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UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

ROBERT HALE, et al., Plaintiffs, v. **GALE NORTON**, Secretary of the Interior, et al., Defendants, **NATIONAL PARK CONSERVATION ASSOCIATION**, et al., Defendant-Intervenors.	No. A03-0257-CV (RRB) **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

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INTRODUCTION

Plaintiffs (the Pilgrims) file this motion respectfully requesting that this Court reconsider its decision denying injunctive relief and dismissing the Pilgrims' complaint. This Court should reconsider its decision and grant relief because the Pilgrims have established conclusively certain, significant facts demonstrating the balance of the hardships tips sharply in the Pilgrims favor and also raising sufficiently serious legal questions to make them a fair ground for litigation.

On November 18, 2003, this Court issued a decision finding the Pilgrims' "lifestyle will not be significantly impacted by any delay involved." Order Denying Plaintiffs' Motion for Temporary Restraining Order and Dismissing Plaintiffs' Request for Permanent Relief and Injunction (Order) at 16. In addition, the Court found "it is not clear that Plaintiffs will ultimately prevail in this matter." *Id.* at 17.

The Pilgrims respectfully contend that this Court should have granted the Pilgrims' relief because, under the test employed in this Circuit, the Pilgrims did indeed establish not just that their "lifestyle" *has and would be* "significantly impacted" but, more importantly, that they have suffered and will continue to suffer serious hardships and irreparable injury absent injunctive relief. The Pilgrims contend the Order constitutes an abuse of discretion because it is based on erroneous factual findings and commits clear legal error. The Pilgrims presented an overwhelming amount of substantiated factual evidence concerning both their past, present, and future injuries. In addition, the Pilgrims presented facts and evidence supporting the legal merits of their case regarding the existence of the McCarthy-Green Butte Road as a valid, existing right-of-way sufficient to raise serious questions concerning their right to continue use of the road.

In contrast, the Defendants (Park Service) presented little contradicting evidence and only sparse, questionable support for its assertions. Nonetheless, the Order, without meaningful analysis, appears to accept as fact the Park Service's bald assertions while ignoring or disregarding the Pilgrims' clearly established evidence.

In addition, the Order consists of clear legal error in ruling the Pilgrims failed to raise sufficiently serious questions concerning the legal merits of the case. Rather than apply the correct legal standard concerning injunctive relief, the Order apparently applies a standard which requires the Pilgrims to establish they will "ultimately prevail" on the merits of the case. Moreover, not only does the Order contain an incorrect legal standard for injunctive relief, it also contains error by applying as the "rule of law" a case which significantly differs factually from the Pilgrims' circumstances.

Accordingly, the Pilgrims respectfully ask the Court to reconsider its Order and grant injunctive relief.

ARGUMENT

Neither the Federal Rules of Civil Procedure nor this Court's local rules expressly recognize motions for reconsideration of appealable orders. Instead, such motions are treated either as a motion to alter or amend a judgment under Federal Rules of Civil Procedure Rule 59(e) or a motion for relief from judgment or order under Federal Rules of Civil Procedure Rule 60(b). *See Hinton v. Pacific Enterprises*, 5 F.3d 391, 395 (9th Cir. 1993) (motion for reconsideration is appropriately brought under either Rule 59(e) or 60(b)). While Rule 59(e) contains no standard, courts interpreting that rule have recognized four grounds which justify altering or amending a judgment: (1) to incorporate an intervening change in the law; (2) to reflect new evidence not previously available; (3) to correct a clear legal error; and (4) to prevent manifest injustice. *Sunrich Food Group, Inc. v. Pacific Foods of Oregon, Inc.*, 233 F. Supp. 2d 1273, 1280 (D. Or. 2002). Rule 60(b) provides that relief from an order may be appropriate for "any . . . reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6).

The Pilgrims base this motion on two grounds. First, the Pilgrims bring this motion contending the Order contains clear error in blindly accepting as fact the Park Service's unsubstantiated assertions, yet ignoring or disregarding the Pilgrims' well-supported facts. Second,

the Pilgrims maintain the Order also contains clear legal error in its analysis of the Pilgrims' likelihood of success on the merits of this case.

I

THIS COURT SHOULD RECONSIDER ITS ORDER BECAUSE IT ABUSED ITS DISCRETION BY RELYING ON ERRONEOUS FACTUAL FINDINGS TO DENY INJUNCTIVE RELIEF

The Ninth Circuit holds that if the Pilgrims established a mere "*possibility* of irreparable injury" they satisfied half the test for an injunction. *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis added). The Pilgrims met this burden *easily*. In fact, the Pilgrims established the balance of the hardships actually tipped *decidedly* in their favor. *Cf. Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996).

A. The Pilgrims *Clearly* Established Extreme Hardship and Irreparable Injury

Rather than contain a careful consideration of the Pilgrims' weighty evidence, the Order is devoid of the substantial and significant facts discussed herein in which the Pilgrims established in numerous declarations. No dispute exists that the Pilgrims' home burned down. No dispute exists that the Pilgrims are now living in a temporary outbuilding which does not have insulation. No dispute exists that the temperature is well below freezing. The Pilgrims have established clearly that they are doing so without adequate food or clothing. The Pilgrims have also established clearly that attempts to obtain needed supplies by using various "authorized" methods have proven wholly unsuccessful. The only reasonable, feasible, adequate, and safe access the Pilgrims do have in order to alleviate their current extreme hardship and forestall irreparable injury has been denied without good reason. Astonishingly, the Court's Order apparently disputes, without adequate support, whether the Pilgrims *have* suffered hardship—let alone whether, without the required access, the Pilgrims will continue to suffer hardship and face imminent irreparable injury. The Court should grant reconsideration in order to correct clear error and answer that issue in the affirmative.

