

STATE OF ALASKA

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August 26, 1994

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

Dear Mr. Stieglitz:

The State of Alaska has reviewed the final regulations for the management of cabins on national wildlife refuges in Alaska. The following represents the consolidated comments of the State resource agencies.

GENERAL COMMENTS

The State is generally pleased that a number of changes were made to the draft regulations in response to our comments. The inclusion in the regulations of descriptions for the terms "adequate notice" for unclaimed cabins and "administrative process" for permit revocation provides much needed clarification to claimants and permittees. Additionally, the extension of the application period for cabins not currently under permit from 90 days to one year following the effective date of these regulations is appropriate.

In spite of the positive changes made, we are concerned that a number of sections in the final regulations remain inconsistent with both the language and intent of the Alaska National Interest Lands Conservation Act (ANILCA). Further, there are several issues that are still not adequately addressed in the final regulations. These concerns and issues were raised by the State in previous comments on the cabin policy and the proposed regulations.

Relationship Between Regulations and Cabin Management Policy. The cabin management policy provides extensive guidance, beyond that found in the actual regulations, to refuge managers in deciding whether to issue a permit for the use or construction of a cabin on refuge lands. We continue to maintain that the intent, clarifications and directions regarding cabin management in the current policy should be included in the final regulations or adopted by specific reference.

Access. A continuing deficiency in the final regulations is absence of any reference to the intent of ANILCA Section 1110 in providing access to private owners and occupiers and their successors within national wildlife refuges in Alaska. As previously suggested, the following

language should be inserted in the section of the regulations pertaining to all cabins:

"Special use permits authorizing the use and occupancy of cabins and other related structures shall not restrict access until it becomes necessary to assure continued conservation and use of the refuge pursuant to Section 1110 of ANILCA."

Compatibility. Congress went to great lengths to provide for the continuation of cabin use to support a wide range of traditional activities. Consequently, we maintain that the provisions of ANILCA should be considered in determining what existing and/or new cabin uses are compatible. The regulations should include specific information on cabin compatibility criteria. A list of specific conditions by which a cabin would be found incompatible should also be included in the regulations. As previously suggested, the Service should clarify cabin "compatibility" by inclusion of the following statement:

"The use and disposition of cabins in refuges shall be considered compatible with the purposes for which the refuges are established, except as Congress has directly and specifically provided to the contrary and as it significantly impairs the conservation and use (enjoyment) of the refuge area."

We agree that compatibility determinations are site specific and are directly related to the specific purposes for which each refuge was established by ANILCA, and that each of the refuges have different purposes. At the same time, there is clear intent that use of cabins and related structures is to be allowed to support a wide range of activities within all Alaskan refuges. In light of the recent settlement agreement in *Audubon v. Babbitt*, under the terms of which the Service must revisit all existing compatibility determinations, we believe it is more important than ever to establish clear and comprehensive compatibility criteria which will protect refuge purposes and also ensure the continuation of cabin use, as intended by ANILCA.

SPECIFIC COMMENTS

Definitions

§36.33(a)(5) "Family": That portion of the definition of "family" requiring a blood relation to be within the second degree of kindred is more restrictive than the definition of the same term in the final FWS cabin policy and should be removed.

§36.33(a)(7) "Immediate family": Although the term "legal spouse" under the definition of "immediate family" has been changed to read simply "spouse," making it more consistent with the definition of "family," we again recommend deletion of this term from the regulations.

In earlier comments, the State suggested adoption of a single definition, identical to that found in ANILCA Section 803 and in 50 CFR §36.2(m), for the term "family." That definition, which more appropriately reflects the extended family structure that often exists throughout rural Alaska, states:

"'Family' means all persons related by blood, marriage, or adoptions, or any person living within the household on a permanent basis."

We believe this definition to be more appropriate as it reflects the intent of ANILCA. Additionally, a single definition is less confusing to applicants and permittees, and would properly allow the continuation of cabin use and occupancy by any family member should the original permittee or claimant die or relinquish the permit. Certainly, in the case of a cabin utilized for subsistence activities, any individual that fits the above referenced definition should be eligible to continue use of a cabin under the terms of a permit.

§36.33(a)(6) "Guest": This definition should be revised to include "clients" of guides and other commercial operators. This is consistent with the regulations for use and occupancy of commercial cabins.

