

Winning and losing in court: the great Denali snowmachine debate

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Introduction

The Denali snowmobile case is one in which very different visions for the park collide. Some snowmobile users, for example, view the park interior as having value only if people can get there to see it, including during winter. Other park users advocate protecting natural sounds and places where people don't go and view the interior of Denali as a wildlife refuge.

Protecting the more intangible values of Denali National Park and Preserve is not a new idea. In working during the early 1900s to establish Mount McKinley National Park, Charles Sheldon wrote of attributes such as intact natural systems, solitude, and self-reliance, in addition to wildlife protection. The first superintendent of the park, Harry Karstens, captured the essence of the wilderness in the park with a statement during the 1920s: "There is much to offer those who understand the language of the great silent places, the mighty mouthed hollows, plumb full of hush to the brim" (Brown 1993).

Background

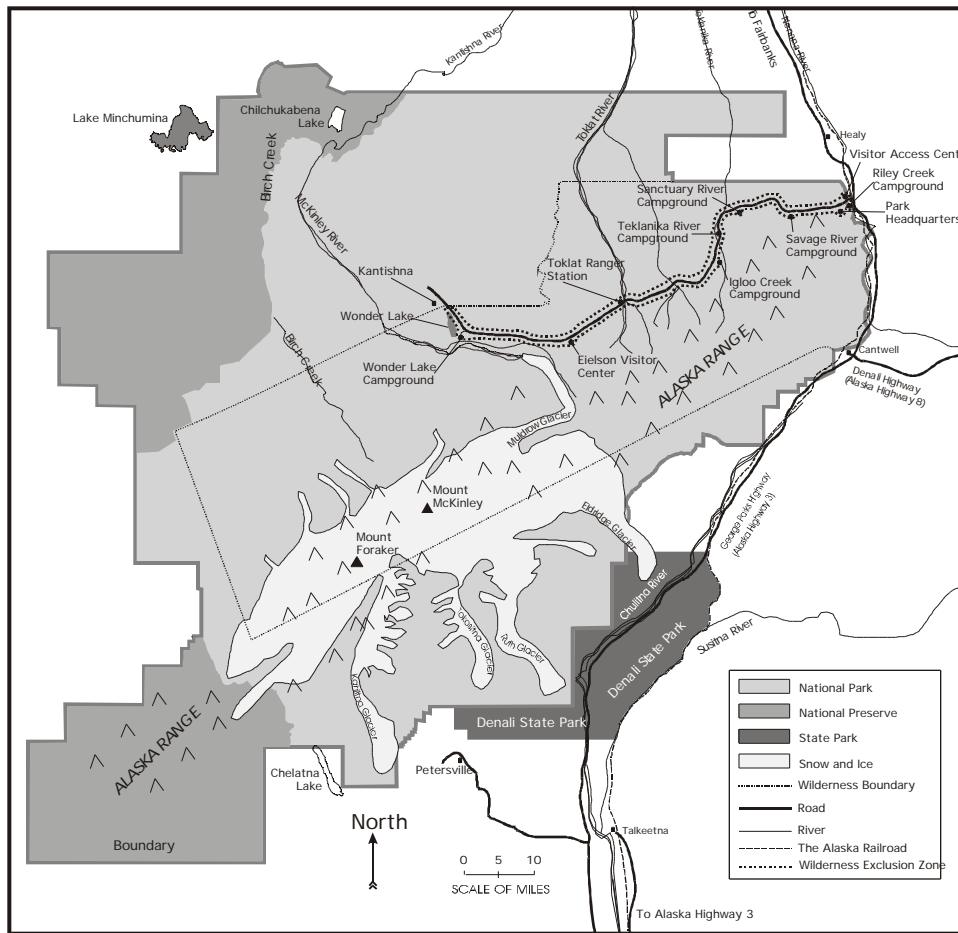
Denali National Park and Preserve is located in south-central interior Alaska and includes over 2.4 million ha (6 million acres). Approximately one-third of the area is designated wilderness (Figure 30.1). The primary access into the park interior is on a tour bus, visitor transportation shuttle bus system, or by bus to a Kantishna area lodge. This controlled access system has been in place since 1972 and has been a significant factor in protecting resource values and the visitor experience in Denali.

