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Submitted via E-Mail

August 9, 2016

Wrangell St. Elias National Park and Preserve
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Re: Comments on the Proposed Action for the Backcountry and Wilderness Stewardship Plan for Wrangell-St. Elias National Park & Preserve (“WRST”)

Dear Mr. Rogers:

On behalf of Alaska Quiet Rights Coalition, Alaska Wilderness League, Copper Country Alliance, Sierra Club Alaska Chapter, The Wilderness Society, Wilderness Watch, and Winter Wildlands Alliance, Trustees for Alaska (“Trustees”) submits the following comments regarding the Proposed Action for the Backcountry and Wilderness Stewardship Plan (“Plan”). These comments focus exclusively on the proposal to allow recreational snowmachining in wilderness.

The National Park Services (“Park Service”) states that the purpose of the Plan is to guide the stewardship of backcountry and wilderness character and resources in WRST within the legal framework of the Wilderness Act of 1964, the Alaska National Interest Lands Conservation Act of 1980 (“ANILCA”), and Park Service policy and regulations.¹ The Proposed Action addresses the stewardship of 9.4 million acres of wilderness, as well as 1.7 million acres of backcountry. The Proposed Action outlines the initial Park Service proposal for what the plan will include and how it will address the management and planning needs of the park’s backcountry and wilderness.

I. The Proposed Action’s Plan for Snowmachining in Wilderness and Backcountry Areas.

The Plan identifies that recreational snowmachining is occurring in wilderness within the WRST. According to the Plan, “[p]rimary areas of known recreational snowmachine use in wilderness include the area south of Copper and Tanada Lakes; the upper end of the Nizina River; the upper end of the Chitina River and tributaries to the south of the Chitina; Chisana to Solo Creek; and scattered areas along the face of Mts. Sanford and Drum.”² The Park Service sets a proposed management direction that would determine “[e]xisting patterns of recreational

¹ Plan at 1.

² *Id.* at 7.

snowmachine use . . . through review of documentation, personal interviews with local public, and evaluation of the patterns of use with evolving snowmachine technology.”³ The Park Service proposes to then use the collected information “to identify and delineate specific areas where recreational snowmachine use occurred, has evolved, and will be permitted within designated wilderness in WRST.”⁴ The Park Service proposes creating and adopting management standards after collecting information on use through the period of 2014 to 2017.⁵ The Plan identifies a suite of potential management actions including: “education of recreational snowmachine users regarding avoidance of high-volume areas or weekends; designation of general point to point routes or corridors for travel; requiring use of low emissions snowmachines; requiring recreational snowmachine users to obtain permits at no cost; limited issuance of permits; and area restrictions justified for administration, safety, and other factors.”⁶

For wilderness areas not included in the list identified above, the Park Service states: “recreational snowmachine use did not occur as an established pattern in 1986, nor does it occur now. For these areas, the Park Service will clarify that recreational snowmachine use is not allowed.”⁷ For non-wilderness portions of the area covered by the Plan, the Park Service would continue to allow recreational snowmachine use to occur.⁸

II. Only “Traditional Activities” Are Allowed in National Parks.

A. Section 1110(a) Provides Access for Continuing Traditional Activities.

Section 1110(a) of ANILCA does not allow recreational snowmachine use in wilderness. When Congress enacted ANILCA in 1980, it recognized that the creation or expansion of federal conservation lands in Alaska might interfere with “traditional means and levels of access” across the protected federal lands.⁹ This consideration, among others, led Congress to create, in ANILCA Title XI, a single comprehensive authority concerning appropriate types and levels of access across and into Alaska conservation lands.¹⁰ Specifically, Title XI addresses issues of: (1) growth and development of Alaska’s transportation infrastructure; (2) routes of access to non-federal lands within or adjacent to the new parks, refuges, and preserves; and (3) special access for continuing traditional activities.

This third “special access” provision memorializes the balance made through ANILCA between, on the one hand, preservation and protection of conservation lands and, on the other hand, preservation and protection of access to such lands for traditional activities. Section 1110(a) of ANILCA provides:

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The Park Service also identifies that “[u]se of snowmachines by local rural residents engaged in subsistence uses will continue to be allowed in backcountry and wilderness, consistent with 36 C.F.R. § 13.460.” *Id.*

⁹ H.R. Rep. No. 96-97, pt. 1, at 236 (1978).

¹⁰ 16 U.S.C. § 3161.

