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Mr. Bud Cribley
Alaska State Director
Bureau of Land Management
NPR-A IAP/EIS Comments
AECOM Project Office
1835 Bragaw Street, Suite 490
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Dear Mr. Cribley:

The Citizens' Advisory Commission on Federal Areas has reviewed the Draft Integrated Activity Plan/Environmental Impact Statement (IAP/EIS) for the National Petroleum Reserve-Alaska (NPR-A). We offer the following comments for consideration in developing and implementing a final IAP/EIS.

The Commission supports the general purpose and intent of this planning effort to determine the appropriate management of federal lands and subsurface resources within the NPR-A. However, we strongly object to the manner in which BLM has alternately followed and ignored key provisions in an extensive list of statutes, regulations, policies and manuals, in some instances omitting relevant information. The result is a draft plan that more closely resembles a management plan for a conservation system unit or similarly designated area than one which meets Congressional direction for the management of the NPR-A.

Wild and Scenic River Reviews

The Commission opposes the inclusion of eligibility and suitability determinations for rivers within the planning area for the purpose of recommending their designation as wild and scenic rivers. Inclusion of these determinations is inconsistent with the provisions of the Alaska National Interest Lands Conservation Act (ANILCA).

We object to the BLM conducting studies or reviews for the purpose of developing recommendations for additional wild and scenic river designations because of the clear provisions of ANILCA Section 1326(b) which states:

> *"No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress."*

By definition, a wild and scenic river is a conservation system unit and any study of rivers within the NPR-A for possible designation is a violation of Section 1326(b). We are aware that federal agencies, including the BLM, frequently circumvent this prohibition on further studies by including them as part of various plans and revisions such as the current planning effort for the NPR-A draft IAP/EIS. We are pleased to note that the BLM at least acknowledges Section 1326 of ANILCA in the draft (Vol. 1, Section 3.4.8.1, pg. 427) even after choosing to ignore it. Nevertheless, any wild and scenic river review violates both the letter and the intent of this section of ANILCA and should not be included in the final IAP/EIS.

In preparing comments on a draft management plan released by another Department of the Interior agency which also decided to ignore the clear directive in Section 1326(b) and elsewhere in ANILCA, Commission staff compiled the following legislative history. Our purpose was to help the agency understand that the so called "no more" clauses were not included in the statute by accident or as an afterthought, but were a deliberate action taken after considerable thought and debate.

We are providing this rather lengthy, and what may be considered by some as unnecessary, look at the legislative history of Section 1326 to emphasize its importance in securing the final passage of the legislation. The "no more clause" was a key piece in the final bill and critical to its passage. By 1980, virtually every acre of federal land and every rivers had been under study or analysis for nearly 10 years. Federal agencies and the Joint Federal-State Land Use Planning Commission had published voluminous reports and environmental impact statements contain recommendations for new parks, refuges, wilderness areas and wild and scenic rivers. Agencies and the public were exhausted with the process. Had Section 1326 and other compromise provisions not been included in a final bill, it is likely that passage of Alaska lands legislation would have been delayed well into the next Congress and new administration.

We also provide this history as proof that Congress clearly retained for itself the sole authority for future studies or reviews for the purpose of creating additional conservation system units in Alaska. And finally, we provide it to simply point out that "no more" actually means "no more."

It is unfortunate that we must remind the Department of the Interior and its agencies, including the BLM, of their responsibility to comply with ANILCA rather than attempting to find ever more creative ways to circumvent its provisions. We object to

DOI agencies' continual efforts to thwart the clear intent of Congress by adopting policies and planning strategies based on expansive interpretations of their statutory authorities while ignoring statutory restrictions. This statement in the plan is a prime example of those policies and strategies: "*The planning team decided to take a permissive interpretation of the eligibility of rivers in the unplanned area.*" (draft IAP/EIS, Vol. 1 Section 3.4.7.2, pg. 424).

