RECARPETING ANILCA: Is it the carpet or the carpet layers that need replacing?

By Father J. Michael Hornick, J.C.L.

When Steve Borell first asked me to write an article on ANILCA, I declined. A couple weeks later, I had to pack up my office and move so it could be recarpeted. That meant packing up my book cases of Federal management plans and Land Use Council/Advisors records. Sorting files and reports served to remind me of how many controversies and experiences were related to ANILCA, now twenty years old.

Most Federal land agencies in Alaska have hired spokespersons to promote the accomplishments of their agency. Consequently, that is a task I will choose not to duplicate. I believe the other side of the story suffers from inadequate telling.

Flood of Tourists

At Thanksgiving of 1956, Bill Fickus was hired to fly supplies in to Pat Barkley's placer claims on Crevice Creek. Fickus eventually got hooked on mining, became sole owner of the claims, and began homesteading.

In July of 1963 Bill Fickus, his wife Lil, and two children established residence on their Crevice Creek homestead in the Brooks Range, fifty miles west of the Dalton Highway. There, they raised four children. In 1980 their family lifestyle was changed dramatically when ANILCA suddenly made them inholders in Gates of the Arctic National Park.

Suddenly Bill's big game hunting was prohibited in the park, seriously impairing his guiding business. He lost hunting in three river valleys which were choice guiding areas. Also gone was one-third of his traditional trapping area. They were permitted to do subsistence hunting but NPS officials claimed that family members were not "rural residents" so now they had to pay $25 for a special permit.

The geology crews who were regular summer visitors were no longer permitted to work in the area of the park so they stopped using his airstrip as a base camp. Pre-park visitors were not tourists and numbered maybe a dozen annually. But with the establishment of the Park, several hundred backpackers, floaters, and campers came through the area each season.

Bill's wife Lil, a Ft. Yukon Athabascan, complained: "They (the NPS) come here and tell us how we should live. Why should they tell me? I've been here a long time; they're the newcomers."

Gates of the Arctic was the same park where the NPS used Executive Order (11644) and the Wilderness Act to prohibit ATV access for subsistence and traditional activities for the residents of Anaktuvuk Pass. This took years to resolve and ultimately required a land trade.

Psychological Warfare

In 1980 ANILCA made an addition of 1,037,000 acres to Katmai Monument and an addition of 308,000 acres to the Preserve. ANILCA renamed this conservation unit as Katmai National Park.

For more than twenty-five years Palakia Melgenak fought with the NPS and Interior Officials over title to her land at the mouth of the Brooks River. She and her family used the site to harvest spawned out salmon. Melgenak was an Aleutian matriarch and spiritual leader who was born in 1879.

When Palakia was 39 (1918), federal officials first showed up at her Brooks River fish camp and staked out what became Katmai National Monument.

In 1950 the NPS granted concessionaire rights to Northern Consolidated Airlines to construct and operate a sports fishing camp on Melgenak's land on the north side of Brooks River. The concessionaire used her northside cabin as a gas storage shed. Concessionaire and NPS encroachments continued with the years. In 1950 the NPS tore down Melgenak's northside tent frames.

The NPS harassed the Melgenak grandchildren and accused them of being "eyesores to the tourists." The entire family was displaced from their campsite on the south side of the river, and placed into a fenced-in area, allegedly for their own protection.

In 1958 NPS officials acknowledged the existence of the Melgenak structures and their traditional use:

> "Though we are apt to think of their fishing camps more as a nuisance and cluttered junk pile than as something of value, we must admit that it is part of the local color of the Monument, and eventually will be of visitor interest."

The last time Palakia visited her fish camp was about 1963 at age 86. She had used her lands at Brooks River for at least seventy years. On her last trip she asked her eldest grandson to mark boundaries for her because the white men were coming and would take the lands. Ted and Ralph Angasan dutifully marked trees to identify her property boundaries that year.

In 1965 the NPS ordered the destruction of her cabin on the north side of the river but family members continued to use the site.

In anticipation of the Alaska Native Claims Settlement Act (1971), Rural CAP began advising Natives to apply for land under the 1906 Native Allotment Act. In March of 1971, after nearly a century of use and occupancy, Palakia filed a native allotment application for her lands on the both sides of the Brooks River.

In March of 1983 the BLM approved her allotment but the NPS and the concessionaire immediately appealed it. After years of legal bickering and several land board appeals, the case ended up in the U.S. District Court of Judge Singleton.

