THE STATE of ALASKA
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Citizens' Advisory Commission on Federal Areas

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Via Regulations.gov Portal

Scott Covington
U.S. Fish and Wildlife Service
Division of Natural Resources and Planning
MS: NWRS, 5275 Leesburg Pike
Falls Church, VA 22043

Re: Proposed Rulemaking on Management of Non-Federal Oil and Gas Rights, Docket No. FWS-HQ-NWRS-2012-0086

Dear Mr. Covington:

The Citizens' Advisory Commission on Federal Areas (CACFA; the Commission) has reviewed the proposed regulations for the management of non-federal oil and gas rights and offers the following comments for consideration in developing the final rule. The Commission is also fully supportive of and endorses the consolidated comments of the State of Alaska, provided in a separate letter by the State's ANILCA Implementation Program, as well as the State's April 24, 2014 comments on the Advanced Notice of Proposed Rulemaking.

GENERAL APPLICABILITY OF THE PROPOSED REGULATIONS

The preamble describes "non-federal oil and gas development" as "activities associated with any private, State, or tribally owned mineral interest where the surface estate is administered by the Service as part of the Refuge System." This limited definition does not carry over into the proposed rule, however, which also applies to all operations on "waters within the boundaries of the refuge . . . without regard to the ownership of submerged lands, tidelands, or lowlands." *See proposed addition at* 50 CFR §29.40(b). This would only be consistent where all waters within the boundaries of a refuge are "administered by the Service as part of the Refuge System."

Direct application of the proposed rule to any area "without regard to ownership" has no basis in law, particularly for Alaska refuges. In Alaska, lands within the external boundaries of a refuge are not part of the Refuge System unless the federal government has title. The Alaska National Interest Lands Conservation Act of 1980 (ANILCA) established that only "public lands" are included as a part of the Refuge System in Alaska. According to ANILCA §102, public lands are those lands situated in Alaska which, after December 2, 1980, are federal lands, meaning lands, waters and interests therein the title to which is in the United States. As such, the Service cannot propose to regulate "operators exercising non-Federal oil and gas rights within the National Wildlife Refuge System" in Alaska unless the regulated activities occur where the federal government has title or, in very limited situations, an established possessory interest.

The proposed addition at 50 CFR §29.40(b) implies that, if the Service claims a possessory interest in lands or waters within refuge boundaries, it could only regulate that area to the extent necessary to administer that interest. In the final rule, this critical caveat needs to more clearly limit the claim to regulate irrespective of ownership. The statement that the regulations would not apply to areas lacking a federal possessory interest "if refuge lands are not accessed" does not provide sufficient assurances. This statement only provides an exemption if no federal property is used at all, it does not guarantee activities solely occurring on non-federal lands will not also be regulated via the regulation of federal property.

Since the Property Clause of the U.S. Constitution and the National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act, are cited as the sources of the Service's authority to propose these regulations, CACFA recommends the final regulations (not just the preamble) be very specific that:

- only areas within the National Wildlife Refuge System, as defined in 50 CFR §25.12 and consistent with ANILCA, excluding coordination areas, are subject to regulation;
- only the use of or impact to federally owned or administered property is subject to regulation;
- regulations will not apply to any area within refuge boundaries unless the federal government has an established property interest; and,
- regulations will only apply to the extent necessary to protect that property interest.

These specifications should also inform the development and imposition of any mitigation requirements under the proposed addition at 50 CFR §29.120(g).

SPECIFIC APPLICABILITY OF THE PROPOSED REGULATIONS

While CACFA appreciates recognition of and deference to existing regulations at 43 CFR part 36, the proposed rule does not clearly articulate when those regulations apply. Neither the DEIS nor the preamble explore the full suite of existing regulatory provisions in Alaska or the statutory basis for them. Without that basic background, and with very inconsistent cross-references, the public, operators and Service employees are left to guess which regulations will apply to which oil and gas-related activities in Alaska refuges.

