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GLACIER BAY FISHERIES ACT

JULY 29, 1999.—Ordered to be printed

Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 501]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 501) to address resource management issues in Glacier Bay National Park, Alaska, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Glacier Bay Fisheries Act".

SEC. 2. RESOURCE MANAGEMENT AND USE.

(a) Section 202(1) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 410hh–1) is amended by adding at the end thereof the following new sentence: "Subsistence fishing and gathering by local residents shall be permitted in the park and preserve in accordance with the provisions of Title VIII."

(b) Within the boundaries of Glacier Bay National Park, the Secretary of the Interior shall not take any action that would adversely affect—

(1) subsistence fishing and gathering under Title VIII of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3111 et seq.);

(2) management by the State of Alaska of marine fisheries including subsistence and commercial fisheries, in accordance with the principles of sustained yield, except that commercial fishing for Dungeness crab shall be prohibited; and,

(3) subsistence gathering activities permitted under the Migratory Bird Treaty.

69–010

(c) Nothing in this section shall enlarge or diminish federal or state title, jurisdiction or authority with respect to the waters of the State of Alaska, the waters within the boundaries of Glacier Bay National Park and Preserve, or the tidal or submerged lands.

SEC. 3. CLAIMS FOR LOST EARNINGS.

Section 3(g) of Public Law 91–383 (16 U.S.C. 1a–2(g)) is amended—

(1) in paragraph (1), by striking "and" at the end;

(2) in paragraph (2), by striking the period at the end and inserting "; and"; and

(3) by inserting after paragraph (2) the following:

"(3) to pay an aggregate of not more than $2,000,000 per fiscal year in actual and punitive damages to persons who, at any time after January 1, 1999, suffered or suffer a loss in earnings from commercial fisheries legally conducted in the marine waters of Glacier Bay National Park, due to any action by an officer, employee, or agent of any Federal department or agency."

PURPOSE OF THE MEASURE

The purpose of S. 501, as ordered reported, is to amend section 202 of the Alaska National Interest Lands Conservation Act (ANILCA) to allow subsistence fishing and gathering within Glacier Bay National Park in accordance with the provisions of title VIII of ANILCA.

The measure also bars the Secretary of the Interior from taking actions that would adversely affect subsistence uses or the State of Alaska's management of marine fisheries.

S. 501 also authorizes the use of up to $2 million per fiscal year of the funds collected under Public Law 91–383 to pay fishermen actual and punitive damages due to actions by Federal officials that interfere with legal commercial fishing and result in a loss of earnings.

BACKGROUND AND NEED

Glacier Bay National Monument was established by presidential proclamation on February 26, 1925 to protect the dynamically changing glacial environment of mountains, tidewater glaciers, and associated movements and development of flora and fauna, and to promote the scientific study of the entire ecosystem.

The monument was expanded by a second presidential proclamation on April 18, 1939. Glacier Bay National Monument was re-designated as Glacier Bay National Park and Preserve (GBPP) in 1980 by Alaska National Interest Lands Conservation Act (ANILCA). The new park included all lands and waters of the existing monument, plus additional land areas.

The statutory language and legislative history of ANILCA provide that certain National Park System units in Alaska, including GBPP, are intended to be large sanctuaries where fish and wildlife may roam freely, develop their social structures and evolve over long periods of time as nearly as possible, without the changes that extensive human activity would cause.

Today, the park itself encompasses approximately 3,225,284 acres. ANILCA also designated a 57,884 acre area as a National Preserve, which is administered as a National Park except that sport hunting, commercial fishing and subsistence activities are permitted in the preserve. (The gathering of seagull eggs is prohibited by the Migratory Bird Act which implements an international treaty.) Recent amendments to the Migratory Bird Treaty address-

es the Spring collection of eggs. It is believed that once the amendments are implemented, the collection of seagull eggs will no longer be prohibited by law, but the collection of eggs still could be prohibited by the National Park Service (NPS) under other rules and regulations. It is unclear, at this time on how the NPS will proceed.

Finally, some 2,770,000 acres of the park were designated as Wilderness by ANILCA.

Since the passage of ANILCA, there has been growing controversy as to whether two distinct activities should be permitted in the Park and if so at what level. These two activities, each of which is addressed in S. 501, are (1) subsistence activities and (2), commercial fishing.

Subsistence activities

With respect to subsistence fishing and gathering, the descendants of the original inhabitants of Glacier Bay, the people of Hoonah, and other communities in the vicinity of Glacier Bay have historically engaged in subsistence fishing and gathering within the boundaries of what is now the GBPP. In addition, there is written and other evidence confirming Tlingit Indian presence and subsistence activities in Glacier Bay dating at least as far back as the early 1800's. Recent archaeological discoveries indicate that the Tlingit people may have been present around Glacier Bay for more than 700 years, and some date the early inhabitants' presence in the area as far back as 9,000 years.

In 1989 and 1990, the Alaska Department of Fish and Game specified areas within GBPP as opened under "subsistence" salmon fishing permits. Subsistence fishing activities in the park had been conducted without specific authorization prior to the 1989 State action. In response to concerns about the potential impact of subsistence fishing on park resources, the NPS issued draft regulations concerning subsistence fishing in 1991, at the same time it considered commercial fishing. In those draft regulations, the NPS proposed to "effectuate the statutory preclusion of subsistence uses of GBPP by specifically prohibiting such uses."

Prior testimony before the Committee on Energy and National Resources describes in great detail that Glacier Bay's importance to the Tlingit people transcends the area's importance as a source of food and other necessities. It is an integral part of the spiritual existence of the Tlingit people, particularly to the Chookaneidi Clan of the Eagle Tribe. It defines them as a people. It appears in their songs and dances, and in their crests and traditional stories.

