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THE ALASKA LANDS ACT: A DELICATE BALANCE BETWEEN CONSERVATION AND DEVELOPMENT

Eric Todderud*

I. INTRODUCTION

Alaska, America's last frontier, is a land of unparalleled splendor and invaluable resources, offering enormous opportunities for both conservation and development. Efforts to preserve vast areas of Alaska's pristine land often conflict with the drive to develop the state's vital resources. These conflicts led Congress to pass the Alaska National Interest Lands Conservation Act (ANILCA) in 1980.1

ANILCA sparked considerable debate over the proper disposition of federal lands in Alaska. Many heralded the legislation as a great conservation measure.2 To others, however, ANILCA's regulation of more than 100 million acres of public land threatened to "lock up" resources and destroy the Alaskan economy.3 In a series of recent ANILCA decisions,4 the Court of Appeals for the Ninth Circuit has addressed this tension between conservation and development inherent in the statute.

This comment examines some of the important provisions of ANILCA and judicial decisions interpreting those provisions. Part II examines the legislative history of ANILCA and the major issues surrounding its enactment. Part III examines the statute's provisions for conservation and development and other provisions governing land use. In an analysis of recent Ninth Circuit decisions in Part IV, this comment concludes the Ninth Circuit must continue to interpret ANILCA in light of Congress' intent to maintain a balance between conservation and development of Alaskan lands.

II. LEGISLATIVE HISTORY

Protecting Alaskan lands has been on the federal agenda for several decades. In 1971, Congress enacted the Alaska Native Claims Settlement

* Eric Todderud is a 1987 graduate of Northwestern School of Law of Lewis and Clark College in Portland, Oregon.
2. 126 CONG. REC. 21,887 (1980) (ANILCA is "the conservation vote of the century") (statement of Sen. Glenn).
4. Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986); City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986); City of Tenakee Springs v. Block, 778 F.2d 1402 (9th Cir. 1985).
Act (ANCSA),\(^5\) which provided land grants and cash payments to Alaskan natives in order to extinguish their aboriginal rights.\(^6\) ANCSA organized the Alaskan native population into twelve regional corporations composed of numerous village corporations. Each village corporation was entitled to select and receive title to federal land.\(^7\) The size of the entitlement was proportionate to the population of the village corporation.\(^8\)

Under ANCSA, the Secretary of Interior was required to withdraw up to 80 million acres of federal land from availability for native selection to protect national interest lands for "public use and enjoyment."\(^9\) The Secretary's withdrawal authority was limited to lands suitable for protection as national parks, forests, wildlife refuges, and wild and scenic rivers.\(^10\) When the ANCSA withdrawals were completed, the Secretary of Interior appeared before Congress in late 1973 and recommended which lands warranted protection.\(^11\) However, Congress failed to ratify the recommendations and the withdrawals lapsed.\(^12\)

Shortly after the ANCSA withdrawals expired, the Carter administration ordered a series of land withdrawals under the apparent authority of the Federal Land Policy and Management Act of 1976 (FLPMA),\(^13\) and the Antiquities Act of 1906.\(^14\) By 1980, the executive branch had withdrawn over 100 million acres of federal land.\(^15\)

As the Carter administration completed its withdrawals, members of Congress began to reassert Congressional authority over the disposition of federal lands\(^16\) by proposing legislation aimed at regulating Alaskan lands under a comprehensive and permanent program.\(^17\) To that end, two

\(^6\) Id. § 1603.
\(^7\) Id. § 1611(a). If village corporations selected the surface estate of the land, id. § 1611(a)(1), the subsurface estate vested in the regional corporations. Id. § 1613(f).
\(^8\) For example, if the population of the village corporation was less than one hundred, the corporation was entitled to 69,120 acres, but if the population was between one hundred and two hundred, the corporation was entitled to 92,160 acres. Id. § 1613(a).
\(^12\) ANCSA provided that Congress had five years to act on the recommendations and without Congressional action, the withdrawals would expire. 43 U.S.C. § 1616(d)(2)(D).
\(^17\) All executive withdrawals made pursuant to FLPMA were temporary and most were valid
Alaskan lands bills were introduced in the House of Representatives during the 96th Congress. Their introduction eventually led to the passage of ANILCA.

The Breaux-Dingell bill proposed protecting 128 million acres. Of that area, 53 million acres would be designated as wilderness, although mining would be permitted in the wilderness areas. The bill also would have protected seven existing mining areas and timber interests in the Tongass National Forest and would have opened the Arctic National Wildlife Refuge for immediate oil and gas exploration.

Congressmen Udall and Anderson offered a substitute bill which eventually passed the House. Amendments, the bill protected 130 million acres under conservation measures more stringent than those in the Breaux-Dingell bill. The bill prohibited all mining in wildlife refuges, but established a study program for determining whether to allow oil and gas exploration in the Arctic National Wildlife Refuge.

