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Steve Martin
Superintendent, Denali National Park and Preserve
P.O. Box 9
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Dear Mr. Martin:

The State of Alaska has reviewed the proposed rule at 36 CFR Parts 5 and 13, published in the Federal Register on November 12, 1999, and the accompanying Environmental Assessment (EA) addressing the Proposed Permanent Closure of the Former Mount McKinley National Park to Snowmobile Use. This letter represents consolidated comments of the state's resource agencies and primarily covers the following topics:

- snowmobile closure procedures and proposed definition of "traditional activities"
- park road vehicle limits and inholder access
- Kantishna firearm closure: procedures and impacts
- authority for temporary and seasonal closures

SNOWMOBILE CLOSURE

Congress recognized that the National Park Service must have the ability to restrict or prohibit snowmobile use and other forms of motorized access to protect the resource values of parklands in Alaska. Section 1110(a) of the Alaska National Interest Lands Conservation Act (ANILCA) is specifically designed to balance this important responsibility with an equally compelling desire by Congress to retain the unique Alaskan way of life in a largely roadless state which has long relied on snowmobiles and other forms of backcountry motorized access.

Our analysis indicates that the Service has not met the procedural requirements set out in ANILCA and envisioned by Congress. This letter identifies these deficiencies and includes our recommendations for successful implementation of Section 1110(a) in this context. Once these procedural requirements are met, the State would support selected snowmobile closures in Alaska parks in general, and Denali in particular. Issues specific to the snowmobile closure include:

- definition of “traditional activities” is unsupported by law or Congressional intent
- “methods of access” and “traditional activities” have been confused
- site specific analysis is insufficient to support closure

Even though we have significant concerns with certain aspects of compliance with ANILCA Section 1110, the State is nonetheless pleased that the Service is finally taking a publicly accountable regulatory approach. For many years we have expressed concern that the Service inappropriately “closed” the old park to snowmobile use through the Superintendent's Compendium. The prohibition of snowmobiles via the compendium was legally flawed, as the Service eventually acknowledged. Pursuit of regulations, as required by ANILCA, with a finding of damage and notice and public hearings, therefore, is a major step in the right direction.

Proposed definition of “traditional activities” is unsupported by law or congressional intent

The State takes issue with both the proposed definition of “traditional activities” in Section 13.1 and the application of that definition to limit winter snowmobile access within Denali National Park and Preserve. It appears the Service is inappropriately attempting to take snowmobile access for all forms of recreation off the table so that it need not meet the rigorous ANILCA Section 1110 requirements for restricting this method of access.

The proposed definition is overly restrictive and not consistent with congressional intent. The rule would require a showing that a traditional activity was “typically associated with [a particular] region as an integral and established part of a utilitarian Alaska lifestyle or cultural pattern”. This stringent requirement finds no support in ANILCA Section 1110 or congressional intent.

Legislative history shows that Congress intended to guarantee continued access within wilderness areas and other conservation system units. With Section 1110, Congress specifically rejected the mechanisms of the 1964 Wilderness Act, which authorize the Secretary, in his discretion, to permit the continued use of motorized access in wilderness areas where uses had already become established. 16 U.S.C. Section 1133(d)(1). Instead,

the Senate report explicitly states that the test under Section 1110(a), “is not a wilderness type pre-existing use test.” Senate Report No. 95-1300, at 207 (1978); and Senate Report 96-413, at 248 (1979).

Despite this direction, the proposed rule attempts to impose a different sort of pre-existing use test by requiring traditional activities to have been conducted in “a unit or a geographically defined area of a unit prior to enactment of ANILCA.” Section 1110, however, does not impose such a requirement. Congressional intent clearly indicates that traditional activities are those “generally occurring in the area” and are not confined to those activities conducted in a particular federal land unit.

The rule also requires that traditional activities be linked to a “utilitarian Alaska lifestyle or cultural pattern.” This standard creates additional impediments to access that are not contained in Section 1110. The statute does not require a showing that traditional activities are an integral and established part of a utilitarian Alaska lifestyle or cultural pattern, and there is no basis for the Service to impose such a requirement through regulation.

