No. _____

In the

Supreme Court of the United States

JOSHUA HALE; JOSEPH HALE;
and ELISHABA HALE,

Petitioners,

v.

DIRK KEMPTHORNE, Secretary of the United States Department of Interior; WILL TIPTON, Acting Superintendent, Wrangell-St. Elias National Park & Preserve; MARSHALL NEECK, Chief Ranger, Wrangell-St. Elias National Park & Preserve; DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE; FRAN MAINELLA, Director of the National Park Service; MARCIA BLASZAK, Regional Director of the National Park Service, all in their official capacities; NATIONAL PARKS CONSERVATION ASSOCIATION; THE WILDERNESS SOCIETY; and ALASKA CENTER FOR THE ENVIRONMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Counsel for Petitioners

QUESTIONS PRESENTED

Petitioners seek adequate and feasible access to their homestead via an established right-of-way within the Wrangell-St. Elias National Park and Preserve (Park). In the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3170(b), Congress directed that, "[n]otwithstanding any other provisions of this Act or other law," the Respondents (Park Service) "shall" allow landowners "such rights as may be necessary to assure adequate and feasible access" across conservation lands. The questions presented are:

1. Does the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, allow the Park Service to deny "adequate and feasible access" to privately owned land when ANILCA expressly mandates that the Park Service cannot deny "adequate and feasible access" "notwithstanding any other . . . law?"

2. Is normal use and routine maintenance of a state-owned right-of-way subject to federal approval and regulation?

3. May an appellate court base a decision on factual determinations that were not reached by the trial court before it mistakenly dismissed the case on jurisdictional grounds?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners (Hales) hereby state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Statutes

Rule

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

Joshua Hale, Joseph Hale, and Elishaba Hale (Hales) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

The Hales filed this action in the district court on November 4, 2003. The Hales sought declaratory and injunctive relief pursuant to Alaska National Interest and Lands Conservation Act (ANILCA), 16 U.S.C. § 3101, *et seq*., and former Revised Statute (R.S.) 2477 concerning the Park Service's authority to prohibit the Hales from accessing their property via overland motorized means, other than by snow machine in winter.

The Ninth Circuit Court of Appeals' initial opinion is reported at *Hale v. Norton* (*Hale I*), 437 F.3d 892 (9th Cir. 2006), and is reproduced herein at Appendix (App.) C. The Ninth Circuit's subsequent opinion, denying the Hales' Petition for Rehearing and Petition for Rehearing *En Banc* and withdrawing and replacing its previous decision is reported at *Hale v. Norton* (*Hale II*), 461 F.3d 1092 (9th Cir. 2006), and is reproduced herein at App. B.

On October 2, 2006, the Ninth Circuit ordered the parties to submit simultaneous briefing concerning whether the court should rehear the case *en banc*. The Court did not rehear the case, but on February 5, 2007, the Ninth Circuit withdrew and

[1] Joseph Hale and Elishaba Hale changed their names from Nava S. Sunstar and Butterfly Sunstar, respectively, during the course of this litigation. These name changes were approved by the Alaska state trial court, Case Nos. 3PA-05-02040 CI and 3PA-07-00958 CI, respectively.

replaced its August 25, 2006, opinion, issuing a third decision, *Hale III*, reproduced in App. A. *Hale v. Norton* (*Hale III*), 476 F.3d 694 (9th Cir. 2007). This revised decision was based, in part, on new findings on disputed factual issues that had not been reached by the trial court, had not been the subject of any evidentiary hearings, and had not been established as a prerequisite to any summary judgment motion (there was no such motion).

The district court's opinion denying declaratory and injunctive relief is included herein at App. D. The district court's opinion denying the Hales' Motion for Reconsideration is included herein at App. E.

The permit the Park Service offered the Hales is reproduced herein at App. F.

JURISDICTION

This case was filed in the United States District Court for the District of Alaska. The statutory basis for the district court's jurisdiction was 28 U.S.C. § 1331, due to the presence of a federal question, and 28 U.S.C. § 2201 (declaratory relief). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS AT ISSUE

The Alaska National Interest and Lands Conservation Act (ANILCA) provides in pertinent part:

> Notwithstanding any other provision of this Act or other law, in 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).

