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IN THE UNITED STATES DISTRICT COURT

FOR THE 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 & Preserve; HUNTER SHARP, Chief Ranger, Wrangell-St. Elias National Park & 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, Defendant.	Case No. A03-256-CV (RRB)

FEDERAL DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Federal defendants oppose plaintiffs' motion for a temporary restraining order and preliminary injunction. Plaintiffs seek an order "preventing Defendants from engaging in any and all actions prohibiting Plaintiffs from continuing to utilize a tracked vehicle on the McCarthy-Green Butte Road for the purpose of accessing their property ..."; "preventing Defendants from engaging in any and all actions prohibiting Plaintiffs from accessing by foot their property known as the Motherlode Mine." and "preventing Defendants from engaging in any and all actions prohibiting Plaintiffs from accessing by tracked vehicle across the McCarthy-Green Butte Road the portions of their property known as the Marvelous Millsite and Spokane Parcel."

Plaintiffs have belatedly applied to the National Park Service (NPS) for a bulldozer access permit across national park land in the Wrangell-St. Elias National Park and Preserve (WSENPP) from McCarthy to property they own approximately 12-13 miles to the northeast. Declaration of Hunter Sharp, Exh. 1 ¶ 39. Plaintiffs bladed the bulldozer trail without a permit in 2002. *Id.* at ¶¶ 14, 15, 20. Both NPS regulations and the National Environmental Policy Act require the NPS to prepare at least an environmental assessment (EA) before issuing the access permit. The NPS has offered to prepare an EA and, assuming that the agency determines that issuing the permit would not significantly impact the environment, process the permit application in approximately nine weeks from whenever the plaintiffs clarify certain aspects of their application and inform the NPS that they wish the agency to proceed. *Id.* at ¶ 46. The agency has agreed to waive the cost of the preparation of the

EA. *Id.* at ¶ 46.

To date, and despite repeated requests, plaintiffs have not provided the clarifications, nor requested the agency to proceed. *Id.* at ¶ 51. Instead plaintiffs have come to this court for declaratory and injunctive relief arguing that the agency has no authority to regulate their use of the bulldozer along their proposed route because of access afforded by the Alaska National Interest Lands Conservation Act (ANILCA) and because the route they seek to use is allegedly a right of way established pursuant to Revised Statutes (R.S.) 2477. They claim that because the agency may not regulate this use, there is no need for an EA. They claim that unless this court enjoins the agency from interfering with their bulldozer access, they will be unable to bring needed winter supplies to their property.

Plaintiffs also seek an order enjoining the NPS from interfering with their entry into an abandoned mine opening on park land, which the NPS has closed for safety reasons as directed in 30 CFR § 57.20021, implementing the Federal Mine Safety and Health Act of 1977, 91 Stat. 1290 (Nov. 9, 1977).

Plaintiffs are entitled to no such relief. They have no likelihood of success on the merits and fail to raise serious questions for at least three reasons.

First, the Ninth Circuit has consistently rejected claims that the United States lacks the authority to regulate access to inholdings regardless of whether the inholder claims that he has access rights pursuant to Revised Statutes (R.S.) 2477. *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988); *Clouser v. Espy*, 42 F.3d 1522, 1534 (9th Cir. 1994); *Adams v. United States,* 3 F.3d

1254, 1258 n. 1 (9th Cir. 1993). That regulatory authority predates ANILCA, and arises out of the National Park Service Organic Act, 16 U.S.C. §1. *United States v. Vogler,* 859 F.2d at 641-42. In addition, Congress specifically authorized the Secretary of the Interior to regulate access to inholdings in National Parks and other national conservation areas in Alaska in Section 1110(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3170. In 1984, the Department of the Interior promulgated regulations implementing that delegation at 43 CFR § 36.10. The regulations specifically require compliance with the National Environmental Policy Act (NEPA) in processing inholder access applications. 43 CFR § 36.10(b)(d); 43 CFR § 36.6.

Second, this Court lacks jurisdiction to grant the relief sought.[1]/ Plaintiffs' theory requires this Court to determine that the route they propose to travel is a R.S. 2477 right of way. The United States does not concede that an R.S. 2477 right of way exists in the area, but whether or not one does exist, plaintiffs are not entitled to the relief they seek. Even if an R.S. 2477 right of way exists in the area, it does not coincide with the route proposed by plaintiffs. Declaration of Hunter Sharp, Exh. 1 at ¶¶ 4, 16, 26. The exclusive remedy by which a plaintiff can obtain an adjudication of property interests against the United

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[1]/ We have organized this memorandum in the manner we believe is most logical for preliminary injunction proceedings, beginning with the merits. We note that, if the Court decides to consolidate the preliminary injunction proceedings with a hearing on the merits, Supreme Court precedent requires this Court to resolve jurisdictional issues before deciding contested issues of law on the merits. *Steel Company v. Citizens for a Better Environment,* 523 U.S. 83, 101 (1998).

States is the Quiet Title Act (QTA), 28 U.S.C. § 2409a. *Block v. North Dakota,* 461 U.S. 273 (1983). Plaintiffs have not brought and could not bring a QTA action. Even had they brought a QTA action, 28 U.S.C. § 2409a(c) absolutely prohibits the issuance of preliminary injunctions in such cases.

Third, plaintiffs purport to bring this action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 702 *et seq.* That act limits judicial review to final agency action. 5 U.S.C. § 704. Here there is no final agency action. To the contrary, plaintiffs seek to short-circuit the environmental assessment process required before the agency can take final agency action. The NPS has not denied plaintiffs access to their inholding; rather plaintiffs have failed to complete the approval process required by statute and regulation for the means of access they seek Accordingly, APA jurisdiction would be unavailable even if Congress had not made the QTA the exclusive remedy for the adjudication of United States interests in land.

Nor would plaintiffs suffer irreparable harm if the Court denied the motion for temporary restraining order and preliminary injunction. Plaintiffs claim that their use of a tracked vehicle is necessary to move winter provisions to the Marvelous Millsite. Plaintiffs require a permit if they wish to use a tracked motorized vehicle to transport their provisions to the property.

However, they have available and have used other methods of access to bring provisions to their property which require no permit. Plaintiffs possess a large horsedrawn wagon. Declaration of Hunter Sharp, Exh. 1 at ¶¶ 52, 53. A NPS employee has witnessed plaintiffs using that wagon to bring a large load of building

supplies to the property in recent weeks. *Id.* at ¶ 53. The wagon holds the equivalent of two pickup trucks. *Id.* at ¶ 53. Section 1110(a) of ANILCA, as implemented by 43 CFR 36.11(e), permits non-motorized access except in areas where such access is specifically prohibited or restricted. The NPS has not prohibited non-motorized access in the McCarthy Creek area. Declaration of Hunter Sharp, Exh. 1 at ¶ 23. In addition, air transport, for which no permit is required, is available in McCarthy for loads up to 2000 lbs. at $200 per round trip. *Id.* at ¶ 52. Snowmachines do not require a permit once there is sufficient snow cover, a condition expected in the near future. *Id.* at ¶ 52. Snowmachines can tow sleds with large loads and are a customary means of overland freighting of materials in the area. *Id.* at ¶ 52.

