



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

ANILCA Implementation Program

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Maria Fosado, Refuge Manager
Izembek National Wildlife Refuge
P.O. Box 127 MS 515
Cold Bay, Alaska 99571-0127

Dear Ms. Fosado:

The State of Alaska reviewed the draft Compatibility Determinations (CD) for Special Use Permits (SUPs) requested by the Alaska Department of Transportation and Public Facilities (DOT&PF) to conduct wetland delineation and cultural resources surveys. One CD addresses bridge survey work on King Cove Corporation lands; the other CD addresses cultural resource and wetland delineation surveys that were originally intended to be completed in July 2021. The information that will be obtained from the surveys is necessary for the SF 299 application submitted to the US Fish and Wildlife Service (USFWS) on October 28, 2020, and supplemented with a Section 404 wetland permit application to the US Army Corps of Engineers (USCOE) on November 4, 2020 pursuant to Section 1110(b) of the Alaska National Interest Lands Conservation Act (ANILCA) and 43 CFR 36.10. The community of King Cove, including state-owned land within the community, is an inholding effectively surrounded by the Izembek National Wildlife Refuge. Accordingly, the SF 299 application seeks approval to construct a 19-mile, one-lane gravel road to provide residents of King Cove with a safe and reliable method of access to the all-weather airport in Cold Bay.

The following comments represent the consolidated views of state agencies, including DOT&PF as the applicant, and focus on the cultural resources and wetland delineation survey CD. The bridge survey work was previously approved by the Refuge Manager in a letter dated June 7, 2021 in support of the ANILCA 1110(b) application. That work has been completed.

On July 23, 2021, the USFWS provided the State with a limited opportunity to review the draft CDs. As always, we appreciate the review opportunity. In this instance, the opportunity was a mere gesture since USFWS noticed the CDs for public comment prior to receipt of the State's comments on the draft and the CDs did not include any changes from discussions with the State. Therefore, we incorporate the previous comments herein by reference (many are reiterated below).

The CD for the wetland delineation and cultural resources surveys does not reflect the work plan previously agreed to by ADOT&PF and the USFWS. The revised work plan, as drafted by the

USFWS in the CD, in combination with additional restrictions in the CD, will result in an unusable permit for the following reasons:

- The timeframe (late August through September) and length (limited to 15 days each) established by the USFWS does not provide adequate time to complete the surveys without alternative methods of access (i.e., helicopter and off-highway vehicles (OHV)).
 - Given the unpredictability of weather, extensive amount of surveying planned, and remoteness of the project area, expectation that the work can be completed with only pedestrian access in this timeframe is unrealistic.
- The timeframe for the surveys established by the USFWS represents a critically important time period for fish and wildlife species and subsistence activities on the refuge; therefore, the stipulation in the CD that prohibits flights and boating activities within one mile of “notable concentrations” of wildlife makes the survey work infeasible.
- The requirement to camp on durable surfaces (i.e. higher elevations) exposes field staff to unpredictable weather, compromising safety.
- The timeframe for the surveys established by the USFWS in the CD coincides with migratory bird hunting and caribou hunting seasons. The availability of lodging, OHV rentals, skiff rentals, and local bear guards is greatly diminished during this period. Without the availability of these services, the expectation that the work can be completed is unrealistic. In addition, due to the unknown outcome of this public process, ADOT&PF is wary of procuring these services until a permit is in hand.
- The CD prohibits the proposed aerial overflight, which is a critical piece of the cultural resources survey.

We are dismayed by the effective denial of access for the requested field work particularly when USFWS is required under ANILCA to authorize such access and USFWS's course of dealing with the SUP applications has been dilatory and arbitrary. The needless delay and now disallowance of motorized access reflects a disregard for the safety of the Alaskans conducting these surveys and a lack of understanding of ANILCA. The permit as described in the CD is an illusory grant of access for the field work.

