

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

RIN 1018-AC49

**Seasonal Closure of the O'Malley River Area in the Kodiak National Wildlife Refuge**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

**SUMMARY:** This rule closes a 2,560 acre area within the Kodiak National Wildlife Refuge (Refuge) to all public access, occupancy and use from June 25 through September 30 annually. This closure includes a portion of the O'Malley River drainage and adjacent Refuge lands bordering Karluk Lake and O'Malley Lake. The area is heavily used by Kodiak brown bears that concentrate along the O'Malley River from late June through October to feed on spawning salmon. Extensive research indicates that public use of the O'Malley area has increased to a level that is adversely affecting brown bears. The seasonal closure is necessary to protect brown bears and prevent incompatible conflicts between people and brown bears at an important bear concentration area.

**EFFECTIVE DATE:** August 18, 1995.**ADDRESSES:** U.S. Fish and Wildlife Service, Kodiak National Wildlife Refuge, 1390 Buskin River Road, Kodiak, Alaska 99615.**FOR FURTHER INFORMATION CONTACT:** Refer all questions to Jay Bellinger, Refuge Manager, at the address listed above; Telephone: (907) 487-2600.**SUPPLEMENTARY INFORMATION:****Background**

President Franklin D. Roosevelt established the Kodiak National Wildlife Refuge by Executive Order 8857 on August 14, 1941, to "preserve the natural feeding and breeding ground of the brown bear and other wildlife." This action withdrew about 1.9 million acres from unreserved public domain on Kodiak and Uganik Islands. Congress redesignated the Kodiak National Wildlife Refuge in 1980 when it enacted the Alaska National Interest Lands Conservation Act (ANILCA). All the lands, water, interests, and submerged lands retained in Federal ownership at the time of statehood were included in the refuge. This legislation also added about 50,000 acres of public lands on Afognak and Ban Islands to Kodiak National Wildlife Refuge. Section

303(5)(b) of ANILCA states the purposes for which the Refuge is established and shall be managed. The primary purpose and management priority of the Refuge is:

"\* \* \* to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, Kodiak brown bears, salmonoids, sea otters, sea lions, and other marine mammals and migratory birds."

The Kodiak Refuge Comprehensive Conservation Plan (U.S. Fish and Wildlife Service, 1987) provides primary guidance for management of the Kodiak National Wildlife Refuge. According to its approved alternative, "the Service will undertake detailed management planning to guide implementation of the plan and operation of the refuge." In compliance with that mandate, utilizing a full spectrum of public involvement, the Kodiak Refuge Public Use Management Plan (PUMP) was developed. This rule is a result of direction provided by both these planning processes.

The O'Malley River area in Kodiak National Wildlife Refuge contains crucial habitat for the world-renowned Kodiak brown bears. Bears concentrate along the O'Malley River from late June through October to feed on spawning salmon. The area supports about one third of the brown bears in the Karluk Lake Basin during this period. During the season of heavy bear use, many people also visit the area primarily to view and photograph the bears and/or to fish. This public use has steadily increased for many years.

In 1991, the Service began a study of brown bear use of the O'Malley area and potential impacts of public use on bears. This study documented detrimental impacts on bears in the O'Malley area resulting from the public uses in the area, indicating a need to regulate public uses. To provide viewing opportunities while reducing human-bear conflicts, the Refuge implemented, on a trial basis, a guided bear viewing program (BVP) in the O'Malley area in 1992. Structured BVPs have been used successfully elsewhere in Alaska as a conservation management tool and to enhance public use opportunities. On national wildlife refuges, such services are normally provided by commercial permittees. However, the Service operated the experimental O'Malley BVP to maintain full control over its development and to ensure the scientific integrity of the study. The Service was satisfied with the results of the trial BVP. The O'Malley BVP and public use closure were suspended in 1993. However, the bear study was

continued to provide additional information on the impacts of unrestricted public use on the bears. The 1993 and 1994 study documented significant disturbance to feeding bears and confirmed the need to protect bears from rapidly growing and unrestricted public use.

The Service is committed to conserving healthy populations of Kodiak brown bears in their natural diversity, as this is a primary purpose for which the Refuge was established. The Service must manage public uses of the Refuge in a manner consistent with this purpose.

On May 11, 1994, the Service published an Interim Rule closing the O'Malley River area to public use from June 25-September 30, 1994, except for individuals participating in a refuge-sponsored bear viewing program (59 FR 24564). A proposed rule that would make the seasonal public use closure permanent was also published (59 FR 24567) concurrently with the Interim Rule. The Service reinstated the O'Malley BVP to provide controlled, low impact recreational opportunities, as an alternative to seasonal closure to all public use. The proposed and interim rules were subject to a 60 day public review.

