STATE OF ALASKA

FRANK MURKOWSKI, GOVERNOR

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF GOVERNMENTAL COORDINATION

■ SOUTHCENTRAL REGIONAL OFFICE
550 W. 7TH AVENUE, SUITE 1660
ANCHORAGE, ALASKA 99501
PH: (907) 269-7470 / FAX: (907) 269-3981

❑ 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) 257-1351 / FAX: (907) 272-3829

January 27, 2003

Cynthia Orlando
Concessions Program Manager
National Park Service
1849 C Street, N.W. Room 2410
Washington, D.C. 20240

Email: WASO_Regulation@nps.gov

Dear Ms. Orlando:

The State of Alaska has reviewed the Proposed Rule at 36 CFR Part 52, published in the Federal Register on November 27, 2002, concerning National Park Service Commercial Use Authorizations. These regulations implement Section 418 of Public Law 105-391, enacted November 13, 1998. This letter represents the consolidated comments of State of Alaska agencies having responsibilities for natural resource management and tourism business development.

Overview

This rule, if implemented as currently written, is highly burdensome to commercial visitor service providers and counter productive to both sound business management and the ability of the National Park Service to guide the long term provision of quality visitor services. Many provisions are also inconsistent with the Alaska National Interest Lands Conservation Act (ANILCA). The proposed regulations should recognize that this rule does not supercede any conflicting Alaska provisions in ANILCA, as addressed in the 1998 Omnibus Act.

Key specific problems – which are addressed in the analysis below – include:

- Gross receipts of less than $25,000 for in-park commercial use is not a reasonable criterion.
- Definitions of "*park area boundaries*" and "*within the boundaries of a park area*" could be highly problematic, especially in Alaska.
- Rule is inconsistent with ANILCA Section 103(c).

- Rule would unnecessarily put many visitor service providers under concession management.
- Before evaluating possible limitations, the Service should develop park-specific criteria.
- Public notice and comment should be required to limit number of authorizations.
- Using "random selection" to initially select or renew limited authorizations is short sighted and runs counter to the interests of the providers, visitors and the Service.
- "Random selection" is also inconsistent with ANILCA Section 1307 statutory preferences.
- A reasonable evaluation of fees should include unique local costs borne by the visitor service provider.
- A one-size-fits-all fee is not appropriate; and discretion to issue waivers should be provided.
- Prohibition of construction of improvements is inconsistent with ANILCA Section 1316.
- Termination of authorizations should include opportunities for notification, correction and appeal.

Some problematic provisions we have identified, most notably the "random selection" renewal method, stem from the 1998 statute. It appears there is no useful way to remedy this deeply flawed approach without Congressional action.

Section by Section Analysis

Section 52.1

> "*The Director at any time may choose to issue a concession contract in accordance with 36 CFR part 51 to authorize the conduct of commercial services even though the proposed services may be subject to authorization under a commercial use authorization*."

This section provides no criteria or guidance to determine when a business otherwise qualified for a commercial use authorization would be required to conduct activities subject to the concession regulations at 36 CFR Part 51. We request such guidance be provided to lessen the potential for arbitrary decision making. We also request the Service be required to work with visitor service providers in these instances to explore alternative measures that could address Service concerns, if possible, while remaining within the framework of Part 52.

Section 52.3 includes two problematic definitions:

> "*Incidental activity commercial use authorization means a commercial use authorization that authorizes the holder to provide specified commercial services to visitors to a park area when the services originate and terminate outside of park area boundaries*."
> emphasis added

> "*In-park commercial use authorization means a commercial use authorization (issued only if projected annual gross receipts under the authorization are less than $25,000) that authorizes the holder to provide specified commercial services to visitors of a park area that originate and are provided solely within the boundaries of a park area*."
> emphasis added

The addition of a new category for in-park commercial use that need not comply with complex concession requirements is welcome. It would be more reasonable, however, if the criteria were not based solely on the monetary size of the operation. Operations that have higher expenses yet limited impacts on the park (a scenario more likely in Alaska due to remoteness) should have the option of coverage under this category.

