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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

**ROBERT HALE; JOSHUA HALE; NAVA S.
SUNSTAR; and BUTTERFLY SUNSTAR,**

Plaintiffs,

v.

GALE NORTON, Secretary of the Interior; **GARY
CANDELARIA**, Superintendent, Wrangell-St. Elias
National Park and Preserve; **HUNTER SHARP**, Chief
Ranger, Wrangell-St. Elias National Park and Preserve;
**DEPARTMENT OF THE INTERIOR; NATIONAL
PARK SERVICE; FRAN MAINELLA**, Director of
the National Park Service; **MARCIA BLASZAK**,
Acting Regional Director of the National Park Service,
all in their official capacities,

Defendants.

No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

COMPLAINT FOR DECLARATORY
& INJUNCTIVE RELIEF

1. This is a civil action asking this Court to declare that the Plaintiffs have the right to continue using a tracked vehicle on the only road allowing access to their land and to prohibit the Defendants from preventing the Plaintiffs from accessing their land via the road by any method other than foot, horseback, or snow machine. The Plaintiffs seek declaratory and injunctive relief concerning the legal obligations of the Secretary of the United States Department of Interior (Secretary) and the National Park Service (Park Service) under the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980), 16 U.S.C. §§ 3101, *et seq.*, and former Revised Statute 2477 (R.S. 2477), 43 U.S.C. § 932, repealed October 21, 1976, by 43 U.S.C. § 1763. These statutes require Defendants to allow, at a minimum, adequate and feasible access to owners of private land within national parks and preserves.

2. Access across federal lands free from unnecessary regulations causing immediate and irreparable injury by threatening the survival of rural citizens is vital to the well-being of the people of the western United States. This is especially the case in undeveloped areas of the West which are dominated by land under federal jurisdiction. What was true for these areas in the late 1800's is equally true today: access can be, and in this particular case *is*, necessary for survival.

3. Defendants' actions prohibiting Plaintiffs' reasonable, adequate, and feasible access to their property emasculates Congress' intent to preserve access to private property and existing rights-of-way, violates long-standing principles of property law and federal-state comity, and eviscerates the property interests of private landowners. Rather than being a responsible regulatory agency accommodating private, state, and federal interests in the use and enjoyment of federal park land, the Park Service seeks to lock up national parks and prevent access to private land in nothing short of a federal land grab.

4. Plaintiffs seek to require Defendants to allow reasonable, adequate, and feasible access to their land for survival and other necessary purposes as provided for under federal law. Plaintiffs also seek a declaration of rights pursuant to 28 U.S.C. §§ 2201 and 2202.

JURISDICTION AND VENUE

5. An actual and existing controversy exists between Plaintiffs and Defendants relative to their respective rights and obligations as set forth herein.

6. This Court possesses subject matter jurisdiction based on 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-02 (declaratory judgment), and 5 U.S.C. §§ 701-06 (judicial review of agency actions).

7. Venue in this Court is proper under 28 U.S.C. § 1391(e)(3) because Plaintiffs officially reside in the State of Alaska.

PARTIES

A. Plaintiffs

8. Plaintiffs Robert Hale, Nava S. Sunstar, Butterfly Sunstar, and Joshua Hale (Pilgrims) are 4 adult members of a family of 17 who either own or lease 410 acres of land surrounded by the Wrangell-St. Elias National Park and Preserve. The Pilgrims acquired their land in the spring of 2002. The property lies approximately 15 miles from McCarthy, Alaska, and is accessed by McCarthy-Green Butte Road. No other over land access exists to the Pilgrims' land. For over a year, the Pilgrims have used and maintained the McCarthy-Green Butte Road.

B. Defendants

9. Defendant United States Department of Interior (Interior Department) is a cabinet-level agency of the Executive Branch. The Interior Department possesses statutory responsibilities for the administration and implementation of national parks within the United States, including the Wrangell-St. Elias National Park and Preserve.

10. Defendant Gale Norton is sued in her official capacity as Secretary of the United States Department of Interior. In her official capacity, Congress delegates to Secretary Norton certain responsibilities for the Interior Department's implementation and administration of the National Park System. The Wrangell-St. Elias National Park and Preserve is listed among the areas established as

units of the National Park System to be “administered by the Secretary under the laws governing the administration of such lands and under the provisions of [ANILCA].” 16 U.S.C. § 410hh.