I. Background Information

ADOT&PF originally requested an SUP from the USFWS to conduct field work which was necessary to complete an ANILCA 1110(b) application on July 27, 2020. Even though ANILCA Title XI implementing regulations at 43 CFR 36.3 require federal agencies, including the USFWS, to authorize preapplication activities, the USFWS rejected this initial request, stating it would be premature to grant such access prior to receiving the application. The USFWS also indicated a preapplication meeting was required. Even though 43 CFR 36.10 does not require pre-application meetings, state staff and King Cove representatives met with the USFWS the following fall to discuss the State's 1110(b) application. Following that meeting, an ANILCA 1110(b) application was submitted by the State of Alaska, the Aleutians East Borough and the City of King Cove as co-applicants to the USFWS on October 28, 2020, supplemented by a

Section 404 wetlands permit application to the USCOE on November 4, 2020. The USFWS responded on December 21, 2020 with an extensive 10-page list of information requirements that it declared were necessary to complete the ANILCA Section 1110(b) application, including field study data that could only be obtained with the SUP initially requested by the State.

On January 15, 2021, Secretary Bernhardt issued a memorandum to the Director of the USFWS, responding to a request for guidance on the 1110(b) application and a determination on whether the co-applicants had a statutory right under ANILCA Section 1110(b). The well-reasoned and comprehensive memorandum indicated that pursuant to ANILCA and the Department of Interior (DOI) ANILCA Title XI implementing regulations at 43 CFR 36, the applicants were effectively surrounded by the Izembek National Wildlife Refuge and were entitled to the rights afforded inholders in Section 1110(b) of ANILCA. Further, the Secretary declared that the application contained sufficient information to be determined complete per 43 CFR 36.10, noting that additional information to supplement existing environmental analyses may be required at some future point in the process. The memorandum concluded by acknowledging that “[w]hile 43 CFR 36.10 allows for mitigation to address impacts to refuge resources and consideration of alternative routes, protection of natural resource values cannot frustrate or effectively deny inholders their rights under ANILCA to receive ‘adequate and feasible’ access to their inholding.”

The USCOE issued a letter to the State on February 5, 2021, indicating that the information they required to complete their application, which the State had previously attempted to collect via the aforementioned denied SUP applications, had not yet been received; therefore, they were closing the file, pending receipt of the required information. The USFWS followed up with a letter dated February 17, 2021, stating that based on the USCOE’s action, they were returning the 1110(b) application and closing their file. The State responded with a letter dated February 22, 2021 stating that once they received the USFWS’ authorization to conduct the field studies necessary to obtain the information required by the USCOE, the USCOE’s file would be re-opened and pursuant to the DOI Title XI regulations at 43 CFR 36, the 1110(b) application would be reinstated. The State in emails and letters between February and April reiterated the need for the survey work and the time sensitive nature of such work given the conditions in the refuge.

The State, USFWS and USCOE staff met on April 2, 2021 to discuss the SUP application filed by DOT&PF. The USCOE confirmed in an email that approval of the SUP would allow the State to obtain the information needed to complete their portion of the 1110(b) application. The State and USFWS continued to work cooperatively to refine the proposed work plan, which included reducing the number of helicopter landings and replacing with off-highway-vehicle (OHV) access to reduce impacts to wilderness character pursuant to the Wilderness Act and USFWS Alaska Regional Policy (610 FW 1), which allows for helicopter use if determined the minimum tool in a minimum requirements analysis (MRA). Discussions with USFWS staff indicated a categorical exclusion would be applied to comply with the National Environmental Policy Act (NEPA). A CD was not required because the work was related to an established right

under ANILCA Section 1110(b). Consultation with resource managers indicated the best time for completing the work was in July 2021. In a letter dated June 7, 2021, the USFWS stated that an SUP for a bridge survey on land owned by the King Cove Corporation was not necessary and a CD was not necessary because the work would provide information needed to complete the ANILCA 1110(b) application. The State completed its hiring process for a contractor to conduct the bridge and other studies identified in the work plan.

On July 16, 2021, ten days after the beginning of the field study timing window identified in the cooperatively developed work plan, the USFWS sent the State a letter, indicating that based on unspecified “concerns” with Secretary Bernhardt’s memorandum, they would be taking a cautious approach to processing the SUPs and would require a compatibility determination and an MRA, consistent with ANILCA and the Wilderness Act, which would require public review, thus delaying the issuance of the SUPs and subsequent field studies until late August. On July 21, 2021, the State received a one-page memorandum issued by DOI Deputy Secretary Beaudreau, dated July 15, 2021, purporting to rescind Secretary Bernhardt’s memorandum. The Deputy Secretary’s memorandum provides no substantive justification for the action and demonstrates a lack of understanding of the Title XI process established under ANILCA and the implementing regulations at 43 CFR 36. Meanwhile the ANILCA 1110(b) application is still active, pending the required authorizations to conduct field studies to fulfill the USCOE’s data requirements.

