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Forest Service

36 CFR Part 251

Land Uses; Revenue-Producing Visitor Services in Alaska; Final Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596–AB57

Land Uses; Revenue-Producing Visitor Services in Alaska

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The Department is adopting regulations to establish procedures by which certain persons may conduct revenue-producing visitor services in Conservation System Units within the National Forests in Alaska. These regulations are required by section 1307 of the Alaska National Interest Lands Conservation Act. This final rule will guide the solicitation, selection of applications, and issuance of permits for visitor services within Conservation System Units for the National Forests in Alaska. The intent is to establish workable procedures for recognizing and administering statutory rights and preferences for conducting visitor services within these units.

EFFECTIVE DATE: This rule is effective July 11, 2003.

FOR FURTHER INFORMATION CONTACT: Neil Hagadorn, Recreation, Lands, and Minerals Staff, Alaska Region, P.O. Box 21628, Juneau, Alaska 99802, (907) 586–9336.

SUPPLEMENTARY INFORMATION:

Statutory Requirements

The Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3101 *et seq.*) provides for the disposition and use of a variety of federally administered lands in Alaska. Section 1307 (16 U.S.C. 3197) contains two provisions concerning persons and entities who are to be given special rights and preferences with respect to revenue-producing visitor services on certain lands designated by ANILCA as Conservation Units (CSUs) under the administration of the Secretary of Agriculture.

Under section 102(4) of ANILCA, a CSU, as it relates to the National Forests, means any unit in Alaska of the National Wild and Scenic Rivers System, National Trails System, and National Wilderness Preservation System, or a National Forest Monument, including existing units or any such unit established, designated, or expanded hereafter (16 U.S.C. 3102(4)).

Section 1307(a) of ANILCA (16 U.S.C. 3197(a)) provides that, notwithstanding any other provision of law, the Secretary of Agriculture, under such terms and conditions as the Secretary deems reasonable, shall allow any person who, on or before January 1, 1979, was engaged in adequately providing any type of visitor service within any area established as, or added to a CSU, to continue providing that type of service and similar types of visitor services within that CSU, if those services are consistent with the purposes for which the CSU was established or expanded.

Section 1307(b) of ANILCA (16 U.S.C. 3197(b)) provides that in selecting a person to provide any type of visitor service for any CSU, except sport fishing and hunting guiding activities, and except as provided in section 1307(a), the Secretary of Agriculture shall (1) give preference to the Native Corporation which the Secretary determines is most directly affected by the establishment or expansion of that CSU; and (2) give preference to persons determined to be local residents.

Section 1307(c) of ANILCA (16 U.S.C. 3197(c)) defines ''visitor service'' to mean any service made available for a fee or charge to persons who visit a CSU, including such services as providing food, accommodations, transportation, tours, and outfitting and guiding, except the guiding of sport hunting and fishing.

Summary of Public Comments

The Forest Service proposed rule at 36 CFR part 251, subpart E, was published in the **Federal Register** on April 25, 1997 (62 FR 20140) and provided for a 60-day comment period ending June 24, 1997. Efforts to notify the public of this proposal included news releases, published legal notices, and notification letters to permit holders, Native Corporations in southeast and southcentral Alaska, and Federal, State, and local community officials. Four written comments on the proposed rule were received: One from the State of Alaska, two from Native Corporations, and one from a private, nonprofit corporation.

Most of the comments dealt with (1) § 251.120, involving the scope and applicability of the regulations; (2) § 251.122, the process of how historical rights would be determined; and (3) § 251.123, the administration of preferred operator preferences, including the effect of the regulations on other operators without preferred status. No comments were received on the information collection requirements or criteria for determining the most directly affected Native Corporation status. One Native Corporation responded enthusiastically about the prospect for participating in the visitor industry and requested a determination of most directly affected status. Minor changes have been made in the final rule to respond to the comments received and to achieve clarity and consistency with Forest Service policy. In addition, to be consistent with section 1307 of ANILCA, the final rule will apply only to CSUs on the Tongass and Chugach National Forests in Alaska and not to other designations of National Forest System lands.

Interagency Coordination

The Forest Service has coordinated with the National Park Service and the U.S. Fish and Wildlife Service in the U.S. Department of the Interior in the development of this final rule. While not identical, this final rule is consistent (insofar as is practical within the framework of each agency's legal mandates) with provisions of the final rules of the U.S. Department of the Interior implementing section 1307 of ANILCA for the National Park Service at 36 CFR part 13 (61 FR 54334, Oct. 18, 1996) and for the U.S. Fish and Wildlife Service at 50 CFR part 36 (62 FR 1838, Jan. 14, 1997).

Analysis of Public Comments and Section-by-Section Description of Final Rule

The following is an analysis of public comments received on the proposed rule and a section-by-section description of the final rule for revenue-producing visitor services in Alaska.

Section 251.120 Scope and Applicability

Section 251.120 of the proposed rule explained that the regulations at subpart E would implement section 1307 of ANILCA with regard to the continuation of visitor services existing as of January 1, 1979. It also explained the preferences granted to local residents and certain Native Corporations for obtaining special use authorizations for visitor services on designated lands within National Forest System lands in Alaska. The proposed rule stated that the provisions of subpart E would apply only to existing and future Forest Service-administered CSUs in Alaska, not to all National Forest System lands, and provided a comprehensive list of CSUs within the Tongass and Chugach National Forests.