Moreover, the proposed rule contains undefined and subjective terms, leaving federal land managers with significant discretion in the application of Section 1110. Individual federal land managers would decide if particular activities have a sufficient link to an undefined “Alaska lifestyle or cultural pattern.” This is precisely the result Congress sought to avoid when it enacted the special access provisions in ANILCA. Legislative history illustrates Congress’ clear intent to provide certainty to motorized access and to preclude land managers from using their discretion to unnecessarily restrict or to deny particular forms of access on ANILCA lands.

The State has generally interpreted "traditional activities" to mean "activities that were generally occurring in the area prior to December 2, 1980." We encourage the Service to adopt a similar, broadly worded definition that more closely adheres to the statute and legislative intent.

“Methods of access” and “traditional activities” have been confused

In its analysis of the proposed closures, the Service has fundamentally confused the permissible methods of access under ANILCA Section 1110(a) (motorboats, airplanes, snowmobiles and non-motorized surface transportation) with the traditional activities for which access is allowed. In both its proposed rule and the supporting EA, the Service contends closure is justified because there was no pattern of recreational snowmobile use in the park prior to ANILCA. This analysis requires a showing that *both* the form of access and the resulting activity were traditionally conducted in the park. The law, however, does not impose such a requirement. ANILCA Section 1110 explicitly permits

certain forms of access, including snowmobiles, for “traditional activities” such as subsistence, recreation, hunting or berry picking. Thus, the analysis should be whether recreational activities were conducted in the park prior to ANILCA, not whether snowmobiles were used for a particular purpose.

The existence of winter recreation in the old park cannot be contradicted. In 1917, Congress established Mount McKinley National Park to “set apart as a public park for the benefit and enjoyment of the people . . . for recreation purposes by the public” Moreover, ANILCA Section 101(b) provides that Congress intended to preserve wilderness resource values and related recreational opportunities. The Service recognized the central importance of recreational opportunities in its EA, stating on page 19 that the old park provides outstanding opportunities for recreation such as nature study, backcountry camping, wilderness and wildlife photography, mountain climbing, skiing, snowshoeing and dog mushing. By statute, Congress directed that snowmobiles could be used to access these traditional winter activities in the park.

To the extent the Service believes particular activities conducted on a snowmachine are not “traditional” (e.g. highmarking, jumping, speeding) and are detrimental to resource values, it should implement less stringent regulations targetting those particular uses to reduce damage. Although Section 1110 does not provide authority to implement an outright ban of all snowmachine travel, it does provide authority to implement reasonable regulations. For example, if the Service completed a transportation or backcountry management plan for the park and follows the 43 CFR Part 36 regulatory process, it could designate zones, areas or times to restrict motorized winter use within the park along with any additional rules governing specific behavior that are designed to protect park resources and values. This would protect the statutory right to use a snowmobile as a means to access this vast and spectacular public resource and, at the same time, protect resource values and minimize the potential for conflicts among user groups.

Site-specific analysis is insufficient to support closure

The State recognizes the Service's responsibility to protect park resources and understands the desire to institute regulatory controls before damage occurs. ANILCA, however, limits the ability of federal land managers to invoke their closure authority. Section 1110 provides that access via snowmachine, motorboat, airplanes, . . . “shall not be prohibited unless, after notice and 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”.

The statute does not require land managers to wait until resource damage has occurred before acting on a closure. However, the provision does require land managers to thoroughly evaluate the impact of current levels of access before moving on a closure. In

this instance, the Service has not undertaken the detailed analysis needed to support a closure and has relied excessively on hypothetical damage and theoretical “what if’s” and “may or might” impacts in the EA. It is insufficient to rely solely upon hypothetical damage to park resources based on studies conducted in other regions. The EA dismisses the one study which is available and applicable to the area of the park, relying instead on studies in other states where hundreds of users intensively use small areas and where snow conditions differ considerably from those at Denali. Before implementing a closure, the Service must, at a minimum: (1) quantify current snowmobile use in the old park, (2) estimate any projected increases in use, (3) conduct an on-the-ground analysis of impacts of current and projected use using current techniques in areas near or adjacent to the park which already have higher levels of current use and newer technology, and (4) evaluate the impacts of management tools less restrictive than a total closure of millions of acres, i.e., the old park. Consideration of impacts to vegetation are already adequately addressed by the statute and existing 43 CFR Part 36 regulations which require snowmachine use to be limited to adequate snow cover.