We request the regulations provide park managers with the discretion to waive these authorizations, and associated fees, for short-term commercial use of parks – such as an individual providing short term interpretation of a local craft with incidental sales. The US Forest Service, for example, provides waivers for those who commercially use forest lands for less than 50 days. Waivers for short-term commercial and fee-exempt groups would decrease time spent issuing permits, and would provide more incentive for historic, natural or cultural interpretation by local residents.

Definitions of "*park area boundaries*" and "*within the boundaries of a park area*" must be explicitly clarified to eliminate application to non-federal land; otherwise these definitions will be highly problematic. These definitions could be especially onerous in Alaska where whole communities, (e.g. Anaktuvuk Pass, McCarthy) are included within the exterior boundaries of large parks. Without such assurance, the combination of definitions imply that larger commercial service providers are always based outside park units, and smaller operations are the only ones that can or do provide services completely within park boundaries. Simply relying on the existing definitions of "*boundary*" and "*park area*" in 36 CFR 1.4(a)[1] is inadequate since "*boundary*" does not explicitly exclude non-federal land.

Contrary to the implications in the proposed rule, many commercial operators with existing incidental business permits that originate and terminate services within Alaskan park boundaries have annual gross receipts well over $25,000. It appears the high costs of doing business in remote Alaska parklands has been overlooked.

In Alaska, this provision is also inconsistent with Section 103(c) of the Alaska National Interest Lands Conservation Act, which limits application of park regulations in Alaska to federal lands within the unit.

Section 52.5

> "*… all solicitation of customers, sales, and payment for the services must occur <u>outside of park area bounda</u>*ries…." emphasis added

See comments about definitions in 52.3. For example, if this provision is intended to apply to McCarthy based air taxi operators and backcountry guides within Wrangell-St. Elias National Park and Preserve, they would not be able to operate from their privately owned, locally based, store fronts in the center of the local McCarthy business district. The entire town of McCarthy,

[1] 36 CFR 1.4(a) definitions include: *"Boundary" means a delineation of federal interest on a map. "Park area" means lands and waters administered by the National Park Service.*

its associated state road system, and thousands of acres of non-federal land are located within the statutory boundaries of this six million-acre park unit.

Even assuming this restriction only applies to federal land, it is not supported by the statute and remains overly restrictive. Air taxi operators, for example, often string together various charter flights, sometimes without advance notice, and prohibiting payments in the field would be burdensome for both the client and the operator.

While we recognize the value of discouraging aggressive, unsolicited sales pitches on parklands, preventative measures should not preclude pre-arranged or visitor-initiated transactions that would otherwise be inconvenient.

Section 52.6

> "*An in-park commercial use authorization authorizes the holder to provide specified commercial services to visitors (issued only if projected gross receipts under the authorization are less than $25,000) that originate and are provided solely within the boundaries of the park area…. If the Director projects that the annual gross receipts are expected to exceed $25,000, … a concessions contract or other applicable authorization must be issued.*" emphasis added

Similar to our comments about definitions in 52.3, this section should also be explicitly clarified to avoid the implication that it applies to non-federal land.

Furthermore, automatically requiring commercial service providers with gross receipts higher than $25,000 to operate as concessions under Part 51 is unnecessarily burdensome to both the provider and park administrators. At a minimum, the Service should be granted the ability to waive this provision if park impacts are minimal and the time and expenses associated with concession compliance would not provide significant benefits. We also urge development of alternative criteria to determine when use of concession rules would be triggered or considered.

It is also unclear if the $25,000 limit applies to gross receipts collected from only one park each year, or whether it applies to the overall gross receipts of a business operating within more than one park.

We also request the reference to "*other applicable authorization"* be deleted or clarified.