During the 102nd Congress and, after much discussion, the Committee on Energy and Natural Resources reported a bill (S. 1624) authorizing commercial and subsistence fishing in certain areas of Glacier Bay National Park. The Committee report (S. Rept. 102–404) stated in part, "* * * S. 1624 as ordered reported by the Committee, reflects the Committee's view that subsistence fishing and gathering in Glacier Bay and Glacier Bay National Park have not posed a threat to the park's resources and can in the future be conducted and managed pursuant to ANILCA in a way so as not to threaten the viability of the marine and other natural resources of Glacier Bay and the park."

The Committee noted that it "also recognizes that it is also possible that individual natives may need, from time to time, to engage in cultural and ceremonial activities (aside from subsistence fishing and gathering) within their traditional and historical homeland, and to pass down to succeeding generations their customs and traditions. This need—and responsibility—should be recognized and facilitated by the Park Service."

No further action was taken by the Senate on S. 1624 during the remainder of the 102nd Congress.

In 1995, a memorandum of understanding was adopted by the NPS and the Hoonah Indian Association, representing some local subsistence users, for the purpose of identifying areas of mutual concern, establishing a framework for cooperative relationships and promoting communication.

More recently, the NPS has suggested, in informal consultations, that it would accept a formula that would, under NPS management, allow some subsistence fishing to occur under the rubric of "educational" fishing to Alaska Natives residing in Hoonah. Many argue that this would not be consistent with the management of subsistence uses on other public lands in Alaska, including National Parks, which are governed by the provisions of Title VIII of ANILCA, and could be used as a precedent for management of subsistence activities in other national parks and monuments within the State of Alaska.

S. 501 would permit subsistence fishing and gathering by local rural residents in accordance with Title VIII of ANILCA, which describes "subsistence uses" as an activity engaged in by "rural Alaska residents." Title VIII of ANILCA establishes a preference for subsistence uses, together with a non-racial mechanism to limit such uses in times of scarcity. For national parks and national monuments specifically, it further establishes a 6-member subsistence resource commission for each park or monument, which is charged with providing recommendations on subsistence uses with each park or monument. The Secretary of the Interior is also directed to implement the recommendations of the subsistence resource commissions unless he finds that the recommendations are inconsistent with conservation, contrary to the purposes of the park or monument, or detrimental to the satisfaction of subsistence needs.

Commercial fishing

Commercial halibut and salmon fishing has occurred in the park since at least the turn of the century, and prior to the monument's establishment in 1925, when fish processing plants operated in Bartlett Cove, Excursion Inlet and Dundas Bay. Commercial fishing continued under federal regulation after the national monument's establishment in 1925 and its subsequent enlargement in 1939. Since 1966, the National Park Service contends that its regulations have prohibited commercial fishing in Glacier Bay National Monument and Glacier Bay National Park. The State of Alaska, however, argues that the 1966 regulations apply only to fresh waters and not the marine environment.

Currently several species of fish and crabs are harvested in Glacier Bay proper. Tanner crab pots are spread across the mid bay

during openings for those species, which generally occur in the late winter months. Dungeness crab have been fished mostly in the lower to mid bay during separate openings. Some of the most productive Dungeness crab fishing grounds are located in the Beardslee Islands. Halibut are fished year-around under the Alaska individual fishing quota system from the mouth of the bay to as far north as Reid Inlet. A small amount of commercial salmon trolling, mostly for chinook salmon, occurs during winter and spring within a few specific locations throughout the bay proper. Some groundfish species (i.e., Pacific cod, rockfish and sablefish) are fished primarily in the mid to lower bay.

Outside Glacier Bay, there are seine openings in Excursion Inlet during the fall chum salmon run which targets these spawners en route to the Excursion River. Other fisheries in park waters include Dungeness crabbing off the Gustavus forelands in Dundas Bay and along the outer coast. Salmon trolling and halibut longlining occurs throughout Icy Strait, Cross Sound and along the outer coast. Also some shrimp are also taken from Icy Strait and along the outer coast and in Lituya Bay.

The Alaska Department of Fish and Game sets seasons and bag limits, while National Park Service law enforcement rangers have joint jurisdiction to enforce State commercial fishing laws as well as park regulations. Fishing boats actively pursuing sanctioned fishing in park waters are exempt from GBPP vessel quotas.

In 1966, the NPS revised its fishing regulations so as to prohibit commercial fishing activities in Glacier Bay National Monument. Although the 1966 NPS regulations, unlike previous versions, only prohibited fishing "for merchandise and profit" in fresh waters, these same regulations generally prohibited unauthorized commercial activities, including commercial fishing, in all NPS areas. In contrast to earlier NPS regulations, the 1966 regulations did not contain specific authorization for commercial fishing in Glacier Bay National Monument. However, there are also other park planning documents and management plans which have been formulated since the 1966 regulations which would argue that the NPS considers commercial fishing to be authorized.

The 1978 NPS "Management Policies" reiterated that "commercial fishing is permitted only where authorized by law." Furthermore, in 1978, the Department of the Interior directed the Fish and Wildlife Service to convene an Ad Hoc Fisheries Task Force to review NPS fisheries management. The task force concluded that the extraction of fish for commercial purposes was a nonconforming use of park resources which should be phased out.

As already noted, in 1980, ANILCA re-designed Glacier Bay National Monument to GBPP, enlarged the area, and designated wilderness that included marine waters within the park. ANILCA specifically authorized certain GBPP areas where commercial fishing and related activities could continue, including the Dry Bay area of Glacier Bay National Preserve but not any area of Glacier Bay National Park.

ANILCA also specifically recognized (and authorized) commercial fishing in Glacier Bay National Preserve, and included similar language for portions of two other national park units: Cape Krusenstern National Monument and Wrangell-St. Elias National

Park and Preserve. No such language was included for Glacier Bay National Park. There are some who believe that Congress intentionally left out similar provisions for Glacier Bay National Park. Others believe that the lack of legislative language for the continuation of activities at Glacier Bay National Park was an oversight. The legislative record is silent on the subject.