This section also explained that existing regulations in 36 CFR part 251, subpart B, apply to all requests involving revenue-producing visitor services in Alaska unless expressly waived by subpart E, and that subpart E would not apply to the guiding of sport hunting and fishing.

The following is an analysis of and response to comments received on § 251.120 of the proposed rule.

Comment: The State of Alaska wanted the Forest Service to clarify that the proposed regulations would not apply to State-owned lands and waters, including navigable waters, shore lands, tidelands, and submerged lands within the boundaries of national forests in Alaska. The State of Alaska contends that these lands and waters are, and will continue to be, managed and regulated by the State.

Response: The regulations at 36 CFR part 251, subpart E, apply only to CSUs, which, in accordance with section 103(c) of ANILCA, exclude State and private lands. To provide further clarification of the application of subpart E, the words ''National Forest System lands'' have been added to § 251.120(a) in the final rule.

Comment: The State of Alaska believed that it was unclear whether the proposed regulation applied to the Nellie Juan-College Fiord Wilderness Study Area and to rivers identified as eligible for inclusion in the Wild and Scenic Rivers System. The State of Alaska supported application of these regulations to the wilderness study area and to these rivers.

Response: Section 102(4) of ANILCA defines CSUs as existing units or units that are established, designated, or expanded in the future. Therefore, the statutory rights and preferences created by section 1307 of ANILCA do not apply to study areas or areas identified as eligible units of the Wild and Scenic Rivers System. To clarify the applicability of the regulations, the following wording based on section 102(4) of ANILCA has been added to the end of the definition of ''Conservation System Unit'' in § 251.121 of the final rule: ''* * * including existing units and any such unit established, designated, or expanded hereafter.''

Comment: One respondent stated that section 506 of ANILCA provides certain Alaska natives specific rights on Admiralty Island in addition to the more general rights granted by section 1307 of ANILCA.

Response: Section 506 of ANILCA addresses a number of specific lands issues associated with the Admiralty Island National Monument that involve several Native Corporations, including a provision for consultation and cooperation in the management of specific lands with Kootznoowoo, Incorporated. The regulations at 36 CFR part 251, subpart E, are not intended to diminish or supersede the provisions of section 506 of ANILCA; therefore, no change has been made in the final rule with regard to this issue.

In the final rule, the Department has added a sentence to § 251.120(b) providing that in case of a conflict between subpart B and subpart E, subpart E controls.

Section 251.121 Definitions

Proposed § 251.121 provided definitions for special terms used in the regulations. No public comments were received on § 251.121. However, the Department has made minor changes in the final rule to clarify definitions, revise references, and maintain a format consistent with subpart B.

The term *best offer* in the proposed rule has been changed to *best application* in the final rule for consistency with the agency's competitive application process.

The definition of *Conservation System Unit* has been clarified to address the applicability of the rule to future CSUs and to additions to existing CSUs, consistent with the wording in section 102(4) of ANILCA. This change was made in response to a comment from the State of Alaska regarding application of the rule to Wilderness Study areas and areas eligible for inclusion in the Wild and Scenic Rivers System.

The definition of *controlling interest* has been revised by adding the phrase ''or its capital'' following ''the entity'' to clarify that a controlling interest includes ownership of capital assets. Additionally, the word ''business,'' which preceded the word ''entity,'' has been deleted because it was unnecessary.

The definition of *historical operator* has been simplified to remove the word ''current'' as a description of a holder because the three criteria adequately describe a qualifying holder. Additionally, the words ''revenue-producing'' as a description of visitor services have been removed because this concept applies to all of subpart E and is addressed in its title.

Local area in the proposed rule was defined as ''that area within 100 miles * * *'' In the final rule, the definition has been modified to read ''any site within 100 miles * * *'' to allow for greater specificity in determining the point to which a measurement will be made.

The definition of *local resident* for individuals has been changed by adding the phrase ''Alaska residents.'' This revision clarifies the intent of the proposed rule that persons otherwise qualifying as local area residents must be Alaska residents. Additionally, the other entities in which a controlling interest may be held that are referenced in the definition for *controlling interest* have been added to paragraph (2) of the definition for *local resident.* Finally, the following sentence was removed from the definition for *local resident* and inserted at § 251.124(d) to improve the organization and clarity of the rule: ''Factors demonstrating the location of an individual's primary, permanent residence and business include, but are not limited to, the permanent address indicated on licenses issued by the State of Alaska, tax returns, and voter registration.''

In the definition for *preferred operator,* the reference to § 251.124 has been changed to § 251.123, and the reference to § 251.123 has been changed to § 251.124, in accordance with the renumbering of those sections in the final rule, as discussed in the following descriptions of those sections.

Responsive offer has been changed to *responsive application* in the final rule for consistency with nomenclature in the agency's competitive application process. The phrase ''terms and conditions'' was replaced with ''requirements'' because ''terms and conditions'' are contained in a permit, not a prospectus.