1. The Pilgrims Established Conclusively Extreme Hardship and the Imminent Threat of Irreparable Injury by Providing Overwhelming Evidence Concerning Their Current Circumstances

The Pilgrims established in substantial testimony through numerous declarations the dire hardship the Park Service had already imposed on them and the even more extreme hardship they would face imminently if this Court did not grant injunctive relief. For example, Plaintiff Robert Hale's declaration established that the Pilgrims "desperately need to obtain supplies necessary to rebuild [their] home and survive the harsh Alaska winter." Declaration of Robert Hale in Support of Temporary Restraining Order (Hale TRO Decl.) ¶ 4. Likewise, the Hale TRO Decl. established they have been unable to replace proper winter clothes or obtain adequate food for themselves or their livestock. *Id.* ¶ 8. The Pilgrims are forced to attempt to exist without sufficient winter provisions in weather that is well below freezing, while the family of 17 lives in a small, temporary outbuilding which does not have insulation. *Id.* Given that a bed has already frozen to the floor once, *id.*, one wonders what more "hardship" the Pilgrims must suffer in order to obtain injunctive relief. Indeed, the Hale TRO Decl. states clearly and emphatically, without condition, "[w]ithout the necessary supplies and materials, we cannot last the winter—let alone survive in the long term." *Id.* ¶ 17. Days later, Plaintiff Robert Hale stated again in another declaration:

> Our situation requires that we get our supplies in immediately. We need food for the family, feed for the animals, fuel, bedding, building materials such as insulation, roofing materials, and tools. These needs are all critical now, despite reports to the contrary.

Supplemental Declaration of Robert Hale (Supp. Hale Decl.) ¶ 6.

Normally, when one's home burns to the ground as did the Pilgrims', Hale TRO Decl. ¶ 4, such an event is considered "hardship" that, in and of itself, results in "significant impacts" to one's "lifestyle." When one is subsequently forced to live thereafter for months without a home as the result of being denied the only reasonable, feasible, adequate, and safe access to supply their needs, *id.* ¶ 5, that hardship is magnified beyond reason. When one cannot continue to survive without needed food, clothes, and adequate shelter, *id.* ¶ 17, that hardship is considered irreparable injury.

2. The Pilgrims Further Established Extreme Hardship and Irreparable Injury Through Extensive Evidence Concerning the Lack of Reasonable, Feasible, Adequate, and Safe Access Absent Use of a Tracked Vehicle

Recognizing the Pilgrims' extreme hardship, the local, caring community gathered to assist the Pilgrims to the extent it was able with a volunteer airlift. *Id.* ¶14. The community succeeded in airlifting some immediately essential supplies in more than 60 airplane trips. *Id.* However, even that number of airplane trips transported only as much as could have been delivered in *one* trip with a 16-foot trailer. *Id.* Furthermore, a plane crash which marred the effort demonstrated clearly the dangerous, unsafe nature of air travel in the region. *Id.*

Not only did the plane crash exacerbate the Pilgrims' hardship, so too does the fact that a large cargo plane is no longer available for use. *See* Declaration of Jenny Rosenbaum (Rosenbaum Decl.). Indeed, that plane is currently in Anchorage, Alaska, undergoing maintenance for at least two months. *Id.* ¶ 4. The Pilgrims further substantiated this fact through the declarations of two other individuals. *See* Declaration of Robert Hale (Hale Decl.) ¶ 7; Declaration of Rick Kenyon (Kenyon Decl.) ¶ 6. Moreover, even when the plane becomes available, the pilot is out of state—as testified to by multiple individuals. Rosenbaum Decl. ¶ 5; Kenyon Decl. ¶ 7. Likewise, numerous declarations established that even were the plane and the pilot available, the plane does not have the capacity to carry heavy or large supplies. Rosenbaum Decl. ¶ 6; Hale Decl. ¶ 3; Kenyon Decl. ¶ 8. Accordingly, an airplane does not exist as reasonable, feasible, adequate, or safe access.

The Pilgrims' hardship is further worsened by the fact they are unable to use a horse and wagon to provide the essential supplies the Pilgrims need immediately. Faced with no other option, the Pilgrims *did* try. Indeed, four different people provided declarations describing the Pilgrims' doomed horse and wagon attempt and establishing facts that proved access by horse and wagon also is not reasonable, feasible, adequate, or safe access—even when lightly loaded. *See* Declaration of John Adams (Adams Decl.); Declaration of Butterfly Sunstar (Sunstar Decl.); Kenyon Decl.; Hale Decl. Indeed, the Pilgrims provided impressive testimony from a knowledgeable person formerly

in the business of providing wagon rides to tourists in the area and who possesses experience with horses and horse drawn wagons. That person concluded "that a wagon was not reasonable for transporting supplies." Adams Decl. ¶ 8. Moreover, the Adams Declaration stated further that "[m]y experience with the horse and wagon is that it would be dangerous to rely on it for transportation of cargo." *Id.* ¶ 9. Two other individuals actually present during the perilous attempt established the same facts in detail. *See* Sunstar Decl.; Kenyon Decl.

Finally, the Pilgrims also established facts clearly proving that snow machines do not provide reasonable, feasible, and adequate access for their needs. *See* Supp. Hale Decl. First, the snow machines the Pilgrims have available can only carry 200 to 300 pounds each. *Id.* ¶ 2. Yet, the Pilgrims' needs include 1,800 bales of hay and 200 bags of grain—several tens of thousands of pounds of supplies. *Id.* Second, the McCarthy Creek has not yet frozen over and snow machines cannot travel under water or through water. *Id.* Accordingly, to the extent the Order relies on this mode of access as reasonable, feasible, adequate access for the Pilgrims' needs, it constitutes clear factual error.

3. The Order Constitutes an Abuse of Discretion Because It Ignores the Pilgrims' Substantial Evidence of Extreme Hardship and Irreparable Injury Supported by Numerous Persuasive Declarations

Inexplicably, the Order simply ignored the overwhelming weight of the Pilgrims' evidence concerning extreme hardship and irreparable injury—without the benefit of reasoning, analysis, or explanation. The Order first acknowledged the Pilgrims' plight by referring only to the alleged "successful efforts Plaintiffs have made to supply themselves for the winter." Order at 15. The Order's description is in error. As established above, the Pilgrims have *not* been successful in supplying themselves for the winter. *See* Supp. Hale Decl. ¶ 6 ("Our situation requires that we get our supplies in immediately . . . These needs are all critical now, despite reports to the contrary."). *Clearly*, rather than successfully supplying themselves for the winter, the Pilgrims "desperately need to obtain supplies necessary to rebuild [their] home and survive the harsh Alaska winter." Hale TRO

Decl. ¶ 4. Able to rely on little more than a newspaper article to contradict the Pilgrims' declarations, the Order committed an abuse of discretion by doing so.

