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March 5, 1997

Bureau of Land Management
Room 401LS, 1849 C Street, N.W.
Washington, D.C. 20240

Attn: Erica Petacchi

Subject: AC30 - Draft Regulations - Law Enforcement - Criminal

Dear Ms. Petacchi:

The State of Alaska has reviewed the draft regulations concerning Criminal Law Enforcement under the Bureau of Land Management, published in the Federal Register on November 7, 1996. The package proposes to consolidate in one place various citation and penalty clauses scattered throughout 43 CFR (the exception is law enforcement clauses dealing with leasable and locatable minerals, which would stay in their current location). This letter represents the consolidated comments of the State's resource agencies.

Consolidation of most BLM law enforcement provisions in a new Part 9260 is sound. The change should reduce the bulk of the regulations, eliminate duplication, allow standardization of procedures that currently have needless minor differences, and make it easier to find the rules. BLM's effort to put the regulations in plain English is also laudable. While most of the proposed revisions do amount to basic housekeeping, there are, however, several new parts that appear to extend BLM's management authority beyond that specifically allowed by statute, in spite of BLM's claims to the contrary. Additionally, other new parts outline statutory authorities which do not appear in the current regulations. While the State is generally supportive of most of these regulations, we do find that several raise important issues of concern, most notably:

- inappropriate application of BLM enforcement to certain water bodies (e.g. Section 9260.7);
- keeping "willful and knowingly" penalties (primarily mining) in their existing location rather than in the new section;
- lack of recognition of key exceptions for Alaska pursuant to the Alaska National Interest Lands Conservation Act (ANILCA).

On the first point about inappropriate extension of federal authority on non-federal land, the State does not yield authority over waters whose beds are state-owned and managed by the Department of Natural Resources. On the other hand, in light of decreasing budgets, the State is willing to cooperate with federal and private upland managers in addressing unlawful activities, and some of the proposed regulations facilitate such cooperation.

Regarding the second item, since the objective of the proposed regulations is to make it easier to find the “prohibited acts” provisions, the same rationale should also apply to the “knowing and willful” enforcement provisions. We recommend consolidating both these categories. The continued artificial separation of the enforcement authority implies that BLM enforcement under Groups 3000 to 3800 is stronger. If it is not prudent to combine all the enforcement regulations in one place, then the title of Part 9260 should be revised to reflect the fact that it is not complete. For example it could read “Law Enforcement for Surface Use, General” or “Law Enforcement other than Section 303 FLPMA, General”.

Remaining comments are organized chronologically.

Section 9260.2 should more explicitly cite the authority of the Secretary of the Interior through the Director, Bureau of Land Management to issue use authorizations for land or water not under the direct control of BLM. This authority is especially important in defining how the BLM intends to apply civil or criminal penalties against persons who are engaged in an activity on water bodies that are not public land as defined by FLPMA. Any definition of BLM authority in Alaska extending to non-public land and resources needs to consider the special compromises embodied in the Alaska Statehood Act, the Alaska Native Claims Settlement Act and ANILCA. Elsewhere in this section, BLM should list the prohibited acts on non-public land that are subject to BLM enforcement penalties.

Section 9260.4(ii)(4)&(5) appears to provide BLM enforcement officers authority to search without warrant, or to seize property (evidence) without warrant. If the relevant federal law or rule of law requires a warrant, then the wording should be sufficiently defined for a lay person to understand when the BLM law enforcement officer is or is not violating their protected rights.

Section 6260.5. Following this section, add a new section addressing subsurface authorizations in Groups 3000-3800.

Section 9260.6 defines “highway, road, or trail” as being publicly *operated or maintained*. This definition ignores two other highway, road or trail conditions: RS 2477 state owned rights of way that may or may not be currently maintained by a public entity, and the vast number of highways, roads or trails that are maintained by a private entity under authorization from an appropriate public entity that may permit public use. For example, a forest harvest road that also is left open for wildlife viewing and hunting users.

Also, we recommend adding a definition covering BLM's enforcement authorities for aircraft landings on public land as defined by FLPMA. These should include: designated landing sites for fixed-wing and/or rotor aircraft; regularly used but undesignated landing sites for fixed-wing or rotor aircraft; and hot air balloons as well as motorized and non-motorized hang gliders.

Sections 9260.6 and .7 define several types of land resources such as an "outstanding natural area," "research natural area," "area of critical environmental concern," "scientific resource," "special management and control," and "paleontological resources" but fails to link these terms to a delineated area in a *completed* land use plan prepared by the responsible BLM official. Are these special areas to be appropriately marked on the ground so that the users of public land are reasonably aware that special enforcement conditions will be applied by BLM?