Section 251.122 Historical Operator Special Use Authorizations

Section 251.122 of the proposed rule provided that persons who were adequately providing visitor services within CSUs on National Forest System lands in Alaska prior to January 1, 1979, would be permitted to continue to provide those services and similar types of services under appropriate terms and conditions, if these services are consistent with the purposes for which the CSUs were established or expanded. Consequently, persons who, on or before January 1, 1979, were engaged in adequately providing any type of visitor service within a CSU in Alaska, have continued to provide that visitor service and have retained the controlling interest in the business providing the visitor service, would be considered ''historical operators'' under these regulations and would be entitled to the rights conferred by section 1307(a) of ANILCA. However, a right to continue to provide visitor services under section 1307(a) is not unlimited; rather, it is subordinate to the management of the CSU and does not grant a monopoly to provide all visitor services in a given area to the exclusion of other individuals or entities.

This section of the proposed rule also specified under what circumstances the rights of a historical operator would be lost. These included revocation due to failure to comply with special use

authorization terms and conditions; refusal of an offer to reissue a special use authorization; and failure to provide authorized services for 24 consecutive months. In addition, the rights of a historical operator would terminate upon a change in the controlling interest in the business providing the visitor services, unless the controlling interest passed to those who otherwise qualify as historical operators.

The following is an analysis of and response to a comment on § 251.122 of the proposed rule.

Comment: One respondent suggested that a provision be added to § 251.122 to require that before making a decision to grant historical operator status, the authorized officer notify any Native Corporations that have applied for designation as the most directly affected Native Corporation for the CSU and give them the opportunity to comment before making the determination. The respondent stated that notice and opportunity to comment are equitable and consistent with due process because a determination granting historical operator status for a particular CSU may defeat the most directly affected Native Corporation's preference right within the same CSU. According to the respondent, information that can be provided by the most directly affected Native Corporation should, therefore, be obtained before any final determination is made regarding historical operator rights within an affected CSU.

Response: The Department disagrees with this respondent and has not revised the rule to require notice and comment prior to granting historical operator status because the Department disagrees that a determination granting historical operator status for a particular CSU may defeat a most directly affected Native Corporation's preference right within the same CSU. Historical operator rights conferred by section 1307(a) of ANILCA are separate from the preferences granted to local residents and most directly affected Native Corporations under section 1307(b) of ANILCA. In addition, historical operator determinations are based on objective, specific statutory criteria applied to information contained in established special use authorization files. Consequently, the Department believes that public notice and comment would be an unnecessary administrative burden and would not greatly aid in making historical operator determinations. Finally, the Department wants its rule to be as consistent as possible with the final rules published by the National Park Service and the U.S. Fish and Wildlife Service, neither of which provides for public notice and comment in connection with historical operator determinations.

In the final rule, the Department has added a paragraph to § 251.122 to address a concept in the statute that was omitted in the proposed rule. The new paragraph (c) clarifies that a historical operator may apply for an authorization to provide visitor services similar to but in lieu of those provided by that historical operator before January 1, 1979, and specifies the criteria under which that type of application will be granted. The new language is almost identical to the language governing this subject in the National Park Service rule. Under this new provision, the authorized officer shall approve the application if the visitor services to be provided are (1) similar in kind and scope to the visitor services provided by the historical operator before January 1, 1979; (2) consistent with the purposes for which the applicable CSU was established or expanded; and (3) consistent with the legal rights of any other person.

A corresponding change was made to paragraph (i) to clarify that the preference granted to historical operators applies only to the use authorized pursuant to paragraph (d). Any increase in the scope or level of use authorized pursuant to paragraph (d) for either the same or similar services is not subject to the preference granted to historical operators.

In the final rule, a sentence has been added to paragraph (e)(2)(ii) to make it clear that when only historical operators participate in a competitive process to allocate use because reductions in visitor capacity make it necessary to reduce operators in an area, they may not claim a preference as a preferred operator under § 124.

Section 251.123—Most Directly Affected Native Corporation Determination

Proposed § 251.124 (which has been redesignated at § 251.123 in the final rule) specified the process for making the most directly affected Native Corporation determination.

No comments were received on this section, and no comments were received on the related information requirements or the process for applying for most directly affected Native Corporation status.

In addition to the change in the numbering of this section in the final rule, the Department is replacing the phrases ''more than one Native Corporation is'' with ''two or more Native Corporations are,'' and ''within the meaning of this section'' with ''for purposes of the most directly affected Native Corporation determination pursuant to this section.'' These changes clarify that if two or more Native Corporations are determined to be equally affected for purposes of the most directly affected Native Corporation determination, each of those Native Corporations is considered a preferred operator.

Section 251.124—Preferred Operator Competitive Special Use Authorization Procedures

Section 251.123 of the proposed rule, which has been redesignated at § 251.124 in the final rule, provided for implementation of section 1307(b) of ANILCA and would grant a preference to local residents (as defined in proposed § 251.121) and to most directly affected Native Corporations, as determined under proposed § 251.124 (§ 251.123 of the final rule), in the competitive issuance of special use authorizations to provide visitor services in CSUs. In the proposed and final rules, local residents and most directly affected Native Corporations are collectively referred to as ''preferred operators'' and have equal preference in the issuance of a special use authorization.

