

# STATE OF ALASKA

**FRANK H MURKOWSKI**  
**GOVERNOR**

## **ANILCA IMPLEMENTATION PROGRAM**

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November 17, 2006

Tom Melius  
Regional Director  
U. S. Fish and Wildlife Service  
1110 East Tudor Road  
Anchorage, Alaska 99503

Dear Mr. Melius:

This letter follows up our previous discussions regarding the October 5, 2006 letter from Daryle Lons, Refuge Manager, to William Horn, attorney for Mr. Sam Egli of Egli Air Haul, reporting Mr. Lons denial of Mr. Egli's August 2006 application for a special use permit for helicopter access to selected sites on the Alaska Peninsula/Becharof National Wildlife Refuges. We understand that Mr. Horn has stated his intention to formally appeal the permit denial on behalf of Mr. Egli.

### **The State's Interests**

The State has a keen interest in both the final US Fish and Wildlife Service (Service) decision and in the evaluation process and criteria used to support the decision. Specifically, the "Documentation for Finding of Appropriateness of a Refuge Use" accompanying the denial of the above-referenced special use permit does not adequately address the requirements of the Appropriate Use Policy. As you know, this is the first application of the new Appropriate Use Policy in Alaska, and perhaps nationally. As such, we are particularly interested in assuring that the process used by the Service to evaluate this application establishes sound precedent for future findings, regardless of whether or not the uses are found to be appropriate. Consequently, this letter offers for your consideration our comments on the basis of the decision as you review Mr. Egli's appeal.

Even though we have substantive concerns with the decision making process at hand, we commend the Service's initial consultation with the State in accordance with the new Policy. We were contacted in a timely manner upon the Service's receipt of Mr. Egli's application and we met with the Refuge Manager and regional staff to discuss details of the proposal, the applicability of the Policy, and the draft findings. The Refuge Manager provided the State an opportunity to provide informal feedback before his final decision,

and we have had several subsequent conversations with the regional office. We look forward to building on this experience to further develop a mutually-beneficial state consultation and elevation process as a model for future Appropriate Use decisions.

### **Appropriate Use Finding**

Our primary concern with the finding is the limited rationale supporting the final decision that the proposed use is inappropriate. Specifically, the decision

- lacks meaningful discussion of possible mitigation of perceived or potential impacts;
- infers that any potential conflicts associated with helicopter access are unacceptable without supporting rationale or policy;
- does not recognize any potential benefits associated with accessing remote areas of the refuge by helicopter; and
- contains unsupported and contradictory assertions about the availability of alternative access.

Also, while the document includes some site-specific discussion about the area proposed for wildlife dependent use (Big Bend), additional site-specific information provided in advance by the State was not addressed. As a result, the one site with a proposed use that has the greatest potential for further consideration was also rejected. Taken as a whole, it appears the Service views this application as a referendum on the desirability of allowing helicopter access throughout the refuge system in Alaska, instead of a refuge-specific, site-specific consideration of the proposed use.

All of these concerns were articulated in our original informal discussions. An updated detailed evaluation, including new information, is attached.

### **Concerns with the Appropriate Use Policy Itself**

We realize that, as Regional Director, you are not in a position to deviate from adopted national policy; however, you should be aware that we are separately pursuing several Appropriate Use Policy issues at the national level, for example:

- Some of the questions used to determine appropriateness are awkwardly worded or confusing.
- The Policy does not provide adequate guidance about the elevation process for state fish and wildlife agencies.
- The unrealistic requirement to complete appropriate use determinations for all existing uses by July 2007 (if no post-1997 CCP is in place) will challenge Service staff, already burdened with the task of completing Comprehensive Conservation Plans (CCP) revisions by 2010.
- Making appropriate use determinations while a concurrent CCP process is underway raises important NEPA questions.

Thank you for your consideration of this letter. We are available to discuss any of these issues with you or your staff at any time. If you have any questions, please do not hesitate to call me.

