

## Chapter 8: Steering Toward the “Lesser of Two Evils”

### Bill Clinton, Bruce Babbitt, and George Frampton

Hopes were high in the environmental community in 1993. Democrats controlled the White House and both chambers of Congress, and President Clinton had appointed Bruce Babbitt as his Secretary of the Interior. A former governor of Arizona and past president of the League of Conservation Voters, Babbitt was a committed conservationist and was sensitive to Native concerns. He was assisted by George Frampton, who gave up the presidency of The Wilderness Society to become Assistant Secretary of the Interior for Fish and Wildlife and Parks. A veteran of Alaska conservation battles, Frampton once provocatively said that “We ought to make the whole state an historical park so people can...see how folks thought in the 19th Century,” in reference to several prevailing Alaskan attitudes about resource development.<sup>574</sup>

Only six days after Bill Clinton’s inauguration, Representative Don Young introduced Glacier Bay legislation in the new Congress. H.R. 704 was identical to H.R. 3418, which had languished in the previous Congress. Several days later Senator Murkowski introduced S. 291, which was identical to his last version of S. 1624.<sup>575</sup> So far as commercial fishing was concerned, the bills were essentially the same. Likewise, their fates were essentially the same. Before winter had ended, Senator Murkowski’s legislation had died without a hearing in the Senate Committee on Natural Resources. Representative Young’s legislation lasted until mid-summer. It received a single hearing in late April in the House Committee on Merchant Marine and Fisheries’ Subcommittee on Fisheries Management. Witness participation was limited to the NPS (opposed), State of Alaska (in favor), The Wilderness Society (opposed), and Sealaska, Southeast Alaska’s regional Native corporation (in favor).<sup>576</sup>

Roger Kennedy, director of the NPS, provided the committee a comprehensive summary of his agency’s view of commercial fishing in Glacier Bay National Park:

The National Park Service (NPS) Organic Act and its supplemental basic legislation require the protection of all forms of wildlife, includ-

ing fish, in an unimpaired condition, and limit the authorization of activities to those which will not derogate park purposes and values. NPS regulations prohibit commercial fishing on the basis that the commercial removal of fish is contrary to park purposes and values, including the purpose of conserving those fish in an unimpaired state. There is no doubt that the commercial removal of several million pounds of fish annually is adversely affecting that park resource—the fish—which the NPS has a mandated obligation to protect. We also believe that the commercial removal of these large quantities of fish, some of them in concentrated locations, has a secondary effect on unimpaired park ecosystems and the natural composure of biodiversity on a local level, which are also park values. Fish are both predators and prey of other species. Large scale commercial removal of fish affects the food chain, the ecosystem, and ultimately, attempted maintenance of unaffected biodiversity.<sup>577</sup>

Representative Young’s legislation was reported by the Committee on Merchant Marine and Fisheries to the full house, which took no action, effectively killing the bill.

It would be 1997 before Alaska’s congressional delegation would again introduce legislation to perpetuate commercial fishing in Glacier Bay. By this time most of the commercial fishing industry recognized that it was Senator Stevens, not Representative Young or Senator Murkowski, who stood the best chance of favorably resolving the Glacier Bay commercial fishing issue.

Under the new administration the NPS argued for immediate publication of a final rule in place of the 1991 proposed rule, but the DOI declined to do so because George Frampton “wanted to study this difficult issue thoroughly before recommending regula-



tions shaped in the last Administration.”<sup>578</sup> Changes to the 1991 rule were deemed necessary, and the NPS in Alaska and the DOI in Washington, DC each quietly contemplated what alterations needed to be made. The changes both involved only non-wilderness waters; commercial fishing in wilderness waters in each case would be immediately terminated. In contrast to the seven-year phase out under the 1991 proposed rule, the new “proposal” that emanated in August 1993 from the NPS in Alaska, where public pressure to continue commercial fishing in Glacier Bay was high, reflected a tacit acknowledgment that the NPS would have to soften its approach if its proposal was to stand a chance of being acceptable regionally. It allowed for a ten-year phase out period in Glacier Bay N.P., and it raised the possibility of fisheries being permanent, pending an NPS proposed study of the effect of the commercial catch on park resources to learn “what, if any, types and levels of harvest should continue.”<sup>579</sup>

Action on any version of the proposed rule was forestalled, however, when, at the request of the State of Alaska, Secretary Babbitt agreed to refrain from issuing a final rule while the possibility of resolving the issue through legislation was discussed with state and Congressional staff.<sup>580</sup> An informal “Glacier Bay Working Group,” consisting of representatives of AFSA, SEACC, Sealaska, and ADF&G, was formed to develop an Alaska consensus position and draft language for a bill that would advance that consensus.<sup>581</sup> The DOI/NPS effort to resolve the Glacier Bay issue had moved from the regulatory to the political realm.

Among the consensus points reached by the working group were that the average annual commercial fishing effort in Glacier Bay N.P., by species, should be maintained at a level no greater than the average that had existed during the years 1981 through 1991 (this was virtually identical to the modified Glacier Bay legislation that Senator Murkowski introduced in 1991), and that commercial (as well as subsistence) fishing should continue “unless unbiased studies or other substantial information demonstrate that Park resources or values are jeopardized or specific stocks are mismanaged.” The group thought the wilderness issue could be dealt with through legislation that specifically permitted commercial fishing in Glacier Bay N.P.’s wilderness waters or through bound-

ary modifications that would exclude portions of areas such as the Beardslee Islands and Hugh Miller Inlet from wilderness.<sup>582</sup>

In 1993, Bruce Babbitt scheduled a summer trip to Alaska, part of which was to learn more about the state, and part of which was a family vacation that included an August kayaking trip in Glacier Bay. In an attempt to delay action on Senator Murkowski’s Glacier Bay legislation (S. 291), Babbitt portrayed his Alaska trip as an opportunity to “collect first-hand knowledge on numerous departmental issues, including Glacier Bay.” He said that there were “many ambiguities” surrounding fishing in the park, and that he himself had many questions. Babbitt also professed his “desire to investigate the wisdom” of the proposed regulations and to explore potential solutions to the commercial fishing issue.<sup>583</sup>

Word of Babbitt’s planned visit reached the Glacier Bay Working Group, which was well aware of the fact that any meaningful consensus on the Glacier Bay issue would need to include that of the national environmental groups to which Babbitt had close ties. Although the group did not have the opportunity to meet with Babbitt during his Alaska visit, a letter was later written asking him to help build consensus at the national level.<sup>584</sup>

Coinciding with Babbitt’s visit to Glacier Bay, ADF&G published a report titled “The Fisheries of Glacier Bay National Park and Preserve,” pointing out that “In the 33 years since statehood, Alaska has effectively managed the fishery resources so they are as abundant and healthy as ever,” and that “Fish and shellfish populations are healthy and abundant in and around Glacier Bay, following three decades of careful state management, coordinated with federal and international management of the fishery resource.”<sup>585</sup> Several months earlier, Jeffery Koenings, of ADF&G, wrote of the state’s position on commercial fishing in Glacier Bay:

The State of Alaska simply and firmly believes that traditional levels and types of fisheries should be allowed to continue in Glacier Bay and other waters adjacent to the national park. These fisheries have proven to be compatible with the park’s natural values throughout and before its entire existence. Communities have grown up

depending upon the livelihood provided by these traditional fisheries. This history should be celebrated rather than prohibited.<sup>586</sup>

For its part, the NPS at Glacier Bay prepared to lobby Babbitt on the advantages of Glacier Bay as a marine reserve and the need for studies of the ecosystem effects of commercial fishing in the park.<sup>587</sup> The strategy of the agency's hierarchy beyond the park level, however, favored the ultimate termination of commercial fishing in Glacier Bay. Upper echelon NPS officials believed that the agency's regulatory authority was sufficient to achieve that goal, and that a legislative approach should be employed only to introduce legislation to counter that which might be introduced by Alaska's congressional delegation.<sup>588</sup>

Essentially all of Babbitt's time at Glacier Bay was spent vacationing with his family. Glacier Bay Superintendent Marvin Jensen took the opportunity to travel with Babbitt and his family on the local charter boat that transported them to Muir Inlet. While en route, Jensen stated to Babbitt his strong interest in resolving the commercial fishing issue. But Babbitt, he recalled, wasn't "much interested in engaging any issues," and mostly just listened. Likewise, his kayaking guide, who had some knowledge of Glacier Bay's fisheries, did not recall any discussions about commercial fishing in Glacier Bay.<sup>589</sup>

At any rate, Bruce Babbitt was skeptical of the Alaska-generated working group proposal. He considered commercial fishing to be an illegal activity, and the proposal would, in effect, extend it for ten years. It was, in his mind, "clearly in contravention of the law." Despite all the work that had been done, Babbitt even pondered the possibility of not really dealing with the issue, of simply announcing a policy of non-enforcement of the existing law. Instead, however, he decided that legislation was the "way to go," and suggested that the department had better start working with a couple of NPS-friendly congressmen.<sup>590</sup> About two months after his return from Alaska, Babbitt met with Alaska's Congressional delegation to discuss possible compromises that might settle the issue.<sup>591</sup> As the year 1993 was coming to a close, the DOI was still on the legislation track, with George Frampton continuing the legislative

effort, his department convinced that legislation was the "desired long-term solution to the Glacier Bay fishing issues."<sup>592</sup> The department was not, however, planning to work with NPS-friendly congressmen. Instead, it would work with Senator Murkowski, who had worked hard to halt the NPS's effort to close Glacier Bay to commercial fishing and was not inclined to compromise.<sup>593</sup> The reality was that any legislation proposed by the NPS that was not satisfactory to Alaska's congressional delegation, particularly to Senator Stevens, would face a difficult future in Congress.

On the suggestion of John Katz, the Washington, DC representative of the Alaska's governor's office, a core group consisting of Alaska's Congressional delegation (represented by Senator Murkowski's office), DOI/NPS, and Alaska's governor's office was formed to arrive at a consensus on which mutually acceptable legislation could be based. Once consensus was reached, the group would be expanded outward to include fishermen, Native interests, the environmental community, and key congressional players.<sup>594</sup> At Katz's request, the DOI continued to refrain from issuing the proposed rule, but kept it, as Jensen wrote, "in our hip pocket."<sup>595</sup> With Frampton's office representing DOI/NPS, the group negotiated privately.

The DOI/NPS generated a proposal for the negotiations. The fact that it was generated in Washington, DC may have affected its tone: Clinton administration officials in the nation's capital—many of them already preservation-oriented—were more likely to hear from, and be sympathetic with, representatives of national conservation organizations than concerned fishermen. Significant in this proposal was that Glacier Bay proper was to be treated differently than the park's outer waters. For Glacier Bay proper as well as other bays and inlets, the DOI/NPS proposal favored a shorter phase-out period than it had in the 1991 proposed rule: three years. Commercial fishing in the outside waters and those of Icy Strait and Cross Sound would be phased out over ten years.<sup>596</sup>

In contrast to its public plans that would terminate commercial fishing in the outer waters after 10 years, DOI/NPS was willing in the discussions with the state and Senator Murkowski's office to allow commercial fishing to continue in perpetuity in the outer waters of Glacier Bay N.P., contin-

gent upon a “demonstration of no adverse impact.”<sup>BBBB 597</sup> It may have been coincidence that the previous summer, Chip Dennerlein of the National and Parks Conservation Association had told Randy King that the long-term goal of the national conservation groups was to close at least Glacier Bay proper to commercial fishing.<sup>598</sup> Molly Ross, a solicitor at the Department of the Interior who was involved in Glacier Bay issues for many years, later said that Washington, DC-based discussions on treating the park’s outer waters differently than Glacier Bay proper were first held in 1992.<sup>599</sup>

The self-named Glacier Bay Task Force met on January 24, 1994 and reviewed a DOI outline for commercial fishing legislation. General agreement was reached on two important items: (1) the wilderness waters of Glacier Bay could be closed immediately to commercial fishing, and (2) fishing could be phased out of Glacier Bay proper over a three-year period with the provision that DOI/NPS agree to meet with interest groups to hear concerns about the issue. The sticking point was the future of commercial fishing in Glacier Bay N.P.’s outer waters. The state and Alaska’s congressional delegation wanted a 10-year scientific study to determine if the outside waters resource was being harmed by commercial fishing, with the provision that during the study only temporary conservation-based restrictions could be placed on the fisheries.

A DOI draft outline for legislation promoted the idea of Glacier Bay as the first “protected marine system” on the Pacific Coast and a reserve that would provide “unparalleled opportunities” for research. The perennial NPS commercial fish/sport fish contradiction was front and center to the commercial fishermen: commercial fishing would be terminated, yet sport fishing would be allowed to continue.<sup>600</sup>

The second meeting of the Glacier Bay Task Force was held two weeks later. At this meeting the State of Alaska was less accommodating. It was supposed to provide its own outline for legislation, but instead it introduced some incomplete legal research that claimed the NPS did not have jurisdiction over the waters of Glacier Bay N.P. This legal/ideological approach sowed doubt in the DOI and NPS that the Hickel administration would be able to provide an acceptable commercial fishing proposal.<sup>601</sup>

In early March, however, John Katz called Molly Ross at DOI to inform her that the state and Senator Murkowski’s office wanted to come back to the bargaining table, to make another attempt at resolving the Glacier Bay issue.<sup>602</sup> Late the following month, the state provided a proposal that would address the Glacier Bay commercial fishing issue through legislation and cooperative agreements with the NPS. The proposal, which was developed with the close cooperation of Senator Murkowski’s office, reiterated the state’s claim to ownership of Glacier Bay’s submerged lands, and presented two options. Option A was based on a cooperative management agreement similar to that contained in the legislation that created Channel Islands National Park. As the Channel Islands N.P. legislation guaranteed the State of California’s rights and jurisdiction over submerged lands and waters within the Channel Islands N.P.’s boundaries as established by a 1978 Supreme Court ruling, this legislation would guarantee the State of Alaska’s jurisdiction over submerged lands and waters within Glacier Bay N.P.<sup>603</sup> From the DOI’s perspective, Option A was a non-starter. Option B involved the legislative implementation of the Glacier Bay Working Group’s consensus points. In this option, the state tacitly agreed to the immediate closure of wilderness waters in Glacier Bay N.P. to commercial fishing. In Glacier Bay proper, the state recognized “the legitimate concerns of the Interior Department regarding the potential for conflict that exists between commercial fishing ... and visitor enjoyment of the Park and other Park resources.” To minimize conflicts in Glacier Bay proper, the state was willing, under its management authority, to limit “the level or effort of catch, methods and means, and the seasons in which commercial fishing can take place.” Regarding the park’s outer coast, the state maintained that commercial fishing there did not conflict with visitor uses and that the stocks harvested were migratory species that did not originate in the park. No restrictions on commercial fishing would be necessary, but the NPS should cooperate with the state in conducting studies to ensure the continued health of the fisheries.<sup>604</sup> The state’s proposal did not address the effects of commercial fishing on Glacier Bay N.P.’s ecosystem. This was an important consideration, given the state’s proclivity for managing fisheries for maximum sustained yield.

<sup>BBBB</sup> As used in this work, “outer waters” refers to all marine waters in the park outside Glacier Bay proper.

The NPS was looking for something more, something along the lines of its 1991 proposed rule, and was in no way willing to agree that the state had jurisdiction over Glacier Bay's marine waters.

