

**Explanation of Proposed Alaska Region Supplement to
Forest Service Manual 2800 Zero Code
Mining Operations within Misty Fjords and Admiralty Island National Monuments**

Background:

The Alaska Region of the Forest Service proposes to adopt a regional supplement to the Forest Service Manual (FSM) chapter 2800. This chapter of the FSM provides direction for managing mining and mineral activities on National Forest System lands. The proposed R10 Supplement would add language to FSM 2801 and 2803 providing additional guidance to Forest Service officials responsible for authorizing and administering mining operations within the Admiralty Island and Misty Fjords National Monuments, as provided in Sections 503 and 504 of the Alaska National Interest Lands Conservation Act (ANILCA) and the implementing regulations, 36 CFR 228.80. This paper provides an explanation of the background and resources relied upon to develop the proposed regional supplement.

The need for this supplement arose in the summer of 2013, when the Tongass National Forest was completing the Final Environmental Impact Statement (EIS) and Record of Decision (ROD) for the Greens Creek Mine Tailings Disposal Facility Expansion project. It became evident during that process that some provisions of Section 503 of ANILCA were unclear and could potentially even conflict with each other and with other law. Accordingly, the Forest Supervisor stated in the ROD that the Forest Service would develop a supplement to clarify how the numerous legal requirements, most of which apply only to mining in the two national monuments on the Tongass, should be applied in future projects. This supplement is the response of the Alaska Region to the Forest Supervisor's request, and proposes a holistic interpretation of the entire body of applicable law, based on several principles of statutory interpretation established by the Supreme Court in many of its decisions.

Introduction: Some Provisions of ANILCA are Ambiguous

Section 503 of ANILCA (see Appendix 1 for the entire text) is ambiguous. Subsection 503(i) entitles the holders of valid mining claims at Quartz Hill in Misty Fjords National Monument and Greens Creek in Admiralty Island National Monument to a lease on National Forest System (NFS) lands for mining and milling purposes only if the Secretary determines:

- (A) that milling activities necessary to develop such claims cannot be feasibly carried out on such claims or on other land owned by such holder;
- (B) that the use of the site to be leased will not cause irreparable harm to the Misty Fjords or the Admiralty Island National Monument; and
- (C) that the use of such leased area for such purposes will cause less environmental harm than the use of any other reasonably available location.

Such uses of National Forest System (NFS) lands are normally approved as part of a mining plan of operations. Subsection 503(i) does not state that leases are the only means of authorizing such uses within the monuments, raising the question of whether leases are actually required.

Subsection 503(i) also provides no definition of “irreparable harm.” Further, under paragraph (A), the fact that the mining claimants own other land does not negate their entitlement to a lease if the necessary milling activities cannot feasibly be carried out on those lands. Similarly, under paragraph (C), there may be other sites where such activities would cause less environmental harm, but if it is not feasible to conduct the activities on other sites, they cannot be deemed reasonably available, and the claim holders would still be entitled to a lease at the preferred location. Only paragraph (B) is unqualified; its language suggests that if the use of a site will cause irreparable harm to one of the monuments -- even if there is no feasible alternative location for milling activities necessary to develop the valid claims, and perhaps if only a small portion of the affected monument would be harmed – the use may not be allowed, even if that would force mining operations to stop.

Some Provisions of ANILCA Conflict with Each Other and with Other Law

If interpreted strictly – to prohibit milling activities necessary to develop valid mining claims even if there were no feasible alternative (thereby forcing mining operations to shut down) -- the “irreparable harm” language in Subsection 503(i) would conflict with other provisions of law, including Section 503(c) of ANILCA, which reads as follows:

(c) 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 (emphasis added).

Preventing development of valid mining claims would be a “taking” of valid existing rights granted under the Mining Law of 1872, in violation of the “Subject to valid existing rights” language in Section 503(c). Moreover, the phrase “except as provided in this section” implies that some activities managed by the Secretary within the monuments would *not* “protect the objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.”

Any interpretation of the “irreparable harm” provision that caused a cessation of mining operations would also conflict with subsection 503(f)(2)(A), which provides that holders of valid mining claims in the monuments “shall be permitted” to mine “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.”