The Pilgrims were able to obtain *some* needed supplies via airlift. *Id.* ¶ 14. However, the airlift was not adequate for supplying the Pilgrims' needs. *See* Rosenbaum Decl.; Kenyon Decl.; Hale Decl. Moreover, an airlift is no longer available. *See* Rosenbaum Decl.; Kenyon Decl.; Hale Decl. Likewise, the Pilgrims obtained only a few materials via horse and wagon but, in doing so, established that method of access was also not reasonable, feasible, adequate, or safe. *See* Adams Decl.; Sunstar Decl.; Kenyon Decl.; Hale Decl. Given the facts established in these numerous declarations, the Order could have only relied on an abbreviated, inadequate airlift cut short by a plane crash and a wagon nearly completely destroyed in its only trip for its description of the Pilgrims' "successful efforts" to supply themselves for the winter. Obviously, though, the Pilgrims' efforts have been far less than "successful." Any other finding constitutes an abuse of discretion and should be reconsidered.

Likewise, the only other mention the Order makes concerning the Pilgrims' extreme hardship is the cursory observation that the "Plaintiffs' lifestyle will not be significantly impacted by any delay . . . ." Order at 16. Curiously, the Order arrives at that conclusion reasoning, "there is no reason for [the Pilgrims] to have expected that access existed when they purchased the property in question." Order at 16. However, not only is the conclusion concerning the Pilgrims' access expectations wholly inaccurate, it also completely irrelevant to the issue of whether the Pilgrims established the requisite hardship—thus clearly constituting an abuse of discretion. The Pilgrims clearly not only *thought* access existed to the property, Declaration of Raymond A. Kreig in Support of Motion for Reconsideration (Kreig Reconsider Decl.) ¶ 2, they also proved they did have access to the property. Hale TRO Decl. ¶ 3. Thus, the conclusion constitutes clear factual error. Most importantly, however, the Pilgrims' expectations concerning access does not reduce the fact that the Park Service's act of cutting off the reasonable, feasible, adequate, and safe access the Pilgrims

possessed—subjecting animals to starvation and allowing children and adults to live in conditions well below a reasonable minimum—imposed extreme hardship and irreparable injury.

The Order's inaccurate observations aside, the Pilgrims *have* established a "significant impact" on their lifestyle. Furthermore, the Pilgrims have done so by uncontroverted facts. For the Order to summarily "find" otherwise without analysis constitutes an abuse of discretion by virtue of clear factual error.

4. The Order Constitutes an Abuse of Discretion by Virtue of Clear Factual Error Because It Relies on the Park Service's Slim and Unsupported, Yet Irrelevant, Assertions

For the proposition that the Pilgrims failed to demonstrate irreparable harm, the Park Service could assert barely more than a single page, citing only four of the 56 paragraphs in the Declaration of Hunter Sharp (Sharp Decl.). *See* Federal Defendants' Opposition to Motion for Temporary Restraining Order and Preliminary Injunction (Fed. TRO Opp.) at 30-31. In that sparse information, the Park Service contends "there are many means of access to plaintiffs' property," including airplane access, horse drawn wagons, and snow machines. *Id.* at 30. However, the Pilgrims have already demonstrated that each of those modes of access are not reasonable, feasible, adequate, and safe. *Supra* at 5-6 (citing numerous declarations). Thus, relying on the Park Service's bald assertions and disregarding the Pilgrims' weighty evidence constitutes clear factual error and an abuse of discretion. The Court should correct the error in its Order.

Because it could not conceivably dispute the Pilgrims' case of hardship and irreparable injury, the Park Service instead attacked the Pilgrims themselves, making the offensive claim that the Pilgrims created their own "difficult situation." Park Service Memorandum at 32-35. The Pilgrims can only surmise this formed much of the Order's basis concerning hardship. Nonetheless, the Order constitutes an abuse of discretion, which this Court should reconsider and correct.

The Order appears to provide some credence to the assertion the Park Service "attempted to work with Plaintiffs and expedite the permitting process at no cost." Order at 4. However, the Park

Service in no manner "attempted to work" with the Pilgrims. The Park Service has always maintained steadfastly that the Pilgrims must apply for a permit and that before the Park Service could grant *or deny* that permit it would have to comply with the National Environmental Policy Act (NEPA). *See, e.g.*, Attachment 18 to Defendants' Exhibit (Attachment) 1, dated June 2, 2003; Attachment 24, dated July 10, 2003; Attachment 26, dated September 8, 2003; Attachment 28, dated October 1, 2003. Thus, rather than "attempt to work" with the Pilgrims, the Park Service merely made repeated demands for a permit application. Moreover, whenever the Pilgrims attempted to comply, under protest, with the Park Service's demands, the Park Service repeatedly stated it needed more information or employed similar stall tactics. *See, e.g.*, Attachment 24 (suggesting a meeting between the parties); Attachment 26 (requesting more information). Of course, when counsel for the Pilgrims did meet with representatives of the Department of Interior and Park Service officials, he was told only that the Park Service required a permit application and a NEPA assessment. *See* Attachment 28; *see also* Kreig Reconsider Decl. ¶ 2.

Moreover, the Order appears also to give some weight to the fact the Park Service sought to "expedite the permitting process at no cost." Order at 4. However, the Order's reliance on this fact is misplaced. Indeed, the Park Service did not make such an offer until, significantly and unsurprisingly, September 29, 2003. *See* Attachment 29. Moreover, that offer consisted only of a completed environmental assessment (EA) and a decision on the permit application in nine weeks. *Id.* In other words, from the date of the letter, the Park Service offered to make a decision by the end of November—assuming the process proceeded according to the Park Service's estimated timeline. Of course, the Pilgrims were justified in reasonably believing at the time that the required access would be impossible were they unable to even begin until the end of November. Moreover, the unspoken implication in the Park Service's offer is that its decision at the end of November could well have been a *denial*. Such a decision at that late date would have left the Pilgrims only the option of challenging the denial beginning in December, 2003—a date far more likely to be too late

to obtain supplies immediately needed for the winter. The Pilgrims' dilemma surely was not lost on the Park Service. Thus, the Park Service's "generous" offer was merely a Trojan horse.