This section further provided that if a preferred operator's offer under this subpart was in the form of a joint venture, the offer would be considered valid only when it is documented to the satisfaction of the authorized officer that the preferred operator holds the controlling interest in the joint venture. Additionally, Native Corporations and local residents who submitted an offer in the form of a joint venture with other persons would retain their preferred operator status as long as the Native Corporations or local residents have the controlling interest in the joint venture. This provision would allow flexibility without compromising the statutory intent of section 1307 of ANILCA.

Section 251.123 in the proposed rule is redesignated § 251.124 in the final rule, and § 251.124 in the proposed rule is redesignated § 251.123 in the final rule. The new sequence in the final rule is more logical for two reasons: (1) The section governing the determination of most directly affected Native Corporation status (§ 251.123) now precedes the section in the final rule governing the competitive selection process (§ 251.124), where the preference for most directly affected Native Corporations is applied; and (2) the section addressing preferred operator competitive special use authorization procedures (§ 251.124) now precedes the section governing preferred operator privileges and limitations (§ 251.125).

Proposed § 251.123(a) (§ 251.124(a) in the final rule) set out a procedure for the solicitation and issuance of special use authorizations that would effectuate the rights of preferred operators under section 1307(b) of ANILCA. The proposed rule provided that an authorized officer must publicly solicit offers to provide visitor services by issuing a prospectus, when the Forest Service determines that:

(1) There is a need for visitor services within the area of a CSU;

(2) There is a need to limit authorized visitor use in the area and/or the number of authorized operators;

(3) There is an opportunity for competitive bidding to provide such services; and

(4) The proposed visitor services are consistent with the Forest Plan direction and all applicable laws and regulations.

In all other situations, except as provided in proposed § 251.122 for historical operators, special use authorizations would be issued noncompetitively on a first-come, first-served basis upon application to the authorized officer in accordance with the provisions at 36 CFR part 251, subpart B.

The following is an analysis of and response to a comment received on § 251.123(a) of the proposed rule (now § 251.124(a) of the final rule).

Comment: One respondent was concerned about the process the Forest Service would use to determine when authorized use needs to be restricted. The respondent stated that determination to restrict use should be made only as part of the public planning process, with adequate opportunity for notice and comment prior to implementation of restrictions.

Response: The Department agrees with this respondent. Existing Forest Service policy provides that decisions to limit use be made in accordance with the National Environmental Policy Act of 1969, its implementing regulations, and Forest Service Manual (FSM) 1950, which provides for public notice and comment. Additionally, land use allocations are made through the forest planning process and delineated in Forest land and resource management plans. Therefore, no changes were made in the final rule in response to this comment.

The Department has made the following changes to proposed § 251.123(a), which has been redesignated as § 251.124(a) in the final rule. The requirement for public solicitation through issuance of a prospectus has been moved to § 251.124(b) in the final rule. The remaining provisions in § 251.123(a) of the proposed rule have been removed in their entirety since they duplicate agency policy in Forest Service Manual (FSM) 2712 and 2343 and in Forest Service Handbook (FSH) 2709.11, chapter 40, that applies to a competitive selection process and establishment of limitations on use. Section 251.124(a) of the final rule is similar to § 13.85 of the final National Park Service rule, which provides that a preference shall be given to a preferred operator when a competitive selection process is used to select a provider for visitor services.

Proposed § 251.123(b) (§ 251.124(b) in the final rule) specified the evaluation criteria that would be used to select an applicant. There were no comments on proposed § 251.123(b). However, the Department has made the following changes in the final § 251.124(b). The provisions contained in § 251.123(b) of the proposed rule have been removed in their entirety since they duplicate policy in the FSM 2712 and 2344 that establishes evaluation criteria used in a competitive evaluation process. Section 251.124(b) of the final rule includes a requirement for public solicitation through issuance of a prospectus when the opportunity to issue authorizations is limited. This section also provides that when authorizations, including priority use permits, expire they shall not be reissued if there is a need to limit use and when there is competitive interest by preferred operators.

Proposed § 251.123(c) (§ 251.124(c) in the final rule) specified that in order to be a preferred operator under subpart E, an applicant responding to a prospectus must be a local resident or a most directly affected Native Corporation. There were no comments on this provision, and no substantive changes have been made in § 251.124(c) of the final rule.

Proposed § 251.123(d) (§ 251.124(f) in the final rule) specified that a qualified preferred operator would be given preference over all other operators, except historical operators. The following is an analysis and response to comments received on § 251.123(d) of the proposed rule.

Comment: One respondent stated that the proposed regulations do not make clear the impacts of a Forest Service decision to restrict access, solicit applications, and grant a preference on other commercial operators in the affected area and questioned whether existing permits, including priority use outfitter-guide permits, would be revoked.

Response: Existing special use authorizations in CSUs in Alaska will be revoked only for cause, such as for noncompliance with their terms and conditions. Except for permits held by historical operators, authorizations will not be reissued when there is a need to limit use and there is competitive interest by preferred operators. The business opportunities previously authorized by these permits will be allocated through issuance of a prospectus, as provided in § 251.124 of the final rule.