The Department of Agriculture adopted such regulations in 1986 (36 CFR 228.80) (See Appendix 2 for text). If the only feasible locations for milling activities needed for development of valid claims at Greens Creek or Quartz Hill are sites where such activities would harm one of the monuments, interpreting that harm as “irreparable” and disallowing a lease would violate the mandate in subsection 503(f)(2)(A) that mining activities “shall be permitted” under these regulations.

ANILCA Case Law is not Completely Clear

The only court case dealing with ANILCA Section 503 is *Southeast Alaska Conservation Council (SEACC) v. Watson*, 697 F.2d 1305, 1309-1310 (9th Cir. 1983), in which the Ninth Circuit ruled that “ANILCA should be interpreted in light of its underlying protective purposes: ‘to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest.’” (emphasis added by the Court). In addition, the ruling stated that “The ‘maximum extent feasible’ standard is a strict one and demands strict compliance with environmental protection provisions set forth in ANILCA and in other environmental statutes.”

This ruling could be read to require the “irreparable harm” provision to be interpreted rigidly and independently from the rest of Section 503. However, while the decision directs ANILCA to be interpreted “in light of” its protective purposes, the sentence that specifies those purposes begins with the phrase “Subject to valid existing rights and except as provided in this section”. Thus, Congress recognized that mining within the monuments would continue, and that management of mining would not be entirely protective. Thus, interpreting ANILCA “in light of” its protective purposes does not require an interpretation that excludes other provisions of law.

Upon closer examination, the Court’s interpretation of “to the maximum extent feasible” may also not be quite as rigid as it may first appear. The Court’s ruling cites several cases for this interpretation, and explained the last one as “interpreting [the National Environmental Policy Act’s] 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.’” We have already discovered that any strict interpretation of the “irreparable harm” standard to prohibit the development of a valid mining claim at Greens Creek or Quartz Hill when there is no feasible alternative would be a “clear and unavoidable conflict” with the language in Section 503 providing that the monuments will be managed “Subject to valid existing rights,” and that the holders of such rights “shall be permitted” to develop those rights under the regulations developed to assure the mining activities are “compatible to the maximum extent feasible” with ANILCA’s protective purposes.

Finally, any strict interpretation of the “irreparable harm” standard that ended mining activities would conflict with the Ninth Circuit’s statement that “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....”

The Need and Basis for a Holistic Interpretation

The ambiguities and potential conflicts among the applicable provisions of ANILCA, including the interpretation of them by the Ninth Circuit in *SEACC v. Watson*, create a potentially untenable situation for the management of mining operations within the monuments. The proposed supplement to FSM 2800 was developed to resolve these issues by proposing a holistic interpretation of these provisions. In this effort, the Alaska Region was guided by several principles of statutory interpretation gleaned from Supreme Court decisions and summarized by

the Congressional Research Service (CRS) in a report for Congress titled *Statutory Interpretation: General Principles and Recent Trends* (CRS Report 97-589, Eig, Larry M., 2011; available at www.crs.gov). One of the most basic principles is that:

Statutory construction... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or *because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law*. (emphasis added) (*United Savings Ass’n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (citations omitted)).

See Appendix 3 for the statutory interpretation principles the proposed supplement is based on.

How the Proposed Supplement Applies Principles of Statutory Interpretation

Based on the Supreme Court’s principles of statutory interpretation, the policy section of the proposed supplement includes seven subsections that together represent a holistic interpretation of ANILCA and other applicable legal requirements. Each subsection is described below.

Subsection 1 of the policy section of the proposed supplement provides that (a) all requirements of subsection 503(i) apply to all NFS lands; (b) all uses directly connected with or facilitating mining at Greens Creek and Quartz Hill require a lease; and (c) no lease can be issued without the determinations specified in subsection 503(i)(1). This is based on the legislative history of this subsection in Senate Report No. 96-413 (see Appendix 4 for text).

Subsection 2 of the policy section of the proposed supplement provides that certain uses of NFS lands described in Senate Report No. 96-413 are subject to the special use authorization process governed by FSM 2700 as instructed in the Senate Report. In addition, the Greens Creek Land Exchange Agreement, ratified by Congress in the Greens Creek Land Exchange Act of 1995 (110 Stat. 879; 16 U.S.C. 431 note), states:

There shall be no use or occupancy of the surface estate overlying the Exchange Properties until the operator...has applied for and received approval of a plan of operations, including reclamation, in accordance with the provisions of 36 CFR 228.80 and 36 CFR 228, Subpart A in effect on the effective date of this Agreement.