George Frampton took the time to visit both Glacier Bay and Hoonah during the summer of 1994.<sup>605</sup> At Hoonah he was treated to a Native dancing program and an array of local food. Frampton did not meet with Albert Dick, Hoonah's mayor, but Dick later penned him a letter stating that the closure of Glacier Bay to commercial fishing would have a "devastating" effect on Hoonah. Dick added that "our people have done a good job in protecting the natural resources for the future of Glacier Bay," and asked Frampton's help in ensuring that the people of Hoonah "continue our unique lifestyle, and allow us the ability to continue to make a living from the bountiful waters of Glacier Bay."<sup>606</sup> Frampton came away better understanding the issue.

To Tom Traibush, the end of his Dungeness crabbing venture in Glacier Bay seemed near. He thought the NPS might close the park's wilderness waters to commercial fishing as early as that fall, and he later said that Superintendent Jensen told him that there would be no Dungeness crab fishing in Glacier Bay in 1995.<sup>607</sup> Though they couldn't have known it at the time, Traibush was too pessimistic and Jensen was too optimistic. Fishing in the Beardslees would continue for half a decade.

A near agreement on legislation to settle the Glacier Bay issue negotiated by Frampton between the DOI, the State of Alaska, and Senator Murkowski's office collapsed late in 1994 when the Hickel administration pulled out of negotiations.<sup>608</sup> The agreement would have involved a 5-year phase-out of commercial fishing in Glacier Bay proper in exchange for allowing commercial fishing to continue in perpetuity in the outer waters of the park. This near miss on a relatively short phase-out left Frampton less receptive to longer time frames later suggested by park staff.<sup>609</sup> Governor Hickel was succeeded that December by Democrat Tony Knowles, whose administration was considered to be more open to negotiation than his predecessor.

While negotiating with the state and Alaska's congressional delegation, the NPS was also waiting for the federal court to conclude its deliberations on *AWA v. Jensen*, which had

been filed in August 1990. On February 28, 1994 the court ruled 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 designated as wilderness area (see Figure 32)."<sup>610</sup> Until this ruling the NPS had continued to profess that commercial fishing was illegal in the non-wilderness waters of Glacier Bay N.P. The court had determined otherwise, that while commercial fishing was indeed illegal in wilderness waters, the NPS had the authority to prohibit or permit the activity in the non-wilderness waters of Glacier Bay. Though the NPS seemed to have had the authority to keep the non-wilderness waters of Glacier Bay open to commercial fishing, to do so was against park values and purposes. The Alaska Wildlife Alliance, for its part, was not satisfied with the ruling, and appealed it to the Ninth Circuit Court of Appeals.

The people of Hoonah have had a long history in Glacier Bay, both in aboriginal and modern times. The community stood to lose a lot if Glacier Bay N.P. was closed to commercial fishing. Particularly where Senator Murkowski was concerned, the Hoonah Indian Association had been overshadowed in Glacier Bay issues by the Sealaska Corp. and its CEO, Robert Loescher. On April 15, 1994 the HIA passed a resolution regarding Glacier Bay that pointed out the association's status as a federally recognized tribe whose ancestral homeland was Glacier Bay. The resolution noted as well that commercial fishing was a "customary and traditional use" of Glacier Bay, and it requested that the federal government develop and implement a plan that would "promote the survival of [the Hoonah Tlingit] culture and way of life and insure continued customary, traditional and historical use of resources" within Glacier Bay N.P.<sup>611</sup> A second resolution passed the same day called for the federal government to meet with the HIA to develop a plan that would provide for the management of Glacier Bay by the association.<sup>612</sup> The requests were not of the sort that could be readily accommodated by the NPS.

In spite of the ongoing efforts, it became progressively clear to Jensen that the regulations were not likely to be published.<sup>613</sup> The 1991 proposed rule, however, remained alive in DOI, in part revised by Molly Ross, a hard-working solicitor in the Secretary of



Figure 32: A portion of the Beardslee Islands wilderness area (courtesy James Mackovjak)

the Interior's office who had been involved in Glacier Bay issues since the late 1970s and had later represented the DOI in Glacier Bay stakeholder meetings.<sup>CCCC 614</sup> Ross wanted to move the rule forward, but the DOI and the NPS were conflicted over whether it should be published as final or as proposed. Apparently the DOI had made a commitment to the State and Alaska's congressional delegation to publish the revised regulations as proposed, but publishing them as final had the advantage of avoiding "another provocative (extra) round of hearings (with no anticipated change in outcome resulting from additional public comment)." A downside of publishing the rules as final was the increased likelihood of provoking legislation by Alaska's congressional delegation.<sup>615</sup>

#### **Political Change in Washington**

The national political equation affecting Glacier Bay changed dramatically with the mid-term elections of 1994, when the Re-

publican party took control of both houses of Congress. Heavy with seniority, Alaska's delegation gained unprecedented power. Sen. Murkowski became chairman of the Senate Committee on Energy and Natural Resources, which has jurisdiction over the national park system, and Rep. Young became chairman of the House Committee on Resources, which also has jurisdiction over the national park system. Ted Stevens was a senior member of the Senate Appropriations Committee, and in line to become its chairman. Stevens was very effective in using the appropriations process to direct huge amounts of federal money to Alaska and to direct the policy of federal agencies. The power of Alaska's congressional delegation, however, was limited by what the Clinton administration would agree to.

#### **Fisheries Research (1991-2003)**

In contrast to its Organic Act mandate to manage the parks for resource protection

<sup>CCCC</sup> Ross told the author that Glacier Bay N.P. in the 1990s had some of the toughest issues facing the NPS, including commercial fishing and cruise ship regulation.

and enjoyment, Congress provided the NPS with no specific mandate to develop a science program that would provide a basis for the management of natural resources. Despite decades of prodding from within and outside the agency, the Service failed to take the initiative to develop a significant science program on its own. A conference of government and private experts held at Vail, Colorado in 1991 as part of the Park Service's 75th anniversary proceedings produced the "Vail Agenda." The report stated bluntly that the Service's support of science was "sporadic and inconsistent," and that the agency overall was "extraordinarily deficient" in scientific matters.<sup>616</sup>

An early advocate for at least some science in Glacier Bay was Chief Ranger David Butts, who in 1963 recognized the need for research on Glacier Bay's commercial fisheries. Butts wrote that "Studies of both fresh and saltwater fisheries [are] greatly needed. Present efforts are merely small scale 'extensive' probes in order to obtain some data on this valuable resource. More intensive study as a part of a carefully planned research program is necessary if we are to understand this resource and protect it wisely."<sup>617</sup> The 1964 Glacier Bay annual fisheries resources report—likely written by Butts—stated the need for the services of a "fishery expert" whose job would include gathering data on species distribution and abundance.<sup>618</sup> Comprehensive scientific research being of very low priority for the NPS, Butts's recommendation fell on deaf ears. To be sure, the NPS was evolving toward science-based management of its natural resources, but it still had a long way to go. Despite the growth of environmental awareness nationally, Mission 66 was at that time still in full swing, and the NPS remained focused on the development of visitor facilities and related management programs.

At Glacier Bay in 1967, Superintendent Bob Howe, himself a biologist by training, needed to fill a vacant ranger position. Howe recognized the park's lack of knowledge of the biological resources the NPS was charged to protect, and he wanted someone who had a background in biology as well as experience in Alaska's backcountry.<sup>DDDD</sup> Greg Streveler, who had been working as a biologist for Alaska's

Department of Fish and Game, fit the bill perfectly and was hired. Several years later the park established a park biologist position. Streveler, a generalist who knew something of both terrestrial and marine biology, successfully competed for the position and retained it until leaving the Park Service in 1980.<sup>EEEE</sup> The park biologist position was eliminated at the time of Streveler's departure, and responsibility for the work of the sort he was doing transferred to the Resource Management Division.

The 1964 recommendation of David Butts to employ a fishery expert would, however, go largely unheeded for nearly three decades. The small amount of commercial fisheries research that was done at Glacier Bay during those years was overseen by the park's resource management division. That changed in 1991, when a small, professionally-staffed research division was established at Bartlett Cove. To head the new division Superintendent Marvin Jensen hired Jim Taggart, who had received a Ph.D. in zoology from the University of California at Santa Cruz in 1987 and had done marine mammal research in western Alaska. Taggart was assisted beginning in 1992 by seasonal biological technician Chad Soiseth, who became the fisheries biologist at Glacier Bay in 1996.

Within the research division, Glacier Bay's commercial fisheries research program was born specifically of a need by the NPS to learn more about the impacts of commercial fishing in the Bay. It was also supported by a general NPS policy (1988) to inventory and monitor the natural resources under its stewardship "to detect changes that may require intervention and to provide reference points for comparison with other, more altered environments."<sup>619</sup>

The principal task of the fisheries research program was to determine what effects commercial fishing had on Glacier Bay's ecosystem.<sup>620</sup> If the findings demonstrated that commercial fishing jeopardized the agency's mandate—as declared in the 1916 Organic Act—to "...conserve the scenery and the natural and historic objects and the wild life therein ... by such means as will leave them unimpaired for the enjoyment of future generations," then there might be justification to close fishing.<sup>621</sup> In relation to Glacier Bay's fisheries, however, the term "unimpaired" presented a problem:

<sup>DDDD</sup> The issue of greatest concern at the time was potential hard rock mining within the monument.

<sup>EEEE</sup> Streveler still resides in Gustavus, where he works as an independent environmental consultant. His broad understanding of Glacier Bay's natural environment is unparalleled.



**Figure 33: NPS researcher Phillip Hooge implanting a sonic tracking device in an adult halibut in Glacier Bay. (NPS collection, Bartlett Cove)**

it was difficult—and perhaps impossible—to quantify this term because fish populations fluctuate naturally and there was no baseline data on unfished populations. Time was of the essence, as the commercial fishing issue was rolling ahead, but the sort of questions that needed to be answered would require a number of years, if not decades, of study. In 1996, the NPS estimated that a 10-year research program to determine the effects of commercial fishing on marine and riparian habitats would cost \$1,300,000 per year.<sup>622</sup>

Fisheries research in Glacier Bay began in earnest in 1992, and focused on the three most important commercial species: Dungeness crab, Pacific halibut, and Tanner crab. In addition to the research, the geographical distribution of commercial gear for these species was monitored. Basic oceanographic work, including an important mapping of Glacier Bay's benthic habitats, was also begun.

The most prominent study of Dungeness crab was a multi-agency study that involved the NPS, the National Marine Fisheries Service, the U.S. Geological Survey, the University of Alaska, and the Alaska Department of Fish and Game.<sup>FFFF</sup> (NPS research was viewed as suspect by some who thought the agency was inherently biased toward proving commercial fishing was damaging Glacier Bay's ecosystem. The involvement of the different agencies provided

the study with a strong element of credibility.) The intent of the study was to document changes in the structure of Dungeness crab populations in Glacier Bay that would result from the anticipated closure of the Dungeness crab fishery. The 11-year study documented a dramatic increase in the relative abundance of large male Dungeness crab following the closure of the Dungeness crab fishery in Glacier Bay.<sup>623</sup> From their experience, fishermen—particularly Duke Rothwell, whose strategy was to fish an area, then let it “rest” so the numbers and size of crab would rebound—would have expected this, but the changes had not been scientifically documented until this study was completed.

Research efforts in Glacier Bay on halibut focused on diet, home range, site fidelity, habitat selection, distribution patterns, and the relationships between halibut and other species (see Figure 33).<sup>624</sup> The most prominent halibut study was an effort to determine the species's movement patterns. In this study, more than 1,500 longline-caught halibut were fitted with coded wire tags. Sonic transmitters about the size of shotgun shells were implanted in an additional 97 halibut larger than about 100 pounds. Coded wire tags were recovered when the halibut were caught by commercial fishermen, sportsmen, or researchers. The locations of halibut fitted with transmitters were

<sup>FFFF</sup> The study was officially known as the “Multi-Agency Dungeness Study” (“MADS”).

monitored with a special receiver. The study found that juvenile halibut moved widely, but tended to stay in Glacier Bay, while large, sexually mature individuals tended to have a much smaller home range.<sup>625</sup> This was something of a surprise to most fishermen: the conventional wisdom was that halibut generally migrated out of Southeast Alaska's waters into the Gulf of Alaska for the winter.

The Tanner crab research effort focused on the species's distribution and movement. To determine the species's distribution, a test pot was set in each grid of a square-kilometer grid system that comprised all of Glacier Bay. A tagging program attempted to determine movement patterns.

Fisheries research in Glacier Bay was conducted on government-owned as well as on chartered local fishing vessels. The 31-foot *Drumlin*, owned by the NPS was involved, as was the 38-foot research vessel *Quillback*, which was borrowed from the DOI's Mineral Management Service. The *Quillback* was returned in 1998, and replaced by the 50-foot *Tamnik*, a used salmon seiner that was renamed the *Alaskan Gyre*. The "Gyre," as it was called, was transferred from Glacier Bay to Prince William Sound in 2006. In 2007, the 24-foot USGS vessel *Sigma T* (formerly Naomi Sundberg's Dungeness crab vessel *Wavelength*, was stationed at Glacier Bay to provide support for researchers.

The stability of the fisheries research effort in Glacier Bay suffered from a lack of consistent funding. (At its peak, circa 1995, the budget for the research program was \$400,000 annually.<sup>626</sup>) The program also suffered from a lack of administrative continuity: in a major reorganization, the DOI in 1993 consolidated the biological research functions of all the department's bureaus, including Glacier Bay N.P.'s fledgling research division, into the newly-created National Biological Survey. Glacier Bay's research division became the Glacier Bay Field Station and was placed under the supervision of the Alaska Science Center in Anchorage. In 1995 the National Biological Survey's name was changed to the National Biological Service (NBS). The NBS, in turn, became part of the Biological Research Division (BRD) of the U.S. Geological Survey in 1996. The BRD's primary mission is to provide research expertise for DOI bureaus. The Glacier Bay Field Research Station was shuttered in 2006. During its short heyday, its staff included two perma-

nent scientists, a research vessel captain, an administrative secretary, a Ph.D. student, and usually 1-3 biological research technicians.<sup>627</sup>

With little hard scientific data on Glacier Bay's fisheries, at least one individual acknowledged in a 1996 NPS draft document that "No biological or sociological evidence is available to determine what, if any affects (sic) commercial fishing has on Park resources."<sup>628</sup> Unable to make a case that commercial fishing damaged Glacier Bay's marine ecosystem, the agency would have to base its reasoning for terminating commercial fishing in Glacier Bay on the more nebulous issues of "park values" and the global need for marine reserves.

### Superintendent Jim Brady

Marvin Jensen was transferred to Mojave National Preserve in December 1994 and was replaced as Glacier Bay's superintendent by Jim Brady, who arrived at Bartlett Cove in January 1995. Unlike Jensen, Brady was given clear marching orders: NPS Regional Director Robert Barbee instructed him that his first priority was to resolve the commercial fishing issue by implementing at least a variation of the plan initiated under Jensen. Among others, an additional priority for Brady was to rebuild the NPS's strained relationship with the people of Hoonah.