A major theme in the House debates on the proposed legislation was the proper balance between development and conservation of Alaskan lands. Proponents of both Alaskan lands bills emphasized the strong conservation measures in the bills, but proponents were criticized for only three years. 43 U.S.C. § 1714(e). The Antiquities Act authorized the President to designate land as a national monument, but the President was limited to designating the smallest area compatible with proper care and management of the land. 16 U.S.C. § 431. The Antiquities Act withdrawals were challenged in Anaconda Copper Co. v. Andrus, 14 Env't. Rep. (BNA) 1853 (1980) and Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978). Although neither challenge was successful, Congress felt compelled to resolve the uncertainty surrounding the status of federal land in Alaska. See S. REP. No. 413, 96th Cong., 2d Sess. 136, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5080.

19. The sponsors of the Breaux-Dingell bill contended that the law existing at the time permitted mining in all wilderness areas. 125 CONG. REC. 11,129 (1979). See also Wilderness Act of 1964, § 4, 16 U.S.C. § 1133(d)(3) (1982). However, Representative Young of Alaska, who supported the Breaux-Dingell bill, remarked that mining operations were incompatible with wilderness, and that at the time, there were no mining operations in wilderness areas. 125 CONG. REC. 11,135 (1979).
21. The Arctic National Wildlife Refuge comprises over 18 million acres in northeast Alaska along the Beaufort Sea extending from the Canadian border to just east of Prudhoe Bay. NAT’L AUDUBON SOC’Y, AUDUBON WILDLIFE REPORT 450 (M. Disilvestro ed. 1986).
26. In the Udall-Anderson bill, the statement of purposes included a goal of “managing multiple values in a manner which will permit utilization of natural resources, where appropriate, consistent with sound ecological principles.” H.R. REP. No. 97, 96th Cong., 1st Sess. 6 (1979). However, the Senate deleted this provision without debate.
forcefully by pro-development legislators who feared the legislation would "lock up" Alaskan resources and destroy the economy. Floor debate in the House included extensive discussion on the degree to which development would be permitted under the two bills.

The House eventually passed the Udall-Anderson bill on May 16, 1979. The Udall-Anderson bill did not permit as much immediate land development as the Breaux-Dingell bill would have, but it did seek to establish a long-range program that would ensure careful development decisions in the future.

The Senate passed a compromise version of the Udall-Anderson bill on August 19, 1980. The Senate version permitted more development than did the House version. The Senate redrew conservation system boundaries, decreasing the amount of newly protected land to 106 million acres. The Senate bill authorized mining in Misty Fjords National Monument. The House then concurred in the Senate compromise, thus indicating that Congress intended ANILCA to be neither a development nor a conservation bill, but a compromise between the two.

President Carter signed ANILCA on December 2, 1980. At the signing ceremony, the President applauded ANILCA's balance between conservation and development and remarked, "[w]ith this bill we are acknowledging that Alaska's wilderness areas are truly this country's crown jewels and that Alaska's resources are treasures of another sort."

III. Overview of Major Statutory Provisions

A. Purposes

ANILCA seeks to achieve three general purposes. The principal aim of the legislation is to protect Alaska's wilderness, scenic and cultural
values. The statute also seeks to preserve opportunities for Alaskans to pursue a subsistence way of life. Finally, ANILCA declares that additional conservation legislation for Alaska is unnecessary because ANILCA represents a proper balance between land protected for natural values and land needed for more intensive use.

B. Conservation Provisions

ANILCA governs thirteen new and existing units of the National Park system and adds 43 million acres to the system’s holdings. These additions double the size of the National Park system. The Secretary of Interior manages the National Park units according to the National Park Service Organic Act. Special provisions in ANILCA permit subsistence uses and mining, but ensure that Alaskan cultural, recreational and scenic values are protected.

Seventeen new and existing wildlife refuges, comprising nearly 55

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36. 16 U.S.C. § 3101(c). Subsistence uses are defined as “the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, clothing, tools or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; and for barter, or sharing for personal or family consumption; and for customary trade...” Id. § 3113.
38. 16 U.S.C. § 410hh. See also 126 Cong. Rec. 21,670 (1980). ANILCA governs the following National Park System units: Aniakchak National Monument and National Preserve, which contain approximately 515,000 acres and are located in southwest Alaska; the Bering Land Bridge National Preserve containing 2,450,000 acres located on the Bering Sea in west central Alaska; Cape Krusenstern National Monument comprising 7,050,000 acres on the Chukchi Sea in northwest Alaska; Gates of the Arctic National Park and Preserve, located in north central Alaska and containing 7,950,000 acres; Glacier Bay National Monument and National Preserve, located near Juneau in southeast Alaska, to which ANILCA adds 580,000 acres; Katmai National Monument and National Preserve, south of Cook Inlet, which ANILCA expands by 1,345,000 acres; Kenai Fjords National Park containing 570,000 acres near Anchorage in southern Alaska; Kobuk Valley National Park, which includes 1,700,000 acres located in northwest Alaska; Lake Clark National Park containing 2,240,000 acres on the Cook Inlet in south central Alaska; Mount McKinley National Park and Denali National Preserve, located between Anchorage and Fairbanks in south central Alaska, to which 2,750,000 acres are added; Noatak National Preserve, which includes 6,460,000 acres; Wrangell-St. Elias National Park and National Preserve comprising 5,320,000 acres in southeast Alaska; and Yukon-Charley Rivers National Preserve, which contains 1,710,000 acres and is located on the Canadian border in east central Alaska.
42. See id. § 410hh-1(3)(c).
43. Id. § 410hh.
These additions double the size of the National Wildlife Refuge system. ANILCA directs the Secretary of Interior to manage the refuges in compliance with the National Wildlife Refuge Administration Act. In addition, the Secretary may allow uses of refuge land which are compatible with ANILCA's purposes in establishing the refuge. Such purposes include preserving fish and wildlife habitats in their natural diversity, providing opportunities for subsistence uses.

