

**Federal Laws
Affecting Access**

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Federal Laws Affecting Access

INTRODUCTION

A complex web of laws, regulations, policies, and agency practices controls the use of Federal lands. The availability of access use of Federal lands for any given mineral resource development project is dependent on these legal controls, as well as on economic and physical factors.

Decisions on access are rarely simple. Except in unusual circumstances, numerous alternatives are available to any party seeking surface transportation between two points of non-Federal land. There may be many possible routes, a variety of transportation modes (e.g., train, truck, barge), and a number of different protective measures to safeguard other land values. In principle, it is almost always possible to travel between any two non-Federal areas in Alaska without using Federal lands for access; airplanes or helicopters obviate the need to ever set foot on Federal lands. Meaningful access, however, generally requires the ability to use intervening Federal lands for the construction of surface transportation systems adequate to move men, machinery, and materials economically. The ultimate choice of route, transportation mode, and protective measures will be determined by the legal considerations that regulate the use of any affected Federal lands.

This report analyzes those laws that will have the greatest influence on decisions relating to the use of Federal lands in Alaska for access to mineral resources on non-Federal lands. For the purposes of this report, the analysis is confined to land in the six Federal land management systems. Lands managed by other Federal agencies for program purposes, including military reservations, Department of Energy lands, and the National Petroleum Reserve in Alaska, are not discussed. Federal lands do not include Indian reservations, which are managed by the Government in trust, nor do they include lands selected by Alaskan Regional Corporations or villages pursuant to the Alaska Native Claims Settlement Act (ANCSA).

The analysis of access to non-Federal lands does not include access to mineral claims on Federal lands, even where the claims have been patented and are in private ownership. It also does not include any consideration of access to ‘inholdings’ or other valid occupancies within a national park or forest.

Access is an enforceable legal right to use certain lands for a specific purpose. It may be conferred by a special use permit, by an easement, by a right-of-way or, in certain limited conditions, through public use. There are two

major types of access, private and public. Private access, on which most of this chapter is focused, is a right granted to a specific individual or corporation to use lands; generally the grantee is responsible for providing whatever facilities are needed to make access feasible. Public access involves the construction of roads and highways by the Federal, State, or local government. This may involve condemning land within one of the Federal land management systems and transferring it to the control of the Department of Transportation. The laws governing public access are covered in the review of section 4(f) of the Department of Transportation Act and the National Forest Transportation System.

The analysis of Federal laws affecting access to minerals on non-Federal lands attempted to answer the following questions, which are relevant to policy decisions on the disposition of Alaska National-Interest Lands:

- What provisions of Federal land management laws provide access across Federal lands for the development of minerals on non-Federal lands?
- What terms and conditions are placed on such access use of Federal lands?
- Do existing laws and policies governing the Federal land management systems provide rights-of-way across the public lands and national conservation systems in Alaska?
- What other Federal laws influence access across Federal lands?
- What is the impact of Federal land planning and environmental laws on access?
- What effect does the presence of federally managed areas have on mineral access and mining activities in surrounding areas?



Photo Credit: The Alaska Coalition

View of Mt. McKinley from the north on the road near the Kantishna mining district

To answer these questions, three categories of Federal laws that affect access were examined. They are:

1. Federal Land Management Laws—Laws and regulations providing for access across units of the six Federal land management systems: public lands, National Park System, National Wildlife Refuge System, National Forest System, National Wild and Scenic Rivers System, and National Wilderness Preservation System.
2. Federal Laws Relating to Alaska Lands and Mineral Resources—The Alaska Statehood Act, the Alaska Native Claims

Settlement Act, the Trans-Alaska Pipeline Authorization Act, the Alaska Natural Gas Transportation Act of 1976, and the Naval Petroleum Reserves Production Act of 1976.

3. Federal Land Planning and Environmental Laws—These laws can affect the availability of access through various procedural and substantive requirements. The report analyzes the impact on access of the National Environmental Policy Act of 1969, section 4(f) of the Department of Transportation Act, the Endangered Species Act, the Clean Air Act, the Clean Water Act, and the Coastal Zone Management Act.

FEDERAL LAND MANAGEMENT SYSTEMS

Each Federal land management system has its own rules governing access for mineral development on non-Federal lands. Two factors determine the terms and conditions placed on access use of Federal lands: (1) the classification of the affected land, and (2) the proposed use for which access is needed. Land managers for every system, including the Wilderness System, have statutory authority to grant some rights-of-way. The availability of such grants and the nature of any conditions reflect the general purposes for which the affected unit is managed.

PUBLIC LANDS

The Bureau of Land Management (BLM) administers the public lands. The Secretary of the Interior has comprehensive authority under Title V of the Federal Land Policy and Management Act of 1976, (commonly known as the BLM Organic Act) to grant rights-of-way over the public lands, except lands in designated wilderness areas, Rights-of-way

are specifically authorized for “roads, trails, highways, railroads, . . . airways, or other means of transportation . . . or such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through such lands.” This comprehensive authority provides a legal basis for rights-of-way over public land areas for access to minerals on non-Federal lands or for the construction or improvement and expansion of transportation systems. There are two limitations on this general availability of rights-of-way:

- . BLM public lands wilderness areas.—The Secretary of the Interior may allow access use of public lands that are part of the National Wilderness Preservation System only as provided in the Wilderness Act of 1964. All access provisions of the Wilderness Act applicable to national forest wilderness areas are applicable to designated wilderness areas managed by the BLM. The exceptions relevant to access for purposes of non-

Federal minerals exploration and development are:

- Existing private rights.
 - Continued use of aircraft and motorboats where use predates wilderness designation.
 - Access to State and private lands completely surrounded by a wilderness area or exchange of the surrounded lands for other Federal land of equal value.
- Access to valid mining claims and other valid occupancies wholly within a wilderness area by means customarily enjoyed in other areas similarly situated.
 - Presidentially granted exceptions for facilities, including roads, in the national interest.
 - Any other exceptions expressly provided by Congress for specific wilderness areas.

