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Park: Alaska Regional Office
Project: Amend Hunting and Trapping Regulations in National Preserves in Alaska
Document: Wildlife Harvest on National Park System Preserves in Alaska

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December 3, 2014

Herbert C. Frost, PhD Regional Director, Alaska Region National Park Service 240
West 5th Avenue Anchorage, Alaska 99510

RE: RIN 1024-AE21, Proposed 36 CFR Part 13 Regulations on Hunting and
Trapping in Alaska National Preserves, 79 FED. REG. 52595-52602 (Sept. 4, 2014);
Wildlife Harvest on National Park System Preserves in Alaska, Environmental
Assessment (Sept. 2014)

Dear Director Frost,

The Citizens' Advisory Commission on Federal Areas (Commission) requests the
National Park Service (NPS) rescind the proposed rule to amend NPS regulations at
36 CFR Part 13 and instead revisit the need for and means of regulating hunting and
trapping through consultation with the State of Alaska and affected user groups.

Comments:

To be effective and meaningful, the proposed rule requires substantive edits which
the public should be given an opportunity to weigh in on, as opposed to simply seeing
changes adopted in the final rulemaking. More than that, as written, the proposed
rule lacks context, detail, justification, clarity and scope, frustrating any opportunity
for informed consideration by the public and concealing the potential impact of the
proposed additions and amendments. For these reasons, withdrawal is the only
appropriate recourse at this time.

The Commission defers to and endorses the comments submitted on the proposed
rulemaking by the Alaska Department of Fish and Game (ADF&G), dated November
28, 2014, and incorporates by reference all previous comments by the Commission
on the issue of wildlife closures, Part 13 and the Compendium process, which the
Commission has been actively engaged in commenting on since the 1990s. The
following comments are intended to focus on aspects of the proposed rule which the
Commission believes warrant its immediate withdrawal.

THE PROPOSED RULE FAILS TO ACKNOWLEDGE KEY ANILCA PROVISIONS

The preamble provides select references to the Alaska National Interest Land Conservation Act (ANILCA), including excerpts from its extensive legislative history and references to pertinent provisions at Sections 101, 804 and 1313. Some of the substance of Section 1314 is also included in one uncited reference to State of Alaska management of general hunting in National Preserves. This presents a rather limited view of a fundamental governing legislation, focusing on only one side of the scale Congress used to balance the national interest in conservation with the economic and social needs of Alaskans.

For instance, the preamble provides the text of Section 1313 while glossing over its limitations. Section 1313 provides specific criteria governing the Secretary's closure authority: public safety, administration, floral and faunal protection, and public use and enjoyment. The preamble states that prior temporary restrictions protected fauna and provided for public use and enjoyment. However, there is no explanation or support in the proposed rule or its supporting documents for these criteria being met in this instance, or even how the criteria were satisfied when these uses were restricted temporarily.

Further, in focusing on Section 1313, and the Secretary's authority to close preserve areas to the taking of fish and wildlife, the rulemaking ignores the counterbalance of Section 1314, and Congress' intent to vest management decisions regarding fish and wildlife with the State of Alaska. Section 1314 provides that nothing in ANILCA, including Section 1313, is intended to diminish the State of Alaska's authority in this respect, or to amend the Alaska Constitution. Managing for sustained yield and maximum use consistent with the public interest, subject to preferences among beneficial uses, was in the Alaska Constitution when this provision was passed; thus, management of wildlife guided by those principles cannot be inconsistent with ANILCA, as the preamble implies.

THE PROPOSED RULE'S IMPLICIT "BATTLE OF THE MANDATES" LACKS SUPPORT

The Commission recognizes the NPS must adhere to its mandates under both the 1916 Organic Act and ANILCA in managing preserves, and that federal and state law conflicts are typically resolved with deference to federal mandates. However, the proposed rule does not establish how the state regulations at issue conflict with anything other than the NPS' interpretation of the State's actions and the 2006 NPS Management Policies.

The State's mandate and wildlife management obligations under the Alaska Constitution are clear. ANILCA specifically provided that the State would continue to manage fish and wildlife populations under these principles, e.g., determine and allocate harvestable surplus, set methods and means of harvest, establish seasons and bag limits, etc. The Board of Game authorized the hunting regulations, which the NPS proposes to preempt, consistent with this mandate through an open and thorough public process.

