UNIVERSITY
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May 22, 2006

Marcia Blaszak
Regional Director
National Park Service
240 W. 5th Avenue
Anchorage, AK 99501

Re: University of Alaska Comments on Second Draft NPS Draft User's Guide to Accessing Inholdings in a National Park Service Area in Alaska

Dear Ms. Blaszak:

The University of Alaska ("University") is pleased to submit the following comments in response to the National Park Service's ("NPS") second draft "User's Guide to Accessing Inholdings in a National Park Service Area in Alaska."

A. The University's Interests

The University is the State University of Alaska, and is an instrumentality of the State of Alaska, a body corporate provided for in Article VII of the Alaska Constitution[1] for the purpose of serving the needs of the people of the State of Alaska for higher education.

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[1]Article VII of the Alaska Constitution states in part as follows:

§ 2. State University

The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

§ 3. Board of Regents

The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

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The University was created early in the 20th Century. The University was first endowed with Federal trust land grants in section 1 of the Act of March 4, 1915, 38 Stat. 1214 (formerly 48 U.S.C. § 353) ("1915 Act"), and later received additional lands pursuant to the Act of January 21, 1929, 45 Stat. 1091, codified as 43 U.S.C. § 852 note ("1929 Act"), in the total amount of in excess of 200,000 acres. The purpose of these land grants was to assist in financing the University. The University's lands acquired under these Acts were impressed with a trust under Federal law to ensure they would be used only to further the purposes of higher education.

The University owns over 9,000 acres of land within the boundaries of Wrangell-St. Elias National Park and Glacier Bay National Park. These inholdings are all within National Parks or portions of National Parks that are Conservations System Units ("CSU's") created pursuant to the Alaska National Interest Lands Conservation Act ("ANILCA"), Act of December 2, 1980, PL 96-487, (94 Stat. 24011 *et seq.*). Approximately 7,500 acres of this land was acquired by the State in trust for the University in the early 1960's, while approximately 1,250 acres of this land is held in trust, and was conveyed to the University by the State in the 1980's to replace other University trust lands. The University owns an additional 400 acres of "non-trust" land in Glacier Bay National Park, which the University purchased about 8 years ago, which contain patented mining claims pre-dating ANILCA.

The 1915 Act and the 1929 Act together effectuate an important Federal purpose to grant Federal lands to the University of Alaska to provide for higher education in Alaska. As enacted, there was no prohibition or discouragement in the 1915 Act and the 1929 Act upon free access across Federal lands to the lands thereby conveyed to the University.

The vast majority of the University's lands in these National Parks (at least 7,500 acres) were acquired by the University well before the enactment of ANILCA, 16 U.S.C. § 3101, *et seq.*, and the creation of these CSU's that now surround those lands.

ANILCA was enacted to effectuate other important Federal policies concerning Alaska's lands by creating new land management classifications. Thus, the NPS must use care to ensure it does not frustrate one important Federal land policy, stated in the 1915 Act and the 1929 Act, when it pursues another important Federal land policy, stated in ANILCA.

The task of ANILCA was complicated because Alaska lands had already been conveyed to the State, to Native Corporations, and to other landowners (including the University) for other purposes. Thus, a central feature of ANILCA, one that allowed it to be enacted in the first place, was a set of access provisions, largely contained in Title XI of that Act (specifically in ANILCA §§ 1110 (b) and 1111), which recognize and protect the rights of property owners who possess inholdings within the enclaves created by ANILCA. These provisions are fundamental to the purposes of ANILCA and without them, there would be no ANILCA, and no National Parks or other CSU's created under ANILCA.

Much of the University's lands have no practical means of access except across National Park lands. This land is only valuable to the University, to accomplish the purposes for which it was given to the University by the Federal government, if there is adequate access. Accordingly, the University is concerned with the preservation of access rights. ANILCA unequivocally grants and guarantees the right of access to inholders. Any NPS policies regarding access to inholdings must comport with the intent of the statute to grant inholders guaranteed continued access to their land.

B. Applicable Statutes and Legislative History

ANILCA specifically gives and guarantees access to inholders without limitation. ANILCA §1110(b) provides:

> (b) Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land ... is within or is effectively surrounded by one or more conservation system units, ... 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.