§36.33(a)(8) "New cabin": There are inconsistencies between this definition and additional regulations found in §36.33(c)(3), regarding the status of existing cabins whose owners fail to meet the deadlines for applying for a special use permit. The definition in §36.33(a)(8) states that "new cabin" may include a cabin "whose claimant failed to meet the application deadline for existing cabins but is otherwise under permit." This language would appear to give a refuge manager flexibility in those instances where a claimant may have missed a deadline, but who otherwise can demonstrate that construction and use of the cabin in question either pre-dates the establishment of the refuge or was legally located on lands that are subsequently added to the refuge. The regulations at §36.33(c)(3), however, in addition to establishing application deadlines, state that following the deadline dates "all applications for cabins will be for 'new' cabins only, no matter when the cabin was built or first used." This language would appear to remove any flexibility from the refuge manager. The inconsistency between these sections need to be corrected. This can best be accomplished by deletion of the appropriate portions in §36.33(c)(3). Requiring a cabin owner to relinquish his or her cabin to the FWS in exchange for a special use permit is not consistent with the ANILCA.

We agree with the Service's assertion that regulations requiring permits have been in place since 1981 and that considerable time and effort has been expended in notifying cabin occupants. However, we must again remind the Service that during much of that time the regulations were not consistently enforced, there was no comprehensive regional policy, and claimants and applicants were too often given incomplete or incorrect information about the application and appeals process. For example, following years of problems brought about by the lack of any regional policy guidance, the first draft cabin policy was released in September 1987. A revised draft was released in December 1988 and the final policy was signed in August 1989. Release of draft regulations to implement the policy then took nearly two more years and it has taken more than three years to finalize these current regulations. In short, since passage of ANILCA, management of cabins on Alaskan refuges has been characterized primarily by inconsistency and uncertainty.

While the extension of the application period from 90 days in the proposed regulations to one year following the effective date of the final regulations should provide sufficient time for all cabin claimants to be notified and for them to submit their applications, nevertheless, we urge the FWS to delete this portion of the regulations.

§36.33(b) Privileges and Rights of All Cabin Users: The final regulations should acknowledge and provide protection for the privileges and rights of cabin owners and permittees. The following provisions, which are excerpted from the cabin management policy, should be included in the regulations:

1. Adequate and feasible access shall be provided to cabin permittees and other authorized cabin occupants.
2. A cabin permit shall not be denied or revoked on the basis on non-use until all circumstances have been carefully evaluated. Every consideration shall be given to avoid undue hardships on the permittee. Extended absences for personal and family medical care, education, military service, and other legitimate purposes should not be considered "non-use".

§36.33(b)(4) All Cabins: Despite the Service's assurances that the language in this section complies with the court's decision in *Tarnai v. Fisher*, we maintain that modification to this portion of the regulations is necessary to ensure continued compliance. This subsection should be changed to read:

"No special use permit will be issued for the construction of a cabin for the sole private recreational use or for the sole private recreational use of an existing cabin. Lawful non-commercial activities incidental to and within the same time frame of a permitted activity may be allowed. Cabin permits may be issued for one or more activities provided they are necessary to accommodate a customary and traditional use and no other reasonable alternative is available."

Language contained in the last two sentences was taken from the current cabin management policy.

§36.33(b)(5) Guests- All Cabins: The requirement in this section that a "guest" occupying a cabin during the absence of the permittee have a letter of authorization from the permittee is unreasonable, is not consistent with ANILCA and is an invasion of the privacy of both the permittee and his or her guests. It is clearly not consistent with customary and traditional use.

The Service argues that requiring a letter of authorization will reduce the problem of unauthorized use of cabins and vandalism, which have been problems in the past. However, there is no evidence that these problems are so wide spread as to justify this invasive provision of the regulations. If unauthorized use of a cabin during the absence of the owner/permittee is

identified as a continuing problem within a refuge, it may then be appropriate for the refuge manager to take specific measures to prevent such use. In the case of an existing cabin, we would question the legal authority of the Service to require the owner/permittee to provide his or her guest with a letter of authorization to use what is statutorily recognized as personal property.

§36.33(b)(6) Appeal Process for Application Denials and Permit Revocations: The inclusion of the appeal procedures in §36.41 in these regulations is an improvement over the policy and earlier versions of the regulations. However, as we recommended in earlier comments, the following changes should be made to this section of the regulations or to §36.41.