The National Forest Service has jurisdiction over five units: three National Forests and two National Monuments. The Secretary of Agriculture manages the 6 million acres of National Forest system land under existing management authority, as well as site-specific provisions. Logging is prohibited in National Monuments except in certain mining areas. The Natural Resources Conservation Service of the U.S. Department of Agriculture administers the mining program.
interests are protected.\textsuperscript{53}

Fourteen wilderness areas are created within the National Forest system.\textsuperscript{54} Wilderness areas are managed to preserve their primeval character and thus few uses are permitted.\textsuperscript{55}

ANILCA protects an area larger than California, and sets forth separate guidelines for managing many of more than one hundred conservation system units. The elaborate protective scheme gives considerable force to ANILCA's purpose of protecting natural values.\textsuperscript{56} Yet conservation is not the only purpose of ANILCA. To meet the economic needs of Alaska and the nation,\textsuperscript{57} Congress has woven broad concessions to development concerns into the statute.

C. Provisions Allowing Resource Development

Much of the text of ANILCA is devoted to authorizing and regulating intensive use of federally controlled land. Mining, logging, and oil and gas recovery are three types of development authorized under ANILCA, indicating that Congress was not concerned solely with conservation, but instead wished to balance conservation with development.

1. Mining

Valuable hard rock mineral resources lie beneath federal lands in Alaska. Recognizing the need to develop these resources, ANILCA's drafters sought to keep mining areas out of the conservation system\textsuperscript{58} and to protect existing mining claims.\textsuperscript{59} ANILCA guarantees access across conservation system lands for mining claims within conservation system boundaries.\textsuperscript{60} It also preserves existing mining claims\textsuperscript{61} in National Parks,\textsuperscript{62} National Recreation and Conservation Areas,\textsuperscript{63} and National

\textsuperscript{53} Id. § 503(f), (h) and (i), 94 Stat. at 2400-02. Section 504 of ANILCA allows holders of unperfected mining claims in Misty Fjords and Admiralty Island National Monuments certain development rights.

\textsuperscript{54} Id. § 703, 94 Stat. at 2418-19.


\textsuperscript{56} 16 U.S.C. § 3101(d).

\textsuperscript{57} Id.

\textsuperscript{58} See 125 Cong. Rec. 11,167 (1979).

\textsuperscript{59} Id. at 11,436.

\textsuperscript{60} 16 U.S.C. § 3170(b).

\textsuperscript{61} To constitute a valid mining claim, there must have been a mineral discovery. See Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1962).

\textsuperscript{62} 16 U.S.C. § 410hh-5. ANILCA establishes a study program for mining in Mount McKinley National Park, id. § 410hh-1(3)(b), and subjects existing claims to reasonable regulation. Id. § 410hh-1(3)(c).

\textsuperscript{63} Id. § 460mm-1(b). This provision also applies to mining claims where there has been no mineral discovery. Id. § 460mm-(3).
A major controversy during the ANILCA debates was the status of United States Borax and Chemical Corporation’s claim to a vast molybdenum deposit lying beneath Quartz Hill in Misty Fjords National Monument, Tongass National Forest. The Udall-Anderson bill proposed designating all of Misty Fjords National Monument as wilderness. However, the House passed a compromise which granted U.S. Borax authority to conduct bulk sampling and develop its claim, subject to environmental safeguards. Before permitting any bulk sampling at Quartz Hill, the Secretary of Agriculture was required to prepare an Environmental Impact Statement (EIS) which covered “an access road for bulk sampling purposes and the bulk sampling phase . . . .”

ANILCA allows mining at Quartz Hill if mineral recovery is commercially feasible. However, mining activity must remain compatible, to the maximum extent feasible, with the purposes for which the National Monument was established. Recently Congress passed legislation extending the validity of mining claims in the Green’s Creek region of Admiralty Island National Monument. The House passed a bill opening

64. Id. § 539.
65. Molybdenum is a metal used in the manufacture of steel. 17 ENCYCLOPEDIA BRITANNICA 637 (1977). The metal is in abundant supply, but the Quartz Hill deposit is one of the largest deposits known in the world. See Southeast Alaska Conservation Council v. Watson, 697 F.2d 1305, 1306 (9th Cir. 1983).
68. ANILCA, Pub. L. No. 96-487, §§ 503(f)(2)(A) and 503(h), 94 Stat. 2371, 2400-01. ANILCA also respects all mining claims in Misty Fjords and Admiralty Island National Monuments even if there has been no mineral discovery. Id. § 504, 94 Stat. at 2403-05.
71. Id. § 503(j)(1), 94 Stat. at 2402. ANILCA also directs the Secretary to permit construction of an access road to the Quartz Hill site unless he can show that the road would cause “an unreasonable risk of significant irreparable damage” to certain fish species and habitats. Id. § 503(h)(4)(A), 94 Stat. at 2401.
73. ANILCA, Pub. L. No. 96-487, § 503(f)(2)(A), 94 Stat. at 2400. For Misty Fjords, the purposes include protecting objects of ecological, cultural, geological, historical, prehistorical and scientific interest. Id. § 503(c), 94 Stat. at 2399-400.
the region to mineral recovery, but it did not pass the Senate.

