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June 14, 1991

Mr. Walter Stieglitz
Regional Director
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, AK 99503

Dear Mr. Stieglitz:

The State of Alaska appreciates the opportunity to review the proposed regulations for the management of cabins on national wildlife refuges in Alaska. The following represents the consolidated comments of State resource agencies.

SUMMARY

The State is concerned that several of the proposed regulations are not in the public's best interests and are inconsistent with the intent and provisions of existing federal regulations and the Alaska National Interest Lands Conservation Act (ANILCA).

The State has commented on several drafts of the existing cabin management policy in an attempt to bring it into compliance with existing federal regulations and ANILCA. Several of the State's previous comments and recommendations, not incorporated in the final policy, are again submitted in this document. These include the following issues:

- 1) exemption for certain types of cabins,
- 2) Section 810 analysis,
- 3) adequate and feasible access to cabins,
- 4) definitions and application of "family" and "immediate family",
- 5) requirements for reconstructing, remodeling, or rehabilitating existing cabins,

- 6) public use of seasonally permitted cabins,
- 7) development of regulations that recognize and allow for changes in subsistence uses and traditional activities, and
- 8) construction of new cabins and use of commercial cabins in wilderness areas.

We also request additional information on existing cabins on refuges to complete our analysis of the draft regulations.

The State has demonstrated its strong commitment to work cooperatively with FWS in developing policy and regulations for the management of cabins on refuges. The proposed regulations contain serious flaws, several of which were previously identified in State comments on the cabin management policy. The State will pursue all available means to ensure these flaws are corrected and the proposed regulations are consistent with the intent and provision of ANILCA and federal regulations.

GENERAL COMMENTS

Relationship Between Proposed Regulations and the Existing Cabin Management Policy. The current cabin management policy for refuges was released in June 1989 after approximately five years of extensive review and comment by the public and the State. This policy is referenced in the Supplementary Information section only as a step in development of the proposed regulations. We request that the intent, clarifications, and directions regarding cabin management in the policy be included either in the final regulations or be adopted by specific reference in the Federal Register.

Purposes of the Proposed Regulations and Compatibility. Some of the "purpose(s)" of the proposed regulations appear to be in conflict with ANILCA. The purpose referenced in the Summary section, "to ensure proper and uniform management of all cabins on National Wildlife Refuges in Alaska", needs to be revised. Such "proper and uniform management" is not appropriate given the variety of uses, lifestyles, traditional activities, and other public uses that were protected by ANILCA in 77 million acres within 16 refuges across the State of Alaska. In particular, "customary and traditional" use of existing cabins is part of the natural evolution of the Alaskan lifestyle which Congress intended to continue. Use of cabins for trapping is not comparable with use of cabins for operating set net fisheries, recreational hunting, guiding activities, commercial gear storage, subsistence harvesting, or public safety. Traditional (preANILCA) use of cabins in interior Alaska is not comparable

with traditional uses in coastal areas. We request the U.S. Fish and Wildlife Service (FWS) revise its purpose to reflect the purpose of Congress--that cabins be managed to allow continuation of the traditional Alaskan lifestyle while assuring the purposes of the refuges are not significantly impacted.

On November 19, 1984, the Alaska Land Use Council adopted recommendations regarding cabin management for all federal agencies in Alaska. The ALUC recommended that: 1) cabin permits and stipulations be directly related to ensuring customary and traditional uses are compatible with refuge purposes [ANILCA 1303(b)], 2) traditional uses will not cause significant detriment to the principle purposes for which the unit or area was established [(ANILCA 1303(a)(b)], and 3) specified periods of availability for use by the claimant of the cabin or structure should be avoided unless clearly necessary to ensure compliance with the aforementioned criteria.

One of the stated purposes referenced in the Supplementary Information section is "to ensure the compatibility of cabin uses with the purposes of the refuge". Senator Stevens discussed some of the problems associated with the lack of a definition of "compatibility" in Section V of his November 16, 1986 review of the draft cabin management policy. He concluded that ANILCA mandates the development of terms and conditions that establish compatibility by regulation.

Since Congress went to great lengths to provide for the continuation of cabin uses on refuges, federal statutory provisions should be considered in determining what existing types of cabin uses are compatible. We request that the regulation include specific information on cabin compatibility criteria. A list of specific conditions by which a cabin or related structure's use would be found incompatible should be included, particularly to define criteria by which a cabin would be found to "interfere with general public's use of the area." We also request that FWS clarify cabin "compatibility" by inclusion of the following statement:

"The use and disposition of cabins in refuges shall be considered compatible with the purpose for which the refuges are established, except as Congress has directly and specifically provided to the contrary and as significantly impairs the conservation and use (enjoyment) of the refuge area."

Request for Additional Information. To assist in our review of proposed cabin regulations, we request information on the number, location, and uses associated with existing (permitted) and unclaimed cabins on refuge lands. This information was requested

of FWS earlier during our review of the cabin management policy and, although our request was acknowledged by FWS, (attached letter), this information has not been received to date.

Economic Effects: The FWS states that the proposed regulations "will not have a significant economic effect on a substantial number of small entities" using the refuges. This statement cannot be verified since FWS has not provided information on the numbers, type, and status of cabins and cabin permits on the refuges. We request that FWS provide this information and also consider the economic consequences of the proposed denial of use and occupancy of new and commercial cabins in wilderness areas.

Inadequate Public Review: We feel that the public review of proposed regulations needs to be strengthened to facilitate input from cabin and other refuge users. The timing of release of the proposed regulations is about the worst possible for Alaska residents to be able to fully provide comments. Spring/summer seasonal activities, the short response period, insufficient locations for the affected public to participate in hearings, and the lack of attention paid to previous input discourages public interest. There is an inadequate period of time for public review, especially since we find no evidence of special measures taken to facilitate the input of the local residents of approximately 70 remote communities located within or adjacent to national wildlife refuges in Alaska. Soliciting comments through the mail is not the most appropriate public review method, especially for rural residents.

The FWS has scheduled the only two hearings in the large urban centers, rather than the more appropriate locations such as in communities most affected by the proposed regulations (e.g., communities in the vicinity of Kodiak, Yukon Delta, Alaska Maritime, Tetlin, and other refuges with large dependency upon cabin usage).

We request that the public review period be extended and that public meetings be conducted in rural communities where residents are dependent on use of cabins.

Section 810 Analysis: This analysis, which is included in the section on "Supplementary Information", consists of a single sentence which states: "the regulations are consistent with the purposes and intent of Section 810 and will result in no significant restrictions on subsistence activities". Since no information is provided to support this statement, the Section 810 analysis is incomplete and unacceptable.

Section 810 of ANILCA requires that the FWS evaluate the effects of use, occupancy, or disposition of public lands on subsistence uses and needs. The FWS policy on cabin management (August 1989) also requires that compatibility and Section 810 determinations will be made before issuing or renewing any special use permits for cabins.

We request that the analysis evaluate both direct and indirect effects on subsistence use by the use and occupancy of cabins. At a minimum, there needs to be discussion regarding the role that cabins play in providing opportunities for continued subsistence uses by local residents, one of the legislatively mandated purposes for 15 of the 16 national wildlife refuges in Alaska. The number and location of cabins currently permitted in each refuge and the type of use associated with each would constitute important supplemental information for the Section 810 analysis.

Environmental Protection Requirements: The regulations currently do not indicate that there are additional federal and State laws and regulations that apply to the location and construction of cabins that address environmental protection. While these need not be individually included here, it is important that cabin permittees understand that there are additional requirements that may need to be met to protect water quality, significant habitat and environmental values, and public health and safety. Regulations exist that apply to construction and siting of outhouses, grey water discharge, drinking water systems, disposal of solid waste, and storage of fuel, among others. To address these issues, we request that language be added that recognizes there are other authorities that affect cabin construction, and indicates that it is the permittee's responsibility to identify and comply with all applicable environmental protection standards.

