

STATE OF ALASKA

DEPARTMENT OF LAW

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December 2, 2010

Mr. Rowan Gould, Acting Director
U.S. Fish and Wildlife Service
Department of the Interior
1849 C Street NW
Washington, DC 20240

Re: Togiak Refuge Public Use Management Plan

Dear Mr. Gould:

As you know from your previous tenure as Regional Director of the U.S. Fish and Wildlife Service in Alaska, maintaining the balance of state and federal interests recognized by Congress in the Alaska National Interest Lands Conservation Act (ANILCA) and other federal law is a high priority for the State of Alaska. A key element of that balance is preserving state control of state-owned navigable water systems and their beds. Thus, the Service's attempt to assert jurisdiction over state-owned navigable waters and underlying lands flowing through the Togiak National Wildlife Refuge is cause for significant concern.

The Togiak Refuge Public Use Management Plan (PUMP), signed by the Regional Director on September 21, 2010, is legally flawed, as articulated below and in the State's January 18, 2008, detailed correspondence to Paul Liedberg, Refuge Manager. The PUMP's decision would impose permitting requirements for unguided use of two state-owned waterways, requirements that would substantially restrict access to these river systems. These restrictions are not authorized by ANILCA and not supported by actual conditions on the ground. Therefore, I respectfully request that you rescind the Togiak PUMP and associated Finding of No Significant Impact for the following reasons:

- The PUMP relies on use of refuge uplands as justification for effectively asserting jurisdiction over state-owned navigable waterways when, in fact, the use the Service wishes to regulate is the use of state waters, lands and resources.
- Direction in the PUMP to regulate activities on state lands and waters contravenes congressional direction in ANILCA Section 103(c) that non-federal land shall not be subject to refuge regulations.
- Even if ANILCA's Alaska-specific limits on federal regulation of state lands did not apply, the PUMP fails to show an overriding need to restrict public use of state navigable waterways, including their beds, to protect upland refuge resources.

- The PUMP also proposes restrictions on public river use and access that do not meet the criteria for federal regulation in ANILCA Section 1110(a) and its implementing regulations in 43 CFR Part 36 (i.e., only allow restriction of use detrimental to the resource values).

Background and State Authority

The Kanektok River and Goodnews River and their sources, the Kagati, Goodnews and Kukaktlim lakes, are clearly navigable for state title purposes under the standard applied by the federal courts and Department of the Interior to Alaska. *See, e.g., State of Alaska v. Ahtna, Inc. & United States*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) (Gulkana River in Alaska); *Appeal of Doyon, Ltd.*, 86 Interior Dec. 692 (ANCAB 1979) (Kandik and Nation Rivers in Alaska). The Kanektok and Goodnews rivers and source lakes are undeniably used, and susceptible to use, for navigation using inflatable boats and other watercraft having a load capacity of 1000 lbs. or so of supplies or commercial recreationalists. By law, Alaska received title to these rivers and lakes when it became a state in 1959. The activities the Service intends to restrict – the staging and preparation for unguided trips downstream – occur on state-owned waterways, beaches and gravel bars below the ordinary high water line. Use of federally-owned refuge uplands, if any, is incidental.

ANILCA and Federal Non-authority

While Congress may have the power to regulate activity on adjacent non-federal land under some circumstances, the first question is whether in this instance Congress exercised that power on these state lands. There is no indication in ANILCA that it did so. To the contrary, Congress expressly limited the reach of federal authority on ANILCA's conservation system units, including the Togiak Refuge. ANILCA Section 103(c) explicitly provides:

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. *No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.*

(Emphasis added.) ANILCA Section 102 also excludes all “land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and *lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law*” from the definition of public lands. (Emphasis added.) In ANILCA Congress thus excluded state-owned submerged, tide, and shore lands and their resources and waters from the reach of regulations promulgated for national wildlife refuges in Alaska.

Lack of Agency Justification

In addition to the lack of authority addressed above, the Service does not have sufficient justification required by Congress to impose the PUMP's intended limits on public use. In particular, those river use limitations do not meet the rigorous standard in ANILCA Section

1110(a) that such use would be detrimental to the resource values of the unit or area. Furthermore, the stringent proposed restrictions are neither reasonable nor justified by current or projected use levels.

