

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

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January 21, 1994

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

Dear Mr. Stieglitz:

The State of Alaska has reviewed the *Final Public Use Management Plan and Environmental Assessment for Public Use Regulations* for the Kodiak National Wildlife Refuge. This letter represents the consolidated comments of the State's resource agencies.

As we have previously stated, State agencies are supportive in concept of efforts to protect Kodiak's world-renowned wildlife resources; yet the Service's over-zealous approach to this goal is without regard to existing public uses and regulatory requirements. Based on a thorough review of this document, we urge the U.S. Fish and Wildlife Service to withdraw the plan and environmental assessment for four primary reasons:

**Management actions addressed within the document violate Congressional intent in provisions of the Alaska National Interest Lands Conservation Act (ANILCA).**

**Public use regulations proposed within the document violate ANILCA provisions and the federal agency's own regulations.**

**Portions of the planning process manipulated or circumvented knowledgeable and appropriate public participation.**

**The process and management decisions embodied in plan violate the Master Memorandum of Understanding between the Service and Alaska Department of Fish and Game.**

To correct this plan's deficiencies, the State of Alaska continues to offer assistance in a mutual effort to balance

protection of refuge resources with maintenance of traditional public uses. It is our firm belief that this can be accomplished to the satisfaction of both the State and the Service.

The following provides essential background and discussion relevant to the specific deficiencies in the management plan and environmental assessment.

## **BACKGROUND**

With the December 2, 1980 passage of ANILCA, and after four years of extensive debate and compromise, Congress established over 100 million acres in refuges, parks, and other conservation system units with express intention to protect and maintain the unique Alaskan lifestyle. Among other provisions, ANILCA guaranteed the public's continuation of traditional (pre-ANILCA) activities, access for traditional and subsistence activities, State management of fish and wildlife, and active participation of the State and public in the preparation and revisions of required plans for the units.

ANILCA Section 304(g)(1)-(6) requires preparation of a comprehensive conservation plan for each refuge, with specific requirements for content and public involvement. After scoping of public issues, the Service prepared a *Draft Comprehensive Conservation Plan/Environmental Impact Statement/Wilderness Review* in December 1985 and a Final Plan was adopted upon signing of the Record of Decision in December 1987.

In the meantime, while Congressional discussions and ANILCA compromises were fresh in everyone's mind, the federal agencies adopted regulations to implement ANILCA provisions for public access and uses. These regulations detail the processes which federal agencies must follow before restricting public activities. Fish and Wildlife Service regulations directly applicable to management of, and access on, Alaska refuges occur in 50 CFR Part 36 and 43 CFR Part 36.

**50 CFR Part 36:** Interim final regulations, consistent compromises in ANILCA, were adopted by the Service on June 17, 1981 to guide management of the ANILCA-created or expanded units. For example, the Section-by-Section Analysis clarifies:

Sections 36.21-36.24 of these regulations implement sections 1110 and 1111 of the Alaska Lands Act concerning access by the public across Alaska National Wildlife Refuges for nonsubsistence purposes. These proposed regulations generally relax restrictions on access that are

applicable to National Wildlife Refuge units outside of Alaska, consistent with the requirements of the Alaska Lands Act. These sections are designed to and are presented in an order which will funnel the vast majority of access needs away from a system of individual access permits. Section 36.21 opens all refuges to access by snowmobile, aircraft, motorboat, and nonmotorized surface transportation for most purposes. (Additional access for subsistence uses is set forth in S 36.12). . . .

This section [36.21] treats the use of snowmachines, motorboats, aircraft and nonmotorized surface transportation for other than subsistence purposes. Motorboat, fixed wing aircraft and nonmotorized surface transportation use for all purposes are authorized on Alaska Refuges. Snowmachine use on Alaska refuges is open to the maximum extent possible consistent with existing law.

**43 CFR Part 36:** On September 4, 1986, the Secretary adopted regulations implementing ANILCA Title XI access provisions for Alaska. The Analysis of Comments and Section-by-Section Analysis which accompany the rulemaking clarify the Secretary's interpretations and decisions for access provisions. The regulations echo the decisions made in 1981 and further clarify procedures which the agencies must follow before restricting snowmachine, aircraft, and other forms of access. For example:

In reviewing the issue of the standards for closures under the provisions of section 1110(a), Interior has concluded that this standard must be applied to all types of closures developed in these regulations. For purposes of this section, only if it is determined that a proposed use otherwise authorized by this section would be detrimental to the resource values of a particular area may that area be closed to the use, unless closure is authorized under other agency law. . . .

We do not believe the statute authorizes the discretion to make any closures before a notice and hearing. As with the standards discussed above, section 1110(a) does not distinguish between the various types of closures developed in these regulations. The statutory language clearly provides that the authorized uses "shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary of Interior finds that such use would be detrimental to the resources values of the unit or area." Accordingly, the regulations require notice and hearing prior to any of the forms of closures.

**Chronology of Planning and Related Activities**

With this backdrop of legislation and regulations, the following chronology of Kodiak refuge planning is presented as key to understanding the State's major problems with the *Public Use Management Plan and Environmental Assessment for Regulations*.

**Comprehensive Conservation Plan (CCP):** In November 1982, the Service initiated public scoping of issues for preparation of the CCP for the Kodiak refuge. Public and state involvement consisted of: scoping in 1983; meetings and review of some proposals in 1985; review of the *Draft Comprehensive Conservation Plan/Environmental Impact Statement/Wilderness Review* in March 1986; meetings during 1986 and 1987 regarding significant problems; and review of the *Final Comprehensive Conservation Plan/Environmental Impact Statement/Wilderness Review* in 1987. The Record of Decision for the completed CCP was signed in December 1987. Throughout this 4-year process, we raised significant issues regarding the Service's failure to uphold ANILCA's intent regarding public use activities.

**"Step-Down" Plans; Draft Public Use Management Plan:** In October 1987 and February 1988, before the CCP was completed, the Service discussed with the State intent to develop "step-down" plans to address specific portions of refuge management not fully detailed in the CCPs. In November 1988, the Service initiated such a "step-down" plan for Kodiak refuge, the *Public Use Management Plan (PUMP)*. Several workbooks and newsletters were released by the Service in December 1988 and in the spring of 1989. The *Draft Public Use Management Plan and Environmental Assessment for Public Use Regulations* was released for review in March 1990. The State raised numerous significant concerns regarding restrictions proposed in the plan.

