

**OFFICE OF THE GOVERNOR**

**OFFICE OF MANAGEMENT AND BUDGET  
DIVISION OF GOVERNMENTAL COORDINATION**

**SOUTHCENTRAL REGIONAL OFFICE**  
3601 "C" STREET, SUITE 370  
ANCHORAGE, ALASKA 99503-5930  
PH: (907) 561-6131/FAX: (907) 561-6134

**CENTRAL OFFICE**  
P.O. BOX 110030  
JUNEAU, ALASKA 99811-0300  
PH: (907) 465-3562/FAX: (907) 465-3075

**PIPELINE COORDINATOR'S OFFICE**  
411 WEST 4TH AVENUE, SUITE 2C  
ANCHORAGE, ALASKA 99501-2343  
PH: (907) 278-8594/FAX: (907) 272-0690

September 8, 1995

Mr. Robert Barbee  
Field Director  
National Park Service  
2525 Gambell Street, Rm 107  
Anchorage, Alaska 99503

Dear Mr.  Barbee:

The State of Alaska has reviewed the Vessel Management Plan, Environmental Assessment, and proposed 36 CFR Part 13 rule, dated May 1995, for Glacier Bay National Park and Preserve. This letter represents the consolidated comments of the state's resource agencies.

The State acknowledges the unique environmental and management challenges associated with Glacier Bay. The interwoven issues in the plan are complex and the results will significantly affect both visitors to Glacier Bay and residents of neighboring communities. We also recognize that a healthy tourism industry is vital to the economic well-being of Alaska's families and communities, just as the resources of Glacier Bay are important to local residents.

State agencies have a longstanding interest in participating in Glacier Bay decision making. Time invested now to mutually explore balanced solutions will be exceedingly valuable. All parties should strive for long-term solutions based on:

- \* sound science that guides, rather than dictates, management decisions;
- \* long-term sustainability and conservation;
- \* a consensus-based public process which utilizes the skills and ingenuity of Alaskans to solve problems at the local level.

The purpose of this letter is to briefly identify issues of state concern that have arisen in response to this plan. Additional documentation and justification supporting these issues is available if necessary. The State is committed to working with the National Park Service on each of these issues to find solutions which best strike a balance between protection of Glacier Bay's unique resources, and the interests of the visitor industry, commercial fishers, subsistence users and local residents.

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Re: Glacier Bay Vessel Management Plan and Regulations

Jurisdictional dispute. As you know, the state has consistently asserted ownership of the marine waters within the boundaries of Glacier Bay National Park and Preserve on the premise that the park unit contains no marine waters. An analysis of the legal arguments supporting the state's position is attached for your reference. We recognize, however, that the federal government does not share this view, and that ultimately this issue can only be resolved in the courts. Thus the jurisdictional dispute itself cannot be satisfactorily addressed in the Vessel Management Plan. If, however, the state and the Service can agree in concept to an overall management strategy that respects both national and state interests, then jurisdictional questions become less important. This approach is currently being used successfully in management of disputed tidelands adjacent to the Kodiak National Wildlife Refuge. Cooperative problem solving by the state and Service, with the active participation of affected constituents, could achieve long term mutual management goals without the necessity of resolving jurisdictional disputes.

Other advantages of cooperation. A related advantage of the Service working with the state is the availability of state mechanisms to manage public use. The Alaska National Interest Lands Conservation Act (ANILCA) limits the ability of the Service to restrict or prohibit many public uses that were taking place in conservation system units throughout Alaska prior to 1980 as part of the final compromise legislation. The state, however, is not constrained by these federal requirements. Thus use of state mechanisms increases the tool box of management options.

Cooperation with the state is further supported, even mandated, by ANILCA under Section 1301 which addresses preparation of management plans. This administration is seriously interested in pursuing the benefits of cooperation as illustrated by the current joint planning effort with the Service, local governments and Native corporations on the south side of Denali National Park and Preserve. At Glacier Bay, the Service should similarly emphasize local community involvement by working with Hoonah, Elfin Cove, Pelican, Gustavus, and the larger communities of Juneau and Yakutat.