In any event, if the plaintiffs face a difficult situation, it is of their own creation. The NPS has sought to work with the plaintiffs since their acquisition of the property in the spring of 2002 to process access applications. *Id.* at ¶¶ 6,9, 10, 11, 12, 13. Plaintiffs repeatedly rebuffed these efforts and bulldozed a road through the McCarthy Creek valley in the fall of 2002 with no permit to do so. *Id.* at ¶¶ 14, 15, 16. They failed to submit their permit application until September 2003. *Id.* at ¶¶ 20, 35, 39. At that time they asserted that the latest go-ahead date for moving their provisions was the end of September. *Id.* at ¶ 39 and Attachment 25 thereto. The application contained inadequate detail. The NPS promptly sought that information by letter dated September 8. *Id.* at ¶ 40. The agency also offered to prepare an EA on an expedited basis in nine weeks and to waive recovery of the expenses of preparing the EA. *Id.* at ¶ 46.

Plaintiffs' allegation of irreparable harm with regard to the use of the Polk 1601 Adit is likewise without merit. Plaintiffs state that "the Park Service has informed the Pilgrims they can no longer access, *by foot*, 2,600 feet of Park Service land in order to get to their Motherlode mine." The description in plaintiffs' brief is totally inadequate to give the Court an understanding of the dispute regarding the Polk 1601 Adit. The plaintiffs own in fee the Motherlode Mine Claims consisting of over 200 acres. Declaration of Hunter Sharp, Exh. 1 at ¶ 7. The NPS has taken no action to prevent plaintiffs from traveling to the Motherlode overland by foot. *Id.* at 32. The dispute involves use of a mine tunnel within park land whose opening is located more than a half mile outside the Motherlode claim on park land. The agency has closed access to the tunnel for safety reasons pursuant to the Federal Mine Safety and Health Act of 1977. *Id.* at 32.

Harm to the park can be expected if the injunction issues. The route proposed by plaintiffs involves multiple stream crossings with a bulldozer during dolly varden spawning season. *Id.* at ¶¶ 16, 56. Congress, in ANILCA § 1110(a), distinguished between certain kinds of motorized access because the motorized modes authorized raised far fewer environmental concerns than those associated with other forms of motorized travel. It is precisely in order to evaluate the extent of such impacts that the agency must prepare an EA.

Issuance of the requested injunctive relief would harm the public interest and send the signal that those wishing to obtain bulldozer access to inholdings should bulldoze first (as plaintiffs have done) and ask later; procrastinate dealing with the NPS or

bringing in provisions by means of access not requiring a permit; and then claim an emergency. The doctrine of "clean hands" likewise justifies denial of the motion for injunctive relief in this case.

BACKGROUND

A. Creation of Wrangell-St. Elias National Park and Preserve

In 1980, Congress created the Wrangell-St. Elias National Park and Preserve (WSENPP)in section 201(9) of ANILCA to:

> maintain unimpaired the scenic beauty and quality of high mountains, foothills, glacial systems, lakes and streams, valleys, and coastal landscapes in their natural state; to protect habitat for, and populations of fish and wildlife including, but not limited to caribou, brown/grizzly bears, Dall sheep, moose, wolves, trumpeter swans and other waterfowl, and marine mammals; and to provide continued opportunities including reasonable access for mountain climbing, mountaineering, and other wilderness recreational activities.

Congress directed that the WSENPP be administered pursuant to the National Park Service Organic Act, as modified by ANILCA. ANILCA § 203, 16 U.S.C. 410hh-2.

B. Access Provisions of ANILCA

Congress also provided for certain access rights to inholders in National Parks and other conservation system units established in ANILCA. Congress distinguished broadly between two types of access, set forth respectively in sections 1110(a) and 1110(b) of ANILCA, 16 U.S.C. §§ 3170(a) and (b) which provide:

> (a) Notwithstanding any other provision of this Act or other law, the Secretary shall permit, on conservation system units, national recreation areas, and national conservation areas, and those public lands designated as wilderness study, the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface

> transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units, national recreation areas, and national conservation areas, and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area. Nothing in this section shall be construed as prohibiting the use of other methods of transportation for such travel and activities on conservation system lands where such use is permitted by this Act or other law.
>
> (b) Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

As is clear from the language of the statute, Congress intended to treat non-motorized and certain enumerated motorized modes of transport quite differently from other motorized modes. Under 1110(a), the use of snowmachines, motorboats, airplanes and non-motorized surface transportation (hereafter collectively "special access" is permitted (subject to reasonable regulation) except in areas where it has been restricted. Before prohibiting special access access, the agency must give notice and hold a hearing.

Under 1110(b), the Secretary is to provide, subject to regulation "adequate and feasible" access to inholders. Adequate

and feasible access can include, but does not necessarily require, access by motorized overland vehicles. 43 CFR 36.10. The access is subject to reasonable regulation by the agency. Section 1110(b) contains no notice and hearing requirement comparable to the provision relating to special access in section 1110(a).

In 1984, the Department of the Interior promulgated regulations at 43 CFR Part 36 to implement the regulatory authority delegated to him in ANILCA. 43 CFR 36.10 requires inholders to apply for access permits under section 1110(b). The Secretary must provide adequate and reasonable access, but that access need not be the least costly alternative. 43 CFR 36.10(a)(1). The determination of whether to issue a particular access permit requires the preparation of appropriate documentation under NEPA. 43 CFR 36.10(d); 43 CFR 36.6.

C. The National Environmental Policy Act

In NEPA, Congress directed agencies "to the fullest extent possible" to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment" and to prepare a "detailed statement" on "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332.

Congress authorized the Council on Environmental Quality (CEQ) to promulgate regulations binding on the other federal agencies with regard to the implementation of the procedural provisions of NEPA. *The Steamboaters v. FERC,* 759 F.2d 1382,

1393 n. 4 (9th Cir. 1985). CEQ's NEPA regulations appear at 40 CFR Parts 1500 through 1508. Before an agency takes an action significantly affecting the environment, it must prepare an environmental impact statement (EIS). 42 U.S.C. § 4332. If it is unsure whether an action would significantly affect the environment, it must prepare at least an EA unless the action falls within a group of activities referred to as "categorical exclusions" found by the agency to be "actions which do not individually or cumulatively have a significant effect on the human environment." 43 CFR 1507.3(b)(2)(ii), 1508.4. The NPS list of categorical exclusions appears at Director's Order #12 and Handbook, § 3.3, Exh. 2. Plaintiffs' access request does not fall within any of those categorical exclusions. NEPA therefore requires the preparation of at least an EA before issuing an access permit to plaintiffs.[2]/

Consonant with the requirements of NEPA itself, the Department of the Interior regulations on access provide that:

> (a) The provisions of NEPA and the Council for Environmental Quality regulations (40 CFR parts 1500-1508) will be applied to determine whether an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) is required, or that a categorical exclusion applies.