Sincerely,

A handwritten signature in black ink, appearing to read "Sally Gibert". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sally Gibert  
ANILCA Program Coordinator

cc: Daryle Lons, Refuge Manager, Alaska Peninsula/Becharof Refuges

Attachment

State of Alaska Attachment:  
Appropriate Use Decision for  
Proposed Helicopter Access for Recreational Activities on the  
Alaska Peninsula/Becharof National Wildlife refuges.

General Comments

Our comments reflect as much or more on the Appropriate Use process, the decision making criteria, and the intent of the questions as they do about the specific responses to the application for a special use permit to provide a visitor service enabling both a wildlife-dependent recreation and other activities. Since this is the first time through this process, it is worth carefully thinking through how the pieces fit together, what is intended, and how it will work for future applications for general public uses and activities as well as for special use permits.

Our comments also seek thorough and consistent analysis, objectivity, and due process. Given the potentially controversial nature of authorizing a commercial service permit for public access via helicopter, and (our) previous claims of arbitrary decision-making associated with this method of access, we recommend the Service do a particularly thorough job of documenting the basis for the answers to the questions and the decision itself. We understand that not all future Appropriate Use findings will be this complex or lengthy.

Regarding the specifics of this finding, it looks very much like the Service is responding to requests for general recreational helicopter access on all refuges, rather than the limited number of sites and landings specified in the application. Much of the rationale for saying “No” now seems to be to avoid having to face this issue again. We recommend that the Service set aside this concern as much as possible and focus on the merits of the specific proposal at hand.

Decision Criteria

**(c) Is the use consistent with applicable Executive orders and Department and Service policies? If the proposed use conflicts with an applicable Executive order or Department or Service policy, the use is not appropriate. (Yes)**

We agree with the “Yes” answer, but have the following comments regarding the following sentence: “*Specific policy addressing use of helicopters for transport of recreational users on National Wildlife Refuges in Alaska has not yet been developed.*” In contrast to this plain statement, much of the rest of this paragraph, especially in combination with other sections, implies that the Alaska Region does have an unwritten policy that no recreational helicopter access will be allowed on any Alaska refuges. To help correct this implication, we recommend deemphasizing the content of other CCPs.

The Appropriate Use Policy requires all refuges to evaluate the appropriateness of all uses within one year. In light of this highly burdensome requirement, the Region could

consider a regional finding that 1) acknowledges that helicopter use is the only feasible or reasonable access in certain remote areas given Alaska's lack of infrastructure and often difficult terrain, and 2) develops an objective evaluation of conditions under which helicopter access for wildlife-dependent recreation and other uses could be found appropriate, and 3) articulates any permit stipulations necessary to reduce or avoid user conflicts and insure the use would be compatible. If the Service pursues this course of action, we recommend working with the applicant to develop a temporary authorization (minimum one year) to test the viability of a preliminary set of stipulations.

**(e) Is the use consistent with refuge goals and objectives in an approved management plan or other document? .... If the proposed use, either itself or in combination with other uses or activities, conflicts with a refuge goal, objective, or management strategy, the use is generally not appropriate. (No)**

The accompanying analysis points to Goal 7 in the CCP: "*to provide opportunities for subsistence, recreation, and commercial users to enjoy and benefit from compatible activities on the Refuges in ways that minimize conflicts among user groups.*" Given the remoteness and inaccessibility by the general public of the areas addressed in the application, the proposed use could be "*consistent with refuge goals and objectives*" if permits are issued judiciously with appropriate stipulations. The following points are not currently considered in rendering an apparently arbitrary "No" response:

- Helicopters do provide and facilitate opportunities for recreational users on the refuge in remote locations with little or no practical alternative access.
- The requested landing sites affect a small and little-used portion of the refuge. Recreational helicopter access would not be authorized throughout most of the refuge, therefore providing ample opportunities for those wishing to avoid them and minimizing user conflicts.
- There are very few other refuge users in the area to create substantial user conflicts, so this alone argues that "conflicts among user groups" will be minimal.
- The criterion above does not demand a total absence of conflicts. In fact, the new national policies urge that multiple uses be facilitated and conflicts minimized through seasonal, spatial, and temporal separation.
- The few actual user conflicts can be minimized through permit stipulations and monitoring. We suggest consideration of a joint reporting system whereby the local, state and federal staff share anecdotal reports of conflicts specific to fishing, hunting, floaters, etc. as a form of monitoring uses and conflicts so that further permit stipulations can be fine-tuned.