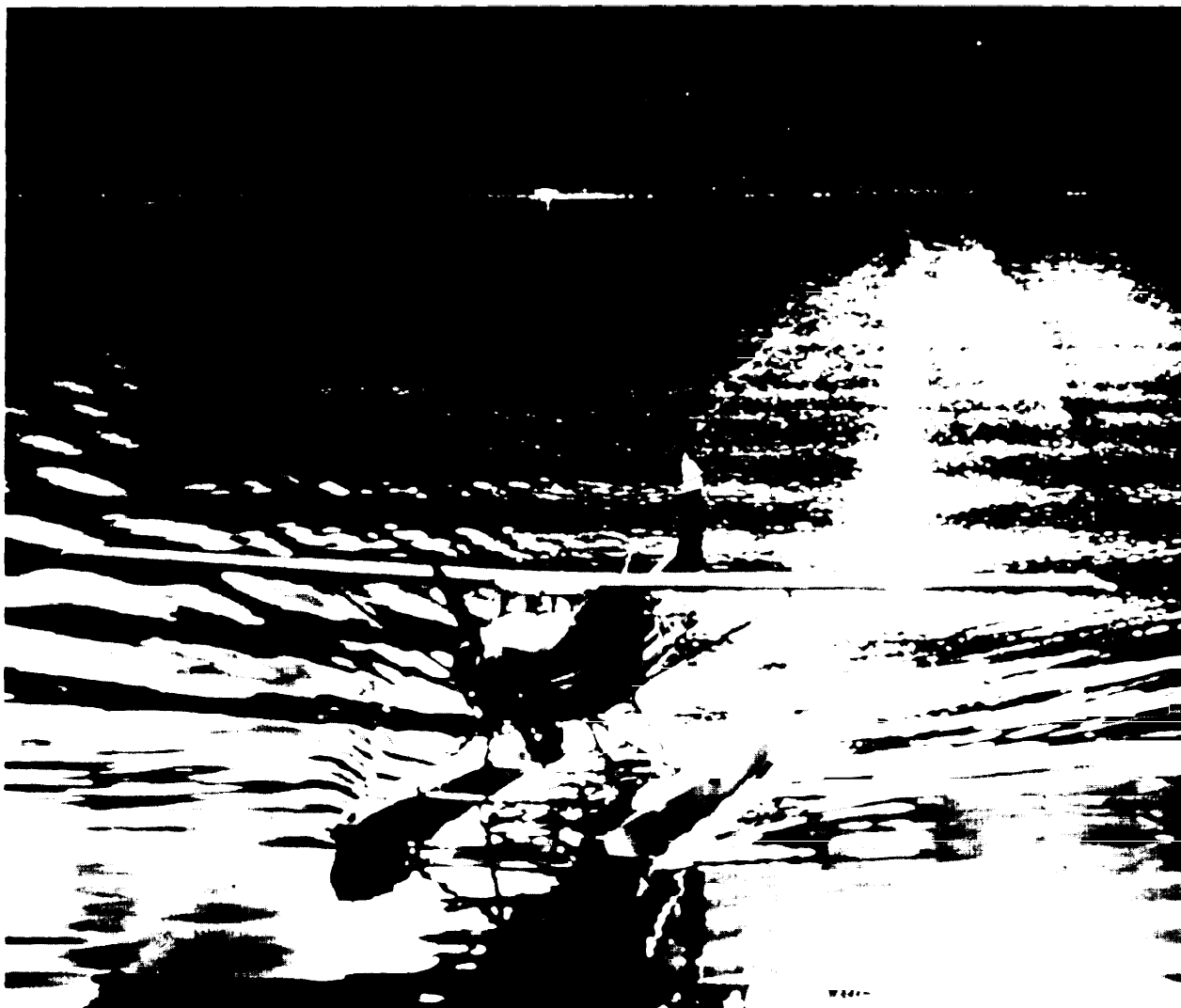


Photo Credit: The Alaska Coalition

Bush plane, a primary means for transportation of people and supplies in rural Alaska

Public lands in wilderness study classification.—Section 603 of the BLM Organic Act requires that the BLM inventory all roadless public land areas of 5,000 acres or more and roadless islands for wilderness potential. Those areas with wilderness potential are to be classified as wilderness study areas and managed to preserve those values until completion of administrative review and congressional consideration. While rights-of-way are not prohibited in study areas, section 603 imposes restrictions on the exercise of the right-of-way authority by limiting the Secretary's discretion to approve any use that conflicts with or impairs wilderness values.

NATIONAL PARK SYSTEM

The National Park System is managed by the Secretary of the Interior through the Na-

tional Park Service for the purposes of preservation of natural and historic values of park areas for the enjoyment of present and future generations. The Park Service is vested with broad discretionary authority to control activities and uses within the national parks. There is no statutory provision expressly authorizing rights-of-way through park areas for access to non-Federal lands. While the absence of a specific provision authorizing grants of rights-of-way across national parks does not bar such use, it does not provide assurance to non-Federal landholders who may need to cross park lands. This lack of any assurance of access and of the terms and conditions of rights-of-way could deter potential developers.