11. Defendant National Park Service is an agency within the Interior Department possessing by delegation responsibilities for administering and implementing the National Park System, including provisions concerning access in the Wrangell-St. Elias National Park and Preserve.

12. Defendant Fran Mainella is sued in her official capacity as Director of the National Park Service. The Secretary delegates most of her National Park Service authority to the Park Service Director.

13. Defendant Maria Blaszak is sued in her official capacity as Acting Regional Director of the National Park Service. The Acting Regional Director generally acts with respect to each statute the Secretary administers in this geographical area.

14. Defendant Gary Candelaria is sued in his official capacity as Superintendent of the Wrangell-St. Elias National Park and Preserve. ANILCA created the Wrangell-St. Elias National Park and Preserve and made it a part of the National Park System in December, 1980.

15. Defendant Hunter Sharp is sued in his official capacity as Chief Ranger of the Wrangell-St. Elias National Park and Preserve.

GENERAL ALLEGATIONS

(Factual Allegations)

16. The Pilgrims’ home burned in April, 2003. Practically everything the family owned was inside the home and destroyed in the fire. The family of 17 now lives in a temporary small outbuilding on their land. The Pilgrims need to obtain supplies to rebuild their home and survive the harsh Alaska winter. Normally, the Pilgrims accessed their property by tracked vehicle during the winter months. However, in April, 2003, days after the Pilgrims’ home burned, the Park Service closed the McCarthy-Green Butte Road to tracked vehicles. Exhibit (Ex.) A (Public Notice). The Park Service closed the road by public notice but without a public hearing.

17. The McCarthy-Green Butte Road, which leads to the Pilgrims' homesite, is an old mining road that has existed for almost 100 years and is approximately 15 miles long. Between McCarthy, Alaska, and the Pilgrims' land, the road crosses McCarthy Creek approximately 13 times. The State of Alaska has designated the road as an RS 2477 right-of-way. The road has been used for decades, but the Park Service arbitrarily closed the road to tracked vehicles in April of 2003.

18. When the Pilgrims tried to use a tracked vehicle on the McCarthy-Green Butte Road during the summer of 2003, the Park Service informed them they must obtain a permit. The Pilgrims have been trying to comply with the Park Service's demand since July, 2003—but to no avail. *See* Ex. B (Original Access Permit Request via E-mail). Because access on the road is not reasonably possible after November, the Pilgrims have most recently attempted to obtain an emergency access permit. *See* Ex. C (Application for Transportation and Utility Systems and Facilities on Federal Lands). The Pilgrims filed for the permit under protest, reserving all rights not to accept unreasonable permitting requirements and claiming that Title XI of ANILCA requires the federal government to allow inholders reasonable access across federal lands to their property. *Id.*

19. Below freezing weather is now upon McCarthy (McCarthy has already recorded a temperature of 10 degrees this month), and the Pilgrim family is very short of winter provisions. Prohibited from using a tracked vehicle on the McCarthy-Green Butte Road, the Pilgrims have been unable to replace proper winter clothes that burned in the fire or obtain adequate food to feed their horses and other animals. They have had to slaughter two milk-producing goats which were starving for lack of feed.

20. The Pilgrims need emergency access to get adequate food for themselves and their animals. In addition, the Pilgrims need personal items such as winter clothing. The Pilgrims need windows, insulation, and many other items necessary to winterize the small summer building they are staying in. The Pilgrims also need access to their property to bring in supplies so they can begin building another home. Much of this material, such as windows and insulation, is too big to bring in any other way except by a small tracked vehicle towing a trailer. Due to the Park Service's

restrictions, the Pilgrims can adequately obtain other items—such as food, sleeping bags, and emergency items—only by airplane, which is too expensive for the family to afford.

21. In addition, the Park Service has informed the Pilgrims they may not have access *on foot* across 2,600 feet of Park Service property to their parcel of land known as the Motherlode Mine. The Pilgrims must have continued access to the Motherlode Mine in order to perform seasonal maintenance on the ventilation adit that provides air to the mine.

22. Seasonal maintenance on the ventilation adit consists merely of opening doors to the adit and closing them in winter. Two doors exist; one 200 feet from the surface entrance and the other approximately 500 feet further inside.

