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June 23, 1998

Mr. Robert Barbee  
Regional Director  
National Park Service  
2525 Gambell Street, Room 104  
Anchorage, Alaska 99503

Dear Mr.  Barbee:

The State of Alaska has reviewed the 1998 Compendium for the Glacier Bay National Park and Preserve. This letter represents the consolidated views of the state's resource agencies. While we recognize this is not a regular review document, we are compelled to submit these comments because the compendium triggers two legal concerns. In some instances, it purports to restrict access to and activities occurring on state owned and administered lands and waters, such as waters of Glacier Bay and the Alsek River. Additionally, some compendium closures and restrictions do not comply with procedures mandated by ANILCA and supporting regulations. Due to procedural errors, these provisions are not enforceable and should be removed from the compendium.

### Lack of Jurisdiction over State Land and Water

Marine waters and navigable rivers are not part of Glacier Bay National Park and Preserve, but are "inholdings" within the park and preserve boundaries. The National Park Service (NPS) does not possess general regulatory authority over these areas and should work with the state to resolve its regulatory concerns. A summary of the state's views on jurisdiction were attached to state comments on the Vessel Management Plan and accompanying proposed rule, dated September 8, 1995. We recognize, however, that the federal government does not share this view, and that ultimately this issue can only be resolved in the courts. Hence we have commented on some portions of the compendia that address state waters from an NPS procedural standpoint as well, especially since these procedural issues are often generic to other NPS units where there are no jurisdictional disputes.

## Procedures Inconsistent with ANILCA

Although some restrictions have been dropped from the May 1994 compendium, most of the previously identified procedural and compliance problems remain. Consequently, many of the closures and restrictions remain invalid and legally unenforceable. We are particularly disappointed to see these lingering problems in light of assurances from the NPS regional office to the state and the Citizen's Advisory Commission on Federal Areas (CACFA) in 1994 that the procedural problems with this and the other compendia would be corrected. While a number of the closures in the 1994 Glacier Bay compendium were properly incorporated in the vessel management plan regulations at 36 CFR §13.65 (revised May 1996), some of the earlier problems remain. In addition, there are several new closures and public use restrictions found in this latest revision that trigger our longstanding concerns. In concept, the state may or may not support some of these restrictions, but until they have been proposed in an appropriate context with the required documentation, we are focusing on the procedural flaws.

## Specific Comments in Chronological Order

*Page 1, 1.6(f) Compilation of activities requiring a permit:*

-- *Memorialization and scattering of ashes.* It would seem to be inappropriate to list this activity as requiring a permit in light of section 2.62 (page 6) where it states that all areas of the park are open to scattering of ashes without a permit.

-- *Backcountry Camping:* The compendium states that, starting this year, a permit will be required for all persons camping in the backcountry of Glacier Bay proper, May 1 through September 30. It also retains the existing prohibition on camping for more than 3 consecutive nights in one location unless authorized by the superintendent and the 12 person group size limit. The compendium cites 36 C.F.R. §13.30(d)(2) as authority for this requirement; yet this regulation only sets out a procedure for temporary closures or restrictions, which may be in effect no longer than 12 months. It does not appear to support the backcountry permit requirement, since that requirement is in the nature of a permanent regulation. If the permit restriction is to be effective on a permanent seasonal basis, it must be adopted through the process set forth at 36 C.F.R. § 13.30(e). Even the new upper limits on the number of backcountry users over the next two years exceed the authorities of §13.30(d)(2).

-- *Use of Non-motorized Surface Transportation - Non-commercial Alsek River Permit:* Department of the Interior regulations at 43 C.F.R. § 36.11(e) generally authorize the use of nonmotorized surface transportation in Alaska conservation system units. Prohibitions or restrictions on this means of access must be adopted in accordance with the procedures

set forth in 43 C.F.R. § 36.11(h). Section 36.11(h) permits temporary or permanent area closures only upon a finding that such use would be detrimental to the resource values of the area. The compendium restriction is a permanent restriction, and therefore should further comply with the procedural requirements of § 36.11(h)(3). Proposal of such permits in a draft River Management Plan does not meet these regulatory requirements.

*Page 4. 2.11 Picnicking- designated areas.* This section should be revised to indicate that §2.11 is superseded by §13.18(b) for Alaskan park units. Under §13.18(b), picnicking is allowed in all parks.

*Page 8, 13.30(d)(2) Temporary closures and restrictions*

This section of the compendium sets forth closures and restrictions on camping and group size in many park areas. NPS regulations for park areas in Alaska generally authorize camping, except where prohibited or restricted in accordance with 36 C.F.R. § 13.30. (See 36 C.F.R. § 13.18(a)). The closures and restrictions identified in the compendium do not comply with the procedural requirements of 36 C.F.R. § 13.30, however. These closures and restrictions are not temporary, but are in fact permanent seasonal restrictions. The explanation for the new 2,200 non-commercial backcountry visitor limitation for Glacier Bay proper, for example, clearly identifies NPS' intent to retain these seasonal closures for multiple years. To be enforceable, permanent restrictions must be adopted pursuant to 36 C.F.R. § 13.30(e), which requires published rulemaking in the Federal Register, public comment and public hearing in the area affected.

