THE STATE of ALASKA
GOVERNOR BILL WALKER

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September 28, 2016

Bud C. Cribley, State Director
Bureau of Land Management
Alaska State Office
222 W. 7th Avenue, #13
Anchorage, AK 99513-7504

Re: Governor's Consistency Review of the proposed Eastern Interior Resource Management Plan and Final Environmental Impact Statement

Dear Mr. Cribley:

The State of Alaska reviewed the proposed Eastern Interior Resource Management Plan (EIRMP or Plan) and Final Environmental Impact Statement (EIS). The planning period for the EIRMP spanned approximately eight years, from 2008 through 2016. During that timeframe, the planning approach to implementing existing law and regulation and new Bureau of Land Management (BLM) policies changed several times, resulting in a sometimes fractured planning effort that focused on issues in isolation, outside the larger legal and practical management context.[1] In accordance with our written agreement, the State worked cooperatively with BLM to participate fully in every stage of the planning process, including providing the State's perspective, relevant data and information, and technical review of the plan in a timely manner.

While the State and BLM worked cooperatively throughout the planning process, not all issues were resolved to our satisfaction. Specifically, the proposed Plan does not support sustainable opportunities for mineral exploration and development in the State's oldest mining district, as reflected in the State's area plans, and interferes with the State's ability to develop its resource-based economy. The Plan relies on outdated withdrawals to implement unsupported restrictions on access, use, and resource development. The proposed Plan also frustrates the State's ability to prioritize its statehood land selections as required by the Alaska Statehood Act and the Alaska Land Transfer Acceleration Act, and does not respect the congressional mandate to balance federal land management in Alaska with the State's economic and social needs. Therefore, pursuant to 43 CFR 1610.3-2, the State finds the plan to be inconsistent with officially approved state plans, policies, and programs. We respectfully request BLM's full consideration of the issues identified below.

This finding is separate from and in addition to the State's protest dated August 29, 2016, filed pursuant to 43 CFR 1610.5-2. All previous applicable comments submitted by the State on the EIRMP are incorporated by reference, including protest comments.

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[1] The White Mountains Supplemental EIS, proposed Areas of Environmental Concern (ACECs), and implementation of the Wild Lands policy are examples.

The Plan is inconsistent with the federal statutes that implement the goals of the Alaska Statehood Act and protect the State's resource management responsibilities

The 1958 Alaska Statehood Act directed the State to select 103 million acres of vacant, unappropriated, and unreserved federal land, including the mineral estate, with the intent that the new state would manage these resources to sustain itself economically and socially.[2] In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA) to resolve the aboriginal land claims of Alaska Natives and provide for the future expansion and creation of national parks, wildlife refuges, and other specially managed federal units in the State. To this end, ANCSA directed the Secretary to withdraw over 80 million acres for conservation purposes. The 1980 Alaska National Interest Lands Conservation Act (ANILCA) specifies how these federal lands in Alaska are to be managed, and contains specific provisions that further the goals of the Alaska Statehood Act.

The Eastern Interior Planning area includes several conservation system units (CSUs) and other areas designated by ANILCA. CSUs and other ANILCA designated areas managed by BLM include the White Mountains National Recreation Area (NRA), the Steese National Conservation Area (NCA), and the Birch, Beaver, and Fortymile Wild and Scenic Rivers. The planning area also encompasses the Yukon-Charley Rivers National Preserve, managed by the National Park Service (NPS), and portions of the Yukon Flats, Arctic, and Tetlin National Wildlife Refuges, managed by the U.S. Fish and Wildlife Service (USFWS). The remaining land in the planning area is comprised of BLM-managed multiple use lands, State-owned and selected lands, and private lands, primarily Native Corporation owned and selected lands, which are managed for a variety of uses, including resource development.