Non-Federal owners must rely on the general discretionary management authority of the Secretary and individual park superintendents for access through park lands. Park regulations issued under this authority



Photo Credit. The Alaska Coalition

Camping, Wrangell-St. Elias Region

provide that special use permits may be issued for commercial and other use of existing park roads for access to private lands within or adjacent to a park for which other means of access are not otherwise reasonably available. Certain public lands statutes that are applicable to the National Park System authorize rights-of-way through park areas for electric power, communications, and water drainage and irrigation systems and facilities. The use of the right-of-way must be compatible with the public interest and with the purposes of the park system. These laws may provide rights-of-way through parks for utility systems associated with mineral resource development on non-Federal lands. These

utility rights-of-way may not be used for other forms of access to non-Federal lands or for transportation systems.

NATIONAL WILDLIFE REFUGE SYSTEM

The National Wildlife Refuge System is managed by the U.S. Fish and Wildlife Service. The Secretary of the Interior has ample authority to grant rights-of-way across units of the National Wildlife Refuge System for access to non-Federal lands or for transportation systems where such use does not conflict with the management purposes of a particular area. The National Wildlife Refuge



Snowy Owl



Golden Eagle



Alaska Red Fox



Photo Credits The Alaska Coal/tin?

Alaska Brown Bear — McNeil River

Administration Act authorizes the Secretary of the Interior to permit the use of lands in the National Wildlife Refuge System for any purpose, including access. Section 4 of the Act specifically provides that rights-of-way through refuge areas may be granted for any purpose, "such as . . . powerlines, telephone lines, canals, ditches, pipelines, and roads," where such uses are determined to be compatible with the purpose for which the refuge areas are established. "Compatible" means that the requested right-of-way or use will not interfere with or detract from the purpose for which units of the refuge system are established.

Holders of rights-of-way are required to pay the fair market value of the right-of-way. Net proceeds from right-of-way grants are deposited into the Migratory Bird Conservation Fund to be used for land acquisition. Section 4 of the Refuge Administration Act largely supplants other right-of-way provisions applicable to the National Wildlife Refuge System. There are two limitations on the availability of rights-of-way across refuge units:

- Access uses of refuge system components of the National Wild and Scenic Rivers System are governed by laws applicable to the National Park System consistent with purposes of the Wild and Scenic Rivers System.
- Access uses of Refuge System Wilderness areas may be granted only as recognized in the Wilderness Act and are thus limited to those individual exceptions specifically provided by Congress and to existing private rights. The exceptions applicable to national forest and BLM wilderness areas do not apply to refuge wilderness areas. Use of refuge system wilderness areas for transportation systems and facilities must have express congressional approval.

NATIONAL FOREST SYSTEM

The national forests are managed by the Forest Service under the mandate of the Multiple-Use Sustained-Yield Act of 1960. The Secretary of Agriculture has broad dis-



Photo Credit OTA Staff

Tugboat towing logs to mill, Southeast Alaska

cretionary authority to allow the use of Forest System lands, except wilderness areas, for access to non-Federal mineral areas and for transportation systems.

Express statutory authority for rights-of-way across national forest lands for access purposes is found in Title V of the Federal Land Policy and Management Act of 1976 and in the Act of October 13, 1964, as amended, authorizing development of the National Forest Transportation System. National forest components of the National Wilderness Preservation System and the National Wild and Scenic Rivers System are managed under the laws and regulations applicable to those systems in addition to general laws governing the National Forest System. Access uses of these areas are limited. The Federal Land Policy and Management Act authorizes rights-of-way across forest lands, except designated wilderness areas, for roads, highways, railroads, and other transportation systems and facilities. The Act of October 13, 1964, as amended, authorizes grants of temporary or permanent easements for road rights-of-way over national forest lands. Forest service regulations implementing provisions relating to the National Forest Transportation System indicate a policy of coordinated planning with consideration of the transportation and resource development needs of surrounding communities. The Secretary of Agriculture may approve rights-of-way and other access use of forest system components of the National Wild and Scenic Rivers System under laws applicable to the forest system provided that any conditions placed on grants of such easements must be related to the policies and purposes of the Wild and Scenic Rivers Act. Rights-of-way through designated wilderness areas in the National Forest System may be approved only as provided in the Wilderness Act. The Wilderness Act recognizes the following exceptions relevant to minerals access to non-Federal areas and transportation systems:

- Existing private rights;
- Preestablished use of aircraft and mo-

torboats in areas of national forest wilderness subject to regulation by the Secretary;

- Rights necessary to provide adequate access to State or private lands completely surrounded by a national forest wilderness area (or exchange of these lands for other Federal lands);
- Ingress and egress to valid mining claims or other valid occupancies wholly within a forest wilderness area by means customarily enjoyed with respect to other areas similarly situated;
- Presidential authorization of other facilities needed in the public interest “including road construction” or use where he determines that such use “will better serve the interest of the United States and the people thereof” than will its denial; and
- Any other exception expressly provided by Congress for specific wilderness areas.

NATIONAL WILD AND SCENIC RIVERS SYSTEM

The National Wild and Scenic Rivers System was established so that certain rivers with outstandingly remarkable scenic, recreational, fish and wildlife, and other similar values would be “preserved and protected in a free-flowing condition for the benefit of present and future generations.” The system includes both federally and State designated rivers. Federal wild and scenic rivers are managed by the land management agency that had responsibility for the river before its designation. The classification of rivers as wild, scenic, or recreational is made according to certain characteristics, including their accessibility by road; wild rivers are the least accessible, scenic rivers are more accessible, and recreational rivers are the most accessible. Rivers are to be managed to preserve the values that led to their initial designation and classification. Therefore, any use that might be detrimental to these values could be denied.