The USFWS made a unilateral internal decision that the use of helicopters and other motorized methods of access are no longer desirable, which was used as the basis for the draft CDs that are currently undergoing public review, as opposed to the State’s work plan, which was cooperatively developed with the USFWS to safely complete the work with minimal impacts to refuge resources, including but not limited to wilderness character. Similar to the ANILCA 1110(b) application, the State has taken no action to further modify or rescind the work plan.

II. The CD does not Reflect the State’s Cooperatively Developed Work Plan

The Justification section of the CD (page 10) inaccurately states DOT&PF adopted the changes to their work plan as represented in the CD (e.g., no helicopter or OHV access). As noted in the background information above, the USFWS first advised the State in discussions that they would no longer authorize helicopter access as previously discussed because they had begun to question Secretary Bernhardt’s memorandum. Contrary to the statements in the CD, DOT&PF has not since modified its work plan.

DOT&PF had been working with the USFWS to perform the proposed work during a lower-impact time period from July 5-31, 2021. Despite these months of discussions, the State’s consistent reminders of the seasonal nature of the studies, and even assurances by DOI officials that the SUPs were proceeding, the USFWS abandoned the cooperatively developed plan for one needless delay and a CD designed to render the work logistically impossible to complete. The USFWS subsequently, and immediately prior to the agreed upon issuance date of early July,

altered the process by which the permits were to be issued. The work window now proposed by the USFWS has moved to a less desirable timeframe on the refuge. In addition, this unnecessary delay introduced by the USFWS has made it so that if the DOT&PF desired to pursue reasonable pre-application activities guaranteed under 43 CFR 36.3, which are being facilitated by helicopter and OHV access for the proposed work, the additional time required to adjudicate these requests would place the work outside of this work season.

The following comments on specific aspects of the CD identify inaccuracies and demonstrate how the work plan as represented in the CD makes the field work logistically challenging or infeasible during late August and September.

Additionally, because the USFWS' actions have pushed the work to the end of August and September, several stipulations included in the CD unreasonably complicate the proposed work. The USFWS is now well beyond the SUP 45-day adjudication timeframe required by 50 CFR 36.41.

Refuge Purposes

The administration of designated Wilderness in Alaska is modified by ANILCA Section 707, which states “**Except as otherwise provided for in this Act** wilderness designated by this Act shall be administered in accordance with applicable provisions of the Wilderness Act...” (emphasis added). The Title XI process is a mandatory process in ANILCA and Wilderness Act provisions and requirements, including in the MRA, cannot be used to frustrate the administration of ANILCA's provisions. See additional comments below on the MRA.

Description of Use

Why is this use Proposed?

The Izembek Refuge CCP and 43 CFR 36.3(b) indicate survey activities are permitted in the Refuge. The impacts from the survey work and methods of access as previously agreed to by the State and USFWS are all temporary, non-invasive, and/or de minimis. The USFWS' modifications to the process and resulting delay in issuing the SUP is unnecessary and inconsistent with ANILCA and its implementing regulations.

*Reasonable preapplication activities in areas **shall be permitted** following a determination by the appropriate Federal agency that the activities are necessary to obtain information for filing the SF 299, that the activities **would not cause significant or permanent damage** to the values for which the area was established or **unreasonably interfere with** other authorized uses or activities and that it would not **significantly restrict subsistence uses** [43 CFR 36.3(b); emphasis added]*

When will the use occur?

The CD incorrectly states the required timeframe for the proposed surveys is approximately 15 days. Under DOT&PF's work plan, the proposed wetland delineation will require 30 days of field work, while the proposed cultural resource survey will require 15 days in the field.

Where will the use occur?

The CD fails to recognize that survey work proposed by DOT&PF will be conducted both within and outside of designated Wilderness.

The CD states "The wetland determination survey would occur along the entire ROW requested by the DOT&PF, as identified in the SF-299 application # R-353-IZ." However, DOT&PF modified the survey to identify wetlands within a 500-foot corridor centered on the centerline of the proposed roadway. This change was communicated to the USFWS in a letter dated June 4, 2021.

How will the use be conducted?

This section does not indicate that Team #2 will be using highway vehicles and/or OHVs to access the refuge on established roads and trails up to the Wilderness boundary.

