STATE OF ALASKA

ANILCA IMPLEMENTATION PROGRAM
Office of Project Management and Permitting

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Mr. Jon Jarvis, Director
National Park Service
Main Interior Building, Room 3112
1849 C Street NW
Washington, DC 20240

Dear Mr. Jarvis:

The State of Alaska requests your assistance in resolving a long-standing issue regarding application of National Park Service regulations in 36 CFR to state-owned submerged lands and related waters and resources. Attempts to resolve this issue in the past were unsuccessful, and some urgency is needed to address increasing impacts on the State's traditional sovereign management of public uses in state navigable waterways.

We request your consideration of the following information and an opportunity to discuss solutions at your earliest convenience.

Background

Congress adopted the National Park Service Administration Improvement Act of 1976, which included one sentence (16 U.S.C. §1a-2(h)) that authorized the Service to:

> *Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.*

The Interior Department's April 8, 1976, letter to the committee considering the bill expansively stated that the bill "*would clarify the authority of the Secretary of the Interior to regulate boating and other water-related activities for the purpose of preserving and protecting the resources of the National Park System," 1976 USCCAN 4298*. Notably, however, Congress did not indicate such intent to defeat state title and expand authority to regulate all public activities in state navigable waters.

The legislative history never hints that the 1976 Act was intended to authorize a significant expansion of federal regulatory authority, nor implicitly repeal in part the 1953 Submerged Lands Act and Equal Footing Doctrine, nor diminish states' traditional authority to manage public use activities on state navigable waters, including fishing, hunting, trapping, boating, and commercial activities. The 1976 Act's grant of authority to regulate public use activities related to boating safety is a narrow additive to Congress's grant of authority under the Commerce clause and Property clause. We do not believe that Congress intended to overturn Section 6(m) of the Alaska Statehood Act of 1958 in which title, ownership, and dominion over lands beneath navigable waters, both freshwater and marine, within the state's exterior boundaries and the natural resources within such lands and waters were granted to the State of Alaska, with few unrelated exceptions.

Despite objections from Alaska and all other state fish and wildlife agencies, in 1996 the National Park Service revised its regulations to expand jurisdiction to broadly regulate public activities in state waterways within the exterior boundaries of park units not previously subject to Service regulations. (See 36 CFR §1.2(a)(3).) Both before and after adoption of the final regulations, the Western Association of Fish and Wildlife Agencies requested the Service rescind the regulations, noting "*if the Service has concerns about particular activities occurring on non-federal lands and waters adjacent and within federal park units, the Service should discuss these concerns with appropriate State managers and land owners to resolve issues through cooperative efforts.*" (August 6, 1996, and November 18, 1996.) For several years, the states unsuccessfully sought revisions to remove state waterways from the Service's asserted jurisdiction over activities beyond "Coast Guard type" restrictions for public safety and elevated the issue to the Director and Secretary without results.

Prior to the 1996 rulemaking, the National Park Service identified the applicability of its regulations by defining its authority as limited to lands and waters "*under legislative jurisdiction of the United States,"* clearly stating in 36 CFR §1.2(b) that Service regulations "*do not apply on non-federally owned lands and waters . . . within the boundaries of a park area."* The 1983 and 1987 revisions in Service regulations contain both language and intent to clearly limit the application of Service authority to lands and waters under legislative jurisdiction and specifically exclude state-owned lands and waters (48 FR 30261, 30275; 52 FR 12037; and 52 FR 35238, 35239).

The July 5, 1996, (61 FR 35133) regulations extended application of **all Service regulations** of public use activities **to all state navigable waterways** in 36 CFR §1.2(a):

> *(a) The regulations contained in this chapter apply to all persons…within:*
> *(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and* ***without regard to the ownership*** *of submerged lands, tidelands, or lowlands ....* [Emphasis added.]

This 1996 expansive change in national regulations is not a simple clarification of prior law as the Service portrays in the background information in the rulemaking. These regulations affect authorities vested in the State as an essential attribute of sovereignty by virtue of ownership of submerged lands to control navigation, hunting, trapping, fishing, boating, transportation, mining, submerged land uses, and other traditional state authorities where there is no demonstrated need to apply Service authority to protect park resources.