43 CFR 36.6(a).

D. R.S. 2477

Former R.S. 2477, 43 U.S.C. 932, repealed with savings

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[2]/ If, upon completion of an EA, the agency concludes that the action would not have a significant impact on the environment, it may issue the permit on the basis of the EA. If the agency concludes that the action would significantly affect the environment, it must prepare an EIS before issuing the permit.

clause[3]/, provided:

> The right-of-way for the construction of highways over public lands not reserved for public uses, is hereby granted.

The statute constitutes a federal offer to grant an easement for the construction of "highways" across unreserved federal land. Within the scope of that federal offer, a state or territory's law determines whether the offer has been accepted. *See, United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411 (9th Cir. 1984). Of course, no acceptance can occur after the repeal of R.S. 2477 in 1976 or after the land traversed by a route has been appropriated. The land traversed by the route at issue in this case has been continuously appropriated and unavailable for the creation of an R.S. 2477 right of way since at least January 19, 1969. Declaration of Hunter Sharp at ¶ 4. Portions of the route may have been unavailable for creation of a R.S. 2477 right of way since a much earlier date due to the presence of mining claims. *See, Clark v. Taylor,* 9 Alaska 298 (1938).

R.S. 2477 grants only a right-of-way easement and the underlying fee remains in federal ownership. *Adams v. United States,* 3 F.3d 1254, 1258 (9th Cir. 1993). The Ninth Circuit has repeatedly held that R.S. 2477 rights-of-way traversing land still in federal ownership are subject to regulation by the federal government. *United States v. Vogler,* 859 F.2d 638 (9th

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[3]/ Congress repealed R.S. 2477 in section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793 (October 21, 1976). Section 701 of FLPMA preserved from termination any R.S. 2477 rights of way in existence on the date of that act.

Cir. 1988); *Clouser v. Espy,* 42 F.3d 1522 (9th Cir. 1994); *see also, Adams v. United States,* 3 F.3d at 1258 n.1; *Sierra Club v. Hodel,* 848 F.2d 1068 (10th Cir. 1987); *United States v. Garfield County,* 122 F.Supp.2d 1201, 1238, 1239 (D. Utah 2000). The *Vogler* case specifically held that the NPS could require prior approval for motorized access to an inholding along a R.S. 2477.

E. The McCarthy-Green Butte Route

The Ninth Circuit has made clear that the United States may regulate the use of R.S. 2477 rights-of-way. Consequently, plaintiffs could not prevail even if the entirety of their proposed route were a R.S. right of way. Federal defendants must, nonetheless, take exception to plaintiffs' allegations regarding the route at issue in this action.

Plaintiffs' references to their mere "continued" use of tracked vehicles on the route and claims that the route has been in "continuous use" since 1922 are simply not supported by the facts.

In the early 1900s, vast quantities of copper were discovered in the McCarthy area. Declaration of Hunter Sharp, Exh. 1 at ¶ 4. The two largest finds were on Bonanza Ridge that separates the McCarthy Creek Valley from the McCarthy-Kennecott Valley. *Id.* at ¶ 4.

In 1916, the Motherlode Coalition built an all-season wagon road from McCarthy to the Marvelous Millsite, complete with two tunnels and numerous bridges at stream crossings. *Id.* at ¶ 4.

While there is no doubt that a road was constructed to the Marvelous Millsite in the early years of the twentieth century, it does not follow that the route bulldozed by the plaintiffs

necessarily constitutes a R.S. 2477 right of way today.

In 1919, the Kennecott Company bought the Motherlode claims. *Id.* at ¶ 4. There is no evidence that Kennecott maintained the road after it acquired the Motherlode in 1919, but if it did, that effort certainly ended by 1926 when the company abandoned both its camps on McCarthy Creek. *Id.* at ¶ 4. The Green Butte and Tjosevig mining interests maintained the road for a few years in the twenties, and in 1928 the Alaska Road Commission assumed responsibility of the route as far as Green Butte. *Id.* at ¶ 4. Beginning in 1938, the Alaska Road Commission listed the McCarthy-Green Butte Road as "abandoned". *Id.* at ¶ 4.

The road fell into disuse and became overgrown. *Id.* at ¶ 4. No one lived at the Marvelous Millsite, Spokane Placer and Motherlode since at least the creation of the WSENPP in 1980 until plaintiffs purchased the properties in the spring of 2002 for $420,000. *Id.* at ¶¶ 6, 7. At the time plaintiffs bought the properties, the numerous bridges at stream crossings had all washed away and the prior road had grown over to the extent that there was no road access passable by motorized vehicles between the parcels and McCarthy. *Id.* at ¶ 6.

Sometime during the fall of 2002, plaintiffs bulldozed a route between the Marvelous Millsite and McCarthy. Declaration of Hunter Sharp, Exh. 1 at ¶ 14, 15. Plaintiffs route bulldozed across McCarthy Creek up to 17 times. *Id.* at ¶ 16.

NPS regulation 36 CFR 5.7 prohibits "constructing or attempting to construct a road, ... trail, path or other way upon across, or through or under any park areas except in accordance with the provisions of a valid permit, contract or other written

agreement with the United States." NPS regulation 36 CFR 2.1(a) prohibits "destroying, injuring, removing, digging or disturbing from its natural state ... plants or the parts or products thereof." Plaintiffs neither applied for nor received a permit for road construction or clearing of vegetation prior to blading the route to McCarthy. Declaration of Hunter Sharp, Exh. 1 at ¶¶ 17-20.

The NPS notified plaintiffs of the illegality of their activities and instituted an assessment of the injury to Park resources as required by 16 U.S.C. 19jj, a statute by which Congress created strict liability for injury to park resources. Declaration of Hunter Sharp, Exh. 1 at ¶¶ 23, 27. In connection with that assessment, it was discovered that the route bladed by plaintiffs diverged significantly in places from the route of the McCarthy-Green Butte Road as created in the early part of the twentieth century and that multiple alternative tracks had been forged in some areas. *Id.* at ¶ 16.

F. The Polk 1601 Adit

The Polk 1601 Adit is the entrance to a tunnel constructed by the Kennecott Company and located on national park land approximately one third to one half mile from the Motherlode Claim owned by plaintiffs. *Id.* at ¶ 5.

During the summer of 2002, NPS placed a public notice in McCarthy that it was continuing its program to secure mine openings to the abandoned underground workings because they are extremely unstable and pose a safety hazard to the public. *Id.* at ¶ 10. The Notice stated specifically that the mine openings in Independence Gulch (where the 1601 adit is located) would be

closed. *Id.* at ¶ 10. The Notice is consistent with Section 2.1(a)(5) of the compendium[4]/ of rules of Wrangell-St. Elias National Park and Preserve, which provides:

> 2) Mine tunnels and other openings within the Kennecott Historic Site are closed to entry.
>
> The abandoned mines contain hazards that could result in serious injury or death. They have decayed support timbers, unsafe ladders, rotten structures, unstable explosives, deep pools of water, cave-ins, rock fall from unstable ceilings and walls, deadly gas, lack of oxygen, concealed or thinly covered vertical shafts in tunnel floors.

