

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 36**

RIN 1018-AC02

Visitor Service Authorizations on Alaska National Wildlife Refuges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service (FWS) proposes regulations to implement Section 1307 of the Alaska National Interest Lands Conservation Act (ANILCA). This action is necessary to establish the procedures for granting historical use, Native Corporation, and local preferences in the selection of commercial operators who provide visitor services other than hunting and fishing guiding on National Wildlife Refuge System lands in Alaska. This rulemaking will provide guidance in the solicitation, award, and renewal of Alaska visitor service authorizations.

DATES: Written comments will be accepted until June 26, 1995.

ADDRESSES: Comments should be addressed to: Regional Director, Alaska Region, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503.

FOR FURTHER INFORMATION CONTACT: David G. Patterson, Regional Public Use Specialist, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503; Telephone (907) 786-3389.

SUPPLEMENTARY INFORMATION:**Background**

ANILCA (16 U.S.C. 3101 et. seq.) was signed into law on December 2, 1980. Its broad purpose is to provide for the disposition and use of a variety of federally owned lands in Alaska. Section 1307 of ANILCA (16 U.S.C. 3197) contains two provisions concerning persons and entities who are to be given special rights and preferences with respect to providing "visitor services" in certain lands under the administration of the Secretary of the Interior, in this context, units of the National Wildlife Refuge System. The term "visitor service" is defined in section 1307 as "any service made available for a fee or charge to persons who visit a conservation system unit, including such services as providing food, accommodations, transportation, tours and guides excepting the guiding of sport hunting and fishing."

Section (a) of Section 1307 states as follows:

Notwithstanding any other provision of law, the Secretary [of the Interior], under such terms and conditions as he determines are reasonable, shall permit any persons who, on or before January 1, 1979, were engaged in adequately providing any type of visitor service [as defined in subsection (c)] within any area established as or added to a conservation system unit to continue providing such type of service and similar types of visitor services within such area if such service or services are consistent with the purposes for which such unit is established or expanded. (16 U.S.C. 3197)

Subsection (b) of Section 1307 states as follows:

Notwithstanding provisions of law other than those contained in subsection (a), in selecting persons to provide (and in the contracting of) any type of visitor service for any conservation system unit, except sport fishing and hunting guiding activities, the Secretary [of the Interior]—

(1) shall give preference to the Native Corporation which the Secretary determines is most directly affected by the establishment or expansion of such unit by or under the provisions of this Act;

(2) shall give preference to persons whom he determines, by rule, are local residents * * * (16 U.S.C. 3197).

Subsection (b) also provides to Cook Inlet Region, Incorporated (CIRI), in cooperation with Village Corporations within the Cook Inlet Region when appropriate, the right of first refusal to provide new visitor services within the Kenai National Moose Range, (Kenai National Wildlife Refuge), within the Cook Inlet Region.

The Alaska National Wildlife Refuge System is managed by the U.S. Fish and Wildlife Service under the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd-668ee), Refuge Recreation Act (16 U.S.C. 460k-460k-4), and the Alaska National Interest Lands Conservation Act (ANILCA) (84 Stat. 2371 et seq.; codified as amended in scattered sections of 16 U.S.C., 43 U.S.C., 48 U.S.C.).

The Secretary of the Interior is authorized under the National Wildlife Refuge System Administration Act to provide for visitor services within the refuge system which he determines are compatible with the purposes for which the area was established as a refuge (16 U.S.C. 668dd(b)(1)). In accordance with that authority, provision is made in the Fish and Wildlife Service refuge regulations for operation of public use facilities and services on national wildlife refuges by concessionaires or cooperators under appropriate contracts or legal agreements (50 C.F.R. 25.61). These proposed regulations provide the means for selecting the providers of services and facilities (except sport fishing and hunting guiding activities)

to the public on national wildlife refuges in Alaska under section 1307 of ANILCA.

Paperwork Reduction Act

The information collection requirements contained in part 36 have been approved by the Office of Management and Budget under 44 U.S.C. et seq. and assigned clearance number 1018-0077. The information is being collected to assist the Service in administering these programs and, particularly, in the issuance of permits and the granting of statutory or administrative benefits. The information requested in the application form is required to obtain a benefit. The public reporting burden for this collection of information is estimated to average 1.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Information Collection Clearance Officer, MS 224 ARLSQ, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project (1018-0077), Washington, DC 20530.

Environmental Considerations

In accordance with 516 DM 2, Appendix 2, the Service claims a categorical exclusion to this rulemaking as this is pursuant to "policies, directives, regulations and guidelines of an administrative, financial, legal technical or procedural nature", and as this rulemaking establishes procedures to allow continuing services on certain Alaska refuge units.