The 1983 revision of the NPS general regulations, which still applies, included a prohibition on commercial fishing throughout marine and fresh waters within park areas system-wide, unless specifically authorized by law. The 1988 revision of NPS "Management Policies," which is still current, reiterates this approach.

However, certain NPS documents during the 1980's suggested that some commercial fishing would continue in Glacier Bay. For example, the 1980 and 1985 Glacier Bay whale protection regulations implicitly acknowledged commercial fishing operations in Glacier Bay proper. also, the park's 1984 General Management Plan stated the following:

> (1) Traditional commercial fishing practices will continue to be allowed throughout most park and preserve waters. However, no new (nontraditional) fishery will be allowed by the National Park Service. Halibut and salmon fishing and crabbing will not be prohibited by the Park Service; and
>
> (2) Commercial fishing will be prohibited in wasters that are within wilderness boundaries in accordance with ANILCA and the Wilderness Act.

The 1984 General Management Plan defined "traditional commercial fishing practices" to include "trolling, long lining and pot fishing for crab, and seining (Excursion Inlet only) in park waters. * * *" Finally, the 1998 Final Environmental Impact Statement concerning wilderness recommendations for Glacier Bay National Park referred to the continuation of commercial fishing in non-wilderness park waters.

In 1990, the Alaska Wilderness Alliance and American Wildlands filed a lawsuit challenging the NPS's failure to bar commercial fishing activities from GBPP. *Alaska Wildlife Alliance* v. *Jensen,* No. A90–0345–CV (D. Ak.). In 1994, the district court concluded that "there is no statutory ban on commercial fishing in Glacier Bay National Park provided, however, that commercial fishing is prohibited in that portion of Glacier Bay National Park designed as wilderness area." The U.S. Court of Appeals for the Ninth Circuit upheld the option of the District Court on March 6, 1997. *Alaska Wilderness Alliance* v. *Jensen,* 108 F.3d 1065 (9th Cir. 1997).

Simultaneously with the above litigation the State of Alaska's Citizens Advisory Commission on Federal Areas hosted a series of public meetings in local communities to discuss commercial fishing issues. After participating in these meetings, the NPS decided to draft a regulatory approach to resolving the controversy.

The NPS published its proposed rule on August 5, 1991 (56 FR 37262). In essence, the proposed rule would have (a) clarified the prohibition on commercial fishing in designated wilderness waters, and (b) exempted commercial fishing in other park waters from the nationwide regulatory prohibition for a "phase out" period of seven years. At the State's request, the Department of the Interior refrained from issuing a final rule in 1993, and instead agreed to dis-

cuss with State and Congressional delegation the possibility of resolving the issues through a legislative approach.

In 1992, Congress considered but did not enact proposed legislation on subsistence activities and commercial fishing in Glacier Bay NP. (The Committee on Energy and Natural Resources reported the bill (S. 1624) with an amendment in the nature of a substitute, adopted by a vote of 19 to 1. No further action was taken by the Senate.).

In 1993, at the beginning of the 103rd Congress legislation was again introduced by Senator Murkowski (S. 291). The legislative effort was temporarily set aside to allow a series of discussions exploring the legislative and regulatory options between the State of Alaska, the Department of the Interior, and Congressional offices.

In 1995, local NPS officials invited a wide array of interest groups to meet with the goal of reaching some consensus on the issues of subsistence activities and commercial fishing at GBPP, only to disbanded in May 1996 due to concerns of violations of the Federal Advisory Committee Act (FACA).

In April, 1997, the NPS published a new proposed rule, inviting discussion on alternatives under consideration pending the completion of an environmental assessment. The proposed rule would have prohibited all commercial fishing in Glacier Bay proper after a 15-year phase-out period, with virtually no fishing being allowed during the summer visitor season except for a five to seven year extension of Dungeness crab fishing in and around the Beardslee Islands. October 15, 1997 was the public comment deadline date for this proposal. However, in October the deadline was extended to June 1, 1998 to provide additional opportunity to comment on the rule and the subsequent environmental assessment due to be published in the early Spring of 1998.

In the Fall of 1997, the NPS began sponsoring a series of "workshops" in order to avoid the FACA concerns raised the previous year. These sessions led to a proposed consensus position advanced by the fishermen, the State of Alaska, and the Southeast Alaska Conservation Council. The proposal would have allowed time and area closures of commercial fishing in the upper reaches of Glacier Bay and the complete closure of Dungeness crab fishing in the Beardslee Islands and upper Dundas Bay in order to minimize interactions between the visitor, industry and non-motorized users. In return, the proposal required agreement that the remaining fishing activities be allowed to continue. The proposal was eventually rejected by the NPS.

An environmental assessment was published and available for comment in April 1998. This document describes environmental and socio-economic effects of the proposed rule along with five alternatives for the management of the fisheries. The public comment period on the environmental assessment was to have ended on June 1, 1998, but was later extended to November 15, 1998.

Because local fishermen, the State of Alaska and others felt that the discussion sessions held in late 1997 and early 1998 had been close to resulting in a full consensus, a proposed one-year moratorium for the issuance of final regulations, to allow continuing discussions was accepted by the Senate as an amendment to the Interior Appropriations Act for FY1999, but was strongly opposed by

the Administration and was dropped from legislation during the conference between the Senate and the House of Representatives.

The Appropriations Conference Managers did adopt a new proposal supported by the Administration (Sec. 123 of P.L. 105–277). The new proposal further extended the comment period on the proposed rule; directed the NPS and the State of Alaska to develop a cooperative management plan for commercial fishing within the park; allowed continued fishing in the marine waters outside Glacier Bay proper; limited fishing within Glacier Bay proper to certain qualifying fishermen, and only for their lifetime, and established a compensation plan for Dungeness crab fishermen affected by the closure of their customary fishing grounds, in particular, the Beardslee Islands and upper Dundas Bay.

