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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Plaintiffs,

vs.

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.

Case No. A03-0257 CV (RRB)

ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND DISMISSING PLAINTIFFS' REQUEST FOR PERMANENT RELIEF AND INJUNCTION

I. INTRODUCTION

Before the Court are Plaintiffs Robert Hale, Joshua Hale, Nava S. Sunstar, and Butterfly Sunstar (hereinafter collectively referred to as "Plaintiffs") with (1) an Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction (Docket No. 2) and (2) a Complaint for Declaratory and Injunctive Relief (Docket No. 1). The Court has reviewed the extensive pleadings filed by the parties and has considered the arguments of counsel presented at the hearing in this matter on November 17, 2003.

II. FACTS

Plaintiffs are the owners and/or leaseholders of certain property located near the town of McCarthy, Alaska. Plaintiffs' property is surrounded by the Wrangell-St. Elias National Park and Preserve (hereinafter the "Park"). Plaintiffs' property was privately owned for many years prior to the creation of the Park in 1980. Plaintiffs' property was at one time connected to the Alaska road system by the McCarthy-Green Butte Road, which provided valid and legal access rights to the property in question for many years. However, whether valid and legal access existed at the time that the Park was created is in dispute.

The McCarthy-Green Butte Road is a roughly thirteen (13) mile long trail that leads from Plaintiffs' property to the town of

McCarthy and passes through the Park. This road, however, has not been used for vehicular travel for many years and has fallen into disrepair. For example, the bridges crossing McCarthy Creek are now gone and vegetation covers much of the roadway. The only vehicles that could possibly traverse the road today are four-wheel drive vehicles, tracked vehicles, and/or snow machines. The Alaska Road Commission listed the road as "abandoned" in 1938. There is little evidence that anyone has sought to maintain the road or has successfully driven a motor vehicle on it since.

Plaintiffs obtained the property in question in the Spring of 2002 and have, on occasion, utilized the McCarthy-Green Butte Road, in one fashion or another, to access their property from the town of McCarthy. Until recently, the primary method used by Plaintiffs on the trail has been horseback, although a tracked vehicle was apparently utilized as well.

In the Spring of 2003, Plaintiffs' house burned to the ground and Plaintiffs began efforts to rebuild. In order to bring new supplies in via the McCarthy-Green Butte Road, they began using a tracked vehicle, a D-4 Caterpillar. Shortly thereafter, Plaintiffs were advised by representatives of the Park Service that they could not use the aforementioned tracked vehicle on the McCarthy-Green Butte Road. On April 8, 2003, a Public Notice was posted near the roadway prohibiting the use of any motorized

vehicles on the road other than snow machines. In August of 2003, Plaintiffs sought Park Service permission to utilize a motorized tracked vehicle in order to bring supplies into their property. The Park Service refused to give Plaintiffs permission for this, on either a temporary or permanent basis, although it attempted to work with Plaintiffs and expedite the permitting process at no cost.

It is the Park Service's position that an environmental assessment and a route study must be conducted before it can act upon Plaintiffs' request to utilize motorized tracked vehicles on the McCarthy-Greene Butte Road. Plaintiffs contend that they are not required to obtain a permit or Park Service permission before upgrading and utilizing the route in question.

The Park Service has also notified Plaintiffs that they cannot utilize a tunnel that is on Park land, which tunnel leads to an underground mine owned by Plaintiffs. Although this is a separate issue, it is addressed below as well.

III. DISCUSSION

Several issues are raised in this matter. The first issue is whether Defendants can regulate right of access over federal conservation lands when the right of access existed before the creation of the conservation unit. Included within this issue is the question of whether or not a right of access, which was at

one time valid, can be abandoned and, if so, whether it was abandoned in this instance. More specifically, the ultimate question is whether or not Plaintiffs must obtain a license and/or a permit to utilize a motorized tracked vehicle on the McCarthy-Green Butte Road in order to access their property which is located within the Park. Although this has been described by some as a "landmark" dispute, it is not. As set forth below, the matter has been previously litigated and resolved in this Circuit.

The second issue is whether Defendants can prohibit Plaintiffs from entering a mine tunnel on Park land which leads underground to Plaintiffs' mine but has been closed by the Park Service for safety reasons.

This dispute would have never likely arisen prior to 1980 and the enactment of the Alaska National Interest Lands Conservation Act (ANILCA). Prior to this time, the land in question was subject to few restrictions and was utilized freely for mining, subsistence, and recreational purposes. ANILCA changed this, and for reasons clearly articulated by Congress, a large portion of land within Alaska was placed into conservation units, i.e., national forests, parks, wildlife refuges, and wild and scenic rivers. From the outset, concern existed regarding how this dramatic change in land classification would impact those with vested rights in and/or around the conservation units and those who

customarily used the land in question. The challenge for Congress was to balance the interests of private property owners, as well as subsistence and recreational users, against the need to safeguard and regulate federal land and wildlife. With this in mind, considerable discussion, debate, and compromise preceded the enactment of ANILCA. The hope was to once and for all resolve the conflicts that this proposed legislation created and to preserve forever much of Alaska's pristine wilderness, while not significantly compromising the lifestyle of those who resided there, who pioneered the land, and who contributed to its unique and colorful character. The legislation that ensued lies at the center of the current dispute.