This section of the final rule will preempt the Forest Service's national outfitting and guiding policy in FSH 2709.11, chapter 40 (60 FR 30830), that authorizations providing for priority use are subject to renewal. To make the preemptive effect of this rule clearer, the Department has added the following sentence at the end of § 251.124(b): ''Notwithstanding Forest Service outfitting and guiding policy in Forest Service Handbook (FSH) 2709.11, chapter 40, when authorizations, including priority use permits for activities other than sport hunting and fishing, expire in accordance with their terms, they shall not be reissued if there is a need to limit use and when there is competitive interest by preferred operators.'' Preemption of agency policy authorizing reissuance of priority use outfitting and guiding permits without competition is required to effectuate the preferences granted to Native Corporations and local residents under section 1307(b) of ANILCA.

Additionally, to make clear that priority use permits shall not be reissued without competition if the criteria under 36 CFR 251.124(b) are met, the Forest Service is issuing Amendment 2709.11–2003–2 to FSH 2709.11, chapter 40, to revise direction at sections 41.53c and 41.54f regarding priority use by adding a reference to 36 CFR part 251, subpart E. This amendment is available via the World Wide Web/Internet at *http://www.fs.fed.us/im/directives*.

Comment: One respondent questioned if the Forest Service intended that preferred operators would have exclusive rights to provide visitor services in a specific area. The respondent further stated that if this were so, it would be clearly contrary to the intent of Congress that the preference is not a license to create a monopoly, and that public policy favors diversity in the provision of visitor services.

Response: Section 1307(b) of ANILCA grants a preference, rather than exclusive rights or a monopoly, to Native Corporations and local residents in the issuance of a visitor service authorization. Where the need exists, and where use limits allow, the prospectus may provide for more than

one operator to be allocated a portion of the available use.

Comment: One respondent questioned how the Forest Service would allocate permits if all available use were not allocated to a preferred operator. The respondent noted that the preamble to the proposed rule suggested that remaining use be allocated by permits on a first-come, first-served basis, which would be highly unfair to operators who have provided quality, reliable services for a number of years and who have made a substantial investment in the continuation of these services.

The respondent further stated that in all instances where use is restricted but some commercial operators, other than those with a statutory preference, will be permitted to operate in the area, priority should be given to those seeking reissuance of a special use authorization, in order of the date their authorization was first issued (assuming continuous service).

Response: If there is a limit on the number of special use authorizations for a CSU and all available use is not allocated to a preferred operator, the Forest Service will allocate the remaining use according to the competitive process set forth in § 251.124 of the final rule. The commentary about first-come, first-served in the preamble of the proposed rule discussing § 251.123 refers to situations where there are no limitations on the number of special use authorizations being issued and therefore no competitive issuance of special use authorizations.

In CSUs where there are limits on the number of special use authorizations, all authorizations, other than those for historic operators under § 251.122, will be issued competitively in accordance with § 251.124 of the final rule. However, commercial operators without a statutory preference who have performed satisfactorily under a special use authorization likely will be more competitive than other operators without a statutory preference who either do not have satisfactory evaluations or who have not had an authorization. No change from the proposed rule is warranted based on this comment.

The Department has added a new § 251.124(d) to the final rule to clarify and describe factors that demonstrate local residency for applicants seeking preferred operator status. This new paragraph incorporates the factors previously set out in the definition of *local resident* at § 251.121 of the proposed rule.

Proposed § 251.123(e) (§ 251.124(g) in the final rule) specified that if the best offer to a prospectus is made by a non-preferred operator, the preferred operator with the best offer would be given an opportunity to amend its offer to meet the offer of the non-preferred operator. No comments were received on this provision. However, the Department has made minor changes in the final rule. The word ''offer'' has been changed to ''application'' for consistency with the definitions and Forest Service policy, and the provisions governing application of the preference have been modified for clarity and consistency with the final rules promulgated by the National Park Service and the U.S. Fish and Wildlife Service.

Proposed § 251.123(f) (§ 251.124(e) in the final rule) required a preferred operator to document that it holds the controlling interest in a joint venture submitting an application. No comments were received on this provision of the proposed rule. The Department has, however, modified and clarified this section by adding examples of the types of entities for which documentation of a controlling interest might be required.

Section 251.125 Preferred Operator Privileges and Limitations

Proposed § 251.125 contained a number of provisions enumerating preferred operator privileges and limitations.

No comments were received on § 251.125, and no substantive changes were made to this section in the final rule; only minor changes have been made in this section for consistency with existing Forest Service policy. In addition, the order of the paragraphs in this section has been changed for clarity. Paragraph (a) in the proposed rule has been removed because it repeats a provision in § 251.124(f) in the final rule, and paragraph (d) in the proposed rule has been removed because it repeats a provision in § 251.124(e) in the final rule; the remaining paragraphs have been re-designated (a) through (e) in the final rule.

Section 251.126 Appeals

Proposed § 251.126 provided that decisions related to the issuance of special use authorizations in response to written solicitations by the Forest Service or to the modification of special use authorizations to reflect historical use are subject to administrative appeal under subpart C of this part.

No comments were received on § 251.126, and no substantive changes were made from the proposed rule.

