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June 26, 1998

David B. Allen, Regional Director
U.S. Fish and Wildlife Service
1011 E. Tudor Road
Anchorage, AK 99503-6199

Re: Land Protection Plans

Dear Mr. Allen:

As you know, the U.S. Fish and Wildlife Service (FWS) recently released the Land Protection Plan (LPP) for Yukon Flats National Wildlife Refuge. While the State of Alaska resource agencies appreciate this effort to express how FWS wants to work with the owners of private lands within the Refuge boundaries to conserve fish and wildlife resources, we have procedural and substantive concerns about the document. We understand that the Yukon Flats LPP has been released in final form. However, it is our hope that by bringing these concerns to your attention, and suggesting remedies, we can work together to improve future FWS documents, including the upcoming Alaska Peninsula/Becharof and Kanuti LPPs, and to the extent applicable, the Comprehensive Conservation Plan (CCP) updates. We also hope that, to the extent the Yukon Flats LPP would be improved by incorporating these comments, you will consider amending the document.

Procedurally, we ask that, through the Division of Governmental Coordination (DGC), you involve the state resource agencies in the development of future LPPs. By discussing topics of mutual interest with the State prior to release of documents, potential misunderstandings can be avoided and perhaps more helpful information can be disseminated to the public. Given previous assurances that there would be full involvement of state agencies in all "step-down" planning efforts, we are disappointed that the Yukon Flats LPP was released without review and comment by the state. We are

encouraged that FWS staff in charge of the AP/Becharof LPP and Kanuti LPP have indicated that we will have the opportunity to review and comment on these documents while still in draft form.

In addition to several miscellaneous comments, our substantive concerns relate primarily to how the FWS characterizes:

- 1) public access issues such as Revised Statute (RS) 2477 rights-of-way (ROWs), section line easements, and 17(b) easements, and,
- 2) threats to resources from development on private lands within the boundaries of the refuge.

PUBLIC ACCESS ISSUES:

Page 13, paragraphs 2 and 3 - Citing the state's opposition to proposed revisions to the RS 2477 regulations, the plan contends that the state is "seeking control" of the ROW qualification process. The plan misstates the applicable legal standards and misleads the reader as to the state's actions. The validity of an individual ROW is governed by established legal standards, not by state policy or control. To be valid, an RS 2477 ROW must meet the standards of the federal statute. Decades of federal and state court precedent interpreting this statute provide that state laws govern the criteria for acceptance of the RS 2477 grant. Department of Interior regulations long recognized the role of state law in this process. It is only within the last five years that Interior has attempted to promulgate regulations that would circumvent state law.

The state's RS 2477 program stands as the only ongoing effort to evaluate the validity of these important ROWs. In this process, the state is not attempting to set standards for qualifying routes. Rather, the state is evaluating the historical use of specific routes to determine whether such use meets the legal standards established under the statute and case law. The Department of Interior has not located and evaluated the numerous RS 2477 ROWs claimed in Alaska, and should welcome the state's efforts to undertake this difficult and time-consuming task. All parties will benefit from the state's strong commitment to locate, evaluate, and certify those ROWs meeting the standards of the federal grant.

Page 13, paragraphs 4 and 5 - Use of the term "highway" is misleading. While the RS 2477 Statute (enacted in 1866) does use the term "highway", a qualifying route need not meet the standards of a modern highway. Access routes traveled by foot, horse, dog team or snowmachine, for instance, can qualify as a valid ROW. However, citing the state's assertion of 21 routes as RS-2477 claims, and stating that "typically" a RS 2477 ROW is used for building a public highway, the Yukon Flats LPP contends that the state has "proposed" 21 "highways" within the boundary of the Refuge. Clearly, the state does not intend to construct 21 highways within the Refuge. Most RS 2477 ROW's will continue to be used as they have in the past, as trails.

Page 14, paragraph 1 – The plan suggests here that the state claims an RS 2477 ROW on every square mile of the refuge. This statement is misleading and will serve only to polarize discussion of this issue. The plan correctly notes that the state has accepted the federal ROW grant along surveyed section lines. However, there is legal debate as to whether this ROW grant can be accepted where section lines have not been surveyed on federal land. Most if not all section lines within this and the other refuges in Alaska have not been surveyed, and this legal issue remains unresolved.

Page 14, paragraph 2 - While the Yukon Flats LPP doesn't specifically state that ANCSA 17(b) easements provide an alternative to RS 2477 ROWs, some readers may be confused by the differences between the two. We suggest a more adequate discussion of the different applications of these two laws. It is also important to inform the public that 17(b) easements can be extinguished, if not proven to have received use by December 18, 2001, and if there is reasonable, comparable access.

Proposed RS 2477 language - Based upon language contained in the Yukon Flats CCP/EIS/Wilderness Review document (1987), we suggest use of the following language in future LPPs (and CCPs as appropriate) to describe RS 2477 rights-of-way within refuges:

'Revised Statute 2477 (formerly codified as 43 U.S.C. 932; enacted in 1866) provides that "the right-of way for the construction of highways over public lands, not reserved for public use, is hereby granted." The act was repealed by P.L. 94-579 as of October 21, 1976, subject to valid existing claims. The State of Alaska has identified a number of such possible transportation rights-of-way that have been historically used on refuge lands. If these rights-of-way are valid, they could be developed as transportation corridors by the State. A list and map of these possible RS 2477 rights-of-way (not necessarily all inclusive) is included in this plan as an Appendix.'