Declaration of Hunter Sharp, Exh. 1 at ¶ 32.

The Polk 1601 adit is within the Kennecott Historic Site. *Id.* at ¶ 32. The tunnel was not built by the Motherlode Coalition, but by the Kennecott Company, and the adit (tunnel entry) is located on federal land. Plaintiffs have no property rights to the tunnel or the opening. They have surface access to the Motherlode claims.

30 CFR 57.20021 directs owners or operators to "close or fence off all surface openings [of mines] down which persons could fall or through which persons could enter."

In April 2003 NPS gave notice to Robert Allen Hale, Butterfly Sunstar, Nava S. Sunstar, and Joshua Hale that:

> Personal property located at the Polk 1601 level ventilation portal, located on park land is in trespass and must be removed by July 1, 2003. Removal of the personal property is necessary to allow the NPS to complete work required by the Federal Mine Safety and Health Act of 1977 and its implementing regulation which require unattended mine openings to be closed.

Declaration of Hunter Sharp, Exh. 1 at ¶ 23.

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[4]/ The compendium is authorized by sections 1.5(a), 1.7(b) and 2.1(a)(5) of Title 36 Code of Federal Regulations.

Nonetheless on July 1, the NPS found hand-lettered signs on the adit entrance stating:

> 1. "'Mother Lode' Mine Coalition *Private Entrance * No Trespassing * Personal Inside * Stay Away <A Legal Patented Right of Way> Violators Will Be Persecuted [sic]. Contact 'Pilgrims' % McCarthy Lodge % Neil"
>
> 2. "7-02. This entrance is closed to all public and 'Park' Officials - Liability Laws are now in effect with the new ownership! Workers are inside At This Time - and this entrance is patrolled Daily - Violators will be persecuted [sic] to the full extent of the Law! 'Pilgrim' Family."
>
> 3. "Private Property. New Owner-ship has mine in operation and mine personal are inside 'mother lode' mine. Do not tamper with this entrance in any way - and STAY OUT. 'Pilgrim Family' 6-02, 7-02."

Id. at ¶ 32.

On July 1, NPS personnel replaced those signs with signs indicating that the land was park land and that the mine entrance was closed. *Id.* at ¶ 32. The Park Service placed a NPS lock on the entrance in accordance with the abandoned mine lands regulations. *Id.* at ¶ 32; 30 CFR 57.20021.

On July 16, Joseph Pilgrim (Nava S. Sunstar) used a pick ax to remove the NPS signs and break the chain of the door to the adit, and entered the adit. *Id.* at ¶ 36. The NPS issued two notices of violation charging him with vandalism and trespassing, which are violations of 36 CFR 2.31(a)(1)and (3). Those citations are pending. Declaration of Hunter Sharp, Exh. 1 at ¶ 36.

G. Plaintiffs' Pattern and Practice of Ignoring Park Service Regulation

Plaintiffs have demonstrated a practice and pattern of ignoring NPS regulations. As set forth in the declaration of

Hunter Sharp, the NPS attempted to contact plaintiffs to discuss access and other issues beginning shortly after plaintiffs bought the McCarthy Creek properties in the spring of 2002. *Id.* at ¶¶ 6, 9, 10, 12, 13. Plaintiffs refused to speak with NPS officials and returned letters addressed to them from the Park Service unopened. *Id.* at ¶¶ 6, 9, 13. The plaintiffs bladed the route to McCarthy in the fall of 2002 without a permit. *Id.* at ¶¶ 14, 15, 16, 20. They cleared NPS land outside the boundaries of their parcels without a permit. *Id.* at ¶ 13. They interfered with the closing of the 1601 Adit. *Id.* at ¶¶ 32, 36.

On July 25, 2003, the undersigned wrote to J.P. Tangen, counsel for plaintiffs. Exh. 3. The letter stated that there were indications that plaintiffs might be conducting commercial activities on park land. *Id.* The letter also informed plaintiffs' attorney that 36 CFR § 5.3 prohibits "engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States...." Exh. 3. The letter referred plaintiffs to the website and phone contact where the application for a commercial operations permit could be obtained, and noted that the regulation applied to such matters as motorized and non-motorized tours of park lands. *Id.* The plaintiffs requested no such permit. Declaration of Hunter Sharp, Exh. 1 at ¶ 37. On August 13, 2003, NPS cited plaintiff Joshua Hale for engaging in commercial activities on park land for conducting horse tours of the Park on August 2, 2003 without a permit. *Id.* at ¶ 37. That citation is pending. *Id.* at ¶ 37.

ARGUMENT

PLAINTIFFS ARE ENTITLED TO NONE OF THE INJUNCTIVE RELIEF THEY SEEK

I. INJUNCTIVE RELIEF IS EXTRAORDINARY RELIEF AND DOES NOT ISSUE AS A MATTER OF RIGHT

The test for the issuance of a temporary restraining order is the same as for the issuance of a preliminary injunction. *Rice v. Cayetano,* 941 F.Supp. 1529, 1537 (D. Haw. 1996), *aff'd* 146 F.3d 1075 (9th Cir. 1998). A preliminary injunction is a "drastic and extraordinary remedy that is not to be routinely granted." *Intel Corp. V. ULSI System Technology, Inc.*, 995 F.2d 1566, 1568 (9th Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994). As the Ninth Circuit recognized in *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison (AWRTA)*, 67 F.3d 723, 731 (9th Cir. 1995), there is a "fundamental principle that an injunction is an equitable remedy that does not issue as of course." *Accord Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)(citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982)). No injunctive relief can issue without a finding of irreparable injury. *Amoco Production Co. v. Village of Gambell*.

The basic purpose of issuing a preliminary injunction is to preserve the *status quo* pending decision on the merits of the case. *Chalk v. United States District Court for the Central District of California*, 840 F.2d 701, 704 (9th Cir. 1988).

In this Circuit, the standard governing the issuance of a preliminary injunction is whether the moving party has established: "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for

litigation, and the balance of the hardships tips sharply in favor of the party seeking relief." *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996)(*citing Sierra Club v. Marsh*, 816 F.2d. 1376, 1382 (9th Cir. 1987)). These are not two distinct tests but the "extremes of the continuum of [the Court's] equitable discretion." *Sierra Club,* 816 F.2d at 1382-83; *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457, 459 (9th Cir. 1994)("sliding scale"). On this continuum, the required probability of success on the merits that the moving party must demonstrate decreases as the degree of harm increases. *Westlands Water*, 43 F.3d at 459. Moreover, where the public interest is implicated, the court must determine whether the public interest favors the moving party. *Id.*

II. PLAINTIFFS HAVE NO LIKELIHOOD OF PREVAILING ON THE MERITS AND FAIL TO RAISE SERIOUS QUESTIONS AS THE NINTH CIRCUIT HAS ALREADY UPHELD THE REGULATIONS AT ISSUE HERE

A. Use of Tracked Vehicles over Park Land Requires a Permit

This case presents virtually the same scenario as was present in *United States v. Vogler,* 859 F.2d 638 (9th Cir. 1988). There a miner argued that he could operate a tracked vehicle (bulldozer) across the Yukon-Charley National Preserve to his inholding mining claims without a permit from the NPS. This court granted, and the Ninth Circuit upheld, a permanent injunction against Vogler from "operating off-road vehicles in Alaska's Yukon-Charley Rivers National Preserve without first obtaining an access permit." *Id.* at 640. Like plaintiffs here, Vogler claimed that he did not need an access permit because the route he was following was an R.S. 2477 right of way. *Id.* at 642. The Ninth Circuit rejected Vogler's argument that "he cannot be

required to obtain a permit before moving heavy equipment through the Preserve area...." *Id.* at 640.