Brady and his staff later defined the NPS's main goals in resolving the commercial fishing issue:

- Preserve and perpetuate habitats, natural ecosystem processes, biodiversity, and population structure and density of species;
- Protect the wilderness and other inspirational, recreational, and educational park values;
- Expand knowledge and understanding of marine ecosystems;
- Enhance visitor experience opportunities;
- Sustain and strengthen Hoonah cultural ties to the park.<sup>629</sup>

Although traditional visitor-oriented NPS responsibilities were important, a Brady-era NPS draft document of unknown authorship dated April 1996 stated it was most important to "maximize the marine sanctuary value of Glacier Bay."<sup>630</sup>

After 33 years of service with the NPS, Brady had been eligible for retirement for a

number of years. His career with the NPS nearly at its end, Brady could afford to be bold, to do what he felt was right without fear of jeopardizing his future in the Service. He was not shy about doing so, although early on he deferred to Randy King, who had been immersed in the commercial fishing issue for half a decade. Brady's ideas regarding how the issue might be resolved did not always coincide with those of his superiors in Washington, DC.

Very shortly after he received word of his assignment to Glacier Bay, Brady became involved in developing a strategy to deal with the commercial fishing issue, which had been languishing in part because Molly Ross had been too busy with other issues. His basic strategy was to attempt to negotiate a settlement with the Knowles administration. The staff at Glacier Bay thought Knowles might support, or at least not oppose, closing Glacier Bay to commercial fishing if it received something in return, such as allowing the outer waters to remain open.<sup>631</sup>

**"Pay me not to fish in Glacier Bay!"—Tom Traibush to Bruce Babbitt, September 1994<sup>632</sup>**

In late June 1995 Brady began meeting privately with Dungeness crab fishermen who fished the Beardslee Islands. Those who participated in the meetings characterized Brady as sincere and respectful, with Charlie Clements expressing their appreciation for Brady's "attempt to understand us as individuals and not just as a political problem."<sup>633</sup> The first meeting seems to have been with Otto Florschutz, who in 1984 had bought Duke Rothwell's boat, *Adeline*, and crab fishing operation. Florschutz explained to Brady that he was not a radical, but he would do everything he could to stop the NPS from shutting down commercial fishing in Glacier Bay. He said that if the NPS wanted the Glacier Bay's fisheries closed, the NPS should "replace our income."<sup>634</sup>

After meeting among themselves on July 12, Beardslee Islands Dungeness crab fishermen Tom Traibush, Otto Florschutz and Charlie Clements on July 15 sent a joint letter to Jim Brady requesting a meeting to "discuss language

to promote an acceptable solution and form of compensation."<sup>635</sup> Brady met with the group not long afterward in Gustavus, at the home of Tom Traibush and Naomi Sundberg.<sup>GGGG</sup> Subsequent letters to Brady by the fishermen listed three possible forms of compensation:

1. a concession permit to operate a tour boat in Glacier Bay;
2. 50,000-60,000 pounds of halibut or sablefish IFQs;
3. a cash settlement in the range of \$350-500 thousand.<sup>636</sup>

The idea of fishermen being compensated with a concession permit would have been complicated and would have required waiting for existing permits to expire. This idea seems to have been rejected outright. The halibut quota share program had been implemented only a year earlier, and the Government had begun seizing shares owned by fishermen who owed back taxes.<sup>HHHH</sup> It was thought that these could be transferred to fishermen at little cost to the government. Brady rejected the idea of compensation with IFQs as being too complicated.<sup>637</sup>

A simple buyout, however, was an option. The idea had been discussed at Glacier Bay N.P. as early as 1989 among park officials, but was given greater consideration after a \$25 million federal buyout of excess fishing capacity in the Northeast in 1994-1996.<sup>IIII 638</sup> This was reflected in a meeting Brady had with Tom Traibush on the dock at Bartlett Cove. Brady asked Traibush what it would take to, in Traibush's words, "make you guys go away." Traibush responded that if the NPS closed commercial fishing in Glacier Bay, he would take the issue to court. (Traibush later calculated how much he could afford to spend on a court challenge.) Brady then asked how much it would cost for the Government to buy him out. Traibush gave Brady an estimate that he made clear represented only himself.<sup>639</sup>

In September 1995, Glacier Bay N.P. staff met with ADF&G personnel to

<sup>GGGG</sup> Matt Metcalf was not party to the discussions, but about this time he realized that the end of his Dungeness crab fishing career in Glacier Bay might really be at hand.

<sup>HHHH</sup> See page 105 (Fish Report 6) for a description of the halibut quota share program.

<sup>IIII</sup> Government buyouts or "buybacks" are generally associated with fleet overcapitalization and over-harvest capability that jeopardize the fleet's economic viability and/or threaten fish stocks. The situation was different at Glacier Bay. Here the buyout was not related to over-harvest or overcapitalization.

explore options for a resolution to the commercial fishing issue. The parties agreed that a stable, long-term resolution would require the involvement of key stakeholders representing the commercial fishing industry, Natives, and environmental groups. To that end, NPS and ADF&G agreed to jointly sponsor stakeholder meetings in Juneau in mid-November.<sup>640</sup> Those who participated in these and subsequent meetings were sometimes referred to as the “Glacier Bay Working Group,” not to be confused with a 1993 group with the same name. Among the groups represented at the meetings were the Allied Fishermen of Southeast Alaska (AFSA), Hoonah Indian Association (HIA), National Parks and Conservation Association (NPCA), and the Southeast Alaska Conservation Council (SEACC).

The November 15-16 meetings were held in ADF&G’s conference room in Juneau. The meeting’s sponsors set a modest agenda: “build a better understanding of the issues and stakeholder concerns and needs, and to develop a framework for seeking consensus,” and noted that “this unresolved issue leaves individuals, communities, and the interests of the State and National Park in an unacceptable void.”<sup>641</sup> The meeting was mostly a “get acquainted” affair and accomplished nothing of substance.

Likewise, little was accomplished in the meetings of December 5<sup>th</sup> and 6<sup>th</sup>. Though led by a contracted facilitator/mediator, stakeholders did little more than make what the NPS termed a “general (though tenuous) commitment to participate in discussions,” and establish ground rules—no electronic recording among them—for future meetings.<sup>642</sup>

That same month, Alaska’s House of Representatives waded into the Glacier Bay commercial fishing issue, at least rhetorically. The chamber passed a resolution that claimed that the prohibition of commercial fishing (and subsistence use) in the park would have “disastrous and widespread economic, environmental and social consequences” for Southeast Alaska’s fishermen and communities. The legislators concluded by requesting that the NPS promulgate regulations to provide for the continuance of commercial fishing in Glacier Bay N.P. under the laws of the state. The resolution was passed by Alaska’s Senate in late February 1996.<sup>643</sup> It had no effect whatsoever on the NPS’s effort to terminate commercial fishing in Glacier Bay.

The following month Jim Brady and his staff met with ADF&G Deputy Commissioner Rob Bosworth, who represented the department on the Glacier Bay commercial fishing issue. Bosworth had a rustic second home in Gustavus, and knew personally some of the individuals (including the author) involved in commercial fishing in Glacier Bay. Brady wanted to negotiate a settlement, and said that the NPS was willing to look at changing policy or regulations to allow commercial fishing to continue in Glacier Bay, subject to restrictions that involved the prohibition of commercial fishing during the visitor season and an immediate closure of wilderness waters. This agreement, he said, would garner the support of DOI. Bosworth stated that ADF&G might be willing to work with the NPS on designing special Glacier Bay regulations.<sup>644</sup> Such was not to be. Glacier Bay had become a high profile issue at DOI, and the department hierarchy was not willing to support a continuation of commercial fishing. It wanted a phase-out, ideally a short phase-out, that would result in a complete end to commercial fishing in the bay.

With the support of his regional director, Jim Brady worked directly with Assistant Secretary of the Interior George Frampton and his special assistant, Molly Ross. At least part of the reason for the close relationship was Molly Ross’s concern that Brady needed the guidance that she and Frampton could provide.<sup>645</sup> Simply put, Brady was far more accommodating of commercial fishing interests than Frampton and Ross preferred. In mid-March 1996, Brady recommended a framework to resolve the Glacier Bay commercial fishing issue. Among other components, it involved the continuation, save during the primary visitor season (May 1 through September 30), of commercial fishing in the waters of Glacier Bay—including wilderness water—for 15 years, after which the activity would be reevaluated for possible continuation. Additionally, commercial fishing would not be restricted in the park’s outer waters.<sup>646</sup> Frampton and Ross thought broader closures could be achieved on a much shorter timetable.

The DOI plan that evolved was to continue stakeholder meetings while working on a modification of the 1991 proposed rule, which the agency considered “stale.”<sup>647</sup> Another factor that forced the abandonment of the 1991 rule was that it had been held for so long by DOI

that it might not have met federal procedural requirements for publication as a final rule.<sup>648</sup>

Frampton and his successor, Donald J. Barry, wanted a maximum phase-out period of 5 years. Brady thought negotiations with commercial fishing interests would break down if more time was not offered. To “keep people at the table,” Brady proposed a 15-year phase-out period.<sup>649</sup> There was a lot of support in Southeast Alaska for a longer phase-out period—one was for 77 years—but the NPS, for the time being, decided it was committed to a maximum of 15 years, which it considered very liberal.

Although the court had determined in 1994 that commercial fishing was illegal in wilderness waters, the regulation was not enforced while the NPS worked on a revised Vessel Management Plan. That plan was published as a final rule in May 1996. It closed Glacier Bay’s wilderness waters to motorized use from May 1 through September 15. If enforced, this rule would have ended the summer Beardslee Islands Dungeness crab fishery. Partly as an act of good faith while stakeholder talks were ongoing, however, the NPS agreed to allow commercial fishing in the Beardslees to continue until June 1997.<sup>650</sup>

A second round of the Glacier Bay Working Group stakeholder meetings was held in Juneau on March 13-14, 1996. Proposals were presented by SEACC, AFSA and the NPS with the goal of identifying areas of agreement and disagreement and to focus discussions.<sup>651</sup> Bart Koehler, who represented SEACC at the meetings, thought the working group was “pretty darn close” to reaching an agreement that would retain traditional fisheries on the outer coast, Cross Sound, and Icy Strait in perpetuity, and would delete the Beardslee Islands area from its wilderness designation, while designating Muir and Wachusett inlets as wilderness.<sup>652</sup> Jim Brady pointed out a sticky impediment to the ongoing local consensus process: that the involvement of national conservation groups would be required at some point.<sup>JJJJ</sup> The groups (mainly the Sierra Club, Wilderness Society, and National Parks and Conservation Association) were more hard-line than SEACC, and the issue could not be resolved comprehensively without their being part of the process.

At the March 14 meeting Brady presented a seven-point proposal to resolve the Glacier Bay commercial fishing issue. The proposal, which was not authorized by the DOI, would be the main subject of the following stakeholder meeting.<sup>653</sup>

In addition to the desire by the NPS and many conservation groups to terminate the commercial fishery, Glacier Bay’s Dungeness crab fishermen faced pressure from another side. Among many stakeholders, the fishery was early-on considered second-tier, of lesser importance than the halibut and salmon fisheries. At least one fishing interest involved in the meetings looked upon the Dungeness crab fishery as trading stock, an expendable fishery that could be terminated in exchange for favorable consideration by the NPS and conservation interests of other Glacier Bay fisheries. Tom Traibush was advised that he and his fellow Glacier Bay Dungeness crab fishermen might have to “take one for the team.”<sup>654</sup> Sensing his vulnerability, Traibush almost immediately hired Jim Clark, a Juneau attorney with close ties to Alaska’s congressional delegation (particularly Senator Murkowski), to represent him.<sup>KKKK</sup> At the next stakeholder meeting, Daniel Boone, an attorney colleague of Clark’s, was at Traibush’s side. With the involvement of a private attorney, the Dungeness crab fishery quickly became a first-tier issue, and the intensity and sophistication of the Glacier Bay negotiations were ratcheted up a notch. Bill Woolf, Senator Murkowski’s aide who specialized in commercial fisheries issues, said in late 1996 that the Beardslee Islands crabbers were the “most serious problem” in resolving the Glacier Bay issue. Woolf favored granting the handful of crabbers with 10-year histories in the Beardslees life tenancy or what he thought was a reasonable buy-out option: approximately \$50,000.<sup>655</sup> At DOI in the spring of 1996, Molly Ross, in contemplating the possibility of legislation to settle the Glacier Bay issue, wondered whether a “few life permits” should be authorized.<sup>656</sup>

Traibush and other “similarly situated” Beardslee Island crab fishermen soon attempted to negotiate a deal of their own. Represented by Clark, the fishermen proposed a compromise: in exchange for being able to fish in Glacier Bay in perpetuity in all seasons subject to ADF&G regulations, they were willing to stipulate that

<sup>JJJJ</sup> Jack Hession, of the Sierra Club, was present at the meeting.

<sup>KKKK</sup> Frank Murkowski was elected governor of Alaska in 2002. Jim Clark became his chief of staff.

their collective right to fish would terminate when they ended their fishing careers. The phase-out desired by the NPS would occur, but on the fishermen's schedule. The proposal warned that any litigation on the issue would be "protracted and unpleasant."<sup>657</sup> The offer fell on deaf ears, but soon thereafter, at the third round of stakeholder meetings, which took place in Gustavus on May 2-3, 1996, an 11-member work group was established to address compensation for the Beardslee Islands Dungeness crab fishermen.<sup>LIII</sup> The group met on May 31 and discussed the historical effort in the fishery and participation thresholds for eligibility, as well as alternatives to compensation.<sup>658</sup>

The main focus of the early May stakeholder meetings was a modified version of Brady's seven-point proposal that would eventually close Glacier Bay proper to make it a marine sanctuary or "core protected area"—"a minimally disturbed ecosystem with high biological diversity where researchers can observe and study unique, exceptional natural and successional processes."<sup>659</sup> According to the NPS, "Glacier Bay could be a leader in marine conservation and the north-most marine sanctuary/refuge of global significance."<sup>660</sup> Knowledge gained in Glacier Bay could be applied to other areas. What was clear with this proposal, however, was the NPS's focus on ending commercial fishing in Glacier Bay proper, and its willingness to allow it to continue in other waters of the park. The seven points of Brady's proposal were:

1. Authorize commercial fishing in waters outside Glacier Bay proper;
2. Implement the NPS December 1988 Wilderness FEIS Modified Proposed Action that would delete Rendu Inlet, Beardslee Entrance, and the mouth of Adams Inlet from wilderness designation. In exchange, Muir Inlet and Wachusett Inlet above Point McLeod would be designated wilderness;
3. Close Glacier Bay to commercial fishing during visitor season (May-September);
4. Authorize commercial fishing in Glacier Bay during the non-visitor season (October-April), including some wilderness, with a 15-year phase-out period;

5. Reduce sport fishing impacts because sportfishing was viewed by the commercial industry as inconsistent with the park's stated objectives;
6. Develop a Native educational fishery; and,
7. Charter an advisory panel.<sup>661</sup>

The NPS was finally putting substantive proposals on the table. Brady thought considerable progress was made at the meeting, and that opportunities for continued progress clearly existed. He believed that everyone at the table was committed to making the process work and reaching an agreement.<sup>662</sup> Rob Bosworth, the state's principal representative at the meeting, thought that the Glacier Bay issue could actually be resolved if the group continued on its trajectory. It was a big "if," however, given the deep and fundamental divisions that separated the stakeholders, and Bosworth considered a fairly prompt resolution to the issue "pretty unlikely." He saw no alternative other than to continue "plugging away."<sup>663</sup>

Assistant Secretary George Frampton saw little merit in the seven-point proposal, thinking it might be appropriate for a multiple-use area, but not in line with his office's more preservationist objectives. Frampton feared that the stakeholder negotiations could get out of hand very quickly, and he had concerns about the ability of the NPS staff at Glacier Bay to arrive at a satisfactory resolution of the issue.<sup>664</sup> Frampton no doubt had a fine legal and philosophical understanding of the issue, but he was insulated from the personal component that those at Glacier Bay faced almost daily.