Anticipated Impacts of the Use

Wilderness

The CD and accompanying MRA do not reflect the work plan proposed by DOT&PF that was modified in cooperation with the USFWS to minimize the impacts of helicopters on wilderness character. DOT&PF and the USFWS agreed upon OHV use to supplement the minimum necessary amount of helicopter use to provide a feasible work plan that minimizes impacts on wilderness character. The CD instead summarily eliminates all helicopters and OHV use. This section cites Service policy 610 FW 2.12(5)(f) but also needs to recognize Alaska Regional Policy 610 FW 5; including 610 FW 5.9, which allows for helicopter landing areas when determined to be the minimum tool in an MRA, as was the case and evidenced through mutual agreement.

The use of helicopters is an important consideration in the context of administrative activities, ANILCA, the Wilderness Act, and regional USFWS policy. The request for the SUP and associated activities are necessary to collect data from the Refuge, including within designated Wilderness, to complete the ANILCA 1110(b) application; the data serves to help ensure the protection of the Wilderness by collecting information that will be used to avoid or minimize potential future effects and it supports the administration of the Wilderness in light of the application process. Therefore, we question the USFWS interpretation that this is not the case and that the collection of the wetlands and cultural resources data is not necessary for the administration of the Wilderness.

The only operative decision is whether helicopter access is the "minimum tool" to safely complete the field work while minimizing impacts to refuge resources, including wilderness

character. As noted above, this potentiality is supported by Alaska regional policy 610 FW 5.9 which allows for helicopter access in Wilderness if conditions or circumstances warrant the use as determined through an MRA. Helicopter access is often used to reduce time in the field and minimize prolonged activities and safely transport workers in Alaska's rough terrain and frequently changing extreme weather conditions.

We reiterate our request for a dialogue with the USFWS on the principles associated with the completion of this MRA and the MRA process in general to facilitate cross-agency understanding and communication.

Fisheries

September coincides with some adult salmon migration; a few individuals accessing the area on foot and crossing streams in the uplands should have minimal to no impact on fish habitat. There will be pink salmon spawning in most rivers in September with subsistence fishing occurring during this time and the potential for minimal impact on these activities. Earlier in the summer is generally better for activities as you can avoid active spawning even though there may be fish migrating in the area.

The use of helicopters would be unlikely to impact fish and fish habitat unless landings occur very close to streams, especially stream mouths. ADF&G Habitat Section has previously issued Fish Habitat General Permit 16-II-GP78 (http://www.adfg.alaska.gov/static/license/uselicense/pdfs/ii_78_gp_kinzarof_lagoon.pdf) for vehicles weighing less than 1,000 lbs. dry weight (e.g., OHVs) to cross 7 anadromous streams in Kinzarof Lagoon below the mean high water line. This permit expires at the end of 2021 and is expected to be reissued. Stipulations in the general permit should minimize impacts to fish habitat. If OHV stream crossings are proposed at additional locations not covered by the general permit, there is the potential for impacts to fish habitat and a Fish Habitat Permit would be required for crossing most streams in the project area. Steps should be taken to try to avoid active spawning. If OHV's are to be authorized by USFWS, we request the USFWS and DOT&PF work with the ADF&G Habitat Section to determine appropriate accommodations to mitigate potential impacts.

Waterfowl

July and August would have been preferable for the field work for better minimizing potential disturbance to waterfowl. September and October are the two months that likely hold the highest concentrations of waterfowl at Izembek during the year, particularly for Brant geese. Brant are flocked in huge numbers during this time and are easily disturbed, especially by helicopters (see previously published helicopter disturbance study at Izembek by David Ward, USGS). Brant are also disturbed by boats and OHVs, but to a lesser degree and this disturbance can be minimized. September also holds very high concentrations of molting Steller's Eiders, which are listed as threatened.

Helicopter use and landings would likely cause a high level of disturbance during September. Helicopter use would have been less of a concern during July/August because Eiders and Brant are present in much lower numbers during that time. Nonetheless, according to the CDs, there will only be two small field crews on the ground for the wetland delineation field work thereby reducing impact potential. The disturbance from these crews will be similar to, if not less than, that of other users accessing the area during this time. Transiting across the lagoons via skiff will have a brief disturbance with little lasting impact on the birds; skiffs are already commonly present and active in the area during the sport harvest. Similarly, low impacts could be expected from the temporary storage of OHVs on refuge lands above mean high tide.