The 1996 regulation change also contradicts Congress's clearly stated limit of federal authorities in Alaska park units with passage of the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. 96-487, Sec. 103[1], which states:

> *(c) Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.*

In enacting ANILCA Section 103(c), Congress specifically excluded nonfederal lands, including state owned submerged, tide and shore lands and the resources in them, from the application of regulations promulgated solely for public lands within the conservation system units (e.g., parks, preserves, monuments) in Alaska.

Beginning in 2000, the National Park Service in Alaska has taken a series of actions to restrict public use activities beyond boating safety and related activities. Examples include steps to restrict floaters in a state navigable waterway for aesthetic reasons, prohibit catch and release fishing due to perceived mortality in a closely-managed state sport fishery, close a state managed fishery based on methods and means not allowed in parks, restrict methods of access by fish and wildlife protection officers, require commercial use permits for dog mushers on frozen state waterways, and prohibit types of watercraft on the Yukon and Nation rivers for public transportation, among others.

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[1] ANILCA Sec. 102(4) defines "*conservation system unit*" to include "*any unit in Alaska of the National Park System . . . including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.*"

ANILCA Sec. 102(3) defines "*public lands*" as "*land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law; . . ..*"

ANILCA 102(2) defines "*Federal land*" as "*lands the title to which is in the United States after the date of enactment of this Act.*" 16 U.S.C. §3102.

Resolution
Although Alaska believes the regulation at issue exceeds the Service's statutory authority, the State proposes that the Service amend its existing regulations to exempt Alaska from its national regulations at 36 CFR 1.2(a)(3). Such a revision would be consistent with the intent of Congress in ANILCA Section 103(c), which limits the application of regulations that are promulgated for management of federal conservation system units in Alaska to federal public lands within those units. Such a revision could be adopted in the national regulations or more simply in the 36 CFR Part 13 regulations that are specific to Alaska. Such a revision would limit the extent of authority over public activities in State of Alaska waterways that unnecessarily impact state fisheries management and public transportation traditionally managed by states, among other uses.

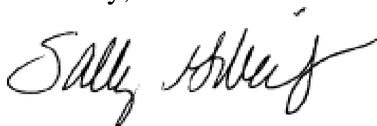
We understand consideration of a regulatory revision would include the Service's desire to leave intact the Service's narrow regulatory authority granted in 1976 by Congress to assure public safety on state waterways otherwise regulated by the U.S. Coast Guard. Alternatives to a regulation exempting Alaska include proposing guidelines for adoption by Director's Order or Policy that establish criteria for managers before adopting restrictions that would recognize traditional state managed activities and jurisdiction.

Conclusion
We have met several times with the Alaska Regional Office leadership over the past few years with no progress on resolution, including as recently as December 17, 2009, with Regional Director Sue Masica. She recommended we contact you directly.

We hope you will consider that Congress did not intend to amend the state sovereign authorities under the Equal Footing Doctrine, Submerged Lands Act, or the Alaska Statehood Act when in 1976 Congress authorized the National Park Service to supplement Coast Guard regulations for public use activities related to boating safety on state waterways. Given your extensive background with Alaska and ANILCA, we trust you will not ignore the clear direction of ANILCA Section 103(c), which limited the application of federal rulemaking for management of conservation system units to federal lands. Alaskans greatly depend upon their ability to move supplies, hunt, fish, and travel between villages on the State's navigable waterways.

With the summer season nearly upon us and ice moving out of our rivers, we hope to avert further conflicts for our public engaged in traditional activities and for our state in the conduct of its traditional sovereign management of navigable waterways. We look forward to discussing this with you toward resolution at your earliest convenience.

Sincerely,



Sally Gibert
State ANILCA Program

cc: Sue Masica, Regional Director, National Park Service
John Katz, Office of the Governor
Commissioner Tom Irwin, Alaska Department of Natural Resources
Commissioner Denby Lloyd, Alaska Department of Fish and Game
Attorney General Dan Sullivan, Department of Law