state of Alaska resolves this dilemma, the NPS will continue to work cooperatively with subsistence users and the state as a technical resource, cooperative administrator, and monitor of ANILCA compliance. The initiative for implementing subsistence policy lies with regional advisory councils, subsistence

resource commissions, and the state of Alaska. The burden of proof lies with the NPS if it disagrees with that implementation and decides to overrule recommendations. Unless the agency's management partners fail to fulfill the ANILCA subsistence mandate, the NPS is relegated to a passive role in managing subsistence use of national park areas in Alaska. Congress has, however, reserved and delegated limited discretionary authority over specific aspects of subsistence access to the NPS.

#### *Closure Authority*

NPS general regulations state national park area superintendents may close an area to an activity for "maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, implementation of management responsibilities, equitable allocation and use of facilities, or the avoidance of conflict among visitor use activities ...."<sup>41</sup> However, ANILCA states that preservation of subsistence opportunity is a fundamental purpose of designated Alaska national park areas.<sup>42</sup> Therefore, while ANILCA park area superintendents must consider the effect on subsistence use when exercising closure authority, subsistence access may not be closed under these general regulations; closures must serve and be compatible with the purposes for which a national park area was established, and closure of subsistence access would contradict a primary

<sup>39</sup> Atkinson, "Striking the Balance," p. 428, 434; Letters to the Editor, "No On Subsistence," *The Anchorage Times*, Friday, 22 December 1989, p. B-5.

<sup>40</sup> The Alaska Supreme Court recently found Alaska subsistence regulations in compliance with ANILCA to be unconstitutional. "Three of four Supreme Court Justices agree with Jacobus when she argued the state law was discriminatory against urban residents who hunt and fish for subsistence reasons. It doesn't matter what their income is or whether they have access to a grocery store, she said. The constitution recognizes equal rights for all Alaskans." Joe Hunt, "Court tosses out subsistence laws," *The Anchorage Times*, Saturday Morning, 23 December 1989, p. A-1, 8.

<sup>41</sup> 36 C.F.R. § 1.5.

<sup>42</sup> ANILCA §§ 101(c), 1314(c)(1).

ANILCA park area purpose — subsistence opportunity.<sup>43</sup>

ANILCA does, however, provide alternative authority in the event an Alaska national park area must be closed to subsistence access. Section 816(b) authorizes the NPS to close any Alaska national park area temporarily to subsistence uses of particular plant or animal populations if necessary for reasons of public health and safety, administration, or management for viable populations of plants, fish, or wildlife. Any such closure must be preceded by consultation with the state of Alaska and proper notice and comment procedures unless an emergency exists. Justification of emergency closures must be published immediately and emergency closures may not be extended beyond sixty days without instituting non-emergency procedures.<sup>44</sup> Legislative history indicates the NPS "remains empowered to authorize a more restrictive hunting season than is otherwise permitted by State law. However ... subsistence uses ... may be prohibited on public lands, or on any portion thereof, *only temporarily* ...."<sup>45</sup> [emphasis added]

Therefore, NPS discretion to close areas to subsistence access is derived from ANILCA and limited in two manners. First, section 816(b) closure authority is not intended to allow blanket prohibitions; closures should address specific populations of plants, fish, or wildlife. Second, closures may not be permanent, but "only so long

as reasonably necessary to achieve the purposes of the closure."<sup>46</sup> However, while Congress believed that "recognition of the importance of subsistence activities to most rural residents requires that this authority be utilized narrowly and with consistent restraint," it also stated it did not intend "that actual depletion of a population or an emergency exist before a closure under [section 816(b)] may be justified;"<sup>47</sup> the NPS may devise technical standards to monitor subsistence management and weigh the need for preventative closures to protect fish and wildlife resources.

#### *Management Standards*

NPS regulations prohibit levels of subsistence use in Alaska national preserves "inconsistent with the conservation of *healthy populations* ..." of fish and wildlife.<sup>48</sup> [emphasis added] Congress intended "healthy" to mean

the maintenance of fish and wildlife resources and their habitat in a condition which assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystems, including recognition that local rural residents engaged in subsistence uses may be a natural part of that ecosystem; minimizes the likelihood of irreversible or long-term adverse effects upon such populations and species; and ensures maximum practicable diversity of options for the future. The greater the ignorance of the resource parameters, particularly of the ability and capacity of a population or species to

<sup>43</sup> 36 C.F.R. § 13.30(b).

<sup>44</sup> ANILCA § 816(b).

<sup>45</sup> S. Rept. 96-413, pp. 277-8.

<sup>46</sup> 36 C.F.R. §§ 13.49(c), 13.49(a).

<sup>47</sup> S. Rept. 96-413, pp. 277-8; H. Rept. 96-97, pt. 1, p. 289.

<sup>48</sup> 36 C.F.R. § 13.40(f).

respond to changes in its ecosystem, the greater the safety factor must be.<sup>49</sup>

Subsistence access to national parks and monuments must not be "inconsistent with the conservation of *healthy and natural* populations of fish and wildlife."<sup>50</sup> [emphasis added] Congress felt the phrase "healthy and natural" recognized

that the management policies of those units may entail methods of resource and habitat protection different from methods appropriate for other types of conservation system units.<sup>51</sup>

Neither Congress nor the NPS have further defined the "healthy" or "healthy and natural" standards. ANILCA park area GMPs indicate only one subsistence closure has been proposed, and although these standards reserve NPS discretion, the NPS currently yields management of subsistence resources in ANILCA park areas to the state of Alaska.<sup>52</sup>

#### *Growth Management*

Shifting human populations affect environmental balance as well as shifting populations of fish and wildlife. Originally, the House Committee on Interior and Insular Affairs

<sup>49</sup> S. Rept. 96-413, p. 233.

<sup>50</sup> 36 C.F.R. § 13.40(f).

<sup>51</sup> S. Rept. 96-413, p. 235.

<sup>52</sup> "Dall sheep, which moved into the Igichuk Hills in the southern portion of [Cape Krusenstern National] Monument today number 14. The National Park Service considers this herd too small and isolated to be subject to any harvest pressure and remain viable. Thus it is recommended that the Alaska Board of Fish & Game ... close the Igichuk Hills in the monument to hunting either sex of Dall sheep" *Cape Krusenstern: GMP*, p. 80.

intended not to allow significant expansion of subsistence access over 1968-78 levels.<sup>53</sup> This language was not, however, included in the final draft of ANILCA. At least four national park areas in Alaska anticipate levels of subsistence use to parallel regional population growth. Subsistence use of ANILCA park areas will also increase if, as expected, Alaska Natives lose subsistence access to Native corporation lands through bankruptcy and stock sales.<sup>54</sup> If resources are threatened by growth of subsistence use, the NPS may restrict access under the subsistence priority system outlined in section 804. The three criteria for prioritized access are: customary and direct dependence on subsistence resources; local residency; and availability of alternative resources.<sup>55</sup>

The NPS may also redefine the term "local rural resident" if the nature of resident zone communities changes radically and threatens degradation of subsistence resources. Congress stated that "the resident zone approach to subsistence hunting is consistent with the protection of park and monument values only so long as such zones remain composed primarily of concentrations of residents with an established or historical pattern of subsistence uses of wildlife within the units." If the composition of residents alters substantially in the future, "the Committee expects, and section 203 and Title VIII [of ANILCA] so authorize, the NPS to protect unit

<sup>53</sup> H. Rept. 96-97, pt. 1, p. 288.

<sup>54</sup> Berger, *Village Journey*, pp. 34, 40, 45, 111.

<sup>55</sup> ANILCA § 804; 36 C.F.R. § 13.40(d).

values by determining eligibility of residents of communities within previously designated resident zones for subsistence hunting purposes through implementation of an individual permit system."<sup>56</sup> If resident zone communities grow by immigration of non-traditional subsistence users or become urban areas, the NPS is authorized to replace community resident zone access with individual subsistence permits to control subsistence use of ANILCA park areas.

#### SUBSISTENCE ACCESS: CONCLUSIONS

There is no inherent conflict between the subsistence mandate of ANILCA and the conservation mandate of the Organic Act. The Leopold Committee report of 1963 suggested "[a] national park should represent a vignette of primitive America," and the goal of each national park should be maintenance or restoration of "the condition that prevailed when the area was first visited by the white man."<sup>57</sup> Humans subsisted in Alaska long before invasion by European cultures, and subsistence access may, in fact, be necessary to preserve Alaska national park areas; prohibition of subsistence access would remove a significant environmental factor from those areas traditionally used. Therefore, ANILCA would contradict the Organic Act only if it failed to provide for

management of subsistence use of Alaska national park areas within an established environmental balance.

NPS authority and discretion to manage subsistence access to Alaska national park areas is limited. However, although definitions of "subsistence" and "local rural" create uncertainties, and the agency may only close areas to subsistence access on a temporary basis, ANILCA does provide the NPS with management tools. Subsistence users and the state of Alaska direct policy implementation, but the NPS retains veto power to assure compliance with the ANILCA subsistence mandate. The NPS is also authorized to set technical standards to monitor subsistence access, and the agency may regulate growth of subsistence use by initiating a system of prioritized use or converting resident zone community access to individual subsistence permits.

Therefore, although ANILCA modifies traditional NPS access policy, it does not necessarily violate the Organic Act. The NPS does not have absolute control of subsistence access to national park areas in Alaska, but it has sufficient oversight to ensure compatibility with ANILCA. However, long-term conservation of scenic, natural, historic, wildlife, and subsistence resources for half the acreage in the National Park System will require resolution of remaining uncertainties, development of adequate standards, and effective guidance of cooperative subsistence management in the national park areas of Alaska.

<sup>56</sup> S. Rept. 96-413, p. 170.

<sup>57</sup> U.S., Department of the Interior, Advisory Board on Wildlife Management, *Wildlife Management in the National Parks*, by A. S. Leopold, et al. (March 4, 1963), p. 4. As cited by Runte, *National Parks*, p. 198-9.

## CHAPTER IV

## NATURAL RESOURCE ACCESS

In 1979, the Alaska Federal-State Land Use Planning Commission forecast the effects of proposed national park areas in Alaska: NPS areas would limit sport fishing and hunting to some degree; national park areas would have serious effects on local mining economies but no state-wide impact since ample federal land would remain accessible; and ANILCA park areas would help the state's economy by protecting industrial fishing resources and creating new travel destinations for tourists.<sup>1</sup> The ensuing balance between resource use and preservation rendered by ANILCA included 103 million acres of conservation units. The price paid by preservation interests to off-set the negative socio-economic effects of those areas included potential development of oil and gas resources in national wildlife refuges, adjustment of national park boundaries to exclude mineral resources, and liberal application of the national preserve designation to permit sport hunting. When the dust settled Congress had provided access to 64% of the mineral potential, 95% of the oil and gas potential, and 91% of sport hunting country in Alaska.<sup>2</sup> The resource access provided by ANILCA directly affected NPS management in Alaska and effectively modified traditional NPS policy for plant, wildlife, and mineral access.

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<sup>1</sup> Federal-State Land Use Planning Commission, *Alaska Society and Alaska's Land: The Social and Economic Effects of the Designation of Certain Federal Lands in Alaska to National Park or National Monument, Wildlife Refuge, Wild and Scenic River, and National Forest Status*, (Anchorage: Federal-State Land Use Planning Commission, June 1979), pp. 6-7, 10.

<sup>2</sup> Theodore Swem and Robert Cahn, "The Politics of Parks in Alaska," *AMBIO*, vol. XII, no. 1 (1983), pp. 15, 17.

### PLANT RESOURCES

The Organic Act authorizes the Secretary of the Interior to

sell or dispose of timber in those cases where in his judgement the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any ... park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or other reservations.<sup>3</sup>

Congress allowed removal of timber or plants only if necessary to conserve park area resources. Therefore, since no provision had been made for harvesting plant resources, NPS general regulations prohibit disturbing plants or gathering wood in national park areas.<sup>4</sup> ANILCA, however, provided several exceptions to traditional NPS management of plant resource access in Alaska national park areas.

Timber is a renewable resource, and as such, it falls within the definition of subsistence use discussed in Chapter III. Generally, timber access in Alaska national park areas parallels standard NPS policy. Noncommercial subsistence users, however, may cut standing trees less than three inches in diameter, and superintendents may issue permits to cut larger trees for cabin logs or other

subsistence uses compatible with the purposes of an area.<sup>5</sup> Further restrictions have been enacted or suggested in several ANILCA park areas: Yukon-Charley Rivers discourages cutting trees under three inches in diameter within view of the Charley River;<sup>6</sup> while Kobuk Valley permits removal of timber cut for subsistence uses, Cape Krusenstern and Noatak require all timber cut to be used within those areas;<sup>7</sup> Gates of the Arctic permits cutting of trees over three inches in diameter only if no alternative timber resource exists outside the unit.<sup>8</sup>

Subsistence access is also mandated for other plant resources. Fruits, berries, mushrooms, and dead or fallen wood may be gathered for noncommercial use without permit.<sup>9</sup> This mandate does not extend subsistence access beyond general access to the same resources; gathering of natural plant food items, driftwood, ceremonial plant materials, and dead or downed wood for campfires is generally permitted in all national park areas created by ANILCA.<sup>10</sup>

NPS regulations state that herding and grazing in a national park area are prohibited unless permitted by federal statutory law.<sup>11</sup> ANILCA provides one statutory exception to this general

<sup>3</sup> National Park Service Act, 16 U.S.C.A. § 3.

<sup>4</sup> Superintendents may, however, designate areas open to gathering fallen deadwood for campfire use in the area, or fruit, nut, or berries for personal consumption. 36 C.F.R. § 2.1.

<sup>5</sup> 36 C.F.R. § 13.49.

<sup>6</sup> *Yukon-Charley River: GMP*, p. 55.

<sup>7</sup> *Kobuk Valley: GMP*, p. 86; *Cape Krusenstern: GMP*, p. 102; *Noatak: GMP*, p. 105.

<sup>8</sup> *Gates of the Arctic: GMP*, p. 105.

<sup>9</sup> 36 C.F.R. § 13.49(b).

<sup>10</sup> 36 C.F.R. § 13.20.

<sup>11</sup> 36 C.F.R. § 2.60(a)(1).

TABLE 4. Summary of ANILCA Provisions and NPS Regulations for Natural Resource Access to Alaska National Park Areas

ANILCA Directives to the Secretary of the Interior	ANILCA Qualifications on Resource Access	Related NPS Regulations From 36 CFR
		§13.49(a) subsistence users may cut standing timber under 3" in diameter in areas open to subsistence.
		§§13.49(b), 13.20(b,d) subsistence users may collect renewable resources for personal, noncommercial use in areas open to subsistence.
<p>§201(2)</p> <ul style="list-style-type: none"> <li>• Continue reindeer grazing, including necessary facilities and equipment, in Bering Land Bridge.</li> </ul>	<p>§201(2)</p> <ul style="list-style-type: none"> <li>• In areas subject to grazing permit before Jan. 1, 1976.</li> <li>• In accordance with sound range management practices.</li> </ul>	
<p>§815(4)</p> <ul style="list-style-type: none"> <li>• Shall not construe Title VIII to modify or repeal any federal law on conservation of fish &amp; wildlife.</li> </ul>		
<p>§815(3)</p> <ul style="list-style-type: none"> <li>• Shall not construe Title VIII to restrict non-subsistence taking of fish and wildlife on preserves.</li> </ul>	<p>§815(3)</p> <ul style="list-style-type: none"> <li>• Unless necessary for conservation of healthy populations of fish and wildlife, pursuant to §816, to continue subsistence uses, or pursuant to other law.</li> </ul>	
<p>§§816(a), 1314(c)(1)</p> <ul style="list-style-type: none"> <li>• Shall close all parks &amp; monuments in Alaska to taking wildlife.</li> </ul>	<p>§§816(a), 1314(c)(1)</p> <ul style="list-style-type: none"> <li>• Except where subsistence uses are permitted by this act.</li> </ul>	
<p>§§816(a), 1314(c)(2)</p> <ul style="list-style-type: none"> <li>• Shall permit sport fishing in Alaska parks &amp; monuments.</li> </ul>	<p>§§816(a), 1314(c)(2)</p> <ul style="list-style-type: none"> <li>• Under applicable state and federal law.</li> </ul>	§13.21(b) state and federal fishing regulations adopted.

(continued)

TABLE 4. (continued)

ANILCA Directives to the Secretary of the Interior	ANILCA Qualifications for Resource Access	Related NPS Regulations From 36 CFR
<p>§§203, 1313</p> <ul style="list-style-type: none"> <li>• Shall permit fishing, hunting, and trapping in preserves.</li> </ul>	<p>§§203, 1313</p> <ul style="list-style-type: none"> <li>• Under applicable state and federal law.</li> </ul>	<p>§13.21(b) state and federal fishing, hunting, and trapping regulations adopted.</p> <p>§13.21(d) may not hunt or trap as an employee.</p>
<p>§1313</p> <ul style="list-style-type: none"> <li>• May establish times and places closed to hunting, fishing, trapping, or entry.</li> </ul>	<p>§1313</p> <ul style="list-style-type: none"> <li>• For reasons of public safety, administration, floral &amp; faunal protection, or public use &amp; enjoyment.</li> <li>• If consistent with §816(b) which defines authority to close access for subsistence uses.</li> </ul>	<p>§13.21(e) superintendent may prohibit or restrict taking of fish &amp; wildlife.</p> <p>§13.30(a,b,g) superintendent may close or open an area or restrict an activity temporarily or permanently for purposes of public health &amp; safety, resource protection, and subsistence uses.</p>
<p>§206</p> <ul style="list-style-type: none"> <li>• All NPS units established or expanded by ANILCA are withdrawn from appropriation or disposal, including mineral entry or leasing, or future selections by the state of Alaska or native corporations.</li> </ul>	<p>§206</p> <ul style="list-style-type: none"> <li>• Subject to valid existing rights.</li> <li>• Except as explicitly provided otherwise in ANILCA.</li> </ul>	<p>§13.20(c) recreational rock collecting permitted except for certain minerals, and gold panning allowed if it causes no surface disturbance.</p>

prohibition in Bering Land Bridge; continued reindeer grazing is permitted pursuant to acknowledged range management practices to the extent existing on January 1, 1976.<sup>12</sup> Although atypical of NPS policy, Congress did not intend to provide grazing precedent for other areas where grazing did not already occur.<sup>13</sup> Congress also delegated authority to the NPS to regulate reindeer herding in Bering Land Bridge "so that the purposes of the area are not degraded and that there is no permanent or substantial harm to the area."<sup>14</sup>

#### FISH AND WILDLIFE RESOURCES

ANILCA provisions for taking fish and wildlife modified NPS natural resource policy in Alaska to a greater extent. Traditionally, sport fishing is allowed in national park areas, but hunting and trapping are prohibited.<sup>15</sup> Subsistence access provides an exception to this standard in most Alaska national park areas, but non-subsistence access to fish and wildlife is neither permitted nor prohibited by ANILCA subsistence provisions; Title VIII did not modify or repeal any federal law concerning the conservation of fish and wildlife, or restrict non-subsistence taking of fish and wildlife except as

necessary to sustain viable subsistence resources.<sup>16</sup>

Under ANILCA, national parks and monuments in Alaska are closed to non-subsistence taking of fish and wildlife. Sport fishing is permitted in accordance with applicable state regulations.<sup>17</sup> The only notable exception to standard NPS fish and wildlife policy in Alaska national parks and monuments is commercial fishing in Glacier Bay. This access, however, is precluded in wilderness waters, limited to existing fisheries, and prohibited from taking fish species used by humpback whales.<sup>18</sup>

National preserves in Alaska, like most ANILCA parks and monuments, are open to subsistence hunting, trapping, and fishing as well as sport fishing. There is a significant difference, however. Preserves are also open to sport hunting and general trapping pursuant to ANILCA and applicable state and federal regulations.<sup>19</sup>

Legislative history discloses Congressional intent to include sport hunting as one of the "traditional or customary activities" allowed access to ANILCA park areas by section 1110 of the Act.<sup>20</sup> Legislative history also indicates Congress

<sup>12</sup> ANILCA § 201(2).

<sup>13</sup> S. Rept. 96-413, p. 142; H. Rept. 96-96, pt. 1, p. 150-1.

<sup>14</sup> S. Rept. 96-413, p. 142.

<sup>15</sup> 36 C.F.R. §§ 2.2, 2.3.

<sup>16</sup> ANILCA § 815(3-4).

<sup>17</sup> ANILCA §§ 816(a), 1314(c)(1-2); 36 C.F.R. § 13.21(b).

<sup>18</sup> 36 C.F.R. § 13.65(b)(5); *Glacier Bay: GMP*, pp. 51, 53.

<sup>19</sup> ANILCA §§ 203, 1313, 1314.

<sup>20</sup> S. Rept. 96-413, pp. 247-8. ANILCA § 1110 is discussed in Chapters V and VI.

considered opportunity for independent and guided sport hunting one of the purposes of Alaska national preserves.<sup>21</sup> The only evident restriction intended by Congress and adopted by the NPS concerns the level of subsistence and general trapping; Congress did "not intend that the preserves would be a place where more extensive forms of commercial trapping would be allowed. Where, for example, the trapping itself becomes a business with employees paid to support the trapping operation."<sup>22</sup>

Congress first applied the category of "national preserve" in 1979 with establishment of Big Thicket National Preserve in southeastern Texas and Big Cypress National Preserve in southern Florida. Congress permitted hunting in both of those areas. Therefore, when Congress considered addition of potential sport hunting lands to the National Park System and confronted the dilemma between exclusion of sport hunting and the precedent of hunting in NPS areas, preserves offered a compromise. Establishment of extensive national preserves in Alaska allowed inclusion of areas in the National Park System, access for sport hunting, and continuity of the traditional non-hunting policy for national parks and monuments.<sup>23</sup>

ANILCA authorized the NPS to prohibit or restrict non-subsistence taking of fish or wildlife

and close any national park area to non-subsistence taking of fish and wildlife on a temporary or permanent basis if necessary to protect public health and safety, area resources, administration, public use and enjoyment, or viability of subsistence uses.<sup>24</sup> NPS regulations provide three categories of closure under this authority: emergency closures relating to fish and wildlife must be accompanied by notice and hearing procedures, may last up to thirty days, and may not be extended; temporary closures must be preceded by notice and comment procedures, may last up to twelve months, and may not be extended; permanent closures must be published as rulemaking in the *Federal Register* and follow more formal notice and comment procedures.<sup>25</sup>

ANILCA therefore provides NPS discretion over access to fish and wildlife resources and, technically, expands the NPS management role without altering its traditional policy. However, use of the national preserve category in Alaska did effectively change NPS fish and wildlife policy; of the 43.6 million acres added to the National Park Service by ANILCA, nineteen million acres, or over 40%, are in national preserves and open to sport hunting.<sup>26</sup> Congressional intent to support

<sup>21</sup> S. Rept. 96-413, p. 307; H. Rept. 96-97, pt. 1, p. 147; H. Rept. 96-97, pt. 2, p. 208.

<sup>22</sup> S. Rept. 96-413, p. 307; H. Rept. 96-97, pt. 2, pp. 192, 208; *Wrangell-St. Elias: GMP*, p. 211.

<sup>23</sup> Williss, "Do Things Right the First Time," pp. 166-7.

<sup>24</sup> ANILCA §§ 816(b), 1313; 36 C.F.R. § 13.30(b).

<sup>25</sup> 36 C.F.R. § 13.30(c-e).

<sup>26</sup> See Table 3 for ANILCA acreages. Even this balance was unacceptable for Alaska sport hunters. In 1983, Senator Stevens of Alaska introduced Senate Bill 49 to convert twelve million acres in Alaska national parks and monuments to national preserve status. National park proponents vehemently fought the bill as bad precedent, and it was eventually

sport hunting is revealed in ANILCA park area GMP resource maps; while a large proportion of Alaska national parks and monuments are composed of lifeless rock and ice, national preserves are consistently composed of prime wildlife habitat.<sup>27</sup> Whereas the NPS had previously allowed hunting only under exceptional circumstances, when doubled by ANILCA, over 20% of the acreage in the National Park System became accessible for sport hunting.

#### MINERAL RESOURCES

Although mining in national park areas has never been commonplace, it was only with enactment of the Mining In Parks Act of 1976 that Congress finally foreclosed all hardrock mineral development in the National Park System.<sup>28</sup> Oil, gas, and other mineral leasing, had long been prohibited in national park areas by the Mineral Lands Leasing Act of 1920.<sup>29</sup> Therefore, as of 1976, mineral exploration, prospecting, location, mining, and leasing have been generally prohibited

by NPS regulations.<sup>30</sup> In cases of existing mining claims or inholdings of gas and oil rights, NPS regulations require operations to minimize environmental damage.<sup>31</sup>

ANILCA mineral policy for Alaska national park areas is consistent with the general NPS prohibition and regulation of mineral access. National park areas created by the Act were withdrawn from all forms of appropriation including location, entry, and patent of mining claims, or mineral leasing. This withdrawal, however, was subject to valid existing claims.<sup>32</sup>

Several ANILCA park areas included large numbers of mineral claims. Although relatively few claims have been active, many unpatented claims are invalid, and several patented claims are contested, the impact of active claims and the potential for expanded mining activity is high. The four areas with the most extensive mineral claims are:

- Wrangell-St. Elias — 500 patented and 600 unpatented claims;<sup>33</sup>
- Yukon-Charley Rivers — 15 patented and 165 unpatented claims;<sup>34</sup>
- Denali — 17 patented and 420 unpatented claims;<sup>35</sup>

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retired to a pigeon hole. Gaylord Nelson and Ted Stevens, "Hunting in Alaska's Parklands," *American Forests*, vol. 89, no. 10, pp. 10-11, 29, 56-7; Ruth Norris, "Alaska: Hunters Aim Their Big Guns at America's New National Parks," *Audubon*, vol. 85, no. 4 (July 1983), pp. 128-135; David M. Rosenberg, *The Concept of National Preserves in Senate Bill 49: A Dangerous Precedent?* 21 *Harvard Journal On Legislation* 549-557 (Spring 1984).

<sup>27</sup> See, for example: *Wrangell-St. Elias: GMP*, p. 125.

<sup>28</sup> Mining In Parks Act, 16 U.S.C. § 1901.

<sup>29</sup> Mineral Lands Leasing Act, 30 U.S.C. § 181.

<sup>30</sup> 36 C.F.R. § 5.14.

<sup>31</sup> 36 C.F.R. Part 9. For a discussion of mineral access to national park areas, see: John L. Watson, *Mineral and Oil and Gas Development in Wilderness Areas and Other Specially Managed Federal Lands in the U.S.*, 29 *Rocky Mountain Mineral Law Institute, Proceedings Annual* 37-110 (1983); in particular, pp. 80-1, 101.

<sup>32</sup> ANILCA § 206.

<sup>33</sup> *Wrangell-St. Elias: GMP*, pp. 69, 73.

<sup>34</sup> *Yukon-Charley Rivers: Draft EIS*, p. 51.

<sup>35</sup> *Denali: GMP*, pp. 80-1.

• Gates of the Arctic — 250 unpatented claims.<sup>36</sup>  
Four other ANILCA park areas report less extensive mineral claims:

- Bering Land Bridge — 79 unpatented claims;<sup>37</sup>
- Lake Clark — 1 patented and 32 unpatented claims;<sup>38</sup>
- Glacier Bay — 20 patented and 1 unpatented claims;<sup>39</sup>
- Kenai Fjords — 8 unpatented claims.<sup>40</sup>

Cape Krusenstern,<sup>41</sup> Kobuk Valley,<sup>42</sup> and Aniakchak include no valid mining claims, although approximately 50% of Aniakchak National Preserve subsurface oil and gas rights have been selected by Native Corporations. Although much of that area may eventually be selected, studies do not indicate much mineral potential.<sup>43</sup>

NPS general mining regulations were promulgated under very different circumstances than those faced by ANILCA park areas. A focus on prevention of new mineral claims does not fit the Alaska reality of existing claims. In national park areas like Wrangell-St. Elias, mining claims could impair lands which are needed to accomplish the purposes of the area, and NPS mining regulations are expected to be inadequate for resolution of resulting land-use conflict.<sup>44</sup> Furthermore, although NPS land is closed to

mineral entry, state lands are not. Since submerged lands beneath navigable water are held by the state of Alaska, mining entry is possible in many ANILCA park areas; two such claims exist under the Yukon River in Yukon-Charley Rivers.<sup>45</sup> The NPS has recommended the state close submerged lands in Alaska national park areas to mineral entry,<sup>46</sup> and two park areas have stated policy prohibiting access for facilities to support submerged land mining.<sup>47</sup>

NPS discretion to restrict mining activity, however, is limited: the agency may apply strict discovery standards to prevent questionable patent of claims; it may purchase mineral rights to valid unpatented and patented claims; and it may carefully enforce existing statutes and regulations to maximize control of mining.<sup>48</sup> Two recent court opinions suggest the NPS may have little choice on this last alternative.

In *Sierra Club v. Penfold*,<sup>49</sup> the Ninth Circuit Court of Appeals held the cumulative effects of multiple mining operations must be analyzed pursuant to the National Environmental Policy Act

<sup>36</sup> *Gates of the Arctic*: GMP, pp. 110, 176.

<sup>37</sup> *Bering Land Bridge*: GMP, p. 82.

<sup>38</sup> *Lake Clark*: GMP, p. 37.

<sup>39</sup> *Glacier Bay*: GMP, p. 62.

<sup>40</sup> *Kenai Fjords: Land Protection Plan*, p. 13.

<sup>41</sup> *Cape Krusenstern*: GMP, p. 60.

<sup>42</sup> *Kobuk Valley*: GMP, pp. 18, 55, 66.

<sup>43</sup> *Aniakchak*: GMP, pp. 54, 93.

<sup>44</sup> *Wrangell-St. Elias*: GMP, p. 31.

<sup>45</sup> *Yukon-Charley Rivers*: GMP, p. 79.