A. Valid Rights Of Access That Existed Prior To ANILCA Were Not Significantly Restricted By ANILCA.

Interestingly, one of the issues which is debated here was not the subject of any debate preceding the adoption of ANILCA by Congress. The Congressional Record suggests that legislators presumed existing rights of access, or right-of-ways, would not be impacted by ANILCA and only discussed the issue in passing. Their views were explicitly set forth in the resulting legislation, i.e., 16 U.S.C. §§ 3101 - 3233.

More specifically, 16 U.S.C. § 3129 provides: "Valid existing right of access[.] Nothing in this subchapter shall be construed to adversely affect any valid existing right of access."

This provision was adopted both by the House of Representatives (H.R. Rep. No. 96-97, pt. 2, at 66 & 206 (1979)) and the United States Senate (S. Rep. No. 96-413, at 67 & 300 (1979)) and remained intact after numerous committee conferences. The provision itself is clear and unambiguous and stands alone in its expression of Congressional intent.

The Court notes that Congress engaged in considerable debate concerning access rights by in-holders who did not have a valid existing right of access to their property when ANILCA was adopted. This was codified in 16 U.S.C. § 3170 and was the subject of extensive discussion. Of note, during these discussions, and on August 1, 1978, Alaska Senator Ted Stevens specifically addressed the issue here raised concerning existing access rights.

> Senator Stevens: Mr. Chairman, again the problem is understanding it. If you will permit me – in some of these areas, as I mentioned, there are existing accesses, existing roads that have been used, existing airports.
>
> They are going now to be placed into parks and perhaps wilderness areas. This says the Secretary can grant temporary access when he determines such access will not result in permanent harm to the resources of such units.
>
> Now, I wonder about that in terms of again the existing level of access and what is going to happen to that. Are we going to be able to use those roads?

* * *

> Does this mean, Mr. Quarles, that permanent harm to the resources – does that mean that the existing uses would be foreclosed for such purposes?
>
> Mr. Quarles: No. I don't read it that way at all, sir.[1]

Later that day Senator Stevens sought to again clarify the issue when addressing Senator Jackson, the Chairman of the United States Senate Committee on Energy and Natural Resources, while discussing the issue of temporary access across federal lands.

> Senator Stevens: I want to make sure you are not foreclosing the existing permanent access.
>
> The Chairman: We are enlarging it. The key situation here, the word is temporary. It is for surveys, geographical, exploratory or other temporary uses. It deals only with those special situations, as I understand it.[2]

Finally, in order to make it absolutely clear that ANILCA would not eradicate and/or seriously compromise existing right-of-ways, Senator Stevens, on the floor of the United States Senate on

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[1] Alaska National Interest Lands Conservation Act of 1980: Alaska (d)(2) Lands - Mark Up Before the Senate Energy and Natural Resource Comm., 95th Cong. 75-76 (August 1, 1978) (statements of Senator Stevens, Member, Senate Comm. Energy and Natural Resources; and, Mr. Quarles).

[2] Id. at 78.

August 18, 1980, engaged in the following brief colloquy with Senator Jackson:

> Mr. Stevens: I would like to clarify a point regarding valid existing rights. The designation of conservation system units are subject to valid existing rights and use of such rights subject to reasonable regulation, shall be permitted. It is my understanding that valid existing rights do include any valid existing rights of way or rights of way which are created in the future.
>
> Mr. Jackson: The Senator is correct. The designation of units of this bill are subject to valid existing rights and the use thereof, subject to reasonable regulation.[3]

The Court was unable to locate any part of the Congressional Record, following an extensive search of the committee hearing notes, the numerous commentaries contained in the compilation of legislative history, and the debate on the floors of both the House of Representatives and the Senate, that indicated congressional intent different from that expressed by Mr. Quarles and/or Senator Jackson to Senator Stevens, and set forth specifically in 16 U.S.C. § 3169. Consequently, the Court concludes ANILCA was not to prohibit any valid right of access that existed at the time it was enacted, although such rights of access were subject to reasonable regulation.

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[3] 126 Cong. Rec. S11,195-96 (daily ed. Aug. 19, 1990) (statements of Senators Stevens and Jackson).

