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Federal Land Management Systems

Chapter 4.- FEDERAL LAND MANAGEMENT SYSTEMS “

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Federal Land Management Systems

PUBLIC LANDS

The Bureau of Land Management (BLM) of the Department of the Interior administers the Nation's public lands—those federally controlled lands that have not been placed in any other specific land management system. As defined in the Federal Land Policy and Management Act of 1976:¹

The term “public lands” means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except—

1. lands located on the Outer Continental Shelf; and
2. lands held for the benefit of Indians, Aleuts, and Eskimos,²

Traditionally, BLM lands have been the least restricted and regulated Federal lands, and the most open to development and use.

The BLM manages about 60 percent (470 million acres) of all federally owned lands; more than half of this area (over 295 million acres) is in the State of Alaska.³ The BLM has interim jurisdiction over public lands in Alaska that have been selected by Alaska Natives under the Alaska Native Claims Settlement Act⁴ (ANCSA) and lands selected by the State under provisions of the Alaska Statehood Act.⁵ It also manages lands cur-

rently withdrawn for potential designation as part of national conservation systems under section 17(d)(2) of ANCSA. On final congressional disposition of the (d)(2) national interest lands, management of substantial acreage will be transferred to the National Park Service, the U.S. Fish and Wildlife Service, and the Forest Service.⁶

Final conveyances of Native and State selections will further reduce acreage under BLM management.⁷ Nevertheless, the BLM will still have jurisdiction over millions of acres of Alaska land. At present, all public lands in Alaska that have not been selected by Natives or the State or withdrawn for d-2 consideration by Congress have been withdrawn for classification under section 17(d)(1) of ANCSA. Scattered Native and State selections have been made in mineralized areas surrounded by these so-called d-1 lands.⁸

BLM policies will influence decisions associated with mineral resource development on non-Federal lands in Alaska. Until legislative disposition of d-2 lands and final conveyance of State and Native selections, the BLM will administer more than 75 percent of all lands in the State. After d-2 designations and final land conveyances, it is likely that more than 100 million acres will remain under BLM administration. In many regions, access to non-

Note: Footnotes for this section appear on pp. 64-66,

Federal lands for mineral resource development will involve transportation over and use of BLM lands.

BLM ORGANIC ACT

The Federal Land Policy and Management Act of 1976,⁹ commonly referred to as the BLM Organic Act, restructured the public land laws. It gives the BLM comprehensive and explicit authority to manage public lands and resources, and repeals many archaic and overlapping statutes governing public land withdrawal, disposal, and rights-of-way. Title V of the BLM Organic Act sets forth right-of-way authorization for public lands administered by the BLM and for National Forest System lands.¹⁰ The term “right-of-way” as used in the Act includes “an easement, lease, permit, or license to occupy, use, or traverse public lands” for the purposes listed.¹¹ Several sections of the BLM Organic Act bear on the issue of access; of principal importance for access are section 302, which is the general management authority for public lands;¹² sections 501-511 (Title V), the Right-of-Way authorization;¹³ and section 603, BLM wilderness review.¹⁴

Until regulations and directives have been issued under the authority of the BLM Organic Act, the old regulations remain in effect.¹⁵ These regulations also specify the general application procedure for rights-of-way and easements over lands administered by the Fish and Wildlife Service and the Park Service.¹⁶

Section 302 of the BLM Organic Act¹⁷ authorizes the Secretary of the Interior to regulate the use, occupancy, and development of public lands by several means, including easements, permits, licenses, and leases.¹⁸ The Secretary is directed to manage the public lands according to land use plans developed under section 202¹⁹ and to take action necessary to prevent unnecessary or undue degradation of the land. The Secretary may permit Federal departments and agencies to occupy and develop public lands only under the right-of-way provisions of section

507²⁰ or under the withdrawal provisions of section 204.²¹ However, if proposed Federal use and development are “similar or closely related to” programs of the Secretary for the lands involved, he may enter into cooperative agreements under section 307(b).²²

Enforcement of regulations—a serious problem under earlier laws—is enhanced by mandatory provisions in all permits. All instruments providing for use or occupancy of public lands must contain a provision allowing revocation after notice and hearing for violation of any terms or conditions including compliance with the applicable State or Federal air or water quality standards or implementation plans.²³

PURPOSES FOR WHICH RIGHTS-OF-WAY MAY BE GRANTED

Title V of the BLM Organic Act authorizes the Secretary of the Interior “to grant, issue, or renew rights-of-way over, upon, under, or through” public lands, except lands designated as wilderness.²⁴ The purposes for which a right-of-way may be issued include:

1. Reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;
2. Pipelines and other systems for the transportation or distribution of liquids and gases, other than water and other than oil, natural gas, synthetic liquid or gaseous fuels, or any refined products produced therefrom, and for storage and terminal facilities in connection therewith;
3. Pipelines, slurry and emulsion systems, and conveyor belts for transportation and distribution of solid materials, and facilities for the storage of such materials in connection therewith;
4. Systems for generation, transmission, and distribution of electric energy, ex-

cept that the applicant shall also comply with all applicable requirements of the Federal Power Commission under the Federal Power Act of 1935 (49 Stat. 847; 16 U.S.C. 791);

5. Systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals, and other means of communication;
6. Roads, trails, highways, railroads, canals, tunnels, tramways, airways, livestock driveways, or other means of transportation except where such facilities are constructed and maintained in connection with commercial recreation facilities on lands in the National Forest System; or
7. 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.²⁵

INFORMATION REQUIREMENTS

An applicant for a right-of-way is required to submit and disclose plans, contracts, agreements, and other information reasonably related to the use or intended use of the right-of-way.²⁶ In addition to any other information necessary to the determination of whether the right-of-way should be issued and what terms and conditions it should contain, the Secretary may require a statement of the effect on competition of the grant of right-of-way.²⁷ If the applicant is a partnership, corporation, association, or other business entity, information concerning the identity of the participants and the financial structure and control of the entity must be disclosed.²⁸

ENVIRONMENTAL IMPACT ASSESSMENT

If the Secretary determines that the use of a proposed right-of-way may have a "signifi-



Photo Credit: OTA Staff

Road to former gold mine now provides recreational access, Hatcher Pass, near Palmer, Alaska

cant impact on the environment, ” the applicant is required to submit a plan for construction, operation, and rehabilitation for the right-of-way.²⁹ If, in addition, the Secretary determines that the grant of a right-of-way is a major Federal action “significantly affecting the quality of the human environment,”³⁰ the agency must prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA).³¹ The applicant may be required to bear the costs of the EIS preparation as part of the costs of administration.³²

EXTENT OF RIGHTS= OF= WAY

The right-of-way is limited to the grounds occupied by the facilities for which the grant was issued and that are necessary for the operation, maintenance, or safety of the project and will do no unnecessary damage to the environment.³³ The temporary use of additional land may be authorized as necessary for construction, operation, maintenance, or termination of the project, or for access purposes.³⁴ The right-of-way is granted for a reasonable term considering the cost of the facility, its useful life, and any public purpose it serves.³⁵ The right-of-way specifies whether it is renewable and the terms and conditions of renewal.³⁶

The Secretary is authorized to issue regulations for rights-of-way.³⁷ These regulations may be applied to any existing rights-of-way renewed under the new BLM Act.³⁸ The holder of a right-of-way may use mineral, timber, or vegetative resources of the right-of-way lands in connection with construction or other purposes only if authorization is obtained under applicable laws.³⁹

RIGHT- OF- WAY FEES

The holder must pay annually, in advance, the fair market value of the right-of-way.⁴⁰ When the value is less than \$100, the Secretary may require advance payment for more than 1 year at a time.⁴¹ The holder or ap-

plicant may be required to reimburse the agency for “all reasonable administrative and other costs incurred in processing the application for such right-of-way and in the inspection and monitoring of construction, operation, and termination of the facility pursuant to such right-of-way.”⁴² The requirement of rental payment and reimbursement of costs may be waived if a reciprocal right-of-way is granted to the United States by the holder in connection with a cooperative cost-share program.⁴³ Federal, State, or local government units; nonprofit associations; nonprofit corporations that are not owned or controlled by profitmaking corporations or business enterprises; holders who provide at no or reduced cost a benefit to the public or to the programs of the Secretary; or holders who already are compensating the United States for authorized use or occupancy of Federal land, may be granted a right-of-way at a lesser charge, or no charge, as the Secretary finds to be equitable and in the public interest.⁴⁴ Assignments of free or reduced rental rights-of-way must be approved by the Secretary.⁴⁵ When appropriate, the holder may be required to furnish a bond or other satisfactory security to secure any or all of the obligations imposed upon him by statute, regulations, rules, or the terms or conditions of a specific right-of-way.⁴⁶ The Secretary may issue or renew a right-of-way only when he is satisfied that the applicant has the necessary technical and financial capability to construct the project in accordance with the requirements of the Act.⁴⁷

FINANCING TRANSPORTATION PROJECTS

The BLM Organic Act provides several arrangements for financing transportation and other projects on public lands. The Secretary is authorized to acquire or construct roads within or near the public lands that will permit maximum economy in timber harvesting in the area and at the same time meet requirements for the protection, development, and management of the lands for utilization

of other resources.⁴⁸ Financing for these timber roads near or on public lands may be accomplished (a) from appropriated Department of the Interior funds, (b) by requirements on purchasers of timber and other public land resources, (c) by cooperative financing agreements with Federal, State, local, or private agencies, or persons, or (d) by a combination of these three methods.⁴⁹ However, when roads are required to meet higher technical standards than necessary for timber or resource removal, the purchasers of timber and resources will not be required to bear the costs necessary to meet the higher standards unless the resource is offered under the condition that a road of that specified standard be built.⁵⁰ The Secretary may make such arrangements as necessary to this end. The Secretary may also require the users of roads, trails, lands, or other facilities administered by the Bureau to maintain the land or facilities in a satisfactory condition “commensurate with use requirements of each.”⁵¹ Costs assessed to each user must be proportionate to total use. The Secretary may require reconstruction of existing roads or facilities when necessary to accommodate a use, but if the reconstruction or maintenance cannot be provided by the user or is impractical, the Secretary may require a deposit in an amount sufficient to cover a proportionate share of costs.⁵²

TERMS AND CONDITIONS

In addition to the requirements described above, each right-of-way must contain certain mandatory terms and conditions that are necessary to:

- I. Carry out the purposes of the BLM Act and related rules and regulations;
- II. Protect the environment and minimize damage to scenic and esthetic values, and to fish and wildlife habitats;
- III. Require compliance with air and water quality standards established pursuant to Federal or State laws; and

- IV. Require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of rights-of-way for similar purposes, if those standards are more stringent than Federal standards.⁵³

Each right-of-way must also contain any specific additional conditions that the Secretary deems necessary for:

1. Protection of Federal property and economic interest;
2. Efficient management of the lands subject to and adjacent to the right-of-way, and protection of other lawful users of the lands involved;
3. Protection of life and property;
4. Protection of fish, wildlife, and other biotic resources of the area for subsistence users;
5. Location of rights-of-way along routes that will cause the least damage to the environment taking into consideration feasibility and other relevant factors; and
6. Protection of the public interest in lands traversed by the right-of-way or adjacent thereto.⁵⁴

In order to minimize adverse environmental impacts and the proliferation of rights-of-way, the BLM Act requires the utilization of rights-of-way in common to the extent practical.⁵⁵ Each right-of-way permit must contain a provision reserving to the Secretary the right to grant additional rights-of-way or permits for compatible uses on or adjacent to the original right-of-way.⁵⁶ The Secretary may designate right-of-way corridors and require that all rights-of-way be confined to that corridor. In making this designation the Secretary is required to consider National and State land use policies, environmental quality, economic efficiency, national security, safety, and good engineering and technological factors.⁵⁷ The Secretary must issue regulations containing the criteria and proce-

dures he will use in designating such corridors. Existing utility and transportation corridors may be designated for such uses under this subsection without further review.⁵⁸ This provision allows expanded multipurpose use of existing criteria.

SUSPENSION OR TERMINATION

A right-of-way may be suspended or terminated for abandonment⁵⁹ or noncompliance with statutory requirements or with the applicable conditions, rules, or regulations for rights-of-way.⁶⁰ Holders of a right-of-way must receive due notice prior to a finding of abandonment or noncompliance. Holders of an easement are entitled to an administrative proceeding under section 554 of Title 5 of the United States Code before termination or suspension.⁶¹

Existing rights-of-way or rights-of-use are not terminated by the BLM Act, but with consent of the holder, they may be canceled and reissued under the terms and conditions of Title V.⁶² When the Secretary issues a right-of-way for railroad and communications facilities in a realignment of the railroad, he may require that the applicant relinquish any existing right-of-way if he finds that the requirement is in the public interest, and the lands involved are not within an incorporated community and are of equal values. He may, in lieu of the provisions of Title V, provide for the same terms and conditions in the new right-of-way with respect to rental, duration, and nature of interest in the lands granted, as were applied to the relinquished right-of-way. Action on such a trade is to be made within 6 months of the receipt of all information required by Title V.⁶³

OTHER CONDITIONS

When an applicant is before Federal departments or agencies, other than the Department of the Interior or the Department of Agriculture, seeking a license, certificate, or other authority for a project that involves a

right-of-way over, upon, or through public lands or national forests, the applicant must simultaneously apply to the appropriate Secretary for permission to use public lands and provide all information submitted to the other department or agency.⁶⁴ After enactment of the BLM Organic Act, all rights-of-way sought over public lands or national forests, for purposes listed in section 501 must be issued in accordance with the requirements of Title V. This provision is a direct limitation on any other laws not repealed by the Act that would grant a right-of-way over public lands.⁶⁵

Federal departments and agencies may obtain use of public lands under the provisions of Title V subject to such terms and conditions as the Secretary may impose.⁶⁶ Any action to terminate or limit the use of a right-of-way reserved for use by a Federal department or agency must be done with the consent of the head of the department or agency.⁶⁷

BLM WILDERNESS STUDY

Section 603 of the Act provides for wilderness study of certain BLM lands.⁶⁸ When the Wilderness Act was passed in 1964, the Park Service, the Fish and Wildlife Service, and the Forest Service were all required to inventory lands under their control to determine whether any meet the wilderness requirements set forth in section 2(c) of that Act.⁶⁹ BLM lands were not affected.⁷⁰ Section 603 provides the framework for a survey of almost all BLM lands to determine if any should be considered for inclusion in the National Wilderness Preservation System.

Section 201(a) of the Organic Act requires a complete inventory of public lands, including their resource and other values, with priority given to areas of "critical environmental concern."⁷¹ Within 15 years of the effective date of the Act (October 21, 1976), the Secretary of the Interior must review all roadless areas of over 5,000 acres and all roadless islands⁷² that were identified in the section 201 inventory as having wilderness

characteristics; he must then report to the President on their suitability for preservation as wilderness. All areas formally identified by the BLM as "natural" or "primitive" areas prior to November 1, 1975, must be reviewed, and a wilderness recommendation made to the President by July 1, 1980.⁷³

Before recommendations to the President can be made, the Geological Survey and the Bureau of Mines must conduct a survey to determine any mineral values of a specific area prior to its recommendation for wilderness designation.⁷⁴ Review of these areas will be conducted under provisions of section 3(d) of the Wilderness Act.⁷⁵ The President is required to advise Congress of his recommendation on the wilderness status of each area within 2 years of receipt of each report from the Secretary.⁷⁶

BLM lands that are designated by Congress as components of the National Wilderness Preservation System will be subject to provisions of the Wilderness Act applicable to national forest wilderness areas.⁷⁷ Wilderness designation will remove the authority of the Secretary of the Interior to grant rights-of-way under Title V.⁷⁸ However, BLM wilderness areas would be subject to the limited provision for presidentially granted national interest exceptions that is applicable to national forest wilderness areas.⁷⁹

While the status of wilderness lands is clearly defined, there is some uncertainty about lands that are being reviewed for wilderness characteristics and lands that have been placed in "wilderness study" by BLM.⁸⁰ Section 603(c) requires that areas under review for potential wilderness designation be managed "in a manner so as not to impair the suitability of such areas for preservation as wilderness."⁸¹ However, this protective management is subject to the continuation of "existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act."⁸² This implies that some existing activities are allowed to continue. But, immediately following that sentence is

the proviso that, "in managing the public lands, the Secretary shall by regulation or otherwise, take any action required to prevent unnecessary or undue degradation of the lands and their resources or to provide environmental protection."⁸³ This protection does not extend to withdrawal from appropriation under the mining laws; the Secretary may make such withdrawals only "for reasons other than preservation of this wilderness character."⁸⁴

With few exceptions, all 470 million acres of land managed by the BLM initially are subject to the provisions of section 603. In order to avoid bringing all activities on BLM land to a halt, the Bureau has adopted a two-phase policy for identifying and protecting lands with wilderness potential. The first phase is a wilderness inventory:

Every resource managed by the BLM has an inventory. (For purposes of wilderness review, "inventory" means the examination and display of areas on maps and in narratives that are considered to be (a) roadless, (b) have wilderness characteristics, and (c) are 5,000 acres or more, or of sufficient size to make wilderness management practical, or are public land islands.)⁸⁵

