

112(i)(3)(B) of the Act, as discussed in paragraph § 63.182(a)(6) of subpart H.

\* \* \* \* \*

(2) Compliance with the compressor provisions of § 63.164 of subpart H shall occur no later than March 5, 1998, for any compressor meeting all the criteria in paragraphs (d)(2)(i) through (d)(2)(iv) of this section.

\* \* \* \* \*

(iv) The owner or operator submits the request for a compliance extension to the U.S. Environmental Protection Agency (EPA) Regional Office at the addresses listed in § 63.13 of subpart A no later than June 16, 1997. The request for a compliance extension shall contain the information specified in § 63.6(i)(6)(i)(A), (B), and (D) of subpart A. Unless the EPA Regional Office objects to the request for a compliance extension within 30 calendar days after receipt of the request, the request shall be deemed approved.

\* \* \* \* \*

(6) Compliance with the heat exchange system provisions of § 63.104 of subpart F, as required in § 63.502(f), shall occur no later than September 5, 1999.

\* \* \* \* \*

**Subpart JJJ—National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins**

3. Section 63.1311 is amended by revising paragraphs (d) introductory text, (d)(2) introductory text, and (d)(2)(ii) to read as follows:

**§ 63.1311 Compliance schedule and relationship to existing applicable rules.**

\* \* \* \* \*

(d) Except as provided for in paragraphs (d)(1) through (d)(5) of this section, existing affected sources shall be in compliance with § 63.1331 no later than July 31, 1997, unless an extension has been granted pursuant to section 112(i)(3)(B) of the Act, as discussed in § 63.182(a)(6).

\* \* \* \* \*

(2) Compliance with the compressor provisions of § 63.164 shall occur no later than March 12, 1998, for any compressor meeting all the criteria in paragraphs (d)(2)(i) through (d)(2)(ii) of this section.

\* \* \* \* \*

(ii) The owner or operator submits the request for a compliance extension to the U.S. Environmental Protection Agency (EPA) Regional Office at the addresses listed in § 63.13 no later than June 16, 1997. The request for a compliance extension shall contain the

information specified in § 63.6(i)(6)(i)(A), (B), and (D). Unless the EPA Regional Office objects to the request for a compliance extension within 30 calendar days after receipt of the request, the request shall be deemed approved.

\* \* \* \* \*

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BILLING CODE 6560-50-P

**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:** Final rule.

**SUMMARY:** The Fish and Wildlife Service (Service) adopts regulations to implement Section 1307 of the Alaska National Interest Lands Conservation Act of 1980 (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 provides guidance in the solicitation, award and renewal of competitively offered visitor service authorizations on National Wildlife Refuges in Alaska.

**DATES:** This rule is effective February 13, 1997.

**ADDRESSES:** 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**

The 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.”

*Subsection (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; and

(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-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 CFR 25.61). This rule provides the procedures for selecting the providers of services and facilities, excluding sport fishing and hunting guiding activities, to the public on national wildlife refuges in Alaska under section 1307 of ANILCA. These procedures apply only when a visitor services permit must be issued competitively.

#### Summary of Public Involvement

For the convenience of the public and to enhance the public involvement process, the National Park Service and the U.S. Fish and Wildlife Service agreed to publish simultaneously the draft regulations implementing section 1307 of ANILCA and to undertake a joint public involvement effort. The public comment period was open from April 25 to June 26, 1995, and then, in response to numerous requests, reopened from July 13 to September 11, 1995. The Fish and Wildlife Service conducted public meetings jointly with the National Park Service in Anchorage and Fairbanks. The meetings were mostly informational with one official statement presented by a Native Corporation. National Wildlife Refuge field offices made individual contacts, conducted informational public meetings, and held open houses.

The Fish and Wildlife Service received written comments from 28 different groups or individuals. Eight of those commenters addressed Fish and Wildlife Service issues specifically, while 20 of the commenters addressed issues of both agencies. The National Park Service received an additional 28 written comments from groups or individuals addressing specific park issues. All written comments received by one agency were shared with the other agency in the event a response addressed both agencies. Of the 28 written comments received by the Fish and Wildlife Service, 11 were from Alaska Native organizations, eight from visitor service providers, three from individuals, two from non-tourism related businesses, two from special interest groups, one from federal

government, and one from state government. The following analysis applies only to those 28 comments affecting national wildlife refuges. The comments are discussed on a section by section basis.

