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You Can Get There From Here: The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands

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*This article*** presents recent developments in the law of access across federal lands. After discussing federal land access principles in the western States, the authors examine the innovative substantive access guarantees and transportation or utility system siting procedures contained in the Alaska National Interest Lands Conservation Act. Since most of these ANILCA provisions are limited to federal lands in Alaska, the authors explore whether similar provisions applicable to federal lands in all States would be advisable.*

The federal government owns vast amounts of land in Alaska and the Western States.¹ Development and use of private lands adjacent to federal

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1. The federal government owns nearly 32% of the lands in the United States, totaling over 726 million acres. Most of these federal lands are located in the Western states and were part of the public domain acquired from foreign sovereigns. In many states, the federal government owns over half of the land within the state—for example, Alaska (86%), Idaho (63%), Nevada (85%), and Utah (64%). BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 1985, at 5 (1985).

lands often requires access across federal lands. Access permission for a right-of-way from the federal land-managing agency usually is necessary where a road, transmission line or pipeline would cross federal lands. While the federal land-managing agencies historically have granted such rights-of-way, since the advent of the environmental movement in the 1960's, a number of impediments to securing access across federal lands have arisen. This conflict between private property interests and environmental concerns led Congress to enact special access guarantees and procedures in the 1980 Alaska National Interest Lands Conservation Act (ANILCA or Alaska Lands Act).²

This article explores federal lands access issues, focusing on the innovative access provisions of the Alaska Lands Act. Part I provides a brief background of the general law of access across federal lands and identifies the reasons why access issues came to the forefront in ANILCA. In Parts II through V, the article explains in detail ANILCA's access and transportation and utility system routing provisions, as implemented in a 1986 Department of the Interior (Interior) rulemaking.³ Finally, Part VI addresses whether these ANILCA provisions should be legislatively extended to federal lands in states other than Alaska. Thus, this article explores the extent to which the lament that "you can't get there from here" holds true on public lands in and outside Alaska.

I. BACKGROUND ON THE LAW OF ACCESS ACROSS FEDERAL LANDS

The federal lands are managed by a number of agencies and for a variety of purposes. In general, each federal land-managing agency has its own statute(s) governing its land management responsibilities and its ability to issue rights-of-way.

Three of the land-managing agencies are housed within Interior. The Bureau of Land Management (BLM) administers the unreserved public domain under the Federal Land Policy and Management Act of 1976 (FLPMA).⁴ The National Park Service (NPS) manages the federal lands that have been reserved as part of the National Park System under several statutes.⁵ The Fish and Wildlife Service (FWS) manages the National Wildlife Refuge System under the National Wildlife Refuge System Administration Act⁶ and related authorities.

2. Act of December 2, 1980, Pub. L. 96-487, 94 Stat. 2371 (1980). The majority of the Act is codified at 16 U.S.C. §§ 3101-3233 (1982).

3. See 51 Fed. Reg. 31,619 (Sept. 4, 1986). These ANILCA rules are now codified at 43 C.F.R. Part 36 (1986). Minor corrections were published at 51 Fed. Reg. 36,011 (Oct. 8, 1986). Portions of the 43 C.F.R. Part 36 rules recently have been challenged in a suit brought by environmental groups. See *Trustees for Alaska v. Department of the Interior*, No. A87-055 (D. Alaska filed Feb. 9, 1987).

4. 43 U.S.C. §§ 1701-1784 (1982). Title V of FLPMA governs right-of-way issuances on BLM land. See 43 U.S.C. §§ 1761-1771 (1982). Rights-of-way for oil and gas pipelines on BLM lands are governed by section 28 of the Mineral Leasing Act. See 30 U.S.C. § 185 (1982).

5. See 16 U.S.C. §§ 1 to 460 (1982). The principal NPS rights-of-way authorities are found at 16 U.S.C. §§ 5, 79 (1982) and 23 U.S.C. § 317 (1982).

6. See 16 U.S.C. § 668dd (1982).

The Forest Service, within the Department of Agriculture, is the other major federal landowner. It administers the National Forest System under several statutes.⁷ Some NPS, FWS, BLM and Forest Service lands also have been placed in other conservation-oriented land systems, such as the National Wilderness Preservation System (Wilderness)⁸ and the National Wild and Scenic Rivers System,⁹ which can further constrain access opportunities.

Access into or across these extensive federal land systems often is required to reach private lands which are surrounded by federal lands (private inholdings) and to site rights-of-way. Through the early 1900's, such access generally was granted routinely either because it was thought to be part of the public's implied license to use federal lands.¹⁰ Since the advent of the modern environmental movement in the 1960's, however, a number of impediments to securing access across federal lands have arisen.

First, the government has increasingly dedicated federal land to conservation-oriented purposes. Access across such conservation lands often is significantly restricted. The Wilderness Act, for example, virtually precludes motorized access or rights-of-way across Wilderness lands.¹¹ The National Wildlife Refuge Administration Act permits the FWS to issue rights-of-way across units of the National Wildlife Refuge System only when the rights-of-way are "compatible" with wildlife refuge purposes.¹² Within the National Park System, the NPS may grant rights-of-way under a "public interest" standard only for specified purposes, such as transmission lines, and authority for some types of rights-of-way, such as oil and gas pipelines, is lacking.¹³ Other statutes that provide direction for the management of the federal conservation land systems also contain provi-

7. See *id.* §§ 471-583 (1982). Rights-of-way across Forest Service lands are generally governed by Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1982).

8. The Wilderness Act is codified at 16 U.S.C. §§ 1131-1136 (1982). Rights-of-way and motorized access generally are prohibited in Wilderness areas under 16 U.S.C. § 1133(c) (1982).

9. The Wild and Scenic Rivers Act is codified at 16 U.S.C. §§ 1271-1287 (1982). Rights-of-way through the National Wild and Scenic Rivers System are governed by 16 U.S.C. § 1284(g) (1982).

10. See *Burford v. Houtz*, 133 U.S. 320 (1890); *Coggins, Evans & Johnson, The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 588-93 (1982); Comment, *Gamesmanship on the Checkerboard: The Recurring Problem of Access to Interlocked Public and Private Lands Located Within the Pacific Railroad Land Grants*, XVII LAND & WATER L. REV. 429, 432-35 (1982).

11. The most significant access restriction in the Wilderness Act is § 4(c), which provides that generally "there should 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 [Wilderness] area." 16 U.S.C. § 1133(c) (1982); see also *id.* §§ 1133(d), 1134 (1982).

12. Under the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. § 668dd (1982), the Secretary of the Interior is authorized to grant easements over Wildlife Refuge lands for "powerlines, telephone lines, canals, ditches, pipelines, and roads . . . [only when] he determines that such uses are compatible with the purposes for which these areas are established." *Id.* § 668dd(1)(B).

13. See *id.* §§ 5, 79 (1982).

sions which severely constrain access opportunities in order to protect conservation values.¹⁴

Second, even on federal lands managed for multiple uses, such as Forest Service and BLM lands, the issuance of rights-of-way has become more complicated. The obligation to maintain wilderness values until wilderness study lands have been adequately reviewed for possible inclusion in the National Wilderness Preservation System may preclude access across federal roadless areas.¹⁵ With the enactment of federal environmental responsibilities under the National Environmental Policy Act of 1969,¹⁶ the Forest Service and BLM have become more than passive grantors of rights-of-way. Additionally, the enactment of Forest Service land use planning responsibilities under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976,¹⁷ and the enactment of BLM land use planning responsibilities under FLPMA¹⁸ also have prompted these agencies to decide the appropriate access route and specify environmental constraints. While the BLM and the Forest Service generally do grant some form of access, ultimately the granting of rights-of-way across BLM and Forest Service lands under Title V of FLPMA is discretionary, and there is no statutory assurance of access.¹⁹

Third, the 1979 Supreme Court decision in *Leo Sheep Co. v. United States*,²⁰ arguably suggest that the doctrine of easements by necessity does not apply to federal lands. Application of that doctrine would require that the government grant access across federal lands to the owner of land surrounded by federal lands. *Leo Sheep* addressed the converse of the issue examined in this article: access across private lands to reach federal lands. The private and federal lands were held in a "checkerboard" land ownership pattern which resulted from a railroad land grant. Because of the checkerboard configuration, it was physically impossible for the government to provide recreational access to a reservoir on public lands without intruding on the plaintiff's property. The plaintiff brought an action to quiet title against the federal government, which had built a road across the plaintiff's property to access the reservoir. The government argued that it had a common law easement by necessity across the plain-

14. See generally OFFICE OF TECH. ASSESSMENT, CONGRESS OF THE U.S., ANALYSIS OF LAWS GOVERNING ACCESS ACROSS FEDERAL LANDS—OPTIONS FOR ACCESS IN ALASKA (1979).

15. Section 3(b) of the Wilderness Act requires the Secretary of Agriculture to administer "primitive" areas of the National Forest System to preserve wilderness values "until Congress has determined otherwise." 16 U.S.C. § 1132(b) (1982). Legal difficulties in conducting the RARE II wilderness study program for national forests often have resulted in the delay or denial of access across such primitive areas. See, e.g., *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

16. 42 U.S.C. §§ 4321-4344 (1982).

17. 16 U.S.C. §§ 1600-1614 (1982). In particular, the Forest Service planning requirements are developed in *id.* § 1604.

18. 43 U.S.C. §§ 1701-1782 (1982). In particular, the BLM planning and rights-of-way requirements are developed in *id.* §§ 1712, 1761-1771 (1982).

19. See FLPMA § 501(a). Since the relevant Secretary is merely "authorized to grant . . . rights-of-way," access is not guaranteed. 43 U.S.C. § 1761(a) (1982).

20. 440 U.S. 668 (1979); cf. Comment, *supra* note 10.

tiff's property. Rejecting the government's claim, the Court found the applicability of the common law doctrine of easements by necessity "somewhat strained," primarily because the government could rely upon its power of eminent domain to gain access. Instead, the Court viewed the issue solely as one of discerning congressional intent in enacting the original federal land grant statute.²¹ A unanimous Court held that the federal government had no implied right of recreational access across the private lands. While the "tea leaves" of *Leo Sheep* are somewhat uncertain concerning implied access across federal lands, the case can be read to suggest that the common law doctrine of easements by necessity does not apply against the federal government. Since the Court viewed the issue of federal access across private lands as one to be resolved under statutory law, it arguably hinted that private access across federal lands similarly should be implied only to the extent consistent with congressional intent in enacting land grant legislation.²²

Fourth, a year after the *Leo Sheep* decision, the United States Attorney General opined that inholders have no guarantee of access across federal lands. On June 23, 1980, the Attorney General, Benjamin Civiletti, issued an opinion concerning the access rights of Burlington Northern Inc. across a Wilderness study area in a national forest in Montana.²³ Relying in part on the exclusive congressional authority under the Property Clause²⁴ to dispose of federal land interests, and adopting the position that the Court had perhaps implicitly accepted in *Leo Sheep*, the Civiletti Opinion concluded that the common law doctrine of easements by necessity—which ordinarily assures some form of access across private lands—does not operate on federal lands.²⁵ Instead, the Civiletti Opinion stated that an inholder must base an access claim on statutory authority. Further, the Attorney General suggested that, in particular circumstances,

21. *Leo Sheep*, 440 U.S. at 681-82.

22. Though eminent domain ordinarily would not be available to a private landowner, it can be argued that *Leo Sheep*—by phrasing the easement by necessity doctrine in terms of transactions among "private landowner[s]" and by ultimately finding "the intent of Congress" to be determinative—obliquely confirmed that there are no easements of necessity across federal lands and that private access rights can be implied only when access was intended by the Congress. *Id.* at 681.