SPECIFIC COMMENTS

Access to Cabins and Other Related Structures: Access to cabins and other related structures is referenced in one location of the introductory materials--"Subsistence use and access are expected to differ little from existing use"--but access is not addressed within the regulations. The regulatory language needs to reflect the intent of ANILCA Section 1110 in providing access to private owners or occupiers and their successors within the federal conservation system units in Alaska. Such intent should provide for flexibility of cabin use as populations of fish and wildlife

move or change. We request that the following language be inserted in the proposed regulations for "all cabins":

"Special use permits authorizing the use and occupancy of cabins and other related structures shall not restrict access until it becomes necessary to assure continued conservation and use of the refuge pursuant to Section 1110 of ANILCA."

We also support the development of guidelines for refuge managers use in determining "reasonable" access referenced in ANILCA Section 1110.

Section 36.33 Cabins and Other Structures: The title of this section should be changed to read "Cabins and other related structures". This language is consistent with the definition of "other related structures" contained in these proposed regulations [36.33(a)(8)]. Also this language clarifies that the proposed regulations are not applicable to temporary structures unrelated to cabin use.

We request that clarification be provided regarding the specific types of cabins that will be affected by these proposed regulations. In addition to temporary facilities (unrelated to cabins), headquarter sites and visitor centers should be exempted from these proposed regulations similar to the provisions of the August 1989 policy on cabin management. We also request that state facilities used to support fish and wildlife related management, monitoring, research, and fishery development activities be exempted from these proposed regulations. The proposed regulations do not clarify authorized state cabins and related structures for supporting fish and wildlife activities are regarded as "administrative cabins" in the definitions or as an "administrative and government-owned public use cabin" in Section 36.33(f).

Section 36.33 (a)(2) Definitions of "Cabin" and "Temporary Facility": Clarification needs to be made that cabin regulations are not necessarily applicable to "temporary facilities". The latter are defined in refuge Comprehensive Conservation Plans (CCPs) as:

"any structure or man-made improvement which can readily be completely dismantled and removed from the site when the period of authorized use is terminated."

The regulations should be revised to indicate which type of use or structure is affected by each provision.

Section 36.33 (a)(4) and (5) Definitions of a "Family" and "Immediate Family": The definition of "family" in the proposed regulations is inconsistent with the intent and definitions in ANILCA and in 50 CFR 36.2(m) which state that a "family means all persons related by blood, marriage or any person living within the household on a permanent basis." This broader definition recognizes the cultural differences between rural and urban Alaskans and the more frequent existence of common law adoptions, informal adoptions, and extended family structures in rural Alaska. The definition of "immediate family" in the proposed regulations includes only the legal spouse and children, either by birth or adoption of the claimant residing in the cabin or structure. This definition is not found in ANILCA or existing federal regulations and its use in other proposed regulations [36.33(c)(2), (d)(2), and (d)(3)] prohibits the rights of cabin use and occupancy of some family members after the death of the claimant. The denial of customary and traditional uses and activities for these family members is inconsistent with ANILCA.

Senator Stevens addressed the legal ramifications of these definitions in his November 16, 1987 letter (attached). We request that the aforementioned definition be used in place of the proposed definition of "family" and request that references to "immediate family" be deleted from the proposed regulations.

36.33 (a)(5) Definition of "Guest": We request that this definition include "clients" of guides and other commercial operators, which is consistent with the proposed regulation for commercial cabins.

Sections 36.33(a)(7), 36.33 (b)(2) and 36.33(c)(3) Late Applications for Existing Cabin Filed Under New Cabin Requirements: As a result of new language not found in the current policy, claimants who failed to meet application deadlines for existing cabins must file under the more restrictive requirements of "new cabins". There is no justification for this in ANILCA, and we request that this requirement be deleted. There are extenuating reasons why an existing cabin claimant may not be able to meet application deadlines including sickness, extended travel, or receipt of incomplete or confusing instructions from refuge staff. We also request that the term "permitted" be deleted in the definition of "new cabin" since applicants or occupants of existing cabins were not consistently provided timely and comprehensive information on the appeals process, and some were told that deadlines had passed so they could no longer apply for cabin permits.

Section 36.33(b) All Cabin Regulations Applicable to Public Lands: We request that clarification be provided to portray that the proposed regulations affect cabins and related structures only on the "public lands" within refuges. The term "Public lands" is already defined in ANILCA as excluding lands conveyed to the State, native corporations and other private landowners.

Section 36.33(a)(8) and 36.33(b)(1) Definition and Application of "Other Related Structures": The definition of "(8) Other related structures" needs to be clarified in light of ANILCA Section 1316 which directs that "temporary facilities directly and necessarily related to the taking of fish and wildlife shall be permitted". Clarification should be provided that the reference to "other related structures" only includes structures in the proximate vicinity of a cabin and directly related to the operation of a cabin. For example, food caches and toilets are necessary at set net sites whether or not a cabin is permitted.

In application of (b)(1) under All Cabins, the regulations state:

"A special use permit is required to construct, use and/or occupy a cabin on refuge lands. The permit may also authorize the use of **related structures and other necessary appurtenances.**" (emphasis added).

We request that the latter sentence be modified to clarify that temporary facilities may also occur under other regulations or provisions unrelated to the cabin management regulations.

36.33(a)(9) Definition of "Public Use Cabin" and Public Use of Seasonally-Permitted Cabins: The present definition limits cabins for consideration as public use cabins to only those "owned and administered by the Fish and Wildlife Service and available for use by the public." Multiple uses are a customary and traditional use of private as well as publicly owned cabins. We request the FWS recognize these uses by providing flexibility in the definition and use of the permitted cabins to also be used as public use cabins. For example, we suggest the definition be revised to:

"...a cabin owned or administered by Fish and Wildlife Service and/or available for use by the public."

36.33(a)(10) Definition of "Trespass Cabin": We request deletion of this definition since it is not referenced elsewhere in the proposed regulations. It is also inconsistent with previous recommendation of the ALUC:

"a claimant with a trespass action pending either administratively or judicially as of 12/2/80 may be entitled to apply for and receive a permit under Section 1303 of ANILCA if otherwise conforming to the requirements of law. Trespass action finalized administratively and judicially prior to 12/2/80 may not be affected by Section 1303."

Reference and/or adoption of this recommendation should be included in the final regulations or accompanying Preamble and Section-by-Section Analysis.

Section 36.33(b) Privileges and Rights of All Cabin Users: The proposed regulations should acknowledge and provide protection for the privileges and rights of the cabin users. We request the following provisions excerpted from the current cabin management policy, be included in the proposed regulations:

1. Adequate and feasible access shall be provided to cabin permittees and other authorized cabin occupants,
2. A cabin permit shall not be denied or revoked on the basis of non-use until all circumstances have been carefully evaluated. Every consideration shall be given to avoid undue hardships on the permittee. Extended absences for personal and family medical care, education, military service, and other legitimate purposes should not be considered "non-use".

Section 36.33(b)(2) Special Use Permit Application for Existing Cabins: We request that the proposed 90-day application period for existing cabins be extended for one year beyond the effective date of these regulations. This is consistent with existing federal regulations and is necessary to ensure that all cabin owners and users, including those living and working in remote areas or on extended travel, are informed of these requirements.

We also request that this section be changed to read:

"Applications for existing cabins, which are not under valid permits, will only be accepted for a period of one year following the effective date of these regulations".

We object to the current language which seems to automatically require re-application for cabins under existing permits. ANILCA Section 1303(c)(2) provides that a permit may only be revoked if "the use under the permit is causing or may cause significant detriment to the principal purposes for which the unit was established." Section 1303(d) provides that "nothing in the Act shall preclude the renewal or continuation of valid leases or permits in effect on the date of enactment of this Act for cabins".

Section 36.33(b)(3) Unclaimed Cabins: This regulation states "after adequate public notice has been given, unclaimed cabins become the property of the Federal Government". We recommend that "adequate notice" be described or defined in the proposed regulations. Without additional supplementary information on the history of cabin use on refuges, some of the "unclaimed cabins" may be those that past owners/occupants incorrectly assumed had to be abandoned.