Denali is an internationally significant protected area that has been proclaimed a biosphere reserve under the United Nations Man and the Biosphere program. Wilderness is a fundamental value identified with Denali at its establishment, and this value has been reaffirmed throughout the administrative history of the park.

Congress established Mount McKinley National Park in 1917 to "set apart as a public park for the benefit and enjoyment of the people . . . for recreation purposes by the public and for the preservation of animals, birds, and fish and for the preservation of the natural curiosities and scenic beauties thereof . . . said park shall be, and is hereby established as a game refuge" ("An Act to Establish the Mount McKinley National Park, in the Territory of Alaska," 39 Stat. 938).

The Alaska National Interest Lands Conservation Act (ANILCA; 94 Stat. 2371) of 1980 expanded Mount McKinley National Park from 2 million to 6 million acres and renamed it Denali National Park and Preserve. Almost all of the former Mount McKinley National Park was designated as wilderness.

ANILCA contains language defining the broad purposes of the new national parks and preserves in Alaska as well as the specific purposes of each conservation unit, including Denali. The primary purposes of the new and enlarged national parks and preserves in Alaska, such as preserving extensive, unaltered ecosystems in their natural state, are included in Section 101. Section 202 includes language specific to Denali National Park and Preserve:



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Figure 30.1. Denali National Park and Preserve.

- To protect and interpret the entire mountain massif and the additional scenic mountain peaks and formations.
- To protect habitat for, and populations of fish and wildlife including, but not limited to, brown/grizzly bears, moose, caribou, Dall sheep, wolves, swans, and other waterfowl.

- To provide continued opportunities, including reasonable access, for mountain climbing, mountaineering, and other wilderness recreational activities.

The law also contains language providing for motorized access to traditional activities. Section 1110(a) states:

... the Secretary shall permit ... the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be subject to reasonable regulations ... to protect the natural and other values ... and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area.

History of snowmobile use in Denali National Park and Preserve

The designated wilderness, or “old park” of Denali National Park and Preserve, has a long history of non motorized use, with winter access primarily by dogsled, skis, and snowshoes. Mechanized equipment was not used by the general public during the winter from the time Mount McKinley National Park was established in 1917 to 1970 because of the remoteness of the area and the lack of dependable equipment (NPS 1999a).

Mount McKinley National Park was officially closed to snowmobile use in 1970 by a nationwide regulation applying to many park units. From 1970 to 1980, illegal snowmobile travel into the park was sporadic. However, as snowmobile technology advanced significantly during the 1980s and 1990s, more individuals began to use the lands in and near the newly designated Denali National Park and Preserve for snowmobiling (NPS 1999a).

The legislative history of ANILCA indicates that this rapidly expanding level of snowmobile use was unanticipated when the law was written. The Senate committee report in 1979 stated:

The adverse environmental impacts associated with these transportation modes are not as significant as for pipelines, railroads, etc., both because no permanent facilities are required and because the transportation vehicles cannot carry into the country large numbers of individuals (U.S. Senate 1979).

The type of snowmobile use also changed, from a utilitarian form of access for the traditional activities discussed in ANILCA, such as hunting the trapping, to a new and popular recreational activity in and of itself. Snowmobile manufacturers began producing more reliable, higher-performance vehicles that could travel farther into the backcountry and up much steeper slopes. The level of use in Denali rapidly increased, paralleling a dramatic rise in snowmobile sales and use throughout Alaska. During the past several years, these changes resulted in numerous incursions into the old park. Concern about new pressures on park resources increased with the publication of a newsletter article (Gauna 1998) urging snowmobile users to travel throughout the former Mount McKinley National Park area.