ANILCA identifies specific purposes for CSUs and other designated areas, while also incorporating numerous special provisions to protect access for traditional activities and provide access to resources that are the bedrock of Alaska's economy. The United States Supreme Court recently confirmed that ANILCA establishes a different framework for federal land management in Alaska by stating "Those Alaska specific provisions reflect the simple truth that Alaska is often the exception, not the rule."[3]

For example, in recognition of the State's resource-based economy, ANILCA Section 1010 directed the Secretary to assess the oil, gas, and other mineral potential on all public lands in Alaska (except those identified in ANILCA Section 1001) in order to expand the data base with respect to their mineral potential. This includes both lands within CSUs and the federal public lands managed by BLM for multiple use. The opening policy statement in Section 101(d) of ANILCA specifically identified "…public lands necessary and appropriate for more intensive use and disposition" as being part of the "proper balance" achieved through ANILCA.

> *This Act provides* ***sufficient protection for the national interest*** *in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides* ***adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people****; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a* ***proper balance***

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2 *Sturgeon v. Frost*, 136 S. Ct. 1061, 1065 (2016).

3 *Id.* at 1071.

> ***between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition****, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.* [Emphasis added]

The EIRMP fails to properly respect this balance, and is thus inconsistent with the federal legislation governing the planning area.

The Plan is inconsistent with Previous BLM Plans and BLM's Multiple-Use Mandate

The Federal Land Policy and Management Act (FLPMA) and BLM land use planning regulations at 43 CFR 1610.3-2 direct BLM to cooperate with adjacent landowners when developing resource management plans to ensure consistent management across land ownership and that BLM management direction remain consistent with federal law.

The State has a long history of working cooperatively with BLM on the development of resource management plans (RMPs). Over the years, BLM plans have largely been consistent with state land management. The State has rarely protested or determined that plans are inconsistent in the context of the Governor's Consistency Review (GCR). Of the four most recent RMPs and two river management plans,[4] only one RMP and a related step-down management plan were protested or found inconsistent – East Alaska RMP for concerns related to the retention of the Pipeline Utility Corridor Public Land Order and the Delta River Special Recreation Management Area Plan primarily for ANILCA-related access issues. Both appeals were partially resolved with BLM committing to future negotiations with the State on land conveyance issues and agreeing to manage ANILCA-protected access consistent with Department of Interior (DOI) ANILCA Title XI regulations at 43 CFR 36, which apply to all DOI land managing agencies in Alaska, and other ANILCA implementing regulations.

The EIRMP diverges from BLM's historical interpretation of FLPMA's multiple use mandate in Alaska, in part by inappropriately relying on outdated withdrawals to implement special management objectives. Previous RMPs provide meaningful opportunities for resource development and other uses by applying area designations where special management is considered necessary, and relying primarily on existing environmental laws and regulations to protect resource values, including BLM's authority to apply permit stipulations and required operating procedures on projects and commercial uses. For example, the Kobuk Seward RMP designates several ACECs, totaling 6.5 million acres, but does not recommend mineral withdrawals as underlying special management for any of them. One notable exception is the Bering Glacier Research Natural Area (RNA) in the East Alaska RMP, which BLM recommended for mineral withdrawal as special management. However, the area is almost entirely covered by glacial ice and holds little potential for resource development. As a result, the State did not protest or find these area designations inconsistent.

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[4]2006 Gulkana Wild and Scenic River Management Plan, 2007 Kobuk-Seward RMP, 2007 East Alaska RMP, 2008 Bay RMP, 2008 Ring of Fire RMP, and the 2013 Delta Wild and Scenic River SRMA/East Alaska RMP Amendment.

The EIRMP instead applies layers of special area designations or resource delineations, many of which recommend mineral withdrawals as the special management prescription. Sixty-nine percent of the BLM managed lands within the planning area are now identified as requiring special management, resulting in large swaths of closures to mineral exploration and development in a region where mining has been occurring for over 100 years.

As a result of this new management approach, the EIRMP appears to instead buffer CSUs or expand protections already afforded CSUs and other ANILCA designated areas, managed by BLM, the NPS and USFWS. This new approach departs from BLM's practice in other Alaska RMPs, and conflicts with allowed activities on adjacent state lands and frustrates the State's ability to finalize state land conveyances by stifling resource exploration and development opportunities in the area as a whole. Additionally, the plan fails to address—let alone resolve—potential user displacement and other access-related conflicts for a majority of the planning area because it defers travel management decisions to step-down plans. Issues relating to consistency with adopted State land use plans and State land selections are discussed in greater detail below.