23. Rights-of-Way Across National Forests, 43 Op. Att'y Gen. No. 26 (1980) [hereinafter Civiletti Opinion].

24. U.S. CONST., art. IV, § 3, cl. 2, which provides in part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting that territory or other Property belonging to the United States"

25. Civiletti Opinion, *supra* note 23, at 12, which states: "It is also my view that the common law doctrine of easement by necessity does not apply to congressional disposition of the public domain." The common law doctrine of easements by necessity has two main variants: one which infers an easement across lands originally held under unity of title only where the parties to the severance document appear to have contemplated access, and one which is a judicial fiction implying access in all severance situations to favor the productive use of lands, regardless of party intent. See 3 R. POWELL, THE LAW OF REAL PROPERTY § 410 (P. Rohan ed. 1979); 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 363 (J. Grimes ed. 1980 repl. vol. & Supp. 1981); 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 793 (B. Jones (3d) ed. 1939 & Supp. 1986). In effect, the implied statutory access theory adopted by the Civiletti Opinion may be parallel to the first variant of easements by necessity.

inholders may have access rights implied under federal land grant statutes— an “intent of Congress” theory that is somewhat analogous to the “intent of the parties” version of easements by necessity. Not all inholders would have access rights under the statutory interpretation rules the Attorney General provided for discerning the existence of such implied access rights.²⁶ In the absence of an implied statutory access right, the Civiletti Opinion suggested that there is no true guarantee of access across federal lands; the inholder would be subject to agency discretion in authorizing access under FLPMA Title V or other applicable federal law. The Civiletti Opinion apparently still controls the federal litigating position.

A final impediment to access has been the government’s use of discretionary access authority to regulate indirectly the development of non-federal lands. By relying on the purported power to deny any access, several federal agencies have asserted the lesser power to condition access to allow development only when it is consistent with the uses of surrounding federal land.²⁷ This access “handle” often supplies an effective substitute for the regulation of development where Congress has not granted direct federal regulatory authority over private lands. Such regulation often results in diminished development expectations.

As these impediments have arisen and shaped existing access law, a corresponding concern has grown among private inholders that they could become landlocked by federal lands and be without adequate access to their private lands. In many situations involving federal lands in western States, it may not be possible “to get there from here” satisfactorily because of the substantive limits and administrative discretion embodied in statutory access provisions applicable to federal lands. Congress responded to these concerns by placing in ANILCA a variety of unique and revolutionary access-related provisions.²⁸

26. Civiletti Opinion, *supra* note 23, at 14-15 (citations and footnotes omitted), which states:

To determine what rights have passed under federal law, it is necessary to interpret the statute disposing of the land. It is a recognized principle that all federal grants must be construed in favor of the government “lest they be enlarged to include more than what was expressly included.” . . . These general rules must not be applied to defeat the intent of Congress, however. The Supreme Court has stated that public grants are “not to be construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. . . .”

These rules dictate that if it is clear that Congress intended to grant access, such access must be acknowledged, its scope consistent with the purposes for which the grant was made. An implied easement defined by the actual intent of Congress must be distinguished from an easement by necessity, which relies on the presumed intent of the parties.

27. For example, 36 C.F.R. Subpart 9B (1986) controls the development of non-federal oil and gas within the National Park System by conditioning access across federal lands.

28. In enacting the ANILCA Title XI access provisions, the Senate and House committees stated that they did “not agree with the arguments that existing law is sufficient;” therefore, they enacted Title XI “which supersedes rather than supplements existing law.” S. REP. No. 413, 96th Cong., 1st Sess. 245-46 (1979); H.R. REP. No. 97, pt. I, 96th Cong., 1st Sess. 237-38 (1979).

ANILCA became the focal point for innovations in access law for several reasons. ANILCA is the most significant federal conservation measure in terms of acreage ever enacted, adding nearly 104 million acres of "conservation system units" (CSU's)²⁹ in Alaska, thereby doubling the size of the National Park and National Wildlife Refuge Systems, and tripling the size of the Wilderness System.³⁰ Congress recognized that existing law "allows only limited public access" across the massive CSU's, and enacted specific access guarantees to ensure "full rights of access" for CSU inholders.³¹ Also, recognizing that Alaska's "existing transportation and utility systems are in their embryonic stage of development," Congress provided for Alaska's economic growth by adopting "a procedure for future siting of transportation facilities which supersedes rather than supplements existing law when such systems cross CSU lands."³² Finally, Congress enacted specific access guarantees across BLM and Forest Service lands "to resolve any lingering questions by making it clear that non-Federal landowners have a right of access."³³

In this article, ANILCA's access-related provisions are categorized for analysis as follows: (1) access guarantees across CSU's (ANILCA §§ 1110(a), 1110(b), 1111); (2) access guarantees across the National Forest System and BLM lands (ANILCA § 1323); and (3) procedures and standards for approving transportation or utility systems (ANILCA §§ 1101-1107). The sections below discuss the scope of these provisions and significant implementing actions.

II. ACCESS GUARANTEES ACROSS CONSERVATION SYSTEM UNITS

A. ANILCA § 1110(a)—*Traditional, Non-Environmentally Damaging Access*

ANILCA § 1110(a) is the only ANILCA access provision which does not require a permit for access; it authorizes certain access methods in CSU's unless and until prohibited by administrative action.³⁴ This provision allows the use of snowmachines, motorboats, airplanes, and non-motorized surface transportation methods such as dog sleds and horses

29. The term "conservation system unit" is defined in ANILCA § 102(4) to mean:

any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

See 16 U.S.C. § 3102(4) (1982).

30. See GENERAL ACCOUNTING OFFICE, STATUS OF FEDERAL AGENCIES' IMPLEMENTATION OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (Apr. 19, 1982).

31. S. REP. NO. 413, *supra* note 28, at 248.

32. *Id.* at 245-46.

33. *Id.* at 310.

34. ANILCA § 1110(a) provides:

Notwithstanding any other provision of this Act or other law, the Secretary shall permit, on conservation system units, national recreation areas, and national conservation areas, and those public lands designated as [W]ilderness study, the use of snowmachines (during periods of adequate snow cover, or

in CSU's and other named areas for "traditional activities" and for travel to and from villages and homesites. The provision's legislative history reflects a congressional intent to authorize generally the use of these access methods—methods which require no permanent improvements on federal lands and cause little environmental injury.³⁵

In its 1986 rulemaking, Interior uniformly implemented and expanded upon ANILCA § 1110(a) access rights for all NPS and FWS lands and certain BLM lands (for example, wilderness study lands) in Alaska subject to § 1110(a).³⁶ These rules broaden the statutory access guarantee by allowing the use of motorboats, airplanes and nonmotorized surface transportation methods for *any* purpose on most Interior lands covered by § 1110(a).³⁷ No corresponding regulations have been issued for Forest Service lands subject to ANILCA § 1110(a). Consequently, the statutory limitation that access must be for "traditional activities" or "travel to

frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units, national recreation areas, and national conservation areas, and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area. Nothing in this section shall be construed as prohibiting the use of other methods of transportation for such travel and activities on conservation system lands where such use is permitted by this Act or other law.

See 16 U.S.C. § 3170(a) (1982).

35. S. REP. NO. 413, *supra* note 28, at 248, which states:

The Committee recommends that traditional uses be allowed to continue . . . if uses were generally occurring in the area prior to its designation, those uses shall be allowed to continue and no proof of pre-existing use will be required

The adverse environmental impacts associated with these transportation modes are not as significant as for roads, pipelines, railroads, etc. both because no permanent facilities are required and because the transportation vehicles cannot carry into the country large number of individuals.

36. See 43 C.F.R. § 36.11 (1986). Prior to the uniform rulemaking in 43 C.F.R. § 36.11, the National Park Service and the Fish and Wildlife Service had adopted similar rules on an interim basis. See 36 C.F.R. §§ 13.11 to .13 (1982) (NPS); 50 C.F.R. § 36.21 (1982) (FWS). These interim rules were superseded by the 1986 rulemaking. The preamble material on the interim rules, and on the re-codification of the uniform Interior rules, provides much useful information on how Interior construes ANILCA's access guarantees. See 51 Fed. Reg. 31,626-28 (Sept. 4, 1986) (Interior's final uniform rulemaking); 48 Fed. Reg., 32,506 (July 15, 1983) (Interior's proposed uniform rulemaking); 46 Fed. Reg., 31,827 (June 17, 1981) (NPS and FWS interim rulemaking).

37. Interior eliminated the statutory limitations to access for traditional activities and for homesite travel, reasoning that: (1) the agency "has the discretion to broaden the authorization beyond that required in the statute;" (2) a general use authorization "would not be in derogation of the [CSU] values;" and (3) a general use authorization "would provide for greater enjoyment of these areas by visitors." 51 Fed. Reg. 31,626 (Sept. 4, 1986).

Several environmental groups have challenged Interior's expansion of ANILCA § 1110(a) access rights in *Trustees for Alaska v. Department of the Interior*, No. A87-055 (D. Alaska filed Feb. 9, 1987). The suit alleges that 43 C.F.R. § 36.11 violates ANILCA in several ways, such as by not restricting access to particular areas where the "traditional activities" occurred and not restricting access to traditionally employed modes of access (e.g., dog sled).

and from villages and homesites" presently remains a potential hurdle with respect to the use of snowmachines on Interior lands and with respect to all ANILCA § 1110(a) access methods on Forest Service lands.³⁸

As implemented, ANILCA § 1110(a) provides access rights in Alaska national parks and wildlife refuges superior to those available in similar areas outside Alaska. Airplane and snowmachine access ordinarily are significantly restricted in national parks and wildlife refuges outside Alaska.³⁹

While ANILCA § 1110(a) provides a "floor" of guaranteed access in CSU's and related areas, two constraints make the section an incomplete access guarantee. First, ANILCA § 1110(a) does not appear to authorize the construction or maintenance of improvements, such as landing strips, docking facilities and roads, which may be required for use of the specified access methods.⁴⁰ Second, the limited access methods authorized by ANILCA § 1110(a) do not include use of off-road vehicles (other than snowmachines), which often are a preferred means of access in the absence of improvements. In national parks, wildlife refuges and BLM Wilderness study areas in Alaska, the regulations allow off-road vehicle use only by permit to qualified applicants, or following a general opening of an area to off-road vehicle use.⁴¹

B. ANILCA § 1110(b)—Access to Inholdings

Congress provided the major access guarantee for CSU inholders in ANILCA § 1110(b). This provision obligates the government to permit "adequate and feasible access" to qualified inholders.⁴² The scope of

38. The 1986 Interior rulemaking retains the limitation of ANILCA § 1110(a) that access is allowed only "for traditional activities" or "for travel to and from villages and homesites and other valid occupancies" only when snowmachines are used. 43 C.F.R. § 36.11(c) (1986). These limitations on access purposes do not apply when motorboats, nonmotorized surface transportation or fixed-wing aircraft are used. *See id.* §§ 36.11(d) to -(f) (1986).

39. *See* 36 C.F.R. §§ 2.17, 2.18 (1986); 50 C.F.R. §§ 27.31, 27.32, 27.34, 35.5 (1986). For example, aircraft landings are generally precluded in national parks, *see* 36 C.F.R. § 2.17 (1986), and wildlife refuges, *see* 50 C.F.R. § 27.34 (1986), outside Alaska.