BLM plans to complete an accelerated wilderness inventory by July 1980.⁸⁶ The inventory will emphasize roadless areas and roadless islands in the 11 Western States. According to the draft proposal, "Alaska inventory will be postponed until Native claims land tenure has been finalized."⁸⁷

It is not clear what level of protection will be afforded lands during the wilderness review. An Organic Act directive states that all environmental assessment reports and environmental statements must include a discussion of potential wilderness resources that might be affected by a proposed action.⁸⁸ However, it gives no indication of what actions should be taken in response to threats to wilderness potential. The draft wilderness policy document states:

During the wilderness review, multiple use activities [including access] will continue

with advanced planning to protect the existing wilderness designation potential of areas or islands. Environmental assessment records or environmental statements prepared on activities will include discussion of the wilderness resource where appropriate. The discussion will cover values per section 2(a) and (c) of the Wilderness Act of September 3, 1964 (Public Law 88-577). Environmental controls or modifications in proposed actions will be made if necessary to protect wilderness values.⁸⁹

At the end of the wilderness inventory, those roadless areas with wilderness characteristics will be designated "wilderness study areas:"

A roadless area which has been found to have wilderness characteristics (thus having the potential of being included in the National Wilderness System), and which will be subjected to intensive analysis in the Bureau's planning system, and public review to determine wilderness suitability, and is not yet the subject of a congressional decision regarding its designation as wilderness.⁹⁰

It is reasonable to expect that "wilderness study areas," as opposed to areas merely under review, will receive the full scope of section 603(c) protections of their wilderness characteristics. Preliminary views about some of the permissible limitations have been spelled out in a memorandum issued by the Deputy Solicitor.⁹¹ On the issue of access to private lands, the memorandum stated:

In general, access across public lands can only be granted under Title V of FLPMA, and the granting of this right-of-way is discretionary with the Secretary. Section 603 limits the discretionary authority of the Secretary by allowing him to grant access only when it will not impair the suitability of the area under review for wilderness designation. See also section 302, which provides, in pertinent part:

Except as provided in . . . section 603 . . . and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under the Act, including, but not limited to, rights of ingress and

egress. In managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

Currently, the Solicitor's Office is preparing a memorandum involving the Secretary's authority to regulate access to and from mining claims. In regard to existing access across wilderness study lands to private property, it is my opinion that any legal opinion is best given after applying each separate factual situation to the criteria of section 603.⁹²

The gist of the opinion is that the Secretary has full discretion to deny, and might even be forced to do so by section 603, requests for access from all persons except locators under the Mining Law, who he could regulate under the provisions of section 302. Only three existing uses are specifically protected by the section—mining, grazing, and mineral leasing—there is no mention of existing access. Of these, only mining could conceivably occur off public lands and receive protection, because patenting a mining claim would take it out of Federal lands while preserving rights to ingress and egress.

The opinion also raises the point that, in some instances, land uses might be under a more stringent system of controls during the review period than after congressional designation as wilderness.⁹³ Access to private lands may prove to be one of these instances. During the review period, access decisions are governed solely by Title V as affected by section 603. Section 603 requires management "so as not to impair the suitability of such areas for preservation as wilderness."⁹⁴ After designation as wilderness, section 4(d)(4) of the Wilderness Act would apply, allowing the President to grant a right-of-way:

Within wilderness areas in the national forests designated by this Act, (1) the President may, within a specific area and in accordance with such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water conservation works, power projects, transmission

lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial . . .⁹⁵

EXISTING BLM RIGHT-OF-WAY REGULATIONS

Existing BLM right-of-way regulations, issued under the general authority of the Department of the Interior to manage the public lands,⁹⁶ provide the general institutional framework for the application and review process for rights-of-way on lands under BLM jurisdiction. The Fish and Wildlife Service and Park Service follow the BLM regulations, however, application is made directly to the managing agency.⁹⁷ These regulations cover all non-Federal applicants seeking rights-of-way, including State and local governments; Federal agencies now may obtain rights-of-way under the provisions of section 507 of the BLM Organic Act.⁹⁸

An applicant must file an application with the BLM listing the statute authorizing the right-of-way, the primary purpose for which it is sought, and the date on which any prior unauthorized use began.⁹⁹ The applicant agrees to accept the terms and conditions set forth in the regulations¹⁰⁰ and deposits a nonreturnable fee based on the length of the right-of-way.¹⁰¹ A map of the area indicating the extent of the right-of-way must be included with the application along with data about the planned developments projects.¹⁰² Information concerning citizenship,¹⁰³ disclosure of control, and financial status of business entities is required.¹⁰⁴

The applicant must reimburse the Government for administrative costs incurred in processing the application including preparation of reports and statements required under NEPA if the approval of the application is determined to be a major Federal action significantly affecting the environment. '05 Upon

receipt of the application, an estimate is made of anticipated administrative costs. If the costs are greater than the initial payment by an amount exceeding the cost of maintaining actual cost records for the application, periodic payments of costs may be requested.¹⁰⁶ If the application is rejected or withdrawn, the applicant is assessed the costs incurred to that point.¹⁰⁷

In order to assist actual and potential applicants, the regulations provide that a person may request, prior to submitting an application, a nonbinding estimate of the anticipated administrative and other costs expected to be incurred.¹⁰⁸ On approval of the application, the holder must make payment based on the length of right-of-way and must reimburse the agency for costs of monitoring the construction, operation, maintenance, and termination of the right-of-way and for the costs of protecting and rehabilitating the lands involved.¹⁰⁹ A bond or other security may be required to assure payment of costs or satisfaction of the conditions of a right-of-way.¹¹⁰ The charge for use and occupancy of a right-of-way is set by the regulations at the fair market value of the permit, right-of-way, or easement as determined by the appropriate officer, but not less than \$25 per 5-year period.¹¹¹

The terms and conditions set forth in the regulations generally provide for:

1. Compliance with Federal and State laws and regulations applicable to the lands or right-of-way project.¹¹²
2. Compliance with regulations and directives of the supervising officer of the agency with respect to clearing and restoring land, public safety, protection of property and environmental values, fire prevention, and payment for the use of timber or mineral resources of the right-of-way.¹¹³
3. Acceptance of any additional special conditions necessary to make the grant of a right-of-way compatible with the public interest.¹¹⁴

4. Acceptance of the condition that use of the right-of-way will not “unduly interfere with management or administration of lands affected by it,” and that the right-of-way may be modified or terminated by the Secretary if its use conflicts with other works constructed by authority of the United States.¹¹⁵
5. Agreement to pay for all damage to U.S. property and to indemnify the United States for any liability for damages for injury to property or person arising from use of the right-of-way.¹¹⁶

The right-of-way granted under these regulations, unless otherwise provided by statute, does not convey a property interest in the lands involved, only a right to use the public lands for a specific purpose.¹¹⁷ The right-of-way may be terminated by a specific order of cancellation for noncompliance with conditions of the grant,¹¹⁸ non-use, abandonment,¹¹⁹ or failure to proceed with timely construction of the project for which the right-of-way was issued,¹²⁰ or when use of the right-of-way conflicts with other authorized uses,¹²¹ or unduly interferes with the management and administration of the affected lands.¹²²

FOOTNOTE REFERENCES FOR PUBLIC LANDS

¹¹⁵Public Law 94-579, 90 Stat. 2743, 43 U.S.C. 1701 et seq. (1977 supp.).

¹¹⁶43 U.S.C. 1702(e). Public lands are divided into public domain lands which have never left Federal ownership, and acquired lands which are lands in Federal ownership which are not public domain and have been obtained by the Government through purchase, condemnation, gift, or exchange. “Lands” includes all interests in land—such as surface ownership, mineral rights, timber rights, and easements.

¹¹⁷Department of the Interior, Bureau of Land Management, *Public Land Statistics* 1976, pp. 20-21.

¹¹⁸Public Law 92-203, 85 Stat. 688 (1971).

¹¹⁹Public Law 85-508, 72 Stat. 339 (1958), as amended **77 Stat. 223 (1963)**.

¹²⁰Exact acreages will be determined by Congress.

¹²¹Conveyance of Native selections is now expected to take until 1981 or beyond. See testimony of Guy Martin, Hearings Before Subcommittee on General Oversight and Alaska Lands of House Committee on Interior and Insular Affairs, 95th Cong., 1st sess., July 21, 1977.

¹²²See maps of land status and d-2 proposals in OTA working paper by John W. Whitney and Dennis Bryan, *Assessment of Transportation Access Requirements for Minerals Exploration and Mine Development and Operation in Alaska*, in *Analysis of Laws Governing Access Across Federal Lands: Options for Access in Alaska*, Volume 11, Working Papers (OTA-M-76).

¹43 U.S.C. 1701 et seq.

²43 U.S.C. 1761-1771.

³43 U.S.C. 1702(f).

⁴43 U.S.C. 1732.

⁵43 U.S.C. 1761-1777.

⁶43 U.S.C. 1782.

⁷Section 310 of the Act, 43 U.S.C. 1740, requires that the Secretary promulgate rules and regulations imple-

menting the Act in accordance with the provisions of the Administrative Procedure Act. The last sentence of the section states:

Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical.

The Bureau has adopted a policy of issuing Organic Act Directives (OADs), approved by its FLPMA Policy Committee, to provide guidelines for carrying out specific activities affected by the Organic Act prior to the completion of formal rulemaking. BLM, *The Federal Land Management Policy Act: An Interim Report—Oct. 21, 1976 to June 30, 1977, 1977*, p. 7.

⁸43 CFR Part 2800, Regulations for Fish and Wildlife Refuges are also found at 50 CFR 29.

⁹43 U.S.C. 1732.

¹⁰43 U.S.C. 1732(b).

¹¹43 U.S.C. 1712.

¹²43 U.S.C. 1767.

¹³43 U.S.C. 1714(b).

¹⁴43 U.S.C. 1737(b), Section 302(b) states in part: “Provided, that unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way under section 507 of this Act, withdrawals under section 204 of this Act and, where the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under subsection (b) of section 307 of this Act.”

¹⁵43 U.S.C. 1732(c).

¹⁶43 U.S.C. 1761(a).

¹⁷*Id.*

¹⁸43 U.S.C. 1761(b)(l).

²⁷Id.

²⁸43 U.S.C. 1761(b)(2).

²⁹43 U.S.C. 1764(d). OAD 76-15, Dec. 14, 1976, *supra*, note 15, requires that applications indicate whether a right-of-way will have any impact on roadless areas of more than 5,000 acres or "areas of critical concern." Another directive, OAD 7629, Mar. 15, 1977, requires all environmental assessment reports to discuss impacts on potential wilderness. See discussion of section 603 of the Act below.

³⁰42 U.S.C. 4332(2)(C).

³¹42 U.S.C. 4321 *et seq.* See the discussion Of NEPA in this report.

³²43 U.S.C. 1764(g). See also, existing BLM right-of-way regulations at 43 CFR 2800.

³³43 U.S.C. 1764(a).

"Id.

³⁵43 U.S.C. 1764(b).

"Id.

³⁷43 U.S.C. 1764(e).

³⁸Id.

³⁹43 U.S.C. 1764(f).

⁴⁰43 U.S.C. 1764(g).

"Id.

"Id.

"Id.

"Id.

"Id.

⁴⁸43 U.S.C. 1764(i).

⁴⁷43 U.S.C. 1764(j).

⁴⁶43 U.S.C. 1762(a).

⁴⁹Id.

⁵⁰Id.

⁵¹43 U.S.C. 1762(c).

"Id.

⁵³43 U.S.C. 1765(a).

⁵⁴43 U.S.C. 1765(b).

⁵⁵43 U.S.C. 1763.

⁵⁶Id.

⁵⁷Id.

⁵⁸Id.

⁵⁹A "rebuttable presumption of abandonment" arises when the holder fails to use the right-of-way for the purpose for which it was granted for a continuous 5-year period, 43 U.S.C. 1766.

⁶⁰43 U.S.C. 1766.

⁶¹This distinction between an easement and a right-of-way is not explained in the BLM Act. See Morrison, "Rights-of-Way on Federally Owned Lands: A Journey Through the Statutes by Way of the Federal Land Policy and Management Act of 1976," 9 *Transportation Law Journal*, 97,103 [1977].

⁶²43 U.S.C. 1769(a).

⁶³43 U.S.C. 1769(b).

"43 U.S.C. 1771§

⁶⁵43 U.S.C. 1770(a). Section 28 of the Mineral Leasing Act, 30 U.S.C. 185, relating to oil and gas pipelines, and the Federal Power Act, 16 U.S.C. 791-825, relating to pipelines and water projects, are not of great importance here; but both provide additional authorization

for rights-of-way over public lands. See Morrison, *supra*, note 61, at 105-109.

⁶⁶43 U.S.C. 1767(a).

⁶⁷43 U.S.C. 1767(b).

⁶⁸43 U.S.C. 1782. Lands covered by the Act of August 28, 1937, 43 U.S.C. 1181(a) to 1181(j) and the Act of May 24, 1939, 50 Stat. 753, are not affected by this provision, see section 701(b). The Bureau has yet to issue any rules regarding the Wilderness Study. Current policy regarding the study is contained in the following documents: BLM, Draft Proposed Wilderness Policy and Review Procedure, Feb. 27, 1978 (Draft); Office of the Solicitor, Application of Mining and Grazing Laws to Areas Under Review for Inclusion into Wilderness System: Section 603, Federal Land Policy and Management Act of 1976, Jan. 8, 1978 (Opinion), and the following Organic Act Directives: OAD 76-15, Dec. 14, 1976; OAD 77-21, Feb. 16, 1977; and OAD 77-29, Mar. 15, 1977.

⁶⁹Wilderness Act, Public Law 88-577, 78 Stat. 89, Sept. 3, 1974, 16 U.S.C. 1131 *et seq.*

⁷⁰The Bureau established two land classification categories—primitive areas and natural areas—in which use and activity were severely restricted, 43 CFR 6221 (primitive areas) and 43 CFR 6225 (natural areas). The criteria for selection were similar to those used for wilderness. There are 11 primitive areas containing 234,000 acres and 44 natural areas containing 271,000 acres. See Draft, pp. 15-16; *supra*, note 68.

⁷¹43 U.S.C. 1711(a). "Areas of critical environmental concern" are defined as: "areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards." 43 U.S.C. 1702(a).

⁷²BLM has formulated the following definitions of the key terms "public land island" (equivalent to roadless island), "road," and "roadless area." Draft, pp. 9, 10; *supra*, note 68:

Public Land Island: A body of land above the ordinary high-water elevation of any meanderable body of water, except those islands formed in navigable bodies of water after the date of admission of the State into the Union.

Road: For the purpose of the wilderness inventory, a road is defined as and must meet all of the following: An access route that has been improved and maintained by using hand or power machinery or tools to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

Words and phrases used in the above definition of "road" are defined as: Improved and Maintained: Where actions have been and will continue to be directed to physically keep the road open to traffic. Relatively regular and continuous use: Use by vehicles having four or more wheels that has

occurred and will continue to occur on a recurring basis, for a predetermined, planned, or intended purpose. (An example would be access for equipment to maintain a stock water tank, Casual or random use by off-road vehicles or recreationists does not qualify.)

Roadless Area: That area bounded by a road using the edge of the physical change that creates the road or the inside edge of the right-of-way as a boundary.

⁷³43 U.S.C. 1782(a).

⁷⁴Id.

⁷⁵Id. Section 3(d) of the Wilderness Act is found at 16 U.S.C. 1132(d).

⁷⁶43 U.S.C. 1782(b).

⁷⁷43 U.S.C. 1782(c).

⁷⁸43 U.S.C. 1761(a).

⁷⁹16 U.S.C. 1133(d)(4).

⁸⁰The Act discusses protective actions the Secretary may take "during the period of review of such areas and until Congress has determined otherwise." 43 U.S.C. 1782(c). BLM policy, as reflected in the Draft, indicates a two-step process involving a wilderness inventory and wilderness study of areas selected from that inventory, see text accompanying notes 85-90. The BLM review process indicates that much importance is placed on making early "negative declarations" about areas that should not be subject to section 603 protection. Draft, p. 11; *supra*, note 68.

⁸¹43 U.S.C. 1782(c).

⁸²Id.

⁸³Id.

⁸⁴Id.

⁸⁵Draft, p. 7.

⁸⁶Draft, p. 17.

⁸⁷Id.

⁸⁸OAD 77-29, Mar. 15, 1977, *supra*, note 15.

⁸⁹Draft, p. 12.

⁹⁰Draft, p. 10. Primitive and natural areas, *supra*, note 70, have been classified as "Instant Study Areas," meaning that they will be treated as wilderness study areas right now, without the need for a wilderness inventory. Draft, p. 7.

⁹¹Opinion, *supra*, note 68.

⁹²Opinion, p. 11.

⁹³Opinion, p. 5.

⁹⁴43 U.S.C. 1782(c).

⁹⁵16 U.S.C. 1133(d)(4). This provision, and all other provisions of the Wilderness Act relating to national forest wilderness areas, are applied to BLM wilderness areas by section 603.