In response to these discussion points, the Finding includes the following statement:

*While implementing various permit stipulations for the helicopter use could reduce the potential for future conflicts among user groups, there would still inevitably be an increase to some degree in potential for conflicts to arise over the present situation. I don't believe that the limited additional recreation opportunities which would be provided to the few members of the public who*

*would have the opportunity to access the proposed sites on the refuge by helicopter would offset the overall potential for conflicts among user groups.*

This response does not adequately address our comments above and implies a zero tolerance for impacts regardless of the benefits.

**(f) Has an earlier documented analysis not denied the use or is this the first time the use has been proposed? If we have already considered the proposed use in a refuge planning process or under this policy and rejected it as not appropriate, then we should not further consider the use unless circumstances or conditions have changed significantly. If we did not raise the proposed use as an issue during a refuge planning process, we may further consider the use. (No)**

It appears the second and third sentences in the criterion above attempt to clarify the awkward question. If so, then denial of the 1992 helicopter application is not relevant since it was not considered in a refuge planning process or evaluated under the Appropriate Use policy under the Refuge Improvement Act of 1997. The old application is also not relevant since the requested landing locations and refuge issues were different in 1992. Furthermore, the issue of recreational helicopter use was raised in the subsequent CCP with the direction that applications would be addressed on a case-by-case basis, as noted in the Finding's "Background" discussion. Consequently this question should not be used to deny the current application and the answer should not be a simple "No."

Getting back to the meaning of the question, we also observe that it would not make any sense to intend that any past denial of use would automatically preempt a subsequent authorization. This approach illogically assumes that no future CCP could ever change an old decision.

**(g) For uses other than wildlife-dependent recreational uses, is the use manageable within available budget and staff? If a proposed use diverts management efforts or resources away from the proper and reasonable management of a refuge management activity or wildlife-dependent recreational use, the use is generally not appropriate. In evaluating resources available, the refuge manager may take into consideration volunteers, refuge support groups, etc. If a requested use would rely heavily on volunteer or other resources, the refuge manager should discuss the situation with the refuge supervisor before making an appropriateness finding. The compatibility policy also addresses the question of available resources (603 FW 2.12A(7)). (No)**

Again, a single yes/no answer does not recognize that there is often more than one way to address a problem. We appreciate the challenges associated with declining budgets, staff, and limited law enforcement. This is an issue for all public land managers. Nonetheless, the response over-simplifies the potential management implications and misses an opportunity for more meaningful discussion. Based on the stated rationale, the refuge could easily deny any non-wildlife-dependent use without further analysis. On the other

hand, commercial use stipulations can be designed to be easily monitored, and could even be used to subsidize other refuge management, monitoring, and enforcement efforts. For example, the Chugach National Forest requires a number of stipulations on their commercial recreation helicopter permits that make monitoring and enforcement easier.

See link from [http://www.fs.fed.us/r10/chugach/news\\_releases/heliski\\_feis.html](http://www.fs.fed.us/r10/chugach/news_releases/heliski_feis.html).

A useful and relevant report was recently released by The Alaska Quiet Rights Coalition: "Helicopter Supported Commercial Recreation Activities in Alaska", which includes a table of permit stipulations issued by various federal and state agencies to manage commercial recreational helicopter use. This report is on the web (but takes some time to download). See link at:

[http://www.alaskaquietrights.org/images/pdf/AQRMainReportOct23\\_2006.pdf](http://www.alaskaquietrights.org/images/pdf/AQRMainReportOct23_2006.pdf)

Possible permit stipulations that could be useful in the current context include:

- required on-board GPS recordings of location and elevation,
- specified flight paths to avoid sensitive wildlife areas and other refuge users,
- designated no-fly zones (e.g. to prevent moose hunting conflicts)
- dedicated flying time or seats for Service personnel for monitoring purposes,
- required toll free number for visitors to find out when/where to avoid helicopter encounters.