Notwithstanding any other provision of this Act or other law, the Secretary shall permit, on [Park and other conservation lands], *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.¹¹

Section 1110(a) specifically authorizes the Secretary to issue “reasonable regulations” to protect the “natural and other values” of the affected area.¹² Finally, this section authorizes the Secretary to altogether close an area otherwise open to these types of motorized vehicles for such “special access” if, after notice and a hearing in the vicinity of the affected area, the Secretary finds that such use would be “detrimental to the resource values of the unit or area.”¹³

This section does not authorize the use of snowmachines on any conservation land where, prior to 1980, snowmachines were not used to access that area for traditional activities. As discussed below, Section 1110(a) authorizes only the continuation of *existing* motorized uses of the three specified types for the pursuit of *existing* traditional activities. To further underscore this point, a detailed discussion of the legislative history of ANILCA, and what Congress meant to preserve in Section 1110(a), is discussed below in Section D.

B. Section 1110(a) of ANILCA Does Not Override the Wilderness Act.

In ANILCA, Congress established and expanded National Park units in Alaska. Congress also designated portions of those units as Wilderness, to be managed pursuant to the Wilderness Act. Congress expressly intended that there be co-existence between newly designated Wilderness and pre-existing, established patterns of motorized access and use by boat, airplane, and snowmobile. However, ANILCA did not expressly provide for the modification or nullification of the Wilderness Act.¹⁴

¹¹ 16 U.S.C. § 3170(a) (emphasis added). Note that in Alaska, the terms “snowmobile” and “snowmachine” are used interchangeably to refer to vehicles generally fitting the Park Service’s regulatory definition of the term snowmobile: “a self-propelled vehicle intended for travel primarily on snow, having a curb weight of not more than 1000 pounds (450 kg), driven by a track or tracks in contact with the snow, and steered by ski or skis in contact with the snow.” 36 C.F.R. § 1.4(a).

¹² 16 U.S.C. § 3170.

¹³ *Id.*

¹⁴ See ANILCA Section 707, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

Section 4 of the Wilderness Act prohibits the introduction of new motorized uses in Wilderness areas.¹⁵ Congress stated unequivocally that its designation of an area as Wilderness in ANILCA “in no manner lower[s] the standards evolved for the use and preservation of such park.”¹⁶ That Congress intended the statutory concepts and purposes of the Wilderness Act to be incorporated into ANILCA is further emphasized by the definition section of ANILCA: “[a]s used in this Act . . . [t]he terms ‘wilderness’ and ‘National Wilderness Preservation System’ have the same meaning as when used in the Wilderness Act.”¹⁷

The legislative history further demonstrates the intent of Congress to have ANILCA operate in tandem with the Wilderness Act. Congress sought to protect prior existing uses but not override the Wilderness Act. For example, Sen. Church noted that “if we are going to make special access to broaden the purposes of the law, we better be careful for what purposes we make it and not change the whole normal application of the Wilderness Act.” Sen. Jackson, the Chairman of the Committee, noted that

*If you go the wilderness route, you live by the wilderness rules, except where there have been prior practice in existence for a long time and our policy basically has been to permit those on-going prior practices, but if you are going to have a wilderness, the rules, if you are going to call it a wilderness, the rules ought to be basically the same except as to prior rights relating to practices that have been followed for some time. . . .*¹⁸

ANILCA Section 707 establishes the manner in which such statutory Wilderness designations are to be reconciled with other provisions of ANILCA. It states:

*Except as otherwise expressly provided for in this Act wilderness designated by this Act shall be administered in accordance with applicable provisions of the Wilderness Act governing areas designated by that Act as wilderness*¹⁹

An “express” change in the requirements of the Wilderness Act would require Congress to state its purpose in direct, explicit or unmistakable terms.²⁰

The language introducing Section 1110(a) does not “expressly” or “unmistakably” modify the applicability of the Wilderness Act. That section provides that the Secretary is to allow the use of snowmobiles for traditional activities “[n]otwithstanding any other provision of this Act or other law.”²¹ The Wilderness Act is not directly or unmistakably referred to in Section 1110(a). The plain text of Section 1110(a) does not “unmistakably” modify the

¹⁵ 16 U.S.C. § 1133(d)(1).

¹⁶ 16 U.S.C. § 1133(a)(3).

¹⁷ 16 U.S.C. § 3102(13).

¹⁸ Senate Comm. Mark-Up, 8-1-78 (ANILCA Vol. 30, pp. 64, 68-70) (emphases added).

¹⁹ ANILCA Sec. 707, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (emphasis added). Congress enacted ANILCA Section 707, but the section was not codified.

²⁰ Black’s Law Dictionary, 581 (6th ed. 1990).

²¹ 16 U.S.C. § 3170(a).

Wilderness Act to authorize the introduction of *new* snowmobile use in wilderness where it had never lawfully occurred prior to 1980.