Accordingly, the proposed supplement provides that uses described in Senate Report 96-413 will be authorized through the special use authorization process if they are located outside the Exchange Properties established under the Greens Creek Land Exchange Act, or by the approval process for mining plans of operations under regulations implementing the mining laws (36 CFR 228.80 and 36 CFR 228, Subpart A) and Forest Service Manual 2810 if they are located within the Exchange Properties.

Also, as provided in subsection 503(i)(1) of ANILCA and in the Senate Report, the proposed supplement requires all necessary uses associated with a lease issued under subsection 503(i) to be authorized.

Subsection 3 of the policy section of the proposed supplement provides that all three determinations required for a lease under subsection 503(i) have equal weight, and that NEPA documents describing the environmental effects of proposals requiring a lease must evaluate whether each alternative considered in detail meets all three of the requirements of subsection 503(i). Such evaluations would start with whether the activities cannot be feasibly carried out on the mining claimant's own land, then address which reasonably available site will cause the least environmental harm, and finally whether the use of the site to be leased will cause irreparable harm to either of the monuments. This order starts with the simplest and most quantifiable assessment and ends with the most difficult one that requires the most interpretation.

Subsection 4 of the policy section of the proposed supplement requires evaluations of the "least environmental harm" and "irreparable harm" requirements to consider the entire alternative, including mitigation measures. This is based on regulations providing that "Effects may also include those resulting from actions which may have both beneficial and detrimental effects..." (40 CFR 1508.8(b)). The related Forest Service Handbook (FSH) also requires that "For each alternative considered in detail, analyze and document the environmental effects, including the effectiveness of the mitigation measures that would result from implementing each alternative..." (FSH 1909.15, Chapter 10, Section 15).

Subsection 5 of the policy section of the proposed supplement requires the authorized officer (the Forest Service official authorized to approve a mining plan of operations and issue a lease under ANILCA; in this case, the Forest Supervisor) to consider 11 specific factors when determining whether the use of a site to be leased will cause irreparable harm to one of the monuments. This section is the longest of the supplement, because this statutory provision requires the most interpretation and consequently the most analysis by the Forest Supervisor. The term "must consider" means "comply" when referring to a legal requirement; there is no suggestion that the Forest Supervisor may consider not complying with any such requirement. The factors to be considered are:

- a. Subsection 503(c) of ANILCA (see Appendix 1), including both the requirement to manage the monuments to protect certain resources they contain, and the clause that such management is "Subject to valid existing rights and except as provided in this section..."
- b. Excerpts from Senate Report 96-413 (see Appendix 3), which provides the legislative intent of ANILCA Section 503 as described the Senate Energy and Natural Resources Committee.
- c. Relevant excerpts from the Senate's final floor debate on H.R. 39 on August 19, 1980. This discussion is especially indicative of congressional intent for several reasons: 1) the Senate debated and adopted a substitute version of the bill offered on the floor by Senator Tsongas, so the intent of changes made to the bill as reported by the Senate Energy Committee was not explained in the committee report; 2) the intent of these changes was described by Senator Tsongas, the author of the language, and by Senator Jackson, the chairman of the committee of jurisdiction and floor manager of the bill; 3) the text described is identical to Section 503

of ANILCA as enacted into law; and 4) the intended effects of this language were described to all the Senators in the chamber shortly before their final vote on the bill.

- d. Excerpts from Congressman Udall's description of H.R. 39 as passed by the Senate, specifically his explanation of sections 503 and 504 of the bill. This description is less indicative of congressional intent because Representative Udall did not author the legislative text, and because his description of the bill was inserted into the *Congressional Record* after the floor debate and final House vote was taken on November 12, 1980, as indicated by the "bullets" printed in the *Record* before and after Representative Udall's statement.
- e. Whether the use complies with Proclamation 4611, issued by President Carter on December 1, 1978 (See Appendix 5 for complete text), which established Admiralty Island National Monument; specifically, compliance with provisions that indicate the purposes for which the Monument was established.
- f. Whether the use complies with Proclamation 4623, issued by President Carter on December 1, 1978 (See Appendix 6 for complete text), which established Misty Fjords National Monument; specifically compliance with provisions that indicate the purposes for which the Monument was established.
- g. Excerpts from the Ninth Circuit's decision in *SEACC v. Watson*.
- h. Findings of Congress expressed in the Greens Creek Land Exchange Act of 1995 that sections 503 and 504 of ANILCA provide "special provisions under which the Greens Creek Claims would be developed."
- i. Whether the use of the site to be leased includes all feasible measures to reduce adverse impacts on the monuments as required by 36 CFR 228.80, the USDA regulations written to implement ANILCA Section 503's "compatible, to the maximum extent feasible" standard.

