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Robert Barbee, Field Director
National Park Service
2525 Gambell Street, Room 107, Docket 1307
Anchorage, Alaska 99503-2892

David Allen, Regional Director
U.S. Fish and Wildlife Service
1101 East Tudor Road
Anchorage, Alaska 99503

Dear Mr. Barbee and Mr. Allen:

The State of Alaska has reviewed the draft regulations implementing visitor service authorizations under Section 1307 of the Alaska National Interest Lands Conservation Act (ANILCA). This letter represents the consolidated comments of the state's resource agencies. Because the regulations proposed by National Park Service (NPS) in 36 CFR Part 13 and by U. S. Fish and Wildlife Service (FWS) in 50 CFR Part 36 are substantially similar, we are providing combined comments on both sets of regulations.

We appreciate the NPS and FWS finally proposing these regulations. Since passage of ANILCA in 1980, many Alaskans have been interested in offering services or continuing to provide services within parks, preserves, refuges, wild and scenic rivers, wilderness units and other conservations system units. Although the proposed regulations appear to reflect much of the overall intent of the statute, we believe portions of the regulations do not provide the full extent of local preference envisioned by Congress in ANILCA, specifically:

A. The definitions of "*controlling interest*" and "*historical operator*" inappropriately exclude those who have been substantially involved in pre-ANILCA visitor services if they have not been listed as the sole operator (e.g. family members or partners).

B. Termination of "*historical operator*" rights must be based on reasonable, specific criteria to prevent arbitrary and/or subjective decisions by unit managers.

C. Termination of "*historical operator*" rights based on failure to provide services "*for a period of more than eleven months*" is too restrictive because
   1) it does not provide exceptions for natural disasters, and
   2) it retroactively excludes those who may have missed one or more years since 1980 - before this criteria was proposed.

D. The relationship of "*historical operator*" rights and the ability to provide an increase in services beyond 1979 levels should be clarified.

E. The "*35 straight-line miles*" residency limit for local preference inappropriately excludes many people who should have a legitimate preference within the intent of ANILCA. Furthermore, exclusion from the local resident preference of those living in communities with a population of 5,000 or more is too restrictive. The Alaska Land Use Council's 1989 recommendations for a three-tiered preference provides a more equitable model.

F. Confusion about the relationship of "*local residents*" and "*corporations*" in the proposed regulations could inadvertently exclude local Native corporations from their statutory preference if they are headquartered in a larger Alaskan city.

G. Allowing a "*preferred operator*" a second chance to meet an otherwise successful bidder's proposal could have the unintended effect of discouraging high quality proposals.

H. The definition of "*adequate services*", defined only in the regulations for the U.S. Fish and Wildlife Service, appears to be of questionable value and is too subjective.

Each of these points is discussed in more detail below. To assist the reader's understanding of the state's rationale, selected sections of the statute are quoted as appropriate.

Continuation of Pre-ANILCA Services

The statute states:

> *1307.(a) Continuation of Existing Visitor Services--. . .*
> *the Secretary, under such terms and conditions as he determines are reasonable, shall permit* ***any persons*** *who, on or before January 1, 1979, were engaged in adequately providing* ***any*** *type of visitor service within* ***any*** *area established as or added to a conservation system unit to continue providing such type service and similar types of visitor services within such area . . .. (emphasis added)*

If consistent with the unit's purposes, the statute protects the economic enterprises of "*any persons*" which would otherwise be automatically jeopardized by creation of CSUs. Congress' use of the term "*any*" directs a broad interpretation by the federal agencies.

In 1989, the Alaska Land Use Council (ALUC), an interagency organization established by ANILCA to monitor the Act's implementation, addressed Section 1307. The ALUC Staff Committee, representing state, federal and native organizations, developed numerous recommendations, including urging the agencies adopt a definition of "*person*" to include *"an individual who represents himself or herself, a corporation, partnership or other business entity. . .."* The NPS analysis accompanying the proposed regulations hints at such a definition, yet application of the proposed definitions would effectively eliminate persons who should be protected according to the statute. For example:

A. The definitions of "*controlling interest*" and "*historical operator*" inappropriately exclude those who have been substantially involved in providing pre-ANILCA visitor services if they have not been listed as the sole operator (e.g. family members or partners).