Temporary closure and legal challenge

The National Park Service (NPS) conducted hearings at several locations in Alaska during November 1998 to enact a temporary closure effective February 3, 1999. This closed the former Mount McKinley National Park area to snowmobiles

for traditional activities, with the exception of two corridors that were to be used for further information-gathering.

The temporary closure was based on the potential threats of snowmobile use to biological resources, threats to intangible values such as solitude and natural sounds, and potential for user conflicts. NPS emphasized that 95% of south-central Alaska was open to snowmobiles, including the remaining 4 million acres, or two-thirds, of Denali National Park and Preserve. However, because of the nationwide regulation prohibiting snowmobile use in national park units except as specifically authorized by special regulation, the remainder of Denali was open for snowmobile use for traditional activities as stated in ANILCA. The park emphasized that the temporary closure did not affect the remainder of the park and did not set a precedent since snowmobile use for both traditional and other activities would be addressed in a backcountry management plan.

The Alaska State Snowmobile Association, as plaintiffs, and the Wilderness Society, as defendant-interveners, presented various legal challenges to the temporary closure in Federal District Court. The Alaska State Snowmobile Association contended that NPS had violated the mandated snowmobile access expressly provided for in Section 1110(a) of ANILCA, had failed to consider less-restrictive alternatives, and had failed to complete an environmental assessment and provide the adequate public participation required by the National Environmental Policy Act. The Wilderness Society contended that the agency failed to evaluate the effects of the temporary closure in an environmental assessment and had violated the Wilderness Act by allowing snowmobile use in the two corridors left open by the temporary closure (NPS 1999a).

On November 18, 1999, the court voided the temporary closure because NPS had failed to define “traditional activity.” NPS followed this decision by continuing work on proposed regulations to define the term and effect a permanent closure of the old park to snowmobile use.

Permanent closure and legal challenge

On November 12, 1999, just before the court ruling, NPS published proposed regulations to define “traditional activity” and permanently close the old park to snowmobiles. Public comment on the proposed regulations closed on January 25, 2000. The regulations were finalized and published in the Federal Register in June 2000, resulting in closure of the old park to snowmobiles beginning in the winter of 2000-2001.

The term “traditional activity” was defined in the new regulations as “involving the consumptive use of one or more natural resources of the Old Park such as hunting, trapping, fishing, berry picking or similar activities” (36 CFR 13.63(h)(1)). Other major components of the permanent closure included the NPS case for proactive management, interpreting and applying laws and policies, and public response. Intangible values were emphasized as with the temporary closure, and the agency argued that research on effects of snowmobile use in other similar areas was relevant.

Two important concepts emerged from analysis of relevant case law. First, in meeting its responsibilities under the Organic Act, NPS need not wait for actual damage to occur before acting (*Wilkins v. Dept. of Interior, 1993; New Mexico State Game Commission v. Udall, 1969*). Second, the agency is expected to allocate limited recreational resources among users (*Bicycle Trails Council of Marin, 1996; Wilderness Public Rights Fund v. Kleppe, 1979; Bader 1999*). The concept of proactive management, or not waiting for damage to occur before acting, is paralleled in the “would be detrimental” phrase in ANILCA. NPS emphasized that a plain reading of this phrase meant acting in advance of proven resource damage was not only appropriate—it was required.

NPS outlined the requirements of the enabling legislation for Denali and demonstrated how this called for a high standard of care. The “unimpaired” mandate in the

Organic Act was emphasized, along with the importance of intangible values as defined in NPS management policies. While site-specific resource information was limited at the time the permanent closure was initiated, the agency held that because of the high standard of care expected for Denali, studies from other similar areas proved the need to exercise caution in allowing any new types of uses in the old park.

