Committee on Resources

Witness Statement

STATEMENT OF WILLIAM P. HORN

ON BEHALF OF

ALASKA STATE SNOWMOBILE ASSOCIATION

BEFORE THE

COMMITTEE ON RESOURCES

U.S. HOUSE OF REPRESENTATIVES

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My name is William P. Horn and I am appearing on behalf of the Alaska State Snowmobile Association. We greatly appreciate the scheduling of this hearing and the opportunity to bring the Committee's attention the wholesale attack being mounted against the ANILCA access guarantees by the Clinton Administration. Specifically, Section 1110(a) of ANILCA is a unique statutory guarantee of access by airplane, motorboat and snowmachine for the pursuit of traditional activities on over 120 million acres of conservation system unit (CSU) lands in Alaska. It has been implemented consistently and reasonably, in most part, for 19 years with close adherence to Congressional intent and minimal controversy. In the last year, however, the Administration has turned its back on the law, misadministered the statute, and when found to be in violation of the law by a U.S. District Court, launched an even more serious attack on the Congressional access guarantee through the pending proposed rulemaking.

As I will discuss below, the transparent attempt to get around the court's ruling by concocting a new crabbed unsupported definition of "traditional activities" is based on "utilitarian" activities an outrage.

This radical rewrite of 19 year old agency regulations is inconsistent with the law and violates clear Congressional intent. It will eviscerate the access guarantee enshrined in Section 1110(a) and deny thousands of citizens their right to access millions of acres of public lands in Alaska to engage in long recognized traditional activities, including sightseeing, camping, picnicking, sport fishing, sport hunting, and other forms of outdoor activities. Adoption of the proposed regulation will be arbitrary and capricious and in violation of ANILCA, and the Administrative

Procedure Act, and other Federal laws.

Misreading ANILCA

The egregious flaw in the proposed definition of Atraditional activities@ is the attempt to add a new requirement that only Autilitarian@ activities with a Acultural@ component qualify as Atraditional.@ In its political zeal to drive snowmachine use from the Old Park (for example, the Park Service illegally closed the old Park through a "Superintendent's Compendium" for numerous years) the redefinition is an assault on ANILCA=s critical access guarantee and threatens the access rights of thousands of other users of Alaska=s CUS=s.

Congress has already enacted two specific utilitarian access provisions: Sections 811 and 1110(b). Section 811 addresses access by motorized conveyances for subsistence purposes. Subsistence within the context of ANILCA and applicable agency regulations encompasses an array of gathering activities, including fishing, hunting, trapping, berry picking, egg gathering, firewood gathering, and limited harvest of live timber for personal and family use and sustenance. *See* 36 CFR Part 13, Subpart B. These are the epitome of utilitarian and cultural activities. And as the law and regulations provide (36 CFR ' 13.46), a limited number of authorized individuals (i.e., Alocal rural residents,@ see Title II of ANILCA and 36 CFR ' 13.42) are assured of the ability to use motorboats, snowmachines, ATV=s, and , in some instances, airplanes, for the purpose of accessing park lands in Alaska to engage in these subsistence/utilitarian/cultural activities.

Similarly, Section 1110(b) addresses another form of utilitarian access: access to property for economic and other purposes. Because it enables the land owner to put its property to economic use, this kind of access is utilitarian by its very nature. As the agency is well aware, Congress primarily designed this form of access to address the needs of Native Corporations with millions of acres inside ANILCA CSU=s, other private property inholders, mining claim holders, oil and gas lessees, and other similarly situated persons.[(1)]

In contrast, Section 1110(a) covers primarily non-utilitarian activities that generally occurred in the CSU=s prior to enactment of ANILCA in 1980, including recreational pursuits such as sport fishing, sport hunting, picnicking, camping, recreational gold panning, non-subsistence berry picking, and sightseeing, to name a few (see 36 CFR Part 13, Subpart A - Public Use and Recreation). An attempt to introduce utilitarian features into this section of the law is nothing more than a transparent effort to (1) limit its scope, (2) guillotine the access guarantee for thousands of users of public lands, and (3) try to fool people into believing that Congress was unable to discern differences between utilitarian users (protected in Sections 811 and 1110(b)) and recreational and other types of users (protected in Section 1110(a)).