13.81 Definitions and 13.82 Services on or before January 1, 1979: Two definitions proposed by NPS address: "*controlling interest*" and "*historical operator*". These terms (which are not used in ANILCA) are defined to restrict the protections which the statute extends to "any persons". These definitions contradict Congressional intent to protect ventures in place prior to the passage of ANILCA. The unnecessary restrictiveness of the proposed definitions is illustrated in application of 13.82(e) and (b) and 36.37(c)(2):

> *...the rights of a historical operator under this subpart shall terminate upon a* ***change****, after January 1, 1979, in the* ***controlling interest*** *of the historical operator through sale, assignment, devise, transfer or otherwise. (emphasis added)*

This language directs that a family-owned business venture, represented by "Dad" but which really included other members of the family who contributed to its success, will be terminated without rights (affecting several persons' livelihood) when the representative *"controlling interest*" and/or "*historical operator*" dies. The proposed regulations consider this a *"change*" because the regulations recognize only one rather than "*any persons*" involved in the operation as having historical rights. We urge the two definitions be deleted and replaced with provisions that recognize and protect continued operation by "*any persons*" who substantially contributed to historical operation of the business.

B. Termination of "*historical operator*" rights must be based on reasonable, specific criteria to prevent arbitrary and/or subjective decisions by unit managers.

If a "*historical operator*" declines to accept an offer to renew his permit, the proposed regulation directs that the person(s)' rights as "*historical operator*" are terminated. We urge

that this regulation be revised to clarify that any new terms or conditions must be reasonable and necessary. This change should prevent a unit manager from arbitrarily using permit stipulations to terminate a historical operator based on personal preference or philosophical differences.

C. Termination of "*historical operator*" rights based on failure to provide services "*for a period of more than eleven months*" is too restrictive because the provision 1) does not provide exceptions for natural disasters, and 2) retroactively excludes those who may have missed one or more years since 1980 - before this criteria was proposed.

Application of 13.82(d) and 36.37(c)(4) appear to eliminate the protections Congress provided for "any persons" by terminating the persons rights if he "*fails to provide visitor services for a period of more than eleven consecutive months*". In Alaska, given our unpredictable weather and other natural phenomena (e.g., volcanic eruptions), health emergencies, and variable economic conditions, these proposed regulations unnecessarily disqualify individuals who for valid reasons cannot operate for one or more seasons. If the final regulations include any such standards of minimum operation, we request additional provisions protecting the continuation of historical operator status, e.g. if a future lapse in the permitted period of service occurs for reasons beyond the control of the operator, and if operator notifies the CSU manager as soon as practicable.

Retroactive application of the "*eleven consecutive months*" criteria starting in 1980 is particularly onerous given the long period of time without regulations.

D. The relationship of "*historical operator*" rights and the ability to provide an increase in services beyond 1979 levels should be clarified.

Two separate sections addressing "*historical operators*" reflect some confusion or possibly a contradiction: 36.37(c)(1) and 13.82(a) state *"an historical operator may be permitted under separate authority to increase the scope and level of visitor services provided prior to January 1, 1979, but no historical operating rights shall be obtained in such increase*". This language is confusing in light of 36.37(c)(6)(iv) and 13.82(f)(4) which do not allow the agencies to issue or amend an historical operators permit if doing so would result in an increase in the scope and level of service in excess of those provided by that operator as of January 1, 1979.

Public use is increasing throughout Alaska conservation system units, often with the encouragement of the managers. Therefore, it is inappropriate to arbitrarily limit services to 1979 levels. A more appropriate yard stick, consistent with other portions of ANILCA (e.g., 1307(b) would be consistency with the unit's purposes and/or the absence of measurable impact to unit resources. We presume the regulations intend that if a historical operator is permitted to increase his operation, only the 1979 level of service is subject to historical operating rights. At a minimum, these sections should be further clarified.

