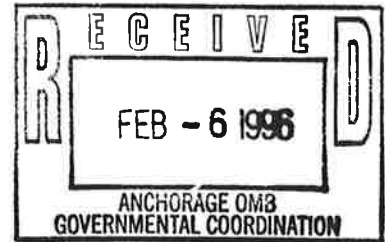


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February 2, 1996

Ms. Maureen Finnerty
Associate Director, Operations
National Park Service
Department of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

Re: State of Alaska's Comments on the Proposed Rule at 60 Federal Register
62233 (December 5, 1995)

Dear Ms. Finnerty:

The State of Alaska has reviewed the proposed rule published December 5, 1995, at 60 Fed. Reg. 62233. These comments represent the consolidated views of various state agencies and replace the overview of comments previously provided to Solicitor Leshy.

The proposed rule would revise portions of the National Park Service's (NPS) general regulations, as well as certain provisions governing National Park System units in Alaska. Primarily at issue is whether NPS should extend regulatory jurisdiction over all navigable waters within park boundaries, regardless of ownership of the submerged lands. The proposed rule is not a simple "clarification" of prior law as the NPS has attempted to portray. The regulations would substantively and inappropriately extend NPS jurisdiction.

The State opposes the proposed rule and urges that it be withdrawn for the following reasons:

- The Federal Register notice fails to adequately address potential effects of this rulemaking in light of the draft NPS subsistence policy and management in Alaska and the State of Alaska v. Babbitt case.
- The federal government has no authority to regulate waters within the boundaries of conservation system units where Alaska owns the submerged lands.

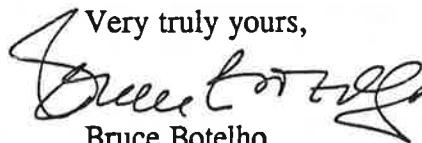
- The proposed rule is premature given that the Alaska National Interest Lands Conservation Act's definition of "public lands" is still in question.
- The NPS has failed to show other authority, e.g. the Commerce Clause, for its proposed action.
- Proposed definitional changes are inconsistent with existing law.

For these reasons, the NPS does not have the authority to extend its regulatory jurisdiction to all navigable waters within park boundaries, regardless of ownership of the submerged lands. These and other issues are documented in greater detail in the attachment, which should be considered part of the State's formal comments.

If NPS has concerns about particular activities occurring on navigable waters within park boundaries in Alaska, the State encourages NPS to discuss these concerns with the appropriate state representatives. We believe that many issues of particular concern to NPS can be resolved through ongoing cooperative efforts.

Thank you for your consideration of this letter and the attachment.

Very truly yours,



Bruce Botelho
Attorney General

Attachment

cc: Robert Barbee, Field Director, NPS
John Katz, Governor's Office, Washington, D.C.
Marilyn Heiman, Governor's Office, Juneau
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
Michele Brown, Commissioner, Department of Environmental Conservation
William Hensley, Commissioner, Department of Commerce and Economic
Development

ATTACHMENT

State of Alaska's Comments on the Proposed Rule at 60 Fed. Reg. 62233, December 5, 1995:

- A. The Federal Register notice fails to adequately address potential effects of this rulemaking in light of the draft NPS subsistence policy and management in Alaska and the State of Alaska v. Babbitt case.**

At the present time, an extensive statewide review of subsistence management and policy is underway within NPS. In fact, NPS has requested public review and comment until May 1, 1996 on its "Draft Review of Subsistence Law and National Park Service Regulations." In light of this ongoing internal review, the State believes the present rulemaking is premature and recommends that this rulemaking be postponed in order to consider the outcome of the subsistence program review. Remaining comments are provided without the benefit of this information.

- B. The proposed rule is more than a "clarification" of prior law; it substantively extends NPS jurisdiction.**

In the Federal Register notice, NPS states that the proposed rulemaking is designed to "clarify" that existing NPS regulations apply on navigable waters within National Park System units regardless of ownership of the submerged lands, and that the proposed rule does not create new or additional regulatory controls.

