Subsistence, Inholdings, and ANILCA

The Complexity of Wilderness Stewardship in Alaska

BY RANDY J. TANNER

Article author Randy J. Tanner.

Introduction

For many, Alaska exemplifies the characteristics that make wilderness one of the United States' most valued natural resources. Not only does Alaska contain some of the country's most pristine wilderness, it also contains more of the National Wilderness Preservation System than the Lower 48 combined (Landres and Meyer 2000).

Not all of the unique wilderness qualities of Alaska are desirable. Perhaps one negative aspect is the legal ambiguity and controversy associated with the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (Public Law 96-487). Two intertwined issues at the heart of legal controversies and ambiguities are subsistence and access to Native (a citizen of the United States and a minimum one-fourth degree Alaska Indian, Inuit, Aleut, or combination thereof) allotments and other wilderness inholdings (see Figure 1). The fact that more than 800,000 acres (323,886 ha) of inholdings are within Alaska's wilderness provides managers with an extremely challenging task: preserving wilderness while recognizing the importance of these inholdings for the subsistence lifestyles of many Native Alaskans (National Park Service [NPS] 1999). Given the large number and size of inholdings within Alaska's Wilderness, access for subsistence purposes will inevitably be a contentious issue. Nevertheless, through informed discussion of the legal ambiguities surrounding access and subsistence, a better understanding of the issues could lead to fewer disputes and conflicts concerning some of our nation's most precious wilderness.

The origins of the Alaska National Interest Lands Conservation Act

When the Alaska Statehood Act (Public Law 85-508) passed in 1958, the state of Alaska was permitted to select for withdrawal 104 million acres (42.1 million ha) of public domain. Alaska proclaimed that "all right and title to any lands or other property not granted or confirmed to the State … may be held by any … Natives, or held by the U.S. in trust for said Natives" (Public Law 85-508).

Contention arose when the state began to make selections that intruded on Native settlements and hunting grounds. This encroachment, in turn, spawned several lawsuits by Natives. As a result, Congress sought to resolve the issue through the Alaska Native Claims Settlement Act (ANCSA) of 1971 (Public Law 92-203), which disposed of 44 million acres (17.8 million ha) and dispensed nearly $1 billion to Natives. In addition to this disbursement, Natives were also entitled to a perpetual 2% royalty on mineral leases

Figure 1—The community of Anaktuvuk is within the boundaries of Gates of the Arctic National Park and Preserve. Photo courtesy of NPS.

owned by the federal government at the time of statehood (Zaslowsky and Watkins 1994). However, ANCSA was conditional—Native Alaskans had to agree to absolve all land claim suits against the state and agree not to file any more.

Not only did ANCSA provide a mechanism for granting Native allotments, it also contained a particularly important provision—§17(d)(2)—which allowed for the future establishment of up to 80 million acres (32.4 million ha) of National Interest Lands. These lands would eventually contain national forests, national parks, wildlife refuges, and designated wilderness. The implementation of this provision was ANILCA.

Passed in 1980, ANILCA is a significant piece of wilderness legislation. After a decade of legislative debate, more than 104 million acres (42.1 million ha) of federal lands in Alaska were preserved as national parks, wildlife refuges, and conservation areas, with 56.5 million acres (22.9 million ha) designated as wilderness. At 449 pages, ANILCA is as complicated as it is long. Unfortunately, ANILCA has engendered a great deal of controversy involving subsistence rights and access to wilderness inholdings, and much of this controversy can be attributed to ambiguous language found within the act.

Subsistence and ANILCA

One clear purpose of ANILCA is to "preserve Wilderness resource values" (§101[a] Public Law 96-487); however, another is "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so" (§101[c[Public Law 96-487). *Subsistence* is defined in ANILCA as

> the customary and traditional uses by rural Alaska residents of wild renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of non-edible byproducts of fish and wildlife resources taken for personal or family consumption; and for customary trade. (§ 803 Public Law 96-487)

Considering the above purposes, conflicting views about the relationship between wilderness preservation and subsistence are inevitable. For example, unlike designated wilderness in the Lower 48, snowmobile use, motorboats, and airplanes are allowed in Alaskan wilderness for subsistence, traditional activities, and travel to and from villages and homesites (§811[a] and §1110 Public Law 96-487).