No definition of "unclaimed" or "abandoned" is included within this section; however, Section (c)(4) refers to a three year process whereby existing cabins on subsequent land acquisitions may be declared abandoned. We assume that this process will be applied to all cabins, even though not so clarified in Section (b). We suggest that unless FWS has clear historical documentation about a cabin, that infrequent use or "unclaimed" status not be interpreted as "abandoned". Such cabins likely serve a general public or traditional use.

Section 36.33 (b)(4) Permit Revocation-All Cabins: This section refers to "grounds to invoke the administrative process leading to notice and hearing, and possible revocation of the permit." The "administrative process" should be described.

Section 36.33 (b)(5) All Cabins: In order to comply with provisions of the current cabin management policy and a recent U.S. District Court Decision (Tarnai vs. Fisher) regarding a cabin on a refuge, this subsection should be changed to read:

"No special use permit will be issued for the construction of a cabin for the sole private recreational use or for the sole private recreational use of an existing cabin. Lawful non-commercial activities incidental to and within the same time frame of a permitted activity may be allowed. Cabin permits may be issued for one or more activities provided they are necessary to accommodate a customary and traditional use and no other reasonable alternative is available".

Language contained in the last two sentences was taken from the current cabin management policy.

Section 36.33(b)(6) Guests - All Cabins: The proposed restrictions on cabin occupancy by "guests" are unreasonable and not consistent with ANILCA Section 1303(d). Customary and traditional use does not include writing notes of permission for one's guests. Requiring a permittee to be present at all times that a cabin is occupied by a guest is similarly unreasonable. Such a restriction also, as Senator Stevens noted in his November 16, 1987 letter,

"conflicts with traditional and customary use, does not recognize emergency situations or legitimate absence of permittee, and does not provide for the use of oral communication as provided in 50 CFR 36.41(a)(2) (1986) regulations governing special use permits in Alaska National Wildlife Refuges."

36.33 (b)(7) Appeal Process for Application Denials and Permit Revocations - All Cabins: The appeal procedures cited in 36.41 are a significant improvement over existing policy and previous regulations for applicants of all activities, as well as cabin and related structure users. However, we recommend the following changes to 50 CFR, Subpart F, Section 36.41(b) or to the proposed regulations.

1. Application denials and permit revocations should be issued in writing to cabin applicants/occupants and appeal procedures be provided within 30 days of the written notice.
2. The written notice of application denial or permit revocation should describe the entire appeal process in layman's terms.
3. The appeal process should be expanded to include another independent level of appeal involving an administrative law judge, consistent with our request of the comparable National Park Service regulation. Suggested wording for this is as follows:

"If the claimant desires to further appeal the decision rendered by the Regional Director, then a hearing should be held by an administrative law judge who decision shall be binding."

Section 36.33(c) Privileges and Rights of Existing Cabin Users:

We request that the rights and privileges of cabin permittees (claimants) be added consistent with provisions of the current cabin management policy as follows:

"Existing cabins and related structures are considered the property of the claimant (permittee). The owner of a cabin may sell his/her interest in the cabin to another person, however, the new owner does not automatically qualify for a permit and must apply for a new one."

Section 36.33(c)(5) Reconstruction, Remodelling, or

Rehabilitation of Existing Cabins: We request that "vandalism" be included in the list of causes that would allow reconstruction, remodelling, or rehabilitation of existing cabins. Since these cabins must meet "construction guidelines", we request that these guidelines be incorporated in the proposed regulations. Further, such guidelines should be sufficiently flexible to reflect the needs and lifestyles of individual cabin owners.

Section 36.33(d)(1) Use of New Cabins: The second, third and fourth sentences in this section should be re-examined to ensure their compliance with the intent of ANILCA. The second sentence says that new cabins will be permitted only in geographic areas where cabins historically supported an ongoing activity or other allowed use. The regulations should specify that the "geographic areas" referred to here are the same as the "unit or area" wording in ANILCA Section 1303(b)(1). Criteria for allowing new cabins in only certain geographic areas within a refuge is not supported by ANILCA.

The third sentence says new cabin permits generally will be issued only to local residents for pursuing a legitimate subsistence activity. This appears to be more restrictive than the provisions for issuing a special use permit in ANILCA Section 1303 (b)(1), which says new cabins can be build for uses related directly to the administration of the unit or area or to provide for continuation of an ongoing activity or use otherwise allowed. ANILCA does not restrict new cabin permits to subsistence users. Additionally, we are unclear what constitutes a "legitimate" subsistence activity. Some type of guidelines should be provided.

ANILCA does not limit the participation in customary and traditional activities to the individual. To the contrary, ANILCA intent is to protect the Alaskan lifestyle which includes the evolution of rural communities, traditional movement between

urban and rural locations, and, in fact, emphasizes the community component of most ongoing activities. We therefore request "for the applicant and the area" to be struck from the fourth sentence.

Section 36.33(d)(2)(v) Legal Interest in New Cabins: We oppose the proposed regulation which requires an applicant for a new cabin to acquiesce to having no legal interest in the cabin and related structures. It seem appropriate and uniform for a new cabin owner to have the same rights to remove or relocate a cabin as existing cabin owners. This position was also supported in recommendations of the ALUC (attached) regarding cabin management on federal conservation system units.

Section 36.33 (d)(4) and (5) Prohibition of New Cabins in Wilderness Areas: These sections propose to limit cabins for public use to non-wilderness areas. By virtue of this regulation, government employees and occasional trappers will be the only persons to use much of the refuges. It appears that FWS is restrictively interpreting the designation of wilderness in refuge areas to supersede the ANILCA authorization of cabin usage. The ANILCA Section 707 specifically amends the Wilderness Act stating:

"Except as otherwise expressly provided for in this Act wilderness designated by this Act shall be administered in accordance with applicable provisions of the Wilderness Act" (emphasis added).

ANILCA Section 102(4) defines wilderness units as conservation system units (CSU), therefore we interpret ANILCA Sections 1303, 1306, and 1316 which address the uses of cabins and other structures on CUSs to apply to wilderness areas. It is particularly important to note that ANILCA Sections 1315 (c) and (d) specifically provide for continued public uses of existing cabins as well as construction of new cabins and shelters. We therefore assert that restricting public use cabins to non-wilderness refuge areas is in direct violation of ANILCA.

Section 36.33 (d)(4) and 36.33(e)(3) Construction and Use of New Cabins and Commercial Cabins: These sections refer to the construction and use of new cabins in wilderness areas and the prohibition of new commercial cabins in wilderness areas, respectively, which do not comply with the intent and provision of ANILCA. Provision in ANILCA and permitted activities in refuge CCPs provide for cabins in wilderness areas and support of subsistence uses and guiding (Section 1303), commercial fishing [304(d)] and public recreation (1315), provided they meet certain conditions. This is also supported by the legislative history of ANILCA as reported in Senate Report 96-413 (committee on energy

and natural resources on November 14, 1979). We recommend that the state reiterate its objection to these restrictions, which is contained in a February 9, 1989 letter to FWS (attached).

Section 36.33(e) Clients Occupying Commercial Cabins: For clarification and consistency we request that "clients" be added to the list of persons that can occupy commercial cabins. There is no statutory basis for excluding "clients", and "clients" are referred to in subsequent regulation proposals [36.33(e)(4)].

Section 36.33 (e)(1) Use of New Commercial Cabins Limited to Type of Use in Original Permit: The third sentence, which states that the use of a new commercial cabin shall be limited to the type of use specified in the original permit, is inconsistent with the intent and provisions of ANILCA. The intent of ANILCA is to protect the Alaskan lifestyle which includes the evolution of customary and traditional activities in rural areas. To resolve this issue, we request the word "original" be deleted in the third sentence.