<sup>46</sup> *Katmai*: GMP, p. 53; *Kobuk Valley*: GMP, p. 65; *Noatak*: GMP, p. 80; *Wrangell-St. Elias*: GMP, pp. 30, 43; *Yukon-Charley Rivers*: GMP, p. 55.

<sup>47</sup> *Gates of the Arctic*: GMP, pp. 110, 176; *Yukon-Charley Rivers*: GMP, p. 55.

<sup>48</sup> Jerry R. Fish, *Preservation and Strategic Mineral Development in Alaska: Congress Writes a New Equation*, 12 *Environmental Law* 137-196; in particular, pp. 165-6.

<sup>49</sup> *Sierra Club v. Penfold*, 857 F. 2d 1307; Court of Appeals, 9th Circuit, 1988. See brief of case in Appendix C.

of 1969 (NEPA)<sup>50</sup> and section 810(a) of ANILCA. Section 810(a) mandates,

[i]n determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands ... [the federal agency] having primary jurisdiction over such lands ... shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs .... No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until ... [the agency] determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.<sup>51</sup>

Although this case involved the Bureau of Land Management, the court's decision applies equally to the NPS; federal agencies must analyze unpatented mining activity on public land, consider the cumulative effect of mining on the environment and subsistence opportunity, and require reasonable steps to mitigate negative effects.

Furthermore, federal agencies do not have the discretion to neglect existing regulations. In *Northern Alaska Environmental Center v. Hodel*,<sup>52</sup> environmentalists accused the NPS of

not enforcing its mining regulations. The Ninth Circuit Court of Appeals held for the plaintiffs and enjoined mining in Wrangell-St. Elias, Yukon-Charley Rivers, and Denali until the NPS could complete adequate EIS reports pursuant to NEPA, and review mining plans of operation for compliance with NPS regulations. Although miners intervened and appealed the case (without success), the NPS voluntarily committed itself to produce EIS and minerals management plans for the affected national park areas. Although valid existing mining claims may legally conduct operations, the NPS is authorized and required to regulate both individual mines and the cumulative effect of mining for preservation of national park resources in Alaska.

#### NATURAL RESOURCE ACCESS: CONCLUSIONS

ANILCA did not overtly alter NPS policy on plant, wildlife, and mineral resource access. In general, plant resources may not be harvested, parks and monuments are closed to the taking of wildlife, and mining is prohibited. In practice, however, ANILCA provided substantial exceptions that effectively modified traditional NPS management of natural resource access.

NPS management of plant resources was not radically affected. Timber use is limited to subsistence users and restricted. Access to plant resources by subsistence and non-subsistence users

<sup>50</sup> National Environmental Policy Act, 42 U.S.C.A. § 4321.

<sup>51</sup> 16 U.S.C. 3120.

<sup>52</sup> *Northern Alaska Environmental Center v. Hodel*, 803 F. 2d 466; Court of Appeals, 9th

Circuit, 1986. See brief of case in Appendix C.

is limited to personal use and varies little from typical NPS regulation of plant use. Although ANILCA grazing provisions for Bering Land Bridge depart from standard NPS policy, they represent an established land use and are limited to that area.<sup>53</sup>

NPS management of wildlife resources, however, was greatly affected by ANILCA. National parks and monuments in Alaska are closed to the taking of wildlife and open to sport fishing like most national park areas in other states. Alaska national preserves, however, are open to sport hunting and represent over one fifth the acreage in the entire National Park System. Despite nominal adherence to traditional NPS policy, creation of extensive national preserves to permit access for sport hunting represents an extreme modification of NPS wildlife management.

NPS mineral management was also unaffected by the letter of ANILCA but altered in fact by existing Alaska conditions. ANILCA park areas are closed to mining and mineral entry. However, existing valid mineral claims provide an extensive exception; over 2,000 mining claims exist in eight of the ANILCA park areas. Currently, little mining activity occurs on most of these claims. However, it takes but little mining activity to create a large impact on surrounding resources, and

the potential for increased mining activity in Alaska national park areas is high.

ANILCA did not amend the NPS mandate; the purpose of the NPS remains preservation of scenic, natural, historic, wildlife, and recreation resources. Under ANILCA, however, the agency must fulfill that role in Alaska and simultaneously manage non-traditional grazing, sport hunting, and mining access. If ANILCA did not alter the mission of the NPS, it did expand the agency's role and complicate its management environment.

Changes in NPS resource policy in Alaska are the result of the compromise between development and preservation interests in ANILCA. However, the NPS retains substantial authority and discretion under the Act. Subsistence timber use and reindeer grazing may not be prohibited, but the NPS may regulate such access to prevent degradation of national park area resources. The NPS may restrict access or create emergency, temporary, or permanent closures to control the impact of plant gathering and non-subsistence taking of fish and wildlife. Mining on valid existing claims may not be prohibited, but the courts have declared that the NPS must regulate mining to minimize negative effects in national park areas. Nonetheless, if Alaska national park areas are to be conserved in perpetuity, the NPS must adjust to this modified role and actively implement agency authority to balance the resource access exceptions of ANILCA with traditional preservation policy.

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<sup>53</sup> An attempt to prohibit reindeer herding by Euro-Americans in 1980 would have been ironic; Euro-Americans were responsible for the introduction of reindeer herding to the area in 1891. Dr. Sheldon Jackson hoped to provide a self-sufficient industry for Natives. Naske and Slotnick, *Alaska*, p. 75.

## CHAPTER V

### INCIDENTAL ACCESS

NPS general regulations prohibit construction of buildings, boat docks, roads, trails, communication lines, or power lines in national park areas unless such facilities are necessary to fulfill the purposes of an area.<sup>1</sup> ANILCA, however, qualified this blanket prohibition and provided for exceptions typically not permitted in, and potentially inconsistent with the purposes of national park areas in Alaska. These exceptions address individual rights derived from pre-existing use and private ownership, and anticipate future social needs for expanded public utility systems within a resource-based state economy. ANILCA provisions for access incidental to the primary purposes of Alaska national park areas address: technical support facilities, cabin occupancy, temporary facilities, inholding access, and transportation and utility systems. Each category of incidental use represents a limitation of NPS authority to manage access to national park areas in Alaska. Table 5 presents a summary of pertinent incidental use provisions in ANILCA.

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<sup>1</sup> 36 C.F.R. § 5.7.

### TECHNICAL SUPPORT FACILITIES

ANILCA provides access to Alaska national park areas for continued maintenance and operation of existing navigation aids, communication stations, meteorological monitors, fishery stations, and defense installations. The Act also permits federal agencies to site new facilities in ANILCA park areas in accordance with NPS recommendations to minimize adverse impact.<sup>2</sup> Access for technical support facilities is allowed in all Alaska national park areas notwithstanding the Wilderness Act prohibition of structures and installations in designated wilderness.<sup>3</sup> Only three ANILCA park area GMPs mention existing technical support facilities: Cape Krusenstern includes one Coast Guard navigation aid;<sup>4</sup> Glacier Bay inventoried three lighthouses;<sup>5</sup> and Katmai proposed removal of an ineffective fish ladder.<sup>6</sup>

The NPS has little control of either existing or future technical support facilities: the NPS must provide access to existing facilities; it has no authority for either removal of an inconsistent existing facility or prevention of adverse effects from existing facilities; and, although the NPS may cooperatively set terms and conditions to prevent undue negative impact from new facilities, it has no authority to prohibit new facilities.

Public interests obviously include continued benefits from technical support facilities as well as preservation of national park areas. Congress, however, has provided a formula which restricts NPS discretion and favors an otherwise incidental use of national park areas in Alaska.

### CABIN OCCUPANCY

Both Congress and the NPS have invested considerable time and effort in an attempt to resolve the issue of cabin use in Alaska federal reservations. Section 1303, "Use of Cabins and Other Sites of Occupancy on Conservation System Units," fills three pages of the statute, and related NPS regulations cover seven pages of the Code of Federal Regulations. Paragraph (e) of section 13.17 alone is over four pages long.<sup>7</sup> This complicated policy for cabin access can be analyzed in three parts: general policy, specific exceptions, and occupancy rights.

#### *General Policy*

Except as discussed below, cabins in Alaska national park areas may be used only for government business or emergency shelter.<sup>8</sup> However, cabins outside of designated wilderness areas may be maintained for public use at agency discretion. Cabins in wilderness which were open

<sup>2</sup> ANILCA § 1310(a-b).  
<sup>3</sup> Wilderness Act, 16 U.S.C.A. § 1133(c).  
<sup>4</sup> *Cape Krusenstern: GMP*, pp. 60, 109.  
<sup>5</sup> *Glacier Bay: GMP*, p. 63.  
<sup>6</sup> *Katmai: GMP*, pp. 46-7.

<sup>7</sup> ANILCA §§ 1303, 1315; 36 C.F.R. § 13.17, pp. 165-171.

<sup>8</sup> ANILCA § 1303(a)(3); 36 C.F.R. § 13.17(d)(9).

TABLE 5. Summary of ANILCA Provisions and NPS Regulations for Incidental Access to Alaska National Park Areas

ANILCA Directives to the Secretary of the Interior	ANILCA Qualifications on Incidental Access	Related NPS Regulations from 36 CFR Unless Noted
<p>§1310(a)</p> <ul style="list-style-type: none"> <li>• Shall permit reasonable access to existing navigation aids, communication sites, weather &amp; fishery stations, and national defense facilities.</li> </ul>	<p>§1310(a)</p> <ul style="list-style-type: none"> <li>• For operation and maintenance.</li> <li>• As appropriate.</li> </ul>	
<p>§1310(b)</p> <ul style="list-style-type: none"> <li>• Shall permit new facilities listed in §1310(a).</li> </ul>	<p>§1310(b)(2)</p> <ul style="list-style-type: none"> <li>• In accordance with conditions to minimize adverse effects.</li> </ul>	
<p>§1303(a)(3)</p> <ul style="list-style-type: none"> <li>• Cabins not under permit may be used only for government business.</li> </ul>	<p>§1303(a)(3)</p> <ul style="list-style-type: none"> <li>• Unless an emergency or designated for public use.</li> </ul>	<p>§13.17(d)(9) emergency use allowed.</p> <p>§13.17(e)(5) may designate public use cabins outside wilderness areas.</p>
<p>§1315(c)</p> <ul style="list-style-type: none"> <li>• May permit continued use of preexisting public use cabins in wilderness areas.</li> </ul>	<p>§1315(c)</p> <ul style="list-style-type: none"> <li>• Subject to maintenance of wilderness character of an area.</li> </ul>	<p>§13.17(e)(6) may maintain or replace wilderness area public use cabins pre-existing 11/20/78.</p>
<p>§1315(d)</p> <ul style="list-style-type: none"> <li>• May build new public use cabins in wilderness areas.</li> </ul>	<p>§1315(d)</p> <ul style="list-style-type: none"> <li>• If necessary for public health and safety.</li> <li>• Shall notify Congress if building or removing cabins.</li> </ul>	
<p>§205</p> <ul style="list-style-type: none"> <li>• May take no unreasonably restrictive action on valid commercial fishing rights to use campsites and cabins on specified park land in Cape Krusenstern, Wrangell-St. Elias, &amp; Glacier Bay.</li> </ul>	<p>§205</p> <ul style="list-style-type: none"> <li>• Unless such uses constitute a significant expansion of use of park lands beyond 1979 use levels.</li> </ul>	<p>§13.17(e)(3) commercial fisher cabins allowed in these areas.</p> <p>§13.21(c) campsites &amp; cabins permitted for pre-12/2/80 commercial fishers if directly incidental to fishing rights, no significant impairment of resources, &amp; no significant expansion beyond 1979 uses.</p>
<p>§1303(a)(4)</p> <ul style="list-style-type: none"> <li>• May permit temporary use or construction of cabins for subsistence uses.</li> </ul>	<p>§1303(a)(4)</p> <ul style="list-style-type: none"> <li>• If necessary to reasonably accommodate subsistence uses.</li> </ul>	<p>§13.17(e)(4) may allow subsistence use or construction of cabins by permit, or without permit if designated common use facility.</p>
<p>§1303(d)</p> <ul style="list-style-type: none"> <li>• Shall administer cabins under permit before 12/2/80 pursuant to terms of permit.</li> </ul>	<p>§1303(d)</p> <ul style="list-style-type: none"> <li>• Unless constitutes a direct threat or significant impairment to purpose of a park unit.</li> </ul>	<p>§ 13.17(e)(1) valid permits on 12/2/80 may continue subject to terms of permit if no direct threat to or significant impairment of purposes of area.</p>

(continued)

TABLE 5. (continued)

ANILCA Directives to the Secretary of the Interior	ANILCA Qualifications on Incidental Access	Related NPS Regulations from 36 CFR Unless Noted
<p>§1303(a)(1)</p> <ul style="list-style-type: none"> <li>• Shall permit occupancy of cabins existing before 12/18/73.</li> </ul>	<p>§1303(a)(1)</p> <ul style="list-style-type: none"> <li>• Pursuant to a renewable, nontransferable 5 yr. permit.</li> </ul>	<p>§13.17(e)(2)(i) pre-12/18/73 occupancy permitted by 5-year, nontransferable permit.</p> <p>§13.17(d)(7)(ii) reasonable access for cabin permittees consistent with purposes.</p>
<p>§1303(c)</p> <ul style="list-style-type: none"> <li>• Shall renew renewable cabin permits until death of last immediate family member occupying a cabin.</li> </ul>	<p>§1303(c)</p> <ul style="list-style-type: none"> <li>• Unless renewal may cause significant detriment to the principal purposes of a park unit.</li> </ul>	<p>§13.17(d)(3) may revoke if permit is violated or may cause significant detriment to purposes of area.</p> <p>§13.17(e)(2)(i) 5-year permits end with death of last claimant occupying cabin for original permit.</p>
<p>§1303(a)(2)</p> <ul style="list-style-type: none"> <li>• Shall permit occupancy of cabins first occupied between 12/18/73 and 12/1/78.</li> </ul>	<p>§1303(a)(2)</p> <ul style="list-style-type: none"> <li>• Pursuant to a nonrenewable, nontransferable 1 yr. permit.</li> <li>• May extend permit for reasons of equity and justice.</li> </ul>	<p>§13.17(e)(2)(ii) occupancy beginning between 12/18/73 and 12/1/78 permitted under 1-year, nontransferable permit not to be extended beyond 12/1/1999.</p> <p>§13.17(d)(7)(ii) reasonable access for cabin permittees consistent with purposes.</p>
<p>§1316(a)</p> <ul style="list-style-type: none"> <li>• Shall permit use of temporary campsites, tent platforms, shelters, and other temporary facilities.</li> </ul>	<p>§1316(a)</p> <ul style="list-style-type: none"> <li>• If directly necessary for the taking of fish and wildlife.</li> <li>• Subject to reasonable regulation.</li> </ul>	<p>§13.1(t) "temporary" defined.</p> <p>§13.17(c) "temporary campsite," "temporary facility," "tent platform" defined.</p> <p>§13.17(e)(4) regulation of temporary facilities for subsistence users.</p> <p>§13.17(e)(7) regulation of temporary facilities for non-subsistence users.</p>
<p>§1316(b)</p> <ul style="list-style-type: none"> <li>• May deny use of new §1316(a) facilities.</li> </ul>	<p>§1316(b)</p> <ul style="list-style-type: none"> <li>• If they would constitute a significant expansion of facilities or uses which would be detrimental to the purposes of a park unit.</li> </ul>	

(continued)

TABLE 5. (continued)

ANILCA Directives to the Secretary of the Interior	ANILCA Qualifications on Incidental Access	Related NPS Regulations from 36 CFR Unless Noted
<p>§1110(b)</p> <ul style="list-style-type: none"> <li>• Shall assure adequate and feasible access to state or private land, subsurface right, mining claim, or other valid occupancy effectively surrounded by park units, for economic and other purposes.</li> </ul>	<p>§1110(b)</p> <ul style="list-style-type: none"> <li>• Subject to reasonable regulation to protect natural and other values of park units.</li> </ul>	<p>§13.1(a) "adequate &amp; feasible" defined.  43 CFR §36.10(a)(1) "adequate &amp; feasible" defined for inholding access.  §13.17(d)(7)(i) no valid occupancy without a pre-12/2/80 permit.  43 CFR §36.10(e) access denial for harm must include adequate and feasible alternative.</p>
<p>§1111</p> <ul style="list-style-type: none"> <li>• Shall permit temporary access to state or public land for survey, geophysical, exploratory, or other temporary uses.</li> </ul>	<p>§1111</p> <ul style="list-style-type: none"> <li>• If will not result in permanent harm to resources.</li> <li>• May stipulate conditions to insure consistency with unit purposes and prevent permanent damage.</li> </ul>	<p>43 CFR §36.12(b,d) shall permit temporary access for reasons in statute if no permanent harm to result.</p>
<p>§201(4)(b)</p> <ul style="list-style-type: none"> <li>• Shall permit surface transportation across Western Unit of Gates of the Arctic.</li> </ul>	<p>§201(4)(d)(i,ii)</p> <ul style="list-style-type: none"> <li>• Most desirable route and conditions of right-of-way chosen by Secretary with Secretary of Transportation.</li> </ul>	<p>43 CFR §36.13(a) surface transportation across Gates of the Arctic shall be permitted.  43 CFR §36.2(h) "economically feasible &amp; prudent alternative route" defined.</p>
		<p>43 CFR §36.13(b) Doyon Ltd. TUS application shall be granted across Yukon-Charley Rivers if there is no economically feasible alternative route, except no right-of-way may be granted across Charley River watershed.</p>
<p>§1106(a)</p> <ul style="list-style-type: none"> <li>• Shall approve or disapprove Transportation and Utility System (TUS) applications not in wilderness areas based on applicable law.</li> </ul> <p>§1106(b)</p> <ul style="list-style-type: none"> <li>• Shall make recommendations to president on applications for TUS in wilderness areas and permit TUS if so directed by Congress.</li> </ul>		<p>43 CFR §36.2 "compatible," "economically feasible and prudent," "improved right-of-way," and "Transportation and Utility System (TUS)" defined.  43 CFR §36.7 findings required by NPS for decision or recommendation.</p>

to public use before November 20, 1978 may also be maintained for such use if the NPS determines the wilderness character of an area would not be threatened. Furthermore, new public use cabins may be built if necessary for public health and safety, although Congress must be notified if such cabins are to be sited in designated wilderness.<sup>9</sup> Cabin inventories for most national park areas in Alaska had not been completed at the time GMPs were first published. However, Aniakchak, Cape Krusenstern, Glacier Bay, and Noatak all report one existing public use cabin. The only ANILCA park area to propose new public use cabins is Kenai Fjords.<sup>10</sup>

#### *Specific Exceptions*

Congress mandated two exceptions to ANILCA general cabin use policy. First, commercial fishing operations pursuant to valid pre-existing rights were guaranteed continued access to designated areas of Cape Krusenstern, Wrangell-St. Elias, and Glacier Bay for campsites

or cabin use. The NPS may prohibit such use if it is not directly necessary for the exercise of fishing rights, it constitutes a detriment to national park area resources, or it includes a significant expansion over 1979 use levels.<sup>11</sup> In Glacier Bay, commercial fishing operations at Dry Bay consist of a fish processing plant, several roads and airstrips, temporary shelters for 40-50 fishermen, and about 20 fish camps with cabins and outbuildings. The Glacier Bay GMP states a 25% increase in use would be significant, and notes the NPS has permitted four new cabins and two additions since 1980.<sup>12</sup> Neither the Cape Krusenstern GMP nor the Wrangell-St. Elias GMP discuss cabin use by commercial fishing operations.

The second exception to general cabin policy is related to ANILCA subsistence provisions. Many subsistence activities require remote shelters for feasible access. Therefore, the NPS may allow temporary use of cabins or construction of new cabins as necessary to reasonably accommodate subsistence uses where allowed. Subsistence cabin use does not require a permit if facilities are available to all subsistence users.<sup>13</sup>

<sup>9</sup> ANILCA §§ 1303(a)(3), 1315(c-d); 36 C.F.R. §13.17(e)(5-6).

<sup>10</sup> Five public use cabins are proposed for Kenai Fjords; four in proposed wilderness additions, and one in proposed non-wilderness. *Kenai Fjords: GMP*, pp. 49-50, 52; *Kenai Fjords: Draft EIS*, p. 19. Eleven ANILCA park areas explicitly state no public use cabins are proposed. *Aniakchak: GMP*, p. 37; *Bering Land Bridge: GMP*, p. 107; *Cape Krusenstern: GMP*, p. 107-8; *Denali: GMP*, p. 48; *Gates of the Arctic: GMP*, p. 159; *Katmai: GMP*, p. 39; *Kobuk Valley: GMP*, p. 82; *Lake Clark: GMP*, p. 26; *Noatak: GMP*, p. 99-100; *Wrangell-St. Elias: GMP*, p. 23.

<sup>11</sup> ANILCA § 205; 36 C.F.R. §§ 13.17(e)(3), 13.21(c).

<sup>12</sup> *Glacier Bay: GMP*, pp. 41, 71-2.

<sup>13</sup> ANILCA § 1303(a)(4); 36 C.F.R. § 13.17(e)(4).

### *Occupancy Rights*

General NPS regulations state "[r]esiding in park areas, other than on private lands, except pursuant to the terms and conditions of a permit, lease or contract, is prohibited."<sup>14</sup> When ANILCA created new national park areas in Alaska, it recognized that many areas included unsanctioned homesites. Therefore, Congress created a hierarchy of cabin occupancy rights to accommodate existing unofficial residents of federal land. Few ANILCA park area GMPs have comprehensive data on cabin numbers and use: Kobuk Valley reported one inhabited cabin;<sup>15</sup> Yukon-Charley Rivers reported "several" cabins;<sup>16</sup> Gates of the Arctic reported sixteen cabins;<sup>17</sup> and Lake Clark reported 160 cabins of uncertain status.<sup>18</sup> Further analysis of cabin use in Alaska national park areas must await completion of cabin inventories.

Cabin occupancy under permit prior to ANILCA was allowed to continue pursuant to existing permits.<sup>19</sup> Cabin occupancy without permit which began before December 18, 1973 was eligible to continue pursuant to nontransferable

five-year permits. These permits are to be automatically renewed until the death of the last family member covered in the initial permit.<sup>20</sup> Cabin occupancy without permit which began between December 18, 1973 and December 1, 1978 was eligible to continue pursuant to nontransferable one-year permits. These permits were not to be renewed, but the Secretary of the Interior was authorized to renew such permits on a case by case basis in the interests of equity and justice. Extensions of one-year permits may not, however, go beyond December 1, 1999.<sup>21</sup>

ANILCA cabin permits are contingent on an applicant's agreement to renounce all legal interest in the real property on which cabins are located; "[t]he United States retains ownership of all new cabins and related structures on Federal lands within [the National Park System], and no proprietary rights or privileges shall be conveyed through the issuance of the special use permit authorized [by ANILCA]."<sup>22</sup> Cabin rights do, however, include the right to reasonable access across ANILCA park areas if consistent with the purposes of an area.<sup>23</sup>

ANILCA cabin rights are not unlimited. The NPS may revoke permits if use may cause significant detriment to national park area

<sup>14</sup> 36 C.F.R. § 2.61. "Any unauthorized occupancy or use of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass." 36 C.F.R. § 14.8.

<sup>15</sup> *Kobuk Valley: GMP*, p. 144.

<sup>16</sup> *Yukon-Charley Rivers: GMP*, p. 100.

<sup>17</sup> *Gates of the Arctic: GMP*, pp. 91, 158.

<sup>18</sup> *Lake Clark: GMP*, pp. 21-2.

<sup>19</sup> ANILCA § 1303(d); 36 C.F.R. § 13.17(1).

<sup>20</sup> ANILCA § 1303(a)(1), (c); 36 C.F.R. § 13.17(2)(i).

<sup>21</sup> ANILCA § 1303(a)(2); 36 C.F.R. § 13.17(2)(ii).

<sup>22</sup> ANILCA § 1303(a)(2)(C-D), (a)(3)(C-D), (a)(4).

<sup>23</sup> 36 C.F.R. § 13.17(d)(ii).

purposes. Even cabin permits which pre-existed ANILCA may be revoked if continued use would constitute a direct threat to or significant impairment of ANILCA park area purposes.<sup>24</sup> Therefore, although ANILCA created new rights of occupancy for national park areas in Alaska, it also restricted access under those rights to 1999, death of the last original permit holder, or the renewal conditions of pre-existing permits. Furthermore, ANILCA authorized NPS regulation and possible revocation of cabin occupancy to prevent degradation of Alaska national park areas.

#### TEMPORARY FACILITIES

ANILCA provided access for temporary facilities necessary for either subsistence use or sport hunting in Alaska national park areas that permit the taking of fish and wildlife. "Temporary facilities" include temporary campsites, tent platforms, and shelters.<sup>25</sup> NPS regulations refine the term as "a structure or other manmade improvement that can be readily and completely dismantled and/or removed from the site when the authorized use terminates."<sup>26</sup> The NPS defines "temporary" to mean "a continuous period of time not to exceed 12 months, except as specifically provided otherwise."<sup>27</sup>

<sup>24</sup> ANILCA § 1303(c)(2), (d); 36 C.F.R. § 13.17(d)(3).

<sup>25</sup> ANILCA § 1316(a).

<sup>26</sup> C.F.R. § 13.17(c).

<sup>27</sup> C.F.R. § 13.1(t).

The NPS has interpreted ANILCA and its legislative history to restrict temporary facility access to Alaska national preserves.<sup>28</sup> This interpretation is supported by the general prohibition of hunting in national parks and monuments and Congressional intent; ANILCA temporary facility access was provided primarily to support the interests of sport hunters and hunting guides.<sup>29</sup> Full inventories of temporary facility uses are incomplete, but several ANILCA park area GMPs provide limited information: Bering Land Bridge reports no temporary facility sites;<sup>30</sup> Gates of the Arctic reports one site;<sup>31</sup> Noatak reports two sites;<sup>32</sup> Aniakchak reports six sites;<sup>33</sup> and Wrangell-St. Elias reports 50 sites.<sup>34</sup>

Subsistence users do not require permits for temporary facilities in place less than thirty days if sites are returned to natural conditions when vacated.<sup>35</sup> General temporary facilities in place over fourteen days do require a permit.<sup>36</sup> The NPS may deny a general permit if temporary facilities are not necessary for proposed activities, the facilities or intended uses would be detrimental to the purposes of a national preserve, or the proposed

<sup>28</sup> Senate Energy Committee Mark-Up, 96th Congress, Oct. 9, 1979, p. 65. As cited in *Noatak GMP: GMP*, p. 95.

<sup>29</sup> S. Rept. 96-413, pp. 220, 309.

<sup>30</sup> *Bering Land Bridge: GMP*, p. 108.

<sup>31</sup> *Gates of the Arctic: GMP*, pp. 160-1.

<sup>32</sup> *Noatak: GMP*, p. 96.

<sup>33</sup> *Aniakchak: GMP*, p. 39.

<sup>34</sup> *Wrangell-St. Elias: GMP*, pp. 24-5.

<sup>35</sup> 36 C.F.R. § 13.17(e)(4)(vi).

<sup>36</sup> 36 C.F.R. § 13.17(e)(7)(i).

temporary facilities would represent a significant increase in facilities or use. Seven of ten ANILCA preserve GMPs have stated that any new temporary facilities would be detrimental to preserve resources and therefore a significant and impermissible increase in facilities or use.<sup>37</sup> Permit applications beyond temporary facility ceilings or allocations in GMPs must be denied.<sup>38</sup>

### INHOLDING ACCESS

Most land within ANILCA park area boundaries is owned by the federal government. However, the history of Alaska lands resulted in incorporation of considerable non-federal and potentially non-federal land. Inholdings in Alaska national park areas include private and state land, Native corporation land or land selections, patented and unpatented mineral claims, and other valid occupancies. Inholdings are usually surrounded by federal reserves. However, in a state consisting of mountains, wetlands, unbridged rivers, and few roads, land may be effectively surrounded; non-federal lands reasonably accessible only through federal reserves must be granted inholding status.<sup>39</sup>

<sup>37</sup> *Aniakchak: GMP*, pp. 38-9; *Bering Land Bridge: GMP*, p. 107; *Denali: GMP*, p. 46; *Gates of the Arctic: GMP*, p. 160; *Katmai: GMP*, p. 40; *Noatak: GMP*, p. 95; *Wrangell-St. Elias: GMP*, pp. 24-5.

<sup>38</sup> ANILCA § 1316(b); 36 C.F.R. § 13.17(e)(7)(iii).

<sup>39</sup> ANILCA § 1110(b); 43 C.F.R. § 36.10(3); S. Rept. 96-413, pp. 248-9.

### *Land Status*

Land status in Alaska national park areas is further complicated by several factors.<sup>40</sup> ANILCA park areas inherited a backlog of claims adjudication for small-tract entries and Native allotments.<sup>41</sup> Survey work in Alaska is incomplete and state ownership of submerged lands will remain uncertain until determinations of waterway navigability can be completed. The Lode Mining Act of 1866 (RS 2477) granted rights-of-way over unreserved public land for construction of highways. RS 2477 rights were repealed in 1976, but valid existing claims under the statute remained in effect.<sup>42</sup> Extensive unsettled RS 2477 easement claims exist throughout ANILCA park

<sup>40</sup> See notes for Table 6 for GMP discussion of these land status issues.

<sup>41</sup> The Homestead Act of 1862, 43 C.F.R. § 161 (repealed 1976), was extended to Alaska in 1898. Native Alaskans were permitted to file for homesteads under the Alaska Native Allotment Act of 1906, Pub. Law 171, 34 pt. 1 Stat. 197 (May 17, 1906); formerly at 48 U.S.C.A. § 357 (repealed by Alaska Native Claims Act of 1971, 43 U.S.C.A. § 1617). See Naske and Slotnick, *Alaska*, pp. 86, 188. Imminent repeal of the Alaska Allotment Act produced a surge of applications. 10,000 claims were still pending in 1985. Berger, *Village Journey*, pp. 88-9.

