file

TONY KNOWLES, GOVERNOR

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF GOVERNMENTAL COORDINATION

SOUTHCENTRAL REGIONAL OFFICE
3601 "C" STREET, SUITE 370
ANCHORAGE, ALASKA 99503-5930
PH: (907) 269-7470/FAX: (907) 561-6134

CENTRAL OFFICE
P.O. BOX 110030
JUNEAU, ALASKA 99811-0030
PH: (907) 465-3562/FAX: (907) 465-3075

PIPELINE COORDINATOR'S OFFICE
411 WEST 4TH AVENUE, SUITE 2C
ANCHORAGE, ALASKA 99501-2343
PH: (907) 271-4317/FAX: (907) 272-0690

February 4, 1998

National Park Service
Ranger Activities Division
MS 650 (ROW)
P.O. Box 37127
Washington, D.C. 20013-7127

To Whom It May Concern:

This letter supplements the State of Alaska's comments of January 30, 1998 regarding proposed revisions to interim regulations at 36 CFR Parts 1 and 14 - General Provisions and Rights-of-Way. In our letter we stressed the importance of clarifying the relationship between the proposed regulations and Title XI of the Alaska National Interest Lands Conservation Act (ANILCA). In particular, we believe that these regulations do not usurp the existing access procedures that have already been specifically established for Alaska. By the same token, we suggest that ANILCA Title XI and its implementing regulations at 43 CFR Part 36 be evaluated for application throughout the National Park System, whether or not some portions may affect Alaska.

Clearly, the State recognizes that the National Park Service (NPS) has certain general statutory authorities, in addition to ANILCA Title XI, for issuing a right-of-way permit. Yet implementation of some of these authorities could result in decisions that are potentially inconsistent with ANILCA and Congressional intent. Given the substantial appearance of overlap between these proposed regulations and ANILCA Title XI, the final regulations should detail how the two sets of regulations will interrelate, if at all. For example, Section 14.2(g) should indicate that a transportation and utility system in a national park unit in Alaska would "not be required to comply with the procedures set forth in this part" in addition to the regulations at 43 CFR Part 36. If there is some application to Alaska, this section should discuss how those regulations would be modified or supplemented by the 36 CFR Part 14. To the extent that Alaska processes might be affected by these regulations in some way, the Preamble

could cite examples for illustratation. NPS personnel in Alaska seem to be largely unable to fully address questions about the proposed regulations' relationship to ANILCA. We interpret this as confirmation that ANILCA Title XI remains the dominate authority to addressing access and right-of-way issues in Alaska.

The remainder of our comments are predicated on the assumption that these regulations will not apply in Alaska. They address issues of interest to Alaska, however, that should be considered regardless of their application.

We believe Section 14.11(e)'s standard ten year term of all NPS right-of-way permits "unless otherwise specified in the permit criteria" is inappropriate. This standard appears arbitrary as there is no rationale given in either the supplementary information or the regulations. We recommend NPS coordinate with the Bureau of Land Management to develop a standard table showing the term of each type of right-of-way (railroad, highway, pipeline, airfield, power or water line, etc.) and incorporate the resulting terms into the final regulations. Term criteria should also include any terms established by law, or the useful life of the transportation or utility system as identified during NEPA compliance.

The discussion of the proposed regulations uses inconsistent language on one of the important criteria for consideration of a right-of-way application. The discussion under Section 14.1 - **Purpose** uses the term "no feasible and prudent alternative" while the discussion under Section 14.2 - **Applicability and Scope** uses the term "no prudent or feasible alternative". (We favor use of "and".) This same inconsistency is found in the proposed regulations themselves. The discussion of Section 14.50 - **Rights-of Way** for Highway Purposes - uses the term "feasible and prudent", as do the regulations under that section. The final regulations, including §14.1(b), §14.2(c)(1), §14.21(a)(6), and §14.50(a)(1) and (b) should contain consistent terminology throughout.

Like ANILCA Title XI, these regulations should exempt federal land management agencies from procedural requirements. It would also be appropriate to clarify in the Preamble or Section 14.2(b) that the regulations do not modify the applicability of other statutes governing the development of rights-of-way, e.g. the National Environmental Policy Act (NEPA) and the National Historic Preservation Act.

We also suggest the use of default decision time frames for consideration of right-of-way applications. For reference, ANILCA Title XI decision time frames are:

a) Draft environmental impact statement no later than 9 months after the date the completed application is filed.
b) Final environmental impact statement no later than 12 months after the date the completed application is filed.
c) Final administrative decision to approve or disapprove the application within 4 months after the final environmental impact statement.

We recognize the above timeframes are probably only realistic for projects of a smaller scale. However they are reasonable targets to insure timely processing. For larger or more complex projects, we also recommend developing an process for a negotiated schedule at the outset that minimizes delays for the applicant yet insures sufficient analysis. For purposes of these proposed regulations, we urge consideration of the ANILCA Title XI which addresses both target timelines and application procedures.

Most of the national park boundaries in Alaska are unsurveyed, which may or may not be an issue in other states. The proposed regulations require all costs associated with processing a right-of-way permit be the responsibility of the applicant. The regulations should clearly state that costs that typically are exclusively the responsibility of the federal government, such as surveying the boundary of a national park unit, should not be passed on to the applicant unless agreed to by the applicant to expedite the project.