Two additional facts should be addressed: (1) helicopter landings are currently occurring in the area of the permit applications by landing on state-owned waterways and tidelands; and (2) by authorizing alternative landing sites on refuge uplands, the refuge's management concerns about over flights and conflicts with other users could be directly addressed. The State finds that the limited number of landings in these state waterways has no detrimental effect on fish and wildlife, and the extremely low level of visitation by other users does not suggest significant user conflicts. Thus the State sees no reason to apply further restrictions on the limited number of helicopter landings currently occurring on state land/water in the refuge. Nonetheless, the State and refuge staff visited and evaluated some of these sites in 2000 and concluded that it would be preferential if the helicopter landings occurred a distance back from the waterways on refuge lands. If the Service issues permits for these sites, the operator then must comply with stipulations that reduce potential over flight conflicts with other users.

Commercial operators are typically highly motivated to comply with refuge permit stipulations. If they ignore these requirements, their permits will be subject to revocation or non-renewal – a serious consequence for most rural Alaska businesses. Thus judicious use of permit stipulations, developed in consultation with the operator, is a very effective means of avoiding or mitigating resource impacts and user conflicts.

We also observe several contradictions among the various responses that we urge be rectified prior to responding to the applicant. For example, the response to question (g) says "the proposed areas are only practically accessible by that motorized means [helicopters]." Response (h) says that helicopters will be needed by the Service for monitoring. In contrast, the response to question (i) touts the relative ease of access by

fixed-wing aircraft in an attempt to argue that helicopter access on the refuge is not necessary.

**(h) Will the use be manageable in the future within existing resources? If the use would lead to recurring requests for the same or similar activities that will be difficult to manage in the future, then the use is not appropriate. If we can manage the use so that impacts to natural and cultural resources are minimal or inconsequential, or if we can establish clearly defined limits, then we may further consider the use. (No)**

We disagree with the response to this question for the following reasons: First, the Refuge has little evidence supporting the assumption that other helicopter operators would be expected in the foreseeable future to request landing areas given the lack of other helicopters based within economic proximity of the Refuge. There is little basis to conclude that demand for helicopter landings (from commercial operators or the public) would increase substantially. The high cost of helicopter access is self-limiting in this remote part of Alaska. Therefore, projections of the difficulty of addressing reasonable upper limits on recreational helicopter use are likely over-estimated. The lack of an attempt to address whether or not a modified application could alleviate Service concerns is also notable. The Refuge could develop a “management program” in response to the existing permit application that could provide criteria upon which future applications could be judged without reinventing the wheel. Denying a current application for fear of not being able to control responses to future applications appears to thwart due process for current and potential future applicants.

As discussed in our comments regarding question (g), the answer could be used to arbitrarily deny many uses in the future. We urge the Refuge to consider other options; for example, propose back to the applicant a down-sized application that would reduce management concerns. The answer also contradicts the question (g) claim that there will be no other helicopters available to assist with monitoring. Also, FWS can’t simply deny a current application based on intent to deny future applications for a similar use. Each application must be evaluated on its merits in consideration of due process.

**(i) Does the use contribute to the public’s understanding and appreciation of the refuge’s natural or cultural resources, or is the use beneficial to the refuge’s natural or cultural resources? If not, we will generally not further consider the use. (No)**

The response misses the intent of the question, which appears designed to focus solely on the positive aspects of the proposed activity. The corresponding impacts of the activity are to be addressed elsewhere, such as in response to question (j) and any subsequent compatibility determination. With this in mind, the response does not recognize that helicopters do facilitate access to, and appreciation of, the refuge – especially in remote areas that would otherwise receive little, if any use. We agree that not everyone desires or appreciates the flexibility provided by helicopter access, and that for others the presence of a helicopter detracts from their experience; however, this does not negate the



positive and unique experience that this method of access can provide under controlled circumstances.

The response also fails to account for the benefits of employing permit stipulations to mitigate potential impacts on the refuge of existing helicopter landings on adjacent non-federal land (e.g., state waterways within the refuge boundaries). Under Service management, permit stipulations could address issues that are currently beyond the Service's jurisdiction, including over flights, and to avoid potential conflicts with other users or refuge resources. This is clearly a potential "benefit." See our comments under question (g).