Section 36.33(e)(1) Commercial Cabins Used in Support of Commercial Fishing Activities: ANILCA Section 304(d) does not limit the exercise of valid commercial fishing rights, including use of cabins, to non-wilderness lands as is stated in the fourth sentence. We request that this sentence be revised to read: "The refuge managers shall permit the exercise of valid commercial fishing rights, including the use of cabins on all refuge lands." This language is consistent with Section 304(d) in ANILCA and the permitted activities contained in refuge CCPs.

We request that another sentence be inserted at the end of this subsection to read: "The determination of 1979 levels will recognize cyclic fishery levels and will be based on cooperative evaluation between the FWS and the Alaska Department of Fish and Game." This clarification was developed cooperatively with the State and is reflected in the Record of Decision for the Alaska Maritime Refuge CCP.

Section 36.33(e)(4) Occupancy of Commercial Cabins Restricted to Time of Authorized Activity: We are concerned about the language in this proposed regulation that cabin occupancy is limited to "the time that the authorized activity is occurring." We request that language be inserted to clarify that the period of authorized activity may include time prior to and after the specified activity for site preparation and clean-up.

Senator Stevens in his November 16, 1987 letter objected to such restrictions as follows:

"The policy should provide flexibility in specifying the authorized activities and periods of use. Commercial fishermen must have the ability to use their cabins as fishing season dictate. ... valid exercise of commercial fishing rights includes the flexibility to engage in more than one fishery, for example, herring in the spring, salmon or halibut in the summer."

The ALUC similarly adopted the following recommendation:

"In implementing Section 1303 of ANILCA, federal agencies in Alaska are encouraged to adopt regulations specifying that permits issued under Section 1303 do not in and of themselves authorize commercial uses, but that such cabins or structures may be used for commercial purposes if such commercial uses are permitted under other appropriate agency authorities.

Thank you for the opportunity to provide these comments on the proposed U.S. Fish and Wildlife Service cabin regulations. State representatives would welcome the opportunity to further discuss the issues we have raised herein prior to promulgating final regulations.

Sincerely,



Paul C. Rusanowski, Ph.D.
Director

cc: Commissioner Harold Heinze, Dept of Natural Resources
Commissioner Carl Rosier, Dept of Fish and Game
Commissioner John Sandor, Dept of Environmental Conservation
Commissioner Frank Turpin, Dept of Transportation and Public
Facilities

**FWS CABIN LETTER
DISTRIBUTION LIST**

June 14, 1991

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John Katz, Governor's Office, D.C.
Stan Leaphart, Citizen's Advisory Commission on Federal Areas, Fairbanks
Dick Swainbank, Dept. of Commerce and Economic Dev., Fairbanks
C. Rankin, Fish and Wildlife Protection, Kodiak

RF/9793r

Ron Regnart
Alaska Department of
Fish and Game
333 Raspberry Road
Anchorage, Alaska 99502

Dear Ron:

This is in response to your letter and comments on the cabin policy dated November 22, 1989. The cabin policy that you reviewed is the final policy and it has been widely distributed, not the "current draft" as mentioned in your letter.

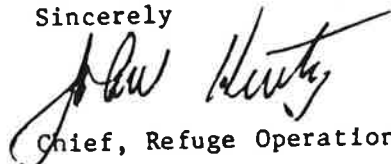
A policy is only intended to provide uniform guidance to refuge managers to assist them in administering cabins on national wildlife refuges. Policies have no legal authority. The next step is to develop regulations to implement the policy and provide the necessary legal authority. The regulation setting process will again require extensive public involvement.

The policy is worded, in most cases, in a permissive tone, using words and terms such as, "in general", "normally", "may" etc. in an attempt to provide for flexibility on a case by case basis.

In your letter you asked for the number, location, description, and period of use for cabins on refuges. We do not have this information available in the regional office. Each refuge has been requested to submit this information. We will consolidate it and send the information to you in a few weeks.

If you have any questions give me a call.

Sincerely


Chief, Refuge Operations

Enclosure

JOHN C. STUBBS, MISSISSIPPI, CHAIRMAN

- ITRES, WEST VIRGINIA
- CLARE, WISCONSIN
- OLIVE, HAWAII
- OLLING, SOUTH CAROLINA
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United States Senate
 COMMITTEE ON APPROPRIATIONS
 WASHINGTON, DC 20510-6025

November 16, 1987

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Walter O. Stieglitz
 Regional Director
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Dear Walter:

I have reviewed your draft policy governing cabin management on national wildlife refuges in Alaska and would like to offer my comments. I appreciate your willingness to consider my concerns.

IV. DEFINITIONS

2. Immediate Family -- Under the draft policy, occupancy of a cabin is limited to the permittee, his immediate family, and guests. Defining "immediate family" as a typical nuclear family is contrary to the traditional extended family social structure prevalent in rural Alaska. The definition should be expanded to include extended family members and "live-in" arrangements.

The current definition of "immediate family" includes common law spouses. However, since the State of Alaska does not recognize common law marriage, there are no common law spouses in Alaska. In effect, this means that live-in girlfriends and boyfriends are precluded from residing in a cabin with a permittee under the draft policy. This clearly violates the spirit of ANILCA's protection of traditional and customary uses.

On a related point, while the policy recognizes a common law spouse as a family member for the purposes of applying for an original permit, a common law spouse is not considered a family member for the purposes of renewal. This inconsistency should be eliminated.

In addition to spouses, the draft definition includes only "sons and daughters of the claimant related by blood, marriage or adoption." Other blood relatives such as parents are excluded. Not only does this narrow definition violate the intent of ANILCA, but it creates serious Constitutional problems as well.

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In Moore v. East Cleveland, 431 U.S. 494 (1977), the United States Supreme Court struck down a zoning ordinance which allowed only members of a family to live together, but defined "family" so narrowly that a grandmother was barred from living with her grandchildren. In essence, that is what the draft cabin policy does. Grandmothers, aunts, uncles, cousins, and even parents would be barred from living with the claimant in his cabin.

To address the common law spouse and extended family issues, the word "immediate" preceding "family" should be dropped, and the definition should be modified to include "all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis." See, 50 C.F.R. 36.2(m)(1) (1986)(definition of "family" in current regulations governing Alaska National Wildlife Refuges).

Finally, the definition states that to qualify as an immediate family member, the individual must "reside with the claimant in the cabin at the time the permit is issued." This definitional restriction has no statutory basis and fails to recognize legitimate absences for medical reasons, education, or military service. See, Section 1303(c)(1) of ANILCA.

7. Guest -- The proposed definition defines "guest" as "a person who occasionally and for a short period of time visits the permittee in the cabin." In order to reflect customary and traditional use, the definition should be expanded to include persons who visit family members in the permittee's absence, and persons who use the cabin in the permittee's absence with his express permission.

"Clients" are also excluded from the definition, however, there is no statutory authority for this exclusion. If left unchanged, this restriction would outlaw guide cabins in National Wildlife Refuges in Alaska. The reference to clients should therefore be deleted.

9. Non-use -- This definition is not included in existing cabin regulations and fails to recognize legitimate non-use of a cabin. Absences for medical care, education such as college and technical school, military and reserve service, or other legitimate purposes should not be considered non-use. Further, if a fisherman or hunter does not occupy a cabin because the fishing or hunting season has been closed, the FWS should not consider this "non-use."

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Finally, the permittee should not be required to notify the Service in advance when he is going to be absent from his cabin for a legitimate purpose. Such a requirement may impair the right of privacy and the right to travel which are guaranteed by the United States Constitution.

13. Year Round Use or Occupancy -- This definition as currently drafted requires the permittee to occupy the cabin for "a substantive portion of the year," but that term is not defined. The FWS should identify exactly what is required for a permittee to meet this requirement. Provisions should also be made to allow a permit holder to be absent for legitimate purposes. See, discussion of "non-use" at page 2 supra.

V. POLICY

A. EXISTING CABINS

The draft policy provides for "the continued customary and traditional use of existing cabins, provided that the uses are consistent with existing laws and regulations and compatible with the purposes for which the refuge was established." However, it does not establish the criteria which will be used to determine if existing uses are "consistent with existing laws and regulations" or "compatible with the purposes for which the refuge was established." Since no criteria are identified, cabin owners have no reasonable means of determining whether their particular use will be allowed to continue.