> The requirements at issue here are designed to protect federal land from injury and trespass. Vogler's attacks on their validity are without merit. The regulations do not deprive Vogler of "adequate and feasible" access to his claims. *See* 16 U.S.C. § 3170(b). The Park Service has simply required that Vogler apply for a permit to transport his offroad vehicles though the preserve and that he submit a mining plan before beginning operations. The extensive damage Vogler caused along the Bielenberg trail demonstrates the necessity for a permit procedure to regulate off-road travel, especially during the summer when the ground is soft. This case demonstrates all too clearly that compliance with the Park Service's permit regulations is essential to ensuring the protection of the Preserve's natural beauty and value. These regulations are designed to "conserve the scenery and the natural and historic objects and the wildlife therein and to ... leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. They are, therefore, authorized by ANILCA and within the power granted under the property clause.

Id. at 641. The access regulations Vogler was required to comply with are exactly the same ANILCA regulations that apply to plaintiffs.

The Circuit held that Vogler was required to obtain an NPS access permit to operate off-road vehicles even if the route at issue were an R.S. 2477 right of way. *Id.* at 642. The Circuit refused to speculate what precise use Vogler might make of the Bielenberg Trail because he had not applied for a permit. *Id.* at 642 n.5. The Circuit likewise rejected Vogler's taking claim, ruling that it would not be ripe for adjudication until "the entity charged with implementing the contested regulations reaches a final decision regarding their application."

Plaintiffs seek to avoid *Vogler,* claiming that it applies only to instances where the agency first finds that use of the bulldozer would "raise cain" with the land involved. To the

contrary, the Ninth Circuit made very clear that a permit was necessary whenever off-road vehicles were used to traverse park land so that the agency could analyze how best to protect the park values while providing for "adequate and feasible" access to the inholder. The Circuit cited the damage that Vogler had caused as an illustration of the wisdom of requiring by regulation that all those using off-road vehicles obtain an access permit prior to use, but did not limit the requirement for a permit to those cases in which the agency made a determination of significant damage.

The regulations specify that the agency shall comply with NEPA in issuing access permits. 43 CFR § 36.6. The EA process is the very process prescribed by law for the agency to determine what the impacts of the access would be and whether they are significant. It is incongruous that plaintiffs would limit *Vogler* to access that would cause damage, and simultaneously seek to prevent the agency from determining whether the access they seek would cause damage.[5]/

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[5]/ Plaintiffs also suggest that application of the federal access permit provisions would violate Alaska Statute 19.30.400. Of course, if there is any conflict between federal and state law, federal law is supreme. Since the decision in *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat) 316, 405-06 (1819), it has been established that the laws of the United States made under the authority reserved to the federal government are the supreme law of the land notwithstanding anything in the constitution and laws of the individual states. *Accord Testa v. Katt*, 330 U.S. 386, 391 (1947); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 178 (3rd Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996). This supremacy attaches not just to statutes, but also to regulations issued by federal agencies. *Fidelity Federal Savings and Loan Assoc. V. Cuesta*, 458 U.S. 141, 153 (1982); *Donmar Enterprises, Inc. v. Southern National Bank*, 64 F.3d 944, 949 n. 8

B. NEPA is Fully Applicable to Plaintiffs' Access Application

As explained in part C of the Background portion of this memorandum, NEPA requires an agency to prepare at least an EA for any action that does not fall into a "categorical exclusion." Plaintiffs' access request does not fall within any of the NPS categorical exclusions. Accordingly, no permit may issue on plaintiffs' application prior to the completion of at least an EA. The Ninth Circuit has repeatedly held that where an agency has not prepared an EA, a court cannot make its own findings of no significant impact and avoid thereby the necessity for the agency preparation of the EA. *LaFlamme v. Federal Energy Regulatory Comm.*, 842 F.2d 1063, 1070 (9th Cir. 1988); *The Steamboaters v. Federal Energy Regulatory Commission*, 759 F.2d 1382, 1393-94 (9th Cir. 1985); *Accord, Sierra Club v. Hodel*, 848 F.2d at 1093.

Plaintiffs argue that NEPA simply does not apply because the agency has no discretion to exercise with regard to plaintiffs' application and that it must issue the permit in the form requested by plaintiffs. According to plaintiffs, the agency cannot regulate use of the route sought by plaintiffs because it

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(4th Cir. 1995); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 53 (2nd Cir. 1988).

In any event, if there has been a violation of state law, it has been by plaintiffs rather than federal defendants. The Office of the Governor has advised that R.S. 2477 rights-of-way traversing national parks are subject to reasonable regulation by the NPS. Exh. 4. The Office of the Governor also advised that those wishing to improve an R.S. 2477 right of way required permission from the State. *Id.* To our knowledge, the plaintiffs obtained no state permit before blading the route at issue in this case.

is a R.S. 2477 right of way and because the use is necessary to insure plaintiffs' adequate and feasible access to their inholdings under ANILCA § 1110(b). According to plaintiffs, the United States can regulate reconstruction and improvement of R.S. 2477 rights of way, but cannot regulate "mere continued use" of such a right of way.

Plaintiffs' argument is squarely inconsistent with the Ninth Circuit's holding in *Vogler v. United States*. The Ninth Circuit's opinion deals with travel on a putative R.S. 2477 right of way, not with construction or improvement:

> Vogler argues that the government is without power to regulate his *travel* on the Bielenberg Trail because the trail is a right of way established under R.S. 2477. Even if we assume that the trail is an established right of way, we do not accept Vogler's argument that the government is totally without authority to regulate the manner of its use.

859 F.2d at 642 (emphasis added).

The Circuit likewise rejected Vogler's claim that ANILCA 1110(b) deprived the NPS of discretion to regulate travel by off-road vehicles to inholdings, and suggested that different access restrictions would be appropriate in summer and winter.

> The extensive damage Vogler caused along the Bielenberg trail demonstrates the necessity for a permit procedure to regulate off-road travel especially during the summer when the ground is soft.

859 F.2d at 641. Clearly, despite any rights plaintiffs may enjoy under R.S. 2477 or 1110(b), NPS retains discretion to regulate the manner of that access or to condition use of the trail to minimize environmental harm.