Any perceived conflict with the NPS' mandate and wildlife management obligations is not clear. Citing the 2006 NPS Management Policies implementing the 1916

Organic Act, as amended, the proposed rule describes the NPS' mandate as requiring the preservation of natural wildlife populations and the protection of natural ecosystems and processes. The preamble further explains that predator control efforts, defined as activities to reduce one species in order to harvest another species, are inconsistent with the NPS' obligations under this mandate.

As ADF&G explained in its February 14, 2013, comment letter on the temporary prohibitions preceding this rulemaking, and which it has stated consistently before and since, no "intensive management" program was established and the state regulations at issue do not constitute a predator control effort, defined in AS 16.05.255(e) as restoring the abundance or productivity of identified big game prey populations as necessary to achieve human consumptive use goals. The State of Alaska does not practice predator control on NPS lands, and it does not conceal or disguise where those programs are in effect. The state regulations proposed for preemption recognized a harvestable surplus consistent with sustained yield management, allowing for the continuation of traditional practices, as requested through public proposals, pursuant to a constitutional mandate to do just that.

The proposed rule would formally prohibit predator control on NPS lands, but the State is not practicing predator control on NPS lands. Thus, it is not clear how the State's and the NPS' mandates conflict at all, let alone in a manner sufficient to justify preemption of the State's management authority. The proposed rule and the supporting documents provide little or no other justification for the prohibition of the take of brown bears using artificial light at den sites, the harvesting of brown bears at state- or federally-authorized bait stations, or the take of caribou while swimming under state regulations.

If a separate conflict(s) exists, it is not explained in detail, and there is not enough information in the proposed rule or supporting documents to even independently ascertain it. The proposed rule does not outline what is actually required under the NPS' mandate to preserve natural wildlife populations and protect natural ecosystems and processes. No guidelines or metrics are given or anticipated to quantify, or even clarify, what a "natural" ecosystem baseline would demand (e.g., no population composition, abundance or dynamic at either an individual, population, species or landscape scale).

THE POTENTIAL IMPACT OF THE PROPOSED RULE ON ALASKANS AND STATE MANAGEMENT IS NOT ADEQUATELY EXPLAINED

The proposed rule includes a regulation at 36 CFR 13.42(f) which would automatically prohibit state laws or regulations "with the intent or potential to alter or manipulate natural predator-prey dynamics and associated natural ecological processes to increase harvest of ungulates by humans." 79 FED. REG. at 52597, 52600. The justification in the preamble for this regulation is that, "[t]o the extent such practices are intended or reasonably likely to manipulate wildlife populations for harvest purposes or alter natural wildlife behaviors, they are not consistent with NPS management policies implementing the NPS Organic Act." 79 FED. REG. at 52596.

Responsible wildlife management results in authorizations intended to influence reproduction and survival of wild populations to achieve management objectives and abundance. The proposed rule does not explain the threshold which triggers a

determination that a particular management action or authorization has the noted intent or potential. For example, the proposed rule offers no guidelines for what altering or manipulating a natural predator-prey dynamic would look like, what natural ecological processes are associated with that dynamic, what those processes would look like, or how the increased harvest of ungulates is factored in.

As shown in the proposed prohibitions on current state harvest regulations, the "intent" of an authorization is determined by the NPS. The State has been very clear these authorizations are not predator control efforts, but the NPS persists in arguing that predator control is the intent. The "potential" in an authorization is also determined by the NPS, since the proposed rule offers no guidelines regarding when the prohibition is triggered. Without guidelines, including the word "potential" means any conceivable harvest of either predators or prey, possibly with some undefined effect on ungulates, could be prohibited per se.