⁹⁶The regulations are found at 43 CFR part 2800. See *supra*, note 15, for a discussion of the current applicability of these regulations. OADS have been issued for "Processing of Right-of-Way and Temporary Use Applications" (OAD 76-15; Dec. 14, 1976); "Right-of-Way Cost Recovery" (OAD 76-15; Dec. 15, 1976); "Processing Pending Applications for Airport Leases" (OAD 77-8; Jan. 24, 1977); and "Valuation of Non-linear Rights-of-Way for Communication Purposes" (OAD 77-30; Mar. 15, 1977). Laws cited as underlying authority for the BLM right-of-way regulations are 5 U.S.C. 301, 43 U.S.C. 2, and 43 U.S.C. 1201. See 43 CFR 2802.1 - l(a).

⁹⁷Fish and Wildlife Service regulations are found at 50 CFR 29.21.

⁹⁸43 U.S.C. 1767.

⁹⁹43 CFR 2802.1-1(a).

¹⁰⁰43 CFR 2801.1-5.

¹⁰¹43 CFR 2802.1-2(a)(3).

¹⁰²43 CFR 2802.1-5(a).

¹⁰³43 CFR 2802.1-4(a).

¹⁰⁴43 CFR 2802.1-3, 2802.1-4(b).

¹⁰⁵43 CFR 2802.1 -2(a)(1). OAD 76-15 states that except for exclusion of management overhead, the policy embodied in the regulations is consistent with FLPMA requirements for cost recovery.

¹⁰⁶43 CFR 2802.1-2(a)(4).

¹⁰⁷43 CFR 2802.1 -2(a)(6).

¹⁰⁸43 CFR 2802.1 -2(a)(9).

¹⁰⁹43 CFR 2802.1-2(b).

¹¹⁰43 CFR 2802.1 -2(a)(n) and (12). Provisions requiring payment of costs, fair market or rental value, and bonding do not apply to State and local government applicants for rights-of-way for public purposes, pursuant to road use or reciprocal road use agreements or to Federal agencies. 43 CFR 2802.1 -2(a)(2), 2802.1-7.

¹¹¹43 CFR 2802.1-7.

¹¹²43 CFR 2801.1-5(a).

¹¹³43 CFR 2801.1-5 (b),(c), (d),(e), (g), and (i).

¹¹⁴43 CFR 2801.1-5(h).

¹¹⁵43 CFR 2801.1-5(e).

¹¹⁶43 CFR 2801.1-5(f).

¹¹⁷43 CFR 2801.1-1.

¹¹⁸43 CFR 2802.3-1.

¹¹⁹43 CFR 2802.2-3.

¹²⁰43 CFR 2802.2-2.

¹²¹43 CFR 2801.1-5(m).

¹²²43 CFR 2801.1-5(1).

NATIONAL PARK SYSTEM

The National Park System embraces over 25 million acres (7 million acres in Alaska) in national parks, national monuments, historic monuments, parkways, recreation areas, memorials, historic sites, and other reservations administered by the Secretary of the Interior through the National Park Service.² Congress established the national parks “to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”³ The National Park Service is required to promote and regulate use of park areas in conformance with the declared purposes of preservation and management “for the benefit and inspiration of all the people of the United States.”⁴ In conformance with these declared purposes of the National Park System, most nonrecreational uses of park areas are sharply limited or prohibited.



Photo Credit: OTA Staff

Caribou, McKinley National Park

The legal basis for use of park land for rights-of-way is found in (a) the general authority of the Secretary of the Interior to manage the national parks under his authority in conformance with their established purposes; (b) specific statutes and regulations governing individual units of the National

Note: Footnotes for this section appear on pp. 72-73.

Park System; (c) public land right-of-way statutes applicable to park lands; and (d) statutes and regulations relating to highways, navigable waters, and other modes of transportation.

GENERAL AUTHORITY FOR RIGHTS-OF-WAY

There is no express and comprehensive access or right-of-way authorization for the National Park System as there is for the public lands,⁵ the National Wildlife Refuge System,⁶ and the National Forest System.⁷ In general, the laws governing administration of national parks are less detailed and more discretionary than those for other land management systems. Access through a national park for mineral exploration and development is subject to the broad authority of the Secretary of the Interior to manage the national parks through the National Park Service.⁸ Exercise of this authority should be in conformance with the general purposes of the park system of preservation and recreation, and with the particular purposes for which a given park unit was established.⁹ The Secretary is specifically authorized to aid in the development of transportation systems which serve units of the national parks. The Secretary may construct, maintain, or, by agreement, make funds available for local airports¹⁰ and roads designated as park approach roads.¹¹ The Secretary may construct roads and trails within national park areas and obtain any rights-of-way necessary for improvement or construction of roads within authorized boundaries of park areas.¹² In the administration of the parks, the Secretary is authorized to regulate boating and other activities on waters in the National Park System, including navigable waters under the jurisdiction of the United States.¹³ The regulation of navigable waters in park areas by the Secretary of the Interior complements the Coast Guard's general jurisdiction over navigable waters.

For administrative purposes, the Park Service has divided components of the National Park System into three categories:

- Natural areas—all national parks and certain national monuments established as such because of their natural features.¹⁴
- Historical areas—all park areas designated because of their historic or archeological significance, historical sites, battlefields, monuments, and memorials.¹⁵
- Recreational areas—all units of the park system administered for purposes of public recreation, such as seashores, lakeshores, parkways, and wild rivers.”

Permissible uses of park areas often depend upon the administrative classification.

Regulations promulgated by the Park Service limit the operation of motor vehicles, aircraft, and vessels primarily for reasons of safety and the protection of life and property. Generally, aircraft must take off and land only at designated land and water areas and comply with Federal aviation regulations.¹⁷ Cars, offroad vehicles, and other motor vehicles are allowed only on established roads or use areas unless special permission is obtained.¹⁸ Boats must comply with Coast Guard requirements and may be restricted in operation in wildfowl nesting areas and fish habitats for safety reasons.¹⁹

The use of existing park roads by commercial vehicles is subject to strict controls. Park service regulations provide that:

The use of Government roads within park areas by commercial vehicles, when such

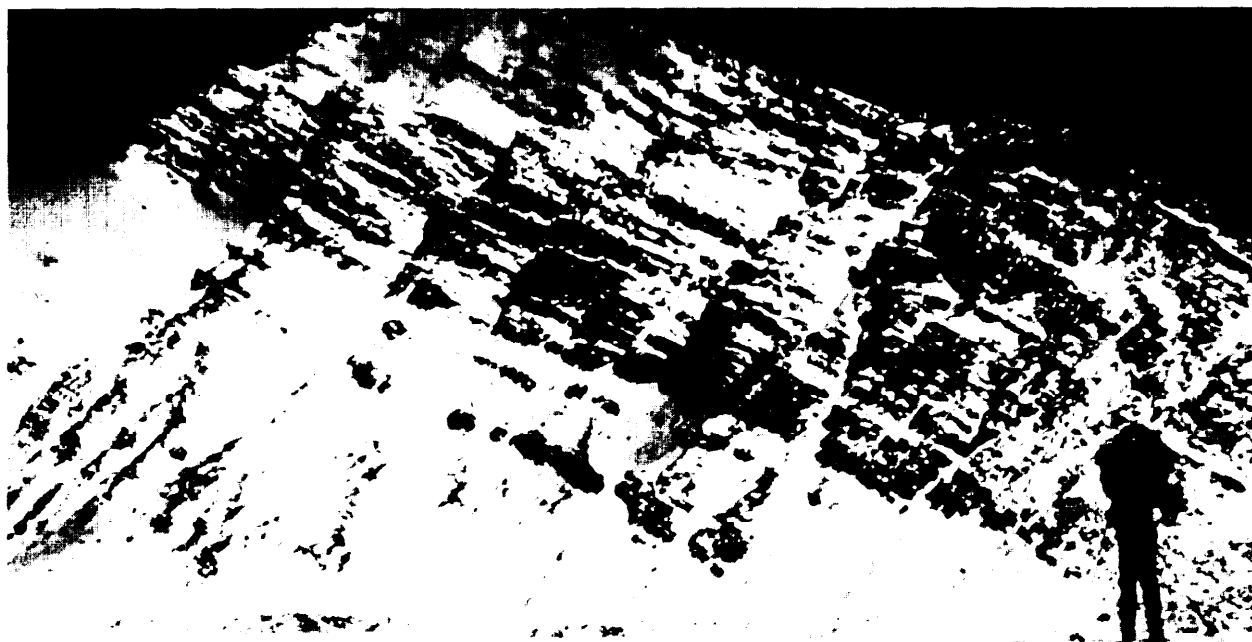


Photo Credit: The Alaska Coalition

National Parks offer many outdoor recreational opportunities. The photograph shows a skier in the Wrangell-St. Elias Region, a proposed National Park area

use is in no way connected with the operation of the park area, is prohibited, except that in emergencies the Superintendent may grant permission to use park roads.²⁰

The sole exception to this rule applies when a denial of the use of park roads would totally foreclose access:

The Superintendent shall issue permits for commercial vehicles used on park area roads when such use is necessary for access to private lands situated within or adjacent to the park area, to which access is otherwise not available.²¹

The "local park superintendent is vested with broad discretion in matters relating to the management of a particular park unit. In addition to laws applicable to the park system as a whole, the statutes and executive orders that established and govern individual park units often impose more or less stringent requirements on permissible uses."²²

STATUTES PROVIDING FOR RIGHTS-OF-WAY THROUGH NATIONAL PARKS

The 1901 Act, Rights-of-Way for Public Utilities

The Act of February 15, 1901,²³ provides that the Secretary of the Interior may permit the use of rights-of-way, for certain specified purposes, through "the public lands, forests, and other reservations of the United States, and the Yosemite and Sequoia National Parks, Calif., and the General Grant grove section of Kings Canyon National Park, Calif."²⁴ Rights-of-way may be obtained under the 1901 Act for construction and operation of facilities for the generation and distribution of electricity for telephone and telegraph systems, and for water projects for irrigation, mining, quarrying, timbering, manufacturing, or supplying water for domestic, public, or other beneficial purposes.

The right-of-way does not convey any property interest in the lands involved; it is a license revocable at the discretion of the Sec-

retary.²⁵ The right-of-way is limited in extent to the grounds occupied by the project plus an additional area not to exceed 50 feet from the margins of the project. For pipes, pipelines, and electrical, telegraph, or telephone poles, the right-of-way may not exceed 50 feet from the centerline of the projects. A permit for a right-of-way across one of the named national parks or other reservations may be issued only on the approval of the "chief officer of the department" having jurisdiction over the lands after a finding that the proposed use is "not incompatible with the public interest."²⁶

The 1901 Act expressly referred to grants of rights-of-way across Yosemite and Sequoia National Parks (the General Grant grove was added by amendment in 1940).²⁷ It has, therefore, been suggested that the Act does not apply to any other parks, though it would apply to all monuments and recreation areas administered by the Park Service.²⁸ The implication is that because the 1901 Act listed some parks and did not list others and because one park was added in 1940, the unlisted parks were not to be subject to this provision and were not, under principles of statutory construction, covered by the phrase "other reservations."

Unlike the Act of March 4, 1911, the 1901 Act is not mentioned in section 1c(b) of Title 16, United States Code, as one of those laws that are applicable to all units of the Park System regardless of their designation as parks, monuments, or recreation areas in legislation redefining the National Park System.²⁹ However, that provision is, on its face, not an exclusive compilation of laws of general applicability. It states: "the various authorities relating to the administration and protection of areas under the administration of the Secretary of the Interior through the National Park Service, including but not limited to . . . shall, to the extent such provisions are not in conflict with any such specific provision be applicable to all areas within the National Park System and a reference in such Act to national parks, monuments, recreation areas, historic monuments, or parkways shall hereinafter not be construed as limiting such

Act to those Areas.”³⁰ (Emphasis added). If the 1901 Act is covered by this provision then, because it applies to some elements of the System, it would apply to all. If it is not covered, then only three parks are subject to the right-of-way provision.

The 1911 Act, Rights-of-Way for Power and Communications Facilities

The Act of March 4, 1911,³¹ authorizes the Secretary of the Interior to grant an “easement for right-of-way” for a period of up to 50 years from date of issuance to any person, association, or corporation of the United States for one or more of the listed purposes. This Act has been expressly extended to all areas in the National Park System.³² An easement for right-of-way may be granted “over, under, across, and upon” national parks and other reservations of the United States for:

- a. up to 200 feet from the center line of poles and lines for the transmission and distribution of electricity or for lines and poles for radio, television, and other communications purposes; and
- b. sites not exceeding 400 square feet for transmitting, relay, receiving, and other communications structures and facilities.

A right-of-way is granted only after approval by the “chief of the department” upon a finding that the proposed use is not incompatible with the public interest.³³ All or part of the right-of-way may be annulled or terminated for non-use or abandonment after a period of 2 years. Communications facilities are subject to regulation by the Federal Communications Commission.³⁴ Electrical power projects are subject to regulation by the Federal Energy Regulatory Commission³⁵ and by State authorities.

The Ditches and Canals Acts

A series of public land laws, commonly referred to as the “ditches and canals acts”³⁶ grant rights-of-way through the public lands and reservations of the United States for drainage and irrigation projects. The right-of-way may be obtained by a canal ditch com-

pany, irrigation or drainage district,³⁷ individual, or association³⁸ upon filing with the Secretary of the Interior certain required documents such as corporate articles of incorporation, or other evidence of organization under State law, ownership information, and maps of the location of the proposed right-of-way for drainage or irrigation projects.³⁹

The right-of-way includes the ground occupied by the water of any reservoir, canals, and laterals, up to 50 feet from the marginal limits of the project, and any additional area as the Secretary may deem necessary for the proper operation and maintenance of the right-of-way project.⁴⁰ The holders of ditch and canal rights-of-way also obtain the right to take any material, earth, and stone necessary for the construction of canals and ditches from the adjacent public lands.⁴¹

The right-of-way may not be located so that it interferes with the proper occupation by the Government of such reservations. Maps of right-of-way location are subject to the approval of the administering department.⁴² The right-of-way is effective upon approval of the required maps and certificates and authorizes occupation of the right-of-way only for the purpose of construction, operation, maintenance, and care of the project, and no other purposes.⁴³ Existing ditch and canal rights-of-way may also be used for purposes of a public nature, for water transportation, for domestic purposes, “or for the development of power as subsidiary to the main purpose of irrigation or drainage.”⁴⁴

Public Utility Rights-of-Way and Mineral Access

The 1901 Act, the 1911 Act, and the ditches and canals acts do not address the problems of mineral access. Individuals or business entities seeking permission to use lands in the National Park System for access to adjacent non-Federal lands for the purpose of mineral exploration and development alone will find no legal basis under these laws for access. However, these laws may provide authority to approve rights-of-way over park

lands for utilities systems that may be necessary to support mineral development.⁴⁵

Under each law, the grant of a right-of-way is conditioned on a finding by the Secretary of the Interior that a proposed use is appropriate. The 1901 Act authorizes issuance of a revocable license for use of a right-of-way for electric power, communications, and water projects subject to approval of the Secretary and a finding that the proposed use is "not incompatible with the public interest."⁴⁶ This public interest standard, though seemingly broad, should be construed in light of the declared purposes of the national parks. Any use detrimental to that purpose may be found to be not in the public interest.

The 1911 Act provides for a right-of-way for a term of up to 50 years for electric power transmission and distribution systems and communications facilities subject to approval of the Secretary, and a finding that the use of the right-of-way is "not incompatible with the public interest."⁴⁷

The ditches and canals acts grant a right-of-way for drainage and irrigation projects upon the approval by the Secretary of the project maps and required certificates. The right-of-way continues in effect as long as it is used for its primary declared purpose. Existing canal and ditch rights-of-way may be used for certain limited public and subsidiary purposes but no other occupancy is authorized. Approval of a right-of-way may be denied if the location sought is found to interfere with the Government's proper occupation of the park or reservation.⁴⁸ Therefore, if the proposed use of the right-of-way is not consistent with the purposes of preservation and recreation, it may be denied.

APPLICATIONS FOR RIGHTS-OF-WAY

The Department of the Interior applies the BLM regulations on the applications for and issuance of rights-of-way to applications for rights-of-way across National Park System lands.⁴⁹ Applications for rights-of-way

through park areas are made to the Director of the National Park Service.⁵⁰ Applicants must file a request for a right-of-way, citing the statute(s) or other authority under which it is sought, providing maps and supporting documents, and making a deposit for administrative costs. The applicant agrees to accept all the terms and conditions of issuance set forth in the regulations.