Preference for New Operations

The statute states:

> *Section 1307.(b) Preference.-- . . . in selecting persons to provide (and in contracting for the provision of) any type of visitor service for any conservation system unit, except sport fishing and hunting guiding activities, the Secretary--*
> *(1) shall give preference to the Native Corporation which the Secretary determines is most directly affected by the establishment or expansion of such unit by or under the provisions of this Act:*
> *(2) shall give preference to persons whom he determines, by rule, are local residents;*

Similar to Section 1307(a), the definitions applied to 1307(b) unnecessarily restrict persons and corporations from being eligible for the statutory preference intended by Congress. For example:

13.83 Preference in granting services after January 1, 1979: The discussion contained in the Section-by-Section Analysis accompanying the proposed regulations reference a number of unnecessarily restrictive provisions, which are incorrectly construed to be congressional intent. The ALUC staff members (including NPS and FWS representatives) who studied this issue and developed interagency recommendations, prepared an exhaustive review of the preference provisions of this section. The proposed regulations depart from the ALUC recommendations in two major ways. First, the regulations chose very narrow criteria for defining *"local resident"*; and secondly, the definitions of *"corporations"* is not consistent with congressional intent.

E. The "*35 straight-line miles*" residency limit for local preference inappropriately excludes many people who should have a legitimate preference consistent with the intent of ANILCA. Furthermore, exclusion from the local resident preference of those living in communities with a population of 5,000 or more is too restrictive. The Alaska Land Use Council's 1989 recommendations for a three-tiered preference provides a more equitable model.

After considerable deliberation, the ALUC recommended the 1307(b) preference *"should be provided to all Alaska residents who meet the definitions"*. The recommendations then included a three-tiered approach to apply if allocation required more refinement in order to grant a preference, as follows:

> *First Tier - Resides within the boundary, or within 35 miles of the boundary, of a CSU for which the proposed services are to be provided.*
>
> *Second Tier - "Resides within the boundary, or within 100 miles of the boundary, of the CSU for which the proposed visitor services are to be provided.*

Third Tier - Resides within the State of Alaska.

In contrast, the NPS and FWS intend that a "*local resident as defined in these proposed regulations means a person living within 35 straight-line miles of a park area boundary*" AND EXCLUDES "*persons living in communities with a population of more than 5,000*". This would exclude persons living in numerous communities around the state who are most affected by adjacent conservation system units. For example, residents of Kodiak are excluded from having a historical preference to conduct services in Kodiak National Wildlife Refuge.

The Section-by-Section Analysis accompanying the regulations incorrectly implies that Congress gave some direction that this preference was to be given to residents of "sparsely populated areas of Alaska". A review of the legislative history for this section reveals no such qualification. In fact, as described by the ALUC staff recommendations, Congress seemed intent on protecting all Alaskans, with the greater preference given to proximity in cases where allocation of preference required further distinguishing criteria.

The ALUC recognized the limitations of a 35 mile proximity criterion and listed communities of residents "*who logically were most familiar or impacted by a particular CSU*" that would be excluded from the narrow 35 mile criterion. The examples they cited include:

* Kotzebue - 75 miles from Kobuk Valley National Park
* Kotzebue - 45 miles from Bering Land Bridge National Preserve
* Nome - 75 miles from Bering Land Bridge National Preserve
* Yakutat - 40 miles from Glacier Bay National Monument
* Juneau - 40 miles from Glacier Bay National Monument
* Anchor Point - 40+ miles from Kenai Fjords National Park
* Copper River Basin - Variable to 60 miles from Wrangell- St. Elias Park/Preserve

The ALUC staff further recommended that the preference system be accompanied by a definition of the term "*local resident*" (used solely in the implementation of ANILCA 1307(b)(2)), as follows:

> *The term "local resident" shall be any person 21 years of age or older who maintains his/her primary place of residence within the area(s) defined in Section III(B). Factors determining the location of a person's primary place of residence may include, but are not limited to, the permanent address indicated on licenses issued by the State of Alaska, federal and state tax returns, and voter registration.*

This definition should apply to all "*all Alaska residents who meet the definitions*" [tiers] quoted above. We therefore request that the proposed definition of local resident be deleted and replaced with the definitions developed by the ALUC Staff Committee.

F. Confusion about the relationship of "*local residents*" and "*corporations*" in the proposed regulations could inadvertently exclude local Native corporations from their statutory preference if they are headquartered in a larger Alaskan city.