**Special Management Area; Public Use Restrictions:** In May 1992, the Service implemented a special management program on the refuge, though the PUMP was still in draft and contained no proposed special management (bear-viewing) program, and no documented resource problems calling for public use closures. This program, the O'Malley Bear Viewing Area, included major public use restrictions (e.g., closed sport fisheries) and access closures (e.g., prohibited aircraft landings). The Service maintained the program through the 1992 season despite major objections by the State of Alaska. The program was canceled in 1993. The Service announced in December 1993 that the program, including associated closures of access and traditional public use activities, will again be implemented in 1994. There has been no attempt by the Service to resolve the objections of the State of Alaska.

**Final Public Use Management Plan:** In October 1992, the State reviewed an internal final PUMP. This document revealed some beneficial changes from the draft plan, but the State identified numerous remaining significant problems, including unjustified public use closures. In November 1992, the Service met with the State to address some of the significant issues. In January 1993, the Service provided the State an opportunity to review proposed revisions to some sections of the plan but chose not to reveal management intent or pursue resolution for other significant issues. In March 1993, the State provided additional comments on the available portions of the revised internal PUMP. No further consultation with the State regarding the PUMP occurred prior to the Service releasing the *Final Public Use Management Plan and Environmental Assessment for Regulations* in November 1993 for public review. The final PUMP includes numerous public use restrictions, access closures, and the O'Malley Bear Viewing area with associated public use restrictions.

### **Overview of Major Concerns with the Kodiak PUMP Planning Process**

#### **Inconsistent With ANILCA Intent**

ANILCA was designed to further the dual goals of protecting Alaska's vast wildlands and providing for the continuation of the unique Alaskan lifestyle. Congress understood that with appropriate monitoring and necessary regulations, many existing uses and activities are compatible and consistent with the purposes for which the units were designated.

The Service has inappropriately pursued public use restrictions that are not consistent with Congressional intent. It appears that a number of decisions in the final PUMP have been made arbitrarily or are based on management philosophies that do not follow the guidelines set out in ANILCA, particularly restrictions on access for traditional activities. The Service also appears poised to implement restrictions without following proper regulatory procedures; i.e., provide appropriate documentation of resource damage. We are aware that the plan repeatedly states that such procedures are necessary; however, management decisions to restrict uses have already been made without appropriate findings, notice and hearings.

The State realizes that many of the public uses we are concerned about may indeed need close monitoring and subsequent regulation on a case-by-case basis where necessary

to protect important resources of the refuge. However, the Service is precluding Congressionally-protected compatible uses by relying on broad refuge-wide restrictions to handle potential site-specific impacts.

It appears that the Kodiak refuge staff and the Service's various planning documents have determined that motorized access, hunting, fishing, trapping, cabin use, and other activities protected by ANILCA are variously incompatible with protecting refuge lands in Alaska. The Service professes speculative types of supporting information and stretches existing data to justify closures rather than cooperatively assessing options for limiting impacts. Over time, through incremental decisions and continued planning, this approach will eventually eliminate such uses without minimal public protest. Yet Congress directed the Service to manage Alaska refuges differently than it has traditionally managed "lower 48" refuges -- with responsibility to assure continuation of the unique uses of Alaska land.

#### Lack of Consultation and Cooperation with the State

We are particularly disturbed that in the past few years, an increasing number of issues or management decisions have been handled without genuine cooperation with State agencies. For example, each time the State has provided critical reviews of plans or proposed restrictions for Kodiak refuge, the Service has initiated one meeting resulting in promises for more to follow. Such follow-up does not occur, however, until the next major conflict is raised by the State. The Service proclaims a record of coordinating with the State, but the token efforts have been largely ineffective and have failed to address basic State interests and authorities in the Kodiak refuge.

Where issues involving public access to, and use of, fish and wildlife resources, close integrated involvement of the Department of Fish and Game (DFG) is critical to successful management of the resources and interpreting use data. Improved day-to-day coordination between the Service and DFG is critical for basic data collection, interpretation, application of differing management objectives, and cooperative development of management strategies. Such coordination should occur at the policy and middle management level, not just at the local level where the desire for harmonious relations may obscure broader agency interests when conflicts arise.

At our request, State and Service representatives met a year ago to discuss outstanding issues in the draft Public Use Management Plan. We were encouraged by the Service's interest in exploring ways to resolve some of the issues. However, we are greatly disappointed this positive effort was not followed up with further dialogue on the remaining significant issues for cooperative resolution prior to finalization of the plan. **We strongly urge that the plan be withdrawn so that the apparent violations of ANILCA direction and outstanding conflicts with the State of Alaska can be resolved prior to adoption of a final public use management plan.**

Consistency with Statewide Direction for Refuges

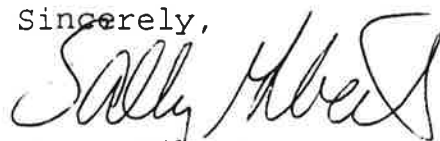
The State also notes, with frustration, that there has been insufficient plan oversight by Service staff in the Regional Office who are familiar with statewide issues and their historical resolution. During development of the step-down planning process, the Service stated a commitment that plans prepared by the refuge staffs would be reviewed by appropriate regional staff for consistency with the treatment of issues which span numerous refuges and with policy resolutions achieved between the Regional Office and affected State agencies. Some of the examples offered in the attachment indicate that such oversight has been insufficient or ineffective.

Organization of Specific Comments in the Attachment

The remaining comments, attached, are organized by topics. Some topics are researched and documented more thoroughly than others, though the level of detail or order of presentation is not necessarily indicative of their importance. These issues are essentially examples of the larger concerns noted in this overview. The magnitude and extent of problems in the plan preclude our addressing each and every shortcoming.

Thank you for the opportunity to provide these comments. If you have any questions, please call this office. We hope these comments provide a catalyst for discussion within the Service about the overall direction of this Public Use Management Plan.