B. The Order Contains an Abuse of Discretion in Relying on Clear Factual Errors to Find the Pilgrims Failed to Raise a Serious Legal Question Sufficient to Constitute a Fair Ground for Litigation

The Order contains factual errors concerning the Pilgrims' required use of the McCarthy-Green Butte Road which, in part, formed the Order's conclusion that the Pilgrims failed to raise a serious legal question concerning whether they have a right to use a tracked vehicle on the road as an Revised Statute (R.S.) 2477 right-of-way. For example, the Order states, "Plaintiffs . . . must apparently travel outside the right-of-way in certain places, and must, in some instances, create new sections of roadway." Order at 12. Likewise, the Order also finds, "Plaintiffs believe that 'adequate and feasible access' to their property should permit them to . . . deviate [from the McCarthy-Green Butte Road] when necessary." *Id.* at 13. Finally, the Order concluded, "there is no reason for [the Pilgrims] to have expected that access existed when they purchased the property in question." *Id.* at 16. Again, the Order contains clear factual errors.

No evidence exists whatsoever that the Pilgrims "must apparently travel outside the right-of-way in certain places" or that the Pilgrims must "create new sections of roadway." Indeed, the Pilgrims declared they would not "cause any impact whatsoever off the trail itself." Hale TRO Decl. ¶ 19; *see also* Kreig Reconsider Decl. ¶¶ 7, 8. For its erroneous factual conclusion, the Order may have relied on the Park Service's Attachment 17 which contains a photograph of allegedly new routes, allegedly created by the Pilgrims. First, however, this photograph is irrelevant concerning the issue of whether the Pilgrims must travel off the established trail to obtain their supplies. Even if the Pilgrims *did* create the diversions, that fact would have no bearing on whether their required access which is the subject of *this* suit would involve traveling outside the McCarthy-Green Butte Road itself or would result in creating new sections of roadway.

This Court should not punish the Pilgrims by minimizing their current situation merely because the Park Service alleges that they created diversions off of the McCarthy-Green Butte Road. The Park Service's allegations have not been proven and, furthermore, are not relevant to the Pilgrims' hardship and do not, in and of themselves, establish that the Pilgrims must, or will, deviate from the McCarthy-Green Butte Road.

Moreover, the Order also erred in merely accepting Attachment 17 as established fact. The Supplemental Declaration of Ray Kreig establishes that, in certain areas, the McCarthy-Green Butte Road consisted of more than one route during various periods over time. Second Declaration of Raymond A. Kreig in Support of Motion for Temporary Restraining Order and Preliminary Injunction (Second Kreig Decl.) ¶ 4, Ex. A, Photographs 4, 6. The Park Service's Attachment 17 alleges that the Pilgrims created these diversions. However, the United States Geological Survey topographic maps attached to the Second Kreig Decl. indicate that one route existed on the east side of McCarthy Creek in 1913, and a second route existed on the west side of the creek in 1939. Thus, multiple routes existed *before* the Pilgrims came to the area. Moreover, because both of these routes were created by public use prior to repeal of R.S. 2477 in 1976, these routes—and any other routes created prior to 1976—exist as valid R.S. 2477 rights-of-way *and are available for the Pilgrims' legal use.*[1] Likewise, concerning the issue of abandonment, even assuming for the sake of argument that the route had been abandoned in 1938, any subsequent use in any manner between 1938 and 1976 would constitute a new and valid assertion of an R.S. 2477 right-of-way.

For example, the Park Service alleges that "[i]n the 1970s Mr. Walt Wigger reopened the old mining road however he was unable to follow the original route and consequently diverted from the original alignment in several places . . . ." Sharp Decl. ¶ 4. Thus, to the extent Mr. Wigger created these new routes prior to 1976, these routes exist as valid R.S. 2477 rights-of-way, preserved by

[1] Consequently, it also follows that these routes provided the Pilgrims an expectation of access, contradicting the Order's assertion that the Pilgrims had no right to expect access. *See* Order at 16.

Alaska National Interest Land Conservation Act (ANILCA), and were also available for use by the Pilgrims—they certainly cannot be used as a reason to deny the Pilgrims access. Notably, the Park Service does not indicate when in the 1970s Mr. Wigger created these roads and does not provide a declaration by Mr. Wigger. However, the Park Service does admit that "Wigger kept a bulldozer at the Marvelous Millsite." *Id.* Thus, the Park Service establishes that as late as the 1970s, a bulldozer was used on the road, again clearly contradicting the Order's assertion that the road had "been . . . abandoned for more than 65 years." Order at 12.

Likewise, the Order cited repeatedly that the McCarthy-Green Butte Road was "abandoned," as did the Park Service. *Compare* Order at 3, 11-12, 15-16, *with* Fed. TRO Opp. at 13, 27 n.7; *But see* Kreig Reconsider Decl. ¶ 2. Although the Order cites nothing for its finding, the Park Service states that the Alaska Road Commission listed the McCarthy-Green Butte Road as abandoned in 1938. *See, e.g.*, Fed. TRO Opp. at 13. Apparently, the only support the Park Service has for its assertion is the "report of Park Historian Geoff Bleakley." Sharp Decl. ¶ 4 (citing Attachment 2). If the Order relied on this report, rather than the Pilgrims' extensive evidence, it committed an abuse of discretion. The report exists as little support for the allegation that the road is abandoned. The Park Service made no attempt to authenticate the report. The Park Service does not explain who Geoff Bleakley is, what his credentials are as a "Park Historian," when the report was compiled, for what purpose the report was compiled, or why the Court should rely on the report. Likewise, for the allegation that the road was abandoned, the Bleakley report cites in a footnote only the "Board of Road Commissioners for Alaska, 'Annual Report, 1938,' 36." Attachment 2, n.7. Yet, neither the report nor the Park Service attached that Annual Report as the best evidence of the assertion.

Moreover, the Park Service does not explain how this bald assertion refutes—let alone convincingly contradicts—the fact that, in 1998, the Alaska Legislature identified and accepted as a right-of-way the McCarthy-Green Butte Road. AS 19.30.400(d). Likewise, the Park Service does not explain why, if the road was abandoned, the United States Department of Transportation

referenced the road in a 1973 Public Facilities trails inventory on map 67 as trail #16. *See* Ex. E to Plaintiffs' Memorandum of Points and Authorities in Support of Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction (Pilgrims' Memo).

Thus, to the extent the Order relied on the Park Service's thin support and ignored or disregarded the Pilgrims' extensive evidence in order to arrive at the finding of abandonment, the Order contains clear factual errors and constitutes an abuse of discretion. Accordingly, this Court should grant the Pilgrims' Motion for Reconsideration.