<sup>42</sup> Lode Mining Act, formerly at 43 U.S.C. § 932. Repealed by Public Law 94-579 as of October 21, 1976, subject to valid existing claims. For a discussion of RS 2477 easement claims from a pro-development perspective, see: Leroy K. Latia, Jr., *Public Access Over Alaska Public Lands as Granted by Section Eight of the Lode Mining Act of 1866*, 28 Santa Clara Law Review 811-840 (Fall 1988).

TABLE 6. Non-Federal and Uncertain or Encumbered Land Status  
in Alaska National Park Areas

National Park Area and Total Acreage	Non-Federal Land		Uncertain and Encumbered Land		General Management Plan Reference
	Acreage	% of Total Acreage	Acreage	% of Total Acreage	
Aniakchak 602,779	12,507	2%	185,310	31%	p. 51
Bering Land Bridge 2,784,960	94,781	3%	180,819	6%	p. 127
Cape Krusenstern 659,807	43,039	7%	112,310	17%	p. 137
Denali 6,028,091	2,597	0.04%	67,979	1%	p. 80
Gates of the Arctic 8,472,517	301,491	4%	27,313	.32%	p. 174
Katmai 4,124,075	148,844	4%	33,436	.8%	pp. 57, 62
Kenai Fjords 669,500	19,475	3%	77,210	12%	Kenai: Land Protection Plan, p. 8
Kobuk Valley 1,750,421	23,958	1%	77,068	4%	p. 109
Lake Clark 3,653,000	161,410	4%	—	—	pp. 1, 38
Noatak 6,574,481	4,771	0.07%	335,178	5%	p. 129
Wrangell-St. Elias 13,188,000	733,400	6%	255,400	2%	p. 69
Yukon-Charley Rivers 2,527,000	257,369	10%	140,755	6%	pp. 15, 74

areas. State and Native corporation land selections are also incomplete. ANCSA permitted Native Corporations to overselect lands. Where selections overlap national park areas, land status will not be determined until final surveys and preferred selections can be processed. Table 6 summarizes the extent to which national park areas in Alaska incorporate inholding, uncertain, and encumbered land.

#### *Section 1110(b) Access*

Section 1110(b) of ANILCA guarantees "such rights as may be necessary to assure *adequate and feasible access* for economic and other purposes" to state, private, subsurface, mining, or other valid occupancies within or effectively surrounded by national park areas in Alaska. [emphasis added] Such rights of access are subject to "reasonable regulations issued by the [NPS] to protect the natural and other values of [the National Park System]."<sup>43</sup>

Two regulations provide conflicting definitions of "adequate and feasible access." First, regulations specific to Alaska national park areas construe the term as "a reasonable *method and route of pedestrian or vehicular transportation* which is economically practicable for achieving the use or development desired" of property by an inholder. This "does not necessarily mean the least costly alternative."<sup>44</sup> [emphasis added] Second,

Alaska general federal land regulations pursuant to section 1110(b) define the term as "*a route and method of access* that is shown to be reasonably necessary and economically practicable but not necessarily the least costly alternative for achieving the use and development by the applicant on the applicant's nonfederal land or occupancy interest."<sup>45</sup> [emphasis added]

The lack of specificity in the second definition has been interpreted by development interests to permit pipeline, road, and transmission line access to inholdings as well as pedestrian and vehicular transportation.<sup>46</sup> This interpretation is based on Department of the Interior explanations in notice of rule-making for the second definition. An expansive application of section 1110(b) was adopted for three reasons: no justification was found for distinguishing between small private routes and larger systems; the section plainly supports any economic use of inholdings; and legislative history indicates Congress intended grants of access to be broadly construed.<sup>47</sup> Environmentalists filed suit to overrule this expansion of section 1110(b) access beyond

<sup>43</sup> ANILCA § 1110(b).

<sup>44</sup> 36 C.F.R. § 13.1(a).

<sup>45</sup> 43 C.F.R. § 36.10(a)(1).

<sup>46</sup> Steven B. Quarles and Thomas R. Lundquist, *Alaska Lands Act's Innovations In the Law of Access Across Federal Lands*, 4 Alaska Law Review 1-36, 11-12 (June 1987). The following paragraph was derived from this article.

<sup>47</sup> 51 Fed. Reg. 31,624 (1986); H. Rept. 96-97, pt. 1, p. 240; S. Rept. 96-413, p. 249.

pedestrian and vehicular transportation, but success is unlikely in light of legislative history.<sup>48</sup>

NPS regulations also state that right-of-way permits shall be issued to valid inholdings upon application unless the route or method of access desired would cause significant adverse impact, jeopardize public health and safety, be inconsistent with the purposes of the area, or be unnecessary to accomplish the land-use objective of the applicant. If a right-of-way permit is denied for any of these reasons, however, the NPS must provide an alternative adequate and feasible route or method of access after consultation with the applicant.<sup>49</sup> In *Northern Alaska Environmental Center v. Hodel*<sup>50</sup> the Ninth Circuit Court of Appeals found that section 1110(b) overruled NPS regulations which require an approved plan of operations before access to a mining claim may be granted.<sup>51</sup> In short, inholdings in ANILCA park areas have guaranteed access; the NPS may not prohibit access to inholdings, and even potentially destructive routes

or methods of access must be permitted if no less costly alternative is available.

#### *Section 1111 Access*

ANILCA also provided temporary access across national park areas for survey, geophysical, exploratory, or other short-term use of inholdings whenever such use will not result in permanent facilities or permanent harm to the resources of an area.<sup>52</sup> Congress intended section 1111

to authorize only temporary, short-term access, requiring no permanent facilities, to undeveloped State or private lands. [Section 1111] allows only very limited access, and not successive entries, or access on a regular basis, even if no permanent facilities are required.<sup>53</sup>

The NPS may require stipulations and conditions for temporary access necessary "to insure that the private use of public lands is accomplished in a manner that is not inconsistent with the purposes for which the public lands are reserved and which insures that no permanent harm will result to the resources of the [national park area]."<sup>54</sup>

Section 1111 temporary access duplicates the access guarantee of section 1110(b) but contradicts that section's delegation of authority. Whereas the NPS may regulate but not prohibit general inholding access, temporary access may be prohibited if it would result in permanent facilities or harm to national park area resources. This

<sup>48</sup> *Trustees for Alaska v. U.S. Department of the Interior*, no. A87-055 (D. Alaska, filed February 9, 1987). Considering this challenge was filed in 1987 and no decision has been published as of February 1990, it is likely the case was dismissed without trial.

<sup>49</sup> 43 C.F.R. § 36.10(e)(1-2).

<sup>50</sup> *Northern Alaska Environmental Center v. Hodel*, 803 F. 2d 466; Court of Appeals, 9th Circuit, 1986. See brief of case in Appendix C and discussion of ANILCA § 1110(b) effect on 36 C.F.R. Part 9 in: *Fish, Preservation and Strategic Mineral Development in Alaska*, p. 191.

<sup>51</sup> 36 C.F.R. §§ 9.3(a-b), 9.32(a-b).

<sup>52</sup> ANILCA § 1111(a); 43 C.F.R. § 36.12(d).

<sup>53</sup> S. Rept. 96-413, p. 300; 43 C.F.R. § 36.12(a)(2).

<sup>54</sup> ANILCA § 1111(b); 43 C.F.R. § 36.12(d).

contradiction is moot, however, in light of legislative history and Congressional intent; temporary access

is not to be construed to limit in any manner the broad guarantee of access to inholdings .... To the extent that conflicts may arise in the application of these two provisions, the [NPS] should construe the statutory language so as to permit the application of the provision which provides the broader grant of access.<sup>55</sup>

Section 1111 access is inferior to the broad grant of access in section 1110(b).<sup>56</sup> In the final evaluation, NPS discretion is limited to restricting inholding access to the least harmful adequate and feasible alternative.

#### *Inholding Access Management*

Non-federal land is a relatively low percentage of any Alaska national park area. However, even a low percentage of an area the size of ANILCA national parks, monuments, and preserves may encompass vast acreage. For example, although non-federal land in Lake Clark is only four percent of the park and preserve, it totals 161,400 acres. The shoreline of Lake Clark's namesake is 75% non-federal land and development of that area could conceivably impair the purposes of the national park and preserve throughout the watershed and beyond.<sup>57</sup> In some cases, uncertain land status compounds this issue. For example, Native

corporations are currently finalizing 77,210 acres of land selections in Kenai Fjords. These selections will boost the percentage of non-federal lands in the park to 15% and leave virtually nothing but high mountain slopes and glaciers protected from potentially inconsistent use.<sup>58</sup>

Not all inholding use is anathematic to ANILCA park area purposes. A representative list of compatible inholding uses includes:

- dispersed recreation development,
- nonconsumptive research and education,
- low-density residence,
- existing facilities,
- limited new facilities,
- travel to villages and homesites,
- travel to subsistence areas,
- sustainable subsistence activity,
- selective tree cutting,
- sustainable sport hunting,
- reindeer herding,
- nondestructive expansion of reindeer herding,
- commercial fishing activities,
- small-scale nonconsumptive commercial development,
- winter hauling of jade boulders,
- airstrips,
- fuel storage in remote areas,
- public access to federal land,
- sale or transfer of property.

A composite list of incompatible inholding uses includes:

- more than one residence,
- destructive use of subsistence cabins,
- expanded facilities,
- consumptive commercial development,
- subdivision and sale of land in smaller tracts,
- ORV or road access,
- new airstrips,
- airstrips with significant vegetative disruption,
- contamination of water,
- pollution,
- trash disposal which disrupts wildlife,

<sup>55</sup> S. Rept. 96-413, p. 250.

<sup>56</sup> Quarles and Lundquist, *Alaska Lands Act's Innovations*, pp. 14-15.

<sup>57</sup> *Lake Clark: GMP*, p. 39.

<sup>58</sup> *Kenai Fjords: GMP*, pp. 4, 36.

- impairing healthy populations of fish and wildlife,
- wildlife habitat destruction or manipulation,
- sport hunting on private lands within national parks or monuments,
- mining,
- surface disturbances,
- clearcutting timber,
- commercial timber harvest,
- aquaculture,
- commercial clam dredging,
- destructive jade boulder hauling,
- damage to historical and archeological resources,
- blocking public access to national park areas,
- visual intrusion on national park areas,
- destruction of wilderness character.<sup>59</sup>

There is a considerable grey zone for many uses. For example, some ANILCA park areas consider airstrips compatible and others do not. This is the result of differences in specific statements of purpose and land use history. However, in general, compatible uses tend to be small-scale, pre-existing, traditional, and sustainable uses. Incompatible uses are typically larger-scale, increased levels, resource destructive, and consumptive uses.

NPS discretion to regulate use of and access to non-federal land within the National Park System is limited. The NPS may not excessively impair owners' rights to enjoy property without effecting a regulatory taking. Before 1987, agencies could risk borderline regulations. If the courts found an agency had effected an unconstitutional taking of

private property without just compensation, the agency could either withdraw the offending regulations or provide just compensation. After 1987, however, agencies may be liable for temporary loss of value; if an agency chooses to revoke regulations found to take property, the courts may still require just compensation for the period during which possessory rights were unconstitutionally restricted.<sup>60</sup> Therefore, agencies must be careful not to overextend regulations lest they unwittingly commit expensive unintended takings.

Furthermore, Congress explicitly limited agency regulation of non-federal land within Alaska conservation units, including ANILCA park areas. Section 103(c) of the Act states that "[n]o lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within [conservation system units]."<sup>61</sup>

Two cases in the Ninth Circuit Court of Appeals have addressed federal regulation of inholdings under ANILCA. In *City of Angoon v. Marsh*, a community and environmentalists sought to prevent timber harvesting on a Native corporation inholding in Admiralty Island National

<sup>59</sup> *Aniakchak: GMP*, pp. 59-60; *Bering Land Bridge: GMP*, pp. 135, 138; *Cape Krusenstern: GMP*, pp. 136, 138; *Denali: GMP*, p. 79; *Gates of the Arctic: GMP*, pp. 187-8; *Katmai: GMP*, p. 67; *Kenai Fjords: Land Protection Plan*, p. 15; *Kobuk Valley: GMP*, pp. 112-3; *Noatak: GMP*, pp. 133-4; *Wrangell-St. Elias: GMP*, pp. 75-6.

<sup>60</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 107 S. Ct. 2378, United States Supreme Court, 1987.

<sup>61</sup> ANILCA § 103(c).

Monument.<sup>62</sup> ANILCA section 503(d) prohibits timber harvest sales within the monument, but the court held that "within the boundaries" of the monument does not equal "within the monument." Application of the section 503(d) prohibition to Native corporation land within the boundaries of the monument would have applied federal regulations to non-federal land and violated the clear meaning of ANILCA section 103(c).

In *City of Angoon v. Hodel*, the same plaintiffs sought to invalidate an Army Corps of Engineers permit for log transfer facilities on the Native corporation inholding in Admiralty Island.<sup>63</sup> The issue in this case was whether approval of this federal permit required processes pursuant to section 810(a) of ANILCA. Section 810(a) requires federal agencies to provide notice, receive comments, and state findings to protect subsistence opportunity before permitting use of Alaska federal public land. The court held that section 810(a) did not apply; although the permit was issued by a federal agency, it affected only private facilities on privately owned land within the boundaries of the national monument.

Therefore, the NPS may neither unreasonably regulate use of and access to inholdings nor apply federal land regulations to inholdings within Alaska national park areas. It is apparent from Land Protection Plans in GMPs, however, that the NPS anticipates extensive incompatible use of inholdings within ANILCA park areas. Virtually the only NPS strategy available to prevent such use is acquisition of inholding property rights.

However, ANILCA restricts federal land acquisition authority in section 1302.<sup>64</sup> Land within Alaska national park areas owned by the state or Native corporations may not be acquired without the consent of owners. Land owned by actual occupants, their spouses, or lineal descendants may not be acquired without owners' consent unless a tract is no longer occupied for the purposes for which it was conveyed, or activities on the tract are or will be detrimental to the purposes of the area.<sup>65</sup>

Non-federal land owned by entities other than the state, Native corporations, or actual occupants may not be acquired without owners' consent unless the owners refuse an offer of exchange for land of similar characteristics and like value from public land located outside the boundaries of

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<sup>62</sup> *City of Angoon v. Marsh*, 749 F 2d 1413; Court of Appeals, 9th Circuit, 1984. See brief of case in Appendix C. ANILCA created two national monuments, Admiralty Island and Misty Fjords, under jurisdiction of the National Forest Service. ANILCA § 503.

<sup>63</sup> *City of Angoon v. Hodel*, 803 F 2d 1016; Court of Appeals, 9th Circuit, 1986. See brief of case in Appendix C.

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<sup>64</sup> For a discussion of NPS land acquisition authority in the contiguous 48 states, see: Joe Priest, "Attacking the National Parks from Within," *National Parks and Conservation Magazine*, vol. 54, no. 9 (September 1980): pp. 6-11.

<sup>65</sup> ANILCA § 1302(b).

reserved federal lands.<sup>66</sup> Such exchanges "shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the property exchanged, except that if the parties agree to an exchange and the Secretary determines it is in the public interest, such exchanges may be made for other than equal value."<sup>67</sup> In *National Audubon Society v. Hodel* the federal district court of Alaska held land exchanges pursuant to ANILCA must be "for the purposes of ANILCA" as stated in section 1302(a), and either consist of lands of equal value or further the public interest as required in section 1302(h).<sup>68</sup>

Finally, no improved property may be acquired without the consent of owners unless acquisition is necessary for fulfillment of the purposes of ANILCA or a particular national park area.<sup>69</sup> "Improved property" is defined as either a detached single family dwelling on which construction was begun before January 1, 1980 together with the land on which it is situated, or property developed for noncommercial recreational uses including structures on the property used for recreation before January 1, 1980.<sup>70</sup>

In summary, inholdings present a potential threat to the purposes of Alaska national park areas. Extensive non-federal land exists within

ANILCA park areas and the NPS must permit access for any use of those lands. The agency may not unreasonably regulate either access to or use of inholdings and the NPS may not generally purchase or acquire non-federal land by exchange without the consent of owners. Essentially, the NPS may simply have to accept incompatible use of inholdings within Alaska national park areas.

#### TRANSPORTATION AND UTILITY SYSTEMS (TUS)

In 1979, the Federal-State Land Use Planning Commission anticipated that formation of national park areas in Alaska would not inhibition the state's economic growth if "some reasonable system for determining access across these lands in the near future is provided by Congress."<sup>71</sup> Transportation and utility systems (TUS) are particularly critical in resource-based economies where "[n]atural resource development and transportation are really one and the same thing."<sup>72</sup> There is little doubt from a development perspective that the Alaska TUS network is incomplete.<sup>73</sup> Road and pipeline TUS are periodically proposed.<sup>74</sup> Congress recognized that

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<sup>66</sup> ANILCA § 1302(c).

<sup>67</sup> ANILCA § 1302(h).

<sup>68</sup> *National Audubon Society v. Hodel*, 606 F. Supp. 825; District Court, Alaska, 1984.

<sup>69</sup> ANILCA § 1302(d).

<sup>70</sup> ANILCA § 1302(f).

<sup>71</sup> Federal-State Land Use Commission, *Alaska Society and Alaska's Land*, pp. 3-4.

<sup>72</sup> Becky Norsworthy, "Roads to Somewhere: Boosters group sets priorities for land links," *The Anchorage Times*, Sunday, 26 November 1989, pp. D-1, 3.

<sup>73</sup> ANILCA § 1101(a).

<sup>74</sup> For example: Norsworthy, "Roads to Somewhere," pp. D-1,3; Ray Tyson,

existing law had made "siting of roads and airports, particularly, but other modes as well, very difficult if not impossible in wilderness, parks, [and other conservation units]."<sup>75</sup> Therefore, Title XI of ANILCA established a special procedure for allowing TUS access into and across Alaska public interest lands to express Congressional concern and expedite "access to and from resource development areas."<sup>76</sup>

TUS include the following systems if any portion of such systems would cross an Alaska national interest land reservation:

- canals, ditches, pipelines, and other systems for the transportation of water,
- pipelines and other systems for the transportation of liquids or gases other than water,
- pipelines, slurry and emulsion systems, and conveyor belts for the transportation of solid materials,
- systems for the transmission and distribution of electric energy,
- systems for transmission or reception of radio, television, telephone, telegraph, and other means of communication,
- improved rights-of-way for snowmachines, air cushion vehicles, and other all-terrain vehicles,
- roads, highways, railroads, tunnels, tramways, airports, landing strips, docks, and other systems of general transportation.<sup>77</sup>

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"Chukchi Pipeline Preferred," *The Anchorage Times*, Friday, 1 December 1989, pp. C-1, 3.

<sup>75</sup> S. Rept. 96-413, p. 245.

<sup>76</sup> S. Rept. 96-413, p. 244. For another explanation of Title XI TUS provisions, see: Sanford Sagalkin and Mark Panitch, *Mineral Development Under ANILCA*, 10 *UCLA-Alaska Law Review* 117-142, 133-141 (Spring 1981).

<sup>77</sup> ANILCA § 1102(4); 43 C.F.R. § 36.2(p).

#### *Mandated TUS Access*

Four specific TUS exist or are pending in ANILCA park areas. The first is active and bisects Bering Land Bridge; Congress mandated continued access for customary patterns and modes of travel from Deering to the Taylor Highway during periods of adequate snow cover. This access is subject to reasonable regulation to insure consistency with the purposes of the preserve.<sup>78</sup> The NPS has therefore prohibited use of this right-of-way in the summer<sup>79</sup> and defined "adequate snow cover" as "generally 6-12 inches or more, or a combination of snow and frost depth sufficient to protect the underlying vegetation and soil."<sup>80</sup>

Second, Congress mandated the opportunity for surface transportation across Gates of the Arctic National Preserve to provide access from the Ambler Mining District to the Alaska Pipeline Haul Road.<sup>81</sup> The Gates of the Arctic GMP reports that no application has yet been received for this TUS.<sup>82</sup> If such an application is submitted, the Secretaries of the Interior and Transportation shall jointly prepare an economic and environmental analysis in lieu of a NEPA EIS to determine the most desirable right-of-way.<sup>83</sup> This analysis shall consider "economically feasible and prudent alternate routes across the preserve which

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<sup>78</sup> ANILCA § 201(2).

<sup>79</sup> *Bering Land Bridge: GMP*, p. 88.

<sup>80</sup> 43 C.F.R. § 13.11(a)(2).

<sup>81</sup> ANILCA § 201(4)(b); 43 C.F.R. § 36.13(a)(1).

<sup>82</sup> *Gates of the Arctic: GMP*, p. 119.

<sup>83</sup> ANILCA § 201(4)(d); 43 C.F.R. § 36.13(3).

would result in fewer or less severe adverse impacts on the preserve."<sup>84</sup> "Economically feasible and prudent" 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 costs.<sup>85</sup>

Route selection for the Gates of the Arctic TUS must also consider

[t]he environmental, social and economic impacts of the right-of-way including impacts upon wildlife, fish, and their habitat, and rural and traditional lifestyles including subsistence activities and measures which should be instituted to avoid or minimize negative impacts and enhance positive impacts.<sup>86</sup>

The third and fourth TUS are also resource extraction provisions. Doyon, Ltd., a Native corporation, is guaranteed TUS access across the eastern end of Yukon-Charley Rivers National Preserve if no economically feasible alternative route is available and the proposed right-of-way does not enter the Charley River watershed. No application for this access has been submitted yet.<sup>87</sup> Finally, an active TUS across the north end

of Cape Krusenstern was granted by independent legislation. This 100 year right-of-way consists of a 25 mile easement for access from the coast to the Red Dog Mine site.<sup>88</sup> The Red Dog Mine began production of lead and zinc ore in late 1989 to the acclaim and relief of development interests.<sup>89</sup>

#### *Future TUS: Non-Wilderness*

There are two separate decision processes for review of TUS applications. "The first is used when the appropriate federal agencies have an applicable law to issue a right-of-way permit and the area involved is outside the National Wilderness Preservation System."<sup>90</sup> [emphasis added] Under these circumstances, the federal agency may approve or deny a TUS application after considering the following factors:

- the need for and economic feasibility of the proposed TUS;
- economically feasible and prudent alternatives to proposed routes and methods both outside and within the area;
- the feasibility and cumulative impact of different TUSs within an area;
- social, economic, and environmental impacts (including impact on fish and wildlife, and traditional lifestyles);
- national security interests;

<sup>84</sup> ANILCA § 201(4)(d); 43 C.F.R. § 36.13(a)(4)(i).

<sup>85</sup> 43 C.F.R. § 13.2(h).

<sup>86</sup> ANILCA § 201(4)(d)(ii); 43 C.F.R. § 36.13(a)(4)(ii).

<sup>87</sup> ANILCA § 1419(d); 43 C.F.R. § 36.13(b); *Yukon-Charley Rivers: GMP*, p. 76.

<sup>88</sup> Terms and Conditions Governing Legislative Land Consolidation and Exchange between the NANA Regional Corporation, Inc., and the United States of America as amended by the Act of September 25, 1985, Public Law 99-96, 99 Stat. 460-464; 43 U.S.C.A. § 1629. As cited in *Cape Krusenstern: GMP*, p. 92.

<sup>89</sup> Letters to the Editor, "A Sign of Better Days," *The Anchorage Times*, Friday, 1 December 1989, p. B-5.

<sup>90</sup> 43 C.F.R. § 36.7; ANILCA § 1106(a)(1).

- the purposes of the area;
- measures which should be instituted to minimize negative impacts;
- the net benefits of negative and positive effects on public values;
- the impacts on subsistence opportunity.<sup>91</sup>

If an agency disapproves a TUS application, the applicant may appeal the decision to the President of the United States. On appeal the President shall consider the above factors and approve the application if the TUS would be in the public interest and both compatible with the purposes of the federal reserves to be crossed and the only economically feasible and prudent alternative route. The President must also consider any pertinent EIS findings, public comments, and agency recommendations. If the President denies a TUS application, applicants will have exhausted their administrative remedies and may challenge the decision in federal court.<sup>92</sup>

Except as specifically provided by ANILCA, "applicable law shall apply with respect to the authorization and administration of transportation and utility systems."<sup>93</sup> However, authority to determine TUS access under applicable law is confused by several statutes and regulations:

"Applicable Law" is defined as

any law of general applicability (other than [Title XI of ANILCA]) under which any Federal department or agency has *jurisdiction to grant any authorization* (including but not limited to, any right-of-way permit, license,

lease or certificate) without which a transportation and utility system cannot, in whole or in part, be established or operated.<sup>94</sup> [emphasis added]

Section 5 of the Organic Act states

[t]he head of the department having jurisdiction over the lands is authorized and empowered under general regulations to be fixed by him, to grant an easement for rights-of-way ... upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio; television, and other forms of communication transmitting, relay, and receiving structures and facilities ...: *Provided*, That such right-of-way shall be allowed within or through any national park or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest ....<sup>95</sup> [emphasis added]

Department of the Interior regulations state

[t]he Act of March 3, 1921 (41 Stat. 1353; 16 U.S.C. 797), provides that *no right-of-way ... within the limits as then constituted of any national park or monument, shall be approved without the specific authority of Congress.*<sup>96</sup> [emphasis added]

This section continues, however, and states

[p]ursuant to any statute, including those listed in this subpart, applicable to lands administered by the National Park Service, *rights-of-way over or through such lands will be issued by the Director of the National Park Service, or his delegate, under the regulations of this subpart.*<sup>97</sup> [emphasis added]

<sup>91</sup> ANILCA §§ 1104(g), 1106(a)(1); 43 C.F.R. § 36.7(a).

<sup>92</sup> ANILCA § 1106(a)(1)(B), (a)(2,4); 43 C.F.R. § 36.8(a).

<sup>93</sup> ANILCA § 1103.

<sup>94</sup> ANILCA § 1102(1); 43 C.F.R. § 36.2(b).

<sup>95</sup> National Park Service Act, 16 U.S.C.A. § 5.

<sup>96</sup> 36 C.F.R. § 14.10(a).

<sup>97</sup> 36 C.F.R. § 14.10(b).

Finally,

[t]he Act of February 15, 1901 (31 Stat. 790; 43 U.S.C. 959), *authorizes the Secretary* under such regulations as he may fix, *to permit the use of rights-of-way* through public lands and certain reservations of the United States, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for pipelines, canals, ditches, water plants, and other purposes .... The Act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. 961), as amended, *authorizes the head of the department having jurisdiction over the lands*, under general regulation fixed by him, *to grant an easement for rights-of-way ...* over and across public lands and reservations of the United States, for poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes and for radio, television and other forms of communication transmitting, relay and receiving structures and facilities ....<sup>98</sup> [emphasis added]

Potential complications arising from the combination of these statutes and regulations deserve further study. However, a cursory reading indicates that each of these laws is applicable and provides authority to issue right-of-way permits for facilities defined as TUS in ANILCA. Specifically, the Secretary of the Interior is authorized to grant electric and communication TUS in all national park areas, and TUS for pipelines, canals, ditches, water plants, and other purposes in "certain" reservations. The NPS is authorized to issue rights-of-way for water TUS in national parks and monuments, and electricity and communications in all park areas.

<sup>98</sup> 36 C.F.R. § 14.70; 36 C.F.R. §§ 14.90 and 14.95 repeat all or portions of § 14.70.

Gaps in the applicable law and legislative history indicate there may be instances where authority to approve TUS in national park areas was not delegated to the executive branch. For example when Congress passed ANILCA, it believed "there is no applicable law providing for oil and gas pipelines across National Parks."<sup>99</sup> Furthermore, Congress felt that "Congressional approval should be required for permanent transportation facilities across the National Park System ... and wilderness."<sup>100</sup> It would appear, however, discretion for most TUS applications in non-wilderness areas rests with the Secretary and the NPS, and the TUS review process outlined above would apply.

#### *Future TUS: Designated Wilderness*

The second process of TUS application review "is used when an area involved in the application is within the National Wilderness Preservation System or an appropriate Federal agency has no applicable law with respect to issuing a right-of-way permit across all or any area covered by a TUS application."<sup>101</sup> In this process, agency review is merely advisory and the President is authorized to make the initial determination after consideration of agency recommendations, pertinent EIS findings, and public comment. If the President denies a TUS application for a wilderness area, administrative remedies will have been exhausted

<sup>99</sup> S. Rept. 96-413, p. 298.

<sup>100</sup> S. Rept. 96-413, p. 246.

<sup>101</sup> 43 C.F.R. § 36.7.

and an applicant may contest the decision in court. If the President recommends approval, the TUS application must be submitted to Congress which then has 120 days to pass a joint resolution of approval.<sup>102</sup> If such a joint resolution is not passed, TUS access to designated wilderness is denied.<sup>103</sup>

#### *Procedural Ambiguity*

Three aspects of ANILCA TUS procedures inject a degree of uncertainty. First, TUS provisions overlap section 1110(b) inholding access. In cases where TUS applications are made by inholders for access to non-federal land within national park areas in Alaska, both provisions apply. Currently, NPS regulations resolve this duplication by combining the two sections' procedures and privileges; TUS application, EIS production, public notice and comment, and review criteria must meet ANILCA TUS requirements, but application review ends at the agency level and the applicant is guaranteed adequate and feasible TUS access.<sup>104</sup> Despite the agency's ad hoc resolution, litigation over this duplication is expected.<sup>105</sup>

Second, the two processes for TUS application review provided by ANILCA potentially reverse

the established hierarchy of protection for wilderness and non-wilderness designations within Alaska national park areas. Congress intended these processes to provide more protection for wilderness areas.<sup>106</sup> However, while non-wilderness review by the Secretary and the NPS will occur within the context of the Organic Act and ANILCA statements of purpose, TUS applications for wilderness access will be reviewed by the President and Congress within a wider spectrum of public interests and a broad political arena. A paradox may emerge from this reversal; if TUS are eventually granted access across designated wilderness, what NPS discretion will remain to deny similar facilities across other, nominally less protected areas? At least two Senators felt ANILCA TUS provisions represent "a significant weakening of the basic laws governing our national conservation systems."<sup>107</sup>

Finally, even if ANILCA provisions for TUS application review do theoretically provide greater protection for designated wilderness, that protection may not exist in practice; Congress may not have the constitutional authority to reserve final approval. The Supreme Court recently held that a house of Congress may not invalidate an action of the executive branch by resolution.<sup>108</sup> If the

<sup>102</sup> ANILCA §§ 1105, 1106(b-c); 43 C.F.R. § 36.7(b).

