



April 12, 2016

Herbert Frost, Regional, Ph.D.
Alaska Regional Director
National Park Service
240 West 5th Avenue
Anchorage, AK 99501

Dear Mr. Frost:

The State of Alaska reviewed the National Park Service's (Service) proposed rule "Alaska; Subsistence Collections" (RIN 1024-AE28), which amends Alaska-specific regulations at 36 CFR Part 13. The Federal Register Notice (Notice) for the proposed rulemaking indicates that it implements the May 8, 2014 Finding of No Significant Impact (FONSI) for the "Subsistence Collections and Uses of Shed or Discarded Animal Parts and Plants from NPS Areas in Alaska Environmental Assessment" (EA), as well as propose new wildlife restrictions, which are unrelated to the EA and FONSI. The following comments represent the consolidated views of the State's resource agencies.

The State's March 21, 2012 comments on the EA expressed full support for authorizing the collection of shed and discarded animal parts and plants in Alaska park units. We reiterate our support and commend the Service for being responsive to subsistence user's requests to expand authorization of this important subsistence activity beyond the two park units where it is currently allowed (Gates of the Arctic National Park and Preserve and Kobuk Valley National Park).

Unfortunately, we are concerned that the method of authorization described in the proposed rule could, contrary to clear intent in the Alaska National Interest Lands Conservation Act (ANILCA), unnecessarily burden subsistence users administratively, as well as effectively circumvent the subsistence closure process that is currently in regulation. The proposed rule also generates several other concerns, which are discussed in more detail below. Perhaps most concerning, however, is the overall lack of consultation prior to the release of the proposed rule – with the State, tribes, ANCSA corporations, and citizen-based subsistence advisory groups created by ANILCA specifically to integrate local knowledge into management decisions on subsistence issues.¹

With regard to tribal consultation, the Service determined that no consultation was required "because the rule will have no substantial direct effect on federally recognized Indian tribes or ANCSA Native Corporation lands, water areas, or resources." However, the Notice indicates that all affected

¹ ANILCA Section 801. (5) *The national interest in the proper regulation, protection and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.* [Emphasis added]

Subsistence Resource Commissions (SRCs) and Regional Advisory Councils (RACs) provided input during the scoping phase of the EA, following presentations by the Service. It also states that all tribes affiliated with affected park areas were invited to consult on the alternatives in the EA. Since the proposed rule implements the Service's FONSI, it is unclear why the very same entities would not be consulted with on the more specific implementing regulations.

In addition, the rule proposes new restrictions on the use of bait for the take of bears under federal subsistence regulations and, according to the Notice, "clarifies" regulations that apply to the collection of wildlife (not applicable to subsistence activities), including activities that "might" be authorized under state regulation (81 FR 1594). Since these proposals can directly affect state management and subsistence users' interests, it is also unclear why there was no consultation with the State, SRCs, or RACs prior to the release of the proposed rule; nor is it clear why the Service chose not to submit proposals to the Federal Subsistence Board (FSB) or the State Board of Game (BOG) for consideration.

We understand the Service's current view is that it is appropriate to conduct consultation during a public comment period; however, this is a significant departure from the way in which consultation has been conducted previously, even in recent past, as noted above. We also believe that consultation after a proposed action is released for public review can undermine its very purpose, which is to obtain resource-related data and other relevant information to inform the Service's decision-making. Consultation that occurs only *after* publicly releasing a proposed action can result in proposals that are based on incomplete or inaccurate information, and lead to unnecessary paperwork, confusion, and controversy among the public and other stakeholders.

The need for consultation was recently reinforced at a March 2016 meeting between the East Interior RAC (EIRAC) and the Service, where members clarified that they had significant concerns with the lack of consultation and the manner in which the regulation was promulgated without local input. The EIRAC also maintained that the lack of consultation resulted in a rule that made baiting of bears - a use they desire to continue - unworkable, and unlikely to result in the harvest of bears.