II

THIS COURT SHOULD RECONSIDER ITS ORDER BECAUSE IT ABUSED ITS DISCRETION BY COMMITTING CLEAR LEGAL ERRORS TO DENY INJUNCTIVE RELIEF

The Order concluded "it is not clear that Plaintiffs will ultimately prevail in this matter." Order at 17. The Order erred in not applying the correct legal standard for injunctive relief. Because the Pilgrims demonstrated such an extreme case of hardship, under the Ninth Circuit test they needed only to demonstrate sufficiently serious questions going to the merits to make them a fair ground for litigation. *Marbled Murrelet*, 83 F.3d at 1073. Indeed, because the "balance of hardships tips decidedly toward the [Pilgrims]," this Court need not have "require[d] a robust showing of likelihood of success on the merits." *Caribbean Marine Services Co.*, 844 F.2d at 674.

A. The Order Commits an Abuse of Discretion by Relying on the Clear Legal Error That ANILCA Does Not Mandate the Pilgrims' Access

1. The Clear Language of ANILCA Mandates Adequate and Feasible Access for the Pilgrims

The Order begins its discussion concerning ANILCA by correctly stating, "[t]his dispute would have never likely arisen prior to 1980 and the enactment of [ANILCA]." Order at 5. However, the Order fails to realize that, because ANILCA preserved valid, existing rights, the dispute also should not have arisen *after* enactment of ANILCA. Instead, the Order cites only a conversation between Senator Stevens and Mr. Quarles, which it characterized as supporting

legislative history. Order at 7-9. Although the relevance of the legislative history the Order cites is not clear, what is clear is that the Order fails to cite or rely on both statutory language and legislative history directly relevant to the Pilgrims' guaranteed access right.

Indeed, the legislative history the Order cites and quotes does not even concern Section 1110(b) (16 U.S.C. § 3170) at issue in this case. Instead, the cited legislative history concerns *Section 1111*, involving temporary access. *Compare* Order at 7-9, *with* Section 1111. Relying on the legislative history behind temporary access provisions in Section 1111 and ignoring the clear language and legislative history of Section 1110(b) constitutes clear legal error and an abuse of discretion.

The Order's first point should have been that, without need to resort to legislative history, the clear language of Section 1110(b) provides:

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

16 U.S.C. § 3170(b) (emphasis added). Clearly, then, the plain language of Section 1110(b) mandates that the Park Service *shall* provide *adequate and feasible access* to inholders such as the Pilgrims.[2] "Shall," of course, does not mean "maybe," "perhaps," or "if an economic assessment allows." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995) ("If Congress had intended civil penalties under section 309(d) to be discretionary, it would have used the word 'may' instead of 'shall be subject to.'"). "Shall" means the Park Service *must* provide the Pilgrims with adequate and feasible access to their property. *Id.* ("[A]s a matter of statutory interpretation, a

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[2] Moreover, Section 1110(b) states, in addition: "including *subsurface rights* of such owners underlying public land." Section 1110(b) (emphasis added). Thus, clearly, and notwithstanding *any other law*, the Pilgrims' access rights *includes* access to their Motherlode Mine. Accordingly, the Order committed clear legal error in summarily disposing of the Pilgrims' claim of access to the mine. *See* Order at 16.

longstanding canon holds that the word 'shall' standing by itself is a word of command rather than guidance when the statutory purpose is protection of public or private rights."). Thus, the Park Service has no discretion in the matter. Congress' use of the word "shall" unequivocally eliminates any choice other than providing access. Thus, the Park Service has no decision to make other than it **must** provide adequate and feasible access.[3]

2. The Legislative History Is Clear: Congress Intended That ANILCA Mandate Adequate and Feasible Access for Inholders

If any ambiguity could possibly be construed to exist in the statute's clear language, the legislative history clears the confusion. First, for example, the Committee Reports accompanying ANILCA demonstrate Congress eliminated the Park Service's discretion in allowing access to inholdings:

> [I]f [preexisting] uses were generally occurring in the area prior to its designation, those uses *shall* be allowed to continue and *no proof of pre-existing use will be required.*

Sen. Rep. 96-413, 96th Cong., 1st Sess., at 248 (emphases added). Accordingly, not only did Congress *again* use the commandment "shall," it also precluded the Park Service from requiring any proof of preexisting use on the part of landowners themselves, if the landowner could establish the preexisting use had previously existed prior to passage of ANILCA. Thus, the Pilgrims did not need to establish that they personally have used tracked vehicles to access their property. They merely need establish, as they did, that tracked vehicles or other similar modes of access were exercised at some point prior to passage of ANILCA.

But the legislative history doesn't stop there. For example, the Committee Report explains its reasoning:

> The Committee enacted this provision in recognition of the fact that restrictions placed on public access on or across many federal land areas in Alaska may interfere with the ability of private inholders to exercise their right to use their lands. The

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[3] This, of course, raises the question, "what constitutes adequate and feasible access?" Clearly, this question, as it pertains to the Pilgrims, was answered in the preceding section.

> Committee believes that owners of inholdings should not have their ability to enjoy their land reduced simply because restrictions are placed on general public access to the land surrounding their inholdings.

Id. Thus, although the Park Service may be able to restrict the general public's access to the Park, it may not so restrict inholders', such as the Pilgrims', access. Congress held the Pilgrims' access, as inholders, to a higher level so that the Park Service may not restrict the Pilgrims' right to use or enjoy their land.

Thus, in sum, Congress *again* commanded the Park Service

> to grant the owner of an inholding such rights as are necessary to assure adequate access to the inholding, and . . . to assure a permanent right of access to the concerned land across, through or over these Federal lands by . . . private owners.

Id. Moreover, in the same section, Congress did *not* limit the type of access inholders such as the Pilgrims might utilize:

> The Committee recognizes that such rights may include the right to traverse the Federal land with aircraft, motor boats, *or land vehicles*, and to use such parts of the Federal lands as are necessary to construct safe routes for such vehicles.

Id. (emphasis added). Accordingly, the Pilgrims' access is *not* limited to airplanes, horses, or snow machines. *Clearly*, Congress contemplated *and allowed* the use of *land vehicles*. Notably, Congress did not limit access to "automobiles" or "four-wheel drive vehicles." Instead, Congress broadly allowed use of "land vehicles."