Over the years government attorneys raised some "interesting" arguments. They claimed the Native Allotment Act of 1906 applied to Indians and Eskimos but not Aleuts. They claimed that Melgenak's claim was void because she had "tacked" it to her husband's claim. They argued that Melgenak lacked evidence of continuous occupation of her fish camp though NPS records demonstrated otherwise. Best of all, the NPS, having burned down her cabin, then argued its absence as proof of nonuse.

Judge Singleton concluded: "In fact, the NPS people had knowledge of Melgenak and her family's presence, and did everything they could to discourage it."

With court proceedings still pending in July of 1996, the NPS announced they were closing the concessionaire headquarters on the north side of the river and moving to the south side. The NPS Concept Plan and EIS placed their planned facilities in direct conflict with the Melgenak allotment on the south parcel, according to Court records.

In his decision Judge Singleton concluded that the Melgenak heirs had valid claim to the south side parcel but not the north side parcel. Singleton's decision made reference to NPS treatment of the Melganak family as "psychological warfare." Government lawyers wanted this phrase removed from Singleton's decision but the comment remained.

Angasan, a grandson, speaking of Judge Singleton said "He is the only one who has recognized how we were treated all those years. It was just a dirty fight."

No More Firewood

Kenneth Owsichek was a hunting guide and lodge owner in Lake Clark National Park. His story was told in The Anchorage Times (8/4/90): "In 1980, when Lake Clark National Park was established we all cut wood, and no permits were required. This is my primary home out here, Port Alsworth. Now a couple of parkies out here decide I'm not a resident."

When the Park Service refused to grant him subsistence rights for thirty cords of firewood from Lake Clark Park/Preserve, he sued them because "I've had to buy wood from private property here for the past year."

Owsechek filed documents in U.S. District Court stating the he had lived in Port Alsworth on the south lake shore for the last fourteen years. He built his hunting lodge there in 1976.

Park Service spokesperson Quinley claimed. "We (the NPS) determined he did not qualify." Owsichek claimed in court papers that he travels to the Lower 48 two to three months of the year to promote his guiding business. Owsichek said he was aware that the NPS granted cutting permits to other Port Alsworth residents who were "physically present at their residences less than" he was.

The Park Service defined "local rural resident" as any person who has a primary permanent residence evidenced by a driver's license, fishing/hunting license, or location of voter registration. Owsichek stated in his court complaint that he has been a registered voter in Port Alsworth since 1982.

Then there was the flap between park officials and residents in late 1990. Port Alsworth residents (pop. 50) raised complaints against some park service employees ranging from misuse of government property—including aircraft—to alleged physical abuse of Kathy Painter. Painter said she was slapped in the face by Chief Ranger Hollis Twitchell. Painter's husband, an Alaska state trooper, considered pressing charges but reconsidered when the NPS promised to investigate. The NPS investigated but nothing ever happened, according to Trooper Painter.

Glen Alsworth, lifelong resident and mayor of the local borough, said conflicts with park administrators and local residents began in the 1970's after President Carter designated these lands for eventual park status.

Boyd Evenson, NPS Regional Director, claimed there were 25,000 visitors in the park the previous year (1990). Alsworth, who operates an air-taxi service, and other residents disputed that figure as grossly inflated. Alsworth claimed he transports several thousand people per summer but only 3 to 5% are park visitors. Evenson admitted NPS visitor numbers are inflated to justify maintenance and operations budgets.

We Don't Care How They Do It Outside

Federal managers would consider this maxim to be indicative of narrow minded Alaskans. I would suggest it ought to be applicable to the way Federal agencies manage Wilderness in Alaska.

In 1980, ANILCA added 56.7 million acres of Alaska to the Federal Wilderness system. This made Alaska's contribution equal to 62% of all Wilderness lands in the entire United States. More Wilderness designations were created by Congress in the late 1980's.

The Act defines Wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain...." Notice that mankind is clearly not considered to be a part of "the community of natural life!"

The Act's prohibitions against roads, motorized vehicles, equipment and boats, the landing of aircraft and structures of any kind have caused considerable controversy among inholders, miners, loggers, oil and gas drillers, developers and others concerned about our Federal government locking up lands from multiple use.

Cognizant of Alaska's unique situation and what the Wilderness Act would do to traditional lifestyles, Vern Wiggins, former Federal Cochairman of the Alaska Land Use Council, noted that ANILCA created twenty-one special provisions which pertained to the administration of Wilderness lands in Alaska (8 of which modified or amended the Wilderness Act).