The access provision of the Wild and Scenic Rivers Act distinguishes between those river components managed by the Secretary of the Interior and those managed by the Secretary of Agriculture.

Rights-of-way across all wild and scenic rivers administered by the Secretary of the Interior are issued in accordance with the laws applicable to the National Park System regardless of whether the river is part of the National Park System, the National Wildlife Refuge System, or the public lands. For these rivers, there is no statutory provision expressly authorizing rights-of-way for access to non-Federal lands.

Rights-of-way for components administered by the Secretary of Agriculture are issued under laws relating to the National Forest System. The Secretary of Agriculture has ample authority to grant rights-of-way over forest system component rivers under Title V of the Federal Land Policy and Management Act. There is additional authority to grant easements for roads and trails under laws relating to development of the National Forest Transportation System. Any conditions placed on the issuance of a right-of-way or easement must be related to the purposes of the Wild and Scenic Rivers Act. When a river is also managed as part of the Wilderness System, the more restrictive provisions apply in case of any conflict.



Photo Credit National Park Service

The Charley River meanders through a park-like setting

NATIONAL WILDERNESS PRESERVATION SYSTEM

The National Wilderness Preservation System was created to provide the whole Nation with “the benefits of an enduring resource of wilderness.” Congressionally designated wilderness areas in national parks, forests, wildlife refuges, and public lands are managed under special rules “for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness.” Provisions of the Wilderness Act of 1964, and the regulations thereunder, which control activities and uses in wilderness areas, are protective

and stringent. The general policy for use of wilderness areas is:

Except as specifically provided for in this Act, and subject to existing Private rights, there shall be no commercial enterprise-and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motor-boats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

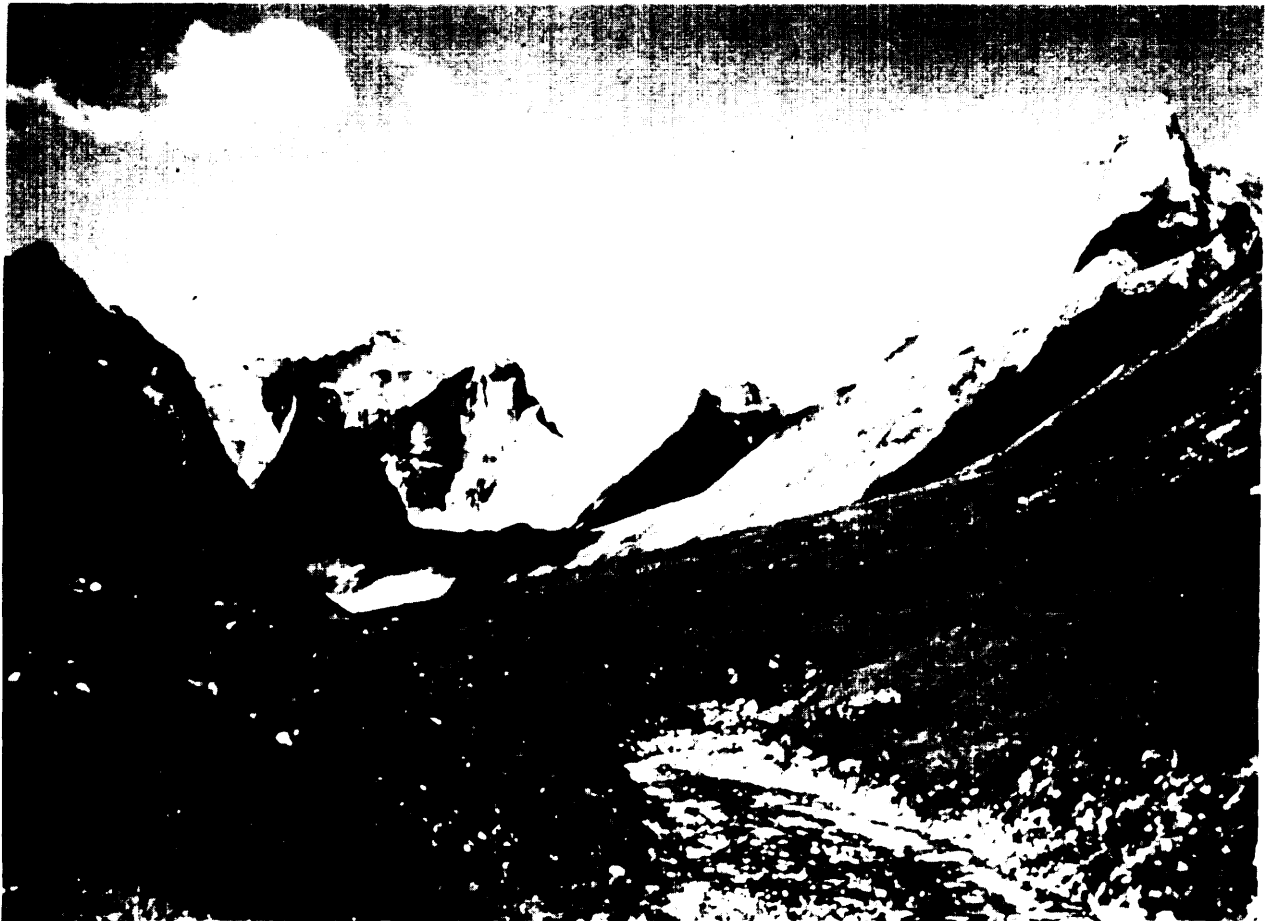


Photo Credit: The Alaska Coalition

The Brooks Range near the Arrigetch Peaks

Access uses of wilderness areas recognized in the Wilderness Act are limited to the following:

- a. Preexisting private rights;
- b. Access routes and facilities for wilderness recreation and management purposes;
- c. Emergency purposes;
- d. Established use of motorboats and aircraft where such use predates wilderness designation—subject to regulation by the management agency;
- e. Presidential authorization of the use of national forest and public lands wilderness areas for projects and facilities in the national interest;
- f. Adequate access rights for State and private lands completely surrounded by wilderness areas in national forests or public lands;
- g. Access to valid mining claims and other valid occupancies wholly within a national forest or public lands wilderness area by means that are currently or customarily enjoyed in similarly situated areas; and
- h. Special provisions applicable to specific wilderness areas.

