

# STATE OF ALASKA

**SEAN PARNELL, Governor**

## **ANILCA IMPLEMENTATION PROGRAM Office of Project Management and Permitting**

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December 6, 2011

Mitch Ellis, Chief of Refuges – Alaska  
U.S. Fish and Wildlife Service  
1011 E. Tudor Road, MS-225  
Anchorage, AK 99503

Dear Mr. Ellis:

As a follow-up to our meeting on November 22, 2011 with you and others regarding the Kodiak Refuge Commercial Fisheries Support Facilities Management Plan, I'd like to thank you for your personal interest regarding these longstanding issues. As discussed at the meeting, the State has a strong interest in the continued and expanded use of commercial fishing support facilities provided for under Section 304(d) of the Alaska National Interest Lands Conservation Act (ANILCA) and has raised significant issues since before initiation of the 1987 Comprehensive Conservation Plan (CCP). We have similarly commented on subsequent planning efforts, including the 1987 Kodiak Management Plan for Commercial Fishing Activities, the 1994 Kodiak Public Use Management Plan, the 2007 Revised Kodiak CCP and, most recently, the 2011 Revised Commercial Fishing Facilities Management Plan. Over the years, the Service has indicated the State's issues relative to Section 304(d) would be cooperatively addressed. Several examples of correspondence from our respective agencies are provided below.

Memorandum dated November 5, 1986, from Planning Team Leader Leslie Kerr to Joe Mazzoni, Chief of Refuge Planning:

#### *4. Commercial Fishing*

*The State is concerned that the wording in the intensive management category is not consistent with ANILCA section 304(d). A language change can alleviate this concern without debating the meaning of 304(d) (i.e., "significant expansion...beyond the level of such activities during 1979." This wording was developed in consultation with the fisheries staff and the state.*

*We expect the state will still want to pursue development of a mutually agreeable definition of what constitutes a "significant expansion". When such an agreement has been reached it can be incorporated into the text of the various plans; the table would not need to be changed again.*

November 4, 1988 Record of Decision for the Alaska Maritime Refuge, Appendix B:

*The Service confirms the statement, on page III-26, that the cyclic nature of fisheries will be taken into consideration when applying the "1979 level" criteria. The determination of the*

*“1979 level” will be consistent with previous agreements with the Alaska Department of Fish and Game.*

Letter dated March 19, 2004 from Leslie Kerr, Kodiak Refuge Manager, to Tina Cuning, ADF&G ANILCA Program referencing support of Commercial Fishing Facilities:

*This issue was not raised by the public in any of the many meetings we have held during development of our draft comprehensive conservation plan revision so I feel it would be inappropriate to add it at this late date. The conservation plan does lay out an orderly process and schedule for review of our various step-down plans. This particular plan is scheduled for review in 2007 and I look forward to the State’s participation.*

Letter dated December 15, 2006 from Sally Gibert, ANILCA Program Coordinator, to Gary Wheeler, Kodiak Refuge Manager:

*Our only outstanding CCP issue will be addressed in the upcoming revision of the Commercial Fisheries Management Plan (CFMP). The State remains particularly interested in the judicious allowance of shore-based special use permits in support of commercial fishing activities authorized under ANILCA Section 304(d). The state continues to hear from commercial fishermen who have been denied commercial use permits to relocate closer to their fishing area, thus affecting their ability to participate in the state managed fishery, even though the overall fishing effort associated with these permit applications has declined below the 1979 use levels allowed under Section 304 (d). We request the Record of Decision (ROD) clarify that the Refuge will work with the State to resolve this issue. We urge progress toward a temporary or permanent solution before the 2007 fishing season.*

Email dated June 9, 2010 from Gary Wheeler, Kodiak Refuge Manager, to Susan Magee and Brad Palach, ANILCA Program, cc: Brian Glaspell and Kent Sundseth:

*Thanks for the time you spent with us yesterday. I feel we had a fruitful discussion and I look forward to working with you to try to define “significant expansion.”*

Given our expectation that the State’s comments on commercial fishing support facilities in the 2007 Kodiak CCP would be addressed in this step-down planning process, our 2008 scoping comments regarding that plan included a request to work with the Service on its revision. This planning process was not the full collaborative effort that we requested; however, based on a commitment from the Refuge Manager, we anticipated an opportunity to have constructive and productive follow-up discussions related to the significant issues we raised in our comments on the draft plan. Our understanding was that we would have an opportunity to resolve the longstanding issue of establishing criteria to define “*significant expansion of commercial fishing activities*” consistent with the intent of ANILCA. As you are aware, those follow-up discussions did not occur, and the draft plan was finalized without any State involvement.

As previously noted in the State’s scoping comments, Section 304(d) of ANILCA (and Section 205 for Park Service units) illustrates how Congress intended conservation system units (CSUs) in Alaska to be managed differently than in the contiguous 48 states. By determining that support for commercial fishing was a permitted use of refuges and other CSUs in Alaska, Congress was providing direction to

federal agencies that they should manage lands in Alaska to assure the continuation of unique uses not found elsewhere. ANILCA also included direction that, while providing sideboards, clearly indicated the intent to allow reasonable *expansion* of commercial fishing activities. To ensure the use would not be arbitrarily curtailed, Congress also required that, after conducting a public hearing, the Secretary must find the activity both inconsistent with the purposes of the unit and a significant expansion of commercial fishing activities.