Final reclamation of an approved right-of-way and removal of personal property and improvements should be based upon an abandonment or reclamation plan that is developed as part of the application process. Without such a plan, the NPS cannot adequately describe the impacts to the park unit or prescribe adequate mitigation measures as part of the NEPA process. Thus Section 14.15 and Section 14.26 should provide that rehabilitation and revegetation requirements are established in the application and NEPA compliance document. The right-of-way authorization should also specify mitigation measures associated with termination of the authorized use. If a proposed termination date cannot be estimated, then a preliminary reclamation plan should provide for a decision sequence for submission and approval of a final reclamation plan. The NPS should also indicate whether the right-of-way has any long-term values or uses for park administration or management needs.

The decision schedule and appeal processes need to be more completely described, perhaps in Section 14.31 or Section 14.50. As proposed, the regulations only address appeals to the authorized officer and the regional director. The final regulations should discuss appeals to the NPS Director, the Secretary of the Interior, or the Interior Board of Land Appeals. Further, the appeals discussion should reflect how appeals will be resolved when primary jurisdiction for a proposed right-of-way rests with another federal agency. For example, the Department of Transportation role for certain highways is discussed in proposed Section 14.50, but the Secretary of Transportation's responsibilities for airports is not. Additionally, the U.S. Army Corps of Engineers has lead authority over works in rivers and harbors and the Federal Energy Regulatory Commission has jurisdiction over certain pipeline systems and hydroelectric production and transmission facilities.

Additional Comments By Section

§14.2(d). This section should be modified by either deleting the last sentence or by providing a rationale and criteria for requiring a transportation and utility system that has been "specifically authorized" to "comply with the procedures set forth in this

part." The section is also confusing, as the first two sentences apply to oil and gas related activities and petroleum product pipelines, while the last sentence appears to apply to all rights-of-way.

§14.13(a)(6). This section should also provide for notification of the State Historic Preservation Officer.

§14.13(a)(8) and (9). This section establishes a requirement that construction of a right-of-way begin within two years of permit approval. A two year diligence requirement with an implied penalty of forfeiture of the right-of-way and all costs appears arbitrary and increases the potential for frivolous litigation. §14.13(a)(8) should be revised to incorporate a negotiated target date for construction. This would provide the necessary flexibility for those transportation and utility systems intended to serve markets significantly influenced by economic factors not under the control of the applicant. For example, litigation could forestall implementation of NPS approval of a right-of-way to a time when the originally identified economic window has passed and which may not reopen within the proposed two year diligence period.

§14.28. This section should be expanded to cover how, and under what conditions, a NPS approved right-of-way will be renewed. Renewal provisions should specifically address whether a new application, NEPA compliance document, or other procedures are required. We recommend that renewal be automatically approved when:

a) The applicant (permittee) has record of compliance with the existing term and conditions of the right-of-way permit.
b) The useful life of the right-of-way has not expired.
c) There are no significant adverse environmental changes directly related to the existing right of way.

To serve the interests of both the applicant and NPS, we suggest incorporating into the original approval process specific renewal criteria which strive for objectivity and predictability. The renewal process should also include provisions for modifying conditions of operation to address any unanticipated impacts so that use of the right-of-way may continue.

§14.31 The section does not reflect the total administrative appeal process for a right-of-way decision by the authorized officer. ANILCA Title XI established an overall 16 month timeframe for completion of the entire public involvement process and administrative decisions through the President. The proposed appeal process does not recognize that a local agency decision can be appealed to the Director NPS and then to the Secretary of the Interior and/or the Interior Board of Land Appeals. The final regulations in this should streamline the administrative decision process for rights-of-way across all units of the National Park system by adopting a process similar to that found in ANILCA Title XI.

§14.42 This section should be revised to require a mutually developed reimbursement agreement between the applicant and the NPS. The agreement should identify the time schedule for key agency and applicant actions including publication and release of any NEPA documents, any special consultants required by the agency, cost reimbursement documentation by the NPS and responsibility for costs associated with any appeals or litigation. The final regulations should also make it clear that certain costs are normally the responsibility of the federal government, such as a boundary survey, and are not "appropriate costs" that automatically become the responsibility of the applicant.

§14.42(c) Final regulations in this section should make it clear that costs for monitoring required by permit stipulations will be done on a least cost basis. Proper and adequate monitoring may be more cost effective if done by the applicant, another federal agency, state or local government entity, Native American entity, or a third party consultant. The final regulations should allow monitoring by qualified non-agency personnel when appropriate.

The State of Alaska appreciates the opportunity to provide these supplemental comments. For questions or clarification, please contact this office.

Sincerely,

Sally Gibert

Sally Gibert
State CSU Coordinator

cc: Robert Barbee, Alaska Regional Director, National Park Service
John Katz, Governor's Office, Washington, D.C.
Diane Mayer, Director, Division of Governmental Coordination
John Shively, Commissioner, Department of Natural Resources
Frank Rue, Commissioner, Department of Fish and Game
Joseph Perkins, Commissioner, Department of Transportation and Public Facilities

bcc: Tina Cunning, DFG-Anch
Terry Haynes, DFG-Fbx
Patty Bielawski, DNR-Anch
Clyde Stoltzfus, DOT/PF-Jun
Norm Piispanen, DOT/PF
Myles Conway, AG's-Anch
Anna Kertulla, Gov's Office-WDC
Stan Leaphart, CACFA-Fbx