In related correspondence to the Service, dated March 4, 2016, the EIRAC further commented that the proposed rule was sidestepping the BOG and the FSB regulatory processes - the appropriate venues for considering these types of issues - causing unnecessary confusion for users. The EIRAC concluded that the baiting provision of the proposed rule should be withdrawn, followed by meaningful consultation with the individual RACs and submittal of any resulting proposals to the BOG and the FSB for consideration.

While we are acutely aware that suspending or re-publishing the proposed rule to allow for appropriate consultation will further delay implementing the desired allowance for subsistence collection activities, we feel that a delay is necessary and in the public's best interest.

Subsistence Collection for Customary Trade

ANILCA authorized subsistence use in specific Alaska park units, including "for barter, or sharing for personal or family consumption; and for customary trade" (ANILCA Section 803). The Notice recognizes that the definition of subsistence uses in ANILCA "reflects that the creation of hand-made crafts from nonedible natural materials **has long been a part of the cultural, social, and economic**

practices of those living a subsistence way of life in Alaska.” (Emphasis added, 81 FR 1593). The notice also states that the omission of “plant materials” within that same definition does not indicate any intent to prohibit the use of plant materials in the making of handicrafts.

While “customary trade” was identified in the statutory definition of subsistence uses and later mirrored in the Service’s implementing regulations (36 CFR Part 13), it was not specifically defined in ANILCA. However, there is considerable discussion of “customary trade” in the preamble to the Service’s 1981 final regulations at 36 CFR Part 13. In particular, the preamble recognized that “as with fur trading, so too **the making and selling of handicraft articles out of plant material is a customary and traditional part of the subsistence lifestyle** in certain places” (Emphasis added, 46 FR 31850). As a result, the final regulations specifically authorized the sale of handicraft articles made from plant materials by local rural residents in two park units - Kobuk Valley National Park and Gates of the Arctic National Park and Preserve (36 CFR Part 13.1504 and 36 CFR 13.1006 respectively) - *without a permit*.

Instead of following this precedent, as well as the intent in ANILCA Section 802 “to cause the least adverse impact possible on rural residents who depend upon subsistence,” the proposed rule establishes a permit system and gives superintendents broad discretion to apply restrictions and identify areas in the park unit that are “open” to the use. This approach effectively “closes” park lands not designated as “open” to this ANILCA authorized use, which is contrary to the “open until closed” concept that prevails throughout ANILCA and Alaska-specific regulations at 36 CFR Part 13.

In particular, the “open until closed” concept established in ANILCA Section 816 for subsistence is mirrored in Alaska-specific regulations at 36 CFR 13.485(c) *Subsistence use of timber and plant material*, which the rule proposes to amend. Currently, this section of the Part 13 regulations allows noncommercial gathering by local rural residents of fruits, berries, mushrooms, and other plant materials for subsistence uses *without a permit*. The authority to restrict these and other subsistence uses is limited to *temporary* closures for *specified* reasons.

...the Superintendent, after notice and public hearing the affected vicinity and other locations as appropriate, may temporarily close all or any portion of a park area to subsistence uses of a particular plant population. The Superintendent may make a closure under this paragraph only if necessary for reasons of public safety, administration, resource protection, protection of historic or scientific values, conservation of endangered or threatened species, or the purposes for which the park area was established, or to ensure the continued viability of the plant population. For purposes of this section the term “temporarily” shall mean only so long as reasonably necessary to achieve the purposes of the closure.

While the proposed rule retains the current public closure process in 36 CFR 13.485, given Superintendents are at the same time granted broad discretionary authority to determine when, where, and how the use can be conducted, it is unclear how or when the public closure process would apply, or be followed.

