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FSM 2800 – MINERALS AND GEOLOGY

CHAPTER – ZERO CODE

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Digest:

This supplement adds regional guidance to sections 2801, 2803, and 2804 of the Manual to reflect unique legal provisions applicable only to mining activities in Misty Fjords and Admiralty Island and National Monuments, including sections 503 and 504 of the Alaska National Interest Lands Conservation Act, the Greens Creek Land Exchange Act of 1995, Proclamations 4611 and 4623, and 36 CFR 228, Subpart D.

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2801 – AUTHORITY

2801.1 – Surface Management Authorities

2801.11 – Statutory Authorities

The following statutory authorities provide the Forest Service additional authority to manage surface resources in conjunction with mineral exploration and development on National Forest System (NFS) lands within Misty Fjords and Admiralty Island National Monuments, Alaska:

1. Alaska National Interest Lands Conservation Act (ANILCA; 94 Stat. 2371, as amended; 16 U.S.C. 431 note). Section 503 of ANILCA establishes Misty Fjords and Admiralty Island National Monuments within the Tongass National Forest to be managed “Subject to valid existing rights and except as provided in this section... to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.” Section 503 also provides for the continuing right to conduct mining activities on valid existing claims within the monuments, subject to specific conditions. Section 504 governs the management of mining claims within these two national monuments that were unperfected when ANILCA was enacted.
2. Greens Creek Land Exchange Act of 1995 (110 Stat. 879; 16 U.S.C. 431 note). This act ratifies a land exchange agreement between the Department of Agriculture and Kennecott Greens Creek Mining Company “by which the area surrounding the Greens Creek Claims could be explored and developed under terms and conditions consistent with the protection of the values of the Admiralty Island National Monument.” The Act also finds that Sections 503 and 504 of ANILCA provide “special provisions under which the Greens Creek Claims would be developed.”

2801.13 – Proclamations

Admiralty Island National Monument and Misty Fiords National Monument were first established by President Carter on December 1, 1978 by the following proclamations¹:

1. Proclamation 4611—Admiralty Island National Monument (December 1, 1978; 93 Stat. 1446). This proclamation establishes the Admiralty Island National Monument “to preserve intact the unique scientific and historic objects and sites located there” and for “the scientific purpose of preserving intact this unique coastal island ecosystem.”

¹ Pursuant to Section 1322 of ANILCA, these proclamations were rescinded by Secretarial Order 2701, signed by the Secretary of the Interior on March 24, 1981 and published in the Federal Register on April 1, 1981.

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2. Proclamation 4623—Misty Fiords National Monument (December 1, 1978; 93 Stat. 1466). This proclamation establishes the Misty Fiords National Monument to protect this “unspoiled coastal ecosystem containing significant scientific and historical features unique in North America.”

2803 – POLICY

1. All requirements of subsection 503(i) of ANILCA apply to all National Forest System (NFS) lands, including lands within the Misty Fjords and Admiralty Island National Monuments, NFS lands within any other conservation system unit, and other NFS lands not within any conservation system unit. As provided in Senate Report 96-413, all uses of NFS lands directly connected with or facilitating the removal and processing of ore from the mineral deposits at Greens Creek and Quartz Hill as described in subsection 503(i)—for example, pumping works, miners’ accommodations, mine offices, workshops, ore storage, or waste and tailing disposal-- require a lease issued by the Secretary of Agriculture. No such lease may be issued unless the Secretary makes the determinations specified in subsection 503(i)(1) (See section 2804 below).
2. As provided in Senate Report 96-413 and the Greens Creek Land Exchange Act, other functions such as power generation, transmission of power, transportation facilities, and impoundment of water—to the extent they are not associated with a conventional millsite or “mining and milling purposes” as that phrase is interpreted under the mining laws of the United States—are subject to the special use authorization process governed by FSM 2700 if they are located outside the Exchange Properties established under the Greens Creek Land Exchange Act, or to the approval process for mining plans of operations governed by 36 CFR 228.80, 36 CFR 228, Subpart A and FSM 2810 if they are located within the Exchange Properties. All such uses necessary to allow the purposes of a lease issued under subsection 503(i) to be carried out will be authorized.
3. All three determinations required under subsection 503(i)(1) of ANILCA have equal weight, and all alternatives considered in detail in an environmental analysis must be evaluated to assess whether they meet all three requirements. In such analyses, evaluate first whether the activities “cannot be feasibly carried out on such claims or on other land owned by such [claim] holder” as described in subsection 503(i)(1)(A), because this question is likely to be most readily answered in a definitive fashion, and must be answered to determine whether a search for alternative locations on NFS lands is necessary. If so, evaluate next which site “will cause less environmental harm than the use of any other reasonably available location” as described in subsection 503(i)(1)(C), because this evaluation is more quantifiable than determining what constitutes “irreparable harm” as described in subsection 503(i)(1)(B). Finally, evaluate whether “the use of the site to be leased will not cause irreparable harm to the Misty Fjords or the Admiralty Island National Monument” as required by subsection 503(i)(1)(B) of ANILCA.