To improve the Service's approach to documentation of use which “would be detrimental to the resource values of the unit or area,” we suggest focusing greater attention on the intrinsic values of the unit, which are becoming of increasing importance to the public. Such values are inherently subjective, thus, use of this criterion in the context of ANILCA Section 1110 requires well documented studies in the vicinity of the unit and a planning context with full public involvement such as a backcountry management plan. The Service is already in the early stages of developing a backcountry management plan for Denali, and this would be the appropriate tool for evaluating present/projected public uses, values, and management options, including this facet of snowmobile use.

Since portions of this rule apply to or affect uses in the park additions and preserve, as well as establish precedent for other Alaska parks and preserves, an evaluation of the impacts of this rule on subsistence may be an important consideration in the future. For example, while Section 1110(a) protects access via snowmachine for subsistence activities, among other traditional activities, Section 811 directly guarantees snowmachine access, if traditional, for subsistence activities.

EA Purpose and Need discussion of post-ANILCA use

The *Purpose and Need* section of the EA has been written to refrain from explicit references to the post-ANILCA compendium closures, however there remain various statements to the effect that traditional activities have not occurred in the old park since passage of ANILCA - which is largely as a result of the Compendium and the associated closure signs along the Parks Highway. Post-ANILCA use is less relevant in this overall discussion than pre-ANILCA use generally occurring in the area. Nonetheless, we wish to point out that continued EA references to lack of snowmobile access in the old park is

more a function of the flawed compendium closures than any natural patterns of use over time. For example, page 6 notes that only one time since passage of ANILCA has a snowmobile attempted to cross the old park to get to Kantishna. We are sure that if the park had been managed as if it were open to snowmobiles, winter snowmobile access to Kantishna would be more common.

Starting with our comments on the 1986 General Management Plan, the State has consistently urged the Service to engage in cooperative studies to document traditional (pre-ANILCA) access in the area of the park and environs in order to have verifiable use numbers prior to pursuing restrictions. We are aware that the park has been monitoring snowmachine use within the exterior boundaries of the park but those data unfortunately have not been made available.

In the interests of brevity, we are not submitting detailed page specific comments on the EA, although all of the general comments above are applicable to the EA as well.

ANILCA Section 810 Analysis

We agree that the proposed prohibition in the preferred alternative may benefit local subsistence users by eliminating potential displacement of wildlife by recreational snowmobile use in sections of the original park adjacent to areas used by local rural residents for subsistence purposes. We also agree with the less-positive conclusion that increasing competition could result from increasing snowmobile use being concentrated into the preserve and areas of the park additions currently used for subsistence purposes. For the latter reason, we disagree with the finding that the proposed action would not result in a significant restriction on subsistence uses. The ANILCA Section 810 Analysis is deficient for not explaining why the adverse effects identified on page 10 of the Analysis do not constitute a potential significant restriction on subsistence uses.

If future incremental increases in snowmobile use are diverted, as proposed, to preserve lands or areas of the new park open to subsistence uses, the next step could be for the Service to prohibit or restrict snowmobile use for recreational purposes on these lands if conflicts with protected subsistence uses occur. This possibility should be discussed in more detail as a potential long-term consequence of the preferred alternative.

PARK ROAD VEHICLE LIMITS AND INHOLDER ACCESS

Inholder access under Section 1110(b)

The State recognizes the difficulty of balancing park resource values against the right of park inholders to use the Denali Park Road and the government's responsibility to provide for safe passage along the route. While we understand the utility of using regulatory vehicle allocations as a management tool, the current approach does not adequately protect the statutory rights of park inholders under Section 1110(b). The statute provides "the State or private owner or occupier" of land within park boundaries with "such rights as may be necessary to assure adequate and feasible access for economic or other purposes." The Service cannot diminish the scope of this broad statutory right through regulation. Specifically, the statute does not allow the Service to place a ceiling on trip permits for inholders or to deny other inholders access in the future. Rather, the Service remains responsible for insuring access which the statute guarantees for the State and private inholders while protecting park resources. At a minimum, the regulations must provide a mechanism for currently active inholders to seek adjustments of individual allocations and must provide for other inholders to acquire access for their possible future "economic or other purposes."