Vessel restrictions and research. The current plan significantly increases the number of cruise ships allowed in Glacier Bay, yet provides no new opportunities for small vessel operators. The total number of vessels, and an appropriate mix of vessel size and type needs to be re-evaluated in the context of demand and resource sensitivity. If the National Park Service goes forward with an increase in vessel numbers, the state strongly advocates an active monitoring and research program to insure that any incremental increases in vessel numbers are based on sound scientific data. Decisions concerning increased opportunities for other types of boats (tour, charter, private) should recognize that different types and sizes of vessels may have different impacts on air and marine resources. As the plan suggests, current science is somewhat ambiguous and additional studies are necessary, particularly prey and acoustic impact studies which accurately document whale behavior in general, and specifically in relation to vessels types. The state desires to work with the Service in designing a long term research and monitoring program, and in analyzing the results for management implications.

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Attention should also be focused on insuring adequate funding for future research. In light of declining research budgets at all levels, creative funding options should be considered. By insuring that vessel management decisions are scientifically based, and incorporating public participation, the Service can reasonably look forward to appropriate increases in use of the waters of Glacier Bay.

Emergency response. As part of the Vessel Management Plan's effort to identify appropriate levels of vessel traffic, the Service should also be updating and broadening the scope of its emergency response capabilities and oil spill contingency planning. Proper coordination with other agencies having response capabilities is essential in this regard.

Change in "Whale Water" designation process. The proposed regulation at 36 CFR 13.65(b)(3)(iv)(C) eliminates the existing requirement for consultation with other agencies and the public. Existing whale protection regulations were cooperatively developed by the Service, National Marine Fisheries Service, State of Alaska, and others. It is inappropriate to drop this important and valuable component.

Commercial fishing data and management. Consistent with past requests, the Alaska Department of Fish and Game continues to seek opportunities to work cooperatively with the Service on data needs associated with commercial fishing and subsequent decision making. Efforts to jointly develop a research plan have not yet been fruitful.

Non-motorized use areas. The specific locations and extent of non-motorized use areas should be re-evaluated to reduce impacts on longstanding commercial fishing, subsistence and other pre-ANILCA uses and to seek a better balance between national and local interests. We urge that results of the intensive and positive negotiations among the state, Service and users groups in the late 1980's be revisited. ANILCA does not provide administrative discretion to close waters entirely to all motorized use without a finding of resource damage, even in designated wilderness. The potential exists, however, to separate different user types through use of time and space "zoning". If a new balance among user interests can be achieved, use of alternate state management tools may also assist in implementing a successful solution.

Closure procedures. In an effort to be more responsive to rapidly changing ecological conditions at Glacier Bay, the draft regulations contain new provisions which grant the Superintendent discretionary authorities beyond those allowed in ANILCA. While we recognize the validity of the overall management goal, the regulations as proposed are legally questionable, as further described in the attachment. We would like to discuss the basis of these regulations and cooperatively explore alternatives which provide an appropriate degree of flexibility yet are consistent with ANILCA.

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Compendia issues. In light of the Service's recognition last year that the Superintendent's Compendia for each of the Alaska park units are largely unenforceable, we are disappointed and somewhat surprised that the Service has not used this regulatory review opportunity to correct previously identified problems. The current compendium for Glacier Bay continues to be legally deficient under ANILCA standards.

Conclusion. In conclusion, the State of Alaska urges the Service to implement a vessel management plan which emphasizes the following goals: increases the spectrum of vessel use consistent with sound science, recognizes the importance of Glacier Bay to the local and regional economy, and protects the resources and values that make Glacier Bay unique. Given the state's jurisdictional claim and shared interest in these same goals, state agencies are willing to work with the Service to find better solutions to Glacier Bay's unique management challenges. State representatives are available to work with the Service at the earliest opportunity. We look forward to hearing from you.

Thank you for your patience and consideration of these comments.