2. **Oil and Gas Production**

The richest onshore oil fields in Alaska, and possibly the nation, lie beneath the coastal plain of the Arctic region. Much of this region is protected under ANILCA through the addition of 9 million acres to the Arctic National Wildlife Refuge. This wildlife refuge now extends from the Brooks Range to the Beaufort Sea and includes 130 miles of the coastal plain. In enacting ANILCA, Congress recognized the potential for petroleum recovery in the Arctic coastal plain and established a detailed scheme governing future development of the region.

The scheme established includes a study program for the northeast corner of the state, in which the Secretary of Interior must assess the wilderness characteristics and the potential for hydrocarbon recovery from these lands. The Secretary of Interior must then make findings on such issues as the national need for developing these lands and the national interest in protecting wilderness and wildlife resources. After completing the study, the Secretary of Interior must recommend which lands should be designated wilderness.

For the Arctic National Wildlife Refuge, the Secretary of Interior’s duties are even more detailed because Congress retains extensive control over the use of the refuge. Without legislative approval, oil and gas production is prohibited in the Arctic National Wildlife Refuge. However, exploratory activities are sanctioned by ANILCA and regulated according to the results of the Secretary’s studies.

Under ANILCA, the Secretary was granted two years to study the potential impacts of oil and gas exploration on the fish and wildlife populations of the refuge and promulgate regulations based on that study.
for oil and gas exploration. For five years thereafter, the Secretary was required to monitor exploration activities and report to Congress on which areas showed promise for oil and gas recovery, the adverse effects of oil and gas production, and how such production relates to the national need for additional petroleum products. Finally, the Secretary was to recommend to Congress which areas of the refuge should be available for oil and gas production.

Lands outside the study area are open for oil and gas leasing so long as no other law prohibits such development. Petroleum resource recovery is governed by the Mineral Leasing Act of 1920.

3. Timber

Timber harvesting is an important part of the Alaskan economy. ANILCA accommodates the timber industry through various means. For example, ANILCA establishes a subsidy program for the Alaska timber industry, and it directs the Secretary of Agriculture to make annual reports to apprise Congress on whether the amount of land available for logging is sufficient to maintain the timber industry.

ANILCA exempts most of the National Forest system in Alaska from judicial review for compliance with the Roadless Area Review and Evaluation program. The enacted version of ANILCA also keeps more of the Tongass National Forest open for logging than either of the original House proposals would have allowed.

86. Id. § 3142(d).
87. Id. § 3142(b)(1)-(5). Secretary of Interior Watt delegated responsibility for the baseline study to the Fish and Wildlife Service and delegated guideline and approval authority as well as the reporting duties to the U.S. Geological Survey. In 1981, the district court for the District of Alaska ruled that the U.S. Geological Survey lacked authority to fulfill the duties delegated, because those duties constituted refuge administration, and Congress required the Fish and Wildlife Service to administer refuges. Trustees for Alaska v. Watt, 524 F. Supp. 1303 (D. Alaska 1983).
90. See 125 CONG. REC. 11,130 (1979).
91. ANILCA establishes a 40 million dollar annual subsidy to ensure a constant timber supply of 4.5 billion board feet per decade. 16 U.S.C. § 539d(a). See also 125 CONG. REC. 10,732 (1979).
92. Specifically, ANILCA directs the Secretary to determine whether sufficient land is available to maintain a supply of 4.5 billion board feet per decade. 16 U.S.C. § 539e(a). When making this finding, the Secretary must consult and cooperate with various public and private organizations, including the Alaska timber industry. Id. § 539e(c).
93. Id. § 708. The Roadless Area Review and Evaluation Program is a Forest Service inventory of all roadless areas on forest service lands. The Forest Service classifies each roadless area as wilderness, further planning or non-wilderness areas for the purpose of formulating a national planning scheme. U.S. Forest Service, U.S. Dep't. of Agriculture, Draft Environmental Impact Statement, Roadless Area Review and Evaluation at 1-9 (1978); see also California v. Block, 690 F.2d 753 (9th Cir. 1982).
D. Subsistence Provisions

In addition to its provisions on development, ANILCA also seeks to protect subsistence uses and forces federal agencies to consider subsistence uses before they withdraw land, permit development, transfer or use ANILCA land. The agency with jurisdiction over that land must analyze the impact of the land use proposal on subsistence uses and determine if suitable alternative lands or alternative development means are available.

For land use proposals that would "significantly restrict subsistence uses," ANILCA requires notice and a hearing. If such restriction is found, the agency may allow action on the proposal only if action is necessary in light of sound management principles, if the minimum amount of land is used, and if reasonable mitigation measures are imposed.

The statute's additional procedural requirements seem to impose obstacles to developing conservation system lands. However, the provision is not intended to affect state or native corporation land, nor is it intended to interfere with conservation objectives.