Thus, under § 1110(b), notwithstanding other laws, inholders are "given" and "assured" "adequate and feasible access" to their lands.[2]

ANILCA § 1111 also addresses temporary access to inholdings for certain specified purposes relating to survey and mineral and oil and gas exploration, and other temporary uses. Section 1111 provides:

> (a) IN GENERAL.--Notwithstanding any other provision of this Act or other law the Secretary shall authorize and permit temporary access by the State or a private landowner to or across any conservation system unit, ... in order to permit the State or private landowner access to its land for purposes of survey geophysical, exploratory, or other temporary uses thereof whenever he determines such access will not result in permanent harm to the resources of such unit, area, Reserve or lands.
>
> (b) STIPULATIONS AND CONDITIONS.--In providing temporary access pursuant to subsection (a), the Secretary may include such stipulations and conditions he deems 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 unit, area, Reserve or lands.

That ANILCA was intended to *guarantee* access to inholders is confirmed by the legislative history. The Senate Committee report (Rep. No. 96-413 to accompany H.R. 39) discusses § 1110 in two different places. The first is the "Committee Amendments" of the Senate Committee on Energy and Natural

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[2] The term "adequate and feasible" is defined in 36 CFR § 13.1(a) of the NPS regulations as:

> A reasonable method and route of pedestrian or vehicular transportation which is economically practicable for achieving the use or development desired by the applicant on his/her non-Federal land or occupancy interest but does not necessarily mean the least costly alternative.

Resources; § 1110 is discussed on pages 247-49. The second is the "Section by Section Analysis"; § 1110 is discussed on page 299.

The Senate Committee Report provides that "The Committee amendment *guarantees* access subject to reasonable regulation . . . ." Senate Committee Report, at 247. Further, the Committee Report explains that "[w]here a ... private interest in land is surrounded ... the Secretary *shall* grant the owner of the private interest such rights as may be necessary to assure adequate access for economic and other purposes." *Id.* at 248.

Perhaps most importantly, the Committee Amendments section, at 249, takes the view that § 1110 grants a right to the inholder:

> The Committee understands that the common law guarantees owners of inholdings access to their land, and that rights of access might also be derived from other statutory provisions, including other provisions of this title, or from constitutional grants. *This provision is intended to be an independent grant supplementary to all other rights of access*, and shall not be construed to limit or be limited by any other right of access granted by the common law, other statutory provisions, or the Constitution. (emphasis added.)

The legislative history also demonstrates that the Secretary's discretion is limited to protection of the CSU resources. As the Committee explained, "[t]he Committee expects the Secretary to regulate such access in order to protect the natural and other values for which the units where established." *Id.* at 248.

Thus, the statutes and legislative history demonstrate that inholders *must* be given "adequate and feasible access" to their land. The Secretary may only exercise his/her discretion to protect the resources of the CSU.

C. Discussion

1. The User's Guide Omits Any Mention of the Requirements of ANILCA Which Protect Access to Inholdings.

It is almost inconceivable that the User's Guide omits any but the most passing and indirect reference to the above-quoted requirements of ANILCA that inholders be "assured" and "guaranteed" a right of access to their property.

NPS refers to these provisions in an oblique way which is obviously intended to minimize the importance of the statutes which create rights of access, and which guides and limits NPS actions in this arena. The User's Guide states at page 1 "As a property owner...you are assured access to your land" and at page 3 "The National Park Service acknowledges the access provided in both section 1110(a) and section 1110(b) is very important to inholders." The latter statement in particular avoids the conclusion that these statutes significantly limits what NPS may do with respect to access applications.

This linguistic indirection and minimization of the requirements of the law speaks volumes about the impartiality and the purposes of NPS in the User's Guide. A simply stated provision, directly quoting the statute and its legislative history and the significance of this language to the NPS processing of access permit applications, is necessary.

2. The Process to Date has been Inadequate Because it Has Almost Completely Failed to Incorporate the Interests and Views of the Major Stakeholders, and Because the Process is Essentially a Rule-Making.

The process of drafting this User's Guide has, to date, failed to meaningfully recognize or consider the viewpoints of the major stakeholders on this issue.

Simple review of the comments received by NPS in response to the first draft User's Guide demonstrates that there are primary stakeholders in this issue whose viewpoints have not been adequately considered: The University of Alaska owns 9,000 acres in NPS units. Doyon, Ltd. owns nearly three million acres in CSU's and 300,000 acres in NPS units in Alaska. Chugach Alaska Corporation owns 139,000 acres within NPS units (and other Alaska Native Corporations also own large amounts of lands within NPS units). The Alaska Miner's Association represents holders of patented and unpatented mining claims within NPS units. The State of Alaska owns extensive lands (including submerged lands) within NPS units. Substantially all of these inholdings predate the creation of the NPS units by ANILCA.