*"The unique topography of the Alaska Peninsula and Becharof Refuges provides the most numerous and diverse types of fixed wing aircraft landing areas of any of the 16 national wildlife refuges in Alaska."* (2<sup>nd</sup> paragraph)

As previously noted, this statement contradicts other statements that the refuge needs helicopters for administration and monitoring purposes.

*"Seven of the eight proposed landing sites would be principally for the purpose of non-wildlife dependent uses...."* (3<sup>rd</sup> paragraph)

The Findings responses are collectively based on non-wildlife-dependent uses. The responses should also address the uses that are wildlife-dependent. Based on this information, the applicant may choose to modify the application or the Service could suggest the applicant revise the application rather than reject it outright.

*"The 'Big Bend' landing site is the only proposed site where wildlife dependent recreation (sport fishing) would be the principal use. This location is in the upper-middle reaches of Big Creek where helicopter access is not the only practical means of access. Several nearby lakes, dry lake beds, lake shorelines and possibly some tundra areas provide access for wheel/float airplanes."* (4<sup>th</sup> paragraph)

We have researched several of the specific landing areas identified in the application. The flat sand blow area around Big Bend is probably too short for a Super Cub to safely land, and both sides of the creek for a half mile either side consist of tundra hummocks and swampy grassland with rough surfaced tops. In combination it appears there are no suitable flat areas for a tundra-tire airplane at Big Bend. Big Creek is negotiable by watercraft but is about 100+ river miles upstream of King Salmon. By helicopter it is 28 miles. We also learned that the "lake" on the map near the landing site called Swirl Crater 2 is actually just a crater, very small, shallow, rocky and barricaded on all sides by the crater walls and mounds of glacial till. A helicopter may be the lowest impact, practical, and safest access in these remote locations addressed in the application.

**(j) Can the use be accommodated without impairing existing wildlife-dependent recreational uses or reducing the potential to provide quality (see section 1.6D), compatible, wildlife-dependent recreation into the future? If not, we will generally not further consider the use. (No)**

We do not concur that limited helicopter landings under controlled circumstances will significantly impair wildlife-dependent recreational uses on either a refuge-wide basis or in these locations. Site-specific impacts and potential user conflicts can be avoided or mitigated. The number of hunters, fishermen or other users during the periods of applied use is unknown but estimated to be less than a handful that ever reach these remote upland locations. Furthermore, refuge management via a special use permit has the added benefit of increasing Service control over the existing over flights. Most of the four million-acre refuge will remain closed to helicopters for public access.

We frequently hear that the Service desires the State to support the application of Wood-Tikchik State Park management tools on or near national wildlife refuges. To clarify the State's perspective, we look at each circumstance and each tool in context. Wood-Tikchik and its nearby refuge neighbors are different in many ways; therefore management actions that may be appropriate in one location are not necessarily so elsewhere.

Regarding the Kvichak River helicopter access restriction, it is important to understand the different circumstances and purpose behind the initial closure. The Alaska Board of Fish and Game made the decision to prohibit use of helicopters in 1967, in response to reports that US Air Force personnel stationed at King Salmon Air Base were being transported to the area by helicopters and causing numerous angling violations. The closure has been retained over the years after consideration at the local advisory committee level only, not by the Board of Fisheries as indicated. To date, the full Board has not received or discussed any proposals to rescind the regulation. The Board, however, has rejected proposals for helicopter restrictions in other areas, such as the Chuit River, ruling there was no conservation issue necessitating action.

The characterization of the intent of the Refuge Improvement Act referenced in the last paragraph is over-simplified and used inappropriately. The Mission of the System is to "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." The "theme" that "protection of wildlife resources comes first" belies the fact that the Refuge Improvement Act provides for both conservation and for the benefit and use by the public.

Finally, a statement in the last sentence of the response to question (j) says that even multiple use agencies "...*limit widespread use of helicopters for recreation access....*" This statement is not relevant and appears inflammatory since the actual permit under consideration involves only 8 landing sites across 4 million acres of the refuge and no other applications are pending. Neither the applicant, nor the State, is proposing or advocating for "widespread use of helicopters."