E. Land Exchange Provisions

Since ANILCA's passage, the most common reason for land exchanges has been the lack of appropriate land for meeting development needs. ANILCA authorizes exchanges intended to benefit Alaskan natives. One such exchange involved timber land on Admiralty Island in the Tongass National Forest. As part of its ANCSA settlement, the Shee-Atika corporation selected land in the Hood Bay region of Admiralty

The Breaux-Dingell proposal would have designated approximately 6 million acres of the Tongass National Forest as wilderness, 125 CONG. REC. 11.087 (1979), and the Udall bill would have designated 5.9 million acres as wilderness. S. REP. NO. 413, 96th Cong., 2d Sess. 224, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5168. As enacted, ANILCA designates 5.4 million acres as wilderness. 16 U.S.C. § 1132.

95. 16 U.S.C. § 3101(c). For the definition of subsistence uses, see supra note 36.


97. Id. A hearing is required whenever the proposal may significantly restrict subsistence uses even though there is no likelihood of such restriction. People of the Village of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985), vacated and remanded, 107 S. Ct. 1396 (March 24, 1987) (ANILCA's subsistence protection provisions do not apply to the outer continental shelf). See also Tribal Village of Akutan v. Hodel, 792 F.2d 1376 (9th Cir. 1986).


100. 16 U.S.C. § 3101(c).


102. Shee-Atika is a native corporation formed pursuant to ANCSA. 43 U.S.C. § 1606. See supra notes 5-8 and accompanying text.
Island. Two environmental groups challenged the selection.  

While litigation was pending, Congress acted to resolve this dispute through ANILCA by providing Shee-Atika corporation with 23,000 acres of timber land in a different region of the island in return for Shee-Atika’s ANCSA claims in the Hood Bay region. Some members of Congress thought this exchange would end the dispute between environmentalists and timber interests, but the debate continued.  

In 1986 Congress proposed a new land exchange for Admiralty Island. Congress first authorized the Secretary of Interior to negotiate with the Shee-Atika corporation to halt logging on Admiralty Island in order to protect the land for inclusion in Admiralty Island National Monument. The House of Representatives then passed a bill that would have allowed Shee-Atika corporation to exchange certain Admiralty Island holdings for other land on Admiralty Island and in other areas. The purpose of this bill was to resolve disputes over appropriate uses of Admiralty Island, improve mineral exploration and development, and alleviate the financial difficulties of the Shee-Atika corporation. This proposal did not pass the Senate.  

To further bolster the timber industry, Congress enacted the Haida Land Exchange Act of 1986 which offered cash and land to the Haida and Sealaska corporations in return for their interests in South Pass Island and Goat Island in southeastern Alaska. The legislation was a congressional response to the economic hardships of the Haida corporation resulting from the decline of the timber industry. Through the exchange,
Congress intended to help fulfill the purposes of ANCSA and ANILCA by increasing the Haida corporation's flexibility in selecting and receiving settlement lands.116

The ANILCA land exchange offers and subsequent legislative exchange offers demonstrate that, despite Congress' failure to heed its own admonition against future land use legislation for Alaska,116 Congress remains committed to a detailed program that will satisfy the need to develop Alaskan lands without needlessly compromising conservation values. These exchange offers also provide Congress the flexibility to fine tune ANILCA's provisions for supporting the natives of Admiralty Island while preserving valuable resource land without drastically changing substantive provisions.

ANILCA also gives the Secretary of Interior broad authority to exchange public lands in Alaska.117 ANILCA permits the Secretary to exchange any federal land for private land, and imposes only two conditions. First, exchanges must further ANILCA's purposes and, if a proposed exchange involves lands of unequal value, the Secretary must determine that the exchange is in the public interest.118

The Secretary is granted exchange authority "notwithstanding any other provision of law."119 Presumably, this authority enables the Secretary of Interior to place conservation system lands in private hands, despite the fact that Congress designated the lands as part of a conservation system unit.120

Little legislative history is available to clarify the limits on the Secretary's exchange authority. Although early Alaska lands bills did not authorize land exchanges, the Udall-Anderson bill included exchange authority purportedly as a tool for eliminating inholdings121 from conservation system units.122 The House intended exchange authority to provide great flexibility for acquiring lands, but expected that such flexibility would not be used to undermine the integrity or frustrate the purposes of conservation system units.123 Likewise, the Senate wished to maximize the

117. Id. § 3192(h).
118. Id.
119. Id.
120. See infra notes 155-61 and accompanying text.
121. Inholdings are tracts of privately owned land lying within the boundaries of or surrounded by public land.
122. 125 CONG. REC. 9906 (1979).
123. See H.R. REP. No. 97, 96th Cong., 1st Sess. 212 (1979). The Udall-Anderson bill included a provision for a one-house legislative veto of agency actions, which could significantly restrain the
use of exchanges to acquire lands, leaving condemnation as a last resort.\textsuperscript{124}

Like the statutory exchange offers, the Secretary of Interior's exchange authority stems from Congress' efforts to implement a permanent Alaskan lands program that is sufficiently flexible to accommodate the need for development. Congress delegated broad exchange authority in the interests of furthering ANILCA's purposes, and these purposes include preserving ANILCA's balance between protecting natural values and "the economic and social needs of the State of Alaska and its people."\textsuperscript{125}

ANILCA's history reveals two legislative goals that shaped the lands legislation. First, Congress intended to strike the proper balance between conservation and development.\textsuperscript{126} Second, Congress intended to implement a permanent Alaska lands policy to preserve that balance,\textsuperscript{127} while retaining the flexibility to allow future land use decisions compatible with the proper balance between development and conservation.\textsuperscript{128} ANILCA's numerous provisions reflect these competing policy concerns, providing conservation measures, the means to develop needed resources and long-term programs to ensure that development and conservation reflect national needs. How these competing interests have been resolved by the Ninth Circuit is the subject of Part IV of this comment.