The fact that some of the compendium restrictions are consistent with the Alsek River Visitor Use Management Plan and park Wilderness Visitor Use Management Plan does not justify the compendium limitations. The identified management plans also were not adopted consistent with the procedural requirements of 36 C.F.R. § 13.30(e). The management plan provisions therefore cannot result in enforceable restrictions.

Our analysis and comment on the 1994 compendium stated that none of the camping restrictions or closures were enforceable because there had been no compliance with the closure procedures in §13.30. Steve Shackelton, former NPS Chief of Law Enforcement for the Alaska region, responded in a letter to Stan Leaphart on August 18, 1994:

“Analysis noted that permanent limits on camping should go through rule-making. NPS will recommend that a special regulation be proposed.”

The compendium restriction on group size for uses of the Alsek River also raises jurisdictional questions, since the state claims ownership of this navigable waterway. As a result, the state urges that NPS consult with the appropriate state entity before proceeding with limitations on uses of this river.

*Bartlett Cove.* As previously stated, it is incorrect to categorize these seasonal closures as temporary. By listing them as such under §13.30(d)(2) they become effective upon notice, there is no requirement for a hearing in the local area, the NPS avoids the need to fully justify them on a resource impact, administrative or public safety basis and, most importantly, avoids the need to promulgate formal regulations under §13.30(e). Temporary closures may not remain in effect longer than 12 months and may not be extended. These closures are permanent, even though they are in place only a portion of the year.

-- *Alsek River.* Restricting group size to 15 persons for river trips and limiting camping in the 3 listed areas along the river requires compliance with §13.30(e) for permanent restrictions. As previously noted, simply implementing these limits based on the river management plan is insufficient and procedurally flawed.

-- *Areas Closed to Overnight Camping.* Similarly, these limits described on page 9 and shown in Appendix B require §13.30(e) procedural compliance. While the restrictions on overnight camping may be justified because of potential problems with bears in the area, both ANILCA and the 36 CFR Part 13 regulations require certain determinations be made and the public provided the opportunity to participate in the decision making process. Formal regulations must be adopted to implement these types of closures.

*Page 13:*

--36.11(d) *Restrictions on use of motorboats, and*

--36.11(e) *Restrictions on use of non-motorized surface transportation*

The access closures and restrictions on use of motorboats and non-motorized surface transportation on the Alsek River raise the same jurisdictional and authority problems discussed above. The state owns and manages this navigable waterway. Under ANILCA § 103(c), it is not part of Glacier Bay National Park and Preserve, but is an "inholding" subject to state authority. NPS should not proceed with these closures without state involvement and action.

The compendium's Alsek River access closures and restrictions also do not comply with the requirements of ANILCA Title XI and applicable NPS regulations. ANILCA Title XI guarantees special access and access to inholdings in conservation system units, and it specifically provides for use of motorboats and nonmotorized surface transportation methods. (ANILCA § 1110, 16 U.S.C. § 3170). These uses cannot be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that the use would be detrimental to the resource values of the unit or area. For permanent access closures and restrictions like those identified for the Alsek River, NPS regulations similarly require a finding that the uses would be detrimental to the resource values of the

area. In addition, NPS must publish rulemaking in the Federal Register, accept public comment, and hold a public hearing in the affected area. (43 C.F.R. § 36.11(h)). Because these procedural requirements have not been satisfied, the compendium access closures and restrictions are not valid.

When these issues were raised in 1994, NPS responded in both instances: "NPS will recommend that special regulations be proposed".

### Conclusion

In light of the time that the state, CACFA, and NPS have invested in assessing the validity of and limits to compendia in Alaska, and the expressed willingness by NPS to correct the procedural deficiencies, our disappointment with this new compendia is understandable. We are aware that Denali is about to release draft regulations to correct its compendium deficiencies, so we know that at least some parks are on the right track (even if movement is painfully slow).

Many people will consider these closures and use restrictions both minor and appropriate for management of Glacier Bay National Park. Some may well be. However, we are not prepared to address that issue until such time as the NPS complies with the ANILCA mandated requirements for implementing these types of closures and restrictions. At this point in the long history of compendia, this is our most important consideration.

To clarify again for the record, our primary underlying concern continues to be requiring a clearly demonstrated need for restrictions of statutorily protected activities, and providing the public with the opportunity to participate in the evaluation and decisionmaking process. The longer these improperly implemented closures and restrictions remain in place, the more a mockery is made of a carefully thought out regulatory process.

Thank you for your consideration of these comments. We would like to meet with appropriate NPS staff on this issue, particularly Randy King and Jay Liggett, to further discuss the procedural aspects of this compendium in light of ANILCA. I look forward to continuing dialogue on this issue.

Sincerely,



Sally Gibert

State CSU Coordinator

cc: Patricia Phelan, Superintendent, Glacier Bay National Park and Preserve  
Randy King, Glacier Bay National Park and Preserve  
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