The phrase "traditional uses," found within ANILCA's definition of subsistence, has incited a conflict reflected in a U.S. Senate report addressing ANILCA. The report states that restriction of subsistence to customary and traditional uses shall "in no way impede the use of new technology for subsistence purposes" (Senate Report 96-413). This controversy has heightened with rapid changes in technology. For example, it is not clear whether or not all-terrain vehicles (ATVs) are permitted under ANILCA for subsistence purposes. The legislative history suggests that the only special modes of transportation permitted within wilderness designated under ANILCA are airplanes, snowmobiles, motorboats, and dogsleds (Senate Report 96-413). Rather than new, technologically advanced modes of transportation being permitted, Senate Report 96-413 suggests that as the technology of the allowed special modes of transportation advances, access via these modes will still be permitted. In either case, the mode of transportation permitted for subsistence purposes is a significant factor in determining acceptable modes and routes of access to wilderness inholdings and Native allotments when the purpose of that access is to engage in subsistence activities.

Wilderness Inholding Access Provisions of ANILCA

There are two primary sections of ANILCA related to inholding access: §1110 and §1323 (see Table 1). Subsection 1110(b) states that

> in any case in which State owned or privately owned land … is effectively surrounded by one or more conservation system units … such rights shall be given by the Secretary … to assure adequate and feasible access for economic and other purposes … subject to the reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

Should an inholder desire access, ANILCA stipulates that it *must* be granted. Although this is generally accepted as factual, the type of access to be granted to the inholder is certainly not guaranteed. To illustrate, suppose an inholder requests ATV access to an inholding within a designated wilderness in Alaska. Three issues should be considered when deciding whether or not this mode of access should be granted:

1. "Adequate" access: Could the route be reasonably traversed by foot, dog sled, snowmobile, or airplane? If so, then either of these modes are "adequate" and ATV access may not be appropriate (§ 1110(a) Public Law 96-487).
2. "Feasible" access: Common law doctrine has shown that potential actions are considered "feasible" if those actions are possible and consistent with the purposes of the Act (Friends *of the Boundary Waters*

Wilderness v. *F. Dale Robertson* 1992).

3. "Economical" access: Although the phrase "economic purposes" in §1110(b) has traditionally been interpreted as applying to the *purpose* of the access, the legislative history suggests that economic aspects of the *mode* and *route* of access should also be considered. Senate Report 96-413 asserts that "we do not believe that the access route which is chosen must be, in all instances, the most economically feasible alternative." For instance, can the owner afford to charter a flight to the inholding? If so, access via airplane may be a possibility.

Although the ambiguity of §1110 has certainly imbued ANILCA with a degree of uncertainty, §1323 is perhaps the most infamous section concerning wilderness inholdings in Alaska, and arguably nationwide. Section 1323 is divided into two subsections: (a) addresses inholdings found within national forests, whereas subsection (b) addresses inholdings surrounded by Bureau of Land Management (BLM) administered lands (see Table 1).

Table 1—Legislative Statutes about Landowner Inholdings in Wilderness as Stated within ANILCA.

ANILCA Section	Statute
§1110(b)	"Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land … is effectively surrounded by one or more conservation system units, … the State or private owner shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes … subject to the to reasonable regulations issued by the Secretary to protect the natural and other values of such lands"
§1111	"(a) Notwithstanding any other provision of this Act or other law, the Secretary shall authorize and permit temporary access by the State or a private landowner to or across any conservation system unit … (b) In providing temporary access pursuant to subsection (a), the Secretary may include such stipulations and conditions he deems necessary to insure that the private use of public lands is accomplished in a manner that is not inconsistent with the purposes for which the public lands are reserved and which insures that no permanent harm will result to the resources of the unit"
§1323(a)	"Notwithstanding any other provision of law, … 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."
§1323(b)	"Notwithstanding any other provision of law, … the Secretary [of the Interior] shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof."

Section (a) directs the secretary of agriculture to provide adequate access to inholdings located within the national forest *system* that will secure to the owner reasonable use and enjoyment of the inholding. In 1981, the Ninth Circuit Court for the U.S. Court of Appeals interpreted §1323(a) to apply to the entire nationwide national forest system. This section has been the only section of ANILCA interpreted as having nationwide scope. Following the Ninth Circuit opinion, the U.S. Forest Service adopted §1323(a) as its policy governing access to wilderness inholdings nationwide (USFS 1990). In implementing this decision as policy, though, there has been a failure to acknowledge that ANILCA directs managers to implement a different statute, namely ANILCA's §1110(b), when addressing wilderness inholdings in Alaska. Essentially, the legislative history of §1323(a) suggests that the subsection is intended to apply to Alaska national forest lands as a whole, but when such a national forest happens to also be a designated Wilderness, §1110(b) is to be applied.