R.S. 2477, Rights-Of-Way and Other Easements in Public Lands, Mining Act of 1866, 43 U.S.C. § 932. Act repealed by the Federal Land Policy and Management Act (FLPMA) on October 21, 1976 (Pub. L. No. 94-579, sec. 706(a), 90 Stat. 2744, 2793) preserving valid rights-of-ways existing under 43 U.S.C. § 932 at the date of its approval. 43 U.S.C. § 1701, note. R.S. 2477 provides in entirety:

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

43 U.S.C. § 932.

The National Environmental Policy Act (NEPA) provides in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal government shall—
>
> . . . .
>
> (C) include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332.

STATEMENT OF THE CASE

ANILCA was the product of an intense congressional battle. To overcome opposition from a majority of Alaska's citizens, Congress included certain provisions specifically designed to address Alaskans' concerns of use and access. *See*, *e.g.*, 16 U.S.C. § 3170(b). This congressional compromise provided the public with tens of millions of acres of new parks, yet Congress also afforded Alaskans unique and special rules enabling continued use and access to private property within these vast new parks. ANILCA guaranteed that Alaskans shall retain the rights necessary to secure adequate and feasible access, subject only to reasonable regulation.

The Hales accept that under ANILCA the Park Service may *reasonably* regulate their access. Indeed, Congress provided the Park Service with authority in ANILCA "to protect the natural and other values" of the Park. 16 U.S.C. § 3170(b). But the Hales contend that, in exercising its authority to protect the Park's values, the Park Service must also uphold the promise of access Congress deemed so important and, thus, may not deny adequate and feasible access. The Park Service denied the Hales adequate and feasible access

by requiring a NEPA environmental review, subjecting their right of access to unreasonable regulation. The Park Service's regulation of the Hales' access violated ANILCA's access guarantee, exceeded its ANILCA authority to protect Park values, and constitutes *per se* unreasonable regulation.

A. Factual Background

The Hales own land within the Park.[2] Their inholding lies approximately 13 miles from McCarthy, Alaska, and is accessible by a single road, the McCarthy-Green Butte Road (Road), which crosses the Park.[3] During the spring and summer of 2002, after purchasing the property, the Hales used and maintained the Road without incident, using motorized vehicles when necessary.[4]

In April, 2003, the Hales' home burned to the ground, destroying practically everything the Hales owned.[5] After the Hales' home burned, they attempted to travel the Road in order to obtain urgently needed supplies and building materials.[6] To transport the large and cumbersome materials needed to rebuild their home and supply their needs, the Hales required the use of a motorized, tracked vehicle, a bulldozer, with its blade up, to pull the loaded 16-foot trailer over the mountainous road.[7] However, the Park Service posted a public notice permanently prohibiting use of motorized vehicles on the Road, other than

---

[2] App. A at A-3.

[3] *Id.*

[4] App. D at D-3.

[5] App. A at A-3.

[6] App. D at D-3 and A at A-3.

[7] App. F at F-2.

snow machines in winter, thereby preventing the Hales' use of their motorized vehicle to obtain their needed supplies.[8]

The Park Service then informed the Hales they needed a one-time permit for motorized access of the Road.[9] After securing temporary shelter, the Hales began trying in July, 2003, to obtain the permit from the Park Service.[10] The Hales requested a permit on an expedited basis as the Road, even via motorized, tracked vehicle, becomes treacherous during the winter.[11]

The Park Service did not cooperate in allowing the Hales adequate and feasible access.[12] Instead, the Park Service decided that before issuing a permit decision, it must conduct an environmental review pursuant to NEPA, issue a formal environmental assessment (analysis), and publish it for public comment.[13] With the window of safe and feasible access closing, the Hales urgently sought an emergency permit in September, 2003.[14] But on September 29, 2003, then on October 2, 2003, and again on October 29, 2003, the Park Service refused to allow adequate and feasible access because

---

[8] App. D. at D-3 and A at A-3.

[9] App. A at A-3.

[10] *Id.*

[11] *Id.*

[12] *Id.* at A-3, 4.

[13] *Id.* at A-4.