40. Legislative history arguably suggests that the ANILCA § 1110(a) access rights do not include the right to construct permanent improvements. *See supra* note 35. Most improvements, such as landing strips, appear to qualify as a transportation or utility system (TUS) under ANILCA § 1102(4), 16 U.S.C. § 3162(4) (1982). Consequently, persons probably may construct such improvements only by complying with the TUS procedures set out in *id.* §§ 3161-3167. *See infra* text accompanying notes 82-116.

41. Interior could not generally open its Alaska lands to off-road vehicle (ORV) use due to the ORV restrictions contained in Executive Order 11644. *See* 51 Fed. Reg. 31,626 (Sept. 4, 1986); *infra* note 126. The regulations allow ORV use only: (1) on established roads or parking areas; (2) in additional areas designated in accordance with the procedures of E.O. 11633; and (3) in additional areas by a permit issued under 43 C.F.R. §§ 36.10 or 36.12, or by a permit issued upon a finding that ORV use would be compatible with the purposes of the CSU. 43 C.F.R. § 36.11(g) (1986).

42. ANILCA § 1110(b) provides:

Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or its effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those

ANILCA section 1110(b) can be analyzed by answering two questions: (1) Who is a qualified inholder? (2) What is the level of the access entitlement?

To qualify for access under ANILCA § 1110(b), a person must be an "owner or occupier" holding: (1) title to non-federal land interest, including surface or subsurface rights; (2) a valid mining claim, whether patented or unpatented, under the 1872 Mining Law;⁴³ or (3) a "valid occupancy" interest, such as a lease or permit from a federal or non-federal landowner.⁴⁴ The land interest must be either a true "inholding" completely surrounded by a CSU or private land "effectively surrounded" by a CSU and "physical barriers" to fall within the scope of § 1110(b).⁴⁵ ANILCA § 1110(b) is silent as to whether the provision guarantees access only from the boundary of the CSU to the inholding, or whether it also creates a right to access across adjacent Forest Service and BLM lands to reach a CSU inholding.⁴⁶

Interior's 1986 rulemaking interpreted the level of access entitlement, stating that the ANILCA § 1110(b) guarantee of "adequate and feasible access" means:

a route and method of access that is shown to be reasonably necessary and economically practicable but not necessarily the least costly alternative for achieving the use and development by the applicant on the applicant's non-federal land or occupancy interest.⁴⁷

This regulatory definition presents two interesting issues.

First, as clarified in the preamble to the rulemaking, Interior has defined the nebulous ANILCA § 1110(b) concept of "access" in terms of any right-of-way necessary to permit development of the inholding, including

public lands designated as [w]ilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

See 16 U.S.C. § 3170(b) (1982). In contrast, CSU inholders outside of Alaska do not have this absolute assurance of access. See *supra* notes 11-27 and accompanying text.

43. 30 U.S.C. §§ 22-54 (1982).

44. See 43 C.F.R. § 36.10(a)(4) (1986). The rulemaking preamble makes it clear that a "valid leasehold" or "valid occupancy" (e.g., an oil and gas lease, grazing lease, or special use permit) is sufficient to create ANILCA § 1110(b) access rights. 51 Fed. Reg. 31,625 (Sept. 4, 1986).

45. 43 C.F.R. §§ 36.10(a)(3), -(4) (1986).

46. In *id.* § 36.1(a) (1986), Interior arguably takes the position that § 1110(b) applies only "within any conservation system unit." This issue could become significant. If ANILCA § 1110(b) guarantees to inholders access only from the CSU boundary, there might not be assurance of access across adjacent BLM and Forest Service lands. For example, ANILCA § 1323 might not assure CSU inholders access across such adjacent lands because it applies to BLM and national forest inholders; a CSU inholder might not qualify. This could frustrate the legislative intent that ANILCA § 1110(b) assure access and could require that the provision be read to encompass access rights across adjacent lands in appropriate cases.

47. 43 C.F.R. § 36.10(a)(1) (1986).

rights-of-way for roads, pipelines and transmission lines.⁴⁸ This interpretation represents a significant change from that of Interior's now rescinded, interim 1980 rulemaking which had defined access solely in terms of "pedestrian or vehicular transportation" (e.g., access refers to movement of people and machinery), thus excluding a guarantee for pipelines and transmission lines.⁴⁹ Under Interior's current view, ANILCA § 1110(b) becomes an all-encompassing guarantee that an inholder will be granted all rights-of-way necessary for development.

Second, the regulatory definition seems to make the inholder virtually the sole arbiter of the desired type and level of development of his non-federal land interest. The adequate and feasible access definition obligates the federal government to permit "economically practicable" access commensurate with the "development [intended] by the applicant." This result appears to flow from ANILCA § 103(c),⁵⁰ which arguably prohibits direct federal regulation of inholdings, and from ANILCA § 1110(b), which appears to prohibit indirect regulation of inholding development through access controls. These two sections leave Interior with no discretion to deny access to a qualified inholder, or to tailor access so as to interfere with the intended use or development of the inholding. This means that Interior's regulations likely ensure inholder access for anything from a small wilderness cabin to a large scale mineral, timber or housing development. The implementing Interior regulations strive to provide to the inholder his desired route and method of access. However, if the appropriate agency makes certain findings, it may substitute another form or route of adequate and feasible access in exceptional circumstances.⁵¹

48. The rulemaking preamble states Interior's intent to apply ANILCA § 1110(b) to requests for "pipelines or transmission lines," since "the statute clearly states that the access right is for 'economic and other purposes'; not merely for ingress and egress." 51 Fed. Reg. 31,624 (Sept. 4, 1986). Several environmental groups have alleged that 43 C.F.R. § 36.10 is unlawful because it is not limited to pedestrian and vehicular access in the *Trustees for Alaska* litigation. See *supra* note 37. This suit also alleges that other aspects of the § 36.10 rule are unlawful under ANILCA.

49. The prior and now rescinded definition of access as solely "pedestrian or vehicular transportation," appears at 36 C.F.R. § 13.1(a) (1982) (NPS) and 50 C.F.R. § 36.2(a) (1982) (FWS). In this superseded interim rulemaking, see *supra* note 36, the NPS and FWS had stated that non-vehicular rights-of-way for pipelines and transmission lines were not within the scope of the ANILCA § 1110(b) "access" guarantee: "If the permanent improvement is not required as part of the applicant's right to adequate and feasible access to an inholding (e.g., pipeline, transmission line) the permit granting standards of sections 1104-1107 of ANILCA shall apply." 36 C.F.R. § 13.15(c)(2)(iii) (1986); 50 C.F.R. § 36.23(c)(2)(ii) (1986).

50. ANILCA § 103(c) provides:

Only those lands within the boundaries of any conservation system unit which are public lands [federally owned lands] . . . shall be deemed to be included as a portion of such unit. No lands which, before, on, or after [the date of enactment of this Act,] are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.

See 16 U.S.C. § 3103(c) (1982).

51. The Interior regulations provide that the federal agency shall:

(e)(1) . . . permit the route(s) and method(s) across the area(s) desired by the applicant, unless it is determined that:

(i) the route or method of access would cause significant adverse impacts on natural or other values of the [federal land] area and adequate and feasible access otherwise exists; or

The 1986 Interior regulations also clarify the relationship between the guarantee of inholder access in ANILCA § 1110(b) and the procedures for obtaining federal approval of a transportation or utility system (“TUS”) in ANILCA §§ 1101-1107. Congress did not clarify whether § 1110(b) or §§ 1101-1107 should govern when the access route desired by a qualified § 1110(b) applicant also constitutes a TUS under § 1102(4). Under the regulations, an applicant for access under § 1110(b) must comply with the procedures of § 1104 by filing a consolidated application to request access and submitting to expedited National Environmental Policy Act (NEPA) compliance procedures and agency decisions to evaluate the access proposal.⁵² However, these regulations do accord better treatment to the qualified ANILCA § 1110(b) applicant than to the ordinary applicant for a TUS, who has no assurance that Interior will grant access.⁵³ The rules relieve the qualified ANILCA § 1110(b) applicant from the obligation to comply with the remaining procedures in §§ 1101-1107 and ensure that such applicant will receive a permit for “adequate and feasible access” from the federal agency at the end of the administrative process.⁵⁴ Thus, as discussed below, the regulations appear to implement faithfully the guarantee of access in § 1110(b) and to interpret reasonably the disparate commands of §§ 1101-1107 and § 1110(b) in a harmonious manner.⁵⁵

C. ANILCA § 1111—Temporary Access

While ANILCA § 1110(b) accords CSU inholders guaranteed access, ANILCA § 1111 provides a “private landowner” with temporary access across CSU’s and other listed areas for “survey, geophysical, exploratory or other temporary uses” of non-federal lands.⁵⁶ Unlike the ANILCA

(ii) The route or method of access would jeopardize public health and safety and adequate and feasible access otherwise exists; or

(iii) The route or method is inconsistent with the management plan(s) for the [federal] area or purposes for which the area was established and adequate and feasible access otherwise exists; or

(iv) The method is unnecessary to accomplish the applicant’s land use objective.

(2) If the appropriate Federal agency makes one of the findings described in paragraph (e)(1) of this section, another alternative route(s) and/or method(s) of access that will provide the applicant adequate and feasible access shall be specified by [the appropriate] Federal agency

43 C.F.R. § 36.10(e)(1) to -(2) (1986). Thus, these regulations seem to assert the authority to change not only the route, but also the method (e.g., off-road vehicle to airplane access), of desired access to protect federal resource values, so long as the access remains economically practicable and adequate.

52. See *id.* §§ 36.10(c), -(d).

53. See *infra* text accompanying notes 100-109.

54. See 43 C.F.R. § 36.10(e)(1) (1986).

55. See *infra* text accompanying notes 111-116.

56. ANILCA § 1111 provides:

(a) In General

Notwithstanding any other provision of this Act or other law the Secretary shall authorize and permit temporary access by the State or a private landowner to or across any conservation system unit, national recreation area, national conservation area, the National Petroleum Reserve—Alaska or those public lands designated as [w]ilderness study or managed to maintain the [w]ilderness

§ 1110(b) absolute assurance of access, the regulations implementing ANILCA § 1111 allow temporary access only where it does not require "permanent facilities" and "will not result in permanent harm to the resources of" the federal lands.⁵⁷ And while "owners and occupiers," such as lessees, have ANILCA § 1110(b) access rights, § 1111 does not expressly authorize access for lessees and permittees.

Thus, the conclusion of the implementing Interior regulations that ANILCA § 1110(b) provides access rights superior to those provided by ANILCA § 1111 when both sections apply is well-founded.⁵⁸ This relationship may render ANILCA § 1111 a relatively unimportant access provision, for the most part useful only when the applicant is not a CSU inholder and seeks access completely across a CSU; a situation not covered by ANILCA § 1110(b).

III. GUARANTEED ACCESS TO INHOLDINGS WITHIN THE NATIONAL FOREST SYSTEM AND BLM-MANAGED PUBLIC LANDS

In substantially identical language, subsections (a) and (b) of ANILCA § 1323 assure adequate access to inholdings located within the National Forest System and BLM-managed public lands, respectively.⁵⁹ Neither

character or potential thereof, in order to permit the State or private landowner access to its land for purposes of survey, geophysical, exploratory, or other temporary uses thereof whenever he determines such access will not result in permanent harm to the resources of such unit, area, Reserve or lands.

(b) Stipulations and conditions

In providing temporary access pursuant to subsection (a) of this section, the Secretary may include such stipulations and conditions he deems necessary to insure that the private use of public lands is accomplished in a manner that is not inconsistent with the purposes for which the public lands are reserved and which insures that no permanent harm will result to the resources of the unit, area, Reserve or lands.