Sincerely,



Sally Gibert  
State CSU Coordinator

CC:

Jay Bellinger, Refuge Manager, Kodiak National Wildlife Refuge

Carl Rosier, Commissioner, Department of Fish and Game

Harry Noah, Commissioner, Department of Natural Resources

John Sandor, Commissioner, Department of Environmental  
Conservation

Bruce Campbell, Commissioner, Department of Transportation and  
Public Facilities

Richard Burton, Commissioner, Department of Public Safety

John Katz, Governor's Office, Washington, D.C.

Cheri Jacobus, Department of Law



January 21, 1994 Attachment to  
Letter from the State of Alaska  
Concerning the Final Kodiak Public Use Management Plan/EA

**Analysis of Examples of Major Problems**

CLOSURES OF ACCESS METHODS

**ANILCA and its implementing regulations mandate that public access restrictions may be pursued only upon findings of damage to the resources. There are no findings that specifically support the proposed access and public use restrictions for Kodiak refuge are nonexistent.**

The public's rights to access Kodiak Refuge by means of snowmachine, motorboat, wheeled and float planes, and other methods to pursue traditional activities such as fishing, hunting, trapping, and photography are codified in ANILCA Section 1110(a):

"Notwithstanding any other provision of this Act [ANILCA] or other law, the Secretary shall permit, on conservation system units . . . the use of snowmachines (during periods of adequate snow cover . . .), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities . . . and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area."

The regulations implementing ANILCA Section 1110(a) similarly provide for the use of fixed-wing aircraft, snowmachines, and other access methods subject to restrictions "only upon a finding . . . that such use would be detrimental to the resource values of the area." (43 CFR 36.11(c), (f), (h)).

ANILCA Section 1110(a) guarantees such access. This section explicitly exempts this access guarantee from being subject to any other applicable sections of ANILCA or other law. Therefore, the Service is not authorized to perform a compatibility analysis on the listed forms of access. Once the compatibility of the underlying traditional (pre-ANILCA) activity is established, the access by snowmachine, motorboat, aircraft and other methods is guaranteed. In incorporating this section into ANILCA, both the House and Senate limited the Secretary's authorities to limit this access:

In order to prevent the land manager from using his discretion to unnecessarily limit such access, the Committee amendment provides that such access shall not be prohibited unless the Secretary finds after holding a hearing in the area that it would be detrimental to the resource values of the unit. (House Report 97, Part I at 239; Senate Report 413 at 248)

There is no basis for pursuing the restrictions and closures of aircraft, snowmachine, and other access proposed in the plan. As clearly provided in our letter of October 16, 1992, wildlife populations on Kodiak refuge, including brown bear, are healthy under the careful management of the State of Alaska. In fact, apparent increases in bear populations have coincided with increases in human activities. The plan also indicates that no adverse impacts have yet been identified on the Kodiak bear population. While we concur that some actions may be appropriate to limit or modify public use to avoid impacting bears and their habitat, we disagree that there is any imminent damage to wildlife as suggested by the Service throughout the plan. The Service's discussion suggesting there may be changes in bear movements, displacement of individual bears, and possible increases in DLP (bears killed in defense of life or property) mortality is speculative only. As stated in our March 3, 1993 letter,

we respectfully continue to disagree that increasing use levels are causing 'adverse human/bear interactions' that in turn cause DLPs. The data simply do not support the inference that such interactions and kills have increased to a point necessitating refuge-wide emphasis on reduction of recreational and existing activities to protect the resources.

The following sections describe specific concerns regarding the proposed access closures and public use restrictions.

#### Snowmachine Use

The underlying bias of the Service in its approach to snowmachines is evident in its statement "snowmachines have not been used traditionally on Kodiak Refuge" (p 24). This fact is superfluous. Congress specifically guaranteed this form of access for traditional activities such as hunting, fishing, trapping, and other subsistence and recreational pursuits. The Secretary of the Interior specifically considered this issue in light of the fact that such access was illegal in some pre-ANILCA units and concluded while adopting Title XI regulations (51 FR 31619) that:

The argument is made that Congress did not intend to open the pre-ANILCA areas to the uses described in section 1110(a), since these pre-ANILCA areas had been closed to such uses prior to the enactment of ANILCA. Interior does not find any statutory support for this position, since section 1110(a) provides no exception for the pre-ANILCA areas. Accordingly, no exception for pre-ANILCA areas is provided for in these regulations.

As indicated in our May 13, 1991 and October 16, 1992 correspondence, there may be sufficient justification to consider site-specific prohibitions of snowmachines use in critical bear denning areas (as defined by DFG), but this conceptual support does not include the blanket, refuge-wide prohibition (all refuge closed except for small area of current use) proposed in the plan. The proposed prohibition ignores the fact (mentioned in the plan) that snowmachine use has not had adverse impacts on bear and deer populations to date.

**We object to this broad prohibition and request that it be withdrawn. DFG continues to offer assistance in providing identification of critical bear denning areas in order to appropriately monitor for resource impacts and subsequent necessary site-specific closures.**

#### Aircraft Access

The State objects to the preferred alternative's refuge-wide prohibition that "no upland landings of fixed-wing aircraft would be allowed" (pages xiii, 45, 50, 53, 80). The Service attempts to justify this based on

a limited number of upland landings are now occurring with only negligible impacts on bears and other wildlife. These impacts would be eliminated under this alternative, as would the potential for more significant impacts if upland aircraft landings were permitted on the refuge.

This proposed prohibition is wholly indefensible. The purported "finding" required under Section 1110 (a) is unsubstantiated speculation rather than based on environmental and biological evidence. As quoted above, the existing uses by wheeled aircraft have not caused identifiable impacts to refuge resources; nor can the Service support the claim that new uses will cause significant harm. Furthermore, such an illegal closure would eliminate the only viable means of access to large sections of the refuge for pursuit of traditional activities.

In addition, there is probably some confusion among the Kodiak residents about what aircraft uses are presently allowed in the refuge. The CCP prohibited wheeled and ski planes from landing on the uplands and float planes from the special river management areas. However, the poorly distributed Record of Decision clarified that such restrictions "are proposed only". To add to this confusion, pages 50 and 53 of the PUMP cite the CCP: "no upland landings would be allowed" while pages 45 and 62 clarify that landings are allowed throughout the refuge.