In 1994, to reduce government costs and strengthen support from the private sector, the Service turned the bear viewing program over to a commercial operator, who provided the services through a special use permit issued by the Refuge. The operator, a long time Kodiak guide, was selected through a competitive selection process. In light of problems in the selection process and heavy public opposition to privatization of the O'Malley BVP, the Service canceled the program and revoked the Refuge permit in December 1994.

**Summary of Public Comments**

Six persons attended a public hearing on the interim and proposed rule held in Kodiak, Alaska on April 20, 1994. Concerns and comments were extracted from the administrative record of that hearing and evaluated by the Service.

The Service also received 36 letters and post cards containing written comments from individuals. Comments received over the telephone from one individual were also documented and considered. Of these responses from private individuals, 27 supported or conditionally supported the proposed rule, and 8 opposed it. In two cases, comments were ambiguous as to whether the person supported or opposed the proposed rule.

Nine environmental organizations and one sportsman's organization

commented on the proposed rule. Six of these private organizations opposed the proposed rule, and four provided support or conditional support for it. The Service also received written comments opposing the proposed rule from the State of Alaska, Kodiak Chamber of Commerce, and the Alaska Citizens Advisory Commission on Federal Areas.

Most public opposition and concerns with the proposed rule were directed at the privately operated bear viewing program and/or the continuation of bear hunting in the area. The Service reevaluated the proposed rule, in light of public comments and other concerns, and modified the final rule as follows:

(a) The Service eliminated the O'Malley BVP. The O'Malley area will now be closed to *all* public use from June 25–September 30.

(b) The area subject to this public use restriction has been reduced from 3,955 acres to 2,560 acres.

#### Analysis of Public Comments

(a) Objections to private operation of the bear viewing program:

Most comments in opposition to the proposed rule focused on the bear viewing program. Most commenters conceptually supported the need for reducing conflicts between people and brown bears and providing public bear viewing opportunities. However, there was considerable objection to the specific actions proposed and implemented by the Service at O'Malley. Common objections to the bear viewing program included:

(1) The Service issued a five year special use permit to a private businessman to operate the O'Malley BVP for personal profit, prior to the proposed rule.

(2) The permitted private operator of the O'Malley BVP also guides bear hunters on the Refuge, which raises conflict of interest and ethical concerns.

(3) The permittee pays a minimal fee to the Federal government to operate the bear viewing program, but charges the public \$1,400 each to view bears on public lands.

(4) One permittee is allowed exclusive commercial use of the area.

(5) Costs charged to view bears are exorbitant and prohibitive to many people.

(6) The O'Malley BVP makes bears more familiar with, and therefore less afraid of, people. Such "habituation" to human presence may increase their vulnerability to bear hunting.

This rulemaking establishes a seasonal use restriction to protect bears. The O'Malley BVP was subjected to a full, but separate, public review and

environmental assessment before the seasonal use restriction was published in the **Federal Register**. Though already established by separate action, the O'Malley BVP had to be considered in the proposed and interim rules because it created an exception to the general public use closure. Although public use restrictions are necessary to protect brown bears and maintain compatibility with Refuge purposes, the bear viewing program is not necessary to achieve these objectives. The Service intended the program to provide a quality wildlife viewing opportunity, as an alternative to a complete seasonal closure.

The decision to allow a private permittee to operate the O'Malley BVP was based largely on the high cost to taxpayers for the government to operate the program. Funds are not available for the Service to operate such programs without sacrificing higher priority resource management programs. Also, it is general Service policy to allow private operators, rather than the government, the opportunity to provide recreational services on refuges.

Public comments raised valid questions about the need, cost to the public and the Service, and impacts of the O'Malley BVP on bears and other recreational uses of the Refuge. Due to these and other concerns, the Service canceled the O'Malley BVP. This final rule now prohibits all public use in the O'Malley area during the season of important and concentrated bear activities.

(b) Comments that the seasonal closure is inadequate or inappropriate, since bear hunting is still allowed in area:

Next to the privatization of the O'Malley BVP, allowing bear hunting to continue in the area appeared to be the most contentious issue in the proposed rule. The proposed seasonal public use closure dates (June 25–September 30) will not effect brown bear hunting opportunities in the O'Malley area. Currently, spring bear season runs April 1–May 15, and fall season runs October 25–November 30. Several commenters voiced strong concerns that:

(1) The proposed rule restricts opportunities to view and photograph wildlife, and to participate in other non-consumptive activities, in order to protect bears from benign and incidental impacts, but then allows hunters to deliberately kill bears in the same area.