See 16 U.S.C. § 3171 (1982).

57. 43 C.F.R. § 36.12(d) (1986). Certain aspects of the § 36.12 rule implementing ANILCA § 1111 have been challenged in the *Trustees for Alaska* litigation, *supra* note 37.

58. 43 C.F.R. § 36.12(b) (1986) provides that "[s]tate and private landowners meeting the criteria of § 36.10(b) [the regulation implementing ANILCA § 1110(b)] are directed to utilize the procedures of § 36.10 to obtain temporary access."

59. ANILCA § 1323 provides:

(a) Reasonable use and enjoyment of land within boundaries of National Forest System

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, that such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

(b) Reasonable use and enjoyment of land surrounded by public lands managed by Secretary

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of [the] Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, that such owner comply with rules and regulations applicable to access across public lands.

See 16 U.S.C. § 3210 (1982).

the Forest Service nor the BLM has promulgated regulations implementing ANILCA § 1323.

A. *The Level of Assured Access Under ANILCA § 1323*

ANILCA § 1323 obligates the relevant agency to provide by permit access that is "adequate to secure . . . reasonable use" to an "owner" whose property is surrounded by Forest Service or BLM land. The level of access that is "adequate" would appear to vary with the level of "reasonable" development. The relevant agency likely can prescribe less environmentally deleterious access routes and methods, so long as economically practicable access is provided. Like the access rights afforded by ANILCA § 1110(b), the access rights provided by § 1323 also presumably include the right to construct permanent access improvements on federal lands, such as roads, landing strips, and bridges, in appropriate cases.

Unlike ANILCA § 1110(b), however, ANILCA § 1323 is more ambiguous as to whether the inholder can dictate the extent of his desired development. Since ANILCA § 1323 guarantees only "reasonable use and enjoyment" of an inholding, the relevant federal land manager arguably retains the discretion to declare a proposed development activity "unreasonable" due to its inconsistency with surrounding federal land use and thereby to refuse to grant access sufficient for the proposed development. It remains to be seen whether the Forest Service or BLM will assert this authority.

Additionally, ANILCA § 1323 employs the same inexact term "access" found in § 1110(b). Interior has interpreted "access" under ANILCA § 1110(b) comprehensively to include all rights-of-way needed for development, such as rights-of-way for pipelines, transmission lines, and the like. It is unclear, however, whether Interior and the Forest Service will construe § 1323 similarly.⁶⁰ Arguably, the Forest Service could attempt to interpret ANILCA § 1323(a) differently to include only personal transportation rights since the provision, unlike ANILCA § 1110(b) and section 1323(b), refers to the landowner's access for "ingress and egress."

B. *The Geographic Scope of ANILCA § 1323*

The geographic scope of ANILCA § 1323 has received more attention than the nature of its access rights. In *Montana Wilderness Association v. U.S. Forest Service*,⁶¹ the Ninth Circuit held that ANILCA § 1323(a) assures access to inholdings within the National Forest System nationwide. The Interior Board of Land Appeals has similarly held that § 1323(b) applies to BLM lands nationwide. These cases are discussed below.

The *Montana Wilderness Association* litigation arose in 1979, as a challenge by environmental groups to the Forest Service's grant of a per-

60. See *supra* text accompanying notes 48-49.

61. 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The case is discussed in Comment, *Wilderness Values and Access Rights: Troubling Statutory Construction Brings the Alaska Lands Act Into Play*, 54 U. COLO. L. REV. 593 (1983).

mit authorizing Burlington Northern Inc. to construct a logging road giving it access to its own timberlands. The access was to be across federal lands in a "checkerboard" area of alternate federal and private lands in the Gallatin National Forest in Montana. The road would have defeated the wilderness study protection afforded to the federal lands by the Montana Wilderness Study Act of 1977.⁶² After the plaintiffs had received a temporary restraining order barring action under the permit, the Forest Service suspended the permit and submitted the question of Burlington Northern's access rights to the Attorney General. This resulted in the Civiletti Opinion, discussed above, which rejected the Forest Service's arguments that the common law doctrine of easements by necessity applies to federal lands, and found that Burlington Northern had no express statutory access rights.⁶³ The Forest Service then reinstated the access permit on the grounds that an access right should be implied under the 1984 land grant, in accordance with the implied statutory access rights theory of the Attorney General.

After the Forest Service reinstated the access permit under its new theory of an implied statutory right to access, the case proceeded in district court. In 1980, the district court held that Burlington Northern was entitled to access across the Gallatin National Forest under either an easement by necessity theory or an implied statutory access theory.⁶⁴ The parties then cross-appealed to the Ninth Circuit. In the Ninth Circuit's first opinion of May 14, 1981, the court rejected the government's argument that § 1323(a) of the recently enacted Alaska Lands Act applies to states other than Alaska and thus guarantees access to Burlington Northern.⁶⁵ This initial Ninth Circuit opinion also reversed the district court's holding that Burlington Northern had implied statutory and easement by necessity access rights, leaving Burlington Northern without its desired access.⁶⁶

62. Pub. L. No. 95-150, 91 Stat. 1243 (1977). Wilderness areas are, by definition, roadless. See 16 U.S.C. §§ 1131(c), 1133(c) (1982).

63. Attorney General Civiletti construed the statutory provision under which the permit had been granted (16 U.S.C. § 478) literally to grant access rights across National Forest System lands only to "actual settlers." See Civiletti Opinion, *supra* note 23, at 1-13.

64. 496 F. Supp. 880, 880-81 (D. Mont. 1980), *aff'd in part & rev'd in part*, 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

65. While the May 14, 1981, opinion is not found in the official reporters, it was briefly reported at 11 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,521 (9th Cir. 1981). The court withdrew its May opinion upon issuing a new opinion on Aug. 19, 1981. The *Environmental Law Reporter* replaced the earlier pages with new ones, discarding the May opinion. A copy of the May opinion as published in the ELR is on file at the Land & Water Law Review office. In its May opinion, the court stated: "We hold that § 1323 of the Alaska National Interest Lands Conservation Act is limited to the State of Alaska, and so has no relevance to this case." *Id.* at 20,524 (May opinion).

66. On the implied statutory access rights theory, the Ninth Circuit opined that private access rights in the railroad land grant checkerboard was the "flip side of *Leo Sheep*" and, since the government has no implied access rights over private lands, "no reciprocal rights" should be granted to private parties. *Id.* at 20,524, 20,525 (May opinion). The court viewed the easement by necessity doctrine as allowing only access that "is consistent with the intent of the sovereign" and, since it had previously concluded that Congress had intended no implied access in enacting the railroad land grant statute, the court held that "Burlington Northern does not have an easement by necessity across federal land to its inholding." *Id.* at 20,525, 20,526 (May opinion).

The government then moved for reconsideration. On August 19, 1981, the Ninth Circuit reversed itself and vacated its earlier opinion. The court held that, despite the provision's incongruous placement in the Alaska Lands Act, ANILCA § 1323(a) provides a statutory guarantee of access applicable to the National Forest System "nation-wide."⁶⁷ Thus, at least with respect to the States encompassed by the Ninth Circuit, ANILCA § 1323(a) provides a minimum assurance of access that applies to the National Forest System outside Alaska. Although the question of the nationwide scope of ANILCA § 1323 is clouded by conflicting legislative history, the Ninth Circuit's resolution seems correct, particularly given the Forest Service's endorsement of that position.⁶⁸

Montana Wilderness Association left two issues unresolved. First, the second Ninth Circuit opinion expressly left open the issue of whether ANILCA § 1323(a), which purports to require access within the "National Forest System . . . [n]otwithstanding any other provision of law," governs access over national forest lands that have been designated as part of the National Wilderness Preservation System.⁶⁹ Sections 4(c) and 5(a) of the Wilderness Act contain access restrictions which arguably are as controlling as ANILCA § 1323(a) purports to be.⁷⁰ Although the issue of the supremacy of either ANILCA § 1323(a) or the Wilderness Act is a difficult one, it nonetheless appears that the later enacted ANILCA

67. *Montana Wilderness Ass'n*, 655 F.2d 951, 957 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982).

68. The confusing, contradictory and sometimes after-the-fact legislative history of ANILCA § 1323(a) is developed at length in *id.* at 955-57. All that can be said with certainty is that Senator John Melcher of Montana, the sponsor of ANILCA § 1323, and certain other congressmen intimately involved in the development of ANILCA thought that ANILCA § 1323 applied nationwide, while others (notably Representative Morris Udall, Chairman of the House Comm. on Interior and Insular Affairs, which reported ANILCA, until he changed his mind in voting for the conference report quoted *infra* note 71) thought that it did not. The Forest Service's interpretation that ANILCA § 1323(a) applies nationwide arguably should govern given that courts accord great deference to the contemporaneous interpretation of an ambiguous statute urged by the implementing agency. See, e.g., *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

69. "We recognize a facial problem or tension between 1323(a) and a portion of . . . [the Wilderness Act]. We need not decide in this case whether there is repeal by implication." *Montana Wilderness Ass'n*, 655 F.2d at 957 n.12.

70. Section 4(c) of the Wilderness Act provides:

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be . . . no permanent road within any [W]ilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter . . . 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.

16 U.S.C. § 1133(c) (1982). Section 5(a) of the Wilderness Act provides:

In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as [W]ilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access . . . or the State-owned land or privately owned land shall be exchanged for federally owned land

16 U.S.C. § 1134(a) (1982). The Attorney General construed § 5(a) not to contain an absolute assurance of access; rather, the "landowner has a right to access or exchange." *Civiletti Opinion*, *supra* note 23, at 26 (emphasis in original).

§ 1323(a)—which provides that it applies “[n]otwithstanding any other provision of law”— would be found to govern and thus to guarantee inholder access in national forest Wilderness areas. This result comports with the legislative history that the court in *Montana Wilderness Association* found to favor the nationwide applicability of ANILCA § 1323(a). The court relied on a conference committee decision on a post-ANILCA Wilderness bill that deleted an access provision for the bill on the ground that ANILCA § 1323(a) already provided such access in Wilderness areas outside Alaska.⁷¹ Consequently, ANILCA § 1323(a) appears to apply in Wilderness areas of national forests nationwide.

Second, the court in *Montana Wilderness Association* left in doubt the applicability of ANILCA § 1323(b) to BLM lands outside Alaska, since the court merely assumed *arguendo* that § 1323(b) applies only in Alaska.⁷² The Interior Board of Land Appeals (IBLA) has since held that ANILCA § 1323(b) similarly assures inholder access across BLM lands nationwide.⁷³ In *Utah Wilderness Association*, the IBLA considered the access rights of Shell Oil Company across a BLM-managed Wilderness study area in Utah to a Shell oil lease on State lands. The majority reasoned that, since the ANILCA § 1323 “legislative history clearly supports the conclusion that these two subsections have the same [geographical] scope” and since *Montana Wilderness Association* had held that § 1323(a) applies nationwide, § 1323(b) likewise applies to BLM lands nationwide.⁷⁴ The IBLA rejected the statutory argument that § 1323(b) is applicable only in Alaska because it provides access across “public lands” and ANILCA § 102(3) defines “public lands” as certain federal “land situated in Alaska.”⁷⁵

71. The legislative history that the Ninth Circuit found “decisive” in *Montana Wilderness Ass’n*, 655 F. 2d at 957, for the proposition that ANILCA § 1323(a) applies nationwide also appears equally decisive for the proposition that ANILCA § 1323(a) guarantees access into National Forest System Wilderness areas. In considering the designation of Wilderness in National Forests in Colorado, the House-Senate Conference Committee stated that special access protections were not required because ANILCA § 1323(a) already guaranteed access in national forest Wilderness areas:

Section 7 of the Senate amendment contains a provision pertaining to access to non-federally owned lands within national forest [W]ilderness areas in Colorado. The House bill has no such provision.