Economic Effects/Regulatory Flexibility Act Compliance

This rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et. seq.) further requires the preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which include small businesses, organizations or governmental jurisdictions. It is estimated that the need for new visitor services will result in less than five (5) special use permits per year statewide. There is a high probability that local visitor service providers, exercising their right under Section 1307(b) of

ANILCA, would be awarded more permits than companies without the preference. This preference will have a positive impact on the local areas by increasing the economic base of these communities. This impact, while important in relation to the total economic level of the local area, is very small in actual dollar value. It is anticipated that each of the projected new permits issued annually will generate between \$50,000 and \$200,000 in revenue, depending on the service provided. Therefore, this rule would have no "significant" economic impact on the local communities or local governmental entities.

Drafting Information

The primary author of this proposed regulation is David G. Patterson, Regional Public Use Specialist, Fish and Wildlife Service, Alaska Region.

List of Subjects 50 CFR Part 36

Alaska, Recreation and recreation areas, Reporting and recordkeeping requirements, and Wildlife refuges.

Accordingly, part 36 of chapter I of Title 50 of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 36—[AMENDED]

1. The authority citation for Part 36 continues to read as follows:

Authority: 16 U.S.C. 460k *et seq.*, 668dd *et seq.*, 742(a) *et seq.*, 3101 *et seq.*, 44 U.S.C. 3501 *et seq.*

2. A new § 36.37 is added to subpart D of part 36 to read as follows:

§ 36.37 Revenue producing visitor services.

(a) Applicability.

The regulations contained in this section apply to visitor services, except guided sport fishing and hunting, provided within all Alaska National Wildlife Refuge areas.

(b) *Definitions.* The following definitions shall apply to this section:

(1) *Adequate services* means, services which are safe, sanitary, and attractive, at levels visitors would expect from the private sector operating outside U.S. Fish and Wildlife Service (Service) areas, have been evaluated as satisfactory, and meet the needs and requirements of the Service and the refuge in which the service is authorized.

(2) *Controlling interest* means, in the case of a corporation, an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the business, so as to permit exercise of final managerial authority over the

actions and operations of the corporation, or election of a majority of the Board of Directors of the corporation. "Controlling interest" in the case of a partnership, limited partnership, joint venture or individual entrepreneurship, means a beneficial ownership of or interest in the entity so as to permit the exercise of final managerial authority over the actions and operations of the entity. In other circumstances, "controlling interest" means any arrangement under which a third party has the ability to exercise general management authority over the actions or operations of the business.

(3) *Historical operator* means any person who:

(i) On or before January 1, 1979, was lawfully engaged in adequately providing any type of visitor service in a refuge within the scope of paragraph (c) of this section;

(ii) Has continued to provide that visitor service without a break in the service for more than eleven continuous months; and

(iii) Is otherwise determined by the Refuge Manager to have a right to continue to provide such services or similar services pursuant to paragraph (c) of this section.

(4) *Local area* means that area in Alaska within the refuge boundary as well as the area within 35 straight-line miles of the refuge boundary, but excluding communities with a population in excess of five thousand persons.

(5) *Local resident* means:

(i) *For individuals that operate a business as a sole proprietorship or partnership.* Those individuals that maintain a primary, permanent residence and business within the local area and whenever absent from this primary, permanent residence, have the intention of returning to it. Factors demonstrating the location of an individual's primary, permanent residence and business may include, but are not limited to, the permanent address indicated on licenses issued by the State of Alaska, Department of Fish and Game, tax returns, and voter registrations.

(ii) *For corporations.* A corporation which maintains its headquarters within the local area, and all of the stockholders, who own a controlling interest in the corporation, qualify as individual local residents under this section.

(6) *Native Corporation* means the same as defined in section 102(6) of ANILCA.

(7) *Preferred operator* means a local resident or Native Corporation which is entitled to a preference under this

section in the award of visitor service authorizations, and as otherwise provided under section 1307(b) of ANILCA.

(8) *Similar visitor service* means that visitor service authorized by the Refuge Manager to be provided on a refuge and determined by the Refuge Manager, on a case by case basis, to be similar to an established service being provided by an historical operator.

(9) *Visitor service* means any service or activity made available for a fee, commission, brokerage or other compensation to persons who visit a refuge, including such services as providing food, accommodations, transportation, tours, and guides, excepting the guiding of sport hunting and fishing. This also includes any activity where one participant/member or group of participants pays more in fees than the other participants (non-member fees, etc.), or fees are paid to the organization which are in excess of the bona fide expenses of the trip.