<sup>103</sup> S. Rept. 96-413, p. 247.

<sup>104</sup> Quarles and Lundquist, *Alaska Lands Act's Innovations*, pp. 13-14, 30.

<sup>105</sup> Fish, *Preservation and Strategic Mineral Development*, p. 193-5.

<sup>106</sup> H. Rept. 96-97, pt. 2, p. 157.

<sup>107</sup> *Additional Views of Senators Metzenbaum and Tsongas*, S. Rept. 96-413, p. 423.

<sup>108</sup> *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, United States Supreme Court, 1983. ANILCA may violate this decision in three provisions: ANILCA §

President recommends approval of a wilderness area TUS application, Congress may not be able to reverse and deny access by either resolution or inaction.

#### *Discretion Over TUS*

NPS discretion over TUS access to ANILCA park areas is severely limited. First, Congress legislatively mandated two active and two potential rights-of-way in four areas. Second, future TUS across wilderness areas are controlled by the President or Congress. ANILCA designated 32,355,000 acres, or 74%, of Alaska national park areas as wilderness and this percentage will increase as the NPS institutes additional wilderness designations.<sup>109</sup> In the remaining non-wilderness areas, the NPS may be authorized by applicable law to approve or deny TUS applications, but Congress requires the agency to consider net public benefits as well as national park area purposes and impact on area resources.

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1106(c), 16 U.S.C.A. § 3166(c) — discussed above; ANILCA § 1326, 16 U.S.C.A. § 3213 — limits future executive branch study or withdrawal of federal lands in Alaska; and ANILCA § 1502, 16 U.S.C.A. § 3232 — requires Congressional resolution to effect executive branch proposal for mineral activity for national needs in Alaska.

<sup>109</sup> ANILCA § 701; see Wilderness Suitability Review section of ANILCA park area GMPs and Wilderness Recommendations. For example: *Yukon-Charley Rivers National Preserve: Draft Environmental Impact Statement — Wilderness Recommendation*, p. 16-17. The proposed additional wilderness designation for Yukon-Charley includes 1,093,120 acres.

However, NPS discretion does exist to an extent. The NPS may moderate the effect of cost benefit analysis on agency TUS decisions by adopting a comprehensive scope of review and including factors which address the mandates of the Organic Act and ANILCA statements of purpose. Furthermore, once a TUS permit is authorized, the NPS must reasonably regulate access to minimize adverse impact and "insure that, *to the maximum extent feasible*, the right-of-way is used in a manner compatible with the purposes for which the affected conservation unit ... was established or is managed."<sup>110</sup> [emphasis added]

In *Southeast Alaska Conservation Council, Inc. v. Watson*,<sup>111</sup> the Ninth Circuit Court of Appeals interpreted "the maximum extent feasible" standard in section 503(f)(2)(a) of ANILCA. The court's decision required the National Forest Service to regulate mining claims in Admiralty Island and Misty Fjords National Monuments to insure compatibility with the purposes of those areas "to the fullest extent possible."<sup>112</sup> This indicates "that the court will also read other portions of the act containing similar language in a

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<sup>110</sup> ANILCA § 1107(a).

<sup>111</sup> *Southeast Alaska Conservation Council, Inc. v. Watson*, 697 F. 2d 1305, Court of Appeals, 9th Circuit, 1983.

<sup>112</sup> As cited in, Eric A. Kueffner, *Southeast Alaska Conservation Council, Inc. v. Watson and the Future of ANILCA*, 12 Ecology Law Quarterly 149-173, 167 (Winter 1984).

strict manner,"<sup>113</sup> and assertive preservation terms in TUS permits will be upheld.

#### INCIDENTAL ACCESS: CONCLUSIONS

ANILCA did not specifically alter NPS policy for incidental use of national park areas in Alaska, but it did essentially modify the agency's authority over incidental access. First, ANILCA established new private rights, based on pre-existing occupancy of cabins and use of temporary facilities, and tempered by duration and NPS discretion to prohibit expanded use. ANILCA strengthened possessory rights for inholdings, guaranteed access to non-federal land, and limited NPS authority to determine routes or prevent land uses inconsistent with surrounding national park areas. ANILCA recognized the public interest in continued operation of technical support facilities and provided only enough authority to mitigate, but not prohibit, new access. Finally, ANILCA mandated TUS rights-of-way and provided a process for TUS application which delegated minimal review authority to the NPS.

The NPS must permit access to Alaska national park areas for technical support facilities, cabin occupancy, temporary facilities, inholding access, and transportation and utility systems. All of these uses are non-essential and potentially contrary to many of the purposes of ANILCA park

areas and the mandate of the Organic Act. In particular, access provisions for inholding and TUS may threaten to impair or degrade national park resources. However, control of incidental use of national park areas in Alaska was not delegated to the NPS. To a great extent, long-term viability of scenic, natural, historic, wildlife, and recreation resources under ANILCA will be determined by inholders, the Department of the Interior, the President, and Congress.

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<sup>113</sup> Kueffner, *Southeast Alaska Conservation Council, Inc. v. Watson*, p. 150.

## CHAPTER VI

### MODE OF ACCESS

Access for subsistence use, natural resource use, and incidental use of ANILCA park areas is defined by statements of who, where, and what. ANILCA also addresses how such access may be physically accomplished. A mode of access may be either an end use in its own right — e.g. recreational boating or horseback riding — or a mean to accomplish other ends — e.g. snowmobile maintenance of trap lines or airfreight to a mining claim. ANILCA provides policy for management of access by non-motorized surface transportation, motorboats, off-road vehicles, snowmobiles, and aircraft. Both this policy and a myriad of specific exceptions modify traditional NPS management of modes of access in Alaska national park areas. Table 7 summarizes ANILCA provisions for modes of access.

### GENERAL NPS REGULATIONS

The NPS typically prohibits access by motorized or mechanical modes of transportation in national park areas without improved roadways. Regulations can vary greatly from area to area, but general policy states the following:

- Pack animals — use is prohibited outside of designated trails, routes, or areas.<sup>1</sup>
- Vessels — use is permitted pursuant to applicable state and federal regulations.<sup>2</sup>
- Motor Vehicles — use is prohibited except on roads, parking areas, and routes or areas designated for off-road vehicle use; off-road use is absolutely prohibited in national parks and monuments.<sup>3</sup>
- Snowmobiles — use is prohibited except on designated routes or water surfaces used by motor vehicles or motorboats during warmer seasons; use is prohibited unless consistent with safety considerations, management objectives, and an area's natural, cultural, scenic, and aesthetic resources.<sup>4</sup>
- Aircraft — use is prohibited on lands or waters not designated pursuant to special regulations.<sup>5</sup>
- Skates, skateboards, and similar devices — use is prohibited except in designated areas.<sup>6</sup>

<sup>1</sup> 36 C.F.R. § 2.16(b).

<sup>2</sup> 36 C.F.R. § 3.1(a). For the purposes of this section, "Vessel" means every type or description of craft, other than a seaplane on the water, used or capable of being used as a means of transportation on water, including a buoyant device permitting or capable of free flotation." 36 C.F.R. § 1.4(a).

<sup>3</sup> 36 C.F.R. § 4.10(a-b).

<sup>4</sup> 36 C.F.R. § 2.18(c).

<sup>5</sup> 36 C.F.R. § 2.17(a)(1). For the purposes of this section, "Aircraft" means a device that is used or intended to be used for human flight in the air, including powerless flight." 36 C.F.R. § 1.4(a).

<sup>6</sup> 36 C.F.R. § 2.20.

- Bicycles — use is prohibited except on roads, parking areas, and designated routes; off-road use is prohibited unless consistent with safety considerations, management objectives, and an area's natural, cultural, scenic, and aesthetic resources; use or possession is prohibited in designated wilderness areas.<sup>7</sup>

With the exception of water transportation, modes of access with wings, wheels, motors, or hooves are generally prohibited in the National Park System.

The Wilderness Act of 1964 designated official wilderness in areas managed by federal land agencies including the NPS. Congress directed that,

[e]xcept as specifically provided for in this chapter, and *subject to existing private rights*, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, *no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport*, and no structure or installation within any such area.<sup>8</sup> [emphasis added]

<sup>7</sup> 36 C.F.R. § 4.30(a), (d)(1). The advent of off-road "mountain bikes" has posed a management challenge for the NPS. See: Scott Havlick, *Mountain Bicycles on Federal Lands: Over the River and Through Which Woods?* 7 *Journal of Energy Law and Policy* 123-144, 128 (1986).

<sup>8</sup> Wilderness Act, 16 U.S.C.A. § 1133(c). For a summary of case law on this section, see: George Cameron Coggins and Charles F. Wilkerson, *Federal Public Land and Resources Law*, 2nd ed. (Mineola, New York: The Foundation Press, Inc., 1987), pp. 990-991.

TABLE 7. Summary of ANILCA Provisions and NPS Regulations for Modes of Access to Alaska National Park Areas

ANILCA Directives to the Secretary of the Interior	ANILCA Qualifications on Modes of Access	Related NPS Regulations from 36 CFR Unless Noted
<p>§1110(a)</p> <ul style="list-style-type: none"> <li>• Shall permit the use of snowmachines, motorboats, airplanes, and nonmotorized surface transportation.</li> </ul>	<p>§1110(a)</p> <ul style="list-style-type: none"> <li>• If adequate snow cover (snowmachines).</li> <li>• For traditional activities, where permitted, and travel to and from villages and homesites.</li> <li>• Subject to reasonable regulation.</li> <li>• Unless such use would be detrimental to values of a unit.</li> </ul>	<p>43 CFR §36.11(c,d,e) snowmobiles are permitted for traditional activities and travel to and from occupancies if adequate snow; motorboats and other non-motorized surface transportation are permitted.</p> <p>§13.46(e) subsistence users may use snowmobiles, motorboats, and non-motorized surface transportation when not exercising subsistence rights in accordance with 43 CFR §36.11.</p> <p>§13.46(d) applicable state and federal law adopted and use for harassing or driving hunted wildlife prohibited.</p> <p>43 CFR §36.11(g) off-road vehicles are prohibited off designated routes.</p> <p>43 CFR §36.11(f) non-subsistence aircraft operation is permitted but harassing wildlife is prohibited.</p> <p>43 CFR §36.11(h) closures to paragraph c, d, e, &amp; f uses permissible only if such uses are detrimental to resource values.</p>
<p>§811(b)</p> <ul style="list-style-type: none"> <li>• Shall permit appropriate use for subsistence purposes of snowmobiles, motorboats, and other surface transportation.</li> </ul>	<p>§811(b)</p> <ul style="list-style-type: none"> <li>• If traditionally employed for such uses by local residents.</li> <li>• Subject to reasonable regulation.</li> </ul>	<p>§13.46(a,b) subsistence users may use snowmobiles, motorboats, and other traditional surface transportation, at times and in places not closed to such use, pursuant to state and federal law.</p> <p>§13.46(d) applicable state and federal law adopted and use for harassing or driving hunted wildlife prohibited.</p> <p>§13.45 subsistence use of aircraft is prohibited unless exempted and nothing in this section prohibits aircraft use for anything other than the taking of fish &amp; wildlife.</p> <p>§§13.64, 13.73 communities of Anaktuvuk Pass and Yakutat are exempt from §13.45.</p>

(continued)

TABLE 7. (continued)

ANILCA Directives to the Secretary of the Interior	ANILCA Qualifications on Modes of Access	Related NPS Regulations from 36 CFR Unless Noted
<p>§201(2)</p> <ul style="list-style-type: none"> <li>• Shall permit customary patterns and modes of travel from Deering to Taylor Hwy. in Bering Land Bridge.</li> </ul>	<p>§201(2)</p> <ul style="list-style-type: none"> <li>• During adequate snow cover.</li> <li>• Subject to reasonable regulation to maintain consistency with the purposes of the park unit.</li> </ul>	
<p>§205</p> <ul style="list-style-type: none"> <li>• May take no unreasonably restrictive action on valid commercial fishing rights to use motorized vehicles and airstrips on specified park land in Cape Krusenstern, Wrangell-St. Elias, &amp; Glacier Bay.</li> </ul>	<p>§205</p> <ul style="list-style-type: none"> <li>• Unless such uses constitute a significant expansion of use of park lands beyond 1979 use levels.</li> </ul>	<p>§13.21(c) motor vehicle and airstrip use is permitted by pre-12/2/80 commercial fishers if directly incidental to fishing rights, no significant impairment of resources, and no significant expansion beyond 1979 uses.</p>
<p>§201(2)</p> <ul style="list-style-type: none"> <li>• Continue reindeer grazing, including necessary facilities and equipment, in Bering Land Bridge.</li> </ul>	<p>§201(2)</p> <ul style="list-style-type: none"> <li>• In areas subject to grazing permit before Jan. 1, 1976.</li> <li>• In accordance with sound range/management practices.</li> </ul>	<p>§13.61(a) off-road vehicles for reindeer herding permitted in Bering Land Bridge.</p>
<p>§201(6,10)</p> <ul style="list-style-type: none"> <li>• Shall permit aircraft to land at specified sites in Kobuk Valley and Yukon-Charley.</li> </ul>	<p>§201(6,10)</p> <ul style="list-style-type: none"> <li>• Except when and where to do so would be inconsistent with a park unit's purposes.</li> </ul>	

Congress added another provision which states that "the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue ...."<sup>9</sup> Nonetheless, the general intent and effect of the Wilderness Act is prohibition of motorized and mechanical modes of transportation in designated wilderness areas.

### ANILCA PROVISIONS

Two sections of ANILCA address modes of access for general and subsistence use of Alaska national park areas. These provisions mandate access opportunity by specific modes regardless of any other law. Therefore, sections 1110(a) and 811(b) supersede the mandate of the Wilderness Act in designated wilderness areas of the National Park System in Alaska.<sup>10</sup>

#### *Section 1110(a): General Access*

Congress provided for general access to ANILCA park areas by snowmobile, motorboat, airplane, and non-motorized surface transportation, but restricted use of these modes to "traditional activities (where such activities are permitted by this Act or other law) and travel to and from villages and homesites."<sup>11</sup> "Traditional" is an ambiguous term currently interpreted by the NPS

without statutory definition.<sup>12</sup> Legislative history, however, indicates that Congress intended a broad application of section 1110(a) to permit use of these modes of access for subsistence activities and general activities including sport hunting, sport fishing, berrypicking, and travel between villages.<sup>13</sup> Therefore, federal land management regulations permit all of these modes of access throughout national park areas in Alaska except where prohibited or otherwise restricted.<sup>14</sup>

ANILCA authorized the Secretary of the Interior to reasonably regulate modes of access to protect the values of ANILCA conservation units.<sup>15</sup> According to legislative history, although the Secretary has no discretion to allow or disallow existing modes of access, section 1110(a) does authorize the Secretary "to close entirely to these uses certain areas within the units upon his determination after notice and a hearing that such closure is necessary to protect the values of that unit."<sup>16</sup> Therefore, the NPS has authority to close an ANILCA park area to general access by aircraft, snowmachine, motorboat, or non-motorized surface transportation on a temporary or permanent basis if necessary to protect the natural and other values of the area.<sup>17</sup>

<sup>9</sup> Wilderness Act, 16 U.S.C.A. § 1133(d)(1).

<sup>10</sup> ANILCA §§ 707, 811(b), 1110(a).

<sup>11</sup> ANILCA § 1110(a).

<sup>12</sup> See discussion in "Subsistence Defined," Chapter III.

<sup>13</sup> S Rept. 96-413, pp. 247-8.

<sup>14</sup> 43 C.F.R. § 36.11 (c-f).

<sup>15</sup> ANILCA § 1110(a).

<sup>16</sup> S. Rept. 96-413, p. 299; H. Rept., pt. 1, p. 305.

<sup>17</sup> ANILCA § 1110(a); 43 C.F.R. § 36.11(h)(1); 36 C.F.R. § 13.30(b).

The NPS has promulgated specific closure regulations and defined three types of closure to guide management of Alaska national park areas by superintendents: emergency closures for these modes of access must be preceded by notice and hearing procedures, may last up to thirty days, and may not be extended; temporary closures must be preceded by notice and hearing procedures, may last up to twelve months, and may not be extended; permanent closures must be published as rulemaking in the *Federal Register* and follow more formal notice and comment procedures.<sup>18</sup>

*Section 811(b): Subsistence Access*

Congress mandated reasonable access to subsistence resources on public lands for rural residents engaged in subsistence lifestyles. This access was defined to include "appropriate use ... of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation."<sup>19</sup> NPS regulations require operators of these modes of access to comply with applicable state and federal law, prevent waste or damage to national park areas, and refrain from herding, harassment, or driving wildlife for hunting or other purposes.<sup>20</sup>

When subsistence users are not engaged in subsistence activities, they are subject to the

general access provisions of section 1110(a).<sup>21</sup> However, due to the vague definition of "traditional" and the all-encompassing nature of subsistence, it is unlikely general regulations could or should be enforced for subsistence users. Merely carrying a trap or another subsistence accoutrement could provide legal justification for access under section 811(b), and rigid application of non-subsistence regulations might impair the ANILCA's intent to support comprehensive subsistence lifestyles.<sup>22</sup>

Section 811(b) does not mention aircraft. The NPS has interpreted this omission to preclude subsistence aircraft access for the taking of fish and wildlife in Alaska national parks and monuments.<sup>23</sup> No restriction is made on subsistence aircraft access to national preserves.<sup>24</sup> Subsistence users may employ aircraft access for purposes other than the taking of fish and wildlife, and exceptions are possible for that use under extenuating circumstances.<sup>25</sup> The legislative history of ANILCA, however, indicates Congress

<sup>18</sup> 36 C.F.R. § 13.30(c-e).

<sup>19</sup> ANILCA § 811(a-b).

<sup>20</sup> 36 C.F.R. § 13.46(d).

<sup>21</sup> 36 C.F.R. § 13.46(e).

<sup>22</sup> Sanford Rabinowitch, Landscape Architect/Planner, Anchorage Regional Office, National Park Service, Telephone Conversation (January 1990); Berger, *Village Journey*, p. 68.

<sup>23</sup> 43 C.F.R. § 36.11(f)(4); 36 C.F.R. § 13.45(a).

<sup>24</sup> Sport hunters may access Alaska national preserves under section 1110(a). Therefore, restrictions on subsistence aircraft access to preserves would be unreasonable and violate the subsistence priority mandated in ANILCA § 802(2).

<sup>25</sup> 36 C.F.R. § 13.45(b-c).

intended exceptions to be granted sparingly; "... only rarely should aircraft use for subsistence hunting purposes be permitted within National Parks and National Monuments."<sup>26</sup>

Despite the omission of aircraft for subsistence access, Congress hoped to avoid imposing a freeze on Native access technology;

Although aircraft are not included within the purview of [section 811], reference to "traditionally employed" for subsistence purposes is not intended to foreclose the use of new, as yet unidentified means of surface transportation, so long as such means are subject to reasonable regulation necessary to prevent waste or damage to fish, wildlife or terrain.<sup>27</sup>

Subsistence access to designated ANILCA park areas is guaranteed and NPS authority to regulate such access is limited. Alaska national park area superintendents may restrict or close a route or an area to section 811(b) access on an emergency or permanent basis if such access may cause adverse impact to public health and safety, area resources, historic or scientific uses, endangered or threatened species, or the purposes of an area.<sup>28</sup> Closure to subsistence access by snowmobile, motorboat, dog team, or other surface transportation may not, however, effect an unreasonable restriction of overall subsistence

access or create a permanent closure to subsistence use.<sup>29</sup>

### MANAGEMENT UNDER ANILCA

Implementation of sections 1110(a) and 811(b) have taken different forms under the different statements of purpose and varying circumstances of ANILCA park areas. The five basic modes of access discussed in ANILCA, management in Alaska national park areas, and policy exceptions are discussed below. Table 8 summarizes management of general and subsistence modes of access in Alaska national park areas.

#### *Non-Motorized Surface Transportation*

Federal land management regulations categorize dogs, horses, and other pack or saddle animals as non-motorized surface transportation.<sup>30</sup> NPS general regulations define "pack animals" as horses, burros, mules, or other hoofed mammals.<sup>31</sup> Gates of the Arctic has set a restriction of three hoofed pack animals per recreational party due to environmental impact.<sup>32</sup> Cape Krusenstern, Kobuk Valley, and Noatak have proposed closing access to all pack and saddle animals except dogs to prevent environmental

<sup>26</sup> S. Rept. 96-413, p. 169.

<sup>27</sup> S. Rept. 96-413, p. 275; H. Rept. 96-97, pt. 1, pp. 286-7.

<sup>28</sup> 36 C.F.R. § 13.46(a-c).

<sup>29</sup> ANILCA § 816(b). See: "Subsistence Management — Closure Authority," Chapter III.

<sup>30</sup> 43 C.F.R. § 36.11(e).

<sup>31</sup> 36 C.F.R. § 1.4(a).

<sup>32</sup> *Gates of the Arctic: GMP*, p. 137.

degradation.<sup>33</sup> Otherwise, use of dogs and other pack animals is currently unrestricted in ANILCA park areas and access by non-motorized surface transportation is available to general park users, inholders, and subsistence users.

#### *Motorboats*

Motorboat access is usually unrestricted in ANILCA park areas. Glacier Bay, however, has limited the number of vessels permitted in area waters to protect endangered humpbacked whales. This restriction primarily affects access by the tour industry.<sup>34</sup> Glacier Bay has also proposed closing selected wilderness waters to motorized boats to preserve wilderness character, protect marine environments, and provide for ecological research in those areas.<sup>35</sup> Gates of the Arctic has proposed closure of recreational motorboat access in certain areas to prevent degradation of wilderness character, wildlife, cultural, subsistence, and other natural resources.<sup>36</sup> Katmai has proposed closing the Savanoski River above Old Savanoski to all motorized water transportation.<sup>37</sup> Therefore, motorboat access is currently limited for

recreational use in only one Alaska national park area, and otherwise use of motorboats is unfettered for general, inholding, and subsistence use of both non-wilderness and wilderness areas.

#### *Off-Road or All-Terrain Vehicles (ORV)*

ORV access is not discussed in ANILCA, but commonplace use of ORVs in Alaska required the promulgation of regulations. ORVs are defined as "any motor vehicle designed for or capable of crosscountry travel on or immediately over land, water, sand, snow, ice, marsh, wetland or other natural terrain, except snowmachines or snowmobiles ...."<sup>38</sup> Executive Order 11644 prohibits use of ORVs except on established roads and parking areas, or designated routes. ORV routes may not be designated in wilderness areas, and ORV use may be permitted on existing routes in national parks, monuments, and preserves in Alaska only if such routes would not adversely affect the natural, aesthetic, or scenic values of such areas.<sup>39</sup>

An NPS study in Wrangell-St. Elias documented that ORVs cause significant resource damage at even the lowest level of use.<sup>40</sup> Therefore, recreational ORV access to Alaska

<sup>33</sup> *Cape Krusenstern: GMP*, p. 88; *Kobuk Valley: GMP*, pp. 72, 89; *Noatak: GMP*, pp. 21, 92.

<sup>34</sup> *Glacier Bay: GMP*, pp. 74-76. Regulation and allocation of access to Glacier Bay waters continues to be an issue. See, for example: "Park Service Plan to Issue Permits Angers Cruise Lines," *The Anchorage Times*, Saturday, 9 December 1989, p. B-3.

<sup>35</sup> *Glacier Bay: GMP*, pp. 58-9.

<sup>36</sup> *Gates of the Arctic: GMP*, p. 139.

<sup>37</sup> *Katmai: GMP*, pp. 22, 30.

<sup>38</sup> 36 C.F.R. § 13.1(l).

<sup>39</sup> Use of Off-Road Vehicles on Public Lands, Executive Order 11644 § 3(a)(4), 3 C.F.R. 1971-1975 Compilation, p. 666 (February 8, 1972). Amended by: Executive Order 11989, 3 C.F.R. 1977 Compilation, p. 120 (May 24, 1977); 43 C.F.R. § 36.11(g).

<sup>40</sup> *Wrangell-St. Elias: GMP*, pp. 11-12.

TABLE 8. Summary of Modes of Access Allowed for General and Subsistence Access to National Park Areas in Alaska

- "Yes" & "No" indicates whether general (top) or subsistence (bottom) access by a mode is permitted.
- Heading footnotes apply to all entries in that column unless in parentheses.
- Margin footnotes refer to tables in GMPs; "N" means no GMP table was available and entries in parentheses are derived from the noted text.
- Footnotes in the body of the table refer to exceptions or clarifications in GMPs.
- "—" indicates no information available for a mode of access.

Top = General Bottom = Subsistence	pack animals, saddle stock, and sled dogs						
	motorboats						
	off-road vehicles (ORV or ATV) <sup>1, 2</sup>						
	snowmachines					fixed-wing aircraft <sup>3, 4</sup>	
						helicopters <sup>5</sup>	
						ultra-lights <sup>6</sup>	
Aniakchak Nat'l Monument & Preserve <sup>7</sup>	Yes Yes	Yes Yes	No No <sup>8</sup>	Yes Yes	Yes Yes	No No	No No
Bering Land Bridge Nat'l Preserve <sup>9</sup>	— —	Yes Yes	No No <sup>8, 10</sup>	Yes Yes	Yes Yes	No No	— —
Cape Krusenstern Nat'l Monument <sup>11</sup>	Yes <sup>12</sup> Yes <sup>12</sup>	Yes Yes	No No <sup>8, 13</sup>	Yes Yes	Yes Yes	No No	— —
Denali Nat'l Park and Preserve <sup>14</sup>	Yes Yes	Yes Yes	No No <sup>8</sup>	Yes <sup>15</sup> Yes <sup>16</sup>	Yes Yes	No No	No No
Gates of the Arctic Nat'l Park & Preserve <sup>17</sup>	Yes <sup>18</sup> Yes	Yes <sup>19</sup> Yes	No No <sup>8</sup>	Yes <sup>20</sup> Yes	Yes <sup>21</sup> Yes <sup>22</sup>	No No	No No
Glacier Bay Nat'l Park & Preserve <sup>N</sup>	— —	Yes <sup>23</sup> —	— —	Yes <sup>24</sup> —	Yes <sup>24</sup> —	— —	— —
Katmai Nat'l Park and Preserve <sup>25</sup>	— —	Yes <sup>26</sup> Yes <sup>26</sup>	No No <sup>8</sup>	Yes Yes	Yes <sup>27</sup> Yes <sup>28</sup>	No No	— —
Kenai Fjords Nat'l Park <sup>N, (29)</sup>	— (No)	— (No)	— (No)	Yes <sup>30</sup> (No)	Yes (No)	— (No)	— (No)
Kobuk Valley Nat'l Park <sup>31</sup>	Yes <sup>12</sup> Yes <sup>12</sup>	Yes Yes	No No <sup>8</sup>	Yes Yes	Yes <sup>32</sup> Yes	No No	No No
Lake Clark Nat'l Park & Preserve <sup>N, (33)</sup>	(Yes) (Yes)	(Yes) (Yes)	(No) (No)	(Yes) (Yes)	(Yes) (Yes)	(No) (No)	(No) (No)
Noatak Nat'l Preserve <sup>34</sup>	Yes <sup>12</sup> Yes <sup>12</sup>	Yes Yes	No No <sup>8</sup>	Yes Yes	Yes Yes <sup>35</sup>	No No	No No
Wrangell-St. Elias Nat'l Park & Preserve <sup>36</sup>	Yes Yes	Yes Yes	No Yes <sup>37</sup>	Yes Yes	Yes Yes <sup>38</sup>	No No	No No
Yukon-Charley Rivers Nat'l Preserve <sup>N, (39)</sup>	(Yes) —	(Yes) —	(No) (No)	(Yes) (Yes)	(Yes) <sup>40</sup> —	No <sup>41</sup> —	— —

(notes on following pages)

TABLE 8. (continued)