As noted in our comments on the EA, the collection of these resources is generally opportunistic and incidental to other allowed subsistence activities, such as hunting and berry picking. This allowance is not going to substantially increase overall subsistence use. The EA itself acknowledged statements made by the SRCs and RACs during scoping that the making of handicrafts is labor intensive and time

consuming, which limits the amount of resources sought and used at any given time, alleviating general conservation concerns. Neither the FONSI nor the proposed rule provides any evidence to substantiate resource concerns as the basis for such a restrictive permit system. Absent any documented resource impact or other valid concern, ANILCA compels the Service to allow this activity without subjecting subsistence users to a burdensome permit system that further complicates the federal subsistence program. To preserve this traditional subsistence activity, we request the Service work with the State, the Federal Subsistence Board, and all affected SRCs and RACs, to identify discrete regulatory changes that would allow the Service to authorize this use and be responsive to resource and other management concerns, consistent with ANILCA.

Alaska park regulations at 36 CFR 13.420 also left the door open to authorize other “customary trade” activities on a park specific basis.² There is no indication in the preamble on the 1981 implementing regulations that the sale of handicrafts made from plant materials was the *only* other form of customary trade; however, the proposed rule forecloses the option of authorizing other activities by removing the provision “and such other activities as may be designated for a specific park area in the applicable special regulations of this part” from the definition of “customary trade” in 36 CFR 13.420(3). We therefore request that language be retained.

Gates of the Arctic and Kobuk Valley National Parks

The proposed rule specifically invites comments on whether the existing allowance in Gates of the Arctic and Kobuk Valley national park units should remain the same or be subject to the proposed permit system. For the reasons explained above, and absent any on-the-ground issues associated with the existing allowance, we see no reason to change the existing park-specific regulations. Further, we request the Service consult with the above entities *before* proposing any new restrictions, including the system-wide changes in the proposed rule.

Amended Definitions

The proposed rule invites comments on specific terminology used in two definitions - the existing definition for “customary trade” and the new proposed definition for “handicraft article.”

According to the Notice, the proposed rule amends the current definition of “customary trade” found in 36 CFR 13.420 to clarify that such use “does not include trade which constitutes a significant commercial enterprise.” Given “customary trade” is embedded in the definition of subsistence use, the language in question seems self-explanatory, making further clarification unnecessary. However, the preamble to the 1981 final Service regulations at 36 CFR Part 13 also provides clarification, which states “*It should be recognized, that the definition of “customary trade was intended by Congress to be narrow.” “Accordingly, this provision is not intended to allow trapping or any other customary trade practice within the parks and monuments to be or become a solely or predominately commercial enterprise beyond its traditional role as part of the subsistence regimen.”* (Emphasis added, 46 FR 31850) It would have been helpful for the Notice to explain what the Service finds unclear with the existing direction. The Service could have also requested input on this issue in advance of releasing the proposed rule with the entities specifically tasked with advising the Service on subsistence issues, the

² 36 CFR 13.420(2)(3) “*Customary trade*” shall be limited to the exchange of furs for cash (and such **other activities as may be designated for a specific park area** in the applicable special regulations of this part) [Emphasis added].

SRCs and RACs. We therefore request the Service consult with all affected SRCs and RACs on further clarification before finalizing the proposed rule. Relying only on public comments or limited comments received from SRCs and RACs during the proposed rule's public comment period would not meet congressional intent in Title VIII of ANILCA.

The proposed rule adds a new definition for "handicraft article" and specifically requests input from the public on the terminology "substantially greater monetary and aesthetic value" as used in the proposed definition. Similarly, the Service is proposing terminology that it feels is unclear without seeking input through advance consultation with the entities tasked with advising the Service on subsistence uses - the SRCs and RACs. Since this is a new definition, we did not find anything in the preamble to the 1981 regulations at 36 CFR Part 13 to assist with providing clarity. We again request the Service consult with all affected SRCs and RACs on this specific terminology before finalizing the proposed rule. Relying only on public comments or limited comments received from SRCs and RACs during the proposed rule's public comment period would not meet the intent in Title VIII of ANILCA.