MANAGEMENT SYSTEMS AND d-2 DESIGNATIONS

The final congressional designation of additions to national conservation systems called for in section IT(d)(Z) of ANCSA will reduce some of the uncertainties concerning access use of Federal lands in Alaska. The terms and conditions for obtaining access across some conservation units—forests, refuges, and public lands—can be anticipated based on existing laws and policies.

The public lands and the National Forest System have broad and comprehensive right-of-way provisions. Consequently, lands in those two systems, with the exception of wilderness study areas and designated wilderness areas, are the most available Federal lands for access to non-Federal mineral lands and for construction of transportation routes. Access use and rights-of-way across refuge system lands may be allowed in the discretion of the managing agency if the proposed use is compatible with the purposes of the refuge and if the applicant agrees to pay the fair market value for the use.

Access use of national park lands rests with the management discretion of the Secretary and the individual park superintendent.

Such use must be in conformance with the purposes of the park system. There is no statutory provision expressly authorizing rights-of-way across park areas for access to non-Federal lands or for transportation systems.

Rights-of-way across National Wild and Scenic Rivers System components managed by the Department of the Interior are issued under laws applicable to the National Park System regardless of the managing agency. Access uses of wilderness areas is highly restricted and subject only to the exceptions recognized in the Wilderness Act. The wilderness review required by section 603 of the BLM Organic Act raises some uncertainty about the future availability of access use of d-1 lands (those public lands currently withdrawn under section IT(d)(1) of ANCSA that will remain after Native conveyances, State selections, and congressional designation of conservation system additions under section 17(d)(2)).

The BLM has decided that wilderness review of public land roadless areas in the lower 48 States will have priority. The wilderness inventory of Alaska public lands will be deferred until after congressional action on

Alaska National Interest Lands and settlement of Native selections and conveyances under ANCSA. This delay will allow an opportunity for State and Native access needs to be defined. It will also permit decisions on inventory and use classification of remaining public lands to include a consideration of the impacts of such classifications on the protected values of new and existing conservation system units. As a result of BLM wilderness reviews, additional Federal lands may be placed under wilderness protection in the future. This protection will restrict access uses of those areas.

It is difficult to ascertain what effect these possible future classifications will have on the availability of public lands in Alaska for access purposes. The public land inventory and wilderness review procedures, however, provide a mechanism for the State, Native Corporations, or other parties to present any need to use the proposed wilderness areas for access. Moreover, BLM wilderness areas will be subject to all the exceptions applicable to National Forest Wilderness areas, thus even after wilderness designation, several classes of access use are preserved.

FEDERAL LAWS RELATING TO ALASKA LANDS AND MINERAL RESOURCES

Until statehood, over 99 percent of all land in Alaska was in Federal ownership. Although public land laws encouraging disposition, such as the Homestead Acts, applied to Alaska lands, they did not operate to transfer significant amounts of public land to private ownership.

Two laws—the Alaska Statehood Act and ANCSA—will transfer more than 148 million acres from Federal ownership. ANCSA also provides a framework for the reclassification of Federal lands in Alaska. Three other laws have established special rules for the use of some Federal lands in Alaska in connection with three major energy development projects.

An analysis of the Alaska Statehood Act and ANCSA indicates that development of land-based resources, including minerals, was one of the purposes behind the unprecedented grants of Federal lands to the State and to Alaska Natives. The House report accompanying the Alaska Statehood Act indicates that the grants of lands and revenues from lands were designed to remove a potential impediment to the operation of an effective State government. There was concern that Alaska, which has always been heavily

dependent on federally financed construction projects and military bases, could not support the costs of self-government from resources on which revenue could be generated. Similarly, ANCSA's grant of subsurface rights to profit-making Native Regional Corporations was one of several provisions designed to ensure a viable economic future for Alaska Natives.

ALASKA STATEHOOD ACT

The Alaska Statehood Act, enacted in 1959, contains several important provisions that changed the previous patterns of land-ownership and control in Alaska. The State was permitted to select:

- 102,550,000 acres of statehood land grants from vacant, unreserved, and unappropriated public lands;
- 400,000 acres of vacant, unreserved, and unappropriated forest lands (with approval of selection by the Secretary of Agriculture) for community expansion and recreation purposes; and
- 400,000 acres of vacant, unreserved and unappropriated public lands for com-

munity centers and recreation areas (with approval of selection by the Secretary of the Interior).

The Act confirmed prior Territorial grants of university, mental health, and school lands of over 1 million acres. It also transferred miscellaneous parcels of Territorial government property to the State and gave the State title to 35 million to 40 million acres of submerged lands.