RIGHTS-OF-WAY FOR HIGHWAYS

Federal agencies, States, and local jurisdictions seeking a right-of-way through National Park System lands for federally aided highways and other transportation projects may file a designated route with the Secretary of Transportation.⁵¹ This begins a multi-tier review process. The Secretary of Transportation cooperates with the Secretaries of the Interior, Housing and Urban Development, and Agriculture and the States to develop a transportation plan and program that includes measures to maintain or enhance the natural beauty of the lands involved.⁵²

Federal-local cooperative studies are authorized to determine the most feasible Federal aid for the movement of vehicular traffic through or around national parks so as "to best serve the needs of the traveling public while preserving the natural beauty of these areas."⁵³ If the Secretary of Transportation concludes that Federal park land is reasonably required for a highway or other transportation project and that no prudent or feasible alternative exists, a request for a right-of-way and supporting information is filed with the Secretary of the Interior.⁵⁴ If the Secretary of the Interior does not certify that the proposed right-of-way is contrary to the public interest or inconsistent with the purposes of the park reservation or if he approves the right-of-way subject to conditions deemed necessary for the adequate protection and utilization of the park within 4 months, the Secretary of Transportation may appropriate the necessary land and transfer a right-of-way to the State agency.⁵⁵

FOOTNOTE REFERENCES FOR NATIONAL PARK SYSTEM

¹Department of the Interior, Bureau of Land Management, *Public Land Statistics* 1976, 21.

²16 U.S.C. 1c(a). "Reservation" is a generic term, which refers to any public lands that have been withdrawn for certain specific purposes and thereby segregated from the operation of various other public land laws that authorize the use or disposition of the lands. Lands may be reserved or "withdrawn" by statute, by executive order pursuant to statute, or by executive action subject to an implied inherent withdrawal authority of the President (this last power, to the extent that it exists, has been limited by sections 204 and 704 of the Federal Land Policy and Management Act of 1976, commonly known as the BLM Organic Act, Public Law 94-579, Oct. 21, 1976, 90 Stat. 2743. See 43 U.S.C. 1714). Almost all national parks were created by statute. Many national monuments were originally created by reservations pursuant to the Antiquities Act of 1906, which authorizes the President to establish national monuments in areas of historic or scientific interest or value by public proclamation (16 U.S.C. 431-433). Most national recreation areas were created by cooperative agreement between the Park Service and the Bureau of Reclamation under which lands previously withdrawn for reclamation were subjected to recreation uses.

When the term reservation is used in a statute, particularly older statutes, it includes any lands under the jurisdiction of the Park Service unless specified otherwise.

³16 U.S.C. 1.

⁴16 U.S.C. 1a-1.

⁵43 U.S.C. 1761 et seq.

⁶16 U.S.C. 668dd(d).

⁷43 U.S.C. 1761 et seq.; 16 U.S.C. 532-538.

⁸See 16 U.S.C. 1 et seq.

⁹16 U.S.C. 1a-1, 1c(b).

¹⁰16 U.S.C. 7a-7e.

¹¹16 U.S.C. 8, 8a-8f.

¹²16 U.S.C. 1, 1b(7), 8.

¹³16 U.S.C. 1a-2(h).

¹⁴36 CFR 1.2(g).

¹⁵36 CFR 1.2(h).

¹⁶36 CFR 1.2(i).

¹⁷36 CFR 22.

¹⁸See regulations relating to operation of motor vehicles at 36 CFR 4.19. For snowmobiles, see 36 CFR part 2.34.

¹⁹36 CFR part 3.

²⁰36 CFR 5.6(b) Commercial vehicles are defined as any vehicles "used in transporting moveable property for a fee or profit." 36 CFR 5.6(a).

²¹36 CFR 5.6(c).

²²16 U.S.C. 1c(b), laws establishing individual units of the national parks are codified in Title 16 U.S.C. and in regulations, 36 CFR Pt. 7 and also 36 CFR parts 6, 12, 20, 21, 25, 28, 30.

²³31 Stat. 790, 43 U.S.C. 959 (1970), also codified at 16 U.S.C. 79, 522 (1970). The BLM Organic Act, 43 U.S.C. 1701 et seq., repealed the 1901 Act to the extent it applied to public lands and national forests—leaving only application to named parks "and other reservations." Public Law 94-579, section 703(a), 90 Stat. 2743.

²⁴43 U.S.C. 959. Note, however, that the codification at 43 U.S.C. 79 governing national parks was not amended to include General Grant grove section of Kings Canyon National Park, Calif., as a named park.

²⁵*United States v. Colorado Power CO.*, 240 F. 217 (D. Col. 1916).

²⁶43 U.S.C. 959.

²⁷Act of March 4, 1940, 54 Stat. 41.

²⁸Lee D. Morrison, "Rights-of-Way on Federally Owned Lands: A Journey through the Statutes by Way of the Federal Land Policy and Management Act of 1976," 9 *Transportation Law Journal* 97 (1977), at 111. The 1901 Act was passed after the establishment of Yellowstone National Park, Act of March 1, 1872, c. 24 s1, 17 Stat. 32, and Mount Rainier National Park, Act of March 2, 1899, c. 377 s1, 30 Stat. 993. Neither is mentioned in the Act.

²⁹Act of August 18, 1970, Public Law 91-383, 84 Stat. 825, 16 U.S.C. 1c.

³⁰16 U.S.C. 1c(b).

³¹36 Stat. 1253, 43 U.S.C. 961 (1970) (also codified at 16 U.S.C. 5, 420, 523). Section 5 applies to national parks and other reservations; section 420 to national parks, military, or other reservations; section 961 to public lands, Indian, or other reservations; section 523 applies to national forests. The BLM Organic Act partially repealed the 1911 Act insofar as it applied to public lands and national forests. Public Law 94-579, 90 Stat. 2743, section 703(a).

³²43 U.S.C. 1c(b).

³³43 U.S.C. 961, 16 U.S.C. 5, 420.

³⁴*Id.*

³⁵See, generally, 16 U.S.C. 797 et seq. and regulations thereunder. The Federal Energy Regulatory Commission was formerly the Federal Power Commission.

³⁶The "ditches and canals acts" include: Act of March 3, 1891, c. 561, 26 Stat. 1101; Act of January 13, 1897, c. 11, 29 Stat. 484; Act of May 11, 1898, c. 292, 30 Stat. 404; Act of March 4, 1917, c. 184, 39 Stat. 1197; Act of March 3, 1923, c. 219, 42 Stat. 1437; Act of March 3, 1925, c. 462, 43 Stat. 1145; and Act of May 28, 1926, c. 409, 44 Stat. 668. The "ditches and canals acts" are codified generally at 43 U.S.C. 946 to 954. These laws were repealed in part by the BLM Organic Act as they apply to public lands and national forests. See Public Law 579, section 703(a), 90 Stat. 2743 (1976).

³⁷43 U.S.C. 946.

³⁸43 U.S.C. 948.

³⁹43 U.S.C. 946.

⁴⁰*Id.*

⁴¹Id.

⁴²Id.

⁴³43 U.S.C. 949.

⁴⁴43 U.S.C. 951.

⁴⁵The availability of rights-of-way for utilities may seem useless if there is no means of surface access for the enterprise which the facilities are intended to support. But such split access may be feasible where air or sea transport or a more circuitous surface transport route can be established. It should be taken into account that the costs of utility systems are much more sensitive to additional length than many other transportation systems.

⁴⁶16 U.S.C. 79.

⁴⁷16 U.S.C. 420.

⁴⁸43 U.S.C. 946.

⁴⁹43CFR 2801.1-7(b). See discussion of BLM regulations in previous section on Public Lands.

⁵⁰43CFR 2802. 1-1(a).

⁵¹See laws applicable to the Federal-aid highway system, 23 U.S.C. 101 et seq., and 23 U.S. C. 317.

⁵²23 U.S.C. 138.

⁵³23 U.S. C. 138.

⁵⁴23 U.S.C. 1653(f), commonly known as section 4(f) of the Department of Transportation Act and also found at 23 U.S. C. 138. See discussion of section 4(f) elsewhere in this report.

⁵⁵23 U.S.C. 317.

NATIONAL WILDLIFE REFUGE SYSTEM

| | | | | | |
|------|-------|---------|----------|---------|-------------|
| Th N | W d | R g | S m | Th mp n | h NWRS n d |
| NWRS | dm n | d b h F | h nd W d | d w | nd n h n dm |
| S | h D p | m | h | d b h S | h n |



Photo Credit: The Alaska Coalition

A N W R g w g N Am gg d

wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas.” This system comprises over 30 million acres nationwide, with 22.2 million acres in Alaska.²

There are at least eight statutes that may provide authority for the management policies and purposes of the NWRS.³ The primary authority is found in the National Wildlife Refuge System Administration Act⁴ which makes specific provisions for grants of easements across NWRS lands.⁵ Other statutes, which may provide authority for rights-of-way in wildlife refuges, are the Act of February 15, 1901,⁶ the Act of March 4, 1991,⁷ and the ditches and canals acts.⁸ Rights-of-way through wildlife refuges for federally funded highways and other transportation projects may be obtained under section 4 of the Refuge Administration Act. However, federally aided transportation projects through refuge areas are subject to review under section 4(f) of the Department of Transportation Act.⁹ (The Mineral Leasing Act makes provision for oil and gas pipeline rights-of-way through refuges, but requires prior findings that such use is not inconsistent with the purposes of the refuge.)¹⁰

RIGHTS-OF-WAY UNDER SECTION 4 OF THE REFUGE ADMINISTRATION ACT

The National Wildlife Refuge System Administration Act authorizes the Secretary of the Interior to permit the use of “any area within the system for any purpose, including but not limited to . . . access whenever he determines that such uses are compatible with the major purposes for which such areas were established.”¹¹ The Secretary is further authorized to: “permit the use of, or grant easements in, over, across, upon, through, or under any areas in the system for the purposes such as, but not necessarily limited to, powerlines, telephone lines, canals, ditches,

Note: Footnotes for this section appear on pp. 77-78.

pipelines, and roads including the construction, operation, and maintenance thereof, wherever he determines that such uses are compatible with the purposes for which such areas were established.”¹²

Right-of-way regulations issued by the Fish and Wildlife Service state, “No right-of-way will be approved unless it is determined by the Regional Director to be compatible.”¹³ That term is defined by the regulations: “ ‘Compatible’ means that the requested right-of-way or use will not interfere with or detract from the purposes for which units of the National Wildlife Refuge System are established.”¹⁴

The holder of any right-of-way in a wildlife refuge granted by the Secretary under provisions of the Refuge Administration Act or any other law is required to pay in advance the fair market value or yearly rental value of the right-of-way.¹⁵ If the holder is a Federal, State, or local agency exempted by law from payment requirements, the agency is required to compensate the Secretary by other acceptable means such as the loan of other land, equipment, or personnel to the extent such arrangements are consistent with the objectives of the National Wildlife Refuge System; otherwise the Secretary may waive the compensation requirement.” After deduction of necessary administrative expenses, any proceeds from private right-of-way easements on refuge system lands are deposited to the Migratory Bird Conservation Fund¹⁷ to be used for land acquisition to carry out the purposes of the Migratory Bird Conservation Act¹⁸ and the Migratory Bird Hunting Stamp Act.¹⁹

RIGHTS-OF-WAY UNDER OTHER STATUTES

Lands reserved for fish and wildlife purposes may be subject to the right-of-way provisions of the 1901 Act, the 1911 Act, and the ditches and canals acts, which are laws of general applicability. Although these laws were partially repealed by the Federal Land

Policy and Management Act insofar as they applied to public lands and national forests, their applicability to "other reservations" remains.²⁰ However, the express and broad authorization for wildlife refuge rights-of-way in the Refuge Administration Act would seem to be more favorable to applicants than the trio of special right-of-way laws, especially since payment is required even if access is sought under another statute.²¹ The right-of-way regulations issued by the Fish and Wildlife Service require that all applications for a right-of-way easement be made under the Refuge Administration Act provisions.²² Access use of refuge areas that are also components of the National Wild and Scenic Rivers System or the National Wilderness Preservation System is regulated by the laws covering those systems.²³ Wild and Scenic Rivers System components administered by the Fish and Wildlife Service are subject to the access authority for national parks instead of that for wildlife refuges.²⁴ The Fish and Wildlife Service has declared that construction of transportation facilities in designated refuge wilderness areas will not be allowed without special authorization by Congress.²⁵

RIGHTS-OF-WAY FOR TRANSPORTATION SYSTEMS

Federally funded highways, railways, or waterways may be built through wildlife refuges but they must meet certain requirements. First, the application for a right-of-way must be approved by the Fish and Wildlife Service and the Secretary of the Interior as being compatible with the purposes for which the refuge was established, and arrangements for payment or other compensation must be made.²⁶ Second, under section 4(f) of the Department of Transportation Act of 1966,²⁷ the Secretary of Transportation must review the proposed project. Approval may be granted only if (1) there are no feasible and prudent alternatives to the use of refuge lands, and (z) the program includes all

possible planning to minimize environmental damage.²⁸

The general position of the Fish and Wildlife Service on the use of refuge areas for transportation projects and the use of specific transportation modes within refuges is stated in the Final Environmental Statement for the Operation of the National Wildlife Refuge System:

The use of passenger vehicles, including ORVs is restricted in time and place to protect wildlife, habitat, public safety, and Government property. Many refuges include inland, intracoastal, and in some cases up to a 3-mile strip of coastal waterways. Commercial transportation use of navigable waters is limited primarily to powered boats but significant recreational use occurs in certain areas. Navigable waters are generally not subject to refuge regulations as management must acknowledge State ownership of submerged lands, commitment for navigation purposes, and authorities of other agencies such as the U.S. Coast Guard or U.S. Army Corps of Engineers.

Regulation of access on inland and intracoastal waters is generally necessary to protect wildlife but use of traditional navigation channels is generally permitted. Regulations may include control of methods, times, and routes of access.²⁹

APPLICATIONS FOR RIGHTS-OF-WAY

An applicant for a right-of-way across refuge lands must submit an application and supporting information to the Regional Director of the Fish and Wildlife Service for the area in which the refuge is located.³⁰ The Fish and Wildlife Service has adopted right-of-way procedures and requirements similar to those followed by BLM.³¹

Applicants must pay a nonreturnable application fee³² as well as all costs incurred in processing the application.³³ They must also agree to reimburse the United States for all costs incurred "in monitoring the construction, operation, maintenance, and termination of facilities within or adjacent to the easement or permit area."³⁴ All applications

must include a detailed analysis of the impact of the proposed action on the environment.³⁵ A map or plat accurately describing the right-of-way must accompany each application.³⁶

Easements are generally granted for 50 years or so long as the right-of-way is used for the purposes granted.³⁷ All easements include terms requiring the following:

- Compliance with State and Federal laws and regulations applicable to the project for which the easement is granted and to the lands included in the easement.³⁸
- Soil and resource conservation and protection measures.³⁹
- Fire prevention.⁴⁰
- Rebuilding or repairing roads, fences, structures, and trails destroyed or damaged by construction, and building and maintaining suitable crossings for roads and trails which intersect the right-of-way.⁴¹
- Payment to the United States for damages to lands or property caused by the

applicant and indemnification against any liability for damages arising from occupancy or use of lands under easement.⁴²

- Restoration of the land to its original condition upon revocation and termination.⁴³

The applicant is required to pay the fair market value for use and occupancy of lands subject to an easement.⁴⁴

The Regional Director may suspend or terminate an easement for failure to comply with any terms or conditions of the grant or for abandonment.⁴⁵ He must give the easement holder 60 days notice, during which time the holder may avoid suspension or termination by taking such corrective action as is specified in the notice.⁴⁶ If, at the end of the 60 days, corrective action has not been taken, a determination to that effect by the Regional Director will operate to suspend or terminate the easement, without a hearing.⁴⁷ There are provisions for administrative appeals from an adverse determination.⁴⁸

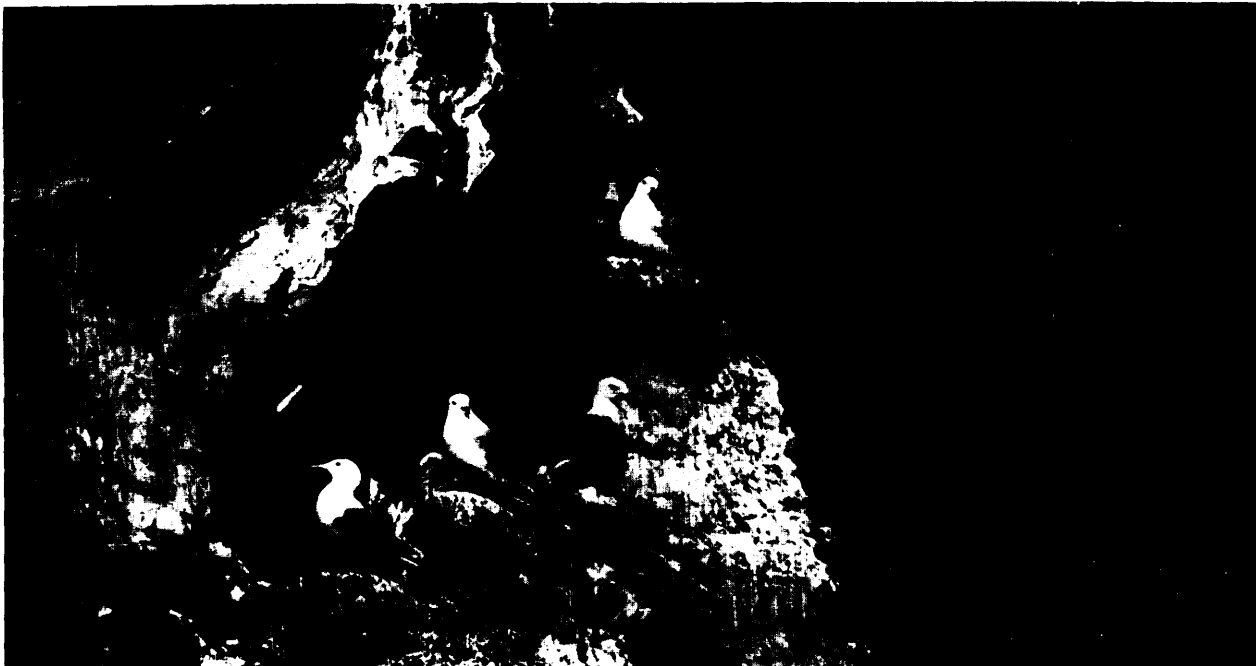


Photo Credit: National Park Service

Kittiwakes, birds of the open ocean, nest on the cliffs of the Seward Peninsula and the islands of the Bering Sea

FOOTNOTE REFERENCES FOR NATIONAL WILDLIFE REFUGE SYSTEM

¹⁶16 U.S.C. 668dd(a)(1). Fish and Wildlife Service regulations provide that: "all wildlife refuge areas are maintained for the fundamental purpose of developing a national program of wildlife conservation and rehabilitation. These areas are dedicated to wildlife found thereon and for the restoration, preservation, development, and management of wildlife habitat; for the protection and preservation of endangered or rare wildlife and their associated habitat; and for the management of wildlife, in order to obtain maximum production for perpetuation, distribution, dispersal, and utilization." 50 CFR 252.