1. Application denials and permit revocations should be issued in writing to cabin applicants/occupants and appeal procedures provided within 30 days of the written notice.
2. The written notice of application denial or permit revocation should describe the entire appeal process in layman's terms.
3. The appeal process should be expanded to include another independent level of appeal involving an administrative law judge, similar to that found in National Park Service cabin regulations at 36 CFR Part 13. Suggested wording for this is as follows:

"If the claimant desires to further appeal the decision rendered by the Regional director, then a hearing will be held by an administrative law judge, whose decision shall be binding."

§36.33(c)(1) Existing Cabins: This section of the regulations directs a refuge manager to provide for the continuation of a cabin permit or lease that was in effect on December 2, 1980 or at the time the land was subsequently added to the refuge, unless the continuation would directly threaten or significantly impair the purposes for which the refuge was established. This section incorrectly allows the issuance only of a nontransferable permit. This is inconsistent with Section 1303(d) of ANILCA, which states in part:

"Subject to the provisions of the original lease or permit, nothing in this Act or subsection shall necessarily preclude the appropriate Secretary from transferring such a lease or permit to another person at the election or death of the original permittee or leasee."

In order for the regulations to be consistent with the provisions of the statute and the cabin management policy, this subsection should be replaced with the following:

- (1) "Where a valid cabin permit or lease was in effect on December 2, 1980, or at the time the land was subsequently added to the refuge, the refuge manager shall provide for the continuation of the permit or lease under the same conditions as the original lease or permit unless the Secretary issues specific findings, following notice and an opportunity

for the leaseholder or permittee to respond, that renewal or continuation of such valid permit or lease constitutes a direct threat or a significant impairment to the purposes for which the refuge was created. The permit shall be renewable every five years and, subject to the provisions of the original permit or lease, may be transferred to another person at the election or death of the original permittee or leasee."

§36.33(d)(4)&(5) and §36.33(e)(3) Prohibition of New Cabins in Wilderness Areas: The prohibition on the construction of new cabins in designated wilderness unless they are built specifically for administration of the area, for public safety or for trapping and the prohibition on the use or construction of cabins for commercial purposes is inconsistent with both the language and intent of ANILCA.

Provisions in ANILCA and permitted activities in refuge comprehensive conservation plans (CCP) provide for cabins in wilderness areas in support of subsistence uses and guiding (Section 1303) commercial fishing (Section 304 (D)) and public recreation (Section 1315), provided they meet certain conditions. This is also supported by the legislative history of ANILCA as reported in Senate Report 96-413 (Committee on Energy and Natural Resources) and House Report 96-97, Part I (Committee on Merchant Marine and Fisheries).

§36.33(e)(1) Commercial Cabins Used in Support of Commercial Fishing Activities: ANILCA Section 304(d) does not limit the exercise of valid commercial fishing rights, including cabins, to non-wilderness lands as stated in this subsection. The fourth sentence of this subsection should be replaced with the following in order to make the regulations consistent with Section 304(d) and the permitted activities contained in the refuge CCPs:

"The refuge manager shall permit the exercise of valid commercial fishing rights, including the use of cabins on all refuge lands."

We again suggest that the following language be inserted at the end of this subsection:

"The determination of 1979 levels will recognize cyclic fishing levels and will be based on cooperative evaluation between the U.S. Fish & Wildlife Service and the Alaska Department of Fish & Game."

This clarification was developed cooperatively with the State and is contained in the Record of Decision for the Alaska Maritime Refuge CCP.

§36.33(e)(4) Occupancy of Commercial Cabins Restricted to Time of Authorized Activity: We remain concerned about the language in this subsection that cabin occupancy is limited to the "time the authorized activity is occurring." Clarification is needed that the period of authorized activity may include time prior to and after the specified activity for site preparation and clean-up.

We ask that you give consideration to our comments and suggestion for revisions to these

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regulations prior to final adoption. Although the current regulations represent an improvement over those adopted shortly after the passage of ANILCA, we believe that additional changes are necessary in order to make them fully consistent with the language and intent of that statute. State representatives would welcome the opportunity to further discuss the issues and concerns we have raised about these regulations.

Sincerely,

A handwritten signature in cursive script, appearing to read "Paul C. Rusanowski". The signature is written in dark ink and is positioned above the typed name.

Paul C. Rusanowski, Ph.D.
Director

Distribution List
FWS Cabin Regulations
September 19, 1994

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