#### Analysis of Public Comments

Comments touched on a wide range of topics. A significant number of comments addressed the statute (ANILCA) rather than the regulations, or offered opinions reflecting personal choices rather than identifying problems or potential improvements, or example, "preferences are not fair" or "are not appropriate." Also significant was the number of commenters stating that the regulations discriminate against Natives or Native entities. On the other hand a significant number of commenters stated that the regulations give Natives an unfair advantage in providing visitor services. The view was raised by several persons that giving preferences does not always allow the selection of the best qualified provider or the safest service, and that preferences discourage non-preferred providers from submitting bids.

One commenter requested that subsistence use of refuges be specifically protected. Title 8 of ANILCA provides that protection does not need to be addressed in these regulations. The same commenter stated that the local Native Corporation should be given a right of first refusal for any visitor service provided in that refuge. Section 1307 of ANILCA does not require for that right. Paragraph (b) does require the Secretary of the Interior to "(1) \* \* \* 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."

In the draft regulations the terms "new visitor services" and "future visitor services" were used interchangeably. Regulations implementing section 1307 of ANILCA apply to all new visitor services, except hunting and fishing guiding, offered by a competitive bidding process on all national wildlife refuges in Alaska. The term "new visitor services" is used consistently throughout the final regulations.

#### Section 36.37(b) Definitions

The definition of "adequate services" was subjective and lacked standards, according to some commenters. The term was not used in the text of the draft regulations as published in the Federal Register; it has been deleted from the list of definitions.

Numerous commenters felt that the definitions for "controlling interest" and "historical operator" should include family members and partners in those situations where a refuge permit holder providing a visitor service is no longer able to provide the service because of death or illness. The policy of the Service in Alaska is that refuge permits will carry a right-of-survivorship during the term of the permit. If an individual permittee dies or becomes physically or mentally incapacitated, the permit will automatically pass to a qualified spouse, immediate family member, or prior existing business partner. This policy is not limited to permits issued pursuant to these regulations.

A diversity of commenters were concerned about the definition of "local area" and identified two predominant issues: (1) the size of a community should have no bearing on whether it is local; and (2) because of the relationship of the people to the land, a distance of 35 miles from the refuge boundary could exclude communities from visitor service areas which impact them directly, while at the same time include communities that have no socio-economic ties to the location where a visitor service would be offered. Regarding the first issue, the Service agrees that "local" should be determined by proximity, not size. The requirement that a community have a population of 5,000 or fewer persons in order to be considered local has been deleted from the final regulation. Regarding the second issue, different suggestions were offered. The large size of many of the refuges causes the external boundary to be an inadequate reference point when determining "local area." In response to the numerous comments the Service reevaluated the issue and concluded that "local area" should be defined using the location of the visitor service as the reference point. The final regulation defines "local area" as follows: "Local area means that area in Alaska within 100 miles of the location within a refuge where any of the visitor service is authorized."

Likewise a significant portion of the comments addressed the definition of "local resident," both for individuals and for corporations. Numerous opinions were offered, the most common being that any resident of the State of Alaska should be considered local. More of the comments related to corporations than to individuals. A sample of the comments include: "corporations should be treated the same as an individual;" "Native Corporations should be allowed to form

joint ventures with non-preferred providers;" "a Native Corporation should be considered local within its regional corporation boundary;" "a corporation should be considered local if the majority of the shareholders are local;" "if the majority of stockholders of a corporation are local, there should be no requirement for the corporation to be headquartered locally;" and, "a corporation should not be considered as having changed because of a change in the stockholder roster."

The purpose of paragraphs (b)(1) and (b)(2) of section 1307 of ANILCA was to provide assurance that the designation of the wildlife refuges would not negate economic opportunity for the persons and businesses located within the vicinity of those refuges, and who have direct socio-economic ties to the resources within the refuges. ANILCA acknowledges the probability that some Native Corporations having direct socio-economic ties to a refuge may not be considered local by definition. Identification of the "most directly affected Native Corporation" was to protect the economic interests of those Native Corporations in existence at the time of the passage of ANILCA, and that had social or economic ties to a particular refuge. Designation of "most directly affected Native Corporation" provides a preference to those Native Corporations. A local preference and a most directly affected Native Corporation preference are equal in value and are not additive. A Native Corporation that is eligible for a local preference receives no additional preference by requesting designation as most directly affected Native Corporation.