In a related manner, on March 4, 1999, with the stated intention of protecting the rights of commercial and subsistence fishermen, the State of Alaska filed notice of its intent to file a real property quiet title action for all of the underlying marine waters within the boundaries of Glacier Bay National Park, including tidelands, pursuant to the Equal Footing Doctrine, the Submerged Land Act, and the Alaska Statehood Act.

LEGISLATIVE HISTORY

S. 501 was introduced by Senators Murkowski and Stevens on March 2, 1999. The Committee on Energy and Natural Resources held a hearing on S. 501 on April 15, 1999.

At its business meeting on June 30, 1999, the Committee on Energy and Natural Resources ordered H.R. 501, favorably reported, as amended.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Committee on Energy and Natural Resources, in open business session on June 30, 1999, by majority vote of a quorum present recommends that the Senate pass S. 501, if amended as described herein.

The rollcall vote on reporting the measure was 13 years, 7 nays as follows:

YEAS	NAYS
Mr. Murkowski	Mr. Bingaman
Mr. Domenici	Mr. Dorgan [1]
Mr. Nickles [1]	Mr. Graham [1]
Mr. Craig	Mr. Wyden [1]
Mr. Campbell [1]	Mr. Johnson [1]
Mr. Thomas	Mr. Bayh [1]
Mr. Smith [1]	Mrs. Lincoln
Mr. Bunning	
Mr. Fitzgerald	
Mr. Gorton	
Mr. Burns [1]	
Mr. Akaka	
Ms. Landrieu	

[1] Indicates vote by proxy.

COMMITTEE AMENDMENT

During the consideration of S. 501, the Committee adopted an amendment in the nature of a substitute which amends section 202 of ANILCA to clarify that subsistence fishing and gathering is allowed within Glacier Bay National Park in accordance with the provisions of title VIII of ANILCA.

The measure also bars the Secretary of the Interior from taking actions that would adversely affect subsistence uses or the States' management of fisheries.

The amendment also authorizes the use of up to $2 million per fiscal year of the funds collected under Public Law 91–383 (which covers cruiseship franchise fees) to pay fishermen for actual and punitive damages based on actions by federal officials that interfere with legal commercial fishing and result in a loss of earnings.

SECTION-BY-SECTION ANALYSIS

Section 1 designates the bill's short title as the "Glacier Bay Fisheries Act".

Section 2(a) amends section 202(1) of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 410hh–1) to allow subsistence fishing and gathering by local residents in the Glacier Bay National Park and Glacier Bay National Preserve in accordance with provisions of title VIII.

Subsection 2(b) prevents the Secretary of the Interior from taking any action in Glacier Bay National Park that would adversely affect subsistence fishing and gathering under title VIII of ANILCA and the management by the State of Alaska of marine fisheries with specific reference to subsistence and commercial fisheries, in accordance with principles of sustained yield. However, commercial fishing for Dungeness crab is prohibited.

Subsection 2(c) provides that nothing shall enlarge or diminish Federal or State title, jurisdiction or authority in the waters of the State of Alaska or within the boundaries of Glacier Bay National Park and Preserve including tidal and submerged lands.

Section 3 amends Section 3(g) of Public Law 91–383 (U.S.C. 1a–2(g)) to authorize payment of an aggregate of not more than $2 million per fiscal year in actual and punitive damages to persons who suffered a loss in earning from legally conducted commercial fisheries in Glacier Bay National Park, due to actions by any Federal officer, employee or agent.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 13, 1999.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 501, the Glacier Bay Fisheries Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippin, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 501—Glacier Bay Fisheries Act

CBO estimates that enacting S. 501 would have no significant impact on the federal budget. Because the bill would affect direct spending, pay-as-you-go procedures would apply. We estimate, however, that there would be no significant change in direct spending. S. 501 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 501 would permit local residents to engage in subsistence fishing and egg gathering at Glacier Bay National Park in Alaska. The bill would prohibit the Secretary of the Interior from taking any action that could adversely affect the state's management of marine fishing in the park or any legal subsistence fishing and gathering. Section 3 of the bill would make available an existing special fund of the National Park Service (NPS) for paying damages to persons who after January 1, 1999, suffer any loss of earnings when legal commercial fishing conducted in Glacier Bay is affected by any federal action. The fund, which consists of 60 percent of fees paid by tour concessioners, could be used to pay damages of up to $2 million annually. At present, the fees deposited in this fund are available without further appropriation to acquire certain emergency equipment and to conduct investigations on the effects of allowing tour vessels to enter the bay.

The interpretation of section 3 is uncertain, but CBO believes that this provision would have no significant net impact on the federal budget. The section would not establish any new cause of action for lost fishing revenues but would instead designate a new source of payment for such claims brought under existing statutes, most likely the Federal Tort Claims Act. Under that law, for successful claims of over $2,500, payment is currently made from the U.S. Treasury's claims and judgments fund, which has permanent indefinite authority to make such payments. Judgments of less than $2,500 are made from an agency's appropriated funds. Under S. 501, in contrast, it appears that a successful claim would be paid from the permanent NPS fund if sufficient balances are available. If not, or if aggregate claims for the year already exceed $2 million,

CBO assumes that the legislation would allow the claim to be paid from one of the two payment sources specified by the Federal Tort Claims Act—as it would be in the absence of this legislation. Thus, the total amount of claims payments would not be affected. Some small judgments that are currently paid from appropriated funds would instead be paid from the NPS special fund—but any such increase in direct spending would not be significant.

The other provisions of S. 501 would have no effect on the federal budget.

The CBO staff contact is Deborah Reis. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 501. The bill is not a regulatory measure in the sense of imposing Government-established standards of significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from enactment of S. 501, as ordered reported.

EXECUTIVE COMMUNICATIONS

On May 25, 1999, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth executive views on S. 501. These reports had not been received at the time the report on S. 501 was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate. The testimony provided by the National Park Service at the Subcommittee hearing follows:

STATEMENT BY DON BARRY, ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Thank you for the opportunity to present the position of the Department of the Interior on S. 501, a bill to address resource management issues in Glacier Bay National Park.