Additionally, as noted above under stipulations, it is unreasonable to expect that this work can occur in September without flight, OHV or boating activities coming “within one (1) mile of notable concentrations of wildlife, such as seabird colonies, marine mammal concentrations, bald eagle nests...,” especially when transiting the lagoon via skiff or OHV along with tidelands. The waters and mudflats of Izembek hold nearly the entire population of Brant Geese during this time of year, in addition to tens of thousands of other waterfowl; avoidance of significant concentrations while on or adjacent to the water would be impossible.

If helicopters were to be authorized to access the most difficult to reach locations, DOT&PF can use best practices to minimize disturbance to waterfowl by avoiding the waters and mudflats of Kinzarof Lagoon and avoid generalized disturbance from flight paths. For example, in addition to minimizing the number of landings and use of helicopters, DOT&PF can employ vertical take-offs and landings, overland flight paths and flying at higher altitudes to facilitate the minimization of disturbances.

Subsistence Data

Data for subsistence harvest activities, including the area proposed for survey, can be obtained by contacting ADF&G Division of Subsistence and all quantitative data collected during 2016–2017 subsistence harvest surveys for the associated area is also available to the public on the Community Subsistence Information System (CSIS) page on the ADF&G Division of Subsistence website <http://www.adfg.alaska.gov/sb/CSIS>. A forthcoming technical report will also be available upon publication:

Hutchinson-Scarborough, L, J. Van Lanen, and D. Koster. *In prep.* The Harvest and Use of Salmon and Other Wild Resources in Cold Bay, King Cove, and Sand Point, Alaska, 2016. Alaska Department of Fish and Game, Division of Subsistence Technical Paper No. NNN, Anchorage.

ANILCA Section 810 Subsistence Analysis

Much of the information in Tables 1 and 2 is incorrect or outdated. In the Table 1 cited from Wright et al (1985), the species listed for land mammals are for the entirety of the Bristol Bay Region, not the Aleutians East Borough (AEB) as stated in the table title in the CD. The AEB is Game Management Unit 9D, plus Unimak and Akutan Islands. Wright et al (1985) divided the

Bristol Bay region into subregions, including the Lower Alaska Peninsula subregion, which is the same land area as Unit 9D. We request this be corrected and updated accordingly.

The land mammal resources listed for the lower Alaska Peninsula by Wright et al. 1985 (referenced in this analysis) does *not* include black bears, brown bears, snowshoe hare, marmot, ground squirrel, arctic fox, coyote, marten, weasel, lynx and muskrat. Many of these species have never been seen in Unit 9D. However, they *are* included in Table 1 of this 810 analysis as subsistence resources harvested. There are also resources included inaccurately in Table 1 in the analysis. We request these tables be corrected to reflect the appropriate species for the Lower Alaska Peninsula (Unit 9D).

In Table 2, the seasons listed for brown bears are for Kodiak Island, not Unit 9D. The correct seasons for Unit 9D are Oct. 7 – 21 (odd years only) and May 10 – 25 (even years only). The caribou bag limit is 3 caribou for residents, not 1. Many of the waterfowl bag limits are incorrect in Table 2. We request all hunting season and fishing regulatory data in the 810 analysis be checked for accuracy and corrected where applicable.

The analysis of the impacts from work in September regarding subsistence harvest of land mammals appears accurate. Caribou and moose are generally not present on the isthmus during the proposed period and bear season is closed. Survey activities occurring in August/September/October may have minimal potential for impact on caribou hunting by King Cove or Cold Bay residents.

The subsistence migratory bird hunting season for Unit 9D is open through the latter part of summer; there is minimal potential for the survey activities to impact hunting if activities occur in August/September. Helicopter landings, if occurring, may have potential to cause disturbance to hunters depending on location and timing which can be mitigated. Survey activities are likely to only have minimal impact on subsistence bird hunting. Additionally, other allowed Refuge uses would likely displace more waterfowl flocks in the lagoons during a given day than the small research field crews in the ROW uplands.

Stipulations Necessary to Ensure Compatibility

Several stipulations included in the draft compatibility determination include broad statements prohibiting certain acts. One such stipulation states: “The use of off-highway vehicles is prohibited unless specifically authorized in writing in this permit.” Since this CD is intended to address a specific proposal, it should not include standard stipulations typically found in CDs prepared in conjunction with refuge Comprehensive Conservation Plans. Any stipulations with similar broad statements must be revised so that they are tailored to the agreed to work plan. Moreover, pursuant to ANILCA Section 103(c), such stipulations also cannot be applied to non-refuge lands.

