Promises Broken

By Steve Borell

On December 2, 1980 President Jimmy Carter signed the Alaska National Interest Lands Act (ANILCA), also known as the Alaska Lands Act, thereby placing more than 104,000,000 acres of Alaska into National Parks, Preserves, Refuges, Monuments, Wilderness, and Wild & Scenic Rivers.

This Act contained all manner of promises. These promises were for access and continued use of valid existing rights, lands and resources. However, just as the federal government broke and abused the promises and treaties it made with Native Americans all across the lower-48 states, the federal government is breaking the promises made in ANILCA.

Background History

The discovery of oil at Prudhoe Bay in 1968 meant that a pipeline to an all-year deep water port would be required. The Native People of Alaska filed legal claim to land required for the pipeline right of way. They had sought a just settlement of their land claims for decades and this provided a mechanism to force such a settlement. After nearly three years of negotiating, the U.S. Congress passed the Alaska Native Claims Settlement Act of 1971 (ANCSA). ANCSA established 13 Regional Native Corporations and over 200 village and other corporations. Based on historic living patterns and number of the shareholders, Regional Corporations were authorized to select approximately 44 million acres of land from the federal government-owned land base in Alaska.

During the ANCSA negotiations there was much discussion about designation of additional National Conservation System Units (CSUs) such as Parks, Preserves, Refuges, etc. However, an agreement could not be reached and the decision was made to pass ANCSA without more federal CSUs, but to include a statement that the Congress would revisit this issue. Section 17(d)(2) of ANCSA states this, and the subsequent discussion lasting more than 9 years became known as the d(2) Lands Debate.

In early discussions, the plan was to place 40 million acres in federal CSUs. That number then grew to 80 million acres. Because the appetite for increasing the amount of CSUs continued to grow, an agreement between Alaskans, the environmentalists and the U.S. Congress could not be reached. At each turn in the discussions the demands for more CSU land in Alaska continued to rise. Then, on December 1, 1978, President Carter, using an obscure law known as the Antiquities Act of 1906, administratively declared much of Alaska as a National Monument. This meant that Native Corporations could not continue selecting their 44 million acres promised by ANCSA; the State of Alaska could not continue selecting its 104 million acres promised at Statehood; homesteaders could no longer select lands promised to them; Native allotment holders could no longer ob-

tain lands promised to them; federal agencies such as the Bureau of Land Management and U.S. Forest Service could no longer lease timber for harvest; and mining companies could no longer stake mining claims.

Closure of Alaska through use of the Antiquities Act greatly increased the pressure to reach a solution to the d(2) issue and settle once and for all which lands would be placed in CSUs. The primary parties involved included the Department of Interior under Secretary Cecil Andrus, environmentalists, the Alaska Congressional Delegation, the State of Alaska, Alaska industries, Native Corporations, the general public and Congressman Morris (Mo) Udall, Chairman of the House Natural Resources Committee, who was also the prime sponsor of H.R.39, the Alaska National Interest Lands Conservation Act (ANILCA).

These negotiations were heated and extended from 1978 right up to the signing of ANILCA by President Carter on December 2, 1980. During the process the mining, logging, and oil and gas industries were told to go out and find and define the areas of highest potential for development and that these would be excluded from future CSUs. However, the mining industry discovered that whenever new mineral deposits were found, the next map would move the boundary to include those deposits. In those days before e-mail and graphic information systems to update the maps, it was three or four months between the meeting and the next map. This pattern of deception continued throughout the process. In one instance, three Bureau of Land Management specialists were sent to Washington, D.C. to plot the most favorable recreation areas and the most favorable resource areas on the maps. In the end, all lands defined for each of these categories were withdrawn and placed in CSUs. In this instance the specialists were ordered to turn in all preliminary maps and notes, as well as the final copies. Being honest, they did just that and as a result there is no record of what took place. This kind of deception and trickery was not an isolated example, but a common occurrence. Due to the mistrust and concerns that existed, numerous promises were made in ANILCA to address these issues.

What were the Promises Made by ANILCA?

The promises made in ANILCA can be grouped into three general categories. The first promise was for the protection of valid existing rights where lands containing such rights were being withdrawn and placed in CSUs. In other words, activities previously allowed would be allowed to continue. This included such things as sport and subsistence hunting and fishing, guiding operations and mining. This promise also meant that miners with existing claims could continue to develop and mine those claims and if they could meet all the necessary requirements, they could still patent those claims, just as before the passage of ANILCA.

The second general promise was that access to private lands inside CSUs (inholdings) and across CSUs would be guaranteed. This was a major theme found throughout ANILCA. Access to Native Corporation lands; access to Native allotments; access to homesteads;

access to mining claims; access to State owned lands; access to guide and outfitter leases, etc. ANILCA addresses historic access routes, temporary access, as well as new access needs, both into and across CSUs. Access was such a big issue that one major section of the Act, Title XI, focuses entirely on new access routes where none existed before.

The third general promise, often called the "no more" clause, stated simply, says that Alaska has given its share of land for federal CSUs. Section 101(d) of ANILCA states that the need for more parks, preserves, monuments, wild and scenic rivers, etc. in Alaska has been met. Then, to make it even more clear, Section 1326(a) specifically states that administrative closures, including the Antiquities Act, of more than 5,000 acres can no longer be used in Alaska and that if a larger area is administratively withdrawn, "Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress."

To add even more emphasis and strength to the "no more" requirements, Section 1326(b) states that the federal agencies are not even allowed to study lands for consideration for set-asides unless Congress specifically authorizes the study. To quote this section (b), "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."

The Promises have been Broken

I will not try to list examples of how the promises of ANILCA have been broken. That discussion will occur as many others relate their personal experiences and horror stories. However, I will set the stage by discussing one of the most serious and most egregious examples of a promise that has been broken and continues to be broken today.

This example involves the "no more" clause and how some federal agencies have worked to get around the clear intent of Congress. In the previous section I quoted Section 1326(b). The U.S. Forest Service attorneys have reviewed this section and they have concluded that they can still study Forest Service lands for set-asides if the study is part of their normal review of forest management plans, as in the Tongass Land Management Plan (TLMP) completed a couple years ago, and the Chugach Land Management Plan (CLMP) that is now in progress. Their argument turns on the phrase "...for the single purpose of considering..." They argue that their evaluations are not for a "single purpose" and, therefore, studies for more "Wilderness" or Wild & Scenic Rivers are allowed. As a result the Forest Service continues full-speed-ahead studying and proposing more areas in Alaska for these special restrictions.

The Bureau of Land Management (BLM) took a very different approach until the Clinton Administration came into office. In the December 14, 1990 Instruction Memorandum No. 91-127 the Director of the BLM clarified that the agency was not allowed to study lands for the designation of new CSUs or other restrictive set-asides. Before that time it was clear to the BLM staff in

Alaska that such studies were simply not allowed. Memorandum 91-127 quoted ANILCA Sections 101(d) and 1326(d) as the legal reason why such studies were not allowed. However, once the Clinton Administration came into office this Memorandum was removed.

Finally

To quote a past author, "The price of freedom is eternal vigilance." The "no more" example given above is a serious reminder of this fact. As this quote applies to Alaska, being vigilant includes educating Alaskans about the d(2) process, the promises made, and the mineral deposits lost when ANILCA became law. This compilation comprises articles from many persons that were involved in the d(2) debate. We trust that all AMA members will benefit from this look at history and share these articles with others. We also hope to stop further erosion of the promises that were made and encourage new legislation that will strengthen the "NO MORE" clause!

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