There is a parallel controversy associated with §1323(b) that directs the secretary of the interior to provide adequate access to "public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976" (FLPMA) (Public Law 94 -579) that will secure to the owner the reasonable use and enjoyment of the inholding. The

FLPMA dealt exclusively with management direction for all BLM lands, and BLM has determined that §1323(b) of ANILCA has nationwide scope (see Interior Board of Land Appeals 83-356, 1984). However, ANILCA clearly states that when the phrase "public lands" is used within ANILCA, it is defined as public lands in Alaska and suggests that §1323(b) should only be applied to inholdings within BLM-administered lands in Alaska (§102[3] PL 96-487). There are currently no BLM-administered Wildernesses within Alaska, however.

Mitigating the competing demands of wilderness preservation, subsistence, and inholding access is among the most fundamental challenges to wilderness stewardship in Alaska. A case study is presented here for Gates of the Arctic Wilderness.

Figure 3—There are more than 800,000 acres of inholdings within Alaska's designated Wilderness lands. Photo courtesy of U.S. Fish and Wildlife Service.

Gates of the Arctic Wilderness: A Case Study

In July 2002, the NPS issued an Environmental Assessment (EA) (required by the National Environmental Policy Act for any significant action that possibly affects the integrity of the resource) that brought to the forefront the intertwined nature of the controversies surrounding subsistence and access to wilderness inholdings in Alaska. The EA was in response to an application for temporary summer access, via an eight-wheeled amphibious ATV, to a Native allotment located approximately 10 miles within Gates of the Arctic Wilderness. The allotment has been historically accessed by airplane and snowmobile. The applicant requested ATV access for the purposes of repairing a tent, removing trash, and subsistence. Three alternatives were considered: a no-action alternative and two alternatives that would permit ATV access, each along a different route through the wilderness and each approximately 11 to 14 miles long (NPS 2002).

The concerns of wilderness advocates centered on the likelihood of a permanent scar across the wilderness and damage to wilderness character that would be incurred in an otherwise trail-less wilderness. This concern was strengthened by a study conducted in Gates of the Arctic National Park that concluded,

> Passage of but one ATV through some landscapes can leave an indelible imprint. … Continued use of ATVs over the same path will result in disturbance that is irreversible in terms of the human life span. Recovery in some cases will be impossible to achieve and only a functional recovery can be expected for much of the remaining trail network within the park and preserve if the trails are abandoned." (Alstrand 1988)

Accessing the inholding by airplane, snowmobile, or dogsled may be the only legal way the inholder can carry out subsistence activities and then transport the harvested or collected goods back across the wilderness. The NPS has interpreted the Anaktuvuk Land Exchange of 1996 (Public Law 104-333) to imply that ATVs cannot be used for subsistence purposes within the vast portion of wilderness where the access was requested (NPS 2002). Since transporting the harvested and collected goods back to the residence in Anaktuvuk Pass is part of subsistence, transporting goods across Wilderness via ATV may not be legally permissible.

The organization Wilderness Watch alerted other conservation groups to the access proposal, and, as a result, the NPS received several comments concerning the potentially damaging impacts to wilderness. Besides comments about the physical scarring of the wilderness, several challenges were raised regarding the lack of alternatives considered and the legal provisions for ATV access.

The NPS posited that access to the inholding was subject to §1110(b) of ANILCA. Whereas in most cases access to NPS administered wilderness inholdings is governed by §1110(b), in this instance the access requested was temporary and could be interpreted as being subject to §1111 of

ANILCA, which speaks directly to temporary access to wilderness inholdings. This clarification is essential since §1111 is more conservative with the nature of permitted modes and routes of access. For example, §1111 states that the secretary may include stipulations to the temporary access such that the access is "accomplished in a manner that is not inconsistent with the purposes for which the public lands are reserved and which insures that no permanent harm will result to the resources of the unit." Subsection 1110(b), on the other hand, makes no explicit mention of protecting wilderness from permanent harm and not permitting access that is inconsistent with the purposes of wilderness. The only protective language found within §1110(b) is that reasonable regulations must be applied to protect the natural and other values of such lands.