These are some of the primary stakeholders in this issue. Except for the State of Alaska, these primary stakeholders were completely excluded from the initial drafting of the User's Guide, and then were allowed to comment on the first draft only by letter, as members of the general public.

That process utterly fails to recognize that Congress required that NPS "...assure adequate and feasible access for economic and other purposes to the concerned land...." We do not understand how NPS can assure "adequate and feasible access" without directly contacting and considering the views of the major stakeholders in a face to face process. The direct, statutorily recognized right of the University and the other major inholders to be "assured" and "guaranteed" access should be accommodated in a workshop structure that recognizes our statutorily recognized interest in access and that opens the User's Guide to significant redrafting.

Receipt of written public comments from the primary stakeholders is inadequate to correct the lack of primary stakeholder participation in a process that has spanned over three years. This is precisely the sort of one-sided and interested process the Department should studiously avoid here, in light of Congress' specific statutory protections for inholders rights, where the statutes so clearly grant broad rights of access to inholders, and where preserving the rights of access for inholders was so central to the scheme of ANILCA. Excluding the primary stakeholders from this process is an important signal of a lack of impartiality and fairness in the process followed to date and certainly affects the outcome of the process.

We agree with the changes to conduct programmatic EA's, to extend the term of the permits, and to waive permit fees in some cases. However, probably as a result of the failure to meaningfully include the stakeholders, while the changes made in the second draft as a result of this process are appreciated by the University, they do not resolve the basic problems of the User's Guide.

Because of the central role of ensuring access to inholders across the massive Federal land enclaves created by ANILCA, this process should not continue until stakeholders become involved actively in this process.

NPS should withdraw the "Draft User's Guide," then involve inholder representatives in the process, and create a new User's Guide that reflects the participation of those who are most affected by its content.

In addition, notwithstanding the statements contained in the second draft User's Guide, we believe this process is in essence a rule-making and must follow ordinary rule-making processes. Section 1010(b) contemplates that its protections of the CSU's would be administered by regulation: "Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands."

Because the User's Guide is establishing standards of general applicability concerning the requirements of permits and because it materially alters the content and the application of existing rules, rule-making processes must be followed. The second draft arguably deletes some of these new standards of general applicability, but we think its essence is not changed. Thus, the process followed should be adoption of regulations under the Administrative Procedures Act, not the issuance of rules in the form of a "User's Guide", drafted in a process that excluded meaningful public participation by the affected stakeholders.

3. The Permitting Process Proposed by the NPS is Unduly Burdensome.

The second draft User's Guide makes improvements to the process for obtaining permits, primarily in the areas of abolishing fees, lengthening the permit term, and conducting programmatic EA's in some circumstances. These are positive steps, and we applaud the NPS for taking them.

However, notwithstanding this positive change, we believe that the process set forth in the User's Guide remains unduly burdensome and thus inconsistent with ANILCA §§ 1110 and 1111, because it acts to unreasonably to delay, discourage or prevent adequate and feasible access granted by ANILCA. The level of discretion the Secretary asserts here to deny or condition permits, the uncertainty of the scope of the review, and the time spent in the process, are objectionable.

First, the guide still lacks clear guidance on when permits are required. The Draft User's Guide contains discussion at page 2 concerning when permits are required. However, the discussion is vague and confusing. It states that a permit is required when "this access does not require construction or maintenance on national park areas" and that "[p]ermits are usually necessary when construction or maintenance of a trail, road, powerline, or a landing strip would occur on national park areas..." However, a requirement of "maintenance" is not an adequate distinction, because virtually any use of any trail, road etc. (even occasional summertime use of a trail by a hiker, bicyclist or horse) will require at least some maintenance—thus <u>any</u> use <u>might</u> require a permit. In addition, the guide does not define "maintenance" and thus leaves much uncertainty about the application of the regulations.

Second, the times required for issuance of a permit frustrate and contradict the clear language of ANILCA §§ 1110 and 1111 because they contemplate (indeed, apparently intentionally embrace) great delay in issuing a permit. The permit process does not begin until the application is determined to be complete, but that requirement to submit a complete application is not clear in the User's Guide and apparently involves agency actions such as determining what information NPS must gather itself.