(2) Bears habituated to human presence in a bear viewing area are highly susceptible to hunting. Hunting such bears presents serious ethical problems and violates reasonable standards of fair chase.

(3) Bear hunting is inconsistent with other more appropriate public uses of an important bear viewing area.

The Service recognizes the potential problem of bears losing their fear of people wherever there is high public use in areas occupied by bears. The Service canceled the O'Malley BVP and, under this final rule, will close this important bear concentration area to all public use during the period of high bear activity. These actions should obviate the problems associated with hunting habituated bears.

The Service feels this closure includes the minimum area and time period necessary to protect bears. The closure dates include the period of highest concentrations and vulnerability of bears in the O'Malley area. During this period, the bears concentrate along the O'Malley River to feed on salmon. The four-year study of people-bear interactions in the O'Malley area indicated that, during the closure period, human activity disrupted feeding activities and displaced bears from the area. Continued disruption of bear feeding activities along the O'Malley River during the closure period may adversely affect their ability to accumulate the fat and protein reserves necessary for winter hibernation and reproduction. Bear hunting, which the Service has determined through a separate process to be compatible with Refuge purposes, does not occur during the critical period of heavy bear use.

(c) Comments on displacement of public use pressures and problems to other areas:

Some commenters stated that restricting public use from the O'Malley area would only displace public use pressure and associated problems to other areas. In a related concern, a few commenters stated that the Refuge needs a comprehensive system of multiple viewing areas and that this rule focuses too much attention on one small area.

The O'Malley closure will displace some public use pressure/problems to other areas. This rulemaking focuses on one area where a significant problem warranting immediate action has been documented. Public use has been rapidly increasing and commercial visitor service providers have been targeting the O'Malley area. The Kodiak PUMP more comprehensively addresses the issue of public use in bear concentration areas. It identifies other areas on the Refuge where bear viewing opportunities and potential problems exist. The Service will develop regulations to protect bear use of other critical areas, as identified in the PUMP.

For now, the Service intends to proceed with these regulations, which are necessary to protect bears using the O'Malley area. The Refuge will continue to monitor other brown bear concentration areas and limit public use, where necessary to protect bears.

(d) Concerns that closure to all public use is unnecessary:

Some commenters stated that the seasonal public use closure was excessive and/or unwarranted. Some recommended the Service consider alternatives that allow public use to continue, but in a manner not detrimental to resources of the area. Several commenters recommended limiting public use through a lottery or drawing permits, as an alternative to an expensive commercially operated bear viewing program. One commenter recommended providing all visitors with orientation and education materials to reduce human/bear conflicts.

Several years of research data reveal unrestricted public use at O'Malley is adversely affecting bear use of this area, indicating that public use restrictions are needed. The Service proposed allowing limited public use of the area through the Refuge-permitted O'Malley BVP, as an alternative to complete seasonal closure, but then canceled the BVP in light of problems in the selection process and heavy public criticism and opposition. Providing visitors with bear orientation and education materials will not, by itself, effectively alleviate the problems. Such materials are already available.

The Service agrees that a structured bear viewing program is not the only means of controlling public use of important bear habitat. In fact, the Kodiak PUMP addresses other means of regulating public uses of other important bear use areas (e.g., seasonal restrictions on overnight camping). The Service intends to proceed with public use closures or restrictions only as necessary to protect and conserve healthy populations of brown bears and other refuge wildlife resources.

(e) Comments about excessive area of restriction:

Some commenters stated that the area included in the O'Malley closure was larger than necessary to protect bears. Cancellation of the bear viewing program made it feasible to eliminate a safety buffer area and reduce the closure area by 36%, from about 3,955 acres to 2,560 acres. The Service considers the closure area delineated in this final rule the minimum size necessary to effectively protect bear use of the O'Malley area.

(f) Comments that justification for the restrictions was misleading and impacts were exaggerated or speculative:

Some commenters contended the justification or rationale for the public use restriction was misleading. They claimed it inappropriately implied that non-consumptive uses, such as wildlife viewing and photography, are causing adverse effects on bears, while ignoring impacts from hunting activities that will be allowed to continue. Some stated the impacts were exaggerated and/or speculative.