The conferees agreed to delete the section because similar language has already passed Congress in section 1323 of the Alaska National Interest lands Conservation Act.

H. R. REP. No. 1521, 96th Cong., 2d Sess. 20 (1980). At least one commentator has expressed the view that ANILCA § 1323(a) does not guarantee access in national forest Wilderness areas. See Comment, *supra* note 61, at 612-14. The authors believe that the Comment’s “repeal by implication” argument is incorrect, since ANILCA § 1323(a) repeals prior laws expressly (that is, it applies “[n]otwithstanding any other provision of law”) and not by implication. See *In re Oswego Barge Co.*, 664 F.2d 327, 340 (3d Cir. 1981); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739 (5th Cir. 1980).

72. *Montana Wilderness Association*, 655 F.2d at 954. The court stated, “Subsection (b), therefore, is arguably limited by its terms to Alaska, though we do not find it necessary to settle that issue here. Our consideration of the scope of § 1323(b) proceeds under the assumption that § 1323(b) is limited to Alaska.”

73. *Utah Wilderness Ass’n*, 91 Interior Dec. 165, 172-73 (1984) (also reported at 80 Interior Bd. Land App. 64, 76-77 (Mar. 30, 1984) (IBLA No. 83-356)).

74. *Id.* at 172.

75. 16 U.S.C. § 3102(3) (1982).

Instead, the IBLA reasoned that "the subsection itself defines the term 'public lands' as land 'managed by the Secretary under the Federal Land Policy and Management Act of 1976'" and that this latter definition should control to accord with the legislative intent.⁷⁶

A concurring opinion in *Utah Wilderness Association* would have granted Shell's desired access on the separate ground that the decision in *Utah v. Andrus* requires access to state school trust lands.⁷⁷ The concurring opinion questioned whether the IBLA could ignore the "public lands" definition of ANILCA § 102(3) and hesitated to have the IBLA construe expansively ANILCA § 1323(b) without judicial guidance, "particularly where such an interpretation requires that we ignore the plain meaning of the language used."⁷⁸

While *Utah Wilderness Association* was appealed, no judicial opinion regarding the nationwide application of ANILCA § 1323(b) was issued.⁷⁹ The case was dismissed as moot after Shell relinquished the right-of-way. The BLM has taken the position in its Manual that ANILCA § 1323(b) applies on BLM lands nationwide, and requires "that the access necessary for the reasonable use and enjoyment of the non-Federal land cannot be denied."⁸⁰

A recent Supreme Court decision casts some doubt on the *Montana Wilderness Association* and *Utah Wilderness Association* conclusions that ANILCA § 1323 guarantees inholder access across the National Forest System and BLM lands nationwide.⁸¹

76. 91 Interior Dec. at 169, 171-73.

77. 486 F. Supp. 995 (C.D. Utah 1979).

78. *Utah Wilderness Ass'n*, 91 Interior Dec. at 176-77.

79. *Utah Wilderness Ass'n v. Clark*, No. C-84-0742J (C.D. Utah complaint filed May 25, 1984).

80. BLM MANUAL Part 2800.06 D (1985).

81. In *Amoco Production Co. v. Village of Gambell*, 107 S. Ct. 1396 (1987), the Court held that the protection of subsistence afforded by ANILCA § 810 (16 U.S.C. § 3120 (1982)) did not apply outside the State of Alaska, for instance on the federal Outer Continental Shelf outside state boundaries. In so ruling, the Court stated in dictum that the "other provisions of ANILCA . . . need not be extended beyond the State of Alaska in order to effectuate their apparent purposes." 107 S. Ct. at 1407. This statement arguably implies that ANILCA § 1323 does not apply outside Alaska. Despite this, since the Court did not expressly address ANILCA § 1323, its legislative history, or the *Montana Wilderness Association* and *Utah Wilderness Association* decisions, arguably the *Village of Gambell* decision does not restrict ANILCA § 1323 to Alaska.

The Court also noted that ANILCA § 102(3) (16 U.S.C. § 3102(3) (1982)) definition of "public lands" as "Land situated in Alaska", and stated in dictum that this definition "applies as well to the rest of the statute". 107 S. Ct. at 1405-07. This statement appears to undercut the IBLA's reasoning in *Utah Wilderness Association*, 92 Interior Dec. 165, 171-73 (1984). The IBLA reasoned that ANILCA § 102(3) definition of "public lands" did not apply to ANILCA § 1323(b) because § 1323(b) had its own definition of Public lands which was not limited to Alaska. If ANILCA § 102(3)'s definition is controlling as the Supreme Court suggested, ANILCA § 1323(b) is limited to BLM lands in Alaska.

Thus, dicta in the *Village of Gambell* case calls into question the nationwide applicability of ANILCA § 1323 in general, and § 1323(b) in particular. The uncertain geographical scope of these ANILCA access guarantees provides a further reason for legislative clarification of access rights across federal lands, as advocated in Section VI, *infra*.

IV. TRANSPORTATION OR UTILITY SYSTEMS UNDER ANILCA

The provision of specific access guarantees in ANILCA was motivated in part by the absence of mature transportation and utility infrastructures in Alaska. Congress also recognized that existing law was cumbersome and inadequate for consideration of transportation or utility systems.⁸² Consequently, in ANILCA §§ 1101-1107,⁸³ Congress provided new authorities and procedures for federal consideration of transportation and utility system proposals in Alaska. The intent of Congress was to establish a mandatory, uniform and expedited process for the federal consideration of a "transportation or utility system" (TUS). An overview of ANILCA §§ 1101-1107 is provided in the next paragraph, followed by a more detailed discussion of the provisions as implemented in Interior regulations.⁸⁴

ANILCA § 1102 broadly defines the key term "transportation or utility system" to include such facilities as pipelines, transmission lines, roads, and airports—if any portion of the system would cross a CSU or similar conservation area in Alaska. Whenever a qualifying TUS is proposed, ANILCA § 1104 requires that the proponent file a consolidated application form containing all the information required for TUS approval by all federal agencies. The provision also contains schedules for expedited agency decision-making and compliance with the National Environmental Policy Act of 1969 (NEPA). Substantive agency decision-making standards for a TUS remain largely intact. Agency decisions may be appealed under ANILCA § 1106 if: (1) an agency disapproves a given TUS in its discretion; or (2) an agency lacked authority to approve a given TUS; or (3) the TUS would cross a Wilderness area. In the first situation, ANILCA § 1106(a) allows the applicant to appeal to the President, who has authority to approve the TUS. In the latter two situations, the TUS may be approved under ANILCA § 1106(b) if the President recommends approval and the Congress adopts a joint resolution of approval.

82. The ANILCA legislative history contained recognition that Alaska's "existing transportation and utility systems are in their embryonic stage of development." H.R. REP. No. 97, Pt. I, 96th Cong., 1st Sess. 235 (1979). Congress felt that existing law was inadequate to ensure the approval of future transportation and utility systems needed for Alaska's development:

[E]xisting law makes siting of roads and airports, particularly, but other modes as well, very difficult if not impossible in [W]ilderness areas, parks, wild and scenic rivers, and wildlife refuges (in descending order of difficulty). Specifically, in the case of parks and [W]ilderness, no statutory law presently permits the issuance of rights-of-way for general access. Secondly, existing law makes for bad decisions from a land planning and environmental standpoint because it is incremental in nature.

Id. at 237. One of the gaps in existing law was that "there is no applicable law providing for oil and gas pipelines across National Parks." S. REP. No. 413, *supra* note 28, at 298. To remedy such inadequacies, Congress "adopted a [consolidated] procedure for future siting of transportation facilities which supersedes rather than supplements existing law." *Id.* at 246.

83. 16 U.S.C. §§ 3162-3167 (1982). Due to the length of these sections, only the most significant provisions will be quoted in the text and footnotes which follow.

84. The operation of the TUS procedures also is discussed in Sagalkin & Panitch, *Mineral Development Under the Alaska Lands Act*, 10 UCLA-ALASKA L. REV. 117, 133-41 (1981).

Interior has implemented the TUS provisions in two actions: the 1981 publication of the consolidated application form⁸⁵ and the 1986 promulgation of regulations governing Interior's consideration of TUS proposals.⁸⁶ The operation of the TUS provisions as implemented is discussed in detail below.

ANILCA § 1102(4) and the regulations define the critical term "transportation or utility system" by type and location.⁸⁷ The term covers seven categories of systems and is applicable if any portion of the system would be routed across a CSU or other listed federal areas. Under this definition, a system built wholly on non-federal lands or on certain Forest Service and BLM lands would not be subject to the TUS procedures. The broad categories of qualified systems appear to encompass nearly every form of transportation, utility, and energy distribution methods, particularly because of the catch-all phrase that "other systems of general transportation"⁸⁸ are included. The congressional choice of the word "systems" to describe these rights-of-way—implying that ANILCA Title XI applies only to large-scale transportation and utility networks—appears misleading, since a relatively small-scale facility, such as a road or landing strip, also may constitute a TUS.

85. 46 Fed. Reg. 29,757-58 (June 3, 1981). The form (Standard Form 299) was revised and re-issued in 1983.

86. 43 C.F.R. §§ 36.1 to .9 (1986). Certain aspects of the TUS rules have been challenged in the *Trustees for Alaska* litigation, *supra* note 37.

87. ANILCA § 1102 provides:

(A) The term "transportation or utility system" means any type of system described in subparagraph (B) if any portion of the route of the system will be within any conservation system unit, national recreation area, or national conservation area in the State (and the system is not one that the department or agency having jurisdiction over the unit or area is establishing incident to its management of the unit or area).

(B) The types of systems to which subparagraph (A) applies are as follows:

(i) Canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other systems for the transportation of water.

(ii) Pipelines and other systems for the transportation of liquids other than water, including oil, natural gas, synthetic liquid and gaseous fuels, and any refined product produced therefrom.

(iii) Pipelines, slurry and emulsion systems and conveyor belts for the transportation of solid materials.

(iv) Systems for the transmission and distribution of electric energy.

(v) Systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals, and other means of communication.

(vi) Improved rights-of-way for snow machines, air cushion vehicles, and other all-terrain vehicles.

(vii) Roads, highways, railroads, tunnels, tramways, airports, landing strips, docks, and other systems of general transportation.

Any system described in this subparagraph includes such related structures and facilities (both temporary and permanent) along the route of the system as may be minimally necessary for the construction, operation, and maintenance of this system. Such related structures and facilities shall be described in the application required by section 1104, and shall be approved or disapproved in accordance with the procedures set forth in this title.

See 16 U.S.C. § 3162(4) (1982); 43 C.F.R. § 36.2(p) (1986).

88. ANILCA § 1102(4); see 16 U.S.C. § 3162(4) (1982). The legislative history suggests that systems of general transportation include "private and commercial transportation of passengers and shipment of goods." S. REP. NO. 413, *supra* note 28, at 244.