The Department of the Interior strongly opposes S. 501 and would recommend to the President that he veto this bill if it is enacted. The bill seeks to nullify the provisions of Section 123 of Public Law 105–77, which closed certain areas of Glacier Bay National Park (18 percent of Glacier Bay) to commercial fishing. The enactment of this bill would impair park resources and destroy the bipartisan consensus that led to the language of Section 123 of Public Law 105–77. The bill would also open up Glacier Bay National Park to ANILCA subsistence fishing and gathering, something which is opposed by local native groups and the National Park Service. Further, the bill could require a

payment of damages every time the National Park Service made contact with someone engaged in legal commercial fishing in the waters of Glacier Bay National Park. The enactment of this bill could deter legitimate law enforcement activity and place the public and park resources in jeopardy.

Section 2(a)(1) of S. 501 seeks to provide for subsistence fishing and gathering consistent with Title VIII of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). We do not believe the time is appropriate to expand ANILCA's provisions for subsistence to Glacier Bay. Glacier Bay National Park has been closed to most subsistence activities since 1925. Since 1990, the Department of the Interior has managed subsistence hunting on federal public lands in Alaska. We have worked with the State of Alaska with the hope that the state would resume its management of subsistence hunting. Because of the federal court's decision in the recent *Katie John* case and subsequent disagreement among the citizens and political leadership in Alaska, we are at the brink of taking over subsistence fish management on these same lands. We want the State of Alaska to manage subsistence fishing, gathering and hunting—that has been our position throughout the long debate. Adding Glacier Bay National Park to the current federal subsistence responsibilities at a time when this complex, volatile issue is still being negotiated by the state and federal governments and the citizens of Alaska only adds to the burden of reaching a satisfactory solution to the entire Title VIII situation.

In addition, it is important to note that the native people most closely affected by this proposed change—the Tlingit village of Hoonah, Alaska—have opposed ANILCA Title VIII subsistence for Glacier Bay, as explained in the July 29, 1996 letter from Kenneth Grant, President of the Hoonah Indian Association, to Senator Murkowski. The reason for this opposition is that under Title VIII, subsistence fishing and gathering would be open to all local, rural Alaskans.

We believe a solution can be worked out between the National Park Service and the local Tlingit people that would allow the Tlingit people to engage in certain activities, while ensuring that park resources are protected. For instance, at a two-day meeting held in the fall of 1997 between Hoonah tribal representatives and the NPS, a list of issues of concern to the tribe was generated.

At the top of that list was access to seagull eggs. Forthcoming treaty amendments and new Fish and Wildlife Service regulations implementing the Migratory Bird Treaty Act may assist those interested in legalizing egg collecting in Glacier Bay. Additionally, other changes in law and regulation would be required if a gull egg collecting provision is to occur.

To help further the process, the NPS has initiated a two-phase study—an ethnographic study to define the cultural

practices associated with the tradition of bird egg collection and a biological inventory to assess the health and viability of the seagull population. These studies are essential first steps in assessing the possibility of allowing egg collecting in a national park. The NPS and the Hoonah tribal government will continue working closely to find a solution. There are also opportunities for fishing under current authorities. The state of Alaska provides ample opportunities for fishing under non-conflicting state fishing regulations. For example, a personal use sockeye salmon net fishery in Glacier Bay is already available to local rural resident and other Alaskans. This fishery, available only to Alaskans, has liberal bag limits and is designed for families to help sustain their rural lifestyle and cultural dependence on fish. Further, existing sport fishing rules allow additional catches of salmon, halibut, crab and other fish. The National Park Service has also indicated a willingness to consider a cultural fishing opportunity specific to the Hoonah Tlingit as a means of sustaining cultural knowledge and tradition.

We believe that these ongoing efforts between the National Park Service and local groups are the best way to address the issue of allowing these groups better access to fishing and gathering activities. Legislation that would bring these activities under Title VIII of ANILCA would not be in the interest of resource preservation or maintaining the cultural traditions of local native Alaskans.

Section 2(a)(2) of S. 501 attempts to reopen areas in Glacier Bay National Park that are presently closed to commercial fishing. This issue has been with us for many years in the form of proposed regulations, proposed legislation, public workshops and extensive public debates. We believe P.L. 105–277 brought a successful compromise and conclusion to these thorny issues. This law did the following:

- Dungeness crab fishing was stopped immediately. This primarily took place in the wilderness waters of the park, particularly in the Beardslee Islands. Fewer than a dozen fishermen took part in this fishery, and they are being compensated under the provisions of the current law.
- Salmon, halibut and Tanner crab fishermen in Glacier Bay proper will receive permits to continue their businesses for the rest of their lives. Fishing under this permit system will begin next summer, and we expect these fishermen to continue working for several decades.
- All other existing fisheries on the outer coastal waters—about 80 percent of the catch—will continue indefinitely under a cooperative state-federal fisheries management plan.
- Fishing was immediately closed in all wilderness waters of the park, bringing the NPS into compliance with a Ninth Circuit Court of Appeals ruling.

The current law is a fair compromise for fishermen, other park users, and for the resources of the national

park. Most importantly, the agreements represented by the current law are important for the resource protection and scientific study mission of Glacier Bay National Park. Waters closed to commercial fishing will allow us to study for the first time unfished populations of crab and halibut. These unfished areas, fundamental to comparative scientific studies, did not exist anywhere in the park prior to the 1998 compromise. Glacier Bay is now America's largest marine protected area. What we learn may provide valuable insights for the sustained yield management of commercial fisheries both elsewhere in the park and in Southeast Alaska. Additionally, as commercial fishing is phased out of the bay proper, the park can better fulfill its original mission as a place to study the plant and animal succession process associated with a post-glacial period. The Park Service is already studying the colonization of streams in the bay by salmon, the behavior of other marine life, and the plant succession in the non-glacial areas.