The language of Section 1110(b) indicates Congress' intent to grant broad rights of access. In Section 1110(a), concerning traditional uses, Congress limited the types of access that could be used for traditional purposes: "[T]he Secretary shall permit . . . the use of snow machines (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 . . . ." However, drawing from the legislative history, Section 1110(b) does not limit the types of access available to inholders. Instead, Section 1110(b) grants broad rights of access: "the . . . private owner . . . shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access . . . ."

In addition, this section of the legislative history does not limit the Pilgrims merely to the right to use preexisting access. The Committee also intended for inholders to "use such parts of the Federal lands . . . necessary to *construct* safe routes for [land] vehicles." S. Rep. 96-413, 96th Cong., 1st Sess., at 248 (emphasis added). The Order, however, struggled with issues raised by the Park Service for the purpose of obfuscation such as whether the McCarthy-Green Butte Road still existed in 1980, whether the Pilgrims reopened the road, whether the Pilgrims created new routes, and whether the road had long been abandoned. Clearly, though, under ANILCA and its legislative history these issues are red herrings—even if no route existed Congress preserved for inholders the right to use federal land to construct a route for the purpose of adequate and feasible access to inholdings.

Thus, the clear language of the statute and its legislative history denies any discretion whatsoever of the Park Service to *deny* access. Indeed, the Park Service *shall* allow access. Moreover, not only *must* the Park Service allow access by aircraft and motorboats, it also *must* allow access by land vehicles. However, in Section 1110(b) Congress also conditioned access on "*reasonable* regulation," which forms a large part of this dispute.

B. The Order Commits an Abuse of Discretion by Relying on the Clear Legal Error That the Park Service's Regulations Denying the Pilgrims' Access Are Reasonable

The Order provides a number of examples of what it concluded might constitute reasonable regulation. Order at 10-11. However, the Order commits a clear legal error in that it fails to harmonize the part of the statute referring to "reasonable regulation" with the previous part of the statute, and the corresponding legislative history, that commands the Park Service to grant adequate and feasible access necessary for the use and enjoyment of private land. Read properly in conjunction with one another, the Park Service *may* reasonably regulate the Pilgrims' access but, in doing so, it may not *deny* adequate and feasible access necessary for the use and enjoyment of private land. This reduces this case down to the issue the Order failed to address—whether the Park

Service's regulations are reasonable in that they prohibit the Pilgrims' ability to use and enjoy their property. In other words, notwithstanding the Park Service's ability to regulate the Pilgrims' access, whether the regulations violate the Pilgrims' rights, granted by Congress, to use and enjoy their land.

The Park Service has done exactly that. After the Pilgrims home burned down, they needed access to bring materials to rebuild the home—in other words, to use and enjoy their land as Congress allowed. As winter neared, the Pilgrims' access needs became more urgent, not just for the purpose of rebuilding their home to secure adequate winter shelter, but to then obtain adequate supplies to survive the winter. The Pilgrims have demonstrated clearly the type of access they require in order to use and enjoy their land—a land vehicle, as allowed by Congress. Indeed, the Pilgrims have demonstrated not only that this type of access is required, but that it is reasonable and that no other type of access is adequate, feasible, or safe. Nonetheless, the Park Service's regulations require the Pilgrims to apply for a permit, which may be denied under the Park Service's regulations; contends it must perform an environmental analysis prior to granting or denying the permit; and, finally, asserts authority to deny the Pilgrims their adequate and feasible access until the Park Service's process is followed. Under this scenario, the Order committed *clear* legal error in finding the Park Service had not infringed on the Pilgrims' guaranteed rights.

The Park Service maintains the only access allowed is via airplane, horse, or snow machine. Clearly, the Park Service is wrong. Congress allowed for use of land vehicles. *See* Sen. Rep. 96-413, 96th Cong., 1st Sess., at 248. The Park Service contends it may regulate the Pilgrims' access. The Park Service may be correct, to some extent, but in this particular case, under these circumstances, the Park Service violates the law because its regulations deny the Pilgrims adequate and feasible access for the use and enjoyment of their land.

C. The Order Commits Clear Legal Error by Finding the Park Service May Deny Access Pursuant to the National Environmental Policy Act

1. ANILCA Governs the Pilgrims' Guaranteed Access Right Notwithstanding Any Other Law

Section 1110(b) of ANILCA subjects the Pilgrims' right of access to "reasonable regulation." However, the Order committed clear legal error in failing to reconcile the Park Service's right of reasonable regulation with the Pilgrims' congressionally mandated right of adequate and feasible access for the purpose of using and enjoying their land. Clearly, *whatever* "reasonable" regulations the Park Service may impose, they *may not* interfere with the rights Congress promised the Pilgrims. The Park Service has done just that. With the Pilgrims facing an emergency situation, the Park Service denied the reasonable, feasible, adequate, and safe access the Pilgrims established they needed—for the sole purpose of performing an environmental analysis. The Park Service erred, and the Order committed an abuse of discretion by relying on clear legal errors to uphold the Park Service's *unreasonable* regulations.

Clearly, the Park Service may impose "reasonable regulations" to "protect the natural values" of the Wrangell-St. Elias Park (Park). Congress' overriding concern, however, was the Pilgrims' adequate and feasible access for use and enjoyment of their private land. Thus, the Park Service's regulations are reasonable in this case only if they do not in any way prevent or interfere with adequate and feasible access for the use and enjoyment of the Pilgrims' land.

Congress began both subsection (a) and subsection (b) of Section 1110 with overriding words demonstrating its intent: "*Notwithstanding any other provision of this Act or other law . . . .*" Accordingly, *only* Section 1110, in this case subsection (b), governs the Pilgrims' access, and, according to Congress, governs access exclusive of any other provision of ANILCA and, most importantly, exclusive of any other law—*including NEPA*. Clearly, then, although the Park Service may reasonably regulate the Pilgrims' access, the Park Service may not use either its regulations or NEPA to prohibit adequate and feasible access for the Pilgrims' use and enjoyment of their land.

In order to underscore the balance Congress intended, Congress made its intentions clear. Indeed, Congress regarded so highly the rights of access that it noted specifically where on the continuum it placed access rights:

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

123 Cong. Rec. 261, Page No. H2858 (1979) (statement of Rep. Udall). Thus, it clearly follows—concerning the Park Service's desired environmental analysis and the Pilgrims' essential needs, the Park Service must accept the Pilgrims' needs notwithstanding any environmental harm that follows, thus obviating any need for an environmental analysis concerning a permit application for emergency access.