Related structures and facilities along the route of the system that are necessary for its construction and maintenance (e.g., construction roads) also are included in the TUS. While the proposed rulemaking specifically excluded certain production and storage facilities from the definition of "related structures and facilities," these exceptions were deleted in the final rulemaking. Instead, the preamble states that the "test will be whether the related facility is reasonably necessary to the operation of the TUS."⁸⁹ Further, the rule defines "related structures and facilities" as those which are listed by the applicant on the consolidated application form.⁹⁰

Persons proposing a system or facility must accurately determine whether it constitutes a TUS under ANILCA Title XI and then identify all components of the TUS. ANILCA § 1104(a) ominously provides that no federal authorization for a TUS "shall have any force or effect" unless the entire TUS complies with § 1104.⁹¹ For example, if a person mistakenly obtains approval for a right-of-way under legal authority other than ANILCA §§ 1101-1107 and an opposing group or the government later discovers that the right-of-way comes within the definition of a TUS, litigation may ensue to invalidate the earlier approval. The desirability of such a potentially punitive provision in a statutory scheme enacted for the benefit of TUS proponents is questionable. Interior, however, has attempted to forestall the potentially adverse consequences of this provision by urging TUS proponents to engage in preapplication meetings with federal officials to seek agreement on the extent and components of the proposed TUS.⁹²

The unique Title XI procedures begin when an applicant proposes a qualifying TUS. Instead of completing a number of different agency forms and being subjected to a maze of federal processing schedules, the TUS applicant need submit only a single consolidated application form that the relevant agencies will consider under expedited procedures established by ANILCA § 1104.⁹³ ANILCA § 1104(e) contemplates that NEPA's

89. 51 Fed. Reg. 31,622, 31,630 (Sept. 4, 1986).

90. 43 C.F.R. § 36.2(m) (1986). This subsection states: "'Related structures and facilities' means those structures, facilities and right-of-ways [sic] which are reasonably and minimally necessary for the construction, operation and maintenance of a TUS, and which are listed as part of the TUS on the consolidated application form"

91. ANILCA § 1104(a) provides:

Notwithstanding any provision of applicable law, no action by any Federal agency under applicable law with respect to the approval or disapproval of the authorization, in whole or in part, of any transportation or utility system shall have any force or effect unless the provisions of this section are complied with.

See 16 U.S.C. § 3164(a) (1982).

92. See 46 Fed. Reg. 29,759-60 (June 3, 1981); 43 C.F.R. § 36.3 (1986).

93. In pertinent part, ANILCA § 1104 provides:

(b) Consolidated applications

(1) Within one hundred and eighty days after the enactment of this Act, the Secretary, the Secretary of Agriculture, and the Secretary of Transportation, in consultation with the heads of other appropriate Federal agencies, shall jointly prescribe and publish a consolidated application form to be used for applying for the approval of each type of transportation or utility system. Each

environmental impact statement (EIS) responsibilities related to the TUS "shall be completed within one year from the date" of filing a consolidated application form.⁹⁴ The application and TUS approval procedures apply not only to the affected federal land managing agencies, but also to every federal agency having jurisdiction over the construction or operation of the TUS.⁹⁵ For example, if a telecommunications facility on CSU lands requires the approval of the Federal Communications Commission, the TUS procedures likely apply to both Interior's approval of the site and any Commission approval for operation of the facility. Thus, the TUS procedures appear to provide "one-stop shopping" for all federal authorizations necessary to establish a TUS.

Four factors may lengthen the NEPA compliance period or may diminish the cost savings suggested by the "one-stop shopping" approach. First, ANILCA Title XI generally did not supersede existing agency informational requirements; consequently, the consolidated application form may not reduce appreciably the TUS proponent's reporting burden.⁹⁶ Second, Title XI does not decrease meaningfully a TUS proponent's information cost, since the regulations require that the TUS proponent pay the "costs to the United States of application processing" and the

such application form shall be designed to elicit such information as may be necessary to meet the requirements of this title and the applicable law with respect to the type of system concerned.

(2) For purposes of this section, the heads of all appropriate Federal agencies, including the Secretary of Transportation, shall share decisionmaking responsibility in the case of any transportation or utility system described in section 1102(4)(B)(ii), (iii), or (vii); but with respect to any such system for which he does not have programmatic responsibility, the Secretary of Transportation shall provide to the other Federal agencies concerned such planning and other assistance as may be appropriate.

(c) Filing

Each applicant for the approval of any transportation or utility system shall file on the same day an application with each appropriate Federal agency. The applicant shall utilize the consolidated form prescribed under subsection (b) for the type of transportation or utility system concerned.

See 16 U.S.C. § 3164(b), -(c) (1982). One may question whether the publication of one general consolidated application form by the Secretaries of the Interior, Agriculture and Transportation comports with the intent of Congress, since ANILCA § 1104 appears to envision different and specific application forms for each of the seven categories of Systems. See ANILCA § 1104(b)(1) (The Secretaries "shall . . . publish a consolidated application form . . . for the approval of each type of transportation or utility system. Each such application form shall be designed to elicit such information . . . with respect to the type of system concerned."); -(c) ("The applicant shall utilize the consolidated [application] form . . . for the type of transportation or utility system concerned."); 16 U.S.C. §§ 3164(b)(1), -(c) (1982).

94. 16 U.S.C. § 3164(e) (1982).

95. See ANILCA §§ 1102(1), 1104(c); 16 U.S.C. §§ 3162(1), 3164(c) (1982); 43 C.F.R. §§ 36.2(d), 36.4(a) (1986).

96. Congress seems to have contemplated the retention of existing agency information requirements by providing in ANILCA § 1103 that, "[e]xcept as specifically provided in this title, applicable law shall apply with respect to the authorization" of a TUS. See 16 U.S.C. § 3163 (1982). The rulemaking preamble also suggests that ANILCA did not significantly reduce the applicant's reporting burden ("each Federal Agency has regulations and informational material which specifies the type of information that must be included in an application.") 51 Fed. Reg. 31,623 (Sept. 4, 1986).

“reasonable administrative and other costs of EIS preparation”.⁹⁷ Third, Interior’s regulations allow several extensions of the one year NEPA compliance schedule by postponing the effective submission date of the consolidated application form.⁹⁸ Finally, ANILCA § 1104(e) creates a “good cause” exception permitting federal agencies to extend the time period for NEPA compliance in certain situations.⁹⁹

Two different procedures for obtaining federal approval of a TUS application exist. Interior’s rules establish separate procedures for approval of: (1) a TUS that does not traverse a Wilderness area and for which the agency has legal authority other than ANILCA Title XI to approve the TUS; and (2) a TUS that crosses Wilderness lands or for which there is no authority other than Title XI to approve the TUS.¹⁰⁰

When the TUS would be sited outside a Wilderness area and the relevant federal agencies have substantive legal authority to approve the TUS under “applicable law” (that is, authority other than Title XI), ANILCA § 1104(g) directs the agencies to make a final decision on the TUS within four months after publication of the final EIS.¹⁰¹ In this situation, ANILCA § 1104(g) likely does not supersede the substantive “applicable law” that ordinarily would be applied in evaluating a similar proposal outside of Alaska. The provision only supplements applicable law by forcing agencies to make additional considerations and findings—findings that may provide grounds for litigation challenges.¹⁰²

97. 43 C.F.R. § 36.6(c) (1986). ANILCA § 1104(e) obliquely requires EIS cost reimbursement by incorporating the provisions of FLPMA § 304 (43 U.S.C. § 1734 (1982)) on cost reimbursement. See 16 U.S.C. § 3165 (1982).

The FLPMA cost recovery rule (43 C.F.R. § 2301.1-1) was invalidated in *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Cir. 1983). Interior has proposed new FLPMA cost recovery rules at 51 Fed. Reg. 26,836 (July 25, 1986). In the interim, “total costs will be presumed to be recoverable” for TUS EIS costs. 51 Fed. Reg. 31,623 (Sept. 4, 1986).

Even persons with a statutory guarantee of access under ANILCA § 1110 are not exempted “from paying reasonable fees” for processing the access application. 51 Fed. Reg. 31,625 (Sept. 4, 1986). The regulations compel payment of administrative costs by barring issuance of the TUS permit “until all fees and other charges have been paid in accordance with applicable law.” 43 C.F.R. § 36.9(a) (1986).

98. Although the date that the applicant files the consolidated application form ordinarily starts the clock for the one year NEPA compliance period, the regulations create two exceptions. First, although ANILCA § 1104(c) requires the form to be filed with all affected federal agencies “on the same day”, the regulations: (1) allow a “15 day” grace period to file with all agencies and start the clock only when the last federal agency filing is made; and (2) provide that, if the TUS applicant has not filed with all pertinent federal agencies, the application must be returned to the TUS “applicant without further action.” 43 C.F.R. §§ 36.4(c), 36.5(b) (1986). Second, if the application is incomplete and the TUS proponent does not provide requested information within thirty days, the application will be processed only if the TUS proponent agrees that the official filing date becomes the date on which the specific additional information is provided. *Id.* § 36.5(d)(1). Thus, the ANILCA § 1104 schedule for federal decisionmaking can be upset unless the applicant carefully supplies all pertinent information in the application and submits it to all relevant federal agencies on the same day.

99. ANILCA § 1104(e) allows time extensions for EIS preparation “for good cause,” if the federal agency notifies the TUS proponent and publishes the reasons justifying the extension in the *Federal Register*. See 16 U.S.C. § 3164(e) (1982).

100. See 43 C.F.R. § 36.7 (1986).

101. See 16 U.S.C. § 3164(g) (1982); 43 C.F.R. § 36.7(a) (1986).

102. In this situation, ANILCA § 1104(g) provides that “each Federal agency shall make a decision to approve or disapprove in accordance with applicable law,” and ANILCA § 1102(1)

When all relevant federal agencies agree that the TUS should be approved, TUS rights-of-way will be issued without further levels of review.¹⁰³ If an agency disapproves a TUS that it had the authority to approve, ANILCA § 1106(a) allows a TUS applicant to appeal to the President. This unusual Presidential appeal process directs the President to approve the TUS if, within four months of the filing of the appeal, the President concludes that: (1) the TUS would be in the "public interest"; (2) the TUS "would be compatible with the purposes for which" the particular CSU to be traversed was established; and (3) "no economically feasible and prudent alternative route for the" TUS exists.¹⁰⁴ These tests appear to have been adapted from the wildlife refuge compatibility test of the National Wildlife Refuge System Administration Act of 1966 and the feasible and

defines applicable law as "any law of general applicability (other than this title) under which" a federal agency has jurisdiction to authorize a portion of a TUS. See 16 U.S.C. §§ 3164(g), 3162(1) (1982). The rulemaking preamble identified the "applicable law" for granting rights-of-way across lands managed by Interior as including: (1) for BLM lands, Title V of FLPMA (43 U.S.C. §§ 1761-1771 (1982)) and 30 U.S.C. § 185 (1982); (2) for Fish and Wildlife Service lands, 16 U.S.C. § 668dd (1982); 50 C.F.R. §§ 29.21 to .22 (1986) (implementing rules); and (3) for National Park Service lands, 16 U.S.C. §§ 5, 79 (1982); 23 U.S.C. § 317 (1982); 36 C.F.R. Part 14 (1986) (implementing rules). See 51 Fed. Reg. 31,620 (1986).

ANILCA § 1104(g)(2) appears to only supplement existing law by requiring the agency to consider and "make detailed findings supported by substantial evidence" on the following:

- (A) the need for, and economic feasibility of, the transportation or utility system;
- (B) alternative routes and modes of access, including a determination with respect to whether there is any economically feasible and prudent alternative to the routing of the system through or within a conservation system unit, national recreation area, or national conservation area and, if not, whether there are alternative routes or modes which would result in fewer or less severe adverse impacts upon the conservation system unit;
- (C) the feasibility and impacts of including different transportation or utility systems in the same area;
- (D) short- and long-term social, economic, and environmental impacts of national, State, or local significance, including impacts on fish and wildlife and their habitat, and on rural, traditional lifestyles;
- (E) the impacts, if any, on the national security interests of the United States, that may result from approval or denial, of the application for a transportation or utility system;
- (F) any impacts that would affect the purposes for which the Federal unit or area concerned was established;
- (G) measures which should be instituted to avoid or minimize negative impacts; and
- (H) the short- and long-term public values which may be adversely affected by approval of the transportation or utility system versus the short- and long-term public benefits which may accrue from such approval.