¹⁷Department of the Interior, Bureau of Land Management, *Public Land Statistics 1976*, p. 19.

¹⁸The statutes cited include: 5 U.S. C. 301 which provides general authority to promulgate regulations; 16 U.S.C. 685, 725, 690d which are portions of acts establishing specific NWRS areas; 16 U.S.C. 7-15(i) from the Migratory Bird Conservation Act; 16 U.S.C. 664 from the Fish & Wildlife Coordination Act; 43 U.S.C. 315a from the Taylor Grazing Act; and 16 U.S.C. 460 from the Act of September 28, 1962, as amended by the Act of October 15, 1966, which provides for recreational use of NWRS lands, fish hatcheries, and other conservation areas administered for fish and wildlife purposes. Measures have been introduced in recent sessions of Congress to establish a governing agency and organic act for the NWRS. See, e.g., S. 984, 95th Cong., 1st sess., 123 Cong. Rec. S4020 (daily ed. Mar. 11, 1977); H.R. 2082, 95th Cong., 1st sess., 123 Cong. Rec. H477 (daily ed. Jan. 19, 1977). The National Wildlife Refuge System Administration Act Amendments of 1976, Public Law 94-223, 90 Stat. 199, Feb. 27, 1976, provided that all units of the NWRS would be administered by the Fish and Wildlife Service (previously there had been joint administration of some areas with BLM) and that areas may not be removed from the System without an Act of Congress. Section a(l) of the Act authorized continuance of cooperative programs for the management of resources on Alaska refuge lands. 16 U.S.C. 688dd(a)(1).

¹⁹16 U.S.C. 668dd.

²⁰16 U.S.C. 668dd(d)(1).

²¹43 U.S.C. 959.

²²43 U.S.C. 961.

²³43 U.S.C. 946-954.

²⁴49 U.S.C. 1653(f). 4(f) review only occurs when funds appropriated to the Department of Transportation are used.

²⁵30 U.S.C. 185(b)(1).

²⁶16 U.S. c. 668dd(d)(1).

²⁷Id.

²⁸50 CFR 29.21-l(a). Regulations for the grant of easements for rights-of-way are set out at 50 CFR 29.21. These regulations were recently extensively revised to

reflect amendments to the Mineral Leasing Act and the National Wildlife System Administration Act Amendments of 1974. See 42 F.R. 43916, Aug. 31, 1977.

²⁹50 CFR 29.21(h).

³⁰16 U.S.C. 668dd(d)(2).

³¹Id.

³²Id.

³³16 U.S. C. 715 et seq.

³⁴16 U.S.C. 718 et seq.

³⁵Public Law 94-579, section 703(a), 90 Stat. 2743. All wildlife refuges are reservations. A discussion of the 1901 Act, the 1911 Act, and the ditches and canals acts is contained in the section on National Parks.

³⁶16 U.S.C. 668dd(d)(2).

³⁷50 CFR 19.21-l(a) as revised, 42 F.R. 43917, Aug. 31, 1977. One commentator has observed that these old laws are no longer cited as right-of-way authority in the regulations issued for NWRS. See Lee D. Morrison, *Rights-of-Way on Federally Owned Lands: A Journey Through the Statutes by Way of the Federal Land Policy and Management Act of 1976*, 9 *Transportation Law Journal* 113 (1977).

³⁸See discussion of these systems in other sections of this report.

³⁹16 U.S.C. 1284(g).

⁴⁰Department of the Interior, Fish and Wildlife Service, *Final Environmental Statement on the Operation of the National Wildlife Refuge System*, p. III-82 (1976).

⁴¹16 U.S.C. 668dd(d).

⁴²49 U.S.C. 1653(f).

⁴³Id.

⁴⁴Final Environmental Statement, *Supra*, note 25, III-82.

⁴⁵50 CFR 29.21-2.

⁴⁶The regulations, as revised, are set forth at 50 CFR 29.21 and 42 F.R. 43916, Aug. 31, 1977, *supra*, note 13.

⁴⁷50 CFR 29.21-l(a)(2)(i). This requirement does not apply to State or local governments or their agencies and instrumentalities unless a pipeline easement is sought.

⁴⁸50 CFR 29.21 -2(a)(2)(ii)(D).

⁴⁹50 CFR 29.21-2(a)(3)(i). See *infra*, note 44.

⁵⁰50 CFR 29.21-2(a)(4). The analysis must be sufficient to allow FWS to prepare an impact statement under NEPA, if required. It must also comply with the requirements of the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Archeological and Historical Preservation Act of 1974 (16 U.S.C. 469 et seq.), E.O. 11593 "Protection and Enhancement of the Cultural Environment," May 13, 1971 (36 F.R. 8921) and "Procedures of Historic and Cultural Properties" (36 F.R. 800).

⁵¹50 CFR 29.21-2(b). It must be sufficiently detailed to locate accurately the right-of-way on the ground.

⁵²50 CFR 29.21-3(a).

³⁸50 CFR 29.21-4(b)(1).

³⁹50 CFR 29.21-4(b)(4).

⁴⁰50 CFR 29.21-4(b)(5).

⁴¹50 CFR 29.21-4(b)(6).

⁴²50 CFR 29.21-4(b)(7).

⁴³50 CFR 29.21-4(b)(10). This requirement may be waived in writing.

⁴⁴50 CFR 29.21-7. Payment may be made in a lump sum or through annual fair market rental payments. Federal, State, or local agencies, exempted from payment by Federal law, shall compensate by other means such as making land available or loaning equipment or personnel. A separate provision requires a nonreturnable payment within 60 days of the grant of an easement under a schedule based on the length of the easement, 50 CFR 29.21-2(a)(3)(ii). This payment is to defer costs incurred in monitoring activities on the easement. If actual costs for monitoring are greater, additional re-

imbursement can be required, 50 CFR 29.21(a)(3)(ii)(B).

⁴⁵50 CFR 29.21-4(9). A rebuttable presumption of abandonment is raised by deliberate failure to use all or part of the easement for a continuous 2-year period.

⁴⁶50 CFR 29.21-4(9). The Regional Director may extend the 60-day period when extenuating circumstances or other compelling reasons warrant.

⁴⁷50 CFR 29.21-4(9). Holders of rights-of-way under the Mineral Leasing Act are entitled to a formal hearing conducted pursuant to 5 U.S.C. 554 prior to a final decision to suspend or terminate. Other easement holders do not have the right to this procedure.

⁴⁸50 CFR 29.22. Appeals may be taken from any final disposition by the Regional Director to the Director. Decisions of the Director may be appealed to the Secretary of the Interior. The procedure for such appeals is set out at 43 CFR part 4, subpart G.

NATIONAL FOREST SYSTEM

The National Forest System consists of over 187.5 million acres¹ of forest, rangeland, and other lands and waters administered by the Forest Service of the Department of Agriculture.² The national forests are established and maintained “to improve and protect the forest,” to secure “favorable conditions of water flow,” “to furnish a continuous supply of timber,”³ and for other outdoor recreation, range, timber, watershed, fish, and wildlife purposes.⁴ The national forests are managed on a multiple-use sustained-yield basis⁵ with “due consideration” given to “the relative values of the various resources in a particular area,” including wilderness values.⁶ Under the Forest and Rangeland Renewable Resources Planning Act of 1974,⁷ units of the National Forests System are to be administered according to land and resource management plans prepared under the Renewable Resources Program developed by the Department of Agriculture as part of a continuing responsibility to inventory and assess renewable resources uses and supplies.⁸ Development of mineral resources is a generally recognized and accepted use of national forests.⁹

Clear statutory authority for the use of na-

Note: Footnotes for this section appear on pp. 81-82.

tional forest lands for access purposes is found in Title V of the Federal Land Policy and Management Act of 1976¹⁰ and in laws authorizing development of the National Forest Transportation System.¹¹ 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 the general laws governing the National Forest System. Access uses of these areas are limited and are discussed under sections of this report on those systems.

THE BLM ORGANIC ACT

The Federal Land Policy and Management Act of 1976, commonly referred to as the BLM Organic Act, established comprehensive right-of-way authorization for the Secretary of the Interior for the public lands and the Secretary of Agriculture for the national forests, except for those areas designated as wilderness. The Act repealed many older right-of-way laws including the Act of February 15, 1901,¹² the Act of March 4, 1911,¹³ and the ditches and canals acts¹⁴ to the extent that they applied to public lands and national forests.¹⁵

Under Title V, permits for rights-of-way may be granted for:

- Systems and facilities for impoundment, storage, transportation, or distribution of water;
- Pipelines and other systems for transportation and storage of liquids and gases other than water, or petroleum or natural gas products;
- Pipelines, slurries, and other transportation systems for solid materials and related storage facilities;
- Electric power projects (subject to compliance with Federal Energy Regulatory Commission (FERC) requirements);
- Communications systems;
- Transportation purposes such as roads, highways, canals, and airways, except where they are associated with commercial recreation facilities on National Forest System lands; or
- Other necessary transportation systems or other systems or facilities in the public interest requiring rights-of-way over National Forest System lands. ”

The applicant for a right-of-way must provide the Secretary with any contracts, plans, and other information reasonably related to the use of the right-of-way that are needed for a decision on the issuance or renewal of the right-of-way and on any terms or conditions required. ¹⁷ When appropriate, the Secretary may also require the applicant to provide information on the competitive effect of the right-of-way. Business entities must disclose ownership and other relevant financial information. ¹⁹ If a proposed use might have a significant impact on the environment, the applicant is required to submit a plan for the construction, operation, maintenance, and rehabilitation of the right-of-way in compliance with stipulations and regulations issued by the Secretary prior to approval of the application. ²⁰

Rights-of-way will be granted for a reasonable term for the area occupied by the project

and necessary for its safe operation and for such additional area as needed for the construction, maintenance, or termination of the right-of-way project. ²¹ The use of corridors for rights-of-way in common maybe required where practical to minimize adverse environmental impacts. ²² The holder must pay the administrative costs associated with the issuance and monitoring of the right-of-way, as well as for the fair market value of the right-of-way, unless such payment is waived or other financing arrangements exist. ²³ Each grant of a right-of-way must contain enforceable provisions requiring compliance with applicable Federal and State standards for health, safety, and environmental protection, compliance with conditions for protection of scenic, esthetic, and fish and wildlife values, and protection of the interests of other lawful users and the public in the lands covered by the right-of-way. ²⁴ No right-of-way will be issued or renewed unless the Secretary determines that the applicant has “the technical and financial capability to construct the project for which the right-of-way is requested” in accordance with all terms and conditions imposed. ²⁵

THE NATIONAL FOREST TRANSPORTATION SYSTEM

In the Act of October 13, 1964²⁶ Congress declared that “the construction and maintenance of an adequate system of roads and trails within and near national forests and other lands administered by the Forest Service is essential if increasing demands for timber, recreation, and other use of such lands are to be met.”²⁷ The anticipated effects of the existence of such a road system would be an increase in “the value of timber and other resources tributary to such roads” and improved ability of the Secretary of Agriculture to provide for the “intensive use, protection, development, and management of these lands under principles of multiple use and sustained yield of products and services.”²⁸

To promote development of a forest roads and trails system, the Secretary of Agricul-

ture is authorized to grant permanent or temporary easements for road rights-of-way over national forests or other lands administered by the Forest Service or related lands in which the Department has an interest under the terms of the grant to it.²⁹ The easement may be terminated by consent of the owner, by condemnation, or for non-use for a period of 5 years.³⁰ The Secretary may, under the forest development road program, provide for the acquisition, construction, and maintenance of such roads within and near National Forest System lands.³¹ These roads are to be located and built in such a manner as to permit maximum economy in timber harvesting, while meeting requirements for protection, development, and management of lands and resources in surrounding non-Federal lands. Roads may be financed by departmental appropriations, requirements on the purchasers of national forest timber and resources, cooperative financing with public or private agencies or individuals, or a combination of these methods.³² The Secretary may also require users of Forest Service roads to maintain or reconstruct the roads in relation to their proportionate share of total use or to provide a deposit against the costs of maintenance or reconstruction.³³

Congress has directed that the development of a transportation system to serve the national forests be carried forward in time "to meet anticipated needs on an economical and environmentally sound basis and that methods chosen to finance the construction and maintenance of the system should be such as to enhance local, regional, and national benefits."³⁴ All roads constructed on National Forest System lands must meet "standards appropriate for the intended uses, considering safety, cost of transportation, and impacts on land and resources."³⁵ Unless a permanent road is necessary as part of the National Forest Transportation System, any road constructed in connection with a timber contract or other lease or permit must be designed so that vegetative cover will be reestablished by natural or artificial means within 10 years of termination of operation.³⁶

CONFLICT BETWEEN ACCESS PROVISIONS

The two statutes discussed above differ in some material respects. Section 510(a) of the BLM Organic Act provides that, in the event of any conflict between the requirements of Title V and the Act of October 13, 1964, the latter Act will prevail.³⁷ When dealing with components of the National Forest Transportation System, the Secretary need not apply any provisions of Title V. Rights-of-way that are not roads built under the 1964 Act are governed by Title V. A proviso states that it shall not be mandatory for the Secretary of Agriculture to apply limitations on rights-of-way, ownership disclosure requirements, or any other condition contrary to established practices under the 1964 Act when dealing with any forest roads.³⁸ A clear implication of the proviso, however, is that the Secretary may apply such provisions at his discretion.

Forest Service regulations implementing the 1964 Act³⁹ stress a policy of coordinated planning that takes into account the transportation and resource development needs of surrounding communities.⁴⁰ Each unit of the National Forest System is to have a plan for a transportation system for the protection and utilization of the area, or the development of resources on which communities within or adjacent to the national forest are dependent.⁴¹ Use of existing roads and trails in the National Forest System is permitted subject to certain regulations for protection and administration of lands and apportionment of costs.⁴² Easements for construction or use of a road across Forest Service lands may be granted for a reciprocal benefit, or conditioned on payment of reasonable charges and acceptance of necessary and appropriate terms and conditions.⁴³ Applications under the 1964 Act are made to the Chief of the Forest Service. Permits may be required for commercial hauling of non-Federal forest products or other commodities and materials on designated "special service roads" conditioned on meeting proportionate costs of use or appropriate terms and conditions of opera-

tion.⁴⁴ In circumstances where transportation systems serving forest lands and intermingled and adjacent non-Federal lands are undeveloped or inadequate, the Chief of the Forest Service may join in cooperative planning, financing, construction, and maintenance of roads to the extent that it is feasible and advantageous to the United States.⁴⁵

ROADLESS AREA REVIEW

The Forest Service is currently engaged in a major review of all potential wilderness areas in the forest system called the Roadless Area Review and Evaluation (RARE II).⁴⁶ It has identified approximately 67 million acres of roadless areas, including 18 million acres in Alaska, which might be suitable for designation as wilderness.⁴⁷

As a result of an out-of-court settlement, the Forest Service has agreed that it will

prepare an environmental impact statement for any proposed actions that might affect the wilderness potential of roadless lands in the RARE II inventory.⁴⁸ To minimize disruption and uncertainty, the Forest Service hopes to conclude the evaluation of all areas in the inventory by early 1979, at which time inventoried lands will be divided into three categories—"recommended wilderness," "further evaluation," and "no further wilderness consideration."⁴⁹ Areas in the first two categories will be managed to protect wilderness potential and access may well be limited.⁵⁰ The size of final wilderness designation is uncertain. The Forest Service has established a program goal in its Renewable Resource Program that calls for the eventual designation of 25 million to 30 million acres of forest land in the wilderness system (as of December 1977, there were 12.5 million acres of land in the National Wilderness Preservation System).⁵¹

FOOTNOTE REFERENCES FOR NATIONAL FOREST SYSTEM

¹Bureau of Land Management, *Public Land Statistics* 1976. There are 20.7 million acres of National Forest System lands in Alaska.