An articulated, quantifiable threshold is absolutely critical, especially considering this regulation proposes to automatically prohibit valid state law in preserve areas. The proposed rule only requires notice of those prohibitions with absolutely no assurance that any written justification or explanation will be provided. Even if a public comment period were offered, it would be hollow without a means of understanding the threshold or rationale to unilaterally implement per se prohibitions under this regulation. The proposed rule offers no way in which the public or the State can predict when the NPS will preempt state hunting regulations, and no mechanism to meaningfully weigh in on that determination since regulations governing notice and hearing requirements are also being amended. The deviation from current regulations and the increased level of discretion warrants, at a minimum, a highly detailed rationale and some form of limitation or guidance for decision makers. Otherwise, this regulation creates a blanket opportunity for NPS Superintendents to preempt state law without any guidelines or accountability and to completely disregard the State's wildlife management expertise and the thorough public processes accompanying state harvest regulation. This situation is inconsistent with ANILCA, the Master Memorandum of Understanding with ADF&G, federal policy at 43 CFR 24 and good government.

PROPOSED CHANGES TO THE CLOSURE PROCESS CREATE AMBIGUITY, NOT CLARIFICATION

The preamble understates the purpose and scope of the proposed process revisions, which modify longstanding guarantees and expand the NPS' discretionary authority. In addition, the process revisions do not just apply to general hunting and trapping activities, which is not at all apparent in the proposed rule. More than that, though, the proposed amendments to the closure process undo decades of meaningful specificity for Alaskans and promise an uncertain future.

Current regulations provide for three categories of closures or restrictions - emergency, temporary and permanent. Emergency and temporary closures are subject to time limitations. Permanent closures or restrictions must be implemented by rulemaking. All three categories include variations of the notice and hearing requirements. Consultation with the State and affected user groups is required in specified instances.

In the proposed rule, the Alaska-specific categories are eliminated and replaced with

select portions of the national standard in 36 CFR 1.5. Among other things, this exchange: removes the requirement to implement all permanent closures and restrictions through rulemaking; allows for emergency closures without notice and hearing or consultation with the State, and for an extended period of time; incorporates subjective and undefined criteria for justifying closures and restrictions, while omitting the national process' requirement for written justification and an explanation why less restrictive measures are insufficient; removes the requirement for consultation with affected user groups; and, removes the requirement to provide notice and hearing, including within the affected vicinity.

The only justification provided in the proposed rule for these sweeping and fundamentally significant process changes for Alaska is an attempt to "simplify categories of restrictions." While applying a national standard may be simpler for the NPS, the current categories and closure processes were purposefully designed for the Alaska context which, by its very nature, made imposition of the national standard complicated. The proposed rule simultaneously reinstates the ambiguities regarding potential closures and restrictions while limiting the extent to which the State, area residents and others can argue for Alaska-specific accommodations.

For example, factors in a determination to implement a closure or restriction currently include public health and safety, resource protection and subsistence uses. Retaining these factors, the proposed rule adds protection of "the integrity of naturally-functioning ecosystems." As noted above, the NPS has not provided guidelines or any means of discerning when that integrity is at risk. Further, rulemaking is currently necessary for permanent closures, which is clearly defined as those exceeding 12 months in duration. Eliminating the categories, and without context or explanation, the proposed rule replaces this defined rulemaking trigger with undefined, discretionary criteria. This is even more significant owing to the proposed removal of notice and hearing requirements. A formal rulemaking accompanies a thorough public process, whereas the proposed amendments only provide a nondescript public comment period for non-emergency closures and restrictions (and nothing for emergency closures and restrictions).

While these changes may look like minor amendments individually, taken as a whole, they are far more significant than the proposed rule indicates. Added factors and criteria may have been rolled over from the national closure process, but the process is devoid of guidance and removes longstanding accommodations Alaskans understand and use. Since the wholesale modification of the closure process has been downplayed and insufficiently detailed, the proposed rulemaking should be withdrawn to remedy those deficiencies in consultation with the State and affected user groups.

PROPOSED CHANGES TO THE CLOSURE PROCESS SIGNIFICANTLY UNDERMINE MEANINGFUL OPPORTUNITIES FOR PUBLIC ENGAGEMENT

The Commission agrees that adding the Internet to the suite of existing outreach tools would be a beneficial update. However, replacing so-called outmoded or uneconomical methods of outreach with the Internet is inappropriate. At this time, reliable Internet service is an unrealistic expectation for many rural Alaskans at risk of citation under the proposed and future hunting and trapping closures and restrictions. While adding Internet notification can streamline the inclusion of and outreach to the broader American public, those viewpoints are not currently at risk

of omission, whereas shifting notification to the Internet could considerably disenfranchise those most intimately impacted by hunting and trapping closures.