See 16 U.S.C. § 3164(g)(2) (1982). The sufficiency of these additional findings could be challenged in litigation, employing the substantial evidence test called for by ANILCA § 1104(g)(2). See Sagalkin & Panitch, *supra* note 84, at 139-40.

103. See ANILCA § 1106(a)(1)(A), 16 U.S.C. § 3166(a)(1)(A) (1982); 43 C.F.R. §§ 36.7(a), 36.9 (1986).

104. The presidential approval process of ANILCA § 1106(a)(2), 16 U.S.C. § 3166(a)(2) (1982) requires the President to override a discretionary agency disapproval if the President finds "that such approval would be in the public interest and that (1) such system would be compatible with the purposes for which the unit was established; and (2) there is no . . . alternative route for the system.

prudent alternative standard of the Department of Transportation Act of 1966.¹⁰⁵

A separate set of procedures for evaluating a proposed TUS is triggered when the TUS would traverse Wilderness lands or when the agency otherwise lacks authority to approve a TUS. These procedures require presidential and congressional approval of the TUS. Under ANILCA § 1105, a federal agency that lacks authority to approve a given TUS under "applicable law" must first file, within four months after the filing of the final EIS, recommendations on the compatibility of the TUS with the purposes of the CSU it would traverse and on the existence of economically feasible and prudent alternative routes for the TUS.¹⁰⁶ Under ANILCA § 1106(b)(2), the President then has four months from the receipt of the agency recommendations to decide whether to recommend approval of the TUS to the Congress. If the President recommends TUS approval to the Congress, ANILCA § 1106(c) provides that the TUS shall be considered approved only if the Congress passes a joint resolution of approval within 120 days of continuous session.¹⁰⁷ If the President does not recommend approval, the applicant has a right of judicial review. That right, however, may be illusory because the President's review appears to lack reviewable standards and there may be no law to apply.¹⁰⁸

If TUS approval is obtained from the agencies, the President, or the Congress, ANILCA § 1107 directs the Secretaries of the Interior and Agriculture to issue necessary rights-of-way over the lands they manage, while striving to protect important natural resource values "to the maximum extent feasible."¹⁰⁹ Approval of the TUS under any of these procedures apparently provides all necessary federal authorization for TUS

105. Section 4(d)(1) of the National Wildlife Refuge System Administration Act of 1966 allows access and other Wildlife Refuge uses when the Secretary of the Interior "determines that such uses are compatible with the major purposes for which such areas were established." 16 U.S.C. § 668dd(d)(1)(A) (1982). Section 4(f) of the Department of Transportation Act of 1966, as amended, authorizes federally-assisted highways through National Park and Wildlife Refuge areas only where "there is no feasible and prudent alternative to the use of such land." 49 U.S.C. app. § 1653(f) (1982) (repealed by Act approved Jan. 12, 1983, Pub. L. No. 97-449, § 7(b), 96 Stat. 2413, 2444 (1983)) (revised and reenacted by Act approved Jan. 12, 1983, Pub. L. No. 97-449, § 1(b), 96 Stat. 2413, 2419 (1983) (to be codified at 49 U.S.C. § 303)).

106. ANILCA § 1105; see 16 U.S.C. § 3165 (1982); 43 C.F.R. § 36.7(b)(1)(i) (1986). Interior has defined an "economically feasible and prudent alternative" in terms of being feasible "to attract capital to finance its construction" and of being prudent from a cost-benefit perspective. 43 C.F.R. § 36.2(h) (1986). "Compatibility" is defined in terms of "not significantly interfer[ing] with . . . the purposes for which the area was established." 43 C.F.R. § 36.2(f) (1986) (defining "compatible").

107. See 16 U.S.C. § 3166(c) (1982). If congressional approval is not received under this joint resolution process, thus TUS approval may require an Act of Congress.

108. Unlike the presidential approval standards of ANILCA § 1106(a) and the agency recommendation standards of ANILCA § 1105, ANILCA § 1106(b) provides no standards to guide the President's decision. It merely states that "the President shall decide whether or not the application for the system concerned should be approved." 16 U.S.C. § 3166(b)(2) (1982). Consequently, the absence of judicially discoverable standards may render the President's denial decision unreviewable because it is committed to Presidential discretion by law. See 5 U.S.C. § 701(a)(2) (1982); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

109. See 16 U.S.C. §§ 3166(c)(6), 3167 (1982); 43 C.F.R. § 36.9 (1986).

construction and operation. The stated purpose of the Title XI provisions—to provide “a single comprehensive statutory authority for the approval or disapproval of applications for such systems”— supports this conclusion.¹¹⁰

V. THE CONFLICT BETWEEN THE TUS PROVISIONS AND THE ACCESS PROVISIONS OF §§ 1110(b) and 1111

In many situations, both the ANILCA TUS provisions and the separate access provisions of ANILCA §§ 1110(b) and 1111 may apply. Neither the ANILCA Title XI statutory language nor its legislative history make clear the intended relationship, although Interior’s regulations offer a reasonable compromise. The uncertainty arises from conflicting clauses making each set of provisions controlling notwithstanding any other law and from an imprecise definition of “applicable law.”

A simple example illustrates this statutory conflict. Suppose that an inholder within a Wilderness area desires to construct an improved road to his inholding. Assuming that the inholder qualifies under § 1110(b) and given that the road constitutes a TUS, the conflict is plain. There are three possible interpretations of the manner in which the desired access could be granted.

A. ANILCA § 1110(b) Controls, and ANILCA §§ 1101-1107 Do Not Apply

Under one interpretation, ANILCA § 1110(b) directs the relevant Secretary to permit this “adequate and feasible access” forthwith, “[n]otwithstanding any other provisions of” ANILCA or other law. Even though the road also constitutes a TUS under the definition in ANILCA § 1102(4), compliance with the ANILCA § 1104 arguably is not required as ANILCA § 1104(a) supersedes only “applicable law” and ANILCA § 1110(b) is not “applicable law.”¹¹¹ Under this reading, ANILCA § 1110(b) is a self-contained provision for access, and a qualified inholder need not comply with the ANILCA § 1104 application, EIS processing and agency decision procedures.

B. ANILCA §§ 1104 and 1110(b) Apply, But ANILCA §§ 1105 and 1106 Do Not Apply

Alternatively, Title XI might be interpreted to guarantee access to the ANILCA § 1110(b) inholder after procedural compliance with ANILCA § 1104. Interior has adopted this interpretation. Two legal bases support

110. ANILCA § 1101(c), 16 U.S.C. § 3161(c) (1982). This all-encompassing federal approval purpose also is reflected in the legislative history: “[T]he reported bill makes it clear that Title XI provides a single comprehensive statutory authority for . . . all facets of such systems.” S. REP. No. 413, *supra* note 28, at 246.

111. ANILCA § 1102(1) provides that the “term ‘applicable law’ means any law of general applicability (*other than this title*) under which any Federal department or agency has [any] jurisdiction to grant any authorization . . . without which a transportation or utility system cannot, in whole or in part, be established or operated.” See 16 U.S.C. § 3162(1) (1982) (*emphasis added*). Since Congress excluded all of ANILCA Title XI from the definition of “applicable law,” and ANILCA §§ 1104 and 1110(b) are both part of Title XI, arguably ANILCA § 1104 does not supersede ANILCA § 1110(b).

Interior's view that the applicant should comply with the procedures contained in ANILCA § 1104: (1) this view represents a proper exercise of agency discretion in implementing an application and permit system for granting ANILCA § 1110(b) access rights; and (2) this view ensures compliance with the § 1104(a) directive that no access authorization has "any force or effect unless the provisions of this section are complied with." However, once the applicant complies with § 1104, the agency must issue the ANILCA § 1110(b) access rather than submit the issue of the Wilderness access to the President and Congress under ANILCA §§ 1105 and 1106. The latter two provisions are expressly superseded since § 1110(b) directs the Secretary to issue such access "[n]otwithstanding any other provisions of this Act."

C. ANILCA §§ 1104-1106 Control, and There Is No ANILCA § 1110(b) Access Guarantee

The third possible reading is that only the President and the Congress can approve a road in a Wilderness area. Under this reading, ANILCA § 1104(g) allows a federal agency to approve the TUS only "in accordance with applicable law" and, if ANILCA § 1110(b) is excluded from applicable law, the agency is under no legal requirement to approve the construction of a road in a Wilderness area.¹¹² Furthermore, ANILCA § 1106(b) seems to direct that, where "any application for [a TUS] . . . proposes to . . . traverse any area within the National Wilderness Preservation System," only the President and the Congress, exercising their discretion under ANILCA § 1106, may approve the TUS.¹¹³

Thus, three possible and conflicting interpretations exist. Resort to legislative history to undo this Gordian knot of conflicting interpretations is of little avail since Congress drafted the TUS provisions and access guarantee provisions at different times and desired each set of provisions to be comprehensive and controlling.¹¹⁴

112. ANILCA § 1104(g)(1) provides that "each Federal agency shall make a decision to approve or disapprove [the proposed TUS], in accordance with applicable law." 16 U.S.C. § 3164(g)(1) (1982). The definition of "applicable law" precludes ANILCA § 1110(b) from being a source of authority to approve the TUS. See *supra* note 111. The only potential source of "applicable law" to approve the TUS would be the Wilderness Act. Section 4(c) of that Act, however, generally provides that there shall be "no permanent road within any [W]ilderness area," and § 5(a), as interpreted in the Civiletti Opinion, provides agency discretion to allow either access or a land exchange. 16 U.S.C. §§ 1133(c), 1134(a) (1982); see *supra* note 23. Accordingly, "applicable law" would not require the agency to allow the construction of a road in a Wilderness area.

113. 16 U.S.C. § 3166(b)(1) (1982). In other words, the TUS provisions seem to allow a TUS in a Wilderness area only after presidential and congressional approval.

114. For example, the Senate report describes the TUS provisions as providing "a single comprehensive statutory authority for the approval or disapproval of applications for all facets of such systems." S. REP. No. 413, *supra* note 28, at 246. The same Report, however, states that ANILCA § 1110(b) "directs the Secretary to grant the owner of an inholding such rights as are necessary to assure adequate access to the inholding . . ." *Id.* at 248. Further, the access right is not "limited by any right of access granted by . . . other statutory provisions . . ." *Id.* at 249. Thus, the legislative history preserves the statutory conflict that both the TUS provisions and § 1110(b) access guarantees are to be controlling.

Interior's regulations adopt the second, seemingly reasonable interpretation. In essence, if an applicant seeks an ANILCA § 1110(b) access method that also constitutes a TUS, the regulations require that the applicant comply with the procedural elements of ANILCA § 1104, but obligate the federal agency to grant adequate access at the agency level once the applicant so complies.¹¹⁵ This approach fulfills the congressional intent underlying ANILCA § 1110(b) to provide a statutory assurance of adequate and feasible access. It also fulfills the intent of ANILCA § 1104 that all TUS components comply with the section's procedures. Finally, Interior's approach provides for NEPA analysis to identify access alternatives which would reduce environmental damage to federal CSU's.¹¹⁶

VI. THE ANILCA ACCESS AND TUS PROVISIONS— MODELS FOR LEGISLATION APPLICABLE NATIONWIDE?

Although the scope of most ANILCA provisions is limited to Alaska, the need for access to federal lands is often as critical in other states. Are the ANILCA provisions unique to Alaska needs, or are they appropriate models for legislative regulation of access across federal lands in other states? The following paragraphs explore this question. The authors conclude that the provisions guaranteeing access to inholdings offer the strongest case for general applicability.