23. Opening and shutting these doors during summer and winter is necessary to control the buildup of ice and snow that can completely shut off the adit and stop the flow of necessary ventilation to the inside of the Motherlode Mine. If air cannot circulate in the mine, moisture accumulates in the passages which are all below freezing, and ice blocks more and more of the mine. Moisture also accumulates on the wood and rots timbers which deteriorate and fail. The areas of the mine that are well-ventilated from free passage of air have better preserved timber and are safer.

24. In the winter, the air flows into the mine, while in the summer, it flows out of the mine. The doors should now be shut to keep out blown snow and moisture. The doors should be reopened in the summer. If the Park Service does not allow proper seasonal maintenance of the Motherlode Mine soon, it will take weeks of heavy work to reopen the ventilation adit.

25. The local community, out of concern for the Pilgrims' well-being, recently came together, pooled their resources, and funded an airlift to the Pilgrims property in order to provide them with essential items for their temporary survival. To date, more than 60 airplane trips have resulted in the transfer of approximately the same amount of supplies and materials that could have been transported in a single trip using a 16-foot trailer. However, a crash involving one of the planes marred that effort on October 10, 2003.

26. Judging from the amount of supplies delivered by the more than 60 airplane trips accomplished to date, the Pilgrims estimate that approximately 350 more trips by airplane would be required to finalize the winter provisioning. Even then, however, not all the needed materials and supplies can be transported by light aircraft. The Pilgrims initially estimated they would need to make approximately eight or nine trips in order to obtain their supplies. However, due to the airlift, the Pilgrims now believe they will need to make as few as a half dozen trips or less.

27. The Park Service has refused to cooperate in allowing the Pilgrims access to and from their land. The Park Service claims that before it may issue an access permit, emergency or otherwise, it must comply with the National Environmental Policy Act (NEPA) by performing an environmental assessment and publishing it for public comment. *See* Ex. D (Letter from Acting Regional Director Marcia Blaszak). This burdensome and unnecessary process will prevent the Pilgrims from timely accessing their property, rebuilding their home before winter sets in, or winterizing their temporary shelter, and saving their animals.

(The Alaska Native Interest Lands Conservation Act)

28. ANILCA was the product of an intense legislative battle. In order to enact the law in opposition to a majority of Alaska's citizens, Congress included certain provisions specifically designed to address citizens' concerns. The compromise allowing ANILCA's passage was that the public would get millions of acres of new parks, but Alaska and its citizens would get unique special rules to enable a wide array of activities and access to continue in these vast new preservation units.

29. The first of these special rules, Section 1109 of ANILCA entitled, "Valid existing rights" states: "Nothing in this subsection shall be construed to adversely affect any valid existing right of access." 16 U.S.C. § 3169. Most importantly, Section 1110 states: "Such use . . . shall not be prohibited unless, after notice and hearing . . ., the Secretary finds that such use would be detrimental to the resource values of the unit or area." 16 U.S.C. § 3170(a). Thus, the Park Service may only close areas if access causes adverse impacts on resources and a public closure process is followed. Congress set the bar high for closures to ensure Alaska's citizens that the access guarantee was real.

30. The second special rule, Section 1110(b), is another pillar of the promises Congress made to Alaskans. Section 1110(b), entitled, "Special access and access to inholdings," provides:

[I]n any case in which . . . privately owned land . . . is within . . . one or more conservation system units . . . the . . . private owner . . . *shall* be given . . . such rights as may be *necessary to assure adequate and feasible access* for economic and other purposes to the concerned land by such . . . private owner. . . . Such rights shall be subject to *reasonable* regulations issued by the Secretary to protect the natural and other values of such lands.

16 U.S.C. § 3170(b).

31. The Committee Reports accompanying ANILCA indicate the federal government has no discretion in allowing access to inholdings:

The Committee recommends that traditional uses be allowed to continue in those areas where such activities are allowed. This is not a wilderness type pre-existing use test. Rather, if uses were generally occurring in the area prior to its designation, those uses *shall* be allowed to continue and *no proof of pre-existing use will be required*.

