September 4, 2007

Ms. Mary Bomar,
Director,
National Park Service,
1849 C Street, NW,
Washington, D.C. 20240

Dear Ms Bomar:

On behalf of Public Employees for Environmental Responsibility (PEER), I am writing to express our deep concerns with the "Interim User's Guide to Accessing Inholdings in National Park System Units in Alaska" (Interim Guide). The National Park Service (NPS) Alaska Regional Director adopted this Guide in July 2007.

PEER acknowledges that the Guide is an "interim" document and is subject to change and, we hope, improvement. Governing statutorily guaranteed rights of access to inholdings within parks is not simply an "Alaska issue." We ask that you mandate improvements to the Interim Guide before it is made final.

PEER identifies the following areas where the Interim Guide needs improvement:

1. WETLANDS

Page 9 of the Interim Guide creates a double standard for wetlands compensation when NPS-owned wetlands are adversely affected by the exercise of an access right. The Interim Guide states that "[E]xcept in the case of an EIS, the NPS will not charge applicants for mitigation…for replacement of wetlands." This appears to mean that if the NPS prepares an environmental assessment (EA) for the exercise of an access right, then the applicant will not be responsible for mitigation, replacement or restoration of affected wetlands. PEER sees no reason why NPS-owned wetlands should be protected **only** when the request to exercise an access right reaches the EIS level. Exercise of an access right may adversely affect park wetlands long before the proposed action reaches the threshold level of "major Federal actions significantly affecting the quality of the human environment." (42 USC 4332). No intelligible or justifiable reason exists why the compensation trigger point for NPS-owned wetlands should be reached only when the EIS threshold is reached.

The Interim Guide also equivocates about wetlands compensation when an EIS is required for an access right. The Interim Guide states "[W]etlands compensation…will be treated in a manner similar to EIS cost recovery (43 CFR 2804.14). These regulations

allow for reductions and waivers of cost recovery in certain circumstances." p 9. Thus, even when the proposed access requires an EIS, the Regional Director may exempt the applicant from compensating for affected NPS-owned wetlands.

These provisions are contradictory. First, according to the Interim Guide, compensation for damage to NPS-owned wetlands is due only when an EIS is required, but not an EA. Second, even when an EIS is required, the NPS may waive the wetlands compensation.

There are other circumstances throughout the national park system when the NPS is required to govern the exercise of citizen's rights – whether those rights are rights to property, or the rights guaranteed by the First Amendment. The Interim Guide, were it applicable elsewhere, may establish the principle that when NPS-owned wetlands may be harmed by an oil and gas subsurface owner at Big Thicket National Preserve, Texas, or by exercise of free speech, then no compensation for wetlands loss is due.

2. CONSISTENCY WITH EXISTING RULES

The Interim Guide needs close scrutiny to determine consistency with 43 CFR Part 36 – Transportation and Utility Systems In and Across, and Access Into Conservation System Units in Alaska. Section 36.10 governs access to inholdings in Alaska. The jargon of the Interim Guide differs from 43 CFR 36.10. For example, 43 CFR 36,10 repeatedly refers to "a right-of-way permit for access" to an inholding. But the Interim Guide calls them "Right-of-Way Certificates of Access." Why the Alaska Regional Office elected to create a new term as a matter of policy is unknown. However, that new term is at variance with the terms of existing regulation. There should be good justification for deviating in a policy from the terms used in the underlying regulation. The Interim Guide presents neither an explanation nor a justification.

3. WILDERNESS

In the late 1980's, the NPS prepared EISs for the parks in Alaska. The EISs found 16,898,774 acres to be roadless, undeveloped and "fully qualified" as wilderness. (Note: The FEISs proposed far fewer acres under political pressure from Assistant Secretary William Horn. The NPS and the Secretary have never transmitted wilderness proposals for the Alaska parks to the President or to Congress).

PEER concedes that the rights of access to an inholding, guaranteed by the Alaska National Interest Lands Conservation Act (ANILCA), may be exercised through wilderness, even through designated wilderness. Protecting the undeveloped nature of roadless national park areas is a goal for which the NPS may reasonably regulate inholding access rights. The Interim Guide does not refer to wilderness a single time. For example, when an inholder requests access to a tract within designated wilderness (Katmai, Denali and Glacier Bay National Parks), or across roadless lands qualified for wilderness in the other Alaska parks, the NPS could consider acquisition of the tract.

4. ACQUIRING INHOLDINGS IS AN NPS POLICY

NPS Management Policies (2005) state that "A number of park units have nonfederally owned lands within their authorized boundaries. When nonfederal lands exist within

park boundaries, acquisition of those lands and/or interests in those lands may be the best way to protect and manage natural and cultural resources or provide for visitor enjoyment." p. 42. The NPS Management Policies do not then say "except for Alaska."