NPS claims this "clarification" of previous regulatory intent was made necessary by a seal hunting case in Glacier Bay National Park. United States v. Greg Brown. NPS states the seal hunting case made it aware that 36 C.F.R. § 1.2(b) "inadvertently incorporated language that seems ambiguous and could preclude park regulation of 'non-federally owned . . . waters.'" However, the proposed rule does not "clarify" existing regulations; it substantively extends NPS jurisdiction to areas not previously regulated.

Despite NPS' representations, 36 C.F.R. § 1.2(b) is not ambiguous. It clearly states that NPS regulations do not apply on non-federally owned waters.¹ The only exception

1 Section 1.2(b) states:

Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in parts 1 through 5 and part 7 of this chapter do not apply on non-federally owned

to this rule is for non-federally owned lands and waters under the legislative jurisdiction of the United States. For areas under the legislative jurisdiction of the United States, NPS regulations apply only when the regulations are made specifically applicable regardless of land ownership. 36 C.F.R. § 1.2(b). There is no dispute that state owned lands and waters within Glacier Bay National Park, and most every other park system unit in Alaska, are not within the legislative jurisdiction of the United States.

Other NPS regulations reaffirm the unambiguous language and intention of 36 C.F.R. § 1.2(b). For example, the regulations applying to park units in Alaska state: "The regulations contained in this part 13 are applicable only on federally owned lands within the boundaries of any park area. . . ." 36 C.F.R. § 13.2(e).² See also 36 C.F.R. § 13.1(p) (defining "public lands" to mean lands in Alaska "which are federally owned lands"); 36 C.F.R. § 13.65(a) (humpback whale protection regulations, expressly stating they are an exception to §§ 1.2(b) and 13.2(e) and therefore apply on all navigable waters within Glacier Bay National Park).

Indeed, in the Glacier Bay seal hunting case, the United States openly acknowledged the express limitation in 36 C.F.R. § 1.2(b) on its regulatory jurisdiction. See United States v. Brown, No. 94-30019, United States' brief to the Ninth Circuit Court of Appeals at 5-6, 9 (submitted May 12, 1994) (conceding that, for NPS general regulations to be enforceable against Mr. Brown, 36 C.F.R. § 1.2(b) requires that the United States prove either legislative jurisdiction over Glacier Bay National Park or ownership of the submerged lands in question). Thus, in dismissing the Brown prosecution, the United States recognized the unambiguous language of its regulations. The United States conceded it does not have legislative jurisdiction over Glacier Bay National Park, see id. at 5, and decided not to attempt to prove ownership of the submerged lands in that case.

Contrary to NPS' assertion in the Federal Register, both the language and intent of its 1983 and 1987 regulatory revisions were that NPS regulations did not apply to non-federally owned lands and waters, unless those lands and waters were under the legislative jurisdiction of the United States. See 48 Fed. Reg. 30252 at 30261, 30275 (June 30, 1983) (regulations do not apply to state owned inholdings within national park boundaries unless those areas are under the legislative jurisdiction of the United States).

The regulatory revision in 1987 simply "clarified" that state owned lands would

lands and waters . . . within the boundaries of a park area.

2 For the reasons discussed in these comments, the State opposes the proposed deletion of this statement in 36 C.F.R. § 13.2(e).

be treated like privately owned lands, and NPS regulations would not apply as a matter of course to either private or state lands and waters within park boundaries. See 52 Fed. Reg. 12037 (April 14, 1987) (proposing to clarify that NPS regulations only would apply to state owned lands and waters within park boundaries if those areas were under the legislative jurisdiction of the United States); 52 Fed. Reg. 35238, 35239 (Sept. 18, 1987) (certain NPS regulations apply to non-federally owned lands and waters within park boundaries only if those areas are under the legislative jurisdiction of the United States).

For these reasons, it is at best misleading for NPS to characterize the proposed rule as a "clarification" and not a substantive extension of regulatory jurisdiction. The proposed action substantially extends NPS jurisdiction to areas not previously covered by its regulations. The exclusion of state owned lands and waters from prior and existing regulations was not "inadvertent" but by express design. By not acknowledging these facts in its December 5, 1995 Federal Register notice, NPS significantly understates the effect of its proposed rule.