Another statement requiring correction occurs on page 50: "traditional access by float planes to refuge lands and waters would continue to be allowed unless evidence of incompatible use levels which conflict with refuge purposes is documented." ANILCA Section 1110(a) guarantees the right to such access, subject to a finding of damage to the resources; such access is not subject to a compatibility analysis under other Acts. Congress removed the discretion of denying or unnecessarily limiting such access through a compatibility test.

#### Jet Boat and Motorboat Use

Under the plan's preferred alternative (pages xiii, 50, 80), "jet boat use would be allowed throughout the refuge with the exception of a limited number of specific drainages", which are listed and described as "critical brown bear feeding areas". This restriction is inappropriate because 1) the State manages navigable waterways; 2) motorboat (including jet boat) access is a protected right of access for traditional activities; and 3) the plan acknowledges that the level of jet boat use is very low, not likely to increase significantly, and is not known to cause resource damage in the Kodiak area to date. This prohibition should be eliminated from the plan.

If jet boats use is documented to cause detrimental effects to refuge resources, the Service should approach the State concerning appropriate restrictions, consistent with the commitment in the Kodiak CCP Record of Decision which says "The Service will pursue cooperative management agreements with the State of Alaska regarding public uses on waterways in the refuge."

We also question whether the DFG was formally consulted to identify "critical brown bear feeding areas". We are aware that consultations have occurred with local staff, but unaware of any policy-level concurrence with identification of such areas. It seems that refuge management is rendering determinations on the biology and management of wildlife which is, in fact, managed by the State of Alaska.

Pack Animals

The State objects to the unrealistic and burdensome requirements proposed for those wishing to use pack animals on the refuge. The effect of the requirements will be to essentially eliminate most, if not all, use of pack animals without proper regulatory procedures.

The published Kodiak CCP did not permit the use of pack animals, despite ANILCA's protection of this form of access in Alaska refuges. The Record of Decision, however, stated the policy "is revised as follows: Pack Animals may be permitted, subject to provisions of the National Environmental Policy Act and promulgation of appropriate regulations." The Draft PUMP revived the proposal to prohibit pack animals, despite the correction in the Record of Decision, but the final PUMP has modified that prohibition once again.

While we appreciate lifting the proposed prohibition of pack animals in the Record of Decision and again in the Final PUMP, the latest revision is only a superficial improvement in rhetoric. Page xiv of the Final PUMP states:

the final plan recommends that use of pack animals (including dogs) will be allowed on the refuge on a case-by-case basis and subject to regulation under a refuge special use permit. Persons wanting to use pack animals will be required to submit a plan of operation which the refuge must approve prior to issuing a refuge special use permit.

Similar recommendations and overly stringent restrictions are described on pages xii, 52, 47, 58, and 78. The State believes the following provisions illustrate unnecessary bias by the Service:

- 1) "Pack animals (horses, mules, donkeys, llamas, and other ungulates) would be allowed on refuge lands to support recreational or commercial activities under a special use permit after an operations plan is submitted by the prospective permittee and approved by the Service. Both private recreationist and commercial operators would be allowed to use pack dogs. No unattended pack animals would be allowed". (Page 47 preferred alternative)
- 2) "would allow use of pack animals on the refuge on a case-by-case basis. Open grazing of these animals on the refuge would not be permitted. Use of pack animals could result in increased bear/human conflicts and defense of

life or property (DLP) kills as a result of bear predation on pack animals or bears raiding pack camps to secure feed brought in for pack animals. [The refuge projects that] the use of pack animals on Kodiak Refuge might encourage larger camps of longer duration with the increased likelihood of attracting bears into camps. Pack animal use would also allow access to areas of the refuge which are not currently accessible causing additional bear/human conflicts." (Page 58)

- 3) "would allow pack animal use throughout the refuge, but only after a plan of operation has been submitted and approved by the refuge. For the refuge to issue a special use permit for use of pack animals on the refuge, the plan of operation must adequately demonstrates [sic] how potential resource conflicts will be minimized and obtains a refuge special use permit. Use of pack animals on the refuge could lead to increased bear/human conflicts and DLP kills. . . . Minor localized impacts to bear populations and habitats would be expected, even with the required plans of operation. However, impacts would be primarily of a short-term nature as plans of operation would be modified in order to reduce the level of impacts occurring." (Page 78, preferred alternative)

**As stated in our March 3, 1993 letter, we object to the requirement that any individual must obtain a special use permit, submit a plan of operation more than a month in advance and comply with other such burdensome stipulations.** Such requirements effectively assure that this use will not be applied for or allowed (but without having gone through the ANILCA-mandated regulatory procedure to prohibit). While there certainly are valid reasons for managing the use of pack animals, not all such use is necessarily going to result in DLPs or habitat impacts. As the excerpts above show, the Service has speculated on possible impacts to justify the closure. The plan fails to document damage to resources to justify the restrictive requirement that everyone using pack animals must submit a prospectus and receive a special use permit--that is a back door approach to prohibiting a type of access which Congress said the Secretary "shall permit".

To satisfy ANILCA, the Service must provide more reasonable discussion and management directions, particularly considering the exceedingly low potential for such use. The State is prepared to work with the Service on identifying mutually agreeable solutions.

Camping Limits/Bear Concentration Areas

Blanket camping restrictions are excessive based on the lack of information that resource damage is occurring and the great variability in seasonal use of specific drainages. The total closure of "bear concentration areas" to public entry is of particularly grave concern to the State. No portion of the public land should be totally closed to public entry unless there are paramount health and safety concerns (e.g, hazardous waste). The brown bear population is healthy, and other alternatives are available to encourage/discourage public activities and behaviors while in bear concentration areas to reduce impacts to the bears and their habitats.

The Service also proposes a 7-day limit in three areas for specified periods; and a 15-day limit from May through December throughout the remainder of the refuge. These camping limits would apply to all unguided public and commercial operators, and are justified to reduce "moderate long-term impacts to local bear populations and the habitats they use" resulting from the current unrestricted situation. However, a review of the definition of "moderate impacts" on page 57 reveals that the current projected impacts do not justify such closures. The plan provides no factual substantiation for closing portions of the refuge to the public.