While almost ignoring *Vogler*, plaintiffs place heavy reliance on *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988)

as support for their theory that the agency has no discretion to exercise in this case. Beyond the obvious point that Ninth Circuit rather than Tenth Circuit precedent is controlling in this district, *Sierra Club v. Hodel* has nothing to do with whether the National Park Service can regulate use of off-road vehicles over park land in Alaska. *Sierra Club v. Hodel,* was not a case about the ability of an agency to regulate travel on an R.S. 2477 right of way. Rather, in that case, environmental plaintiffs sued the Bureau of Land Management (BLM) arguing that the BLM had an *obligation* under the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (October 21, 1976)(FLPMA), to regulate a county's plans to widen and improve an R.S. 2477 right of way so as to prevent undue degradation of wilderness study areas.

Plaintiffs make the obvious error of conflating the right to engage in an activity with the right to engage in that activity without regulation. Miners have a right to operate their mining claim, but their operations within National Parks is subject to approval of a mining plan of operations. *United States v. Vogler,* 859 F.2d at 639. The approval of such mining plans requires compliance with NEPA. *Northern Alaska Environmental Council v. Hodel,* 803 F.2d 466 (9th Cir. 1986)*; see also, Sierra Club v. Penfold,* 857 F.2d 1307 (9th Cir. 1988). In the same way, access permits may be required and they, in turn, require compliance with NEPA.

In any event, plaintiffs' argument is premised upon the erroneous proposition that the plaintiffs seek "mere continued use" rather than improvement and maintenance of a R.S. 2477 right

of way. The premise is faulty for at least four reasons.

First, plaintiffs state that while they will follow the trail bladed by them with the bulldozer blade up in most instances, they will use the blade to clear areas where rock slides have covered the route since their last use. Attachment 27 to Exh. 1. Obviously, at least some improvement of the route is contemplated.

Second, as set forth in detail in the background section, plaintiffs bladed the route in 2002 without obtaining an access permit. It is not equitable to treat the requested travel as mere continuous use when plaintiffs' own earlier blading activities occurred in violation of law. To do so would violate the "fundamental principle that no person can take advantage of his own wrong." *Johnston v. McLaughlin,* 55 F.2d 1068 (9th Cir. 1932).

Third, as set forth in the background section and the Declaration of Hunter Sharp, the route diverges in a number of places from the original McCarthy-Green Butte Road and plaintiffs have created more than one alternative route in some places. Declaration of Hunter Sharp, Exh. 1. at ¶ 16.

Fourth, the United States does not concede that the present McCarthy Green-Creek route constitutes a valid existing R.S. 2477 right of way. As set forth below, the claim that the route constitutes a R.S. 2477 can only be adjudicated in an action brought under the federal Quiet Title Act (QTA), 28 U.S.C. 2407(a). No preliminary injunctive relief is permissible under the QTA. 28 U.S.C. 2409a(c).

C. Plaintiffs' Suggestion that the NPS Improperly Closed

the Route to Tracked Vehicles in April 2003 is without Merit

Plaintiffs repeatedly, but erroneously state that the NPS closed the route at issue in April 2003, and suggest that the closure violated ANILCA because it was done without a public hearing. That argument is based upon the erroneous premise that the route was open to motorized vehicles prior to April 2003. It also erroneously applies the requirement of a hearing before closing an area to special access covered by ANILCA 1110(a) with the rules relating to motorized access, including motorized access to inholdings, covered in 1110(b).

Department of Interior regulations at 43 CFR 36.11(g) provide:

> (g) *Off-road vehicles.* (1) The use of off-road vehicles (ORV) in locations other than established roads and parking areas is prohibited, except on routes or in areas designated by the appropriate Federal agency in accordance with Executive Order 11644, as amended or pursuant to a valid permit as prescribed in paragraph (g)(2) of this section or in § 36.10 or § 36.12.

The established roads in the WSENPP for purposes of this regulation are the roads deeded to the State of Alaska. Declaration of Hunter Sharp, Exh. 1, ¶ 3. The McCarthy-Green Butte Road route was not deeded to the State of Alaska. *Id.* at ¶ 3. Nor has it been designated pursuant to Executive Order 11644. *Id.* at ¶ 3. Accordingly, the route was not open to off-road vehicles prior to April 2003. The Public Notice (Plaintiff's Exh. A) was not a closure, but merely an attempt to provide additional notice[6]/ to the public of the preexisting need for a

[6]/ As a matter of federal law, publication of regulations in the Federal Register is legally sufficient notice to all of the contents of the regulations regardless of actual knowledge or

permit in order to minimize further injury to the route.

In any event, any suggestion that a closure to off-road vehicles requires notice and a public hearing is incorrect. The notice and hearing requirement appears only in ANILCA 1110(a), 16 U.S.C. 3170(a) which provides for the "use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and *nonmotorized surface transportation*...." See also 36 CFR § 36.11 (emphasis added). It has no application to the access methods proposed by plaintiffs.

D. This Court Lacks Jurisdiction to Issue the Relief Requested

1. Ownership of the alleged R.S. 2477 right of way can only be adjudicated in an action under the Quiet Title Act which precludes the relief sought by plaintiffs

Plaintiffs' claims for injunctive relief are dependent on a holding that the route plaintiffs seek to use is an RS 2477 right of way. As shown above, they have no likelihood of prevailing on the merits even if the route were in its entirety an RS 2477 right of way. However, the United States does not concede that the route is a RS 2477 right of way.[7]/

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hardship resulting from ignorance. *Shiny Rock Mining Corp. v. United States,* 906 F.2d 1362, 1364 (9th Cir. 1990).

[7]/ The United States has not had the opportunity to perform sufficient research to take a position on whether or not the McCarthy-Green Butte route is a R.S. 2477 right of way. However, as explained in the background section, even if such a right of way ever came into existence, the Alaska Road Commission listed the McCarthy-Green Creek Road as "abandoned" after 1938. No research has been done to determine whether preexisting mining claims rendered portions of the route unavailable for establishment of a R.S. 2477 right of way. Moreover, the route bladed by plaintiffs

The exclusive remedy for the adjudication of claims to land and interests in land against the United States is the Quiet Title Act, 28 U.S.C. 2409(a). *Block v. North Dakota,* 461 U.S. 273 (1983). One can not bring a suit for the adjudication of title by invoking the waiver of sovereign immunity in the, Administrative Procedure Act (APA), 5 U.S.C §§ 702 *et seq. Id.; State of Alaska v. Babbitt,* 38 F.3d 1068, 1072-73 (9th Cir. 1994).

Plaintiffs have not brought a QTA action, and with good reason. The QTA unequivocally and absolutely prohibits the preliminary relief sought by plaintiffs:

> (c) No preliminary injunction shall issue in any action brought under this section.

28 U.S.C. § 2409a(c). Accordingly, this court lacks jurisdiction to grant the relief sought by plaintiffs.[8]/

2. Even in the absence of the QTA, plaintiffs have failed to establish jurisdiction under the APA

Plaintiffs rely on the APA for this court's

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substantially diverges in places from the route of the old McCarthy-Green Butte Road. At the very least, there are issues as to whether the route constitutes an existing R.S. 2477 right of way. In any event, the court can not and need not decide the issue in order to dismiss this action because the Ninth Circuit has already ruled in *Vogler* that a permit is required even if the route is a R.S. 2477 right of way.