[14] *Id.* at A-3.

the Hale's situation did not fall into NEPA's emergency exceptions and they refused the Hales access without a permit.[15]

The Park Service claimed it could complete its NEPA analysis and issue a permit decision in nine weeks.[16] However, the Park Service released the results of its NEPA analysis five months after the Hales first sought a permit, and did not issue a permit until almost an additional three months later.[17] The Park Service offered a temporary, one-time permit valid for one year only valid between March 12, 2004, to April 15, 2004, and from October 20, 2004, to March 12, 2005, and only for 18 one-way trips using a tracked vehicle pulling a trailer.[18] Otherwise the Park Service allowed access only by air, foot, and horseback in the summer, and snowmachine in the winter when the ground was frozen.[19]

The Hales did not accept the permit offer because it did not provide adequate and feasible access.[20] Under the Park Service's interpretation of its authority, a second attempt to obtain adequate and feasible access will require the Hales to (1) apply for another permit; (2) await another NEPA analysis; and (3) again submit to unreasonable conditions that prevent adequate and feasible access.

---

[15] App. A at A-4.

[16] *Id.*

[17] App. F.

[18] *Id.* at F-1, 5.

[19] *Id.* at F-4.

[20] *Id.* at F-4 to F-9.

The Park Service violated the mandatory access provision Congress placed in ANILCA, granting reasonable and feasible access, by subjecting the Hales' access to their property to a NEPA analysis and the resulting access restrictions. The Hales required access during the summer, before harsh winter conditions prevented safe access. The Hales' access required use of their motorized, tracked vehicle because it can readily ford open water (the Road crosses McCarthy Creek a number of times) and because it can pull the heavy large materials, building supplies, fuel and food, that the Hales need to transport.

The only forms of access the Park Service allows inholders without a permit, are horseback and foot, which are wholly inadequate and infeasible for the Hales to use because neither they nor horses can adequately transport the needed materials. Snow machine use is also inadequate and infeasible because snow machines can be used only in certain restricted wintertime conditions when travel is treacherous, especially with large materials over mountainous roads. So long as the Park Service requires a NEPA analysis before allowing adequate and feasible access, the Park Service violates ANILCA and Congress' guarantee of adequate and feasible access, and exceeds its discretion to reasonably regulate access.

B. The Lower Court Decisions

The Hales asked the district court to declare that ANILCA provided them the right to continue using a motorized vehicle on the only road accessing their land and to enjoin the Park Service from preventing them from accessing their land over the road by any method other than foot, horseback, or snow machine. The Hales relied on the Park Service's legal obligations under ANILCA and former R.S. 2477. The Hales contended that, with these statutes, Congress commanded the Park Service to allow adequate and feasible access to owners of private land within national parks and preserves.

The district court denied the Hales relief and dismissed their case, finding that it had no jurisdiction and the Hales' access rights were subject to "reasonable regulation."[21] The Hales filed a motion for reconsideration, which the district court denied.[22] The court did not make any factual findings. In fact, it expressly eschewed reaching any factual conclusions regarding the reasonableness of the Hales' access: "The Court has yet to visit the site and cannot therefore render a personal opinion with regard to the reasonableness of various modes of travel."[23]

The Hales filed a notice of appeal and an emergency motion for an injunction pending appeal under Ninth Circuit Rule 27-3. In a summary order, the Ninth Circuit denied the motion for emergency relief and dismissed the Hales' appeal.

The Hales filed a motion for reconsideration, which the court granted and reinstated the Hales' appeal. The Hales' appeal concerned the Park Service's decision that it would not allow the Hales adequate and feasible access to their property without first completing a NEPA analysis. The Hales contend that Section 1110(b) of ANILCA, entitled, "Special Access and Access to Inholdings," *commands* the Park Service to provide such rights as necessary to assure adequate and feasible access to private landowners notwithstanding any other law. 16 U.S.C. § 3170(b). This congressional guarantee of access limits the Park Service's regulatory discretion such that *reasonable* regulation, allowed under ANILCA, could not deny adequate and feasible access for rebuilding the Hales' home, and specifically foreclosed the Park Service's ability to deny adequate and feasible access pending completion of a NEPA review.

---

[21] App. A at A-5.

[22] App. E.

[23] *Id.* at E-3, ¶ 7.