The next stakeholder meeting was tentatively scheduled to be held in Gustavus on June 6-7, 1996, but the meeting was cancelled and the stakeholder process stymied when the Service determined that procedural requirements of the Federal Advisory Committee Act (FACA) made more such meetings illegal.<sup>665</sup> The negotiations that George Frampton found so objectionable were on hold.

With its options dwindling, the NPS decided to go it alone and established a strategy and timeline to design a new rule on commercial fishing in Glacier Bay N.P. The agency an-

<sup>LIII</sup> The task group consisted of five fishermen, two representatives of the NPS, two representatives of the State of Alaska, one representative of a fisherman's group (AFSA), and one representative of a regional environmental group (SEACC).

anticipated the publication of a final rule around September 15, 1997.<sup>666</sup>

Resolving the Glacier Bay issue remained a “very critical priority” for the NPS, but became less so for the DOI. This led to some frustration at Glacier Bay. A September 1996 decision paper prepared by park staff at Glacier Bay contained the following plea: “We need the Department’s support in resolving the commercial fishing issue. NPS urges action now. The progress achieved to date is eroding and will be lost entirely without clear support, action and direction from the Department.”<sup>667</sup> The NPS proposed moving forward as soon as possible by employing a negotiated rulemaking process that was suggested by Molly Ross. In this process the agency would develop a proposed rule to serve as a focus for negotiations. A FACA chartered committee would then be charged with developing a consensus rule based on the proposed rule. The NPS would then propose the committee’s consensus rule through the regular rulemaking and NEPA process. It was estimated that the process would take a year. A disadvantage of the process in this case was the difficulty of including all interested parties.<sup>668</sup> Brady recognized the importance of “keep[ing] fishermen at the table,” and he suggested that Secretary Babbitt agree to a two-year moratorium on any actions affecting the status of ongoing commercial fisheries in Glacier Bay.<sup>669</sup>

In contemplating what a final rule might look like, the NPS considered the possibility of “compensating or dispensating” displaced commercial fishermen.<sup>670</sup> The DOI wondered if the rule could provide the NPS authority to negotiate voluntary buy-outs of the rights of individual grandfathered fishermen during the anticipated 15-year phase-out period. It was thought that some fishermen who used Glacier Bay only occasionally might be willing to “sell 15 years of opportunity” for “a few thousand dollars up front.” It was thought that a bit of “surgical legislation” would likely be needed to establish a legally defensible program of grandfathering and phase-outs.<sup>671</sup>

Bill Woolf, of Senator Murkowski’s office, had little faith in the negotiated rulemaking

process because he thought that the Sierra Club and The Wilderness Society could not be trusted. In early November, Woolf convened a meeting of a group that he termed the “core stakeholders.” The group was comprised of Randy King (NPS), Judy Gottlieb (NPS), Rob Bosworth (State of Alaska), Bart Koehler (SEACC), Greg Streveler (SEACC), Dale Kelley (ATA), Jev Shelton (fisherman), and Beardslee Islands crabbers Tom Traibush and Naomi Sundberg with their attorney, Daniel Boone. Woolf intentionally did not invite anyone to represent Native/subsistence interests or representatives of national environmental groups. He believed that consensus was reachable within this core group. It may certainly have been, but the reality was that any realistic consensus required the concurrence of the two interests Woolf chose to leave out of the meeting. And Woolf wasn’t even sure what his boss, Senator Murkowski, would agree to.<sup>672</sup> Nothing of substance was accomplished at the meeting, and at least some members left wondering why it had been called.

In December 1996, Brady met with Bill Woolf of Senator Murkowski’s office to discuss the Glacier Bay issue. As opposed to a negotiated rulemaking, Woolf favored continued stakeholder discussions that would hopefully lead to a foundation for legislation. He was looking for a solution that provided for a continuation of commercial fishing in the outer waters that was subject to restrictions (no new gear types) and the designation of Glacier Bay proper as some sort of marine reserve that included some commercial fishing.<sup>MMMM</sup> According to Brady, Woolf also wanted to provide “fair compensation to those who will not have an alternative area to fish in.”<sup>673</sup>

Brady and his staff, on the other hand, continued to seek out options on how to make Glacier Bay a marine reserve that did not include commercial fishing. That same December, an invitation-only federal interagency meeting was held in Juneau. The subject of the meeting was “Marine Reserves: Possible Applications for Glacier National Park and Preserve.” Its purpose was “To learn about and discuss the objectives, effectiveness, design, and monitoring of marine fisheries reserves in other

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<sup>MMMM</sup> In 1993, John Katz, Alaska’s governor’s representative in Washington, DC, said that maintaining provision for the continuation of commercial fishing in what George Frampton termed “off coastal” waters of Glacier Bay N.P. was something Alaska’s congressional delegation (and the state) would “fall on their swords” over. In the spring of 1998, Bill Woolf said that the termination of commercial fishing in Glacier Bay’s Outer Coast waters would only occur “over the dead bodies of the Alaska Delegation.”

parts of the U.S. and world; learn about how this information could be applied to managing fisheries in Glacier Bay waters.”<sup>674</sup> Some of the meeting involved strategizing on how to marry the marine reserve concept to the elimination of commercial fishing in Glacier Bay. On the subject of minimizing public objection to the possible closing of Glacier Bay to commercial fishing, Jim Bohnsack, research fishery biologist with the National Marine Fisheries Service, said that calling a closure “experimental” often helps to sell the idea to fishermen: After 10 years, according to Bohnsack, people are accustomed to the closure.<sup>675</sup>

Not long after this meeting, researcher Jim Taggart pointed out that the elimination of commercial fishing in Glacier Bay would allow researchers to determine what population parameters are characteristic of unexploited fish populations. This knowledge, in turn, would provide marine resource managers with an idea of what “unimpaired” meant quantitatively.<sup>676</sup>

Under Jim Brady, the relationship with the people of Hoonah improved. Evidence of this was the signing in September 1995 of a 5-year memorandum of understanding (MOU) with the Hoonah Indian Association (HIA), which is the federally-recognized governing body of the Huna Tlingit, whose traditional homeland included Glacier Bay.<sup>NNNN</sup> In 1998 the HIA represented 547 members.<sup>677</sup> The impetus for the MOU was an executive memorandum signed by President Clinton earlier that year that directed all agencies of the federal government to formalize government-to-government relations with federally-recognized Native American tribes.<sup>678</sup> The MOU between the NPS and HIA was largely the result of groundwork laid by NPS regional cultural anthropologist Tim Cochrane, park resource management specialist Mary Beth Moss, and anthropologist Wayne Howell. It committed the NPS to work with the HIA to protect the cultural heritage of the Huna Tlingit, explore ways to acknowledge and honor their cultural connection to Glacier Bay, and allow cultural activities in Glacier Bay that were “compatible with park objectives.” Toward that end, the NPS expressed its commitment to work with the HIA to develop a cultural fishery program as a means of sustaining cultural knowledge and tradition.<sup>679</sup>

In the 1996 election, Bill Clinton was re-elected as president, and the Republican Party enhanced its control of the Senate by gaining two seats. The most important result of the election for Alaska was that when the new Congress convened in January 1997, Alaska’s Senator Ted Stevens became chairman of the Senate Appropriations Committee. As such, he was one of the most powerful politicians in Washington, DC. One of Stevens’s preferred methods of expeditiously passing (sometimes unpopular) legislation was by attaching it as a last minute “rider” to a must-pass and often unrelated appropriations bill. This maneuver circumvented the committee process and irritated many within and outside of Congress. Bruce Babbitt derided the method as a “back-room, back-door, [and] dead-of-night way” to do the public’s business.<sup>680</sup> For commercial fishing interests seeking a resolution of the Glacier Bay commercial fishing issue on favorable (or the least unfavorable) terms, Stevens quickly replaced the more ideologically motivated and as yet unsuccessful Frank Murkowski as the “go-to guy.”

Shortly after Bill Clinton was inaugurated to his second term of office, Bruce Babbitt hired William Y. Brown, a former chairman of the conservation group Ocean Conservancy, to be his science advisor. Among Brown’s duties was to explore ways in which to expand DOI’s role in protecting the oceans.<sup>681</sup> While Brown had little directly to do with Glacier Bay, his appointment signaled the Clinton administration’s strong interest in protecting marine areas.

### **George Frampton’s Time for Action**

Assistant Secretary of the Interior for Fish and Wildlife and Parks George Frampton gave the Clinton administration advance notice that he would leave the DOI in mid-February 1997. Frampton recognized that his last opportunity to begin resolving the Glacier Bay issue was at hand. Also, he was concerned that in the absence of DOI action, Alaska’s congressional delegation might actually succeed in passing Glacier Bay legislation hostile to DOI’s goals. In mid-January 1997, Frampton asked NPS and DOI to embark on an intense two to three-week effort to develop a proposed rule

<sup>NNNN</sup> The MOU was renewed for five years in September 2000, and again in 2005.

for possible publication in the near future. Rulemaking had the advantage over legislation of including extensive public participation and, important to Frampton, the ability of the NPS to influence the decision. A disadvantage of promulgating a rule was that it would be subject to revision by a future administration. Legislation, on the other hand, was the result of a political process, and resulted in statutes, which were more difficult to change than regulations. The general approach, as directed by the DOI, was to secure a phase-out of commercial fishing in Glacier Bay proper through a ban on such activity except for individuals who, based on historic use, would be grandfathered for a limited period of time.<sup>682</sup> Frampton considered it fortunate that discussions and interest in Alaska had “advanced the issue.” “The time for action,” he wrote, “is now.”<sup>683</sup> According to a briefing paper prepared for Bruce Babbitt in February 1997, John Katz had indicated that the state supported the rulemaking approach, but recognized that some “surgically precise” legislation might be needed as well.<sup>684</sup>

Frampton’s staff spent considerable time deciding how to best expedite the process bureaucratically. It also pondered phase-out periods and the possibility of buyouts. Frampton favored buyouts as a way to hasten the termination of the fishery.<sup>685</sup>

In Alaska, Supt. Brady believed the treatment of the handful of fishermen who had a history of Dungeness crab fishing in the Beardslee Islands would set the tone for the overall rulemaking. The group had attracted the concern of the fishing industry, the State of Alaska and Alaska’s Congressional delegation, and Brady thought there would be a need to provide them some fishing opportunity in the Beardslees. Brady considered this issue, as well as two others, to be “keystone, deal-maker/deal-breaker” issues. The others were the length of the phaseout of the fisheries (Brady expected the state to hold out for a phaseout period of at least 15 years), and, in order to give the state a legitimate stake in the issue and lessen its opposition, a provision for joint federal/state management of ongoing fisheries in Glacier Bay N.P.<sup>686</sup>

Within a month Frampton was supplied with a description of the proposed rule, which he quickly approved.<sup>687</sup> Frampton promptly contacted Rob Bosworth at ADF&G and John Katz, the governor’s representative in Wash-

ington, DC, regarding his department’s effort to force a solution to the Glacier Bay issue. Frampton did not notify Alaska’s Congressional delegation.<sup>688</sup> Before the end of January, the Sierra Club and other interested parties were briefed regarding the content of the new proposal.<sup>689</sup> In its haste to resolve the issue on its own terms, the DOI decided to publish a proposed rule before the environmental assessment (EA) required by the National Environmental Policy Act (NEPA) was completed. Draft alternatives outlined when the proposed rule was published would be fleshed out in the EA. Although the NPS would accept written comments on the proposed rule until October 15, 1997, the formal public comment period would follow publication of the EA.

In early March 1997, the U.S. Ninth Circuit Court of Appeals upheld the lower court’s decision in *AWA v. Jensen* that the NPS’s Organic Act did not, per se, prohibit commercial fishing in Glacier Bay N.P. One concurring judge (Mary M. Schroeder) stated that the court’s decision “should not be interpreted as an endorsement of unfettered agency discretion to permit commercial fishing in the Park.”<sup>690</sup>

Brady recognized that the NPS had a degree of discretion on whether or not to allow commercial fishing in Glacier Bay N.P.’s non-wilderness areas. He noted that if commercial fishing was to be permitted in Glacier Bay N.P., the current general regulation forbidding it would need to be modified.<sup>691</sup>

### 1997 Proposed Rule and Its Backlash

The 1997 proposed rule got off to a rough start. To help insure that it was portrayed as DOI/NPS intended (not an elimination of commercial fishing, but a proposal to facilitate robust discussion of the issue), there was supposed to be a carefully controlled roll-out of the rule beginning about April 15. Courtesy and tradition demanded that Alaska’s congressional delegation and the state be briefed prior to the rule’s publication in the *Federal Register*. As it happened, however, the public—including Alaska’s congressional delegation and the state—first learned of the rule’s imminent publication not from DOI/NPS, but in an April 10 article in the *Anchorage Daily News*. Even the title of the article, “Park Fishing May Be Axed,” though precisely accurate, was problematic in light of the softer message DOI/NPS wanted to portray. In the article, Glacier

Bay Superintendent Jim Brady remarked that the proposed rule was expected to be issued in about two weeks. Molly Ross first learned of Brady's pre-emption of their plan through a phone call from Senator Murkowski's office. (Ross's reaction was a groan, followed by a profuse apology, quick plans to make more apologies and a plan to keep the proposed rule on track.)<sup>692</sup>

On April 16, 1997 the NPS published a new proposed rule that was, except for the closure of commercial fishing in Glacier Bay proper during the visitor season, considerably less restrictive than its 1991 predecessor.<sup>693</sup> The new proposed rule incorporated each of Jim Brady's "keystone" recommendations, as well as many of the ideas discussed in the 1995-1996 stakeholder meetings, particularly those presented by the NPS.<sup>694</sup> The proposed rule would:

- prohibit all commercial fishing in Glacier Bay proper but provided exemptions for a 15-year phase-out period for fishermen who had developed an historical reliance in any or all of four specified fisheries (trolling for salmon, long-lining for halibut, and pot and ring net fishing for Dungeness and Tanner crab) and could verify participation during six of the last ten years. Fifteen years was considered enough time for fishermen to adjust their activities to waters outside Glacier Bay, to amortize investments they had made in vessels and gear, and, in some cases, to continue fishing until retirement.<sup>695</sup> Subject to the availability of funds, the NPS or a third party could offer to purchase and retire exemption permits from fishermen willing to sell them;
- close Glacier Bay proper to all commercial fishing during the visitor season (May 1-September 30);
- implement the statutory prohibition on commercial fishing in designated wilderness marine waters, with the possible granting of a special use permit that would allow certain Beardslee Islands Dungeness crab fishermen to continue

to take crab in specified locations as part of an ongoing research project that was expected to last an additional 5-7 years;<sup>696</sup>

- propose management of Glacier Bay's commercial fisheries under a plan cooperatively developed by NPS and the state, but subject to the Secretary of the Interior's authority to "protect park purposes and values;" and
- allow most commercial fisheries in the park's non-wilderness marine waters outside Glacier Bay proper to continue for 15 years, after which they would be subject to re-examination.