Section 52.12

> "*The Director must limit the number of commercial use authorizations… if the Director determines that issuing an unlimited number of such commercial use authorizations is inconsistent with the preservation and proper management of the resources and values of the park area [and if] the Director… determines in accordance with section 52.14 of this part to establish visitor use limits ….*"

The proposed rule includes no requirement for a public process to evaluate a potential determination by the Director to limit the number of commercial use authorizations. This lack of

an open public process would allow park managers to make arbitrary decisions without accountability for the required determinations. In Alaska, several park units are initiating Backcountry Management Plans that are expected to address and perhaps propose commercial use limits – possibly including specific locations, times of year, and appropriate types and levels of use. Limiting commercial use authorizations is an important management decision affecting visitor and local use as well as local economic development. Assessing limits, especially for the first time, should require public notice and comment opportunities.

Section 52.13

> "*If the Director determines to limit the number of commercial use authorizations to be issued for a particular type of commercial services, the issuance of the available commercial use authorizations must be accomplished by the Director by random selection under which all qualified applicants have an equal opportunity to obtain an authorization…. An incumbent holder will have no right or any form of preference to issuance of a subsequent commercial use authorization or Special Park Use Permit."*
> emphasis added

The lack of selection or renewal criteria is highly burdensome, unworkable, and inconsistent with sound business practices, especially since the statute requires that commercial authorizations not exceed 2 years. By fostering continual uncertainty, this provision severely and unreasonably limits the ability of businesses to participate in long term financing and marketing efforts. Unfortunately, the statutory language at Section 418(e) – "*No preferential right of renewal or similar provisions for renewal shall be granted by the Secretary*" – appears to grant little flexibility to develop any sort of meaningful renewal criteria beyond drawing straws or flipping coins. Must this statutory restriction on renewals also apply to the original selection in the case of first time limits?

Unless some way can be found to develop renewal standards, criteria or other method of increasing the long-term certainty of commercial operators, this provision should be dropped from the rule and the statute should be amended.

Fortunately for Alaska, ANILCA specifically relieves the NPS from having to implement this untenable provision in Alaska park units. Section 1307[2] of ANILCA provides for the continuation of visitor services in place before January 1, 1979, and, except for sport fishing and hunting guiding, provides preferences[3] to Native Corporations and local residents for new visitor services. These specific statutory preferences clearly over ride the proposed regulations; thus the final rule should explicitly clarify that Section 1307 supercedes this provision in Alaska. If any aspect of these regulations apply to administrative sites and visitor services as referenced in

---

[2] Section 1307(a) *"Notwithstanding any other provision of law, the Secretary, under such terms and conditions as he determines are reasonable, shall permit any persons who, on or before Jan. 1, 1979, were engaged in adequately providing any type of visitor services within any area established as or adding to a conservation system unit to continue providing such type of service and similar types of visitor services within such area if such service or services are consistent with the purposes for which such unit is established or expanded."*

[3] Section 1307(b) states that 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;…*"

ANILCA Section 1306, then this Alaska-specific statutory provision should also be recognized as superceding the current proposal.

Section 52.14

> "*The Director will establish visitor use limits if the Director determines that the limits are appropriate to protect park area visitors or resources….*"

Similar to Section 52.12, this provision should include a public notice and comment opportunity.

In addition, the NPS should develop park-specific criteria to determine when limitations may be necessary, and should consider alternative measures for reducing impacts before imposing them. The NPS should also be required to consider the economic impacts of visitor use limits on commercial service providers.

Section 52.15

> "*… the reasonableness and appropriateness of rates and charges shall be determined primarily by comparison with those rates and charges for facilities, goods, and services of comparable character under similar conditions, with due consideration to the following factors and other factors deemed relevant to the Director: length of season, peakloads, average percentage of occupancy, accessibility, availability and costs of labor and materials, and type of patronage. Such rates and charges may not exceed the market rates and charges for comparable facilities, goods, and services after taking into account the factors referred to in the preceding sentence*." emphasis added

As noted for 52.14 above, the NPS should also consider the overall economic impacts on commercial service providers operating within park units. This is just as important as assuring the public that they will not be overcharged. The higher costs and voluntarily reduced volume often associated with providing a high quality commercial visitor experience on parklands should not be overlooked. In addition, the extra cost of NPS fees and compliance work should also be recognized if commercial service providers are being compared to non-park visitor service providers.