The Ninth Circuit held (*Hale I*) that (1) the court lacked jurisdiction to reach the merits of the case because the Park Service had not issued a permit granting or denying the Hales' access; (2) the Hales' access to their property was subject to reasonable regulation under ANILCA; and (3) the Park Service could regulate the Hales' use of the Road even if the Road existed as a valid R.S. 2477 right-of-way.[24]

The Hales filed a petition for rehearing and for rehearing *en banc*. In denying the Hale's petition, the Ninth Circuit also withdrew its decision in *Hale I* and issued an amended opinion *Hale II*.[25] The Ninth Circuit's subsequent opinion differed from its first in determining that it possessed jurisdiction to reach the merits of the case.[26] However, *Hale II* affirmed the previous holdings that (1) the Park Service may condition the Hales' ANILCA access rights on a NEPA analysis, despite Congress' mandate that ANILCA ensures adequate and feasible access notwithstanding any other law; and, (2) the Park Service could regulate the Hales' use of the Road even if the Road existed as a valid R.S. 2477 right-of-way.[27]

After the Hales petitioned for a writ of certiorari,[28] on October 2, 2006, the Ninth Circuit contacted the parties and directed them to file new briefing to decide whether the case should be reheard en banc. On February 5, 2007, the Ninth Circuit withdrew and replaced its previous decision with *Hale III*. This third opinion of the Ninth Circuit affirmed its decision in *Hale II*, but found that the Park Service's requirement that a

---

[24] App. C at C-4 to C-5.

[25] App. B at B-2.

[26] *Id.* at B-4 to B-8.

[27] *Id.* at B-8 to B-11.

[28] No. 06-090.

NEPA analysis be performed with a routine permit application was not a per se violation of ANILCA's requirement of reasonable and feasible access.

The Ninth Circuit also, for the first time in this litigation, made several factual determinations to support its holding. It found that the "trips contemplated by the Hales threatened to cause significantly more environmental damage than would be caused by the more usual post-freeze up runs."[29] It also found that "the Hales' principal justification for this [the Hales'] request—that it was more dangerous to drive in the winter—makes no sense to those experienced with conditions in Alaska."[30]

On February 20, 2007, the Hales withdrew their petition in No. 06-090, based on the withdrawal by the Ninth Circuit of *Hale II*. The petition now being filed with this Court stems from *Hale III*.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD ADDRESS THE EXCEPTIONALLY IMPORTANT ISSUE CONCERNING CONGRESS' CAREFULLY CRAFTED PROTECTION OF THE ACCESS MANDATED IN ANILCA

ANILCA allows the Park Service to *reasonably* regulate access. However, the Park Service's requirement of a NEPA review exceeds its regulatory discretion and eviscerates Congress' carefully crafted balance in ANILCA between reasonable regulation and mandatory access. The core of this

---

[29] *See* App. A at A-11 (9th Circuit's conclusions).

[30] *Id.* at A-11 to A-12.

dispute is whether Congress' grant to the Park Service of the authority to reasonably regulate access also provides the Park Service with discretion such that it can violate Congress' guarantee of adequate and feasible access. Although the Park Service possesses authority under ANILCA to reasonably regulate access, and to protect Park values, ANILCA limits the Park Service's regulatory discretion such that it may not deny adequate and feasible access. In short, access does not remain adequate and feasible during NEPA review because owners are totally deprived of the statutorily mandated right during the review.

In ANILCA, Congress already balanced environmental protection with citizens' right to access their property—allowing "reasonable regulation" to protect park values. The words Congress chose to guarantee access are significant—Congress' guarantee commands the Park Service to grant that access which is adequate and feasible under the circumstances—notwithstanding any other law. 16 U.S.C. § 3170(b). The Park Service cannot burden access with requirements that render it inadequate or infeasible, thereby violating Congress' mandate that the Park Service "*shall* [*grant*] . . . adequate and feasible access." *Id.*

Congress did not give the Park Service discretion to deny adequate and feasible access by unreasonably regulating access to inholdings. As the Senate explained upon passage of ANILCA:

> The subsection on access to inholdings, provides that, where a State or private interest in land is surrounded by one or more conservation system units, . . . the Secretary shall grant the owner of the private interest such rights as may be necessary to assure adequate access for economic and other purposes.

S. Rep. 96-413, at 248 (1979).

The Committee Reports accompanying ANILCA indicate Congress limited the Park Service's discretion to regulate access to inholdings:

> This provision *directs* the Secretary *to grant* the owner of an inholding *such rights as are necessary to assure adequate access* to the inholding, and is intended to assure a permanent right of access to the concerned land across, through or over these Federal lands by such State or private owners or occupiers and their successors in interest. 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. (emphases added).

Congress took care to explain the reasoning for granting such extraordinarily broad access rights to inholders:

> 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 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. (emphases added). Thus, although the Park Service may restrict the public's access to the Park, it may not restrict the access of inholders such as the Hales. Clearly, "[t]he Committee adopted a specific standard regarding access" and "expects the Secretary to be reasonable and fair in his judgments regarding access." *Id*.