²The National Forest System is defined in the Forest and Rangeland Renewable Resources Planning Act of 1974 as "all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under title 111 of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1010 et seq.), and other lands, waters, or interest therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system." 16 U.S.C. 1609.

³16 U.S.C. 475.

⁴16 U.S.C. 528.

⁵*Id.* As defined in the Multiple-Use Sustained-Yield Act of 1960, "multiple use" means: the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic

adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output. 16 U.S.C. 531(a).

"Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land. 16 U.S.C. 531(b).

⁶16 U.S.C. 529.

⁷16 U.S.C. 1601 et seq., as amended by the National Forest Management Act of 1976, Public Law 94-588, 90 Stat. 2949.

⁸16 U.S.C. 1604. Until a plan is developed for a given unit, management continues under existing plans, 16 U.S.C. 1604(c).

⁹16 U.S.C. 528. The Multiple-Use and Sustained-Yield Act of 1969.

¹⁰43 U.S.C. 1761 et seq.

¹¹16 U.S.C. 532-538, 16 U.S.C. 1608.

¹²43 U.S.C. 959, 16 U.S.C. 522.

¹³43 U.S.C. 961, 16 U.S.C. 523.

¹⁴43 U.S.C. 946-951,

¹⁵For a discussion of these laws, see section on National Parks.

¹⁶43 U.S.C. 1761(a).

¹⁷43 U.S.C. 1761(b)(l).

¹⁸Id.

¹⁹43 U.S.C. 1761(b)(2).

²⁰43 U.S.C. 1764(d).

²¹43 U.S.C. 1764(a).

²²43 U.S.C. 1763.

²³43 U.S.C. 1764(g).

²⁴43 U.S.C. 1765.

²⁵43 U.S.C. 1764(j).

²⁶Public Law 88-657, 78 Stat. 1089, 16 U.S.C. 532-538.

²⁷16 U.S.C. 532.

²⁸Id.

²⁹16 U.S.C. 533.

³⁰16 U.S.C. 534.

³¹16 U.S.C. 535.

³²Id. When a higher quality road is needed than that necessary for purchasers' removal of forest resources or timber, the purchasers may be required to meet the costs proportionate to their use.

³³16 U.S.C. 537.

³⁴16 U.S.C. 1608(a).

³⁵16 U.S.C. 1608(C).

³⁶16 U.S.C. 1608(b).

3743 U.S.C. 1770(a).

³⁸Id.

³⁹The regulations are at 36 CFR 212.1. It should be noted that these regulations address issues germane to the development of a transportation system by the Government. With the exception of provisions for "special service roads," there is little that addresses fact situations involving applicants seeking a right-of-way for their own use.

⁴⁰See 36 CFR 212.1(c), 212.2.3, 212.8(a),212.0(d).

⁴¹36 CFR 212.3. The regulations define a forest development transportation plan as a "plan for the system of access roads, trails, and airfields needed for the protection, administration, and utilization of the national forests and other lands administered by the Forest Service, or the development and use of resources upon which communities within or adjacent to the national forests are dependent." 36 CFR 212,1(c).

⁴²36 CFR 212.7,212.12.

⁴³36 CFR 212.10

⁴⁴36 CFR 212.10.

⁴⁵36 CFR 212.9(d).

⁴⁶The background and history of RARE II and its predecessor, RARE I, are highly involved. A summary may be found in Senate Committee on Energy and Natural Resources, *Roadless Area Review and Evaluation*, Publication 95-92, February 1978, (committee print). The Forest Service has issued no rules or regulations for the management of the RARE II process. Policy directives have come from Interim Directives in the Forest Service Manual or from the "RARE II Notebook" compiled by Forest Service staff personnel working on RARE II.

⁴⁷42 F.R. 59688, Nov. 18, 1977. An accelerated land management program is being undertaken in the Tongass National Forest which contains 1.3 million acres of roadless area. Forest Service Manual, chapter 8260, Interim Directive No. 5, p. 9.

⁴⁸Statement of Dr. M. Rupert Cutler, Assistant Secretary for Conservation, Research, and Education, Department of Agriculture, committee print, *supra*, note 46, p. 5. Environmental impact statements are a normal component of land management plans required by section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974. Forest Service decisions on access must be consistent with the land management plan.

⁴⁹RARE II Notebook, Inset HI, "RARE II Process.

"Protective management will not be accomplished through the land management planning process, *supra*, note 48. Most of the areas that will be included in the two categories presently are not used for access or any other activity; they are considered "de novo wilderness," Access or any other new activity can only be permitted pursuant to a land management plan or by other action of the Forest Service requiring an EIS.

[S] Department of Agriculture, *Final Environment* Statement and Renewable Resource Program, 1977 to 2020, p. 97. (1976). See also committee print, *supra*, note 46, p. 36, (Statement of Dr. Cutler). In June 1978 the Forest Service issued the Draft Environmental Statement on Roadless Area Review and Evaluation (RARE 11) consisting of a national programmatic volume and 20 State and regional supplemental volumes.

NATIONAL WILD AND SCENIC RIVERS SYSTEM

The Wild and Scenic Rivers Act of 1968¹ established a national policy that selected rivers and their surrounding environments possessing “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values shall be preserved and protected in a free-flowing condition for the benefit of present and future generations.”² The National Wild and Scenic Rivers System was created to implement this policy. It consists of all river units included by congressional designation or by State action (subject to approval by the Secretary of the Interior after review by appropriate Federal agencies).³

ADMINISTRATION OF THE SYSTEM

Congressionally designated components of the National Wild and Scenic Rivers System are administered by either the Secretary of Agriculture through the Forest Service or by the Secretary of the Interior through one of the Department’s land management agencies, principally the National Park Service and the Fish and Wildlife Service. State-designated rivers are under State administration consistent with the purposes of the Wild and Scenic Rivers Act. There are three classifications of rivers in the system:

1. Wild river areas—Those rivers or sections of rivers, which are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted.
2. Scenic river areas—Those rivers or sections of rivers, which are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.
3. Recreational river areas—Those rivers or sections of rivers, which are readily

accessible by road or railroad, which may have some development along their shorelines, and which may have undergone some impoundment or diversion in the past.⁴

A component of the National Wild and Scenic Rivers Systems is managed “in such manner as to protect and enhance the values which caused it to be included in the system, without insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.”⁵ Management plans for each component river may allow varying degrees of protection and development based on its special attributes. Primary emphasis, however, must be given to protecting esthetic, scenic, historic, archeologic, and scientific features.⁶

Wild and scenic rivers under the jurisdiction of the National Park Service are part of the National Park System and are subject to laws governing the administration of the park system. Components administered by the Fish and Wildlife Service are part of the National Wildlife Refuge System and subject to all laws applicable to wildlife refuges. The Secretary of the Interior may also use any general statutory authority relating to national parks, and any other authority available to him for recreation and preservation purposes or for natural resources conservation and management, which he deems appropriate for the administration of any component of the Wild and Scenic Rivers System. The Secretary of Agriculture may use any statutory authority relating to the National Forest System for purposes of the administration of components of the Wild and Scenic Rivers System.⁸ Whenever there is a conflict between the provisions of the Wild and Scenic Rivers Act and such other authority, the more restrictive provisions are applied.⁹ Components of the National Wild and Scenic Rivers System within designated wilderness areas are managed according to provisions of

Note: Footnotes for this section appear on p. 88.

both systems, and in case of conflict between provisions of the two Acts, the Wilderness Act provisions shall be applied.¹⁰

RIVER STUDIES

Any wild, scenic, or recreational river area possessing one or more scenic, recreational, archeologic, or scientific values and in a free-flowing condition, or upon restoration to such condition, may be considered for inclusion in the Wild and Scenic Rivers System. As of December 1976, 16 rivers have been designated as components of the system, and 58 rivers have been nominated by Congress for study. (See tables 2 and 3.) No Alaskan rivers have been designated or nominated for study. All Alaska National Interest Lands proposals contain some wild and scenic rivers designations. The Secretary of the Interior and the Secretary of Agriculture are responsible for conducting studies of all rivers nominated by Congress as potential wild and scenic rivers, and submitting a report on the suitability of each river to the President, who, in turn, forwards his recommendation to Congress.¹¹ Cooperation of appropriate State and local governments is sought, and reports may be prepared as joint

Federal-State efforts. Priority is given to the study of those potential additions to the system where there is the greatest likelihood of development and there is the greatest proportion of private lands.¹² Proposals for inclusion of a river in the system must be accompanied by a report to Congress and the President showing the characteristics of the area that affect its suitability for inclusion:

- The current status of land ownership and use;
- The effect of inclusion on potential land and water uses;
- The proposed administering agency;
- The extent to which cost and administration may be shared with State or local government; and
- The estimated costs of acquiring necessary lands and interests in land and administrative costs.¹³

Prior to recommendation to Congress, the report is reviewed by the Secretaries of the Interior, Agriculture, and the Army, and the Chairman of the Federal Energy Regulatory Commission (FERC, formerly the Federal Power Commission), and the heads of other affected Federal agencies; and if non-Federal

Table 2.-Component Rivers of the National Wild and Scenic Rivers System*

Original components, designated in October 1968

- | | |
|-----------------------------------|--------------------------------|
| 1. Clearwater, Middle Fork, Idaho | 5. Rogue, Oreg. |
| 2. Eleven Point, Mo. | 6. Saint Croix, Minn. and Wis. |
| 3. Feather, Calif. | 7. Salmon, Middle Fork, Idaho |
| 4. Rio Grande, N.Mex. | 8. Wolf, Wis. |

Later additions

- | | |
|---|---|
| 9. Lower Saint Croix, Minn. (added by Congress in 1972) | 13. Allagash Wilderness Waterway, Maine (added by State action in 1970) |
| 10. Chattooga, N. C., S. C., and Ga. (added by Congress in 1974) | 14. Little Miami, Ohio (added by State action in 1973) |
| 11. Rapid, Idaho (added by Congress in 1975) | 15. Little Beaver, Ohio (added by State action in 1975) |
| 12. Upper Middle Snake, Idaho and Oreg. (added by Congress in 1975) | 16. New River, N.C. (added by State action in 1976) |

● Only the names of the river, forks, and States are given here; the particular segment or segments designated by Congress are specified in 16 U.S.C. 1274, as amended. Further information about the rivers added by State action may be obtained from appropriate State agencies.

Table 3.—Rivers Designated as Potential Additions to the National Wild and Scenic Rivers System*

Designations made in October 1968

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. Allegheny, Pa. 2. Bruneau, Idaho 3. Buffalo, Term. 4. Chattooga, N. C., S. C., and Ga. 5. Clarion, Pa. 6. Delaware, Pa. and N.Y. 7. Flathead, Mont. 8. Gasconade, Mo. 9. Illinois, Oreg. 10. Little Beaver, Ohio 11. Little Miami, Ohio 12. Maumee, Ohio and Ind. 13. Missouri, Mont. 14. Moyie, Idaho | <ol style="list-style-type: none"> 15. Obed, Term. 16. Penobscot, Maine 17. Pere Marquette, Mich. 18. Pine Creek, Pa. 19. Priest, Idaho 20. Rio Grande, Tex. 21. Saint Croix, Minn. and Wis. 22. Saint Joe, Idaho 23. Salmon, Idaho 24. Skagit, Wash. 25. Suwanee, Ga. and Fla. 26. Upper Iowa, Iowa 27. Youghiogheny, Md. and Pa. |
|--|---|

Designations made in January 1975

- | | |
|--|--|
| <ol style="list-style-type: none"> 28. American, Cal if. 29. Au Sable, Mich. 30. Big Thompson, Col. 31. Cache la Poudre, Col. 32. Cahaba, Ala. 33. Clark's Fork, Wyo. 34. Colorado, Col. and Utah 35. Conejos, Cot. 36. Elk, Col. 37. Encampment, Col. 38. Green, Col. 39. Gunnison, Col. 40. Illinois, Okla. 41. John Day, Oreg. 42. Kettle, Minn. | <ol style="list-style-type: none"> 43. Los Pines, Col. 44. Manistee, Mich. 45. Nolichucky, Term. and N.C. 46. Owyhee, South Fork, Oreg. 47. Piedra, Col. 48. Shepaug, Corm. 49. Sipsy Fork, West Fork, Ala. 50. Snake, Wyo. 51. Sweetwater, Wyo. 52. Tuolumne, Cal if. 53. Upper Mississippi, Minn. 54. Wisconsin, Wise. 55. Yampa, Col. 56. Dolores, Col. |
|--|--|

Designation made in December 1975

57. Lower Middle Snake, Idaho, Oreg., and Wash.

Designation made in October 1976

58. Housatonic, Corm.

● Only the names of the rivers, forks, and States are given here; the particular segment or segments designated for study are specified in 16 U.S.C. 1276, as amended.

lands are involved, the Governor(s) of the affected State(s). The comments received are included in the submission to the President and Congress.¹⁴ The final determination is made by Congress. Historically, however, some rivers have been included directly in the system without prior nomination and study.¹⁵

PROTECTIONS AFFORDED WILD AND SCENIC RIVERS

Restrictions on Private Development

Once designated as components of the system, river areas receive several types of pro-

tection. Some activities of private landowners, which might jeopardize the character of the river, can be restricted by the purchase of land or the acquisition of scenic easements” within the boundaries of the administrative unit. The Act authorizes the appropriation of funds for the acquisition of land and scenic easements,¹⁷ but it places some stringent limits on the scope of this approach.

The first limit is found in the boundaries of the administrative unit. Boundaries may include no more than an average of 320 acres per mile on both sides of the river,¹⁸ i.e., an average of one-quarter of a mile on a side. Within these boundaries, the Secretaries of the Interior and Agriculture cannot purchase title to an average of more than 100 acres per mile.¹⁹ Furthermore, they may not condemn property if more than 50 percent of the total area is owned by Federal, State, and local governments,²⁰ nor may they condemn any property within an incorporated city, village, or borough that has in force “satisfactory zoning ordinances” designed to protect the river area.²¹ In areas of extensive private landownership, regulation by purchase must, of necessity, depend on the purchase or condemnation of scenic easements within the river area boundaries.²²

Restrictions on Water Resource Projects

The plenary Federal power over navigable waters forms the basis for a second type of protection. The Act restricts water resources projects and other activities which directly affect river areas of the system. FERC may not license water resources or other projects “on or directly affecting a river in the system.”²³ Other Federal agencies may not assist projects which would have a “direct and adverse effect on the values for which such river was established.”²⁴ However, the Act does not prohibit projects above or below the designated river area that do not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on October 2, 1968, the date the Act was passed.²⁵ No Federal agency may recommend authorization of, or appro-

priations for, a water resources project having a direct and adverse effect on protected values of a component river area without notifying the Secretary of the administering department and Congress of its intention and the possible effects on the protected values.²⁶

Rivers nominated for potential inclusion in the system are also subject to restrictions on water resources projects until 1978 or for 3 years after nomination, whichever is later, and during any additional time necessary to complete study and congressional actions.²⁷ In addition, the Secretaries of the Interior and Agriculture and the heads of other Federal agencies must review their management policies and activities affecting lands under their jurisdiction that include, border, or abut river areas nominated as potential components and determine the actions necessary to protect the river area during the period of review with particular attention given to “scheduled timber harvesting, road construction, and similar activities” which might be contrary to the purposes of the Act.²⁸

Restrictions on Federal Land Management Agencies

The Act also restricts the ability of Federal land management agencies administering units of the system to take or permit actions that would detrimentally affect wild and scenic rivers.

Each river is administered for the protection and enhancement of the values that justified its inclusion in the system.²⁹ Each component is also managed according to the general statutory authority of the administering agency with the most restrictive provisions of law applying in case of any conflict.³⁰ River areas may thus become doubly or triply protected as wild, scenic, or recreational rivers, as units of national conservation systems, i.e., national parks, wildlife refuges, or forests, and as part of the National Wilderness Preservation System. The administering agency must cooperate with the Secretary of the Interior and the appropriate water pollution control agencies for the purpose of elimi-

nating or diminishing the pollution of waters in the component river area.³¹

RIGHTS-OF-WAY

The Wild and Scenic Rivers Act authorizes “easements and rights-of-way upon, over, under, across, or through any component of the National Wild and Scenic Rivers System.”³² Rights-of-way across any component river areas administered by the Secretary of the Interior are issued in accordance with laws applicable to the National Park System.³³ Rights-of-way for components administered by the Secretary of Agriculture are issued under laws relating to the National Forest System.³⁴ 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.

The principal legal bases for the grant of easements or rights-of-way in National Park System lands are found in (a) the general authority to manage the national parks in conformance with the purposes of preservation and recreation;³⁵ (b) the Act of February 15, 1901, granting revocable rights-of-way for electric powerlines, water, and communications projects on a finding that the use is “not incompatible with the public interest;”³⁶ (c) the Act of March 4, 1911, which grants a right-of-way for a period of up to 50 years for communications and electric power systems subject also to a finding that the project is “not incompatible with the public interest;”³⁷ and (d) the ditches and canals acts,³⁸ which

confer a right-of-way for drainage and irrigation projects subject to the filing of necessary maps and documents and approval of the location as one not interfering with proper occupancy by the Government.