C. The federal government has no authority to regulate waters within the boundaries of conservation system units where Alaska owns the submerged lands.

On the substance of NPS' proposed action, the State disagrees that NPS has authority to extend its regulatory jurisdiction to all waters within park system boundaries, including navigable waters, and without regard to ownership of submerged lands.

The State has consistently objected to previous attempts by NPS to grant itself such extraterritorial authority in proposed rulemaking, e.g., Alaska's comments dated Nov. 1, 1991 (regarding proposed rule published Aug. 5, 1991). We reiterate our objections to NPS' efforts to extend regulatory jurisdiction to lands and waters lawfully owned and managed by the State.³

The proposed extension of NPS authority appears to be particularly dramatic in Alaska. Numerous navigable waterways run through the exterior boundaries of nearly all of the thirteen multi-million acre park units in the state. These waterways are often used for transportation and for many other activities. Under the proposed rule, NPS would apparently

³ Under the constitutional doctrine of equal footing and confirmed by the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act of July 7, 1958, and the Alaska Constitution, the State of Alaska owns and therefore is responsible for the management of all water columns, shorelands, tidelands, and submerged lands, including the resources located within or on such lands and waters.

intend to regulate these activities. For example, under the proposed rule, NPS might require an NPS Commercial Use Permit for the commercial barging and ferry service interests currently operating on the navigable Yukon River as it passes through the Yukon-Charley Rivers Preserve, despite the fact that the State presently manages water uses, access and activities on those waters. Such an assertion of general jurisdiction is not permitted by the Alaska National Interest Lands Conservation Act (ANILCA) or other applicable law.

One of Congress' primary purposes in enacting ANILCA was to preserve vast quantities of lands and waters in Alaska. 16 U.S.C. § 3101. Congress implemented this purpose in part by creating "conservation system units" (CSUs). By definition, CSUs include any unit in Alaska of the National Park System. 16 U.S.C. § 3102(4).

However, not all lands within Glacier Bay National Park or other national park units in Alaska are included as part of the CSU. ANILCA section 103(c) states in relevant part:

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.
16 U.S.C. § 3103(c).⁴

Similarly, in coastal areas, ANILCA section 103(a) excludes lands seaward of the mean high tide line from the boundaries of areas added by ANILCA to the National Park System. 16 U.S.C. § 3103(a).

ANILCA Section 103(c) further provides that those lands not included within the conservation system unit are not subject to federal regulation:

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.
16 U.S.C. § 3103(c).

4 The legislative history of ANILCA § 103(c) makes clear Congress' intent to exclude lands which are not owned by the U.S. from conservation system unit regulations. The history specifies that "only public lands (and not State or private lands) are to be subject to the conservation system unit regulations applying to public lands." 126 Cong. Rec. S15129-32 (daily ed. Dec. 1, 1980) (statement of Sen. Stevens).

Legislative history establishes that Congress took this action fully aware of Kleppe v. New Mexico, 426 U.S. 529 (1976) and its progeny, which might arguably support extension of federal regulatory control over non-federally owned lands.⁵ Congress directly and knowingly limited federal regulatory authority to "public lands" within conservation system units and specifically exempted inholdings from regulation. 16 U.S.C. § 3103(c). NPS recognized this fact in promulgating 36 C.F.R. § 13.2(e). See 46 Fed. Reg. 31836, 31843 (June 17, 1981) (ANILCA §§ 103(c) and 906(o) restrict the applicability of NPS regulations to federally owned lands within park boundaries; therefore, 36 C.F.R. § 13.2(e) applies only to federally owned lands).

In the case of parks in Alaska, any submerged lands underlying navigable waters within park boundaries are "inholdings" belonging to the State of Alaska. See Submerged Lands Act of 1953, 43 U.S.C. § 1311(a); Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). Federal regulation does not apply to these waters.⁶ The NPS therefore does not have authority to regulate navigable waters within park boundaries regardless of ownership.