Regulatory Certifications

Environmental Impact

An environmental assessment (EA) was prepared for the proposed rule. Notice of the availability of this EA was published in the **Federal Register** notice of the proposed rule (62 FR 20143). No comments were received on the EA. The Department has determined that there are no significant environmental impacts associated with adoption of this final rule. A copy of the EA and Finding of No Significant Impact may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** earlier in this document.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 on regulatory planning and review. It has been determined that this is not a significant rule. This rule will not have an annual effect of $100 million or more on the economy, nor will this rule adversely affect productivity, competition, jobs, the environment, public health and safety, or State and local governments. This rule will not interfere with an action taken or planned by another agency or raise new legal or policy issues. Finally, this rule will not alter the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients under such programs. Accordingly, this final rule is not subject to OMB review under Executive Order 12866.

Proper Consideration of Small Entities

This final rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It has been determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined by the act. Section 1307 of ANILCA provides a competitive advantage for Native Corporations and local residents that qualify as small entities. This rule merely implements section 1307 and does not increase or decrease any preference granted by the statute. This final rule will not impose record-keeping requirements; will not affect the competitive position of small entities in relation to large entities; and will not affect their cash flow, liquidity, or ability to remain in the market.

Federalism

The Department has considered this final rule under the requirements of Executive Order 13132 on federalism and has determined that the rule conforms with the federalism principles set out in this Executive Order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further consultation with State governments is necessary upon adoption of this final rule.

No Takings Implications

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that the final rule does not pose a risk of a taking.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12988 on civil justice reform. Upon adoption of this final rule, (1) all State and local laws and regulations that are in conflict with this final rule or that will impede its full implementation will be preempted; (2) no retroactive effect will be given to this final rule; and (3) this final rule does not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Department has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Energy Effects

This final rule has been reviewed under Executive Order 13211 of May 18, 2001, ''Actions Concerning Regulations That Significantly Affect Energy Supply.'' It has been determined that this final rule will not have an adverse effect on the supply, distribution, and use of energy.

Consultation With Tribal Governments

This final rule has been reviewed under Executive Order 13175 of November 6, 2000, ''Consultation and Coordination with Indian Tribal Governments.'' It has been determined that this final rule does not implicate the consultation provisions of that Executive order. Native corporations are not Indian tribes. Providing a preference for certain providers of visitor services in CSUs in Alaska does not directly affect Indian tribes or the relationship between the Federal government and the tribes in the State of Alaska.

Controlling Paperwork Burdens on the Public

The information requirements associated with implementation of this regulation were set out in the proposed rule. No comments were received concerning information requirements associated with this rule.

The information collection required to determine which Alaska Native Corporations qualify for the statutory preference in the award of competitively issued special use authorizations for commercial visitor services on designated lands within the National Forests in Alaska is currently covered under the information requirements in subpart B of this part, which are assigned OMB control number 0596–0082.

List of Subjects in 36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands—rights-of-way, Reporting and record-keeping requirements, and Water resources.

■ Therefore, for the reasons set forth in the preamble, amend part 251 of Title 36 of the Code of Federal Regulations by adding a new subpart E to read as follows:

PART 251—LAND USES

Subpart E—Revenue-Producing Visitor Services in Alaska

Sec.

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Authority: 16 U.S.C. 3197.

§ 251.120 Applicability and scope.

(a) These regulations implement section 1307 of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3197) with regard to the continuation of visitor services offered as of January 1, 1979, and the granting of a preference to local residents and certain Native Corporations to obtain special use authorizations for visitor services provided on National Forest System lands within Conservation System Units of the Tongass and Chugach National Forests in Alaska.

(b) Except as may be specifically provided in this subpart, the regulations at subpart B shall apply to special use authorizations issued under this subpart. However, if subpart B conflicts with subpart E, subpart E controls.

(c) This subpart does not apply to the guiding of sport hunting and fishing.

§ 251.121 Definitions.

In addition to the definitions in subpart B of this part, the following terms apply to this subpart:

Best application—the application, as determined by the authorized officer, that best meets the evaluation criteria contained in a prospectus to solicit visitor services.

Conservation System Unit (CSU) as it relates to the Tongass and Chugach National Forests in Alaska—a National Forest Monument or any unit of the National Wild and Scenic Rivers System, National Trails System, or National Wilderness Preservation System, including existing units and any such unit established, designated, or expanded hereafter.

Controlling interest—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 the exercise of managerial authority over the actions and operations of the corporation or election of a majority of the board of directors of the corporation. In the case of a partnership, limited partnership, joint venture, or individual entrepreneurship, a beneficial ownership of or interest in the entity or its capital so as to permit the exercise of managerial authority over the actions and operations of the entity. In other circumstances, any arrangement under which a third party has the ability to exercise management authority over the actions or operations of the business.

Historical operator—a holder of a valid special use authorization to provide visitor services in a CSU under Forest Service jurisdiction who:

(1) On or before January 1, 1979, was lawfully and adequately providing visitor services in that CSU;

(2) Has continued lawfully and adequately to provide the same or similar types of visitor services within that CSU; and

(3) Is otherwise determined by the authorized officer to have a right to continue to provide the same or similar visitor services.

Local area—any site within 100 miles of the location within a CSU where any visitor services covered by a single solicitation by the Forest Service are to be authorized.

Local resident:

(1) *For individuals*—Alaska residents who have lived within the local area for 12 consecutive months prior to issuance of a solicitation of applications for a visitor services authorization for a CSU; who maintain their primary, permanent residence and business within the local area; and who, whenever absent from this primary, permanent residence, have the intention of returning to it.