B. Even If A Valid Access Right Exists, It Is Subject To Reasonable Regulation.

Controlling case law,[4] which is binding upon this Court, as well as Senator Stevens' comments on the Senate floor,[5] suggest that, despite valid existing rights of access, the Secretary of the Interior (hereinafter the "Secretary") has the authority to reasonably regulate access routes that pass through Park property. This is largely because the land underlying and surrounding the access routes is Park land, and because one of the overriding purposes of ANILCA was to preserve and protect Park land.[6] However, what constitutes "reasonable regulation," in light of the clear mandate to protect valid existing rights of access, remains the subject of dispute.

"Reasonable regulation" might include, among other things, the prohibition of uses that would damage land outside the right-of-way, or it might prohibit uses that would alter or upgrade the roadway from the way it existed in December of 1980 when the Park was created. "Reasonable regulation" may even require an

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[4] See U.S. v. Vogler, 859 F.2d 638, 642 (9th Cir. 1988), wherein the Ninth Circuit determined, "[t]he Secretary's power to regulate within a national park to 'conserve the scenery and the nature and historic objects and wildlife therein . . .' applies with equal force to regulating an established right of way within the park."

[5] Supra note 3.

[6] 16 U.S.C. § 3101.

environmental assessment when the access route in question is being reactivated after years of non-use and natural deterioration. And "reasonable regulation" can include a permitting process to enforce reasonable regulations so long as the permitting process is itself reasonable, not unnecessarily restrictive, and consistent with the Congressional mandate favoring access. Therefore, even if a valid right of access existed at the time Plaintiffs acquired the property in question, the Court concludes the Park Service may require Plaintiffs to seek a permit prior to re-opening a roadway that has long since been inactive.[7]

Moreover, even though the declarations submitted by Plaintiffs' expert, Raymond A. Kreig (Docket No. 26), are impressive and should be considered by the Park Service in evaluating Plaintiffs' access request, they do not dispose of the issue. If it were clear that, in addition to Mr. Kreig's findings, the access route in question existed at the time ANILCA was enacted, had not been subsequently abandoned, followed the same route as it historically did, is in roughly the same condition as it was at the time of ANILCA, and is sought to be used in the same manner as it was capable of being used in 1980, Plaintiffs' arguments may have merit and any permitting process would likely only need to be perfunctory. However, to utilize this route today,

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[7] Vogler, 859 F.2d at 642.

Plaintiffs must cross streams that were originally spanned by bridges, must apparently travel outside the right-of-way in certain places, and must, in some instances, create new sections of roadway. They must essentially open up a road that has been overgrown and abandoned for more than 65 years. This type of activity would naturally be of concern to the Park Service and would justify a reasonable investigation and/or a permitting process whether access rights existed or not. Therefore, the Park Service was justified in asking the questions it did and in seeking input concerning Plaintiffs' activities on the roadway. Consequently, the Court concludes the Park Service is entitled, within the scope of 16 U.S.C. § 3169, to require Plaintiffs to obtain a permit before utilizing the roadway in dispute.

C. If Plaintiffs Lack Valid Rights Of Access Pursuant To 16 U.S.C. § 3169, They Are Still Entitled To Access To In-holdings Subject To Reasonable Regulation.

There is no question that Plaintiffs are "in-holders" in the sense that they own property that is surrounded by Park land. Therefore, without a valid right of access under 16 U.S.C. § 3169, they are limited to the protections of 16 U.S.C. § 3170, which permits the use of snow machines, motorboats, airplanes, and non-motorized surface transportation. These rights may not be

restricted without first providing notice and a "hearing in the vicinity of the affected unit or area."[8]

As "in-holders," Plaintiffs are also entitled to such rights as are "necessary to assure adequate and feasible access" to their property.[9] These additional rights are again "subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands."[10] Herein lies much of the present dispute.

Plaintiffs believe that "adequate and feasible access" to their property should permit them to utilize the old McCarthy-Green Butte Road, to deviate therefrom when necessary, to utilize a tracked vehicle to do so, to ford streams where bridges used to be, and to do so without permission or permit. Defendants appear to question Plaintiffs' entitlement to these rights, but have not foreclosed anything at this time. Defendants contend that, in any event, a permit is required, thereby necessitating a study of the impact of Plaintiffs' proposed uses.

Once again, it is clear that if the Secretary has the authority to regulate the manner and means of access, as is provided here by statue, then the Secretary, via the Park Service,

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[8] 16 U.S.C. § 3170(a).

[9] 16 U.S.C. § 3170(b).

[10] Id.

has the authority to require permits before allowing use of an access route. Therefore, the Court concludes Plaintiffs must obtain a permit whether proceeding under 16 U.S.C. § 3169 or 16 U.S.C. § 3170.

This does not necessarily mean that Plaintiffs will be prevented from accessing their property as they seek to do. It simply means that the Park Service is entitled to first evaluate their request and consider the impact it will have on the Park. The Park Service will then, after considering all relevant factors, issue a document outlining the means and manner of access it permits. If Plaintiffs are dissatisfied with the Park Service's decision, they can appeal it to this Court.