The PUMP acknowledges that fish and wildlife populations are healthy and water quality remains high. Instead, the PUMP emphasizes protecting a “wilderness fishing experience” (PUMP p. 123), relying on information from refuge-implemented visitor surveys in 1995 and 2001 (PUMP Appendix B). The State objected to the methodology and interpretation of those two surveys. Regardless, the surveys indicated almost everyone was satisfied with their recreational experience on the rivers; and subsequent visitor use trends do not show the sort of increased use that might threaten recreational experiences in the foreseeable future. For example, on the three river systems surveyed by the Service in 2001, between 82% and 88% of the respondents reported they agreed or strongly agreed that fishing conditions were uncrowded and there were minimal conflicts with other anglers or users. Since then, most use levels have remained stable or declined. I understand that the Refuge Manager has indicated he is doubtful that unguided use limits are warranted at present low use levels.

Moreover, this fishing experience is inherently associated with use of the state-owned waterways – *not* the refuge uplands. While anglers boating and fishing the rivers may certainly appreciate the surrounding scenic and wilderness setting, actual use of the refuge uplands, if any, is incidental to the primary use of the navigable waterways, the fisheries, and the associated shorelands – all under the ownership and jurisdiction of the State.

The State has consistently disputed the Service’s wilderness fishing justification as a basis for imposing federal restrictions on public use and access of these state waterways. If public uses or impacts were jeopardizing the waterway, the Alaska Department of Natural Resources would revise its current land use plan, just as it did simultaneously with the first refuge planning process in the 1980s. However, the low-concentration, water-based unguided use has not been shown to be harmful to upland wilderness values or even the wilderness experience of a majority of the anglers on the rivers. Once float parties begin their trips and spread out on the upper river, there are typically few upland wilderness users, if any, to even notice the river use. The guided use staging activities at the popular Kagati Lake outlet to the Kanektok River have more impact on wilderness values than the transient unguided parties, who will bear the brunt of restrictions outlined in the PUMP.

In addition, the limits on levels of use sought by the Service are unjustifiably low. The State is aware of only two other rivers in North America with comparable use limits – the Selway River in Idaho with road access and the Alsek River starting in Canada. Both of these rivers have very different access and use issues than at the Togiak Refuge. The refuge’s study of encounter rates supports a level of both guided and unguided use well above the PUMP’s one launch per day target. As the Service apparently knows, most up-river user conflicts, particularly at the put-in for the Kanektok, are associated with encounter rates caused when poor flying weather prevents floatplane access to the put-in lakes. When the weather breaks, the transport of backlogged parties can create a short-term spike in use at the put-in points. Since such weather events are beyond the control of both refuge managers and floaters, the PUMP provides an exception to the one-launch-per-day limit for such weather-related backlogs. Even when multiple parties launch on the same

day, they quickly disperse downriver. If the temporary, launching-point social impacts of these occasional weather-related spikes are discounted, there appears even less need for the PUMP's public use limits.

Despite the State's objections to the impending rulemaking to implement the permit system proposed by the PUMP, our resource agencies remain available to consider a cooperatively-developed monitoring program as a viable management tool. An effective monitoring program could identify legitimate indicators of emerging resource concerns or user conflicts that may need state or federal management attention in the future. Although the PUMP does intend to implement a future monitoring program, such a program should be implemented before access is limited, to determine whether the limitation is actually necessary.

Although the restrictions proposed by the Togiak PUMP apply only to the Goodnews and Kanektok rivers and their source lakes, limiting access to these rivers is a significant concern to the State of Alaska. Furthermore, the precedent that could be created by the Service's attempt to restrict access to these state-owned waterways is a matter of added concern. ANILCA reserved great portions of Alaska land for federal use and protection, but simultaneously placed clear limits on federal power over state and private lands. Maintaining ANILCA's balance is a key priority for the State of Alaska. Because the Togiak PUMP upsets that balance, I respectfully request you repeal the Togiak PUMP and associated Finding of No Significant Impact.

Sincerely,



Daniel S. Sullivan
Attorney General

cc: The Honorable Sean Parnell, Governor, State of Alaska
The Honorable Lisa Murkowski, United States Senate
The Honorable Mark Begich, United States Senate
The Honorable Don Young, United States Congress
Kim Elton, Interior Director of Alaska Affairs, United States Department of the Interior
Pat Pourchot, Special Assistant to the Secretary for Alaska Affairs, United States Department of the Interior
Geoffrey Haskett, Alaska Regional Director, United State Fish and Wildlife Service
John W. Katz, Director of State/Federal Relations and Special Counsel, Office of the Governor
Tom Irwin, Commissioner, Alaska Department of Natural Resources
Cora Campbell, Acting Commissioner, Alaska Department of Fish and Game