On first blush these limits may seem reasonable, based upon the descriptions of bear and habitat impacts, until one reviews the justifications closely and views the closures in conjunction with the other proposed total closures to the public of "bear concentration areas". The latter are defined as "areas with critical potential for bear/human conflicts closed [to all public entry] seasonally; and areas with high potential for bear/human conflicts closed seasonally to overnight camping" (p xii). The cumulative impact on users is significant and subject annually to refuge management discretion.

According to the PUMP (p 78), bear concentration areas "would close to all human use a limited number of critical bear concentration areas seasonally; additional areas would be closed to overnight camping seasonally." The problem with the logic of this proposal is twofold:

- 1) the bear concentration areas occur everywhere bears feed on returning salmon, which are also desired as human fishing locations. Consequently, closing any area will cause existing human use to concentrate at other fish

streams, thus increasing possible impacts. There are other ways to reduce human uses, or disperse uses along salmon streams without completely closing the areas. The Service is setting themselves up for an enforcement nightmare; and

2) who determined these are "critical" - critical for the bears? In most cases, people are approaching and fishing at one location of a stream (closest to access points). The Kodiak bears primarily show temporary modification to their movements rather than disperse from the entire drainage. DFG manages bears and fish and has not identified any area on Kodiak for the Boards of Fisheries or Game to close in order to protect the bear population. We suggest that this closure is not supportable as a means to protect bears but rather a preference of the refuge management to reduce human uses in the face of Congressional protection of such uses.

The Service proposes establishing camping time limits for the unguided public which are the same as for commercial operators. The plan notes that limiting the length of stay at a campsite would result in an overall reduction in potential impacts to wildlife habitats and to bears and other sensitive wildlife populations as long-term camping activities would be reduced. (p 78) Again, such limitations are based on "potential" impacts--not measurable, documented impacts to the resources. Our assessment is supported by the "Biological Consequences" discussion of the current situation (p 59), which proposes:

no camping time limits for unguided public use. Use would continue without restrictions on camper numbers, camping time limits or camping locations. . . . Moderate long-term impacts to local bear populations and the habitats they use *would be expected*, particularly in the vicinity of the primary access points along lakes, rivers, and the coastline, areas where long-term camps *would most likely* be established. Long-term camping and increasing numbers of unguided users *could also impact* other sensitive species, such as swans or eagles, if use occurs in the vicinity of nest sites. (emphasis added)

As we have indicated in our previous reviews, we do not support the blanket restrictions on the length of time that users can set up temporary camps on the refuge. The time limits will prove to be expensive and difficult to enforce and difficult to abide by, given the terrain, weather, and other factors, despite the best intentions of either the refuge user



or the Service staff. Long-term camping is a traditional recreational use for some refuge users such as bear hunters, deer hunters, archers, photographers, and trappers. Visitor use is very light during the mid-summer period (between the king salmon and coho salmon/steelhead runs) in many areas. We suggest that programs to increase public awareness of brown bear behavior and the necessity of maintaining sanitary camp conditions will go a long way toward reducing negative encounters with brown bears.

The Service justifies these proposed closures as the means to protect public health and safety by preventing bear/human conflicts. The plan does not identify such conflicts have occurred on Kodiak refuge in the areas proposed for closure. In fact, such occurrences have been documented primarily on private land and in association with other activities and have not increased in the same order of magnitude as numbers of users documented using refuge lands. We also question why all data regarding DLPs provide no data after 1990.

**Until data are available to document the potential of problem bear/human encounters as a public health and safety issue, any closure to otherwise permissible activities violates ANILCA, federal regulations, and policies of the refuge system.**

#### Trail and Campsite Facilities

The Kodiak CCP allows for the development of trails, defined as "designated routes that are restricted to walking" which will be "not cleared or maintained" but "may be provided" in all management areas (CCP p 166). Yet according to the PUMP, trails will not be permitted (p 61). In contrast, the location of facilities such as meat caches and outhouses at heavily used campsites may be considered if methods designed to reduce use at these sites are not effective (page 50). The Service justifies this (p 61) as follows:

Development of new trails or construction of campsites would not occur . . . By not allowing construction of developed campsites, the impacts associated with human use of these facilities would not result. . . The development of trails could open currently inaccessible areas of the refuge. Impacts similar to those associated with development of improved campgrounds could result, particularly increased levels of resource harvest and bear/human conflicts. . . By not allowing development of these facilities, no associated impacts to the bear population, to other fish and wildlife, or to their habitats are now occurring or would occur in the future.

This is an incredibly restrictive and speculative justification--what happens when people concentrate their access along the bear trails and camp in the easiest locations near stream confluences with access points? We strongly request the Service reevaluate this decision. As we have previously corresponded, we request the Service provide some off-bear trails for access and to harden some campsites away from the stream confluences to disperse and/or reduce pressure in the popular camping areas. We believe this will **reduce**, not increase, impacts on the habitat and wildlife populations. We completely disagree with the assessment that "by not allowing development of these facilities, no associated impacts . . . are now occurring." If this is the case, how does the Service explain the reasons for wanting to encourage transporters to disperse campers, and limit camping in certain locations?

#### Tent Platforms and Other Temporary Facilities

We cannot endorse the prohibition of new tent platforms. Such temporary structures are recognized and allowed by ANILCA Section 1316, which states:

On all public lands where the taking of fish and wildlife is permitted in accordance with the provisions of this Act or other applicable State and Federal law the Secretary shall permit, subject to reasonable regulation to insure compatibility, the continuance of existing uses, and future establishment, and use, of temporary campsites, tent platforms, shelters, and other temporary facilities and equipment directly and necessarily related to such activities.

According to the final PUMP (page 81), the Service "would restrict tent platform use to existing sites. . . Currently only two tent platforms are under permit on the refuge. The plan fails to identify what criteria have been established to evaluate the need to restrict activities which Congress clearly intended to protect.

The discussion in the plan makes it obvious that the Service still considers tent platforms to be permanent rather than temporary structures. The Service's argument that allowing additional tent platforms (or public use cabins or meat caches) is incompatible with refuge purposes is unfounded. People feel more secure in tent platforms and cabins and are less likely to feel threatened by bears. A well-maintained and clean cabin or tent platform is no more likely to attract bears than a temporary tent camp.