- 1 Recreational access by ORV is prohibited due to adverse effect on resource values. ORV may be used, by permit, for access to inholdings pursuant to ANILCA § 1110(b) if no alternative traditional and customary mode of access is adequate and feasible. *Aniakchak: GMP, p. 27; Bering Land Bridge: GMP, pp. 88, 90; Cape Krusenstern: GMP, p. 90, 104; Denali: GMP, pp. 33-4; Gates of the Arctic: GMP, pp. 140-1; Katmai: GMP, p. 25; Kobuk Valley: GMP, pp. 74-5; Noatak: GMP, pp. 90-1; Wrangell-St. Elias: GMP, pp. 16, 18.*
- 2 The NPS has the authority, pursuant to ANCSA § 17(b), to reserve public access easements on lands conveyed to Native corporations. In park areas which have already conveyed such lands, existing 17(b) easements typically include access by foot, dog, animals, snowmobiles, two and three wheeled vehicles, and ORV under 3,000 pounds. Some 17(b) easements also include ORV over 3,000 pounds, track vehicles, and four-wheel drive vehicles. In some instances, 17(b) easement access by vehicles with greater impact is restricted to winter use. *Bering Land Bridge: GMP, p. 60; Cape Krusenstern: GMP, p. 58-9, 88; Gates of the Arctic: GMP, pp. 70, 75; Katmai: GMP, pp. 119-20; Kobuk Valley: GMP, pp. 50-1; Noatak: GMP, pp. 65-6.*
- 3 All federal land within these areas is open to aircraft landing unless otherwise noted. *Aniakchak: GMP, p. 25; Bering Land Bridge: GMP, p. 94; Cape Krusenstern: GMP, p. 59; Denali: GMP, p. 35; Gates of the Arctic: GMP, p. 137; Katmai: GMP, p. 26; Kenai Fjords: GMP, p. 62; Kobuk Valley: GMP, pp. 51, 71, 91; Noatak: GMP, p. 89; Wrangell-St. Elias: GMP, p. 15; Yukon-Charley: GMP, p. 61.*
- 4 Subsistence access by aircraft for the taking of fish and wildlife is prohibited in parks and monuments but not prohibited in preserves. Exceptions are noted in the table. *Aniakchak: GMP, p. 33; Bering Land Bridge: GMP, p. 94; Cape Krusenstern: GMP, pp. 59, 91; Denali: GMP, pp. 35, 45; Gates of the Arctic: GMP, p. 124; Kobuk Valley: GMP, pp. 72, 88; Lake Clark: GMP, p. 17; Noatak: GMP, p. 106; Wrangell-St. Elias: GMP, p. 18.*
- 5 The use of helicopters is prohibited, unless a landing area has been designated or a park area superintendent has granted a permit. 43 CFR 36.11(f)(4). No areas have been designated for helicopter landings. *Aniakchak: GMP, p. 26; Bering Land Bridge: GMP, p. 97; Cape Krusenstern: GMP, pp. 59, 91; Denali: GMP, p. 35 and Superintendent's Orders (Compendium), Denali National Park and Preserve, May 14, 1989, pp. 7-8; Gates of the Arctic: GMP, p. 138; Katmai: GMP, p. 27; Kobuk Valley: GMP, p. 91; Noatak: GMP, p. 90; Wrangell-St. Elias: GMP, p. 16.*
- 6 All park areas with prohibitions include ultralights. Some also prohibit hovercraft and airboats. See citation under each park area name for specifics.
- 7 *Aniakchak: GMP, p. 24.*

(continued)

TABLE 8. (continued)

- 8 ORV have not been found to be a traditional mode of access for subsistence uses. *Aniakchak: GMP, p. 33; Bering Land Bridge: GMP, p. 102; Cape Krusenstern: GMP, pp. 104; Denali: GMP, p. 45; Gates of the Arctic: GMP, p. 124; Katmai: GMP, p. 30; Kobuk Valley: GMP, pp. 75, 88; Noatak: GMP, pp. 92, 106.*
- 9 *Bering Land Bridge: GMP, p. 91.*
- 10 ORV may be used for reindeer herding by superintendent's permit. *Bering Land Bridge: GMP, pp. 90-1.*
- 11 *Cape Krusenstern: GMP, pp. 93-4.*
- 12 The NPS proposes to close Cape Krusenstern National Monument and Kobuk Valley National Park to pack animals other than dogs; pack and saddle stock are not traditional or customary for the area and would cause significant detriment to area resources. *Cape Krusenstern: GMP, p. 88; Kobuk Valley: GMP, pp. 72, 89; Noatak: GMP, pp. 21, 92.*
- 13 ORV are permitted on two trail easements (amendments to ANCSA §§ 34-5) if sufficient snow cover or frozen ground conditions exist. *Cape Krusenstern: GMP, pp. 59, 93-4.*
- 14 *Denali: GMP, pp. 37-8.*
- 15 Recreational snowmobile use is permitted only if it is a traditional activity. *Denali: GMP, pp. 37-8.* The use of snowmachines in the pre-1980 Park is not traditional, and is not allowed. *Superintendent's Orders (Compendium), Denali National Park and Preserve, May 14, 1989, p. 8.*
- 16 Subsistence snowmachine access is allowed only in the Preserve, where subsistence uses are traditional in the Park additions, and only if snowmachines were the traditionally used mode of subsistence access. *Denali: GMP, pp. 37-8.* The use of snowmachines in the pre-1980 Park is not traditional, and is not allowed. *Superintendent's Orders (Compendium), Denali National Park and Preserve, May 14, 1989, p. 8.*
- 17 *Gates of the Arctic: GMP, pp. 262-3.*
- 18 Recreational users are limited to three hooved pack animals per group. Only harnessed or restrained dog teams or pack dogs are permitted. *Gates of the Arctic: GMP, pp. 136-7.*
- 19 Park is pursuing legislation to prohibit recreational use of motorboats in certain areas. *Gates of the Arctic: GMP, p. 139.*

(continued)

TABLE 8. (continued)

- 20 Park is pursuing legislation to prohibit recreational use of snowmachines in certain areas. *Gates of the Arctic: GMP*, pp. 139-40.
- 21 The NPS is considering designating the eastern edge of the Park a no-landing zone to protect the solitude and quality of experience in an anticipated high walk-in recreational use area. *Gates of the Arctic: GMP*, pp.137-8.
- 22 Residents of Anaktuvuk Pass may use aircraft for subsistence taking of fish and wildlife in the Park. *Gates of the Arctic: GMP*, pp. 262-3.
- 23 A portion of the waters designated wilderness are proposed for closure to motor boats. Larger motorized vessels (e.g. tour boats) are currently limited throughout the park area. Access limitations are founded on the impact of vessels on the humpbacked whale population. *Glacier Bay: GMP*, pp. 58-9, 74, 76 and *Glacier Bay National Park and Preserve Compendium*, June 21, 1989, pp. 5-7.
- 24 The NPS proposes to close most beaches in the Park to aircraft landing and snowmobiles. *Glacier Bay: GMP*, p. 76.
- 25 *Katmai: GMP*, p. 20.
- 26 The NPS proposes a motorboat closure on Savanoski River above Old Savanoski. *Katmai: GMP*, p. 22.
- 27 The NPS proposed closures to aircraft landings on lakes and land in four areas. *Katmai: GMP*, p. 30.
- 28 Katmai National Park is closed to subsistence uses, therefore, subsistence aircraft access applies only to the Preserve. *Katmai: GMP*, p. 30.
- 29 Kenai Fjords is closed to subsistence activities. 36 CFR § 13.67(a).
- 30 The entire Park is open to snowmachine access. Commercially supplied access to the Harding Icefield, however, will be limited for public safety to multi-passenger vehicles operated by an employee of the concessioner. *Kenai Fjords: GMP*, pp. 51, 62.
- 31 *Kobuk: GMP*, p. 205.

(continued)

TABLE 8. (continued)

- 32 Aircraft access to the Salmon River for recreational float trips should be below the headwaters since water levels are typically too low to float on the upper portions of the river. Aircraft may be landed anywhere in the Park and a natural or constructed airstrip will be designated if necessary to provide safe access for float trips. *Kobuk Valley: GMP, pp. 91-2.*
- 33 Circulation within the Park and Preserve for both general and subsistence access is allowed by airplane snowmachine, motorboat, non-motorized vessels, dog sleds, and foot travel. Circulation within areas designated as wilderness is allowed by aircraft, snowmobiles, and motorboats (where traditional). No other motorized access are generally permitted. *Lake Clark: GMP, pp. 24, 32.*
- 34 *Noatak: GMP, pp. 213-14.*
- 35 Subsistence aircraft access is permitted for the taking of fish and wildlife. *Noatak: GMP, p. 106.*
- 36 *Wrangell-St. Elias: GMP, pp. 177-8.*
- 37 ORV access for subsistence use may be permitted on designated routes if customary and traditional. Currently subsistence ORV access is limited to existing routes under permit by the superintendent. *Wrangell-St. Elias: GMP, pp. 17-18.*
- 38 Residents of Yakutat may use aircraft for subsistence taking of fish and wildlife from the Malaspina forelands of the Park. *Wrangell-St. Elias: GMP, p. 18.*
- 39 General and Subsistence Access will continue by aircraft, motorboats, snowmachines, and dogsleds. ORV will be prohibited. *Yukon-Charley Rivers: GMP, p. 61.*
- 40 Aircraft access to the Charley River for recreational float trips is permitted. The existing airstrip near the headwaters is bad repair. Renovation is impossible without extensive damage to the Preserve's resources. Use of the airstrip is allowed at pilots' discretion, and at their own risk. *Yukon-Charley Rivers: GMP, pp. 61, 99-100.*
- 41 Helicopter permits from the superintendent for float-trip access to the Charley River will not be site specific, but adjustable to adjust starting points to the changing water level of the river. *Yukon-Charley Rivers: GMP, pp. 61-2, 99-100.*

national park areas is typically prohibited.<sup>41</sup> ORVs may be used for subsistence access if such use is "appropriate" and "traditionally employed."<sup>42</sup> Most areas, however, have found and declared that subsistence ORV access is not traditional and therefore not permitted.<sup>43</sup> These standard prohibitions have several exceptions.

First, rights-of-way in many national park areas in Alaska allow ORV access. Federal easements have been reserved across Native corporation lands within or adjacent to national park areas pursuant to section 17(b) of ANCSA to preserve public access to public lands.<sup>44</sup> There are currently twenty-two 17(b) easements in six ANILCA areas and many more will evolve as Native corporation land selections are finalized. ORV access along these easements is often permitted, although such use is typically restricted to vehicles less than 3,000 pounds or winter

access.<sup>45</sup> Congress recognized tractors with sleds and snowmachines as customary modes of access for the right-of-way across Bering Land Bridge.<sup>46</sup> Two easements in Cape Krusenstern also permit ORV use pursuant to sections 34 and 35 of ANCSA.<sup>47</sup>

Second, ANILCA permitted continued access by ORVs for specific purposes. Use of motor vehicles by commercial fishing operators may continue at 1979 levels of use in Cape Krusenstern and designated areas of Wrangell-St. Elias and Glacier Bay. This access may be denied if such use is not necessary for the exercise of valid commercial fishing licenses or would constitute a significant detriment to area resources.<sup>48</sup> ORV use is also permitted, subject to reasonable regulation, as "necessary facilities and equipment" for continued reindeer herding in Bering Land Bridge.<sup>49</sup>

Finally, ANILCA provided ORV access for two classes of use. Subsistence ORV use is permitted in Wrangell-St. Elias as a traditionally

<sup>41</sup> *Aniakchak*: GMP, pp. 27, 33; *Bering Land Bridge*: GMP, pp. 88, 90, 102; *Cape Krusenstern*: GMP, pp. 90-1, 104; *Denali*: GMP, pp. 33-4, 45; *Gates of the Arctic*: GMP, pp. 124, 140-1; *Katmai*: GMP, pp. 25, 30, 119; *Kobuk Valley*: GMP, pp. 74-5, 88; *Noatak*: GMP, pp. 90-2, 106; *Wrangell-St. Elias*: GMP, pp. 12, 16, 18; *Yukon-Charley*: GMP, p. 61.

<sup>42</sup> ANILCA § 811(b).

<sup>43</sup> *Aniakchak*: GMP, p. 33; *Bering Land Bridge*: GMP, p. 102; *Cape Krusenstern*: GMP, p. 104; *Denali*: GMP, p. 45; *Gates of the Arctic*: GMP, p. 124; *Katmai*: GMP, p. 30; *Kobuk Valley*: GMP, p. 75; *Noatak*: GMP, pp. 92, 106; *Yukon-Charley*: GMP, p. 61.

<sup>44</sup> Alaska Native Claims Settlement Act, Public Law 92-203, 85 Stat. 708 (1981).

<sup>45</sup> *Bering Land Bridge*: GMP, p. 60; *Cape Krusenstern*: GMP, pp. 58-9, 88-9; *Gates of the Arctic*: GMP, pp. 70, 75; *Katmai*: GMP, pp. 119-20; *Kobuk Valley*: GMP, pp. 50-1; *Noatak*: GMP, pp. 65-6.

<sup>46</sup> ANILCA § 201(2); see: "Transportation and Utility Systems — Mandated TUS Access," Chapter V; S. Rept. 96-413, pp. 142-3; H. Rept. 96-97, pt. 1, p. 151.

<sup>47</sup> *Cape Krusenstern*: GMP, pp. 90, 104.

<sup>48</sup> ANILCA § 205; 36 C.F.R. § 13.21(c).

<sup>49</sup> ANILCA § 201(2); 36 C.F.R. § 13.61(a); *Bering Land Bridge*: GMP, p. 90.

employed subsistence mode of access.<sup>50</sup> Wrangell-St. Elias is the only ANILCA park area to permit ORV access pursuant to section 811(b). All national park areas in Alaska, however, must provide ORV access to inholdings under section 1110(b) and the Wilderness Act if no alternative traditional and customary mode of access is adequate and feasible.<sup>51</sup> Congress intended inholding rights to "include the right to traverse the Federal land with aircraft, motorboats, or *land vehicles*, and to use such parts of the Federal lands as are necessary to construct safe routes for such vehicles."<sup>52</sup> [emphasis added]

#### *Snowmachines*

"Snowmachines" or "snowmobiles" are defined as self-propelled vehicles under 1,000 pounds intended for off-road travel on snow, driven by tracks, and steered by skis.<sup>53</sup> Snowmachines may only be used during periods of adequate snow cover

or frozen river conditions.<sup>54</sup> "Adequate snow cover" means "sufficient depth, approximately 6-12 inches, or a combination of snow and frost depth sufficient to protect the underlying vegetation and soil."<sup>55</sup>

Limitations of snowmobile access under ANILCA are rare. Denali has determined recreational snowmachine access to that part of the park originally in Mt. McKinley National Park is not traditional and therefore not permitted. Denali has also limited subsistence snowmachine access to the preserve and areas of the park addition where such use is traditional; subsistence access to the original park area is not traditional and not permitted.<sup>56</sup> Glacier Bay has proposed closing most beaches to snowmachine access to prevent excessive noise from disrupting visitor enjoyment and wildlife habitat.<sup>57</sup> Gates of the Arctic is pursuing a legislative prohibition of recreational use of snowmobiles in certain areas to prevent environmental degradation, disruption of wilderness character, and negative impact on wildlife and subsistence opportunity.<sup>58</sup> Therefore, with one exception general, subsistence, and inholding snowmachine access is currently permitted throughout both non-wilderness and wilderness park areas in Alaska.

<sup>50</sup> *Wrangell-St. Elias: GMP*, p. 17.

<sup>51</sup> *Aniakchak: GMP*, p. 27; *Bering Land Bridge: GMP*, p. 90; *Cape Krusenstern: GMP*, pp. 90, 104; *Denali: GMP*, p. 34; *Gates of the Arctic: GMP*, p. 141; *Katmai: GMP*, p. 25; *Kobuk Valley: GMP*, pp. 74-5; *Noatak: GMP*, p. 91; *Wrangell-St. Elias: GMP*, p. 16. Inholdings are assured adequate access, and mineral claims or other valid occupancies surrounded by designated wilderness are guaranteed ingress and egress "by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." Wilderness Act, 16 U.S.C.A. § 1134(a-b).

<sup>52</sup> S. Rept. 96-413, p. 248.

<sup>53</sup> 36 C.F.R. § 13.1(q).

<sup>54</sup> ANILCA § 1110(a); 43 C.F.R. § 36.11(c).

<sup>55</sup> 43 C.F.R. § 36.11(a)(2).

<sup>56</sup> *Denali: GMP*, pp. 37-8; *Superintendent's Orders (Compendium)*, Denali National Park and Preserve, May 14, 1989, p. 8.

<sup>57</sup> *Glacier Bay: GMP*, p. 76.

<sup>58</sup> *Gates of the Arctic: GMP*, p. 140.

*Aircraft*

General and inholding access by fixed-wing aircraft is permitted to all Alaska national park area lands and waters unless otherwise prohibited or restricted.<sup>59</sup> The legislative history of section 1110(a) indicates Congress may have originally intended to limit aircraft access to airplanes equipped with skis or floats.<sup>60</sup> However, natural landing areas without snow or water have historically been used throughout the state and the language of ANILCA and its consequent regulations reflect final Congressional intent to allow continued use of airplanes in general.<sup>61</sup>

Section 1110(b) authorizes the Secretary of the Interior to reasonably regulate or prohibit modes of access if such uses would be detrimental to the resource values of an ANILCA conservation unit.<sup>62</sup> Therefore, the NPS has prohibited operation of aircraft which results in harassment of wildlife.<sup>63</sup> Helicopters are universally prohibited without a permit for designated landing sites,<sup>64</sup> and most ANILCA park areas report that helicopter

landing sites for general access have not been designated.<sup>65</sup>

No fixed-wing aircraft closures are currently reported in ANILCA park area GMPs.<sup>66</sup> However, several closures have been proposed. Gates of the Arctic will consider future closures on the east edge of the park where the North Slope Haul Road may provide easy access and high levels of walk-in recreation.<sup>67</sup> Glacier Bay has proposed closing most beaches to aircraft landings to prevent excessive noise from disrupting visitor enjoyment and wildlife habitat.<sup>68</sup> Katmai has proposed closing four areas to aircraft landing.<sup>69</sup>

ANILCA mandated adequate and feasible access to inholdings.<sup>70</sup> Inholding access by fixed-wing aircraft or helicopter may not be prohibited unless such modes of access would cause significant adverse effect, jeopardize public health and safety, or contradict the purposes of an area. Furthermore,

<sup>59</sup> 43 C.F.R. § 36.11(f).

<sup>60</sup> S. Rept. 96-413, pp. 248, 299; H. Rept. 96-96, pt. 1, p. 305.

<sup>61</sup> S. Rept. 96-413, p. 249.

<sup>62</sup> ANILCA § 1110(a); 43 C.F.R. § 36.11(h).

<sup>63</sup> 43 C.F.R. § 36.11(f).

<sup>64</sup> 43 C.F.R. § 36.11(f)(4). Yukon-Charley Rivers is an exception; helicopter permits for Charley River float trips will not be site specific due to unpredictable water levels near the headwaters. *Yukon-Charley Rivers: GMP*, pp. 61-2, 99-100.

<sup>65</sup> *Aniakchak: GMP*, p. 26; *Bering Land Bridge: GMP*, p. 97; *Cape Krusenstern: GMP*, p. 59; *Denali: GMP*, p. 35; *Gates of the Arctic: GMP*, p. 138; *Katmai: GMP*, p. 27; *Noatak: GMP*, p. 90; *Wrangell-St. Elias: GMP*, p. 16.

<sup>66</sup> *Aniakchak: GMP*, p. 25; *Bering Land Bridge: GMP*, p. 94; *Cape Krusenstern: GMP*, p. 91; *Denali: GMP*, p. 35; *Gates of the Arctic: GMP*, p. 137; *Katmai: GMP*, p. 26; *Kenai Fjords: GMP*, p. 62; *Kobuk Valley: GMP*, pp. 51, 71; *Lake Clark: GMP*, pp. 24, 32; *Noatak: GMP*, p. 89; *Wrangell-St. Elias: GMP*, p. 15; *Yukon-Charley Rivers: GMP*, p. 61.

<sup>67</sup> *Gates of the Arctic: GMP*, pp. 137-8.

<sup>68</sup> *Glacier Bay: GMP*, p. 76.

<sup>69</sup> *Katmai: GMP*, p. 30.

<sup>70</sup> ANILCA § 1110(b).

the NPS may prohibit such inholding access only if an adequate and feasible alternative method of access is available.<sup>71</sup>

ANILCA also mandated aircraft access for two specific purposes. First, continued access by aircraft is guaranteed for commercial fishing operators in Cape Krusenstern and designated areas of Wrangell-St. Elias and Glacier Bay. This access is limited to 1979 levels of use, must be necessary for the exercise of valid commercial fishing licenses, and may not significantly impair an area's resources.<sup>72</sup> Second, Congress required the NPS to permit aircraft access for recreational float trips on the Salmon River in Kobuk Valley and the Charley River in Yukon-Charley Rivers.<sup>73</sup> The NPS currently allows such access but does not maintain improved landing strips.<sup>74</sup>

Subsistence aircraft access for the taking of fish and wildlife in ANILCA national parks and monuments is not permitted.<sup>75</sup> However, subsistence resident zone communities or subsistence permit holders may be exempted from this prohibition if the resources on which they depend are extraordinarily difficult to access by surface transportation, and there is no reasonable

alternative access to those subsistence resources.<sup>76</sup> Two resident zone communities are currently exempt: residents of Anaktuvuk Pass in Gates of the Arctic may use aircraft for subsistence hunting due to extreme variance in caribou migration routes;<sup>77</sup> residents of Yakutat across Yakutat Bay from Wrangell-St. Elias may use aircraft for subsistence access to the Malaspina forelands since such use is traditional and safer than alternative boat access.<sup>78</sup>

#### MODES OF ACCESS: CONCLUSIONS

National park areas in Alaska are extremely remote and lack developed internal transportation networks; only two of the thirteen ANILCA park areas have extensive road access, both of those are rugged gravel systems, and neither provide access to more than a small portion of each park area.<sup>79</sup> ANILCA addressed the exigencies of travel across Alaska mountains, rivers, bogs, distances, and climates and balanced the rights of pre-existing use, inholdings, and subsistence needs with public interest in the preservation of federal lands. The result of that balance is general access by non-

<sup>71</sup> 43 C.F.R. § 36.10(e)(1-2). See: "Inholding Access — Section 1110(b) Access," Chapter V.

<sup>72</sup> ANILCA § 205; 36 C.F.R. § 13.21(c).

<sup>73</sup> ANILCA § 201(6,10); S. Rept. 96-413, p. 152; H. Rept. 96-97, pt. 1, pp. 159, 171.

<sup>74</sup> *Kobuk Valley: GMP*, pp. 91-2; *Yukon-Charley Rivers: GMP*, p. 61.

<sup>75</sup> 43 C.F.R. § 36.11(f)(4); 36 C.F.R. § 13.45(a).

<sup>76</sup> 36 C.F.R. § 13.45(b).

<sup>77</sup> 36 C.F.R. § 13.64(a)(2); S. Rept. 96-413, p. 169; *Gates of the Arctic: GMP*, pp. 262-3.

<sup>78</sup> 36 C.F.R. § 13.73(a)(2); S. Rept. 96-413, p. 169; *Wrangell-St. Elias: GMP*, p. 18.

<sup>79</sup> *Denali: GMP*, p. 140; *Wrangell-St. Elias: GMP*, p. 132. Denali has one road, 89 miles long (15 miles paved, 74 miles gravel), and Wrangell-St. Elias has two roads, 43 and 61 miles long (both gravel).

motorized surface transportation, motorboats, snowmachines, and fixed-wing aircraft, and restricted access by ORV.

ANILCA did not change traditional NPS policy for motorized and mechanical transportation so much as it modified underlying assumptions. Modes of access typically prohibited in the National Park System are not automatically considered contrary to the purposes of ANILCA park areas. The NPS is authorized to regulate, restrict, or prohibit modes of access as necessary to

protect the resources, values, and purposes of national park areas in Alaska, but the burden of proof lies with the agency; regulation in Alaska will require initiative by the NPS. Therefore, future fulfillment of the Organic Act mandate and ANILCA statements of purpose in Alaska national park areas will rely on vigilant research, monitoring, and planning by the NPS for the effect, impact, and appropriate use of ANILCA modes of access.

## CHAPTER VII

### THE EFFECT OF ANILCA ON THE NPS

How has ANILCA affected the NPS? ANILCA doubled the acreage of the National Park System, but more important for the purposes of this analysis, ANILCA modified traditional NPS interpretation of the Organic Act, mandated exceptions to NPS access policy, and redefined NPS authority over national park areas in Alaska. Furthermore, ANILCA continued well established trends, shaped the development of NPS history, and ultimately, created a challenge and enigma for future National Park System management in Alaska. Table 9 summarizes the general effect of ANILCA provisions on NPS access management of Alaska national park areas.

SUMMARY:  
MODIFICATIONS AND EXCEPTIONS

Both the Organic Act and ANILCA statements of purpose contribute to the mandate of Alaska national park areas. The Organic Act states that the National Park System must conserve scenic, natural, historic, and wildlife resources, and provide for sustainable enjoyment of those resources. Congress intended the thirteen national park areas created or expanded by ANILCA to preserve:

- populations of and habitats for fish and wildlife;
- environments, natural processes, and wilderness character;
- opportunities for research and education;
- cultural, historic, and archeological resources;
- opportunities for recreation; and
- outstanding scenery.

ANILCA statements of purpose for individual park areas therefore complement the mandate of the Organic Act. ANILCA as a whole, however, was a compromise between many competing interests, and the broader purposes of the Act required a balance between preservation and development. Elements of that balance extend to and affect NPS management of ANILCA park areas in four categories of access.

Subsistence access to Alaska national park areas is a major modification of traditional NPS access management. 95% of the acreage in ANILCA park areas is open to inherited cultural patterns of non-commercial consumption of renewable resources by local rural residents. The NPS may set technical management standards, implement growth control tools and, if necessary,

temporarily close areas to the use of specific plant or wildlife populations. Otherwise, authority over subsistence access is shared with councils and commissions composed of subsistence users, and the state of Alaska. Cooperative management may ultimately prove advantageous, but initially, it has been complicated by ambiguous statutory definitions and conflicts of interest in state administration. Subsistence use may be consistent with the conservation mandate of the Organic Act if properly managed for sustainable use. Nonetheless, ANILCA subsistence access to Alaska national park areas represents a reinterpretation of the Organic Act mandate and a new role for the NPS.

Natural resource provisions in ANILCA also modified and expanded the role of the NPS in Alaska. Aside from limited exceptions, general policies for the use of plant and fish resources were not affected. However, access policy for wildlife resources was dramatically modified by the formation of extensive national preserves; sport hunting is allowed in ANILCA preserves, or 40% of the acreage added to the National Park System. ANILCA park areas are closed to mineral access, but extensive pre-existing mining claims were incorporated within Alaska national park area boundaries. The NPS is authorized to close access to renewable resources and regulate mining in ANILCA park areas, but NPS resource management in Alaska is complicated by several factors: state owned submerged lands within national park areas remain open to mineral location

TABLE 9. Generalized Summary of the Effect of ANILCA on National Park Service Access Management in Alaska National Park Areas

ANILCA Provisions	Traditional NPS Interpretation of the Organic Act	Exceptions to Organic Act & ANILCA Mandates	NPS Discretion	Ambiguities and Complications
ANILCA General Purposes	<ul style="list-style-type: none"> <li>Potential contradiction; balance between preservation &amp; development</li> </ul>		<ul style="list-style-type: none"> <li>None; legislatively mandated</li> </ul>	<ul style="list-style-type: none"> <li>Congressional intent for balance of preservation &amp; development</li> </ul>
ANILCA Park Area Statements of Purpose	<ul style="list-style-type: none"> <li>Complimentary; preservation of scenic, historic, natural, wildlife, and recreation resources</li> </ul>		<ul style="list-style-type: none"> <li>None; legislatively mandated</li> </ul>	<ul style="list-style-type: none"> <li>Congressional intent for balance with ANILCA modifications, exceptions, and authorizations</li> </ul>
Subsistence Use Access	<ul style="list-style-type: none"> <li>Modification; consistent with Organic Act if managed for sustainable use</li> </ul>		<ul style="list-style-type: none"> <li>Cooperative management; loss of autonomy</li> <li>Temporary closure authority</li> <li>Set standards</li> <li>Control growth</li> </ul>	<ul style="list-style-type: none"> <li>New NPS role</li> <li>Definition of "traditional," "rural/urban," "healthy," and "healthy &amp; natural"</li> <li>Conflict of interest in state administration</li> </ul>
Plant Use Access	<ul style="list-style-type: none"> <li>Complimentary; non-commercial collection allowed for personal use</li> </ul>	<ul style="list-style-type: none"> <li>Subsistence use of timber</li> <li>Grazing in Bering Land Bridge</li> </ul>	<ul style="list-style-type: none"> <li>Closure authority</li> </ul>	
Fish Use Access	<ul style="list-style-type: none"> <li>Complimentary; sport fishing allowed</li> </ul>	<ul style="list-style-type: none"> <li>Commercial fishing in Glacier Bay</li> </ul>	<ul style="list-style-type: none"> <li>Closure authority</li> </ul>	
Wildlife Use Access	<ul style="list-style-type: none"> <li>Modification — nat'l. preserves; consistent with Organic Act if managed for sustainable use</li> </ul>		<ul style="list-style-type: none"> <li>Closure authority</li> </ul>	<ul style="list-style-type: none"> <li>New NPS role; sport hunting management</li> </ul>

(continued)

TABLE 9. (continued)

ANILCA Provisions	Traditional NPS Interpretation of the Organic Act	Exceptions to Organic Act & ANILCA Mandates	NPS Discretion	Ambiguities and Complications
Mineral Access	<ul style="list-style-type: none"> <li>• Complimentary; prohibited</li> </ul>	<ul style="list-style-type: none"> <li>• Valid existing mineral claims</li> </ul>	<ul style="list-style-type: none"> <li>• Regulatory Authority</li> </ul>	<ul style="list-style-type: none"> <li>• New NPS role; mining management</li> <li>• Extensive claims in Alaska park areas</li> <li>• Inadequate NPS mining regulations</li> <li>• State submerged lands open to mineral entry</li> </ul>
Technical Support Facilities	<ul style="list-style-type: none"> <li>• Modification (of Wilderness Act, too); permitted</li> </ul>		<ul style="list-style-type: none"> <li>• advisory authority</li> </ul>	
Cabin Occupancy	<ul style="list-style-type: none"> <li>• Complimentary; prohibited</li> </ul>	<ul style="list-style-type: none"> <li>• Existing cabin occupancies</li> <li>• Commercial fishing use in specific areas</li> <li>• subsistence use</li> </ul>	<ul style="list-style-type: none"> <li>• Permit revocation authority</li> </ul>	
Temporary Facilities	<ul style="list-style-type: none"> <li>• Modification; consistent if regulated to prevent resource degradation</li> </ul>		<ul style="list-style-type: none"> <li>• Prohibition authority</li> </ul>	
Inholding Access	<ul style="list-style-type: none"> <li>• Complimentary; permitted as private right under Fifth Amendment</li> </ul>		<ul style="list-style-type: none"> <li>• Must permit adequate and feasible access</li> <li>• May not enforce federal regulations on inholdings</li> <li>• Acquisition of inholdings only with consent of owners</li> </ul>	<ul style="list-style-type: none"> <li>• Incomplete state &amp; Native corporation land selections and small claims adjudication</li> </ul>

(continued)

TABLE 9. (continued)

ANILCA Provisions	Traditional NPS Interpretation of the Organic Act	Exceptions to Organic Act & ANILCA Mandates	NPS Discretion	Ambiguities and Complications
Transport and Utility Systems	<ul style="list-style-type: none"> <li>• Complimentary; applicable law applies</li> </ul>	<ul style="list-style-type: none"> <li>• Four TUS mandated by Congress</li> </ul>	<ul style="list-style-type: none"> <li>• Advisory authority only for future TUS in wilderness areas; decision by the President or Congress</li> <li>• regulatory authority to "maximum extent feasible"</li> </ul>	<ul style="list-style-type: none"> <li>• Uncertain authority for non-wilderness TUS decisions</li> <li>• Overlap with inholding access</li> <li>• Reversal of protection for non-wilderness and wilderness</li> <li>• Constitutionality of reserved Congressional approval</li> </ul>
Modes of Access	<ul style="list-style-type: none"> <li>• Modification (of Wilderness Act, too); all modes except ORV &amp; helicopters allowed; consistent if regulated to prevent resource degradation</li> </ul>	<ul style="list-style-type: none"> <li>• ORV; permitted on easements, for commercial fishing use in specific areas, and for reindeer herding in Bering Land Bridge</li> </ul>	<ul style="list-style-type: none"> <li>• Closure authority</li> </ul>	<ul style="list-style-type: none"> <li>• Definition of "traditional"</li> <li>• Overlap between general and subsistence modes of access</li> </ul>

and entry; NPS mining regulations are not adequate to manage the volume of existing mineral claims in ANILCA park areas; and the NPS is new to both mining and sport hunting management.