After reviewing the draft regulations in light of the comments received, the Service agreed that the treatment of corporations in the definition of local resident was not equitable to the treatment received by individuals. The definition for local resident has been rewritten so that location of the headquarters is not a factor in determining "local corporation." Paragraph 36.37(b)(4)(ii) now reads as follows: "For corporations. A corporation in which the controlling interest is held by an individual or individuals who qualify as 'local resident(s)' within the meaning of this section. For non-profit corporations a majority of the board members and a majority of the officers must qualify as 'local residents.'"

Some commenters expressed concern that non-local persons could move to a community immediately prior to submitting an offer to provide a visitor service and thereby receive a local

preference. Other commenters expressed concern that a business located outside the local area could arrange to have a local resident submit an offer on its behalf and thereby receive a local preference. Both these scenarios appeared to be contrary to the spirit of ANILCA. Responding to those concerns the Service has further altered the definition of "local resident" to include a requirement that individuals "\* \* \* have maintained a primary, permanent residence and business within the local area for the past twelve consecutive months \* \* \*."

Although not in response to a specific comment, the Service added a definition for "a responsive offer" to help clarify the process used to identify preferred operators.

*Section 36.37(c) Visitor Services Existing On or Before January 1, 1979, "historical operators"*

Several comments reflected confusion regarding the ability of a historical operator to increase the scope and level of visitor services pursuant to section 1307. Paragraph (c)(1) states that a historical operator may be permitted by the Refuge Manager to increase the scope or level of visitor services provided prior to January 1, 1979, but under separate authority. No historical operating rights shall be obtained in such increase. Paragraph (c)(2) states that a historical operator may apply for a permit or amended permit to provide similar visitor services pursuant to section 1307. For clarification the following sentence has been relocated within the paragraph: "Granting the request will not result in an increase in the scope or level of service in excess of those provided by the requesting historical operator as of January 1, 1979."

Concerns were expressed by several commenters that the time allowed for non-delivery of visitor services in paragraph (c)(4) of the draft regulations was not adequate to provide for certain legitimate circumstances. After reviewing the comments the Service agreed that eleven (11) months was not an appropriate time period to allow for non-delivery of services. The time frame has been increased to twenty-four (24) months and is reflected in paragraph (c)(5) of the final regulations. Twenty-four (24) months accommodates a situation in which a visitor service provider may only have a one month season. If that provider is unable to offer the service the following season for reasons beyond his control, he would then be twenty-three (23) months without providing the visitor service.

*Section 36.37(d) Visitor Services Initially Authorized After January 1, 1979, "preferred operators"*

Many of the comments reflected confusion regarding the relationship between local preference and preference for most directly affected Native Corporation. The following sentence has been added to paragraph (d)(1) for clarity: "Preferences for most directly affected Native Corporation(s) and local residents are equal and are not additive."

Numerous commenters, especially those attending the public meetings in Anchorage and Fairbanks, demonstrated concern and confusion regarding the use of the terms "best offer" and "meeting the terms of the best offer." To many people the term "best offer" implies a monetary bid. When the Service issues a prospectus, bidders are required to describe in detail the service they would be providing. As an example, this description might include types of equipment, means of transportation, personnel qualifications, safety measures, methods of communication, length of time required, and other aspects of service delivery specified in the prospectus. The bid, or response to the prospectus, constitutes an "offer" and is evaluated by a panel. After reviewing the comments, the Service recognizes that "meeting the terms of the best offer" would be difficult to evaluate and could lead to unfair comparisons. The term in the final regulations has been changed as suggested from "meeting the terms of the best offer" to "substantially equal to the terms of the best offer." Also a definition of "best offer" has been added to §36.37(b).

Several commenters expressed concern that Native Corporations were not treated equitably by paragraph (d)(4) of the draft regulations which required a Native Corporation to document total ownership of the business entity making an offer in order to qualify for a preference. A local corporation, however, only needed to document a controlling interest in the business entity making an offer in order to qualify for a preference. The paragraph has been changed so that both Native Corporations and local corporations are required to document a controlling interest in the entity making the offer. In the case of a joint venture, corporations with a preference must document a controlling interest in the joint venture.