As it had done while Marvin Jensen was superintendent, the NPS claimed that the economic effects of the proposed rule would be "negligible" and that the proposed 15-year phase-out period would allow fishermen to "disperse to areas outside of Glacier Bay proper with no significant change in their landings and revenues."<sup>695</sup> The possible exception was the 6-10 Dungeness crab fishermen who operated in Glacier Bay N.P., primarily in the Beardslee Islands. Given that the limited Dungeness crab fishing grounds in the region were already fully utilized, the opportunities available to these fishermen (once the possible research fishery was completed) would be limited. The NPS, however, took no responsibility for the impending closure of the Beardslee Islands to commercial fishing, citing their designation as wilderness in 1980 under ANILCA.<sup>696</sup>

The NPS was quick to publicly portray the proposed rule as only a proposal that would provide the legal basis and structure for reinitiating and encouraging discussion of the Glacier Bay commercial fishing issue among all interested parties.<sup>697</sup> Commercial fishing interests had a more sinister conclusion: it was all about closing Glacier Bay to commercial fishing as soon as possible.

The NPS scheduled open houses/workshops for May in Gustavus, Hoonah, Pelican, Elfin Cove, Juneau, Sitka and Seattle.<sup>698</sup> The public was given fully six months (until Octo-

<sup>692</sup> SEACC later complained that the regulations "failed to incorporate numerous proposals made by the Glacier Bay Stakeholders Group." (Bart Koehler, May 20, 1998 letter to Jim Brady.)

<sup>693</sup> According to a DOI/NPS planning document, "The 15 year period of time was derived from a general assessment of the average age of the fishers involved in park fisheries, and the amount of time it would take for these fishermen to retire." (Glacier Bay National Park Framework for Proposed Rulemaking, January 20, 1997.)

<sup>694</sup> Some at DOI worried that a future administration could "drive a truck through this opening in the Wilderness Act."

ber 15, 1997) to comment on the issue.<sup>RRRR</sup> The DOI hoped to have a comprehensive resolution to the controversial issue crafted before the 1998 summer visitor season.<sup>699</sup> Secretary of the Interior Bruce Babbitt wanted the issue settled on his watch, saying in a DOI news release that it was time to “identify the best solutions and get it done.”<sup>700</sup>

In promoting and defending its plan, the NPS continued to insist that commercial fishing in the non-wilderness waters of Glacier Bay N.P. was illegal.<sup>701</sup> Although this may have been technically correct, it was misleading: the district court’s decision, upheld by the appeals court only a month prior to the release of the proposed rule, had clearly stated that there was no statutory ban on commercial fishing in the non-wilderness waters of Glacier Bay N.P., and that the NPS had the authority to allow commercial fishing in such waters through a complex environmental planning process and regulatory changes. Commercial fishing in Glacier Bay N.P.’s non-wilderness waters was illegal only because the NPS had not made it legal. The Small Business Administration later harshly criticized the NPS over this “misstatement of the law.”<sup>702</sup>

Within a month of the proposed rule’s release, Alaska Governor Tony Knowles asked the NPS to work with the state to immediately reconvene the stakeholder discussions, which to Knowles represented the best chance for a fair resolution of the issue.<sup>703</sup> It was the state’s observation that the DOI was most interested in a compromise that ended commercial fishing in Glacier Bay proper and allowed it to continue in the other waters of the park. According to the state, DOI was interested in protecting migratory species, such as king salmon, but more interested in protecting “seasonal” species, such as halibut. DOI was most interested, according to the state, in protecting Glacier Bay’s resident species, such as Dungeness crab.<sup>704</sup> Two months later ADF&G director Frank Rue demanded that the NPS provide a comprehensive analysis of the economic effects of the proposed rule. Specifically, Rue asked:

1. What will be the long-term and short-term socioeconomic impact to fishermen and their families, processors, processing workers, and local communities if commercial fishing is phased out in the Park?

2. What will be the socioeconomic impact to these same groups when fishermen are forced out of traditional Park waters and must disperse to other fishing grounds in Southeast Alaska?
3. What other fisheries are these fishermen most likely to shift their effort into or will they exit the regional fisheries altogether?
4. What will be the biological impact to fish and game populations due to increased pressure on stocks in other areas? What impact will this have on the State of Alaska’s management regime for those fisheries affected by the redistribution of effort?
5. What are the perceived national benefits to be gained by applying a prohibition on commercial fishing in the Park?<sup>705</sup>

Brady responded that a comprehensive economic assessment would be made, but it would be hampered somewhat by the difficulty of obtaining fishery landing data from ADF&G and the fact that ADF&G’s statistical reporting areas did not coincide with the boundaries of Glacier Bay N.P.<sup>706</sup>

At the request of commercial fishermen, Alaska’s Legislature responded to the proposed rule by appropriating \$100,000 of Department of Law funds to defend commercial fishing in Glacier Bay N.P. The money was drawn from a fund used for legal battles over federal-state issues.<sup>707</sup> Some of the money was used to support litigation, some to support public stakeholder meetings, and some to pay the expenses of Rob Bosworth and two fishermen who journeyed to Washington, DC late that year to lobby on the Glacier Bay issue.<sup>708</sup>

One of the benefits touted by the NPS of the proposed rule was that it would “minimize conflicts among visitors pursuing different yet appropriate park experiences.”<sup>709</sup> The NPS was basically referring to kayakers. Recreational “sea kayaking,” as noted above developed in the 1970s and was one of the primary visitor uses in Glacier Bay. Visitors brought their own kayaks, rented them at Bartlett Cove or Gustavus, or participated in guided trips operated by concessioners. Alaska Discovery, a major guiding company in Glacier Bay N.P., was one of Southeast Alaska’s premier backcountry travel companies. Its business at Glacier Bay was

<sup>RRRR</sup> The period would be extended twice.

established in 1972 with Gustavus residents Hayden and Bonnie Kaden as principals. In 1986, the Kadens split from Alaska Discovery and formed Glacier Bay Sea Kayaks.

If there was one business group in Southeast Alaska that one would have instinctively thought would be opposed to commercial fishing in Glacier Bay, it would likely have been the kayakers. This was not the case, however. Although there were certainly some in Southeast Alaska who favored ending commercial fishing in Glacier Bay, the strong support of local kayaking interests for the continuance of commercial fishing at historical levels showed the relative unity that many Southeast Alaskans felt in opposing the NPS's efforts to end commercial fishing in Glacier Bay.

Though there were exceptions, local kayaker operators generally seemed to have little problem with commercial fishermen, and some, uneasy in the wilderness, even appreciated their presence. The assistance of power vessels with radio communications could be very handy should an emergency arise. Out of generosity and perhaps a desire to promote good relations, Dungeness crabbers occasionally offered kayakers enough crab for a meal. There was, however, occasional irritation among kayakers over engine noise and occasional loud music that emanated from commercial fishing boats, as well as the high concentrations of Dungeness crab buoys in the Beardslees. Even Senator Frank Murkowski acknowledged the potential for conflict between commercial fishermen and kayakers in Glacier Bay.<sup>710</sup>

Among local kayak businesses, the evidence of unequivocal support for commercial fishermen is contained in two letters written to Jim Brady in 1997. The owners of Glacier Bay Sea Kayaks wrote the following in response to the proposed rule:

We are writing to express our support of historic levels of commercial fishing in Glacier Bay National Park. We believe our comments will be of value to you since we have been serving the independent kayaker as the concession service for kayak rentals in Glacier Bay since 1978.

As an historical operator, we cannot report a single negative comment about commercial fishing in Glacier Bay from the hundreds of clients we have served annually for

the past nineteen years. Their reaction towards fishing in Glacier Bay has been quite the opposite; we have had many rental customers inquire as to where they might be able to see fishing boats while kayaking in Glacier Bay. These backcountry visitors are unoffended by Glacier Bay's small scale commercial fishing and, in fact, have expectations to see the small fishing boats in Glacier Bay because they consider it part of their visitor experience...

It has been the aid that fishermen have provided on occasion to lost kayakers in the Beardslee Islands that we have especially appreciated over the years. Despite the maps and thorough orientations that are provided, more than once day paddlers have become disoriented in the maze that is the Beardslees, but have been pointed in the right direction by fishermen.

As a commercial operator in the Park serving the needs of the independent kayaker, we feel strongly that there has never been a conflict between the backcountry visitor's use of the Park and commercial fishing. We advocate continued historical levels of commercial fishing in Glacier Bay.<sup>711</sup>

The folks at Alaska Discovery were of a like mind. Ken Leghorn and Susan Warner stated that they wished to

reiterate Alaska Discovery's support of historic levels of commercial fishing in Glacier Bay National Park. In the 25 years in which we have operated in the Park, we have not had one single negative experience between our guided groups of kayakers/campers and any commercial fishing operation. We seldom have any interaction or even a sighting of a commercial fishing boat. When an interaction does occur, it has always been positive. Our customers and guides tend to view commercial fishing as a non-intrusive, 'charming' part of the Alaska water experience. We also know that fishermen have

from time to time helped aid or rescue campers.

Sometimes I hear the allegation that commercial fishing is incompatible with kayak/camping use of the Park. I wish to set our record straight, that at least as far as Alaska Discovery is concerned there is not a conflict. We believe there should be a way to accommodate continued low levels of commercial fishing in Glacier Bay.<sup>712</sup>

There must have been at least occasional dissatisfaction among Alaska Discovery's clients with commercial fishing in Glacier Bay, because at a public meeting on commercial fishing in Glacier Bay early the following year Leghorn stated that "guides can set the stage for how a visitor reacts—those guides that know the commercial fisheries and how/what he says regarding the type of vessels can influence expectations and biases are based on that."<sup>713</sup>

The proposed rule rang alarm bells in the offices of Alaska's U.S. senators. To neutralize the rule, at least in part, Senators Stevens and Murkowski co-sponsored legislation in July 1997 (S. 1064) that would permanently allow trolling, long-lining, and pot and ring net fishing in Glacier Bay proper.<sup>714</sup> Dungeness crab fishermen who had fished in the Beardslee Islands for 10 seasons during the years 1984-1995 and who were reliant upon it for a significant part of their income would be grandfathered into the fishery. Upon retirement, they would be able to transfer their rights to one successor. A provision of the legislation would have allowed the Secretary of the Interior to force a successor to relinquish his permit by paying him an amount equal to his expected lifetime income from the fishery.<sup>715</sup> Three fishermen—Charlie Clements, Otto Florschutz, and Tom Traibush—would have certainly qualified under the bill's provisions, and possibly several others would have as well. For cosmetic purposes, the legislation would have also designated Glacier Bay proper as the "Glacier Bay Marine Fisheries Reserve."<sup>716</sup>

In his floor statement introducing the bill, Senator Murkowski said that "there is no biological reason, none whatsoever, for restricting commercial fishing activity anywhere in the park. The fishery resources are healthy, they are diverse, they are closely monitored by

the State of Alaska Department of Fish and Game, and they are very carefully regulated." He then provided a very local perspective on the issue:

in the grand scheme of things, and recognizing consideration of the Nation's economy, these fisheries are small potatoes. But to the fishermen, the natives who depend upon them, to the families of small remote communities in which they live, these fisheries are of the utmost importance. They are harm free. And those who partake in them deserve this Government's help, not the destruction of their simple lifestyle.<sup>717</sup>

The NPS, in reaction to the bill's submission, contacted an aide to Senator Murkowski about the possibility of working out something together, but was informed that Murkowski now had no interest in that approach, and was unlikely to be at all conciliatory toward the NPS.<sup>718</sup> A hearing on the legislation before the Senate Committee on Energy and Natural Resources was scheduled for October 8 in Washington, DC.<sup>719</sup>

In October 1997, the NPS extended the proposed rule's public comment deadline from October 15, 1997 to June 1, 1998.<sup>720</sup> Part of the reason for doing so was the rekindling of the Glacier Bay Working Group, which had been initially formed in 1993 and re-formed in 1995. It was the NPS staff at Bartlett Cove's emphatic goal in late 1997 to "Resolve the commercial fishing issue in 1998!" The uncertainty of the current situation, it said, was "inherently untenable for all concerned, particularly fishermen needing to plan their lives."<sup>721</sup> In fact, the issue had by this time dragged on for so long that it seemed to many in the commercial fishing industry that the issue might never be resolved.

### **Mission Impossible: Seeking a Broad Consensus**

Although the Federal Advisory Committee Act prevented the NPS itself from holding stakeholder meetings without going through a lengthy process, no such constraint prohibited ADF&G from doing so. Rob Bosworth, deputy commissioner of ADF&G, organized the Glacier Bay Working Group. According to an optimistic Jim Brady, the goal of the

group was to find “substantial agreement on key issues.”<sup>722</sup> Some referred to this goal as the “Alaska Solution.”<sup>723</sup> In recognition of the group’s efforts and to give it time to work, Senator Murkowski, at the request of the State of Alaska and others, rescheduled the hearing on S. 1064 from October 8, 1997 to February 26, 1998.<sup>724</sup>

The prospects for an agreement among stakeholders were grim. Despite the efforts of individuals such as Bart Koehler at SEACC to forge one, a compromise between the national environmental groups that demanded an end to commercial fishing in Glacier Bay and the fishermen who would pay the price with their livelihoods was highly unlikely. The NPS rulemaking process was nevertheless grinding forward, and the meetings might help to define the parameters of a possible legislative solution.

Almost simultaneous with the initial work group meetings, the NPS sponsored three public workshops in Juneau (November 1997, January and February 1998). The purpose of the workshops was to increase public understanding of the Glacier Bay commercial fishing issue and to serve as a forum for public discussion of the legal, policy and resource issues associated with commercial fishing in the park. David Hanson of Anchorage-based ARKTOS Associates was contracted by the NPS as a neutral, third-party facilitator who would “enhance our ability to talk to one another.”<sup>725</sup> Hanson specialized in land, natural resource, environmental, and public policy mediation and facilitation. Presentations were made and discussions held on a number of facets of the fishing issue, including NPS and state objectives, the status of the rulemaking process, and Glacier Bay N.P.’s fisheries. Though he may have been less sanguine privately, Supt. Brady publicly hoped the workshops would result in “an enduring solution reflecting substantial public agreement on key issues.”<sup>726</sup> He later characterized the meetings as “difficult, often intense and protracted.”<sup>727</sup> The presence at all of the workshop (and work group) meetings of Molly Ross, special assistant to the Assistant Secretary of the Interior for Fish and Wildlife and Parks, was an indication that the DOI hierarchy was paying close attention to, if not trying to control, the issue. Brady later remarked with humor that Ross was there, in part, to “keep a lid on Brady.”<sup>728</sup>

<sup>722</sup> Marvin Jensen liked to point out the inconsistency of the NPS prohibiting a hunter from killing a 300-pound bear in the park but allowing a sport or commercial fisherman to kill a 300-pound halibut.