ANILCA "No-More Clause"

ANILCA Section 101(d) provides the general declaration that Congress believed no further legislation designating new conservation system units, national recreation areas or conservation areas was necessary because ANILCA struck a proper balance between protection of the national interest in the public lands in Alaska and the future economic and social needs of the State of Alaska and its citizens.

Congress provided confirmation of this by taking additional steps in Section 1326 to limit the power of the Executive Branch to use its authority to upset that balance. Section 1326 provides clear and unambiguous restrictions on federal land management agencies with respect to future withdrawals and further studies or reviews. We quote this section here in its entirety:

> *Sec. 1326 (a) No further executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after notice of such withdrawal has been submitted to Congress.*
>
> *(b) No further studies of the Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or* ***for related or similar purposes*** *shall be conducted unless authorized by this Act or further Act of Congress*" (emphasis added)

Inclusion of this section was not unintentional, nor was it done without considerable effort. At least one early version of the "D-2" legislation contained language curbing the authority of the executive branch. However, most of the bills introduced during the time of the "D-2" deliberations did not address this issue. Following the December 1978 Presidential Proclamations designating 17 national monuments under the Antiquities Act of 1906, the Alaska delegation and other members of Congress noted this deficiency and moved to correct it. At the

invitation of Senator Henry Jackson, chairman of the Senate Committee on Energy and Natural Resources, Alaska Senator Mike Gravel submitted a letter to the committee expressing his views on H.R. 39, the bill which is the foundation for the final ANILCA. One section of Senator Gravel's letter addressed the "no more" issue directly:

Title XII – Administrative Provisions

"No More"

The Committee bill contains two provisions which I think are absolutely necessary to reassert Congress' authorities in the matter of land designations: (1) the revocation of the monuments and the other FLPMA withdrawals which were made last year by the Administration to put pressure on the legislative process, and (2) the exemption of Alaska from the wilderness study provisions of FLPLMA in the just belief that with passage of this bill "enough is enough".

However, one further critical provision is lacking. With the designation of over 100 million acres by this bill, coupled with the 50 million acres of units already existing in Alaska, nearly 40 percent of the land mass of the State would be within conservation systems. Surely that sufficiently meets even the most generous allocation of land for this specific purpose to the exclusion of most other land uses. Should this bill become law, we in Alaska must have some assurance that this represents a final settlement of the nation's conservation interests. We cannot continue to be exposed to the threats and intimidation of a zealous Executive which may feel in the future that the Congress did not meet the Administrations desires for land designations in Alaska.

Thus, absent from this bill is a provision barring further conservation system designations through administration action such as the Antiquities Act. Obviously, the Congress could act again in the future if it were so inclined, but the arbitrary permanent removal of federal lands from the public domain can no longer be left to the Executive in Alaska. Deletion of such a provision in this bill is a serious deficiency which must be corrected prior to any final action." (Senate Report No. 96-413, pg. 446)[1]

A later version of the Alaska lands legislation, the so-called Tsongas Substitute for H.R. 39, was amended to include the language now found in ANILCA Section 1326. During the August 18, 1980 Senate floor debate on the Tsongas Substitute, Senator Stevens explained that the Alaska State

[1] While the legislative history of ANILCA is extensive, given the number of bills introduced by both the House and Senate, *Senate Report 96-413* from the Senate Committee on Energy and Natural Resources is acknowledged as one of 2 committee reports that constitute the most relevant legislative history for the Act. It is cited at the end of the original slip law under *Legislative History.*

Legislature had asked the Alaska delegation to address seven consensus points that were not originally contained in the bill:

> *"I have uniformly responded to questions in those areas [Alaska communities] concerning the revised Tsongas substitute. This substitute now is a version of the Senate Energy Committee bill, but it does not satisfy the seven points that our State legislature asked us to address in connections with this legislation.*
>
> *I have told Alaskans that while I cannot vote for the Tsongas substitute, I think it has to be judged as being a compromise that is better than the existing situation under the national monuments and certainly better than those the President has indicated he will impose if a bill does not pass.*
>
> *Our State legislature asked us to address seven points. We call them the consensus points.....*
>
> *The fifth injunction of the legislature was to be sure that there is what we call a no-more provision. This was a provision I insisted on in 1978. It was in the so-called Huckaby bill. It was in the bill that almost was approved in 1978. That clause is not in the committee bill. It is in the revised Tsongas substitute because the agreement we had in committee that when the bill had reached its final version on the floor of the Senate, the committee would agree to the no more clause. Realizing that the Tsongas revised substitute may be final version, the Senator from Massachusetts, at my request, has included that."* (Congressional Record – Senate August 18, 1980, pg. S11047)

Senator Stevens later in the floor debate formally introduced Amendment No. 1967 to H.R. 39 for the following purpose:

> *"To provide congressional oversight for major modifications of areas established or expanded by this Act and to require congressional approval for future major executive withdrawals of certain public lands in Alaska."*

The amendment containing the essential wording of Section 1326 was adopted and became part of the Tsongas substitute[2]. That bill was approved by the Senate on August 19, 1980 and by the House on November 12, 1980.

[2] Subsection 1324(a) of Amendment 1967 is identical to the language found in Section 1326(a), however subsection (b) of the amendment was more inclusive than the final language of Section 1326(b): "No further studies of Federal lands for the single purpose of considering the establishment of a conservation system unit, special management area, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress." In this instance "special management area" referred to proposed areas within the Tongass National Forest.

The draft IAP/EIS incorrectly asserts that the BLM is required by Section 5(d)(1) of the Wild and Scenic Rivers Act to conduct reviews of the rivers within the NPRA-A to determine their eligibility and suitability for possible designation. In light of the provisions of Section 1326(b) and other actions taken by Congress in passing ANILCA, this is incorrect.

Congress added 26 rivers to the Wild and Scenic River System and was fully aware of the provisions in Section 5(d)(1). However, rather than allow a wholesale and never ending study process for rivers within the Federal public lands in Alaska, ANILCA Section 604(d) directed the study of an additional 12 rivers under Section 5(a) of the Wild and Scenic Rivers Act. That is the sole authority for wild and scenic river studies in Alaska, unless Congress directs additional studies at some point in the future.

The river studies required under ANILCA 604(d) were completed. Rather disingenuously, the draft IAP/EIS fails to inform the reader that four of the rivers, the Colville, Utukok, Etiviluk and Nigu, identified as suitable in one or more of the alternatives in the draft IAP/EIS, were included on the list of study rivers in ANILCA Section 604(a). It also fails to note that Section 604(b) states:

> *"For the rivers listed in paragraphs (77), (78), and (79) the studies prepared and transmitted to the Congress pursuant to Section 105(c) of the Naval Petroleum Reserves Production Act of 1976 (Public Law 94-528) shall satisfy the requirements of this section."*

The NPRPA section 105(c) study, which was submitted to Congress April 12, 1979, recommended only the Colville for designation as a component of the system. The transmittal to Congress triggered a three year review period during which Congress could add the Colville to the system. Congress took no action on the recommendation. The 105(c) study determined the Utukok, Etiviluk, and Nigu Rivers were not suitable "*due to insufficient flow of water and lack of outstanding attributes*." We note that the Section 105(c) study is cited at least 7 times in the bibliography for the draft IAP/EIS and find it interesting that the preparers neglected to include this relevant information about these four rivers.

Because these rivers were previously studied, in addition to our general opposition to these unauthorized wild and scenic river reviews, we question both their re-evaluation and, as applicable, the proposed decision to recommend designation, particularly since they were previously found unsuitable. Perhaps the planning team also took a "permissive interpretation" of their suitability as well.

