

THE *REAL* ANILCA

by William P. Horn, Esq.

The Alaska National Interest Land Conservation Act of 1980 (ANILCA) was the product of an intense four year legislative battle. Enacted into law over the opposition of a vast majority of Alaskans, the Act contained dozens of unique provisions specifically designed to address the concerns of Alaskans and protect traditional uses on millions of acres of public lands. The primary architects of the Act also made repeated assurances that ANILCA would not adversely affect traditional uses and users and that access to the millions and millions of acres of set aside lands would not be curtailed. This is a crucial legal, historical, and political fact: the agreement that underlies ANILCA was that the “national interest” would get its 120 million acres of new Parks, Refuges and Wilderness areas, but Alaska would get unique special rules to enable a wide array of activities to continue in these vast new units.

Unfortunately, not all of these promises have been redeemed and honored. The federal agencies and their personnel — who were not present when the original promises were made — have not always fully appreciated the special provisions designed to fulfill the promises. Personnel with training and experience in the Lower 48 have not readily grasped how unique and different ANILCA can be compared to Park Refuge or Forest administration outside of Alaska.

The crucial access provisions enshrined in section 1110 are emblem-

atic of the problems faced by many Alaskans. Experience with these sections provides ample evidence of the institutional difficulties the agencies have had in implementing a unique and often radically different law such as ANILCA.

Traditional Access

This crucial provision of ANILCA *guaranteed* access by floatplane, motorboat, and snowmachine to millions of acres within Parks, Refuges, Wilderness Areas, etc. for the purpose of engaging in traditional activities. It established an “open until closed” regime and constitutes a substantial departure from Lower 48 management practices. Without this guarantee, there would have been no acceptance of ANILCA among Alaskans. Moreover, without this provision, millions upon millions of acres of public land would be off limits, as a matter of fact, to all U.S. citizens.

The language does provide some latitude to the federal agencies. Areas can be closed if the access causes adverse impacts on unit resources and a public closure process is followed. Congress set the “bar” high for closures to ensure that the access guarantee was real.

In recent years, the Interior Department has attempted to repudiate this Congressional access commitment and taken actions which are systematically lowering the bar to closures. If uncorrected, the restrictions on closures will be dropped so low that the access guarantee will be gutted. Most notewor-

thy, the National Park Service first imposed an arbitrary blanket closure of two million acres to snowmachines based solely on completely unquantified effects, conjecture, speculation, and Lower 48 studies on species such as whitetail deer. Fortunately, the Alaska State Snowmobile Association fought back and a year ago the U.S. District Court in Anchorage invalidated the NPS closure for violating section 1110(a). Undaunted, NPS has come back with a second closure and the Alaska State Snowmobile Association has sued again. The critical issue is not snowmachines – it is the sanctity of the traditional access guarantee. Should NPS ultimately succeed, the assurances in section 1110(a) will be eviscerated with adverse consequences for airplane, motorboat and snowmachine users throughout Alaska.

Unfortunately, the National Park Service is not the only culprit. In the Kodiak Refuge, thousands of acres have been previously proposed for closure to aircraft landings even though the Fish and Wildlife Service (FWS) acknowledged that landings are causing no identifiable resource problems. Hunting and fishing guides have anxiously watched “quick and dirty” studies of the purported impacts of jet outboard units by NPS and FWS waiting for closures to follow.

The agencies clearly have authority to pursue site specific closures limited to the smallest practical area or limited to the smallest period of time to solve specific resource problems. However, proceeding with blanket closures (as in Denali) goes far beyond what is needed to solve any specifically identified prob-

lems. These actions represent the triumph of the Clinton-Gore Administration politics over the letter and spirit of the law.

Access to Inholdings

Section 1110(b) is another pillar of the promises rendered to Alaskans. When the vast conservation system units were established, over 10 million acres of Native, private, and state lands were included within the boundaries. These landowners needed assurances that they would have the RIGHT to access their lands to pursue both traditional activities and economic development. Congress provided that assurance with the extraordinary language of section 1110(b). It specifies that an inholder is ENTITLED to access including the form of access necessary to assure economic use of the property.

The Interior Department regulations — promulgated in the mid-1980’s — reflect the strong promise of the statute; regulations that have been upheld in federal court. Nonetheless, the agencies have had a difficult time honoring the Congressional commitment. One inholder went to FWS and kept getting told to file for a traditional right-of-way using the lower 48 law and regulations. Despite repeated efforts, the agency simply wouldn’t recognize that section 1110(b) was the law of the land in Alaska.

Other inholders went to NPS for an inholding access easement. In one case the agency acknowledged that the inholder was entitled to access but insisted that this small landowner had to pay \$10,000 in processing costs for a permit that NPS was obligated to is-

sue! A statutory access guarantee means nothing when it can be ignored or an agency can erect an insurmountable fee barrier.

Yet others have been told that they must pay the costs of a full fledged environmental impact statement (EIS) in order for the inholder to realize his access entitlement. Please note, that EIS's are required only for discretionary agency decisions. In the case of section 1110(b) the agency action is NOT discretionary; the law directs that it SHALL grant the needed access.

Conclusion

When the agencies have a hard time honoring the legal promises regarding traditional access and access to inholdings, it is no wonder the problems are so much worse when it comes to development activities. ANILCA has

created winners and losers during its 20 year tenure. Among the former are the federal agencies. Among the latter the small miners and loggers are most conspicuous.

It is critical that the basic agreement enshrined in ANILCA be clearly understood and recognized as the law enters its third decade. Only with understanding and recognition can Alaska insist that the promises be honored and redeemed. Only with understanding and recognition can the three branches of the federal government be informed and kept aware of these vital commitments. Alaska must continue to fight for its side of the bargain or it will simply slip into a constricting tangle of federal restrictions, requirements and regulations that will suck the life out of the Last Frontier.