Congress utilized the same type of general “notwithstanding any other provision” language that introduces Section 1110(a) in twenty-one other sections in ANILCA.²² None of these sections expressly preempt or otherwise override of the Wilderness Act. In contrast to these provisions, Congress did provide the “express” override of the Wilderness Act referenced in Section 707 in two other sections of ANILCA. In Section 1310, Congress stated that the Wilderness Act does not prohibit reasonable access to existing air and water navigation aids, communication sites, weather or fisheries research sites, or “facilities for national defense purposes” within Wilderness designated by ANILCA.²³ And in Section 1010, Congress provided that Wilderness Act restrictions were not to prohibit core and test drilling for geologic information as part of the “mineral assessment program,” except in National Parks.²⁴

The fact that Congress expressly provided for the override of the Wilderness Act in ANILCA Sections 1010 and 1310 by specifically naming that Act, but did not use similar language in Section 1110(a) or in twenty-one other places in ANILCA, emphasizes the point: Congress did not intend to override the Wilderness Act with its general “notwithstanding” language that introduces Section 1110(a).

C. “Traditional Activities,” As Previously Defined by the Park Service, Does Not Include Recreation.

The best guidance on what “traditional activities” include under Section 1110(a) of ANILCA is the Park Service’s own regulation of “traditional activities” in Denali National Park & Preserve. This regulatory definition is the only instance where the Park Service has formally defined traditional activities as it relates to snowmachines.

Specifically, the Park Service provided the following definition for traditional activities in Denali’s Old Park:

A traditional activity is an activity that generally and lawfully occurred in the Old Park contemporaneously with the enactment of ANILCA, and that was associated

²² See ANILCA Section 203 (codified at 16 U.S.C. § 410hh-2); ANILCA Section 606(a) (codified at 16 U.S.C. § 1285(b)); ANILCA Section 811 (codified at 16 U.S.C. § 3121); ANILCA Section 816 (codified at 16 U.S.C. § 3126); ANILCA Section 1009 (codified at 16 U.S.C. § 3149); ANILCA Section 1110(a) (codified at 16 U.S.C. § 3170(a)); ANILCA Section 1110(b) (codified at 16 U.S.C. § 3170(b)); ANILCA Section 1111 (codified at 16 U.S.C. § 3171); ANILCA Section 1302 (codified at 16 U.S.C. § 3192); ANILCA Section 1303(c)(2) (codified at 16 U.S.C. § 3193); ANILCA Section 1306 (codified at 16 U.S.C. § 3196); ANILCA Section 1307 (codified at 16 U.S.C. § 3197); ANILCA Section 1310 (codified at 16 U.S.C. § 3199); ANILCA Section 1314 (codified at 16 U.S.C. § 3202); ANILCA Section 1323(a) (codified at 16 U.S.C. § 3210(a)); ANILCA Section 1323(b) (codified at 16 U.S.C. § 3210(b)); ANILCA Section 1414 (codified at 43 U.S.C. § 1605); ANILCA Section 906(k) (codified at 43 U.S.C. § 1635(k)); ANILCA Section 906(o) (codified at 43 U.S.C. § 1635(o)); ANILCA Section 907 (codified at 43 U.S.C. § 1636); ANILCA Section 1415 (codified at 43 U.S.C. § 1640); ANILCA Section 1320 (codified at 43 U.S.C. § 1784).

²³ 16 U.S.C. §3199(a).

²⁴ 16 U.S.C. §3150(a).

with the Old Park, or a discrete portion thereof, *involving the consumptive use of one or more natural resources of the Old Park such as hunting, trapping, fishing, berry picking or similar activities*. Recreational use of snowmachines was not a traditional activity. If a traditional activity generally occurred only in a particular area of the Old Park, it would be considered a traditional activity only in the area where it had previously occurred. In addition, a traditional activity must be a legally permissible activity in the Old Park.²⁵

The definition clearly sets out that the traditional activity must (1) exist at the time ANILCA was enacted, and (2) involve a consumptive use. Moreover, it explicitly stated that recreational use of snowmachines was not a traditional activity.

Beyond the rule itself, the history of the rulemaking demonstrates consistency in the Park Service's position regarding snowmachining as a "traditional activity." In its notice of the proposed rule, the Park Service discussed the legislative history of ANILCA Section 1110(a), and found that this section was drafted to provide access to those who might not precisely fit under the subsistence access provisions of Title VIII, but who were nonetheless "engaged in subsistence-like activities (hunting, fishing, berry picking and trapping) as part of the unique Alaska lifestyle."²⁶ The Park Service noted that the Senate Committee Report and the House Report (Committee on Interior and Insular Affairs) list several examples of "traditional activities" for which access was to be provided by Section 1110(a): subsistence and sport hunting, fishing, and berry picking — provided the activity was generally occurring before the area's designation in ANILCA.²⁷