Sincerely,



Sally Gibert  
State CSU Coordinator

cc: Jim Brady, Glacier Bay National Park and Preserve Superintendent  
Honorable Ted Stevens, U.S. Senate  
Honorable Frank Murkowski, U.S. Senate  
Honorable Don Young, U.S. House of Representatives  
Lt. Governor Fran Ulmer  
John Katz, Governor's Office, Washington, D.C.  
Marilyn Heiman, Governor's Office  
Diane Mayer, Director, Division of Governmental Coordination  
John Shively, Commissioner, Department of Natural Resources  
Frank Rue, Commissioner, Department of Fish and Game  
Joseph Perkins, Commissioner, Department of Transportation and Public Facilities  
Gene Burden, Commissioner, Department of Environmental Conservation  
William Hensley, Commissioner, Dept. of Commerce and Economic Development

Attachment to State of Alaska Comments on  
Glacier Bay Vessel Management Plan and Regulations

**JURISDICTION ISSUES**

**Ownership of State Waters and Submerged Lands**

As described in correspondence dated November 1, 1991, the State of Alaska has reviewed the legislation which created and expanded Glacier Bay National Park. The Glacier Bay National Monument was originally established and Monument additions were made by presidential executive orders. The only legislation establishing the Glacier Bay park unit is ANILCA, which was enacted after statehood. Title to shorelands, tidelands, submerged lands passed to the state at the time of statehood. Following statehood, Congress cannot later withdraw such lands and retain title. It is the state's view that the prior presidential executive orders did not operate to withdraw such lands within Glacier Bay Monument boundaries from state ownership. Our reading of the executive orders and the law do not permit such a result.

Therefore the state does not agree with the Service's assertion that the park contains marine waters. The actual language of Presidential Proclamation #1733 in 1925 describes the monument as: "*the tract of land lying within the following described boundaries*" (emphasis added) and the calculation of acreage clearly excludes waters. Similarly, Presidential Proclamation #2330 of 1939 added "*the following-described lands which lie within the Tongass National Forest in Alaska, are excluded therefrom, and that subject to valid existing rights, all of the following lands are hereby added*" (emphasis added). Again, a calculation of the proclamation's acreage supports the state's position that no marine waters were included. Also contrary to the Service's assertions, neither proclamation mentions "marine waters" or "preservation of marine flora". We request the incorrect citations be deleted in these documents.

The following Solicitor Opinion of June 28, 1950, specifically interprets the ownership of tidelands in Excursion Inlet, in the vicinity of Glacier Bay park unit:

*the proclamation [of 1925] should be regarded as inoperative with respect to tidelands, since the forest boundaries were enlarged under the authority of laws which relate to the establishment of forest reservations on "public lands" (16 U.S.C. 471, 475), and tidelands in a territory are not "public lands" of the United States,<sup>1/</sup> [153 U.S. 273, 1894] but are held in trust for the benefit of the State which may be formed in the Territory.<sup>2/</sup> [152 U.S. 1, 1894]*

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As described in State of Alaska correspondence to the Service on August 29, 1988:

*The State of Alaska does not waive or otherwise concede its claims of ownership to the submerged lands in the territorial waters adjacent to Glacier Bay. See United States v. California, 436 U.S. 32 (1978) (California has dominion over submerged lands surrounding Channel Islands National Monument established by Presidential Proclamation): cf. Utah Division of State Lands v. United States, 107 S. Ct. n 2318 (1987) (Title to submerged lands passes to state upon admission to Union).*

The United States Supreme Court held in Utah v. United States (1987) that:

*There is strong presumption against finding congressional intent to defeat a State's title, and, in light of the longstanding policy of the Federal Government's holding land under navigable waters for the ultimate benefit of future states absent exceptional circumstances, an intent to defeat a State's equal footing entitlement could not be inferred from the mere act of reservation itself. The United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation, but would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land. (emphasis added)*

In support of the Utah Lake decision in 102 IBLA State of Alaska v. Alaska State Office, Bureau of Land Management (1988), the court held:

*Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state. (emphasis added)*

Section 103(a) of ANILCA specifically limits the conservation system units to within the mean high tide line. In the absence of legislation making it very plain that the land was not to be granted to the state prior to the title passing to the State of Alaska and according to the Supreme Court, Congress must specifically intend to abrogate the state's title and such cannot be implied; therefore, the state asserts the National Park Service lacks justification to assume jurisdiction based on title.

During the 1980s, the state cooperated with National Marine Fisheries Service and National Park Service in the adoption of regulations deemed necessary to protect whales, but this does not imply that the state concedes jurisdiction to enact other regulations in waters claimed by the state. At a minimum, the plan and regulations should acknowledge this significant dispute.