Far too many controversies of the past twenty years have resulted from the fact that Federal managers were either ignorant of ANILCA provisions/exemptions or just chose to ignore them. There have been conflicts as well because Federal managers insist on regulating/managing wilderness study areas or proposed areas as if they were already Wilderness designated by Congress.

Subject To Reasonable Regulation

Few other more irritable words have been heard in Alaska than the phrase "subject to reasonable regulation." The phrase is often cited in Federal law. Unfortunately, the experience of ANILCA has demonstrated that "reasonable regulation" often means bureaucratic hoops which never end. It's how to say "yes" when you really mean "no."

ANILCA promised to preserve access rights for inholders. While Federal agencies sanctimoniously acknowledge individual and State's rights of access in their management plans, in reality they obstruct any practical use of such access rights.

RS2477 is an 1866 statute which provided rights-of-way across undesignated Federal lands. It was repealed in 1976 but preserved already

existing rights-of-ways. ANILCA allegedly preserved existing rights-of-way.

In the fall of 1993 Paul Shultz filed suit in the Ninth Circuit Court vs. the U.S. Army over access to his homestead. The Army asserted unrestricted right to regulate access to the roads of Ft. Wainright. District Court Judge Andrew Kleinfeld determined in favor of the Army.

Shultz claimed he established a right-of-way to his homestead which he acquired in 1924. Judge Kleinfeld negated all six routes proposed by Shultz as RS2477 access routes or public easements.

The Ninth Circuit Court provided a sweeping reversal of Kleinfeld's decision. The Ninth Circuit judges determined that "in Alaska, more than most locations, the season dictates the nature and means of passage."

After developing the legal history of RS2477's, the Ninth Circuit Court concluded that "as long as the termini of the right of ways are fixed (the homesteaders cabin on one end, Fairbanks on the other) to establish a public right of way, the route in between need not be absolutely fixed (as it might be in other settings)."

The Department of the Interior was panic stricken. Secretary Babbitt reacted immediately to the potential threat of RS2477 access for Federal conservation units in Alaska. Babbitt issued new Federal RS2477 access regulations for the BLM, NPS and FWS in August of 1994. When that was opposed by Congress, Secretary Babbitt tried the back door route of issuing new "policy guidance" which would preclude Alaska from any practical use of the RS2477 rights-of-way Schultz Decision.

This was not the end of the story. The Shultz case bounced in and out of Ninth Circuit Court for another three years. In November of 1993, the Government was granted a rehearing of the opinion favoring Shultz. In September of 1996, the Ninth Circuit Court reversed its earlier decision and substituted a new decision affirming the District Court decision of Kleinfeld. The Ninth Circuit Court agreed that Shultz had not sustained his burden to factually establish a continuous RS2477 route or right of way under Alaska common law. Judge Alarcon, however, dissented.

This story suggests a question: how realistic is RS2477 access if you have to prove it in Court? And, in order to prove it, you have to fight the Federal government in several court actions?

Transportation? I Doubt It

Given the addition of millions of acres of Alaska to ANILCA conservation units, the need was recognized to provide for access in, across and into the new Federal conservation units. ANILCA Title XI was intended to safeguard such access for State, Native and private landholders blockaded by the new conservation units.

The past twenty years have proven Title XI access to be pretty useless. The first time I believe it was ever used was for the widening of the Sterling Highway through the Kenai National Wildlife Refuge—this was no new road.

When Cominco needed access from its Red Dog Mine to tidewater, it was easier to do a Congressional land trade than to get mired down pursuing a Title XI transportation corridor.

Another example of Title XI failure was for the people of King Cove who needed road access to the airport at Cold Bay for medical emergency evacuations. Unfortunately, Izembeck National Wildlife Refuge divides the two villages. Department of the Interior and environmentalists adamantly opposed any routing through the Refuge. Senator Stevens got $37.5 million in funding for alternate routing in 1998. Alternate plans routed the roadway on Native land parallel to the Refuge border. The Department of the Interior and environmental groups have opposed this as well because they claim hovercraft crossing of Kinzarof Lagoon would unduly disturb waterfowl.

Unusable as Title XI provisions have been, environmentalists aim to eliminate it from ANILCA. They fear the prospects of future access. Access requires roads and would likely bring development. The existence of roads or development would preclude the future nomination of such areas to Wilderness designation.

An Airplane Is An Airplane

In the late 1980's Senator Stevens carried on considerable negotiations with Federal managers over several aviation issues. Federal managers refused to recognize helicopters as having been included in ANILCA's term "airplanes;" and aircraft access was being managed too restively.