Section 1110(a) is Not AUtilitarian@

As previously noted, there is a small utilitarian component within Section 1110(a). It provides that the access guarantee is tied to Atraditional activities@ as well as Afor travel to and from villages and homesites.@ Because it listed this travel component separately, Congress did not consider these latter forms of Autilitarian@ travel to constitute Atraditional activities.@ This distinction within the Section 1110(a) itself is strong demonstration that Congress did not intend Atraditional acitivities@ to be only utilitarian activities. If Congress had wanted Atraditional activities@ to be synonymous with Autilitarian activities@ it could have and would have said so. The fact that it did not means that the agency=s effort to put this twist on the meaning of the provision is an impermissible interpretation.

Agency Revisionist History

Any objective review of ANILCA=s legislative history reveals that the purpose of the Special Access guarantee was to ensure that airplanes, motorboats, and snowmachines could be used within all CSU=s to engage in traditional activities. As the statute provides, this is in cases where the activities are Apermitted by this Act or other law.@ The relevant committee reports (H. Rept. 96-97 Part I, April 18, 1979; S. Rept. 96-413, November 14, 1979) both refer to these activities as those that were Agenerally occurring in the area prior to its designation@ (emphasis added) as a CSU, and then lists some *examples*. No one disputes that recreational activity, including sightseeing and camping, were generally occurring on almost all ANILCA CSU lands, especially the pre-ANILCA park units such as Denali, Glacier Bay, and Katmai where Apublic use and enjoyment@ is one of the two fundamental purposes of all park units pursuant to the National Park Service Organic Act of 1916. Thus, these activities properly fall under Section 1110(a)=s authorization.

The Park Service=s supposed reliance on Committee Markup transcripts is unwarranted for at least two reasons. First, these markup sessions are not indicative of Congressional intent. As the cover page of the transcripts notes, the transcripts are not reviewed for accuracy. As the Park Service is well aware, the Committees prohibit reliance on these transcripts. The transcript of these sessions that the ASSA has is full of hand-written strike-throughs and other indicia of unreliability. Further, mark up sessions, the informal discussion between staff and Committee members, are hardly the type of legislative history the agency should be relying on to change 19 years of consistent policy and practice.[(2)]

Second, the Department has grossly mischaracterized the 1978 Senate Energy and Natural Resources Committee markup regarding the earliest versions of both Sections 1110(a) and 811. I was present at all of the these mark-up sessions and personally participated in the development

of the statutory language of Section 1110(a), as well as the legislative history. From this first hand knowledge, I know that the agency=s interpretation of the mark up session is simply wrong.

It is important to note that the Committee took up the access issue (i.e., Title XI) before it wrestled with subsistence (*i.e*., Title VIII). The first version of Section 1110(a) as proposed by the Democratic Committee *staff* was a utilitarian provision to provide access only for undefined Asubsistence activities@ and travel to and from villages (see pp. 53-54 of unedited, unverified August 1, 1978 transcript). Without this access, standard restrictions or prohibitions would be applicable (e.g., Wilderness Act pre-existing use test) (*id*. at 54) to all other forms of motorized access.

Senator Ted Stevens (R-AK) objected that a Asubsistence only@ access guarantee was inadequate. He wanted to ensure access by airplane, motorboat, and snowmachine for those who are A*recreational* or commercial users.@ *Id*. at 53 (emphasis added). Contrary to NPS assertions, neither of these categories of users are Asubsistence-like.@ Later in the same session, Senator Stevens reiterated that he wanted to Abend it [existing law access restrictions and prohibitions] for *all* hunters, fisherman, for the three conventional means of non-environmental damage transportation, motor boats, snowmachines in the winter time, and planes.@ *Id*. at 57 (emphasis added).

Ultimately, subsistence activities got their own express access provision at Section 811. One Autilitarian@ part remained within Section 1110(a): travel to and from villages. The term Atraditional activities@ was selected for inclusion and described by the Senate and House Committees as uses Agenerally occurring@ and still permitted to occur in areas designated or expanded by ANILCA. Since January, 1981 everyone, including the Department, has understood this to include recreational activities.

The explanatory language in the Park Service's proposed regulation is a bold attempt at revisionist history and a transparent attempt to gut the broad access guarantee that Congress sought to and ultimately did enact.

Committee Reports Support Recreation as Traditional

In addition, the committee reports= explanations of Section 1110(a) are contrary to the political and philosophical goals of the agency.[(3)] Those reports do not list only utilitarian activities and do not indicate that the list is exclusive. First, listed activities such as sport hunting and fishing, are not utilitarian nor even limited to local or Alaskan residents. Thus, the fact that the Committee included these non-utilitarian activities in their list of examples demonstrates they

did not intend the meaning the Department now proposes.