NPS cited the Organic Act of 1916 (39 Stat. 535) along with the park's enabling legislation as among the statutory authorities for the permanent closure. The Organic Act grants the Secretary of the Interior the authority to implement "rules and regulations as he may deem necessary or proper for the use and management of the parks...under the jurisdiction of the National Park Service" (16 U.S. Code 3).

The environmental assessment for the permanent closure also stated that the 1978 amendments to the Organic Act (in the Redwood National Park Expansion Act) expressly articulated the role of the National Park System in an effort to ensure ecosystem protection:

The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided for by Congress (16 U.S. Code 1-al).

NPS management policies were referenced in the permanent closure. These policies interpret laws and regulations and guide decision-making within park units. They direct the agency to protect both tangible and intangible resource values, the latter of which include qualities such as natural sounds, solitude, space, and scenery. The management policies also interpret the "unimpaired" mandate of the Organic Act, clarifying that both tangible and intangible resources and values may be impaired, and that it is agency policy to treat potential impairments in the same way as known impairments (NPS 2000).

In the portion of the park closed to snowmobiles, natural sounds and solitude were identified among the primary values being protected. The agency made a case for proactive management, arguing that existing information was adequate to document a threat to resource values.

Public comments on the proposed permanent closure received during the winter of 1999-2000 showed overwhelming support. Of the 6,039 public comments received, 96% were in favor of the permanent closure. Of comments received from Alaskans, 92% were in favor. This may have reduced the potential for any legislative threats to the closure.

However, in August 2000 the Alaska State Snowmobile Association, the International Snowmobile Manufacturers Association, and three individuals filed a lawsuit in U.S. District Court in Alaska challenging the closure on three main points:

1. NPS improperly interpreted ANILCA in defining "traditional activities" that did not include sightseeing, photography, camping, or picnicking;
2. The agency improperly concluded that any snowmobile use in the old park would be detrimental; and
3. The agency failed to comply with the National Environmental Policy Act in not looking at the potential impacts of the decision to close the old park and by not analyzing the impacts of the traditional activities definition on other parks in Alaska.

The snowmobile groups dropped the lawsuit in late May 2001 without prejudice so that they would retain the option of filing it again later. Their hope in the interim is to pursue a legislative proposal with Congress.

Future challenges: setting limits in a seemingly limitless landscape

NPS faces the future challenge of determining visitor capacity for a wide variety of uses in the park additions, including snowmobile use for both traditional and other (recreational) activities. This will require new methods for implementing the agency's visitor experience and resource protection program. A broad definition of resource values—to include intangible values—will continue to be essential. The park must also anticipate continued rapid advances in technology.

The park has significantly expanded research and monitoring related to snowmobile use since the temporary closure was instituted in February 1999. The planning process relies upon all available scientific information, but scientific studies cannot independently recommend specific limits on recreational and other park uses. These limits must be set based on visitor experience and on accounting for all park values, including intangible values. The environmental assessment on closure of the former Mount McKinley National Park to snowmobile use (NPS 1999a) established the importance of solitude and natural sounds to the overall resource values of the park. The backcountry management plan will expand upon this discussion, with the overall goals of protecting resources and continuing to provide for a range of visitor opportunities. Among these opportunities are activities in which the natural and cultural environment of the park are the focus of the experience. These goals will guide decisions on appropriate levels and types of access, including recreational snowmobile use, in the park additions.

Conclusions

Among the lessons learned during the snowmobile case is that losing in court is not necessarily a problem if we win in the court of public opinion. Public understanding and support for challenging management actions is critical. We must continue to do everything possible to acquire new resource information.

Statutes such as the Organic Act, the Wilderness Act, and the park's enabling legislation set the vision for protecting Denali National Park and Preserve. Protecting intangible values such as aesthetics, natural sounds, and opportunities for solitude and inspiration is a critical part of realizing this vision. The park will continue to bring these values into the discussions of appropriate levels and types of use while completing the backcountry management plan that determines the future of the internationally significant Denali wilderness.

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