S. Rep. 96-413, 96th Cong., 1st Sess., at 248 (emphases added).

32. Likewise, the Committee Report explained its reasoning for recognizing the need for such extraordinarily broad access rights:

The Committee enacted this provision in recognition of the fact that restrictions placed on public access on or across many federal land areas in Alaska may interfere with the ability of private inholders to exercise their right to use their lands. The Committee believes that owners of inholdings should not have their ability to enjoy their land reduced simply because restrictions are placed on general public access to the land surrounding their inholdings.

Id.

33. Accordingly,

This provision directs the Secretary to grant the owner of an inholding such rights as are necessary to assure adequate access to the inholding, and is intended to assure a permanent right of access to the concerned land across, through or over these Federal lands by such state or private owners or occupiers and their successors in interest. The Committee recognizes that such rights may include the right to traverse the federal land with aircraft, motor boats, *or land vehicles*, and to use such parts of the federal lands as are necessary to construct safe routes for such vehicles.

Id. (emphasis added).

34. Clearly, “[t]he Committee adopted a specific standard regarding access” and “expects the Secretary to be reasonable and fair in his judgments regarding access.” *Id.*

35. Congress noted specifically the extent to which it regarded and intended to protect access rights:

When conflicts arise between the essential needs of the holder of a valid claim for reasonable access to work or develop his claim and restrictions to minimize the adverse impact on the ecology of the conservation system unit, then if such conflicts cannot be resolved by agreement, the Federal Government must be prepared to accept the degree of environmental harm that is unavoidable if the holder’s essential needs are to be met or be prepared to purchase the claim in question.

123 Cong. Rec. 261, Page No. H2858 (1979) (statement of Rep. Udall).

36. Section 1110(b) defines “inholdings” broadly, including within the term more than only non-federal property interests which lie within the external boundary of a conservation system unit.

Instead, Section 1110(b) defines “inholdings” as:

State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy [which] is within or is *effectively surrounded by* one or more conservation units

16 U.S.C. § 3170(b) (emphasis added). Accordingly, private property is also considered inholdings under ANILCA, even when located outside the external boundaries of a conservation system unit, where the only “adequate and feasible” access is across the unit.

37. When Congress established the vast conservation system in Alaska, over 10 million acres of land were included in the boundaries. Landowners with property within the now federal holdings needed assurances that they would continue have the *right* to access their lands. Congress provided this promise in the extraordinary and **expansive language of Section 1110(b).**

(Former Revised Statute 2477)

38. As part of the Mining Act of 1866, Section 2477 of the Revised Statutes provides in its entirety: “The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

39. Section 2477 was retained, virtually unchanged, for over 100 years:

No application should be filed under R.S. 2477, as no action on the part of the Government is necessary. Grants of rights-of-way referred to in the preceding section become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses.

43 C.F.R. § 2822.1-1, .2-1 (Oct. 1, 1979); *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1978, 1084 (10th Cir. 1988).

40. R.S. 2477 was a *self-executing* grant by the federal government that could be accepted merely by public use. *Sierra Club*, 848 F.2d at 1083; *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248 (9th Cir. 1974). Upon accepting the grant, R.S. 2477 conveyed to the public an irrevocable right-of-way across federal lands. *Wilderness Society v. Morton*, 479 F.2d 842, 882 (D.C. Cir. 1973). In essence, the passage of R.S. 2477 was an offer made by Congress for the development of roads over federal lands. Like any offer, once accepted according to its terms, the offeror is bound.

41. Formerly codified as 43 U.S.C. § 932, the Federal Land Policy Management Act (FLPMA) repealed R.S. 2477 in 1976. 43 U.S.C. § 1763. However, FLPMA expressly preserved all rights-of-way existing on the date of repeal. *Id.* at §§ 1769(a), 1701.

42. In 1986, the Department of Interior recognized its duty to honor prior, valid existing rights:

A right-of-way grant issued on or before October 21, 1976, pursuant to then existing statutory authority is covered by the provisions of this part unless administration under this part diminishes or reduces any rights conferred by the grant or the statute under which it was issued, in which event the provisions of the grant or the then existing statute shall apply.

43 C.F.R. § 2801.4.

43. Similarly, ANILCA also preserved R.S. 2477 rights-of-way as “valid and existing rights.” *See Aleknagik Natives, Ltd. v. United States*, 806 F.2d 924, 926-27 (9th Cir. 1986); *see also Northern Alaska Environmental Center v. Lujan*, 872 F.2d 901, 903 (9th Cir. 1989).