- The use of off-highway vehicles is prohibited unless specifically authorized in writing in this permit.

As stated above, this stipulation must be limited to refuge lands and does not apply to state-owned lands, including submerged lands or tidelands. Additionally, the USFWS has communicated to the DOT&PF that the use of OHVs on established refuge roads and trails outside of the wilderness area is allowed. Use of vehicles on these roads and trails is crucial to the completion of the proposed work. This stipulation must either be eliminated or be reworded to include such uses. Furthermore, this stipulation does not address the proposal by the DOT&PF to store OHV's on uplands immediately above the high tide line.

- The operation of aircraft is prohibited unless specifically authorized in writing in this permit.

The USFWS has no authority under law to regulate the operation of aircraft, only aircraft landings within the refuge and effects of low flying aircraft on refuge resources. This stipulation must either be eliminated or reworded to reflect the USFWS' jurisdiction.

This CD should also recognize and address the DOT&PF's intended use of an aerial survey for cultural resources.

- Travel and camp on durable surfaces (gravel, rock, sand, or snow)

Because the CD does not allow helicopter access, camping is now required. This stipulation provides undue burden to field staff as durable surfaces can only be found at the highest elevations of the refuge. We request that this stipulation be removed.

- Detailed camping and safety plan of operations will be required if camping is determined necessary by permittee.

Camping is not part of DOT&PF's work plan but is now necessary because helicopter and OHV access have not been incorporated into the CD. There are sufficient stipulations in the CD and in the plan submitted by the DOT&PF to provide for the safety of field staff for these isolated camping stays. If the temporary storage of OHVs on refuge lands above mean high tide is prohibited as indicated in the CD, access across state tidelands is also eliminated. The logistics and complexity for that duration of camp-based operations would require a complete revision of the work plan. There is, likewise, not enough time left in this field season for such extensive camp-based operations.

- Any harassment or interference with non-game wildlife, including land animals, marine mammals, waterfowl, seabirds, and other migratory birds is strictly forbidden. Permittee shall employ best practices in avoiding disturbance to wildlife and damage to sensitive tundra habitats.

This stipulation must be reworded to state “any intentional harassment or interference . . .”. As currently written, any incidental disturbance to wildlife, the probability of which is much higher due to the unnecessary delay in issuing the SUPs, would be prohibited and grounds for permit revocation. Given the high concentration of wildlife on the refuge during the new work window, incidental disturbances are more likely certain.

- No flight or boating activities are allowed within one (1) mile of notable concentrations of wildlife, such as seabird colonies, marine mammal concentrations, bald eagle nests (Note more restrictive regulations for Steller sea lion rookery below).

This stipulation provides undue burden to the DOT&PF and its contractors. Given the high concentration of wildlife on the refuge during the work window prescribed by the USFWS, encounters with “notable concentrations of wildlife” are certain. The current provision effectively denies the use of boats and OHVs on Kinzarof Lagoon, which is necessary for completing the proposed work. Seabird colonies and other “notable concentrations of wildlife” are often unidentifiable from a distance of one mile. We request that this stipulation be removed as notable concentrations of wildlife cannot be avoided during the work window proposed by the USFWS.

Justification

This section references “geologists” two separate times. None of the field staff will be geologists but should instead be referred to as “surveyors” or “field staff.”

III. Effective Denial of Access

The USFWS justified the requirement of a CD on the purported withdrawal of Secretary Bernhardt’s January 15, 2021 memorandum by Deputy Secretary Beaudreau on July 15, 2021, which occurred in excess of a week after the planned commencement date collaboratively established for the required field work. The State was not provided the July 15 memo until a week after that; two weeks after the field work was to start. The CD is not based upon the State’s proposed work plan and previously agreed to modifications to reduce (not eliminate) helicopter landings in exchange for OHV access (see above comment), but on a work plan contrived independently by the USFWS to purportedly expedite approval of the SUP in time to enable field the work to be completed this season. However, the purported withdrawal of Secretary Bernhardt’s memorandum has no bearing on the decision to eliminate motorized access from the State’s work plan.

