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DIVISION OF GOVERNMENTAL COORDINATION

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March 10, 1988

Mr. Walter Stieglitz
Regional Director
U.S. Fish and Wildlife Service
1011 E. Tudor Road
Anchorage, AK 99503

Dear Mr. Stieglitz:

The State of Alaska has reviewed the **final** Comprehensive Conservation Plan/Environmental Impact Statement/Wilderness Review (CCP) for the **Yukon Delta** National Wildlife Refuge. This letter is submitted on behalf of state agencies and represents a consolidation of agency concerns and comments.

The state commends the U.S. Fish and Wildlife Service (FWS) for the considerable effort it has devoted to resolving issues raised by the state regarding the draft CCP. The majority of state comments have been satisfactorily addressed by the FWS. In addition, the state concurs with FWS's determination that the plan is consistent, to the maximum extent practicable, with the standards of the Alaska Coastal Management Program. We do, however, have the following remaining concerns which we believe can be addressed in the Record of Decision (ROD) for this plan.

Tide and Submerged Lands Around Nunivak Island

As recognized on page 230, paragraph 3, of the final plan, the state disagrees with assertions that the FWS owns tide and submerged lands around Nunivak Island. The state maintains that pre-statehood or post-statehood federal withdrawals and/or reservations do not preclude state ownership of tidelands and submerged lands within wildlife refuges. This position is based on the constitutional doctrine of equal footing, as confirmed by the Alaska Right-of Way Act of 1898, the Submerged Lands Act of 1953, and the Statehood Act, which state that title to and ownership of the lands underlying navigable waters in Alaska is vested in Alaska upon statehood. This policy was recently confirmed by the U.S. Supreme Court in "Utah Division of State Lands vs. United States," 482 U.S. ____ (1987).

The applicable areas of each of these Acts are briefly discussed below:

- a) On January 3, 1959, the State of Alaska was admitted into the Union on a equal footing with the other states in all respects, pursuant to the Alaska Statehood Act. Section

March 10, 1988

6(m) of this Act stated that the Submerged Lands Act of 1953 shall be applicable to Alaska and that it shall have the same rights as do existing states.

- b) The Alaska Right-of-Way Act of May 14, 1898 (43 USC 942-1) states:

That nothing in this Act contained shall be construed as impairing in any degree the title of any state that may hereafter be erected out of said district, or any part thereof, to tidelands and beds of any navigable waters, or the right of such state to regulate the use thereof, or the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any state or states which may hereafter be erected out of said district. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all non-tidal waters navigable, in fact, up to the line of ordinary high water mark.

- c) Section 6(a) of the Submerged Lands Act states:

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership . . .

Although the plan (page 230) acknowledges state views regarding ownership of tide and submerged lands surrounding Nunivak, in numerous other locations the plan reflects FWS's assertion of ownership (e.g., pages 43, 48, and 50). We recognize that this is not an issue that can be resolved in the CCP. However, to further clarify the respective positions of the FWS and the state, we suggest that the following language be included in the ROD:

"The FWS and the State of Alaska disagree about who owns tide and submerged lands around Nunivak Island. Based on the Equal Footing Doctrine, the Submerged Lands Act of 1953, and Section 6(m) of the Alaska Statehood Act, the state asserts that it owns all tide and submerged lands adjacent to the refuge, including those lands adjacent to Nunivak Island. The FWS acknowledges that the state owns all tide and submerged lands, with the exception of those lands adjacent to Nunivak Island. The FWS asserts ownership of the submerged land of Nunivak Island based on a pre-statehood withdrawal, which has been interpreted by the Department of Interior Solicitor's Office as to preclude,

under operation of law, the passage of title to submerged land to the State of Alaska at the date of statehood.

"The U.S. Supreme Court recently ruled in "Utah Division of State Lands vs. United States," 482 U.S. ____ (1987) that pre-statehood withdrawals do not defeat the state's title to tide and submerged lands. The state currently is involved in litigation with the federal government on a similar issue on the North Slope which should provide the basis for resolving the ownership issue around Nunivak Island. The FWS and the state acknowledge their disagreement on this issue, and until ownership is decided, agree to work together to manage these lands. Cooperative management agreements may be pursued by either the state or FWS when a case-by-case resolution of management issues proves unacceptable to the Service or the state."

Subsistence

In its July 21, 1987, comments on the draft CCP, the state expressed concern about several aspects of the Subsistence/Section 810(a) Evaluation and Finding that accompanied the Preferred Alternative. The state questioned FWS' apparent assumption that restrictions on subsistence use must be "refuge-wide" in order to be significant. The state continues to object to this assumption, which remains part of the final 810 Evaluation. As previously indicated, even if impacts are to one community only, there may not be alternative harvest areas or economic alternatives for these residents.