44. The obligation to honor this vested property right limits federal authority over R.S. 2477 rights-of-way. Any federal agency action taken to limit or divest these rights is contrary to established legal principles.

45. Courts recognized that state law provides the basis for determining the existence and scope of R.S. 2477 rights-of-way. See, e.g., *Sierra Club v. Hodel*, 675 F. Supp. 594, 604 (D. Utah 1987); *United States v. Jenks*, 804 F. Supp. 232, 235 (D. N.M. 1992); *Schultz v. Department of the Army*, 10 F.3d 649 (9th Cir. 1993); *Wilkinson v. Department of the Interior*, 634 F. Supp. 1265, 1272 (D. Colo. 1986).

46. A requirement that the federal government recognize an acceptance has never existed. *Sierra Club v. Hodel*, 848 F.2d at 1084.

47. Where not specified, the scope of an R.S. 2477 right-of-way is that which is reasonable and necessary to provide safe travel for legitimate uses. *Id.*

48. The Alaska Supreme Court has outlined the operation of the statute and the procedure for accepting an R.S. 2477 right-of-way as follows:

[B]efore a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961).

49. In 1998, the Alaska Legislature passed Alaska Statute (AS) 19.30.400, termed "Identification and acceptance of rights-of-way." The statute states:

The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. § 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under [R.S. 2477] is available for use by the public under regulations adopted by the Department of Natural Resources

AS 19.30.400(a). The statute continues:

The rights-of-way listed in (d) of this section have been accepted by public users and have been identified to provide effective notice to the public of these rights-of-way.

Id. at .400(c).

50. AS 19.30.400(d) specifically lists the McCarthy-Green Butte Road as right-of-way number RST 0135. The trail is mapped on United States Geological Survey (USGS) 1:63, 360

McCarthy b_5, b_6 and c_5 quadrangle maps. *See* Ex. E (Alaska Department of Natural Resources, Land Administration System, Case Abstract Information).

51. Alaska law broadly defines “highway” to include a “road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof.” AS 19.45.001(9) (1988).

52. In order to prove RS 2477 rights by public acceptance, a claimant must show “(1) that the alleged highway was located over public lands, and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant.” *Hamerly*, 359 P.2d at 123.

53. The McCarthy-Green Butte Road has been historically used beginning at least in 1922 to access the Green Butte and Motherlode mines from McCarthy. *See* Ex. E. The road is referenced in Alaska Road Commission (ARC) documentation as route #57e, “McCarthy - Green Butte.” *Id.* The route is also referenced in the 1973 Department of Transportation and Public Facilities trails inventory on map 67 as trail #16. *Id.*

54. A 1929 ARC report stated:

This route extends from McCarthy up the McCarthy Creek valley to the Green Butte mine. It was built by the mining company and maintained by them previous to last year. A flood in the fall of 1927 greatly damaged the road and its repair was undertaken by the commission. The road is passable for *motor* traffic.

Id. (emphasis added).

55. Subsequent reports from 1929 to 1933 indicate that a total of \$2,319.68 was spent to maintain the route. *Id.*

56. A 1938 USGS bulletin, number 894, states:

[A] road four miles long connects the town of McCarthy with Kennecott, and another 13 miles along follows McCarthy Creek to the old Motherlode camp. This road was constructed privately but is now controlled by the Alaska Road Commission.

Id.

57. The earliest reservation along the road was for University grant 1216188, with a survey date of June 9, 1922. *Id.*

58. The Alaska Department of Natural Resources document states “[T]he grant of the R.S. 2477 right-of-way for the McCarthy-Green Butte Road was accepted by construction and use, subject to valid, existing rights, when the land was not reserved for public purposes.” *Id.*

59. Motorized travel has occurred on the McCarthy-Green Butte Road since the 1920s. *Id.*; *see also* Ex. F (McCarthy-Green Butte Road photos (<http://www.landrights.org/ak/wrst.McCarthyCreekRoadPhotos.htm>)).