Incidental use provisions also affected NPS access management in Alaska. Access for technical support facilities and temporary facilities modified traditional NPS interpretation of the Organic Act mandate and the Wilderness Act. ANILCA provisions for cabin occupancy, inholding access, and transportation and utility systems are superficially consistent with traditional NPS policy. However, ANILCA permitted continued existing cabin use, mandated four specific TUS, and essentially, modified these policies in practice. Furthermore, ANILCA eviscerated NPS authority over several incidental uses of Alaska national park areas. The NPS is authorized to prohibit temporary facilities or revoke cabin permits if necessary to protect ANILCA park area purposes, but the agency has little discretion over other incidental access: NPS authority over technical support facilities is merely advisory; the NPS may not enforce federal regulations on inholdings, deny economically practicable access to inholdings, or generally acquire inholdings without owners' consent; and, while the NPS may regulate accomplished TUS access, it has only advisory authority over future TUS applications in designated wilderness areas. Incidental access management is further complicated by incomplete land conveyances, the uncertainty enshrouding TUS authority over non-

wilderness ANILCA park areas, the overlap between inholding and TUS provisions, and the questionable constitutionality of reserved Congressional approval for wilderness area TUS applications.

Modes of access permitted under ANILCA also modified traditional NPS management. Unlike other national park and designated wilderness areas, ANILCA park areas allow virtually unrestricted access by non-motorized surface transportation, motorboats, and snowmachines. Furthermore, aircraft access is generally permitted except for subsistence taking of fish and wildlife in Alaska national parks and monuments. Only helicopter and non-subsistence ORV access are banned in ANILCA park areas, and even these prohibitions are subject to exceptions. The NPS is authorized to close an area to access by any mode that may threaten national park area purposes, but the incomplete statutory definition of "traditional" and overlapping access provisions complicate NPS management of modes of access in Alaska national park areas.

#### HISTORY:

#### CONTEXT AND CONTINUITY

ANILCA modifications of traditional interpretations of the NPS mandate, ANILCA exceptions to NPS management policy, and ANILCA dilution of NPS authority over Alaska national park areas continues an historic pattern. Public interest in the National Park System,

selection criteria for national park areas, and the role of the NPS have all changed since enactment of the Organic Act in 1916. Review of three important monographs from the history of the National Park System suggests ANILCA is a logical extension, a shaping force, and a watershed within the development of national park history.

#### *Development of Wilderness Appreciation*

Although national park areas are not synonymous with wilderness, that image dominates modern perceptions of the National Park System and ANILCA can be understood as the latest legislative step toward wilderness appreciation in the United States. *Wilderness and the American Mind*, by Roderick Nash, documents the growth of a wilderness ethic in the United States.<sup>1</sup> Wilderness preservation is a relatively recent phenomenon in America. European settlers approached the continent with a mixture of hostile utilitarianism and moral imperative. By the early 1800's, however, urban romantics had discovered the novelty of wilderness and endued it with aesthetic values and moral purity. The literati of the young United States therefore embraced wilderness as both a resource to be conquered and a nationalistic cultural identity. The concept of preservation was born of increasing scarcity and the gradual realization of the physical and social conservation roles of wilderness. By the 1960's

wilderness proponents had effectively organized and instituted wilderness preservation in national legislation.

The third edition of *Wilderness and the American Mind* includes a chapter on Alaska, the history of ANILCA, and the results of the Act.<sup>2</sup> According to Nash, ANILCA was the "greatest single act of wilderness preservation in world history."<sup>3</sup> The United States' final frontier was the natural site for a major confrontation between competing American values of material progress and environmental preservation. Nash avoided irrational optimism for the long-term potential of sustainable wilderness, but establishment of extensive federal conservation units in Alaska led him to conclude that ANILCA came "close to creating the permanent American frontier preservationists desired."<sup>4</sup>

In one sense, ANILCA is the culmination of a radical shift in American attitudes toward wilderness. Quite recently, wilderness was considered morally degenerate and valued solely as an economic resource. In ANILCA, however, wilderness was treated as a resource to be preserved, and an area larger than the state of California was withdrawn from the historic American pattern of settlement and resource exploitation. What had been inconceivable in the early 1800's was proposed by the middle of the century; the urban

<sup>1</sup> Roderick Nash, *Wilderness and the American Mind*, 3rd ed. (New Haven and London: Yale University Press, 1982).

<sup>2</sup> Nash, *Wilderness*, Chapter 14, "Alaska," pp. 272-315.

<sup>3</sup> Nash, *Wilderness*, p. 272.

<sup>4</sup> Nash, *Wilderness*, p. 315.

minority that had been defeated at Hetch Hetchy in 1913 was a popular movement and victorious at Echo Park in 1956;<sup>5</sup> and the ethic first codified in the Wilderness Act of 1964 was expanded in 1980 with enactment of ANILCA and designation of 103 million acres of federal reserves including 56.4 million acres of official wilderness.

On the other hand, ANILCA also represents a redefinition of statutory wilderness in Alaska. ANILCA park area statements of purpose express an American wilderness ethic, but ANILCA modifications and exceptions temper that expression: Congress permitted subsistence access to 95% of ANILCA park area acreage and allowed cabin occupancy for the lifetime of current residents; 40% of ANILCA park area acreage is open to sport hunting access; and technical support stations and motorized modes of access are permitted throughout national park areas in Alaska in direct contradiction to the Wilderness Act. If ANILCA created a "permanent American frontier," it also modified the statutory definition of national park area wilderness to allow far more intrusive human presence and impact.

#### *Development of the National Park Idea*

*National Parks: The American Experience*, by Alfred Runte, focuses on prime natural areas of the National Park system as the most representative

<sup>5</sup> Hetch Hetchy is a canyon in Yosemite National Park, California, which was dammed and flooded. Echo Park is a canyon in Dinosaur National Monument, Colorado, where a dam was prevented.

symbols of the conservation movement.<sup>6</sup> Like Nash, Runte attributes the initial impetus for national parks to the cultural aspirations of a young nation; lacking its own fine art or history, the United States turned to the curiosities of nature and monumental scenery for national identity. The high mountain landscapes at the heart of early national park areas typically lacked resource development potential and therefore blended with the predominant American value of progress to limit the role of national park areas. Although Congress has experimented with environmental preservation of non-scenic resources in the second half of this century, it has consistently failed to provide adequate boundaries or protection to sustain ecosystems threatened by development interests. *National Parks* states that the addition of large natural areas to the National Park System has consistently been justified by and conditioned on scenic value and a complete lack of economically viable natural resources.<sup>7</sup>

Runte added a chapter on ANILCA in the second edition of *National Parks*.<sup>8</sup> In this chapter he stated that reservation of extensive national park areas in Alaska did evidence growth of a

<sup>6</sup> Alfred Runte, *National Parks: The American Experience*, 2nd ed. (Lincoln, Nebraska and London: University of Nebraska Press, 1987).

<sup>7</sup> For a critical review of this thesis, see: Richard W. Sellars, Alfred Runte, Robert M. Utley, Robert W. Winks, and Thomas R. Cox, "The National Parks: A Forum on the 'Worthless Land' Thesis," *Journal of Forest History*, vol. 27 (July 1983): pp. 130-45.

<sup>8</sup> Runte, *National Parks*, Chapter 12, "Decision in Alaska," pp. 236-258.

preservation role in the National Park System. However the conditions of ANILCA once again proved the primacy of American development values. Alaska was the United States' last chance to dedicate national park areas to biological management principles and,

[o]n a scale unique in American History, the passage of the Alaska Lands Act of 1980 realized this fondest of preservationists' dreams. But could the dream be sustained? Indeed, even in the vastness of Alaska, one fundamental accomplishment still eluded the movement — effecting its dreams in perpetuity, in physical reality as well as in transitory laws.<sup>9</sup>

Runte concluded ANILCA would preserve national park areas only to the degree Congress had not excluded and fragmented ecological resources to permit economic use and development.

Emphasis on monumental scenery is obvious in many of the ANILCA park areas. Congress mandated scenic preservation in six Alaska national park areas and several others could well have been justified by the traditional formula of spectacular mountain landscapes. However, all of the ANILCA park areas also include significant low elevation wildlife habitat. Congress mandated preservation of natural environments, geological and biological processes, and wilderness character in eleven of the Alaska national park areas, and all thirteen are directed to preserve populations of and habitat for fish and wildlife. Therefore, ANILCA both sustained the historic purpose of national

parks and continued the recent trend toward ecological preservation.

Unfortunately, there is wide-spread believe among preservationists that ANILCA boundaries and access provisions will not allow sustainable preservation.<sup>10</sup> Several external boundaries around Alaska national park areas were drawn to exclude natural resources.<sup>11</sup> Internal boundaries and access provisions are even more revealing: boundaries between parks or monuments and preserves were clearly designed to favor the guide industry and use of wildlife resources; Congress provided extraordinary access rights for economic use of non-federal land within ANILCA park areas; previously undisturbed mining claims may be developed in the heart of Alaska national park areas; and ANILCA includes a TUS application and approval process specifically to prevent isolation of economically viable natural resources. Therefore, ANILCA confirmed the "worthless lands" thesis of national park history; Congress

<sup>9</sup> Runte, *National Parks*, p. 258.

<sup>10</sup> Environmental publications periodically inventory the short-comings of ANILCA and state goals for future action. For example, see: Rebecca Wodder, "The Challenge Ahead," *The Living Wilderness*, vol. 44, no. 152 (Spring 1981): pp. 13-19; Edgar Wayburn, "Alaska Parks in Peril," *Sierra*, vol. 70, no. 4 (July-August 1985): pp. 24-27; Rice O'Dell, "Alaska: A Frontier Divided," *Environment*, vol. 28, no. 7 (September 1986): pp. 15, 34-7; "Toward the Twenty-First Century: A Wilderness Society Agenda for ANILCA," *Wilderness*, vol. 47, no. 164 (Spring 1989): pp. 35-8.

<sup>11</sup> Swem and Cahn, "The Politics of Parks in Alaska," p. 17.

once again failed to transcend development values in the interest of scenic or ecological preservation.

*Development of the National Park Service*

*America's National Parks and Their Keepers*, by Ronald A. Foresta, is an administrative history which describes the evolution of the NPS from Progressive Era cohesion to contemporary policy confusion.<sup>12</sup> The NPS was established to manage the nation's scenic "crown jewels," but the agency sought functional diversity and specialization to defend itself from bureaucratic competition and keep pace with social change. The NPS succeeded in absorbing dominant roles in historic preservation, national recreation, and environmental preservation, but diversification also incurred negative side-effects. Internal coherency and traditional alliances eroded as the NPS expanded and adapted, and both Congress and the executive branch have learned to use the weakened NPS as a catch-all for popular preservation, a format for broader policy implementation, and a lever in regional and partisan politics.

By the 1970's when distribution of Alaska federal land became a pressing issue, the NPS "found itself a bit player in a process which was of major importance to the future of the System in its charge."<sup>13</sup> The NPS had long coveted lands in

Alaska and hoped to re-establish the primary mission of the agency with creation of wilderness areas in the grand tradition of the earliest parks. However, the NPS also justified Alaska additions by modern selection criteria based on resource representation. In fact, addition of the final "crown jewels" in 1980 allowed the NPS to shift the focus of future expansion in other directions based less on visitor appeal and more on environmental preservation. In that sense, Foresta concluded, ANILCA contributed to the dissolution of the original function of the NPS with the result that, "the Park Service no longer knows what its purpose is nor that of the Park system it manages."<sup>14</sup>

ANILCA certainly highlights the functional diversity of the NPS; ANILCA statements of purpose mandate preservation of everything from wildlife, geological processes, and cultural resources to scenery, research potential, and subsistence viability. The blend of monumental scenery and environmental representation is particularly evident if the mountain landscapes of Wrangell-St. Elias and Aniakchak are compared with the relatively monotonous tundra and rounded mountains of Bering Land Bridge and Kobuk Valley. The diverse purposes of ANILCA coalesce, however, in one primary function; each resource listed in ANILCA statements of purpose contributes to the sustainable conservation mandate

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<sup>12</sup> Ronald A. Foresta, *America's National Parks and Their Keepers* (Washington, D.C.: Resources for the Future, Inc./The Johns Hopkins University Press, 1984).

<sup>13</sup> Foresta, *America's National Parks*, p. 85.

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<sup>14</sup> Foresta, *America's National Parks*, p. 1.

of the Organic Act, and the mission of the NPS in Alaska is clear.

However, ANILCA did create policy confusion due to inconsistent legislative direction and dissolution of NPS authority. Although ANILCA statements of purpose complement the Organic Act mandate, so many general modifications and specific exceptions were inserted that Congressional intent was thoroughly obfuscated. ANILCA dispersed or diluted NPS authority to manage Alaska national park areas and, although the NPS may restrict or prohibit some forms or modes of access, the burden of proof has been shifted; whereas traditional NPS policy assumes certain access is contradictory to the Organic Act, ANILCA requires evidence before closures may be instituted. In this sense, ANILCA left the NPS with mixed signals and a seemingly arbitrary policy which wavers between preservation and development.

### THE FUTURE:

#### EVALUATION AND EXTRAPOLATION

The historic tension in ANILCA is illustrated in Figure 1. A wilderness ethic has emerged and grown in the United States. However, predominant American emphases on progress and productivity have set a ceiling on the growth of conservation values. Policy confusion has resulted from the inevitable clash over increasingly scarce natural resources; there is no longer enough wilderness left to simultaneously support

unlimited private rights, development interests, and environmental preservation.

ANILCA is both a microcosm of national park history and a watershed. Alaska federal land represented the last opportunity to add prime natural areas to the National Park System in the grand tradition of the earliest parks.<sup>15</sup> ANILCA doubled the acreage managed by the NPS, but as the Alaska land disposal frontier closed, the conflict between development and preservation focused on land use. ANILCA defined the land use management frontier with policy modifications and exceptions which limit the probability of sustainable conservation in Alaska national park areas. If these restrictions are to be transcended and the Organic Act realized within ANILCA park areas, the NPS must assertively apply existing discretion under the Act and Congress must delegate greater authority over ANILCA park area land use to the NPS.

#### *Existing Discretion*

ANILCA modifications of and exceptions to traditional NPS interpretations of the Organic Act permit access to Alaska national parks typically prohibited elsewhere in the National Park System. However, the NPS is authorized by ANILCA and

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<sup>15</sup> Congress stated that ANILCA obviated the need for future legislation to create federal conservation units in Alaska. ANILCA § 101(d). However, it is a common principle of law that no legislature may bind the actions of future members — new national park areas in Alaska are a possibility if not a likelihood.

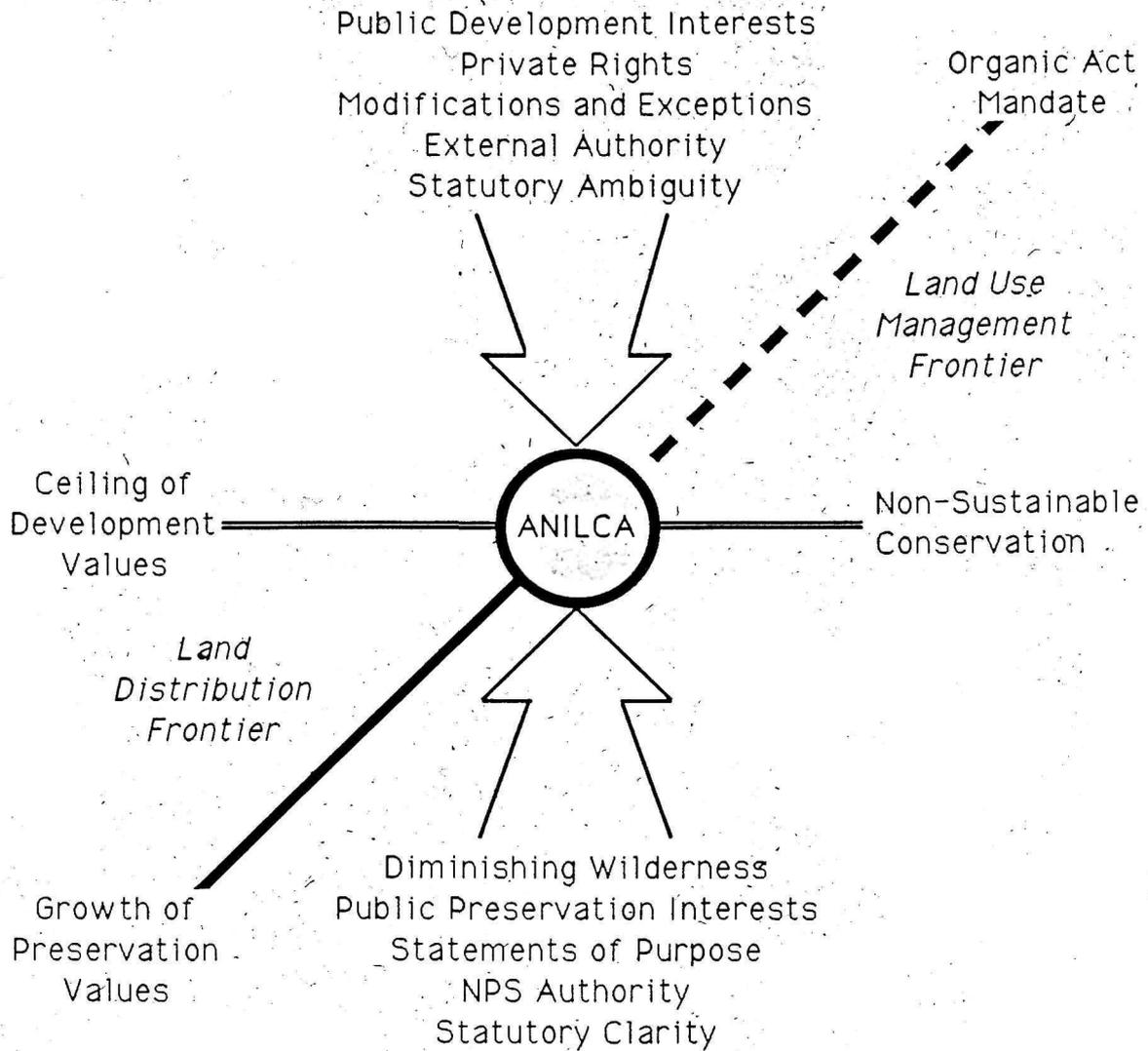


FIGURE 1. ANILCA and the Growth of Preservation Value

other applicable law to regulate subsistence use, plant use, fish and wildlife use, mining activity, cabin occupancy, temporary facility use, and modes of access in Alaska national parks. None of these uses need necessarily impair national park resources if properly limited and regulated by the NPS. However, in Alaska, the NPS must take the initiative and carefully justify any restrictive management; ANILCA shifted the burden of proof to the NPS.

The NPS has made a slow start managing ANILCA park areas. Despite extensive research during the "d-2" land selection process and the first ten years of ANILCA, relatively little is known about each of the national park areas in Alaska. Furthermore, the NPS has been acutely aware that every initial management action may influence future policy. Therefore, the agency has carefully avoided creating irreversible policy precedent.<sup>16</sup>

This caution is well founded. The federal courts<sup>17</sup> have evolved an interpretation of ANILCA which requires a case by case analysis based on the Act's overall purposes.<sup>18</sup> However,

<sup>16</sup> Williss, "Do Things Right the First Time," pp. 286, 290.

<sup>17</sup> In particular, the 9th Circuit Court of Appeals, which has jurisdiction over the Alaska District Court. Only one ANILCA case, *AMOCO Production Company v. Village of Gambell*, 480 U.S. 531, 1987, has reached the Supreme Court, and it was remanded to the 9th Circuit Court for further decisions.

<sup>18</sup> Eric Todderud, *Alaska Lands Act: A Delicate Balance Between Conservation and Development*, 8 *The Public Land Law Review* 143-163 (1987).

The court's implicit recognition that the legislative history behind ANILCA demonstrates an intent to compromise between environmental protection and resource development means that litigants who can point to favorable portions of legislative history will not necessarily prevail. The overall conservationist purpose of the act will be more persuasive than evidence of the frequently conflicting intentions of the legislators who forged the compromise.<sup>19</sup>

This dearth of persuasive legislative history leaves the NPS without guidance or support when confronting ambiguous Congressional intent or statutory language in ANILCA.

Review of ANILCA case law emphasizes NPS vulnerability to statutory language.<sup>20</sup> Four cases during the first ten years of litigation pivoted on inconsistently applied, undefined, ambiguous, or implied language in ANILCA and were decided in favor of development interests.<sup>21</sup> However, the

<sup>19</sup> Kueffner, *Southeast Alaska Conservation Council, Inc. v. Watson*, p. 150.

<sup>20</sup> Although the NPS was named in only one of 16 case histories during the first decade of ANILCA, the implications of many of these cases apply to the NPS. See briefs of ANILCA cases in Appendix C.

<sup>21</sup> *Montana Wilderness Association, Nine Quarter Circle Ranch v. United States Forest Service*, 655 F. 2d 951 (9th Cir. 1981); *AMOCO Production Co. v. Village of Gambell*, 480 U.S. 531 (1987); *City of Angoon v. Marsh*, 749 F. 2d 1413 (9th Cir. 1984); *City of Angoon v. Hodel*, 803 F. 2d 1016 (9th Cir. 1986). For an analysis of the *Montana Wilderness* decision, see: David A. Price, *Wilderness Values and Access Rights: Troubling Statutory Construction Brings Alaska Lands Act into Play*, 54 *University of Colorado Law Review* 593-615 (Summer 1983).

courts held for preservationists in seven decisions when ANILCA or case history provided clear and consistent meaning.<sup>22</sup> Many of these cases, as well as other ANILCA court decisions, were influenced by legal principles besides statutory language. However, the trend is evident; where ANILCA language is clear, the preservation purpose of ANILCA will be upheld, and where it is ambiguous, the courts will weigh ANILCA in favor of development values.

In all probability, the NPS will continue a cautious approach to national park management in Alaska through the agency's second round of planning in the mid-1990's. Several factors will remain uncertain (*e.g.*, final state and Native corporation land conveyances will take years to complete), fiscal austerity will limit administrative initiative, and the Alaska political environment will remain volatile as the state faces dramatically reduced oil revenues.<sup>23</sup> However, sustainable

conservation of national park area resources in Alaska will eventually require the NPS to accept the burden of proof bestowed by ANILCA and assert its role as technical expert. The NPS must collect base line data, document the impact of ANILCA access provisions, and exercise existing discretion over access for subsistence use, renewable resource use, mining, cabin occupancy, temporary facilities, and modes of access in order to fulfill the Organic Act mandate.

#### *Missing Authority*

Even if the NPS diligently exercises agency authority under ANILCA, it cannot completely control access and assure sustainable conservation; access to Alaska national park areas for technical support facilities, inholdings, and transportation and utility systems is beyond NPS discretion. Existing technical support facilities are operated and new facilities sited by authorities outside the NPS. Inholding use, and routes and methods of access are determined by inholding owners. Existing TUS are regulated by the NPS, but most future TUS proposals will be accepted or denied by either the Secretary of the Interior or the President and Congress. None of these decision makers is primarily accountable to the Organic Act mandate, and if that mandate is to be fulfilled in ANILCA park areas, authority over these uses should be vested in the NPS.

ANILCA recognized a strong public interest in continued operation of existing technical support facilities and the potential need for siting future

<sup>22</sup> *Nevitt v. United States*, 828 F. 2d 1405 (9th Cir. 1987); *City of Tenakee Springs v. Block*, 778 F. 2d 1402 (9th Cir. 1985); *People of Village of Gambell v. Hodel*, 869 F. 2d 1273 (9th Cir. 1989); *Southeast Alaska Conservation Council v. Watson*, 697 F. 2d 1305 (9th Cir. 1983); *National Audubon Society v. Hodel*, 606 F. Supp. 825 (D. Alaska 1984); *Trustees for Alaska v. Watt*, 524 F. Supp. 1303 (D. Alaska 1981); *Trustees for Alaska v. Hodel*, 806 F. 2d 1378 (9th Cir. 1986).

<sup>23</sup> Oil revenue has provided up to 90% of the Alaska state budget. Oil revenue peaked in 1982 at \$3,574,800,000 and dropped to \$1,663,000,000 in 1988. A rapid decline is expected in the 1990's as the Prudhoe Bay and Cook Inlet oil fields are exhausted. Naske and Slotnick, *Alaska*, pp. 273, 282.

facilities in Alaska national park areas. Certainly, in most cases, such access is small-scale and relatively compatible with ANILCA park area purposes. However, the competitive public interest in national park area preservation cannot be assured without NPS authority to require mitigating measures and prohibit inordinately obtrusive facilities. Essential technical support facilities should be permitted if vital to public welfare and no viable alternatives exist outside ANILCA park areas. However, the burden of proof should rest on operating or siting agencies. Congress should amend ANILCA to authorize NPS control of technical support facility access.

ANILCA explicitly restricted federal regulatory and acquisition authority over inholdings in Alaska conservation units. Furthermore, Alaska federal land management agencies like the NPS must permit proposed rights-of-way and modes of access to inholdings or offer alternative adequate and feasible access. In effect, Congress prevented NPS control of what may arguably constitute the greatest threat to ANILCA park area resources. Without management tools to prevent debilitating incompatible use of inholdings, the NPS may be unable to fulfill the Organic Act mandate. Federal regulation of private activity on private or state lands under the Property Clause of the Constitution has been upheld in a string of court decisions and could be permitted in ANILCA park

areas.<sup>24</sup> Congress should amend ANILCA to authorize broader NPS regulatory and acquisition authority of inholdings to assure sustainable conservation of Alaska national park areas.

The NPS also lacks decision-making authority over TUS access in most Alaska national park areas. The majority of ANILCA park area acreage has been or will be designated wilderness, and under ANILCA, authority to approve or deny TUS applications across wilderness areas rests with the President and Congress. TUS determinations outside the NPS will occur within a broad political forum in which the Organic Act mandate will be one of many factors weighed. TUS determinations within the NPS would be conducted within a conservation context and focus on the purposes of the National Park System. And, if public interests demanded a larger perspective, Congress would still have the option to individually legislate ANILCA park area TUS as it has already done in four instances. Congress should amend ANILCA to authorize NPS discretion over TUS applications for all Alaska national park areas.

External authority over ANILCA access may not necessarily impair conservation of Alaska

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<sup>24</sup> *United States v. Brown*, 552 F. 2d 817 (8th Cir. 1977); *United States v. Lindsey*, 595 F. 2d 5 (9th Cir. 1979); *Minnesota v. Block*, 660 F. 2d 1240 (8th Cir. 1981); *United States v. Arbo*, 691 F. 2d 862 (9th Cir. 1982); *Free Enterprise Canoe Renters Association v. Watt*, 549 F. Supp. 252 (E.D. Mo. 1982). As cited in: George Cameron Coggins and Charles F. Wilkinson, *Federal Public Land and Resources Law*, 2d ed. (Mineola, New York: The Foundation Press, Inc., 1987), pp. 208-9.

national park areas. Likewise, greater NPS discretion would not guarantee complete compliance with the Organic Act mandate — federal agencies may make mistakes, the NPS must balance access for both preservation and enjoyment of national park area resources, and the agency is influenced by a myriad of unavoidable political forces. Nevertheless, the probability of effective Organic Act implementation is much greater with the NPS than with external agencies, inholders, or the President and Congress. Therefore, if Alaska national park areas are to be managed for sustainable conservation, Congress should amend ANILCA to authorize:

- NPS control of technical support facility access,
- NPS regulation or acquisition of inholdings involving incompatible access, and
- NPS determination of TUS applications for all Alaska national park areas.

There has been no indication, however, that Congress will delegate further NPS discretion, and it is likely ANILCA park area management will continue without full NPS authority over access.