We also find that the wild and scenic river reviews are inconsistent with the BLM's own Wild and Scenic River Manual 8351. The draft IAP/EIS (Vol. 1, Section 4.4.7, pg. 422) states:

> *"The BLM Manual states that, 'The BLM evaluates identified river segments for their eligibility and suitability for WSR river designation through its RMP process' (BLM 8351.06(B))."*

Perhaps to avoid making the public aware of the unfortunate fact that it has chosen to selectively ignore the guidance in its own manual, the BLM omitted a key sentence found in 8351.06(B). We offer a more complete citation here:

> *"B. Evaluation. The BLM evaluates identified river segments for their eligibility and suitability for WSR river designation through its RMP process.* ***Activity planning shall not be used to accomplish such evaluations.*** *(BLM 8351.06(B) (emphasis added.)*

The draft IAP/EIS (Vol. 1, Section 1.5.1, pg. 5) contains the following explanation of the legislative constraints on the planning effort for NPR-A:

> *"The Department of the Interior and Related Agencies' Fiscal Year (FY) 1981 Appropriations Act exempted the Petroleum Reserve from two sections of FLPMA. It exempted the NPR-A from section 202 of FLPMA (43 USC § 1712), which requires the preparation of land use plans (called Resource Management Plans, or RMPs, in regulations—43 CFR Part 1600—adopted by the BLM).* ***Because of the exemption from FLPMA section 202, this plan is not being developed as a RMP.*** *(emphasis added.)*

We are unclear why the draft IAP/EIS fails to recognize or offer any explanation for this obvious conflict between the decision to include a wild and scenic river review in an activity plan and BLM Manual 8351 which states clearly that activity planning cannot be used to conduct such reviews.

The agency cannot have it both ways. Since the provisions of the NPRPA do not allow the BLM to prepare a Resource Management Plan (RMP), it cannot then include reviews that are restricted by its own directives to inclusion in an RMP. This is another reason that the wild and scenic river evaluations should be removed from the final IAP/EIS.

The draft IAP/EIS references the 1993 settlement agreement between American Rivers and the Department of the Interior (*Case No. J91-023 Civil*) as another justification for conducting wild and scenic river reviews. The settlement agreement required the BLM to modify BLM Manual 8351 to delete the exemption for Alaska for conducting wild and scenic river studies as part of the RMP process:

> *" BLM Manual, Part 8351.06F will be amended to delete the exemption for Alaska for conducting wild and scenic river studies as part of the RMP process." (Settlement Agreement, pg. 2)*

Again, since the current planning effort for the NPR-A is an integrated activity plan and not an RMP; it is not subject to the terms of the settlement agreement between BLM and American Rivers.

We should note that the same settlement agreement also stipulates:

> *"Pursuant to 1326(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §3213(b), no study shall be conducted for the single purpose of considering eligibility for wild and scenic river designation."*

While the draft IAP/EIS does not propose recommending rivers for designation in every alternative, the only purpose for conducting the review was to consider eligibility and suitability. Inserting the eligibility/suitability review into a larger planning process still violates this restriction.

ANILCA Title XI

Chapter 4, Section 4.2.1.2 of the draft IAP/EIS makes a number of basic assumptions regarding impacts to oil and gas exploration and development activities, including transportation needs. The draft IAP/EIS then looks at how these activities, including transportation, would be affected under each of the 4 alternatives. One effect that is not considered under Alternatives B and C, the two alternatives recommending wild and scenic river designation, is how designation would impact development of transportation and utility system corridors.

The NPRPA (§6502) authorizes the Secretary to:

> *"make such dispositions of mineral materials and grant such rights-of-way, licenses and permits as may be necessary to carry out his responsibilities under this Act."*

A wild and scenic river is a conservation system unit (CSU) and the development of any transportation and utility system corridor within or across a CSU must follow the procedures outlined in Title XI of ANILCA, regardless of other authorities.

Because the Secretary has authority under the NPRPA to grant rights of way within the NPR-A, granting or permitting a right of way across a wild and scenic river corridor within the NPR-A would be subject to the procedural requirements of ANILCA Section 1104, which states:

> *"Notwithstanding any provision of applicable law, no action by any Federal agency under applicable law with respect to the approval or disapproval of the authorization, in whole or in part, of any transportation or utility system shall have any force or effect unless the provisions of this section are complied with. (1104(a))*

While we have already raised objections to the inclusion of wild and scenic river reviews and recommendations in the draft IAP/EIS and oppose any designation of additional rivers in Alaska, we concede the possibility that one or more of the rivers recommended in the draft IAP/EIS could be designated. We also realize that the identified rivers are within identified Economic Zones or portions of zones within NPR-A that are assumed to have relatively small amounts of recoverable oil and gas. Nevertheless, the final IAP/EIS

should examine the potential effects of wild and scenic river corridors on potential future development of transportation and utility systems within NPR-A.