For example, none of the references to 43 CFR part 36 are helpful when contemplating how to authorize access to and development of subsurface inholdings, which ironically purports to be the main objective in drafting the proposed regulations. Despite the definition of "inholding" at 43 CFR §36.10(a)(4) as including "subsurface rights . . . underlying public lands," inholdings are always presented in the proposed rule in the context of surface estate. For example, the preamble describes "wells drilled from outside refuges or on non-Federal inholdings" and "accessing oil and gas rights from a non-Federal surface location (including inholdings)." Regulations at 43 CFR §36.10 are presented as governing "physically cross[ing] Service land for access, including access to a non-Federal surface location such as an inholding, to conduct operations" in Alaska.

And while the proposed addition at 50 CFR §29.42(c) attempts to be comprehensive in applying 43 CFR part 36 to "the permitting process for authorizing the use of refuge land in order to provide access to an operator's oil and gas right," this point is oddly compromised where the operator is "accessing" a subsurface inholding. The proposed definition of "access" relates to "any method of entering or traversing on or across" federal land, with methods of air and surface transportation as examples. It is not clear if this definition could include "operating or existing on" federal land, which would more likely be the case for facilities and infrastructure necessary to access subsurface resources and which are provided for under 43 CFR part 36.

In addition to guessing when 43 CFR part 36 applies instead of the proposed regulations, the public, operators and Service employees also have to guess when 43 CFR part 36 is being supplemented or preempted. For example, what happens when the information required under the proposed addition at 50 CFR §29.94 is not required in an SF-299? Would a right-of-way permit under 43 CFR part 36 be required in addition to an operations permit under the proposed rule, particularly since many of the activities governed by the proposed operations permit would not intuitively fall under the proposed definition of access? *See, e.g., proposed additions at* 50 CFR §§29.95 and 29.96. If so, how would the application approval and denial standards under the proposed additions at 50 CFR §§29.100 through 29.104 be modified to ensure consistency with Title XI of ANILCA? Will the proposed additions relating to cost recovery and financial assurances apply in addition to those required under Alaska-specific regulations and procedures? With regard to the proposed addition at 50 CFR §29.190(f), where does subpart B relate to violations of 43 CFR part 36?

Another example of potential confusion relates to temporary access. The proposed addition at 50 CFR §29.70 just says: "For Alaska, the temporary access provisions at 43 CFR 36.10 still apply." There is no mention of 43 CFR §36.12, or its complex relationship to 43 CFR §36.10 (which does not have specific "temporary access provisions"). As such, there is no clear way to know when proposed additions at 50 CFR §§29.70 through 29.73 would apply in Alaska. Since 43 CFR §36.10 "still" applies, the proposed additions could be a supplement specifically for reconnaissance surveys. And since 43 CFR §36.10 only applies to inholders, the aforementioned confusion regarding subsurface inholdings adds an additional layer of uncertainty. Further, the proposed rule provides no guidance on how temporary access under ANILCA §1111 that is unrelated to reconnaissance surveys would be integrated into the proposed regulatory scheme. For instance, the proposed addition at 50 CFR §29.95 makes no mention of ANILCA or 43 CFR part 36 in the context of authorizing geophysical surveys.

The few times Alaska is mentioned in the Draft Environmental Impact Statement (DEIS) do not remedy these concerns. The DEIS notes that existing procedures at 43 CFR part 36 provide for temporary access and right-of-way permits, including financial assurances, cost recovery, access fees and a region-specific hearing and appeals process. Right-of-way permits in Alaska are briefly noted to include roads and well pad construction. Even so, in making these statements, the DEIS neither clarifies where the proposed rule applies nor forecloses its potential application to supplement or even preempt 43 CFR part 36 in regulating operations in Alaska.

ALASKA REFUGES SHOULD BE EXEMPTED

While there is value in having nationwide consistency in how specific activities are managed in the Refuge System, there is no avoiding the fact Alaska refuges are administered very differently from refuges in other states. And while it is possible to have nationwide consistency in many respects, or for specific purposes, it is a very challenging thing to do successfully considering the enormous complexity of the legal, environmental and policy context that is unique to the Alaska Region. And unfortunately the proposed rulemaking does not adequately account for or consider necessary distinctions for Alaska refuges, including effectively accommodating applicable laws, regulations and policies. Unless those distinctions are incorporated into a proposed rule, and meaningfully made available for public comment, any attempt at nationwide consistency through regulation is at odds with the proper and lawful administration of the Refuge System.