### CONCLUSION

This analysis barely begins to explain the effect of ANILCA on the NPS. A complete study would require volumes to do justice to the political and technical complexities of actual application of ANILCA in Alaska national park areas. Nonetheless, certain conclusions may be drawn:

- First, ANILCA modified traditional NPS access policy with development oriented exceptions and limited NPS authority over access to national park areas in Alaska.
- Second, ANILCA was a logical extension of both NPS history and the ongoing conflict between American values of preservation and development.
- And third, the Organic Act will require assertive NPS management in ANILCA park areas and either expanded NPS authority or the continued growth of wilderness appreciation in broader American values and institutions.

In the final analysis, the Alaska National Interest Lands Conservation Act limited the power of the National Park Service to implement sustainable conservation in Alaska national park areas and thereby embodied the continued ambivalence and enigma of preservation in the United States.

## APPENDIX A

## ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT:

## SUMMARY OF TITLES

Title I — Purposes, Definitions, and Maps

Provides an overall statement of purpose, gives definitions, and states the role of map references.

Title II — National Park SystemTitle III — National Wildlife Refuge SystemTitle IV — National Conservation Area and National Recreation AreaTitle V — National Forest SystemTitle VI — National Wild and Scenic Rivers SystemTitle VII — National Wilderness Preservation System

Delineate the physical additions and alterations to each system or area. Provide the general and specific purposes of each area designated, and in some instances, specific directives for the management and use of areas.

Title VIII — Subsistence Management and Use

Acknowledges the importance of subsistence lifestyles for Natives and citizens of Alaska and provides policy and structure for fulfillment of the Alaska Native Claims Settlement Act (ANCSA). Provides for continued use of ANILCA public land areas for subsistence activities where such uses are customary, traditional, and consistent with the purposes of each area, and gives subsistence taking of fish and wildlife priority over other uses of Alaska federal public land. Establishes an administrative structure to protect and provide continued subsistence opportunity. Mandates regional subsistence advisory councils and subsistence resource commissions for NPS park areas, and authorizes the state of Alaska to administer subsistence policy.

Title IX — Implementation of Alaska Native Claims Settlement Act  
and Alaska Statehood Act

Defines policy for disposition of submerged lands, clarifies administrative provisions, adjusts deadlines, establishes administrative agencies, and reconciles conflicting law. Expedites fulfillment of land grants made under ANCSA and the Alaska Statehood Act.

### Title X — Federal North Slope Lands Study Program

Mandates comprehensive assessment of and planning for mineral, oil, and gas resources, wilderness review and selection recommendations, and wildlife study and management recommendations. Focuses baseline research on the North Slope, including the coastal plain of the Arctic National Wildlife Refuge, but includes assessment of non-north slope oil, gas, mineral resources, and development impact on wilderness and wildlife. Provides Congress with data on mineral and wilderness resources within two years of the enactment of ANILCA.

### Title XI — Transportation and Utility Systems In and Across, and Access Into, Conservation System Units

Provides a unified procedure for application for transportation and utility systems, and review of applications by agencies, the president, and Congress. Addresses rights of access and special access into ANILCA areas, or through areas to inholdings.

### Title XII — Federal-State Cooperation

Creates the Alaska Land Use Council composed of a presidential appointee, the governor of Alaska, the heads of Alaska offices of federal land-use management agencies, the commissioners of Alaska state land-use management agencies, and Alaska Native Regional Corporation representatives. Defines function of the Council as study and advisor to state and federal governments for management, economic development, planning, and coordination between managing agencies of Alaska state, federal, and Native lands. Emphasizes state and federal cooperation in planning and management of lands in the Bristol Bay region.

### Title XIII — Administrative Procedures

Presents a wide range of management directives. Authorizes or limits actions by the Secretary of the Interior, provides for study of land uses, guarantees access and use of general or specific areas, reconciles elements of the Act with previous legislation, and authorizes appropriations for implementing the Act.

### Title XIV — Amendments to the Alaska Native Claims Settlement Act and Related Provisions

Amends ANCSA for administrative clarification and simplification. Defines land selections by and agreements with Native corporations.

### Title XV — National Need Mineral Activity Recommendation Process

Provides a process for opening mineral exploration and development for urgent national needs on all public lands other than national park areas and the Arctic National Wildlife Refuge.

## APPENDIX B

## TOPICAL SUMMARY OF ANILCA SECTIONS RELEVANT TO THE NPS

Title I — Purposes, Definitions, and Maps<sup>1</sup>

- § 101(a-d) states purpose of ANILCA is preservation.
- § 101(b) lists values to be preserved.
- § 101(c) states further purpose of ANILCA is to provide subsistence opportunity.
- § 101(d) states intent of ANILCA is to obviate need for further legislation on federal land reservation in Alaska.

Title II — National Park System<sup>2</sup>

- § 201(1-10) designates new or expanded national park areas in Alaska; provides
- § 202(1-3) statements of purpose for each area; designates national park and monument areas open to subsistence access.
- § 203 states Title II is subject to valid existing rights; states areas are to be administered pursuant to the Organic Act of the NPS and applicable sections of ANILCA;<sup>3</sup> permits hunting in ANILCA preserves; permits subsistence access to ANILCA preserves and those parks and monuments indicated in statements of purpose.
- § 205 permits holders of valid pre-existing commercial fishing rights to continue use of areas in Cape Krusenstern, Wrangell-St. Elias, and Glacier Bay.
- § 206 withdraws lands designated in Title II from all appropriation or disposal including mineral patenting or mineral leasing, and Alaska state or Native corporation selection; states withdrawal is subject to valid existing claims and other ANILCA provisions.

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<sup>1</sup> 94 Stat. § 2374; sections discussed are codified in 16 U.S.C.A. § 3101.

<sup>2</sup> 94 Stat. § 2377; sections discussed are codified in 16 U.S.C.A. § 410hh — 410hh-5.

<sup>3</sup> Specifically, 39 Stat. § 535; 16 U.S.C. §§ 1, 2-4, 3201. See 16 U.S.C. § 410hh-2.

Title VI — National Wild and Scenic Rivers System<sup>4</sup>

- § 601 adds thirteen rivers within ANILCA park areas to Wild and Scenic Rivers System; states administration of these rivers is to be pursuant to the Wild and Scenic Rivers Act.<sup>5</sup>

Title VII — National Wilderness Preservation System<sup>6</sup>

- § 701 designates eight wilderness areas within ANILCA park areas; states administration of these areas is to be pursuant to the Wilderness Act,<sup>7</sup> except as provided by ANILCA.

Title VIII — Subsistence Management and Use<sup>8</sup>

- § 801 acknowledges the necessity of subsistence use of public lands for native and non-native Alaskans; acknowledges lack of resource alternatives and threats to continuing subsistence lifestyles; declares an administrative structure to protect subsistence opportunity.
- § 805(a) mandates regional advisory councils for all federal lands open to subsistence access.
- § 805(d) delegates administration of subsistence to the state of Alaska, if it conforms to ANILCA.
- § 808(a) mandates subsistence resource commissions, to be directed by the Secretary of the Interior, for each national park and monument open to subsistence access.
- § 811(a) guarantees reasonable subsistence access to national preserves and designated parks and monuments.
- § 811(b) lists modes of access permitted for subsistence access.

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<sup>4</sup> 94 Stat. § 2412; sections discussed are codified in 16 U.S.C. § 1274(a) and accompanying notes.

<sup>5</sup> 16 U.S.C.A. §§ 1271, 1274(a).

<sup>6</sup> 94 Stat. § 2417; sections discussed are codified in 16 U.S.C. § 1132 and accompanying notes.

<sup>7</sup> 16 U.S.C.A. § 1131.

<sup>8</sup> 94 Stat. § 2422; sections discussed are codified in 16 U.S.C. §§ 3111, 3115-6, 3118-9, 3121, 3125-6.

- § 815(2) exempts lands closed to the taking of fish and wildlife on Jan. 1, 1978 from subsistence access.
- § 815(4) states that Title VIII does not modify or repeal any federal laws governing conservation or protection of fish and wildlife.
- § 816(a) closes Alaska parks and monuments to non-subsistence taking of fish and wildlife.
- § 816(b) authorizes the Secretary of the Interior to temporarily close any public lands to subsistence uses for listed reasons.

TITLE XI—Transportation and Utility Systems In and Across,  
and Access Into, Conservation System Units<sup>9</sup>

- § 1101 Anticipates future public need for TUS in Alaska; declares standardized process and authority for right-of-way applications and determinations.
- § 1102(4) defines TUS.
- § 1105 sets standards for TUS application recommendations for areas with no applicable law.
- § 1106(a) sets process of TUS application determinations for areas with applicable law, outside of designated wilderness areas.
- § 1106(b) sets process of TUS application determinations for areas with no applicable law, or designated wilderness areas.
- § 1110(a) lists modes of access permitted for traditional uses and travel to and from villages and homesites.
- § 1110(b) guarantees adequate and feasible access to inholdings for economic and other purposes.
- § 1111 provides for temporary access to inholdings.

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<sup>9</sup> 94 Stat. § 2457; sections discussed are codified in 16 U.S.C. §§ 3161, 3166, 3170-1.

Title XIII — Administrative Provisions<sup>10</sup>

- § 1301(a-c) requires preparation of management plans for all ANILCA areas.
- § 1302 defines acquisition authority.
- § 1303(a)(1) creates rights of occupancy for unsanctioned cabin use which began prior to Dec. 18, 1973.
- § 1303(a)(2) creates rights of occupancy for unsanctioned cabin use which began between Dec. 18, 1973 and Dec. 1, 1978.
- § 1303(a)(3) states cabins not under permit may only be used for government business, emergency shelter, or public use.
- § 1303(a)(4) permits subsistence use of cabins by permit if necessary to accommodate reasonable subsistence access.
- § 1303(d) states cabins under permit prior to Dec. 2, 1980 shall be administered by the provisions of such permits.
- § 1310(a) requires reasonable access to existing navigation aids and other facilities in ANILCA conservation units; states that nothing in the Wilderness Act will prohibit operation of these facilities.
- § 1310(b) permits establishment of new navigation aids and other facilities in coordination with managing agencies of ANILCA conservation units.
- § 1313 states ANILCA national preserves shall be managed as parks and monuments except that sport hunting and trapping will be allowed; authorizes the Secretary of the Interior to close any public lands to non-subsistence taking of fish and wildlife for listed reasons.
- § 1314(c) closes ANILCA national parks and monuments to the taking of wildlife; exempts subsistence use where permitted; permits fishing.
- § 1315(c-d) permits public use cabins in designated wilderness areas to continue; permits new public use cabins in designated wilderness areas with notification of Congress.
- § 1316 permits continued use of temporary facilities in conservation units which permit the taking of fish and wildlife.

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<sup>10</sup> 94 Stat. § 2472; sections discussed are codified in 16 U.S.C. §§ 3191-3, 3197, 3199, 3201, 3202(c), and 3203-4.

## APPENDIX C

## ANILCA CASE LAW

ANILCA case law extends from 1981 to 1989. Two cases briefed here have been remanded to lower courts and do not yet have published decisions. Cases were found in U.S.C.A. "Notes of Decisions" following each section of ANILCA, law journal articles, and the Environmental Law Reporter "Table of Cases."<sup>1</sup>

Of the 16 case histories briefed below, thirteen were initiated by plaintiffs to preserve subsistence opportunities or environmental values. In fourteen cases the principle defendant was a branch of the United States government: the Department of the Interior — 4 cases; the Bureau of Land Management — 4 cases; the National Forest Service — 5 cases; the National Park Service — 1 case. Although the NPS has received indirect guidance from many of these cases, it has only been involved in one litigation, *Northern Alaska Environmental Center v. Hodel*. Table 8 provides a summary of ANILCA case law. Cases are presented in chronological order in both the table and following briefs.

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<sup>1</sup> 16 U.S.C.A. §§ 1274, 3101, 3113, 3115, 3120, 3142, 3170, 3192, 3210, 3215, 5396; 43 U.S.C.A. § 1635; Eric Todderud, "Alaska Lands Act: A Delicate Balance between Conservation and Development," 8 *The Public Land Law Review*, pp. 143-63 (1987); "Table of Cases," 20 E.L.R. 1001 (1971-1989).

Trustees for Alaska v. Watt

(plaintiff — defendant)

524 F. Supp. 1303, 12 ELR 20107

District Court, Alaska, 1981

Background — Environmentalists and a Native village contest the transfer of authority to implement ANILCA § 1002(d,e,h) from the Fish and Wildlife Service (FWS) to the United States Geologic Survey (USGS). ANILCA § 1002(d,e,h) directs the Secretary of the Interior to research and present a report to Congress with recommendations for oil, gas, and wildlife management of the coastal plain of the Alaska National Wildlife Refuge.

Issue — Did this transfer of authority for ANILCA § 1002(d,e,h) exceed the Secretary's statutory authority?

Held — The transfer exceeded the Secretary's statutory authority found in ANILCA and National Wildlife Refuge System Administration Act (NWRSA), and therefore, the transfer is voided.

Reasons — ANILCA and the NWRSA both clearly assign administrative authority over wildlife refuges to the FWS alone. The responsibilities of ANILCA § 1002(d,e,h) are clearly administrative functions. Therefore, the Secretary of the Interior had no authority to transfer those functions from the FWS to the USGS.

Status — Affirmed on appeal to the 9th Circuit Court of Appeals with no additional discussion; 690 F. 2d 1279, 1982.

Montana Wilderness Association,Nine Quarter Circle Ranchv. United States Forest Service

(plaintiff, appellant — defendant, respondent)

655 F. 2d 951, 11 ELR 20521

Court of Appeals, 9th District, 1981

Background — Environmentalists and a neighboring land owner sought to prevent a logging road across National Forest Service (NFS) land proposed as wilderness. The district court denied an injunction. On appeal, respondents claim the newly enacted ANILCA § 1323 supported their case.

Issue — Does ANILCA § 1323 apply to NFS land outside of Alaska?

Held — ANILCA § 1323 applies to all NFS land and may apply to Bureau of Land Management land outside of Alaska as well; affirmed.

Reasons — The court found that parallel construction with other ANILCA sections, the overall language of ANILCA, and ANILCA legislative history all indicated § 1323 was intended to apply only to NFS land in Alaska. Despite this, the court decided ANILCA § 1323 applied to all NFS land. This decision was based on legislative history for another bill, specifically, discussion by ANILCA drafters in a House-Senate conference committee three weeks after the passage of ANILCA.

Status — The Supreme Court denied certiorari; 455 U.S. 989, 1982.

TABLE 10. Summary of ANILCA Case Law, 1980-1989

Cases & Citations	Legal Issues	Underlying Conflicts	Results of Cases	Significance of Cases
<i>Trustees for AK v. Watt</i> 524 F.Supp. 1303	Administration of ANILCA § 1002(d,e,h) contested.	Preservation of a national wildlife refuge versus corporate mineral development.	Interior transfer of ANILCA § 1002(d,e,h) administration from F.&W.S. to the U.S.G.S. violated statutory authority.	<ul style="list-style-type: none"> <li>• Statutory delegations of authority cannot be transferred.</li> <li>• Balance toward preservation.</li> </ul>
<i>Montana Wilderness Association</i> 655 F.2d 951	Interpretation of ANILCA § 1323 contested.	Preservation of proposed wilderness area versus private timber rights.	ANILCA § 1323 guarantees access to private land within NFS (and possibly BLM) lands throughout the nation.	<ul style="list-style-type: none"> <li>• Expands ANILCA § 1323 Alaska NFS access provisions to all NFS land in the U.S.</li> <li>• Balance toward development.</li> </ul>
<i>Burgess</i> 654 P.2d 273	Accuracy and impartiality of initiative summary contested.	Implication that state vote could affect ruling federal statute and regulations.	Initiative summary was accurate — voters may be assumed to know state votes do not affect federal law.	<ul style="list-style-type: none"> <li>• Alaska state courts acknowledge predominance of federal law over subsistence management of Alaska public lands.</li> </ul>
<i>Southeast AK Conservation Council</i> 697 F.2d 1305	Interpretation of ANILCA § 503(h)(3) contested.	Preservation of a national monument versus private mineral development.	ANILCA § 503(h)(3) requires an EIS for bulk sampling regardless of access mode, and proposal constitutes bulk sampling.	<ul style="list-style-type: none"> <li>• Statutory language must be followed.</li> <li>• Balance toward preservation.</li> </ul>
<i>Albany County</i> 682 P.2d 1062	Application of <i>Montana Wilderness Assoc.</i> contested.	County control of growth versus developers' economic interest.	<i>Montana Wilderness Association</i> indicates the NFS must provide access to the proposed subdivision.	<ul style="list-style-type: none"> <li>• Accepts application of ANILCA § 1323 to NFS land in Wyoming.</li> <li>• Balance toward development.</li> </ul>
<i>Audubon Society</i> 606 F.Supp. 825	Adherence to ANILCA § 1302(a,h) contested.	Preservation of wilderness resource versus native corporation and corporate mineral development.	Interior land exchange was illegal since it was contrary to the purposes of ANILCA and the public interest.	<ul style="list-style-type: none"> <li>• Land exchanges must meet preservation purposes of ANILCA as well as development interests.</li> <li>• Balance toward preservation.</li> </ul>
<i>Kunaknana</i> 742 F.2d 1145	Adherence to ANILCA § 810 contested.	Preservation of subsistence opportunity versus corporate mineral development.	BLM met ANILCA § 810 procedures to protect subsistence with <i>post hoc</i> finding of no significant impact.	<ul style="list-style-type: none"> <li>• Courts will defer to agency ANILCA § 810 determinations.</li> <li>• Balance toward development.</li> </ul>
<i>City of Angoon v. Marsh</i> 749 F.2d 1413	Interpretation of ANILCA § 503(d) contested.	Preservation of a national monument versus private timber rights.	Native corporation lands within the boundaries of a N.M. are not "within" the N.M. & are exempt from ANILCA § 503(d).	<ul style="list-style-type: none"> <li>• Limits control of timber sales on inholdings within NFS lands.</li> <li>• Balance toward development.</li> </ul>

(continued)

-TABLE 10. (continued)-

Cases	Legal Issues	Underlying Conflicts	Results of Cases	Significance of Cases
<i>City of Tenakee Springs</i> 778 F.2d 1402	Interpretation of ANILCA § 708(b) contested.	Preservation of forest within a national wildlife refuge versus corporate timber development.	ANILCA § 708(b) precludes judicial review of RARE II wilderness designations, but not Alaska NFS plans in general.	<ul style="list-style-type: none"> <li>• Expands scope of judicial review of NFS Alaska plans.</li> <li>• Balance toward preservation.</li> </ul>
<i>Northern AK Environmental Center</i> 803 F.2d 466	Interpretation of ANILCA § 1110(b) contested.	Preservation of three national park areas versus private mineral rights.	ANILCA § 1110(b) guarantees access to mines within N.P. areas, but does not preclude impact analysis of access.	<ul style="list-style-type: none"> <li>• Expands scope of environmental review to require access impact.</li> <li>• Balance toward preservation.</li> </ul>
<i>City of Angoon v. Hodel</i> 803 F.2d 1016	Adherence to NEPA and interpretation of ANILCA §§ 1302(b) & 810 contested.	Preservation of a national monument & subsistence opportunity versus private timber rights.	The EIS was adequate, the land conveyance was not for transfer, & ANILCA § 810 does not apply to private land.	<ul style="list-style-type: none"> <li>• Limits protection of subsistence opportunity by excluding inholdings from ANILCA § 810 procedures.</li> <li>• Balance toward development.</li> </ul>
<i>Trustees for AK v. Hodel</i> 806 F.2d 1378	Interpretation of NEPA § 102(2)(c) and ANILCA § 1002(h) contested.	Preservation of a national wildlife refuge versus corporate mineral development.	CEQ regulations require NEPA public comment procedures for the ANILCA § 1002(h) report on ANWR to Congress.	<ul style="list-style-type: none"> <li>• Public interest demands open procedures.</li> <li>• Balance toward preservation.</li> </ul>
<i>Wilderness Society</i> 824 F.2d 4	Denial of standing and discovery of affected lands contested.	Preservation of recreational opportunities versus Alaska and native corporation land rights.	Plaintiffs do not have standing without "probable injury" & this requires they be permitted discovery of lands affected.	<ul style="list-style-type: none"> <li>• Requires public access to policy impacts on public use of federal land.</li> <li>• Balance toward preservation.</li> </ul>
<i>Nevitt</i> 828 F.2d 1405	Interpretation of Homestead Act regulations & ANILCA § 1328 contested.	Homesteader's interest in claim versus public interest in legality of claim.	The BLM correctly applied its regulations and ANILCA § 1328 in denial of the Homestead claim, & ANILCA legislative approval.	<ul style="list-style-type: none"> <li>• Supports agency regulation of public land occupancy.</li> <li>• Balance toward preservation.</li> </ul>
<i>Sierra Club</i> 857 F.2d 1307	Adherence to NEPA, 40 CFR 1508.25, and ANILCA § 810 contested.	Preservation of rivers and subsistence opportunity versus private mineral rights.	BLM approval of mines under 5 acres does not trigger NEPA and NEPA & ANILCA § 810 require cumulative mining review.	<ul style="list-style-type: none"> <li>• Limits application of NEPA.</li> <li>• Expands scope of ANILCA § 810.</li> <li>• Balance between preservation and development.</li> </ul>
<i>Village of Gambell</i> 869 F.2d 1273	Denial of subsistence rights and adherence to ANILCA § 810 contested.	Preservation of subsistence opportunity versus corporate mineral development.	ANILCA § 810 protection of subsistence does not extend to the OCS; decision on subsistence rights still pending.	<ul style="list-style-type: none"> <li>• Limits ANILCA § 810 protection of subsistence opportunity.</li> <li>• Subsistence rights pending remand.</li> <li>• Balance toward development.</li> </ul>

Burgess v. Alaska  
Lieutenant Governor Terry Miller  
 (plaintiff, appellant — defendant, respondent)  
 654 P. 2d 273, Alaska Supreme Court, 1982

Background — Plaintiff sought to prevent inclusion of misleading initiative proposal on ballot. The Lieutenant Governor's initiative summary stated the proposal would preclude subsistence use priorities based on residence and customary use. Plaintiff contended the summary improperly implied the initiative would change controlling subsistence provisions from Title VIII of ANILCA. Plaintiff appeals the decision of the trial court.

Issue — Is the initiative summary prepared by the Lt. Governor accurate and impartial?

Held — The initiative summary is within the proper limits of accuracy and impartiality; affirmed.

Reasons — Neither the Alaska Constitution nor electoral law require the Lt. Governor to provide warnings that state votes affect only state law. The Lt. Governor may assume voters know state votes do not change federal laws.

Status — Decision stands.

Southeast Alaska Conservation  
Council, Inc. v. Watson  
 (plaintiff, respondent — defendant, appellant)  
 697 F. 2d 1305, 13 ELR 20233  
 Court of Appeals, 9th Circuit, 1983

Background — Environmentalists claimed the National Forest Service (NFS) failed to fulfill National Environmental Policy Act (NEPA) procedural requirements for Quartz Hill molybdenum bulk sampling in Misty Fjords National Monument, Tongass National Forest. The district court held for the plaintiffs and remanded the case to the NFS for further procedures. [526 F. Supp. 202, 1981] On remand, the NFS determined the 1980-83 Quartz Hill plan of operations did not constitute bulk sampling and, therefore, did not trigger an Environmental Impact Statement (EIS) requirement under ANILCA § 503. The district court held the NFS decision was in error and a full EIS was required. [535 F. Supp. 653, 1982] The NFS appeals this decision.

Issues — Does the 1980-83 plan of operation constitute bulk sampling? Does ANILCA § 503(h)(3) require an EIS for bulk sampling?

Held — The proposed activities do constitute bulk sampling and ANILCA § 503(h)(3) does require an EIS; affirmed.

Reasons — ANILCA § 503(h)(3) specifically required an EIS for "an access road for bulk sampling and bulk sampling;" Congressional intent required an EIS for both a road and bulk sampling. Access by helicopter did not avoid the separate requirement of an EIS for bulk sampling. Activities outlined in the 1980-83 plan of operation are substantively the same as in the 1977 and 1979 plans which recognized such activities as bulk sampling. The NFS failed to evaluate the plan of operations by case history. It focused on an environmentally irrelevant factor (amount of ore to be removed from site) and did not consider factors mandated by the district court (number, length, width of test tunnels — i.e. amount of ore produced).

Status — Decision stands.

Board of County Commissioners,  
Albany County  
v. Federer Development Company  
(defendant, appellant — plaintiff, respondent)  
682 P. 2d 1062; Wyoming Supreme Court, 1984

Background — The developer contested commissioners' refusal to approve a subdivision preliminary plat. Commissioners cited failure to satisfy a statute requiring two accesses to the proposed subdivision. The trial court held for the developer and the commissioners appeal.

Issue — Does an existing limited-use permit for access across Forest Service land constitute assured access to fulfill the requirements of the subdivision statute?

Held — The Forest Service permit can be considered assured; affirmed.

Reasons — Among other reasons, *Montana Wilderness Association* [655 F. 2d 951, 1981], was cited to show the Forest Service would have to provide access pursuant to ANILCA § 1323.

Status — Decision stands.

National Audubon Society v. Hodel  
(plaintiff — defendant)  
606 F. Supp. 825, 15 ELR 20591  
District Court, Alaska, 1984

Background — The Department of the Interior conducted a land exchange in 1983. Wilderness land interests on St. Matthew Island in the Alaska Maritime National Wildlife Refuge were traded for Alaska Native corporation land interests in two other refuges under authority of ANILCA § 1302(a,h). The land on St. Matthew Island was to be conveyed to the Native corporations for 50 years for leasing as an oil and gas production staging area. Environmentalists filed suit to invalidate the exchange as arbitrary and capricious.

Issue — Does the exchange further the "public interest" and acquire lands "for the purposes of ANILCA" as required by ANILCA § 1302(a,h)?

Held — The exchange did not provide a net benefit for the public interest pursuant to ANILCA § 1302(a,h); the court granted summary judgement to invalidate the exchange and a preliminary injunction to halt development on St. Matthew Island.

Reasons — The Department of the Interior actions were arbitrary and capricious. Determination of public interest failed to consider relevant facts on the record. Land interests gained were redundant with the existing protections of the Alaska Native Claims Act §§ 22(g) and 14(h) and prevented only speculative damages. Land interests traded allowed unquestionable environmental damage and were never properly considered in balancing public interests. Consideration of all relevant facts indicated the exchange was not in the public interest and did not fulfill the purposes of ANILCA.

Status — Decision stands.

Kunaknana v. Clark

(plaintiff, appellant — defendant, respondent)  
742 F. 2d 1145, 14 ELR 20827  
Court of Appeals, 9th Circuit, 1984

**Background** — Alaska Natives challenged Bureau of Land Management (BLM) oil and gas lease sale for the North Slope on the grounds that it failed to meet ANILCA § 810 procedural requirements for protection of subsistence opportunity. The district court held for the BLM and the plaintiffs appeal.

**Issue** — Did the BLM complete ANILCA § 810 requirements?

**Held** — The BLM did sufficiently complete ANILCA § 810 procedures; affirmed.

**Reasons** — Although the BLM's modified finding of no significant impact on subsistence use was a *post hoc* justification, it was allowable, since it was necessary for judicial review. Since the modified finding found no significant restriction of subsistence opportunity, the BLM did not need to conduct any further procedures from ANILCA § 810. The court failed to find evidence that the BLM's review and conclusion were arbitrary or capricious, or that the agency's definition of "significant restriction" was too narrow an interpretation.

**Status** — Decision stands.

City of Angoon v. Marsh

(plaintiff, respondent — defendant, appellant)  
749 F. 2d 1413  
Court of Appeals, 9th Circuit, 1984

**Background** — Environmentalists and the City of Angoon sought to prevent logging of Native corporation land on Admiralty Island within the boundaries of a National Forest Service (NFS) monument. The district court granted a preliminary injunction on the basis of ANILCA § 503(d) and the defendants appeal.

**Issue** — Are Native corporation lands inside the boundaries of Admiralty Island National Monument "within" the monument and subject to ANILCA § 503(d)?

**Held** — Native corporation lands are private and not subject to the regulation of public land; reversed and remanded to the district court for determination of triable issues.

**Reasons** — "Within the boundaries" of the monument does not equal "within the monument." Native corporation lands are private lands and the legislative history of ANILCA § 503(d) clearly indicates that section was intended for public lands; private lands within the boundaries of NFS monuments were explicitly excepted from ANILCA § 503(d). Furthermore, to read ANILCA § 503(d) otherwise would contradict ANILCA § 103(c) and § 506(c).

**Status** — Decision stands.

City of Tenakee Springs v. Block  
(plaintiff, appellant — defendant, respondent)  
778 F. 2d 1402, 16 ELR 20263  
Court of Appeals, 9th Circuit, 1985

**Background** — The City of Tenakee Springs and environmentalists brought action to enjoin construction of an eleven mile road through the Kadashan watershed of Chichagof Island in the Tongass National Forest. The district court denied injunctive relief and the plaintiffs appeal.

**Issues** — Does ANILCA § 708(b) preclude judicial review of the Tongass National Forest Environmental Impact Statement (EIS)? Does agency discretion to set the scope of an EIS prevent judicial review of EIS specificity?

**Held** — The court has authority to review the specificity of the Tongass National Forest EIS; reversed and remanded.

**Reasons** — ANILCA § 708(b) only precludes judicial review of wilderness designations. The language of the statute and legislative history indicate the content of non-wilderness EIS are open to judicial review (although the concurring opinion disagreed — the intent of ANILCA § 708(b) is to preclude any judicial review of the Tongass EIS). The National Environmental Policy Act determines EIS specificity requirements, and agency failure to meet those standards is not discretionary and is open to judicial review.