Second, the Department mischaracterizes the passages as including the whole universe of specific types of traditional activities. The Reports explain that Section 1110(a) Aguarantees access@ for traditional activities A*such as* subsistence and sport hunting, fishing, berry picking, and travel between villages.@ (Emphasis added). The Reports do not limit the meaning of traditional activities to those four listed activities. Instead they discuss activities and uses of the lands that Awere generally occurring in the area prior to its designation.@ S. Rep. 96-413 at 248; H. Rep. 96-97 at 239. Because of the universe of traditional activities that Congress contemplated was greater than these four listed activities, it was an error for the Department to conclude that these four activities indicated an intent to limit Section 1110(a) to utilitarian activities. (In any event, as discussed above, the inclusion of sport hunting and fishing defeats the Department=s logic.)

Recreation and Sightseeing Are Traditional

Lest there be any doubt that, for example, sightseeing (e.g., viewing wildlife and scenery) and photography are traditional activities in a unit like Denali, one need only read the history of the Park written by NPS Historian William E. Brown. *Denali - Symbol of the Alaskan Wild*, William E. Brown, 1993, Alaska Natural History Association. The chapter, entitled ATraditional Times@ refers to the mountains and the wildlife in the Park and notes:

migrations continue to this day. The animals still band together for their seasonal convocations. And people come from afar to behold this recurrent display of wildlife posed against the mountain. Today except on the fringes of the recently expanded parkland, they hunt with spotting scope and camera.

(*Id*. at 13).

In later chapters he recounts the vision of one the Park=s early proponents, Charles Sheldon:

Visitors would view that wildlife, which, with the mountains, composed that living landscape that had so moved Sheldon and shaped his vision. The utility of a great unhunted game refuge in Alaska=s center lent practicality to a proposal esthetic at its core.

(*Id*. at 93). Visitors are still permitted to come to the Park to see the mountain scenery, view the wildlife, and take photographs. For the agency to arbitrarily decree that these are not traditional activities -- that is, activities generally occurring in the area prior to designation -- borders on the unbelievable.

Congress was aware of these facts and made it clear that recreational opportunities were a primary reason for establishing and expanding park units in ANILCA. During Senate consideration of the bill in l979, Sen. Gaylord Nelson (D-WI), later President of The Wilderness Society, proposed more Wilderness designations for Denali on the grounds that such action Aassures that convenient wilderness opportunity will be available to the recreationists who visit this major Alaskan attraction.@ *Congressional Record*, S 5784, May 22, 1980. House Interior Committee Chairman Rep. Morris K. Udall (D-AZ) acknowledged that a fundamental purpose of the Alaska park units was for recreation: AThese National Park System units will also provide an opportunity for people to enjoy a wide array of recreational experiences unique in our Nation. The new and expanded national park units in Alaska, like all national parks, are places for people.@ *Congressional Record*, H10532 Nov. 11, 1980.

The access issue was also addressed expressly during the ANILCA debates. Alaska=s Sen. Ted Stevens (R-AK) discussed the measure on the eve of Senate passage and reviewed the Aseven consensus points@ B seven items that Alaska=s political leadership insisted on being addressed in the bill that became ANILCA. One of those points was to ensure and maintain the right to use and enjoy the set aside lands, including motorized access via airplane, motorboat, and snowmachine. This came under the heading of the AAlaska lifestyle@: AThat leads to the seventh point and that this the lifestyle question B the right to use motorboats, aircraft, and snowmachines, as well as the right for cabins on public lands and so forth.@ He went on to conclude that these provisions (primarily Section 1110(a)) were adequate and provided sufficient guarantees to Alaskans. *Congressional Record,* S 11047, August 18, 1980.

During the litigation that overturned the first illegal closure of the Old Park to snowmachine access, ASSA provided information about traditional recreational activities in the Old Park prior to December 1980. This also included information about snowmachine use in Denali Park and Preserve area. This information further demonstrates that recreational activities were generally occurring in the Old Park and are clearly a traditional activity under any common sense understanding of that term.