The public policy issue of the proper allocation of rights to private landowners and federal land conservation interests has become one of the most contentious and emotional issues in public land law. On one hand, inholders typically assert that their private property rights cannot be diminished, either in law or equity, simply because conservation-oriented federal lands surround their property. They claim that the government must grant reasonable access and development rights. On the other hand, conservation interests often contend that stewardship over natural resource values on federal lands must be paramount, and that the government should constrain the privileges of private access and development where such privileges would conflict with federal conservation objectives.

Although ANILCA primarily served the stewardship objective of the conservation interests, the inholder interests prevailed on the issue of specific access guarantees. Congress should consider broadening the scope of this accommodation of divergent interests by providing a legislative guarantee for access to inholdings within the parks, wildlife refuges and Wilderness areas throughout the United States. The equitable claim that

115. The regulations require the applicant for an ANILCA § 1110(b) access method to use the consolidated application form, and provide that the application "shall be reviewed and processed in accordance" with the expedited NEPA compliance and agency decision-making procedures of 43 C.F.R. §§ 36.5 and 36.6. 43 C.F.R. §§ 36.10(c), -(d) (1986). As long as the applicant complies procedurally with ANILCA § 1104, however, the regulations direct the federal agency to grant adequate and feasible access to the ANILCA § 1110(b) inholder, without presidential and congressional reviews. See 43 C.F.R. § 36.10(e) (1986).

116. Interior's interpretation of an ambiguous, and perhaps conflicting, statutory mandate may be sustainable under decisions such as *Citizens to Preserve Spencer County v. United States EPA*, 600 F.2d 844 (D.C. Cir. 1979).

inholders should not have their access restricted simply because the government has designated a CSU around their property seems too compelling to be denied. In certain cases, this claim may even blossom into a right of access to prevent a deprivation of property.¹¹⁷

Legislative ratification of inholders' access rights appears desirable from a number of perspectives. From the private landowner's or lessee's viewpoint, legislation is the only sure means of confirming the entitlement to access that is so integral to economic property rights. In the absence of legislation, the holdings of the Civiletti opinion and the first Ninth Circuit opinion in *Montana Wilderness Association* that no absolute guarantee of access across federal lands exists may prevail. From the federal land management perspective, clarifying legislation could eliminate most troublesome property "taking" litigation and ill-will among CSU neighbors by creating a workable and definite standard for access.

Admittedly, any statutory guarantee of inholder access is not without its costs in diminished protection of the resource values located on federal lands. If the access guarantee is to be meaningful to an inholder, it must go beyond the minimal access level of "sure you can hike to your property" and instead provide access commensurate with the level of economic development. In many cases, such access may unavoidably degrade the natural resource values, or diminish the visiting public's psychic enjoyment, of the federal lands; it undoubtedly will complicate the government's job of managing those lands.

Two partial solutions, both suggested by the Alaska Lands Act, can be offered for this difficult problem. First, the federal land manager should have the discretion to choose the access route which minimizes environmental harm. Second, if the risk of damage resulting from mandatory access remains unacceptably high, the government should acquire the inholding by condemnation, negotiated purchase or a land exchange (as provided in ANILCA § 1302).

In sum, a statutory guarantee of inholder access across all categories of federal lands, similar to the provisions of ANILCA §§ 1110(b) and 1323, appears appropriate. This suggested nationwide guarantee of access across federal lands likely should: (1) apply to property right holders (e.g., fee owners, lessees, permittees) within federal areas; (2) guarantee access sufficient to support the intended private land use; (3) establish an access by permit system; (4) provide the federal land manager with discretion to dictate the access route least damaging to federal lands; and (5) require the inholder to bear all costs for access construction and maintenance.

Although ANILCA's provisions concerning access to inholdings appear to be beneficially transferable to States other than Alaska, other ANILCA provisions appear unique to Alaska. For instance, the need for the TUS procedures of ANILCA §§ 1101-1107 is predicated on the

117. See, e.g., *Johnson v. United States*, 479 F.2d 1383, 1390-91 (Ct. Cl. 1973); *Burdess v. United States*, 553 F. Supp. 646 (E.D. Ark. 1982); *Utah v. Andrus*, 486 F. Supp. 995, 1011 (C.D. Utah. 1979); *Bydlon v. United States*, 175 F. Supp. 891, 899-901 (Ct. Cl. 1959).

extraordinary extent of CSU and other federal land holdings in Alaska and on the infant stage of development of Alaska's transportation and utility networks. Though substantial federal land holdings and the need for future rights-of-way through them are not entirely absent in the western States, there does not appear to be a strong present justification for a complete revamping of rights-of-way permitting procedures outside Alaska.

Although the wholesale transference of the Alaska Lands Act's TUS procedures is not recommended, legislative consideration should be given to the establishment of more uniform standards for the processing of all forms of rights-of-way. Disparate standards for approving rights-of-way across CSU's and illogical gaps in authority to approve particular types of rights-of-way persist. For example, in most instances the National Park System, the NPS may approve a right-of-way other than a road only if it finds that the right-of-way "is not incompatible with the public interest."¹¹⁸ In the National Wildlife Refuge System, the right-of-way must be "compatible with the major purposes"¹¹⁹ of the National Wildlife Refuge System unit. In the National Wilderness Preservation System, the President must find that approval of the right-of-way will "better serve the interests of the United States and the people thereof than will its denial."¹²⁰ In some cases, such as rights-of-way for oil and gas pipelines and water conduits in the National Park System (except for Yosemite and Sequoia National Parks,) approval authority appears to be totally lacking.¹²¹

Objective reasons for this crazy-quilt pattern of differing standards and gaps in authority are not discernible. Why should the National Park and Wilderness Preservation Systems be subject to a lesser degree of protection from potentially damaging access under their more liberal public interest standards—which allow consideration of non-conservation, economic development interests¹²²—than the National Wildlife Refuge System under its standard of compatibility with refuge purposes? Why should above-ground electrical transmission lines be aesthetically acceptable in National Parks, while less intrusive underground pipelines are not? Continuation of these historic anomalies does not appear justified.

To eliminate the gaps in statutory authority to approve certain types of rights-of-way across CSU lands, consideration of legislation to establish uniform procedures for the approval of any conceivable right-of-way is recommended. This general authorization could parallel the exhaustive lists of qualifying rights-of-way contained in ANILCA § 1102(4)(B) and FLPMA § 501(a).¹²³

118. 16 U.S.C. §§ 5, 79 (1982).

119. *Id.* § 668dd(d)(1)(B).

120. *Id.* § 1133(d)(4).

121. *See id.* § 79.

122. Interior construes the "public interest" standard for rights-of-way under *id.* § 79 as allowing consideration of "the public interest both in and out of the park," including developmental benefits. *City of San Francisco*, 36 Interior Dec. 409, 411-13 (1908).

123. 16 U.S.C. § 3162(4)(B) (1982); 43 U.S.C. § 1761(a) (1982).

The appropriate substantive standard for approval of such rights-of-way presents a more difficult issue. Several alternatives deserve legislative consideration. One alternative would be to adapt the Alaska Lands Act approach to TUS's by preserving the approval standards of existing law, and supplementing a generic standard only where no other approval authority exists.¹²⁴ At the other end of the spectrum, a new generic approval standard superseding existing law could be enacted for all CSU's nationwide. Candidates include the public interest test currently applicable to national parks and Wilderness areas, the compatibility test currently applicable to wildlife refuges, or a "not incompatible with the management of a CSU" standard to overcome burden of proof and philosophical incompatibility problems.¹²⁵

The final issue is whether general legislation similar to ANILCA § 1110(a) would be desirable outside Alaska to open federal lands to certain types of access without requiring a permit. Such legislation would be premised on a notion of *de minimis* environmental harm: there are certain minimally damaging access methods, such as airplanes, snowmachines, and horses, that should be authorized generally in CSU's and not be made subject to permit procedures and the vagaries of administrative discretion. This premise, however, would be inconsistent with the national off-road vehicle policy of Executive Order 11644, as amended. E.O. 11644 prohibits the use of most snowmobiles and airplanes within Wilderness areas, and establishes a presumption against authorization of such access methods in national parks and wildlife refuges.¹²⁶ Furthermore, while the argument that unregulated access would not cause significant environmental harm might hold true for the sparingly used and expansive CSU's in Alaska, such may not be the case for the more intensively used and smaller CSU's in States outside Alaska.¹²⁷

For the above reasons, the authors believe that a provision comparable to ANILCA § 1110(a) should not be part of any national legislation on

124. See ANILCA § 1105, 16 U.S.C. § 3165 (1982).

125. In other words, an affirmative finding that a right-of-way is "compatible" with the purposes of a CSU may be more difficult to sustain than a finding that the right-of-way "is not incompatible" with CSU objectives (for example no evidence suggests the right-of-way would materially degrade natural resource values). Additionally, phrasing the standard in terms of practical management considerations, instead of the purposes of the CSU, could avoid *per se* incompatibility findings based on the language of the CSU statute, such as the argument that roads can never be compatible with Wilderness purposes because a Wilderness area is defined as an area with "no permanent road." 16 U.S.C. § 1133(c) (1982).

126. Exec. Order No. 11,644, as amended by Exec. Order No. 11,989, 3 C.F.R. at 666-69 (1971-1975), 3 C.F.R. at 120-21 (1976-1978), reprinted in 42 U.S.C. § 4321 app., at 510-11 (1982). Section 3(a)(4) of Exec. Order 11,644, as amended, provides:

Areas and trails [for off-road vehicle use] shall not be located in officially designated Wilderness Areas or Primitive Areas. Areas and trails shall be located in areas of the National Park system, Natural Areas, or National Wildlife Refuges and Game Ranges only if the respective agency head determines that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values.

42 U.S.C. § 4321 app., at 511.

127. The conservation and access problems raised by off-road vehicle use in CSU's outside Alaska are illustrated in cases such as *Coupland v. Morton*, 5 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,504 (E.D. Va.), *aff'd*, 5 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,507 (4th Cir. 1975).

access across federal lands. The better course of action outside Alaska appears to be continued application of the E.O. 11644 policy to open or close areas to general off-road vehicle use depending on expected environmental consequences, supplemented by a statutory access guarantee for CSU inholders who have no other form of adequate ingress and egress.

VII. CONCLUSION

In response to several impediments to securing access across federal lands, Congress included in the Alaska Lands Act some of the most important and innovative provisions on access and rights-of-way yet enacted. In §§ 1110(b) and 1323, ANILCA guarantees inholder access across CSU's in Alaska and the lands of the Forest Service and the BLM. A similar provision guaranteeing such access nationwide across all federal lands appears to be desirable. Responding to the immature stage of development of Alaska's transportation and utility systems, ANILCA provides uniform procedures for obtaining approval of such systems that cross federal lands. Although a wholesale application of similar procedures nationwide may be unwarranted, the authors conclude that Congress should establish uniform procedures and standards for the evaluation of all forms of rights-of-way across federal lands. Until such time as Congress so responds, Alaska may be the only state where the lament that "you can't get there from here" does not have an element of truth.