**Status** — Decision stands.

City of Angoon v. Hodel  
(plaintiff, cross-app. — defendant, cross-app.)  
803 F. 2d 1016, 17 ELR 20180  
Court of Appeals, 9th Circuit, 1986

**Background** — On remand from *City of Angoon v. Marsh* [749 F. 2d 1413, 1984] the district court held the Army Corps of Engineers permit for a log transfer facility on Native corporation land within Admiralty Island National Monument was invalid due to an incomplete Environmental Impact Statement (EIS). It also held that neither the Alaska Native Claims Act (ANCSA) nor ANILCA were violated by the proposed logging. Both parties appealed.

**Issues**

- 1) Was the EIS inadequate?
- 2) Was the conveyance of land on Admiralty Island to the Native corporation intended solely for purposes of future exchange?
- 3) Did ANCSA harvest restriction periods commence at enactment of the statute or at the time of land conveyance?
- 4) Does ANILCA § 810(a) require evaluation of effects on subsistence for the log transfer facility permit?

**Held** — No on all counts; affirmed in part and reversed in parts.

**Reasons**

- 1) An EIS for a log transfer facility does not need to consider "remote and speculative" alternatives like the possibility that the source of logs may be exchanged for other land.
- 2) ANILCA § 1302(b) requires land exchanges to be voluntary and no statutory language or legislative history indicates this land conveyance was for future exchange.
- 3) The Secretary of the Interior has discretion to determine when periods of time begin if a statute is silent, and the courts will defer to the agency.
- 4) ANILCA § 810(a) requires subsistence evaluation for federal actions on public lands, but not on private Native corporation land.

**Status** — The Supreme Court denied certiorari; 108 S. Ct. 197, 1987.

Northern Alaska Environmental Center  
v. Hodel

(plaintiff, respondent — defendant, appellant)  
803 F. 2d 466, 17 ELR 20015  
Court of Appeals, 9th Circuit, 1986

Background — Miners appeal (as intervenor-appellants) a district court decision to enjoin mining in Wrangell-St. Elias National Park and Preserve, Yukon-Charley Rivers National Preserve, and Denali National Park and Preserve until the National Park Service (NPS) completes environmental analysis in compliance with the National Environmental Policy Act (NEPA) and NPS regulations. [15 ELR 21048, 16 ELR 20244, 1985]

Issues

- 1) Does NPS voluntary preparation of Environmental Impact Statements (EIS) and Minerals Management Plans moot the appeal on the issue of required environmental analysis?
- 2) Did the district court violate ANILCA § 1110(b) in requiring separate access permit evaluation by the NPS?
- 3) Was a preliminary injunction within the discretion of the district court?

Held — affirmed.

- 1) NPS environmental analysis moots that part of the appeal,
- 2) separate access consideration does not violate ANILCA § 1110(b), and
- 3) the District Court's preliminary injunction was within its discretion.

Reasons

- 1) The NPS has stated it is producing environmental analysis regardless of this decision, therefore the issue is moot.
- 2) ANILCA § 1110(b) guarantees access to inholdings within Alaska national park areas and nullifies 36 CFR 9.3 which required an approved plan of operation for access to mining claims (36 CFR 9.9, 9.10 still require approved plans of operation to conduct mining operations). ANILCA § 1110(b) does not, however, prevent separate consideration of access within an EIS.
- 3) The District Court's findings of NEPA and NPS regulation violations are not clearly erroneous, and the district court has broad discretion to grant injunctive relief in the public interest.

Status — Decision stands.

Trustees For Alaska v. Hodel  
 (plaintiff, respondent — defendant, appellant)  
 806 F. 2d 1378, 17 ELR 20323  
 Court of Appeals, 9th Circuit, 1986

**Background** — ANILCA § 1002(h) required the Secretary of the Interior to submit a report to Congress with recommendations for oil, gas, and wildlife management of the coastal plain of the Alaska National Wildlife Refuge. The Secretary was given up to 5 years and 9 months to complete the report. Environmentalists sought and were granted an injunction preventing submission of the report to Congress without compliance with National Environmental Policy Act (NEPA) procedures for public comment. [16 ELR 20507, 1986] The U.S. appeals the district court decision.

**Issue** — Does the report for ANILCA § 1002(h) require NEPA § 102(2)(c) public comment procedures.

**Held** — The Secretary must permit public comment and include such comment in the Legislative Environmental Impact Statement (LEIS) comprising the ANILCA § 1002(h) report to Congress; affirmed.

**Reasons** — The regulations of the Council on Environmental Quality (CEQ) are binding on administrative agencies and guide judicial interpretation of NEPA requirements. CEQ regulation 40 CFR 1506.8(b)(2)(ii) requires agency proposals to Congress resulting from a "study process required by statute" to follow NEPA public comment procedures. The Secretary's report is a "study process" in the ordinary meaning of the term — it is to include detailed information requiring research over a long period of time — and it is required by statute — ANILCA § 1002(h). Furthermore, the public comment process complies with the overall purpose of NEPA.

**Status** — Decision stands.

Wilderness Society v. Griles  
 (plaintiff, appellant — defendant, respondent)  
 824 F. 2d 4, 17 ELR 21117  
 Court of Appeals, D.C. Circuit, 1987

**Background** — The Bureau of Land Management (BLM) waived the policy of including submerged land acreage in selection quotas for Alaska Native corporations and the state of Alaska. Environmentalists claimed this change of policy would result in greater land alienation and injury to them due to loss of lands open to their recreational use. The district court held the environmentalists lacked standing to bring suit and they appeal.

**Issues** — Do the plaintiffs have standing? Did the district court err in refusing the plaintiffs' discovery request?

**Held** — Plaintiffs do not have standing, but the district court did err in refusing discovery; affirmed in part and reversed and remanded in part.

**Reasons** — The environmentalists could not name specific lands that would be made unavailable for their use, and therefore could not show probable injury to earn standing. However, actual injury is not necessary for plaintiffs to bring suit, and if held to the "probable injury" threshold for standing, they must be granted discovery of which lands are to be affected by the policy change; denial of discovery unconstitutionally prevents the plaintiffs from demonstrating probable injury and possibly establishing standing.

**Status** — Decision stands. No published results are found on the remand to district court.

Nevitt v. United States

(plaintiff, appellant — defendant, respondent)  
828 F. 2d 1405  
Court of Appeals, 9th Circuit, 1987

**Background** — This case is an appeal from a Homestead Act claim denial by the Bureau of Land Management (BLM) affirmed by the Interior Board of Land Appeals (IBLA) and the District Court of Alaska.

Issues

- 1) Did the claim meet Homestead Act requirements for final proof?
- 2) Did the BLM err in not granting a reduction in cultivation requirements?
- 3) Did ANILCA § 1328 legislatively approve the claim?

**Held** — The plaintiff failed on all three issues; affirmed.

Reasons

- 1) Plaintiff neither fulfilled the residency requirement nor the cultivation requirement as interpreted by the BLM, and an agency's interpretation is afforded deference by the court.
- 2) BLM regulations prevent reduction of cultivation requirements due to heavily forested land. In fact, uneconomically dense forest is considered an indicator of "speculative" entry in bad faith under the Homestead Act.
- 3) ANILCA § 1328(a)(3) withholds legislative approval from claims on which challenges are filed. Two challenges were filed on plaintiff's claim, and the BLM followed the proper procedure in adjudicating the claim.

**Status** — Decision stands.

Sierra Club v. Penfold

(plaintiff, cross-app. — defendant, cross-app.)  
857 F. 2d 1307, 19 ELR 20207  
Court of Appeals, 9th Circuit, 1988

**Background** — Environmentalists and Alaska Natives challenged Bureau of Land Management (BLM) administration of mining in four Alaska watersheds. This appeal combines four appeals from both parties on several substantive and technical issues. Threshold issues of jurisdiction, statutes of limitation, mootness, and ripeness will not be discussed.

Issues

- 1) Did the district court err in determining that systematic approval by the BLM of notices to mine less than five acres per year ("notice" mines) is not a major federal action requiring National Environmental Policy Act (NEPA) procedures?
- 2) Did the district court err in interpreting NEPA regulations (40 CFR 1508.25) and ANILCA § 810(a) to require Environmental Impact Statements (EIS) to consider cumulative mining effects?

**Held** — The district court did not err on either issue; affirmed.

Reasons

- 1) Approval of "notice" mines is a marginal federal action since it does not commit federal funding, the BLM cannot require approval before miners conduct operations, and the BLM has no authority to bring judicial or administrative enforcement action against "notice" miners for failure to comply with mining statutes or regulations.
- 2) Multiple mining operations have clear and uncontroverted "cumulative" and "synergistic" effects. There is uncontroverted evidence that these effects are "significant" and therefore require consideration pursuant to 40 CFR 1508.25. ANILCA § 810(a) does not specifically require consideration of cumulative impact on subsistence uses, but parallel language in NEPA § 102(2)(c) has been held to require consideration of cumulative impact.

**Status** — Decision stands.

People of the Village of Gambell v. Hodel

(plaintiff, appellant — defendant, respondent)

869 F. 2d 1273, 19 ELR 21150

Court of Appeals, 9th Circuit, 1989

Background — Two Native villages sought to void a lease sale for gas and oil exploration in the Norton Sound area of the Alaska outer continental shelf (OCS). The villages charged violation of their subsistence rights and failure to comply with ANILCA § 810 procedures for the protection of subsistence opportunities. The following sequence of court proceedings led to the present appeal:

- a) The district court held the Alaska Native Claims Act (ANCSA) extinguished plaintiffs' subsistence rights to the OCS and ANILCA § 810 protection of subsistence opportunity did not extend to the OCS.
- b) On appeal, the 9th Circuit Court affirmed in part and reversed in part. It agreed ANCSA extinguished subsistence rights "in Alaska" and the OCS was in Alaska, but found that ANILCA § 810 required protection of subsistence opportunity "in Alaska" and therefore extended to the OCS. [746 F. 2d 572, 1984]
- c) On remand, the Secretary of the Interior found OCS oil and gas exploration created no significant impact on subsistence opportunity, but OCS oil and gas production might cause significant impact. The plaintiffs restated their original claims to enjoin the lease sale, but the district court denied injunctive relief.
- d) On appeal, the 9th Circuit Court reversed and granted the injunction. [774 F. 2d 1414, 1985]
- e) the U.S. Supreme Court granted certiorari and found that "in Alaska" commonly means "in the state of Alaska" and does not include the OCS. This was supported by the use of this language and connotations in ANCSA, the Alaska Statehood Act, and ANILCA as a whole. Therefore, the Supreme Court reversed and held ANILCA § 810 did not extend to the OCS, and vacated and remanded the decision that ANCSA extinguishes subsistence rights on the OCS. [*AMOCO Production Company v. Village of Gambell*, 480 U.S. 531, 1987]

This case history established that ANILCA language, "in Alaska," restricted § 810

subsistence opportunity protection from extension to the OCS. In this appeal, plaintiffs rely on the same interpretation of "in Alaska" to establish that ANCSA extinguishment of subsistence rights does not extend to the OCS.

Issues

- 1) Does paramount federal sovereignty over the OCS preclude any aboriginal subsistence rights which may exist?
- 2) Does federal failure to exercise complete sovereignty over the OCS prevent recognition of possible possessory rights?
- 3) Does ANCSA extinguish subsistence rights beyond the established bounds of "in Alaska?"

Held

- 1) Federal sovereignty does not preclude possible rights of occupation and use,
- 2) such possessory rights must be addressed despite partial exercise of sovereignty, and
- 3) ANCSA does not apply to the OCS;

reversed and remanded to determine if plaintiffs possess aboriginal subsistence rights, if the lease sale would interfere significantly with any such rights, and if the Outer Continental Shelf Lands Act extinguishes subsistence rights.

Reasons

- 1) Plaintiffs do not claim a sovereign right, rather a possessory right of occupancy and use subordinate to and consistent with national interest and supported by Supreme Court precedent.
- 2) The U.S. has exercised sovereignty to lease the OCS and must therefore address any existing rights of the same nature brought into conflict.
- 3) ANCSA at no point expands the plain meaning of "in Alaska" to extend extinguishment of subsistence rights to the OCS. Plain language, consistency throughout the statute, and consistency with other statutes removes the need to consult possibly controverting legislative history.

Status — Decision stands. No decision on remand has been published.

## BIBLIOGRAPHY

### STATUTES AND CODES

- Alaska National Interest Lands Conservation Act. Public Law 96-487. 94 Stat. 2371-2551 (1980). 16 U.S.C.A. §§ 410bb, 410hh - 410hh-5, 431, 460mm - 460mm-4, 539 - 539e, 688dd, 1132, 1274, 1276, 1279, 1280, 1285b, 3101-3233 ; 43 U.S.C.A. §§ 1602, 1605 -1607, 1611, 1613, 1614, 1618, 1620, 1621, 1631-1641, 1784; 48 U.S.C.A. § 21. See also U.S.C.A. 1989 Cumulative Annual Pocket Part (1980).
- National Park System Organic Act. 16 U.S.C.A. § 1 et seq. (1916).
- Parks, Forests, and Public Property. 36 C.F.R. Parts 1-199 (July 1, 1989).
- Public Lands: Interior. 43 C.F.R. Part 36 (October 1, 1989).
- "C.F.R. Parts Affected." Fed. Reg. vol. 54, no.s 168, 188, 209, 229, 249; vol. 55, no.s 21, 40, 58: p. i.

### REPORTS AND GUIDELINES

- Federal-State Land Use Planning Commission. *Alaska Society and Alaska's Land: The Social and Economic Effects of the Designation of Certain Federal Lands in Alaska to National Park or National Monument, Wildlife Refuge, Wild and Scenic River, and National Forest Status*. Anchorage: Federal-State Land Use Planning Commission (June 1979).
- Planning Process Guideline (NPS-2, Release No. 3, Amendment No. 1)*. Washington, D.C.: Department of the Interior, National Park Service (March 1983).
- U. S. Congress. House. Committee on Interior and Insular Affairs. *Alaska National Interest Lands Conservation Act of 1979*. H. Rept. 96-97, pt. 1, to accompany H. R. 39. 96th Cong., 1st sess. (April 18, 1979). [Congressional Information System #H443-2]
- U. S. Congress. House. Committee on Merchant Marine and Fisheries. *Alaska National Interest Lands Conservation Act of 1979*. H. Rept. 96-97, pt. 2, to accompany H. R. 39. 96th Cong., 1st sess. (April 23, 1979). [Congressional Information System #H563-2]
- U. S. Congress. Senate. Committee on Energy and Natural Resources. *Alaska National Interest Lands Conservation Act of 1979*. S. Rept. 96-413 to accompany H. R. 39. 96th Cong., 1st sess. (November 14, 1979). [1980 United States Code Congressional and Administrative News 5070-5316]
- Williss, G. Frank. *"Do Things Right the First Time:" Administrative History; The National Park Service and the Alaska National Interest Lands Conservation Act of 1980*. NPS D-81. U. S. Government Printing Office: 1985—576-039/20005 Region No. 8 (September 1985).

NATIONAL PARK AREA DOCUMENTS

*Aniakchak National Monument and Preserve: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1987-0-773-038/40021. NPS D-8A (December 1986).

*Bering Land Bridge National Preserve: Draft Environmental Impact Statement — Wilderness Recommendation.* U. S. Government Printing Office: 1988-0-573-038/60013. NPS D-21 (February 1988).

*Bering Land Bridge National Preserve: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1987-773-038/40,017 Region No. 8. NPS D-18A (December 1986).

*Cape Krusenstern National Monument: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1987-0-773-038/4002b. NPS D-7A (December 1986).

*Compendium of Designations, Closures, Request Requirements and Other Restrictions Imposed Under the Discretionary Authority of the Superintendent.* Northwest Alaska Areas — Cape Krusenstern National Monument, Noatak National Preserve, and Kobuk Valley National Park.

*Denali National Park and Preserve: Addendum to the 1983 Development Concept Plan / Environmental Assessment for the Park Road Corridor.* U. S. Government Printing Office 853-889. NPS D-1875B (June 1987).

*Denali National Park and Preserve: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1987-0-773-038/40022. NPS D-96A (December 1986).

*Denali Park Road Corridor: Development Concept Plan.* U. S. Government Printing Office: 1983-676-031/58 Region No. 8. NPS 1875A (February 1983).

*Denali — Superintendent's Orders (Compendium).* Denali National Park and Preserve (May 14, 1989).

*Gates of the Arctic National Park and Preserve: Final Environmental Impact Statement — Wilderness Recommendation.* NPS D-15A (August 1988).

*Gates of the Arctic National Park and Preserve: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1987-0-773-038/40018. NPS D-11A (December 1986).

*Glacier Bay National Park and Preserve Compendium.* Glacier Bay National Park and Preserve (June 21, 1989).

*Glacier Bay National Park and Preserve: General Management Plan.* U. S. Government Printing Office: 1984-776-032/4042 Region No. 8. NPS D-2034A (September 1984).

*Katmai National Park and Preserve: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1987-0-773-038/40020. NPS D-28A (December 1986).

*Kenai Fjords National Park: Draft Environmental Impact Statement — Wilderness Recommendation.* U. S. Government Printing Office: 1988-573-038/60,014 Region No. 8. NPS D-9A (February 1988).

*Kenai Fjords National Park: General Management Plan.* U. S. Government Printing Office: 1984-776-031/4013 Region No. 8. NPS D-2059A (July 1984).

*Kenai Fjords National Park: Land Protection Plan.* (January 1988).

*Kobuk Valley National Park: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1987-0-773-038/40026. NPS D-12A (December 1986).

*Lake Clark National Park and Preserve: Draft Environmental Impact Statement — Wilderness Recommendation.* U. S. Government Printing Office: 1988-573-038/60,016 Region No. 8. NPS D-11 (March 1988).

*Lake Clark National Park and Preserve: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1984-776-031/4021 Region No. 8. NPS D-10 (August 1984).

*Noatak National Preserve: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1987-0-773-038/40024. NPS D-9A (December 1986).

*Wrangell-St. Elias National Park and Preserve Compendium (Draft).* Wrangell Saint Elias National Park and Preserve (February 1987).

*Wrangell-St. Elias National Park and Preserve: General Management Plan; Land Protection Plan; Wilderness Suitability Review.* NPS D-13A (December 1986).

*Yukon-Charley Rivers National Preserve: Draft Environmental Impact Statement — Wilderness Recommendation.* U. S. Government Printing Office: 1988-573-038/60,012 Region No. 8. NPS D-12 (February 1988).

*Yukon-Charley Rivers National Preserve: General Management Plan; Land Protection Plan; Charley Wild River Management Plan; Wilderness Suitability Review.* U. S. Government Printing Office: 1985-576-039/10,023 Region No. 8. NPS D-2102A (March 1985).

#### BOOKS

Berger, Thomas R. *Village Journey: The Report of the Alaska Native Review Commission.* New York: Hill and Wang, 1985.

Carter, Lief H. *Administrative Law and Politics: Cases and Comments.* Boston and Toronto: Little, Brown and Co., 1983.

Caspar, Dale E. *Public Lands and Public Policy: Law and Legislation, 1983-1988.* (Public Administration Series: Bibliography no. P2573) Vance Bibliographes, January 1989.

Coggins, George Cameron and Wilkinson, Charles F. *Federal Public Land and Resources Law.* 2d ed. Mineola, New York: The Foundation Press, Inc., 1987.

- Everhart, William C. *The National Park Service*. Boulder, Colorado: Westview Press, 1983.
- Foresta, Ronald A. *America's National Parks and Their Keepers*. Washington, D. C.: Resources for the Future, Inc., 1985.
- Hans, Linde A.; Bunn, George; Paff, Fredericka; and Church, W. Lawrence. *Legislative and Administrative Processes*. Mineola, New York: The Foundation Press, Inc., 1981.
- Hunter, Celia and Wood, Ginny. *Alaska National Interest Lands: The D-2 Lands*. (Alaska Geographic Series: vol. 8, no. 4) Anchorage: The Alaska Geographic Society, 1981.
- Jacobini, H. B.; Melone, Albert P.; and Kalvelage, Carl. *Research Essentials of Administrative Law*. Pacific Palisades, California: Palisades Publishers, 1983.
- Nash, Roderick. *Wilderness and the American Mind*. 3rd ed. New Haven and London: Yale University Press, 1982.
- Naske, Claus-M. and Slotnick, Herman E. *Alaska: A History of the 49th State*. 2nd ed. Norman, Oklahoma and London: University of Oklahoma Press, 1987.
- Runte, Alfred. *National Parks: The American Experience*. Lincoln, Nebraska and London: University of Nebraska Press, 1987.
- Sax, Joseph L. *Mountains Without Handrails: Reflections on the National Parks*. Ann Arbor: The University of Michigan Press, 1980.
- Tilden, Freeman. *The National Parks*. 3rd ed. New York: Alfred E. Knopf, Inc., 1986.

#### PERIODICALS

- Callison, Charles. "The Great Lands: Four Years Later." *The Amicus Journal*. vol. 6, no. 4 (Spring 1985): pp. 4-7.
- Catanese, A. J. and Snyder, J. C. "The Environment and Planning of Alaska." *Environment and Planning*. vol. 13, no. 6 (June 1981): pp. 719-728.
- Clusen, Charles M. "Beyond Compromise: ANILCA at the Mercy of Expedience." *Wilderness*. vol. 47, no. 164 (Spring 1984): pp. 11-17, 24.
- Connally, Eugenia Horstman. "Saving Our Last Frontier." *National Parks*. vol. 55, no. 33 (March 1981): pp. 5-8.
- Duscha, Julius. "How the Alaska Act Was Won." *The Living Wilderness*. vol. 44, no. 152 (Spring 1981): pp. 4-9.
- Finkler, Earl. "Land Planning Above the Arctic Circle." *Planning*. vol. 49, no. 8 (September 1983): pp. 22-24.
- Fish, C. Ben and Bury, Richard L. "Wilderness Visitor Management: Diversity and Agency Policies." *Journal of Forestry*. vol. 79, no. 9 (September 1981): pp. 608-612.

- Gaylord, Nelson and Stevens, Ted. "Hunting in Alaska's Parklands." *American Forests*. vol. 89, no. 10: pp. 10-11, 29, 56-7.
- Hart, John. "The Troubled Parks." *Cry California*. vol. 16, no. 3 (Summer 1981): pp. 55-61.
- Norris, Ruth. "Alaska: Hunters Aim Their Big Guns at America's New National Parks." *Audubon*. vol. 85, no. 4 (July 1983): pp. 128-35.
- O'Dell, Rice. "Alaska: A Frontier Divided." *Environment*. vol. 28, no. 7 (September 1986): pp. 10-15, 34-7.
- Priest, Joe. "Attacking the National Parks from Within." *National Parks and Conservation Magazine*. vol. 54, no. 9 (September 1980): pp. 6-11.
- Schene, Michael G., ed. "The National Park Service and Historic Preservation." *The Public Historian*. vol. 9, no. 2 (Spring 1987).
- Sellars, Richard W.; Runte, Alfred; Utely, Robert M.; Winks, Robin W.; Cox, Thomas R. "The National Parks: A Forum on the 'Worthless Lands' Thesis." *Journal of Forest History*. vol. 27 (July 1983): pp. 130-45.
- Smith, Allen E. "Alaska Wildlife in the Balance." *Defenders*. vol. 58, no. 3 (May-June 1983): p. 44.
- Swem, Theodore and Cahn, Robert. "The Politics of Parks in Alaska." *Ambio*. vol. XII, no. 1 (1983): pp. 14-19.
- "Toward the Twenty-First Century: A Wilderness Society Agenda for Alaska." *Wilderness*. vol. 47, no. 164 (Spring 1989): pp. 35-8.
- Wayburn, Edgar. "Alaska Parks in Peril." *Sierra*. vol. 70, no. 4 (July-August 1985): pp. 24-7.
- Wayburn, Edgar. "Alaska's Public Lands." *Sierra*. vol. 69, no. 3 (May-June 1984): pp. 19-22.
- Wodder, Rebecca. "The Challenge Ahead." *The Living Wilderness*. vol. 44, no. 152 (Spring 1981): pp. 13-19.
- Zube, Ervin H. "Local and Extra-Local Perceptions of National Parks and Protected Areas." *Landscape and Urban Planning*. vol. 13 (1986): pp. 11-17.

LAW JOURNAL ARTICLES

- Atkinson, Karen J. *ANILCA: Striking the Balance in Favor of "Customary and Traditional" Subsistence Uses by Alaska Natives*. 27 *Natural Resources Journal* 421-40 (Spring 1987).
- Baer, Susan D. *The Public Trust Doctrine: A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*. 15 *Boston College Environmental Affairs Law Review* 385-436 (Winter 1988).
- Castellon, Michael C. *Standing to Challenge the Disposition of Land in Alaska: A Proposed Remedy for the Inadequacies in the Current Case Law*. 2 *Alaska Law Review* 393-408 (1985).
- Chavez, Merry J. *Public Access to Landlocked Public Lands*. 39 *Stanford Law Review* 1373-1401 (July, 1987).
- Edwards, Gregory W. *Keeping Wilderness Areas Wild: Legal Tools For Management*. 6 *Virginia Journal of Natural Resources Law* 101-42 (Fall 1986).
- Fish, Jerry R. *Preservation and Strategic Mineral Development in Alaska: Congress Writes a New Equation*. 12(1) *Environmental Law* 137-96 (Fall 1981).
- Frost, Don J. *Preliminary Injunctions as Relief for Substantial Violations of Environmental Statutes*. 4 *Alaska Law Review* 105-151 (June 1987).
- Havlick, Scott. *Mountain Bicycles on Federal Lands: Over the River and Through Which Woods?* 7 *Journal of Energy Law and Policy* 123-144 (1986).
- Kueffner, Eric A. *"Southeast Alaska Conservation Council, Inc. v. Watson" and the Future of ANILCA*. 12 *Ecology Law Quarterly* 149-173 (Winter 1984).
- Laitos, J. G. and Westfall, R. A. *Government Interference with Private Interests in Public Resources*. 11 *Harvard Environmental Law Review* 1-75 (1987).
- Latia, Leroy K., Jr. *Public Access Over Alaska Public Lands As Granted By Section Eight of the Lode Mining Act of 1866*. 28 *Santa Clara Law Review* 811-40 (Fall 1988).
- Lemons, John and Stout, Dean. *A Reinterpretation of National Park Legislation*. 15(1) *Environmental Law* 41-65 (Fall 1985).
- Price, David A. *Wilderness Values and Access Rights: Troubling Statutory Construction Brings Alaska Lands Act Into Play*. 53 *University of Colorado Law Review* 593-615 (Summer 1983).
- Quarles, Steven B. and Lundquist Thomas R. *Alaska Land Act's Innovations In the Law of Access Across Federal Lands*. 4 *Alaska Law Review* 1-36 (June 1987).
- Rosenberg, David M. *The Concept of National Preserves In Senate Bill 49: A Dangerous Precedent?* 21 *Harvard Journal on Legislation* 549-557 (Spring 1984).
- Sagalkin, Sanford and Panitch, Mark. *Mineral Development Under ANILCA*. 10 *UCLA-Alaska Law Review* 117-142 (Spring 1981).

- Shepard, Blake. *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Property to further the Purposes of National Parks and Wilderness Areas*. 11(3) Boston College Environmental Affairs Law Review 479-538 (1984).
- Todderud, Eric. *Alaska Lands Act: A Delicate Balance Between Conservation and Development*. 8 The Public Land Law Review 143-163 (1987).
- Twitchell, Marlyn J. "AMOCO Production Co. v. Village of Gambell:" *Federal Subsistence Protection Ends at Alaska's Border*. 18 Environmental Law 635-664 (Spring 1988).
- Watson, John L. *Mineral and Oil and Gas Development in Wilderness Areas and Other Specially Managed Federal Lands in the United States*. 29 Rocky Mountain Mineral Law Institute Proceedings 37-110 (1983).

#### CASES

- AMOCO Production Company v. Village of Gambell*. 480 U.S. 531 (1987).
- Board of County Commissioners, Albany County v. Federer Development Company*. 682 P. 2d 1062 (Wyoming Supreme Court 1984).
- Burgess v. Alaska Lieutenant Governor Terry Miller*. 654 P. 2d 273 (Alaska Supreme Court 1982).
- City of Angoon v. Hodel*. 803 F. 2d 1016 (9th Cir. 1986).
- City of Angoon v. Marsh*. 749 F. 2d 1413 (9th Cir. 1984).
- City of Tenakee Springs v. Block*. 778 F. 2d 1402 (9th Cir. 1985).
- Kunaknana v. Clark*. 742 F. 2d 1145 (9th Cir. 1984).
- Montana Wilderness Association v. United States Forest Service*. 455 U.S. 989 (1982).
- Montana Wilderness Association, Nine Quarter Circle Ranch v. United States Forest Service*. 655 F. 2d 951 (9th Cir. 1981).
- National Audubon Society v. Hodel*. 606 F. Supp. 825 (Alaska District Court 1984).
- Nevitt v. United States*. 828 F. 2d 1405 (9th Cir. 1987).
- Northern Alaska Environmental Center v. Hodel*. 803 F. 2d 466 (9th Cir. 1986).
- People of the Village of Gambell v. Clark*. 746 F. 2d 572 (9th Cir. 1984).
- People of the Village of Gambell v. Hodel*. 774 F. 2d 1414 (9th Cir. 1985).
- People of the Village of Gambell v. Hodel*. 869 F. 2d 1273 (9th Cir. 1989).
- Sierra Club v. Penfold*. 857 F. 2d 1307 (9th Cir. 1988).

*Southeast Alaska Conservation Council, Inc. v. Watson.* 535 F. Supp. 653 (Alaska District Court 1982).

*Southeast Alaska Conservation Council, Inc. v. Watson.* 697 F. 2d 1305 (9th Cir. 1983).

*Trustees for Alaska v. Hodel.* 806 F. 2d 1378 (9th Cir. 1986).

*Trustees for Alaska v. Watt.* 524 F. Supp. 1303 (Alaska District Court 1981).

*Trustees for Alaska v. Watt.* 690 F. 2d 1279 (9th Cir. 1982).

*Wilderness Society v. Griles.* 824 F. 2d 4 (D. C. Cir. 1987).