The Park Service's actions in this case exist in stark contrast to Congress' commands. Their home having burned down, the Hales desperately need a reasonable and feasible way to bring in building supplies before the onset of winter. At every turn, the Hales were met with resistance and the ultimate requirement that there could be no meaningful access until the Park Service completed a drawn out environmental review under NEPA.

The Park Service denied the Hales their right of "adequate access for economic or other purposes." Pursuant to Congress' guarantee, the Hales sought to use a land vehicle to access their property. But, despite Congress' direction, the Park Service refused to recognize such a right, and instead the Park Service ignored Congress' command and denied access except by foot, horseback, or snow machine in winter. The Park Service's denial of the Hales' access by motorized vehicle violates the mandatory, nondiscretionary access provisions Congress mandated in ANILCA.

For these reasons, this Court should address this important question to ensure that while the Park Service protects park values pursuant to its ANILCA authority, that it also grants landowners adequate and feasible access, thereby upholding Congress' guarantee and respecting Congress' carefully crafted balance between access rights and environmental protection.

II

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION AND TWO OF THIS COURT'S DECISIONS CONCERNING WHETHER CONGRESS INTENDED NEPA TO OVERRIDE SUBSTANTIVE STATUTES

Less than three years ago, this Court unanimously reversed the Ninth Circuit's interpretation of NEPA. *See Dep't of Transportation v. Public Citizen*, 541 U.S. 762 (2004). The

issue this Court addressed in *Public Citizen* was whether NEPA and the Clean Air Act "require[s] the Federal Motor Carrier Safety Administration to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers" before deciding whether to grant registration to Mexican trucks. *Id*. at 756. Like ANILCA in this case, the Safety Administration's governing statute instructs that the agency "shall" grant registration to any motor carrier meeting certain criteria. *Id*. at 766. This Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, . . . under NEPA . . . the agency need not consider these effects in [an environmental analysis] when determining whether its action is a 'major Federal action.'" *Id*. at 770 (citation omitted).

Upholding the Safety Administration's decision to grant registration without considering the environmental impact of Mexican trucks, this Court stressed that

> [the agency] has only limited discretion . . . : It must grant registration to all domestic or foreign motor carriers that are "willing and able to comply with" the applicable . . . requirements. [The agency] has no statutory authority to . . . establish environmental requirements unrelated to motor carrier safety.

Id. at 758-59 (citation omitted). This Court concluded:

> Hence, under NEPA . . . the agency need not consider these effects . . . . [B]ecause [the agency] has no discretion to prevent the entry of Mexican trucks, [it] did not need to consider the environmental effects arising from the entry.

Id. at 770.

This Court's holding in *Public Citizen* applies equally to this case: Because the Park Service has no discretion under ANILCA to deny adequate and feasible access, the Park Service could not utilize a lengthy NEPA environmental review to deny

the Hales' access. Because Congress has not repealed the command "shall" in ANILCA, this case is similar to *Public Citizen*. "Shall" means, as it did in *Public Citizen*, that the Park Service has no discretion to deny adequate and feasible access. Just as in *Public Citizen*, the Park Service's action—granting adequate and feasible access to inholders—is not a legally relevant "cause" of any impact on the Park's environment because the Park Service had no discretion to deny adequate and feasible access. Accordingly, the Park Service's obligation to grant adequate and feasible access was not subject to a NEPA analysis and is inconsistent with Congress' ANILCA mandate. As a result, the Ninth Circuit's decision conflicts with this Court's unanimous decision.

Indeed, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), this Court addressed the issue of whether the Interstate Commerce Commission was required to perform NEPA analysis when issuing orders. According to the Court,

> [t]he statutory language [of NEPA], in fact, indicates that NEPA was not intended to repeal by implication any other statute. Thus, 42 U.S.C. § 4335 specifies that "[t]he policies and goals set forth in (NEPA) are supplementary to those set forth in existing authorizations of Federal agencies," and 42 U.S.C. § 4334 instructs that the Act "shall (not) in any way affect the specific statutory obligations of any Federal agency . . . ."

Id. at 694.

Likewise, in *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976), this Court addressed the issue of whether the Department of Housing and Urban Development (HUD) was required to comply with NEPA before allowing a disclosure statement filed with it by a private real estate developer pursuant to the

Interstate Land Sales Full Disclosure Act to become effective. Holding that HUD was not required to comply with NEPA before allowing a disclosure statement to become final, this Court held that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." *Id*. at 788.