[8]/ It is questionable whether plaintiffs could bring a QTA action in any event. The QTA requires a plaintiff to "set forth with particularity the nature of the right, title or interest, which the plaintiff claims in the real property..." Individuals do not have an ownership interest in R.S. 2477 rights-of-way that would enable them to bring a QTA action. *Kinscherff v. United States,* 586 F.2d 159, 161 (10th Cir. 1978); *Long v. Area Manager Bureau of Reclamation,* 236 F.3d 910-915 (8th Cir. 2001).

jurisdiction. That act limits judicial review to "[a]gency action made reviewable by statute and final agency action..." 5 U.S.C. § 704. There is no special statutory review provision or final action to review in this case. The agency has received an application from plaintiffs and has agreed to prepare an EA on a prompt schedule once plaintiffs confirm that they still desire such preparation and provide clarification whether certain assumptions regarding plaintiffs' application are correct. Plaintiffs have not responded to confirm that they wish the agency to proceed with the preparation of the EA. Nor have they confirmed that the agency's understanding of their application request is correct. That information is necessary to prepare an adequate EA.

Under the APA, courts lack subject matter jurisdiction to review action of an administrative agency that is not "final agency action."[9]/ *Franklin v. Massachusetts,* 505 U.S. 788, 796 (1992); *Veldhoen v. U.S. Coast Guard,* 35 F.2d 222 (5th Cir. 1994). The courts have repeatedly dismissed claims brought prior to the completion of the NEPA process. *ONRC Action v. Bureau of Land Management,* 150 F.3d 1132, 1135-36 (9th Cir. 1998); *Hawaii County Green Party v. Clinton,* 124 F.Supp.2d 1173, 1195-96 (D. Haw. 2000); *Communities for a Great Northwest, Ltd. v. Clinton,* 112 F.Supp.2d 29, 37-38 (D. D.C. 2000). This Court thus lacks

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[9]/ The APA does provide for review of action unduly delayed, 5 U.S.C. 706, but in this case the agency has made every effort to cooperate and stands ready to process plaintiffs' application promptly as soon as they indicate that they wish the agency to do so and clarify the assumptions to be used in evaluating the application. There can thus be no basis for a finding of undue delay.

jurisdiction to hear plaintiffs' complaint.

III. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM, AND IN ANY EVENT THEIR SITUATION IS OF THEIR OWN MAKING

A. Plaintiffs Have Alternate Means To Access Their Property

As demonstrated above, there are many means of access to plaintiffs' property that do not require a permit.

1. Airplane access

No permit is necessary for airplane access and plaintiffs have already brought in many winter supplies by plane. 43 CFR 36.11(f). The Fairbanks News Miner reported on November 3, that plaintiff Robert Hale stated the family has enough food, brought in by air. Exh. 5. Plaintiffs complain that flights are not available to accommodate rolls of insulation and window frames to winterize the house in which they are living. However, an air taxi service in McCarthy has a plane capable of transporting 2000 lbs. per flight to plaintiffs' airstrip for $200 per flight. Declaration of Hunter Sharp at ¶¶ 43, 52.

2. Horsedrawn wagons

No permit is needed for non-motorized travel. 43 CFR 36.11(e). Plaintiffs possess 2 horsedrawn wagons, the larger of which is capable of carrying the contents of approximately two pickup trucks. Declaration of Hunter Sharp, Exh. 1 at ¶¶ 52, 53. A NPS fisheries biologist at the confluence of Nicholai and McCarthy Creeks observed the plaintiffs driving that wagon toward plaintiffs' property on October 8, 2003, loaded with what appeared to be insulation and lumber. Declaration of Hunter Sharp at ¶ 53.

3. Snowmachines

No permit is needed for travel by snowmachine once there is adequate snow cover (generally 6-12 inches or more) or combination frost and snow cover sufficient to protect the underlying vegetation and soil. 43 CFR 36.11(a)(2), (b). Plaintiffs possess snowmachines. Declaration of Hunter Sharp at ¶ 21. Freighting in supplies and building materials by snowmachine is a customary manner of transport use in the McCarthy area. *Id.* at ¶ 52. Adequate snow conditions, if not already present, can be expected in the near future. Even assuming that airplane and horse-drawn wagon access do not satisfy all of plaintiffs' needs, the delay in the ability to bring in freight will be relatively short.

B. It is doubtful that granting the relief plaintiffs seek would result in the bringing in of supplies now.

The timing of this lawsuit is puzzling. On November 3, 2003, the day this suit was filed, the Fairbanks News-Miner reported that plaintiff Robert Hale stated:

> But even if the road opened immediately, Pilgrim said, he's not sure construction materials could be brought in this year. The road crosses mountain passes that have glaciated, he said and ice would have to be cleared by bulldozer for the road to be safe.

Exh. 5.

C. The 1601 Adit has been abandoned for many years

Plaintiffs' allegation of irreparable harm if they cannot access the 1601 Polk Adit is implausible. The 1601 Adit was dug by the Kennecott Company in the early twentieth century and abandoned after the cessation of copper mining in the area in 1938. Declaration of Hunter Sharp at ¶ 32. The adit has been left unattended for decades without "necessary winter work" and

there is no reason to believe that access is particularly necessary this year. *Id.* at ¶ 32. In any event, to the extent plaintiffs seek access to the adit in connection with mining activities on their property, they need an approved plan of operations for such activities. Mining in the Parks Act, 16 U.S.C. § 1902; *Vogler,* 859 F.2d at 639*; see also, NAEC v. Hodel,* 803 F.2d at 467; 36 CFR §§ 9.3, 9.9(b)(2). Plaintiffs have neither applied for nor received such approval. *Id.* at ¶ 32.

D. Plaintiffs' Situation Is of Their Own Creation

To the extent the plaintiffs find themselves in a difficult situation with regard to access, they created that situation themselves. The Park Service attempted to contact plaintiffs as early as April 2002, shortly after their purchase of the property to discuss access and other issues. Part B of the Declaration of Hunter Sharp sets out the numerous attempts made to contact plaintiffs by letter and in person, only to have the letter returned unopened or plaintiffs refusing to speak to NPS personnel. On July 8, 2003, after receiving a letter from the Department of Justice pursuant to Executive Order 12778 (Attachment 18 to Exh. 1), plaintiff Robert Hale sent a brief email message to the Superintendent requesting a "permanent permit" to "dead head" a bulldozer between McCarthy and plaintiffs' property whenever he felt it necessary. Plnts' Exh. B. On July 10, 2003, the Superintendent of WSENPP responded as follows:

> Thank you for your email. From the content of your message, it appears that your are seeking a Right-of-Way permit. We will be happy to assist you and/or your attorney in completing the necessary Right-of-Way Permit application and facilitating the required

> coordination with other affected federeal and state agencies such as the Corps of Engineers, Fish and Wildlife Service, etc. This is a complicated process, but one we have been through before and are willing to assis you in following. It would be most helpful for you or your attorney to contract the park, specifically Ms. Vicki Snitzler, Park Planner and Chief of Compliance at 907-822-7206, for details and to set-up a meeting to begin the permit application procedures.