In its public notice regarding the proposed rule, the Park Service specifically asked commenters to identify and describe when and where ANILCA's "traditional activities" may have lawfully occurred in the Old Park.²⁸ The Park Service received no comments that identified a history of any traditional activities, as that term was used by Congress, as having legally taken place during the winter in Old Denali contemporaneously with the enactment of ANILCA.²⁹ The Park Service found that while some non-snowmobile based winter recreational activities occurred in the Old Park prior to ANILCA, these activities were not the type of activities offered during the Congressional deliberations as the traditional activities for which it meant to preserve access in Section 1110(a).³⁰

The final definition differed from the Park Service's proposed definition in that it applied to the Old Park only, while the earlier proposed definition would have applied to all Park Service units in Alaska. The definition also differed from the proposed definition in that it clearly set out activities that were traditional — such as hunting, trapping, fishing, and berry picking — rather

²⁵ 36 C.F.R. § 13.63(h)(1). The Park Service adopted final regulations on June 19, 2000. *See* 65 Fed. Reg. 37863 (June 19, 2000).

²⁶ *Id.* at 61566, *citing* Senate Cmte. on Energy and Natural Resources, August 1, 1978, pgs. 50-75.

²⁷ *Id.* at 61566–67, *citing* S. Rep. No. 413, 96th Cong., 1st Sess. pp. 247-248 (1979); *see also* H.R. Rep. No. 96-97, 96th Cong. 1st Sess. Pt. 1 at 238 (1979).

²⁸ 64 Fed. Reg. at 61568.

²⁹ 65 Fed. Reg. at 37867.

³⁰ *Id.*

than relying on the more general phrase “utilitarian Alaska lifestyle.” The Park Service tailored the definition to the Old Park in these ways to allow for the possibility of different historical uses in some areas, and to provide specific examples of traditional activities to facilitate public understanding.³¹

In promulgating this definition, the Park Service undertook an extensive discussion of the administrative history of ANILCA Section 1110(a), noting that initial regulations to implement Section 1110(a) distinguished between recreational uses and traditional activities.³² The Park Service also undertook a careful review of the legislative history of ANILCA, which supported a definition of “traditional activities” that revolved around “consumptive use.”³³ The Park Service found four specific examples of “traditional activities” discussed in the legislative history: sport hunting, fishing, trapping, and berry picking.³⁴

The Park Service responded to comments on the proposed definition.³⁵ The Park Service found that commenters did not identify any other consumptive activities in the Old Park which were “traditional activities” under the adopted definition.³⁶ Further, in a response to comments, the Park Service explicitly rejected including recreation as a traditional use:

Comment: Many of the same commentors felt that *the definition of traditional activities should have been written more broadly to include activities that these commentors generally concede are recreational in nature*, such as sightseeing, picnicking, wildlife viewing, camping and photography. These commentors insist that if these activities generally occurred in the Old Park prior to ANILCA, they are “traditional activities.” Most commentors, however, strongly disagreed with this approach; they felt that [the Park Service] had correctly identified “traditional activities” as activities that are necessarily connected with a generally rural—and from the Alaska perspective, generally unique — Alaska lifestyle or Alaska culture.

Park Service response: *[the Park Service] finds no specific reference in ANILCA or its legislative history that indicates that Congress intended to include any recreational activities under section 1110(a).* With respect to the Old Park, NPS is certain that Congress did not expressly intend and did not create, an exception to the Wilderness Act that would allow snowmachines in wilderness areas—because someone on the snowmachine intended to look around, or happened to be carrying a sandwich or disposable camera — or because non-motorized sightseeing, picnicking and photography were permissible in the Old Park prior to ANILCA. *If a contrary interpretation were correct, Congress need not have linked snowmobile access to traditional activities, but would have allowed it for any purpose since virtually any use of the Park entails an element*

³¹ *Id.* at 37866.

³² *Id.* at 37865, *citing* 46 Fed. Reg. 5642.

³³ *Id.* at 37866.

³⁴ *Id.*

³⁵ *Id.* at 37868-71.

³⁶ *Id.* at 37866.

*of sightseeing. Such an interpretation would render the term “traditional activities” as the equivalent of “for any purpose.” NPS has found no evidence of such intent in the legislative history.*³⁷

The Park Service further explained its position, relying on the legislative history:

*The mark-up colloquies reveal that, in consideration of the large size of the new conservation system units and the remoteness of rural Alaska, Congress carefully fashioned an exception to the 1964 Wilderness Act in ANILCA section 1110(a). Motorized access for specific traditional activities, where they were generally occurring, was allowed to continue in Alaska wilderness because Congress recognized that continued access for these activities was necessary to sustain the Alaska lifestyle. Where snowmachines were being used for such things as hunting or trapping, or service functions such as hauling freight to villages, snowmachine use for these purposes would continue regardless of wilderness designations. Congress understood that where access for these activities was ongoing, it supported Alaskan lives and defined Alaskan identity.*³⁸

In response to questions about recreational use outside the Old Park, the Park Service provided the following response:

[Park Service] response: Unlike the proposed rule, the final definition adopted here applies only to the Old Park. [The Park Service] intends to use park planning processes, particularly the backcountry management planning process for the Denali addition areas and other park units, in developing and applying the definitions of “traditional activities” outside the Old Park. Although [the Park Service] makes no decision at this time on such definitions, *based on its present review of the statute and its legislative history, [the Park Service] believes that such future processes could conclude that recreational activities independent of the types of activities discussed in this preamble are not traditional activities for purposes of section 1110(a) in these other areas.* [The Park Service] intends nevertheless to examine, as part of these planning processes, where snowmobile use for recreational activities then determined to be outside the scope of section 1110(a) could be appropriate within individual park units, consistent with the applicable statutes and Executive Orders pertaining to the National Park System in Alaska.³⁹

The Park Service’s opinion, based on a comprehensive review of ANILCA’s legislative history, found that “traditional activities” did not include recreational snowmachining. The Park Service highlighted that traditional activities are those types of activities associated with sustaining the Alaskan lifestyle, and included snowmachine use for purposes like hunting or trapping, or service functions such as hauling freight to villages.

³⁷ *Id.* at 37869 (emphasis added).

³⁸ *Id.* at 37870 (emphasis added).

³⁹ *Id.* (emphasis added).

Therefore, in the absence of any traditional activities for which snowmobile access is to be granted under Section 1110(a), and in light of the existing regulation that closes national parks to off-road use of snowmobiles,⁴⁰ the Park Service promulgated 36 C.F.R. § 13.63(h)(2) formalizing and maintaining the long-standing closure of the Old Park to the use of snowmobiles.⁴¹

The Park Service also promulgated a regulation, 36 C.F.R. § 13.63(h)(3), clarifying that snowmobiles could be used for access to traditional activities, for travel to and from villages, and for subsistence in the four million acres of Denali National Park and Preserve outside of the Old Park.⁴²

The definition clearly exhibits the Park Service's intention to limit traditional activities to consumptive uses, expressly repudiating "[r]ecreational use of snowmachine" as a permissible traditional activity.⁴³

While the Park Service's position on the relationship between the mode of access and the type of activity is not clearly articulated in this provision, other provisions and policy statements illustrate a Park Service interpretation that links both the mode of access and the type of activity to the pre-existing requirement of ANILCA § 1110(a). In the provision formally closing the Old Park to all snowmachine use, the Park Service determined that "no traditional activities [] occurred during periods of adequate snow cover," implying that the mode of access was intrinsically tied to type of activity.⁴⁴ Furthermore, the Park Service concluded in its June 2000 "Statement of Finding, Permanent Closure" for the Old Park that:

Section 1110(a) was not an intentional effort to drastically alter the management of an area that had existed for more than 60 years prior to ANILCA, and under which snowmachine use had been prohibited. The DOI remains of the opinion that Congress's stated intention in the committee reports was to protect *generally occurring, pre-existing modes of access* for traditional activity [sic] related to the Alaska lifestyle, on the lands where those activities and modes of access were actually occurring at the time of passage of ANILCA. The Old Park's long administrative history as a national park precluded the occurrence of many activities, such as hunting and trapping, that might otherwise be traditional for purposes of Section 1110(a) of ANILCA in non-park CSUs and park preserves.⁴⁵

At least as it relates to snowmachines in the Old Park, the Park Service interpreted "traditional activities" as requiring a pre-existing mode of access and type of activity. Further and of significant importance for this Plan, the Park Service recognized that recreational activities

⁴⁰ See 36 C.F.R. § 2.18

⁴¹ *Id.* at 37878-79.

⁴² *Id.* at 37879.

⁴³ *Id.*; see also 65 Fed. Reg. 37863, 37869 (Jun. 19, 2000).

⁴⁴ 36 C.F.R. § 13.63(h)(2).

⁴⁵ Park Service, "Statement of Finding, Permanent Closure," June 2000, at 6 (emphasis added).

outside the scope of traditional activities for which Congress meant to preserve access in Section 1110(a).⁴⁶

D. ANILCA's Legislative History Demonstrates Section 1110(a) Does Not Authorize Recreational Snowmachining.

The “traditional activities” for which Congress meant to preserve access include those involving consumptive use of natural resources such as hunting, fishing and subsistence gathering. While ANILCA does not define “traditional activities,” the structure of ANILCA and its legislative history demonstrate a clear intent to ensure access for those consumptive uses was not interfered with by the enactment of ANILCA. Moreover, the legislative history provides no support for an interpretation that would include recreational snowmachining. Instead, throughout its legislative history, “traditional activities” and “traditional uses” are linked to consumptive uses, local rural lifestyles and cultural traditions, either in the subsistence context or as a general utilitarian way of life.