60. The General Management Plan for the Wrangell-St. Elias National Park and Preserve states: “The park/preserve was established subject to valid existing rights, including rights-of-way established under R.S. 2477.” *See* Ex. G (General Management Plan at 13 (<http://www.nps.gov/wrst/GMP1986/GMP.htm#visitoruse>)). The Management Plan recognizes 107 trails as “possible R.S. 2477 rights-of-ways,” including the McCarthy-Green Butte Road. General Management Plan, Appendix M, at 214.

61. An important public policy objective of any state is to foster the state’s economic and social well-being. In Alaska, properly managed and utilized R.S. 2477 rights-of-way support the growth that will enhance Alaska’s economic and social well-being.

62. Through the grant of 102,500,000 of land in the Alaska Statehood Act, Congress intended to provide Alaska with a solid economic foundation. Congress knew that Alaska’s economy would be resource based. Such an economy, especially in Alaska, requires a thorough and dependable transportation system.

63. Unlike other states, Alaska is relatively new and sparsely populated, without a highly sophisticated and well-developed transportation system. Alaska’s communities are widely scattered over vast, unpopulated areas. Access is vital to Alaska’s communities and to the state’s development. Many R.S. 2477 trails and roads were originally pioneered by dog mushers, miners, teamsters, traders, and trappers, and have evolved into Alaska’s existing transportation network.

(The Pilgrims' Access Attempts)

64. For over a year, the Pilgrims used the McCarthy–Green Butte Road, often with a tracked vehicle, without a need for a permit. After the Pilgrims' home burned in April of 2003, they attempted to travel the road using a tracked vehicle in order to obtain supplies and building materials. The Pilgrims required a 16-foot trailer to transport the materials. In addition, due to periodic obstructions, such as rock slides, the Pilgrims required the small tracked vehicle. The blade on the tracked vehicle would remain up and out of use except in the event it was needed to move an obstruction to the extent passage was made possible. Accordingly, the Pilgrims' current required access is consistent with previous use, and will not cause any undue or unnecessary degradation of environmental or aesthetic values.

65. However, Park Service rangers prevented the Pilgrims from using a tracked vehicle on the road to obtain needed supplies. Rangers forced the Pilgrims to return to their homesite, informing them they would have to obtain a permit to use a tracked vehicle on the road. Days afterward, Park Service rangers closed the road to use by any tracked vehicles. The Park Service flew in the owner of the tracked vehicle and had him padlock the controls so it could not be used. Park Service rangers told the Pilgrims they would have to obtain their extensive supplies by foot, horseback, snowmobile or airlift.

66. The Park Service's actions effectively left the Pilgrims unable to supply their needs or rebuild their home.

67. With winter in Alaska fast approaching, the McCarthy-Green Butte Road has already begun to glacialize, the Pilgrims attempted to comply with the Park Service's permit requirement. The Pilgrims did so under protest, reserving all their rights. Running almost completely out of supplies and the "open window" of feasible travel closing, the Pilgrims had no choice but to attempt to comply with the Park Service's demand for a permit application.

68. Alaska's harsh winter instilled in the Pilgrims a sense of urgency. In winter, travel is extremely dangerous. Indeed, the threat of injury to people and livestock and destruction of

equipment and supplies is greatly increased due to the likelihood of avalanches, treacherous ice, and extreme temperatures. In addition, work on rebuilding their home is not practical in the extreme winter. The Pilgrims contend they must be allowed to obtain their supplies by the end of November, 2003, at the latest.

69. Accordingly, on July 8, 2003, the Pilgrims attempted to obtain a temporary access permit, under protest, so they could transport supplies to their homesite—but to no avail. Ex. B. The Pilgrims made an emergency access request via electronic mail to Superintendent Candelaria, but never received a substantive response. *Id.*

70. As a result, on August 30, 2003, the Pilgrims filed an emergency permit application with the Park Service. Ex. C. The Park Service again refused to grant the Pilgrims' emergency application, claiming no emergency existed and that the Park Service would have to perform an environmental impact study (EIS) pursuant to NEPA before it could issue a decision on the Pilgrims' permit application. Ex. D.

(The National Environmental Policy Act)

71. NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c).

72. "Major federal action" encompasses not only actions by the federal government but also actions by nonfederal actors "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. *See Sierra Club v. Hodel*, 848 F.2d at 1092 (finding "major" action in project in right-of-way improvement project involving realignment, widening, considerable blasting, significant improvement in road surface quality, and large increases in future traffic).