Regional Director Stieglitz of the USFWS responded to Stevens' challenge in a letter claiming their position was moderate and in line with Department of the Interior directives. However, Stieglitz did concede that the USFWS would no longer require permits first before helicopters could respond to medical emergencies or rescues within Wildlife Refuges. God forbid if you needed a helicopter permit for a rescue or emergency after 5:00 P.M. on a Friday night.

In November and December of 1993 the Magazine of the National Park and Conservation Association protested a proposed $600,000 FAA grant to the State of Alaska for "planning airports" in Denali and Wrangell-St. Elias Parks.

The NPS and the NPCA insisted that the FAA had no authority to issue such grants and "strongly opposes building state-owned commercial airports in the heart of two of the country's premier wilderness parks."

Chip Dennerlein, Alaska regional director of NPCA, complained: "The FAA has taken from the Park Service and given to the State the authority to control access to these parks." The NPCA claimed it was the NPS who operated a small airstrip in Kantishna and another in Chisana. In August of 1993, Dennerlein and Alaska Regional NPS Director Moorehead wrote the FAA asking the grants not be issued because the airstrips were on Park Service land. The FAA responded that Alaska held rights-of-way to both airstrips.

The duplicity of the NPS and NPCA becomes a bit more evident if you recall the battle of the Kantishna airstrip during the summer of 1990. In June of 1990, State DOT workers took a roadgrader, a loader and dump truck to Kantishna to maintain the road between the Wonder Lake Ranger Station and Kantishna. While there, they also undertook brush clearing and mainte-

nance of the gravel runway. Brush, last cleared by the State in 1974, was encroaching on the runway. NPS officials summoned a van-load of armed rangers who confronted and threatened the road crew as they worked on the airstrip. Work was temporarily halted until the Governor and the Commissioner of the Department of Transportation intervened, and the innocent maintenance was allowed to proceed. Ironically, DOT officials had notified the NPS of their intended work three weeks in advance.

The Chisana airstrip was not the only one at risk in Wrangell-St. Elias. Judy Miller and her family lived in the Wrangells long before the Park Service arrived. While living in McCarthy, she, at first, even obtained employment with the NPS. She suggested that the NPS should tread lightly while getting established in the Wrangells. "I suggested the Park personnel should not assume rights to trespass on private property, but was instructed to do so anyway." Her family became frustrated with the NPS' continuous creation of restrictive regulations. The family moved further back into the bush.

In May of 1995 Mrs. Miller came to Anchorage to testify at the Energy and Natural Resources Committee hearings hosted by Senator Murkowski. Mrs. Miller's testimony expressed concern: "There has been an ongoing effort to force this strip from the long existing lease into NPS control. The Park now claims it is theirs but I urge this committee to further investigate this."

For the Miller family the May Creek strip was their official mail address and passenger access. "Air-taxi operators have been told they cannot land at May Creek without a Park permit. Doesn't this infringe on our right of access?"

Antiquities Act vs. Private Property

President Carter tentatively locked up Alaska lands for ANILCA (D-2) by invoking the Antiquities Act of 1906. The National Natural Landmarks Program operates under the same Antiquities Act.

James Ridenour, Denver NPS Director, announced that he might want to "track down" advocates of private property rights and "punch 'em out." Ridenour made the outlandish comment in October of 1991 during the NPS Advisory Board meeting in Estes Park, Colorado. The discussion focused on the controversial Natural National and Historical Landmarks Program of the NPS. Alston Chase, national syndicated columnist, published a 1989 expose which prompted grassroots organizations to oppose the NPS designations. As much as 90 million acres of private property could have been affected by such designations.

James Richards of the Mountain States Legal Foundation, appealed to the Inspector General's Office, Department of the Interior, to determine if Ridenour's comments constituted an assault upon or an illegal use of office to intimidate private citizens.

In December of 1991 (report 92-I-204), the Inspector General concluded that the National Park Service may have infringed upon the property rights of as many as 2,800 private landowners. In many instances the evaluation, nomination, and designation processes

were conducted without the landowners knowledge or consent.

The Cabin Battle

In the mid-1980's Federal agencies began writing regulations to manage privately owned cabins captured by the new land additions of ANILCA. The Land Use Council became a forum within which these were to be formulated.