2. Any Permit the Park Service May Require Can Only Be Ministerial in That It May Not Interfere or Prohibit the Pilgrims' Guaranteed Access Right

The preceding section does not mean the Pilgrims may pillage the Park, of course. Section 1110(b) contemplates the Park Service may exercise "reasonable regulations." However, even assuming the Park Service may require the Pilgrims to obtain a permit, such a permit may only be construed as a ministerial act. In this Circuit, a "ministerial act" is defined as a clear, nondiscretionary agency obligation to take a specific affirmative action, which obligation is positively commanded and so plainly prescribed as to be free from doubt. *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969). This describes the Park Service's position in this case. Congress commanded the Park Service in Section 1110(b) to provide access, and it did so plainly prescribed, leaving no doubt or ambiguity—the Park Service *shall* grant access.

As a consequence, to the extent the Park Service can require a permit from the Pilgrims, it can only be a ministerial act. *See Swanson v. Babbitt*, 3 F.3d 1348, 1353 (9th Cir. 1993) ("[T]he department's [of Interior] approval . . . is non-discretionary and is purely a ministerial act.").

Likewise, "when an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to NEPA." *Sugarloaf Citizens Association v. Federal Energy Regulatory Commission*, 959 F.2d 508, 513 (4th Cir. 1992); *see also American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788, 803 (5th Cir. 2000) ("Agency decisions which do not entail the exercise of significant discretion do not require an [environmental impact statement]."). The reason for this is that, because the primary purpose of NEPA is "to aid agency decisionmaking, courts have indicated that nondiscretionary acts should be exempt from the requirement." *South Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir. 1990); *see also Goos v. Interstate Commerce Commission*, 911 F.2d 1283, 1296 (8th Cir. 1990) ("Because the ICC [Interstate Commerce Commission] has not been granted any discretion under section 1247(d) to base its issuance of a [permit] on environmental consequences, we agree that it would make little sense to force the ICC to consider factors which cannot affect its decision.").

The same reasoning applies to this case. Because the Park Service **must** provide adequate and feasible access necessary for the use and enjoyment of private property, it may not deny that access—even for the excuse of protecting the Park's environmental value. *Congress* struck that balance, not the Pilgrims. In sum, NEPA is not required because it would make little sense to force the Park Service to consider factors which cannot affect its decision. *See* 123 Cong. Rec. 261, Page No. H2858 ("[T]he Federal Government must be prepared to accept the degree of environmental harm that is unavoidable if the holder's essential needs are to be met . . . .").

This case is much like *Marbled Murrelet v. Babbitt*, 83 F.3d 1068. In that case, the United States Fish and Wildlife Service (FWS) provided advice and consultation to private lumber companies (loggers) as to how the loggers could thin a forest without "taking" protected species. *Id.* at 1070. In order to stop the thinning of the forest, environmental groups brought suit, claiming the FWS engaged in "major federal action" and, therefore, must comply with NEPA. *Id.* The district court found for the environmental groups and ordered NEPA compliance. *Id.* The loggers appealed

and the Ninth Circuit reversed the district court. *Id.* The Ninth Circuit held the FWS provided nothing more than advice and consultation pursuant to its powers to protect species under the Endangered Species Act (ESA) and did not have any federal discretion or control over the forest thinning. *Id.* at 1070-71. Thus, the FWSs' actions did not constitute "major federal action" under NEPA. *Id.* at 1071. The Ninth Circuit explained:

> The record here establishes only that the USFWS provided advice under its power to enforce section 9 of the ESA. As a matter of law, such advisory activity does not constitute discretionary involvement or control over the Lumber Companies' proposed tree harvest operations.

Id. at 1075.

Likewise here, the Park Service may fulfill its obligation to reasonably regulate to protect the Park's values by consulting with the Pilgrims and advising them how they may exercise their guaranteed access rights in a way that will most protect the Park's values. As the Ninth Circuit has held, however, "[a]s a matter of law, such advisory activity does not constitute discretionary involvement or control." *Id.* at 1075. Thus, NEPA does not apply in this case.

The Tenth Circuit Court of Appeals has illustrated how this principle applies in a case similar to this one. *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1987), concerned plans of Garfield County, Utah, to undertake extensive and substantial improvements to the Burr Trail, an R.S. 2477 right-of-way. The Tenth Circuit held that no major federal action existed in the Bureau of Land Management's (Bureau) actions taken to ensure the county's construction project did not exceed the scope of the R.S. 2477 right-of-way through federal lands or involve actions outside the boundary of the right-of-way. *Id.* at 1090. Thus, the Bureau provided, in essence, consultation concerning the county's plans to ensure it did not harm the surrounding federal land, which did not require NEPA compliance.[4] Indeed, the consultation and advice was extensive, yet the Ninth Circuit held it did not

[4] The Tenth Circuit did find major federal action concerning *improvements* on rights-of-way and the Bureau's duty under Federal Land Policy Management Act to prevent improvement from causing (continued...)

involve NEPA because it did not constitute major federal action. For example, the Bureau performed physical inspections, monitored construction progress, and even required the county to re-route the project in ten different areas. *Id.* at 1090, and n.17. Thus, in this case, the Park Service could take similar actions—inspecting and monitoring the Pilgrims' access, for example—in order to protect federal land without having any need for an environmental analysis and NEPA compliance.

D. The Order Commits Clear Legal Error by Applying as the "Rule of Law" a Case Which, on Close Analysis, Does Not Control the Outcome of This Case

Summarily, the Order concluded that a decision of the Ninth Circuit controls this case. Order at 17 (citing *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988)). Yet, the Order's lack of discussion belies the fact it contains no analysis of *Vogler*, let alone a comparison to this case. Quite simply, though it may seem so on a cursory reading, *Vogler* does not control this case.

First, and most importantly, although the Ninth Circuit upheld the Park Service's imposition of a permit application, it did so without any discussion of NEPA. Indeed, NEPA was not involved in the case. Thus, *Vogler* does *not* control this case concerning the issue of whether the Park Service can interfere with the Pilgrims' guaranteed access rights for the purpose of complying with NEPA. For the Order to conclude that *Vogler* is controlling on that issue, is a clear legal error.