If identical regulations addressing both state and federally owned lands or waters are particularly desirable in certain instances or for certain issues, the State encourages NPS to discuss these with the appropriate state regulatory entity. Through a cooperative effort, the goal of consistent regulation of especially significant issues can be lawfully achieved. Without State consent and cooperation, however, NPS may not extend its regulatory jurisdiction as proposed.

D. The proposed rule is premature given that the definition of "public lands," over which ANILCA permits some federal regulation, is still in question.

As noted earlier, the Federal Register notice does not address the proposed rule's potential effect on the implementation of ANILCA's Title VIII subsistence priority, and the State requests that NPS address the rule's implications for subsistence management and

⁵ The State does not concede this authority. While there is case law in the Eighth Circuit that appears to support this contention, the question of extra-territorial regulation is not yet resolved. In any event, NPS does not purport to rely on Congress' Property Clause power to justify this proposed action.

⁶ The fact that ANILCA (and existing NPS regulations) specifically exclude state lands and waters from NPS general jurisdiction is also reflected in the General Management Plans adopted for park units in Alaska.

policy.⁷

ANILCA specifically limits federal regulatory authority in conservation system units to "public lands." Accordingly, federal jurisdiction depends on whether the waters in question constitute "public lands" as defined in ANILCA.

Although the State asserts the definition of "public lands" does not include any navigable waters where the state owns the submerged lands, this question is currently unresolved. The Alaska Supreme Court's decision in Totemoff v. State, as well as Judge Hall's dissent from the Ninth Circuit opinion in State of Alaska v. Babbitt (also commonly known as the "Katie John" case), conclude that navigable waters are not "public lands" under ANILCA. See Totemoff v. State, 905 P.2d 954 (Alaska 1995); State of Alaska v. Babbitt, ___ F.3d ___, 1995 WL 749795 (9th Cir., Dec. 19, 1995). This issue is presently before the U.S. Supreme Court on a petition for certiorari. Accordingly, the NPS should withdraw these regulations until they can be reassessed in light of the Babbitt litigation once it has been finalized.

E. The NPS has failed to show other authority for its proposed action.

NPS asserts that Congress' Commerce Clause power provides authority for NPS' regulation of non-federally owned lands and waters within park boundaries. However, NPS fails to explain where it derives its Commerce Clause power, and how its power is co-extensive with Congress' Commerce Clause powers.

Moreover, even assuming NPS has some authority to regulate pursuant to the Commerce Clause, the United States Supreme Court has confirmed that the Commerce Clause power is not unlimited. See United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624 (1995). To rely on this power, NPS must satisfy traditional Commerce Clause analysis, including a showing as to how the regulated activities "substantially affect" interstate commerce. Id. at 1629-30.

NPS' Federal Register notice makes no effort to undertake a Commerce Clause analysis, and the state does not agree that the Commerce Clause permits the proposed action. Cf. State of Alaska v. Babbitt, ___ F.3d ___, 1995 WL 749795 (9th Cir., Dec. 19, 1995) (majority opinion concludes that Congress did not intend to exercise its Commerce Clause authority to regulate subsistence fishing in Alaska's navigable waters; dissenting opinion

⁷ Along this line, we note that the proposed revision to 36 C.F.R. § 13.2(c) deletes Sitka National Historical Park from the list of park units where subsistence activities are prohibited. This change is not addressed by NPS in its notice.

concludes that subsistence fishing in navigable waters does not "substantially affect" interstate commerce).⁸

Nor does NPS otherwise justify its authority to extend general regulatory jurisdiction over non-federally owned waters within park boundaries. NPS cites to 16 U.S.C. § 1a-2(h); however, the authority set forth therein is limited. That section permits NPS to promulgate and enforce regulations concerning boating and related activities; it does not provide general jurisdiction over non-federally owned waters within park boundaries. Likewise, the fact that NPS may enforce Coast Guard regulations on navigable waters within park boundaries does not provide authority over navigable waters for other purposes.