Section 52.16

> *"The Director must charge a reasonable fee for a commercial use authorization, in addition to any application fee."*

Charging a single fee that applies to all commercial authorization use holders would unfairly penalize, and could even preclude, small operators. The Service should develop criteria for determining a fair and equitable fee structure that considers the needs of clients and operators. In addition, the Service should be authorized to waive the fee for smaller or short-term commercial authorization use holders. For example, local crafters may provide valuable interpretive information along with incidental sales of goods. The potential benefits provided to the park and its visitors may greatly outweigh the few dollars in fees that might be collected. It would also be unfortunate if even minimal fees discouraged such activities.

The regulations should also note that the 1998 National Parks Omnibus Management Act waives the authorization fees for the selling of Native goods, and should include a definition of Native goods sufficient to trigger the waiver.

Section 52.21

> "*… A commercial use authorization may not authorize the construction of structures, fixtures or improvements on lands located within the boundaries of a park area….*"

In Alaska, this prohibition of construction of facilities is not consistent with Section 1316[4] of ANILCA, which provides for the use of tent platforms and other temporary facilities directly and necessarily related to the taking of fish and wildlife. Thus the final rule should clarify that Section 52.21 is superceded by ANILCA Section 1316 (and Section 1306 if applicable) in Alaska park units.

Section 52.22

> "*… A commercial use authorization must contain appropriate provisions allowing the Director to terminate the authorization without liability at any time at the discretion of the Director*."

To assure accountability, documentation or written justification should be required to implement a discretionary termination. In addition, an administrative appeal process should be articulated. Before terminating an authorization, the Service should first provide a notice of intent to the operator with a reasonable opportunity to respond or correct the problem. Requiring these steps, consistent with the Administrative Procedures Act, will reduce arbitrary decisions, decrease liability, and lessen the number of judicial reviews.

Section 52.24

> "*… A commercial use authorization will not grant the holder a right or preferences of any form to the issuance of subsequent commercial use authorizations or to particular visitor use allocations*."

Consistent with our last comment on Section 52.13, this provision should acknowledge that regulations addressing preferences are superceded by ANILCA Section 1307.

Section 52.25

> *"A commercial use authorization must contain appropriate provisions requiring the holder to maintain normal accounting books and records and granting the Director and the General Accounting Office access to such books and records at any time for the purpose of determining compliance with the terms of a commercial use service authorization and this part."*

---

[4] Section 13.16(a): *"On all public lands where the taking of fish and wildlife is permitted, in accordance with the provisions of this Act or any other applicable State and Federal law, the Secretary shall permit, subject to reasonable regulation to ensure compatibility, the continuance of existing uses, and the future establishment, and use, of temporary campsites, tent platforms, shelters, and other temporary facilities and equipment directly and necessarily related to such activities…."*

The 1998 Omnibus Act states that five years is the length of time that books and records needs to be kept for concession permits, but there is no mention of the length of time needed to keep records and books for commercial use authorization permits. The length of time should be specified in these regulations.

Section 52.26

> "*Commercial use authorizations must contain such provisions as are otherwise required by law and must contain such provisions as the Director determines are necessary and appropriate (1) to protect park area visitors; (2) to assure that holders provide appropriate services to visitors; and (3) to protect and properly manage the resources and values of the park area. Commercial use authorizations must also contain appropriate provisions strictly limiting the holder's conduct of services to the services specified in the authorization issued*."

Without further guidance, commercial operators could be subject to unnecessarily burdensome requirements under this provision. At a minimum, the rule should be modified to reference "*provisions as the Director determines are **reasonable**, necessary and appropriate…"*

Thank you for your consideration of these comments. Feel free to contact me if you have any questions.

Sincerely,

/ss/

Sally Gibert
State ANILCA Coordinator