Section 304(b) of ANILCA requires the Secretary of the Interior to "prescribe such regulations and impose such terms and conditions as may be necessary and appropriate to ensure that activities carried out under any use or easement granted under any authority are so compatible." This provision mandates the development of terms and conditions that establish compatibility. The draft policy does not reflect this requirement.

In addition, Section 1303(d) of ANILCA provides that "unless the Secretary . . . issues specific findings following notice and an opportunity for the leaseholder or permittee to respond, that renewal or continuation of such valid permit or lease constitutes a direct threat to or a significant impairment to the purposes for which a conservation unit was established. . . , he shall renew such valid leases or permits upon their expiration" (emphasis added). The current draft fails to recognize the statutory requirements of findings, notice, and an opportunity to be

VI. GUIDELINES

The guidelines require the refuge manager, in implementing the cabin policy, to protect "the privileges and rights of the permittees." The guidelines should also require the refuge manager to protect the rights of applicants for cabin special use permits.

VIII. IMPLEMENTATION PROCEDURES

A. APPLICABLE TO ALL CABINS

(1) Special use permit -- This provision should be clarified to reflect the fact that a special use permit for a cabin includes use of related structures. In other words, a separate special use permit is not required for related structures.

(3) Limitations on occupancy -- The draft policy currently limits occupancy of a cabin to "the permittee, immediate family, and guests." This provision is acceptable only if the definitions of "immediate family" and "guest" are amended along the lines I suggested in Part IV. See, pages 1 through 3 supra. The word "immediate" preceding "family" should be deleted from this section to reflect those definitional modifications.

(4) Guests -- The requirement that "the permittee must be in proximity during use by guests" is unreasonable. It is unclear whether the permittee must be in proximity of the guest or of the cabin. In addition, customary and traditional use has not required a permittee's presence during a guest's use.

Requiring a written document from a permittee for each and every "short term absence" by the permittee for "reasonable cause" is totally unacceptable. First of all, the terms "short term absence" and "reasonable cause" are not defined making it impossible for a permittee to know whether he might be in violation. More significantly, there is no statutory authority for such a requirement. Although Section 1303(d) of ANILCA authorizes the Secretary to impose "reasonable regulations" on permits, in my opinion, this requirement is not reasonable. Furthermore, it is in conflict with traditional and customary use, does not recognize emergency situations or legitimate absences, and does not provide for the use of oral communication as provided in 50 C.F.R. 36.41(a)(2) (1986)(regulations governing special use permits in Alaska National Wildlife Refuges).

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(6) Activity period and year-round residency -- This section limits the use of a cabin to the activity period on the permit. Provision should be made to ensure that the activity periods are reasonable and provide for flexibility in the case of changes in fishing seasons.

The draft policy also provides that "new cabin will not permit year-round occupancy." I find no statutory authority in ANILCA for such a restriction.

The word "immediate" preceding "family" should be deleted to allow extended family members and permanent residents to reside with the permittee. See, discussion of immediate family at page 2 supra.

(8) Non-compliance -- This section indicates that non-compliance with a permit stipulation may result in cancellation, non-renewal, or a violation citation. This provision should be amended to read that "willful" or "purposeful" non-compliance can result in these consequences. As the draft policy currently stands, even inadvertent or excusable non-compliance could have serious consequences.

The policy also provides that non-use may result in the cancellation or non-renewal of a permit. This violates Sections 1303(c)(2) and (d) of ANILCA. Before a permit may be revoked or discontinued under those sections, the Secretary must provide notice and a hearing, and must make findings that the use is a "significant detriment" or a "direct threat" to the purposes for which the refuge was established. The draft should be modified to reflect these statutory requirements.

The policy further provides that the permit may be immediately revoked "in extreme cases." This term should be defined; otherwise the policy leaves too much discretion in the hands of the refuge manager. In cases of immediate revocation, the refuge manager should present the permittee with a written notice setting forth the basis for the revocation as required by Section 1303(c)(2) of ANILCA.

The permittee should be entitled to an immediate hearing before the refuge manager to present facts in mitigation of the revocation. See, Section 1303(c)(2) of ANILCA. The refuge manager may uphold the revocation only if he "determines, on the basis of substantial evidence in the administrative record as a whole, that the use under the permit is causing or may cause significant detriment to the principal purposes for which the unit was established." See, Section 1303(c)(2) of ANILCA. An expedited

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Finally, this section allows an individual to "appeal any revocation or non-renewal to the Regional Director." A permittee should also have the right to appeal a violation citation to the Regional Director.

(9) Cabins exempted from the policy -- This section provides that cabins located on Native corporation lands (not subject to 22(g) restrictions) or State lands are not affected by this policy. This provision should also state that cabins located on pending or certified Native allotments are not governed by this policy. In addition, it should provide that Native lands reconveyed to other individuals or entities pursuant to Section 14(c) of ANCSA are not subject to the policy.

(13) Special use permit provisions -- The policy should provide flexibility in specifying the authorized activities and periods of use. Commercial fishermen must have the ability to use their cabins as fishing seasons dictate. Runs of anadromous fish can be early or late and commercial openings occur on different dates each year. A specific provision to allow commercial fishermen to use their cabins during the entire salmon season is essential and within the intent of ANILCA.

In addition, valid exercise of commercial fishing rights includes the flexibility to engage in more than one fishery, for example, herring in the spring and salmon or halibut in the summer. These activities and periods of use must be provided for in the final policy for cabin management.

(15) Special conditions -- The mandatory special conditions which would be imposed on all cabin permittees are overly restrictive and in some cases, likely to be legally unenforceable. Specifically:

(a) Immediate revocation for non-compliance with any law or permit condition, or cancellation during an emergency does not provide for due process under the law and is clearly contrary to the intent of ANILCA. Section 1303(c)(2) of ANILCA authorizes the Secretary to revoke a permit but only "after notice and hearing" and only after "he determines, on the basis of substantial evidence in the administrative record as a whole, that the use under the permit is causing or may cause significant detriment to the principal purposes for which the unit was established."

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(b) Requiring the permittee to be responsible for ensuring that other individuals adhere to permit conditions is untenable. It is unreasonable to require the permittee to be legally responsible for the actions of another. All individuals are legally responsible for their own actions. It should be made clear that a permit violation by an employee of a permittee is not sufficient basis for revocation or non-renewal.

(c) The word "cabin" should be replaced with "buildings." A permittee should have exclusive use of out buildings as well as his cabin and personal effects.

(d) Incidents involving wildlife should only have to be reported to one agency -- the Alaska Department of Fish and Game or the Fish and Wildlife Service, but not both.

(f) The draft requires cabin construction to be in compliance with Section 106 of the National Historic Preservation Act. The policy should set out what is required to comply with the Act, so permit holders will know exactly what is required of them without having to look up additional laws and regulations.

(g) Reasonable remodeling of a structure is customary and traditional and should not require prior written approval from the refuge manager. Such a requirement could constitute a 5th Amendment taking. See, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) ("While property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking.") Further, no definitions of "minor repairs" or "remodeling" are provided.

(h) Loaning of cabins is a customary and traditional use. For example, a cabin may be loaned to a relative in the course of subsistence activities. There is no statutory authority to support a ban on loaning cabins. The argument that an activity such as this is banned unless it is specifically authorized is faulty and does not conform with the spirit or the letter of ANILCA.

(16) Use of firewood -- The use of local firewood is inherent in the use of a cabin and is clearly a customary and traditional use. Requiring a special condition in a permit authorizing the use of firewood is unreasonable, unless there is specific evidence that the wood supply is depleted.

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(17) Appeals procedures -- When a renewal application is denied, the refuge manager should "automatically" provide the permittee with a copy of the appeals procedure; he should not have to specifically request it, because he may not know that there are avenues of appeal available to him.