The Plan is Inconsistent with State Land Use Plans, Programs, and Policies

The plan does not discuss state area plans in detail nor does it explain how the plan is consistent or inconsistent with them – it merely states that BLM "considered management of federal and state lands immediately adjacent to BLM-managed public lands and consistent management decisions to the extent possible" (EIRMP Section 1.9, page 13). This does not meet the consistency mandate in FLPMA and BLM planning regulation 43 CFR 1610.3-2(a), which requires BLM to be consistent with state "officially adopted resource related plans, and the policies and programs contained therein" so long as they are consistent with Federal laws and regulations. The proposed management direction in EIRMP Alternative E is inconsistent with management policies for state-owned and selected lands, as provided in officially adopted state land use plans, despite the fact that the statutory direction of FLPMA and the later adopted state statutes as they relate to the overarching state policies and planning requirements are substantially similar.

The Constitution of the State of Alaska, adopted almost twenty years before FLPMA, provides the basis for management of resources in the State. Article 8, Section 1 of the State Constitution states:

> It is the policy of the State to encourage the ***settlement of its land and the development of its resources*** by making them available for maximum use consistent with the public interest. [Emphasis added]

Article 8, Section 2 of the State Constitution states:

> The legislature ***shall provide for the utilization, development, and conservation*** of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people. [Emphasis added]

The Alaska Legislature implemented this constitutional direction by enacting specific resource management statutes in Title 38 of the Alaska Statutes. These statutes establish the State's land management policy as well as planning and classification requirements and were enacted in

1978, just two years after the federal government adopted FLPMA. These State statutes mirror many of the land use planning provisions contained in FLPMA, and in some cases are nearly identical.

AS 38.04.005 (a) provides the policy for the state to inventory and plan for state lands.[5] Alaska Statute 38.04.065 requires the State to adopt land use plans that "…provide for the use and management of state-owned land." This statute requires the Commissioner of the Department of Natural Resources (DNR) to, among other provisions: "use and observe the principles of multiple use and sustained yield;" "consider physical, economic, and social factors affecting the area and involve other agencies and the public in achieving a systematic inter-disciplinary approach;" and "give priority to planning and classification in areas of potential settlement, renewable and nonrenewable resource development, and critical environmental concern."

Both the State and BLM have statutory direction to inventory their lands and develop land use plans. Both federal and state law require the agencies to observe the principles of multiple use and sustained yield and to use a systematic and interdisciplinary approach, among other direction, in the development of land use plans.[6] Thus, similar to state statutory direction, FLPMA directs that BLM plans provide for multiple use of the lands – including balancing long-term needs for renewable and non-renewable resources; that a "high-level annual or regular" output of renewable resources be achieved and maintained; and, that certain lands of "critical environmental concern" can be identified.

DNR, in cooperation with other state agencies, including the Alaska Department of Fish and Game, assessed its land base, including state-selected BLM lands, and established management intent and recommendations in four state land use plans within and adjacent to the EIRMP planning area. These include the Upper Yukon Area Plan; Eastern Tanana and Yukon Tanana area plans (revisions of the Tanana Basin Area Plan); and, Copper River Basin Area Plan (currently under revision). Having assessed essentially the same land and resources within the EIRMP planning area with similar statutory direction, the policies and recommendations contained in the recently completed EIRMP are fundamentally inconsistent with the existing state land use plans, and in some cases reach vastly different conclusions on how the lands are to be managed.

For example, the State's Upper Yukon Area Plan (UYAP) identified approximately 193,995 acres in the Middle Fork Fortymile (Region 1 in UYAP) as habitat lands recognizing use by caribou for calving, with the remaining lands within the planning area classified largely as Resource Management Lands.[7] In contrast, the Fortymile subunit designates twice that acreage

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[5] AS 38.04.005(a) states: "In order to provide for ***maximum use*** of state land consistent with the public interest, it is the ***policy*** of the State of Alaska to plan and manage state-owned land to establish a balanced combination of land available for both public and private purposes. The choice of land best suited for public and private use ***shall be determined through the inventory, planning, and classification processes*** set out in AS 38.04.060 - 38.04.070." [Emphasis added]

