



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources

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Tristan Fluharty
Juneau District Ranger
USDA Forest Service
8510 Mendenhall Loop Road
Juneau, AK 99801

Submitted electronically: <https://cara.fs2c.usda.gov/Public//CommentInput?Project=60550>

Re: Mendenhall Glacier Recreation Area Mineral Exploration Withdrawal Draft Environmental Assessment

Dear Mr. Fluharty,

Thank you for the opportunity to provide comments on the U.S. Forest Service (USFS) Draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for proposed mineral withdrawal on National Forest lands adjacent to the Mendenhall Glacier Recreation Area (MGRA). This proposed withdrawal of mineral resources on 4,560 acres of federally managed lands adjacent to an existing mineral withdrawal (Public Land Order 829) is requested for a 20-year term. Based on a letter from the Forest Service to interested parties (File Code 2760, September 30, 2022), the withdrawal is needed to be consistent with direction in the Tongass National Forest Land and Resource Management Plan by maintaining the predominately natural setting for semi-primitive types of recreation and tourism, protecting the current and future viewsheds from adverse effects of mining activities, and protecting the recreational and natural resources in areas expected to be exposed as the Mendenhall Glacier recedes.

The Office of Project Management and Permitting has coordinated with the following state agencies to review the Draft EA in relation to State of Alaska (State) authorities and expertise: Alaska Departments of Natural Resources, Environmental Conservation, Fish and Game, Health, and Law. This letter constitutes the State's consolidated comments for your consideration. The State has two primary concerns. First, that the US Forest Service is circumventing the intent of the Alaska National Interest Lands Conservation Act (ANILCA) Section 1326(a), and second, that certain waters within Mendenhall Lake could be considered navigable or State managed waters due to glacial retreat. These concerns are further discussed below.

ANILCA Section 1326(a)

In a comment letter submitted September 7, 2021, the State argued the withdrawal constituted a withdrawal of greater than 5,000 acres in the aggregate and required notice and Congressional approval pursuant to the ANILCA Section 1326(a). In response, the Forest Service provided two justifications in the Draft EA. First, that ANILCA Section 1326(a) applies only to "future"

withdrawals in the aggregate of greater than 5,000 acres and second, that the existing MGRA and the proposed withdrawals have different purposes

In response to the first justification, DNR holds that it is impractical to consider the proposed withdrawal as separate and apart from the adjacent existing Mendenhall Lake Scenic and Winter Sports Area withdrawal and must be considered cumulatively. If applied widely, this policy would allow incremental public land orders to gradually withdraw land adjacent to pre-1980 withdrawal boundaries so long as each stayed under 5,000 acres, thereby circumventing the intent of ANILCA. In response to the second justification, DNR holds that the purpose and duration of a withdrawal are immaterial as ANILCA Section 1326(a) makes no reference to these factors. Again, applied widely, such a policy would allow the Executive Branch to piece together incremental withdrawals exceeding 5,000 acres in aggregate by simply changing the purpose or duration of each adjacent withdrawal.

Notwithstanding these policy concerns, additional elements support DNR's position that the proposed withdrawal would not be under consideration but for the existing Mendenhall Lake Scenic and Winter Sports Area and that the two areas should be considered in the aggregate per ANILCA. Throughout the Draft EA, the USFS links the MGRA to the proposed withdrawal, indicating that the intent of the proposed withdrawal is to expand some of the purposes of the existing recreational area (e.g., protecting viewsheds from the existing visitor's center; expansion of existing MGRA recreational opportunities into the proposed withdrawal area as the glacier recedes). Practically, PLO 829 includes withdrawal from mineral entry, therefore encompassing the same purpose as the proposed, adjacent withdrawal. Finally, the USFS states that the "requested withdrawal would be a new withdrawal rather than an expansion or modification of PLO 829" (Draft EA, p. 2). DNR holds that ANILCA Section 1326(a) applies regardless of whether the proposed withdrawal is a modification of an existing withdrawal or a new, adjacent withdrawal, and we again assert that ANILCA Section 1326(a) does apply to this matter, thereby requiring notice in the federal register and approval by both Houses of Congress.

State assertion over navigable waters

In the September 7, 2021 comment letter the State noted that the withdrawal does not apply to state navigable waters, which should be specifically excluded from the proposed withdrawal expansion. The State asserted that the entirety of Mendenhall Lake, including all recently exposed waters and shorelands due to glacial retreat, and the Mendenhall River to be state owned navigable waterways. The state requested that all maps and descriptions in the EA identify these state-owned lands and waters. In the Draft EA, the USFS responded that "there are no such state-owned lands in the proposed area" (Draft EA, p. 22).

DNR clarifies that within the twenty-year scope of the proposed withdrawal, potential exists for glacial retreat to expose portions of Mendenhall Lake that would be considered navigable, and state owned, and we request that the dynamic nature of these navigable waters be reflected in the final EA. All maps and descriptions should identify state-owned lands and waters, including all of Mendenhall Lake as it changes over time.

Thank you for the opportunity to review the draft environmental assessment and FONSI. Please contact me if you have any questions regarding the comments or want to discuss the State's concerns further.

Sincerely,

Sylvia A. Kreel

Sylvia Kreel
Large Project Coordinator

Ecc: State Review Team
Kyle Moselle, Executive Director, DNR Office of Project Management and Permitting