The Court held that such a conflict between NEPA and the Disclosure Act existed, and as such NEPA must give way because

> [i]t is inconceivable that an environmental impact statement could, in 30 days, be drafted, circulated, commended upon, and then reviewed and revised in light of the comments.

Id. at 788-89.

Accordingly, this Court concluded:

> In sum, even if the Secretary's action in this case constituted major federal action significantly affecting the quality of the human environment so that an environmental impact statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty. The Secretary cannot comply with the statutory duty to allow statements of record to go into effect within 30 days of filing . . . and simultaneously prepare impact statements on proposed developments. In these circumstances, we find that NEPA's impact statement requirement is inapplicable.

Id. at 791.

A similar conflict exists in this case. ANILCA commands the Park Service to allow adequate and feasible access to property owners. Yet, the Park Service denied the Hales' adequate and feasible access by requiring a NEPA analysis. Moreover, it took the Park Service five months to release the results of its NEPA analysis and finally offer the Hales a

temporary access permit.[31] The Park Service cannot comply with Congress' statutory command to allow adequate and feasible access and also perform a NEPA analysis.

As a result, a NEPA analysis is inapplicable and "NEPA must give way." *Flint Ridge*, 426 U.S. at 788. Nowhere in NEPA's terms did Congress indicate it intended to provide the Park Service with authority it had limited in ANILCA. Accordingly, this Court should resolve the conflict between the Ninth Circuit and this Court's opinions concerning whether Congress limited NEPA review in the ANILCA mandate to allow adequate and feasible access.

III

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION AND THE TENTH CIRCUIT CONCERNING FEDERAL CONTROL OVER STATE-OWNED RIGHTS-OF-WAY

The Ninth Circuit's decision held that "even if the Hales have a valid right-of-way over the [Road]—which we do not decide—the existence of that right-of-way would not shield them from reasonable regulation by the [Park Service]." *Hale III*, 476 F.3d at 699. In so holding, the Ninth Circuit's decision conflicts with *Southern Utah Wilderness Alliance (SUWA) v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005).

SUWA arose when county road crews entered public lands managed by the Bureau of Land Management (BLM) and graded 16 roads. *SUWA*, 425 F.3d at 742. Nine of the roads were within the Grand Staircase-Escalante National Monument. *Id*. The counties did not notify BLM in advance, or obtain permission to grade the roads. *Id*. With few exceptions, the

---

[31] App. F.

counties had not previously graded any of the roads. *Id*. *SUWA* filed suit, alleging the counties had engaged in unlawful road construction activities and that BLM violated its duties under NEPA by not taking action against the counties. *Id*. The counties contended their activities were lawful because they occurred within R.S. 2477 rights-of-way. *Id*.

The Tenth Circuit determined that *SUWA*'s claims, in part, presented an issue of the scope of the R.S. 2477 rights-of-way:

> [T]he scope of an R.S. 2477 right of way is limited by the established usage of the route as of the date of repeal of the statute. That did not mean, however, that the road had to be maintained in precisely the same condition it was in on October 21, 1976; rather, it could be improved "as necessary to meet the exigencies of increased travel," so long as this was done "in the light of traditional uses to which the right-of-way was put" as of repeal of the statute in 1976.

Id. at 746 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988)). Accordingly, the Tenth Circuit held that unless the holder of an R.S. 2477 right-of-way across federal land proposes to undertake improvements in a right-of-way beyond mere maintenance, the holder need not obtain approval from the federal land management agency. *Id*. at 748. The Tenth Circuit explained that, in drawing the line between routine maintenance, which it held did not require consultation with BLM, and construction or improvement, which does require consultation, it endorsed the following definition:

> "[C]onstruction" . . . includes the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and other drainage structures, as well as any significant change in the surface composition of the

> road (*e.g.*, going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any "improvement," "betterment," or any other change in the nature of the road that may significantly impact Park lands, resources, or values. "Maintenance" preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage[, and] keeping drainage features open and operable—essentially preserving the status quo.

Id. at 749 (citation omitted). The Tenth Circuit further explained that, under this standard, grading a road *for the first time* would constitute construction and would require advance consultation. *Id.* However, *grading or blading a road to preserve the character of the road in accordance with prior use* would not. *Id.* Thus, in some limited and narrow circumstances, actions involving R.S. 2477 rights-of-way may be subject to federal influence.

