

STATE OF ALASKA

CITIZENS' ADVISORY COMMISSION ON FEDERAL AREAS

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February 28, 2011

Sandy Hamilton
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National Park Service
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Dear Ms. Hamilton:

The Citizens' Advisory Commission on Federal Areas reviewed the December 30, 2010 Notice of Intent to prepare a programmatic environmental impact statement (EIS) for revisions to the regulations at 36 CFR Part 9, Subpart B (75 FR 82362). The regulations govern the exercise of nonfederal oil and gas rights within the boundaries of units of the National Park System. The Commission offers the following comments for your consideration in preparing the draft programmatic EIS and revised regulations.

The Commission recommends that any revisions to the existing 36 CFR Part 9, Subpart B regulations continue to exempt units of the National Park System in Alaska from their application. This exemption has been in place since 1981. We further request that the draft programmatic EIS recognize that access to State or private inholdings in Alaskan park units is regulated solely by Title XI of the Alaska Interest Lands Conservation Act (ANILCA) and the regulations at 43 CFR Part 36.

The Alaska National Interest Lands Conservation Act of 1980 (ANILCA) expanded the National Park System in Alaska by creating 10 new units and expanding 3 existing units. The 51 million acres of National Park System lands in this state encompass more than 1.6 million acres of state and private lands and effectively surround millions more. These inholdings¹ include lands

¹ Regulations at 43 CFR §§36.10(3) & (4) define the terms *effectively surrounded by* and *inholding*:

(3) *Effectively surrounded by* means that physical barriers prevent adequate and feasible access to State or private lands or valid interests in lands except across an area(s). Physical barriers include but are not limited to rugged mountain terrain, extensive marsh areas, shallow water depths and the presence of ice for large periods of the year.

owned by Alaska Native regional corporations pursuant to the Alaska Native Claims Settlement Act (ANCSA).

In June 1981 the National Park Service adopted final regulations providing interim guidance for public uses within National Park units in Alaska (46 FR 31836). The purpose of that rulemaking was to establish administrative procedures necessary to implement and clarify various provisions of ANILCA, including the guarantee of adequate and feasible access to inholdings found in Section 1110(b). That section of the statute states:

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

The 1981 regulations addressed access to inholdings in Section 13.15. *Access to Inholdings*, with Section 13.15(d) *Clarification of the Applicability of 36 CFR Part 9* speaking specifically to the question of access for mineral development and nonfederal oil and gas rights within Alaskan park units. Section 13.15(d)(2) stated:

“Non-Federal Oil and Gas Rights and 36 CFR Subpart 9B. Since section 1110(b) of ANILCA guarantees adequate and feasible access to park area inholdings notwithstanding any other law, and since 36 CFR Subpart 9B was predicated on the park area Superintendent’s discretion to restrict and condition such access, 36 CFR Subpart 9B is no longer applicable in Alaska park areas.”

The Section by Section Analysis for these regulations provided the following explanation for Section 13.15(d)(2):

“Section 13.15(d)(2) is an interpretive rule stating the Department’s views that the regulations of 36 CFR Part 9B are no longer applicable in Alaska park areas. These regulations concerning the development of non-federal oil and gas rights in parks were premised on the land manager’s discretion to restrict access. Section 1110(b) of ANILCA effectively removes this discretion from the land manager. Therefore, 36 CFR Part 9B does not apply to Alaska park areas.” (46 FR 31845)

(4) *Inholding* means State-owned or privately owned land, including subsurface rights of such owners underlying public lands or a valid mining claim or other valid occupancy that is within or is effectively surrounded by one or more areas.

The Department of the Interior adopted final ANILCA Title XI final regulations for the permitting and development of transportation and utility systems in and across, and access into, conservation system units in Alaska in September 1986 (51 FR 31619). These final regulations at 43 CFR Part 36 removed the regulations at 36 CFR Sections 13.10 through 13.16 and became the sole regulatory authority governing access to inholdings within conservation system units. These regulations also made it clear that ANILCA 1110(b) was the sole statutory authority for access to inholdings in CSU's. The Section by Section analysis explained changes made to the proposed regulations for access to inholdings:

"Section 36.10(b)[Access to Inholdings] has been modified slightly to correct an error in drafting the proposed regulation. The change clarifies that this part is to address all access issues in CSU's, and it was incorrect to also refer to 'other applicable law'." (51 FR 31624)

There is no authority under the Part 9B regulations or other statutory authority to regulate access to inholdings in Alaskan park units for the purpose of oil and gas development.

Another key provisions of ANILCA which must be considered in any revision of the Part 9B regulations is found in Section 103(c). This section specifically excludes State and private inholdings from Alaska conservation system units, including units of the National Park System. This section also prohibits the application of public land regulations, such as the Part 9B regulations, to activities on those inholdings:

"Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No 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 such units".

By definition, State and private inholdings are not part of a conservation system unit, even if they lie within external park boundaries. Activities on these inholdings, including oil and gas activities or mineral development are not subject to park specific regulations. Contrary to the claim made in the November 2009 Advance Notice of Proposed Rulemaking (ANPRM), the general authority found in the National Park Service Organic Act does not supersede the specific exemption found in ANILCA Section 103(c).

The Commission requests clarification of the following statement in the November 25, 2009 ANPRM. (74 FR 61597):

"Non-federal oil and gas rights are the result of a conveyance of an interest in real property from a grantor other than the United States and may be held by individuals, companies, non-profit organizations, or state and local governments." (emphasis added)

In considering this explanation of what constitutes *non-federal oil and gas rights*, it appears that for those lands conveyed to the State of Alaska under the Alaska Statehood Act (Public Law 85-508) or lands conveyed to Native Regional Corporations under ANCSA (Public Law 92-203) the oil and gas rights included in those conveyances do not fall under this description since clearly those rights were conveyed by the United States, as grantor. This description on non-federal oil and gas rights further emphasizes that any oil and gas development occurring on State or private inholdings in Alaska park units are not subject to the Part 9B regulations.

The Commission appreciates the opportunity to comment. We again request that any revision to the Part 9B regulations recognize the specific provisions found in ANILCA for access to inholdings and the exemptions from regulation of oil and gas activities on those inholdings under those regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Stan Leaphart", with a long, sweeping horizontal flourish extending to the right.

Stan Leaphart
Executive Director