*Section 36.37(e) Preference to Cook Inlet Region, Incorporated (CIRI)*

In response to a request by CIRI the comma was deleted before "when appropriate" in the first sentence of paragraph (e)(1) in order to be consistent with the statutory language. The second sentence of paragraph (e)(2) was more appropriately placed in subsection (b) Definitions. Also in paragraph (e)(2) the draft regulations required an offer to document total ownership by CIRI and/or the village corporation in the entity making the offer. This wording has been changed to require documentation of a controlling interest by CIRI rather than a total ownership.

*Section 36.37(f) Most Directly Affected Native Corporation Determination*

Many of the comments directed to this paragraph were addressed in the comment section for paragraph 36.37(b) Definitions.

A few comments stated that "most affected Native Corporation" status should be determined by historical use. Section 1307 of ANILCA provided a preference to help offset potential economic impacts caused by the establishment of the refuges. Other sections of ANILCA provide for continued subsistence and other traditional uses. Socio-economic impacts are among the criteria identified in the regulations and are to be used in the determination of "most directly affected Native Corporation." Historical use would be considered as it relates to socio-economic impacts. Wording has been added to paragraph (f)(1)(iii) to accommodate historical and traditional use.

One comment suggested that the criteria for determination of "most directly affected Native Corporation" should include land ownership in the vicinity of the refuge and not merely within or adjacent to the refuge.

The Service has decided to maintain the wording as it appears in the draft regulations. As stated earlier in the comment analysis, section 1307 of ANILCA was intended to help offset potential economic impacts caused by the establishment of the refuges. Providing a preference to all individuals or corporations experiencing consequences would defeat the intent of mitigating the impacts to those most directly affected. In the case of Native Corporations, although more than one may be determined most directly affected, the intent is to provide a preference to those that are affected "most directly." Native Corporations owning land within or adjoining a refuge boundary certainly have greater

potential to be impacted. The Service does not believe it is appropriate to diminish the opportunity for preference afforded those Native Corporations by expanding the criteria to include additional Native Corporations. Neither does the Service believe it to be appropriate to automatically provide a "most directly affected" preference to a Native Corporation based solely on its proximity to the refuge boundary.

Although one Native Corporation comment requested automatic preference for the Regional Corporation within whose boundary a visitor service was being proposed, the Service believes that all Native Corporation requests for preference should be reviewed equitably.

Paragraph (f)(3) of the draft regulations contained a sentence allowing joint ventures between preferred operators. Several commenters stated the concern that the wording was too limiting and that preferred operators should be permitted to enter into joint ventures with non-preferred businesses. Other commenters expressed concern that non-Native, non-local businesses would use a preferred corporation or individual as a front to respond to a visitor service solicitation, thereby receiving the preference. In evaluating these two perspectives the Service concluded that the spirit of section 1307 of ANILCA could easily be violated by providing for joint ventures between preferred and non-preferred providers unless limits were placed on the manner in which the joint venture could be structured. Forbidding joint ventures between preferred and non-preferred providers, however, may exceed appropriate limits. In order to accommodate the expressed need for expanded opportunities to form joint ventures, the sentence in paragraph (f)(3) limiting joint ventures has been deleted.

The subject of joint ventures has been addressed by rewriting paragraph (d)(4) to read "An offer from a Native Corporation or a local corporation under this section must document its controlling interest in the entity or, in the case of a joint venture, all partners making the offer." Preferred providers wishing to access the experience and/or resources of non-preferred providers are encouraged to enter into alternative arrangements with those providers. Such arrangements must result in the preferred provider making the offer and being responsible for the delivery of the visitor service, as well as being accountable for the performance of the permit terms and conditions. Contracting the services of

the non-preferred provider would be an example of such an arrangement.

The draft regulations did not clearly state the intent to provide multiple opportunities to apply for "most directly affected Native Corporation." This has been clarified by adding paragraph (f)(5) to the regulations.

*Section 36.37(g) Appeal Procedures*

To maintain consistency of appeal procedures related to permits on national wildlife refuges in Alaska, this section of the draft regulations has been rewritten and adopts the procedures set forth in 50 CFR 36.41 Permits.