In addition, we believe that the 810 Evaluation for the Preferred Alternative could have been expanded based on the development scenario provided on pages 306-309. As stated on page 289, these scenarios represent "likely developments and events in the refuge." Although we recognize they are only projections, they are "reasonable assumptions" that can be used as a basis for the required 810 Evaluations. Specifically, FWS could have delineated which communities utilize the areas subject to possible oil and gas exploration and development and placer mining, and for which seasonal activities. This process would lead to a much better appraisal of the potential impacts to subsistence opportunities and uses. The state recommends that this approach be adopted in the final Alaska Maritime and Arctic refuge plans.

Finally, the state wishes to reiterate its support for continued cooperative state/federal research efforts on subsistence activities. Fish and wildlife uses by communities on and adjacent to the refuge are a primary use of the refuge and need to be more fully documented than they are at the present time. A greater information base will be needed to address management issues likely to arise in the years ahead.

Use of Mechanized Equipment in Wilderness Areas

The state requests that the ROD clarify that the FWS retains the discretion, under 50 CFR 35.5, to designate certain areas within a Wilderness where mechanized equipment may be used. At the November 24, 1987, meeting of the Alaska Land Use Council, the Council unanimously adopted a motion urging the FWS to maintain flexibility to allow limited use of mechanized equipment where necessary to support traditional activities and where it would not significantly detract from Wilderness values. FWS voted in favor of this motion and indicated that the use of such equipment may be permissible where traditional and when used in support of guiding or outfitting operations. However, the final Yukon Delta CCP (pages 243-244) limits the use of mechanized equipment (excluding means of access) to use of chainsaws for subsistence purposes. This restrictive policy does not provide for the flexibility endorsed by the Council on November 24. The state therefore requests that the ROD explicitly clarify that FWS retains the discretion to allow the use of mechanized equipment at places within a Wilderness where such uses were established prior to 1980, consistent with FWS regulations.

Use of Off-Road Vehicles (ORVs)

The final plan (page 233) indicates that use of ORVs will be prohibited on the refuge, except on specifically designated routes and areas. However, the plan does not describe the process by which such routes and areas can be designated. The state requests that the FWS briefly describe this process in the ROD.

Muskoxen

The state requests that the FWS find that muskoxen are an indigenous species to the Yukon Delta, consistent with information previously supplied to the FWS by the Alaska Department of Fish and Game (DFG). We request that this finding be reflected in the ROD. This point is significant because of the effect this finding may have on FWS and DFG management options (e.g., future muskox transplants).

Additional Comments

The following comments are provided to assist FWS in future revisions to the Yukon Delta CCP.

Page xi and 4 - The lead-in to the list of ANILCA purposes provided on these pages could more clearly indicate that these are not the only or major purposes of the refuge. The state requests that this be clarified, so that readers are not left with the mistaken impression that these lists are all-inclusive.

March 10, 1988

Page 122 - That the state's 1984 population data for Russian Mission previously provided to the FWS appear to be more accurate than the source of information used here, since these data were based on a Subsistence Division research project in the community. The data on Eskimo groups in the map shown as Figure 36 have been updated by Anne Shinkwin and Mary Pete in their 1984 article, "Yup'ik Eskimo Societies: A Case Study." This appears in a special supplementary issue of *Etudes/Inuit Studies*, entitled The Central Yup'ik Eskimos, edited by E.S. Burch.

Pages 138-185 - The "Subsistence" section of the final plan is informative and its limitations are pointed out reasonably well. However, the first two paragraphs on page 138 might incorrectly convey the impression that furbearer trapping is managed under subsistence regulations. It is not. Technically speaking, then, Figure 42 on page 145 should exclude "subsistence" from its title.

Page 161 - Beaver should be included among the furbearer species harvested by St. Mary residents. In some years, the beaver harvest may equal the harvest of all other furbearer species.

Page 180 - The Kwethluk narrative on this page could be strengthened by replacing it with the substitute language appearing as comment number 76 in the state's letter reproduced on pages 487-488 of the final plan. This substitute language is based on a careful review of the FWS subsistence use area maps and more precisely describes their content.

Pages 187 and 251 - Nunivak Island not only has two guides but numerous outfitters who also take out non-local, recreational muskox hunters. The number of active outfitters fluctuates greatly each year and has numbered up to 12 in past years.

Page 189 - Guided hunters in the Andraefsky area have not, to our knowledge, taken any moose. The two guides in the Kilbucks normally target bears but have also accounted for several moose in past years.

On behalf of the State of Alaska, thank you for the opportunity to review the final Yukon Delta National Wildlife Refuge CCP. If we can be of any assistance in clarifying these comments, please contact this office.

Sincerely,

Michelle Sydeman
CSU Coordinator

Mr. Walter Stieglitz
Yukon Delta NWR Final CCP

-6-

March 10, 1988

cc: Commissioner Judith Brady, Department of Natural Resources
Commissioner Don Collinsworth, Department of Fish and Game
Commissioner Dennis Kelso, Department of Environmental
Conservation
Commissioner Mark Hickey, Department of Transportation &
Public Facilities
Alaska Land Use Council
Land Use Advisors Committee
Mr. Rod Swope, Office of the Governor

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