Easements through wild and scenic rivers units administered by the Fish and Wildlife Service are to be granted under park system laws³⁹ instead of the specific right-of-way provisions for wildlife refuge system lands.⁴⁰

Rights-of-way across any wild and scenic rivers managed by the BLM would also be issued under Park Service standards, rather than provisions applicable solely to public lands.

The Secretary of Agriculture has general right-of-way authority for forest system lands under Title V of the Federal Land Policy and Management Act,⁴¹ and has additional authority to grant easements for roads and trails under laws relating to development of the National Forest Transportation System.⁴²

Other provisions of the Wild and Scenic Rivers Act that are relevant to access to minerals on non-Federal land are: (a) the review process for potential rivers, which includes an assessment of the effects of the designation on the existing and potential uses of the lands and waters involved;⁴³ (b) the scenic and recreational river classifications, which allow roads and some development;⁴⁴ and (c) the provision assuring the existing rights of any State, including the right of access, to the bed of navigable waters located in a component river area.⁴⁵

FOOTNOTE REFERENCES FOR NATIONAL WILD AND SCENIC RIVERS SYSTEM

¹16 U.S.C. 1271 et seq.

²16 U.S.C. 1271. As defined in the Wild and Scenic Rivers Act: " 'Free-flowing,' as applied to any river or section of a river, means existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence, however, of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the national wild and scenic rivers system shall not automatically bar its consideration for such inclusion: Provided, that this shall not be construed to authorize, intend, or encourage future construction of such structures within components of the National Wild and Scenic Rivers System. " 16 U.S.C. 1286(b).

³A listing of component rivers and potential additions to the National Wild and Scenic Rivers System is included in tables 2 and 3. A river may be included by State action if: (1) it is designated as a wild, scenic, or recreational river pursuant to State law; (2) it is permanently administered by an agency or political subdivision of the State without expense to the United States; and (3) the Secretary of the Interior, upon application by the Governor of the State, finds that it meets the criteria in the Act and approves it for inclusion in the System. 16 U.S.C. 1274.

⁴16 U.S.C. 1273(b).

⁵16 U.S.C. 1281(a).

⁶Id.

⁷16 U.S.C. 1281(c).

⁸16 U.S.C. 1281(d).

⁹16 U.S.C. 1281(c).

¹⁰16 U.S.C. 1281(b).

¹¹16 U.S.C. 1275(a).

¹²Id.

¹³Id.

¹⁴16 U.S.C. 1275(b) and(c).

¹⁵For example, eight original component rivers and the Rapid River, Idaho and Upper Middle Snake River, Idaho and Oregon were included by direct congressional action. Act of December 31, 1975, Public Law 94-199, section 3(a), 89 Stat. 1117.

¹⁶A scenic easement for purposes of the Wild and Scenic Rivers Act, "means the right to control the use

of land (including the air space above such land) within the authorized boundaries of a component of the wild and scenic rivers system, for the purpose of protecting the natural qualities of a designated wild, scenic, or recreational river area, but such control shall not affect, without the owner's consent, any regular use exercised prior to the acquisition of the easement. " 16 U.S.C. 1286(c).

¹⁷16 U.S.C. 1277(a).

¹⁸16 U.S.C. 1274(b).

¹⁹16 U.S.C. 1277(a).

²⁰16 U.S.C. 1277(b).

²¹16 U.S.C. 1277(c).

²²Condemnation of easements is specifically exempted from the acreage limitations of 16 U.S.C. 1277(a).

²³16 U.S.C. 1278(a).

²⁴Id.

²⁵Id.

²⁶16 U.S.C. 1278(c).

²⁷16 U.S.C. 1281.

²⁸16 U.S.C. 1283(a).

²⁹16 U.S.C. 1281.

³⁰16 U.S.C. 1281(c).

³¹16 U.S.C. 1283(c).

³²16 U.S.C. 1284(g).

³³Id.

³⁴Id.

³⁵16 U.S.C. 1 et seq. See discussion in section on National Parks.

³⁶Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U.S.C. 959, 16 U.S.C. 79,522.

³⁷Act of March 4, 1911, c.238, 36 Stat, 1253,43 U.S.C. 961, 16 U.S.C. 5,420,523.

³⁸43 U.S.C. 946-954.

³⁹16 U.S.C. 1284(g).

⁴⁰16 U.S.C. 668dd(d)(1).

⁴¹43 U.S.C. 1761 et seq. See discussion in section on National Forest System.

⁴²16 U.S.C. 532-538.

⁴³16 U.S.C. 1275(a).

⁴⁴16 U.S.C. 1273(b).

⁴⁵16 U.S.C. 1284(f).

NATIONAL WILDERNESS PRESERVATION SYSTEM

The Wilderness Act of 1964¹ created the National Wilderness Preservation System to provide “the benefits of an enduring resource of wilderness”² for the whole Nation. 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.”³ In keeping with the purpose of wilderness preservation, the use of wilderness areas is highly restricted. Statutory provisions for access through wilderness areas are limited, since such use, generally, is viewed as inconsistent with the maintenance of the primeval character of wilderness.

Section 2(c) of the Wilderness Act⁴ describes the special character of wilderness that the Act seeks to preserve:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor and does not remain.⁵

Note: Footnotes for this section appear on pp. 97-99.

For the purposes of the Wilderness Act, a “wilderness area” is further defined as:

... an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.⁶

Most of Alaska's land unquestionably fits this characterization.⁷ In the current debate over national interest lands in Alaska one of the most controversial issues is how much of the land proposed for inclusion in the national conservation systems should be legislatively classified as wilderness.

Table 4.— Wilderness Areas in Alaska

| | <i>Date of Designation</i> |
|---|----------------------------|
| Bering Sea Wilderness— Bering Sea National Wildlife Refuge, Alaska | Oct. 23, 1970 |
| Bogoslof Wilderness— Bogoslof National Wildlife Refuge, Alaska | Oct. 23, 1970 |
| Chamisso Wilderness— Chamisso National Wildlife Refuge, Alaska | Jan. 3, 1975 |
| Forrester Island Wilderness— Forrester Island National Wildlife Refuge, Alaska | Sept. 28, 1969 |
| Hazy Islands Wilderness— Hazy Islands National Wildlife Refuge, Alaska | Oct. 23, 1970 |
| Saint Lázaria Wilderness— Saint Lázaria National Wildlife Refuge, Alaska | Oct. 23, 1970 |
| Simeonof Wilderness— Simeonof National Wildlife Refuge, Alaska | Oct. 19, 1976 |
| Tuxedni Wilderness— Tuxedni National Wildlife Refuge, Alaska | Oct. 23, 1970 |

DESIGNATION OF WILDERNESS AREAS

Lands may be added to the National Wilderness Preservation System only by an act of Congress.⁸ The Wilderness Act itself does not establish any single process to be used before Congress acts on potential wilderness designations. Several approaches have been used in adding to the wilderness system.

Instant Wilderness

The first approach has been called “instant wilderness”—certain areas are included in the system by direct congressional action without prior congressional nomination or executive review. More than half of all wilderness designations have been made this way. The 1964 Wilderness Act designated 54 national forest areas containing some 9.1 million acres,⁹ which had been administratively classified as “wilderness,” “wild,” or “canoe” areas, as the original components of the system. The Eastern Wilderness Act of 1974,¹⁰ which applied to lands in national forests east of the 100 meridian, added 16 areas totaling some 207,000 acres in 13 Eastern States to the system. None of these areas had been subject to any wilderness study process. The Omnibus Wilderness Act of 1976,¹¹ creating wilderness areas in the National Wildlife Refuge System and the National Forest System, also included wilderness designations for some areas which had never been part of any wilderness study. Finally, the Endangered American Wilderness Act¹² of 1978 designated 17 wilderness areas, only 1 of which had ever been subject to wilderness study.

Wilderness Study

The second approach, often called “wilderness study,” was first expressed in sections 3(b) and 3(c) of the Wilderness Act. Those provisions directed Federal land managers to survey certain lands within their jurisdiction over a 10-year period and make recommendations to the President on the suitability of such lands for designation as wilderness.

Section 3(b) required the Forest Service to survey the 34 areas classified as “primitive”¹³ on the date of enactment; section 3(c) required the Secretary of the Interior to review all roadless areas of 5,000 acres or more in any unit of the Park System and roadless areas and roadless islands in wildlife refuges and game refuges.¹⁴

Under these provisions, the Secretaries of the Interior and Agriculture were required to make reports to the President within 10 years.¹⁵ The Act mandated public notice of any potential designations,¹⁶ hearings in the affected areas,¹⁷ and consultation with State and local officials prior to making any report.¹⁸ The Wilderness Act required that the President make recommendations to Congress on the basis of the departmental reports. Recommendations on at least one-third of all areas were to be made within 3 years of enactment, recommendations on at least two-thirds within 7 years, and all areas were to be completed within 10 years.¹⁹

The study provisions in the original Act did not establish any policies or procedures for interim management for areas under study. None of the areas covered by sections 3(b) and 3(c) was subject to multiple-use management. Primitive areas were under protective Forest Service management²⁰ and the Act stated that, “Nothing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the National Park System.”²¹

These studies required by the Wilderness Act were completed by 1974. The Forest Service is continuing a wilderness study effort, the Roadless Area Review and Evaluation (RARE II), which grew out of difficulties encountered in meeting the mandate of section 3(b).²² However, RARE II covers all roadless areas under the jurisdiction of the Forest Service, not just areas classified as primitive, and is not subject to any timetable, nor is there any requirement that the President make reports on the recommendations of the Forest Service.

Section 603 of the Federal Land Policy and Management Act established a new wilderness study program for public lands administered by the Bureau of Land Management (BLM), which, in many ways, is similar to the section 3(b) and 3(c) study.²³ The entire program must be completed by October 21, 1991, but the Secretary of the Interior must make recommendations to the President by July 1, 1980, on all BLM “primitive” or “natural” areas.²⁴

Section 603 contains two provisions not found in the Wilderness Act. Mineral surveys must be conducted by the Geological Survey and the Bureau of Mines before any recommendation is made to the President.²⁵ In addition, an interim management policy is established.

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable laws in a manner so as not to impair the suitability of such areas for preservation as wilderness subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act.²⁶

Congressional Nominations

Finally, Congress has often acted to require wilderness study of specific areas of land.²⁷ Generally, when this is done the law specifying the study area also requires that the study be conducted pursuant to section 3(d) of the Wilderness Act and sets a time limit on the period for study. Most specific study designations also contain provisions concerning interim management practices during the study period.

Wilderness areas are, unless otherwise provided by Congress, managed by the agency which had jurisdiction over the area immediately prior to its inclusion in the National Wilderness Preservation System.²⁸ In the Department of the Interior, the agencies that may administer components of the wilderness

system are the National Park Service, the Fish and Wildlife Service, and the BLM. The Secretary of Agriculture administers wilderness areas of the National Forest System through the Forest Service. Wilderness areas are subject to all general laws governing the department and agency administering them, but management must be consistent with the provisions of the Wilderness Act. Each managing agency is responsible for preserving the wilderness character of areas under its jurisdiction. The area must be managed for the purposes for which it was established (i.e., park, forest, refuge, wild and scenic rivers) in a manner that will preserve its wilderness character.²⁹ Wilderness areas are to be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.³⁰

ACTIVITIES IN WILDERNESS AREAS

The provisions of the Wilderness Act and the regulations thereunder, which control activities and uses in wilderness areas, are protective and stringent. The general policy for the use of wilderness areas as provided in the Act 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 motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.³¹

This general rule is subject to certain exceptions, specifically provided in the Act. The use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture



Photo Credit: GeorgeWallerstein

High camp in the Wrangell Mountains

deems desirable.³² The Secretary may also provide for the use of such measures for “control of fire, insects, and diseases” as he deems desirable.³³ Activities for the purpose of gathering information about mineral or other resources may be conducted in national forest wilderness areas in a manner compatible with preservation of the wilderness environment.³⁴ National Forest and BLM wilderness areas are to be “surveyed on a planned, recurring basis consistent with the concept of wilderness preservation” by the Geological Survey and the Bureau of Mines under a program developed by the Secretary of the Interior in consultation with the Secretary of Agriculture. Reports on the mineral values, if any, of such wilderness areas are to be made available to the public and submitted to the President and Congress.³⁵ Mining and mineral leasing activities are permitted to continue on

national forest wilderness areas subject to regulation by the Secretary of Agriculture.³⁶ After 1983 the minerals in wilderness areas are withdrawn from appropriation or disposition under the mining and mineral leasing laws.

The most important exception to the general prohibitions on access in the Wilderness Act is found in section 4(d)(4)³⁷ which provides:

Within wilderness areas in the national forests designated by this Act, (1) the President may, within a specific area and in accordance with such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction

and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial;³⁸

This provision also applies to wilderness areas managed by the BLM.³⁹ This limited exception provides an institutional mechanism for access through wilderness areas in unusual and critical situations where such access is demonstrably in the national interest.

Livestock grazing that is established on national forest and public lands wilderness areas prior to wilderness designation may be continued subject to reasonable regulation by the appropriate Secretary.⁴⁰ Commercial activities that are proper for realizing the recreational and other wilderness purposes of the areas are permitted.⁴¹

The Act provides for adequate access to private or State owned land that is “completely surrounded” by a national forest or public lands wilderness area, either by the grant of such rights as are necessary or by an exchange of the surrounded land for other federally owned land in the State of approximately equal value.⁴²

Ingress and egress to valid mining claims and other valid occupancies “wholly within” a national forest or public lands wilderness area is permitted subject to regulation consistent with the preservation of wilderness. Access to these surrounded areas is limited to means that have been or are being customarily enjoyed with respect to other such areas similarly situated.⁴³

The concept of wilderness management described in the Act is intended to preclude the use of wilderness areas for all inconsistent purposes. No permanent or temporary road or other manmade structures or facilities are to be allowed except as specifically provided for in the Act. A wilderness area is to be preserved in its primitive, unaltered state. Most means of access, even footpaths, are to some extent inconsistent with preservation of wilderness as an area “untrammelled by man;” however, necessary access for pur-

poses of wilderness recreation and management is clearly intended.⁴⁴ New access routes or intensive use of existing routes for any purpose could be detrimental and destructive of wilderness character. Accordingly, access in wilderness areas may be strictly limited when necessary.

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

- a. Preexisting private rights (It is assumed that “private” includes State and local governments);
- b. Wilderness recreation and management access routes and facilities;
- c. Emergency purposes;
- d. Established use of motorboats and aircraft where 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 a national forest or public lands wilderness area;
- g. Access to valid mining claims and other valid occupancies by means that are currently or customarily enjoyed in similarly situated areas; and
- h. Special provisions applicable to specific wilderness areas by congressional action.

Additional authorization for access uses of wilderness areas may be found in “the other purposes for which an area was established;”⁴⁵ that is, use as a national park, a wildlife refuge, a forest, public lands, wild and scenic rivers, or associated uses of those land classification systems. However, any such use must be consonant with wilderness character.⁴⁶ Even if access use of wilderness areas within each of the land management

systems is found to be compatible with provisions of the Wilderness Act, it must also comply with the laws and regulations of the land management agency and land classification system.

PARK WILDERNESS

The National Park Service recognizes the established use of aircraft and motorboats that predates the creation of wilderness areas, and includes provisions relating to such access in its recommended wilderness legislation. However, all preestablished motorized modes of access to wilderness areas are not necessarily recognized.⁴⁷ Motorized vehicles are banned in designated wilderness areas in the park system, except for minimum access and management purposes and emergencies. As discussed in the section on the National Park System, rights-of-way and access permits for park areas are based on the general authority to manage and regulate the park system, the 1901 Act, the 1911 Act, and the ditches and canals acts.⁴⁸ These Acts require that the proposed use be compatible with the public interest or not interfere with Government use of the reservation. Plainly, most access uses would be contrary to the explicit provisions of the Wilderness Act and would probably be denied on that basis. Any grant of access through a wilderness area that is not consistent with wilderness preservation and is not based on the Wilderness Act exceptions might be found to be unlawful on judicial review.

Access is assured to private lands completely surrounded by national park wilderness.⁴⁹ Such access rights are, however, subject to regulation by the Park Service. Where access proves to be incompatible with wilderness preservation or where the private owner so desires, the surrounded lands may be exchanged under laws applicable to the wilderness system and the park system. Mining inholdings and other valid occupancies wholly within a park wilderness area are also assured access as consistent with the Wilderness Act and by means customarily enjoyed in

similarly situated areas.⁵⁰ The Mining in the Parks Act of 1976 allows the Secretary of the Interior to regulate mining activities within the parks, including wilderness areas.⁵¹ Any other access through a national park wilderness area, as through a national park, would require congressional authorization. The limited Presidential exception of the Wilderness Act does not apply to national parks.