The proposed rule provided a simple summary and evaluation of extensive research data. The Service believes the impacts were accurately depicted. Formal research and general management experience with brown bears in the O'Malley River area clearly indicate that unrestricted human use is detrimental to the resource values of the Refuge.

The impacts of all public uses were evaluated. Though not clearly articulated in the rulemaking documents, impacts of all public uses were addressed in the environmental assessment (EA) and compatibility determination for the O'Malley BVP and the Kodiak PUMP. The EA for the O'Malley BVP and the Kodiak PUMP presented an evaluation of all public uses occurring in the area during the period of concentrated bear use. The Service did not intend to single out wildlife viewing and photography as the only public uses impacting bears. The decision to propose the closure was based upon the cumulative effect of all uses that occur during the period of heavy bear use. In regard to impacts on bears, the *period* of human use is just as important as the type of use.

Unfortunately some uses, such as wildlife viewing and photography, occur predominately during the critical season of concentrated bear feeding activities. The data compiled indicated that this intrusion on the critical season of bear feeding *would* have a higher adverse impact on the bear population as a whole, as opposed to controlled hunting, because it would lessen the chances of their surviving the winter if the bears were not allowed to feed unmolested by the public. Hunting does not occur during the critical season of bear use and, as hunting is controlled, the take (and ultimate impact on the bear population) is predictable and designed to be biologically acceptable.

#### Paperwork Reduction Act

This rulemaking does not contain information collection requirements that require approval by the Office of

Management and Budget under 44 U.S.C. 3501 *et seq.*

#### Environmental Considerations

The Final Public Use Management Plan and Environmental Assessment for Public Use Regulations for Kodiak National Wildlife Refuge was completed in October 1993, after a full public review process. It addresses the environmental considerations and need for the O'Malley seasonal public use closure, as well as for other important bear concentration areas. The environmental assessment for the Kodiak PUMP resulted in a Finding of No Significant Impact.

#### Economic Effect

Implementation of the rule will seasonally close slightly more than one tenth of one percent (0.13%) of Kodiak Refuge lands, to commercial operators and public use. Average use (commercial and non-commercial) of the O'Malley area was estimated at 266 user days during 1989 and 1990, and 353 user days during 1991. Most commercial use previously occurring in the closure area will be displaced to other locations and not lost to the local economy.

Changes in use of the resource will have no significant effect on national income. The public use closure will cause an insignificant impact on the local economy. Agency costs for monitoring the closure will be about \$4,000 less than expended during fiscal year 1994 for monitoring the commercial bear viewing program, and about \$40,000 less than expended during fiscal year 1992 for the Refuge to operate the program.

This rulemaking was not subject to Office of Management and Budget review under Executive Order 12866. In addition, a review under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) has been done to determine whether the rulemaking would have a significant effect on a substantial number of small entities, which include businesses, organizations or governmental jurisdictions. This rule would have minimal effect on such entities. The Department of the Interior has determined this document is *not* a major rule.

#### List of Subjects in 50 CFR Part 36

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

Accordingly, Part 36 of Chapter I of Title 50 of the Code of Federal Regulations is amended as follows:

**PART 36—[AMENDED]**

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

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

**§ 36.39 [Amended]**

2. § 36.39 *Public use* is amended by adding paragraph (j) to read as follows:

**§ 36.39 Public use.**

\* \* \* \* \*

(j) *Kodiak National Wildlife Refuge—*  
 (1) *Seasonal public use closure of the O'Malley River Area.* That area within the Kodiak National Wildlife Refuge described in this paragraph (j)(1) is

closed to all public access, occupancy and use from June 25 through September 30. The area subject to seasonal closure consists of lands and waters located within Township 33 South, Range 30 West, Seward Meridian, Alaska, consisting of approximately 2,560 acres, and more particularly described as follows: Township 33 South, Range 30 West, Seward Meridian, Alaska, all of Section 25; all of Section 26, excluding U.S. Survey 10875 and the adjacent riparian ownership (Koniag Inc.) fronting the survey and extending to the center of Karluk Lake; and all of Sections 35 and 36, excluding U.S. Survey 10876 and the adjacent riparian ownership (Koniag Inc.) fronting the survey and extending

to the center of Karluk Lake. Maps of the closure area are available from the Refuge.

(2) Access easement provision. Notwithstanding any other provision of this paragraph (j), there exists a twenty-five foot wide access easement on an existing trail within the Koniag Inc. Regional Native Corporation lands within properties described in paragraph (j)(1) of this section in favor of the United States of America.

Dated: July 7, 1995.

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

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