We continue to assert that minor campground improvements such as outhouses and meat/food caches at popular sites are needed to reduce impacts. Instead, refuge management continues to emphasize limiting public use rather than accommodating use. Given the concern that the Service expresses throughout the plan for minimizing adverse bear/human interactions, we would expect that the Service would view tent platforms as offering an additional margin of safety to refuge users, and hence to brown bears. Even more significantly, since much of the Service's concern relates to DLP bear kills by deer hunters, the plan should consider and allow use of meat and supply caches and other structures to contribute to a reduction of DLP kills.

The final PUMP (p 45 and 51) refers to The Kodiak CCP (Appendix N) recommendations that no new commercial fishing sites (onshore facilities) would be permitted on the Kodiak refuge as the number of commercial fishing sites on refuge lands has significantly expanded beyond the 1979 level of activity. This seems to be the end of the Service's willingness to mention tent platforms, for which we again point out two significant problems: tent platforms and other temporary facilities "shall" be permitted in support of the taking of fish and wildlife, but are not limited to commercial fishing support; and secondly, Appendix N of the CCP had numerous errors of fact and interpretation of fish and wildlife data. We disagree that it supports the decisions as quoted in the plan and urge the planners to review the DFG June 19, 1987 letter on this subject (attached).

### Cabin Policies

We believe the remaining eight public use cabins are insufficient for public use and safety on Kodiak refuge. We also again object to the prohibition of alternate traditional uses, e.g., trapping, hunting, general public recreation, of set net and other cabins when not under commercial fishing permitted use. Many cabins which were formerly available to local residents in the off season can no longer be used for these traditional activities. The State continues to object to the Service's continued refusal to allow cabin use for secondary activities and to cooperatively evaluate the need for additional public use cabins. Also, we strongly support extensions in the season of use and other changes in the specific activities and uses permitted for existing cabins.

MANAGEMENT OF FISH AND WILDLIFE

The Master Memorandum of Understanding between the Service and DFG recognizes that cooperation between these two agencies on fish and wildlife concerns is essential. In signing the agreement, both agencies agreed "To coordinate planning for management of fish and wildlife resources on Service lands so that conflicts arising from differing legal mandates, objectives, and policies either do not arise or are minimized."

In stark contrast, the Service's planning of public uses related to use and enjoyment of fish and wildlife resources on Kodiak refuge has chronically been characterized by failure to fully coordinate with DFG. Individual and select involvement of local staff has typically occurred after the Service has determined its management direction rather than actively involving the appropriate levels of DFG in selecting management direction.

Nowhere is this blatant circumventing of appropriate DFG involvement more apparent than in the decisions to pursue and implement bear viewing areas on the refuge (discussed below). But beyond this glaring oversight, consideration of DFG's expertise in evaluating bear, deer, and public use data is also superficial at best. Had appropriate cooperation transpired throughout the planning processes, cooperative implementation of appropriate public use restrictions may have been possible. As we stated in our October 16, 1992 review of the draft PUMP, "without such a partnership approach, however, state agencies must rely on the information and rationale in the PUMP document; which in our view is insufficient to justify the full spectrum of public use closures."

The plan also has a tendency to equate temporary bear avoidance of humans with permanent bear displacement. The State does not believe the periodic avoidance of humans equates to a major impact on bear populations that must be minimized. Even with the increased public use in recent years, the bear population on the refuge remains high and stable under the careful management of the State of Alaska.

The State obviously manages to maintain a healthy bear population, but we also support maintaining and facilitating public uses which are compatible with this goal. The State urges the Service to work cooperatively with DFG to re-evaluate any data which the Service may have and alternatives to reduce significant impacts to bears while accommodating existing public uses. For example, some of the

drainages proposed for closure are sport fishing areas. Hence, it is appropriate for the Service to genuinely cooperate with State resource experts and DFG policy to define fishing limits in some areas and develop uses in others. The State of Alaska is willing to cooperate with the Service in designing fish and game-related public use restrictions that have undergone full analysis by all agencies and the public. The State can then work with the Boards of Fisheries and Game to implement site specific, season specific, and/or use specific regulations to protect refuge resources. Instead, the plan continues to propose across-the-board public use restrictions in many areas of the refuge.

The State also requests inclusion in the PUMP of a major goal or objective of the Service to continue support of DFG's operation of fish counting weirs on all major sockeye systems. These weir sites, located on Ayakulik River, Karluk River, Upper Station lakes, Dog Salmon (Frazer) River, and Akalura Lake, are critical in assuring that salmon escapement goals are achieved annually.

#### Bear Viewing Program

**The State continues to vigorously object to the implementation of the O'Malley Creek bear viewing area based on insufficient consultation with the State, lack of compliance with the closure requirements, and inappropriate use of a concessionaire.**

The final PUMP states (p 63): "A three year study, including a two year (1992-1993) trial bear viewing program, is currently being conducted at O'Malley Creek in the upper Karluk drainage. Previously, a two year (1990-1991) study and trial program was conducted at upper Dog Salmon Falls on Dog Salmon Creek. The intent of the current study is to evaluate the feasibility and impacts of introducing this program into the O'Malley Creek area."

A less informed reviewer would not learn from the plan (pages 45, 51, 53, 63, 64, 66, and 81) that the Service has previously closed public access and uses in both Dog Salmon Falls and O'Malley Creek without appropriate consultation with the State of Alaska, particularly the Department of Natural Resources and DFG. Nor is it apparent that the Service has already issued a concessionaire permit for the private operation of the O'Malley site in 1994, including intent to close public access, sport fishing, and other public uses without appropriate regulatory process for implementing such closures. Instead, the plan downplays the significance of

these unilateral actions by stating (p 45): "A private operator would be selected to run the program on a trial basis during the summer of 1994. An ongoing program would be established if the trial program is successful." In fact (p 66) the trial program also means "general public access to the viewing site would be restricted and the O'Malley public use cabin would be closed during the viewing period."

The State of Alaska provided a critical review of the proposed O'Malley Creek bear viewing area and its environmental assessment on June 9, 1992 (attached). Similarly, DFG was shocked and vehemently protested the unilateral establishment of the Dog Salmon Falls viewing area previously (May 13, 1991 letter, attached). Each of these concerns still applies to the Service's unilateral actions in the case of selecting and operating the O'Malley Creek bear viewing area, e.g., "lack of consultation and coordination with state agencies and the Board of Fisheries", "Not consistent with the requirements of the National Environmental Policy Act and the Service planning process", and "inappropriate and premature use of a concessionaire".