IV. JUDICIAL INTERPRETATIONS

The Court of Appeals for the Ninth Circuit, in one of its early decisions addressing ANILCA,\textsuperscript{129} interpreted the statute almost solely as a

\textsuperscript{124} S. REP. No. 413, 96th Cong., 1st Sess. 304, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5248.
\textsuperscript{125} 16 U.S.C. § 3101(d).
\textsuperscript{126} See e.g., 126 CONG. REC. 21,887 (1980); see also supra notes 26-34 and accompanying text.
\textsuperscript{127} 16 U.S.C. § 3101(d).
\textsuperscript{128} See 125 CONG. REC. 11,157 (1979); 126 CONG. REC. 21,888 (1980); 126 CONG. REC. 29,263 (1980).
\textsuperscript{129} Southeast Alaska Conservation Council v. Watson, 697 F.2d 1305 (9th Cir. 1983). The first appellate interpretation of ANILCA was Montana Wilderness Ass'n v. United States Forest Service, 655 F.2d 951 (9th Cir. 1981). There, the court examined ANILCA's access provision, which provides, "the Secretary [of Agriculture] shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof. . . ." 16 U.S.C. § 3210(a). The court distinguished other ANILCA sections referring to National Forests by noting that the language in those sections referred specifically to National Forests in Alaska. The court then concluded, based on the statutory language and the legislative history of the provision, that the access provision in ANILCA applied nationwide.
conservation measure. This interpretation ignored one of ANILCA's primary policies of accommodating development and needlessly burdened Alaskans who depend on the state's natural resources for their economic livelihood.

More recently however the Ninth Circuit has adopted a broader view of ANILCA's purposes that includes recognition of the need for some development of Alaskan lands. This view accords with Congress' intent in passing ANILCA. Especially now when Alaska's economy is suffering, the Ninth Circuit should remain faithful to Congress' purpose of providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people . . . "

A. Southeast Alaska Conservation Council

The Ninth Circuit's interpretation of ANILCA got off to a somewhat faulty start in Southeast Alaska Conservation Council v. Watson. The dispute in that case concerned mineral exploration at Quartz Hill in Admiralty Island National Monument. U.S. Borax and Chemical Co. proposed exploring its mining claim by digging, blasting and removing rock by helicopter from the National Monument. ANILCA required U.S. Borax to undertake an EIS if its exploration included "bulk sampling." The EIS was required for the bulk sampling proposal and any access road for bulk sampling. U.S. Borax claimed that its proposal was not bulk sampling, and the Secretary of Interior approved the plan without preparing an EIS.

Environmental groups claimed the exploration plan was bulk sampling and sued to enjoin exploration pending preparation of an EIS. The Forest Service and U.S. Borax responded that the ANILCA EIS requirement applied only to construction of an access road in conjunction with bulk sampling, not to bulk sampling alone. After two adverse district court decisions, the defendants appealed to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit determined that it should interpret the EIS

Montana Wilderness Ass'n, 655 F.2d at 957.
130. 16 U.S.C. § 3101(d).
131. 697 F.2d 1305 (9th Cir. 1983).
134. Id. at 204-05; Southeast Alaska Conservation Council, 697 F.2d at 1306-08.
requirement in light of ANILCA's "underlying protective purposes," which included protecting objects of ecological, cultural, geological, historical, prehistorical and scientific interest. The court noted ANILCA authorizes mining so long as mining was compatible, to the maximum extent feasible, with the National Monument. According to the court, this compatibility standard demanded strict compliance with ANILCA's environmental protection provisions, including the EIS requirement. Therefore, an EIS was required for bulk sampling whether or not an access road was also proposed. Accordingly, the injunction against exploration activities was affirmed.

The Ninth Circuit was correct in stating that conservation was one of the primary purposes of ANILCA. However, the court's emphasis of the statute's "underlying protective purposes" resulted in too narrow an interpretation of the statute. The Ninth Circuit has corrected this error in more recent decisions in which it has not limited analysis to the protective purposes of ANILCA. Instead, the court in these later decisions examines ANILCA's aim of balancing conservation and development. The implicit focus of these later cases is whether an agency strictly complied with the mechanisms Congress established to preserve a proper balance and whether land use proposals are consistent with Congress' efforts to achieve and protect that balance.

B. City of Tenkakee Springs

ANILCA's exemption of National Forest land in Alaska from compliance with the Roadless Area Review and Evaluation was scrutinized by the Ninth Circuit in City of Tenkakee Springs v. Block. The dispute in that case arose over a 1983 Forest Service contract for building a logging access road in the Tongass National Forest.