[6] FLPMA Sections: 102; 103; 201(a); and, 202(a)-(f)

[7] Resource Management Lands are defined by the State in 11 AAC 55.200 as: (1) land that might have a number of specific or important resources but for which a specific resource allocation decision is not possible because of a lack of adequate resource, economic, or other relevant information, or is not necessary because the land is presently inaccessible or remote and development is not likely to occur

as an ACEC where mineral exploration and development will be prohibited, and then surrounds the ACEC with another 685,000 acres as caribou and Dall sheep critical habitat that is subject to additional use limitations, including trail density, access methods, roads, and facility footprints. These use limitations discourage or will effectively preclude any mining activities, even though mining is not presumptively prohibited in critical habitat and the area has significant mineral potential. Further, the areas of the subunit that are recommended as open to mining have low mineral potential; therefore, there is little likelihood that mining will occur in any areas recommended as open in the subunit.

In addition, mineral exploration and development opportunities in Steese NCA and White Mountains NRA, although allowed through the discretionary authority granted the Secretary through ANILCA, have been precluded in all but 1.5 percent of the units' land area.[8] While the BLM analyzed leasing for hardrock minerals in the White Mountains NRA in a Supplement to the Draft RMP/EIS, the proposed EIRMP and FEIS prohibits hard rock mineral leasing in the entire NRA. The effects analysis in the FEIS discusses economic benefits associated with mining activities and the ability of required operating procedures and stipulations to mitigate for impacts to recreational use, but fails to explain why allowing mining activities would have an "adverse effect on the administration of the recreation area." The NRA contains high potential for rare earth elements, which are uncommon and considered by the U.S. Geological Survey and the Department of Defense to be strategic and critical metals that are important to the nation's security interests. The Plan dismisses this important need with minimal explanation. A similar decision in the Steese National Conservation Area (NCA) lacks sufficient justification, where all but 30,000 acres will be closed to locatable mineral entry.

This is sharply inconsistent with the State's planning goals in the UYAP to "Make metallic and non-metallic resources available to contribute to the energy and mineral supplies and economy of Alaska" and to "Contribute to Alaska's economy by making subsurface resources available for development, which will provide job opportunities, and stimulate economic growth."[9]

The EIRMP is inconsistent with adopted state land use plans and state statutes that open all state land to mineral entry unless specifically closed.[10] The vast majority of state-owned and selected lands within the EIRMP planning area remain open to mineral entry as the State relies on its

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within the next 10 years; or (2) land that contains on or more resource values, none of which is of sufficiently high value to merit designation as a primary use.

[8] ANILCA Sections 401 and 402 designated approximately one million one hundred twenty thousand acres of land as the Steese NCA and withdrew it from mineral location, entry, and patent under the U.S. mining laws, subject to valid existing rights, but gave the Secretary the discretion to open lands determined through a land use planning process to be suitable to mining, while also considering caribou range and Birch creek as special values. ANILCA Section 403 designated approximately one million acres of land as the White Mountains NRA to provide public outdoor recreational opportunities, to conserve scenic, scientific, historic, fish and wildlife, and other values that contributed to the public's enjoyment of the area. ANILCA Section 1312 withdrew the White Mountains NRA from location, entry, and patent under the U.S. mining laws, subject to valid existing rights, but gave the Secretary discretionary authority to permit the removal of non-leasable and leasable minerals if found to not have significant adverse affects on the administration of the recreation areas.

[9] UYAP Chapter 2, page 2-32

[10] Alaska Statute 38.05.185 and 38.05.275

permitting process to identify appropriate stipulations for mining activities. In contrast, the EIRMP preemptively prohibits mineral exploration and development without determining if the activity can be conducted under existing federal and state environmental laws and regulations, including BLM standard operating procedures and permit stipulations to eliminate, minimize, or mitigate resource impacts. This conflicts with BLM's report to Congress on the 2004 Alaska Land Transfer Acceleration Act, which justified lifting outdated ANCSA (d)(1) withdrawals in Alaska because existing laws and regulations that did not exist in the 1970's are now in place to protect natural resource values.[11] As a result, the EIRMP preempts exploration and development, which precludes expansion of the state's mining economy and forecloses the ability to establish mineral rights in the State's oldest mining district.