The draft IAP/EIS (Chap. 4, pg.4) notes that the BLM issues minimum impact rights-of-way for overland moves to bring supplies to villages. ANILCA Section 1111 guarantees temporary access for a variety of purposes to private landowners within the NPR-A. That temporary access is regulated under 43 CFR §36.12. The final IAP/EIS should include this information.

Wilderness Characteristics

The Commission objects to the inclusion of any inventory of wilderness characteristics in the IAP/EIS. As with the wild and scenic river review, the question of wilderness within the NPR-A has been addressed under the NPRPA. Unlike the wild and scenic river reviews, the draft IAP/EIS does acknowledge the NPRPA Section 105(c) study and the recommendation of no wilderness in the1979 report to Congress. It also cites previous plans to explain how the question of wilderness in the NPR-A has been addressed:

> *"The BLM recognizes the Congressional intent of PL* 96-514, *which indicates that no "wilderness" designations will be made in the Reserve and the intent of PL* 96-487 [ANILCA]. *The BLM cannot reinterpret Congressional authority through administrative procedures."* (1983 NPR-A FEIS)
>
> *"Because wilderness designation would not meet the purposes and objectives of this planning effort, BLM decided not to consider possible wilderness designation for the planning area in the IAP/EIS."* (1998 NE NPR-AIAP/EIS)
>
> *"Because creating new wilderness designations is inconsistent with the management objective, alternatives proposing such an action* [wilderness designation] *are outside the scope of the Amended IAPIEIS and this Supplement thereto."* (2008 NE NPR-A Final Supplemental IAP/EIS)

We strongly disagree with the claim that Secretary Salazar's June 1, 2011 directive to consider wilderness values in management decisions applies to the NPR-A. We understand that the scope of land use planning in the Reserve is limited by the Reserve's organic act. The NPRPA 42 USC § 6506a(c) states that FLPMA Sections 202 and 603 do not apply to the Reserve.

> *(c)* ***Land use planning; BLM wilderness study***
> *The provisions of section 202 and section 603 of the Federal Land Policy and Management Act of 1976...shall not be applicable to the Reserve.*

The FLPMA Section 603 exemption clearly means that there is to be no wilderness reviews or wilderness management in the NPR-A. This is further confirmed by ANILCA, which specifically excluded the Reserve from the wilderness study area and interim management requirements of Sections 1001 and 1004.

In addition, both ANILCA Section 1320 and Secretarial Order 3310, as revised by the June 1, 2011 Salazar Memo, rely on FLPMA Section 202 authority, which as BLM acknowledges, does not apply in the Reserve. While FLPMA Section 201 authorizes BLM to *inventory* resource and other values, it is not within BLM's authority to implement land use planning direction from which the Reserve is specifically exempted by the NPRPA. As the 1983 NPR-A FEIS stated, the BLM cannot reinterpret Congressional authority through administrative procedures.

The Commission appreciates the opportunity to comment on this plan. We also thank the BLM for agreeing to extend the comment period on this plan so that the public would have more time to review it and offer meaningful comments.

We are hopeful that the BLM will comply with applicable statutes and policies and decide against including in the final IAP/EIS what we maintain are unauthorized and unnecessary wild and scenic river reviews and wilderness characteristics inventories.

Sincerely,

Stan Leaphart

Stan Leaphart
Executive Director

cc: Governor Sean Parnell
Daniel Sullivan, Commissioner, Department of Natural Resources
Sue Magee, State ANILCA Program Coordinator
Sara Longan, Office of Project Management and Permitting