Interior Got It Right for 19 Years

The clear legislative history discussed above was foremost in the Department=s mind when it proposed the original ANILCA and Section 1110(a) regulations on January 19, 1981 B mere weeks after President Carter signed the bill into law. *See* 46 Fed. Reg. 5642 (Jan. 19, 1981). The Carter Administration Department officials correctly concluded that Aopportunities for access, carrying of firearms for personal protection, camping, picnicking, and personal collection of natural resources [e.g. recreational gold panning] are greatly enhanced under these regulations since these proposed regulations would relieve restrictions and remove hardships

imposed on the Alaska lifestyle.@ *Id*. at 5642. The proposed regulations carefully distinguished between subsistence users and recreational users. *See id*. at 5643. Indeed, Subpart A of the proposed and later adopted regulations still appear in the CFR under the heading of APublic Use and Recreation.@ As originally explained, these Aregulations ...govern activities such as the use of aircraft, snowmobiles, and motorboats ... and other activities related to access or general public use and recreation.@ *See id*. at 5643. These proposed regulations were subsequently adopted by the Reagan Administration in June 1981 and have been essentially accepted and unchanged for 19 years.

The newly proposed radical change would undo this well settled rule. The key issue is what constitutes a Atraditional activity?@ It is abundantly clear that the authors of Section 1110(a) were referring to activities permitted to occur in units and that had generally occurred in the past (i.e, traditionally). In the case of Park units, it is evident that sightseeing B scenery and wildlife B has long been part of park tradition. The Department recognized these facts, and Congressional intent, in its original ANILCA rulemakings. Today, however, the public is fighting a radical change based on a revisionist history of ANILCA. This radical change is driven by a monomanical zeal to ban all snowmachine use in Denali National Park, especially from the core area, regardless of the law and the facts.

The Proposed New Rule Guts ANILCA Access Throughout Alaska

The agency apparently does not appreciate the enormous adverse consequences its proposed regulations will have on access rights in Alaska. It will apply to all 45 plus million acres of park and preserve lands, as well as the Wild and Scenic Rivers under Park Service administration (e.g., Alagnak).

The impermissible insertion of the utilitarian and cultural concepts from Section 811 subsistence access into Section 1110(a) will curtail the access rights of a vast number of users. An array of otherwise traditional activities will be deemed not to be traditional and the associated access rights will be guillotined. For example, what is utilitarian and cultural about catch and release sport fishing or any sport fishing? What is utilitarian and cultural about a non-resident hunting a trophy Dall ram in the Wrangells Preserve? What is utilitarian and cultural about one-time visitors flying into a headwaters lake for a recreational float trip? What is utilitarian and cultural about landing on the Ruth Glacier or in a Katmai crater lake for sightseeing? What is utilitarian and cultural about running a motorboat up a wild and scenic river for a camping trip? What is utilitarian and cultural about an Anchorage resident taking a private motorboat into Glacier Bay to view glaciers and wildlife?

None of these activities appear to fit within the proposed definition of traditional activity. Once

the Park Service establishes this utilitarian and cultural criteria, the *right* to use motorized access to engage in these activities is gone. For example, the Department asserts that the proposed closure will not affect Section 1110(a) access in the four million acres in the Denali Addition Lands or in other CSU=s in Alaska. 64 Fed. Reg. at 61566, 61568. The agency either grossly misunderstands the consequences of its rule or believes the public will not see through this big lie. The Department=s cramped general definition of traditional activities and its conclusion that only subsistence and sport hunting, fishing, and berry picking meet this definition mean that sightseeing, camping, wilderness experience, and photography can not be the basis for Section 1110(a) access *anywhere in Alaska*. Moreover, once the utilitarian/cultural definition is adopted in the Code of Federal Regulations, it is only a matter of time before the Department decides that sport hunting and sport fishing do not fit within that definition. Either the agency will take that step through an Ainterpretative rule@ not subject to public review or some animal rights activists or other zealots will ask a judge to adopt this interpretation. Simply put, adoption of the proposed definition and rule will destroy the access rights of thousands of recreationists engaging in traditional activities in numerous CSU=s. This must not happen.