An environmental group and a local municipality sued to enjoin the Forest Service project. They claimed that the Tongass Plan, which allowed logging in the area, did not comply with the National Environmental

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136. Southeast Alaska Conservation Council, 697 F.2d at 1309.
137. Id.
139. Southeast Alaska Conservation Council, 697 F.2d at 1311. The court then examined the Secretary's conclusion that the proposed activity did not constitute bulk sampling and found that the Secretary acted arbitrarily and capriciously in reaching that conclusion. Id. at 1311-13.
140. Id.
141. Id. at 1309.
142. ANILCA, Pub. L. No. 96-487, § 708, 94 Stat. 2371, 2421; see also supra note 92 and accompanying text.
143. 778 F.2d 1402 (9th Cir. 1985).
144. Before ANILCA was enacted, the Secretary of Agriculture issued a land management plan along with a programmatic EIS covering the Tongass National Forest, as required by the National
Policy Act. The Forest Service argued that ANILCA shielded the plan from judicial review because the Tongass Plan was part of the Roadless Area Review and Evaluation.

The Ninth Circuit ruled that ANILCA did not foreclose judicial review of the Tongass Plan EIS. The court found that the exemption provision precluded inclusion of the Tongass Plan in the Roadless Area Review Evaluation and noted that "[a]s a compromise between logging and environmental interests, the Alaska Lands Act was to be the final word on what land in Alaska was to remain wilderness and what land was to be open to further development." The court reasoned that Congress did not want this compromise placed in jeopardy by challenges to the roadless area program. Because the Roadless Area Review and Evaluation simply allocated between wilderness and land suitable for development, but the Tongass Plan was a comprehensive land use management program, the court concluded that these were separate studies. The court also found that Congress intended to shield only the wilderness/nonwilderness designation from judicial review, and thus the Tongass Plan EIS was reviewable.

As in Southeast Alaska Conservation Council, the Ninth Circuit looked to the purposes of ANILCA to resolve the issue in City of Tenkakee Springs. In the later decision, however, the court was influenced by ANILCA's purpose of establishing a long-term program for balancing conservation and development. The court adopted a more flexible view and deferred to legislative pronouncements on whether development of Alaskan lands was permitted under ANILCA but acted to enforce procedural safeguards for managing that development.

C. City of Angoon

The Ninth Circuit again focused on ANILCA's purpose of accommodating development of Alaskan natural resources in City of Angoon v.
In that case the federal government, pursuant to its authority under ANILCA to transfer Alaska conservation lands to private owners, conveyed some land into private hands to allow logging. The same statutory section which gave the government its transfer authority also provided that "nothing in this section shall affect the continuation of the opportunity for subsistence uses by residents of Admiralty Island." Environmentalists and native groups claimed the conveyance of the land for logging significantly affected subsistence uses by native residents in the neighboring Admiralty Island National Monument. Therefore, ANILCA required an evaluation of alternatives to the governmental action and their impacts on subsistence uses.

The Ninth Circuit read the subsistence provision narrowly. The court held that the plain language of ANILCA did not extend the subsistence evaluation requirement to governmental actions respecting private lands. The court further held that the ANILCA language prohibiting land conveyances from affecting subsistence uses by Admiralty Island residents only applied to one of the native corporations—the Kootznoowoo—on Admiralty Island. Thus, the federal government was relieved from the duty to evaluate the impact of the land conveyance on all residents of Admiralty Island.

The Ninth Circuit’s reasoning in this case is somewhat questionable. The court certainly had grounds for requiring a subsistence evaluation based on the language protecting subsistence uses on Admiralty Island. Arguably, if Congress wished to limit the application of this language, it would have named the Kootznoowoo corporation specifically rather than referring to all residents of Admiralty Island. Moreover, the court was required to construe ambiguities in favor of native Alaskans. The important point here, however, is that in City of Angoon the court again refused to interpret ANILCA in a manner that would interfere with the balance Congress struck in ANILCA between protecting conservation

154. 803 F.2d 1016 (9th Cir. 1986).
156. City of Angoon, 803 F.2d at 1027.
158. City of Angoon, 803 F.2d at 1027.
159. Id. at 1028; see also supra notes 94-99 and accompanying text.
160. City of Angoon, 803 F.2d at 1028.
161. Id. at 1027-28. The court reasoned that the subsection containing the language protecting subsistence uses on Admiralty Island also granted land to the Kootznoowoo corporation, whereas other subsections of the disputed ANILCA section included independent grants to different corporations without also containing language on subsistence use protection. Id.
162. The court conceded that requiring a subsistence evaluation may be consistent with the purposes of ANILCA. Id. at 1028.
163. People of the Village of Gambell v. Clark, 746 F.2d 572, 581 (9th Cir. 1984).
lands and opening land for development.

D. Trustees For Alaska

ANILCA's fact-finding and reporting procedures for oil and gas exploration in the Arctic National Wildlife Refuge were at issue in Trustees for Alaska v. Hodel. In that case, the Fish and Wildlife Service did not receive public comments on an EIS to accompany the report to Congress recommending which areas of the refuge should be open to oil and gas development. Five environmental groups sued to force the Secretary of Interior to receive public comments on the EIS.

The National Environmental Policy Act requires an EIS for every "recommendation or report on proposals for legislation." Based on this statute, the district court for the District of Alaska awarded an injunction in the plaintiffs' favor. The Secretary proceeded to take comments but delayed final action on the report until the lawsuit was resolved.