## 2. No Grounds for Preemption under the Property Clause

The U. S. Constitution gives Congress certain limited powers to control uses on state owned submerged land under the Property Clause, navigational servitude, and the Commerce Clause. The Supreme Court ruled that Congress may choose not to exercise that power, leaving regulation totally up to the state. (Escanaba Co. v. Chicago, 107 U. S. 678, 1883). Only Congress can enable the Executive branch to exercise these authorities, and Congress has not done so. Neither the Property Clause nor other sources of congressional legislative power are self-executing; Congress must affirmatively exercise its legislative power before the federal Executive branch may implement such regulatory policy. California Coastal Commission v. Granite Rock Co., 480 U. S. 572, 107 S. Ct. 1419 (1987). Instead, ANILCA contains numerous provisions which plainly recognize and respect the State's inherent authority over state owned land and water; e.g., Sections 102, 103, 1314, and 1319.

The State of Alaska has managed the water columns, shorelands, tidelands, and submerged lands in the vicinity of the Glacier Bay park unit since 1959 without degradation of the resource values. The state has statutes, regulations and a management structure in place to control all land and water uses in the area. Non-discretionary programs such as mineral entry on state shorelands, tidelands, or submerged lands have not been permitted in the vicinity of the Glacier Bay unit. The State of Alaska's coastal management plan requires that the productivity and diversity of coastal waters be protected, and it insures that any activities which require two or more permits are reviewed by the Service as well as other federal agencies.

### CLOSURE PROCEDURES

Granting discretionary authorities to the Superintendent to restrict public use activities is specifically limited in ANILCA. Without revision, the state believes the proposed regulations concerning public use restrictions or closures are not in compliance with the intent of ANILCA Section 1110 and implementing regulations contained in 36 CFR 13.30 and 43 CFR 36.11(h). The significance of this issue is described below:

ANILCA Section 1110(a) states:

*. . . the Secretary shall permit, on conservations system units . . . and those public lands designated as wilderness study, the use of snowmachines . . . motorboats, airplanes, and non-motorized surface transportation for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units . . . and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area. (emphasis added)*

To implement this section, the Service adopted Alaska-specific regulations shortly after final passage of ANILCA that generally reflect the understandings and interpretations which accompanied the final version of ANILCA. Adoption of specific use regulations for Alaska units in 36 CFR Part 13 reflect its unique ANILCA management directions and, thereby, modify or supersede the corresponding national regulations contained in 36 CFR Parts 1-7. Subsequently, the Secretary adopted regulations in 43 CFR Part 36 to implement this section for all units managed by the Department of the Interior in Alaska.

Under the combination of ANILCA's language above and both sets of Alaska-specific public use regulations, any public use restrictions require public notice, a hearing, and a finding of damage **prior to** implementation of public use restrictions and closures. If permanent, such closures must additionally be published in the Federal Register. Temporary closures may not exceed 12 months nor be extended. Provisions for emergency closures comply with statutory direction as follows:

*36 CFR 13.30 (c) Emergency closures. (1) Emergency closures or restrictions relating to the use of aircraft, snowmachines, motorboats, or non-motorized surface transportation shall be made after notice and hearing; (2) emergency closures or restrictions relating to the taking of fish and wildlife shall be accompanied by notice and hearing; (3) other emergency closures shall become effective upon notice as prescribed in 13.30(f); and (4) no emergency closure shall extend for a period exceeding 30 days, nor may it be extended.*

The proposed regulations would effectively replace the above regulations and statutory procedures which are specifically mandated for Alaska park units. In their place, the Service proposes language parallel with the more general regulations found in 36 CFR Part 1 applicable only to "lower 48" park units.

The regulations propose granting the Service the additional discretion without advance notice, hearing, finding, and publication, which is inconsistent with ANILCA intent. The Service claims this exemption is necessary because it "*avoids duplication of existing authority and standards*" (60 FR 29528). The duplicative regulations which the Service are apparently referencing are the general national regulations contained in 36 CFR 1.5 for "lower 48" park units, which Congress chose not to apply in Alaska. These general regulations allow the Service to implement a closure or restriction without prior notice, without a hearing, without a finding of damage, and only occasionally require publication in the Federal Register.