The Organic Act of the National Park Service tells us to manage these resources unimpaired for future generations. Commercial fishermen take 800,000 pounds of fish from Glacier Bay proper every year, including top-level predators like halibut. The effect of the harvest on park resources is unknown. The current law brings us closer to that mandate in a way that is fair to the current generation of fishermen.

Also, the current law allows us to comply with two recent federal court rulings which found that commercial fishing was illegal in the wilderness waters of the park. This not only provides the underpinnings for the scientific benefits described above, but allows areas for visitors to enjoy the key wilderness values of this national park. S. 501 seeks to do away with these public benefits.

Section 3 of S. 501 would require the federal government to pay damages any time a contact made by the National Park Service with someone fishing lawfully in Glacier Bay resulted in a loss of income to the fisherman. This would endanger public safety and park resources.

As part of a well-organized fishery, commercial fishermen and their crews are required to carry valid fishing licenses, to adhere to certain gear and catch restrictions, and to follow state and federal laws while fishing. S. 501 would have the government paying fishermen for the first time spent checking on the compliance with those laws.

Similarly, to protect endangered species such as humpback whales and Stellar sea lions, harbor seal pupping and molting areas, nesting sea birds and other park resources, the National Park Service regulates vessels operating in the park, including some seasonal closures of sensitive areas. To enforce these rules under the proposed language—actions which could "interfere" with a fishing vessel in park waters—the government might have to pay compensation for lost fishing time as well as punitive damages.

The proposed law would put the National Park Service in the unreasonable position of potentially paying for disturbing a fishing period while investigating other, potentially serious crimes, or while responding to other park emergencies.

These are not just hypothetical examples. If this law had been in effect over the past few years, the government might have had to pay for National Park Service actions that interfered with commercial fishing boats during our 1993 response to the ship Yorktown Clipper, which was grounded on a rock. Similarly, during a lengthy 1996 standoff and eventual arrest on felony charges of heavily armed man who had assaulted a local charter boat operator with a revolver, the government might have had to defend itself against lawsuits from fishermen whose work was "interfered" with by rangers trying to ensure public safety. S. 501 could have the effect of deterring this type of law enforcement, which could jeopardize the well-being of the public and park resources.

The National Park Service works closely with the Alaska Department of Public Safety's Division of Fish and Wildlife Protection so we do not duplicate patrols or double-check licenses, gear and catch for commercial fishermen. But a well-regulated national park, which last year hosted 400,000 visitors in all sizes of vessels, requires monitoring by park rangers. This has to be done while the vessels are on the water, just like catching speeders requires being on the road. We cannot agree to a proposal which fines the National Park Service for enforcing the laws of this country as passed by Congress.

This concludes my testimony. I would be happy to answer any of your questions.

MINORITY VIEWS OF SENATOR JEFF BINGAMAN

S. 501 would allow commercial and subsistence fishing to occur within Glacier Bay National Park. I oppose the bill for three principal reasons. First, it is contrary to the legislative intent of the Alaska National Interest Lands Conservation Act (ANILCA), which established the management guidelines for the park in 1980. Second, it is inconsistent with two recent legislative compromises that provide a very generous settlement to commercial fishermen and other affected parties in and around Glacier Bay. Finally, the third section of the bill, which purports to authorize payment of actual and punitive damages for lost earnings from commercial fishing, is highly ambiguous and sets bad policy.

Legislative intend of ANILCA

When ANILCA was enacted in 1980, no provision was made for the continuation of commercial fishing in Glacier Bay National Park, despite the inclusion of language permitting such activities to occur in other areas, including the Dry Bay area of the adjacent Glacier Bay National Preserve. If Congress had intended for commercial fishing to continue in Glacier Bay, it surely would have referenced those activities, as it did in other areas.

In addition, the legislative history is equally clear that subsistence activities were not to be allowed within Glacier Bay National Park. This intent was clearly expressed in this Committee's report which accompanied H.R. 39, the ANILCA legislation: "Subsistence uses will be allowed within the [Glacier Bay] preserve, but not in the park." S. Rept. 96–413 at 164.

The Committee's report describes the purpose for establishing Glacier Bay National Park in terms that are inconsistent with ongoing commercial fishing activities. The report stated that four of the national parks established in ANILCA, including Glacier Bay, "are intended to be large sanctuaries where fish and wildlife may roam freely, developing their social structures and evolving over long periods of time as nearly as possible without the changes that extensive human activities would cause." Id. at 137.

Since 1983, National Park Service regulations have prohibited commercial fishing in units of the National Park System "unless specifically authorized by Federal statutory law" (36 C.F.R. § 2.3(d)(4)).

In addition, in 1997 the Ninth Circuit Court of Appeals upheld an Alaska Federal District Court decision that the Wilderness Act prohibits commercial fishing in the park's waters which are designated as wilderness. *Alaska Wilderness Alliance* v. *Jensen*, 108 F.3d 1065 (1997).

Recent legislative compromises

Despite the clear legislative history regarding commercial fishing in Glacier Bay, commercial fishing has had a long history in Glacier Bay waters, and the immediate closure of those waters could have a significant effect not only on local fishermen, but on other area residents as well.

For that reason, I thought it was appropriate that a compromise was included as part of the Omnibus Appropriations Act of 1998 (Public Law 105–577, section 123). That provision allowed for commercial fishing to continue indefinitely within the park's outer waters, where a significant portion of the commercial catch occurs, and granted fishermen currently fishing in Glacier Bay with lifetime fishing permits. Only certain areas in the bay—primarily the wilderness waters—were slated for immediate closure. In addition, section 123 provided an appropriation of $2.4 million to compensate Dungeness Crab fishermen who were most affected by the closures.