Bear Baiting and Live Collection/Falconry

The proposed rule also introduces new subsistence wildlife restrictions, unrelated to the EA or referenced in the title to the proposed rule. As noted above, these proposed restrictions were also developed without advance consultation with the State, tribes, Native corporations, SRCs and RACs.

The proposed rule will restrict certain materials (described in the Notice generally as unnatural food sources, such as human foods) used by subsistence users for baiting bears on the basis that the use of these substances is "inconsistent with NPS regulations that prohibit feeding wildlife (36 CFR 2.2(a)(2) and the NPS legal and policy framework which calls for managing wildlife for natural processes."

The materials that will be allowed (i.e. parts of legally taken native fish and wildlife that are not required to be salvaged and remains of native fish or wildlife that died of natural causes) are not only not available during certain hunting seasons, they are generally ineffective in attracting bears to bait stations. Baiting bears is a subsistence activity conducted by federally-qualified subsistence users on park lands where subsistence use is authorized under ANILCA. By limiting the materials that subsistence users can use as bait, the proposed regulation effectively eliminates this common subsistence practice in areas where it is conducted. This is analogous to eliminating subsistence use opportunities by limiting access to subsistence resources, which is why ANILCA Title VIII protects *both* subsistence opportunities and access. To ensure this traditional subsistence activity is preserved, we request the Service consult with all affected SRCs and RACs prior to finalizing the proposed rule. Relying only on public comments or limited comments received from SRCs and RACs during the proposed rule's public comment period would not meet the intent in Title VIII of ANILCA.

The second concern is regulatory in nature and is an example of unintended consequences, some of which is the result of lack of consultation. In January 2016 the Service implemented revised Alaska-specific regulations under 36 § 13.42 (Taking of wildlife in National Preserves) that prohibit the harvest of brown or black bear with the use of bait under State of Alaska general hunting regulations in Service administered areas. The rule allows federally qualified subsistence users to continue to conduct this activity under federal subsistence regulations. However, under the general provisions for the use of bait, federal regulations require compliance with State of Alaska regulations, including registering bait

stations with the Alaska Department of Fish and Game (ADF&G). This places ADF&G in the questionable position of administering a state authorized use that, except for federally-qualified subsistence users, is a prohibited activity on park lands. As such, ADF&G may be in conflict with provisions in the State's constitution that mandate common use of natural resources. To resolve this potential conflict, we request an opportunity to discuss this issue further with the Service before the rule is finalized.

The Notice indicates the Service is also "clarifying" existing Service regulations with regard to the collection of live wildlife. First, we question the inclusion of a falconry-related regulatory action within a proposed rule on subsistence use. It is highly unlikely under those circumstances that members of the falconry community would be aware of the proposed rulemaking in order to provide comments. We believe the affected public would have been better served by proposing these changes in a separate rulemaking. In addition, the explanation in the Notice is confusing and appears to prohibit uses that "might" be authorized under a state issued falconry permit. While the Service and the State discussed this issue briefly at a meeting that was held after the proposed rule was published, after reviewing the Notice, it is still unclear what the proposed rule is attempting to clarify. We therefore request an opportunity to discuss this issue further with the Service.

Conclusion

The above comments raise a number of issues that we feel could have been reasonably addressed through consultation with the State and other appropriate entities prior to the rule's release. Workloads and other competing responsibilities (including seasonable subsistence activities, meeting schedules, and board cycles) can and often do interfere with the ability to provide meaningful input on increasingly complex issues during limited public comment periods. During a recent meeting with the Service, we committed to meet again in the near future to discuss ways to make the consultation process more inclusive and collaborative. We look forward to working with the Service on that effort, as well as in regard to this rulemaking.

Thank you for the opportunity to comment. Please contact me at (907) 269-7529 if you have any questions or to arrange follow-up discussions with state representatives.

Sincerely,

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

Susan Magee
ANILCA Program Coordinator