In the end, the NPS did not implement any of these provisions. At present, other solutions, such as land exchange, are being explored in lieu of granting access. Nevertheless, not all access requests will or should necessarily result in such solutions. Wilderness managers, advocates, and those living in and around wilderness must come to terms with the undeniable truth that humans are a part of the wilderness landscape in Alaska. Determining the appropriate context within which this relationship exists, however, remains to be determined.

Conclusions

Clearly, there is no easy and straightforward answer to inholding access requests that are linked to subsistence activities (see Figure 3). In Alaska, wilderness and the cultural landscape are inseparable. Given this close linkage, managers have been charged with the extremely challenging task of weighing statutory obligations of preservation with the demands of those who depend upon the landscape and its resources for their livelihood. Managing both protection and use will require shared learning and understanding among managers, surrounding communities, and wilderness advocates, as well as a thorough understanding of the intent of relevant laws. In the end, what is desired most is a harmonious coexistence of wilderness and cultural lifestyles found within Alaska.

REFERENCES

Alaska National Interest Lands Conservation Act. 1980. P.L. 96–487.

Alstrand, G. M. 1988. *Effects of All-Terrain Vehicle Use in the Vicinity of Anaktuvuk Pass, Gates of the Arctic National Park*. National Park Service, U.S. Department of the Interior.

Federal Land Policy and Management Act. 1976. P.L. 94–579.

Friends of the Boundary Waters v. F. Dale Robertson, Chief of the United States Forest Service. 1992. Eighth Circuit Court. Case No. 91-3032, Interior Board of Land Appeals. 1984. Number 83-356.

Kunz, M., and K. Troxel. 1988. *The Anaktuvuk Pass All-Terrain Vehicle Study 1986–1988: A Narrative Report of the Field Operations and Dispersed ATV Use*. Alaska Regional Office, National Park Service, U.S. Department of Interior.

Landres, P., and S. Meyer. 2000. *National Wilderness Preservation System Database: Key Attributes and Trends, 1964–1999*. USDA Forest Service Gen. Tech. Report RMRS-GTR-18-Rev. Ed. Ogden, UT: Rocky Mountain Research Station.

Montana Wilderness Association v. United States Forest Service, No. 80-3374, United States Court of Appeals, Ninth Circuit, 655 F.2d 951. February 9, 1981, argued; August 19, 1981, decided.

National Park Service. 1999. Inholding data requested through the Freedom of Information Act.

National Park Service. 2002. *Environmental Assessment: All-Terrain Vehicle Access to an Inholding at Agiak Lake within Gates of the Arctic National Park Wilderness*. Gates of the Arctic National Park and Preserve.

Tanner, R. 2002. Inholdings within Wilderness: Legal Foundations, Problems, and Solutions. *IJW* 8 (3): 9–14.

U.S. Forest Service. 1990. *Forest Service Manual: Title 2300—Recreation, Wilderness, and Related Resources*, Section 2326.13. Washington, DC: U.S. Forest Service.

Zaslowsky, D. and T. H. Watkins. 1994. *These American Lands: Parks, Wilderness and the Public Lands*. Washington, DC: Island Press.

RANDY TANNER is Wilderness Policy Analyst for Wilderness Watch, a national conservation organization dedicated to the wise stewardship of the U.S. designated Wilderness Areas, and a graduate student in the Department of Conservation and Society in the College of Forestry and Conservation at the University of Montana, Missoula. E-mail: randy.tanner@umontana.edu.

From LEOPOLD CENTER page 34

Users of the WSRS need to be aware of what it does not provide. First, the WSRS does not provide full text documents. For example, it contains excerpts from House Reports that are relevant to the issues, but it does not contain the full text of these House Reports. Second, it does not cover nonwilderness legislation such as the Endangered Species Act or the Multiple Use Sustained Yield Act, although these laws may affect wilderness stewardship. Third, much of the information on the WSRS, and legislative history information in particular, is subject to interpretation. Most importantly, the 1964 Wilderness Act frames all uses of the WSRS, and this website should not be used as a substitute for seeking legal counsel.

The WSRS also has links to the Wilderness.net Law Library that contains all U.S. wilderness laws in a downloadable format, and to the Policies and Regulations page that contains links to the full text documents of all U.S. federal agency wilderness regulations and policies. Pending funding and support, and feedback on its functionality, the WSRS will be updated annually.

PETER LANDRES is a research ecologist at the Aldo Leopold Wilderness Research Institute, P.O. Box 8089, Missoula, MT 59807, USA. E-mail: plandres@fs.fed.us.