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4. In determining which alternative site considered in an environmental analysis will cause the least environmental harm and whether the use of a site to be leased will cause irreparable harm as described in subsection 503(i)(1) of ANILCA, the authorized officer shall evaluate each alternative in its entirety, including all required mitigation measures described in the environmental analysis for that alternative.
5. In determining whether the use of the site to be leased will cause irreparable harm as described in subsection 503(i)(1)(B) of ANILCA, the authorized officer shall consider the following factors:
 - a. The provisions of Section 503(c) of ANILCA that “Subject to valid existing rights and except as provided in this section, the National Forest Monuments... shall be managed by the Secretary of Agriculture as units of the National Forest System to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.”
 - b. The congressional intent of Section 503 of ANILCA as described in the following statements by the Senate Energy and Natural Resources Committee in Senate Report 96-413:

The committee intends that mining on existing claims shall be permitted under reasonable regulations designed to make that activity compatible to [the] maximum extent feasible with the purposes of the monument.

The committee intends that the evaluation and development of these claims be permitted to continue should that prove economically feasible, and intends to avoid the implication that mining or related activities are inherently incompatible with the purposes for which the monument was established.

The committee intends that existing Forest Service regulations governing mining operations apply except to the extent that new regulations are promulgated. These new regulations are to be designed to provide environmental safeguards under which development of the claims can continue, not to prevent their evaluation and development.

- c. The further explanation of congressional intent of Sections 503 and 504 of ANILCA provided by the following statements by Senators Ted Stevens, Henry Jackson, and Paul Tsongas during final Senate floor action on ANILCA on August 19, 1980 (see *Congressional Record*, Volume 126 (1980), pp. S 11194 – S 11197):

Mr. STEVENS. One of the major concerns I had is that by changing the west side of Admiralty Island from special management area to wilderness,

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Congress could make it impossible for mining at Greens Creek or Admiralty Island to go forward.

As I understand it, the provisions of the substitute, including sections 503 and 504, will permit certain activities necessary to the operation of the mine.

Mr. JACKSON. That is correct. An area of about 27,000 acres of the Admiralty Island monument was not designated as wilderness in the substitute. This area, referred to in TLUMP as VCV 144, will provide a sufficient area for Greens Creek to operate. The committee report detailed a number of activities which are incidental to mining or milling purposes. These include, but are not limited to, pumping works, miners' accommodations, mine offices, or shops, ore storage, or waste and tailing disposal.

Mr. STEVENS. Senator Tsongas, as we both know, the U.S. Borax molybdenum deposit at Quartz Hill is located within a national monument. It is my understanding that the classification of these lands as national monument will not impinge on U.S. Borax's ability to develop that deposit. Does this comport with your understanding?