An applicant should have 60 days, not just 30 days, to file an opening brief in an appeal. The applicant may wish to consult with an attorney which may be difficult if he is located in a remote location which is not served by telephone.

(18) Change of ownership and permit renewal -- The Service has not yet established the criteria by which the cabin and associated uses will be determined to be compatible with the purposes for which the refuge was established. The cabin management policies should clearly state the criteria to be used for making compatibility determinations. In addition, the policy fails to note the ANILCA Section 1303(d) requirement for "specific findings following notice and an opportunity for the permittee to respond" to compatibility determinations.

B. APPLICABLE TO EXISTING CABINS

(2) Permit application information --

(a) The word "reasonable" preceding proof" should be deleted. The term "reasonable proof" may have certain meanings within the law of evidence beyond what the drafters intended. Provision should also be made for oral documentation of use as authorized in 50 C.F.R. 36.41(a)(2) (1986).

(h) The term "substantial portion of time" is not defined. The customary and traditional use of cabins has no relationship to an undefined "substantial portion of time." Moreover, ANILCA contains no requirements for a minimum use threshold to establish customary and traditional use.

(i) The word "immediate" preceding the word "family" should be deleted.

(3) Cabin modification or rehabilitation -- A permittee desiring to modify or rehabilitate an existing cabin should not be required to seek the approval of the refuge manager. See, discussion of cabin modifications at page 7 supra.

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The policy also requires that modifications "will take on the character of the existing structure." It further requires that reconstruction of destroyed cabins "shall take on the character of the old structure." In some cases, the permittee may be able to improve on the character of an existing or old structure during modifications or reconstruction. For example, if a plywood cabin covered with tar paper could be replaced with a log cabin, this should be permitted. Some flexibility should be built into this requirement

(4) Abandonment -- This section defines abandonment as non-use for one year. This reference should be deleted.

There is no authority in ANILCA for such a provision. In fact Section 1303(c)(2) provides that a permit may only be revoked if "the use under the permit is causing or may cause significant detriment to the principal purposes for which the unit was established." It can hardly be said that non-use adversely affects the purposes for which the refuges were established.

In addition, Section 1303(d) provides that "nothing in this Act shall preclude the renewal or continuation of valid leases or permits in effect on the date of enactment of this Act for cabins," which would include non-use (emphasis added).

Furthermore, this provision has serious Constitutional problems. It may violate due process requirements and may constitute a taking. Further it may impair the right of interstate travel by prohibiting travel for periods of one year or longer.

(5) Permit renewal -- The draft policy provides that "the special use permit shall be renewed every five years upon request until the death of the last immediate family member of the claimant residing in the cabin at the time the permit is issued. . ." (emphasis added) The phrase "at the time the permit is issued" is not included in Section 1303(c)(1) of ANILCA governing renewal and should not be part of any cabin policy or regulations.

Under the draft as it is currently written, if a baby was born to a couple after a cabin permit was issued, the child, once he became an adult, would not be allowed to renew the permit upon the death of his parents. Section 1303(c)(1) of ANILCA, however, would allow him to renew. The cabin policy should conform with the clear letter of the

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This section also states that in the event of a sale of a cabin, the purchaser must qualify for a cabin permit. In the case of commercial set net sites, a site is composed of buildings that are in direct support of the permitted activity. The permitting requirement places a substantial portion of the seller's business assets outside the buyer-seller relationship to the detriment of the seller. This has the potential to drastically impact the value of a valid commercial fishing right.

The criteria to be used by the refuge manager to qualify a purchaser are not stated. The criteria for determining the qualifications of a purchaser should be developed in a formal rule making process, provided to all cabin owners, and should be acceptable to financial institutions that might finance a purchaser.

(6) Cabin occupancy -- The word "immediate" preceding the word "family" should be deleted along with the reference to "common law relationships" which are not recognized in Alaska.

In addition to trapping partners, hunting and fishing partners should also be allowed to occupy a cabin.

C. APPLICABLE TO NEW CABINS

(2) Customary and traditional use -- This section limits new cabins to subsistence users. It requires that an "applicant will have participated in the activity for a minimum of three years in the geographic area in order to establish his customary and traditional use." This provision may be in direct conflict with Constitutional case law providing a right to interstate travel and should be deleted.

In Shapiro v. Thompson, 394 U.S. 618 (1969), the United States Supreme Court held that shelter is a "necessity of life" which cannot be denied for failure to meet a one year residency requirement. The draft cabin policy proposes to deny a permit to construct shelter based on a three year residency requirement.

(3) Wilderness cabins -- This policy establishes that new cabins for trapping may be permitted in wilderness management areas. Similar provisions for guiding, subsistence, and commercial fishing shelters should also be included as authorized under Section 1316(a) of ANILCA.

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(5) Permit renewal -- The word "may" in the phrase "the special use permit may be renewed" should be replaced with "shall." Section 1303(d) of ANILCA requires the Secretary to renew a cabin permit unless he "issues specific findings following notice and an opportunity for the permittee to respond, that renewal or continuation of such valid permit constitutes a direct threat to or a significant impairment to the purposes for which a conservation system unit was established." The policy should reflect this statutory mandate.

(6) Construction specifications --

(a) Composition -- Construction with logs should be authorized automatically and should not require the refuge manager's approval.

(b) Size -- The Guidelines section of this policy provides that "the refuge manager shall consult with the permittee to determine the size, purpose, location, and number of related structures necessary for the permitted activity, but must be within the size limits set forth in this policy." Subsequently, the proposed construction specifications establish a general maximum size of 200 square feet for new cabins. ANILCA does not include such restriction on cabin size. The 200 square feet maximum for new cabins is unreasonably small, particularly for large families. The size restrictions should either be increased or deleted altogether.

For commercial fishing cabins, the policy states that "the size of the cabins and the type and size of other associated facilities will be guided by what is considered to be minimally necessary to carry out the activity in compliance with Section 304(2)(d) of the Lands Act. First of all, I would like to point out that there is no section 304(2)(d) in ANILCA. Section 304(d) requires the Secretary to permit the use of federal lands for cabins in the exercise of valid commercial fishing rights, subject to reasonable regulation. The question is what is "reasonable."

It is my understanding that in the past, refuge managers have not authorized adequate space for commercial set net fishermen. To resolve this problem, the burden of proof should be placed on the refuge manager to demonstrate that a particular building size would be detrimental to the purpose of the refuge.

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D. APPLICABLE TO COMMERCIAL CABINS

(1) Occupancy -- Occupancy of a commercial cabin is limited to "individuals involved in the commercial enterprise and their dependents," however, the term "dependents" is not defined. The term "family" should be substituted for "dependents." See, discussion of immediate family" at page 1 supra.

The section also indicates that "clients are permitted to occupy the cabin," however, this conflicts with the policy applicable to all cabins set out in Section VIII (A) (3). That section limits occupancy to "the permittee, immediate family, and guests" which does not include clients. In fact clients are specifically excluded from the definition of "guest."

The definition of guest should be amended to include clients. See, discussion of "guest" at page 2 supra. Section VIII (A) (3) should also be modified to make it clear that clients are permitted to occupy guide cabins.

(3) Use of cabins by guides -- This provision indicates that guides may use existing cabins if compatible with the purposes for which the refuge was established and "if necessary for the operation." If a guide's use of a cabin is compatible with the refuge's purposes, he should be permitted to use the shelter whether it is "necessary" or not.

If a guide had a special use permit in effect on December 2, 1980, the Secretary must renew it unless he "issues specific findings following notice and an opportunity for the permittee to respond, that renewal or continuation of such valid permit constitutes a direct threat to or a significant impairment to the purposes" of the refuge. The policy should be modified to reflect this statutory mandate.

(5) Use of cabins by commercial fishermen -- The policy as it is currently stated provides that the refuge manager "may" permit the use of a cabin for the exercise of valid commercial fishing rights if the use is consistent with the purposes of the refuge and is not a significant expansion of commercial fishing activity. The word "may" should be replaced with "shall" to comport with ANILCA.