The State received full mineral rights in all lands granted or confirmed under the Act. All State reconveyances of these lands must contain a reservation to the State of the mineral rights and the right-of-access to extract them. Alaska was permitted to select Federal lands that were leased or in production under the Mineral Leasing Act of 1920 and to succeed to all rights of the Federal Government. In addition, the State received the following royalty rights on lands that remained in Federal ownership:

- The right to receive 52 1/2 percent of the leasing proceeds from the Mineral Leasing Act of 1920 in lieu of participation in the reclamation fund. (This grant was in addition to the 37 1/2 percent of leasing revenues paid to all public land States for public road and educational purposes. Alaska thus received the right to 90 percent of all leasing profits from public lands.)
- The right to receive 90 percent of Federal revenues from the operation of Government coal mines and coal leases under the Alaska Coal Leasing Act of 1914.

In addition the State was given the right to 5 percent of the net proceeds from the sale of public lands in Alaska for education purposes, and 70 percent of the net proceeds of the Pribilof Islands fur trade.

The Alaska Native Claims Settlement Act extinguished all Native claims to lands and hunting and fishing rights based on aboriginal title or use. In exchange, the Alaska Indians, Aleuts, and Eskimos received: (1) the

right to select 44 million acres of unreserved Federal lands, and (2) distributions from a Native fund of \$962.5 million.

The Act authorizes the establishment of 13 profit-making Native Regional Corporations. The Regional Corporations administer distributions from the Native fund, hold title to lands not specifically apportioned to Village Corporations, and hold subsurface rights to all selected lands. Village Corporations hold title to surface rights in lands selected in and around villages and receive disbursements of funds and other revenues from the Regional Corporations.

The 44 million acres were apportioned according to a complex formula. Village Corporations were allowed to select surface rights to approximately 22 million acres of land in and around existing villages on the basis of population. Regional Corporations received proportional shares of all remaining lands. All subsurface rights (including mineral rights) are vested in the Regional Corporations.

The grant of mineral rights to the profit-making Regional Corporations indicates an intent that those resources might be developed. The Alaska Native Fund is also dependent on the development of mineral resources; payments of a 2-percent overriding royalty on all mineral-leasing revenues from State and Federal lands (other than the National Petroleum Reserve) are to provide \$500 million.

Section 17 of the Act established the Federal-State Land Use Planning Commission for Alaska. It is to identify necessary easements across lands selected by Regional and Village Corporations. The Secretary of the Interior is to reserve such easements. No provisions were made for the reservation of easements across Federal lands to assure access to Native lands. The subsequent order reserving extensive easements is the subject of litigation. A tentative settlement has been reached.

Section 17(d) of the Act provided for the reclassification of all Federal lands in the

State. Under section 17(d)(2), the Secretary was authorized to withdraw 80 million acres of land for addition to or creation of national parks, forests, wildlife refuges, and wild and scenic rivers. To protect the national interest in these lands, they were withdrawn from all forms of appropriation under the public land laws and the mining and mineral-leasing laws, and from selection by the State under the Alaska Statehood Act and by Native Regional Corporations under ANCSA. The authority for these withdrawals expired in December 1978. The Secretary was also authorized to withdraw other lands to protect the public interest under the authority of section ii'(d)(1); these withdrawals did not affect the right of Village Corporations, Regional Corporations, or the State to make land selections within and around existing Native villages.

OTHER LAWS

In addition, three other laws relating to the role of Federal land management in the devel-

opment of energy resources in Alaska are examined. The Trans-Alaska Pipeline Act authorized an expedited procedure for granting a right-of-way for the Alaska oil pipeline. Judicial and administrative review of licensing and environmental proceedings were limited. The Act also required a reservation for additional rights-of-way for compatible uses on or adjacent to the pipeline right-of-way. The Alaska Natural Gas Transportation Act of 1976 provided a similar expedited procedure for the consideration of several proposals to construct a natural gas pipeline. These expedited procedures provided for coordinated review of right-of-way applications covering several different management systems. The Naval Petroleum Reserve Production Act transferred jurisdiction over and management of the Naval Petroleum Reserves in Alaska to the Department of the Interior. No provision was made for any right-of-way over the Reserve. The Secretary was directed to make a study of the nonpetroleum value of the reserve within 3 years.



Photo Credit: The Alaska Coalition

Construction of the Trans-Alaska Pipeline

FEDERAL LAND PLANNING AND ENVIRONMENTAL LAWS

The report also analyzes a set of Federal land planning and environmental laws that have, or were thought to have, an influence on the availability of access for mineral resource development. The laws have varied effects. One, the Coastal Zone Management Act (CZMA), requires the establishment of comprehensive land use planning. Two of these laws, the Endangered Species Act and section 4(f) of the Department of Transportation Act, place substantive constraints on the activities of Federal land managers.

The National Environmental Policy Act of 1969 (NEPA) places procedural requirements on Federal land managers that often apply during decisionmaking on access requests. The Clean Air Act and the Clean Water Act influence access in several ways: first, the access project itself, i.e., construction and

transportation, must comply with applicable standards; second, the mineral resource project for which access is granted must comply with the Acts before a Federal land manager may grant a permit; third, the Clean Air Act places stricter standards on projects in and near certain highly protected Federal conservation units (although the number of such units in Alaska is less than commonly perceived and National Interest Lands legislation cannot create any of the most highly protected areas). NEPA requires that an environmental impact statement (EIS) must be prepared for major Federal actions significantly affecting the quality of the human environment, and that Federal agencies consider the environmental effects of and possible alternatives to a proposed action, consult with other agencies, and solicit public comment. NEPA imposes no specific environmental



Photo Credit: The Alaska Coalition

North Slope tundra — late summer



D m g A d m d h

standards or direct restraints on access to non-Federal minerals. It does, however, exert substantial indirect influence since Federal land management agencies must comply with NEPA in their review of requests for rights-of-way and other permits. Applicants may be required to pay the costs of preparing an EIS if approval is determined to be a major Federal action.