(10) *Right of first refusal* means, as it relates to section 1307(a) of ANILCA, a reasonable opportunity for a historical operator to review a description of the new similar service and the terms and conditions upon which it is to be provided to determine if the historical visitor service operator wishes to provide the service. As it relates to section 1307(c) of ANILCA, it refers to the opportunity for Cook Inlet Region, Incorporated, to have the first opportunity to provide new visitor services on the Kenai National Wildlife Refuge in the Cook Inlet Region.

(1) *Right of preference* means that persons with a preference conveyed by section 1307(b) of ANILCA will be given an opportunity to meet the terms and conditions of the best proposal submitted in response to a visitor service prospectus.

(c) *Visitor services existing on or before January 1, 1979, "historical operators"*. (1) An historical operator shall have a right to continue to provide visitor services or similar services in a refuge under appropriate terms and conditions so long as such services are determined by the Refuge Manager to be consistent with the purposes for which the refuge was established. An historical operator must obtain a permit from the refuge manager to conduct the visitor services. The permit shall be for a fixed term and shall contain such terms and conditions as are in the public interest. Failure to comply with the terms and conditions of the permit may result in cancellation of the authorization and consequent loss of historical operator rights under this section. Nothing in this section shall prohibit the Refuge

Manager from permitting persons in addition to historical operators to provide visitor services in the refuge at the Refuge Manager's discretion so long as historical operators are permitted to conduct a scope or level of visitor services equal to or greater than those provided prior to January 1, 1979, under terms and conditions consistent with this section. An historical operator may be permitted by the Refuge Manager under separate authority to increase the scope or level of visitor services provided prior to January 1, 1979, but no historical operating rights shall be obtained in such increase.

(2) When an historical operator permit has expired, and if the visitor services permitted thereunder continue to be adequately provided and consistent with the purposes of the refuge as determined by the Refuge Manager, the Refuge Manager shall renew the permit for a fixed term consistent with such new terms and conditions as are in the public interest. Should an historical operator decline to accept an offer of renewal, its rights as an historical operator shall be considered as terminated.

(3) If the Refuge Manager determines that permitted visitor services must be curtailed or reduced in scope or season to protect refuge resources, or for other purposes, the Refuge Manager shall require the historical operator to make such changes in visitor services. If more than one historical operator providing the same type of visitor services is required to have those services curtailed, the Refuge Manager shall establish a proportionate reduction of visitor services among all such historical operators taking into account historical operating levels and other appropriate factors so as to achieve a fair curtailment of visitor services among the historical operators. If the level of visitor services must be so curtailed that only one historical operator feasibly may continue to provide the visitor services, the Refuge Manager shall select one historical operator to continue to provide the curtailed visitor services through a competitive selection process.

(4) The rights of an historical operator shall terminate if the historical operator fails to provide the visitor services under the terms and conditions of a permit issued by the Refuge Manager or fails to provide the visitor services for a period of more than eleven consecutive months.

(5) The rights of an historical operator under this section shall terminate upon a change, after January 1, 1979, in the controlling interest in the historical

operator through sale, assignment, devise, transfer or otherwise.

(6) An historical operator may apply to the Refuge Manager for a permit or amended permit to provide similar visitor services. The Refuge Manager shall grant the request if such visitor services are determined by the Refuge Manager:

(i) To be consistent with the management of refuge resources and the purposes for which the refuge area was established;

(ii) Similar to the visitor services provided by the historical operator prior to January 1, 1979;

(iii) To not be in violation of the legal rights of any other person; and

(iv) Granting the request will not result in an increase in the scope and level of service in excess of those provided by the requesting historical operator as of January 1, 1979.

(7) The Refuge Manager may authorize other persons to provide visitor services in a refuge in addition to historical operators, as long as such other persons conducted the services in a manner compatible with the purposes of the refuge.

(d) *Visitor services initially authorized after January 1, 1979, "preferred operators"*. (1) In selecting persons to provide, and in permitting any type of visitor services, excepting guided hunting or fishing, the Refuge Manager will give a preference to preferred operators determined qualified to provide such visitor services.

(2) In selecting persons to provide any type of visitor services for refuges subject to a preferred operator preference under this section, the Refuge Manager will publicly solicit offers for persons to apply for a permit, or the renewal of a permit, to provide such visitor services pursuant to Service procedures. A preferred operator must submit a responsive offer to such solicitation in order to effect their preference. If, as a result of the solicitation, an offer from a person other than a preferred operator is determined to be the best offer received and that offeror is determined to be capable of carrying out the terms of the authorization, a preferred operator which submitted a responsive offer shall be given an opportunity to meet the terms of the best offer received by amending its offer. If the amended offer of a preferred operator is considered by the Refuge Manager as meeting the terms of the best offer, the preferred operator, if it is determined to be capable of carrying out the terms of the permit, shall be awarded the visitor service permit. If a preferred operator fails to meet these requirements, the

Refuge Manager shall award the permit to the person who submitted the best offer in response to the solicitation. In the event this process results in more than one preferred operator having submitted an offer meeting the terms of the best offer received, the Refuge Manager will select for award of the permit that preferred operator who submitted the best offer as determined by the Refuge Manager.