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Section 104 mandates that the Secretary "shall" permit the use of federal land for commercial fishing cabins unless he determines after conducting a public hearing that the use is inconsistent with the purposes of the refuge and is a significant expansion of commercial fishing activity. The draft policy should also be modified to reflect the hearing and findings requirements.

In summary, the draft cabin policy must be amended to comply with the spirit and the letter of ANILCA. To the degree possible, I have tried to point out where the draft departs from the law. I hope my comments in that regard will be helpful as you begin the revision process. If you have any questions about my comments, please feel free to contact me.

With best wishes,

Cordially,

TED STEVENS

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cc: all D.J.U.

MEMORANDUM

October 26, 1984

TO: Alaska Land Use Council
 FROM: Staff Coordinators
 SUBJECT: Draft Report on Cabin Policy

*Adopted (attached) by
 ALUC on Nov 19
 with the following
 changes as hand
 use*

Enclosed for the consideration of the Council is the draft report of the Cabin policy work group. The report is organized into a Background and Legislative History Section and concludes with a section containing a set of eight recommendations for Council action.

The Staff Committee has the following recommendations:

1. Work group recommendation number 5. This item recognizes that there may have been a number of trespass actions pending either administratively or judicially as of the enactment of ANILCA on December 2, 1980. The work group recommendation suggests that persons with such pending action may have become eligible for permits under Section 1303 as of the enactment of ANILCA thus mooted the pending action.

The Staff Committee recommends that the work group seek a Solicitor's opinion on this matter and provide the Council with their advice and recommendations at the May Council meeting.

2. Work group recommendation number 7. This recommendation points out the apparent lack of a clear definitional distinction in ANILCA between the phrase "private recreational use" and "traditional and customary uses." The work group recommendation encourages federal agencies in Alaska to develop and employ a consistent definition of the concepts. The definition of these two concepts is of particular importance in that permits under authority of Section 1303(b) may not be issued for "private recreation use."

The Staff Committee recommends that the work group consult with the Solicitors office and develop a recommended definition of these concepts for consideration of the Council at the May Council meeting.

GUIDELINES FOR THE USE AND OCCUPANCY OF
CABINS ON PUBLIC LANDS IN ALASKA

Federal

BACKGROUND AND LEGISLATIVE HISTORY

There is a long established history of the use and occupancy of cabins on the public lands in Alaska both with and without benefit of authorizing permits. In most cases, the cabins are used for a variety of purposes including subsistence, mining, hunting and fishing, commercial outfitting and guiding, etc. In addition, many of the cabins could have been permitted under long established authorities but instead the construction and use of cabins, for the most part, was simply allowed to continue with only a minimal effort on the part of the land management agencies to enforce compliance with permitting requirements. There are many reasons that this was allowed to happen including lack of manpower and funding, the vast distances in Alaska, the low density of cabins relative to the large amount of public land, the small population of Alaska, and, most significantly, the traditional expectations regarding cabin occupancy and use in Alaska.

Over the years some of the once applicable permitting authorities have lapsed as in the case of lands once open to entry but now closed. However, the most significant change was the passage of ANILCA (PL 96-487) which reclassified millions of acres of public lands into Conservation System Units to be managed for specific purposes. As a result of ANILCA the land management agencies charged with the administration of the various CSU's have limited authorities to grant permits for cabin use and occupancy. Consequently, continued use and occupancy of a significant number of cabins on the new CSU's is in jeopardy.

The Congress in passing ANILCA recognized the unique situation in Alaska with respect to cabins and at Section 1303 provided the Secretaries of Interior and Agriculture with specific authorities to issue permits to allow for the continuation of such uses. The authorities were designed to reflect the differing mandates of the federal land management agencies. The Senate Committee report number 96-413 provides insight into the intent of Congress in providing these new permitting authorities. At page 78 the report states:

Section 1303: Use of Cabins and Other Sites of Occupancy on Conservation System Units.

This section provides the Secretaries with authority to permit the (1303z) continued use of cabins in Alaska even though the occupants may not hold legal title to these cabins.

The Committee is familiar with the use by Alaska residents of cabins and other sites of occupancy on lands which are located in the various units

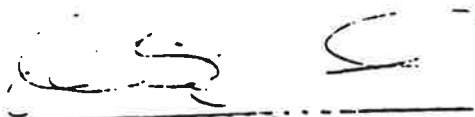
6. Cabins or other structures on NPS lands the use or occupancy of which commenced after December 1, 1978 and new cabins or structures on NPS lands after passage of the Act.

Each of these categories provides criteria for the continuation of cabin use and occupancy on Federal lands in Alaska. Over time, the provisions of Section 1303 will result in a significant reduction in the number of privately owned cabins on the public lands in Alaska. The differing criteria are a reflection of Congressional intent to balance the CSU values to be protected against fair and equitable treatment of persons using and occupying cabins on public lands.


3.

Work group recommendation number 8. This work group recommendation encourages federal agencies in Alaska in implementing Section 1303 to consult closely with the Bureau of Indian Affairs and the USDI Solicitors Office to avoid adversely affecting the rights of claimants under the Native allotment program whose land claims are yet to be adjudicated.

The Staff Committee recommends that the work group give this item additional attention including consultation with the Bureau of Indian Affairs, the USDI Solicitors Office and others as appropriate and provide the Council with their advice and recommendations at the May Council meeting.



Marvin S. Frankel
State Staff Coordinator



Ronald B. McCoy
Federal Staff Coordinator

established by this Act. The use of such cabins has become known nationwide because of the descriptions of John McPhee in his book "Coming into the Country." The types of occupancies described in this book provide a difficult question for the Committee because in many instances it appears that the occupants do not hold any legal interest in the land on which they occupy. Nevertheless, the (1303z) Committee believes these residents carry on a unique lifestyle which may further the purposes of or may not necessarily endanger the units established by this Act. While recognizing that many of these occupants hold no legal interest in these sites, it is the intent of the Committee that the Secretary be fair and equitable in his administration of the permitting authority granted under provisions at this Act. In some cases, the residents of Alaska have lived on these sites of occupancy for a number of years but were unaware of the legal requirements of filing under the various public land laws. The Committee intends that the Secretary utilize (1303z) this permitting system to permit the continuation of this life style wherever possible and where there is no real conflict or danger to the resources for which the units have been established.

The Committee adopted an amendment which provides for the continuation of valid leases or land use permits for cabins, homesites, or (1303z) similar structures on Federal lands. The Secretary is directed to renew existing valid permits or leases unless he determines the use of the lease is a direct threat or significant impairment to the values of the units.

Section 1303 of ANILCA provides the specific Congressional direction and authority for the permitting of cabins on Federal lands in Alaska. The section defines six categories of cabin occupancy and use as follows:

1. Cabins with valid existing leases or permits at the time the Act was passed.
2. Cabins on non-National Park System lands which were not under a permit or lease at the time the Act was passed.
3. Cabins constructed after passage of the Act on non-National Park Service lands.
4. Cabins existing prior to December 18, 1973 on National Park Service lands.
5. Cabins or other structures on NPS lands, the use or occupancy of which commenced between December 18, 1973 and December 1, 1978.

ALASKA LAND USE COUNCIL RECOMMENDATIONS

1. In implementing Section 1303 of ANILCA federal agencies in Alaska should adopt regulations which, to the extent allowed by their differing mandates are consistent across all agencies.

2. In implementing Section 1303 of ANILCA federal agencies in Alaska should adopt regulations which provide for the issuance of a permit to a claimant who by application:

A. Reasonably demonstrates by affidavit, bill of sale, or other documentation, proof of possessory interest or right of occupancy in the cabin or structure. Proof of actual occupancy during specific periods or for minimum length of time should not be required;

B. Submits a sketch or photograph of the cabin or structure and a map showing its geographic location;

C. Agrees to vacate the cabin and to remove all personal property from the cabin or structure upon expiration of the permit; and

D. Acknowledges in the permit that the applicant has no interest in the real property on which the cabin or permit is located.