A good example of the proposed rulemaking's failure to accommodate the unique Alaska context can be found in the preamble's explanation of how split estate in refuges is created. *See* 80 FED. REG. 77200, 77202 (Dec. 11, 2015). According to the preamble, the only two circumstances that lead to the creation of a split estate are where the United States acquired the land from an owner that did not own the oil and gas rights or where s/he reserved the oil and gas rights. In Alaska refuges, where the United States initially had title to virtually all lands, ownership interests have passed in the entirely opposite direction. This is not a petty distinction when considering the split estate created by the Alaska Native Claims Settlement Act of 1971 (ANCSA), which includes both conveyed ownership of subsurface resources and establishment of ANCSA §22(g) lands to satisfy the federal government's obligation to resolve aboriginal land claims. Neither the DEIS nor the proposed rule make any reference to ANCSA at all.

Further, in addition to the specific concerns noted earlier, randomly deferring to regulations at 43 CFR part 36 fails to sufficiently account for the gravity of the guarantees made to all Alaskan inholders under ANILCA, which are not adequately incorporated for consideration in this effort. The legislative history of ANILCA describes the right to access inholdings, including the "right to build a road or a pipeline or a powerline to develop [the inholding] across the wilderness areas, or a park or a refuge or a wild and scenic river," as an "absolute right," further noting "that the fact it is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land or make it subject to any laws or regulations that pertain the U.S. public lands." 125 CONG. REC. 11158 (May 15, 1979). The inholding is not to be regulated as a part of the Refuge System, and the right of access applies to subsurface interests, specifically including access for economic development or other purposes. These unique guarantees significantly informed and led to the establishment of enormous refuges in Alaska, yet neither the DEIS nor the proposed rule make any reference to them.

Not only would pushing forward with applying the current rule to Alaska refuges be inconsistent with federal law, and significantly challenging to implement, it does not appear to be intimately warranted by the circumstances. Duly considering the proposed rule's justification, there would be no short- or long-term harm from exempting Alaska from this rulemaking effort. The precept stated in the preamble that "[t]he existing non-Federal oil and gas regulations have remained unchanged for more than 50 years and provide vague guidance" is entirely inaccurate for Alaska refuges, which are governed by comprehensive and relatively recent regulations and policies.

The preamble also describes issues that are not relevant to Alaska refuges, including "lack[ing] both a process a specific guidance for operators and refuge employees" and needing to "apply a consistent and reasonable set of regulatory and management controls" to "protect the public's surface interests." The preamble even proposes to remedy these concerns by implementing practices long in place for Alaska refuges, such as requiring permits, fees and assurances for split estate operations. The reports from the Government Accountability Office cited as prompting this effort do not entertain or accommodate needed improvements for the Alaska Region. The 2003 report even uses practices on the Kenai National Wildlife Refuge as a positive example of how things should be done, and effectively concludes such practices should be "implemented throughout the agency" to ensure "environmental effects of oil and gas activities are minimized."

CACFA is in no way adverse to the possibility of enhanced regional consistency and improved management of oil and gas activities on Alaska refuges, just to the use of the current nationwide rulemaking effort to accomplish those advances. For example, the DEIS notes fees are charged for special use permits in Alaska, where used for non-federal oil and gas activities (e.g., seismic surveys). The DEIS then comments on the larger number of special use permits versus right-of-

way permits, noting no financial assurances are required for the former (p. 4-418). If that is a concern, it can be addressed through a separate process, and not necessarily a rulemaking process, which can meaningfully account for the unique Alaska context and legal framework.

Thank you for this opportunity to comment on the proposed rulemaking. Should you have any questions or require more information or clarification, please do not hesitate to inquire.

Yours faithfully,

Sara Taylor
Executive Director

cc: Mark Myers, Commissioner, Alaska Department of Natural Resources
Sue Magee, Statewide ANILCA Coordinator, State of Alaska