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[4] (...continued)
undue degradation. *Id.* However, the Tenth Circuit explained its reasoning which illustrates the fact the Pilgrims' use stands in stark contrast to the county's project in *Sierra Club* and does not require NEPA compliance:

> The project in this case runs ten miles along one [wilderness study area] and twelve miles along another, with some sections affecting both. It involves *realignments, widening, considerable blasting, a significant improvement in the quality of the road surface, and large increases in future traffic.* Surely that much work is a major project.

Id. at 1092.

Second, the *Vogler* case does not contain the same exigencies as those present here. Here, the Pilgrims currently suffer hardship and require immediate access on the only route they have available, and only a small tracked vehicle can serve as reasonable, feasible, adequate, and safe access under their circumstances. *Vogler*, however, gives no indication of any exigency or even if other routes existed for Vogler's use—indeed, the court concluded Vogler was *not* deprived of adequate and feasible access. *Id.* at 641.

Third, the Ninth Circuit in *Vogler* repeatedly referred to "off-road" travel. Indeed, the court stated:

> 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.

Id. (emphasis added). Thus, the Ninth Circuit clearly referred to "a permit procedure for *off-road* travel." Of course, here, however, the Pilgrims will not be traveling off-road—they have a road, the McCarthy-Green Butte Road. In addition, the court noted specifically that Vogler traveled with his Caterpillar alongside his transport vehicle, *off the trail*. *Id.* at 640. The Ninth Circuit also made note of damage that Vogler had caused "along the side of the trail." *Id.*

Finally, this case concerns far different facts than those in *Vogler*. *See* Kreig Reconsider Decl. ¶¶ 3-8. Accordingly, the Ninth Circuit decided *that* case under certain, different circumstances than those presented in this case. *Vogler* involved havoc not only on the alleged trail used but also extensively on surrounding land consisting of the Yukon-Charley Rivers National Preserve. *Id.* Of course, the Pilgrims' required access will in no way cause any harm, let alone the harm that so alarmed the Ninth Circuit. *See* Declaration of Raymond A. Kreig in Support of Motion for Temporary Restraining Order and Preliminary Injunction (Kreig Decl.).

Upholding the Park Service's attempt to regulate the miner's travel, the Ninth Circuit relied on the Park Service's authority to "conserve the scenery and the nature and historic objects and wildlife therein." *Vogler*, 859 F.2d at 642 (citations omitted). Here, of course, the Pilgrims' use of

the McCarthy-Green Butte Road is not so extraordinary because it involves no damage to federal park land—certainly not the extensive damage the Ninth Circuit noted in *Vogler*. *See* Kreig Decl. ¶¶ 8-15; Kreig Reconsider Decl. ¶¶ 3-8. The Pilgrims intend to use their vehicles on the trail. Hale TRO Decl. ¶¶ 9, 19; Kreig Decl. ¶ 7. The Pilgrims also do not contemplate uprooting or cutting trees, stripping vegetation, or causing any impact whatsoever off the trail itself. Hale TRO Decl. ¶¶ 9, 19-20; Kreig Decl. ¶¶ 8-15. The Pilgrims' use will not impact negatively the park's natural and other values. *See* ANILCA, § 1110.

III

THE ORDER COMMITS CLEAR LEGAL ERROR IN CONCLUDING NO JURISDICTION EXISTS UNTIL THE PARK SERVICE HAS ISSUED A PERMIT DECISION

The Order concluded that no jurisdiction exists to address issues relating to a permit until after the permit process has been completed. The Order erred, however, because jurisdiction is not a valid issue in this case. Indeed, because the dispute is clear and definite, this case is ripe for consideration absent a permit. The Pilgrims rely on their congressionally guaranteed right of access in requiring reasonable, feasible, adequate, and safe access to use and enjoy their land. The Park Service claims it can deny that access, first, until a permit is granted and, second, until it performs an environmental analysis pursuant to NEPA. Thus, the dispute is clear and definite. Regardless of whether the Park Service *may* require a permit, it cannot utilize its permitting process to deny congressionally mandated rights of access and *cannot* prohibit that right of access by conditioning permit approval on NEPA compliance. Therefore, the actual specifics of a permit and its language or conditions do not need to be known for this Court to settle this dispute.

The Park Service has long and continuously maintained, first, that the Pilgrims must apply for a permit to exercise their valid, existing rights and, second, that it requires an environmental assessment pursuant to NEPA before it may grant or deny the permit for access. The Pilgrims, however, contend the Park Service has no authority to prohibit their continued use of motorized or

tracked vehicles on the McCarthy-Green Butte Road and that no major federal action exists subjecting their valid, existing right to NEPA compliance. Thus, the controversy arises long before a permit decision would issue.

Under *these* circumstances, any additional applications by the Pilgrims would be pointless and, therefore, not required because the Park Service has made very clear its belief that it may deny access until it reaches a permit decision after performing an environmental analysis. *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 n.8 (1986) (strongly rejecting the notion that a court would require "further 'useless' applications"). This is so because it may be futile in a particular case because the agency's response to any additional application is already known with reasonable certainty.

In this case, there is no reason to believe that, before the Pilgrims brought suit, the Park Service would have allowed their valid, existing right of access absent permit approval after an environmental assessment. Thus, there is no validity to an argument that the demand for an environmental analysis was anything but a final agency action that determined, indeed rejected, the Pilgrims' emergency permit application. Indeed, the Park Service admits it rejected the Pilgrims' emergency permit application because it did not consider the Pilgrims' situation an emergency. Park Service's Memorandum at 33 (citing Declaration of Gary Candelaria). The Park Service then supplied a written explanation of reasons for denying the emergency permit. *Id.* at 34 (citing Sharp Decl.). Consequently, the process concluded and the Order erred in finding a lack of jurisdiction absent a permit decision.

CONCLUSION

By its interpretation of ANILCA, a statute embodying an obvious congressional compromise, the Order ruptures that compromise without support in fact, law, or the purposes that Congress could plausibly have been attempting to achieve when it enacted ANILCA. Because the Order commits clear errors of fact and law, it constitutes an abuse of discretion. Accordingly, the Pilgrims

respectfully ask that this Court grant their Motion for Reconsideration in order to correct those errors and grant them the injunctive relief for which they have established a clear need.

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Respectfully submitted,

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