When it enacted ANILCA, Congress recognized that its creation and expansion of federal consideration lands in Alaska could interfere with “traditional means and levels of access across” the protected federal lands.⁴⁷ Congress sought to preserve opportunities for Alaskans to engage in a traditional way of life through Section 1110(a) of ANILCA, titled “special access.”

The legislative history makes clear that Congress meant to preserve motorized access only for activities that (1) generally and lawfully occurred in a conservation unit area prior to enactment, and (2) involved the consumptive use of the area's resources. For example, in the final report accompanying ANILCA, Congress explained that section 1110(a) “guarantees access subject to reasonable regulation . . . for *traditional or customary activities such as subsistence and sports hunting, fishing, berry picking, and travel between villages.*”⁴⁸ The illustrative list lacks any reference to non-consumptive recreational activities like snowmachining.

The legislative history of Section 1110(a) also clearly expresses the congressional intention to eliminate Secretarial discretion to allow new motorized uses and to preclude the Secretary from eliminating prior existing motorized uses for *access and traditional activities*:

Existing law does not guarantee this form of access [float and ski planes, snowmachines, motor boats, and dogsleds] into Parks, Wildlife Refuges, Wild Rivers, or Wildernesses, *although in all cases the law does permit provision of such access in the land manager's discretion. Even in wilderness, access by airplane and motorized boat may be permitted at pre-existing levels of intensity.*

In order to prevent the land manager from using his discretion to unnecessarily limit such access, the Committee amendment provides that such access shall not be prohibited

⁴⁶ 65 Fed. Reg. at 37867.

⁴⁷ H.R. Rep. No. 96-97, pt. 1 at 236 (1978).

⁴⁸ S. Rep. No. 96-413, at 247-248, *reprinted* in 1980 U.S.C.C.A.N. at 5191-5192 (emphasis added).

Trapping was identified as a traditional activity in committee mark-up of ANILCA. See Senate Energy Committee Mark-Up at 56,62 (Aug. 1, 1978).

unless the Secretary finds after holding a hearing in the area that it would be detrimental to the resource values of the unit.⁴⁹

The reference to “in all cases” must be interpreted to refer to the exercise of Secretarial discretion to allow motorized uses on non-Wilderness lands, because as to Wilderness lands, it would have been an erroneous statement of then-existing law. As to Wilderness lands, the Secretary’s discretion under the Wilderness Act extended only to allowing or disallowing “established” pre-existing motorboat and airplane use as private rights under Section 1133(c) and (d). Except for adding snowmobiles to the list and recognizing existing patterns of motorized use for traditional activities, rather than individual rights, ANILCA Section 1110(a) did not expressly alter this pre-ANILCA application of the Wilderness Act.⁵⁰

This interpretation is reinforced by the Report’s reference to the Secretary’s existing discretion “even in wilderness” where “pre-existing levels of intensity” was the yardstick. With Section 1110(a), Congress was removing the Secretary’s discretion to disallow the listed established traditional uses, plus snowmobiles, at their pre-existing levels of intensity. Senate Report 96-413, in discussing the effect of Section 1110(a), stated: “These are [access] rights subject to reasonable regulation by the Secretary to protect the values of the unit. *This removes the discretion for allowing or not allowing use of these vehicles that currently exists.*”⁵¹ In other words, the uses had to be allowed, but they could not be expanded.

In Congressional debates in 1978, Congress discussed the impacts of designated wilderness on existing airplane and motorboat use. In one particularly notable discussion, Rep. Roncalio noted that existing traditional motorized uses would be permitted:

[t]hese sections *permit, among other things: the use of motorboats and even snowmobiles in Alaskan wilderness areas for subsistence hunting and fishing; the use of “customary patterns and modes of travel across such units”; “continued public access to areas conveyed to the State”; and general public access. . . .* I mention these facts because our committee took great pains in the drafting of H.R. 39 to *insure that access to the wilderness areas would not be denied.* Many of us . . . were impressed by the fact that *access* to many areas in Alaska is available only by airplane, motorboat, or nonmotorized transportation. As such, we promised the people of Alaska that aircraft and motorboat *access would not be curtailed*, and we have specifically fulfilled this promise by specific provisions in H.R. 39 which complement and reinforce the general provisions of the Wilderness Act of 1964.⁵²

Rep. Symms found that the bill would “lock up” lands and, as a result, there would be “no vehicle recreation” in wilderness.⁵³ In direct response to Rep. Symms, Rep. Leggett clarified the

⁴⁹ H.R. Rep. No. 96-97, at 239 (1979) (emphases added); *see also* S. Rep. No. 96-413, at 248; 1980 U.S.C.C.A.N. 5192.

⁵⁰ *See* ANILCA Section 707.

⁵¹ S. Rep. No. 96-413, at 299 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5243 (emphasis added).