Section 9260.6 defines the terms "pollute" and "contaminate" *waters*. This appears to be an overlap of EPA and state jurisdiction. The authority for BLM to issue and/or enforce NPDES discharge permits is not clear and may place a responsible person in jeopardy of other state and federal reporting requirements. Accordingly, this authority should be either deleted or clarified so that the lay public can understand the limitations of BLM enforcement authority over pollution and contamination on public land in contrast with other federal and state pollution and contamination enforcement authorities over water. This distinction could be done in a manner similar to the way hunting and fishing enforcement is described in sections 9269.8 and .24 of these regulations.

Section 9260.6 defines mechanical equipment in a way that excludes canoes, rafts, and kayaks that are paddled. Is this intended, since the BLM enforcement regulations specifically included both a bicycle and a hang glider that are generally propelled by human power?

Section 9260.7. The regulations assert that the civil penalties will also apply to "*...unauthorized activities on or having a clear potential to affect water bodies on or adjacent to BLM lands.*" Consistent with December 3, 1996 comments to BLM (attn: Gary Marsh) on wild and scenic river regulations, the State opposes the apparent extension of federal authorities over non-federal land. In its discussion of the proposed regulations (61 FR 57606) BLM asserts that this statement is "not an attempt to establish ownership over those waters [on or adjacent to BLM lands], but an attempt to clarify BLM's jurisdiction for protection of resources." No citations of authority are given for this extension.

Further, the regulations should make it very clear that the term "*unauthorized*" does not apply when there is no authority for BLM to either approve or disapprove of an activity that is not on public land under its jurisdiction. Likewise, the term "*clear potential to affect water bodies on or adjacent to BLM lands*" should be defined. It is recommended that the words "finding that there is a direct and adverse affect" be substituted for the words "*clear potential to affect*". Also, does "*adjacent*" mean "near or close" or "adjoining"? If the "unauthorized" use in question is not on a water body under BLM jurisdiction, then its proximity is moot for BLM enforcement purposes and the entire reference to waters not under the direct control of BLM (regardless of proximity to BLM lands) should be deleted. Because the Secretary's authority is limited to

public lands, as defined by FLPMA (and ANILCA), it is clear that no authority over activities on adjacent State or private lands and waters has been granted to the Secretary.

Section 9262.4(b)(1) See previous comment about the confusion between BLM and other authorities when dealing with pollution or contamination. Is the reporting requirement to the nearest BLM office consistent with the reporting requirements specified by EPA or the responsible state entity? There appears to be a significant potential for jeopardy if the responsible person reports only to BLM which is one way of reading this requirement.

Section 9262.5(a). This section prohibits occupancy or camping for longer than 14 consecutive days out of every 90 consecutive days in the same site or within a 25 mile radius of that site, unless authorized. Currently there is no limit unless set by the authorized officer, with no distance requirement. A requirement to move more than 25 miles is excessive. (Alaska State regulations set the limit at 14 days, with a 2 mile move required.) Leaving personal property longer than 14 consecutive days (currently 10 days) is prohibited. This section should also be clarified to indicate that subsistence hunting and fishing camps on BLM land in Alaska would not be affected by this provision. Authority to address this activity rests with the Federal Subsistence Board.

Also, regarding use of the term “consecutive days”, if a person camps on public land as defined by FLPMA for 13 consecutive days, leaves and returns within the 90 day period one or more times for additional 13 consecutive day periods, is the person in violation of this provision? If so the definition needs to be modified to clearly state BLM’s intention.

Section 9264.1 defines types of activities that BLM requires authorizations. See previous comments about BLM authorizations on non-FLPMA defined land as it applies to waters and submerged lands.

Section 9264.30. We recommend reference to ANILCA Title XI regulations at 43 CFR Part 36 in those cases involving BLM managed conservation system units in Alaska.

Section 9264.70 discusses enforcement actions associated with locatable minerals. It is not clear why the appropriate sections of Group 3000-3800 that are defined as “willful and knowingly” are not pulled into this discussion and deleted from the noted Group.

Section 9265.30 and .31. (Cave resources) In light of the recent management significance of caves in the Tongass National Forest, we recommend inclusion of provisions in the statute which provide for hearing and appeals procedures for anyone assessed a civil penalty.

Section 9265.41. This section should be clarified to note that purchase of a Sikes Act stamp does not relieve the purchaser from compliance with applicable state laws and regulations governing the taking of fish and wildlife, e.g. state hunting and fishing licenses.