(3) The rights of preferred operators under this section take precedence over the permit privileges granted to satisfactorily performing current special use permit holders, but do not take precedence over the rights of historical operators as described in this section. Nothing in this section shall prohibit the Refuge Manager from authorizing persons other than preferred operators to provide visitor services in refuge areas so long as the procedures described in this section have been followed with respect to preferred operators. Preferred operators are not entitled by this section to provide all visitor services in a qualified refuge.

(4) An offer from a Native Corporation under this section must document its total ownership of the business entity making the offer.

(5) The preferences described in this section may not be sold, assigned, transferred or devised, directly or indirectly.

(e) *Preference to Cook Inlet Region, Incorporated (CIRI)*. (1) Cook Inlet Region, Incorporated, (CIRI) in cooperation with village corporations within Cook Inlet Region, when appropriate, shall have a right of first refusal to provide new visitor services within that portion of the Kenai National Moose Range, (Kenai National Wildlife Refuge), within the boundaries of Cook Inlet Region. CIRI shall have ninety (90) days from receipt of a prospectus in which to exercise its right.

(2) In order to exercise this right of first refusal, CIRI must submit a responsive offer under the terms of a Service public solicitation for offers to conduct such visitor services. A responsive offer is one which is timely made and meets the terms and conditions of the solicitation document. If CIRI makes such an offer and is determined by the Refuge Manager to be capable of carrying out the terms of the special use permit, it shall be awarded the permit. If it does not, the permit may be awarded to another person pursuant to a showing that such other person can carry out the conditions of the special use permit in a manner compatible with the purposes of the refuge. An offer from CIRI under this section must document total ownership in the entity making the

offer by CIRC and/or a Village Corporation. The CIRC right of first refusal shall have precedence over the rights of preferred operators.

(3) The right of first refusal described in this section may not be sold, transferred, devised or assigned, directly or indirectly.

(f) *Most directly affected Native Corporation determination.* (1) Prior to the issuance of a solicitation document for any future visitor service in a refuge, the Refuge Manager shall provide an opportunity for any Native Corporation interested in providing such new visitor services within a refuge to submit an application to the Refuge Manager including, but not limited to, the following information:

(i) The name, address, and phone number of the Native Corporation; the date of incorporation; its articles of incorporation and structure; and the name of the applicable refuge area;

(ii) The location of the Native Corporation's population center or centers; and

(iii) The socio-economic impacts and their effects as a result of the expansion or establishment of the refuge area.

(2) Upon receipt of all applications from interested Native Corporations, the Refuge Manager will determine the "most directly affected" Native

Corporation based on the following criteria:

(i) The number of acres of surface land within and adjoining the refuge that the Native Corporation owns, or which has been selected under the Alaska Native Claims Settlement Act, unless such selection is determined to be invalid or is relinquished;

(ii) The distance and accessibility from the Native Corporation's population center and/or business address to the applicable refuge; and

(iii) The socio-economic impacts and their effects as a result of the expansion or establishment of the refuge.

(3) In the event that more than one Native Corporation is determined to be equally affected, each such Native Corporation shall be considered as a preferred operator under this section. Preferred operators may form joint ventures with other preferred operators in applying for a visitor service authorization under this section.

(4) The Refuge Manager's "most directly affected" Native Corporation determination or, when requested, the Regional Director's appeal decision, for a refuge is final for all applicable solicitations for new visitor services.

(g) *Appeal procedures.* Any person who considers that they have been improperly denied rights with respect to providing visitor services under this

section may appeal the denial to the Regional Director. Such an appeal must be submitted in writing within thirty (30) days of receipt of the denial from which an appeal is sought. Appeals must set forth the facts and circumstances which the appellant considers as supporting the appeal. The appellant may request an informal meeting to discuss the appeal with the Regional Director. After consideration of the materials submitted by the appellant, the Service record of the matter, and any meeting as requested by the appellant, the Regional Director shall affirm, reverse, or modify the denial appealed from and shall set forth in writing the basis of the decision. A copy of the decision shall be forwarded to the appellant and shall constitute the final administrative decision in the matter. No person shall be considered to have exhausted administrative remedies with respect to a denial of rights to provide visitor services under this section until a final administrative decision has been made pursuant to this section.

Dated: March 18, 1995.

George T. Frampton, Jr.,
Assistant Secretary for Fish and Wildlife and Parks.

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