That is not the case here. Instead, this case involves those circumstances that, according to the Tenth Circuit, are not subject to federal discretion. Here, the Hales merely seek to continue using the Road for access to and from their land. The Hales need nothing more than to pull a trailer with a motorized, tracked vehicle. The Hales do not intend to perform any construction or make any improvements to the road beyond routine maintenance. Accordingly, the circumstances in *SUWA* are strikingly similar to those of this case and the Hales do *not* require the Park Service's approval for their use of the road because the Park Service has no control over continued historical use of a valid, existing R.S. 2477 right-of-way. *SUWA*, 425 F.3d at 749.

This Court should grant certiorari to resolve the conflict among the circuits concerning federal control over state-owned rights-of-way.

IV

THIS COURT SHOULD GRANT REVIEW TO RESOLVE WHETHER AN APPELLATE COURT MAY BASE AN OPINION ON FACTUAL QUESTIONS NOT HEARD OR REACHED BY THE TRIAL COURT

In its third and final iteration of the operative decision, the Ninth Circuit buttressed its opinion with factual conclusions that had previously never been decided or even heard by any court. The Ninth Circuit based its holding that NPS did not violate ANILCA's promise of "reasonable and feasible access" in part on certain factual determinations that were not part of the trial court's holdings. In particular, the Ninth Circuit found that the "trips contemplated by the Hales threatened to cause significantly more environmental damage than would be caused by the more usual post-freeze up runs."[32] It also found that "the Hales principal justification for this [the Hale's] request—that it was more dangerous to drive in the winter—makes no sense to those experienced with conditions in Alaska."[33] While the Hales strongly disagree with these factual findings, it is more important to note that they never had an opportunity to litigate these assertions. Indeed, the *Alaska-based* trial court noted: "The Court has yet to visit the site and cannot therefore render a personal opinion with regard to the reasonableness of various modes of travel."[34]

---

[32] *See* App. A at A-11 (9th Circuit's conclusions).

[33] *Id.* at A-11 to A-12.

[34] App. E at E-3, ¶ 7.

With this petition, the Hales are not asking this Court to address these factual conclusions, but seek a ruling that the Ninth Circuit cannot reach such determinations until they are first litigated in the trial court. They do so because the Ninth Circuit's action is in conflict both with decisions of this Court (regarding an appellate court's ability to arrive at factual findings not reached by a trial court) and with the decisions of other circuits (holding that the question of what is reasonable access to property is a question of fact, not law).

Federal Rule of Civil Procedure § 52(a) states, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This Court has repeatedly stated that appellate courts should accept district court findings of fact that are not clearly erroneous. *See, e.g.*, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 n.14 (2001) (referencing factual review standard in case concerning the constitutionality of a punitive damages award); *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) (comparing the level of deference given to district court findings of fact to deference given to agency findings of fact); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995) (upholding a district court's factual finding that parties did not agree to arbitrate dispute). In this case, of course, there were *no* findings of fact because the district court wrongly dismissed the case on procedural grounds. But just as it is inappropriate for an appellate court to reject trial court findings of fact that are not clearly erroneous, it is equally inappropriate for an appellate court to arrive independently at findings of fact that are not reached, decided, or even heard by the trial court. With this petition, this Court has an opportunity to establish the degree to which an appellate court can sua sponte reach factual conclusions that are not part of the trial court proceedings.

It should be noted, moreover, that if the Ninth Circuit were deciding the issue of whether the Park Service's actions gave the Hales reasonable access as a matter of *law*, it would be in conflict with those Circuits that have found that the question of reasonable access is one of *fact*.[35] For example, the First, Second, and Third Circuits have all found that what constitutes reasonable access is a question of fact. *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 294 F.3d 307, 326 (2d Cir. 2002), *rev'd in part by Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398 (2004); *N.H. Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326, 331 (1st Cir. 1995); *United States v. Certain Land in City of Newark, County of Essex, State of N.J.*, 439 F.2d 670, 673 (3d Cir. 1971).

CONCLUSION

For the reasons contained herein, the Hales respectfully ask that this Court grant their Petition for Writ of Certiorari.

DATED: May, 2007.

Respectfully submitted,

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioners

[35] These cases are, of course, outside the context of ANILCA. Nevertheless, the underlying question of what is reasonable access to property is not a question unique to ANILCA, and traditional understandings of that question should, as a matter of logic, inform similar determinations under ANILCA.