The first NPS workshop meeting was held on November 6, 1997. Ross welcomed the group, noting that one of her functions was to “bring to the discussion a national perspective that cannot be ignored in managing one of the best and most valued national parks.” She explained the NPS’s national policy and perspective on the issue, noting that the NPS’s “protection ethic” for terrestrial ecosystems was just beginning to be applied to management of marine ecosystems.<sup>729</sup> Ross said that from a policy perspective, commercial fishing was not allowed. Glacier Bay’s appropriate role, from a national law and policy perspective, was “to provide a protected marine ecosystem free from significant harvest.” Ross added, however, that when there were compelling reasons for doing so, some flexibility could occur in the application of national policy. Glacier Bay N.P., said Ross, had a “schizophrenic history” in regard to the legality of commercial fishing and the enforcement of fisheries-related regulations. Ross also pointed out that among the interests that must be considered in resolving the commercial fishing issue were the many people who would never visit Glacier Bay, but who cared about and were interested in it.<sup>729</sup>

The first work group meeting was held in Juneau on November 7, the day after the NPS public workshop. The stated purpose of the meeting was very basic: to “Identify and clarify issues that must be resolved in any lasting solution; discuss adequacy of existing mechanisms for achieving that solution; develop a process that will lead to definition of and agreement on a solution.”<sup>730</sup> The meeting was facilitated by Sally Gibert, of the Office of the Governor. Because of its involvement in the rulemaking process, the NPS could not participate, but Jim Brady and Molly Ross were at the table as ex-officio members. Rob Bosworth, deputy commissioner of ADF&G, represented the State of Alaska. Groups represented were: Allied Fishermen of Southeast Alaska (AFSA), Citizens’ Advisory Committee on Federal Areas (CACFA), Hoonah Indian Association (HIA), Sealaska, Friends of Glacier Bay (FOGB), Southeast Alaska Conservation Council (SEACC), National Parks and Conservation Association (NPCA), Sierra Club, and Alaska Wildlife Alliance (AWA).

The work group member most persistent in opposing the NPS's proposal to end commercial fishing in Glacier Bay was Jev Shelton. An intelligent and articulate Harvard graduate who earned his living as a commercial fisherman, Shelton had first fished for halibut in Glacier Bay in the mid-1970s. At the work group meetings, he represented the United Southeast Alaska Gillnetters Association (many gillnetters, like Shelton, also fished for halibut), and he worked closely with AFSA. For him, commercial fishing in Glacier Bay was an economic as well as a philosophical issue. Of the work group members, he was probably the most convinced that the NPS did not have a solid legal argument for closing Glacier Bay to commercial fishing. Shelton maintained that commercial fishing actually enhanced park values in Glacier Bay by making the park unique, accurately noting that fishermen had been working the bay for more than 100 years and fish stocks were healthy. Shelton said that he never heard park visitors complain about commercial fishermen, and he liked to point out that fishermen sometimes assisted people who had become lost or stranded in Glacier Bay's backcountry.<sup>731</sup> To bolster his case, he was able to point to a June 1997 *Consumer Reports* article that rated Glacier Bay as the nation's top national park.<sup>732</sup> Shelton had little desire to compromise, and maintained a narrow personal definition of what a compromise might entail. He was willing to entertain the possibility of spatial or temporal restrictions on commercial fishing, such as prohibiting commercial fishing in specific areas of Glacier Bay or restricting the activity during the visitor season. To Shelton, however, a phase-out was not a compromise, but an unacceptable termination of a fishery.<sup>733</sup> But the hard reality was that, absent compromise legislation that would almost certainly involve phase-outs, the NPS/DOI was prepared to attempt eliminating commercial fishing from Glacier Bay on its own terms. Some who attended the Glacier Bay work group meetings considered Shelton to be the most intransigent of those opposed to ending commercial fishing in the bay. Others recall him as the individual who "got it right" from the beginning.

In 1998, Senator Murkowski noted that "Every time we compromise on a fishery matter, we lose."<sup>734</sup> So far as Glacier Bay was concerned, he had a valid point: for the fishermen in Glacier Bay, there was nothing to gain

in the ongoing negotiations. All they could do was work to lose less or to prolong the process in the hope that political change (the Monica Lewinsky scandal was brewing) would force the NPS and DOI to abandon its effort.

Not long after the November 7 meeting, Rob Bosworth, two fishermen (Jev Shelton and Doug Ogilvy), plus Dale Kelly and Bruce Weyhrauch of the Allied Fishermen of Southeast Alaska and Bart Koehler of the Southeast Alaska Conservation Council, journeyed to Washington, DC to lobby on the Glacier Bay commercial fishing issue. Among those contacted were staff in Senators Stevens's and Murkowski's offices, Molly Ross, and the staff of the President's Council on Environmental Quality. According to Bosworth, the group learned that any unilateral attempt by Alaska's congressional delegation or the DOI to impose a solution on the Glacier Bay issue was not likely to succeed. The work group could best serve the process by seeking to reach consensus on as many facets of the Glacier Bay issue as possible. The inclusion of such consensus points would increase the likelihood of success of any attempts at legislation. Bosworth thought the trip was worthwhile for the contacts made.<sup>735</sup>

On December 15, a day prior to the second meeting of the work group, Beardslee Islands Dungeness crab fishermen met with NPS and State of Alaska personnel and facilitator Dave Hanson to discuss various options for the Beardslee Islands, including a continuation of the fisheries as part of a research program, variations of grandfathering, and buyouts.<sup>736</sup> The fishermen were asked to respond to the proposals before the next work group meeting, but as yet they had no consensus among themselves on what they were willing to give up and to receive in turn.<sup>737</sup> Chip Dennerlein, who had represented the National Parks and Conservation Association in Glacier Bay commercial fishing discussions as early as 1993, endorsed the idea of buyouts for Dungeness as well as Tanner crab fishermen in a December 1997 letter to fellow work group members.<sup>738</sup> Possibly influenced by Dennerlein's position, the DOI soon thereafter drafted legislation for a buyout as well as a "jobs program" for affected Dungeness and Tanner crab fishermen.<sup>739</sup> The draft was by no means a comprehensive solution to the Glacier Bay commercial fishing issue, and it never really saw the light of day.

The second meeting of the work group was held in Juneau on December 16. The meeting's purpose was to review available information on Glacier Bay's commercial fisheries and to discuss possible consensus points.<sup>740</sup> Comprehensive presentations were made by ADF&G personnel on the history of Alaska's commercial fishing industry, the state's fisheries management philosophy and practice, and the individual fisheries of Glacier Bay N.P. Bart Koehler and Greg Streveler, representing SEACC, presented a proposal that ranked individual fisheries by their effect on park visitors and resident species, and provided a matrix of options that emphasized simplicity.<sup>741</sup> (In ranking the fisheries, the winter troll king salmon fishery, which took place in the off season and targeted a transient fish population, was the least problematic. The king crab fishery, because it targeted what Streveler termed "small vulnerable resident populations," was the most problematic.<sup>742</sup>) Present also at this meeting was National Parks and Conservation Association's Chip Dennerlein, who also represented the various viewpoints of a coalition of national conservation groups.<sup>743</sup> Dennerlein presented his organization's view of how commercial fishing might be phased out of Glacier Bay, and thought the work group was "ready to focus on detailed elements of a potential resolution."<sup>744</sup> One important element of a compromise was falling into place: Dennerlein suggested that Glacier Bay N.P.'s outer waters could remain open, subject to a "cooperative conservation plan." As well, Anthony Crupi, of the Alaska Wildlife Alliance—almost certainly the most preservation-oriented group represented at the meeting—stated his group's willingness to consider continued commercial fishing in Glacier Bay N.P.'s outer waters.<sup>745</sup> The sanctioning of this consumptive activity in a national park by these groups was in itself extraordinary, and perhaps representative of what they were willing to sacrifice to accomplish their chief goal—the elimination of commercial fishing from Glacier Bay proper, in particular the bay's wilderness waters.

On January 8, 1998, the NPS held a second public workshop in which Molly Ross presented the DOI perspective on the Glacier Bay issue and the status of the ongoing rulemaking process. She mentioned that compensation for losses incurred was part of the phase-out package, and noted that of the roughly 400 public comments on the Glacier Bay issue received

before October 15, fully 95 percent either supported the NPS proposal or desired something more restrictive.

Presentations were also made on past and ongoing halibut research, and general information was provided on other commercial fish resources in Glacier Bay.<sup>746</sup> The meeting's main presentation, however, was by National Marine Fisheries Service research fisheries biologist Jim Bohnsack, who spoke on the functions and benefits of marine reserves. Worldwide, less than one percent of the total area of the seas is protected as marine reserves, and as little as .01 percent is protected from all fishing.<sup>747</sup> Bohnsack noted that fisheries around the world were collapsing, and just because Alaska didn't currently have a problem didn't mean one wasn't coming. The public's focus on Glacier Bay as a marine reserve increased that month when more than 1600 scientists and marine conservationists from 70 countries voiced their concern for the oceans by signing a statement titled *Troubled Waters: A Call to Action*. The statement, an initiative of the Seattle-based Marine Conservation Biology Institute (MCBI), cited the degradation of the global marine environment and called for immediate action that included increasing the number and effectiveness of marine reserves. The head of MCBI, Elliot Norse, was working hard to make Glacier Bay a marine reserve. As some had claimed in the past, establishing Glacier Bay as a marine reserve would set a precedent that would make it easier to protect marine resources worldwide.<sup>748</sup> It was later pointed out that fishery managers in Alaska didn't know what unfished populations looked like because they didn't exist, and that less than one-tenth of one percent of U.S. marine waters were closed to commercial fishing. With sufficient support for research, a Glacier Bay marine reserve could benefit management and protection of important fisheries throughout the North Pacific.<sup>749</sup>

A somewhat contrarian but practical point of view of Glacier Bay as a marine reserve was that such a designation would be largely an ideological action and not as useful for conservation or scientific purposes as would an area that had been carefully studied with specific goals in mind.<sup>750</sup>

For its part, the Allied Fishermen of Southeast Alaska (AFSA) did not support the concept of marine reserves beyond Glacier Bay's existing wilderness waters. The group

was in favor of no fishing in wilderness waters, with the exception that the Beardslee Islands Dungeness crab fishery should continue.<sup>751</sup>

The day after the NPS's second meeting, January 9<sup>th</sup>, was the third meeting of the work group. A summary of the meeting contained Rob Bosworth's reiteration of the importance of their work:

I believe the best chance we have of reaching a satisfactory and politically stable solution is ... to keep working together here in Alaska. There is a big risk of this issue being taken over by politicians who are not really interested in the people of Southeast Alaska and maybe not even in ... the resources of the park. I'm constantly advised by people who spend a lot of time in DC that if this group goes back there ... with no position or an overly general position, then we will give up a lot of control over the final outcome. If we leave a vacuum, it will be filled.<sup>752</sup>

At the meeting, the group reviewed and discussed options for resolving the Glacier Bay commercial fishing issue, including proposals by Beardslee Island Dungeness crab fishermen. If and when the NPS issued its final rule, commercial fishing in the Beardslee Islands would be terminated without delay, and those fishermen dependent on the Beardslees would suffer economically almost immediately. Tom Traibush suggested that the core group of Beardslee Islands Dungeness crab fishermen be allowed to continue for 50 years—likely longer than the lifetime tenancy he had suggested to Supt. Brady through his attorney two years earlier. The closure of the Beardslees to commercial fishing was at the top of the NPS's list as well as that of the national environmental groups, and the NPS countered Traibush's proposal with a proposal to phase out the fishery in five to seven years.<sup>753</sup> Traibush's fellow fisherman, Otto Florschutz, then made a simple statement that permanently changed how the Beardslee Island crab fishery would be terminated. Florschutz told Brady and Ross that if they wanted him gone, the NPS should buy him out, and that a component of the buyout should involve the purchase and retirement of Dungeness crab limited entry permits to reduce the displacement effects on

an already saturated fishery. His suggestion was not new, but its time had come. From that time on the Beardslee Island Dungeness crab fishermen would not be phased out; they would be bought out. Though there was some residual support for a phase out, future discussions mostly focused on how a fair buyout program might be structured. At least one environmental group, the National Parks and Conservation Association, had no problem with buyouts.<sup>754</sup>

The NPS remained invested in the working group meetings in part to hold off Senator Murkowski's proposed Glacier Bay legislation, which it found highly objectionable. But even though the rulemaking process was continuing, the NPS actually preferred a legislative solution. As mentioned earlier, statutes are more difficult to change than regulations, and with legislation Congress would have to absorb any criticism that resulted. Jim Brady thought that legislation might be needed in the near future to codify an "agreed-upon, coherent and compatible mix of values and uses that respects both the national park and local traditional fishing."<sup>755</sup>

An NPS public workshop at Juneau on February 3, 1998 preceded the work group meeting. At the workshop, which was planned to provide an opportunity for public discussion of the Glacier Bay issue, the NPS explained the content of the upcoming environmental assessment, a characterization of Glacier Bay's current fisheries, some material on patterns of visitor use in Glacier Bay, and the role of fisheries research in the park.<sup>756</sup>

The fourth work group meeting, on February 4-5, 1998, was also held in Juneau. Its purpose was to "find acceptable 'middle ground' with regard to commercial fisheries activities in Glacier Bay."<sup>757</sup> The group was unable to do so, though at this time there was general consensus for a short phase-out period and buyout of the Dungeness crab fishery.<sup>758</sup> On a personal note, Otto Florschutz commented on how difficult it was for him to leave Glacier Bay at the end of a season not knowing if he would be able to fish the following year.<sup>759</sup>

One effect of the work group's efforts was that Senator Murkowski eased somewhat his push for legislation pending the results of the meetings. The hearing on S. 1064 scheduled for February 26 was indefinitely postponed. The reason for the postponement seemed to be that Murkowski wanted Bill Woolf, his staff member who was most knowledgeable

of commercial fisheries, to handle the issue. Woolf was on medical leave and due back on the job shortly.<sup>760</sup> Although pushing the legislation may have provided some satisfaction to Senator Murkowski, it was a futile effort. His Glacier Bay bill was considered “anti-environment,” and stood little chance of making it through the Senate, let alone being signed into law by President Clinton.

The fifth meeting of the work group was held on March 13. After this meeting it was reported that the group had reached “general agreement” on two points: (1) there would be no new or expanding fisheries in Glacier Bay N.P., and (2) wilderness waters would be closed to commercial fishing, except that Dungeness crab fishermen in the Beardslee Islands would be phased out over five to fifty years, with an option to be bought out.<sup>761</sup> A follow-up meeting was scheduled for March 23, but was postponed until June 15 to allow fishermen more time to reach a consensus position of their own.<sup>762</sup> The fishermen’s representatives, it seemed at the time, were caught between the proverbial “rock and a hard spot.” They did not want to be seen as the ones who “sold out” Glacier Bay, but by taking a hard line and not accepting the latest proposals, they risked losing it all.<sup>763</sup> Bill Woolf ridiculed the process, charging that it was in its entirety being orchestrated from Washington, DC, that Molly Ross and Chip Dennerlein were in consort establishing the parameters for discussion. According to Woolf, anything that Ross and Dennerlein said they wanted was treated as non-negotiable. In contrast, anything the fishermen said was important to them was negotiable.<sup>764</sup> In the absence of consensus, however, the NPS was likely to proceed unilaterally with its efforts to ultimately close Glacier Bay to commercial fishing.