DFG has many years of experience in operating bear viewing areas at McNeil River and Pack Creek. Policy level staff should have been closely involved in the Service's consideration of overall wildlife management priorities and in selecting an appropriate bear viewing site. Instead, it is evident that the Service determined many years ago to operate bear viewing areas as a "new" public use to the detriment of protected existing public uses, and appears unconcerned about the State's objections.

#### Sport Fishing Closures

The above described bear viewing area proposals and other public use closures effectively close areas of the refuge to sport fishing--a Congressionally protected and completely compatible use. Procedures for closing areas of the refuge are governed by regulations for administration of the refuge system (50 CFR Part 36). In addition to findings which dictate the necessity to close the area, the Service must give notice of proposed closure and hold hearings in the affected vicinity. We also challenge that the Service should coordinate appropriately during early considerations with DFG, consistent with the Master Memorandum of Understanding and ANILCA Section 1314.

According to the PUMP, closures of large sections of O'Malley Creek, Karluk Lake to sport fishing and other uses is

necessary for successful implementation of the bear viewing program. There is no demonstrated factual basis for this conclusion or the size of the closure. Bear activity (hence the ability to view bears) along the river has not diminished or been appreciably altered by the presence of sport fishermen. Temporary avoidance behavior by bears is simply not the same as permanent loss of habitat. Experience elsewhere in Alaska provides convincing evidence that closed areas can be quite small and still facilitate popular bear viewing programs; e.g., Brooks Camp in Katmai National Park.

Furthermore, the closures at Dog Salmon Falls and O'Malley Creek to conduct "trial programs" were executed not in accordance with the notice and hearing provisions of the regulations. **In fact, in 1992 the public notice stated the dates and locations of public access closures yet the Service categorically denied there were closures when the State of Alaska objected.** The implementation of this program reflect wholesale rejection of the public interest, disregard for the responsibilities and authorities of DFG to manage wildlife and fisheries, and flagrant abuse of the procedural protections in ANILCA and refuge administration provisions.

#### MANAGEMENT AUTHORITY OF NAVIGABLE WATERBODIES

The State is pleased to see that the PUMP includes previously suggested wordings about the ownership dispute of navigable waterways in the refuge (p 40). While this compromise is commendable, it in no way changes the State's position on ownership or management authority.

We suggest the following changes to the final PUMP to further clarify management to the public while the dispute is pending:

- P. vi, definition of "navigable": The State definition differs. We request inclusion of our definition, included in the State's shoreland policy in the Appendix, or at least a footnote informing the public of a difference that might affect applications for land and water use.
- P. 3, para. 2: We appreciate the substantial re-write which more accurately reflects existing management authorities and agreements regarding fish and wildlife. We are pleased to see appropriate recognition of the Master Memorandum of Understanding between the Service and DFG. We request two changes to further improve the discussion:

Delete the fourth sentence in this paragraph "The State of Alaska...." As written it may inadvertently imply State general management authority over private land.

Insert clarification that the issue of federal regulation of the fish and wildlife harvests is presently in litigation. In that manner, future users of the final plan will look for applicable court decisions rather than assuming the January 1994 status still applies.

- P. 37, ANCSA 17(b) easements: We request including the state's generic language on 17(b) easements.
- P. 39, unguided public use, line 5: To say unguided public use will be subject to limit implies that limits will be set regardless of determinations or monitoring. If this is the case, the State objects to blanket limits. Change "will" to "may."
- P. 40, shorelands, 3rd para., last 2 lines: Please add:  
"...using state land and water to have a permit." This will help the public when applying for land use permits. Again, we suggest including the state's shoreland policy in the Appendices.

#### WATER RIGHTS

The plan should acknowledge the role of the State regarding water rights. Please include the following language:

Federal reserved water rights are created when federal lands are withdrawn from entry for federal use. They are created for the minimum amount of water reasonably necessary to satisfy both existing and reasonable foreseeable future uses of water for the primary purposes for which the land is withdrawn. The priority date is the date the land is withdrawn for those primary purposes.

Federal reserved water rights in Alaska can be claimed and adjudicated in basin-wide adjudications in conformance with the McCarran Amendment under state law, AS 46.15.165-169 and 11 AAC 93.400-440, either administratively or judicially. Alternatively, federal water rights may be applied for and granted under state law for either out-of-stream or instream water rights. In any case, water claimed or requested must be quantified.



The Service will work cooperatively with the State of Alaska to inventory and quantify its federal water rights under state law. Water resources of the Kodiak National Wildlife Refuge will be managed to maintain the primary purposes for which the unit was established.

In addition to federal reserved water rights, the plan should note that a federal agency can apply for water rights through the existing state water rights system. Use of the State's application system will, in many cases, provide the Service with the senior water rights and save both the State and federal government the cost of a federal reserved water right adjudication. The issuance of state water rights will not preclude the federal agency from applying for its federal reserved water rights in the future if the need arises. The Alaska Water Use Act also allows public agencies to apply for reservations of water for instream uses including fisheries, recreation, and water quality purposes.

#### PURPOSES OF THE REFUGE AND OBJECTIVES FOR MANAGEMENT

In numerous locations in the plan (e.g., p viii, 8, 21, and 110) and appendices, the Service asserts that there are "four primary purposes" of the refuge. This error has consistently been retained in the various plans for Kodiak refuge despite correction for most other refuges in the state. It was, however, corrected in the Summary of the CCP. We request that all such sections correct the references to Section 304(g) by clarifying that the purposes listed for each refuge are not all-inclusive and not prioritized. In fact, the Service should quote the introductory language in 304(g) so as to avoid this consistent misrepresentation.

Further, we request revisions in appropriate locations to reflect that the refuge system purposes in the National Wildlife Administration Act, Refuge Recreation Act, and ANILCA reconfirm that the purposes of the refuge system include providing recreational opportunities. Although this is touched upon early in the PUMP, the objectives and management decisions in the plan significantly downplay this requirement. For example, the objectives should be reordered so that #3 emphasizing short-term, low-density public use" follows #4's maintenance of traditional uses. The current order infers that maintenance of traditional uses is a lower priority than providing high quality but reduced public uses.