Within Alaska parks, the acquisition of an inholding may be both necessary and appropriate to accomplish the mission of the NPS. The Interim Guide not only ignores but reverses NPS Management Policies. Instead, the "Guiding Principles" on page 3 of the Interim Guide appears to establish as the NPS mission to preserve all inholdings, and access to them. This is fundamental misinterpretation of ANILCA. ANILCA guarantees a right of access to inholdings but does not exempt the inholding from acquisition in lieu of a grant of access.

The Interim Guide never employs the "A" word. Every EA and/or EIS for exercise of an access right must consider acquisition as one of the reasonable alternatives. Where the exercise of an access right to an inholding would result in considerable damage to wildlife, ecosystem values, wetlands, cultural resources on Federal park lands, the NPS must consider acquisition as a high priority. The right of access to inholdings is not free from regulations to protect the park lands that are crossed. Equally, inholdings are not immune to acquisition by the NPS that extinguishes the attached right of access.

5. CALIFORNIA DESERT PROTECTION ACT (CDPA)

ANILCA, section 1110(b) (16 U.S.C. 3170(b)), is not the only law that governs access to inholders within areas of the national park system. Alaska Region procedures for granting adequate and feasible access for economic and other purposes to inholders has implications elsewhere.

In 1994 Congress reserved millions of acres in the California Desert as national park lands and as BLM wilderness. Within the new boundaries lay hundreds of thousands of acres of State and other nonfederal lands. In recognition of the inholdings created by the new parks and BLM wilderness areas, the CDPA contains an access provision that is nearly identical to ANILCA section 1110(b). Section 708 of the CDPA, codified at 16 USC 410aaa-78, states "The Secretary shall provide adequate access to nonfederally owned land or interests in land within the boundaries of the conservation units and wilderness areas designated by this Act which will provide the owner of such land or interest the reasonable use and enjoyment thereof."

The three parks of the California Desert, created and/or expanded by the CDPA are Death Valley, Joshua Tree and Mojave. The NPS has adopted General Management Plans (GMP) for all three parks. One GMP, for Joshua Tree, contains an Appendix that spells out procedures for governing access to inholdings. (Note: one difference between ANILCA and CDPA, is that the former requires the Secretary to promulgate regulations to govern inholder access, the CDPA does not require regulations, and regulations do not exist.)

None of the GMPs for any of the three parks adopts the Alaska Interim Guide approach that inholdings are an important value to be protected and perpetuated. Indeed, since

1994, the NPS, largely through third party acquisitions, has acquired title to many tracts of State and private lands. Acquisition obviates the need to grant access. More significantly, NPS behavior in California more broadly comports with NPS Management Policies that acquisition of certain inholdings is necessary and appropriate to accomplish the NPS' preservation mission.

For the "Alaska is different" chorus, PEER wishes to point out, that in at least one respect, the CDPA more rigorously protects certain inholdings from acquisition than does ANILCA. The CDPA allows the NPS to acquire lands without the consent of the owner (i.e. use of eminent domain) if the NPS makes a written determination that the use of the land is detrimental to the integrity of the (Mojave) Preserve. However, the CDPA forbids the NPS to make a detriment determination for a single family residence, thus, <u>in all cases,</u> sparing from condemnation any single family residential inholding. 16 U.S.C. 410aaa-56.

ANILCA also imposes a requirement that a detriment (or similar determination) precede use of condemnation for inholders on Alaska Native Claims, or improved properties within Alaska parks. But ANILCA does not categorically protect any class of inholders from a detriment or similar determination, and possible condemnation, as the CDPA protects single family residential inholders in the Mojave National Preserve. ANILCA section 1302(b) and (d), at 16 U.S.C. 3192. So, why is it that in the California Desert, and in parks throughout the nation, the NPS acquires inholdings when necessary and appropriate, but in the parks in Alaska, inholdings actually become a protected resource? It is not a provision of ANILCA.

Yes, Alaska is different. In Alaska, the NPS succumbed to political pressure from a very unified and powerful congressional delegation, and former Secretary Norton to develop a policy that, in effect, places Alaska far outside the mainstream of the NPS.

CONCLUSION

PEER calls upon you to ensure a speedy review of the Interim Guide before its principles harden into a legacy of mismanagement. The review must be done in an atmosphere that is thoughtful and reflective, and more resistant to naked political pressure. The review must be done with an eye on the entire national park system, so that guidance adopted in Alaska does not pollute the preservation mission of the NPS both in Alaska and elsewhere.

This document is too important to be revised in secret. It is tantamount to a rulemaking and should be reviewed under the procedures of the Administrative Procedures Act. Please inform PEER when you decide to institute a review of the Interim Guide.

Cordially,

Jeff Ruch
Executive Director