Section 4(f) of the Department of Transportation Act of 1966 bars the use of Federal funds for any transportation project that uses any land of National, State, or local significance from any public park, refuge, or recreation area, or from any historic site unless the Secretary of Transportation finds that there is no prudent and feasible alternative to such use and that the proposed project in-

cludes all possible planning to minimize harm to the area involved. By restricting the expenditure of Federal funds, section 4(f) limits the availability of lands owned by Federal, State, or local governments and some privately owned historic sites, for transportation systems which, in some instances, could be necessary for mineral resource development. Lands in the National Park System, the National Wildlife Refuge System, and the National Wild and Scenic Rivers System are clearly within the protections of section 4(f). Some public lands managed by the BLM and National Forest System lands are also subject to the restrictions of section 4(f) if the lands are actually used or proposed for park, recreation, wildlife protection, or historic purposes, or are under study for wilderness or wild and scenic rivers designation.

Section 7 of the Endangered Species Act requires that all Federal agencies ensure that their actions do not jeopardize the continued existence of any endangered or threatened species or result in the destruction or modification of a critical habitat. Compliance with the Act requires that any agency consider the effects a proposed action may have on a protected species or habitat, and consult with the Secretary of the Interior to determine whether any harm may result and what steps may be taken to minimize any risk. In areas that are home to unique and endangered species, the Act may impose substantial and additional constraints on Federal land management agencies in the issuance of rights-of-way across Federal areas. In other areas where there are few or no endangered species, the compliance requirements would have a lesser effect on the actions of Federal land managers.

The Clean Air Act establishes national standards to limit the presence of five common air pollutants that present known risks to human health and safety. Direct Federal controls apply only to certain major new facilities with the potential to emit large quantities of these pollutants; all other polluters are regulated by the States under plans designed to assure that the five national standards are met.

The Act imposes strict controls on the construction of new facilities in areas where air quality is better than the national standards, in order to prevent significant deterioration of existing air quality. There are three classes of "clean air" regions: Class I areas, where minimal additional pollution is allowed; Class 11 areas, where moderate amounts of new pollution are permitted; and Class III areas, where pollution levels can be increased to the national standards. The Clean Air Act Amendments of 1977 classified most clean air regions, including both Federal and non-Federal lands, as Class 11. Some existing Federal parks and wilderness areas are designated mandatory Class I areas (including one park and three wilderness areas in Alaska); no d-2 lands are mandatory Class I

areas. Other large national parks, monuments, and refuges are Class 11 areas and cannot be redesignated to Class III status. There are two such areas in Alaska. It is anticipated that most Alaska National Interest Lands will fall into this Class 11 subcategory on enactment of d-2 legislation. The authority to redesignate the classification of clean air areas, with the exceptions noted above, is vested in State governments. Federal land managers have only an advisory role in the redesignation process.

Preconstruction review of new sources and modification of existing sources are carried out at the State level. There are four types of preconstruction review: (1) to assure the maintenance of national ambient air quality standards; (2) to assure compliance with applicable Federal new source standards; (3) to prevent significant deterioration in clean air areas; and (4) to assure compliance with the special rules that apply to new sources of pollution in areas that do not meet the national standards. In the last two instances, preconstruction review may impose severe controls on allowable new construction or, perhaps, prevent it altogether.

The Clean Air Act requires that State air pollution control agencies consult with the appropriate Federal land manager on all applications for permits for major emitting facilities that may affect air quality in a Federal Class I area. Applicants for rights-of-way over Federal land management system lands must agree to comply with State and Federal air quality standards, not only in activities associated with the use of the right-of-way, but also in their operations in non-Federal areas.

The Clean Water Act imposes Federal controls on all forms of water pollution. Every "point source" of pollution, i.e., any enterprise that discharges pollutants into rivers, lakes, or streams through pipes, conduits, channels, and the like, is required to obtain a discharge permit that prescribes allowable levels of pollution. Some mines are regulated as sources. "Nonpoint sources" of pollu-

tion—including the runoff from roads and from agricultural, construction, and some mining activities, are regulated at the State and local level pursuant to local water pollution control plans.

The Act establishes a series of deadlines for progressively more stringent controls on point sources of pollution. It requires the utilization of various levels of pollution control technology. By 1979, all point sources must be using the “best practicable control technology” and between 1983 and 1987 they must begin applying the “best available technology” for various classes of pollutants. The Environmental Protection Agency develops guidelines on an industry-by-industry basis.

Effluent standards have been promulgated for some mining activities including, for example, placer mines that use gravity separation to extract precious metals.

More stringent controls may be applied where pollution discharges threaten Federal and State water quality standards for specific waterways. An antidegradation policy protects the water quality of streams and rivers that already have clean water. The antidegradation program applies to both Federal and non-Federal areas. Right-of-way applicants must agree to comply with Federal and State water quality standards and to obtain all necessary permits. This compliance requirement not only applies to activities associated with use of the right-of-way such as road-building and bridge construction, but also with the conduct of mining operations on non-Federal sites.

The Coastal Zone Management Act provides incentives for States to develop comprehensive land management programs for their coastal areas. Participating States receive Federal grants to develop and administer their programs, as well as Federal aid to offset the impact of energy development activities. All eligible States have chosen to participate. To date, only two State programs have been approved.