⁵² Cong. Record - House, H-4107-08 (May 17, 1978), ANILCA Vol. 39, pp. 707-08 (701-02) (emphasis added).

⁵³ Cong. Record - House, H-4252 (May 18, 1978) (ANILCA Vol. 39, p. 816 (810)) (emphasis added).

use of snowmachines as they pertain to customary traditional subsistence/consumptive uses and access, not recreation:

So that everybody may understand, we are not locking up this 65 million acres. We are allowing hunting and fishing to take place in that area; *we are allowing all Native subsistence activities in that area, including the use of snow machines*; we are allowing for the development of aquaculture facilities; we are allowing for fish research in parks; and *we are allowing access* to this area by aircraft and motorboats. *That was the way people gained access* to virtually every portion of Alaska in the past, by aircraft, motorboat, snow machines, and various kinds of vehicles.⁵⁴

On the Senate side, a year later and near the end of ANILCA's legislative trail, a report on the Mathias-Tsongas substitute bill, discussing Wilderness designation and the protection of existing subsistence uses, stated:

There are a number of reasons for designating lands, especially lands in Alaska, as wilderness. Perhaps the most important is the protection of subsistence lifestyles which depend on the wildlife and vegetation in wilderness areas. . . . The Committee bill *provides for protection of traditional subsistence uses, as well as traditional means of access to and through areas for subsistence purposes.*⁵⁵

The House and Senate legislative mark-up transcripts further explain and clarify the various competing considerations which Congress weighed before Section 1110(a) became law. In the House Committee Mark-Up, House staff member Roy Jones, in discussing an amendment to what is now Title XI, told Rep. Young in part, “[w]e also included language that would allow the *existing access* on wilderness areas under existing law to be allowed in wilderness areas in Alaska. . . .”⁵⁶

On the Senate side, the committee mark-up record is replete with references to “existing use” and “existing access.” The Senate was aware and careful of the type of use they were authorizing in wilderness. For example, in discussing the implications of the bill, Sen. Stevens highlighted that access was critical for Alaskans:

Sen. Stevens: But specifically the questions I would like to ask is, can motor boats be used for fishing, for hunting, for transportation, for commercial freight operations *particularly in the river areas where they have been in use in the past?*

Mr. Harvey (Committee staff): *The Wilderness Act so provides, Senator. Within wilderness areas I don't think anybody's objected to the use of aircraft and motor boats for these uses have already been established and may be permitted to continue.*⁵⁷

⁵⁴ *Id.*

⁵⁵ Cong. Record - Senate, S-11121 (August 18, 1980) (ANILCA Vol. 39, p. 92 (86)) (emphasis added).

⁵⁶ House Comm. Mark-Up, 2-2-78 (ANILCA Vol. 28, p. 159) (emphasis added).

⁵⁷ Senate Comm. Mark-Up, 8-8-78 (ANILCA Vol. 30, p. 383) (emphases added).

When Senator Stevens further identified his concerns regarding whether aircrafts had to land at precise landing sites, the Senator focused on maintaining *access*, not on allowing recreational motorized use in wilderness:

*The problem is it was tied down to traditional uses and it is still going to be a concept of access to the area for the people involved. Most of them are living along the river. It is my understanding this is not to be used to say that the landing site has to be 10 miles from the cabin or something. It is the concept of giving him the right to determine, but it is still subject to the intent of the committee that it is for the purpose of the people who are there and access to their uses that will be continued under other provisions of the bill.*⁵⁸

The focus of Congress was directed on ensuring continued “access,” and authorization of traditional activities like hunting and fishing. Nowhere among the debate did any member of Congress argue that the balance between ANILCA’s 1110(a) and the Wilderness Act would allow for recreational motorized use of snowmachines in wilderness. There is simply no indication that any members of Congress sought to open the door into Wilderness for new, non-traditional uses of snowmachines for purely recreational purposes. In fact, no references can be found in the history that indicates that Congress even discussed or considered allowing recreational snowmachining when they addressed the access issues and preservation of traditional uses.

Moreover, the discussions throughout the legislative history tie the mode of the motorized access to the traditional activity. The discussions throughout the legislative history focus on allowing motorized *access* to the traditional use. There is no discussion of allowing motorized use for the sole purpose of operating a snowmachine, aircraft, or boat. In fact, such an interpretation would be at odds with the concerns identified by Senator Stevens — the primary Senator responsible for ensuring that “special access” was a provision in the bill to protect “access” to pre-existing traditional uses of the land.

A comprehensive review of the legislative history supports the unavoidable conclusion that Congress in Section 1110(a) meant to protect *access* for *utilitarian, consumptive activities*, and that any other interpretation of the statutory term “traditional activities” — particularly one that would include recreational snowmachining — would violate the compromise struck in ANILCA for such “special access.” Further, with regard to designated Wilderness areas, the Secretary has no discretion to permit snowmachine motorized use for non-traditional activities or to permit snowmachine use where it was not an established, pre-existing customary use (i.e. traditional activity) before the wilderness area was created.