That compromise was expanded earlier this Congress in section 501 of the FY 1999 Emergency Supplemental Appropriations Act (Public Law 106–31). That provision delayed the date certain areas in Glacier Bay were to be closed to commercial fishing and significantly expanded the class of persons qualifying for compensation to include not only affected fishermen, but also fish processors, crew members, local communities and "others negatively affected" by the fishing restrictions. Section 501 also appropriated an additional $26 million in compensatory funds.

For better or worse, Congress has now tried to resolve this issue on two occasions, by compensating those affected while allowing the National Park Service to continue to implement its regulations. At the same time, it has provided the Park Service and commercial fishing operators with certainty as to future fishing operations within the park. S. 501 will undo both the compromise and the certainty of future operations.

Payment of damages

Section 3 of the bill would authorize the Secretary of the Interior to use revenues from cruise ship permits in Glacier Bay to compensate persons who lose earnings from commercial fishing in Glacier Bay as a result of the actions of a federal employee. This provision is extremely ambiguous and sets bad policy. At a minimum, enactment of the provision will encourage lawsuits against federal law enforcement officers—not against the agencies or the United States itself, but against individual officer personally. It will circumvent Congress's long-standing policy against the payment of punitive damages by the Federal Government. And it will divert revenues now available to fund wildlife and other natural resources studies to the payment of damages.

To begin with, it is unclear what the intended purpose and effect of the provision are. By its terms, the provision merely authorizes the Secretary of the Interior to use cruise ship revenues "to pay * * * actual and punitive damages to persons who * * * suffer a loss in earnings from commercial fisheries * * * due to any action by an officer, employee, or agent of any Federal department or agency." It does not expressly create a new private right of action

that would enable commercial fishermen or anyone else to bring suit against federal officials.

Nonetheless, there is concern that the courts may read the provision as creating a new and exceedingly broad right of action against officers and employees of the National Park Service, the Coast Guard, the National Marine Fisheries Service, and other Federal agencies who may "adversely affect" commercial fishing in Glacier Bay. The Assistant Secretary of the Interior for Fish and Wildlife and Parks testified that the provision could "put the National Park Service in the unreasonable position of potentially paying compensation for disturbing a fishing period while investigating other, potentially serious crimes, or while responding to other park emergencies." S. Hrg. 106–58 at 60.

This concerns stems from the common law doctrine of implied rights of action. Under this doctrine, the courts were, at one time, willing to imply a private right of action "where a statute enacts, or prohibits a thing for the benefit of a person," even though the statute does not expressly provide a right of action. *Texas & Pacific Railway Co.* v. *Rigsby,* 241 U.S. 33 (1916). As late as 1964, the Supreme Court said it was "the duty of the courts to * * * provide such remedies as are necessary to make effective the congressional purpose" and "'to utilize any of the procedures or actions normally available to the litigant,'" to protect rights created by federal statutes. *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433–434 (1964) (quoting *Deckert* v. *Independence Shares Corp.,* 311 U.S. 282,288 (1940)).

The Supreme Court has "long since abandoned its hospitable attitude toward implied rights of action." *Thompson* v. *Thompson,* 484 U.S. 174, 190 (1988) (Scalia, J., concurring). For a time, the Court applied a four-part test to determine whether to imply a new right of action. *Cort* v. *Ash,* 422 U.S. 66, 78 (1975). Later, it narrowed the test to the "central inquiry [of] whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Ridington,* 442 U.S. 560, 575 (1979). But the most recent history of the Court's "holdings is one of repeated rejection of claims of an implied right." *Thompson* v. *Thompson,* 484 U.S. 174, 190 (1988) (Scalia, J., concurring).

By any test, no private right of action should be read into S. 501. Even under the most lenient of the Supreme Court's tests for implied rights of action, "the statute [must] create a federal right in favor of the plaintiff." *Cort.* v. *Ash,* 422 U.S. 66, 78 (1975). The only federal rights created by S. 501 are for:

(1) "subsistence fishing and gathering by local residents" within the park and preserve;

(2) "subsistence fishing and gathering" under title VIII of ANILCA:

(3) "management by the State of Alaska of marine fisheries"; and

(4) "subsistence gathering activities permitted under the Migratory Bird Treaty."

S. 501 creates no such federal right for commercial fishing. Yet the only potential plaintiffs eligible to obtain compensation under section 3 are "persons who * * * suffer a loss in earnings from commercial fisheries legally conducted in the marine waters of Gla-

cier Bay National Park." Plainly, S. 501 fails the first prong of the *Cort* v. *Ash* test.

Moreover, S. 501 fails to meet both the second prong of the *Cort* v. *Ash* and the *Touche Ross* test because there is no evidence in the text of S. 501 or its legislative history that the sponsors or the Committee on Energy and natural Resources intend to create a new private right of action. The issue did not come up either when the Committee heard testimony on the bill or when it marked up the bill. The Committee report states no such intent. In my view, if the Committee intends to create a new right of action, the bill should say so plainly. It does not.

If the third section of S. 501 does not create a new private right of action, what does it do? By its terms, section 3 merely authorizes the Secretary of the Interior to use cruise ship fees to pay damages awarded under existing rights of action. One must look elsewhere to find a federal law that creates the right of action itself.

Under current law, the only generally applicable statute providing a right of action against the United States for tort liability is the Federal Tort Claims Act, which provides a right of action "for money damages * * * for injury or loss * * * caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment. * * * " 28 U.S.C. 1346(b). In addition, the Supreme Court has established a nonstatutory right of action against federal agents for intentional wrongdoing that violates a person's constitutional rights. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics.* 403 U.S. 388 (1971). Section 3, then, in my view, merely identifies a source of funds to pay claims for lost commercial fishing earnings that arise under either the Federal Tort Claims Act or a *Bivens*-type action.