Mr. TSONGAS. My distinguished colleague from Alaska knows that it has always been our intention to allow the Quartz Hill deposit to be developed if it is economically feasible for U.S. Borax to do so. Let there be no misunderstanding. U.S. Borax will have to comply with some very restrictive environmental regulations incorporated into the bill. *But we have taken care in this legislation to do nothing which would directly or indirectly prevent the development of this mineral deposit solely because the deposit is located inside a national forest monument.* (Emphasis added.)²

- d. The description of Sections 503 and 504 of ANILCA inserted into the *Congressional Record* by Representative Udall immediately following final House floor action on ANILCA on November 12, 1980 (see *Congressional Record*, Volume 126 (1980), p. H105643):

The bill both extinguishes and recreates the two National Forest Monuments in southeast Alaska, the Misty Fjords and Admiralty Island National Monuments. The reason [*sic*] for designating these monuments remain the same as when they were designated in December, 1978. They are designated for the purposes of protecting their ecological, cultural, historical,

² This discussion is relevant to Greens Creek as well, because the provisions in Section 503 of ANILCA regarding economic feasibility, restrictive environmental regulations, and the leasing provisions of subsection 503(i) apply to valid claims at Greens Creek within Admiralty Island National Monument as well as to valid claims at Quartz Hill within Misty Fjords National Monument.

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prehistorical, biological, fish and wildlife, and other natural and scientific values; and the Secretary of Agriculture is to manage these monuments so as to protect (and further research concerning) objects of ecological, cultural, geological, historical, prehistorical, and scientific interest and so as to maintain these monuments' scenic, natural, biological, fish and wildlife, and other values.

- e. Consistent with Proclamation 4611, whether the use of a site affecting Admiralty Island National Monument will:
- i. “assure continued opportunities for study” of the Monument’s “unique resources of scientific interest;”
 - ii. protect the Monument’s “unique combination of archeological and historical resources in a relatively unspoiled natural ecosystem;”
 - iii. protect the Monument’s “historic structures and sites, including whaling stations, canneries, old mining structures and old village sites;”
 - iv. protect the Monument’s “exceptional distribution of animal species, including dense populations of brown bears and eagles, but excluding entirely – because of the island’s separation from the mainland – a large number of species indigenous to the general area;”
 - v. protect opportunities within the Monument for scientific study of bald eagles, brown bears, and the distribution of animal species; and
 - vi. serve “the scientific purpose of preserving intact this unique coastal island ecosystem”.
- f. Consistent with Proclamation 4623, whether the use of a site affecting Misty Fjords National Monument will protect the Monument’s:
- i. “unusual scientific phenomenon of recent plant succession newly-exposed land with the accompanying animal species;”
 - ii. “mineral springs and lava flows;”
 - iii. “cultural sites and objects of historical significance, including traditional native hunting and fishing grounds;”
 - iv. “wildlife representative of nearly every ecosystem in Southeast Alaska;”
 - v. opportunities for “continuing scientific study” of the Monument’s “remarkable geologic and biological objects;” and
 - vi. “unspoiled coastal ecosystem containing significant scientific and historical features unique in North America”.

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- g. The interpretation of Section 503 of ANILCA provided by the U. S. Court of Appeals for the Ninth Circuit in *Southeast Alaska Conservation Council, Inc. v. Watson*, 697 F.2d 1305:

ANILCA should be interpreted in light of its underlying protective purposes: “to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.” ANILCA Sec. 503(c) (emphasis added [by the court]). See also ANILCA Sec. 101.

Congress drafted section 503 of ANILCA with the clear intention that holders of valid mining claims shall be permitted to carry out activities related to exercising rights under those claims, but Congress specified that any such activities shall be conducted “in accordance with reasonable regulations promulgated by the Secretary to assure that such activities are compatible, to the maximum extent feasible, with the purposes for which the Monuments were established.” ANILCA Sec. 503(f)(2)(A) (emphasis added [by the Court]). The “maximum extent feasible” standard is a strict one and demands strict compliance with environmental protection provisions set forth in ANILCA and in other applicable environmental statutes. Cf. *Flint Ridge Development Co. v. Scenic Rivers Ass’n*, 426 U.S. 776, 787-88, 96 S.Ct. 2430, 2437-38, 49 L.Ed.2d 205, 215-16, reh’g denied, 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d 159 (1976) (interpreting NEPA mandate that agencies comply with the Act “to the fullest extent possible” as “neither accidental nor hyperbolic,” but rather “a deliberate command” that agencies comply *unless there is “a clear and unavoidable conflict with statutory authority”* [emphasis added]).