States participating in the CZMA program must develop a plan for managing activities in the coastal zone. The plan must include a definition of permissible land and water uses in the coastal zone, proposals for protecting areas of unique, scarce, fragile, or vulnerable natural habitat, and a process to ensure that the State adequately provides for “consideration of the national interest” in the siting of certain energy and resources development facilities, including associated transportation systems.

Once the State has adopted a plan that is approved by the National Oceanic and Atmospheric Administration, it has a major effect on Federal activities in the coastal zone. Federal activities must be “consistent to the maximum possible extent” with the State plan. This provision has a fourfold effect:

1. Direct Federal activities in the coastal zone, including land management policies, must be consistent;
2. Federal development projects in the zone must be consistent;
3. Applicants for Federal licenses and permits (such as right-of-way permits) must secure State certification; and
4. Applicants for Federal assistance must include the views of the State management agency with their proposals.

A State plan will not be approved unless the State demonstrates that it has the authority to control land and water uses in the coastal zone. The State may do this by direct land and water use regulation, through local implementation of State established standards subject to State administrative review, or by State authority to disapprove all local land and water use regulation. Transportation and mining activities in the coastal zone must comply with State coastal zone requirements.

The following chapters describe the requirements for obtaining rights-of-way through the major Federal land management

systems for purposes of mineral resource development on non-Federal lands. Several laws relating to Federal lands in Alaska are also included as background information. The major Federal land planning and environmental laws affecting right-of-way applications are also discussed. All references are cur-

rent as of May 1978, and, in some instances, more recent material has been added. This report was structured as both a technical reference for Congress in its consideration of access issues in Alaska Lands legislation and as a primer on rights-of way across Federal lands for mineral resource development.

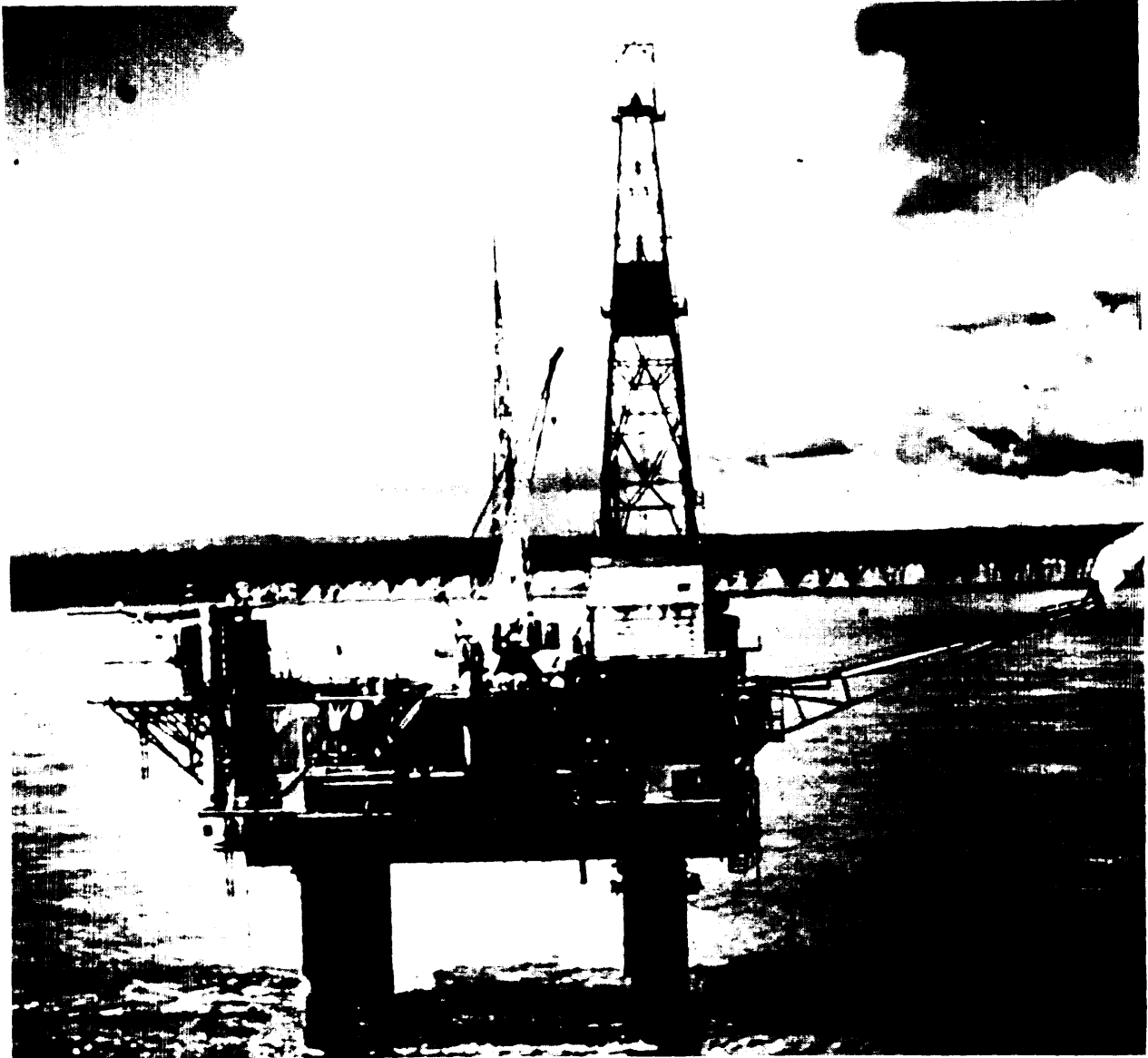


Photo Credit The Alaska Coalition

Offshore Oil Production Rig, Cook Inlet