In April of 1984 the Department of the Interior/Park Service published draft regulations in the Federal Register, supposedly in accordance with ANILCA. The State of Alaska submitted its critique in August of 1984 and the Land Use Council reviewed the issues in November 1984. ANILCA required the Department of the Interior to respond to objections in writing. However, the NPS chose to go their own way, publishing final regulations in September of 1986, to be effective in October. Several days before the effective date, the State petitioned the Department of the Interior and was ignored.

On April 27, 1987 the State filed suit (J87-0012CIV) vs. the Department of the Interior/Park Service that they violated ANILCA in not responding to the Council's objections in writing. The State complained the regulations involved the following violations: phased out cabins more rapidly in Alaska than intended by Congress; improperly denied adequate and feasible access; inadequate protection of traditional and customary cabin use; unnecessarily burdened valid commercial fishing rights and permits; temporary facilities regulations substantially deviated from ANILCA 1316 (a); use of cabins in Wilderness for commercial activities were unnecessarily restrictive; unduly restricted subsistence use; and failed to provide complete, adequate, proper evaluation of the effects of these regulations on subsistence use.

Getting Rid of Miners

In 1985 the Sierra Club (and others) filed a friendly lawsuit against the NPS and successfully obtained an injunction. This precluded the NPS from approving any plans of operation until the NPS completed an environmental impact study on "the cumulative and synergistic" effects of mining. This effectively killed mining in Denali, Wrangell-St. Elias, and Yukon-Charley National Parks.

It was May of 1990 before the NPS finally completed their EIS'. A Record of Decision was not issued until August of 1990. The Sierra Club did not give up just yet. They tried to further delay possible approval of any plans of operation by attacking the EIS' in court as being flawed and incomplete. The years it took the NPS to complete their EIS' ensured that many of the claimholders and miners were destroyed financially.

Clarifying the Clarification

Evidence indicates that the NPS began targeting the miners years earlier. Through years of legal wrangling, the NPS discovered that a few claimholders had slipped through a hole in federal law. If a miner could access valid claims within a National Park by using a non-park access route, their plans of operation did not need NPS approval.

Mining in the Parks Act was passed in 1976. In 1977 it was implemented (36 CFR Part 9 Subpart A) to require an approved plan of operation as a condition for access to all mining inholdings.

ANILCA Sec 1110 (b) (1980) created a conflict with this because it guaranteed "adequate and feasible access" to all inholdings in Alaska NPS units.

In June of 1981 Mining in the Parks law was clarified by "interim access regulations" (36 CFR 13.10-15), which stated that in Alaska park units no plan of operations was required for patented claims where access is not across federally owned parklands. In October of 1986, the NPS, without any explanation, repealed the previous access "clarification."

In April of 1987, the Interior Department issued a draft amendment "clarifying" the original regulations of Mining in the Parks Act as applying throughout the National Park system to all claims, patented or unpatented, without regard to method or route of access.

Between the Mining in the Parks Act and the Sierra Clubs' friendly law suit, the last of the miners in Alaska National Parks were eliminated—something Congress had promised not to do when establishing these parks.

Promises, Promises!

Secretary of the Interior, Cecil Andrus explained in 1998 how he promoted the Alaska Lands Act with President Carter. He attributed some of that momentum, however, to the work of previous Secretary Udall.

Lowell Thomas, Jr. (Lieutenant governor under Hammond during D-2) also spoke praises of Udall: "He really cared about our extraordinary environment and, I think, carried the day (for ANILCA) with President Carter."

I mention this background because it highlights the significance of promises Udall made on behalf of Congress to the people of Alaska about the effects of ANILCA:

"We want to make it abundantly clear that it is our intention that those persons possessing valid existing mineral rights should be permitted access to those rights. Reasonable access should not mean access which is so hedged with burdensome restrictions as to render the exercise of his valid rights virtually infeasible...

"The bottom line of our position is that holders of valid existing claims *will not* be precluded by the Federal Government from the reasonable development of these claims." (emphasis added)

The past twenty years of ANILCA history have demonstrated that Federal land managers have provided their own interpretation of Congressional intent.

Each set of management plans is one step stricter than the previous. Each set of step-down plans is stricter than the previous. We have become victims of what has been called legislation by administration. Invariably each new set of regulations ends up being stricter than the original provisions of Congress in ANILCA.

On ANILCA's tenth anniversary (December 1990), I wrote former President Jimmy Carter a short note commending his humanitarian causes but also giving him credit for the ANILCA injustices inflicted upon inholders and users of federal lands in Alaska. Needless to say, there was no reply.