II. WRST Should Define Traditional Activities and Exclude Recreational Use.

The Plan, as proposed, violates ANILCA and the Wilderness Act and fails to follow Park Service precedent regarding the interpretation of ANILCA section 1110(a). To the degree to

⁵⁸ Senate Comm. Mark-Up, 10-10-79 (ANILCA Vol. 32, pp. 98-99) (emphases added).

which the Park Service authorizes snowmachine use within WRST, the Park Service must limit that use to the traditional uses of snowmachines that were present prior to ANILCA's enactment. The Park Service has no discretion to expand authorization of snowmachines to non-traditional uses like recreation.

The Park Service further violates ANILCA by proposing to base justification of use, as well as the amount/intensity of use, off of analyses of use between 2014 to 2017. This is wholly inconsistent with the intent of providing for continued uses at 1980 levels.⁵⁹ Authorization of any demonstrated traditional use that did exist prior to enactment (e.g. snowmachine access for subsistence purposes or to a cabin or hunting ground) is limited to the levels of use at the time of enactment. The Park Service cannot assume that an area was used by snowmachines for traditional activities; a general pattern of pre-ANILCA customary and traditional use must be demonstrated to have existed in or prior to 1980. Otherwise, the Park Service may not authorize it.

The Park Service should define "traditional activities" in accordance with past Park Service interpretation (the Denali Rule) and Congress's intent, as evidenced through the legislative history discussed above. Section 1110(a) is titled "special access," and that is just what it provides — special access that accommodates the unique rural Alaska lifestyle in which individuals use federal lands for utilitarian, consumptive activities. Section 1110(a) represents the balance in ANILCA between, on the one hand, preservation and protection of conservation lands and, on the other hand, preservation and protection of access to such lands for traditional activities. Inclusion of recreational snowmachining in the definition of "traditional activities" would upset this delicate balance and is contrary to the intent of ANILCA.

Further, any effort to authorize recreational snowmachining in the Park and Preserve is counter to the Park Service's Organic Act and its implementing regulations. Snowmachines have been widely acknowledged to have significant impacts on wildlife, air and water quality, vegetation and soils, wetlands, and Wilderness values and users.⁶⁰ Because recreational snowmachining is not a traditional use, it also would violate the Wilderness Act, Executive Order 11644⁶¹ and the Park Service's regulations regarding snowmachine use.⁶² The Wilderness Act generally prohibits motorized access, except for "existing private rights" that had "already

⁵⁹ See e.g., Sen. McClure's statement in the Senate Committee mark-up where he noted that the bill would "sanctify[y] the use of motorized vehicles in the areas to the extent *and at the level of their present use*." Senate Comm. Mark-Up, 8-8-78 (ANILCA Vol. 30, p. 432 (emphases added)).

⁶⁰ See National Park Service "Statement of Finding: Permanent Closure of the Former Mt. McKinley National Park," June 2000; National Park Service "Environmental Assessment for Proposed Permanent Closure," Nov. 1999.

⁶¹ Executive Order 11644 states that ORVs and snowmachines may be used on federal public lands, including lands within the National Park System and the National Wildlife Refuge System, on trails or in areas that have been designated for their use after the relevant agency makes a determination that they will not "adversely affect their natural, aesthetic, or scenic values." Executive Order 11644, § 3. Trails and areas may not be designated in Wilderness Areas or Primitive Areas. *Id.* This executive order also imposes certain criteria on these designations. *Id.* In the Denali Rule, the Park Service noted that it "agreed with comments made that the findings required by Executive Order 11644 would not allow a general opening for snowmachine use. . . ." 65 Fed. Reg. at 37865.

⁶² See 36 C.F.R. § 2.18 (prohibiting snowmachines use in national parks, except on routes and water surfaces designated by special regulations).

become established” before the area was designated as wilderness.⁶³ Absent this exemption, snowmachines, motorboats, and airplanes may only be permitted in wilderness for traditional activities pursuant to ANILCA section 1110(a).

III. Conclusion

ANILCA provides for access to traditional activities — those activities that are essential to a traditional rural Alaskan way of life. Recreational snowmachining is not a traditional activity. Congress in no way sought to protect motorized recreation, like snowmachining, in National Parks. The Park Service must expressly prohibit recreational snowmachining in the Plan. Our clients are concerned that failure to define traditional use consistent with 1110(a) will result in difficulty in enforcement, expanded recreational snowmachine use under the guise of Section 1110(a), and damage to park resources.

Thank you for your consideration of these comments as you move forward with the Plan.

Sincerely,



Brian Litmans
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⁶³ 16 U.S.C. §1133(c)(d)(1).