*Paperwork Reduction Act*

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Service has had an authorization number 1018-0014, from the Office of Management and Budget (OMB) that has expired. The Service has received an emergency extension through June 30, 1997, and is likewise working on a long-term (three year), authorization request which will be submitted before the emergency authorization expires.

This collection of information will be achieved through the use of a USFWS Application Form, which will be modified pursuant to 50 CFR 13.12(b), to address the specific requirements of this final rule. The information collection requirements needed for the proper use and management of all Alaska National Wildlife Refuges is contained in 50 CFR 36.3. The information is being collected to assist the Service in administering these recreation programs and, particularly, in the issuance of permits and the granting of statutory or administrative benefits.

This collection of information will establish whether the applicant is fully qualified to receive the benefits of a refuge permit. The information such as name, address, phone number, depth of experience, qualifications, time in residence, knowledge of function, and affiliations, requested in the application form is required to obtain a benefit.

The likely respondents to this collection of information will be individual Alaska citizens and local and native corporations who wish to be considered to receive a refuge permit. This information will be needed by the USFWS to determine whether a given individual or corporation qualifies. A refuge permit will be approved for five (5) years. Permits shall be noncompetitively renewed by the refuge manager for a period of five additional years upon showing permittee compliance with all applicable permit terms and conditions, and a satisfactory

record of performance. The annual burden of reporting and record keeping should be less than 40 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. The estimated number of likely respondents is less than ten (10), yielding a total annual reporting and record keeping burden of four hundred (400) hours or less.

Direct comments regarding the burden estimate or any other aspect of the form to the Service Information Collection Clearance Officer, Fish and Wildlife Service, Mail Stop 224, Arlington Square, U.S. Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240, and to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Interior Department (1018-0014), Washington, D.C. 20503.

#### Economic Analysis

Service review has revealed that this rulemaking will 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 rule provides guidance in the solicitation, award, and renewal of competitively offered visitor service authorizations on refuges in Alaska. ANILCA provides assurance that designation of the wildlife refuges would not negate economic opportunity for the persons and businesses located within the vicinity of those refuges, and who have direct socio-economic ties to the resources within the refuges.

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.

This rulemaking has been reviewed by the Office of Management and Budget under Executive Order 12866. A review under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) has revealed that this rulemaking would not have a significant effect on a substantial number of small entities, which include businesses, organizations, or governmental jurisdictions.

#### Unfunded Mandates

The Service has determined and certifies pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities.

#### Civil Justice Reform

The Department has determined that these final regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

#### Environmental Considerations

In accordance with 516 DM 2, Appendix 1, 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 new and continuing services on Alaska refuge units.

#### Primary Author

The primary author of this rule 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 record keeping requirements, and Wildlife refuges.

The U.S. Fish and Wildlife Service amends Part 36 of Chapter I of Title 50 of the Code of Federal Regulations as follows:

#### **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 Section 36.37 is added to subpart D of part 36 to read as follows:

#### **§ 36.37 Revenue producing visitor services.**

(a) Applicability.

(1) Except as otherwise provided for in this paragraph, the regulations contained in this section apply to new

visitor services provided within all National Wildlife Refuge areas in Alaska.

(2) The rights granted by this section to historical operators, preferred operators, and Cook Inlet Region, Incorporated, are not exclusive. The Refuge Manager may authorize other persons to provide visitor services on refuge lands. Nothing in this section shall require the Refuge Manager to issue a visitor services permit if not otherwise mandated by statute to do so. Nothing in this section shall authorize the Refuge Manager to issue a visitor services permit to a person who is not capable of carrying out its terms and conditions in a satisfactory manner.

(3) This section does not apply to the guiding of sport hunting or sport fishing.

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

(1) *Best Offer* means a responsive offer that best meets, as determined by the Refuge Manager, the selection criteria contained in a competitive solicitation for a visitor services permit.

(2) *Controlling interest, in the case of a corporation* means 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.

(3) *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.

(4) *Controlling interest in other circumstances* means any arrangement under which a third party has the ability to exercise general management authority over the actions or operations of the business.

(5) *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 lawfully provide that visitor service; 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.

(6) *Local area* means that area in Alaska within 100 miles of the location

within a refuge where any of the visitor service is authorized.

(7) *Local resident* means:

(i) For *individuals*. Those individuals that have maintained their primary, permanent residence and business within the local area for the past twelve (12) consecutive months 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, tax returns, and voter registrations.