73. The distinguishing feature of "federal" involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. Cases finding "federal" action emphasize authority to exercise discretion over the outcome.

Sierra Club, 848 F.2d at 1089.

74. The touchstone of major federal action is an agency's authority to influence significant nonfederal activity. *Id.* This power must be more than the power to give nonbinding advice to the nonfederal actor. *Almond Hill School v. United States Department of Agriculture*, 768 F.2d 1030, 1039 (9th Cir. 1985) (no federal action where federal officials constituted minority of state advisory board which had power to recommend but not to act).

75. Rather, the federal agency must possess actual power to control the nonfederal activity. *Compare Sierra Club*, 848 F.2d at 1090 (no federal action in ensuring nonfederal actor's use of right-of-way does not exceed the boundaries of the right-of-way) *with Sierra Club*, 848 F.2d at 1090 (federal action in ensuring *improvement* to right-of-way does not degrade wilderness study area).

(Injunctive Relief Allegations)

76. Plaintiffs repeat, replead, and reallege as though set forth in full each and every allegation contained in Paragraphs 1 through 75 inclusive.

77. If injunctive relief does not issue enjoining Defendants from prohibiting Plaintiffs' reasonable, adequate, and feasible access to each parcel of their of property, Plaintiffs' health, safety, and survival will be impaired resulting in irreparable injury. Defendants' actions have inflicted, and will continue to inflict, immeasurable harm on Plaintiffs by preventing them from obtaining needed supplies and materials necessary to survive the harsh Alaska winter, to rebuild their home, and to winterize their property.

78. Plaintiffs do not have a plain, speedy, and adequate remedy at law.

79. Defendants, if not enjoined by the Court, will continue to prohibit Plaintiffs' reasonable, adequate, and feasible access to each parcel of their property in derogation of Plaintiffs' rights.

80. Accordingly, injunctive relief is appropriate.

(Declaratory Relief Allegations)

81. Plaintiffs repeat, replead, and reallege as though set forth in full each and every allegation contained in Paragraphs 1 through 80 inclusive.

82. An actual and substantial controversy exists between Plaintiffs and Defendants as to the respective legal rights and duties. Plaintiffs contend Defendants are unlawfully denying them reasonable, adequate, and feasible access to their property in derogation of Plaintiffs' rights. Defendants contend the opposite.

83. Accordingly, declaratory relief is appropriate.

FIRST CAUSE OF ACTION

(Violation of the Alaska Native Interest Lands Conservation Act)

84. Plaintiffs repeat, replead, and reallege as though set forth in full each and every allegation contained in Paragraphs 1 through 83 inclusive.

85. The Park Service has prevented the Pilgrims from using a tracked vehicle on the McCarthy-Green Butte road in order to supply their homesite.

86. Section 1110(b), entitled, "Special access and access to inholdings," clearly provides that the federal government shall provide adequate and feasible access across federal land to citizens owning private land inside or surrounded by federal conservation system units. 16 U.S.C. § 3170(b).

87. The Park Service's actions violate Section 1110(b) of ANILCA by preventing the Pilgrims from exercising adequate and feasible access to their property.

88. The Secretary may impose *reasonable* regulations on the Pilgrims' use of the McCarthy-Green Butte Road to access their property. *Id.* Here, however, the Park Service arbitrarily denied entirely the Pilgrims' access by tracked vehicle.

89. The Park Service denied the Pilgrims access claiming they must obtain a permit and that the Park Service could not issue such a permit until it complied with NEPA. However, the Pilgrims' mere continued use of the McCarthy-Green Butte Road under the rights assured to them by ANILCA does not require a permit. Nor does the Pilgrims' mere continued use of the road involve a major federal action involving NEPA.

90. Thus, Defendants' action in prohibiting reasonable, adequate, and feasible access violates the Pilgrims' rights granted in ANILCA and creates an emergency concerning irreparable injury to the health, safety, and survival of the Pilgrims' and their livestock.

SECOND CAUSE OF ACTION

(Violation of the Alaska Statute 19.30.400)

91. Plaintiffs repeat, replead, and reallege as though set forth in full each and every allegation contained in Paragraphs 1 through 90 inclusive.