When a permit is required, the permitting process for *any* inholder application is extensive and open-ended. As set forth in the User's Guide, it may take a minimum of approximately 16 months (excluding any pre-application meetings as advised by the User's Guide) to complete the permit process using an EA, and a minimum of approximately 19 months if an EIS is required. While this sort of timeline may be appropriate for a major project or development such as a mine or oilfield or similar development, it may significantly disrupt a lesser project, such as a residential development, or similar project. This lengthy permitting process contradicts ANILCA § 1110(b)'s requirement that inholders be "given" and "assured"

"adequate and feasible" access. Rather, it will discourage and frustrate adequate and feasible access because of the excessive costs, length of time, and unpredictable results.

The Draft User's Guide must be rewritten to ensure short permit processing times consistent with adequate and feasible access.

4. The Process Asserts a Level of Discretion in the Secretary that is Not Supported by the Statute.

ANILCA expressly grants and guarantees to all inholders a right of access to their lands located within a CSU. The direction of ANILCA §§ 1110 and 1111 to the Secretary is direct, and mandatory. As provided in ANILCA § 1110(b), "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" (emphasis added). *See also* Senate Committee Report, at 247 (providing "the Secretary *shall* grant the owner of the private interest such rights as may be necessary to assure adequate access for economic and other purposes"). As stated in ANILCA § 1111, "the Secretary *shall authorize and permit temporary access* by the State or a private landowner to or across any conservation system unit."

The sole discretion granted to the Secretary under ANILCA relating to inholding access is to ensure protection of the values of the affected CSU. The Secretary can only utilize his/her discretion to take steps to reduce or avoid harm to resources within the CSU, but the Secretary cannot (except under extraordinary circumstances) act to deny an inholder the access rights guaranteed by ANILCA §§ 1110 and 1111.

The procedures set forth in the User's Guide, however, fail to recognize that there is any limit on the Secretary's discretion. For example, the User's Guide fails to recognize that, while the EIS can be used by the Secretary to determine which of several measures might be taken to protect resources within the unit and to select alternatives which minimize damage to such resources, it *cannot* be used to refuse a permit or to impose burdensome conditions that deny the inholder "adequate and feasible" access.

The User's Guide asserts the right of the NPS to determine what access is "adequate and feasible." On the contrary, the statute grants the right of adequate and feasible access directly to inholders, subject *only* to the Secretary's discretion to protect the CSU's resources.

In light of this structure of the statute and the grant of access, if the NPS is going to alter the terms of access applied for by an inholder in any substantial or material way (route, basic terms and uses of lands, means of access), the NPS should be required to do a particularized analysis to determine whether the proposed changes to access remain adequate and feasible given the purposes of the claimant-inholder, in a decision document subject to administrative and judicial review. ANILCA §§ 1110 and 1111 clearly place the burden of proof on the Secretary, not the applicant.

The mandates of the statute and the limits on Secretarial discretion contained in the statute should be clearly stated in the User's Guide.

D. ANILCA §§ 1110 and 1111 Constitute a Categorical Exclusion from NEPA, or Constitute a Significant Limitation on the Scope of Any NEPA Review

ANILCA §§ 1110(b) and 1111 each begin with the words "Notwithstanding any other provision of this Act or other law" and then require the Secretary to take specific actions.

This language arguably constitutes a categorical exclusion from the NEPA process for grant of access rights under ANILCA §§ 1110(b) and 1111.

Even assuming the NPS does not agree that this language constitutes a categorical exclusion from NEPA, it is still obvious that this language, coupled with the sharply limited discretion given to the Secretary under ANILCA §§ 1110(b) and 1111 (the Secretary is required by the statute to grant "adequate and feasible access" "subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands") means the scope of the NEPA review is sharply limited to the actions of the Secretary in protecting the CSU. This limits the scope of the EIS and means the Secretary and not the applicant should bear its cost.

This limitation should be expressly recognized in the User's Guide.

E. Conclusion

The process underlying the User's Guide is flawed because NPS has failed to meaningfully include any stakeholders other than the State in its creation or preparation, and because it amounts to a rule-making without use of rule-making processes. Further, the User's Guide provides for a burdensome and unpredictable process that denies "adequate and feasible" access by inholders of their lands.

Sincerely,

Steve Connelly

for Mari E. Montgomery
Director

cc: Drue Pearce, U.S. Department of the Interior
Michael Menge, Alaska Department of Natural Resources
Vicki Otte, Association of Regional Corporation CEO's