DEVELOPMENT ON PRIVATE LANDS:

General Comment - The format of this LPP seems to lend itself to an unfortunate, and we assume unintended, inference of an anti-development bias on the part of the FWS. This is in part due to the emphasis on the relative rankings of lands based on the APS model, and the de-emphasis of the other five "considerations" upon which decisions will be based as described under "Resource Protection Guidelines" (pages 35 –37). These considerations include "[e]valuation of development threats that would harm refuge resources" (item #2, page 36), but instead of categorizing or describing these "threats", the plan here (and on pages 28-32 under "Evaluation of Threats") lumps all development activity together. For instance, there is no distinction made between lodge development

and oil and gas development. This could lead to an assumption by some that the FWS considers all development in conflict with refuge values or all development has equal impacts on resources. Not until the final paragraph of page 37 does it state that all land protection proposals will be evaluated on a case-by-case basis (*presumably* using the six itemized considerations).

We suggest FWS clarify and emphasize that:

- 1) the Land Protection Priorities as described and mapped are based only on the consideration of the value of resources per the APS model;
- 2) These resource values are only one of six considerations used by the FWS when making decisions;
- 3) Development potential on individual parcels is not addressed or mapped within the document but will be considered on a case-by-case basis when specific land protection proposals are evaluated;
- 4) All resource protection methods, whether cooperative agreements, leases, easements, donations, land exchange, or land acquisition, will be voluntary on the part of the landowner;
- 5) Some level of development and human activity is culturally, socially, and economically appropriate and necessary, especially given the limited number of options available to local communities to develop sustainable economies.

Page 31 – To reiterate our previous general comment, while the FWS has emphasized concerns regarding the *potential* for *cumulative* impacts to refuge resources from development on private lands, it should be made clear that some level of development and human activity is culturally, socially, and economically appropriate and necessary. Otherwise, given the heading of this section as *Threats* to Refuge Resources, some readers may infer an unintended anti-development bias on the part of the FWS. Certainly, even though this and other national wildlife refuges in Alaska are "potentially vulnerable to certain types of development", some private lands within or adjacent to the boundaries of refuges may be suitable for some types of development that would not necessarily conflict with the resource protection concerns of either the FWS or local residents.

Page 34 - We suggest that the first sentence be revised to read: "All of the refuge lands within the boundaries of the Yukon Flats Refuge..." to help ensure readers understand that this sentence does not apply to private lands within the boundaries of the Refuge.

Page 36. item #3 - It may be helpful to define "ecological integrity" and more fully describe what types of "habitat protection measures" the FWS might pursue to protect refuge resources on a "key area in private ownership".

Pages 39 and 40 – We suggest it be made clearer that acquisition or exchange of private lands by FWS would be on a "willing-seller" basis.

Page 40, paragraph 3 – In this second paragraph of the "Impact on Public Use" section, the LPP tries to strengthen the case for acquiring private lands by suggesting that the public might have to pay user fees if certain lands remain in private ownership. It is reasonable and appropriate for private landowners and local communities to develop their economies by, for example, providing visitor services and charging access fees. We are not aware of user fees on private lands in the Yukon Flats Refuge area currently being a problem affecting or limiting public use. We suggest the FWS acknowledge the legitimacy of some economic use of private lands and the need for balancing public access with economic opportunities for local residents.

MISCELLANEOUS:

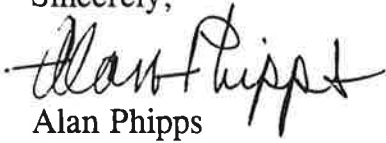
Page 14, paragraph 3 - The language regarding ownership of submerged lands is not entirely consistent with previously agreed-upon CCP language and legislation. Also, the last sentence is not an accurate reflection of the Katie John decision. The federal government was given authority to assure a subsistence preference in certain waterways under certain conditions but the court did not transfer management of the waterways to the federal government.

Page 41 – The first sentence inaccurately states that subsistence is provided for by law on all federal lands in Alaska. For example, the original portions of Denali National Park are closed to subsistence. Subsequent language implies that the federal government can protect subsistence opportunities better than the State. We suggest FWS abstain from comparing in these documents the pros and cons of federal vs. state management of subsistence.

Page 43 – We are concerned that the Yukon Flats LPP was finalized some six years after the completion of public meetings, and that it therefore may not sufficiently reflect the current concerns of the public. We urge the FWS to endeavor to release future documents in a more timely manner, and perhaps include summaries of public comments so that readers may better understand the concerns expressed by the public to the FWS.

We hope these suggestions are helpful. We would be happy to meet with FWS staff to discuss our suggestions and find common ground if there is disagreement. We look forward to discussing these issues in more detail as the FWS proceeds with the development of the LPPs and CCPs for the national wildlife refuges of Alaska. If you have any questions or comments about our concerns please do not hesitate to contact me.

Sincerely,



Alan Phipps

Project Review Coordinator

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