(ii) For *corporations*. A corporation in which the controlling interest is held by an individual or individuals who qualify as "local resident(s)" within the meaning of this section. For non-profit corporations a majority of the board members and a majority of the officers must qualify as "local residents."

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

(9) *Preferred operator* means a local resident or Native Corporation which is entitled to a preference under this section in the award of a permit, and as otherwise provided under section 1307(b) of ANILCA.

(10) A *responsive offer* means one which is timely made and meets the terms and conditions of the solicitation document.

(11) *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 a historical operator.

(12) *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.

(13) *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.

(c) Visitor services existing on or before January 1, 1979, "historical operators".

(1) A historical operator shall have a right to continue to provide visitor services or similar services within such area, 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. A historical operator must obtain a permit from the refuge manager to conduct the visitor services. The permit shall be for a fixed term and specified area, 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. A 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) A historical operator may also apply to the Refuge Manager for a permit or amended permit to provide similar types of visitor services. Granting the request will not result in an increase in the scope or level of service in excess of those provided as of January 1, 1979, by the requesting historical operator. The Refuge Manager shall grant the request if such visitor services are determined by the Refuge Manager to be:

(i) 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; and

(iii) Consistent with the legal rights of any other person.

(3) When a historical operator permit has expired, and if the visitor services permitted by it were 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 a historical operator decline to accept an offer of renewal, its rights as a historical operator shall be considered as terminated.

(4) 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.

(5) The rights of a 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 twenty four (24) consecutive months.

(6) The rights of a historical operator under this section shall terminate upon a change, after January 1, 1979, in the controlling interest of the historical operator through sale, assignment, devise, transfer or otherwise.

(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 conduct 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 service, excepting guided hunting or fishing, the Refuge Manager will give a preference to preferred operators determined qualified to provide such visitor services. Preferences for most directly affected Native Corporation(s) and local residents are equal and are not additive.

(2) In selecting persons to provide any type of visitor service for refuges subject to a preferred operator preference under this section, the Refuge Manager will publicly solicit competitive offers for persons to apply for a permit, or the renewal of a permit, to provide such visitor service pursuant to Service procedures. Preferred operators 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 and that offeror is determined to be capable of carrying out the terms of the permit, the preferred operator which submitted the most responsive offer shall be given an opportunity to substantially equal the best offer received by amending its offer. If the amended offer of the preferred operator is considered by the Refuge Manager as being substantially equal to the terms of the best offer, the preferred operator, if determined to be capable of carrying out the terms of the permit, shall be awarded the visitor service permit. If the 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. The Native Corporation(s) determined to be "most directly affected" under this section and local residents have equal preference.

(3) 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 or a local corporation under this section must document its controlling interest in the entity or in the case of a joint venture, all partners, 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, 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. The 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 an offer responsive to the terms of a visitor services solicitation. 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 being made by CIRI under this section must document controlling interest by CIRI when made in cooperation with village corporations within the Cook Inlet Region. The CIRI 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 new visitor service in a refuge, the Refuge Manager shall provide an opportunity for any Native Corporation interested in providing visitor services within that refuge to submit an application to the Refuge Manager to be determined "most directly affected" Native Corporation. The application shall include but not be limited to, the following information:

(i) The name, address, and telephone 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 corporation's population center or centers;

(iii) An assessment of the socioeconomic impacts, including historical and traditional use, and their effects on the Native Corporation as a result of the expansion or establishment of the refuge; and

(iv) Any other information the Native Corporation believes is relevant.

(2) Upon receipt of all applications from interested Native Corporations, the

Refuge Manager will determine the "most directly affected" Native Corporation based on, but not limited to, 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, including historic and traditional use, 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.

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

(5) Any Native Corporation that has not applied for a most directly affected Native Corporation determination may apply for a determination upon issuance of a future solicitation for a new visitor service. A corporation determined to be most directly affected for a refuge will maintain that status for all future visitor service solicitations.

(g) Appeal procedures.

Any person(s) who believe 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 forty-five (45) days of receipt of the denial from which an appeal is sought. The appeals process as defined in 50 CFR Subpart F, 36.41 (b) will apply with exception of the period of time allowed to file an appeal.

Dated: September 10, 1996.

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

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