Id.

Neither plaintiffs nor their attorney contacted Ms. Snitzler on the subject of a right of way permit. Declaration of Hunter Sharp at ¶ 35.

On September 3, the WSENPP received a letter from plaintiffs' attorney seeking, not a permanent right-of-way permit, but an "emergency" permit to use the bulldozer. *Id.* at 39. In the application plaintiffs stated: "There is an immediate and urgent emergency need to transfer supplies between McCarthy and Homestead. Latest date for go-ahead is 9/30/03." Plnts' Exh. C. By letter to plaintiffs' counsel dated September 8, 2003, the NPS sought clarification as to the nature of the emergency, asking for more detail about several aspects of the proposal, and pointing out that the NPS would have to prepare an EA prior to authorizing a permit. Declaration of Hunter Sharp at ¶ 40.

On September 14, 2003, Robert Hale sent a hand-written response, but this response was inadequately specific in several respects to permit the preparation of an EA. *Id.* at 41.

On September 17, 2003, representatives of the Department of the Interior met with J.P. Tangen, counsel for plaintiffs, regarding counsel's request that the NPS issue a permit without preparing an EA. Declaration of Gary Candelaria, Exh. 6. The NPS informed Mr. Tangen that it had researched whether

plaintiffs' request fell within the CEQ's "emergency action" exception that permits an action to occur without the preparation of an EA, and had concluded that it did not. *Id.* The NPS suggested that plaintiffs consider using other means of access such as air flights, horse packing, horse-drawn wagon if the time frame for an EA did not satisfy plaintiffs. *Id.* Mr. Tangen requested the agency to provide a written statement of why the emergency exemption to NEPA did not apply in this case. *Id.* The NPS provided that statement on October 1. Declaration of Hunter Sharp, Exh. at ¶ 45.

On September 29, the Acting Deputy Regional Director, Vic Knox proposed to counsel for plaintiffs that the NPS would prepare an EA on an expedited basis of 30 days to prepare the EA, 30 days for public review and one week after the receipt of comments to make a decision. *Id.* at ¶ 46. By letter dated October 2, the Superintendent of WSENPP reiterated that offer and specified that the agency would waive the recovery of costs related to conducting the NEPA process. *Id.* at ¶ 46. The agency committed to begin work as soon as the plaintiffs informed the NPS that they wished the agency to proceed despite the fact that the timeline for completion of the EA did not meet the timeline in their application. *Id.* at ¶ 46. The agency also asked for a point of contact to respond to questions that might arise during the EA process. *Id.* at ¶ 46 and attachment # 29. The agency received no response to those questions. *Id.* at ¶ 51.

By letter dated October 29, 2003, the Superintendent once again reiterated the offer to prepare an expedited EA as soon as the plaintiffs informed the agency that they wished the agency to

proceed and confirmed the assumptions to be used in the preparation of the EA. *Id.* at ¶ 50. The agency has not received a response, other than the filing of this litigation. *Id.* at 51.

IV. ISSUANCE OF THE INJUNCTION WILL RESULT IN HARM TO THE PARK

The NPS prepares an EA in order to determine the whether the proposed activity would significantly affect the environment. 40 CFR 1501.4. Plaintiffs seek to short-circuit that process, but there are clear indications of concern regarding environmental impacts which should be studied prior to the proposed use of the bulldozer.

Congress distinguished between special access and other forms of motorized travel in section 1110 of ANILCA out of a recognition of the more serious impacts associated with the other forms of motorized travel. In addition to those impacts, the route the plaintiffs propose to travel crosses McCarthy Creek approximately 17 times without bridges. Declaration of Hunter Sharp, Exh. 1 at ¶ 16. The NPS has discovered the presence of dolly varden at each point in the stream where the NPS fisheries biologist took samples. *Id.* at ¶ 55. Dolly Varden spawn from late August through November. *Id.* at ¶ 56. While plaintiffs claim that they are merely continuing prior access along the route, it should be noted that McCarthy-Green Butte Road as it existed during the previous century had 19 bridges across it, and therefore did not present the threat to the fish posed by plaintiffs' proposed bulldozer crossings. *Id.* at ¶ 4.

In addition, plaintiffs' prior illegal adventures with a bulldozer in 2002 resulted in substantial damages "off-trail", including the creation of multiple routes, and the cutting of 145

year old trees. There is every reason to be concerned that if plaintiffs' present request for access is not carefully reviewed, that additional damages to park lands will result.

V. ISSUANCE OF AN INJUNCTION WOULD HARM THE PUBLIC INTEREST

An injunction will not issue if it is contrary to the public interest. *E.E.O.C. v. Recruit USA, Inc.*, 939 F.2d 746, 754 (9th Cir. 1991). The court must consider and make specific findings on the record of the public interest. *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988).

The issuance of an injunction would harm the public interest in this case. There is a clear public interest in the protection of national park resources "unimpaired for the enjoyment of future generations." 16 U.S.C. 1. There is likewise a public interest in informed environmental decisionmaking pursuant to NEPA.

Issuance of an injunction in this case would especially harm the public interest by sending the signal that it is advantageous to blade first and ask later; that non-compliance with access regulations, delaying applications, and failing to work with the NPS in putting together applications will result in access without going through the NEPA process. Such a signal poses a great threat to our national parks and to the public interest.

VI. **PLAINTIFFS' UNCLEAN HANDS PRECLUDE EQUITABLE RELIEF**

The "clean hands" doctrine insists that one who seeks equity must come to court without blemish; it is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter on which he seeks relief. *Equal Employment Opportunity*

Commission v. Recruit U.S.A., Inc., 939 F.2d 746, 752 (9th Cir. 1991); see also *Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 876-77 (9th Cir. 2000). No person can take advantage of his own wrong. *Johnson v. McLaughlin*, 55 F.2d 1068, 1069 (9th Cir. 1932). Plaintiffs' bulldozing of the route without a permit, avoidance of NPS attempts to coordinate early on the permitting process, failure to provide information necessary for the NPS to proceed with the preparation of the EA, and their pattern of ignoring Park Service regulations constitute unclean hands and provide further justification for the denial of injunctive relief.

CONCLUSION

For the foregoing reasons, the motions for temporary restraining order and preliminary injunction should be denied.

RESPECTFULLY SUBMITTED this ____ day of November, 2003, at Anchorage, Alaska.

_____
BRUCE M. LANDON
Attorney for Federal Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of November, 2003 a copy of the foregoing was served by United States mail, first class, postage paid, to the following counsel of record:
J.P. Tangen by hand
James S. Burling memorandum by fax, exhibits by fedex
Russell C. Brooks memorandum by fax, exhibits by fedex
Robert Randall

_____
Lorraine Carter