Resource Detriment Closure

The Department also announced a new closure based on alleged resource detriment, but provides no more quantification or qualification of actual snowmachine use that is allegedly causing the resource detriment than it did for the temporary closure that the District Court invalidated. The Department continues to rely on its February 1999 Statement of Finding (AClosure Order@). As the ASSA pointed out in briefing to the Court, this so-called finding is long on speculation and conjecture and short on necessary facts. Importantly, the Closure Order does not quantify the level and nature of the current or anticipated snowmachine use other than in vague terms. The Closure Order contains, for example, absolutely no quantitative information about how many snowmachines were being used or are anticipated to be used in the Old Park on a given day or seasonally, for how many hours and how many miles the use occurs, where in the Old Park the use occurs, where are the alleged heavily-used areas, what level of interactions with wildlife and other recreational users is actually occurring, and what types and numbers of wildlife are allegedly involved and in what situations. Instead, the Park Service vaguely refers to Arecent developments of snowmobile use patterns and intensity that constitute a marked departure from past snowmobile exclusion [sic] in the affected area,@ Closure Order at 1, Aincreased numbers of snowmobile users,@ *id.* at 3, and similar statements, *see, e.g., id.* at 9-12.

Park Service documents demonstrate that the Park Service also had little or no information about the actual effects snowmachines were having or would have on the Old Park resources. In numerous documents going back several years, the Park Service states that it is unsure of the

actual effects of snowmachine use in the Old Park and that it needs to do research to determine the effect. *See*, *e.g.*, Closure Order at 8 (Athere has not been enough time to conduct local studies@), 13 (closure needed to protect resources Awhile definitive research and planning can be conducted and completed@), 16-17 (admitting lack of information about long-term impact of snowmachine use in the Old Park); Internal DOI document labeled General Comments regarding snowmachine use in Denali (undated, but written in 1996) (admitting that the Park Service does not know Athe full scope or intensity [of the effect snowmachining is having in the Old Park] because we haven=t seriously investigated the situation@; Letter to Sandy Kogl from Stephen P. Martin, Superintendent (AYou asked what affect [sic] snowmachine use in the wilderness area of the park is having upon wildlife and vegetation resources. *The honest answer is that we really don=t know*.@) (emphasis added); Framework for South Slope Studies (August 1998) (recognizing need for documentation of, among other things, snowmachine use in the South Side, which would allow better assessment of effects on resources). Yet the Department plows ahead with its proposed closure

The Draft Environmental Assessment (AEA@) basically reiterates the points made in the Closure Order and is no better. Also fails to account for the Court=s November 18, 1999 Order, which came out after the draft EA was complete. The Department has said nothing about how the Court=s Order affects the EA or the proposed action, thus depriving the public of an opportunity to meaningfully comment on the final proposal. This has been the Department's method, make a de facto final decision then allow the public to file comments.

Betraying A Promise

During the Senate debate on ANILCA, an apparently prescient exchange occurred between Sen. Mike Gravel (D-AK) and the late Sen. Paul Tsongas (D-MA), one of the Act=s primary architects:

AMR. GRAVEL: I know that many accept the words of the managers of the bill and the proponents of the bill saying that yes there will be access. But I think time will bear out that the access is not worth the paper it is written on and that the rights and sovereignty of the State of Alaska and the people of Alaska will have been breached on this day and on tomorrow.

MR. TSONGAS: Mr. President, let me say, although this may be cold comfort, I am willing to work with the Senator from Alaska to put together language in a report that would make it clear to any bureaucracy, judiciary, administrative, whatever, that the access provisions provided in this bill were put in there seriously, that it is the intent of all parties concerned that they should be lived up to.A

Congressional Record, S 11062, August 18, 1981.

The Department=s proposed radical rewrite of the Section 1110(a) regulations betrays the commitment made by Paul Tsongas and the other architects of ANILCA, eviscerates the special access guarantee Congress worked hard to enact, and shatters the promise of access made to Alaska nearly 20 years ago. ASSA has urged the Department to simply withdraw this ill-considered proposed regulation and continue to use an approach consistent with Congress=s intent and agency practice over the last 20 years. The Department can then proceed to identify these specific activities that meet the generally and legally occurring in the area test in each of the areas or units. This approach, unlike the Department=s proposal, complies with the Court=s Order and complies with Congress=s intent in Section 1110(a).

If the agency will not comply with the law and clear Congressional intent, we urge this Committee to take whatever action is necessary to ensure that the promises enshrined within ANILCA are fulfilled.

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1. [1] Even Section 1110(a) has a small, but *expressly* stated, utilitarian component relating to guaranteed access to and from villages and homesites.

2. [2] The ASSA was unable to find any case law supporting reliance on mark up sessions in interpreting a statute.

3. [3] These reports are the best source of legislative history on Section 1110(a).

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