Section 9265.70. This section deals with water resources on BLM land as defined by FLPMA. The BLM regulations, perhaps in the preamble, should discuss the requirements of the McCarran Act that most water use authorizations within a state are issued by the appropriate state entity, not BLM. In some cases the court may specify the specific quantities and uses of water deemed to be reserved water rights to BLM. Given these facts, what rules will BLM be enforcing in the absence of a specific enforcement agreement between the local BLM office and the concerned state? In many cases the site of water and the location of the use are not public lands as defined by FLPMA, but intervening land may be used for a water ditch. This situation does not appear to be recognized as this section appears to be limited only to water that BLM “owns” (e.g. has obtained a valid water right from the state or a court has expressly approved the kind and amount of a reserved water right for a defined area of public land as defined by FLPMA).

Subpart 9266- Recreation Sites and Areas. The heading for this subpart should be changed to read “developed” or “designated” recreation site or area. Without this modification, these regulations could be applied to any “area” of BLM land, including the White Mountains National Recreation Area, or any other BLM lands for that matter, and not just in a developed campgrounds or recreation areas.

Section 9266.25. The portion which prohibits use or discharge of a firearm or weapon “over or from water bodies on or adjacent to BLM lands” attempts to improperly extend the agency’s jurisdiction over State owned waters, as discussed under §9260.7. Additionally, it conflicts with state regulations which allow hunting from a boat provided the engine is not running and there is no longer any forward momentum from the engine.

Section 9267.43. After this section, add BLM rules specific to the White Mountain National Recreation Area in Alaska, the Steese National Conservation Area, and the National Petroleum Reserve-Alaska. If there are none, so indicate for each area.

Section 9268.50. The prohibitions in this section on use of motorized vehicles, aircraft and facilities are more restrictive than those for conservation system units and designated wilderness in Alaska. Recognition of the special ANILCA provisions for the management of federal public lands in Alaska should be included in this section. Administrative creation of a “primitive area” in Alaska, as defined in §9260.6, outside of a BLM managed conservation system unit or greater than 5000 acres in size may constitute a violation of ANILCA 1326(a).

Section 9268.30. Is there more than one Fossil Forest Research Natural Area?

Subpart 9269- Local Closures, Restrictions, and Rules. The criteria and process which must be met and followed under these proposed regulations is very similar to the ANILCA 1110(a) provisions and the Title XI regulations at 43 CFR Part 36. However, this section should be revised to state that in the case of conservation system units managed by BLM in Alaska (Steese National Conservation Area, White Mountains National Recreation Area, and components of the Wild and Scenic River System) the procedures in 43 CFR Part 36, including the required criteria which must be met, for implementing closures or restrictions to access into these areas

will be followed. Additionally, the process for public involvement and opportunity for public comment on any proposed closure or restriction must be outlined in the final regulations.

Section 9269.24. This section requires the same consultation process found in Section 9269.8. As with the proposed regulations addressing closures, this section should acknowledge any ANILCA provisions and requirements for implementing “supplemental and special rules” for activities or uses in BLM managed conservation system units in Alaska.

Section 9269.8 should be combined with **Section 9269.24** since the legal citations are identical.

Section 8372.0-7 asserts that BLM will enforce civil penalties for authorized and unauthorized uses of public land as defined by FLPMA including unauthorized use of water bodies “on or adjacent to” BLM lands. See previous concern (Section 9260.7) about inappropriate extension of federal authority. The term “BLM lands” should read “public land” to be consistent.

In closing, while the state generally supports converting existing regulations to “plain English”, we take issue with the idea of rephrasing every section title in the form of a question, mirroring the “Jeopardy” game show. This practice should be abandoned. The resultant long titles are a waste of paper and the reader’s time. When people want to research the rules on using mountain bikes, for instance, they look for a caption such as “Bicycles.” Swamping the key word in extra verbiage—“May I use a bicycle or mechanical equipment on BLM lands?”—is not user-friendly. Furthermore, since not all uses are posed as a question there is additional room for unnecessary confusion. The supplementary information makes note of this but such material is seldom read by a lay person using the regulations.

When these regulations are finalized, the Federal Register notice should contain a **complete and detailed** list of each section being deleted, which will be retained, and which will be replaced with the new Part 9260.

Thank you for the opportunity to provide these comments. If you have any questions, please call me at 907-269-7477.

Sincerely,



Sally Gibert
State CSU Coordinator

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