"Rules of the Road"

The proposed regulations (see p.61565) incorporate the "rules of the road" restrictions which are implemented and changed at the discretion of the superintendent. To the extent these rules regulate vehicle safety and driver etiquette as portrayed, we believe the proposed approach is reasonable, although we request that the final rule incorporate an annual notice requirement and some sort of built-in administrative appeal mechanism. We caution against using these discretionary rules to indirectly restrict public access outside the Section 1110(a) and (b) processes.

FIREARM CLOSURE

Page 61566, 36 CFR 13.63(g) Firearms. The State does not oppose a firearm closure when needed for safety reasons, and such a closure in the Kantishna area may indeed be warranted. Again, however, we are concerned with the methodology and possible implications for future firearm closures. First, the Service has not addressed how the area is currently used for subsistence purposes and how that use might be affected. Implementation of the existing closure at Kantishna already has had some impact on subsistence uses in the area. We are particularly concerned about the cumulative affects of a gradual expansion of areas closed to firearm use at Denali or in other parks and preserves. Multiple firearm closures over time could incrementally erode legally-authorized uses and have significant long-term, cumulative impacts on subsistence and other allowed consumptive uses. An evaluation of site-specific and cumulative impacts conducted prior to firearm closures would address this concern.

Secondly, all firearm closures should be accompanied by more thorough documentation of need and should be the minimum necessary to meet public safety requirements. The current closure proposal includes the state road and airport in Kantishna and areas within one mile of these facilities. In other areas of the state, public safety firearm closures have been limited to 1/2 mile; examples of 1/2 mile closures include certain public buildings in the City and Borough of Juneau and Lost Lake off the Richardson Highway. Alaska State Park examples may be found in Chugach State Park at 11 AAC 20.010, Kachemak Bay State Park at 11 AAC 20.100, and Denali State Park at 11 AAC 20.400.

Finally, we wish to guard against management decisions which treat legally-authorized subsistence uses secondarily to non-consumptive uses. In this vein, we continue to encourage the Service to take a proactive role in educating park visitors about historic and modern subsistence practices and the statutory protection of hunting in parks and preserves. Legitimate firearm closures on the basis of public safety should not evolve into attempts to conceal legitimate consumptive uses.

TEMPORARY AND SEASONAL RESTRICTIONS TO PROTECT WILDLIFE

Section 13.63(i) proposes to codify the Superintendent's procedures for using compendia authority in 36 CFR Parts 1-7 for implementing seasonal closures or public access restrictions to protect wildlife and habitat, such as wolf denning areas. ANILCA and its implementing regulations in both 43 CFR Part 36 and 36 CFR Part 13 already provide closure procedures to accomplish these objectives with appropriate consultation with the state and public processes. The National Park Service regulations adopted on June 17, 1981 (FR Vol. 46, No. 116) immediately upon passage of ANILCA clearly reflected the Congressional intent to limit discretionary authority in park units in Alaska, requiring specific steps before implementing closures.

In those very limited instances where existing regulations do not provide sufficient day-to-day flexibility to address protection of changing sensitive wildlife conditions, (such as some of the current closures along the park road) using a much more narrowly defined regulatory approach with tightly limited, built-in flexibility may be appropriate. While we recognize the Service's interest in flexibility, such flexibility must be kept to a minimum and must still adhere to the essence of Section 1110(a). The wide-ranging rule proposed in Section 13.63(i) appears to circumvent the process protections Congress envisioned before restricting public use activities in Alaska parks.

To devise an approach consistent with ANILCA, a park-specific proposed rule under Section 1110(a) should: (1) be preceded by science-based documentation of impacts, (2) spell out the specific scope, e.g. protection of wolf denning sites in pre-identified areas, (3) provide very specific criteria addressing when public use restrictions are appropriate, and (4) establish a public notice and appeal process that is conducted at least annually. In

some instances, it may be appropriate to tie decision making to a planning process such as a backcountry management plan.

Thank you for the opportunity to provide these comments. If you have any questions, please call this office.

Sincerely,

/ss/

Sally Gibert
State CSU Coordinator

cc: Bob Barbee, Regional Director, National Park Service
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