A meeting of some work group members was held on May 2-3, 1998. One of the issues discussed was the establishment in Glacier Bay of a “core protected area,” which was defined as “a minimally disturbed ecosystem where researchers can observe and study unique, exceptional natural and successional processes.”<sup>765</sup> Little agreement was reached, but, a “Working Group on How to Define and Implement Sanctuary Values” and “Working Group on Options for Compensation” were established. The latter was led by Rob Bosworth of ADF&G, and it was charged with identifying and reporting to the main working group the “options for compensat-

ing fishermen who suffer economic losses as a result of closures of fisheries in Glacier Bay.”<sup>766</sup> Later that month, Bosworth sent notice to work group members about scheduling a meeting in June. Bosworth must have been losing faith in the group’s prospects for success: he suggested that the meeting should be about the future of the work group, whether it would be possible for the group to actually arrive at a consensus position.<sup>767</sup>

On April 10, 1998, a month before Superintendent Jim Brady retired, the NPS released its 388-page Environmental Assessment (EA) of the effects of the proposed rule and four alternatives, one of which was a “no-action” alternative. The proposed action was similar to the proposed rule published a year earlier: fishing in wilderness waters would terminate “at the time the regulations go into effect,” but with allowance for up to seven Dungeness crab fishermen to continue fishing in the Beardslee Islands (wilderness) during the non-visitor season as part of a 5 to 7-year study program. Commercial fishing in non-wilderness waters of Glacier Bay proper would be allowed to continue for 15 years, and commercial fishing would be authorized to continue in perpetuity in the non-wilderness outer waters of Glacier Bay N.P. under a cooperative fisheries management plan developed by the NPS and the State of Alaska.<sup>768</sup>

Public hearings on the proposed rule were scheduled by the NPS in six Southeast Alaska communities (Elfin Cove, Gustavus, Hoonah, Juneau, Pelican, and Sitka) as well as Seattle. At the request of residents, hearings were later held in Wrangell and Petersburg.<sup>769</sup> Afternoon open houses preceded the hearings and provided an informal opportunity for individuals to discuss commercial fishing in Glacier Bay on a one-on-one basis with NPS officials. A court recorder was present at the open houses for those who might want to testify. The formal public hearings were structured around recording public testimony.<sup>770</sup>

Despite Brady’s earlier assertion to Frank Rue that the EA would provide a comprehensive analysis of the economic effects of the proposed rule, this was hardly the case. With only limited input from people qualified to do economic analysis, it was done mostly by the staff at Glacier Bay.<sup>771</sup> The document contained only general statements. No figures were presented to quantify specific effects.

According to the EA, most fishermen phased out of Glacier Bay proper over 15 years “would be able to successfully prospect new areas and adjust their operations accordingly.” The exceptions were those Dungeness and Tanner crab fishermen who were reliant on the Beardslee Islands, because they would have difficulty re-establishing themselves in locations already fully-utilized by other fishermen. The EA also acknowledged the adverse effect the out-migration of displaced Glacier Bay fishermen would have on fishermen who had not fished in Glacier Bay or even intended to fish there. The influx of displaced Glacier Bay fishermen into areas left open would result in a reduction in the average catch of all.<sup>772</sup> The NPS concluded that the effect of its proposed action on the Icy Strait area would be to reduce the number of active fishermen as well as the “diversity and economic viability of the commercial fishing lifeway.”<sup>773</sup>

The EA acknowledged that it was difficult to determine the extent to which the phased out closure of Glacier Bay proper would affect communities in Southeast Alaska. The proposed action was thought unlikely to change the character of Gustavus, but it would have a noticeable effect on Hoonah. Sympathy was evident in the NPS’s assessment: “... the closure of Glacier Bay proper to commercial fishing would add more stress to an already fragile economy, contributing to the social ills typically associated with economic uncertainty and a loss of hope for the future.”<sup>774</sup>

Reaction to the document, and the proposed action, was swift and strong. The United Fishermen of Alaska (UFA)—no fan of the NPS—wrote then that the document “reveals a lack of understanding of Alaska’s fisheries and management practices,” and that the analysis of environmental and socio-economic impacts was “severely flawed.”<sup>775</sup>

Commenting on the NPS’s proposal, Senator Murkowski was particularly exercised. He characterized the proposal as “simply unacceptable” and “mindless,” adding that the regulations should be ignored if they go into effect. The issue was, in his mind, “non-negotiable,” and he urged fishermen to “rise up and testify against the regulations and in support of their traditional livelihoods during public hearings.”<sup>776</sup> Fishermen at the Juneau hearing were reported to be “outraged.”<sup>777</sup>

As noted above, Hoonah, where commercial fishing was of cultural as well as economic importance, stood to lose a lot if Glacier Bay N.P. was closed to commercial fishing. The Hoonah Indian Association was one of the groups that worked to keep Glacier Bay open. Its efforts to do so were fundamentally based on an optimistic but flawed interpretation of the 1980 Alaska National Interest Lands Conservation Act’s (ANILCA) provision to cause the “least adverse impact possible on rural residents” who depend on specified set aside lands for subsistence uses. Glacier Bay N. P., however, was not among those specified lands.

A liberal definition of “subsistence uses” also figured into the association’s reasoning. “Subsistence uses” were defined by Congress in ANILCA as “the customary and traditional uses by rural Alaska residents of wild renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.”<sup>778</sup> The Hoonah Indian Association maintained, however, that “our inherent customary and traditional and commercial fisheries are not separate.”<sup>779</sup>

In addition to the association’s flawed interpretations of ANILCA, its requests to keep Glacier Bay open to commercial fishing were often unrealistic because they included language that favored continued commercial fishing by Hoonah Tlingits to the exclusion of others. Such requests were patently discriminatory and could not be seriously considered by the federal government. One such request was included in HIA’s October 1998 “Huna Tlingit Culture Fishing Environmental Assessment.” The document was roughly modeled after the NPS commercial fishing environmental assessment and misleadingly portrayed as having been prepared jointly by the HIA and NPS. In the document, HIA proposed that Hoonah Tlingits be granted their “indigenous right to their historical cultural fishing seasons and methods within the bay.” The proposal also included an unlimited exemption for Hoonah Tlingits to fish commercially in Glacier Bay’s wilderness waters.<sup>780</sup>

On June 1, 1998, at the request of the State of Alaska and Senator Murkowski’s office,

the public comment period on the April 1997 proposed rule was once again extended. The 169-day extension, which included comment on the EA, terminated on November 15, 1998.<sup>781</sup> This second extension of the comment period was intended to give the public, particularly fishermen, more time to comment, and would provide for consideration in the regulations of anything the Glacier Bay work group might accomplish.<sup>782</sup>

The fishing season was well underway on June 15, and only one fisherman member, Jev Shelton, was present at the meeting of the Glacier Bay Work Group that day.<sup>783</sup> Proposals were presented by the National Parks & Conservation Association (NPCA), the Allied Fishermen of Southeast Alaska (AFSA) and the Southeast Alaska Conservation Council (SEACC). Each of the proposals had one thing in common: the outer waters of Glacier Bay N.P. would remain open to commercial fishing (except for scallop dredging, to which the NPCA had an objection) in perpetuity.<sup>TTTT</sup> The NPCA's proposal was significant in that a national environmental organization stated its approval of commercial fishing operations in a national park.

Within Glacier Bay proper, AFSA and the NPCA agreed that a buyout of the Dungeness crab fleet was a viable option, but consensus on the broader commercial fishing issue remained elusive. NPCA wanted all commercial fishing, save the winter king troll salmon fishery, phased out, while AFSA wanted commercial fishing to continue, but was willing to make some concessions regarding seasons and closed areas.

Three committees were appointed at this meeting: Cooperative Conservation Strategies, Citizens Advisory Board, and Dungeness Crab Fishery Alternatives. Members of the three committees were directed to work on their respective issues prior to the work group's next meeting.<sup>784</sup> The work group agreed to a final effort in October or November, after the summer fishing season and before the closure of the comment period on the proposed rule.<sup>UUUU</sup><sup>785</sup>

Unbeknownst to those in attendance, the June meeting was the final gathering of the Glacier Bay work group. The effort to resolve the Glacier Bay issue would shift to the politi-

cal arena before the fall meetings. The issues that ultimately divided the stakeholders, as some observed later, were "narrow, but deep."<sup>786</sup>

Although the work group failed to reach a compromise, SEACC and the commercial fishing groups continued to address the issue among themselves and came to an agreement that would have included a buyout of Beardlee Island Dungeness crab fishermen, a cap on the number of commercial fishing boats in Glacier Bay proper, and the establishment of marine reserves in Geike Inlet, several small portions of the West Arm, Wachusett Inlet, and nearly all of Muir Inlet. Instead of a phase-out, commercial fishing in Glacier Bay proper would continue for 15 years, after which it would be re-evaluated. Commercial fishing would continue in perpetuity in the outer waters of Glacier Bay N.P.<sup>787</sup> Their effort was for naught, because the time for compromise, at least within Southeast Alaska, had ended.

#### The "Resolution" of the Glacier Bay Issue

Glacier Bay Superintendent Jim Brady retired from the NPS in May 1998. He had hoped to remain in his position until sometime the following spring, but was unable to do so due to a family emergency. In mid-July, the NPS announced that his successor would be Tomie Lee, who had previously been chief ranger at Utah's Glen Canyon National Recreation Area. Lee knew little of commercial fishing, but that wasn't supposed to matter: upon accepting the job, she was informed that the commercial fishing issue was close to being resolved, and there was no need for a new person to become involved.<sup>788</sup> She would learn differently.

In Washington, DC, the Glacier Bay commercial fishing issue was quickly becoming a significant factor in the political arena. In June 1998, Vice President Al Gore had warned the Republican-controlled Congress that the White House would tolerate no anti-environment riders tacked onto spending bills, specifically citing any that might challenge the planned phase-out of commercial fishing in Glacier Bay.<sup>789</sup> "Veto bait" was the term administration officials used to describe such riders. Gore's threat was not idle. In 1995 the Republican-controlled Congress had gambled that

<sup>TTTT</sup> Scallops are "dredged" by dragging along the seafloor a heavy steel frame to which a chain mesh bag is fastened.

<sup>UUUU</sup> Once the comment period was closed, the NPS avoided having any discussions with any one group that would be construed as having undue influence.

President Clinton would not shut down parts of the federal government by vetoing critical appropriations bills that contained riders (one relating to Alaska's Tongass National Forest) that the White House found objectionable.<sup>790</sup> It was a costly gamble: Clinton vetoed the bills, and the public blamed the Republicans in Congress for the shutdown. The Republican leadership in the 105<sup>th</sup> Congress wanted to avoid a repeat of the 1995 debacle.

Undeterred by White House threats or the concerns of his Republican colleagues, Senator Murkowski the following week attached a rider to the must-pass Interior Appropriations Bill. The purpose of that rider was to prevent the NPS from issuing new regulations that would ban commercial and subsistence fishing within Glacier Bay N.P.<sup>791</sup> Senator Stevens supported the rider.<sup>792</sup> The *New York Times* included mention of the rider in an editorial titled "Mugging the Environment."<sup>793</sup> Concerned that Murkowski's action might jeopardize the appropriations bill, the Senate leadership asked Stevens to work out a solution to the Glacier Bay commercial fishing issue that would remove Murkowski's rider.<sup>794</sup>

On September 21, 1998, the compensation work group (part of the overall Glacier Bay Working Group) that had been established the previous May met in Gustavus at the home of Charlie Clements and Deb Woodruff. Four fishermen were present, as were Tomie Lee and Randy King from the NPS. Rob Bosworth and Jeff Hartman of ADF&G were in communication via telephone, as were two additional fishermen. The group discussed the specifics of a buyout of Dungeness crab fishermen, including eligibility criteria and the purchase of permits, crab pots, and vessels used in the fishery. The fishermen present agreed that eligibility should require a six to ten year fishing history in Glacier Bay between the years 1987 and 1996, as well as possession of a valid ADF&G Dungeness crab fishing permit as of August 15, 1998. They thought similar criteria should be used to determine the eligibility of processors for compensation.

Several days later Tom Traibush sent Randy King a letter in which he estimated that a congressional appropriation of at least \$15 million would be needed to fairly compensate Dungeness crab permit holders, crewmem-

bers and processors. (Traibush noted that the losses of crewmembers had not been addressed during the September 21 meeting.) Traibush thought six permit holders, three processors, and perhaps two crewmembers would qualify for compensation. The main intent of Traibush's letter, however, was not to reiterate what the fishermen had agreed upon or to speculate how much compensation might be needed. What he wanted was the NPS to make an offer and to assure fishermen that they could continue fishing until a fair resolution was reached. He signed his letter as a representative of "The Fishers of the Dungeness Crabber's Fair Compensation Committee." Copies were sent to, among others, Alaska's congressional delegation.<sup>795</sup>

By this time it was recognized that funds for a buyout were not available from either the NPS or the state. Compensation would have to be provided by a special congressional appropriation or a third party.<sup>796</sup> At some point, the fishermen were apparently assured by Senator Stevens's office that securing a congressional appropriation was "not a problem."<sup>797</sup> Most of the same group met again on October 8 to discuss how values for permits, crab pots and vessels would be determined.<sup>798</sup>

Senator Stevens was well aware that the NPS's proposed regulations were close to being finalized and, absent Congressional action, would likely take effect in 1999. He was also frustrated that the issue had drawn out for so many years, and he wanted to settle it as best he could. On top of this, he was under pressure from his Republican colleagues in the Senate to have Senator Murkowski's rider removed.

As the fall of 1998 began, Stevens directed his staff member, Christine Schabacker, to negotiate a legislative settlement with the DOI. Lisa Sutherland, Senator Stevens's aide in the Senate Appropriations Committee office, was also involved. Schabacker and Sutherland, neither of whom was very familiar with the intricacies of the issue, negotiated primarily with John Berry, Assistant Secretary of the Interior for Policy Management and Budget.<sup>VVVV799</sup> Berry was in contact with Randy King and others for technical assistance. Molly Ross was detailed to draft DOI's proposal for legislation.

Despite the fact that Senator Murkowski chaired the Senate Energy and Natural

<sup>VVVV</sup> Trevor McCabe was Senator Stevens's principal aide for commercial fisheries matters.

Resources Committee, which would normally have jurisdiction over the issue, neither Murkowski's office nor that of Representative Young was directly involved in the negotiations. In fact, Senator Stevens's office asked Molly Ross not to have any contact with Murkowski's office while the agreement was being finalized. Nor was the State of Alaska involved. "We had no idea the cleaver was falling," said ADF&G deputy commissioner, Rob Bosworth.<sup>800</sup> Randy King characterized the situation as "very dynamic," the outcome of which he was uncertain.<sup>801</sup>

The compromise agreement was negotiated in less than a week.<sup>802</sup> Broadly speaking, the framework of the negotiations between the DOI and Senator Stevens's office was defined by geography, and the results of their effort included elements of positions taken by the National Parks and Conservation Association and the Allied Fishermen of Southeast Alaska as presented in proposals at the final meeting (June 15, 1998) of the Glacier Bay Work Group. Like the rest of Alaska's Congressional delegation and the State of Alaska, Senator Stevens was focused on the continuation of commercial fishing in the outer waters of Glacier Bay N.P., where about 80 percent (reported biomass) of the park's commercial catch was taken.<sup>803</sup> The NPS, on the other hand, remained focused on the elimination of commercial fishing in Glacier Bay proper.<sup>804</sup>

The Beardslee Islands Dungeness crab fishermen also figured prominently in the negotiations. Their fishery would be terminated, not phased out, and not just the wilderness waters of the Beardslee Islands, but in all of Glacier Bay proper. The DOI and Senator Stevens's office both favored a simple buy-out of those with substantial histories in the fishery. The DOI initially proposed that qualifying individual fishermen be compensated an amount equal to five years of expected lost earnings, based on an average of their individual average incomes from the fishery for the years 1992 through 1997.<sup>805</sup> Several days later it increased that amount to six years of expected lost earnings.<sup>806</sup> This amount was offered by Assistant Secretary John Berry through Molly Ross to the fishermen. At least among the Gustavus fishermen involved, the offer was rejected as too low.<sup>807</sup>

The group apparently made their dissatisfaction known to Senator Stevens's office,

for not long afterward—sometime in early October, 1998—an aide from Senator Stevens's office called the home of Charlie Clements and Deb Woodruff. He wanted to know how much it might cost to buy out the seven or so Beardslee Island Dungeness crab fishermen who met certain requirements for historical participation in the fishery. He suggested a dollar amount (per fisherman) and asked if this amount was acceptable. He then made it clear that time was of the essence. Woodruff contacted Tom Traibush and Otto Florschutz, and together they accepted the offer.<sup>808</sup>

Had Tom Traibush not elevated the issue in prominence in 1996 by employing legal counsel, there may never have been such an offer (see Figure 34). Absent Senator Murkowski's pending legislation to amend ANILCA, the courts would have had no recourse but to force a very willing NPS to terminate commercial fishing in Glacier Bay's wilderness waters, which would have effectively ended the bulk of Glacier Bay's Dungeness crab fishery. Moreover, there was scant support for the Beardslee Islands crabbers among some of their colleagues in the fishing industry. Some thought that the relatively small but locally important fishery could have been used as a bargaining chip—terminated in exchange for more favorable consideration of other fisheries.