But the enactment of section 3 is likely to have practical consequences far beyond simply identifying a source of funds. These consequences will flow principally from the fact that section 3 authorizes the payment of punitive damages. The Federal Tort Claims Act expressly bars punitive damage claims against the government, 28 U.S.C. 2674, and section 3 does not lift that bar. But punitive damages may be awarded against individual federal employees personally in a *Bivens* suit. *Carlson* v. *Green,* 446 U.S. 14, 12–22 (1980).

Why does section 3 authorize the Secretary of the Interior to pay punitive damages if punitive damage claims against the government are barred? In my view, including punitive damages in section 3 only makes sense if it is read as authorizing the Secretary of the Interior to indemnify federal employees who violate the constitutional rights of commercial fishermen in Glacier Bay and, in so doing, become liable for punitive damages in a *Bivens* action.

I have no objection to the Secretary of the Interior indemnifying his employees who become liable for damages while acting within the scope of their employment. If that were the sole purpose and effect of section 3, I would not object to it. But I fear that the practical consequences of section 3 will not be so benign. Instead of protecting federal employees in Glacier Bay from personal liability section 3 will instead encourage litigation against them.

Understanding this point requires some knowledge of current federal tort law. The Federal Employee Liability Reform and Tort Compensation Act of 1988, often called the Westfall Act, makes the United States the exclusive defendant in any tort action arising from the conduct of a government employee. 28 U.S.C. 2679(b)(1). There are, however, two important exceptions to this rule. The first exception is for claims against a federal employee for the violation of a constitutional right in a *Bivens* suit. 28 U.S.C. 2679(b)(2)(A). The other is for claims against a federal employee for violation of a federal statute authorizing action against the employee. 28 U.S.C. 2679(b)(2)(B).

Thus, anyone wishing to collect the $2 million offered by section 3 must bring his or her claim against an individual federal employee rather that the government itself and allege a constitutional violation under the first exception to the Westfall Act (or convince a court to imply a right of action under the Westfall Act's second exception). This should not be hard to do. Section 3 will invite anyone whose commercial fishing vessel is stopped in Glacier Bay in the course of routine law enforcement activities to claim that the vessel was unreasonably searched and seized in violation of the Fourth Amendment.

The increased threat of litigation caused by enactment of S. 501 is likely to have a profoundly chilling effect on law enforcement efforts in Glacier Bay and on the ability of honest, hard working federal law enforcement officers to do their jobs. Although section 3 may offer them some hope and comfort that the Secretary of the Interior may indemnify them for any damages awarded against them, the Secretary's indemnification authority is only implicit in the bill and is, as best, only discretionary with the Secretary. (See "Indemnification of Department of the Interior Employees," 43 C.F.R. § 22.6.)

In sum, I think the Committee on Energy and Natural Resources should not reopen this issue, which was fairly settled only two months ago, by reporting a measure that not only sets bad policy but is so vague and ill considered that it raises more legal questions than it settles. For these reasons, I strongly oppose reporting this bill.

JEFF BINGAMAN.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 501, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

PUBLIC LAW 96–104

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SEC. 202. The following units of the National Park System are hereby expanded:

(1) Glacier Bay National Monument, by the addition of an area containing approximately five hundred and twenty-three thousand acres of Federal land. Approximately fifty-seven thousand acres of additional public land is hereby established as Glacier Bay National Preserve, both as generally depicted on map numbered GLBA–90,004, and dated October 1978; furthermore, the monument is hereby redesignated as "Glacier Bay National Park". The monument addition and preserve shall be managed for the following purposes, among others: To protect a segment of the Alsek River, fish and wildlife habitats and migration routes, and a portion of the Fairweather Range including the northwest slope of Mount Fairweather. Lands, waters, and interests therein within the boundary of the park and preserve which were within the boundary of any national forest are hereby excluded from such national forest and the boundary of such national forest is hereby revised accordingly. *Subsistence fishing and gathering by local residents shall be permitted in the park and preserve in accordance with provisions of title VIII.*

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PUBLIC LAW 91–383

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SEC. 3. In order to facilitate the administration of the national park system, the Secretary of the Interior is authorized, under such terms and conditions as he may deem advisable, to carry out the following activities:

(a) * * *

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(g) Exhibits and demonstrations; sale of products and services; contracts and cooperative arrangements; credits to appropriations

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(1) to the extent determined necessary, to acquire and preposition necessary and adequate emergency response equipment to prevent harm or the threat of harm to aquatic park resources from permittees; [and]

(2) to conduct investigations to quantify any effect of permittee activity on wildlife and other natural resource values of Glacier Bay National Park. The investigations provided for in this subsection shall be designed to provide information of value to the Secretary in determining any appropriate limitations on permittees' activity in Glacier Bay. the Secretary may not impose any additional permittee operating conditions in the areas of air, water, and oil pollution beyond those determined and enforced by other appropriate agencies. When competitively awarding permits to enter Glacier Bay, the Secretary may take into account the relative impact particular permittees will have on park values and resources, provided that no operating conditions or limitations relating to noise abatement shall be imposed unless the Secretary determines, based on the weight of the evidence from all available studies including verifiable scientific information from the investigations provided for in this subsection, that such limitations or conditions are necessary to protect park values and resources. Fees paid by certain permittees for the privilege of entering Glacier Bay shall not exceed $5 per passenger. For the purposes of this subsection, "certain permittee" shall mean a permittee which provides overnight accommodations for at least 500 passengers for an itinerary of at least 3 nights, and "permittee" shall mean a concessionaire providing visitor services within Glacier Bay. Nothing in this subsection authorizes the Secretary to require additional categories of permits in, or otherwise increase the number of permits to enter Glacier Bay National Park[.]*; and*

(3) to pay an aggregate of not more than $2,000,000 per fiscal year in actual and punitive damages to persons who, at the time after January 1, 1999, suffered or suffer a loss in earnings from commercial fisheries legally conducted in the marine waters of Glacier Bay National Park, due to any action by an officer, employee, or agent of any Federal department or agency.

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