Claimants with pending Native allotment applications, ^{valid} mining claims or other ^{valid} ~~land~~ ^{from public land law} claims are exempt from ~~these~~ ^{sections} sections. Real property interests of such claimants will be determined through appropriate adjudication processes. ^{subagency.}

3. In renewing permits under Section 1303 of ANILCA for life of claimant and immediate family, federal agencies in Alaska are encouraged to adopt by regulation a definition of eligible immediate family members as follows: "last immediate family member of the claimant residing in the cabin or structure under permit" means any person related to the claimant by blood, marriage or adoption and whose eligibility as an immediate member is so declared by the claimant as a part of the initial permit application or as a part of the claimant's subsequent renewal applications.

4. In issuing permits under Section 1303 of ANILCA federal agencies in Alaska are encouraged to include only those conditions and stipulations that meet the following tests:

A. Permits issued under authority of Section 1303(b) - permit conditions and stipulations should be directly related to insuring that the customary and traditional uses are compatible with the purposes for which the unit or area was established. (The provisions of Section 1303(b) apply to federal public lands in Alaska other than those administered by the National Park Service.)

B. Permits issued under authority of both Section 1303(a) and (b) - permit conditions and stipulations should be directly related to insuring that customary and traditional uses will not cause significant detriment to the principle purposes for which the unit or area was established. (Section 1303(a) is specific to lands administered by the National Park Service.)

C. Specified periods of availability for use by the claimant of the cabin or structure should be avoided unless clearly necessary to insure compliance with criteria A and B above.

5. In implementing Section 1303 of ANILCA, federal agencies in Alaska are encouraged to adopt regulations that recognize that a claimant with a trespass action pending either administratively or judicially as of 12/2/80 may be entitled to apply for and receive a permit under Section 1303 of ANILCA if otherwise conforming to the requirements of law. Trespass actions finalized administratively and judicially prior to 12/2/80 may not be affected by Section 1303.

6. In implementing Section 1303 of ANILCA, federal agencies in Alaska are encouraged to adopt regulations specifying that permits issued under Section 1303 do not in and of themselves authorize commercial uses, but that such cabins or structures may be used for commercial purposes if such commercial uses are permitted under other appropriate agency authorities.

7. In implementing Section 1303(b) of ANILCA, federal agencies in Alaska are encouraged to develop and employ a consistent definition of "private recreation uses" as opposed to "customary and traditional uses." The definition of these two concepts is of particular importance in that permits under authority of Section 1303(b) may not be issued for private recreation use.

8. In implementing Section 1303(b) of ANILCA, federal agencies in Alaska are encouraged to consult closely with ^{BLM,} ~~the~~ Bureau of Indian Affairs and the USDI Solicitors Office to avoid adversely affecting the rights of claimants under the Native allotment program.

OFFICE OF THE GOVERNOR
DIVISION OF GOVERNMENTAL COORDINATION

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February 9, 1989

Mr. Walter O. Stieglitz
Regional Director
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, AK 99503

To	HAB	TAT	INT	DATE
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COMMISSIONER'S OFFICE
RECEIVED
FEB 13 1989

DEPARTMENT OF FISH AND GAME

Dear Mr. Stieglitz:

The State of Alaska appreciates the opportunity to review the U.S. Fish and Wildlife Service's (FWS) revised draft Cabin Management Policy for National Wildlife Refuges in Alaska. We appreciate the significant changes that the FWS made to this draft and the time the FWS has devoted to meeting with state agency representatives to discuss cabin management issues. The attached comments summarize our remaining concerns with this policy. We are hopeful that additional resolution of these concerns can occur before the policy is finalized and draft regulations are prepared.

Sincerely,

Robert L. Grogan
Director

Michelle Sydemar

By: Michelle Sydemar
State CSU Coordinator

Attachment

cc: Commissioner Collinsworth, DFC
Commissioner Gorsuch, DNR
Commissioner Hickey, DOTPF
Commissioner Kelso, DEC
Mr. John Katz, Office of the Governor
Mr. Denby Lloyd, Office of the Governor

ALASKA DEPT. OF
FISH & GAME

FEB 16 1989

REGION II
HABITAT DIVISION

STATE OF ALASKA
COMMENTS ON
THE
U.S. FISH AND WILDLIFE SERVICE'S
REVISED DRAFT CABIN MANAGEMENT POLICY
FOR
NATIONAL WILDLIFE REFUGES IN ALASKA

GENERAL COMMENTS

I. New Commercial Use Cabins in Wilderness Areas

The state urges the U.S. Fish and Wildlife Service (FWS) to re-evaluate its policy prohibiting the construction of new cabins in support of commercial activities in designated Wilderness. Although the Wilderness Act generally prohibits "structures" within Wilderness, several sections of the Alaska National Interest Lands Conservation Act (ANILCA) authorize the construction and use of cabins and other facilities within Wilderness areas in Alaska. In particular, Section 1303(b) of ANILCA authorizes the construction of new cabins in Wilderness if "necessary to provide for the continuation of an on-going activity or use otherwise allowed within the unit or area where the permit applicant has no reasonable alternative site for constructing a cabin" and if "compatible with the purposes for which the unit or area was established."

The FWS appears to be interpreting this section of ANILCA as not applying to Wilderness areas; however, Section 1303(b) clearly indicates that Wilderness areas are included within its scope. This section reads as follows: "IMPROVED PROPERTY ON OTHER UNITS OR AREAS ESTABLISHED OR EXPANDED BY THIS ACT. The following conditions shall apply regarding the construction, use and occupancy of cabins and related structures on Federal lands within conservation system units . . ." (Emphasis added.) Section 102(4) states that "The term 'conservation system unit' means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act . . ." (Emphasis added.) Thus, Wilderness areas clearly fall under the purview of this section, and cabins for on-going commercial activities, such as guiding and commercial fishing, should be allowed under limited circumstances in designated Wilderness.

Additional clarification regarding this issue is provided in ANILCA's legislative history. For example, Senate Report 96-413 (Committee on Energy and Natural Resources, November 14, 1979) at page 308 states:

Section 13.15: Wilderness Management: It is recognized that some uses which are allowed within wilderness areas designated by this bill, most notably guiding and trapping, may in some areas require the use of rudimentary line cabins, shelters, caches and other minimal support facilities. Without recognition of these incidental uses and facilities, guiding, trapping and other allowed uses, while technically allowed, would be impossible to conduct as a practical matter. Therefore, the Committee intends that those related uses and facilities required to accomplish uses otherwise allowed within wilderness areas shall also be allowed, consistent with the allowed use and the purposes of the areas designated as wilderness.

On page 309, this report goes on to state:

Section 13.16: Allowed Uses: This section, adopted as a committee amendment, clarifies that activities incidental and necessary to allowed uses within conservation system units, including wilderness areas, shall be permitted, subject to reasonable regulations. The amendment provides that equipment and facilities, which would be utilized in carrying out permitted activities such as guided hunting, sport hunting, and commercial fishing, shall be permitted, but the Secretary may through reasonable regulations ensure these activities are made compatible with administration of the area. This amendment applies to the continuing use of existing facilities and equipment and to the use of new facilities and equipment.

The State of Alaska therefore urges the FWS to provide for the construction and use of new cabins in support of commercial activities, consistent with the clear language of ANILCA and its legislative history.

II. Trapping Cabins in Wilderness

The state requests that the FWS reconsider its proposed limitation on the use of trapping cabins in designated wilderness to "interior Alaska" and to areas "where trapping is a customary and traditional use." There is no basis in the law or in ANILCA's legislative history for this limitation, and none is provided in the draft policy. In addition, this limitation does not appear to be warranted or to make sense in terms of the protection of refuge resources or the needs of refuge users. Trapping has traditionally occurred on refuges throughout the state, and the need for and impacts of cabins in support of trapping is not significantly different in the Interior than it is in other regions of the state.