As examples of its asserted authority, NPS cites park-specific regulations that have applied on navigable waters within certain parks. However, these limited instances do not justify this proposed rule. In the case of Glacier Bay National Park, the State cooperated with the National Marine Fisheries Service and NPS in the adoption of regulations deemed necessary to protect whales. These special whale regulations were identified as an exception to NPS' general regulatory authority. See 13 C.F.R. §13.65(a), (b)(2). This example does not imply that NPS has jurisdiction to enact other regulations applying to waters owned by the State.

F. Proposed definitional changes are inconsistent with existing law.

Though the State's objections to NPS' proposed definitional changes should be clear from the preceding comments, we address the following comments specifically to NPS' proposed definitional revisions.

NPS' proposed revision of "boundary" at 36 C.F.R. § 1.4 would broadly include "the limits of lands or waters administered by the National Park Service" as "published or posted by the National Park Service." This definition grants to NPS the ability to define "boundaries" essentially as it chooses, on a case-by-case basis.

This definition is not permissible under ANILCA. ANILCA Section 103 directs that the conservation system units created by ANILCA shall have specific and defined boundaries. 16 U.S.C. § 3103 (a), (b), (c). Pursuant to the mandate in ANILCA § 103(b),

⁸ In any case, even if the proposed action could be justified under a Commerce Clause analysis, the Submerged Lands Act expressly limits that authority as it applies to this situation. See 43 U.S.C. § 1311(a) (confirming state title and ownership of lands beneath the navigable waters within the states, as well as the natural resources within those lands and waters, and providing states rights to manage those lands and natural resources).

NPS published in 1992 a legal description of the external boundaries of national park units established or expanded by ANILCA. 57 Fed. Reg. 45166 (Sept. 30, 1992).

As a result of these authorities, the proposed definition of "boundary" would conflict with the determined boundaries of park units and with ANILCA's defined areas of NPS authority. NPS is not free to ignore these existing legal boundaries, nor may it grant itself authority to amend park boundaries simply by posting a notice of intent. Accordingly, NPS may not broadly revise "boundary" as proposed.⁹

The proposed revision to 36 C.F.R. § 13.2(e), including the revised definition of "federally owned lands," likewise is not permitted by ANILCA. Under ANILCA, "federally owned lands" include lands, title to which is in the United States. 16 U.S.C. § 3102. Thus, State and privately owned lands cannot be defined as "federally owned lands," as they apparently would be under the proposed rule. ANILCA prohibits this definitional change, as well as NPS' attempt to extend its jurisdiction to state owned lands and waters.

G. No notice of the proposed rule was provided to the State despite ongoing meetings with NPS regarding Glacier Bay National Park.

To promote cooperation between state and federal resource managers, Alaska agency representatives participate in quarterly meetings with the NPS field director to discuss issues involving park units in Alaska. In addition, state representatives and commercial fishing interests have embarked upon good faith discussions with NPS to resolve potential conflicts arising from activities on state waters adjacent to Glacier Bay. In fact, on December 5, 1995, the day this proposed rule was published in the Federal Register, the Superintendent of Glacier Bay National Park met with state representatives, fishermen, special interest groups and others to seek cooperative resolution of problems related to activities on waters adjacent to the park.

The State is troubled that, despite these ongoing meetings, NPS provided no notice of the proposed extension of NPS regulations over all navigable waters within park boundaries, regardless of ownership, especially since the seal hunting case in Glacier Bay inspired the proposed rulemaking.

To avoid compromising the effectiveness of these ongoing cooperative efforts,

⁹ Similarly, NPS may not use such a broadened definition of "boundary" to assert general jurisdiction over state-owned lands and waters administered by NPS pursuant to a cooperative agreement. NPS and the State have entered into several cooperative agreements which grant NPS some limited administrative authority over state lands or waters. We do not contemplate that these agreements can be construed to permit broader federal authority over these areas.

the State urges the NPS field office to alert us of pending rulemakings in the future and to promote discussion of the issues involved.

Conclusion

The State disagrees that NPS has authority to extend its regulatory jurisdiction to all navigable waters within park boundaries regardless of ownership of the submerged lands. Consistent with the above discussion, the state requests that NPS withdraw the proposed rule.