WILDLIFE REFUGE WILDERNESS

The National Wildlife Refuge System wilderness areas are administered by the Fish and Wildlife Service. Refuge system wilderness regulations follow provisions of the Wilderness Act and do not allow temporary or permanent roads, manmade structures, or the use of motorized transport within wilderness areas.⁵² Subject to such restrictions as the Director may impose, the established use of aircraft and motorboats may be continued in refuge wilderness areas.⁵³ Access to private property and valid occupancies within refuge wilderness areas is recognized. Adequate access is defined as the combination of modes and routes of travel that will best preserve the wilderness character of the landscape. The designated mode of travel must be reasonable and consistent with accepted, conventional, and contemporary modes of travel in that vicinity. Access use must be consistent with the reasonable purposes for which the land is held. The Director will issue access permits designating the means and route of travel that will preserve the area's wilderness character.⁵⁴

Wildlife refuge wilderness areas are also subject to general refuge regulations as well as special regulations and orders issued for particular refuges. These regulations restrict the operation of aircraft, motorized vehicles, and boats to designated areas and routes within a refuge, and provide that such access may be restricted and limited as necessary.⁵⁵ Right-of-way authorization for wildlife refuge areas⁵⁶ requires that the access use be compatible with the purpose for which the indi-

vidual refuge was established. Other right-of-way provisions in the 1901 Act, the 1911 Act, and the ditches and canals acts, which are applicable to wildlife refuges, also must meet the compatibility standard. However, section 668dd(d) and the regulations on refuge rights-of-way appear to be controlling.⁵⁷ Since a wilderness area is established to preserve wilderness characteristics, access uses that are deleterious to these values are not consistent, and, therefore, do not meet the standards required for issuance.⁵⁸ There is no provision in the Wilderness Act for Presidential national interest authorizations of access use of refuge areas. Any access use of refuge wilderness would, if incompatible with wilderness status, require congressional approval.⁵⁹

BLM WILDERNESS

Wilderness areas on public lands administered by the BLM are subject to the provisions of the Wilderness Act applicable to national forest wilderness areas.⁶⁰ The Federal Land Policy and Management Act of 1976⁶¹—the BLM Organic Act—specifically excludes wilderness areas from the right-of-way authority granted to the Secretary of the Interior for public lands.⁶² Any access use must therefore be consistent with the purposes of wilderness preservation and recreation or be included in one or more of the specific exceptions to the Wilderness Act. These exceptions recognize existing private rights, preestablished use of aircraft and motorboats within a given area, and access use in emergency situations. The President may authorize use of BLM wilderness areas for projects in the national interest.⁶³ Any other access use requires congressional authorization.

FOREST WILDERNESS

National forest wilderness areas are administered by the Forest Service of the Department of Agriculture. Regulations issued by the Forest Service for administration of

wilderness areas⁶⁴ provide that “except as provided in the Wilderness Act, or subsequent legislation establishing a particular wilderness unit . . . there shall be in the National Forest Wilderness . . . no temporary or permanent roads; no aircraft; no dropping of materials, supplies, or persons from aircraft; no structures or installations; and no cutting of trees for nonwilderness purposes.”⁶⁵ The Chief of the Forest Service may permit the landing of aircraft and use of motorboats within any wilderness where these uses were established prior to wilderness designation.⁶⁶ Maintenance of landing strips, heliports, and helispots, which preexist wilderness designation, may also be allowed.⁶⁷

Adequate access to surrounded State and private lands is defined in the regulations as the combination of routes and modes of travel that will, as determined by the Forest Service, cause the least lasting impact on the primitive character of the land, and which, at the same time, will serve the reasonable purposes for which the surrounded land is held or used. Access by routes or modes of travel not available to the general public must be authorized in writing by the Forest Service. The authorization prescribes the means and the routes of travel to and from the lands and sets forth the conditions necessary to preserve the wilderness characteristics while allowing adequate access.⁶⁸

Persons with mining claims or other valid occupancies wholly within forest wilderness areas are permitted access by means consistent with the preservation of wilderness that are or have been customarily used for other such occupancies surrounded by national forest Wilderness.⁶⁹ When appropriate, the Forest Service will issue an access permit specifying the mode and route and any protective conditions.⁷⁰

The Wilderness Act provides that the President may allow the use of a national forest wilderness area for projects in the national interest.” Wilderness areas are specifically excluded from the right-of-way authorization granted to the Secretary of Agricul-

ture in Title V of the Federal Land Policy and Management Act of 1976 which is the comprehensive right-of-way authority for national forests.⁷² Easements for roads under the provisions for the development of the National Forest Transportation System⁷³ would appear to be precluded by the prohibition of the Wilderness Act that there be no road in any wilderness area.⁷⁴ Congressional authorization is needed for any proposed access use that does not come under one or more exceptions to the Wilderness Act.

WILD AND SCENIC RIVERS WILDERNESS

The National Wild and Scenic Rivers System⁷⁵ is a land classification system, which, like the National Wilderness Preservation System, does not have a separate management agency. Instead, wild and scenic rivers are managed by the Forest Service, the National Park Service, the Fish and Wildlife Service, or the BLM. Wild and scenic rivers within wilderness areas are managed according to provisions applicable to both systems, and, in the event of conflict, the Wilderness Act provisions prevail.⁷⁶ Access through or over wild and scenic rivers areas that are also components of the wilderness system is granted under the authority of the managing agency as interpreted in light of both the Wild and Scenic Rivers Act and the Wilderness Act.⁷⁷ Access over river areas managed by the Department of the Interior may be granted according to the rules applicable to the National Park System. Access permits for components administered by the Secretary of Agriculture are issued under laws applicable to the National Forest System.⁷⁸

MANAGEMENT OF WILDERNESS STUDY AREAS

The entire National Wilderness Preservation System now comprises approximately 16 million acres, which is a small fraction of all roadless areas in the United States. The

Forest Service, in its RARE II program, is evaluating over 66 million acres of land to determine its suitability for designation as wilderness.⁷⁹ It is estimated that the BLM wilderness review mandated by section 603 of the Federal Land Policy and Management Act of 1976 will evaluate over 120 million roadless acres and 13,000 roadless islands.⁸⁰ This land will be studied for wilderness potential, but none of it has as yet been formally designated as a wilderness study area.

During the period of initial evaluation and up to final disposition of the wilderness recommendation by the Congress, these lands will be in some form of restrictive management. While it is clear that multiple use management will not be practiced, it is difficult to ascertain exactly what standards will be used in managing wilderness study areas.

There is some statutory guidance on the management of BLM lands under wilderness study. Section 603(c) of the BLM Organic Act provides:

The Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act. Provided, that in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.⁸¹

Preliminary indications are that BLM intends to apply a strict interpretation of this provision to all proposals for new activity.⁸²

There is less statutory guidance with respect to Forest Service lands. In the Eastern Wilderness Act, Congress designated 17 wilderness study areas in national forests. The Act stated:

Nothing in this Act shall be construed as limiting the authority of the Secretary of

Agriculture to carry out management programs development, and activities in accordance with the Multiple-Use Sustained-Yield Act of 1960 within areas not designated for review in accordance with the provisions of this Act.⁸³

Presumably, this means that almost all land in the RARE II inventory of potential wilderness areas is subject to management under the principles of the Multiple-Use Sustained-Yield Act (although one of the uses specified in that Act is the preservation of wilderness).⁸⁴

The Forest Service has indicated that it would not approve any use inconsistent with wilderness on an existing roadless area without filing an environmental impact statement, either with the permit or license approving the use or as a required part of a land management plan.⁸⁵

The question of authorizing nonwilderness uses is closely related to the problem of removing lands from potential wilderness status without a negative determination by Congress. Both the Forest Service and the BLM have indicated a desire quickly to identify roadless areas that should not be recom-

mended for wilderness status, and to return them to multiple use management. The mechanics of this process have not been completely worked out. BLM officials have indicated that they do not presently intend to prepare environmental impact statements on the decision not to recommend an area for further study.⁸⁶ Forest Service policy appears to be similar.⁸⁷ The prospect of litigation over particular areas seems inevitable.⁸⁸

These decisions concerning positive evaluation and negative evaluation of potential study areas are enmeshed in the new land management planning procedures that both agencies are now being required to take for the first time. Plans must be filed for every management unit in both systems.⁸⁹ The Forest Service allows land to drop out of the RARE II inventory if a management plan is filed that provides for nonwilderness use.⁹⁰ This meets the requirement of the out-of-court settlement that led to RARE II; such plans are always accompanied by environmental impact statements. BLM—which was required to prepare such plans in more recent legislation⁹¹—has not yet indicated if it intends to use the plans as a mechanism to remove areas from potential wilderness protections.

FOOTNOTE REFERENCES FOR NATIONAL WILDERNESS PRESERVATION SYSTEM

¹16 U.S.C. 1131-1136,

²16 U.S.C. 1131(a).

³Id.

⁴16 U.S.C. 1131(c).

⁵Id.

⁶Id.

⁷The Joint Federal-State Land Use Planning Commission for Alaska estimates that about 200 million acres of Federal lands are of "primitive" character and there are about 75,000 acres in existing wildlife refuges classified as wilderness. See the D-2 book inventory of Alaska land values in Federal-State Land Use Planning Commission for Alaska, "The D-2 Book" *Lands of National Interest in Alaska* (May 1977) at p. 8. Alaska wilderness areas are listed in table 4.

⁸16 U.S.C. 1132(e). As of February 1978, there were 177 congressionally designated wilderness areas en-

compassing approximately 16 million acres. Ninety-two wilderness areas had never been the subject of wilderness reviews, H.Rept. 95-1045 pt. I, pp. 134-35 (1978).

⁹16 U.S.C. 1132(a).

¹⁰Public Law 93-622, 88 Stat. 2096, Jan. 3, 1975.

¹¹Public Law 94-557, 90 Stat. 2633, Oct. 19, 1976.

¹²Public Law 95-327, 92 Stat. 40, Feb. 14, 1978.

¹³16 U.S.C. 1132(b). A national forest "primitive area" is subject to protective management similar to that for wilderness areas. See 36 CFR 293.17.

¹⁴16 U.S.C. 1132(c). A roadless area is defined by Interior Department regulations as "a reasonably compact area of undeveloped Federal land which possesses the general characteristics of a wilderness and within which there is no improved road that is suitable for public travel by means of four-wheeled, motorized vehicles intended primarily for highway use." 43 CFR

19.2(e). **Roadless** island means a **roadless** area that is surrounded by permanent waters or that is markedly distinguished from surrounding lands by topographical or ecological features such as precipices, canyons, thickets, or swamps. 43 CFR 19.2(f).

¹⁵16 U.S.C. 1132(b) and 16 U.S.C. 1132(c).

¹⁶16 U.S.C. 1132(d)(1)(A).

¹⁷16 U.S.C. 1132(d)(1)(B).

¹⁸16 U.S.C. 1132(d)(1)(C).

¹⁹16 U.S.C. 1132(b) and 16 U.S.C. 1132(c).

²⁰36 CFR 293.17.

²¹16 U.S.C. 1132(c).

²²See *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972), Wyoming Outdoor Coordinating Council v. *Butz*, 484 F. 2d 1244 (10th Cir. 1973), and Senate Comm. on Energy and Natural Resources, **Roadless Area Review and Evaluation (RARE II)**, Serial No. 95-92, (Committee Print 1978), p. 5.

²³43 U.S.C. 1782(a).

²⁴*Id.*

²⁵*Id.*

²⁶43 U.S.C. 1782(c).

²⁷See, for example, Act of October 19, 1976, Public Law 94-557, section 3.90 Stat. 2635; Act of October 20, 1976, Public Law 94-567, section 5, 90 Stat. 2665. See note following 16 U.S.C.A. 1132 (1977 *supp.*), p. 32.

²⁸16 U.S.C. 1131(b).

²⁹16 U.S.C. 1133(b).

³⁰*Id.*

³¹16 U.S.C. 1133(c).

³²16 U.S.C. 1133(d)(1). The Secretary of the Interior establishes the conditions for the use of planes and motorboats in wilderness areas under his jurisdiction. See, *infra*, note 47.

³³*Id.*

³⁴16 U.S.C. 1133(d)(2).

³⁵*Id.*

³⁶16 U.S.C. 1133(d)(3).

³⁷16 U.S.C. 1133(d)(4).

³⁸*Id.*

³⁹43 U.S.C. 1782(c).

⁴⁰16 U.S.C. 1133(d)(4).

⁴¹16 U.S.C. 1133(d)(6).

⁴²16 U.S.C. 1134(a). Adequate access is defined in Fish and Wildlife Regulations to mean the combination of modes and routes of travel that will best preserve the wilderness character of the landscape. 50 CFR 35.13.

⁴³16 U.S.C. 1134(b).

⁴⁴See 16 U.S.C. 1133(c), 1133(d)(1)(6).

⁴⁵16 U.S.C. 1133(b).

⁴⁶*Id.*

⁴⁷Department of the Interior, National Park Service, Management Policies, 1975, p. VI-6, cited in *Krutilla and Rice*, "Management Systems, Land Classifications, and Use Restrictions" reprinted in House Comm. on Interior and Insular Affairs, **Subcomm.** on General Oversight and Alaska Lands. Background *Information for Alaska* Lands Designations, (Committee Print No. 4) 95th Cong., 1st sess., p. 174 (1977).

⁴⁸See section on National Parks.

⁴⁹16 U.S.C. 1134(a).

⁵⁰16 U.S.C. 1134(b).

⁵¹16 U.S.C. 1901 et seq.

⁵²50 CFR 35.5.

⁵³50 CFR 35.5(b).

5450 CFR 35.13.

⁵⁵50 CFR pts. 25-29.

⁵⁶16 U.S.C. 668dd(d).

⁵⁷50 CFR 19.21-1(a).

⁵⁸See Department of the Interior, Fish and Wildlife Service, Final Environmental Statement on the Operation of the National Wildlife Refuge System (1976).

⁵⁹43 U.S.C. 1782(c).

⁶⁰43 U.S.C. 1701 et seq.

⁶¹43 U.S.C. 1761(a).

⁶²16 U.S.C. 1133(a) and (d).

⁶³16 U.S.C. 1133(d)(4).

⁶⁴36 CFR pt. 293.

⁶⁵36 CFR 2936.

⁶⁶36 CFR 293.6(d).

⁶⁷*Id.*

⁶⁸36 CFR 293.12.

⁶⁹36 CFR 293.13.

⁷⁰*Id.*

⁷¹16 U.S.C. 1133(d)(4).

⁷²43 U.S.C. 1761(a).

⁷³16 U.S.C. 532-538, 16 U.S.C. 1608.

⁷⁴16 U.S.C. 1133(C).

⁷⁵16 U.S.C. 1271 et seq.

⁷⁶16 U.S.C. 1281(b).

⁷⁷16 U.S.C. 1284(g) and 16 U.S.C. 1281(b).

⁷⁸16 U.S.C. 1284(g).

⁷⁹42 F.R. 59688, Nov. 18, 1977.

⁸⁰Hearings on the Federal Land Policy and Management Act and Grazing Fee Moratorium of 1977 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st sess., Serial No. 95-25 (1978) at p. 103. ("Hearings").

⁸¹43 U.S.C. 1782(c).

⁸²See Jan. 9, 1978, Memorandum of the Deputy Solicitor, "Application of Mining and Grazing Laws to Areas under Review for Inclusion into Wilderness System: Section 603 Federal Land Policy Management Act of 1976" reprinted in Hearings, *supra*, note 80, pp. 131-44. BLM has indicated that areas which meet the minimum criteria for wilderness will be subject to stringent interim protection. A recent letter to a permit applicant reflects this policy: "Those activities which are of a permanent nature or not easily rehabilitated . . . cannot be allowed until a formal wilderness review of the areas has been completed." Letter from Department of the Interior, Bureau of Land Management, Fairbanks District Office to W. G. M., Inc., dated Apr. 14, 1978 provided by Dr. E. Beistline, Dean of the College of Mineral Industries, University of Alaska, a member of the assessment advisory panel.

⁸³Public Law 93-622, section 4(d), 88 Stat. 2098.

⁸⁴16 U.S.C. 1604(e)(1), added by the National Forest Management Act of 1976, Public Law 94-588, 90 Stat.

2949, Oct. 22, 1976, implicitly amends the Multiple-Use Sustained-Yield Act of 1960 to include the preservation of wilderness:

“In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans: (1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.”

⁸⁵See Forest Service, RARE 11 Notebook, p. III-A, Forest Service, Forest Service Manual, Chapter 8260, Interim Directive No. 5 (July 21, 1977), p. 3, section (8260)(b)(l)(f).

⁸⁶Department of the Interior, Bureau of Land Management, Draft Wilderness Review Procedures,

Feb. 27, 1978, p. 13. “Since legislation will be required for an area to be included in the National Wilderness Preservation System, the report for each study area being recommended as suitable will be accompanied by an environmental assessment record or environmental impact statement. An environmental assessment record or environmental impact statement will not be required for areas recommended as nonsuitable.”

⁸⁷Forest Service, RARE II Notebook, “RARE II Evaluation,” figure 1. However, some areas will drop out of the RARE II inventory after filing of a land management plan that contains an environmental impact statement.

⁸⁸The cases listed, *supra*, note 22 seem to indicate that an agency decision to allow development or other activity in a previously pristine area would require an environmental impact statement.

⁸⁹16 U.S.C. 1604.

⁹⁰*Supra*, note 85.

⁹¹43 U.S.c. 1712.