The State, on behalf of itself and the other co-applicants, filed an 1110(b) application on October 28, 2020. In accordance with 43 CFR 36, the State must be allowed access to the refuge to obtain data required to complete the application. Because the proposed access road crosses designated Wilderness, the work must be conducted in designated Wilderness and is therefore subject to an MRA. Impacts to wilderness character must be minimized but do not have to be

eliminated.¹ Many factors must be taken into consideration in that analysis, including impacts to other refuge resources and uses, and the safety of workers in the field. The State asked to engage in a dialogue and be included in the second round of the MRA as we have experience with other federal agencies for state management activities (USFS/ADF&G Expectations Document).² This request was denied by the USFWS.

Additionally, as the managing agency of refuge lands (ANILCA Section 1314(b)), with additional authority over migratory birds pursuant to the Migratory Bird Act, the USFWS would be keenly aware that this approval is now slated for a time when waterfowl concentrations on the refuge are at their peak. The elimination of helicopter and OHV access during that timeframe would be expected, and with the addition of other restrictions in the CD, such as the condition that prohibits flight and boating activities “within one (1) mile of notable concentrations of wildlife, such as seabird colonies, marine mammal concentrations, bald eagle nests...” would all preclude the State from completing this work in a safe and efficient manner during that timeframe. These factors taken in conjunction are an effective denial by design.

The USFWS’ assertion that helicopter access can no longer be approved without delaying the timeline further is unfounded – as previously noted, USFWS regional policy at 610 FW 5 allows for the use of helicopters if determined to be the minimum tool in an MRA. The MRA requirement is not affected by the withdrawal of Secretary Bernhardt’s memorandum.

The only change in process that may be supported in policy is the preparation of a CD, and as discussed below, even this is questionable. The Deputy Secretary’s July 15, 2021 memorandum purports to withdraw Secretary Bernhardt’s memorandum. Notably, the Deputy’s memorandum does not provide any justification to support a conclusion that King Cove is not an effectively surrounded inholding. As such, the USFWS now asserts the reserved right and associated legal mandates associated with that determination, which are explicit exceptions to the requirement to prepare a CD pursuant to 603 FW 2.10, are not applicable at this time. However, it is also reasonable to assert that the requirement to process applications pursuant to Title XI of ANILCA, including the requirement to authorize pre-application activities, is also a legal mandate that qualifies as an exemption under 603 FW 2.10. If a CD is determined necessary despite this, those legal requirements must also be factored into the compatibility determination.

Unfortunately, in this second round consideration of the SUPs, the USFWS also did not develop an MRA that considered the cooperatively developed work plan and instead created a straw dog in the form of a CD that effectively denies the State reasonable access to conduct the required

¹ For example, a Compatibility Determination issued by the Izembek National Wildlife Refuge on July 26, 2002 authorized the Alaska Department of Fish and Game to land a helicopter in designated Wilderness to collect salmon tissue samples.

² *Expectations Regarding State of Alaska Administrative Activities in National Forest Wilderness*, dated 10/30/09.

studies – studies that are necessary for the protection and administration of fish, fish habitat, and cultural resources within the Refuge and the Izembek Wilderness and therefore necessary for the administration of the Izembek Wilderness Area. Therefore, in preventing the State from conducting field work again this season (proposed field work in 2020 was also denied by the USFWS as premature despite requirements in 43 CFR 36 to allow “pre-application” activities), the USFWS is effectively denying the SUP. As the USFWS is aware, doing so also prevents the State from supplementing its 1110(b) application with data required by the USCOE, thereby denying the State the opportunity to present the necessary data to allow the application to be reinstated pursuant to 43 CFR 36, and thereby restart the timeline established in ANILCA and implementing regulations to process the application. With these actions, the USFWS is further obstructing the process required by law.

As proposed in the CD, the resulting permit would be an effective denial of access to complete the requested field work prior to October 4th, the USCOE’s required survey closure date. The CD was not required and has caused needless delay. That said, any CD accompanying the permit must correct the inaccuracies noted in the State’s comments. The SUP and any CD that accompanies it should be revised to allow for helicopter and OHV access consistent with the cooperatively developed work plan. A properly prepared MRA can appropriately justify these methods of access when the existing terrain and extreme weather patterns of an area, and potential impacts to resources warrant their use.

Thank you for this opportunity to comment. Please contact me at susan.magee@alaska.gov to discuss these comments further.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Magee', written in a cursive style.

Susan Magee
ANILCA Program Coordinator