*The Secretary shall permit within units of the National Wildlife Refuge System designated, established, or enlarged by this Act, the exercise of **valid commercial fishing rights or privileges** obtained pursuant to existing law and the use of Federal lands, subject to reasonable regulation, **for campsites, cabins, motorized vehicles, and aircraft landings directly incident to the exercise of such rights or privileges**: Provided that nothing in this section shall require the Secretary to permit the exercise of rights or privileges or uses of the federal lands directly incident to such exercise, which he determines, **after conducting a public hearing in the affected locality**, to be **inconsistent with the purposes of a unit** of the National Wildlife Refuge System as described in this section **and to be a significant expansion of commercial fishing activities** within such units **beyond the level of such activities during 1979**. [ANILCA Section 304(d) Emphasis added.]*

Legislative history confirms this intent:

*Chairman of the Committee, Senator Henry Jackson. ...Senator Gravel raised an issue with the commercial fishing language that we might be putting a rigid cap on the authority of the Secretary to permit an increase in commercial fishing. We did work out some language...[that]guarantees that subject to reasonable rules and regulations the Secretary shall permit these commercial fishing rights and privileges to take place as well as incidental facilities on Federal land, and this activity is to be permitted at the '79 level **and can rise above that '79 level** if the Secretary determines that that is, in fact, compatible with the purposes of the refuge.*

*Senator Stevens. The Secretary has to find it is **inconsistent and that there is a significant – just a significant expansion won't trigger it?***

*Mr. Williams. **Right.*** (US Senate Markup Session on S.9, Alaska Lands Committee on Energy and Natural Resources, October 10, 1979, pages 81-82, Emphasis added.)

Unfortunately, the plan's comment summary section claims "...defining significant expansion of commercial fishing activities is problematic due to the multiple factors that could contribute to a potential expansion" but then generally identifies three main parameters as primary indicators of expansion and concludes that "The Service would consider expansion of any one of these parameters beyond the levels identified in this plan to be significant." This implies there could be an overall reduction but with any one expansion among several variables, the significance threshold would be exceeded. In addition, that statement only addresses one of the three criteria required by ANILCA. There has been no public hearing on this determination nor has the Service issued a formal finding that additional use would also be inconsistent with Refuge purposes. Furthermore, the plan does not include a comparative analysis of the commercial fishery and related structures beyond the number of commercial set net permits issued in 1979 as compared to 2010 levels to support the claim that there has been a significant expansion of fishing activities. We also note the plan limits the number of permits to that issued in 1979, when the 1987 CCP allowed the continued use of 34 sites. Additionally, there is no discussion of the anticipated resource impacts that would result from additional accommodations, such

as the State's request to allow occupancy through the full commercial fishing season without having to request special authorization. We therefore find the statement referenced above both premature and inadequate to justify limiting this ANILCA protected use. While we understand management discretion is an element of the decision process, ANILCA requires the basis for the limitation be fully disclosed and vetted through a public hearing process.

For over 25 years, the State has consistently maintained there is merit in working cooperatively to identify ways to further accommodate support of this valuable commercial fishery as intended by ANILCA, while ensuring resources are protected consistent with the purposes of the Kodiak Refuge and the mission of the National Wildlife Refuge System. It was encouraging that participants in the meeting acknowledged the cyclical nature of the fishery and expressed a willingness to revisit restrictions in the plan should there be a corresponding increase in demand for fishery-related support facilities; however, this intent is not expressed in the plan. We are therefore dissatisfied with the Service's decision to not engage in meaningful dialogue on this issue, and without adequate justification, to preclude future consideration of additional permits or any other allowances. As such, in order to fully understand the rationale for the Service's current decision and evaluate how to proceed, we request the following:

1. A complete copy of the administrative record for this planning process.
2. A written account of the accommodations made over and above the use as it was occurring in 1979 that the Service believes, if exceeded, would be both inconsistent with the purposes of the Kodiak Refuge *and* constitute a "significant expansion" pursuant to ANILCA Section 304(d).
3. A full response to the issues raised in the State's two comment letters on the draft plan (attached).
4. An explanation of how the step-down plan complied with NEPA.

Thank you for your attention to this important matter. Please contact me at (907) 269-7529 if you have any questions.

Sincerely,



Susan Magee  
ANILCA Program Coordinator

#### Enclosures

cc: Geoff Haskett, Alaska Regional Director  
Polly Wheeler, Deputy Refuge Chief  
Gary Wheeler, Kodiak Refuge Manager  
Tracey McDonnell, Refuge Supervisor  
Helen Clough, Chief, Division of Conservation Planning and Policy  
Stan Leaphart, CACFA Executive Director  
Doug Vincent-Lang, Alaska Department of Fish and Game  
Jeff Regnart, Alaska Department of Fish and Game  
Brad Palach, Alaska Department of Fish and Game