- h. The findings of Congress that Sections 503 and 504 of ANILCA provide “special provisions under which the Greens Creek Claims would be developed” and that “the area surrounding the Greens Creek Claims could be explored and developed under terms and conditions consistent with the protection of the values of the Admiralty Island National Monument” as provided by the Greens Creek Land Exchange Act of 1995.
- i. Whether the use of a site to be leased “includes all feasible measures which are necessary to prevent or minimize potential adverse impacts on [resources of ecological, cultural, geological, historical, prehistorical, and scientific interest] likely to be affected” as stated in 36 CFR 228.80. In evaluating feasibility of specific mitigation measures or alternative sites considered in an environmental analysis, the authorized officer shall use reasoning similar to the “prudent man test” established in *Castle v. Womble*, 19 L.D.455 (1894). A measure or alternative shall be considered feasible if “the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his

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labor and means, with a reasonable prospect of success.” (See paragraph 7 below.)

- j. The provision of 36 CFR 228.80 that “The authorized officer shall not require implementation of mitigating measures which would prevent the evaluation or development of any valid claim for which operations are proposed”. A mitigation measure or alternative site shall not be considered feasible, and shall not be required, if “the evidence is of such a character that a person of ordinary prudence would” *not* “be justified in the further expenditure of his labor and means, with a reasonable prospect of success.” (See paragraph 7 below.)
 - k. The severity, duration, and geographic scope of potential adverse effects on resources of ecological, cultural, geological, historical, prehistorical, and scientific interest within Admiralty Island and Misty Fjords national monuments, and the likelihood that such effects will occur.
6. When evaluating alternative sites on NFS lands for activities requiring a lease under Section 503(i) of ANILCA, the authorized officer shall not reject a site as causing irreparable harm to the Misty Fjords or the Admiralty Island National Monument unless the authorized officer determines that:
- a. the use of the site to be leased will most likely cause substantial, long-lasting adverse effects to a substantial portion of the monument’s resources of ecological, cultural, geological, historical, prehistorical, or scientific interest, after accounting for any beneficial effects of mitigation measures included in the proposal; and
 - b. at least one feasible alternative site exists that will cause less harm to the environment.
7. Environmental documents such as Environmental Assessments (EA) and Environmental Impact Statements (EIS) for activities related to mining in Admiralty Island National Monument or Misty Fjords National Monument must evaluate the feasibility of each alternative considered in detail in the document, based on analysis prepared by a Forest Service Certified Mineral Examiner that considers, at a minimum, the factors specified in 36 CFR 228.80(c)(2) and applies reasoning similar to the “prudent man rule” as described in paragraphs 5(i) and (j) above: an alternative shall be considered feasible if “the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success;” an alternative shall not be considered feasible if “the evidence is of such a character that a person of ordinary prudence would” *not* “be justified in the further expenditure of his labor and means, with a reasonable prospect of success.” Such feasibility analyses must be completed and a summary of the results disclosed as early as practicable in the NEPA process; for projects requiring an EIS, disclosure in the draft EIS is required. All

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proprietary information in such reports must be handled in a manner consistent with 36 CFR 228.6: it must be kept in the project record but not made available to the public; marked as not subject to release under the Freedom of Information Act; and summarized in the relevant EA or EIS. When the available information indicates that an alternative that would otherwise meet all applicable legal requirements is not feasible, reasonable efforts must be made to determine what changes would be necessary to make the alternative feasible.

2804 – RESPONSIBILITY

1. The Forest Supervisor of the Tongass National Forest has the authority to issue leases and other special use authorizations and to make the determinations required by subsections 503(i) and 504(f) of ANILCA under Forest Service Manual Supplements R-10 1200-2003-2 and R-10 2700-2006-5.