The proposed supplement also provides that, when evaluating feasibility, the Forest Supervisor must use reasoning similar to the "prudent person test" used in determining whether a mining claimant has made a valuable discovery under the mining laws. The Region proposes to apply this test because the issues are similar. The prudent person test essentially asks whether a reasonable person would believe, based on available information, that he or she has a reasonable chance to make a sufficient profit by mining the minerals in the claim -- under the conditions required to protect the surface resources of the Federal lands in the area -- to warrant the investment required. This question was already answered in the affirmative during the validity examination to determine that the subject claims are valid. Determining the feasibility of mitigation measures under the 36 CFR 228.80 asks essentially the same question -- whether a reasonable person would *continue to* believe there is a reasonable chance to succeed under *current* conditions and information to justify *continuing to* evaluate or develop the claim *on which a valuable discovery has been made*.

These differences do not alter the type of analysis required. Moreover, the prudent person test is well understood, it has been upheld by the Supreme Court three times, claimants know what type of information must be supplied to meet it, and Forest Service specialists are trained to apply it. Determining feasibility of complex operations, especially economic feasibility, is difficult and inherently subjective. By requiring reasoning similar to the prudent person test, the proposed supplement would adopt well-established standard and procedure to minimize such subjectivity. Otherwise, the Forest Supervisor would be required to make a judgment whether a mitigation measure “would prevent the evaluation or development of any valid claim for which operations are proposed,” as specified in 36 CFR 228.80, with no established standard or process on which to rely.

- j. The provision of 36 CFR 228.80 that prohibits the Forest Supervisor from requiring mitigation measures that would prevent evaluation or development of a valid claim.

This portion of the proposed supplement would also apply the prudent person test to feasibility evaluations.

- k. The severity, duration, and geographic scope of potential adverse effects on the resources the monuments were established to protect, and the likelihood of such effects. These provisions are based on Forest Service NEPA direction to “Consider the magnitude, duration, and significance” of the impacts of an action on the physical, biological, economic, and social components of the human environment, and to “consider the environmental effects in terms of their context and intensity.” (FSH 1909.15, Chapter 10). In addition, under the Council on Environmental Quality’s NEPA regulations, “Intensity” refers to “the severity of the impact.” (40 CFR 1508.27). While these provisions help agencies determine the significance of environmental effects and do not apply directly to the issues at hand, they still offer guidance that can help the Forest Service determine whether adverse effects on the monuments constitute “irreparable harm” under ANILCA.

Subsection 6 of the policy section of the proposed supplement provides that the Forest Supervisor cannot determine the use of a site proposed for a lease under Section 503(i) will cause irreparable harm to the monuments and reject it from consideration for a lease unless a) he or she determines that the use of that site – including all mitigation measures – will most likely cause substantial, long-lasting adverse effects to a substantial portion of the resources the monuments were established to protect; and b) that at least one feasible alternative site exists that will cause less harm to the environment.

The first criterion is intended to help define “irreparable harm,” based on NEPA guidance, other provisions of ANILCA, the legislative history of the statutory requirement, and principles of statutory interpretation. ANILCA does not say that permit holders are entitled to a lease only if the Secretary determines that the use of the site will not cause irreparable harm to the monuments *as a whole*, but neither does it limit the entitlement to a lease upon a finding of no irreparable harm to *every acre* of the monuments.

The search for a reasonable definition between these two extremes led us to consider the ANILCA direction to assure that mining activities are compatible, to the extent feasible, with the purposes for which the monuments were established. Representative Udall's summary of ANILCA states the bill "both extinguishes and recreates the two National Monuments" ... for reasons that "remain the same as when they were designated in December, 1978" by Proclamations 4611 and 4623. Proclamation 4611 expresses the President's concern about protecting – among other things -- Admiralty Island's "relatively unspoiled natural ecosystem," and "the scientific purpose of preserving intact this unique coastal island ecosystem." Proclamation 4623 uses the word "ecosystem" six times, including references to Misty Fjords as "an unspoiled coastal ecosystem" and "an intact coastal ecosystem," and to "protection of this unique ecosystem and the remarkable geologic and biological objects and features it contains." Thus, while an ecosystem approach is not the only permissible way to define "irreparable harm" to the monuments, it is certainly one of the viewpoints that should be considered, since an ecosystem approach was taken in these proclamations to establish the monuments.