Senator Murkowski was furious over the compromise being negotiated without his participation. "That's simply not acceptable," he said in a news release, "Every time we compromise on a fishery matter, we lose. I am just not going to accept a sellout of the rights of Alaska fishermen to earn a living over the long haul."<sup>809</sup> Murkowski also understood that this compromise was going to replace the Glacier Bay rider deemed so offensive by the Clinton administration, that it would be removed for political reasons by his senior Alaska colleague who had, ironically, co-sponsored it.

In November 1998, Murkowski elaborated on the compromise: "I have made no secret of the fact that I think this 'deal' is no deal at all. I believe the state should be clearly managing all these fisheries and that there is no valid reason to close any part of the park to fishing. And although the crab buyout provisions will be acceptable to some of the crabbers, others agree the buyout just isn't adequate compensation for someone's lifestyle and livelihood. Moreover, only the Dungeness crabbers will be com-



Figure 34: Gustavus Dungeness crab fisherman Tom Traibush (courtesy James Mackovjak)

compensated at all, which ignores the impacts on processors, process workers and communities. There is – or at least there should be – more to establishing a fair and equitable fishery closure than just saying, ‘Get Out!’<sup>810</sup>

Murkowski’s principal interest was not in compensating fishermen and others. His interest was ideological: keeping Alaska’s resources available for development, in this case keeping Glacier Bay open to commercial fishing. To that end, Murkowski introduced legislation on October 9. “Come what may,” said the senator, “I will not stand by and allow the existing small commercial fishing operators to eventually be thrown out of Glacier Bay.”<sup>811</sup>

Senator Murkowski’s “Glacier Bay Management and Protection Act of 1998” read:

... commercial fishing shall be allowed to occur in the marine waters of Glacier Bay National Park, except that--

“(1) fishing in Glacier Bay north of a line drawn from Point Carolus to Point Gustavus may be limited to the use of longlining for halibut, the use of pots and ring nets for crab, and troll gear for salmon;

“(2) the waters of Rendu Inlet, Adams Inlet, and the Scidmore Bay-Hugh Miller Inlet-Charpentier Inlet complex shall be closed to commercial fishing; and,

“(3) fishing for Dungeness crab shall be permitted in the Beardslee Islands

and in upper Dundas Bay, but may be limited to the number of individuals who harvested Dungeness crab in either the Beardslee Islands or upper Dundas Bay in 1995, 1996 or 1997.<sup>812</sup>

The free-standing legislation, which would have essentially neutralized the compromise Senator Stevens’s office was negotiating, had little chance of passing in the closing weeks of the 105<sup>th</sup> Congress, but Murkowski vowed to reintroduce it in January and to keep introducing it until it passed.<sup>813</sup> The relationship between Alaska’s senators, usually amicable, was showing a rare fracture.

In mid-October 1998, Senator Stevens, after informing Senator Murkowski of his intentions, deleted Murkowski’s offensive Glacier Bay rider and replaced it with the compromise his staff had negotiated with the DOI. With negotiations on the massive spending package in progress, Senator Stevens withheld his comments on the Glacier Bay compromise.<sup>814</sup> In essence, the compromise stated that the Glacier Bay Dungeness crab fishery was terminated, with a provision that Beardslee Island Dungeness crab fishermen who could meet criteria for past participation would be bought out. Commercial fishing for halibut, Tanner crab and salmon (troll) would be allowed in Glacier Bay proper under a system that “grandfathered” fishermen who could meet certain criteria for past participation. All other fisheries in Glacier

Bay proper would be terminated, and no new or expanded fisheries would be permitted. The outer waters of Glacier Bay N.P. were to remain open to commercial fishing in perpetuity.

The DOI was very pleased with the compromise. Molly Ross, however, wondered in internal discussions whether more should be considered. While the legislation was still pending in Congress, she noted that “With the closures plus wilderness waters in Glacier Bay, we probably have created the world’s largest potential marine refugia (sic). We should think about limiting sport fishing in these closed areas . . .”<sup>815</sup> John Berry cautioned her: “I would do nothing to anger sports fisherman (sic) until we have the entire deal to bed a few years from now. They are important allies and we dont (sic) need them sniping at this.”<sup>816</sup> He added that “ANY mention of sportsfishing will risk souring everything, so we should not have anything on paper – or any discussions that could leak and raise up a sleeping dog.”<sup>www 817</sup>

#### **The Deal, the Reaction to It, and Its Ramifications**

The 4,000-page Omnibus Appropriations Bill (H.R. 4328), which incorporated 8 of 13 annual appropriations measures (including Interior) and totaled \$520 billion, was passed by Congress and signed into law on October 21, 1998.<sup>818</sup> Senator Stevens voted for the measure, Senator Murkowski did not vote. Incorporated in it were Senator Stevens’s Glacier Bay provisions that amounted to a forced (though incomplete) settlement of the Glacier Bay issue, and which set the basic direction that the remainder of the settlement would take. Fundamentally, the legislation:

- mandated that the non-wilderness waters of Glacier Bay N.P. outside Glacier Bay proper remain open to commercial fishing;
- immediately terminated commercial fishing in all wilderness waters of Glacier Bay N.P. (a total of 53,270 acres);
- terminated commercial fishing in the following non-wilderness waters of Glacier Bay proper: Johns Hopkins Inlet, Tarr In-

let, Reid Inlet, Adams Inlet, Geike Inlet, and most of Muir Inlet (a total of 57,960 acres);<sup>xxxx 819</sup>

- allowed commercial fishing in the remaining non-wilderness waters of Glacier Bay proper.<sup>yyy</sup> Fishing was limited, however, to longlining for halibut, trolling for king salmon during the “winter” months, and fishing with pots or ring nets for Tanner crab by fishermen who could prove a history of participation in those fisheries;
- prohibited “new or expanded” fisheries in Glacier Bay N.P.;
- directed the Secretary of the Interior and the State of Alaska to cooperate in the development of a management plan for the regulation of commercial fisheries in Glacier Bay N.P.
- authorized a buyout of Dungeness crab fishermen who had fished in the wilderness waters of the Beardslee Islands or Dundas Bay for at least six years during the period 1987 through 1996. In exchange for agreeing not to engage in commercial fishing for Dungeness crab in Glacier Bay proper and surrendering their permits to the State of Alaska for the purpose of its retirement, each permit holder was to be compensated whichever was greater: \$400,000 or the fair market value of the permit plus an amount equal to forgone income for the years 1999 through 2004, based on the individual’s net earnings from the Dungeness crab fishery from 1991 through 1996. At the option of the fishermen, the NPS would purchase at fair market value from each fisherman one fishing vessel and the crab pots used in the Dungeness crab fishery under the surrendered permit. The legislation authorized up to \$5 million to implement the buyout program.<sup>820</sup>

Among the federal bureaucrats, Randy King, who had been working on the issue for years, called the result “very much unexpected for all of us involved in the issue.”<sup>821</sup> King characterized the legislation as “not perfect,” but added that it was now the NPS’s job to “try to make it work and make it the best we can.”<sup>822</sup>

<sup>www</sup> The elimination of sport fishing in Glacier Bay was not and is not a goal of the NPS.

<sup>xxxx</sup> Approximately 18% of the park’s marine waters were closed to commercial fishing. These waters historically accounted for less than 10 percent of the total commercial harvest (reported biomass) in Glacier Bay N.P.

<sup>yyy</sup> In certain waters of Glacier Bay’s east and west arms, all commercial fishing was terminated except seasonal (October 1 through April 30) trolling for king salmon by those who could prove a history of participation in this fishery.

Bruce Babbitt hailed it as “a fair and reasonable solution.”<sup>823</sup> Deborah Williams, the DOI’s representative in Alaska, thought the deal was “a very fair compromise” that protected both fishermen and the environment.<sup>824</sup>

The reaction by fishermen was far less enthusiastic. Joe Emerson, who had a long history of trolling and longlining in Glacier Bay, said “Some people feel it’s the best we can get. Some people feel it’s a lousy idea and we should go to court.” Emerson thought the principal impact of the commercial fishing closures and restrictions would be on the communities surrounding Glacier Bay. His observation was echoed by Tom Traibush, one of the principal Beardslee Island crabbers who were about to be bought out. Traibush voiced concern for the two processors in Gustavus that were about to lose a major portion of their business.<sup>825</sup> Competitors though they were, Icy Passage Fish and Point Adolphus Seafoods found themselves in the same dire situation, and immediately coordinated their efforts to obtain consideration from Congress.

Senator Stevens defended his legislation on the floor of the U.S. Senate, observing that

There simply has been no solution that Alaskans can fully support. In the omnibus bill we have chosen the lesser of evils. Without Congressional action, the National Park Service would have gone forward with regulations to phase out fishing in the Bay over 15 years and eventually ban it altogether... I reluctantly concluded that this proposal was better than taking no action at all.

According to Stevens, the legislation was a “safety net” that offered better protection to fishermen’s interests than was offered by the draft NPS regulations. The senator admitted that the losses to local communities and processing companies had not been addressed “because we simply did not have time in the closing days of the 105<sup>th</sup> Congress to identify the scope of the problem or the extent of the relief needed.” According to Stevens, the DOI acknowledged that this was a shortcoming in the legislation and had pledged to work with the Alaska delegation to address the issue. Senator Stevens pledged to work in the months ahead with local communities and processors to rectify this situation. Among

the remedies was financial compensation for communities and small businesses. Stevens also emphasized the “critical importance” of Glacier Bay N.P.’s outer waters remaining open to commercial fishing.<sup>826</sup>

Alaska Representative Don Young considered the compromise “a bite at parts of the apple,” and “the best we could do this year” because it kept some people fishing.<sup>827</sup> Alaska Governor Knowles expressed a similar sentiment: the compromise was the “best that was attainable under the circumstances.” Knowles also expressed a desire to work with Senator Stevens to address some of the remaining issues.<sup>828</sup>

Alaska’s junior senator again rejected the compromise: “I don’t look at it as being a done deal... An injustice was done. There was no reason for it. I intend to pursue it with legislation that rectifies the situation.”<sup>829</sup> “What’s done can be undone—or at least most of it,” wrote Senator Murkowski in the *Ketchikan Daily News*. Murkowski vowed once more to continue to introduce Glacier Bay legislation in the next Congress and to keep introducing it until he could get it passed.<sup>830</sup> A representative of the NPCA said that Senator Stevens’s aides Christine Schabacker and Lisa Sutherland told her that Stevens was in total philosophical agreement with Senator Murkowski, and had only negotiated because he was forced to do so by the Republican leadership. They added that Stevens might work with Murkowski and Congressman Young on legislation to “get back to where we were,” though they doubted that the Dungeness crab or wilderness waters provisions would be revisited.<sup>831</sup>

There was a question of how fisheries managers would react to the phase-out and closure of commercial fishing in Glacier Bay. The International Pacific Halibut Commission determined that since Glacier Bay was a “relatively small area” that depended on in-migrating halibut for its productivity, it was unlikely that any adjustment to the Area 2C halibut quota would be made.<sup>832</sup>

The situation was different with Tanner and Dungeness crab. Glacier Bay’s share of the Tanner crab harvested in Southeast Alaska between 1989 and 1998 ranged from a low of 7 percent in 1991 to a high of 18 percent in 1997. Overall, it averaged about 10 percent. ADF&G’s position was that it was not possible to know with certainty how the restrictions

on Tanner crab might affect the fishery, noting that management of fishery harvests was “a dynamic and evolving process” that responded to crab population changes and other factors. Barring unforeseen circumstances, however, Southeast Alaska Tanner crab fishermen could expect the region’s Guideline Harvest Level to be reduced in proportion to declines in the Glacier Bay harvest.<sup>833</sup> The Tanner crab ring net fishery, for all practical purposes, was ended because nearly all the productive ring net fishing grounds in Glacier Bay were located in wilderness waters.<sup>834</sup> (At least two ring net fishermen continued to fish Tanner crab in Glacier Bay after 1999. Only one fished during the 2007 season.<sup>835</sup>)

Glacier Bay’s share of the Dungeness crab harvested in Southeast Alaska between 1989 and 1998 ranged from a low of 4 percent in 1998 to a high of 10 percent in 1993. Overall, it averaged about 6 percent of Southeast Alaska’s production. ADF&G managers could not predict how the Glacier Bay closure to Dungeness crab fishing would affect their management of the species.<sup>836</sup> (As of the end of the year in 2006, no adjustments had been made.)

No change was expected in the management of the king salmon troll fishery. The average number of king salmon harvested annually in Glacier Bay for the years 1989 through 1998 was about 2,000.<sup>837</sup> King salmon are highly migratory, and Glacier Bay’s harvest of king salmon even in its best years was less than two percent of Southeast Alaska’s annual quota.<sup>zzzz</sup>

Glacier Bay’s production of king crab was so small that its elimination was expected to result in no change in the management of the fishery in Southeast Alaska. The groundfish (basically Pacific cod) fishery that had developed in Glacier Bay was also very marginal. Its termination region-wide was insignificant. NPS regulations allow the retention, subject to state and federal fisheries regulations, of groundfish caught as by-catch in the halibut fishery.<sup>838</sup>

On November 6, 1998—two weeks after the buyout bill became law—Rob Bosworth, deputy commissioner of ADF&G, sent a memorandum to members of the Glacier Bay work group informing them that the stakeholder process was ended. (His memorandum was partly a formality: fishing interests had already pulled out of the process.<sup>839</sup>) Bosworth

expressed personal appreciation for the years of effort devoted to resolving the issue, and said that the fact that the work group was not directly involved in crafting a solution was no reflection on its accomplishments.<sup>840</sup> Bosworth later said that the most frustrating aspect of the stakeholder process was the refusal by some in the fishing industry to acknowledge that the continuation of the status quo in Glacier Bay was not an option, that at least some restrictions on commercial fishing were inevitable.<sup>841</sup> While it is true that the working group was not directly involved in the legislative process, the use of the group’s June 1998 report by Senator in his negotiations with DOI indicated that their effort had value.

<sup>zzzz</sup> The annual quota for king salmon is stated in individual fish.