(2) *For corporations, partnerships, limited partnerships, joint ventures, individual entrepreneurships, and other circumstances*—where the controlling interest is held by an individual or individuals who qualify as local residents within the meaning of this section.

(3) *For nonprofit entities*—where a majority of the board members and a majority of the officers qualify as local residents within the meaning of this section.

Native Corporation has the same meaning as under section 102(6) of ANILCA (16 U.S.C. 3197).

Preferred operator—a Native Corporation that is determined, pursuant to § 251.123, to be most directly affected by establishment or expansion of a CSU; or a local resident, as defined in this section, who competes for a visitor service special use authorization under § 251.124 of this subpart.

Responsive application—an application that is received in a timely manner and that meets the requirements stated in the prospectus.

Visitor service—any service or activity for which persons who visit a CSU pay a fee, commission, brokerage, or other compensation, including such services as providing food, accommodations, transportation, tours, and outfitting and guiding, except the guiding of sport hunting and fishing.

§ 251.122 Historical operator special use authorizations.

(a) A historical operator has the right to continue to provide visitor services under appropriate terms and conditions contained in a special use authorization, as long as such services are determined by the authorized officer to be consistent with the purposes for which the CSU was established or expanded. A historical operator may not operate without such an authorization.

(b) Any person who qualifies as a historical operator under this subpart and who wishes to exercise the rights granted to historical operators under section 1307(a) of ANILCA (16 U.S.C. 1397(a)) must notify the authorized officer responsible for the CSU.

(c) A historical operator may apply for a special use authorization to provide visitor services similar to but in lieu of those provided by that historical operator before January 1, 1979. The authorized officer shall grant the application if those visitor services are determined by the authorized officer to be:

(1) Consistent with the purposes for which the applicable CSU was established or expanded;

(2) Similar in kind and scope to the visitor services provided by the historical operator before January 1, 1979; and

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

(d) Upon the authorized officer's determination that the person qualifies as a historical operator, under either paragraph (a) or paragraph (c) of this section, the authorized officer shall amend the current special use authorization or issue a new special use authorization to identify that portion of the authorized services that is deemed to be historical operations. The special use authorization shall identify the location, type, and frequency or volume of visitor services to be provided.

(e) When a historical operator's special use authorization expires, the authorized officer shall offer to reissue the special use authorization for the same or similar visitor services, as long as the visitor services remain consistent with the purposes for which the CSU was established or expanded, the historical operator was lawfully and adequately providing visitor services under the previous special use authorization, and the historical operator continues to possess the capability to provide the visitor services adequately.

(1) If the operator accepts the offer to reissue, the authorized officer shall issue a new special use authorization that clearly identifies the historical operations as required by paragraph (d) of this section.

(2) If the authorized officer determines that it is necessary to reduce the visitor services to be provided by a historical operator, the authorized officer shall modify the historical operator's special use authorization to reflect the reduced services as follows:

(i) If more than one historical operator provides services in the area where visitor service capacity is to be reduced, the authorized officer shall apportion the reduction among the historical operators, taking into account historical operating levels and such other factors as are relevant to achieve a proportionate reduction among the operators.

(ii) If the reductions in visitor service capacity make it necessary to reduce operators in an area, the authorized officer shall select, through a competitive process that is limited to historical operators only, the operator or operators to receive a special use authorization from among the historical operators. Historical operators participating in this competitive process may not claim a preference as a preferred operator under § 251.124.

(f) Any of the following shall result in the loss of historical operator status:

(1) Revocation of a special use authorization for historical types and levels of visitor services for failure to comply with the terms and conditions of the special use authorization;

(2) A historical operator's refusal of an offer to reissue a special use authorization made pursuant to paragraph (e) of this section;

(3) A change in the controlling interest of a historical operator through sale, assignment, devise, transfer, or otherwise, except as provided in paragraph (g) of this section; or

(4) An operator's failure to provide the authorized services for a period of more than 24 consecutive months.

(g) A change in the controlling interest of a historical operator that results only in the acquisition of the controlling interest by an individual or individuals, who were personally engaged in the visitor service activities of the historical operator before January 1, 1979, shall not be deemed a change in the historical operator's controlling interest for the purposes of this subpart.

(h) Nothing in this section shall prohibit the authorized officer from authorizing persons other than historical operators to provide visitor services in the same area, as long as historical operators receive authorization to provide visitor services that are the same as or similar to those they provided on or before January 1, 1979.

(i) If an authorized officer grants to a historical operator an increase in the scope or level of visitor services from

what was provided on or before January 1, 1979, beyond what was authorized under paragraph (d) of this section, for either the same or similar visitor services, the historical operator has no right of preference for the increased amount of authorized services. If additional operations are authorized, the special use authorization shall explicitly state that they are not subject to the historical operator preference.

§ 251.123 Most directly affected Native Corporation determination.

(a) Before issuance of the first special use authorization for a specific CSU pursuant to § 251.124 on or after the effective date of this subpart, the authorized officer shall give notice to Native Corporations interested in providing visitor services within the CSU and give them an opportunity to submit an application to be considered the Native Corporation most directly affected by the establishment or expansion of the CSU under section 1307(b) of ANILCA (16 U.S.C. 1397(b)). In giving notice of the application procedure, the authorized officer shall make clear that this is the only opportunity to apply for most directly affected status for that particular CSU.