Another basis for the supplement's approach to "irreparable harm" is the *De Minimis* principle of statutory interpretation (see Appendix 3), under which minor deviations from a prescribed standard may be allowed. The proposed supplement does not attempt to define in precise numerical terms what adverse effects from mining activities should be deemed a *De Minimis* exception to the "irreparable harm" standard, because such an approach would be very difficult if not impossible. Long-lasting harm to less than an acre of land would seem to qualify, unless it included a unique object of ecological, cultural, geological, historical, prehistorical, or scientific interest.

For all of these reasons, the proposed supplement limits "irreparable harm" to uses that will most likely cause substantial, long-lasting adverse effects to a substantial portion of the resources the monuments were established to protect.

The second criterion in the proposed supplement's treatment of "irreparable harm," which restricts findings of irreparable harm to cases where a feasible alternative exists that causes less environmental harm, is based on all the factors and reasoning described in this paper, including several of the principles of statutory interpretation established by the Supreme Court (see Appendix 3). It is the "only one of the permissible meanings [that] produces a substantive effect that is compatible with the rest of the law" as required by the holistic interpretation principle. In addition, any other interpretation would:

- Render other provisions of ANILCA "inoperative or superfluous, void or insignificant," in violation of the principle that statutes contain no superfluous language.
- Be "An inference drawn from congressional silence [that] certainly cannot be credited [because] it is contrary to all other textual and contextual evidence of congressional intent" in violation of the principle on congressional silence.
- Be "tantamount to a formalistic disregard of congressional intent."

Finally, applying the “plain meaning” of the irreparable harm language “would compel ‘an odd result’” if there were no other feasible alternative to one that caused irreparable harm: the Forest Service would be compelled by the mining laws and some parts of ANILCA to allow mining to continue, and compelled by the irreparable harm language to stop it.

For all these reasons, the irreparable harm provision of ANILCA *must* be interpreted *as if* it entitled the holders of valid claims to a lease only if the Secretary determines “that the use of the site to be leased will not cause irreparable harm to the Misty Fiords or the Admiralty Island National Monument *unless there is no feasible alternative site or the use causes more harm to the environment than any other reasonably available location...*”. This meaning is “most compatible with the surrounding body of law into which the provision must be integrated.”

Subsection 7 of the policy section of the proposed supplement requires NEPA documents to include a feasibility evaluation of each alternative considered in detail. The evaluation must be based on analysis that is 1) prepared by a Certified Mineral Examiner; 2) considers, at a minimum, all the factors of feasibility specified in the regulations; and 3) applies reasoning similar to the “prudent man rule.” Results of the analysis must be summarized and disclosed as early as practicable in the NEPA process; when an EIS is prepared, the results must be included in the draft EIS. Proprietary information must be handled under existing procedures specified in 36 CFR 228.6. When results indicate an alternative is not feasible, reasonable efforts must be made to identify changes needed to make the alternative feasible.

As already discussed, the Region is proposing to adopt a standard and process for determining the feasibility of mitigation measures and alternative lease sites under ANILCA and its implementing regulations that is similar to the well-established standard and process for determining the validity of mining claims, because the question of whether a valuable mineral discovery has been made (answered by applying the prudent person test) is so similar to the question of whether adoption of a mitigation measure or potential lease site would preclude further exploration and development of a valid mining claim. Certified Mineral Examiners are trained to conduct validity examinations; those skills are what will be needed to conduct the required feasibility analyses.

Conclusion

The Alaska Region proposes to adopt the enclosed regional supplement to FSM 2800 for all the reasons described in this paper. It would clarify how to interpret the entire body of law applicable to mining within the Admiralty Island and Misty Fiords National Monuments in a reasonable manner. Such an interpretation is essential to achieve the dual goals of the law: to protect the resources the monuments were established to protect, while also ensuring that valid mining claims within them can continue to be explored and developed.