On appeal to the Ninth Circuit, the Secretary argued that Congress did not authorize a study process but instead solicited the views of the Secretary alone. The court disagreed, and held that any regulations and reports promulgated pursuant to the National Environmental Policy Act required public comments because they constituted a "study process required by statute."

In the Trustees for Alaska case, the Ninth Circuit sought to ensure that the Secretary of Interior properly weighed the national need for oil against the national need for wilderness lands through the public comment process. In compelling the Secretary's adherence to these procedural steps, the Ninth Circuit again illustrates its recognition of the

165. 806 F.2d 1378 (9th Cir. 1986).
166. Supra notes 77-87 and accompanying text.
167. Trustees for Alaska, American Wilderness Alliance, Defenders of Wildlife, Northern Alaskan Environmental Center, and the Wilderness Society. Trustees for Alaska, 806 F.2d at 1379.
171. Trustees for Alaska, 806 F.2d at 1383. The defendants also argued that the report may recommend that Congress take no action and thus the plaintiffs' claims were not ripe until the Interior Department made its recommendation. Rejecting the ripeness argument, the court reasoned that the statutory language required some change in the status quo: either allowing development or designating the land as wilderness. Thus the Department's interpretation did not comport with the purpose for the report. Id. at 1381.
172. Id. at 1383. See 40 C.F.R. § 1506.8(b) (1985) (outlining the process of preparing legislative environmental impact statements).
Congressional intent to maintain ANILCA's careful balance between development and conservation.

Preparation of the Arctic National Wildlife Refuge report has not been delayed by the Trustees for Alaska suit. The Interior Department recommended that the entire refuge be opened to oil and gas exploration.\textsuperscript{177} The report recognized that development would cause long-term losses in wildlife resources and wilderness values, but claimed those losses would be justified by the 14 billion barrels of oil projected to be lying beneath the plain.\textsuperscript{178}

In response to the Interior Department's recommendation, Congressman Udall introduced a bill in the 99th Congress that would designate the entire refuge as wilderness.\textsuperscript{179} The issue is certain to resurface in the 100th Congress.

E. National Audubon Society

ANILCA's land exchange provisions have also been the subject of litigation. In \textit{National Audubon Society v. Hodel},\textsuperscript{178} the National Audubon Society and other organizations sued in the federal district court for the District of Alaska to halt the Secretary of Interior's exchange of land on St. Matthew Island in the Alaska Maritime National Wildlife Refuge for inholdings in other national wildlife refuges. St. Matthew Island, which is located near valuable oil fields in the Bering Sea, was the proposed site for support facilities for offshore oil development.\textsuperscript{179} Secretary Watt found that the exchange would advance ANILCA's purposes by consolidating resource land, and that it would further the public interest by providing economic and environmental benefits.\textsuperscript{180}

In its analysis the district court determined first that the Secretary must define the "public interest" in light of the purposes of ANILCA.\textsuperscript{181} The court found that the Secretary had considered the environmental purposes of ANILCA, and the court also concluded that the Secretary was justified in considering non-environmental factors.\textsuperscript{182} However, the district court still held that the Secretary's decision was arbitrary and capricious.

\textsuperscript{180} See Nat'l Audubon Soc'y, 606 F. Supp. at 828-30.
\textsuperscript{181} Id. at 835 n.48.
\textsuperscript{182} Id. at 836.
The court concluded that the exchange added few resource benefits to the conservation system. The court also found that exchange agreement stipulations requiring that development must be conducted in a manner compatible with the refuge were insufficient to prevent disastrous environmental consequences. The court further characterized the benefits to ANCSA settlements, the nation’s economy and the outer continental shelf program as “speculative” and concluded that the minimal benefits of the exchange did not justify the potential harm to St. Matthew Island. Therefore, the court ruled that under the arbitrary and capricious standard of review, the Secretary’s decision was a “clear error of judgment.” The court then invalidated the St. Matthew Island exchange and granted the National Audubon Society’s application for a preliminary injunction.

If the Secretary of Interior could demonstrate that an exchange would further ANILCA’s purpose of balancing development and conservation, environmental degradation may be justified. One way to accomplish this result would be to exchange refuge lands for lands on which more extensive development is planned. The National Audubon Society decision indicates however that courts are not concerned simply with federal lands being opened to development. Instead, courts will examine whether such changes in land use are justified by changes in resource protection, and this concern is consistent with the balancing purpose of ANILCA.

V. CONCLUSION

With ANILCA the 96th Congress enacted legislation that profoundly affects Alaskan lands. The legislation is not simply a reflection of the environmental movement of the 1970s, but is an attempt to establish an ordered, permanent program that enhances both conservation and development of Alaskan lands. The trend in the Court of Appeals for the Ninth Circuit to defer to Congress’ intent to maintain a balance between conservation and development is proper. The court’s willingness to enforce strictly the statutory mechanisms designed to maintain that delicate balance is also correct. So long as the Ninth Circuit continues to heed the balancing purpose of ANILCA, judicial decisions will be in step with Congress’ policy of gradually opening conservation lands as they are needed to fulfill the economic needs of Alaskans.