The proposed rule provides that closures or restrictions would be effective after posting on individual park websites. Internet-based public interactions and comment submissions are discussed in the preamble. In recognition of the fact "many individuals in rural Alaska do not have access to high speed internet[.]" additional means of notice will be provided "where available." 79 FED. REG. at 52598. The preamble also acknowledges that "in-person public meetings will still be the most effective way to engage Alaskans on some issues and in certain areas and the NPS intends to continue that practice when appropriate." Id. However, the NPS has not explained how or when an outreach method would be considered "available," "reasonably likely" or "appropriate" under the proposed regulation at 43 CFR 13.50(e).

The NPS argues these amendments to current public outreach guarantees are needed to more effectively engage the public in a fiscally sustainable manner. Neither the proposed rule nor its supporting documentation is clear on why the existing and longstanding requirements for public notice and participation – e.g., radio and newspaper broadcasts, public notices in community centers and post offices, posted signs, consultation with affected user groups, public hearings and, in particular, public hearings in the affected vicinity – detract from this objective and merit this very unexpected removal. Signs, notices and broadcasts are very standard and inexpensive outreach tools, making the proposed elimination very confusing. As for public hearings, the preamble appears to present a numbers game as indicative of meaningful contribution (75 in-person participants versus 59,000 emails). On behalf of the 75 people who attended the seven 2013 public hearings, and the many others who take the time to do so, the Commission objects to the removal of the public hearing requirement. Public engagement is not free, it is invaluable.

Ironically, testimony provided at public hearings associated with the proposed rule offers a poignant reminder of the voices that could be lost under its implementation. One Alaskan described how, while the proposed prohibitions would not restrict subsistence opportunity outright, it would inevitably impact the success of any subsistence harvest of wild foods. At the Nome hearing, other Alaskans described how the proposed regulations would prohibit bringing family members visiting from other parts of Alaska along on the hunt, or even have them help bring a harvest safely into the boat. One Alaskan described how the prohibition on taking a caribou swimming in the water was too vague to enforce, since animals often fall in the low spots when shot, like a river's edge or swamp ponds.

The Commission argues, in the strongest possible terms, that insights like these are indispensable in the sound management of public lands, and no closure or restriction should be proposed or finalized without actively cultivating and considering them. The NPS is lucky to have Alaskan experiences to draw from in its decision making, which the current regulations recognize. The proposed rule's unceremonious removal of existing guarantees respecting local knowledge and contribution from the regulated public is disrespectful and disheartening. The Commission has commented repeatedly in the past on the NPS' failure to follow its public participation requirements; removing the requirements altogether does not obviate these prior critiques, it justifies them.

IN CONCLUSION

The Commission would like to join the number of other organizations representing Alaskans with a keen interest in the management and conservation of fish, wildlife and public lands which have requested that this regulation package be rescinded, including the Alaskan Outdoor Council, Safari Club International, Alaska Trappers Association, Subsistence Resource Commissions, Regional Advisory Councils, Fish and Game Advisory Committees, Alaska Federation of Natives, Ahtna, Inc., the Native Village of Kotzebue and the State of Alaska. In good company, we add our request for withdrawal and reconsideration.

Thank you for this opportunity to comment on the proposed rulemaking. Please do not hesitate to contact the Commission with any questions or concerns raised by these comments or otherwise related to these issues.

Sincerely,

/s/ Sara Taylor Executive Director

CC: Kip Knudson, Director of Federal/State Relations, D.C. Office of the Governor of Alaska Marty Rutherford, Acting Commissioner, Alaska Dep't of Natural Resources Sam Cotten, Acting Commissioner, Alaska Dep't of Fish & Game Susan Magee, Statewide ANILCA Coordinator, Alaska Dep't of Natural Resources Bruce Dale, Acting Director of Wildlife Conservation, Alaska Dep't of Fish & Game

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