D. The Court Lacks Jurisdiction To Address Issues Relating To The Permits, Under The Administrative Procedure Act, Until After The Permit Process Has Been Completed.

The jurisdiction of the U.S. District Court is limited and specific.[11] Without jurisdiction the Court cannot act.[12] In the present case, it is clear that Plaintiffs must seek a permit to use the roadway in question, regardless of the nature of their access rights. Consequently, the Park Service is entitled to investigate

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[11] See Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 701 (1982).

[12] Clow v. U.S. Dept. of Housing and Urban Development, 948 F.2d 614, 625 (9th Cir. 1991) abrogated on other grounds by 523 U.S. 83 (1998).

the matter and make a reasoned determination. Once a final decision is made, Plaintiffs may appeal the same, should they choose to do so. However, before this process is completed, the Court lacks jurisdiction over the Plaintiffs' claims.[13]

E. The Motion For Temporary Restraining Order Is Denied As Plaintiffs Have Failed To demonstrate A Probability Of Success On The Merits And/Or Irreparable Injury.

Given the lack of jurisdiction, the current posture of the case, the successful efforts Plaintiffs have made to supply themselves for the winter, and the fact that this matter was brought to the Court's attention at such a late date, the Court hereby **DENIES** Plaintiffs' Request for Temporary Restraining Order (Docket No. 2). This dispute must be adjudicated pursuant to the Administrative Procedures Act (APA) and brought before the U.S. District Court once a final decision has been entered.[14]

As the Court previously indicated, vehicular travel over the roadway in question has not occurred for more than 65 years. This was not a secret at the time Plaintiffs purchased the

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[13] The Administrative Procedure Act provides in relevant part: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (emphasis added). Consequently, because the Park Service has yet to make a "final agency action," the Court determines it lacks jurisdiction over Plaintiffs' claims.

[14] Id.

property, as many living within the Park boundaries lack vehicular access to their property. Therefore, it is reasonable to allow the Park Service time to investigate the issue before making a decision. Plaintiffs' lifestyle will not be significantly impacted by any delay involved, as there is no reason for them to have expected that access existed when they purchased the property in question.

By the same token, the tunnel which Plaintiffs wish to enter, Polk Adit 1601, has been unused for many years and there is no urgency at the present time that would justify a temporary restraining order. This tunnel is the property of the Park Service and is located entirely on Park land. Moreover, the safety issues the Park Service raises do not appear to be unreasonable upon their face. Plaintiffs can, nevertheless, seek an appropriate permit to utilize the tunnel in question and can appeal any final decision entered.

IV. CONCLUSION

The Court greatly appreciates the desire of Alaskans to access the lands that surround them and can personally recall the turmoil and agony of the '60s and '70s, as these sensitive issues were debated both locally and throughout the Nation. The Court also understands the wilderness lifestyle and the need to reasonably balance environmental concerns with human needs.

However, more than anything else, the Court appreciates the rule-of-law. The Court has no option but to follow the law as enacted by Congress and established in this Circuit. For the Court to grant Plaintiffs' request, it would have to ignore U.S. v. Vogler, 859 F.2d 638 (9th Cir. 1988), which case is directly on point and controlling in this matter. More specifically, both the Vogler decision and ANILCA authorize the Park Service to require a permit for motorized travel on Park land and subject the traveler to reasonable regulation.[15] Furthermore, the APA precludes the Court from acting until after the Park Service has ruled upon Plaintiffs' permit application, according to its established procedures.[16]

Finally, the facts of this case do not justify the issuance of a temporary restraining order, as it is not clear that Plaintiffs will ultimately prevail in this matter, although the Court notes that they may well be granted some form of motorized access to their property. Plaintiffs have long since been aware of the Park Services's position with regard to access. Consequently, the Court determines Plaintiffs will not be irreparably harmed by adhering to Park Service rules until the matter is finally resolved.

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[15] Vogler, 859 F.2d at 642.

[16] Supra note 13.

The Court expects that, henceforth, as the parties continue to address these issues through the permitting process, they will each respect the other and will communicate openly and candidly. The showmanship and emotionalism that have characterized their interactions in the past must cease. After all, they are neighbors. The ultimate resolution of this case will be based solely on a fair application of applicable law.

Therefore, for the reasons stated herein, Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction (Docket No. 2) is hereby **DENIED**, and Plaintiffs' Complaint for Declaratory and Injunctive Relief (Docket No. 1) is hereby **DISMISSED** for lack of jurisdiction.

ENTERED at Anchorage, Alaska, this 18th day of November, 2003.

RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

A03-0257--CV (RRB)

B. LANDON (AUSA)
J. HURLING
R. RANDALL

MAILED ON 11/18/03
BY PD