92. The Park Service's act of denying the Pilgrims' adequate and feasible access to their land violates Alaska Statute 19.30.400. In that statute, the State of Alaska recognized as rights-of-way all valid access routes as defined by R.S. 2477 and accepted and preserved those routes for use by the public.

93. Likewise, public acceptance of the McCarthy-Green Butte Road as a valid R.S. 2477 right-of-way occurred through the historical use of the road, which has continued for over 80 years.

94. Accordingly, the Park Service has no discretion to exercise concerning prohibiting the continued use of tracked vehicles on R.S. 2477 rights-of-way, and may not deny their use. The Park Service possesses discretion to regulate the *improvement* of existing R.S. 2477 rights-of-way on federal land and also possesses the discretion to regulate the establishment of *new* rights-of-way on federal land. However, the use of existing R.S. 2477 rights-of-way within the scope for which they were originally accepted and used does not require federal government approval and is not subject to federal regulation.

95. Thus, the Park Service's action violates Alaska Statute 19.30.400 and the public's right of access across accepted R.S. 2477 rights-of-way, and creates an emergency concerning irreparable injury to the health, safety, and survival of the Pilgrims' and their livestock..

THIRD CAUSE OF ACTION

(Violation of the Administrative Procedures Act)

96. Plaintiffs repeat, replead, and reallege as though set forth in full each and every allegation contained in Paragraphs 1 through 95 inclusive.

97. The Park Service's decision that it must comply with NEPA prior to allowing the Pilgrims' use of the McCarthy-Green Butte Road is arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A).

98. The Park Service has no discretion to prohibit the Pilgrims mere continued use of the McCarthy-Green Butte Road. Thus, no major federal action is implicated in this case because the Pilgrims mere continued use of the road does not rise to a level subjecting it to federal control, responsibility, or influence.

99. Congress imposed the NEPA requirements on federal agencies in order to inform the decision maker. Here, the Park Service has no judgment to exercise concerning mere use of the right-of-way, as opposed to improvement or construction of a new right-of-way. Thus, the Park Service has no decision to make requiring the benefit of NEPA information.

100. Because the Park Service has no power to control mere continuing use of the McCarthy-Green Butte Road, its action prohibiting the Pilgrims' use of the road until it has complied with NEPA is arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A), and creates an emergency concerning irreparable injury to the health, safety, and survival of the Pilgrims' and their livestock.

PRAYER FOR RELIEF

Plaintiffs pray for judgment from this Court as follows:

1. Injunctive relief in the form of an order and injunction requiring Defendants to allow Plaintiffs continued reasonable, adequate, and feasible access to all parcels of their land, including via tracked vehicle use on the McCarthy-Green Butte Road;

2. A declaratory judgment that Defendants violated Plaintiffs' rights as provided for in federal law under Section 1110(b) of the Alaska Native Interest Lands Conservation Act by prohibiting continued use of a right-of-way recognized and protected by that Act;

3. A declaratory judgment that the McCarthy-Green Butte Road is a valid R.S. 2477 right-of-way;

4. A declaratory judgment that Defendants violated Plaintiffs' rights as provided for in state law under Alaska Statute 19.30.400 by prohibiting motorized use of a right-of-way recognized and protected by that Statute;

5. A declaratory judgment that Plaintiffs' use of the McCarthy-Green Butte Road does not implicate a major federal action necessitating compliance with the National Environmental Policy Act;

6. A declaratory judgment that Defendants' decision to prohibit Plaintiffs' continued use of the McCarthy-Green Butte Road and Defendants' decision to implicate the National Environmental Policy Act prior to allowing motorized vehicle use of the road is arbitrary, capricious, and not in accordance with the law in violation of the APA and must be set aside;

7. An award to Plaintiffs of reasonable attorneys' and experts' fees in bringing and maintaining this action pursuant to the APA, 5 U.S.C. § 552; ANILCA, 16 U.S.C. § 3117(a); and the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A);

8. An award to Plaintiffs of costs of suit pursuant to Federal Rule of Civil Procedure 54(d);
and

9. An award to Plaintiffs of any such other and further relief that the Court deems proper under the circumstances of this case.

DATED: October 31, 2003.

Respectfully submitted,

J. P. TANGEN

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By _____
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