The ALUC staff also addressed the issue of defining corporations under this preference, which again is not reflected in the proposed definition. The ALUC recommendation states:

> *Another consideration was the differentiation, if any between individuals and corporations or other business entities. Analysis of the legislative history revealed that Congress consistently used the word "individual" when discussing ANILCA Section 1307.* ***The only time Congress used the word "corporation" was in reference to Native Corporations*** *. . . (emphasis added)*
>
> *Any business whose principal owners would be "local residents" could be considered a local business. Any business whose principal owners would not be "local residents" could be considered the same as any person maintaining legal residence outside the local area and merely operating a business within the area.*

We recommend consideration of the following ALUC Staff Committee definition of "*person*" which eliminates the need to define "*corporation*" as contained in the proposed regulation:

> *The term "person" means an individual who represents himself or herself, a corporation, partnership, or other business entity, as long as (1) the person has vested controlling authority over the management and operation of the business* [thus including all owners/operators], *and (2) the business entity is licensed to control* [and conduct] *business in the State of Alaska under applicable federal, state and local law.*

The application of preference to "*preferred operators*" using the definitions of "*corporation*" and "*Native Corporation*" seems to exclude what would otherwise be a local corporation under ANILCA, but is eliminated by 13.81(e)(2) if its headquarters is in Anchorage or Fairbanks. Although the agencies may not have meant such an interpretation, it appears a manager could eliminate consideration of, for example, NANA Corporation or Arctic Slope Regional Corporation whose stockholders reside in and around conservation system units.

We urge substitution of the ALUC definition of "*persons*"; OR at a minimum, clarification of the process for granting preference to a corporation versus a person. The regulations also do not seem to provide for corporations that are family businesses or combinations of family, local investors and outside investors which operate only on a local level.

Process for Granting Preference and Other Issues

G. Allowing a "*preferred operator*" a second chance to meet an otherwise successful bidder's proposal could have the unintended effect of discouraging high quality proposals.

36.37(d)(2) and 13.83(b) allow a "*preferred operator*" a second chance to submit an offer after reviewing an otherwise successful bidder's proposal. While we support the overall goal of providing the intended local resident and Native corporation preference, we are concerned that this particular provision will discourage other potential bidders from even submitting a bid, given the likelihood that if they submit the best proposal, it will later be matched by a preferred operator. By discouraging a wide range of bids, these regulations could have an unintended negative impact on the quality and variety of services and accommodations available to visitors. If this system is retained in the final regulations, we also caution against allowing competing businesses access to proprietary or confidential information submitted by other applicants. As an alternative, we suggest consideration of some form of bidder's preference in the form of a percentage or point preference, or the tiered approach recommended by the ALUC Staff Committee. Such a system is used successfully to favor state residents under the state's procurement code. In addition, the development of a specific bidder package should be considered to help create a level starting point for consideration of proposals.

H. The definition of "*adequate services*", defined only in the regulations for the U.S. Fish and Wildlife Service, appears to be of questionable value and is too subjective.

36.37(b)(1) of the FWS regulations defines the term "*adequate services*" as services which are "*safe, sanitary, and attractive, at levels visitors would expect from the private sector operating outside U.S. Fish & Wildlife areas, have been evaluated as satisfactory, and meet the needs and requirements of the Service and the refuge in which the service is authorized.*"

We question why the FWS provides such a definition while the NPS does not. A single definition for both agencies would appear to make more sense. We also question the necessity of such a definition. If such a definition is necessary, it should be developed with the input of the visitor service industry and the public. The proposed definition appears to be too vague to provide the public or visitor industry with much useful direction; and it gives the FWS too much latitude to make subjective judgements. Before proceeding further, we suggest the NPS and FWS work with affected interests to determine the necessity and adequacy of the proposed definition.

Section 1307 Regulations and Other Agencies

In closing, we question why the Department of the Interior did not choose to include the Bureau of Land Management in development of uniform regulations for the Alaska units. The statutory direction is not distinguished by managing agency, but is the same for all Interior agencies. Admittedly, BLM has fewer acres within CSUs than the NPS or FWS; yet the Steese and White Mountain units, along with the wild and scenic river corridors contain visitor services. We also question why the U.S. Forest Service was not involved, since opportunities are provided for visitor services in Forest Service Wilderness areas which resemble those available in other Alaska units. We recognize this issue is beyond the scope of these individual draft regulations, so by copy of this letter we are addressing this concern to the BLM and USFS.

Thank you for the opportunity to provide these comments. If you have any questions, please feel free to contact this office at 269-7477.

Sincerely,

Sally Gibert
State CSU Coordinator

cc:
Molly Ross, Special Assistant to the Assistant Secretary for Fish, Wildlife and Parks
Tom Allen, State Director, Bureau of Land Management
Phil Janek, Regional Forester, U. S. Forest Service
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