PAGE-SPECIFIC COMMENTS

page ix. We have requested that the distinction of whether the access method is traditional or not be removed as a moot point. We also note that the observation "snowmachines have not been used traditionally" on the refuge should be amended to read "on the portions of Kodiak refuge which were refuge lands prior to the expansion in 1980".

page ix, xii. Regarding the reference to "new activities in permitted cabins", we maintain that activities occurred in those cabins which were "traditional activities" which the Service has closed. In discussions above, we have requested those off-season activities be allowed, and we object to the Service calling them "new activities".

page xvi. We object to a private operator for a federal program (bear viewing area) involving limitations and uses of a species managed by the State for "common use". There are numerous locations on private lands within and adjacent to the refuge where private operators would implement a bear viewing program if desired. It is inappropriate for the refuge to close existing public uses and limit access to persons paying in excess of \$1,000 on public lands to the detriment of other uses for the financial gain of one private individual.

page 3, footnote 3. This litigation is now commonly called "State of Alaska vs Babbitt, et al."

pages 12, 61, 65, 82, 87, 88, 119, 124. In numerous locations, we question why the most recent deer harvest data used is the peak harvest year in 1987 and nowhere is the subsequent decline in harvest referenced. An estimated 7,000 deer were taken by 5,500 hunters in 1992, representing only a 10% increase in hunters since 1987 and a major decline from the 13,000+ deer killed in 1987.

Table 1 figures show that there was a decrease of approximately 18% in deer hunting activity/use from 1987 (1523) to 1990 (1246).

page 33 incorrectly states: "The Service and the State of Alaska cooperatively manage the fish and wildlife resources of Kodiak Refuge." The statement remains incorrectly written despite previous state request (March 3, 1993) to correct it. The remainder of the paragraph

is excellent and this issue appears to be correctly detailed on pages 2-3.

page 34, paragraph 4. The last sentence states: "The Service is committed to continual monitoring and re-evaluation of the public use cabin program to ensure that it continues to meet the public need." But the plan still lacks consideration of additional public use cabins and campsite improvement. The reference to studying the possible conversion of squatters' cabins into public cabins is a poor substitute. A good example of the need for campsite improvement is at Bare Creek on Ayakulik River, where sport fishermen concentrate for kings in May and June. A couple of food caches and an outhouse at that site would decrease the conflict with bears and greatly enhance the appearance of the streamside willows!

page 36 states: "The comprehensive plan allows fixed-wing aircraft to land on all waterways and salt water beaches for traditional activities. This plan will re-evaluate this policy, potentially proposing changes to the policy which would allow upland landings of fixed-wing aircraft throughout the refuge." Please note that the CCP was corrected by the Record of Decision: "To address another of the State's concerns, the following footnote should be added to the discussion of Land and Float Planes in Table 17 (page 165): It should be noted that the restrictions listed on page 165 regarding land and float planes are proposed only."

page 40 claims that "refuge-specific regulations (regulations unique to an individual refuge) are used to govern public use programs such as hunting, fishing, camping, and refuge access." Aside from the fact that regulations should not "govern public use programs" because Congress expressly established access provisions then a planning process for developing programs, Service regulations do not govern hunting and fishing programs! The State regulates the harvest of fish and wildlife under its management programs; the MMOU reflects this mutual understanding and ANILCA Section 1314 reconfirms that authority rests with the State.

page 48. Figure 5 depicts the area where snowmachine use will be allowed versus not allowed on the refuge. The map is wholly inadequate for Alaskan field conditions. The boundaries are section lines rather than geographic or topographic features. Imagine using that map while snowmachining and trying to be sure you are operating in

legally designated areas. Imagine the enforcement problems for the refuge staff.

page 51 states: "Existing tent platforms would continue to be permitted and could be rebuilt in the same location if destroyed by natural causes." We request that this be revised to include fire caused by humans, either accidental or arson.

As has been the case from the beginning of the planning process, the Service's projections on visitor use are poorly documented. Note discrepancies in pages 51, 82, 61, 67, 119, etc. Again, the most recent deer harvest data used is the peak harvest year of 1987 instead of the more recent harvest estimates; e.g, 1992.

page 61 describes: "an inventory and assessment of refuge waters and the opportunities to use these waters and the fishery resources they support . . .will evaluate potential impacts to refuge fishery populations". Such inventory and assessment has not been formally coordinated with DFG which has responsibility for management and allocation of the fisheries.

page 108 states: "Fishery resources on the refuge will be analyzed more thoroughly as a part of the river management planning process which is currently underway on the refuge." (Page 2 makes a similar reference.) We are concerned that this apparently ongoing planning process has not involved cooperation with all appropriate levels of affected state agencies; i.e., DFG and the Department of Natural Resources, as illustrated by the lack of interagency discussion of study design or methodology.

page 120 states: "unreported kills [DLPs] (estimated by the refuge staff to be equal to the reported DLPs) are increasing". This statement contains several unsubstantiated assumptions upon which many of the refuge's restrictions are based. We question the basis of these "facts".

The plan should include a reference to ongoing discussions by the Kodiak Electric Association to install a relatively small hydro plant downstream of the Terror Lake dam. This plan, as it stands, doesn't provide for any additional development at Terror Lake.

**CSU Distribution List  
Kodiak PUMP  
January 26, 1994**

*Tina Cuning, Department of Fish & Game, Anchorage*

*Terry Haynes, Department of Fish & Game, Fairbanks*

*Priscilla Wohl, Department of Environmental Conservation, Anchorage*

*Alice Iliff, Department of Natural Resources, Anchorage*

*Jeff Otteson, Department of Transportation/Public Facilities, Juneau*

*Paul Rusanowski, Division of Governmental Coordination, Juneau*

*Beth Kertulla, Attorney General's Office, Juneau*

*Cheri Jacobus, Attorney General's Office, Anchorage*

*Mary Pignalberi, Tourism, Department of Commerce & Economic Development, Juneau*

*Jack Griffin, Governor's Office, Washington, D.C.*

*Stan Leaphart, CACFA, Fairbanks*

*Lisa Sutherland, Senator Ted Steven's Office, Washington, D.C.*

*Jerome Selby, Mayor, Kodiak Island Borough, Kodiak*