(1) At a minimum, an application from an interested Native Corporation shall include the following:

(i) Name, address, and telephone number of the Native Corporation; date of its incorporation; its articles of incorporation and structure; and the name of the applicable CSU and the solicitation to which the Native Corporation is responding;

(ii) Location of the Native Corporation's population centers; and

(iii) An assessment of the socioeconomic impacts (including changes in historical and traditional use and landownership patterns) on the Native Corporation resulting from establishment or expansion of the applicable CSU.

(2) In addition to the minimum information required by paragraph (a)(1) of this section, Native Corporations may submit such additional information as they consider relevant.

(b) Upon receipt of all applications from interested Native Corporations, the authorized officer shall determine the most directly affected Native Corporation considering the following factors:

(1) Distance and accessibility from the Native Corporation's population centers and/or business address to the applicable CSU;

(2) Socioeconomic impacts (including changes in historical and traditional use and landownership patterns) on Native Corporations resulting from establishment or expansion of the applicable CSU; and

(3) Information provided by Native Corporations and other information considered relevant by the authorized officer to assessment of the effects of establishment or expansion of the applicable CSU.

(c) In the event that two or more Native Corporations are determined to be equally affected for purposes of the most directly affected Native Corporation determination pursuant to this section, each such Native Corporation shall be considered a preferred operator under this subpart.

(d) A Native Corporation determined to be most directly affected for a CSU shall maintain that status for all future visitor service solicitations for that CSU.

§ 251.124 Preferred operator competitive special use authorization procedures.

(a) In selecting persons to provide visitor services for a CSU, the authorized officer shall, if the number of visitor service authorizations is to be limited, give a preference (subject to any rights of historical operators under this subpart) to preferred operators as defined in this subpart who are determined to be qualified to provide such visitor services.

(b) In such circumstances, the authorized officer shall solicit applications competitively by issuing a prospectus for persons to apply for a visitor services authorization. Notwithstanding Forest Service outfitting and guiding policy in Forest Service Handbook 2709.11, chapter 40, when authorizations, including priority use permits for activities other than sport hunting and fishing, expire in accordance with their terms, they shall not be reissued if there is a need to limit use and when there is competitive interest by preferred operators.

(c) To qualify as a preferred operator under this subpart, an applicant responding to a solicitation made under this section must be determined by the authorized officer to be a local resident as defined in § 251.121 of this subpart, or the Native Corporation most directly affected by establishment or expansion of the CSU covered by the solicitation pursuant to § 251.123 of this subpart.

(d) Applicants seeking preferred operator status based on local residency must provide documentation verifying their claim. Factors demonstrating the location of an individual's primary, permanent residence and business include, but are not limited to, the permanent address indicated on licenses issued by the State of Alaska, tax returns, and voter registration.

(e) An application from a preferred operator in the form of a corporation, partnership, limited partnership, joint venture, individual entrepreneurship, nonprofit entity, or other form of organization shall be considered valid only when the application documents to the satisfaction of the authorized officer that the preferred operator holds the controlling interest in the corporation, partnership, limited partnership, joint venture, individual entrepreneurship, nonprofit entity, or other form of organization.

(f) A qualified preferred operator shall be given preference, pursuant to paragraph (g) of this section, over all other applicants, except with respect to use allocated to historical operators pursuant to § 251.122 of this subpart.

(g) If the best application from a preferred operator is at least substantially equal to the best application from a non-preferred operator, the preferred operator shall be issued the visitor service authorization. If an application from an applicant other than a preferred operator is determined to be the best application (and no preferred operator submits a responsive application that is substantially equal to it), the preferred operator who submitted the best application from among the applications submitted by preferred operators shall be given the opportunity, by amending its application, to meet the terms and conditions of the best application received. If the amended application of that preferred operator is considered by the authorized officer to be at least substantially equal to the best application, the preferred operator shall be issued the visitor service authorization. If a preferred operator does not amend its application to meet the terms and conditions of the best application, the authorized officer shall issue the visitor service authorization to the applicant who submitted the best application in response to the prospectus.

§ 251.125 Preferred operator privileges and limitations.

(a) A preferred operator has no preference within a National Forest in Alaska beyond that authorized by section 1307 of ANILCA (16 U.S.C. 1397) and by § 251.124 of this subpart.

(b) Local residents and most directly affected Native Corporations have equal priority for consideration in providing visitor services pursuant to § 251.124 of this subpart.

(c) Nothing in this subpart shall prohibit the authorized officer from issuing special use authorizations to other applicants within the CSU, as long

as the requirements of § 251.124 are met.

(d) If an operator qualifies as a local resident for any part of an area designated in the solicitation for a specific visitor service, in matters related solely to that solicitation, the operator shall be treated as a local resident for the entire area covered by that solicitation.

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

§ 251.126 Appeals.

Decisions related to the issuance of special use authorizations in response to written solicitations by the Forest Service under this subpart or related to the modification of special use authorizations to reflect historical use are subject to administrative appeal under subpart C of this part.

Dated: May 27, 2003.

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Deputy Under Secretary, Natural Resources and Environment.

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