The Plan frustrates the State's and Federal Government's obligations under the Statehood Act and the Alaska Land Transfer Acceleration Act.

Under the Statehood Act, Alaska was entitled to select over 100 million acres of federal lands. Consistent with the Statehood Act, the State has made its selections, and has top-filed selections on lands across the state. Lands selected for conveyance to the State under the Statehood Act and subsequent federal laws, are identified and addressed in the State's land use plans. Management intent applicable to the entire planning area and to specific units is provided in these plans.

The State prioritizes its selections for conveyance through a separate internal review process within DNR that is based on a number of factors such as mineralization, public use, and habitat. The State periodically reviews and updates selection priorities as new information is available and as the entitlement land pool is reduced through conveyance. Currently, the State only has approximately five percent of its land entitlement remaining, making resource assessment on the land vital to prioritizing our selections.

BLM, through the EIRMP, proposes a policy to retain existing PLOs, initiated in 1971 with the passage of ANCSA, until new withdrawals are established. Maintaining these outdated ANCSA withdrawals impedes or prevents some high priority top-filings from automatically attaching and restricts the State's ability to effectively prioritize its requests for transfer of statehood entitlement lands based upon sound science and the potential for future economic development of the land's resources. It further precludes benefits realized from mineral development on public lands selected by the State by not allowing mineral entry where state goals and policies specifically provide for this use. Under the proposed EIRMP, vast areas will be closed to mineral entry, therefore, the State is not able determine that the mineral entry is in the State's interest and should occur. This has the effect of obstructing conveyance by limiting

[11] "In the early 1970s when the lands were withdrawn under Section 17(d)(1) and (d)(2) of the ANCSA, there were few regulations to oversee the development of the public lands and protect important natural resources. Since then Congress has passed significant legislation for the orderly development of the public lands and to protect the environment from adverse impacts. The BLM has 1) developed extensive oil and gas lease stipulations, required operating procedures (ROPs), and surface management regulations for miners, which are now in place and sufficient to assess and protect the resources in most situations…" (BLM, Sec. 207 Alaska Land Transfer Acceleration Act: A Review of D-1 Withdrawals, Report to Congress (June 2006), at 5, 6.

our ability to fully assess and prioritize our remaining entitlement lands. Furthermore, it forestalls mineral entry on public lands – lands that may ultimately be conveyed to the State – and precludes these lands from contributing to the State's mineral economy. This is inconsistent with the intent of ANILCA 906(k) which provides a mechanism for the State to review and approve an action that creates an interest on federal land that is selected by the state.

Findings and Requests

Maintaining PLOs that have met their purpose, and therefore are no longer needed, prohibits mineral entry and development in an area that has a rich and long history of mining; precludes expansion of the State's resource-based economy; and obstructs the State's ability to prioritize its final entitlement selections as provided in the Statehood Act. We therefore request the BLM State Director revise the EIRMP for management continuity with state land use plans by recommending all ANCSA (d)(1) withdrawals that have fulfilled their intended purpose be lifted. In addition, we request BLM remove recommendations for new mineral withdrawals and instead follow existing federal and state environmental laws and regulations, including BLM's standard operating procedures and permit stipulations, to protect resource values.

Conclusion

On behalf of the State of Alaska and Governor Bill Walker, I respectfully submit this Governor's consistency finding on the proposed Eastern Interior Resource Management Plan. The State appreciates our long-standing cooperative relationship and looks forward to resolving the issues raised in this consistency review.

Sincerely,

Andrew T. Mack

Andrew T. Mack
Commissioner

cc: The Honorable Lisa Murkowski, United States Senator
The Honorable Dan Sullivan, United States Senator
The Honorable Don Young, United States Representative
The Honorable Sam Cotten, Commissioner, Alaska Department of Fish and Game
The Honorable Larry Hartig, Commissioner, Alaska Department of Environmental Conservation
The Honorable Marc Luiken, Commissioner, Alaska Department of Transportation & Public Facilities